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State of Washington
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Case No. 367363-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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
BYERS LUBY,

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT HITEST SAND, INC.

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I. INTRODUCTION

The sale of public land purchased by HiTest Sand, Inc. (“HiTest”) from the Public Utility District No. 1 of Pend Oreille County (the “District”) should be upheld under the bona fide purchaser doctrine. Under the doctrine, HiTest was entitled to presume all proceedings leading up to the sale were procedurally valid and was under no obligation to conduct independent research as to relevant statutory procedures or the District’s adherence to such. HiTest negotiated and paid fair value (in excess of the independent appraised value) for the properties in an arms-length transaction. Washington law is clear that a good faith purchaser for value is entitled to rely on the resulting conveyance deed to enforce even a procedurally irregular sale. Accordingly, HiTest is a bona fide purchaser and is entitled to enforce the sale as a matter of law. As recognition and application of this doctrine here is dispositive as to all of Appellants’ claims, HiTest respectfully requests this court affirm the order on summary judgment of the court below, dismissing Appellants’ Complaint, in its entirety.

In addition, because the District acted within its authority in purchasing real property, Appellants’ assertions of ultra vires acts are not supported by Washington law or the record below.

II. STATEMENT OF THE ISSUE

Whether the trial court properly granted summary judgment, dismissing Appellants' claim and upholding the District's sale of property to HiTest where HiTest was a bona fide purchaser, entitled to presume the proceedings were procedurally valid?

III. STATEMENT OF THE CASE

A. HiTest purchased four parcels of land from the District for above fair market value in an arms-length transaction.

Between 1995 and 1996, the District purchased three parcels of land within the District's boundary, Parcel Nos. 17036, 19183 and 19193 (the "District Properties"). CP 13. The District Properties were purchased for a planned turbine electricity plant, but plans for the turbine plant were scuttled and the property was thereafter managed for timber. *Id.*

In February 2016, at the direction of its Board of Commissioners, the District undertook an evaluation of its holdings to identify real property that was no longer needed or useful to the District. CP 87. The District's Board declared the District Properties as surplus to the District's needs at a public meeting on March 15, 2016. CP 87; CP 13. The District advertised the District Properties for sale on August 31, 2016, and September 7, 2016, but did not receive any purchase offers. CP 87; CP 13.

On April 18, 2017, HiTest submitted an inquiry and request for electric service to the District. CP 102-04; CP 13. By its letter, HiTest also expressed interest in purchasing the District Properties, together with an adjacent fourth parcel that was owned by Pend Oreille County, Parcel No. 19182 (the District Properties, together with Parcel 19182, referred hereafter as “the Four Parcels”) CP 102-04; CP 13.

The record reflects the District decided to acquire Parcel No. 19182 from Pend Oreille County so that it could reserve an express easement on that property in case it became privately owned. CP 79-80; *see also* CP 106. The County authorized the sale of its property to the District, at the tax assessed value, on June 20, 2017, and the District ultimately purchased and received title to Parcel 19182 through a tax title property deed recorded August 2, 2017. CP 105-07; CP 89; CP 135.

HiTest signed a tentative Letter of Intent with the District and paid earnest money to the District for the Four Parcels on April 25, 2017. CP 109-113. HiTest and the District signed a revised Letter of Intent on June 13, 2017. CP 114-116. HiTest received a draft Purchase Agreement from the District on June 16, 2017. CP 117-125.

The District’s planned sale of the Four Parcels to HiTest was discussed several times during the regularly scheduled meeting of the

District's Board of Commissioners, held August 1, 2017, and the attending public was given the opportunity to be heard on the matter. CP 88; CP 126-130. The Commission unanimously adopted Resolution No. 1399, expressing its intent to sell the Four Parcels to HiTest after appraisal and due diligence. CP 88; CP 131-33.

HiTest and the District executed a 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. In return for HiTest's payment of the purchase price at closing, the District executed and recorded a Special Warranty Deed for the sale of the Four Parcels to HiTest on September 18, 2017, reserving an easement interest in favor of the District. CP 148-50.¹ The District subsequently recorded a corrected Special Warranty Deed for the sale of the Four Parcels to HiTest on May 14, 2018, correcting the express easement reservation. CP 151-155.

HiTest has owned the Four Parcels in fee for nearly two years now. Subsequent to its purchase of the properties, HiTest has begun the process

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 in this case. While the location of the easement was subsequently corrected based on a scrivener's error, the reserved easement itself was included in the original statutory warranty deed. *See* CP 148-50.

of seeking permits for its facility and submitted a formal request for power service from the District, which included a cost reimbursement agreement. CP 159-169.

B. The trial court found HiTest was a bona fide purchaser, entitled to enforce the sale of the properties.

Appellants filed their Complaint on June 8, 2018, alleging the District's sale of property to HiTest was not done under the proper statutory authority and thus the action was *ultra vires*. CP 10-11. HiTest moved for summary judgment according to the bona fide purchaser doctrine on November 16, 2018. CP 185-186. The trial court granted the motion in an order filed on April 1, 2019. CP 445. In the trial court's written decision, Judge McKay found HiTest to be a bona fide purchaser, "entitled to presume that the proceedings leading up to the sale of the parcels were procedurally valid." CP 469.

While Appellants now appeal the trial court's summary judgment ruling, they do not assign error to the trial court's conclusion that HiTest was a bona fide purchaser for value.

IV. ARGUMENT

A. Standard of Review

Summary judgment is proper if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law. CR 56. The appellate court reviews orders on summary judgment de novo, engaging in the same inquiry as the court below. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

In this case, the order on summary judgment by the trial court should be affirmed because there is no genuine issue as to any material fact. *See Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964). Mere denials, argumentative assertions, or unsupported conclusory allegations will not defeat summary judgment. *Island Air, Inc. v. Labar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). The parties here do not dispute the facts; instead, the instant litigation involves a purely legal question that was properly decided by the trial court on summary judgment. *See Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 368, 680 P.2d 448 (1984) (citing *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1978)).

B. Appellants do not assign error to, or otherwise challenge, the trial court's conclusion that HiTest was a bona fide purchaser for value.

Appellants did not assign error to the trial court's findings that HiTest was a bona fide purchaser for value. Nor do Appellants present any argument in their Opening Brief regarding the trial court's holding that

“HiTest Sand, Inc. was a bona fide purchaser of the parcels, including Parcel 19182.” CP 447. Appellant’s only reference to HiTest’s bona fide purchaser defense is an acknowledgment that “the Court found that [HiTest] was a bona fide purchaser doctrine [sic] thereby affirming the transaction.” Opening Br. at 6. Appellants assign no error to this basis for affirming the transaction.

HiTest’s demonstrated facts and evidence establishing it as a bona fide purchaser for value were uncontroverted and not challenged below. “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). At a minimum, Appellants’ failure to assign error to or challenge the application of the bona fide purchaser doctrine precludes pursuit of Assignments of Error 6 and 7 which are based wholly on alleged procedural violations.

C. HiTest is entitled to enforce its purchase of the Four Parcels because it is a bona fide purchaser.

The trial court properly denied Appellants’ request to unwind the sale of the Four Parcels HiTest purchased from the County nearly two

years ago. *Even if* the sale was procedurally deficient as Appellants contend (which HiTest disputes), HiTest is nevertheless entitled to enforce the sale under the bona fide purchaser doctrine because it purchased the Four Parcels in good faith and without actual or constructive notice of the alleged procedural deficiencies.

The bona fide purchaser doctrine is well-established. The doctrine provides that “a good faith purchaser for value who is without actual or constructive notice of another’s interest in purchased real property has [a] superior interest in that property.” *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 127, 233 P.3d 871 (2010). As the Supreme Court explained:

where the State has general authority to sell the land, a good faith purchaser has the right to rely on the resulting deed. A bona fide purchaser may thus enforce a procedurally irregular land sale.

Id. at 127-28, 233 P.3d 871. As a public utility district, the District has such “general authority” 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. Washington courts have held that an express grant of proprietary authority includes “powers . . . necessarily or fairly implied in or incident to [express powers] and also those essential to the declared objects and purposes of the [municipal] corporation.” *E.g., City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d

679, 693-95, 743 P.2d 793 (1987) (quoting *Port of Seattle v. State Utils. & Transp. Comm'n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979)). Thus, independent of the Appellants' challenges to the order on summary judgment, and regardless of the resolution, HiTest's purchase of and current ownership of the Four Parcels should be upheld and enforced.

The trial court correctly found the bona fide purchaser doctrine is not limited to sales of private land. CP 454. In fact, the Washington Supreme Court has expressly applied the doctrine to uphold sales of public land to bona fide purchasers. *Id.*

Most notably for purposes of this case, the Court has also emphasized that purchasers of public land are entitled to **presume that the sale is proper:**

“A purchaser of land sold by the state or patented by the government has a right to presume that all proceedings leading up to the sale are regular. He is not bound to look beyond the face of the deed, either to find out whether the department has strictly complied with the law or rightly decided some fact, nor is he bound to investigate the conduct of the patentee or grantee.”

S. Tacoma Way, LLC, 169 Wn.2d at 127-28, 233 P.3d 871 (quoting *State v. Hewitt Land Co.*, 74 Wash. 573, 586, 134 P. 474 (1913)) *see also* 10 E. McQuillin, *Municipal Corporations* § 28.10 (3d ed., rev. Oct. 2017) (it is presumed that “lands purchased by a municipal corporation were

purchased for a purpose authorized by law”). Consequently, a purchaser of public land will be deemed a bona fide purchaser absent actual notice that the sale is procedurally irregular. *S. Tacoma Way, LLC*, 169 Wn.2d at 128, 233 P.3d 871. As the Supreme Court has explained, the purchaser has **“no obligation to discover the relevant statutory procedures or to ensure that the [public entity] adhered to them.”** *Id.* (emphasis added).

As a purchaser of public land owned by the District, HiTest “was entitled to presume that the proceedings leading up to the sale were procedurally valid.” *See Id.* HiTest had “no obligation to discover the relevant statutory procedures or to ensure that the [District] adhered to them.” *See Id.* It is undisputed that HiTest purchased the Four Parcels from the District in good faith for value and without actual notice of any of the procedural deficiencies alleged by the Appellants. HiTest paid fair-market value for the Four Parcels, paying \$300,000 for the properties, being \$50,000 over the appraised value. CP 136-147. HiTest has now owned these properties for nearly two years. Accordingly, HiTest is a bona fide purchaser and is entitled to enforce the sale as a matter of law. The *South Tacoma Way, LLC* case is directly analogous and on point, and the decision below should accordingly be affirmed.

D. There is no *ultra vires* act precluding application of the bona fide purchaser doctrine.

The trial court properly found the District acted within its authority in purchasing Parcel 19182, and thus there was no *ultra vires* act precluding application of the bona fide purchaser doctrine, let alone one of which HiTest was aware. CP454. Further, the District acted in accordance with the purpose of RCW 54.16.180 in selling the parcel to HiTest. This court should affirm the ruling of the trial court and enforce HiTest's purchase of the Four Parcels.

1. The District acted within its authority in purchasing Parcel 19182.

The trial court found the District acted within its authority in purchasing Parcel 19182. CP 454. It is undisputed that the District purchased Parcel 19182 for the purpose of securing an easement for its underground distribution lines. CP 79, 87, 453.

Appellants argue that the District exceeded its statutory authority in purchasing Parcel 19182 from Pend Oreille County, rendering the purchase *ultra vires*. Opening Br. at 12. However, Appellants' argument stems from the inaccurate assumption that the District purchased Parcel 19182 "for the purpose of conveying it to a third party." Opening Br. at 13. This does not correctly characterize the undisputed evidence before the trial court—that the District purchased Parcel 19182 for the purpose of

securing an easement. As explained by the District's Director of Engineering, Amber Orr, this was a business decision informed by the District's belief that purchasing the property and reserving an express easement would be easier than attempting to negotiate an easement with a third party if Pend Oreille County ever sold the property to someone else:

Since the underground line ran along or near the border of the District's properties and the former County parcel [Parcel 19182], the District never obtained a utility easement while the properties were held by public entities. However, when HiTest expressed its interest in acquiring the District properties and the County parcel, I believed it would be easier for the District to obtain the easement by reservation rather than trying to negotiate an easement from a future customer. It was for that reason that the District acquired Parcel No. 19182 before selling it as surplus once the easement was reserved.

CP 79. This easement purpose is further documented in the public records preceding and leading up to the transfer from the County to the District.

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").²

As a public utility district, the District is authorized to purchase and acquire land, property and property rights, including easements and

² Appellants assert that the purpose of retaining an easement was "only discussed *ex post facto* of the sale, at which point the public had no opportunity to be included in such discussions." Opening Br. at 17. This assertion is factually incorrect and in contravention of the undisputed record in this case. *See contra* CP 106.

rights of way, as needed to generate electric energy. RCW 54.16.020. The District also has broad authority to purchase property and property rights as “necessary or convenient for its purposes.” RCW 54.16.090.³ The District’s purchase of Parcel 19182 to secure an easement falls squarely within that grant of authority. The District is entitled to an easement and correctly recognized that buying the property itself would be an easier and less expensive option. As such, the trial court properly found the District acted within its authority in purchasing Parcel 19182.

Since the District acted within its statutory authority, the trial court properly applied the bona fide purchaser doctrine as detailed above. As a good faith purchaser for value with no notice of any (alleged) procedural irregularities, HiTest is entitled to enforce its purchase of Parcel 19182 as a bona fide purchaser.

2. The District did not contravene RCW 54.16.180 in selling Parcel 19182 to HiTest.

The District acted in accordance with the purpose of RCW 54.16.180 in selling Parcel 19182 to HiTest. Appellants allege the

³ The District’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 District’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).

District’s “failure to follow the procedural requirements contravenes the underlying policy” of the statute, rendering the sale of Parcel 19182 void. Opening Br. at 21. According to Appellants, the policy in question is that “public utility districts were created to serve the people and the public interest.” Opening Br. at 21 (citing LAWS OF 1931, ch. 1 § 1).

This argument fails for two reasons. First, the District *was* serving “the people and the public interest” by acquiring Parcel 19182 in order to secure an easement for its distribution lines. There is no dispute that the District was entitled to this easement and could have obtained an express easement by eminent domain if necessary. The fact that the District chose to obtain the easement in a more efficient and cost-effective manner does not somehow mean that it acted outside the public interest. To the contrary, the District was able to avoid unnecessary complication and cost—a textbook example of serving the people and the public interest.

Second, Appellants have identified the wrong “policy” of the statute. Public utility districts have express authority to sell real property without approval of the voters. RCW 54.16.180(2)(b). That statute allows 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.

RCW 54.16.180(2)(b). Appellants did not offer any factual evidence below contravening or challenging the fact that this isolated parcel, once the relevant easement was obtained and reserved, was unnecessary for the District's operations. The policy associated with maintaining property which remains necessary, is not hindered with a sale of surplus unnecessary property.

Furthermore, to the extent Appellants challenge procedural compliance with RCW 54.16.180, such procedural defects, if any, are trumped here by the bona fide purchaser doctrine. As a purchaser of public land, HiTest "was entitled to presume that the proceedings leading up to the sale were procedurally valid" and had "no obligation to discover the relevant statutory procedures or to ensure that the [District] adhered to them." *S. Tacoma Way*, 169 Wn.2d at 128, 233 P.3d at 876. Because there was no *ultra vires* act in either the purchase or sale of Parcel 19182, the bona fide purchaser doctrine should be applied, precluding the unwinding of this property transaction.

V. CONCLUSION

The trial court properly found that HiTest Sand, Inc. was a bona fide purchaser of the Four Parcels, and thus properly dismissed

Appellants' claims at summary judgment. The trial court also properly found the District acted within its statutory authority under RCW 54.16.180 in acquiring Parcel 19182 from Pend Oreille County for the purpose of securing an express easement. Even if there were some procedural irregularities in the District's sale of the parcel to HiTest, its actions did not contravene the purpose of the statute. Accordingly, HiTest is entitled to enforce the sale as a bona fide purchaser. The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of August, 2019.

WITHERSPOON BRAJCICH MCPHEE, PLLC

By: /s/ James A. McPhee

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CERTIFICATE OF SERVICE

I, James A. McPhee, hereby certify that on 22nd day of August, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants who are registered e-portal users will be served by the appellant system.

/s/ James A. McPhee

James A. McPhee

WITHERSPOON BRAJCICH MCPHEE, PLLC

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