

FILED  
Court of Appeals  
Division III  
State of Washington  
8/21/2019 1:17 PM  
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; MANES 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 PUBLIC UTILITY DISTRICT NO. 1 OF  
PEND OREILLE COUNTY**

---

John Ray Nelson, WSBA No.16393 FOSTER PEPPER PLLC 618 W. Riverside Ave., Ste. 300 Spokane, Washington 99201 Telephone: (509)777-1600 Facsimile: (509) 777-1616 Email: <a href="mailto:john.nelson@foster.com">john.nelson@foster.com</a>	Tyler R. Whitney, WSBA No.48117 PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY 130 North Washington P.O. Box 190 Newport, WA 99156 Telephone: (509)447-9331 Email: <a href="mailto:twhitney@popud.org">twhitney@popud.org</a>
--	--

Attorneys for Respondent

**TABLE OF CONTENTS**

*Page*

I.	INTRODUCTION .....	1
II.	STATEMENT OF THE CASE.....	2
	A.    PLAINTIFFS’ CLAIMS AND ALLEGATIONS.....	2
	B.    THE DISTRICT’S MOTION AND UNDISPUTED EVIDENCE .....	3
	C.    PLAINTIFFS’ RESPONSE AND FAILURE TO OFFER COMPETING EVIDENCE.....	8
III.	ARGUMENT .....	10
	A.    STANDARD OF REVIEW .....	10
	B.    SUMMARY JUDGMENT IS PROPER AGAINST PLAINTIFFS’ COMPLAINT .....	13
	1.    The District’s purchase of Parcel No. 19182 from Pend Oreille County was not <i>ultra vires</i> .....	14
	2.    The District’s sale of Parcel No. 19182 was not <i>ultra vires</i> , and was not invalid, and cannot be set aside. ....	23
	3.    Even if the purchase and sale of Parcel No. 19182 <i>had</i> been procedurally invalid, the District cured any procedural misstep by ratifying the sale, such that the sale is valid and must be enforced. ....	29
IV.	CONCLUSION.....	30

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Bale v. City of Auburn</i> , 87 Wn. App. 205, 941 P.2d 671 (1997).....	30
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963).....	20, 21
<i>Buchanan v. Cassell</i> , 53 Wn.2d 611, 335 P.2d 600 (1959).....	13
<i>Chamberlain v. Dep’t of Transp.</i> , 79 Wn. App. 212, 901 P.2d 344 (1995).....	19
<i>Cowiche Basin P’ship v. Mayer</i> , 40 Wn. App. 223, 698 P.2d 567 (1985).....	19, 20, 21
<i>Deep Water Brewing, LLC v. Fairway Res. Ltd.</i> , 170 Wn. App. 1, 282 P.3d 146 (2012).....	11
<i>Dewey v. Tacoma Sch. Dist. No. 10</i> , 95 Wn. App. 18, 974 P.2d 847 (1999).....	21
<i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 716 P.2d 842 (1986).....	18, 19
<i>Eugster v. City of Spokane</i> , 128 Wn. App. 1, 114 P.3d 1200 (2005).....	22
<i>Granite Beach Holdings, LLC v. State ex rel. Dept. of Natural Resources</i> , 103 Wn. App. 186, 11 P.3d 847 (2000).....	12
<i>Henry v. Oakville</i> , 30 Wn. App. 240, 633 P.2d 892 (1981).....	13, 30
<i>Hillis Homes, Inc. v. Public Util. Dist. No. 1</i> , 105 Wn.2d 288, 714 P.2d 1163 (1986).....	15

<i>Howell v. Spokane &amp; Inland Empire Blood Bank,</i> 117 Wn.2d 619, 818 P.2d 1056 (1991).....	18
<i>In re Swanton,</i> , 115 Wn.2d 21, 804 P.2d 1 (1990).....	26
<i>Int’l Ultimate, Inc. v. St. Paul Fire &amp; Marine Ins.</i> <i>Co.,</i> 122 Wn. App. 736, 87 P.3d 774 (2004) .....	12
<i>Jones v. Centralia,</i> 157 Wash. 194, 289 P. 3 (1930).....	30
<i>Jones v. Renton Sch. Dist. No. 403,</i> 2016 WL 2654572 (Wash. Ct. App. May 9, 2016) .....	29
<i>Keck v. Collins,</i> 184 Wn.2d 358, 357 P.3d 1080 (2015).....	12
<i>King County v. Taxpayers of King County,</i> 133 Wn.2d 584, 949 P.2d 1260 (1997).....	12
<i>Kries v. WA-SPOK Primary Care, LLC,</i> 190 Wn. App. 98, 362 P.3d 974 (2015) .....	11
<i>LaMon v. Westport,</i> 22 Wn. App. 215, 588 P.2d 1205 (1978) .....	13
<i>Lane v. Port of Seattle,</i> 178 Wn. App. 110, 316 P.3d 1070 (2013) .....	29
<i>LaRose v. King County,</i> 20 Wn. App 808, 584 P.2d 393 (1978).....	30
<i>Mackey v. Graham,</i> 99 Wn.2d 572, 663 P.2d 490, <i>cert. denied</i> , 464 U.S. 894 (1983).....	18, 20
<i>Owen v. Burlington N. Santa Fe,</i> 114 Wn. App. 227, 56 P.3d 1006 (2002) .....	22

<i>Owen v. Burlington N. Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005).....	11
<i>Pepper v. J.J. Welcome Constr. Co.</i> , 73 Wn. App. 523, 871 P.2d 601 (1994).....	13
<i>Puget Sound Power &amp; Light Co. v. Public Util. Dist. No. 1</i> , 17 Wn. App. 861, 565 P.2d 1221 (1977).....	15
<i>S. Tacoma Way, LLC v. State</i> , 169 Wn.2d 118, 233 P.3d 871 (2010).....	14, 27, 28, 29
<i>Seattle v. Wright</i> , 72 Wn.2d 556, 433 P.2d 906 (1967).....	13
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	12
<i>Spokane Educ. Ass’n v. Barnes</i> , 83 Wn.2d 366, 517 P.2d 1362 (1974).....	30, 31
<i>State v. Roberts</i> , 117 Wn.2d 576, 817 P.2d 855 (1991).....	25, 26
<i>Steinbock v. Ferry County Pub. Util. Dist. No. 1</i> , 165 Wn. App. 479, 269 P.3d 146 (2012).....	11
<i>Sundquist Homes v. Snohomish PUD</i> , 92 Wn. App. 950, 965 P.2d 1148 (1998).....	15, 25
<i>Swinehart v. City of Spokane</i> , 145 Wn. App. 836, 187 P.3d 345 (2008).....	11
<i>Taylor v State</i> , 29 Wn.2d 638, 188 P.2d 671 (1948).....	13
<i>Truitt v. Truitt</i> , 100 Wash. 608, 171 P. 532 (1918).....	13
<i>Twisp v. Methow Valley Irrigation Dist.</i> , 32 Wn. App 132, 646 P.2d 149 (1982).....	13

*UPS v. Department of Rev.*,  
102 Wn.2d 355, 687 P.2d 186 (1984).....26

*Washington Beauty College v. Huse*,  
195 Wash. 160, 80 P.2d 403 (1938).....13

*White v. Kent Medical Ctr.*,  
61 Wn. App 163, 810 P.2d 4 (1991).....22

*Young v. Key Pharmaceuticals, Inc.*,  
112 Wn.2d 216, 770 P.2d 182 (1989).....12

*Young v. Toyota Motor Sales, U.S.A.*,  
\_\_\_ Wn.2d. \_\_\_, 442 P.3d 5 (2019).....11

**STATUTES**

LAWS OF WASHINGTON 1931, CH. 1, § 2 .....3, 15

RCW 7.24 .....12

RCW 15.04.020 .....15

RCW 28A.335.120.....29

RCW 35.61.132 .....26

RCW 35.94.040 .....26

RCW 42.30 .....22

RCW 42.30.030 .....21

RCW 42.30.060 .....31

RCW 42.30.060(1).....22

RCW 47.12.063 .....28

RCW 54.12.010 .....3

RCW 54.16 .....4, 15, 25

RCW 54.16.020 .....2, 4, 15

RCW 54.16.090 .....	4, 15
RCW 54.16.100 .....	4
RCW 54.16.180 .....	2, 3, 24, 27
RCW 54.16.180(2).....	25
RCW 54.16.180(2)(b).....	24, 25, 26
RCW 54.16.182 .....	2
RCW Chapter 54.16.....	24
RCW Title 54.....	3

**OTHER AUTHORITIES**

64 Am. Jur. 2d <i>Public Securities and Obligations</i> § 381 (1972).....	30
56 Am. Jur. 2d <i>Municipal Corporations</i> §§ 355, 382 (1971).....	13
E. McQuillin, <i>Municipal Corporations</i> 597-98 (3d ed. rev. 1979) .....	30
GR 14.1 .....	29

## I. INTRODUCTION

Plaintiffs filed this action because they oppose construction of Respondent HiTest Sand, Inc.'s ("HiTest") proposed silicon smelter outside of Newport, Washington. Rather than fight the proposed project on its environmental merits, however, Plaintiffs chose to embroil the Public Utility District No. 1 of Pend Oreille County (the "District"), Pend Oreille County (the "County"), and HiTest in a meritless challenge to the District's statutory authority to purchase and dispose of real property rights. But Plaintiffs filed their action without conducting any meaningful investigation of the facts, and therefore based their claims on speculation and conspiracy theories, rather than evidence. As a consequence, Plaintiffs were unable to oppose the District's summary judgment motion with admissible evidence creating a genuine issue of material fact for trial.

As the trial court correctly concluded, the record evidence proves beyond any genuine dispute that the District acquired Parcel No. 19182 from the County to secure a utility easement for its existing distribution lines across the property. There is no dispute that the District needed an easement if Parcel No. 19182 became privately owned, and there is no dispute that the District has statutory authority to acquire property, property rights and easements for its distribution lines. Consequently, the purchase of Parcel No. 19182 from the County was not *ultra vires*. Nor

was the sale of Parcel No. 19182 to HiTest *ultra vires*. There is no reasoned dispute that the District has authority to dispose of property that is no longer needed or useful to its purposes, or that the District no longer needed Parcel No. 19182 once it had secured the ability to ensure its utility easement across the lot--the evidence to establish those facts is also undisputed. Plaintiffs' unsupported conspiracy theories and rank allegations of "collusion" do not create a genuine issue of fact for trial, and Plaintiffs' persistent misreading of RCW 54.16.182 does not change the plain language of the statute. The trial court properly entered summary judgment against Plaintiffs' Complaint, and its order should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. Plaintiffs' Claims and Allegations**

Plaintiffs filed this action on June 8, 2018, seeking judgment that the District's purchase and sale of Parcel No.19182 was *ultra vires* and void. CP 10-18. Plaintiffs complained that the District "did not declare Parcel No. 19182 'surplus' at any time prior to selling it to HiTest Sand," and that the District "did not conduct an election of the voters of the PUD" regarding the sale of Parcel No. 19182. CP 15, ¶¶ 4.17-18. Plaintiffs sought declaratory judgment that:

1. The District "operated outside of statutory authority prescribed under RCW 54.16.020 and thus acted *Ultra Vires* when it purchased Parcel No. 19182 from Pend Oreille County";

2. The District “operated outside of statutory authority prescribed under RCW 54.16.180 and thus acted *Ultra Vires* when it approved Resolution 1399 authorizing the sale of Parcel No.19182”; and

3. The District “operated outside of statutory authority prescribed under RCW 54.16.180 and thus acted *ultra vires* when it conveyed Parcel No.19182 to HiTest Sand, Inc.” CP 16, ¶¶ 5.5, 5.7 and 5.8.<sup>1</sup>

## **B. The District’s Motion and Undisputed Evidence**

The District<sup>2</sup> moved for summary judgment against Plaintiffs’ Complaint on October 19, 2018. CP 48-176. The District’s evidence established the following facts. Between 1995 and 1996, the District

---

<sup>1</sup> Plaintiffs’ Complaint also challenged the County’s Resolution authorizing the sale of Parcel No. 19182 to the District, CP 16, ¶5.6, but plaintiffs abandoned that claim during summary judgment proceedings. CP 363, Ins. 7-8 (“Plaintiffs do not assert that the County lacked authority to sell the property”), CP 447 Ins. 22-24 (“Any claim that Plaintiffs asserted against Pend Oreille County regarding the County’s sale of Parcel 19182 to the District was abandoned and relinquished by Plaintiffs during the summary judgment proceedings”). Plaintiffs’ Complaint also requested a “writ of prohibition” against the District’s purchase and sale of Parcel No. 19182, CP 16-17, ¶¶5.10-5.14. The District moved for summary judgment against that claim, citing well established authority that a writ of prohibition cannot issue against an act that has already occurred. CP 65-66. Plaintiffs did not oppose that motion, and the trial court granted summary judgment against the claim. CP 447 Ins 18-19 (Order granting judgment against Complaint “and all claims therein”).

<sup>2</sup> The District was established in 1936 pursuant to Rem. Rev. Stat. § 11606 (LAWS OF WASHINGTON 1931, CH. 1, § 2). Washington Public Utility Districts (“PUDs”) are now governed by RCW Title 54. The District’s municipal powers are exercised through a three-member Board of Commissioners (“Board”). RCW 54.12.010. The Board is empowered to appoint a District Manager, who acts as the District’s chief administrative officer. RCW 54.16.100.

purchased three parcels of land within the District's boundary, Parcel Nos. 17036, 19183 and 19193 (the "District Properties"). Complaint ("Compl."), ¶4.1. The District Properties were purchased for a planned turbine electricity plant, but plans for the plant were scuttled, and the property was subsequently managed for timber. *Id.*

In February 2016, the District's Board directed staff to identify real property that was no longer needed or useful to the District. Willenbrock Dec., CP 87, ¶6. The Board determined that the District Properties were no longer needed or useful. CP 87, ¶7; CP 99. 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, ¶8; CP 101.

On April 18, 2017, the District received an inquiry and request for electric service from HiTest. CP 87, ¶9; CP 103-04. HiTest's letter also expressed its interest in purchasing the three District Properties, as well as an adjacent fourth parcel that was owned by Pend Oreille County--Parcel No. 19182. *Id.* As explained by Amber Orr, the District's Director of Engineering, the District's staff knew on receipt of HiTest's letter that the District had previously installed underground electric distribution lines along the border of Parcels Nos. 19182 and 19183, extending south through Parcel No. 19193. Orr Dec., CP 79, ¶7. Ms. Orr recalls engaging in multiple conversations between April and July 2017 "about the

infrastructure needed to potentially serve HiTest with the power it was requesting.” CP 79, ¶¶3-4. Regarding the potential purchase of the properties by HiTest, Ms. Orr’s sworn Declaration states:

5. I specifically recall conversations with District staff, including with Ms. Kimberly Gentle, in the summer of 2017 where we discussed the existing underground electrical distribution line and the need to specifically reserve an express easement across the western portion of Parcel No. 19182, as part of the potential land sale to HiTest.

6. I recall working with Ms. Gentle, as well as with District counsel, Ms. Elizabeth Tellessen, in identifying the location and width for the needed easement across Parcel No. 19182. These conversations occurred before the August 1, 2017 meeting of the District’s Board of Commissioners where they approved the sale of land to HiTest.

8. Since the underground line ran along or near the border of the District’s properties and the former County parcel, the District never obtained a utility easement while the properties were owned 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 way of 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 said easement was reserved.

CP79 (emphasis supplied).

Mr. Willenbrock’s Declaration confirmed Ms. Orr’s testimony:

“The District sought to acquire Parcel No. 19182 from Pend Oreille County to reserve an express easement on that property.” CP 87, ¶11.

The District signed a tentative Letter of Intent with HiTest and received an earnest money deposit for the properties on April 25, 2017. CP 88, ¶13; CP 110-113. A revised Letter of Intent was signed on June 13, 2017. CP 88, ¶14; CP 115-116. A draft Purchase Agreement was exchanged on June 16, 2017. CP 88, ¶14; CP 118-125. The County authorized the sale of Parcel No. 19182 to the District on June 20, 2017. CP 88, ¶12; CP 106-108. Once the District had secured the ability to subject Parcel No. 19182 to its utility easement, the land would no longer be necessary or useful in the District's operations. Willenbrock Dec., CP 88, ¶15.

The District's planned sale of the properties to HiTest was discussed several times during the District's regularly scheduled Board meeting on August 1, 2017, and the attending public was given the opportunity to be heard on the matter. Willenbrock Dec., CP 88, ¶16; CP 127-130. After extensive discussion, the Board determined that the District did not need Parcel No. 19182 (which could now be made subject to the District's easement), such that it too could be sold to HiTest. CP 88, ¶17. The Board unanimously adopted Resolution No. 1399, authorizing the General Manager to independently negotiate the property sale. CP 88, ¶18; CP 132-33.

The District purchased and received title to Parcel No. 19182 through a tax title property deed recorded August 2, 2017. CP 89, ¶19; CP 135. The District contracted with Valbridge Property Advisors to obtain an independent appraisal of the fair market value of the District Properties and Parcel No. 19182. CP 89, ¶20. Valbridge appraised the four parcels at \$250,000. CP 89, ¶20; CP 139.

The District and HiTest executed a Real Estate Purchase and Sale Agreement for the four properties on August 21, 2017, for a total purchase price of \$300,000. CP 89, ¶21; CP 141. A Special Warranty Deed was recorded on September 18, 2017. CP 89, ¶22; CP 149. The original deed mistakenly reserved the District's utility easement across Parcel 1, instead of between Parcels 2 and 3 and across Parcel 4. CP 149-150. The mistake was corrected by a revised deed recorded on May 14, 2018. CP 153-55.

On May 15, 2018, the District's Board of Commissioners unanimously adopted Resolution 1411. CP 90, ¶27; CP 173-175. Resolution 1411 noted that the District had previously installed underground distribution lines on, along and through the western portion of Parcel No. 19182, that an easement for the distribution lines was necessary, that "the District sought to acquire the County Parcel from Pend Oreille County to reserve an express easement for an existing underground distribution line," and that "the County Parcel, once subject

to the easement, was unfit to be used in the operations of the District's system, and thus was no longer necessary or useful in the District's operations." CP 173-74. Resolution 1411 also noted that the Board had made that same determination on August 1, 2017, at a public meeting after extensive discussion. CP 174. Consequently, Resolution 1411 affirmed and expressly ratified the District's purchase of Parcel No. 19182, the Board's determination that Parcel No. 19182 was unnecessary to the District after it had been made subject to a utility easement, and the sale of Parcel No. 19182, along with the District Properties, to HiTest. CP 174-75. Plaintiffs made no objection to the evidence establishing those facts.

**C. Plaintiffs' Response and Failure to Offer Competing Evidence**

Plaintiffs' response to the District's motion ignored Ms. Orr's and Mr. Willenbrock's sworn declaration testimony that the District acquired Parcel No. 19182 because District staff believed that was the best way to secure the utility easement the District indisputably needed, and which it indisputably had the authority to procure (by purchase or condemnation). CP 197-99.<sup>3</sup> Plaintiffs submitted no deposition testimony, no declarations of any witness with knowledge of the issue (personal or otherwise), and no

---

<sup>3</sup> Plaintiffs' 18 page brief devoted a total of four words to the District's evidence, by a conclusory assertion that this was not the District's purpose, but did not mention the District's sworn Declarations. CP 209, ln. 20.

documentary evidence to create a genuine dispute – let alone to support the Plaintiffs' burden of proving their claims and allegations. Instead, Plaintiffs relied exclusively on two letters to speculate as to the District's supposed "purpose" in acquiring Parcel No. 19182: an April 18, 2017 letter from HiTest to the District;<sup>4</sup> and the District's April 25, 2017 Letter of Intent to HiTest.<sup>5</sup> *HiTest's* letter makes a "formal request" for a "formal offer of contract for power supply services from the District." CP 253, 254. The *District's* letter "outlines some of the major terms and conditions under which Public Utility District No. 1 of Pend Oreille County ("District") proposes to enter negotiations to sell the property described below [including Parcel No. 19182] to HiTest." CP 272-75. Neither letter makes *any* statement regarding the District's purpose for acquiring Parcel No. 19182. Plaintiffs offered no other evidence to sustain their burden of proof.

Plaintiffs also argued that "[n]o discussion of any other purpose was stated prior to the sale."<sup>6</sup> But Plaintiffs did not explain how a supposed "lack of prior discussion" creates a genuine issue of fact for trial: they did not pretend that a "lack of prior discussion" might impeach Orr's and Willenbrock's sworn testimony about the District's purpose, nor did

---

<sup>4</sup> CP 253-54.

<sup>5</sup> CP 272-75.

<sup>6</sup> Response, pp. 2:10-11; 14:3-4.

they identify any reason why the District would preview its own internal business strategy to its counterpart in a proposed commercial transaction. Finally, Plaintiffs did not explain how a “lack of prior discussion” regarding the need for an easement might prove their claims, and they did not submit evidence sufficient to carry their burden of proof at trial. Consequently, there was no genuine issue of material fact regarding Plaintiffs’ unsupported allegation that the District acquired Parcel No. 19182 “for the sole purpose of selling it to HiTest.”

### **III. ARGUMENT**

#### **A. Standard of Review<sup>7</sup>**

The Court reviews an order granting summary judgment *de novo*. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 843, 187 P.3d 345 (2008). The Court may affirm an order granting summary judgment on any basis supported by the record. *Steinbock v. Ferry County Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 484-85, 269 P.3d 146 (2012); *Deep Water*

---

<sup>7</sup> Plaintiffs discuss “findings of fact” and “substantial evidence” as the standard of review. Brief of Appellants (“BOA”) at pp. 10-11. Neither has any pertinence to this appeal of an order granting summary judgment. *See, e.g., Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974 (2015) (findings of fact are inappropriate and superfluous on summary judgment); CR 52(a)(5)(B); *Young v. Toyota Motor Sales, U.S.A., \_\_\_ Wn.2d. \_\_\_, 442 P.3d 5, 9* (2019) (“substantial evidence” standard applies to review of trial court’s findings of fact following bench trial).

*Brewing, LLC v. Fairway Res. Ltd.*, 170 Wn. App. 1, 11, 282 P.3d 146 (2012).

Summary judgment is proper when the admissible record evidence presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one that affects the outcome of the litigation. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). An issue of material fact is “genuine” if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

A party moving for summary judgment has the initial burden to establish the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets that burden, the burden to show a genuine issue of material fact shifts to the nonmoving party. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). To sustain its burden, the nonmoving party must present evidence sufficient to prove specific facts establishing a genuine issue for trial. *Young*, 112 Wn.2d at 225-26, 770 P.2d 182. The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744,

87 P.3d 774 (2004). While properly disputed facts will be viewed in favor of the nonmoving party, questions of fact may be determined as a matter of law when reasonable minds could reach but one conclusion. *Granite Beach Holdings, LLC v. State ex rel. Dept. of Natural Resources*, 103 Wn. App. 186, 11 P.3d 847 (2000).

Here, the Plaintiffs have the burden of proof in the underlying action. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 595, 949 P.2d 1260 (1997) (“the plaintiff in a declaratory judgment suit under RCW 7.24 has the burden of proof”)<sup>8</sup>; *Twisp v. Methow Valley Irrigation Dist.*, 32 Wn. App. 132, 135, 646 P.2d 149 (1982) (party claiming municipal deeds were *ultra vires* had burden to prove noncompliance with statute); *Henry v. Oakville*, 30 Wn. App. 240, 246-47, 633 P.2d 892 (1981) (party challenging municipal action must rebut presumed validity)<sup>9</sup>; *Truitt v. Truitt*, 100 Wash. 608, 171 P. 532 (1918) (party challenging validity of a deed bears the burden of proof). Plaintiffs’ burden of proof is not sustained by evidence that requires resort to speculation or conjecture. *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn.

---

<sup>8</sup> Citing *Taylor v. State*, 29 Wn.2d 638, 641, 188 P.2d 671 (1948) and *Washington Beauty College v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938).

<sup>9</sup> Citing 56 Am. Jur. 2d *Municipal Corporations* §§ 355, 382 (1971), *Seattle v. Wright*, 72 Wn.2d 556, 559, 433 P.2d 906 (1967), and *LaMon v. Westport*, 22 Wn. App. 215, 219, 588 P.2d 1205 (1978).

App. 523, 547-48, 871 P.2d 601 (1994) (when a party’s “intent” is an essential element of a claim it must be established without resort to speculation and conjecture). “If there is nothing more tangible to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine facts.” *Id.*; *see also Buchanan v. Cassell*, 53 Wn.2d 611, 615, 335 P.2d 600 (1959) (trial court could not base finding of intent on speculation and conjecture).

**B. Summary Judgment Is Proper Against Plaintiffs’ Complaint<sup>10</sup>**

Plaintiffs’ challenge to the District’s purchase and sale of Parcel No. 19182 fails for three reasons: (1) the District’s purchase of Parcel No. 19182 from Pend Oreille County was not *ultra vires*; (2) the District’s sale

---

<sup>10</sup> Plaintiffs’ first assignment of error argues that the trial court erred by quoting the Washington Supreme Court’s opinion in *S. Tacoma Way, LLC v. State*, that “a government action is truly ultra vires only if the agency was without authority to perform the action.” Court’s Written Decision, p. 2, CP 454 (quoting *S. Tacoma Way*, 169 Wn.2d 118, 122-23, 233 P.3d 871 (2010)). Plaintiffs suggest that the Supreme Court’s statement ignores its other decisions that “distinguish between acts, which are done wholly without statutory authority, and those, which are done with authority but in direct violation of another existing statute.” BOA, p. 10. While one might wonder how the trial court can be faulted for quoting a Supreme Court opinion that allegedly ignored its own precedent, the issue is irrelevant: Plaintiffs did not claim that the District “violated another existing statute” before the trial court, and do not make any such argument to this Court. Plaintiffs contend that the District acted “beyond its authority” in buying and selling Parcel No. 19182. BOA, p. 2. They make no argument that the purchase or sale violated another existing statute, so the trial court’s alleged “error” in this regard is irrelevant.

of Parcel No. 19182 was not *ultra vires*, and was not invalid, and cannot be set aside; and (3) even if the purchase and sale were technically “invalid” initially, the District’s curative Resolution No. 1411 ratified any procedural defect.

**1. The District’s purchase of Parcel No. 19182 from Pend Oreille County was not *ultra vires*.**

The District’s motion for summary judgment is supported by the direct testimony of two percipient witnesses that it acquired Parcel No. 19182 from the County to secure an easement for its existing distribution lines across the property.

The District’s powers and authority are set out in RCW 54.16. RCW 54.16.020 empowers the District to “purchase, acquire, lease, add to, maintain, operate, develop, and regulate all lands, property, property rights...easements [and] rights-of-way...for generating electric energy by water power, steam, or other methods...” RCW 54.16.090 grants the District authority to “acquire by gift, devise, bequest, lease, or purchase, real and personal property necessary or convenient for its purposes....” The statute plainly gives the District express and implied authority to acquire property, property rights and easements as necessary or convenient for its purposes. Thus, the acquisition of property to secure an easement

for electrical distribution lines is clearly within the District's broad grant of statutory powers.

Ms. Orr's testimony provides specific time frames, relays her conversations with Ms. Gentle and Ms. Tellessen about the need for an easement, and explains the District's purpose and thinking in significant detail. Mr. Willenbrock's Declaration confirms Mr. Orr's testimony. Thus, to withstand summary judgment, Plaintiffs were required to submit admissible evidence sufficient to support a reasonable finding, without resort to speculation or conjecture, that "[t]he PUD bought this land for the sole purpose of selling it to Respondent Defendant HiTest Sand, Inc." CP 11, lns. 5-8.

Plaintiffs chose not to depose Ms. Orr, Mr. Willenbrock, Ms. Gentle or Ms. Tellessen. Instead, to carry their burden of proof, Plaintiffs relied on the following facts:

- The District's April 25, 2017 Letter of Intent offered to purchase Parcel No. 19182 from the County and sell it to HiTest with three other parcels owned by the District. Brief of Appellant ("BOA"), p. 7, citing CP 110.<sup>11</sup>
- "The retention of an easement was never stated prior to the sale." BOA p. 7.

---

<sup>11</sup> The District's letter also anticipates that Parcel No. 19182 might not be acquired from the County, in which event "the District shall have no responsibility to acquire the 13.83 acres and there shall be no refund of the LOI Deposit." CP 110, ¶1.

- “The Minutes of the PUD Commission do not indicate any desire to retain an easement.” BOA, pp. 7-8, citing CP 127-130.
- “No documents that existed prior to or at the time of the sale indicate a desire by the PUD to retain an easement.” BOA, p. 8.
- The District issued a press release on September 19, 2017, stating that “the PUD acquired the adjacent county property with the intent to sell the entire package to HiTest.” BOA p. 9, citing CP 157-158.
- The District’s initial Deed to HiTest purportedly did not reserve an easement for its distribution lines [it indisputably did reserve a utility easement, but across the wrong parcel]; the corrected Deed reserving the easement across Parcel No. 19182 was not recorded until May 19, 2018. BOA 9-10, citing CP 296-97 and 152-55.

These “facts” do not sustain Plaintiffs’ burden. In essence, Plaintiffs are simply inviting the Court to conclude that Ms. Orr and Mr. Willenbrock have perjured themselves and draw an inference contrary to their sworn testimony because the *District* did not produce documentary evidence of its reason for buying Parcel No. 19182. *See* BOA p. 16 (“the PUD should be able to point to evidence in the record regarding their (sic) intention to retain an easement”).<sup>12</sup> But that argument improperly

---

<sup>12</sup> Notably, the District’s intent to reserve an easement for its lines is clearly reflected by evidence in the record -- the original Deed expressly reserved “a perpetual easement and right to enter and install, maintain, repair, rebuild, operate and patrol underground electric power distribution lines over, in, under, and through the west sixty feet of Parcel 1, as well as reasonable ingress and egress across the parcels to reach the easement area.” CP 149-150. The corrected deed deleted that language and reserved the easement “between Parcels 2 and 3 and extending south through Parcel 4 to the southern boundary of Parcel 4.” CP 155.

attempts to flip the burden of proof in this case, as well as Plaintiffs' burden under CR 56. "A party must provide affirmative factual evidence to oppose a motion for summary judgment." *Dunlap v. Wayne*, 105 Wn.2d 529, 536-37, 716 P.2d 842 (1986) (emphasis supplied) (citing CR 56(e) and *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490, *cert. denied*, 464 U.S. 894 (1983)). Moreover, Plaintiffs offer no reason why the District *would* reveal its internal business strategy during commercial negotiations with a third party, and Plaintiffs tacitly concede that there are obvious reasons it would not. BOA p. 15.

Nor does Plaintiffs' "evidence" raise an issue of credibility, because an "issue of credibility is present only if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue. A party may not preclude summary judgment by merely raising argument and inference on collateral matters." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626-27, 818 P.2d 1056 (1991). Plaintiffs produce no affirmative documentary or testimonial evidence that contradicts the Orr and Willenbrock Declarations, say, by stating that the District did not desire to acquire Parcel No. 19182 in order to secure a utility easement, or that the District only purchased Parcel No. 19182 to sell it to HiTest. In short, the facts on which Plaintiffs rely – that the

District proposed to purchase and then sell the property, that the District's press release stated that it bought the property with the intent to sell it to HiTest, and that the initial Deed mistakenly reserved the easement across the wrong parcel – do not contradict the District's direct testimonial evidence. Even if Plaintiffs' supposed "facts" supported a speculative inference that the District had other reasons to purchase the property (they do not), that does not sustain Plaintiffs' burden. *Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995) (party opposing summary judgment cannot rely on speculation, conjecture, or mere possibility to raise a genuine issue of fact).

The courts' decisions in *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), and *Cowiche Basin P'ship v. Mayer*, 40 Wn. App. 223, 698 P.2d 567 (1985), best illustrate this rule. *Dunlap* involved a defamation claim based on an alleged statement that the plaintiff, a bank employee, solicited a "kick-back" from a bank customer for assistance in procuring financing for a development project. The plaintiff produced no admissible evidence to prove that the defendant made the allegedly defamatory statement. Instead, he argued that the court should draw an inference that the statement was made from other undisputed facts: (1) in a letter, the defendant's attorney threatened to notify the Bank of the plaintiff's "solicitation of kick-backs", (2) the defendant did in fact contact

the Bank, and (3) the Bank fired the plaintiff for his participation in the defendant's business. Affirming summary judgment, the Supreme Court stated:

This suggested inference does not qualify as evidence. A party must provide affirmative factual evidence to oppose a motion for summary judgment. CR 56(e); *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490, *cert. denied*, 464 U.S. 894 (1983). Moreover, the plaintiff asks this court to disregard the testimony of Bank officials to draw the suggested inference. The Bank president denied that he or Wayne used the words "kickback" or "shakedown." The Bank official who met with defendant Wayne also denied that Wayne used the words "kickback" or "shakedown" to characterize Dunlap's conduct. To raise an issue of credibility at a hearing on a motion for summary judgment, the nonmoving party must present contradictory evidence or otherwise impeach the evidence of the moving party. *See Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963); *Cowiche Basin Partnership v. Mayer*, 40 Wn. App. 223, 228, 698 P.2d 567 (1985). The plaintiff has not placed the credibility of these Bank officials into issue with admissible contradictory or impeaching evidence.

*Id.* at 536-37.

*Cowiche* involved a claim for payments under a mineral rights lease. The defendant claimed that the lessors had not properly ratified certain warranties under the lease, such that payments were not owed. The lessors argued that the lessee had waived any defect in the ratification by recording the ratification and other documents. The defendant filed an affidavit stating that the recording was inadvertent, not intentional, and therefore not a knowing waiver of the defective ratification. On appeal, the

lessors argued that an issue of fact regarding intent precluded summary judgment. The Court rejected that argument because the lessors failed to submit any affirmative evidence of intent to contradict or impeach the lessee's affidavit:

According to Cowiche, Mr. Mayer's credibility is at issue. **But to raise an issue of credibility at a hearing on a motion for summary judgment, the nonmoving party must present contradictory evidence or otherwise impeach the evidence of the moving party.** *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963). The fact Mr. Mayer recorded the ratification along with other documents relating to section 6 neither contradicts nor impeaches his claim that the recording was inadvertent. On the evidence presented, the trier of fact could only speculate as to whether Mr. Mayer intended to waive his rights.

40 Wn. App at 228-29 (emphasis added). Consequently, summary judgment was proper against the waiver argument. The same rule applies to Plaintiffs' argument in this case.

In tacit recognition that they lack evidence sufficient to withstand summary judgment, Plaintiffs suggest (without any supporting authority) that the Open Public Meetings Act ("OPMA") somehow required the District to discuss its need for an easement "on the record." BOA p. 16. This argument fails for a number of reasons.

First, Plaintiffs' Complaint did not plead or allege a violation of RCW 42.30.030. CP 15-17 (stating causes of action). "A party who does

not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.” *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). Moreover, Plaintiffs did not even raise an OPMA argument until their *reply* brief before the trial court – and even then only with regard to the sale of Parcel No. 19182, not its purchase. See CP 196 (Table of Authorities to Plaintiffs’ Response Brief, containing no reference to RCW 42.30); CP 362 (Plaintiffs’ Reply Brief in Support of Cross Motion). As noted by the District’s Motion to Strike Plaintiffs’ untimely argument, a party cannot raise new (unpleaded) claims or new issues in reply on summary judgment. CP 412, citing *White v. Kent Medical Ctr.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991), and *Owen v. Burlington N. Santa Fe*, 114 Wn. App. 227, 240, 56 P.3d 1006 (2002).

Second, Plaintiffs cite no authority for the proposition that the OPMA somehow affirmatively required public discussion of the District’s need for a utility easement on Parcel No. 19182, as opposed to its purchase and sale. This Court need not address arguments that are unsupported by citation to authority. *State v. Mercado*, 181 Wn. App. 624, 637, 326 P.3d 154 (2014). Nor is Plaintiffs’ unsupported argument well taken: The OPMA is a procedural safeguard to ensure public notice of open meetings of a governing body--it does not, in itself, add substantive

requirements to the statutory authority of agencies like the District. *See Eugster v. City of Spokane*, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005) (“[t]he purpose of the OPMA is to permit the public to observe the steps employed to reach a governmental decision”). But the Court need not engage that issue in any event, because there is no dispute that the District’s intent to purchase and sell Parcel No. 19182 *was* discussed at the District’s regularly scheduled, open public meeting. CP 127-129 (Minutes from August 1, 2017 District meeting); CP 132 (Res. 1399 addressing “authorization to purchase Pend Oreille County land Parcel number 19182” and sell the entire four parcel package to HiTest). Plaintiffs certainly *could* have attended that meeting and asked why the District was purchasing Parcel No. 19182 if they had wanted. Although not pleaded as a claim, the OPMA’s requirements were met, and more importantly its purpose was served.<sup>13</sup>

Finally, Plaintiffs’ confused OPMA argument misses the forest for the trees. Plaintiffs did not bring this action to protest the imposition of a utility easement on Parcel No. 19182 – they sued to challenge the purchase and subsequent sale of the property to HiTest. As noted, that action was clearly approved at an open public meeting. Plaintiffs’

---

<sup>13</sup> Notably, Plaintiffs offer no evidence to support their assertion that “absolutely no public discussion occurred on the need for an easement on Parcel No. 19182.” Brief of Appellants, p. 17.

unsupported assertion that the District’s meeting minutes must disclose the *reason* for its action simply reveals the lack of evidence to prove their actual case.

**2. The District’s sale of Parcel No. 19182 was not *ultra vires*, and was not invalid, and cannot be set aside.**

**a. RCW 54.16.180 does not require a PUD to hold a public “vote” or formally declare unnecessary property as “surplus” prior to sale.**

Chapter 54.16 RCW grants PUDs broad powers to acquire real property; not surprisingly, it also gives PUDs broad discretionary authority to sell their property – particularly property that is no longer necessary or useful to the district operations. Indeed, RCW 54.16.180(2)(b) does not impose any restrictions or limitations on a PUD’s authority to sell – or even “dispose of” – property that has become unserviceable and unnecessary in the operation of its system. There is no requirement for a “vote” regarding the disposition of unnecessary property, and no requirement that the District formally or expressly declare such property to be “surplus” prior to selling or disposing of it. Consequently, summary judgment is proper against Plaintiffs’ challenge to the sale of Parcel No. 19182.

As relevant here, RCW 54.16.180(2) provides:

(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:

...

(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.

The Court should note the sweeping breadth of this statutory empowerment, even aside from the requirement that RCW 54.16 be liberally construed.<sup>14</sup> By the statute’s plain language, property that is no longer “necessary” or “useful” can be sold – or even just “disposed of” – without a vote of the district’s voters. Moreover, the statute does not require that such property be declared “surplus” before being sold. Indeed, the broad statutory grant of a PUD’s power to dispose of unserviceable and unnecessary property does not even use the word “surplus.”

RCW 54.16.180(2)(b) must be construed and applied “by approaching the language of the act on its face and accepting plain and unambiguous language.” *State v. Roberts*, 117 Wn.2d 576, 584, 817 P.2d 855 (1991). The plain and unambiguous language of RCW 54.16.180(2) expressly negates any requirement of a vote to dispose of unnecessary

---

<sup>14</sup> See *Sundquist Homes*, 92 Wn. App. at 955 (citing LAWS OF 1931, ch. 1, § 11, p. 29)

property, and does not require that unnecessary property be declared “surplus” prior to disposition.<sup>15</sup> This flexible discretion to freely dispose of the PUD’s unnecessary, useless property serves the public interest, by putting it back on the tax rolls in productive private use.

Finally, even if RCW 54.16.180(2)(b) were ambiguous with respect to whether a PUD must formally “declare” a property “surplus” prior to its sale or disposition (it is not), the Court would be required to construe the absence of any such language as indicating the legislature’s intent not to require such a step. The Legislature knows how to require a specific declaration that municipal property is “surplus” when it intends to do so. *See, e.g.*, RCW 35.94.040 (expressly requiring cities to pass a resolution determining property to be “surplus” prior to its sale or lease); RCW 35.61.132 (expressly requiring a unanimous decision by a board of park commissioners declaring property to be “surplus” before sale, lease or exchange of metropolitan park property). “[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *Roberts*, 117 Wn.2d at 586 (quoting *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990), and *UPS v. Department of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)).

---

<sup>15</sup> Plaintiffs’ brief flagrantly misrepresents the statute as requiring that “the land had previously been declared ‘surplus.’” BOA p. 29.

- b. Even assuming *arguendo* that Parcel No. 19182 should have been declared “surplus,” the sale to HiTest was neither *ultra vires* nor invalid.**

RCW 54.16.180 indisputably empowers a PUD to dispose of property that is no longer needed or useful to its operations. Consequently, the District’s sale of Parcel No. 19182 to HiTest cannot have been “*ultra vires*” as a matter of law. A procedural error in the sale of Parcel No. 19182 might have hypothetically rendered the sale *invalid* – but not *ultra vires*. The distinction was made clear by the Washington Supreme Court in *S. Tacoma Way, LLC v. State*:

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. Ultra vires acts cannot be validated by later ratification or events.

**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. 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.

If in this case the State was generally authorized to sell the surplus property, its act of doing so was not *ultra vires*. No serious dispute exists that, under its statutory authority, the State is generally authorized to sell surplus property. The issue in this case centers on 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) (internal citations omitted; emphasis added).

The Court’s “may or may not be” language is important, because it confirms that procedural missteps do not require invalidation of municipal action. Instead, the Court must examine the facts of the case to determine whether technical noncompliance with a given procedural requirement offends its purpose. If not, the court need not invalidate municipal action.

Applying this rule in *S. Tacoma Way*, the Washington Supreme Court reversed Division II and reinstated the trial court’s order confirming the Department of Transportation’s sale of surplus property to a private party, despite DOT’s failure to provide notice of the sale to “all abutting landowners” as required by RCW 47.12.063. The Supreme Court noted that DOT had clear authority to sell surplus property – as in this case – so the sale was not *ultra vires*. More importantly, the evidence was clear that DOT’s failure to give the required notice was simply an oversight. The sale was not collusive, and was indisputably made for fair value – as in this case – so the purpose of the notice requirement (to prevent collusion and prevent fraudulent sales) was not offended. Consequently, the Court held that DOT’s failure to comply with the statute’s procedural “notice” requirement did not invalidate its sale of surplus property to a third party

who paid fair value.<sup>16</sup> *Accord Lane v. Port of Seattle*, 178 Wn. App. 110, 124-25, 316 P.3d 1070 (2013) (affirming summary judgment against action challenging Port of Seattle’s acquisition of rail line prior to passing resolution as required by statute, because Port had authority to purchase property and complied with purpose of resolution requirement by carefully considering needs and options prior to purchase); *Jones v. Renton Sch. Dist. No. 403*, 2016 WL 2654572 at \*4-5 (Wash. Ct. App. May 9, 2016) (affirming summary judgment dismissing declaratory judgment action because school district was generally authorized to sell real property under RCW 28A.335.120, and District's failure to comply with the statutory notice requirements did not contravene the statute's underlying policy).<sup>17</sup>

*S. Tacoma Way, Lane* and *Jones* instruct the proper result in this case, even assuming that Parcel No. 19182 should have been declared to be “surplus” prior to sale. The District clearly had authority to dispose of property that was no longer needed or useful. Having secured the ability to ensure its utility easement, Parcel No. 19182 was no longer needed or useful. Any alleged failure to declare such property “surplus” prior to sale

---

<sup>16</sup> The Court also held that the sale should be confirmed because the buyer was a bona fide purchaser for value. 169 Wn.2d at 127. That doctrine also applies in this case, and independently supports summary judgment against Plaintiffs’ claims.

<sup>17</sup> This unpublished opinion has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1.

should not invalidate the sale, because the property was sold after an open public meeting, for more than its appraised value. Plaintiffs’ new conspiracy theory –that the District purchased Parcel No. 19182 so that HiTest could avoid “public accountability” and an allegedly “onerous” public auction—is (like the rest of their claims) unsupported by any evidence.<sup>18</sup> Summary judgment is proper against Plaintiffs’ challenge to the sale.

**3. Even if the purchase and sale of Parcel No. 19182 had been procedurally invalid, the District cured any procedural misstep by ratifying the sale, such that the sale is valid and must be enforced.**

When a municipality takes otherwise proper action that might be challenged for procedural reasons, it may retrace its steps and remedy the defects by reenactment with the proper formalities. *Henry v. Oakville*, 30 Wn. App 240, 247, 633 P.2d 892 (1981) (city ratified ordinances initially passed in violation of Open Public Meetings Act);<sup>19</sup> *see also Bale v. City*

---

<sup>18</sup> BOA p. 29-30. Plaintiffs’ argument is actually worse than unsupported by evidence, it is misleading. Plaintiffs cite CP 103, HiTest’s April 18, 2017 Request for Power Services, to support their accusation regarding HiTest’s alleged intent to avoid a public auction, and their allegation that HiTest “never inquired with the County about purchasing the land directly from them (sic).” BOA p. 29. HiTest’s letter contains no evidence that would support either allegation.

<sup>19</sup> Citing *Jones v. Centralia*, 157 Wash. 194, 212, 220, 289 P. 3 (1930), *LaRose v. King County*, 20 Wn. App 808, 814, 584 P.2d 393 (1978), 4 E. McQuillin, *Municipal Corporations* 597-98 (3d ed. rev. 1979), 64 Am. Jur. 2d *Public Securities and Obligations* § 381 (1972), *Board of*

*of Auburn*, 87 Wn. App. 205, 210, 941 P.2d 671 (1997) (city ratified ordinance passed without proper publication). A municipal corporation's ratification of a contract validates it as if it had been entered into properly. *See Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d 366, 378, 517 P.2d 1362 (1974) (holding that the board's re-approval of a plan effected compliance with RCW 42.30.060).

In this case, the District properly passed Resolution No. 1411 on May 15, 2018. Resolution No. 1411 ratified the District's purchase of Parcel No. 19182 from Pend Oreille County to ensure the utility easement it needed, declared the property to be "surplus" (after the easement was secured), and confirmed the sale of Parcel No. 19182 to HiTest (along with the other parcels). Consequently, summary judgment is proper against Plaintiffs' claim challenging the purchase and sale.

#### IV. CONCLUSION

The District's contracts to purchase and sell Parcel No. 19182 are presumed valid. To overcome that presumption, Plaintiffs had to prove that the contracts were beyond the scope of the District's express and implied statutory authority. Plaintiffs are required to carry that burden by

---

*Supervisors v. Schenk*, 72 U.S. 772, 18 L.Ed. 556 (1876), and *Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d 366, 378, 517 P.2d 1362 (1974).

admissible evidence; conclusory allegations, conspiracy theories and arguments inviting speculation or conjecture do not suffice.

The District's motion for summary judgment was supported by extensive evidence, including the unchallenged testimony of two percipient witnesses. The District's evidence proved that the District acquired Parcel No. 19182 as the best way to acquire an easement for its electrical distribution lines across the property. To create a genuine issue of fact for trial, Plaintiffs were required to submit affirmative evidence contradicting or impeaching that testimony. Because they failed to do so, summary judgment was properly entered against their challenge to the purchase of Parcel No. 19182. Plaintiffs' challenge to the sale of Parcel No. 19182 was also properly rejected. The District has broad discretion to dispose of property no longer necessary to its operations, without a public vote or a formal declaration that such property is "surplus." Once subject to the District's easement, Parcel No. 19182 was no longer necessary or useful. Consequently, the sale of Parcel No. 19182 was not *ultra vires*, and it would not have been invalid even if, hypothetically, some technical procedural requirement had not been met. The trial court's summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of August, 2019.

*s/John Ray Nelson*

John Ray Nelson, WSBA #16393  
FOSTER PEPPER PLLC  
618 West Riverside Avenue, Suite 300  
Spokane, WA 99201-5102  
Telephone: (509) 777-1600  
Email: [john.nelson@foster.com](mailto:john.nelson@foster.com)

*s/Tyler R. Whitney*

Tyler R. Whitney, WSBA No. 48117  
PUBLIC UTILITY DISTRICT NO. 1 OF  
PEND OREILLE COUNTY  
130 NORTH WASHINGTON  
P.O. BOX 190  
NEWPORT, WA 99156  
TELEPHONE: (509) 447-9331  
EMAIL: [TWHITNEY@POPUD.ORG](mailto:TWHITNEY@POPUD.ORG)

*Attorneys for Respondent Public Utility  
District No. 1 of Pend Oreille County*

### **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 August 21, 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 eportals users will be served by the appellant system.

*/s/ Pam McCain*  
Pam McCain, Legal Assistant

**FOSTER PEPPER PLLC**

**August 21, 2019 - 1:17 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36736-3  
**Appellate Court Case Title:** Responsible Growth NE WA, et al v. Pend Oreille Public Utility, et al  
**Superior Court Case Number:** 18-2-02551-1

**The following documents have been uploaded:**

- 367363\_Briefs\_20190821131359D3708535\_6470.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Pend Oreille Brief of Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- Brian.Kistler@KutakRock.com
- Spowers@cascadialaw.com
- eichstaedt@gonzaga.edu
- enickelson@cascadialaw.com
- jed@bardenandbarden.net
- jmcpee@workwith.com
- jrehberger@cascadialaw.com
- nathan.smith@kutakrock.com
- pwitherspoon@workwith.com
- rclayton@workwith.com
- stan@cascadialaw.com
- twhitney@popud.org

**Comments:**

---

Sender Name: Pam McCain - Email: pam.mccain@foster.com

**Filing on Behalf of:** John Ray Nelson - Email: john.nelson@foster.com (Alternate Email: litdocket@foster.com)

Address:  
1111 Third Avenue, Suite 3000  
Seattle, WA, 98101  
Phone: (206) 447-4400

**Note: The Filing Id is 20190821131359D3708535**