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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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

Petitioners-Plaintiffs,

vs.

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1; PEND OREILLE COUNTY; and HiTEST
SAND, INC.,

Respondents-Defendants.

NO. 18-2-02551-1

DEFENDANT HITEST SAND,
INC.'S MEMORANDUM: (1) IN
OPPOSITION TO PLAINTIFFS'
CROSS-MOTION FOR
SUMMARY JUDGMENT, AND
(2) IN SUPPORT OF PUBLIC
UTILITY DISTRICT NO. 1 OF
PEND OREILLE COUNTY'S
MOTION FOR SUMMARY
JUDGMENT

I. INTRODCUTION AND RELIEF REQUESTED

Defendant HiTest Sand, Inc., ("HiTest") by and through counsel, submits this memorandum: (1) in opposition to Plaintiffs' cross-motion for summary judgment, and (2) in support of the summary judgment motion filed by Defendant Public Utility District No. 1 of Pend Oreille County ("District").

DEFENDANT HITEST SAND, INC.'S MEMORANDUM: (1) IN
OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT, AND (2) IN SUPPORT OF PUBLIC
UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY'S
MOTION FOR SUMMARY JUDGMENT- 1



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MCPHEE

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1 As a bona fide purchaser, HiTest is entitled as a matter of law to enforce the sale of the
2 subject property. In addition, the doctrine of laches bars Plaintiffs' claims because they waited
3 too long to request relief which, if now granted, would substantially prejudice HiTest given
4 the resources it expended in reliance on that sale. This Court should grant the District's
5 motion for summary judgment and deny Plaintiffs' cross-motion for summary judgment.

6 **II. EVIDENCE REPLIED UPON**

7 HiTest's response to Plaintiffs' motion for summary judgment is supported by the
8 declarations and exhibits filed by the District in this matter, together with the pleadings and
9 record already on file with the Court herein.

10 **III. ARGUMENT**

11 **A. HiTEST JOINS IN THE REPLIES AND RESPONSES FILED BY ITS CO-DEFENDANTS**

12 HiTest joins in: (1) *Public Utility District No. 1 of Pend Oreille County's Reply*
13 *Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs'*
14 *Cross-Motion for Summary Judgment*, and (2) *Defendant Pend Oreille County's Reply Brief in*
15 *Support of Defendant Public Utility District No. 1 of Pend Oreille County's Motion and*
16 *Memorandum for Summary Judgment* and respectfully requests that the Court grant the relief
17 requested therein.
18

19 **B. THE COURT SHOULD ENFORCE HiTEST'S PURCHASE OF THE DISTRICT PROPERTIES**
20 **UNDER THE BONA FIDE PURCHASER DOCTRINE.**

21 This Court should apply the bona fide purchaser doctrine and deny Plaintiffs' motion
22 for summary judgment and dismiss its request to unwind the sale of the subject real property.
23 Rather than fully re-state its argument, HiTest submits a summary analysis below and
24 incorporates its *Memorandum in Support of Defendant HiTest's Motion for Summary Judgment*
25 by this reference as though fully set forth herein.

26 Even assuming arguendo that the procedural deficiencies alleged by Plaintiffs exist
27 (which HiTest disputes), HiTest is entitled to enforce the sale under the bona fide purchaser
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1 doctrine. As a purchaser of public land, HiTest “was entitled to presume that the proceedings
2 leading up to the sale were procedurally valid” and had “no obligation to discover the relevant
3 statutory procedures or to ensure that the [District] adhered to them.” *S. Tacoma Way, LLC v.*
4 *State.*, 169 Wn.2d 118, 128, 233 P.3d 871, 876 (2010). It is undisputed that HiTest purchased
5 the subject real property in good faith for value and without actual notice of any alleged
6 procedural deficiencies. HiTest was entitled to, and did, presume the sale was procedurally
7 valid. The bona fide purchaser doctrine precludes unwinding of this property transaction.

8 **C. PLAINTIFFS’ DELAY IN BRINGING THIS ACTION, AND RESULTING PREJUDICE TO**
9 **HiTEST AND THE DISTRICT, BARS PLAINTIFFS’ CLAIMS THROUGH THE DOCTRINE OF**
10 **LACHES.**

11 As a result of Plaintiffs’ inexplicable delay in filing this lawsuit, coupled with the
12 inescapable prejudice to HiTest and the District, the doctrine of laches bars Plaintiffs’ claims.
13 Plaintiffs have known that the District intended to sell the subject real property since March 9,
14 2016. They have known that the District was going to sell it to HiTest since August 2017. Yet
15 they waited nearly a year following HiTest’s actual purchase of the properties to assert claims
16 that, if successful, would cause substantial prejudice to HiTest and the District. As such, those
17 claims are barred by the doctrine of laches.

18 Plaintiffs assert that HiTest did not change its position in reliance on the purchase and
19 sale. That assertion, however, is disproven by the record herein. HiTest expended resources in
20 reliance on the purchase and sale including several months of due diligence, starting the permit
21 application process, meeting with state and local officials from Washington and Idaho, hiring a
22 company to make air dispersion models for the facility, validating preliminary layouts and plans
23 by completing geotechnical and environmental studies, obtaining a Project of Statewide
24 Significance and accompanying grant funding to offset study costs from the Washington
25 Department of Commerce, and establishing an Executive Committee of local elected officials
26 to provide coordination throughout the permitting process. (Dec. of Colin Willenbrock, ¶ 24,
27 Ex. O; ¶ 25, Ex. P). HiTest further entered into a cost reimbursement agreement for system
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1 studies and engineering work necessary to secure power to the proposed facility. *Id.* at ¶ 26,
2 Exs. Q and R. HiTest paid a security deposit of \$250,000 to commence the necessary planning
3 and study process. *Id.*

4 If Plaintiffs were allowed to divest HiTest of its real property and negate its substantial
5 investments of time and money, the prejudice would be palpable. The doctrine of laches bars
6 such an inequitable outcome.

7 **IV. CONCLUSION**

8 Based on the foregoing, HiTest respectfully requests that the Court grant the District's
9 Motion for Summary Judgment, deny Plaintiffs' Cross-Motion for Summary Judgment, and
10 deny Plaintiffs' request to enter a declaratory judgment that the real property transactions are
11 *ultra vires* and void as a matter law.

12
13 DATED this 14th day of December, 2018

14 WITHERSPOON BRAJCICH MCPHEE, PLLC

15 

16
17 By _____
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23 *Attorneys for Defendant HiTest Sand, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing and/or attached was served by the method indicated below to the following this 14th day of December, 2018.

<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) TO: <input checked="" type="checkbox"/> EMAIL TO: jrehberger@cascadialaw.com stan@cascadialaw.com	Joseph A. Rehberger Stephen J. Tan Cascadia Law Group, PLLC 606 Columbia St. NW, Suite 212 Olympia, WA 98501
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Veronica J. Clayton