

Welcome to PETCO Park: Home of Your Enron-by-the-Sea Padres

The story of the controversy surrounding the public funding of San Diego's PETCO Park and the legal efforts to stop the construction

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I. Introduction

On September 12, 1998, the San Diego Padres fell behind the Los Angeles Dodgers 7-0 before roaring back for an 8-7 win. Greg Vaughn capped his incredible fifty-homerun year by driving in the winning run with a two-out single in the sixth inning. Future Hall-of-Famer Trevor Hoffman closed out the Dodgers to win the National League Western Division title for the Padres in front of a sellout crowd of 60,823 at Qualcomm Stadium. Even with eight home games left to play, the clinching sellout was enough to set the franchise record for season attendance. Led by Tony Gwynn, Ken Caminiti, Vaughn, and Kevin Brown, the Padres would go on to defeat the Houston Astros and the Atlanta Braves in the playoffs to win only the second National League pennant in the history of their franchise. Although the Padres would be swept the New York Yankees in the World Series, 1998 was a thrilling year for the Padres and their fans.¹

Indeed, Major League Baseball could hardly have wished for a more successful season than the 1998 year. Still reeling from the 1994 strike that cancelled the World Series for the first time in ninety years, attendance throughout baseball was up significantly in 1998 as fans came out to watch the dominant Yankees win 114 regular season games and record-breaking individual performances across the league.² At the center of baseball's revival were Mark McGwire and Sammy Sosa, who spent the summer one-upping each other as they chased and eventually shattered Roger Maris' single season mark of sixty-one homeruns, arguably baseball's most hallowed record. Commissioner Bud Selig called it "a renaissance" in baseball. The *New York Times* called the 1998 season "magical."³ In a news year dominated by the Clinton / Lewinsky scandal, baseball was the feel-good story of the summer.

The San Diego Padres were no doubt thrilled with how the 1998 season panned out, both in terms of the team's individual success and in the resurgence of baseball more generally. McGwire and Sosa were treated as national heroes⁴, and baseball truly reasserted itself as America's national pastime. The timing could hardly have been better for the Padres. Throughout the 1998 season, as his team compiled the most wins in the franchise's history,

¹ Krasovic: *Padres cap dream season with 8-7 comeback vs. Dodgers*. San Diego Union-Tribune. September 13, 1998. A-1; Center: *Padres hoist the flag; L.A. blows 7-0 lead in sweet clincher*. San Diego Union-Tribune. September 13, 1998. C-1.

² Wertheim: *Did Mac and Sammy Save Baseball?* Sports Illustrated, September 20, 1999.

³ Kakutani: *The Taint Baseball Couldn't Wash Away*. New York Times. July 5, 2005.

⁴ *But see*, Mitchell: *Report to the Commissioner of Baseball of an Independent Investigation Into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players in Major League Baseball*. December 13, 2007. Available at <http://i.l.cnn.net/cnn/2007/images/12/13/mitchell.report.pdf>.

Padres majority owner John Moores was preoccupied with the upcoming election. In August 1998, Moores had convinced the City of San Diego City Council to pass an ordinance that placed Proposition C on the November 1998 general election ballot.⁵ Although strategically drafted to refer only to the “redevelopment” of downtown San Diego, Proposition C was in fact a referendum on a new baseball stadium for the Padres that would be built with mostly public funds. The proposed \$270 million ballpark would be the centerpiece of a \$411 million plan to redevelop part of downtown San Diego. The plan called for the Padres to contribute \$115 million, while the City of San Diego would be responsible for the remaining \$296 million.⁶

While the San Diego City Council was working with John Moores and the Padres to develop a plan to build a dramatic new downtown baseball-only stadium, City officials were seemingly neglecting other managerial duties. A 2006 report by an independent auditing company detailed financial mismanagement and negligence by City officials going back to 1996.⁷ Most of the City’s problems resulted from having funded budget deficits by spending money that should have gone towards funding the City’s pension plan, while making what turned out to be losing bets on the stock market in attempt to repay the pension fund. The City was also charged with undercharging businesses for sewer system costs, leaving residents to foot the bill, and with misleading bond investors as to the state of the City’s finances.⁸ The overall financial picture led one of the auditors to refer to San Diego as “Enron-by-the-Sea.”⁹ Today, the City of San Diego finds itself with a \$1.2 billion deficit.¹⁰ To improve the City’s cash flow, libraries have been closed or had their hours cut-back, roads have gone neglected, police and fire departments have been under-funded, salaries for City employees have been frozen, and jobs have been cut.¹¹ Meanwhile, thanks to a generous financial contribution from the City, the Padres now play in brand-new PETCO Park.

While the roots of San Diego’s financial crisis lie much deeper than with the Padres and the construction of PETCO Park, it seems clear that the City was spending money it did not have when officials and voters agreed to pay for the bulk of the stadium construction. Proposition C passed by a 60-40 margin, giving the Padres and City officials a strong public mandate to go forward with their plans. While the results of the vote seemingly demonstrated widespread public support for the use of public funds to finance a new stadium for the Padres, there was a vocal minority of citizens strongly opposed to the project. This small but active group of citizens, only about fifteen people by some estimates, was arguably quite successful in their opposition of the stadium deal. Although PETCO was ultimately built, largely with public money, opponents succeeded in delaying the construction for two years, important because this delay gave them a chance to vocalize their concerns about the real financial impact of the stadium and raised serious questions about the conduct of San Diego City officials.

⁵ *Padres, L.P. v. Henderson*, 114 Cal. App. 4th 495, 502 (2003).

⁶ Delaney and Eckstein: *Public Dollars, Private Stadiums*. Rutgers University Press, 2003.

⁷ Hall and Vigil: *‘Reckless and wrongful’: Leaders broke laws, but not intentionally, consultants say*. San Diego Union Tribune. August 9, 2006.

⁸ *Id.*

⁹ *Kroll Official Dubs San Diego ‘Enron-by-the-Sea’* NBCSanDiego.com. Available at <http://www.nbcsandiego.com/news/9647784/detail.html>. Accessed February 9, 2008.

¹⁰ Vigil. *City Services, jobs may face cutbacks*. San Diego Union Tribune. January 12, 2008.

¹¹ *Id.*; Ritter: *San Diego now ‘Enron by the Sea.’* USA Today. October 24, 2004; *CCDC’s Time to Pony Up*. Available at <http://www.voiceofsandiego.org/articles/2007/04/11/opinion/01editorial041107.txt>. Accessed Feb. 9, 2008.

Taking their words at face value, these opponents were not against the use of public funds for a sports stadium per se, but rather they were concerned that San Diego officials were betraying citizens by failing to honestly and competently represent the interests of their constituents. According to some reports, negotiations between the Padres and the City Council were uneven, with the substantially more sophisticated Padres representatives overmatching local politicians.¹² The result, according to opponents of the stadium project, was that San Diego officials capitulated on important terms of the deal and simply gave away too much. A second criticism was that San Diego City officials inaccurately portrayed the City's financial position. City officials either knew or should have known, so the argument goes, that the City was facing an impending budgetary crisis. Faced with this knowledge, opponents of PETCO argue that City officials should have either made an unpopular but disciplined decision to refuse public funds for a new sports stadium, or at least made sure that the public was aware of the risk that a publicly funded stadium might necessitate major cutbacks in other areas.¹³

With the negotiations and vote for the new stadium coming during the Padres' World Series season, at a time when public interest and support of the Padres were at a high-water mark, opponents of PETCO invariably had a difficult time getting their voices heard. With other options unclear, this minority opposition turned to litigation. This then, is the story of that litigation, and more generally, a story about the efforts to question what increasingly seems to be an underlying assumption that professional sports teams should be publicly subsidized.

II. The Debate Over Publicly Financed Sports Stadiums

San Diego was hardly alone in agreeing to bankroll a large portion of a new professional sports stadium. As of 1999, as San Diego finalized its plans for its new ballpark, forty-six professional sports stadiums and arenas had been constructed or "substantially renovated" in the previous nine years, and another forty-nine were under construction or in the planning phase. Public funds accounted for approximately two-thirds of the estimated \$21.7 billion dollar construction costs of these ninety-five stadiums and arenas.¹⁴ Although it seems counter-intuitive that cities are so often willing to subsidize the businesses of fantastically wealthy professional sports team owners, two basic ideas arguments are often cited as justification for using taxpayer money to build sports stadiums. First, new sports stadiums theoretically have a direct benefit on local economies. Fancy new stadiums attract fans who spend money on lodging, meals, and entertainment in the area around the stadium, local governments benefit from increased tax revenue, and construction creates new jobs. Secondly, it has been argued that a local sports team is good for civic pride, bringing communities together by promoting a common interest.¹⁵

The Direct Financial Impact of Sports Stadiums and the Substitution Effect

The primary justification for public financing of luxurious new sports stadiums and the force behind the public-funded building frenzy witnessed in the 1990's is the idea that sports

¹² Delaney and Eckstein: *Public Dollars, Private Stadiums*. Rutgers University Press, 2003, 139-40.

¹³ Interview with Bruce Henderson, February 14, 2008.

¹⁴ Groothuis, Johnson, and Whitehead: *Public Funding of Professional Sports Stadiums: Public Choice or Civic Pride?* Eastern Economic Journal, Fall 2004. Available at: http://findarticles.com/p/articles/mi_qa3620/is_200410/ai_n9472619. Accessed February 10, 2008.

¹⁵ Id.

teams can serve as a foundation for local economies.¹⁶ The theory is that fans will flock to the new stadium, spending money at hotels, restaurants, bars, and concession stands, thus promoting local business. Local governments, so the argument goes, recoup their investment in the stadium from an increase in tax revenue on all the money being spent. The actual construction of a new facility creates new jobs. In furtherance of this argument, teams lobbying for public funds commonly enlist outside firms to prepare estimates of the expected financial benefit of a new stadium. The New York Jets cited a study done by Ernst & Young that predicted a new Manhattan football stadium would bring in an estimate \$72.5 million in new tax revenue. A study done for the Dallas Cowboys predicted that a new stadium there would add between \$12.48 billion and \$27.65 billion to the local economy over the stadium's thirty-year lifespan.¹⁷ As Padres owner John Moores began lobbying for public funds for a new baseball stadium in San Diego, the Padres commissioned Deloitte & Touche to do an economic impact study, which predicted that "the Ballpark and its surrounding development should generate about \$588.5 million" per year in expenditures, support 5,268 jobs, and generate \$12.9 million per year in tax revenue.¹⁸ The accuracy of these estimates is fiercely contested.

The notion that new stadiums provide a significant boost to local economies has been challenged on the grounds that this theory does not account for the fact that most, if not all, of this money would have been spent elsewhere in the community if not for the new stadium. This "substitution effect" can be explained by the fact that "most families, whether they keep a budget or not, spend a finite amount of money on entertainment."¹⁹ If not spent at the ballpark, consumers would go see movies or eat out at restaurants or do any number of other activities that have the exact same economic benefit.²⁰ The exception, of course, would be if a ballpark could attract new money through tourism. Given the huge influx of new stadiums and the resulting fierce competition for sports tourists, however, it is unlikely that any one new stadium will consistently attract enough tourists to have a significant economic impact. In fact, season ticket holders purchase most professional sports tickets, while relatively few tourists visit a city merely to attend a game.²¹ Because of the substitution effect, most independent economists now agree that the economic impact of a new sports facility is minimal.²² In the extremely optimistic report that Deloitte and Touche prepared to justify the use of public funds for a new ballpark for the Padres, there is a one sentence note buried in the report: "The substitution effect is difficult to accurately quantify and has not been included in this analysis."²³ Essentially then, the economic impact report used by the Padres to lobby the San Diego citizens and the public for public funds was admittedly misleading.

Although new sports stadiums do have the economic benefit of creating jobs, these new jobs are created extremely inefficiently. Stanford economics professor Roger Noll calculated

¹⁶ Bennet: *Ballpark figures*. The Boston Globe. March 19, 2006. Available at: http://www.boston.com/news/globe/ideas/articles/2006/03/19/ballpark_figures/?page=1. Accessed February 10, 2008.

¹⁷ Id.

¹⁸ *The Prop. C Q&A*. Available at <http://www.sandiegometro.com/1998/oct/padressed.html>. Accessed February 10, 1998.

¹⁹ Bennet: *Ballpark figures*. The Boston Globe. March 19, 2006. Available at: http://www.boston.com/news/globe/ideas/articles/2006/03/19/ballpark_figures/?page=1. Accessed February 10, 2008.

²⁰ Id.

²¹ Weiler: *Leveling the Playing Field*. Harvard University Press, 2000. 267-69.

²² Id.

²³ Bauder: *Ballpark proposal spells out a four-letter word*. San Diego Union Tribune. September 22, 1998. C-1.

that the cost of each job created by the construction of Camden Yards as the new home for the Baltimore Orioles was \$125,000 per job, while jobs created by other urban redevelopment projects in the areas cost only \$6,000 each.²⁴ The substitution effect also damages the job creation argument: “jobs that are created due to the team’s presence merely come from other sectors of the economy that the team’s presence has negatively impacted.”²⁵ There is job creation to the extent that the actual construction of stadiums requires new workers, but these jobs are temporary. In reference to arguments extolling the job creation benefit of new stadiums, University of Chicago economics professor Allen Sanderson has stated that “[c]ities would be better off if the mayor were to go up in a helicopter and dump out \$100,000.”²⁶

Publicly funded stadiums may fall victim to the substitution effect in one additional way: to the extent that public funds are used on sports stadiums, this money cannot be used on other public uses. With finite public funds available, cities must either cut funding elsewhere or raise taxes. In theory, lack of public investment in other areas may damage a city’s ability to be competitive in other sectors of the economy.²⁷

There is one undisputed significant economic benefit from new sports stadiums: sports team owners see the value of their investment dramatically increase. One sports research firm found that a new stadium on average increases a team’s revenue by \$25 million to \$45 million per year, even for the least popular franchises.²⁸ Although new stadiums basically guarantee increased attendance in the first few years, the main revenue owners recognize from stadiums comes not from increased ticket sales per se, but more from increased sales of luxury boxes. In Major League baseball, teams share gate receipts with the League and with other teams. Revenue from luxury boxes, however, is retained entirely by the home team. Indeed, in comparing older stadiums with newer ones, a primary difference is the number of luxury boxes made available to customers willing to pay top dollar for VIP treatment.²⁹ By virtue of increasing annual revenue, it follows that new stadiums increase the value of a professional sports franchise. As the Padres lobbied for public funds for a new baseball stadium, it was pointed out that a new ballpark would increase the value of the club by an estimated \$50

²⁴ Bennet: *Ballpark figures*. The Boston Globe. March 19, 2006. Available at: http://www.boston.com/news/globe/ideas/articles/2006/03/19/ballpark_figures/?page=1. Accessed February 10, 2008.

²⁵ Diedrich: *homefield economics: the public financing of stadiums*. Policy Matters Journal. Vol. 4, No. 2, Spring 2007. 22-27. Available at http://209.85.173.104/search?q=cache:I2BP3ajUFEIJ:www.policymatters.net/issue/diedrich_stadiums.pdf+public+funded+sports+stadium+job+creation&hl=en&ct=clnk&cd=3&gl=us&client=firefox-a. Accessed February 10, 2008.

²⁶ Bennet: *Ballpark figures*. The Boston Globe. March 19, 2006. Available at: http://www.boston.com/news/globe/ideas/articles/2006/03/19/ballpark_figures/?page=1. Accessed February 10, 2008.

²⁷ Diedrich: *homefield economics: the public financing of stadiums*. Policy Matters Journal. Vol. 4, No. 2, Spring 2007. 22-27. Available at http://209.85.173.104/search?q=cache:I2BP3ajUFEIJ:www.policymatters.net/issue/diedrich_stadiums.pdf+public+funded+sports+stadium+job+creation&hl=en&ct=clnk&cd=3&gl=us&client=firefox-a. Accessed February 10, 2008.

²⁸ Gessing: *Public Funding of Sports Stadiums: Ballpark Boondoggle*. National Taxpayers Union Foundation Policy Paper 133. Available at: http://www.ntu.org/main/press_papers.php?PressID=345&org_name=NTUF. Accessed February 10, 2008.

²⁹ Id.

million.³⁰ Thus, while the community economic benefit of a new stadium is questionable, the benefit to an owner is clear.

Sports Teams and Civic Pride

In a study finding that there is no evidence of a statistically significant correlation between construction of new sports stadiums and economic development, two investigators concluded that “if public financing of stadiums is to be defended, it must be done on other grounds” – the idea that sports teams are public goods and that local teams are an important factor in the quality of life of residents.³¹ This argument is convincing, as evidenced by the prominent role that sports play in our society. Local sports teams are arguably different than other forms of entertainment in that teams are inextricably tied to a community’s identity.³² When lobbying for public funds for a new stadium, sports team owners inevitably make threats that they will be forced to move the team elsewhere if the hometown refuses to agree to the right financial package. To the extent that professional sports leagues are a monopoly, with fewer teams than city suitors, this is a viable threat. Thus, it becomes a question of value: is the civic value of a sports team worth the public dollars it will cost to keep the team at home? Clearly it is difficult if not impossible to put a price tag on the benefit of a sports team. Given that the direct economic benefit of a sports team is tenuous at best, this valuation problem is really what the debate over publicly financed stadiums should come down to.

Why Some Cities Pay and Others Just Say No

Any analysis as to why some cities are willing to provide public funds while others are not involves many generalizations because of the multitude of factors at play. In a very well thought-out book, Kevin Delaney and Rick Eckstein, professors at Temple University and Villanova University, respectively, consider nine recently built ballparks in an attempt to provide some framework for this analysis.³³ Their basis thesis is that the existence or lack thereof of a powerful local growth coalition – “an institutional alliance between the local corporate community and the local government” – is the primary reason explaining why some cities allocate public funds for stadiums while others do not.³⁴ These coalitions, “which might include media, religious, and labor organizations,” use their power to further their “parochial” interests.³⁵ Cincinnati and Cleveland, both of which had fairly powerful local growth coalitions, built publicly funded stadiums with little opposition. Minneapolis and Hartford (which tried to lure the New England Patriots with a new stadium) have weak local growth coalitions, and have been unable to build publicly funded stadiums. San Diego, along with Denver and Phoenix, falls between these extremes, yet all three of these cities did build stadiums with the use of public money. While San Diego aspires to be a business center, its local growth coalition was deemed

³⁰ *Padres report financial losses; Critics skeptical of club’s 1997 audit.* San Diego Union Tribune. October 29, 1998. B-1.

³¹ Diedrich: *homefield economics: the public financing of stadiums.* Policy Matters Journal. Vol. 4, No. 2, Spring 2007. 22-27. Available at http://209.85.173.104/search?q=cache:I2BP3ajUFEIJ:www.policymatters.net/issue/diedrich_stadiums.pdf+public+funded+sports+stadium+job+creation&hl=en&ct=clnk&cd=3&gl=us&client=firefox-a. Accessed February 10, 2008.

³² *Id.*

³³ Delaney and Eckstein: *Public Dollars, Private Stadiums.* Rutgers University Press, 2003.

³⁴ *Id.* at 3.

³⁵ *Id.*

lacking because it does not have a relatively large, well established business community. Although San Diego, Denver, and Phoenix all lacked especially strong local growth coalitions, Delaney and Eckstein argue that because these three cities were all growing rapidly, teams benefited from a pro-development mentality within local government that created a receptive audience for arguments that new stadiums could serve as catalysts for growth.³⁶

The San Diego experience also suggests that a public referendum on a publicly financed stadium is an important factor. Voter approval provides city and community leaders with the political mandate they need to use public funds and seems to almost guarantee construction. Alternatively, a public vote against the use of public funds for a stadium sometimes settles the issue, but not always. In San Francisco, voters rejected the use of public funds for a new baseball stadium for the Giants four separate times, and the stadium was ultimately built largely without public money (although San Francisco did donate the land, per the terms of a fifth vote). Business leaders in San Francisco were either unwilling or unable to defy that public mandate. In Pittsburg, voters rejected the use of public funds for new stadiums for football's Steelers and baseball's Pirates by a margin of close to two-to-one. Regardless, a powerful business community in Pittsburg ultimately succeeded in building two new stadiums with public funds. Thus, it seems, a public referendum seems like the default position that a city assumes with respect to the use of public funds. Absent a strong local growth coalition, rejection at the polls seems to foreclose the use of public funds. Alternatively, a public vote in favor of the use of public funds for a professional sports stadium seems to basically guarantee that the stadium will be built, regardless of the strength of local growth coalitions.³⁷

III. The Justification for Public Funding in San Diego: A Stadium or Redevelopment?

Although the Padres did threaten to leave San Diego if the City would not agree to fund a new baseball stadium, the debate in San Diego was really about the developmental benefits of putting a new stadium in a depressed area of downtown. Given that San Diego is an increasingly popular place to live – as evidenced by consistent population growth – citizens there appear content and it would have been difficult for the Padres to argue that the City somehow needed a baseball team for civic pride reasons.³⁸ People live in San Diego for the weather and the laid-back California lifestyle, not for the sports teams, making “community self-esteem” arguments of the sort successfully used in Pittsburgh, Cincinnati, and Cleveland unrealistic.³⁹

While owner John Moores regularly threatened to move the team elsewhere if he did not get a new publicly funded stadium – he liked to declare that “We’re free agents at the end of 1999” – it is unclear how much he really wanted to move the team.⁴⁰ Mexico City and Northern Virginia were the two potential destinations usually mentioned. The possibility of moving a Major League Baseball team to Mexico City always seemed a bit far fetched, and it is unclear how realistic that option was. In addition to logistic issues related to having a team residing outside of the United States, the financial viability of a team in Mexico is questionable. In 1996, John Harrington, then chairman of the baseball owners’ expansion committee, noted that “If you went just by the demographics, Mexico is on its own list and everyone else is on the next list, if you’re talking A and B lists. If you didn’t have to consider the economic troubles and the

³⁶ Id. at 152-54.

³⁷ Id. at 150-56.

³⁸ Delaney and Eckstein: *Public Dollars, Private Stadiums*. Rutgers University Press, 2003, 137.

³⁹ Id.

⁴⁰ Diamos: *Padres Want Stadium, and Ballot Will Be Like Game 7*. New York Times. October 4, 1998.

government situation and well, if Mexico City were in the United States, they would have had a major league team a long time ago.”⁴¹ Mexico City has a population of over 18 million, about 2.5 million more people than reside in New York City, the United States’ largest city.⁴² Still, Mexico was still recovering from its 1994 economic crisis when Moores was making his threats to move the Padres. Given the realities, Harrington conceded that “[t]he economic and governmental situations may be such a handicap over the next 10 years that we may not be able to get there at this time.”⁴³

Northern Virginia was a real option, and in fact the Padres had seriously considered moving to Washington D.C. in the early 1970’s before McDonalds founder Ray Kroc purchased the team to keep them from leaving San Diego. In 2004 Major League baseball announced that the Montreal Expos would move to Washington D.C. in 2005 to become the Washington Nationals, suggesting that the city had been serious about attracting the Padres a few years earlier. As part of that deal, Washington D.C. agreed to provide public funds for 100% of the costs of the construction of a new, \$611 million stadium.⁴⁴ Although it seems very likely that Washington D.C. would have offered a similarly attractive financial package to attract the Padres, John Moores apparently is not a huge fan of Washington D.C. In 2004, after PETCO Stadium had been built, Moores reminisced about the history of the Padres franchise and mused, “[i]t’s very clear that [Ray Kroc] saved the Padres from Washington, D.C., which frankly, is a fate worse than death.”⁴⁵ Vancouver, Columbus (Ohio), and Charlotte (North Carolina) were also periodically mentioned, but there is little evidence any of those cities were ever seriously considered.⁴⁶

The real debate over the use of public funds for a new ballpark in San Diego centered on the potential economic benefits. Although the Padres initially argued for either a waterfront stadium on the western edge of the City or a new stadium near their old home north of the City in Mission Valley, credit must be given to team officials for quickly recognizing that their argument for public funding would be much more viable if framed in the context of a more general redevelopment plan for downtown San Diego.⁴⁷ The Padres used the slogan “It’s more than a ballpark” in advertisements to promote the idea of a new stadium. The pragmatic stance taken by Padres officials was essential in garnering public support and ultimately public approval and funds for the ballpark project.

At the same time Moores and the Padres were trying to win support for a new ballpark, urban planners were trying to win support for a “Bay-to-Park Link” that would revitalize southeastern San Diego. The concept supported by these urban planners envisioned “a heavily landscaped, architecturally coordinated link between the inner City’s prettiest assets – San Diego Bay and Balboa Park.”⁴⁸ Southeastern San Diego, which lay in the middle of this plan,

⁴¹ Smith: *Padres’ Small Step South Reflects Game’s Growing Interest in Mexico*. New York Times. March 29, 1996.

⁴² Largest Cities of the World – by population. Available at <http://www.worldatlas.com/city pops.htm>. Accessed March 6, 2008.

⁴³ Smith: *Padres’ Small Step South Reflects Game’s Growing Interest in Mexico*. New York Times. March 29, 1996.

⁴⁴ Associated Press: Expos finally found a new home. September 30, 2004. Available at <http://sports.espn.go.com/mlb/news/story?id=1891484>. Accessed March 6, 2008.

⁴⁵ Paris: *Fancy Petco Park is her at last – but it took extra innings*. North County Times. March 10, 2004.

⁴⁶ Kindred: *A legacy of his own*. The Sporting News. October 26, 1998.

⁴⁷ Id.

⁴⁸ Shaw, *Enlisting Her Now, Not Later*. San Diego Metropolitan Magazine. Available at <http://sandiegometro.com/1998/sep/publisher.html>. Accessed February 16, 2008.

historically was an industrial area that had not developed with the rest of the City. The area's population was 34% Hispanic, 25% African American, 23% Asian/Pacific Islander, and 18% Caucasian, and it was the sort of a place "where everyone closes their eyes" when passing through.⁴⁹ When the Padres started to push for a new ballpark, this seemed like a perfect match: the Padres could frame the ballpark as a catalyst for a total redevelopment of a depressed area of the City, and urban planners gained a powerful ally anxious to start building. The decision by the Padres to present the stadium proposal as a plan for redevelopment was essential to the eventual success of the project: instead of this being a case of a multimillionaire owner asking taxpayers for free money, the Padres gained some moral high ground by presenting the stadium as a way for the team to fully integrate itself into the future of San Diego.

The Padres were either brilliant or exceptionally lucky in raising the stadium issue with the public at the time when they did. The vote on Proposition C came just weeks after the Padres went to the World Series, an experience that captivated the City and no doubt cultivated goodwill towards the team. While some luck was involved in that respect, the Padres success in 1998 was largely due to owner John Moores' willingness to expand their payroll that year and bring in established stars like Kevin Brown and Greg Vaughn. Of course, after Proposition C passed, Moores drastically cut the Padres payroll. In the five years after their World Series appearance in 1998, the Padres finished fourth twice and last three times in their five-team division. Proposition C also came at a time when the economy was flourishing. On March 29, 1999, just months after Proposition C passed, the Dow Jones Industrial Average passed the 10,000 mark for the first time ever. San Diego residents were under the impression that their City was in sound financial shape: news of massive budget deficits did not break until 2003. A winning team, the feeling of wealth associated with rising stock prices, and belief in a strong local economy were all factors that likely helped the Padres' cause as they worked to convince San Diego voters to fund a new ballpark.

IV. Proposition C: Giving San Diego Citizens the Right to Decide for Themselves?

Armed with the (substitution-effect-ignoring) report from Deloitte & Touche propounding the economic benefits of a new stadium, while also hinting that denial of public funds would force the team to leave, Padres officials convinced the San Diego City Council to pass an ordinance placing the ballpark project on the ballot in the upcoming election.⁵⁰ This ballot measure was named Proposition C. The decision to put the proposed ballpark on the November 3, 1998 election was strategic: there was no legal requirement for public approval of the project, and the City Council would have been legally authorized to allocate public funds for the stadium without a vote.⁵¹ There is no reason to believe that the City Council was against the new stadium per se: Padres owner John Moores and President Larry Lucchino merely figured that a public vote would be easier and quicker. One observer noted that: "The mayor and the city council are basically weak to start with, personalities aside. But [this council] seems to be a bunch of lemmings... The city council was afraid to make a decision."⁵² Moores and Lucchino made a political calculation that it would be easier to convince the voting public than the City Council of the need for a new stadium, and believed that if the Proposition passed the City Council would be unable to defy the public mandate.

⁴⁹ Id.

⁵⁰ Lavelle: *City Council again votes to put ballpark on ballot*. San Diego Union Tribune. August 8, 1998. B-6.

⁵¹ Delaney and Eckstein: *Public Dollars, Private Stadiums*. Rutgers University Press, 2003, 139.

⁵² Id. at 139-40 (quoting a Proposition C supporter).

Proposition C was carefully worded such that it appeared to concern downtown development, with only a vague mention of a new baseball stadium. Pursuant to a California law passed in 1996, public funds spent on a specific project must be approved by a two-thirds super-majority vote, while more general development plans like the one described in Proposition C need only be passed with 50% of the vote.⁵³ The actual details of the proposed stadium deal were contained in a separate Memorandum of Understanding (MOU) between the Padres and the City Council.⁵⁴ Although Proposition C did not contain specifics about the plan for the new Padres ballpark, the MOU was readily available for voters to read. Making the MOU available to the voters, however, was not the same thing as creating voter awareness of the specific terms of the deal. The MOU was thirty-seven pages long. A San Diego business newspaper published an article written by an attorney after the MOU was released to the public that questioned the ability of citizens to fully comprehend the terms of the MOU. In the words of that attorney, “the MOU is not written in plain English” and is “a very complicated document.”⁵⁵ While voters clearly understood that an affirmative vote on Proposition C meant a publicly funded new stadium for the Padres, it is hard to believe that many voters understood the specifics of the deal as expressed in the MOU.

The MOU called for a two-phase plan for construction of a new ballpark as part of redevelopment of southeastern San Diego.⁵⁶ Phase I included a \$270 million downtown ballpark as part of a \$411 million plan to develop twenty-six blocks of the downtown with shops, restaurants, and hotels. The City was responsible for raising \$225 million through a bond sale, with other public funds coming from a \$50 million contribution from the Center City Development Corporation (San Diego’s publicly funded redevelopment agency) and a \$21 million contribution from the San Diego Port Authority (a self-supporting public agency responsible for managing and maintaining port facilities). Although the Padres argued that revenue from a hotel tax on new hotel rooms created by the redevelopment would cover the cost of service on the bonds, if the hotel taxes proved insufficient the MOU stated that “existing sources of revenue in the city’s general fund are available.” The Padres were responsible for the remaining 28% of the costs - \$115 million – and any cost overruns for the ballpark construction part of the project. Additionally, the MOU stated that the Padres would take on the role of “master developers” and arrange – not fund – roughly \$300 million in private investments for development of the area around the ballpark. Phase II of the MOU is unclear, but alludes to the Padres gathering additional investment for the ballpark area.⁵⁷

⁵³ Id. at 132.

⁵⁴ Memorandum of Understanding Between the City of San Diego, The Redevelopment Agency of the City of San Diego, The Center City Development Corporation, and Padres L.P. Concerning a Ballpark District, Construction of a Baseball Park, and a Redevelopment Project. Available at <http://www.sandiego.gov/petcopark/mou/mou.shtml>. Accessed April 20, 2008.

⁵⁵ Carrico: *Plain Speaking: MOU for beginners*. September 18, 1998. Available at http://www.sddt.com/Commentary/article.cfm?Commentary_ID=169&SourceCode=19980918tza. Accessed February 16, 2008.

⁵⁶ Memorandum of Understanding Between the City of San Diego, the Redevelopment Agency of the City of San Diego, the Centre City Development Corporation, and Padres L.P. Concerning a Ballpark District, Construction of a Baseball Park, and a Redevelopment Project. Available at <http://www.sandiego.gov/petcopark/mou/mou.shtml>. Accessed March 2, 2008.

⁵⁷ Braun: *Ballpark vote offers city a national voice; Measure will leave its mark, win or lose*. San Diego Union Tribune. November 1, 1998. A-1; Delaney and Eckstein: *Public Dollars, Private Stadiums*. Rutgers University Press, 2003, 132-33.

Of the \$115 million that the Padres were responsible for, most was not an out-of-pocket contribution. Instead, the Padres' contribution was to come from revenue generated by the new stadium, including "including the naming and advertising rights, ticket and luxury sales, concessions, and potentially, the sale of private seat licenses."⁵⁸ The Padres agreed to pay \$500,000 per year in rent for use of the stadium. Under the terms of the MOU, a non-binding agreement, the Padres committed to staying in San Diego for twenty-two years and "the Padres will make every reasonable effort to keep MLB an affordable family recreation."⁵⁹ The MOU awarded the Padres a 30% ownership stake in the new stadium.

The City's annual contribution for stadium operations was capped at \$3.5 million. The San Diego County Taxpayer's Association estimated that the City's total contribution – including ballpark operations and service on the \$225 million bonds – would be about \$26.7 million per year. Revenues from the ballpark, specifically from the City's Transient Occupancy Tax (TOT – a tax on hotel rooms) were estimated at about \$9 million. Thus, the entire project was estimated to cost the City about \$17.7 million per year, an amount that then represented 3.1% of the City's annual general fund spending. To put that amount in perspective, at that time San Diego was spending about \$21 million annually for the City's libraries.⁶⁰ The expected completion date for the ballpark was April 2002, in time for the Padres opening game that season.

Although the MOU was extremely complicated, polls showed that voters focused more on the redevelopment aspect of the plan than the ballpark part of the plan. Although the price was steep, these polls suggested that redevelopment seemed worth it to San Diego citizens.⁶¹ Voters bought into the idea that a new downtown stadium would be a catalyst for development of a dilapidated area of downtown, expecting it to attract businesses and create new jobs. Of course, the \$296 million that the City of San Diego pledged towards the construction of the new ballpark and development in the area was only part of the cost. There was another cost, one that did not seem to overly concern taxpayers: opportunity cost. As a newspaper editorial at the time asked, "[p]ut simply, if the city of San Diego decides not to devote [this money] – and a large swath of downtown – on a new baseball stadium, what else can it do with these resources? If the money were spent on, say, schools or libraries, could that similarly draw companies to locate in San Diego, while improving the quality of life for current residents?"⁶² This question does not appear to ever have been addressed by taxpayers, the Padres, or by any of San Diego's elected officials.

V. The November 3, 1998 Election: Support From All Corners

In the run-up to the vote on Proposition C at the November 3 election, few dissenting voices could be heard. Not surprisingly, Padres officials and players were vocal in their support for Proposition C. In August, the Padres held a pro-Proposition C rally at the East San Diego

⁵⁸ Braun: *Ballpark vote offers city a national voice; Measure will leave its mark, win or lose*. San Diego Union Tribune. November 1, 1998. A-1.

⁵⁹ Carrico: *Plain Speaking: MOU for beginners*. September 18, 1998. Available at http://www.sddt.com/Commentary/article.cfm?Commentary_ID=169&SourceCode=19980918tza. Accessed February 16, 2008.

⁶⁰ Braun: *Ballpark vote offers city a national voice; Measure will leave its mark, win or lose*. San Diego Union Tribune. November 1, 1998. A-1

⁶¹ *Id.*

⁶² DeMause: *This ballpark deal could leave San Diego holding the bag*. San Diego Union Tribune. October 30, 1998. B-9.

location where the proposed stadium would be built. Free food was distributed, players and politicians gave speeches in support of a new stadium, and players signed autographs for fans in attendance. Third base coach Tim Flannery made a thinly veiled threat, telling the crowd:

There's a lot of things in this city that we've not supported through the years and they're not here anymore – the symphony, some of the arts, and things like that... The biggest problem I have with politics in San Diego is people are not informed at all. I challenge all of you to go find out for yourself what exactly this vote means for you. Because you don't want to be, five years from now, watching players that were once Padres playing in a different city and you say, 'Golly, I didn't know that was going to happen.'⁶³

At the “appreciation” parade for the Padres after their trip to the World Series, shown live on local San Diego television, longtime Padres star Tony Gwynn told the crowd “Don't forget: November 3 is coming quickly. You know what we need to do. Yes on C.”⁶⁴ Padres President Larry Lucchino explicitly linked Proposition C to the team's ability to resign popular free agents Ken Caminiti, Kevin Brown, Wally Joyner, Steve Finley, and Carlos Hernandez.⁶⁵

Padres owner John Moores lobbied hard in the local press, dramatically stating that the Padres “physically cannot survive in Qualcomm,” the team's old ballpark.⁶⁶ Padres officials, citing the usual reasons, argued that without a new ballpark, revenues could not be expanded, leaving the Padres unable to compete with other teams with larger payrolls. Qualcomm Stadium was deemed “obsolete,” with too many seats but not enough field level seats, too few luxury boxes, old concession facilities which constraining potential revenue, and a location outside of downtown San Diego.⁶⁷ Suggestions were made that if the Padres did not get a new stadium, the owners would move the team to Northern Virginia or even Mexico City. Club President Lucchino stated “we will never be able to stabilize this franchise financially without a sea change in the economic realities.”⁶⁸ The week before the referendum on Proposition C, the Padres released their financial report from the previous year. In 1997 – a year in which they finished dead last in their division – the Padres reported losses of \$8.2 million on revenues of \$59.5 million and expenses of \$67.7 million. With amortization and write-offs for intangible assets, the loss was almost \$18 million.⁶⁹

Proposition C's cause even received a little boost from Yankees owner George Steinbrenner, himself lobbying for a new stadium in New York City, who after visiting San Diego for the 1998 World Series remarked that the Padres old stadium “looks terrible. That thing is a cow pasture.”⁷⁰ Of course, Moores repaid Steinbrenner the favor, saying that Yankees stadium is like a “Little League park” and that New York City “ought to do the right thing” and

⁶³ Braun: *Padres start ballpark drive with rally; Players, politicians back ballot measure*. San Diego Union Tribune. August 16, 1998. B-3.

⁶⁴ Perry: *Padre Euphoria Could Sway Stadium Vote*. Los Angeles Times. October 24, 1998. A-21.

⁶⁵ Id.

⁶⁶ Sullivan: *On-Field Battle Over; Padres Now Fight For Stadium*. Chicago Tribune. October 22, 1998. Sports-4.

⁶⁷ DeMause: *This ballpark deal could leave San Diego holding the bag*. San Diego Union Tribune. October 30, 1998. B-9.

⁶⁸ *Padres report financial losses; Critics skeptical of club's 1997 audit*. San Diego Union Tribune. October 29, 1998. B-1.

⁶⁹ LaVelle: *Padres report financial losses; Critics skeptical of club's 1997 audit*. San Diego Union Tribune. October 29, 1998. B-1.

⁷⁰ Bauder: *Ballpark crusade puts Steinbrenner, Moores on same team*. San Diego Union Tribune. October 24, 1998. C-1.

publicly fund a proposed \$1 billion new stadium for the Yankees.⁷¹ Noting that many New Yorkers are in fact quite fond of Yankees stadium, a *New York Times* columnist remarked that Moores “came off like some pontificating, small-town dullard.”⁷²

Perhaps most interesting given that much of their funding came from the same Transient Occupancy Tax that was to fund the bonds that would pay for the new stadium, San Diego cultural institutions came out overwhelmingly in favor of Proposition C. In 1998, the TOT provided roughly \$8.3 million for eighty-two San Diego arts and cultural institutions.⁷³ Still, in an October, 1998 meeting, then mayor Susan Golding met with a delegation of representatives from various cultural institutions and convinced them that the a publicly funded ballpark would have no impact on their own funding. The San Diego League of Performing Arts, which represented “119 theatrical and music groups,” the director of the San Diego Museum of Contemporary Art, the executive director of the Natural History Museum, the managing director of the La Jolla Playhouse, the managing director of the Old Globe Theatre, and the San Diego Symphony all publicly supported Proposition C.⁷⁴ Showing an amazing degree of trust and perhaps an equal amount of naivety, the managing director of the Old Globe Theatre said that Mayor Golding “was straightforward and honest with us. When she says there is no direct linkage between our annual TOT funding and the ballpark, I believe her.” Displaying a less than impressive grasp of economic realities, the executive director of the Natural History Museum stated that “[w]hatever makes San Diego a world-class city is good for us all. That certainly includes the culture and arts community. And if there’s not enough money available, then we ought to find more.”⁷⁵

The arts and cultural institutions in San Diego supported Proposition C because they wanted to be involved in plans to develop and revitalize downtown San Diego. The ballpark and concurrent development was expected to be a boon for these institutions, providing space for construction of new arts facilities while drawing more tourists and local residents downtown. The executive director of the League of Performing Arts noted that “[t]here’s a whole wish list, including a multiplex of small theatres, a municipal gallery and affordable office space for arts groups.” Although there was no actual ballpark design completed before Proposition C went to the voters, there was early talk that an auditorium could be built into the stadium. Of course, Mayor Golding’s assurances that there would be sufficient money for all depended on the assumption that TOT revenue would expand by 8% a year. The 8% a year projection was based on realized growth in the previous few years, a time when the economy was expanding rapidly. Because a new publicly funded ballpark would tie the City’s hands to the extent that a large portion of the TOT revenue would be committed to paying off the bonds for many years to come, if the TOT did not in fact meet the projected 8% annual increase, cuts would have to be made elsewhere. Apparently, arts and culture representatives failed to consider the fact that tourism and thus TOT revenue drops in recession years, and history shows that recessions are inevitable.

Not everyone was convinced that dollars spent on a new ballpark would have no affect on other cultural institutions. When told of the position that these cultural institutions had adopted, Richard Simmons, a member of the Stop C campaign and a retired USD law professor, remarked

⁷¹ Id.

⁷² Araton: *A Stadium Imperfect In Its Glory*. *New York Times*. October 23, 1998. D-1.

⁷³ Jones: *Despite lingering concerns, culture leaders join the ‘Yes on C’ lineup*. *San Diego Union Tribune*. November 1, 1998. E-1.

⁷⁴ Id.

⁷⁵ Id.

that “I’m astounded but not surprised. For years now, arts and culture have been on a starvation diet here. All arts funding depends on the goodwill and outright benevolence of the mayor and the [City] council. If I were in [the arts groups’] position and my responsibility was to say and do those things to get maximum funding in future years, I sure wouldn’t say anything to criticize the mayor or the council.”⁷⁶

In the days before the election, the “Yes on C” campaign spent over \$2.9 million on Proposition campaigning.⁷⁷ Although most of the money came from the Padres, other contributors included Major League Baseball, local television stations, the construction industry, and the stadium caterer.⁷⁸ Two of Mayor Susan Golding’s former top aides ran the “Yes on C” campaign.⁷⁹

Opposition to Proposition C was limited. An all-volunteer group calling themselves “Strike Three on Proposition C” was formed to oppose the Proposition. Also known as the “Stop C” campaign, this group consisted of only about fifteen members, many Libertarians, none of who had notable experience running the sort of professional campaign waged by the Padres and the City. “Stop C” raised about \$26,000, meaning that opponents of Proposition C were outspent by 111 to 1.⁸⁰ The opposition’s largest donator gave \$500, compared to the over \$1.6 million donated by the Padres to the other side.⁸¹

Interesting, residents of the East Village area of San Diego that would be affected by the stadium and redevelopment plans do not appear to have had much a voice. Landowners in East Village were understandably strongly in favor of the development, as they anticipated and later realized appreciated property values. Some residents formed the People’s East Village Association to rally against the ballpark because they feared that their apartments would be torn down in the ballpark related development, but that association got very little publicity and does not seem to have been influential.⁸² The actual area on which the ballpark was to be built did not include many residences – only about thirty-three households by one estimate – perhaps explaining why opposition from East Village residents was for the most part absent. The eventual construction of the ballpark eventually caused rents to soar in residential areas near the ballpark, but these residents do not appear to have come out in strength on either side of the debate in the run-up to the vote on Proposition C.⁸³

VI. Allegations That Voters Were Mislead: The Grand Jury Reports

Even before the vote, allegations were thrown around asserting that the Proposition and the MOU were misleading. Many of these allegations were validated. San Diego, like every other county in California, has a little-known system of using “civil” grand juries to investigate reports of fraud or mismanagement by local officials.⁸⁴ According to the County of San Diego’s

⁷⁶ Id.

⁷⁷ DeMause: *This ballpark deal could leave San Diego holding the bag*. San Diego Union Tribune. October 30, 1998. B-9; Braun: *Ballpark vote offers city a national voice; Measure will leave its mark, win or lose*. San Diego Union Tribune. November 1, 1998. A-1.

⁷⁸ Braun: *Ballpark vote offers city a national voice; Measure will leave its mark, win or lose*. San Diego Union Tribune. November 1, 1998. A-1.

⁷⁹ Id.

⁸⁰ Delaney and Eckstein: *Public Dollars, Private Stadiums*. Rutgers University Press, 2003, 134.

⁸¹ Id.

⁸² Powell: *Ballpark land shift is seismic for some; Property owners on fringes of district are far from united*. San Diego Union Tribune. October 12, 1998.

⁸³ Jones: *Playing Ball; If the ballpark comes East Villagers will go*. San Diego Union Tribune. November 1, 1998.

⁸⁴ Purdum: *Little-Known Panel Turns Mayor Into Defendant*. New York Times. July 2, 1999. A-10.

website, these civil grand juries “may investigate and respond to citizen complaints about governmental entities within the County of San Diego, conduct studies of government operations, prepare reports of its investigations and serve as a watchdog to assure compliance with established law and regulations governing county agencies.”⁸⁵ Citizens are elected for one-year terms on these civil grand juries, and they are empowered to investigate and issue reports on any issues they choose. Normally these grand juries receive little attention. As it turned out, however, the civil grand jury selected for the 1998/99 term was more ambitious than most: some called that group of citizens a “runaway train, armed with a mantle of judicial solemnity they do not deserve,” while others believed that the civil grand jury was finally living up to its designated role.⁸⁶

The 1998/99 civil grand jury issued three reports regarding the ballpark project. The first, released in the early fall of 1998, was a short and vague document citing concerns that the City had not done a good job of informing voters about the financial implications of Proposition C and the MOU and encouraging more efforts to distribute more detailed information.⁸⁷

The second grand jury report, ultimately issued only the day before the vote on Proposition C, was scathing. The panel found that “[t]he issue of information dissemination was left to the advocates and opponents of Proposition C. Notwithstanding the provisions of state law which prohibit governments and their agencies from advocating a position on a ballot measure, sufficiently clear, understandable, readily available, widely disseminated information was not provided to the electorate.” Further, the report stated that financial assumptions underlying the claim that hotel tax revenue would cover the City’s payments were tenuous, noting that these assumptions ignored the possibility of a recession and the chance that hotel tax revenue would not in fact grow at the optimistic rate cited. The report even noted that the use of public funds for the stadium could forestall the possibility of a planned new downtown library, and that it could create a need to raise taxes or cut expenditures for City services in the future.⁸⁸ Because the report was released only one day before Proposition C went to the voters – amid allegations that City officials purposefully delayed its issuance – the impact of the civil grand jury’s report was likely minimal.

In June 1999, almost eight months after the vote on Proposition C, the civil Grand Jury released its third and final report on the ballpark project. The report begins: “The San Diego County Grand Jury finds that the City of San Diego Mayor and other members of the City Administration have acted inappropriately with respect to the building of public support for the Proposition C, before its approval of voters on November 3, 1998.” Among other allegations, the report states that City officials attempted to convince the civil grand jury to end its investigation of the ballpark project and to delay the issuance of the second report, that City officials failed to adequately inform the public about Proposition C, and that City officials failed to ever explain why economic assumptions underlying the City’s ability to afford contributions for the ballpark were unqualifiedly optimistic.⁸⁹ Perhaps the report’s most damning accusation was one that claimed that Mayor Susan Golding agreed to help channel \$4 million to the San

⁸⁵ County of San Diego: Grand Jury Frequently Asked Questions. Available at <http://www.sdcountry.ca.gov/grandjury/faqs.html>. Accessed March 2, 2008.

⁸⁶ Purdum: *Little-Known Panel Turns Mayor Into Defendant*. New York Times. July 2, 1999. A-10.

⁸⁷ 1998/1999 Grand Jury Reports: Interim Report to San Diego City Council, Standards of Disclosure RE: Ballpark Financing Project. Available at http://www.co.san-diego.ca.us/grandjury/reports/1998_1999/intreim.html. Accessed March 2, 2008.

⁸⁸ Id.

⁸⁹ Id.

Diego County Hotel-Motel Association for use in marketing advertisements in exchange for the Association's support for Proposition C.⁹⁰ The City Attorney declined to investigate Mayor Golding for this alleged misconduct, stating that the civil grand jury had acted beyond the scope of its powers.⁹¹

Even with the benefit of the grand jury reports and a growing volume of studies showing that professional sports stadiums have questionable economic benefits, opponents of Proposition C were fighting a losing battle. Polls suggested that Proposition C was never really in danger of failing. On November 3, 1998, when the proposal for downtown redevelopment and a new Padres stadium went to the polls, voters overwhelmingly supported the plan. The final tally was 195,490 in favor of the stadium, and 132,272 against, a margin of 59.64% to 40.36%.⁹² The opposition was not deterred by the success of Proposition C: they next took their arguments to the courts.

VII. Bruce Henderson and the Ensuing Litigation

Proposition C was actually challenged in court even before it went to the voters. In August 1998, shortly after the San Diego City Council passed the election ordinance that placed Proposition C on the November ballot, the first of seventeen separate lawsuits was filed. Eight lawsuits were filed by a single attorney: a former City Councilman, Peace Corps Volunteer, and Boalt Hall graduate by the name of Bruce Henderson. Regarded by some as a brave voice willing to stand-up against the most powerful people in San Diego, and by others as a prime example of lawyers at their worst, Henderson was despised by the Padres. Eventually, the Padres brought their own suit against Henderson, charging him with malicious prosecution for daring to take his issues to court.

Henderson, who gave an extensive interview in support of this paper, is a libertarian who was closely associated with the Stop C campaign. Henderson and many others involved in the ensuing litigation had a much longer history fighting the City of San Diego over publicly backed projects that they regarded as benefiting the rich at the expense of the poor. San Diego's other main professional sports team, the National Football League's Chargers, had themselves recently been embroiled in a huge controversy over a lease they had signed with the City. As part of that deal, the City of San Diego guaranteed the Chargers attendance of at least 60,000 for every game, promising to purchase any unsold tickets under that amount. From 1995 until 2004, that deal cost the City \$36.4 million. Henderson filed a total of six suits against the City related to that ticket guarantee and the use of public funds for the expansion of the Chargers' Jack Murphy Stadium (now Qualcomm) and related to the use of public funds without voter approval for an expansion of the San Diego Convention Center. Even before the PETCO controversy arose, Henderson had gained a reputation as a troublemaker.

Henderson swears he has nothing against decisions by the electorate to use public funds for projects like the Chargers' ticket deal or the plans for a new Padres ballpark. Rather, he takes issue when he believes that City officials make bad deals with private parties because of either their incompetence or their willingness to mislead the public in order to achieve political goals. Believing that San Diego citizens have regularly been deceived and betrayed by their elected officials, Henderson has brought suits to bring those issues into the light. Henderson, a

⁹⁰ Purdum: *Little-Known Panel Turns Mayor Into Defendant*. New York Times. July 2, 1999. A-10.

⁹¹ Associated Press: *Mayor Accused of Misconduct Will Keep Job*. New York Times. July 21, 1999. A-14.

⁹² County of San Diego Registrar of Voters. Available at <http://www.co.san-diego.ca.us/voters/Eng/archive/199811bull.txt>. Accessed February 17, 2008.

practicing corporate lawyer for many years who also had experience with local government law by virtue of his time as a member of the San Diego City Council, strongly felt that the City Council was not being honest about the terms of the stadium deal. Convinced that the City Council was somehow acting illegally, Henderson said that he literally sat down with City bylaws, California state laws, and Proposition C and the MOU and looked for discrepancies. Where he found what he considered to be legit legal issues, he filed lawsuits. As the Padres discovered, he was quite determined.

The lawsuits related to the proposed baseball stadium were different than the sorts of lawsuits most lawyers usually handle in that Henderson never sued for money damages. Instead, he sued for injunctive relief. Whereas a large percentage of private suits are settled before going to trial, there was nothing in these ballpark suits to be resolved before trial: the Padres certainly were not going to agree to anything that would delay construction on their stadium, and Henderson was only seeking such a solution. That conundrum guaranteed that the litigation would be long and drawn-out.

The Early Litigation and the Attempt to Invalidate Proposition C and the MOU: Allegations of Misrepresentations, Failure to Get an Environmental Impact Report, and Budgetary Violations

After the San Diego City Council voted to allow Proposition C to be placed on the November ballot, Henderson filed a lawsuit for injunctive relief against the City of San Diego and the Padres seeking to remove the Proposition from the ballot. The named plaintiff in the case was Jerry Mailhot, a San Diego libertarian who had met Henderson during the litigation surrounding the Chargers' stadium deal and who had also worked with Henderson to try to stop a \$216 million renovation of the San Diego Convention Center.⁹³ The plaintiffs made five claims: "that Proposition C, the MOU, and the ballot materials contained misleading statements; that Proposition C violated the California Constitution by conferring rights and imposing duties on a private entity; that Proposition C violated the California Constitution's and the San Diego Charter's "one subject" rule; that a vote on Proposition C was premature because the City had not prepared or certified an environmental impact report (EIR) for the project as required under the California Environmental Quality Act (CEQA); and that, pursuant to the City Charter, a two-thirds vote was required to pass Proposition C because the City's financial obligations thereunder constituted a debt for the 1998-99 fiscal year exceeding the City's available resources."⁹⁴ After filing the papers, Henderson explained the lawsuit by saying, "We want a fair election, and we want it understood that it's going to require two-thirds vote, and we want an environmental review before the people of San Diego vote on this issue."⁹⁵

On September 4, 1998, a judge rejected all five claims made by Henderson in a ruling that did not provide explanation for the finding. Addressing Henderson's first claim, the judge simply stated that "[t]he language set forth in Proposition C ... is neither false, nor misleading, nor inconsistent." The rejection of Henderson's second and third claims – that Proposition C was giving rights to a private entity and that the referendum violated the "one subject" rule by concerning more than one matter – suggest that the judge viewed the entire project broadly as redevelopment. Had the judge viewed Proposition C as concerning the construction of a new

⁹³ LaVelle: *Ballpark measure is challenged*. San Diego Union Tribune. August 18, 1998. B-1.

⁹⁴ *Padres v. Henderson*, 114 Cal. App. 4th 495, 502 (2003).

⁹⁵ LaVelle: *Ballpark measure is challenged*. San Diego Union Tribune. August 18, 1998. B-1.

ballpark as separate from downtown redevelopment instead of seeing the ballpark as one aspect of this development, conceivably the ruling would have come out differently on those two claims. Henderson's fourth claim – that the vote was premature because the City had completed an environmental impact report on the site – was rejected because the judge seemed to agree with the city attorney that an EIR was not yet needed because Proposition C represented an optional opportunity for the citizens to vote on the project, not a final plan for development. The judge similarly rejected the claim that financing the stadium would create a budget deficit for the 1998-99 fiscal year and thus rejected Henderson's contention that Proposition C required a two-thirds approval from the voters to pass.⁹⁶

With this first legal victory, the Padres and the City of San Diego succeeded in putting Proposition C on the ballot. Henderson and others, however, remained determined to continue their efforts to challenge the construction of the new ballpark. The day the ruling came down, Henderson vowed to fight on, remarking to a local newspaper, "Oh, I'm sitting here, reading the local rules of the Court of Appeal."⁹⁷ Henderson did appeal, and again he lost. In an unpublished decision, the Court of Appeal of California for the 4th District noted that while Proposition C could have been clearer, it was not so confusing as to be invalidated. The appeals court also affirmed the lower court ruling that since Proposition C was not a binding final agreement there was no requirement that an environmental impact report be completed before the vote and no need for a two-thirds majority vote for approval. It took the appeals court only fifteen days to issue the ruling after it heard oral arguments, leading City officials to suggest that Henderson's case was frivolous. City Attorney Casey Gwinn reacted to the victory by stating that "[a]s is usually the case with [Henderson's] lawsuits, there are not difficult issues for the court to rule on. It's another example of using the legal system for a political purpose. If he has political issues, he should argue in the political arena rather than argue in the court system."⁹⁸

After Proposition C passed, the City and the Padres agreed on a final MOU. The basic terms of this final agreement were consistent with the earlier version distributed before Proposition C went to the voters. Some matters, including details regarding parking facilities and aspects of the more general downtown development, were left partly unresolved. In February 1999, the San Diego City Council passed an ordinance based on this final MOU, appropriating \$225 million for a new ballpark for the Padres to be funded by an issuance of bonds.⁹⁹ After this final ordinance passed, Henderson filed two additional suits with Mailhot as the named plaintiff, one in March 1999 and another in August 1999. These suits seem to essentially apply the same legal theories used in the earlier rejected lawsuit in regards to Proposition C to the ordinance authorizing the issuance of \$225 million in bonds. In July 1999, the City of San Diego completed the environmental impact report on the site chosen for the new stadium, leaving that aspect of Henderson and Mailhot's new lawsuits moot. In rejecting the argument that the ordinance allocating the \$225 million to the ballpark violated the City's "balanced budget" requirement, the appeals court noted that this was "essentially the same argument" raised in Henderson's first suit and that he was therefore estopped from asserting it

⁹⁶ LaVelle: *Judge's ruling on ballpark is expected; Challenger Henderson wants ballot tossed out*. San Diego Union Tribune. September 4, 1998. B-1; Lavelle: *Voting on ballpark OK, judge rules*. San Diego Union Tribune. September 5, 1998. B-1.

⁹⁷ Lavelle: *Voting on ballpark OK, judge rules*. San Diego Union Tribune. September 5, 1998. B-1.

⁹⁸ Lavelle: *Court upholds vote on Prop. C; Henderson challenge to ballpark denied*. San Diego Union Tribune. July 27, 1999. B-1.

⁹⁹ *Padres v. Henderson*, 114 Cal. App. 4th 495, 503 (2003).

again.¹⁰⁰ Both of these were suits were rejected without opinions, and neither received much attention in the local press.

On January 31, 2000, the San Diego City Council enacted an ordinance authorizing up to \$299 million to be used to fund its contribution for the new ballpark. Although this seemingly violated the \$225 million cap set forth in Proposition C and the MOU, cost overruns had stalled stadium plans and the Padres were making noise about searching for a new, cheaper site to locate the stadium. Anxious to start building, the City Council agreed to contribute additional monies, arguing that this was neither a violation of the MOU nor deceitful behavior toward the public because the \$225 million cap represented the City's actual contribution to the ballpark and did not include the cost of issuing bonds to finance this expenditure. Henderson immediately protested, and filed a lawsuit in February 2000. The named plaintiff in this lawsuit was Steven J. Currie, a man Henderson met through the Libertarian Party. Although a court eventually agreed with the City's interpretation of the \$225 cap, the City ultimately relented and agreed to limit its total expenditure for stadium bonds to \$225 million. Henderson credits then San Diego Mayor Susan Golding – whom he called “honest to a fault” – for stepping in and doing the right thing.¹⁰¹ Perhaps more realistically, Golding and other San Diego officials were prompted to limit City funds to the \$225 million initially discussed because of growing public unease with the project. A poll conducted in February 2000 revealed that 52% of San Diego residents favored a new ballot measure if the City was to spend more than \$225 million. Interestingly, the same poll revealed that more San Diegans found Padres owner John Moores (39%) to be trustworthy than Bruce Henderson (21%).¹⁰²

Litigation Regarding Public Approval: Attempts at a New Initiative For Voters

In November 1999, Michael Kane Dunkl and Philip Zoebisch began to circulate a petition around San Diego for a proposed initiative that would have declared that certain conditions contained in Proposition C had not been satisfied, thus rendering the MOU moot and ending all of the City's obligations in regards to the ballpark. Further, the initiative would have required “that reinstatement or creation of similar obligations of the City which are terminated by this proposition shall require a two-thirds vote of the people in an election held for that purpose.”¹⁰³ The disputed conditions concerned acquisition of the land the stadium was to be built on, ability to satisfy environmental regulations, plans for parking facilities to be built, and assurances that had been given by the Padres that funds had been lined up to complete private development to be done in concert with the ballpark project. In January 2001, the City and the Padres then brought a suit – filed as *City of San Diego v. Dunkl* - for declaratory relief asserting that Dunkl and Zoebisch's proposed initiative was invalid. Henderson represented Dunkl and Zoebisch. A trial court awarded the City and the Padres summary judgment on grounds that voters did not have the power to weigh in on whether or not the conditions had been satisfied because such interpretation was administrative in nature – not legislative – and thus within the domain of the City's administrative agencies. A section of Proposition C gave the City the right to alter the MOU submitted to the voters “as determined by the [C]ity council to be in the best interests of the City, subject to the criteria that the rights of the City shall not be decreased and its

¹⁰⁰ Id. at 503-06

¹⁰¹ LaVelle: *Henderson raises new hurdle for ballpark; Seeks referendum on city funding*. San Diego Union Tribune. February 2, 2000. B-1; *Padres v. Henderson*, 114 Cal. App. 4th 495, 504-05 (2003)

¹⁰² LaVelle: *Ballpark support dips; many troubled by cost*. San Diego Union Tribune. March 2, 2000. A-1.

¹⁰³ *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 391 (2001)

obligations not increased.” Based on this section, the California Appeals Court affirmed the grant of summary judgment to the Padres and the City.¹⁰⁴

The sixth suit Henderson was involved with similarly involved thoughts of putting a new initiative on the ballot for voters to weigh in on. The impetus for this suit was again in relation to the San Diego City Council’s decision to enact an ordinance authorizing up to \$299 million in public money for the ballpark construction, more than the \$225 million set forth when Proposition C was approved by voters. This time, Henderson and Zoebisch actually got 40,000 people to sign a petition calling for a public vote. As described in a newspaper report, Henderson took the 40,000 signatures – more than the 30,000 necessary to get an initiative on a ballot - to City Hall on the last day the City was accepting such petitions. Once there, Henderson was told by the City Clerk, who was acting on the City Attorney’s recommendation, that the City would take possession of the signatures and the accompanying documentation, but would not formally accept them until the City reviewed them and determined that the requirements for submitting a petition for a public referendum were met. Henderson refused to leave the petitions, accusing the City Attorney of “dirty tricks” and saying that he was afraid that the City officials would delay reviewing the petitions until after the City issued the \$299 million in bonds, which would leave his proposed referendum moot. The City Attorney dismissed Henderson’s allegations and declared the proposed referendum dead since Henderson had not left the petitions and therefore had missed the deadline. City Attorney Casey Gwinn told a reporter that “[e]verything Mr. Henderson is doing right now is done for public show. I don’t think he has an interest at all in the law or following the law. He’s just doing it for media attention.” Henderson answered that he would go to court and settle the issue there, which he did, filing a lawsuit within a week with Zoebisch as the named plaintiff.¹⁰⁵ Both a lower court and an appeals court would soon agree City Attorney Gwinn that the referendum petitions were invalid because they had not been submitted in a timely fashion.¹⁰⁶

More Litigation and An Added Twist: Conflict of Interest and an Old Friend

Henderson filed his seventh suit against the Padres and the City after San Diego newspapers broke a story about questionable dealings by a member of San Diego’s City Council in April 2000. On March 5, 1999, Councilwoman Valerie Stallings purchased shares of Neon Systems in that company’s initial public offering. Neon Systems is a software company owned by Padres majority owner John Moores. Stallings paid \$15 per share for 275 shares, an investment of \$4125.¹⁰⁷ The Neon Systems investment was the first time Stallings bought stocks in her nine years of public life.¹⁰⁸ As was pointed out by the reports at the time, it is exceptionally rare for a private investor to be able to purchase stocks at an IPO; because stocks often go up in value after their IPO, giving investors a windfall, companies usually reserve the right to buy stock at an IPO for large institutional investors in order to curry favor. It would be even more rare for a private citizen with little experience with stocks to buy at an IPO, especially considering that Neon System was little known at the time. The purchase was even more suspicious because of the timing. Stalling sold the stocks twenty-six days after she purchased

¹⁰⁴ Padres v. Henderson, 114 Cal. App. 4th 495, 504-05 (2003)

¹⁰⁵ Huard: *Henderson takes back anti-ballpark petitions*. San Diego Union Tribune. March 2, 2000. B-2.

¹⁰⁶ Padres v. Henderson, 114 Cal. App. 4th 495, 505, 507 (2003)

¹⁰⁷ LaVelle: *Stallings resigns; Councilwoman pleads guilty to counts involving Padres’ gifts, ballpark votes; Padres owner Moores is cleared of wrongdoing; prosecutor closes case*. San Diego Union Tribune. January 30, 2001. A-1.

¹⁰⁸ LaVelle: *Stallings profited in Moores firm IPO*. San Diego Union Tribune. April 21, 2000. A-1.

them, on March 31, 1999. That same day, Stallings and the rest of the San Diego City Council voted that the Padres were on track to secure private financing for ancillary development near the ballpark and thus that the City should continue steps to issue bonds to cover the City's \$225 contribution for the stadium construction.¹⁰⁹ Based on her purchase price of \$15 and her sale price of \$55, Stallings netted a pre-tax return of 267% and an after-tax profit of \$7,600 in just twenty-six days. Stallings' chief of staff also purchased stocks of Neon at the IPO.¹¹⁰

Based on the allegations made against Stallings, the Padres and the City had to have expected a conflict of interest lawsuit, and Bruce Henderson did not disappoint. Making matters a bit more exciting, it just so happened that Valerie Stallings held the City Council seat formerly occupied by Henderson. In the September 17, 1991 general election, Stallings defeated Henderson by a vote of 9,601 to 9481 – a difference of 120 votes or 0.6% of the total votes cast.¹¹¹ Because neither candidate won a 50% majority, the candidates went to a special runoff election on November 5, 1991. In that runoff, in what was regarded as an upset, Stallings bested Henderson by a margin of 55.64% to 44.36% to win the seat on the City Council for San Diego's 6th District.¹¹² Interestingly in light of what would come to pass in the future, in that election local real estate developers came out in favor of Henderson, while environmentalists supported Stallings.¹¹³ Henderson was at that time regarded as pro-business because as a City Councilman he had led a fight against a lawsuit that the Sierra Club and the Environmental Protection Agency brought alleging that San Diego's sewer system was polluting the ocean. Henderson, with pro-bono help from Latham & Watkins attorneys, prevailed in the lawsuit over the sewer system. Although local papers noted that Henderson might have saved the City billions of dollars in sewer renovations by leading the fight against the lawsuit, Henderson claims that suit cost him his reelection.¹¹⁴ Valerie Stallings was a cancer researcher at the Salk Institute, and after the sewer system lawsuit powerful local environmental groups backed her. The election between Henderson and Stallings seemed to have created some bad blood between the two, and likewise Henderson did not seem to have made many friends with other Council members during his four years in office. At that time, Henderson was a Republican who gained some notoriety for some conservative votes on social issues.¹¹⁵ Other members of the City Council criticized Henderson during his time in office for being too flamboyant. His colleagues noted his "grandstanding tendencies," especially during Monday night council meetings that were broadcast on local cable television.¹¹⁶

In August 2000, Henderson filed a suit against the City and the City Council, arguing that Proposition C, the MOU, and all other business transactions between the Padres and the City Council were void because of the obvious conflict of interest that arose out of the Stallings stock

¹⁰⁹ LaVelle: *Stallings made \$7,600 in sale of Neon stock; Texas software company headed by Padres owner*. San Diego Union Tribune. April 22, 2000. B-1.

¹¹⁰ Id.

¹¹¹ San Diego Election Results Bulletin. Available at: <http://www.co.san-diego.ca.us/voters/Eng/archive/199109bull.txt>. Accessed February 18, 2008.

¹¹² Smolens: *Women's vote a big boost for Stallings in runoff election*. November 10, 1991. B-3.

¹¹³ Horstman: *Write-in votes force a runoff in council race*. Los Angeles Times. September 19, 1991. B-1.

¹¹⁴ Horstman: *Pratt, Henderson Legacies as different as their styles*. Los Angeles Times. November 30, 1991. B-3.

¹¹⁵ Id. ("Pratt is a moderate Democrat who promoted a wide array of social programs, Henderson a conservative Republican who opposed most of those plans and prided himself on 'saying no' – casting, for example, the lone votes against a Human Dignity Ordinance outlawing discrimination against homosexuals, and against creation of a Human Relations Commission designed to target racial, ethnic, and religious discrimination.")

¹¹⁶ Id.

deal since the Padres owner allegedly gave what amounted to a gift to Stallings. The named plaintiffs were Bruce Skane and Jerry Mailhot. Later, the complaint was amended to add the Padres as defendants and to allege that the Padres had violated the Cartwright Act (California's antitrust act), the Racketeering Influenced and Corrupt Organizations Act (RICO), and were guilty of unfair business practices.¹¹⁷

On January 29, 2001, Stallings resigned from the City Council. As part of a plea agreement, she pled guilty to two misdemeanors: one for failing to report gifts, and one for failing to recuse herself from Padres votes in 1999.¹¹⁸ According to court documents, Stallings also failed to report gifts from the Padres owner in addition to the right to buy stock at Moore's company's IPO, including air travel on the Padres' plane for Stallings' mother, commercial airplane tickets for Stallings' daughter and sister, a lunch at Pebble Beach country club, an answering machine, a camera, use of a vehicle that Moores loaned Stallings so that she could drive to Carmel to stay at one of Moores' residences there, and Padres souvenirs and autographed memorabilia.¹¹⁹ Stallings admitted to purchasing the shares of Neon Systems "immediately after consulting with [Padres owner] Moores." Although no charges were brought for insider trading, it has been suggested that Stallings was also tipped of when to sell her stocks; she ultimately sold her stocks just short of the all-time high.¹²⁰ U.S. Attorney Gregory Vega said that Stallings had engaged in "a continuing pattern of activity, a continuing pattern of receiving gifts... and a continuing failure, on statements of economic interest, to disclose, and a continuing failure to disqualify" herself from votes.¹²¹ Stallings was fined \$10,000, but a judge declined to impose probation, saying that she "has paid perhaps the highest price a public official can pay" already by being forced to resign.¹²² It is worth noting that Stallings was in her third term as City Councilwoman when she was forced to resign and that she had a law degree, suggesting that she should have been aware that she was committing wrongdoings.

Padres owner John Moores was not charged with any crime in connection with the Stallings bribery scandal. U.S. Attorney Vega held a news conference where he stated: "John Moores did not commit a violation of law. It is not a crime to give gifts to public officials."¹²³ A local reporter called Vega's performance "one of the most pathetic news conferences I've ever seen."¹²⁴ Henderson vehemently argues to this day that Vega was flat-out wrong in his assessment of the bribery laws, and others agree. San Francisco attorney Harold Rosenthal remarked that, "It's incredible for Vega to say that it's not a crime to give a gift to a public official; that's simply not the case. If you give to a public official with the expectation of getting something in return, it is a crime."¹²⁵ Other cases suggest that Henderson was right in his

¹¹⁷ *Skane v. City of San Diego*, 2004 Cal. App. Unpub. LEXIS 2220 (2004).

¹¹⁸ LaVelle: *Stallings resigns; Councilwoman pleads guilty to counts involving Padres' gifts, ballpark votes; Padres owner Moores is cleared of wrongdoing; prosecutor closes case*. San Diego Union Tribune. January 30, 2001. A-1.

¹¹⁹ Perry: *California and the West; Councilwoman in San Diego pleads guilty and resigns; she admits not reporting gifts from the owner of the Padres baseball team and not excusing herself from voting on new ballpark*. Los Angeles Times. January 30, 2001. A-1.

¹²⁰¹²⁰ Bauder: *Sidestepping through latest S.D. Scandal*. San Diego Union Tribune. January 31, 2001. C-1.

¹²¹ LaVelle: *Stallings resigns; Councilwoman pleads guilty to counts involving Padres' gifts, ballpark votes; Padres owner Moores is cleared of wrongdoing; prosecutor closes case*. San Diego Union Tribune. January 30, 2001. A-1.

¹²² LaVelle: *Judge waives probation for Stallings: He says she has suffered enough*. San Diego Union Tribune. February 6, 2001. B-1.

¹²³ LaVelle: *Stallings resigns; Councilwoman pleads guilty to counts involving Padres' gifts, ballpark votes; Padres owner Moores is cleared of wrongdoing; prosecutor closes case*. San Diego Union Tribune. January 30, 2001. A-1.

¹²⁴ *Id.*

¹²⁵ Bauder: *Sidestepping through latest S.D. Scandal*. San Diego Union Tribune. January 31, 2001. C-1.

interpretation of the law and that Moores could have been prosecuted. In 1998, a lawyer was sentenced to three years, five months in prison for giving gifts to two San Diego judges in exchange for favorable rulings. In 2000, a California appeals court upheld a decision sentencing a Los Angeles businessman who gave under \$10,000 worth of gifts to an L.A. County sheriff to three years, four months in prison.¹²⁶ Although a definite valuation of the gifts Moores gave to Stallings is not available, if the total value of these gifts exceeded \$10,000 it seems very suspicious that Moores was not prosecuted. As Bruce Henderson remarked, “Can you imagine if it had been Bruce Henderson giving gifts to public officials?”¹²⁷ Henderson’s lawsuits in relation to the bribery scandal failed, as a court ruled that Henderson could not prove that the gifts had influenced City Council action.

The End of Litigation and Moving Forward

Ultimately, a total of seventeen lawsuits were filed in connection with the new San Diego ballpark, eight of which were filed by Bruce Henderson. Although construction on the ballpark started on March 22, 2000, it stopped again on September 29 of that year when funding ran out because the City had not been able to issue bonds with pending litigation. Construction did not restart until February 19, 2002, a week after the City was finally able to sell bonds to raise cash after having won all sixteen lawsuits that had then been resolved.¹²⁸

One lawsuit remained. Evidently fed up with all the previous lawsuits, the Padres filed a suit against nemesis Bruce Henderson in January 2002, claiming damages of \$100 million for construction delays blamed on his lawsuits. The complaint alleged malicious prosecution by Henderson in reference to the eight lawsuits Henderson had filed in connection with the ballpark project. The suit claimed that “Henderson has attempted to use the lawsuits to decide the pace, timing, and feasibility of the ballpark project with a complete disregard of the unequivocal will of the people of San Diego or their duly elected officials.”¹²⁹ Moores told a local newspaper that after being on the other side of some many lawsuits, “I guess it’s a lot of fun to be a plaintiff, to file a lawsuit and watch someone squirm.”¹³⁰

Henderson eventually prevailed after a court found that the Padres had failed to establish malicious prosecution because they could not show that Henderson had a lack of probable cause for most of his claims. The Padres were ordered to pay Henderson’s attorneys’ fees - \$132,847 – after other claims were dismissed under a law meant “to encourage participation in matters of public significance by allowing a court to promptly dismiss unmeritorious actions or claims that are brought to chill another’s valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”¹³¹ With a single claim left unresolved, Henderson agreed to pay the Padres \$1, and the parties settled in April 2006. Litigation over the stadium deal had stretched out for almost eight years.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Heller: Countdown to opening day 2004; Ballpark project under way – again. San Diego Union Tribune, February 20, 2002, B-3; Heller: Padres owner thanks ballpark supporters. San Diego Union Tribune, March 1, 2002, B-3.

¹²⁹ Soto: Ex-councilman pays \$1 to end lawsuits; Padres accepted deal last month. San Diego Union Tribune. May 5, 2006, B-3.

¹³⁰ Heller: *Leaving the shadow of stadium controversy, John Moores prepares for a season in the sun.* San Diego Union Tribune, February 22, 2004.

¹³¹ *Padres v. Henderson*, 114 Cal. App. 4th 495, 508 (2003); Soto: *Ex-councilman pays \$1 to end lawsuits; Padres accepted deal last month.* San Diego Union Tribune. May 5, 2006, B-3.

VIII. Ten Years Later: PETCO and the San Diego Budgetary Crisis

On April 8, 2004, the Padres played their first game in newly named PETCO Park. A sellout crowd of 41,400 watched the Padres beat the San Francisco Giants 4-3 in ten innings.¹³² The final cost of the stadium facilities, according to most estimates, was \$456.8 million. The Padres chipped in \$153 million, 33.5% of the total cost. The other 66.5% - \$303.8 million – came from public funds: \$225 million from bonds, \$21 million from the San Diego Unified Port District, and \$57.8 million from the City’s redevelopment agency. Looking back to the terms of the original Memorandum of Understanding agreed to in 1998, it appears that both sides essentially stuck to their original financial obligations. The San Diego Center City Development Corporation ultimately contributed \$7.8 million more than the \$50 million originally provided for in the non-binding MOU. The details of this additional \$7.8 million are unclear, despite the fact that the MOU stated that the Padres would be liable for cost overruns. The Padres did, however, provide \$38 million of the \$45.8 million overruns.¹³³

Faced with impending litigation, the Padres initially had trouble finding a buyer for the bonds used to finance most of the City’s share of the stadium. Potential investors were worried that delays from litigation would endanger the entire project, and also that litigation might challenge the tax-exempt status of the local bonds. With tax-exempt status, investors would realize a relatively low rate of return on the bonds since the lower interest rate balances the fact that profits on the investment would be tax-free. If litigation later took away this tax-exempt status, bond investors would have a below market return since they would now be paying tax on their profits.¹³⁴ With no buyers for the bonds initially, the City even considered selling the bonds to its pension fund.¹³⁵ Merrill Lynch eventually stepped forward and purchased the bonds, with San Diego agreeing to pay 7.66% annual interest.¹³⁶ In 2004, Standard and Poor’s suspended its credit rating for San Diego, a move showing that Standard & Poor was no longer willing to vouch for San Diego’s financial health.¹³⁷ Standard & Poor’s decision to suspend San Diego’s bond rating was a result of the City’s investment losses, the pension deficit, and questionable accounting methods on documents concerning the issuance of around \$2.3 billion in municipal bonds by the City.¹³⁸ With the City’s credit rating suspended, San Diego was essentially foreclosed from borrowing money for public bonds well into 2007. Instead the City was forced to borrow from private lenders, which is a more costly undertaking, for water and sewer projects.¹³⁹ The issuance of the ballpark bonds may have been one factor that influenced Standard & Poor’s decision: it is alleged that City officials hid details of the pension fund crisis when looking to issue the ballpark bonds in 2002.¹⁴⁰ On May 15, 2008, citing “the expectation

¹³² David Leon Moore: *Padres open their new park, and 41,400 show up*. USA Today. April 9, 2004.

¹³³ PETCO Park, San Diego, California. Available at <http://www.ballparks.com/baseball/national/sdobpk.htm>. Accessed February 28, 2008.

¹³⁴ McLaughlin: *Ballpark Pitched to Pension System*. Voice of San Diego. Available at <http://www.voiceofsandiego.org/articles/2006/08/29/news/01ballpark.txt>. Accessed March 8, 2008.

¹³⁵ Id.

¹³⁶ Hall: *Ballpark-bond refinancing set; City will save, but it also faces penalty*. San Diego Union Tribune. March 7, 2007.

¹³⁷ LaVelle: *Wall St. firm suspends credit ration for S.D.* San Diego Union Tribune. September 21, 2004.

¹³⁸ *San Diego’s credit rating lowered*. North County Times. February 24, 2004.

¹³⁹ Hall: *S.D. again must rely on private loan deals*. San Diego Union Tribune. January 17, 2007.

¹⁴⁰ Hall and Vigil: *‘Reckless and wrongful.’* San Diego Union Tribune. August 9, 2006. (quoting the newspaper article, which quotes the Kroll report).

that recent improvements in city management practices have begun to address the city's long term financial challenges," Standard and Poor's finally restored San Diego's credit rating.¹⁴¹

As part of their agreed role of "master developers," the Padres were responsible for attracting roughly \$300 million in private investments for the development of the area around the ballpark, and additional investment pursuant to the vaguely worded Phase II of the MOU. The Padres also promised to develop 850 hotel rooms to generate hotel taxes that the City would use to pay off its bonds. The Padres exceeded the private investment obligations, but did not meet the obligations in regards to the hotel rooms. When the ballpark opened in April 2004, 744 hotel rooms had been completed and the Padres claimed that higher than planned room rates would compensate for the tax lost on the 106 uncompleted rooms.¹⁴² Bruce Henderson strongly disputes that claim, claiming that the Padres replaced tax-generating hotel rooms with tax-neutral condominiums because the team's development corporation found that switch to be more profitable. By October 2004, there had been about \$1.2 billion in private investment in the twenty-six blocks surrounding the ballpark.¹⁴³ The Padres and their development company arranged at least \$600 million of that private investment.¹⁴⁴ Padres owner John Moores personally benefited from the downtown development, as his development agency purchased much of the land around the ballpark from the City to build on. By some estimates – specifically, one probably inflated estimate by super-agent Scott Boras, who cares about these issues because he is constantly looking for deep-pocketed owners - Moores might have personally made as much as \$700 million from the downtown development.¹⁴⁵

Overall development of the downtown area near the ballpark is universally recognized as having been an overwhelming success. A May 2007 article that considered a sixty-block area around the ballpark – an area larger than that contemplated in the agreements between the Padres and the City - reported that construction either completed, in progress, or planned was "expected to yield 8,300 new homes, 1.3 million square feet of commercial space, 1,200 hotel rooms and more than 3,000 public parking spaces."¹⁴⁶ In 2007, the Center City Development Corporation – San Diego's public development agency – and the Padres development company, JMI Realty, shared a development award given out by a prestigious Washington, D.C. based urban development organization. The downtown district surrounding PETCO Park was one of ten winners recognized by the Urban Land Institute (ULI), in a contest that had 170 entries. A portion of a very flattering report by the ULI described the ballpark project thus:

In 1998, city of San Diego voters overwhelmingly approved a historic memorandum of understanding for a new Major League ballpark and a major redevelopment effort that has transformed one of the city's most blighted areas—East Village—into one of downtown's fastest-growing and most popular neighborhoods...Located just two blocks from the historic Gaslamp Quarter (a popular downtown dining, shopping, and

¹⁴¹ Virgil: *Standard and Poor's restores S.D. credit rating*. San Diego Union Tribune. May 15, 2008; Standard and Poor's: *San Diego, California; Appropriations; General Obligation*. Available at http://www.signonsandiego.com/news/metro/images/080515standard_poor.pdf. Accessed May 15, 2008.

¹⁴² Rother: *Promises of Padres are a mixed bag*. San Diego Union Tribune. April 5, 2004.

¹⁴³ Broderick: *Moores: 'we underpromised and overdelivered' in 2004; critics still say ballpark not money well spent.* San Diego Business Journal. October 11, 2004. Available at http://goliath.ecnext.com/coms2/gi_0199-3867396/Moores-we-underpromised-and-overdelivered.html . Accessed February 29, 2008.

¹⁴⁴ Rother: *Promises of Padres are a mixed bag*. San Diego Union Tribune. April 5, 2004.

¹⁴⁵ MacMedan: *Boras is baseball's bigger deal man*. USA Today. November 14, 1996.

¹⁴⁶ Weisman: *Petco Park spawns award-winning neighborhood*. San Diego Union Tribune. May 20, 2007. D-2.

entertainment district) and across the street from the San Diego Convention Center, the East Village had long been viewed as one of San Diego's most dangerous, dilapidated neighborhoods... Not surprisingly, private developers demonstrated no interest in the area prior to the construction of PETCO Park, the new stadium for the San Diego Padres baseball team... The momentum fueled by the development of the ballpark is remaking East Village, which is transforming into a vibrant mixed-use, mixed-income community. The substantial risk taken by the public sector in this redevelopment effort has proven incredibly successful, and the private sector is now driving billions of dollars worth of continuing investment. This public/private initiative has become a true model of smart growth and neighborhood revitalization.¹⁴⁷

The ULI also recognized the Padres and the City for holding “[h]undreds of community meetings...to ensure public involvement in the design of the ballpark” and for taking care to preserve historic structures.¹⁴⁸

While the development aspect of the ballpark project was a clear success, the Padres failed to meet other promises they made during their campaign for public funds. In one mailing sent before Proposition C went to the voters, the Padres promised that they would provide “10,000 to 20,000 tickets for every game priced between \$5 and \$10.” A news release issued a month before the Proposition C vote promised lawn seating in the park built behind centerfield for 2,000 to 4,000 fans priced at \$5. In fact, when the ballpark opened in 2004, the Padres sold 1,000 “park passes” – which do not include a seat, just the right to sit on the grass in the outfield – priced at \$5, 733 tickets priced at \$8, and 8,351 tickets for \$12. The Padres also promised – or at least implied a commitment - to build a 400-seat auditorium into the stadium when they were courting the support of arts and cultural groups before the Proposition C vote. That auditorium was never built. A Padres spokesman blamed the higher-than-promised ticket prices and the lack of the auditorium on the “Henderson tax” – the cost of the litigation and the delay in building the stadium.¹⁴⁹ The ticket increase had to have been expected: when the Padres moved from a stadium that seated more than 60,000 into one that seats around 40,000, it follows that ticket prices will rise. As one newspaper reporter remarked, “Forget blue-collar nostalgia. Baseball teams hate you. They want people who can drop \$150 when they go to a game. You can take your miserable \$7 and bad clothes to the bowling alley.”¹⁵⁰

A Proposition C mailer promised that 17,000 new jobs would be created by the stadium project.¹⁵¹ A study done by the San Diego Association of Governments in 1999 estimated that 7,056 permanent jobs would be created, 4,148 of which would not provide healthcare, and according to a labor-think tank in San Diego, that estimate appears to be more accurate. Most of those jobs are part-time.¹⁵²

Under the terms of the MOU, the cost of paying off the bonds that the City sold to raise money for the stadium was supposed to be covered by the revenue from taxes generated by new

¹⁴⁷ Urban Land Institute, Awards for Excellence: 2007 Winner. San Diego Ballpark Neighborhood Revitalization. Available at <http://www.uli.org/AM/Template.cfm?Section=Home&CONTENTID=109938&TEMPLATE=/CM/ContentDisplay.cfm>. Accessed February 29, 2008.

¹⁴⁸ Id.

¹⁴⁹ Rother: *Promises of Padres are a mixed bag*. San Diego Union Tribune. April 5, 2004.

¹⁵⁰ Cushman: *Where's the other side of the ballpark debate?* San Diego Union Tribune. August 13, 1998.

¹⁵¹ Rother: *Promises of Padres are a mixed bag*. San Diego Union Tribune. April 5, 2004.

¹⁵² Id.

hotel rooms. The exact numbers are unclear, but no one claims that new taxes do in fact cover service of the bonds. Most estimates suggest that the City loses between \$9 million and \$19 million a year on the stadium.¹⁵³ Bruce Henderson says that any true estimate of the continuing cost of the stadium would also recognize the opportunity costs of spending money on the stadium that could be spent elsewhere, an amount that he estimates at \$8 million annually.¹⁵⁴

Padres owner John Moores likes to focus on the undeniable successes of the ballpark venture. He told a local newspaper:

I'm not overreaching to say that the ballpark contributed in a profound way to the economic redevelopment in the immediate area and all over town. Suddenly, Downtown San Diego is perceived as a cool place to live. We validated that model. At a minimum, we will see a lot more people coming Downtown, especially to the restaurants. Time will tell how quickly people will start spending more and more time down there...I like to think we underpromised and over-delivered to the city. I think it would be hard to find anybody now that says they didn't favor the ballpark.¹⁵⁵

Moores does have a valid argument that the resulting development was worth the public funds invested in PETCO Park. Indeed, the use of public funds for development projects is extremely common. Cities and municipalities give away public land, waive permit fees, and regularly offer tax breaks to attract new businesses. In San Diego, public funds have been used to subsidize shopping malls and industrial parks. Horton Plaza, a popular, upscale shopping mall built in 1985 in San Diego, was constructed with \$40 million in public investment and \$120 million in private funds.¹⁵⁶ That project attracted an additional \$368 million in private investment, and it was widely regarded as successful use of the City's money.

Bruce Henderson and others say the stadium is different. Henderson says he still thinks using public funds for the stadium was a mistake, explaining that:

There is absolutely no question that there has been a Downtown renaissance... To what extent the ballpark contributed to it, I don't know. My personal sense of it is that, with or without the ballpark, there would have been a Downtown renaissance. To the degree that it did, that's fabulous, but it would have been the same if the private sector had paid its own way.¹⁵⁷

The difference, opponents of the stadium contend, is that other publicly funded projects attract jobs. Given the amount of money spent, PETCO Park itself created very few permanent jobs, and as Henderson points out, it is very unclear that ancillary development would not have happened but for the stadium. In reference to downtown development, a 2000 leaked internal

¹⁵³ Morgan: Sports Support. San Diego Magazine. February 2006. Available at <http://www.sandiegomagazine.com/media/San-Diego-Magazine/February-2006/Sports-Support/>. Accessed March 1, 2008.

¹⁵⁴ Bauder: Overlords Soak the City. San Diego Weekly Reader. February 19, 2004. Available at <http://www.sandiegoreader.com/news/2004/feb/19/overlords-soak-city/>. Accessed March 1, 2008.

¹⁵⁵ Broderick: Moores: 'we underpromised and overdelivered' in 2004; critics still say ballpark not money well spent.' San Diego Business Journal. October 11, 2004. Available at http://goliath.ecnext.com/coms2/gi_0199-3867396/Moores-we-underpromised-and-overdelivered.html. Accessed February 29, 2008.

¹⁵⁶ Heller: *If you give them incentives, they will come.* San Diego Union Tribune. February 24, 2002. B-1.

¹⁵⁷ Broderick: Moores: 'we underpromised and overdelivered' in 2004; critics still say ballpark not money well spent.' San Diego Business Journal. October 11, 2004. Available at http://goliath.ecnext.com/coms2/gi_0199-3867396/Moores-we-underpromised-and-overdelivered.html. Accessed February 29, 2008.

memo from the San Diego Taxpayers Association concluded that “[t]he Convention Center expansion and the strong downtown residential market make these projects viable even without the ballpark project.”¹⁵⁸ If the City had invested in downtown development alone, it is quite possible that San Diego could have enjoyed the same outcome at a lower cost, although it is likely that the pace of development would have been slower. Other critics say that public financing of sports stadiums is not necessarily a bad thing, but that San Diego simply gave away too much. In the Horton Plaza development, the ration of private to public funds was 3:1. In a beachside development project, the ratio was 7:1. Another shopping mall development project had a ratio of 40:1.¹⁵⁹ In the case of PETCO Park, considering only the ballpark and not the nearby development that arguably would have occurred anyway, the ration was 1:2. Certainly the City has benefited to some degree from the construction of PETCO Park, but compared to other projects PETCO Park may have been a bad investment.

IX. PETCO and San Diego’s Budget Crisis

A discussion of the use of public funds for PETCO Park must be framed in the context of San Diego’s overall financial position. At a January 11, 2008 press conference, current San Diego mayor Jerry Sanders described the City’s bleak financial outlook. The pension system had a deficit of \$1.2 billion, a fund to pay for health care for retired City workers had a deficit of about \$800 million, and a fund to maintain streets and public facilities had a deficit of \$900 million.¹⁶⁰

The roots of much of San Diego’s current financial crisis were deals made in 1996 and 2002 between the City and the pension board and unions. Under these deals – one made just as talk of public funds for PETCO Park was starting, the other made as the City was struggling to find buyers for the bonds used to partially fund the stadium - unions agreed that the City Council would under-fund retirement funds for union workers, and in return, the union would realize more generous retirement benefits. At the time both deals were made, the stock market was soaring, and the City was essentially betting that high returns on investments would more than compensate for the fact that the pension account funding was not keeping pace with accumulating obligations.¹⁶¹ The lunacy of this plan was that it increased the City’s obligations by sweetening pension plans while cutting the amount of money set aside for these debts. Of course the stock market inevitably slowed, and San Diego found itself with a pension deficit that reached a high of \$1.4 billion in 2005.¹⁶² Because the City Council members who authorized these deals benefited in that their own pension packages were improved, there is currently ongoing litigation brought by the current City Attorney challenging the aspect of this plan that granted more generous benefits to City workers on the grounds that these were illegal deals that are thus void.¹⁶³

Evidence that San Diego officials lied about the pension scheme and covered up the poor state of San Diego finances in fact lead to an investigation by the Securities and Exchange

¹⁵⁸ Bauder: *San Diego’s cast of characters rehearses for history*. San Diego Union Tribune. May 7, 2000. I-2.

¹⁵⁹ Letters to the Editor: *Tax increment financing is not always a panacea*. San Diego Union Tribune. March 11, 2002. B-7.

¹⁶⁰ Vigil: *Mayor: Deficits remain big part of fiscal future; City services, jobs may face cutbacks*. San Diego Union Tribune. January 12, 2008. B-1.

¹⁶¹ Berthelsen: *San Diego pension saga offers a cautionary tale*. Los Angeles Times. August 24, 2007.

¹⁶² Vigil: *Mayor: Deficits remain big part of fiscal future; City services, jobs may face cutbacks*. San Diego Union Tribune. January 12, 2008. B-1.

¹⁶³ Vigil: *Most city pension increases will stand*. San Diego Union Tribune. December 15, 2006.

Commission. An independent report commissioned by San Diego Council found that City “officials were motivated to hide negative financial information ‘to avoid interfering’ with the city’s 2002 ballpark bond offering, which led to the construction of PETCO Park.”¹⁶⁴ The report, issued by Kroll Inc., a risk-management headed by a former head of the SEC, found that “[t]he evidence demonstrates not mere negligence, but deliberate disregard for the law, disregard for fiduciary responsibility and disregard for the financial welfare of the city’s residents over an extended period of time.”¹⁶⁵ Although the report did not find that officials acted with intent to break laws, “the evidence suggests that at the root San Diego City officials fell prey to the same type of corruption of financial management and reporting that afflicted municipalities such as Orange County and such private sector companies as Enron, HealthSouth and any number of other public corporations.”¹⁶⁶ The scandal forced the resignation of San Diego mayor Dick Murphy in July 2005. The Kroll report followed an earlier investigation by Houston law firm Vinson & Elkins – the same firm that represented Enron – which was widely criticized for “whitewashing” the actions of City officials.¹⁶⁷

On April 7, 2008, the SEC charged five San Diego officials with fraud for misrepresenting the state of City’s finances to bond investors in 2002 and 2003. The SEC complaint alleges that “the five Defendants knew, among other things, that the City faced severe difficulty funding its future pension and retiree health care obligations unless new revenues were obtained, pension and health care benefits were reduced, or City services were cut” but that the officials “acted recklessly in failing to disclose these and other material facts to investors and to rating agencies.”¹⁶⁸ Those charged include a former city manager, a city auditor and comptroller, and a city treasurer. Although not directly related to the ballpark project, the massive pension deficit was a result of questionable transactions that stretched back to 1997, well before Proposition C went to the ballot. As the SEC complaint makes abundantly clear, at the time when City officials were promoting the use of public funds for the new ballpark, at least some high-ranking City officials clearly knew that San Diego was in financial trouble and could not afford the stadium without cuts elsewhere.¹⁶⁹

Because of financial mismanagement, San Diego was left with a massive budget deficit. With a group of conservative leaders hesitant to raise taxes, San Diego has tried to fix its perilous financial position with budget cuts. City workers, police officers, and firemen have been denied raises. Library hours have been cut: most City libraries are no longer open on Sundays, and many branches restricted their Saturday hours. Library budgets to acquire new books were cut. Plans for a new downtown library have been delayed, and none of the funding will come from the City’s general fund.¹⁷⁰ Public pools have been closed. Roads have gone unrepaired. After-school childcare programs for children were cut. Programs for the homeless were cut. City jobs were cut. Trash collection fees were increased. Community services centers were closed.

¹⁶⁴ Hall and Vigil: *‘Reckless and wrongful.’* San Diego Union Tribune. August 9, 2006. (quoting the newspaper article, which quotes the Kroll report).

¹⁶⁵ Report of the Audit Committee of the city of San Diego (The Kroll Report). Available at <http://www.signonsandiego.com/news/metro/pension/20060808-9999-krollreport.html>. Accessed March 2, 2008.

¹⁶⁶ Id.

¹⁶⁷ *Aguirre challenges Kroll to justify its conclusions.* San Diego Union Tribune. August 10, 2006.

¹⁶⁸ Securities and Exchange Commission Complaint. Available at <http://www.signonsandiego.com/news/metro/images/080407sec.pdf>. Accessed May 15, 2008.

¹⁶⁹ Hall: *Ex-city officials charged with fraud.* San Diego Union Tribune. April 8, 2008.

¹⁷⁰ Madaffer: *A better library system for San Diego.* San Diego Union Tribune. December 8, 2005.

Money allocated to maintain playing fields for kids was cut.¹⁷¹ Park ranger positions were cut. Hours at public buildings in popular Balboa Park were cut. Plans to improve the storm drain system were abandoned. Meanwhile, San Diego continues to service bonds issued to cover its \$303.8 million commitment to PETCO Park.

Certainly, the budget crisis is not solely due to the decision to spend public money on PETCO Park. At the same time, however, it seems reasonable to question a decision to spend over \$300 million in public funds to subsidize Padres owner John Moores, a man who has appeared on Forbes Magazine's list of the 400 wealthiest Americans with a net worth of many hundreds of millions of dollars.¹⁷² As Bruce Henderson has said, PETCO Park "cost the city an extraordinary amount of money it wasn't able to afford and contributed to the financial crisis the city faces today... The private sector could have paid its own way... A question for the taxpayers: Were promises kept and what were the alternative uses of that money?"¹⁷³ The decision whether or not to spend public funds on sports stadiums is one that ultimately rests on values and priorities, but by any measure, it seems difficult to argue that San Diego officials served their citizens well by making such a huge financial commitment to PETCO Park when the City clearly could not afford to do so.

X. Concluding Thoughts: Public Funds for PETCO Park and the Role of Litigation

In the end, the Padres got their new publicly financed stadium, perhaps in part because so few people were willing to oppose the Padres and the City officials who backed them. Downtown San Diego was revitalized, and as anyone who has seen a game at the new ballpark can vouch, PETCO Park is a beautiful place to watch a game. The stadium is undeniably attractive, the seats are comfortable, and the views are great. Ironically, given that the public spent over \$300 million on the new stadium, the biggest complaint heard about PETCO Park is that tickets are too expensive. In August 2005, Sports Illustrated writers visited every major league ballpark and ranked them according to the "fan value" each provides, considering the cost of attending a game, the stadium and facilities, the atmosphere, the surrounding neighborhood, and the quality of the team. The PETCO Park experience ranked 22nd out of thirty, its ranking weighed down by expensive tickets, concessions, and souvenirs.¹⁷⁴ IN 2006, ESPN did a similar study, and this time PETCO ranked 16th, almost good enough to be in the top half of baseball's thirty ballparks.¹⁷⁵

The story of San Diego and PETCO Park serves as an illustration of the fundamental question central to the debate over publicly financed stadiums: what is a professional sports team worth to a city, and what is the city willing to sacrifice in order to keep that team? Absent some federal law prohibiting the use of public funds for sports stadiums – an idea thrown around by some – each city must make this valuation judgment according to their own circumstances and

¹⁷¹ Vigil and Powell: *Lamont Ewell proposes job cuts to balance city budget*. San Diego Union Tribune. May 3, 2005.

¹⁷² Forbes 400. Available at

<http://www.forbes.com/finance/lists/54/2002/LIR.jhtml?passListId=54&passYear=2002&passListType=Person&uniqueId=8RXL&datatype=Person>. Accessed March 1, 2008.

¹⁷³ Broderick: *Moores: 'we underpromised and overdelivered' in 2004; critics still say ballpark not money well spent.* San Diego Business Journal. October 11, 2004. Available at http://goliath.ecnext.com/coms2/gi_0199-3867396/Moores-we-underpromised-and-overdelivered.html. Accessed February 29, 2008.

¹⁷⁴ Fan Value Index. Available at <http://sportsillustrated.cnn.com/2005/baseball/mlb/08/31/fvi/>. Accessed March 2, 2008.

¹⁷⁵ Page 2's Ballpark Grades. Available at <http://sports.espn.go.com/mlb/stadiums>. Accessed March 2, 2008.

priorities. In that sense, the PETCO experience should be a model for how such questions are decided: San Diego voters were given the opportunity to vote on the issue, and they overwhelmingly voted in favor of using public funds for a new Padres stadium. The problem, according to opponents like Bruce Henderson, was more procedural. There are valid claims to be made, as were made by an independent auditor in the Kroll Report and by a civil Grand Jury, that San Diego officials mislead the public by failing to accurately present the true costs of the stadium to the public, especially in light of San Diego's worsening financial picture. Proposition C did not explicitly mention that public funds would be used for a stadium, and at least one poll suggests that many voters did not understand this. A February 2000 poll found that when people were told that the ballpark would be partially built with public funds, only 27% said they would have voted for Proposition C, with 61% against it and 13% undecided. When told that the ballpark was part of a larger redevelopment project, the same poll found that support increased to 34%, with 49% against and 18% undecided.¹⁷⁶ Those numbers are drastically different than the roughly 60% support Proposition C actually received, and strongly suggest that voters did not understand the issue before them. A separate relevant question is whether a decision of this magnitude should require a 2/3 supermajority vote.

For those people who did read the details of the plan and who believed that Proposition C was misleading, options to oppose the ballpark plans were limited. Opponents of Proposition C were grossly outspent in the campaign for Proposition C, and once the vote was over, the momentum built by the public mandate seemed unstoppable. Bruce Henderson and others choose to litigate the issue and were successful in delaying the project, but ultimately PETCO was built. Litigation was perhaps the best option concerned citizens had, but it was by no means a good option and definitely not an option available to most people. It takes courage to stand up against the City and against powerful business leaders, but it also takes a person in a certain position in life. A practicing lawyer in the middle of his or her career could not afford to take the position that Bruce Henderson took: he received hate mail, threats, and businesses boycotted his law practice. Henderson was mostly retired when he choose to take on the City, and as he stated in an interview, was in a financial position where he never had to work again. That is simply a liberty that most people do not have.

Although it is not surprising that Henderson and other Proposition C opponents failed in their litigation given that voters had approved the ballpark plan, that outcome was not necessarily inevitable. The lawsuits brought up valid issues, as evidenced by the fact that Padres ultimately paid Henderson over \$100,000 in attorney's fees after the malicious prosecution claim against Henderson was dismissed. Henderson stresses that he feels that the court system treated him fairly, and he believes that the judges he encountered were mostly competent. He also feels, however, that his willingness to bring suits against some of the most powerful people in San Diego made the judges extremely uncomfortable: it was an unconventional method, the quintessential mismatch, and with so much money on the line, judges were hesitant to issue rulings that would further delay ballpark construction. In that sense, perhaps Henderson was fighting an uphill battle from the start, with judges setting a high bar for his lawsuits given what was at stake. Judges are human too, and it is hardly surprising that they would be reluctant to issue rulings that would delay the ballpark and alienate City's powerful elite unless the legal foundation for such a ruling was clear. In the end, although his legal arguments had merit, Henderson was simply unable to present the sort of overwhelming case that would have been a winner.

¹⁷⁶ LaVelle: *Ballpark Support dips; many troubled by cost*. San Diego Union Tribune. March 2, 2000.

Litigation was not the only strategy, but it was the most realistic hope for stopping the ballpark project. John Moores and the Padres must be given credit for taking Proposition C to the voters. Although it is possible that community organization could have been used to fight the use of public funds, the vote gave the Padres a clear public mandate to refute such protests. With almost 60% of San Diegans voting in favor of Proposition C, opponents never had authority to claim that most people did not want the publicly funded stadium. The vote was instrumental in that regard, because it turned the fight against PETCO Park into an argument not about the merits of a publicly funded stadium generally, but more about the procedures that the Padres used to get those funds. Procedural arguments necessarily involve details and laws, and that means litigation. While it is relatively easy to mobilize community members to protest, people seem to recoil at the thought of litigation. In that sense, the success of Proposition C may have foreclosed the possibility of any real community mobilization. Although 40% of the population voted against public funds for PETCO Park, it seems that most of these people either accepted that democracy had spoken or were simply unwilling to get involved in litigation. Thus, Henderson and a few of his fellow skeptics were left isolated by the Proposition C vote.

Given that San Diego is a Republican town, it may seem surprising that there never was any real pre-Proposition C grass-roots effort to block a ballpark deal that involved such a significant outlay of government funds. The logical leader of any tax-related opposition to the new stadium would have been the San Diego County Taxpayer's Association (SDCTA), which according to their website is a "non-profit, non-partisan organization, dedicated to promoting accountable, cost-effective and efficient government and opposing unnecessary taxes and fees."¹⁷⁷ The front page of the SDCTA's website also notes that the organization "takes a leadership role in fiscal oversight of local government and aggressively resists...ill-advised public expenditures."¹⁷⁸ In a Republican city like San Diego, a tax group like the SDCTA would have had a receptive audience had it come out strongly in opposition to the use of public funds for a new sports stadium, and it is possible that such a stand could have had a significant effect on the debate. Although the SDCTA disputed claims by the Padres and the City Council that the ballpark plan would be tax-neutral on residents, the SDCTA never seemed to take the position that the cost of the ballpark was a major concern. Before voters went to the ballots to judge the stadium deal, the SDCTA estimated that the deal would cost the City \$17.7 million per year even after taking into account expected revenue increases from the TOT tax.¹⁷⁹ Apparently the SDCTA decided that this did not represent the sort of "ill-advised public expenditure"¹⁸⁰ that should be opposed: the SDCTA actually publicly endorsed Proposition C after a vote by its board. According to at least one newspaper report, the SDCTA's position was hardly surprising given that "[a] large number of the people who pay heavy dues to the group, and serve on its board, were in a position to benefit from the project, directly or indirectly."¹⁸¹ According to Peter DiRenza, foreman of the civil grand jury that issues the damning reports about the MOU and the conduct of the City Council, "Some pretty wealthy people keep the organization afloat, and a lot of those people were involved with the ballpark... The board voted knowing it was a subsidy to

¹⁷⁷ San Diego County Taxpayers Association. Available at <http://www.sdcta.org/>. Accessed April 20, 2008.

¹⁷⁸ Id.

¹⁷⁹ Braun: *Ballpark vote offers city a national voice; Measure will leave its mark, win or lose*. San Diego Union Tribune. November 1, 1998. A-1

¹⁸⁰ San Diego County Taxpayers Association. Available at <http://www.sdcta.org/>. Accessed April 20, 2008.

¹⁸¹ Bauder: *Taxpayers association should have given its Golden Fleece award to itself*. San Diego Union Tribune. April 17, 1999. C-3.

the private sector.”¹⁸² Thus, it seems possible that the organization that advertises itself as the public watchdog for unnecessary government spending never made a thorough assessment of the stadium deal.

In the end, Henderson’s litigation was doomed to fail simply because Henderson had so few allies to support his position. The public seems to have a visceral hostility to litigation. Once Henderson went to the courts, he lost all of his credibility to serve as an honest voice that would be heard by the public. A poll conducted in February 2000 found that only 21% of the public trusted Henderson, which is especially meaningful given that he was consistently the loudest voice speaking out in opposition to the ballpark deal.¹⁸³ With Henderson ineffectual, no credible voice stepped up to lead opposition efforts. Elected officials were overwhelmingly in support of the new ballpark. Business leaders had a vested interest in seeing the ballpark deal go through because they stood to benefit from the huge influx of public funds to be used for the development. The same February 2000 poll found that 52% of public trusted the SDCTA, suggesting that the opposition was especially damaged by the loss of an organization that seemed like a logical ally.¹⁸⁴ It is possible that the press could have swayed public opinion by taking a harder look at the terms of the stadium deal and serving as a neutral broker, but for whatever reason, it is striking how little scrutiny the MOU was subjected to in San Diego newspapers. The Padres succeeded in winning voter approval of Proposition C because no credible voice ever stood up to question the assumptions underlying the proposed deal. Against that public mandate, the politically isolated opposition to the stadium deal faced an extremely difficult, if not impossible, challenge.

Henderson was awarded for his efforts with a lawsuit brought by the Padres seeking \$100 million in damages against him. Although Henderson says he had emotionally prepared himself for it and that his first thought upon seeing the suit was relief that his clients were not named defendants, certainly no one likes to face a suit brought by a man like John Moores who has basically unlimited funds to pay lawyers. It is hard to see the suit by Moores as anything other than retribution and an attempt to intimidate and coerce people not to cross the Padres. Although Henderson ultimately prevailed in that suit, the threat of suits surely will dissuade others in the future from challenging powerful interests, and surely that cannot be a good thing if cities are going to honestly debate these issues in the future. Henderson sums up his experiences by saying, "I'm proud of having represented citizens who demonstrated the courage to go in and blow the whistle on corrupt activity and conflicts of interest... I think that was a very sad chapter in the history of our city."¹⁸⁵

¹⁸² Id.

¹⁸³ LaVelle: *Ballpark support dips; many troubled by cost*. San Diego Union Tribune. March 2, 2000. A-1.

¹⁸⁴ Id.

¹⁸⁵ Heller: *Leaving the shadow of stadium controversy, John Moores prepares for a season in the sun*. San Diego Union Tribune. February 22, 2004.