

NO. 36687-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

South Tacoma Way, LLC,

Appellant,

v.

State of Washington,

Sustainable Urban Development, LLC,

Respondents.

FILED APPEALS
COURT OF APPEALS
DIVISION II
08 FEB 22 PM 1:43
STATE OF WASHINGTON
BY DEPUTY

REPLY BRIEF OF APPELLANT

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

Robert G. Casey
Eisenhower & Carlson, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
(253) 572-4500

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. REPLY TO RESPONDENT’S STATEMENT OF THE CASE	2
C. SUMMARY OF ARGUMENT	6
D. ARGUMENT	7
(1) <u>Violation of RCW 47.12.063 Renders the Sale Void Even If the Legislature Did Not Expressly So State; Courts Have Held Such Sales to Be <i>Ultra vires</i> and Void Despite the Lack of Express Legislative Mandates</u>	7
(2) <u>As a Party Entitled to Notice Under RCW 47.12.063(2)(g) and a Person Aggrieved by WSDOT’s Failure to Obey that Statute, South Tacoma Has Standing to Challenge the State’s <i>Ultra Vires</i> Sale of Property to SUD</u>	8
(3) <u>The <i>Ultra Vires</i> Doctrine Applies Because WSDOT Violated an Express Limitation on Its Grant of Authority and Bypassed the Entire Statutory Bidding Scheme</u>	12
(4) <u>Whether South Tacoma Would Have Been the High Bidder at Auction Is Irrelevant Because No Auction Was Held</u>	16
(5) <u>The Bona Fide Purchaser Doctrine Cannot Be Used to Ratify the Void Contract</u>	17
(6) <u>Staub/South Tacoma Acted Timely; Estoppel and Laches Do Not Apply</u>	19
E. CONCLUSION.....	21

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Barendregt v. Walla Walla Sch. Dist. No. 140</i> , 26 Wn. App. 246, 611 P.2d 1385 (1980).....	8
<i>Branson v. Port of Seattle</i> , 152 Wn.2d 862, 101 P.3d 67 (2004)	9
<i>Dick Enters., Inc. v. Metropolitan King County</i> , 83 Wn. App. 566, 922 P.2d 184 (1996)	8, 9, 10, 11
<i>Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.</i> , 131 Wn.2d 345, 932 P.2d 158 (1997).....	7, 13
<i>Edwards v. City of Renton</i> , 67 Wn.2d 598, 409 P.2d 153 (1965).....	14
<i>Finch v. Matthews</i> , 74 Wn.2d 161, 443 P.2d 833 (1968)	13
<i>Glaser v. Holdorf</i> , 56 Wn.2d 204, 352 P.2d 212 (1960).....	18
<i>Gross v. Sunding</i> , 139 Wn. App. 54, 161 P.3d 380 (2007)	20
<i>Laborers Local Union No. 374 v. Felton Constr. Co.</i> , 98 Wn.2d 121, 654 P.2d 67 (1982).....	18
<i>Levien v. Fiala</i> , 79 Wn. App. 294, 902 P.2d 170 (1995).....	18
<i>Nelson v. Pacific County</i> , 36 Wn. App. 17, 671 P.2d 785 (1983).....	7, 13
<i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982).....	7, 13, 15, 17
<i>Peerless Food Prods., Inc. v. State</i> , 119 Wn.2d 584, 835 P.2d 1012 (1992).....	8, 9, 10, 11
<i>Platt Elec. Supply, Inc. v. City of Seattle, Division of Purchasing</i> , 16 Wn. App. 265, 555 P.2d 421 (1977).....	14
<i>Properties Four v. State</i> , 125 Wn. App. 108, 105 P.3d 416 (2005).....	7
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	9
<i>Univ. of Wash. v. City of Seattle</i> , 108 Wn.2d 545, 741 P.2d 11 (1987).....	20
 <u>Other Cases</u>	
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794, 96 S. Ct. 2488 (1976).....	18
<i>Newbold v. Glenn</i> , 67 Md. 489, 10 A. 242 Md. (1887)	16
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429, 100 S. Ct. 2271 (1980)	18

Summer Cottagers' Assoc. of Cape May v. City of Cape May,
111 A.2d 435, 34 N.J. Super 67 (1954)15

Statutes

RCW 47.12.0631, 4, 21
RCW 47.12.063(2).....2
RCW 47.12.063(2)(g) *passim*

Rules and Regulations

RAP 2.5(a)8

Other Authorities

[http://seattletimes.nwsources.com/html/localnews/
2004084390_webaudit21m.html](http://seattletimes.nwsources.com/html/localnews/2004084390_webaudit21m.html)2

A. INTRODUCTION

A state agency and a private party should not be granted retroactive judicial approval to violate an express statutory provision and circumvent the public bidding laws.

Respondent Washington State Department of Transportation (WSDOT) failed to notify abutting landowners of its planned sale of real property as required by RCW 47.12.063(2)(g), and sold the property privately to respondent Sustainable Urban Development (SUD). When WSDOT belatedly notified abutting landowners, one of whom timely objected, the agency then refused to hold the required public auction. Finally, WSDOT attempted to ratify its own illegal contract by resort to the bona fide purchaser doctrine.

SUD and WSDOT concede a statutory violation, yet they would like this Court to view the plaintiff as the villain. Appellant South Tacoma Way (South Tacoma) has done nothing more than insist that WSDOT follow the law and obey the statutory restrictions enacted by the Legislature on surplus property sales.

SUD and WSDOT want to play a game of “gotcha” with the requirements for surplus property sales by WSDOT. On the one hand, they acknowledge that the proper notification procedure was not followed and that the manner of sale violated RCW 47.12.063. Abutting property

owners did not have the opportunity to object and request a public auction. On the other hand, now that the sale is a *fait accompli* because the procedure was not followed, they aver that it is too late to object, and that it would be unfair to rescind the contract and obey the statute. By SUD and WSDOT's logic, the statutory scheme of RCW 47.12.63 should be tossed out entirely, and replaced with a requirement that WSDOT simply sell the property at its own discretion. That is not the policy adopted by the Legislature.¹

This Court should reverse the trial court's order and order that summary judgment be entered in favor of South Tacoma.

B. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

It is undisputed that WSDOT violated RCW 47.12.063(2)(g)² when it failed to notify abutting landowners of an impending sale of land

¹ WSDOT's position on public bidding is reminiscent of that of the Port of Seattle whose audit by the State Auditor revealed repetitive violations of public bidding statutes. See http://seattletimes.nwsourc.com/html/localnews/2004084390_webaudit21m.html.

² RCW 47.12.063(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:

...(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

to SUD, and failed to conduct a public auction in violation of competitive bidding laws. Br. of Resp't at 506.

However, in their counterstatement of facts, WSDOT and SUD take pains to emphasize that when SUD casually mentioned to Nicholas Staub³ that it had purchased the alley from WSDOT, Staub did not immediately object. Br. of Resp't at 3-4, 7-11. SUD and WSDOT aver that Staub objected "belatedly." *Id.* at 11. Then, in what appears to be a material misrepresentation to this Court to support their estoppel/laches argument, they also state that:

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. Moreover, Mr. Staub waited over four months to raise an objection after Sustainable twice told him in writing about the sale in September 2005.

Br. of Resp't at 10.

The contention that Staub waited four months to object, or that he did not object promptly after discovering WSDOT's violation, is demonstrably untrue. WSDOT employee Cynthia Tremblay's "Diary of Right of Way Activities" *submitted by SUD and WSDOT* as Exhibit 11 to

property shall be sold at public auction in the manner provided in RCW 47.12.283[.]

³ Staub is South Tacoma's predecessor in interest.

their summary judgment motion response proves this. CP 440. In Tremblay's diary, she recorded that in early November, Tim Pavolka of South Tacoma called "*represent[ing] the Staub family*" and objected to the sale in violation of RCW 47.12.063. CP 440. Again at the bottom of the page, Tremblay noted that Pavolka said he was representing Staub, and listed Nick Staub's name and contact information. *Id.*

Early November 2005 is two months, not four, after SUD emailed Staub about the sale, and is two months *before* WSDOT belatedly sent its written notice to Staub. CP 435, 446. *More importantly, early November is soon after Staub/South Tacoma first learned of the statutory violation in October of 2005.* CP 366. Once armed with the knowledge that the sale was unlawful, Staub and South Tacoma acted promptly to investigate and object. CP 440.

Also, it is undisputed that Staub objected timely once WSDOT notified Staub in writing of his right to object as required by RCW 47.12.063(2)(g). He received the required notice from WSDOT on January 17, 2006. CP 446. He had 15 days to object, according to RCW 47.12.063(2)(g). Staub objected in writing to the sale on January 19, 2006, *two days later.* CP 415. Staub, unlike WSDOT, complied with the statutory procedure.

WSDOT's and SUD's suggestion that Staub's objection was belated is contradicted by the record. Staub explained that before he was made aware of RCW 47.12.063(2)(g), he did not know he had any right to object to the sale. CP 88-89, 130. When he first learned of the statute in October 2005, he objected quickly. CP 366, 440.

WSDOT and SUD claim that there are no public policy concerns raised by this case, citing Judge Pomeroy's letter opinion. Br. of Resp't at 3. However, this is not a clear-cut issue. The record reflects that: WSDOT violated the law (CP 448); SUD knew it was not the only landowner abutting the alley (CP 158-59); WSDOT offered no other excuse than "error" for failing to check readily available public records to ascertain whether there were other abutting landowners (CP 47-65, 448); the appraised price of the alley was based on the erroneous assumption that the alley had only one abutting owner, and that assumption led the appraiser to undervalue the alley (CP 170-207); and despite WSDOT's initial pledge to "work toward meeting the requirements of the law," the agency refused to follow RCW 47.12.063(2)(g) and hold a public auction when Staub timely objected. CP 448.

This case raises numerous public policy concerns.

C. SUMMARY OF ARGUMENT

This Court does not need evidence of legislative intent before declaring an *ultra vires* agency action void. Under well-established case law, *ultra vires* contracts are void *ab initio* regardless of any express legislative directive.

South Tacoma has standing to bring this declaratory judgment action because the controversy is actual, present and existing between opposing parties, the interests involved are direct and substantial, and a judicial determination of will be final and conclusive.

WSDOT's private sale of land to SUD was *ultra vires* because it violated the express provision of RCW 47.12.063(2)(g) and bypassed the entire competitive bidding statutory scheme. This is a declaratory judgment action and no competitive bidding actually took place, therefore WSDOT and SUD's argument that South Tacoma has no vested rights is irrelevant.

The bona fide purchaser doctrine cannot be applied to "cure" WSDOT and SUD's void *ultra vires* contract. Equitable principles protecting free trade must give way to the public interest in requiring agencies to act within their authority and obey competitive bidding laws.

South Tacoma's claim is not barred by laches or estoppel. Once they were aware of the violation and received notification, Staub and

South Tacoma acted promptly to assert their rights and WSDOT's obligations under RCW 47.12.062(2)(g).

D. ARGUMENT

(1) Violation of RCW 47.12.063 Renders the Sale Void Even If the Legislature Did Not Expressly So State; Courts Have Held Such Sales to Be *Ultra vires* and Void Despite the Lack of Express Legislative Mandates

SUD and WSDOT argue at 17-19 that because the Legislature did not specifically provide that WSDOT's violation of RCW 47.12.063(2)(g) renders the contract void, it is inappropriate for this Court to do so, citing *Properties Four v. State*, 125 Wn. App. 108, 105 P.3d 416 (2005). In *Properties Four*, the statute in question contained an express provision that property sold in violation of the statute was void. *Id.* at 114-15.

It is irrelevant that the statute at issue in *Properties Four* happened to contain an express provision voiding any sale made in violation of the statute. No court of this state has held that *ultra vires* contracts are *only* void if the Legislature expressly provides it. SUD and WSDOT fail to contend with other cases in which this Court and the Washington Supreme Court voided such *ultra vires* actions without needing any express statutory mandate from the Legislature. *See Noel v. Cole*, 98 Wn.2d 375, 381, 655 P.2d 245 (1982) (superseded by statute on other grounds, *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 362, 932 P.2d 158 (1997)); *Nelson v. Pacific County*, 36 Wn.

App. 17, 23-24, 671 P.2d 785 (1983); *Barendregt v. Walla Walla Sch. Dist. No. 140*, 26 Wn. App. 246, 249, 611 P.2d 1385 (1980).

This Court may declare the WSDOT/SUD contract void without any express statement from the Legislature.

- (2) As a Party Entitled to Notice Under RCW 47.12.063(2)(g) and a Person Aggrieved by WSDOT's Failure to Obey that Statute, South Tacoma Has Standing to Challenge the State's *Ultra Vires* Sale of Property to SUD

Relying upon inapplicable cases involving competitive bidding irregularities, SUD and WSDOT at 21-25 argue that South Tacoma does not have standing to challenge the legality of WSDOT's failure to notify it of the proposed sale and hold and auction.⁴ They cite *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 835 P.2d 1012 (1992) and *Dick Enterprises, Inc. v. Metropolitan King County*, 83 Wn. App. 566, 922 P.2d 184 (1996) two cases involving bidder challenges to irregularities arising within the competitive bidding process. WSDOT's and SUD's reliance on these competitive bidding cases is ironic, because it is precisely WSDOT's failure to notify South Tacoma and obey competitive bidding laws that distinguishes this case from *Peerless* and *Dick Enterprises*.

⁴ As a threshold matter, SUD and WSDOT never raised their standing challenge to the trial court. CP 281-94. They did mention *Peerless* and made a passing reference to the State being the only "injured party," (CP 285) but never mentioned standing and did not sufficiently develop the issue. The Court should decline to entertain this issue on appeal. RAP 2.5(a). However, because this Court may choose to consider the argument, South Tacoma submits a response.

Before addressing *Peerless* and *Dick Enterprises*, it must be clarified that this is a Uniform Declaratory Judgment Act (UDJA) claim. WSDOT and SUD do not address UDJA standing requirements in their brief, so a review of those principles is helpful. Under the UDJA, an action can be brought by:

A person interested under a deed, will, written contract or other writings constituting a contract, *or whose rights, status or other legal relations are affected by a statute*, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In order to have standing to seek declaratory judgment under the act, a person must present a justiciable controversy, which means:

(1) ...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004), citing *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

Peerless and *Dick Enterprises* are not UDJA cases and are readily distinguishable from this case. The unsuccessful auction bidder in *Peerless* sued for monetary damages from the state. Our Supreme Court made it quite clear that even a wrongfully rejected bidder had no legal right to damages, but could sue for declaratory judgment:

Although a public contractor whose low bid is wrongfully rejected by a government entity is often held to have standing to prosecute an action for injunction, mandamus, or declaratory judgment, it is less frequently held that there is a remedy for damages in such cases, the basic reasoning being that while equitable, extraordinary, or declarative relief may serve the public interest by preventing the award and execution of a contract for an excessive amount, permitting damages in such cases serves the bidder's interest alone....

Peerless, 119 Wn.2d at 591 (emphasis added). The *Peerless* court also noted that wrongfully rejected bidders have the opportunity to sue for declaratory relief before the contract is executed, because as participants in the auction they are aware that the contract is about to be awarded. *Id.* at 596. In *Dick Enterprises*, an unsuccessful bidder tried to sue for injunctive relief after a contract had been formed. *Dick Enterprises*, 83 Wn. App. at 569. This Court concluded that the bidder could not belatedly sue to enjoin performance once the contract had been executed, but distinguished the case from one where equitable relief is requested before the contract is formed. Bidders have standing to enjoin formation

of improperly awarded contracts in advance, “because the public benefits from preventing a contract for an excessive amount.” *Id.* at 569.

Peerless and Dick Enterprises do not preclude South Tacoma from bringing their action because (1) this is a declaratory judgment action, not a damages action, and (2) no advance notice or public auction was provided. South Tacoma had no opportunity to object to the sale in advance. The contract was executed without WSDOT notification to abutting landowners that they had the right to object and bid. WSDOT *completely bypassed the statutory competitive bidding scheme* and executed the sale to SUD privately. Unlike the unsuccessful bidders in *Peerless and Dick Enterprises*, South Tacoma was deprived of the opportunity to protect its interest – and the public interest – by suing to enjoin the contract before its execution.

If this Court accepts the argument that abutting landowners do not have standing to seek declaratory relief regarding a sale of land awarded in violation of RCW 47.12.063(2)(g) and competitive bidding laws, it will eviscerate the notice provision of the statute.

South Tacoma has standing to bring this declaratory judgment action, both to protect its statutory rights as an abutting landowner and to protect the public interest in preventing favoritism in the award of public contracts. The controversy is actual, present and existing between

opposing parties, the interests involved are direct and substantial, and a judicial determination of will be final and conclusive.

(3) The *Ultra Vires* Doctrine Applies Because WSDOT Violated an Express Limitation on Its Grant of Authority and Bypassed the Entire Statutory Bidding Scheme

SUD and WSDOT argue at 26-27 that requiring WSDOT to comply with the express language of RCW 47.12.063(2)(g) will cause untold hardship and create numerous shocking consequences. The weakness of their argument is belied by the inaccurate and absurd way in which they frame the issue: “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 [the statutes], then any subsequent sale is *ultra vires* and void....” Br. of Resp’t at 26.

This statement, of course, is entirely erroneous. RCW 47.12.063(2)(g) does not require WSDOT to provide notice to “every potentially interested purchaser.” It requires notice to abutting landowners, who are a limited number of readily ascertainable parties. Also, if WSDOT takes issue with the requirement that it notify all abutting landowners, it should ask the Legislature to change the statute. It should not ask this Court to ignore the express restrictions on WSDOT’s authority contained in RCW 47.12.063(2)(g).

SUD and WSDOT concede at 28-32 that an action is *ultra vires* if it is in “complete disregard to a statutory scheme.” They also concede that competitive bidding statutes are designed to protect the public. Yet they still insist that WSDOT’s circumvention of the competitive bidding laws was not *ultra vires*. They attempt to distinguish *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982) (*superseded by statute on other grounds, Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 362, 932 P.2d 158 (1997)); *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968); and *Nelson v. Pacific County*, 36 Wn. App. 17, 671 P.2d 785 (1983), on the basis that those cases involve public agency disregard of entire statutory schemes.

Like environmental laws or public trust land ownership laws, the competitive bidding laws are a statutory scheme created to protect the public:

It is now well settled that there is a strong public policy in the State of Washington favoring competitive bidding laws. The purposes of such laws, as declared by our State Supreme Court, are these:

...[R]equiring public bidding on municipal contracts is ‘to prevent fraud, collusion, favoritism, and improvidence in the administration of public business’....

Platt Elec. Supply, Inc. v. City of Seattle, Division of Purchasing, 16 Wn. App. 265, 269, 555 P.2d 421 (1977) (quoting *Edwards v. City of Renton*, 67 Wn.2d 598, 602, 409 P.2d 153, 157 (1965)).

When competitive bidding laws are ignored altogether, or the agency taking bids violates the rules of the bidding process, the resulting contract is void. In *Platt*, a City of Seattle purchasing agent sought bids for light bulbs. After the bidding process had begun, the agent privately allowed one bidder to change his bid, without permitting other bidders the same opportunity. 16 Wn. App. at 266. One of the losing bidders sued to enjoin execution of the contract. *Id.* This Court concluded that private negotiations with one bidder violated the city charter and an ordinance specifying that the lowest and best bid would be awarded the contract. *Id.* at 271. The decision also concluded that allowing a state agent to circumvent public bidding laws – by ignoring express restrictions on that authority in a statute or ordinance – “cannot be permitted.” *Id.* at 274. “A public contract which has been let in violation of a competitive bidding law is illegal and void.” *Id.* at 279.

Despite their attempts to persuade this Court that WSDOT did not act *ultra vires* because it had “general authority” to sell surplus property, and that WSDOT’s failure to conduct competitive bidding was merely

“procedural error,” SUD and WSDOT cannot overcome contrary language from *Noel*:

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 380-81.

The foreign authorities cited by WSDOT and SUD at 36-37 are inapposite here. First, they are contrary to applicable Washington authority. Second, in *Summer Cottagers' Assoc. of Cape May v. City of Cape May*, 111 A.2d 435, 34 N.J. Super 67 (1954), the City attempted to comply with the public notice statute by asking the newspaper to print a special edition with the public notice included. *Id.* at 72. Although the special edition did not reach the usual number of readers, the court upheld the sale. The notice did not violate any express statute or ordinance, and was in all other ways proper. *Id.* at 76-77. Also, the challengers in *Summer Cottagers'* watched the new owners expend large sums of money developing the property, and did not act.

Here, a total lack of notice to abutting landowners *was* a violation of an express law: RCW 47.12.063(2)(g). The city's efforts to comply with the law in *Summer Cottagers* cannot be compared with WSDOT's

actions here, where no notification occurred at all. Also, there is no evidence that SUD made any improvements to the alley between September 2005 and January 2006.

In *Newbold v. Glenn*, 67 Md. 489, 10 A. 242 Md. (1887), there was a serious equitable problem concerning development of the land between the time of the sale and the time of the challenge. Buildings had been erected, and a business organization had been operating on the property “for some time.” *Newbold*, 10 A. at 242. Also in *Newbold*, the property was sold for full market value. *Id.* at 243.

Here, it is undisputed that SUD made no improvements to the alley between the time of purchase and Staub’s objection. Also, the appraised value and sale price were depressed, based on the appraiser’s false assumption that no other party would have use for the property.

The competitive bidding statutory scheme was completely disregarded by WSDOT in this case. The agency’s failure to comply with the statutes makes its action *ultra vires* and voids the contract.

(4) Whether South Tacoma Would Have Been the High Bidder at Auction Is Irrelevant Because No Auction Was Held

SUD and WSDOT argue at 37-39 that South Tacoma has no vested property right because it cannot prove it would have been the high bidder had an auction been held, and cannot force the state to accept a bid if an auction is held.

This entire argument is irrelevant. South Tacoma is not claiming a vested property right, seeking damages, or attempting to force a sale of the alley to South Tacoma. It merely seeks a declaration from this Court requiring WSDOT to comply with the competitive bidding laws. When WSDOT has complied with the law, South Tacoma is perfectly prepared to abide by the result of a properly conducted auction.

(5) The Bona Fide Purchaser Doctrine Cannot Be Used to Ratify the Void Contract

SUD and WSDOT argue at 39-46 that SUD is protected by the bona fide purchaser doctrine.

SUD and WSDOT's attempt to preserve this illegal and void contract citing equitable principles is misguided. Equitable considerations did not validate the void *ultra vires* contract in *Noel*, even though equity did allow the innocent purchaser some remuneration from the state. *Noel*, 98 Wn.2d at 382-83. The *Noel* court had the opportunity to ratify a void *ultra vires* contract by applying equitable principles, and it declined to do so.

In their brief at 44, SUD and WSDOT contend that South Tacoma's policy argument – that the free trade principle underlying the bona fide purchaser doctrine should give way to the public interest when the state is market participant – is “completely lacking in support” because South Tacoma cited language from Justice Dore's dissenting opinion in

Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wn.2d 121, 133-35, 654 P.2d 67 (1982). South Tacoma concedes and apologizes for its oversight in failing to designate Justice Dore's opinion as dissenting in its opening brief.

However, the cited principle is taken directly from majority United States Supreme Court opinions in *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-38, 100 S. Ct. 2271 (1980), and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809, 96 S. Ct. 2488 (1976). As such, the principle is not "completely lacking in support;" it comes from the highest available authority.

SUD and WSDOT's attempt to compare WSDOT's *ultra vires* sale of land to cases involving sales between private parties in *Levien v. Fiala*, 79 Wn. App. 294, 298, 902 P.2d 170 (1995) and *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960) is flawed. Here, the state is participating in commerce. As *Reeves* and *Hughes* explain, when a state engages in commerce as a market participant, the state's role as a guardian of the public interest overrides even the constitutionally protected free flow of commerce guaranteed by the Commerce Clause. *Reeves*, 447 U.S. at 437-38; *Hughes*, 426 U.S. at 809. This principle likewise defeats the argument that this Court should favor the free flow of commerce over WSDOT's responsibility to protect the public interest.

(6) Staub/South Tacoma Acted Timely; Estoppel and Laches Do Not Apply

SUD and WSDOT argue at 47-50 that laches and estoppel bar South Tacoma's claim.

Regarding laches, they opine that South Tacoma missed the 15-day response period allowed under RCW 47.12.063(2)(g).

SUD and WSDOT's laches argument is audacious. South Tacoma objected to the sale two days after receiving proper written notice from WSDOT, well within the 15-day period. This point is not disputed. SUD and WSDOT contend that under RCW 47.12.063(2)(g), South Tacoma was responsible for abiding by the statute and objecting to the sale *before* it received any notice from WSDOT, because SUD had mentioned in an email that it had purchased the alley. SUD's casual communications do not meet the notice requirements of RCW 47.12.063(2)(g).

The record does not support the contention that Staub's objection was belated, or that he sat on his rights. When SUD told Staub it had purchased the alley, Staub believed the transaction was a done deal and did not know he had any right to object. Once Staub was made aware of his right to notice and objection under the statute, Staub did not wait. Pavolka contacted WSDOT on Staub's behalf and requested information. WSDOT responded on January 17, 2006 when it attempted, belatedly, to

fulfill its statutory obligations. Staub objected on January 19, two days later.

Before he received notification, Staub was not under any obligation to object to the transaction, nor did he contradict himself by failing to assert his rights before he knew he had any rights to assert. As Staub's predecessor in interest, South Tacoma's claim is not barred by the doctrine of laches.

Regarding estoppel, SUD and WSDOT contend that South Tacoma's objection to the sale after proper WSDOT notification is contrary to Staub's earlier silence. Br. of Resp't at 49.

The elements of equitable estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Gross v. Sunding*, 139 Wn. App. 54, 161 P.3d 380 (2007). As SUD and WSDOT point out, silence coupled with knowledge of an adverse claim can lead to a finding of estoppel. *Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 553, 741 P.2d 11 (1987).

The problem with SUD and WSDOT's estoppel argument is that Staub and South Tacoma were not silent after they had knowledge of their

adverse claim, which first occurred in October of 2005. CP 366. South Tacoma's claim is that WSDOT's failure to notify abutting landowners and hold a public auction made the sale an *ultra vires* act. Neither Staub nor South Tacoma has ever contended, affirmatively or through silence, that under RCW 47.12.063(2)(g) they were not entitled to notice or that WSDOT's failure to follow the law was permissible.

South Tacoma is not estopped, because Staub had no knowledge of an adverse claim until October 2005, at which time he acted to rectify the matter and assert his claim. CP 366, 440, 446. From the moment Staub first became aware that he had an adverse claim, his actions and statements were consistent with that position.

E. CONCLUSION

State agencies must be constrained to act in accordance with the express authority granted to them by the Legislature. When they violate that authority, no legal or equitable principle can transform that illegal act into a legitimate transaction. DOT acted *ultra vires* here when it privately sold the alley to SUD and did not comply with RCW 42.12.063. The deed in favor of SUD is void under well-established authority.

This Court should reverse the trial court's grant of summary judgment, and remand the case back to the trial court for entry of

summary judgment in favor of South Tacoma in its declaratory judgment
action.

DATED this 21ST day of February, 2008.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Sidney Charlotte Tribe, WSBA #33160
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661
Attorneys for Appellant
South Tacoma Way, LLC

DECLARATION OF SERVICE

On this day said forth below, I deposited with the U.S. Postal Service a true and accurate copy of: Reply Brief of Appellant in Court of Appeals Cause No. 36687-8-II to the following parties:

Patrick J. Mullaney
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

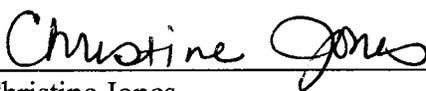
Steve E. Dietrich
Assistant Attorney General
Attorney General of Washington
Transportation & Public Construction Division
P.O. Box 40113
Olympia, WA 98504-0113

Robert G. Casey
Eisenhower & Carlson, PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402

Original sent by ABC Legal Messengers for filing with:
Court of Appeals, Division II
Clerk's Office

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: February 22, 2008, at Tukwila, Washington.



Christine Jones
Legal Assistant
Talmadge/Fitzpatrick

FILED
COURT OF APPEALS
DIVISION II
08 FEB 22 PM 1:43
STATE OF WASHINGTON
BY DEPUTY