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Contracting with Communities: An Analysis of the Enforceability of Community Benefits Agreements

Hannah P. Stephan†

Introduction

Community Benefits Agreements (CBAs), contracts between community members and developers, have emerged in the last few decades as a powerful tool for community groups when faced with a new development in their neighborhood.¹ Community members often have concerns about displacement due to the increased cost of living when a new development is built in a particular area,² so the use of a CBA can help community members address these concerns with developers in a productive way. In turn, the developers gain support from community groups for the developments, which may ease tensions in city approval proceedings and improve the general perception of developers in the neighborhood once their project is complete.³

The creation and enforcement of Community Benefits Agreements play a role in a wide variety of contexts, including land

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1. Julian Gross, *Community Benefits Agreements*, in BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 189, 189 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

2. See, e.g., 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. ENV'T L. & POL'Y 291, 298 (2008) [hereinafter Salkin & Lavine, *Understanding CBAs*] (“Large-scale urban developments tend to have disproportionate impact on low-income and minority communities, and CBAs provide a mechanism for these communities to ensure that they will benefit from developments rather than being overlooked or displaced through gentrification.”).

3. See, e.g., Stephanie M. Gurgol, *Won't You Be My Neighbor? Ensuring Productive Land Use Through Enforceable Community Benefits Agreements*, 46 U. TOL. L. REV. 473, 491 (2015) (explaining that community members agree to support projects, which can add efficiency to development projects).

use planning,⁴ race equity,⁵ and environmental justice efforts.⁶ Understanding each of these contexts is essential to seeing CBAs as a tool for fairer communities and as an important piece in the puzzle of equitable development, and it is important in conceptualizing why it is to the benefit of the community for these agreements to be enforceable.

Equitable development advocates are largely in favor of CBAs as a tool,⁷ but some commentators caution that they should only be a piece of the land use planning puzzle rather than a singular solution for equitable development.⁸ The idea of land use planning, though inherent in many past municipal-level decisions, did not emerge as a separate concept until zoning ordinances began to gain attention.⁹ With demographic changes and ever-increasing levels of development,¹⁰ land use planning will continue to be an important topic, and CBAs are poised to be a key part of the discussion.

We can also understand CBAs as a tool for race equity and as a way to elevate historically marginalized communities.¹¹ In general, civil rights scholars see housing policy and planning, of which CBAs can be a part, as a key element to reducing the impacts of past racist policies.¹² As early as 2006, a Minneapolis

4. See, e.g., *id.* at 475 (“To ensure CBAs will operate as effectively as possible, courts should view them through the lens of traditional land use decisions.”).

5. See, e.g., Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 298 (“CBAs can be effective tools for promoting racial and social equity.”).

6. See Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL’Y 157, 159 (2009) [hereinafter Salkin & Lavine, *CBAs and Comprehensive Planning*].

7. See, e.g., Gross, *supra* note 1, at 189 (“CBAs have generated tremendous excitement among community groups and advocates of equitable development, as well as substantial interest from local government, academia, the media, planning circles, and philanthropic foundations.”).

8. See, e.g., *id.* at 199 (arguing that CBAs are “substantially limited as a long-term strategy for shaping economic development” because of the time and resources it takes to negotiate these agreements).

9. JULIAN CONRAD JUERGENSMEYER, THOMAS E. ROBERTS, PATRICIA E. SALKIN & RYAN MAX ROWBERRY, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 1.1 (3d ed., 2021).

10. *Id.* at § 1.3.

11. See CMTY. BENEFITS L. CTR., *COMMON CHALLENGES IN NEGOTIATING COMMUNITY BENEFITS AGREEMENTS AND HOW TO AVOID THEM* 3, 7 (2016) (centering race equity in its explanation of effective CBAs and in its statement of the mission of the CBA movement in general).

12. See, e.g., Liz Enochs, *Segregation Scholar Richard Rothstein Fighting for New Civil Rights Movement with Best Weapon He Has: Research*, SHAREABLE (Sept. 3, 2020), <https://www.shareable.net/segregation-scholar-richard-rothstein-fighting-for-new-civil-rights-movement-with-best-weapon-he-has-research/>

organization linked CBAs and race equity in a report, stating that communities of color are often excluded from the processes in which development decisions are made, and that “CBAs provide them with a vehicle for guarding against gentrification and displacement,” as well as “a mechanism through which an honest discussion of racism and its historic and current effects can occur.”¹³ Though the creation and implementation of CBAs will not solve the many problems created by racist policies, they can be a helpful tool that is rooted in the community with the goal of enacting important changes.

CBAs are also influential in the environmental justice movement.¹⁴ This movement, a largely community-based effort, seeks to “ensure a fair distribution of both environmental burdens and environmental goods” by including community members in planning processes.¹⁵ This helps avoid outcomes in which locally unwanted land uses are located in historically disinvested communities and areas,¹⁶ which may cause negative health outcomes for communities and cause them to experience further harm.¹⁷ CBAs can work toward this goal in a variety of ways, including by requiring that developers meet certain environmental standards, obtain Leadership in Environmental and Energy Design (LEED) certification, and obtain community input on environmental design.¹⁸

[<https://perma.cc/L2VG-G59D>] (describing residential segregation as the root of other racial disparities such as police abuse and mass incarceration).

13. MAURA BROWN, ALL. FOR METRO. STABILITY, COMMUNITY BENEFITS AGREEMENTS: AN IMPORTANT TOOL IN THE GROWING TWIN CITIES EQUITY MOVEMENT 2 (2006); *see also* Press Release, Chi. Lawyers’ Comm. for Civ. Rts., Coalition Signs Community Benefits Agreement with Proposed Bucktown Dispensary (Jul. 22, 2020), <https://www.clccrul.org/blog/2020/7/22/cannabis-equity-illinois-coalition-signs-community-benefits-agreement-with-proposed-zen-leaf-bucktown-dispensary> [<https://perma.cc/PD39-PKTJJ>] (describing a CBA with the goal of prioritizing individuals for marijuana dispensary jobs who have been most impacted by the past criminalization of marijuana, particularly individuals within communities of color); DANIEL KRAVETZ, EQUITABLE DETROIT COAL., FIGHTING FOR EQUITY IN DEVELOPMENT: THE STORY OF DETROIT’S COMMUNITY BENEFITS ORDINANCE 8 (2017) (explaining how a CBA was brought to fruition by a coalition led mostly by women of color).

14. *See* Salkin & Lavine, *CBAs and Comprehensive Planning*, *supra* note 6, at 159.

15. *Id.*

16. JUERGENSMEYER ET AL., *supra* note 9, at § 1.3.

17. AM. PUB. HEALTH ASS’N, CREATING THE HEALTHIEST NATION: ENVIRONMENTAL JUSTICE FOR ALL 1 (“Disproportionate exposures to pollutants and adverse effects of climate change can result in a multitude of severe health issues that are costly for the American people.”).

18. *Policy & Tools: Community Benefits Agreements and Policies in Effect*, P’SHP FOR WORKING FAMILIES, <https://www.forworkingfamilies.org/page/policy-tools->

This Note will provide context and background surrounding the creation and current implementation of Community Benefits Agreements, including their effectiveness and reception in the public opinion. The primary goal of this Note is to discuss several concerns regarding the enforceability of CBAs as private contracts. Overall, this Note will argue that issues raised about the enforceability of CBAs in terms of consideration, duties of successors and assigns, and third-party enforcement should generally not prohibit a CBA from being perceived as valid and enforceable by courts or communities, though interpretation will depend on each individual contract. In Part I, this Note will provide background information about the creation and use of CBAs. In Part II, this Note will explain the current leading concerns with the enforceability of CBAs: consideration, successors and assigns, and third-party beneficiaries. This Note will provide an analysis of these concerns in Parts III–V to show that CBAs should generally be understood to be enforceable in court but are largely dependent on the specific contractual language that is employed.

I. History and Effectiveness of Community Benefits Agreements

A. History of Community Benefits Agreements

The first Community Benefits Agreement was formed in California in the 1990s, with the Hollywood and Highland agreement.¹⁹ The growth in popularity of CBAs is a result of the desire to see accountability from large developers, due to the common problem of gentrification in low-income communities following the construction of large developments.²⁰ Gentrification tends to cause displacement of existing community members due to increased rent and cost of living in the area.²¹ This has increasingly

community-benefits-agreements-and-policies-effect [https://perma.cc/N86U-7G72] (outlining the key provisions of current CBAs, including environmental provisions).

19. Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 301 (describing the Hollywood and Highland agreement, which was enacted in 1998 as a response to traffic, environmental, and crime concerns surrounding the development of the \$388 million theater which now hosts the Oscar awards).

20. *Id.* at 298.

21. Langston A. Tolbert, *Utilizing Educational Focused Community Funds in the Fight Against Displacement and the Revitalization of Distressed Communities*, 63 *How. L.J.* 303, 307 (2020).

become a larger problem due to the growing populations in big cities.²²

With this backdrop, the Community Benefits Agreement emerged as a contractual tool for developers and community advocates to partner on the terms for a new development. Since these agreements are private contracts, it is hard to know the exact number that are currently in effect, but researchers estimate that at least twenty major CBAs are currently in place around the country.²³ CBAs are valuable to both community organizations and developers, though the goals of each group are different. Coalitions of community organizations typically seek to avoid community member displacement and provide benefits to current residents of an area.²⁴ Developers seek to save money, perhaps by reduced time spent in city procedures or dealing with legal challenges; to gain a higher likelihood of approval in city processes; and to gain positive press in the community.²⁵ As such, CBAs outline certain benefits that a developer agrees to provide the community, which are specific to each community but may include terms such as job training programs or wage requirements.²⁶ In return, the community advocates typically promise to support the project in the community and at municipal meetings regarding approval of the development.²⁷ They may also agree not to sue the developer.²⁸

22. Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 297 (explaining that growth in the largest U.S. cities has been very rapid and with that growth comes a lot of competition for development).

23. *See Policy & Tools: Community Benefits Agreements and Policies in Effect*, *supra* note 18. It is difficult to determine the exact number of CBAs in effect, perhaps due to the private nature of contracts in general, and the fact that each CBA is generally negotiated by a different coalition of advocates in different cities. The Partnership for Working Families database is the most centralized and updated database that is readily available, which is why this database is used to provide the most accurate number of currently active CBAs. In 2011, the Public Law Center published a document outlining 18 major CBAs. *See* DANIEL J. LASALLE, PUB. L. CTR., SUMMARY AND INDEX OF COMMUNITY BENEFITS AGREEMENTS (2011), <https://law.tulane.edu/sites/law.tulane.edu/files/Files/TPLC/summary-and-index-community-benefit-agreements.pdf> [<https://perma.cc/7PAU-RX77>]. *See also* Amy Lavine, *Community Benefits Agreements*, BLOGSPOT, <http://communitybenefits.blogspot.com/> [<https://perma.cc/WRB9-GWC9>], for a blog maintained by CBA scholar Amy Lavine that provides details about 28 CBAs.

24. *See* Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 294.

25. *See, e.g.*, Gurgol, *supra* note 3, at 479 (explaining that CBAs provide an avenue for developers to minimize unnecessary delay caused by community action).

26. JULIAN GROSS, GREG LEROY & MADELINE JANIS-APARICIO, GOOD JOBS FIRST & CAL. P'SHIP FOR WORKING FAMILIES, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 2-3 (2005).

27. *Id.* at 2.

28. *See, e.g.*, Gross, *supra* note 1, at 193 (outlining typical community group commitments, including "release of legal claims").

Sometimes government agencies are party to the agreements, but this has raised constitutional problems, so that is less typical than the agreements between community organizations and developers.²⁹ In the last decade or so, prominent political leaders have also voiced their support for CBAs.³⁰

B. Common CBA Terms and Examples

One key benefit of CBAs is that they are flexible to the needs of a particular community, so terms are likely to vary greatly in these agreements. However, there are several terms that are common across a wide variety of agreements:³¹

- Local hiring and contracting provisions;
- Affordable housing requirements;
- Job preparation and training programs for local residents;
- Environmental protections;
- Agreements for community organizations not to sue developers; and
- Agreements for community organizations to publicly support the project.

Depending on the project and its specific impacts, contracting parties can tailor the agreements to fit their needs.

29. There appears to be an academic consensus on the idea that CBAs, when the government is a party, are subject to analysis under the exactions doctrine, which requires that constraints on development projects need an “essential nexus” with developer land use and promoting land use regulations. *See* Amy Lavine, *Legal & Contractual Issues of Community Benefits Agreements*, 32 ZONING & PLANNING L. REPORT (2009) (analyzing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which developed the exactions doctrine); *see also* Gurgol, *supra* note 3, at 495 (arguing that a CBA would be subject to this analysis and that it may be difficult for the community to show a rational relationship and an essential nexus to a public purpose for some conditions); Gross, *supra* note 1, at 196 (noting that any government involvement, including by use of a CBA ordinance, would be subject to this analysis).

30. Gavin Newsom, current California Governor and former San Francisco Mayor, expressed his support for CBAs in 2008, saying “building support for a large, mixed-use project in a disadvantaged neighborhood is a real challenge By bringing a coalition of labor and community groups to the table, the CBA process built trust, support, and credibility for this vital project.” Gross, *supra* note 1, at 190. Lori Lightfoot, current Chicago Mayor, and other Chicago mayoral candidates also expressed support for CBAs during the 2019 Chicago mayoral elections. Editorial Board, *Lori Lightfoot, Toni Preckwinkle and the Obama Center: Locking in Benefits for the South Side Makes Sense*, CHI. TRIB. (Feb. 28, 2019), <https://www.chicagotribune.com/opinion/editorials/ct-edit-obama-center-cba-light-foot-preckwinkle-20190227-story.html> [<https://perma.cc/3UV6-7TQX>].

31. *See, e.g., Policy & Tools: Community Benefits Agreements and Policies in Effect*, *supra* note 18 (describing twenty current CBAs in effect).

A recent example of a CBA is the Nashville MLS Soccer Community Benefits Agreement, negotiated in response to plans to construct a new soccer stadium in Nashville, Tennessee, and to construct a related mixed-use development adjacent to the stadium.³² This CBA was an agreement between Nashville Soccer Holdings, the entity which will operate the Nashville stadium and manage the team, and an organization called Stand Up Nashville, which represented the interest of Nashville community organizations,³³ regarding the development of the mixed-use parcel of land specifically.³⁴ The parties reached the agreement in 2018, with the CBA containing several typical provisions including affordable housing,³⁵ reservation of space for childcare facilities and other community spaces,³⁶ and minimum wage requirements.³⁷

It also contains unique provisions that are particular to this development; for example, the agreement requires Nashville Soccer Holdings officials, coaches, and players to donate soccer equipment to local schools, host soccer clinics, and visit schools to promote “good sportsmanship and character development.”³⁸ The

32. *Historic Community Benefits Agreement Reached!*, STAND UP NASHVILLE (Sept. 4, 2018), <https://standupnashville.org/historic-community-benefits-agreement-reached/> [<https://perma.cc/2Y72-QH5P>].

33. Stand Up Nashville’s member organizations are the Central Labor Council; the International Association of Bridges, Structural, Ornamental and Reinforcing Iron Workers; the International Union of Painters and Allied Trades; Nashville Organized for Action and Hope (NOAH); the Laborers’ International Union of North America (LiUNA!); Partnership for Working Families; and the Service Employees International Union. *Members*, STAND UP NASHVILLE, <https://standupnashville.org/members/> [<https://perma.cc/92HX-3VEF>].

34. Nashville MLS Soccer Community Benefits Agreement (effective Sept. 3, 2018) [hereinafter Nashville Soccer CBA], *available at* <https://www.forworkingfamilies.org/sites/default/files/18-09-03%20FINAL%20NSH-SUN%20CBA%20with%20REVISED%20Exhibit%20A%20-%20SIGNED%20%2800456717xAA7B8%29.PDF> [<https://perma.cc/S2A5-EPQX>].

35. *Id.* at 4 (“NSH voluntarily agrees that a minimum of 12% of the residential units within the Development shall be set aside for households earning 60% of the AMI/MHI . . . NSH further voluntarily agrees that (i) an additional 4% of the residential units within the Development shall be set aside for households earning between 61% and 80%, and (ii) an additional 4% of the residential units within the Development shall be set aside for households earning between 81% and 120% of AMI/MHI . . .”).

36. *Id.* at 2 (“NSH will cause Developer to reserve no less than 4,000 sq. ft. within or in close proximity to the Development for a childcare location . . . NSH will cause Developer to reserve 4,000 sq. ft. of retail space to the establishment of a micro-unit incubator for the use of artisans and small business merchants . . .”).

37. *Id.* at 5 (“NSH will direct hire employees . . . and pay such employees at least \$15.50 per hour.”).

38. *Id.* at 3 (“NSH will donate new or used soccer equipment and accessories to elementary schools, middle schools and high schools located within Metro that have

agreement, which requires at least thirty years of occupancy and use,³⁹ is an example of the value of CBAs. Not only was the community coalition able to negotiate economic benefits, but it was also aware of the particular needs of the community, and the parties were able to contract in a way that took those community needs into account. The stadium was approved by the city of Nashville in February 2020 and is expected to be built by May 2022.⁴⁰ Nashville Mayor John Cooper stated that he was “fully supportive of the community benefits agreement,” and both the city and the developer respected the terms of the agreement while negotiating about the exact boundaries of the mixed-use development.⁴¹ Most notably, the CBA was critical to gaining the full support of Nashville City Council members who voted on the development.⁴² The community-focused formation of this agreement, its tailored terms, and its influence on city decisions all make the Nashville MLS Soccer CBA a helpful example in understanding the formation and importance of these agreements.

C. CBA Effectiveness

Several researchers have found that CBAs are an effective tool, because they provide real benefits to community members, such as increased wages,⁴³ and they tend to provide these

an active soccer program . . . [.] will host an annual coaching clinic located within Metro . . . [.] and] shall visit, not less than eight (8) times per year, local elementary schools throughout Metro to promote good sportsmanship and character development.”).

39. *Id.* at 2.

40. Drake Hills, *Nashville SC’s Stadium Construction Continues with Steel Beam Installation*, NASHVILLE TENNESSEAN (Jan. 29, 2021), <https://www.tennessean.com/story/sports/nashvillesc/2021/01/29/nashville-sc-first-steel-beam-soccer-stadium-installed-fairgrounds/4262136001/> [<https://perma.cc/U8YQ-9XYP>].

41. Yihyun Jeong, *‘We Are Out of Time’: Ingram Blasts Mayor John Cooper on Stalled MLS Stadium*, NASHVILLE TENNESSEAN (Jan. 31, 2020), <https://www.tennessean.com/story/news/politics/2020/01/31/mls-stadium-nashville-sc-owner-john-ingram-blasts-mayor-cooper-over-stalled-plans/4628151002/> [<https://perma.cc/JFQ2-BS6T>].

42. Meg Garner, *One Year Later, New Committee Launched to Oversee Critical Piece of Nashville’s MLS Stadium Deal*, NASHVILLE BUS. J. (Dec. 26, 2019), <https://www.bizjournals.com/nashville/news/2019/12/26/one-year-later-new-committee-launched-to-oversee.html> [<https://perma.cc/5CHG-AGDW>] (“Signing a community benefits agreement was a critical component in persuading several council members to originally endorse the stadium deal, which received pushback after it was revealed the team’s owners would build a mixed-use development on 10 acres of city-owned land neighboring the stadium.”).

43. Harold Meyerson, *No Justice, No Growth: How L.A. Makes Developers Create Decent Jobs*, 14 RACE, POVERTY & ENV’T 58, 60 (2007) (“CBAs . . . have plainly boosted the wages of the construction workers Between 2000 and 2006, 104,000 construction jobs and 113,000 permanent jobs were covered under CBAs . . .”).

community benefits efficiently by lowering transaction costs associated with disputes between developers and community advocates.⁴⁴ Others have pointed out the potential pitfalls with CBAs, such as vague contract language and no effective accountability measures, which can be avoided with careful drafting, and argue that effectiveness is tied to thoughtful execution and planning during the CBA formation process.⁴⁵ It is also important to note that developers often resist these agreements, because they claim to not need accountability measures in order to make a positive impact on local community members.⁴⁶ Further, some critics point out that it is impossible for CBAs to address the needs of every community member, and the terms therefore may not be as inclusive as they appear.⁴⁷

44. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1773–74 (2016) (arguing that private CBAs work “more efficiently than existing government processes” and that the benefits negotiated by representative community groups enhance civic engagement). *But see* Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOKLYN L. REV. 355, 356–57 (2013) (calling CBAs “a redundancy that leads to additional costs for both developers and community members” and finding that CBAs are generally overly favorable to developers).

45. *See* CMTY. BENEFITS L. CTR., *supra* note 11 (finding that successful CBAs are tied to transparent and inclusive processes with specific contracts, and less successful CBAs are vague and lack accountability measures); *see also* Gross, *supra* note 1, at 198 (“Because the value of a CBA lies in its inclusiveness and accountability, CBAs that fall short in these areas rightly come in for criticism.”).

46. In one example, the company Tesco asserted that a CBA was unnecessary, even after pressure from the community, because Tesco “already provides well-paying jobs, has environmentally-friendly policies, and has pledged to locate stores in underserved areas.” Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 319. President Barack Obama was also opposed to a CBA for his presidential library on the South Side of Chicago, primarily due to his concerns that it would be impossible to include all community voices. President Obama emphasized that the Obama Foundation was a nonprofit, implying that his motives were not financial, and that he was “not an outsider here . . . I know that the minute you start saying, well we’re thinking about signing something . . . next thing I know I’ve got 20 organizations that are coming out of the woodwork . . . [W]e want to work with *everybody* in a transparent way.” Pete Grieve, *Obama Explains Why He Won’t Sign Community Agreement for Presidential Center*, CHICAGO MAROON (Sept. 14, 2017), <https://www.chicagomaroon.com/article/2017/9/15/obama-explains-presidential-center-sign-community/> [<https://perma.cc/S9BU-5AJA>].

47. *See, e.g.*, Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENVTL. L. REV. 543, 551–52 (2010) (raising the concern that one “challenge is how to ensure that the groups that benefit fairly represent the community”); Steven M. Seigel, *Community Benefits Agreements in a Union City: How the Structure of CBAs May Result in Inefficient, Unfair Land Use Decisions*, 46 URB. L. 419 (2014) (arguing that labor groups hold disproportionate power in CBA negotiations).

II. Community Benefits Agreement Enforceability Is An Open Question

A key question regarding Community Benefits Agreements that has not been addressed in detail is whether CBAs are enforceable in court. Though the answer to this question depends to a certain extent on the terms of an individual contract and on state law, commentators have raised general enforceability concerns that could apply to many CBAs.⁴⁸ This Note will focus on three main issues of enforceability. The first issue is whether community organizations provide adequate consideration in agreements with developers. The second issue is how to treat any subsequent parties to the agreement in the event that a developer sells or leases space. The third issue is who the intended beneficiaries are in these agreements, and whether or not certain potential third-party beneficiaries have standing to enforce these agreements. This Note will use the Restatement (Second) of Contracts and select state law, as there is currently no case law regarding the enforceability of CBAs, to show that legal standards favor the general enforceability of Community Benefits Agreements in each of these areas.

A. Consideration

Experts have raised consideration as a potential enforceability issue from the standpoint of a community organization entering an agreement with a developer.⁴⁹ Consideration is a critical component of contract formation and generally refers to the idea that, for a contract to be valid, the promises must be “bargained for,” meaning that parties must exchange promises of performance with each other.⁵⁰ In a typical CBA, the consideration provided by the

48. See Lavine, *supra* note 29 (raising several enforceability concerns including consideration, successors in interest, and government involvement); see also, e.g., Charlotte Clarke, *Community Benefits Agreements: To the Extent Possible*, 6 J. LAND & DEV. 33, 45–47 (2016) (arguing that CBAs lack enforceability due to lack of standing for community members, legal uncertainties regarding future parties, and vague provisions); Fazio & Wallace, *supra* note 47, at 553–54 (questioning standing and successorship and arguing that CBAs need to go further to govern enforcement and monitoring).

49. See Gross, *supra* note 1, at 193 (noting that observers have raised this question and hypothesizing that “the persistence of this concern stems from the novelty of the real-world bargain made by the parties”); Lavine, *supra* note 29 (“This bargain can at times seem lopsided, given the relative monetary worth of these promises, and for this reason, the question has been raised whether CBAs are supported by adequate consideration.”).

50. See RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) (“(1) To constitute consideration, a performance or a return promise must be bargained for.

developer includes most of the substantive terms that encompass the nature of the agreement as one that provides benefits to a community: affordable housing requirements, hiring provisions, environmental covenants, and other terms negotiated by the parties.⁵¹

The more contentious part of the bargain is the consideration provided by the community organizations, which is typically an agreement to not bring a lawsuit preventing the development, to publicly support the development, or simply to not publicly disparage the development.⁵² The major concern is that community organizations are not actually giving something up to take part in these agreements, and the agreements solely benefit those organizations. William Valletta, the former City Planning Commission general counsel of New York City, said of the Atlantic Yards CBA at a town hall event: “What is the community giving up in order to take part in the agreement? Presumably, they can’t sell their vote or their participation in democracy.”⁵³ This argument is likely getting at the fact that, most commonly, community organizations exchange a promise to speak positively about the projects in city meetings or to the press rather than exchanging money or particular services. This aspect of CBAs has not yet been litigated, but current law on consideration can be used to analyze common CBA provisions regarding community organization promises and whether or not they are likely to be adequate consideration.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.”)

51. See CMTY. BENEFITS L. CTR., *supra* note 11, at 7 (discussing typical terms of effective CBAs).

52. Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 36, 46 (2007).

53. Lavine, *supra* note 29 (citing Matthew Schuerman, *The C.B.A. at Atlantic Yards: But Is It Legal?*, OBSERVER (Mar. 14, 2006), <https://observer.com/2006/03/the-cba-at-atlantic-yards-but-is-it-legal> [<https://perma.cc/L9DT-VAQY>]); see also Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL’Y 223, 233 (2008) (“[Legal experts] doubt that the promise given by community groups to give up their democratic right to object or by their members to give up their right as citizens to vote against a project constitutes a valid promise at all.”).

B. Successors and Delegation of Duty

Another open issue about CBA enforceability is what happens once the original developer inevitably sells or leases part of the development property. Practitioners in the CBA space have addressed the fact that a successor or delegee in a CBA could have a number of different legal treatments and responsibilities,⁵⁴ and that absent specific contractual language outlining these legal relationships, courts will have to decide whether the agreements within the contract will carry with the land or if they were specific to the original developer party to the agreement.⁵⁵

This Note will address the contractual language that could lead to a variety of different legal treatments. Successors in interest may assume the entirety of the obligations under the agreement, they may have no obligations at all, or the developers may retain some obligations.

C. Third-Party Beneficiaries

Finally, this Note will address the legal questions presented by a third-party beneficiary analysis of CBAs. The direct parties to the agreement, the developer and signing community organizations, should have clear standing to enforce the CBA.⁵⁶ However, since the agreement purports to benefit the entire community, there is an argument that anyone who is part of the community may have standing to sue to enforce a CBA.⁵⁷ A beneficiary of a contract is someone who can fairly be interpreted to have a right to performance under the contract,⁵⁸ so individual community members could qualify. Part V will discuss whether this interpretation is possible and whether it is beneficial.

54. Gross, *supra* note 1, at 194 ("From a legal perspective, some of these parties may be successors-in-interest, some may be assignees, some may be agents, and some may simply be parties to a relevant contractual relationship . . .").

55. Lavine, *supra* note 29 (recommending contract language that clarifies how each business will be responsible under the CBA).

56. *Id.* at 4–5 (clarifying that while it is beneficial to have multiple community organizations sign the agreement to ensure its enforceability in case of dissolution, the agreement should be enforceable by any signing party).

57. *Id.* at 4.

58. See RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981) ("(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.")

One commentator has pointed out that there is some authority that is not directly on point in this area but can be used as an analogy to show that community members would have standing in court to enforce a CBA.⁵⁹ In the highlighted cases, the Oregon Court of Appeals found that members of a homeowners association had standing to enforce an agreement regarding road improvements between a developer and the county, and the Supreme Court of Appeals of West Virginia held that employees had standing to enforce lunch break requirements promised under a collective bargaining agreement since the agreement was meant to protect the employees.⁶⁰ Similarly, CBAs often include provisions that have the purpose of directly benefitting individual community members rather than the community more generally, so those individuals may have standing to bring a claim to enforce agreements.⁶¹

The Partnership for Working Families, a national network of economic-focused organizations, maintains a list of CBAs currently in effect.⁶² This list includes links to fifteen CBAs⁶³ which were used to provide the information about common contract terms in Parts III–V of this Note.⁶⁴

III. Community Benefits Agreements Likely to Contain Adequate Consideration

A. Common Terms

Terms describing consideration have the most variation within example contracts, perhaps because they may be tailored to the size and abilities of the community groups or coalitions involved in the CBA. Some provisions are very comprehensive, and several elements are common on their own or as a group of requirements:

59. Lavine, *supra* note 29.

60. *Id.*

61. *Id.* (“[A] local job applicant would have a better chance of demonstrating standing to sue if the employer failed to honor a local hiring provision in a CBA than would a neighborhood resident seeking enforcement of a CBA provision with more dispersed beneficiaries, such as a requirement to build a park.”).

62. *Policy & Tools: Community Benefits Agreements and Policies in Effect*, *supra* note 18.

63. Though this list contains information about 19 CBAs, only 15 of the CBAs on the list have a valid link to their specific CBA language. Therefore, this Note analyzes the language of those 15 CBAs.

64. To collect information to inform Parts III–V of this Note, I analyzed the terms of each CBA related to consideration, successors and assigns, and third-party beneficiaries. I categorized the relevant terms to create groups of terms, and these groups are analyzed collectively in Parts III–V.

letters of support and testimony, public comment requirements, agreements not to sue, and implementation committees.

The Bayview Hunters Point CBA requires that the community organizations send a letter of support to any public body requested by the Developer, and it has an example of the language required in the letter:

This letter states [Organization's] support of the integrated development of the Hunters Point Shipyard and Candlestick Point We are proud to join with so many community-based organizations and leaders . . . in support of this Project [Organization] and the other community-based organizations that signed the CBA believe that the Project provides strong, enforceable commitments on issues of major importance to the community. [Organization] therefore urges the developer, the City and County of San Francisco, the San Francisco Redevelopment Agency, and all community members to resolve all issues in a way that . . . allows this important project to be built in a financially feasible manner.⁶⁵

The same CBA also requires testimony to the Redevelopment Agency of San Francisco or the city's Board of Supervisors, or other hearings upon request: "If requested by Developer in writing with at least five days' notice, at least one Lead Organization shall send at least one representative knowledgeable about the Project to speak in support of the Project" ⁶⁶

Some CBAs limit the ability of the community organizations to speak publicly about the project. For example, the Marlton Square CBA requires the following:

From and after the date of mutual execution of this CBP, the Coalition shall not make statements in the media, in public forums, to public officials or their staffs, or to community groups or other organizations, opposing land sales or approvals related to the Marlton Square Development Project. Notwithstanding the above, the Coalition may publicly support the inclusion of this CBP into a Development Agreement.⁶⁷

Almost every agreement provides for the creation of an implementation committee, tasked with meeting on a regular basis to review plans and progress. The terms of these types of conditions

65. Core Community Benefits Agreement: Hunters Point Shipyard/Candlestick Point Integrated Development Project, Attachment B Support Letter (effective May 30, 2008) [hereinafter Bayview Hunters Point CBA], available at <https://www.forworkingfamilies.org/sites/default/files/documents/BayviewHuntersPointCBA.pdf> [<https://perma.cc/5NSW-UHXU>].

66. *Id.* at 14.

67. Marlton Square Redevelopment Project Developer Community Benefits Program, 11 (effective 2002) [hereinafter Marlton Square CBA], available at https://www.forworkingfamilies.org/sites/default/files/documents/cba_marltonsquare.pdf [<https://perma.cc/Y3BD-XEQ6>].

vary from agreement to agreement, but the Staples Center CBA provides an example of common language:

To assist with implementation of this Community Benefits Program, address environmental concerns and facilitate an ongoing dialogue between the Coalition and the Developer, the Coalition and the Developer shall establish a working group of representatives of the Coalition and the Developer, known as the Advisory Committee. This Advisory Committee shall meet quarterly, unless it is mutually agreed that less frequent meetings are appropriate. Among other issues, the Developer shall seek the input of the Advisory Committee in the Developer's preparation of the construction management plan, the traffic management plan, the waste management plan and the neighborhood traffic protection plan. In addition, the Developer shall seek the input of the Advisory Committee in a [sic] effort to develop and implement potential solutions to other environmental concerns, including without limitation, pedestrian safety, air quality and green building principles.⁶⁸

Finally, provisions that limit the ability of community organizations to sue, or that require withdrawal of pending claims, also appear in agreements as exemplified in the Hill District CBA:

The Coalition will (i) cause the Notice of Appeal to be discontinued and dismissed with prejudice, and (ii) cause all other Appellants to the Notice of Appeal to discontinue and dismiss same with prejudice The Releasing Parties hereby knowingly, irrevocably and unconditionally waive, and are hereby deemed to have waived, any and all Released Claims that may arise or relate to the acts or obligations of the Released Parties prior to the date of this Agreement that do not come to the actual attention of the Releasing Parties until after the date of this Agreement, unless concealed by one or more of the Released Parties This Release and Waiver of Claims shall also constitute a covenant not to sue in the future by the Coalition or any of the other Releasing Parties, or anyone acting on their behalf or for their benefit, as to any matter that would come within the definition of a Released Claim.⁶⁹

These terms, along with a situation in which no potential consideration is addressed in a CBA, are analyzed in the following section.

68. Community Benefits Program for the Los Angeles Sports and Entertainment District Project, A-13 (effective May 2001), *available at* <https://www.forworkingfamilies.org/sites/default/files/documents/StaplesCBA.pdf> [<https://perma.cc/9MHD-FDRL>].

69. In this CBA, "Released Claims" include actions of public officials related to the development. Hill District Community Benefits Agreement, 14–15 (effective Aug. 19, 2008) [hereinafter Hill District CBA], *available at* <https://www.forworkingfamilies.org/sites/default/files/documents/HillDistrictCBA.pdf> [<https://perma.cc/MME8-2KVM>].

B. Analysis of Terms

1. Letters of Support and Testimony; Public Comments

These forms of consideration are analyzed together because they involve affirmative actions on the part of the community organization.⁷⁰ The main enforceability question for these promises is whether they are adequate in comparison with the consideration provided by developers in CBAs.⁷¹ It is common for CBAs to include several pages of promises that the developer makes, often requiring significant time or money, while only providing for one or two paragraphs of community organization requirements. For example, the Bayview Hunters Point CBA referenced above, which includes one of the more comprehensive descriptions of community organization obligations, still appears to be imbalanced—the contract contains provisions about affordable housing, workforce development, and employment, which all require significant investment from the developer.⁷² Though the community organization does have obligations, the time and energy required is likely to be far less.

Several sections of the Second Restatement of Contracts are relevant here. First, Section 72 states that “any performance which is bargained for is consideration.”⁷³ The comments clarify that the consideration does not have to have an equal economic value to the promise, but rather things like duress or undue influence may make consideration invalid.⁷⁴ This is unlikely to be an issue because of the sophisticated bargaining position of most developers. Based on the basics outlined in this section of the Restatement, the exchange present in most CBAs for public support in exchange for CBA promises would appear to be valid.⁷⁵

70. Lavine, *supra* note 29 (asserting that CBAs that impose affirmative obligations should be more likely to have adequate consideration).

71. Several commentators have raised the question of adequacy of consideration. *See supra* discussion accompanying note 49.

72. Bayview Hunters Point CBA, *supra* note 65.

73. RESTATEMENT (SECOND) OF CONTS. § 72 (AM. L. INST. 1981). Many courts have affirmed this principle; *see, e.g.*, Design Benefit Plans v. Enright, 940 F. Supp. 200, 206 (N.D. Ill. 1996) (asserting that the parties likely could not bring a lack of consideration argument because of the “broad definition of consideration” in §§ 71 and 72); Hawkeye Commodity Promotions, Inc. v. Miller, 432 F. Supp. 2d 822, 845 (N.D. Iowa 2006) (affirming the principle in Restatement Section 72, and finding that even if defendants had raised a consideration concern, it would not have impacted enforceability).

74. RESTATEMENT (SECOND) OF CONTS. § 72 cmt. d (AM. L. INST. 1981).

75. CBA expert Julian Gross adopts this argument and begins and ends his

Section 79 of the Restatement addresses adequacy of consideration, which is also relevant in this analysis.⁷⁶ First, it is important that the Restatement notes that courts ordinarily do not inquire as to the adequacy of the consideration because of the fact that parties often assign their own values to the deal, and many promises are in fact intangible and difficult to place in terms of market value.⁷⁷ The promises of community organizations in CBAs certainly fall under this category because it is hard to put a price on the value of public testimony, and it will vary in every individual case. For example, if the community organization testimony is essential to gaining a building permit, that may be invaluable to a developer. If, however, the development is likely to be approved regardless, the testimony may be less important. For this reason, Restatement Section 79 is important because it emphasizes the fact that the parties assign value to the consideration, not the courts, and in this case that would weigh in favor of enforceability.

Finally, Section 80 of the Restatement clarifies that “two or more promises may be binding even though made for the price of one” as long as the one promise is adequate consideration.⁷⁸ Since the community organizations’ promises to act are likely to be considered adequate consideration, the fact that one of these actions may be promised in exchange for several actions on the part of the developer would not render the consideration invalid.

Overall, though there is potentially an imbalance in the consideration provided between parties, the consideration if bargained for should be considered as valid. So, in CBAs which

analysis of consideration in the CBA context with the principle that consideration is valid if bargained for, so this should not be a barrier to CBA enforcement. Gross, *supra* note 1, at 191.

76. RESTATEMENT (SECOND) OF CONTS. § 79 (AM. L. INST. 1981) (“If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) ‘mutuality of obligation.’”); *see also* Rosenbaum v. DataCom Sys., No. 13 Civ. 5484 (PKC), 2014 U.S. Dist. LEXIS 18730, at *17 (S.D.N.Y. Feb. 13, 2014) (dismissing the argument that one party did not provide “full consideration” to the other and finding consideration existed even when the value of the exchange was mismatched).

77. RESTATEMENT (SECOND) OF CONTS. § 79, cmt. c (AM. L. INST. 1981) (“To the extent that the apportionment of productive energy and product in the economy are left to private action, the parties to transactions are free to fix their own valuations [I]n many situations there is no reliable external standard of value, or the general standard is inappropriate to the precise circumstances of the parties Ordinarily, therefore, courts do not inquire into the adequacy of consideration. This is particularly so when one or both of the values exchanged are uncertain or difficult to measure. But it is also applied even when it is clear that the transaction is a mixture of bargain and gift.”).

78. RESTATEMENT (SECOND) OF CONTS. § 80 cmt. a (AM. L. INST. 1981).

provide that community organizations must publicly support the project in one or more of a variety of ways, consideration is not likely to be an enforceability issue.⁷⁹

2. Implementation Committees

Many CBA agreements provide for the creation of implementation committees, which meet regularly to assess the progress of the CBA terms. Even in CBAs with no other provisions for consideration, these agreements very often still provide for an implementation committee, so the question is whether a community organization is providing adequate consideration by agreeing to serve on one of these committees.

Though the terms analyzed in the prior section can be described as promises, the Restatement provides that an act other than a promise can be consideration.⁸⁰ In this case, the act by the community organization would be the time, energy, and effort spent preparing for and attending community meetings.⁸¹ The above analysis about adequacy of consideration applies here as well; typically, the parties and not a court would determine whether consideration is adequate, and the sophistication of the developer is likely enough to preclude any finding that CBA agreements providing for implementation committees lack consideration.

3. Agreements Not to Sue

Only two CBAs included an agreement not to sue.⁸² In most cases, this provision would be recognized as a promise to forbear rather than to act.⁸³ The community organization is agreeing to not

79. Critics of CBA enforceability have also raised the issue that individuals cannot provide their participation in democracy as consideration. *See* discussion at *supra* note 53. The analysis of adequacy and validity of consideration applies to this criticism as well. As long as the consideration is bargained for and freely given, courts will typically not inquire as to the adequacy of that consideration, and it should be considered to be valid.

80. RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) (“(3) The performance may consist of (a) an act other than a promise . . .”).

81. The Restatement is clear, and case law confirms, that performance can be consideration. *See id.*; *see also* *Dr.’s Assocs. v. Alemayehu*, 934 F.3d 245, 253 (2d Cir. 2019) (finding that consideration was adequate by adopting the performance standard outlined in § 71).

82. Hill District CBA, *supra* note 69, at 4; Ballpark Village Project Community Benefits Agreement, 14 (effective Sept. 17, 2005) [hereinafter Ballpark Village CBA], available at <https://www.forworkingfamilies.org/sites/default/files/documents/Ballpark%20CBA.pdf> [<https://perma.cc/S3G5-687Y>].

83. There are certain instances, such as in the Hill District CBA, *supra* note 69, at 14–15, where the community organization agrees to withdraw claims currently

bring a claim against the developer in exchange for the developer's various promises. So, the first issue is whether forbearance is valid consideration; the Restatement makes it clear that it is.⁸⁴ The more complex question was raised by CBA scholar Amy Lavine: a potential claim must actually be valid in order for forbearance in this situation to be valid consideration.⁸⁵ Restatement Section 74 clarifies that forbearance to assert an invalid claim is not consideration unless the claim is doubtful, or the party reasonably believes the claim is valid.⁸⁶ So, the question of consequence is whether the potential claims brought by a community organization would be valid.

This question can be answered by examining past lawsuits brought by community organizations or activists against developers. It is important to note that both of the analyzed agreements that included this term also prevent community organizations from taking action against local governments related to the development and its approval.⁸⁷ With this issue specifically, lawsuits are not infrequent. One organization in Los Angeles, California, sued the city, saying that a new development violated its municipal code.⁸⁸ A California group called CaRLA frequently sues cities over planned developments, particularly those not compliant with housing laws or zoning standards.⁸⁹ At least one of CaRLA's cases resulted in a legal victory, three cases settled, and several are ongoing but have gained legal victories along the way.⁹⁰ CaRLA's advocacy demonstrates that community groups likely have standing to sue cities in matters related to developments, at least in some cases, and that they will do so. There certainly are

outstanding. In this case, withdrawing the claim might be an action. However, in cases where litigation is not underway, this term would be forbearance rather than action.

84. RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) (“(1) To constitute consideration, a performance or a return promise must be bargained for . . . (3) The performance may consist of . . . (b) a forbearance.”).

85. Lavine, *supra* note 29.

86. *See* RESTATEMENT (SECOND) OF CONTS. § 74 (AM. L. INST. 1981); *see also* Lavine, *supra* note 29; *Hakim v. Payco-Gen. Am. Credits, Inc.*, 272 F.3d 932, 935–36 (7th Cir. 2001) (“Even if, in hindsight, the legal claim was improbable or nonexistent, ‘it would be enough if at the time of [agreement] [the party] believed in good faith it was vulnerable to a claim by [the other party.]’”).

87. Hill District CBA, *supra* note 69; Ballpark Village CBA, *supra* note 82.

88. CCED Chinatown, *Chinatown Fights Market-Rate Development*, KNOCK LA (May 20, 2019), <https://knock-la.com/chinatown-fights-market-rate-development-dd909d79a73a> [<https://perma.cc/J62B-SPDB>].

89. CARLA, <https://carlaef.org/> [<https://perma.cc/DE8W-DXN6>].

90. CARLA, *Our Work*, <https://carlaef.org/about-us/our-work/> [<https://perma.cc/5LD5-H6RZ>].

valid claims that community organizations could bring, so agreeing to forbear from any related claims appears to be valid consideration.

Overall, as long as the agreement purports to waive claims that would otherwise be valid, agreements not to sue are a legitimate form of consideration.

4. No Explicit Terms

Of the analyzed contracts, only two lacked a provision about community organization obligations and creation of an implementation committee.⁹¹ In these cases, the contracts outline several obligations for the developer, omitting obligations for the community organization. The question here is whether the agreement can still be seen to be supported by consideration.

Restatement Section 71 says that “the creation, modification, or destruction of a legal relation” can be a performance that constitutes consideration.⁹² So, the mere fact that the parties are entering into a contract together could be sufficient consideration, even though in this situation, the relative worth of the consideration may be even more imbalanced than in prior analysis of CBA terms. Restatement Section 79 also adds that courts will not ordinarily inquire into an imbalanced exchange “when it is clear that the transaction is a mixture of bargain and gift.”⁹³ It is possible that CBAs with no clear community organization obligations could be viewed as a partial gift that will bring goodwill to the community. Further, even if the community organization has no formal obligations under the agreement, the developer can use the organization’s credibility in the community to emphasize to community members that the developer should be seen positively and does have formal support from community groups. This credibility alone is arguably a benefit to the developer, even without more from the community organization.

Overall, it is likely that even in the case of no explicit consideration terms, a CBA would not be unenforceable for lack of consideration.

91. Community Benefits Program Lorenzo Project (effective Feb. 2011) [hereinafter Lorenzo Palmer CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/resources/Web_LorenzoPalmer%20CBP.pdf [<https://perma.cc/ZDF2-PLD2>]; Operations Jobs Policy Oakland Army Base Project West Gateway (effective Oct. 11, 2012), <https://www.forworkingfamilies.org/sites/default/files/documents/OABWestGateway.pdf> [<https://perma.cc/WP4J-8RD2>].

92. RESTATEMENT (SECOND) OF CONTS. § 71(3)(c) (AM. L. INST. 1981).

93. RESTATEMENT (SECOND) OF CONTS. § 79 cmt. c (AM. L. INST. 1981).

IV. Successors and Delegation of Duty Greatly Depend on Contractual Language

A. Common Terms

Of the three terms in CBAs most subject to enforceability critiques, a term regarding successors and delegation of duties was the most likely to be included in contracts. Of the fifteen contracts analyzed, only one was silent about the treatment of successors and assigns.⁹⁴ The remainder of the agreements included terms that either contain detailed definitions of successors and delegation of duty, or brief boilerplate language.

The Ballpark Village CBA, a retail and housing development near the San Diego Padres stadium in San Diego, California, contains some of the most detailed language defining successors and assigns:

This Agreement shall be binding upon and inure to the benefit of ACCORD, Member Organizations, ACCORD's Successors, and Successors to any Successors of ACCORD . . . Developer's Successors include, but are not limited to, any party who obtains an Interest, vertical developers, retail developers, contractors, management companies, and owners' or retail merchants' associations participating in the Project. Upon conveyance of an Interest to an entity in compliance with Section 9.4, ACCORD may enforce the obligations under this Agreement with respect to that Interest only against such entity, and neither Developer nor any owner of a different Interest shall be liable for any breach of such obligations by such entity or its Successors. Except as otherwise indicated in this Section 9.3, references in this Agreement to a party shall be deemed to apply to any successor in interest, transferee, assign, agent, representative, of that party.⁹⁵

In addition to this language, the contract includes terms for which the developer will continue to be liable, even upon transfer or assign, including affordable housing, funding for an economic impact study, and funding for arts and culture.⁹⁶

Many more agreements contained language that can be described as "boilerplate" and addresses successors and assigns very generally. For example, a CBA for the new Milwaukee Bucks basketball stadium in Milwaukee, Wisconsin, simply provides: "The

94. See Lorenzo Palmer CBA, *supra* note 91.

95. Ballpark Village CBA, *supra* note 82.

96. *Id.*

Developer agrees that the terms of this agreement shall be applicable to any successor, assignee or transferee of Developer.”⁹⁷

Most contracts contained similar language. Some contracts also included language that all covenants run with the land.⁹⁸

B. Analysis of Terms

1. Detailed Definitions of Successors and Assigns, Boilerplate Language, and Obligations Running with the Land

Many contracts address whether obligations can be delegated by the developers in CBAs; several contracts contained a very detailed definition of successors and assigns, while others included boilerplate language or a few specific terms. These variations are analyzed together because in all cases, the language of the contract is likely to guide the way each contract will be specifically enforced.

Restatement Section 318 says that in general, delegation of duty is allowed unless it is against public policy or if the party has a “substantial interest” in the original party’s performance of the duty.⁹⁹ The Restatement also allows the parties to discharge the duties of the obligor with contractual language.¹⁰⁰ An exception is when duties involve personal services or the exercise of skill and discretion.¹⁰¹

97. Agreement between Milwaukee Bucks LLC and the Alliance for Good Jobs (effective May 12, 2016), *available at* <https://www.forworkingfamilies.org/sites/default/files/resources/Bucks-AfGJ%20Agreement.pdf> [<https://perma.cc/F9GC-GJ37>].

98. *See, e.g.*, Hollywood and Vine Mixed-Use Development Project Community Benefits Agreement (effective Apr. 2004) [hereinafter Hollywood and Vine CBA], *available at* <https://www.forworkingfamilies.org/sites/default/files/documents/CBA-GatehouseFINAL5-7-04.pdf> [<https://perma.cc/CYK7-ZE2T>] (“The provisions of this Agreement are covenants that run with the land and bind all grantees, lessees or other transferees thereto for the benefit of and in favor of the City, the CRA and the Coalition.”).

99. RESTATEMENT (SECOND) OF CONTS. § 318 (AM. L. INST. 1981).

100. *See* RESTATEMENT (SECOND) OF CONTS. § 323 (AM. L. INST. 1981) (holding otherwise, the default is that the obligor is still liable; a “purported promise by a promisor ‘and his assigns’ does not mean that the promisor can terminate his duty by making an assignment, nor does it of itself show an assumption of duties by any assignee”).

101. RESTATEMENT (SECOND) OF CONTS. § 318 (AM. L. INST. 1981); *see also* Dimario v. Flextronics Am., LLC, No. 09-058 ML, 2010 U.S. Dist. LEXIS 132230, at *9 (D.R.I. Dec. 14, 2010) (citing the Restatement and adding that delegation is not allowed when “anything other than personal performance would be unsatisfactory”); *see also* Proriver, Inc. v. Red River Grill, LLC, 83 F. Supp. 2d 42, 51 (D.D.C. 1999) (finding duties could be delegated to an assignee because no personal skill or discretion by the assignor was required to fulfill its obligation).

The critical question then becomes whether delegation of an agreement would violate public policy or otherwise involve special skill or discretion. There are a couple of examples in the analyzed CBAs that may not be able to be delegated for these reasons. In the Nashville Soccer CBA, one of the terms of the contract provides that the coaches and players of the local professional soccer team must visit elementary schools in the area.¹⁰² This provision of the contract could likely not be delegated because it involves the special connection of the parties to the soccer team, which may not exist with a different party. However, the same agreement contains provisions about affordable housing and workforce development.¹⁰³ These provisions are more general and therefore could conceivably be executed by sublessors or other successors in interest.

So, in the absence of policy reasons not to enforce delegation, agreements with clear language addressing successors and assigns are likely to be enforceable and the duties could successfully be delegated to third parties. More detailed language can provide additional protection for the developer such as terminating its duty by making an assignment; this would likely not happen for a contract which only includes the boilerplate terms.¹⁰⁴ Covenants running with the land may be particularly important as well.¹⁰⁵ Overall, the language around delegation is likely to be enforced as written absent special circumstances; because of the importance of the drafting language, experts recommend that parties include terms that are as detailed as possible.¹⁰⁶ Julian Gross describes the “flow-down” problem of successors and assigns in a CBA agreement as the breaks in the contractual chain which can cause agreement terms to go unfulfilled.¹⁰⁷ Gross recommends detailed language to ensure that each party down the chain of successors is made fully aware of all obligations in order that the community groups are

102. Nashville Soccer CBA, *supra* note 34 (“The coaches, players and/or officials of the NSH MLS team shall visit, not less than eight (8) times per year, local elementary schools throughout Metro to promote good sportsmanship and character development, with at least two (2) visits to elementary schools located in Promise Zone communities.”).

103. *Id.*

104. See RESTATEMENT (SECOND) OF CONTS. § 323 (AM. L. INST. 1981).

105. Lavine, *supra* note 29 (highlighting case law that implies that explicit covenants running with the land are critical to CBA enforcement).

106. GROSS ET AL., *supra* note 26, at 55; see also Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 326 (suggesting that CBAs should require that subsequent parties sign a similar agreement to ensure enforceability).

107. GROSS ET AL., *supra* note 26, at 71.

most seamlessly able to enforce CBA terms for any subsequent party controlling the land.¹⁰⁸

2. No Explicit Terms

It is rare, but not unheard of, that a CBA does not address successors and assigns and is silent as to whether duties can be delegated.¹⁰⁹ If the developer wanted to delegate the duties under the contract to a successor in interest, and expressly did so, this would be clearly allowed under the Restatement.¹¹⁰ However, this would most likely come up as an enforceability issue in the event that the developer sells or leases the land without any attempt to delegate its duties under the contract. In that case, the question is whether any successor in interest would be bound to the terms of the original contract. There is no provision for automatic delegation, so the most likely situation is that the developer would be in breach of the contract in this case.

V. Community Benefits Agreements May Enable Third Party Beneficiary Claims

A. Common Terms

It is not uncommon for a CBA to contain no provision about third party beneficiaries; many agreements are silent on this. The agreements that do address it will typically outline the intended third party beneficiaries—often a city or government—and provide that those parties have the power to enforce the agreement. An example of this language comes from the Marlton Square CBA:

Intended Beneficiaries. The City, the Agency, and the Coalition are intended third-party beneficiaries of contracts and other agreements which incorporate this CBP, with regard to the terms and provisions of this CBP. The City, the Agency and the Coalition shall each independently have the right to enforce the provisions of this CBP against all parties incorporating this CBP into contracts or other agreements.¹¹¹

One CBA, the Hill District CBA regarding a new arena for the Pittsburgh Penguins hockey team, contained a section titled “No

108. *Id.*

109. See Lorenzo Palmer CBA, *supra* note 91.

110. RESTATEMENT (SECOND) OF CONTS. § 318 cmt. d (AM. L. INST. 1981) (“An obligor is discharged by the substitution of a new obligor only if the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation. See §§ 280, 328 and 329. Otherwise, the obligee retains his original right against the obligor, even though the obligor manifests an intention to substitute another obligor in his place and the other purports to assume the duty.”).

111. Marlton Square CBA, *supra* note 67, at 9.

Third Party Rights”: “Nothing in this Agreement shall be construed to create any third party rights or benefits under any existing or presently contemplated agreement between the SEA, the URA, the Penguins Entities or any of their respective affiliates”¹¹²

Aside from these two examples, it was by far most common in the analyzed agreements to see no provision regarding third party beneficiaries. The following section will analyze the impact of each of these drafting decisions on whether third parties may be able to bring a claim to enforce the CBA agreement in question.

B. Analysis of Terms

1. Intended Third-Party Beneficiaries

Some contracts explicitly name third party beneficiaries, but none of the examined contracts listed general community members as beneficiaries. This applies to three of the contracts analyzed in this Note.¹¹³ The question is whether the failure to include these third parties in the list of intended beneficiaries would mean that they are excluded and cannot have a right to enforce the agreement.

Though the Restatement is clear that a party does not have to be explicitly included in order to have rights,¹¹⁴ whether a third party can enforce a CBA may differ by state. A Fifth Circuit decision provided that Texas law did not allow treatment of someone as a third party when the contract explicitly included other parties but excluded the party in question.¹¹⁵ Other courts have not addressed this specific question, but the Texas decision is indicative that the failure to include a particular group in a list of intended beneficiaries could be evidence that they are not in fact intended beneficiaries.

Overall, the exclusion of community members may prohibit them from being able to enforce agreements. However, the limited availability of claims to community members may actually be advantageous in the long run. If developers are subject to claims

112. Hill District CBA, *supra* note 69, at 5.

113. Sunquest Industrial Park Project Community Benefits Plan (effective Oct. 25, 2001), *available at* <https://www.forworkingfamilies.org/sites/default/files/documents/SunquestIndustrialParkProject.pdf> [<https://perma.cc/V9RX-MUDA>]; Hollywood and Vine CBA, *supra* note 98; Marlton Square CBA, *supra* note 67.

114. RESTATEMENT (SECOND) OF CONTS. § 308 (AM. L. INST. 1981).

115. *See* Goldberg v. R.J. Longo Constr. Co., 54 F.3d 243, 247 (5th Cir. 1995) (citations omitted) (holding that “Longo’s claim to be a creditor beneficiary of the agreement does not automatically fail simply because the agreement does not so identify Longo. This agreement, however, identifies its intended beneficiaries explicitly in paragraph 4 and Longo is not among them”).

from hundreds or thousands of individuals, they may be less likely to enter into CBAs in the first place. Limiting the group of people who can enforce the agreement is not a surprising contractual term, nor is it necessarily negative for CBAs overall.

2. Disclaimer of Third-Party Beneficiaries

Just one contract claimed that no third parties shall have rights under the agreement.¹¹⁶ The question is whether parties are able to contract away third-party beneficiaries.

This question is straightforward under the Restatement. Restatement Section 302 outlines who is defined as an intended beneficiary, but the provision starts with “[u]nless otherwise agreed between promisor and promisee.”¹¹⁷ It is clear that, in the case where a contract explicitly says there are no third-party rights, it will be difficult to argue that there are.

3. No Explicit Terms

Many contracts had no specific terms regarding third party rights.¹¹⁸ In the case of no specific terms, the question is whether community members or other third parties are intended beneficiaries, thus giving them the right to enforce the contracts, or simply incidental beneficiaries with no right to enforcement.¹¹⁹ There is some case law in different contexts, such as homeowners enforcing a homeowners’ association agreement, which has been suggested to be analogous to this situation, that finds third party beneficiaries do have the right to enforce this type of agreement.¹²⁰

In addition, the Restatement (Second) of Contracts provides further guidance. A party does not have to be explicitly recognized in the contract to be an intended beneficiary.¹²¹ Generally, a party is intended if “recognition of a right to performance in the

116. See Hill District CBA, *supra* note 69.

117. RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981).

118. This is somewhat unexpected given the assumption that developers would want to limit claims from third parties when possible. This is particularly notable since the answer to whether a community member can enforce a CBA is not clear, and there is a high likelihood that enforceability will depend on the particular situation and framing of the agreement. It is possible that not including this term was negotiated by community organizations, or that developers were confident that third party claims would be excluded.

119. See RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981) (providing that intended beneficiaries may enforce duties); RESTATEMENT (SECOND) OF CONTS. § 315 (AM. L. INST. 1981) (providing that an incidental beneficiary cannot enforce duties).

120. See *supra* discussion accompanying notes 59–60.

121. RESTATEMENT (SECOND) OF CONTS. § 308 (AM. L. INST. 1981).

beneficiary is appropriate to effectuate the intention of the parties” and either the performance will satisfy an obligation to pay money, or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”¹²² Two Restatement illustrations under Section 302 are helpful here. See Illustration 10:

A, the operator of a chicken processing and fertilizer plant, contracts with B, a municipality, to use B’s sewage system. With the purpose of preventing harm to landowners downstream from its system, B obtains from A a promise to remove specified types of waste from its deposits into the system. C, a downstream landowner, is an intended beneficiary under Subsection (1)(b).¹²³

This illustration is similar to the promises contained within a CBA. Many promises have the primary purpose of protecting community members as future employees of the developer, or providing a more general benefit such as a community center or other investment. One difference between this illustration and a CBA is that the group of intended beneficiaries is relatively finite; it applies to “landowners downstream” of the plant. In contrast, CBA agreements may intend to benefit an entire community, which may be more difficult to define—it may be hard to determine whether the agreement covers a specific neighborhood, an entire city, or if there is some other measure of “community.”

Illustration 14 is also helpful: “A, a labor union, enters into a collective bargaining agreement with B, an employer, in which B promises not to discriminate against any employee because of his membership in A. All B’s employees who are members of A are intended beneficiaries of the promise.”¹²⁴ The biggest difference between this illustration and a CBA, similar to the issue with Illustration 10, is that with a labor union, all of the employees are actually members of the labor union and therefore have a clearer reason to be considered as intended beneficiaries.¹²⁵ Most community organizations creating CBAs represent the community more generally, as discussed in the above paragraph.

122. RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981).

123. RESTATEMENT (SECOND) OF CONTS. § 302 cmt. d, illus. 10 (AM. L. INST. 1981).

124. RESTATEMENT (SECOND) OF CONTS. § 302 cmt. d, illus. 14 (AM. L. INST. 1981).

125. See Lavine, *supra* note 29 (describing cases of labor unions and homeowners’ associations where employees and homeowners, respectively, were found to be third parties of agreements).

The purpose of Community Benefits Agreements is to benefit communities.¹²⁶ There is no question that the terms in these agreements were crafted to provide a benefit to the future employees and residents of the area surrounding a particular development. However, what differentiates CBAs from the Restatement illustrations and prior case law is how finite and definable the group is, and that is likely to be the argument against enforcement of CBAs by third parties.¹²⁷ CBA scholars Amy Lavine and Patricia Salkin also raise the question of “whether CBAs are intended to benefit individual persons, or whether they are intended to benefit the community at large.”¹²⁸

Depending on the agreement, it is very possible that the community in question could be adequately finite and defined. Describing the impacted “community” specifically may be helpful in the event a third-party community member hopes to bring a claim to enforce a CBA. Some CBAs do define community, or they reference a specific geographic area in the contract.¹²⁹ In such agreements, there is a strong argument based on the Restatement that third parties could bring a claim. Community members attempting to enforce CBAs as third-party beneficiaries would also have to argue that the agreements were meant to benefit individuals in the community, rather than the community as a whole. These individuals could point to provisions such as wage requirements, affordable housing provisions, and job training programs that are expressly targeted toward individual community members. An agreement that contains many of these terms, as opposed to terms focused on community spaces or development funds, may be easier for a third-party community member to enforce.¹³⁰

Though courts have not decided on the question of third-party community members enforcing a CBA,¹³¹ those individuals may

126. See, e.g., Gross, *supra* note 1, at 216; Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 292.

127. See, e.g., Gurgol, *supra* note 3, at 493 (“Critics recognizing CBAs solely as private contracts between developers and community interest groups aver community members from the community at large will not be able to challenge the CBA as a contract because the community is not an intended third-party beneficiary.”).

128. Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 326.

129. See, e.g., Nashville Soccer CBA, *supra* note 34 (“This Nashville MLS Soccer Community Benefits Agreement (‘Soccer CBA’) is made and executed . . . for the benefit of the residents of Metropolitan Nashville and Davidson County . . .”).

130. See also discussion at *supra* note 61.

131. This issue was raised, but not ultimately addressed, in litigation surrounding

have strong arguments that they were intended third-party beneficiaries under Restatement law. Ultimately, the particular terms of the agreement are likely to guide enforcement.

Conclusion

Overall, whether an individual Community Benefits Agreement will be enforceable depends on both the individual contract language and state law to which the agreement is subject. However, an analysis of common contractual terms and legal principles shows that, generally, Community Benefits Agreements should be seen as enforceable when executed. The test for consideration is typically not a high standard, and the various common CBA provisions are likely to meet that standard. In addition, in most cases, obligations will run to any sublessors, subsequent developers, or other parties who take an ownership interest in the land from the initial developer, based on the inclusion of that language. Finally, there may be the possibility that third-party community members could enforce CBAs.

Though the decision about whether to implement a CBA should depend on a particular location and project, these contracts will likely continue to be a valuable and enforceable tool for community organizations hoping to work with developers to make their projects responsible and community conscious.

the Atlantic Yards CBA. *Apple v. Atl. Yards Dev. Co., LLC*, No. 11-CV-5550 JG JMA, 2012 WL 2309028, at *4 (E.D.N.Y. June 18, 2012) (“This argument [that Plaintiffs were not intended beneficiaries] fails because the Plaintiffs’ promissory estoppel claim is not based on any promises made in the CBA, but rather on alleged oral promises that PATP participants would receive jobs and union membership.”).