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SUPREME COURT OF
THE STATE OF WASHINGTON

PUBLIC HOSPITAL DISTRICT NO. 1 OF KING COUNTY,

Appellant,

v.

UNIVERSITY OF WASHINGTON; U.W. MEDICINE,

Respondents.

MEMORANDUM OF AMICI CURIAE SENATORS KAREN KEISER AND PAM ROACH IN SUPPORT OF DIRECT REVIEW

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I. INTRODUCTION

This case presents the issue of whether democratically elected governing bodies, here a municipal corporation board, may divest themselves of the powers vested in them by the Legislature and Voters by entering into contracts that purport to (1) delegate their principal governing functions to other entities; and (2) bind successor governing officials to the decisions of those entities. May a municipality's governing board, without a public vote, transfer its governing authority by contract such that the board, and thus the public district's People, no longer have genuine control over its operation, yet are still taxed for it? In short, can the board of a municipal corporation divest the municipal corporation of its democratic nature and democratic control by a mere contract?

This brief is submitted on behalf of *Legislative Amici*, Democratic Senator Karen Keiser, Ranking Minority Member of the Senate Health Care Committee, and Republican Senator Pam Roach, Chair of the Government Operations Committee. *Legislative Amici* are intimately familiar with the statutory structure and relationship of local municipalities to their voters, with the operation of the health care system in the State, and with the provision of health care services through municipal corporations, including public hospital districts.

The superior court's approval of the Strategic Alliance Agreement between Public Hospital District No. 1 of King County and U.W. Medicine destroys the democratic nature of municipal corporations. Direct review is necessary to determine if this fundamental change is lawful, particularly as

the result will likely affect all local governments. *Legislative Amici* urge this Court to retain this case for direct review to provide prompt and final guidance on this "fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4).

II. REASONS WHY DIRECT REVIEW IS APPROPRIATE

A. Delegation of Governing Functions Is Not Permitted.

1. Under Washington Law, Municipal Corporations Are Created and Governed Locally.

Municipal corporations, as creatures of the state, derive their authority and powers from the legislature. *Town of Othello v. Harder*, 46 Wn.2d 747, 752, 284 P.2d 1099 (1955). The legislature authorized local communities to create public hospital districts such as the appellant Public Hospital District No. 1 of King County ("the District") in 1945. RCW 70.44.910 (1945 WASH. LAWS ch. 264). The purpose of such districts is to "own and operate" hospitals and health care facilities to provide hospital and health care services "for the residents of such districts and other persons." RCW 70.44.003.

Under the statute, the majority vote of the People in a public hospital district creates the district, chooses the number of commissioners to govern the district, and elects the commissioners who govern the People's district. RCW 70.44.040(1). Only district residents may be commissioners. RCW 70.44.040(2). A hospital district's powers include the authority to construct and operate hospitals and other health-care facilities. RCW 70.44.060. The statutes authorize division of a district (RCW 70.44.350-.380) and

withdrawal of territory from a district (RCW 70.44.400); both require a vote of the People. They do not authorize commissioners, on their own, to give away, terminate, or dissolve a district.

The Legislature has similarly authorized school districts (Title 28A) fire protection districts (Title 52 RCW), port districts (Title 53 RCW), public utility districts (Title 54 RCW), and water-sewer districts (Title 57 RCW), all of which are governed by locally-elected commissioners. Likewise, cities and counties are authorized by statute and governed by locally-elected commissioners or other officials. *See* RCW 35.02.078. Towns or cities may, in turn, create municipal corporations such as public facilities districts (ch. 35.57 RCW), metropolitan municipal corporations (ch. 35.58 RCW), and metropolitan park districts (ch. 35.61 RCW).

Although the legal authority to create municipal corporations comes from the Legislature, they are created by and derive their authority from the People, the voters of their districts. They are the epitome of local control. As McQuillin confirms, "The characteristic feature of a municipal corporation beyond all other is the power and right of local self-government." 1 MCQUILLIN MUN. CORP. § 2:9 (3d ed., 2012 supp.).[1]

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[1] Municipal corporations are thus congruent with Washington's history as a populist state embodied in its 1889 Constitution which was initially imbued with the principles of local control and accountability, then strengthened in 1912 by the referendum and initiative amendments. *See* Utter & Spitzer, THE WASHINGTON STATE CONSTITUTION (2002), pp. 11-12 (generally), 50-51 (referenda and initiatives), 146-47 (loan of public credit prohibited). There is a genuine question whether the Strategic Alliance Agreement violates art. VIII, sec. 7 of the Washington Constitution as a gift of the District's property or loan of its credit, to any "individual, association, company or corporation." It is not clear from the

(*Footnote continues on next page.*)

2. Municipal Corporations' Authority to Delegate their Powers and Duties Is Circumscribed by Statute and Common Law.

All municipal corporations are generally authorized to enter into contracts with other entities or agencies in carrying out their powers and duties. For instance, a hospital district has the authority to enter into a contract with another district or governing body "for carrying out" its powers. RCW 70.44.060(7). But that authority is circumscribed by the principle that a municipal corporation must retain the ultimate authority to exercise its legislative powers. There is a material difference between entering into a contract "for carrying out" certain powers and delegating the authority to exercise those powers to an unelected body.

The United States Supreme Court has long recognized that the "legislative power vested in municipal bodies is something which cannot be bartered away in such a manner as to disable them from the performance of their public functions." *Wabash Railroad v. City of Defiance*, 167 U.S. 88, 100 (1897). Similarly, this Court has held that "[w]here the Legislature enacts enabling legislation which vests a municipal corporation or similar entity with legislative powers, ***that body may not delegate its power absent specific statutory authorization.***" *Municipality of Metro. Seattle v. Div. 587, Amalgamated Transit Union*, 118 Wn.2d 639, 643, 826 P.2d 167 (1992) (emphasis added); *see also Roehl v. Pub. Util. Dist. No. 1 of Chelan*

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record that the persons gaining control of the District—the trustees appointed from U.W. Medicine—are exempt from art. VIII, sec. 7's prohibition. Those individuals do not themselves make up a public entity that *might* -- arguably -- be exempt from the prohibition against the loan or gift of public credit or property.

County, 43 Wn.2d 214, 240, 261 P.2d 92 (1953) ("Where the enabling legislation under which a municipal or quasi-municipal corporation derives its power confides legislative or discretionary functions in particular officials or boards, *such functions may not be delegated to others.*") (italics added); AGO 2012 no. 4.[2]

Although a municipal corporation may delegate the performance of duties of a "purely ministerial or administrative nature," it is forbidden to delegate its legislative or discretionary functions. *Roehl*, 43 Wn.2d at 240. "[I]f a public corporation enters into a contract that barters away or otherwise restricts the exercise of its legislative or police powers, then the contract is *ultra vires* and *void ab initio.*" *Vermont Dep't of Pub. Svc. v. Mass. Municipal Wholesale Elec. Co.*, 151 Vt. 73, 558 A.2d 215, 220 (1988). This Court has refused to sanction the delegation of discretionary functions to another entity. *See, e.g., Chemical Bank v. Wash. Pub. Power Supply Sys. (WPPSS)*, 99 Wn.2d 772, 788, 666 P.2d 329 (1983).

The District is a municipal corporation governed by five commissioners elected by the residents of the district and who are

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[2] *Accord King County v. Taxpayers of King County*, 133 Wn.2d 585, 611, 949 P.2d 1260 (1997) ("When the Legislature or state constitution has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power, or surrender any of it under Const. art. XI, § 11, our state supremacy clause."); *Nollette v. Christianson*, 115 Wn.2d 594, 608-09, 800 P.2d 359 (1990) ("Unless authorized by statute or charter, *a municipal corporation*, in its public character as an agent of the state, *cannot surrender, **by contract or otherwise**, any of its legislative and governmental functions and powers, including a partial surrender of such powers.*"), quoting 2 MCQUILLIN, MUNICIPAL CORPORATIONS § 10.38 (3d rev. ed. 1988); *City of Raymond v. Runyon*, 93 Wn. App. 127, 137, 967 P.2d 19 (1998) ("Public powers cannot be surrendered or delegated[.]").

empowered to operate a hospital. The District's current website accurately describes a public hospital district as "owned and governed by local citizens."[3] Yet under the District's Strategic Alliance Agreement with U.W. Medicine, the commissioners purported to expressly allow the District's health care system to become a "component entity of UW Medicine." § 2.2(b). Under the agreement, the "District Healthcare System" is not governed "by local citizens" but by a "board" of trustees, the majority of whom are not commissioners elected from within the District, but are appointed by the UW Medicine CEO. §§ 3.2, 3.4(a). The "board" has "overall oversight responsibility" for the District and is supposedly authorized to exercise most of the District's powers and to act in its name. §§ 3.1(a), 3.6. The "board" has authority to re-delegate to others most of its powers and duties. § 3.6.

Under this agreement, the "board" explicitly has "total control over the application of District Revenues and the use of District Assets." § 5.2(b). The District, through its elected commissioners, does "***not*** have the right to acquire or Transfer any District Assets, since ***such rights have been vested in the Board***." § 5.2(f) (emphasis added). *See also* § 7.2(a)(iv) (District relinquishes authority to transfer its assets). The "board" controls the budget and may incur liabilities and indebtedness on the District's behalf, for which, nevertheless, the *District* is solely responsible. §§ 3.1(b)(viii) & (xii), 3.6(i), § 4.18(a). For certain enumerated purposes, the

[3] http://www.valleymed.org/district (last visited 4/9/2013).

District must "take any and all actions necessary to authorize, and incur Indebtedness, or issue, or cause to be issued, Bonds as requested by the Board." § 4.18(c). The "board" may *dispose* of the District's interests in real property *without* the District's approval. § 4.19. Although the District commissioners may serve on the "board," they are less than a majority; ***and the "board" has authority to remove and replace them with a successor "who need not be a Commissioner of the District.***" §§ 3.2, 3.7(b) (emphasis added).

The net effect is to reduce the District commissioners to silent butlers. It nullifies the democratic nature of the District. It is difficult to see how this expansive delegation does not violate the bar against delegating the District's legislative or discretionary power. For example, the District must now comply with budgets established by the "board" of trustees, the majority of whom are unelected, destroying the *District*'s discretion in exercising -- *on its own* -- its powers to tax and spend—powers that lie at the heart of any meaningful concept of legislative power.

B. A Contract that Purports to Bind Successor Legislative Officials in the Performance of Governing Functions Is *Ultra Vires.*

The initial term of the Strategic Alliance Agreement is nearly 15 years—far beyond the terms of any of the District commissioners. § 10.1. In addition, the agreement purports to be terminable by the District only upon U.W. Medicine's default. § 10.2(ii). The Agreement has the purported effect of binding successor commissioners to the decisions of the board of trustees, raising the question whether a municipal board has authority to

bind successor legislative officials in the performance of core governmental functions.

This Court has repeatedly held that one legislature cannot prevent a future legislature's exercise of its law-making power. *Wash. State Farm Bur. Fed. v. Gregoire*, 162 Wn.2d 284, 302, 174 P.3d 1142 (2007), citing *Gruen v. State Tax Com'n*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). Courts in other jurisdictions have applied this rule to invalidate contracts relating to performance of governmental functions. *See, e.g., City of McDonough v. Campbell*, 289 Ga. 216, 710 S.E.2d 537, 538 (2011); *City of Newburgh v. McGrane*, 82 A.D. 3d 1225, 920 N.Y.S.2d 160, 162 (2011); *Chopmist Hill Fire Dep't v. Town of Scituate*, 780 F. Supp. 2d 179, 187 (D. R.I. 2011); *Altoona Housing Authority v. City of Altoona*, 785 A.2d 1047, 1052 (Pa. Comm. Ct. 2001); *see also* 10A McQuillin, MUNICIPAL CORPORATIONS § 29.102 (3d rev. ed., 2012 supp.). The facts here show the need for a strong public statement by this Court that a municipal board may not enter into a contract that transfers away its core powers and authority while also purporting to bind successor officials in the elimination of their governing functions.

III. CONCLUSION

This case presents the Court an opportunity to address the scope of a municipal board's authority to "delegate"—really to give away and totally relinquish—its core powers and duties to another entity, and remove any vestige of the local control that characterized its creation. If municipal

corporation boards and governing bodies can "delegate" their powers to the extent that occurred here and bind successor officials, that would constitute a fundamental change in the nature of municipal corporations by means of a mere contract by the governing officers, rather than by statute or vote of the People of the district. Any local government could relinquish its core governing powers to any unelected and unaccountable entity. That change would eviscerate and destroy the public control and local accountability of municipal corporations, which is their hallmark. If such a seismic change is to be allowed judicially, it must be by this Court.

This Court should retain this case for direct review to make a prompt and ultimate determination of whether a municipal corporation's governing officers have the authority to unilaterally remove the locally-created municipal corporation from genuine control by and accountability to the People that created it, without giving that public any say in the decision. All municipal corporations will be in limbo until a definitive decision on this issue, which can come only from this Court.

DATED this 17th day of June, 2013.

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