

The Beneficial Use of Community Benefits  
Agreements in Furthering the Environmental Justice Movement

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## I. Introduction

Picture a small community in a rural setting surrounded by a landfill, a waste treatment plant, and a factory. Now picture a developer bulldozing next to a row of houses on a city block that have been there for 100 years, displacing its residents in a wave of gentrification. Or picture a school yard full of children playing outside, racing through the dirt and drinking from the water fountains on a lot that used to house chemical waste. Such scenarios are all too common for countless minority and low-income communities spread across the nation, although they are far less common among those communities' primarily white and more well-to-do counterparts.<sup>1</sup> In fact, historically, low-income and minority communities have had to bear an enormous, disproportionate share of the world's environmental harms – such as living surrounded by landfills and factories or being otherwise exposed to potential toxins.<sup>2</sup> This reality has been coined environmental injustice, and the movement against it, the environmental justice movement.

A part of this movement is the use of what are called “Community Benefits Agreements” (CBAs). CBAs are a relatively new phenomenon which emerged in the 1990s and are proving to be useful in this fight against environmental injustice. CBAs are contracts between developers and communities in which the communities work together with developers to negotiate and mitigate the harms of development.<sup>3</sup> Specifically, CBAs are legally binding contracts between a coalition of community representatives and a developer, in which the community promises support for a project in exchange for a variety of economic, environmental and other benefits.<sup>4</sup> Though

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1. Alex Geisinger, *The Benefits of Development and Environmental Justice*, 37 COLUM. J. ENVTL. L. 205, 209 (2012).

2. *Id.*

3. See generally Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme*, 77 U. CHI. L. REV. 5, 7 (2010).

4. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1776 (2016).

CBAAs are currently used primarily in urban redevelopment projects, they grew out of and have the potential to be used in many of the above-mentioned situations, and their benefits provide many important insights that can further the environmental justice movement. The important benefits of CBAAs include giving communities more of a voice in determining the direction of projects that are most likely to have the greatest impact on them, and thus providing them with greater political and economic power, and allowing them to negotiate for access to amenities like health clinics and public greenspaces they might never attain otherwise.<sup>5</sup> Though CBAAs are not without their limitations, which will be discussed below, as their use becomes more common and their kinks and benefits more flushed out, they may not only provide a realistic and tangible tool to empower urban low-income and minority communities, but also provide important lessons that may be used to further strengthen the environmental justice movement.

This comment will first briefly explain the environmental justice movement. It will then provide an overview of CBAAs, including a discussion about the usual parties to CBAAs, an explanation of their traditional benefits and drawbacks, and a few examples for illustration. This comment will conclude by discussing how the benefits of CBAAs and the lessons learned through their negotiation can better inform and support the environmental justice movement.

## II. A Brief Background on Environmental Justice

The environmental justice movement addresses the increasingly recognized injustice that minorities and low-income individuals commonly live near the nation's worst polluted

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5. See Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 299-300 (2008); Thomas Allen Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 18 FINANCE FACULTY PUBLICATIONS 827, 835 (2012).

environments.<sup>6</sup> Specifically, the movement addresses the reality that minority and low-income communities are regularly targeted to host various facilities and activities that have negative, and often severe, environmental impacts – those facilities such as landfills, industrial plants, and other large developments.<sup>7</sup> The environmental justice movement first gained national attention in 1982, when residents in a minority community in Warren County, North Carolina marched and protested the siting of a landfill, which was to be a dumping site for soil laced with toxic PCBs.<sup>8</sup> Residents were joined by civil rights and religious leaders in their effort to stop construction of the landfill.<sup>9</sup> The waste was eventually deposited at the site, over the residents’ outrage and concern that PCB’s might leak into their water supplies.<sup>10</sup> However, the story of the small community rising up to protest the dumping of the toxic waste sparked national outrage and is considered to be one of the first milestones in the environmental justice movement.<sup>11</sup> It has even been stated that the “legacy of the Warren County PCB protests is that ordinary people can do extraordinary things when they’re united[,]” and the grassroots environmental justice movement grew from there.<sup>12</sup>

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6. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATIONAL RESOURCE DEFENSE COUNSEL (March 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement>.

7. *Id.*

8. *Id.* Polychlorinated Biphenyls (PCBs) are man-made chemicals that were used in a variety of industrial and commercial applications. *Learn about Polychlorinated Biphenyls (PCBs)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs> (last visited April 23, 2017). They have been known to cause adverse health effects such as cancer and problems to the reproductive and immune systems, among many others. *Id.*

9. Cheryl Katz, *Part 9 of Pollution, Poverty, People of Color*, ENVIRONMENTAL HEALTH NEWS (June 20, 2012), <http://www.environmentalhealthnews.org/ehs/news/2012/pollution-poverty-people-of-color-day-9-qa-with-environmental-justice-pioneers>.

10. *Id.*

11. Skelton & Miller, *supra* note 6.

12. Katz, *supra* note 9.

It grew because the siting of a landfill in a minority community in Warren County, North Carolina, was not an outlier. An influential early study prepared by the United Church of Christ's Commission for Racial Justice in 1987 analyzed the locations of hazardous waste facilities and found that race correlated with the siting of hazardous waste facilities more than any other factor.<sup>13</sup> Specifically, the study found that "communities with the highest proportion of ethnic and racial minorities also had the highest number of commercial hazardous waste facilities."<sup>14</sup> Since then, several other studies have found a correlation between race, socioeconomic status and the siting of locally unwanted land uses (LULUs).<sup>15</sup> As one organization puts it, the decisions to site LULUs, like factories and landfills, in low-income and minority communities are in part due to corporations, regulatory agencies, and local planning and zoning boards recognizing that it is easier to site those uses in those communities, rather than their primarily white and better-off counterparts.<sup>16</sup> Scholars have suggested that the reasons for this include not only outright racism, but also that low-income and minority communities have a lack of economic and political clout, which is necessary to combat such decisions.<sup>17</sup>

As more evidence of environmental hazards being forced on low-income and minority communities came to light in the 1980s, more civil rights leaders took notice and began to use

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13. Geisinger, *supra* note 1, at 209.

14. *Id.*

15. *Id.* at n.10. See also Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters Into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L. J. 147, 150 (2002). Additionally, the disparities go beyond just siting. For example, a study by the National Law Journal in 1992 looked at lawsuits nationwide in the preceding seven years and found that penalties for violations under environmental statutes "were forty-six percent higher in white communities than in minority communities." *Id.* Further, the study found that Superfund sites in minority communities "took twenty percent longer to be listed on the National Priority List" than sites in white areas. *Id.*

16. Geisinger, *supra* note 1, at 209.

17. *Id.* at 210.

familiar tactics such as marches, petitions and community empowerment to draw national attention to the problem of environmental racism.<sup>18</sup> The movement gained traction by partnering with traditional environmental organizations, such as those aimed at protecting the wilderness and clean air, and by advancing their agenda in government.<sup>19</sup> In 1991, the First National People of Color Environmental Leadership Summit met in Washington, D.C., bringing together environmental justice leaders from all over the world, and produced documents which laid out the fundamental principles of environmental justice to cement the issue's importance, which have since become foundational to the movement.<sup>20</sup> Subsequently, as it was clear that environmental justice initiatives were gaining footing across the country and the world, President Clinton signed Executive Order 12898 in 1995, which directed "federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations," to develop strategies to implement environmental justice initiatives, and to provide minority and low-income communities with access to information and public participation regarding land use decisions.<sup>21</sup>

Nevertheless, while strides in furthering environmental justice goals have been made since then, current environmental justice regulation consists of "[a] patchwork of laws, regulations,

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18. Skelton & Miller, *supra* note 6.

19. *Id.*

20. *Id.* See *Principles of Environmental Justice*, EJNET (last modified Apr. 6, 1996), <http://www.ejnet.org/ej/principles.html>. These Principles of Environmental Justice include the ideas that "Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias" as well as that "Environmental Justice affirms the fundamental right to political, economic, cultural, and environmental self-determination of all peoples." *Id.*

21. *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (last visited March 28, 2017).

executive orders, and agency policies at both the federal and state levels[.]”<sup>22</sup> For example, present laws and regulations require officials to gather and disseminate information on environmental justice issues, enhance public participation in decision making, and promote enforcement of existing laws.<sup>23</sup> However, there is still much to be done. At present, there is little regulation that directly limits existing or new undesirable land uses in environmental justice communities.<sup>24</sup> Additionally, governments and land-use decision-makers still exclude the most affected from the decision-making processes.<sup>25</sup> As such, many low-income and minority communities continue to suffer.

### III. What Are Community Benefits Agreements (CBAs)?

As noted above, employing the use of Community Benefits Agreements has begun to provide some form of relief for minority and low-income communities that are dealing with the siting of large-scale development projects that infringe upon their homes, businesses, and neighborhoods. CBAs are private contracts that are negotiated between developers and community representatives, and sometimes local governments.<sup>26</sup> They are agreements which lay out certain conditions or benefits that the developer will provide to the impacted community as a

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22. Geisinger, *supra* note 1, at 212.

23. *Id.* at 210-11.

24. *Id.* at 212.

25. *The People’s Senate*, CENTER ON RACE, POVERTY & THE ENVIRONMENT, <http://www.crpe-ej.org/our-work/toxics-in-our-environment/the-peoples-senate/> (last visited March 29, 2017). For example, in one context, “environmental legislation including NEPA, the CAA, the CWA, RCRA, CERCLA, FIFRA, TSCA, SMCRA, SARA and other laws have created extremely complex administrative processes that exclude people who do not have education and training in environmental law or the financial resources to hire lawyers and technical experts that do.” *Assessment of Environmental Justice Needs in Northern Lake County Communities*, HOOSIER ENVIRONMENTAL COUNCIL, <http://www.hecweb.org/wp-content/uploads/2010/04/HEC-Assessment-of-EJ-Needs-in-Northern-Lake-County-Communities-FINAL-REPORT2.pdf> (last visited April 23, 2017).

26. Salkin & Lavine, *supra* note 5, at 293.

part of the development, in exchange for the community cooperating, or at least not opposing, the developer's application for the specific project.<sup>27</sup> This is the community's leverage – the potential that their opposition may delay a project's land use approvals.<sup>28</sup> Typically, it is after a CBA is negotiated that developers will then begin to engage in different application, review and approval procedures and issues.<sup>29</sup>

The “community” party to a CBA is usually made up of several different community organizations that represent a diverse set of community interests. It will typically be “a coalition of community groups, which may include labor, environmental, civic, and religious organizations.”<sup>30</sup> The goals of these community organizations regarding the proposed development may be formulated and prioritized through public meetings, workshops and surveys.<sup>31</sup> The coalition might identify broad goals such as environmental and social justice and racial equality, and then narrow its goals from there.<sup>32</sup> Because the coalition normally represents a diverse set of community interests, commitments that the community may want written into the CBA vary and may include promises to use local residents and businesses for the project's labor and material needs; assurances that a certain percentage of housing units will be kept affordable for low and moderate income individuals; agreements to pay living wages to workers; the construction of parks and other open spaces; requirements that the development be environmentally-friendly; or that the developer must remedy existing environmental issues.<sup>33</sup> Thus, a CBA can include a host of benefits for the community that satisfy the different labor,

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27. Been, *supra* note 3, at 7.

28. Musil, *supra* note 5, at 835.

29. *Id.* at 829.

30. Salkin & Lavine, *supra* note 5, at 294.

31. *Id.* at 294-95.

32. Musil, *supra* note 5, at 831.

33. Been, *supra* note 3, at 7. *See also* Musil, *supra* note 5, at 832.

environmental, and civic organizations that have differing interests. Further, because CBAs are negotiated on a case-by-case basis, the specific benefits incorporated into them can be tailored to fit a community's particular needs.<sup>34</sup> The community coalition negotiating these conditions usually negotiates directly with the project developer.<sup>35</sup> In most cases, because CBAs are negotiated before a proposed development has been approved, the delivery of the benefits will not occur until construction has started or the project is entirely finished.<sup>36</sup>

The "community" party to the CBA is not the only party that receives benefits, however. The incentive for developers to enter into CBAs in the first place is knowing that they will secure the community support for their projects, which might prove to be significant. For example, as a result of negotiations, if a developer can generate the community's cooperation, or at least their forbearance in opposing the proposed project, the local regulatory bodies may be more likely to approve the project and government agencies might be more willing to fund the project.<sup>37</sup> Thus, as the developer's primary goal is profit, a successful CBA can minimize the developer's costs, either by avoiding unnecessary delay in fighting community opposition or by helping the developer secure funding, or both, which furthers the overall monetary goal.<sup>38</sup> Thus, as a result, a CBA can promote the interests of both the community and the developer.<sup>39</sup>

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34. Salkin & Lavine, *supra* note 5, at 294.

35. *Id.* at 292.

36. Barbieri, *supra* note 4, at 1785.

37. Been, *supra* note 3, at 7, 18.

38. Stephanie M. Gurgol, *Won't You Be My Neighbor? Ensuring Productive Land Use Through Enforceable Community Benefits Agreements*, 46 U. TOL. L. REV. 473, 478-79 (2015).

39. As Professor Gurgol explains, "[t]he land use players work together to form an executed agreement to promote a development project and simultaneously gain tangible benefits for the community." *Id.* at 485.

In some cases, local governments may also be involved in the CBA process. For example, local government officials may participate in the CBA negotiations, may sign the actual agreement, or the final CBA may be incorporated into the local government's own agreement with the developer.<sup>40</sup> However, there are a variety of concerns related to a local government's involvement in the negotiation or signing of a CBA. For example, the government's involvement may make the community coalition less significant<sup>41</sup> or bring a host of separate legal issues into the negotiation.<sup>42</sup> Because of this, some scholars and others who have studied what does and does not make a CBA successful suggest that it might be better to leave governments out of the CBA.<sup>43</sup>

CBAs are a product of a long history of trying to find ways to address community concerns about development proposals.<sup>44</sup> One tool that was previously used and which is considered a predecessor to the CBA is a "compensated siting agreement." A compensated siting agreement arises from the idea that a community which is picked to host a facility, such as landfill or a waste treatment plant, should be compensated for having to bear the burden of hosting that LULU and

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40. Been, *supra* note 3, at 7-8.

41. Barbieri, *supra* note 4, at 1786.

42. For instance, one large problem that might be encountered if the government is a party to the agreement is that any sort of requests of the developer by the government must have a "nexus" and "rough proportionality" to the developer's proposal. Been, *supra* note 3, at 19. More specifically, the U.S. Supreme Court's holdings "in *Nollan v California Coastal Commission* and *Dolan v City of Tigard* preclude municipalities from imposing exactions on proposed projects unless those exactions have a substantial nexus to impacts of the developments . . . and unless the exaction is roughly proportional in amount to those impacts." *Id.* However, *Nollan* and *Dolan* only apply to government actions, and, thus, community coalitions can secure benefits "unrelated to the development's land use impacts" such as living wages, public greenspaces, and other benefits a particular community may be seeking. *Id.*

43. Salkin & Lavine, *supra* note 5, at 327. When municipalities and local government officials are involved in the negotiations, CBA opponents caution that "CBAs may begin to look somewhat like disguised exactions" or raise other concerns about conflicts of interest. *Id.*

44. Been, *supra* note 3, at 6.

its negative effects.<sup>45</sup> As part of compensated siting agreements, developers would often “pay neighboring property owners for any decrease in the market value of their homes caused by the facility[,]” include buffer zones between facilities and residents, and/or “reward the community for accepting the facility by providing funds or benefits in excess of those required to remedy any harms caused by the facility.”<sup>46</sup> CBAs are in essence a form of a compensated siting agreement, but there is a difference. Compensated siting agreements are typically used in situations where someone is looking to site something such as a landfill or treatment facility, and CBAs are most commonly employed in large-scale urban redevelopment projects.<sup>47</sup> However, CBAs have the potential to be used in smaller siting situations as well, so it is important to understand their traditional benefits and limitations, in addition to understanding how their effects might better inform the environmental justice movement overall.

#### A. Traditional Benefits of CBAs

One of the most important benefits of CBAs is the greater role they give to traditionally powerless communities. Historically, the public approval processes for major development projects have excluded vulnerable communities.<sup>48</sup> As one scholar notes, “[o]ften, the only hearing open to the public is the environmental impact review process” which may become so technical and focused on details, that it does not provide a “meaningful opportunity for community members to have an impact on the project.”<sup>49</sup> Or, public hearings may be at times and locations not easily

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45. Vicki Been, *Compensated Siting Proposals: Is it Time to Pay Attention*, 21 *FORDHAM URB. L. J.* 787, 791(1994).

46. *Id.* at 792.

47. *Id.* at 789-90; Salkin & Lavine, *supra* note 5, at 296-97. Development projects that have employed CBAs include sports stadium construction, university campus expansions, brownfield remediation’s, and large-scale housing initiatives. Gurgol, *supra* note 38, at 487-89.

48. Barbieri, *supra* note 4, at 1787.

49. Been, *supra* note 3, at 16-17.

accessible to community members.<sup>50</sup> Additionally, it is all too easy and common for government officials to ignore input from interested community members or to simply disregard any recommendations or proposals they might have concerning the development.<sup>51</sup>

CBA's, conversely, level the playing field by giving community members more bargaining power.<sup>52</sup> Broadly, "[t]hrough CBA's and campaigns to challenge development policy and practices, the goals are for community stakeholders to better understand the development process, establish policies that increase developer accountability and government transparency, [and] create opportunities for meaningful public participation."<sup>53</sup> By virtue of being a party to the agreement, CBA's give the members of the community more of a voice in the development process than they would typically have under existing land use procedures for public participation.<sup>54</sup> Because the community shapes and develops the agreement, they may make sure that all of their concerns are heard and addressed. Moreover, advocates for CBA's suggest that the agreements may actually bring communities together by giving them more of a "united voice."<sup>55</sup> Furthermore, CBA's allow the community to address the particular issues that are important to them. In many cases, these issues may relate to wages and employment practices, in addition to securing benefits like a health clinic and greenspaces, which are typically not addressed in the regular land use process.<sup>56</sup>

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50. Leroy Paddock, *The Role of Public Participation in Advancing Environmental Justice*, IUCN ACADEMY OF ENVIRONMENTAL LAW (2008), available at <http://www.iucnael.org/en/e-journal/current-issue-/54-seminars-and-workshop/mexico-colloquium->.

51. Been, *supra* note 3, at 15. "In New York City, for example, community boards' recommendations are advisory only and may be ignored by the appointed planning commission or elected officials." *Id.*

52. Gurgol, *supra* note 38, at 491.

53. Musil, *supra* note 5, at 836.

54. Been, *supra* note 3, at 15.

55. *Id.* at 18.

56. *Id.* at 16.

There are several potential benefits regarding the execution of a successful CBA for a developer as well. For example, as mentioned above, by gaining the support of the community, the developer may greatly increase its chances of getting the project approved.<sup>57</sup> As such, CBAs promote efficiency by lessening the time and expense that a developer may expend to fight opposition to a project, which in turn is likely to lead to higher profit for the developer.<sup>58</sup> Additionally, some propose that negotiating a CBA with a coalition of community groups is less costly for developers than negotiating the proposed development with local government officials.<sup>59</sup> Furthermore, after finalizing a successful CBA, a developer may feel more of a sense of assurance that they will not face legal challenges to the project in the future.<sup>60</sup> Specifically, “[a] CBA will reduce the chances of a lawsuit being filed; the more inclusive the CBA is, the more certainty a developer will have that a project will proceed on a timely basis.”<sup>61</sup> Similarly, if the developer is able to get the community on board with the project, and is able to adequately address their concerns, the developer may find that it is able to reap some public relations benefits.<sup>62</sup>

There are also benefits to using CBAs for the government. Land use proposals are often bogged down by local government conditions. Municipalities cannot impose exactions on proposed projects unless the exactions have a “substantial nexus” to the impact of the development and unless the exaction is “roughly proportional in amount to those impacts.”<sup>63</sup> However, because

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57. *Id.* at 18. For example, “[t]he advantage to the developer of having a CBA in place is that the developer can usually accelerate the entitlement process and obtain public subsidies, zoning changes, and use variances.” Musil, *supra* note 5, at 830.

58. Gurgol, *supra* note 38, at 491 (explaining that “increasing efficiency and the consequential reduction of expenses leads to higher profits for developers.”).

59. Been, *supra* note 3, at 19.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 20; *see also supra* note 42 (describing the limitations set by the U.S. Supreme Court in the *Nollan* and *Dolan* cases).

local governments are not a party to a CBA in most cases, community groups are not constrained by these tests.<sup>64</sup> This means that communities are free to request benefits completely unrelated to the project the developer has proposed – which is actually the hallmark of a CBA.<sup>65</sup> This may provide tangible benefits to local politicians and officials as well, by enabling them to point to negotiated benefits a community will receive to justify their support for a project.<sup>66</sup> Additionally, if their constituents receive more benefits than might typically be accomplished in the public approval process, they are likely to vote to keep their representatives in office.<sup>67</sup>

#### B. Traditional Limitations of CBAs

While there are many positive aspects to CBAs, there are also many risks and limitations associated with them. Perhaps one of the largest and most serious risks in relation to the negotiation of a CBA, is that the people who actually do the negotiating on behalf of the community will not adequately represent the community.<sup>68</sup> For example, it is possible that the coalition negotiating the CBA might not be representative of all the community interests or that it might have a different agenda than several other unrepresented community organizations.<sup>69</sup> Such a reality would defeat the purpose of a CBA, which is to give a voice to those traditionally unrepresented. Similarly, even if the community is well represented at the bargaining table, often times community groups and their leaders are not as skilled as developers at securing a good bargain, and thus may not actually obtain what is best for the community.<sup>70</sup> Furthermore, if the

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64. Been, *supra* note 3, at 20.

65. See, e.g., Salkin & Lavine, *supra* note 5, at 294 (generally describing the wide variety of unrelated benefits that may be included in a CBA).

66. Been, *supra* note 3, at 20.

67. *Id.*

68. Barbieri, *supra* note 4, at 1789 (stating that “occasionally, CBA coalitions do not represent community interests.”).

69. Salkin & Lavine, *supra* note 5, at 320. See also Been, *supra* note 3, at 21.

70. Been, *supra* note 3, at 24-25.

coalition is not actually representative of the community or does not truly have all of the community's interests at heart, there is no way for community members to hold those who negotiated the CBA accountable for the outcome, because the community neither elects nor appoints the negotiators.<sup>71</sup>

In addition to negotiators potentially failing the community members, many scholars suggest there may be potential legal problems regarding the enforcement of CBAs. For example, because the CBA is at its core a contract, it must have consideration; however, critics of CBAs argue that community support for a developer's project may not be adequate consideration to form a valid contract.<sup>72</sup> That is, the community's promise to support the development may be insufficient compared to the extensive benefits the developer provides in return.<sup>73</sup> Although the intricacies of CBAs have not yet been tested in the courts, this argument would likely fail due to the principle that "[c]ourts generally should not inquire into the sufficiency of consideration when determining an agreement's validity" and because "where parties forbear to pursue legal claims under a contract, there is sufficient consideration."<sup>74</sup>

Another legal problem that may arise is that, if a community coalition dissolves after an agreement is achieved, who can then enforce the CBA?<sup>75</sup> One critique is that, because CBAs are

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71. *Id.* at 21-22.

72. Gurgol, *supra* note 38, at 492-93. "A lack of consideration could render an otherwise valid document meaningless, leaving months of negotiations, work, and hard-earned dollars wasted in the event a bad-faith party comes to the table." *Id.* at 493.

73. Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, 59 AMERICAN PLANNING ASSOCIATION 3, 7 (Nov. 2007) (*available at* <https://www.albanylaw.edu/centers/government-law-center/publications/glo/Documents/Community%20Benefits%20Agreements.pdf>).

74. Gurgol, *supra* note 38, at 492-93 (concluding that community support would provide sufficient consideration to uphold the validity of a CBA). *See also* Salkin, *supra* note 73, at 7.

75. Salkin, *supra* note 73, at 7.

private contracts between the developer and the various community interest groups, they may be unenforceable by individual members of the community at large.<sup>76</sup> However, this argument also would likely fail because a third-party beneficiary provision can easily be incorporated into a CBA.<sup>77</sup>

One issue that arose regarding compensated siting agreements, and that could be a problem with CBAs and LULUs, is simply the question of whether they are moral. Specifically, should communities bargain away their potential health and well-being in certain situations? This is less of an issue when dealing with CBAs and large-scale urban development projects, which is the norm; however, ethical considerations still exist.

### C. A Few Examples

Although the first CBA was negotiated in 1998 in Los Angeles during the development of the Hollywood and Highland Center, what is considered by many to be the “first ‘full-fledged CBA’” was negotiated in 2001 during the development of the Los Angeles Lakers’ Staples Center.<sup>78</sup> In that case, when the developer failed to deliver on promises to the community after the first phase of development, the community subsequently negotiated a CBA in the hopes of holding the developer to its promises after the second phase was completed.<sup>79</sup> In negotiating the CBA, the Figueroa Corridor Coalition for Economic Justice “represented more than thirty community organizations, including environmental groups, church groups, health organizations,

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76. Gurgol, *supra* note 38, at 493.

77. *Id.* “[T]hird-party beneficiaries are non-parties who may benefit from a contract and assert legal rights under the contract.” *Id.* at n.200 (internal citation omitted).

78. Salkin & Lavine, *supra* note 5, at 301-02.

79. *Id.* at 302. The developer failed to deliver on promises of union-neutrality and living wage benefits. *Id.* at n.35. Further, at this point in the development, the project had displaced more than 250 primarily low-income residents. *Id.*

and immigrants’ and tenants’ rights supporters[.]”<sup>80</sup> These community organizations used their fierce opposition to the project as leverage in negotiating with the developer, as the project required substantial land use variances and city subsidies.<sup>81</sup> The community coalition was ultimately able to secure benefits including the construction of affordable housing, the development of parks, and loan funding for local businesses, among many others.<sup>82</sup> Additionally, the CBA also established a committee to oversee and enforce the agreement, and included provisions calling for an assessment of the CBA’s implementation after its completion.<sup>83</sup> What’s more, the City’s redevelopment agency incorporated the CBA into its own agreement with the developer, making it enforceable not only by the contracting community groups, but by the City as well.<sup>84</sup>

After the success of the two Los Angeles CBAs, cities across the country began using them.<sup>85</sup> An example of what is largely viewed as a successful CBA took place in Pittsburgh’s own Hill District. The Hill District in Pittsburgh was once a thriving African-American community, but due to broken promises during earlier urban renewals and the displacement of hundreds of businesses and residents as a result of the construction of the Pittsburgh Penguins’ Mellon Arena, the “Hill” was steeped in poverty.<sup>86</sup> When, in 2007, the City agreed to support the construction of a new Penguins stadium, the residents of the Hill District seized the opportunity to make sure they

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80. *Id.* at 302.

81. *Id.* at 302-03.

82. *Id.* at 303.

83. *Id.*

84. *Id.*

85. Currently, CBAs are being used in or are in talks to be used in projects in Georgia, New York, Illinois, Indiana, Maryland, Florida, Wisconsin, Minnesota, Connecticut and California, among others. Barbieri, *supra* note 4, at 1821-22.

86. *Common Challenges in Negotiating Community Benefits Agreements and How to Avoid Them*, PARTNERSHIP FOR WORKING FAMILIES (Jan. 2016), <http://www.forworkingfamilies.org/sites/pwf/files/publications/Effective%20CBAs.pdf>.

were not once again left behind.<sup>87</sup> In 2008, the One Hill coalition came together and organized community members, testified at public hearings, developed policy language, and ultimately negotiated a legally binding CBA on behalf of more than 100 organizations to provide \$8.3 million in services and opportunities for Hill District residents.<sup>88</sup> Benefits to be provided as part of the construction of the new stadium included hiring local workers, the establishment of a grocery store to provide the neighborhood with fresh food, the redevelopment of a YMCA recreation center to improve community health, and the maintenance of environmental building requirements.<sup>89</sup> The Hill District CBA is seen as successful because of the inclusiveness and representation of so many different community interests, and because the negotiating process was effective in making all interests heard.<sup>90</sup>

However, such broad-scale representativeness is not always the case. Though there are several other examples of successful CBAs, there have also been controversial CBAs.<sup>91</sup> One such example is the development of the Atlantic Yards arena in Brooklyn, New York. In 2005, a CBA was negotiated between a developer and eight community groups seeking affordable housing, minority hiring provisions, and the construction of a day care, among other benefits, as part of the

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87. *Id.*

88. *Id.* See also *A Great Leap Forward for a Neighborhood Left Behind: How One Hill Charted the Path Toward Equitable Development in Pittsburgh*, PARTNERSHIP FOR WORKING FAMILIES (Feb. 16, 2016), <http://www.forworkingfamilies.org/resources/publications/great-leap-forward-neighborhood-left-behind-how-one-hill-charted-path-toward> [hereinafter *A Great Leap Forward for a Neighborhood Left Behind*].

89. *Common Challenges in Negotiating Community Benefits Agreements and How to Avoid Them*, *supra* note 86. See also *A Great Leap Forward for a Neighborhood Left Behind*, *supra* note 88; Gurgol, *supra* note 38, at 490.

90. See generally *A Great Leap Forward for a Neighborhood Left Behind*, *supra* note 88.

91. Salkin & Lavine, *supra* note 5, at 309.

construction of what was to become the home of the New Jersey Nets.<sup>92</sup> While the requested community benefits seemed agreeable, the process in which those benefits were requested was not. The Atlantic Yards CBA was heavily criticized because Brooklyn residents opposed to the project were not invited to participate in the negotiations.<sup>93</sup> Further, the CBA was tainted by allegations that the few community groups actually a part of the negotiating coalition did not have the community's best interest at heart.<sup>94</sup> For example, it was alleged that some of the community groups had received millions of dollars from the developer, clearly creating a conflict of interest.<sup>95</sup> Hence, because of the exclusion of the community's residents and the question over the integrity of the negotiations, the CBA was largely disapproved of and weakened.<sup>96</sup> As a result, the Atlantic Yards CBA provides others with a model of what not to do.

#### IV. How the Benefits of and Lessons Learned Through CBAs Can Inform and Further the Environmental Justice Movement

CBAs do indeed encompass environmental justice initiatives. While many of the benefits gained as a result of successful CBAs promote economic and social justice, as noted above, they also work to promote environmental equity. A successful CBA may result in a neighborhood gaining access to parks, environmentally-friendly building designs, and the remediation of existing environmental hazards.<sup>97</sup> Because CBAs are usually negotiated on the behalf of low-income and minority communities, and because it is precisely these communities that environmental justice initiatives seek to promote, CBAs promote environmental justice goals. Moreover, not only do CBAs directly further environmental justice goals by incorporating environmental benefits into

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Been, *supra* note 3, at 7. *See also* Musil, *supra* note 5, at 832.

their terms, they indirectly further the environmental justice movement by virtue of the lessons and consequences their use bestows on communities.

Perhaps the greatest benefit CBAs may have on advancing the environmental justice movement is the unity and strength they confer on the low-income and minority communities that employ their use. The environmental justice movement began at a grassroots level when the residents of Warren County organized to march and protest the siting of the landfill in their community.<sup>98</sup> The movement continues to be propelled by grassroots efforts.<sup>99</sup> CBAs directly add to this idea of organizing a community at a grassroots level to effect change because they too, at least when they are most successful, are only made possible by community organizations, leaders and individuals who come together to put up a united front against a developer at the negotiating table. And the consequences can have a transformative effect, such that “[i]ndividuals are transformed ‘through the process of struggle by learning about, and participating in, a decision that will fundamentally affect their quality of life,’ while communities are transformed when grassroots groups turn ‘marginal communities from passive victims to significant actors in environmental decision-making processes.’”<sup>100</sup> Thus, communities that negotiate successful CBAs know that grassroots organizing and advocacy can make a difference, and may be more likely to continue such efforts if they encounter future questionable development, or to set examples for other communities that encounter large-scale or undesirable development proposals.

Similarly, when communities negotiate successful CBAs, they strengthen their political and economic power. As explained above, it is the lack of political and economic power that causes developers to consistently site undesirable land uses in minority and low-income

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98. Skelton & Miller, *supra* note 6.

99. *Id.*

100. Siegel, *supra* note 15, at 191.

communities in the first place.<sup>101</sup> When a community takes steps to stand up to local governments and developers, it increases its power to deter the siting of LULUs or other development projects they may oppose. Officials will realize they cannot go forward without the community putting up a strong fight. Thus, CBAs help address the need to strengthen the position of minority and low-income communities. Additionally, there is a possibility that, by engaging in negotiations for a CBA, a developer will realize that there is not as much benefit to siting a LULU or development in the environmental justice community and will instead choose to build somewhere else.<sup>102</sup>

Another way that CBAs further environmental justice initiatives is by bringing together organizations with different sets of interests. As mentioned, negotiating coalitions often include labor, environmental, civic, and religious organizations.<sup>103</sup> It is this variety of representation that makes CBAs so strong – everyone feels adequately represented and united. In fact, when diverse community representation is lacking, as was the case in the Atlantic Yards CBA, the process is met with skepticism and the actual resulting CBA can be weak.<sup>104</sup> The idea of diverse representation making a community stronger feeds easily into the environmental justice movement, which grew significantly when it partnered with traditional environmental organizations.<sup>105</sup> Clearly, communities and movements garner more success when they join interests and resources. As long as certain interests do not start to overshadow other interests, bringing organizations together to put up a united front can do a lot of good.

Additionally, as the use of CBAs becomes more widespread, and as their successes continue to be reported, developers and local governments might become more amenable to

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101. Geisinger, *supra* note 1, at 210.  
102. *Id.* at 230.  
103. Salkin & Lavine, *supra* note 5, at 294.  
104. *Id.* at 311-12.  
105. Skelton & Miller, *supra* note 6.

working with low-income and minority communities. If developers continue to realize that they too can reap benefits from using CBAs, they might be more open to hearing the concerns of low-income and minority communities and realize all parties can accomplish goals by working together. Likewise, government officials and those involved in the typical land-use decision-making processes might make more of an effort to get communities involved in public participation – by actually getting them involved and, not merely stating they have a public participation policy.<sup>106</sup> Opening communication and welcoming diverse interests by working together is one way to make progress toward ending environmental injustice. Consequently, the value of CBAs in terms of furthering environmental justice cannot be questioned.

## V. Conclusion

Environmental injustice remains a pressing problem facing minority and low-income communities across the country, but the movement against it is growing every day. A tool that can be useful in this movement is the Community Benefits Agreement. While not without limitations, CBAs promote community unity, strengthen political and economic power, and improve community relationships with developers and local governments. These effects are critical to furthering environmental justice goals. Thus, the use of CBAs should be promoted, because they encourage ordinary people to do “extraordinary things when they’re untied.”<sup>107</sup>

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106. Government officials might take steps like making the time and location of meetings more accessible, providing notice of public participation forums in multiple languages in accessible media, and providing information in understandable formats, which are critical to fostering a community’s “authentic participation.” Paddock, *supra* note 50.

107. Katz, *supra* note 9.