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CASE STUDY

Atlantic Yards Community Benefit Agreement: A Case Study of Organizing Community Support for Development

NATHAN MARKEY*

I. INTRODUCTION

Commercial and residential development is occurring at an explosive rate in Brooklyn at both the Atlantic Center and the Atlantic Terminal. Now, across the street from these two sites developers have proposed a 22-acre, $4.9 billion mixed-use development called Atlantic Yards.[1] Although the Atlantic Yards project has fostered some support through a Community Benefit Agreement (CBA), the development has met significant resistance and opposition remains.[2]

This note examines the Atlantic Yards CBA in detail. The first section shows what a CBA is and how community groups can induce developers to negotiate. The second section addresses what makes a good CBA: inclusive processes, effective negotiation, and that the document is a clear, complete contract. Next, CBA analysis is introduced showing how the CBA process affects the substantive, procedural and psychological interests of the community.[3] The third section evaluates the Atlantic Yards

* J.D., Pace Law School, 2010. I would like to thank my parents, Lowell and Terry Markey, for their unyielding support and encouragement throughout my life and academic career.

1. Atlantic Yards Home Page, http://www.atlanticyards.com/ (now renamed the Barclay's Center) (last visited Oct. 26, 2009). The development will include a sports event venue, affordable market-rate housing, commercial offices, retail establishments and a boutique hotel along with eight acres of open space. *Id.*

2. Numerous community groups have formed coalitions in opposition of the development demanding that the project be more responsive to the community as a whole. *See, e.g.*, Develop—Don't Destroy Brooklyn, http://dddb.net/php/latestnews_ArchiveDate.php (last visited Oct. 26, 2009).

3. CBA interest analysis can be viewed in terms of substantive, procedural, and psychological interests.

CBA, the process used to create it, and how the community's interests have been affected.

II. WHAT IS A COMMUNITY BENEFIT AGREEMENT?

A CBA is an enforceable contract negotiated by a developer and a coalition of neighborhood groups.[4] It is designed to aid community members in shaping a project affecting their lives by pressing for benefits that meet the community's needs.[5] CBAs, are typically negotiated around real estate development, and are entered into to secure community benefits in exchange for coalition support during the administrative approval process.

III. SUCCESSFUL COMMUNITY BENEFIT AGREEEMENTS

A CBA must be evaluated in broad terms since provisions for a successful CBA vary due to individual community circumstances.[6] But any successful CBA must have an inclusive process

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> Substantive interests relate to the content of the decision, (e.g.: does the agreement allow for suitable use, is the resource sufficiently protected, is the community interest protected). Procedural interests reflect a party's need to follow the 'correct procedure.' For a decision to be accepted the process used must be perceived as reasonable and fair. An important component of this fairness is the degree to which the parties have been involved in the process. Psychological interests relate to how parties are treated in the process of making a decision. If a party does not feel adequately involved, treated fairly, and respected by others, he/she is less likely to support any decision.

Pace University Land Use Law Center, Land Use Leadership Alliance Training Program: Day 3, 6 (2008) (unpublished manuscript, on file with Pace Law School's Land Use Law Center).

4. JULIAN GROSS, GREG LEROY & MADELINE JANIS-APARICIO, COMMUNITY BENEFIT AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9 (2005), http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf; *but see* BRENDA PARKET, THIS LAND IS OUR LAND: THE BATTLE FOR A COMMUNITY BENEFITS AGREEMENT IN MILWAUKEE 1 (May 2005), http://www.laborstudies.wayne.edu/power/downloads/Parkeast.pdf (discussing how in 2005, a CBA supported by twenty-five community groups, was passed by the County Board in Milwaukee to be the first CBA implemented through legislation).

5. PARKET, *supra* note 4, at 4.

6. Julian Gross, *Community Benefit Agreements: Definitions, Values, And Legal Enforceability*, 17 J. AFFORD. HOUS. & CMTY. DEV. L. 35, 45 (Fall 2007 / Winter 2008) (Gross, a leading scholar on CBAs, has created a definition of a

for forming a community coalition and negotiating agreements, which will allow stakeholder interests to be addressed including their substantive, procedural and psychological interests.[7] When conflict exists, the process most often offends; when a community feels their voice is not being heard, they believe their procedural justice and psychological interests were violated.[8] The CBA negotiating process needs to be well organized and transparent to be effective, with operating rules laid out prior to negotiation so that communities can understand the process and feel their interests are being addressed. Finally, the CBA must be a complete contract, containing clear, enforceable language, so the developer understands exactly how to proceed. This includes remedies in the event of a breach, progress reports, meetings, and negotiations to ensure all parties' expectations are met. If stakeholder interests are addressed, a CBA will ensure community interests are protected.

A. The Process is Inclusive

A planning process that ignores public opinion results in controversy regardless of any public benefit. However, when public input is allowed, the result is often well received, if not beneficial.[9] A CBA negotiation process "provides a mechanism to

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CBA from four elements: 1) "A CBA concerns a single development project;" 2) "A CBA is [a] legally enforceable contract;" 3) "A CBA addresses a range of community interests;" and 4) "A CBA is the product of substantial community involvement").

7. *See* Land Use Leadership Alliance Training Program, *supra* note 3, at Days 1-2.

8. KIRK EMERSON ET AL., THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 6-9 (Rosemary O'Leary & Lisa Bingham eds., 2003);

> 'Procedural Justice' offers a theory of procedural fairness for civil dispute resolution. The core idea behind the theory is the procedural legitimacy thesis: participation rights are essential for the legitimacy of adjudicatory procedures. The theory yields two principles of procedural justice: the accuracy principle and the participation principle. The two principles require a system of procedure to aim at accuracy and to afford reasonable rights of participation qualified by a practicability constraint.

Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev. 181, Abstract (2004).

9. *See* Land Use Leadership Alliance Training Program, *supra* note 3, at Day 2.

ensure that community concerns are heard and addressed."[10] Community inclusiveness in the development process makes CBAs successful.[11]

When benefits are negotiated in an inclusive CBA, it promotes a sense of procedural justice to the community,[12] which implies that citizen satisfaction with a resolution process is directly related to their opportunities to participate. When citizens feel they are part of procedural justice, the perceived legitimacy of decisions and outcomes increase, thereby decreasing the probability of objection[13] and minimizing opposition to discretionary approval from government entities. This stands in contrast to situations where stakeholders feel a decision was forced upon them without the opportunity to be heard.[14] Exclusion from the process makes parties feel the decision may be unreasonable, or that they were treated unfairly.[15] When stakeholders do not feel procedural justice, they oppose the decision.[16]

B. Effective Community Benefit Agreement Negotiation

The first step in pursuing CBA negotiations is to organize a broad based coalition of stakeholders with diverse community interests, who can formalize their relationship by creating a Community Benefits Coalition (CBC).[17] This will give the CBA an inclusive character and a degree of democratic legitimacy

10. GROSS, LEROY & JANIS-APARACIO, *supra* note 4, at 21.

11. Greg LeRoy & Anna Puriton, NEIGHBORHOOD FUNDERS GROUP, COMMUNITY BENEFITS AGREEMENTS: ENSURING THAT URBAN REDEVELOPMENT BENEFITS EVERYONE 3-4 (2005), http://www.nfg.org/publications/community_benefits_agreements.pdf.

12. GROSS, LEROY & JANIS-APARACIO, *supra* note 4, at 21; Land Use Leadership Alliance Training Program, *supra* note 3, at Day 2.

13. EMERSON ET AL., *supra* note 8, at 8.

14. *Id.* (citing AMY J. DOUGLAS, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987)); Land Use Leadership Alliance Training Program, *supra* note 3, at Days 1-2.

15. Land Use Leadership Alliance Training Program, *supra* note 3, at Day 3.

16. EMERSON ET AL., *supra* note 8, at 8.

17. David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657, 663-64 (2007).

compared to typical bi-lateral negotiations between developers and government.[18]

The CBC members should draft a Coalition Operating Agreement to establish procedures limiting the negotiation with the developer in order to guard against individuals attempting to directly benefit from the negotiation.[19] Throughout the process the CBC should court uninvolved community organizations to increase political clout and influence elected officials.[20] Additionally, the CBC should only negotiate benefits that relate to the impact of the proposed project. Incorporating unrelated benefits corrupts the zoning review process and taints public perception.[21]

The process of negotiating a CBA should be transparent, so the entire community can understand the developer's specific commitments and monitor the development project's outcome.[22] The Coalition must represent the views of the community as a whole to ensure an inclusive public process. If stakeholders are excluded from knowledge about a process, it may be perceived as unreasonable and unfair when that same process later affects them.[23]

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18. *Id.* at 664.

19. *See* Memorandum from David Marcello, The Public Law Center, *A "Concentric Circles" Model For Organizing Community Benefit Agreements* (Mar. 15, 2007), *available at* http://www.law.tulane.edu/WorkArea/downloadasset.aspx?id=5746&LangType=1033 (executable pdf) (discussing of the role of the CBC, along with the steps and procedures that that a CBC should take for negotiations to be effective upon reaching the negotiating table). For a model Operating Agreement *see* Tulane University Law School, The Public Law Center, Services to the Community, http://www.law.tulane.edu/tlscenters/PublicLawCenter/home.aspx?id =3906 (last visited Oct. 26, 2009).

20. *See id.*

21. In an influential 1988 report, the New York City Bar Association said some politicians had approved projects solely to get unrelated benefits, thereby corrupting the zoning process. The lawyers' group recommended that any amenities promised by a developer have a reasonable relationship to the project, a practice that successive administrations adopted said Jesse Masyr, the lawyer who negotiated the Bronx Terminal agreement. *See* Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, *available at* http://www.nytimes.com/2006/06/14/realestate/commercial /14agree.html.

22. GROSS, LEROY & JANIS-APARACIO, *supra* note 4, at 22.

23. *See* Land Use Leadership Alliance Training Program, *supra* note 3, at Days 1-2.

C. The Agreement is Clear and Complete

CBAs are contracts and must meet the basic elements of a contract to be an effective tool. Opponents of CBAs often criticize them for lapses in enforceability, not providing adequate modes of revision or negotiation, a lack of consideration by the community coalition, or clear outcomes to the contract.[24] Enforceability is critical if a CBA is to be an effective tool for providing benefits to the community. The CBA must provide clear terms describing provisions for enforcement, remedies available to the parties, as well as the forum in which parties may seek enforcement. Since a community coalition could dissolve and render the CBA unenforceable, incorporating the government is essential to ensuring that provisions can be imposed in perpetuity.[25]

Often, when the government negotiates a Development Agreement for community benefits, the agreements are couched in vague terms with non-binding goals and aspirations, as opposed to "enforceable language used on traditional land use issues like project design, infrastructure . . . and financing requirements."[26] The CBA should use legally binding terms, thereby assuring that all parties will be accountable for the provisions in the agreement.

A complete CBA should provide adequate modes for review and revision. Most major development projects require continuing oversight since the project will immediately impact the

24. Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities And Traps For Developers, Municipalities and Community Organizations*, American Law Institute—American Bar Association for Continuing Legal Education, Course of Study, SN005 ALI-ABA 1407, 1424-26 (Aug. 16-18, 2007). The author notes that the "enforceability of CBAs has yet to be tested in court, but that some lawyers have expressed concerns that the agreements will not hold up." *Id.* at 1424. The primary concern has been whether community groups provide any consideration for these contracts; however promises to not oppose developments are likely to be deemed supported by consideration. 17 AM. JUR. 2D *Contracts* § 124 (1964). In contract law, only signatories are able to enforce provisions; CBAs have been encouraged to require that each community group sign the CBA separately. Salkin, at 1424. For a more in-depth discussion of legal issues related to CBA, *see* Salkin, at 1424-26.

25. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations,* 26 UCLA J. ENVTL. L. & POL'Y 291, 295 (2008).

26. Gross, *supra* note 6, at 39.

community while benefits may not be realized for years to come. To avoid this, CBAs should include provisions for continued review and monitoring of developers' progress. Further, while negotiations should attempt to capture all of the parties' concerns, as the development progresses, the terms may need to be modified to accommodate all parties. So, the CBA should have flexible provisions allowing for negotiation and change.

IV. ATLANTIC YARDS

Atlantic Yards will be a multi-purpose development project that will collect over $300 million in subsidies from New York City and State, and will receive property and sales tax exemptions along with property transfers.[27] Some have estimated that the project will receive $2,157,260,000 in subsidies and tax breaks.[28] This fiscal promise provides community groups with substantial leverage in negotiating benefits in exchange for support during the approval process.

A. Atlantic Yards CBA

Developer Bruce Ratner announced his intention to build the Atlantic Yards Arena on December 10, 2003.[29] However, not until January 23, 2004 did it become certain that the Atlantic Yards project would move forward.[30] Then, in July 2004, the developer held a meeting of potential CBA signatories[31] including: the New York Chapter for the Association of

27. Charles V. Bagli, *Brooklyn Arena Builder Plans to Break Ground In December After Delay*, N.Y. TIMES, Sept. 9, 2008, *available at* http://www.nytimes.com/2008/09/10/nyregion/10yards.html.

28. Calder, Rich, *Your 'Net' Loss: $2B In Taxes to Ratner*, NEW YORK POST (Apr. 14, 2008), *available at* http://www.nypost.com/p/news/regional/your_net_loss_Qz1qBFFuTuAysV3Be1rEOJ.

29. Charles V. Bagli, *A Grand Plan in Brooklyn For the Nets' Arena Complex*, N.Y. TIMES, Dec. 11, 2003, *available at* http://www.nytimes.com/2003/12/11/nyregion/a-grand-plan-in-brooklyn-for-the-nets-arena-complex.html.

30. Richard Sandomir & Charles V. Bagli, *Ratner's Path to Buy Nets Had Pitfalls and Promise*, N.Y. TIMES, Jan. 25, 2004, *available at* http://www.nytimes.com/2004/01/25/sports/pro-basketball-ratner-s-path-to-buy-nets-had-pitfallsand-promise.html.

31. PRATT INST. CTR. FOR COMMUNITY & ENVTL. DEV., SLAM DUNK OR AIRBALL? A PRELIMINARY ANALYSIS OF ATLANTIC YARDS PROJECT 14 (2005).

Community Organizations for Reform Now (ACORN), a membership-based group representing low-income city residents; Brooklyn United for Innovative Local Development (BUILD), a local group sponsored by Assembly member Roger Green; and the Downtown Brooklyn Oversight and Advisory Committee (DBOAC), which focuses on contracts for minorities and women.[32] The final CBA was signed June 27, 2005, resulting in seven distinct agreed upon categories of benefits[33] including: Jobs Development; Small Business Development and Contracting, Housing; Community Amenities and Facilities; Environmental Assurances; and Public Housing, and Educational Initiatives. These seven areas encompass a broad range of values and benefits for the community beyond those typically provided without a CBA. Despite this, the development still faces large opposition.

B. Atlantic Yards CBA Process

i. Is the Process Inclusive?

Early on it was apparent that the developer desired a CBA to gain public support.[34] BUILD moved to negotiate a CBA, presenting a draft on April 24, 2004, three months after it was certain the project was moving forward.[35] Madeline Janis-Aparicio, executive director of the Los Angeles Alliance for a New Economy, stated it should take up to a year to bring together a coalition before beginning negotiations, and that successful CBAs

32. *See id.*

33. *See* Atlantic Yards Community Benefit Agreement (June 2005) (on file with author); *See also* Atlantic Yards, The Community Benefits Agreement at a Glance, (2005) (on file with author) (providing a brief summation of the major points of each community benefit area negotiated).

34. *See* Bettina Damiani, Comments at the Public Hearing of the New York City Council Committee on Economic Development on the Proposed Atlantic Yards Project (May 26, 2005), *available at* http://www.goodjobsny.org/testimony_bay_5_05.htm. Bettina Damiani, Project Director at Good Jobs New York, which promotes accountability in the use of economic development subsidies, states that this is "the first project [Good Jobs New York] know[s] of in New York City in which the developer has advertised that he seeks to participate in a [CBA]." *Id.*

35. Brooklyn United for Innovative Local Development (BUILD), Facts & Myths, http://www.buildbrooklyn.org/index.php?sect_id=fact (last visited Oct. 26, 2009).

don't skip steps and still form broad, complete community coalitions.[36]

Here, a single entity attempted to negotiate a CBA without taking the time required to create a representative coalition. Bettina Damiani, project director of Good Job New York, stated that the most striking difference between the proposed Atlantic Yards CBA and the CBAs in California is that the Atlantic Yards CBA lacked a broad coalition representing varied interests. In the Atlantic Yards CBA a few groups—all already publicly supporting the project—pursued individual concerns rather than including the community as a whole in a comprehensive negotiation.[37] "While certainly a win in the fight for affordable housing," the chance for an inclusive coalition, representing all parties, was reduced.[38]

Damiani stated that CBAs normally include a broad coalition representing a variety of interests that might oppose a project.[39] As described by Damiani typically "the coalition hammers out its points of unity in advance,"[40] in a Coalition Operating Agreement. Then, during negotiations, individual group issues proceed as unmet until all member issues are addressed.[41] This way the bargaining power of each benefits the coalition as a whole.

The groups that signed the Atlantic Yards CBA did not form a broad coalition representing the entire community.[42] By

36. Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, *available at* http://www.nytimes.com/2006/06/14/realestate/commercial/14agree.html?pagewanted=1.

37. *See* Damiani, *supra* note 34. It should be noted, counter to many statements by opposition parties, that when the negotiations took place, all parties met together, according to BUILD President James Caldwell in a phone interview.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id. See also* Marcello, *Community Benefit Agreements*, *supra*, note 17, at 663-64; Marcello, *"Concentric Circles," supra* note 19.

42. The President of BUILD stated during a phone interview that other community groups were invited to the negotiations by the President of Brooklyn's Office prior to the beginning of the negotiations who turned down the invitations, but neither Mr. Caldwell nor the President's Office were able to name any parties invited nor provide documentation of the invitations to the other groups. It should be noted that eventually, two months into negotiations, another group was invited to join the negotiations by the developer only after

excluding others from negotiation, the signatories defeated the fundamental purpose of the CBA—to garner public support. Instead, an alternative coalition was formed including three elected officials from the project's proposed location.[43] While also supporting development, this coalition had different goals than the CBA signatories. By being left out of the process, this group's sense of procedural justice was breached, creating strong opposition to the development, in spite of the beneficial provisions negotiated by the signatories.[44]

Opposition to the Agreement stated that the public was unaware of negotiations until the story broke on October 2, 2004, two months after negotiation started and an analyst from Good Jobs New York expressed concern over the lack of transparency.[45] Prior to the newspaper article, the negotiators made no public

drawing attention to itself. However this invitation was eventually turned down. *See* Jess Wisloski, *Ratner invites chosen few to draft agreement*, THE BROOKLYN PAPER, Oct. 2, 2004, *available at* http://www.brooklynpaper.com/stories/27/38/27_38nets2.html; Brooklyn United for Innovative Local Development (BUILD), Facts & Myths, http://www.buildbrooklyn.org/index.php?sect_id=fact (last visited Oct. 26, 2009); *but see* Brian J. Carreira, *Ratner Applies Full-Court Press on Downtown Arena*, THE BROOKLYN RAIL, Nov. 2004, *available at* http://www.brooklynrail.org/%202004/11/local/ratner-applies-full-court-press-on-the-d (last visited Oct. 23, 2009). Discussing how,

> [a]t the October 26 BUILD meeting in Crown Heights, however, there was a distinctly different interpretation of both the overall proposal as well as the CBA negotiations. Marie Louis, the 1st Vice President of the group, described the PICCED survey as 'skewed' and said that the assertion that local residents weren't being engaged in the CBA process is 'laughable.'

Id.

43. Develop—Don't Destroy Brooklyn, Community Based Plans, Community Design Principles, http://dddb.net/php/community/principles.php (last visited Oct. 26, 2009). The alternative coalition has created an agreement of values and benefits that they would negotiate for together, as recommended by both Damiani and Marcello. Additionally, the alternative coalition has created a development and found the support of a developer, Extell, who eventually bid more for the Vanderbilt Yards property than Ratner, but MTA choose to go with the lower bid. *See also* Develop—Don't Destroy Brooklyn, Community Based Plans, The UNITY Community Development Plan, http://dddb.net/php/community/unity.php (last visited Oct. 26, 2009).

44. *See* Land Use Leadership Alliance Training Program, *supra* note 3, at Day 1, 2.

45. Jess Wisloski, *Who will benefit from arena CBA*, THE BROOKLYN PAPER, Oct. 16, 2004, *available at* http://brooklynpaper.com/stories/27/40/27_40nets4.html.

statements. A Community Board district manager stated "[o]ngoing negotiations are not something typically done in the public forum," against typical principles of a successful CBA.[46]

While BUILD President, James Caldwell, stated that the meetings were open to the public, and that BUILD held weekly meetings to inform its own members about Atlantic Yards and the CBA process,[47] the public felt the process was hidden.[48] Nearly a full *year* after the CBA was signed, on June 13, 2006, the coalition began to hold "meet & greet" sessions, open forums for the coalition to inform the community about the benefits of the Agreement.[49] While these meetings represented a step toward increasing transparency in the CBA process, it came too late. With the document already signed, the community had already been left out.

ii. Benefits Not Reflective of Community Needs and Concerns

Besides the exclusionary, opaque process, community stakeholders are often concerned that, while the CBA provisions are beneficial, they do not address the actual concerns of the community.[50] The Pratt Institute conducted a survey of residents and businesses in the vicinity of the Atlantic Yards and found they have major concerns about housing, traffic, and the project's potential impact on neighborhood schools and public safety.[51] For the many residents who are not directly facing these issues, the promise of jobs and affordable housing outweighs the neighbor-hood concerns of those residents of Prospect Heights and downtown Brooklyn.[52] The Pratt survey found that residents

46. Wisloski, *supra* note 42.

47. Telephone Interview with James Caldwell, President, BUILD (Feb. 6, 2009); *see also* Carreira, *supra* note 42.

48. *See, e.g.*, Wisloski, *supra* note 42.

49. Posting of Norman Oder, CBA coalition launches invite-only "Meet & Greet" session, to Atlantic Yards Report Watchdog Blog (June 23, 2006, 7:27 AM), http://atlanticyardsreport.blogspot.com/2006/06/cba-coalition-launchesinvite-only.html.

50. PRATT INST. CTR., *supra* note 31, at 56.

51. *Id*. at 2, 24. The survey was of some 20,000 people near downtown Brooklyn, between June and September 2004, about six to nine months after the announcement of the project. *Id*. at 24.

52. *Id*. at 24.

support development in the neighborhood, but they want future development to address neighborhood shortcomings and provide opportunity for the low-income populations in Brooklyn.[53]

The CBA negotiated between the developer and the limited community groups addresses most of the primary concerns found by Pratt in its survey of local residents, except for traffic safety and street conditions, which were marginally addressed during the environmental review process.[54] Section IV of the CBA is named "Workforce Development" and "its purpose is to implement workforce development initiatives addressing the problem of disproportionately high unemployment within the Community."[55] The CBA includes provisions for hiring and training community minorities for skilled jobs while also helping local small business development.[56] The CBA addresses affordable housing, housing for senior citizens, and makes provisions for displaced families by providing leases in the new buildings at the same cost as their prior residences.[57] Community concern over the lack of quality educational facilities, were also addressed, with the promise of adding four schools with specific curricular concentrations and after school programs.[58] In addition, the CBA addresses other concerns such as the need for an affordable health care center, childcare centers, community youth and senior centers, as well as environmental assurances, and open space.[59] Issues not significantly focused on include traffic and parking issues, eminent domain, displacement of residents and businesses, increased real estate prices, impact on public transportation, and the effect that the scale of the development will have on the community character.[60] While the CBA does address numerous community concerns, these unanswered issues demonstrate the necessity for a broader

53. *Id.*

54. *See* Atlantic Yards, Community Benefit Agreement, *supra* note 33; PRATT INST. CTR., *supra* note 31, at 24.

55. Atlantic Yards, Community Benefit Agreement, *supra* note 33, at 11.

56. *Id.* at 11-22, 37; *see also* The Community Benefits Agreement at a Glance, *supra* note 33, at 1.

57. Atlantic Yards, Community Benefit Agreement, *supra* note 33, at 22–25.

58. *Id.* at 38-41.

59. *See generally id.*

60. PRATT INST. CTR., *supra* note 31, at 24.

coalition that will ensure that more of the community's concerns are heard.

iii. Atlantic Yards CBA is Clear and Complete

As stated, a CBA is a contract and must meet the elements of a contract. It must provide the proper mechanisms for community groups to enforce its provisions and provide clear terms as to how the provisions will be enforced. The Atlantic Yards CBA has clear terms throughout the agreement and finalizes those terms with an enforcement section for when the parties need to mediate disagreements.[61]

Some opponents criticize the enforcement provisions of the Agreement as being too lax, since it opts for arbitration and mediation before monetary penalties or litigation.[62] But opponents forget that a CBA is used to collaborate toward a beneficial outcome for all, and that enforcement provisions that advocate continued harmony rather than an adversarial attitude reflect a well thought out Agreement. Some CBAs, including the California Models, have similarly vague enforcement sections,[63] reinforcing the idea that encouraging collaboration is one sign of a thorough CBA. Additionally, mediation and arbitration allow for modification and change during the development process—a key feature as large developments often take years and have unforeseeable impacts. Allowing space for both parties to modify provisions of the agreement as circumstances change is sound reasoning.[64] The Atlantic Yards CBA provisions allowing modification, change and collaboration to solve disputes are signs of a successful CBA negotiation; a document that will allow continued collaboration toward a mutually beneficial end under any circumstance.

While not a requirement of a successful CBA, having the government serve as a signatory of the agreement ensures enforceability of the provisions if the community groups dissolve.

61. Atlantic Yards, Community Benefit Agreement, *supra* note 33, at 46.

62. Posting of Norman Oder, "Substantial legally enforceable penalties?" FCR's claims about CBA raise doubts, to Atlantic Yards Report Watchdog Blog (Feb. 19, 2008, 6:04 AM), http://atlanticyardsreport.blogspot.com/2008/02/substantial-legally-enforceable. html.

63. *Id.*

64. *See generally id.*

This is particularly helpful in a CBA of this nature where there are limited community groups and provisions that may be enforced by only one side.

C. Analysis

The Atlantic Yards CBA illustrates how, when parties feel they are denied procedural justice, their perception of a decision or an outcome's legitimacy will decrease; which will subsequently increases the probability that the community will object to that same decision or outcome during the approval process.[65] Many community residents felt the CBA's formation and negotiation processes were neither reasonable nor correct, that participants were not treated fairly, and that the process infringed upon the communities' procedural and psychological interests.[66] While the CBA does provides numerous benefits, including affordable housing and union jobs, the coalition failed to address other community concerns such as traffic, parking, and the forced relocation of residents.[67] The process that was used violated the community's three categories of interests, and instead fueled parties' opposition to the development.

In addition, the coalition abandoned the California CBA model and rejected much of the academic literature.[68] Instead of acting in unison, the group employed a piecemeal approach driven by individual demands and used a memorandum of understanding that led to the final document.[69] As an alternative, the group should have recruited from the general public to form a representational, or broader community base rather than letting the developer individually approach specific stakeholders and negotiate the agreement behind closed doors. Had an alternative process been used it could have created an inclusive

65. EMERSON ET AL., *supra* note 8, at 8; *see generally* Develop—Don't Destroy Brooklyn, The Opposition, http://dddb.net/php/opposition.php (last visited Oct. 26, 2009).

66. *See* Damiani, *supra* note 34; Land Use Leadership Alliance Training Program, *supra* note 3, at Days 1-2.

67. PRATT INST. CTR., *supra* note 31, at 24.

68. *See* LeRoy & Puriton, *supra* note 11, at 6-9; Marcello, *Community Benefit Agreements*, *supra* note 17, at 663-64.

69. Atlantic Yards Related Documents, Atlantic Yards, http://www.atlanticyards.com/html/footer/documents.html (last visited Mar. 2, 2009).

process, increasing the publicly perceived legitimacy of process.[70] Additionally, the coalition should have composed an Operating Agreement limiting parties from negotiating individually, thereby creating greater unity. When released to the public, an Operating Agreement would have increased transparency and informed the community about the goals and purposes of the negotiations.[71]

While the process that created the CBA was flawed, the final document itself was clear and complete, allowing for ongoing negotiations, modifications, and/or collaborations between the parties. The Atlantic Yards CBA provides numerous benefits, such as affordable housing, open space, union jobs, and environmental assurances, reflecting residents' concerns and needs.[72] However, these benefits were tainted in the public's eye due to a lack of transparency.

V. CONCLUSION

The Atlantic Yards CBA provides many helpful provisions that advance community interests. As a document, it provides for review and revision as the development progresses, and includes provisions so that community groups can enforce their respective conditions. However, the exclusive process negated broader community involvement and created a palpable sense of procedural injustice.[73]

Large developments change the landscape of any given community, even one as developed and urbanized as Brooklyn. They impact daily life both positively by providing new resources and assets, and negatively by further burdening public infrastructure, including schools and roads. These potential impacts of large develop projects typically result in a polarized debate, much like the Atlantic Yards controversy. However, where developers employ an inclusive CBA process that allows

70. *See* Marcello, *Community Benefit Agreements*, *supra* note 17, at 663-64.

71. *See* Marcello, *"Concentric Circles," supra* note 19.

72. *See* Atlantic Yards, Community Benefit Agreement, *supra* note 33.

73. PRATT INST. CTR., *supra* note 31, at 24 (stating that "an overwhelming majority (81.4%) of survey respondents said they were either very concerned or concerned about the impact of the proposed Brooklyn Atlantic Yards Project").

broad community involvement, it can dissipate much of the neighborhood opposition.

When a CBA process is inclusive it allows for a sense of procedural justice and creates a process that can address the interests of the community.[74] When a stakeholder is given the opportunity to participate in the decision-making process, his or her procedural interests are met,[75] and a sense of inclusion satisfies the community's psychological interests.[76] Intuitively, when a party is given an opportunity to be heard, it is more likely that the process will address their substantive interests.[77] When a person's procedural interests are satisfied and he or she is given a sense of procedural justice, the probability that the citizen will object to the development during the approval process is decreased.[78] In summation, when a person's three interests, procedural, psychological and substantive are addressed, it will likely decrease the conflict surrounding a development. Even in situations where the ultimate decision may go against the stakeholder's substantive interest, if that person's procedural interest is met, he or she may feel that the ultimate goal was still achieved—the community interest was protected by its involvement in an inclusive CBA.

The Atlantic Yards CBA provides for numerous potential benefits that would not otherwise be provided to the community from a typical development. However, the process in which the coalition was formed and operated lacked the necessary transparency to create an inclusive group and to give the public assurances that their concerns about the development and the needs of the community were being addressed by the coalition. Future CBA coalitions can look to the Atlantic Yards as a model for potential benefits and how to draft a clear and complete contract, but should avoid the many early pitfalls of failing to create an inclusive CBA. The potential Columbia CBA in Manhattan is already taking note to avoid the errors of the

74. *See* Land Use Leadership Alliance Training Program, *supra* note 3, at Days 1-2.

75. *See id.*

76. *See id.*

77. *See id.*

78. EMERSON ET AL., *supra* note 8, at 8.

Atlantic Yards CBA by seeking a wider coalition and allow greater public review of the process.[79]

79. Posting of Norman Order, CBAs head to head: Columbia vs. Atlantic Yards, Atlantic Yards Report Watchdog Blog (Aug. 22, 2007, 6:25 AM), http://atlanticyardsreport.blogspot.com/2007/08/cbas-head-to-head-columbia-vs-atlantic.html.