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The House that Joe Taxpayer Built: Preserving the Role of Baseball Stadiums Without Providing Distorted Public Subsidies

By

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I. Introduction

Although many events have slipped through my mind, I will never forget attending my first major league baseball game. At the time, my grandparents lived in Chicago and my aunt worked for a tailoring company that made various types of business attire. As fortune had it, my aunt's boss and Tommy Lasorda were friends. Because my visit to Chicago coincided with a series between the Cubs and the Dodgers, my aunt was able to arrange for us to attend a game at Wrigley Field. Although I do not remember the score, I remember how much I enjoyed being in Wrigley Field. Even though I knew little about baseball and less about the individual teams, the view of the field, the bustle of the crowd, and the opportunity to be with my family made for one of the best days of my life. After the game, I received two autographed baseballs and a Dodger mit. The Dodger team signed the first baseball and Tommy Lasorda signed the second. Unfortunately, like many young baseball fans, I thought a baseball was a baseball. My clammy hands washed away Tommy Lasorda's signature before my parents could interrupt a game of catch. Even with only a silhouette of an "L," that baseball remained one of my most cherished possessions. The souvenirs made me a loyal Dodgers fan, yet attending the game itself made me a baseball fan.

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While my first baseball game had a very personal affect on me, I do not think that my experience was unique. Many other baseball fans remember attending their first game and look back upon the stadium they visited with some sentimentality.[1] In many ways, the stadium is as much a part of the baseball experience as the game itself.

As players' salaries have increased and the opportunities for owner's to profit from their teams have also increased, however, the stadium has become more than a place where fans cultivate memories. Baseball stadiums have become some of the grandest examples of public subsidization. Today, through their local governments, taxpayers foot the majority of the hundreds of millions of dollars that it costs to construct a stadium. Recent studies have revealed that public investment in stadium projects usually produces an economic loss.[2] Nevertheless, both local governments and stadium promoters emphasize the benefits that stadiums have in relation to urban renewal and the cultivation of a community identity. If either justification has merit, stadiums must perform their expected functions. In light of recent labor disputes, most notably the strike that occurred between 1994 and 1995, local governments bear the risk of absorbing much of the costs of a disagreement between owners and players. The question, then, becomes how to preserve the important role that baseball stadiums occupy within the American identity while, simultaneously, protecting the interests of taxpayers.

This paper begins with a discussion of the history of recent stadium projects in three cities: Denver, Seattle, and San Francisco. That discussion will elucidate how circumstances can effect a city's bargaining power, how baseball teams generally have

[1] *See e.g.,* William B. Gould, IV, *In Memoriam: The Old Ballparks Are Dying, But Grand Memories Live On*, San Jose Mercury News, October 4, 1999.
[2] *See Generally*, SPORTS, JOBS, AND TAXES (Roger G. Noll and Andrew Zimbalist, eds., Brookings 1997) (series of short essays that debunk current calculations of the estimated value of stadiums, including value related to economic development and urban renewal).

the upper hand in stadium negotiations, and what happens in the rare event that a local government has a substantial bargaining position. This paper will, then, consider some of the legal issues that relate to the public subsidization of stadiums. Specifically, this paper will consider the possibility of shifting the costs of a labor dispute from a local government to a baseball team. Ultimately, however, this paper reaches the conclusion that the disparate bargaining positions of local governments and baseball teams present the root problem behind stadium negotiations. In order to correct that root problem, this paper suggests a more stringent application of anti-trust law.

II. A Tale of Three Cities

During the past ten years, baseball and other sports have experienced a construction boom. In the 1990s, alone, state and local governments provided roughly $11 billion dollars to build 65 stadiums and arenas, having a total cost of $15 billion dollars.[3] The substantial costs and the large number of publicly financed sports venues constructed during the 1990s reflects a larger historic trend. Over the course of the 20th Century, the costs of constructing baseball stadiums increased from roughly $500,000 during the 1910s to roughly $300-500 million during the 1990s.[4] Between 1986 and 2003, approximately 77% of major league baseball teams will have received a new stadium or a significant renovation of an existing stadium.[5] As part of the construction boom, new stadiums were built in Denver, Seattle, and San Francisco. The history of the stadium projects in those cities reflect different tribulations yet, together, reflect the

[3] Paul C. Weiler, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 244 (Harvard University Press 2000).
[4] *See Id.* at 240-241.
[5] Martin J. Greenberg, THE STADIUM GAME 15 (2d ed. 2000).

nature of the bargaining relationship between local governments and major league baseball teams.

A. Denver[6]

In 1990, various Colorado groups began promoting Denver as a possible recipient of a major league baseball expansion franchise. Five years later, in 1995, the Colorado Rockies opened their first official game at Coors Field. Between the time that groups began vying for a franchise and the opening of Coors field, issues arose related to stadium financing, the ownership of Denver's franchise, and the lease agreement between the franchise and the City of Denver.

Major League Baseball took a firm stance as Denver sought an expansion franchise, conditioning the award of a franchise on guarantees of a baseball-only stadium. Subsequently, Major League Baseball backed off its position to allow multi-use stadiums so long as baseball received scheduling priority.[7] Despite the changed position, the chairman of the National League's expansion panel emphasized that cities with dedicated baseball facilities retained an advantage over cities with multi-use facilities.[8] The fact that Major League Baseball could choose between a number of cities, including Pheonix, had a substantial effect upon Denver's efforts to acquire an expansion franchise.[9]

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[6] Although a book has been written on the subject of Denver's efforts to acquire a major league baseball team, ORBIS did not contain the book in its catalog. For reference *see*, David Whitford, PLAYING HARDBALL (Doubleday, 1993).
[7] Irv Moss, *Baseball-Only Facilities Still Rate Expansion Edge*, DENVER POST, June 15, 1990 (explaining MLB's changed position); *see also* Paul Hutchinson, *Broncos Would Share Stadium Baseball-Only Field a Must, Boosters Say*, DENVER POST, June 16, 1990 (Broncos immediately reacted to MLB's changed position by offering to share Mile-High Stadium according to MLB's terms in exchange for lease concessions).
[8] Irv Moss, *Baseball-Only Still a Stadium Priority*, DENVER POST, June 21, 1990.
[9] *See* Irv Moss, *Phoenix Stadium Support Rises From the Ashes*, DENVER POST, July 4, 1990.

In reaction to perceptions that the award of a major league franchise depended upon the construction of a baseball-only stadium, local governments within the Denver metropolitan area took action to provide financing. From the outset, geography and tax laws made Denver the best location for a stadium.[10] Due to the fact that the original estimate for constructing a ballpark reached $100 million dollars, however, the City and County of Denver had to consider ways of combining its financial power with the power of surrounding cities and counties.[11] To sweeten the deal, the City of Denver offered participating counties an additional $6 million in tax-exempt bonds.[12] Five other counties eventually agreed to a proposed financing plan that included a combination of bonds and an a 0.1% sales tax increase, conditioned upon the award of a franchise.[13]

Although the actions taken by the local governments were essential to providing financing for a new stadium, the sales tax included in the proposal depended ultimately on the approval of voters. Early in their efforts, supporters of a tax increase hoped to advertise their position through the proceeds of a $1 million fundraising drive.[14] Organized opposition to the sales tax increase did not exist until roughly four months

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[10] Irv Moss, *New Baseball Stadium Likely to Have Denver Site*, DENVER POST, April 7, 1990 (tax exempt bonds and central location make Denver site preferable); *see also* Irv Moss, *Stadium Sites Get Tax Break*, DENVER POST, March 25, 1990 (explaining how tax exempt bonds available to Denver had potential of saving $2 million per year in interest payments).

[11] In order to persuade five other counties to participate in the financing of a baseball stadium, proposed a revenue sharing plan calculated according to each county's contribution. Through the proposal, Denver also agree to finance initial feasibility studies and to commit tax-exempt bonds. Irv Moss, *Stadium Revenue Sharing Proposal OK'd*, DENVER POST, April 18, 1990.

[12] Irv Moss, *Pena Asks Suburbs' Aid on Stadium*, DENVER POST, April 22, 1990.

[13] Irv Moss, *Spreading Word Key to Passing Sales Tax Hike*, DENVER POST, May 10, 1990.

[14] Paul Hutchinson, *Big League Backers Swing for Fences Sales-Tax Proponents Trying to Lead Denver into Vote-Baseball Column*, DENVER POST, April 29 1990 (describing supporters' efforts as well as the competitive nature of seeking major league franchise). Ultimately, tax supporters were only able to achieve half of their goal. Paul Hutchinson, *Vote on Baseball Stadium*: *"Safe!" Conditional Sales Tax Wins Narrow Approval*, DENVER POST, August 15, 1990.

after proponents began their fundraising efforts.[15] Two weeks prior to the election, proponents of the tax increase demonstrated the popularity of their position through a "baseball day" that unveiled over 21,000 signatures that, when stretched page to page, extended more than a mile.[16] Both voter turnout and the outcome of the August 15, 1990 election further reflected the success of and the need for the supporters' efforts. The demographics of voters registering for absentee ballots indicated that the baseball tax measure significantly increased voter turnout.[17] Additionally, division among the counties that agreed to finance the stadium reflected the close nature of the election. Douglas, Arapahoe, and Jefferson counties posted strong returns in favor of the stadium tax, while the tax only received a narrow victory in Boulder County.[18] Voters in Denver and Adams Counties, however, rejected the tax measure.[19]

Though Major League Baseball reacted favorably to the August 15th election, the League waited nearly a year to make its formal announcement granting Denver a franchise.[20] During that time, the identity of the franchise's prospective ownership became uncertain. Originally, John Dikeou, a real estate investor and owner of Denver's minor league "Zephyrs" baseball team had been poised to become the primary owner of Denver's new major league team.[21] Dikeou, however, had substantial outstanding debts

[15] Jennifer Gavin, *Group Announces Opposition to Stadium*, DENVER POST, July 27, 1990 (Colorado Union of Taxpayers entered the ballot measure campaign relatively under-funded, with a $5,000 budget).
[16] *Signatures Go a Mile Long*, DENVER POST, August 1, 1990.
[17] Fred Brown, *Baseball Expected to Boost Turnout*, DENVER POST, August 14, 1990 (increased requests by unaffiliated voters seeking absentee ballots indicated connection to baseball vote).
[18] Paul Hutchinson, *Vote on Baseball Stadium*: *"Safe!" Conditional Sales Tax Wins Narrow Approval*, DENVER POST, August 15, 1990.
[19] *Id.* Adams County, later, attempted to withdraw from the six-county financing agreement. Paul Hutchinson, *Baseball Pullout by Adams Proposed*, DENVER POST, September 7, 1990.
[20] Irv Moss, *Stadium Vote Wins Applause*, DENVER POST, August 15, 1990 (favorable reaction); Paul Hutchinson and Irv Moss, *"Rockies" a Reality Baseball's Choice Confirmed*, DENVER POST, July 6, 1991 (formal announcement made).
[21] Irv Moss, *Dikeou Lawsuit Clouding Ownership*, DENVER POST, July 2, 1990.

and had not received expected returns on his real estate investments.[22] A lawsuit brought by one of Dikeou's creditors provided the first public indication that he might not have the financial abilities necessary to own a major league franchise.[23] A second lawsuit brought by another creditor[24] and Dikeou's decision to terminate the highly-paid general manager of the Zephyrs provided final evidence that Dikeou could not afford to own a major league franchise.[25]

As John Dikeou's financial abilities became questionable, discussion over a new ownership group materialized. Although discussion of prospective owners extended to a number of individuals, a group of Ohio investors with ties to the Phar-Mor Pharmacy chain eventually replaced Dikeou. Before the Colorado Rockies played their first game, however, the new investors became embroiled in a scandal of their own. Specifically, two of the investors, Mickey Monus and his father, Nathan, became the subject of an FBI investigation related to their dealings within the Phar-Mor company.[26] After both of the Monuses resigned, a group of four Colorado investors stepped forward to become the primary owners of the Rockies.[27] The four investors were trucking company owner Jerry McMorris, beef baron Charles Monfort, uranium trader Oren Benton, and the Coors Brewing Company.[28] With the exception of Benton, who subsequently declared

[22] Irv Moss, *Dikeou's Baseball Future Sealed*, DENVER POST, January 13, 1991.
[23] *See* Moss, *supra* note 21.
[24] Adriel Bettelheim, *Second Bank Files Suit Against Dikeou $170,000 Loan Reportedly in Arrears*, DENVER POST, July 4, 1990.
[25] *See* Moss, *supra* note 22.
[26] Jim Armstrong, *Rockies Partners Pull Out Phar-Mor's Monuses Resign Amid FBI Investigation*, DENVER POST, August 4, 1992.
[27] Jim Armstrong, *Rockies Ownership Put Back on Course Four General Partners Selected*, DENVER POST, August 7, 1992 (new owners acquired shares from the Monuses and another notable Ohio investor, John Antonucci). Additionally, the new ownership group solidified control by purchasing the interests of at least one minor shareholder. Irv Moss, *Rockies Solidify Ownership*, DENVER POST, December 8, 1992.
[28] Jim Armstrong, *Rockies Ownership Put Back on Course Four General Partners Selected*, DENVER POST, August 7, 1992.

bankruptcy, the composition of the Rockies ownership group has remained stable since the resignation of the Monuses.[29]

Beyond the issues related to Denver's sales tax and the Rockies' ownership, the negotiation of the lease between the Rockies and the Denver Metropolitan Major League Baseball Stadium District (the District) deserves discussion. According to the original proposed lease, the Rockies received extremely favorable terms that included rights to all the profits from stadium. The lease also provided the Rockies with naming rights, which they had already sold to Coors.[30] The basic terms of the preliminary lease would have become final if Mickey Monus's Phar-Mor partners had not accused him of embezzling roughly $350 million dollars, which eventually led to the mentioned FBI investigation and Monus's withdraw from the Rockies' ownership group.[31] Because of the controversy created by Monus's dealings, the District had an opportunity to reconsider its position, but did not have an agreement in place before construction on Coors Field commenced October 16, 1992.[32] Some of the original proponents of the stadium, as well as others, sought to prevent the District from agreeing to the terms of the preliminary lease.[33] In response, the National League reacted with pressure of its own. The League implicitly threatened that changes in the lease could jeopardize the final vesting of a franchise.[34]

Both politicians and the Rockies' ownership group engaged in different forms of posturing as lease negotiations continued. Governor Romer entered the fray by ordering

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[29] Earlier this year, a Denver bankruptcy court approved the remaining owners' purchase of Benton's share in the Rockies for $35 million. *Judge Approves Sale of Minority Share of Colorado Rockies*, SALT LAKE TRIBUNE, January 29, 2002.
[30] Paul Hutchinson, *Baseball Stadium in Squeeze Play Sweetheart Lease Deal Assailed, but NL Balks at changes*, DENVER POST, October 4, 1991.
[31] *Ballpark Lease Talks Resuscitated*, DENVER POST, September 3, 1992.
[32] *Id.*
[33] *See* Hutchinson, *supra* note 30.
[34] *Id.*

an investigation of past lease negotiations as well as by attempting to use moral suasion as an inducement for the Rockies ownership group to open their financial records.[35] In addition, members of a legislative auditing committee unanimously agreed to investigate the lease agreement in order to determine whether enabling statutes supported it.[36] Coors reacted to the idea of a less favorable lease by asserting that it would not have made its substantial investment in the Rockies without a lease that guaranteed payment of nearly all of Coors Field's revenues.[37] Likewise, the Rockies ownership group took the position that they had provided a public service, at great risk, but did not receive due credit in light of criticism over the Coors Field lease.[38] Indeed, Jerry McMorris went as far as intimating that unfavorable lease terms might induce him to leave the ownership group.[39]

A concrete solution to the lease controversy did not occur until the Colorado ownership group of McMorris, Benton, Monfort, and Coors solidified their control of the team and assumed the Monuses' ownership interests.[40] As part of the lease negotiations, the District agreed to make additions to the stadium, including extra seats, luxury boxes, and parking.[41] In addition to requiring the Rockies to stay in Denver for 17 years, the final version of the lease required the sharing of parking revenues based upon the nature of usage, 20% for baseball events and 80% for non-baseball events.[42] Further, the lease

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[35] *Romer Umpires Baseball Lease*, DENVER POST, October 8, 1991; Jennifer Gavin, *Romer Urges Rockies to Reveal Finances*, DENVER POST, December 21, 1991.
[36] Jennifer Gavin, *Audit Panel to Probe Stadium Lease*, DENVER POST, December 3, 1991.
[37] Paul Hutchinson, *Coors Says Ballclub Lease Crucial to Its Role*, DENVER POST, November 7, 1991.
[38] Paul Hutchinson, *Ballclub Deserves More Thanks, Less Criticism, Owner Says*. DENVER POST, December 18, 1991.
[39] Irv Moss, *Rockies Seeking Cease-Fire Over Lease*, DENVER POST, December 20, 1991.
[40] Perception, no doubt, had some effect upon debate over lease terms. As the Denver Post explained, the replacement of Ohio investors with an ownership group controlled by Coloradans reduced the stigma of out of towners apparently bilking Colorado taxpayers. Paul Hutchinson, *Coors Field Lease: Only Details Remain*, DENVER POST, January 23, 1993.
[41] *Id.*
[42] Paul Hutchinson, *Ballpark Lease to Yield $2 Million*, DENVER POST, February 4, 1993.

included graduated payments based upon attendance.[43] As a final term, the lease required the Rockies to make annual payments of at least $500,000 to defray the costs of major repairs.[44] The District expected the lease agreement to return $2 million per year, for a grand total of $40 million over the course of the Rockies' initial 17 year tenancy.[45] Even with the adjusted terms, the Coors Field lease provided a extremely favorable bargain for the Rockies' ownership: taxpayers provided $139 million with the owners only having an obligation to provide $40 million over 17 years as a reimbursement.

In 1995, with construction completed,[46] a defined ownership group in charge of the Rockies, and a lease agreement in place, doubt existed about when Coors Field would experience its first major league game. Because of the 1994-1995 baseball strike, the first game played at Coors Field, between the Yankees and the Rockies, involved replacement players.[47] Later, Major League Baseball and the Players' Association reached an agreement and set an official opening date for April 26, 1995.[48] The Rockies won the official opening game at Coors Field against the New York Mets after 14 cold innings.[49] Even though the strike and the weather contributed to the opening game falling short of a sellout by 3,000 seats, baseball had firmly established itself as a Denver institution.[50]

B. Seattle

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[43] Paul Hutchinson, *Ballpark Lease to Yield $2 Million*, DENVER POST, February 4, 1993.
[44] *Id.*
[45] *Id.*
[46] Because of additions, other expenses, and faulty initial estimates, cost overruns exceeded $115.5 million. Taxpayers provided $139 million of those costs. Paul Hutchinson, *Taxpayers Foot the Stadium Bill After Sealing Deal*, DENVER POST, March 31, 1995.
[47] Paul Hutchinson, *Bottoms Up to a Beauty Stadium Takes Its Bow Today*, DENVER POST, March 31, 1995.
[48] Jerry Crasnick, *Ball Strike Over Owners Approve April 26; Issues Unresolved*, DENVER POST, April 3, 1995.
[49] Irv Moss, *ICE COLD COORS Coors Opener Packs Pizzazz at Finish*, DENVER POST, April 27, 1995.
[50] *Id*.

Because the Mariners were already a part of Seattle at the time negotiations over SAFCO Field occurred, one might conclude that Seattle had a much stronger bargaining position than Denver, which had never had a major league team. Seattle's baseball history, however, had left raw nerves. Seattle was home to its first major league franchise, the Pilots, for only one year. During the 1969 season, the Pilots played at Sick's stadium, a minor league park that had been refurbished at the public's expense.[51] Despite voter approval of a bond measure to finance the construction of a new ballpark, the Pilots' ownership group declared bankruptcy.[52] A Seattle bankruptcy court, consequently, approved the sale of the team to present Major League Baseball Commissioner Bud Selig.[53] The Pilots were moved to Wisconsin and renamed the Milwaukee Brewers.[54] Seattle did not have a major league baseball team for another seven years. The arrival of the Mariners came at the $70 million price of constructing the Kingdome.[55] Roughly 13 years after construction of the Kingdome, the Mariners, following in the footsteps of the Pilots, began considering relocation.[56] A group of local investors and the Nintendo Corporation kept the team in Seattle after agreeing to purchase it for $100 million. Needless to say, politicians and baseball fans had grounded fears of loosing the Mariners when the Kingdome lease expired in 1996.[57]

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[51] Kurt Schaefer, *The Seattle Pilots—Major League Baseball's First Venture in the Pacific Northwest*, COLUMBIA vol. 14, number 2 (2000) at http://www.wshs.org/columbia/0200-a2.htm.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *See* Paul C. Weiler, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 229 (Harvard University Press 2000).
[56] Alan Snel, *M's, County Square Off on Cost Overruns Legal Battle Brewing Over Use of Surplus Tax Money*, SEATTLE POST-INTELLIGENCER, June 23, 1999.
[57] By 1996, the Kingdome had become a liability. Falling ceiling tiles required $70 million in repairs. The Mariners' ownership, arguably, had good reason for threatening a sale. *See* Ed Penhale, *Stadium Deal Puts Council in Hot Seat Members are Keen on Team But Wary of Plan*, SEATTLE POST-INTELLIGENCER, October 16, 1995.

As replacing the Kingdome progressed from an idea into SAFECO Field, a number of issues arose. The most notable issues existed in relation to the financing of the stadium project, the Mariners lease agreement, and the allocation of responsibility for covering cost overruns.

When the King County Council first began negotiating with the Mariners in order to keep baseball in Seattle, the Council proposed to finance a new stadium through a referendum to increase the County's sales tax from 8.2% to 8.3%.[58] The Washington Legislature and Governor Mike Lowry, in turn, authorized the Council's plan, making the proposed tax increase contingent upon the Mariners sharing profits and agreeing to a 20-year lease.[59] Before the King County Council submitted the proposed tax increase to voters, however, the Council and the Mariners agreed to a stadium financing plan.[60] Under the plan, the Council limited its contribution to $240.8 million, but agreed to build a parking garage and pay back repair debts incurred by the Mariners in relation to the Kingdome.[61] In exchange, the Mariners agreed to share profits, to provide $45 million for construction costs, and to stay in Seattle for 20 years.[62]

As had occurred in Denver, Seattle's tax referendum increased voter turnout. King County election officials reported a 15% increase in voter registration, which the attributed to the stadium measure.[63] Despite a high turnout, however, voters narrowly

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[58] George Foster, *County, Mariners Talking Council Wants Commitment From Team Before Park Vote*, SEATTLE POST-INTELLIGENCER, June 14, 1995; *see also* Michael Paulson, *Lowry Signs Bill for Vote on Stadium Tax Governor Urges Baseball Revenue Sharing,* SEATTLE POST-INTELLIGENCER, June 15, 1995.
[59] Michael Paulson, *Lowry Signs Bill for Vote on Stadium Tax Governor Urges Baseball Revenue Sharing,* SEATTLE POST-INTELLIGENCER, June 15, 1995.
[60] Rebecca Boren and George Foster, *Stadium Goes to Voters Annual Cost About $7.50 Per Resident*, SEATTLE POST-INTELLIGENCER, July 22, 1995.
[61] *Id.*
[62] *Id.*
[63] *Registration of Voters Up in County*, SEATTLE POST-INTELLIGENCER, September 8, 1995.

rejected the tax increase.[64] Consequently, baseball supporters scrambled to find alternative funding sources through the state government.[65] The Washington Legislature met in special session. While the legislature considered possible funding solutions, the Mariners ownership stressed their intent to sell the team if the public did not help finance a new stadium.[66] To add to the legislature's predicament, a successful season made the Mariners more attractive to potential buyers.[67] Ultimately, the legislature responded with a financing plan that included revenue from license plates, a lottery, and a local tax increases.[68]

Because the legislature's financing plan depended upon local taxes, including a ticket tax and increases in restaurant and car rental taxes, the viability of the plan depended upon agreement within the King County Council.[69] The Council, in turn, approved three tax increases: 1.) A ½% increase of its restaurant and tavern taxes, 2.) A 2% surcharge on rental cars, and 3.) A 10% tax on ticket sales associated with the new stadium.[70]

After the legislature and the council approved the financing plan, a number of interest groups brought legal action that jeopardized the public financing plan. The primary legal issues surrounding the actions were not resolved until December 1996,

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[64] Rebecca Boren, *Stadium Backers Not Giving Up Latest Count Puts Focus on Olympia*, SEATTLE POST-INTELLIGENCER, September 26, 1995.
[65] *Id.*
[66] Michael Paulson, *Owners Warn State Lawmakers They Won't Back Off of Sale Threat*, SEATTLE POST-INTELLIGENCER, October 3, 1995.
[67] Ed Penhale, *High-Stakes Game as Time Ebbs on Stadium Von Reichbauer, Ellis face Make or Break Choices*, SEATTLE POST-INTELLIGENCER, October 20, 1995.
[68] Michael Paulson, *Stadium Package Ready for Legislators Lawmakers Summoned to Olympia to Talk Details*, SEATTLE POST-INTELLIGENCER, October 11, 1995; Ed Penhale, *Stadium Deal Puts Council in Hot Seat Members are Keen on Team But Wary of Plan*, SEATTLE POST-INTELLIGENCER, October 16, 1995.
[69] Ed Penhale, *Stadium Deal Puts Council in Hot Seat Members are Keen on Team But Wary of Plan*, SEATTLE POST-INTELLIGENCER, October 16, 1995.
[70] Ed Penhale, *Its Thumbs Up for Baseball Stadium*, SEATTLE POST-INTELLIGENCER, October 24, 1995.

when the Washington Supreme Court announced its decision in CLEAN v. State.[71] In its opinion, the court applied a deferential standard and concluded that the legislature had proper authority to fund the stadium under the auspices of an "emergency." The court's decision added certainty to the stadium project and cleared the way for further progress.

Apart from legal difficulties, negotiation of a lease agreement created additional obstacles. Significant problems developed around the time that the Mariners' Kingdome lease expired, in December 1996. At that time, negotiations reached an impasse largely over the Mariners' obligations to make rent payments, responsibilities to pay for cost overruns, and the potential consequences if the Mariners' owners filed for bankruptcy.[72] Once talks broke down, the owners formally withdrew from negotiations and the stadium development agreement.[73] As part of their move, the owners began to publicly seek out-of-town buyers from cities that included Portland, Vancouver, B.C., and Washington, D.C.[74] As the Mariners' owners apparently took actions to express the sincerity of their threats, King County continued to take steps to provide funding for the stadium project.[75] Additionally, Washington politicians, including Senator Slade Gorton (who had made similar efforts when the Pilots left), began searching for prospective in-state buyers.[76]

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[71] 928 P.2d 1054 (Wash. 1996).
[72] Heath Foster, *Mariners Playing Hardball on Lease*, SEATTLE POST-INTELLIGENCER, December 11, 1996; Heath Foster, *Quiet Search for an M's Buyer Begins Present Owner's Silence Deafening*, SEATTLE POST-INTELLIGENCER, December 20, 1996.
[73] Heath Foster, *M's Formally Cancel Agreement for Ballpark But District Forges On With Plans*, SEATTLE POST-INTELLIGENCER, December 17, 1996.
[74] Angelo Bruscas, *No Shortage of Out-of Town Buyers for Mariners*, SEATTLE POST-INTELLIGENCER, December 16, 1996.
[75] Ed Penhale, *County Finds $8.1 Million in Hopes M's Stay in Town*, SEATTLE POST-INTELLIGENCER, December 20, 1996.
[76] Heath Foster, *Quiet Search for an M's Buyer Begins Present Owner's Silence Deafening*, SEATTLE POST-INTELLIGENCER, December 20, 1996; Kurt Schaefer, *The Seattle Pilots—Major League Baseball's First Venture in the Pacific Northwest*, COLUMBIA vol. 14, number 2 (2000) at http://www.wshs.org/columbia/0200-a2.htm. (last visited January 29, 2004).

By January 7, 1997, talks between the Mariners and the King County Council had resumed.[77] The Council, through a divided 8-5 vote, authorized a $336 million bond issue and Mariners tentatively agreed to a revised lease.[78] Under the new lease, the contingency fund for cost overruns increased from $23.1 million to $53.1 million.[79] Additionally, the lease postponed enforcement of the Mariners' obligation to provide reimbursements until the Mariners' had received enough profits to cover $70 million in losses incurred at the Kingdome and the $45 million that the Mariners owed for construction of the new stadium.[80] The Mariners conditioned their tentative agreement upon the City of Seattle absorbing the entire costs of additional public services, including police and fire.[81] With an agreement in place, construction commenced on February 20, 1997.[82]

Once construction on the new stadium reached its half-way point in 1998, it became apparent that the contingency fund would not be able to cover all cost overruns.[83] At about the same time, the SAFECO Insurance Company agreed to purchase naming rights from the Mariners for $1.8 million per year.[84] SAFECO's agreement essentially covered the Mariner's $45 million obligation for construction costs.[85] With SAFECO's agreement, cost overruns did not become a matter of contention until tax-revenues for King County's Public Facilities District exceeded original estimates.

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[77] Ed Penhale, *County Council Oks $336 Million for M's Ballpark Bigger Bond Package Approved*, SEATTLE POST-INTELLIGENCER, January 7, 1997.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Heath Foster, *Work on New Ballpark Will Begin Saturday*, SEATTLE POST-INTELLIGENCER, February 13, 1997.
[83] Ed Penhale, *Ballpark Half Done, But Reserves Run Thin*, SEATTLE POST-INTELLIGENCER, April 21, 1998.
[84] Ed Penhale, *A Big Signing for the M's: Safeco Field $1.8 Million a Year to Put Name on Ballpark*, SEATTLE POST-INTELLIGENCER, June 5, 1998.
[85] *Id.*

By 1999 alone, the tax revenues had exceeded original estimates by $6 million, with government officials projecting a $34 million surplus over a 17-year period.[86] At the same time as King County announced its surplus, the Mariners had incurred an $81 million obligation for cost overruns.[87] Even though the Public Facilities District announced its intent to use the surplus to make early payments on its bonds,[88] the Mariners decided to seek an additional $60 million through threatened legal action and public pressure.[89] The Mariners' owners used the team's final series at the Kingdome as an opportunity to announce the existence of the dispute over cost overruns.[90] Despite the Mariners' efforts, the Public Facilities District maintained a no-compromise position.

SAFECO Field opened in July 1999.[91] After the conclusion of the Mariners' partial season in the stadium, the Public Facilities District released a report that attributed the majority of cost overruns to the Mariners' insistence on various design changes.[92] Additionally, the report emphasized that the Mariners benefited from a tight construction schedule and the opportunity to move into the new stadium as soon as possible.[93] Subsequently, the Mariners' owners, themselves, announced their first profit in 7 ½

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[86] Heath Foster, *New Ballpark Stadium-Tax Well Above Estimates*, SEATTLE POST-INTELLIGENCER, February 20, 1999.
[87] *Id.*
[88] The statute authorizing the stadium financing plan contains an ambiguous limitation on the use of surplus funds. According to the provision, surplus funds must be first allocated to early retirement of bonds with secondary allowance for use of surplus funds as a contingency for cost overruns. WASH. REV. CODE § 82.14.360(3)(a) & (b).
[89] Alan Snel, *M's, County Square Off on Cost Overruns Legal Battle Brewing Over Use of Surplus Tax Money*, SEATTLE POST-INTELLIGENCER, June 23, 1999.
[90] Alan Snel, *Fans Cry Foul After M's Seek Cost Overrun Compensation*, SEATTLE POST-INTELLIGENCER, June 24, 1999.
[91] Angelo Bruscas, *Owners Use Opener to Focus on Baseball Politics Set Aside for Celebration*, SEATTLE POST-INTELLIGENCER, July 16, 1999.
[92] Neil Modie, *Report Blames Mariners for Safeco Costs*, SEATTLE POST-INTELLIGENCER, January 21, 2000.
[93] *Id.*

years.[94] Despite the $6 million profit, the Mariners downplayed the effects of SAFECO Field and predicted only moderate future revenue growth.[95] The Mariners also responded to the Public Facilities District's report with claims that cost overruns resulted from a lack of oversight.[96] Ultimately, the Mariners and the Public Facilities District settled their dispute.[97] The Mariners agreed to abandon any legal claims against the District in exchange for being able to bring claims against the stadium's designer (ironically the same company that designed the Kingdome) and the construction company that built the stadium.[98] In spite of the Mariners' hard-line bargaining throughout the evolution of SAFCO Field, Seattle now boasts having some of the nation's most dedicated fans.

C. San Francisco

Like Denver and Seattle, San Francisco faced the threat of not having a major league franchise. Whereas Denver and Seattle responded by directly providing subsidies to defray the costs of constructing stadiums, San Francisco refused to provide such financing. After a drawn out fight and a change in ownership, the San Francisco Giants stayed in San Francisco and constructed the first privately financed stadium built since the construction of Dodger Stadium in 1962. An understanding of the unique outcome in San Francisco requires a discussion of the general history of Giants and a more specific discussion of the history of Pac Bell Park.

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[94] Neil Modie and Angelo Bruscas, *Safeco Field Put Money in Bank For Mariners' Owners*, SEATTLE POST-INTELLIGENCER, February 29, 2000.
[95] *Id.*
[96] Neil Modie, *Mariners Hint At Suit Over Safeco Overruns*, SEATTLE POST-INTELLIGENCER, February 1, 2000.
[97] Mike Lewis, *Taxpayers Off Hook For Safeco Filed Mariners Drop Attempt to Recoup Cost Overruns from the Public*, SEATTLE POST-INTELLIGENCER, February 16, 2001.
[98] *Id.*

In 1957, the guarantee of a public subsidy to build Candlestick Park played a key role in the Giants' decision to move from New York to San Francisco.[99] Favorable lease terms further clinched the deal. According to the lease, the Giants had an obligation to pay the City of San Francisco 5% of the teams net revenues plus an annual rent of $125,000.[100] Compared to lease agreements in other cities, which required 7% of net revenues, the Giants' lease placed the team in an enviable position.[101] Indeed, the lease was so one-sided that a grand jury investigation occurred. Although the grand jury dismissed charges of inside dealing between the Giants' owner and San Francisco's mayor, it concluded that the mayor had made a "bad" deal.[102]

Notwithstanding the financial benefits the Giants received, Candlestick Park presented significant problems for the team. In 1961, the Giants hosted the All-Star Game at Candlestick. The game became a farce after strong winds swept through the stadium.[103] In response to the embarrassing situation, the City of San Francisco began considering ways to fix Candlestick's wind problem. Proposed remedies included covering Candlestick and building a new stadium.[104] Although the City enclosed Candlestick in order to accommodate football, wind remained a problem at the stadium.[105] The City did not take further action further action until in 1981.

In 1981, the Giants submitted a report to the City of San Francisco that declared Candlestick Park "unfit for baseball."[106] The City responded by forming a task force to

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[99] Stephen J. Agostini, John M. Quigley, and Eugene Smolensky, *Stickball in San Francisco, in* SPORTS, JOBS, AND TAXES 388 (Roger G. Noll and Andrew Zimblast, eds. 1997).
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 385-6.
[104] *Id.* at 389.
[105] *Id.*
[106] *Id.*

consider options. The task force returned with a proposal to build a stadium at China Basin (located on the waterfront near the Bay Bridge).[107] Discussion related to the proposed new stadium continued until 1987, when voters had the opportunity to consider Proposition W.[108] Proposition W would have provided financing through a combination of public bonds, revenues from the sale of luxury boxes, and revenues from a hotel tax.[109] Voters rejected Proposition W by a margin of 53 to 47%.[110] Bob Lurie, the Giants' owner, responded by threatening to relocate.[111] A number of cities, including Santa Clara, began posturing to lure the Giants away from San Francisco.[112] In order to appease Lurie, San Francisco's mayor, Art Agnos began discussing and soliciting bids for the construction of a new stadium.[113] Incidentally, Agnos had been elected on a platform that opposed Proposition W.[114]

In 1989, Lurie again presented a proposal for the construction of a new stadium at China Basin.[115] The City of San Francisco opted to present the proposal for voter approval.[116] In turn, Lurie demanded, and the City allowed, a release from the Candlestick lease agreement if the ballot measure failed.[117] Prior to the election, the World Series Earthquake occurred and San Francisco's priorities changed. Ultimately, voters narrowly rejected Proposition P.[118]

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[107] AGOSTINI, *supra* note 99, at 389.
[108] *Id.* at 390-91.
[109] *Id.* at 390.
[110] *Id.* at 391.
[111] *Id.*
[112] *Id.*
[113] *Id*. at 391-92.
[114] *Id.* at 391.
[115] *Id.* at 392.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 394.

Between 1989 and 1992, Lurie entertained offers to relocate.[119] After other National League owners rejected a proposed agreement to move the Giants to Tampa Bay, Lurie agreed to sell the Giants to a group of local investors.[120] The group of local investors, led by Peter Magowan, owner of the Safeway grocery store company, paid $100 million for the team, $15 million less than offered by the Florida group.[121] The City of San Francisco supported the sale of the Giants by providing $3 million in lease concessions to the new owners.[122] Before the deal between the new owners and Lurie became final, however, the City's lease concessions became a point of criticism. Some members of the public questioned the need for the concessions after Magowan and the other owners signed Barry Bonds to a $43 million contract.[123] The new owners justified the Bonds contract as a move made in the interest of the Giants' fans.[124]

In 1995, after suffering $22 million in lost revenue partly because of the 1994-1995 strike,[125] the Giants' ownership group announced a plan to construct a $255 million privately financed stadium on City land located at China Basin.[126] According to the proposal 55% of the construction costs ($140 million) would come from private financing with the remaining monies provided through the sale of naming rights, seating rights, and

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[119] AGOSTINI, *supra* note 99, at 394.
[120] *Id.*
[121] *Id.*; William Carlsen, *Sale of Giants Finally Approved / Deal Receives Unanimous OK From Baseball Team Owners*, SAN FRANCISCO CHRONICLE, January 13, 1993.
[122] Marc Sandalow, *New Giants Boss Says S.F. Deal Must Stand / He Says Lease Concessions a Commitment*, SAN FRANCISCO CHRONICLE, December 9, 1992.
[123] *Id.*
[124] *Id.*
[125] Nancy Gay, *Field of Dreams / What a New Park Means to Giants*, SAN FRANCISCO CHRONICLE, December 22, 1995 (unique stadium necessary to cure Giants' economic woes).
[126] The Giants devised their plan after receiving the results of a poll that indicated public support for a privately financed ballpark. Philip Matier and Andrew Ross, *Poll Finds Support of Privately Financed Stadium*, SAN FRANCISCO CHRONICLE, February 10, 1993. Additionally, the Giants garnered support from local leaders who had opposed previous stadium proposals. Philip Matier and Andrew Ross, *Giants New Game Plan / Team Seeks March Ballot Measure for Park*, SAN FRANCISCO CHRONICLE, December 20, 1995.

concession rights.[127] Additionally, the Giants' proposed an immediate use of $10 million of public funds provided through future property taxes from the stadium.[128]

Unlike the course of events in Denver and Seattle, acceptance of the Giants' proposal occurred in a relatively smooth fashion. Three major events defined the evolution of Pac Bell Park: 1.) Approval of Proposition P, which allowed construction to occur at China Basin, 2.) The Giants' acquisition of necessary financing, and 3.) The Giants' success in overcoming regulatory hurdles.

As opposed to previous efforts to receive approval for a stadium, voters strongly supported the Giants proposal at the time of its initial announcement. The Giants' owners built upon that initial popularity by responding to expressed concerns and by spending a significant amount on their campaign in favor of Proposition P.[129] Even though opposition groups managed to insert text indicating that the China Basin ballpark would require greater than expected public subsidies and produce significant traffic problems, Proposition P passed by a "landslide" 2-1 margin.[130]

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[127] *Id.*

[128] *Id.*

[129] Philip Matier and Andrew Ross, *Giants Ballpark Strategy Soften Up Likely Foes*, SAN FRANCISCO CHRONICLE, January 15, 1996. The significance of the Giants' campaign expenditures is apparent in the fact that the owners had nearly spent $300,000 up to the month before the election; the Giants' expenditures dwarfed the expenditures of opponents by a rate of 126 to 1. Edward Epstein, *Ballpark Proponents Outspending Foes 126 to 1*, SAN FRANCISCO CHRONICLE, February 17, 1996. The disparity in funding can be attributed to the greater popularity of the Giants' proposal as well as the fact that opposition groups did not receive outside financial support, as they had in the past. Previously, a Sacramento developer, Greg Lukenbill, had provided funding in an effort to prod the Giants into moving. Because Lukenbill sold the site he proposed for a ballpark, he no longer had an interest in opposing the Giants' stadium efforts. Edward Epstein, *Old Foes Criticize Giants' New Ballpark Proposal / But Out-Of-Town Developer Won't Help This Time*, SAN FRANCISCO CHRONICLE, December 21, 1995.

[130] After both the Giants and opposition groups argued against the inclusion of text in the voter's pamphlet, the San Francisco Registrar of Voter took a hands off approach and refused to make omissions. *S.F. Registrar Rejects Protests on Stadium Ballot Arguments*, SAN FRANCISCO CHRONICLE, January 26, 1996. Interestingly, the high voter turnout that occurred in Denver and Seattle did not occur in San Francisco. Philip Matier and Andrew Ross, *Probable Low Voter Turnout Has Ballpark Boosters a Bit Edgy*, SAN FRANCISCO CHRONICLE, March 25, 1996. Nevertheless, Proposition P received strong support from the voters who did cast ballots. Edward Epstein and John King, *S.F. Voters Say Play Ball / China Basin Stadium Plan is a Winner*, SAN FRANCISCO CHRONICLE, March 27, 1996.

Once voters approved Proposition P, the Giants were able to secure financing and revenue from the sale of various rights. Chase Manhattan Bank provided the core $140 million of financing.[131] Chase's financing package augmented a deal that the Giants' had already made with Pacific Bell Telecommunication for naming rights.[132] Under that deal, Pac Bell agreed to pay $50 million and to provide a telecommunications infrastructure for the ballpark.[133] In addition, the Giants managed to enter into an agreement with Anheuser Busch that made Anheuser Busch the sole beer company to have advertising rights within Pac Bell Park.[134] Accordingly Anheuser Busch agreed to provide $35 million in increments that exceeded Pac Bell's annual obligations. Beyond advertising rights, the Giants' owners experienced significant success in their efforts to sell seating and luxury box rights.[135] The Giants expected the sale of seating rights to exceed their original projection of $40 million.[136] Luxury suites, likewise, were expected to produce $7.8 million in up-front payments plus approximately $5.5 million in annual rents.[137] According to any objective standard, the Giants succeeded in their efforts to finance Pac Bell Park through private sources.

After the Giants' owners made their agreement with Pac Bell and acquired financing through Chase, they agreed to a lease with the City of San Francisco. According to the lease, the Giants are obligated to pay the City of San Francisco $1.2

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[131] Edward Epstein, *Financing in Place for Giants' New Park / Chase Bank to Arrange $140 Million Loan*, SAN FRANCISCO CHRONICLE, September 10, 1996.
[132] Jeff Pelline, *Pacific Bell, Giants Strike Deal For Park / $50 Million For Right to Name New Stadium*, SAN FRANCISCO CHRONICLE, April 3, 1996.
[133] *Id.*
[134] Carol Emert, *Anheuser is $35 Million Pac Bell Sponsor*, SAN FRANCISCO CHRONICLE, May 23, 1997.
[135] *Id.*
[136] Torri Minton, *Giants Move Up Sale of Park Seat Leases / Charter Rights Going Faster Than Expected*, SAN FRANCISCO CHRONICLE, April 22, 1997.
[137] Jon Swartz, *All the Luxuries of Home Games / Pricey Ballpark Suites Are Helping the Giants Finance Construction of Pacific Bell Park*, SAN FRANCISCO CHRONICLE, June 26, 1999.

million per year (mainly through property taxes) as reimbursement for the costs of site preparation and improvements to areas surrounding Pac Bell.[138] Additionally, the lease required the Giants to commit to remaining in San Francisco for 25 years, with the possibility of renewing the lease in five-year intervals thereafter.[139] If the Giants choose to leave Pac Bell after 25 years, they are responsible for restoring the park to its original condition.[140]

Even though the Giants managed to receive voter approval and managed to acquire necessary financing, the costs and burdens of regulatory requirements could have scuttled Pac Bell Park.[141] In order to avoid the potential demands of city planners, the Giants sought an exemption from the requirement of having to provide an environmental impact statement. Although a California Senate committee unanimously approved a bill providing for such an exemption, Governor Pete Wilson attempted to use the bill as a vehicle for his own environmental agenda.[142] Despite the senate's rejection of Wilson's proposed amendments,[143] the California General Assembly met some of Wilson's demands by approving a bill that also exempted some road and levee projects.[144] Once

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[138] Edward Epstein, *Handshake on Ballpark Lease / Giants to Pay $1.2 Million Annual Rent*, SAN FRANCISCO CHRONICLE, December 17, 1996.
[139] Edward Epstein, *Handshake on Ballpark Lease / Giants to Pay $1.2 Million Annual Rent*, SAN FRANCISCO CHRONICLE, December 17, 1996; *see also* Non-Relocation Agreement between San Francisco Baseball Associates L.P. and the City and County of San Francisco, 1 (November 26, 1997) (25-year relocation limitation includes Giants remaining tenancy at Candlestick plus 22-year limitation that began once the Giants occupied Pac Bell)—contract on file with author.
[140] Edward Epstein, *Handshake on Ballpark Lease / Giants to Pay $1.2 Million Annual Rent*, SAN FRANCISCO CHRONICLE, December 17, 1996
[141] *See* Edward Epstein, *Tab For Giants' Park Could Soar / China Basin Draft Plan Calls for Slew of Costly Improvements*, SAN FRANCISCO CHRONICLE, July 26, 1996.
[142] *State Panel Oks Bill Expediting Giants' Plans*, SAN FRANCISCO CHRONICLE, February 4, 1997; Greg Lucas, *Governor Throws Out Giants' Pitch / Bill to Facilitate Park Construction Hits Snag*, SAN FRANCISCO CHRONICLE, February 26, 1997.
[143] Greg Lucas, *Senate Oks S.F. Ballpark Exemption / Environmental Reprieve Seen as Boost for Giants*, SAN FRANCISCO CHRONICLE, March 4, 1997.
[144] Greg Lucas, *Assembly Oks Giants Park Bill / Senate, Governor Expected to Approve Compromise to Speed Construction*, SAN FRANCISCO CHRONICLE, April 8, 1997.

they received an exemption from having to file an environmental impact statement, the Giants' owners sought and received approval from various commissions.[145] The exemption and the approvals, however, did not ensure that the Giants could commence construction with complete security. Before breaking ground, the Giants entered an agreement with an environmental group that threatened litigation. According to the agreement, the Giants promised to provide increased environmental monitoring in exchange for the group promising not to seek legal relief.[146] Together, difficulties that the Giants faced in overcoming regulatory constraints and potential litigation reflect how politics can weave into even the best stadium financing plans.

Ultimately, Pac Bell Park opened on April 11, 2000. The Park opened on time and on budget.[147] Two years and one world series later, both the Giants and San Francisco residents remain pleased with their new stadium.

D. Meaning

Although each stadium has its own unique and interesting history, trends exist. The history of Coors Field, SAFECO Field, and Pac Bell Park all illustrate how the relationship between local governments and baseball teams can affect stadium financing plans.

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[145] Edward Epstein, *Giants' Ballpark Wins Planning Commission OK With Caveat*, SAN FRANCISCO CHRONICLE, July 11, 1997 (design for Pac Bell approved with prohibition against exterior advertisements); Edward Epstein, *Giants Head Toward Home as Port Oks Ballpark Lease*, SAN FRANCISCO CHRONICLE, July 23, 1997 (port commission approved final version of lease and limitations on non-baseball uses of stadium); *State Commission Oks Giants' Lease for Ballpark Property*, SAN FRANCISCO CHRONICLE, August 27, 1997 (unanimous approval by commission in its capacity as overseer of navigable waterways).
[146] Edward Epstein, *Giants Lose One In Florida, But Win One at Home / Environmental Deal Allows Construction of Ballpark*, SAN FRANCISCO CHRONICLE, October 1, 1997.
[147] Ken Garcia, *Between Fenway Park and Heaven / Magowan and Co. Have Winner in Pac Bell*, SAN FRANCISCO Chronicle, March 25, 2000.

Local governments in both Denver and Seattle had difficult bargaining positions largely because the threat of relocation resonated with voters. San Francisco occupied a much stronger bargaining position largely because of greater population and voters who consistently opposed public subsidies. It also deserves note that the National League (out of interests in keeping a team in San Francisco and protecting the fledgling Marlins) further strengthened San Francisco's bargaining power by putting its weight against Bob Lurie's plan to move the Giants to Florida.

Based upon the history of the three stadiums, it appears that the course of events in Denver and Seattle will remain the norm. Although Pac Bell Park represents a much more efficient construction project than either Coors Field or SAFECO Field, Pac Bell also presents a more significant liability for the Giants' owners. If for no other reason than to protect their investments and reap the greatest possible profit from their operations, baseball team owners will continue to use the scarcity of franchises as a means of receiving substantial public subsidies. Standing alone, reduction of an ownership group's liabilities should not provide adequate justification for hundreds of millions of dollars worth of public subsidies.

Perhaps, reforms should center on the experience in San Francisco. There, a dedicated ownership group worked with the local government to produce a mutually beneficial arrangement that did not place an overwhelming general burden on taxpayers. If anything, the experience in San Francisco demonstrates the possibilities of how creative marketing can encourage corporations and wealthy fans to invest in the baseball experience. The lease agreement between the Giants and the City of San Francisco also

reflects how a city can protect its interests in retaining a baseball franchise without having to do much more than providing suitable land and adequate services.

II. The Legal Arena

While public subsidies may reduce the liabilities of an ownership group, they increase the risks faced by local governments. A local government may choose to subsidize the construction of a stadium for the purposes of economic development or urban renewal. Although the return on such subsidies may not be great to begin with, a local government gains nothing from an empty stadium. Solutions to this problem require discussion of potential remedies through existing legal structures as well as the need to apply anti-trust laws to baseball.

A. Possible Insurance for Local Governments Through Existing Legal Structures

1. Lease Provisions In General

Theoretically, a local government can limit the risks it faces when funding a stadium project by incorporating a number of terms into a lease agreement. For instance, a local government might require higher rent or restrain a team's ability to relocate. Additionally, a local government may require a team to bear the burdens of catastrophic losses and the potential destruction of the stadium. Finally, a local government may include contingencies to protect against the consequences of an ownership group becoming insolvent. The discussion of stadium projects in Denver and Seattle illustrates the dangers of insolvency and volatile ownership groups.

Although there are many theoretical possibilities through which local governments may limit risk, in reality, local governments only have a limited opportunity to explore such possibilities. Because such possibilities exist through contracts, they

depend upon agreement. With a significant bargaining advantage, teams often have the ability to demand generous terms. Consequently, local governments do not have a significant opportunity to limit risks. Nevertheless, a typical stadium lease agreement will contain limitations on relocation and will demand at least a minimal annual payment.

2. The Possibility of Protecting Local Governments from the Adverse Effects of Labor Disputes

Beyond general contract terms, a local government may seek to protect itself through a liquidated damage clause. In particular, a local government might consider incorporating such a clause to protect against the dangers of a labor dispute. As demonstrated by the 1994-1995 strike, a labor dispute can effectively close a stadium. Without events occurring at a stadium, local governments may suffer from lost profit sharing (if agreed to) and lost revenues (because of declines in business around the stadium). Liquidated damages clauses that restrict an employer's rights during a labor dispute, however, raise both constitutional and statutory issues. Consequently, a determination of whether a local government may use a liquidated damage clause to protect itself from the effects of a lock out or strike requires discussion of the relationship between the National Labor Relations Act (NLRA) and the authority of local governments.

Prior to the adoption of the NLRA, regulation of labor law occurred through a combination of state and federal laws. Some overlap between state and federal laws continued to exist after the adoption of the NLRA in 1935 because the original act did not restrict union activity. After adoption of the Taft Hartley Act in 1947, however, the

NLRA became the primary tool for regulating the labor relations of businesses engaged in interstate commerce.[148] Through the Constitution's supremacy clause,[149] the provisions of the NLRA preempt regulations and requirements imposed by local governments. The Supreme Court recognizes preemption in two forms.

First, the Court recognizes preemption where the NLRA at least arguably protects a labor-related activity.[150] So-called *Garmon* preemption extends to both activities clearly protected by the NLRA[151] and activities arguably preempted by the NLRA.[152] Additionally, the Court recognizes the National Relations Board to have the first opportunity to determine whether preemption applies in ambiguous situations.[153] The NLRB's refusal to assert jurisdiction does not provide a proper basis for overcoming preemption.[154] There are, however, two exceptions to the *Garmon* preemption standard. Under the first exception, preemption does not apply to peripheral concerns.[155] In order to determine whether a matter is peripheral, the Court balances a state's legitimate non-labor regulatory interests with both the federal government's interest in uniform labor regulation and the potential for intrusion on that interest by state regulation.[156] The other exception allows for state regulation of matters "deeply rooted in local feeling and responsibility."[157] Limitations on labor violence fall within the latter exception.

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[148] 29 U.S.C. § 160(a).
[149] U.S. Const. Art. VI.
[150] San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959).
[151] *Id.* at 243.
[152] *Id.* at 245.
[153] *Id.*
[154] *Id.* at 246.
[155] *Id.* at 243.
[156] *See* International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619-623 (1958) (balancing mentioned factors).
[157] *Id.* at 243.

Second, the Court recognizes preemption of regulations on conduct neither protected nor prohibited if Congress intended to leave the area unregulated.[158] In relation to the use of economic pressure, such as lockouts and strikes, Congress has expressed its intent to leave the area unregulated.[159] Consequently, the second, so-called *Machinist*, preemption is the most relevant form of preemption when considering whether local governments may condition the subsidization of stadium financing upon a team agreeing to pay liquidated damages in the event of a strike or lockout. If such a condition existed in relation to a local government performing a regulatory function, the *Machinist* standard, undoubtedly, would require preemption.[160] Stadium financing is more of a proprietary function than a regulatory function, though.

The question, then, becomes whether a local government acting in a proprietary role may enter a contract with a team through which the team agrees to give up its rights to economic pressure as well as to bear the burdens of players exercising their rights. Governments acting in proprietary capacities occupy a situation similar to a private business and do not have the same obligations as a government acting in a regulatory capacity.[161] The distinction between regulatory and proprietary capacities is rational because governments that occupy a proprietary capacity are not able to use their coercive powers to impose compliance.

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[158] Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Com'n, 427 U.S. 132, 141 (1976).
[159] *Id.* at 149-50.
[160] Golden State Transit Corp v. City of Los Angeles, 475 U.S. 608 (1986).
[161] *See* U.S. v. Kokinda, 497 U.S. 720, 725-6 (1990) (government acting in proprietary capacity held to lower First Amendment standard when regulating forums); Camps Newfound / Owatonna Inc. v. City of Harrison, 520 U.S. 564, 592-93 (1997) (state government acting in proprietary capacity allowed to treat its citizens more favorably than citizens of other states); Hawaii v. Standard Oil of Calif., 405 U.S. 251, 261 (1972) (government acting in proprietary capacity had standing as "person" when bringing anti-trust action); *contra* Dolan v. City of Tigard, 512 U.S. 374 (1994) (government acting in regulatory capacity lacked ability to require party to give up constitutional right in exchange for remote discretionary benefit).

Although a local government's interests in the operation of a stadium are indirect, for example increased revenues from congregation of sports fans and decreased expenses through the benefits of urban renewal, the interests are nonetheless valid. Through the distinction between regulatory and proprietary roles, local governments should at least have the legal authority to seek a liquidated damages clause that protects against labor disputes. As with other contractual terms, however, a local government's ability to include a liquidated damage clause depends on the strength of its bargaining position.

3. Conclusions

A local government may pursue a number of protections through negotiations and existing legal structures. Unfortunately, a local government's ability to receive such protections depends largely upon its bargaining power. The nature of major league baseball gives teams greater bargaining power through the scarcity of franchises, which often forces local governments into unreasonable bargains as they attempt to win out over other local governments. The reason for a scarcity of franchises and the true problem with publicly financed stadiums lies in the fact that anti-trust laws have never been enforced against baseball.

B. The Real Problem: Anti-Trust Law

The lack of anti-trust litigation involving baseball has resulted from Major League Baseball's own efforts to stay out of court as well as the Supreme Court's recognition of a baseball exception to the Sherman Anti-Trust act. Even if the baseball exemption remains valid, a strong possibility exists that it does not extend beyond labor issues and business associated with games themselves. A discussion of both the evolution and the nature of the baseball exemption is necessary in order to determine whether local

governments may use anti-trust actions to equalize their bargaining powers in relation to stadium financing agreements.

The Supreme Court first recognized a baseball exemption to the Sherman Anti-Trust act in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*.[162] . A Baltimore baseball team from the then-defunct Federal Baseball League initiated the *Federal Baseball* case through allegations that the National and American Leagues had engaged in monopolistic practices by forcing their players to agree to a "reserve clause" as a condition of employment.[163] The reserve clause essentially gave the respective league ultimate authority over a player's employment within the league.[164] Put more succinctly, the Baltimore club argued that the National and American Leagues had driven it out of business. After a favorable ruling at the district court and a reversal by the Court of Appeals for the DC Circuit, the Supreme Court granted certiorari.

To understand the Court's decision, it is necessary to understand the basic requirements of the Sherman Anti-Trust Act. Section 1 of the Sherman Act prohibits contracts and agreements that restrain trade.[165] Section 2 prohibits both monopolistic conduct and attempted monopolistic conduct.[166] Both sections 1 and 2 of the Act depend

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[162] 259 U.S. 200 (1922).
[163] National League v. Federal Baseball Club of Baltimore, 269 F. 681, 683 (1920).
[164] *Id.*
[165] Section 1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1.

[166] Section 2 provides:

on the term "commerce" for their application. Through its opinion, the Court held that the business of baseball did not constitute commerce and, thus, claims related to the reserve clause existed outside the scope of the Sherman act.[167] The Court reasoned that baseball leagues merely facilitated exhibitions in which players made personal efforts unrelated to production.[168]

The Supreme Court did not revisit the baseball exemption again until it decided *Toolson v. New York Yankees*.[169] In Toolson, a baseball player brought an anti-trust action on allegations that application of the reserve clause prevented him from receiving the fair market value of his services.[170] The Court stressed stare decisis as its reason for affirming dismissal of Toolson's action.[171] The Court did, however, limit the baseball exemption to the will of Congress, allowing for legislative repeal.[172]

The most recent Supreme Court examination of the baseball exemption occurred in *Flood v. Kuhn*.[173] In that case, baseball player Kurt Flood brought an anti-trust action after being traded and being refused free agency.[174] Before holding that the baseball exemption remained valid, the Court stated eight conclusions. As expressed by the Court:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2.

[167] Federal Baseball, 259 U.S. at 209.
[168] *Id.*
[169] 346 U.S. 356 (1953).
[170] Toolson v. New York Yankees, 101 F. Supp. 93 (D.C. Cal. 1951) (reserve clause allegedly deprived player of livelihood); *see also* Kowalski v. Chandler, 202 F.2d 413 (1953) (accompanying case in which plaintiff specifically alleged inability to receive fair market value for services).
[171] Toolson, 346 U.S. at 357.
[172] *Id.*
[173] 407 U.S. 258 (1972).
[174] *Id.* at 265.

1. "Professional baseball is a business and it is engaged in interstate commerce."
2. The exemption for the reserve system makes baseball an "anomaly."
3. While the baseball exemption is an "aberration" its established history requires respect through stare decisis.
4. Other professional sports are not subject to the baseball exemption.
5. Television and radio have not eroded the reasoning supporting the exemption.
6. Congress has taken no action to limit the exemption.
7. Legislation, rather than action by the Supreme Court, provides the best avenue for changing the baseball exemption.
8. The baseball exemption has been tied to anti-trust law for 50 years.[175]

As evident in all three cases, the Supreme Court has only expressed the existence of a baseball exemption with regard to baseball's reserve clause. None of the cases address whether the nature of the baseball exemption includes other matters, such as Major League Baseball's authority to limit franchises or prevent franchises from relocating. Despite the lack of Supreme Court precedent, some guidance on this matter exists. Ironically enough, the most relevant case arose from Major League Baseball's refusal to allow Bob Lurie to sell the Giants to a group of Pennsylvania investors, who sought relocate the team to Florida.

In *Piazza v. Major League Baseball*,[176] Major League Baseball moved to dismiss the investors' anti-trust action. The court denied the League's motion after examining the history of the baseball exemption. Specifically, the court concluded that the reserve clause and sale of baseball teams involved distinct activities.[177] Moreover, the court

[175] *Flood*, 407 U.S. at 282-83.
[176] 831 F.Supp. 420 (E.D. Pa. 1993).
[177] *See Id.* at 438.

concluded the Supreme Court had intended the baseball exemption only to apply to claims based on the reserve clause.[178]

The best support for the *Piazza* decision appears to exist through a principle requiring narrow construction of exemptions to the Sherman Act.[179] In any event, the *Piazza* decision signals an opportunity for local governments to achieve some parity with baseball teams as they negotiate stadium-financing agreements. Because both states and local governments have the right to bring anti-trust actions, there is little reason why anti-trust law should be overlooked as a possible response to threats of relocation or excessive demands as conditions for a city receiving a baseball franchise.[180]

III. Conclusion

Unfortunately, baseball stadiums have become monuments to extortion as well as being a place where baseball fans may experience a moment. The detailed histories of stadium projects in Denver, Seattle, and San Francisco illustrate the adversities that local governments must face when negotiating with Major League Baseball and individual teams. The situation in San Francisco offers some promise of what might happen if local governments have greater bargaining power. The Giants' ownership group worked with the City of San Francisco to create a first rate stadium that provides for both the interests of the community and the interests of the baseball team.

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[178] *Piazza*, 831 F.Supp. 435-438. The court, however, tipped its hat to an expansive interpretation of the baseball exemption, that would include both the reserve clause and matters related to the League's internal structures. The court concluded that even under that standard, the record before it did not support summary judgment. *Id.* at 440-41.
[179] *Id.* at 438 (citing Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (narrow construction of anti-trust exemptions well settled).
[180] Both state governments acting as parens patriae and local governments protecting their own proprietary interests may bring anti-trust actions. 15 U.S.C. § 15c (2003) (providing authority to state governments); *see* 15 U.S.C. § 15 (allowing persons injured by illegal activities to bring action); 15 U.S.C. § 7 (2003) (defining state-created entities and associations as "persons").

Within the present atmosphere of stadium negotiations, it appears doubtful that a city will be able to replicate what San Francisco achieved without improving its bargaining position. A local government's bargaining position effects not only the size of the subsidy that a team receives, it limits the degree to which the local government can insulate itself from risk. The apparent answer to this problem resides within the present confines of anti-trust law. Because strong arguments can be made that anti-trust exemptions do not apply to baseball, insofar as relocation and franchise development are concerned, local governments should not ignore the possibilities of anti-trust actions when negotiating stadium financing agreements. Only if local governments can find a way to equalize their bargaining powers, can they receive the same benefits as San Francisco has received.