

The following explains the most likely means by which a private CBA between community members and a developer can be enforced.

### **Summary for Community Coalitions:**

**Consideration:** Consideration is a key piece of valid contract formation. Consideration means that both parties agree to exchanging promises that hold similar value.<sup>[1]</sup> For CBAs, previous rulings suggest that the value of the agreements that a community make in the CBA hold equal weight to the promises the developer makes about employment, environmental provisions, and the like.

- Recommendation for communities to have strong enforcement ground if needed: A community coalition can express:
  - Promises of public support,
  - Promises to serve on implementation committees, and/or
  - Agreements not to sue.

**Successors:** Oftentimes in developments, the owner or manager of the project will award sub-contract with other entities to perform specific tasks, such as excavation, building, opening stores, etc. It is important to include specific language about the duties and obligations of everyone “down the chain of contracts” from the developer, to contractors and subcontractors, to assignees and future entities to whom the developer might sell land.

- Recommendation for communities to have strong enforcement ground if needed:
  - Add specific language about the duties and obligations of everyone “down the chain of contracts” from the developer, to contractors, subcontractors, to assignees, and future entities to whom the developer may sell land.
  - Include explicit covenants running with the land in the CBA as another measure to ensure CBA enforceability.

**Third-party enforcement:** Generally, signatories are contracting parties that have a right to enforce a contract, so community groups or members who sign into to the CBA would possess enforcement rights.<sup>[2]</sup> But, sometimes, a community group or member that is not signed into the CBA (a third-party) may want or need to enforce the CBA. However, if the CBA doesn’t explicitly write out the rights of third parties to enforce a CBA, it may be tricky for that third-party.

- Recommendation for communities to have strong enforcement ground if needed:
  - Create well-defined terms for those who the benefits are intended for. For example, define: “community” or “communities”, with explicit language that specifies beneficiaries as “residents” of distinct geographic areas (e.g., neighborhoods). Likewise, language promising employment, job training, and affordable housing are pretty clearly aimed at individuals within a community and thus residents of a community defined in a CBA would likely be able to enforce a CBA as an intended beneficiary.[3]
  - Consider whether the outcome and/or negotiation could be helped by adding language that explicitly allows third-party rights, or explicitly does not allow third parties to enforce the CBAs.

First, for Ohio, Pennsylvania, and West Virginia, there is no case law on the enforceability of CBAs. Nationally, the story is the same – virtually no cases on CBA enforcement. There is, however, a small body of literature on private CBA



enforceability which provides useful guidance on the issue.<sup>1</sup> Despite the lack of case law, the literature finds that based on common terms used in CBAs, state contract law would determine the enforceability of private CBAs. As with contract law in general, a CBA's specific terms and provisions would determine much of its enforceability. The literature, though, identifies three areas which might affect enforceability:

1. Whether the CBA's provisions provide requisite consideration on a community's part to create a valid, enforceable contract under the law.
2. Whether successors in interest would be subject to a CBA created under prior parties, especially successor developers or industry actors.
3. The extent of signatories' enforceability and whether third parties, such as direct or intended beneficiaries, could enforce a CBA.

These issues are explored in kind below by first discussing how the literature analyzes the three issues and then discussing the likely applicable contract law in Ohio, West Virginia, and Pennsylvania for each issue.

## I: Consideration

Consideration is an essential element of valid contract formation, wherein the parties agree to exchange mutual promises (i.e. bargained for promises).<sup>2</sup> For CBAs, consideration might be a sticking point regarding enforceability because a community might not be providing enough in exchange for a developer's many promises concerning employment, environmental provisions, and the like. However, according to the literature, common CBA provisions such as a community's promise to support a development, promises not to bring lawsuits to stop the development, and promises not to publicly disparage a development project would constitute adequate consideration under contract law.<sup>3</sup> That is likely so for a few reasons. First, contract law and a court's interpretation of a contract generally do not inquire into the adequacy of consideration so long as there is a bargained for exchange.<sup>4</sup> Also, developers are generally

---

<sup>1</sup> Hannah P. Stephan, *Contracting with Communities: An Analysis of the Enforceability of Community Benefits Agreements*, 40(2) *Law & Ineq.* 281 (2022); Patricia E. Salkin, Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 *UCLA J. Envtl. L. & Pol'y* 291 (2008); Julian Gross, *Community Benefits Agreements: Making Development Projects Accountable* (Good Jobs First 2005), available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>; and Stephanie M. Gurgol, *Won't You Be My Neighbor? Ensuring Productive Land Use Through Enforceable Community Benefits Agreements*, 46 *U. Tol. L. Rev.* 473 (2015). Of these, Stephan, Salkin and Levine, and Gross are the most useful, with Stephan the single best analysis available.

<sup>2</sup> Under PA, OH, and WV law, respectfully, see *Weavertown Transp. Leasing, Inc. v. Moran*, 2003 PA Super 385, ¶ 9, 834 A.2d 1169, 1172 (2003)(Consideration consists of a benefit to the promisor or a detriment to the promise); *Fry v. FCA US LLC*, 2017-Ohio-7005, ¶ 17, 143 N.E.3d 1108, 1114 (Consideration is the bargained for legal benefit or detriment); *Young v. Young*, 240 W. Va. 169, 174, 808 S.E.2d 631, 636 (2017)(Consideration is a broad term; we have stated that "[a] valuable consideration may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other")(citation omitted).

<sup>3</sup> Stephan, *Contracting with Communities*, 290-91.

<sup>4</sup> OH, PA, and WV law comport on this point: *Fry v. FCA US LLC*, 2017-Ohio-7005, ¶ 17, 143 N.E.3d 1108, 1114 ("However, once consideration is found to exist, the court may not inquire into the adequacy of that consideration"); *Socko v. Mid-Atl. Sys. of CPA, Inc.*, 2014 PA Super 103, 99 A.3d 928, 934-35 (2014), *aff'd*, 633 Pa. 555, 126 A.3d 1266 (2015)(For most contracts, Pennsylvania appellate courts have historically held that while the existence of consideration is a necessary element for any enforceable contract, the adequacy of the consideration is not a factor to be considered in determining the validity and enforceability of a contract); *Young v. Young*, 240 W. Va. 169, 174, 182, 808 S.E.2d 631, 644 (2017)(Consideration is a broad term . . . this Court has provided that "[c]ourts of law, as a rule, will not enter upon any inquiry as to the adequacy of a consideration in a contract. They presume this to have been determined by the parties to the contract, if they are capable of contracting")(citation omitted).

This resource is part of Fair Shake Environment@ Legal Service's Community Democracy River.

For more information and additional resources, tools, and levers, visit: <https://www.fairshake-els.org/community-organizing-resources>.

sophisticated parties, so courts would likely find that developers were not under duress or another type of defense that would support lack of consideration.<sup>5</sup>

Second, community letters of support or testimony supporting a development project would constitute valid consideration because they are affirmative, obligatory acts on the part of community members or organization that benefit the developer.<sup>6</sup> Similarly, a CBA provision that community members will serve on implementation committees throughout a project's duration would likely constitute consideration because consideration can include an act other than a promise, including acts such as performance (i.e., serving on an implementation committee).<sup>7</sup>

Third, agreements not to sue that are included in a CBA's provisions also would likely constitute valid consideration because contract law and the Restatement recognize a "forbearance" as consideration. For example, the Restatement (Second) of Contracts § 71 (Requirement for Exchange; Types of Exchange) states that a return promise or a performance can constitute valid consideration, and that a performance may consist of forbearance.<sup>8</sup> Importantly, there must be a valid claim in order for forbearance from asserting that claim to be regarded as valid consideration<sup>9</sup> - and the case law in Ohio, West Virginia, and Pennsylvania reflects that principle.<sup>10</sup> However, as discussed below, an individual or group must also have had standing to bring forth a legal claim. Salkin and Lavine argue that in situations with divided community support which might call into question such support as valid consideration, "the forbearance [sic] of legal claims is a stronger basis for consideration than promises to support a development before land use agencies, and it should be included in CBAs whenever possible."<sup>11</sup> The Hill District CBA in Pittsburgh, for instance, contains a waiver of claims.<sup>12</sup>

Lastly, while a CBA should contain express promises of public support, promises to serve on implementation committees, and agreements not to sue, the literature hypothesizes that a CBA without any explicit terms of consideration would still likely be enforceable. That is, even without an express provision obligating public support, a developer could still use a community organizations' credibility in promoting a project which is a benefit to the developer.<sup>13</sup> However, there does not seem to be good reason to exclude express provisions, and including such provisions of community obligations is the best practice.

## II: Enforceability Regarding Successors in Interest, Delegation of Duties, and Future Parties

---

<sup>5</sup> Stephan, *Contracting with Communities*, 296.

<sup>6</sup> *Id.* at 296-98.

<sup>7</sup> *Id.*, at 298, citing Restatement (Second) of Contracts § 71.

<sup>8</sup> *Id.*, at 298-99; Restatement (Second) of Contracts § 71.

<sup>9</sup> Stephan (at 299) discusses community groups in Los Angeles, CA as illustrating the waiving of legal claims wherein those activist organizations frequently sued the city claiming development violated municipal code and was not in accord with zoning standards.

<sup>10</sup> *Klaue v. Ohio Ins. Guar. Assn.*, 2005-Ohio-3003, ¶ 23 ("The trial court was correct in relying on *Mathis v. St. Alexis Hosp. Assn.* (1994) 99 Ohio App.3d 159, 163, 650 N.E.2d 141, 143, which holds that a promise to forbear pursuit of a legal claim can be sufficient consideration to support a contract when the promisor has a good faith belief in the validity of the claim"); *Trumbull Corp. v. Boss Const., Inc.*, 768 A.2d 368, 371 (Pa. Commw. Ct. 2001) ("However, forbearing from proceeding with a lawsuit constitutes consideration for an agreement. . . [w]hile forbearance from proceeding with a law suit may constitute good consideration for an agreement it must be bargained for and given in exchange for the promise made by the promisor") (citations omitted), *Lombardo v. Gasparini Excavating Co.*, 385 Pa. 388, 391-92, 123 A.2d 663 (1956) ("Forbearance to assert invalid claim by one who has not an honest and reasonable belief in its possible validity is not sufficient consideration to support contract"); *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W. Va. 91, 109, 159 S.E.2d 784, 795 (1968) ("While there is a great divergence of opinion respecting the kind of forbearance which will constitute consideration, the weight of authority holds that although forbearance from suit on a clearly invalid claim is insufficient consideration for a promise, forbearance from suit on a claim of doubtful validity is sufficient consideration for a promise if there is a sincere belief in the validity of the claim' . . . The legal principles quoted above have been recognized by this Court") (citations and internal quotation marks omitted).

<sup>11</sup> Salkin and Lavine, *Understanding Community Benefits Agreements*, at 324-25.

<sup>12</sup> Stephan, *Contracting with Communities*, 298 n.82, citing § IX(A) of the Hill District CBA available at <https://perma.cc/MME8-2KVM>.

<sup>13</sup> Stephan, *Contracting with Communities*, 300.

This resource is part of Fair Shake Environmental Legal Service's Community Democracy River.

For more information and additional resources, tools, and levers, visit: <https://www.fairshake-els.org/community-organizing-resources>.

The CBAs analyzed in the literature commonly include provisions and language about successors in interest and delegation of duties.<sup>14</sup> Not surprisingly, the best practice is to include specific language about the duties and obligations of everyone “down the chain of contracts” from the developer, to contractors and subcontractors, to assignees and future entities to whom the developer might sell land.<sup>15</sup> Gross emphasizes that:

The CBA needs to set up a system whereby (1) each business is informed of and agrees to the substantive requirements that apply to it, (2) each business agrees that it will include these requirements in other contracts it enters into, and (3) each business agrees that community groups, the local government, or affected individuals can enforce the requirements.<sup>16</sup>

Salkin and Lavine recommend that future parties (e.g., future tenants, contractors, or buyers) be required to sign the original CBA to help ensure enforceability “against developer’s subcontractors, tenants and successors in interest.”<sup>17</sup> Similarly, Stephan recommends avoiding boilerplate language regarding successors and assignees and including detailed language specific to the CBA’s parties and community.<sup>18</sup> For instance, the successors and assigns language of the Ballpark Village CBA in San Diego regarding the development of a new baseball stadium, negotiated by the community group, ACCORD (A Community Coalition for Responsible Development) is considered model language.<sup>19</sup> Likewise, the Hill District CBA contains fairly specific language about assigns and successors.<sup>20</sup>

As with consideration, because there is no case law on CBA enforceability, state contract law would determine the enforceability of a CBA’s provisions on successors and assigns. Stephan, citing the Restatement (Second) of Contracts § 318, found that delegations are only prohibited when they violate public policy and if the duties of the original party involve “personal services or the exercise of skill and discretion.”<sup>21</sup> Public policy prohibitions are very unlikely, but Stephan did find a few CBAs which contained language that might fall under the latter category of special skill and discretion. For example, a CBA in Nashville regarding a soccer stadium required that players, coaches, and officials of the

---

<sup>14</sup> *Id.*, 301-4, Salkin and Lavine; *Understanding Community Benefits Agreements*, at 326; Gross, *Community Benefits Agreements*, at 71.

<sup>15</sup> Gross, *Community Benefits Agreements*, at 71.

<sup>16</sup> *Id.*

<sup>17</sup> Salkin and Lavine, *Understanding Community Benefits Agreements*, at 326.

<sup>18</sup> Stephan, *Contracting with Communities*, 301-2.

<sup>19</sup> *Id.*, at 301:

“This Agreement shall be binding upon and inure to the benefit of ACCORD, Member Organizations, ACCORD’s Successors, and Successors to any Successors of ACCORD . . . Developer’s Successors include, but are not limited to, any party who obtains an Interest, vertical developers, retail developers, contractors, management companies, and owners’ or retail merchants’ associations participating in the Project. Upon conveyance of an Interest to an entity in compliance with Section 9.4, ACCORD may enforce the obligations under this Agreement with respect to that Interest only against such entity, and neither Developer nor any owner of a different Interest shall be liable for any breach of such obligations by such entity or its Successors. Except as otherwise indicated in this Section 9.3, references in this Agreement to a party shall be deemed to apply to any successor in interest, transferee, assign, agent, representative, of that party.”

<sup>20</sup> “Successors, Assigns and Agents. This Agreement shall bind and inure to the benefit of the agents, assigns, and successors in interest of each Party; as applicable, each Party will notify its agents, assigns and successors in interest of existence of this Agreement. Any reference in this Agreement to a Party shall be deemed to include any agents, assigns, and successors-in-interest of that Party, with respect to rights and/or responsibilities relevant to this Agreement, to the extent permitted by law. In the event that, during the term of this Agreement, Penguins Redevelopment enters into a binding written agreement relating to the future development or redevelopment of the Additional Redevelopment Area (or any portion thereof) (a “Future Development Agreement”) with any person or entity (a “Successor Developer”), pursuant to which Penguins Redevelopment proposes to assign all or a portion of its rights to develop or redevelop the Additional Redevelopment Area (or a portion thereof) to the Successor Developer, and/or all or a portion of Penguins Redevelopment’s corresponding obligations under this Agreement, then within 10 days of any assignment of rights or obligations described in this subsection IX(D) becomes effective, Penguins Redevelopment shall notify the Coalition in writing of the assignment of such rights and obligations and the name and contact information of the Successor Developer.” § IX(D) at <https://perma.cc/MME8-2KVM>.

<sup>21</sup> Stephan, *Contracting with Communities*, 302-3, the Restatement (Second) of Contracts §318.

This resource is part of Fair Shake Environmental Legal Service’s Community Democracy River.

For more information and additional resources, tools, and levers, visit: <https://www.fairshake-els.org/community-organizing-resources>.



professional soccer team visit local schools a prescribed number of times per year.<sup>22</sup> According to Stephan, such obligations specific to particular individuals might not be delegable to future parties.<sup>23</sup> However, more general provisions regarding local hiring would likely be delegated to future parties and entities.<sup>24</sup>

In Ohio, West Virginia, and Pennsylvania, state contract law generally tracks with Stephan's focus on the Restatement (Second) of Contracts § 318, with Pennsylvania specifically adopting that section of the Restatement, and Ohio and West Virginia having similar law but without expressly adopting that Restatement section. For Pennsylvania, see *Smith v. Cumberland Grp., Ltd.*, 455 Pa. Super. 276, 285, 687 A.2d 1167, 1172 (1997) (Absent an express provision against assignment, the rights and duties under an executory bilateral contract which does not involve personal skill, trust, or confidence may be assigned without the consent of the other party so long as it does not materially alter the other party's duties and responsibilities).

For Ohio, see *Talbott v. Condevco, Inc.*, 2020-Ohio-3130, ¶ 24, 155 N.E.3d 84, 92 (“Absent a clause making delegation ineffective, a party may generally delegate his or her duties under a contract.” *Kuhens v. Weaver*, 7th Dist. Carroll No. 643, 1996 WL 172369 (Apr. 5, 1996)) and *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 2006-Ohio-6551, 112 Ohio St. 3d 482, 861 N.E.2d 121 (“A contract right may be assigned unless: (1) there is clear contractual language prohibiting assignment, (2) assignment would materially change the duty of the obligor, materially increase his burden or risk under the contract, materially impair his chance of securing a return on performance, or materially reduce the contract's value, or (3) assignment is forbidden by statute or by public policy”).

For West Virginia, see *Armstrong v. MGC Mortg., Inc.*, No. 1:09CV131, 2010 WL 4292405, at \*2 (N.D.W. Va. Oct. 22, 2010) (This Court finds that Count I, a claim for breach of contract is assignable. See Syl. pt. 1, *Poling v. Condon-Lane Boom & Lumber Co.*, 55 W.Va. 529, 47 S.E. 279 (W.Va.1904) (finding that “a contract in which the delectus personae is not material, and which is for services that may be as well performed by one person as another, is assignable, unless the assignment thereof be prohibited by the terms of the contract”).

Lastly, the literature recommends that explicit covenants running with the land be included in CBAs as another measure to ensure CBA enforceability.<sup>25</sup>

### III: Signatory & Third-Party Enforcement

Generally, signatories are contracting parties that have a right to enforce a contract, so community groups or members who are parties (signatories) to the CBA would possess enforcement rights.<sup>26</sup> The trickier question the CBA literature contemplates concerns third parties and if and how they might enforce a CBA, particularly because most CBAs analyzed in the literature contained no provisions about third-party beneficiaries or the rights of third parties to enforce a CBA.<sup>27</sup> While most CBAs were silent on the issue, the Hill District CBA contained a provision, “No Third Party Rights,” which explicitly disclaimed such rights.<sup>28</sup> One reason for excluding third party rights would be that developers would be less inclined to enter a CBA if it contained a large number of potential third parties who could sue the developer.<sup>29</sup>

Absent a disclaimer of third-party rights, state contract law would determine the enforcement rights of third parties explicitly identified in a CBA and in CBAs that are silent on the issue. If there is a clear disclaimer of third-party

---

<sup>22</sup> *Id.*, 303.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Stephan, *Contracting with Communities*, 303, citing Amy Lavine, *Legal & Contractual Issues of Community Benefits Agreements*, 32 Zoning & Planning L. Report (2009).

<sup>26</sup> *Am. Rock Mechanics, Inc. v. Thermex Energy Corp.*, 80 Ohio App. 3d 53, 58, 608 N.E.2d 830, 833 (1992) (“It is well established that a contract is binding only upon the parties to the contract and those in privity with them and that an action for breach of contract can only be maintained by the parties to the contract or those deriving rights from the contracting parties”); *City of Allentown v. Lehigh Cnty. Auth.*, 2019 PA Super 333, 222 A.3d 1152, 1157 (2019) (Parties to a contract can move to enforce the contract when there is a breach by another party).

<sup>27</sup> Stephan, *Contracting with Communities*, 303.

<sup>28</sup> The provision stated: “Nothing in this Agreement shall be construed to create any third party rights or benefits under any existing or presently contemplated agreement between the SEA, the URA, the Penguin Entities or any other of their respective affiliates.” See “General Terms” “H” at <https://perma.cc/MME8-2KVM>.

<sup>29</sup> Stephan, *Contracting with Communities*, 306.

This resource is part of Fair Shake Environmental Legal Service's Community Democracy River.

For more information and additional resources, tools, and levers, visit: <https://www.fairshake-els.org/community-organizing-resources>.

rights, as in the Hill District CBA, the literature argues that it would be difficult to argue to the contrary.<sup>30</sup> Stephan looks at the Restatement (Second) of Contracts §302 to support that assessment regarding disclaimer. §302 provides who is a third-party beneficiary and begins by stating “unless otherwise agreed between promisor and promisee,” which indicates that if a CBA disclaims third parties by the contracting parties, then likely no third-party rights exists. Ohio courts adopt that provision of the Restatement in *Long v. Mount Carmel Health Sys.*, 2017-Ohio-5522, 93 N.E.3d 436, and Pennsylvania courts adopts the provision in *Est. of Young v. Louis*, 2018 PA Super 358, 202 A.3d 117 (2018).

West Virginia does not adopt §302, but maintains similar law in *Robinson v. Cabell Huntington Hosp., Inc.*, 201 W. Va. 455, 460, 498 S.E.2d 27, 32 (1997)(“[T]his Court has held that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit”). Likewise, in *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 404, 549 S.E.2d 266, 278 (2001), the West Virginia Supreme Court of Appeals stated:

With regard to making a determination of whether a plaintiff is a third-party beneficiary of a particular contract, we have held that: In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration.

If a CBA is silent on third party beneficiaries, then state law regarding intended third party beneficiaries would determine if an individual or groups constituted such a beneficiary. Stephan looks to the Restatement (Second) of Contracts §308 to analyze the question of CBAs that are silent on third party beneficiaries.<sup>31</sup> §308 provides: “It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.” However, Ohio, Pennsylvania, and West Virginia do not adopt that section of the Restatement.

But, the Restatement (Second) of Contracts §302, which Ohio and Pennsylvania have adopted, offers an illustration analogous to CBA provisions regarding intended beneficiaries: a food processor contracts with a municipality to use the municipality’s sewage system and promises to remove harmful waste from discharges to protect downstream landowners who thus become intended third party beneficiaries.<sup>32</sup> Like a CBA that promises to provide jobs to community members or funding for community education programs, the illustration shows how a contract silent on third party beneficiaries nonetheless can create intended third party beneficiaries.

The main issue of possible contention with CBAs and intended third party beneficiaries is when a CBA has provisions for benefiting a “community” or “communities” but lacks a clear definition what the bounds of the community are or who is a member of the community. That is, is the “community” a neighborhood or some other defined geographic region? Also, is the CBA intended to benefit the community as a whole or individual members?<sup>33</sup> Again, a CBA’s terms and provisions offer the best guidance, particularly when the terms are well defined such as a provision that specifies beneficiaries as “residents” of distinct geographic areas (e.g., neighborhoods).<sup>34</sup> Likewise, the literature, based on the Restatement sections mentioned above, argues that CBA provisions promising employment, job training, and affordable housing are pretty clearly aimed at individuals within a community, and thus residents of a community defined in a CBA would likely be able to enforce a CBA as an intended beneficiary.<sup>35</sup>

Although there is no clear case law on CBA enforcement<sup>36</sup>, contract law on intended beneficiaries in Ohio, Pennsylvania, and West Virginia tends to support an individual’s ability to enforce a CBA as an intended third-party

---

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, 306 n. 121.

<sup>32</sup> Restatement (Second) of Contracts §302 cmt. d. illus. 10.

<sup>33</sup> Stephan, *Contracting with Communities*, 307-8, Salkin and Lavine, *Understanding Community Benefits Agreements*, at 326.

<sup>34</sup> For instance, the CBA in Nashville concerning the professional soccer stadium states the agreement is “made and executed . . . for the benefit of the residents of the Metropolitan Nashville and Davidson County . . .” Stephan, at 308 n. 129.

<sup>35</sup> Stephan, *Contracting with Communities*, 308.

<sup>36</sup> The only case I could find on CBA enforceability concerned a public, not private CBA. In *Lemmon v. Seneca Meadows, Inc.*, 46 Misc. 3d 1215(A), 9 N.Y.S.3d 593 (N.Y. Sup. Ct. 2015), the town of Waterloo entered into a CBA with a mining company requiring the company to be subject to all local zoning laws. Residents alleged that the town did not abide by the CBA when it granted

This resource is part of Fair Shake Environmental Legal Service’s Community Democracy River.

For more information and additional resources, tools, and levers, visit: <https://www.fairshake-els.org/community-organizing-resources>.



beneficiary even when the agreement is silent on such beneficiaries. Specifically, the state law centers on whether an individual or entity is an intended beneficiary or only an incidental beneficiary.

In West Virginia, *see Closson v. Mountaineer Grading Co.*, No. 15-0820, 2016 WL 6651581, at \*2 (W. Va. Nov. 10, 2016) (“[t]his Court has held that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party’s sole benefit.”)(citations omitted); *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 404, 549 S.E.2d 266, 278 (2001)(In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration); and *Pettus v. Olga Coal Co.*, 137 W. Va. 492, 497, 72 S.E.2d 881 (1952)(*dicta*) (“A third person beneficiary under contract to which he is not a party is “incidental beneficiary,” if benefits to him under contract are merely incidental to performance of promise and he is neither a donee beneficiary nor creditor beneficiary”)(quoting 2 Williston on Contracts, Section 356).

Ohio has adopted the Restatement (Second) of Contracts §302 regarding intended beneficiaries, which reads:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

*Torrance v. Rom*, 2020-Ohio-3971, ¶ 32, 157 N.E.3d 172, 184 (quoting the Restatement (Second) of Contracts §302).

Subsequently, Ohio courts apply a test to determine whether an individual is an intended or incidental beneficiary:

Under this analysis, if the promisee intends that a third party should benefit from the contract, then that third party is an ‘intended beneficiary’ who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an ‘incidental beneficiary,’ who has no enforceable rights under the contract.

[T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.

*Id.* at ¶ 35 (citations omitted).

Like Ohio, Pennsylvania adopted the Restatement (Second) of Contracts § 302 in *Guy v. Liederbach*, 501 Pa. 47, 60, 459 A.2d 744, 751 (1983). In subsequent cases the Pennsylvania Supreme Court held that:

[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, *unless, the circumstances are so compelling that recognition of the beneficiary’s right is appropriate to effectuate the intention of the parties*, and the performance satisfies an

---

a permit to the mining company that residents alleged was not in conformity with zoning laws. The town argued that the residents did not have standing under the CBA to assert a breach of contract because the residents were not a party to the agreement. However, the court did not decide on the residents’ standing as intended beneficiaries under the CBA. Rather, the court granted the residents standing to challenge to permit decision as an administrative challenge (i.e., arbitrary and capricious decision), not a claim for breach of contract. Ultimately the court found that the town did not violate the CBA because state mining law preempted the specific zoning ordinances, stating “this provision of the local law, by its terms, exempts the proposed clay mine herein from its reach.” *Id.*, at \*3-\*4.

This resource is part of Fair Shake Environmental Legal Service’s Community Democracy River.

For more information and additional resources, tools, and levers, visit: <https://www.fairshake-els.org/community-organizing-resources>.



obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

*Ario v. Reliance Ins. Co.*, 981 A.2d 950, 959 (Pa. Commw. Ct. 2009)(emphasis added)(citing *Scarpitti v. Weborg*, 530 Pa. 366, 372–373, 609 A.2d 147, 150 (1992)). The *Ario* court further explained that “an intention to benefit a third party may be found in the language of the contract or that intention may be found in the “circumstances.” *Id.*

Overall, the law on third-party beneficiaries in Ohio, West Virginia, and Pennsylvania would likely uphold non-parties’ ability to enforce a CBA if the agreement’s provisions (promises) were specific enough to an individual and the community in which the individual resides.

In conclusion, although CBA enforcement is a new area of the law, the foregoing discussion of consideration, assignments and successors, and enforcement (beneficiaries) under state contract law tends to support CBA enforceability when those issues are explicitly addressed in an agreement’s provisions. Further, while the Ohio, West Virginia, and Pennsylvania law referenced above does not cite analogous cases to provisions commonly found in CBAs, the referenced law does cite the general contract law principles likely applicable to CBA enforcement.