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Public Development for Professional Sports Stadiums

Irwin P. Raij and Alexander Chester

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Abstract and Keywords

This chapter discusses the development and financing for stadiums by the teams in the largest American professional sports leagues, including MLB, the NFL, the NBA, the NHL, and MLS, and the role of government in that process. With the exception of antitrust issues, there may be no aspect of American sports in which the government is as involved as the construction and financing of the stadiums in which the games are played. Stadium development, initially a private matter, entered the public interest because of the dramatic growth in construction costs coupled with the appearance of economic and societal benefits to a region that hosts a major league team. It will come as no surprise that venue projects are challenging and often controversial. This chapter analyzes how teams, leagues, and government entities negotiate for venue development projects, touching on the legal, practical, and political challenges that have emerged over the years.

Keywords: sports, sports law, stadium development, venue development, stadium financing, public financing, public-private partnership, ancillary development

1. Introduction

This chapter discusses the process of development and financing for stadiums used by the teams in the largest American professional sports leagues, including Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), and Major League Soccer (MLS), and the role of government in that process. With the exception of antitrust issues, there may be no aspect of American sports in which the government is as involved as the construction and financing of the stadiums in which the games are played. Stadium development, which was initially a private matter, entered the public interest because of the dramatic growth in construction costs coupled with the appearance of economic and societal benefits to a region that hosts a major league team. It will come as no surprise that venue projects are challenging and often controversial. This chapter analyzes how teams, leagues, and government entities negotiate for venue development projects. The analysis touches on the legal, practical, and political challenges that have emerged over the years. Can the site be acquired? Can it be entitled on zoned property? Is financing available? Are public funds available? Is the project in compliance with league rules? Are there environmental challenges? What kind of opposition, if any, will arise if public funds are invested? These are the questions and challenges that force parties to become more creative and forward thinking to avoid failure. Stadium financing is also unique because negotiations are open to public approval and scrutiny. Teams and governments cannot simply negotiate a good deal; they must be able to sell it to voters. Given the fluctuations in the economy as well as the public and political reception to public development, teams and their counsel must always be ready for unique and novel approaches to complete a successful stadium project.

2. History of Stadium Development

The rise in stadium development has mirrored the rise in professional sports in American life. Professional baseball emerged in the 1860s, but it wasn't until the late 1880s that the National League (NL) and the American Association began drawing a critical mass of spectators.

2.1. Emergence of Major League Baseball Ballparks

The rise of baseball as a spectator sport required the games to be played in specially designed ballparks that could seat thousands of fans rather than public parks. The first such ballpark was the Philadelphia Base Ball Grounds (later called the Baker Bowl), which opened in 1887 as the home to the NL's Philadelphia Phillies with a capacity of 12,500. The ballpark was constructed by the team's owners at a cost of $80,000 ($2.1

million in 2017 dollars; the exponential increase in construction costs is discussed in section2.3 in this volume) and was quickly followed by similar ballparks, including the Polo Grounds in New York (1890, which was actually initially built not for baseball but for polo), League Park in Cleveland (1891), and Robison Field in St. Louis (1893) (Jordan, 2010).

In the first fifteen years of the new century, a booming economy coupled with the emergence of the American League (AL) and the World Series to explode baseball's popularity, and teams built themselves ballparks across the country, including Shibe Park in Philadelphia (1909, $301,000 ($8 million in 2017 dollars) (Kuklick, 1991)), Sportsman's Park in St. Louis (1909, $300,000 ($8 million in 2017 dollars)), Forbes Field in Pittsburgh (1909, $1–2 million ($26–$53 million in 2017 dollars) (Leventhal and MacMurray, 2000)), Comiskey Park in Chicago (1910, $750,000 ($19 million in 2017 dollars)), Griffith Stadium in Washington (1911, $100,000 ($2.6 million in 2017 dollars) (Snyder, 2004)), Fenway Park in Boston (1912, $600,000 ($14.9 million in 2017 dollars) (Stout, 2011)), Crosley Field in Cincinnati (1912, $225,000 ($5.6 million in 2017 dollars) (Rhodes and Erardi, 1995)), Tiger Stadium (then known as Navin Field, 1912, $300,000 ($7.5 million in 2017 dollars)), Ebbets Field in Brooklyn (1913, $750,000 ($18 million in 2017 dollars) (Hollander, 2012)), Wrigley Field in Chicago (1914, $250,000 ($6 million in 2017 dollars)), and Braves Field in Boston (1915, $600,000 ($14.3 million in 2017 dollars)). Each of these venues was privately developed by team owners who maintained complete control over their facilities and all revenues they generated. Baseball was still the only team sport in America attracting mass crowds in the early decades of the twentieth century, but as other sports and leagues developed, they would play in the existing baseball stadiums.

2.2. The Rise of Public Investment

The first stadium built with public funds was City Stadium in San Diego, built in 1914 as part of the 1915 Panama-California Exposition, and primarily used for track and field events (Amero, 2013). City Stadium was followed by the Los Angeles Coliseum, which cost less than $1 million ($13.4 million in 2017 dollars) (Benson, 1989). It was constructed in 1922–1923, in part to help Los Angeles compete for the Olympic Games, which the Coliseum would eventually host in 1932 (and again in 1984). The Coliseum immediately became the home of the University of Southern California Trojans football team, and other tenants arrived in succeeding years, including the University of California-Los Angeles Bruins football team, the Los Angeles Rams, the Los Angeles Raiders, and other professional football, baseball, and soccer teams.

During the Great Depression venue construction was seen as a public works project. The Works Progress Administration oversaw the construction of 2,302 stadiums, grandstands, and bleachers, including War Memorial Stadium (originally Roesch Memorial Stadium) in Buffalo (1937), Roosevelt Stadium in Jersey City, New Jersey (1937), and the Rubber Bowl in Akron, Ohio (1940) (Leighninger, 1996). With the belief that stadiums and the teams they attracted as tenants generated revenue and created jobs, cities began to invest further in stadiums, especially as the economy boomed in the aftermath of World War II. As Americans moved from industrial centers to suburbs or younger cities to the south and west, cities and states discovered that professional sports teams were an avenue of competition and a point of civic pride. In many instances, these teams gave midsize cities national media coverage they would otherwise not receive.

By the 1950s public investment in stadiums was the norm, usually via tax-exempt bonds issued by municipalities. From the 1950s through 1986, major league stadiums were almost exclusively built with financing from the public sector (e.g., twenty-seven of the thirty MLB/NFL stadiums built between 1953 and 1970) (Kishner, 2011). This shift was precipitated by four interrelated factors: economic prosperity, expansion of the major leagues (in the 1960s the NFL expanded from twelve to twenty-six teams and MLB expanded from sixteen to twenty-four teams; the NBA expanded from ten teams in 1967 to twenty-two teams in 1976), the threat of losing a team to a new city offering a newer and more favorable stadium (between 1953 and 1963 six of the sixteen MLB teams and seven of the nine NBA teams relocated), and skyrocketing construction costs. Even as the economy slowed in the 1970s, public investment of major venues was seen as important development for the broader community, including employing idle workers.

The primary benefit of public investment to teams and leagues was the minimal level of risk: teams took on no debt and paid low rent. But teams also lacked complete control over venues and their revenue streams. With the public developing and owning venues, the public cut costs where possible, and venues tended to be multiuse, shared by MLB and NFL (and college football and soccer) teams, with arenas shared by NBA and NHL teams. This trend would continue until the 1990s, when teams began to demand new facilities that granted the teams more control over facility operations to control costs and the design process to improve the fan experience, and broader rights to revenue streams generated by the venue (partly as a result of free agency and the attendant escalation of player salaries).

2.3. Skyrocketing Construction Costs

The dramatic increase in construction costs can best be understood by looking at the relative costs for construction of a given city’s MLB and NFL stadiums over the past century (*all of the figures in this section, 2.3 and all its subsections, are adjusted for inflation in 2017 dollars*).

2.3.1. New York City

Yankee Stadium was built with private funds in 1923 for $43.9 million (Durso, 1972). New York City official Robert Moses offered Dodgers owner Walter O’Malley a publicly owned stadium in Queens in the late 1950s, which the city would rent to the team, with the city retaining ancillary revenue to pay off the construction bonds. But despite the growing trend for public development, O’Malley preferred to fund his own construction costs so that he could own the ensuing stadium outright and control all of its revenue. When Los

Angeles offered O'Malley complete ownership of a stadium, he moved the team. The Dodgers' biggest rival was the New York Giants, and O'Malley thought it would be a wise business move to have a second team in California, so he convinced Giants owner Horace Stoneham to move his team to California as well. With the departure of the Dodgers and Giants, New York was left without NL baseball in 1958, and the city built Shea Stadium for the expansion Mets in 1964 for $187 million.

New York's NFL Giants and Jets shared space with MLB's Yankees and Mets, respectively, until Giants Stadium was opened in 1976 in East Rutherford, New Jersey for $328 million (Bagli, 2013). The stadium was built by the New Jersey Sports and Exposition Authority (NJSEA), an independent authority established by the state. (For further discussion as to why governments form such authorities, see section 3.2, in this chapter) After decades of discussions related to different sites around New York City (including the Meadowlands in New Jersey and Manhattan's West Side for the Yankees and Nassau County, Long Island, Sunnyside Yard in Queens, and the West Side in Manhattan for the Mets), the Yankees and Mets each received new stadiums next to their existing ones in 2009 (each stadium is owned by the team). The stadiums were built simultaneously for a total cost of $3.5 billion ($2.5 billion for Yankee Stadium and $1 billion for Citi Field), including $2 billion in public subsidies, which included the sale of New York City municipal bonds, to be repaid by the teams with interest, with the payments offsetting property taxes for the stadiums' lifetimes. (For further discussion of such payments, see section 3.2.)

The Giants and Jets moved into a new stadium in East Rutherford when MetLife Stadium opened in 2010. A plan for public financing for a Jets stadium on Manhattan's Upper West Side collapsed in 2005 after New York state representatives rejected the proposed state funding, resulting in the Jets joining the Giants to co-own MetLife Stadium. The stadium itself was privately financed by the teams (at a total cost of $1.76 billion), but the land was owned by the NJSEA (New Jersey Sports and Exposition Authority). The state also gave the teams twenty acres each for training facilities, the right to seventy-five acres for further development, and hundreds of acres of parking surrounding the structure. The teams no longer share revenue from suites and club seats, parking, naming rights, and other events with the state, but they pay a total of approximately $6.3 million in annual rent and other expenses. The state also contributed $265 million toward infrastructure, roadways and public transportation (Bagli, 2013).

2.3.2. Baltimore

The Baltimore Colts joined the NFL in 1953 and the Baltimore Orioles moved from St. Louis (where they were the Browns) in 1954 and they shared Memorial Stadium, built in 1950 during the public development era for $65 million. Camden Yards opened for the Orioles in 1992 and was considered the first of the baseball-specific ballparks that MLB teams have moved into over the past twenty-five years. Camden Yards was built for $361 million, 96% of which was publicly funded through lease revenue bonds and revenue notes and lottery funds (Kilar, 2011). Although the Colts moved to Indianapolis in 1984, the Cleveland Browns moved to Baltimore in 1996 and became the Ravens, largely because 90% of the $323 million construction cost for the now-named M&T Bank Stadium came from the public sector.

2.3.3. Washington

As mentioned in section 2.1 in this chapter, Griffith Stadium was built by the Washington Senators in 1911 for $2.6 million and also became home to the Washington Redskins when the NFL team moved from Boston (where they were the Braves) in 1937. Robert F. Kennedy Memorial Stadium (RFK Stadium) was built for the two teams to share in 1961 for $192 million. With teams demanding single sport facilities, which they could design themselves to improve the fan experience and maximize revenue, the Redskins paid for 72% of FedEx Field, which opened in Landover, Maryland, in 1997 and cost $374 million. The Senators moved to Minnesota in 1961 where they became the Twins, and the replacement Senators moved to Arlington, Texas in 1972 where they became the Rangers. Washington finally got its own baseball team again in 2005, when the Montreal Expos moved to RFK Stadium and became the Nationals. Nationals Park opened in 2008 as a baseball-specific stadium at a cost of $918 million. It was publicly financed through general obligation bonds and a special higher sales tax for concessions, beverages and tickets on the nineteen-acre stadium and parking site, though the team also pays rent.

2.3.4. Minneapolis

With an interest in attracting either an MLB team from the East Coast or an expansion team, Metropolitan Stadium was publicly financed in Bloomington, Minnesota (which was near the airport and considered equidistant between the downtowns of the rival Twin Cities of Minneapolis and St. Paul) in 1956 for $75 million. In 1961 it became the home of the Twins and the NFL's expansion Minnesota Vikings. The Hubert H. Humphrey Metrodome was publicly financed in downtown Minneapolis in 1982 for $181 million. It hosted the Twins, Vikings, and the University of Minnesota Gophers football team. Each team has since moved into its own facility. The Gophers moved into TCF Bank Stadium, an on-campus football stadium that cost $339 million. A public university, Minnesota's stadium was primarily financed by the state (plus certain student fees) (Muret, 2009). The Twins moved into Target Field in 2010, which cost $598 million, of which 64% was born by Hennepin County, with the remainder paid for by the team (Mannix, 2009). The Vikings moved into U.S. Bank Stadium in 2016, which cost over $1 billion, split between the team (53%), state (33%), and city (14%) (Associated Press, 2015).

2.4. Government Reaction: The Tax Reform Act of 1986

Government concern over corporate use of public financing led Congress to pass the Revenue and Expenditure Control Act of 1968.[1] The statute intended to curb the proceeds from tax-exempt bonds from flowing to private activities. In order to avoid classification as a private activity bond, a project needed to meet either of two tests: (1) “Private Business Use Test”: 25% or less of the bond proceeds were to be used by a private business; or (2) “Private Security Test”: 25% or less of the debt service was secured by the property used directly or indirectly in the private business. However, sports facilities were exempt from the Revenue and Expenditure Control Act under subsection 103(c)(4)(B), so the statute had no effect on stadium development. The fact that sports venues were excluded from a statute initially intended to target them is an example of the political challenge surrounding this issue. While public and political dissent to public investment in sports stadiums exists, the popularity of sports teams also results in political pull in the opposite direction. To many elected officials, the only thing worse than investing public funds in a stadium is being seen as responsible for a team moving to another city.

The next legislative shot across the bow of stadium development came from the Deficit Reduction Act of 1984,[2] which denied tax exemption for bonds issued to finance “sky boxes” in sports venues. However, the real challenge arose as a result of the Tax Reform Act of 1986,[3] which lowered the threshold for the Private Business Use and Private Security Tests from 25% to 10% and removed the exemption for sports facilities. Though venues already in a planning stage would be grandfathered in, the clear legislative intent was to put an end to public financing of stadiums under the traditional model. No stadium project could realistically meet the Private Business Use Test, since the purpose of the bonds would be for the stadium. However, stadium projects could creatively pass the Private Security Test as long as at least 90% of the debt was serviced using non-stadium revenues. In other words, rent payments from the team to the public jurisdiction would have to be capped at 10% of the bond revenue. Thus, despite the intent of the Tax Reform Act to limit public financing for stadiums through tax-exempt bonds and end a certain form of public subsidy, the result was an *increase* in public funding by limiting the amount of stadium revenue that could be used to repay debt on the tax-exempt bonds. A record pace of stadium development ensued, with MLB, NFL, NBA, and NHL teams receiving more than $5.2 billion in tax-exempt bond issues in the 1990s (Kishner, 2011). That figure grew to $12 billion between 2000 and 2010 (Long, 2013) and $16.9 billion between 2006 and March 2016, according to Thomson Reuters (Fallor, 2016).

3. Variety of Sources: The Emergence of Complex Development Transactions

The confluence of the new legislation, rising construction costs, and the growing desire of teams to build top-of-the-market predominantly single-use stadiums that allow them to generate more revenue, control costs to compete in the industry, and allow for more team control have forced teams and local government to work more closely together to develop stadiums.

3.1. Sources of Team Contribution

Teams have a number of sources of private financing: contributions from the team and the league (e.g., the NFL has established a "G-4" stadium fund under which the league can loan a team up to $200 million, based on project and team qualifications) and loans and debt. Land and debt are secured by contractually obligated income, such as broadcast and cable rights, advertising and naming rights agreements, club seats and luxury suites, pouring rights and concession arrangements, and personal seat licenses (PSLs). If these private sources are sufficient to fund an entire venue, there is no tax increase or bond cost on taxpayers, there is less controversy and public opposition, and the team maintains complete control of all programming and revenue. The Atlanta Braves built Turner Field in 1997 with private funding and the San Francisco Giants built the now-named AT&T Park in 2000 with 96% private funding.

A PSL grants a fan an exclusive license to purchase season tickets for a given seat in a stadium. PSLs are particularly a helpful funding source for NFL stadiums, given the relative scarcity and high demand for NFL tickets compared to tickets for other major league sports. A majority of NFL stadium deals have included PSLs in the last twenty years. The Dallas Cowboys sold 56,314 PSLs for AT&T Stadium, which opened in 2009, generating total revenue of $650 million (Nelson, 2012). PSLs are advantageous to teams because their term is short—generally five years—and the team can reclaim the seats thereafter and sell new licenses. The shorter term and relatively smaller fee are more accessible to some fans. However, PSLs are inefficient for tax purposes, and the shorter term and smaller fee mean less revenue for the team. The shorter term also means that PSLs can only secure short-term debt. In addition, teams can suffer declining revenues if the PSL renewal rate decreases, and because PSL revenue declines over time, it does not help as a stadium ages and requires funding for renovations or repurposing. PSLs also alienate fans, especially because the cost of the tickets themselves is not built in.

An alternative to PSLs are equity seat rights (ESRs), a unique financing method that enables fans to obtain mortgages for purchases of a seat, rather than an outright purchase. They are more fan-friendly than PSLs because they are easier to transfer, there are no annual price increases, and the price of the ticket is built in. However, they present operational challenges to teams, including an uncertain interest rate structure for the mortgages and potential defaults on the mortgage payments. Because they are transferable teams cannot recapture revenue from the secondary market, as they can for PSLs.

Another emerging financing model has been to use the EB-5 program, created by Congress as part of the Immigration Act of 1990 to stimulate the economy through job creation and capital investment by foreign investors. Administered by the U.S. Citizenship and Immigration Services, EB-5 incentivizes foreign nationals to invest in American construction projects in exchange for an accelerated immigration process. A foreign national who commits $1 million ($500,000 in high-unemployment areas) to a development that creates ten American jobs gets a green card, which becomes permanent if the jobs exist for two years. Despite some concerns that the program is susceptible to corruption, it is politically popular (having been reauthorized nearly unanimously by Congress in 2012,[4] and again in 2016) because it comes at no cost to American taxpayers. And because the foreign nationals trade the added incentive of American immigration for very low interest rates and even lower return rates, EB-5 is an attractive financing source for developers. The program was used to finance part of the Atlantic Yards project in Brooklyn, which included the Barclays Center, home arena for the New York Islanders and Brooklyn Nets, and now is being used for stand-alone stadium projects, such as for the MLS franchises Orlando City, D.C. United, and Los Angeles FC. But the timing of EB-5 funds can be a challenge, causing several stadium project committees that planned on using EB-5 financing to decide against doing so. In addition, there is always the threat that Congress could abolish the program. On January 24, 2017, Senators Chuck Grassley (R-Ia.) and Diane Feinstein (D-Cal.) introduced a bill to abolish the program (S.232), though it seems unlikely that this legislation will become law in the near future.

These sources are far more costly to teams and their owners and may inhibit their ability to compete in their league and market. There are additional costs to the aforementioned funding sources. Most leagues have rules limiting teams from taking on debt, and teams are reticent to do so even when it is permitted. Though sports are generally insulated from economic downturns because of the passion of fans and the limited supply of major league teams, revenue opportunities such as advertising and naming rights can dip alongside the market as a whole, so teams open up their risk to the fluctuations of the economy when they depend on contractually obligated income as a source for project funding.

3.2. Sources of Public Investment

Public financing for stadiums can come in the form of nonreimbursable community contributions, such as public grants of funds, land, or both; taxable or tax-exempt bonds; or other sources described below. The loss of the federal tax exemptions can add up to 34% of the total bond costs (Phelps, 2004), and higher interest rates may be required to compensate investors for the taxes due. But given the limited payment of debt service on municipal tax-exempt bonds under the Internal Revenue Code described in section 2.4 in this chapter, occasionally teams and municipalities have agreed to publicly issued taxable bonds. For example, $191 million of taxable bonds was issued toward the construction of Globe Life Park in Arlington, Texas. The Rangers contributed approximately $30 million in cash up front and subsequently have paid approximately $3.5 million annually in rent and other expenses. The debt services payments on the bonds have been paid for with about $18 million collected annually, primarily from a one-half-cent sales tax approved by 65% of voters in a 1991 referendum (Noll and Zimbalist, 1997).

But as discussed previously, tax-exempt bonds serve as the most common form of public-sector financing for stadium projects. Tax-exempt bonds allow the government to pay below-market interest rates, which bondholders are willing to accept because the interest is exempt from federal taxes. Essentially, local governments subsidize the venue through the proceeds of the bonds they issue, while the federal government subsidizes the venue indirectly through the forfeited tax revenue. The argument in favor of the federal subsidy is that the benefits of public capital facilities extend beyond the jurisdiction that provides them (though it is hard to argue that voters in Topeka benefit from the new Yankee Stadium in the Bronx), and without public subsidy, the facilities would be provided at less than optimal levels.

As discussed in section 2.4, in order for bonds to be tax-exempt under the Private Security Test of the Tax Reform Act, team rent payments on the stadium must be capped under the lease arrangement to no more than 10% of the bond revenue. Debt service on bonds may be financed by other revenue sources: tourist taxes (i.e., hotels and car rentals in Indianapolis for Lucas Oil Stadium and in Chicago for U.S. Cellular Field, bed taxes in Miami-Dade County for Marlins Park), “sin taxes” (i.e., tobacco and alcohol taxes in Cuyahoga County, Ohio for Progressive Field and Quicken Loans Arena, state charitable gambling in Minnesota with the revenue dedicated to the bonds used for U.S. Bank Stadium), increase in sales tax (i.e., in Arlington for Globe Life Park and AT&T Stadium and in Washington for the Nationals Park use tax mentioned in section 2.3.3, in this chapter), and income surcharges on the salaries of team players and employees (though teams generally try to negotiate for protection from such future “targeted taxes” in project documents).

Despite the limitations on tax-exempt bonds, they are still the best financial option for teams pursuing stadium projects, less expensive and more efficient than the alternatives. However, there are costs: receiving any public money leads to public scrutiny, and it may require expensive public initiative campaigns. Depending on the local statutory and political climate, public approval may be necessary via referendum. Even if it is not, there are votes by city, county, or state officials. Construction may even trigger a land use review, which can require public hearings held by affected community boards, city planning commissions, and the like. In order to motivate elected officials and voters to support public funding, teams often need to cry poverty or issue veiled or explicit threats of moving the team. These actions can cost political capital and cause harm to the public perception of the team and its ownership.

There are additional sources of public-sector financing or public-private partnership that may be more palatable politically in a given jurisdiction. In addition to the taxes described two paragraphs earlier, these include capital investments to improve infrastructure and transportation upgrades, public reimbursable debts (revenue bonds) supported by stadium revenues, public rent credits or funding of stadium operation reserves, exemptions from property taxes, sales taxes, mortgage recording taxes, and mixed-use development and entitled land and ancillary development (discussed in section 3.3). Special business improvement districts can be created to increase a sales tax zone for stadium project funds. Special districts have the power to impose taxes on residents to be dedicated for one particular purpose, often infrastructure-related. They are seen as a way of fairly spreading the burden across a region that benefits from a particular project, rather than imposing the entire burden on the residents of the municipality where the project is built. Another way for governmental jurisdictions to avoid private activity bond status is to create a “stadium authority,” such as the NJSEA. A tax is not considered to be stadium-related if it is “generally applicable.” By establishing a stadium authority as a separate unit of the state government that manages several stadiums, the taxes on event tickets are generally applicable as long as they are applied to all events equally.

Until a recent Internal Revenue Service (IRS) regulation limited their availability as a source of public funding for stadium projects (Internal Revenue Bulletin, 2008), payments in lieu of taxes (PILOTs) were used when the stadium property was owned by the public and not subject to local property taxes, especially in New York City. PILOTs are defined as contracted payments made to an agency equal to the amount, or a portion of, the real property taxes that would have been levied if the project was not tax-exempt by reason of agency involvement. Under a PILOT agreement, the team would make payments using stadium revenues to pay off debt service from the public bond issue in amount equal to what it would be required to pay in property taxes were the stadium property privately owned.

New York Mayor Michael Bloomberg proposed a PILOT agreement for the stadium proposal for the New York Jets on Manhattan’s Upper West Side in 2005, and PILOTs were used in New York for Barclays Center, Citi Field, and Yankee Stadium after the IRS issued private letter rulings in 2006 which permitted tax-exempt bonds to be paid off with PILOTs rather than tax revenues collected by New York City and the State of New York.[5] The letter rulings argued that the stadiums would serve the public interest by generating significant positive economic impact on the community. But the IRS later reversed course, introducing a new regulation that dramatically curtailed the ability to use PILOTs (Internal Revenue Bulletin, 2008). Because the regulation only applied to bonds sold after October 24, 2008, however, it did not affect Barclays Center, Citi Field, or Yankee Stadium, projects whose bonds had already been sold.

Under tax-increment financing (TIF), municipalities divert future increases in property tax revenues from a defined area toward a project in the community. These types of funds are often used for roads and infrastructure. Property taxes are locked at their current rate, and as they increase, the additional amount is used to fund such projects. The idea is that school districts and other programs that depend on property tax revenues will maintain their current rate of funding, while allowing project bonds against the incremental increase. But as costs of education and other property-tax-dependent services have risen beyond the standard cost-of-living adjustments, a shortfall has developed when property taxes have been tied up by TIFs. As a result, California, the first state in the county to embrace tax-increment financing (known as CRA in California), has also become the first state to abolish it.[6] Nevertheless, it is still being used elsewhere, such as Detroit, where the Downtown Development Authority announced TIF financing for a new Red Wings hockey arena in 2014. Some $250 million of the project cost would be financed using TIF financing to repay thirty-year tax-exempt bonds purchased by the Michigan Strategic Fund, the state's economic development agency (Shea, 2014).

3.3. Ancillary Development

Regardless of where one falls on the debate discussed in section 4.1 (in this chapter) over the local job creation, business development, and economic stimulation that a stadium development brings to a city, it is self-evident that the potential for the same increases significantly when the venue is part of a larger developmental plan. One survey of economic studies concluded that a municipality will benefit from public financing for a new stadium if it is part of a larger, more comprehensive development plan, pointing to the Verizon Center in Washington, D.C. as an example (Johnson, 2011). The Verizon Center opened in the Chinatown section of Washington in 1997. Prior to the arena's construction, the blighted neighborhood had virtually no tourist or entertainment activity. Currently the Verizon Center hosts between 200 and 250 major events per year, including home games for the NBA's Wizards, the WNBA's Mystics, the NHL's Capitals, the Georgetown University men's basketball team, and the Arena Football League's Valor. The area around the arena has been redeveloped and converted into a tourist destination with a dramatic increase in employment opportunities and tax revenue.

"Ancillary development" is a general term for taking the land surrounding or adjacent to a stadium and creating a project on that land that includes commercial, residential, or mixed-use development. When professional teams partner with the public sector to develop or redevelop a stadium, it is increasingly common for the development plans to address ancillary development as well. For the team, this can enhance the fan experience and generate additional revenue. For the public, the benefits extend beyond traditional stadium-related job creation and increased tax revenue, but actually result in dramatic urban revitalization, such as L.A. Live in Los Angeles, the San Francisco China Basin, the Baltimore Inner Harbor, Denver's LoDo District, and Downtown Detroit. Whereas many publicly funded stadiums of the 1960s and 1970s followed fans out to the suburbs, these new developments are drawing fans and their wallets back into the heart of America's cities.

Historically, ancillary development was controlled by the public sector (e.g., Baltimore and Denver). The municipality controlled the type and pace of development, and used the ancillary development to offset its stadium development risk (for which it was also responsible). The city was responsible for acquiring the land, refashioning it to make it attractive for development, entitling it (granting certain tax status), and "upzoning" for greater density or commercial uses. The team's risk exposure was limited to securing land-use restrictions to protect the fan experience and team revenue.

For the reasons stated in section 4.1, the public appetite for stadium projects is lower today than it was in the past. Accordingly, the availability of public funds for stadium development projects has shrunk, and the city-first paradigm for ancillary development has changed. Today the public sector offers ancillary development opportunities to the team, which takes additional risk but also benefits from additional upside to offset its increased investment in the stadium relevant to the previous generation (when the stadium investment came from the public). Although the recent dissolution of the California Redevelopment Agency (California Department of Finance, 2017) has created new challenges, team-funded ancillary development projects have continued in California, such as Downtown Commons (also called DoCo) in Sacramento, which includes the NBA Kings' new arena, Golden 1 Center.

Granting the team investment in ancillary development provides both benefits and costs to the public sector. The public gets an additional tool with which to finance stadium development, a reduction in its operational and financial risk in ancillary development, and a reduction in political exposure, and the city benefits from the team being incentivized to maximize development opportunities to create a new tax base and new jobs. But there are still risks for the public: this is still an additional expenditure that requires public funds, and taxpayers need to be convinced that shifting responsibility to the team is mitigating public exposure for a beneficial cost, not just giving the team additional free corporate incentives.

For teams, greater control over ancillary development means greater control over the fan experience and revenue generation. But professional sports teams are in the sports industry; they may not be comfortable with construction, management, and fiscal responsibilities for broader development projects. If a development is unsuccessful, the team has a long-term expense that could be difficult to unload, and it could create an underwater stadium deal that defeats the very purpose of a team pursuing a new stadium. To mitigate some of this risk, teams may request more land entitlements than a typical real estate developer would expect to receive in a typical development deal. These land entitlements help to make up for the team's additional capital outlay. Another option is for the team to partner with a third-party developer, as the St. Louis Cardinals did with the Cordish Companies in creating the St. Louis Ballpark Village, and the Sacramento Kings did with The Hahn Company in DoCo. The developer provides experience in constructing and operating a commercial/residential development and may serve as an additional source of funds—though the team may have to give up some of the control it has received from the public sector in the first place.

4. Challenges to Public Investment

Section 3 of this chapter discussed a variety of sources for private and public investment for stadium projects. The complexities of these projects generally result in a mixture of private sources, public sources, and ancillary development. No one system works everywhere. Rather, teams, leagues, and government entities must work together to mix and match, finding the right combination of resources that work in a given community for a given project. However, there are many challenges to dedicating any public investment toward stadium projects.

4.1. The Public Debate For and Against Public Development

The benefits a team accrues from public financing for a new venue are obvious. In addition to new revenues, new stadiums generally result in a better fan experience and increased attendance, which in turn is tied to improved on-field performance (though some studies have challenged this assertion (Quinn et al., 2003)). But even if on-field performance improves, public-sector investment in professional sports stadiums still generates political opposition. The primary political argument against public investment is that it serves as a form of “corporate welfare.” Along those lines, critics of public investments in sports stadiums sometimes charge that such allocation of public money enriches the billionaires who own professional teams and the millionaires who play for them. Of course, this claim implies that public funds are a zero-sum game, as if but for the stadium such funds would be going toward public education, health care, or some other purpose.

Stadium advocates also point to potential public economic benefits of a new stadium: job creation (including construction, operation, and tourist expenditures), increased tax revenue, and economic stimulation. Indeed, the Keynesian multiplier, an economic principal introduced by Richard Kahn in the 1930s, demonstrates that any government spending brings cycles of spending that increase additional employment and prosperity. This phenomenon can be evidenced with new stadiums: the economic impact of a new stadium is multiplied by fans spending at local businesses (as discussed vis-à-vis ancillary development in section 3.3). One study points to Nashville, Tennessee, as a success story. Tennessee had no major league sports teams until the late 1990s, when the state provided a $55 million construction bond and spent $12 million for road improvements, and the city financed an additional $144 million to construct a football stadium and hockey arena. The football stadium attracted the Houston Oilers to relocate to Nashville in 1997, and the arena helped result in the NHL awarding Nashville with the expansion Predators in 1998. The Nashville Convention and Visitors Bureau published a study which indicated that visitors traveled to Nashville specifically to attend events at the football stadium and hockey arena, and eighty-five major events at the two facilities between 1997 and 2005 generated over $300 million, making the public investment in the projects successful (Johnson, 2011).

Critics respond by citing economic research which indicates that new venues may not have much impact on the local economy because they tend to redistribute existing entertainment dollars rather than create new wealth. “The large and growing peer-reviewed economics literature on the economic impacts of stadiums … has consistently found no substantial evidence of increased jobs, incomes, or tax revenues for a community associated with” public subsidies for new venues, conclude two economists (Coates and Humphreys, 2008, 310). In addition, bond payments for stadiums can often balloon past initial projections. Legacy costs not only continue to rise, they can continue long past a stadium’s life expectancy. Indeed, it is not unusual for the public to continue paying for stadiums even after they have been demolished (such as old Giants Stadium in

New Jersey, the Kingdome in Seattle's King County, the RCA Dome in Indianapolis, and Veterans Stadium in Philadelphia) or after the team for whom it was built has moved away (such as in Houston, Kansas City, Memphis, and Pittsburgh).[7]

However, even some critics acknowledge that the public can benefit economically from new stadiums to the extent they steer purchases toward activities with higher tax rates or to the extent they recruit and tax out-of-town visitors (such as the claims made in Nashville). Hotels and rental cars are two examples that fall under both categories, as they are often taxed at high rates and new stadiums increase consumption of both. Furthermore, leagues often reward cities that build new stadiums by awarding them national events, such as the Super Bowl, all-star games, college basketball tournaments, and football bowl games. These events can draw additional revenue from out-of-town visitors and provide advertising and increased visibility to the area.

Perhaps most important, notwithstanding the unresolved debate over how much economic benefit a region gets from funding a stadium, absent infrequent expansion, the number of professional teams in the major leagues is a zero-sum game. The benefits a region gets from a team (and, conversely, the harm accruing to a city as a result of the threat of a team leaving) go beyond merely economic concerns. Major league teams and major league stadiums provide a region with civic pride. They serve as a unifying factor across demographics of race, socioeconomic status, and political affiliation. When the Cleveland Cavaliers won the NBA title in 2016, Cleveland's first major championship since 1964, more than 1.3 million people attended the championship parade in downtown Cleveland, more than three times as many people as the city's population (Hoppert, 2016). It is no wonder that cities have invested in publicly built stadiums even before teams commit to them in hopes of attracting them, such as Metropolitan Stadium in Minnesota in 1956, the Edward Jones Dome in St. Louis in 1993, and a variety of proposed football stadiums in Los Angeles before the Rams and Chargers moved there in 2016 and 2017, respectively.

4.2. Taxpayer Lawsuits

The doctrine of public purpose is a standard by which courts determine the legitimacy of state taxation legislation. The doctrine prevents taxpayers from funding private interests, but the definition of "public purpose" has been broadened by advocates such as Robert Moses. In four key cases taxpayers have filed suit against governmental jurisdictions seeking to prevent public money from paying for a professional team's stadium. All four times the court has sided with the team over the taxpayer plaintiffs.

4.2.1. *Meyer v. City of Cleveland*

After Cleveland voters approved a city council proposal to issue $2.5 million in bonds to construct a stadium for the local professional teams by a vote of 112,000 to 77,000, a taxpayer sued the city for financing a stadium intended for "primarily private use." The court rejected the taxpayer's argument, stating that cities are "not limited to policing the city [and] paving streets” and that “the power of cities to maintain institutions which educate and instruct as well as entertain and amuse their inhabitants is unquestioned” (35 Ohio App. at 22–23). The resulting Cleveland Stadium was built for $3 million ($47 million in 2017 dollars) (Cormack, 1997) and after opening in 1931 it served as the home for Cleveland’s MLB and NFL teams for a combined 116 seasons, in addition to other teams.

4.2.2. *Martin v. City of Philadelphia*

Philadelphia’s AL team, the Athletics, moved to Kansas City in 1954 after teetering on the edge of bankruptcy in its old stadium, Shibe Park. Philadelphia also lost the NBA’s Warriors in 1962 when the team moved to San Francisco. Philadelphia’s remaining MLB team, the NL’s Phillies, was unhappy with Connie Mack Stadium, which had been built in 1909, and was considering moving to New Jersey after Pennsylvania banned alcohol sales at sporting events in 1959. In response, city voters authorized a loan of $25 million to build a stadium. A Philadelphia taxpayer sued to enjoin the city from enforcing Ordinance No. 546 of 1964. The Supreme Court of Pennslyvania ruled in favor of the city. As aptly described by the Court of Appeals of New York in a subsequent opinion, *Murphy v. Erie County*, the Supreme Court Pennsylvania held that “it is established that a city may lease its public improvements to private concerns so long as the benefit accrues to the public and the municipality retains ownership of the improvement” (28 N.Y.2d at 88). Ultimately, cost overruns required the voters to authorize an additional $13 million bond issue. The total cost of Veterans Stadium upon completion in 1969 was $63 million ($373 million in 2017 dollars), making it one of the most expensive stadiums to date (Westcott, 2005). It was home to the Phillies and Eagles for thirty-three and thirty-two years, respectively, in addition to the Temple Owls (for twenty-five years) and other teams.

4.2.3. *Murphy v. Erie County*

In May 1968 the New York state legislature enacted a law empowering the Erie County legislature to enter into contracts and incur indebtedness in connection with the building of a stadium for the Buffalo Bills. The county legislature adopted a resolution authorizing the issuance of bonds for $50 million to construct a domed stadium. The county negotiated a contract with the Kenford Company under which Kenford would operate the stadium as the tenant and would pay the county $63.75 million over forty years, to be reduced by tax revenues generated by the stadium. Taxpayer plaintiffs filed suit, alleging that certain terms of the contract violated provisions of the state constitution and effected a waste of county funds. The New York Court of Appeals held that a publicly funded stadium utilized for the benefit of a private corporation fulfilled a public purpose and did not necessarily represent a gift of public property to a private entity. “The private benefit is incidental to the conceded public purpose of the stadium” (28 N.Y.2d at 88).

Ultimately the domed stadium plan was cancelled after the project dissolved into unrelated litigation between the county and the developer, with the developer receiving a financial settlement. But when Bills owner Ralph Wilson publicly explored the option of moving the team to Seattle, Memphis, or Tampa, the county legislature approved new stadium bonds in September 1971. The ensuing stadium (now named after Wilson) was built for $22 million ($119 million in 2017 dollars) (Warner, 2013). It opened in 1973 and has been home to the Bills since.

4.2.4. Poe v. Hillsborough County

The Tampa Bay Buccaneers were bought by Malcolm Glazer in 1995 for $192 million. Though he announced his intention to stay in Tampa, he advised local public officials that without additional stadium-related revenue sources unavailable in the team's existing home (Tampa Stadium), such as luxury suites and club suites, the team could not remain financially competitive with other NFL teams and might have to move. The City of Tampa, Hillsborough County, the Tampa Sports Authority, and the team reached an agreement for a new stadium on August 28, 1996. Related to that agreement, the Hillsborough County Board of County Commissioners passed an ordinance on July 10, 1996, levying a one-half-cent local government infrastructure surtax for a period of thirty years to "acquire infrastructure for general government purposes, public educating, and public safety." As required by law, the surtax was approved by a public referendum, with 53% of voters supporting the tax, whose purpose as presented to the voters included "to finance infrastructure for … a community stadium" (695 So. 2d at 674) The interlocal agreement for distribution of the tax revenue dedicated $318 million of the proceeds for the new Tampa stadium. A taxpayer challenged the application of the funds for the stadium. The court ruled that public purposes provided by a stadium include the anticipated economic benefits as well as "national media exposure" and the "civic pride and camaraderie" associated with having a professional football team play in the city.

Raymond James Stadium opened in 1998 at a construction cost of $169 million ($248 million in 2017 dollars) (Testerman, 2001). It has been home to the Buccaneers, University of South Florida Bulls football team, and the Outback Bowl since. The Buccaneers were the worst team in the NFL from their inception through 1996, with a combined regular season record of 100–223 and no playoff appearances from 1983 to 1996. Within the team's first five years of play in the new stadium they made the playoffs four times, twice setting a team record for wins in a season, and culminating in a Super Bowl championship after the 2002 season. During those five seasons the Buccaneers averaged 99.4% capacity at their regular season home games at Raymond James Stadium, compared to 70.5% capacity during the previous five seasons at Tampa Stadium.

4.3. CEQA and Environmental Lawsuits

Environmental litigation can also slow down the process of developing a new stadium. This is especially true in California, thanks to the California Environmental Quality Act (CEQA).[8] Under CEQA, state and local agencies must give serious consideration to environmental protection when regulating public and private activities, and projects cannot be approved until they can prove that there are no feasible environmentally superior alternatives. The “heart of CEQA,”[9] according to the California appellate court, is the environmental impact report (EIR), a comprehensive report which informs the public and governmental agencies of a given project’s environmental impact.

Because of the deliberateness of the process, as well as the fact that it is a “plaintiffs’ bar,” CEQA poses a challenge to development in California. This is especially true for sports projects, which are large and attract much more public attention than other types of development. Petco Park, the San Diego Padres’ home field, was originally scheduled to open in 2002, but thanks in part to CEQA-related litigation, its opening was delayed until 2004. Because the process has been so burdensome for stadium development, the California state legislature has abrogated CEQA to expedite the appellate process, allowing stadiums to proceed without an EIR. The proposed construction of Los Angeles Stadium was exempted from CEQA in 2009, rendering moot an ongoing lawsuit brought by eight residents who were challenging the validity of the developer’s EIR. The Sacramento Kings and Golden State Warriors have also benefited from targeted legislation reforming the CEQA process in the development of their arenas, and although the legislative abrogation did not stem environmental lawsuits against the teams, each prevailed in court.[10]

4.4. Further Attempted Legislative Reform

For the reasons stated in section 4.1, in addition to other political motivations (on the left, an opposition to corporate welfare; on the right, an opposition to any government spending), Congress has repeatedly considered further legislation aimed at curbing tax-exempt bond issuance to fund professional stadiums. Senator Daniel Patrick Moynihan (D-N.Y.) introduced the Stop Tax-Exempt Arena Debt Issuance Act in 1996, 1997, and 2000, though it never passed committee. Senator Arlen Specter (R-Pa.) introduced the Stadium Financing and Franchise Relocation Act in 1999. Specter’s bill would have required the NFL and MLB to set aside 10% of their national television contract revenue each year to create a stadium construction fund. This fund would then provide up to 50% of the construction costs on new facilities. If the leagues did not comply, they would be penalized by the removal of their antitrust exemptions. Among other flaws, Specter’s bill was unworkable because the MLB’s network contract at the time of the proposal was nowhere near the size necessary to fund it, and this bill died like Moynihan’s bills did.

Senator Tom Coburn (R-Okla.) called for a ban on federal tax-exempt financing for sports stadiums in 2014. President Barack Obama agreed, proposing the elimination of the Private Security Test in his 2016 and 2017 budgets (Fallor, 2016). On March 22, 2016, Representative Steve Russell (R-Okla.) introduced the No Tax Subsidies for Stadiums Act (H.R. 4838), which would prohibit tax-exempt financing for any location that serves as a venue for professional sports and seats more than 100 people for at least five days of the year. Like the previous legislation, Russell’s bill has yet to generate widespread political support and has not passed committee.

5. Due Diligence in Preparation for Stadium Proposal

Before a team goes public with a stadium proposal, the team and its counsel and advisors need to conduct both legal diligence and research related to public affairs. Legal diligence includes identifying potential sources and funding vehicles and potential legal speed bumps related thereto, such as league rules, local laws forbidding certain kinds of funding, municipal noncompetes related to existing venues, and tax issues related to property taxes, sales taxes, ticket taxes, and income taxes. The team should study relevant examples of previous public/private partnerships in the region, and it should review recent local and national stadium development deals. The team needs to determine how much financial responsibility and management/operational control it wishes to assume over both the stadium and ancillary development, as well as its timing requirements in terms of construction. Related to site ownership, the team needs to understand whether land acquisition is necessary (including the potential of eminent domain issues) and determine who will own the stadium, the ancillary development, and the underlying land. Whether the team chooses to be an owner or not will affect its control, property taxes, and impact on financing.

Because the public sector is a partner in the project, the team needs to identify potential allies and opponents in local, state, and federal government. It should review the previous public stands and voting histories of public officials, as well as their private views, as well as how to position itself with elected leaders to maximize their support for the project. The team should also understand how local hot button political issues will affect its project, and it must present a good “story” or narrative for why it needs a new home and why it needs the public’s support in creating it.

As a condition for providing public financing, the public entity often requires the team to make a contractual commitment not to move the franchise, either via a nonrelocation covenant within the operating agreement or a freestanding nonrelocation agreement. Nonrelocation language was first introduced into stadium leases in the late 1980s. A nonrelocation provision will typically grant the municipality exclusive rights to the team’s name and history and provide injunctive relief to prevent an attempted move. But given the challenges in successfully seeking an injunction, there is no guarantee that an injunction would be successful were a team bound by nonrelocation language to seek to move anyway. Specifically, it is possible that a franchise could make a claim under the Bankruptcy Code to enable it to reject its lease and relocate. According to one study, in an executory contract the debtor can attempt to reject the nonrelocation clause, and may be permitted to do so if it is in the best interests of the estate under 11 U.S.C. § 365. The study notes the uncertainty of how a court may rule but suggests that a separate nonrelocation agreement is more likely to be enforceable than a nonrelocation clause in a lease, which is why stand-alone nonrelocation agreements are now standard (Williams, O'Quin, and Stein, 2012).

This chapter focused on the relationship between the team and the public sector in developing a venue, not the operation of the venue itself. But completing construction and then operating a stadium development project requires a variety of legal documents to be negotiated among the team, the government, and various third parties. These include, but are not limited to, the initial agreement between the team and the governmental jurisdiction (city, county, district, state, etc.), financing documents, documents related to the acquisition of the land, zoning, and land use; to operation of the venue itself (including concession agreements, naming rights, and marketing agreements); and to First Amendment Rights policies (pertaining to permitted signage at a venue that is owned by the public).

6. Conclusion

Unlike traditional corporate development transactions, stadium projects are always subject to public review at every stage of the development. Legal drafting that may be standard for more private developments must be able to withstand public scrutiny in order to succeed in the context of a stadium deal. Sports are generally insulated from economic fluctuations due to the passion of the fans and the civic importance that a team represents to a region. Thanks to a changing legal and political landscape, a team that wishes to create a successful development needs to be willing to think creatively. Doing so will allow a team to overcome the challenges and build a market-leading stadium that will allow the team and its host city to succeed for decades to come.

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Notes:

([1]) Public Law 90-364, 82 Stat. 266, I.R.C. § 103(c)(6).

([2]) Public Law No. 98-369, § 171(a).

([3]) Public Law 99-514, 100 Stat. 2085.

([4]) Public Law 112-176, 126 Stat. 1325.

([5]) Private Letter Ruling (PLR) 2006400001 (July 11, 2006); PLR 200641002 (July 19, 2006).

([6]) See, e.g., *California Redevelopment Association v. Matosantos* (2013).

([7]) Regarding this last concern, see the discussion of nonrelocation agreements in section 5 of this chapter.

([8]) California Pub. Res. Code §§ 21000 et seq.) (CEQA).

([9]) *County of Inyo v. Yorty* (1973).

([10]) See Saltonstall v. City of Sacramento, 234 Cal.App.4th 549 (3d Dist. 2015); Mission Bay Alliance v. Office of Cmty. Inv. & Infrastructure, 6 Cal. App. 5th 160 (Cal. Ct. App. Nov. 29, 2016).

Irwin P. Raij

O'Melveny & Myers LLP

Irwin P. Raij is a partner and Co-Chair of the Sports Industry Group in Entertainment, Sports & Media at O'Melveny & Myers LLP.

Alexander Chester

O'Melveny & Myers LLP

Alexander Chester is a counsel with O'Melveny & Myers LLP.