

**No. 67755-1-I**  
 (Consolidated with Case No. 67756-0-1)

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
 DIVISION I

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DIKING DISTRICT NO. 1 OF ISLAND COUNTY, an,  
 Island County diking district,  
 Appellant / Cross Appellants,

vs.

CITIZENS IN SUPPORT OF USELESS BAY COMMUNITY, a  
 Washington nonprofit corporation, and ROBERT and JUDITH  
 WINQUIST, husband and wife and their marital community,

Respondents / Cross Appellants,

vs.

ISLAND COUNTY, a Washington State Municipal Corporation; MARY  
 WILSON ENGLE in her capacity as Island County Assessor; ANNA MARIA d  
 NUNES in her capacity as Island County Treasurer; SHEILA CRIDER, in her  
 capacity as Island County Auditor; and USELESS BAY GOLF and COUNTRY  
 CLUB, Inc., a Washington nonprofit corporation,

Respondents and Respondents on Cross Appeal.

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RESPONSE TO CITIZENS IN SUPPORT OF USELESS BAY COMMUNITY  
 and ROBERT and JUDITH WINQUIST'S BRIEF

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H. Clarke Harvey  
 WSBA# 8238  
 Attorneys for Respondents,  
 Useless Bay Golf and Country Club, Inc.  
 Kelly & Harvey Law Offices LLP  
 P.O. Box 290  
 Clinton, WA 98236  
 360 341 1515

FILED  
 COURT OF APPEALS DIV I  
 STATE OF WASHINGTON  
 2012 MAR 28 AM 10:40

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## I. INTRODUCTION

Island County Diking District No. 1 is a diking district that serves part of South Whidbey Island having been formed in 1914. The Diking District is charged with protecting the lands within its borders from flooding by use of a series of dikes and drainage ditches. Useless Bay Golf and Country Club, Inc. is also located on South Whidbey Island and its land is threatened by the same flooding problem that faces the Diking District. A number of years ago the Golf Club developed its own drainage system which used a pump to pump water over the Diking District's dike and thus keep waters at a manageable level. In 2004 the Diking District, the Useless Bay Golf and Country Club, and Island County entered into a contract to cooperate in draining flood waters that affected all three parties. Citizens in Support of Useless Bay Community initiated legal action challenging several acts by the Diking District Commissioners. The only one that affects Useless Bay Golf and Country Club is the challenge to the 2004 contract between the Diking District, Island County, and the Useless Bay Golf and Country Club. The Island County Superior Court addressed this issue by Summary Judgment resulting in the Court finding the Diking District's act of entering into the contract was not ultra vires and that the contract was valid.

## **II. ISSUES**

A. Was Diking District No. 1's act of entering into the 2004 contract as amended in 2006, with Island County, and the Useless Bay Golf and Country Club, Inc. an ultra vires act thus making the contract void?

B. Is the contract between Diking District No. 1, Island County, and the Useless Bay Golf and Country Club, Inc. unenforceable as a result of procedural irregularity?

## **III. COUNTER STATEMENT OF THE CASE**

Citizens in Support of Useless Bay Community (hereinafter referred to as CSUBC) has set forth an extensive summary of the factual background in this case. The Useless Bay Golf and Country Club, Inc. (hereinafter referred to as the Golf Club), has no comment concerning CSUBC's factual summary since the majority of it has no relevance to the sole issue that affects the Golf Club. The Golf Club accepts CSUBC's factual statement of the case as it relates to the 2004 contract between Diking District No. 1, Island County, and the Golf Club. The Golf Club also accepts CSUBC's factual statement as it relates to the 2006 amendment to the contract.

#### IV. ARGUMENT AND AUTHORITIES

**A. The contract between Diking District No. 1, Island County, and the Useless Bay Golf and Country Club, Inc. is a valid contract and the Diking District's act of entering into that contract was not ultra vires.**

It is undisputed that Diking District No. 1 is a validly formed diking district. The authority of the diking district commissioners is set forth in RCW 85.05.010. That statute provides:

The commissioners hereinafter provided for, and their successors in office, shall, from the time of the organization of such diking district, have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary *contracts*, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and perform such other acts as hereinafter provided, or that may hereafter be provided by law. (Italics added)

RCW 85.05.010.

In addition to the general powers set forth in RCW 85.05.010, diking districts have specifically enumerated powers which are set forth in RCW 85.05.070 including the authority,

To construct all needed and auxiliary dikes, *drains*, ditches, canals, flumes, locks and all other necessary artificial appliances, wherever situated, in the construction of a diking system and which may be necessary or advisable to protect the land in any diking district from overflow, or to provide an efficient system of *drainage* for the land

situated within such diking district, or to assist and become necessary in the preservation and maintenance of such diking system. (Italics added)

RCW 85.05.070(2).

The powers set forth in RCW 85.05.010 and 85.05.070 are not predicated upon the district taking any formal action to create that authority. In other words, the authority set forth in those statutes constitute the general powers of the diking district that exist without the district taking any action to obtain those powers.

These two statutes provided the authority for the Diking District to enter into the 2004 contract. CSUBC argues that the district had no authority to enter into the contract until it prepared a resolution and held a hearing pursuant to RCW 85.05.071. It alleges that since the district did not follow the procedures of RCW 85.05.071 the contract is ultra vires and therefore void.

The Supreme Court thoroughly discussed the doctrine of ultra vires in *South Tacoma Way LLC v. State of Washington*, 169 Wn.2d 118, 233 P.3d 871 (2010). In that case the State of Washington through the Washington State Department of Transportation sold surplus property without providing notice to abutting property owners as required by RCW

47.12.063(2)(g)<sup>1</sup>. *Supra* at 120-121. South Tacoma Way argued that failure to provide the statutorily required notice made the sale an ultra vires act and therefore void. *Supra* at 122. The argument made by South Tacoma Way was similar to the argument made by CSUBC. In other words, the government entity did not have the power to take the action it took without first following a certain set of procedures.

The Court pointed out that there is a distinction between those acts that are ultra vires and those that suffer from procedural irregularity. “Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed.” *South Tacoma Way LLC v. State of Washington*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). The Court further stated,

Conversely, acts done without strict procedural or statutory compliance are subject to different review. Those acts may or may not be set aside depending on the circumstances involved. Thus, government entities may remain responsible for lesser deviations in authority, such as failures to comply with proper procedure. (citation omitted). Consequently, a contract formed between a government entity and a private entity will be void only

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<sup>1</sup> RCW 47.12.063(2) permitted the sale of the surplus property to various governmental entities or persons including “any abutting private owner that only after each other abutting private owner (in any), as shown in the records of the county assessor, is notified in writing of the proposed sale.” RCW 47.12.063(2)(g). RCW 47.12.063(2)(g) has been recodified as RCW 47.12.063(3)(g).

where the government entity had no authority to enter the contract in the first place.

*Supra.*

The power to act in this case existed as the result of RCW 85.05.010 which granted the diking district commissioners the power to “make and execute all necessary contracts” and the provision of RCW 85.05.070(2) which gave the district the power to “construct all needed and auxiliary dikes, drains, ditches, canals, flumes, and all necessary artificial appliances . . . or to provide an efficient system of drainage for the land situated within such diking district . . .” Neither of those statutes require the district to take any procedural steps to create their authority. The diking district had the authority to enter into the contract and therefore its act in doing so was not ultra vires. See, *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976).

**B. There was no procedural irregularity in the execution of the 2004 contract which would make it unenforceable.**

As previously pointed out there is a distinction between acts that are ultra vires and those that were taken as the result of procedural irregularity. If a governmental entity takes action where it fails to follow proper procedural requirements the act taken may or may not be set aside depending on the circumstances. *South Tacoma Way LLC v. State of*

*Washington, Supra* at 123. In essence CSUBC is arguing that the diking district failed to follow the procedures set forth in RCW 85.05.071 and therefore the 2004 contract is unenforceable. A close reading of RCW 85.05.071 reveals that the resolution and public hearing is required before beginning *construction* of any drainage system. In other words, it is the act of construction of the drainage system that is predicated upon the resolution and public hearing. The statute does not prohibit the district from taking preliminary steps in planning construction of the system such as exploring options for various systems, designs, cost estimates, etc. The contract in this case is in essence a preliminary step which sets forth a proposal for a project to deal with the flooding problem.

There is also no prohibition against the district entering into contracts with various service providers to obtain the type of information that is necessary to prepare a resolution with a proposal. If CSUBC's position was correct then any contract that the district entered into to have a system designed and a proposed cost calculated would place the district in a potential Catch 22. RCW 85.05.071 requires that the proposed resolution contain a description of the improvement and its costs but CSUBC's position is apparently that the same statute prohibits the district from entering into those contracts necessary to obtain that information without first having the resolution and public hearing.

CSUBC mischaracterizes the 2004 contract as a construction contract. None of the parties to the 2004 contract are contractors. The 2004 contract is a contract between two governmental entities and a private party to jointly address a common flooding and drainage issue that all of the parties faced. The procedures of RCW 85.05.071 do not require a resolution and public hearing before the diking district can enter into a contract with the County and the Golf Club for a plan to deal with a common flooding and drainage issue.

It is anticipated that CSUBC will argue that it was premature and a poor business decision for the district to enter into the contract prior to presenting the project to the public through the procedures set forth in RCW 85.05.071. Whether or not the decision was a poor business decision or not has nothing to do with the applicability of the procedures set forth in RCW 85.05.071. Those procedures do not apply to the execution of the 2004 contract and whether it was a poor business decision does not make the inapplicability of those procedures suddenly applicable.

Even if the procedures set forth in RCW 85.05.071 are somehow applicable to the execution of the 2004 contract and assuming that execution of the contract was contrary to the procedures in the statute, that does not in and of itself make the contract unenforceable. The legislature obviously indicated its preference that a diking district follow the

procedures set forth in RCW 85.05.071 when addressing drainage system issues, however, that statute was never intended to restrict the district to the extent urged by CSUBC. RCW 85.05.074 gives the diking district commissioners the ultimate authority to proceed with a drainage system project. That statute provides, “But nothing contained in this act shall be held to forbid the commissioners in their discretion overruling all protests and directing the construction of such improvement.” RCW 85.05.074. This is because the commissioners have a duty to carry out the purposes of the diking district. RCW 85.05.010. That duty is:

To construct all needed and auxiliary dikes, drains, ditches.  
*. . . which may be necessary or advisable to protect the land in any diking district from overflow, or to provide an efficient system of drainage for the land situated within the diking district. (Italics added).*

RCW 85.05.070.

In addition RCW 85.18.005 provides:

Where organized diking districts, through their improvements, have reclaimed land or protected it from overflow and have enabled erection of improvements thereon or have furnished such land and buildings protection against flood water, it is necessary to provide a just and equitable method to enable such diking districts continuously to function effectively. It is declared that there is a direct relationship, where such conditions exist, between the continuous functioning of such districts and the fair value of the lands and buildings thereon, or to be erected thereon, thus afforded protection.

RCW 85.18.005.

The purpose of the diking district is to protect lands within its boundaries from “overflow” and therefore RCW 85.05.074 gives the commissioners the authority to proceed with construction of drainage systems even if objections are registered at any public hearing held pursuant to the provisions of RCW 85.05.071. In the present case there has been no allegation that the action taken by the commissioners in executing the 2004 contract was taken for any purpose other than to protect the lands from flooding. Under these circumstances even if there were procedural irregularities in the entry of the contract those irregularities would not make the contract unenforceable.

## **V. CONCLUSION**

The Diking District’s act of entering into the 2004 contract as amended in 2006 with Island County and the Golf Club was not an ultra vires act. As a result the contract was not void at its inception. Additionally, there were no procedural irregularities in the making of the contract that would render it unenforceable. The procedural provisions of RCW 85.05.071 do not apply to the making of the 2004 contract. Even if they did, the failure to follow those procedures under the circumstances of this case would not render the contract unenforceable since the Diking District did not act contrary to the public policy of the statutory scheme set

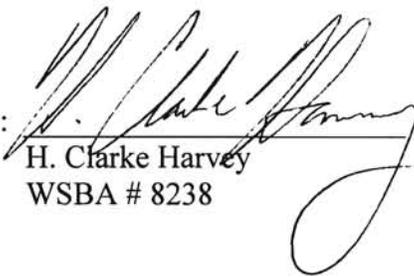
forth in RCW Chapter 85.05. See *South Tacoma Way LLC v. the State of Washington*, 169 Wn.2d 118, 233 P.3d 871 (2010).

March 27, 2012

Respectively submitted,

Kelly & Harvey Law Offices LLP

By:



H. Clarke Harvey  
WSBA # 8238