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No. 36687-8-II

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, LLC

Defendants/Respondents.

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DIVISION II
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STATE OF WASHINGTON
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APPEAL FROM THURSTON COUNTY SUPERIOR COURT
HONORABLE CHRISTINE A. POMEROY

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
AND SUSTAINABLE URBAN DEVELOPMENT'S JOINT
RESPONSE TO PLAINTIFF/APPELLANT'S OPENING
MEMORANDUM

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I. INTRODUCTION

Like all human endeavors, government is not infallible. In this case, all parties acknowledge that a mistake was made: Defendant/Respondent Washington State Department of Transportation (“WSDOT”) disposed of a small, surplus alleyway without notifying an abutting landowner, Francis Staub, of the pending sale, because WSDOT mistakenly assumed that Sustainable Urban Development, LLC (“Sustainable”) was the only abutting property owner.

However, every violation of statutory procedures does not, as Plaintiff/Appellant, South Tacoma Way, LLC (“STW”) would argue, render the governmental action *ultra vires* and void *ab initio*.

The record shows that both the State and Sustainable acted in good faith albeit imperfectly. As made clear in the *Peerless* and *Dick Enterprises* cases, government contracts are not automatically overturned because of procedural irregularities.

Like the government bidding statutes at issue in *Peerless* and *Dick Enterprises*, the WSDOT surplus property statute is for the benefit of the State treasury and not for the benefit of any particular third party. Here, the State received the full fair market

value for the property from Sustainable, while STW's assignor/predecessor-in-interest, Staub, despite actual knowledge of the sale, did nothing for several months after the sale had closed, and only acted when it determined that it could use the error as leverage against Sustainable in lease termination negotiations.

WSDOT's action in this case was not *ultra vires*, and there is no legal basis for overturning the sale to Sustainable, which was a *bona fide* purchaser for value. Therefore, this Court should deny STW's appeal and uphold Thurston County Superior Court Judge Christine Pomeroy's grant of summary judgment in favor of WSDOT and Sustainable.¹

II. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Should the Court void the sale of surplus WSDOT property to a bona fide purchaser for value as *ultra vires* because WSDOT failed to notify an abutting property owner that might have expressed an interest in the property thus requiring a public auction when the intent of the bidding statute is to protect the public's interest and WSDOT received the full appraised value for the property?

¹ CP 575-578: Judge Pomeroy order granting WSDOT/Sustainable Summary Judgment and denying STW's motion for summary judgment; CP 580-582: Judge Pomeroy letter opinion explaining ruling.

2. Is STW barred from voiding the WSDOT surplus property sale by the doctrines of *bona fide* purchaser for value, laches, and estoppel when its predecessor in interest, Staub, had several months notice of the alley sale and failed to register an objection or request to purchase the alley within the 15-day statutory time limit?

III. COUNTER-STATEMENT OF FACTS

A. Summary Of Relevant Facts

- WSDOT received full appraised value for the alley. There is no evidence of any fraud, collusion or wrongdoing.² An abutting property owner, Sustainable, purchased from WSDOT without knowing that the agency had followed the wrong notice procedure for the sale.³
- The actual owner of another abutting property, Francis Staub, expressed no interest in the alley sale. Her son, Nicholas Staub, knew that the alley was owned by WSDOT. He admitted that he was aware of the alley sale for over a year, yet he made no objection to either WSDOT or Sustainable.⁴ To the contrary, when informed about the finalization of the alley sale in a September 7, 2005 email from a Sustainable employee, Nicholas Staub's response was to joke that he would have to clean up the materials he had been unlawfully

² CP 596: Judge Pomeroy Letter Opinion ("There has been no allegation of fraud or any violation of a public policy concern in the current case").

³ CP 511-512: Schoenfeld Dec. ¶¶ 5-7, *see also* CP 370: N. Staub Dep. page 45; lines 18-25 (cited as "14:18-25") (no evidence Sustainable mislead the State about the property interests surrounding the alley or knew that the State had made a mistake); CP 371: N. Staub Dep. 46:1-4; CP 403-404: T. Pavolka Dep. 21:13-17, 22:10-25 (same).

⁴ CP 363, 364, 365, 369: N. Staub Dep. 17:1-4; 19:10-21; 23:13-25; 38:16-25; 39:5-9; 40:16-25; 41:1-13.

storing there.⁵ Nicholas Staub received a second email from Sustainable principal, Jeff Schoenfeld, dated September 16, 2005, that informed Mr. Staub that Sustainable would “let you continue to use the alley at no charge through the end of the year 12/31/05.”⁶ Again, there was no objection from Mr. Staub.

- Nicholas Staub did not contact WSDOT to object to the sale until January 2006, after his mother, Francis, had signed a purchase and sale agreement with STW, and after he and STW had agreed to use the alley sale issue as leverage against Sustainable to obtain an early termination of the Romaine Electric lease.⁷

B. Detailed Statement of Facts

1. Sustainable Becomes The Owner Of the Frye Property And Contacts The State About Purchasing the Alley.

In May 2004, Defendant/Respondent Sustainable purchased approximately 5.73 acres of property from the Frye Free Art Museum Foundation in an area south of downtown Seattle near the football and baseball stadiums.

Next to the Frye property, Defendant/Respondent WSDOT owned a small (5,373 square foot), rectangular alley, which had been a former railroad spur line. The Frye property abutted the alley along its full length to the west and also partially abutted it on

⁵ CP 435: 9/7/05 Scheiber/Staub email; CP 368: N. Staub Dep. 35:19-25; 36:1-25; 37:1-11.

⁶ CP 514: 9/16/05 Schoenfeld/Staub email.

⁷ CP 415: 1/19/2006 Staub/Trembley email; CP 367: N. Staub Dec. 30:20-25, 31:1-8.

the east (i.e. the Frye property was on both sides of the alley.) See map (CP 356), aerial photograph (CP 357), and picture of the alley (CP 443) attached as Appendix I to this Memorandum.

In May 2004, Sustainable approached WSDOT about the possibility of acquiring the alley.⁸ In a May 9, 2004 letter, Sustainable employee, Joe Nabbefeld explained:

We closed last week on buying six acres that abut the right of way on both sides. Our property extends the western length of the right of way and abuts a small stretch to the east.⁹

On February 15, 2005, WSDOT declared the alley to be surplus property. On April 4, 2005, WSDOT and Sustainable executed a purchase and sale agreement, and on August 23, 2005, WSDOT sold the alley to Sustainable by quitclaim deed, for its full appraised value of \$180,000.¹⁰

At the time of the sale to Sustainable, WSDOT was under the mistaken assumption that Sustainable was the only landowner with property abutting the alley. Therefore, WSDOT followed the procedure for sale to a single interested party, rather than the procedure in RCW 47.12.063(2)(g) that applies when two or more

⁸ CP 346: 5/9/04 letter from J. Nabbefeld to WSDOT employee D. Van Dyk.

⁹ *Id.* Previously, Sustainable had supplied WSDOT with a survey of the full Frye property. CP 348: 4/8/04 letter from J. Nabbefeld to D. Van Dyk.

¹⁰ CP 301-336: Appraisal; CP 350-354: WSDOT/Sustainable Quitclaim Deed.

abutting property owners provide timely notice (15 days) of their interest in the property. In such cases, WSDOT is to follow the public auction procedure in RCW 47.12.283.

In November 2005, approximately three months after the sale to Sustainable had closed, WSDOT learned, for the first time, that Francis V. Staub and Mr. T. Marshall each owned a lot that abutted the alley.¹¹ Mr. Marshall later indicated that he had no interest in the alley.

2. The Staub Entities: FVS, LLC, Francis and Nicholas Staub, and Romaine Electric.

Plaintiff/Appellant STW is asserting its claim based on an assignment of rights from Francis V. Staub.¹²

Francis V. Staub, through her company FVS, LLC,¹³ owned an improved lot that abutted the northeast side of the alley (the "Staub Property"). Francis' son, Nicholas Staub, operated a business, Romaine Electric, on the Staub Property.¹⁴ Romaine Electric also leased a parking lot and 24,000 square feet of building space on the west side of the alley from Frye, and later from

¹¹ CP 356-357: Parcel map and aerial photo depicting the Sustainable, Staub, and Marshall properties.

¹² CP 249-250: Francis Staub assignment of rights to STW.

¹³ CP 363: N. Staub Dep. 14:3-8; CP 378: F. Staub Dep. 5:11-16.

¹⁴ CP 362: N. Staub Dep. 10:6. Nicholas Staub is the CEO of Romaine Electric; CP 361: N. Staub Dep. 6:16.

Sustainable.¹⁵ Nicholas Staub was not an owner of the Staub property.¹⁶

In late 2004, Nicholas Staub determined that Romaine Electric would have to move to a much larger facility,¹⁷ and in June 2005, he located property in Kent, Washington for that purpose. He executed a purchase and sale agreement on the new property in August 2005, and closed on the property that September 2005.¹⁸

3. The Staubs Knew That The Alley Was Owned By WSDOT And Did Not Object When They First Learned That It Was Being Sold.

Since 2001 or 2002, Nicholas Staub had been aware that the alley was owned by the WSDOT,¹⁹ because at that time, he had been advised by WSDOT that Romaine Electric was illegally using the alley to store materials.²⁰ Although Mr. Staub cleared the alley for a short period of time, Romaine reverted to its old practices without obtaining WSDOT permission.²¹

¹⁵ CP 363: N. Staub Dep. 15:4-14; CP 362: N. Staub Dep. 11:19-25; 12:1-3.

¹⁶ CP 381: F. Staub Dep. 14:7-11.

¹⁷ CP 363: N. Staub Dep. 15:5-25; 16:1-13.

¹⁸ CP 363: N. Staub Dep. 17:1-4.

¹⁹ CP 364: N. Staub Dep. 21:7-13.

²⁰ CP 413: Photograph of material in the alley.

²¹ CP 365; 373: N. Staub Dep. 22:2-13; 55:17-25; 56:1-5 (Kept property clear for more than a year and then began using it again).

Back in 2001, Mr. Staub had quickly dismissed the possibility of legitimizing his company's use by leasing the alley, because he "got the impression that it was going to be more expensive than [he] was willing to pay to lease it."²²

Between 2002 and January 19, 2006, Mr. Staub never asked WSDOT if he could purchase the alley.²³ Instead, based on a telephone conversation he had in 2002 with a state employee, Mr. Staub testified that he was waiting for the WSDOT to tell him when the property might be offered for sale and, therefore, he saw no reason to contact the WSDOT.²⁴

Mr. Staub was aware of the ongoing sale of the alley to Sustainable by mid-2004 or early 2005, at about the same time that he realized that he needed to move the Romaine Electric business.²⁵ He first learned of the sale through a conversation with Sustainable employee, Glen Scheiber.²⁶ Although he was not sure

²² CP 365: N. Staub Dep. 22:2-7.

²³ CP 365: N. Staub Dep. 23:18-25.

²⁴ CP 365: N. Staub Dep. 23:18-25; 23:13-17. Q. *Other than waiting to see the notice of disposal process did you ever take any other steps to let the State know that you would be interested in purchasing the alley?* A. *No.*

²⁵ CP 364, 369: N. Staub Dep. 19:10-21; 38:16-25; 39:5-8; 40:16-25; 41:1-13.

²⁶ CP 364: N. Staub Dep. 19:22-25; 20:1-22.

that the sale had been completed, Mr. Staub mistakenly assumed that the transaction had closed at that time.²⁷

In addition to the verbal communications that occurred in late-2004 or early 2005, Mr. Staub was provided with written notice that Sustainable had purchased the alley, *nearly four months before he first raised an objection with WSDOT*. On September 7, 2005, Sustainable employee, Glen Scheiber, sent Mr. Staub an email explaining that Sustainable *“recently purchased the alley from the State of Washington.”*²⁸

In his response to this email, Mr. Staub did not raise any objection to the sale. Instead, he joked about the condition of the alley and suggested that the parties set up a meeting because Romaine had purchased a new building and the Staubs were in serious discussions about selling the old building.²⁹

On September 16, 2005, Nicholas Staub received a second email about the alley from Sustainable principal, Jeff Schoenfeld, wherein Mr. Schoenfeld informed Mr. Staub that Sustainable would “let you continue to use the alley at no charge through the

²⁷ CP 364: N. Staub Dep. 20:19-22.

²⁸ CP 435: 9/7/05 email from G. Scheiber to N. Staub. Mr. Staub was also aware of Sustainable’s Phase-1 environmental due diligence that occurred in the alley prior to the purchase of the alley. CP 368: N. Staub Dep. 35:19-25; 36:1-25; 37:1-11.

²⁹ *Id.*

end of the year 12/31/05.”³⁰ Again, there was no objection from the Staubs. Copies of the 9/7/05 and 9/16/05 emails (CP 435 and CP 514) from Sustainable to N. Staub are attached as Appendix II.

From the time that Mr. Staub became aware of what he believed to be the final sale of the alley in late-2004, until he sent an email to WSDOT on January 19, 2006, the sum total of the Staubs’ objection to the alley sale was that Mr. Staub emailed his accountant in 2004 to express his surprise that the State had not contacted him about it.³¹ Moreover, Mr. Staub waited over four months to raise an objection after Sustainable twice told him in writing about the sale in September 2005.³²

Although she was the actual owner of the Staub property,³³ Francis Staub was not involved in any of the discussions with the State in 2001-02 regarding purchase or lease of the alley, and she had no interest in purchasing the alley at that time.³⁴ In fact, between 2001 and the time of her deposition in 2007, she never expressed an interest to anyone about purchasing the alley.³⁵

³⁰ CP 514: 9/16/05 J. Schoenfeld/N. Staub email informing Staub that Romaine could continue to use the alley until 12/31/05.

³¹ CP 364, 365: N. Staub Dep. 20:7-15; 20:23-25; 21:1-6; 25:7-11.

³² CP 435 and CP 514 *supra*.

³³ CP 379: F. Staub Dep. 9:7-12.

³⁴ CP 379: F. Staub Dep. 7:5-8; 10:2-4.

³⁵ CP 379: F. Staub Dep. 9:4-6.

Similarly, she never expressed any concern about Sustainable's purchase of the alley.³⁶ And, she testified that she was indifferent to Sustainable's purchase of the alley.³⁷

4. Nicholas Staub Decides To Belatedly Object To The Alley Sale As A Means Of Forcing Sustainable Into An Early Termination of Romaine's Lease.

Around September 2005, Nicholas Staub was approached by Tim Pavolka and Mike Carr, who are principals in STW, to purchase the Staub property and Romaine Electric building from Francis Staub.³⁸ STW and the Staubs signed a purchase and sale agreement for the Romaine Electric building on December 15, 2005.³⁹

In mid-November 2005, STW principal Tim Pavolka researched the alley sale and contacted WSDOT, claiming to represent the Staubs.⁴⁰ At the urging of STW, Nicholas Staub decided to inform WSDOT of his family's interest in purchasing the alley. On January 19, 2006, Nicholas Staub contacted WSDOT

³⁶ CP 380: F. Staub Dep. 10:5-7.

³⁷ CP 380: F. Staub Dep. 12:22-25.

³⁸ CP 364: N. Staub Dep. 17:13-17.

³⁹ CP 417-431: Staub/STW purchase and sale agreement; CP 242: purchase and sale addendum with clause regarding Romaine lease termination negotiations.

⁴⁰ CP 392: Pavloka Dep. 10:1-22; CP 440-441: Tremblay "Diary of Right-of-Way" activities; CP 365-366: N. Staub Dep. 25:15-19; 28:7-25; 29:8.

and claimed that the Staubs were "quite interested" in purchasing the alley.⁴¹

While the alley had not factored into the purchase price for the Staub property,⁴² STW and Nicholas Staub decided to use WSDOT's error as leverage in negotiations with Sustainable. Nicholas Staub was hoping to use the alley issue to obtain an early termination of the Romaine Electric lease with Sustainable.⁴³

Mr. Staub testified:⁴⁴

We were at the time trying to vacate the Sustainable building and were trying to negotiate an early release of our lease and Sustainable was not willing to give us any relief from that lease. And Tim had researched the transaction between the State, Sustainable and found that it was, as I had thought, not been done by the protocol that was legal or that was laid out to me by the earlier representative of the State.

* * * *

[S]o we talked about the potential of trading the early vacation of the lease for us agreeing to show no interest in the alleyway.⁴⁵

Around January 2005, STW requested an assignment of the Staub's potential claims to the alleyway.⁴⁶ In exchange, STW

⁴¹ CP 369: N. Staub Dep. 41:7-13; CP 415: 1/19/06 email from N. Staub to C. Tremblay at WSDOT.

⁴² CP 393: T. Pavolka Dep. 11:24-25; 12:1-4 (no change in purchase price because the alley was or was not included); CP 368: N. Staub Dep. 35:8-18.

⁴³ CP 366: N. Staub Dep. 29:6-8.

⁴⁴ CP 365: N. Staub Dep. 25:12-19.

⁴⁵ CP 366: N. Staub Dep. 29:6-8.

agreed that it would attempt to negotiate an early lease termination from Sustainable that would have potentially saved the Staubs nearly \$100,000.⁴⁷ On February 12, 2006, the Staubs and STW memorialized their understanding in an Addendum (Paragraph 3) to the purchase and sale agreement that provided that STW and the Staubs would split any savings obtained from early termination of the Romaine lease.⁴⁸ A copy of the purchase and sale Addendum (CP 242) is attached as Appendix III to this Memorandum.

At their depositions, Francis Staub, Nicholas Staub, and Tim Pavolka, all confirmed that they had no evidence that Sustainable knew that the State was making a mistake during the alley purchase process; that they had no evidence that the State received less than fair market value for the property; that they had no evidence that Sustainable misrepresented the abutting property ownerships; and that they had no evidence that the State's error was anything more than an honest mistake.⁴⁹

⁴⁶ CP 367: N. Staub Dep. 31:9-11.

⁴⁷ CP 367: N. Staub Dep. 30:20-25; 31:1-8.

⁴⁸ CP 242: 2/12/06 Purchase and Sale Addendum, paragraph 3.

⁴⁹ CP 370-371: N. Staub Dep. 44:1-25; 45:1-25; 46:1-5; CP 380: F. Staub Dep. 11:6-22; CP 404: T. Pavolka Dep. 22:7-25.

IV. LEGAL ARGUMENT

A. SUMMARY OF ARGUMENT

STW urges this Court to misapply the *ultra vires* doctrine and void the surplus land sale so that a new auction might be held.⁵⁰

STW request should be denied for five reasons:

1. The *ultra vires* doctrine is not applicable where WSDOT held surplus land in a proprietary capacity and was authorized to sell it to an abutting property owner for fair market value;

2. The Legislature did not provide that a surplus land sale under RCW 47.12.063 would be void if proper notice was not given to all abutting property owners. The intent of the statute is to authorize WSDOT to sell surplus land at fair market value, or better, for the benefit of the State's motor vehicle fund, and that intent was accomplished in this case;

3. Had STW's predecessor expressed interest in the property and an auction held, STW can never show that the Staubs would have been the high bidder or that the bid would have exceeded the purchase price paid by Sustainable. The opinion in *Peerless*

⁵⁰ Brief of Appellant, p. 9.

Food Products, Inc. v. State, 119 Wn.2d 584, 835 P.2d 1012 (1992) makes clear that the State's mistakes in a bidding process are not grounds to overturn a contract in the absence of fraud or an overreaching public policy;

4. STW is barred by the doctrine of *bona fide* purchaser for value from overturning the sale; and

5. Because of the Staubs' inaction in waiting for several months after the alley sale closed (or more than a year from the date Mr. Staub mistakenly assumed the alley had been sold) to raise an objection to the sale, STW, as the Staubs' assignee, is barred by the doctrines of laches and estoppel from objecting to the sale.

B. STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56(c). Summary judgment is a favored pretrial device, which avoids an unnecessary trial when no issues of material fact exist, and is designed to secure a "just, speedy, and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); see also *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court. *Marthaller v. King Co. Hospital Dist. No. 2*, 94 Wn. App. 911, 915, 973 P.2d 1098 (1999). The appellate court should affirm summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Here, all parties have moved for summary judgment on the question of whether the WSDOT's procedural error constituted an *ultra vires* act sufficient to void the surplus property sale to Sustainable, and the trial court properly rejected STW's attempt to have the alley sale voided.

C. WSDOT's Surplus Property Statutes Are For The Benefit Of The State And WSDOT's Procedural Mistake Was Not An Ultra Vires Act.

If WSDOT determines that state-owned real property is no longer needed for highway purposes, it is authorized to sell such surplus property at fair market value, or higher, for the benefit of the State. RCW 47.12.063; RCW 47.12.283. Copies of the statutes are attached as Appendix IV to this Memorandum.

WSDOT can sell the surplus property to a variety of entities (RCW 47.12.063(2)(a-h)) and is not obligated to give priority consideration to an abutting landowner unless that

landowner is engaged in an agricultural use.⁵¹ Rather, the intent of the statutes in the case of the sale of property to an abutting commercial user is to ensure that the public receives fair market value for the property.

RCW 47.12.063(2) requires that WSDOT may sell surplus property to "any abutting landowner" but only after any other abutting private owners shown in the county assessor's records have been notified in writing of the proposed sale.

If, within 15 days of receipt of the notice of sale, two or more abutting property owners express an interest in the property, then WSDOT is required to hold a public auction in the manner provided in RCW 47.12.283. This statute allows WSDOT to hold a public auction after providing two weeks notice in the legal and real estate classified sections of the newspaper. All monies received from the sale are to be deposited in the State's motor vehicle fund. RCW 47.12.283(6).

When comparing RCW 47.12.063 with RCW 47.12.283, it is clear that the legislative intent in requiring notification to all

⁵¹ In 1988, the Legislature specifically carved out agricultural areas from the general subsection RCW 47.12.063(2)(g) abutting owner category, and created a new subsection (1). The legislative intent was to single out a preference for surplus property sales to abutting property owners of agricultural land beyond the laundry list of potential purchasers in subsection (2).

abutting property owners of a potential sale is to maximize the state's monetary recovery of the surplus property sale.⁵² It is *not* for the benefit of the abutting owners, like STW or its predecessor-in-interest, Staub.

1. **RCW 47.12.063(1)(g) and RCW 47.12.283 Do Not Evidence A Legislative Intent to Void Surplus Property Sales For Procedural Errors.**

By enacting RCW 47.12.063, the Legislature gave WSDOT authority to unilaterally determine when property under its jurisdiction was no longer needed for transportation purposes and to sell that property at its fair market value for the benefit of the State's motor vehicle fund.⁵³

Washington courts have long held that the State holds title to property in two distinct capacities: (1) in a proprietary capacity as individuals hold property, or (2) in its governmental capacity in trust for the public use. *State v. Superior Court for Jefferson County*, 91 Wash. 454, 458-59, 157 P. 1097 (1916). Property held

⁵² Nicholas Staub testified at deposition that it is his opinion that the surplus property statutes are to protect the public coffers, not the abutting property owners. CP 367: N. Staub Dep. 33:11-23; CP 338-340: WSDOT Sales Terms. Ex. A to Declaration of Ann E. Salay.

⁵³ RCW 47.12.063(2) and (5).

as proprietary may be sold by the State so long as it does not violate trust obligations.⁵⁴

Therefore, once the WSDOT declared the alley to be surplus and unnecessary for highway purposes under RCW 47.12.063, WSDOT owned the property in its proprietary capacity and could sell it for fair market value without violating the public trust. Here it did so.

When the Legislature specifically mandates that a government agency must follow a particular process or the agency's actions will be void and the agency fails to follow the mandated process, then it is appropriate for a court to find that the agency's action was *ultra vires*.

For example, in *Properties Four v. State*, 125 Wn. App. 108, 105 P. 3d 416 (2005) also cited by STW, a property owner attempted to force the State to purchase a piece of property. The court refused to enforce the parties' purchase and sale agreement because the State had not made a legislative appropriation to fund the purchase.

This ruling was proper because, under the controlling statute (RCW 43.88.130), if there is no money appropriated, the

⁵⁴ *Id.* at 459; *Roberts v. City of Seattle*, 63 Wash. 573, 575, 116 P. 25 (1911).

Legislature has provided that any contract made in violation of the funding statute “shall be null and void.” The legislative intent was *expressly* stated in the statute: violate RCW 43.88.130 and the contract is void.

There are numerous examples where the Legislature has provided that property transfers are void for failure to follow statutory procedures including RCW 80.12.030 (sale, lease, or assignment of public utility company property void if made without commission approval); RCW 39.36.020 and .040 (government contracts made in violation of limitations on indebtedness statutes “shall be absolutely void”); and RCW 28B.20.382 (sale or long-term lease of university tract land “shall be null and void” unless approved by legislative act).

Neither RCW 47.12.063 nor RCW 47.12.283 contain an analogous bar. The Court should not read an intent into the WSDOT surplus property statutes that was not expressed by Legislature. *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 977 P.2d 554 (1999).

RCW 47.12.063(2)'s directive is to sell surplus land for fair market value or better, which is precisely what WSDOT did in this case.

2. STW Lacks Standing To Make A Procedural Challenge To WSDOT's Procedural Compliance With The Surplus-Property Disposal Statutes.

STW argues that this sale should be voided because, if an auction were held, WSDOT might theoretically receive more than its asking price.⁵⁵ However, this is not a claim for STW to make. While some statutes allow a member of the public to sue on behalf of the State, neither of the bid statutes at issue in this case contain any such provision.

STW lacks standing to make a post-contract challenge based on the State's alleged failure to comply with the procedural requirements of the bidding statutes at issue, RCW 47.12.063(1)(g) and RCW 47.12.283. Once WSDOT signed the contract, "[e]ven where the illegal contract increases expense to the public", only someone with *taxpayer standing* may challenge the contract.⁵⁶ *Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 922 P.2d 184 (1996).

⁵⁵ Brief of Appellant, p. 15.

⁵⁶ To have taxpayer standing, a plaintiff must plead facts in the complaint that show it has standing. *Dick Enterprises*, 83 Wn. App. at 572-73. These facts must show (1) the plaintiff pays the type of taxes funding the project; (2) the "wrongful public contract . . . would increase the tax burden"; and (3) the plaintiff asked the attorney general to take action before filing suit. *Id.* at 573. STW did not plead any such facts. CP 4-8: STW Complaint.

STW lacks standing because 1) it did not plead taxpayer standing and 2) its private challenge to overturn the sale is contrary to established case law including *Dick Enterprises*, 83 Wn.App. 566, 922 P.2d 184 (1996) and *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 591, 835 P.2d 1012 (1992). These cases recognize that laws governing competitive bidding are enacted for the benefit of the general public, not individual bidders (*Peerless*, 119 Wn.2d at 591) and that “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*, 83 Wn. App. at 569.

In *Peerless*, the lowest bidder on a government dairy supply contract, Peerless, sued when the contract was awarded to another bidder, Carnation. Peerless argued that the State had made mathematical errors in the bid calculation and had committed a procedural error when it allowed Carnation to submit a bid after Carnation had failed to appear at a mandatory pre-bid conference. *Id.* at 588.

Significantly, the parties stipulated that, for purposes of the appeal, Peerless should have been awarded the contract. Despite this, the court rejected Peerless’ claim for damages, reiterating that

public bidding laws are for the protection of the public treasury, not for the protection of individual bidders and that a violation of those laws, is not actionable in damages by the disappointed bidder.⁵⁷

In *Dick Enterprises*, an unsuccessful bidder sued King County on a construction contract claiming that successful bidder did not meet the bid requirements for minority set-aside and that the County knew about the flaw before it accepted the bid.

The court found that the disappointed bidder lacked standing to bring a claim for either damages or injunctive relief once the contract had been signed because to allow the claim would adversely affected the public interest by increasing the expense to taxpayers. *Id.* at 569-70.

The same rationale should guide the Court in the instant case. WSDOT is in the same position as the State was in *Peerless* or *Dick Enterprises*. WSDOT fulfilled its statutory duty when it received the appraised fair market value of \$180,000, even though the Staubs did not receive notice of the proposed sale.

⁵⁷ *Id.* at 591, emphasis in original; *A.A.B. Electric, Inc. v. Stevenson Pub. Sch. Dist. No. 303*, 5 Wn. App. 887, 491 P.2d 684 (1971), (a bid is no more than an offer to contract and that the purpose of bidding statutes is to protect the public interest and not that of a particular bidder).

Like the State in *Peerless*, WSDOT may have gotten a better deal if the notification procedures had been precisely followed. But, consistent with the *Peerless and Dick Enterprises* holdings, WSDOT's contract should not be overturned, and the State treasury damaged, because a putative bidder *might* have submitted a higher bid.

The policy behind *Dick Enterprises* and *Peerless* is simply that the public should not be forced to pay twice for a procedural error in the bidding process.⁵⁸ On this basis, "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 569. The *Dick Enterprises* case also recognizes that Washington courts use "contract formation as a bright-line cutoff point for bidder standing" to challenge an alleged violation of a competitive bidding law. *Dick Enterprises*, 83 Wn. App. at 571; *Peerless*, Wn.2d at 597.⁵⁹

⁵⁸ See *Dick Enterprises*, 83 Wn. App. 570-571: "The cost or rebidding and delay would in many cases far outweigh the financial harm cause by the fraudulent or collusive agreement"; "Private suits are motivated by the bidder's desire to rebid and improve its chances to obtain the award" – not to benefit the public treasury; "[W]here public and private interests conflict under the competitive bidding laws, the public interest must prevail."

⁵⁹ Even when a would-be-successful bidder has been improperly denied injunctive relief, courts have refused to provide post-contract relief where the plaintiff failed to seek an immediate stay of the ruling during the appeal. *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999)

Here, as STW concedes, RCW 47.12.063(1)(g) and RCW 47.12.283 are competitive bidding statutes, designed to protect the public interest.⁶⁰ Brief of Appellant at 14-15. That public interest is not protected by rescinding the sale, and requiring the State to disgorge funds and to be subject to the added costs of repossessing and re-appraising the surplus property with no guarantee that WSDOT will recover the original amount bid on the property. More importantly, under the bright-line rule developed in *Peerless* and *Dick Enterprises*, it is simply too late and STW has no standing to challenge the State's failure to give written notice to the Staubs before selling the property to Sustainable.

(holding trial court improperly denied injunction, but dismissing appeal as moot where city had entered contract after plaintiff failed to seek a stay of the court's ruling on appeal). This does not mean the State may violate bidding laws without consequence. First, a would-be-successful bidder can seek an injunction before the contract is signed. *Peerless*, 119 Wn.2d at 596. This requirement serves everyone's interests because "all parties are interested in as quick and fair a settlement of the issues as possible." *Peerless*, 119 Wn.2d at 596. Here, the Staubs had notice of the pending sale before it was final, but did not raise any objections until after the sale was completed and the right to any claim was assigned to a new entity, STW.

⁶⁰ The requirement in RCW 47.12.063(2)(g) that the state give notice to abutting property owners does not evidence an intent to protect the interests of abutting property owners in non-agricultural areas. This is made clear by RCW 47.12.063(1), which recites a legislative intent to "giv[e] priority consideration to abutting property owners in agricultural areas[.]" If the Legislature had wanted to protect the interests of abutting property owners in non-agricultural areas, it would not have qualified this statement of intent. Any other interpretation that applied to all properties would make the Legislature's express statement of intent to protect abutting owners in agricultural areas meaningless, something this court cannot do. *Aviation West Corp. v. State*, 138 Wn.2d 413, 421, 980 P.2d 701 (1999) ("It is presumed that the legislature does not deliberately engage in unnecessary or meaningless acts.").

3. **The *Ultra Vires* Doctrine Is Inapplicable In This Case.**

STW contends that when WSDOT failed to provide notice to an abutting landowner of its intent to surplus property, WSDOT acted with *no* authority to sell the surplus property and that, as a result, WSDOT's actions were *ultra vires* and void *ab initio*.⁶¹

STW urges this Court to adopt a bright-line *per se ultra vires* rule: If, in the sale of surplus property, WSDOT fails to provide notice to every potentially interested purchaser as required by RCW 47.12.063 and 47.12.283, then any subsequent sale is *ultra vires* and void from its inception, even if WSDOT obtains fair market value for the property.

If taken to its logical extreme, this rule yields absurd results that are not in the public's interest. For example, suppose that surplus property was surrounded by 10 property owners and WSDOT failed to notify one of the 10, while the other 9 expressed interest in the property and participated in an auction that resulted in a fair market value, or better, sale.

⁶¹ Brief of Appellant, pp. 1, 9.

How is the public interest protected by unwinding the sale because one potential bidder was left out and subsequently objects several months after the sale has closed?

Or, how would STW's rule work if the party that did not receive proper notice was an unidentified member of the public?

RCW 47.12.283(2) provides that whenever WSDOT determines to sell property at public auction, it must "first give notice thereof by publication on the same day of the week for two consecutive weeks" in the real estate and legal notice sections of a newspaper of general publication.

One could envision a myriad of procedural errors that could occur with such notice: WSDOT could neglect to publish the notice; perhaps the newspaper makes a mistake and the notice does not run on the same day for two consecutive weeks; the notice could be published in the legal but not the real estate section of the newspaper; the notice might be published for less than two full weeks before the sale, or the notice might contain the wrong address of the property or the time for the auction.

Assume further that WSDOT sells the property at issue to an abutting landowner, or holds an auction that is attended by two

or more abutting landowners, and, that, but for the defective notice to the public, the sale is appropriate in all other respects.

Under STW's rule, such a transaction would be *ultra vires* and void, and a previously unidentified member of the public who claimed an interest in the property, would be entitled to object, perhaps months after he or she had learned about the sale and it had closed, and have the sale overturned merely because he or she missed out on the opportunity to submit a bid, regardless of the bid's likelihood of success or impact to the other parties and the State treasury.

What the *Peerless* and *Dick Enterprise* cases and the foregoing hypothetical demonstrate is that, in the absence of fraud, complete disregard of a statutory scheme, or violation of some overarching public policy, the *ultra vires* doctrine has no place in the WSDOT surplus property program, and that the intended beneficiary of that program, the public treasury, is far better served by allowing a fair market value sale to stand.

a. The Cases Cited By STW For *Ultra Vires* Government Action Are Inapposite.

If government acts completely outside of its authority or enters into a contract that violates public policy or a statutory

scheme, such contract is unenforceable. *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968); *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 207, 26 P. 3d 981 (2001).⁶² However, if government acts imperfectly within its delegated authority, such actions are not *ultra vires*. *Barendregt v. Walla Walla School Dist. No. 140*, 26 Wn. App. 246, 250, 611 P.2d 1385 (1980) (court distinguished between a governmental agency's *ultra vires* act which cannot be estopped and the "irregular exercise of a granted power," which may be estopped if the contract relied on was within the agency's powers); *Board of Regents of Univ. of Wash. v. Seattle*, 108 Wn.2d 545, 741 P.2d 11 (1987) ("an act of an officer which is within his realm of authority, albeit imprudent or violative of a statutory directive, is not *ultra vires*."); *Johnson v. Central Valley School Dist. No. 356*, 97 Wn.2d 419, 433, 645 P.2d 1088 (1982) (same). In this case, WSDOT's actions were not *ultra vires*, meaning that it acted beyond the scope of its delegated authority. Rather, in this case, WSDOT erred on a matter that was well within its scope of authority.

⁶² See also, *Biggers v. City of Bainbridge Island*, ___ Wn.2d ___, 169 P.3d 14 (2007) (City enactment of land use regulations that violated the Shoreline Management Act and State constitution was an *ultra vires* act).

In *Finch*, King County exchanged a dedicated county right-of-way (a ravine that had been found infeasible for street purposes) for flat ground that would facilitate future road construction.

In the meantime, the defendant, Matthews, had improved the ravine by filling it. The City of Seattle decided that, as a successor-in-interest to the County, it was entitled to appropriate the land. Like STW here, the City argued that the court should ignore the obvious equities in the case and void the County's act as *ultra vires*.⁶³

The *Finch* court rejected the *ultra vires* claim noting the "broad distinction . . . between irregular exercise of granted power and the total absence or want of power. . . ."⁶⁴

It upheld the land transfer under the doctrine of equitable estoppel, which it found applicable when government is acting within its *proprietary capacity* and the estoppel was necessary to prevent injustice.⁶⁵

Sustainable is similarly situated to the private property owner in the *Finch* case. WSDOT was transacting business, the

⁶³ *Id.* at 168-69.

⁶⁴ *Id.* at 171.

⁶⁵ *Id.* at 175-76.

sale of surplus property, in its proprietary capacity. Sustainable acted in good faith, and WSDOT received fair market value in exchange for the property.

In support of its *pre se ultra vires* rule, STW cites to cases where a government agency acted in complete disregard to a statutory scheme, or to cases where a government agency is being challenged by a party to a transaction and the court must decide liability based upon whether the governmental action at issue was *ultra vires* (no liability) or subject to equitable estoppel (liability may be imposed).

For example, in *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982), DNR failed to follow the State Environmental Policy Act ("SEPA") RCW 43.21C for a timber sale. Unlike WSDOT's property disposal authority, SEPA is subject to liberal construction with extensive public participation and enforcement requirements.⁶⁶

In *Noel*, DNR entirely ignored SEPA's statutory scheme by failing to conduct environmental review of the proposed sale, thereby violating the Legislature's overarching intent to protect the

⁶⁶ *Id.* at 380; RCW 43.21C.030(2)(b).

State's environment through reasoned government decisionmaking.⁶⁷

WSDOT's actions in this case are not comparable to DNR's actions in *Noel*. WSDOT did not ignore an entire statutory scheme – it tried to follow RCW 47.12.063. Unfortunately, it made a mistake of fact in misidentifying the abutting owners. That mistake resulted in an irregular exercise of the agency's legal authority. It did not, however, place the transaction outside the agency's legal authority to sell surplus property for fair market value.

Appellant's reliance on *Nelson v. Pacific County*, 36 Wn. App. 17, 671 P.2d 785 (1983) is also misplaced. In *Nelson*, the court found that the county could not abandon a dedicated right-of-way along a shoreline in settlement of a quiet title action. *Nelson* is distinguishable for two reasons:

First, in *Nelson*, the county acted completely outside of its statutory authority and disposed of land that it was holding in a public trust capacity.⁶⁸ In so doing, it violated RCW 36.34.020-

⁶⁷ RCW 43.21(c).010; 020.

⁶⁸ *Nelson*, 36 Wn. App. 17, 23. See also, *Commercial Waterway Dist. 1 of King County v. Permanente Cement Co.*, 61 Wn.2d 509, 379 P.2d 178 (1963), which is cited in *Nelson* and discusses the distinction between land held in governmental public trust and proprietary capacities.

.030 (notice and public hearing required) and RCW 36.87.020-.040 (resolution of vacation, county engineer's study, and public hearing required).

In contrast, when WSDOT declared the alley to be surplus property and sold it to Sustainable, WSDOT was acting in a proprietary capacity, and it surplused and sold the land under its proper statutory authorization, RCW 47.12.063. Thus, the instant case falls within the "broad distinction" between government's irregular exercise of granted power, which is not *ultra vires*, and government action in the total absence or want of power, which is. *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968).

More importantly, in *Nelson*, *the county violated an express statutory prohibition (RCW 36.87.130) grounded in the State's public trust doctrine⁶⁹ that forbids the State from vacating roads abutting bodies of water, except for public purposes or when the land is zoned for industrial use.⁷⁰*

⁶⁹ The public trust doctrine evolved out of the public necessity for access to navigable waters and shorelands. *Orion Corp. v. State*, 109 Wn.2d 621, 640, 747 P.2d 1062 (1987). It is partially encapsulated in the language of the State constitution which reserves state ownership in "the beds and shores of all navigable waters in the state". Const. Art. 17, §1. The doctrine has always existed in the State of Washington, *Caminiti v. Boyle*, 107 Wn.2d 662, 670 (1987), and it prohibits the State from disposing of its interest in the waters of the state if the public's right of access is substantially impaired, unless the action promotes the overall interests of the public. *Id.* at 670.

⁷⁰ *Nelson*, 36 Wn. App. at 23.

Unlike the shore land at issue in *Nelson*, the WSDOT alley was not being held for the public trust, and it was not subject to special constitutional (Const. Art. 17, §1) and statutory protections. As such, “the strong legislative intent that property held for public use and benefit may not be summarily disposed without giving the public affected a significant opportunity to participate”⁷¹ that formed the basis for the *Nelson* court’s decision is completely lacking in this case.

Similarly, in *State v. City of Pullman*, 23 Wash. 583, 63 P. 265 (1900), also cited by Appellant, the issue was whether the government action was *ultra vires* or subject to the equitable estoppel doctrine. In *City of Pullman*, the town’s action was deemed *ultra vires* because the town had *no* statutory authority to contract for a water system.

STW citations to *Jones v. City of Centralia*, 157 Wn. 194, 289 P. 3 (1930) and *Barendregt v. Walla Walla School Dist.*, 26 Wn. App. 246, 611 P.2d 1385 (1980) are also inapposite.

In *Jones*, the Supreme Court held that the City could ratify its illegal action of contracting to build a power plant because the

⁷¹ *Nelson*, 36 Wn. App. at 24.

City had the authority, but had improperly exercised that authority. *Jones*, 157 Wn. at 221.

The Court distinguished the case at bar from other cases where courts had not allowed ratification, highlighting that those cases involved situations where “municipal officers, who had absolutely no vestige of authority to enter into the agreements by which they sought to bind the municipality.” *Jones*, 157 Wn. at 217. The Court went on to hold that moneys paid before the contract was ratified could not be recovered because the payments “were made and received by the respective parties in good faith[.]” *Jones*, 157 Wn. at 221.

Thus, *Jones* stands for the proposition that if an agency merely exercises its powers in an irregular fashion, equitable principles apply. The case does not stand for the principal that any irregularity in government action renders that action *ultra vires*.

Barendregt stands for the same proposition. In that case, the court carefully distinguished between situations where an agency has the authority to act, but has exercised that authority in an irregular manner, and situations where the agency has no authority. *Barendregt*, 26 Wn. App. at 250.

In contrast to the *Noel, Nelson, City of Pullman*, and *Barendregt* cases cited by STW, here, WSDOT did not act outside of its authority or in complete disregard of a statutory scheme. Thus, its actions were not *ultra vires*.

There are no Washington cases interpreting RCW 47.12.063 or .283. However, cases from other jurisdictions further support the notion that government land sales are not automatically voided for failure to comply with notice procedures.

In *Summer Cottagers' Assoc. v. City of Cape May*, 111 A.2d 435, 34 N.J. Super. 67 (1954), the notice provided for the sale of city property was faulty because it had been published in a special edition of the newspaper, which had been received by less than 11% of the newspaper's regular subscribers.

Despite the notice defect, the court refused to void the sale because the actions of the city and purchaser had been in the utmost good faith and the challengers, having knowledge of the sale, "did nothing toward asserting their right with diligence."

Id. at 77. The court concluded:

In all other respects the procedure before and after the sale was in accordance with statute. Although we consider the publication defective, we feel it was not in itself in this case a sufficient deviation from the prescribed procedure to render the sale void. *Id.*

In *Newbold v. Glenn*, 67 Md. 489, 10 A. 242 (1887), the City of Baltimore sold land at a private sale without complying with a statute that required notice of the pending sale to be published once a week for a period of three weeks. *Id.* at 243. While the court recognized that notice should have been given because it is intended to invite full competition and to prevent collusive and fraudulent sales, the court held:

[W]here property has been sold at private sale for its full market value, in the absence of fraud or collusion, we are not prepared to hold that the mere failure on the part of the city to observe this requirement of the statute would in itself invalidate the sale.”

D. STW Cannot Show That The Staubs Would Have Been The High Bidder If An Auction Had Been Held For The Surplus Alley Sale.

At their depositions, both Tim Pavolka and Nicholas Staub conceded that, even if Staub had been given the opportunity to bid on the surplus real property, they cannot show that Staub would have been the successful bidder, and thereafter, the successful purchaser.⁷²

Additionally, the terms of a WSDOT auction include the condition that the State “reserves the right to cancel any or all sales

⁷² CP 401: T. Pavolka Dep. 19:7-11; CP 375: N. Staub Dep. 63:10-19 (no way of knowing if Staub would have been the successful bidder or that it would have ultimately acquired the property).

and reject any or all bids.”⁷³ Thus, a bidder’s “offer” to purchase is modified by the terms of WSDOT’s invitation to bid and conditions of sale, which contain a reservation that may be exercised after receipt of a bid. In other words, the reservation to reject or cancel a sale is a condition of that sale, which would have been binding on STW’s predecessor, Staub, as a potential bidder.

Washington courts have long recognized that a bid is nothing more than an offer that does not create a vested property right. *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 597, 835 P.2d 1012 (1992) (competitive bidding laws give the public a right to frugal state contracting through competition; they do not give the low bidder a vested right to state contracts).

The right to reject “any and all bids” was affirmed in *Continental Can v. Commercial Waterway Dist. No. 1*, 56 Wn.2d 456, 347 P. 2d 887 (1959). Furthermore, a bidder at public auction, whose bid has not been accepted, cannot (even though the highest and best bidder) force the acceptance of his bid. *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 287, 288, 88 Pac. 199 (1907) (“unaccepted offers to enter into a contract bind neither party, and can give rise to no cause of action.”).

⁷³ See CP 338-340: WSDOT General Sale Terms.

STW cannot show that had this surplus parcel been offered to the general public at auction, pursuant to RCW 47.12.283, that Staub would have submitted the highest acceptable bid or that the State would have received more than it did in the sale to Sustainable. And, having acquired no vested property right, neither Staub nor STW can overcome the rights that vested in Sustainable at the time of sale as a *bona fide* purchaser for value.

E. Sustainable Is A *Bona Fide* Purchaser For Value And Is Entitled To Rely Upon the Deed Granted By The State.

RCW 47.12.063(2)(g) authorizes WSDOT to sell land "at its fair market value" to any abutting private owner. It is undisputed that Sustainable was such an owner that approached the State in good faith to purchase the alley. Sustainable provided WSDOT with a survey of the Frye property that it recently acquired; it followed the procedure that WSDOT laid out for the sale; it agreed to the quitclaim form of deed that WSDOT offered; and it paid WSDOT's asking price. Sustainable also incurred expense to perform a Phase 1 environmental analysis of the property and to prepare and record the sale documents. In short,

Sustainable faithfully executed its side of the parties' purchase and sale contract.⁷⁴

In this case, Sustainable falls under Washington's bona fide purchaser doctrine, which 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) (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 WSDOT was following the proper procedure when it sold the land. In *State v. Hewitt Land Company*, 74 Wn. 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

⁷⁴ CP 451-459: Sustainable/WSDOT purchase and sale agreement.

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.*⁷⁵

Here, there is no evidence of fraud, and the actual beneficiary of the WSDOT sale, the public, received full value for the property. As a bona fide purchaser for value, Sustainable was entitled to rely upon the deed provided by the State and, under the facts of this case, that deed is conclusive of the rights of the parties.

STW cites three federal cases to argue against application of the *bona fide* purchaser doctrine. The federal authority cited by STW actually supports Sustainable's arguments and shows why the *bona fides* purchaser doctrine applies in this case.

The first case cited by STW, *City of Brenham v. German-American Bank*, merely stands for the proposition that where

⁷⁵ *Id.* at 586-88.

“there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons.” *City of Brenham v. German-American Bank*, 114 U.S. 173, 188 (1892).

But 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 County v. Sovereign Camp, W.O.W.*, 12 F.2d 883, 884 (6th Cir., 1926), 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. *Henderson*, 12 F.2d 885.

Thus, in the second case cited by STW – *Henderson* – the court’s ruling mirrored the Washington court’s ruling in *Hewitt Land Company*, holding that a purchaser was entitled to rely on the government’s authority and that the *bona fides* doctrine applied despite a procedural violation. *Henderson*, 12 F.2d at 885.

STW's third federal case,⁷⁶ like the first, dealt with a lack of statutory authority and clear notice on the bonds of the limitations – and even in that case, the court held that the estoppel doctrine could apply if the face of the bonds did not disclose the failure of a condition. *City of McLaughlin v. Turgeon*, 75 F.2d 402, 406 (8th Cir. 1935).

Taken together, these three 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.”).

⁷⁶ The fourth federal case cited by STW, *City of Huron v. Evensen*, 113 F.2d 598 (8th Cir. 1940) does not address the *bona fides* doctrine at all.

Here, STW's claim is that the State failed to follow a procedural requirement. There is nothing to suggest that Sustainable had notice of this alleged failure. In fact, the Staubs had actual notice of the sale before it closed, but did not express any interest in the alley. Accordingly, even pursuant to STW's own cases, this Court should affirm the trial court.

STW's attempt to distinguish *Glaser v. Holdorf*, 56 Wn.2d 204, 352 P.2d 212 (1960) on its facts is misguided. While the case does involve two parties claiming interest in one property, the Court does not limit the application of the *bona fide* purchaser doctrine to that factual situation. Instead, the Court first defined the *bona fide* purchaser doctrine, and then applied the doctrine to the particular facts in that case. *Glaser*, 56 Wn.2d at 209.

STW's argument that the policies behind the *bona fide* purchaser doctrine "give way to protection of the public interest" (Br. of Appellant at 20-21 citing *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wn.2d 121, 133-35, 654 P.2d 67 (1982)) is completely lacking in support, given that STW has cited to the dissenting opinion in *Laborers*, a fact STW failed to note.

Finally, STW tries to rely on *Levien v. Fiala*, 79 Wn. App. 294, 902 P.2d 170 (1995) to suggest that Sustainable should have

somehow known the State did not provide notice to the Staubs, but, again, that case does not support STW's argument. Instead, the case serves as an example of how purchasers do not have to carry out extensive investigations to qualify as *bona fide* purchasers.

In *Levien*, the court held that a buyer was still a *bona fide* purchaser of the entire property described in the legal description on the deed, even though a fence on the property was not placed on the actual boundary and the neighbor had been using the property on his side of the fence as his own. *Levien*, 79 Wn. App. at 299. A visit to the property did not highlight the discrepancy between the fence and legal description, and the court did not require the purchaser to investigate.

Here, STW is arguing that Sustainable should have somehow investigated whether the State had given the Staub's notice. But like the purchaser in *Levien*, nothing in the transaction suggested to Sustainable that notice to other abutting property owners was required or that it had not been given. And because Sustainable knew the Staubs were moving, and Sustainable had informed the Staubs of the pending and completed sale without the Staubs raising any objection, Sustainable had every reason to think

the Staubs were not interested. Thus, *Levien* supports the trial court's ruling rather than STW's position.

F. STW's Claim Is Barred By The Doctrines of Laches and Estoppel.

As an assignee, STW steps into the shoes of its assignors, the Staubs, and cannot recover more than they would have been entitled to recover. *Pain Diagnostic and Rehabilitation Associates, P.S. v. Brockman*, 97 Wn. App. 691, 699, 988 P.2d 972 (1999). Thus, STW is subject to the same equitable defenses of laches and estoppel that would have barred claims made by the Staubs.

Nicholas Staub testified that he was aware of the alley sale for over one year, and he acknowledges that he received written notice of the sale from Sustainable on September 7, 2005.⁷⁷ Written notice was provided for a second time on September 16, 2005—again without objection from the Staubs.⁷⁸

When he first learned of the sale in late-2004 or early 2005, his only action was to email his accountant.⁷⁹ Despite receiving actual written notice in September 2005, Mr. Staub waited for over four months, until January 19, 2006, to contact WSDOT and

⁷⁷ CP 364, 369: N. Staub Dep. 19:10-25; 38:8-25; 39:5-8; 40:16-25; 41:1-13.

⁷⁸ CP 435 and CP 514.

⁷⁹ CP 364, 365: N. Staub Dep. 20:7-15; 20:23-25; 21:1-6; 25:7-11.

express an interest in the property, which was a month after the Staubs had signed a purchase and sale agreement with STW and while Mr. Staub was agreeing with STW to use the irregularities in the alley sale to pressure Sustainable into granting an early termination of the Romaine Electric lease.⁸⁰

1. Laches.

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).⁸¹ The elements of laches are: 1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; 2) an unreasonable delay by the plaintiff in commencing that cause of action; and 3) damage to the defendant resulting from the unreasonable delay.⁸²

Damage to a defendant can arise either from acquiescence in the act or from a change of conditions.⁸³ As an equitable remedy, laches is an extraordinary defense, and determining whether an injury is cognizable under the doctrine of laches

⁸⁰ CP 365; N. Staub Dep. 24:21-25.

⁸¹ In *Lopp*, the plaintiff was barred by laches from challenging the school district's decision to issue construction bonds when he failed to exercise his rights before the sale was approved or notify the district of his objections.

⁸² *Id.* at 759.

⁸³ *Id.* at 759-60.

depends upon assessing the inherent equities of a particular case. *Crodle v. Dodge*, 99 Wash. 121, 131-32 (1917).

WSDOT's statute, RCW 47.12.063(2)(g), gives an interested party 15 days, after receipt of notice of the proposed sale, to notify WSDOT of the party's interest in the surplus property. The Staubs knew about the sale to Sustainable for over a year and, by any measure, their request to purchase came long after the statutory 15-day time period had expired.

In the meantime, both the State and Sustainable changed their respective positions. The State expended money to conduct an appraisal and prepare the sale documents, and Sustainable paid for an environmental analysis and the \$180,000 purchase price. Under the circumstances and consistent with *Lopp*, STW, as the assignee of the Staubs' claims, should be barred by the Staubs' inaction from contesting the sale.

2. Estoppel.

Estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has been established as the truth. *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948) (respondents estopped from claiming damages for encumbrances after closing of a property sale, when

respondents had knowledge of the encumbrances and failed to object to them).

The three elements of estoppel are: 1) conduct, acts, or statements of a party to be estopped that are inconsistent with a claim afterward asserted by that party; 2) action in reasonable reliance by the party asserting the estoppel; and 3) injury to the party asserting estoppel if the other party was permitted to contradict the prior conduct, acts, or statements. *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943). Silence coupled with knowledge of an adverse claim will estop a party from later asserting an inconsistent claim. *Univ. of Wash. v. Seattle*, 108 Wn.2d 545, 741 P.2d 11 (1987).⁸⁴

All of the elements of estoppel are met in this case. Nicholas Staub knew the surplus property was owned by the State. For over a year, he knew that Sustainable was purchasing the property, and he remained silent even after he was twice informed in writing that the purchase had occurred. The inequities in this case are further compounded by the fact that Staubs' renewed interest in the alley coincided with their efforts to pressure

⁸⁴ See also, *Huff v. Northern Pac. Ry* 38 Wn.2d 103, 228 P.2d 121 (1951) (estoppel may arise from silence or inaction as well as from words or actions).

Sustainable into a \$100,000 early termination of the Romaine Electric lease. These facts speak for themselves and establish that the Staubs' conduct bars STW's claim on equitable grounds.

G. STW Is Not Entitled To An Award Of Attorneys Fees.

STW would not be entitled to attorney fees and costs pursuant RCW 4.84.350 even if it prevailed because the sale of property is not "agency action" as that term is used in the statute. This is because, as STW acknowledges, the sale of property is excluded from the definition of "agency action." STW's argument that it is challenging the implementation of RCW 47.12.063, not the sale of property, is specious because every sale of property must be conducted pursuant to statute and if compliance with those statutes qualified as "agency action" then the express exclusion of the sale of property would be meaningless.

V. CONCLUSION

For all of the forgoing reasons, defendants/respondents WSDOT and Sustainable respectfully request that this Court uphold the grant of summary judgment affirming the property sale and dismissing STW's claims.

RESPECTFULLY SUBMITTED this 23rd day of January,

2008.

FOSTER PEPPER PLLC

ROBERT M. MCKENNA
ATTORNEY GENERAL

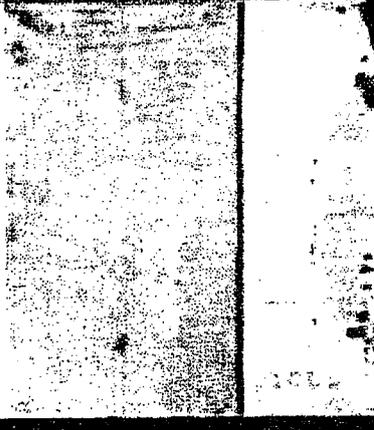
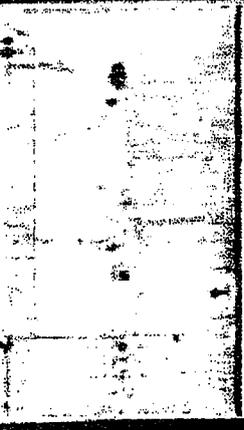
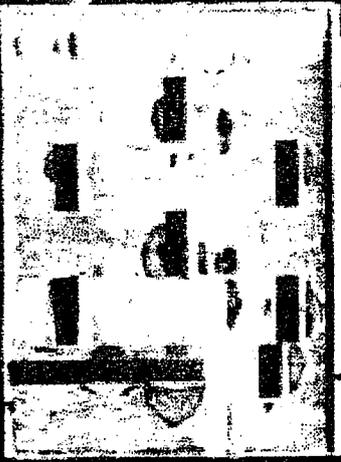
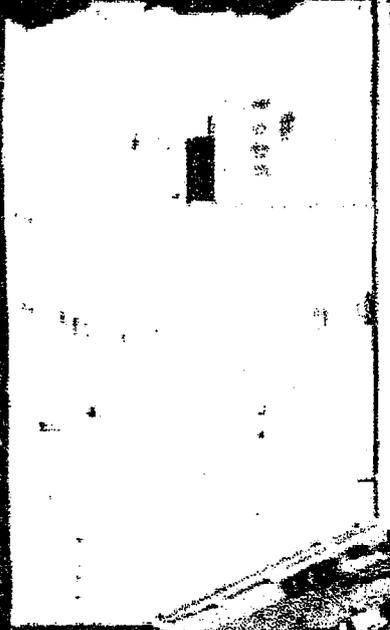


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APPENDIX I



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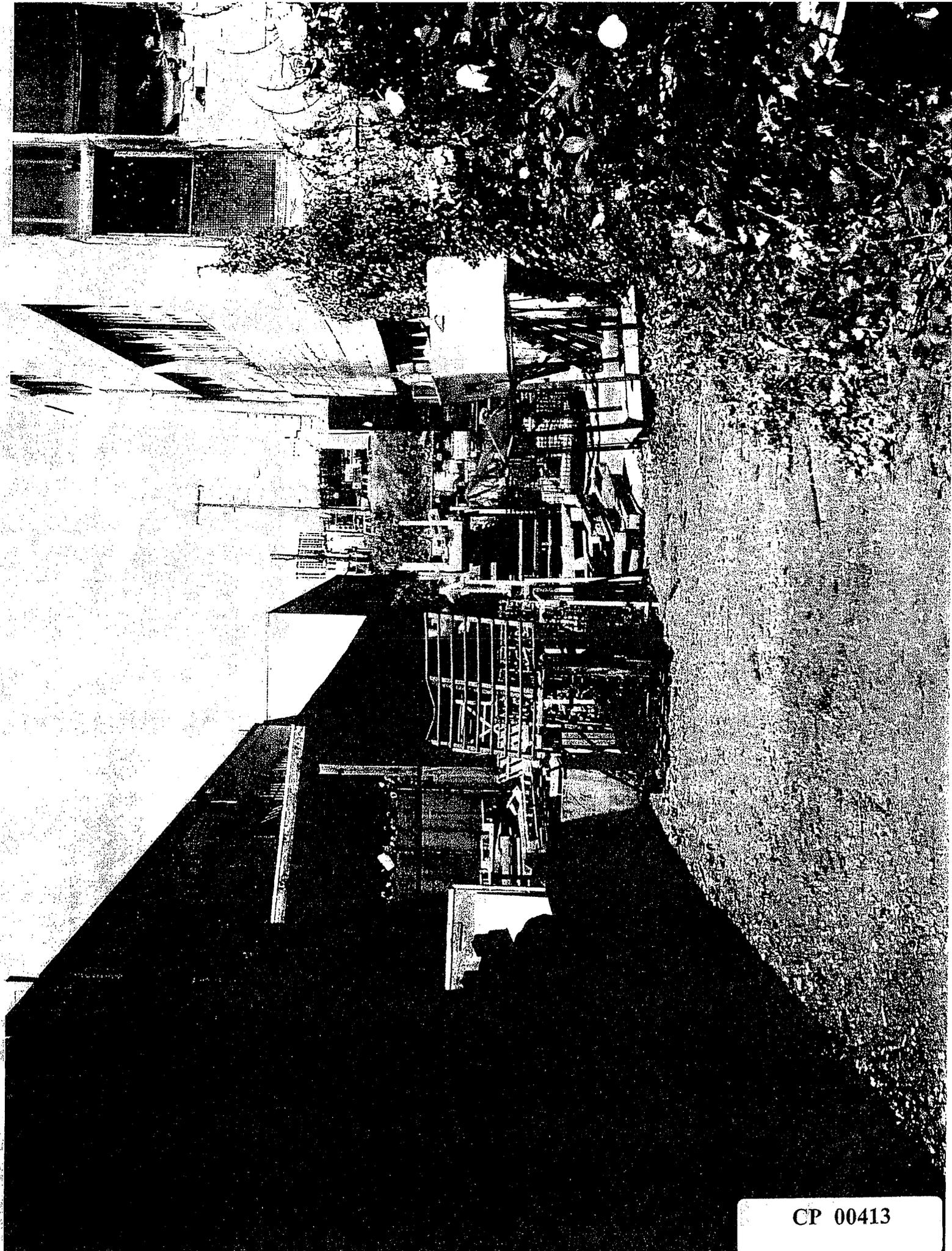
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CP 00357

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CP 00413

APPENDIX II

Glen,

You mean that's not what you mean by clear??? LOL. Yes we do need to get something on the calendar because we have purchased a building and are in serious discussions with parties regarding the Old building. What are your schedules like?

Thanks
Nick

-----Original Message-----

From: Glen Scheiber [mailto:gscheibe@GBSre.com]
Sent: Wednesday, September 07, 2005 2:38 PM
To: Nick Staub (E-mail)
Subject: Romaine Electric & Adjoining Alley

Nick:

Hope all is well. I have not checked in with you in a long time. I wanted to get in touch with you on a few updates. It looks like your business is going well, based on my recent walk of the property.

First of all I wanted to see how you were coming on your future space search. I had heard you were out in the market for 100,000 SF, but that was quite a while ago. I think your lease is up with us in early 2007.

Secondly, wanted to let you know we recently purchased the alley from the State of Washington that separates our property from your building. Our intent is to keep it clear of material, remove the fences and lease it out. You may be interested in that or not if you have a use for that in your business. I have attached a picture in its current condition.

Thirdly, we wanted to keep you up to date in our plans for ultimate redevelopment of our property and the timelines we are working with. I would like to get a meeting with Greg Smith, Jeff Schoenfeld, and I to touch base with you. Both as a neighbor and as a landlord. Let me know if you would be open for a meeting and we can come down to the property.

Thanks

<<Frye Alley.jpg>>

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Jeff Schoenfeld

From: Jeff Schoenfeld
Sent: Friday, September 16, 2005 9:40 AM
To: Nick Staub (E-mail)
Subject: Meeting Recap - Romaine

Nick-

I enjoyed meeting with you...

I am sorry we are losing you as a tenant - but sounds like your new Kent location will work very well for you.

Here is the follow-up on a few items we discussed

1. ALLEY

We will let you continue to use the alley at no charge through the end of the year 12/31/05.

I would appreciate if you move the truck and make best efforts to keep the alley as tidy as possible

2. PARKING PERMITS

I spoke to Ken Kime at Diamond.

I asked him to contact you regarding a discount rate on permits

3. ROMAINE BUILDING

As I mentioned, we are an interested buyer...

Our quick analysis is that the cost to improve the building exceeds its value - so we believe it is a tear-down.

We paid \$52 per square foot for the land we own

At \$52 for your land - 15,400 square feet - that would equate to \$800,800 - we know you are not a seller at that value.

We are willing to offer \$100 per square foot - \$1,540,000

I believe that \$100 per square foot would be the highest land value paid in the area - and we would still have the liability of removing the building (est. \$200,000)

Let me know if you would like us to send a LOI at this value.

Sincerely-

Jeff

Jeff Schoenfeld
jschoenfeld@gbsre.com
206.262.2892 office
206.714.4206 cell

APPENDIX III

ADDENDUM

This is an Addendum to that Purchase Agreement ("Agreement") with an Effective Date of December 18, 2005 between FVS LLC as Seller and South Tacoma Way LLC as Buyer for the property legally described as:

THE SOUTH 20 FEET OF LOT 6, AND ALL OF LOTS 7 AND 8, BLOCK 246, SEATTLE TIDE LANDS, IN KING COUNTY, WASHINGTON; EXCEPT THE WEST 165 FEET THEREOF.

("Property"). Romaine Electric Corporation, ("Romaine") a Washington corporation owned by Nick Staub, a member of the Seller, is also a party to this Addendum. In exchange for good and valuable consideration, Seller, Buyer and Romaine agree as follows:

- 1. Except in the event this transaction fails to Close as provided in the Agreement, Seller agrees not to take any action to compromise, settle or waive any rights or claims Seller may have relating to the sale of an abutting piece of property by the State of Washington to Sustainable Urban Development #1, LLC ("SUD"), pursuant to that Quitclaim Deed dated August 23, 2005, and recorded under King County Recording No. 20050824002595 ("SUD Property").
- 2. Romaine leases a building from SUD which is adjacent to the Property ("Romaine Lease"). The Romaine Lease has a termination date of approximately, 2007. Romaine intends to move its operations to a different building and would like to terminate the Romaine Lease as soon as possible after April 30, 2006.
- 3. Buyer intends to negotiate with SUD to acquire a portion of the SUD Property abutting the Property. As a part of those negotiations, if Buyer reaches an agreement whereby SUD agrees to allow an early termination of the Romaine Lease with SUD, Romaine agrees to pay Buyer 25% of the first \$100,000.00 in rental savings, and 50% of any rental savings over \$100,000.00. For example, if through Buyer's negotiations with SUD the Romaine Lease is terminated effective March 31, 2006, and there is \$135,000.00 in rental savings to Romaine as a result of this early termination, Romaine will pay Buyer \$42,500.00. Any payment by Romaine to Buyer shall be due within ten days after the effective termination date of the Romaine Lease.

Buyer shall exercise diligent and timely business efforts to effect early termination of the Romaine Lease.

*JSS
GN*

DC324057.doc

\$42,500.00

*12 2-6-07
PAUDLKA*

4. The terms and conditions in this Addendum shall survive the Closing of this transaction and shall not be deemed to have merged into the deed.

Buyer:

South Tacoma Way LLC

By: [Signature]

Its: Manager Mink

Date: 2/14/05

Seller:

FVS LLC

By: [Signature]

Its: [Signature]

Date: 2/12/06

Romaine Electric Corporation

By: [Signature]

Its: PRESIDENT

Date: 2/12/08

5. Buyer hereby waives all its conditions precedent to closing; and shall complete FID the closing as soon as administratively possible.

APPENDIX IV

Severability—1984 c 7: See note following RCW 47.01.141.

47.12.044 Proceedings to acquire property or rights for highway purposes—Precedence. Court proceedings necessary to acquire property or property rights for highway purposes pursuant to RCW 47.12.010 take precedence over all other causes not involving the public interest in all courts in cases where the state is unable to secure an order granting it immediate possession and use of the property or property rights pursuant to RCW 8.04.090 through 8.04.094. [1983 c 140 § 2.]

47.12.050 Work on remaining land as payment. Whenever it is considered in the securing of any lands for state highway purpose, whether by condemnation or otherwise, that it is for the best interest of the state, for specific structural items of damage claimed, the court or judge may order or the person whose lands are sought may agree that a portion or all work or labor necessary to the land or remaining land by reason of the taking by way of damage, be performed by the state through the department as all or a part of the consideration or satisfaction of the judgment therefor, in which event the department may perform the work as a portion of the right of way cost of the state highway. [1984 c 7 § 119; 1961 c 13 § 47.12.050. Prior: 1937 c 53 § 27; RRS § 6400-27.]

Severability—1984 c 7: See note following RCW 47.01.141.

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;

(2006 Ed.)

(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.]

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.

47.12.064 Affordable housing—Inventory of suitable property. (1) The department shall identify and catalog real property that is no longer required for department purposes and is suitable for the development of affordable housing for very low-income, low-income, and moderate-income households as defined in RCW 43.63A.510. The inventory shall include the location, approximate size, and current zoning classification of the property. The department shall provide a copy of the inventory to the department of community, trade, and economic development by November 1, 1993, and every November 1 thereafter.

(2) By November 1 of each year, beginning in 1994, the department shall purge the inventory of real property of sites that are no longer available for the development of affordable housing. The department shall include an updated listing of real property that has become available since the last update. As used in this section, "real property" means buildings, land, or buildings and land. [1995 c 399 § 121; 1993 c 461 § 10.]

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

47.12.066 Sale or lease of personal property—Provision of services—Proceeds. (1) The department may sell at fair market value, or lease at rental value (economic rent), materials or other personal property to any United States agency or to any municipal corporation, political subdivision, or another agency of the state and may provide services to any United States agency or to any municipal corporation,

struction project the department may sell the property at fair market value in accordance with requirements of RCW 47.12.063. All proceeds of such sales shall be deposited in the advance right of way revolving fund.

(4) Deposits in the fund may be reexpended as provided in RCW 47.12.180, 47.12.200 through 47.12.230, and 47.12.242 through 47.12.248 without further or additional appropriations. [1991 c 291 § 4; 1984 c 7 § 126; 1969 ex.s. c 197 § 9.]

Severability—1984 c 7: See note following RCW 47.01.141.

47.12.248 Structures acquired in advance of programmed construction—Maintenance. Whenever the department purchases or condemns any property under RCW 47.12.180 through 47.12.240 or 47.12.242 through 47.12.246, the department shall cause any structures so acquired and not removed within a reasonable time to be maintained in good appearance. [1984 c 7 § 127; 1969 ex.s. c 197 § 10.]

Severability—1984 c 7: See note following RCW 47.01.141.

47.12.250 Acquisition of property for preservation, safety, buffer purposes. The department is authorized to acquire by purchase, lease, condemnation, gift, devise, bequest, grant, or exchange, title to or any interests or rights in real property adjacent to state highways for the preservation of natural beauty, historic sites or viewpoints or for safety rest areas or to provide a visual or sound buffer between highways and adjacent properties. However, the department shall not acquire, by condemnation, less than an owner's entire interest for providing a visual or sound buffer between highways and adjacent properties under RCW 47.12.010 and 47.12.250 if the owner objects to the taking of a lesser interest or right. [1984 c 7 § 128; 1967 c 108 § 5; 1965 ex.s. c 170 § 62.]

Severability—1984 c 7: See note following RCW 47.01.141.

Roadside areas—Safety rest areas: Chapter 47.38 RCW.

Scenic and Recreational Highway Act: Chapter 47.39 RCW.

47.12.260 Acquisition of real property subject to local improvement assessments—Payment. See RCW 79.44.190.

47.12.270 Acquisition of property for park and ride lots. The department may acquire real property or interests in real property by gift, purchase, lease, or condemnation and may construct and maintain thereon fringe and transportation corridor parking facilities to serve motorists transferring to or from urban public transportation vehicles or private car pool vehicles. The department may obtain and exercise options for the purchase of property to be used for purposes described in this section. The department shall not expend any funds for acquisition or construction costs of any parking facility to be operated as a part of a transit system by a metropolitan municipal corporation unless the facility has been approved by the department in advance of its acquisition or construction. [1984 c 7 § 129; 1973 2nd ex.s. c 18 § 1.]

Severability—1984 c 7: See note following RCW 47.01.141.

47.12.283 Sale of real property authorized—Procedure—Disposition of proceeds. (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 thereof by publication on the same day of the week for two consecutive weeks, with the first publication at least two weeks prior to the date of the auction, in a legal newspaper of general circulation in the area where the property to be sold is located. The notice shall be placed in both the legal notices section and the real estate classified section of the newspaper. The notice shall contain a description of the property, the time and place of the auction, and the terms of the sale. The sale may be for cash or by real estate contract.

(3) The department shall sell the property at the public auction, in accordance with the terms set forth in the notice, 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. No property shall be sold by negotiations or through a broker for less than the property's appraised fair market value. Any offer to purchase real property pursuant to this subsection shall be in writing and may be rejected at any time prior to written acceptance by the department.

(5) Before the department shall approve any offer for the purchase of real property having an appraised value of more than ten thousand dollars, pursuant to subsection (4) of this section, 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. A subsequent offer shall not be considered unless it is accompanied by a deposit of twenty percent of the offer in the form of cash, money order, cashier's check, or certified check payable to the Washington state treasurer, to be forfeited to the state (for deposit in the motor vehicle fund) if the offeror fails to complete the sale if the offeror's offer is accepted. If a subsequent offer is received, the first offeror shall be informed by registered or certified mail sent to the address stated in his offer. The first offeror shall then have ten days, from the date of mailing the notice of the increased offer, in which to file with the designated state employee or real estate broker a higher offer than that of the subsequent offeror. After the expiration of the ten day period, the department

shall approve in writing the highest and best offer which the department then has on file.

(6) All moneys received pursuant to this section, less any real estate broker's commissions paid pursuant to RCW 47.12.320, shall be deposited in the motor vehicle fund. [1979 ex.s. c 189 § 1.]

Effective date—1979 ex.s. c 189: "This 1979 act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1979." [1979 ex.s. c 189 § 8.]

47.12.287 Exchange of real property authorized—Conveyance by deed. The department of transportation is hereby authorized to enter into an exchange agreement with the owner of real property required for highway purposes to convey to such owner real property, owned by the state and under the department's jurisdiction, as full or part consideration for property to be acquired for highway purposes. Such an exchange agreement may relate back and apply to any exchange of property previously agreed to and partially executed (pursuant to an earlier exchange agreement found to be void for want of a governor's deed as required by prior law), and shall be subject to such agreed terms and conditions as are authorized by RCW 47.12.063(3) as now existing or hereafter amended. Any conveyance from the state of Washington made pursuant to this section shall be by deed executed by the secretary of transportation, which shall be duly acknowledged. [1979 ex.s. c 189 § 2.]

Effective date—1979 ex.s. c 189: See note following RCW 47.12.283.

47.12.290 Sale of real property—Execution, acknowledgement, and delivery of deed. When full payment for real property agreed to be sold as authorized by RCW 47.12.283 has been received, the secretary of transportation shall execute the deed which shall be duly acknowledged and deliver it to the grantee. [1979 ex.s. c 189 § 3; 1975 1st ex.s. c 96 § 6; 1973 1st ex.s. c 177 § 2.]

Effective date—1979 ex.s. c 189: See note following RCW 47.12.283.

47.12.300 Sale of unneeded property—Department of transportation—Authorized—Rules. See RCW 47.56.254.

47.12.301 Sale of unneeded property—Department of transportation—Certification to governor—Execution, delivery of deed. See RCW 47.56.255.

47.12.302 Department of transportation—Sale of unneeded property. See RCW 47.60.130.

47.12.320 Sale of property—Listing with broker. The department may list any available properties with any licensed real estate broker at a commission rate otherwise charged in the geographic area for such services. [1984 c 7 § 130; 1973 1st ex.s. c 177 § 7.]

Severability—1984 c 7: See note following RCW 47.01.141.

47.12.330 Advanced environmental mitigation—Authorized. For the purpose of environmental mitigation of transportation projects, the department may acquire or

develop, or both acquire and develop, environmental mitigation sites in advance of the construction of programmed projects. The term "advanced environmental mitigation" means mitigation of adverse impacts upon the environment from transportation projects before their design and construction. Advanced environmental mitigation consists of the acquisition of property; the acquisition of property, water, or air rights; the development of property for the purposes of improved environmental management; engineering costs necessary for such purchase and development; and the use of advanced environmental mitigation sites to fulfill project environmental permit requirements. Advanced environmental mitigation must be conducted in a manner that is consistent with the definition of mitigation found in the council of environmental quality regulations (40 C.F.R. Sec. 1508.20) and the governor's executive order on wetlands (EO 90-04). Advanced environmental mitigation is for projects approved by the transportation commission as part of the state's six-year plan or included in the state highway system plan. Advanced environmental mitigation must give consideration to activities related to fish passage, fish habitat, wetlands, and flood management. Advanced environmental mitigation may also be conducted in partnership with federal, state, or local government agencies, tribal governments, interest groups, or private parties. Partnership arrangements may include joint acquisition and development of mitigation sites, purchasing and selling mitigation bank credits among participants, and transfer of mitigation site title from one party to another. Specific conditions of partnership arrangements will be developed in written agreements for each applicable environmental mitigation site. [1998 c 181 § 2; 1997 c 140 § 2.]

Findings—1998 c 181: "The legislature finds that fish passage, fish habitat, wetlands, and flood management are critical issues in the effective management of watersheds in Washington. The legislature also finds that the state of Washington invests a considerable amount of resources on environmental mitigation activities related to fish passage, fish habitat, wetlands, and flood management. The department of transportation's advanced environmental mitigation revolving account established under RCW 47.12.340, is a key funding component in bringing environmental mitigation together with comprehensive watershed management." [1998 c 181 § 1.]

Intent—1997 c 140: "It is the intent of chapter 140, Laws of 1997 to provide environmental mitigation in advance of the construction of programmed projects where desirable and feasible, [which] will provide a more efficient and predictable environmental permit process, increased benefits to environmental resources, and a key tool in using the watershed approach for environmental impact mitigation. The legislative transportation committee, through its adoption of the December 1994 report "Environmental Cost Savings and Permit Coordination Study," encourages state agencies to use a watershed approach based on a water resource inventory area in an improved environmental mitigation and permitting process. Establishment of an advanced transportation environmental mitigation revolving account would help the state to improve permit processes and environmental protection when providing transportation services." [1997 c 140 § 1.]

47.12.340 Advanced environmental mitigation revolving account. The advanced environmental mitigation revolving account is created in the custody of the treasurer, into which the department shall deposit directly and may expend without appropriation:

(1) An initial appropriation included in the department of transportation's 1997-99 budget, and deposits from other identified sources;

No. 36687-8-II

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, LLC

Defendants/Respondents.

**APPEAL FROM THURSTON COUNTY SUPERIOR COURT
HONORABLE CHRISTINE A. POMEROY**

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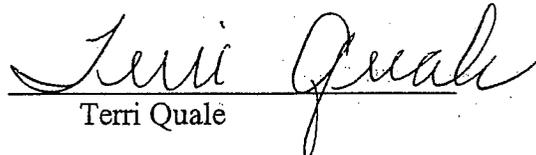
CERTIFICATE OF SERVICE

I, Terri Quale, certify under penalty of perjury that true and correct copies of Washington State Department of Transportation and Sustainable Urban Development's Joint Response to Plaintiff/Appellant's Opening Memorandum were delivered as follows:

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