

NO. 73738-4-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION 1

ROBIN JONES and ROSEMARY QUESENBERRY,
Appellants'/Plaintiffs,

vs.

THE RENTON SCHOOL DISTRICT #403,
Respondent/Defendant.

APPELLANTS' REPLY BRIEF

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"B]ecause [the government] did not violate the purpose of the notice requirement . . . , the court held that [the government's] failure to comply with the statutory notice requirements did not invalidate the contract or impair its enforceability." Brief of Respondent, at 14, discussing *S. Tacoma Way, LLC v. State of Washington*, 169 Wn.2d 118, 233 P.3d 871 (2010) (emphasis added). The "purpose [of RCW 28A.335.120(2)] appears to be providing a school district with an opportunity to gather and consider evidence and weigh the propriety and advisability of a proposed sale." Brief of Respondent, at 10 (emphasis added).

The Renton School District did not provide statutorily required notice to its residents, before deciding to sell certain real property. That violated the purpose of the statute. The question in this case is whether a violation both of the statute and its purpose can be ignored.

A. Argument.

1. S. Tacoma Way does not authorize the Court to ignore a procedural error where the statutory purpose is violated.

The fundamental rule is that courts will not enforce government actions that follow from

illegal acts. *Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949). Municipal corporations possess only those powers conferred on them by the constitution, statutes, and their charters. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987). The power to sell real property has been granted to school districts by RCW 28A.335.120 and its predecessors.

The Renton School District relies on an exception to this rule, as considered in *S. Tacoma Way, LLC v. State of Washington*, 169 Wn.2d 118, 233 P.3d 871 (2010). This is the only basis the trial court relied on in dismissing this case on summary judgment.¹ CP 314. But *S. Tacoma Way* permitted the illegal act only because the purpose behind the non-complied-with statute was nevertheless satisfied. That is not the situation in this matter, and the trial court never even considered whether the purpose behind RCW 28A.335.120 was met.

The District acknowledges, correctly, that it was because the purpose was met that *S. Tacoma Way*

¹ *Lane v. Port of Seattle*, 178 Wn. App. 110, 316 P.3d 1070 (2013), applies the same analysis. See Appellants' Opening Brief, at 17-18.

was decided as it was. Brief, at 14. The District cannot show that the purpose behind RCW 28A.335.120 was met.

The District argues the purpose behind the public notice and hearing requirement was to "consider evidence" as to the propriety and advisability of the proposed sale. Brief, at 10. Plaintiffs argue the purpose was also to provide them with the opportunity to offer their input to their elected representatives, relying on the changes enacted in 1979. Laws 1979, 1st Ex. Sess. ch. 16 §1.

Either way, though, by not providing the statutorily required notice the District limited the evidence it could consider if offered against the propriety and advisability of the sale. The failure to provide the notice directly contradicted the purpose of the statute.

Only where the underlying policy is satisfied may the Court overlook the failure to follow the statutory requirements. *S. Tacoma Way* imposes no requirement that the statute must expressly provide otherwise, contrary to the District's assertion. Brief, at 12.

The District attempts to confuse language

concerning substantive violations from procedural violations. Brief, at 13-14. But even for procedural violations, the court must look at the policy underlying the statutory requirements. *S. Tacoma Way* did, and the District acknowledges such.

Plaintiffs note that the District also confuses arguments involving equitable doctrines with those applicable here.

The District also misapprehends *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982). *Noel* rejected a government action which did not comply with the policy behind a procedural requirement. That is still good law.

What has changed is the a specific procedural requirement. At the time of *Noel* whether projects categorically exempt from SEPA review nevertheless had to be reviewed under SEPA on a case-by-case basis to determine whether the project created a significant adverse environmental impact, was an open question. *Noel* assumed categorically exempt projects nevertheless had to be reviewed. But that was subsequently changed by statute, and the Supreme Court confirmed that categorically exempt projects are in fact exempt from SEPA review.

Dioxin/ Organochlorine Center v. Pollution Control Hearings Bd., 131 Wn.2d 345, 362, 932 P.2d 158 (1997).

The case-by-case review, though, was whether a project created a significant adverse environmental impact. It was not a review of "legislative history and policy," contrary to the District's assertion. Brief, at 16.

The District has not cited *any* case where a statutory violation was nevertheless allowed, where the underlying policy was violated. Because the District violated the policy underlying the public notice and hearing requirement, the Court should reverse the trial court's grant of summary judgment and remand for further proceedings.

2. The Renton School District failed to follow the statutory process before deciding to sell the real property.

There is no question the Renton School District failed to follow the required process before deciding to sell the property. It admits it published the notice in a Snoqualmie (not Renton) newspaper. Brief, at 3. It then held a hearing, and subsequently² entered into a binding³

² The District suggests it decided to sell before the hearing, Brief, at 2, but the Board's

purchase and sale agreement to sell the property.

The District argues instead that there is no requirement to publish the notice, or hold the hearing, prior to entering into a contract to sell. Brief, at 9. This is absurd.

Prior to 1979, a school district had no authority to sell real property over a certain value without a public vote. If the vote went against the district, the property could not be sold.

In 1979, the public vote requirement was removed and replaced with what is now RCW 28A.335.120(2). Laws 1979, 1st Ex. Sess., ch. 16. The statute required that when a district "proposes" a sale of real property, it publish public notice and hold a hearing on the "proposal" to dispose of the property and "admit evidence offered for and against the propriety and advisability of the "proposed" sale. (Quotation

Resolution was shortly thereafter. Plaintiffs note that if the District had decided to sell before the hearing, that would be even more egregious.

³ The District told the Court the PSA was not binding, CP 203-204, but the Court reviewed it and indicated otherwise. CP 205. The District no longer has argued otherwise.

marks added).

It is simply absurd to believe the legislature permitted a district to enter into a binding purchase and sale agreement before it held a hearing to consider evidence against the propriety and advisability of that very same sale. The would make the hearing an absurd circus. The legislature does not intend to require such ridiculous results.

Plaintiffs note that the District's position in its Brief is different from what was presented at the first hearing. There the District said that evidence "against the sale must be heard and considered by the Board." Wilson Dec. Ex. E, at page 6, lines 20-22, in CP 20-163. It is not possible to "consider" evidence against the sale if the decision to sell has already been made.

The District did not comply with its own suggestion that a hearing would be "pointless" if there were insufficient detail of the sale terms. Brief, at 10. The hearing is to determine whether it is proper and advisable to sell in the first place. That is not possible if there is a binding agreement with specific sale terms.

RCW 28A.335.120 subsection (2) should be

distinguished from subsections (3) and (4). Subsection (2) was enacted in 1979, not 1981, contrary to the District. See Brief at 7, 9. Subsections (3) and (4) were added in 1981. The latter apply to all real property, but the notice requirement is different, and there is no requirement for a public hearing.

Whether a second hearing "corrected" the procedural error is premature. Brief, at 5,11. The District made this argument in its initial motion to dismiss, but the trial court ultimately rejected that argument ruling that the record should be more fully developed before adjudicating that claim. CP 205. While it may be technically correct that the parties 'engaged in discovery," Brief, at 4, the District cut that off in the very preliminary stages. Compare CP 236 (filed summary judgment motion on May 14) with CP 289-92 (first interrogatories answered on May 29). The District did not make the argument in its summary judgment motion that the second hearing corrected its error. CP 208-221.

Holding a hearing when subject to a binding purchase and sale agreement hardly gives the District's residents a full and fair opportunity

to present evidence against entering into such an agreement. Had this Court entered into such an agreement to sell, it would hardly agree that it could fairly consider evidence and impartially decide whether to sell.

The trial court did not rule that the plaintiffs lack standing, and the District offers nothing new. Rosemary Quesenberry never knew about the first hearing. CP 232. For purposes of ruling on a motion for summary judgment, this must be accepted as true. The District cannot plausibly claim that it gave her an opportunity to be heard. Brief, at 11. She had already moved to be added as a plaintiff before the trial court ruled on the District's first motion to dismiss, but the Court's ruling on the merits made ruling on her motion moot. *Cf.* Brief, at 4.

The authority to sell real property is authorized solely by RCW 28A.335.120. The District cites RCW 28A.335.090(1), Brief, at 17, but that authority is expressly subject to RCW 28A.335.120. Nor does the general public corporation statute RCW 28A.320.010, Brief, at 17-18. That statute restricts actions to those authorized by law. Interpreted in any other way

would give school districts essentially unlimited authority, and render duplicative the authority to sell provided in RCW 28A.335.120.

This case is not frivolous and brought solely for the purpose of delay. Brief, at 24. No case has held what the Renton School District desires, which is a holding that ignoring statutory requirements by a process which violates the purpose of those requirements is acceptable. *S. Tacoma Way* most certainly did not. No reported case has considered the requirements of RCW 28A.335.120. The Complaint is factually well grounded, and there is no need in responding to a summary judgment motion to point to factual errors by the trial court.

Plaintiffs brought this case to hold the Renton School District responsible for not following the statutory requirements before deciding to sell the property next door to their homes. The appeal will not lead to any delay which would "unwind" the purchase and sale agreement, because there is still more than a year to run before it expires, and in any event the parties have shown willingness to extend closing on multiple occasions. Nor does a delay of 14

days, when considering the record as a whole, and particularly District's error in not providing proper notice, and both it's and the purchaser's willingness to extend closing, matter significantly or indicate anything.

The Distict does not explain how this appeal "indirectly" will unwind the decision to sell. Brief, at 25. The only action which would "unwind" the sale is by prevailing on the merits. A declaratory judgment that the District has not complied with the statute would cause the purchaser to look to see whether he could obtain clear title.

At that point, the District should start over. They should hold a hearing at which all their residents are given a full and fair opportunity to offer evidence against the propriety and advisability of a sale, and consider the evidence with open minds, both in fact and giving the appearance of fairness.

The District should not refuse to "abandon its plan," Brief, at 26, if this Court tells it that it has violated the purpose of the law by deciding to sell before giving its residents the full and fair opportunity at a new hearing. What

would indeed happen should be unknown, and the District should not threaten or speculate on this matter.

B. Conclusion.

The trial court erred in dismissing this case on summary judgment. The District's failure to provide the statutory notice for a hearing, and subsequent decision to sell property, violated the underlying policy of the statute. The District did not give its residents a full and fair opportunity to offer evidence against the propriety and advisability of the sale.

This Court should reverse and remand for further proceedings.

DATED: December 14, 2015.

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