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SUPERIOR COURT FOR 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. &
ROSEMARY CHANDLER; AND PAMELA
BYERS LUBY,

Plaintiffs,

vs.

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

Defendants.

Case No. 18-2-02551-1

**REPLY IN SUPPORT OF PLAINTIFFS’
CROSS-MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

Plaintiffs Responsible Growth *NE Washington, *et al.* respectfully submit this Reply Brief in support of the Cross-Motion for Summary Judgement. As set forth below and in Plaintiffs’ opening brief, the purchase and subsequent sale of land by the Pend Oreille Public Utility District No. 1 (“PUD”) for the development of a silicon smelter failed to comply with Washington law governing the purchase and sale of property by government entities and is, therefore, *ultra vires* and void as a matter of law.

1 **II. ARGUMENT AND AUTHORITY**

2 **A. PLAINTIFFS SUFFERED “INJURY IN FACT” TO DEMONSTRATE STANDING.**

3 In its response, the PUD argues Plaintiffs have not alleged an injury in fact from the purchase
4 or sale of the property in question. PUD Response at 7. In the multiple declarations, Plaintiffs
5 have shown their injury is real because they were deprived of the benefit of the proper process
6 for disposal of public property, are customers of the PUD, and will suffer environmental harm.
7 *See, e.g.*, Kardos Decl. ¶ 7; Koenig Decl. ¶ 7-9; Luby Decl. ¶ 7,9; Johnson Decl. ¶ 12; James
8 Chandler Decl. ¶ 7; Rosemary Chandler Decl. ¶ 7; Miller Decl. ¶ 7; CANSS Decl. ¶ 5; Teeples
9 Decl. ¶ 7. Moreover, Defendants failed to rebut that this Court has standing under the public
10 importance standing doctrine.¹

11 **B. THE PUD’S LACHES ARGUMENT IS WITHOUT MERIT.**

12 HiTest responds that laches should apply here because Plaintiffs waited too long to file suit.
13 This argument fails for three reasons. First, courts have rejected laches to void actions: “If the
14 transaction was truly void . . . **it would be subject to challenge and invalidation at any time,**
15 **perhaps years later.** Any improvements made in reliance on the invalid deed would be in vain.”
16 *S. Tacoma Way, LLC v. State*, 169 Wash. 2d 118, 124 (2010) (emphasis added). Second,
17 Defendants were on notice of this dispute on April 23, 2018 when Plaintiffs informed the PUD
18 that the purchase and sale of Parcel #19182 was done in violation of the statutes. Eichstaedt
19 Decl., Ex. N. Third, HiTest overstates the prejudice it will suffer as a result of any delay – it has
20 not applied for any permits with the Department of Ecology, it has not applied for any land use
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23 ¹ *In re Cross*, 99 Wn.2d 373, 379 (1983) (failure to address in response brief an issue raised is a concession).

1 permits from the County, and it has actually used State money, not its own, for part of the
2 planning of this project. Second Eichstaedt Decl., Exs. A-C. Moreover, if this Court finds this
3 transaction *ultra vires*, HiTest could seek a claim for restitution or unjust enrichment. *Abrams v.*
4 *Seattle*, 173 Wash. 495, 500-01 (1933); *Jones v. Centralia*, 157 Wash. 194, 223-24 (1930); *Kerr*
5 *v. King County*, 42 Wn.2d 845 (1953); *Batcheller v. Westport*, 39 Wn.2d 338 (1951).

6 **C. THE BONA FIDE PURCHASER DOCTRINE DOES NOT APPLY TO *ULTRA VIRES* ACTIONS.**

7 HiTest responds that the bona fide purchaser doctrine applies to this case. However, this is
8 not the case. Washington law is clear that this doctrine is inapplicable when the land sale was
9 *ultra vires*. *S. Tacoma Way*, 169 Wn.2d at 120, *see also Noel v. Cole*, 98 Wn.2d 375, 379-80
10 (1982); *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874 (1984);
11 *Finch v. Matthews*, 74 Wn.2d 161, 169-70 (1968); *Edwards v. Renton*, 61 Wn.2d 598, 602-03
12 (1965). Void title “cannot be passed to any buyer (regardless of good faith status) because of the
13 *nemo dat quod non habet* (“he who hath not cannot give”) rule.” *State v. Mermis*, 105 Wn. App.
14 738, 748 at n. 27 (2001).

15 **D. ONLY *EX POST FACTO* DECLARATIONS SUPPORT THE PUD’S CONTENTION THAT PARCEL
16 NO. 19182 WAS ACQUIRED FOR LEGITIMATE PUD PURPOSES.**

17 The PUD responds that Plaintiffs have failed to demonstrate that it acquired Parcel No.
18 19182 for legitimate PUD purposes. PUD Response at 4-5. Moreover, the PUD relies on two *ex*
19 *post facto* declarations to support its claim that it acquired the property for the purposes of an
20 easement. *Id.* The PUD does not dispute that RCW § 54.16.020 limits land purchases by the
21 PUD solely to energy purposes - not for acquisition and conveyance to a third party.

22 The undisputed facts demonstrate the PUD purchased Parcel #19182 from Pend Oreille
23 County for the purpose of selling it to PacWest as part of a combined sale of a total of four

1 parcels and not to obtain an easement as the PUD asserts. Eichstaedt Decl., Ex. G. The work of
2 the Commission is accomplished in public meetings. RCW 54.12.090 states in part that "All
3 proceedings of the Commission shall be by motion or resolution, recorded in its minute books,
4 which shall be public records." No discussion occurred of the need for an easement in any PUD
5 documents any time prior to or at the time of sale. *See, e.g.* Willenbrock Decl., Ex. H at 3.

6 The PUD points to the two *ex post facto* declarations to explain the actions of the
7 Commission and/or to explain the land contract. However, Washington courts prohibit "after the
8 fact" declarations to explain the local legislative intent and contract intent. *See Yakima v. Fire*
9 *Fighters*, 117 Wn.2d 655, 677 (1991) (After the fact affidavit inadmissible to demonstrative local
10 government legislative intent); *Hearst Comm., Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503
11 (2005) ("Washington continues to follow the objective manifestation theory of contracts");
12 *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944
13 (1982) (unilateral, self-serving, post-hoc expressions of subjective intent are irrelevant). Only
14 contemporaneous and objective manifestations of intent should be considered by this Court.²
15 Evidence before this Court fails to demonstrate any legitimate PUD purpose to validate the
16 purchase. It is therefore *ultra vires* and void.

17 **E. ONLY THE PUD COMMISSION CAN AUTHORIZE THE SALE OF SURPLUS PROPERTY AND PAST**
18 **PRACTICE SUPPORTS THIS.**

19 The PUD responds that it is not required to declare property surplus in order to sell it. PUD
20 Response at 5-6. This ignores both the plain language of Washington law and best practice of the

21 _____
22 ² The PUD cites *State ex rel. Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Schwab*, 40 Wash. 2d 814 (1952) to
23 support the use of *ex post facto* declarations. However, in that case involving interpretation of a PUD resolution, the
court relied upon a "reading of the resolution as a whole" and "considered" testimony of PUD officials. The court
did not rely exclusively on the after the fact testimony of PUD officials as is suggested here.

1 PUD.

2 While the PUD has the power to sell surplus land, that power is vested in the PUD
3 Commission and carries the requirements that follow with Commission actions. RCW 54.12.010
4 states in part: "The powers of the PUD shall be exercised through a Commission consisting of
5 three members in three commissioner districts." The work of the Commission is accomplished in
6 public meetings. RCW 54.12.090 states in part that "All proceedings of the Commission shall be
7 by motion or resolution, recorded in its minute books, which shall be public records." Public
8 utility districts, as "public agencies", are subject to the requirements of the Open Public Meetings
9 Act ("OPMA"), Chapter 42.30 RCW. The OPMA requires that meetings at which "action" is
10 taken be open to the public. RCW 42.30.030. More specifically, the OPMA provides that "[n]o
11 governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order,
12 or directive, except in a meeting open to the public and then only at a meeting, the date of which
13 is fixed by law or rule, or at a meeting of which notice has been given according to the
14 provisions of this chapter." RCW 42.30.060(1). Action taken at a meeting in violation of this
15 provision is deemed null and void. *Id.*

16 The PUD has not and cannot point to an action of the Commission during an open meeting³
17 declaring the property surplus. To the contrary, a review of PUD Commission minutes, including
18 one provided in support of the PUD's argument indicate that it is common practice for the
19 Commission: (1) to declare property surplus; (2) in writing; (3) by Commission vote. *See*
20 Willenbrock Decl., Ex. H at 2 (vote to surplus fleet vehicle); Second Eichstaedt Decl., Exs. E-H

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22
23 ³ If the PUD can demonstrate that the Commissioners voted outside a Commission meeting, the act is void per the OPMA.

1 (minutes documents votes of PUD commission to declare property surplus). Without action of
2 the Commission, the property cannot be declared surplus and the transaction is *ultra vires* and
3 void.

4 **F. PLAINTIFFS ASSERT THAT THE PUD FAILED TO COMPLY WITH THE LAW IN ITS PURCHASE**
5 **OF PARCEL NO. 19182 AND NOT WHETHER THE COUNTY HAD AUTHORITY TO EFFECTUATE**
6 **THE SALE.**


7 Pend Oreille County responds that Plaintiffs failed to demonstrate that the County lacked
8 authority to sell Parcel No. 19182. County Response at 2-6. Plaintiffs do not assert that the
9 County lacked authority to sell the property. When the PUD purchased the land from Pend
10 Oreille County, the PUD acted outside of its statutorily granted authority. The PUD does not
11 have general statutory authority to buy land, but only to buy and sell land for energy purposes
12 causing the purchase of Parcel No. 19182 by the PUD from Pend Oreille County to clearly be
13 *ultra vires*. RCW § 54.16.020. Courts have consistently held that “[u]*ltra vires* acts are those
14 performed with no legal authority and are characterized as void on the basis that no power to act
15 existed.” *S. Tacoma Way*, 169 Wn.2d at 123; *see also Noel v. Cole*, 98 Wn.2d 375 (1982) (sale of
16 timber *ultra vires* because state failed to comply with statutory requirements and underlying
17 policy). In the case of government entities, an illegal contract is *ultra vires* and is void. *Barnier*
18 *v. City of Kent*, 44 Wn. App. 868, 873-74 (1968). Accordingly, the actions of the PUD render the
19 transaction with the County void and the property should properly revert to County ownership.


20 **III. CONCLUSION**

21 For the aforementioned reasons and those stated in Plaintiffs’ opening brief, this Court
22 should GRANT Plaintiff’s cross-motion for summary judgment and declare (1) the purchase of
23 land by PUD is void as it is *ultra vires*; (2) the sale of land to HiTest is void as it is *ultra vires*;
and (3) Resolution 1399 is void as it is *ultra vires*.


1 DATED this 4th day of January, 2018.

2 UNIVERSITY LEGAL ASSISTANCE

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