

82212-3

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.

BRIEF OF APPELLANT

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A. INTRODUCTION

In a private deal and without first giving notice to other abutting landowners, the State of Washington Department of Transportation (“DOT”) sold surplus land to a major developer, Sustainable Urban Development (“SUD”). DOT’s action directly violated a statute requiring DOT notify all abutting landowners before disposing of surplus property.

Although DOT admitted to violating the statute, thereby making the sale to SUD *ultra vires* and void, the agency refused to rescind the void sale. South Tacoma Way LLC, (South Tacoma) an interested abutting landowner, sought a declaratory judgment to void the sale and require DOT to put the property up for public auction. The trial court allowed DOT and SUD’s unlawful deal to stand.

State agencies only possess the authority given to them by statute. When agencies violate those statutes and exceed their authority, they cannot then ratify their own *ultra vires* actions. This Court should reaffirm the long-standing rule that contracts executed by state agencies in violation of existing statutes are void.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in granting summary judgment to the defendants and denying summary judgment in favor of the plaintiff on August 2, 2007.

(2) Issues Pertaining to Assignments of Error

a. Is a state agency's action *ultra vires* when it is taken in direct violation of an existing statute? (Assignment of Error Number 1)

b. Is an *ultra vires* contract, formed in violation of an existing statute, void? (Assignment of Error Number 1)

c. Can an agency ratify its own *ultra vires* deed, or ask a trial court to do so, despite long-standing case law that renders the deed void? (Assignment of Error Number 1)

d. Does the "bona fide purchaser" doctrine apply to cure a void deed granted *ultra vires* by a state agency? (Assignment of Error Number 1)

e. If the bona fide purchaser for value doctrine does apply, is a buyer of real property from a state agency a bona fide purchaser when the buyer had constructive notice of a statute requiring notice to abutting landowners and knew of at least one other abutting landowner? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

From 1969 to 2006, the Staub family owned a commercial building located on Airport Way in downtown Seattle.¹ CP 47-48, 78. During that time, the building was leased by Romaine Electric, a starter and alternator business owned by Nicholas Staub. *Id.* 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. One small portion was owned by an individual named Timmi I. Marshall. CP 65-66.

Because its growing business was outstripping its Staub building space, Romaine Electric sometimes stored materials in DOT's alley. CP 364. To remedy this problem, 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 up for sale. *Id.*

In 2004, major Seattle land developer 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

¹ During the period relevant to this appeal, Frances Staub owned the building via a business entity named FVS, LLC.

Staub felt that SUD's 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. Despite leasing the extra space from SUD, Romaine Electric still did not have enough room to meet its growing needs. CP 83, 122.

In May 2004, SUD wrote to DOT and requested to purchase the alley. CP 346. Because the alley had more than one abutting landowner, 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).² Operating under the misimpression that SUD was the only landowner abutting the alley, DOT failed to notify the Staubs or Marshall 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 SUD's interest, Nicholas Staub would have asked DOT to auction the alley. CP 130.

² RCW 47.12.063(2)(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."

In late 2004, although the alley sale was not yet complete, Glen Scheiber of SUD told Nicholas Staub verbally that SUD had already purchased the alley. CP 369-70. Although Staub was surprised that DOT had not contacted him in advance about the alley sale, Staub was not aware of DOT's statutory obligations concerning sale of property. CP 88-89, 130. In September 2005, Scheiber sent an email to Staub again announcing the alley purchase and asking Staub to clear out any materials Romaine Electric had stored there. CP 435.

During the same period that DOT and SUD were negotiating sale of the alley, the Staubs were seeking a larger facility and putting their building up for sale. CP 83. In autumn 2005, South Tacoma sought to purchase the Staub building as a location for its business, Performance Radiator. CP 212. During negotiations, Tim Pavolka of South Tacoma asked Nicholas Staub about the alley because he believed that the Staub 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. While conducting due diligence on the purchase, Pavolka contacted DOT about the possibility of purchasing the alley. CP 214. Cindy Tremblay of DOT informed Pavolka that the alley had already been sold to SUD. *Id.* Pavolka informed Tremblay that Staub, an abutting landowner, had not been notified. CP 215, 217. Tremblay responded that

a lack of notification to abutting landowners raised a problem with the sale to SUD. *Id.*

Tremblay sent a letter to the Staubs, asking them to retroactively waive their rights as abutting landowners. CP 165. Staub responded by email, refusing to waive any rights, expressing interest in the alley and requesting more information about the sale. CP 161. Tremblay admitted that DOT had violated the statutes governing the sale of surplus property, but stated that SUD was a “bona fide purchaser for value” and refused to void the sale. CP 167. Tremblay also asserted that the Staubs could not prove that they would have been the high bidders had DOT followed the statute and put the alley up for auction. *Id.*

After South Tacoma completed the purchase of the Staub building, it filed this declaratory judgment action, asking the trial court to declare the sale of the alley to SUD was void because DOT’s action was *ultra vires*. CP 7-8. 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 did not enter findings of fact and conclusions of law, but issued a letter opinion. CP 594-96. The court noted that DOT did not comply with RCW 47.12.063(2)(g). CP 595. However, the court determined that the transaction was not *ultra vires* because DOT was “authorized” to sell the

property at fair market value, and noted the Legislature did not expressly provide that a state agency's sale in violation of RCW 47.12.063(2)(g) was void. CP 596. The trial court also concluded that South Tacoma had not proven it would have prevailed in the bidding had an auction been held. *Id.* The court ruled that SUD was a bona fide purchaser for value and was entitled to rely on the deed conveyed by DOT. CP 596.

D. SUMMARY OF ARGUMENT

The trial court erred when it allowed DOT's void, *ultra vires* sale of property to SUD to stand. DOT acted in direct violation of an existing statute, voiding the sale and nullifying the deed. The Legislature need not expressly provide that a deed granted in violation of RCW 47.12.063(2)(g) is void, because courts of this state have held for decades that *any* contract entered into by a state agency in violation of a statute is void. By refusing to rescind the sale, the trial court condoned DOT's violation of the Legislature's express limitation on a state agency's authority to sell surplus property. If no consequence stems from violation of the surplus property statutes, it raises the specter of potential sweetheart deals between agencies and favored private parties.

The trial court also misapplied the bona fide purchaser doctrine. Just as estoppel would not apply in this circumstance, the bona fide purchaser doctrine cannot cure *ultra vires* agency action. Also, SUD did

not meet the test for being a bona fide purchaser, because it knew there were other abutting landowners, had constructive notice of RCW 47.12.063(2)(g), and should have inquired whether DOT had followed applicable statutory procedures.

E. ARGUMENT

(1) Standard of Review

Review of a grant of summary judgment is de novo. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Korlund*, 156 Wn.2d at 177. Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party; summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Id.*

The trial court's statutory construction is also reviewed de novo. *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n.*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). If a statute is plain on its face, no resort to rules of statutory construction is required. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When a statute is unambiguous, its meaning is derived from statutory language alone. *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746

(1991).

(2) DOT Acted in Direct Violation of an Existing Statute,
Which Made The Sale *Ultra Vires* and Void

An administrative agency only has those powers expressly granted or necessarily implied by statute. *Properties Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.3d 416 (2005). When a state agency acts in direct violation of an existing statute, the action is *ultra vires*. *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968).³ When a state agency enters into a contract *ultra vires*, the contract is void and unenforceable. *Pierce County v. State*, 159 Wn.2d 16, 55, 148 P.3d 1002 (2006); *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)); *Barendregt v. Walla Walla Sch. Dist.*, 26 Wn. App. 246, 249, 611 P.2d 1385 (1980).

In *Noel*, the Department of Natural Resources (DNR) sold logging rights on publicly-held timberland to Alpine Excavating, a private landowner. *Noel*, 98 Wn.2d at 377. DNR did not conduct an environmental impact statement as required by statute. Local citizens

³ In *Finch*, the Court concluded that the state entity did not violate any express statutory prohibition, and therefore its act was not *ultra vires*. *Finch*, 74 Wn.2d at 173-74. However, *Finch* supports South Tacoma's position because DOT admitted to violating RCW 47.12.063(g), and *Finch* clearly states that actions taken in direct violation of a statute are always *ultra vires*. *Id.* at 172.

challenged DNR's action as *ultra vires*. The trial court issued a permanent injunction, and awarded Alpine expectation damages for breach of contract. DNR appealed, arguing that because its action was *ultra vires*, the contract was void and unenforceable, and Alpine was therefore precluded from seeking damages for breach of contract. The Supreme Court agreed, declared the contract void, and reversed the damage award for breach of contract. *Id.* at 380-81.⁴

A state agency or local government cannot dispose of public property by contract when an express statute requires disposal by another method. *Nelson v. Pacific County*, 36 Wn. App. 17, 23-24, 671 P.2d 785 (1983). *Nelson* involved a dispute over whether certain property had been dedicated as a public right-of-way. *Id.* at 18. *Nelson*, an abutting landowner, argued that the property had not been validly dedicated and was his. *Id.* Pacific County and another interested landowner, Atkinson, disagreed. *Id.* at 19. The County attempted to settle the dispute by abandoning its interest in the property in exchange for different piece of property to be reserved as a right-of-way. *Id.* After a trial between *Nelson* and Atkinson, the trial court found that the property had been properly dedicated, and the County's attempt to abandon the dedication via settlement agreement was unenforceable. *Id.* The court denied the

⁴ The Court did provide some relief for Alpine under the doctrine of unjust enrichment, but made clear that the contract itself was void. *Id.*

Nelsons' request to quiet title in their favor. *Id.* This Court affirmed, noting that although the County had statutory power to settle disputes, its attempt to abandon property through private contract violated express statutory provisions requiring opportunity for public hearings and comment. *Id.* at 23.

Here, DOT sold property to SUD, an abutting private owner, without notifying the other abutting property owners. RCW 47.12.063(2)(g) provides that DOT can sell surplus property to any abutting property owner, but

only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283.

RCW 47.12.063(2)(g) (emphasis added). Because the abutting property owners were not notified and given the opportunity to object under RCW 47.12.283, DOT did not publicly auction the property under RCW 47.12.283. DOT and SUD do not dispute that the sale of the alley violated this statutory scheme. CP 257, 272. The action was in direct violation of an existing statute, and therefore it was *ultra vires*. *Finch*, 74 Wn.2d at 172.

The trial court here concluded that DOT's action was not *ultra*

vires, findings that DOT's failure to follow RCW 47.12.063(2)(g) was merely a "procedural error" in the sale process. CP 596. This interpretation completely contradicts nearly forty years of Washington case law holding that a contract executed in direct violation of an existing statute is *ultra vires* and void. *Finch*, 74 Wn.2d at 172; *Noel v. Cole*, 98 Wn.2d at 381. In support of its ruling the court apparently seized upon language from *Finch* regarding "acts which are within the scope of the broad governmental powers conferred, granted, or delegated, but exercised in an irregular manner or through unauthorized procedural means." *Finch*, 74 Wn.2d at 172.

However, the trial court ignored the phrase directly preceding the "unauthorized procedural means" language in *Finch*. The full context of the quotation from *Finch* illuminates the trial court's misreading:

This court has long recognized that in determining what acts of a government body are *ultra vires* and void, and thus immune from the application of the doctrine of equitable estoppel, *it must distinguish those acts which are done wholly without legal authority or in direct violation of existing statutes, from those acts which are within the scope or the broad governmental powers conferred, granted, or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means.*

Finch, 74 Wn.2d at 172 (emphasis added). The *Finch* court distinguished state actions taken in violation of statutes – which are *ultra vires* – from

mere procedural irregularities. The two are mutually exclusive: a state action taken in violation of an existing statute *cannot* be mere “procedural error.”

When South Tacoma complained to DOT about its illegal sale, DOT overstepped its authority once again. It refused to rescind the sale and follow the statutory scheme of RCW 47.12.063(2)(g). DOT cannot ratify its own *ultra vires* action. The power to ratify is coextensive with the power to contract, so “an act which was illegal for want of authority on the part of the contracting powers cannot be ratified.” *Jones v. City of Centralia*, 157 Wash. 194, 214, 289 P. 3 (1930). Once its statutory violation was brought to DOT’s attention, it should have acknowledged precedent and rescinded the sale to SUD.

The trial court’s conclusion that DOT’s action was not *ultra vires* is erroneous. DOT directly violated an existing statute and exceeded its statutory authority. The sale is void and must be rescinded, allowing DOT to dispose of the alley in compliance with the statute.

(3) The Absence of an Express Provision Voiding *Ultra Vires* Contracts Cannot be Equated with Legislative Permission to Violate the Statute

The trial court observed that in drafting RCW 47.12.063, the Legislature did not include an express provision voiding any sale not conducted in accordance with the statute. CP 596. The trial court

presumed that because DOT submitted an affidavit averring the property was sold at fair market value, the intent of the Legislature was not thwarted despite DOT's illegal private sale. *Id.*

The trial court's interpretation nullifies the statute and ignores case law regarding *ultra vires* state contracts. First, had the Legislature intended to give DOT authority to sell surplus property to abutting landowners without notice and public auction, it could have done so. Other provisions of RCW 42.12.063 provide DOT with such authority. For example, RCW 42.12.063(e) allows the state to sell the property back to the former owner from whom the state acquired title without notice to any abutting landowners. Second, the plain language of RCW 47.12.283 provides that auction sales should secure a sale price "equal to *or higher* than the appraised fair market value of the property." Apparently the Legislature was interested in securing a premium price for surplus property, not just market value. There was no evidence presented to the trial court that the price SUD paid for the property was the highest price that could have been achieved at auction. In fact, because RCW 47.12.063(2)(g) requires a *public* auction, not just an auction between abutting landowners, it would have been virtually impossible to prove at summary judgment that SUD paid the highest possible price for the property.

As SUD and DOT admit, the surplus property statute protects the public interest, not merely the interest of abutting landowners. CP 281, 288. Requiring state agencies to auction public property when more than there is more than one interested party ensures that the state will not favor one private party over another and thwart the public's interest in maximum return on the sale. See *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 590-92, 835 P.2d 1012 (1992).⁵

Preventing favoritism is also the purpose of the *ultra vires* doctrine, to prevent "a governmental agency from favoring a private entity at the expense of the public interest...." *Noel*, 98 Wn.2d at 381. Given the overriding public interest at stake when a state agency violates a statute and makes a back-door deal to sell land to a private party, the *ultra vires* doctrine should have mandated rescission of the sale.

In enacting Ch. 47.12 RCW limiting DOT's ability to dispose of surplus land, the Legislature was concerned not merely with pecuniary interests. Sixty days before disposing of any surplus property, DOT is required to notify the city, county, and town in which the property is located. RCW 47.12.055; RCW 43.17.400. The Legislature intended to

⁵ After erroneously concluding that DOT's action was not *ultra vires*, the trial court answered the hypothetical question of whether South Tacoma had proven it would have been the high bidder had DOT held an auction as required by RCW 47.12.063(g), citing *Peerless*. CP 596. Given that the auction was never held, this analysis is irrelevant. Also, the trial court ignored the fact that South Tacoma was not merely asserting its own interest as a possible bidder, but was defending the public interest just as the *Peerless* court sought to do.

ensure that the opportunity for public benefit and enjoyment of land would not be “permanently lost” to private interests without proper notice:

The legislature also recognizes that dispositions of state-owned land can create opportunities for counties, cities, and towns wishing to purchase or otherwise acquire the lands, and citizens wishing to enjoy the lands for recreational or other purposes. However, the legislature finds that absent a specific requirement obligating state agencies to notify affected local governments of proposed land dispositions, occasions for governmental acquisition and public enjoyment of certain lands can be permanently lost.

In assuming that the Legislature’s only intent in enacting the notice and public auction provisions of Ch. 47.12 RCW was to realize fair market value for the property, the trial court ignored the overall statutory scheme.

Because DOT ignored the statute and the public interest, the trial court erred in upholding the sale.

(4) The Trial Court Misapplied the Bona Fide Purchaser Doctrine

The trial court applied the bona fide purchaser doctrine and concluded that SUD’s claim to the property was superior to South Tacoma’s. CP 596. The court’s use and application of the bona fide purchaser doctrine was erroneous because South Tacoma is not claiming superior title, the doctrine should not apply to *ultra vires* actions, and SUD does not qualify for the doctrine’s protection.

(a) South Tacoma Is Not Claiming Superior Title,
Therefore the Bona Fide Purchaser Doctrine Is
Irrelevant

The bona fide purchaser doctrine is applied to determine which of two purchasers has a superior interest. *Tomlinson v. Clarke*, 118 Wash.2d 498, 508, 825 P.2d 706 (1992). The trial court's use of the bona fide purchaser doctrine rested on the false premise that South Tacoma was attempting to claim title to the alley "superior" to SUD. CP 596. The court cited *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960) in support of its application of the bona fide purchaser doctrine.

Glaser does not apply. *Glaser* involved two parties both claiming superior title to one piece of property. Here, no such competing claims were made. South Tacoma simply sought a declaratory judgment rescinding the sale and requiring DOT *to follow the law*. CP 7-8. Also, *Glaser* involved the sale of property between private parties, not between a private party and a state agency. *Id.* at 205-06.

South Tacoma does not claim that DOT should have privately sold South Tacoma the property instead of SUD; such an action also would have violated RCW 47.12.063(2)(g). DOT denied South Tacoma and other members of the public the right to bid. That denial is the basis for South Tacoma's claim, not a hypothetical quibble about whether South Tacoma would have been the high bidder at auction. Because South

Tacoma is not yet a purchaser and is not claiming superior title, the bona fide doctrine has no application. The trial court erred in using the doctrine to validate the void sale to SUD.

(b) The Bona Fide Purchaser Doctrine Should Not Apply to *Ultra Vires* Actions

The bona fide purchaser doctrine cannot be used to revive a contract that is void as *ultra vires*. Washington courts have not yet definitively addressed whether an *ultra vires* deed directly from the state to a vendee can be cured by resort to the bona fide purchaser doctrine. *State v. Hewitt*, 74 Wn. 573, 134 P. 470 (1913), holds that innocent third parties who purchase land from private owners, when the private owners had previously purchased that land from the state, are protected from state actions to invalidate their deeds. *Id.* at 585. But *Hewitt* does not hold that the state's original sale was *ultra vires*, and mentions in dicta that the original deed directly between the state and a vendee could likely be set aside. *Id.*

There is also no foreign authority on the application of bona fide purchaser doctrine to *ultra vires* sales of state-owned land. However, federal case law extending back to 1892 holds that a municipal bond issued *ultra vires* – when the bond's illegitimacy can be ascertained by reviewing the face of the bond and applicable statutes – is void even as to bona fide purchasers for value. *Brenham v. German-American Bank*, 144

U.S. 173, 188, 12 S. Ct. 559, 36 L.Ed. 390 (1892) (vacated as to disposition on remand, rehearing denied, 144 U.S. 549); *Henderson County, Tenn. v. Sovereign Camp, W. O. W.*, 12 F.2d 883, 885 (6th Cir. 1926); *City of Huron v. Evensen*, 113 F.2d 598, 600 (8th Cir. 1940); *City of McLaughlin, S.D. v. Turgeon*, 75 F.2d 402, 405-06 (8th Cir. 1935).

Here, the face of the deed executed to SUD indicated that the alley was “conveyed pursuant to the provisions of RCW 47.12.063.” CP 11. But SUD did not even make a simple inquiry as to DOT’s proper exercise of that authority. Although the bona fide purchaser doctrine might protect a third party who later purchased the property from SUD, it does not protect SUD itself from the duty of conducting a reasonable inquiry.

Other equitable principles, such as equitable estoppel, are unavailable when the state agency has improperly exceeded its statutory authority. *Campbell & Gwinn*, 146 Wn.2d at 20 n.10; *Finch*, 74 Wn.2d at 172; *Properties Four*, 125 Wn. App. at 108. In *Properties Four*, a representative from the state’s General Administration division (GA) negotiated the purchase of land from Properties Four, a private landowner. *Properties Four*, 125 Wn. App. at 110-11. The state representative told Properties that the Legislature had already budgeted the purchase price for the following year. *Id.* at 112. The deal fell through when Legislature did not approve the funding. *Id.* Properties sued the state for damages

resulting from the failed sale, arguing that the state was estopped from denying its obligations under the agreement. *Id.* at 109-10. But this Court disagreed, noting that *had* the GA attempted to proceed without legislative approval in spite of statutory and constitutional provisions requiring such approval, it would have been acting *ultra vires*: “If a state agent lacks legal authority, no void act of theirs [sic] can be cured by aid of the doctrine of estoppel.” *Id.* at 117-18. Allowing private parties to assert estoppel against state agencies that act without authority would thwart the public interest in limiting agency power, especially in cases where the public treasury is concerned. *Barendregt v. Walla Walla School Dist. No. 140*, 26 Wn. App. 246, 249, 611 P.2d 1385 (1980).

The same reasoning that denies estoppel against the State when it would apply to the actions of a private party, should deny operation of the bona fide purchaser doctrine when a state agency acts in an *ultra vires* fashion. The policy behind the bona fide purchaser doctrine is to stimulate the free flow of commerce; *Tomlinson v. Clarke*, 118 Wash.2d 498, 508, 825 P.2d 706 (1992), but when the state is a party to commerce, free trade considerations give way to protection of the public interest. *Laborers Local Union No. 374 v. Felton Const. Co.*, 98 Wn.2d 121, 133-35, 654 P.2d 67 (1982) (when state agency is commercial market

participant, state sovereignty and protection of public interest outweighs concern for free flow of commerce under the federal Commerce Clause).

To allow state agencies to ratify *ultra vires* land deals despite clear Legislative mandates to the contrary, would open the door to abuse. A private land deal struck in violation of an express statute enacted to protect the public interest can be cured no more by use of the bona fide purchaser doctrine than it can be cured by use of the doctrine of estoppel. The trial court erred in applying the bona fide purchaser doctrine to ratify DOT's *ultra vires* action.

(c) SUD Had Constructive Notice that the State's Actions Were *Ultra Vires*

Even if the bona fide purchaser doctrine can be applied to cure an *ultra vires* transaction, SUD does not qualify for the doctrine's protection in this case. A bona fide purchaser "has a superior interest in property that he or she purchases (1) for value, (2) in good faith, and (3) without actual or constructive notice of another's interest in the property." *Robin L. Miller Const. Co., Inc. v. Coltran*, 110 Wn. App. 883, 892, 43 P.3d 67 (2002). Full knowledge is not required, only "such information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry." *Levien v. Fiala*, 79 Wn. App. 294, 298, 902 P.2d 170 (1995). The buyer may not merely rely upon the representations of the seller: "It will not do for a

purchaser ... to rely on the interested representation of the seller of land that a suspicious circumstances [sic] does not concern the title." *Id.* at 299. This principle is doubly true when a party deals with a state officer who is bound by statutory limitations on his or her authority:

When dealing with an officer . . . of (the State) . . . , one must be presumed to have knowledge of the official's power and authority, and when one deals with them in a manner not in compliance with the law one does so at one's peril.

Barendregt, 26 Wn. App. at 250, 611 P.2d 1385 (1980) (quoting *State ex rel. Bain v. Clallam County Bd. of County Commr's*, 77 Wn.2d 542, 549, 463 P.2d 617 (1970)).

Here, SUD had sufficient information to prompt it to make an inquiry as to whether DOT had followed the correct statutory procedure before selling SUD the alley. First, SUD is charged with knowledge of the scope of DOT's authority under RCW 47.12.063. *Noel*, 98 Wn.2d at 379; *State v. City of Pullman*, 23 Wn. 583, 586, 63 P. 265 (1900). SUD cannot claim ignorance of DOT's mandate to notify abutting landowners of the proposed sale.

Second, SUD knew that it was not the only landowner abutting the alley. In addition to King County records indicating that two other abutting landowners existed, (CP 47-48, 65-66), SUD and South Tacoma's predecessors in interest were neighbors and were in

communication before the sale occurred. CP 511. Whether SUD believed that South Tacoma's predecessor did not want to buy the alley is irrelevant: SUD had sufficient information to put a reasonable buyer on notice to inquire whether DOT had followed the correct statutory procedures. Also, the record contains no information about whether SUD believed that the other abutting landowner, Tim Marshall, had any interest in purchasing the alley.

A buyer who purchases property from a state agency is on notice as to any statutory limitations to that agency's authority. When a buyer knows that an agency must follow statutory procedures, and does not inquire whether those procedures have been followed, he or she cannot claim to be a bona fide purchaser. The trial court erred in concluding that SUD qualified for protection by the bona fide purchaser doctrine.

(5) South Tacoma Is Entitled to Attorney Fees

Under RAP 18.1, a prevailing party may be awarded attorney fees when allowed by applicable law. South Tacoma has challenged an agency action, and is therefore entitled to attorney fees under the Equal Access to Justice Act:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an

award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). "Agency action" is defined as "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. RCW 4.84.340(3); RCW 34.05.010(3).

Although the definition of "agency action" in RCW 34.05.010(3) excludes proprietary decisions in the management of public lands, the agency action challenged here regards the implementation and enforcement of RCW 47.12.063. Therefore South Tacoma is challenging an agency action. "Qualified party" means

... a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed

RCW 4.84.340(5). South Tacoma is a qualified party under this definition.

DOT's action was not justified. The agency violated the law, and ignored the public interest. When its error was pointed out and admitted, DOT still refused to comply with statutory obligations. South Tacoma is entitled to its attorney fees incurred in challenging DOT's improper action.

F. 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. DOT again acted *ultra vires* when it attempted to ratify its actions by refusing to unwind the sale. The bona fide purchaser doctrine cannot cure the wrongfully granted deed.

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 6th day of December, 2007.

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

APPENDIX



**Washington State
Department of Transportation**

Douglas B. MacDonald
Secretary of Transportation

January 17, 2006

Frances V. Staub
10 Skagit Key
Bellevue, WA 98006

Transportation Building
310 Maple Park Avenue S.E.
P.O. Box 47300
Olympia, WA 98504-7300

360-705-7000
TTY: 1-800-833-6388
www.wsdot.wa.gov

RE: Washington State Department of Transportation
Sale of Surplus - I.C. #1-17-06919

Dear Ms. Staub,

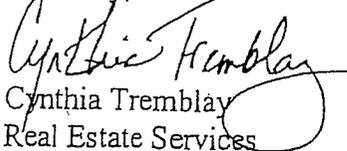
In August, 2005, the Washington State Department of Transportation (WSDOT) sold the above referenced surplus property to Sustainable Urban Development #1, LLC. The property is a narrow strip of land located near 1051 Airport Way So., in Seattle, Washington. I have enclosed two maps showing the surplus outlined in red.

Since completion of the sale, it has come to my attention that there are two additional abutting property owners that should have been notified of the sale, and given the opportunity to indicate an interest in purchasing the property.

I am writing at this time to see if you, as an abutter, have an interest in purchasing the property referenced above. If interested, please complete the enclosed form titled, "Surplus Real Estate Purchase Form". If not interested, please complete the enclosed form titled, "Waiver of Abutters Rights". Then, please mail your response to me at the address shown on the attached business card.

Based on statutory authority, WSDOT has the ability to sell its surplus property to "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." We have now discovered our error, and will work toward meeting the requirements of the law.

Sincerely,


Cynthia Tremblay
Real Estate Services

Assistant Director, Property Management
Washington State Department of Transportation

7
1-3-07
F. Staub

CT

cc: Frances Cal/Northwest Region
Tim Pavolka



Washington State
Department of Transportation

Douglas B. MacDonald
Secretary of Transportation

Transportation Building

310 Maple Park Avenue S.E.

P.O. Box 47300

Olympia, WA 98504-7300

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TTY: 1-800-833-6388

www.wsdot.wa.gov

February 1, 2006

Frances Staub
10 Skagit Key
Bellevue, WA 98006

RE: Washington State Department of Transportation (WSDOT)
Sale of Surplus - I.C. #1-17-06919

Dear Ms. Staub,

Thank you for your inquiry, initially through Tim Pavolka, and now your son, Nick Staub, regarding the above referenced WSDOT sale of surplus property. As you are already aware, the above referenced property was sold to Sustainable Urban Development #1 LLC (SUD) in August, 2005 for \$180,000.00. As I have now discovered, the document that Property Management staff relied upon for identification of abutting property owners contained erroneous information. Instead of SUD being the sole abutting property owner, two additional abutting property owners have now been identified. In addition to SUD and yourself, a third abutter is shown in the County Assessor's records as T. Marshall of Superior, Colorado.

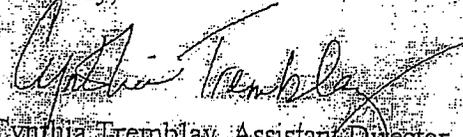
Since receiving the initial inquiry from Tim Pavolka, representing your son, Nick Staub, I have reviewed the inventory file for this transaction and requested legal advice from our attorneys. WSDOT regrets its error in not notifying all abutting property owners of the potential surplus property sale, but because SUD is considered a bona fide purchaser for value, WSDOT cannot void the sale in your favor or in favor of T. Marshall. Even though WSDOT was required to provide all abutting property owners with notice of the proposed surplus property sale, if more than one abutter indicated an interest in purchasing the property, WSDOT would have held a property auction. There is no way to prove, with certainty, that you would have been the successful purchaser at auction. Not only would SUD have bid, but other unknown possible bidders could have bid since under RCW 47.12.283, WSDOT is required to publish notice to all potential bidders.

Additionally, with respect to Nick Staub's comments that your company is being asked to move materials from the former state-owned property, it is important to note that your company had no authority to place materials on, to cross or utilize this property without a lease from the WSDOT and the payment of fair market value for your use. It appears, from Mr. Staub's email, that you have benefited from the use of this state-owned property for several years.

J
1-3-07
N. Staub

Since the WSDOT cannot void the property sale to SUD and since there is no evidence that you (or any other potential bidder) would have prevailed should an auction have been held, the WSDOT cannot accept an offer to purchase the property from you. I will, however, address the issue raised by your son, Nick Staub, regarding the map I enclosed with my letter to you dated January 17, 2006. There is a copy of a survey, dated January 22, 2004, in our file. I will be working with our Title Section to re-verify our ownership based on that survey and our acquisition documents and will provide you with a copy of the survey, as well as the legal description used for the sale to SUD.

Sincerely,



Cynthia Tremblay, Assistant Director
Property Management Program
WSDOT, Real Estate Services
(360) 705-7335

CT

Cc: Tim Pavolka
Frances Cal/Northwest Region

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7
Anne Hirsch, Judge
Department No. 8



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May 30, 2007

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Re: **SOUTH TACOMA WAY v. WSDOT and SUSTAINABLE URBAN
DEVELOPMENT #1 LLC**
Thurston County Cause Number 06-2-00721-0

Letter Opinion

Dear Counsel:

This matter came before the court May 25, 2007 on cross motions for summary judgment.

This case involves the sale of an alley way formerly owned by the Washington State Department of Transportation (WSDOT) located in Seattle, WA. In May of 2004, Sustainable Urban Development #1 LLC¹ purchased 5.73 acres of property from the Frye Free Art Museum Foundation which abutted the alleyway along its western side and partially on its eastern border. Following its purchase of the Frye property, Sustainable approached WSDOT to purchase the alleyway. On February 15, 2005 WSDOT declared the alley way to be surplus property. Then on April 4, 2005 WSDOT and Sustainable

¹ Which will be referred to throughout the rest of this opinion as Sustainable.

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ATTORNEY GENERAL'S OFFICE
TRANSPORTATION & PUBLIC
CONSTRUCTION DIVISION

executed a purchase and sale agreement. On August 23, 2005 WSDOT transferred the property by quit claim deed to Sustainable.²

It has been conceded by the State that at the time of the sale WSDOT was operating under the incorrect assumption that Sustainable was the only owner with property abutting the alley. As a result of this assumption WSDOT initiated the sale under the procedure applying only to the sale of property to a single interested party. In November 2005, WSDOT learned that there were 2 additional owners of property abutting the alleyway. Francis V. Staub and T. Marshall each owned an interest in land which abutted the alley way. The Staub property was subsequently sold to South Tacoma Way. Francis Staub's successor in interest, South Tacoma Way, has sought a declaratory judgment that the state's action was *ultra vires* and asks this court to rescind the sale of the alleyway to Sustainable.

South Tacoma Way argues that chapter 47.12 RCW provides WSDOT with the explicit authority to dispose of and convey real property. Whenever WSDOT determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for highway purposes and that it is in the public interest to do so, the department may, in its discretion, sell the property under RCW 47.12.063 under subsections (2) through (6) of RCW 47.12.283. RCW 47.12.283(1)

South Tacoma Way argues that RCW 47.12.063(g) is the relevant statute to this case. It allows the State to sell the property to:

Any abutting private owner but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283.

RCW 47.12.063(g). The State has conceded that it did not give written notice to all abutting land owners of the sale of the alleyway. South Tacoma Way asserts that because the State did not strictly comply with the language set forth in RCW 47.12.063, the State's actions were beyond the scope of its authority and necessarily voids the contract for sale.

The parties have agreed that there are no genuine issues of material fact at issue and this cause should be decided as a matter of law. Having had an opportunity to review the motions, attached declarations, exhibits and oral argument this court finds the following:

It is clear that the State did not comply with RCW 47.12.063 and did not give notice to all abutting landowners of the sale of the alley way. The question this court must address is whether the State's failure to comply with the statute constitutes an *ultra vires* action and

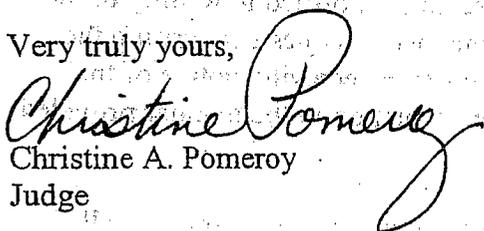
² The property was sold for it's full appraisal value of \$180,000.00. There has been no dispute over the purchase price of the land.

requires rescission of the purchase and sale agreement and initiation of new proceedings in accordance with RCW 47.12.063.

The court holds first, the *ultra vires* doctrine is not applicable where WSDOT held the land and property in a proprietary capacity and was authorized to sell it at fair market value. The procedural error made by WSDOT in failing to provide notice to other abutting property owners does not amount to an *ultra vires* action. Second, even if the plaintiff had been given notice of the sale, it still cannot show that it would have been the successful high bidder if there was an auction proceeding. *Peerless Food Products v. State*, 119 Wn.2d 584, 853 P.2d 1012 (1992), has held that mistakes made by the State during the bidding process are not grounds to overturn a contract absent fraud or overarching public policy. There has been no allegation of fraud or any violation of a public policy concern in the present case. Third, the legislature did not specifically provide that a land sale under RCW 47.12.063 would be void absent proper notice to all abutting property owners. The intent of the statute was to authorize WSDOT to sell surplus land at fair market value for the benefit of the State motor vehicle fund, not for the benefit of abutting property owners. Fourth, Sustainable was a *bona fide* purchaser for value. Washington's *bona fide* purchaser doctrine reasons that where a good faith purchaser for value, who without actual or constructive notice of another's interest in real property, purchases that property, the purchaser has a superior claim to the property. *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960). As a *bona fide* purchaser, Sustainable has the right to rely on the deed conveyed by the State.

Therefore WSDOT and Sustainable's joint motion for summary judgment is granted and South Tacoma Way's motion is denied. The court will sign an appropriate order on presentation.

Very truly yours,


Christine A. Pomeroy
Judge

CP/lmd

cc: court file

DECLARATION OF SERVICE

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

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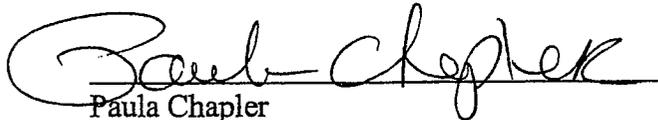
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Tacoma, WA 98402-4427

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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: December 6, 2007, at Tukwila, Washington.



Paula Chapler
Legal Assistant
Talmadge Law Group PLLC