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

Appellants,

vs.

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

Respondents/Cross-Appellants,

vs.

LONG PAINTING, INC., a Washington corporation, HERRICK STEEL,
INC., a California Corporation

Cross-Respondents.

**BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON**

**IN SUPPORT OF RESPONDENT HUBER, HUNT & NICHOLS-
KIEWIT CONSTRUCTION JOINT VENTURE**

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I. IDENTITY OF AMICUS

The AGC has been in existence since 1922 and is the State's largest, oldest and most prominent commercial construction industry trade association. The AGC Washington chapters serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. AGC members perform both private and public sector construction and have been involved with the vast majority of high profile office, retail, industrial, highway, healthcare, utility, educational and stadium projects constructed in this state for the past 80 years.

According to a 2006 study completed by the University of Washington, more than 254,000 workers were employed by contractors, construction services and materials suppliers in the State of Washington. This represents 10.8% of the State's private sector workforce. The total payroll for construction industry jobs exceeded \$11.6 billion, which represents 11.6% of the total state non-government payroll.

In 2006, in-state business activity in the construction industry was nearly \$32.8 billion, 19% of all in-State sales. Construction industry businesses paid a total of \$2,105,960,652 to the State in Sales and B&O taxes, representing 21.1% of all payments.

As the issue before the Court has the potential to affect the interests of this important segment of the state's economy, the AGC submits this brief in support of the position of Respondents Huber, Hunt & Nichols-Kiewit Construction Joint Venture, the general contractor/construction manager for the Safeco Field project.

II. INTEREST OF AMICUS

The trial court correctly dismissed Petitioner's claims as time barred because the claims were filed beyond the six year statute of limitation.

The trial court's order should be affirmed. Respondents seek to significantly expand the definition of "for benefit of the state" by focusing on the police power used by the *legislature* to authorize *creation* of the Public Facilities District. This ignores the established test set forth in this Court's jurisprudence which examines *whether the municipality at issue is performing a sovereign or proprietary function*. Respondents' argument could conceivably apply to any municipal entity which contracts with AGC members. The net result would be to promote uncertainty in the public works construction industry, and have the effect of increasing public works construction costs because of increased, indefinite risk to public works contractors, their sureties and insurers.

III. ARGUMENT AND AUTHORITY

The dispositive issue in this case is whether the Seattle Mariners, as an assignee of the Washington State Major League Baseball Stadium Public Facilities District (the “PFD”), brought an action “for benefit of the state” by suing the Hunt-Kiewit Joint Venture, the GC/CM for the project, for alleged construction defects at Safeco Field. The Mariners and PFD contend that the action was brought for benefit of the state because the PFD exercised a delegated sovereign power of the State by contracting for the construction of Safeco Field. The Mariners erroneously assert that this issue was settled by this Court in *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996). App. Reply Br. at 1.

RCW 4.16.160 provides that statutes of limitation apply to actions brought in the name of or for the benefit of a municipality, unless, with certain exceptions, such an action is “brought in the name of, or for the benefit of the state.” This statute requires a distinction between actions taken by a municipal corporation as an agent or arm of the state, and those actions taken in a proprietary capacity. Stated differently, the exemption from the statute of limitation only applies where a municipal corporation “exercises delegated sovereign powers” of the state. *Washington Public Power Supply System (“WPPSS”) v. General Electric Co.*, 113 Wn.2d 288, 295-96, 778 P.2d 1047 (1989).

For example, in *Bellevue School District No. 405 v. Brazier Construction Co.*, 103 Wn.2d 111, 691 P.2d 178 (1984), this Court held that a school district acted as an arm of the state in carrying out its educational duties, and, as a result, the statute of limitations did not apply to an action by the district for defective construction of a school. Conversely, this Court held in *WPPSS, supra*, that a joint operating agency was not exercising delegated sovereign power in contracting for the construction of a nuclear power plant. *WPPSS*, 113 Wn.2d at 301.

CLEAN held, *inter alia*, that the enactment of the Stadium Act¹ (EHB 2115) was a valid exercise of the State's police power. *CLEAN*, 130 Wn.2d at 806-07. Contrary to the Mariners' argument, *CLEAN* did not hold that the PFD, created by King County pursuant to the Stadium Act, exercised delegated sovereign powers in constructing Safeco Field.²

¹ Laws of 1995, 3rd Spec. Sess., ch. 1.

² The Stadium Act did not direct the construction of a baseball stadium. The Act merely authorized the creation of a "public facilities district" empowered to "acquire, construct, own..." a baseball stadium. *CLEAN*, 130 Wn.2d at 791. The actual decision to create a "public facilities district" rested with King County. *CLEAN*, 130 Wn.2d at 812. The Washington State Major League Baseball Stadium Public Facilities District was enacted by King County Ordinance No. 12000 (1995) as KCC 2.38.010. The PFD's own website states:

The PFD was created in October 1995 by joint action of Washington State and King County. The State authorized King County to create the Public Facilities District to build the ballpark and identified the sources of revenue that could be used to finance it. The County voted to create the District and to use the financing package to build a Major League ballpark.

<http://www.ballpark.org/summary.htm>.

However, relying on dicta in *CLEAN*, the Mariners interpret the concept of “delegated sovereign powers” so broadly that it would encompass virtually all actions of municipal corporations. The Mariners’ argument effectively eliminates any real distinction between delegated sovereign powers and proprietary functions required by RCW 4.16.160, exempting virtually all actions by municipal corporations from the statute of limitations.

A. *CLEAN* held, *inter alia*, that enactment of the Stadium Act was a valid exercise of the State’s police power.

The *CLEAN* case involved a variety of legal challenges to the enactment of the Stadium Act. Among other issues, this Court addressed the question of whether an emergency clause in the Stadium Act violated the constitutionally protected right to referendum. Opponents argued that the Stadium Act was not “necessary for the immediate preservation of the public peace, health or safety” for purposes of Wash. Const. Art. II, § 1. *CLEAN*, 130 Wn.2d at 803.

Observing that the terms “public peace, health or safety” had been interpreted as being synonymous with an exercise of the State’s “police power,” the Court broke the question down into two issues:

- whether enactment of the Stadium Act was a proper exercise of the State’s police power; and

- whether the Stadium Act was necessary for the “immediate” preservation of the public peace, health or safety.

CLEAN, 130 Wn.2d at 805-812. Addressing the first question, the Court examined the importance of major league baseball to the economy and quality of life of King County and the State. *CLEAN*, 130 Wn.2d at 805-807. In the passage relied on by the Mariners’ in this case, the Court stated:

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 806 (italics added). Having held that enactment of the Stadium Act was a valid exercise of police power, the Court also upheld the legislature’s declaration of an emergency. *CLEAN*, 130 Wn.2d at 812.

B. The language in *CLEAN* relied on by the Mariners is dicta.

The Mariners erroneously rely on the passage quoted above as holding that “construction of the new major league stadium fell within the State’s sovereign power.” App. Br. at 18. As Hunt-Kiewit has explained, *CLEAN* addressed the manner in which the Stadium Act was *enacted* by the legislature. There was no discussion of whether a PFD created

pursuant to that Act was actually delegated sovereign powers by the State. There was no discussion of whether the eventual construction of a baseball stadium by a PFD would be an exercise of sovereign authority for purposes of RCW 4.16.160. Nor would the Court have addressed that issue without discussing its prior, key decisions regarding the issue: *Bellevue School Dist.* and *WPPSS*. Therefore, the actual holding in the portion of *CLEAN* relied on by the Mariners was that the *enactment of the Stadium Act* was a valid exercise of the State's police power. The passing reference to a general police power to "construct" a stadium is clearly *dicta*.

The Mariner's reliance on references to stadium construction in *CLEAN* violates the rule that broad language in an appellate opinion is not binding precedent where the court did not actually address an issue. *Kish v. Insurance Co. of North America*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994). "Where the literal words of a court opinion appear to control an issue but the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court..." *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996). Contrary to the Mariners' arguments, the determination in *CLEAN* that the Stadium Act was valid was *not* a determination that every action taken by the PFD would be an exercise of delegated sovereign powers.

C. The Mariners interpret “delegated sovereign powers” much too broadly.

By equating the exercise of police power in enacting legislation with the delegation of sovereign powers to a municipal corporation, the Mariners interpret “delegated sovereign powers” so broad as to effectively make the exception (RCW 4.16.160) swallow the rule (the statute of limitation). According to the Mariners’ interpretation of *CLEAN*, a municipal corporation would exercise delegated sovereign powers for purposes of RCW 4.16.160 seemingly whenever the legislation authorizing the creation of the municipal corporation is a valid exercise of the State’s police power. This expansive interpretation of “delegated sovereign powers” cannot be harmonized with the distinction between delegated sovereign powers and proprietary functions required by RCW 4.16.160.

Stated differently, under the Mariners’ analysis, as long as the legislature’s authorization of a municipal corporation is a valid exercise of the State’s police power, all of the actions of such municipal corporations would be sovereign functions. None of the actions of such municipal corporations would be proprietary. This expansive result is troubling because the test for *valid legislation* under the general police power is not particularly demanding. See *CLEAN*, 130 Wn.2d at 805 (an exercise of

the police power “must reasonably tend to promote some interest of the State, and not violate any constitutional mandate).

The Mariners’ analysis is also inconsistent with this Court’s decision in *WPPSS, supra*. Like the PFD, WPPSS was a municipal corporation created pursuant to a state statute (RCW 43.52.360). *See Chemical Bank v. WPPSS (Chemical Bank II)*, 102 Wn.2d 874, 880, 691 P.2d 524 (1984); RCW 43.52.360 (authorizing cities and public utility districts to create joint operating agencies). Presumably, that statute was a valid exercise of the State’s police power. If the Mariners’ extrapolation of *CLEAN* were correct, every action taken by WPPSS (or any other municipal corporation) would be an exercise of delegated sovereign power. But this Court squarely held that WPPSS “was *not* acting ‘for the benefit of the state, within the meaning of RCW 4.16.160’ when it entered into a contract with GE “because it was *not* exercising a delegated sovereign power.” *WPPSS*, 113 Wn.2d at 301 (emphasis added). Likewise, the PFD was *not* exercising delegated sovereign powers when it contracted with Hunt-Kiewit to serve as the GC/CM for Safeco Field.

Perhaps even more troubling is that the Mariners argue to expand the concept of “delegated sovereign powers” even further beyond established case law, *to encompass any municipal project funded by revenues from lawful taxes*. In a footnote, the Mariners assert that “the

Legislature also delegated state sovereign taxing authority in the Stadium Act.” App. Br. at 17 n.7. According to the Mariners,

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.

App. Br. at 17 n.7. Again, the Mariners’ arguments are misplaced. The cases cited by the Mariners involve the sovereign power to **collect** taxes. *Gustaveson v. Dwyer*, 83 Wash. 303, 306, 145 P. 458 (1915) (county acquired property at tax sale in the exercise of sovereign power of taxation); *Allis-Chalmers Corp. v. City of North Bonneville*, 113 Wn.2d 108, 775 P.2d 953 (1989) (statute of limitations does not apply to collection of taxes); *City of Tacoma v. Hyster Co.*, 93 Wn.2d 815, 613 P.2d 784 (1980) (city acts in a sovereign capacity when collecting taxes and is not subject to any statute of limitations). It simply does not follow from these cases that any action undertaken with tax revenues is an exercise of delegated sovereign powers. The Mariners’ arguments, if accepted, would eliminate any meaningful distinction between delegated sovereign powers and proprietary functions required by RCW 4.16.160.

This Court should reject the Mariners’ interpretation of “delegated sovereign powers” and erroneous reliance on *CLEAN*, supra. The Court should re-affirm the analytic distinction between sovereign and proprietary

functions set forth in *Bellevue School District* and *WPPSS*. Under those cases, the PFD acted in a proprietary capacity in contracting to build Safeco Field, and the Mariners' claims against Hunt-Kiewit are barred by the statute of limitations.

D. It would be inequitable and prejudicial to allow the Mariners' claims against Hunt-Kiewit to survive while barring Hunt-Kiewit's claims for indemnity against its subcontractors.

As the Court knows, construction contracts are risk allocation devices that seek to assign the risk to the party best able to control it. Just as the owner transfers risk to the general contractor (or in this case, the GC/CM), the general contractor transfers certain portions of that risk to each subcontractor for its scope of work.

If the Court accepts the Mariners' arguments, the next question for the trial court will be whether Hunt-Kiewit's claims against its subcontractors are barred by the statute of limitation. The subcontractors contend that Hunt-Kiewit's claims cannot be exempt because Hunt-Kiewit is not acting on behalf of the state.

Thus, if the Court accepts the Mariners' arguments, Hunt-Kiewit could be forced to defend against claims for defective work by its subcontractors who, at the same time, contend that such claims are time-barred. This would place a general contractor such as Hunt-Kiewit in a

highly inequitable and prejudicial position of being unable to utilize the risk transfer mechanisms set forth in its subcontracts.

This inequitable effect is particularly acute for general contractors because so much of the total work is subcontracted. Indeed, the GC/CM on a public works project is required by Washington law to subcontract at least 70% of the work. *See* RCW 39.10.390 (“The value of subcontract work performed and equipment and materials supplied by the general contractor/construction manager may not exceed thirty percent of the negotiated maximum allowable construction cost.”). Thus, if this Court accepts the Mariners’ arguments, and the trial court accepts the subcontractors’ arguments, a general contractor such as Hunt-Kiewit will be whipsawed between an owner whose claims have no time limit and subcontractors that have a complete bar. Such a result would be extraordinarily inequitable.

E. Expansion of the “For Benefit of the State” exception will increase public works construction costs.

Finally, as the Court knows, subcontractors are not the only entities that are assigned risk by general contractors on a public works project; general contractors are required by law to provide surety bonds and general liability insurance as well. And there is no such thing as a free lunch. The net effect of exposing sureties and insurers to effectively limitless risk on a broad class of public works projects performed “on

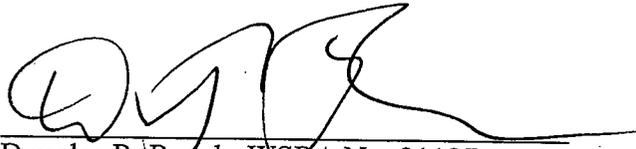
behalf of the state” will certainly be felt in the increasing premiums for such products. Such costs will inevitably be passed along to the general public through higher prices for public works projects as the true cost of the risk attendant to such projects is realized.

IV. CONCLUSION

The Court should reject the Mariners’ expansive interpretation of “delegated sovereign powers” and affirm the trial court’s dismissal of the Mariners claims.

Dated this 12th day of February, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Roach', with a long horizontal line extending to the right.

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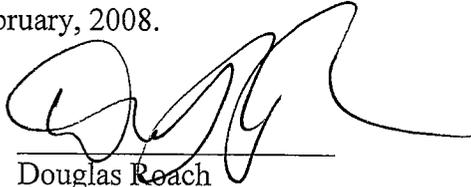
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BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

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DATED this 12th day of February, 2008.



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