98870-6

Court of Appeals No. 367363-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONSIBLE GROWTH *NE WASHINGTON; CITIZENS AGAINST NEWPORT SILICON SMELTER; THEODORE & PHYLLIS KARDOS; DENISE D. TEEPLES; GRETCHEN L. KOENIG; SHERYL L. MILLER; MANES W. & ROSEMARY CHANDLER; AND PAMELA BYERS LUBY,

Petitioners,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1; PEND OREILLE COUNTY; AND HITEST SAND, INC.,

Respondents.

ANSWER TO PETITION FOR REVIEW

John Ray Nelson, WSBA No.16393
FOSTER PEPPER PLLC
618 W. Riverside Ave., Ste. 300
Spokane, Washington 99201
Telephone: (509)777-1600
Facsimile: (509) 777-1616
Email: john.nelson@foster.com

Tyler R. Whitney, WSBA No.48117
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY
130 North Washington
P.O. Box 190
Newport, WA 99156
Telephone: (509)447-9331
Email: twhitney@popud.org

Attorneys for Respondent
Pend Oreille PUD No. 1

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I. INTRODUCTION

Plaintiffs filed this action because they oppose construction of Respondent HiTest Sand, Inc. ("HiTest")'s proposed silicon smelter outside of Newport, Washington. Rather than fight the proposed project on its environmental merits, however, Plaintiffs chose to embroil the Public Utility District No. 1 of Pend Oreille County (the "District"), Pend Oreille County (the "County"), and HiTest in a meritless challenge to the District's purchase and subsequent sale of real property as a means to secure a utility easement it *indisputably* needed for its underground distribution lines – conduct that is clearly within its statutory authority. But Plaintiffs filed and prosecuted their action without conducting any investigation of the actual facts in the case. They did not serve any written discovery or take any depositions of anyone with personal knowledge of the facts, and based their claims instead on rampant speculation and wild conspiracy theories. As a consequence, the Plaintiffs were unable to oppose the District's motion for summary judgment with any admissible evidence. Plaintiffs' Petition for Review continues that ostrich-like approach to the evidence and the law.

The Court of Appeals, reviewing the summary-judgment motion *de novo*, properly looked to the plain language of RCW 54.16.020, .090 and .180(2), and the well-established legal framework for municipal

corporations, and correctly concluded that the District acted within its statutory authority.

The Court of Appeals' decision does not involve an issue of substantial public interest that warrants further review by this Court. While the Plaintiffs' Petition for Review uses colorful hypotheticals to create the illusion of public interest, those hypotheticals are based on unsupported conjecture rather than the record facts. Just as the Superior Court found, and the Court of Appeals affirmed, the Plaintiffs' speculative approach to the record evidence does not sustain their claims. The District's evidence of its purpose in procuring and selling property interests was undisputed. Plaintiff's attempt to ignore or misrepresent that evidence was insufficient to withstand summary judgment, and it is likewise insufficient to create a "substantial public interest" that might warrant this Court's discretionary review.

II. STATEMENT OF ISSUES

Does the Court of Appeals' decision involve an issue of substantial public interest that warrants further review by this Court?

III. STATEMENT OF THE CASE

A. Plaintiffs' Claims and Allegations

Plaintiffs filed this action on June 8, 2018, seeking judgment that the District's purchase and sale of Parcel No.19182 was *ultra vires* and

void. CP 10-18. Plaintiffs complained that the District "did not declare Parcel No. 19182 'surplus' at any time prior to selling it to HiTest Sand," and that the District "did not conduct an election of the voters of the PUD" regarding the sale of Parcel No. 19182. CP 15, ¶¶ 4.17-18. Plaintiffs sought declaratory judgment that:

> 1. The District "operated outside of statutory authority prescribed under RCW 54.16.020 and thus acted *Ultra Vires* when it purchased Parcel No. 19182 from Pend Oreille County";
>
> 2. The District "operated outside of statutory authority prescribed under RCW 54.16.180 and thus acted *Ultra Vires* when it approved Resolution 1399 authorizing the sale of Parcel No.19182"; and
>
> 3. The District "operated outside of statutory authority prescribed under RCW 54.16.180 and thus acted *Ultra Vires* when it conveyed Parcel No.19182 to HiTest Sand, Inc." CP 16, ¶¶ 5.5, 5.7, and 5.8.

B. The District's Motion and Undisputed Evidence

The District moved for summary judgment against Plaintiffs' Complaint on October 19, 2018. CP 48-176. The District's evidence established the following facts. Between 1995 and 1996, the District purchased three parcels of land within the District's boundary, Parcel Nos. 17036, 19183 and 19193 (the "District Properties"). Complaint ("Compl."), ¶4.1. The District Properties were purchased for a planned

turbine electricity plant, but plans for the plant were scuttled, and the property was subsequently managed for timber. *Id.*

In February 2016, the District's Board directed staff to identify real property that was no longer needed or useful to the District. Willenbrock Dec., CP 87, ¶6. The Board determined that the District Properties were no longer needed or useful. CP 87, ¶7; CP 99. The District advertised the District Properties for sale on August 31, 2016, and September 7, 2016, but did not receive any purchase offers. CP 87, ¶8; CP 101.

On April 18, 2017, the District received an inquiry and request for electric service from HiTest. CP 87, ¶9; CP 103-04. HiTest's letter also expressed its interest in purchasing the three District Properties, as well as an adjacent fourth parcel that was owned by Pend Oreille County – Parcel No. 19182. *Id.* As explained by Amber Orr, the District's then-Director of Engineering, the District's staff knew on receipt of HiTest's letter that the District had previously installed underground electric distribution lines along the border of Parcels Nos. 19182 and 19183, extending south through Parcel No. 19193. Orr Dec., CP 79, ¶7. Ms. Orr recalls engaging in multiple conversations between April and July 2017 "about the infrastructure needed to potentially serve HiTest with the power it was requesting." CP 79, ¶¶3-4. Regarding the potential purchase of the properties by HiTest, Ms. Orr's sworn Declaration states:

> 5. I specifically recall conversations with District staff, including with Ms. Kimberly Gentle, in the summer of 2017 where we discussed the existing underground electrical distribution line and the need to specifically reserve an express easement across the western portion of Parcel No. 19182, as part of the potential land sale to HiTest.
>
> 6. I recall working with Ms. Gentle, as well as with District counsel, Ms. Elizabeth Tellessen, in identifying the location and width for the needed easement across Parcel No. 19182. These conversations occurred before the August 1, 2017 meeting of the District's Board of Commissioners where they approved the sale of land to HiTest.
>
> 8. Since the underground line ran along or near the border of the District's properties and the former County parcel, the District never obtained a utility easement while the properties were owned by public entities. However, when HiTest expressed its interest in acquiring the District properties and the County parcel, I believed it would be easier for the District to obtain the easement by way of reservation rather than trying to negotiate an easement from a future customer. It was for that reason that the District acquired Parcel No. 19182 before selling it as surplus once said easement was reserved.

CP 79 (emphasis supplied).

Mr. Willenbrock's Declaration confirmed Ms. Orr's testimony: "The District sought to acquire Parcel No. 19182 from Pend Oreille County to reserve an express easement on that property." CP 87, ¶11.

The District signed a tentative Letter of Intent with HiTest and received an earnest money deposit for the properties on April 25, 2017. CP 88, ¶13; CP 110-113. A revised Letter of Intent was signed on June

13, 2017. CP 88, ¶14; CP 115-116. A draft Purchase Agreement was exchanged on June 16, 2017. CP 88, ¶14; CP 118-125.

The County authorized the sale of Parcel No. 19182 to the District on June 20, 2017. CP 88, ¶12; CP 106-108. In its Resolution No. 2017-22, the County specifically identified the District's interest in acquiring the parcel:

> E. Pend Oreille County Public Utility District (PUD) has inquired into the purchase of Assessor's Parcel No. 19182 **as it is adjacent to PUD land and it contains an easement that impacts PUD operations.**[1]
>
> CP 106 (emphasis added).

Once the District had secured the ability to subject Parcel No. 19182 to its utility easement, the land would no longer be necessary or useful in the District's operations. Willenbrock Dec., CP 88, ¶15.

The District's planned sale of the four adjacent properties to HiTest was discussed several times during the District's regularly scheduled Board meeting on August 1, 2017, and the attending public was given the opportunity to be heard on the matter. Willenbrock Dec., CP 88, ¶16; CP 127-130. After extensive discussion, the Board determined that

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[1] The County's present-tense phrase "contains an easement" is an imprecise way of stating that the District had an underground distribution line running through the property for which it needed an easement; the District did not obtain an express easement until it recorded the corrected Special Warranty Deed.

the District did not need Parcel No. 19182 (which could now be made subject to the District's easement), such that it too could be sold to HiTest. CP 88, ¶17. The Board unanimously adopted Resolution No. 1399, authorizing the General Manager to independently negotiate the property sale. CP 88, ¶18; CP 132-33.

The District purchased and received title to Parcel No. 19182 through a tax-title property deed recorded August 2, 2017. CP 89, ¶19; CP 135. The District contracted with Valbridge Property Advisors to obtain an independent appraisal of the fair market value of the District Properties and Parcel No. 19182. CP 89, ¶20. Valbridge appraised the four parcels at $250,000. CP 89, ¶20; CP 139.

The District and HiTest executed a Real Estate Purchase and Sale Agreement for the four properties on August 21, 2017, for a total purchase price of $300,000. CP 89, ¶21; CP 141. A Special Warranty Deed was recorded on September 18, 2017. CP 89, ¶22; CP 149. The original deed mistakenly reserved the District's utility easement across Parcel 1, instead of between Parcels 2 and 3 and across Parcel 4. CP 149-50. The mistake was corrected by a revised deed recorded on May 14, 2018. CP 153-55.

On May 15, 2018, the District's Board of Commissioners unanimously adopted Resolution 1411. CP 90, ¶27; CP 173-75. Resolution 1411 noted that the District had previously installed

underground distribution lines on, along and through the western portion of Parcel No. 19182, that an easement for the distribution lines was necessary, that "the District sought to acquire the County Parcel from Pend Oreille County to reserve an express easement for an existing underground distribution line," and that "the County Parcel, once subject to the easement, was unfit to be used in the operations of the District's system, and thus was no longer necessary or useful in the District's operations." CP 173-74. Resolution 1411 also noted that the Board had made that same determination on August 1, 2017, at a public meeting after extensive discussion. CP 174. Consequently, Resolution 1411 affirmed and expressly ratified the District's purchase of Parcel No. 19182, the Board's determination that Parcel No. 19182 was unnecessary to the District after it had been made subject to a utility easement, and the sale of Parcel No. 19182, along with the District Properties, to HiTest. CP 174-75. The District's evidence establishing the foregoing facts was and remains uncontested by any testimony on personal knowledge.

C. Plaintiffs' Response and Failure to Offer Competing Evidence

Plaintiffs' response to the District's motion ignored Ms. Orr's and Mr. Willenbrock's sworn declaration testimony that the District acquired Parcel No. 19182 because District staff believed that was the best way to secure the utility easement the District indisputably needed, and which it

indisputably had the authority to procure (by purchase or condemnation). CP 197-99. Plaintiffs submitted no deposition testimony, no declarations of any witness with knowledge of the issue (personal or otherwise), and no documentary evidence to create a genuine dispute – let alone to support the *Plaintiffs'* burden of proving their claims and allegations. Instead, Plaintiffs relied exclusively on two letters to establish the District's supposed "purpose" in acquiring Parcel No. 19182: an April 18, 2017 letter from HiTest to the District; and the District's April 25, 2017 Letter of Intent to HiTest. *HiTest's* letter makes a "formal request" for a "formal offer of contract for power supply services from the District." CP 253, 254. The *District's* letter "outlines some of the major terms and conditions under which Public Utility District No. 1 of Pend Oreille County ("District") proposes to enter negotiations to sell the property described below [including Parcel No. 19182] to HiTest." CP 272-75. Neither letter makes *any* statement regarding the District's purpose for acquiring Parcel No. 19182. Plaintiffs offered no other evidence to sustain their burden of proof.

Rather than submit evidence to support their burden of proof, Plaintiffs relied on an argument that "[n]o discussion of any other purpose was stated prior to the sale." But Plaintiffs did not (and cannot) explain how a supposed "lack of prior discussion" creates a genuine issue of fact

for trial: they did not pretend that a "lack of prior discussion" might impeach Orr's and Willenbrock's sworn testimony about the District's purpose, nor did they identify any reason why the District would preview its own internal business strategy to its counterpart in a proposed commercial transaction. Finally, Plaintiffs did not explain how a "lack of prior discussion" regarding the need for an easement might prove their claims, or submit any other evidence sufficient to carry their burden of proof at trial. Consequently, Plaintiffs' unsupported allegation that the District acquired Parcel No. 19182 "for the sole purpose of selling it to HiTest" did not create an issue of fact for trial. The Superior Court properly granted summary judgment against the Complaint.

D. Affirmation by the Court of Appeals.

Plaintiffs sought review by the Court of Appeals, Division Three. The Court of Appeals affirmed the trial court's grant of summary judgment to the District. In doing so, the court "refuse[d] to narrowly circumscribe the power of Pend Oreille County PUD to contract or the authority to perform acts convenient to the distribution of electricity." *Responsible Growth * NE Washington, et al v. Pend Oreille Public Utility District No. 1, et al*, No. 36736-3-III, __ Wn. App. ___, 466 P.3d 1122, 1131 (2020). The court drew the following conclusions:

- The enabling legislation for public utility districts requires that the statutes governing PUDs be liberally construed.
- PUDs have statutory authority to obtain easements for electrical generation, which necessarily includes transmission and distribution to serve the public.
- While the District's intent is irrelevant for purposes of determining whether an act was *ultra vires*, the declarations of Amber Orr and Colin Willenbrock support the finding that the District acquired Parcel No. 19182 to obtain a utility easement.
- PUDs possess general authority to dispose of land under RCW 54.16.180.
- To the extent there was any need to expressly declare the parcel's uselessness, the District's Board of Commissioners did so by retroactive resolution.

IV. ARGUMENT

A. This case presents no issue of substantial public interest, as both the Superior Court and the Court of Appeals correctly applied well-established principles of Washington law.

Plaintiff's vehement opposition to HiTest's proposed project does not create a "substantial public interest" in this action for purposes of appellate review. RAP 13.4(b)(4). The statutory framework is clear, and

was properly applied to the undisputed record evidence by the Superior Court and the Court of Appeals:

- The District has express statutory authority to acquire real property interests, including easements, as necessary or convenient for its utility purposes. RCW 54.16.020 and 090.

- The District has express statutory authority to, "without the approval of the voters, sell…or otherwise dispose of all or any part of the property owned by it…which has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system and which is no longer necessary, material to, and useful in such operations, to any person or public body." RCW 54.16.180(2). There is no statutory requirement that such property be "declared surplus" prior to disposition.

- While PUDs are not required by their governing statutes to expressly declare unneeded property as "surplus" prior to sale or other disposition, the District's Board of Commissioners rectified any hypothetical procedural defect through its subsequent, ratifying resolution. This is not an "after-the-fact justification" as Plaintiffs suggest, but rather an "abundance of caution" procedural correction to an otherwise lawful action within the PUD's general authority.

B. Plaintiffs' "public interest" arguments rely on an irresponsible misrepresentation of the undisputed record facts.

To paint the illusion of public interest, Plaintiffs falsely characterize the District's desire to obtain a utility easement from the County as an "after-the fact justification[] for both the purchase and sale of property not supported by the record." Pet. for Rev. at 1. To make that argument, Plaintiffs obstinately ignore the unrebutted Declarations of Amber Orr (CP 78-85) and of Colin Willenbrock (CP 86-90), as well as the County's June 20, 2017 Resolution No. 2017-22 that expressly notes the District's need for an easement (CP 106) (noting that Parcel 19182 "is adjacent to PUD land and it contains an easement that impacts PUD operations"). Plaintiffs did not offer a scrap of evidence to contradict the District's facts, and thereby created no issue of fact to avoid summary judgment. Perhaps more importantly, as the Court of Appeals held, the District's "intent" in procuring the utility easement is irrelevant to whether the District acted *ultra vires*. *Responsible Growth*, 466 P.3d at 1132 ("[t]he doctrine of ultra vires focuses on whether a statute authorizes a municipal corporation to perform an act, not whether the municipality performed the act with wrong intent.")

Plaintiffs also take liberties in characterizing the District's procurement of the express easement on Parcel No. 19182. Instead of

acknowledging the District's corrected Special Warranty Deed for what it is – a scrivener's revision – they falsely claim it is "the first mention of an easement on the property in the record." In doing so, they ignore the fact that the District's original deed to HiTest expressly reserved a utility easement. CP 135. While the easement was reserved across the wrong parcel, this undisputed evidence also demonstrates the District's purpose to reserve an easement across the property it sold to HiTest, months before the subsequent deed corrected the error.

V. CONCLUSION

Plaintiffs' Petition for Review is premised on the incorrect notion that there is some unsettled question regarding the authority of PUDs to acquire easements and dispose of unneeded property. But Washington law is abundantly clear on these points. In truth, Plaintiffs simply seek a different result in this action, which is not a proper basis for review. The District respectfully requests that the Superior Court and Court of Appeals' decisions stand, and that this Court deny further review.

RESPECTFULLY SUBMITTED this 26th day of August, 2020.

s/ Tyler R. Whitney
Tyler R. Whitney, WSBA No. 48117
PUD No. 1 of Pend Oreille County
P.O. Box 190
130 N. Washington
Newport, WA 99156
Telephone: (509) 447-9331
Email: twhitney@popud.org

s/John Ray Nelson
John Ray Nelson, WSBA #16393
FOSTER PEPPER PLLC
618 West Riverside Avenue, Suite 300
Spokane, WA 99201-5102
Telephone: (509) 777-1600
Email: john.nelson@foster.com

Attorneys for Respondent Public Utility District No. 1 of Pend Oreille County

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

I hereby certify that on August 26, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered e-portal users will be served by the appellant system.

s/ Julie Robertson
Julie Robertson, Legal Assistant

FOSTER PEPPER PLLC

August 26, 2020 - 3:02 PM

Transmittal Information

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Filing on Behalf of: John Ray Nelson - Email: john.nelson@foster.com (Alternate Email: litdocket@foster.com)

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