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No. 59823-6-I

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

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.

BRIEF OF APPELLANTS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington State Major League Baseball Stadium Public Facilities District (the "PFD") and its assignee, the Baseball Club of Seattle, L.P. (the "Mariners"), brought this action to recover damages resulting from defective construction work by Huber, Hunt & Nichols-Kiewit Construction ("HK"), a general contractor that received hundreds of millions of dollars for construction of Safeco Field. The PFD and the Mariners allege that HK did not properly coat the steel beams at the publicly-owned ballpark and that its defective work has required extensive corrective measures, for which they have paid over \$3.0 million to date.

The trial court accepted HK's argument that, because the PFD and Mariners sued seven years after substantial completion, the applicable statute of limitations barred any remedy for HK's faulty work, and it dismissed their claims. In so doing, the trial court denied the PFD the benefit of RCW 4.16.160, which exempts from the statute of limitations claims brought for the benefit of the State. The PFD and the Mariners now ask this Court to reverse that decision and reinstate their claims.

The Washington Legislature long ago decided that statutes of limitation would *not* apply to actions brought for the benefit of the state. *See* RCW 4.16.160. According to the Supreme Court, this means that limitations periods do not limit actions brought by a municipality that "arise out of the exercise of powers traceable to the sovereign powers of the state which have been delegated to the municipality." *Washington*

Public Power Supply System v. General Elec. Co., 113 Wn.2d 288, 293, 778 P.2d 1047 (1989) Here, the Supreme Court has held that construction of Safeco Field fell "within the general police power of the State," which the Court characterized as "an attribute of sovereignty." *CLEAN v. State*, 130 Wn.2d 782, 804-05, 928 P.2d 1054 (1996).

The PFD and the Mariners seek to recover for defects in a public property constructed with public dollars to implement sovereign purposes. As explained below, any recovery in this lawsuit will benefit the PFD and enhance its ability to maintain, refurbish, and improve the public asset. Accordingly, under RCW 4.16.160, HK cannot invoke the protection of the statute of limitations to insulate it from liability for its defective work.

II. ASSIGNMENT OF ERROR

The trial court erred in granting summary judgment in favor of HK, dismissing the PFD's and the Mariners' claims as barred by the relevant statute of limitations.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the statute of limitations applies to claims asserted by the PFD, a municipal corporation formed pursuant to Washington statute to implement the State's sovereign purpose of constructing a major league baseball stadium, where success on the PFD's claims will facilitate the State's goals by preserving resources for the maintenance and preservation of the public asset created to further the State's purposes.

IV. STATEMENT OF THE CASE

A. The Parties

The Washington State Major League Baseball Public Facilities District (the "PFD"), a Washington municipal corporation, developed and owns Safeco Field. The PFD owes its existence to legislation passed at a special session of the Legislature called by Governor Lowry in 1995 for the purpose of committing State resources to the construction of a state-of-the-art baseball stadium. On October 17, 2005, the Legislature passed EHB 2115 (the "Stadium Act"), which provided a mechanism for financing stadium construction through a combination of state and local taxes, as well as some private money. *See CP 256-273* (Laws of 1995, 3rd Spec. Sess., ch. 1). On October 24, 1995, the King County Council implemented the Stadium Act by adopting Ordinance No. 12000, which created the PFD and adopted a plan for the development of Safeco Field. *CP 275-286*.

The Baseball Club of Seattle, L.P. (the "Mariners"), owns and operates the Seattle Mariners, who play their home games at Safeco Field. Under a "Ballpark Operations and Lease Agreement" (the "Lease") entered into with the PFD in 1996, *see CP 298-413*, the Mariners agreed to perform maintenance and repair of Safeco Field, including any repairs "necessitated by any ... defects in construction or design," so as to maintain the facility's status as a first class major league ballpark. *CP 319* (Lease § 3.2, "Operations and Maintenance"); *336-37* (Lease § 7.1,

"Major Maintenance and Capital Improvements"). The PFD, however, has agreed to reimburse the Mariners for "unanticipated" maintenance and capital improvement expenses, including expenses incurred in repairing defective work, from an "Excess Revenues Fund," which will be created from admissions tax revenues after retirement of bonds issued for construction of the parking garage adjacent to Safeco Field. See CP 339 (Lease § 7.2.3, "Excess Revenues Fund").

Huber, Hunt & Nichols-Kiewit Construction ("HK") is a joint venture composed of two of the nation's largest construction companies, Hunt Construction Group and Kiewit Construction Company. HK successfully bid to build the new major league baseball stadium that would eventually be named Safeco Field. On May 6, 1996, the PFD executed a contract (the "Construction Agreement") with HK, defining its obligations in connection with construction of the stadium. CP 45-102. This case revolves around HK's alleged breach of that agreement.

B. The Defects in HK's Work

The Construction Agreement required HK to apply an intumescent coating system to Safeco Field's enormous quantities of exposed structural steel beams and columns.¹ In particular, Section 07252 of the Construction Agreement's specifications required HK to apply the coating in three layers, in this sequence: (1) apply a primer to the raw steel at the

An "intumescent" coating swells as a result of heat exposure, increasing in volume and decreasing in density. Intumescent function as valuable components in passive fire protection systems.

place of fabrication; (2) spray the intumescent product on the beam or column after installation; and (3) paint the beam or column to achieve the desired aesthetic. CP 462-66; *see* CP 441-42.

In 2005, the Mariners discovered a catastrophic failure in the intumescent coating system caused by a latent defect in HK's work. CP 442-43. Following an extensive investigation, the Mariners concluded that the system had failed between the primer layer and intumescent coating layer and that the failure had resulted from HK's use of an improper primer that was incompatible with the overlain intumescent coating product. As a result of HK's error, the intumescent product separated away from the beam or column. CP 444. The failure did *not* result from normal wear or tear or exhaustion of useful life. *Id.*

The coating failure first manifested itself in visible "blisters" on the structural steel members, which sounded hollow when tapped. CP 442, 444. The blisters appeared isolated to the naked eye, leading the Mariners and the PFD initially to believe that they might be able to limit repairs to spot remediation of specific observed problems. CP 442. When the repair work began, however, the Mariners discovered defects in the intumescent coating far more extensive than first believed. CP 444-45. In fact, during repairs, removal of a blister routinely caused the intumescent product to sheet off an entire column or beam, not just from the immediate site of the blister. CP 444-45.

The Mariners advanced more than \$2.45 million to pay for the first phase of repair, which covered approximately 29,600 square feet of structural steel beams and columns. CP 445. In addition, the Mariners have advanced in excess of \$550,000 on the second phase of repair, which they had not completed by the time of the proceedings below. CP 446.

C. The PFD's Responsibility for the Cost of HK's Faulty Work

Although the Mariners have advanced funds to correct the flaws in HK's work, the PFD remains ultimately responsible for those costs. The PFD's responsibility derives from the statutes, ordinances, and agreements that govern the relationships between the PFD and the Mariners.

1. Excess Revenues and Unanticipated Capital Costs

The Stadium Act authorized King County and the State of Washington to finance the lion's share of the costs of constructing a new baseball stadium. In particular, the Stadium Act authorized counties with a population of "one million or more" to issue bonds to "acquire, construct, own, and equip [a] baseball stadium." CP 262. The Stadium Act earmarked certain state taxes and authorized counties to implement municipal taxes to repay these bonds, including an admissions tax on events at the stadium; taxes on the "retail sale or use within the county by restaurants, taverns, and bars of food and beverages"; and taxes on retail car rentals. CP 257-61 (defining "State Contribution"); CP 261-66 (authorizing "Local Funding").

Under the Stadium Act, the Legislature directed that revenues from the authorized local taxes, including admissions taxes, "be used for the purpose of principal and interest payments on bonds" issued for stadium construction. CP 266 (Stadium Act § 203(3)(a)) (referring to use of admissions tax). The Legislature provided that the local car rental and food and beverage taxes would sunset upon repayment of the bonds issued for ballpark construction. CP 264 (Stadium Act § 201(9)). If admissions tax revenues exceed the amount necessary to pay the principal and interest on the bonds, however, the Legislature directed that any revenue in excess of the amount necessary to retire the bonds early "shall be placed in a contingency fund which *may only be used to pay unanticipated capital costs on the baseball stadium*, excluding any cost overruns on initial construction." CP 266 (Stadium Act § 203(3)(a), codified at RCW 36.38.010) (emphasis added). *See* King County Code § 4.31.010 (providing for use of admissions tax revenues "for such other purposes as are permitted by RCW 36.38.010").

2. The Agreements to Reimburse the Mariners for Unanticipated Capital Costs

Effective December 23, 1996, the PFD and the Mariners entered into the Lease, which sets forth the parties' rights and obligations with respect to the operations, maintenance, and periodic renewal of Safeco Field. *See* CP 298-413. Under Article 7 of the Lease, the Mariners agreed to undertake any work "reasonably required to be performed in and about the Leased Premises . . . to repair, restore, or replace components of the

Leased Premises necessitated by any damage, destruction, ordinary wear and tear, *defects in construction or design*, or any other cause, to the condition required for consistency with the " standards applicable to first class major league ballparks. CP 336-37 (emphasis added).

Pursuant to the directive in the Stadium Act, however, the PFD agreed to fund "unanticipated" maintenance and capital improvement expenses from any "excess revenue," i.e., from admissions tax revenues collected after retirement of the bonds to which they had been dedicated:

Excess Revenues Fund. To the extent that the First Admissions Tax Revenues are no longer required to make principal and interest payments on the Parking Bonds ("Excess Revenues"), the Parties agree that such Excess Revenues will be contributed to and retained in a segregated fund (the "Excess Revenues Fund") and will remain the property of the PFD. ... *The Excess Revenues Fund will be managed by the PFD and shall be used by the PFD, on a first-dollar basis, to fund unanticipated Major Maintenance and Capital Improvement Expenses which the Club would otherwise be obligated to pay under this Article 7.*²

CP 339 (emphasis added).

In February 2001, the PFD and the Mariners clarified the use of excess revenues as part of their Project Closeout and Settlement

² As the quoted passage suggests, the PFD pledged admissions tax revenues to the repayment of bonds issued to construct a parking garage adjacent to Safeco Field, i.e., "the Parking Bonds."

Agreement ("Closeout Agreement"), which they executed to resolve disputes arising out of the development and construction of Safeco Field. CP 199-216. Among other things, the Closeout Agreement clarified the Mariners' right to be reimbursed for expenses they advanced for unanticipated "Major Maintenance and Capital Improvement Expenses" (referred to as "Unanticipated Capital Costs"). CP 201. Under Section 3(a) of the Closeout Agreement, the PFD agreed to reimburse the Mariners from the Excess Revenues Fund for expenses incurred in making repairs to the facility, other than those arising from "(A) normal aging, (B) normal wear and tear, or (C) scheduled replacement at or after the normally expected range of life expectancy." CP 201.

To avoid any doubt, the parties made clear that costs incurred in repairing defective construction (i.e., costs incurred in "repair or replacement of defective or deteriorating components or materials whose life expectancy has been shortened by improper design or installation") would be considered "Unanticipated Capital Costs" subject to "reimbursement ... from the Excess Revenues Fund as a matter of right." CP 201 (Closeout Agreement §§ 3(a), 3(b)). Recognizing that the PFD first must use admissions tax revenues to retire bonds, the Closeout Agreement provides that all Unanticipated Capital Costs, together with interest at an agreed rate, "shall be paid or reimbursed from the Excess Revenues Fund, as and when funds become available." CP 201 (Closeout Agreement § 4(a)).

3. The PFD's Obligation to Reimburse the Mariners for Repair of HK's Defective Work

Pursuant to the Lease and the Closeout Agreement, the PFD and the Mariners have determined that the expenses associated with repair of HK's defective construction constitute "unanticipated capital costs." CP 415-16. As with all Unanticipated Capital Costs, the Mariners carry the costs associated with the repair of the intumescent paint system as an account receivable in an "Unanticipated Capital Cost Receivable" ledger account. *Id.* Conversely, the PFD carries the cost associated with the repair as a payable under the Excess Revenue Fund. *Id.* As a result, if the PFD and the Mariners do not recover repair costs from HK in this action, then the PFD must use the Excess Revenues Fund to repay the Mariners, with interest, for all expenses associated with the repair of the intumescent coating system. *See* CP 201 (Closeout Agreement § 4(a)).³

D. Course of Proceedings

On August 14, 2006, the PFD and the Mariners sued HK and its two members, Hunt Construction Group, Inc., and Kiewit Construction Company.⁴ CP 1-8. The PFD and the Mariners alleged that HK breached

The PFD in the Closeout Agreement assigned the Mariners its rights to pursue claims against parties responsible for defects in the stadium, including HK. *See* CP 205. The PFD also assigned the Mariners "the right (but not the obligation) to prosecute any Construction Claim in the name of the PFD" under Section 7(e) of the Closeout Agreement. CP 205. Any recoveries under assigned claims come to the PFD, which then reimburses the Mariners to the extent the recoveries relate to reimbursable costs. CP 206 (Closeout Agreement § 7(e)); CP 202 (Closeout Agreement § 5(d)).

⁴ Before suit, the Mariners sent HK a notebook detailing the legal and factual basis of the claim and inviting dialogue to resolve the matter. Despite having

the Construction Agreement by failing to execute the construction at Safeco Field in accordance with the contract documents and specifications as they pertained to the intumescent coating system on the structural steel members, and sought to recover all costs and expenses associated with the repair of the defective work. CP 1-8.

HK filed its Answer on October 13, 2006. CP 9-15. Among other things, HK alleged as an affirmative defense that the claims of the PFD and the Mariners were "time barred by the Statute of Limitations." CP 12.

HK later brought a motion for summary judgment as to all claims asserted by, the PFD and the Mariners on the basis that they "failed to file their complaint within the six-year statute of limitations for breach of contract." CP 177-92. The trial court granted HK's motion in an Order Granting Defendants' Motion for Summary Judgment re Time-Barred Claims (the "Order") dated March 23, 2007. CP 502-04.

The PFD and the Mariners filed a timely Notice of Appeal from the Order on April 9, 2007. CP 492-97. HK filed a timely conditional Notice of Cross Appeal on April 19, 2007, seeking review of the dismissal of HK's third party claims in the event that this Court reverses the trial court's dismissal of the PFD's and the Mariners' claims. CP 498-504.

V. ARGUMENT

This Court applies a de novo standard in reviewing the trial court's ruling on summary judgment. *See Go2Net, Inc. v. FreeYellow.com, Inc.*,

collected hundreds of millions of dollars in public funds for the construction of Safeco Field, HK did not bother to respond. CP 5, 224.

158 Wn.2d 247, 252, 143 P.3d 590 (2006). Because HK did not have a right to judgment as a matter of law, this Court should reverse.

A. Statutes of Limitation Do Not Restrict Claims Brought by Municipal Corporations Arising from Actions in Their Sovereign Capacity.

Municipal corporations have a dual nature. On one hand, they "assist in the government of the state as an agent of the state, often referred to as an arm of the state, and to promote the public welfare generally." *Washington Public Power Supply System v. General Elec. Co.*, 113 Wn.2d 288, 295-96, 778 P.2d 1047 (1989) ("*WPPSS*"). On the other, they exist 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.* The cases commonly refer to these dual purposes as "sovereign" (to describe delegated state functions) and "proprietary" (to describe the municipality's internal corporate functions).

Under Washington law, statutes of limitation have no bearing on claims asserted by a municipality that arise out of its exercise of delegated sovereign powers. *See WPPSS*, 113 Wn.2d at 295-96; *Bellevue Sch. Dist. No. 405 v. Brazier Const. Co.*, 103 Wn.2d 111, 115-116, 691 P.2d 178 (1984). Conversely, limitations periods apply to municipal corporations acting in a proprietary capacity in the same way that they apply to private litigants. RCW 4.16.160 codifies this distinction:

The limitations prescribed in this chapter shall apply to actions brought in the name or

for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, *there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state ...* (Emphasis added.)

To determine whether a municipality's lawsuit falls within this exemption, a court must examine the "nature and character" of the municipal conduct giving rise to the claim. *WPPSS*, 113 Wn.2d at 292. The Supreme Court explained the determinative test as follows:

[M]unicipal actions are brought "for the benefit of the state" when those actions arise out of the *exercise of powers traceable to the sovereign powers of the state* which have been delegated to the municipality.

Id. at 293 (emphasis added). Here, as explained below, the PFD's lawsuit against HK arises out of the construction of Safeco Field and the PFD's exercise of powers traceable to the State's sovereign powers.

B. The Supreme Court Has Held That the Construction of Safeco Field Was an Exercise of Sovereign Power.

The PFD built Safeco Field under an express delegation of the State's sovereign police power, and it paid for the construction of Safeco Field largely with state-authorized tax revenues.

A municipal entity acts in its sovereign capacity when it exercises delegated police powers. *See CLEAN v. State*, 130 Wn.2d 782, 804-805,

928 P.2d 1054 (1996). "[P]olice power by its very nature is governmental and its exercise, whether by state or municipality, must always be regarded as done in a governmental capacity." E. McQuillin, MUNICIPAL CORPORATIONS § 24:2 (3d ed.). As the Washington Supreme Court explained in *Oceanographic Commission v. O'Brien*, 74 Wn.2d 904, 447 P.2d 707 (1968):

However broadly or particularly the term sovereign power may be defined, *it is certain that, among other attributes, it embraces an exercise of the government's inherent police power*, which, in turn, and by ordinary definition, extends to the preservation of the public health, safety, and morals . . .

Id. at 911 (emphasis added) (citing *Clark v. Dwyer*, 56 Wn.2d 425, 353 P.2d 941 (1960); *State v. Dexter*, 32 Wn.2d 551, 202 P.2d 906 (1949)). Put another way, "[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'tl 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).

The police power has a broad reach, extending to "all those measures which bear a reasonable and substantial relation to promotion of

the general welfare of the people." *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980); *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"). It "exists without declaration, the only limitation upon it being that it must reasonably tend to promote some interest of the State, and not violate any constitutional mandate." *CLEAN*, 130 Wn.2d at 805. Statutes of limitations therefore do not bar municipal claims arising out of an exercise of delegated police powers. *See, e.g., Young Elec. Sign Co. v. State ex. rel. Winder*, 135 Idaho 804, 25 P.3d 117, 123 (2001) ("statutes of limitation do not bar actions, such as this one, done in furtherance of the exercise of police power").⁵

Applying these tests, the Washington Supreme Court has held that the development of Safeco Field arose directly from an exercise of the State's sovereign police power. In *CLEAN*, a citizens' group challenged the constitutionality of the Stadium Act, arguing (among other things) that the Act's emergency clause improperly constrained the constitutional right to a referendum. Specifically, the group argued that the Act - contrary to the Stadium Act's express emergency provision - was "not necessary for the immediate preservation of the public peace, health or safety" and thus

⁵ HK has recognized that actions taken pursuant to the state's "police power" are within the attributes of sovereignty under Washington law. *See CP 184*.

did not qualify as a legitimate exercise of the State's police power to address an imminent threat.⁶ *See CLEAN*, 130 Wn.2d at 803.

In rejecting this argument, the Court in *CLEAN* engaged in a two-step inquiry. The Court first held that the Stadium Act, and its authorization of construction of a major league ballpark, represented a valid exercise of the State's sovereign police power. The Court began by explaining that it had interpreted acts to protect "public peace, health or safety" "as being synonymous with an exercise of the State's `police power.'" *CLEAN*, 130 Wn.2d at 804. The Court summarized the State's explanation of why "the Stadium Act [was] a proper exercise of the State's police power," noting the State's claim that "the existence of a major league baseball team in King County provides jobs, stimulates the economy of King County and the state, provides recreational activities for all citizens of the state as well as visitors, and contributes positively to the fabric of the community at large." *Id.* at 805. The Court found ample evidence in the legislative record to show a statewide benefit:

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

⁶ Section 310 of the Stadium Act provides that "[t]his act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately." CP 273.

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 is 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).

Although *CLEAN* did not rely on this point, the Legislature also delegated state sovereign taxing authority in the Stadium Act. The sovereign's authority encompasses all rights that "are traceable to and rest in the sovereign power of taxation." *Gustaveson v. Dwyer*, 83 Wash. 303, 310, 145 P. 458 (1915); *see also Allis-Chalmers Corp. v. City of North Bonneville*, 113 Wn.2d 108, 112, 775 P.2d 953 (1989) (holding that statute of limitations did not apply to City's counterclaim for payment of business and occupation tax); *City of Tacoma v. Hyster*, 93 Wn.2d 815, 613 P.2d 784 (1980) (holding that the City of Tacoma acted in a sovereign capacity in collecting taxes). The Stadium Act authorized King County to create the PFD. *See* CP 266-67 (Stadium Act § 301). Moreover, the Stadium Act specified taxes to fund construction of Safeco Field and provided that certain of those tax revenues could be used only for the "purpose of principal and interest payments on bonds" issued by the county to "acquire, construct, own, remodel, maintain, equip, reequip, repair, and operate a baseball stadium." *See* CP 262-66. Here, because the PFD funded construction of the stadium through various state and local taxes imposed pursuant to state taxing authority (taxes that resulted in payment of hundreds of millions of dollars to HK), the PFD constructed Safeco Field pursuant to state-delegated sovereign tax powers.

Having concluded that construction of the new major league stadium fell within the State's sovereign police power, the Court in *CLEAN* turned to the second part of its inquiry, i.e., the "more knotty" question of whether the Stadium Act addressed an emergency and was necessary for the "immediate" preservation of public peace, health or safety. After analyzing the Act, its legislative history, and the circumstances surrounding its passage, the Court held that the Legislature had passed the Stadium Act in response to "a clear and present danger that this State's existing major league baseball franchise, the Seattle Mariners, would depart this state if prompt action was not taken" to build a new stadium. *Id.* at 808. The Court described the significance of that "clear and present danger" as follows:

The specter of this loss that was a circumstance that the Legislature reasonably could believe would result in a loss of jobs, tax revenue, recreational opportunities, while at the same time diminishing the quality of life for a substantial number of this state's citizens.

CLEAN, 130 Wn.2d at 809. In sum, because the Stadium Act addressed an emergency within the State's sovereign power, the Court found that the Legislature properly had included an emergency clause, which meant that the Act was not subject to referendum. *See Brower v. State*, 137 Wn.2d 44, 73, 969 P.2d 42 (1998) (characterizing *CLEAN* as holding "that construction of a major public sports stadium is a proper exercise of the

State's police power" and that Stadium Act "was necessary for the immediate preservation of the public peace, health or safety").

C. The PFD and the Mariners Assert Their Claims for the Benefit of the State.

CLEAN thus establishes that the PFD constructed Safeco Field in a delegated exercise of the State's police power, which "is an attribute of sovereignty." *CLEAN*, 130 Wn.2d at 804-05. Given that holding, the only remaining question is whether the PFD brought its claims against HK "for the benefit of the state," as RCW 4.16.160 requires.

On that point, the record leaves no doubt. The PFD seeks to recover for defective work on the very facility envisioned by the Stadium Act to address an issue of statewide concern. The Stadium Act requires the PFD to use excess admissions tax revenue to pay unanticipated capital costs associated with Safeco Field. CP 266. Under Paragraph 7.2.3 of the Lease, the PFD and the Mariners agreed that admissions tax revenues in excess of the amounts required to pay principal and interest on the bonds used to fund construction of the Safeco Field parking structure will be "contributed to and retained" in an "Excess Revenues Fund." CP 339. The parties further agreed that the Excess Revenues Fund "shall be used by the PFD . . . to fund unanticipated Major Maintenance and Capital Improvement Expenses." CP 339. Finally, the Closeout Agreement clarifies the Mariners right to reimbursement from the Excess Revenues Fund: under Section 3, the cost of fixing defective work "shall be considered an Unanticipated Capital Cost" and the Mariners are "entitled

to reimbursement" for such Unanticipated Capital Costs from the Excess Revenues Fund "as a matter of right." CP 201 (Closeout Agreement § 3).

In short, either HK will pay to correct its errors or the PFD will use tax revenues to reimburse the expenses incurred to repair HK's faulty work. Accordingly, by seeking recovery from HK in this action, the PFD and the Mariners would preserve excess revenues for use on other improvements and repairs to Safeco Field, enhancing the asset that lies at the heart of the State's delegation of sovereign authority - and benefiting the State.⁸ Given the Supreme Court's holding in *CLEAN*, the statute of limitations cannot bar the PFD's claims arising out of HK's defective work on Safeco Field.

D. Case Law under RCW 4.16.160 Supports Exempting the PFD and the Mariners from Application of the Statute of Limitations.

Even if this Court did not have the benefit of *CLEAN* (which should dispose of this appeal), Washington courts consistently have held

⁸ For these purposes, it does not matter that the Mariners have joined in this lawsuit in their capacity as assignee of the PFD's claims; instead, the only question is whether the claim would benefit the state. In *RCR Services Inc. v Herbil Holding Co.*, 229 A.D.2d 379, 645 N.Y.S.2d 76 (N.Y. App. Div. 1996), a New York court addressed a similar factual situation and held that the otherwise applicable state statute of limitations did *not* bar a private party's action to foreclose a mortgage, assigned to the private party by the Department of Housing and Urban Development ("HUD"). The court noted that a state statute of limitations does not bar the federal government from bringing an action "to enforce public rights or protect the public fisc." It continued: "Here, the plaintiff, although not the Federal government, has submitted evidence sufficient to determine as a matter of law that it is prosecuting its claim as assignee/agent of [HUD] and that the ultimate benefits from the foreclosure will flow to HUD." *Id.* at 380.

that municipal activities similar to the PFD's activities here arise out of the exercise of delegated sovereign power and that, as a result, the statute of limitations does not bar claims arising out of those activities. The Supreme Court in *WPPSS* set forth the following considerations to assist in determining whether a municipality's claim arises out of acts in a sovereign capacity and therefore falls outside the statute of limitations under RCW 4.16.160:

[We] 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.

Id. at 296.

Applying these principles, the Ninth Circuit in *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565 (9th Cir. 1994), for example, held that the Port of Tacoma exercised delegated sovereign power when it leased logyards to private entities. The court noted that the Washington constitution provided that areas designated by the port "shall be reserved for landings, wharves, streets and other conveniences of navigation and commerce"; that a state statute "contemplates the development of commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements,' by the port districts"; and that

"[n]on-monetary concerns" motivated the Port in leasing the logyards, in that it "implemented part of its comprehensive harbor improvement plan." *Id.* at 1582. When the Port sued to recover cleanup costs under CERCLA related to slag used at the leased logyards, the Ninth Circuit concluded that the Port had brought its claim in its sovereign capacity for the benefit of the State and that, as a result, the "statute of limitations does not run against it." *Id.* at 1581-82.

Similarly, in *Bellevue School District No. 405 v. Brazier Construction Co.*, 103 Wn.2d 111, 691 P.2d 178 (1984), the Washington Supreme Court analyzed whether the Bellevue School District exercised sovereign power when it built a school building. The Court noted that the duty and power to educate the people constituted "inherent qualities of sovereignty." *Id.* at 115. It characterized the construction of a school building as "incidental to and a part of the state's overall duty to provide public education for the citizens of the state" and concluded that the "operation of a high school building by a school board is a governmental function." *Id.* at 116 (quoting *Unified Sch. Dist. 490 v. Celotex Corp.*, 629 P.2d 196 (Kan. Ct. App. 1981)). Thus, pursuant to RCW 4.16.160, the Court held that the statute of limitations did not bar the school district from pursuing a breach of contract claim for construction defects arising out of construction work performed twenty years before.⁹ *Id.*

⁹ As *Bellevue* illustrates, RCW 4.16.160 allows municipalities to bring lawsuits long after the completion of a municipal project, a risk well-known to contractors who do business with public entities. For example, a King County Superior Court recently allowed a public owner to bring suit against a

Like the Port's logyard-leasing activities in *ASARCO* and the school construction project in *Bellevue*, the PFD's construction of Safeco Field occurred pursuant to a delegated sovereign power. The PFD acted under a specific grant of authority from the Legislature and King County, conferred in emergency legislation designed to benefit "the economy of King County and the state, provide[] recreational activities for all citizens of the state as well as visitors, and contribute[] positively to the fabric of the community at large." *CLEAN*, 130 Wn.2d at 805. As a result of the Supreme Court's decision in *CLEAN*, HK no longer can debate that "it is within the general police power for the State to construct a publicly owned stadium" to "improve the economy of the state" and "enhance[] the fabric of life of its citizens." *CLEAN*, 130 Wn.2d at 806. For that reason, the otherwise applicable statutes of limitation do not apply to claims of the PFD arising out of the construction of this State-authorized ballpark.

By contrast, the circumstances here do not have any of the hallmarks of a claim asserted by a municipality acting in a "proprietary" capacity, to which the statute of limitations would apply. Like the Port in *ASARCO*, the PFD had fundamentally non-monetary concerns. It has no proprietary money-making functions and does not act "as a private party would act." *See ASARCO*, 24 F.3d at 1582. Instead, as the Legislature

construction contractor *more than II years* after substantial completion. *See* "Order Denying Wick Constructors, Inc.'s Motion for Summary Judgment," *Vashon Island Sch. Dist. v. Bassetti Architects P.S., et al.*, Cause No. 05-2-09083-9 SEA (Oct. 10, 2005) (Inveen, J.). Here, the PFD and the Mariners sued just seven years after substantial completion of Safeco Field.

intended, the PFD built and owns Safeco Field *solely* so Washington and the Northwest can retain the economic, cultural, and social benefits associated with major league baseball. *CLEAN*, 130 Wn.2d at 805-06. The PFD did so by entering into a contract for the construction of Safeco Field, an act undertaken in a delegated sovereign capacity. CP 045-172; CP 298-413. This lawsuit therefore is "traceable to the sovereign powers of the state which have been delegated to the municipality." *WPPSS*, 113 Wn.2d at 293.

The cases in which courts have applied limitations periods to municipal claims under RCW 4.16.160 bear no resemblance to the circumstances here. In *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164 (E.D. Wash. 2006), for example, a federal district judge found that Moses Lake acted in a proprietary capacity when it "rehabilitated" its water system.¹⁰ The court first noted that the "operation of a 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." *Id.* at 1174 (citing *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951)). The distinction between sovereign and proprietary activities, the court explained, revolves around "whether the municipal corporation is acting as a representative of the state in the particular capacity, or is merely seeking to further its own corporate ends." *Id.* at 1174 (quoting *Port of Seattle v. Int'l*

¹⁰ The City took actions to remediate and restore its municipal water supply after discovering trichloroethylene contamination in 1988.

Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 322, 324 P.2d 1099 (1958)).

Based on these principles, Moses Lake "seemingly" conceded that the normal operation of a municipal water supply system amounted to proprietary activity. *Id.* at 1174. The City argued, however, that it undertook remediation pursuant to health and safety concerns arising out of the chemical contamination, which made its activities a "formal exercise of the City's police power." *Id.* at 1173. The court disagreed on the facts, concluding that 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 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). The district court held that the actions were proprietary and that the statute of limitations barred the City from collecting damages related to the remediation.

In contrast to *Moses Lake*, where the City acted to protect its own interests and the needs of a discrete body of local customers, the Legislature authorized the formation of the PFD to carry out statewide (even regional) purposes of a far-reaching public character. *See CLEAN*, 130 Wn.2d at 805. The PFD does not engage in a proprietary money-making activity, unlike Moses Lake in operating its municipal water company. It has no "corporate ends" other than to preserve the "existence

of a major league baseball team" in the Northwest to improve the economy of the State and enrich the quality of life of the State's citizens. The delegation of the State's sovereign power to the PFD for the purpose of saving the only major league baseball franchise west of Denver and north of San Francisco differs fundamentally from the "regulation and administration of the local and internal affairs of Moses Lake for the special benefit and advantage of the urban community embraced within the boundaries of the municipal corporation of Moses Lake." *Moses Lake*, 430 F. Supp.2d. at 1178.

Unlike the claims in *Moses Lake*, the claims here arise out of the PFD's exercise of the State's delegated sovereign powers. For that reason, the statute of limitations cannot bar these claims.

VI. CONCLUSION

For the reasons stated above, the Court should reverse the trial court's decision and reinstate the PFD's and the Mariners' claims.

RESPECTFULLY SUBMITTED this 9th day of July, 2007.

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DECLARATION OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing Brief of Appellants to be served upon the following counsel of record:

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