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SUPREME COURT
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No. 82212-3

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SOUTH TACOMA WAY, LLC

Respondent,

v.

STATE OF WASHINGTON AND SUSTAINABLE URBAN
DEVELOPMENT # 1, LLC

Petitioner.

**PETITIONER SUSTAINABLE URBAN DEVELOPMENT'S
SUPPLEMENTAL BRIEF**

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TABLE OF CONTENTS

Page

1. SUMMARY OF CASE 1

2. STATEMENT OF RELEVANT FACTS 10

3. ARGUMENT 10

 3.1 Statutory Scheme for the Sale of Surplus WSDOT
 Property. 11

 3.2 WSDOT’s Notice Error Did Not Render Its Sale of
 Surplus Property Ultra-Vires. 12

 3.3 STW Lacks Standing To Challenge the Sale to
 Sustainable. 16

 3.4 STW Was a *Bona Fide* Purchaser for Value that
 Was Entitled to Rely Upon the Deed Conveyed by
 the State. 19

4. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

<i>A.A.B. Electric, Inc. v. Stevenson Pub. Sch. Dist. No. 303</i> , 5 Wn. App. 887, 491 P.2d 684 (1971).....	18
<i>Bain v. Clallam County Board of Commissioners</i> , 77 Wn.2d 542, 463 P.2d 617 (1970)	3
<i>Barendegt v. Walla Walla School Dist. #10</i> , 26 Wn. App. 246 (1980).....	4
<i>BBG Group, LLC v. City of Monroe</i> , 96 Wn. App. 517, 521, 982 P.2d 1176 (1999).....	17
<i>Board of Regents of Univ. of Wash. v. City of Seattle</i> , 108 Wn.2d 545, 741 P.2d 11 (1987)	2, 3, 4, 13
<i>Davis v. Dept. of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999)	12
<i>Dicks Enterprises, Inc. v. King County</i> , 83 Wn. App. 566, 922 P.2d 184 (1996).....	7, 16, 17, 18, 19
<i>Edwards v. Renton</i> , 67 Wn.2d 598, 409 P.2d 153 (1965)	13, 14, 15
<i>Finch v. Matthews</i> , 74 Wn.2d 161, 443 P.2d 833 (1968)	3, 4, 12, 13
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005)	7
<i>Haslund v. City of Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976)	13
<i>Henderson County v. Sovereign Camp, W.O.W.</i> , 12 F.2d 883 (6th Cir., 1926)	20
<i>Kramarevchy v. DSHS</i> , 122 Wn.2d 738, 863 P.2d 535 (1993)	2, 14
<i>Levien v. Fiala</i> , 79 Wn. App. 294, 902 P.2d 170 (1995).....	9, 19
<i>Nelson v. Pacific County</i> , 36 Wn. App. 17, 671 P.2d 785 (1984).....	3

<i>Newbold v. Glenn</i> , 67 Md. 489, 10 A. 242 (1887).....	15
<i>Paopao v. DSHS</i> , 145 Wn. App. 40, 185 P.3d 640 (2008).....	5
<i>Peerless Food Products v. State</i> , 119 Wn.2d 584, 853 P.2d 1012 (1992).....	14, 17, 18, 19
<i>Pierce County v. State</i> , 159 Wn.2d 16, 148 P.3d 1002 (2006)	14
<i>Properties Four, Inc. v. State</i> , 125 Wn. App. 108, 105 P.3d 416 (2005).....	3
<i>Skamania County v. Columbia River Gorge Com'n</i> , 144 Wn.2d 30, 26, P.3d 241 (2001)	7
<i>South Tacoma Way, LLC, v. State of Washington and Sustainable Urban Development #1, LLC</i> , 146 Wn. App. 639, 191 P.3d 938 (2008).....	6, 10
<i>State v. Hewitt Land Company</i> , 74 Wash. 573, 134 P. 474 (1913).....	2, 8, 9, 14, 20
<i>State v. Ort</i> , 66 Wash. 130, 119 P. 21 (1911).....	8, 9
<i>Summer Cottagers' Assoc. v. City of Cape May</i> , 111 A.2d 435, 34 N.J. Super. 67 (1954).....	15
<i>Wendel v. Spokane County</i> , 27 Wash. 121, 67 P. 576 (1902).....	12, 15

STATUTES & ADMINISTRATIVE CODES

RCW 28B.20.382.....	12
RCW 39.36.020	12
RCW 42.32.010	3
RCW Ch. 42.30.....	3
RCW Ch. 47.12.....	8
RCW 47.12.063	passim
RCW 47.12.063(1)(g)	13
RCW 47.12.063(2).....	11, 12

RCW 47.12.063(2)(a-h)	11
RCW 47.12.063(2)(g)	1
RCW 47.12.283	11, 12
RCW 80.12.030	12

1. SUMMARY OF CASE

In August 2005, Petitioner, Sustainable Urban Development, (“Sustainable”) purchased a small parcel of surplus property from the State of Washington Department of Transportation (“WSDOT”). The property was a former railroad spur.¹ Sustainable owned most, but not all of the land surrounding the surplus property.²

In April 2006, Respondent, South Tacoma Way (“STW”), challenges the validity of the sale to Sustainable because WSDOT made an error during the sales process when it failed to realize that STW’s predecessor-in-interest, Staub, was an abutting property owner that was entitled to notice of the pending sale under RCW 47.12.063. Had Staub responded to WSDOT’s notice within 15 days and expressed an interest in buying the property, WSDOT would have been required to post notice in the newspaper and hold a public auction. RCW 47.12.063(2)(g).

Here, the Court is asked to consider the proper scope of the *ultra vires* doctrine in the context of a land sale by a State agency. The Court is also asked to consider whether the successor-in-interest to a potential bidder has standing to challenge an executed contract. Finally, the Court is asked to consider whether it will continue to uphold the long-established rule that an innocent purchaser for value has a right to rely upon a deed

¹ CP 307; 318.

² CP 356 (map showing ownership interests).

granted by the State. *State v. Hewitt Land Company*, 74 Wash. 573, 134 P. 474 (1913).

Interpreting the dissenting opinion in *Kramarevcky v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993), Division II expanded the *ultra vires* doctrine and ruled that a *bona fide* purchaser for value could be stripped of its title to land, long after the deed had been executed, because WSDOT made a procedural error in conducting the sale.

Division II's decision conflicts with longstanding Washington law that limits the *ultra vires* doctrine to questions of jurisdictional authority—i.e. whether the Legislature granted a government agency authority to engage in a particular action.³ Once such authority has been established, the *ultra vires* doctrine does not void actions where the agency fails to strictly comply with the law or rightly decide some fact. *Hewitt*, 74 Wash. at 586; *Board of Regents of Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987).

The *ultra vires* doctrine shields government from liability by voiding the actions of employees that act outside the scope of their delegated authority. If an action is found to be *ultra vires*, then the action is void *ab initio*, and the action cannot form the basis for an estoppel claim

³ *Hewitt*, 74 Wash. at 585 (“There is a wide difference between power and jurisdiction and the irregular exercise of jurisdiction. ‘The test of jurisdiction is not the right decision, but the right to enter upon the inquiry and make some decision.’”).

against the government. *Finch v. Matthews*, 74 Wn.2d 161, 171, 443 P.2d 833 (1968); *Board of Regents of Univ. of Wash.*, 108 Wn.2d at 552 (“the State does not “act” and will not be held estopped based on the ultra vires acts of its officers”).

Thus, in *Properties Four, Inc. v. State*, 125 Wn. App. 108, 117-18, 105 P.3d 416 (2005), a State General Administration employee’s agreement to purchase land was *ultra vires* and void because the agreement violated the Washington Constitution’s prohibition on incurring liabilities or expending funds in excess of allotted appropriations.

In *Bain v. Clallam County Board of Commissioners*, 77 Wn.2d 542, 463 P.2d 617 (1970) an alleged oral collective bargaining contract was held void because the contract was not in writing, the money to fund the contract was not in the budget, and the contract was not properly adopted in conformance with the former version of Washington’s Open Public Meeting Act.⁴

And, in *Nelson v. Pacific County*, 36 Wn. App. 17, 23, 671 P.2d 785 (1984), Pacific County’s attempt to alienate public property through a settlement agreement was held *ultra vires* because the property was held in public trust and could not be alienated without legislative authority through a proscribed statutory procedure.

⁴ RCW 42.32.010 was repealed in 1971 and replaced with Ch. 42.30 RCW.

The key determination for whether particular government conduct is *ultra vires* is the distinction between an act that is within the realm of a state actor's power and an act that is outside the scope of the granted power. *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968).

If there is no authority vested by law in an agency's officers, no void act can be cured with the aid of the doctrine of estoppel. *Barendegt v. Walla Walla School Dist. #10*, 26 Wn. App. 246, 250 (1980). However, “[a]n act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not *ultra vires*.” *Board of Regents of Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987) (emphasis added).

WSDOT is statutorily authorized to dispose of surplus property, and it holds such property in a proprietary capacity. RCW 47.12.063. Here, WSDOT exercised its statutory authority imperfectly when it followed RCW 47.12.063's procedure for sale to a single interested abutting owner, instead of the procedure for sale when there are two or more abutting owners.

Because WSDOT had statutory authority to sell the property and its error was in the way it exercised that authority, WSDOT's actions were not *ultra vires* and did not preclude Sustainable from becoming a *bona fide* purchaser for value.

If allowed to stand, the Court of Appeals' decision will turn the rationale for the *ultra vires* doctrine on its head. The doctrine protects citizens from unjust, ill-considered, or extortionate contracts, or those showing favoritism. *Paopao v. DSHS*, 145 Wn. App. 40, 51-2, 185 P.3d 640 (2008).

In this case, there is no evidence of favoritism, or an unjust, ill-considered, or extortionate contract. To the contrary, the evidence is of an arm's length transaction that resulted in the public receiving the full, fair market value for the surplus property.⁵ By declaring the sale void, Division II did not protect the public's interest but rather exposed the State to further expense to conduct another sale, to liability to Sustainable for expenses it incurred as part of the original sale, and to the very real possibility that the State would receive less money for the property upon resale today than it did in 2005.

The Court of Appeals' decision also does injustice to the principle of finality and the ability of *bona fide* purchasers to rely on conveyances from the State.

Under RCW 47.12.063, an abutting landowner has 15 days from the time of notification to express an interest in bidding on surplus

⁵ CP 586-589: Declaration of Review Appraiser Shirley Hughes; CP 594-96: Judge Pomeroy's Letter Opinion: "There has been no allegation of fraud or any violation of a public policy concern in the present case."

WSDOT property. Here, STW, and its predecessor-in-interest Staub, far exceeded the 15-day statutory time period after they had notice of the sale.

STW brought this case on April 16, 2006, nearly a year after Sustainable had signed the purchase and sale agreement with the State, more than seven months after the deed had been executed, and nearly five months after STW had contacted WSDOT on Staub's behalf regarding the sale. *STW*, 146 Wn. App. 639, 644, 191 P.3d 938 (2008).

At the time that WSDOT sold the property to Sustainable, Staub was in the process of relocating its business. *STW*, 146 Wn. App. 644-45. Once they discovered the State's notice error, Staub and STW did not act diligently to bring an action challenging the conveyance.⁶ Instead, Staub and STW concocted a scheme to use WSDOT's error in an attempt to negotiate an early termination of a building lease that Staub had with Sustainable and they agreed to split the \$100,000 in savings that they hoped to extort in return for overlooking the State's error.⁷

At his deposition, Mr. Staub testified:⁸

We were at the time trying to vacate the Sustainable

⁶ Although she was the actual owner of the Staub property, at her deposition, Francis Staub testified that she never expressed an interest to anyone about purchasing the surplus property. CP 379: F. Staub Dep. 7:5-8, 9:4-6; 10: 2-4. In 2001, when WSDOT approached Nicholas Staub about his company's unauthorized use of the surplus property, Mr. Staub testified that he rejected the idea of leasing it. CP 365: N. Staub Dep. 22:2-7.

⁷ CP 242: Addendum to STW/Staub purchase and sale agreement.

⁸ CP 365: N. Staub Dep. 25:12-19.

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.⁹

The Staub/STW assignment was made on February 12, 2006, nearly 5 months after Staub had actual notice of the sale to Sustainable.¹⁰

Finality is an important component of Washington law. In cases regarding government bidding contracts, it is public treasury, not the interests of the bidder, that is paramount. In the absence of fraud or collusion, the execution of the bid contract cuts off a third-party's right to contest irregularities in the bidding process. *Dicks Enterprises, Inc. v. King County*, 83 Wn. App. 566, 922 P.2d 184 (1996) (disappointed bidder lacked standing to request injunctive relief or bar performance of the contract after the award had been made).

Similarly, Washington courts have recognized the strong policy in favor of finality matters of property. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) (Under the Land Use Petition Act, even illegal decisions must be challenged in a timely, appropriate manner).

⁹ CP 366: N. Staub Dep. 29:6-8.

¹⁰ CP 249-50: Assignment of Cause of Action.

Finality is favored because, without it, no landowner would be safe in proceeding with the development of his property. *Skamania County v. Columbia River Gorge Com'n*, 144 Wn.2d 30, 26, P.3d 241 (2001).

The principle of finality applies to uphold the deed in this case. *State v. Ort*, 66 Wash. 130, 133-4 (1911). In *Ort*, the State attempted to void a deed when it discovered that the property that it sold had more than 1,000,000 board feet of lumber, which should have been sold separately under existing statutes. *Ort*, 66 Wash. at 131-2.

Upholding the completed sale, the court distinguished between the State's right to void executory contracts, where the State had not parted with its interest, and the situation where the parties had dealt at arm's length and completed the transaction. The court concluded:

*[That] the state may have innocently made a mistake as to the character of the land is no ground for setting aside its sale. It can vacate and set aside its consummated sale of land only in those cases where fraud has been practiced upon its officers by the purchasers, or through their connivance.*¹¹

The intent of Ch. 47.12 RCW is for WSDOT to sell surplus land at fair market value or better for the benefit of the State's motor vehicle fund. That is precisely what occurred in this case.

Except for agricultural uses, Ch. 47.12 RCW is not for the benefit of abutting property owners. Here, the best that STW can establish is that

¹¹ *State v. Ort*, 66 Wash. at 133.

its predecessor-in-interest missed out on the opportunity to submit a bid and that it waited more than seven months after Staub had notice of the sale to assert a claim. STW cannot show that Staub would have been the successful bidder or that the State would have received more money from the sale than it has already received from Sustainable.

Against Staub/STW's missed opportunity to submit a bid, Sustainable stands as a *bona fide* purchaser for value that relied upon WSDOT's representations that it had authority to sell the surplus property.

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

For nearly a century, Washington law has held that a *bona fide* purchaser has a right to rely on a deed granted by the State. *State v. Hewitt Land Company*, 74 Wash. 573, 134 P. 474 (1913); *State v. Ort*, 66 Wash. 130 (1911).

Here, Sustainable signed the State's purchase and sale agreement, agreed to the State's form of deed, paid the State's \$180,000 asking price and incurred expense to perform a Phase 1 environmental analysis of the property and to prepare and record the sale documents. Additionally,

Sustainable expended tens of thousands of dollars in reliance on its ownership of the property, including money spent on incorporating the surplus property into its land use plans and development designs.¹²

Given WSDOT's statutory authority to dispose of surplus property, it is a misapplication of the *ultra vires* doctrine to void the sale, when a deed has been executed and the property transferred to a *bona fide* purchaser for value, particularly where the only certain outcome from redoing the whole process would be that the State would have to disgorge the money it has already received from the sale.

2. STATEMENT OF RELEVANT FACTS

Sustainable adopts and incorporates the statement of facts from Division II's Opinion. *South Tacoma Way v. WSDOT & SUD #1*, 146 Wn. App. 639, 641-46, 191 P.3d 938 (2008) (hereinafter "Opinion").

3. ARGUMENT

Division II made at least three erroneous rulings in its Opinion:

1. Division II greatly expanded the "ultra vires" doctrine by holding that any act that violates a statute procedure is *ultra vires* even though WSDOT has broad authority to sell surplus property.

2. Division II ignored the case law governing standing to challenge WSDOT's failure to comply with the bidding statutes. This holding would allow unsuccessful bidders seeking to protect their private interests to challenge such contracts at the expense of the State's interest.

¹² CP 513: Declaration of Jeff Schoenfeld.

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

3.1 Statutory Scheme for the Sale of Surplus WSDOT Property.

Once 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.

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. RCW 47.12.063 and RCW 47.12.283 are intended 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.

Unlike other statutes, RCW 47.12.063(2) does not provide that a deed is void or voidable.¹³ In addition, the only specially benefitted property owners are abutting agricultural uses. Division II erred by reading an intent into the WSDOT surplus property statutes that was not expressed by the Legislature. *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 977 P.2d 554 (1999).

3.2 WSDOT's Notice Error Did Not Render Its Sale of Surplus Property Ultra-Vires.

Over 100 years ago, this Court explained that an act is only “absolutely ultra vires” when a governmental entity has “no authority to act on the subject-matter – it being wholly beyond the scope of its powers[.]” *Wendel v. Spokane County*, 27 Wash. 121, 124, 67 P. 576 (1902). Time and again, this Court has reaffirmed this principle:

- Acts are not ultra vires when “the acts are within the general powers granted to the [government] even though such powers have been exercised in an irregular and unauthorized manner[.]” *Finch v. Matthews*, 74 Wn.2d 161, 171, 443 P.2d 833 (1968).

¹³ RCW 28B.20.382 (without legislative approval, sale or long-term lease of university tract land “null and void”); RCW 39.36.020 (government contracts that violate indebtedness statutes void); RCW 80.12.030 (without commission approval, sale or lease of public utility property is void).

- “An ultra vires act is one performed without any authority to act on the subject.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976).
- “An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires.” *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987).

In its Opinion, Division II acknowledged that “there is no question that the legislature gave DOT authority to determine when it no longer needs property under its jurisdiction for transportation purposes and to sell that surplus property at its fair market value or greater for the benefit of the state's motor vehicle fund.” Opinion, 191 P.3d at 945.

This acknowledgement should have ended Division II’s *ultra vires* analysis. But Division II then inexplicitly finds that WSDOT’s sale was absolutely ultra vires because WSDOT did not follow the statutory directive of selling the property “only” after providing notice to all abutting property owners. Opinion, 191 P.3d at 945.

This Court’s opinions have repeatedly made clear that acts that violate statutory requirements are not *ultra vires* when the government agency had authority over the subject matter. *Edwards v. Renton*, 67 Wn.2d 598, 409 P.2d 153 (1965). The test that the *Edwards* court applied was whether “the contract, if entered into in conformity with the statutes, would not have been unlawful[.]” *Edwards*, 67 Wn.2d at 605; see also *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 591, 835 P.2d 1012

(1992) (enforcing contract despite State's failure to comply with statutory mandate that it "must" accept the lowest responsible bid, citing RCW 43.19.1911).

Division II's error stems from its interpretation of the dissenting opinions in *Kramarevchy v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993) and *Pierce County v. State*, 159 Wn.2d 16, 55-56, 148 P.3d 1002 (2006), which Division II cites to support its expansive interpretation of the *ultra vires* doctrine as voiding any government action that was inconsistent with a statutory directive. Opinion, 191 P.3d at 945.

Division II also failed to address the *Hewitt* case. In *Hewitt*, the state land commission sold a 310-acre parcel of land. The land was subsequently resold. The sale of a 310-acre parcel violated a statutory requirement that no more than 160 acres of any school or granted land could be sold in any one parcel. Discovering the error, the State sought to eject the buyer's successor-in-interest. *Hewitt*, 74 Wash. 575.

The court upheld the deed, explaining:

The officers of the state have exercised the power vested in them in an irregular way. In exercising their admitted power they have ignored or overlooked the letter of the law; instead of offering the land in two tracts, they have offered and deeded it in one tract. As against the interest of those who have come into possession and ownership of the land so sold, a purchaser for value and without fraud on the part of any one, the state cannot be heard to question its conveyance.

* * * *

A purchaser of land sold by the state . . . has the 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. In other words, the patent or deed being in regular form, the law will not presume that it has been obtained in fraud of the public right. *'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 of the rights of the parties unless impeached for fraud.'* This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of peace of society and the permanent security of titles.¹⁴

If this Court allows the Division II's Opinion to stand, government agencies would be able to avoid their contractual obligations anytime an agent fails to strictly comply with statutory requirements. Innocent members of the public that contract with the government will be damaged,

¹⁴ Emphasis added. Cases from other jurisdictions have also upheld sales of government property despite notice defects. In *Summer Cottagers' Assoc. v. City of Cape May*, 111 A.2d 435, 34 N.J. Super. 67 (1954), the sale of city property was upheld despite faulty notice published in a special edition of the newspaper, which had been received by less than 11% of the paper's regular subscribers. Similarly, in *Newbold v. Glenn*, 67 Md. 489, 10 A. 242, 243 (1887), the City of Baltimore sold land at a private sale without complying with a statute that required published notice of the pending sale. While the court recognized that notice should have been given, it 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.

there will be increased uncertainty and expense, and the public interest will suffer.

3.3 STW Lacks Standing To Challenge the Sale to Sustainable.

Once WSDOT signed the purchase and sale contract, “[e]ven where the illegal contract increases expense to the public”, only someone with *taxpayer standing* may challenge the contract.¹⁵ *Dick Enterprises*, 83 Wn. App. 566 (1996).

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. 85 Wn. App. at 588.

The *Dick Enterprises* case 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 569-71.¹⁶

¹⁵ 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.

¹⁶ *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999) (court refused to provide post-contract relief when plaintiff failed to immediately enjoin the contract).

In *Dick Enterprises*, 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 affect the public interest by increasing the expense to taxpayers. The policy for this rule is that the public should not be forced to pay twice for the mistake in the bidding process, which is exactly what will happen in this case if Division II's Opinion is not overturned. *Dick Enterprises*, 83 Wn. App. at 569-71.

Division II's holding that STW had standing to challenge the WSDOT sale based on an assignment of rights from Staub and application of Uniform Declaratory Judgment Act undercuts the public's interest in favor of private interests, in direct contravention of the policy expressed by this Court in *Peerless*, that "laws governing competitive bidding are enacted for the benefit of the general public, not individual bidders." *Peerless*, 119 Wn.2d at 591.

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. *Peerless* is particularly noteworthy, because in that case, *Peerless* was denied relief despite the fact that all parties acknowledged that *Peerless*, the unsuccessful bidder, should have been awarded the contract.¹⁷

Under Division II's Declaratory Judgment Act analysis, an unsuccessful bidder would always have standing because there would always be an actual controversy between parties having genuine opposing interests.

However, here, there was no "right" to be assigned, because as this Court held in *Peerless*, until an offer is accepted, there is no contract. *Peerless*, 119 Wn.2d at 592-95. The Staubs themselves had no right to challenge the sale once it was completed, so they could not create a right that did not exist for STW by executing an assignment of rights.

WSDOT is in the same position as the State was in *Peerless* or *Dick Enterprises*. WSDOT made an error in its bidding process, but it 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.

¹⁷ *Id.* at 591; *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, in the absence of fraud or collusion, WSDOT's contract should not be overturned, and the State treasury damaged, because a putative bidder missed its opportunity and *might* have submitted a higher bid.

3.4 STW Was a Bona Fide Purchaser for Value that Was Entitled to Rely Upon the Deed Conveyed by the State.

In upholding the WSDOT sale, Judge Pomeroy concluded: "As a bona fide purchaser, Sustainable has a right to rely on the deed conveyed by the State."¹⁸ Sustainable's status as a *bona fide* purchaser provides it with a superior interest in the property that trumps claims by STW. *Levien v. Fiala*, 79 Wn. App. 294, 299, 902 P.2d 170 (1995).

This is not a case where a public right-of-way was being vacated as a legislative act, where an abutter might have an interest in the underlying fee. Rather, the property was a former railroad spur¹⁹ that WSDOT held in a proprietary capacity and had the power to sell. Thus, neither Sustainable nor Staub had any special vested rights in the property by virtue of their status as abutters.

¹⁸ CP 582.

¹⁹ CP 307; 318.

Moreover, Sustainable had a right to presume that WSDOT was following the proper procedure when it sold the land. *Hewitt* 74 Wn. 573, 586 (1913) (Purchaser of land sold by the state 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.)

In *Henderson County v. Sovereign Camp, W.O.W.*, 12 F.2d 883, 884 (6th Cir., 1926), the court reached a similar conclusion to *Hewitt* when it held that if 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 and *Hewitt* 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 fide* purchaser without knowledge of government’s failure to take the proper procedural steps is valid and enforceable. *Henderson*, 12 F.2d at 884.

4. CONCLUSION

For all of the foregoing reasons, Sustainable respectfully requests that the Court grant its Petition, reverse the Court of Appeals and uphold the trial court’s grant of summary judgment to Sustainable and WSDOT.

RESPECTFULLY SUBMITTED this 30th day of June, 2009.

FOSTER PEPPER PLLC

A handwritten signature in cursive script, reading "Patrick J. Mulaney". The signature is written in black ink and is positioned above the printed name and contact information.

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