RENEGOTIATING THE ENERGY TRANSITION

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Public-private bargaining is a central component of the energy transition transforming the U.S. landscape. Solar and wind energy developers routinely enter into agreements with local governments, community groups, or both, in which developers promise benefits to communities in exchange for project support. This trend emerges from a long tradition of such agreements in other types of land development. Yet residents in communities hosting new renewable energy infrastructure—and a growing academic literature—cast a jaundiced eye on private corporations' use of bargaining tools to move energy projects forward. Developers' "good neighbor" payments to residents near proposed projects raise similar suspicion.

This Article offers a normative theoretical framework for public-private negotiation for energy transition infrastructure—focusing on large-scale solar and wind farms, which dominate new U.S. energy growth. It argues that the purpose of negotiations and resulting agreements is threefold: (1) to augment governance processes that inadequately address the local externalities of projects, (2) to speed up project approval, and (3)

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to fulfill some developers' sincere desire to operate as good community citizens.

Even where developers primarily use negotiation for self-serving reasons of speeding up projects, negotiations should be treated as quasi-governmental tools that follow good governance standards of accountability, accessibility, and equitable outcomes. These standards will best achieve the three core purposes of negotiations. Furthermore, governments increasingly require community benefits agreements or developer payments—thus dragging them into more of a public sphere. And energy negotiations are essentially standing in for sclerotic governance processes. Building from this normative framework, this Article operationalizes energy transition negotiation, arguing for a comprehensive suite of tools to achieve the theoretical values of the framework and move renewable energy projects forward.

INTRODUCTION

Economic forces and state policies have set the United States on a path to transform its energy sector, which is the backbone of the economy and human well-being.[1] Many state

1. For an accounting and overview of these policies, see GALEN L.BARBOSE, LAWRENCE BERKELEY NAT'L LAB'Y, U.S. STATE RENEWABLES PORTFOLIO STANDARDS & CLEAN ENERGY STANDARDS: 2024 STATUS UPDATE (2024); *Summary of Inflation Reduction Act Provisions Related to Clean Energy*, U.S. EPA, https://www.epa.gov/green-power-markets/summary-inflation-reduction-act-provisions-related-renewable-energy [https://perma.cc/F4AQ-A9DL] (last updated July 29, 2025); Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818. For

policies mandate or incentivize the rapid replacement of fossil fuel-fired resources with low-carbon ones—particularly large-scale solar and wind farms paired with energy storage.[2] Even without subsidies or mandates, solar and wind energy are the cheapest forms of new generation and have therefore recently dominated new energy infrastructure additions.[3] Corporations are also purchasing low-carbon energy en masse to meet shareholder or leadership-based mandates.[4] The scramble for renewable energy is likely to continue to grow despite federal opposition to solar and wind energy.[5] This is in large part because data centers have increased demand for energy—including clean energy—at a rate that is unprecedented in the past several decades.[6] These "clean energy" sources primarily consist

modifications to the Inflation Reduction Act, including termination of clean energy tax credits, see *infra* note 5.

2. *See supra* note 1.

3. GEORGE BILICIC & SAMUEL SCROGGINS, LAZARD, 2023 LEVELIZED COST OF ENERGY+ (2023), https://www.lazard.com/media/2ozoovyg/lazards-lcoeplus-april-2023.pdf [https://perma.cc/9JCN-NUL2]; Suparna Ray, *Solar and Battery Storage to Make Up 81% of New U.S. Electric-Generating Capacity in 2024*, U.S. ENERGY INFO. ADMIN.: EDUC. (Feb. 15, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61424 [https://perma.cc/4X8Z-UEG2].

4. JAMES KOBUS ET AL., COLUM. UNIV. SCH. OF INT'L & PUB. AFFS., CTR. ON GLOB. ENERGY POL'Y, THE ROLE OF CORPORATE RENEWABLE POWER PURCHASE AGREEMENTS IN SUPPORTING US WIND AND SOLAR DEPLOYMENT (2021), https://www.energypolicy.columbia.edu/sites/default/files/pictures/PPA%20report,%20designed%20v4,%203.17.21.pdf [https://perma.cc/M5P7-TYZS]; Greg Robinson, *Tackling the Data Center Clean Energy Dilemma*, FORBES: TECH. COUNCIL (Oct. 2, 2024, at 08:00 AM), https://www.forbes.com/councils/forbestechcouncil/2024/10/02/tackling-the-data-center-clean-energy-dilemma [https://perma.cc/BC6S-CAHB].

5. Brad Plumer & Lisa Friedman, *Suddenly, the Trump Administration Tightens the Vise on Wind Farms*, N.Y. TIMES (Aug. 7, 2025), https://www.nytimes.com/2025/08/07/climate/trump-wind-solar-power-projects.html [https://perma.cc/B8MF-PH2Z] (noting new federal barriers to solar and wind development); Pub. L. No. 119-21, §§ 70506, 70512, 70513, 139 Stat. 72, 251, 252–70, 270–73 (2025) (terminating and restricting federal clean energy tax credits).

6. ARMAN SHEHABI ET AL., LAWRENCE BERKELEY NAT'L LAB'Y, 2024 UNITED STATES DATA CENTER ENERGY USAGE REPORT 7 (2024), https://eta-publications.lbl.gov/sites/default/files/2024-12/lbnl-2024-united-states-data-center-energy-usage-report_1.pdf [https://perma.cc/XPU8-5QDS] (projecting a compound annual growth rate in data center electricity demand between 13 and 27 percent between 2023 and 2028); FED. ENERGY REGUL. COMM'N, Doc. No. AD24-11-000, Transcript: TECHNICAL CONFERENCE REGARDING LARGE LOADS CO-LOCATED AT GENERATING FACILITIES 10 (2024), https://www.ferc.gov/media/transcript-technical-conference-regarding-large-loads-co-located-generating-facilities [https://perma.cc/78JU-L5B7] (noting that "[l]oad [electricity demand] has been flat most everywhere in America[] for certainly almost 20 years" but is now "shooting up").

of sprawling renewable energy infrastructure built in rural areas by large corporations headquartered in distant states.[7]

Despite the growth of clean energy, a major hurdle sits imposingly in the middle of this path. The entry of large, well-resourced outsiders into insular rural areas has sparked predictable controversy and increasingly successful opposition. Local and national groups (sometimes in concert) have drummed up a litany of talking points against these projects. Numerous residents pack public meetings where elected town or county commissioners make land use approvals for renewable energy projects—a critical gatekeeping point for such projects.[8] Opponents appear with slogans on T-shirts and a wide range of concerns, such as displacement of farmland, interrupted landscapes, interference with hunting and recreation, a belief that chemicals will leach from solar panels into soil, complaints about unsightly fences around sites and blinking lights or glare, and fear of eroding rural community ties.[9] Predictably, local government

7. KAREN MAGUIRE ET AL., U.S. DEP'T OF AGRIC., UTILITY-SCALE SOLAR AND WIND DEVELOPMENT IN RURAL AREAS: LAND COVER CHANGE (2009–20) 1 (2024), https://www.ers.usda.gov/webdocs/publications/109209/err-330.pdf [https://perma.cc/ZRA3-4V2T] ("As of 2020, 99.8 percent of utility-scale wind turbines and 74 percent of utility-scale solar installations were in rural areas."); The 100 Percent Clean Energy Act of 2018, S.B. 100, 2017–18 State Legislature, Reg. Sess. (Cal. 2018) (defining the energy sources in the "Clean Energy" bill as "eligible renewable energy resources and zero-carbon resources").

8. The other major bottleneck for renewable energy projects is interconnection to existing transmission lines—a time consuming and even stalled process that ultimately halts many projects. *See, e.g.*, *Grid Connection Backlog Grows by 30% in 2023, Dominated by Requests for Solar, Wind, and Energy Storage*, LAWRENCE BERKELEY NAT'L LAB'Y: ENERGY MKTS. & PLAN. (Apr. 10, 2024), https://emp.lbl.gov/news/grid-connection-backlog-grows-30-2023-dominated-requests-solar-wind-and-energy-storage [https://perma.cc/R68W-VGB7]. The elected officials making the decision are called "select people," council members, commissioners, or similar titles depending on the jurisdiction. In some states, counties have land use codes that apply to unincorporated land within county boundaries, or within incorporated municipalities (towns, townships, or in some states, also boroughs) that have opted to not have their own zoning code. NAT'L ASS'N OF CNTYS, LAND USE, ZONING, INFRASTRUCTURE & COMMUNITY PLANNING 7 (July 2024), https://www.naco.org/sites/default/files/2024-06/Housing_Planning%20and%20Zoning_v8_final.pdf [https://perma.cc/J9SZ-MVDF].

9. *See, e.g.*, Dan Gearino, *The Choice for Rural Officials: Oppose Solar Power or Face Revolt*, INSIDE CLIMATE NEWS (Sep. 30, 2022), https://insideclimatenews.org/news/30092022/solar-power-williamsport-ohio-rural-leaders [https://perma.cc/PML7-3WYB] (showing a crowd at a local government meeting with T-shirts stating: "No Industrial Solar Plants on Farmland"); *County Commissioners' Opposition Played Major Role in OPSB Staff Recommendation Against Stark Solar Application*, MOUNT VERNON NEWS (July 26, 2024), https://mountvernonnews.com/stories/662098017-county-commissioners-

bodies—themselves either opposed to projects or facing a torrent of concerns from constituents—deny zoning permits for these projects in a growing number of cases.[10]

The energy transition therefore rests at a critical point. Many states, corporations, and a meaningful percentage of voters agree that we need to aggressively move toward low-carbon energy infrastructure.[11] Yet local governments are regularly denying these installations. As of 2024, Matthew Eisenson and colleagues, who closely track utility-scale renewable energy development and policy, identified "395 local restrictions across 41 states," "19 state-level restrictions," and "378 renewable energy projects that have encountered significant opposition in 47 states."[12]

Although misinformation about the impacts of renewable energy is burgeoning, proponents and opponents of growing renewable energy installations both have valid arguments.[13] Local

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opposition-played-major-role-in-opsb-staff-recommendation-against-stark-solar-application [https://perma.cc/3H5F-GRJ6] (noting local officials' emphasis on "strong local opposition" in their decision to recommend denial of solar project); ZACHARY GOLDBERG ET AL., CTR. FOR RURAL PA., UNDERSTANDING AND ADDRESSING THE IMPACT OF SOLAR DEVELOPMENT ON PENNSYLVANIA FARMLAND (2024), https://www.rural.pa.gov/getfile.cfm?file=Resources/reports/assets/262/Impact%20of%20Solar%20Development%20on%20Pennsylvania%20Farmland%20Report%20Web.pdf [https://perma.cc/4SJV-LLDR] (documenting and analyzing predominant rural concerns in Pennsylvania). Decisions by farmers to lease their land for solar are also impacting rural families, causing present and inter-generational conflicts surrounding the predominant use of the land for farming or solar. GOLDBERG ET AL., *supra*.

10. MATTHEW EISENSON ET AL., COLUM. L. SCH., SABIN CTR. FOR CLIMATE CHANGE L., OPPOSITION TO RENEWABLE ENERGY FACILITIES IN THE UNITED STATES: JUNE 2024 EDITION (2024), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1227&context=sabin_climate_change [https://perma.cc/WZ3Q-7TUW].

11. KOBUS ET AL., *supra* note 4; BRIAN KENNEDY ET AL., PEW RSCH. CTR., MAJORITIES OF AMERICANS PRIORITIZE RENEWABLE ENERGY, BACK STEPS TO ADDRESS CLIMATE CHANGE 4 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/06/PS_2023.06.25_climate-energy_report-1.pdf [https://perma.cc/86BL-WGDD] ("67% of U.S. adults prioritize the development of alternative energy sources such as wind, solar and hydrogen power over increasing the production of fossil fuel energy sources.").

12. EISENSON ET AL., *supra* note 10, at 5.

13. Travis G. Coan et al., *Computer-Assisted Classification of Contrarian Claims About Climate Change*, 11 SCI. REPS., no. 22320, 2021, at 1, 1 (documenting and analyzing claims about renewable energy and climate and citing to the broad misinformation literature); MATTHEW EISENSON ET AL., COLUM. L. SCH., SABIN CTR. FOR CLIMATE CHANGE L., REBUTTING 33 FALSE CLAIMS ABOUT SOLAR, WIND, AND ELECTRIC VEHICLES (2024), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1218&context=sabin_climate_change [https://perma.cc/4HF2-

residents and state and national groups are legitimately concerned about land use change and the transformation of community culture in the name of energy that does not directly benefit them.[14] Many new energy facilities—including renewable facilities—generate energy in predominantly agricultural areas to send to urban or industrial population centers.[15] Residents are also frustrated by the lack of meaningful consultation with community members in many cases and are concerned that governments and developers, although interacting in public meetings, are making separate decisions behind their backs.[16] Yet policymakers, shareholders, and voters also have legitimate goals for lower-carbon energy to address effects such as extreme weather, wildfires, and rising seas.[17]

Effective negotiation among developers, local governments, non-governmental community groups, and individual community members provides a key path toward compromise within this seemingly intractable space.[18] Negotiations, if designed and

C5WU]; DAVID ANDERSON, ENERGY & POL'Y INST., FUELING THE OPPOSITION: HOW FOSSIL FUEL INTERESTS ARE FIGHTING TO KILL WIND AND SOLAR FARMS BEFORE THEY ARE BUILT (2024), https://energyandpolicy.org/wp-content/uploads/2024/08/How-Fossil-Fuel-Interests-Are-Fighting-to-Kill-Wind-and-Solar-Farms-Before-They-Are-Built-1.pdf [https://perma.cc/DVG7-U2W2].

14. *See* Ann M. Eisenberg, *Extracting Clean Energy*, 59 U.C. DAVIS L. REV. (forthcoming 2026) (manuscript at 6) (on file with authors) (applying internal colony theory to U.S. clean energy development and observing that "locals may be resisting corporate and urban domination as much as they are resisting clean energy itself").

15. GOLDBERG ET AL., *supra* note 9 (documenting rural concerns and opportunities). There are widespread benefits of large quantities of clean energy supported by a nationally interconnected transmission grid, including the potential lowering of climate impacts (if enough carbon mitigation occurs) and lower electricity prices in the long term. *See* U.S. DEP'T OF ENERGY, NATIONAL TRANSMISSION PLANNING STUDY (2024), https://www.energy.gov/gdo/national-transmission-planning-study [https://perma.cc/CT3M-XTGW]. But the climate crisis is so large that emissions reductions from the United States alone—although important—do not directly and quickly translate to benefits for individual communities.

16. Kaitlyn Spangler et al., *Legitimating Grid-Scale Solar: Shaping Pennsylvania's Farmland as a Renewable Energy Landscape*, 20 SUSTAINABILITY SCI. 1277, 1288 (2025).

17. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT 46–51, 68–77 (2024), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf [https://perma.cc/23UZ-3Q8H] (documenting current impacts and projecting and quantifying likely future impacts, with degrees of certainty specified).

18. *Cf.* Simona Trandafir et al., *Community Benefit Agreements for Solar Energy: Examining Values, Preferences and Perceived Benefits in the United States Using a Discrete Choice Experiment*, 106 ENERGY RSCH. SOC. SCI., Dec. 2023, at 1, 12 (finding "a prevailing inclination among respondents for private benefits,

implemented thoughtfully, can give local governments and community members a procedural voice in how project decisions proceed and result in meaningful developer investment in long-term community growth. Take the example of two wind projects in the Mt. Pulaski area of Illinois, where the developer invested in community economic development funds used to "establish[] a community-owned grocery co-op" and support local businesses, and refurbished a historic building in the community to serve as its operations and maintenance center.[19] One local official suggested that the developer "has been a terrific neighbor" taking a "whole different approach" by wanting "to be a part of the community and make it better."[20] The official went so far as to claim that, for the second wind project initiated by the developer, "I have not heard one iota of opposition."[21]

Despite opportunities for productive negotiations between renewable energy developers, local governments, and residents, the negotiation currently greasing the wheels of many renewable energy projects is not the type necessary for wholly effective energy governance. This "weak" form of negotiation involves one-off deals between renewable energy developers and local governments, in which the developer offers the town a new firetruck or park, and the conditional zoning approval that is necessary for the project magically appears.[22] These types of negotiations are procedurally inadequate, as they omit many important

particularly those offered on a voluntary basis by developers"); Mhairi Aitken, *Wind Power and Community Benefits: Challenges and Opportunities*, 38 ENERGY POL'Y 6066, 6074 (2010) (finding, in the UK, that "[i]t is likely that earlier discussion and involvement of the local community in early decisions relating to the design of the community benefits package may have helped to . . . give members of the local community a sense of ownership" over portions of project development).

19. David Blanchette, *Wind Farm Project Starting in Mount Pulaski Area*, STATE J.-REG. (Aug. 12, 2019, at 10:21 PM), https://www.sj-r.com/story/news/2019/08/12/wind-farm-project-starting-in/4479008007 [https://perma.cc/5MX8-VFKZ]; *HillTopper Wind Farm, USA*, ENEL, https://www.enelgreenpower.com/our-projects/operating/hilltopper-wind-farm [https://perma.cc/SAF2-6JBH].

20. Blanchette, *supra* note 19.

21. *Id.*

22. Agreements or "deals" between local government officials and developers can constitute illegal "contract zoning" if they do not follow certain procedures and benefit the public, as explored in further detail in Part IV. For one example from Florida, see Walberg v. Metro. Dade Cnty., 296 So.2d 509, 511 (Fla. Dist. Ct. App. 1974) (affirming the legality of developer concessions linked to a zoning approval when the local government considered the "public's interest" and did not act upon a "private contract" between the developer and local government).

and concerned stakeholders, involve weak forms of developer-stakeholder interaction, and include too few interactions.[23] They are also substantively weak, as they do not offer a comprehensive approach to mitigating the impacts of renewable energy development and investing in longer-term community benefits and growth.[24]

As we highlight in Part I, some negotiations better achieve the values that we argue for in this Article, incorporating more parties and producing a broader array of more permanent benefits.[25]

Regardless of their strength—whether simple, one-off agreements or more complex negotiations and agreements involving numerous parties—such negotiations and resulting agreements are typically called *community benefits agreements* (CBAs) or *host community agreements*.[26] The negotiation that we focus on in this Article includes a renewable energy developer and either local governments or community groups (or both) as parties; and they contain specific potentially binding and enforceable provisions with monetary or other benefits (such as hiring commitments) that flow from the developer to at least some individuals within the community.[27]

Beyond developer-local government negotiations, renewable energy developers increasingly offer residents near projects "good neighbor" payments.[28] These types of negotiations have

23. *See infra* Part I.

24. *See infra* Part I.

25. *See infra* Table 1.

26. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 5 (2010) (defining CBAs outside of the renewable energy context); Kristen van de Biezenbos, *Contracted Fracking*, 92 TUL. L. REV. 587, 614 (2018) (defining CBAs as the same). Note that under the Biden Administration, the Department of Energy required projects receiving federal support to include community benefits plans, which were also tied to equity and justice considerations. *See infra* note 34. The Trump Administration has prohibited such plans. *See infra* note 37. While some of community benefits plans resulted in the types of negotiation that we discuss here, this Article covers *all* forms of community-developer negotiation.

27. For more a more detailed definition, see *infra* Part I. *See also infra* text accompanying notes 35–36. We use the term "potentially" binding and enforceable because although the agreements that we describe here include specific provisions that appear to be mandatory for the developer, as we discuss in Parts I and IV, some wording and procedures leading up to the agreement can make enforceability questionable.

28. Kristine A. Tidgren, *Evaluating a Wind Energy Agreement: A Brief Overview*, IOWA STATE UNIV.: CTR. FOR AGRIC. L. & TAX'N (May 19, 2016),

been common practice for developers of large-scale housing and non-energy commercial projects.[29] Yet communities with increasing clean energy development—and a burgeoning academic literature—cast a jaundiced eye on such negotiations in the energy space and other prominent types of infrastructure development. Many view them as unsavory bribes or hush money, designed solely to push projects forward.[30]

This Article argues for a wholesale restructuring of negotiations for energy transition infrastructure. Treating negotiation as a key facet of energy transition governance, the Article builds a theory of constructive community negotiation, integrating examples of good negotiation in existing renewable energy projects. It also draws from the long-standing practice of sophisticated negotiations between multinational fossil energy companies and communities in the international space. The Article proposes mandatory processes for meaningful, ongoing conversations between members of communities, other

https://www.calt.iastate.edu/article/evaluating-wind-energy-agreement-brief-review [https://perma.cc/3TT6-4PP9] ("In an effort to reduce future problems, developers often enter into agreements with landowners owning property adjacent to the wind turbine sites."); LEAH ADELMAN, UNIV. OF MICH., WIND TURBINE ECONOMIC IMPACT: LANDOWNER PAYMENTS, https://graham.umich.edu/media/pubs/Wind-Turbine-Economic-Impact-Landowner-Payment-46930.pdf [https://perma.cc/QHV7-2UCX] ("In Michigan, some wind developers also pay neighbors who own property near wind turbines, not just those with turbines on their land."); *cf. Neighbour Matters*, AUSTL. ENERGY INFRASTRUCTURE COMM'R: COMM'R'S OBSERVATIONS & RECOMMENDATIONS, https://www.aeic.gov.au/observations-and-recommendations/chapter-2-neighbour-consultation-agreements [https://perma.cc/TK9G-YY5N] (noting the content of "neighbour agreements" with renewable energy developers in Australia).

29. *See infra* Part I.

30. Indeed, some research shows that renewable energy developers sign community benefits agreements to placate local governments and residents. Shelley Welton, *The Public-Private Blur in Clean Energy Siting*, 35 KING'S L.J. 258 (2024); Richard Cowell et al., *Acceptance, Acceptability, and Environmental Justice: The Role of Community Benefits in Wind Energy Development*, 54 J. ENV'T PLAN. & MGMT. 539 (2011); Sharlissa Moore & Edward J. Hackett, *The Construction of Technology and Place: Concentrating Solar Power Conflicts in the United States*, 11 ENERGY RSCH. SOC. SCI. 67 (2016); Spangler et al., *supra* note 16; Salmsa Elmallah & Joseph Rand, *"After the Leases Are Signed, It's a Done Deal": Exploring Procedural Injustices for Utility-Scale Wind-Energy Planning in the United States*, 89 ENERGY RES. & SOC. SCI., July 2022. *Cf.* D. L. Bessette et al., *Good fences make good neighbors: Stakeholder perspectives on the local benefits and burdens of large-scale solar energy development in the United States*, 108 ENERGY RES. & SOC. SCI., Feb. 2024 (discussing disparities among neighbors with respect to leasing and associated benefits); Shanti Gamper-Rabindran & Joshua Ash, *"Farming the Sun" or "Coal Legacy"? Social Perspectives On Solar Energy Projects in Appalachia*, 117 ENERGY RES. & SOC. SCI., Nov. 2024 (same).

stakeholders, and renewable energy developers, as well as real involvement of communities in clean energy projects.

Many CBAs currently reflect a weak model of negotiation involving too few parties, too few discussions, and too little substance.[31] The framework proposed in this Article for communities, neighbors to renewable energy projects, and developers of such projects would ensure that negotiations between communities and clean energy developers did not merely comprise a one-way, one-off flow of resources to achieve the developer's outcome.[32] The framework would also convert good neighbor payments to individuals who abut renewable energy projects from apparent "bribes" to consistent mechanisms designed to compensate neighbors for the negative externalities of projects.[33]

There has been limited progress toward more uniform use of detailed CBAs. Under the Biden Administration, the U.S. Department of Energy (DOE) required developers of most clean energy projects that received federal funding to prepare a Community Benefits Plan (CBP), but this did not mandate an actual

31. *See infra* Part I.

32. As we note throughout the Article, this Article builds from other excellent sources that suggest best practices or better approaches to community-developer relations for renewable energy development. *See, e.g.*, ANNIE CORRIGAN & MATT HENRY, NAT'L RENEWABLE ENERGY LAB'Y, COMMUNITY BENEFIT PLANS – GUIDELINES AND TIPS (2024), https://docs.nrel.gov/docs/fy24osti/89472.pdf [https://perma.cc/9RSU-GF4Q]; MADELEINE LEWIS & SELENA GERACE, U. WYO. SCH. OF ENERGY RES., COMMUNITY BENEFITS PLANNING TOOLBOX FOR ENERGY DEVELOPMENT WITH THE U.S. DEPARTMENT OF ENERGY (DOE): RESOURCES & GUIDANCE FOR WYOMING (2024), https://www.uwyo.edu/ser/research/centers-of-excellence/energy-regulation-policy/_files/community-benefits-guide.pdf [https://perma.cc/65Z2-TSQ2]; MATTHEW EISENSON & ROMANY M. WEBB, COLUM. L. SCH., SABIN CTR. FOR CLIMATE CHANGE L., EXPERT INSIGHTS ON BEST PRACTICES FOR COMMUNITY BENEFITS AGREEMENTS 5–6 (2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1207&context=sabin_climate_change [https://perma.cc/WW8Q-6MVM]; Erifili Draklellis & Jeremy Richardson, *Community Benefits Plans: Driving Equitable Clean Energy Development*, RMI (Sep. 25, 2023), https://rmi.org/community-benefits-plans-driving-equitable-clean-energy-development [https://perma.cc/5Q62-L794]; *Community Benefits Agreements: Framework for Success,* POWER SWITCH ACTION: RES., https://www.powerswitchaction.org/resources/community-benefits-agreements/#framework [https://perma.cc/9XD5-JFF3]; U.S. DEP'T OF ENERGY, OFF. OF CLEAN ENERGY DEMONSTRATIONS, GUIDANCE FOR CREATING A COMMUNITY BENEFITS PLAN FOR THE REGIONAL CLEAN HYDROGEN HUBS (2022) (on file with authors).

33. *See, e.g.*, *Neighbour Matters*, *supra* note 28 (noting that neighbors may often prefer payments over screening to block their views of energy projects).

CBA.[34] CBAs contain binding provisions with specific benefits, whereas CBPs were "non-binding" instruments that contained priorities such as job creation and local hiring.[35] While CBPs could lead to binding, enforceable CBAs, they were not mandatory.[36] Additionally, the federal government now prohibits CBPs under federal contracts[37]—making a comprehensive, well-theorized state and local approach to all forms of negotiation, including CBPs, CBAs, and other instruments, even more critical.

Several states have endeavored to formalize negotiation as a tool within the governance framework for siting renewable energy projects.[38] None, however, have required or incentivized the type or extent of negotiations proposed here. Some states require that wind energy developers pay neighboring landowners within specified distances of projects,[39] and others mandate CBAs for each large-scale renewable energy project. New York, for example, mandates reduced electricity bills for residents.[40] Renewable energy developers also increasingly and voluntarily institute more complex negotiation processes, resulting in lengthy CBAs that promise local jobs and job training, strategies to mitigate environmental impacts, and methods for reducing traffic disruption during construction, among other strategies.[41] Despite these steps in a positive direction, there is no regularized governance within this space, and it is incomplete, lacking

34. *About Community Benefits Plans*, U.S. DEP'T OF ENERGY, https://www.energy.gov/infrastructure/about-community-benefits-plans [https://perma.cc/8NPH-2NCT] ("The Department of Energy (DOE) requires Community Benefits Plans [CBPs] for nearly all BIL [Bipartisan Infrastructure Law] and IRA [Inflation Reduction Act] funding opportunity announcements (FOAs) and loan applications.").

35. Draklellis & Richardson, *supra* note 32.

36. *Id.*

37. Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 28, 2025) (rescinding Executive Order 13,985).

38. *See infra* Part I.

39. *See infra* note 151 and accompanying text.

40. Order Adopting a Host Community Benefit Program, Case 20-E-0249 (N.Y. Pub. Serv. Comm'n Feb. 11, 2021) (on file with authors).

41. Community Benefits Agreement: Castle Wind Morro Bay Offshore Wind Farm Project, City of Morro Bay & Castle Wind LLC (Nov. 29, 2018), https://ia902808.us.archive.org/0/items/5448635-Read-the-community-benefits-agreement-between/5448635-Read-the-community-benefits-agreement-between.pdf [https://perma.cc/Q7P2-7DNM]. The developer never built this wind energy project, but developers who pursue similar projects in the future have the opportunity to join the agreement. *Id.*; Neil Farrell, *With Castle Wind Out, Where Does That Leave Morro Bay?*, ESTERO BAY NEWS (Jan. 13, 2023), https://esterobaynews.com/featured-stories/with-castle-wind-out-where-does-that-leave-morro-bay [https://perma.cc/NHZ7-5JKL].

theoretical normative support and a structure that ensures inclusive, accountable governance through negotiation. This Article endeavors to fill this gap.

Part I analyzes the concept of developers—those who amass capital to complete infrastructure projects—negotiating with individuals and communities to achieve desired outcomes. It explores the long history of such strategies for non-energy development and the growing use of negotiation in the energy space, both domestically and abroad. Part II constructs a normative theory of negotiated development, exploring the negative connotations of negotiation and proposing a more constructive grounding of accountable, inclusive negotiation aimed at negative externalities and the creation of net benefits for a broad array of stakeholders. Part III operationalizes the framework, proposing mandatory negotiation of large-scale renewable energy projects and providing examples of beneficial energy negotiation to date. Finally, Part IV addresses legal hurdles to negotiation, concluding that none would impede the enhanced form of negotiation proposed here.

Negotiation is only one component of the energy transition puzzle, but it is—this Article argues—the *central* component. Much work has already explored the level and structure of energy transition governance—the extent to which states should or should not preempt local control, for example, and whether states should place ceilings on local energy regulation to avoid overly stringent project-killing conditions.[42] Yet regardless of who controls the siting process for the infrastructure behind the energy transition, a widespread transition is unlikely to move forward in an effective and fair manner without better negotiation characterized by meaningful, in-depth interactions between developers, local governments, and community members impacted by the transition. Positive examples from other land use spheres, and a growing number of more sophisticated agreements in the energy context, show that such interactions are not merely theoretical aspirations.[43]

42. *See, e.g.*, Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927 (2015); K.K. DuVivier & Thomas Witt, *NIMBY to NOPE—Or YESS?*, 38 CARDOZO L. REV. 1453 (2017); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law,* 40 HARV. ENV'T L. REV. 293 (2016).

43. *See infra* notes 124–130 and accompanying text.

I. ENERGY NEGOTIATION AS GOVERNANCE

Corporate payments to communities and individuals for the impacts of development are a long-standing practice.[44] Indeed, the benefits have also commonly flowed in the opposite direction, with communities offering packages of perks such as tax breaks and land to attract corporate headquarters or sports stadiums. Negotiations surrounding these payments—largely payments from developers to communities and neighbors of projects—are expanding as the energy transition proceeds haltingly, in large part due to local opposition. This Part frames negotiation as a key component of energy governance, exploring how negotiation operates within the energy space and how negotiation has long shaped the land use sphere more generally.

Three core types of agreements are driving the U.S. energy transition. As defined here, these include: (1) CBAs, which are potentially binding agreements between developers and local governments, community groups, or labor groups, or both; (2) good neighbor payments, which are agreements between developers and landowners who are near proposed development but are not part of the land lease; and (3) agreements between developers and landowners through option contracts and formal lease agreements, often mediated through legal representation.

Although the third type of negotiation is critical, we omit specific discussion of leases and option agreements between developers and the landowners who host renewable energy development. Our focus here is on the broader impacts of renewable energy development—those that extend beyond the leased land.

Section I.A explores developer-community negotiations, including the components of CBAs and the parties to them, their enforceability, and the uniquely public nature of CBAs. Section I.B maps the history of local land use regulation, which morphed into discretionary regulation by governments and then community-developer negotiation. That Section also explores international impact benefits agreements, which are historically prevalent and remain important. Section I.C analyzes good neighbor payments, and Section I.D explores community-developer negotiation in the modern renewable energy context. Collectively, these analytical discussions set the stage for a normative theory of better negotiation constructed in Part II.

44. *See infra* notes 119–123 and accompanying text.

A. Dissecting Developer-Community Negotiations

This Section introduces and defines the forms of developer-community negotiation in the United States that are driving the energy transition by assessing their components, the parties to the negotiation, the unique "publicness" of CBAs, and their enforceability.

1. Defining CBAs

This Article uses the term "negotiation" loosely to describe any "dealing," conversation, or similar interaction aimed toward an agreement between a land developer—the party who amasses capital to build infrastructure—and a community group, members of a community, or the local government that represents the community.[45] Specifically, the Article focuses on negotiations that lead to potentially binding agreements in the form of commitments in a CBA.

CBAs, host community agreements, good neighbor agreements, and similar instruments (hereinafter collectively referred to as CBAs) all involve a written commitment by a developer to provide a variety of benefits to the community.[46]

45. For more formal definitions of legal negotiation, see, for example, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 710 (1986) (defining lawyer negotiation on behalf of a client as a process in which the lawyer "communicates with another person in an attempt to obtain things of value through concession or agreement"); John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 12, 13–18 (2014) (defining negotiation generally as the "process of seeking agreement" but also exploring many theoretical and legal definitions of negotiations and the different ends toward which negotiations aim). For the term "dealing," see, for example, 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, 959 (defining government-citizen-developer "dealing" as "mediation activity that allocates rights among competing private claimants").

46. *See Community Benefits Agreements: Overview*, POWER SWITCH ACTION: RES., https://www.powerswitchaction.org/resources/community-benefits-agreements/#overview [https://perma.cc/GNY2-9ULK] ("A Community Benefits Agreement (CBA) is a project-specific agreement between a developer and a broad community coalition that details the project's contributions to the community and ensures community support for the project."); Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS. & COMM. DEV. L., Fall 2007/Winter 2008, at 35, 37 ("A CBA is a legally binding contract (or set of related contracts), setting forth a range of community benefits

Developers are entities that amass resources to install new physical infrastructure or expand it, and they are often a private entity—typically a corporation—that proposes to develop a project in or near the territories of the public government or governments in the agreement.

On the other side of the agreement is a local government itself or community organization, or both.[47] CBAs are, therefore, typically signed by a public entity—a municipality such as an incorporated town, township, city, or borough, and additionally or alternatively a county.[48]

To be a CBA as we define it, the benefits within the agreement must flow to more than one or just a few residents—to at least a segment of the population of the community, such as job creation, economic growth, or recreational or cultural opportunities.[49] The benefits promised within CBAs are potentially binding, meaning the developer commits to take some form of action, such as making a payment or attempting to hire local workers, even if that commitment is not ultimately enforceable.[50] Finally, the benefits are either negotiated, pre-established by the state—where the state mandates benefits—or both. For example, for landfills, New Jersey mandates host community benefits of a specific amount (annual payment to host communities "not less than the equivalent of $1.00 per ton of solids" accepted).[51] With Department of Environmental Protection approval, New Jersey allows additional local government negotiation for benefits such as payments in lieu of taxes, non-payment of waste fees for all waste generated within the host community, and "[t]he receipt of a lump sum cash payment."[52] New York, in turn, requires renewable energy developers to provide specific amounts of utility bill relief to residents within communities that host

regarding a development project, and resulting from substantial community involvement.").

47. *See infra* notes 54–55 and accompanying text.

48. U.S. DEP'T OF ENERGY, FAQ: COMMUNITY BENEFITS AGREEMENTS 1, https://www.energy.gov/sites/default/files/2024-12/CBA%20Guidance%20FAQ.pdf [https://perma.cc/5KPW-L4WE] ("A community benefits agreement is a legally binding, negotiated agreement between a project proponent/developer and a community.").

49. *See infra* text accompanying note 54.

50. *See supra* note 27 and accompanying text.

51. N.J. REV. STAT. § 13:1E-28(a) (2024).

52. *Id.* § 13:1E-28(a)(3).

renewable energy development as part of a community benefits agreement.[53]

Two foundational definitions of CBAs highlight these core components. Professors Patricia Salkin and Amy Lavine, land development law experts who helped define and steer the course of modern CBAs, categorize a CBA as follows:

> A CBA is a contract negotiated between a prospective developer and community representatives. In essence, a CBA specifies the public benefits and amenities that a particular developer will provide to the impacted community in exchange for the community's support of its proposed project.[54]

Vicki Been—a property and land use law expert who centrally influenced modern understandings of CBAs—employs a similar definition:

> A community benefits agreement (CBA) results from negotiations between a developer proposing a particular land use and a coalition of community organizations that claims to represent the individuals and groups affected by the proposed development. In a typical CBA, community members agree to support the developer's proposed project, or at least promise not to oppose the project . . . . In return, the developer agrees to provide to the community such benefits as assurances of local jobs, affordable housing, and environmental improvements.[55]

The term "agreement" in CBA is key because although some definitions of CBA include the term "contract," many CBAs do not amount to formal contracts. A CBA is often quite one-sided and might not officially be recognized as a contract in which consideration is exchanged. For example, within a CBA, the government's commitment to support a project is often silent and not

53. Order Adopting a Community Benefit Program, *supra* note 40, at 5–6 (requiring renewable facility developers to provide a credit on each resident's utility bill within the town or city where the facility is located).

54. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENV'T L. & POL'Y 291, 293 (2008).

55. Been, *supra* note 26, at 5–6.

expressed in writing. Through a good neighbor payment, in turn, a developer contracts with landowners or residents near a proposed project to pay them money.[56] Even when such discussions result in something less than a formal contract, however, the result is contractual in nature: binding or potentially binding commitments or benefits that arise from an interaction between at least two parties.

2. Distinguishing CBAs from Other Developer-Local Government Commitments

In contrast to CBAs between developers and community groups or local governments, more formal, state-recognized agreements between developers and local governments are formally called *development agreements*, exactions, Payment in Lieu of Taxes (PILOT) agreements, or other forms of negotiated zoning.[57] Development agreements typically involve a specific, state-approved instrument through which local governments agree to keep current land use regulations in place through the course of a development project in exchange for commitments from the developer.[58]

"Exactions" is a broader term that defines any mechanism through which a local government extracts benefits in exchange for benefit given to the developer. For example, when issuing a building permit or land use approval, a local government may require that the developer pay money, build a bike trail, or preserve conservation land.[59] Other tools, including conditional,

56. *See supra* note 28 and accompanying text.

57. *See, e.g.*, Been, *supra* note 26, at 8 n.11 (arguing that the 1998 CBA for the Kodak Theater might actually be best characterized as an exaction because it involved a city council member in negotiations); Salkin & Lavine, *supra* note 54, at 295 n.6; Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 393 (2004); Wegner, *supra* note 45, at 994–95; MD. CODE ANN., TAX–PROP. § 7-514 (2024) ("The governing body of a county . . . may enter into an agreement with the owner of a facility for the generation of electricity . . . for a negotiated payment by the owner in lieu of taxes on the facility.").

58. Green, *supra* note 57; Santa Margarita Area Residents Together v. San Luis Obispo Cnty. Bd. of Supervisors, 100 Cal. Rptr. 2d 740, 743 (Cal. Ct. App. 2000); Benavidez v. Bernalillo Cnty. Bd. of Cnty. Comm'rs, 2021-NMCA-029, ¶ 43, 493 P.3d 1024, 1039 (N.M. Ct. App. 2020).

59. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (striking down the dedication of beachfront easement for the public as unconstitutional); Dolan v. City of Tigard, 512 U.S. 374 (1994) (striking down a bike path as unconstitutional).

special exceptions, or special use zoning, involve local governments reviewing proposed projects on a case-by-case basis and determining whether they are permitted. For conditional and special use zoning, a local government, through a legislatively approved ordinance, specifies that particular types of land uses (say, solar energy in an agricultural zoning district) will be permitted if compatible with other nearby land uses. This gives the government the authority to reject proposed projects for a variety of reasons.

Finally, PILOT agreements typically involve a community, as expressly permitted by a state legislature, contracting with a developer to receive various payments and benefits and committing, with state permission, to accordingly reduce developer tax obligations.[60] There is a large body of law, explored in Part IV, that constrains these types of tools used by local governments.

In contrast to these more formal tools, governments using CBAs often do not formally commit to anything, such as locking current land use regulation in place. Rather, the developer agrees to provide a broad range of benefits, from vocational training to hiring of local labor and the provision of money, and local governments or community groups or both make vague but likely not ultimately enforceable commitments to support the project, or make no firm commitments. If the government provides more formal consideration, such as commitment to zone the land in a particular way and freeze the zoning, the CBA would typically be categorized as a development or siting agreement.[61] When community groups are parties to CBAs, they typically promise to support the project or not initiate lawsuits opposing the project.[62] This is likely adequate consideration according to Salkin and Lavine, who note courts' hesitancy to question the adequacy of consideration.[63]

60. TAX–PROP. § 7-514; *See, e.g.*, Cnty. Council of Howard Cnty., Res. No. 90-2014 (Md. 2014), https://howardcounty.granicus.com/MetaViewer.php?view_id=2&clip_id=2092&meta_id=71489 [https://perma.cc/TUY8-QGR2] (showing a typical PILOT agreement in the renewable energy context).

61. *See infra* Table 1.

62. U.S. DEP'T OF ENERGY, *supra* note 48, at 1.

63. Salkin & Lavine, *supra* note 54, at 324.

3. Enforceability

Despite often being labeled as "contracts" and possessing all the formal trappings of a contract—signatory parties, recitations of consideration, and so on—many forms of developer-community negotiation pose unique challenges for enforcement. This is critical; if development proceeds but the community does not garner the benefits that it bargained for, or vice versa, this undermines the entire purpose of community-developer negotiation. Externalities of development emerge without adequate compensation or offsets, or communities receive benefits while clean energy valued by large segments of the public remains unbuilt. We explore this problem from a theoretical perspective in Part III but introduce its legal roots here.

Formal development agreements, in which both the developer and the local government provide clear consideration, pose fewer hurdles to enforcement than other forms of developer-community negotiation, and courts apply traditional doctrines of enforceability. For example, at the summary judgment stage, courts examine whether the contract creates unambiguous obligations and whether these obligations have been met, thus triggering enforcement.[64] Therefore, in a development agreement in which a county entitled a developer to build a housing subdivision—conditioned upon the developer submitting plans to expand a sewage treatment plan within six months of the agreement—the developer's failure to meet this deadline allowed the county to withdraw its commitments.[65]

Despite these types of enforceability hooks, local governments sometimes avoid obligations under a development agreement by arguing, ex post, that the development agreement was illegal, such as illegal "contract zoning" not allowed by the state.[66] One might expect an equitable or promissory estoppel claim by the developer here; parties should typically not be able

64. Bollech v. Charles Cnty., 166 F. Supp. 2d 443, 455–57 (D. Md. 2001).

65. *Id.* at 456–57.

66. Morgran Co. v. Orange Cnty., 818 So. 2d 640, 641–44 (Fla. Dist. Ct. App. 2002) (showing a court's invalidation, on contract zoning grounds, of a development agreement in which Orange County's Board of County Commissioners committed to amend policy and in the future "support and expeditiously process" a developers' zoning application to enable a 437-acre mixed-use development, in exchange for developer donation of a park, and then showing that Orange County argued that it was not bound to its previous commitment of support, as such a commitment was unlawful contract zoning).

to use their own illegal behavior to their advantage. But this claim has worked to benefit municipalities in some cases, with local governments avoiding enforcement of their previous commitments to developers.[67]

Many land use approvals—whether involving local governments approving a conditional use, special exception, special use, development agreements, or a wholesale rezoning (changing the zoning code)—occur simultaneously with a developer's commitment to provide money or other benefits.[68] Courts sometimes deem this type of approval to be illegal "contract zoning" and thus unenforceable. To avoid the label of illegal "contract zoning," many states require that the government-developer agreement must provide a *public* benefit from a developer and must have followed land use approval procedures set out by local ordinances.[69] The agreement also must *not* constrain decisions by future local government officials—say, by promising that the government will in the future support land use approval for the project; rather, the approval must occur when the benefit is promised.[70] Some state courts also suggest that there must *not* have been bilateral developer-local government negotiation or a quid pro quo for a land use approval to avoid the label of illegal

67. *Id.*

68. *See infra* note 154 and accompanying text; Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions – Installment One*, 24 STAN. ENV'T L.J. 3, 20 (2005) ("In contract or conditional zoning, a landowner agrees to a set of conditions that limit the property to a particular use, protect the surrounding area, and/or secure additional amenities or contributions for the local government, in exchange for a rezoning of the property."). In some states, zoning that formally amounts to the state's definition of "contract zoning" is illegal, however, as discussed in Part IV. Yet many government-developer deals that look like a contract are not deemed as such by courts. *See, e.g.*, Gladwyne Colony, Inc. v. Lower Merion Twp., 187 A.2d 549, 551 (1963) (finding that a township's grant of a rezoning application to a developer that transferred land to the township for a park was not contract zoning). See *infra* Part IV for more detailed discussion of contract zoning cases.

69. *See* O'Dell v. Bd. of Comm'rs, 910 S.W.2d 436 (Tenn. Ct. App. 1995) (finding no illegal contract zoning when the benefits provided by the developer were "reasonable and in the best interests of the public health, safety and welfare"); Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 369 (2003) (finding that "[i]n the absence of any infirmity other than the existence of a voluntary offer" of a developer—in this case, a utility obtaining a land use approval—"to make a gift to the town at some time in the future when the power plant became operational," there was no illegal land use action).

70. *Morgran Co.*, 818 So. 2d at 640.

contract zoning. Rather, the local government simply must have imposed conditions on the developer.[71]

Where a court does find illegal contract zoning,[72] damages "are unavailable" and "neither specific performance nor an injunction will be granted to a party to an illegal contract."[73] Where courts deem development agreements and other land use approvals that occur simultaneously with developer commitments as lawful, however, their enforceability is generally clear.[74]

CBAs also often contain language making it difficult for parties to obtain relief.[75] In some states, local governments are not allowed to commit to specific land use regulation within an agreement in which a developer promises benefits; this would constitute illegal "contract zoning."[76] Due in part to this limitation, local governments sometimes enter into a CBA that mentions only vague commitments involving land use approvals (perhaps to avoid an illegal contract zoning designation in some states) and simply involves, at least expressly, a one-way flow of promises from the developer to the local government.[77] The land

71. *See, e.g.*, Benton v. City of Chattanooga, No. C/A 808, 1988 WL 74608, at *3 (Tenn. Ct. App. July 20, 1988) (cited with approval in the reported case *O'Dell*, 910 S.W.2d at 439).

72. Dacy v. Vill. of Ruidoso, 1992-NMSC-066 ¶ 20, 114 N.M. 699, 704, 845 P.2d 793, 796 (1992).

73. *Id.* ¶ 21.

74. *See, e.g.*, Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 120 Cal. Rptr. 3d 797, 830 (2022) (affirming a jury award to a developer based on a town's breach of a development agreement). *But see* Wheat Ridge Urb. Renewal Auth. v. Cornerstone Grp. XXII, L.L.C., 176 P.3d 737, 744–47 (Colo. 2007) (showing that in states such as Colorado, courts refuse to enforce local governments' contracts by requiring specific performance by the government, even when the contracts themselves are lawful—at least in the context of ordering the exercise of a "core governmental power" such as eminent domain).

75. Apple v. Atl. Yards Dev. Co., No. 11-CV-5550, 2012 WL 2309028, at *1–2 (E.D.N.Y. June 18, 2012); *see also* Apple v. Atl. Yards Dev. Co., No. 11-CV-5550, 2014 WL 5450030, at *1 (E.D.N.Y. Oct. 27, 2014).

76. *See infra* Part IV.

77. *See, e.g.*, Riverhead Community Benefits Agreement, LI Solar Generation LLC & Town of Riverhead (Dec. 2020), (on file with authors) (involving a variety of express commitments from the solar company but only vague potential commitments from the town, stating "LI Solar desires to work cooperatively with the Town and as a condition to the grant of approvals and ongoing support of the Project LI Solar seeks to fund programs"); Denise Civiletti, *Town Board Authorizes Supervisor to Sign $1.5 Million Community Benefits Agreement with Solar Developer*, RIVERHEAD LOC. (Dec. 22, 2020, at 4:42 PM), https://riverhead-local.com/2020/12/22/town-board-authorizes-supervisor-to-sign-1-5-million-community-benefits-agreement-with-solar-developer [https://perma.cc/6T6B-WLRD]

use approval for the development, if it occurs, is separate and not formally conditioned on the CBA. Within these types of CBAs, there is a recitation that the contract is based on consideration, but it is questionable whether the local government has in fact provided consideration.[78] This vague consideration attribute—among other components of CBAs—can impede enforcement.

In an example of vague consideration, the Atlantic Yards CBA for the construction of the New Jersey Nets basketball arena and commercial and residential buildings in Brooklyn, New York, appeared to promise union membership for local workers.[79] However, it only included statements from community group signatories that these signatories, as summarized by the court, "'intend to negotiate' with the relevant union and that it is their 'intention' that the union will accept [apprenticeship] participants."[80] The CBA was finalized and the arena was built, but several objecting plaintiffs did not obtain union membership, apprenticeships, or jobs.[81] When plaintiffs sued, arguing violation of the CBA, their breach of contract claims had only limited success at the motion to dismiss stage,[82] and few other claims,

(exploring various versions of the agreement, the fact that the agreement accompanied potential solar farm approvals by the government, and a concern that language was added to the agreement involving site plan approval from the town—something that town officials had not agreed to). *But see* Community Benefits Agreement: Castle Wind Morro Bay Offshore Wind Farm Project, *supra* note 41, at 5 (stating that, in an agreement not implemented because the project was not built, the "City agrees, subject to [its] reservation of discretion . . . to reasonably cooperate with, assist and support Castle Wind in the Environmental Review Process and the Governmental Agency Approvals process . . ."); Host Community Agreement, South Fork Wind, LLC & Town of East Hampton, N.Y. at 5, South-Fork-Wind-Host-Community-Agreement-Updated-12-14-20-1.pdf [https://perma.cc/H8NJ-HBFQ] (committing the town to "grant Developer a conditional transmission easement for a term of years, as well as a temporary installation easement").

78. *See, e.g.*, Riverhead Community Benefits Agreement, *supra* note 77 (noting "good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged," in an agreement somewhat vaguely providing "LI Solar desires to work cooperatively with the Town and as a condition to the grant of approvals and ongoing support of the Project LI Solar seeks to fund programs").

79. *Apple*, 2012 WL 2309028 at *2.

80. *Id.* at *5.

81. *Id.* at *3; Apple v. Atl. Yards Dev. Co., No. 11-CV-5550, 2014 WL 5450030, at *3 (E.D.N.Y. Oct. 27, 2014).

82. *Apple*, 2012 WL 2309028 at *8 (illustrating arguments by defense in response to breach of contract claim not addressed by plaintiffs and abandoned); *Apple*, 2014 WL 5450030 at *5–6 (finding that claims against one defendant involving breach of contract, promissory estoppel, and violation of New York statutes would be resolved at jury trial, but dismissing these claims against other defendants).

such as unjust enrichment and promissory estoppel, were successful.[83] These terms lacked "any clear and unambiguous promises" according to the unreported opinion of the court.[84]

In other cases, residents of a community attempting to enforce the CBAs are deemed to be third-party beneficiaries—which is problematic if one views CBAs literally as instruments that *benefit communities* comprised of individual residents. For example, a city in New York, through a land disposition agreement, conveyed land to a developer conditioned on the development being used for low- and moderate-income housing under an urban renewal plan.[85] When tenants of the resulting building objected to the dissolution of the limited-profit housing company that owned the building and sued, New York's highest court labeled them as third-party beneficiaries who failed to show "that the contract was intended for [their] benefit and . . . that the benefit to [them] is sufficiently immediate, rather than incidental."[86]

In other cases, CBAs are enforceable, but the modes of enforceability are constrained. In an unreported case involving a CBA between a high-speed rail developer and community groups including unions, the unions' collective bargaining agreements were incorporated into the CBA.[87] These agreements, in turn, required wage and benefits disputes to be subject to arbitration.[88]

And finally, as can occur with any contract, some CBAs are not enforceable simply because they include requirements that developers comply with provisions external to the contract (such as local laws), yet these provisions are ultimately deemed inapplicable to the project.[89] For example, in another unreported case, residents near a clay mine invoked local law and a CBA between a town and the mining company, attempting to prevent

83. *Apple*, 2012 WL 2309028 at *10 (listing court's partial grant of defendants' motions to dismiss for three issues); *Apple*, 2014 WL 5450030 at *10–11 (barring plaintiffs' unjust enrichment claim and dismissing their claims under state employment acts).

84. *Apple*, 2012 WL 2309028, at *5.

85. Mendel v. Henry Phipps Plaza W., Inc., 844 N.E.2d 748, 749–50 (N.Y. 2006).

86. *Id.* at 751 (quoting Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459, 469 (N.Y. 1983)).

87. Burmudez v. Dragados USA, Inc., No. 21-CV-00853, 2021 WL 5417658, at *3 (E.D. Cal. Nov. 18, 2021).

88. *Id.*

89. Lemmon v. Seneca Meadows, Inc., 9.N.Y.S.3d 593 (N.Y. Sup. Ct. 2015).

mining operations within one thousand feet of other properties.[90] They managed to avoid third-party beneficiary status on a technicality, but the court determined that the one thousand-foot limitation within local law did not apply to mines regulated by the state, as this one was.[91]

In summary, the term "agreement" within CBAs is apt because some CBAs are not in fact enforceable contracts. Some incorporate other agreements with limited enforceability, contain vague language regarding parties' commitments, or could be challenged on grounds that third parties to the agreement lack standing to enforce them. This can be problematic for communities seeking specific, actionable commitments from renewable energy developers. Part III accordingly explores tools for ensuring enforceability and other key components of community-developer negotiations.

No matter who bargains with developers for benefits, the objections to these negotiations tend to focus on the process and the outcome, not on whether the party negotiating was a non-governmental organization (NGO) or government. As analyzed in this Article, critics focus on inadequate access to the negotiation process, inequitable distribution of benefits, and an appearance of or actual corruption or bribery, in which developers buy community or governmental support.[92]

Given that concerns about land use negotiation typically target process and outcomes, rather than the specific parties involved, this Article places more emphasis on the *how* of negotiation—how contracting or negotiation for energy infrastructure can be conducted in an optimal way, regardless of who is participating in such negotiation. At the same time, it acknowledges the importance of the *who*, analyzing how certain parties are

90. *Id.*

91. *Id.*

92. *See, e.g.*, Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements*, 17 J. AFFORDABLE HOUS. & COMM. DEV. L., Fall 2007/Winter 2008, at 113, 123 (referring to concerns that monetary benefits from a CBA were a "slush fund" that would "not be distributed impartially"); Julian Gross, *Chapter 13: Community Benefits Agreements*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 215, 224 (Roger A. Clay & Susan R. Jones eds., 2009) (observing that "CBAs negotiated in New York City have been widely disparaged by the public and the legal community," and noting issues such as local officials acting "outside of their official capacities" to negotiate agreements involving large distributions of subsidies to developers, as well as establishing a "nominally private entity as the sole community representative" in negotiations).

held to different legal standards in the negotiation process and exploring how better negotiating structures should ensure that such standards are met.[93]

4. CBAs as "Public" Negotiation

One thorny concept that arises repeatedly within developer-community negotiation is "publicness." CBAs and similar mechanisms are essentially public instruments infused with a heavy dose of private involvement. Even when these agreements only involve technically private parties—a developer and nonprofit community groups—the community as the "public" often feels betrayed by them, viewing them as instruments that *should* encompass public values.[94] Colin Jerolmack, an environmental sociologist, describes this as a public-private paradox, as exemplified by hydraulic fracturing for oil and gas.[95] When involved parties make a private decision to allow drilling, this decision holds public implications and externalities, and the broader community feels betrayed by their lack of involvement.[96]

As energy and democracy expert Professor Shelley Welton frames the issue, such agreements blur the public and private spheres.[97] In the context of this Article, developer-community or developer-neighbor agreements, regardless of public official involvement, have a strong public element when any one of the following conditions is present: (1) a public entity—in this case, an elected government body such as town or county commissioners—is a signatory; (2) the subject of the agreement or contract is a benefit that will be relatively widely distributed to or will impact a relatively broad set of constituents; or (3) a public body (typically an elected state legislature) has mandated or enabled the agreement or contract and set contours for its provisions.

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93. *See infra* Parts III, IV.

94. *See, e.g.*, Been, *supra* note 26, at 22, 29 (observing that "CBA negotiations are not subject to requirements and procedures designed to ensure access to the policymaking process for all affected constituencies" and noting that opponents view certain CBAs as "buying" support).

95. *See generally* COLIN JEROLMACK, UP TO HEAVEN AND DOWN TO HELL: FRACKING, FREEDOM, AND COMMUNITY IN AN AMERICAN TOWN (2021).

96. *Id.*

97. *See, e.g.*, Shelley Welton, *The Public-Private Blur in Clean Energy Siting*, 35 KING'S L.J. 258, 260 (2024).

The third condition, however, will not always result in an agreement being "public." A public body solely being a party to a contract or agreement does not make the deal essentially public, particularly when a government is acting as a market participant by, say, leasing a fleet of cars for city employees.[98] Here, the public body is not on its face engaging in an action to benefit the public. But even such market participant actions affect the public—the set of constituents who elect the public body—in that the market decision impacts the tax base and is infused with public values. A decision to rent a fleet of diesel as opposed to electric vehicles for city employees, for example, will elicit varied reactions from constituents. Where the subject of the contract is explicitly oriented toward constituents, however—as occurs for CBAs that promise resources or services for the community—the contract has even more of a public flavor.

When a public body mandates negotiation—the third element of "publicness" used here—this infuses publicness into the negotiations because it makes the deal part of governance, rather than an alternative to or voluntary augmentation of a governance scheme. It also changes the appearance of the negotiation. When a government has spoken ex ante—requiring that all large renewable energy projects must include negotiations, or creating incentives for such negotiations—this constructs a more inclusive, less arbitrary playing field.[99] It puts all on notice that the rules of the governance game include a negotiation component, changing the appearance of the negotiation from "bribe" to standardized practice.

As with other community benefits literature, this Article does not aim to deeply engage the important literature on the nature of public versus private actions.[100] It is essential, however, to acknowledge the strong public elements of negotiation,

98. The "market participant" action allows governments to evade restrictions on their behavior, such as preemption of their rules or invalidation under the Dormant Commerce Clause, when such governments act more like a private entity making proprietary decisions for itself rather than enacting rules within the auspice of their police powers or other governmental powers. *See, e.g.*, Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist., 498 F.3d 1031, 1047 (9th Cir. 2007) (finding that "a state directive determining which vehicles the state and its political subdivisions will procure" fell within the market participant doctrine, in part because it involved "direct state participation in the market").

99. *See infra* notes 154, 164 and accompanying text.

100. *See, e.g.*, Welton, *supra* note 97 (focusing on and analyzing the public and private realms in renewable energy governance).

as this helps to distinguish CBAs and good neighbor payments from traditional private contracts; this public flavor also animates the normative theory of negotiation constructed in Part II.

Development agreements, siting agreements, CBAs, and good neighbor payments, with their many variations, have been common in numerous development contexts for decades, as explored in the following Section. Their use for renewable energy is a more recent development.

B. The Long History of Developer-Community Negotiation

Public governments have negotiated with private corporations and similar entities since the formation of the colonies that predated the United States. Indeed, some of the original colonies were commercial corporations chartered by the British government to form a governmental unit of a colony.[101] And beginning in the 1800s, it became common practice for local governments to franchise public services, such as water and energy, to corporations.[102] Deals between governments and private corporations to obtain specific local land use approval for development on private lands did not substantially emerge until the 1960s and 1970s.[103] This Section explores the rise of "discretionary" land use regulation, which morphed into common use of CBAs and the longer-standing practice of using CBA-type instruments in the international context, particularly for resource extraction.

1. The Evolution of Discretionary Land Use Regulation

The many types of agreements at the heart of this Article—those reached between developers and communities, community organizations, or individual residents—are all rooted in land use. They involve developers contracting with local governments, NGOs, neighbors to projects, or all of these stakeholders

101. *See, e.g.*, Herbert L. Osgood, *The Proprietary Province as a Form of Colonial Government – II*, 3 AM. HIST. REV. 31 (1897).

102. *See, e.g.*, Werner Troesken, *The Sources of Public Ownership: Historical Evidence from the Gas Industry*, 13 J.L. ECON. & ORG. 1, 4–6 (1997) (documenting the history of gas franchises and the control that such franchises granted to corporations).

103. *See infra* Section II.B.1.

to gain approval for local government land use regulation and associated permits that will involve development of that land. Developer negotiations with individual members of communities, therefore, endeavor to address the externalities of the development that fall on those members—often to gain these members' support within land use regulatory proceedings.

Land use regulation primarily involves a practice called "zoning," in which a local government—a public corporation of elected officials—determines which types of land uses should be allowed within different parts of its territory.[104] The goal of a zoning enterprise is to minimize conflicts among land uses, and the traditional "Euclidean" approach to zoning involves minimizing friction by separating potentially conflicting uses.[105] For example, local governments commonly designate industrial districts in which factories and similar land uses are designated as the primary uses, and separate residential districts relatively undisturbed by industrial land uses.[106] Alternatives to Euclidean zoning are more performance-based, allowing a mix of uses but placing individual conditions or limitations on uses to avoid conflict.[107]

As work by scholars such as Daniel Selmi and Alejandro Camacho documents, local governments' regulation of land use in the United States—which was and remains largely Euclidean—evolved from a largely technocratic approach to land use.[108] Following the initial burgeoning of zoning in the 1930s, local governments developed increasingly detailed tools to address, for example, the need for mixed uses, flexible land use

104. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); NAT'L COMM'N ON URB. PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, at 203–04 (1st Sess. 1969).

105. *See* sources cited *supra* note 104. This is called Euclidean zoning because this is the type of zoning involved in the famous *Euclid* case, in which the U.S. Supreme Court affirmed the constitutionality of the approach to zoning in which a local government designates different parts of its territory within separate zones and limits the permitted uses within those zones. *Euclid*, 272 U.S 365 (1926).

106. David M. Morley & Nicholas A. Walny, *Codifying Zoning's Little Helpers*, ZONING PRACTICE, Dec. 2015, at 1, 2.

107. Michael N. Widener, *Animating Performance Zoning at Sustainability's Competitive Edge*, 29 GEO. ENV'T L. REV. 647, 649–51 (2017).

108. Daniel P. Selmi, *Land Use Regulation by Contract* (Loy. L. Sch., Legal Studies Paper No. 2009-51, 2009); Camacho, *supra* note 68.

rules that could be layered with others, and other more innovative techniques.[109]

Local governments increasingly imposed ex ante requirements on all developments with large impacts, such as large housing, commercial, or industrial developments that necessitated the provision of new roads, schools, water and sewer infrastructure, fire and police stations, or similar infrastructure or services.[110] Some local governments instituted "impact fees" to be paid directly by developers or the residents of new housing developments, which covered the cost of new supporting services and infrastructure.[111] Others required offsets, in which developers paid for or provided infrastructure off the development site to cover the additional infrastructural burdens imposed on-site.[112] Additionally or alternatively, they imposed development schemes for which the timeline for approval and completion was tied to developers' provision of the necessary services or infrastructure or proof that such services and infrastructure were already available.[113] And in some states, large developments received a special designation, such as "developments of regional impact," and were subject to heightened local, regional, or state review prior to approval, or all of these.[114]

Beyond ex ante, uniform schemes to address the impacts of development on communities, it became increasingly common

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109. Ferdinand S. Tinio, Annotation, *Zoning: Planned Unit, Cluster, or Greenbelt Zoning*, 43 A.L.R. 3d 888 (1972); 1 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 14:31 (4th ed. 2025); Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783 (2003) (describing and analyzing floating zones and planned unit developments, among other "flexible" zoning tools).

110. *See, e.g.*, *Farewell to Florida's 'Development of Regional Impact' (DRI) Law*, FLA. TREND (June 26, 2015), https://www.floridatrend.com/article/18621/farewell-to-floridas-development-of-regional-impact-dri-law [https://perma.cc/65VE-7DLP] (describing Florida's long-standing, but now weakened, regulation of developments of regional impact).

111. Ronald H. Rosenburg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 205 (2006).

112. *E.g.*, N.J. REV. STAT. § 40:55D-42 (1998) ("The governing body may by ordinance adopt regulations requiring a developer, as a condition for approval of a subdivision or site plan, to pay the pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located off-tract but necessitated or required by construction or improvements within such subdivision or development.").

113. Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 305 (N.Y. 1972) (affirming the town's decision imposing this type of points-based scheme for impacts).

114. 22 ELIZABETH M. BOSEK & RACHEL M. KANE, FLORIDA JURISPRUDENCE: ENVIRONMENTAL RIGHTS AND REMEDIES § 65 (2d ed. 2025).

for local governments to impose case-by-case "exactions" on development projects.[115] Local governments demanded that in exchange for receiving zoning approval or a building permit, developers offset the impacts of proposed development through, for example, the preservation of an offsite park, payment of a specific amount of money, or construction of a bicycle path, among many other conditions.[116]

2. Historic Community-Developer Agreements: Parties and Content

These new zoning mechanisms to address community impacts of land use provided fuel for the expansion of community-developer negotiations in the 1960s and 1970s. States began to expressly authorize local development agreements and even require host community benefits for some types of development, as introduced in Section II.A. However, key differences exist between rural and urban land use planning; many rural local governments have been historically less engaged in the planning process, making rural land use planning more haphazard and less regulated.[117] Haphazard or weak zoning regulations can allow development to occur with little review, sometimes with negative impacts for residents.

Even where development agreements or CBAs were not (and still are not) expressly authorized, it became common practice for governments to require fees and developer-provided infrastructure for proposing large housing subdivisions or other developments with large impacts.[118] Following this evolution toward local government discretion to conditionally approve or reject projects based on their impacts to the community came a cascade of developer-community negotiation, complete with court approval. Thus, courts affirmed the following types of community-developer agreements:

115. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

116. *See infra* Part IV; *Nollan*, 483 U.S. at 825; *Dolan*, 512 U.S. at 374; *Koontz*, 570 U.S. at 595.

117. Anne M. Eisenberg, *Disaster Recovery in Rural Communities*, *in* THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY, AND REDEVELOPMENT 229–239 (John Travis Marshall et al. eds., 2022).

118. Selmi, *supra* note 108, at 20–22.

(1) a township's rezoning approval for apartments (changing the zoning designation to allow apartments) accompanied by a developer's donation of land for a public park (1962);[119]

(2) a town's promise to recommend rezoning of land for multifamily apartments in exchange for a developer's commitment to limit the density of apartment development for twenty years and preserve land for conservation, as a well as a separate promise to donate a park (1968);[120]

(3) a city's approval of a commercial developer's rezoning application conditioned on twenty-three items, such as the developer's inclusion of a "pedestrian circulation plan" and promise that the private covenants restricting use of the land would be approved by the city council (1999);[121]

(4) a town's commitment to provide water and sewer services and attempt to provide necessary permits to expand a landfill in exchange for the landfill owner promising three $50,000 payments to the town's Chamber of Commerce to help build recreational facilities and maintain local roads (1995);[122] and

(5) a town's rezoning approval for an electric utility following a developer's offer of $8 million to the town (2003).[123]

The above examples in which courts expressly affirmed promises from a developer to a community touch on limited types of development. CBAs cover a much wider range of land uses. For example, a developer proposing an emergency shelter for the unhoused in Washington, DC, entered into a "good-neighbor agreement" with a community advisory team to "address expectations and commitments regarding exterior facility and

119. Gladwyne Colony, Inc. v. Lower Marion Twp., 187 A.2d 549, 551 (Pa. 1963).
120. Funger v. Mayor of Somerset, 239 A.2d 748, 750–52, 757 (Md. App. Ct. 1968).
121. Old Canton Hills Homeowners Ass'n v. Mayor of Jackson, 749 So. 2d 54, 57 (Miss. 1999).
122. Prock v. Town of Danville, 655 N.E.2d 553, 556 (Ind. Ct. App. 1995); *see also* Ogden v. Premier Props., 755 N.E.2d 661, 669 (Ind. Ct. App. 2001).
123. Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 368–69 (Mass. 2003).

landscape maintenance, community safety, neighborhood codes of conduct, and communication, problem-solving, and mutual respect," which "would be in place and binding on it prior to the issuance of a certificate of occupancy for the shelter."[124]

Cities often flip CBAs—offering benefits to sports stadium developers and corporate headquarters to lure them in.[125] But promises of benefits also flow from developers even when cities initiate the CBA process. For example, the developer of the Atlantic Yards project in Brooklyn, New York, promised, as summarized by the court, "creation of a program to train community residents for construction jobs at the Atlantic Yards project, known as the pre-apprenticeship training program (the 'PATP')" and an intent that the "NYC Building Trades Council 'will accept workers from the [PATP] into [its] apprentice program.'"[126]

CBAs are also commonplace for energy projects involving mining and fossil fuel drilling and refining.[127] When Chevron endeavored to upgrade a refinery in Richmond, California, it "presented the City" with a $61 million CBA at the first public meeting addressing the refinery.[128] The $61 million in benefits promised to Richmond included, among other provisions, $6.75 million for job training and apprenticeships; $6.25 million for rooftop solar and energy efficiency projects; $6 million in competitive grants for community programs for health, education and the environment; and $2 million for public safety programs.[129] Richmond approved the plant upgrades in 2014 and a

124. Neighbors for Responsive Gov't, LLC v. D.C. Bd. of Zoning Adjustment, 195 A.3d 35, 49 n.53 (D.C. 2018).

125. Philip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul*? 1–5 (St. John's U. Sch. of L., Working Paper No. 05-004, 2005); Leslie Hook, *Amazon Showered with Offers of Tax Breaks*, FIN. TIMES (Oct. 21, 2017), https://www.ft.com/content/e83c71c8-b4fd-11e7-a398-73d59db9e399 [https://perma.cc/AF7V-6FPZ].

126. Apple v. Atl. Yards Dev. Co., No. 11-CV-5550, 2012 WL 2309028, at *1–2 (E.D.N.Y. June 18, 2012); *see also* Apple v. Atl. Yards Dev. Co., No. 11-CV-5550, 2014 WL 5450030 (E.D.N.Y. Oct. 27, 2014).

127. For a detailed exploration of this issue, see van de Biezenbos, *supra* note 26.

128. Cmtys. for a Better Env't v. City of Richmond, 108 Cal. Rptr. 3d 478, 483 (Cal. Ct. App. 2010).

129. Chevron Refinery Modernization Project Environmental and Community Investment Agreement Between City of Richmond, California and Chevron Products Company, A Division of Chevron U.S.A. Inc. at 6–9 (2015), https://www.ci.richmond.ca.us/DocumentCenter/View/37791/ECIA-12-7-15 [https://perma.cc/SQ34-HDM7].

final amended community and environmental benefits agreement in 2015.[130]

It is important to note that this evolutionary time frame encompasses all forms of community/landowner negotiation defined in Section II.A. When one strictly narrows negotiation to CBAs—which are often only defined as negotiations between developers and *non-governmental* entities—the time frame for the evolution of such agreements is much shorter. For example, Vicki Been identifies the first formal CBA as originating in California in 2001 with an agreement between, on one side of the CBA, the developers associated with the Los Angeles Lakers Stadium, and labor unions and community groups on the other side.[131] Patty Salkin and Amy Lavine describe the first CBA in California (an early adopter state of CBAs) as emerging in 1998.[132]

Following the early emergence of CBAs, a growing number of community/landowners-developer negotiations now involve large-scale solar and wind generation projects driving the energy transition, as explored in Section II.C.

3. International CBAs: Multinational Corporations and Communities

Although sophisticated community-developer negotiations have emerged in the domestic space for large infrastructure such as sports stadiums, perhaps the best examples of negotiation emerge from agreements between multinational oil and gas and mining companies and communities (often Indigenous communities).[133] These are typically called Impact Benefit Agreements (IBAs).[134] Some nations require such agreements, and where

130. John Coté & David R. Baker, *Chevron Refinery Project Approved by Richmond City Council*, SFGATE (July 30, 2014), https://www.sfgate.com/business/article/Chevron-Richmond-refinery-decision-drags-deep-5655736.php [https://perma.cc/9G5B-YEUB] (showing approval of upgrades); *Chevron Environmental and Community Investment Agreement*, CITY OF RICHMOND, https://www.ci.richmond.ca.us/DocumentCenter/View/37791/ECIA-12-7-15 [https://perma.cc/99GE-5YV8] (showing the final amended agreement).

131. Been, *supra* note 26, at 8.

132. Salkin & Lavine, *supra* note 54, at 301.

133. SIMON FRASER UNIV., IMPACT BENEFIT AGREEMENT DATABASE: ALL AGREEMENTS, http://rem-main.rem.sfu.ca/planning/IBA/IBA_Fiscal_Instruments_Database.pdf [https://perma.cc/XY3A-5HS2].

134. van de Biezenbos, *supra* note 26, at 611; Maggie Cascadden et al., *Best Practices for Impact Benefit Agreements*, RES. POL'Y, March 2021, at 1; Ken J. Caine

they are not required, Indigenous-corporate negotiation is often a voluntarily measure as encouraged by the United Nations Declaration on the Rights of Indigenous Peoples.[135] The components of IBAs are largely parallel to those seen in domestic CBAs, including provisions such as funding for human resource and economic development programs within communities. Others include specific payments for social and cultural benefits.[136] Many IBAs, however, also include regular payments to Indigenous communities based on the quantity of mineral extracted.[137] Similar mechanisms incorporated into CBAs could potentially better ensure that payments are commensurate with the impacts of development.

IBAs are prevalent in Canada, in part because some Indigenous treaties with the government require them.[138] The agreements and resources supporting such agreements provide important examples of strong forms of CBAs that we further explore in Parts II and III. Yet they are also a cautionary tale, showing that even comprehensive, carefully crafted negotiations do not always bear tangible results. For example, the Mary River Project Inuit Impact and Benefit Agreement promises education and training for Qikiqtani Inuit members, employment, contracts with Inuit firms, and social benefits such as "protection of Inuit traditions" and financial support.[139] A three-year review of the project concluded, however, that the mining company had failed to develop any "strategy to allocate and spend the

& Naomi Krogman, *Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North*, 23 ORG. & ENV'T 76, 80 (2010) ("At a broad level, IBAs are contractual arrangements based on exchange and negotiated between a development proponent and an Aboriginal group.").

135. van de Biezenbos, *supra* note 26, at 610.

136. *See, e.g.*, SIMON FRASER UNIV., *supra* note 133, at 20 (noting "multiple fixed payments" for "Social and Cultural Well-Being" in an agreement between a ruby and sapphire mining company and the Government of Greenland).

137. *See generally id.* (showing numerous examples of royalty payments).

138. *Mining-Indigenous Relationship Agreements*, MINING ASS'N OF CAN.: OUR FOCUS, https://mining.ca/our-focus/indigenous-affairs/mining-indigenous-relationship-agreements [https://perma.cc/5V97-VLEN] (indicating 500 agreements in place); Neida Gonzalez, *Impact Benefit Agreements*, LAND CLAIMS AGREEMENT COAL. (Feb. 27, 2014), https://landclaimscoalition.ca/assets/Economic-Measures-Neida-Gonzalez.pdf [https://perma.cc/XF4N-BZLL] (observing that some IBAs are required by treaties between the government and Aboriginal groups).

139. QIKIQTANI INUIT ASS'N, MARY RIVER PROJECT INUIT IMPACT BENEFIT AGREEMENT: THREE YEAR REVIEW, 2013–2016, at 1, https://www.qia.ca/wp-content/uploads/2017/04/160916-qia-Mary-River-iiba-3yearreview-eng-final.pdf [https://perma.cc/3FDQ-SDKX].

Education and Training Fund" and that employment of Inuits by the mining company has declined, although the company had begun to develop an "Inuit Procurement and Contracting Strategy."[140]

To help assist communities with these types of IBAs and improve their results, the Canadian government supports a Centre of Expertise on Impact and Benefit Agreements that provides training to communities to help them more effectively negotiate with mining companies, conduct project analysis, prepare for negotiation, and implement IBAs.[141]

IBAs, despite facing implementation challenges, tend to contain broader, longer-lasting benefits, stakeholder-inclusive strategies, and other elements that we argue for in the CBA context in Part III. Another important tool for addressing the impacts of infrastructural development in communities is narrower, yet critical—negotiations with residents who directly abut infrastructure projects, as we explore in the following Section.

C. Good Neighbor Payments

Most good neighbor payments are less "public" in nature than CBAs or similar agreements between developers, community groups, or local governments. Good neighbor payments constitute agreements between developers and (typically private) landowners and residents who live near proposed development projects.[142] However, as with CBA negotiations, residents within communities that host renewable energy, as well as academic critics, often view good neighbor payments as a mechanism by which private developers of infrastructure limit opposition through bribes without addressing legitimate concerns of the project. These payments are "bribe-like" to some because they do not emerge from an open negotiation process and do not

140. *Id.* at 3–5.

141. *Centre of Expertise on Impact and Benefit Agreements: An Important Ally*, GOV'T OF CAN.: INDIGENOUS SERVS. CAN., https://sac-isc.gc.ca/eng/1645561183367/1645561204248 [https://perma.cc/MAA3-XKXJ].

142. Spangler et al., *supra* note 16, at 1285. Good neighbor payments should not be confused with "good neighbor *agreements*," which are sometimes a synonym for CBAs between developers and community groups. U.S. DEP'T OF ENERGY, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, LAND-BASED WIND ENERGY: ECONOMIC DEVELOPMENT GUIDE 25 (2022), https://windexchange.energy.gov/economic-development-guide.pdf [https://perma.cc/HJ5N-HPTY].

have the purpose—at least on their face—of mitigating unfavorable impacts of the project.[143] Critics expect good neighbor payments, like developer-group negotiations, to be infused with more publicly oriented values.[144] More broadly, good neighbor agreements (GNAs)—as opposed to individual good neighbor payments—can lead to a more publicly negotiated process of the developer promising to mitigate harmful impacts or concerns in exchange for ceasing litigation or other forms of activism from community groups.[145] These GNAs fall beneath—or at least overlap with—the broad category of CBAs as we define them. We therefore focus on two categories of negotiation in this Article: CBAs and good neighbor payments.

In good neighbor payments, the developer promises to pay these landowners or residents money (or sometimes other benefits).[146] As with CBAs, the contours of good neighbor payments are at least in one state publicly delineated, with local governments having the option to require specific amounts of payments based on the neighboring properties' proximity to the proposed development. In Wisconsin, for example, for landowners who have not leased their land to a wind energy company, the company may offer annual compensation of $600 to neighbors within a half mile of one turbine, $800 to neighbors within a half mile of two turbines, and $1,000 for those within a half mile of three or more turbines.[147] The payments may increase by an indexed amount, on a percentage basis.[148] In other states without regulation, developers are free to offer an amount they choose.

Developers voluntarily enter into good neighbor payments for reasons similar to their motivations with CBAs: to ease the development process by lessening opposition to the project; to act as a good citizen of the community and address the externalities of the project; or a combination of both.[149]

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143. Spangler et al., *supra* note 16, at 1284–85

144. Cowell et al., *supra* note 30, at 541–43; *see* Spangler et al., *supra* note 16, at 1278.

145. DOUGLAS S. KENNEY ET AL., UNIV. OF COLO. SCH. OF L., NAT. RES. L. CTR., EVALUATING THE USE OF GOOD NEIGHBOR AGREEMENTS FOR ENVIRONMENTAL AND COMMUNITY PROTECTION (2004).

146. Spangler et al., *supra* note 16, at 1285 (describing a developer offering to install a small solar array on a neighbor's farmette).

147. WIS. ADMIN. CODE PSC § 128.33(3) (2011).

148. *Id.*

149. Spangler et al., *supra* note 16, at 1285.

These agreements are more public than they may appear, in part due to their underlying motivations. When exercised for the purpose of reducing opposition to a project, many individuals view the payments as improper expenditures designed to ensure that neighbors of proposed projects will not appear at public meetings and speak out against the projects.[150] Further, the good neighbor payments are decidedly "public" when mandated or even guided in form by a state or local government, as in Wisconsin with mandated payments to neighbors that vary based on distance from the project.[151] Good neighbor payments without such governmental guidance raise equity issues, as some neighbors receive offers and others do not, and offer amounts can differ.[152] Some residents may also view them as unfair windfalls rather than legitimate mechanisms to address the externalities that fall most heavily on neighbors, such as aesthetic impacts or noise and traffic during construction.[153]

Considered together, the range of mechanisms for addressing the impacts of infrastructure development within communities is impressive, ranging from formal development agreements to less formal CBAs with broad-based benefits to the narrower mechanism of payments to project neighbors. Although these tools are sometimes deficient, they offer substantial opportunities for mitigating the powerful localized impacts of infrastructure. This is in part why they are increasingly common in the fast-growing renewable energy sector.

D. Negotiation in the Energy Transition

The types of developer-community negotiations for energy transition infrastructure, including large-scale solar and wind generation, are as varied as those introduced for other forms of development in Section II.B. So too are their contents. Some community-developer negotiations for wind and solar generation involve formal zoning conditioned on benefits. Virginia, for example, allows local governments to issue "special exception" (conditional) land use approvals to solar farms and energy storage projects, such as batteries. They may condition such

150. Moore & Hackett, *supra* note 30.
151. PSC § 128.33(1).
152. Spangler et al., *supra* note 16, at 1288.
153. *See id.*

approvals on the "dedication of real property of substantial value" or "substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the granting of a conditional use permit."[154]

In an approach somewhat similar to Virginia's, Maine incentivizes negotiations for wind energy by expediting approval of projects for which developers enter into CBAs. Developers must show that benefits in the agreement are at least $4,000 annually for each wind turbine, averaged over twenty years.[155] Illinois provides mandatory components of contracts if developers and local governments, road districts, or the Department of Transportation choose to enter into road use agreements to address, for example, damage or wear to roads from heavy construction equipment carrying wind turbine blades or solar panels to sites. These agreements must make the developer responsible for paying for necessary road improvements and repairs relating to the use of roads by the developer.[156]

Other states mandate the use of CBAs. New York requires developers of large-scale renewable energy to enter into CBAs and specifies the consideration that developers must offer benefits in the form of electricity bill discounts to the residents within the local government where the project will be located.[157] Connecticut allows "[a]ny municipality, owner or developer" to "enter into a community environmental benefit agreement in connection with" legislatively defined "affecting facilities"—energy facilities and other infrastructure with pollution impacts.[158] The state requires these agreements for such facilities in environmental justice communities that have five or more affecting facilities.[159]

Previous federal requirements for community benefits plans are somewhat more flexible, but they contain clear guidance.

154. VA. CODE ANN. § 15.2-2288.8(B) (2021).
155. ME. STAT. tit. 35-A, § 3454(2) (2011).
156. 55 ILL. COMP. STAT. 5/5-12020(s) (2023).
157. S. 7508B, 2020 Gen. Assemb., Reg. Sess. (N.Y. 2020), at 119; RENEWABLE ENERGY FACILITY HOST COMMUNITY BENEFIT PROGRAM IMPLEMENTATION PLAN UPDATE, CASE 20-E-0249, N.Y. PUB. SERV. COMM'N (2025), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={20621B99-0000-C11A-B88C-C0730A030000} [https://perma.cc/QS6Y-WXAF]. *See generally* S. 8308, 2024 Gen. Assemb., Reg. Sess. (N.Y. 2024) (New York statute moderately revising the Accelerated Renewable Energy Growth and Community Benefit Act).
158. CONN. GEN. STAT. § 22a-20a(c) (2024).
159. *Id.*

The federal Bipartisan Infrastructure Law of 2021 and Inflation Reduction Act of 2022 both committed billions of dollars of federal funding to clean energy projects and supporting infrastructure.[160] Much of this funding was distributed by the DOE through competitive grants and similar mechanisms.[161] Under the Biden Administration, the DOE required all applicants to include a CBP in their package.[162]

Under the Biden Administration DOE's requirement, the CBP had to be "specific, actionable, and measurable," and the DOE provided plan templates, but this was a *plan* for how developers must work with communities, not a mandate for an agreement.[163] CBAs were one component that developers could include within the plan, and "examples" of provisions to be included within such agreements included the following provisions:

- job access for "disadvantaged communities and/or underrepresented workers";
- job training for similar groups; investments in "subsidies for caregiving" or "transportation services for workers" or both;
- "[a]ccess to local educational programs, electricity discounts, critical services, and associated grants";

160. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021); Pub. L. No. 117-169, 136 Stat. 1818 (2022). The One Big Beautiful Bill Act withdrew much of this funding. Pub. L. 119-21, 139 Stat. 72 (2025).

161. *See, e.g.*, *Biden-Harris Administration Announces $30 Million in Clean Energy Funding to 28 State, Local and Tribal Governments*, U.S. DEP'T OF ENERGY (Oct. 12, 2023), https://www.energy.gov/articles/biden-harris-administration-announces-30-million-clean-energy-funding-28-state-local-and [https://perma.cc/MQ9R-53PZ]. *But see Secretary Wright Announces Termination of 24 Projects, Generating Over $3 Billion in Taxpayer Savings*, U.S. DEP'T OF ENERGY (May 30, 2025), https://www.energy.gov/articles/secretary-wright-announces-termination-24-projects-generating-over-3-billion-taxpayer [https://perma.cc/GBE2-Q9CK].

162. *About Community Benefits Plans*, *supra* note 34.

163. *See id.* and accompanying text; U.S. DEP'T OF ENERGY, OFF. OF MINORITY BUS. & ECON. DEV., GUIDE TO ADVANCING OPPORTUNITIES FOR COMMUNITY BENEFITS THROUGH ENERGY PROJECT DEVELOPMENT 8–10 (2017).

- commitments to invest in community development funds;
- "[e]nvironmental, wealth-building, local energy and other benefits identified by the community";
- "remedies for non-compliance"; and
- formation of a "[c]ommunity steering committee/community governance structure."[164]

In other cases, federal agencies did not require CBAs, but if developers pursued them, developers previously had to provide the CBAs to the agency as part of the permitting process. This was the case for offshore wind projects, which are permitted by the Bureau of Ocean Energy Management (BOEM).[165] BOEM offered a nonmonetary credit (ranging from 5–20 percent) to applicants who lease federal land for offshore projects when developers offer proof of a CBA.[166]

In states without mandates or requirements when developers opt to negotiate with communities, the consideration provided by developers can be quite extensive or involve a simple payment of money that flows to public coffers. Table 1 summarizes the types of consideration offered by developers within CBAs, as well as provisions for open processes in the distribution of benefits and enforcement. The Table provides a small sampling of provisions from an extensive set of CBAs for solar and

164. *Community Benefits Plan Template for Demonstration and Deployment*, U.S. DEP'T OF ENERGY, https://eere-exchange.energy.gov/FileContent.aspx?FileID=9848d718-ddc3-4b79-ba9c-3d0b0f155844 [https://perma.cc/DE2S-K62Y]; U.S. DEP'T OF ENERGY, *supra* note 163, at 7 (explaining how to include "measurable" benefits in plans by describing "expectations of project deliverables," including reporting requirements, and making reports public).

165. KATHERINE HOFF & KATIE SEGAL, BERKELEY L., OFFSHORE WIND & COMMUNITY BENEFITS AGREEMENTS IN CALIFORNIA 2 (2023), https://www.law.berkeley.edu/wp-content/uploads/2023/06/CBA-Policy-Paper.pdf [https://perma.cc/UX4E-Y6QA].

166. LORELEI WALKER & ARNE JACOBSON, SCHATZ ENERGY RES. CTR., COMPETITIVE OFFSHORE WIND LEASES ON THE U.S. OUTER CONTINENTAL SHELF: A REVIEW OF THE USE OF MULTI-FACTOR AUCTIONS AND NONMONETARY CREDITS 10, https://schatzcenter.org/pubs/2023-OSW-R1.pdf [https://perma.cc/5HFJ-B3HK] (discussing BOEM's credits).

wind development—which are, in recent decades, the fastest growing forms of renewable energy in the United States.[167]

In selecting examples for Table 1, we focused on provisions that tend to: (1) incorporate and address the diverse needs of a broad set of stakeholders within communities, ranging from health to cultural programs; (2) provide longer-term community benefits through, for example, investments in education, job training, and infrastructure; and (3) provide more than a single or "one-off" benefit such as a one-time donation of emergency services equipment. The Table also provides contrast, however, by also showing examples of simple monetary commitments to communities by renewable energy developers.

167. We collected this data from independent searches and community benefits agreements databases, including those collected by Georgetown Capstone and Columbia's Sabin Center. *See* Maya Alcantara et al., *Community Benefits Agreements in Renewables: Insights from the Georgetown Capstone on Community Involvement on Renewable Energy Siting Processes*, MIT RENEWABLE ENERGY CLINIC (Oct. 26, 2023), https://renewable-energy.mit.edu/old-blog-verion/community-benefits-agreements-in-renewables-insights-from-the-georgetown-capstone-on-commmunity-involvement-on-renewable-energy-siting-processes [https://perma.cc/L77L-Z4GV]; *Community Benefits Agreements Database*, COLUM. L. SCH.: SABIN CTR. FOR CLIMATE CHANGE LAW, https://climate.law.columbia.edu/content/community-benefits-agreements-database [https://perma.cc/VM5B-J8B4]. We include some examples from wind energy development, but most examples are from solar energy development because this will be the predominant form of new U.S. "clean energy development" in this decade and coming decades. Vikram Linga, *EIA Projects that Renewable Generation Will Supply 44% of U.S. Electricity by 2050*, U.S. ENERGY INFO. ADMIN. (Mar. 18, 2022), https://www.eia.gov/todayinenergy/detail.php?id=51698 [https://perma.cc/ZA27-LNRS]. "Clean" energy refers to energy that does not emit greenhouse gases when it is used. MIT CLIMATE PORTAL WRITING TEAM, *What is Clean Energy? Is Any Kind of Energy Completely Clean?*, ASK MIT CLIMATE (May 7, 2014), https://climate.mit.edu/ask-mit/what-clean-energy-any-kind-energy-completely-clean [https://perma.cc/AF4P-Z5UG].

Table 1. Sample Components of Renewable Energy CBAs

Type of consideration provided by developer	Examples
Benefits distribution	• Local benefits need survey, public forum to discuss survey results, and gathering of "further feedback from residents"[168] • "Consultation with community leaders to confirm the feasibility and reception" of community resource center; a community-based advisory committee to guide investment[169]
Community improvement and beautification	• Developer commitment to "enroll in the 'Adopt a Highway' program" for a specific road[170] • Community service district contribution for improvements at community park ($250,000)[171] • "Community events and revitalization projects" (in addition to health and wellness and education), $1.5 million over 20 years (including initial $500,000 gift)[172] • Donation to, and employee volunteer work time at, a professional rodeo event[173] • Donations to 4-H clubs and county fairs[174]

168. CNTY. OF S.D., JACUMBA HOT SPRINGS CMTY. SPONSOR GRP., FINAL MINUTES OF REGULAR MEETING (Sep. 13, 2021), https://www.sandiegocounty.gov/content/dam/sdc/pds/Groups/jacumba/2021_agendas_minutes/JA210913MI.pdf [https://perma.cc/8X6H-VBFV].

169. CONNECTGEN, FOUNTAIN WIND PROJECT: COMMUNITY BENEFIT PROGRAM 3 (2021), https://www.fountainwind.com/wp-content/uploads/2021/10/CG_Fountain-Wind-Community-Benefit-Programs-10.13.21.pdf [https://perma.cc/VQ93-7RUP].

170. Solar Benefits Agreement: Wright Solar PV Project, Cnty. of Merced & Wright Solar Park, LLC (2015), https://climate.law.columbia.edu/sites/climate.law.columbia.edu/files/content/CBAs/14.%20County%20of%20Merced.pdf [https://perma.cc/33NJ-YAM3].

171. CNTY. OF S.D., *supra* note 168.

172. *Ocotillo Wind Community Benefits Program*, IMPERIAL VALLEY CMTY. FOUND., http://www.ivcommunityfoundation.org/funds-&-programs/ocotillo-wind-community-benefits-program [https://perma.cc/5HJH-59MP]; *Ocotillo Wind Community Fund*, IMPERIAL VALLEY CMTY. FOUND., http://www.ivcommunityfoundation.org/funds-&-programs/ocotillo-wind-community-benefits-program/ocotillo-wind-community-fund [https://perma.cc/RT3G-B93K].

173. Leeward Renewable Energy, LINKEDIN (2023), https://www.linkedin.com/posts/leeward-renewable-energy_lreimpact-windenergy-activity-7087088377082068992-HFv3 [https://perma.cc/8J8Y-8RM4].

174. NEXTERA ENERGY, FAQ: WHITE RIVER VALLEY SOLAR PROJECT 3 (2023), https://www.theheraldtimes.com/wp-content/uploads/2023/05/NextEra-White-

Type of consideration provided by developer	Examples
Economic development	• Economic development fund—community endowment[175] • $250,000 up-front payment and $115,000 annual payment to Economic and Development Planning Board "community initiatives"—support of small businesses, architectural study for downtown revitalization, establishment of community-owned grocery co-op[176] • $45,000 in seed funding for a "regional initiative to support clean energy and the blue economy"[177]
Education	• Education grant—local community college scholarship[178] • $1.5 million over 20 years (including $500,000 up-front gift)—Education Fund with scholarships[179] • Community resource center for education built at closed elementary school[180] • "Hybrid Renewable Energy System training facility dedicated specifically to green technology training for youths and veterans" on the solar site[181] • Contribution for "K-12 energy educational programs"[182] • $200,000 to public schools for curriculum and programs on "Indigenous history and culture of the area"; $1.25 million for public schools pre-K partnership; $1 million for capital costs, infrastructural improvements,

River-Valley-Solar-Project-FAQ25304367.8-002.pdf [https://perma.cc/8FQS-JWPC].

175. CONNECTGEN, *supra* note 169.

176. Blanchette, *supra* note 19.

177. *City of Salem and Crowley Wind Services Announce Historic Community Benefits Agreement for Wind Terminal Project*, CITY OF SALEM: MAYOR'S OFF. (Feb. 23, 2024, at 11:05 AM) [hereinafter *City of Salem*], https://www.crowley.com/news-and-media/press-releases/city-of-salem-and-crowley-wind-services-announce-historic-community-benefits-agreement-for-wind-terminal-project/ [https://perma.cc/VVE3-UHMR] (among other educational support).

178. *Wing Solar*, ORIGIS ENERGY, https://origisenergy.com/project/wing-solar [https://perma.cc/2X9X-MHK4].

179. *Ocotillo Wind Community Benefits Program*, *supra* note 172.

180. CONNECTGEN, supra note 169.

181. Cnty. Council of Howard Cnty., supra note 60, at 1.

182. *Chevelon Butte Wind Farm*, AES, https://www.aes.com/chevelon-butte [https://perma.cc/YSZ7-8VER].

Type of consideration provided by developer	Examples
	training aids and facilities—public schools; and "$400,000 in scholarships for offshore wind or maritime-related career paths and educational opportunities"[183]
Continued local presence	• Owners of solar facility "shall open and staff a permanent business office" in the county[184]
Health	• Health and wellness (plus economic workforce and development, disaster recovery, civic engagement, and youth education, recreation and safety), $1.5 million over 20 years (including initial $500,000 gift)[185]
Infrastructure and service improvement	• Internet expansion[186] • Commitment to electrification of port; installation of 10 electric vehicle charging stations; $850,000 to improve a street intersection[187]
Investment in community businesses	• "Best efforts" to make purchases from local businesses for landscaping required to be planted around solar farm; encourage all employees to make purchases of meals, gas, etc. from local businesses[188] • Commitment to "utilize local supply chain sourcing for the project to the greatest extent feasible"[189]
Labor and workforce development	• Commitment of "promoting local hiring of qualified residents from the Morro Bay community, including handicapped persons"[190] • All contracts for construction and operation shall be advertised within the county; project labor shall be recruited from the county "to the maximum extent feasible"[191]

183. *City of Salem*, *supra* note 177.
184. Solar Benefits Agreement: Wright Solar PV Project, *supra* note 170.
185. *Ocotillo Wind Community Benefits Program*, *supra* note 172; *Ocotillo Wind Community Fund*, *supra* note 172.
186. CONNECTGEN, *supra* note 169.
187. *City of Salem*, *supra* note 177.
188. Riverhead Community Benefits Agreement, *supra* note 77, at 10.
189. *City of Salem*, *supra* note 177.
190. Community Benefits Agreement: Castle Wind Morro Bay Offshore Wind Farm Project, *supra* note 41, at 4.
191. Solar Benefits Agreement: Wright Solar PV Project, *supra* note 170.

Type of consideration provided by developer	Examples
	• Workforce development (plus disaster recovery, health and wellness, civic engagement, and youth education, recreation and safety), $1.5 million over 20 years (including initial $500,000 gift)[192]
Mitigation of environmental and social impacts	• Buffer zone of 300 feet between edge of solar farm and residences[193] • Mitigation of impacts to fisheries (limitations on timing and location of construction)[194] • Commitments for road repair, noise limits, traffic management, and decommissioning, among others[195] • Developer-funded protection of agriculture and open space initiative—$250,000[196] • Marine mammals and wind fund[197] • Commitment to not site future offshore turbines closer to town's historic district than current offshore wind project is located[198] • "[C]ommercially reasonable efforts to develop and integrate agricultural activities" at the solar site, including grazing and pollinator habitat[199]

192. *Ocotillo Wind Community Benefits Program*, *supra* note 172; *Ocotillo Wind Community Fund*, *supra* note 172.

193. Camille von Kaenel, *Developer's Deals with Community Groups Under Fire as Giant Solar Farm Moves Closer to Approval*, TIMES OF S.D. (July 20, 2021, at 10:45 PM), https://timesofsandiego.com/politics/2021/07/20/developers-deals-with-community-organizations-under-fire-as-giant-solar-farm-moves-closer-to-approval [https://perma.cc/XRP9-RZ72].

194. Community Benefits Agreement: Castle Wind Morro Bay Offshore Wind Farm Project, *supra* note 41, at 14.

195. Host Community Agreement, *supra* note 77; HOFF & SEGAL, *supra* note 165, at 8 (discussing the agreement).

196. Riverhead Community Benefits Agreement, *supra* note 77, at 5.

197. Good Neighbor Agreement, Vineyard Wind, LLC, Town & Cnty. of Nantucket, Maria Mitchell Ass'n & Nantucket Pres. Tr. (Aug. 27, 2020), https://nantucket-ma.gov/DocumentCenter/View/37347/Good-Neighbor-Agreement-PDF [https://perma.cc/T7WM-HK8D]; *Committing $15m to Make Massachusetts the Center of the Offshore Wind Industry*, VINEYARD WIND, https://www.vineyardwind.com/masswinds/#marine-mammals [https://perma.cc/7D4L-3EJL] (describing the fund supported by the agreement).

198. Good Neighbor Agreement, *supra* note 197.

199. Host Community Agreement for the Morris Ridge Solar Energy Center Project, Town of Mount Morris & Morris Ridge Solar Energy Ctr., LLC 14 (Apr. 27,

Type of consideration provided by developer	Examples
Direct investment	• $1 million (including taxes, payments in lieu of taxes, and additional host community payments) annually years 1 through 11 and $1 million with 3% escalation fee annual years 12 through 30[200] • $4 million; additional payments to a museum ($75,000), community health organization ($125,000); and community service district for community park (also noted under "Community Improvement" above)[201] • Offshore Wind Community Fund—grants administered by board of directors appointed by town; $4 million and $3 million for each additional wind project by same developer[202] • $500,000 initially to county; three additional payments to county, one $583,334 and two $1.08 million each, after state Department of Environment approval and county approval of final building permit and certificate of occupancy, which allows operation of facility;[203] funds to be used for "any purpose"[204]
Public access to energy site (hunting, etc.)	• Community access program to wind site for hunting and "culturally significant sites"[205]
Public service (emergency response, police, fire contributions)	• $25,000 annual payment to county general fund for public safety purposes for 20 years; $30,000 annual payment if battery storage system approved[206] • $1 million to county sheriff's office[207]

2022) [hereinafter Host Community Agreement for the Morris Ridge Solar Energy Center] (on file with authors).

200. Host Community Agreement for the South Ripley Solar Project, Town of Ripley & Connectgen Chautauqua Cnty. LLC 6 (Dec. 30, 2021) (on file with authors).

201. CNTY. OF S.D., *supra* note 168, at 1.

202. Good Neighbor Agreement, *supra* note 197, at 3–4.

203. Solar Energy Siting Agreement, Bd. of Supervisors of Lunenburg Cnty. & Red Brick Solar LLC 5 (June 9, 2022) [hereinafter Red Brick Solar Energy Siting Agreement] (on file with authors).

204. *Id.*

205. CONNECTGEN, *supra* note 169.

206. Solar Benefits Agreement: Wright Solar PV Project, *supra* note 170, at 3.

207. CONNECTGEN, *supra* note 169.

Type of consideration provided by developer	Examples
	• $350,000 toward forest fire prevention measures[208] • "Fly car" and all-terrain vehicle for rural town's ambulance service[209]
Reimbursement of local government permitting fees and expenses	• $250,000 for local government review of stormwater, decommissioning, and inspections[210]

Type of consideration provided by local government or community groups	Examples
Commitment to support or not oppose the project	• Museum commitment of solar energy exhibit and support in exchange for museum funding[211] • "Reasonable and good faith efforts" by town to ensure that "residents and visitors are informed of the benefits of the project"[212] • Assurance to developer that visual impacts mitigation within the agreement is sufficient for regulatory purposes[213] • Commitment that no additional review of project's compliance with local comprehensive plan is required[214]

208. *Id.* (noting fuel break and fuel reduction project—measures to reduce brush that burns in forest fires, as well as a wildfire protection plan update).

209. Host Community Agreement for the Morris Ridge Solar Energy Center, *supra* note 199, at 7.

210. Red Brick Solar Energy Siting Agreement, *supra* note 203, at 4.

211. CNTY. OF S.D., *supra* note 168; Camille von Kaenel, *Developer's Deals with Community Organizations Under Fire as Giant Solar Farm Moves Closer to Approval*, CBS8, https://www.cbs8.com/article/news/local/inewsource/developers-deals-with-community-organizations-under-fire-as-giant-solar-farm-moves-closer-to-approval/509-6b6275e7-2363-4771-b6ed-6697c7579c89 [https://perma.cc/63GL-UL6S] (last updated Aug. 18, 2021, at 8:43 AM) ("The Imperial Valley Desert Museum in Ocotillo has also signed an agreement with BayWa r.e. in which the developer would provide $75,000 for an exhibit and general support.").

212. Good Neighbor Agreement, *supra* note 197, at 4–5.

213. *Id.* at 5.

214. Red Brick Solar Energy Siting Agreement, *supra* note 203, at 6.

Type of consideration provided by local government or community groups	**Examples**
Local government land	• Exclusive option to lease city property for transmission line access[215] • Easements for cable to transport electricity from offshore wind farm[216]
Compliance and enforcement	**Examples**
Developer payment of penalties	• Developer's late payments to town—5% late payment penalty plus interest[217] • Late fees assessed at 1% monthly[218]

Table 1 provides only a small sampling of the myriad forms of negotiation occurring for the large-scale renewable energy projects driving the energy transition. Other common provisions not noted in Table 1 include, among others, waivers of jury trials by both parties,[219] promises of confidentiality of information exchanged in negotiations leading up to agreements,[220] or commitments to use alternative dispute resolution if disagreements arise.[221] The agreements typically provide that developers are to make payments directly to a local government (where such governments are parties to the agreement)[222] or to an escrow

215. Community Benefits Agreement: Castle Wind Morro Bay Offshore Wind Farm Project, *supra* note 41, at 6.

216. Host Community Agreement, *supra* note 77, at 5; *see also* HOFF & SEGAL, *supra* note 165, at 8 (discussing the agreement).

217. Riverhead Community Benefits Agreement, *supra* note 77, at 6.

218. Host Community Agreement for the Morris Ridge Solar Energy Center, *supra* note 199, at 6.

219. Good Neighbor Agreement, *supra* note 197, at 7.

220. *Id.* at 6.

221. Host Community Agreement for the Morris Ridge Solar Energy Center, *supra* note 199, at 14 (providing alternative dispute resolution for most agreement provisions).

222. Riverhead Community Benefits Agreement, *supra* note 77, at 6, 10 ("Payments shall be made directly to the Town."); Host Community Agreement for the Morris Ridge Solar Energy Center, *supra* note 199, at 6 ("Host Fee payments shall be paid directly to the Town and sent to the attention of the Town Supervisor . . . .").

account managed by legal counsel, with subsequent distributions to the beneficiaries in the agreements.[223]

In summary, CBAs are complex and highly diverse in content. As this Part has explored, CBAs include a broad array of NGO-developer or local government-developer agreements arising from "negotiations," loosely defined. CBAs represent a long-standing practice, and they exist alongside similar mechanisms through which communities obtain commitments from developers, such as formal development agreements. CBAs for renewable energy, specifically, are increasingly sophisticated and incorporate some of the essential values that we argue for in Part III. But CBAs do not uniformly encompass these values, and the following parts explore, from both a theoretical normative and practical standpoint, how they can improve.

II. A THEORETICAL FRAMEWORK FOR BETTER ENERGY NEGOTIATION: ACCOUNTABILITY, ACCESSIBILITY, AND EQUITY

The practices of negotiation and contracting are one beast in the private context; they are entirely another when operating within or circling dangerously close to the public sphere. "Public" negotiation of the type documented in Part I has been a central facet of the energy transition, and it will continue to be. Absent extensive preemption of local control—a move unlikely to arise due to political opposition—projects are less likely to be built without concessions from developers.[224] Indeed, even if it were politically palatable, extensive preemption of local control is not likely desirable, as it leaves inadequate space to address diverse community needs and preferences.[225]

This Part proposes a normative theoretical framework for good negotiation of new energy transition infrastructure, namely large-scale solar and wind projects. It sets forth a fresh understanding of the purpose of negotiation in the land use context and explores how negotiation should better align with that purpose through three primary values: (1) accountability—substantive results that incorporate and in some cases directly

223. Good Neighbor Agreement, *supra* note 197, at 8; Red Brick Solar Energy Siting Agreement, *supra* note 203, at 4.

224. Welton, *supra* note 97, at 267.

225. Alexandra B. Klass & Hannah Wiseman, *Repurposed Energy*, 109 MINN. L. REV. 219 (2024).

respond to constituent preferences; (2) the accessibility and openness of negotiation processes; and (3) equity—results that do not unduly favor certain individuals or groups of individuals over others, taking into account the fact that individuals and groups of individuals have different background circumstances.[226]

Section II.A explores why developers negotiate with communities and the purposes toward which both parties aim in such negotiations. This Section argues that these purposes collectively connect to the values of accountability, accessibility, and equity. Building from this assertion, Section II.B constructs a normative framework for accountable, accessible and open, and equitable CBAs.

A. The Purpose of Negotiation in Land Use

There is overwhelming evidence that energy governance that supports higher and more transparent levels of public participation promotes greater equity and acceptance.[227] Land use change negotiations that involve the public require a normative framework, and we construct such a framework in Section II.B.[228] Even if negotiations proceed primarily to benefit developers by greasing the wheels of projects, there are functional reasons for making these negotiations more accountable to community concerns, more accessible, and more oriented toward equitable results. And given governments' growing tendency to mandate negotiation, this formally public imprimatur drags negotiation far beyond the status of private contract.

226. This Part justifies these three values as central to CBAs based on the purposes of CBAs. Others, too, however, have described these types of values as defining CBAs. *See* Gross, *supra* note 46, at 36 (defining inclusiveness and accountability as "the essential values of past CBAs").

227. Cascadden et al., *supra* note 134; Aitken, *supra* note 18, at 6074; Trandafir et al., *supra* note 18; Spangler et al., *supra* note 16.

228. For explorations of the many purposes of CBAs, some of which overlap with the three points of focus here, see, for example, U.S. DEP'T OF ENERGY, *supra* note 34, at 1.

1. Adaptive Governance to Address Diverse Externalities

The "original meaning" of land use regulation—and indeed, still a central purpose of this regulatory regime—is to limit the externalities of land development.[229] The first language of the Standard State Zoning Enabling Act of the 1920s—still encompassed within many local government codes—pointed to the perils of building too many conflicting uses too close together, from fire hazards to noise, the spread of disease, and generally unpleasant living conditions.[230] The original approach to reducing externalities was Euclidean zoning.[231] This broad-brush approach, as the early *Euclid* case acknowledged, was both too broad and too narrow—it failed to exclude some uses that in some cases would generate substantial externalities, and it excluded many uses that would often pose few objections.[232] Despite the Supreme Court's affirming the constitutionality of this approach, it quickly became clear that such a broad-brush scheme was too sclerotic.[233] The forms of discretionary zoning noted in Section I.A became the norm, with governments treating zones as a baseline from which to depart through case-by-case negotiation.[234]

229. ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT (1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf [https://perma.cc/F7YY-JXUD].

230. *Id.*

231. Zoning divided local governments' territories into specific zones in which a list of land uses was allowed or prohibited. *See* Morley & Walny, *supra* note 106, at 2 and accompanying text.

232. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves."); *Id.* at 392 ("The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful.").

233. *Id.* at 397 (affirming the constitutionality of Euclidean zoning); Jay Wickersham, *Jane Jacobs's Critique of Zoning: From* Euclid *to Portland and Beyond*, 28 ENV'T AFFS. 547, 548 (2001) (exploring the limitations of Euclidean zoning).

234. Camacho, *supra* note 68, at 319 n.211 (characterizing zoning as a "baseline rights allocation").

There were several reasons for this relatively quick departure from "command and control" Euclidean zoning.[235] Two of the most important reasons are central to today's energy transition: (1) flexibility and adaptation, and (2) mitigation and compensation for externalities. First, this zoning, without exceptions, conditions, and the like, is highly inflexible due to its broad-brush approach; it is also notoriously maladaptive, failing to accommodate new types of uses not envisioned by original codes. Negotiation between developers and local governments allows developers to proceed with projects in a manner that achieves the goals of Euclidean zoning—avoiding conflicting land uses with large externalities on neighbors and communities—even when such uses were not allowed or anticipated by the original regime. Indeed, in the case of solar and wind energy, many early codes—and even today's zoning codes—fail to address these technologies at all.[236] Importantly, most wind and solar projects are in rural areas, and local governments in these areas—often understaffed, with few resources—tend to have less land use planning and development.[237]

Negotiation also addresses the externalities of land use more comprehensively and, arguably, more efficiently, than land use regulation does. This is exceedingly important in the land use context because all infrastructural development has powerful local externalities and more attenuated regional and national effects.[238] Yet the localized externalities of land use development—impacts that fall on parties beyond the developer, such as aesthetic disruption, noise, dust from construction, and the like—are highly varied.[239] A thousand-acre solar project constructed on a highly visible farm in the middle of a community has far more aesthetic impacts than solar panels tucked discreetly into a valley, for example. Broad-brush Euclidean zoning

235. *Id.* at 270.

236. *See, e.g.*, Hannah Wiseman, *PA Solar Ordinance Database*, PENN. ST.: CTR. FOR ENERGY L. & POL'Y (Aug. 3, 2024), https://celp.psu.edu/publications/pa_solar_database [https://perma.cc/EEZ9-ZMY9] (showing that only a minor portion of Pennsylvania's more than 2,500 municipalities have codes that address utility-scale solar).

237. Eisenberg, *supra* note 117, at 229.

238. David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 378 (2014); Hannah J. Wiseman, *Taxing Local Energy Externalities*, 96 NOTRE DAME L. REV. 563, 572 (2020).

239. *Cf.* HOFF & SEGAL, *supra* note 165, at 4–5 (arguing that a "CBA reflects the unique circumstances of a community").

cannot effectively address such externalities; it would require thousands of pages of regulatory text, and a great deal of wasted governmental effort, to predict and craft solutions for the unique externalities of millions of land uses.

The argument for the efficiency and effectiveness of bargaining to address externalities has strong Coasean tones. Ronald Coase and subsequent variations on Coase's original work argue that rather than regulating or litigating to reduce externalities—for example, shutting down a factory or mandating pollution control devices to reduce smoke—the factory operator and neighbors can negotiate a solution.[240] Neighbors have an identifiable willingness to pay for smoke-free air, and the factory has a price at which it will continue operating or choose to shut down. If transaction costs are sufficiently low and original rights are allocated carefully, negotiations over these factors will directly address these preferences, resulting in an efficient level of externalities. As we emphasize in this Section, ideal conditions for this contractual approach to land use are rarely met, however. Governmental or other forms of intervention are often necessary to ensure that land use outcomes address individual and community-based preferences surrounding positive and negative externalities of land use.

The challenge to the idealized form of Coasean negotiation is that transaction costs of bargaining are typically not low in the land use context.[241] Land uses such as large solar or wind farms impact many community members, influencing residents' sense of place, enhancing some members' desire for "cleaner" energy, and displacing or improving farmland or wildlife habitat, for example. But the alternatives to addressing externalities, such as litigation and taxation, have their own costs. A uniform tax or fee on specific types of land use—such as Pennsylvania's fee for hydraulically fractured wells, with many of the proceeds flowing to local improvement projects—forces developers to internalize externalities by paying the community for them.[242] But the uniformity, like Euclidean zoning, results in

240. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 42 (1960); Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

241. *See* Wiseman, *supra* note 238, at 569; *but see* Spence, *supra* note 238.

242. *See* Wiseman, *supra* note 238, at 571.

gross over- or underpayment due to varied impacts.[243] And tort-based litigation, such as nuisance suits, is quite costly, requiring case-by-case solutions.[244] Litigation is also most accessible to those with the most resources, thus potentially excluding a large swath of individuals impacted by development.

Negotiation, in contrast to litigation, avoids the broad-brush challenges posed by zoning and taxes or fees. And although it is case-by-case—a developer negotiates a CBA or similar mechanism for each project and often pays neighbors for the impacts of each project—negotiation encompasses more parties than typical nuisance litigation. CBAs are often designed to address community-wide impacts that fall on a variety of groups—labor, education, and affordable housing, for example.[245] Indeed, proponents of land use negotiation tools such as CBAs view them as opportunities to revolutionize community involvement in development through meaningful and lasting change.[246]

The type of negotiation explored here involves property rules, in which the government does not establish a price at which a development may proceed.[247] Rather, local governments—which, in many states, hold the ultimate veto authority over projects—may demand as much as they wish, in part to embrace the fact that externalities differ meaningfully among

243. *Id.* at 614.

244. The authors are not aware of empirical assessments of the extent to which rules are less costly than litigation by avoiding case-by-case solutions. One somewhat relevant comparison, however, is the negotiated regulation literature, in which scholars assessed whether enlisting regulated actors in the regulation forming process reduced later litigation. The results are mixed. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENV'T L.J. 32, 45–49 (2000); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1264 (1997).

245. *See supra* Table 1.

246. *See, e.g.*, *How Community Benefits Agreements Build Thriving Communities and Authentic Democracies*, POWERSWITCH ACTION (Nov. 1, 2024), https://www.powerswitchaction.org/updates/how-community-benefits-agreements-build-thriving-communities-and-authentic-democracy [https://perma.cc/Y72P-AP4A]; David C. Blount et al., *Pursuing Housing Justice: Interventions for Impact*, URBAN INST. (May 24, 2023), https://www.urban.org/apps/pursuing-housing-justice-interventions-impact/community-benefit-agreements [https://perma.cc/LJ5L-GTXS] ("For housing justice, CBAs can be a tool to guard against displacement through centering community voices and interests in the planning and development of housing and committing direct investments to improve housing quality and to increase housing affordability in a neighborhood.").

247. Calabresi & Melamed, *supra* note 240, at 1092. Liability rules, in contrast, involve the government or another entity establishing the price at which parties may destroy initial property rights/entitlements. *Id.*

communities. This property rule is likely only feasible, however, when implemented above a floor that removes unfettered local government discretion over the permitting of renewable energy projects. With such discretion, local governments—which already can negotiate with renewable energy developers—are simply setting the bar for compensation too high. In a growing number of cases, they are directly banning renewable energy or implementing effective bans through stringent land use regulations.[248] A large preemption literature explores the need to strike some balance within this space.[249] For local governments accustomed to full "gatekeeping" control over the fate of renewable energy projects—and community members seeking continued input within the siting process—more robust negotiation requirements take the sting out of ceilings on, or partial preemption of, local government authority.

2. Greasing the Wheels of a Sclerotic Governance Regime

Viewed more cynically, negotiation is merely a clever mechanism to grease the regulatory wheels of a relatively sclerotic regulatory system, speeding up approvals and making such approvals more likely. Evidence from utility-scale solar projects in rural communities suggests that negotiation processes between developers, local governments, and landowners can be a tool to move projects forward more quickly and with fewer hurdles, while also obfuscating any meaningful participation from the broader community.[250]

A great deal of land use development likely would not proceed without negotiation. Placing land use control within the hands of local governments gives them some degree of veto power over land development.[251] In the realm of Coasean

248. EISENSON ET AL., *supra* note 10; Jake Zuckerman, *Ten Ohio Counties Ban Wind, Solar Projects Uunder New State Law*, OHIO CAP. J. (Aug. 23, 2022, at 3:55 AM), https://ohiocapitaljournal.com/2022/08/23/nine-ohio-counties-ban-wind-solar-projects-under-new-state-law [https://perma.cc/J7TS-DDHT].

249. *See, e.g.*, Outka, *supra* note 42.

250. Spangler et al., *supra* note 16, at 1289.

251. Spence, *supra* note 238. Even when local governments can (and do) wholly ban specific types of land use, however, land uses with capital, such as large oil and gas companies proposing hydraulic fracturing in a community, can and do influence local elections to help change the composition of local government commissions with legislative power over land use decisions, among other forms of influence. *Id.*

bargaining, this veto power is in the form of a property rule; the local government has discretion to deny the project entirely unless the developer offers a sufficient sum of money or similar benefits to appease the government or its constituents.[252]

Local governments often use their veto powers in response to influence from constituents often labeled as "Not in My Back Yard" (NIMBY) pressure.[253] While NIMBYism is typically used as a pejorative term for landowners who oppose every and any type of land use proposed near their property, scholars such as William Fischel have observed that negative responses to land use change are rational, given that individuals' largest investment is often their home, and changes to property value threaten this investment.[254] Furthermore, even residents who do not own a home have a range of reasons for supporting or opposing land use change, such as concerns about substantial changes to "sense of place."[255] In other cases, communities have competing visions of sense of place; long-time residents, such as farmers, have different visions than relatively new homeowners.[256] And finally, community opposition is sometimes influenced by external forces; for example, some fossil fuel companies have launched campaigns against renewable energy at the local government level.[257]

Many communities have repeatedly opposed land use changes ranging from low-income housing development to

252. Calabresi & Melamed, *supra* note 240.

253. DuVivier & Witt, *supra* note 42, at 1462.

254. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 4, 11–12 (2005).

255. Richard C. Stedman, *Toward a Social Psychology of Place: Predicting Behavior from Place-Based Cognitions, Attitude, and Identity*, 34 ENV'T & BEHAV. 561, 561 (2002) (defining sense of place as "cognitions, attitudes, identities, and behavioral intentions located in and fundamentally about place," including "place satisfaction, conceptualized as an attitude toward a setting, and attachment, conceptualized as personal identification with a setting").

256. Sense of place is the primary value driving community debates over renewable energy. *See* GOLDBERG ET AL., *supra* note 9, at 4–5, 75; *Id.* at 33 (noting that "[i]n conversations with farmers, the opinion is common that it is not their obligation to preserve other landowners' views by avoiding solar development on their farmland" but that "some farmers who are impacted by solar development share that they are upset by looking at panels because it reminds them of land that they might otherwise be able to farm").

257. *See, e.g.*, Isaac Slevin et al., *Beyond Dark Money: Information Subsidies and Complex Networks of Opposition to Offshore Wind on the U.S. East Coast*, 119 ENERGY RSCH. & SOC. SCI., Jan. 2025, at 1 (documenting connections between local renewable energy opposition groups and national groups, which are funded by the fossil fuel industry, among other interests).

hydraulic fracturing or landfills.[258] This same type of response is occurring for renewable energy development, with numerous community bans or rejections of individual proposed projects.[259] We use the broader term "opposition" here, however, to acknowledge that community resistance to renewable energy projects is more nuanced than the pejorative "NIMBYist" term suggests.

Even constituents who support land uses such as solar or wind development often oppose them within their communities out of concern that these uses will affect property values or change their sense of place.[260] And in the relatively rare event when a large swath of residents support a project, those closest to projects and therefore most powerfully impacted by them are the most likely to participate in local government proceedings and vocally criticize projects.[261]

Given these dynamics, it is rational—albeit crude and unsavory in appearance—for developers to offer payments to the closest neighbors who will pose the greatest opposition and to offer broader benefits to the local government or its constituent groups. These, after all, are the parties most likely to block the project, and repeated denials of solar and wind projects suggest that payments are a necessary part of the formula for project success. Adding to the unsavory appearance of these payments, however, is the fact that many are accompanied by non-disclosure agreements.[262] It is also possible that the payments could

258. *See, e.g.*, PATRICK J. WALSH ET AL., NAT'L AGRIC. & RURAL DEV. POL'Y CTR., WHAT FACTORS DRIVE LOCAL REGULATION OF FRACKING? (2015), https://aese.psu.edu/nardep/publications/policy-briefs/what-factors-drive-local-regulation-of-fracking [https://perma.cc/T6QK-NEXY] (exploring local bans on hydraulic fracturing and factors driving community support or opposition and bans); Isabella P. Douglas et al., *Understanding How Racism and Affect Impact Public Opinions Toward Affordable Housing in the United States*, 45 J. PLAN. EDUC. & RSCH. 512, 513 (2025) ("Local public opposition has been identified as one of the main drivers of housing unaffordability through blocking proposed developments and thus limiting the housing supply.").

259. Lawrence Susskind et al., *Sources of Opposition to Renewable Energy Projects in the United States*, 165 ENERGY POL'Y, June 2022, at 1; EISENSON ET AL., *supra* note 10.

260. FISCHEL, *supra* note 254, at 4.

261. *Cf.* Ernesto dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006) (describing how well-resourced, organized groups with the most to gain or lose from a decision will have the most influence within a process, whereas dispersed, less organized groups who will collectively benefit more, but have smaller individual benefits, will have less of an influence).

262. Spangler et al., *supra* note 16.

be unfair in light of the imbalanced resources of neighbors and developers—particularly in low-income areas, where neighbors are less able to hire attorneys for representation in any negotiation process.

Framing negotiation solely as a mechanism for greasing the wheels of project approval places negotiation in a relatively unsightly position. Indeed, energy law experts Romany Webb and Matthew Eisenson observe, in suggesting best practices for successful negotiations:

> When developers discuss monetary payments as a way to mitigate impacts, it sends a message to the community that local impact and concerns are taken seriously; when developers discuss monetary payments as a way to buy (or win) community support, it sends a message to the community that the relationship is purely transactional.[263]

Developers' "buying" of support is uncomfortable—indeed, even problematic—from the perspective of good governance and social preferences. However, if one steps back to temporarily view good neighbor agreements and CBAs solely as one method of supporting infrastructure that is critical to society, and contested at the local level, CBAs and good neighbor payments have an important role. Negotiation is by no means a replacement for more meaningful public participation within governance processes, though. As we emphasize here, governments requiring negotiation or communities voluntarily negotiating should ensure more open, participatory, and deliberative processing, thus yielding more just outcomes. Negotiation for renewable energy, in short, should be deployed in a cautious and thoughtful way, and negotiation should not displace critical, broader forms of participation explored here.[264]

Negotiation with neighbors and with communities is a legitimate tool in the sense of enabling societally beneficial energy development that faces opposition. But negotiation of both forms should be exercised in a far more responsible way than mere

263. EISENSON & WEBB, *supra* note 32, at 5–6.

264. *See generally* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION (1977) (arguing that there are too few land use approvals to meet demand for such approvals).

payments for government performance.[265] Indeed, the prohibitions on "contract zoning" by local governments in many states, as explored in Part IV, address this concern and prohibit current local governments from tying the hands of future governments by promising support for a project in exchange for benefits.

Despite legitimate legal wariness of contract-type zoning, states' explicit allowance of "development agreements" and zoning conditioned on payments, as occurs in Virginia for solar development, acknowledges that land use is, in many ways, inherently transactional.[266] Developers want to freeze regulations over the course of a large project or simply obtain project approval, and governments want something in return to address community concerns about impacts.

The case for speeding up local approvals of solar and wind development is indeed quite strong. There is broad (albeit still contested) societal consensus for the need for more wind and solar energy to address climate change,[267] yet a growing number of local government bans or regulations that in practice ban this energy.[268] Of course, there could be more efficient ways than benefits negotiation to grease the wheels of infrastructural governance—such as limiting or wholly preempting local government control and easing permitting processes. But we do not advocate for these, given our emphasis on participatory governance and justice within the normative framework we propose. Indeed, as scholars such as Shelly Welton observe in the renewable energy context, reforms as drastic as preemption may not be desirable.[269] There is some merit in local review and jurisdiction over infrastructural projects for a variety of reasons explored in the

265. There is a broad literature exploring the efficiency of bribes and bribe-like behavior in terms of its reduction of transaction costs and allocation of contracts to the firms with the highest demand for such contracts. As would be predicted, there is also a large responsive literature critiquing the morality of this account, and a literature arguing that bribes introduce inefficiencies. For an overview of the literature, see Yan Leung Cheung et al., *How Much Do Firms Pay as Bribes and What Benefits Do They Get? Evidence from Corruption Cases Worldwide* (Nat'l Bureau of Econ. Rsch., Working Paper No. 17981, 2012), https://www.nber.org/system/files/working_papers/w17981/w17981.pdf [https://perma.cc/QJT4-NNX5]; Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, AM. BEHAV. SCIENTIST, Nov. 1964, at 8, 8.

266. *See supra* note 154 and accompanying text.

267. KENNEDY ET AL., *supra* note 11 and accompanying text.

268. EISENSON ET AL., *supra* note 10 (documenting obstacles to renewables and bans).

269. Welton, *supra* note 30.

federalism sphere. Local governments are "closer to the people," for example, and better aware of distinctly local impacts, despite sometimes being subject to disproportionate pressure from those opposed to development.[270] Negotiation offers a way to individualize review of externalities and address them without sacrificing important local governance advantages.

3. Achieving a Social License to Operate

Standing alone, the purpose of easing constraints on renewable energy projects is not persuasive to those within communities—many of whom are focused on the powerful local impacts of projects rather than the benefits of low-carbon energy that accrue globally. But a third purpose of negotiation resonates more strongly with community members and CBA critics more generally. Specifically, some developers negotiate with local governments, community groups, and project neighbors out of a sincere commitment to act as a "part of the community."[271] This is also called a social license to operate, which is a company's voluntary commitment to gain public acceptance within the communities in which it operates.[272] This term has roots in the mining

270. Regulatory capture theory suggests that those with the most to gain or lose from a proposal will most vocally participate in processes. In the case of renewable energy development, William Fischel's "homevoters"—those whose wealth is largely invested in their home—will rationally oppose any development that threatens home value. FISCHEL, *supra* note 254, at 4. More dispersed interests who may support renewable energy are less likely to appear at local hearings. For a summary of federalism justifications for sub-federal control, see, for example, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

271. *See, e.g.*, Spangler et al., *supra* note 16, at 1285 (quoting a land acquisition manager for solar projects: "Developers . . . They're a member of the community. If they get this project built, they're as part of the community as much as anybody else, and they want to be a good neighbor. Most developers want to be a prudent, good, solid neighbor, where, you know, there's no issues."); *see also* Hugh Breakey et al., *Benefits or Bribes? Ethical Concerns with the Potential Corruption of Civic Obligations Through Community Benefits Schemes for Wind Farms*, 127 ENERGY RSCH. & SOC. SCI., Sep. 2025, at 1, 4 (noting the importance of corporate social responsibility as a justification for community benefits agreements).

272. Jim Cooney, *Reflections on the 20th Anniversary of the Term 'Social License'*, 35 J. ENERGY & NAT. RES. L. 197, 198 (2017) (describing the origins of the term social license to operate, and noting the need for companies to "cultivate an ongoing positive relationship with current governments and with possible future governments, by demonstrating that they were operating . . . in the best interests of the country and the government, and that they had broad public support"); Jason Prno & D. Scott Slocombe, *Exploring the Origins of 'Social License to Operate' in the*

industry with reference to mining developers being constrained by what society deems unacceptable behavior, regardless of whether such a social license is codified in law.[273]

Some corporations, through resolutions and corporate actions, express a degree of sincere commitment to act as good citizens in the communities where they operate; in other words, they prioritize their social license to operate.[274] Yet, problematic greenwashing efforts—attempts by corporations to assert environmental and social responsibility without proving achievement of substantive outcomes—abound.[275] Despite prevalent greenwashing, other corporations have followed through on their commitments to communities, including in the energy transition context, through actions emanating from such negotiation.

As explored in Part I, renewable energy developers have substantially supported local education, health initiatives, wildfire prevention, and similar initiatives.[276] Much of this support was likely rooted in a simple desire to move projects forward. But perhaps some of these dollars may have come from a more genuine space of corporate responsibility, if one believes that statements from developers are more than greenwashing. In one example of a developer's statement in the renewable energy development context, at the beginning of its extensive community benefits document, ConnectGen states:

Mining Sector: Perspectives from Governance and Sustainability Theories, 37 RES. POL'Y 346 (2012) (defining social license to operate).

273. Cooney, *supra* note 272, at 198–99.

274. *Cf.* Alison Taylor, *Building a Social License to Operate in the Renewable Energy Sector*, BUS. FOR SOC. RESP.: BLOG (Apr. 7, 2016), https://www.bsr.org/en/blog/building-a-social-license-to-operate-in-the-renewable-energy-sector [https://perma.cc/2JWJ-B9GK].

275. Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2037 (2022) (defining greenwashing); Ágnes Lublóy Judit Lilla Keresztúri & Edina Berlinger, *Quantifying Firm-Level Greenwashing: A Systematic Literature Review*, 373 J. ENV'T MGMT., 2025, no. 123399 (exploring varied definitions of greenwashing); Sebastião Vieira de Freitas Netto et al., *Concepts and Forms of Greenwashing: A Systematic Review*, ENV'T SCIS. EUR., Feb. 2020, at 1, 7 (providing examples of greenwashing by companies).

276. *See supra* Table 1; *supra* notes 207–208 and accompanying text (funding for measures to prevent wildfires); *supra* note 177 and accompanying text (education example); *Ocotillo Wind Community Benefits Program*, *supra* note 172 (showing contributions to a cancer resource center, Ronald McDonald House, and child abuse prevention, among other health-related causes).

> ConnectGen's core values include community engagement and community investment. Listening to the community and helping with local needs is how we establish strong bonds with our host communities and neighbors. ConnectGen has spent the past two years listening to the community and is pleased to share the updated Fountain Wind Community Benefit Program.[277]

On paper, at least, this demonstrates a commitment by a developer to genuinely engage with the community. Anecdotal evidence suggests that in some cases, developers follow through on these paper commitments, as in the case of the Mt. Pulaski wind project in Illinois.[278]

Even if corporate leadership and shareholders are not strongly motivated to act as good citizens within host communities for projects, many external incentives are pushing corporations toward community-beneficial actions. Informally, efforts such as "pollinator scorecards" publicly reward or shame solar companies for planting and maintaining pollinator friendly habitat beneath solar panels.[279] More formally, the DOE previously issued grants to teams that worked with solar companies to test agrivoltaics practices at solar sites—allowing the continuance or establishment of farming practices beneath and around solar panels.[280]

More formalized methods of auditing and verifying good corporate behavior—through third-party certification and similar methods of private environmental governance—would inspire more trust in companies' claimed "good will" in the renewable energy space. These types of regimes are far more developed for longer-running industries, such as fisheries and forest products,

277. CONNECTGEN, *supra* note 169.

278. *See supra* note 19 and accompanying text.

279. Logan Rowe & Rufus Issacs, *Michigan Pollinator Habitat Planning Scorecard for Solar Sites Now Available*, MICH. STATE UNIV.: BEEKEEPING & POLLINATORS (June 13, 2018), https://www.canr.msu.edu/news/michigan-pollinator-habitat-planning-scorecard-for-solar-sites [https://perma.cc/R642-FDWU].

280. *DOE Announces $8 Million to Integrate Solar Energy Production with Farming*, U.S. DEP'T OF ENERGY (Dec. 8, 2022), https://web.archive.org/web/20250122144040/https:/www.energy.gov/articles/doe-announces-8-million-integrate-solar-energy-production-farming [https://perma.cc/A9QZ-VSYQ].

and would benefit from more development in the renewable energy space.[281]

Certification of voluntary corporate compliance with shared standards, such as types of required plantings and site maintenance for pollinator habitats, might best occur on a site-by-site basis for renewable energy, as ownership of these companies changes frequently.[282]

The purposes of negotiation for infrastructure—including large-scale renewable energy infrastructure—are multifaceted. However, even if one labels such negotiations as primarily transactional mechanisms to ease the approval process, treating such negotiations as publicly oriented instruments encompassing public values is functionally wise. Such negotiations will be far more effective at increasing the speed and efficiency of the approval process if they garner public acceptance. If, on the other hand, negotiations raise concerns about secretiveness and unseemly dealmaking, they are less likely to aid development.[283]

B. A Normative Theoretical Framework for Energy Negotiation

Beyond pure functionalism, there are good reasons to believe that many negotiations at least partially incorporate the more publicly oriented purposes explored in Section II.A. These include corporate responsibility and the importance of addressing varied impacts that are difficult to capture within one-size-fits-all regulations. This Section explores three core elements that are likely to better ensure that negotiation achieves the purposes outlined in Section II.A, including: (1) an accountable negotiation process—one that identifies and addresses varied community impacts and needs; (2) an inclusive and relatively open process; and (3) a process that produces equitable results to the greatest extent possible. Accountability, inclusivity, and openness will better ensure that unique externalities are

281. For discussion of these well-developed private governance regimes outside of the renewable energy context, see Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).

282. Spangler et al., *supra* note 16, at 1286 (noting the "common practice" of selling solar projects to different developers during the option period).

283. *Id.* at 1285 (noting an attorney's view of a developer's contribution of a small solar accessory to a neighbor that objected to the large development as "wildly inappropriate" and describing other factors that can lead to mistrust).

addressed and will avoid mere greenwashing by renewable energy corporations. More equitable distribution of negotiation benefits, in turn, is likely to result in more community acceptance of negotiation and hopefully more sustainable project design.

These three elements, in addition to helping to achieve the purposes of negotiation outlined in Section II.A, are core components of a governance regime that endeavors to identify and respond to a variety of community concerns.[284] While negotiations for infrastructure involve varying degrees of publicness, as analyzed in Part I, all of these negotiations possess sufficient public characteristics to suggest that negotiation, while not formally public governance, should meet core governance values. This is particularly true given that, as scholar Shelley Welton observes, negotiation is essentially taking the place of a sclerotic governance structure that inadequately supports energy transition infrastructure.[285]

1. Accountability: Acknowledgement and Responsiveness to Concerns

As we explore in Part I, a primary objection to the many agreements between renewable energy developers and local governments or neighbors is that they are bribes designed to coerce the government into approving projects or neighbors into supporting them.[286] This objection implicates all of the values

284. Definitions of "good governance" in the legal and social science literature abound, but there is some consensus around the principles that we focus on here. As explored in prior work, governance scholars such as Orly Lobel emphasize accountability, participatory, contextualized, and responsive governance. Hannah J. Wiseman et al., *Zoning the Subsurface*, 72 UCLA L. REV. 784, 792 n.18, 809–11 (2025); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 466 (2004). The deliberative democracy literature focuses on the importance of participation both to improve governance outcomes and as an independently essential value. Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY (Derek Matravers & Jon Pike eds., 2003); *see also cf.* Spangler et al., *supra* note 16, at 1279 (discussing legitimacy as intertwined with accountability, one of the three governance values that we emphasize here).

285. Welton, *supra* note 30, at 276 (observing that CBAs and community energy are "have at least aimed to serve—and partially succeeded at serving—as a sort of gap-filler that alleviates the burden of some of the public law requirements slowing clean energy infrastructure development").

286. Eisenberg, *supra* note 14. In contrast, advocates of effective CBAs argue that they enhance accountability by creating benefits that address actual

explored in this Section, but it particularly emphasizes accountability. Critics argue that negotiations do not respond to genuine constituent concerns. Rather than local governments or neighbors acting with community preferences in mind, the suggestion is that energy-based negotiations are one-way instruments—raw payments from developers to governments and individuals to quickly push projects forward.[287] Viewed through this lens, negotiations are coercive or corrupt, involving local governments approving projects for reasons other than the public good.[288]

Some energy negotiations have these sorts of unsavory trappings. If a local government and developer, outside of a public meeting, reach an agreement in which a developer gives the government a new fire truck or ambulance, and one month later the government approves a permit for the project,[289] this may legitimately raise suspicion. A one-time donation of a relatively narrow benefit, largely unrelated to the impacts of a renewable energy project, does not address broad community concerns about

community concerns. *See, e.g.*, JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 5 (2005) (observing that CBAs are one tool within the broader community benefits movement, which asserts that the "main purpose of economic development is to bring measurable, permanent improvements to the lives of affected residents, particularly those in low-income neighborhoods").

287. EISENSON & WEBB, *supra* note 32, at 10 ("If the developer presents a boilerplate agreement that does not recognize any of the specific concerns, community members may feel as though the developer is simply trying to throw money at them.").

288. SPECIAL COMM. ON THE ROLE OF AMENITIES IN THE LAND USE PROCESS, ASS'N OF THE BAR OF THE CITY OF N.Y., THE ROLE OF AMENITIES IN THE LAND USE PROCESS 13 (1988) ("The ad hoc payment of money or services in return for favorable government action . . . adversely affects the decision making process. In egregious cases, the decision maker is corrupted.").

289. Donations of local emergency response equipment to emergency response units are common, although they are not always timed prior to approval of projects. *See, e.g.*, *Renewable Energy Company Helps Fund New Fire Apparatus for Honey Creek Township (IN) VFD*, FIRE APPARATUS & EMERGENCY EQUIP. (July 27, 2023), https://www.fireapparatusmagazine.com/fire-apparatus/renewable-energy-company-helps-fund-new-fire-apparatus-for-honey-creek-township-in-vfd [https://perma.cc/B4VM-BEEC]; *Wind Hill Solar Supports Equipment Fund for Citizens Fire Company*, JOURNAL: NEWS (Aug. 2, 2021), https://www.journal-news.net/journal-news/wild-hill-solar-supports-equipment-fund-for-citizens-fire-company/article_501ccfc9-fe8b-5739-b5ce-d90635dd5df4.html [https://perma.cc/6NHD-G25L]; Nat'l Grid Renewables, *National Grid Renewables Donates $5,000 to Crofton Volunteer Fire Department*, GERONIMO POWER, https://nationalgridrenewables.com/neighborhood-news/national-grid-renewables-donates-5000-to-crofton-volunteer-fire-department [https://perma.cc/5Q3A-YV93].

that project. The same is true of secretive developer payments to residents who live near projects; other members of the community might correctly wonder whether these payments were actually meant to address the externalities of the project or were simply designed to reduce opposition.

When negotiations fail to acknowledge or respond to broad community concerns about the impacts of projects, they lack accountability. But why should agreement signers ensure accountability to the community as a whole?[290] For negotiations involving local governments, the answer is clear. Centuries of governance philosophy and theory emphasize accountability—government actions that address constituent preferences and proceed with a public purpose—as a core facet of good governance.[291] Additionally, negotiations in this space typically impact communities broadly. Developers increasingly offer large sums of money, which, particularly in rural areas that predominantly host renewable energy, can have substantial impacts on community revenue.[292] Developers' promises of jobs, training, and similar benefits are also quite publicly oriented, as are commitments to mitigate impacts, such as designating specific roads to be used for construction equipment or repairing damage to roads. In this type of negotiation, the public, in other words, seems to hold a status greater than that of a third-party beneficiary to a contract.

For negotiations involving only community groups and developers, or, even more starkly, developers and one or two neighbors to a proposed project, the importance of accountability to the public seems less clear. But there are strong arguments that private contracting to address infrastructure impacts should be publicly oriented, as well. First, as Shelley Welton has observed,

290. *See, e.g.*, Salkin & Lavine, *supra* note 54, at 297 (noting the "accountable development" movement that demands real substantive benefits for communities rather than hypothetical economic ripple effects asserted by developers); Nicholas J. Marantz, *What Do Community Benefits Agreements Deliver? Evidence from Los Angeles*, 81 J. AM. PLAN. ASS'N 251, 253 (2015) (noting labor advocacy organizations' criticism of "public-private deal making as a source of largely invisible public spending that generated low-wage jobs with little potential for economic mobility").

291. *See, e.g.*, ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY (1973); ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (2nd ed. 1966).

292. *See, e.g.*, *supra* notes 172–173 (showing gifts that over time would ultimately exceed $1 million and many other examples from Table 1 of substantial monetary compensation from renewable energy developers to communities).

negotiations for energy infrastructure are largely taking the place of public governance for the siting of renewable energy infrastructure.[293] They have become a relatively "institutionalised" practice, and for now, they could be viewed as "essentially private law substitutes for public law reform."[294] Without such reform, Welton argues that renewable energy projects would be substantially stalled by local governance processes that frequently result in renewable energy bans.[295] Alternatively, growing public reforms such as preemption efforts, Welton observes, largely displace local control, thereby reducing the opportunity to address unique community concerns.[296] As it stands, then, negotiation is serving as an important gap-filler or even substitute for a great deal of public governance and, arguably, should encompass the values ascribed to public governance, including accountability.

Here, we do not argue in favor of this state of affairs. Negotiation should not be a substitute for better renewable energy governance. Rather, it should be a more effective "gap-filler" for what is currently weak governance, as Welton observes, and it should better augment governance.[297] Additionally, opposition to solar projects does not arise solely in the form of government bans or other hostile governance responses, and both negotiation and governance must recognize this.

In many cases, community opposition arises through more subtle measures, but ones that can cause rifts within communities and families. For example, neighbors sometimes confront farmers who leased their land for solar at the grocery or hardware store, place large opposition signs in their yards, and protest at hearings; disputes about land leasing can also create long-standing tensions between families.[298] To address the

293. Welton, *supra* note 30, at 276.

294. *Id.* at 278.

295. *Id; see also* EISENSON & WEBB., *supra* note 32 and accompanying text (documenting opposition and bans).

296. Welton, *supra* note 30, at 278, 282–84 (describing the threat of communities being "centralised out" of the process).

297. *Id.* at 276.

298. Nadejda Komendantova & Antonella Battaglini, *Beyond Decide-Announce-Defend (DAD) and Not-in-my-Backyard (NIMBY) Models? Addressing the Social and Public Acceptance of Electric Transmission Lines in Germany*, 22 ENERGY RSCH. & SOC. SCI., Dec. 2016, at 224, 227 (describing protests against a transmission line for clean energy in Europe); Kaitlyn Spangler et al., *Just Energy Imaginaries? Examining Realities of Solar Development on Pennsylvania's*

opposition, conflict, and suspicion that currently dominate renewable energy siting, we need public regimes that better engage communities in energy decision-making processes. We must move beyond the inadequate "decide-inform-defend" model of participation toward deliberative processes in which developers and local government consult with and learn from community members and engage them in decision-making or monitoring before, during, and after project development.[299] But given the current state of affairs, the negotiation that is substituting for public processes must better encompass public values. This negotiation should address the conflict and inadequate community engagement that currently define renewable energy siting governance—both public and private.[300]

2. Accessibility: Open Processes with Broad Stakeholder Representation

A second key element of negotiation is accessibility—a two-part concept involving the inclusion of stakeholders at the decision-making table and the openness of decision-making processes once the decision-making parties are established.[301] This element encapsulates many of the values of procedural justice and the growing literature on improved engagement practices for communities. This literature argues for, among other things, constructively working with the public to address concerns.[302] Arguments for better procedures call for genuine engagement, in which private actors and governments genuinely consult with

Farmland, 108 ENERGY RSCH. & SOC. SCI., Feb. 2024, at 1, 6 (documenting community rifts and family disputes).

299. Komendantova & Battaglini, *supra* note 298, at 225.

300. For conflict and better models, see, for example, Komendantova & Battaglini, *supra* note 298.

301. ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (2003); COHEN, *supra* note 284.

302. Komendantova & Battaglini, *supra* note 298, at 229; Mahir Yazar et al., *Cities Incorporate Equity in Their Climate Policies but Overlook Procedural Justice in Decision-Making*, 2 NATURE CITIES 17, 18 (2025); Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 PLAN. THEORY & PRAC. 419, 425–31 (2004); *see also* Valeria Monno & Abdul Khakee, *Tokenism or Political Activism? Some Reflections on Participatory Planning*, 17 INT'L PLAN. STUD. 85, 90 (2012) (emphasizing that for participation that empowers people, a key factor is "enhancing the capacity of individuals or groups to transform their claims and concerns into ability to make choices and to transform those choices into desired actions and outcomes").

community members through a variety of accessible practices (discussed here), and involve community members in ongoing decisions about those projects, as well as post-project monitoring.[303]

Although negotiation is not inherently public governance, as explored in Part I, communities hold negotiation to the same standards of governance—or even higher ones.[304] Communities' strong expectations for inclusion and openness in energy negotiations may flow from the fact that negotiations involve a discrete event in which large sums of money or projects with large monetary value are distributed. The stakes are high, and the community expects a seat at the negotiation table and access to discussions that unfold at that table.

Fair, inclusive processes are directly intertwined with accountability and equity, and this Section is accordingly short. For accountable negotiation that addresses unique community impacts, parties to negotiations can (and should, as argued in Part III) independently study community needs. But concerns cannot be wholly understood or addressed without listening to and integrating more stakeholders within relatively open fora. Similarly, equitable results are unlikely to be achieved without including a broad range of stakeholders to advocate for their slice of the benefits pie, or without opening negotiations to a skeptical public that is likely to criticize benefit allocations that strongly favor some groups over others.

Open processes may have their own value, too—a value independent of increasing the likelihood that negotiations will be accountable and equitable. Deliberative democratic theory argues for "collective decision making with the participation of all who will be affected by the decision or their representatives" and decision-making "by means of arguments *by* and *to* participants who are committed to the values of rationality and impartiality."[305] This theory often focuses on the value of the process

303. CONNECTGEN, *supra* note 169.

304. Spangler et al., *supra* note 16, at 1285–86 (noting a lawyer's concern about a solar developer's contribution of an accessory solar farm to a neighbor opposed to a large solar project and a solar developer's frustration that community members often accuse the developer of trying to hide things when developers cannot disclose all of the information that residents want, such as the location of every proposed solar panel).

305. Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY 1, 8 (Jon Elster ed., 1998).

itself, although some deliberative democracy theory is more outcome-oriented than other theory.[306]

Still other approaches to deliberative democracy combine the merits of process and outcomes. Political scientist James Fearon, for example, focuses on the value of individuals discussing an issue before voting on it because it helps to "[r]eveal private information," including the intensities of preferences and forces more justification of "claims or demands."[307] This, in turn, is likely to lead to a better outcome that balances actual preferences and addresses them in a constructive way.[308] But Fearon also identifies process-centric values rooted in the nature of rational humans—an argument that the process of deliberation within a group (rather than individual, internal deliberation) legitimizes the outcome, regardless of the outcome.[309] Better processes can also fulfill "human qualities assumed to be distinctive in some way to our political being," such as careful reasoning and consideration of alternatives.[310]

The challenge, of course, is implementing the values of accessibility and procedural justice, as meaningful community engagement is often persuasive in theory but quite difficult to implement. It is difficult to get stakeholders to the table given stakeholders' limited time, challenges of providing stakeholders with the resources that they need to meaningfully participate, and, in some cases, barriers such as language or a lack of access to transportation or technology needed to engage with private firms and decision-makers.[311]

In the context of negotiations for payments to neighbors, as opposed to communities, one might argue that these types of negotiations require less accessibility, as these payments have more private contracting flavors than community-based

306. *Id.*

307. James D. Fearon, *Chapter Two: Deliberation as Discussion*, *in* DELIBERATIVE DEMOCRACY, *supra* note 305, at 44, 45, 52.

308. *Id.* at 45–55.

309. *Id.* at 55–58.

310. *Id.* at 62; *see also* JULES COLEMAN, MARKETS, MORALS, AND THE LAW 97 (2002).

311. *See, e.g.*, TRANSIT RSCH. BD., NAT'L ACAD. OF SCIS., TRCP SYNTHESIS 89, PUBLIC PARTICIPATION STRATEGIES FOR TRANSIT 36–40 (2011) (noting competing work, household, and other personal obligations and insufficient "methods, places, times" to provide input); Azlan Abas et al., *A Systematic Literature Review on Public Participation in Decision-Making for Local Authority Planning: A Decade of Progress and Challenges*, 46 ENV'T DEV., June 2023, at 1 (noting language barriers).

negotiations. Yet these payments might demand the most public scrutiny, as they can have the purpose of shutting down meaningful public debate about the merits of the project and whether it should proceed. As argued in Section II.A, payments to neighbors often have purposes other than silencing dissent, including finding a balancing point where neighbors' willingness to pay to reduce externalities meets developers' willingness to pay to proceed with the project and compensate for its externalities. But developers have acknowledged that payments ease the public approval process, too, and regardless of their actual purpose, payments to neighbors and CBAs are often viewed as problematic.[312] Mandating uniform payments to neighbors, as we argue for in Part III, would make these processes fairer and would raise fewer suspicions from skeptical community members.

3. Equity: Fair Results

A central facet of good governance is equity.[313] Old and new philosophy and legal theory point us toward this value. For example, the Rawlsian "veil of ignorance" suggests that individuals asked to select a governance regime without knowing their future identity or societal status would choose a regime that would treat groups relatively evenly.[314] Furthermore, this regime would account for the baseline positions of these groups and the potential need to allocate resources or impacts in a manner that reduced these differential positions. Building from Rawls, Sandel, and others, energy justice theorists Michael Dworkin and Benjamin Sovacool observe that "the distribution of material outcomes, or public goods such as resource and wealth" is central to just governance.[315]

One could devote reams of text to this topic alone, but for the purposes of this Article, we argue there is critical consensus surrounding the importance of equitable results, notwithstanding the current U.S. political climate. This consensus exists in

312. *See supra* note 30 and accompanying text.

313. In the energy governance context, equity is "the fair distribution of benefits and burdens of energy production, distribution, and consumption, and fair engagement in this system's decision-making processes." Jay Barlow et al., *Advancing the State of Energy Equity Metrics*, 35 ELEC. J., Dec. 2022, at 1, 2.

314. JOHN RAWLS, A THEORY OF JUSTICE 11, 118–20 (rev. ed. 1999).

315. Benjamin K. Sovacool & Michael H. Dworkin, *Energy Justice: Conceptual Insights and Practical Applications*, 142 APPLIED ENERGY 435, 437 (2015).

the growing justice-based literature—including energy justice literature—and in policies that require more attention to differential impacts of governance and the allocation of resources.[316] Indeed, even older doctrines devoid of the terms "equity" or "justice" contain foundational principles supporting such terms. For example, the long-standing state constitutional prohibitions on "special legislation" and courts' interpretations of these bans are rooted in equality, if not equity.[317]

Even if one accepts that *public* governance should have equitable results, however, should public-private negotiation be held to the same values? We argue that it should, in part for the strong notes of "publicness" to this negotiation explored in Part I. But negotiation should strive for equity for more reasons than its "public" tones. If the negotiation is to arise to something more than a legal yet seemingly unsavory bribe, it must show evidence of broader, more widely distributed benefits. The same is true if negotiation is intended to instantiate corporate claims of social license. Indeed, as explored in Part IV, doctrines against contract zoning require local governments to prove relatively broad public benefits for a permitting deal between a government and developer to pass muster.

Equitable results in broader developer-community negotiations may be persuasive, but what about developer payments to neighbors? How does a set of payments to a relatively small group implicate equity? Developers' payments to neighbors may

316. SHALANDA BAKER ET AL., INITIATIVE FOR ENERGY JUST., THE ENERGY JUSTICE WORKBOOK (2019), https://iejusa.org/wp-content/uploads/2019/12/The-Energy-Justice-Workbook-2019-web.pdf [https://perma.cc/X6MD-6NEQ]; Darren McCauley et al., *Advancing Energy Justice: The Triumvirate of Tenets*, 32 INT'L ENERGY L. REV. 107 (2013); Sanya Carley & David M. Konisky, *The Justice and Equity Implications of the Clean Energy Transition*, 5 NATURE ENERGY 569 (2020).

317. *See, e.g.*, Ky. Harlan Coal Co. v. Holmes, 872 S.W.2d 446, 452 (Ky. 1994) (observing that "[t]he primary purpose of Kentucky Constitution, Section 59 is to prevent special privileges, favoritism, and discrimination, and to insure equality under the law"); Bd. of Ed. of Jefferson Cnty. v. Bd. of Ed. of Louisville, 472 S.W.2d 496, 498 (Ky. 1971) ("A special law is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others."); Gourley ex rel. Gourley v. Neb. Methodist Health Sys., 663 N.W.2d 43, 66 (Neb. 2003) ("We note that a special legislation analysis is similar to an equal protection analysis, and often the two are discussed together . . . ."); Caulkins v. Pritzker, 2023 IL 129453, ¶ 49 ("The special legislation clause supplements the equal protection clause, and in many cases, the two clauses provide the same protection. . . . The special legislation clause prohibits the legislature from conferring a benefit or privilege upon one group while excluding other similarly situated groups.").

in fact represent the most important point at which equitable distribution of benefits should be considered. Within such a small group of people who are so clearly disadvantaged by development, fairness is at a premium. The project neighbors, after all, receive no lease money yet they bear many of the externalities of the project. They see the project, experience dust and equipment noise during construction, and may dislike its changes to the character of their immediate neighborhood.[318] Indeed, some neighbors view payments to neighbors as a method for enhancing fairness by providing those not participating in the lease—due to, for example, land characteristics not conducive to development—with benefits somewhat akin to those received by the lessor landowners.[319]

The reasons for negotiations surrounding renewable energy development are numerous and diverse. Some are quite practical—developers want projects to move forward—while others are rooted in deeper community demands for equitable treatment in decision-making processes that deeply affect sense of place. But both the practical and value-based demands for negotiation lead to three places: (1) more accountable agreements resulting from (2) broader, more open negotiations that (3) more equitably address impacts. We explore tools for such negotiations in the following Part.

III. OPERATIONALIZING ENERGY TRANSITION NEGOTIATION

Achieving the theoretical values of negotiation for energy infrastructure explored in Part II will require a suite of governance tools. Some renewable energy developers are already entering into relatively comprehensive negotiations with local governments and community groups that achieve these values.[320] Additionally, DOE-funded projects previously had to include: community benefits plans (not agreements) that met criteria related to community and labor engagement; workforce development; diversity, equity, inclusion, and belonging; and achievement of the Justice40 initiative, which aimed to funnel federal funding to energy justice communities.[321] But this was only a

318. *See* GOLDBERG ET AL., *supra* note 9, at 4–5 (describing numerous concerns about solar's impact on community character).

319. Spangler et al., *supra* note 16.

320. *See supra* Table 1.

321. *About Community Benefits Plans*, *supra* note 34.

plan, not a requirement for actual negotiation, and it did not fully address some of the environmental and public health issues at the forefront of communities' concerns surrounding energy projects.[322]

Beyond voluntary negotiation by industry and previously mandated planning for negotiation for federally funded projects, some states, too, require developer-community negotiation for energy projects, as Part I documents.[323] The trajectory of community negotiation for energy infrastructure is tilting in a positive direction, in other words. Yet, in the many instances where private companies fund renewable energy projects in states without mandatory negotiation, negotiation often fails to achieve the theoretical values outlined in Part II. Instead, developer-community relations often involve a simple donation of a fire truck or similar emergency equipment from a developer to a town and payments to neighbors, leading to accusations of bribes and hush money.[324] This Part explores how negotiation for renewable energy infrastructure can move beyond the voluntary Coasean framework for addressing externalities and better encompass the values set forth in Part II.

A. Accountable Energy Negotiation

Accountability of developers and other negotiating parties to the broader community requires a more neutral arbiter, better identification of broad project impacts, and an assurance that these impacts are addressed, within feasible boundaries. This is true both for community negotiations and good neighbor payments.

322. *Id.*

323. *See* UNDER2 COALITION, NEW YORK STATE: ACCELERATED RENEWABLE ENERGY GROWTH AND COMMUNITY BENEFIT ACT, https://www.theclimategroup.org/sites/default/files/2020-11/Building%20back%20greener%20-%20New%20York%20State.pdf [https://perma.cc/V6JX-C6AP]; *supra* note 157 and accompanying text (discussing CBAs for large renewable energy projects in New York); *see also* CONN. GEN. STAT. § 22a-20a(c) (2024) (discussing CBAs for energy projects in environmental justice communities in Connecticut).

324. *See supra* note 30 and accompanying text.

1. Communities

The composition of the parties to the negotiation is a key determinant of the accountability of the process. Relying only on developers, who must legally answer only to their shareholders, and community groups to negotiate for benefits and impact mitigation is unlikely to adequately address a diverse array of concerns.[325] Even the inclusion of local governments—while critical—may not ensure accountability or public perception of accountability. Community members may continue to view governments as "bought out" by the generous local benefits offered to governments by developers.[326] Negotiations for renewable energy development should therefore be led by a neutral third party selected by consensus of the negotiating parties. This would better ensure a process that balanced numerous concerns—not just those of the company's shareholders, or local governments' need for revenue—and that appeared more balanced in the public eye.

A critical precedent to negotiation aimed at identifying, acknowledging, and addressing communities' and community members' needs is an effort by parties to the negotiation—and particularly the developer—to gather information. Holding one or two public meetings, at which community members have limited opportunities to voice concerns and are likely to galvanize around hot-button issues, is not sufficient or, indeed, even effective in this context. Rather, as former federal agency assistant Sherry Arnstein outlines in her "ladder" for meaningful public participation, developer representatives must have conversations with community members at times and places convenient for those members, and these conversations must also hold the potential to shift the nature and course of a proposed project; in other words, to achieve meaningful participation from the public means to relinquish some control over the outcome.[327] Further,

325. There is of course extensive debate surrounding those to whom a traditional corporation (not benefit corporation) in fact owes duties, but the predominant "shareholder model" of the corporation is that corporate "managers are to maximize shareholder profits, 'subject to the constraint that the corporation must meet all its legal obligations to others.'" Its legal obligations to others are limited. Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27, 29 (1996) (quoting ROBERT CLARK, CORPORATE LAW 17–18 (1986).

326. *See supra* note 30 and accompanying text.

327. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (1969).

they must build up enough initial trust such that community members are willing to talk. In some cases, this means that developers must first approach leaders of community groups who could serve as key liaisons for discussions with more individuals.

Some energy developers appear to be following these practices of information gathering prior to negotiations and the development of an agreement—at least on paper.[328] As noted in Part II, ConnectGen engaged in two years of discussions with community members prior to the development of an agreement.[329]

Developers need not be the only party to negotiations to solicit information about residents' concerns. Local governments, even when not part of negotiations, play an important information gathering role, as well, through information voluntarily shared by concerned constituents and in public meetings about the proposed project. Community groups, too, have a distinct advantage in terms of gathering information about concerns from their members, who are likely to trust the group—and perhaps more openly and honestly share concerns and hopes for a proposed project—than directly with a developer.[330] But soliciting information is not enough. Local governments and developers must then use this information to inform project decisions and how the project substantively proceeds.

One central element of any negotiating or non-negotiating party's discussions involves individuals' impressions of how energy development will affect residents' sense of place in their communities.[331] This has been one of the largest overarching concerns voiced against large-scale renewable energy development.[332] This is understandable, as solar panels and wind turbines can occupy thousands of acres of land and change the landscape and social fabric of a community, particularly those fabrics

328. Mere statements that communities engaged in discussions are not adequate to prove meaningful engagement, companies may not disclose or incorporate results from discussions.

329. *See supra* note 277 and accompanying text.

330. *Cf.* INST. FOR LOC. GOV'T, PARTNERING WITH COMMUNITY-BASED ORGANIZATIONS FOR MORE BROAD-BASED PUBLIC ENGAGEMENT (2015), https://www.ca-ilg.org/sites/main/files/file-attachments/partnering_with_comm_based_orgs_final.pdf [https://perma.cc/T8EA-U73W] (noting local governments' collaboration with community-based organizations to reach a broader swath of the public and "[r]educe misperceptions and mistrust").

331. *See generally* Stedman, *supra* note 255; GOLDBERG ET AL., *supra* note 9.

332. *See* GOLDBERG ET AL., *supra* note 9.

centered on agricultural, forestry, and other industries that these projects disrupt.[333] Scholars such as Richard Stedman have shown that asking residents about impacts to sense of place is a meaningful enterprise, and sense of place impacts can be reasonably measured and quantified.[334] This, as a result, means that developers can address sense of place concerns in the negotiation process. For example, this could include modifying the location or orientation of projects, more carefully planning landscape design for multifunctionality, or even, if economically feasible, breaking up projects so that they dot the landscape rather than dominate it.[335]

Impressions of sense of place and other community concerns need not be—and should not be—solely identified through conversations with communities, focus groups, or similar direct contact mechanisms. Negotiating parties should also conduct broader studies, such as a "community assessment" as previously recommended by the Environmental Protection Agency (EPA).[336] The EPA further recommended that negotiating parties provide community education.[337] This is important because many community members may not be adequately familiar with the likely contours or impacts of the project to fully identify the issues that most concern them. Communities with the necessary information and resources will be better equipped to project impacts and negotiate for solutions. Such education can also

333. *See generally* Stedman, *supra* note 255; GOLDBERG ET AL., *supra* note 9.

334. *See, e.g.*, Bradley S. Jorgensen & Richard C. Stedman, *Measuring the Spatial Component of Sense of Place: A Methodology for Research on the Spatial Dynamics of Psychological Experiences of Place*, 38 ENV'T & PLAN. B: PLAN. & DESIGN 795 (2011); Richard C. Stedman, *Sense of Place and Forest Science: Toward a Program of Quantitative Research*, 49 FOREST SCI. 822 (2003).

335. Utility-scale solar energy is the least expensive form of new energy development in part because of economies of scale, however, so developers will be limited in the extent to which they are willing to break up projects or design for multifunctionality throughout the construction of a project. Even providing more space between panels, however, or "tucking" the panels into valleys between ridges—provided such valleys had adequate sun—could improve visual impacts, however. Further, while agrivoltaics holds promise not fully addressed here, it is worth noting the same constraints of developers to implementing thoughtfully and sustainably designed agrivoltaics projects.

336. *Community Benefits Agreement Training*, U.S. EPA OFF. TRANSP. & AIR QUALITY (unpublished PowerPoint file) (on file with authors); *see also* SAMUEL LAVINE ET AL., COMMUNITY BENEFITS AGREEMENTS: CASE STUDIES, FEDERAL GUIDELINES, AND BEST PRACTICES 23 (Kara Hoving ed., 2023) (discussing the EPA recommendations).

337. *Community Benefits Agreement Training*, *supra* note 336.

provide a meaningful platform for negotiating parties to listen, learn, and respond to community perspectives; in other words, the education process can, in fact, operate in both directions.

Once information about concerns and opportunities is identified as comprehensively as possible, the thornier question of which concerns to address emerges. Local governments that conditionally approve projects in some cases tie approval directly to impacts. They allow projects to move forward only after developers have indicated that they will pay for all the additional supporting infrastructure and services that will be necessary for the developer, or that such infrastructure and services are already present. For example, in the famous case of *Golden v. Planning Board of Town of Ramapo*, a town in New York assigned points to infrastructure and services, such as fire stations, sewer, and water, and developers had to demonstrate that they had accrued a specific number of points before they could build.[338] The court affirmed the validity of this system.[339] Florida, which previously required local governments to conduct detailed concurrency analyses, required governments to consider the adequacy of schools, transportation, sewer and water, and other infrastructure and services prior to approving certain types of land uses.[340]

One could define an "accountable" negotiation process as one that followed a similar path—measuring the likely direct and potentially indirect impacts of the project and requiring, within the negotiated agreement, payment for those impacts or direct mitigation of them. But the robust literature praising the potential offered by negotiation over infrastructure projects has far loftier goals, arguing that negotiation in these circumstances offers the perfect chance to require real, transformative economic benefits from projects. The literature does not argue, necessarily, that benefits must exceed the proven impacts, but rather supports a more thorough accounting of many negative impacts that large infrastructure such as sports stadiums can generate and of the perks offered up by local governments to induce development.[341] This literature argues that developers claiming broad economic benefits to obtain those perks should

338. Golden v. Plan. Bd. of Town of Ramapo, 285 N.E.2d 291, 368–69 (N.Y. 1972).

339. *Id.* at 383.

340. FLA. STAT. § 163.3180 (2025).

341. *See* sources cited *supra* note 125.

follow through more genuinely on those claims, producing real results rather than vague proof of moderate job production or revenue creation.[342]

This perspective is a persuasive one. Large infrastructure projects do have extensive impacts—both positive and negative. Some states have recognized this in requiring heightened local government review—in some cases coordinated review by neighboring municipalities—of large "developments of regional impact."[343] These include, for example, developments that involve large numbers of housing units or rooms (e.g., hotels), will have substantial traffic impacts beyond the host locality, or will impact groundwater or other shared resources. And when developers make lofty promises of economic benefits that make the negative impacts worthwhile, local governments and community groups should hold them to these promises.[344] For the most robust assurances, CBAs should include penalties paid by developers in the event of a failure to meet economic thresholds under developers' control.

Implemented in this way, with real metrics for success and enforcement of these metrics, accountability involves more than simply ensuring that negotiation mitigates or compensates the community for the direct impacts of projects. It also entails a broader calculation of what the developer is willing to pay (in the form of proven economic benefits) to have a project approved, and the "price point," if any, at which the community will accept it.

For a negotiation process to be accountable to a community, relatively broad benefits—even those seemingly unrelated to project impacts—should also be on the table, even if not ultimately included in an agreement. Viewed through this lens, renewable energy developers' donations of money to museums, community health centers, and other organizations seemingly not directly impacted by the proposed project may possess some

342. *See* sources cited *supra* note 125.

343. *See Farewell to Florida's 'Development of Regional Impact' (DRI) Law*, *supra* note 110 (noting Florida's previous requirements for reviewing developments of regional impact).

344. One way of doing this is the requirement for pre-project bonds, in which developers provide money that the local government can later use to address issues that developers promised to address (such as project decommissioning, or maintenance of pollinator habitat) but fail to. *See e.g.*, N.C. GEN. STAT. § 160D-804.1 (2023).

attributes of "accountability" to the community, rather than serving as mere "bribes" to secure project approval.[345]

True accountability in the renewable energy development process would require more. It would include transparency as to how developers actually use community perspectives and feedback to adjust their projects. It is not enough for companies to claim they are listening to communities; rather, they must also be clear about what this listening brings and how it changes their approach. This kind of transparency requires developers to be nimble and adaptive to each community and its place-specific needs, preferences, and concerns. While this might slow down the development process—a key critique of publicly engaged negotiations—it ultimately promotes a more sustainable and equitable outcome.[346] Such outcomes are likely to lead to broader acceptance of these projects and, potentially, more development.

The suggestion that accountable negotiation will involve broad benefits—beyond those directly related to project impacts—may sound like an unsavory, transaction-centric approach. Yet communities' "price point" is in fact a nuanced, and not purely monetary, one. The benefits that communities sometimes want—and that should be included in "accountable" negotiations—have included, for example, the opportunity to paint Indigenous art on the base of a wind tower on Australian Aboriginal lands, or to access the renewable energy site to visit cultural sites and hunt.[347]

Once a broad suite of benefits is negotiated, strong mechanisms for long-term monitoring and enforcement are also necessary to ensure that both sides to the negotiations follow through on their commitments.[348] Agreements should include: clear

345. *Cf.* EISENSON & WEBB, *supra* note 32, at 5 (recommending that developers "[f]rame negotiations around addressing impacts rather than buying community support").

346. Arnstein, *supra* note 327, at 2, 9 (analyzing better processes that allow participants to influence outcomes).

347. CONNECTGEN, *supra* note 169; Press Release, Siemens & Neoen Renewing Energy, *First Ever Wind Towers Featuring Australian Indigenous Art Unveiled in South Australia* (July 7, 2016), https://assets.new.siemens.com/siemens/assets/api/uuid:37c88f21e7747df975673242fb45fe582218bb9c/20170207-wind-towers-featuring-australian-indigenous-art-unveile.pdf [https://perma.cc/L2MZ-GU4B] (asserting that "[t]he installation of the artwork reflects the collaborative community engagement approach taken by Neoen while developing the wind farm").

348. EISENSON & WEBB, *supra* note 32, at 12 (recommending that CBAs "[i]nclude mechanisms for monitoring compliance and enforcement").

obligations and deadlines; the appointment of a long-term monitoring committee, comprised of representatives from the local government, community group, and developer; and specific time frames for monitoring compliance.[349] Obligations should also include company obligations in worst-case scenarios—like halting uncompleted projects or abandoning them due to bankruptcy. If public laws do not require pre-project bonds to address this contingency, negotiations should.

As an alternative or addition to a long-term monitoring committee, agreements could build from the "bucket brigade" concept in public governance, in which groups of citizens conduct on-the-ground monitoring of, say, environmental quality, in part to help identify potential violations of laws.[350] Governments, too, should conduct this monitoring for long-term compliance with CBAs, but they often lack adequate resources or staff; relying on legions of on-the-ground volunteers can lead to more and better monitoring, if done well. A bucket brigade of committed citizens is a riskier long-term solution, however, as these citizens may move or become less committed over time. Citizen monitoring should augment, not replace, government monitoring and enforcement.

Although external monitoring for compliance is a necessary component of effective developer-community agreements, the developer itself should bear much of the burden for monitoring, with requirements that the developer maintain adequate records and report regularly to the external monitoring committee and the community more broadly.[351]

Another alternative is for the state to pay for and certify community monitors. In Pennsylvania, the state partially funds, trains, and certifies "Host Municipality Inspectors," whose job is

349. LAVINE ET AL., *supra* note 336, at 21 (noting the importances of "clear performance benchmarks and timelines"); GROSS ET AL., *supra* note 286, at 70 ("Every benefit described in a CBA should have a clearly defined time frame."); *id.* at 70 ("Community groups should consider how each benefit in a CBA will be monitored."); EISENSON & WEBB, *supra* note 32, at 11 (recommending that agreements "[s]et an end date to any benefits and obligations").

350. *See, e.g.*, *About the Bucket*, LA. BUCKET BRIGADE: POLLUTION TOOLS + RES., https://labucketbrigade.org/pollution-tools-resources/the-bucket [https://perma.cc/TH62-XF2U]; *Camden Waterfront South Air Toxics Pilot Project - Bucket Brigade Results*, N.J. DEP'T OF ENV'T PROT.: ENV'T JUST., https://dep.nj.gov/ej/camden/bucket [https://perma.cc/WD4Q-SSN5].

351. *See, e.g.*, GROSS ET AL., *supra* note 286, at 29, 111 (appending Section V—"Reporting Requirements and Recordkeeping"—of the "Staples CBA," which is "[p]erhaps the best-known community benefits agreement").

to inspect waste disposal facilities in Pennsylvania municipalities and "voice the host municipality's priorities."[352] In the context of solar energy projects, community monitors could help mediate and assess the accountability of developers to any community agreements for the solar site previously agreed upon. This may increase the trust of community members in the overall development process as compared to prior experiences of abandoned and orphaned oil and gas wells left unaccountable to developers in rural communities.[353] State funding, as opposed to or in addition to municipal, industry, or citizen-sponsored monitoring, is a good option when a state wishes to support a land use that many residents deem to be locally undesirable, such as landfills or solar.

Beyond monitoring provisions and clear deadlines for compliance, negotiated agreements for energy infrastructure should also include penalties and other remedies for non-compliance and specify the procedures through which compliance will be verified. Some best practices literature also recommends that even when local governments are not parties to an agreement, the content of the agreement should be adopted within a formal development agreement. The threat of enforcement by government, the argument goes, is far stronger than a similar threat from community groups, and governments have enforcement experience.[354] But this literature also notes that some components of agreements often deemed critical by communities, such as affirmative action measures, should *not* be incorporated into public documents, as they may be unenforceable.[355]

A final feature is central to ensuring negotiation's accountability to the community over time. As Eisenson and Webb emphasize, developer-community agreements should include provisions for amending the agreement and removing provisions as

352. PA. DEP'T OF ENV'T PROT., HOST MUNICIPALITY INSPECTOR PROGRAM (2023), https://files.dep.state.pa.us/waste/bureau%20of%20waste%20management/wastemgtportalfiles/SolidWaste/Municipal_Waste/2540-FS-DEP2143.pdf [https://perma.cc/HJ4R-M9P2]. The authors are grateful to Michael Meloy for bringing this program to our attention.

353. *See* Claire A. Grove & Matthew Merrill, *United States Documented Unplugged Orphaned Oil and Gas Well Dataset*, USGS (Aug. 22, 2022), https://www.usgs.gov/data/united-states-documented-unplugged-orphaned-oil-and-gas-well-dataset [https://perma.cc/P82C-ZMUQ] (showing 117,672 improperly abandoned wells).

354. GROSS ET AL., *supra* note 286, at 72.

355. *See id.*

necessary, as needs and concerns change over time.[356] This is particularly true since the impacts of development are typically projected, not fully known, when parties first reach the agreement.

2. Neighbors

Developer negotiation with neighbors has the initial appearance of a more private contract. Yet there are typically multiple neighbors to projects, and accountability not only entails addressing unique impacts to different properties, but also ensuring that there is a sense of collective accountability to the group. State-mandated amounts for payments, based on the distance of renewable energy infrastructure from nearby residences and other land uses, may best ensure this collective accountability and achieve more of a sense of equity and openness, as explored further below.

A one-sized-fits-all compensation scheme, however, may fail to address specific impacts to individual properties, thus obfuscating the benefits of Coasean bargaining for an efficient level of externalities. State schemes should likely allow departures from the specified amounts for good cause, to be agreed upon in a forum with opportunity for public comment—or at least comments by all impacted neighbors. To ensure flexible departures to address varied externalities that uniform schemes cannot wholly address, these departures should likely take the form of a modified property rule—allowing neighbors and developers to negotiate up or down from standard amounts as much as they are able within the process, provided they demonstrate to the state that the departure is justified to address unique externalities.

A property rule in some cases gives too much power to the party holding the initial right. As explored in Section II.A, for example, if local governments maintained the power to effectively ban renewable energy projects, a property rule in which governments departed from this position only for an agreed-upon price could cause them to demand exorbitant amounts from developers. The same concern is not present in developer-neighbor negotiations. Although neighbors can and do loudly oppose projects and influence local government decision-makers, they are not the sole voices in the process—

356. EISENSON & WEBB, *supra* note 32, at 11–12.

particularly with robust processes for community negotiation of benefits. And although developers do have the ability to force unwilling neighbors to consent to impacts—by receiving local government approval for a renewable energy project—the baseline requirement that developers pay neighbors a uniform amount of money for impacts helps to temper this power. A property rule therefore makes sense in this context, as it gives both developers and neighbors more flexibility in negotiating to address the varied impacts of projects.

B. Inclusion and Accessibility: Limited Private Negotiations and Mandatory Stakeholder Inclusion

Inclusive, accessible, and transparent negotiation processes fit hand-in-glove with accountability. Developers will not successfully identify the most important community impacts and address them without including a broad range of stakeholders in the negotiation process. Developers also must ensure that these stakeholders have adequate fora through which they can express concerns and suggest solutions. For negotiations with neighbors, openness is essential largely to demonstrate accountability and equity—to show that payments are at least in part to address externalities to neighbors, and that they are not grossly uneven among different neighbors to proposed energy projects.

1. Communities

The importance of broad stakeholder representation is a mantra in the literature on infrastructure negotiation best practices. Patricia Salkin and Amy Lavine emphasize the importance of including a coalition "inclusive of all interests that may be impacted by the proposed development" in the negotiation process.[357] Other CBA experts similarly conclude that "that there needs to be an explicit requirement to consider and include vulnerable and marginalized groups" in the formation of impact benefits agreements.[358]

357. Salkin & Lavine, *supra* note 54, at 320.

358. Cascadden et al., *supra* note 134, at 3; *see also* CAMERON GUNTON ET AL., IMPACT BENEFIT AGREEMENT GUIDEBOOK 36 (2020), https://rem-main.rem.sfu.ca/planning/IBA/IBA_Guidebook_2-24.pdf [https://perma.cc/DR8L-8ANX].

To ensure that negotiations include an adequately broad and diverse array of stakeholders, parties to negotiations should conduct "stakeholder mapping" or similar research efforts in which they identify the many stakeholders within the community.[359] These stakeholders should naturally include all of the major community groups that tend to benefit (or not) from agreements, such as community health, environmental, and labor organizations, as well as educational institutions and emergency services agencies. Truly just and equitable negotiations also have an eye to community members who may not be formally represented in community stakeholder groups but nonetheless deserve a seat at the proverbial table.[360] Several representatives of local government bodies should also be included—at least one from the legislative body (typically called a council, commission, or selectboard) that makes land use decisions and one from the planning commissions that guide these decisions.

As with research into community concerns and hopes for projects, locating and initiating discussions with community leaders will be a necessary first step of stakeholder inclusion. Once a broad-based, representative negotiation team is established, negotiation processes should largely track those followed for local government decisions.[361] Decisions about the content of agreements should be made in a public forum open to all residents, with ample notice beforehand. But there will also need to be some departures from local government processes—mostly to expand the quality of public involvement, but also to allow more private discussions in limited circumstances.

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359. Kanchana Ginige et al., *Mapping Stakeholders Associated with Societal Challenges: A Methodological Framework*, 212 PROCEDIA ENG'G 1195, 1198 (2018) (noting that mapping involves identifying the specific issue area to be addressed and identifying "the stakeholders that can influence or be affected by the challenge based on the lists of stakeholders identified" by, for example, interviews and focus group responses, and noting that stakeholders from a broad list of categories should be identified, such as government, nonprofit group, and private and corporate sectors, among others).

360. For renewable energy, these groups might include, for example, farmers who lease rather than own land.

361. These practices include "providing advanced public notice about the ordinance, holding a public hearing, requiring a certain number of votes for the ordinance to pass, and publishing the final ordinance (or detailed summary) in a newspaper." *Taking Action Using Ordinances, Resolutions, Motions, and Proclamations*, MUN. RSCH. & SERV. CTR. INSIGHT (Feb. 16, 2024), https://mrsc.org/stay-informed/mrsc-insight/february-2024/ordinances-resolutions-motions-proclamations [https://perma.cc/E4UJ-TNDE].

With respect to enhancing the quality of public involvement in negotiation, participation literature critiques typical local government decision-making processes as following a "decide-announce-defend" model.[362] Local governments reach key land use decisions at one or several public meetings, where developers present their project and defend it from attack. Individuals and groups have small windows for participation—typically just several minutes behind a microphone.[363] This limited forum tends to galvanize relatively unproductive community reactions, with those opposed to the project having one opportunity to make their point. It incentivizes individuals to park themselves firmly within the "support" or "oppose" camp (with opponents typically dominating) and deploy the most dramatic, attention-grabbing arguments for their cause. They print slogans on signs and T-shirts and develop loud social media platforms. In the energy transition, external groups funded by the fossil fuel industry increasingly participate in these processes, sometimes using misinformation to fuel their cause.[364]

More productive processes involve more varied forms of participation than large public meetings. Individual focus groups that address different topics—for example, an "employment" or "labor" focus group one day, and an environmental impacts group another—can generate more productive and deep discussions and better identify impacts to negotiate around. Individual conversations between parties to the negotiation and residents held at times when those residents are available, and which incorporate tools that allow those residents to effectively communicate, are also important. This may require meetings on weekends (as some developers have already initiated) and language translation support. A key challenge remains that, in a market-based system of renewable energy development, developers, at present, have few financial and logistical incentives to

362. Komendantova & Battaglini, *supra* note 298; *see also* Elisabeth van de Grift & Eefje Cuppen, *Beyond the Public in Controversies: A Systematic Review on Social Opposition and Renewable Energy Actors*, ENERGY RSCH. & SOC. SCI., Sep. 2022, at 1, 2.

363. Courts have deemed procedures allowing one minute for each resident to speak to meet due process requirements. *See* Guenther v. Sheffield Lake Zoning Bd. of Appeals, 2015-Ohio-4521, 42 N.E.3d 816, at ¶ 22–28.

364. *See* Klass & Wiseman, *supra* note 225, at 222 n.3 (listing sources documenting misinformation campaigns).

carry out these extra steps of broader community inclusion and accessibility to the process.[365]

Beyond ensuring that processes occur at times and in formats accessible to a broad range of stakeholders, education to facilitate effective participation in negotiation is also critical, particularly for individuals who are not part of groups that regularly engage in negotiation or advocacy. Julian Gross—a CBA expert and attorney—and others, for example, note the "[n]eed for leadership development training for grassroots community member participants."[366] Communities negotiating with developers should ask developers to provide the funds necessary to better educate stakeholders who wish to be involved.

Finally, in a slight departure from public, open local government processes, some aspects of negotiations will need to be closed from full public participation. As noted above, some focus groups should include only stakeholders who identify with a particular cause, such as employment and labor, to most constructively address concerns. These groups will by necessity exclude stakeholders who identify primarily with different causes. Additionally, some initial negotiations surrounding content to include in agreements may need to occur in smaller groups rather than meetings open to the full public. These smaller meetings could encourage early, more open conversation and a broader range of creative solutions, to be later modified in proceedings open to all.

In summary, processes for better CBAs should involve more inclusive identification of stakeholders through mapping efforts; a broader array of participatory options than public meetings, such as separate focus groups or listening sessions for different stakeholder groups; and open meetings, with the exception of some small meetings limited to defined stakeholders to encourage more open and honest discussion.

2. Neighbors

Developers' payments to neighbors risk raising suspicion of developers' intentions when they occur solely through secretive

365. *See* Robi Nilson et al., *Halfway Up the Ladder: Developer Practices and Perspectives on Community Engagement for Utility-Scale Renewable Energy in the United States*, 117 ENERGY RSCH. & SOC. SCI., Nov. 2024, at 1, 9–10.

366. GROSS ET AL., *supra* note 286, at 31.

payments. Yet neighbors may be hesitant to individually negotiate openly for payments, as with any other private contracts involving an exchange of money.[367] Uniform, state-mandated good neighbor payments avoid this problem, making payments a standard part of the permitting process. The public and all residents around the project will know what neighbors are receiving as compensation for the externalities of the project. If departures from the payment schedule are negotiated for good cause, provided this negotiation is done in a public forum—with both the local government and the relevant neighbors participating, and with options for broader public participation—these payments can still achieve some of the Coasean values of an efficient level of externalities without appearing secretive and unfair.

C. Equity: Solutions for Neighbors, Community Groups, and Local Governments

Communities will not view developers of energy infrastructure as good community citizens, and negotiations will not be accountable to communities, if the benefits of negotiation are narrowly distributed. This Section explores solutions for achieving equitable outcomes in both community and neighbor-based negotiations.

1. Communities

Open, accountable processes involving a broad range of diverse stakeholders will go a long way toward ensuring that the benefits of renewable energy projects are distributed broadly around the community. Accountability and accessibility, in other words, are inherently intertwined with equitable outcomes. Accountable, accessible processes will not, however, guarantee such outcomes. To ensure true equity, those most in need of resources to achieve relatively equal footing with others must have the ability to bargain for and receive resources—and likely more of them than other groups that are already well-resourced. Yet

367. Groups of neighbors are likely more willing to engage in public negotiations with developers, as they have relatively commonly done in the context of hydraulic fracturing. JEROLMACK, *supra* note 95; *see also* Grace Wildermuth, Marcellus Shale Landowner Coalitions: Form, Function, and Impact 18 (May 2018) (M.S. thesis, Pennsylvania State University), https://etda.libraries.psu.edu/catalog/14902gvw5117 [https://perma.cc/F5KL-76RR].

these groups need leverage in the bargaining process to achieve this outcome, and they are less likely to have such leverage.

Providing necessary resources, from information to compensation, to participants will be particularly important in this context. As non-governmental organization experts observe, negotiations involving community groups that have inadequate organization and leverage are likely to fail.[368] These experts suggest that routine negotiation, as would be required by this Article (mandatory negotiations for all large renewable energy projects), would gradually build organization and leverage, as community groups became aware of opportunities and the importance of organizing to engage those opportunities.[369] Furthermore, successful negotiations have also involved coalitions of community groups, creating more leverage through numbers and helping to educate and support less-resourced groups that are part of coalitions.[370]

2. Neighbors

The state-required, uniform payments to neighbors explored in Sections III.A–B will be essential to achieving equity in good neighbor schemes. So, too, will be the exceptions to uniformity proposed in Section III.A, in which developers or neighbors can request from the state payments that differ from the uniform scheme for good cause. For example, neighbors that run businesses particularly impacted by changes to views (such as event venues), or whose livelihoods or health would be unusually impacted by the noise and dust of construction, could potentially request higher payments. Such departures would help to address the baseline circumstances that cause some neighbors to suffer greater harms or reap more benefits than others—ensuring that those who need more compensation to achieve equal status with neighbors receive the benefits that they need.

Another approach to ensuring equality, although not necessarily equity, is "most favored nation" status, which would require developers to offer each neighbor an amount equal to the highest amount offered to any neighbor to a renewable project in the same municipality, region, or even state. Some

368. GROSS ET AL., *supra* note 286, at 22–23.
369. *Id.* at 23.
370. *Id.*

landowners have included most-favored-nation provisions when leasing lands for oil and gas.[371] But this type of approach fails to account for potentially legitimate differences among impacts that might require upward or downward departures, thus necessitating more nuanced language within good neighbor agreements.

IV. THE LEGAL BASIS FOR ENHANCED NEGOTIATION FOR ENERGY INFRASTRUCTURE

If governments mandate and implement enhanced negotiation in the renewable energy space, as proposed here, the question of legality is paramount. Given the legal baseline, which allows relatively extensive developer-community or developer-local government bargaining, enhanced negotiation with more public process and input is unlikely to encounter major legal snags. This Part briefly explores the legality of negotiations with community groups and then focuses on potential legal pitfalls to avoid in developer-local government negotiations.

There are few legal impediments to developers contracting with community groups for benefits, aside from potential enforcement challenges noted in Part I. In addition to the consideration issue analyzed in Section I.A.3, community groups that are successors to the original signatories to an agreement may encounter enforcement snags.[372] Governments, community groups, and developers can address these types of issues by careful and detailed drafting of agreements, however.

Developer-local government negotiations and agreements are, as explored in Parts I and II, commonplace, but these negotiations face more legal restrictions—none of which should block the solutions proposed here. Courts that have affirmed the validity of local governments' approval of land uses, coupled with developers' commitments of benefits, focus on the importance of public processes.[373] For example, in Florida, where the prohibition on contract zoning is relatively strict,[374] virtually every

371. *See, e.g.*, EP Energy E&P Co. v. Storey Mins., Ltd., No. 04-19-00534-CV, 2022 WL 223253, at *2 (Tex. App. Jan. 26, 2022) (showing a most-favored-nation clause in a lease).

372. *See supra* Section I.A.1.b.

373. *See generally infra* note 375.

374. *See* Chung v. Sarasota Cnty., 686 So. 2d 1358, 1359 (Fla. Dist. Ct. App. 1996).

development project still involves some sort of commitment by the developer to offer benefits—often initiated by the developer.[375] The Florida courts have consistently held that while local governments may not tie the hands of future, elected governments (absent a formal development agreement), they may negotiate for benefits with broad public value within a public forum while making a decision about the land use requested by the developer.[376] Other states follow similar doctrine. As the United States District Court of Maryland observes, the test for legal zoning versus illegal contract zoning in Maryland looks to the "general proposition of whether an agreement was made to benefit the general welfare."[377]

In contrast with relatively detailed contract zoning tests, some states view contract zoning as an unhelpful and largely irrelevant doctrine, asking simply instead whether a developer-local government agreement meets other basic legal requirements for land use actions. For example, the Massachusetts Supreme Court observes:

> We . . . find no persuasive authority for the proposition that an otherwise valid zoning enactment is invalid if it is in any way prompted or encouraged by a public benefit voluntarily offered. We conclude that the proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety, or general welfare.[378]

Under this view, contract zoning is largely an irrelevant question.[379]

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375. Mark A. Rothenberg, *The Status of Florida Law on Contract Zoning: Practical Drafting Suggestions to Avoid Contract Zoning Claims in Settlement Agreements*, 81 FLA. BAR J. 51 (2007), https://www.floridabar.org/the-florida-bar-journal/the-status-of-florida-law-on-contract-zoning-practical-drafting-suggestions-to-avoid-contract-zoning-claims-in-settlement-agreements [https://perma.cc/N99T-3D8H].

376. Walberg v. Metro. Dade Cnty., 296 So. 2d 509, 511 (Fla. Dist. Ct. App. 1974); Hialeah Citizens All. v. City of Hialeah, 2 Fla. L. Weekly Supp. 45 (Fla. Cir. Ct. 1993); *see* Rothenberg, *supra* note 375 (discussing these cases).

377. Bollech v. Charles Cnty., 166 F. Supp. 2d 443, 454 (D. Md. 2001).

378. Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 369 (Mass. 2003).

379. *Id.* at 366 (concluding that "labels such as 'contract zoning' may not be helpful or determinative in resolving the validity of a zoning enactment").

The extent to which local governments may actually negotiate for benefits, as opposed to simply accepting benefits proffered by developers in public meetings to gain community and government acceptance, is less clear in states with strict contract zoning principles. Beyond the requirement that the benefits accepted by local governments have relatively broad public value, another core court-created mandate is that the government take the action desired by the developer at the same time of the developer's offer of benefits.[380] This is sometimes referred to as "unilateral" contract zoning, in that the government is not committing itself to any future action and is simply accepting benefits offered by a developer.[381] In this case, the government makes a zoning decision, and the developer "makes a promise in return for a municipality's *act* of rezoning."[382] The key is that there is no promise by the government for future action that would bind it or future elected local government bodies—"there is no enforceable contract until the municipality acts to rezone the property."[383]

This time-based focus aims in part to avoid governments tying future elected governments' hands and also to ensure that any bargains are made within a public hearing.[384] As the New Mexico Supreme Court has emphasized, "[b]ecause the municipality does not commit itself to any specified action before the zoning hearing, it does not circumvent statutory procedures or compromise the rights of affected persons."[385]

This doctrine, applied strictly, could prevent meaningful negotiations because one or two public hearings in which local governments discuss benefits while considering zoning action will not adequately air community needs. There is a work-around, however. Community groups—not including local governments—can and often do negotiate sophisticated agreements with developers and then later fold the local government into a

380. Dacy v. Vill. of Ruidoso, 1992-NMSC-066, ¶ 13, 845 P.2d 793.
381. *Id.*
382. *Id.* ¶ 18.
383. *Id.*
384. *See* People's Couns. for Balt. Cnty. v. Beachwood I Ltd., 670 A.2d 484, 505 (Md. Ct. Spec. App. 1995) ("Part of the reason why the governmental authority may not enter into such a contract is because the governmental unit may not bargain away its future use of the police power.").
385. *Dacy*, 1992-NMSC-066, ¶ 18, 845 P.2d at 797–98.

formal development agreement, in part to increase the likelihood that the agreement will be enforced.[386]

Development agreements—allowed by some state statutes—do enable longer-term local government negotiations with developers, including local government commitments to maintain the zoning rules in place at the time the agreement is reached.[387] Within these processes, governments also emphasize the importance of airing such agreements in adequate public fora, albeit with far less process or diverse forms of process as advocated here. Florida, for example, requires two public hearings prior to finalization of the agreement.[388]

The accountable negotiation processes proposed here would capture and expand both of the values at the heart of courts' contract zoning and development agreement doctrine—ensuring that most discussions, and not only the final deal, occur within public fora and mandating broad public benefits. More robust negotiation for broad, relatively equitable benefits would also help to avoid accusations of governments unlawfully enacting "special legislation" that benefited too small of a group.[389]

Despite few major legal impediments to negotiation, local governments would need to avoid certain types of formal legal labels to their agreements with developers to engage in the extensive bargaining proposed here. For example, when governments issue exactions—conditions imposed on a project when the project is approved or denied, or prior to such approval or denial—strict constitutional doctrine requires that those conditions relate to the purpose of the permit being approved or denied.[390] Furthermore, the dollar amount or approximate cost of the conditions imposed must be "roughly proportionate" to the impacts of the development being approved.[391] Both of these conditions are unlikely to be met in the types of broad negotiation proposed here. The extensive negotiation envisioned for the energy transition involves developers, community groups, and local governments uniformly engaging broad sets of stakeholders in negotiations, agreeing upon similarly broad benefits—not

386. GROSS ET AL., *supra* note 286, at 72.
387. *See supra* note 58.
388. Rothenberg, *supra* note 375.
389. *See supra* note 317.
390. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987); *see also* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013).
391. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

all directly related to project impacts, and certainly unlikely to be deemed to have an "essential nexus" to the project and its impacts.[392] As shown in Table 1, these negotiations will also often result in extensive benefits, which are likely to be deemed larger in degree than the negative externalities of the project within the community.

CONCLUSION

The tenor of relationships between developers of renewable energy projects and the communities hosting these projects will largely establish the pace of the energy transition. Policymakers and corporations pushing renewable energy projects largely ignore this challenge, seemingly hoping that by ignoring the local realities, they will somehow disappear. As new energy projects move forward rapidly in a race with the climate change clock, a more comprehensive theoretical framework for negotiation and a toolkit for operationalizing this framework are both critical.

Without better negotiation, many host communities will continue to oppose or ban renewable energy development, and those located where development occurs may resent the development and the highly localized externalities that it generates. Community members have already critiqued negotiation that they view as problematic—it is inadequately inclusive, resulting in narrowly-distributed or largely symbolic benefits and appearing as a "bribe" or "hush money" rather than a legitimate tool to address externalities.[393]

Equally critical to enhanced negotiation, however, is the efficiency of such negotiation. We argue for a relatively comprehensive suite of negotiation practices—stakeholder mapping, neutral third-party negotiation leaders, inclusion of a broad range of long-lasting benefits, specific and enforceable mechanisms, and periodic reviews to assess progress, for example. It is imperative, however, that parties designing and implementing these practices avoid rolling out a new form of negotiation that will further delay projects. Rather than acting as a new layer of problematic red tape, CBAs should achieve genuine community benefits while allowing projects to proceed. A meaningful subset of U.S. society believes that these projects are important, as

392. *Koontz*, 570 U.S. at 606; *Nollan*, 438 U.S. at 837.
393. *See supra* notes 30, 143 and accompanying text.

evidenced by obligated Inflation Reduction Act incentives or the many power purchase agreements that corporations have signed with renewable energy developers.[394]

Renewable energy has broad societal benefits and powerful local impacts.[395] While public and private actions increasingly aim to capture these broad benefits, a new, robust, and uniformly implemented negotiation regime will address the critical local component. It will help to strike a balance between developer and community preferences, appropriately compensate residents near projects for the real impacts that they experience, and adjust projects based on meaningful public participation. Without this local negotiation component, the energy transition away from fossil fuel infrastructure is unlikely to proceed at the pace needed to meet targets set by many U.S. states and corporations.[396] Nor will the transition happen in a "just" way, as critical decisions about the types of energy to which we transition, and how and where this development occurs, will continue to be made by powerful private interests navigating relatively inaccessible public institutional processes.[397] A new approach to negotiation will steer the transition toward a more feasible, fair, and sustainable path for society and communities.

394. *See* KOBUS ET AL., *supra* note 4, at 10 ("Further growth in the corporate PPA market is frequently projected as an important future driver of renewable capacity additions.").

395. *See supra* note 238.

396. There is also a risk that even if renewable energy development proceeds rapidly, with more community support, this infrastructure will only add to the energy mix and not decrease the quantity of fossil fuel-fired infrastructure. Richard York & Shannon Elizabeth Bell, *Energy Transitions or Additions? Why a Transition from Fossil Fuels Requires More Than the Growth of Renewable Energy*, 51 ENERGY RSCH. & SOC. SCI., May 2019, at 1, 1–2. More meaningful public participation in all levels of decision-making, including—in the United States—in state public utility commission and regional transmission organization processes, which largely dictate the energy mix—will be necessary to ensure that renewable energy development displaces, rather than merely adds to, fossil fuel-fired infrastructure.

397. Peter Newell & Dustin Mulvaney, *The Political Economy of the 'Just Transition'*, 179 GEOGRAPHICAL J. 132, 135 (2013).