SPOKANE COUNTY COURT HOUSE

Superior Court of the State of Washington
for the County of Spokane

Department No. 4

JULIE M. MCKAY
Judge

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Jody Dashiell — **Court Reporter**

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Re: RESPONSIBLE GROWTH NE WA ETC VS PEND OREILLE PUB UTIL ETAL
No. 2018-02-02551-1

Dear Counsel:

The parties were before the court on January 11, 2019 for oral argument on defendant Pend Oreille PUD No. 1's (hereinafter District) motion for summary judgment against Plaintiffs' Complaint and all claims therein. Defendants Pend Oreille County and HiTest Sand Inc. joined in the District's motion. HiTest Sand, Inc. also argues it is a bona fide purchaser of the property in question. The Court heard Plaintiffs' cross-motion for summary judgment asking the court to issue declaratory judgment to declare the land purchase and land sale void as ultra vires. After hearing the argument of all parties, the court took the matters under advisement. I have had the opportunity to review all the motions, memorandums, supporting declarations, opposition declarations, attached exhibits, the court file, relevant case law, and have arguments in mind to make my decision in this matter.

The first issue raised by the Defendants is that the Plaintiffs do not have standing to bring this action. Defendants argue the Plaintiffs have not alleged injury in fact caused by the District's purchase and sale of the land. The test for standing to bring suit is two-part: 1) whether the interest asserted is arguably within a zone of interests to be protected by the statute; and 2) whether the party seeking standing has suffered an injury in fact, economic or otherwise. Branson v. Port of Seattle, 152 Wn.2d 862 (2004). Being within the zone of interest wasn't disputed by Defendants. The issue argued was a lack of injury in fact.

Defendants' position is that Plaintiffs have not alleged any personal, substantial harm beyond making conclusory statements. General dissatisfaction with the Districts purchase and sale is insufficient. Plaintiffs counter that they are harmed when the PUD deprived them of being part of the proper process to dispose of public property; they are PUD customers giving them an economic interest; the land sale exposes them to future harmful environmental effects; and the Plaintiffs goals of promoting and encouraging green and healthy growth in the Pend Oreille County community were negatively impacted by the PUDs actions. Plaintiffs also base standing upon RCW 80.04.440 and the Public Importance Doctrine. Defendants do not address these basis for standing.

There are facts to indicate that the issue of the land purchase/sale was discussed at a public meeting on August 1, 2017. The open, public discussion had at this meeting led to the passage of Resolution 1399. This allowed the public to be part of the discussion. In addition, the Plaintiffs provide numerous declarations from the individual plaintiffs, who are tax paying residents of the county, that they will suffer future injury by being impacted by the smelter. The majority of the declarations speak to impacts or injuries that have not occurred at this time. It is questionable whether this threat of future injury is "immediate, concrete, and specific" enough to meet injury in fact at this time. No permit to begin construction of the smelter has been granted.

The Plaintiffs standing can be supported under the Public Importance Doctrine, however. The District distributes electricity to approximately 8500 customers and the development of a smelter would impact commerce, finance, labor, industry, or agriculture generally. The controversy is of serious public importance, especially to the Pend Oreille community.

Defendants' motion for summary judgment based upon lack of standing is denied.

Defendants argue the Doctrine of Laches also bars the Plaintiffs' claims because of the considerable amount of time Plaintiffs waited to bring this action. Defendants have the burden to prove the elements of laches: Plaintiff 1) knows or reasonably should know of the action; 2) unreasonably delays in commencing the action; and 3) causes damage to the defendant as a result. Kightlinger v. Pub. Util. Dist. No. 1, 119 Wn. App. 501 (2003). The issue is whether the delay was unreasonable and whether the delay caused damage to the Defendants. There are various ranges of delay that Washington courts have found to constitute unreasonable when applying the laches doctrine. In this case, suit was filed only eight (8) months after the sale of the parcel. This amount of delay is not unreasonable. Defendant HiTest does not point to a particular damage or damages that it has encountered as a result of this amount of delay.

Defendant's motion for summary judgment based upon the Doctrine of Laches is denied.

Turning then to the ultra vires issue, both the Plaintiffs and Defendants are requesting summary judgment based upon whether this Court finds the Districts actions ultra vires or not. The only evidence before the Court regarding the purpose of the purchase of Parcel No. 19182 is found in the declarations of Colin Willenbrock, General Manager of the PUD, and Amber Orr, Director of Engineering of the PUD. Both indicate the purpose was to obtain an easement for the District. There was a need for the easement if ownership of the parcel was to change from Pend Oreille County to a private entity. There is no evidence presented that controverts an easement was necessary for the District to continue its regular activities and services. The fact that the District was aware HiTest wanted to purchase all four parcels does not change these facts. There have been no facts presented that purchasing the property was outside the authority of the District. There has been no authority presented that makes it improper for the District to purchase property knowing that it was going to turn around and sell it in short order.

Plaintiffs argue the sale of the property was procedurally in error because the public was not given notice and allowed input into the sale. However, the sale was discussed at an open public meeting on August 1, 2017. A resolution was recorded from that meeting, Resolution 1399. The Plaintiffs also argue that the action taken by the District was ultra vires because the purchase, the sale, then ultimate ratification of these acts occurred after the August 1, 2017 meeting.

RCW 54.16.180 allows the District "without the approval of the voters, sell, convey, lease or otherwise dispose of all or any part of the property owned by it ..." that has become "unserviceable, inadequate, obsolete, worn out, or unfit to be used in the operations of the system and which are no longer necessary, material to, and useful in such operations, to any person or public body." After the easement was secured, there is no factual dispute the property is no longer useful to the District. Plaintiffs supporting declarations make generalizations about a public use of Parcel No. 19182 but nothing was specified as to what that use would be.

While the manner in which the District acquired and then sold Parcel No. 19182 was not similar to the process surrounding the other three parcels in question, there is no indication the District operated outside the scope of its authority to purchase and sell property no longer useful. The process surrounding Parcel No. 19182 can be described as unusual or irregular. Resolution 1399 from August, 2017 was entered after a public meeting was held. That resolution referred to the purchase, authorized by the County June 20, 2017, and the intent to sell all four parcels including No. 19182. There was no specific language referring to this parcel as surplus.

After the resolution, the District paid the County for the parcel, then entered into a sale agreement with HiTest. The sale was complete mid August, 2017, with the deed recorded September 18, 2017. On May 15, 2018, the District ratified their previous acts to purchase Parcel No. 19182, declared it to be surplus after receiving a utility easement, and thereafter selling Parcel No. 19182 along with the three other District parcels to HiTest.

The District has the authority to purchase property, create easements, declare property to be surplus, and sell surplus property. While all of this was not done following the procedure used for the prior parcels found to be surplus, I cannot say the District acted outside it's authority and therefore its acts were ultra vires.

Case law has drawn a distinction between acts that are ultra vires and acts that suffer from procedural irregularity. [A] government action is truly ultra vires only if the agency was without authority to perform the action. South Tacoma Way v. State, 169 Wn.2d 118 (2010). The South Tacoma Way case goes on to state that "ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed."

I do not find the actions of the District in purchasing then selling Parcel No. 19182 was ultra vires. Because of this finding, HiTest Sand Inc. is a bona fide purchaser. The bona fide purchaser doctrine is well-established. It provides that a good faith purchaser for value who is without actual or constructive notice of another's interest in the purchased real property has a superior interest in that property. The doctrine applies to private and public land sales. HiTest paid over fair-market value for the property. HiTest is entitled to presume that the proceedings leading up to the sale of the parcels were procedurally valid.

The Defendants' motion for summary judgment on the basis of the Districts' actions are not ultra vires is granted and the Plaintiffs' motion for summary judgment on the basis of ultra vires is denied.

Mr. Nelson shall prepare an order reflecting my ruling. Presentment is scheduled for **Wednesday, April 3, 2019, at 8:30 a.m.** without oral argument. The parties shall review and confer regarding the proposed order. If the parties cannot come to an agreed proposed order, then each party not in agreement, shall provide their own proposed order. Once all orders are received by the Court, the presentment will be struck.

Sincerely,

Julie M. McKay
Superior Court Judge

cc: Court File