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IN THE COURT OF APPEALS (DIVISION II)
OF THE STATE OF WASHINGTON

SOUTH TACOMA WAY, LLC

Plaintiff/Appellant,

v.

STATE OF WASHINGTON AND SUSTAINABLE URBAN
DEVELOPMENT # 1, LLC

Defendants/Respondents.

**SUSTAINABLE URBAN DEVELOPMENT'S
PETITION FOR DISCRETIONARY REVIEW TO THE SUPREME
COURT OF A PUBLISHED DECISION FROM THE COURT OF
APPEALS, DIVISION II**

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1. IDENTITY OF MOVING PARTY

Sustainable Urban Development #1, LLC (“Sustainable”) moves for the relief identified in this petition, pursuant to RAP 13.4.

2. DECISION FROM DIVISION II OF THE COURT OF APPEALS

Sustainable asks this Court to accept review of Division II of the Court of Appeals’ decision in *South Tacoma Way v. State*, -- Wn. App. --, 191 P.3d 938 (2008) (Opinion).¹

3. INTRODUCTION

In this case, Division II erred by relying upon the dissenting opinions from two Supreme Court decisions to expand the scope of the State’s ultra vires doctrine. Division II further erred when, after acknowledging it was a “novel issue of law” in Washington, Division II concluded that the bona fide purchaser for value doctrine did not protect the purchaser of State-owned property from subsequent challenge by a potential bidder for the property. Division II ordered its decision published. Thus, unless corrected by this Court, Division II’s errors will become precedent that will be relied upon in future cases.

In the fall of 2005, the Washington State Department of Transportation (“DOT”) declared a small (5,373 square foot) alleyway to be surplus property and sold it to Sustainable Urban Development #1,

¹ The Westlaw version of Division II’s opinion is appended as Exhibit 1.

LLC (“Sustainable”). Sustainable owned property abutting both sides of the alley.² Sustainable paid DOT’s asking price of \$180,000, which was the full appraised value for the property. Opinion, 191 P.3d at 941.

RCW 47.12.063 grants DOT the power to declare property surplus and sell it for the benefit of the State’s motor vehicle fund. In conducting the sale, DOT made a mistake. Under this statute, when DOT declares property surplus, it is supposed to determine the identity of all abutting property owners and provide them with notice of the proposed sale. If more than one abutting owner expresses interest in the property within 15 days of receiving notice, DOT is supposed to hold a public auction.³

In this case, DOT’s appraiser did not identify South Tacoma Way, LLC’s (“STW’s”) predecessor-in-interest (“Staub”) as an abutting property owner. As a result, DOT did not provide Staub with notice of the sale and an opportunity to bid, although Staub had actual knowledge of the sale through communications with Sustainable. Opinion, 191 P.3d 941-42.

At the time that DOT was completing the sale, Staub was in the process of selling its property to South Tacoma Way, LLC (“STW”). Although the alley had not been a factor in the purchase price for the Staub property, STW and Staub decided to use DOT’s error as leverage in negotiations with Sustainable to obtain early termination of a lease

² A map showing the alley and surrounding ownerships is attached as Exhibit 2.

³ A copy of RCW 47.12.063 is appended as Exhibit 3.

between Staub and Sustainable, which would have saved Staub approximately \$100,000. *Id.* When Sustainable refused to give Staub an early termination of its lease, Staub assigned its claims to STW who then brought a declaratory judgment action.

After all parties moved for summary judgment, Thurston County Superior Court Judge Christine Pomeroy ruled in favor of DOT and Sustainable. Judge Pomeroy upheld the sale for four reasons:⁴

First, Judge Pomeroy concluded that DOT's sale was not an ultra vires act because DOT held the land in a proprietary capacity and was authorized to sell it for fair market value. Therefore, because DOT had authority to act, but exercised that authority imperfectly by failing to notify all adjoining property owners, DOT's action was not ultra vires.

Second, even if Staub had been given notice of the sale, Staub could not show that it would have been the highest bidder if an auction had been held and that, based on the holding in *Peerless Food Products v. State*, 119 Wn.2d 584, 853 P.2d 1012 (1992), DOT's mistake in the bidding process was not grounds to overturn the contract in the absence of fraud or overreaching public policy, which were not present in the case.

Third, the Legislature did not specifically provide that a land sale under RCW 47.12.063 would be void absent notice to abutting property

⁴ A copy of Judge Pomeroy's letter opinion is appended as Exhibit 4.

owners. Moreover, the intent of the statute was to authorize DOT to sell the surplus land for the benefit of the State's motor vehicle fund and that intent was accomplished by the sale to Sustainable.

And, fourth, Sustainable was a bona fide purchaser for value without actual or constructive notice of Staub's rights. Judge Pomeroy concluded: "As a bona fide purchaser, Sustainable has a right to rely on the deed conveyed by the State."

Division II of Court of Appeals reversed. In reaching this result, Division II made at least three erroneous rulings:

First, Division II ignored the case law governing standing to challenge DOT's failure to comply with the bidding statutes. Rather than follow well-established precedent holding that only someone with taxpayer standing can bring a challenge to contract allegedly entered into in violation of a bidding statute, Division II applied the test for standing under the Uniform Declaratory Judgment Act. This holding would allow unsuccessful bidders seeking to protect their private interests to challenge such contracts at the expense of the State's interest. Second, Division II relied on dissenting opinions to greatly expand the "ultra vires" doctrine by holding that any act that violates the strict language of a statute is "ultra vires."

Finally, Division II refused to apply the bona fides purchaser doctrine because DOT's actions were allegedly ultra vires, and Division II failed to address the *Hewitt* case which held that a purchaser of property from the State is entitled to rely upon the deed that has been granted.

4. ISSUES PRESENTED FOR REVIEW

- 4.1 Should this Court accept review where Division II ignored decisions from Division I and this Court that hold only someone with taxpayer standing can challenge a final contract claimed to be entered into in violation of a bidding statute? (RAP 13.4(b)(1) & (2))
- 4.2 Should this Court accept review where Division II ignored over 100 years of authority regarding the ultra vires doctrine and instead relied on dissenting opinions – without even acknowledging they were dissenting opinions? (RAP 13.4(b)(1))
- 4.3 Should this Court accept review where Division II's opinion creates uncertainty in public contracts by allowing persons seeking to further their own private interests to challenge contracts after they have been executed, and in the absence of fraud or collusion? (RAP 13.4(b)(4))
- 4.4 Should this Court accept review where Division II's opinion expands the ultra vires doctrine, which will have the effect of greatly reducing the public's ability to rely upon agency action when such agency action may fail to strictly comply with statutory requirements? (RAP 13.4(b)(4))
- 4.5 Should this Court accept review when Division II failed to apply Washington law in concluding that the bona fide purchaser for value doctrine does not protect the purchaser of State surplus property from errors made by the State in the course of the purchase process, when the State received full appraised value for the property and there is no evidence of actual notice, constructive notice, fraud, or collusion in the sale transaction? (RAP 13.4(b)(4))

5. STATEMENT OF THE CASE

Sustainable adopts and incorporates the statement of facts from Division II's Opinion.

6. GROUNDS FOR REVIEW AND ARGUMENT

6.1 Review Is Warranted Because the Opinion's Holding Regarding Ultra Vires Doctrine Conflicts With Over 100 Years of Precedent from this Court.

In the Opinion, Division II greatly expanded the ultra vires doctrine by holding DOT's actions were ultra vires simply because DOT did not strictly comply with the statutory requirements for the sale of surplus property. Division II reached this conclusion by relying on Supreme Court dissents – *without acknowledging that it was citing to the dissents*. In doing so, the Opinion conflicts with over a century of precedent from this Court that narrowly construe the ultra vires doctrine.

In 1902, this Court succinctly explained that an act is only “absolutely ultra vires”⁵ when a governmental entity has “no authority to act on the subject-matter – it being wholly beyond the scope of its powers[.]” *Wendel v. Spokane County*, 27 Wash. 121, 124, 67 P. 576 (1902). Time and again, this Court has reaffirmed its holding that an act is

⁵ In *Wendel*, this Court distinguished between an act that is “absolutely ultra vires” and an act “which in a sense are termed ultra vires.” *Wendel*, 27 Wash. at 124. Some subsequent opinions continue to use “ultra vires” to cover both situations, while at the same time recognizing that there are distinct consequences. For example, in *Edward v. Renton*, the Court held that a city's actions were ultra vires, but because the actions would have been lawful if the city had complied with statutory requirements and were not completely outside of the subject-matter of city authority over, equitable principles should still be applied. *Edward v. Renton*, 67 Wn.2d 598, 601-02, 604-05, 409 P.2d 153 (1965).

only ultra vires when the government entity has no authority to act on the subject matter:

- Acts are not ultra vires when “the acts are within the general powers granted to the [government] even though such powers have been exercised in an irregular and unauthorized manner[.]” *Finch v. Matthews*, 74 Wn.2d 161, 171, 443 P.2d 833 (1968).
- “An ultra vires act is one performed without any authority to act on the subject.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976).
- “An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires.” *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987).

In the Opinion, Division II begins its analysis by noting that “there is no question that the legislature gave DOT authority to determine when it no longer needs property under its jurisdiction for transportation purposes and to sell that surplus property at its fair market value or greater for the benefit of the state's motor vehicle fund.” Opinion, 191 P.3d at 945. In other words, DOT has the authority over the subject matter of selling its surplus property. Based on this finding, and applying *Wendel* and its progeny, DOT’s sale of the property would not be ultra vires.

But Division II then inexplicitly finds that the act was absolutely ultra vires because DOT did not follow the statutory directive of selling the property “only” after providing notice to all abutting property owners. Opinion, 191 P.3d at 945; RCW 47.12.063(1)(g). As a result of its

conclusion that the sale was ultra vires, Division II refused to apply the equitable bona fide purchaser doctrine. Opinion, 191 P.3d at 946.

This Court's opinions have repeatedly made clear that acts that violate statutory requirements are not absolutely ultra vires when the government agency had authority over the subject matter. This Court's seminal opinion in *Edwards v. Renton*, 67 Wn.2d 598, 409 P.2d 153 (1965) is directly on point.

In *Edwards*, the Court held that Renton lacked statutory authority for developer installation of a traffic light and for reimbursement to the developer at a later time, in part because the city should have put the project out for bidding. *Edwards*, 67 Wn.2d at 601-02. The Court rejected authority that would have treated the City's act as absolutely ultra vires,⁶ and immune for equitable doctrines. *Edwards*, 67 Wn.2d at 604.

Instead, the Court held that equitable doctrines allowed reimbursement of the developer because Renton "could have, by appropriate action, lawfully and regularly installed the traffic control device[.]" *Edwards*, 67 W.2d at 605. The test that the *Edwards* Court applied was whether "the contract, if entered into in conformity with the statutes, would not have been unlawful[.]" *Edwards*, 67 Wn.2d at 605

⁶ In *Edwards*, the court made the distinction between acts that are just ultra vires and those that are ultra vires, meaning they are "malum in se, malum prohibitum or manifestly violative of public policy." *Edwards*, 67 Wn.2d at 604. See also, *supra* note 5.

(quoting *Green v. Okanogan County*, 60 Wash. 309, 111 P. 226, 114 P. 457 (1910)); see also, e.g., *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 591, 835 P.2d 1012 (1992) (enforcing contract despite State's failure to comply with statutory mandate that it "must" accept the lowest responsible bid, citing RCW 43.19.1911); *Haslund*, 86 Wn.2d at 622 (holding code officer did not act ultra vires when issuing a permit in violation of city code requirements because the officer had authority to issue permits).

Division II's Opinion in this case directly conflicts with *Edwards*. Here, like in *Edwards*, it is uncontested that DOT had the authority to take the actions it took – to sell its surplus property. Just as in *Edwards*, DOT simply failed to bid the contract. Just as in *Edwards*, the DOT's sale agreement with Sustainable, "if entered into in conformity with the statutes, would not have been unlawful." Thus, just as in *Edwards*, Division II should have applied equitable principles and enforced the bona fide purchaser doctrine. But instead, Division II found that because the statute had not been strictly complied with, it was ultra vires and equitable principles did not apply. Opinion, 191 P.3d at 945-46.

Division II's error stems from its unacknowledged reliance on dissenting opinions in two cases: *Kramarevchy v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993) and *Pierce County v. State*, 159 Wn.2d 16, 55-56,

148 P.3d 1002 (2006). Division II cites to the dissent in both opinions without acknowledging that it was citing to the dissent. The dissent in both of these cases advocates for a broader application of the ultra vires doctrine that would void any action in violation of the strict language in the statute, which is the conclusion that Division II reached in this case. *See, e.g., Kramarevchy*, 122 Wn.2d at 761 & n.5 (Madsen, J., dissenting); *see also* Opinion, 191 P.3d at 945 (quoting and relying on *Kramarevchy* dissent). These dissenting opinions are not the law. Division II's Opinion accordingly conflicts with established precedent, and this Court should accept review.

6.2 Review Is Warranted Because Division II's Holding that STW Has Standing Conflicts With The Supreme Court's Opinion in *Peerless* and Division I's Opinion in *Dick Enterprises*.

Division II's holding that STW has standing to challenge DOT's sale of the property to Sustainable in violation of the bidding statute conflicts with this Court's and Division I's long-standing rule that unsuccessful bidders' interests are subordinate to the public's interest and only persons with taxpayer standing can challenge a contract awarded in violation of a bidding statute.

6.2.1 Bidding Statutes Are Meant to Protect Public
Coffers, Not Unsuccessful Bidders.

Washington courts reject unsuccessful bidders' challenges to public contracts after those contracts have been awarded – even if the award was in violation of bidding statutes. This rule rejecting such challenges is based on the well-founded policy to not “make the public suffer *twice*: first, for the award of an excessive contract to one not the lowest bidder; and second, for the additional payment of lost profits to an unsuccessful bidder who is not performing the contract.” *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 591, 835 P.2d 1012 (1992). “Competitive bidding statutes exist to protect the public purse from the high cost of official fraud or collusion. The bidder’s interest in a fair forum is secondary.” *Dick Enterprises, Inc., v. Metropolitan/King County*, 83 Wn. App. 566, 569, 922 P.2d 184 (1996). The purpose of bidding statutes is the “protection of the public treasury before protection of bidders.” *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 591, 835 P.2d 1012 (1992). The courts have recognized that “the rationale of protecting the public treasury has priority over compensation for bidders wrongfully rejected.” *Peerless*, 119 Wn.2d at 591-92.⁷

Accordingly, the court in *Dick Enterprises* held that only taxpayers – and not disappointed unsuccessful bidders – have standing to challenge

⁷ Here, the State received the full appraisal amount for the surplus property.

contracts awarded in violation of bidding statutes. *Dick Enterprises*, 83 Wn. App. at 185-86. In *Peerless*, this Court reaffirmed that “a taxpayer’s suit is the exclusive remedy available for the improper award of a public contract.” *Peerless*, 119 Wn.2d at 596.

6.2.2 Division II’s Holding Undercuts the Public’s Interest By Giving Unsuccessful Bidders Standing.

Division II’s Opinion directly conflicts with the express holding in *Dick Enterprises* by finding STW has standing based on its assignment of interest and under the Uniform Declaratory Judgment Act. It also conflicts with this Court’s holding in *Peerless* curtailing unsuccessful bidder’s rights in favor of protecting the public’s interest and affirming that a taxpayer suit is the exclusive remedy for challenging the improper award of a public contract.

Division II held that STW had standing because the Staubs had assigned their rights to STW. Opinion, 191 P.3d at 943. The only authority to support this conclusion is a case where a corporation assigned a tort claim. Opinion, 191 P.3d at 943 (citing *Styner v. England*, 40 Wn. App. 386, 699 P.2d 234 (1985)). But under *Dick Enterprises* and *Peerless*, the Staubs themselves would not have standing, so the assignment is irrelevant.

Moreover, there was no “right” to be assigned, because as this Court held in *Peerless*, until an offer is accepted, there is no contract.

Peerless, 119 Wn.2d at 592-95. The Staubs themselves had no right to challenge the sale once it was completed so they could not create a right that did not exist by executing an assignment of rights.

Second, Division II held that STW had standing under the Uniform Declaratory Judgment Act. Opinion, 191 P.3d at 943-44. But *Dick Enterprises* and *Peerless* implicitly reject standing under that Act by holding that disappointed bidders lack standing and that only someone with taxpayer standing can challenge the contract once it has been awarded. Under Division II's analysis, an unsuccessful bidder would always have standing because there would always be an actual controversy between parties having genuine opposing interests. As recognized by this Court and Division I, allowing unsuccessful bidders to challenge a contract after it has been awarded would "make the public suffer twice." *Peerless*, 119 Wn.2d at 591; *Dick Enterprises*, 83 Wn. App. at 570.

"As a matter of public policy, the courts may refuse to recognize a cause of action where the lawsuit would work against the purposes of the underlying statute." *Dick Enterprises*, 83 Wn. App. at 570 (citing *Peerless*, 119 Wn.2d at 596-97). Division II's Opinion undermines the purpose of the bidding statutes and directly conflicts with *Dick Enterprises* and *Peerless* by allowing an unsuccessful bidder to challenge an already awarded contract. Based on this conflict, this Court should accept review.

6.3 Review Is Warranted Because the Opinion's Holding Undercuts State Policy on Limiting How and When Public Contracts Can Be Awarded.

Division II's Opinion undercuts two essential public policies in Washington: (1) that government agencies should not be allowed to escape their responsibilities when acting on matters within their jurisdiction, albeit imperfectly; and (2) bidding statutes are meant to protect the general public, not unsuccessful bidders. Thus, there is substantial public interest in this case

6.3.1 Division II's Holding Regarding the Ultra Vires Doctrine Would Allow Government to Escape Responsibility Anytime an Agent Acts in Violation of a Statutory Requirement.

When an agent's actions are absolutely ultra vires, the government will not be liable for the agent's actions. *See, e.g., Wendel*, 27 Wn. at 123 (county arguing it is not liable for illegal takings because agents' actions were ultra vires; court finds county liable because county has general authority). Likewise, when an agent enters a contract that is absolutely ultra vires, the government cannot be held liable, even in equity. *See, e.g., Edwards*, 67 Wn. 2d 603 (city arguing it is not liable for contract payments because contract was ultra vires; court finds city liable in equity because city has general powers over the subject matter). Accordingly, this Court has *only* applied the ultra vires doctrine when the government entity has "no authority to act on the subject-matter – it is wholly beyond

the scope of its powers”⁸ or it is “malum in se, malum prohibitum, or manifestly violative of public policy.”⁹ None of these standards apply to the facts in this case, as found by the trial court.

This Court’s limitations on the ultra vires doctrine further the public policy that government entities should be held “to the same standard of right and wrong that the law imposes upon individuals.” *Edwards*, 67 Wn.2d at 604.

Division II’s Opinion undercuts this policy by holding DOT’s actions were absolutely ultra vires simply because DOT failed to comply with a statutory requirement, even though the sale of the property was clearly within DOT’s authority and the outcome of the sale accomplished RCW 47.12.063’s intent through payment of the full appraised value for the surplus property.

If this Court allows the Division II Opinion to stand, government agencies would be able to avoid reasonability anytime an agent fails to strictly comply with statutory requirements. Innocent members of the public that rely upon the government action will be damaged. And the public benefit will be subsumed to the interests of unsuccessful bidders. This dramatic extension of the ultra vires doctrine is a matter of substantial public interest that should be reviewed by this Court.

⁸ *Wendel*, 27 Wash. at 124.

⁹ *Edwards*, 67 Wn.2d at 604.

6.3.2 Division II's Holding Regarding Standing Would Subordinate the Public's Interests to that of Unsuccessful Bidders.

Division II's holding on standing is of substantial public interest because it undercuts the public's interest in favor of private interests, in direct contravention of the policy expressed by this Court in *Peerless*. There, the Court recognized that "laws governing competitive bidding are enacted for the benefit of the general public, not individual bidders." *Peerless*, 119 Wn.2d at 591. The Court unambiguously described this policy when quoting from an earlier decision:

Plaintiffs misinterpret the purpose of [the competitive bidding statute]. *Its mantle of protection was not intended to benefit the unsuccessful contractor seeking a public work contract, but rather the tax paying public from arbitrary, capricious, fraudulent conduct on the part of public officials who would favor, without legitimate cause, someone other than the low bidder.*

Peerless, 119 Wn.2d at 596 (quoting *Mottner v. Mercer Island*, 75 Wn.2d 575, 578, 452 P.2d 750 (1969)) (emphasis and addition original).

If there is fraud or collusion, someone with taxpayer-standing can still challenge the contract. *Peerless*, 119 Wn.2d at 595. Moreover, the unsuccessful bidder can protect its own interests by seeking an injunction before the contract is awarded. *Peerless*, 119 Wn.2d at 596. *Peerless* is particularly noteworthy, because in that case, *Peerless* was denied relief despite the fact that all parties acknowledged that *Peerless*, the unsuccessful bidder, should have been awarded the contract. In contrast,

here, there is no evidence that Staub would have been the successful bidder at a DOT public auction.

Division II's holding that the successor to an unsuccessful bidder has standing because of an assignment and under the Uniform Declaratory Judgment Act harms the public interest by allowing the unsuccessful bidder to challenge the completed contract and require the public to pay twice for government's mistake.

6.4 Review Is Warranted Because Division II Erred in Ruling The Bona Fide Purchaser Doctrine Did Not Establish Sustainable's Superior Rights to the Property.

RCW 47.12.063(2)(g) authorizes DOT to sell land "at its fair market value" to an abutting private owner. It is undisputed that Sustainable was such an owner that approached DOT in good faith to purchase the alley. Sustainable provided DOT with a survey of the Frye property that it recently acquired; it followed the procedure that DOT laid out for the sale; it agreed to the quitclaim form of deed that DOT offered; and it paid DOT's asking price.¹⁰

Washington's bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive notice of another's interest in real property purchased has a superior interest in the property. *Levien v. Fiala*, 79 Wn. App. 294, 299, 902 P.2d 170 (1995)

¹⁰ CP 451-459: Sustainable/WSDOT purchase and sale agreement.

(Buyer's *bona fide* property purchase barred adjoining owner's claim to disputed triangular strip based upon an unrecorded quitclaim deed).

Moreover, Sustainable had a right to presume that DOT was following the proper procedure when it sold the land. In *State v. Hewitt Land Company*, 74 Wash. 573, 134 P. 474 (1913), the court explained this principle as follows:

A purchaser of land sold by the state . . . 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. . . . The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive as of the rights of the parties, unless impeached for fraud. This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine that is well founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of the society and the permanent security of titles.

* * * *

*It is only where the department had no jurisdiction, or the lands sold were never public property, or had been previously disposed of, or no provision had been made for their sale, or that they had been reserved, that the deed would be inoperative and void.*¹¹

Here, there is no evidence of fraud, and the actual beneficiary of the DOT sale, the public, received full value for the property. As a *bona fide* purchaser for value, Sustainable was entitled to rely upon the deed

¹¹ *State v. Hewitt Land Company*, 74 Wash. 573, 586-88, 134 P. 474 (1913).

provided by the State and, under the facts of this case, that deed is conclusive of the rights of the parties.

Division II erred when it concluded that the DOT sale was an ultra vires act and that, therefore, the bona fide purchaser doctrine did not apply. Opinion, 191 P.3d 946. Division II recognized that “[w]hether the bona fide purchaser doctrine can cure an ultra vires sale of state-owned land is a novel issue of law in Washington.”

Division II then misapplied the holding of a single federal case, *Henderson County, Tennessee v. Sovereign Camp, W.O.W.*, 12 F.2d 883, 885 (6th Cir.), *cert. denied*, 273 U.S. 721 (1926), and Division II ignored the holding in a Washington case, *Hewitt*.

Henderson stands for the proposition that when a public agency has the statutory authority to issue bonds and has merely failed to satisfy a procedural condition, “*an innocent holder was not required to look further for evidence of compliance with the grant [of authority].*” *Henderson*, 12 F.2d at 884 (emphasis added). This rule applies because, unlike cases dealing with a complete lack of authority, when the “claim . . . deals with procedure, and the happening of a condition upon which it could be exercised – a totally different” situation arises. *Id.*

Thus the *Henderson* court’s ruling mirrored the this Court’s

holding in *Hewitt Land Company* that a purchaser was entitled to rely on the government's authority and that the *bona fide* purchaser doctrine applied despite a procedural violation. *Henderson*, 12 F.2d at 885.

Taken together, these cases stand for the proposition that if a public entity has the authority to enter into a sales contract, but is required to take certain procedural steps, a sale to a *bona fides* purchaser without knowledge of the entity's failure to take the proper procedural steps is valid and enforceable. *Henderson*, 12 F.2d at 884 ("It is the law that a *bona fide* purchaser of municipal bonds for a valuable consideration, without actual notice of any defense to them, is not bound to do more than to see that there was legislative authority for their issue, and that the officers who were thereunder authorized to issue them have decided that the precedent conditions upon which the grant was allowed to be exercised have been fulfilled.").

Thus, Division II's conclusion that "federal case law has found that a municipal bond issued ultra vires is void even to bona fide purchasers for value" is 1) contrary to the holding of a Washington case, *Hewitt*, and 2) is not even supported by the federal authority, *Henderson*, that Division II relies upon for its Decision.

7. **CONCLUSION**

For all of the foregoing reasons, Sustainable respectfully requests that the Court grant this petition for review.

RESPECTFULLY SUBMITTED this 2nd day of October, 2008.

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read 'Patrick J. Mullaney', written over a horizontal line.

Patrick J. Mullaney, WSBA # 21982
Ramsey Ramerman, WSBA #30423
Attorneys for Defendant Sustainable
Urban Development # 1, LLC

Exhibit 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SOUTH TACOMA WAY, LLC, a Washington
limited liability company,

Appellant,

v.

STATE OF WASHINGTON; and
SUSTAINABLE URBAN DEVELOPMENT
#1, LLC, a Washington limited liability
company,

Respondents.

No. 36687-8-II

PUBLISHED OPINION

Quinn-Brintnall, J. — South Tacoma Way, LLC (South Tacoma) appeals the trial court's grant of summary judgment in favor of the Washington State Department of Transportation (DOT) and Sustainable Urban Development #1, LLC (Sustainable), arguing that (1) DOT's private sale of an alley to Sustainable without complying with RCW 47.12.063's notice requirements was ultra vires, (2) contracts in violation of RCW 47.12.063 are necessarily void, and (3) Sustainable is not a bona fide purchaser for value. Sustainable and DOT counter that (1) South Tacoma does not have standing, and (2) the doctrines of laches and estoppel bar its claims. We hold that, because DOT violated RCW 47.12.063 when it sold the alley to Sustainable, the sale is ultra vires and void. Accordingly, we reverse.

FACTS

Factual Background

From 1969 to 2006, Frances V. Staub, as FVS, LLC, owned a commercial building located on Airport Way south of downtown Seattle (the Staub property). FVS leased the building to Romaine Electric, a starter and alternator business owned by Frances's¹ son, Nicholas Staub. The Staub building abutted the northeast side of a 5,373 square foot alley that DOT owned. The Frye Free Public Art Museum (Frye) owned property that abutted the alley along its full length to the west and also partially abutted it on the east. While Frye owned most of the other property surrounding the alley, Timmi I. Marshall owned a small parcel abutting the north end of the alley.² In addition to the Staub property, Nicholas leased a parking lot and 24,000 square feet of building space from Frye for Romaine Electric.

Because Romaine Electric was outgrowing the Staub building, Nicholas stored materials in DOT's alley. In order to legitimize his use of the alley, in 2001, Nicholas offered to purchase or lease the alley from DOT.³ But after speaking with DOT, he abandoned the idea because he "got the impression that it was going to be more expensive than [he] was willing to pay to lease it." Clerk's Papers (CP) at 365. DOT told Nicholas that it would contact him in the future if DOT decided to sell the alley.

In 2004, Seattle-based land developer Sustainable purchased two parcels of unconnected

¹ Frances Staub's and Nicholas Staub's first names are used for clarity.

² Marshall is not a party to this action.

³ Although she was the actual owner of the Staub property, Frances was not involved in any of the discussions with DOT in 2001-02 regarding purchase or lease of the alley, and she had no interest in purchasing the alley at that time. Nicholas seems to have acted in her place.

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land abutting the alley from Frye for \$13,500,000.⁴ Sustainable also expressed an interest in purchasing the Staub property but Nicholas refused because he believed the offer was for “less than the market value.” CP at 98. But despite the failed purchase, Sustainable and the Staubs’ had a business relationship; Nicholas continued to lease the parking lot and the 24,000 square feet of building space it had previously leased from Frye.

In May 2004, Sustainable approached DOT about purchasing the alley. According to DOT, on February 15, 2005, it determined that the alley was surplus property because it no longer used the alley for transportation purposes. On August 23, 2005, DOT sold the alley to Sustainable by quitclaim deed for its full appraised value of \$180,000.

DOT maintains that, when it sold the alley to Sustainable, it mistakenly believed that Sustainable was the only landowner with property abutting the alley. As a result, DOT followed the procedure for sale to a single interested party, rather than the procedure that applies when there is more than one abutting landowner.⁵ Under circumstances involving multiple abutting owners, DOT is required to give all abutting landowners written notice of the proposed sale and,

⁴ Sustainable purchased approximately 5.84 acres of property. One of the parcels was next to the Staub building.

⁵ RCW 47.12.063(2)(g) provides that DOT may sell the surplus property to [a]ny abutting private owner but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283.

if two or more abutting property owners provide timely notice (15 days) of their interest in the property, DOT is required to hold a public auction.⁶ See RCW 47.12.063(2)(g); RCW 47.12.283.

Nicholas testified that, if DOT had notified him as required by the statute, he would have asked DOT to auction the alley.

⁶ RCW 47.12.283 provides:

(1) Whenever the department of transportation determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for highway purposes and that it is in the public interest to do so, the department may, in its discretion, sell the property under RCW 47.12.063 or under subsections (2) through (6) of this section.

(2) Whenever the department determines to sell real property under its jurisdiction at public auction, the department shall first give notice . . . in the area where the property to be sold is located. . . .

(3) The department shall sell the property at the public auction . . . to the highest and best bidder providing the bid is equal to or higher than the appraised fair market value of the property.

(4) If no bids are received at the auction or if all bids are rejected, the department may, in its discretion, enter into negotiations for the sale of the property or may list the property with a licensed real estate broker [for no] less than the property's appraised fair market value. . . .

(5) Before the department shall approve any offer for the purchase of real property having an appraised value of more than ten thousand dollars, [under subsection 4], the department shall first publish a notice of the proposed sale in a local newspaper of general circulation in the area where the property is located. The notice shall include a description of the property, the selling price, the terms of the sale, including the price and interest rate if sold by real estate contract, and the name and address of the department employee or the real estate broker handling the transaction. The notice shall further state that any person may, within ten days after the publication of the notice, deliver to the designated state employee or real estate broker a written offer to purchase the property for not less than ten percent more than the negotiated sale price, subject to the same terms and conditions. . . .

(6) All moneys received pursuant to this section . . . shall be deposited in the motor vehicle fund.

In mid-2004 or early 2005, Glen Sheiber of Sustainable spoke with Nicholas and, as a result of that conversation, Nicholas believed that Sustainable had already purchased the alley.⁷ Although Nicholas was surprised that DOT had not contacted him in advance about the alley sale, he was not aware that DOT was statutorily obligated to notify him of the sale or that he had a right to object to the sale and request a public auction. In September 2005, Sheiber sent Nicholas an e-mail again announcing Sustainable's alley purchase and asking Nicholas to clear out any materials Romaine Electric had stored there. Shortly thereafter, Jeff Shoenfeld, another of Sustainable's principals, sent Nicholas an e-mail in which he informed Nicholas that Sustainable would continue to let him "use the alley at no charge through the end of the year [December 31, 2005]." CP at 514.

During the same period that DOT and Sustainable were negotiating the sale of the alley, Nicholas was seeking a larger facility for Romaine Electric and Frances put the Staub building up for sale. In the autumn of 2005, South Tacoma sought to purchase the Staub building as a location for its business, Performance Radiator. During negotiations, Tim Pavolka of South Tacoma asked Nicholas about the alley because Pavolka believed that the Staub building needed earthquake retrofitting that would require use of the alley. Nicholas replied that he believed DOT owned the alley. While conducting its "due diligence" on the Staub property prior to the purchase, Pavolka contacted DOT about the possibility of purchasing the alley. DOT informed him that it had already sold the alley to Sustainable. At that time, Pavolka informed DOT that it had failed to notify Frances, an abutting landowner.

In response to learning that it had failed to comply with the statutory requirements, DOT

⁷ In fact, the sale of the alley was not complete at this time.

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sent a letter to Frances, asking her to waive her right to notice as an abutting landowner retroactively. Nicholas responded by e-mail on her behalf, refusing to waive any of her rights. In addition, Nicholas expressed an interest in the alley and asked for more information regarding the sale. DOT admitted that it had violated the abutting landowner notice requirement of RCW 47.12.063 but stated that, because Sustainable was a “bona fide purchaser for value,” it could not void the sale. CP at 167. DOT also asserted that Frances could not prove that she would have been the high bidder had DOT followed the statute.

Although the alley had not been a factor in the purchase price for the Staub property, South Tacoma and Nicholas decided to use DOT’s error as leverage in negotiations with Sustainable; specifically, Nicholas hoped to use the error to obtain an early termination of Romaine Electric’s lease with Sustainable for the building space and parking lot.⁸ On February 12, 2006, Frances assigned any potential claims she had to the alleyway to South Tacoma and, in exchange, South Tacoma agreed to attempt to negotiate an early lease termination from Sustainable.

Procedural History

After South Tacoma completed the purchase of the Staub building, it filed this declaratory judgment action, asking the trial court to declare the sale of the alley to Sustainable void because it was ultra vires. Sustainable and DOT joined to defend the action and filed joint

⁸ Nicholas had been trying to negotiate an early release from its lease with Sustainable but Sustainable had refused to give him any relief. As a result, Nicholas and South Tacoma discussed “the potential of trading the early vacation of the lease for us agreeing to show no interest in the alleyway.” CP at 366.

pleadings. On cross-motions for summary judgment, the trial court ruled in favor of Sustainable and DOT. The trial court ruled that, although DOT failed to comply with RCW 47.12.063(2)(g), the transaction was not ultra vires because DOT was authorized to sell the property at fair market value. The trial court further reasoned that, because the legislature did not expressly provide that a state agency's failure to follow the notice requirement in RCW 47.12.063 rendered the contract void, and the sale did not thwart the legislature's intent, the notice defect did not render the contract void. The trial court also found that South Tacoma had failed to prove that it would have prevailed in the bidding if DOT had held an auction. Lastly, the trial court concluded that Sustainable was a bona fide purchaser for value and was entitled to rely on the deed that DOT conveyed.

ANALYSIS

Standard of Review

We review an order on summary judgment de novo.⁹ *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). We view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 26,

⁹ It appears that, because the parties stipulated to the facts, the trial court reached the merits and decided the issues of law under CR 40(2), instead of as a proper summary judgment motion. But we review this matter under the summary judgment standard because the parties and the lower court treated it as such.

109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26.

Standing

As an initial matter, Sustainable and DOT argue that South Tacoma does not have standing to “make a post-contract challenge based on [DOT’s] failure to comply with the procedural requirements” of RCW 47.12.063 because “only someone with *taxpayer standing* may challenge [a] contract” with DOT, and South Tacoma failed to properly plead taxpayer standing.¹⁰ Br. of Resp’t at 21. We disagree.

Here, although South Tacoma did not plead taxpayer standing, it was unnecessary for it to do so. When South Tacoma purchased the Staub property, Frances transferred and assigned “any and all claims and causes of action which may exist against [DOT] and/or [Sustainable] . . . concerning the sale by [DOT] to [Sustainable]” of the alleyway. CP at 249. As a result, South Tacoma became the party in interest in whose name suit could be filed against DOT and Sustainable and, thus, South Tacoma has standing to bring the instant suit. *See Styner v. England*, 40 Wn. App. 386, 389-90, 699 P.2d 234 (1985) (partnership that bought stock from a brokerage house and received a formal assignment of the brokerage house’s chose in action against defaulting customer had standing to assert brokerage house’s claim against customer).

¹⁰ Sustainable and DOT also argue that South Tacoma does not have standing because the laws governing competitive bidding are enacted for the benefit of the general public, not an individual bidder and, thus, the bidder’s interest in a fair forum is secondary. But this argument fails because competitive bidding did not take place; the issue here is not whether the forum in which bidding took place was fair but, rather, whether South Tacoma being denied the right to bid at all as a result of DOT’s failure to notify South Tacoma’s predecessors was lawful.

Furthermore, South Tacoma brought this suit as a Uniform Declaratory Judgments Act (UDJA) claim, ch. 7.24 RCW. 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.

RCW 7.24.020.

In order to have standing to seek declaratory judgment under the UDJA, a party must present a justiciable controversy, which is

“(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) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), *cert. denied*, 535 U.S. 931 (2002)).

Here, not only does South Tacoma have standing as the Staubs’ assignee but it also has standing under the UDJA: the controversy is actual, present, and existing between opposing parties; the interests are direct and substantial; and a judicial determination will be final and conclusive.

Laches

DOT and Sustainable argue that the doctrine of laches bars South Tacoma’s claim because Frances, through Nicholas, knew about the sale for over a year, but did not object or express any interest in the alley.¹¹ Because Frances did not delay for a time period sufficient to satisfy laches,

we disagree.

Laches is an “implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978) (plaintiff barred by laches from challenging the school district’s decision to issue general obligation bonds because he failed to exercise his rights before the sale was approved or notify the district of his objections until he filed suit).

The elements of laches are (1) knowledge or a reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against the defendant, (2) an unreasonable delay by the plaintiff in commencing the cause of action, and (3) damage to the defendant resulting from the unreasonable delay.

Lopp, 90 Wn.2d at 759. Damage to the defendant can arise either from acquiescence in the act or from a change in conditions. *Lopp*, 90 Wn.2d at 759-60. But laches is an extraordinary remedy that a party should not, under ordinary circumstances, employ to bar an action short of the applicable statute of limitations. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680 P.2d 453 (1984).

Here, Nicholas knew about the sale for a year and had received information from Sustainable about the sale twice in September 2005; although Nicholas did not object on his mother’s behalf until January 2006, South Tacoma objected on Frances’s behalf in November 2005. Thus, Frances did not delay for a time period sufficient to satisfy laches. See *Davidson v. State*, 116 Wn.2d 13, 27, 802 P.2d 1374 (1991) (claim barred by laches after it had been delayed for more than 60 years); *Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev. Inc.*, 143 Wn. App. 345, 177 P.3d 755 (2008) (reasonable minds could differ as to whether an 18-

¹¹ We address the issue of laches because, by reaching the merits of this case, the trial court necessarily found that laches did not bar the claim.

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month delay is an “unreasonable” delay for the purposes of laches).

Ultra Vires

South Tacoma argues that, because DOT failed to notify all abutting landowners of its intent to sell the alley as required by RCW 47.12.063(2)(g), DOT acted outside the scope of its authority and, as a result, the sale was ultra vires and void. We agree.

An administrative agency has only those powers expressly granted or necessarily implied by statute. *Properties Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.3d 416, *review denied*, 155 Wn.2d 1003 (2005). When a state agency enters into a contract that is completely outside of its authority, i.e., ultra vires, or enters into a contract that violates public policy or a statutory scheme, the contract is void and unenforceable. *See Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968); *see also Pierce County v. State*, 159 Wn.2d 16, 55-56, 148 P.3d 1002 (2006) (quoting *Faylor's Pharm. v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994)).

But in determining what acts of a government body are ultra vires and void, courts must distinguish between those acts that are done wholly without legal authorization or in direct violation of existing statutes from those acts that are within the scope of the broad governmental powers conferred, granted, or delegated but which powers have been exercised in an irregular manner or through unauthorized procedural means. *Finch*, 74 Wn.2d at 172. Thus, state action that is “within [its] realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires.” *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 761, 863 P.2d 535 (1993) (quoting *Bd. of Regents of Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987)). And “statutory directives” are “acts that violate procedure rather than acts that

violate statute[s].” *Kramarevcky*, 122 Wn.2d at 761 n.6 (a directive is “a general instruction as to conduct or procedure”) (quoting Webster’s New International Dictionary, 738 (1956)).

Here, by enacting RCW 47.12.063, there is no question that the legislature gave DOT authority to determine when it no longer needs property under its jurisdiction for transportation purposes and to sell that surplus property at its fair market value or greater for the benefit of the state’s motor vehicle fund. *See* RCW 47.12.063(2), (5). But the notice requirement in RCW 47.12.063(2)(g) is an express limitation on DOT’s grant of authority: RCW 47.12.063(2)(g) authorizes DOT to sell surplus property to an abutting landowner “only after each other abutting private owner . . . is notified in writing of the proposed sale.” RCW 47.12.063(2)(g) (emphasis added). As a result, DOT did not have the authority to sell the alley to Sustainable without first notifying Frances of the proposed sale; RCW 47.12.063(2)(g) conditioned DOT’s authority to sell the alley to Sustainable on first notifying Frances and giving her the opportunity to request a public auction. Furthermore, DOT’s argument that it did not know that the Staubs were abutting landowners lacks merit because DOT had previously dealt with Nicholas when he inquired about purchasing the alley and checking the assessor’s website to verify whether there were any abutting landowners would have been simple. Because DOT failed to follow the requirements of RCW 47.12.063(2)(g) when it sold the alley to Sustainable, the sale is ultra vires and void.¹²

¹² Sustainable and DOT argue that, even if this court finds that the sale is ultra vires, it is not necessarily void because RCW 47.12.063(2)(g) does not expressly state that violative sales are void. But Washington courts have made clear that ultra vires contracts are void and unenforceable. *Finch*, 74 Wn.2d at 172. No Washington court has held that ultra vires contracts are only void if the legislature provides it; to the contrary, Washington courts have voided ultra vires actions without requiring any express statutory mandate from the legislature. *See, e.g., Noel v. Cole*, 98 Wn.2d 375, 381, 655 P.2d 245 (1982), *superseded by statute on other grounds as stated in Dioxin Ctr. v. Pollution Bd.*, 131 Wn.2d 345, 360, 932 P.2d 158 (1997).

Bona Fide Purchaser Doctrine

South Tacoma argues that the trial court erred when it applied the bona fide purchaser doctrine and concluded that Sustainable's claim to the property was superior to South Tacoma's claim to the property.¹³ Specifically, South Tacoma argues that the bona fide purchaser doctrine does not apply to contracts that are ultra vires. We agree.

The bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive knowledge of another's interest in real property purchased has a superior interest in the property. *Levien v. Fiala*, 79 Wn. App. 294, 298, 902 P.2d 170 (1995). Purchasers of real property may take advantage of the doctrine. *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992). "The notice 'need not be actual, nor amount to full knowledge.'" *Casa del Rey v. Hart*, 110 Wn.2d 65, 70, 750 P.2d 261 (1988) (quoting *Daly v. Rizzutto*, 59 Wash. 62, 65, 109 P. 276 (1910)). Constructive notice may be given either by means of a public record or by inquiry notice. *Ellingsen v. Franklin County*, 117 Wn.2d 24, 33, 810 P.2d 910 (1991) (Smith, J., dissenting) (citing, e.g., *Paganelli v. Swendsen*, 50 Wn.2d 304, 308-09, 311 P.2d 676 (1957)). Whether a person is a bona fide purchaser is a mixed question of law and fact. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984). What a purchaser knew is a factual question but the legal significance of what he knew is a legal

¹³ South Tacoma also argues that the policies behind the bona fide purchaser doctrine "give way to protection of the public interest" and, as a result, should not protect Sustainable. Br. of Appellant at 20 (citing *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wn.2d 121, 133-35, 654 P.2d 67 (1982)). But South Tacoma relies on the dissenting opinion in *Laborers* to support its argument, a fact that it failed to bring to this court's attention, and offers this court no further authority. Thus, we do consider its superior claim argument. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986) ("Contentions unsupported by argument or citation of authority will not be considered on appeal."), *review denied*, 107 Wn.2d 1020, *cert. denied*, 482 U.S. 916 (1987).

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question. *Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc.*, 54 Wn. App. 668, 674, 775 P.2d 466 (1989).

Whether the bona fide purchaser doctrine can cure an ultra vires sale of state-owned land is a novel issue of law in Washington. But federal case law has found that a municipal bond issued ultra vires is void even as to bona fide purchasers for value. *See Henderson County, Tennessee v. Sovereign Camp, W. O. W.*, 12 F.2d 883, 885 (6th Cir.), *cert. denied*, 273 U.S. 721 (1926). Furthermore, other equitable principles, such as equitable estoppel, are unavailable when a state agency has improperly exceeded its statutory authority. *See Finch*, 74 Wn.2d at 172 (courts may apply equitable estoppel against a claim of a municipality *only* if its acts are within general powers granted to that municipality); *see also Barendregt v. Walla Walla Sch. Dist. No. 140*, 26 Wn. App. 246, 249-50, 611 P.2d 1385 (allowing private parties to assert estoppel against state agencies that act without authority would thwart the public interest in limiting agency power, especially in cases where the public treasury is concerned), *review denied*, 94 Wn.2d 1005 (1980). By analogy, because DOT's actions were ultra vires, the bona fide purchaser doctrine does not protect Sustainable.

Accordingly, because DOT's private sale of the alley to Sustainable was ultra vires and void, even as to bona fide purchasers for value, we reverse.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

No. 36687-8-II

VAN DEREN, C.J.

South Tacoma Way, LLC v. State
Wash.App. Div. 2,2008.

Court of Appeals of Washington, Division 2.

SOUTH TACOMA WAY, LLC, a
Washington limited liability company,
Appellant,

v.

STATE of Washington; and Sustainable
Urban Development # 1, LLC, a
Washington limited liability company,
Respondents.

No. 36687-8-II.

Sept. 3, 2008.

Background: Abutter brought action against Department of Transportation (DOT) and alley purchaser, seeking declaration that sale of alley to purchaser was void due to lack of notice. The Superior Court, Thurston County, Christine A. Pomeroy, J., granted DOT's and purchaser's motions for summary judgment, and abutter appealed.

Holdings: The Court of Appeals, Quinn-Brintnall, J., held that:

- (1) abutter had standing to bring action;
- (2) doctrine of laches did not apply;
- (3) sale was ultra vires and void; and
- (4) as a matter of first impression, bona fide purchaser doctrine did not apply.

Reversed.

West Headnotes

[1] States 360 ↪98

360 States

360III Property, Contracts, and Liabilities

360k98 k. Proposals or Bids for Contracts. Most Cited Cases

Abutter had standing to make post-contract challenge to failure of Department of Transportation (DOT) to comply with procedural requirements prior to sale of alley, although abutter did not plead taxpayer standing; when abutter purchased the property, abutter's predecessor transferred and assigned to abutter "any and all claims and causes of action which may exist against" DOT and alley purchaser concerning the sale of the alley, and thus abutter became the party in interest in whose name suit could be filed against DOT and alley purchaser. West's RCWA 47.12.063.

[2] Declaratory Judgment 118A ↪300

118A Declaratory Judgment

118AIII Proceedings

118AIII(C) Parties

118Ak299 Proper Parties

118Ak300 k. Subjects of Relief in General. Most Cited Cases

Alley abutter had standing under Uniform Declaratory Judgments Act to bring action for declaratory judgment as to validity of sale of alley by Department of Transportation (DOT) to alley purchaser due to lack of notice to abutter or predecessor; controversy was actual, present, and existing between opposing parties, interests were direct and substantial, and a judicial determination would be final and conclusive. West's RCWA 7.24.020, 47.12.063.

[3] Declaratory Judgment 118A ⚡62

118A Declaratory Judgment

118AI Nature and Grounds in General

118AI(D) Actual or Justiciable Controversy

118Ak62 k. Nature and Elements in General. Most Cited Cases

Declaratory Judgment 118A ⚡292

118A Declaratory Judgment

118AIII Proceedings

118AIII(C) Parties

118Ak292 k. Interest in Subject Matter. Most Cited Cases

Declaratory Judgment 118A ⚡299.1

118A Declaratory Judgment

118AIII Proceedings

118AIII(C) Parties

118Ak299 Proper Parties

118Ak299.1 k. In General.

Most Cited Cases

In order to have standing to seek declaratory judgment under the Uniform Declaratory Judgments Act (UDJA), a party must present a justiciable controversy, which is: (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. West's RCWA 7.24.020.

[4] Declaratory Judgment 118A ⚡255

118A Declaratory Judgment

118AIII Proceedings

118AIII(A) In General

118Ak255 k. Limitations and Laches. Most Cited Cases

Delay of one year between knowledge of sale and objection did not, under the doctrine of laches, bar alley abutter's declaratory judgment action against Department of Transportation (DOT) and alley purchaser; abutter's predecessor learned of sale one year before abutter objected.

[5] Equity 150 ⚡70

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k70 k. Knowledge of Facts. Most Cited Cases

Equity 150 ⚡71(4)

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k71 Lapse of Time

150k71(4) k. Acquiescence.

Most Cited Cases

“Laches” is an implied waiver arising from knowledge of existing conditions and acquiescence in them.

[6] Equity 150 ⚡70

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k70 k. Knowledge of Facts.

Most Cited Cases

Equity 150 ⚡72(1)

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k72 Prejudice from Delay in General

150k72(1) k. In General. Most

Cited Cases

The elements of laches are (1) knowledge or a reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against the defendant, (2) an unreasonable delay by the plaintiff in commencing the cause of action, and (3) damage to the defendant resulting from the unreasonable delay, which can arise either from acquiescence in the act or from a change in conditions.

[7] Equity 150 ⚡87(2)

150 Equity

150II Laches and Stale Demands

150k87 Following Statute of Limitations

150k87(2) k. Delay Short of Statutory Period. Most Cited Cases

Laches is an extraordinary remedy that a party should not, under ordinary circumstances, employ to bar an action short of the applicable statute of limitations.

[8] States 360 ⚡89

360 States

360III Property, Contracts, and Liabilities

360k89 k. Disposition of Property. Most Cited Cases

Failure of Department of Transportation (DOT) to notify alley abutter of intent to sell the alley rendered sale to purchaser ultra vires and void; DOT's authority to sell the alley was conditioned by statute on first notifying abutter and giving her the opportunity to request a public auction, and DOT had previously dealt with abutter and had learned of abutter when he inquired about purchasing the alley prior to DOT's sale to purchaser. West's RCWA 47.12.063(2)(g).

[9] Administrative Law and Procedure 15A ⚡305

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak303 Powers in General

15Ak305 k. Statutory Basis and Limitation. Most Cited Cases

Administrative Law and Procedure 15A ⚡325

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak325 k. Implied Powers. Most Cited Cases

An administrative agency has only those powers expressly granted or necessarily implied by statute.

[10] States 360 ⚡102

360 States

360III Property, Contracts, and

Liabilities

360k102 k. Unauthorized or Illegal Contracts. Most Cited Cases

When a state agency enters into a contract that is completely outside of its authority, i.e., ultra vires, or enters into a contract that violates public policy or a statutory scheme, the contract is void and unenforceable.

[11] Municipal Corporations 268 ↪732

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k732 k. Acts Ultra Vires in General. Most Cited Cases

In determining what acts of a government body are ultra vires and void, courts must distinguish between those acts that are done wholly without legal authorization or in direct violation of existing statutes from those acts that are within the scope of the broad governmental powers conferred, granted, or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means.

[12] States 360 ↪67

360 States

360II Government and Officers

360k65 Authority and Powers of Officers and Agents, and Exercise Thereof

360k67 k. Executive Departments, Boards, or Other Bodies. Most Cited Cases

State action that is within a government body's realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires; "statutory directives" are acts that violate procedure rather than acts that violate statutes.

[13] Public Contracts 316A ↪14

316A Public Contracts

316AI In General

316Ak14 k. Unauthorized or Illegal Contracts. Most Cited Cases

Ultra vires contracts are void and unenforceable.

[14] States 360 ↪89

360 States

360III Property, Contracts, and Liabilities

360k89 k. Disposition of Property. Most Cited Cases

Bona fide purchaser doctrine did not apply to protect alley purchaser's acquisition of alley from Department of Transportation (DOT), as sale was ultra vires and void due to lack of notice to alley abutter. West's RCWA 47.12.063(2)(g).

[15] Vendor and Purchaser 400 ↪220

400 Vendor and Purchaser

400V Rights and Liabilities of Parties

400V(C) Bona Fide Purchasers

400k220 k. Nature and Grounds of Protection in General. Most Cited Cases

The bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive knowledge of another's interest in real property purchased has a superior interest in the property.

[16] Vendor and Purchaser 400 ↪220

400 Vendor and Purchaser

400V Rights and Liabilities of Parties

400V(C) Bona Fide Purchasers

400k220 k. Nature and Grounds of

Protection in General. Most Cited Cases
Purchasers of real property may take advantage of the bona fide purchaser doctrine.

[17] Vendor and Purchaser 400 ↻229(1)

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(C) Bona Fide Purchasers
400k225 Notice
400k229 Constructive Notice, and Facts Putting on Inquiry
400k229(1) k. In General.

Most Cited Cases

Notice of another's interest in property to an alleged bona fide purchaser need not be actual, nor amount to full knowledge.

[18] Vendor and Purchaser 400 ↻229(1)

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(C) Bona Fide Purchasers
400k225 Notice
400k229 Constructive Notice, and Facts Putting on Inquiry
400k229(1) k. In General.

Most Cited Cases

Constructive notice, for purposes of bona fide purchaser status, may be given either by means of a public record or by inquiry notice.

[19] Vendor and Purchaser 400 ↻245

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(C) Bona Fide Purchasers
400k245 k. Questions for Jury.

Most Cited Cases

Whether a person is a bona fide purchaser is a mixed question of law and fact.

[20] Vendor and Purchaser 400 ↻245

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(C) Bona Fide Purchasers
400k245 k. Questions for Jury.

Most Cited Cases

What a purchaser knew is a factual question under the bona fide purchaser doctrine, but the legal significance of what he knew is a legal question.

[21] Estoppel 156 ↻62.2(1)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States

156k62.2(1) k. State Government, Officers, and Agencies in General. Most Cited Cases
Equitable principles such as equitable estoppel are unavailable when a state agency has improperly exceeded its statutory authority.

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QUINN-BRINTNALL, J.

¶ 1 South Tacoma Way, LLC (South

Tacoma) appeals the trial court's grant of summary judgment in favor of the Washington State Department of Transportation (DOT) and Sustainable Urban Development # 1, LLC (Sustainable), arguing that (1) DOT's private sale of an alley to Sustainable without complying with RCW 47.12.063's notice requirements was ultra vires, (2) contracts in violation of RCW 47.12.063 are necessarily void, and (3) Sustainable is not a bona fide purchaser for value. Sustainable and DOT counter that (1) South Tacoma does not have standing, and (2) the doctrines of laches and estoppel bar its claims. We hold that, because DOT violated RCW 47.12.063 when it sold the alley to Sustainable, the sale is ultra vires and void. Accordingly, we reverse.

FACTS

Factual Background

¶ 2 From 1969 to 2006, Frances V. Staub, as FVS, LLC, owned a commercial building located on Airport Way south of downtown Seattle (the Staub property). FVS leased the building to Romaine Electric, a starter and alternator business owned by Frances's ^{FN1} son, Nicholas Staub. The Staub building abutted the northeast side of a 5,373 square foot alley that DOT owned. The Frye Free Public Art Museum (Frye) owned property that abutted the alley along its full length to the west and also partially abutted it on the east. While Frye owned most of the other property surrounding the alley, Timmi I. Marshall owned a small parcel abutting the north end of the alley.^{FN2} In addition to the Staub property, Nicholas leased a parking lot and 24,000 square feet of building space from Frye for Romaine Electric.

^{FN1}. Frances Staub's and Nicholas Staub's first names are used for clarity.

^{FN2}. Marshall is not a party to this action.

¶ 3 Because Romaine Electric was outgrowing the Staub building, Nicholas stored *941 materials in DOT's alley. In order to legitimize his use of the alley, in 2001, Nicholas offered to purchase or lease the alley from DOT.^{FN3} But after speaking with DOT, he abandoned the idea because he "got the impression that it was going to be more expensive than [he] was willing to pay to lease it." Clerk's Papers (CP) at 365. DOT told Nicholas that it would contact him in the future if DOT decided to sell the alley.

^{FN3}. Although she was the actual owner of the Staub property, Frances was not involved in any of the discussions with DOT in 2001-02 regarding purchase or lease of the alley, and she had no interest in purchasing the alley at that time. Nicholas seems to have acted in her place.

¶ 4 In 2004, Seattle-based land developer Sustainable purchased two parcels of unconnected land abutting the alley from Frye for \$13,500,000.^{FN4} Sustainable also expressed an interest in purchasing the Staub property but Nicholas refused because he believed the offer was for "less than the market value." CP at 98. But despite the failed purchase, Sustainable and the Staubs' had a business relationship; Nicholas continued to lease the parking lot and the 24,000 square feet of building space it had previously leased from Frye.

FN4. Sustainable purchased approximately 5.84 acres of property. One of the parcels was next to the Staub building.

¶ 5 In May 2004, Sustainable approached DOT about purchasing the alley. According to DOT, on February 15, 2005, it determined that the alley was surplus property because it no longer used the alley for transportation purposes. On August 23, 2005, DOT sold the alley to Sustainable by quitclaim deed for its full appraised value of \$180,000.

¶ 6 DOT maintains that, when it sold the alley to Sustainable, it mistakenly believed that Sustainable was the only landowner with property abutting the alley. As a result, DOT followed the procedure for sale to a single interested party, rather than the procedure that applies when there is more than one abutting landowner.^{FN5} Under circumstances involving multiple abutting owners, DOT is required to give all abutting landowners written notice of the proposed sale and, if two or more abutting property owners provide timely notice (15 days) of their interest in the property, DOT is required to hold a public auction.^{FN6} See RCW 47.12.063(2)(g); *942 RCW 47.12.283. Nicholas testified that, if DOT had notified him as required by the statute, he would have asked DOT to auction the alley.

FN5. RCW 47.12.063(2)(g) provides that DOT may sell the surplus property to

[a]ny abutting private owner but only after each other abutting private owner (if any), as shown in

the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283.

FN6. RCW 47.12.283 provides:

(1) Whenever the department of transportation determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for highway purposes and that it is in the public interest to do so, the department may, in its discretion, sell the property under RCW 47.12.063 or under subsections (2) through (6) of this section.

(2) Whenever the department determines to sell real property under its jurisdiction at public auction, the department shall first give notice ... in the area where the property to be sold is located...

(3) The department shall sell the property at the public auction ... to the highest and best bidder providing the bid is equal to or higher than the appraised fair market value of the property.

(4) If no bids are received at the auction or if all bids are rejected, the department may, in its

discretion, enter into negotiations for the sale of the property or may list the property with a licensed real estate broker [for no] less than the property's appraised fair market value....

(5) Before the department shall approve any offer for the purchase of real property having an appraised value of more than ten thousand dollars, [under subsection 4], the department shall first publish a notice of the proposed sale in a local newspaper of general circulation in the area where the property is located. The notice shall include a description of the property, the selling price, the terms of the sale, including the price and interest rate if sold by real estate contract, and the name and address of the department employee or the real estate broker handling the transaction. The notice shall further state that any person may, within ten days after the publication of the notice, deliver to the designated state employee or real estate broker a written offer to purchase the property for not less than ten percent more than the negotiated sale price, subject to the same terms and conditions....

(6) All moneys received pursuant to this section ... shall be deposited in the motor vehicle fund.

¶ 7 In mid-2004 or early 2005, Glen Sheiber of Sustainable spoke with Nicholas and, as a result of that conversation, Nicholas

believed that Sustainable had already purchased the alley.^{FN7} Although Nicholas was surprised that DOT had not contacted him in advance about the alley sale, he was not aware that DOT was statutorily obligated to notify him of the sale or that he had a right to object to the sale and request a public auction. In September 2005, Sheiber sent Nicholas an e-mail again announcing Sustainable's alley purchase and asking Nicholas to clear out any materials Romaine Electric had stored there. Shortly thereafter, Jeff Shoefeld, another of Sustainable's principals, sent Nicholas an e-mail in which he informed Nicholas that Sustainable would continue to let him "use the alley at no charge through the end of the year [December 31, 2005]." CP at 514.

FN7. In fact, the sale of the alley was not complete at this time.

¶ 8 During the same period that DOT and Sustainable were negotiating the sale of the alley, Nicholas was seeking a larger facility for Romaine Electric and Frances put the Staub building up for sale. In the autumn of 2005, South Tacoma sought to purchase the Staub building as a location for its business, Performance Radiator. During negotiations, Tim Pavolka of South Tacoma asked Nicholas about the alley because Pavolka believed that the Staub building needed earthquake retrofitting that would require use of the alley. Nicholas replied that he believed DOT owned the alley. While conducting its "due diligence" on the Staub property prior to the purchase, Pavolka contacted DOT about the possibility of purchasing the alley. DOT informed him that it had already sold the alley to Sustainable. At that time, Pavolka informed DOT that it had failed to notify Frances, an

abutting landowner.

¶ 9 In response to learning that it had failed to comply with the statutory requirements, DOT sent a letter to Frances, asking her to waive her right to notice as an abutting landowner retroactively. Nicholas responded by e-mail on her behalf, refusing to waive any of her rights. In addition, Nicholas expressed an interest in the alley and asked for more information regarding the sale. DOT admitted that it had violated the abutting landowner notice requirement of RCW 47.12.063 but stated that, because Sustainable was a “bona fide purchaser for value,” it could not void the sale. CP at 167. DOT also asserted that Frances could not prove that she would have been the high bidder had DOT followed the statute.

¶ 10 Although the alley had not been a factor in the purchase price for the Staub property, South Tacoma and Nicholas decided to use DOT's error as leverage in negotiations with Sustainable; specifically, Nicholas hoped to use the error to obtain an early termination of Romaine Electric's lease with Sustainable for the building space and parking lot.^{FN8} On February 12, 2006, Frances assigned any potential claims she had to the alleyway to South Tacoma and, in exchange, South Tacoma agreed to attempt to negotiate an early lease termination from Sustainable.

^{FN8}. Nicholas had been trying to negotiate an early release from its lease with Sustainable but Sustainable had refused to give him any relief. As a result, Nicholas and South Tacoma discussed “the potential of trading the early vacation of the lease for us agreeing

to show no interest in the alleyway.” CP at 366.

Procedural History

¶ 11 After South Tacoma completed the purchase of the Staub building, it filed this declaratory judgment action, asking the trial court to declare the sale of the alley to Sustainable void because it was ultra vires. Sustainable and DOT joined to defend the action and filed joint pleadings. On cross-motions for summary judgment, the trial court ruled in favor of Sustainable and DOT. The trial court ruled that, although DOT failed to comply with RCW 47.12.063(2)(g), the transaction was not ultra vires because DOT was authorized to sell the property at fair market value. The trial court further reasoned that, because the legislature did not *943 expressly provide that a state agency's failure to follow the notice requirement in RCW 47.12.063 rendered the contract void, and the sale did not thwart the legislature's intent, the notice defect did not render the contract void. The trial court also found that South Tacoma had failed to prove that it would have prevailed in the bidding if DOT had held an auction. Lastly, the trial court concluded that Sustainable was a bona fide purchaser for value and was entitled to rely on the deed that DOT conveyed.

ANALYSIS

Standard of Review

¶ 12 We review an order on summary judgment de novo.^{FN9} Hisle v. Todd Pac. Shipyards, 151 Wash.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). We view all facts in the light most favorable to the nonmoving party. Vallandigham v. Clover Park Sch. Dist., 154 Wash.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. Vallandigham, 154 Wash.2d at 26, 109 P.3d 805.

FN9. It appears that, because the parties stipulated to the facts, the trial court reached the merits and decided the issues of law under CR 40(2), instead of as a proper summary judgment motion. But we review this matter under the summary judgment standard because the parties and the lower court treated it as such.

Standing

[1] ¶ 13 As an initial matter, Sustainable and DOT argue that South Tacoma does not have standing to “make a post-contract challenge based on [DOT's] failure to comply with the procedural requirements” of RCW 47.12.063 because “only someone with *taxpayer standing* may challenge [a] contract” with DOT, and South Tacoma failed to properly plead taxpayer standing.^{FN10} Br. of Resp't at 21. We disagree.

FN10. Sustainable and DOT also argue that South Tacoma does not have standing because the laws governing competitive bidding are

enacted for the benefit of the general public, not an individual bidder and, thus, the bidder's interest in a fair forum is secondary. But this argument fails because competitive bidding did not take place; the issue here is not whether the forum in which bidding took place was fair but, rather, whether South Tacoma being denied the right to bid at all as a result of DOT's failure to notify South Tacoma's predecessors was lawful.

¶ 14 Here, although South Tacoma did not plead taxpayer standing, it was unnecessary for it to do so. When South Tacoma purchased the Staub property, Frances transferred and assigned “any and all claims and causes of action which may exist against [DOT] and/or [Sustainable] ... concerning the sale by [DOT] to [Sustainable]” of the alleyway. CP at 249. As a result, South Tacoma became the party in interest in whose name suit could be filed against DOT and Sustainable and, thus, South Tacoma has standing to bring the instant suit. See Styner v. England, 40 Wash.App. 386, 389-90, 699 P.2d 234 (1985) (partnership that bought stock from a brokerage house and received a formal assignment of the brokerage house's chose in action against defaulting customer had standing to assert brokerage house's claim against customer).

[2] ¶ 15 Furthermore, South Tacoma brought this suit as a Uniform Declaratory Judgments Act (UDJA) claim, ch. 7.24 RCW. 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.

RCW 7.24.020.

[3] ¶ 16 In order to have standing to seek declaratory judgment under the UDJA, a *944 party must present a justiciable controversy, which is

“(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 Wash.2d 862, 877, 101 P.3d 67 (2004) (quoting To-Ro Trade Shows v. Collins, 144 Wash.2d 403, 411, 27 P.3d 1149 (2001), *cert. denied*, 535 U.S. 931, 122 S.Ct. 1304, 152 L.Ed.2d 215 (2002)).

¶ 17 Here, not only does South Tacoma have standing as the Staubs' assignee but it also has standing under the UDJA: the controversy is actual, present, and existing between opposing parties; the interests are direct and substantial; and a judicial determination will be final and conclusive.

Laches

[4] ¶ 18 DOT and Sustainable argue that the doctrine of laches bars South Tacoma's claim because Frances, through Nicholas, knew about the sale for over a year, but did not object or express any interest in the alley.^{FN11} Because Frances did not delay for a time period sufficient to satisfy laches, we disagree.

FN11. We address the issue of laches because, by reaching the merits of this case, the trial court necessarily found that laches did not bar the claim.

[5][6][7] ¶ 19 Laches is an “implied waiver arising from knowledge of existing conditions and acquiescence in them.” Lopp v. Peninsula Sch. Dist. No. 401, 90 Wash.2d 754, 759, 585 P.2d 801 (1978) (plaintiff barred by laches from challenging the school district's decision to issue general obligation bonds because he failed to exercise his rights before the sale was approved or notify the district of his objections until he filed suit).

The elements of laches are (1) knowledge or a reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against the defendant, (2) an unreasonable delay by the plaintiff in commencing the cause of action, and (3) damage to the defendant resulting from the unreasonable delay.

Lopp, 90 Wash.2d at 759, 585 P.2d 801. Damage to the defendant can arise either from acquiescence in the act or from a change in conditions. Lopp, 90 Wash.2d at

759-60, 585 P.2d 801. But laches is an extraordinary remedy that a party should not, under ordinary circumstances, employ to bar an action short of the applicable statute of limitations. Brost v. L.A.N.D., Inc., 37 Wash.App. 372, 375, 680 P.2d 453 (1984).

¶ 20 Here, Nicholas knew about the sale for a year and had received information from Sustainable about the sale twice in September 2005; although Nicholas did not object on his mother's behalf until January 2006, South Tacoma objected on Frances's behalf in November 2005. Thus, Frances did not delay for a time period sufficient to satisfy laches. See Davidson v. State, 116 Wash.2d 13, 27, 802 P.2d 1374 (1991) (claim barred by laches after it had been delayed for more than 60 years); Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev. Inc., 143 Wash.App. 345, 177 P.3d 755 (2008) (reasonable minds could differ as to whether an 18-month delay is an "unreasonable" delay for the purposes of laches).

Ultra Vires

[8] ¶ 21 South Tacoma argues that, because DOT failed to notify all abutting landowners of its intent to sell the alley as required by RCW 47.12.063(2)(g), DOT acted outside the scope of its authority and, as a result, the sale was ultra vires and void. We agree.

[9][10] ¶ 22 An administrative agency has only those powers expressly granted or necessarily implied by statute. Properties Four, Inc. v. State, 125 Wash.App. 108, 117, 105 P.3d 416, review denied, 155 Wash.2d 1003, 122 P.3d 185 (2005). When a state agency enters into a contract that is

completely outside of its authority, i.e., ultra vires, or enters into a contract that violates public policy or a *945 statutory scheme, the contract is void and unenforceable. See Finch v. Matthews, 74 Wash.2d 161, 172, 443 P.2d 833 (1968); see also Pierce County v. State, 159 Wash.2d 16, 55-56, 148 P.3d 1002 (2006) (quoting Failor's Pharm. v. Dep't of Soc. & Health Servs., 125 Wash.2d 488, 499, 886 P.2d 147 (1994).)

[11][12] ¶ 23 But in determining what acts of a government body are ultra vires and void, courts must distinguish between those acts that are done wholly without legal authorization or in direct violation of existing statutes from those acts that are within the scope of the broad governmental powers conferred, granted, or delegated but which powers have been exercised in an irregular manner or through unauthorized procedural means. Finch, 74 Wash.2d at 172, 443 P.2d 833. Thus, state action that is " 'within [its] realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires.' " Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wash.2d 738, 761, 863 P.2d 535 (1993) (quoting Bd. of Regents of Univ. of Wash. v. City of Seattle, 108 Wash.2d 545, 552, 741 P.2d 11 (1987)). And "statutory directives" are "acts that violate procedure rather than acts that violate statute[s]." Kramarevcky, 122 Wash.2d at 761 n. 6, 863 P.2d 535 (a directive is " 'a general instruction as to conduct or procedure' ") (quoting Webster's New International Dictionary, 738 (1956)).

[13] ¶ 24 Here, by enacting RCW 47.12.063, there is no question that the legislature gave DOT authority to determine when it no longer needs property under its jurisdiction for transportation purposes and to sell that

surplus property at its fair market value or greater for the benefit of the state's motor vehicle fund. See RCW 47.12.063(2), (5). But the notice requirement in RCW 47.12.063(2)(g) is an express limitation on DOT's grant of authority: RCW 47.12.063(2)(g) authorizes DOT to sell surplus property to an abutting landowner "only after each other abutting private owner ... is notified in writing of the proposed sale." RCW 47.12.063(2)(g) (emphasis added). As a result, DOT did not have the authority to sell the alley to Sustainable without first notifying Frances of the proposed sale; RCW 47.12.063(2)(g) conditioned DOT's authority to sell the alley to Sustainable on first notifying Frances and giving her the opportunity to request a public auction. Furthermore, DOT's argument that it did not know that the Staubs were abutting landowners lacks merit because DOT had previously dealt with Nicholas when he inquired about purchasing the alley and checking the assessor's website to verify whether there were any abutting landowners would have been simple. Because DOT failed to follow the requirements of RCW 47.12.063(2)(g) when it sold the alley to Sustainable, the sale is ultra vires and void.^{FN12}

FN12. Sustainable and DOT argue that, even if this court finds that the sale is ultra vires, it is not necessarily void because RCW 47.12.063(2)(g) does not expressly state that violative sales are void. But Washington courts have made clear that ultra vires contracts are void and unenforceable. Finch, 74 Wash.2d at 172, 443 P.2d 833. No Washington court has held that ultra vires contracts are only void if the

legislature provides it; to the contrary, Washington courts have voided ultra vires actions without requiring any express statutory mandate from the legislature. See, e.g., Noel v. Cole, 98 Wash.2d 375, 381, 655 P.2d 245 (1982), *superseded by statute on other grounds as stated in* Dioxin Ctr. v. Pollution Bd., 131 Wash.2d 345, 360, 932 P.2d 158 (1997).

Bona Fide Purchaser Doctrine

[14] ¶ 25 South Tacoma argues that the trial court erred when it applied the bona fide purchaser doctrine and concluded that Sustainable's claim to the property was superior to South Tacoma's claim to the property.^{FN13} Specifically, South Tacoma argues that *946 the bona fide purchaser doctrine does not apply to contracts that are ultra vires. We agree.

FN13. South Tacoma also argues that the policies behind the bona fide purchaser doctrine "give way to protection of the public interest" and, as a result, should not protect Sustainable. Br. of Appellant at 20 (citing Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash.2d 121, 133-35, 654 P.2d 67 (1982)). But South Tacoma relies on the dissenting opinion in Laborers to support its argument, a fact that it failed to bring to this court's attention, and offers this court no further authority. Thus, we do consider its superior claim argument. Camer v. Seattle Post-Intelligencer, 45 Wash.App. 29, 36, 723 P.2d 1195 (1986) ("Contentions unsupported by

argument or citation of authority will not be considered on appeal.”), review denied, 107 Wash.2d 1020, cert. denied, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 677 (1987).

[15][16][17][18][19][20] ¶ 26 The bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive knowledge of another's interest in real property purchased has a superior interest in the property. Levien v. Fiala, 79 Wash.App. 294, 298, 902 P.2d 170 (1995). Purchasers of real property may take advantage of the doctrine. Tomlinson v. Clarke, 118 Wash.2d 498, 500, 825 P.2d 706 (1992). “The notice ‘need not be actual, nor amount to full knowledge.’ ” Casa del Rey v. Hart, 110 Wash.2d 65, 70, 750 P.2d 261 (1988) (quoting Daly v. Rizzutto, 59 Wash. 62, 65, 109 P. 276 (1910)). Constructive notice may be given either by means of a public record or by inquiry notice. Ellingsen v. Franklin County, 117 Wash.2d 24, 33, 810 P.2d 910 (1991) (Smith, J., dissenting) (citing, e.g., Paganelli v. Swendsen, 50 Wash.2d 304, 308-09, 311 P.2d 676 (1957)). Whether a person is a bona fide purchaser is a mixed question of law and fact. Miebach v. Colasurdo, 102 Wash.2d 170, 175, 685 P.2d 1074 (1984). What a purchaser knew is a factual question but the legal significance of what he knew is a legal question. Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc., 54 Wash.App. 668, 674, 775 P.2d 466 (1989).

[21] ¶ 27 Whether the bona fide purchaser doctrine can cure an ultra vires sale of state-owned land is a novel issue of law in Washington. But federal case law has found that a municipal bond issued ultra vires is void even as to bona fide purchasers for

value. See Henderson County, Tennessee v. Sovereign Camp, W.O. W., 12 F.2d 883, 885 (6th Cir.), cert. denied, 273 U.S. 721, 47 S.Ct. 111, 71 L.Ed. 858 (1926). Furthermore, other equitable principles, such as equitable estoppel, are unavailable when a state agency has improperly exceeded its statutory authority. See Finch, 74 Wash.2d at 172, 443 P.2d 833 (courts may apply equitable estoppel against a claim of a municipality *only* if its acts are within general powers granted to that municipality); see also Barendregt v. Walla Walla Sch. Dist. No. 140, 26 Wash.App. 246, 249-50, 611 P.2d 1385 (allowing private parties to assert estoppel against state agencies that act without authority would thwart the public interest in limiting agency power, especially in cases where the public treasury is concerned), review denied, 94 Wash.2d 1005 (1980). By analogy, because DOT's actions were ultra vires, the bona fide purchaser doctrine does not protect Sustainable.

¶ 28 Accordingly, because DOT's private sale of the alley to Sustainable was ultra vires and void, even as to bona fide purchasers for value, we reverse.

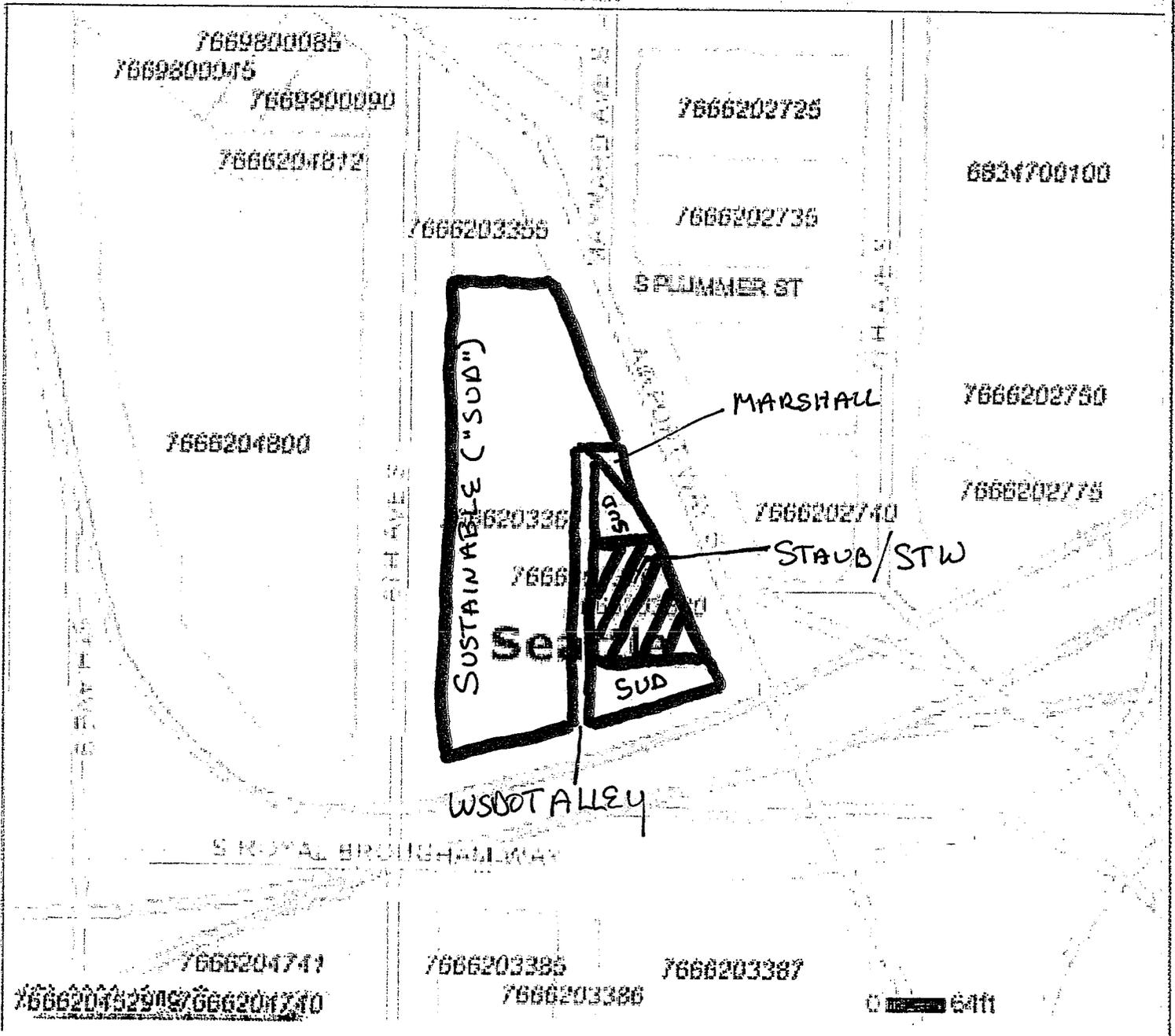
We concur: BRIDGEWATER, J., and VAN DEREN, C.J.

Wash.App. Div. 2, 2008.
South Tacoma Way, LLC v. State
191 P.3d 938

END OF DOCUMENT

Exhibit 2

Parcel Map and Data



Parcel Number	7666203360
Address	1022 6TH AVE S
Zipcode	98134
Taxpayer	SUSTAINABLE URBAN DEVELOPMENT #1 LLC

Exhibit 3

RCW ~~47.12.063~~

Surplus real property program.

(1) It is the intent of the legislature to continue the department's policy giving priority consideration to abutting property owners in agricultural areas when disposing of property through its surplus property program under this section.

(2) Whenever the department determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for transportation purposes and that it is in the public interest to do so, the department may sell the property or exchange it in full or part consideration for land or improvements or for construction of improvements at fair market value to any of the following governmental entities or persons:

- (a) Any other state agency;
- (b) The city or county in which the property is situated;
- (c) Any other municipal corporation;
- (d) Regional transit authorities created under chapter 81.112 RCW;
- (e) The former owner of the property from whom the state acquired title;
- (f) In the case of residentially improved property, a tenant of the department who has resided thereon for not less than six months and who is not delinquent in paying rent to the state;
- (g) Any abutting private owner but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283;
- (h) To any person through the solicitation of written bids through public advertising in the manner prescribed by RCW 47.28.050;
- (i) To any other owner of real property required for transportation purposes;
- (j) In the case of property suitable for residential use, any nonprofit organization dedicated to providing affordable housing to very low-income, low-income, and moderate-income households as defined in RCW 43.63A.510 and is eligible to receive assistance through the Washington housing trust fund created in chapter 43.185 RCW; or
- (k) A federally recognized Indian tribe within whose reservation boundary the property is located.

(3) Sales to purchasers may at the department's option be for cash, by real estate contract, or

exchange of land or improvements. Transactions involving the construction of improvements must be conducted pursuant to chapter 47.28 RCW or Title 39 RCW, as applicable, and must comply with all other applicable laws and rules.

(4) Conveyances made pursuant to this section shall be by deed executed by the secretary of transportation and shall be duly acknowledged.

(5) Unless otherwise provided, all moneys received pursuant to the provisions of this section less any real estate broker commissions paid pursuant to RCW 47.12.320 shall be deposited in the motor vehicle fund.

[2006 c 17 § 2; 2002 c 255 § 1; 1999 c 210 § 1; 1993 c 461 § 11; 1988 c 135 § 1; 1983 c 3 § 125; 1977 ex.s. c 78 § 1.]

NOTES:

Finding -- 1993 c 461: See note following RCW 43.63A.510.

Proceeds from the sale of surplus real property for construction of second Tacoma Narrows bridge deposited in Tacoma Narrows toll bridge account: RCW 47.56.165.

Exhibit 4

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge,
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge,
Department No. 7
Anne Hirsch, Judge
Department No. 8



BUILDING NO. 2, COURTHOUSE
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TELEPHONE (360) 786-5560 • FAX (360) 754-4060

Christine Schaller
Court Commissioner
709-3201
Indu Thomas
Court Commissioner
709-3201

Marti Maxwell
Superior Court Administrator
Gary Carlyle
Assistant Superior
Court Administrator
Eliza Goodman
Drug Court Program
Administrator
357-2482

May 30, 2007

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Re: **SOUTH TACOMA WAY v. WSDOT and SUSTAINABLE URBAN
DEVELOPMENT #1 LLC**
Thurston County Cause Number 06-2-00721-0

Letter Opinion

Dear Counsel:

This matter came before the court May 25, 2007 on cross motions for summary judgment.

This case involves the sale of an alley way formerly owned by the Washington State Department of Transportation (WSDOT) located in Seattle, WA. In May of 2004, Sustainable Urban Development #1 LLC¹ purchased 5.73 acres of property from the Frye Free Art Museum Foundation which abutted the alleyway along its western side and partially on its eastern border. Following its purchase of the Frye property, Sustainable approached WSDOT to purchase the alleyway. On February 15, 2005 WSDOT declared the alley way to be surplus property. Then on April 4, 2005 WSDOT and Sustainable

¹ Which will be referred to throughout the rest of this opinion as Sustainable.

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
07 MAY 30 PM 4: 20
BY BETTY J. GOOD, CLERK
DEPUTY

SCANNED

0-000000594

executed a purchase and sale agreement. On August 23, 2005 WSDOT transferred the property by quit claim deed to Sustainable.²

It has been conceded by the State that at the time of the sale WSDOT was operating under the incorrect assumption that Sustainable was the only owner with property abutting the alley. As a result of this assumption WSDOT initiated the sale under the procedure applying only to the sale of property to a single interested party. In November 2005, WSDOT learned that there were 2 additional owners of property abutting the alleyway. Francis V. Staub and T. Marshall each owned an interest in land which abutted the alley way. The Staub property was subsequently sold to South Tacoma Way. Francis Staub's successor in interest, South Tacoma Way, has sought a declaratory judgment that the state's action was *ultra vires* and asks this court to rescind the sale of the alleyway to Sustainable.

South Tacoma Way argues that chapter 47.12 RCW provides WSDOT with the explicit authority to dispose of and convey real property. Whenever WSDOT determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for highway purposes and that it is in the public interest to do so, the department may, in its discretion, sell the property under RCW 47.12.063 or under subsections (2) through (6) of RCW 47.12.283. RCW 47.12.283(1)

South Tacoma Way argues that RCW 47.12.063(g) is the relevant statute to this case. It allows the State to sell the property to:

Any abutting private owner but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283.

RCW 47.12.063(g). The State has conceded that it did not give written notice to all abutting land owners of the sale of the alleyway. South Tacoma Way asserts that because the State did not strictly comply with the language set forth in RCW 47.12.063, the State's actions were beyond the scope of its authority and necessarily voids the contract for sale.

The parties have agreed that there are no genuine issues of material fact at issue and this cause should be decided as a matter of law. Having had an opportunity to review the motions, attached declarations, exhibits and oral argument this court finds the following:

It is clear that the State did not comply with RCW 47.12.063 and did not give notice to all abutting landowners of the sale of the alley way. The question this court must address is whether the State's failure to comply with the statute constitutes an *ultra vires* action and

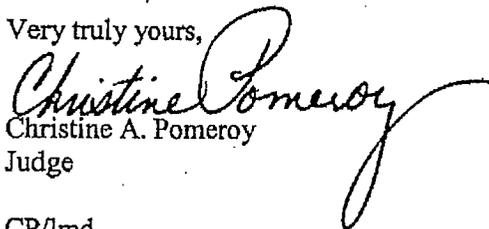
² The property was sold for its full appraisal value of \$180,000.00. There has been no dispute over the purchase price of the land.

requires rescission of the purchase and sale agreement and initiation of new proceedings in accordance with RCW 47.12.063.

The court holds first, the *ultra vires* doctrine is not applicable where WSDOT held the land and property in a proprietary capacity and was authorized to sell it at fair market value. The procedural error made by WSDOT in failing to provide notice to other abutting property owners does not amount to an *ultra vires* action. Second, even if the plaintiff had been given notice of the sale, it still cannot show that it would have been the successful high bidder if there was an auction proceeding. *Peerless Food Products v. State*, 119 Wn.2d 584, 853 P.2d 1012 (1992), has held that mistakes made by the State during the bidding process are not grounds to overturn a contract absent fraud or overarching public policy. There has been no allegation of fraud or any violation of a public policy concern in the present case. Third, the legislature did not specifically provide that a land sale under RCW 47.12.063 would be void absent proper notice to all abutting property owners. The intent of the statute was to authorize WSDOT to sell surplus land at fair market value for the benefit of the State motor vehicle fund, not for the benefit of abutting property owners. Fourth, Sustainable was a *bona fide* purchaser for value. Washington's *bona fide* purchaser doctrine reasons that where a good faith purchaser for value, who without actual or constructive notice of another's interest in real property, purchases that property, the purchaser has a superior claim to the property. *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960). As a *bona fide* purchaser, Sustainable has the right to rely on the deed conveyed by the State.

Therefore WSDOT and Sustainable's joint motion for summary judgment is granted and South Tacoma Way's motion is denied. The court will sign an appropriate order on presentation.

Very truly yours,



Christine A. Pomeroy
Judge

CP/lmd
cc: court file

SCANNED

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