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DIVISION ONE  
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No. 59823-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM  
PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF  
SEATTLE, L.P.,

Appellants,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a  
Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a  
foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a  
foreign corporation,

Respondents.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

HK's response brief boils down to two fundamental points, neither of which has a basis in the record or the law:

*First*, HK asks the Court to conclude that the PFD did not exercise sovereign authority delegated from the State when it built Safeco Field. Although that might seem to be a debatable proposition in the abstract, the Supreme Court settled the point in *CLEAN v. State*, 130 Wn.2d 782; 928 P.2d 1054 (1996), when it held that the Stadium Act authorizing the construction of Safeco Field fell squarely within the State's police power. That being the case, the PFD's construction of the stadium in furtherance of the Act necessarily implemented the State's police power, rather than providing a parochial benefit to the residents of Seattle or King County. Under settled Washington law, that means the PFD carried out a delegated sovereign power when it contracted to pay HK hundreds of millions of dollars to build Safeco Field.

*Second*, HK claims that because the Mariners advanced the funds necessary to repair HK's defective work, subject to reimbursement from the PFD, the PFD and the Mariners have brought this lawsuit for the sole benefit of the Mariners, not the PFD. But the record shows something else. In fact, if the Court affirms dismissal, the PFD will lose, as it will remain legally responsible to repay the Mariners the money it cost to repair HK's defective work. Because that result would hinder the PFD's fulfillment of the State's sovereign purposes, to the detriment of the

public, the PFD and the Mariners have brought this action for the benefit of the State. For that reason, pursuant to RCW 4.16.160, the statute of limitations cannot bar this action and insulate HK from liability for its work on this public project.

## II **FACTUAL BACKGROUND**

HK opens its brief by describing the facts as if a judge or jury had decided them. Resp. Br. at 4-11. But this case comes before the Court on appeal from an order granting HK's motion for summary judgment based on its statute of limitations defense. "Because the statute of limitations is an affirmative defense, the burden is on [HK] to prove those facts that establish the defense." *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000). In assessing the facts, "[t]he court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party," i.e., the PFD and the Mariners. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The Court will readily discern where HK has taken liberties with these standards. Two points in particular deserve mention:

*First*, HK deflects any discussion of its role in the failure of the intumescent system at Safeco Field. It claims that "[t]he cause and extent of the alleged defects are irrelevant to the issue on appeal" and labels the accusation that it was at fault "nothing more than unproven allegations." Resp. Br. at 6. In fact, the record contains two reports laying the blame

squarely on HK and its subcontractors. CP 440-60. HK had a copy of these reports before the PFD and the Mariners filed suit (*see* CP 5, 224) - but it never, to this day, has denied the failure or explained how anyone else could bear the blame. Thus, in reviewing de novo the trial court's decision on HK's motion, the Court must assume that the PFD and the Mariners have a meritorious claim that HK seeks to avoid through application of the statute of limitations.

*Second*, HK argues that "[t]here is no guarantee" that the conditions precedent to funding the Excess Revenues Fund "will ever be met." Resp. Br. at 4. But this flips the burden on this motion, for the PFD and the Mariners have the right to all reasonable inferences from the record. *Wilson*, 98 Wn.2d at 437. The record shows that "[t]he source of funding for the Excess Revenue is the 5% Admission. Tax," which "*will fund* the Excess Revenue Fund" after repayment of the bonds used to finance construction of the parking garage at Safeco Field. CP 289 (emphasis added). *See also* CP 199 ("Excess Revenues Fund will be funded with proceeds of the First Admissions Tax"). This tax is "the only dedicated revenue source that will survive retirement" of the construction bonds," CP 199, and the PFD and the Mariners anticipated funding the Excess Revenues Fund within "several years" of 2001. CP 199 at ¶ E. Taking every inference in favor of the PFD and the Mariners, this

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In keeping with industry custom, HK's agreement with the PFD expressly made it responsible not only for its own acts and omissions, but also for those of its subcontractors. CP 114 § 3.3.2.

evidence establishes that the Excess Revenues Fund will be funded - and, absent reversal of the decision below, the PFD will have to divert some of these tax revenues to pay for the coating failures that HK caused.

### III. ARGUMENT

#### A. The PFD Built Safeco Field Pursuant to Delegated State Sovereign Power.

HK admits that *Washington Public Power Supply System v. General Electric Co.*, 113 Wn.2d 288, 293, 778 P.2d 1047 (1989), sets forth the governing standard for determining whether the PFD built Safeco Field under an "exercise of powers traceable to the sovereign powers of the state" delegated to the PFD. Under *WPPSS*, a municipality acts in a sovereign capacity when it "assist[s] in the government of the state as an agent of the state, often referred to as an arm of the state, and . . . promote[s] the public welfare generally." *WPPSS*, 113 Wn.2d at 295-96 (citation omitted). On the other hand, a municipality acts in a proprietary capacity when it acts to "regulate and to administer the local and internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban community embraced within the corporation boundaries." *Id.* (citation omitted).

The Supreme Court's decision in *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996), established the sovereign nature of the PFD's task in constructing Safeco Field. HK misrepresents *CLEAN* (relying on a footnote instead of the related text) and seeks to distinguish it on immaterial grounds. Further, HK's effort to create a new test for the

application of RCW 4.16.160 (i.e., that only powers expressly described in the Constitution count as "sovereign" for purposes of the statute) contradicts both the case law and its own position below.

1. ***CLEAN* Settled the Sovereign Nature of the PFD's Task in Constructing Safeco Field.**

*WPPSS*'s central holding shows that a municipality, such as the PFD, acts in a proprietary capacity when it "regulate[s] and . . . administer[s] the local and internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban community embraced within the corporation boundaries." *WPPSS*, 113 Wn.2d at 295-96. In an effort to fall within this holding, HK argues that "the fact that Safeco Field was located in King County necessarily means that the entertainment it provides primarily benefits those who reside in King County, and therefore serves a proprietary function." Resp. Br. at 16. In support, HK points to footnote 9 in *CLEAN*, where the Supreme Court pointed to the benefits that "Seattle area" businesses would reap from construction of Safeco Field. Resp. Br. at 16.

But HK's brief does not fairly excerpt from the Supreme Court's opinion. Indeed, in the very paragraph to which footnote 9 is appended (which HK could not possibly have overlooked), the Supreme Court painstakingly detailed the state *and* regional benefits associated with building a facility to keep major league baseball in Washington:

The notion that the Mariners have a positive impact on *the state's economy* found support at the public hearing before the

Trade and Economic Development  
Committee of the House of Representatives  
and the Ways and Means Committee of the  
Senate in the form of testimony of various  
business owners and a representative of  
organized labor, all of whom indicated how  
important the presence of a major league  
baseball team was to *the economy of the  
region*. Other witnesses concentrated on the  
intangible benefits that flow from the  
presence of having a major league baseball  
team *in this state*. Governor Lowry  
supported both of these points of view in his  
testimony before the committees of the  
Legislature, describing how *the economy of  
the state and the quality of life of its  
citizens* [are] enhanced by the presence of a  
major league baseball team. If it is true that  
the existence of a major league baseball  
team in a city *improves the economy of the  
state* in which that city is located and  
*enhances the fabric of life of its citizens*,  
and we believe it is the prerogative of the  
Legislature to conclude that it does, *it is  
certainly within the general police power of  
the State to construct a publicly owned  
stadium in order to promote those interests*.

*CLEAN*, 130 Wn.2d at 805-807 (emphasis added).<sup>2</sup> Thus, in *CLEAN*, the  
Supreme Court resolved a sharply contested matter of public policy and  
held that construction of Safeco Field fell within the State's police power  
because of the broad benefits to residents of the State and the region.

Clearly, then, by implementing the Stadium Act and building the stadium  
in question, the PFD "assist[ed] in the government of the state as an agent

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<sup>2</sup> The King County Council also specifically recognized the local, statewide  
and regional benefits of the presence of major league baseball in Seattle - and, by  
extension, of a facility to promote those benefits. See CP 276.

of the state, often referred to as an arm of the state, and . . . promote[d] the public welfare generally." *WPPSS*, 113 Wn.2d at 295-96.

Even though this holding lies at the core of *CLEAN*, HK declares that it amounts to "nothing more than *dicta* that should be disregarded by the Court." Resp. Br. at 18. HK claims that *CLEAN* addressed only the "manner" in which the Legislature enacted the Stadium Act and thus "has nothing to do with statutes of limitation." *See* Resp. Br. at 17, 18.

HK's argument misses the point. The PFD and the Mariners never have claimed that *CLEAN* decided issues concerning statutes of limitation. But *CLEAN* did decide the legal issue on which HK's statute of limitations defense hinges, i.e., whether the construction of Safeco Field involved the exercise of sovereign authority. The *CLEAN* plaintiffs attacked the Stadium Act's constitutionality on several grounds. In one challenge, plaintiffs contended that the emergency clause in the Stadium Act infringed their right to a referendum. 130 Wn.2d at 803-07. Under Washington jurisprudence, addressing this issue required the Supreme Court to decide whether the Stadium Act represented a valid exercise of the State's sovereign police power. *See* App. Br. at 15-16.

*CLEAN* held that the Legislature passed the Stadium Act (and thus authorized the creation of the PFD and the development of Safeco Field) as a proper exercise of the general police power of the State, which the Supreme Court characterized as "an attribute of sovereignty." 130 Wn.2d at 804-05. Far from being *dicta*, this holding disposed of the plaintiffs'

argument that the Legislature acted improperly in attaching an emergency clause to the Act. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (*dicta* means an observation that was "not necessarily involved in the case or essential to its determination") (citation omitted).

In passing the Stadium Act and authorizing construction of Safeco Field, the Legislature delegated its sovereign authority to an entity to be created pursuant to the Stadium Act's terms - the PFD.<sup>3</sup> Under *CLEAN*, when the PFD did as the Legislature contemplated and built Safeco Field (thereby saving major league baseball for the State), the PFD "assist[ed] in the government of the state as an agent of the state ... and ... promote[ed] the public welfare generally." *WPPSS*, 113 Wn.2d at 295-96.

HK urges that this Court should ignore the portion of *CLEAN* in which the Supreme Court held the Stadium Act to be a valid exercise of the police power and instead focus on its skepticism as to whether development of a baseball stadium was a "fundamental purpose" of state government. *See* Resp. Br. at 18. But the "fundamental purpose" nomenclature has no bearing on whether action is sovereign or proprietary - and HK does not point to any case suggesting that it does. Instead, the Supreme Court's observations about "fundamental purpose" addressed the *CLEAN* plaintiffs' claim that the Act constituted an impermissible gift of state funds in violation of Wash. Const., art. VIII, §§ 5 and 7. (Under

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It bears repeating that the full name of the PFD - the "*Washington State Major League Baseball Stadium Facilities District*" (CP 282) - confirms its origins as a creature of the *State* government.

Washington law, "no gift of public funds has been made" if "funds are being expended to carry out a fundamental purpose of the government." *CLEAN*, 130 Wn.2d at 797.) That issue did not turn on whether the Act fell within the sovereign police power - as did the Court's disposition of the emergency clause challenge. *See CLEAN*, 130 Wn.2d at 797-98.

*CLEAN* put to rest this issue - i.e., whether the PFD acted in a delegated sovereign capacity in building Safeco Field. Having reaped hundreds of millions of dollars in revenue from the project that *CLEAN* made possible, *see CP 053* (establishing initial construction cost for HK's contract at \$216.35 million),<sup>4</sup> HK should live with the holding of the case. Under *CLEAN*, this action arises out of the PFD's exercise of delegated sovereign functions.

**2. HK's Effort to Limit the Reach of RCW 4.16.160 Has No Support in the Case Law.**

On review, HK raises for the first time an argument to the effect that delegated "sovereign power" must originate in the express words of the Constitution for RCW 4.16.160 to apply. Thus, because the PFD built Safeco Field under a grant of statutory authority implementing the police power, HK claims that the PFD's claim cannot be exempt from the statute of limitations. *See Resp. Br.* at 14, 17.

In the superior court, however, HK sang a different tune. In its motion for summary judgment, HK catalogued "several sovereign powers

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The figure quoted in the text comes from HK's contract with the PFD, without taking into account construction cost overruns. The record does not show the much larger total that HK actually received on the project.

that have been recognized by Washington courts," including (among others) "police power (including the preservation of the public health, safety, and morals)." CP 184. HK's concession recognized that "[t]he police power of the State is an attribute of sovereignty, an essential element of the power to govern." *CLEAN*, 130 Wn.2d at 805 (citing *Alderwood Assocs. v. Washington Env't'l Council*, 96 Wn.2d 230, 252, 635 P.2d 108 (1981) (Dolliver, J., concurring)). The police power embodies an "exercise of the *sovereign right* of the Government to protect the lives, health, morals, comfort and general welfare of the people." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (emphasis added). *See Weden v. San Juan County*, 135 Wn.2d 678, 692, 958 P.2d 273 (1998) (the "police power is firmly rooted in the history of this state, and its scope has not declined"). Because *CLEAN* found that the Stadium Act amounted to a proper exercise of the sovereign police power, construction of Safeco Field necessarily amounted to an exercise of delegated sovereignty.

Aside from contradicting its trial court briefing, HK's new position does not find any support in the case law - including the cases on which it relies. In *WPPSS* itself, for example, the Supreme Court held that it would look to a variety of sources to ascertain the nature of the power:

[W]e may look to constitutional *or statutory provisions* indicating the sovereign nature of the power, *and we may consider our traditional notions of powers* which are inherent in the sovereign. Relevant to this analysis are the general powers and duties

under which the municipality acted, the purpose of those powers, and whether the activity or its purpose is normally associated with private or sovereign concerns.

*WPPSS*, 113 Wn.2d at 296 (emphasis added). Consistent with this approach, the Court in *Bellevue School District No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 115-16, 691 P.2d 178 (1984), relied not only on the State Constitution but also "inherent qualities of sovereignty" that made education a sovereign power. 103 Wn.2d at 115-116. And in *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 24 F.3d 1565, 1582 (9th Cir. 1994), the Ninth Circuit relied on a state statute governing the development of port district properties, which implemented a broad constitutional provision reserving areas within port districts for the conveniences of navigation.

The indicia of sovereign authority here resemble those on which the Court relied in *Louisiana-Pacific*. The Stadium Act implemented the police power, an attribute of sovereignty so fundamental that it requires no express articulation in the Constitution. See *Alderwood Assocs.*, 96 Wn.2d at 252 (Dolliver, J., concurring) (calling police power "an attribute of sovereignty, an essential element of the power to govern"). Like the Port in *Louisiana-Pacific*, whose discretionary leasing activities were held to be valid exercises of delegated sovereign power, the PFD acted in a sovereign capacity by carrying out state policy and building Safeco Field.

By contrast, this case has nothing in common with *City of Moses Lake v. United States*, 40 F. Supp. 2d 1164 (E.D. Wash. 2006), on which HK relies. In the first place, nothing even remotely suggests that the

district court found *Moses Lake's* operation of a water system to be proprietary simply because the Constitution did not expressly provide for it. Instead, as the PFD and the Mariners explained in their opening brief (App. Br. at 24-26), Moses Lake "seemingly" conceded that the normal operation of a municipal water supply system amounted to proprietary activity. *Id.* at 1174. Further, the City rehabilitated the water supply system primarily to "make it usable and have it produce sufficient water" for its rate-paying "customers," much like any business would. *Id.* at 1177. The court therefore held that the City's actions "were *not* taken as a representative of the State of Washington, but ultimately were taken to further its own corporate ends." *Id.* at 1177-78 (emphasis added). HK ignores these points, each of which differs from the PFD's position here. .

The cases do not support HK's newly-minted theory. As *WPPSS* teaches, this Court's inquiry into the sovereign character of the PFD's work should consider the inherent attributes of sovereignty, the State Constitution, and the statutes that the Legislature has passed to implement sovereign goals. Those sources establish that the PFD's construction of Safeco Field amounted to a delegated exercise of the State's police power, as the Supreme Court held in *CLEAN*.

### **3. HK's Out-of-State Cases Do Not Provide Guidance Here.**

Finding no support in Washington law, HK turns to several out-of-state cases. As explained above, however, Washington has a well-developed body of law concerning the application of RCW 4.16.160, as

well as *CLEAN*, which squarely decides that the construction of this very facility falls within the State's sovereign police power. In the circumstances, it makes no sense to turn to law in other jurisdictions - and in fact, the cases on which HK relies show the hazards of doing so.

For example, HK relies on a Pennsylvania case holding that a public school district is not exempt from the statute of limitations. Resp. Br. at 20-21, citing *Altoona Area School District v. Campbell*, 152 Pa. Cmwnlth. 131, 618 A. 2d 1129, 1132 (1992). But Washington law holds *exactly* the opposite, as HK knows. *See Bellevue School District No. 405*, 103 Wn.2d at 115-16.<sup>5</sup> Further, HK's Pennsylvania authority turns on a factor that has no significance under Washington law, i.e., whether the decision to build the facility was "imposed by law" or "voluntary." *See* Resp. Br. at 20-21 & n.11, citing *Altoona Area School District*, 618 A.2d at 1132; *Montgomery County v. Microvote Corp.*, 23 F. Supp. 2d 553, 555 (E.D. Pa. 1998). The *WPPSS* analysis, which controls here, turns on a qualitative assessment of the nature of the delegated power, not on whether the ultimate municipal action was mandatory. For that reason, the Ninth Circuit has found an exercise of sovereign authority arising from a Washington statute that merely permitted, but did not require, municipal

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<sup>5</sup> For the same reason, *Board of Trustees of Bergen Community College v. J.P. Fyfe, Inc.*, 192 N.J. Super. 433, 471 A.2d 38 (1983), provides no guidance. As summarized in the opinion, New Jersey law apparently provides that a school district is not exempt from the statute of limitations when suing to recover damages "in contract or in tort." Instead, to qualify for the exemption under New Jersey law, the claim must involve enforcement of a property right, such as prescriptive ownership. 471 A.2d at 39. New Jersey law squarely contradicts Washington law.

action. *See Louisiana-Pacific Corp.*, 24 F.3d at 1582 (port "may" lease properties under terms port deems proper under RCW 53.08.080).

On the other hand, *Newman Memorial Hospital v. Walton Const. Co. Inc.*, 37 Kan. App. 46, 149 P.3d 525 (2007), has nothing to do with the facts here. In *Newman*, a Kansas appellate court held that a county acted in a proprietary capacity when it built a medical office building because (1) the county made a profit on rent; (2) the benefits of the facility flowed only to two specific counties; (3) the county charged market rents under its leases; and (4) the facility was not a teaching hospital serving the entire state. 149 P.3d at 537. The court also noted that "the Kansas Supreme Court has twice held that when a government entity operates a hospital, it acts in a proprietary function." *Id.* at 536. In this respect, the Kansas case appears consistent with *WPPSS* (where the Supreme Court held that electricity production is a function not typically associated with sovereign authority) and *Moses Lake* (holding that the "operation of the municipal water system has not traditionally been considered a power or duty which inheres in the sovereign, but rather a proprietary activity for the advantage of each community"). *See App. Br.* at 24. In stark contrast, the PFD does not make a profit on rent, it provides benefits that (according to the Legislature and the Supreme Court) serve the entire state, and it does not charge market rate rents.

HK's out of state authority provides no reason to revisit the conclusion that Washington law compels - that the PFD acted in a

delegated sovereign capacity when it contracted with HK for the construction of Safeco-Field.

**B. The PFD and the Mariners Have Brought This Action for the Benefit of the State.**

Even though the PFD acted in a delegated sovereign capacity in building Safeco Field, HK argues that contractual arrangements between the PFD and the Mariners deprive the PFD, the State and its citizens of the benefits of RCW 4.16.160. In particular, HK claims that because the Mariners advanced the funds necessary to correct HK's defective work, "nothing in the record" shows that the PFD will incur a detriment due to the intumescent paint repairs. *See* Resp. Br. at 4. HK does not deny that the Mariners have a legal right to recover the costs of repair from the Excess Revenues Fund or that the PFD carries the costs as a liability on its books, matched by a corresponding "payable" on the Mariners' books. Instead, HK declares that the Excess Revenues Fund does not exist and may never be funded. *See* Resp. Br. at 7-9. For that reason, HK contends that this case "is for the Mariners' benefit" and that the "PFD is a party in name only." Resp. Br. at 22.

The record contradicts each predicate to HK's argument.

**1. The Stadium Act Mandated the Excess Revenues Fund, Which Protects the Public's Investment in Safeco Field.**

The Stadium Act *mandated* the creation of a "contingency fund" as a source of money to pay the publicly-owned stadium's "unanticipated capital costs," other than cost-overruns on initial construction. CP 266.

The obvious purpose, as the PFD and the Mariners recognized in their Closeout Agreement, was to provide a means of funding capital projects deemed necessary or desirable to "assure the ongoing viability of the Ballpark, both during and beyond the term of the Lease." CP 199 ¶ E (describing creation). Article 7.2.3 of the Lease provides that revenues generated by the First Admissions Tax after retirement of the parking bonds will be contributed to and retained in the Excess Revenues Fund and will remain the PFD's property. CP 339.

2. **The PFD Has a Legal Obligation to Reimburse the Mariners for the Costs of Repairing HK's Defective Work.**

In 2001, the parties wrote a list of then-existing "Qualified Expenditures" by the Mariners "which *will be* reimbursed from the Excess Revenues Fund" and appended that list to the Project Closeout Agreement. *See* CP 202, 211-212 (emphasis added). Since then, the PFD regularly has consulted with the Mariners to discuss capital projects and determine whether the projects (if undertaken) would qualify to be funded from the Excess Revenues Fund as unanticipated capital costs. CP 293. The PFD's financial statements recognize its "obligation under [the] Excess Revenue Fund." CP 289 ("Notes to Financial Statements No. 9") ("The Club *has the right to obtain reimbursement from the Excess Revenue Fund* for costs of repairs and maintenance that fall under the definition of 'Unanticipated Capital Costs' it incurs").

In particular, the Mariners have the right to reimbursement from the Excess Revenues Fund for the money spent to repair the intumescent coating system. The PFD and the Mariners agreed that the intumescent repair qualified as an unanticipated capital cost because it resulted from defective work in HK's original construction, not from ordinary wear and tear. CP 293. As the Mariners Vice President-Finance explained:

[T]he Mariners advanced the funds necessary to undertake the intumescent repair and today the Mariners carry these funds as a receivable in the "Unanticipated Capital Cost Receivable" ledger account. Conversely, the PFD carries the intumescent repair cost as a payable under the Excess Revenue Fund established in the Agreements.

CP 416.

The record, then, shows that the PFD has the legal obligation to pay for the repair of HK' s work. By prevailing in this action, the PFD will relieve itself of that obligation, freeing up collected taxes for other uses on this public facility. For that reason, the Court should conclude that the PFD and the Mariners have brought this action for the benefit of the State.

**3. The Excess Revenues Fund "Will Be" Funded by the First Admissions Tax.**

Faced with this evidence, HK retreats to the bare speculation (unsupported by the record) that "[t]here is no guarantee" that the Excess Revenues Fund will ever be funded. Resp. Br. at 9. The record, however, supports the inference that the Excess Revenues Fund *will* be funded and

the Mariners *will* be paid - with the only question being the timing of payment. HK has not pointed to any evidence from which the Court could draw a contrary inference.

The PFD's Financial Statements explain that "[t]he source of funding for the Excess Revenue [Fund] is the 5% Admission Tax," which "*will fund* the Excess Revenue Fund only after the taxable bond issue (the parking garage bonds) has been retired." CP 289 (emphasis added). "The Excess Revenues Fund *will be funded* with proceeds of the First Admissions Tax," which is "the only dedicated revenue source that *will survive retirement* of the existing Ballpark Bonds and Parking Bonds under existing law." CP 199 (emphasis added). *See CP 266* (Stadium Act authorization of First Admissions Tax); King County Code § 4.31.010.

Nothing in the record could give rise to even a permissible inference that the Excess Revenues Fund might not be funded.<sup>6</sup>

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<sup>6</sup> HK points to the Project Closeout Agreement, CP 199 ¶ E, in which the parties acknowledge that the Excess Revenues Fund "may not be sufficient to provide for prudent and desirable capital improvements to the Ballpark." Resp. at 9. But that emphasizes the importance of this litigation to the State: if the PFD must devote the Excess Revenues Fund to the cost of repairing HK's defective work (an expense that HK should bear), the Fund may not be available to pay for "prudent and desirable capital improvements" to protect and enhance the public's substantial investment. *See CP 199 ¶ E*. The Mariners have no obligation to pay for such enhancements: under the Lease, they have the "option" whether to pay to "improve components of [Safeco Field] beyond" the minimum condition required by the Lease. *See CP 335-36, If 7.1*.

**4. The PFD Is the Real Party in Interest, Not a "Conduit."**

Based on this record, a reasonable fact finder would infer that a recovery in this case will benefit the PFD by releasing it from a legal liability and making the proceeds of the First Admissions Tax available for uses other than bearing the burden for repair of HK's work - uses that will benefit the State and the public. Nevertheless, HK persists in claiming that the PFD has no stake in the outcome here and is merely a "conduit" for a private party claim. Resp. Br. at 21, 22. The facts, as explained above, categorically negate this argument.

HK's treatment of the law is equally flawed. HK cites *Herrmann v. Cissna*, 82 Wn.2d 1, 5, 507 P.2d 144 (1973), for the proposition that the statute of limitations applies when the State functions as nothing more than a "mere formal plaintiff" with no interest in the outcome. That is no surprise. But here, the PFD will benefit directly from this suit through the elimination of its obligation to reimburse the Mariners out of the Excess Revenues Fund. Thus, the PFD is not merely a "formal plaintiff" in a suit brought solely for the private benefit of the Mariners, but is the real party in interest. Further, in *Herrmann*, the Washington Insurance Commissioner became the statutory rehabilitator of a defunct carrier and sued the carrier's former officers and directors for losses caused by their malfeasance and fraud. Although acknowledging that the "proceeds of the commissioner's suit, if any, will inure to the benefit of the Company and its policyholders," 82 Wn.2d at 5, the Court held that the Commissioner's

lawsuit was "taken primarily in the public interest" in furtherance of the Commissioner's duty to enforce the Insurance Code. 82 Wn.2d at 6.

As in *Hermann*, this case primarily will benefit the public, through the PFD. No matter what happens, the Mariners will receive reimbursement - either from the Excess Revenues Fund (with interest) or from HK as the responsible party. But the PFD (and thus the State) stands to gain from this action, because recovery from HK will release it from its obligation to reimburse the Mariners for the intumescent repair costs. Accordingly, the aim of this suit - recovery from HK - would preserve the PFD's tax revenues for public purposes other than repairing defective work performed by a contractor that has received more than \$200 million.

The cases cited by HK from outside Washington all involve claims purely for private benefit where the State retained no beneficial interest. In one case, for example, the assignee of a government claim could not invoke the government's immunity under the statute of limitations because the claim was solely "for private benefit." *McCloskey and Co. v. Wright*, 363 F. Supp. 223, 227 (E.D. Va. 1973). The Florida case involved a disputed road easement over land previously owned by the federal government, but now owned by a private party, where "[t]he sovereign has no further interest" and thus "[p]laintiff seeks to enforce rights which it holds purely for its private benefit." *Lovey v. Escambia County*, 141 So.2d 761, 764 (Fla. App. 1962) (quotation omitted). Finally, the Pennsylvania case was prosecuted by an insurance company as subrogee

to a school district after making payment on its policy with the district, leaving only the private interest of the carrier at stake because "the public interests have been made whole." *School Dist. of Borough of Aliquippa v. Maryland Casualty Co.*, 402 Pa. Super. 569, 587 A.2d 765, 772 (1991).

By contrast, *in. RCR Services Inc. v. Herbil Holding Co.*, 229 A.D.2d 379, 645 N.Y. Supp. 2d 76 (N.Y. App. Div. 1996), a private party sued on an assigned claim - but the ultimate benefits flowed back to the government, just as they do here. For that reason, the court held that the statute of limitations did not bar a claim that would have been barred if filed by a private party for private benefit. The PFD and the Mariners discussed this case in detail in their opening brief, App. Br. at n. 8, but HK elected to ignore it.

#### IV. CONCLUSION

For the foregoing reasons, the PFD and the Mariners respectfully request that this Court reverse the trial court's order of summary judgment and remand with instruction that, pursuant to RCW 4.16.160, the statute of limitations does not bar the claim asserted by the PFD and the Mariners.<sup>7</sup>

RESPECTFULLY SUBMITTED thisday of September, 2007.

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7. In the alternative, if the Court were to conclude that disputed issues of fact prevent the Court from ruling in favor of the PFD and the Mariners as a matter of law, they request that the Court reverse and remand to allow for HK's affirmative defense to be decided by the trier of fact. Where the facts material to the affirmative defense of statute of limitations are in controversy, summary judgment is inappropriate. Here, for example, if the Court believes there is disputed evidence on the issue of whether the Excess Revenues Fund exists and will be used to reimburse the Mariners, and that the dispute is material, the proper remedy would be to provide for a full factual hearing on HK's defense.

PROOF OF SERVICE

I hereby certify that on the 26th day of September, 2007, I mailed a true and correct copy of the foregoing document titled Reply Brief of Appellants to counsel of record at the following addresses by depositing the envelope in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

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EXECUTED at Seattle, Washington this 26th day of September,  
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Cindy Bourne

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