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Community Benefits Agreements in a Value Capture Context

Laura Wolf-Powers

When economists refer to value capture, they are typically speaking of instruments by which the public sector recovers for the use of the collectivity some portion of the land value created through public investment. Advocates of community benefits agreements (CBAs) aim to insert local stakeholders, typically low-wealth households in the vicinity of a development project, directly into the process of recovering this value. Today's community benefits movement, also known as the movement for accountable development, is a national phenomenon with auxiliary institutions,[1] an associated academic literature (Baxamusa 2008; Salkin and Levine 2008a, 2008b), and proponents in the mainstream public policy sphere (Blackwell and Fox 2008). But of all land value capture tools, the CBA is perhaps the most controversial. While it has received resounding affirmation in some quarters as a model of civic participation (Goodno 2004), it has been questioned in others as potentially contrary to the principles of economics, civics, and good planning practice (Been 2010; Freeman 2007; New York City Bar Association 2010). It is not unusual to hear CBAs referred to as end runs around established land use review processes, as the purchase of political support by cynical real estate developers, or as the solicitation and acceptance of bribes by community-based organizations.

A brief delineation of the multiple logics at play in community benefits advocacy and within the agreements themselves illustrates the reason for this controversy. For the economically inclined, a CBA, which I have defined elsewhere

S___ 1. See the Web sites for the Partnership for Working Families, http://www.communitybenefits
R___ .org/, and the Community Benefits Law Center, http://www.communitybenefits.org/legal/.

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as a set of programmatic and material commitments that a private developer has made to win public support from the residents of a development area and others claiming a stake in its future (Wolf-Powers 2010),[2] derives legitimacy from its status as a kind of Coasian bargain.[3] If intensified land development will, for instance, create traffic problems, limit parking, or cause property values to rise with negative consequences for renters, a CBA is a mechanism by which affected stakeholders direct a portion of the publicly created value increment toward mitigation of these effects. For others, however, the CBA represents a tool (albeit one that has not been systematically compared with other instruments such as progressive taxes) to rely on captured value to affirmatively pursue broader objectives such as poverty reduction and social equity (Cummings 2001).[4] The question of whether benefits that alleviate underlying social distress are as appropriate as those that directly mitigate project harms looms large in the political arena. Some argue that wage standards for low-income city residents, for example, have no place in the redevelopment deals that private sector actors reach with planning departments and redevelopment authorities. A statement by a redevelopment official I once interviewed—that "the tax base generated by a redevelopment project will be the largest community benefit"—is tantamount to making the Kaldor-Hicks argument that value is value regardless of where it accrues. From this perspective, there is no reason to distribute captured value in any particular way. Advocates counter, however, that it is incumbent on municipalities and authorities to use the negotiating power they possess to capture value

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2. The participants in a CBA negotiation are neighborhood-based groups from the area surrounding the development site, often working in coalition with advocates for affordable housing, environmental quality, and workers' rights. To garner the support of these constituencies before bodies that must approve subsidies and regulatory changes, developers provide a range of benefits, including public space amenities, affordable housing, employment training and matching for newly created jobs, and commitments to work with union construction contractors or to require project tenants to abide by wage standards. Local government actors also play important roles in the negotiation, implementation, and enforcement of community benefits provisions in almost every instance (Wolf-Powers 2010).

3. The American economist Ronald Coase himself was actually skeptical about the prospect of using market exchanges to internalize negative externalities, arguing in his work that the court system in the United States is often more effective at resolving environmental and land use disputes where transaction cost barriers prevent parties from arranging solutions privately. Thus, while a CBA might be termed Coasian in a colloquial sense, Coase might well have cautioned community bargainers about some of the very enforceability and accountability issues raised here.

4. The well-known and precedent-setting community benefits agreement forged in Los Angeles around the L.A. Live entertainment district contains both kinds of measures. A parking permit program that mitigates the impact on residents of increased parking demand from visitors falls under the rubric "just compensation." In contrast, provisions mandating that tenants of the complex (mainly retail and hospitality-related enterprises) pay their hourly workers in line with an economic self-sufficiency standard for the region serve the cause of distributive justice (Gross, LeRoy, and Janis-Aparicio 2005; Marcello 2007).

in a way that explicitly serves redistributive goals. In this, they may be seen as operating in the tradition of the early land economists David Ricardo and John Stuart Mill, who were concerned not only with value recovery, but also with the redistribution of unearned land rent.

A second explanation for the fierce controversy around the CBA as a value capture mechanism has to do with the distinction between interest group politics and democratic participation. In CBA campaigns, sets of tactically aligned groups pursue these agreements to gain the value increment for the community that would otherwise be captured by the public sector in the form of general fund revenues or (more likely) be retained by the developer. The strength of the coalition's bargaining position rests on its ability to expedite (or, conversely, delay) development, and the disposition of captured value may be as much a matter of negotiation among interest groups as a matter of negotiation with the developer and the public sector. While proponents' descriptions of CBA negotiations center on democratic deliberation, inclusion, and the pursuit of shared social justice objectives (Baxamusa 2008; Gross 2008), others argue (and experience has shown) that in some settings, activists disingenuously bargain as if their particularistic interests are broader community interests, gaining benefits for narrowly defined constituencies rather than a more inclusive collectivity (Been 2010). Contracting that has not been inscribed into a formal process—a process in which the "standing" of claimants has been determined in advance—runs the risk of both perceived and actual illegitimacy. This is, in fact, the first problem of contracting identified by Ronald Coase—the identification of relevant bargaining parties.

Perhaps significantly, cries of particularism and self-dealing are often at their loudest when the public value of a project itself is subject to scrutiny and questioning. As Susan Fainstein notes in chapter 2 in this volume, "There is an assumption that encouraging investment in land improvements is always desirable: it reduces sprawl and maximizes efficiency in the use of infrastructure. But the consequences of promoting development can be negative in regard to the public good."

In other words, even if value is captured in a CBA, it may be value produced at an unacceptably high cost to the public. For example, opponents of the Atlantic Yards arena complex in Brooklyn, New York, alleged that the developer forged a CBA with supporters whose organizations stood to gain handsomely from the developer's largesse, while excluding groups pushing for modifications to the project plan, including revisions to a subsidy package that independent analysts viewed as revenue negative for the public sector (Freeman 2007, New York City Independent Budget Office 2009). Similar allegations surrounded a 2008 CBA between the Philadelphia group Fishtown Action and the SugarHouse Casino, which opened on the Delaware River waterfront in September 2010 (Gates 2008).

Community benefits agreements occupy strange territory in the universe of value capture. First, they may duplicate other value capture mechanisms. The provisions to which developers agree at the behest of community groups have

much in common with linkage fees and exactions, for example, the difference being that in the case of a CBA, it is community stakeholders who determine how captured value will be spent. Second, CBA commitments often involve other value capture tools; in at least one case, developer-granted affordable-housing funds are being funneled into a community land trust (Leavitt 2006). Third, it is the public sector's use of value capture mechanisms such as tax increment financing (TIF) and payment in lieu of taxes (PILOT) to subsidize development that often spurs advocates to demand community benefits.

There are two ways to argue for the legitimacy of a deal-specific CBA as opposed to a linkage fee or development exaction. The first is an appeal to fairness and justice. Where public sector resources, including forgone tax revenues, are being expended for the primary purpose of private value creation, advocates maintain that it is fitting that part of the value of the resulting development should be tapped to redress economic disadvantage in ways that communities themselves are involved in formulating. Alternatively (or additionally), community groups maintain that their involvement in a development project increases its overall value, creating a win-win context for the sharing of surplus (Susskind, McKearnan, and Thomas-Larmer 1999). Community endorsement in the form of a CBA does not simply limit the probability that a project will be scuttled, but it also cements the support of crucial elected officials, burnishes the reputation and "brand" of the developer, and makes it more likely that local residents will patronize the development. In sum, the CBA removes uncertainty around project financing and timing and generates goodwill that produces positive externalities for the project. All of these things can be extremely valuable to developers (Baxamusa 2008).

The Gates-Cherokee Case: Community Benefits Achievements Without an Official Agreement

A community benefits arrangement forged between 2002 and 2006 in Denver illustrates several of the points made in the previous section.[5] In June 2002, Cherokee Investment Partners announced a $1 billion plan to redevelop a 50-acre brownfield in south-central Denver with a dense mix of offices, retail establishments, and housing. Cherokee had bought the contaminated site from the Gates Rubber Company, which until 1992 had operated a factory there that supplied the automotive and industrial power industries with belts, hoses, and hydraulics. Planned for adjacency to a station on Denver's new light-rail system, the plan won immediate accolades in local development and smart growth circles, as did Cherokee's transit-oriented development credentials and its reputation as

5. Sources consulted for this case description include Wolf-Powers (2010); Cherokee Partners LLC (2007); Front Range Economic Strategy Center (2008); and LeRoy and Purinton (2005).

the world's largest brownfield investor. Shortly after Cherokee's announcement, the Denver Urban Renewal Authority (DURA) announced that it would create an urban renewal district at the site, facilitating the formation of a tax increment financing (TIF) district and two other special taxing districts to generate up-front funding for remediation and infrastructure development. Cherokee was requesting a public subsidy totaling $126 million: $85 million for a city-backed TIF district and a special taxing district that would provide future revenue to support another $41 million in private debt.

Soon after the unveiling of the project plan, the Front Range Economic Strategy Center (FRESC), the nonprofit policy advocacy arm of the Denver Area Labor Federation (the AFL-CIO's Central Labor Council for the Denver metropolitan area), formed the Campaign for Responsible Development (CRD), spearheading a coalition that included 24 organizational members and 32 endorsers from among religious congregations, unions, housing groups, and community-based organizations in the low-income Baker neighborhood next to the Gates site. Taking the position that "any project receiving that magnitude of public support should meet principles of responsible development and provide community benefits" (Front Range Economic Strategy Center 2007), CRD began to press Cherokee for a range of commitments at the Gates site, including a 20 percent affordable-housing set-aside, local hiring preferences, a project labor agreement for all construction on the site (site preparation and vertical development), and wage and health benefits requirements for the employees of future commercial tenants. After meeting with Cherokee several times, the group obtained an agreement that the developer would not consider big-box grocery stores as tenants. This led to the CRD's endorsement of a zoning change in April 2003 that enabled Cherokee's redevelopment of the site to move forward.

Following the zoning change, the developer ceased to meet with the CRD, responding to signals from city redevelopment officials that approval of the TIF district and special taxing district by the Denver City Council could be achieved without the community benefits advocates' support. The CRD pressed forward with a strategy centered on outreach and media exposure, publishing research underscoring the dire need for low-cost housing and middle-class jobs in the metropolitan region and highlighting ways in which existing TIF projects in Denver had compromised social equity by aggravating displacement and creating jobs that paid less than comparable positions elsewhere in the city. Although no CBA was reached, the consensus view is that the CRD's ultimate support was essential to the city council's approval of the subsidy package in February 2006, which was accompanied by Cherokee's announcement of a far-reaching inclusionary housing plan for the project, a commitment to pay prevailing wages to workers hired for remediation and infrastructure (though not to all construction workers), a commitment to work with the city's Office of Economic Development on local hiring, and a pledge to involve neighborhood residents closely in the monitoring of environmental cleanup, which had also arisen as an issue in the campaign. These provisions were documented in the development agreement

between Cherokee Denver and the DURA. Thus, although there was not a CBA document, the Government Law Center at Albany Law School, regarded as an authoritative source on the status of CBA campaigns and of completed CBAs, includes the Gates-Cherokee redevelopment deal with the City of Denver in its comprehensive inventory.[6]

The Gates-Cherokee case aptly illustrates several CBA formulation and implementation quandaries. A few of the CRD's demands centered on the mitigation of project harms, but most were clearly formulated in the spirit of distributive justice. The leadership role played by labor unions in the organizing raises the question of whether the CRD was appropriately representative of all community-based stakeholders. And as an example of an eminently popular and acceptable project, it casts light on the additional complexities that would have obtained in the face of a project that was more controversial in itself. The fact that the Gates project has not yet been implemented makes an ex post facto assessment of its costs and benefits impossible. However, it enables us to return to the value capture issues articulated earlier in light of a concrete case.

JUST COMPENSATION VERSUS DISTRIBUTIVE JUSTICE

The nationwide movement to foster and institutionalize CBAs arose within a specific market context that obtained in the United States in the 1990s and early 2000s. Central cities were seeing a renewal of private sector interest in formerly disinvested land. The resurgent popularity of cities as cultural destinations and locations for market-rate residential development, combined with government incentives for infill, brownfield, and transit-oriented projects, was stimulating building booms in neighborhoods on the fringes of central business districts, on abandoned industrial sites, and along major transportation corridors. Advocacy to win benefits for the "community" in this context resulted in part from anxiety among neighborhood-based groups that certain negative by-products of revitalization—residential and retail displacement, traffic, the commodification of formerly public or semipublic space—would affect their constituents more keenly than benefits such as tax base increases[7] and employment growth. Community members were not familiar with Bartik's classic study of economic development incentives, which argues that the employment and wage rates of low-income and minority households disproportionately rise with regional job growth (Bartik 1991). What they saw most clearly was that many jobs in new mixed-use projects were relatively low wage and that they and their neighbors were not particularly well positioned to obtain the ones that were not—something that would not have been the case in the day of the factory. Nor was it difficult to imagine that the

6. See Gates-Cherokee Redevelopment CBA, http://communitybenefits.blogspot.com/2008/01/gates-cherokee-redevelopment-cba.html.

S___ 7. Skepticism about the value to current residents of new revenue streams intensified whenever
R___ a project was financed by the sequestration of future tax revenue, as was the case in Denver.

property value appreciation so essential to the success of a TIF or special assessment district could lead to the displacement of renter households.

In Denver the CRD's efforts to include affordable housing and wage standards in the project agreement for the Gates site can be construed as demands that the developer and the city provide mitigation in light of these anticipated harms. If housing values were destined to appreciate in the nearby high-poverty community of Baker, either regulated options for low-income renters would be needed or members of those households would require opportunities to increase their earnings. To achieve this outcome, it would seem logical to draw on the value that the public sector was creating by virtue of its regulatory and financial participation in the Gates project, relating compensation directly to negative impacts and "pricing" that compensation accordingly. However, to state advocates' goals in those terms—to seek out an "essential nexus" between harms suffered and benefits achieved[8]—is to give short shrift to the social equity framework within which the advocates were attempting to hold the community benefits discussion. It is perhaps fitting that the efforts of the CRD in Denver did not produce a "standard" developer-coalition CBA, but rather set in motion a political process that resulted in pressure on the DURA to include community benefits provisions (some explicit, others tacit) in the agreement it negotiated with Cherokee. In the political economy of capitalist democracies, the appropriate target of advocacy for distributive justice is, after all, the state.

INTEREST GROUP POLITICS VERSUS DEMOCRATIC PARTICIPATION

Planners tend to be uncomfortable lauding desirable outcomes unless they have been achieved through desirable processes. Hence, the city planning literature on CBAs is thick with analysis of democratic deliberation and the politics of inclusive coalition building (Baxamusa 2008; Fleischer 2007). Accountable-development advocates claim that existing land use and development review processes marginalize legitimate stakeholders, thus limiting the potential for genuinely public-benefiting value capture. They argue that community benefits negotiations represent a more inclusive alternative. Inclusion is also viewed as important in light of the public sector's blatant exclusion of low-income community members from the planning process during past waves of urban redevelopment, especially the urban renewal projects that transformed low-wealth neighborhoods in the 1950s and 1960s. (For example, the land that became subject to the

8. As many have noted, CBAs in which benefits are not specifically related to a project's direct physical and environmental impacts are legally vulnerable (Been 2010; New York City Bar Association 2010). In the context of zoning and exactions law, a developer's provision of unrelated benefits in exchange for project approval or a zoning change violates the nexus and proportionality strictures imposed by the well-known *Nollan* and *Dolan* cases (*Nollan v. California Coastal Commission*, 483 U.S. 825 [1987]; *Dolan v. City of Tigard*, 512 U.S. 374 [1994]). In most instances, however, officials and advocates have skirted the issue by connecting CBAs with subsidy decisions as opposed to zoning actions.

Park East Redevelopment Compact in Milwaukee County in 2006 is the site of a 1965 highway construction project that displaced a thriving working-class black neighborhood [Wolf-Powers 2010].) As attorney Julian Gross writes, "A CBA is the product of substantial community involvement . . . One of the core purposes of a CBA is to enable a wide range of community members to help shape a development that will affect them" (Gross 2008, 40).

As a practical matter, however, determining who belongs to the community is difficult and is inevitably prejudiced by actors' stances on the philosophical questions described earlier in this chapter. Susskind and Cruikshank's (2006) work on the consensus-building approach details proven mechanisms for bringing appropriate stakeholders to the table. But if there is fundamental disagreement about whether community groups deserve to claim any value at all, even good-faith efforts to employ these methods may fail. Further, this framework depends on a neutral convener, which is rarely available in a CBA situation. In Denver, Cherokee brought together registered neighborhood organizations in the vicinity of the Gates redevelopment project in the Cherokee Denver Redevelopment Advisory Committee (CDRAC). This was a forum in which nearby residents aired their concerns about the project and suggested potential mitigations, but the process hewed to a "just compensation" paradigm rather than a "distributive justice" one and was thus problematic from the perspective of the CRD. One can assume that the CRD's approach, in contrast, was interpreted as an overreach by actors disinclined toward the idea that government is obligated to link subsidized land development to the redress of economic and social inequalities.

For many in Denver, there were also questions about whether the CRD itself represented broad-based or particularistic interests. The CRD, like many of its counterparts in Los Angeles and elsewhere, included housing advocates, environmental justice groups, and neighborhood associations, but organized labor was its engine and unions' interest in construction employment its spark. (Service sector unions also hoped for living-wage provisions covering the development's retail tenants, but this was not achieved.) Making common cause with other interest groups to campaign for community benefits at the Gates site was both principled and tactical, and ultimately the benefits achieved addressed a wide range of community interests, including (arguably) the interests of neighborhood residents who stood to obtain union employment and the interests of workers in general who would benefit from the wage floors established by union contracts. But the educational and cultural challenges of making union construction jobs available to the residents of low-income neighborhoods surrounding the Gates site did not go unacknowledged by campaign organizers.[9] If the criterion at hand

9. In contrast with the Denver case, the most powerful provision of the Park East Redevelopment Compact in Milwaukee County is a prevailing wage requirement for construction labor, a provision that some argue primarily benefits the middle-income suburbanites who dominate the area's building trade unions. Some municipal officials and development agency staff in

is "what most contributes to the thriving of city users" and the alleviation of economic disadvantage (see chapter 2 in this volume), then one must at least consider the possibility that captured value would be better spent directly on helping the least advantaged members of the community become more employable in construction and then requiring that they be well represented in the construction workforce, although this may not have been a realistic option in the negotiations. Another highly favorable outcome for low-skilled neighborhood residents would have been living-wage jobs at the retail establishments in the project, something that advocates requested but did not win.

PRACTICAL QUESTIONS: THE DESIRABILITY OF THE PROJECT AND THE RISK OF OVERBURDENING

Two practical issues also played a large part in the outcome of the Denver case. First, the Gates development was relatively uncontroversial in and of itself. Cherokee Denver planned to remediate a vacant site and convert it to productive use. No households or businesses faced direct displacement; location on a light-rail line made the project desirable from an environmental sustainability perspective; and public subsidy of the project, though substantial, was not considered excessive. The resultant political costs associated with abandoning the project made the coalition's implicit threat to "kill" it over community benefits provisions less credible than it would otherwise have been. But the project's popularity also insulated the coalition from charges that it was achieving community gains at the expense of the wider public. This differentiates the Gates case in significant ways from, for instance, the Atlantic Yards example mentioned earlier.

A second practical consideration concerns the possibility that provisions imposed on Cherokee by the City of Denver at the behest of the coalition imperiled a beneficial development project. Principled opponents of CBAs liken the mechanism to a Christmas tree around which community groups crowd opportunistically to "grab" whatever benefits they can from the developer, and they invoke the possibility that a value capture agreement will tip the project into the red, thus causing the developer to withdraw and depriving the collectivity of a welfare-improving land use. Certainly, the capacity of a developer to offer affordable housing, living wages, or open space in connection with a project depends on the strength of the investment climate, and the "market" in CBAs has slowed considerably since the national real estate market has slackened in recent years. However, CBAs are freely negotiated bargains, as are development agreements between the public and private sectors that incorporate community benefits provisions. As the Denver case suggests, developers are shrewd negotiators unlikely

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Milwaukee assert that without more aggressive attention to the educational deficits and employment barriers facing residents of the city, and without a stronger commitment by trade unions to admit new members from outside traditional employment networks, the CBA has limited ability to raise wages and reduce poverty in the central city (Wolf-Powers 2010).

to agree to provisions that threaten to jeopardize investors' cash. Cherokee agreed to an extensive affordable-housing package and to employ union contractors to perform infrastructure work, but it stopped short of much more costly measures such as project labor agreements for vertical construction and an agreement to require retail tenants to offer living wages and benefits. Of course, this points to the gamesmanship that accompanies any development negotiation as all parties attempt to obtain the most favorable terms possible (Sagalyn 1997). Cherokee and its tenants may or may not have been able to "afford" higher labor costs and maintain an acceptable rate of return, but making its financial calculus plain would have violated best practices in negotiation.

Conclusions

In part because the Gates-Cherokee redevelopment has been a casualty of the recent market downturn (the City of Denver has not yet established a TIF district or issued debt), it is not currently possible to draw on this case to assess how the welfare of communities surrounding the Gates site (or of low-income residents of the metro area at large) has changed in the presence of the community benefits arrangement. However, this case, which is fairly typical of successful community benefits arrangements in the United States (Wolf-Powers 2010), does illustrate the issues at hand when policy makers in specific situations consider the CBA as a value capture tool. The distinction between just compensation and distributive justice is a significant determinant of their approach: do officials see the CBA as a tool to mitigate negative externalities or as an instrument by which to pursue redistributive goals?[10] Another consideration, following closely from the first, has to do with how they identify legitimate claimants to the store of value created when the public sector takes actions that increase the worth of private property. Finally, public officials should be convinced of the baseline public desirability[11] of development projects before considering their potential to yield incremental community benefits.

For the past three years, students in city planning master's programs at the University of Pennsylvania and the University of Illinois at Chicago have been pilot testing a simulated development negotiation based on the Gates case (created for the Lincoln Institute of Land Policy in 2008). This exercise asks students to use

10. Future research should compare CBAs with tax instruments such as property taxes, capital gains taxes, and income taxes to determine their relative effectiveness in achieving redistributive aims.

11. Although "desirability" is inevitably subjective in a global sense, municipal officials can at a minimum rely on independent fiscal impact assessments. Evidence that a project is revenue positive seems to be a reasonable condition on which to base public involvement and subsidy.

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a spreadsheet model to estimate the effect of provisions such as wage standards and affordable-housing and neighborhood hiring initiatives on government and private sector costs and returns. While necessarily stylized, the Gates simulation requires students to reflect on value capture in a practical setting. In considering questions such as "Would this project occur without public subsidy?" and "Which benefits requests should receive the public sector's highest consideration?" students discover for themselves the principles animating their orientation to city planning practice and public value creation (Wolf-Powers 2012).

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COMMENTARY

Julian A. Gross

Laura Wolf-Powers uses a value capture perspective to consider community benefits agreements (CBAs), with particular attention to Cherokee Denver's redevelopment of the former Gates Rubber factory site. She provides an excellent, in-depth discussion of the public debates around Cherokee's community benefits commitments, including a perceptive understanding of the policy goals, motivations, and strategic judgments of local stakeholders at the time.[1] She also provides a brief overview of some of the criticisms and concerns that have been leveled against CBAs, as well as some of the arguments in favor of CBAs that advocates have raised. The chapter concludes by exploring how some of these arguments might apply to the Gates project. This application of theoretical arguments to a complex real-world factual situation is a notable contribution in this area.

As Wolf-Powers notes, CBAs have been widely addressed in academic and planning community literature. Yet there is no widespread agreement on the definition of the term *community benefits agreement*. Everyone agrees that a standalone, legally enforceable contract between multiple community groups and a private developer, requiring community benefits from the developer in exchange for the community groups' support of (or non-opposition to) the project, should be termed a CBA. Examples of this type of agreement include the CBA governing the much-discussed Staples/L.A. Live entertainment district project in Los Angeles (2001) and the controversial Atlantic Yards arena complex CBA in Brooklyn, New York (2005), both mentioned by Wolf-Powers.

Sometimes also termed a CBA is a slate of commitments at least in part advocated for by community groups, finally negotiated by a developer and a public entity like a redevelopment agency, and then set forth only in a legally enforceable agreement between the developer and the public entity, such as a development agreement. Examples of this type of agreement include the Gates-Cherokee agreement detailed by Wolf-Powers and commitments regarding community benefits in the Yale Cancer Center project in New Haven, Connecticut (2004).[2]

Previously, I have described the former type of agreement as a private CBA and the latter as a public CBA (Gross 2008). Wolf-Powers's definition similarly includes both private and public CBAs: she defines a CBA as "a set of programmatic and material commitments that a private developer has made to win public support from the residents of a development area and others claiming a stake in its future." I believe that these definitions are too broad, as the inclusion of

1. While the Gates project was being considered, I advised some members of the Campaign for Responsible Development (CRD) on their policy demands and strategic options, so I have firsthand knowledge of many of the situations described in this chapter.

2. *See* Partnership for Working Families, http://communitybenefits.org/article.php?id=1468.

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public CBAs obscures the novel and important qualities of private CBAs. These definitions would apply to almost every large, controversial urban development project, since in virtually every such case, the developer must make programmatic and material commitments in order to obtain community support.

In light of academic analysis and continued real-world experience with CBAs in recent years, it seems that the types of agreements I previously described as public CBAs share little in common with those I called private CBAs, as either a practical or a theoretical matter. It is very challenging to distinguish a public CBA, such as the Gates-Cherokee agreement, from the community benefits commitments negotiated by any public agency for any large urban development project.[3] In most such projects, many community stakeholders weigh in through public forums and private lobbying, and some community benefits expressed at these forums are then included in the agreement between the developer and the public entity. All of this occurs through normal planning and public participation processes. Agreements we have termed public CBAs are inevitably hard to distinguish from hypothetical results that would have been obtained without the alleged CBA. They are difficult to evaluate for analytical purposes, as they cannot meaningfully be untangled from preexisting processes and legal relationships.

In addition, public CBAs do not contain several of the noteworthy characteristics of private CBAs. First, a public CBA is generally not legally enforceable by the affected community stakeholders. By definition, a private CBA is. Second, a public CBA does not deviate in any way from the public participation processes, contractual agreements, and project approvals that would exist without the CBA. A private CBA derives its force from its status as an additional agreement, involving different parties, made outside established planning processes. It is these defining factors that make private CBAs such an attractive new tool and that present new and important issues for the legal and land use planning communities. For these reasons, I believe that the term *community benefits agreement* should apply only to private CBAs—stand-alone contracts between community groups and developers.

Wolf-Powers's evaluation of the Gates-Cherokee agreement as a community benefits "arrangement" is a useful, thorough, and perceptive account of the public debate around community benefits, and it recaps many of the criticisms of the type of community benefits advocacy practiced by the coalition in that case. I question, however, whether the "community benefits agreement" frame adds significantly to this useful discussion.

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3. In my 2008 article I attempted to distinguish public CBAs from the normal course of business by including as a definitional element of CBAs that the ultimate slate of community benefits be "the product of substantial community involvement" (Gross 2008, 37). This definitional element is, however, obviously imprecise and is subject to individual interpretation with regard to any particular agreement.

The bulk of the arguments for and against CBAs set forth in the chapter relate to issues that are raised in regard to most large urban development projects. Every development agreement necessarily establishes how the financial benefits of a project will ultimately be allocated among the public entity, the private developer, the surrounding neighborhoods, and the general public. Similarly, how much "mitigation" is appropriate with regard to alleged project impacts must be determined by the public entity approving the project. Arguments for and against requirements such as wage standards for project employers are considered by the public entity.

Private parties can express their views on such issues through public hearings, private lobbying efforts, and, occasionally, direct conversations with the developer. If the result of this advocacy is reflected only in the public development agreement, rather than in a private document—that is, if there is no private CBA—this is simply democracy in action, effected through standard planning and public input processes. Calling this outcome a CBA, or a public CBA, adds little to this analysis and may in fact confuse the issue by raising concerns relevant only to private CBAs. Many of the arguments set forth in the chapter speak simply to the question of how public entities should structure all development deals, rather than anything unique about the concept of a "community benefits agreement."

Some of the ideas presented in the chapter are, however, relevant to private CBAs. These include questions regarding whether there should be a "formal process" to identify contracting parties, as well as those related to possible "self-dealing." Similarly relevant to private CBAs is much of Wolf-Powers's analysis comparing the private contract approach to established public processes such as the imposition of exactions. Unfortunately, this set of complex and interesting issues, to which Wolf-Powers devotes substantial attention, has limited relevance to the Gates-Cherokee project, since ultimately there was no private agreement related to approval of the project.[4] Conversely, Wolf-Powers incisively applies non-CBA-related arguments, primarily those regarding value capture models and redistributive justice, to the Gates-Cherokee project. This is particularly useful in light of the chapter's comprehensive account of the community benefits debates in the case.

This chapter invites further analysis on two topics. First, although she provides a detailed account of various arguments regarding value capture, redistributive justice, impact mitigation, and other policy choices specifically in regard to the Gates-Cherokee project, this exercise might be successfully applied more generally to public entities charged with making this type of land use decision, without the CBA frame. Second, it might be helpful to examine in more detail

4. As Wolf-Powers notes, there was an early, issue-specific private agreement between certain community groups and the developer, but this agreement predated the disputes and project approval process described in the chapter.

the complex issues and arguments regarding private CBAs, perhaps including a particular case study and bringing to bear the level of thoroughness Wolf-Powers brought to her exploration of the Gates-Cherokee project.

The conflation of what I have termed public CBAs and private CBAs under the general rubric "community benefits agreements" is widespread. I have contributed to it myself, and Wolf-Powers's chapter reflects this pervasive approach. The limited relevance of some of the key questions about private CBAs to the Gates-Cherokee project is a strong indication that some clarification or reworking of my definitions is appropriate. I hope that Wolf-Powers and others writing in this area, including myself, will continue to refine the dialogue around these important issues in land use development.

REFERENCE

Gross, J. 2008. CBAs: Definitions, values, and legal enforceability. *Journal of Affordable Housing and Community Development Law* 17(1–2):36–58. Reprinted in *Zoning and planning law handbook*, ed. P. E. Salkin (St. Paul, MN: West Publishing, 2009).

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