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No. 82212-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

SOUTH TACOMA WAY, LLC,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION
AND SUSTAINABLE URBAN DEVELOPMENT #1, LLC,

Petitioner.

SOUTH TACOMA WAY LLC'S
ANSWER TO SUSTAINABLE URBAN DEVELOPMENT'S
PETITION FOR REVIEW

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A. INTRODUCTION

Petitioner Sustainable Urban Development (“SUD”) and defendant Washington State Department of Transportation (“DOT”)¹ made a back-door deal for the sale of land that directly violated an existing statute and circumvented public bidding laws. The Court of Appeals correctly concluded that the contract was ultra vires and void, and ordered DOT to follow the law. Now, SUD asks this Court to ratify the illegal, ultra vires, void contract.

The Court of Appeals applied long-standing case law in reaching its conclusion, and created no conflicts in authority. There is no broad public interest in allowing SUD to benefit from the illegal contract. Statutory constraints on agency power, particularly public bidding laws that prevent fraud, collusion, and favoritism in government dealings, protect the public interest and should be upheld.

This straightforward case merits no attention from this Court. Review should be denied.

B. COUNTERSTATEMENT OF THE CASE

The factual and procedural background of this case are amply described in the Court of Appeals’ opinion, attached as Exhibit 1 to SUD’s

¹ DOT was a co-defendant below, but has not joined SUD’s petition for review to this Court.

petition.

Although SUD and DOT were aligned below in defense of this action, DOT did not join in SUD's petition for review to this Court.

Petition at 1.

C. ARGUMENT WHY REVIEW OF SUD'S PETITION SHOULD NOT BE ACCEPTED

Under RAP 13.4, a petition for review will be accepted only under the following circumstances:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

SUD has argued that review should be accepted under prongs (1), (2) and (4). Petition at 5.

The ruling of the Court of Appeals is not of substantial public interest. This case is of interest to SUD, which wants to enforce for its own benefit an ultra vires contract executed in direct violation of a statute and in total circumvention of the public bidding laws. However, allowing a party to benefit from an illegal state agency contract is not a matter of substantial public interest, particularly when the state agency does not view it as such. This case does not meet the criterion of RAP 13.4(b)(4).

The Court of Appeals followed decades of well-established Washington authority stating that contracts executed in direct violation of an existing statute, which circumvent public bidding laws designed to protect the public interest, are void and may not be enforced based on equitable principles. Therefore, this case also does not meet the criteria of RAP 13.4(b)(1) or (2).

(1) DOT Has Not Petitioned This Court for Review; This Case Does Not Involve an Issue of Substantial Public Interest

DOT has apparently concluded that the Court of Appeals' ruling does not threaten the interests of the agency or the public. It has not petitioned this Court for review.

DOT, the state agency most directly affected by the Court of Appeals' ruling, is in the best position to judge whether the Court of Appeals' opinion raises an issue of public interest. The Court of Appeals concluded that the public interest in limiting agency power was greater than the public interest in seeing SUD's contract upheld. *South Tacoma v. State of Washington*, ____ Wn. App. ____, 931 P.3d 938, 946 (2008). If DOT believed that this case was wrongly decided and implicated a substantial public interest, then surely it would have joined in SUD's petition, as it did at trial and at the Court of Appeals. An issue of substantial public interest under RAP 13.4(b)(4) is not present here.

(2) The Court of Appeals' Decision Protects the Public Interest by Preventing the Favoritism and Collusion that Competitive Bidding Laws Were Enacted to Prohibit

SUD suggests that voiding its contract with DOT harms “innocent members of the public that rely upon the government action.” Petition at 15. SUD has not explained how it is harmed by unwinding the sale and holding a public auction, as DOT should have done in the first place.

Edwards v. City of Renton, 67 Wn.2d 598, 409 P.2d 153 (1965) cited by SUD, specifically condemned circumvention of public bidding laws – which SUD seeks to do here – as contrary to the public interest:

[T]he objects of statutory bidding requirements in connection with the letting of municipal contracts are to prevent fraud, collusion, favoritism, and improvidence in the administration of public business...*It should be axiomatic that plans, schemes, or devices which thwart or circumvent the wholesome objects and purposes of such statutory provisions are invalid.*

Id. at 603-04. The public policy behind public bidding laws, as explained by this Court in *Edwards*, is fulfilled by nullifying a contract executed in violation of a statute designed to prevent fraud and collusion in the execution of government contracts. The Court of Appeals has upheld the public policy and the public interest behind bidding laws.

(3) Application of the Bona Fide Purchaser Doctrine to Revive This Void Ultra Vires Contract Would Serve SUD's Interest, But Would Harm the Public Interest

SUD argues that, in certain cases, equitable principles can apply to protect parties who have been the victims of ultra vires government action. Petition at 17-20. It is true that in specific circumstances, equitable principles can apply to reimburse innocent parties harmed by government malfeasance. *See, e.g., Noel*, 98 Wn.2d at 381.

However, application of the bona fide purchaser doctrine to “revive” the void contract would eviscerate the ultra vires doctrine and reward SUD and DOT’s illegal actions.² In *Noel*, this Court *specifically rejected* any remedy to the purchaser property that involved enforcement of the contract:

The parties have conceded, both before this court and by their failure to appeal the trial court's decision in the Noel action, that the regulations exempting timber sales from SEPA are invalid as applied to this case. As a result, they concede that DNR is required to prepare an EIS prior to any sale which is a major action significantly affecting the environment. The trial court found that the sale in the instant case was such an action and therefore that DNR was required to prepare an EIS. Since it did not do so, the

² Even if the doctrine were applicable, SUD could not claim bona fide purchaser status because it had constructive knowledge of the illegal exercise of DOT’s authority. First, SUD is charged with knowledge of the scope of DOT’s authority under RCW 47.12.063. *Noel*, 98 Wn.2d at 379; *State v. City of Pullman*, 23 Wash. 583, 586, 63 P. 265 (1900). SUD cannot claim ignorance of DOT’s mandate to notify abutting landowners of the proposed sale. Second, SUD knew that it was not the only landowner abutting the alley. In addition to King County records indicating that two other abutting landowners existed, (CP 47-48, 65-66), SUD and South Tacoma’s predecessors in interest were neighbors and were in communication before the sale occurred. CP 511. Whether SUD believed that South Tacoma’s predecessor did not want to buy the alley is irrelevant: SUD had sufficient information to put a reasonable buyer on notice to inquire whether DOT had followed the correct statutory procedures.

contract of sale to Alpine was ultra vires and Alpine cannot recover for any alleged breach.

Id. at 380-81. Instead, this Court concluded that monetary compensation from the state for any improvements to the property was the correct equitable result. *Id.* at 383.

State v. Hewitt Land Company, 74 Wash. 573, 134 P. 474 (1913) relied upon by SUD, is inapposite. SUD ignores critical language in the case that distinguishes it, factually and legally, from the case at bar. In *Hewitt*, the state conferred land to one party, and that party then conveyed the land to a third party. *Id.* at 585. The Court held the innocent *third party* should not be deprived of the land, but noted that if the original vendee were asking for enforcement of its deed against the state, another outcome would be appropriate:

As between the state and its vendee, it is possible that the sale [of land] could be set aside; but here the property has passed into the hands of third parties, purchasers for value and in good faith.

Id. (emphasis added).

Here, DOT violated a statute. *South Tacoma*, 191 P.3d at 944. SUD is not a third party, as in *Hewitt*, but itself entered into an illegal contract with the state that is ultra vires and void. No contract remedy, even if clothed in "equitable principles," can apply. If SUD wishes to sue DOT for recovery regarding any improvements made to the alley, or any

other damages suffered as a result of DOT's action, it is within its rights to do so. But it cannot request, as an equitable remedy, that its illegal contract be enforced by this Court.³

If parties were able to circumvent the public bidding laws simply by proclaiming their ignorance that the laws applied to their contract, as SUD and DOT attempted to do here, it would undermine the important public purpose behind such laws. The Court of Appeals protected the public interest by ruling correctly here.

(4) The Court of Appeals' Decision Does Not Conflict With Any Decision of this Court or Another Court of Appeals

From this very straightforward opinion citing this Court's well-settled authority on the *ultra vires* doctrine, SUD tries to create an appearance of conflict. None exists. The Court of Appeals correctly concluded that when a state agency directly violates existing statutes and circumvents the public bidding process, the resulting contract is *ultra vires* and void.

(a) It Is Well Settled That a Contract Executed In Direct Violation of an Existing Statute Is Ultra Vires and Void

³ The Court of Appeals incorrectly stated that South Tacoma Way failed to offer any support for its policy argument that the free trade principle underlying the bona fide purchaser doctrine should give way to the public interest when the state is market participant. In its reply brief, South Tacoma noted that the cited principle is taken directly from majority United States Supreme Court opinions in *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-38, 100 S. Ct. 2271 (1980), and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809, 96 S. Ct. 2488 (1976). As such, the principle is not "completely lacking in support;" it comes from the highest available authority.

The Court of Appeals relied on numerous, well-settled majority opinions in reaching its conclusion that an agency acts ultra vires when it directly violates an existing statute. *South Tacoma*, 191 P.3d at 944-45, citing *Properties Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.2d 416, review denied, 155 Wn.2d 1003, 122 P.3d 185 (2005); *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968); *Noel v. Cole*, 98 Wn.2d 375, 381, 655 P.2d 245 (1982), superseded by statute on other grounds in *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 360, 932 P.2d 158 (1997).

SUD attempts to create conflict where none exists, by arguing that the ultra vires doctrine only applies when the acts are not “within the general powers granted to the government.” Petition at 7.

What SUD fails to acknowledge, is that the acts in this case were not within the powers granted to DOT. The Legislature granted to DOT the power to sell the property in question *only* after notifying all abutting landowners. RCW 47.12.063(1)(g). If one of those landowners objected, an auction had to be held. *Id.* Here, no notice was given before the sale was executed. When notice was belatedly given and an objection was lodged, no public auction was held.

The Court of Appeals correctly relied on directly applicable cases from this Court holding that when an agency acts in direct violation of an existing statute, the resulting contract is null and void. There is no conflict with any decision of this Court.

- (b) Although the Court of Appeals Mistakenly Cited Language From Two Dissents Regarding the Ultra Vires Doctrine, the Related Majority Opinions Do Not Even Address the Ultra Vires Doctrine, and the Cited Dissenting Language Is Taken Directly From Majority Opinions of this Court

SUD makes much of the fact that the Court of Appeals cited language regarding the ultra vires doctrine from dissenting opinions, without acknowledging the same. Petition at 6. The Court of Appeals did mistakenly fail to acknowledge that it cited dissenting opinion language from two cases, *Kramarevsky*⁴ v. *Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 863 P.2d 535 (1993) and *Pierce County v. State*, 159 Wn.2d 16, 148 P.3d 1002 (2006).

However, a brief review of the majority opinions from *Kramarevsky* and *Pierce County* reveal that neither addresses the *ultra vires* doctrine at all. The *Kramarevsky* majority made clear that it specifically declined to address the *ultra vires* argument because it was not raised on appeal:

⁴ SUD refers to the case as "*Kramarevchy*." Petition at 9-10.

DSHS consequently has not raised the issue of whether its act of overpaying benefits is an ultra vires act to which equitable estoppel may not apply. ... This issue therefore remains for determination in an appropriate future case.

Kramarevcky, 122 Wn.2d at 744. The *Pierce County* majority does not mention the *ultra vires* doctrine at all, and where it discusses the issue of “statutory authority,” it finds no statutory violation whatsoever. *Pierce County*, 122 Wn.2d at 45-46.

Also, both dissenting opinions rely on language cited from this Court’s past majority opinions in *Bd. of Regents of Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 741 P.2d 11’ (1987) and *Failor’s Pharm. v. Dep’t of Social & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994). *South Tacoma*, 191 P.3d at 945. Therefore, the suggestion by SUD that the Court of Appeals was somehow adopting minority language that conflicted with majority opinion is incorrect.

Although the Court of Appeals should have noted that two of the many cases cited regarding the ultra vires doctrine discussed the doctrine in their dissents, that fact does not alter the accuracy of the ultimate legal analysis of this case. Review is not warranted.

- (c) The Case That SUD Cites As Being “Directly on Point” Completely Supports the Court of Appeals’ Conclusion that State Contracts Executed In Direct Violation of Statutes Are Ultra Vires and Cannot Be Enforced

Applying strange logic, SUD argues that the Court of Appeals decision here conflicts with *Edwards v. Renton*. Petition at 8.

One need look no further than the holding of *Edwards* to see that its reasoning completely supports the Court of Appeals' decision here:

Municipal corporations do not possess inherent power to borrow money. ...Power to do so should not be inferred or implied from a general statutory authority permitting municipalities to enter into contracts or incur indebtedness. Though the purpose for which the funds were expended can be characterized as *infra vires*, *the manner in which the funds were obtained was ultra vires, and the purported repayment agreement was accordingly void.*

Edwards, 67 Wn.2d at 601-02 (citation omitted, emphasis added).

Edwards supports the Court of Appeals' conclusion that the contract between SUD and DOT was *ultra vires* and void because it directly violated RCW 47.12.063(2)(g) and circumvented public bidding laws that are designed to protect the public from fraud and collusion.

(d) The Court of Appeals' Opinion Does Not Conflict With This Court's Authority or That of Other Courts of Appeal Regarding Standing; No Public Auction Was Ever Held

The Court of Appeals' opinion does not conflict with authority from this Court and the Court of Appeals regarding standing. In a futile attempt to argue that South Tacoma has no standing in this case, SUD tries to mislead this Court into believing that a public auction actually took place. Numerous times in its petition, SUD describes South Tacoma as a

“disappointed” or “unsuccessful” bidder, and describes DOT’s *total failure* to hold a public auction as merely a “mistake in the bidding process.” Petition at 3, 11-17.

SUD’s attempt to suggest that South Tacoma is merely a “disappointed bidder” without standing is deceptive and should be rejected. The implication that an auction was held is flatly false: no auction was ever held because SUD and DOT circumvented the public bidding laws in back-door deal.

Based on its false “unsuccessful bidder” characterization, SUD then argues that the Court of Appeals’ decision conflicts with cases in which parties *who actually were allowed to bid* at a public auction challenged the resulting contract. Petition at 11-13, 16-17.

Peerless Food Products, Inc. v. State, 119 Wn.2d 584, 835 P.2d 1012 (1992) and *Dick Enterprises, Inc. v. Metropolitan/King County*, 83 Wn. App. 566, 922 P.2d 184 (1996) have no application here. Those cases hold that participants in a public auction may not challenge the resulting contract after it has been executed. *Peerless*, 119 Wn.2d at 581; *Dick Enterprises*, 83 Wn. App. at 570. However, here no auction was held: DOT and SUD circumvented the public bidding process altogether.

Here; no auction ever occurred. This is a declaratory judgment action filed by a highly interested party, an abutting landowner

specifically identified as having a right to notice under RCW 47.12.063(2)(g). SUD does not even attempt to argue that South Tacoma does meet the test for standing under the Uniform Declaratory Judgment Act (UDJA), because such an argument would be futile. Petition at 13. It simply asserts that UDJA standing is implicitly rejected by the irrelevant *Peerless* and *Dick Enterprises* cases. *Id.*

Under the UDJA, an action can be brought by:

A person interested under a deed, will, written contract or other writings constituting a contract, *or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise*, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In order to have standing to seek declaratory judgment under the act, a person must present a justiciable controversy, which means:

(1) ...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004), citing *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

South Tacoma meets the test for standing under the UDJA. South Tacoma filed this action to prevent the exact danger the public bidding statutes were designed to prevent: unlawful back-door contracts between the state and private parties. The Court of Appeals correctly concluded that South Tacoma had standing to bring this declaratory judgment action.

D. CONCLUSION

The Court of Appeals protected the public interest by nullifying an illegal contract executed in direct violation of an existing statute which circumvented public bidding laws designed to protect the public interest.

The Court of Appeals properly applied well-settled principles of law and policy and correctly resolved this case. SUD has presented no argument or authority to this Court that should persuade it to accept review.

Review should be denied.

DATED this 30th day of October, 2008.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day said forth below, I deposited with the U.S. Postal Service a true and accurate copy of the South Tacoma Way LLC's Answer to Sustainable Urban Development's Petition for Review in Supreme Court Cause No. 82212-3 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 30, 2008, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

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To: OFFICE RECEPTIONIST, CLERK
Subject: South Tacoma Way, LLC v. State of Washington et al.

Dear Sir or Madam:

Attached please find South Tacoma Way LLC's Answer to Sustainable Urban Development's Petition for Review for the following case:

Case Name: South Tacoma Way, LLC v. State of Washington, et al.
Cause No. 82212-3
Attorney Name: Philip A. Talmadge, WSBA #6973
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Thank you for your attention to this matter.

Sincerely,

Paula Chapler
Legal Assistant
Talmadge/Fitzpatrick