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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant HiTest Sand, Inc., ("HiTest") by and through counsel, respectfully submits this reply memorandum in support of its Motion for Summary Judgment.

I. INTRODUCTION

S. Tacoma Way, LLC v. State of Washington, 169 Wn.2d 118, 233 P.3d 871 (2010), is controlling. Plaintiffs' efforts to distinguish the case are misguided. The purchase of Parcel 19182 by Defendant Public Utility District No. 1 of Pend Oreille County ("District") for the purpose of securing an express easement for its distribution lines fell well within the District's

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authority under chapter 54.16 RCW. Moreover, even assuming *arguendo* that the District violated the procedural requirements imposed by RCW 54.16.180(2)(b) in selling Parcel 19182 to HiTest as Plaintiffs contend (which all of the Defendants dispute), the District's actions were consistent with the statute's underlying policy. Accordingly, HiTest is entitled to enforce the sale as a bona fide purchaser under a straightforward application of *S. Tacoma Way*.

II. UNDISPUTED MATERIAL FACTS

The facts relevant to this reply are set forth in the District's *Reply Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment*, which HiTest incorporates herein by reference.[1] As outlined in that filing, the sworn declarations of two District witnesses confirm that (1) the District purchased Parcel 19182 from Pend Oreille County for the purpose of securing an express easement for its underground distribution lines (*Orr Decl.*, ¶¶ 5, 8; *Willenbrock Decl.*, ¶ 11); and (2) the subsequent sale of Parcel 19182 to HiTest was discussed at a public meeting of the District's Board of Commissioners on August 1, 2017, at which members of the public were advised of the proposed sale to HiTest and afforded an opportunity to comment (*Willenbrock Decl.*, ¶ 16 & Ex. H).

III. ARGUMENT

The District's purpose in acquiring Parcel 19182 was to secure an easement for its underground distribution lines. That purpose fell squarely within the District's authority to acquire property under chapter 54.16 RCW. The District's purchase of Parcel 19182 was therefore not *ultra vires*.

Assuming *arguendo* that the District violated the letter of RCW 54.16.180 in selling Parcel 19182 to HiTest, the purpose of the statute was fully served. Accordingly, HiTest is entitled to enforce its purchase of Parcel 19182 as a bona fide purchaser.

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[1] HiTest joined in the District's Reply in its *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*, filed on December 14, 2018.

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A. THE DISTRICT'S PURCHASE OF PARCEL 19182 WAS NOT *ULTRA VIRES*.

Plaintiffs argue that the District exceeded its statutory authority in purchasing Parcel 19182 from Pend Oreille County, rendering the purchase *ultra vires*. Pl.s' Resp. at 2-4. By virtue of having acquired the property through an *ultra vires* act, Plaintiffs reason, the District lacked authority to sell the property to HiTest, which in turn Plaintiffs argue means that HiTest cannot enforce its rights as a bona fide purchaser. *Id.*

The premise of this argument—that the District exceeded its statutory authority—is simply wrong. It is undisputed that the District purchased Parcel 19182 for the purpose of securing an easement for its underground distribution lines. *Orr Decl.*, ¶¶ 5, 8; *Willenbrock Decl.*, ¶ 11. As explained by the District's Director of Engineering, Amber Orr, this was a business decision informed by the District's belief that purchasing the property and reserving an express easement would be easier than attempting to negotiate an easement with a third party if Pend Oreille County ever sold the property someone else:

> Since the underground line ran along or near the border of the District's properties and the former County parcel [Parcel 19182], the District never obtained a utility easement while the properties were held by public entities. However, when HiTest expressed its interest in acquiring the District properties and the County parcel, I believed it would be easier for the District to obtain the easement by reservation rather than trying to negotiate an easement from a future customer. It was for that reason that the District acquired Parcel No. 19182 before selling it as surplus once the easement was reserved.

Orr Decl., ¶ 8. This easement purpose is further documented in the public records preceding and leading up to the transfer from the County to the District. *See, e.g.*, *Willenbrock Decl.* at Ex. D (Pend Oreille County Resolution No. 2017-22 noting that the PUD "inquired into the purchase of the [subject parcel] as it . . . contains an easement that impacts the PUD operations").[2]

As a public utility district, the District is authorized to purchase and acquire land, property and property rights, including easements and rights of way, as needed to generate

[2] Plaintiffs' assertion that no discussion of an easement was stated any time prior to the sale, *see* Pl.s' Resp. at 4, lines 8-9, is factually incorrect and in contravention of the undisputed record in this case.

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electric energy. RCW 54.16.020. The District also has broad authority to purchase property and property rights as "necessary or convenient for its purposes." RCW 54.16.090.[3]

The District's purchase of Parcel 19182 to secure an easement falls squarely within that grant of authority. There can be no dispute that the District is *entitled* to an easement. After all, the District's distribution lines are buried on the property. Had the property been sold to a different party, the District would have been forced to negotiate an easement with the new owner—or, failing that, to condemn an easement via eminent domain. The District correctly recognized that buying the property itself would be an easier and less expensive option, and it sensibly chose to do so.

Since the District acted within its statutory authority, the Court's decision in *S. Tacoma Way* is directly on point, *i.e.*, there was no *ultra vires* act that would preclude application of the bona fide purchaser doctrine. As a good faith purchaser for value with no notice of any (alleged) procedural irregularities, HiTest is entitled to enforce its purchase of Parcel 19182 as a bona fide purchaser.

B. THE DISTRICT DID NOT CONTRAVENE THE PURPOSE OF RCW 54.16.180 IN SELLING PARCEL 19182 TO HITEST; HITEST IS THEREFORE ENTITLED TO ENFORCE THE SALE AS A BONA FIDE PURCHASER.

Plaintiffs also argue that, even if the District acted within its statutory authority, the sale to HiTest must nonetheless be invalidated because the District "undermined the policy" behind the procedural statutes that it is alleged to have violated. Pl.'s Resp. at 4. According to Plaintiffs, the policy in question is that public utility districts were established to "serve the people and the public interest." *Id.* at 5-6 (citing LAWS OF 1931, ch. 1, § 1).

This argument fails for two basic reasons. First, the District *was* "serving the people and the public interest." As noted above, the District acquired Parcel 19182 in order to secure

[3] The District's authority is not nearly as limited as Plaintiffs argue, and its authority includes those powers "necessarily or fairly implied in or incident to powers expressly granted by statute," *Hite v. Pub. Util. Dist. No. 2 of Grant County*, 112 Wn.2d 456, 458-59, 772 P.2d 481 (1989), and "the range of powers that may be 'fairly implied' is broader when the activity at issue is proprietary rather than governmental in nature." 2001 OP. ATT'Y GEN. No. 3 at 4 (citing *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 693-95, 743 P.2d 793 (1987)). Further, in general, "[t]here is a presumption that lands purchased by a municipal corporation were purchased for a purpose authorized by law." 10 E. McQuillin, *Municipal Corporations* § 28.10 (3d ed., rev. Oct. 2017)

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an easement for its distribution lines. There is no dispute that the District was *entitled* to this easement and could have obtained an express easement by eminent domain if necessary. The fact that the District chose to obtain the easement in a more efficient and cost-effective manner does not somehow mean that it acted outside the public interest. To the contrary, the District was able to avoid unnecessary complication and cost—a textbook example of serving the people and the public interest.

Second, and in any case, Plaintiffs have identified the wrong "policy." Public utility districts have express authority to sell real property without approval of the voters. RCW 54.16.180(2)(b). That statute allows PUDs to sell real property

> within or without its boundaries, which has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system and which is no longer necessary, material to, and useful in such operations, to any person or public body.

Id. Plaintiffs have not offered any factual evidence challenging the fact that this isolated parcel, once the relevant easement was obtained and reserved, was necessary for the District's operations. The policy associated with maintaining property which remains necessary, is not hindered with a sale of surplus unnecessary property.

Furthermore, to the extent Plaintiffs challenge procedural compliance with RCW 54.16.180, such procedural defects, if any, are trumped here by the bona fide purchaser doctrine. The alleged procedural statute in question is RCW 54.16.180(2)(b), which requires a public utility district find unwanted real property "no longer necessary, material to and useful in [its] operations" before selling to a private party. RCW 54.16.180(2)(b). Like the procedural statute at issue in *S. Tacoma Way*, RCW 54.16.180 is a procedural statute. Its main purpose is to prevent "fraud and collusion in [public] sales of surplus property," *S. Tacoma Way*, 169 Wn.2d at 126, 233 P.3d at 875.[4]

[4] Plaintiffs citations to *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982) are not instructive. In that case, the court invalidated a sale where the Department of Natural Resources failed to comply with required State Environmental Policy Act (SEPA) requirements. No such infirmity exists or has been alleged here. *See also S. Tacoma Way*, 169 Wn.2d at 875 (distinguishing *Noel v. Cole* based on unique SEPA considerations).

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There is no evidence of fraud or collusion between the District and HiTest. Indeed, there was no fraud or collusion whatsoever. As the District points out, the proposed sale of Parcel 19182 to HiTest was discussed at a public meeting of its Board of Commissioners on August 1, 2017, at which members of the public were afforded an opportunity to comment. *Willenbrock Decl.*, ¶ 16 & Ex. H. The Board voted to approve the sale at the conclusion of the meeting. *Willenbrock Decl.*, Ex. H.

The discussion of the sale at the August 1 meeting was entirely consistent with the purpose of RCW 54.16.180(2)(b). There was public notice of the sale, and its terms were openly discussed. Assuming *arguendo* that the District violated the statute in some technical respect (which all of the Defendants dispute), its actions did not contravene the statute's purpose. Accordingly, HiTest is entitled to enforce the sale as a bona fide purchaser. *S. Tacoma Way*, 169 Wn.2d at 124-26, 233 P.3d at 874-75.

As a purchaser of public land, HiTest "was entitled to presume that the proceedings leading up to the sale were procedurally valid" and had "no obligation to discover the relevant statutory procedures or to ensure that the [District] adhered to them." *S. Tacoma Way,* 169 Wn.2d at 128, 233 P.3d at 876. It is undisputed that HiTest purchased the subject real property in good faith for value and without actual notice of any alleged procedural deficiencies. HiTest was entitled to, and did, presume the sale was procedurally valid. HiTest has established all of the elements of the bona fide purchaser defense. The bona fide purchaser doctrine precludes unwinding of this property transaction.

IV. CONCLUSION

The District acted within its statutory authority in acquiring Parcel 19182 from Pend Oreille County for the purpose of securing an express easement. There was no *ultra vires* act that distinguishes this case from *S. Tacoma Way*. Even assuming *arguendo* that the District violated the procedural requirements imposed by RCW 54.16.180(2)(b) in selling the parcel to HiTest, its actions did not contravene the purpose of the statute. Accordingly, HiTest is entitled to enforce the sale as a bona fide purchaser. The Court should enter summary judgment for HiTest.

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DATED this 4th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing and/or attached was served by the method indicated below to the following this 4th day of January, 2019.

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