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MARICOPA COUNTY STADIUM DISTRICT

v.

ARENA PARK PLACE, et al.

Gary L. Birnbaum

Jessica Gifford Funkhouser

Charles W. Herf

Marvin S. Cohen

Jay Dushoff

Dale S. Zeitlin

Timothy L. Pierson

James L. Hohnbaum

Phoenix City Attorney
By: Kent T. Reinhold

Brent C. Appelgren

Steven A. Hirsch

Clare H. Abel

Norman R. Freeman, III

John J. Hebert

Martin R. Galbut

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The Court finds:

INTRODUCTION

Plaintiff Maricopa County Stadium District has undertaken to design and construct a stadium. To finance the Stadium Project, the District's Board of Directors has approved an increase in the county-wide sales tax which became effective on April 1st of this year. The principal purpose of the stadium will be to serve as the "home field" of the Arizona Diamondbacks Major League Baseball Team. The District and the Team have agreed to a lease of the stadium to the Team for major league baseball (MLB) purposes. The District retains control of the Stadium for other public uses.

In order for the District to construct the Stadium Project, the District needs to acquire fee title to and other interest in approximately 20 separate parcels of land located in the area between 4th Street on the West, 7th Street on the East, Jefferson Street on the North and Buchanan Street on the South. The properties of Defendants Downtown Phoenix Partners - Jefferson Limited Partnership and Arena Park, et. al. are located within the stadium project site.

ISSUES

The principal challenges that are being raised by Defendants regarding the District's power to condemn their properties are:

1. Is the taking for a public use?

2. Is the taking compatible with the greatest public good and the least private injury (i.e., Is the taking a necessity)?

3. Is the scope of the taking as to Downtown Phoenix Partners a

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necessity - compatible with the greatest public good - least private injury?

4. Did the District improperly delegate the Stadium site selection to the Team?

5. Is the public financing for the Stadium an unconstitutional subsidy of a private enterprise? Is the gift clause applicable?

DISCUSSION

PUBLIC USE

The burden of proof rests with the District to show, by a preponderance of the evidence, that the proposed stadium constitutes a public use. In Arizona, the concept of public use has been broadly defined and consistently applied since pre-statehood days when the Arizona court rendered its decision in Oury v. Goodwin, 3 Ariz. 255. Since 1891, this "broad approach" to "public use" has been the law in Arizona. "Public use" means "public benefit" and it is not considered essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement in order that it constitute a public use. Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296; Oury v. Goodwin, 3 Ariz. 255. Further, the mere fact that the intended plan is to develop, sell or lease the property to a private individual or corporation does not render the use private if there is some public benefit from the use to be made of the property. City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270 (auditorium and civic center is public use); Cordova v. City of Tucson, 16 Ariz. App. 447 (art center to be leased to private entity is public use); Humphrey v. City of Phoenix, 55 Ariz. 374 (slum clearance project, in which land was to be sold to private interests for redevelopment and leasing to tenants for profit as part of redevelopment program, was public use).

The proposed stadium is within the Arizona Courts' broad concept of "public

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use." Article II, § 7 of the Arizona Constitution provides that the determination of whether a proposed use is a "public use" is a judicial question, to be determined without regard to any legislative assertion that the use is public. The public use concept as defined in Nichols on Eminent Domain, has been adopted by the Arizona Supreme Court:

> Judicial opinion which follows [the] broad concept considers that the narrow doctrine has been repudiated and is no longer the prevailing view. "Public use" is considered "public benefit" and it is not considered essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement in order that it constitute a public use.

Following this rationale, subsequent Arizona cases have held that the mere fact that the intended plan is to develop, sell or lease the property to a private individual or corporation does not render the use private, if there is some public benefit from the use to be made of the property. City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270; Cordova v. City of Tucson, 16 Ariz. App. 447; Humphrey v. City of Phoenix, 55 Ariz. 374.

Additionally, courts in other jurisdictions have considered whether arenas and stadiums constitute a "public use." In Schreiner v. City of Spokane, 74 Wash. App. 617, the Court of Appeals of Washington affirmed the trial court's order of public use and necessity. That case involved the construction of an arena by a public facilities district, similar to the District here. Anaheim Stadium was held to be a "public use" in City of Anaheim v. Michel, 66 Cal. Rptr. 543, even though the court recognized that the California Angels were the major tenant. In City of Los Angeles v. Superior Court, 333 P.2d 745, the contract to convey land in Chavez Ravine to a private entity for the construction of Dodger Stadium was held to have a "proper public purpose," even though some of the provisions were "of benefit only to the baseball club." The construction and operation of the Meadowlands Stadium, home of the New York Giants football team, was held to be a public use in New Jersey Sports &

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Exposition Authority v. McCrane, 119 N.J. Super. 457. Cleveland Municipal Stadium, where the Cleveland Indians baseball team played, was held to be a public use in Meyer v. City of Cleveland, 35 Ohio App. 20. The Court in Green v. Garrett, 192 Md. 52, 62-63, held that a lease of Baltimore Stadium to the Baltimore Orioles was a public use.

The Maryland Court of Appeals affirmed the trial Court's denial of a challenge to a statute authorizing the state stadium authority to issue bonds and also recognized that "[i]t is well settled in Maryland that government, state or local, acts pursuant to a valid public purpose when it provides parks or sports facilities, including stadiums, for public recreational activities." Kelly v. Marylanders for Sports Sanity, Inc, 310 Md. 437. The court went on to note public ownership of well-known stadiums around the country:

> In addition to Maryland's financial support for the Baltimore Memorial Stadium and public ownership of the Cleveland and New Jersey Meadowlands stadiums, the Pittsburgh Stadium Authority owns Three Rivers Stadium; the Metropolitan Council Sports Facilities Commission owns the Metrodome; the Louisiana Stadium & Expositions District own the Louisiana Superdome; the Tampa Sports Authority owns Tampa Stadium; the City of Irving owns Texas Stadium; the Pontiac Stadium Authority owns Pontiac Silverdome; the Jackson County (Mo.) Sports Complex Authority owns both Royals Stadium and Arrowhead Stadium; King County (Wash.) owns the Kingdome; the City of Atlanta and the Fulton County Recreation Authority own the Omni; and the City of Philadelphia owns the Spectrum.

Respected treatises dealing with the subject also recognize that the construction and operation of a sports stadium is a "public use" within the proper scope of eminent domain power. For example, McQuillin, The Law of Municipal Corporations, § 32-53(Rev. 1991) states:

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> The acquisition and operation of a sports stadium for the purpose of providing public recreation is a valid public use. Similarly, acquisition and operation of a sports franchise which fields a team to play in a municipal stadium is a public purpose for which the power of eminent domain may be exercised.

Although the amount of economic impact or benefit is subject to debate, the evidence in the record establishes:

- The Stadium will be open for public events, public tours, entertainment and restaurant use.
- There are already some 42,000 season ticket reservations for Major League baseball.
- The intangible benefits of stadium construction and operation include: civic pride, a new recreation venue, national media exposure, a new tourist attraction and general enhancement of the quality of life.
- The District will receive direct revenue of at least $1 - 3 million plus revenues from non-MLB events and other uses of the facility.
- There will be "indirect" or "spin-off" benefits.

Thus, the evidence establishes that the Stadium Project falls within the broad definition of public use long recognized by Arizona courts.

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"NECESSITY"/GREATEST PUBLIC GOOD - LEAST PRIVATE INJURY

The burden is on defendants to show, by clear and convincing evidence, fraudulent or arbitrary and capricious conduct on the part of the District. Chamber v. State, 82 Ariz. 278. Necessity and project location (site selection) are legislative determinations, which may not be disturbed by the courts unless there is fraud or arbitrary and capricious conduct. City of Phoenix v. Superior Court, 137 Ariz. 409.

Pursuant to A.R.S. § 12-1112(2), once the use is determined to be a "public use," the taking must be "necessary to such use." In contrast to the judicial nature of the "public use" determination, the determination of "necessity" is a legislative function, and the decision of a condemning authority to condemn a particular property constitutes a legislative determination of necessity. The courts may not disturb that legislative determination in the absence of fraud, or arbitrary and capricious conduct. City of Phoenix v. Superior Court, 137 Ariz. 409.

In City of Phoenix v. Superior Court, 137 Ariz. 409, the issue of the city's power to condemn was challenged at the order to show cause hearing conducted to determine if the city's application for immediate possession should be granted. In that case, the particular challenge was directed at the city's determination to take the defendant's property for the purpose of slum clearance and redevelopment. The city council had made a finding, consistent with the statutes enabling the city to condemn for slum clearance, that certain areas of the city were "slum" and "blighted." The court noted that the determination of slum and blight were legislative determinations, properly left to the city counsel, and subject only to limited review by the judiciary. The Arizona Supreme Court explained the limited judicial review as follows:

> We believe that courts "are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases." [Citation omitted.] The court, therefore, is not precluded from reviewing the findings expressed in the City's resolution.

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The court also noted:

> This does not mean that the court reviews the evidence, if any, which was before the governmental body when it adopted the initial resolution of necessity. It means that the court may receive evidence at trial on the issue of necessity vel non and may determine, from that evidence, whether the resolution of necessity was arbitrary. If the evidence is such that the city could reasonably have found necessity, ... the resolution is not arbitrary. "Even if the City's action ... is reasonably doubtful ... or even fairly debatable, we cannot substitute our judgment for that of the City Council."

City of Phoenix v. Superior Court, 137 Ariz. 409; Tucson Community Development and Design Center, Inc. v. City of Tucson, 131 Ariz. 454.

In this case, Tom Irvine supervised a site selection process that took many months and involved numerous consultants in several pertinent professional disciplines, such as traffic engineering and architecture. The process narrowed the reasonably available sites to seven and these sites were then evaluated in terms of access, noise, neighborhood impact, and various other factors. The site selection process considered the greatest public good/least private injury. Among the important factors noted by various witnesses were compatibility with adjacent uses, four-freeway access, existing infrastructure, existing mass transit facilities, neighboring convention facilities, zoning, existing structural parking and the absence or knowledge of significant environmental, archaeological, and governmental ownership issues.

As announced in City of Phoenix v. Superior Court, this Court cannot substitute its judgment for that of the District merely because the site selection is "fairly debatable." Board of County Supervisors v. Rio Rico Volunteer Fire Dist., 119 Ariz. 361.

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Defendants have not demonstrated that the District's finding of necessity was arbitrary, capricious or fraudulent. Thus, the Stadium District's finding of necessity cannot be disturbed by this Court.

Section 12-1115(A) provides that "[w]here land is required for public use, . . . it shall be located in the manner which will be the most compatible with the greatest public good and the least private injury." In Chambers v. State, 82 Ariz. 278, the principal Arizona case interpreting this provision, the Court held: (1) the burden of proof on the greatest public good/least private injury issue rests with the defendant landowner, and (2) that burden must be carried by clear and convincing proof.

In Chambers v. State, the court also recognized the peril of Defendants' argument that the present stadium site selection should be set aside or modified. The court quoting from Montebello Unified School Dist v. Keay, 55 Cal.App 839, 131 P.2d 384, noted:

> If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because, whatever location was proposed, it could be defeated by showing another just as good.

In City of Phoenix v. Superior Court, 137 Ariz. 409, the court found that the Section 12-1115 balancing of public good with private injury should be treated, like "necessity," as a legislative function. Thus, the District's balancing of these interests in selecting a site can not be disturbed absent fraud or arbitrary and capricious conduct. In City of Phoenix, Justice Feldman concluded that "necessity" was an issue for legislative, rather than judicial resolution, and that "necessity" required "knowledge of a wide range of social and economic circumstances and the application of broad measures of public policy" and was an issue as to which "much can be said for either side of each argument." These same attributes inure to the balancing inherent in the selection of a particular site for a

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stadium in this case.

DEFENDANTS' CLAIM OF IMPROPER DELEGATION OF SITE SELECTION AUTHORITY

The constitutionality of the District Board's action is strongly presumed. Republic Investment Fund v. Town of Surprise, 166 Ariz. 143, 148. The burden of proof thus rests with the party who challenges the legislative act. As previously stated under the discussion on public use, necessity and project location (site selection) are legislative determinations, which may not be disturbed by the courts unless there is fraud or arbitrary and capricious conduct. City of Phoenix v. Superior Court, 137 Ariz. 409.

So we turn to the evidence in the record. The Memorandum of Understanding (MOU) was adopted by the District Board after an extensive site selection process. The site selection took many months and involved numerous consultants and experts. In the MOU, a "broader site" is designated. The "broader site" incorporated a number of potential stadium locations. Following the MOU adoption on February 17, 1994, a year-long process began to designate a specific stadium footprint. Input was received from two potential stadium architects and from the construction manager selected through the District public procurement process. The Team (now designated Project Coordinator) also provided input. However, its specific recommendation was not adopted. Ultimately, all of the parties and all of the principal consultants, including both architectural firms that were involved through the District's procurement process, agreed on a specific project site. Their recommendation went to the District Board in March 1995, and in paragraph 4.1 of the Facilities Development Agreement, the District Board made its final site selection determination. Accordingly, the delegation of the site selection is not supported by any evidence.

At best, the evidence shows that well intentioned experts and non-experts may have selected different sites for different reasons (i.e., the site selection is fairly debatable).

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Under Arizona law, this is not enough. Defendants must prove that the site selection was arbitrary, capricious, or based on fraud. City of Phoenix v. Superior Court, 137 Ariz. 409. The fact that the District sought and received extensive input from the Team, and ultimately selected for condemnation a site within the broader site preferred by the Team, does not constitute improper delegation by the District. A condemning authority may consider and follow the recommendations of "interested" parties in selecting the site and quantity of land required. Silver Springs, Inc. v. Florida Canal Auth., 226 So. 2d 893; City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960. Thus, the District did not improperly delegate site selection to the Team.

THE SCOPE OF THE TAKING AS TO DOWNTOWN PHOENIX PARTNERS

Downtown Phoenix Partners (DPP) asserts that its property, in whole or in part, is not "necessary" for construction of the Stadium Project, because such property will be used for V.I.P. parking areas, aesthetics, marquee, emergency access, emergency evacuation, landscaping and public gathering places. However, various courts have upheld a condemning authority's determination that property used in conjunction with a major league baseball stadium, but not for the stadium itself, is "necessary" for the public use. Superior Laundry and Towel Supply Co. v. City of Cincinnati, 168 N.E.2d 445; Jackson Redevelopment Auth. v. King, Inc., 364 So.2d 1104.

The District has determined that each of the properties which is the subject of this action is necessary for construction of the Project. The burden is on DPP to show, by clear and convincing evidence, fraudulent or arbitrary and capricious conduct on the part of the District. Chamber v. State, 82 Ariz. 278. As previously discussed, necessity and project location (site selection) are legislative determinations, which may not be disturbed by the courts unless there is fraud or arbitrary and capricious conduct. City of Phoenix v. Superior Court, 137 Ariz. 409. DPP has cited cases from other jurisdictions such as Montana and Alaska. However, those cases can be distinguished, because they involve different statutory provisions and a partial taking of the landowners' property which impacted an existing, specific and critical use of the property, so that the potential for a

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unique private injury existed.

DPP has failed to prove that the District's determination of necessity is fraudulent, or the product of arbitrary and capricious conduct. The District has established that all of the condemned property is necessary for stadium purposes especially for the public's safety. The evidence establishes that the DPP property is needed to provide adequate public ingress/egress from the Stadium under both normal and emergency conditions. The land is required not only for the Stadium and landscaping but for people movement, evacuation areas, and emergency vehicle access, among other uses. A principal concern is user safety. Life safety issues are implicated if a smaller site is considered. The public's safety cannot be imperiled by allowing a partial taking of DPP's property. For example, the DPP property provides a pedestrian massing area, an emergency evacuation area, and an emergency vehicle access route, in addition to its other functions (i.e., retention, marquee location, restaurant parking). Both vehicular access and pedestrian massing issues create safety concerns which must be addressed in any design, and DPP's attempt to reduce the Stadium project does not address these safety issues. The average baseball stadium project site encompasses approximately three times as much land as the planned stadium site of 22 acres. The District's legislative judgment is not subject to second guessing by the Court. The remedy provided to the landowner is just compensation for the property rights acquired by the District.

DEFENDANTS' CLAIM OF VIOLATION OF "GIFT CLAUSE"

EXEMPTION

The constitutionality of a District Board's action is strongly presumed. Republic Investment Fund v. Town of Surprise, 166 Ariz. 143. The burden of proof rests with the Defendants because they are the parties challenging the legislative act. The Defendants have not overcome the threshold issue of exemption. Article 13, § 7 of the Arizona Constitution exempts tax-levying public improvement districts, including the Maricopa County Stadium District, from the gift clause:

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> Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the State, and vested with all the rights, privileges and benefits and entitled to the immunities and exemptions granted municipal and political subdivisions under this Constitution or any law of the State or of the United States; but all such districts shall be exempt from the provisions of sections 7 and 8 of Article IX of this Constitution.

The terms of the Constitutional provision are mandatory. Moreover, those terms provide that "all" such districts "shall" be exempt from Article 9, § 7.

The Maricopa County Stadium District, created pursuant to A.R.S. § 48-4202, qualifies as an exempt tax-levying public improvement district. Subparagraph (D) of that statute provides:

> The district is a tax levying improvement district and a political taxing subdivision of this state and has all the powers, privileges and immunities granted generally to municipal corporations for the purposes of implementing this chapter, including eminent domain and immunity of its property, bonds and interest on and transfer of its bonds from taxation.

The Stadium District, created as a tax levying public improvement district pursuant to law, is exempt from the "gift clause" of Article 9, § 7. Thus, the Stadium District statutes and the transaction entered into pursuant to those statutes do not violate Article 9, § 7, of the Arizona Constitution (the "gift clause"). Even if the Stadium District was not exempt from the "gift clause," the evidence establishes that the Stadium District obtained sufficient consideration to satisfy the gift clause requirements.

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NO GIFT OR SUBSIDY - FAIR CONSIDERATION

The Arizona courts have adopted a two-pronged test for determining whether transactions entered into by non-exempt political subdivisions of the State satisfy the "gift clause" requirements. First, the use of public funds must be for a public purpose. Second, the consideration for the transaction may not be "'so inequitable and unreasonable that it amounts to an abuse of discretion,' thus providing a subsidy to the private entity." Wistuber v. Paradise Valley Unified Sch. Dist., 141 Ariz. 346, City of Tempe v. Pilot Properties, Inc., 22 Ariz. App. 356, Arizona Center for Law v. Hassell, 172 Ariz. 356. In reviewing both the public purpose and consideration questions, the Arizona Supreme Court has provided guidance as to the nature and level of review this Court must perform: "the courts must not be overly technical and must give appropriate deference to the findings of the governmental body." Wistuber v. Paradise Valley Unified Sch. Dist.

Here, there have been three separate findings of "public purpose" by three separate governmental bodies. First, in enacting A.R.S. §§ 48-4201, et. seq., the Arizona Legislature made a public policy decision that the public would be benefitted by a major league baseball franchise. Second, pursuant to A.R.S. § 48-4202(A), the Maricopa County Board of Supervisors determined that the "public convenience, necessity or welfare" would be promoted by establishing the Maricopa County Stadium District, which would be formed to engage in activities involving major league baseball spring training and regular season play. Third, the Maricopa County Stadium District Board of Directors determined that the economic and non-economic benefits of having a major league baseball franchise in Maricopa County justified adopting the transaction privilege tax authorized by A.R.S. § 48-4233(A).

Additionally, Arizona Courts have recognized that the use of public property to attract major league baseball to Arizona, "with its attendant economic and recreational benefits" is an accepted public purpose in Arizona. City of Tempe v. Pilot Properties, Inc.

The evidence suggests that the agreement between the District and Team is

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among the best Major League Baseball deals in recent years. As previously noted, the decision to construct a stadium is a legislative act. However, once that decision is made, "use" agreements must be tested by giving recognition to the use and purpose of the facility.

ECONOMIC IMPACT

The Maricopa County Stadium District, like many other cities, has decided to publicly finance a professional sports stadium, in this case a baseball stadium. The principal reasons generally given for investing public funds in a stadium relate to anticipated economic (direct-indirect) and non-economic (intangible) benefits. The anticipated economic benefits including economic development are based upon the rationale that an increase in sport-generated revenues correlates to an increase in the local economy. The historical data indicates that the use of taxpayers money to design and construct a baseball stadium will realign/substitute economic activity to some extent. For example, the Stadium District is obligated to pay up to $253,000,000 of the stadium project cost incurred during the construction phase of the project. Pursuant to the MOU, the Stadium District will finance $238,000,000 of the project costs by levying a .25 percent increase in the sales tax. This method of financing may divert some of the consumer spending on goods and services to spending on the stadium. Whether there will be a significant increase in overall spending is subject to debate among the experts who testified at the hearing.

However, the statistical research indicates that once the project becomes operational, there is an imperceptible change in real per capita income. For example, during the period 1958-1987, thirty-two (32) metropolitan statistical areas (MSA) added or lost a professional sports team. Thirty (30) showed no change in real per capita income. Of the remaining two (2), Indianapolis showed significantly positive change in real per capita income, while Baltimore showed significant negative change in real per capita income. Thus, the prospective analysis, projections and estimates performed on behalf of and considered by the Stadium District regarding the potential economic impact that a Major League professional baseball sports stadium and professional baseball team could have, should be considered in light of the sobering historical metropolitan experience.

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COMPARATIVE RETURNS ON EQUITY

Article 16 of February 17, 1994 Memorandum of Understanding between the "District" and the "Team" stipulates:

> In order to implement the transactions that are outlined in this MOU, the District and the Team recognize that they will have to enter into a series of agreements that incorporate the terms and provisions of this MOU but do so in a more detailed fashion.

Some of these "Related Agreements" are still in negotiations. Until the "Related Agreements" are fully executed a precise analysis of the economic impact cannot be performed. However, the available information provided by the MOU and other reports permits an analysis of the benefits the District and the Team will obtain from the stadium subsidy.

The District owns the stadium, so if we analogize the stadium to a business, the taxpayers are the stockholders. The stockholders' (taxpayers) equity position in the stadium is the $238,000,000 that constitutes their initial investment. One method of analyzing stockholder/taxpayer benefit involves comparing the rate of return on this investment to other possible investments. Stadium revenues result in returns on equity (ROE) ranging from 0.4% to 1.0%. If tax revenues to the county and its municipalities are included, the ROE ranges from 1.82% to 2.32%. Even though the Stadium Project may stack up well when compared to other Stadium Projects around the country, the taxpayers' investment yields a return smaller than a common savings account. Additionally, the substitution or realignment of spending patterns by the taxpayer reduces the overall economic impact (i.e., spending associated with spectating may increase direct overall spending somewhat but not necessarily by that amount in the geographic area analyzed).

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Even though the predictions of economic boom should be tempered by historical reality, under Arizona law, the "consideration" prong is satisfied by the terms of the transaction between the District and the team. The MOU sets out the consideration for the project which includes, among other things, the following:

- The District will receive five percent of revenues from Premium Suites and Club Seat sales.
- The District will receive at least $325,000.00 each year for naming rights.
- The District will received 50% of Club Membership fees, if needed to fund the District loan.
- The public may use the stadium.
- The District will receive revenues from District events.
- The District will receive two-thirds of the net revenues from all non-major league baseball rentals of the stadium.
- The Team is obligated to pay a minimum user fee of $1 million per year plus a portion of each ticket sold, if annual baseball attendance exceeds 2 million.
- The Team is obligated to use the stadium (and pay user fees) for a minimum of 30 years.
- The District's investment in the project is capped at $238 million from tax proceeds and $15 million in loan proceeds, even though the current budget for the project exceeds $278 million.

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- The Team is responsible, not only for the additional costs of building the stadium, but also for all costs of obtaining the franchise.
- The Team will pay 100 percent of the Operating and Maintenance costs.
- The District maintains the ownership of the stadium at all times.[1]

Thus, even if Article 9, § 7 applied to this transaction, the evidence does not establish that consideration to support the transaction is not "so inequitable and unreasonable that it amount to an abuse of discretion." Wistuber v. Paradise Valley Unified Sch. Dist., 141 Ariz. at 349.

DEFENDANTS' CLAIM OF UNCONSTITUTIONAL SPECIAL OR LOCAL LAW

The constitutionality of a legislature's enactment is strongly presumed and the burden of proof rests with the party who challenges the legislative act. Republic Investment Fund v. Town of Surprise, 166 Ariz. 143.

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[1]Before the Maricopa County Stadium District entered into this transaction, the Directors considered an independent study by Deloitte & Touche conducted for the Arizona Department of Commerce and the City of Phoenix. That study concluded that a major league baseball franchise would result in economic impact of approximately $477 million from the construction of the stadium, and $230 million annually from operation of the stadium and franchise operations. The study also identified other non-pecuniary community benefits, such as community spirit and relocation appeal. That study should be considered with guarded perspective in light of past experience.

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Article 4, Part 2, § 19 of the Arizona Constitution provides in pertinent part:

> No local or special laws shall be enacted in any of the following cases:
>
> * * *
>
> 13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises.
>
> * * *
>
> 20. When a general law can be made applicable.

In Arizona Center for Law in the Public Interest v. Hassel, the Court set out a three-part test to determine whether a statute is a valid general law or whether it is an unconstitutional local or special law:

(1) Is the classification rationally related to a legitimate legislative purpose?;

(2) Is the classification sufficiently general to encompass all members similarly situated?; and

(3) Is the classification sufficiently elastic to accommodate warranted inclusions and exclusions as circumstances change?

RATIONAL BASIS

Here, the "public purpose/rational basis" criteria is met by the District's enabling legislation, A.R.S. § 48-4202(A), which provides:

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> The board of supervisors of each county having a population of more than one million five hundred thousand persons according to the most recent United States decennial census or any county in which a major league baseball organization has established or seeks to establish a spring training operation may organize a county stadium district to include both the incorporated and unincorporated areas of the county, if the board determines that the public convenience, necessity or welfare will be promoted by establishing the district.

"If there is any conceivable rational connection between the law and a legitimate governmental interest," this court must uphold the statute. Picture Rocks Fire District v. Pima County, 152 Ariz. 442. Furthermore, this court must "assume that the Legislature has found all antecedent facts necessary upon which to base the law." Hazas v. State, 25 Ariz. 453. In Arizona, use of public property to bring major league baseball to Arizona, "with its attendant economic and recreational benefits" is an accepted public purpose. City of Tempe v. Pilot Properties, Inc.

A.R.S. § 48-4202(A) identifies three types of counties which are permitted to form a stadium district: (1) those with populations of greater than one million five hundred thousand persons; (2) those which have major league spring training; and (3) those in which major league baseball seeks to establish a spring training operation.

A law is not "special" or "local" solely because it "has a limited application." Picture Rocks Fire Dist. v. Pima County Fire Dist., 152 Ariz. 442; Arizona Downs v. Arizona Horseman's Found., 130 Ariz. 550. Furthermore, the Legislature may enact legislation creating or dealing with limited classes. Arizona Downs, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029.

In this case, the legislature acted rationally in limiting the transaction privilege tax rate that could be assessed for a Major League Baseball franchise stadium to not more

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than 5% of the January 1, 1990 tax rate pursuant to A.R.S. § 48-4233(B), and in limiting the potential taxing authorities to counties with a large enough population base to raise the funds necessary for a stadium project within a reasonable amount of time and to meet attendance projections upon completion of the stadium. The population figure is a reasonable criteria for permitting a county to form a special taxing stadium district. Furthermore, the population criteria gives growing counties the same opportunity in the future that Maricopa County has exercised.

However, population is not the only criteria which qualifies a county to form a stadium district. Counties which have demonstrated or can demonstrate a sustained community interest in professional baseball through spring training may also form a stadium district. Maricopa County qualified for establishment of a stadium district under both the spring training classification and the population criteria. These alternative criteria expand the class and increase the opportunity for multiple counties qualifying for stadium districts.

Arizona courts have held that a law will be considered general and not special "if it applies to all cases and to all members of the specified class to which the law is made applicable." Arizona Downs, Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282. Here, the specified class are those counties governed by A.R.S. § 48-4202. Any county coming within that statute is treated the same as any other county meeting the criteria (i.e. has the population base or has a spring training relationship with major league baseball). The statute does not limit Arizona to one franchise award.

THE CLASS OF COUNTIES CREATED BY A.R.S. § 48-4202 IS "ELASTIC"

In Republic Investment Fund, the Arizona Supreme Court defined the "elasticity" prong of the test:

> [T]he classification must be elastic, or open, not only to admit entry of additional persons, places, or things attaining the

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> requisite characteristics, but also to enable others to exit the statute's coverage when they no longer have those characteristics.

In Republic, the Arizona Supreme Court held that a statute in which the population criteria was limited to the decennial census figure of 1980 lacked the requisite elasticity. This limited the effect of the statute, for all time, to 13 specific cites in one specific county. In contrast, A.R.S. § 48-4202(A) is not limited to the decennial census of a particular year. The classification is based upon the "most recent" decennial census, which may change over time. Counties with relationships to spring training may also change over time. Thus, counties may enter or exit the coverage of the statute and the effects of the statutes are not frozen in time to affect only Maricopa County. For example, Pima County has formed a stadium district because of its spring training affiliation and Yuma County previously satisfied the statutory criteria, but has since lost its cactus league team and could no longer qualify under the statutory criteria. The "elasticity" of the statute has, in actuality, already been shown. Thus, the statute is a constitutional "general" statute.

RATIONAL BASIS-BASEBALL STADIUM ONLY VERSUS JOINT-USE FACILITY

Defendants also assert that A.R.S. § 48-4204(A) is a local or special law because it permits the construction of a major league baseball stadium and excludes use of the stadium for games of the national football league. A.R.S. § 48-4204(A) provides:

> From the transaction privilege tax levied under A.R.S. § 48-4233, the district may acquire land and construct, finance, furnish, maintain, operate, market and promote the use of a major league baseball franchise stadium and other structures, utilities, roads, parking areas or other buildings necessary for the full use of the stadium for sports and other purposes and do

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> all things necessary or convenient to accomplish those purposes. The stadium shall not be used for football games of the national football league.

First, historically, tourism in Arizona is at its peak from the fall to the spring of each year. From Memorial Day through Labor Day, Arizona tourism ordinarily drops. Second, the Deloitte and Touche report prepared for the Arizona Department of Commerce and the City of Phoenix and considered by the District notes:

> A MLB team and a retractable dome stadium would also be important additions to the Phoenix area's base of tourist attractions. As a major resort area, Phoenix and the State of Arizona offer a variety of attractions. The team and stadium would be two more reasons for tourists to visit the Phoenix area and the State of Arizona and/or to extend their stay.

Third, the legislature's decision that a baseball stadium may contribute to the economic stability and recreational needs of Arizona's summer inhabitants, a need which the NFL could not provide at the same time of year because it does not play football games in the summertime, is a policy decision to be made by the legislative body. Finally, at the time the statute was enacted in 1990, Arizona already had NFL games to offer its residents and visitors during the NFL season from September through January (during the "regular" tourism season) and a publicly-owned stadium was and is the site of NFL football. Thus, A.R.S. § 48-4202(A) is not a local or special law in violation of the Arizona Constitution, Article 4, Part 2, § 19.

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DEFENDANTS' CLAIM THAT OSC HEARING RE: IMMEDIATE POSSESSION IS PREMATURE

Eminent domain is the right and power of the sovereign to appropriate private property for particular uses. The right is an inherent one which pertains to sovereignty as a necessary, constant, and inextinguishable attribute. Constitutional provisions do not create or grant the power, but are merely limitations upon it. City of Mesa v. Salt River Project, 92 Ariz. 91.

The Legislature may provide for the exercise of the power of eminent domain, and may delegate the right to specified public entities. County of Maricopa v. Anderson, 81 Ariz. 339. Here, the Legislature has granted the power of eminent domain to county stadium districts pursuant to A.R.S. § 48-4203(A)(6), which provides that the board of directors, on behalf of any such district, may "[a]cquire by any lawful means, including eminent domain, and operate, maintain, encumber, and dispose of real and personal property and interests in property". The Legislature has also enacted a comprehensive statutory scheme governing the exercise of the power of eminent domain, which is codified at A.R.S. § 12-1111 through 1128.

Pursuant to § 12-1111(2), the right of eminent domain may be used for "[b]uildings and grounds for any public use of the state and all other public uses authorized by the legislature." Section 12-1112 sets forth the prerequisites for taking property:

> Except as provided by § 28-1865.03, before property may be taken, it shall appear that:
>
> 1. The use to which the property is to be applied is a use authorized by law.
>
> 2. The taking is necessary to such use.
>
> 3. If the property is already appropriated to some public use, the public

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use to which it is to be applied is a more necessary public use.

Defendants make two arguments regarding prematurity:

1. The takings violate the public use clause of Ariz. Const., art. 2, § 17; and consideration of the District's application is not appropriate until the public use issue is resolved.

2. Whether these takings are for a public use turns in large part upon the transactional relationship between the District and the Team as expressed in a series of agreements between the District and the Team. Defendants argue that some of those agreements remain under negotiation, and have not yet been signed, and thus, the Defendants cannot properly and fully evaluate the transactional relationship prior to the June 12 Order to Show Cause, nor will the Court have the full transactional relationship before it on June 12.

The Court is not persuaded by Defendants' contention. The takings do not violate the public use clause of Arizona Constitution, Article 2, § 17 for reasons previously stated in this minute entry. Further, the public use issue turns on the transactional relationship between the Stadium District and the Team which is contained in the Memorandum of Understanding and Facilities Development Agreement. Thus, the pending negotiation of agreements and unexecuted agreements do not preclude the public use determination.

AMOUNT OF THE BOND

Initially, the burden rests with the District to introduce some evidence on fair market value; the burden then shifts to the Defendants if there is a disagreement on the amount. A.R.S. § 12-1116(c) provides that the Court determine the probable damages to be suffered by each "interested party," for purposes of setting the amount of bond to be

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posted by the condemning authority. The only evidence on this issue was the appraisal testimony of Mr. Sell. For purposes of this proceeding only, his appraisal reports are in evidence (exhibits 30 - 49) and form the foundation upon which the bond determination must be made. Mr. Sell's testimony, although unanswered, must be considered in light of all of his appraisal reports, in light of issues raised on his cross-examination, the fact that he is not a neutral, impartial and independent expert witness to the litigation, and giving due consideration to the nature of the proceeding and the purpose for which an adequate bond is required. Thus, the Court concludes that the amount of bond that the District must post is as follows:

Stern Investments (i.e. Stern Rental, Stern Produce) - $1,500,000

Downtown Phoenix Partners - $1,800,000

Texas Multifamily Corporation (Zemex) - $135,000

Arena Park Place - $175,000

Linsenmeyer, Ernest M. - $440,000

Scarla, George and Angelica - $200,000

Oens, Donald L. and Lela M. - $55,500

TOTAL: $4,305,500

DATE OF POSSESSION (STERN)

The District's acquisition of the Stern property is in collision with Stern Produce's need to have reasonable and adequate time to relocate. The evidence suggests that the Stadium Project is currently behind schedule, and that November 10, 1995 is the

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latest possible date on which the District could obtain full possessory rights and still maintain its critical path construction schedule; that use of a part of the Stern property during demolition would be unsafe; that continued use of the Stern property would prevent street closures, mass excavation, and utility relocation; and thus, the entire project would be delayed.

If several variables and conditions can be met, the new facility planned for Stern Produce can be completed by November 10, 1995. Relocation to a temporary facility while the Stern Produce facility is being built may be a viable option, albeit not the preferred option. Although, the District has voluntarily agreed to pay the accelerated planning and construction costs in order to facilitate Stern Produce's occupancy at the 7th Street and Victory property by November 10, 1995, the feasibility of the November 10 date is inextricably woven in a web of "ifs." Thus, the November 10 date should be considered a firm date, however, the Court requires flexibility with respect to the Stern relocation.

ORDERS

The Court has considered the District's proposed Second Amended Order Letting Plaintiff Into Use and Possession of Property lodged June 29, 1995 and the District's proposed Partial Judgment of Public Use and Necessity lodged June 12, 1995. Except as modified by the Court in this minute entry, the Court incorporates and adopts as its findings, conclusions and orders all of those matters set forth in the District's proposed Partial Judgment of Public Use and Necessity and proposed Second Amended Order Letting Plaintiff Into Use and Possession of Property. For ease of reference and economy of words, the Court has incorporated and adopted those orders and judgment as part of this minute entry. However, Defendants' right to object to any proposed form of order(s)/judgment(s) submitted by Plaintiff is preserved. Also, Subparagraph (v), line 15, page 11, of the proposed Second Amended Order shall read in parenthesis (but in no event for more than 60 days unless so stipulated by the District and Stern Produce, or upon prior written approval and order of the Court).

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34

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Therefore, IT IS ORDERED that Plaintiff, no later than July 24, 1995, shall submit a Third Amended Order Letting Plaintiff Into Use and Possession of Property and Second Amended Partial Judgment of Public Use and Necessity.

IT IS FURTHER ORDERED that the findings of fact and conclusions of law shall be incorporated by reference only in the proposed form of Judgment/Order.

IT IS FURTHER ORDERED that Defendants may submit objections, if any, to the form of Order/Judgment no later than five (5) judicial days after the filing of Plaintiff's forms of Order/Judgment. Plaintiff may submit any response to Defendants' objection no later than three (3) judicial days after the filing of Plaintiff's objection. The following page limitations shall apply:

- Objection to form of Judgment/Order - no more than 15 pages.
- Response to Objection to form of Judgment/Order - no more than 15 pages.
- Reply - no more than 10 pages.