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No. 98870-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONSIBLE GROWTH *NE WASHINGTON; CITIZENS AGAINST NEWPORT SILICON SMELTER; THEODORE & PHYLLIS KARDOS; DENISE D. TEEPLES; GRETCHEN L. KOENIG; SHERYL L. MILLER; MANES W. & ROSEMARY CHANDLER; AND PAMELA BYERS LUBY,

Petitioners,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1; PEND OREILLE COUNTY; and HITEST SAND, INC.

Respondents.

ANSWER TO PETITION FOR REVIEW

Attorneys for Respondent HiTest Sand, Inc.
Peter A. Witherspoon, WSBA #7956
James A. McPhee, WSBA #26323
Witherspoon Brajcich McPhee, PLLC
601 West Main Avenue, Suite 714
Spokane, Washington 99201
Telephone: (509) 455-9077

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I. INTRODUCTION

The Court of Appeals correctly affirmed the trial court's grant of summary judgment because the Public Utility District No. 1 of Pend Oreille County (the "PUD") acted within its authority to purchase and sell land to HiTest Sand, Inc. ("HiTest"). Because the lower courts correctly applied the clear and unambiguous law of Washington to undisputed facts, further review of this case will neither offer guidance nor change the outcome and, as a result, this Court should decline review.

II. STATEMENT OF THE CASE

Between 1995 and 1996, the PUD purchased three parcels of land within its boundary, Parcel Nos. 17036, 19183, and 19193 (the "PUD Properties"). CP 13. After the originally intended use for the PUD Properties never came to fruition, the PUD's Board declared them as surplus to the PUD's needs at a public meeting on March 15, 2016. CP 87; CP 13. The PUD thereafter attempted to sell the PUD Properties but did not receive any offers to purchase them.

On April 18, 2017, HiTest submitted an inquiry and request to the PUD for electric service. CP 102-04; CP 13. HiTest additionally expressed interest in purchasing the PUD Properties, along with an adjacent fourth parcel that was then owned by Pend Oreille County (the "County"), Parcel

No. 19182 (the PUD Properties, together with Parcel No. 19182, are referred to hereafter as "the Four Parcels") CP 102-04; CP 13. The April 18, 2017 letter was not a present offer to purchase the Four Parcels, nor did it solicit an offer to sell the Four Parcels from the PUD.

The PUD maintained a transmission line over and across Parcel No. 19182, for which no formal easement existed. CP 79. Accordingly, the record reflects the fact that the PUD decided to acquire Parcel No. 19182 from the County to reserve an easement on that parcel in case it ever became privately owned. CP 79-80; *see also* CP 106.

On April 25, 2017, HiTest signed a tentative Letter of Intent and deposited earnest money with the PUD for its purchase of the Four Parcels. CP 109-113. HiTest and the PUD revised the Letter of Intent on June 13, 2017. CP 114-116. The PUD then sent HiTest a draft Purchase Agreement on June 16, 2017. CP 117-125.

The County authorized the sale of Parcel No. 19182 to the PUD, for the tax assessed value, on June 20, 2017. The PUD purchased and received title to Parcel No. 19182 through a tax title property deed recorded August 2, 2017. CP 105-07; CP 89; CP 135.

As the potential sale of the Four Parcels was progressing, the PUD's Board of Commissioner's discussed the fact that Parcel No. 19182 was surplus following reservation of the easement and the sale of all Four

Parcels several times during the regularly scheduled open public meeting of the PUD's Board of Commissioners on August 1, 2017. CP 88; CP 126-130. The PUD's Board of Commissioners additionally unanimously adopted Resolution No. 1399, expressing its intent to sell the Four Parcels to HiTest after an appraisal and due diligence period. CP 88; CP 131-33.

HiTest and the PUD executed the Real Estate Purchase and Sale Agreement for the Four Parcels on August 21, 2017, for a total purchase price of $300,000 ($50,000 more than the appraised value). CP 140-47. The PUD executed and recorded a Special Warranty Deed for the sale of the Four Parcels on September 18, 2017, and in doing so expressly reserved an easement interest on Parcel No. 19182 in favor of the PUD. CP 148-50.[1] The PUD subsequently recorded a corrected Special Warranty Deed for the sale of the Four Parcels to HiTest on May 14, 2018, correcting the location of the reserved easement. CP 151-155.

By the time this Petition is considered, HiTest will have owned the Four Parcels in fee for over three years. Subsequent to its purchase of the properties, HiTest promptly began the due diligence and permit process.

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[1] Appellants argument to this Court that the addition of the easement only occurred after the property had been sold and was "the first mention of an easement" contravenes the undisputed record. While the location of the easement was subsequently corrected based on a scrivener's error, the reserved easement was included in the original statutory warranty deed. *See* CP 148-50.

HiTest additionally submitted a formal request for power service from the PUD and entered into a cost reimbursement agreement. CP 159-169.

Notwithstanding the foregoing, Appellants filed their Complaint on June 8, 2018, asking the trial court to invalidate the sale, alleging the sale to HiTest was not done with the proper statutory authority, meaning the action was *ultra vires*. CP 10-11. The PUD moved for summary judgment on the basis that the sale was not *ultra vires.* Both the County and HiTest joined with the PUD's motion. HiTest further argued that it was a bona fide purchaser of the Four Parcels. CP 185-186. Appellants filed a cross motion for summary judgment on their claims. The trial court granted the PUD's and HiTest's motions in an order filed on April 1, 2019. CP 445. In the trial court's written decision, the Honorable Julie McKay found that the PUD's actions during the sale were not *ultra vires,* and that HiTest was a bona fide purchaser, "entitled to presume that the proceedings leading up to the sale of the parcels were procedurally valid." CP 454, 469.

Appellants appealed the trial court's ruling on summary judgment to Division III of the Court of Appeals. On April 21, 2020, the Court of Appeals affirmed the trial court's decision that the PUD's sale to HiTest was not *ultra vires* because the PUD had authority to purchase and sell Parcel No. 19182. Because the Court of Appeals correctly held that the PUD was authorized to sell Parcel No. 19182 to HiTest, it was unnecessary to

address HiTest's argument that the sale should be separately affirmed because of its status as a bona fide purchaser, and the Court of Appeals declined to do so.

III. ARGUMENT

Appellants raise two issues in its Petition for Review. First, Appellants question the lower courts' decisions pertaining to the authority of the PUD to purchase land to obtain an easement for its benefit. Second, Appellants question whether public participation and notice requirements were allegedly violated by the PUD when it sold property to HiTest.

The Petition for Review must be denied because the lower courts accurately found that the PUD acted within its statutory grant of authority both when it purchased, and when it sold Parcel No. 19182.

A. RCW 54.16.020 grants the PUD authority to purchase property to obtain an easement.

Review by this Court is unnecessary because Washington law clearly delineates the authority of the PUD to purchase property, and the PUD acted within that authority. Both the trial court and the Court of Appeals found that the PUD acted within the statutory authority set forth in RCW 54.16.020 when it purchased County property to obtain an easement. Because the PUD acted within its statutory grant of authority, purchasing Parcel No. 19182 was not an *ultra vires* act.

The lower courts also found that even if the PUD had at some point intended to sell Parcel No. 19182, its stated intent to obtain an easement on Parcel No. 19182 for its benefit rendered the PUD's actions squarely within its authority. Appellants' Petition for Review incorrectly summarizes the record facts found and relied on by both lower courts to justify their allegation that the PUD did not seek to obtain an easement until after the sale.

As Appellants acknowledge, based on its status as a public utility district, the PUD is authorized to purchase and acquire land, property, and property rights, including easements and rights of way, as needed to generate electric energy. RCW 54.16.020. RCW 54.16.090 additionally grants the PUD broad authority to purchase property and property rights as "necessary or convenient for its purposes."[2] The PUD's act of purchasing Parcel No. 19182 to secure an easement for its own benefit falls squarely within its statutory grant of authority. Thus, the statutes are clear: the PUD has authority to make property purchases to obtain an easement. In deciding to purchase Parcel No. 19182 to secure that easement, the PUD correctly

[2] The PUD's "range of powers" is even "broader when the activity at issue is proprietary rather than governmental in nature." 2001 Op. Atty. Gen. No 3 at 4 (citing *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 693-95, 743 P.2d 793 (1987)). Because the PUD's acts here – entering into a contract with a third party and managing assets – are proprietary, it is afforded broad discretion and its choices will be upheld on judicial review unless a particular action or contract is arbitrary or capricious. *See, e.g., Burns v. City of Seattle*, 161 Wn.2d 129, 154-155, 164 P.3d 475 (2007).

recognized that buying the property itself would be a more convenient and less expensive option. As such, both the trial court and the Court of Appeals properly found the PUD acted within its authority when it purchased Parcel No. 19182.

Appellants have attempted to combat this clear conclusion by alleging the PUD exceeded its statutory authority in purchasing Parcel No. 19182 based on its inaccurate assumption that the PUD purchased Parcel No. 19182 "for the purpose of conveying it to a third party." In fact, Appellants' entire argument hinges on its hypothesis that the PUD created a shell game to purchase Parcel No. 19182 for the purpose of selling it to HiTest, and only invented the need for the easement after the fact. But Appellants' claims do not correctly characterize the undisputed evidence which indisputably shows that the PUD purchased Parcel No. 19182 for the purpose of securing an easement.

In fact, the record more accurately shows a series of actions taken by the PUD to purchase Parcel No. 19812, reserve an easement for its benefit, and then sell the property to HiTest. As explained by the PUD's Director of Engineering, Amber Orr, the PUD's decision to purchase Parcel No. 19182 was based on its belief that purchasing it and reserving an express easement would be easier than having to negotiate an easement with a third party if the County ever sold Parcel No. 19182. CP 79. The PUD general

manager, Colin Willenbrock, confirmed that the PUD's intent in acquiring Parcel No. 19182 was to reserve an easement on that property. CP at 87. Additionally, the public records preceding and leading up to the transfer from the County to the PUD expressly documented the purpose of the easement. CP 106 (Pend Oreille County Resolution No. 2017-22, adopted June 20, 2017, noting that the PUD "inquired into the purchase of the [subject parcel] as it…contains an easement that impacts the PUD operations").[3] The PUD followed through on its stated intent of purchasing Parcel No. 19182. Contrary to Appellants inaccurate representations, the PUD reserved the easement through a Special Warranty Deed recorded on September 18, 2017. The fact that the Deed had to be corrected and re-recorded on May 14, 2018 because of a scrivener's error does not change the clear facts that the easement was reserved in the initial deed.

Because the PUD acted within its statutorily granted authority in purchasing Parcel No. 19182, with its stated purpose to obtain an easement for itself, and because the PUD did just that, Appellants' Petition for Review must be denied.

[3] Appellants assert that the purpose of retaining an easement was only after the property was sold to HiTest. *Petition to Review* p. 9. This assertion is factually incorrect and in contravention of the undisputed record in this case. *See contra* CP 106.

B. <u>The PUD did not contravene RCW 54.16.180 when it sold Parcel No. 19182 to HiTest.</u>

Review by this Court is additionally unnecessary because the PUD complied with its statutory authority in selling property to HiTest, and there has been no impact on the public interest.

RCW 54.16.180 governs the procedure for the PUD to sell land. Public utility districts are provided with the express authority to sell real property without approval of the district voters. RCW 54.16.180(2)(b) permits PUDs to sell real property:

> without or without its boundaries, which has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system and which is no longer necessary, material to, and useful in such operations, to any person or public body.

Appellants have never offered <u>any</u> evidence contravening or challenging the fact that Parcel No. 19182 became unnecessary for the PUD's purposes once the easement was obtained and reserved.

Furthermore, Appellants challenge the PUD's procedural compliance with RCW 54.16.180. The PUD fully complied with the statutory requirements to sell property. The PUD Board of Commissioners discussed the sale of the Four Parcels to HiTest during the August 1, 2017 board meeting and voted that Parcel No. 19182 "was unfit for and no longer necessary or useful in systems operations, such that it should be sold for its

fair market value." CP at 88. After, that August 1 board meeting, the PUD and HiTest executed the Real Estate Purchase and Sale Agreement for the Four Parcels. The lower courts did not find any procedural defects with the PUD later adopting Resolution 1411, which summarized, ratified, and affirmed the PUD's previous steps of acquiring Parcel No. 19182 from the County, reserving an easement for itself on that parcel, and declaring that parcel no longer needed or useful for the PUD's operations after obtaining the easement.

Because the PUD complied with RCW 54.16.180, there was no *ultra vires* act in the sale of Parcel No. 19182, and review by this Court is unnecessary. Appellants' Petition for Review should be denied.

C. Because Appellants did not challenge the trial court's finding that HiTest is a bona fide purchaser, the transaction cannot be unwound regardless of whether this Court accepts review.

When Appellants appealed the trial court's summary judgment ruling to the Court of Appeals, they did not assign error to its finding that HiTest was a bona fide purchaser for value.[4]

HiTest demonstrated facts and evidence establishing it as a bona fide purchaser for value. These facts and evidence were uncontroverted and not

[4] Appellants' only reference to HiTest's bona fide purchaser defense in the briefing before the Court of Appeals was an acknowledgment that "the Court found that [HiTest] was a bona fide purchaser doctrine [sic] thereby affirming the transaction." *Brief of Appellants* at 6 (citing CP 469). Appellants assign no error to this separate basis for affirming the transaction.

challenged below by the Appellants. "Unchallenged conclusions of law become the law of the case." *Rush v. Blackburn*, 190 Wn. App. 945, 956, 361 P.3d 217 (2015); *see also Fisher Broad-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 528, 326 P.3d 688 (2014) (declining to address issues below where appellant did not assign error or otherwise address the issue in its opening brief).

Because Appellants have not assigned error to this finding, it is incontrovertible that HiTest is a bona fide purchaser for value. As a good faith purchaser for value with no notice of any (alleged) procedural irregularities, HiTest is entitled to enforce its purchase of Parcel No. 19182 as a bona fide purchaser. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 127, 233 P.3d 871 (2010). Thus, regardless of whether this Court accepts review and finds the PUD exceeded its statutory authority, the transaction cannot be unwound.

D. RAP 13.4 does not apply because Washington law clearly supports the PUD's actions and the lower courts' findings.

Review is unnecessary in this case because the Court of Appeal's opinion falls squarely into the unambiguous controlling statutes. Appellants allege that its Petition for Review is based on an issue of substantial public interest. Appellants ask that this Court to accept review for clarification on the "basic rules for the purchase and sale of property by PUDs across the

state." Appellants ignore the fact that the statutory authority of RCW 54.16 *et seq.* already does that.

This case is not one where the lower courts read the applicable statutes in a new light. Instead, the lower courts used the plain, unambiguous language of the statutes to find that the PUD complied with both the purchase and sale of the Four Parcels.

Further, the issues Appellants seek to raise here do not "involve issues of substantial public interest that should be determined by the Supreme Court" under RAP 13.4.[5] Rather, Appellant's challenge to the PUD's purchase of Parcel No. 19182 from the County is based on a misconstruction and misrepresentation of the record, specific to facts of this case – arguments that have now been twice rejected by the lower courts. Appellants' challenge to the PUD's sale of the Four Parcels to HiTest was properly resolved by both lower courts based on the authority granted public utility districts in chapter 54.16 RCW.

As such, review by this Court is unnecessary and should be denied.

[5] Appellants principal interest is in challenging HiTest's proposed industrial facility, and not in the manufactured issues arising under the purchase and sale of the Four Parcels. *See* CP at 12 (noting that "the mission of CANNS is to prevent Hi-Test's proposed Silicon Smelter from being located in the Newport area).

IV. CONCLUSION

Based on the foregoing, HiTest. respectfully asks this Court to deny the *Petition for Review*.

RESPECTFULLY SUBMITTED this 27th day of August, 2020.

WITHERSPOON BRAJCICH MCPHEE, PLLC

By: s/ James A. McPhee
Peter A. Witherspoon, WSBA #7596
James A. McPhee, WSBA #26323
Attorneys for HiTest Sand, Inc.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I hereby certify that on August 27, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered e-portal users will be served by the appellate system.

DATED: August 27, 2020, at Spokane, Washington.

s/ Veronica J. Clayton
Veronica J. Clayton, Paralegal
Witherspoon Brajcich McPhee, PLLC

WITHERSPOON BRAJCICH MCPHEE, PLLC

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