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NO. 67755-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITIZENS IN SUPPORT OF USELESS BAY COMMUNITY, a
Washington nonprofit corporation, and ROBERT and JUDITH
WINQUIST, husband and wife and their marital community

Respondents / Cross Appellants

vs.

DIKING DISTRICT NO. 1 OF ISLAND COUNTY, a Washington
Municipal Corporation,

Appellant/Cross Respondent;

and

ISLAND COUNTY, a Washington State Municipal Corporation; MARY
WILSON ENGLE, in her capacity as Island County Assessor; ANNA
MARIA d'NUÑEZ, in her capacity as Island County Treasurer; SHEILAH
CRIDER, in her capacity as Island County Auditor; and USELESS BAY
GOLF AND COUNTRY CLUB, Inc., a Washington nonprofit
corporation,

Respondents and Cross Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 09-2-00845

BRIEF OF RESPONDENTS ISLAND COUNTY, MARY WILSON
ENGLE, ANNA MARIA d'NUÑEZ and SHEILAH CRIDER

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I. INTRODUCTION AND LIMITS OF ISLAND COUNTY'S RESPONSE

Petitioners below, Citizens in Support of Useless Bay Community (CSUBC) brought suit against Diking District No. 1 of Island County (District), the Useless Bay Golf and Country Club (County Club) and the Island County Assessor, Treasurer, Auditor, and Island County (collectively, the County). In 2004 the District, County and Country Club entered into a three-party contract to design and obtain permits for a project to enhance the District's drainage system. The contract was amended in 2006. In 2008, the District sought to levy benefit assessments upon its constituent properties to finance the construction of the drainage system enhancements that had been designed and permitted at the expense of the County.

CSUBC, a group of property owners within the boundaries of the District, sought a writ of review in Superior Court to overturn the District's imposition of the benefit assessments and set aside the three-party contract. The gravamen of CSUBC's complaints is directed at the procedures followed by the District in approving the property rolls and the benefits assessment used to finance the \$400,000 construction project.

Island County has consistently declined to take a position with regard to the establishment of benefitted property rolls or the levy of the

benefits assessment. The County had no role in the District's decision-making, and no control over the District's methods of financing its projects. Furthermore, the County is not an aggrieved party, as no benefits assessment has been imposed on County-owned property. In this appeal, the County remains neutral on the issues of procedural compliance and validity of the District's resolutions for setting benefit assessments.

CSUBC, however, also challenges the 2004 three-party contract, as amended in 2006, between the District, the County and the Country Club. CSUBC claims the District had no legal authority to enter into the contract. The execution of the contract, claims CSUBC, was *ultra vires*, and therefore void *ab initio*. The County responds that CSUBC is incorrect, and that the trial judge's decision regarding the contract should be affirmed. The County's participation in this appeal is limited solely to the issue of the validity of the three-party contract.

II. STATEMENT OF THE ISSUES

1. Whether a contract entered into by the District with explicit statutory authority to "make and execute all necessary contracts" is void *ab initio* by virtue of being *ultra vires* because of claimed procedural irregularities.

SHORT ANSWER: No. The contract is not *ultra vires* because the District had an explicit legislative grant of power to enter into such contracts.

2. Whether the contract to design and obtain permits for enhancements to an existing drainage system is voidable because of the District's failure to comply with statutory procedures governing initial construction of a new drainage system.

SHORT ANSWER: No. The statutory procedures governing the construction of new drainage systems are inapplicable to a contract for the design and permitting of the enhancement. Moreover, the contract has been substantially discharged by the performances of the parties, so the issue of whether it may be voided is moot.

III. STATEMENT OF THE CASE

The undisputed facts in the case, that are relevant to the County's response brief, are that the District, the County, and the Country Club executed a three-party contract on December 20, 2004 to design, permit and assign future responsibilities to later construct a drainage system improvement project. CP 199-205¹. The contract was amended on April 3, 2006 to refine specific technical requirements of the project. CP 206-207. The intent of the contract was to improve the drainage of the Useless Bay tidal areas behind the District's dikes², thereby benefitting all three

¹ The County is only a party to Superior Court Cause Number 09-2-00845-5. Consequently, all citations to the record in the County's brief will be to Clerk's Papers from that case. The County will use the standard format of "CP" followed by the page number(s) of the relevant document.

² Dikes that prevent tidal inundation of lowlands have the undesirable consequence of impounding surface water runoff from upland areas, creating a need for drainage systems.

parties. This was to be accomplished by connecting the District's eighty-year-old gravity-fed system of ditches and tidal gates³ to the Country Club's adjacent drainage system. The Country Club's system included a holding pond and a pump, which moved the water to an outfall in Useless Bay. The project described in the 2004 contract would expand the holding pond and install a higher-capacity pump to handle the combined water flow of the two previously independent systems.

The 2004 contract recitals state, *inter alia*, that "a drainage problem presently exists in the DISTRICT and the COUNTRY CLUB in Island County, Washington that is exceeding the capacity of the *existing COUNTRY CLUB and DISTRICT drainage systems* to protect residential and agricultural land uses and county roads." CP 199 (italics added). The Superior Court found, in ruling on cross-motions for summary judgment:

It is undisputed that the Diking District constructed a system of drainage in 1931. ...

The 2004 contract added a pump ... to increase the capacity of the existing drainage system because the existing system was not adequate to drain the land within the diking district. The Diking District appropriately decided to upgrade the existing drainage system to protect the benefited property within the Diking District. These upgrades do not constitute a new system, but instead are

³ In 1931 the District adopted a resolution for construction of its drainage system. CP 739-751. In 1944 the drainage system was apparently augmented, according to a declaration by a member of the Plaintiffs (CP 196) and a chronology apparently prepared by one of the District's then-board members (CP 239 – 40).

improvements to and maintenance of existing facilities.

CP 33.

The County's obligations under the contract were to engineer the system, apply for all needed permits, and tender a payment of \$80,000 to the District. CP 202; CP 117-119. The County has discharged all of its mandatory obligations under the contract. CP 118. According to Island County Engineer and Director of Public Works William Oakes, P.E., the County incurred approximately \$140,000 in engineering expenses. CP 117-119. The County obtained the permits for the project on July 9, 2007, more than a year before the District adopted its first resolution levying the benefit assessment. CP 118; CP 761.

The contract itself does not include provisions for the actual construction of the project. Section 2 of the contract obligated the District to enter into a separate construction contract through competitive bidding only after the County's preliminary engineering and permitting work was completed. CP 300-301.

Inexplicably, the actual contract for the construction of the drainage enhancements is not of record. However, there is a reference to is in the chronology filed by Coyla Shepard, a member of CSUBC. Apparently, a low bid of \$414,000 was accepted in 2008 and the system enhancements were constructed that same year. CP 240. The County

satisfied its \$80,000 obligation to the District in September, 2008. CP 118. The completed construction was initially found to be acceptable to state and federal regulators in March, 2009. CP 240.

IV. ARGUMENT

A. **A Diking District Established Pursuant To Chapter 85.05 RCW Has The Power To Bind The District Through Contracts With Other Entities To Carry Out The Business Of The District.**

Island County joins with Respondent Useless Bay Golf and Country Club to urge this Court to uphold Judge Churchill's ruling that the contract was not *ultra vires*. An *ultra vires* contract is "a contract which is not within the power of a municipal corporation to make under any circumstances or for any purpose." 10 E. McQuillan, *Municipal Corporations* § 29.14 (3d ed. 2010). If a contract is *ultra vires*, it is wholly void and may not be ratified, even by subsequent legislative action. *Id.* McQuillan points out that the term *ultra vires* is often mistakenly applied to contracts that are invalid for some other reason, such as a procedural infirmity, and therefore only voidable. *Id.*

The Washington Supreme Court reiterated its longstanding concurrence with these legal principles in *South Tacoma Way LLC v. State*

of Washington, 169 Wn.2d 118, 233 P.3d 871 (2010). “Over the years, we have repeatedly upheld this distinction, maintaining that a government action is truly *ultra vires* only if the agency was without authority to perform the action.” *South Tacoma Way*, 169 Wn.2d at 122 (citing *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987) (“An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not *ultra vires*.”)). *See also*, *Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976) (“An *ultra vires* act is one performed without any authority to act on the subject.”); *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968) (stating that an entity is bound by “acts which are within the scope of the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means”); *Commercial Elec. Light & Power Co. v. City of Tacoma*, 20 Wash. 288, 292, 55 P. 219, 220 (1898)(“[U]ltra vires' [means] an act which both intrinsically and in its external aspects is, under all circumstances, wholly and necessarily beyond the possible scope of the chartered powers of the municipality.”).

It is undisputed that Diking District No. 1 of Island County was properly formed in 1914 under what is now codified as Chapter 85.05

RCW. RCW 85.05.010 authorizes the creation of diking districts, and grants such districts powers including the following:

The commissioners hereinafter provided for, and their successors in office, shall, from the time of the organization of such diking district, have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; *make and execute all necessary contracts*, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and perform such other acts as hereinafter provided, or that may hereafter be provided by law.

RCW 85.05.010 (emphasis added).

Diking districts also have statutory authority to condemn land, and construct and maintain diking and drainage systems to protect lands that would otherwise be flooded. RCW 85.05.070. In addition, RCW 85.05.085 grants the board of diking district commissioners the “exclusive charge of the construction and maintenance of all dikes or dike systems which may be constructed within the district, and shall be the executive officers thereof, with full power to bind the district by their acts in the performance of their duties, as provided by law.”

It is clear that the District, like any diking district in the State of Washington, has been granted the power to bind the district through contracts covering the design, permitting, construction and maintenance of

diking and drainage systems. As such, no contract enacted by the District for those authorized purposes can be *ultra vires*.

B. Alleged Procedural Irregularities Would Not Render the Contract Void *ab initio*.

Even if the contract were, for some other reason, executed illegally or irregularly, it would only be voidable, and not void. 10 McQuillan § 29.14 (3rd ed. 2010). CSUBC alleges numerous procedural deficiencies in the way the District conducted its business. With regard to the 2004 contract, CSUBC complains that the District did not comply with the resolution provision of RCW 85.05.071, which says:

Before entering upon the construction of any system of drainage for the land situated within such diking district, the commissioners thereof shall adopt a resolution which shall contain a brief and general description of the proposed improvement, a statement that the costs thereof shall be paid by warrants drawn and payable in like manner as for the original construction of the dikes of such district, and fixing a time and place within such district for hearing objections to such proposed improvement or for the proposed method of paying the costs thereof.

(emphasis added).

Even if this statute applied, CSUBC's argument at most would render the contract to design and obtain permits voidable. The essence of their complaint is that these are acts exercised in an irregular manner, as opposed to acts which the District had no authority whatsoever to perform.

Acts done merely without statutory or procedural compliance may or may not be set aside depending on the circumstances. *South Tacoma Way*, 169 Wn.2d at 123.

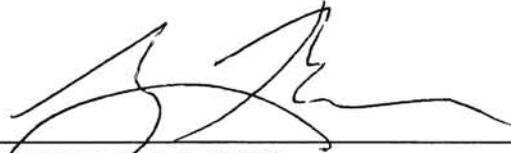
As the court below reasoned, RCW 85.05.071 does not apply to this case. Rather, it applies to construction of new drainage systems. Here, the District had “entered upon the construction” of a system of drainage in 1931. Based on that, the trial court concluded that the project described in the 2004 contract was for maintenance of existing facilities. CP 33. Thus, CSUBC cannot even make a case that failure to follow RCW 85.05.071 renders the contract voidable, because the project involved only a modification to an existing drainage system.

Furthermore, as the Country Club argues in its brief, the 2004 contract dealt with the preliminary exploration of the drainage system enhancements, and does not satisfy the predicate act of “entering upon construction” of a drainage system to trigger the resolution requirements of RCW 85.05.071. Had the County been unable to secure the necessary permits, or had the cost estimates been too great, the District would not have taken the next step of letting a contract for the actual construction. The Country Club further points out that, even if RCW 85.05.071 applies to the 2004 contract, and the District violated the statute’s procedural requirements, it does not render the contract a nullity. RCW 85.05.074

obligations under the contract. The Court should uphold the contract as a lawful exercise of the authority vested in diking districts.

Respectfully submitted this 28th day of March, 2012.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

A handwritten signature in black ink, appearing to read 'G. Banks', written over a horizontal line.

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