



Offshore Wind Energy Agreement Enforcement

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Executive Summary

This report summarizes the different types of agreements (e.g., Community Benefits Agreements and Host Community Agreements) that are becoming more commonplace for community benefit groups (hereinafter CBG or CBGs) or municipalities and offshore wind energy developers to enter into as offshore wind energy development in the Northeast United States increases. In addition, this report examines varying enforcement provisions, or the lack thereof, that previously entered into agreements contain. Importantly, the agreements constitute legally binding and enforceable contracts, meaning that an agreement containing enforcement provisions will be enforced according to the terms of the agreement.

This report also explores potential enforcement barriers that exist with these types of agreements, including: (1) whether the CBG or municipality provides any consideration to the agreement, which is a necessary element of contract formation; (2) whether the offshore wind energy developer's attempt to assign their rights and/or delegate their duties under the contract to another party is enforceable and/or binds the other party to the agreement; (3) whether the agreement permits various third parties the right to enforce the agreement; and (4) whether a CBG or municipality could successfully seek the contract remedy of specific performance as opposed to monetary damages. Ultimately, this report's examination of several sections of the Restatement (Second) of Contracts as well as specific terms of previously entered into agreements helps illustrate that: (1) the first of these potential enforceability concerns is likely to be overcome; (2) the second of these potential enforceability concerns is likely to be determined based on the exact terms of the contract itself; (3) the third of these potential enforceability concerns is likely to be determined based on the exact terms of the contract itself as well as the relevant state's law; and (4) the fourth of these potential enforceability concerns is unlikely to be overcome. This report also highlights several tactics that CBGs or municipalities could implement in order to overcome these potential enforcement barriers, including by retaining legal counsel.

Finally, given the possibility that all major law firms in the state could be conflicted out of representing either the CBG or municipality seeking enforcement of the agreement against an offshore wind energy developer, this report examines the various options for recourse that might be available. Notably, the Maine Rules of Professional Conduct permit representation by conflicted-out lawyers and/or law firms so long as certain requirements have been met, but it is unlikely that the parties to the dispute would choose to proceed with the representation. Thus, there are several alternatives that a party seeking enforcement of an agreement may consider, such as by seeking legal representation from either: (1) an out-of-state lawyer and/or law firm that has been granted pro hac vice admission to practice in the state of Maine; (2) a smaller, in-state law firm; (3) an in-state solo practitioner; (4) a public interest law firm; or (5) a legal assistance clinic. Importantly, all of these alternatives have various advantages and disadvantages that should be carefully considered.

Over the past several years, there has been a rapid expansion of offshore wind energy development in the Northeast United States.¹ As a result, community benefit groups (hereinafter CBG or CBGs)² and municipalities have begun entering into various agreements with offshore wind energy developers as a way to address the potential benefits and harms that can arise from the rapidly expanding development.³ Interestingly, some municipalities have expressed a feeling of regret in choosing to enter into an agreement with an offshore wind energy developer.⁴ Thus, in response to the municipalities' concerns as well as agreements between CBGs or municipalities and offshore wind energy developers becoming more commonplace, Maine Sea Grant (MESG) has developed the following questions: How will agreements between CBGs or municipalities and offshore wind energy developers be enforced, and are there any options for recourse that may be available to a CBG or municipality seeking enforcement of an agreement when all of the state's major law firms have been conflicted out of representing the party?⁵ This report will address MESG's questions and provide background on several examples of agreements that CBGs or municipalities and offshore wind energy developers have previously entered into.

Section 1 of this report provides an overview of the different types of agreements that have become more common for CBGs or municipalities and offshore wind energy developers to enter into, highlighting that the types of agreements constitute legally binding and enforceable contracts. Section 2 of this report examines how these types of agreements can be enforced as legally binding contracts and potential enforcement barriers that exist in regard to these agreements. Section 2 of this report also examines tactics that CBGs or municipalities can use to overcome these potential enforcement barriers. Finally, Section 3 of this report examines the possible options for recourse that a CBG or municipality may have to enforce an agreement when all of the state's major law firms have been conflicted out of representing the party.

1 An Overview of the Different Types of Agreements Between CBGs or Municipalities and Offshore Wind Energy Developers

As offshore wind energy development increases, there are several agreement types that have become more commonplace for CBGs or municipalities and offshore wind energy developers to enter into,

¹ Nat'l Oceanic and Atmospheric Admin., *Offshore Wind Energy Development in New England/Mid-Atlantic Waters*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/new-england-mid-atlantic/science-data/offshore-wind-energy-development-new-england-mid-atlantic-waters> (last updated Dec. 28, 2023).

² U.S. Dep't of Energy, *Community Benefit Agreements: Frequently Asked Questions (FAQs)*, U.S. DEP'T OF ENERGY 1, <https://www.energy.gov/justice/articles/community-benefit-agreement-cba-resource-guide-faqs> (last visited Feb. 8, 2024) (defining CBGs as "a coalition of neighborhood associations, faith-based organizations, unions, environmental groups and others representing the interests of a community that will be impacted by development(s)").

³ This information is from meetings with Maine Sea Grant.

⁴ Nancy Lavin, *Portsmouth Town Council begrudgingly approves host agreement with SouthCoast Wind*, WHAT'S UP NEWP, <https://whatsupnewp.com/2024/01/portsmouth-town-council-begrudgingly-approves-host-agreement-with-southcoast-wind/> (last updated Jan. 19, 2024) ("Faced with receiving \$23 million or nothing, the Portsmouth Town Council begrudgingly approved an agreement that allows a Massachusetts offshore wind farm developer access to town property under which to bury power cables."); see also Alex Kuffner, *Despite opposition, Portsmouth approves deal with SouthCoast Wind. Here's what the town gets.*, PROVIDENCE J., <https://www.providencejournal.com/story/news/environment/2024/01/18/southcoast-wind-will-pay-portsmouth-millions-to-run-transmission-cable/72256666007/> (last updated Jan. 18, 2024, 5:10 PM) ("I'm going to support this because I believe our choices are cooperate . . . and get paid for some of the inconveniences we will have to deal with, or it will go through anyway and we will get nothing," said Portsmouth Town Councilman Len Katzman.).

⁵ This information is from meetings with Maine Sea Grant.

all of which can be considered legally binding contracts. For instance, a Community Benefits Agreement (CBA) is a legally binding and enforceable contract that is entered into by a CBG and an offshore wind energy developer, which identifies an array of benefits the developer agrees to provide the CBG with as part of the project's development in exchange for the CBG's agreement to provide the developer with its support of the project.⁶ Importantly, a CBA serves to “commit developers—in writing—to promises they make.”⁷ Alternatively, a Host Community Agreement (HCA) is a legally binding and enforceable contract⁸ that differs from a CBA in that the agreement type is often negotiated between a developer and a municipality rather than a CBG.⁹ However, much like a CBA, an HCA will also identify benefits that the offshore wind energy developer agrees to provide the municipality with in exchange for the municipality's support of the development project.¹⁰ There is a danger that an HCA might be characterized as an occurrence of illegal contract zoning, which is an agreement between the municipality and the offshore wind energy developer whereby the municipality either promises to or actually does zone property in a manner requested by the developer.¹¹ However, it is the specific terms of the HCA between the municipality and the offshore wind energy developer that will likely dictate whether the agreement will be found to be an occurrence of illegal contract zoning or a legally binding and enforceable contract.¹² Ultimately,

⁶ U.S. Dep't of Energy, *Guide to Advancing Opportunities for Community Benefits through Energy Project Development*, U.S. DEP'T OF ENERGY 4 (Aug. 1, 2017), <https://www.energy.gov/justice/articles/community-benefit-agreement-cba-resource-guide>; *Community Benefit Agreements: Frequently Asked Questions (FAQs)*, *supra* note 2, at 1. *See also* Katherine Hoff, *Community Benefits Agreement (CBAs) and Offshore Wind*, LEGALPLANET (June 21, 2023), <https://legal-planet.org/2023/06/21/community-benefits-agreements-cbas-can-provide-tools-for-communities-negotiating-offshore-wind-development-impacts/>. *See generally* U.S. Dep't of Energy, *About Community Benefits Plans*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/infrastructure/about-community-benefits-plans> (last visited Mar. 7, 2024) (explaining that the term CBA can also be used to refer to a Good Neighbor Agreement, which too is a “legally binding agreement[] that [is] negotiated directly between community coalitions and project developers”).

⁷ *Guide to Advancing Opportunities for Community Benefits through Energy Project Development*, *supra* note 6, at 5.

⁸ Daniel A. Spitzer et al., *Host Community Agreements for Wind Farm Development*, N.Y. ZONING L. AND PRAC. REP., Mar./Apr. 2009, at 1, 1 (“An HCA is defined as a contract between a developer and the local governing body or bodies of the host community, whereby the developer agrees to provide the community with certain benefits and mitigate specified impacts of the project.”). *See also* Adnan Durakovic, *Orsted Agrees to Multi-Million South Fork Community Benefit Package*, OFFSHORE WIND (Sept. 14, 2020), <https://www.offshorewind.biz/2020/09/14/orsted-agrees-to-multi-million-south-fork-community-benefit-package/> (describing the Host Community Agreement entered into between South Fork Wind, LLC, the Town of East Hampton, New York, and the Trustees of the Freeholders and Commonalty of the Town of East Hampton as a contract); *see generally* *Host Community Agreement*, TOWN OF E. HAMPTON, N.Y. (Mar. 9, 2021), <https://ehamptonny.gov/DocumentCenter/View/8493/Host-Community-Agreement--South-Fork-Wind-LLC>.

⁹ Hoff, *supra* note 6; *see also* Univ. of Cal. Berkeley Sch. Of L. Ctr. For L., Energy, & the Env't, *Offshore Wind & Community Benefits Agreements in California*, UNIV. OF CAL. BERKELEY SCH. OF L. CTR. FOR L., ENERGY, & THE ENV'T 7 (June 2023), <https://www.law.berkeley.edu/wp-content/uploads/2023/06/CBA-Policy-Paper.pdf>.

¹⁰ *See* Vineyard Wind, *Vineyard Wind and Barnstable Enter into Host Community Agreement, Advancing USA's First Commercial-Scale Offshore Wind Farm*, VINEYARD WIND (Oct. 5, 2018), <https://www.vineyardwind.com/press-releases/2018/11/27/vineyard-wind-and-barnstable-enter-into-host-community-agreement-advancing-usas-first-commercial-scale-offshore-wind-farm> (describing various benefits that Vineyard Wind will provide to the Town of Barnstable, MA, including the opportunity to conduct a “detailed review of Vineyard Wind's specifications for a new substation,” which will ensure both groundwater protection and the overall delivery of clean energy); *see also* *Host Community Agreement*, VINEYARD WIND 9-11 (Oct. 3, 2018), <https://vineyardwind.app.box.com/s/efzup1n6isjrifyfloyjehy8a9f70e5am> (describing various types of support that the Town of Barnstable, MA, will provide to Vineyard Wind).

¹¹ *See* Dacy v. Village of Ruidoso, 845 P.2d 793, 796 (N.M. 1992).

¹² *See* Shelby D. Green, *Development Agreements: Bargained-For Zoning That is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. UNIV. L. REV. 383, 414 (2004) (“[I]n most jurisdictions, it is the nature of the agreement—whether the municipality promises to rezone without regard to the merits of the rezoning application and whether the rezoning serves the public interest—that determines whether an agreement amounts to contract zoning.”). *See also* Spitzer, *supra* note 8, at 4 (stating

given the generally legally binding and enforceable status of both CBAs and HCAs, these types of agreements have the potential to serve as a useful tool for impacted communities to hold offshore wind energy developers liable for breaching any terms of the agreement.

2 An Examination of How CBAs and HCAs Can Be Enforced as Legally Binding and Enforceable Contracts

CBAs and HCAs entered into by CBGs or municipalities and offshore wind energy developers are legally binding and enforceable contracts that will be enforced according to the terms of the agreement.¹³ There are several notable enforcement provisions that have been included in past agreements that CBGs or municipalities in the state of Maine looking to enter into an agreement with an offshore wind energy developer should be aware of. For example, an enforcement provision that was included in the South Fork Wind & East Hampton, NY HCA permitted the non-breaching party to pursue a number of remedies in the case of a breach of contract.¹⁴ These remedies included the non-breaching party's ability to pursue either: (1) any action to enforce performance; (2) any action to recover damages; or (3) any action to seek other relief from the breaching party.¹⁵ Interestingly, the agreement also provided that in the case of a breach of contract, the non-breaching party would first be required to permit the breaching party thirty days to cure the breach of contract upon first being notified of the party's breach.¹⁶ Similarly, an enforcement provision in the Vineyard Wind & Barnstable, MA HCA provided that the town's remedies in the case of a breach of contract included seeking injunctive and declaratory relief¹⁷ and/or monetary damages.¹⁸ Notably, the provision also barred the town from being able to terminate the agreement and their obligations under the agreement in the case of a breach of contract by Vineyard Wind.¹⁹ Rather, in the case of a breach of contract, the contracting parties explicitly agreed that the non-breaching party would first be required to permit the breaching party ninety days to cure the breach of contract upon first being notified of the party's breach.²⁰ Then, if the breaching party failed to cure their breach of contract, the non-breaching party would be required to make an attempt to solve the dispute informally, and then by mediation if efforts to informally resolve the dispute were unsuccessful, and then lastly by seeking judicial relief.²¹ Ultimately, because the terms of the agreement will determine how either the CBA or HCA is to be enforced in the case of a breach of contract, CBGs or municipalities should

that “[t]he main problem in characterizing HCAs as either a proper exercise of municipal powers or a forbidden journey into the realm of contract zoning is that HCAs are all unique, and gross classifications will not suffice” before describing the differing terms of various HCAs).

¹³ Julian Gross et al., *Community Benefits Agreements: Making Development Projects Accountable* 11 (2005), https://juliangross.net/docs/CBA_Handbook.pdf (explaining that enforcement of a CBA is dependent upon the exact enforcement provisions the agreement contains).

¹⁴ *Host Community Agreement*, *supra* note 8, at 7.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ Legal Info. Inst., *injunctive relief*, CORNELL L. SCH., https://www.law.cornell.edu/wex/injunctive_relief#:~:text=Injunctive%20relief%2C%20also%20known%20as,the%20relief%20is%20not%20granted (last visited Feb. 14, 2024) (defining injunctive relief as “a remedy which restrains a party from doing certain acts or requires a party to act in a certain way”); Legal Info. Inst., *declaratory relief*, CORNELL L. SCH., https://www.law.cornell.edu/wex/declaratory_relief (last visited Feb. 14, 2024) (defining declaratory relief as “a court’s declaratory judgment stating the rights of parties without ordering any specific action or listing awards for damages”).

¹⁸ *Host Community Agreement*, *supra* note 10, at 17.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

be aware of the varying enforcement provisions that can be included in an agreement with an offshore wind energy developer.

In contrast to the aforementioned agreements that have more detailed enforcement provisions, some agreements that have been entered into between CBGs or municipalities and offshore wind energy developers do not contain any substantive enforcement provisions. For example, the Vineyard Wind & Vineyard Power CBA merely summarized the parties' individual and mutual obligations.²² Similarly, the Monhegan Plantation et al. & Maine Aqua Ventus CBA summarized the various community benefits that were agreed upon by the parties, but failed to describe how the parties could actually enforce the explicit terms of the agreement.²³ Ultimately, seeing as how a CBA or HCA will be enforced according to the terms of the agreement in the case of a breach of contract, the lack of enforcement provisions in an agreement with an offshore wind energy developer bears the risk of being viewed as an illusory promise.²⁴ Therefore, CBGs or municipalities in the state of Maine looking to enter into an agreement with an offshore wind energy developer should be aware of the risk that not including any enforcement provisions in a CBA or HCA poses.

2.1 Potential Barriers that CBGs or Municipalities Seeking to Enforce an Agreement May Encounter

There are several potential barriers that CBGs or municipalities seeking to enforce either a CBA or an HCA against an offshore wind energy developer may encounter. For instance, overall contract formation could be challenged by the offshore wind energy developer, as an enforceability concern that exists in regard to these types of agreements is whether the CBG or municipality provides any consideration to the agreement.²⁵ Importantly, there are several sections of the Restatement (Second) of Contracts (Restatement), a nonbinding but influential source,²⁶ that can be used to examine this enforceability concern. For instance, consideration is a required element of contract formation, which section 71 of the Restatement defines as a bargained for promise or performance.²⁷ The same section of the Restatement further clarifies that promises and performances are considered to be

²² *Community Benefits Agreement Summary Vineyard Power Cooperative and Offshore MW*, <https://static1.squarespace.com/static/57797a98414fb50ac42515d/t/579b845229687f6efd779504/1469809746655/Community+Benefits+Agreement+Summary.pdf> (last visited Jan. 23, 2024).

²³ See *Community Benefit Agreement*, SABIN CTR. FOR CLIMATE CHANGE L. (2017), <https://climate.law.columbia.edu/sites/default/files/content/CBAs/Monhegan%20-%20Aqua%20Ventus.pdf>.

²⁴ Legal Info. Inst., *illusory promise*, CORNELL L. SCH., https://www.law.cornell.edu/wex/illusory_promise (last visited Mar. 5, 2024) (“An illusory promise is a promise that is unenforceable due to indefiniteness or lack of mutuality, where only one side is bound to perform. The promise is normally a statement that seems to be an offer or agreement, but is so vague, ambiguous or conditional that it does not actually obligate the promisor to do anything at all.”).

²⁵ See 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. OF ENV'T L. AND POL'Y 291, 324 (2008); see also Hannah P. Stephan, *Contracting with Communities: An Analysis of the Enforceability of Community Benefits Agreements*, 40 MINN. J. OF L. & INEQ. 281, 290-1 (2022) (explaining that while the consideration given by a developer normally provides the bulk of the agreement's terms, “[t]he more contentious part of the bargain is the consideration provided by the community organizations, which is typically an agreement to not bring a lawsuit preventing the development, to publicly support the development, or simply to not publicly disparage the development,” thereby giving rise to the concern that the community organizations are not actually giving something in exchange for the developer's promises).

²⁶ Libr. of Cong., *Restatements*, LIBR. OF CONG., <https://guides.loc.gov/law-secondary-resources/restatements#:~:text=Restatements%20often%20influence%20court%20decisions,versions%20are%20available%20on%20HeinOnline.> (last visited Jan. 25, 2024).

²⁷ Restatement (Second) of Contracts § 71(1) (Am. Law Inst. 1981).

bargained for if the parties seek out and give either the promise or the performance in exchange for the other party's promise.²⁸ Thus, the provisions of the Vineyard Wind & Barnstable, MA HCA describing all the ways in which the town agrees to support Vineyard Wind,²⁹ especially the town's specific agreement to support the individual and comprehensive zoning exemptions that the developer is seeking as well as to withdraw any prefiled testimony with the Siting Board concerning the zoning exemptions,³⁰ are likely to constitute valid consideration since the provisions can arguably be characterized as the town's overall promise to perform.³¹ Furthermore, section 79 of the Restatement importantly clarifies that the values of the parties' promises are not required to be equal.³² In fact, "courts do not [typically] inquire into the adequacy of consideration," since the parties are thought to be in a better position to assign value to their promises³³ and because it is often difficult for courts to place the parties' promises in terms of market value.³⁴ Thus, given that the value of Barnstable, MA's agreement to withdraw any prefiled testimony pertaining to Vineyard Wind's seeking of various zoning exemptions will be difficult for a court to ascertain, but is likely to be viewed as invaluable to Vineyard Wind,³⁵ the town's promise will be likely to constitute valid consideration. Lastly, section 80 of the Restatement makes clear that a single promise can be exchanged for several promises, so long as the single promise constitutes valid consideration.³⁶ While it is unlikely that agreements entered into for offshore wind energy development projects will contain the exchange of a single promise for several, since the promises made by the CBG or municipality are likely to constitute valid consideration, then "the fact that one of these actions may be promised in exchange for several actions on the part of the developer would not render the consideration invalid."³⁷ Ultimately, taking the aforementioned sections of the Restatement into account, the enforceability concern that exists in regard to whether a CBG or municipality would provide adequate consideration in either a CBA or HCA with an offshore wind energy developer is likely to be overcome.

In the event that an offshore wind energy developer attempts to assign their rights and/or delegate their duties under the contract to another party, determining whether the assignment and/or delegation is enforceable, and whether it binds the other party to the contract, is another potential barrier that CBGs or municipalities seeking to enforce an agreement may encounter.³⁸ Yet, there are

²⁸ Restatement (Second) of Contracts § 71(2) (Am. Law Inst. 1981).

²⁹ See generally *Host Community Agreement*, *supra* note 10, at 9-11.

³⁰ *Id.* at 9.

³¹ See Salkin & Lavine, *supra* note 25, at 325 ("Under contract theory, which does not generally inquire into the adequacy of consideration, promises not to oppose developments are likely to be deemed supported by consideration.").

³² Restatement (Second) of Contracts § 79 (Am. Law Inst. 1981).

³³ Restatement (Second) of Contracts § 79 comment c (Am. Law Inst. 1981).

³⁴ Stephan, *supra* note 25, at 297.

³⁵ See *id.* (explaining how the value of public testimony is difficult to ascertain and tends to vary on a case-by-case basis, because "if the community organization testimony is essential to gaining a building permit, that may be invaluable to a developer," and in other instances, the public testimony may be a less important factor to consider).

³⁶ Restatement (Second) of Contracts § 80(1) (Am. Law Inst. 1981) ("There is consideration for a set of promises if what is bargained for and given in exchange would have been consideration for each promise in the set if exchanged for that promise alone.").

³⁷ Stephan, *supra* note 25, at 297.

³⁸ See Salkin & Lavine, *supra* note 25, at 326 ("Enforceability questions may also center on which parties are bound by developers' promises. Many CBAs contain language indicating an intent that a CBA's provisions will be binding upon the development's future tenants, contractors or buyers. If a CBA does not require these future parties to sign the original CBA or a similar agreement with the developer, community groups may have difficulties enforcing the CBA's terms against developers' subcontractors, tenants and successors in interest."). See also Gross, *supra* note 13, at 71 (describing the various problems that can arise when "lengthy chain[s] of contracts [are] involved" in CBAs); Stephan,

two sections of the Restatement that can be used to examine this enforceability concern. Section 318 of the Restatement provides that delegation of contractual duties is generally allowed unless either the delegation goes against public policy or if the non-delegating party has a substantial interest in the delegating party's performance of the duty.³⁹ Additionally, section 323 of the Restatement provides that explicit terms of a contract manifesting the non-delegating party's assent to the future delegation of a duty will be considered effective.⁴⁰ Thus, so long as public policy considerations do not prohibit the delegation and/or the CBGs or municipalities do not have a substantial interest in the offshore wind energy developer performing the duty, CBAs and HCAs containing language that clearly address any potential successors and assigns, such as the provision in the Vineyard Wind & Barnstable, MA HCA describing how the agreement will be "binding upon and shall inure to the benefit of each of the [p]arties as well as their respective affiliates, successors, and assigns,"⁴¹ are likely to be deemed enforceable, meaning that the offshore wind energy developer would be able to successfully delegate their duties under the contract.⁴² Meanwhile, in regard to CBAs and HCAs that fail to contain any language addressing potential successors and assigns to the agreement, such as the Vineyard Wind & Vineyard Power CBA,⁴³ any proposed assignments and/or delegations made by the offshore wind energy developer would likely be deemed unenforceable, as the Restatement does not provide for the automatic delegation of duties. Rather, the offshore wind energy developer would likely be deemed to have breached the contract by attempting to delegate their duties.⁴⁴ Ultimately, taking the aforementioned sections of the Restatement into account, the enforceability concern that exists in regard to whether an offshore wind energy developer's assignment and/or delegation is enforceable and whether it binds the other party to the contract is likely to be determined based on the exact terms of the contract itself.

Determining whether the CBA or HCA grants various third-party beneficiaries standing to enforce the agreement is another potential barrier that CBGs or municipalities seeking to enforce an agreement against an offshore wind energy developer may encounter.⁴⁵ Nevertheless, there are several sections of the Restatement that can be used to examine this enforceability concern. Section 302 of the Restatement provides that, unless otherwise agreed, intended beneficiaries to a contract exist where "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and the relevant circumstances are suggestive of the contracting parties' intention to "give the beneficiary the benefit of the promised performance."⁴⁶ Thus, because the terms of the South Fork Wind & East Hampton, NY HCA explicitly disclaimed any intended

supra note 25, at 290 ("The second issue is how to treat any subsequent parties to the agreement in the event that a developer sells or leases space.").

³⁹ Restatement (Second) of Contracts § 318(1)-(2) (Am. Law Inst. 1981).

⁴⁰ Restatement (Second) of Contracts § 323(1) (Am. Law Inst. 1981).

⁴¹ *Host Community Agreement*, *supra* note 10, at 20.

⁴² Stephan, *supra* note 25, at 303. *See generally* Restatement (Second) of Contracts § 318(3) (Am. Law Inst. 1981) (clarifying that, importantly, the delegation of contractual duties will not discharge any duty or liability of the delegating party unless the non-delegating party agrees otherwise, meaning that a CBG or municipality will still likely be able to hold the offshore wind energy developer liable under the CBA or HCA should the other party fail to perform the delegated duty).

⁴³ *See Community Benefits Agreement Summary Vineyard Power Cooperative and Offshore MW*, *supra* note 22.

⁴⁴ *See* Stephan, *supra* note 25, at 304.

⁴⁵ *Id.* at 290. *See also* Salkin & Lavine, *supra* note 25, at 326 ("The third party beneficiary rule generally holds that a person not a party to a contract may nevertheless enforce it if the contract was made directly and primarily for his or her benefit. Still, it may be questioned whether CBAs are intended to benefit individual persons, or whether they are intended to benefit the community at large, thus making individual community members mere incidental beneficiaries incapable of enforcing CBAs.").

⁴⁶ Restatement (Second) of Contracts § 302(1)(b) (Am. Law Inst. 1981).

beneficiaries' rights,⁴⁷ any party attempting to assert a right as an intended third-party beneficiary under the agreement will likely be denied standing. Moreover, section 308 of the Restatement clarifies that identification of the intended beneficiary in the contract is not essential.⁴⁸ Despite this section of the Restatement, however, whether a third party will be deemed to be an intended beneficiary may be dependent upon state law.⁴⁹ Thus, CBAs and HCAs entered into by CBGs or municipalities and offshore wind energy developers that expressly name certain beneficiaries to the agreement but fail to name the general community and/or its members as beneficiaries might have the effect of denying the general community and/or its members standing to enforce the agreement.⁵⁰ On the other hand, CBAs and HCAs that contain no express language naming certain beneficiaries to the agreement but instead sufficiently describe the potentially impacted community might allow the community and/or its members standing to enforce the agreement.⁵¹ Ultimately, taking the aforementioned sections of the Restatement into account, the enforceability concern that exists in regard to whether various third-party beneficiaries have standing to enforce the CBA or HCA is likely to be determined based on the exact terms of the contract itself as well as relevant state law.

Lastly, seeking the contract remedy of specific performance as opposed to monetary damages, which Maine's constituents would likely prefer,⁵² is another potential barrier that CBGs or municipalities seeking to enforce either a CBA or an HCA against an offshore wind energy developer may encounter. However, there are several sections of the Restatement that can be used to examine this enforceability concern. For instance, section 357 of the Restatement describes how courts have the discretion to grant either specific performance of a contract duty or, in certain circumstances, an injunction against the breach of a contract duty.⁵³ Importantly, however, courts are very hesitant to grant the contract remedy of specific performance, as a court will not grant this remedy unless the contract's terms provide a clear basis for the court to do so.⁵⁴ In fact, section 359 of the Restatement provides that specific performance or an injunction will only be ordered in instances where monetary damages would not be deemed an adequate remedy for the non-breaching party.⁵⁵ As such, courts will use various factors in determining whether the award of monetary damages would be adequate, including "(a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages,

⁴⁷ *Host Community Agreement*, *supra* note 8, at 11 ("Nothing contained in this Agreement shall be construed to render or constitute any Party as the employee, agent, partner, joint venturer, or contractor of any other Party. This Agreement is made and entered into for the sole protection and legal benefit of the Parties, and their permitted successors and assigns, and no other person or entity shall be a direct or indirect legal beneficiary of, or have any direct or indirect cause of action or claim in connection with, this Agreement.").

⁴⁸ Restatement (Second) of Contracts § 308 (Am. Law Inst. 1981).

⁴⁹ Stephan, *supra* note 25, at 305 ("A Fifth Circuit decision provided that Texas law did not allow treatment of someone as a third party when the contract explicitly included other parties but excluded the party in question. Other courts have not addressed this specific question, but the Texas decision is indicative that the failure to include a particular group in a list of intended beneficiaries could be evidence that they are not in fact intended beneficiaries.").

⁵⁰ *Id.* ("[T]he exclusion of community members may prohibit them from being able to enforce agreements.").

⁵¹ *See id.* at 308 ("Describing the impacted 'community' specifically may be helpful in the event a third-party community member hopes to bring a claim to enforce a CBA. Some CBAs do define community, or they reference a specific geographic area in the contract. In such agreements, there is a strong argument based on the Restatement that third parties could bring a claim.").

⁵² This information is from meetings with Maine Sea Grant.

⁵³ Restatement (Second) of Contracts § 357 (Am. Law Inst. 1981).

⁵⁴ Restatement (Second) of Contracts § 362 (Am. Law Inst. 1981).

⁵⁵ Restatement (Second) of Contracts § 359(1) (Am. Law Inst. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.")

and (c) the likelihood that an award of damages could not be collected.”⁵⁶ Thus, even though the South Fork Wind & East Hampton, NY HCA includes a provision granting the non-breaching party the ability to pursue any action to enforce performance⁵⁷ and the Vineyard Wind & Barnstable, MA HCA provides that the town’s remedies include seeking injunctive and declaratory relief,⁵⁸ a court would still be unlikely to grant an order for specific performance unless it can be established that an award of monetary damages would be insufficient. Ultimately, taking the aforementioned sections of the Restatement into account, the enforceability concern that exists in regard to CBGs or municipalities seeking the contract remedy of specific performance from an offshore wind energy developer is unlikely to be overcome.

2.2 Strategies for Overcoming Potential Enforcement Barriers

There are several proactive approaches that CBGs or municipalities seeking to enforce an agreement against an offshore wind energy developer could include in agreements in order to combat the aforementioned potential enforcement barriers. For instance, it is recommended that CBAs and HCAs “contain carefully-drafted provisions describing how commitments will be monitored and enforced.”⁵⁹ Since CBAs and HCAs are to be enforced according to the terms of the agreement,⁶⁰ the inclusion of specific enforcement provisions will allow the CBGs or municipalities to dictate what remedies can be sought in the case of a party’s breach. In addition, it is also recommended that commitments made by the developer in the agreement be made applicable to successors and assigns,⁶¹ which are provisions that are likely to be held enforceable under the Restatement. Furthermore, CBAs and HCAs are encouraged to be incorporated into the development agreement, which is an agreement made between the developer and the city or county that outlines any subsidies the city or county agrees to provide the developer with,⁶² as agreements that are

⁵⁶ Restatement (Second) of Contracts § 360 (Am. Law Inst. 1981).

⁵⁷ *Host Community Agreement*, *supra* note 8, at 7.

⁵⁸ *Host Community Agreement*, *supra* note 10, at 17.

⁵⁹ Gross, *supra* note 13, at 14. *See also* Matthew Eisenson & Romany M. Webb, *Expert Insights on Best Practices for Community Benefits Agreements*, Sept. 2023, at 1, 12 (recommending that CBAs, including Good Neighbor Agreements and HCAs, be drafted to include provisions that relate to monitoring the parties’ compliance and provisions that will “hold parties accountable for non-compliance”); Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENV’T L. REV. 543, 553-4 (2010) (recommending that CBAs “include specific deadlines for the developer to comply with its commitments (i.e., incorporating a specific date by which a new park would be constructed after the development of new residential/commercial buildings are completed)” so that the agreement is not an illusory promise). *See generally* The Pub. L. Ctr., *Summary and Index of Community Benefit Agreements*, THE PUB. L. CTR. 36 (2011), <https://law.tulane.edu/sites/law.tulane.edu/files/Files/TPLC/summary-and-index-community-benefit-agreements.pdf> (describing the Shaw District CBA as weak, especially the agreement’s “monitoring and enforcement provisions, which gives the developer over 2 months to correct any failures to provide community benefits”); *Atlantic Yards now a prime example of a failed Community Benefits Agreement. No comment from arena, or CBA signatories. Spin from new developer.*, ATL. YARDS/PAC. PARK REP. (June 21, 2022), <https://atlanticyardsreport.blogspot.com/2022/06/atlantic-yards-now-prime-example-of.html> (highlighting that the agreement’s required Independent Compliance Monitor has not yet been hired, which arguably hinders ultimate enforcement of the agreement by the contracting parties).

⁶⁰ Gross, *supra* note 13, at 11 (explaining that enforcement of a CBA is dependent upon the exact enforcement provisions the agreement contains).

⁶¹ *Id.* at 14. *See also* Fazio & Wallace, *supra* note 59, at 553 (“If there are community hiring and procurement requirements for the project, the CBA should be crafted to ensure that those requirements are enforceable against the developer’s subcontractors and tenants who may be doing most of the procurement and hiring.”). *See generally* Neil deMause, *When Developers Promise Community Benefits, Who Holds Them Accountable?*, CITY LIMITS (June 17, 2022), <https://citylimits.org/2022/06/17/when-developers-promise-community-benefits-who-holds-them-accountable/> (“The Atlantic Yards CBA lacks a successor clause indicating who would take on responsibility if the project was sold, making it nearly impossible to hold the current owners responsible even if someone tried to enforce the CBA’s provisions.”).

⁶² Gross, *supra* note 13, at 9.

incorporated into the development agreement can be enforced not only by the party that signs the agreement, but also by the city or county providing the subsidies.⁶³ Ultimately, given that the above recommendations all pertain to the careful drafting of the CBA or HCA or to the agreement's incorporation into another type of agreement, it is imperative that CBGs or municipalities retain legal counsel when considering entering into an agreement with an offshore wind energy developer.⁶⁴

3 An Examination of the Possible Options for Recourse that a CBG or Municipality Seeking Enforcement of an Agreement May Have When Certain In-State Legal Representation is Conflicted Out

When a party seeking to enforce either a CBA or HCA against an offshore wind energy developer tries to retain legal counsel, there is a possibility that all available law firms in the state could be prohibited from representing the CBG or municipality. Under the Maine Rules of Professional Conduct (Rules), lawyers that are licensed to practice in the state of Maine are prohibited from representing a client if the subsequent representation will result in a violation of the Rules.⁶⁵ As such, lawyers in the state of Maine are prohibited from representing a client “with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.”⁶⁶ A prospective client is defined as an individual that engages a lawyer in a discussion regarding the possibility of entering into a client-lawyer relationship for a specific matter.⁶⁷ Furthermore, once an individual lawyer has been disqualified from providing the CBGs or municipalities with legal representation, the lawyer's firm will also be disqualified from providing legal representation to the affected CBGs or municipalities.⁶⁸ Thus, if an offshore wind energy developer were to become a prospective client to all of the state's major law firms, then the firms and the lawyers therein would be prohibited from representing the affected CBGs or municipalities. Interestingly, however, it may be possible for either the conflicted-out lawyer or its firm to provide the CBGs or municipalities with legal representation against the offshore wind energy developer. Legal representation will be permitted so long as either (1) both parties to the dispute have given their informed consent, confirmed in writing to the lawyer's representation, or (2) the disqualified lawyer, among other requirements, is both timely screened from participating in the representation of the CBG or municipality and is provided with no fees resulting from said representation, and the prospective client is given adequate notice of the representation.⁶⁹ Overall, while the Rules do permit either a conflicted-out lawyer or law firm to represent the affected CBGs or municipalities against an offshore wind energy developer, it is unlikely that the parties to the dispute would either choose to consent to the lawyer's representation or wish to proceed with the law firm's representation.

⁶³ *Id.* at 11. See also Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements* 17 J. OF AFFORDABLE HOUS. AND CMTY. DEV. L. 113, 117 (2008) (“The [Staples Center] CBA was also incorporated into the development agreement between the developer and the city's redevelopment agency, making it enforceable by the city as well as by the contracting community groups.”).

⁶⁴ See Gross, *supra* note 13, at 23 (describing how it is pertinent “to have the fine print of the CBA finalized by a trusted attorney, to make sure the contract reflects both the substance and spirit of the negotiations”); see also Eisensohn & Webb, *supra* note 59, at 10 (“Because CBAs are legally binding contracts, any party to a CBA should be represented by legal counsel.”).

⁶⁵ ME. RULES OF PRO. CONDUCT r. 1.16(a)(1).

⁶⁶ ME. RULES OF PRO. CONDUCT r. 1.18(c).

⁶⁷ ME. RULES OF PRO. CONDUCT r. 1.18(a).

⁶⁸ See ME. RULES OF PRO. CONDUCT r. 1.18(c).

⁶⁹ ME. RULES OF PRO. CONDUCT r. 1.18(d).

There are several options for representation that a CBG or municipality seeking enforcement of either a CBA or HCA may have when all the state’s law firms have been conflicted out. For instance, legal representation from an out-of-state lawyer and/or law firm can be retained, so long as the lawyer and/or the firm is granted pro hac vice admission to practice in the state of Maine.⁷⁰ Maine does permit pro hac vice admission for out-of-state lawyers, but the out-of-state lawyer is required to work with local counsel for the duration of the matter.⁷¹ Several benefits exist in regard to CBGs or municipalities seeking out-of-state legal representation. An out-of-state lawyer could provide the party with the necessary subject matter expertise for their claim since presumably all capable in-state subject matter experts would be disqualified from providing legal representation. Moreover, Maine’s requirement that out-of-state lawyers work with local counsel could also benefit the CBG’s or municipality’s case against the offshore wind energy developer, as retaining local counsel would ensure that the party is being represented by someone with an adequate understanding of the local jurisdiction’s courts’ rules.⁷² However, given that a major disadvantage to retaining out-of-state legal representation is the additional costs that the CBG or municipality might bear,⁷³ there are other options for representation that a CBG or municipality seeking enforcement of either a CBA or HCA might explore.

Other options for representation that a CBG or municipality seeking to enforce either a CBA or HCA might consider include seeking legal representation and/or assistance from either: (1) a smaller, in-state law firm; (2) an in-state solo practitioner; (3) a public interest law firm;⁷⁴ or (4) a legal assistance clinic.⁷⁵ Each option comes with its own benefits. For example, retaining legal representation from a smaller, in-state law firm has the notable benefit of providing the CBG or municipality with more attention and service to their claim, as the firm “typically [has] a smaller caseload, [thereby] allowing them to dedicate more time and effort to each client.”⁷⁶ Similarly, retaining legal representation from an in-state solo practitioner provides the CBG or municipality

⁷⁰ Rachel V. Rose & Robert J. Rando, *Attorney Admissions: Identifying and Working with Local Counsel and Pro Hac Vice Admissions*, FED. BAR ASS’N 49 (Sept. 2016), <https://www.fedbar.org/wp-content/uploads/2016/09/ProHacVice-pdf-1.pdf> (“Latin for ‘this time only,’ *pro hac vice* ‘enables an out-of-state lawyer [to] be admitted to practice in a local jurisdiction for a particular case only.’”).

⁷¹ *Pro Hac Vice Admission*, ME. BD. OF OVERSEERS OF THE BAR, https://www.mebaroverseers.org/attorney_services/registration/pro_hac_vice_admission.html (last visited Jan. 29, 2024).

⁷² See Rose & Rando, *supra* note 70, at 50 (describing “[l]ocal practitioners[?] familiar[ity] with the particular district court’s local rules and the individual judge’s rules of practice” as beneficial and necessary). See also *id.* at 50-1 (“[T]he court law clerks and judges are well aware of the practitioners who appear before them on a regular basis. It is preferable for the court to have a favorable predisposition toward the attorney who is functioning as legal counsel.”)

⁷³ *Id.* at 51.

⁷⁴ *Public Interest Employment Breakdown*, YALE L. SCH., <https://law.yale.edu/student-life/career-development/alumni/career-pathways/public-interest#:~:text=A%20public%20interest%20law%20firm,rather%20than%20to%20make%20money>. (last visited Jan. 29, 2024) (“A public interest law firm is a private, for-profit association of lawyers, like any other private law firm. Public interest law firms are distinguished from other private firms in that their primary mission is to assist underrepresented people or causes, rather than to make money.”).

⁷⁵ Sammy Allen, *Legal Clinics: What Law School Students Should Know*, U.S. NEWS (May 19, 2023, 9:32 AM), <https://www.usnews.com/education/articles/legal-clinics-what-law-school-students-should-know> (“A legal clinic is a law school program that allows students to get practical experience providing legal aid, often to underrepresented individuals or organizations, on real cases in a specific topical area under the supervision of professors. The legal services are provided at reduced or no cost.”).

⁷⁶ *Local Attorneys vs. Massive Law Firms: Why Going Local Makes a Difference*, COHEN & SINOWSKI PERS. INJ. L. FIRM (May 8, 2023), <https://www.cohensinowski.com/2023/05/08/local-attorney-advantages/>.

with the benefits of the lawyer’s “personal approach, [overall] availability to clients, and lower fees compared to larger law firms.”⁷⁷ However, a major drawback associated with retaining a solo practitioner is the lawyer’s inability to handle a complex matter.⁷⁸ Altogether, there are various pros and cons to the available options for recourse that a CBG or municipality may have that should be explored when seeking legal representation to help enforce an agreement against an offshore wind energy developer.

4 Conclusion

Overall, as the development of offshore wind energy continues to increase and agreements between CBGs or municipalities and offshore wind energy developers become more commonplace, concerns have been raised regarding how these agreements will be enforced and whether a CBG or municipality seeking enforcement of the agreement would be able to retain adequate legal representation. Ultimately, CBAs and HCAs are legally binding and enforceable contracts that present several enforcement barriers. However, there are several recommended tactics that CBGs or municipalities could implement in order to overcome these barriers. In addition, there are several options for recourse that a CBG or municipality seeking to enforce an agreement against an offshore wind energy developer may have when all of the state’s major law firms have been conflicted out of representing the party, and there are various pros and cons associated with each option that should be considered.

⁷⁷ Maria Laus, *Solo Practitioner Attorney: Everything You Need to Know*, LAW CROSSING (Feb. 1, 2023), <https://www.lawcrossing.com/article/900053799/Solo-Practitioner-Attorney-Everything-You-Need-to-Know/#:~:text=Introduction-,A%20solo%20practitioner%20attorney%20is%20a%20lawyer%20who%20operates%20their,management%20to%20billing%20and%20marketing.>

⁷⁸ *Id.*