

YES IN MY BACKYARD: DEVELOPERS, GOVERNMENT AND COMMUNITIES WORKING TOGETHER THROUGH DEVELOPMENT AGREEMENTS AND COMMUNITY BENEFIT AGREEMENTS

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INTRODUCTION

The modern real estate development approval process requires a developer to have more than knowledge of the traditional zoning system in order to successfully obtain approval for his projects.¹ A range of concerns have found a voice in the zoning process, yielding an equally broad range of zoning strategies and exceptions.² Added to the growing number of concerns addressed in zoning regulation is the greater scope and complexity of modern development projects. Complex modern land use developments, such as major urban renewal “New Urbanism” projects, are key to the future success of many cities, and push traditional zoning regulations to their limits.³

While the zoning application process still provides the backdrop for modern developments, direct negotiations between developers and local government are growing in prominence as a means of dispute resolution.⁴ However, when negotiations cover decisions that are ultimately subject to a regulatory process,

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1. Traditional zoning is often referred to as Euclidean zoning, so called for the U.S. Supreme Court decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that upheld a zoning ordinance which imposed strict building regulations. *Id.* The original purpose of Euclidean zoning was to control the rapid growth of urban areas at the start of the twentieth century. 1 ARDEN H. RATHKOPF ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING §§ 1:5 (4th rev. ed. 2007). As the century progressed, urban areas declined and revitalization of urban cores grew in prominence, leading to a modern system of zoning that rules as much by exception as it does by restrictive rule. *Id.* §§ 1:5, 1:13-1:14.

2. New zoning strategies are constantly arising to address an ever-growing list of concerns. Examples include such disparate concerns as inclusionary zoning, wetlands preservation zoning, and solar access zoning. *See id.* § 1:13.

3. New Urbanism is a movement by planners, architects and developers to design new multi-use projects which evoke the dense, pedestrian-friendly small town centers and city neighborhoods of the pre-World War II United States. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 783-84 (2003).

4. For examples of alternative approaches to land use disputes, see generally Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705 (2001).

concerns arise regarding the constitutionality of the deals made.⁵ Developers must also appease the varying political influences on local government so as to ensure that a shift in the political winds does not sink the project.⁶ Finally, even if developers manage to successfully steer their projects through the maze of constitutional, regulatory and political problems associated with development negotiation, there is still a chance that the deals will fall through due to pressure from local NIMBY (not in my backyard) syndrome.⁷ NIMBY syndrome is especially common with large urban developments, such as airports and sports stadiums, that provide broad benefits to the community but disproportionately impact a specific area.⁸

Resolving the conflicting interests of developers, the local government, and the community requires approaches that go beyond the standard zoning approval format of application, board hearing, and appeal. Developers and communities have attempted various methods, the most successful of which is a statutory method known as development agreements. Development agreements may solve many of the constitutional problems posed by other methods.⁹ However, development agreements and other prominent land use negotiation tools are largely a partnership between the developer and local government, leaving community interests without sufficient involvement.¹⁰ When deals are negotiated solely between a developer and local government, there remains a significant chance that any settlement will be derailed by local residents who are angry over their lack of inclusion in the process. The bitter nature of most NIMBY disputes leads to a breakdown of the development approval process, as politicians faced with entrenched opposition are likely to take a protectionist stance regarding the neighborhoods they represent.¹¹ To truly combat the NIMBY syndrome,

5. See *infra* Part II. For a more detailed analysis of the constitutional problems raised by public-private partnerships in land use zoning agreements, see generally David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 361-65 (2007).

6. See Barak D. Richman, Student Article, *Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response*, 20 UCLA J. ENVTL. L. & POL'Y 223, 223-24 (2001-2002).

7. *Id.* NIMBY, or "not in my backyard," syndrome refers to the negative response to large developments by the surrounding community. *Id.* at 223. No matter how beneficial a project may be, there is always someone who is unhappy with the result. See *id.* at 223-25.

8. See *id.*

9. See *infra* Part III.B. For more thorough examinations of development agreements and the issues associated with such agreements, see Callies & Sonoda, *supra* note 5, at 380-408; Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 392-400 (2004).

10. David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657, 660-61 (2007) (citing Barbara L. Bedzek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 59 (2006)).

11. See Richman, *supra* note 6, at 224.

developers and local government must find a way to bring community organizations into the negotiations as a central participant, not as an afterthought.¹²

In recent years, concerns over the lack of community involvement in development negotiations—and a fear of the consequences—have led some developers to consider community benefit agreements, a new development tool propounded by coalitions representing a broad range of the local community in order to receive concessions directly from the developers.¹³ In exchange for benefits to the community, the coalition agrees to support the developer's project and pressure the local government for favorable rulings and funding.¹⁴ Not only do these agreements provide significant benefits to the community, but the developer benefits by securing political support for what might have otherwise been a contentious project. By incorporating community benefit agreements into more traditional negotiation tools such as development agreements, the potential arises to solve many of the lingering problems found in development negotiations.

This Note proposes the combined use of development agreements with community benefit agreements to solve some of the lingering problems in land use negotiations. Part I describes the current state of land use negotiation and the problems developers face when attempting to negotiate land use agreements. The discussion begins with a description of the shortcomings of regulatory zoning as a method of resolving disputes over complex development projects. Part II addresses the constitutional issues that arise when attempting to negotiate deals involving the regulatory zoning system. Part III discusses the dominant approaches to development negotiations—conditional zoning and development agreements—and addresses both their merits and deficiencies. Part IV introduces community benefit agreements, discusses the origin of these agreements, their benefits, limitations, and their possible use as a solution to many of the lingering concerns in development negotiations, including NIMBY syndrome. This Note concludes with a call for a wider adoption of development agreements and an inclusion of community benefit agreements in development negotiations.

I. THE NEED FOR NEGOTIATED LAND USE AGREEMENTS AND THE SHORTCOMINGS OF EUCLIDEAN ZONING

Euclidean zoning has been the dominant framework for development in the

12. *See id.* at 224-25.

13. *See* Marcello, *supra* note 10, at 657-61 (explaining what a community benefit agreement is and what factors exist in driving the need for community benefit agreements); Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, American Law Institute-American Bar Association Continuing Legal Education, Aug. 16-18, 2007, available at SN005 ALI-ABA 1407.

14. *See* Marcello, *supra* note 10, at 658-60.

United States since World War I.¹⁵ The system was originally designed to provide for a strict delineation of land uses in the planning of communities.¹⁶ However, over time traditional Euclidean zoning has been modified with numerous exceptions, which led to a system that now zones largely by exception to the rule, rather than strict adherence to segregated zones.¹⁷ Euclidean zoning has also created its own problems, chief among these being excessive sprawl in metropolitan areas.¹⁸ Modern developers now face new problems not foreseen at the time of Euclidean zoning's adoption, and have turned to new methods of development approval in order to ensure their complex projects are not defeated by the overly rigid system of zoning classification.

A. *The Evolution of Euclidean Zoning*

Euclidean zoning power is derived from the state's inherent police powers (i.e., the power to protect the public health, safety, and general welfare).¹⁹ This power of the sovereign state is generally delegated to local government to enforce through enabling statutes or state constitutional provisions.²⁰ The classical model of zoning provided only for rigid categorization and has largely been replaced by more flexible options so as to enforce the goals of zoning in the face of unforeseen challenges.²¹ The need for more flexible zoning regulations arose in part due to the promotion of concepts such as urban renewal, smart growth initiatives which call for greater urban densities to combat sprawl, and multi-use developments.²² More flexible zoning options, such as variances and special use permits, have become a core part of modern zoning, allowing local governments to fill the need for individualized, non-conforming land uses which would not be possible under the more rigid traditional zoning scheme.²³

Euclidean zoning became one of the major defining factors of American postwar growth.²⁴ The sprawling growth encouraged by Euclidean zoning led to the decline of the traditional urban commercial core as the center of metropolitan areas.²⁵ Instead, suburban commercial nodes are now the destinations for most

15. James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 492-96 (1994).

16. *Id.* at 494.

17. See 1 Zoning and Land Use Controls (MB) § 5.01[1] (Damien Kelly ed., 2008).

18. See Wickersham, *supra* note 15, at 494-96.

19. 6 Zoning and Land Use Controls, *supra* note 17, § 35.02[3].

20. *Id.* § 35.03[2]-[3].

21. See *id.* § 5.01[1].

22. For some discussion on the merits of new, flexible zoning alternatives in aiding these projects, see Michael B. Kent, Jr., *Forming a Tie that Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS ENVTL. L. & POL'Y J. 1, 3-7 (2006); Wickersham, *supra* note 15, at 507-48.

23. 1 Zoning and Land Use Controls, *supra* note 17, § 5.01[1].

24. See Wickersham, *supra* note 15, at 494-96.

25. *Id.*

commuters.²⁶ The zoning system's use as an efficient means for rapid growth has often come at the expense of sustainability, environmental destruction and quality-of-life concerns.²⁷

B. Current Limitations of Euclidean Zoning

Combating the problems caused by Euclidean zoning is a very difficult task to perform within the traditional zoning system. Euclidean zoning was primarily designed to create low-density, small-scale development.²⁸ This goal is reflected in the Standard Zoning Enabling Acts (SZA) adopted subsequent to the *Euclid* decision.²⁹ The goal of SZA is to provide development consistent with a community's comprehensive plan.³⁰ Because this system envisions each zone containing only properties for specific uses, large-scale developments often require special mechanisms which go beyond the SZA limitations.³¹ Other inherent limitations in the zoning system prevent the cooperation and foresight needed to develop smart growth strategies.³² These limitations include a lack of broader planning to tie together specific zoning districts, and a lack of cooperation between zoning authorities in politically fractionalized metropolitan areas.³³ Often this lack of a unified strategy leads to a lack of foresight regarding the "spillover" effects a large development might have on surrounding towns.³⁴

To combat the problems created by Euclidean zoning, many communities turn to large, mixed commercial and residential use projects.³⁵ These projects are designed to promote smart and sustainable growth by creating entirely new communities based upon the small town centers and city neighborhoods that dominated development prior to Euclidean zoning.³⁶

Yet these projects face additional hurdles because of the size and scope of

26. *Id.*

27. *Id.*

28. *Id.* at 494-97.

29. *See* 6 Zoning & Land Use Controls, *supra* note 17, § 37.03[1].

30. *Id.*

31. One method of dealing with large developments within Euclidean zoning is the "Planned Unit Developments" (PUDs) exception. *Id.* PUDs set broad density and use type requirements for a project, but allow developers discretion in the placement of individual units within that project. *Id.* This relaxed zoning management style illustrates how many modern zoning approaches have only the barest relation to the original lot-by-lot style of administration of Euclidean zoning. *See id.* However, while PUDs are more flexible than traditional zoning, local governments are often unwilling to give PUDs the broad scope necessary to combat some of the most fundamental problems created by inflexible zoning patterns. *See* Ohm & Sitkowski, *supra* note 3, at 785-86.

32. *See* Wickersham, *supra* note 15, at 498-99.

33. *Id.*

34. *Id.* at 503.

35. Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 *FORDHAM URB. L.J.* 657, 683 (2007).

36. *See* Ohm & Sitkowski, *supra* note 3, at 783-84.

these developments.³⁷ Developers of large-scale projects face numerous challenges—from complex regulatory approval processes to the equally complex task of organizing contractors, lenders, and other players necessary for a successful completion of the project.³⁸ Such broad coordination takes time, and the longer a project takes to develop, the greater the chance that political and market forces will turn against the project, grounding it before construction can even begin.³⁹ Variances and special use permits can provide relief from existing zoning conflicts, but cannot prevent future changes to applicable zoning regulations. Developers faced with a long-term project seek assurances that zoning regulations enforced upon the development will not be changed in the middle of construction.⁴⁰ Such assurances are not easily obtained, as political shifts within the local government may lead to rezoning or curtailment of permissions granted to a developer.⁴¹ Granting a large urban development any significant abatements from zoning regulation is likely to have more than a fair share of detractors, and when faced with public opposition, the public approval process is likely to fall apart as politicians choose politically safe neighborhood protection over development.⁴²

Local governments also face hurdles when approving large, multi-use projects. Such projects require long-term political support, usually over the course of multiple administrations.⁴³ Funding for infrastructure improvements related to developments is also scarce; for example, federal funding for local infrastructure has long been on the decline.⁴⁴ Cash-strapped local governments have been forced to add increasingly high impact fees to new developments, a cost which is often passed on to new home buyers by the developer.⁴⁵

To overcome these obstacles, modern zoning decisions are now often made by local governments working in direct negotiations with individual developers.⁴⁶

37. One difficulty facing large mixed-use developments which is not discussed in this Note is the impact of *Kelo v. City of New London*, 545 U.S. 469 (2005), and subsequent state legislation on the use of eminent domain as a tool for facilitating smart growth and urban renewal. For a discussion of the effects of post-*Kelo* eminent domain legislation for smart growth and urban renewal on large, mixed-use projects, see generally Blais, *supra* note 35 (discussing *Kelo*'s arresting effect on ongoing urban development and revitalization projects and the associated legislative responses).

38. Green, *supra* note 9, at 383.

39. *Id.* at 390.

40. *See id.*

41. *Id.* at 389-90.

42. Richman, *supra* note 6, at 224.

43. *See* Kent, *supra* note 22, at 5-7.

44. *See* Callies & Sonoda, *supra* note 5, at 354.

45. Such fees disproportionately affect the housing market. For example, impact fees added an average of \$24,325 to the cost of a new home in California in 1999. *Id.* at 371.

46. *See* Green, *supra* note 9, at 389-90. Some commentators have even gone as far as to call for a complete replacement of the piecemeal zoning variance system with mediation. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL.

Direct dealing between local government and developers offers a number of advantages over pure Euclidean zoning.⁴⁷ Yet if such dealings are not checked by a regulatory system and public scrutiny, the risk for inefficiency and abuse is profound.⁴⁸ Thus, a public-private partnership between local government and developers must be contractual in nature yet still incorporate the traditional zoning process.⁴⁹ As discussed in the next Part, the dual contractual-regulatory nature of this partnership creates new constitutional hurdles to land use development.

II. THE CONSTITUTIONAL PROBLEMS FACING LAND USE AGREEMENTS

Historically, several constitutional issues limited the scope of direct negotiations between local governments and private parties over possible legislative action. These included concerns over the government's ability to contractually limit its actions and concerns about the limitations on exactions that government may impose upon parties seeking legislative action.⁵⁰ These limitations are well defined by the Supreme Court, and other than exactions concerns, the constitutional concerns regarding public-private agreements have largely been resolved. However, before discussing the current methods for enabling public-private agreements in zoning negotiations, a look at the concerns that led to their development is appropriate.

A. *The Contract Clause*

The Contract Clause of the U.S. Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁵¹ A literal reading of the Contract Clause would prevent government from passing any laws that

L. REV. 837, 887-93 (1983).

47. There are numerous benefits to direct dealing between local government and developers: [Direct dealing] allows for individualized decisions that take into account the unique features of a particular parcel or project and the availability of measures capable of mitigating adverse land use effects. A carefully tailored set of land use requirements based on a bargaining process may be fairer than traditional regulation: rather than simply treating roughly similar land equally, it takes into account specific characteristics and problems that justify variations from a potentially overbroad norm. Furthermore, the bargaining process may be more efficient because it facilitates cost-efficient outcomes and substitutes a potentially cheaper decisionmaking process that fosters prompt and amicable compromises while avoiding the costs attendant to protracted administrative and judicial appeals.

Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 960 (1987).

48. *Id.* at 960-61.

49. *Id.* at 963-65.

50. Callies & Sonoda, *supra* note 5, at 356-60, 381-87.

51. U.S. CONST., art I, § 10, cl. 1.

would impair the execution of obligations found in contracts in which the Government is a party.⁵² Yet the Contract Clause is not a literal bar to all government actions, as no court has interpreted the clause as preventing the states from exercising their police powers to ensure the health and safety of the people.⁵³ Instead, the Supreme Court has developed a balancing test to determine if a particular action impairs a contract.⁵⁴ A government act must be balanced against the impact such action has on a contract, and will be found constitutional "if it is reasonable and necessary to serve an important public purpose."⁵⁵

A threshold question that must be answered before completely investigating the impact of the Contract Clause is whether land use agreements between local governments and developers qualify as contracts subject to the Contract Clause.⁵⁶ The relationship between local government and developers is never strictly contract based, as the ever-increasing complexity of local, state and federal land use regulations define much of the relationship.⁵⁷ One of the earliest Contract Clause interpretations determined that a true contract is not needed for a contractual relationship with the government to be formed.⁵⁸ Yet not all relationships between government and private parties will rise to the level of a contractual obligation.⁵⁹ Subtle factors such as legislative language and the context of the government's actions are involved in determining whether the relationship is contractual.⁶⁰ Deals that involve the government as a party also have an additional layer of complexity under the Contract Clause; accordingly, they must be examined to determine if they have an impermissible blend of contract and police powers under the reserved powers doctrine.⁶¹

52. See *Callies & Sonoda*, *supra* note 5, at 386.

53. See *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977); see also *Callies & Sonoda*, *supra* note 5, at 386-87.

54. *U.S. Trust Co.*, 431 U.S. at 21 ("We must attempt to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' necessarily reserved by the States to safeguard the welfare of their citizens.").

55. *Id.* at 25. The police powers and Contract Clause concerns are typically dismissed by courts so long as the contracts are just, fair, reasonable and serve a legitimate public purpose. See, e.g., *Pima County v. Grossetta*, 97 P.2d 538, 541 (Ariz. 1939); *Carruth v. City of Madera*, 43 Cal. Rptr. 855, 860 (Ct. App. 1965); *Douglas v. City of Dunedin*, 202 So. 2d 787, 789 (Fla. App. 1967); *Pitzer v. City of Abilene*, 323 S.W.2d 623, 626 (Tex. App. 1959).

56. See *Wegner*, *supra* note 47, at 963.

57. See *Green*, *supra* note 9, at 448-54.

58. *Fletcher v. Peck*, 10 U.S. 87, 137 (1810) ("[The words of the Contracts Clause] are general, and are applicable to contracts of every description.").

59. Compare *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885) (law which fixed pay rate for an attorney was an implied contract; therefore, state could not reduce pay after the services had been rendered), with *Douglas v. Kentucky*, 168 U.S. 488 (1897) (statute granting operation of lottery to private party was not a contract subject to Contract Clause). See also *Wegner*, *supra* note 47, at 963-64.

60. See *Wegner*, *supra* note 47, at 963-64.

61. See *id.* at 967.

B. Reserved Powers Doctrine

The reserved powers doctrine is a special limitation on the scope of the Contract Clause.⁶² An agreement that bargains away the state's police powers is void ab initio and not subject to the protections of the Contract Clause.⁶³ This rule, known as the reserved powers doctrine, has been black letter law since first defined by the Supreme Court in the 1879 case of *Stone v. Mississippi*.⁶⁴ The rule also prevents state legislatures from bargaining away their future right to use police powers.⁶⁵ The Court in *Stone* found that contracting away police power exceeds the authority given to the state by the people.⁶⁶ Zoning regulation is a delegation of the state's police power; therefore, local governments are similarly bound by such regulation.⁶⁷ Thus, local governments cannot give up their right to actions which promote the public health, safety, and welfare, such as the right to improve streets and other public infrastructure.⁶⁸

The Court in *Stone* did not establish a specific test for when the reserved powers doctrine is violated. In fact, the court recognized that police powers are difficult to define and "vary with varying circumstances."⁶⁹ Generally courts look for factors which indicate an impermissible blend of police powers and contract, such as a lack of government authority, a granting of unwarranted private rights, and an immediate public interest that is adversely impacted.⁷⁰ Additionally, some attention should be paid to the duration of the agreement, as the majority of cases invalidating an agreement have done so on the grounds that long-term or

62. *U.S. Trust Co.*, 431 U.S. at 21.

63. *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877).

64. 101 U.S. 814 (1879); *see also* *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 484-85 (Wis. 2006) ("The principles of *Stone* remain good law.).

65. *Stone*, 101 U.S. at 817-18. The court stated,

"Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

Id. (quoting *Metro. Bd. of Excise v. Barrie*, 34 N.Y. 657, 668 (N.Y. 1866)).

66. *Id.* at 820 ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.").

67. 6 Zoning and Land Use Controls, *supra* note 17, § 35.03[2][a]-[b].

68. *Wabash Ry. Co. v. Defiance*, 167 U.S. 88, 97-98 (1897). The court held,

[T]he right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety, and morals of its inhabitants.

Id.

69. *Stone*, 101 U.S. at 820.

70. *See* *Wegner*, *supra* note 47, at 967.

permanent agreements not to exercise police power are per se invalid.⁷¹

C. Contract Zoning

As previously mentioned, developers and local government each have something the other desires with regard to a land use project—regulatory freezes or rezoning for the developer and funding of public infrastructure or other exactions for the government. Contract zoning occurs when this promise or performance from the developer is directly exchanged for an agreement to either rezone a property or freeze zoning regulations in their current form.⁷² Specifically, courts look to whether the government “‘enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property.’”⁷³ This contracting away of the state’s police power violates the reserved powers doctrine.⁷⁴ Additionally, contract zoning requires local government to bind itself to a particular course of action, something which may violate the public duties that the local government must observe in granting zoning applications.⁷⁵ Thus, in order to avoid reserved powers and statutory roadblocks, developers and local governments must frame their agreements in such a manner as to avoid truly contracting away their police powers while still observing the requirements of the formal zoning approval process.

D. Exactions and the Nollan/Dolan Test

A final hurdle to negotiated land use agreements is a limitation on the scope and nature of exactions requested by the government. Exactions in the form of fees and dedications have long been a tool for controlling growth and offset the impact a development has on their community’s public infrastructure.⁷⁶ These fees, while arguably justified as an exercise of the government’s police power to promote public welfare, often go beyond the scope of an individual development.

71. See Callies & Sonoda, *supra* note 5, at 382-83.

72. McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002).

73. *Id.* (quoting 3 RATHKOPF ET AL., *supra* note 1, § 44:11).

74. *Id.* However, agreements involving zoning are not per se illegal as contract zoning; it is the nature of the agreement and the zoning action that determine the illegality. *Id.*

75. For example, public accountability laws, commonly referred to as “Sunshine Laws,” often require local legislative actions such as zoning to be held open to public comment prior to their approval. See, e.g., CAL. GOV’T CODE § 54953 (West 1997); FLA. STAT. ANN. § 286.011 (West 2003); OHIO REV. CODE ANN. § 121.22 (West 2007). An agreement between developers and local government prior to such a hearing may be viewed as rendering the public accountability illusory and thus in violation of the state’s Sunshine Law. See, e.g., Trancas Prop. Owners Ass’n v. City of Malibu, 41 Cal. Rptr. 3d 200, 206-07 (Ct. App. 2006); Chung v. Sarasota County, 686 So. 2d 1358, 1360 (Fla. Dist. Ct. App. 1996).

76. The use of such fees can be traced back to the invention of the subdivision, when local governments began charging a premium for subdivision platting as a simpler alternative to describing land by metes and bounds. See Callies & Sonoda, *supra* note 5, at 354.

The assessment of fees for the impact the development will have on large, shared public facilities invites scrutiny by the courts under the U.S. Constitution's Fifth Amendment Takings Clause to determine if a taking of private property for public use without just compensation has occurred.⁷⁷

Determining whether an exaction rises to the level of a taking is done under the test developed by the U.S. Supreme Court in *Nollan v. California Coastal Commission*⁷⁸ and *Dolan v. City of Tigard*.⁷⁹ In *Nollan*, homeowners questioned public beach access requirements placed upon a landowner as a condition for a building permit.⁸⁰ The Court, in holding that an unconstitutional taking had occurred, said there must be an "essential nexus" between the condition or exaction placed upon the owner, and the owner's purpose for the land, even when the condition imposed serves a valid government purpose.⁸¹

The *Nollan* court did not address what degree of relationship between the condition and the land's use constituted a nexus. This issue was subsequently addressed in *Dolan*, where the Court's majority held that local governments must demonstrate a relationship between the conditions imposed on a development and the development's impact on the community.⁸² In *Dolan*, a business owner applied for permission to expand the size of her store's parking lot. In return, the City required the business owner to donate a portion of her land as a public greenway and bicycle path. The City attempted to justify these requirements as necessary to offset the increased water runoff and vehicle traffic her larger parking lot would cause.⁸³ The Court, in finding that the City's requirements were an unconstitutional taking, required the condition to be in "rough proportionality" to the impact of the development.⁸⁴

The combined *Nollan/Dolan* test sets three standards that conditions imposed by local government must meet in order to pass the takings test. The condition must: 1) promote a legitimate government interest; 2) share an essential nexus with the development; and 3) be proportional to the need created by the development.⁸⁵ The test's limits on the scope of exactions are beneficial to developers, but also have unintended drawbacks.

First, the *Nollan/Dolan* test is more likely to be applied to exactions made on an ad hoc basis.⁸⁶ General legislation that applies to all developments in a community is usually not subject to the *Nollan/Dolan* test.⁸⁷ These general laws

77. See U.S. CONST. amend. V, cl. 3; Callies & Sonoda, *supra* note 5, at 355.

78. 483 U.S. 825 (1987).

79. 512 U.S. 374 (1994). For further commentary on the application of the *Nollan/Dolan* test to common exactions found in land use agreements, see Callies & Sonoda, *supra* note 5, at 354-80.

80. *Nollan*, 483 U.S. at 827-29.

81. *Id.* at 837.

82. *Dolan*, 512 U.S. at 390-91.

83. *Id.* at 379-80.

84. *Id.* at 390-91.

85. See Callies & Sonoda, *supra* note 5, at 360.

86. *Id.* at 369.

87. *Id.* at 367-69.

often assess impact fees according to fixed schedules in an attempt to meet the proportionality requirements of *Nollan* and *Dolan*.⁸⁸

Second, this trend toward uniformity, which *Nollan* and *Dolan* encourage, comes at the expense of market competition. "In fact, taken together, the nexus and proportionality doctrines stand for the proposition that most potential bargains are bad. Nexus and proportionality erect a jurisprudential barrier to value-creating exchange that would lie at the heart [sic] of successful negotiated resolutions to land use conflicts."⁸⁹ In many cases, the benefits of nonuniform exactions may outweigh the fairness concerns behind the *Nollan/Dolan* test: "Nonuniform property protection could provide a previously unidentified source of interlocal competition, allowing different communities to satisfy different demands by offering competing packages of property rights."⁹⁰

Third, under the *Nollan/Dolan* test, local governments lost the benefits that would occur under a market-oriented approach, where local governments are allowed to set varying levels of conditions on development.⁹¹ According to Professor Charles Tiebout's famous theory on local government competition, a balance of taxes versus services drives where residents choose to live, which in turn drives where a developer chooses to place his project.⁹² Conditions that support beneficial services greater than the specific impact of the development may be desirable to some developers, and if not, the developer can inform the local government that the conditions imposed are too high by simply taking his investment to another, more favorable municipality.⁹³

III. THE SOLUTIONS THUS FAR: CONDITIONAL ZONING AND DEVELOPMENT AGREEMENTS

One possible method of avoiding the constitutional concerns facing these public-private agreements is for developers to *voluntarily* impose conditions upon themselves, in the hope of a favorable regulatory decision by the local government.⁹⁴ This is the idea behind conditional zoning, a variation on contract

88. *Id.* at 371-74.

89. Erin Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Conflicts*, 7 HARV. NEGOT. L. REV. 337, 376 (2002).

90. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 884-85 (2007).

91. *Id.* at 887-88 (applying Professor Vicki Been's theory that exactions are constrained by market competition between local governments). For more on Professor Been's market-oriented theory of exactions, see Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 521 (1991).

92. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417-20 (1956). For a modern approach to Tiebout's theory and its impact on land development, see Serkin, *supra* note 90, at 886.

93. See Serkin, *supra* note 90, at 887-89.

94. See Callies & Sonoda, *supra* note 5, at 403-04.

zoning which has largely been accepted as constitutional.⁹⁵ However, conditional zoning is limited in the scope of problems that it is capable of addressing. Conditional zoning agreements are also often unenforceable against the local government, who offers little recourse to the developer if local governments decide to back out of a proposed agreement.⁹⁶ An alternative to conditional zoning is statute-based development agreements. Such agreements avoid many of the scope and enforcement concerns of conditional zoning through clearly defined enabling statutes.⁹⁷

A. Conditional Zoning

1. *Advantages of Conditional Zoning and Differences from Contract Zoning.*—Conditional zoning is essentially a specialized form of contract zoning which purports to avoid the illegality of standard contract zoning.⁹⁸ The problem with contract zoning is the bilateral exchange of promises between the developer and local government requires the government to contract away powers it has no right to alienate. Conditional zoning attempts to solve this problem by framing this agreement as a *unilateral* promise by the developer, conditioned on the local government's future approval of a zoning application.⁹⁹ Typically this promise is made either through a zoning ordinance, or in the form of a binding covenant upon the developer's land which sets forth certain actions the developer will take if the desired regulations are passed.¹⁰⁰ Local government is thus not obligated by contract to pass certain legislation, removing concerns of violating the reserved powers doctrine. Additionally, because developers voluntarily promise to abide by certain conditions under conditional zoning, the *Nollan/Dolan* test regarding the nexus and proportionality of conditions may not apply.¹⁰¹

2. *Initial Problems with Conditional Zoning and the Modern Approach.*—Multiple concerns over the legality of conditional zoning have been raised over the years. First and foremost is the question of whether conditional zoning is, just like contract zoning, per se illegal. One of the earliest examinations of conditional zoning found that it exceeds the scope of power provided in zoning

95. 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

96. *See, e.g.*, *Morgan Co. v. Orange County*, 818 So. 2d 640 (Fla. Dist. Ct. App. 2002). This case is discussed *infra* text accompanying notes 134-38.

97. *See infra* Part III.B.3.

98. Some commentators have viewed contract zoning and conditional zoning as merely two ends of the same spectrum of "contingent zoning" actions. The term "contract zoning" is simply applied to those with an illegal outcome, while "conditional zoning" applies to those which courts view more favorably. *See* Wegner, *supra* note 47, at 978-82.

99. 1 Zoning and Land Use Controls, *supra* note 17, § 5.01[2]-[4].

100. *Id.* § 5.01[2].

101. *See, e.g.*, *City of Annapolis v. Waterman*, 745 A.2d 1000, 1017-18 (Md. 2000). *But cf.* *T-Mac, LLC v. Mayor & Common Council of Westminster*, 2007 U.S. Dist. Lexis 61478, *2 n.1 (D. Md. 2007).

legislation.¹⁰² If the zoning is truly a unilateral action, then there may be no justification for why a particular parcel has received special exemptions from the comprehensive plan, leading to charges of “spot zoning.”¹⁰³ Concerns have also been raised over the possibility of private abuses of the police power. Developers and local politicians can enter politically beneficial deals without any direct evidence of a deal existing, thus creating a convenient method of distributing political kickbacks.¹⁰⁴

Furthermore, the supposed unilateral nature of conditional zoning covenants does not wholly remove the implication that a contract has been formed. Thus, even if the local government takes regulatory action without a binding contract directing such action, a regulatory decision in the developer’s favor could be seen as the result of an implied contract for spot zoning between the developer and local government.¹⁰⁵ If such an implied contract exists and the government’s decision prior to zoning hearings, then the government also violates procedural requirements of the zoning process, such as public notice prior to a final decision.¹⁰⁶

The majority of modern courts have moved beyond these concerns and approve the use of conditional zoning as a valid land use regulatory tool.¹⁰⁷ For example, Indiana has passed a statutory provision enabling developers to submit commitment proposals to be considered as part of a zoning hearing.¹⁰⁸ Under the modern perspective, conditional zoning is distinguished from contract zoning, and generally will be upheld if: 1) the regulatory action promotes public welfare and not merely a private interest; 2) the regulatory action does not constitute spot zoning; 3) the conditions are reasonable and legal; and 4) the government has not expressly contracted away their police powers.¹⁰⁹

102. See, e.g., *V. F. Zahodiakin Eng’g Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131-32 (N.J. 1952).

103. *State ex rel. Zupancic v. Schimenz*, 174 N.W.2d 533, 539 (Wis. 1970). Spot zoning is “an arbitrary zoning or rezoning of a small tract of land that is not consistent with the comprehensive land use plan and primarily promotes the private interest of the owner rather than the general welfare.” 1 RATHKOPF ET AL., *supra* note 1, § 1:39.

104. See, e.g., *Goffinet v. County of Christian*, 333 N.E.2d 731, 736 (Ill. App. Ct. 1975) (describing conditional zoning as “neither all bad, nor all good” and finding the legality of a conditional zoning agreement dependant on the intentions of the zoning board); *V. F. Zahodiakin Eng’g Corp.*, 86 A.2d at 131 (finding that “undue hardship” is a valid reason for a zoning board placing special conditions on a zoning permit).

105. See *Knight v. Lynn Twp. Zoning Hearing Bd.*, 568 A.2d 1372, 1375-76 (Pa. Commw. Ct. 1990). *But see Zupancic*, 174 N.W.2d at 538-39 (holding that municipalities and landowners may contract as a motivation for rezoning so long as the rezoning is not spot zoning intended entirely for the benefit of the developers).

106. See *infra* note 166.

107. 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

108. See, e.g., IND. CODE § 36-7-4-613 (2007) (written proposals submitted by developer become a binding part of the zoning ordinance if approved).

109. 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

3. *Remaining Problems with Conditional Zoning.*—Although the majority of jurisdictions now favor conditional zoning,¹¹⁰ limitations still exist. Many courts still object to certain uses of conditional zoning on the basis that such uses destroy the uniformity of Euclidean zoning districts.¹¹¹ Other problems with conditional zoning are more fundamental. Conditional zoning is likely to violate the reserved powers doctrine if local government expressly agrees to limit its future regulatory powers toward the subject land.¹¹² Thus, developers cannot seek express regulatory freezes, but must instead rely on a local government's assurance to rezone and permit the development.¹¹³ The framing of conditional zoning agreements as a unilateral promise makes enforcement of such an agreement difficult, leaving a developer with little recourse should a local government entity change its mind and abandon the proposed zoning action.¹¹⁴ While a properly worded promise will not bind the developer further once the desired zoning has been revoked, the developer will still be out significant amounts of money if politics no longer support his proposal.¹¹⁵

B. Development Agreements

1. *Advantages of Development Agreements.*—Development agreements first came into prominence after the 1979 passage of a statute in California allowing local governments to enter into specific bilateral contracts with private developers.¹¹⁶ Development agreements are primarily statute based, which allows local governments to avoid the reserved powers and Contract Clause issues that arise when governments attempt to freeze regulations.¹¹⁷

Development agreement statutes offer a number of advantages over conditional zoning.¹¹⁸ One of the major problems with conditional zoning

110. See *id.* (noting that “many courts evidencing a modern trend, have expressly upheld or strongly indicated support for conditional rezoning,” and listing the states and decisions in footnote 1).

111. See, e.g., *Bartsch v. Planning & Zoning Comm'n*, 506 A.2d 1093 (Conn. App. Ct. 1986); *Mayor of Rockville v. Rylins Enters.*, 814 A.2d 469, 501 (Md. 2002). For detailed analyses of these cases and their arguments regarding conditional zoning and uniformity, see Green, *supra* note 9, at 448-54.

112. See Green, *supra* note 9, at 458.

113. See, 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

114. See *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla Dist. Ct. App. 2002). This case is discussed further *infra* text accompanying notes 134-38.

115. See *Kent*, *supra* note 22, at 5-6.

116. See CAL. GOV'T CODE §§ 65864-69 (West 1997); 1 Zoning & Land Use Controls, *supra* note 17, § 5.06.

117. 2 Zoning and Land Use Controls, *supra* note 17, § 9A.02.

118. In addition to avoiding constitutional problems found under contract zoning and conditional zoning, development agreements offer a number of advantages both to developers and to local governments:

Under the development agreement model of land use controls, the developer gains

agreements is that no matter how separate a developer's covenants appear from the local government's legislative decisions, the air of implied contract still permeates the arrangement.¹¹⁹ Development agreement statutes respond to this problem by incorporating conditions as part of the approval process and providing for public oversight in the form of hearings prior to approval of the agreement.¹²⁰ Development agreement statutes also require agreements to limit the time over which a regulatory freeze may operate.¹²¹ Moreover, the statutes often require that the development agreement conform to a comprehensive plan, eliminating concerns over spot zoning.¹²² The statutes also provide for regular compliance reviews over the course of the agreement to ensure a developer is complying with the requirements of the agreement.¹²³

2. *Reserved Powers and Development Agreements.*—Theoretically, the statutory basis of development agreements provides some protection against the constitutional problems associated with contract and conditional zoning. Thus far, however, only a California appellate court has ruled on the validity of regulatory freezes under development agreements, in the case of *Santa Margarita Area Residents Together v. San Luis Obispo County (SMART)*.¹²⁴ In *SMART*, a coalition of neighborhood associations challenged the development agreement created for the redevelopment of a 13,800 acre ranch.¹²⁵ The agreement called for a five-year regulatory freeze so as to allow the developer to conduct both

the following: (1) certainty as to the governing regulations for the development project; (2) the ability to bargain for support and the coordination of approvals; (3) easier and less-costly financing because of the reduction of the risk of non-approval; (4) the ability to negotiate the right to freeze regulations as to changes in the project; (5) predictability in scheduling the phases of the development; and (6) a change in the dynamics of the development process from confrontation to cooperation.

The municipality gains the following: (1) the facilitation of comprehensive planning and long-range planning goals; (2) commitments for public facilities and off-site infrastructure; (3) public benefits otherwise not obtainable under regulatory takings doctrine; and (4) the avoidance of administrative and litigation costs and expenditures.

Green, *supra* note 9, at 394.

119. State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 539 (noting that landowners may make contracts that are used by zoning boards as motivation for zoning approval, but cautioning that a fine line exists between using a contract as motivation and entering into a bargain: "In recognizing the legality of what was done here, we caution that the procedure might well lead to an agreement with the zoning authority which might be fatal.").

120. See, e.g., CAL. GOV'T CODE § 65867 (West 1997); HAW. REV. STAT. ANN. § 46-128 (LexisNexis 2007).

121. See, e.g., CAL. GOV'T CODE § 65865.2 (West 1997); HAW. REV. STAT. ANN. § 46-126(a)(4) (LexisNexis 2007).

122. See, e.g., CAL. GOV'T CODE § 65867.5(b) (West 1997 & Supp. 2008); HAW. REV. STAT. ANN. § 46-129 (LexisNexis 2007).

123. See, e.g., CAL. GOV'T CODE § 65865.1 (West 1997).

124. 100 Cal. Rptr. 2d 740 (Ct. App. 2000).

125. *Id.* at 742.

planning and building under the freeze.¹²⁶ The court declined to find an unconstitutional surrender of police powers, “unless the contract amounts to the ‘surrender’ or ‘abnegation’ of a proper governmental function.”¹²⁷ Instead, the development agreement “is more accurately described as a legitimate exercise of governmental police power in the public interest than as a surrender of police power to a special interest.”¹²⁸ In other words, rather than being a limitation on future police powers, the regulatory freeze itself is a valid exercise of current police powers. This view of a development contract completely reverses the view of similar agreements under contract zoning principles and emphasizes the importance of enabling legislation.¹²⁹ Without an enabling statute, development agreements offering regulatory freezes are likely per se invalid instances of contract zoning.

3. *Shortcomings and Remaining Problems.*—Despite the obvious advantages of development agreements over conditional zoning, a few remaining concerns limit their effectiveness. The main limit on the effectiveness of development agreements is the significance of enabling legislation to ensure true enforceability.¹³⁰ As of 2005, only fifteen states had passed development agreement statutes.¹³¹ The bilateral nature of a development agreement makes their enforcement in states which object to contract zoning highly unlikely. In fact, only two states without development agreement statutes have upheld the use of development agreements.¹³² As demonstrated by the *SMART* court, enabling statutes drastically change the court’s perspective on the validity of contractual

126. *Id.* at 743.

127. *Id.* at 748 (quoting *Morrison Homes Corp. v. City of Pleasanton*, 103 Cal. Rptr. 196, 202 (Ct. App. 1976)).

128. *Id.* (citing *Morrison Homes Corp.*, 103 Ca. Rptr. at 202).

129. *See Callies & Sonoda, supra* note 5, at 381-86.

130. DAVID L. CALLIES ET AL., *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES* 97 (2003).

131. Thirteen states have passed comprehensive development agreement enabling statutes allowing bilateral negotiations between local governments and private developers. *See, e.g.*, ARIZ. REV. STAT. ANN. § 24-68-102 (2008); FLA. STAT. ANN. § 163.3220 (West 2006); HAW. REV. STAT. ANN. § 46-121 (Lexis Nexis 2007); IDAHO CODE ANN. § 67-6511A (West 2006); LA. REV. STAT. ANN. § 33:4780.21 (2002); MD. ANN. CODE art. 66B, § 13.01 (2002); NEV. REV. STAT. ANN. § 278.0201 (West 2000); N.J. STAT. ANN. § 40:55D-45.2 (West 2008); OR. REV. STAT. ANN. §§ 94.504-94.528 (West 2003 & Supp. 2008); S.C. CODE ANN. § 6-31-10 (2004); WASH. REV. CODE ANN. §§ 36.70B.170-36.70B.190 (West 2003). A number of other states allow development agreements in limited circumstances, such as municipal annexations. *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 2005).

132. *See Giger v. City of Omaha*, 442 N.W.2d 182, 190 (Neb. 1989) (finding development agreements to be a form of conditional zoning); *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 512 N.W.2d 202, 205 (Wis. Ct. App. 1993) (finding that the city’s promise to cooperate toward making the project successful did not circumvent the normal approval process, and thus did not contract away the state’s police power).

zoning arrangements.¹³³ In order to ensure the constitutionality of development agreements, an enabling statute appears necessary.

While development agreements make it possible for local governments to offer highly desirable regulatory freezes to developers, not everything a developer might require is guaranteed through a development agreement. For example, in the Florida appellate case of *Morgran Co. v. Orange County*,¹³⁴ a developer entered into a development agreement calling for the immediate rezoning of a property.¹³⁵ However, the developer, perhaps wary from prior experience under conditional zoning agreements, did not request a binding commitment to rezone, but rather merely required the city to “support and expeditiously process” the rezoning request.¹³⁶ Under mounting political pressure, the zoning commission then changed its mind on the proposed rezoning and sought to disavow the development agreement.¹³⁷ The court held that a commitment to “support” rezoning amounted to a contracting away of the commission’s final authority on rezoning.¹³⁸ The developer in *Morgran* was essentially in an impossible position. Attempting to bind the county to a particular rezoning decision would likely have resulted in a violation of the reserved powers doctrine. Yet any language less binding would have left the county with no obligations under the development agreement. Ultimately, development agreements will not be able to fully protect against shifting political attitudes to a project unless a concerted effort is made to involve the community.¹³⁹

One final unresolved issue with development agreements is the applicability of the *Nollan/Dolan* takings test. No court has directly addressed the applicability of this test to statutory development agreements.¹⁴⁰ Case law regarding conditional zoning agreements indicates that if the conditions are truly

133. *SMART*, 100 Cal. Rptr. 2d at 748-49 (noting the California development agreement statute expanded police power to allow contemporary approaches to development that might otherwise have been deemed a surrender of the state’s police power).

134. 818 So. 2d 640 (Fla. Dist. Ct. App. 2002).

135. *Id.* at 641.

136. *Id.*

137. *Id.* at 642.

138. *Id.*

139. *See infra* Part IV.

140. *See* Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission* 483 U.S. 825 (1987), 22 URB. LAW. 23, 28 (1990). Perhaps the closest a court has come to ruling on the applicability of the *Nollan/Dolan* test to development agreements was *Toll Brothers v. Board of Chosen Freeholders*, 944 A.2d 1 (N.J. 2008). In *Toll Bros.*, the New Jersey Supreme Court considered whether a development agreement could restrain a developer from applying for additional payments based on changed circumstances, as permitted by a separate New Jersey statute which codifies the *Nollan/Dolan* test. The court found such a limitation unfairly restrictive, and in violation of the nexus and proportionality requirements of the statutory *Nollan/Dolan* test. *Id.* at 16-18. The court discussed the nature and benefits of development agreements at length, but did not directly subject this one to the *Nollan/Dolan* test. *Id.*

voluntary submissions by the developer, then *Nollan/Dolan* does not apply.¹⁴¹ However, a court's view of what is truly voluntary may be entirely persuaded by the statutory nature of development agreements. Courts and commentators have noted that it is often "very difficult to tell whether a landowner's acceptance of a condition is truly voluntary or is instead a submission to government coercion."¹⁴² In *Rocky Mountain Christian Church v. Board of County Commissioners*,¹⁴³ the Federal District Court for Colorado characterized a development agreement between the county and a church as "required" by the county as a condition for rezoning.¹⁴⁴ The court dismissed the church's claims on statute of limitations grounds,¹⁴⁵ but the implication is clear that a requirement to enter into a development agreement may well place its conditions within the realm of *Nollan/Dolan* requirements.¹⁴⁶

The *Nollan/Dolan* test also fails to apply to development agreements because, in most cases, development agreements are promises of forbearance from action, rather than promises of action on the part of the local government.¹⁴⁷ Specifically, the authors note, "In the case of a development agreement, the municipality is not granting the landowner the right to develop nor imposing conditions on such development, but instead promising to protect the developer's investment by not enforcing any subsequent land-use regulation that may burden the project."¹⁴⁸ The development going forward is not strictly contingent on the board's action, making existence of a nexus to the development irrelevant.¹⁴⁹ Viewed in this light, the only test from *Nollan/Dolan* which still applies would be a requirement that the exaction be reasonable.¹⁵⁰ This requirement serves as an important guard against public abuse of development agreements.¹⁵¹ However, because development agreement enabling statutes broadly define what is an appropriate exaction, it is likely that only the most egregious abuses would be deemed unreasonable.¹⁵²

141. See, e.g., *City of Annapolis v. Waterman*, 745 A.2d 1000, 1017-18 (Md. 2000) (subdivision agreement between city and developer was not an unconstitutional taking of developer's property).

142. Crew, *supra* note 140, at 46.

143. 481 F. Supp. 2d 1213 (D. Colo. 2007).

144. *Id.* at 1225.

145. *Id.* at 1226.

146. *Id.* at 1225-26.

147. See Callies & Sonoda, *supra* note 5, at 405-06.

148. *Id.*

149. *Id.*

150. See Crew, *supra* note 140, at 53 ("The test for reasonableness of exactions does not vary according to whether they are 'voluntary' or not, *Nollan* applies even where the developer has agreed to the condition.").

151. *Id.* at 50-55.

152. For example, Hawaii's development agreement statute states, "Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on-and off-site infrastructure and other improvements. Such benefits may be

IV. COMMUNITY BENEFIT AGREEMENTS

A. *What Are Community Benefit Agreements?*

A community benefit agreement (CBA) is an agreement made between developers and representatives of a broad sampling of the communities most likely to be affected by the proposed development.¹⁵³ CBAs provide benefits to both the developer and the community organizations, while providing a means for both groups to enforce the other's promises.¹⁵⁴ In essence, CBAs allow the developer to preemptively address community concerns, avoiding much of the protracted negotiations associated with a court challenge to a large project after final approval.¹⁵⁵

The problems and concerns addressed in a CBA are dependent on the facts of a particular development, and, thus, no standard form exists for such an agreement.¹⁵⁶ Yet, all CBAs offer several established benefits to both the developer and the community. First, a CBA provides enforceability of promises.¹⁵⁷ Both the developer's promises to improve a community and the community coalition's support for the development are bound in a legally enforceable contract.¹⁵⁸ Second, a CBA provides clarity by requiring developers and community coalitions to specify their promises in writing.¹⁵⁹ Local governments gain a clear list of tangible benefits resulting from their approval of the development.¹⁶⁰ A CBA also provides accountability, not just to the community coalition and the developer, but to the public at large, as the numerous organizations within a coalition, local government, and the media will

negotiated for in return for the vesting of development rights for a specific period." HAW. REV. STAT. ANN. § 46-121 (LexisNexis 2007).

153. JULIAN GROSS ET AL., COMMUNITY BENEFIT AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9 (2005), available at http://www.laane.org/docs/research/CBA_Handbook_2005.pdf. The first CBA was developed by the Los Angeles Alliance for a New Economy (LAANE), a community coalition that successfully used a CBA to influence development of the Hollywood and Highland entertainment complex (Kodak Theater) in the late 1990's. LAANE, *Community Benefit Agreements*, <http://www.laane.org/policy/cbas.html> (last visited Sept. 16, 2008).

154. See GROSS ET AL., *supra* note 153, at 9-10.

155. Michael A. Cardozo, *The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 FORDHAM URB. L.J. 797, 803 (2007) (noting that the CBA is, in effect, "a form of mediation before litigation even begins").

156. See GROSS ET AL., *supra* note 153, at 10-11. Common benefits bargained for in a CBA include fair housing subsidies, "first source" hiring policies, day care, living wage covenants enforceable against retail tenants, and environmental benefits. *Id.*

157. *Id.* at 21.

158. *Id.* at 11-14.

159. *Id.* at 21-22.

160. *Id.* at 22.

all have exposure to the development of the agreement and opportunities to monitor its implementation.¹⁶¹ Finally, by addressing a community's issues upfront, the developer avoids delays during the approval process which have the potential to inconvenience and frustrate the developer, local government, and the public at large to equal degree.¹⁶²

Because a CBA benefits more than just the parties signing the agreement, the best solution for securing the benefits of a CBA for all affected is to incorporate the CBA into a development agreement between the developer and local government.¹⁶³ This essentially makes the government a party to the CBA, allowing local government to enforce the CBA's provisions against the developer.¹⁶⁴ Incorporation of a CBA into a development agreement also presents an opportunity to incorporate meaningful public participation into the zoning approval process. Development agreements between local government and a developer have the potential to turn public zoning hearings into closed door negotiations,¹⁶⁵ violating public accountability requirements for such governmental actions.¹⁶⁶ Public input in the form of a CBA ensures that, along with the required public hearings,¹⁶⁷ the community's voice is heard at every step of the negotiation and approval process.

B. CBAs as Solution to Problems with Development Agreements

Because negotiations are conducted directly with the community, developers can avoid two major problems with standard land use agreements negotiated solely with local government. First, the community's bargaining chip in the negotiations is political pressure on behalf of the development.¹⁶⁸ The community coalition's ability to bring about a CBA depends directly on the developer's need

161. *Id.*

162. *Id.*

163. The Partnership for Working Families, *Legal Issue: CBAs and Development Agreements*, <http://www.communitybenefits.org/article.php?id=562> (last visited Sept. 16, 2008).

164. See GROSS ET AL., *supra* note 153, at 9-10.

165. See Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 59-61 (2006).

166. Settlement of a zoning dispute without public input may violate a state's "Sunshine Law," which ensures that certain legislative processes, such as zoning boards, are open and accessible by requiring public meetings for many local government functions. Two recent decisions invoked the Brown Act, California's Sunshine Law, in voiding zoning dispute settlements based upon a lack of a public hearing to discuss the settlements, which essentially granted a zoning permit in exchange for consideration from the developer. See *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056-57 (9th Cir. 2007); *Trancas Prop. Owners Ass'n v. City of Malibu*, 41 Cal. Rptr. 3d 200, 206-07 (Ct. App. 2006). While neither case involved a development agreement under California's development statute, it is likely that the Sunshine Law's public scrutiny requirement would apply to the approval of development agreements as well.

167. See, e.g., CAL. GOV'T CODE §§ 54952.6, 54953(a) (West 1997).

168. See GROSS ET AL., *supra* note 153, at 9; Marcello, *supra* note 10, at 659-60.

for zoning approval, public subsidies, and other benefits approved by local government.¹⁶⁹ If the developer already has sufficient financial and political backing, community coalitions lack the leverage with which to negotiate a CBA.¹⁷⁰ Whether the developer seeks public subsidies, a zoning variance, or both, the approval comes from publicly accountable bodies, thus making community support a valuable bargaining chip for the developer.¹⁷¹ Perhaps the most important benefit developers receive is support for public subsidies, a crucial part of any large development.¹⁷² When a complex urban project with mixed political support is involved, an agreement ensuring the backing of major community groups can be invaluable as it protects against last minute political shifts that might deny a crucial rezoning approval.¹⁷³ In addition, the considerations are made by the developer to community groups instead of the local government and thus not subject to the *Nollan/Dolan* test for the relationship of the condition to the project.¹⁷⁴ CBAs may then be incorporated into a development agreement, allowing the local government to enforce the provisions of the agreement without the possibility of the conditions violating the *Nollan/Dolan* test.¹⁷⁵

C. CBAs and NIMBY Syndrome

One of the main benefits a developer receives from a CBA is a minimization of the NIMBY effect of their development, a problem largely arising from a lack of community involvement in important development decisions.¹⁷⁶ Large-scale developments which produce benefits to the broader community but disproportionately affect the residents near the development's location (such as an airport) are often the focus of heated protests by local residents.¹⁷⁷ CBAs can bring attention to many issues which might otherwise be overlooked by the

169. See Marcello, *supra* note 10, at 660.

170. *Id.*

171. See GROSS ET AL., *supra* note 153, at 10.

172. See Marcello, *supra* note 10, at 659.

173. See *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla. Dist. Ct. App. 2002), discussed *supra* text accompanying notes 134-38.

174. See Salkin, *supra* note 13, at 1425 n.114 (“Whether CBA provisions constitute exactions, however, is dependent on the local government being significantly involved in developing the CBA . . .”).

175. However, two situations could arise in which the *Nollan/Dolan* test might apply. First is when the government is significantly involved in the CBA negotiation process. See Salkin, *supra* note 13, at 1425. Second, if a state has not enacted a development agreement statute, a CBA which is incorporated into a development agreement with local government may be viewed as an exaction, or worse yet, extortion. *Id.*

176. See Charles G. Field, *Building Consensus for Affordable Housing*, 8 HOUSING POL'Y DEBATE 801 (1997), available at [http://www.mi.vt.edu/data/files/hpd%208\(4\)/hpd%208\(4\)_field.pdf](http://www.mi.vt.edu/data/files/hpd%208(4)/hpd%208(4)_field.pdf); Richman, *supra* note 6, at 225-28.

177. See Richman, *supra* note 6, at 223.

developer and local government, including whether the development is appropriate in scale to the neighborhood and whether the proposal sufficiently cushions the impact it has on local residents.¹⁷⁸

Others have argued that CBAs “have little or nothing to do with the NIMBY . . . problem.”¹⁷⁹ “Area residents who are unalterably opposed to a proposed development simply will not enter into CBA negotiations because that would commit them to support the development. CBAs are not an ‘antidote’ to NIMBY concerns; they essentially inhabit two different worlds.”¹⁸⁰ However, unanimous support is not needed to combat the effects of NIMBY syndrome.¹⁸¹ A CBA addresses the underlying problems of NIMBY disputes—problems such as a lack of communication between developers and the community, a lack of a clear and organized community coalition, and a lack of trust that the developer will follow through on promises.¹⁸² Though CBAs may not have been designed with NIMBY syndrome in mind, the underlying problems addressed by CBAs are effective at minimizing NIMBY development opposition.

One notable example of dealing with NIMBY syndrome through a CBA is the 2004 LAX Airport Expansion.¹⁸³ A community coalition bargained for local benefits for those most affected by the expansion.¹⁸⁴ Benefits were specifically designed to minimize the impact on the neighborhood, including soundproofing of local churches, schools, and residences along flight paths, nighttime flight restrictions, pollution controls, and a local first source hiring policy.¹⁸⁵ By negotiating a CBA with a broad coalition, the city was able to resolve a number of disparate concerns, including environmental, labor, minority and local resident interests.¹⁸⁶

The LAX CBA, like most CBAs, was initiated by a grassroots community movement in response to the development announcement.¹⁸⁷ However, it could be argued the agreement benefited the city as much as it did the community. By obtaining the support of a wide range of interests in advance, the City effectively prevented a number of legal battles which could have delayed or further limited the scope of the airport expansion.¹⁸⁸ Thus, CBAs offer an effective means to

178. See GROSS ET AL., *supra* note 153, at 15.

179. See Marcello, *supra* note 10, at 668.

180. *Id.*

181. Some groups have demands that are simply incompatible with the goals of a CBA. For example, when a development is contingent on the use of eminent domain, property owners unwilling to sell and opposed to eminent domain of their lands will not be a party capable of making any meaningful contributions to a CBA. See *infra* Part IV.D.2.

182. See Richman, *supra* note 6, at 225-28; see also Field, *supra* note 176, at 811-15.

183. *Community Benefits Agreement: LAX Master Plan Program*, available at http://www.laane.org/docs/policy/cbas/LAX_CBA.pdf [hereinafter *LAX Master Plan Program*].

184. See GROSS ET AL., *supra* note 153, at 15-19.

185. *LAX Master Plan Program*, *supra* note 183, at pts. III, V, X.

186. See GROSS ET AL., *supra* note 153, at 15-16.

187. *Id.* at 15-17.

188. See *id.* at 18. Technically, the LAX CBA did not require the community groups to

limit delays caused by NIMBY opposition to highly polarizing development projects.

D. Remaining Issues with CBAs

CBAs are relatively new and untested methods of negotiating land use deals. Most court decisions involving CBAs have only indirectly referenced the CBA, and have provided no analysis of the CBA's legality.¹⁸⁹ Without guidance from the courts, several potential problems will need to be addressed. Although one of the main benefits touted by supporters of CBAs is the enforceability by community organizations, this enforceability has not been tested in court,¹⁹⁰ and questions have been raised about the logistics of enforcing an agreement made with numerous community organizations.¹⁹¹

1. *Enforcement of CBAs.*—Until the enforceability of a CBA is tested in court, the exact scope of a CBA's binding power is unknown.¹⁹² Critics have questioned the enforceability of CBAs due to the lack of any express benefits offered as consideration to the developer within the CBA.¹⁹³ However, this is unlikely to prevent a court's enforcement, as the support offered by community groups is a valid, if intangible, benefit. Specifically, such support is often crucial

promise to support the airport expansion project. This was because the "developer" with whom the agreement was made was a governmental entity. Instead of the usual promises to support zoning approval or public funding requests, the community organizations promised not to file lawsuits to challenge the project. Under either approach, the opposition of a broad range of community interests is resolved prior to development, thus reducing the chances of legal battles that would otherwise delay the project. *Id.*

189. Most opinions thus far have only tangentially dealt with CBAs, often attacking the underlying project on eminent domain grounds, but not addressing the CBA. *See infra* notes 216-17. Perhaps the closest a court has come to addressing the legality of CBAs was the case of *Merced County Farm Bureau v. County of Merced*, No. 150013, (Cal. Sup. Ct. Merced. Co. May 16, 2008). This case addressed the applicability of the California Environmental Quality Act (CEQA) to a CBA's provisions. The court determined that the environmental impact report required by the CEQA prior to approval of a project must include some mention of the impact caused by the CBA's proposed benefits, effectively treating the CBA as a portion of the development itself. *Id.* at *12. Although not directly addressing the legality of the CBA, the court's treatment of the CBA as an integral part of the development bodes well for future attempts to bind developers to a CBA's provisions. For more on the *Merced County* decision, see Amy Lavine, *CBAs Go to Court (for the First Time?)*, <http://communitybenefits.blogspot.com/2008/02/cbas-go-to-court-for-first-time.html> (last visited Sept. 17, 2008); Corinne Reilly, *Judge's Ruling Sends Riverside Motorsports Park Back to Starting Line*, *MERCED SUN-STAR*, Feb. 27, 2008, at A1.

190. *See* Salkin, *supra* note 13, at 1424.

191. *See* GROSS ET AL., *supra* note 153, at 23-24.

192. *See supra* notes 190-91 and accompanying text.

193. *See* Erik Engquist, *Developers' Deal-Making Escalates: Community Benefit Agreements Become Costly As Bloomberg Endorses Concept*, *CRAIN'S NEW YORK BUSINESS*, Mar. 27, 2006, available at 2006 WLNR 5423866.

for developers seeking to gain public funding and zoning regulation amendments.¹⁹⁴ What is still unclear is how enforceable some of the broader provisions common in CBAs will be, such as requiring all businesses within a development to employ workers at a living wage. Many CBAs attempt to bind these future business tenants of a development through restrictive covenant, but this too is untested.¹⁹⁵ Furthermore, it is not clear who within the community coalition has standing to enforce the agreement, or how developers can enforce an agreement against coalition members.¹⁹⁶ Often a loose coalition of community organizations and individuals, usually with the status of an unincorporated association, negotiate the CBA.¹⁹⁷ The enforcement of the agreement by the developer may be problematic if the CBA was signed solely by the coalition. For example, if the developer seeks enforcement against a member of the coalition who is in violation of the agreement, the coalition may respond that the individual is not acting in an official capacity on behalf of the coalition. If the agreement is only enforceable against members of the coalition when acting as a coalition, it is effectively meaningless.¹⁹⁸ If each organization signs individually, then the duties of each organization under the agreement and its right to uphold the agreement may be preserved past the dissolution of the coalition group.¹⁹⁹ If not, then the best solution for enforcement is to couple CBAs with a development agreement so as to allow local government to enforce the provisions on behalf of the community.²⁰⁰

However, adding local governments as an enforceable party to the agreement may lead to several further complications for both developers and community groups. Local governments may want a hand in the creation of the CBA. After all, the local government is tasked with enforcing, often pushing positions at odds with the community coalition.²⁰¹ Local governments should be careful not to become too involved in CBA negotiations. Direct government involvement may lead to the agreement's concessions being viewed as exactions subject to the *Nollan/Dolan* test and thus defeat one of the major benefits CBAs offer to local

194. *See supra* Part IV.B.

195. Salkin, *supra* note 13, at 1425.

196. *See* GROSS ET AL., *supra* note 153, at 23-24.

197. *Id.*

198. *Id.*

199. *Id.* at 24.

200. *See* Salkin, *supra* note 13, at 1409-10.

201. One notable example of problems created by government involvement in CBA negotiation occurred with the negotiation of a CBA for the Pittsburgh Penguins Arena development in the Hill district of Pittsburgh. When city and county leaders presented a rather perfunctory proposed CBA to the media, community coalition members, angered at not having been included in the negotiations, set a copy of the agreement on fire. Wade Malcolm, *Agreement on Arena Benefits Goes Up in Flames: Hill District Group Rejects City-County Development Pact, Then Lights It on Fire*, PITTSBURGH POST-GAZETTE, Jan. 8, 2008, at B1, available at 2008 WLNR 394033.

governments.²⁰²

Government enforcement of these privately bargained for agreements may only be possible in states with a development agreement statute.²⁰³ California, which pioneered the CBA, has had repeated success by incorporating CBAs into development agreements.²⁰⁴ States without development agreement statutes have had mixed success in implementing CBAs.²⁰⁵ For example, New York has no development agreement enabling statute, and has seen a disproportionate number of CBAs fail.²⁰⁶ Much of this failure is due to the fact that “local officials in New York City have, until recently, been discouraged from allowing community benefits to influence land use decisions for fear of distorting the planning and review process.”²⁰⁷ The lack of support from city officials has led to many developers rushing inexperienced community groups through the negotiation process, thereby causing the community groups to fail in obtaining any meaningful benefits.²⁰⁸ For example, the Bronx Terminal Market CBA was negotiated by eighteen community groups selected by the borough president, but without any guidance, the groups were rushed to complete a proposal in a month.²⁰⁹ Only three of the groups then signed the resulting CBA.²¹⁰

Without the threat of enforcement by the City, New York developers have had little reason to take community negotiations seriously.²¹¹ The Bronx Terminal Market CBA has also been widely criticized for promising relatively few benefits and containing little to keep a developer from reneging on its promises.²¹² The fine for a violation was only \$60,000, far below the value of benefits promised, including \$3 million for community job training.²¹³

2. *Negotiation of CBAs.*—CBAs also face practical problems due to the scope of the projects involved and the need for broad community coalition involvement in order to make any settlement meaningful.²¹⁴ Bringing together a sufficiently broad coalition may be an impossible task due to the differing perspectives of each group.²¹⁵ Public support is a crucial bargaining chip in CBA

202. See *supra* text accompanying note 174.

203. See Salkin, *supra* note 13, at 1410.

204. See *id.* at 1411-15.

205. *Id.* at 1415.

206. See *id.* at 1418-20.

207. *Id.* at 1418.

208. See *id.* at 1417.

209. *Id.*

210. *Id.*

211. See *id.* at 1418-19.

212. Heather Haddon, *Terminal Market Deal Criticized*, NORWOOD NEWS, Feb. 23, 2006, available at <http://www.bronxmall.com/norwoodnews/past/022306/news/N60223page1.html> (last visited Sept. 16, 2008).

213. *Id.*

214. See Salkin, *supra* note 13, at 1423.

215. *Id.* at 1424.

negotiations,²¹⁶ and so it can be assumed that the parties involved are willing to support a development proposal, provided that the benefits are satisfactory. However, some groups will inevitably oppose developments. Such is the case when eminent domain is employed in the acquisition of land for a development. Residents facing eminent domain may have no motivation to negotiate with the developer seeking to acquire their property.²¹⁷ At least two developments utilizing CBAs have seen local residents facing eminent domain opt out of the agreement and file takings actions instead.²¹⁸ A third case sought to challenge the civil rights implications of a development agreement which incorporated a CBA, but was dismissed for lack of standing.²¹⁹

Some have criticized the CBA negotiation process for being overreaching and encouraging “extractions” from developers for any significant project.²²⁰ As Julia Vitullo-Martin, a fellow at the conservative think tank, The Manhattan Institute, put it, “It’s just the Wild West, . . . [a]nybody who wants something comes forward and demands it from the developer.”²²¹ This sentiment may in part be due to the escalating nature of CBA benefits. Community leaders looking to negotiate a CBA will use prior CBAs as the “floor” for negotiations and seek richer package benefits for their community.²²² Yet this escalation of community benefits cannot continue indefinitely. For the moment, CBAs are still entirely optional,²²³ and developers who find the price of community involvement too high may simply seek their public funding and zoning approval through more conventional lobbying efforts, or may be deterred from developing in a community at all.²²⁴

What a CBA does require to be successful is the mobilization of a broad base of community support.²²⁵ CBAs with limited participation have met with equally limited success. For example, the Atlantic Yards project in Brooklyn—New

216. See Marcello, *supra* note 10, at 659-60.

217. CBAs address *community* issues. A homeowner facing condemnation and an eminent domain taking will naturally be more interested in preventing the loss of their own home than in benefiting the community at large.

218. See *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008); *Cramer Hill Residents Ass’n, Inc. v. Primas*, 928 A.2d 61 (N.J. Super. Ct. App. Div. 2007).

219. *Huertas v. City of Camden*, 245 F. App’x 168, 172 (3d Cir. 2007). The CBA involved in each development was not directly at issue in *Goldstein*, *Cramer Hill*, or *Huertas*.

220. Two vocal proponents of this view were former New York Mayors Rudolph Giuliani and Ed Koch. Current Mayor Michael Bloomberg is supportive of many of the City’s CBA agreements. See Engquist, *supra* note 193.

221. *Id.*

222. See GROSS ET AL., *supra* note 153, at 23.

223. However, some groups have called for mandatory CBAs for all projects seeking public funding or zoning approval. See Engquist, *supra* note 193.

224. See Marcello, *supra* note 10, at 668-69 (“If ‘economic development’ is narrowly defined to mean attracting new business into the local economy, CBAs may be viewed unfavorably as mere ‘speed bumps’ that increase costs and deter developers from investing in a community.”).

225. See GROSS ET AL., *supra* note 153, at 23-24.

York's first CBA—has received a negative reaction in Brooklyn and has been criticized for its lack of true community involvement.²²⁶ Established community groups did not participate, instead negotiations were held with organizations that were largely organized for the purpose of participation in the CBA.²²⁷ These groups then received specific contributions from the developer, appearing to some to be largely interested in their own financial gain rather than benefits for the community at large.²²⁸ This pattern of limited community involvement was once again seen in the Yankee Stadium CBA, an agreement to which no community organizations were parties.²²⁹ Instead, four elected officials signed the agreement on the community's behalf.²³⁰ Similar to the Atlantic Yards CBA, the Yankee CBA has been criticized as a “slush fund” with community investment funds distributed according to political favor rather than community need.²³¹ The chairperson of the distribution committee had political ties to several of the signatories, and the identities of the rest of the distribution committee have not been publicly disclosed.²³² In fact, although money was set aside for community development on the first day of construction, after seventeen months, no funds had been disbursed to community organizations.²³³ Paradoxically, although government officials negotiated the agreement on the community's behalf, the City was unable to enforce the agreement because there were no municipal funds involved.²³⁴

If negotiations fail with part of the coalition, developers may lose their incentive to negotiate with the rest of the coalition.²³⁵ Faced with less than total support, the developer may switch to a “divide and conquer” strategy and attempt to pare down the number of community groups involved in the coalition in order to preserve the appearance of community involvement while excluding many key groups and issues from negotiations.²³⁶ Even if the coalition can stay unified throughout the CBA negotiation, the developer may still have an incentive to withhold some concessions if it anticipates litigation after approval of the project.²³⁷ Because courts increasingly compel the use of mediation and other alternative dispute resolution tools in land use disputes, community coalitions

226. See Salkin, *supra* note 13, at 1416.

227. Of the eight organizations participating, only two existed prior to the negotiations. Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, N.Y. OBSERVER, Dec. 4, 2005, available at <http://www.observer.com/node/38021>.

228. *Id.*

229. See Timothy Williams, *Yankee Stadium is Going up, but Bronx Still Seeks Benefits*, NEW YORK TIMES, Jan. 7, 2008, at B1.

230. *Id.*

231. See Salkin, *supra* note 13, at 1417-18.

232. Williams, *supra* note 229.

233. *Id.*

234. *Id.*

235. See Salkin, *supra* note 13, at 1417-18.

236. See GROSS ET AL., *supra* note 153, at 22.

237. See Cardozo, *supra* note 155, at 803-04.

may actually be encouraged to find a reason to litigate after approval of the development so as to gain a second set of benefits out of mediation.²³⁸ This in turn could cause developers to withhold concessions during CBA negotiations, or if litigation appears to be inevitable, to avoid such agreements altogether.²³⁹

CONCLUSION

Dealing with complex land use development proposals requires more than standard Euclidean zoning has to offer. Negotiation is fast becoming the dominant tool for land use decisions,²⁴⁰ and such negotiations require tools that address constitutional and public accountability concerns.²⁴¹ Development agreements are an ideal framework for such negotiations, and a wider adoption of development agreement enabling statutes is necessary to affect the principles of smart growth throughout the nation.²⁴² The major remaining question regarding development agreements is whether their consensual nature avoids the application of the *Nollan/Dolan* takings test to their bargains.²⁴³ By incorporating most concessions into a community benefits agreement, the parties avoid constitutional takings issues and allow for broader, more flexible solutions to deal with the impact of large urban developments.²⁴⁴ CBAs also ensure public involvement in the development process that is more than illusory;²⁴⁵ this represents a clear improvement over the air of closed-door bargaining that often accompanies public-private land use negotiations.²⁴⁶ The recent rise in negative sentiment toward public-private developments has illustrated the need for greater public involvement in the development approval process.²⁴⁷ Community benefit agreements are an ideal tool for gaining greater public support for large-scale development projects.

238. *Id.* at 803.

239. *Id.*

240. *See Green, supra* note 9, at 392 n.46 and accompanying text.

241. *See supra* Part II.

242. *See Callies & Sonoda, supra* note 5, at 408.

243. *Id.*

244. *See supra* Part IV.B.

245. *See Salkin, supra* note 13, at 1409-10.

246. *See Marcello, supra* note 10, at 661-62.

247. *See supra* note 13 and accompanying text.

