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Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation

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Community Benefits Agreements

A SYMPTOM, NOT THE ANTIDOTE, OF BILATERAL LAND USE REGULATION*

Alejandro E. Camacho†

INTRODUCTION

The Lorenzo is an upscale, Italian-themed apartment and retail complex near the University of Southern California.[1] Primarily marketed to USC students and young professionals, the Lorenzo lures prospective tenants with its indoor basketball courts, stadium-seating movie theater, three-story fitness center, climbing wall, and on-site café.[2] However, what visitors will not see in this $250 million apartment complex is that the on-site community medical clinic will operate rent-free for the next twenty years.[3] Also missing from the list of amenities are the funds that the developer earmarked for job training, local construction workers, and nearby small businesses, as well as the low-income-housing community trust created during the land use negotiation process.[4] These unseen features are part of the Community Benefits Agreement (CBA) negotiated between a South Los Angeles community coalition—United Neighbors in Defense Against Displacement

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[1] Patrick J. McDonnell, *City Planners Approve $250-million Residential-Retail Complex in South L.A.*, L.A. TIMES (Feb. 11, 2011), http://articles.latimes.com/2011/feb/11/local/la-me-lorenzo-development-20110211.

[2] LORENZO, http://www.thelorenzo.com/amenities (last visited Sept. 21, 2012).

[3] Diana Pei Wu, *Los Angeles Coalition Wins Health Clinic and Jobs from Developer*, 18 RACE, POVERTY, & ENV'T 38, 38-41 (2011).

[4] *Id.*

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(UNIDAD)—and the Lorenzo's developer, Geoffrey Palmer.[5] This agreement accomplished many things: affected community members were able to participate in the development's planning; the developer was able to build community support for the project and avoid costly litigation; and the municipality was able to tailor land use development to better accommodate the interests of all stakeholders.[6]

CBAs have proliferated as part of a larger movement throughout the United States away from the unilateral, government-dominated model of land use regulation and toward a more negotiated paradigm.[7] This now-predominant model of negotiated decision making, however, has primarily been bilateral, allowing extensive and unparalleled opportunities for developers to engage in negotiation with government regulators but limiting participation opportunities for other affected parties, such as local residents and small businesses. In contrast to this prevailing bilateral model, CBAs allow a wide array of interested parties to participate in the decision-making process.[8] Some developers and municipalities have recognized that utilizing CBAs can avert or mitigate the negative effects development will have on a community, reduce conflict, promote civic engagement, and create community buy-in and goodwill toward a new project.[9]

Although CBAs have emerged in part to address issues found in the bilateral, negotiated-development model, unfortunately they have been accompanied by significant problems of their own.[10] Most notably, concerns such as whether to engage in a CBA process, the appropriate framework for its negotiation, and its relationship to the public regulatory-approval process are typically left to the discretion of the developer. As a result, such agreements typically develop in parallel to the public process but independently of it—a redundancy that leads to additional costs for both developers and community members. More importantly, the negotiation process

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[5] *Id.*; Annie Lainer Marquit, Commentary, *Public Counsel: Community Development Lawyers Building Foundations for Healthy Communities*, 21 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 9, 15 (2012).

[6] Pei Wu, *supra* note 3, at 40-41.

[7] *See infra* Part I.

[8] *See infra* Part II.

[9] JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 21-22 (2005), *available at* http://www.forworkingfamilies.org/resources/publications/community-benefits-agreements-making-development-projects-accountable.

[10] *See id.* at 22-23.

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results in less-than-optimal agreements that disproportionately reflect the interests of the developer, since it is entirely up to the developer how much to involve other stakeholders.

These weaknesses of CBAs, however, reflect the continued inadequacy of the existing bilateral-negotiation process in providing for legitimate land use decisions. The existing bilateral paradigm could be improved by altering the public regulatory process to require integration of more meaningful and sustained stakeholder participation opportunities—akin to those provided by CBAs—thereby reorienting the governmental authority to serve as mediator rather than negotiator of land use conflict. These improvements could allow states to stimulate democratic participation, minimize the costs that accompany separate public and private negotiations, and promote land use decisions that better reflect the interests of all affected parties. Such a multilateral model would help produce decisions that are better planned and more efficient, fair, and democratic.

This essay proceeds in three sections. Part I outlines the modern public land use decision-making process's transition from a unilateral model to bilateral-negotiation model, while Part II discusses the rise of CBAs as a response to shortcomings of the bilateral process. Part II also analyzes CBAs' benefits and drawbacks, and Part III suggests how elements of the CBA process can be integrated into a more effective negotiating model. In particular, rather than encouraging the creation of CBAs in the land use negotiation process, local governments should seek to integrate the most successful elements of the CBA process into the existing bilateral-negotiation framework, creating a multilateral, community-oriented decision-making process.

I. EVOLUTION TOWARD NEGOTIATED PUBLIC LAND USE REGULATION

Public land use regulation in the United States was initially premised on a unilateral, "command-and-control" model of regulation, akin to the classic "New Deal" model of administrative regulatory authority that bases its legitimacy on regulator expertise.[11] This model viewed local planning

[11] Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440-41, 446 (2003) (describing New Deal model of regulatory management by experts "[g]uided by experience and professional discipline").

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agencies as experts charged with developing the land use rules and decisions for their jurisdiction.[12] Zoning regulations were expected to be detailed, prospective, and generally applicable rules that regulators with limited public involvement established and local expert planners and planning commissions administered.[13] Changes to or deviations from these general rules were expected to be rare.

Unsurprisingly, it quickly became clear that this model failed to produce enduring land use rules and led to the rise of various negotiation-based approaches. Two key problems with this unilateral model were its reliance on planning expertise purportedly capable of conceiving objective rules, as well as an assumption of comprehensive rationality despite substantial uncertainty.[14] In practice, land was frequently designated for uses that were not deemed economically desirable or feasible, and land use rules were often used to exclude and discriminate against persons viewed as undesirable.[15]

Criticisms of this normative model soon gave rise to widespread reliance on a suite of bilateral, negotiation-based approaches. The two most basic variations of this bilateral-negotiation model are negotiated zoning and development and annexation agreements. Negotiated zoning remains closely tied to the traditional unilateral approach of land use regulation. This model accepts the existing command-and-control land use plan, but it also employs a number of flexibility devices that allow piecemeal exceptions to existing zoning regulations, including conditional use permits, variances, planned unit developments, and contract zoning.[16] Under this model, a developer negotiates with the local government for changes to the property's zoning designation, keeping in mind that takings law requires negotiated conditions to be limited to reducing impacts caused by zoning changes.[17] Consequently, while this model allows some deviation from the existing zoning

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[12] Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (Installment I), 24 STAN. ENVTL. L.J. 3, 9 (2005) [hereinafter Camacho, *Mustering I*].

[13] *Id.* at 8.

[14] *Id.* at 13-15.

[15] *See, e.g.*, JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 6, 15 (1961).

[16] Camacho, *Mustering I*, *supra* note 12, at 39.

[17] *See* 2 ANDERSON'S AMERICAN LAW OF ZONING § 9.20, at 171 (Kenneth H. Young ed., 4th ed. 1996); *see also infra* note 112 and accompanying text.

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framework, its negotiation process and permissible revisions are somewhat limited.[18]

Development agreements and annexation agreements, on the other hand, permit more negotiation and greater deviation from existing land use designations.[19] Once a state passes enabling legislation that authorizes such agreements—over sixteen states have done this to date—cities are free to adopt development agreements or annexation agreements as amendments to traditional zoning regulations.[20] Development agreements are express contracts in which a developer, before beginning a project, seeks a long-term change or freeze of rules applicable to the property in question.[21] In California, virtually all large-scale developments are pursued through development agreements.[22]

Legislation authorizing development agreements and annexation agreements typically allows for wholesale exceptions to existing land use codes, and the few courts who have considered the issue agree that projects undertaken through such agreements are not subject to Takings Clause limitations.[23] Indeed, because development agreements and annexation agreements are characterized as voluntary contracts, they allow cities unprecedented flexibility to accommodate developers. In exchange, developers may provide contributions to cities, which are typically placed into a general fund or earmarked for unrelated pet projects.[24] This framework allows the developer to

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[18] Camacho, *Mustering I*, *supra* note 12, at 16-21.

[19] Daniel J. Curtin, Jr. & Michael H. Zischke, *Development Agreements: Securing Vested Rights and Project Completion Benefits*, *in* 1989 ZONING AND PLANNING LAW HANDBOOK 349, 360 (Mark S. Dennison ed., 1989).

[20] NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 154A.02, at 145 (Supp. 2002).

[21] 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, 664 (2001).

[22] *See* DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 46, 53 (1994) (noting that hundreds of communities in California have used development agreements).

[23] *See, e.g.*, Leroy Land Dev. v. Tahoe Reg'l Planning Agency, 939 F.2d 696, 698-99 (9th Cir. 1991) (holding nexus requirement does not apply in settlement agreement between agency and developer "because the promise is entered into voluntarily, in good faith and is supported by consideration"); Xenia Rural Water Ass'n v. Dallas Cnty., 445 N.W.2d 785, 788-89 (Iowa 1989) (holding negotiated setback requirement not a taking where part of agreement between parties); Meredith v. Talbot Cnty., 560 A.2d 599, 604 (Md. Ct. Spec. App. 1989) (stating that agreement between developer and county in which developer agreed to convey property to conservation group in exchange for approval was not a taking because the agreement was an "informed business decision" benefiting the developer and thus voluntary, even if "the decision was made in the face of likely adverse governmental action").

[24] Camacho, *Mustering I*, *supra* note 12, at 30-33.

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negotiate with the city for those changes but, as with negotiated zoning, public input is at best indirect.[25] As a result, adjacent residents and local businesses bear most of the burden but may receive none of the benefits.[26]

The bilateral-negotiation model—whether through more conventional, negotiated zoning or the more recent, development-agreement variation—is now the baseline process for land use regulation in virtually every state in the United States.[27] Although negotiated zoning and development agreements promote more negotiation and flexibility than the traditional, unilateral command-and-control model, certain characteristics of this paradigm shift have undermined its legitimacy. Chief among these criticisms is that the negotiation, implementation, and monitoring processes are exclusionary.[28] Because both negotiated zoning and development agreements typically involve only the developer and the local government, affected community groups are necessarily left out of the equation.[29] Additionally, these arrangements can lead to inefficient agreements that fail to reflect the full range of interests affected by the land use conflict.[30] It also places the local government planner in the unworkable position of negotiating on behalf of many competing interests with little input from the parties who will be affected.[31] Because of this bilateral orientation, the negotiation process and subsequent approval process are also criticized for promoting conflict and ignoring the long-term community engagement that is essential to the legitimacy of decentralized decision-making processes.[32] Finally, although this agreement-by-agreement approach is ad hoc by nature, it simultaneously fails to adapt to change. In particular, it fails to provide mechanisms that ensure continued monitoring and

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[25] *See id.* at 23-30.

[26] *Id.* at 33, 39-40.

[27] *See, e.g.*, Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 166-67 (1989); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26-27 (2000); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 849 (1983); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 347-48 (2002).

[28] Camacho, *Mustering I*, *supra* note 12, at 39.

[29] CALLIES, *supra* note 22, at 53.

[30] Camacho, *Mustering I*, *supra* note 12, at 15.

[31] *Id.* at 40.

[32] *Id.* at 65.

Electronic copy available at: https://ssrn.com/abstract=2269157

adjustment of decisions in order to account for changed circumstances or new information.[33]

II. CBAs AS A RESPONSE TO THE BILATERAL MODEL

CBAs emerged as a tool to help resolve land use conflict largely in response to the lack of transparency and stakeholder representation in public land use decisions. In contrast to development agreements—to which the developer and the governmental authority are the only parties—CBAs are usually negotiated directly between the project developer and community representatives.[34] Rather than containing terms between a developer and the local government, CBAs specify public benefits that a developer will provide in order to secure community support for (or at least tolerance of) the proposed project.[35] Typically, local groups relinquish the right to challenge project approvals and sometimes agree to provide affirmative support in exchange for the developer's agreement to provide community benefits.[36]

CBAs range in shape and size. Some are small agreements between one or more local groups, while others are essentially city-wide contracts that involve many community stakeholders and provide wide-ranging community benefits. Examples of the community benefits these agreements secure include funding for affordable housing, parking, park space, living wages, and local hiring.[37] Most CBAs—such as the Ballpark Village CBA in San Diego, the Atlantic Yards CBA in Brooklyn, and the Los Angeles International Airport and Staples Center CBAs in Los Angeles—are private agreements, signed between community groups and the developer directly.[38] Even privately negotiated CBAs, however, will often include governmental involvement at some stage.[39] In some cases, private CBAs have been incorporated into the public regulatory

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[33] *Id.* at 50.

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

[35] *See* Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENVTL. L. REV. 543, 557 (2010).

[36] Benjamin S. Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 77, 105 (2008).

[37] *Id.* at 98.

[38] *See* Been, *supra* note 34, at 7.

[39] Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements*, 24 PRAC. REAL EST. LAW., no. 4, July 2008, at 20 [hereinafter Salkin & Lavine, *Understanding I*].

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process through development agreements, while other "public" CBAs were negotiated directly between the governmental authority and the developer, enabling government involvement in the agreement's implementation and enforcement.[40] Examples of this latter type of agreement include the Cherokee-Gates Rubber CBA in Denver, agreements related to the Yale Cancer Center in New Haven, and the Oak-to-Ninth project in Oakland.[41] Still other public CBAs involved a governmental entity as the developer, such as the CBA negotiated by the Los Angeles World Airport Authority.[42] Nonetheless, some assert that any agreements that involve governmental authorities are not CBAs but rather public–private partnerships.[43]

In some sense, CBAs can be understood as an extension of more conventional forms of private ordering in the land use context, similar to real covenants and easements in that they allow the developer and other stakeholders to negotiate land use restrictions. Indeed, CBAs are most similar to conventional servitudes in that they involve a set of promises that are intended to burden the use of—and to run with—particular land.[44] Of course, many CBAs differ from private land use controls in that they require local government involvement at some stage.[45] Additionally, even purely private CBAs do not involve a transfer of a real property interest. Indeed, their affirmative promises typically are not intended to benefit any

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[40] *Id.*

[41] Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY. DEV. L. 35, 37, 47 (2008) (describing how community organizations sometimes use the term to describe any outcome resulting in campaigned-for community benefits, while local government officials and developers sometimes use CBAs to describe any set of community benefits commitments to which they agree).

[42] *Id.* at 51.

[43] *But see* David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657, 660-61 (2007) (making a clear distinction between CBAs, which he defines as having no government involvement, and development agreements, which he calls "Public-Private Partnerships").

[44] *Cf.* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(1) (2000) (defining servitude as "a legal device that creates a right or an obligation that runs with land or an interest in land"); JOSEPH WILLIAM SINGER, PROPERTY 224-25 (3d ed. 2010) ("Land use restrictions intended to run with the land are called 'covenants' or 'servitudes.'").

[45] *See supra* notes 39-42 and accompanying text. *Cf.* Terry Pristin, *In Major Projects, Agreeing not to Disagree*, N.Y. TIMES, June 14, 2006, at C6 (characterizing New York City's CBA process that excludes local government officials as atypical of most CBA processes).

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particular real property interest.[46] CBAs thus routinely include as parties community stakeholders who may or may not be landowners. Perhaps the most distinctive feature of private CBAs in contrast to servitudes is the fact that the consideration stakeholders often provide for any community benefits is a return promise to support or at least acquiesce in the development.[47]

A. The Virtues of the CBA Trend

The increased use of CBAs has provided several benefits to the now-prevalent bilateral-negotiation model of land use regulation. Some commenters have argued that the negotiated outcomes are more effective, efficient, fair, and legitimate as a result of CBAs.[48] CBAs enable community stakeholders to negotiate the mitigation of development impacts that adversely affect surrounding neighborhoods. These effects on the surrounding community can include severe environmental concerns, economic concerns, or strain on local facilities or resources.[49] In the case of the UNIDAD CBA in South Los Angeles, where the property owner had demolished one of the few medical facilities in the community to make way for upscale apartments, the community coalition was able to negotiate for a medical clinic as well as money for a land trust to support low-income housing in a new development.[50] CBAs can thus ensure that developers and local governments do not overlook these community impacts when planning or approving development projects.[51]

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[46] *See* GROSS ET AL., *supra* note 9, at 10 (outlining common community benefits negotiated for, including living wage requirements, local hiring, space for community centers or clinics, parks or green spaces, and affordable housing).

[47] Beach, *supra* note 36, at 97.

[48] *See, e.g.*, GROSS ET AL., *supra* note 9, at 21-22 ("The CBA negotiation process provides a mechanism to ensure that community concerns are heard and addressed . . . . CBAs commit developers in writing to promises they make regarding their projects, and make enforcement much easier . . . . CBAs encourage early negotiation between developers and the community, avoiding delays in the approval process."). *Cf.* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 624-25 (2011) (asserting negotiated development can serve to promote economic efficiency).

[49] Fazio & Wallace, *supra* note 35, at 545.

[50] Pei Wu, *supra* note 3, at 38-41 (describing the CBA process and outcome between UNIDAD and developer).

[51] 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, 295-96 (2008) [hereinafter Salkin & Lavine, *Understanding II*] ("CBAs are considered by their supporters to be powerful tools for assuring that community

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To the extent that these agreements integrate the full range of interests of affected parties, CBAs have the potential to promote and perhaps best approximate the broader public interest.[52] Such an assertion mirrors claims raised on behalf of other multilateral or collaborative regulatory processes.[53] Various commenters have reported community participants' substantial satisfaction with the outcome of CBAs,[54] including the development of long-term collaboration among community members as a result of CBAs.[55] In addition to mitigating the negative effects from development, community groups can also secure extra amenities that otherwise would be unobtainable, either because they are not traditionally addressed in the normal planning process[56] or because of local government budget constraints.[57] Of course, the very existence of the CBA itself is evidence that every party believed it was better off with an agreement than without one.

In addition to improving substantive outcomes, there is a credible argument that CBAs may improve land use decision-

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impacts will not be overlooked when large developments are planned for the neighborhood"); *see also* Been, *supra* note 34, at 15 ("CBAs may give neighborhoods a more meaningful role in the development process than the opportunities the existing land use process provides for public participation.").

[52] *See* GROSS ET AL., *supra* note 9, at 16 (discussing the wide array of community interests included in the LAX CBA in Los Angeles, such as labor unions, environmentalists, church congregations, educators, administrators, and minority interest groups).

[53] *See* Alejandro E. Camacho, *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 UCLA L. REV. 293, 309-10 (2007) (describing how advocates of collaborative habitat conservation planning argued that collaborative regulation would serve to better approximate the public interest by integrating stakeholders early and throughout agreement formation and implementation).

[54] *See, e.g.*, Pei Wu, *supra* note 3, at 41 ("[M]ost are extremely excited at the prospect of a new community health center, small business spaces, new jobs at living wages, and other benefits to be implemented at the new development. The hope is that this can become an anchor for community well-being, instead of something that contributes to community displacement.").

[55] *See, e.g.*, GROSS ET AL., *supra* note 9, at 32 ("[O]rganizers note that organizations that learned to work together through the Staples negotiations have continued collaborating with regard to other projects. In this respect, success has bred success; the coalition-building aspect of the CBA process has indeed led to lasting collaboration, resulting in greater political effectiveness for participants.").

[56] *See, e.g.*, GROSS ET AL., *supra* note 9, at 14 (discussing the "unprecedented" features of the Staples CBA in Los Angeles, including "a developer-funded assessment of community park [and] recreation needs, . . . a goal that 70% of the jobs created in the project will pay the City's living wage, . . . consultation with the coalition on selection of tenants[,] . . . increased affordable housing requirements in the housing component of the project, and a commitment of seed money for other affordable housing projects . . . ."); Been, *supra* note 34, at 17 (noting negotiations for wage rates or employment practices).

[57] Fazio & Wallace, *supra* note 35, at 544.

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making processes. Some evidence shows that community members believe CBAs can lead to a more effective, fair, and legitimate decision-making process.[58] In contrast with the more common adversarial approach that usually generates litigation, many prefer the CBA process because it provides an opportunity for more creative and cooperative problem solving.[59] Moreover, because CBAs can increase community participation in land use decisions, they arguably have intrinsic democratic value beyond mere participant satisfaction.[60] CBAs grant communities, including low-income and minority groups, a voice in the development process, empowering them with a degree of control where corporate interests usually dominate.[61] As such, CBAs offer community groups the opportunity for procedural justice by enabling them to participate directly in decision making. Such direct stakeholder participation has been shown to increase the perceived legitimacy of public decision-making processes like CBAs,[62] independent of the ultimate substantive outcome.[63]

Satisfaction with the CBA process is not limited to the community groups who negotiate them. Developers also benefit from its procedural advantages by obtaining less expensive conflict resolution, generating community goodwill and support (which can help secure regulatory approval), and fostering long-term development viability through investment in the surrounding community.[64] While vocal community opposition

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[58] *See, e.g.*, McDonnell, *supra* note 1; Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. LAW. 827, 842 (2013) (stating surveyed community stakeholders believed CBAs improved the development process); Mitch Thompson, *Harrison Residents Grasp CBA as a Tool Towards Racial and Economic Equity*, *in* COMMUNITY BENEFITS AGREEMENTS: GROWING A MOVEMENT IN MINNESOTA 6-8 (2008), *available at* http://www.metrostability.org/efiles/CBAREPORT.pdf.

[59] *See* Fazio & Wallace, *supra* note 35, at 544-45.

[60] *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 27 (1997) [hereinafter Freeman I].

[61] Salkin & Lavine, *Understanding II*, *supra* note 51, at 299; *see also* GROSS ET AL., *supra* note 9, at 35.

[62] Nathan Markey, *Atlantic Yards Community Benefit Agreement: A Case Study of Organizing Community Support for Development*, 27 PACE ENVTL. L. REV. 377, 380 (2009).

[63] *See* Kirk Emerson et al., *The Challenges of Environmental Conflict Resolution*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 3, 8 (Rosemary O'Leary & Lisa B. Bingham eds., 2003); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1311 n.104 (2003) (citing empirical evidence that the public values due process and that fair and inclusive procedures may increase future compliance and perceptions of legitimacy); *see also generally* TOM TYLER, WHY PEOPLE OBEY THE LAW (1990).

[64] *See, e.g.*, Been, *supra* note 34, at 18 ("Some developers . . . have accepted and even embraced the use of CBAs because they may secure some measure of community support for, or at least reduce opposition to, the development. Even if the developer believes the project will be approved without a CBA, by gaining support (or

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can stall projects for years in litigation and severely delay development, CBAs allow developers to address the community's concerns up front.[65] CBAs can thus "provide certainty to a developer that its project can be constructed on" schedule without the risk of litigation delay.[66] In addition, public support can help "facilitate[] [a] project's passage through the city's municipal and regulatory channels,"[67] enabling developers to more easily obtain government approval or subsidies[68] for their projects.[69] Particularly when projects will require city infrastructure investments or public financing, community support can be invaluable to developers. Finally, it is worth noting that negotiated benefits that go to area residents may ultimately have lasting positive benefits for the eventual development project as well. Some assert that the developer's agreement to give priority to local workers during construction of the airport in the Los Angeles World Airport CBA, for example, may have positively affected the project's ultimate profitability.[70] Similarly, such negotiations likely provide developers valuable insights about local market interest in their development and potential alterations that might improve such marketability.

Municipalities may play a neutral role in private CBAs, like in the Lorenzo Project agreement, but they also stand to benefit from the decreased political and legal pressure that emerges from negotiated agreements between developers and community groups.[71] Successful negotiations could mean that a

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reducing opposition) for the project in the community, a CBA may reduce the risk of rejection or save the developer time in the approval process."); Salkin & Lavine, *Understanding II*, *supra* note 51, at 293-94 (explaining value of community support to developers). *But see* Selmi, *supra* note 48, at 642 (asserting that CBA use has not been widespread, "in part because developers have little incentive to enter into them").

[65] Been, *supra* note 34, at 19 ("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."); Steven P. Frank, Note, *Yes In My Backyard: Developers, Government, and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 247 (2009).

[66] Fazio & Wallace, *supra* note 35, at 544.

[67] Naved Sheikh, Note, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL'Y 223, 242 (2008).

[68] Been, *supra* note 34, at 7 ("Community opposition also may affect whether government agencies are willing to help fund the project.").

[69] Marcello, *supra* note 43, at 658.

[70] As one commentator observed, "[t]hese additional dollars 'roll over' several times in the local economy, generating multiple waves of economic development. Many dollars go to existing small businesses whose customer base may be eroded by new large-scale developments." *Id.* at 668.

[71] Been, *supra* note 34, at 20.

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local government will spend fewer of its resources defending environmental or land use decisions.[72] In addition, a broad number of disparate concerns may be addressed through CBAs without a government spending its political capital to address them.[73] Perhaps most importantly, CBAs also enable municipalities to be creative in devising solutions to conflicts and provide more flexibility than conventional negotiated-zoning processes.[74]

Finally, an important but underappreciated procedural benefit of CBAs is that they accomplish the important goal of memorializing the relationships among community members. CBAs embody the recognition and explicit establishment of a long-term relationship between stakeholders. In this sense, CBAs can foster community building, and when combined with a development agreement, they can be a vehicle to promote both flexibility and certainty in the regulatory process.[75] Like development agreements, CBAs can be useful tools for adaptively managing uncertainty through contingency planning: they can anticipate where there are uncertainties and incorporate processes into the agreement that account for known contingencies and the possibility of new information or changed circumstances.[76] Yet development agreements can also provide certainty to a developer by delivering clear assurances in the form of vested rights, allowing the developer to proceed without fear that the city will change midstream the rules applicable to the property.[77]

B. Claimed Shortcomings of CBAs

Though many have extolled the virtues of CBAs, other commenters have raised numerous concerns about their increased use. Some critiques have focused on procedural

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[72] Salkin & Lavine, *Understanding II*, *supra* note 51, at 296.

[73] Been, *supra* note 34, at 20 ("CBAs may allow elected and appointed officials to distance themselves from politically unpopular community demands or from politically unpopular developments.").

[74] *Id.* at 19 (stating "CBAs may allow municipalities to bypass legal constraints on land use regulation imposed by statute and judicial precedent").

[75] Gross, *supra* note 41, at 47.

[76] *Cf.* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (Installment II), 24 STAN. ENVTL. L.J. 269, 296-300 (2005) [hereinafter Camacho, *Mustering II*] (discussing the potential of development agreements and other land use agreements for managing uncertainty and promoting adaptive land use planning).

[77] *Id.* at 299.

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concerns, including a lack of transparency and increased costs, concerns regarding the transfer of public authority to private parties, and a range of concerns focused on the adequate representation of stakeholders. In addition, some commenters have focused on uncertainties pertaining to the legal constraints on CBAs. As detailed below,[78] however, these critiques are based on antiquated notions of the private role in public governance and are more appropriately aimed at the prevailing bilateral model of public land use controls that CBAs arose to try, in part, to address.

One critique of the CBA process is that it mingles or even conflates public and private interests. The CBA negotiation process's integration of private interests into the public decision-making process may be seen as muddying and privatizing public land use regulation.[79] For example, some critics argue that, because public authorities have an obligation to provide public services and benefits such as funding for parks and affordable housing, municipalities and community groups should not rely on private negotiation with developers to assist in providing them.[80] In this vision of a strict public–private dichotomy, determinations of the public interest become tainted when CBAs are incorporated into the zoning-approval process because CBAs involve private parties advancing their private interests.[81] For at least some of these commenters, a more streamlined and insulated public decision-making process, primarily directed and informed by

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[78] *See infra* Part IV.

[79] *See* Musil, *supra* note 58, at 850-51 (stating how CBAs fit into the public regulatory process is unknown and that CBAs raise conceptual confusion and controversy). *Cf.* Selmi, *supra* note 48, at 633 (discussing the inherent public interest in a planning process that "reflects the public interest rather than arbitrarily favoring private or political interests"); *id.* at 615 (bargaining between a government and a developer takes away some of the inherent fairness, neutrality, and legitimacy that accompanies a purely public regulatory model because bargaining indicates that parties are biased toward their own positions, but also signals that the government is willing to give up certain public benefits in the process).

[80] *See, e.g.*, Fazio & Wallace, *supra* note 35, at 551 ("Initially, one could question whether it is fair that communities need to bargain with private actors for community resources that governments arguably have an obligation to provide, such as affordable housing, parks, and adequate funding for schools."); Sheikh, *supra* note 67, at 243 (critiquing the use of CBAs as a tool for governments to negotiate concessions from developers to finance a city's unmet infrastructural needs).

[81] *See, e.g.*, Gross, *supra* note 41, at 38 (commenting that private CBAs, without government guidance or involvement, are prone to community groups without any interest in the project using CBAs to extort benefits); Musil, *supra* note 58, at 840 (noting concerns with some private CBAs as having a distorting effect on the public regulatory process).

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knowledgeable bureaucrats, would presumably produce better, timelier, and more legitimate results.[82]

Similarly, some critics worry that the continued reliance on CBAs will produce an increasingly opaque decision-making process. Indeed, it is true that, as with other negotiated agreements, CBA negotiations are not required to be transparent or public.[83] Furthermore, although negotiations in the conventional, public land use decision-making process may also be inaccessible,[84] the opacity in CBA negotiations is even more pronounced, given that the public process at least requires a minimal public hearing.[85] This lack of transparency has prompted concerns regarding the potential for unfair dealing through the CBA negotiation process[86] and the parallel public decision-making process.[87] For example, some have argued that the developer for the Atlantic Yards CBA in Brooklyn manipulated the CBA process to generate an appearance of public support to improve the project's chances of approval, "yielding just enough concessions to targeted segments of a community to manufacture a semblance of public support and earn the needed permits and approvals from government entities."[88]

Other commentators focus on the increased burdens CBAs place on developers, using the prevailing public bilateral process with limited public participation as a baseline of comparison. For example, some commentators raise concerns regarding the potential that governments will place pressure on developers to engage in CBAs.[89] Others have identified the

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[82] Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 330-31 (2011).

[83] *Cf.* Fazio & Wallace, *supra* note 35, at 552 (discussing how transparency is essential but not required for CBAs).

[84] Camacho, *Mustering I*, *supra* note 12, at 36-42 (detailing the regularly perfunctory and imbalanced public participation in bilateral public land use regulation).

[85] Selmi, *supra* note 48, at 643.

[86] *See, e.g.*, Fazio & Wallace, *supra* note 35, at 552 (stating CBAs might be unfair to taxpayers because public funds in the form of favorable tax breaks might be directed to only one area of the community through a benefits package).

[87] Sheikh, *supra* note 67, at 231, 242; *cf.* LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 362 (1984) (arguing that by "encouraging people to resolve disputes through negotiation, as opposed to litigation, . . . [communities] will strike deals that are good for themselves and bad for society as a whole").

[88] Sheikh, *supra* note 67, at 242.

[89] *See* Gross, *supra* note 41, at 44 (stating a developer might argue that CBA commitments were made under pressure by elected officials and are invalid because they result from governmental action outside of the established approval process).

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additional transaction costs a separate CBA process creates for developers.[90]

Some of the most frequent criticisms of the CBA process, however, focus on community groups' inability to adequately promote stakeholder interests during the CBA's negotiation and implementation. These critiques include questions about whether the full range of interests are represented in negotiations;[91] whether a representative of a particular interest group is truly representative, including whether they have properly managed diverse points of view;[92] and whether stakeholders have the capability to negotiate and monitor agreement implementation effectively.[93] These concerns are amplified further by the fact that federal, state, or even municipal laws fail to mandate a particular negotiation framework or protocol, leaving each CBA negotiation subject to a separate organic process and rendering community groups unable to leverage lessons from prior negotiations.

A number of commenters have argued that the absence of procedural mechanisms for ensuring effective and fair coalition composition has caused community interests to be represented too narrowly or in a biased manner. As an initial matter, some observers state that CBAs must be sufficiently inclusive of community interests to make the settlement meaningful.[94] Indeed, because public support is a crucial bargaining chip, the range of stakeholders represented must be broad enough for the community coalition to be credible.[95]

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[90] *See e.g.*, Been, *supra* note 34, at 30 (discussing the additional processes and transactional costs that CBAs require of developers, including establishing systems for transparency into developer activities not previously public).

[91] Fazio & Wallace, *supra* note 35, at 552.

[92] *Id.* at 551-52 ("Another question is whether the groups that negotiated the CBA . . . should determine which groups should benefit."); Been, *supra* note 34, at 24 (discussing problems with managing the various community group interests in negotiating the terms of the Atlantic Yards CBA).

[93] *See, e.g.*, GROSS ET AL., *supra* note 9, at 23, 25 (recognizing potential legal costs and lack of experience with CBAs as impediments to community group participation in CBA negotiations); Beach, *supra* note 36, at 103 (discussing CBA enforcement and how "some groups may not have the capacity or desire to monitor compliance"); Fazio & Wallace, *supra* note 35, at 553 ("Another concern is whether the community parties have sufficient expertise to negotiate with developers for the CBA."); Salkin & Levine, *Understanding II*, *supra* note 51, at 323 (footnote omitted) ("The costs of negotiating a CBA can be high. Organizing a coalition, holding meetings, conducting community research and preparing reports will all require funding. Coalitions that have no experience with CBAs, moreover, will likely need technical and legal assistance throughout the negotiation process. The funding required for all of this may inhibit the process.").

[94] Frank, *supra* note 65, at 252-53.

[95] *Id.* (footnote omitted).

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However, experienced developers may strategically undermine coalitions by identifying potential stakeholders not represented by the coalition.[96] As a result, "CBAs with limited participation have met with equally limited success."[97] More importantly, when a coalition is too small, it risks excluding valuable voices from the community[98] or allowing certain interests disproportionate power. For example, "In the Atlantic Yards project, one community group" that obtained benefits in exchange for the group's public support "openly dismissed the complaints of other groups opposing the development."[99] Additionally, in San Diego, a number of "local residents decried the heavy influence that labor unions played in the Ballpark Village CBA."[100]

On the other hand, an overly broad coalition precipitates different concerns. A very diverse coalition can be difficult to create, coordinate, and manage.[101] Broad campaigns thus are more likely to result in a divergence of interests, making cooperation and unity difficult to achieve. In these situations, developers can more easily exploit factions by attempting to pare down community representation in the coalition to preserve the appearance of community involvement while excluding many key groups and issues from negotiations.[102] These CBAs not only lose credibility but also raise significant concerns about the capacity of private CBAs alone to promote land use decisions that advance broader public interests.

Various scholars have also detailed limitations in community stakeholders' capacities to effectively negotiate CBAs, keep stakeholder representatives accountable, and monitor developer performance. First, the costs of negotiating a CBA may dissuade or impede stakeholder representatives.[103] In addition, stakeholder representatives may be hindered by inexperience and lack resources to investigate project effects or determine the best terms for stakeholders, particularly as

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[96] Beach, *supra* note 36, at 100.

[97] Frank, *supra* note 65, at 253.

[98] Been, *supra* note 34, at 22.

[99] Sheikh, *supra* note 67, at 236 (footnote omitted).

[100] *Id.* (footnote omitted).

[101] Frank, *supra* note 65, at 252-53.

[102] *See* Been, *supra* note 34, at 24-25; Salkin & Lavine, *Understanding I*, *supra* note 39, at 30-31.

[103] Musil, *supra* note 58, at 848 (stating CBA participants reported a range of concerns regarding cost and resource challenges of CBA negotiation); Salkin & Lavine, *Understanding II*, *supra* note 51, at 323.

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compared to the greater sophistication of real estate developers in negotiating land use agreements.[104] This limited capacity to assess what constitutes an appropriate agreement is exacerbated by the confidentiality of negotiations and terms of previously executed CBAs.[105] Moreover, because CBAs may not be connected to the public regulatory process, stakeholders have no guaranteed forum where they can express their views about the CBA terms or procedure, and no formal way to hold negotiators accountable.[106] Finally, monitoring the developer to ensure adequate performance presents practical, financial, and administrative challenges for stakeholders.[107]

Some commenters have also pointed to uncertainties surrounding the legal enforceability of CBAs, given that courts have not yet examined their validity as private contracts and the absence of express statutory or regulatory authority for CBAs.[108] Accordingly, some scholars question whether community groups provide sufficient consideration for the agreement to be enforceable, although most ultimately conclude that they do.[109] Moreover, there are uncertainties regarding the extent to which community stakeholders have standing to sue to enforce the contract terms, particularly when they are not express parties to the agreement.[110] Finally, some scholars question the extent to which CBAs, when integrated into the public land use process, would be subject to regulatory exactions limitations.[111] Under the Fifth Amendment and analogous state constitutional takings limitations, any governmental conditions on project approvals must have a nexus to the project's impacts and be roughly proportional to those impacts.[112] This concern may come into sharpest relief

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[104] Been, *supra* note 34, at 24-25.

[105] *Id.* at 25.

[106] *Id.* at 21-22, 24.

[107] *Id.* at 30.

[108] Musil, *supra* note 58, at 838-39; Sheikh, *supra* note 67, at 233.

[109] *See, e.g.*, Salkin & Lavine, *Understanding I*, *supra* note 39, at 31. Salkin and Levine suggest promises to support or not to oppose development applications before public land use authorities may not be sufficient when compared to the extensive benefits and concessions offered by developers, particularly when the negotiating community group is not well-organized or broad and the developer's need for community support is low. *See id.* However, the authors conclude that under general contract theory, "which does not generally inquire into the adequacy of consideration," such promises can have substantial value for a developer are likely to be deemed supported by consideration. *See id.*

[110] *See id.* at 32.

[111] *Id.*

[112] Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994) (holding that a local government must show that there is a rough proportionality between the exactions and

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where a developer is required to sign a CBA as part of a public regulatory approval, government officials are closely involved in negotiations, or a CBA is reached proximate to a public approval.[113]

III. THE PERSISTENT LIMITATIONS OF PUBLIC BILATERAL NEGOTIATION

Although there is some merit to commentators' concerns over the increasing reliance on CBAs, these critiques are largely misplaced. CBAs have emerged as a fundamental consequence of the lack of stakeholder representation inherent in the now-prevalent bilateral-negotiation model. Yet CBAs largely function parallel to the public land use process rather than as a part of it. As currently utilized in land use decision making, these agreements can partially and occasionally address inadequacies of the bilateral model, but they certainly cannot abate them all. Rather, the critiques levied against CBAs are more appropriately understood as criticisms of the underlying bilateral model's limitations. Furthermore, because CBAs have been treated as separate from the public land use process instead of as concerted attempts to renovate it, many of the problems with the bilateral model have been exacerbated by an increased reliance on CBAs.

As explained above, the prevailing bilateral land use decision-making process provides extensive and unparalleled opportunities for negotiation by the developer while furnishing very limited participation for other affected parties. As a result, public land use controls are often criticized as being susceptible to corruption or disproportionate developer influence, unnecessarily adversarial, and ad hoc but unable to adapt to changed circumstances.[114] Stakeholders turned to CBAs as a response to the limitations of conventional bilateral bargaining,

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the projected impact of the proposed development); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (holding that to avoid an unconstitutional taking of private property, a "nexus" must exist between any imposed land use exaction and the effects of a proposed development).

[113] Been, *supra* note 34, at 27-28.

[114] *See generally* Camacho, *Mustering I*, *supra* note 12, at 42-62 (detailing the range of concerns about bilateral land use regulation); *see also generally* Selmi, *supra* note 48, at 611-42 (detailing concerns regarding the effects of the contract model of land use regulation on various governmental norms).

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as a way to better reflect the multiplicity of affected interests.[115] In this sense, they have proved useful in increasing stakeholders' involvement in land use disputes. Many commenters—as well as some developers and municipalities—have recognized the value of stakeholder involvement in increasing information, mitigating the likely negative effects from proposed development on other stakeholders, reducing long-term conflict, and helping promote an interactive civic life.[116]

Despite these benefits, concerns persist about CBAs' efficacy and legitimacy. Many critics of CBAs, however, seem to overlook the existing design of the broader regulatory framework and thus neglect the underlying problems of the prevailing bilateral model. The problems raised by these critiques stem more fundamentally from the bilateral model—and the favored position of developers in the process—than from any inherent limitation of CBAs. For example, although private CBAs may enable land use decisions to reflect the broader range of affected interests, they fail to resolve the lack of transparency in the decision-making process as they are currently used. Indeed, CBAs still allow key moments in the process to remain private, keeping them opaque and hidden from public view. In that sense, the emergence of private CBAs has further reduced transparency, removing important decisions from public examination. Nevertheless, this opacity more fundamentally originated from the prevailing bilateral land use process's limited opportunities for participation and its vulnerability to unfair dealing, not from CBAs themselves.

Perhaps the most problematic features of CBAs, however, stem from their use of parallel private negotiations to supplement or circumvent the public land use process in lieu of any concerted attempt to improve public governance. Although the integration of private and public processes is not problematic per se,[117] CBAs undoubtedly have an uneasy and unclear relationship with public land use decision making as they are currently used. And this vagueness is troublesome. CBAs are not wholly private, as they obligate stakeholders to support or acquiesce in development applications that are

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[115] *Cf.* Been, *supra* note 34, at 15 (discussing how supporters of CBAs argue that standard public "land use procedures often fail to ensure that the concerns of the neighborhood most affected by the proposed development are considered and adequately addressed").

[116] *See supra* notes 48-77 and accompanying text.

[117] *See supra* notes 36-46 and accompanying text.

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before public decision makers. Yet they are not public agreements either, as they are typically negotiated without the involvement of public authorities and entered into only by private parties. Treating CBAs as both supplemental and distinct from the public land use process creates a new category of agreement that introduces various legal uncertainties, including their questionable validity, enforceability, and relationship to regulatory exactions.[118] Of course, introducing a parallel private process alongside the existing public one also leads to foreseeable inefficiencies and increased costs for both developers and other community members.[119]

Furthermore, by failing to incorporate CBAs' stakeholder participation mechanisms into the public process, the use of CBAs remains largely elective. CBAs may provide community stakeholders with opportunities for additional input on local community land use decisions, but only when the developer so chooses. In virtually every jurisdiction in the United States, the developer decides the fundamental questions in the CBA process. These questions include whether the CBA process will be used at all; which stakeholders may negotiate; the framework and extent of the negotiation, including the timing, amount, and types of participation by interested stakeholders; and the relationship between the CBA negotiation process and the public regulatory process.[120] As with the more conventional bilateral process, this framework is likely to systematically overvalue developers' interest in relation to other stakeholders.[121] Accordingly, although CBAs may provide other stakeholders with additional opportunities to exert influence, they arguably make the developer an even greater focus of that process.

A corollary to all of this, of course, is that local government planners become less important to the mediation of multilateral land use conflicts. While the standard bilateral public-negotiation process places government planning officials in the difficult position of negotiating for many competing and subjective interests with only limited participatory input,[122] the private CBA process detaches the local government planner—with all her skills for information generation and capacity

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[118] *See supra* notes 105-11 and accompanying text.
[119] *See* GROSS ET AL., *supra* note 9, at 23.
[120] *See supra* notes 90-105 and accompanying text.
[121] Camacho, *Mustering II*, *supra* note 76, at 283.
[122] Camacho, *Mustering I*, *supra* note 12, at 50.

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building—from such decision making. Indeed, the critique of CBAs as presenting a suite of stakeholder representation problems is persuasive precisely because the local governmental authority has been divested of any responsibility or involvement in community organization, information gathering and dissemination, and capacity building.[123]

In sum, CBAs may provide a range of participatory benefits. Because they are ad hoc and elective patches to the public regulatory process, however, they alone cannot fix a regulatory system that often leads to inefficient, unfair, and undemocratic decisions. In fact, their reliance on the developer as the key actor may further erode the public decision-making process. Moreover, CBAs' current lack of transparency and uncertain relationship with public regulation may further divide rather than bridge the considerable accountability and legitimacy gap that exists in public land use governance.

IV. INTEGRATING STAKEHOLDERS THROUGH COLLABORATIVE GOVERNANCE

One of the primary criticisms of CBAs is that they blur the lines between public and private land use processes.[124] However, integrating and relying on private parties in public processes is not illegitimate simply because it might complicate understandings of the relationship between private parties and public governance. Any such critique would rely on an antiquated understanding of governance that expects a strict divide between public and private spheres and envisions a very limited private role in public processes.[125]

Indeed, such a critique vitally disregards how the prevailing bilateral process already blurs the line between public and private roles in land use decision making—at least for developers. The departure from a unilateral model of public land use regulation was largely due to recognition that public planners were unable to divine the public interest through objective expertise.[126] Yet in its place, regulatory processes have increasingly been designed to grant certain private parties—

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[123] Camacho, *Mustering II*, *supra* note 76, at 287.

[124] *See supra* notes 78-80 and accompanying text.

[125] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 558 (2000) [hereinafter Freeman II] (describing the New Deal Era theory of administrative law which viewed the role of the government separate and insulated from private interest).

[126] Camacho, *Mustering I*, *supra* note 12, at 5.

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namely developers—considerable advantages over others in the bargaining process.[127] Although the bilateral model correctly rejects the formalist distinctions between public and private embodied in the unilateral model of zoning, it has legitimacy problems of its own. In particular, the bilateral model grants developers considerable access to revise the rules applicable to their property, while permitting limited public input. By doing so, the bilateral model marginalizes other stakeholders, leading to poorly informed and unfair decisions that often fail to adequately reflect the interests of all affected parties.[128]

As many scholars have argued, private parties are not antithetical to public processes. In fact, active private participation is critical to successful governance.[129] Professor Jody Freeman[130] and other leading scholars[131] have persuasively challenged the formal public–private distinction in regulation, proposing an alternative conception of governance as a set of negotiated relationships between public and private actors.[132] What is vital is that regulatory processes are designed to effectively and fairly harness private resources to promote public ends.[133] Unfortunately, the existing bilateral model—notwithstanding the elective and sporadic complement of CBAs—fails to consistently integrate the full range of affected stakeholders into the governance process in an effective or equitable manner.

Because of the questionable legitimacy of CBAs, some commenters have recommended that local governments refrain from using them.[134] Alternatively, some have argued that if CBAs are used, they should be shielded from the public land use process through the prohibition of government involvement

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[127] *Id.* at 30-33.

[128] *See generally* Camacho, *Mustering I*, *supra* note 12.

[129] *See generally* Freeman II, *supra* note 125 (describing activities traditionally associated with government that depend heavily on private participation).

[130] *See generally* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000) [hereinafter Freeman III]; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2001) [hereinafter Freeman IV].

[131] *See, e.g.*, Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 802 (1998) (discussing role of globalization in creating new forms of blended public and private power); Mark Aronson, *A Public Lawyer's Response to Privatisation and Outsourcing*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 52 (Michael Taggart ed., 1997) (discussing roles of public and private actors in what he calls "mixed" administrations).

[132] *See generally* Freeman III, *supra* note 130.

[133] *Id.* at 824.

[134] Been, *supra* note 34, at 31.

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in their negotiation, implementation, or enforcement.[135] Rather than isolating stakeholders and public authorities from each other, or using CBAs as a selective, ad hoc supplement to the existing bilateral framework, states should integrate lessons from the more collaborative CBAs into the governance process. As I have argued more extensively elsewhere, states should require municipalities to integrate mechanisms for stakeholder participation and negotiation more fully into the process.[136] Additional opportunities to participate in governance should be included at all phases of the regulatory process, from initial city-wide planning through development construction and operation.[137] This could mean giving affected stakeholders direct responsibility for implementing or monitoring elements of the regulatory regime that implicate their interests.[138] Instead of prohibiting or limiting the terms of CBAs, the law should induce local governments to look for opportunities to harness private parties to promote public ends.[139]

By adjusting the public regulatory process to require the integration of more effective participation opportunities for stakeholders, states can stimulate democratic participation, minimize the costs associated with relying on separate public and private negotiations, and promote decisions that better reflect the interests of all affected parties.[140] Integrating private parties would also alleviate the concerns about opacity and enforceability that currently plague the bilateral public process and CBAs. Additionally, this multilateral model would have the ancillary effect of limiting the need for private agreements altogether.[141]

A realistic and appropriate avenue for the expansion of meaningful participation opportunities lies in existing statewide enabling acts that authorize local governments to enter into development agreements and/or annexation agreements.[142] Because they are increasingly used for large-

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[135] *Id.*

[136] Camacho, *Mustering II*, *supra* note 76, at 280-81.

[137] *Id.*

[138] *Id.*

[139] Freeman I, *supra* note 60, at 27.

[140] *Cf.* Camacho, *Mustering II*, *supra* note 76, at 307-14 (discussing the empirical evidence on decreased costs and increased stakeholder satisfaction from multilateral land use and environmental dispute resolution processes).

[141] *Cf.* Sheikh, *supra* note 67, at 245 ("[L]ocal governments should make private contracts less enticing by adopting processes that include and take into account community perspectives on land use and development before and during negotiations with a prospective developer.").

[142] Camacho, *Mustering I*, *supra* note 12, at 53-54.

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scale development and allow developers and local governments unparalleled flexibility to shape the substantive terms and conditions of development, development agreements and annexation agreements provide the ideal experimental opportunity to reshape the process to be more participatory and collaborative. Indeed, because these agreements are voluntary contracts that provide a developer valuable vested development rights, most authorities agree that they are not subject to constitutional exaction limits.[143] However, since development agreements provide few substantive standards to restrict the scope of negotiations, they prompt concerns of unfair dealing and increase the need for heightened participation requirements.[144]

These enabling statutes could be amended to require development agreements and annexation agreements to be negotiated openly and publicly, giving affected stakeholders a voice in negotiations that would compare to the voice they enjoy in both private and public CBAs. Another possibility is for the incorporation of community benefits provisions into the development agreement, which is already done for some CBAs. Indeed, some commenters promote this practice as a way to improve enforceability.[145] Environmental impact assessment processes, such as those required under the National Environmental Policy Act[146] and state analogs such as the California Environmental Quality Act[147] or New York State Environmental Quality Review Act,[148] could also be leveraged to adjust the regulatory process and promote more valuable stakeholder involvement in considering the scope of project features, analyzing potential effects, and assessing alternatives.

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[143] *See, e.g.*, Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach, 103 Cal. Rptr. 2d 447, 464 (Cal. Ct. App. 2001) ("[I]t is likely that the City would have demanded additional consideration from [the developer] for . . . a separate development agreement."); Save the Sunset Strip Coal. v. City of W. Hollywood, 105 Cal. Rptr. 2d 172, 175 (Cal. Ct. App. 2001) (affirming trial court conclusion that development agreement cash payment of $5.2 million does not constitute an illegal sale of city's police power and that city need not "identify some particular cost attributable to the development to justify such a fee"); City of Colo. Springs v. Kitty Hawk Dev. Co., 392 P.2d 467, 472 (Colo. 1964) (holding that a city may impose conditions in annexation agreement because the city action is "purely contractual"); *see also generally* Camacho, *Mustering I*, *supra* note 12, at 30-32; *Development Agreements*, 2 ZONING AND LAND USE CONTROLS (MB) ch. 9A, at 9A-.04 to -.05 (2012).

[144] *See* Camacho, *Mustering II*, *supra* note 76, at 282.

[145] Salkin & Lavine, *Understanding II*, *supra* note 51, at 325; Frank, *supra* note 65, at 251.

[146] *See* National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2005).

[147] *See* CAL. PUB. RES. CODE § 21002.1 (West 2012) (California Environmental Quality Act provision requiring environmental impact reports).

[148] *See* N.Y. ENVTL. CONSERV. §§ 8-0101 to -0117 (McKinney 2005).

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Congruent with modern planning and regulatory theory, these agreements should be adaptive. For example, they should include concrete triggers that mandate sustained monitoring and assessment of compliance, with procedures that permit periodic adjustments to uncertain conditions in order to account for new information and changed conditions.[149]

Once adopted, development agreements would remain enforceable only by the developer and local government; however, affected stakeholders could be assigned key monitoring roles during the implementation and enforcement stages with respect to the benefits or development impacts that will affect them most directly.[150] This approach would empower motivated private parties to promote developer accountability and therefore advance public enforcement goals.[151] Equally significant, incorporating a more multilateral model during each phase of the development's evolution through the development agreement provides a vehicle for fostering and managing an ongoing relationship between the members of a community.[152]

In addition, providing more meaningful opportunities for stakeholder participation reorients the local government planner to a more effective mediation role. No longer would the government planner be expected to serve as a negotiator on behalf of the public interest as she is under the conventional bilateral model, where the planner is disconnected from community stakeholders and presumed omniscient about their needs.[153] Nor would the planner be excluded from negotiations, as is typically the case under the private CBA process. Instead, the local government representative would help identify interested stakeholders and inform interested parties about the potential benefits and effects of proposed development, without negotiating on their behalf.[154]

This role as a facilitator, community organizer, and gatherer and distributor of information draws on a key aspect of contemporary planning theory and reflects a professional orientation that planners are increasingly being trained to embrace.[155] Initially, the local government's function would be

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[149] Camacho, *Mustering II*, *supra* note 76, at 295.

[150] *See id.* at 301-03.

[151] *Cf.* Freeman I, *supra* note 60, at 27.

[152] Camacho, *Mustering II*, *supra* note 76, at 329-30.

[153] *See* Camacho, *Mustering I*, *supra* note 12, at 12-14.

[154] Camacho, *Mustering II*, *supra* note 76, at 287.

[155] JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES 3 (1999). *Cf.* Musil, *supra* note 58, at 831 ("In the

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to facilitate a scoping process to determine the degree of participation in the negotiations that would best serve the interests of the full range of possible stakeholders.[156] Then, if appropriate, the planning official would provide resources and facilitate negotiations, rather than being placed in the impossible role of mandating the public interest (under the unilateral model) or serving as the sole negotiator on behalf of many diverse interests (under the bilateral model). Such a community scoping process would resemble a common community-organizing process used in CBAs, where local groups explore the goals and resource capacity of stakeholders.[157] Crucially, however, local government officials would facilitate and mediate discussions on the range of stakeholder-representation issues. If developers or other stakeholders are unwilling or unable to negotiate, the municipality could negotiate with such parties separately in order to gather information about potential effects and alternatives, assess interests, develop terms and conditions, formulate development plans, and potentially execute agreements.[158]

Though of course the efficacy of a multilateral approach is inevitably context-specific, studies in dispute resolution suggest that multilateral approaches to public policy dispute resolution tend to be more effective in circumstances in which disputes are more concrete, involve a manageable number (and fewer diffuse) stakeholders, and agreement implementation largely depends on the participants and groups they represent.[159] In such circumstances, participation is more likely to be less costly and more convenient, stakeholders tend to have powerful incentives to resolve disputes because relationships are more likely to be long term, and agreements will tend to be easier to enforce and implement. Unlike

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Unites States, local development officials mediate the relationships between business controls of development economic functions and public controls of development incentives and approvals.").

[156] Camacho, *Mustering II*, *supra* note 76, at 280.

[157] Beach, *supra* note 36, at 101.

[158] Community-based organizations can themselves enter into binding, enforceable agreements with public authorities over particular development. *See, e.g.*, Gross, *supra* note 41, at 49.

[159] *See, e.g.*, Thomas C. Beierle & Jerry Cayford, *Dispute Resolution as a Method of Public Participation*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 53, 65 (Rosemary O'Leary & Lisa B. Bingham eds., 2003); SUSAN L. PODZIBA, CIVIC FUSION: MEDIATING POLARIZED PUBLIC DISPUTES (2013); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 77-78 (1987).

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prominent federal multilateral processes such as most negotiated rulemakings, the disputes in local land use conflicts tend to have these characteristics.[160] Although American land use regulatory processes remain understudied, modest evidence suggests that using a more multilateral orientation to resolve land use disputes can reduce costs, lead to processes that are more widely accepted, and produce agreements that are favored over those reached under the conventional bilateral approach. According to "[t]he only broad[ly] published study of the burgeoning use of collaborative land use agreements to date—a study that examined land use mediation processes— . . . ninety-one percent of participants, including government officials, reported that the process cost less . . . than more adversarial, conventional alternatives."[161] Additionally, "eighty-five percent [of participants reported] that the process took less time . . . ."[162] Perhaps most importantly, however, the vast majority of participants were satisfied with their mediated collaborative process and preferred the negotiated outcome to the standard decision-making process.[163] Even where the collaborative process did not result in a final agreement, almost two-thirds of participants who viewed their dispute as unresolved thought that the mediated multilateral process helped the parties make significant progress.[164]

CONCLUSION

Integrating a more multilateral and adaptive model into the development and agreement process promotes the legitimacy of public land use governance. Indeed, this model addresses the biggest critiques of the conventional bilateral

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[160] *See* Camacho, *Mustering II*, *supra* note 76, at 322-24 ("There are fewer logistical and organizational obstacles to collaborative approaches in the local land use context than there are in administrative law disputes.").

[161] *Id.* at 307. The study "examined land use mediation processes." *Id.*

[162] *Id.*; *cf.* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 121 (2000) (The value of newly acquired information on the positions of other affected parties, for example, may extend beyond any particular rulemaking); Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rulemaking: Claims, Counter-Claims and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000).

[163] Camacho, *Mustering II*, *supra* note 76, at 310.

[164] *Id.* at 311 (Where no agreement was ultimately reached, participants nevertheless reported several benefits from the process: "it aided the parties in developing the basis for future negotiations[;] expanded the available information[;] improved stakeholder relationships through constructive dialogue[;] clarified issues and interests[;] and increased participant confidence in government efficacy.").

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approach. Integrating CBAs into development-agreement and annexation-agreement frameworks would minimize the costs from the redundancy of multiple parallel processes, and it would enable local authorities to promote agreements that better reflect the full range of affected parties. The multilateral model also places the government in the more appropriate and effective role of managing and facilitating stakeholder representation, which nurtures a more engaged civic culture by incentivizing participation within affected communities.[165] By enabling affected parties to participate directly in and shape the democratic process, the multilateral model engages and helps cultivate a local government's most distinctive and essential source of legitimacy.[166]

There undoubtedly are challenges with a reliance on a more multilateral model as the basis for land use decision making. These include the difficulties of promoting effective stakeholder representation, minimizing the potential unwieldiness of a multilateral process, and overcoming self-interested behavior by local interests.[167] Nonetheless, one of the key advantages of a multilateral regulatory design is that it can make addressing these concerns regarding the relationship among stakeholders, and between stakeholders and regulators, the focus of governance.[168] Ultimately, by empowering and encouraging community participation, a multilateral model would more likely produce agreements that are fairer, more effective, and broadly accepted. It also would provide a process that is more congruent with modern planning and governance theory than either the initial unilateral model or conventional bilateral model, even as supplemented by CBAs.[169]

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[165] *Id.* at 284.

[166] Rose, *supra* note 27, at 887; *see also* Camacho, *Mustering II*, *supra* note 76, at 277, 327.

[167] Though only briefly identified here due to the more truncated symposium format, these and other potential concerns are considered in more detail at Camacho, *Mustering II*, *supra* note 76, at 306-22.

[168] *Id.* at 314-15.

[169] Rose, *supra* note 27, at 887.

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