SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE county of Spokane

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| 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,  v.  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 |

# 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.

# ARGUMENT AND AUTHORITY

## Plaintiffs suffered “injury in Fact” to Demonstrate Standing.

In its response, the PUD argues Plaintiffs have not alleged an injury in fact from the purchase or sale of the property in question. PUD Response at 7.  In the multiple declarations, Plaintiffs have shown their injury is real because they were deprived of the benefit of the proper process for disposal of public property, are customers of the PUD, and will suffer environmental harm. *See, e.g.,* Kardos Decl. ¶ 7; Koenig Decl. ¶ 7-9; Luby Decl. ¶ 7,9; Johnson Decl. ¶ 12; James Chandler Decl. ¶ 7; Rosemary Chandler Decl. ¶ 7; Miller Decl. ¶ 7; CANSS Decl. ¶ 5; Teeples Decl. ¶ 7. Moreover, Defendants failed to rebut that this Court has standing under the public importance standing doctrine.[[1]](#footnote-2)

## The PUD’s Laches Argument is without merit.

HiTest responds that laches should apply here because Plaintiffs waited too long to file suit. This argument fails for three reasons. First, courts have rejected laches to void actions: “If the transaction was truly void . . . **it would be subject to challenge and invalidation at any time, perhaps years later**. Any improvements made in reliance on the invalid deed would be in vain.” *S. Tacoma Way, LLC v. State*, 169 Wash. 2d 118, 124 (2010) (emphasis added). Second, Defendants were on notice of this dispute on April 23, 2018 when Plaintiffs informed the PUD that the purchase and sale of Parcel #19182 was done in violation of the statutes. Eichstaedt Decl., Ex. N. Third, HiTest overstates the prejudice it will suffer as a result of any delay – it has not applied for any permits with the Department of Ecology, it has not applied for any land use permits from the County, and it has actually used State money, not its own, for part of the planning of this project. Second Eichstaedt Decl., Exs. A-C. Moreover, if this Court finds this transaction *ultra vires*, HiTest could seek a claim for restitution or unjust enrichment. *Abrams v. Seattle*, 173 Wash. 495, 500-01 (1933); *Jones v. Centralia,* 157 Wash. 194, 223-24 (1930); *Kerr v. King County*, 42 Wn.2d 845 (1953); *Batcheller v. Westport*, 39 Wn.2d 338 (1951).

## The Bona Fide Purchaser Doctrine does not apply to *Ultra VIRES ACTIONS*.

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

## Only *Ex Post Facto* Declarations Support the PUD’s Contention that Parcel No. 19182.

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

The undisputed facts demonstrate the PUD purchased Parcel #19182 from Pend Oreille County for the purpose of selling it to PacWest as part of a combined sale of a total of four parcels and not to obtain an easement as the PUD asserts. Eichstaedt Decl., Ex. G. The work of the Commission is accomplished in public meetings. RCW 54.12.090 states in part that "All proceedings of the Commission shall be by motion or resolution, recorded in its minute books, which shall be public records.” No discussion occurred of the need for an easement in any PUD documents any time prior to or at the time of sale. *See, e.g.* Willenbrock Decl., Ex. H at 3.

The PUD points to the two *ex post facto* declarations to explain the actions of the Commission and/or to explain the land contract. However, Washington courts prohibit “after the fact” declarations to explain the local legislative intent and contract intent. *See* *Yakima v. Fire Fighters*, 117 Wn.2d 655, 677 (1991) (After the fact affidavit inadmissible to demonstrative local government legislative intent); *Hearst Comm., Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005) (“Washington continues to follow the objective manifestation theory of contracts”); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc*., 96 Wn.2d 939, 944 (1982) (unilateral, self-serving, post-hoc expressions of subjective intent are irrelevant). Only contemporaneous and objective manifestations of intent should be considered by this Court.[[2]](#footnote-3) Evidence before this Court fails to demonstrate any legislate PUD purpose to validate the purchase. It is therefore *ultra vires* and void.

## Only the PUD Commission can authorize the sale of surplus property and past practice supports this.

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

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

The PUD has not and cannot point to an action of the Commission declaring the property surplus. To the contrary, a review of PUD Commission minutes, including one provided in support of the PUD’s argument indicate that it is common practice for the Commission: (1) to declare property surplus; (2) in writing; (3) by Commission vote. *See* Willenbrock Decl., Ex. H at 2 (vote to surplus fleet vehicle); Second Eichstaedt Decl., Exs. E-H (minutes documents votes of PUD commission to declare property surplus). Without action of the Commission, the property cannot be declared surplus and the transaction is *ultra vires* and void.

## Plaintiffs assert that the PUD failed to comply with the law in its purchase of Parcel No. 19182 and not whether the County had authority to effectuate the sale.

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

# Conclusion

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

DATED this 4th day of January, 2018.

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1. *In re Cross*, 99 Wn.2d 373, 379 (1983) (failure to address in response brief an issue raised is a concession). [↑](#footnote-ref-2)
2. The PUD cites *State ex rel. Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Schwab*, 40 Wash. 2d 814 (1952) to 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. [↑](#footnote-ref-3)