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Case No. 367363-III

IN THE COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

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

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INTRODUCTION

This case examines whether the Pend Oreille County Public Utility District ("PUD") purchased and subsequently sold land in an *ultra vires* transaction. The lower court erred by holding the transaction was not *ultra vires* and holding that HiTest is a bona fide purchaser. The PUD purchased Parcel 19182 in an *ultra vires* transaction because the purchase was for reasons other than for energy purposes, in violation of RCW 54.16.020.

Moreover, the purchase and sale agreement between HiTest and the PUD is *ultra vires* and void because the PUD failed to comply with procedural safeguards and violated statutory policy of RCW 54.16.180.

On April 18, 2017, the PUD received a letter of intent from HiTest regarding Parcels 19183, 19193, 17036, and 19182. CP 253. As identified in the letter, Parcel 19182 was not owned by the PUD at the time but was owned by Pend Oreille County at the time of HiTest's inquiry. CP 253. HiTest expressed an intent to build a silicon smelter plant on the four parcels which "together combine to a total of 186.3 acres." CP 253.

On April 25, 2017, the PUD sent a letter to Jayson Tymko, identified as the president of Hitest Sand, Inc. CP 110. The letter was marked "Re: Letter of Intent to Sell 186.3 acres located south of Newport, WA." CP 110. The letter identified that "(a) one parcel of 13.83 acres (Property ID # 19182) which is currently owned by Pend Oreille County, but is eligible to

be surplused and conveyed to the District through intergovernmental transfer." CP 110. The letter continues "it is anticipated that the intergovernmental transfer will take place prior to execution of the Purchase Agreement." CP 110. The letter does not identify a need for the PUD to get an easement on Parcel 19182 or speak of an existing easement on Parcel 19182. CP 110. The letter also does not indicate the PUD needs to delay the execution of the Purchase Agreement based on a need to comply with procedural safeguards for Parcel 19182 pursuant to RCW 54.16.180. CP 110.

On June 13, 2017, the PUD sent a Revised Letter of Intent reflecting the "changed circumstances regarding the scope of the Property . . ." and identified only Parcels 19183, 19193, and 17036, the parcels owned by the PUD, as part of the Purchase Agreement between the parties. CP 115. The Revised Letter of Intent identifies <u>only 172.47</u> acres to be sold to HiTest. CP 115 (emphasis added). A draft purchase agreement was also exchanged between the parties. CP 118. The draft purchase agreement only contained the three parcels specified in the Revised Letter of Intent. CP 118. On June 20, 2017, Pend Oreille County authorized the sale of Parcel 19182 to the PUD. CP 106.

On August 1, 2017, the PUD held a meeting discussing the sale of land to HiTest. CP 127. The minutes identified a "HiTest Sands, Inc.

Discussion" wherein Ms. Gentle provided an overview of the PUD's surplused land HiTest had expressed interest in purchasing. CP 129. The minutes identify the "total land consists of 187 acres." CP 129 (emphasis added). However, as previously identified in the Revised Letter of Intent, HiTest's purchase of property was for 172.47 acres owned by the PUD. CP 115 (emphasis added). Therefore, Ms. Gentle's discussion with the PUD commissioners, reflected in the minutes, erroneously included Parcel 19182 in the "surplused" land HiTest was interested in purchasing. CP 129. Additionally, the minutes reflect "Mr. Willenbrock reported the land was surplused and advertised but no bids were received" which is untrue as applied to Parcel 19182. CP 129. The meeting minutes do not indicate any discussion about an easement on Parcel 19182 or its use once the easement was obtained. CP 129.

Resolution 1399 passed at this meeting identifies "the District received authorization to purchase Pend Oreille County land Parcel number 19182 at the tax assessed value on June 20, 2017." CP 132. The Resolution makes no mention of purchasing Parcel 19182 for purposes of reserving an easement. CP 132. The Resolution does not identify that having an easement reserved on Parcel 19182 subsequently made the land no longer necessary for PUD purposes. CP 132. The Resolution does not declare Parcel 19182 as surplus. CP 132. The Resolution does not declare Parcel

19182 "unfit" or "no longer necessary" to the PUD. CP 132; RCW 54.16.180. The Resolution does specifically identify "the District now intends to sell the entire four parcel package following final appraisal and due diligence to HiTest, Sands, Inc." CP 132 (emphasis added). The Resolution concludes authorizing the "general manager to independently negotiate the final sale of Parcel numbers 17036, 19182, 19183, and 19193." CP 132 (emphasis added).

While the PUD has claimed that there was "extensive discussion" regarding the easement on Parcel 19182 at the August 1, 2017 meeting, and the PUD Board of Commissioners determined Parcel 19182 "once subject to the easement, was unfit for and no longer necessary or useful in systems operations" that claim is unsupported by the meeting minutes. CP 88 ¶ 16; CP 129. Moreover, the PUD allegedly had these "extensive discussions" and determined Parcel 19182 was "no longer necessary" to PUD operations, as Mr. Willenbrock stated in his declaration, before the PUD owned Parcel 19182. CP 88; CP 135. Parcel 19182 was not sold to the PUD until August 2, 2017. CP 135. As Resolution 1399, adopted August 1, 2017, clearly indicates the PUD had the intent to sell Parcel 19182 before the PUD owned it. CP 132. Allowing the PUD to declare property it does not own "unfit" is contrary to public policy and common sense.

RCW 54.16.180 governs the procedure for disposition of properties by a public utility district. "A district may, without the approval of the voters, sell, convey, lease, or otherwise dispose of all or any part of the property owned by it that is located: (b) Within 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." RCW 54.16.180(2)(b) (emphasis added).

The PUD acted *ultra vires* when purchasing parcel 19182 because they substantively violated RCW 54.16.020 by purchasing property for purposes other than generating electricity. As shown by Resolution 1399, the PUD had the intent to sell Parcel 19182 to HiTest before they owned it and did not note any need for an easement on the property. CP 132. The PUD purchased Parcel 19182 with the intent to sell to HiTest, in clear violation of their statutory obligation to purchase property for purposes of generating electricity. *See* RCW 54.16.020.

Moreover, the PUD acted outside its statutory authority by selling Parcel 19182 to HiTest without determining it was surplus property. *See* RCW 54.16.180. The PUD did not own the property during the August 1, 2017 meeting. CP 135. Therefore, Parcel 19182 could not have become unfit for PUD operations and determined to be no longer necessary for PUD

operations before or during the August 1, 2017 meeting. The sale of Parcel 19182 violated the statute and its underlying policy, making the sale of Parcel 19182 ultimately *ultra vires*. *See S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 124, 233 P.3d 871 (2010).

ARGUMENT

I. The District's purchase of Parcel 19182 from Pend Oreille County was *ultra vires* because the property was purchased for reasons outside the statutory authorization.

The PUD claims that their purchase of Parcel No. 19182 was done so for the purpose of gaining an easement on the land. *PUD Response Brief* at 5. Astonishingly, once the PUD purchased the parcel from the County, it made no effort to actually get an easement before selling the property to HiTest. CP 149-150. Dubiously, a corrected Special Warranty Deed was obtained only after Appellants notified the PUD of the illegality of the transfer. CP 297; CP 149-150; CP 151-155. Resolution 1399 is the clearest indication of the PUD's intent, with the Resolution specifically stating, "the District now intends to sell the entire four parcel package following final appraisal and due diligence to HiTest, Sands, Inc." CP 132. The undisputed facts show the PUD purchased Parcel No. 19182 for the purpose of bundling all four parcels to HiTest.

The PUD points to Collin Willenbrock's declaration, where he states the PUD did seek to acquire Parcel No. 19182 for the purpose of gaining an

express easement. *PUD Response Brief* at 5. This declaration is not supported by the minutes from the August 1, 2017 PUD meeting, Resolution 1399, or any contemporaneous evidence that demonstrates such an intent. The PUD only has authority to purchase land for energy purposes. RCW 54.16.020. Here, the PUD acted *ultra vires* to purchase Parcel No. 19182 in order to sell it to HiTest.

HiTest and the PUD argue for the proposition that they have general authority to purchase land so then any action they take regarding land purchases could not be *ultra vires*. *HiTest Response Brief* at 13; *PUD Response Brief* at 14-15. HiTest cites *S. Tacoma Way* for the same proposition. In that case, a municipal corporation only committed procedural errors in a land transaction. *S. Tacoma Way,* 169 Wn.2d at 121, 233 P.3d 871. The State "was generally authorized to sell surplus property to abutting landowners, it committed no substantive statutory violation." *Id.* at 124, 233 P.3d 871. In this case, the PUD committed substantive statutory violations, not procedural violations. RCW 54.16.020. Respondents' effort to frame *S. Tacoma Way, LLC* for this purpose as controlling is misguided because the PUD has no general authority to buy land it desires, as it can only do so for energy purposes. *Id.* Further, a PUD is "implicitly authorized to make all contracts and to engage in any undertaking which is necessary to render the system efficient and beneficial to the public. . . absent statutory

or case law violations." *Puget Sound Power & Light Co. v. Pub. Util. Dist. No. 1*, 17 Wn. App. 861, 864, 565 P.2d 1221 (1977). Again, without the statutory authority to purchase the parcel, the PUD acted *ultra vires*. *Id.*; *see also* RCW 54.16.020. A public utility district has authority to "purchase, acquire, lease, add to, maintain, operate, develop, and regulate all lands, property, property rights. . . and systems for generating electric energy by water power, steam, or other methods." RCW 54.16.020. While a PUD has authority to purchase land for energy purposes, it lacks the ability to purchase land for any other reason. *Id.* "An unambiguous statute is not subject to judicial interpretation, and the statute's meaning is derived solely from its language." *Spence v. Kaminski*, 103 Wn. App. 325, 333, 12 P.3d 1030 (*citing State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)). RCW 54.16.020 is unambiguous and must be read to constrain a PUD from purchasing Parcel No. 19182 for the purposes of conveying it in a package to a third party. *Id.*

Even assuming the PUD's wrongdoing was only procedurally invalid, its actions are against the underlying policy of the law. *S. Tacoma Way*, 169 Wn.2d at 124, 233 P.3d 871. The underlying policy of RCW 54.16.020 is to be accountable to the taxpayers in the utility district in which the PUD serves. The purpose of the statute is to ensure that the money spent by the PUD is for the energy purposes and to advance the mission of the

PUD. RCW 54.16.020. Advancing the objectives of a third-party company is hardly the objective of the statute. *Id.*

> The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.

Laws of 1931, ch. 1, 1. The PUD's actions are beyond its ability to operate for energy purposes and against the policy behind the statute. RCW 54.16.020. Therefore, the purchase of Parcel No. 19182 must be considered void.

A. Bona Fide purchaser doctrine is not considered if the purchase was *ultra vires* because there was no authority for the transaction.

Moreover, Respondents argue that the purchase should be allowed to stand because HiTest was a bona fide purchaser. *See HiTest Response Brief* at 1; *PUD Response Brief* at 27-28. This argument lacks merit because the purchase of Parcel No. 19182 by the PUD is *ultra vires*. *See* RCW 54.16.020. A good-faith purchaser can only utilize the bona fide purchaser doctrine in their favor when the government entity had the authority to act in the first place. *S. Tacoma Way*, 169 Wn.2d at 128, 233 P.3d 871. Here, when the PUD purchased the property from the County, it had no authority to do so. RCW 54.16.020. This makes Respondents' bona fide purchaser argument ineffective because even if HiTest is a bona fide purchaser, an

ultra vires act by the PUD makes the sale invalid. *S. Tacoma Way*, 169 Wn.2d at 128, 233 P.3d 871.

II. The District's sale of Parcel of 19182 was *ultra vires* because the District failed to comply with the statutes regulating PUD purchase and transfer of property.

The PUD incorrectly argues the sale of Parcel 19182 was not *ultra vires* because it argues it does not have to declare property "surplus" and therefore can sell property in any manner it chooses while still benefitting the citizens of the district. *PUD Response Brief* at 25. This is incorrect because before the PUD may sell or dispose of property, the property must <u>become</u> "unfit" and "no longer necessary" for PUD operations. *See* RCW 54.16.180(2)(b).

The PUD stepped outside its authority when selling Parcel 19182 to HiTest because it did not determine Parcel 19182 was "unfit" and "no longer necessary" for PUD operations. *See* RCW 54.16.180. "More commonly, an agency steps outside its authority by failure to comply with statutorily mandated procedures." *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982) (superseded by statute on other grounds). The statutory mandate of RCW 54.16.180 provides the procedure for PUDs to "sell and convey, lease or otherwise dispose of all" materials or property owned by the PUD. RCW 54.16.180(1). There are two methods for selling and

conveying, leasing, or otherwise disposing of property pursuant to the statute. First,

> (1) A district may sell and convey, lease, or otherwise dispose of all or any part of its works, plants, systems, utilities and properties, after proceedings and approval by the voters of the district, as provided for the lease or disposition of like properties and facilities owned by cities and towns. The affirmative vote of three-fifths of the voters voting at an election on the question of approval of a proposed sale shall be necessary to authorize such a sale.

RCW 54.16.180(1) (emphasis added). If the PUD does not want to submit the sale of property to a vote, the statute provides an alternative second method:

> (2) A district may, without the approval of the voters, sell, convey, lease, or otherwise dispose of all or any part of the property owned by it that is located: (a) Outside its boundaries, to another public utility district, city, town or other municipal corporation; or (b) Within 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.

RCW 54.16.180 (2)(a)-(b) (emphasis added). To sell, convey, lease, or dispose of property without voter approval, the PUD must have property that "has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system" and "is no longer necessary" to any person or public body. RCW 54.16.180(2)(b) (emphasis added).

Historically, the PUD has utilized the second method of disposition of property under the statute by offering notice to the public of a hearing to surplus property, presenting to the public and the PUD commissioners the property to be surplused, and asking for public comment and questions. *See* CP 98. By Resolution, the PUD commissioners declare the property surplus before selling the property. If the PUD commissioners fail to find a property unfit and no longer necessary for operations on the record in a public hearing, then the sale of the property is ripe for a challenge for failure to comply with RCW 54.16.180, like the matter before this Court.

Regarding Parcel 19182, the County did not declare the parcel surplus before the sale of the parcel to HiTest. CP 129. The PUD inappropriately sold and conveyed the property to HiTest without approval from the public because Parcel 19182 <u>had not become</u> unfit and no longer necessary for PUD operations under RCW 54.16.180.

Respondents contend that "extensive discussions" occurred at the August 1, 2017 meeting about selling the property to HiTest. CP 88; *PUD Response Brief* at 6. However, this is immaterial because the PUD did not own Parcel 19182 at the time of those alleged discussions. CP 135. The plain language of the statute requires the PUD to wait until property has become "unfit" and "no longer necessary" before it can dispose of property without approval from the voters. RCW 54.16.180(2)(b). Because Parcel

19182 had not become "unfit" and "no longer necessary" for PUD operations when the PUD Commissioners allegedly discussed the sale of the property the PUD failed to comply with the statute. RCW 54.16.180(2)(b); CP 129. While the PUD has argued Parcel 19182 was unfit for PUD operations once the easement had been obtained on the property, this assumes compliance with the statute without consulting with the citizens of the district. CP 88; CP 129; *PUD Response Brief* at 28.

Similar to the issue in *South Tacoma Way*, at issue in this case is "whether failure to follow procedural requirements renders the contract or sale void." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). In *South Tacoma Way*, the Supreme Court distinguished between a substantive statutory violation and a substantive statutory violation that also violates the policy behind the statute. *Id*. at 124, 233 P.3d 871. Because the State in *South Tacoma Way* was "generally authorized" to sell surplus property, the court found there was no substantive statutory violation that also violated the policy behind the statute. *Id*. The State in *South Tacoma Way* did not violate the statute at issue because the statutory violation, failing to provide notice of the sale to neighboring property owners, did not violate the policy preventing fraud or collusion in state sales of land. *Id*. at 126, 233 P.3d 871.

In contrast, the present matter is distinguishable from the State's actions in *South Tacoma Way* because the PUD violated the policy behind RCW 54.16.180. The PUD does not have "general authority" to sell property the way the State in *South Tacoma Way* was authorized. *See S. Tacoma Way*, 169 Wn.2d at 124. "Consequently, a contract formed between a government entity and a private entity will be void only where the government entity had no authority to enter the contract in the first place." *S. Tacoma Way, LLC*, 169 Wn.2d at 123, 233 P.3d 871.

Whereas the Supreme Court's analysis in *S. Tacoma Way* hinged on whether the State had the "general authority" to sell surplus property, the same question is determinative here. *S. Tacoma Way, LLC*, 169 Wn.2d at 123, 233 P.3d 871. The PUD is authorized to sell property with the permission of the voters, or it can sell the property once the property has become "unfit" and "no longer necessary." *See* RCW 54.16.180. The conditional authority given to the PUD to sell property by RCW 54.16.180 means if the PUD does not meet the conditions – it does not have the authority to sell property. *See* RCW 54.16.180; *cf S. Tacoma Way*, 169 Wn.2d at 124, 233 P.3d 871. The PUD becomes authorized to sell property pursuant to RCW 54.16.180(2)(b) once the property has become unfit and no longer necessary. *See* RCW 54.16.180. Because the PUD does not have

"general authority" to sell surplus property the sale of Parcel 19182 is void and is thus *ultra vires*. *S. Tacoma Way*, 169 Wn.2d at 123.

This view is affirmed by *Hederman v. George*, 35 Wn.2d 357, 362, 212 P.2d 841 (1949), where the Supreme Court rejected a sale of stock. In *Hederman*, the company selling the stock "sought to circumvent the statute by contracting to buy promotion stock at five cents a share." *Id*. The purpose of the statute was "to prevent such sales during the period in which a public offering of the treasury stock was being made." *Id*. Therefore, the court found the contracts for sale of stock were "illegal and will not be enforced by the courts." *Id*. The PUD likewise did not comply with the statute by failing to wait for Parcel 19182 to become unfit and no longer necessary for PUD operations. *See* RCW 54.16.180.

Moreover, the Court's decision in *Noel* is instructive for this Court because the sale made by the State in *Noel* violated the policy behind SEPA as well as the statute itself. *Noel*, 98 Wn.2d at 380, 655 P.2d 245. In *Noel*, the Department of Natural Resources sold timber rights to a private company without preparing an EIS, as required by SEPA. *Id*. The *Noel* court held because the Department of Natural Resources did not prepare an EIS that "the sale to Alpine was *ultra vires* and Alpine cannot recovery for any alleged breach." *Id*. at 381, 655 P.2d 245. Here, the policy behind RCW 54.16.180 is to ensure the PUD is acting for the benefit of the citizens in the

district, not to benefit itself or generate pecuniary gain. *See* Laws of 1931, Ch. 1 § 1. When the PUD sold Parcel 19182 without determining Parcel 19182 was "unfit" and "no longer necessary" for PUD operations it violated the statute and the policy behind RCW 54.16.180. Because the sale occurred without giving the public the ability to comment on whether Parcel 19182 should be "surplus" property the PUD acted without authority and in violation of public policy.

Even if this Court were to find the PUD was "generally authorized" to sell surplus property, the sale to HiTest was still a substantive statutory violation that violated public policy. *See S. Tacoma Way*, 169 Wn.2d at 124, 233 P.3d 871. Without findings that Parcel 19182 was unfit for PUD purposes and no longer necessary for PUD operations, the PUD committed a substantive violation of RCW 54.16.180(2)(b).

The policy underlying chapter RCW 54.16 "authorized the establishment of public utility districts to conserve water and power resources of the State of Washington <u>for the benefit of the people thereof</u>, and to supply public utility service, including water and electricity for all uses." Laws of 1931, Ch. 1 § 1 (emphasis added). The PUD's ability to sell and convey property hinges either on public approval or a determination that property has become unfit and no longer necessary for PUD purposes. *See* RCW 54.16.180. Pursuant to RCW 54.16.180(2)(b) the PUD

commissioners must make a public determination the property is unfit for PUD purposes to show the disposition of the property is in the best interest of the citizens of the district. *See* RCW 54.16.180(2)(b). The disposition of property without a determination the property is unfit leaves a question of whether the disposition was done in the best interest of the citizens of the district.

Although the PUD has made the argument that by reserving the easement, the parcel was no longer necessary for the County's usage, there was no presentation to the PUD commissioners that the parcel was unfit like the other three parcels sold in the package to HiTest. See CP 98-99; *see also PUD Response Brief* at 28. There is also no action item in the minutes from August 1, 2017 declaring Parcel 19182 surplus like the other three parcels. *See* CP 99; CP 129. The PUD clearly did not follow its own procedure for declaring land surplus for Parcel 19182.

If the PUD discussed Parcel 19182 and reserving an easement on the property at the August 1, 2017 meeting, the PUD was assuming Parcel 19182 would not be necessary for PUD operations once the easement was reserved. These discussions would have taken place without notice to the public that land was being surplused, no presentation as to the current or potential use of the property, and no public discussion of Parcel 19182 as an asset or support to the PUD operations. *See* CP 98-99 (Notice,

presentation to the commissioner regarding the property to be surplused, and discussion with the public all occurred related to Parcels 19183, 19193, and 17036). HiTest argues that it was acting for the benefit of the public by obtaining the easement in "a more efficient and cost-effective manner." *HiTest Response Brief* at 14. However, this argument is immaterial because the PUD sold Parcel 19182 without giving notice to the citizens of the district and without properly determining it was unfit and no longer necessary for PUD operations – which is what contravenes the public policy underlying RCW 54.16.180(2)(b).

The PUD is asking this Court to allow a PUD to be able to decide property is unfit for its uses that it does not own. This is contrary to public policy and the powers imbued within PUDs. Moreover, how could the citizens served by a public utility district know if the PUD was acting for their benefit without (1) notice that the PUD was considering declaring property it owned surplus, (2) the opportunity to hear presentation on why declaring property surplus is beneficial, and (3) the opportunity to provide public comment on whether declaring property surplus and selling it is in the best interest of the citizens. Without the aforementioned factors, the citizens of the district are left out of the decision-making process by the very district created to provide electric service for their benefit.

As a quasi-governmental agency, it is the responsibility of the PUD to provide electrical service to the citizens of Pend Oreille County and serve the citizens' best interest. Underlying the procedure for disposition of property is a policy protecting the citizens of the PUD to ensure the PUD is acting in the citizens' interest and not for their own pecuniary gain. The PUD violated this policy by failing to give public notice and failing to provide the opportunity for comment by the public on whether Parcel 19182 should be surplused and sold to HiTest. CP 129. The sale of Parcel 19182 was outside the PUD's authority because Parcel 19182 had not become unfit and no longer necessary for PUD purposes. Moreover, the PUD violated RCW 54.16.180 by not finding Parcel 19182 to be unfit and no longer necessary for PUD operations which violates the policy behind the statute – resulting in the sale of Parcel 19182 being void and *ultra vires*.

A. The PUD's *ultra vires* actions cannot be validated by later ratification or events because the PUD's actions were procedurally defective and it did not have the authority to resolve the defect.

The PUD's argument they can "cure" any procedural misstep and ratify the sale is specious because an *ultra vires* act cannot be ratified. *See PUD Response Brief* at 29. "*Ultra vires* acts cannot be validated by later ratification or events." *S. Tacoma Way, LLC*, 169 Wn.2d at 123, 233 P.3d 871. Because the PUD did not have the authority to sell Parcel 19182 to

HiTest and the sale violated RCW 54.16.180, as well as the policy behind it, the PUD cannot validate the sale retroactively. *See id*.

When the PUD Commissioners met on May 15, 2018 and passed Resolution 1411, the PUD had already sold Parcel 19182 to HiTest. CP 173-175; CP 141-147. Again, the PUD cannot declare property that it does not own to be unfit and no longer necessary for PUD operations. Assuming Parcel 19182 was unfit and no longer necessary because the PUD sold it would be improper because the documents concurrent with the sale do not indicate a finding to that fact. CP 128-129; 132.

The PUD cites *Henry v. Town of Oakville*, 30 Wn. App. 240, 633 P.2d 892 (1981), to support their argument that a municipality may "retrace its steps" and remedy the defects of improper procedure. *See PUD Response Brief* at 29. However, *Henry* is distinguishable from the present matter because the court was reviewing procedural defects related to passing an ordinance and not the sale of property done *ultra vires*. *See Henry*, 30 Wn. App. at 246-47, 633 P.2d 892. While the passing of an ordinance with procedural defects may be cured by a municipality re-enacting the proper formalities, a PUD may not cure an action conducted *ultra vires*. *See id*.

The distinction between the PUD's sale of property and the procedural defect in *Henry* is that the procedural defect in the present matter results in the PUD not having authority to engage in the sale of property. In

contrast, the City of Oakville still had the authority to pass ordinances even with a procedural defect. *See Henry*, 30 Wn. App. at 247 (*citing Jones v. Centralia*, 157 Wash 194, 212, 289 P. 3 (1930) ("where the procedure followed has not been in accordance with law, proceedings had thereunder must be held void; but this nowise precludes the ultimate municipal authority, ... <u>from again exercising in a lawful manner its authority for the purpose of correcting errors and mistakes</u> due, not to a basic want of power, but to defective procedure which has, in some respects, caused the municipal machinery to cease to function")). The PUD's procedural defect is outcome determinative because it directly impacts the PUD's authority to conduct the sale.

The PUD cites *Bale v. City of Auburn*, 87 Wn. App. 205, 941 P.2d 671 (1997), which is distinguishable for the same reason as *Henry*. Whereas in *Bale*, the court found a procedural defect in publishing an ordinance was cured when "the second ordinance ratified and confirmed the first." *Bale*, 87 Wn. App. at 210, 941 P.2d 671. Curing a defect in procedure when passing an ordinance is far distinguishable from an *ultra vires* sale of property.

The PUD also cites *Spokane Ed. Ass'n v. Barnes*, 83 Wn.2d 366, 517 P.2d 1362 (1974), which is also distinguishable because at issue was whether a first meeting by a school district where the "board adopted a plan

for administrative and supervisory reorganization" to address a staffing issue was done in violation of the open public meeting laws. *Spokane Ed. Ass'n*, 83 Wn.2d at 370, 517 P.2d 1362. The court held that the second meeting after the first meeting that adopted the plan "was broad enough in its scope to include reapproval of the reorganization plan approved at the prior meeting." *Id*. at 378, 517 P.2d 1362. The approval of the reorganization plan was affirmed by the court because the second meeting was "properly called under the act" and the court recognized the first meeting was in light of an "emergent" situation facing the district. *Id*. at 373, 378, 517 P.2d 1362.

These circumstances are distinguishable from the present matter because the PUD did not call a second meeting to correct the procedural defect in the sale to HiTest <u>during the time the PUD owned Parcel 19182</u>. If the PUD had recognized that Parcel 19182 had not correctly been surplused, or determined to be unfit for PUD operations, during the August 1, 2017 meeting and then had held a meeting where Parcel 19182 was declared surplus before the sale to HiTest then the holding in *Spokane Ed. Ass'n* would be applicable. However, the PUD failed to remedy the procedural defect when it owned Parcel 19182, therefore, any resolutions declaring Parcel 19182 as "surplus" after the fact is moot and void in effect. CP 174.

The PUD argues that it "ratified" the sale and remedied any procedural error by passing Resolution 1411. *See PUD Response Brief* at 30. However, even if this Court assumes *arguendo ultra vires* actions could be cured by retroactively "ratifying" them – the PUD still failed to cure the procedural defect. The PUD passed Resolution 1411 on May 15, 2018, long after Parcel 19182 had been sold to HiTest. CP 173-175; CP 141-147. The PUD cannot declare property it already sold as "surplus" after the fact because it improperly assumes the property was unfit and no longer necessary for PUD operations instead of waiting until the property <u>had become</u> unfit and no longer necessary, as required by the statute. *See* RCW 54.16.180. Without documents showing the PUD Commissioners determined the property was unfit and no longer necessary for PUD operations while the PUD owned the property, the reasonable conclusion is that the determination was not made. Moreover, the PUD cannot cure a sale it does not have authority to conduct. *S. Tacoma Way*, 169 Wn.2d at 123, 233 P.3d 871.

CONCLUSION

Summary judgment should have been granted for Appellants because the material facts illustrate the District acted outside its authority and failed to comply with RCW 54.16.020 and RCW 54.16.180. "The standard of review of an order of summary judgment is de novo, and the

appellate court performs the same inquiry as the trial court." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). "Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The material facts are not in dispute as shown by the record. The PUD only has authority to purchase land for energy purposes, therefore, the purchase of Parcel 19182 was a substantive violation of the statute. RCW 54.16.020. The undisputed facts show the PUD purchased Parcel No. 19182 for the purpose of bundling all four parcels to HiTest. CP 132. It is clear the PUD failed to declare Parcel 19182 surplus, or unfit and no longer necessary for PUD operations. Regarding the sale, the effect of this failure is a procedural defect that prevents the PUD from having authority to sell the property to HiTest. *See* RCW 54.16.180(2)(b). As a result, this Court should rule in the Appellants' favor, as a matter of law. *See Folsom*, 135 Wn.2d at 663.

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Accordingly, this Court should reverse the Superior Court's grant of summary judgment to the Respondents and grant the Appellants' motion for summary judgment.

Respectfully submitted this 22nd day of October 2019.

s/Rick Eichstaedt
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CERTIFICATE OF SERVICE

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

I hereby certify that on October 22, 2019, 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 eportal users will be served by the appellant system.

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