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No. 82212-3

CLERK *h/h* SUPREME COURT
OF THE STATE OF WASHINGTON

SOUTH TACOMA WAY, LLC,

Respondent,

v.

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

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT SOUTH TACOMA WAY

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A. INTRODUCTION

Petitioner Sustainable Urban Development (“SUD”) and defendant Washington State Department of Transportation (“DOT”)¹ made a deal for the sale of land that directly violated an existing statute and circumvented public bidding laws.

State agencies should be held accountable for violating and exceeding the powers granted to them by the Legislature. Notification requirements and public bidding laws prevent fraud and collusion in the sale of public lands to private parties. The Court of Appeals correctly concluded that an action taken by a state agency in direct violation of an existing statute is *ultra vires* and void. It also correctly declined to apply the equitable “bona fide purchaser” doctrine to revive an illegal contract.

B. ISSUE PRESENTED FOR REVIEW

Is a contract for sale of surplus state property made in direct violation of RCW 47.12.063(1)(g) *ultra vires* and void?

C. STATEMENT OF THE CASE

The facts of this case are undisputed and have been recited in the briefing and the Court of Appeals’ opinion below. The material facts are as follows:

¹ DOT was a co-defendant below, and the two defendants filed joint briefing at the trial court and the Court of Appeals. But DOT did join SUD’s petition for review to this Court.

From 1969 to 2006, the Staub family owned a commercial building located on Airport Way in downtown Seattle, and operating a business there known as Romaine Electric. CP 47-48, 78.² The Staub building abutted an alley owned by the Washington State Department of Transportation (“DOT”). Most of the other property abutting the alley was owned by the Frye Art Museum, CP 58, and one portion was owned by another individual not a party to this action. CP 65-66.

The Staubs offered to purchase or lease the alley from DOT in 2001. *Id.* Based on DOT’s response, the Staubs concluded that insurance costs and red tape would make leasing the alley difficult, and abandoned the idea. CP 365. DOT told Nicholas Staub that he would be contacted in the future if the alley was ever to be sold. *Id.*

In 2004, major Seattle land developer (and recent Seattle mayoral hopeful)³ Greg Smith’s firm Sustainable Urban Development (“SUD”) purchased two parcels of unconnected land abutting the alley, one of which was right next door to the Staub building. CP 52-58. SUD paid \$13,500,000 for 5.84 acres of property. CP 322. SUD showed an interest in purchasing the Staub building also, but Nicholas Staub felt that SUD’s

² During the period relevant to this appeal, Frances Staub owned the building via a business entity named FVS, LLC.

³ http://seattletimes.nwsourc.com/html/politics/2009082451_nickels19m.html.

offer was for "less than market value." CP 97-98. However, SUD and the Staubs did have a business relationship; the Staubs leased 24,000 square feet of SUD's property across the alley from the Staub building. CP 83.

In May 2004, SUD wrote to DOT and requested to purchase the alley. CP 346. At that point, DOT was required by statute to do three things before selling the property to SUD: (1) give written notice to all other abutting landowners; (2) provide other owners 15 days to respond and express interest; and (3) put the property up to public auction if other owners expressed interest. RCW 47.12.063(2)(g).⁴ DOT failed to notify any other abutting owners of the proposed sale. CP 167, 194, 256. The Staubs were not given the opportunity to object, and no public auction was ever held. CP 440. Had the Staubs been notified of the potential sale, Nicholas Staub would have asked DOT to conduct an auction on the sale of the alley. CP 130.

In late 2004, although the alley sale was not yet complete, Glen Scheiber of SUD told Nicholas Staub verbally that SUD was purchasing the alley. CP 369-70. Although Staub was surprised that DOT had not

⁴ RCW 47.12.063(1)(g) allows the sale of surplus state property to a private abutting landowner "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."

contacted him about the alley sale, Staub was not aware of DOT's statutory obligations concerning sale of surplus property with more than one abutting landowner. CP 88-89, 130.

In autumn 2005, South Tacoma Way, LLC ("South Tacoma") sought to purchase the Staub building as a location for its business, Performance Radiator. CP 212. During negotiations, South Tacoma asked Nicholas Staub about the alley, because he believed that the building needed earthquake retrofitting that would require use of the alley. CP 220. Staub replied that he believed the alley was owned by DOT. CP 213. In September, South Tacoma contacted DOT about the possibility of purchasing the alley. CP 214. DOT informed South Tacoma that the alley had already been sold to SUD. *Id.* South Tacoma responded that Staub, an abutting landowner, had not been notified. CP 215, 217. DOT initially responded with concern about this statutory violation. *Id.*

DOT then sent a letter to Staub, asking for retroactive waiver of abutting landowner rights under RCW 47.12.063(1)(g). CP 165. Staub refused to waive any rights, and expressed interest in purchasing the alley. CP 161. DOT admitted that it had violated the statutes governing the sale of surplus property, but stated that SUD was a "bona fide purchaser for value" and refused to rescind the sale. CP 167.

After purchasing the Staub building, South Tacoma filed this declaratory judgment action seeking a court order that DOT must obey RCW 47.13. SUD and DOT joined together to defend the action, filing joint pleadings. CP 266, 459. On cross-motions for summary judgment, the trial court ruled in favor of SUD and DOT. CP 577. The court noted that DOT did not comply with RCW 47.12.063(2)(g). CP 595. However, the court concluded that the transaction was not *ultra vires* and that SUD was a bona fide purchaser. CP 596. South Tacoma appealed.

The Court of Appeals reversed the trial court in a published opinion, holding that because DOT had directly violated an existing statute, it had acted *ultra vires* and the contract was void. *South Tacoma Way, LLC v. State*, 146 Wn. App. 639, 641, 191 P.3d 938 (2008), *review granted*, 165 Wn.2d 1036 (2009). The Court of Appeals distinguished between a violation of a statutory *directive*, which is a “general instruction as to conduct or procedure,” and a direct violation of a statute. *Id.* at 650-51. If an agency violates a directive, the court stated, that act may be *ultra vires*. However, the court concluded, a direct violation of a statutory restriction on an agency’s authority is always *ultra vires*. *Id.* The Court rejected SUD and DOT’s call for application of the *bona fide* purchaser doctrine, because this Court in the past has refrained from applying other

equitable doctrines to revive an illegal contract made in direct violation of a statute. *Id.* at 653.

D. ARGUMENT

(1) DOT Must Obey the Legislature; The Contract Between SUD and DOT Was Illegal, Ultra Vires, and Void

It is well-established that a contract formed in violation of a statute is illegal and unenforceable as a matter of law. *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 333, 828 P.2d 73, review denied, 120 Wn.2d 1007, 841 P.2d 47 (1992); *Hederman v. George*, 35 Wn.2d 357, 362, 212 P.2d 841 (1949); *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 26-27, 182 P.2d 643 (1947). A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable. *Hederman*, 35 Wn.2d at 362; *Northwest Magnesite*, 28 Wn.2d at 26. Where the contract grows immediately out of, and is connected with, an illegal act, a court of justice will not lend its aid to enforce it. *Hederman*, 35 Wn.2d at 361, citing *Armstrong v. Toler*, 11 Wheat 258, 24 U.S. 258, 6 L.Ed. 468 (1826). Where a plaintiff, to make a case, must rely upon the illegal contract itself, that party cannot recover. The law should not aid a party to an illegal agreement. *Id.*

Like all illegal contracts, a contract executed by a state agency beyond the agency's power is void and unenforceable. *Bain*, 77 Wn.2d at

548; *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 797-98, 666 P.2d 329 (1983); *Noel v. Cole*, 98 Wn.2d 375, 378-79, 655 P.2d 245 (1982) (superseded by statute on other grounds by *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997)).

An illegal contract executed by a state agency is doubly flawed, because it is not only unlawful *per se*, it also constitutes an abuse of authority. Political subdivisions of the state are strictly limited to those powers granted to them by the Legislature, and can only form contracts within the bounds of those powers. *State ex rel. Bain v. Clallam County Bd. of County Comm'rs*, 77 Wn.2d 542, 548, 463 P.2d 617 (1970). In *Bain*, Port Angeles city employees sought a writ of mandamus to require city commissioners to adopt a resolution memorializing an oral collective bargaining agreement. 77 Wn.2d at 543. The oral agreement was reached in closed session of the city council, without public participation. *Id.* at 548. This Court held that the contract was not enforceable, because, *inter alia*, the council was prohibited by statute from taking final actions in a closed session. *Id.*

All agencies of state government are of course bound by the laws of the state. 2 MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS (3d Ed. Rev. 2005) §§ 4.5, 4.6. A statute granting to a city authority to do a

particular thing, with a limitation on the power, must be construed to give effect to the limitation as well as to the power granted. *Id.* at § 10.18a.

Even where a given action is generally within an agency's authority, failure to comply with statutorily mandated procedures that limit the granted authority renders the action *ultra vires* and void. *Noel*, 98 Wn.2d at 379-80; *Failor's Pharmacy v. Dep't of Social & Health Servs.*, 125 Wn.2d 488, 886 P.2d 147 (1994). In *Failor's*, the Department of Social and Health Services changed its prescription reimbursement schedule without following formal Administrative Procedure Act rulemaking requirements. 125 Wn.2d at 492. A group of pharmacies sought injunctive relief to invalidate the new schedule and sought damages for repayment of the difference between the old and new schedules. *Id.* The Department argued that regardless of the statutory violation, the contracts for reimbursement at the lower rates should be enforceable. This Court disagreed, and held the contracts unenforceable because, despite its general authority to issue new schedules, the Department had not followed proper rulemaking procedures. *Id.*

This Court has long held that general authority to act in a particular fashion does *not* equate with authority to violate a statute:

In the instant case, there is no question that DNR has general authority to sell timber on land held in trust for educational purposes (*see* RCW 79.01.094) and that such

sales may be by sealed bid (*see* RCW 79.01.200). DNR did, however, fail to prepare a required EIS. ...Since it did not do so, the contract of sale to Alpine was ultra vires and Alpine cannot recover for any alleged breach.

Noel, 98 Wn.2d at 380.

DOT "is a creature of the statute and must obey the mandate of the legislature in word and spirit." *State ex rel. Petroleum Transp. Co. v. Washington Public Service Comm'n*, 35 Wn.2d 858, 862, 216 P.2d 177, 179 (1950). An action in direct violation of enabling statutes is without foundation. *Id.* In *Petroleum*, DOT directly violated a statute requiring it to enter proper findings of fact before granting a common carrier permit to an intrastate carrier. *Id.* at 861-62. This Court had little difficulty finding that because DOT's action expressly violated a statute, the resulting order was "without foundation." *Id.* This Court reversed and remanded with instructions for DOT to follow the law. *Id.*

Here, two direct violations of RCW 47.12.063(1)(g) underlie the contract between SUD and DOT. First, the contract was formed without notice to any abutting landowners. After South Tacoma objected, DOT then refused to hold a public auction as the statute required. DOT and SUD have admitted that these actions directly violated RCW 47.12.063(1)(g).

Regardless of any general authority to sell surplus property, DOT did *not* have authority to sell property to SUD without first notifying abutting landowners. RCW 47.12.063(1)(g). Once South Tacoma objected, DOT did *not* have authority to sell the alley to SUD without holding a public auction. *Id.* Sale of the alley to SUD was *ultra vires* and the contract with SUD is void.

(2) RCW 47.12.063(1)(g) Protects the Important Property Rights of Abutting Landowners

SUD and DOT are not the only parties here with vested property rights in this controversy. South Tacoma, an abutting landowner, also has rights that were violated when DOT failed to comply with RCW 47.12.063(1)(g). In Washington, the public has only an easement of use in a public street or highway, and the underlying fee rests in the owners of abutting property. *Bradley v. Spokane & Inland Empire R.R.*, 79 Wash. 455, 458, 140 P. 688 (1914). By statute, when a public street or alley in any city or town is abandoned, title vests in adjoining landowners. *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 575, 716 P.2d 855 (1986) (citing RCW 35.79.040). Similarly, at common law, the conveyance of land bounded by or along a highway carries title to the center of the “highway unless there is something in the deed or surrounding circumstances showing an intent to the contrary.” *Roeder Co.*

at 575. The basis for this rule is the presumption that the grantor intended to convey such fee along with and as a part of the conveyance of the abutting land. *Roeder Co.* at 575.

Property owners have a vested interest in public property that abuts their land. *Walker v. State*, 48 Wn.2d 587, 295 P.2d 328 (1956); *Fry v. O'Leary*, 141 Wash. 465, 466-67, 252 P. 111 (1927). "The owner of property abutting upon a public thoroughfare has a right to free and convenient access thereto. This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself." *Walker*, 48 Wn.2d at 589. Transfer of use of a road or alley from public to private use causes *per se* damage to abutting property owners. *Fry*, 141 Wash. at 469-70.

In *Fry*, this Court reviewed a municipal ordinance vacating an unimproved public street for the benefit of private use. *Id.* at 467. After concluding that the ordinance was not adopted in accordance with statutory and constitutional strictures, this Court reversed dismissal of the abutting landowners' action and remanded for a trial on damages. In the opinion, this Court was particularly concerned with the fact that the abutting landowners had no notice of the proposed ordinance, and were entitled to have damages assessed and compensation paid *before* the ordinance was passed:

Nor can the city, by the passage of an ordinance of vacation, damage the property of an abutting owner *without first having ascertained and paid* the amount of the damage. Section 16, art. 1, of the Constitution, as often construed by us, requires this to be done. To permit the passage of such an ordinance without first ascertaining the damage and paying therefor is to compel the property owner to bring an action to recover his damages. The burden may not be so placed.

Id. at 473 (emphasis added). *Fry* and its progeny emphasize the important public policy that a landowner's rights regarding abutting property must be carefully protected from government violation or abuse, and proper procedures must be followed.

RCW 47.12.063(1)(g) protects the important rights of abutting landowners by requiring advance notice to those landowners when DOT is planning to convert a public thoroughfare to private use. The statute also gives abutting landowners – and any other interested party – a fair chance to acquire the public land through the competitive bidding process.

Here, South Tacoma has not asked for damages against DOT or SUD for violation of its property rights. It has simply asked that DOT be required to follow the law and hold an auction so that South Tacoma may have an equal chance to acquire this valuable abutting land.

Even assuming *arguendo* that SUD is an innocent property owner, South Tacoma is also an innocent property owner whom DOT has injured. It is anathema to the concept of “equity” uphold an illegal contract as

against an equally innocent third party whose rights have been violated. Here, the illegal contract is challenged by a third party abutting landowner, a party specifically protected by RCW 47.12.063(1)(g).

(3) RCW 47.12.063(1)(g) Protects the Public from Fraud and Collusion and Maximizes Return on the Sale Public Land Through Competitive Bidding Procedures

RCW 47.12.063(1)(g) protects more than the rights of abutting landowners. It also protects the public from the danger of collusion and fraud between private parties and the government. Purchase, ownership, and sale of surplus real property by state agencies is for the benefit of the public. 10 MCQUILLAN, MUNICIPAL CORPORATIONS § 28.52 (3d ed. 1966). Requiring surplus land to be sold at public auction invites competition and guards against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts and not for the enrichment of bidders. *Id.*; see also, *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 596, 835 P.2d 1012 (1992). Any contract for sale of surplus property entered into by a public corporate body which is beyond the scope of its statutory powers (including a violation of the requirement to hold a public auction) is void. *Id.* at § 29.10

Circumvention of public bidding laws by a state official constitutes malfeasance. *In re Recall of Kast*, 144 Wn.2d 807, 815-16, 31 P.3d 677 (2001). It is wrongful conduct because it fails to promote the best interests

of the agency and the public. *Id.* Washington has a strong public policy favoring competitive bidding. *Hanson Excavating Co., Inc. v. Cowlitz County*, 28 Wn. App. 123, 126, 622 P.2d 1285 (1981). Negotiation of a contract that instead required competitive bidding circumvents this policy and opens the door to possible fraud, collusion, and favoritism. *Id.* When a state entity enters into a contract in circumvention of competitive bidding laws, that contract is void. *Id.* at 127.

In violating RCW 47.12.063(1)(g), SUD and DOT not only infringed upon South Tacoma's rights as an abutting landowner, they circumvented laws designed to protect the public from fraud, collusion, and favoritism. By avoiding a public auction they also potentially circumvented the statutory requirement of maximizing revenue to the state. Enforcing the resulting contract would not only ratify direct violation of a statute, it would run contrary to the important public policy that statute protects.

(4) If SUD Claims to Have Been Harmed By DOT, the Proper Remedy Is an Equitable Claim Against DOT, Not Judicial Ratification of the Illegal Contract

SUD's defense in this declaratory judgment action has been entirely misplaced. SUD has suggested that, as a result of the bona fide purchaser doctrine, its property rights are superior to South Tacoma's. This is circular logic. Before DOT forms a contract regarding surplus

property, all abutting landowners are on equal footing, and must receive notice and an opportunity to object. RCW 47.12.063(1)(g). Whether innocently done or not, SUD and DOT infringed upon South Tacoma's rights by entering into a contract in violation of the statute. SUD should not be allowed to use its *fait accompli* to claim superior property rights over South Tacoma. It would reward a violation of the law.

The Court of Appeals properly rejected the argument that *bona fide* purchaser doctrine requires enforcement of the void contract.⁵ Such a claim is insupportable in the face of well-established Washington law that an *ultra vires* contract is void and cannot be enforced. *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 524 (1984); *Noel*, 98 Wn.2d at 379-80; *Finch v. Matthews*, 74 Wn.2d 161, 169-70, 443 P.2d 833 (1968); *Edwards v. Renton*, 67 Wn.2d 598, 602-03, 409 P.2d 153 (1965).

Although this Court has never expressly applied the *bona fide* purchaser doctrine in these circumstances, it has made clear that other equitable principles cannot apply to enforce an *ultra vires* contract. For example this Court has long held that equitable estoppel cannot be applied

⁵ As South Tacoma explained in briefing to the Court of Appeals, even if the *bona fide* purchaser doctrine were properly applied in these circumstances, SUD was on reasonable inquiry notice of restrictions on DOT's authority, and should have inquired regarding whether the statute had been obeyed.

against the state to enforce a contract in similar circumstances, when the application would frustrate the purpose of a law or public policy, or where officials have committed illegal acts:

As a general rule the doctrine of estoppel will not be applied against...state governments, where the application of that doctrine would...frustrate the purpose of the laws of the United States or thwart its public policy; or where the officials on whose conduct or acts estoppel is sought to be predicated...were guilty of illegal or fraudulent acts, or of unauthorized admissions, conduct or statements....

Finch, 74 Wn.2d at 169-70. Even an innocent party injured by an agency's ultra vires action cannot resort to application of equitable principles, if that action was illegal or against public policy. *Id.*

The bona fide purchaser doctrine is applied to determine which of two putative title holders has a superior interest. *Tomlinson v. Clarke*, 118 Wn.2d 498, 508, 825 P.2d 706 (1992). It applies to defeat the claim of one title holder against another if the holder is 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. *Id.* at 500. The bona fide purchaser doctrine cannot apply when the property transfer results from a violation of law, or when the original owner does not voluntarily relinquish ownership.⁶ *Linn v. Reid*, 114 Wash. 609, 611, 196

⁶ Of course, South Tacoma is not claiming to be the "original owner," but that fact only highlights why application of the bona fide purchase doctrine is inapposite in this case.

P. 13 (1921). Also, even when a bona fide purchaser is involved, if the wrongful act of a third party injures two innocent persons the risk of loss must be borne by the person whose conduct made the loss possible. *Ross v. Johnson*, 171 Wash. 658, 667, 19 P.2d 101 (1933).

Here, illegal acts have been committed that frustrate the purpose of statutes and public policy. SUD made the loss possible, by negotiating the contract and by failing to make any inquiry into DOT's exercise of authority. It is not clear whether SUD can recover in equity from DOT, but SUD cannot enforce the contract.

Furthermore, the bona fide purchaser doctrine applies when two parties both claim superior interest. That is not the case here. South Tacoma is not seeking a forced sale to itself. Rather, it has pursued a declaratory judgment that the contract between DOT and SUD was illegal and *ultra vires*, and seeks an order that DOT must follow the law and conduct a fair process for the sale of its surplus property. The bona fide purchaser doctrine has no application in these circumstances.

Although an illegal contract should not be enforced in under the bona fide purchaser doctrine, some other form of equitable compensation is often available. Washington law supports an equitable claim for restitution or unjust enrichment against an agency that acts *ultra vires* and thereby renders a contract void. *Abrams v. Seattle*, 173 Wash. 495, 500-

01, 23 P.2d 869 (1933); *Jones v. Centralia*, 157 Wash. 194, 223-24, 289 P. 3 (1930); *Kerr v. King County*, 42 Wn.2d 845, 259 P.2d 398 (1953); *Batcheller v. Westport*, 39 Wn.2d 338, 235 P.2d 471 (1951). Therefore, in certain circumstances, a government entity may become equitably obligated to an innocent party with whom the entity has done illegal business, even when the contract is void. *Edwards v. Renton*, 67 Wn.2d 598, 603, 409 P.2d 153 (1965). However, that remedy is not enforcement of the contract. *Id.* at 602-03.

Application of the bona fide purchaser doctrine is also not appropriate because SUD had knowledge of DOT's limited authority. A party is presumed to have knowledge of the power and authority of the individual officer or officers with whom he actually negotiates, and that presumption is especially enforced where the public treasury will be directly affected by some action of the entity. *Bain*, 77 Wn.2d at 549. This Court in *Bain* found that employees who claimed to have entered into a binding contract with the city in closed session "knew, or should have known, that negotiations conducted at the Port Angeles Elks' Club could not at that time and place culminate in an agreement or contract binding upon the sovereign state or its political subdivision." *Id.* at 549. The employees in that case were charged with knowledge that RCW 42.32.010 prohibited a binding contract from being created.

SUD should be charged with the knowledge that RCW 47.12.063(1)(g) applied to the transaction between itself and DOT, and that any violation that statute would put the transaction at risk. This means SUD was not a completely innocent party in the property transaction, and cannot resort to equity to enforce the contract.

Regardless of the applicability of equitable principles to SUD, it is misleading for SUD to frame the issue as there is never a remedy except judicial ratification of the illegal contract. SUD has always had the ability to bring a cross-claim against DOT for unjust enrichment, quasi-contract, or any other equitable claim. It has chosen not to do so. It cannot now claim that it would be inequitable to rescind its illegal contract with DOT because it would be financially injured.

(5) The Public Should Be Certain That the Government Will Not Be Allowed to Violate the Law

There is a fundamental principle at issue here, that state agencies should not be allowed to violate the law, and that illegal contracts cannot be ratified by the courts. "To the law every man owes homage, the very least as needing its care, the greatest as not exempted from its power." *State v. Wiley*, 176 Wash. 641, 645 30 P.2d 958 (1934). "All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.") *Lutheran Day Care v. Snohomish County*, 119

Wn.2d 91, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993) (quoting *United States v. Lee*, 106 U.S. 196, 220, 1 S. Ct. 240, 261, 27 L.Ed. 171 (1882)).

Despite conceding the contract's illegality, SUD and DOT have suggested that it should be enforced. They have argued that private parties doing business with the government should be able to expect judicial enforcement of illegal contracts, to provide certainty in business transactions. They suggest that private parties might not want to do business with the state if illegal transactions might be voided.

From the point of view of the public interest, the public should expect and demand that courts remedy illegal government transactions that injure innocent parties. The public has a right to know that its government is operating lawfully and obeying its own laws. State agencies should not be allowed to violate the law with impunity. Illegal contracts should not be ratified by the courts.

E. CONCLUSION

The contract between SUD and DOT was illegal, *ultra vires*, and void, and the Court of Appeals correctly rescinded it. If SUD demonstrates that it has been harmed by DOT's illegal action, it can pursue other remedies for DOT's illegal action, but enforcement of the

illegal contract is not appropriate. This Court should affirm the decision requiring DOT to follow the law.

DATED this 29th day of June, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Supplemental Brief of Respondent South Tacoma Way in Supreme Court Cause No. 82212-3 to the following parties:

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

DATED: June 29, 2009, at Tukwila, Washington.



Christine Jones
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ORIGINAL

DECLARATION

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ATTACHMENT TO EMAIL