

THURSDAY, AUGUST 20, 2015

PERSPECTIVE

Build the arena, and lawsuits will come

By Amrit Kulkarni and Dawn McIntosh

The most valuable player in the competition to retain and recruit professional sports teams is the promise of a new arena — multi-million dollar projects that are often controversial, particularly when public funding is involved. The critical question is how to turn the promise into reality.

The city of Sacramento and the Sacramento Kings NBA team experienced that a home court advantage does not guarantee victory. The parties to the public-private partnership for the Kings' new \$477 million stadium endured years of legal, regulatory and publicity battles before recently winning the last challenge to the team's new home.

Sacramento's unique experience includes fighting a ballot measure to force a public vote, constitutional challenges to legislation, attacks on environmental approvals, eminent domain disputes, alleged violations of bond financing statutes, and a trial including, inter alia, allegations of fraud and waste of public funds. The story provides the strategic game plan that sponsors can use to avoid attempts to delay or derail new arenas.

In January 2013, the city of Sacramento was surprised to learn that the owner of the Kings NBA franchise agreed to sell the team to a new owner who would relocate the team to Seattle. Mayor Kevin Johnson quickly initiated a multi-pronged effort to keep the Kings in Sacramento, including assembling a group of investors who eventually purchased the team. Over the next 16 months, the investors, led by Silicon Valley entrepreneur Vivek Ranadive, negotiated agreements with the city to jointly fund a new multi-use entertainment and sports center in downtown Sacramento for the team.

The NBA set tight timelines for a new arena, requiring negotiation of agreements, acquisition of the site, completion of environmental review and construction to be completed in 2016. The site was acquired through eminent domain in early 2014; environmental review was completed and all agreements for the project were executed by May 2014. The city agreed to contribute \$255 million toward construction of the arena, gave the Kings' owners the right to construct

up to six digital billboards, and entered a management agreement for the Kings to operate and maintain a city-owned parking structure. In exchange, the Kings agreed to pay the balance of the construction cost for the arena; cover all cost overruns; purchase the site; develop, operate and maintain the arena for the duration of the 35-year lease; and make lease payments to the city.

Opponents first attempted to overturn the city's decision using the initiative process to require a public vote to fund sports arenas, but this failed because the initiative conflicted with the city's charter and did not comply with election laws. Other cities have used the initiative process to avoid lengthy environmental reviews or to obtain voter approval to avoid legal challenges. Proponents of new arenas must have an offensive and defensive strategy with respect to the initiative process.

Next, opponents attacked environmental approvals. To meet the NBA's schedule, the city asked the state Legislature to streamline the traditionally lengthy review process under the California Environmental Quality Act. The resulting legislation, Senate Bill 743, shortened the normal timelines and created valuable protections for the project, including allowing for property to be acquired by eminent domain prior to CEQA; requiring certification of the administrative record just days after project approval; heightening the standard for an injunction to stop the project; and mandating that CEQA litigation (including appeal) be resolved within 270 days, if feasible.

While these provisions gave the city a degree of certainty for the project, they also required the city to compile the record during the review process and be prepared to defend its CEQA process in court immediately after project approval. The city succeeded, proving that expedited CEQA review is feasible. Predictably, opponents challenged the constitutionality of SB 743's expedited review and injunction provisions, as well as the city's substantive findings under CEQA. Both the trial court and Court of Appeal rejected the challenges, concluding that the streamlining and other provisions, while aggressive, did not interfere with the court's inherent

powers. *Saltonstall v. City of Sacramento*, 231 Cal. App. 4th 837 (2014).

Additionally, opponents challenged the city's preliminary term sheet and the acquisition of the project site through eminent domain before completion of the CEQA process. The Court of Appeal, affirming the trial court, said the city did not "pre-commit" to the project because it still had complete discretion to review the project, mitigate environmental impacts, and even refuse to approve the arena. *Saltonstall v. City of Sacramento*, 234 Cal. App. 4th 549 (2015).

These two rulings support those looking to use Sacramento's CEQA approval process as a model for other projects.

In the final legal challenge, taxpayers attacked the project agreements, under common law and Code of Civil Procedure Section 526a, asserting claims of a "secret subsidy," fraud, illegality and waste of public funds. See *Gonzalez v. Johnson*, 34-2013-80001489 (Sac. Super. Ct.). These claims demand more than mistakes by public officials; they require an intent to deceive and misuse public funds for no public benefit that results in harm to the public. Taxpayers often argue a project will not generate economic benefits — but the scope of "public benefits" from such projects far exceeds "economic benefits," and is within the discretion of a municipality's governing body (public safety, civic pride, revitalization of a downtown area, retaining or increasing jobs, etc.).

The *Gonzalez* court noted the plaintiffs conceded the arena will provide some public benefits, although they disputed the extent. While there may be disagreement over whether stadium projects generate significant economic activity, a taxpayer claim under Section 526a will fail so long as there are any public benefits from the public contribution.

Gonzalez also involved a challenge to the city's issuance of the bonds for the project under the Marks-Roos Bond Pooling Act of 1985 through a reverse validation action. The validation statutes are procedural statutes designed to meet legislative goals for the speedy resolution of the validity of certain local agency actions, but the validity of any particular action, and the evidentiary

standard, are based on the substantive law pursuant to which the action was taken. The Marks-Roos Act requires the public entity issuing the bonds to make a finding that there will be one of four "significant public benefits" from bond issuance. A court reviews this administrative decision to determine if it is arbitrary, capricious or entirely lacking in evidentiary support based on the evidence considered by the administrative agency.

Here, the *Gonzalez* court said "the 'evidence' considered by the City ... does not include evidence created after-the-fact, including the expert testimony presented in this case." The public entity satisfies the required standard so long as the record includes the specific finding of the significant public benefit and support for that finding.

After a three-week trial, with testimony from 18 witnesses including the mayor and lead investor Ranadive, and presentation of over 150 exhibits plus an administrative record, the court found no merit to plaintiffs' "secret subsidy" allegations. Less than a month later, the *Gonzalez* action was dismissed with prejudice, eliminating any possibility of an appeal and removing the last legal hurdle to the project.

Arena projects often generate controversy and Sacramento's new arena for the Kings was no exception. Numerous attempts were made to derail it, despite public support. All legal challenges failed and the arena is on track for timely completion in 2016 — making the city's experience with the Golden One Arena a strategic roadmap for major economic development projects throughout the state.

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