Externalities or Extortion? Privatizing Social Policy through Community Benefits Agreements

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Ethical Risks

A building is merely the physical byproduct of a lengthy development process. From design to approval to construction, the development process provides countless junctures of ethical risk, particularly in mitigating a project's negative externalities. These externalities, ranging from congestion to gentrification, have been a constant source of friction between developers and neighboring residents. Indeed, the management of such externalities has required government intervention in the form of zoning and permit approval. Like any political process, permit approval consists of negotiating, bargaining, and promise making, actions inherently based on an ethics of trust and transparency. Recently, bargaining innovations have sought to lessen the role of government as a mediator between developers and community groups, potentially increasing the risk of violations of trust and transparency. In this article, I analyze these bargaining innovations to understand how investors, community advocates, and concerned citizens can better navigate the ethical risks of the development process.

Nearly every major urban development project requires the interaction of three players: a developer spearheading the project, a community of neighboring residents, and a cadre of elected officials responsible for project approval. In the traditional model, the developer and elected officials negotiate the project proposal and development agreement. While local residents are free to voice concerns, their participation is targeted toward their elected officials via public hearings and appeals. In other words, the community's ability to engage with the developer must be channeled through government conduits.

Recently, this traditional model of community voice via politicians has been subverted by a new pathway of development bargaining. Labeled "Community Benefits Agreements", CBAs are private contracts negotiated between a project's developer and the surrounding community groups. To counter a new project's potential externalities, the developer will promise either financial, physical, or behavioral goods, ranging for the provision of affordable housing units to the guarantee of a living wage for employees. In exchange, community groups will pledge to publically support

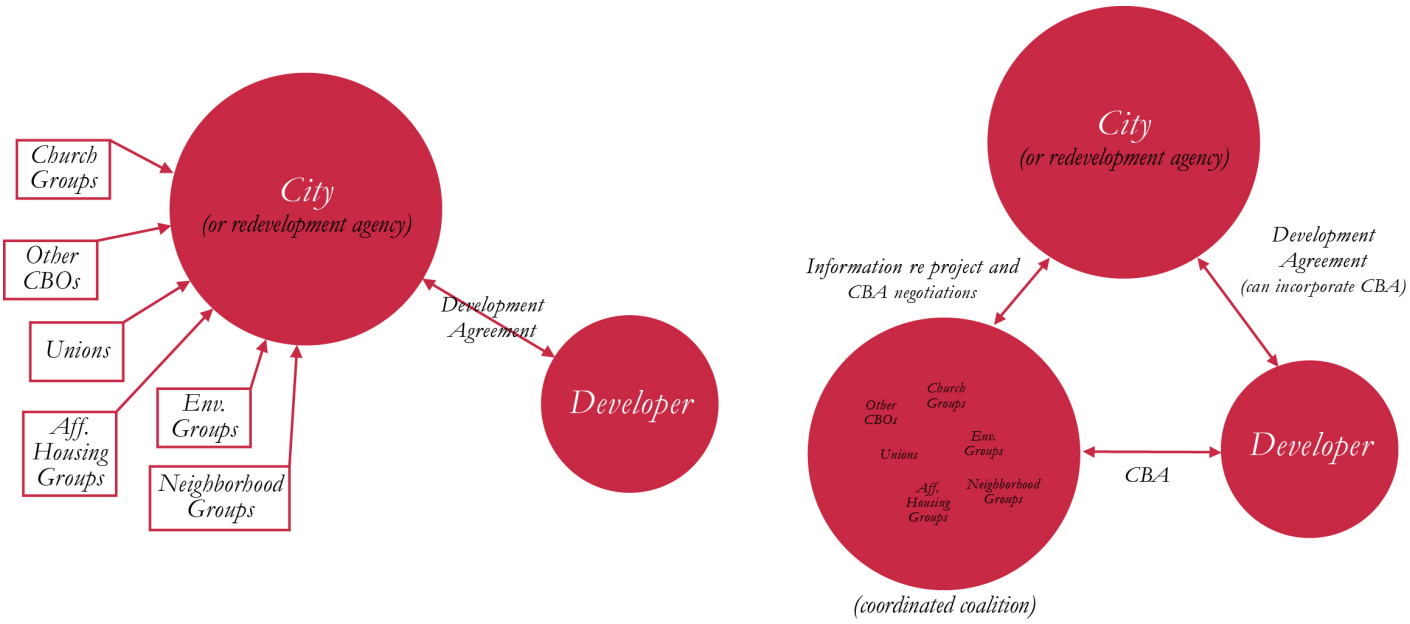

Fig. 1 Without CBA (left), Fig. 2 With CBA (right)

the development, typically through favorable testimony at public hearings. As a result, a well-negotiated CBA can provide a community with valuable resources while helping developers build political momentum behind their projects.

Indeed, the presence of a CBA stems from a community's leverage of power, both political and legal. Politically, organized community protest against a proposed development can weigh heavily on elected officials, specifically when large public subsidies are being extended to the developer. Thus, developers seeking financial support from the city have an incentive to minimize political opposition through community negotiations. Legally, a community's power comes from the ability to delay projects via legal action. Thanks to mandated environmental impact statements and reviews, large scale developments are vulnerable to questions of their effects on air quality, energy use, and public health. Because development delays have high financial costs, even unsuccessful lawsuits can squander a project's financial viability. Consequently, a community's threat of legal action can provide the necessary leverage for a developer to negotiate a CBA.

Describing the Problem

Still nascent, CBAs lack a formal legal definition. There are no specifications on the number of groups necessary to comprise a valid community voice. Nor are there predetermined benefits levels deemed just compensation for a community's political support. In short, a CBA may be signed with various levels of inclusivity and accountability. For instance, an agreement negotiated solely by elected officials may claim to represent the will of the entire community. Julian Gross, who has represented community coalitions in over a dozen CBAs, frames how such an agreement may be misleading:

"[L]ocal government officials and developers sometimes use the term CBA to describe any set of community benefits commitments on which they agree. A charitable view is that this is a convenient term for commitments of interest to the community; a less charitable view is that project proponents hope to fill the political space a community-driven CBA campaign would occupy, thus easing project approval and marginalizing opposition" (Gross 2008).

From his experience drafting community benefits

agreements across the United States, Gross outlines his requirements for an ethically legitimate CBA. First, a CBA applies to a single development project. The agreement must be legally enforceable, not aspirational or voluntary. Finally, the agreement must address a range of community issues and be the product of substantial community involvement (Gross 2008). Together, these measures of inclusivity and accountability form Gross's standards for ethically legitimate CBAs.

Yet, despite these standards of success, the nebulous definition of a CBA has led to a wide spectrum of outcomes. Since 2001, 30 agreements have been negotiated. In this period, two cities stand out as hosting a combined 40 percent of all agreements: Los Angeles (eight) and New York City (four). Yet, though these cities share a disposition towards benefits agreements, the character of their CBAs is completely contrary. While Los Angeles has thrived both as the birthplace and paragon of inclusive and accountable CBAs, New York's agreements have been riddled with controversy (The Public Law Center 2011, Salkin 2007, Gross 2008, Ahern et al. 2010, Been et al. 2010). Not only have the New York agreements been challenged for failing to represent the will of the affected community, but the enforcement and delivery of their promised benefits has been plagued by protest and delay (Robbins 2012). As noted by New York Comptroller John Liu: "[S]tudies have singled out New York City's community benefits agreements as examples of what not to do. It is time for this embarrassment to end" (New York City Comptroller 2010).

A premier example of New York's woes is the Atlantic Yards project in Brooklyn. In June 2005, a CBA of eight community groups was used to win approval of $200 million in public subsides for a $2.5 billion mixed-use development (Oder 2011, Develop Don't Destroy Brooklyn 2012). However, not only had three of the eight signees received over $5 million in financing from the developer prior to beginning CBA negotiations, but two signees had also been formed as pro-development groups in response to the project proposal (Robbins 2012, Develop Don't Destroy Brooklyn 2012). Indeed, the coalition was not representative of the community, but rather handpicked by the developer, raising a conflict of interest in negotiations. Furthermore, while only eight organizations signed the CBA, a coalition of more than 50 community organizations has formed in vehement opposition to the development (Been et al. 2010). Regarding accountability, the CBA lacks specific reporting requirements outside of its workforce provisions (Ahern et al. 2010). Likewise, an independent compliance monitor was to assess the developer's performance in meeting its promised benefits. As of September 2012, over seven years after signing the CBA, a monitor had not been hired (Robbins 2012).

Testing Gross

To assess the ethical risks of CBA negotiation, I conducted the first analysis of the entire population of 30 CBAs. Testing Gross's theory of ethical legitimacy, I sought to identify variables contributing to inclusive and accountable benefits agreements. To begin, I first coded CBA success based on standards of both inclusivity and accountability (Gross 2008). Using control variables of institutional structure, I then tested the hypotheses that these standards are more likely to be met when there exists 1) a pre-established economic justice organization leading the community coalition, 2) the participation of labor unions in the community coalition, and 3) the joint efforts of construction unions and service unions in support of the CBA. I surmised that in the absence of these conditions elected officials and developers are likely to bypass open community representation. Consequently, CBAs formed without these conditions would be of low inclusivity and low accountability, such as that of Atlantic Yards.

The results were illuminating. While the presence and cooperation of labor unions stood as strong predictors of CBA success, the dominant predictive variable was the leadership of an economic justice organization. Indeed, 19 out of the 20 successful CBAs included community coalitions led by such organizations. More so, I traced their structure to affiliation under the Partnership for Working Families (PWF), a national network of 16 regional economic and environmental justice organizations (The Partnership for Working Families 2012, Working Partnerships USA 2008). While there were two successful cases not utilizing PWF support, the inclusivity and accountability of every PWF-supported CBA suggests the benefits of the national network in sharing strategies for the negotiation of successful benefits agreements.

Nevertheless, the analysis should be taken with caution.

While I did my best to code inclusivity, there will always be groups that will protest exclusion. Though a large coalition may seem to display community consensus, there is no way to guarantee the representativeness of self-selecting organizations. Even if full representation were possible, inclusivity does not solve the ethics of non-governmental development agreements. For instance, the developer-promised community benefits represent a privatization of previously government-provided social policy. Applied ad hoc, CBAs may lead to costly neighborhood-by-neighborhood solutions to problems requiring coordinated efforts at the city level (Been et al. 2010). Taken to the extreme, benefits agreements resemble a form of "greenmailing", wherein citizens groups threaten developers with environmental lawsuits only to drop the lawsuit when provided with unrestricted payments (Brasuell 2013, Fulton 2013). In other words, lacking a government mediator, CBAs unleash a new array of ethical dilemmas.

Solving the Problem

This examination of CBAs has raised two questions. First, until today, what variables have contributed to ethical benefits agreements? Second, going forward, what are the ethical risks of these agreements as a new form of social policy? As CBAs continue to evolve, each player in the development process needs to approach their role with an awareness of these inherent risks.

First, the investor valuing fair, good-faith community relations must understand that all CBAs are not created equal. While some CBAs do mobilize extensive community coalitions, others can be forged with handpicked, unrepresentative organizations harboring financial conflicts of interest. In due diligence, the ethical investor needs to look beyond the developer's press release and examine the politics of the actual agreement. The equation of any benefit agreement with the community will is a far too naïve assumption.

Second, elected officials and community advocates seeking a fair bargain for their neighborhoods must recognize the pitfalls of non-inclusive, unaccountable benefits agreements. The findings from the population analysis suggest that leadership from an economic justice organization, specifically one affiliated with the Partnership for Working Families, has been a sufficient condition for success. To minimize the ethical risks of the bargaining process, community advocates should seek the resources and experience of these organizations in forging their own benefits agreements.

Third, concerned citizens must understand the impact of these non-governmental bargains on urban development. As noted above, the benefits of community voice may be outweighed by the agreements' collective costs. While originally a supporter of CBAs, New York City Mayor Michael Bloomberg protested against the agreements, equating community demands for benefits as a form of "ransom" (Braziller 2006). Similarly, the Association of the New York City Bar issued a task force report recommending that the City give no "credit" in the land use approval process to developers for benefits provided through CBAs (Been et al. 2010). In short, these side bargains are likely to increase the costs of urban development, potentially stifling projects of public good operating on slim margins. Citizens must be aware that with their demands for benefits comes a NIMBY-esque tax on development citywide.

Consequently, perhaps the best solution to unethical bargaining in CBAs is not found in enhancing the inclusivity and accountability of the agreements themselves, but in identifying their impetus. Multiple reports attribute the advent of CBAs to citizen discontent with the formal development approval process (Ahern et al. 2010, Been et al. 2010). Thus, to regain its role as the negotiation mediator, city governments must seek methods of empowering community voice in the permit approval process. So long as citizens feel left out of the conversation, they will continue to seek side-bargains with developers, exposing investors, advocates, and fellow citizens to further ethical risk in a development process already fraught with moral dilemma.

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Faculty Review

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Community Benefits Agreements are problematic for Hankinson in large part because they constitute a form of privatized governance that runs the risk of failing three important ethical tests: an inclusion test, an accountability test, and a common goods test. These ethical risks are not however insurmountable. Hankinson's own research suggests they are mitigated when organized advocates of economic justice play a leading role in the crafting of CBAs. Citing work by Gross, Hankinson also identifies the imposition and effective policing of preemptive formal requirements as a potential way to guard against participatory exclusion, developers' breaking their promises, and neighborhood NIMBYism.

Given their ethical risks, Hankinson seems to suggest that city governments should avoid CBAs, concluding that elected politicians should "seek methods of empowering community voice" that allow them to regain their role as "negotiation mediators." This idea that, compared to CBAs, city governments serving as "negotiation mediators" will make development processes more inclusive, accountable, and oriented toward the common good seems questionable, at least in the United States. Take the example of New York City referred to by Hankinson. Electoral participation in city-level elections is extremely low: barely 28 percent of registered voters cast their vote in the mayoral election of 2009. Even if turnout

were higher, it would still be difficult for the voices of political minorities and those with few organizational resources to be heard and have influence in important planning decisions given the combination of the centralization of political powers in the office of the mayor, the city's first-past-the-post electoral system, and the very low level of party competition. The reality is that these and similar structural impediments to inclusion, accountability, and orientation toward the common good are found across the United States. Indeed, as Hankinson recognizes, it is this very dysfunctionality of traditional systems of local development with elected governments at their heart that has driven communities to embrace CBAs in the first place.

So, what is to be done? Perhaps the most obvious but also the most difficult solution is to reform the electoral and decision-making structures and institutions of city governments: making council chambers more inclusive of public opinion in all its diversity and replacing a winner-takes-all logic with one of multiparty dialogue and negotiation that respects political minorities. A second and much more common solution is to establish participatory or deliberative democratic institutions that allow communities to influence city hall's development decisions. In practice however this approach encounters many of the same inclusion and accountability problems as CBAs; moreover, introducing local-level participatory opportunities fails to address the arguably larger problem of the likely very weak claims to inclusion and accountability of elected "negotiation mediators" in such a system. CBAs represent a third solution. If CBAs sideline city hall, in a sense they solve the ethical problems posed by the low levels of inclusiveness and accountability of elected politicians. Moreover, enshrining legally-enforceable obligations to inclusion and accountability, even equality, in CBAs, as per Gross's recommendations, seems much more feasible than achieving the equivalent for elections to and decision making within city hall. It seems then that it is the common goods test that CBAs have the most difficulty passing due to the fact that they fragment the planning process and in so doing exacerbate coordination problems. Though elected "negotiation mediators" that sit in city hall are certainly better placed than those involved in CBAs to see the "big picture" for the city as a whole and achieve coordination to that end across the city, we must ask ourselves whether the big picture they see is in fact a just one, grounded in the common good. Given the typical weakness of city politicians' electoral mandate on the one hand and extant mechanisms of accountability on the other, we might well think it is not.

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In recent decades, regulation of major development projects has shifted away from prescribing "as-of-right" land uses and densities under local zoning codes. Instead, most cities now favor discretionary project-specific approvals, often with significant public participation. The use of the Community Benefits Agreement (CBA), executed by the project developer and a coalition of community groups outside of the governmental approvals process, marks a further step in this evolution.

Hankinson's article makes a valuable contribution by evaluating the success of the first generation of 30 CBAs, starting in 2001, according to the criteria of "accountability" and "inclusivity" articulated by Julian Gross, a leading advocate for their use. By these measures, the analysis finds 20 CBAs to be successful. The strongest correlation for success was the presence of a community coalition led by an economic justice organization – preferably, one structured according to the standards of the Partnership of Working Families (PWF). (Because Julian Gross served as legal director for PWF between 2006 and 2010,[1] there may be some circularity in basing the analysis upon his criteria.)

Hankinson also identifies, but does not analyze in depth, broader ethical and political critiques of CBAs. At the project level, there are concerns about transparency and fairness. CBA negotiations may unfairly advantage parties with greater resources and leverage, on either side.

The U.S. Supreme Court addressed the fairness of discretionary project approvals under the "takings" clause of the Fifth Amendment to the Constitution, in the 1987 Nollan case and the 1994 Dolan case.[2] The Court held that there must be a "nexus" between a project's impacts and the benefits it provides; developers should not be forced to fix problems that they didn't cause. Further, there must be a "rough proportionality" between the relative levels of impacts and benefits. If these tests apply to government approvals, they should also apply to CBAs arising out of a regulatory process.

As Hankinson notes, critics have characterized CBAs as "privatizing" the governmental process. Whom do self-appointed community advocates really represent? What assurance do we have that a CBA process, no matter how inclusive, is an improvement on the elections and deliberations of a representative democracy?

Boston's use of an Impact Advisory Group (IAG) for major development projects, initiated in 2000 to address shortcomings in the approvals process, provides an alternative to a CBA. The IAG process avoids privatization by remaining within the framework of formal governmental reviews.[3] An IAG has up to 15 members, drawn from neighborhood residents, local businesses, and community organizations. Two members are nominated by elected officials representing the affected community; the rest are appointed by the mayor, on the recommendations of community members and at-large city councilors. IAGs participate actively in public hearings and comment processes; they also meet directly with project developers. An IAG does not enter into a separate agreement with the developer; instead, it has the opportunity to review and comment on the binding Cooperation Agreement between the developer and the city before it is executed.

(1) See www.juliangross.net/docs/CV/201301/Julian_Gross_CV.pdf
(2) Nollan v. California Coastal Comm'n, 483 U.S. 525; Dolan v. City of Tigard, 512 U.S. 374.
(3) An Order Relative to the Provision of Mitigation by Development Projects in Boston (Oct. 2000); An Order Further Regulating the Provision of Mitigation by Development Projects in Boston (April 2001). See www.bostonredevelopmentauthority.org/econdev/Impact%20Advisory%20Groups.htm