



March 14, 2013

SENT BY MAIL AND EMAIL (JDangberg@cityofsacramento.org)

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RE: Proposed Sacramento Arena Subsidy

Dear Mr. Dangberg:

This letter is submitted on behalf of a nascent coalition of community groups, responsible businesses and local residents concerned about the City's proposal for significant public subsidy to keep the Kings NBA franchise in Sacramento. The purpose of this letter is to articulate specific concerns and raise specific deficiencies that, even at this early stage, are readily apparent with the proposed subsidy. This coalition is determined to obtain further information regarding the subsidy so that the public may meaningfully evaluate. If the terms of the public subsidy are as unfavorable to the public as previously proposed last year, this coalition is prepared to oppose such subsidy by any and all legal means possible in the absence of a public vote supporting it.

In an attempt to be much more transparent than the City's own efforts to date, this letter lays out our present concerns that are based upon the very limited information that the City has provided to date.

**1. A Significant Public Subsidy Cannot be Justified by Reference to Catalyzing Economic Development**

Despite persistent claims by arena proponents and their consultants to the contrary, trained economists who have analyzed the economic impact of publicly subsidized arenas find no evidence of any economic benefit whatsoever.<sup>1</sup> "Few fields of empirical

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<sup>1</sup> White and Kotval, *Financing Economic Development in the 21st Century*, (2nd ed. 2013), pp. 323-342 (chapter authors Robert A. Baade and Victor A. Matheson) ("*Economic*

economic research offer virtual unanimity of findings. Yet, independent work on the economic impact of stadiums and arenas has uniformly found that there is no statistically significant positive correlation between sports facility construction and economic development.”<sup>2</sup> University of Chicago economist Allen Sanderson put the issue more bluntly, “If you want to inject money into the local economy, it would be better to drop it from a helicopter than invest it in a new ballpark.”<sup>3</sup> This is not simply the idle opinions of these economists. Instead, this is the inescapable conclusion resulting from decades of rigorous independent empirical economic study:

There now exists almost twenty years of research on the economic impact of professional sports franchises and facilities on the local economy. The results in this literature are strikingly consistent. No matter what cities or geographic areas are examined, no matter what estimators are used, no matter what model specifications are used, and no matter what variables are used, articles published in peer reviewed economics journals contain almost no evidence that professional sports franchises and facilities have a measurable economic impact on the economy.<sup>4</sup>

Thus, there is no reasonable debate on this point: publicly subsidized arenas do not have a positive economic impact on the local economy. Although trained economists are unanimous on this point, we have repeatedly seen pro-arena promotional “studies” and “reports” suggesting incredible economic growth resulting from a downtown arena in Sacramento. How can this apparent inconsistency be reconciled? In fact, there is no inconsistency as this phenomenon is well documented: “For politicians eager to embrace sports deals, it’s easy to find consulting firms willing to produce glowing ‘economic impact studies’ – even though sports economists nearly unanimously dismiss them as hogwash.”<sup>5</sup> “The problem with most of them is that they build their model on faulty numbers that are provided by the people who hire them to do the report. In fact, most

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*Development*”); deMaus, Neil, *Why Do Mayors Love Sports Stadiums?*, The Nation (July 27, 2011); Coates and Humphreys, *Do Economists Reach a Conclusion on Subsidies for Sports Franchises, Stadiums, and Mega-Events?*, North American Association of Sports Economists Working Paper Series, Paper No. 08-18 (August 2008); Coates and Humphreys, *Caught Stealing – Debunking the Economic Case for D.C. Baseball*, CATO Institute Briefing Papers (Oct. 27, 2004); Coates and Humphreys, *Professional Sports Facilities, Franchises and Urban Economic Development*, UMBC Economics Dept. Working Paper 03-103; Siegfried and Zimbalist, *The Economics of Sport Facilities and Their Communities*, Journal of Economic Perspectives (Summer 2000).

<sup>2</sup> Siegfried and Zimbalist (2000), p. 103.

<sup>3</sup> deMaus (2011), p \*1.

<sup>4</sup> Coates, D., and B. Humphreys (2008), p. 15.

<sup>5</sup> deMaus (2011), p. \*3.

studies include a disclaimer that they don't vouch for the third-party information given to them."<sup>6</sup> "These studies and a multitude of others generally find that the actual economic impact of sports teams or events is a fraction of that claimed by the boosters, and in some cases actually show a reduction in economic activity due to sports."<sup>7</sup>

In short, prospective economic impact reports, like "The Economic Engine Report" from 2011 that was funded by Think Big Sacramento and the future study authorized by the City Council on February 26, 2013, have absolutely no credibility in predicting the economic impact from proposed arenas. They simply constitute a *post hoc* rationalization to support the goal of whatever entity that commissions the work. These consultants' studies do not refute the unanimous conclusion from decades of rigorous economic research.

Having established both (i) that publicly-financed arenas do not catalyze overall economic development, and (ii) that consultants' studies purporting to document such economic benefit are misleading, intelligent discourse about a publicly subsidized arena must necessarily not include any further misleading suggestions that economic benefits justify a public subsidy. "Numerous cities are littered with 'downtown catalysts' that have failed to catalyze."<sup>8</sup> In light of this overwhelming objective empirical evidence, arena boosters who continue to tout an economic benefit from a publicly-subsidized arena are likely doing so for their own personal reasons that are distinct from the public interest, much like oil industry executives who continue to deny global climate change. This misleading rhetoric must end.

Arena proponents may suggest, in a further attempt to sidestep the overwhelming empirical economic data, that the prevalence of such subsidies is a pragmatic indication of economic benefits. This phenomena, also, is well documented:

The fact that sports subsidies continue to be granted, despite the overwhelming preponderance of evidence that no tangible benefits are generated by these heavily subsidized professional sports facilities, remains a puzzle. . . Elected officials are especially susceptible to flattery from professional athletes, and these officials are keenly aware of the political value of keeping the local team in town regardless of the underlying cost-benefit calculus. These explanations, along with simple collective

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<sup>6</sup> Malaska, *Terminal Error / How county-provided data doomed the stadium tax economic impact study*, CityBeat (Jan. 18, 2012) (quote attributed to Brad R. Humphreys).

<sup>7</sup> *Economic Development* (2013), p. 333.

<sup>8</sup> deMaus (2011), p. \*2.

foolishness when it comes to matters of the heart like sports, have considerable explanatory power.”<sup>9</sup>

It is obvious that the City of Sacramento – and the Mayor in particular – are highly motivated to jump through any hoops required to keep the Kings in Sacramento. It seems safe to say that the local elected officials, and the Mayor in particular as a former NBA player, believe that it would be politically disastrous to lose the Kings on their watch. These perceived political pressures militate in favor of keeping the Kings at all costs in spite of the overwhelming empirical evidence that doing so provide no tangible economic benefit to the local economy. Yet it is axiomatic that the individual fears and aspirations of local politicians is not the proper foundation for sound policy, and in particular the reallocation of significant public assets.

In addressing the absence of any economic benefit resulting from an arena, we appreciate your candor at Councilmember Schenirer’s town hall meeting last year. At that meeting, you plainly stated that – even if “the arena deal doesn’t pencil out” – you suggested that the residents of Sacramento aspire to this type of civil amenity in their community no matter what the cost. If that is what you and other City officials truly believe, the best interest of the community requires honest disclosure and discourse about this goal without misleading distractions of fanciful economic projections.

## **2. A Subsidized Arena Should be Approved by the Voters**

Having established that any rational discussion of an arena requires omission of any further misleading suggestion that an arena can be made to pay for itself,<sup>10</sup> the issue becomes one of basic public policy: how to best allocate significant public resources for the public’s benefit. “The litmus test arguably should not be whether sport induces and increase in economic activity, but *whether it is the most efficient method for improving the economy*. . . It is also important to note that as many as 98 percent of jobs created through sports subsidies are in the relatively low-paying, nonmanufacturing sector.”<sup>11</sup> You previously suggested that an arena of “NBA standards” is itself a justified public benefit even in the absence of an economic benefit. Our coalition, which includes those on the political right who object to government waste as well as those on the left who object to average people being forced to subsidize billionaires, respectfully disagrees. Indeed, recent history demonstrates that our position was embraced by a strong majority

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<sup>9</sup> Coates and Humphreys (2008), p. 29.

<sup>10</sup> Indeed, if this were the case, the new proposed billionaire investors – who can certainly afford \$400 million in construction costs – would simply develop the project themselves without any public subsidy whatsoever.

<sup>11</sup> *Economic Development*, p. 336 (emphasis added).

of the voters in 2006. In light of the significant public assets involved, we believe this basic policy question should be decided by the voters. Indeed, the law is well settled that the public will have the right to vote on it.

**a. The Project and its Subsidy are Subject to Referendum**

Last year, the City Council expressly voted not to allow the residents of Sacramento an opportunity to vote on the prior version of the proposed subsidy. It is hoped that the Council does not again attempt to silence the voters, since it is likely that a proposed subsidy will be subject to referendum.

The Constitution, article IV, section 1, provides for referendum. It is the exercise by the people of a power reserved to them, and not an exercise of a right granted to them. Legislative acts of cities, including charter cities, are subject to the power of referendum no matter how the legislative act is named or its form. (*O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774, 784.) If the proposed deal for the arena subsidy is anything like last year's proposal, the action will likely be considered legislative in character and subject to referendum. (*Wheelright v. County of Marin* (1970) 2 Cal.3d 448 (ordinance authorizing construction of new road subject to referendum because "roadways are of sufficient public interest and concern to weight the scales in favor of construing this ordinance as being legislative and to be well within the referendum powers reserved by the people"); *Hopping v. City of Richmond* (1915) 170 Cal. 605 (approval of contract for construction of city hall was legislative); *Martin v. Smith* (1960) 184 Cal.App.2d 571, 575 (State's lease of tidelands was legislative act); *Pacific Rock & Gravel Co. v. City of Upland* (1967) 67 Cal.2d 666, 668 (granting municipal franchise is subject to referendum); *Joint Council of Interns & Residents v. Bd. of Supervisors* (1989) 210 Cal.App.3d 1202, 1211("It has long been established that 'the award of a contract, and all of the acts leading up to the award, are legislative in character.'").)

If the proposed subsidy is similar to what the City Council approved last year, our coalition will likely file a referendum petition so that the voters will be able to decide the matter. Any attempt to question the applicability of referendum will bear a heavy burden. Challenges to initiatives and referenda are "strictly circumscribed by the long-established rule of according extraordinary broad deference to the electorate's [initiative and referendum] power," which is "one of the most precious rights of our democratic process." (*Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565, 573-574.) Courts "jealously guard these powers and construe the relevant constitutional provisions liberally in favor of the people's right to exercise powers of initiative and referendum." (*Id.*) Consequently, a referendum "must be upheld unless [its] unconstitutionality clearly, positively, and unmistakably appears." (*Rossi v. Brown* (1995) 9 Cal.4th 688,711.) "If doubts can reasonably be resolved in favor of the use of

this reserve power, courts will preserve it.” (*Building Industry Ass’n v. City of Camarillo* (1986) 41 Cal.3d 810, 821.)

**b. Sacramento’s Recent History Demonstrates That the Public is opposed to a Significant Public Subsidy**

If history is any guide, a referendum challenging a subsidy similar to last year would be successful. In response to last year’s proposal, an initiative was certified that would have mandated voter approval for a significantly subsidized arena. Thousands of signatures were being gathered to place that initiative on the ballot, and only halted when the proposed arena deal itself completely collapsed. There is no reason to think public sentiment is any different a year later.

Further, Sacramento County voters in 2006 decidedly rejected Measures Q and R that would have provided public subsidy for a new arena. Arena supporters claim that the ballot results are irrelevant because the measures proposed a sales tax and not some other form of public subsidy, the overwhelming loss (80.38% voted against) suggests that such a nuanced interpretation is not warranted. Indeed, the contrary interpretation is much more likely, namely that a majority of votes simply do not want to provide a public subsidy for an arena. At the very least, these results suggest that the issue of a public subsidy is a very open question, and one that should be decided by the voters.

**3. The Subsidy May Constitute an Unlawful Gift of Public Funds**

Recent statements from the Mayor and other City officials reiterate that the City is prepared to offer a “significant” subsidy in order to promote the arena deal and finance the cost of the arena, which City officials concede will exceed \$400 million. To date, despite protestations from several members of the city council and the public, the Mayor and City Manager have been tightlipped regarding exactly how much of a public subsidy will be part of the plan. But they have acknowledged that the City is pursuing a plan involving a city-controlled financing authority issuing bonds secured by downtown parking operations as the largest contributor to the project. The value of those parking assets is also unclear, given that an arena located at Downtown Plaza (as opposed to last year’s Railyard plan) would carve hundreds of spaces out of the city’s inventory. Thus, certain local officials and the public doubt that the City’s planned contribution derived from parking revenue (which, if last year’s plan is a guide, will likely need to exceed \$255 million), is in fact feasible if the arena is constructed at the Downtown Plaza resulting in the elimination of at least half of the parking spaces that the City relies on for its monetization scheme.

At this stage in the process, it is apparent that the City cannot or will not answer many important fundamental questions regarding the amount of the “significant” public subsidy that the City plans to contribute, or even how exactly the City plans to obtain the funds needed to fulfill its seemingly open-ended commitment. But another looming question that the public deserves an answer to is who will profit from the new arena? And, if as discussed herein, the overwhelming evidence is that the City will not enjoy a return on its “investment,” then who does benefit? The answer appears to be the arena developer, the owner of the Kings, and the NBA. If so, that is potentially an illegal gift of public funds.

Article XVI, section 6, of the California Constitution prohibits the making of “gifts” of public funds. This provision renders illegal “any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . .” (*Ibid.*) This provision has been applied to public agencies in addition to the California Legislature. (*Santa Barbara etc. Agency v. All Persons* (1957) 47 Cal.2d 699, 707.)

“It is well settled that, in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a ‘public’ or a ‘private’ purpose.” (*County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281.) While it is recognized that a few cases have found that public subsidies for professional sports arenas do not constitute a gift of public funds, these cases predate the decades of economic study discussed herein that unanimously find that local agencies do not benefit from the predicted economic returns that purportedly justify such subsidies. Thus, there are serious questions whether the same result would presently occur in litigation alleging gift of public funds, even under the deferential standard of review. (*County of Alameda, supra*, 16 Cal.2d at 281 (determination of public purpose “not disturbed by the courts so long as it has a reasonable basis”).)

In other contexts where allegations of gift of public funds often arise – for instance, the government exercising its power of eminent domain – the concept is simple. The government cannot give away public funds to a private person or enterprise. Thus, in a condemnation scenario, the government cannot propose a “purchase” of property that is in excess of the true value of what the government is obtaining in return. Otherwise, the excess payment is a potentially illegal gift. Normally, the only way for a governmental entity to avoid charges of illegal gift of public funds is to scrupulously document what it is doing and to explain why and how exactly the government will in fact be benefited from the expenditure of the public funds. That exercise is something that, to date, the Mayor and City officials, while being provided cover by organizations like Think Big, have utterly failed to do.

Without any economic benefit to the local economy, it seems beyond legitimate dispute that the underlying reason for proposing the present subsidy – and formulating and implementing the subsidy along this extremely expedited timeline – is to facilitate the private sale of the Kings franchise to a “local” buyer interested in keeping the Kings in Sacramento. The NBA has made it clear that it would only reject the proposed Seattle bid if the Sacramento bid includes a “significant public subsidy” for an arena that meets “NBA standards.” The amenities required to comply with “NBA standards” include “luxury box,” “premiere” and “club” seating that generate higher revenue for NBA franchises. Thus, as a practical matter, the only benefit of the project is to build an arena that generates additional revenue for the Kings franchise – a private benefit. Indeed, the present proposed subsidy is even more egregious than the plan proposed last year. Then, it was generally understood that the Maloofs’ personal finances were such that they could not afford to construct a new arena without substantial financial assistance. Unlike the Maloofs, the new “billionaire” investors presently courted by the City can certainly afford to construct an arena as a necessary component of their private purchase of the NBA franchise. They simply prefer to have the City shoulder the burden.

#### **4. The City May be Violating CEQA by Committing to an Arena Subsidy Prior to Environmental Review**

It does not appear that the City will perform any review of the arena or its subsidy prior to performing environmental review under the California Environmental Quality Act (“CEQA”). The California Supreme Court has recently considered the issue of when a project is “approved” for purposes of triggering CEQA review. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135). In terms particularly applicable here, the California Supreme Court explained:

[L]imiting approval to unconditional agreements that irrevocably vest development rights would ignore what we have previously recognized, that postponing environmental analysis can permit “bureaucratic and financial momentum” to build irresistibly behind a proposed project, “thus providing a strong incentive to ignore environmental concerns.”

A public entity that, in theory, retains legal discretion to reject a proposed project may, by executing a detailed and definite agreement with the private developer and by lending its political and financial assistance to the project, have as a practical matter committed itself to the project. When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency



will not be easily deterred from taking whatever steps remain toward the project's final approval.

For similar reasons, we have emphasized the practical over the formal in deciding whether CEQA review can be postponed, insisting it be done early enough to serve, realistically, as a meaningful contribution to public decisions.

When an agency reaches a binding, detailed agreement with a private developer and publicly commits resources and governmental prestige to that project, the agency's reservation of CEQA review until a later, final approval stage is unlikely to convince public observers that before committing itself to the project the agency fully considered the project's environmental consequences. Rather than a "document of accountability," the EIR may appear, under these circumstances, a document of post hoc rationalization.

(*Id.* at 136.)

Is there any question that the City, and the Mayor in particular, "has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it" such that subsequent CEQA review would become a document of post hoc rationalization?<sup>12</sup>

In a more recent decision, the Sixth District Court of Appeal has appeared to limit somewhat the application of *Save Tara*. (*Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1168.) *Cedar Fair* concerned a term sheet for public financing of the new 49ers stadium in Santa Clara. The court found that approval of the term sheet did not require prior completion of CEQA review. Of course, *Cedar Fair* is factually distinguishable from the instant case on fundamental points. First, "Cedar Fair's petition did not allege any other agreements that concern the preliminary terms set forth in the term sheet or enlarge respondents' commitment under the Stadium Term Sheet." (*Id.* at 1171.) The second point of distinction is that the term sheet in *Cedar Fair* required subsequent voter approval. (*Id.* at 1169 ("Another provision of the term sheet (art. 1, § 1.1) requires voter approval: 'The Stadium will not be constructed unless and until the voters of the City approve a ballot measure endorsing the development of the Stadium consistent with the essential elements set forth in this Term Sheet'").)

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<sup>12</sup> This is true whether the subsequent CEQA review is an EIR or, in an imprudent decision to further cut the public out of the review process, a CEQA review document that purports to rely on the "infill streamlining" review process pursuant to Public Resources Code section 21094.5.

Unlike *Cedar Fair*, there are serious questions regarding other commitments that the Mayor and other City representatives may have already made that are separate from the term sheet. Although NBA Commissioner David Stern clearly stated that “Sacramento’s” proposal to acquire the Kings included a “significant subsidy” from the City, we are not aware that the specific proposal itself has been released so that the public may understand the nature of the City’s existing commitment. This, and other documents prepared during the months of secret negotiations between City officials, private arena proponents and the NBA may ultimately reveal that the City has committed, as a practical matter, to an arena subsidy in violation of *Save Tara* and *Cedar Fair*.

The second point of diction with *Cedar Fair* concerns how the project is approved. Unlike in *Cedar Fair*, the City has given no indication that it will allow the voters to approve or reject the arena subsidy term sheet. In fact, Council voted last year not to allow such a vote. In light of Sacramento’s recent voting record, the Council’s position indicates that the members are subjectively aware that they are acting against the will of the people on this subsidy. However, and we wish to be very clear on this point, if the City Council follows *Cedar Fair* and puts any proposed term sheet to a popular vote, our coalition’s procedural objections to the subsidy would be addressed.

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If the arena proponents are correct in their predictions that the arena will certainly “pencil out,” and since these new billionaire investors can certainly afford the cost of a new arena, one wonders why do these billionaires not simply build the new arena on their own dime. Indeed, the prior justifications given for public subsidies, namely that such facilities will catalyze additional private development, have been soundly refuted.

In light of immense size of the requested public subsidy and its potential impact on the residents of Sacramento for decades to come, this basic policy question about how to best allocate public resources should be addressed by the voters. If the Council voluntarily allows that vote, the majority of or procedural concerns about the subsidy

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would be alleviated. Our coalition is willing to abide by the voice of the people. If the Council is determined to silence the people, however, our coalition is committed to seeing that the vote will occur by referendum.

Very truly yours,

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