

COMMENTS

Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine

I. INTRODUCTION

The Washington Supreme Court has given new life to the old, but very powerful, ultra vires doctrine.¹ In two recent decisions, *Noel v. Cole*² and *Chemical Bank v. Washington Public Power Supply System*,³ the Washington Supreme Court applied different forms of the doctrine to invalidate contracts between public entities and private parties. In *Chemical Bank*, the court used the form known as primary ultra vires⁴ in holding that Washington public utility districts and municipalities did not have statutory authority to enter into contracts that obligated them to pay for bonds sold to finance the construction of two aborted nuclear power plants.⁵ Six months earlier in *Noel*, the court applied the form of the doctrine known as secondary ultra

1. The term ultra vires is used to describe actions of public or private entities that are beyond the scope of the powers granted to them or outside the purposes for which they were created. See C. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* § 27.3 (1980). This Comment will discuss application of the ultra vires doctrine to the contract activities of public sector entities.

2. 98 Wash. 2d 375, 655 P.2d 245 (1982).

3. 99 Wash. 2d 772, 666 P.2d 329 (1983).

4. The term primary ultra vires is a hybrid of previous descriptions for the form of the ultra vires doctrine that finds authority to contract completely lacking and recovery under any theory unavailable.

[I]n so far as acts on the part of the municipality, without or beyond the power or authority conferred by law, are concerned, such acts fall, generally speaking, into two classes: those which are primarily, and those which are secondarily, *ultra vires*. In the first classification, belong such acts as a municipality has no authority whatsoever to perform; in the second classification, fall those which are within the lawful powers of the municipal corporation, but which are void because of some irregularity in the procedure leading up to the act.

Jones v. City of Centralia, 157 Wash. 194, 218, 289 P. 3, 11 (1930). See *infra* notes 16-33 and accompanying text.

5. 99 Wash. 2d at 798, 666 P.2d at 342.

vires⁶ in determining that the State Department of Natural Resources improperly exercised its authority to sell public timber when it failed to comply with provisions of the State Environmental Policy Act (SEPA).⁷

The Washington Supreme Court erred in *Chemical Bank* by misapplying the distinctions between primary and secondary ultra vires that it had articulated in *Edwards v. City of Renton*⁸ and reaffirmed in *Noel*.⁹ In the interest of consistent, fair, and logical results, the court will ultimately need to retreat from the very technical interpretation of primary ultra vires that it applied in *Chemical Bank*. Otherwise, the court may find itself splitting hairs over the exact scope of enabling legislation when the statutes and subsequent legislative acts manifest approval of the actions taken.¹⁰

II. DEVELOPMENT OF ULTRA VIRES IN WASHINGTON

A. Introduction

Municipal corporations, public utility districts, and state agencies possess only the powers granted in their enabling legislation.¹¹ Legislatures, as creators of these subordinate units of government, may enlarge, abridge, qualify, or even repeal the

6. Secondary ultra vires is a hybrid of previous descriptions for the form of the doctrine in which the public entity has authority to act, but carries out its action in an improper manner. Recovery is possible under a quasi-contract theory. See *Jones v. City of Centralia*, 157 Wash. 194, 218, 289 P. 3, 11 (1930). See *infra* notes 34-39 and accompanying text.

7. 98 Wash. 2d at 380, 655 P.2d at 249. The *Noel* decision was based upon the court's analysis of the secondary ultra vires doctrine in *Edwards v. City of Renton*, 67 Wash. 2d 598, 409 P.2d 153 (1965).

8. 67 Wash. 2d 598, 603, 409 P.2d 153, 157 (1965). See *infra* notes 75-82 and accompanying text.

9. *Noel*, however, was consistent with the court's historic approach to the doctrine. See *infra* notes 83-102 and accompanying text.

10. This Comment will argue that the court's narrow interpretation of the language authorizing municipalities and public utility districts to acquire electric energy that led to its finding of primary ultra vires was inconsistent with its previous approach to interpreting municipal power.

11. "Municipal corporations are political subdivisions of the state, and in the absence of constitutional restrictions, the legislature has absolute control over the number, nature and duration of the powers conferred and the extent of the territory over which they may be exercised." C. RHYNE, *supra* note 1, § 4.2. For example, WASH. REV. CODE § 35.01.010 (1983) defines a first class city as one having at least twenty thousand people at the time of its organization or reorganization. WASH. REV. CODE § 35.22.010 (1983) requires first class cities to be organized and governed in accordance with WASH. CONST. art. XI, § 10. WASH. REV. CODE § 35.22.020 (1983) requires first class cities to provide for the organization and performance of their powers in a charter.

powers of municipal corporations.¹²

Historically, courts have used the *ultra vires* doctrine as a tool to control the actions of public entities.¹³ Contracts that exceeded the scope of an agency's legislatively granted authority were declared void and unenforceable.¹⁴ Thus, the doctrine protected citizens from the consequences of improvident acts of their government.¹⁵ The emergence of two different forms of the doctrine, however, created some confusion. An analysis of how the doctrine is applied must begin with an explanation of each form.

B. *Primary Ultra Vires*

The Washington Supreme Court has defined a primary *ultra vires* act as one that a municipality has no authority whatsoever to perform.¹⁶ Since public entities derive authority from state constitutions and statutes, acts that are primary *ultra vires* are outside the scope of the pertinent authorizing instrument.¹⁷

12. C. RHYNE, *supra* note 1, § 4.2.

13. 1A C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 10.13 (1984). Two reasons why the *ultra vires* doctrine is used to control the work of public entities are: (1) courts are afraid that municipalities will expand their own powers by contract rather than by legislative grant, and (2) courts fear that public entities will abuse their contracting power and subject taxpayers to extravagant risks and liabilities.

14. C. RHYNE, *MUNICIPAL LAW* § 10-3 (1957). Rhyme describes a municipal obligation incurred without a previous appropriation to pay for it, as an example of a contract that is void and unenforceable.

15. See *State v. City of Pullman*, 23 Wash. 583, 590, 63 P. 265, 267 (1900). Rivalries between communities for development during the settlement of the West in the late nineteenth century spawned many schemes that impoverished some towns and bankrupted others. Communities attempted to avoid paying for disadvantageous arrangements by pleading that their actions were *ultra vires* and therefore unenforceable. Early in Washington's history, the state supreme court recognized the dangers of unauthorized municipal actions. It is perhaps ironic that *Pullman*, one of the first applications of the *ultra vires* doctrine, shielded a municipal corporation from an unauthorized contract with the state itself. *Id.* at 584, 63 P. at 265. Though the total value of the contract was only \$2,100, the decision illustrates the importance of the doctrine in limiting the exercise of municipal power.

16. See *Jones v. City of Centralia*, 157 Wash. 194, 218, 289 P. 3, 11 (1930) (court refers to municipal actions that are primary or secondary *ultra vires* to distinguish between acts that a municipality has no authority to perform and those acts within its lawful powers, but that are void because of an illegality in the procedures leading up to the act). See *supra* note 4.

17. 10 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 29.10 (3d ed. 1981) (refers to such contracts as *ultra vires* "according to its strict and true construction"). Another commentator has stated that "[c]ontracts which are *ultra vires* in the strict or proper sense are those which are not within the power of the municipality to make under any circumstances, as distinguished from those . . . which are not entered into in a

Consequently, a primary *ultra vires* contract is void and unenforceable.¹⁸ No performance by either party can give an unlawful contract validity.¹⁹ More important, a party to a primary *ultra vires* contract is foreclosed from seeking any quasi-contractual relief.²⁰

proper manner." C. RHYNE, *supra* note 14, § 10-3.

18. "Contracts which are *ultra vires* in the strict sense of that term are wholly void." C. RHYNE, *supra* note 1, § 27.3.

19. 10 E. McQUILLIN, *supra* note 17, § 29.10. The view taken by the Supreme Court of the United States, and the only view that is consistent with legal principles, is as follows:

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

Central Transp. Co. v. Pullman Palace Car Co., 139 U.S. 24, 59-60 (1890).

In finding that an agreement was void as beyond the power of a water district and contrary to the state constitution, one Washington court remarked:

Washington follows the rule that if a municipality contracts for a public improvement . . . the agency providing the improvement is entitled to recover its cost even though the contract is *ultra vires*. However, no recovery is allowed if the contract is *malum in se*, *malum prohibitum*, or manifestly violative of public policy. We hold the agreement in this case was both *malum prohibitum* and against public policy (citation omitted). Therefore recovery of the \$12,000 cannot be obtained.

Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd., 29 Wash. App. 207, 211, 627 P.2d 1010, 1013 (1981). See also Washington Educ. Ass'n v. Smith, 96 Wash. 2d 601, 610, 638 P.2d 77, 82 (1981) ("[E]stoppel will not be applied against a governmental body whose acts are *ultra vires* and void. . . . [W]e find that the contract was *ultra vires*. Therefore, the respondent is not bound."); Paul v. City of Seattle, 40 Wash. 294, 303, 82 P. 601, 605 (1905) ("[W]e conclude that no implied contract between the appellant and the city existed, and also that no contract was ratified by the city. . . . [W]e believe the better weight of modern authority is to the effect that no . . . such estoppel exists.").

20. 10 E. McQUILLIN, *supra* note 17, § 29.10. According to McQuillin:

The fact that the other party to the contract has fully performed his part of the agreement, or has expended money on the faith thereof, does not estop the city from asserting *ultra vires*, nor is a municipality estopped to aver its incapacity to make a contract by receiving benefits thereunder. That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no capacity to make the contract or where it was made in express violation of law. Where a municipal corporation exceeds its powers in executing bonds, its officers cannot by agreement, or by the payment of interest on such bonds, estop the city from raising the question of the legality of the issue, since the local corporation may defend on the ground that it had no legal authority to execute and issue such bonds. The fact that the municipality may have received the benefit of money raised on the bonds is immaterial.

The classic application of the primary ultra vires doctrine involves the invalidation of actions that directly contravene express constitutional or statutory provisions. For instance, a water district violated the doctrine when it obtained the support of a private developer to expand the boundaries of the district in exchange for deferring collection of an assessment.²¹ The agreement was primary ultra vires because it expressly violated the state constitution's prohibition on the lending of credit.²² Primary ultra vires has also been used to invalidate unauthorized personal service contracts to market municipal bonds²³ and to prohibit the state from making voluntary payroll deductions to the political action committee of an employee's union.²⁴ In each of these cases the party that had contracted with the public entity was denied any equitable relief.²⁵

Other primary ultra vires cases contain more subjective determinations of the public entity's authority. In *State ex rel.*

Id. § 29.104c.

21. *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 210-11, 627 P.2d 1010, 1012-13 (1981). WASH. CONST. art. VIII, § 7 prohibits municipal corporations from lending money or credit in aid of any individual or corporation except for the necessary support of the poor or infirm. *Whatcom*, 29 Wash. App. at 211, 627 P.2d at 1012.

22. *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (1981).

23. See *Stoddard v. King County*, 22 Wash. 2d 868, 880-81, 158 P.2d 78, 85 (1945) (employment arrangement offered by one county commissioner, but not formally ratified by the entire county commission, violated REM. REV. STAT. §§ 3984, 4072 (1931) and was therefore ultra vires); *Paul v. City of Seattle*, 40 Wash. 294, 82 P. 601 (1905) (city comptroller retained plaintiff to market municipal bonds without a valid city council ordinance, in violation of art. 4, §§ 27, 28 of the Seattle City Charter).

24. *Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 610, 638 P.2d 77, 82 (1981). The court explained that WASH. REV. CODE § 41.04.230 authorized state disbursement officials to deduct money from the salaries and wages of state employees for credit unions, parking fees, U.S. savings bonds, board, lodging, uniforms, membership dues for public employees or professors, other labor or employee organization dues, and insurance premiums. *Id.* at 604, 638 P.2d at 79. WASH. REV. CODE § 41.04.036 permitted deductions for the United Fund. WASH. REV. CODE § 41.04.233 permitted deductions for health maintenance organizations. WASH. REV. CODE § 41.04.230 also permitted deductions "for purposes clearly related to state employment or goals and objectives of the agency." *Wash. Educ. Ass'n*, 96 Wash. 2d at 605, 638 P.2d at 79 (emphasis in original). The court held that the action was ultra vires because there was no specific statutory provision authorizing deductions for employee political action committee donations. *Id.* at 610, 638 P.2d at 82.

25. See *Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 638 P.2d 77 (1981); *Stoddard v. King County*, 22 Wash. 2d 868, 158 P.2d 78 (1945); *Paul v. City of Seattle*, 40 Wash. 294, 82 P. 601 (1905); *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 627 P.2d 1010 (1981).

PUD No. 1 v. Wylie,²⁶ a public utility district attempted to acquire all of the power-generating resources of a private electric utility. The court concluded that the PUD's plan to sell \$134 million in revenue bonds was ultra vires even though the district's enabling statute authorized the acquisition of generating resources outside its boundaries. The court reasoned that the scope of the PUD's authority was limited to acquisitions that were not unreasonably large or entirely inappropriate for purposes of meeting its customers' electric energy needs.²⁷

The harsh treatment of parties who enter into primary ultra vires arrangements with public entities is grounded in fundamental common law assumptions about the difference between public and private organizations.²⁸ The acts of public agencies and municipal corporations are matters of public record, and, as such, their authority to act can be readily ascertained. Thus, all who contract with a municipal corporation are charged with constructive knowledge of the public entity's authority and limitations.²⁹ The constructive knowledge theory can be traced to

26. 28 Wash. 2d 113, 182 P.2d 706 (1947).

27. *Id.* at 147, 182 P.2d at 723. The Skagit County Public Utility District contended that it had the necessary authority under REM. REV. STAT. § 11610(d) (Rem. Supp. 1945) to purchase electric current for sale and distribution and

to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate works, plants . . . and facilities for generating electric current, . . . within or without its limits, for the purpose of furnishing said public utility district, and the inhabitants thereof and any other person, including public and private corporations, within or without its limits, with electric current for all uses.

Wylie, 28 Wash. 2d at 139, 182 P.2d at 720 (quoting REM. REV. STAT. § 11610(d) (Rem. Supp. 1945)). After an exhaustive analysis of the legislative history of the statute, the court concluded that the statute's primary purpose was to provide electricity to the utility's service area. Since Skagit PUD's customers consumed only five percent of the generating capacity that it sought to acquire, the court held that the action was inconsistent with the purpose of the act. In the court's words: "There is nothing . . . which indicates that the act was intended to give public utility districts the power to engage in business beyond their limits on the grandiose scale here contemplated. . . ." *Id.* at 147, 182 P.2d at 723.

28. "In considering contracts of public corporations the courts apply the ultra vires rule with a greater degree of strictness than in the case of private corporations inasmuch as the rights and interests of the citizens of the municipality are directly involved and the question of public policy arises." C. RHYNE, *supra* note 1, § 27.3.

29. R. WHITTEN & P. BIRDWELL, *THE CONSTITUTION AND THE COMMON LAW* 118 (1977). The denial of both contract and quasi-contract relief for parties whose contract with a public entity is held to be primary ultra vires is premised upon the fundamental difference between the private and public sectors. See C. RHYNE, *supra* note 1, § 27.3. Although corporations have long been organized and regulated under state and federal statutes, their operating procedures have not been subject to full public disclosure. By contrast, the powers, limitations, and contracting procedures of public sector entities are

English common law and has been applied in the United States for over a century.³⁰ Washington State embraced this notion long ago.³¹

Courts have consistently concluded that the need to protect citizens from the usually expensive consequences of unauthorized municipal actions outweighs the injustice wrought upon the private contracting party.³² Courts, therefore, deny equitable remedies, such as equitable estoppel, against governmental entities that commit primary *ultra vires* acts.³³

C. Secondary *Ultra Vires*

Courts apply a different form of the *ultra vires* doctrine to invalidate contracts that are within the authority of a public entity but that involve procedural irregularities in formation or

thought to be more ascertainable to contracting parties. *But see* 1A C. ANTIEAU, *supra* note 13, § 10.13:

[W]ith hundreds of cases every year litigating the existence and extent of municipal powers and with the average city attorney himself in considerable doubt as to the existence of many municipal powers, is it fair to impose upon a citizen who would serve and benefit the city the requirement of exact knowledge of the extent of municipal powers? It is suggested that it is not.

Id.

30. 6 C. FAIRMAN, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION & REUNION 1864-88, PART ONE* 932 n.54 (1971).

[T]he internal affairs of a private corporation are hidden from the outsider. With a municipal corporation authorized to issue bonds upon compliance with certain preliminaries, the practical situation is distinguishable: the petition, the giving notice, the election and the canvass of returns are matters of record open to the world.

Id. (quoting *Royal British Bank v. Turquand*, 6 E. & B. 327 (1856)).

31. In 1945 the Washington Supreme Court noted:

It is the general rule, and we have so announced, that, when dealing with an officer or officers of a municipal corporation, one must be presumed to have knowledge of the power and authority of such officer or officers, and that, when he deals with such officer or officers in a manner not in compliance with the law, he does so at his peril.

Stoddard v. King County, 22 Wash. 2d 868, 883, 158 P.2d 78, 86 (1945).

32. In arriving at this conclusion an early Washington court stated:

But we are not without precedent in our own decisions. In *Arnott v. Spokane*, 6 Wash. 442, 33 P. 1063 (1893), it was held, in common with universal authority, that, wherever a person enters into a contract with an agent of a municipal corporation, he must at his peril, ascertain the extent of such agent's authority, and if he fails to do so, he alone must suffer the consequences.

State v. City of Pullman, 23 Wash. 583, 591, 63 P. 265, 267 (1900). *Accord Stoddard v. King County*, 22 Wash. 2d 868, 158 P.2d 78 (1945).

33. *Jones v. City of Centralia*, 157 Wash. 194, 218-19, 289 P. 3, 10 (1930) (citing *State ex rel. Spring Water Co. v. Town of Monroe*, 40 Wash. 545, 82 P. 888 (1905)).

execution.³⁴ The Washington Supreme Court has described such arrangements as secondary ultra vires.³⁵

Secondary ultra vires contracts are distinguishable from their primary ultra vires counterparts because they stem from legitimate exercises of authority and the courts may afford equitable relief.³⁶ Such actions are within the substantive authority of the public entity and are undertaken in good faith for a tangible public benefit, but are executed in a statutorily deficient manner.³⁷ Equitable estoppel may be applied against a public entity that commits a secondary ultra vires act.³⁸ Thus, the public entity cannot use the doctrine to shield itself from the consequences of procedurally improper acts that are within its general authority. Although a finding of secondary ultra vires invalidates the contract, the private party often can obtain quasi-contractual relief.³⁹

The Washington Supreme Court has adopted the aforementioned distinctions in applying the secondary ultra vires doctrine. Contracts for bridge⁴⁰ and road⁴¹ construction, franchises

34. The Washington Supreme Court has stated:

This court has long recognized that in determining what acts of a governing body are ultra vires and void, and thus immune from the application of the doctrine of equitable estoppel, it must distinguish those acts which are done wholly without legal authorization or in direct violation of existing statutes, from those acts which are within the scope of broad governmental powers conferred, granted, or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means.

Finch v. Matthews, 74 Wash. 2d 161, 172, 443 P.2d 833, 840 (1968).

35. Jones v. City of Centralia, 157 Wash. 194, 218, 289 P. 3, 11 (1930).

36. "Some courts have allowed recovery on the theory of implied contract where the municipal corporation had the power to enter into the contract, but the contract was unenforceable because not in proper form or irregularly executed." C. RHYNE, *supra* note 1, § 27.3.

37. 10 E. McQUILLIN, *supra* note 17, § 29.10. "Where irregular contracts have been performed in good faith for the benefit of the public, recovery thereon is usually permitted." *Id.* McQuillin describes a secondary ultra vires contract as a contract that "is merely ultra vires and not illegal." *Id.*

38. *Id.* McQuillin explains that recovery on such contracts is allowable on the theories of ratification, estoppel, or implied contract. *Id.*

39. *Id.* The ultra vires doctrine cannot be used by a municipal corporation to avoid repaying money that it received and used. *Id.*

40. Green v. Okanogan County, 60 Wash. 309, 111 P. 226 (1910). In *Green*, the supreme court held that the county's award of a contract for bridge construction without previously advertising for bids violated REM. & BAL. CODES §§ 5585, 5680 (1910). The court held that the contract was void, but because the contract, if entered into in conformity with the statutes, would have been valid, the court permitted the contractor to retain the payments received. *Green*, 60 Wash. at 320-21, 111 P. at 230.

41. Besoloff v. Whatcom County, 133 Wash. 109, 113, 233 P. 284, 285 (1925). A subsequent oral contract for work not included in the written bid violated REM. COMP. STAT.

for the operation of street railways,⁴² and contracts for the acquisition of electric power plants⁴³ have all been recognized as beneficial public acts within the authority of the sponsoring public entity.⁴⁴ In each instance, the public entity was authorized to contract for the service provided, but it had improperly executed its authority. Nevertheless, the entities were required to pay to the private party the reasonable value of the benefits provided.

Application of the doctrine of equitable estoppel to secondary ultra vires acts prevents public entities from profiting by authorized, but procedurally improper, actions.⁴⁵ The Washington Supreme Court recognized very early that it is manifestly unjust to place the burden of guaranteeing a procedurally proper

§ 6616 (1922), which required that all construction of roads be performed according to the terms of the contract. The oral contract was void, but the contractor was granted recovery for the value of the extra work performed.

42. *Spokane St. Ry. v. City of Spokane Falls*, 6 Wash. 521, 33 P. 1072 (1893). The city of Spokane Falls had granted the company a franchise to operate a street railroad on certain named streets. The company had erroneously laid track on one street not named in the ordinance. The city later passed an ordinance requiring the company to tear up the rails on the unauthorized street. The court held that the city was estopped from enforcing the ordinance because it had supervised the laying of the track and had assessed and collected taxes on the improvements. Thus, the court declined to enforce the explicit provisions of the authorizing ordinance. *Id.* at 525, 33 P. at 1073.

43. *Jones v. City of Centralia*, 157 Wash. 194, 219-20, 289 P. 3, 12 (1930) (payments to contractor were made in good faith and represented the reasonable value of the benefit conferred by completion of the dam).

44. The courts, however, seem to draw the line on defining a public benefit based upon their interpretation of the agency's authority to act. For instance, in an early case it was argued that the water system sought to be acquired provided public benefits over both the short and long terms, but the court was interested in the motives behind the acquisition. The city had received the beneficial use of the reservoir and piping system during the term of the contract. *State v. City of Pullman*, 23 Wash. 583, 584, 63 P. 265, 265 (1900). But the court was not persuaded. It concluded that only the voters, not the city itself, had the power to authorize this action. *Id.* at 592, 63 P. at 268. In contrast, in another case the public benefit resulting from the secondary ultra vires contract figured prominently in the decision to award the bridge contractor the reasonable value of the work performed:

We are aware that there are cases holding that, where a statute has not been complied with by the officers of a municipal corporation, there is no liability. The injustice of such a rule is apparent where, as in this case, the county retains a needed improvement which it had the power to make had it pursued the mandate of the statute.

Green v. Okanogan County, 60 Wash. 309, 322, 111 P. 226, 230 (1910) (Gose, J., concurring). Thus, the courts appear to use or disregard the public benefit element to the secondary ultra vires equation depending on the results to be substantiated.

45. *Finch v. Matthews*, 74 Wash. 2d 161, 176, 443 P.2d 833, 842 (1968). "[T]he rule against estopping a governmental body should not be used as a device . . . to obtain unjust enrichment or dishonest gains at the expense of a citizen." *Id.*

contract on the party contracting with the public entity.⁴⁶ To do so would permit the public to receive the benefit of goods and services without adhering to procedural requirements.⁴⁷ In recent years the subject has been addressed within the context of the sovereign immunity debate. The argument made is that a citizen has a right to expect the same standard of honesty and fair dealing in contracts with public entities as is expected in contracts between individuals.⁴⁸

In *Jones v. City of Centralia*,⁴⁹ the court recognized that the expectations of private parties to a procedurally improper municipal contract should be protected.⁵⁰ The court stated that:

While laws vesting municipal corporations with statutory powers must be construed by the courts in such a manner as to prevent municipal corporations from exercising powers not conferred upon them by law, courts should not . . . be overly technical in determining just how and by what means municipalities shall exercise powers undoubtedly vested in them by statute.⁵¹

The court applied this principle of statutory construction to uphold the validity of an election by the people of Centralia authorizing the issuance of bonds for construction of a dam.⁵² The election was, in fact, the second time that citizens had approved the measure. The second election was necessary because of irregularities in the ordinance authorizing the first election.⁵³ Construction of the dam had already begun, and the

46. *Jones v. City of Centralia*, 157 Wash. 194, 222, 289 P. 3, 12 (1930). "We have also held that, when a municipal corporation has accepted benefits under a contract, it is estopped from denying liability thereon." *Id.* (citing *Franklin County v. Carstens*, 68 Wash. 176, 122 P. 999 (1912) and *Mallory v. Olympia*, 83 Wash. 499, 145 P. 627 (1915)).

47. *Green v. Okanogan County*, 60 Wash. 309, 111 P. 226 (1910) (Gose, J., concurring). "The county cannot be held for more than the reasonable value of the work, and the principles of common honesty, applicable alike to natural and artificial persons, forbid that it shall retain and use the bridge and pay a less [sic] sum." *Id.* at 322, 111 P. at 230.

48. *Finch v. Matthews*, 74 Wash. 2d 161, 176, 443 P.2d 833, 842 (1968). See Note, *Quasi-Contractual Recovery When Municipal Contract Is Ultra Vires*, 41 WASH. L. REV. 569 (1966). "Thus, holding a city liable on a contract implied on [sic] law appears closely analogous to the recent demise of municipal immunity in the tort liability area; in both instances the courts are endeavoring to hold municipalities to the same standard of right and wrong the law imposes upon individuals." *Id.* at 573.

49. 157 Wash. 194, 289 P. 3 (1930).

50. *Id.* at 221-22, 289 P. at 12.

51. *Id.* at 219-20, 289 P. at 12.

52. *Id.* at 221, 289 P. at 12.

53. *Id.* at 197-98, 289 P. at 4.

court, applying *quantum meruit*, held that the contractor was entitled to retain the money that he had received.⁵⁴

The Washington courts were not the first to recognize that the harsh results of primary *ultra vires* actions are inappropriate in a secondary *ultra vires* context. In making equitable remedies available to private parties in secondary *ultra vires* situations, the Washington Supreme Court relied upon nineteenth-century United States Supreme Court decisions. *Gelpcke v. City of Dubuque*⁵⁵ was an influential decision that helped shape the secondary *ultra vires* doctrine. In *Gelpcke*, the United States Supreme Court reversed the Iowa Supreme Court's invalidation of the City of Dubuque's sale of \$500,000 in bonds. The bond revenue was used to purchase stock in two railroads to facilitate construction of a north-south line through the city. The Panic of 1857 and the completion of rail lines at two other points on the Mississippi, however, dimmed the promise of a bright economic future.⁵⁶ In 1860 the city failed to meet interest payments on the bonds.⁵⁷

The Iowa court had concluded that the City of Dubuque's sale of bonds to raise capital for the railroad violated two articles of the state constitution.⁵⁸ The Supreme Court held that the Iowa court had misconstrued the state constitution, had strayed from its own previous decisions, and, in doing so, had impaired an existing contractual obligation.⁵⁹ Commentators have concluded that in the post-*Swift v. Tyson* and pre-*Erie Railroad v. Tompkins* era, the *Gelpcke* decision was binding precedent for all jurisdictions.⁶⁰

54. *Id.* at 222, 289 P. at 13.

55. 68 U.S. 175 (1863).

56. 6 C. FAIRMAN, *supra* note 30, at 935.

57. *Id.*

58. *Gelpcke*, 68 U.S. at 205.

59. The Court noted that from 1853 until 1859, the Iowa Supreme Court had upheld similar arrangements between municipalities and railroads as constitutionally acceptable. The Iowa court's abrupt change in position convinced the Court to deviate from its practice of following the latest adjudications of the highest court of a state on matters involving the construction of state law. *Id.* "It is the settled rule of this court in such cases, to follow the decisions of the state courts. But . . . [w]e shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07.

60. 6 C. FAIRMAN, *supra* note 30, at 938-39. "*Gelpcke v. Dubuque* and *Swift v. Tyson* may be bracketed as cases where the Supreme Court asserted its independence of state court rulings on state law." Fairman argues, however, that the Court did not exercise its independent judgment in *Gelpcke* because the Iowa court had overruled a precedent and thereby destroyed an acquired right. *Id.* at 939 n.78.

The United States Supreme Court further developed its analysis of the ultra vires doctrine in *Hitchcock v. Galveston*.⁶¹ At issue was the Galveston City Council's authority to adopt an ordinance allowing the mayor and the chairman of the streets and alleys committee to contract for the curbing and paving of sidewalks. The work was to be paid for by the sale of bonds. The ordinance required the creation of a special fund into which proceeds from the increased property tax assessments would be placed and then used to retire the debt.⁶²

The Court concluded that the contracts were ultra vires but that the city was obligated to pay for the work done.⁶³ The Court's analysis distinguished between "the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted."⁶⁴ The Court placed the case in the latter category, concluding that the city's act was unauthorized, but not prohibited, and therefore was "only ultra vires."⁶⁵

61. 96 U.S. 341 (1877).

62. *Id.* at 350.

63. In *Hitchcock*, the Court stated:

If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. . . . Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.

Id. at 350-51.

64. *Id.* at 351. In this case, it was conceded that the city had the authority to construct sidewalks itself or contract for their construction. *Id.* at 348. The city urged, however, that the manner in which the work was to be financed, the sale of bonds, was ultra vires because the total sale exceeded the allowable amount of the city's indebtedness for such purposes. *Id.* at 349. The Court concluded that an action that was not expressly prohibited by statute or charter should be honored.

[A]lthough there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.

Id. at 351 (citing *State Bd. of Agriculture v. Citizens' State Ry.*, 47 Ind. 407 (1874)).

65. *Hitchcock*, 96 U.S. at 351. Five years later, the Court relied upon its analysis in *Hitchcock* to invalidate a Nebraska county's purchase of a farm. *Chapman v. Douglas County*, 107 U.S. 348, 357 (1882). The farm had been obtained from an individual under the terms of a real estate contract that had included a promissory note. The county wanted to construct a poorhouse on the site of the farm. Although the Court concluded that the purpose of the acquisition was within the county's statutory powers, the contract was held to be ultra vires because the use of a promissory note was not one of the methods of purchase specifically authorized in the pertinent Nebraska statute. *Id.* at 353. Since the illegality in the contract related not to the substance, but to the mode of per-

The outline of the Court's reasoning in *Hitchcock* was visible in the early Washington ultra vires cases. In *State v. Pullman*,⁶⁶ the Washington Supreme Court distinguished between the authorized, but procedurally improper, actions in *Hitchcock* and the complete absence of authority for the city of Pullman to acquire a water system outside its boundaries.⁶⁷ The court also used the *Hitchcock* ultra vires reasoning in *Turner Investment Co. v. City of Seattle*⁶⁸ to invalidate a street improvement contract between the city and private property owners.⁶⁹

Courts recognize a certain hierarchy of statutory authority with regard to governmental activities. Courts give the highest level of deference to statutes that specifically grant or limit authority by declaring that actions which contravene the statutory mandates are primary ultra vires.⁷⁰ Courts give far less deference to statutes that merely describe the procedure under which previously granted authority is to be executed.⁷¹ Breaches of procedural statutes do not defeat contractual expectations, provided that good faith and public benefit are established.⁷²

formance, the Court held that a restitution remedy was warranted. *Id.* at 355. Title to the property was returned to the seller. The Court noted that the result was consistent with a rule previously articulated by the Nebraska Supreme Court that cities obtaining money without authority of law are duty-bound to refund it. *Id.* at 357.

66. 23 Wash. 583, 63 P. 265 (1900).

67. "[B]ut the Supreme Court of the United States did not intend to lay down the rule that, when a city exceeded its powers in a contract made by the authorities, the plea of ultra vires could not be successfully interposed. . . ." *Id.* at 587, 63 P. at 266. See also *Green v. Okanogan County*, 60 Wash. 309, 320, 111 P. 226, 229 (1910) (court, citing *Chapman v. Douglas County*, 107 U.S. 348 (1882), said that acceptance of a bridge pursuant to an improperly executed contract obligated county to pay for its reasonable value); *Criswell v. Directors of School Dist. No. 24*, 34 Wash. 420, 432, 75 P. 934, 937 (1904) (citing *Chapman* to support proposition that "if a contract is not unlawful . . . common honesty requires payment of the reasonable value").

68. 70 Wash. 201, 126 P. 426 (1912).

69. The contract at issue in *Turner* obligated the city to pay for the street improvements made by the plaintiff and for the city to establish an improvement district to pay for these and other works, but exempted the plaintiffs from any assessments made by the district. The court ruled that the city had no power to make such a contract, and therefore the ultra vires rule applied in *State v. City of Pullman*, rather than the ultra vires rule in *Hitchcock*, was appropriate. *Id.* at 208-09, 126 P. at 428.

70. See, e.g., *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 627 P.2d 1010 (1981) (strict adherence to constitutional or statutory language). See also *State v. City of Pullman*, 23 Wash. 583, 63 P. 265 (1900).

71. See, e.g., *Finch v. Matthews*, 74 Wash. 2d 161, 443 P.2d 833 (1968); *Jones v. Centralia*, 157 Wash. 194, 289 P. 3 (1911); *Green v. Okanogan County*, 60 Wash. 309, 111 P.2d 226 (1910) (statutes that dictate contracting procedures did not preclude recovery for services rendered).

72. *Besoloff v. Whatcom County*, 133 Wash. 109, 233 P. 284 (1925). In *Besoloff*, the county had additional road work done under a procedurally improper oral contract. A

The difficulty with this approach arises when the statute under consideration has both substantive and procedural attributes. In such cases, the court is forced to make difficult policy choices about the value and the propriety of the governmental action under review. In *Edwards v. City of Renton*⁷³ and *Noel v. Cole*,⁷⁴ the court demonstrated an inclination to move mixed substantive and procedural statutory violations into a secondary ultra vires analysis.

III. RECENT MANIFESTATIONS OF THE DOCTRINE

A. *Reasonable Expectations: Edwards v. City of Renton and Noel v. Cole*

In recent decades the Washington Supreme Court has continued to employ the distinction between primary and secondary ultra vires actions. However, the court has attached additional criteria to the remedial portion of the secondary ultra vires analysis. The Washington Supreme Court introduced its expanded analysis in *Edwards v. City of Renton*.⁷⁵

In *Edwards*, the city contracted for the installation of a traffic signal at an intersection, without calling for competitive bids or budgeting funds for the project during the fiscal year in which the services were rendered.⁷⁶ The court held that the contract was within the city's general authority, but that the city's breach of the competitive bidding and budgeting statutes rendered the contract secondary ultra vires.⁷⁷ After finding that neither the city nor the contractor acted in bad faith, the court stated that in order to grant equitable relief, it must also find that the action was not *malum in se*, *malum prohibitum*, or manifestly against public policy.⁷⁸

The additional test prescribed by the court in *Edwards* further probes the question of good faith and provides the court with latitude in using its equitable powers.⁷⁹ Failure to prove

properly executed contract for the work already existed. The court held that the county was obligated to pay for the work because it had accepted the work and received benefits from it. *Id.* at 113, 223 P. at 285.

73. 67 Wash. 2d 598, 409 P.2d 153 (1965).

74. 98 Wash. 2d 375, 655 P.2d 245 (1982).

75. 67 Wash. 2d 598, 409 P.2d 153 (1965).

76. *Id.* at 600, 409 P.2d at 155.

77. *Id.* at 602, 409 P.2d at 156.

78. *Id.* at 603-04, 409 P.2d at 157.

79. The *Edwards* court relied on its analysis in several secondary ultra vires cases to

that the public entity possessed general authority to act leads to a presumption of bad faith, yet a finding of general authority does not automatically warrant a presumption of good faith.⁸⁰ The purpose of the action had to be tested against the new criteria before it could be established that the action bore sufficient good faith and that equity should be invoked.

The *Edwards* court's "good faith" analysis was especially noteworthy because it led to a generous quasi-contract remedy for the private party. The court reversed the trial court's award to the contractor of the reasonable value of the benefits derived by the city from installation of the traffic signal. The court held instead that the proper measure of recovery, under an unjust enrichment theory, was the reasonable value of the signal itself.⁸¹ Thus, *Edwards* moved the secondary ultra vires doctrine in the direction of fulfilling the reasonable expectations of private parties contracting with public entities, a notion consistent with the decline of the sovereign immunity doctrine.⁸²

In *Noel v. Cole*,⁸³ the court vigorously affirmed the ultra vires analysis adopted in *Edwards*. *Noel*, like *Edwards*, involved applications of the secondary ultra vires doctrine. In *Noel*, however, the public entity was a seller rather than a purchaser of goods. The Department of Natural Resources (DNR), the agency charged with management of the state's timberlands, advertised and sold a tract of timber pursuant to its statutory authority.⁸⁴

support its award to the plaintiff. *Id.* at 604, 409 P.2d at 157-58. The court referred primarily to *Abrams v. Seattle*, 173 Wash. 495, 23 P.2d 869 (1933). In *Abrams*, an individual who advanced money, labor, and materials for the construction of an electrical substation on city property under an ultra vires lease was awarded the reasonable value of the goods and services the city received. *Id.* at 500, 23 P.2d at 871. The court qualified its application of the secondary ultra vires approach in *Edwards* in the following way:

In applying the approach of the *Abrams* case . . . to the instant case, we do so with the understanding that the transaction involved is devoid of any bad faith, fraud, or collusion and that "financial arrangements" such as here evidenced are not usually indulged in by political subdivisions of the state. Should the contrary ever appear, it could well be that the dictates of public policy would require a more stringent approach.

Edwards, 67 Wash. 2d at 606, 409 P.2d at 159.

80. The court was unwilling to grant equitable relief whenever public entities violated procedural statutes. It insisted on yet another analytical step, a determination of whether elements of bad faith were present in the circumstances of the transaction. *Edwards*, 67 Wash. at 606, 409 P.2d at 158-59. Thus, equitable relief was available only for secondary ultra vires contracts that were entered into in good faith.

81. *Id.* at 607, 409 P.2d at 159.

82. See *supra* note 48 and accompanying text.

83. 98 Wash. 2d 375, 655 P.2d 245 (1982).

84. The Commissioner of Public Lands, as the publicly elected administrator of the

Three months later a group of intervenors obtained an order temporarily restraining road construction and timber harvesting on the grounds that the DNR had not prepared an environmental impact statement.⁸⁵ The order was later made permanent.⁸⁶ The purchaser then filed a cross-claim against the DNR for breach of contract.⁸⁷

The DNR maintained that it had followed all appropriate regulations promulgated by the State Council on Environmental Policy and the Department of Ecology implementing the SEPA regulations. The Council had issued regulations exempting most state timber sales from compliance with the substantive portions of the SEPA regulations.⁸⁸ The DNR argued further that it had justifiably relied upon the validity of the exemption in annually processing between 250 and 400 timber sales.⁸⁹

The Washington Supreme Court acknowledged the trial court's determination that the SEPA regulations were invalid and concluded that the DNR's failure to follow statutorily mandated environmental review made the contract *ultra vires*.⁹⁰ The court initiated its discussion of *ultra vires* by contrasting the doctrine's use in private contracts with its application in public contracts.⁹¹ The analogy was particularly appropriate given the proprietary nature of the agency's actions.⁹² Following recitation of the *Edwards* *ultra vires* analysis, the court distinguished between actions in which an agency lacks any power to contract in the government's name (primary *ultra vires*) and the more commonplace situation in which the agency fails to follow procedural requirements (secondary *ultra vires*).⁹³

agency, is authorized to select stands of timber to be sold at public auction. See WASH. REV. CODE §§ 79.01.124, .200 (1983) ("[A]ll sales of valuable materials shall be at public auction or by sealed bid to the highest bidder. . . .").

85. *Noel*, 98 Wash. 2d at 378, 655 P.2d at 248.

86. *Id.*

87. *Id.*

88. See WASH. ADMIN. CODE §§ 197-10-170(19), -175(4) (1980).

89. *Noel*, 98 Wash. 2d at 382 n.4, 655 P.2d at 250 n.4.

90. *Id.* at 382, 655 P.2d at 250. The trial court had awarded the plaintiff damages for breach of contract. Since the Washington Supreme Court held that the contract was *ultra vires*, the quasi-contract unjust enrichment remedy was substituted for the trial court's breach of contract award.

91. *Id.* at 378-79, 655 P.2d at 248. "In the corporate sphere, the *ultra vires* doctrine has come under increasing disfavor. . . . In actions against governmental entities, however, the doctrine retains its vitality." *Id.*

92. See *supra* note 84.

93. *Noel*, 98 Wash. 2d at 379, 655 P.2d at 248. "More commonly, an agency steps outside its authority by failure to comply with statutorily mandated procedures. One

The court viewed the SEPA regulations as a procedural, rather than a substantive, requirement for the sale of timber.⁹⁴ The court compared the DNR's noncompliance with the SEPA statute to government purchases in violation of spending guidelines and procedures.⁹⁵ It viewed SEPA as establishing procedural requirements that attached to all timber sale activities. The court concluded that the DNR had no authority to sell timber without adhering to SEPA's environmental impact statement mandate.⁹⁶ The court acknowledged that the legislature had granted general authority to sell state timber.⁹⁷ Had the environmental analysis been completed, the sale would have been proper.⁹⁸

The court applied the second part of the *Edwards* test to determine whether the action was *malum in se*, *malum prohibitum*, or manifestly against public policy. It found that both parties had acted in good faith and held that recovery for the purchaser was necessary to prevent unjust enrichment.⁹⁹ The purchaser was awarded the reasonable value of the road construction that it had completed prior to the injunction, reduced only by the purchaser's profit on the timber removed.¹⁰⁰

The *Noel* decision was faithful to the ultra vires analysis in *Edwards*. In both cases the court found sufficient statutory authority for each agency's action.¹⁰¹ Traffic control in *Edwards*, and timber sales in *Noel*, were actions within the broad statu-

such set of procedures is that provided by SEPA." *Id.*

94. *Id.* at 382, 655 P.2d at 250.

95. *Id.* at 379-80, 655 P.2d at 249. "The ultra vires doctrine is just as necessary to prevent ill considered environmental action as it is to prevent ill considered financial action." *Id.*

96. *Id.* at 382, 655 P.2d at 250.

97. *Id.* at 380, 655 P.2d at 249.

98. *Id.* at 381, 655 P.2d at 250.

99. *Id.* The court held further:

If these two conditions are satisfied, a private party acting in good faith may recover to the extent necessary to prevent 'manifest injustice' or unjust enrichment. . . . Thus, DNR did not lack substantive authority to make this sale, but merely carried it out in an unauthorized procedural manner. . . . Neither can we say that DNR's action was *malum in se*, *malum prohibitum* or manifestly against public policy. . . . Finally, there is no evidence of bad faith on the part of Alpine. . . . In sum, Alpine is entitled to recover under a theory of unjust enrichment.

Id. at 381-82, 655 P.2d at 250.

100. *Id.* at 382-83, 655 P.2d at 250.

101. *Edwards*, 67 Wash. 2d at 602, 409 P.2d at 156; *Noel*, 98 Wash. 2d at 380, 655 P.2d at 249.

tory authority of the entities.¹⁰² However, six months after Noel, in *Chemical Bank v. Washington Public Power Supply System*,¹⁰³ the court departed dramatically from this analysis of the authority question and became "overly technical"¹⁰⁴ in determining the scope of municipal power.

C. *Statutory Authority Narrowly Construed: Chemical Bank v. Washington Public Power Supply System*

1. *The Decision*

In *Chemical Bank v. Washington Public Power Supply System*,¹⁰⁵ trustees for individuals and institutions that had purchased \$2.25 billion in bonds from the Washington Public Power Supply System (WPPSS) sought a declaratory judgment against the consortium of municipal utilities, rural electric cooperatives, and public utility districts that had contracted with WPPSS for the construction of two nuclear plants. The trustees argued that the utilities were obligated to pay their share of the bond obligation despite termination of the plants' construction. The central issue was the utilities' authority to enter into an agreement with WPPSS under contract terms that obligated the utilities to pay their proportionate share of the facilities regardless of whether the plants ultimately produced electricity.¹⁰⁶ Litigation began after several of the participants refused to pay their share as interest payments on the bonds became due.¹⁰⁷

102. See *Edwards*, 67 Wash. 2d at 602, 409 P.2d at 156; *Noel*, 98 Wash. 2d at 380, 655 P.2d at 249. In both cases, the ultimate purpose of the two ultra vires tests was to ensure that the transactions were made in good faith. Compare *Edwards*, 67 Wash. 2d at 606, 409 P.2d at 159 ("In applying the approach of the *Abrams* case . . . to the instant case, we do so with the understanding that the transaction involved is devoid of any bad faith, fraud, or collusion. . . .") with *Noel*, 98 Wash. 2d at 382, 655 P.2d at 250 ("Finally, there is no evidence here of bad faith on the part of Alpine.").

103. 99 Wash. 2d 772, 666 P.2d 329 (1983).

104. See *Jones v. City of Centralia*, 157 Wash. 194, 220, 289 P. 3, 12 (1930) ("courts should not, on the other hand, be overly technical in determining just how and by what means municipalities shall exercise powers undoubtedly vested in them by statute").

105. 99 Wash. 2d 772, 666 P.2d 329 (1983).

106. *Id.* at 778, 666 P.2d at 332 (quoting § 6(d) of the Participants' Agreement between the Supply System and the Utilities: "The Participant shall make the payments to be made to the Supply System . . . whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part.").

107. *Id.* at 776, 666 P.2d at 331.

2. The Rationale

The court examined four avenues for legal authority to validate the agreements: (1) statutes granting to municipalities and public utility districts authority to acquire electricity;¹⁰⁸ (2) statutes granting authority to acquire electric generating facilities;¹⁰⁹ (3) statutes granting authority to enter into joint operating agreements with joint development agencies;¹¹⁰ and (4) the doctrine of implied municipal authority.¹¹¹ The court ultimately held that the participants lacked the substantive authority to enter into the agreements.¹¹²

The court set the stage for its analysis by concluding that the agreements were unconditional obligations for the purchase of a portion of the projects' capability rather than contracts for the purchase of electricity.¹¹³ Once this distinction was made, the court looked for an express statutory grant of authority for the acquisition of project capability.¹¹⁴ The court excluded from consideration all statutes granting the utilities authority to sell electricity.¹¹⁵ These statutes contained general language authorizing the utilities to provide street lighting and electricity, but

108. *Id.* at 782, 666 P.2d at 334.

109. *Id.* at 784, 666 P.2d at 335.

110. *Id.* at 794, 666 P.2d at 340-41. See WASH. REV. CODE § 54.44.010 (1983), partially quoted *infra* note 132. See also WASH. REV. CODE § 54.44.020 (1983) (authorizing first class cities, public utility districts, and joint operating agencies to participate in the operation of common facilities).

111. 99 Wash. 2d at 791, 666 P.2d at 339.

112. *Id.* at 798, 666 P.2d at 342.

113. *Id.* at 783-84, 666 P.2d at 335. The court held:

[T]he purchase of 'project capability' under this agreement is essentially an unconditional guaranty of payments on the revenue bonds, secured by a pledge of the participants' utility revenues, in exchange for a share of any power generated by these projects. The agreement expressly provides for the possibility that no electricity will be generated and that participant payments will be due even if the project is not completed. The unconditional obligation to pay for no electricity is hardly the purchase of electricity. We hold that an agreement to purchase project capability does not qualify as a purchase of electricity.

Id.

114. The court concluded that the utilities' right to a specific portion of project capability, defined under section 1(v) of the Participants' Agreement as "the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time" was not an acceptable form of ownership under the utilities' authorizing statutes. *Id.* at 777-78, 666 P.2d at 332. "Here, the municipal and PUD participants were not acquiring or constructing generating facilities as set out in the statutes because under the agreement, they ceded virtually all their ownership interest and most of the management responsibilities to WPPSS." *Id.* at 788, 666 P.2d at 338.

115. *Id.* at 789, 666 P.2d at 338.

none used language any more precise than "purchase," "acquisition," "ownership," or "maintenance" to describe the means for accomplishing this purpose.¹¹⁶ Some of the general authorization statutes cited by the court detailed additional procedural requirements for contracting,¹¹⁷ but none of the statutes contained language expressly prohibiting the purchase of project capability or any other specific manner of resource acquisition.

The court also concluded that the utilities lacked implied powers to enter into the agreements.¹¹⁸ The court, relying upon the *Edwards* standard that the power to borrow money will not be inferred from general grants of statutory authority to incur indebtedness,¹¹⁹ determined that the joint development statutes failed to grant sufficient authority upon which a claim of implied powers could be sustained.¹²⁰

3. A Departure from *Edwards*

Although the court relied on *Edwards* to anchor the implied powers analysis, the court did not, as it had in *Edwards*, pursue the distinction between the purpose for which the funds were obtained and the manner in which they were obtained.¹²¹ This distinction was crucial to the ultra vires analysis in *Edwards*. By concluding that the purpose of the contract for the traffic light

116. See WASH. REV. CODE § 35.22.280(15) (1983) (authorizing first class cities "[t]o provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights, and to erect, or otherwise acquire, and to maintain the same, or to authorize the erection and maintenance of such works as may be necessary and convenient therefor."); WASH. REV. CODE § 35.23.440(44) (1983) (authorizing second class cities to provide similar services provided that no purchase of a plant is made without a vote of the electorate); WASH. REV. CODE § 54.16.040 (1983) (authorizing public utility districts "to purchase electric current for sale and distribution . . . construct, condemn and purchase . . . acquire, add to, maintain, conduct and operate works, plants . . . for the purpose of furnishing the district, and the inhabitants . . . with electric current.").

117. See WASH. REV. CODE § 54.44.020 (1983) (requiring that each participant shall own a percentage of the common facility and defray its own interest and other payments).

118. 99 Wash. 2d at 794, 666 P.2d at 340. "Accordingly, we do not believe that this agreement is authorized as an implied power to pay for an admittedly proper municipal service." *Id.*

119. *Edwards*, 67 Wash. 2d at 601-02, 409 P.2d at 156.

120. *Chemical Bank*, 99 Wash. 2d at 793-94, 666 P.2d at 340.

121. The *Edwards* court clearly concluded that the city had the necessary authority to enter the contract. "Though the purpose for which the funds were to be expended can be characterized as infra vires, the manner in which the funds were obtained was ultra vires, and the purported repayment agreement was accordingly void." 67 Wash. 2d at 602, 409 P.2d at 156.

was within the general authority of the city, the court was able to reach the threshold of the secondary ultra vires doctrine and ultimately conclude that an equitable remedy was appropriate. The bidding and budgeting statutes that the city had violated in *Edwards* enumerated the procedural requirements in greater detail than most of the statutes governing the acquisition of electric energy.¹²² The *Edwards* decision did not include a lengthy review of the statutes governing second class cities for the purpose of identifying express authority to acquire street lights. The court made such a review, however, in *Chemical Bank*. The court insisted that authority to purchase electricity or power plants was not sufficiently similar to the ownership arrangement established by the participants' agreement to cross the primary ultra vires threshold and reach the issue of whether the parties to the agreement deserved quasi-contractual relief.¹²³

In *Edwards* and *Noel*,¹²⁴ the court interpreted the statutes in a manner that permitted differentiation of the substantive authority and the procedural aspects of the contracts.¹²⁵ The court was willing to downplay express statutory mandates in authorizing legislation¹²⁶ or in other statutes¹²⁷ to effectuate the

122. Compare WASH. REV. CODE § 35.23.352 (1983) with statutes authorizing the acquisition of electric energy, *supra* note 110.

Any second or third class city or any town may construct any public work or improvement by contract or day labor without calling for bids . . . whenever the estimated cost of such work . . . will not exceed the sum of fifteen thousand dollars. Whenever the cost of such public work or improvement . . . will exceed fifteen thousand dollars, the same shall be done by contract. All such contracts shall be let at public bidding upon posting notice calling for sealed bids upon the work.

WASH. REV. CODE § 35.23.352 (1983).

123. See *supra* note 113.

124. The language of the statute authorizing the sale of timber from educational trust lands was a broad delegation of power. WASH. REV. CODE § 79.01.094 (1983) ("The board of state land commissioners shall exercise general supervision and control over the sale or lease for any purpose of land granted to the state for educational purposes and also over the sale of timber, fallen timber, stone, gravel and all other valuable materials situated thereon. . . .").

125. See *Edwards*, 67 Wash. 2d at 602, 409 P.2d at 156-57; *Noel*, 98 Wash. 2d at 382, 655 P.2d at 250.

126. In *Edwards*, the court downplayed the significance of the city's violation of the contracting procedures in WASH. REV. CODE § 35.23.352 (1965) and § 35.33.120 (1965) by urging that they pertained more to the manner in which the contracts were executed than to the "purpose, intent and spirit" of the statute. 67 Wash. 2d at 602, 409 P.2d at 156.

127. In *Noel*, the court dismissed the department's failure to comply with SEPA as "merely a failure to comply with a procedural, albeit important, requirement." 98 Wash. 2d at 382, 655 P.2d at 250. The provisions of SEPA apply to all branches of state govern-

broader purpose. The court did not do this in *Chemical Bank*, even though the actions in question did not involve contravention of express statutory language. The delineation between substance and procedure with respect to the participants' agreement was plainly evident. The court would have found a convincing case for providing relief "to the extent necessary to prevent manifest injustice"¹²⁸ had it completed the *Edwards* and *Noel* ultra vires analysis. The statutes granting to the state land commissioner the power to sell timber, and to the city of Renton the power to make street improvements, convey general authority in language similar to the statutes authorizing municipalities and public utility districts to provide electric service.¹²⁹

The *Chemical Bank* opinion lacked any references to instances of bad faith, fraud, or collusion, either by the utilities or by the bondholders. Neither the *Edwards* analysis nor the nineteenth-century approach¹³⁰ to the ultra vires doctrine precluded application of quasi-contract remedies in cases in which legitimate general authority was found without further inquiry.¹³¹ Never before has the court been so meticulous in its search for authority to contract.

If it had applied the *Edwards* analysis, the court's next step would have been to consider whether the participants' agreements were *malum in se*, *malum prohibitum*, or manifestly against public policy. The first two criteria, as tests of good faith, appear to be fulfilled by the legislature's statutory declaration that the formation of joint operating agencies by cities and

ment. WASH. REV. CODE § 43.21C.030(2) (1983). The language of the act indicated that its mandate was substantive. See WASH. REV. CODE § 43.21C.030(1) (1983) ("The legislature authorizes and directs that, to the fullest extent possible . . . [t]he policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter. . . ."). Thus, the court must have been willing to subordinate both the substantive and procedural mandates of SEPA to effectuate the purposes of the state timber sales program.

128. *Finch v. Matthews*, 74 Wash. 2d 161, 175, 443 P.2d 833, 842 (1968).

129. Compare WASH. REV. CODE § 79.01.124 (1983) ("Timber . . . may be sold . . . when in the judgment of the commissioner of public lands, it is for the best interest of the state so to sell the same") with WASH. REV. CODE § 35.92.050 (1983) (authorizes cities to "construct . . . purchase, acquire . . . and operate . . . [plants and facilities] for the purpose of furnishing the city . . . and its inhabitants . . . [with electricity]" and grants municipalities the power to "authorize the construction of such plant or plants by others for the same purpose.").

130. See *supra* note 64 and accompanying text.

131. See *Edwards*, 67 Wash. 2d at 603-04, 409 P.2d at 157. See also *Chapman v. Douglas County*, 107 U.S. 348, 355 (1882).

public utility districts is in the public interest.¹³² The participants' agreements represented a course of action consistent with the legislative declaration.¹³³ A second act of the legislature, requiring all municipal corporations that had contracted with an operating agency to participate in the construction or acquisition of an energy plant to adopt annually a plan for repayment of its share of the total obligation,¹³⁴ indicated that the legislature was aware of the provisions of the utilities' contractual obligations and that it expected the utilities to honor those obligations.

The third criterion of the *Edwards* good faith test, whether the agreements were manifestly against public policy, requires balancing the benefits of allowing public entities to act collectively to meet the energy needs of their constituents against the risks associated with large construction projects. The court raised public policy concerns over the ownership and management structure established by the participants' agreement, but these issues were subsumed within the statutory authority analysis.¹³⁵ The court did not specifically conclude that the agreement was manifestly against public policy because the statutes authorizing joint developments did not specify how the management structure should be organized.¹³⁶

The court considered the very scale of the projects as a separate public policy issue.¹³⁷ In connection with this issue, the

132. It is declared to be in the public interest and for a public purpose that cities of the first class, public utility districts, joint operating agencies, . . . regulated electric companies and, rural electric cooperatives . . . be permitted to participate together in the development of nuclear and other thermal power facilities and transmission facilities . . . to meet the future power needs of the state and all its inhabitants.

WASH. REV. CODE § 54.44.010 (1983). See also WASH. REV. CODE § 54.44.900 (1983) ("The provisions of this chapter shall be liberally construed to effectuate the purposes thereof.").

133. WASH. REV. CODE § 54.44.010 (1983).

134. Any municipal corporation, cooperative or mutual which has entered into a contract with an operating agency to participate in the construction or acquisition of an energy plant . . . shall annually adopt a plan for the repayment of its contractual share of any operating agency obligation which matures prior to the planned operation of the plant. . . .

WASH. REV. CODE § 43.52.550 (1983).

135. "As a matter of public policy, the enormous risk to ratepayers must be balanced by either the benefit of ownership or substantial control." *Chemical Bank*, 99 Wash. 2d at 788, 666 P.2d at 337.

136. See *supra* notes 113, 132.

137. *Chemical Bank*, 99 Wash. 2d at 778, 666 P.2d at 338-39.

court referred to its holding in *State ex rel. PUD No. 1 v. Wylie*.¹³⁸ In *Wylie*, the court had concluded that a public utility district's attempted acquisition of electric generating capacity far in excess of its needs was *ultra vires*.¹³⁹ However, comparison to *Wylie* was inappropriate given the forecasts of substantial load growth and future capacity shortages that existed at the time the WPPSS agreements were signed.¹⁴⁰ Moreover, the court did not consider the most disturbing public policy issue arising out of the decision: the potentially far-reaching effects of the largest default in the history of the municipal bond market.

Although there was much more money at stake in *Chemical Bank* than in *Edwards* and *Noel*, the public policy debate came down to essentially the same issue: whether the participants acted reasonably and in good faith in deciding to participate. Had the court adhered to the reasoning and the *ultra vires* analysis applied in *Edwards* and *Noel*, it would have answered the question in the affirmative. The *ultra vires* conduct in *Chemical Bank*, according to the court, involved violations of statutes pertaining to the manner in which ownership and payment were to be organized in joint developments, not to the legitimacy of joint developments themselves. Both *Edwards* and *Noel* suffered from similar irregularities in the manner of performing authorized endeavors, yet sufficient evidence of good faith existed to justify granting the contracting parties a remedy. The plaintiffs in *Chemical Bank* deserved a similar remedy.

If the court had expressly abandoned the *Edwards* *ultra vires* analysis and instead applied the standard it borrowed from the Supreme Court early in the century,¹⁴¹ the court would have found it necessary to prevent "manifest injustice" by fashioning a quasi-contractual remedy. Acquisition of electric energy is within the purpose of the enabling statute, and the imposition of

138. 28 Wash. 2d 113, 182 P.2d 706 (1947).

139. *Id.* at 151-52, 182 P.2d at 726-27.

140. The court said that the primary purpose of the PUD statutes at issue in *Wylie* was to furnish electricity to the district and its inhabitants. The actions of the PUD in joining the consortium expressly furthered this purpose. The PUD's actions in *Wylie* were held *ultra vires* because generating capacity sought to be acquired far exceeded the utility's existing and projected load growth. The court acknowledged that these circumstances were considerably different for the PUD participants in Plants 4 and 5. *Chemical Bank*, 99 Wash. 2d at 789, 666 P.2d at 338.

141. *Hitchcock v. Galveston*, 96 U.S. 341 (1877). "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law." *Id.* at 350.

a remedy would have been necessary to prevent the public agencies from benefiting from authorized, but procedurally improper, acts.¹⁴² Additional review for evidence of bad faith was not part of the earlier secondary ultra vires tests.

Finally, an argument might be made that an equitable remedy is more appropriate in situations where a public agency commits procedural irregularities in the execution of proprietary functions than when it errs in the performance of ministerial duties. The principle that a contracting party should be considered to have constructive knowledge of the scope of municipal power is somewhat more persuasive when the purpose of the contract is in furtherance of a ministerial duty. Conversely, when public entities are selling goods, such as timber, or providing services, such as electric power, that are not fundamentally ministerial, the agency should be held to the standards of contracts and contract remedies available to private parties.¹⁴³ Under this line of reasoning, a remedy would be more appropriate in *Noel* and in *Chemical Bank* than in *Edwards*, in which the city was discharging its ministerial function of traffic control.

IV. CONCLUSION

One of the results of the *Chemical Bank* decision was to tighten the reins on the scope of municipal power. Such a result is consistent with a recent line of cases in which the Washington Supreme Court invalidated actions of other municipal corporations.¹⁴⁴ The ultra vires doctrine is an appropriate means by which a court can accomplish this purpose.

Legitimate concern arises, however, when a powerful legal doctrine is applied in an inconsistent manner. In *Chemical Bank*, the court did not adhere to the analysis it had previously used when invoking the doctrine. The court was overly technical in reviewing the means by which municipalities should exercise their vested powers. The court failed to draw from the statutes

142. See *Jones v. City of Centralia*, 157 Wash. 194, 222, 289 P. 3, 12 (1930). See *supra* notes 4, 16.

143. *Finch v. Matthews*, 74 Wash. 2d 161, 176, 443 P.2d 833, 842 (1968).

144. See *Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 650 P.2d 193 (1982) (court invalidated fees on new residential developments to pay for services necessitated by population increases); *In re Seattle*, 96 Wash. 2d 616, 638 P.2d 549 (1981) (city lacks authority to condemn property for the purpose of promoting private retailing); *Port of Seattle v. Washington Utils. & Transp. Comm'n*, 92 Wash. 2d 789, 597 P.2d 383 (1979) (port service cannot offer its own transportation service to airport).

that it reviewed the scope of the legislative mandate to municipal utilities and public utility districts.¹⁴⁵ The change in the court's approach to the ultra vires doctrine is destined to create confusion in the minds of those who contract with public entities in Washington. The burden of the decision will likely fall on the legislature, which may have to become a strict parent to its municipal corporation offspring. Given the new unpredictability in the ultra vires doctrine, cities and counties may reach the conclusion that no action is safe unless the legislature *expressly* says it is safe. Thus, the legislature may be forced to allocate considerably more time to the organization and management problems of municipal corporations. Neither the municipal corporations nor the legislature will likely applaud this prospect.

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145. This was especially perplexing because at the beginning of its opinion, the court recited the principle of statutory construction that language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purposes of the statute. *Chemical Bank*, 99 Wash. at 782, 666 P.2d at 334.