**Case No. 367363-III**

**IN THE COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON**

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

Appellants,

v.

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

Respondents.

**BRIEF OF APPELLANTS**

**RESPONSIBLE GROWTH \*NE WASHINGTON; CITIENS AGAINST NEWPORT SILICON SMELTER; THEODORE & PHYLLIS KARDOS; DENISE D. TEEPLES; GRETCHEN L. KOENIG; SHERYL L. MILLER; JAMES W. & ROSEMARY**

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1. **QUESTION PRESENTED**

May a Public Utility District in Washington State buy and sell land in a manner that is inconsistent with its statutory authority?  This case addresses that very question.  Appellants urges this Court to uphold the rule of law regarding Public Utility Districts in Washington State. Respondents, Pend Oreille Public Utility District No. 1 (the “PUD”), Pend Oreille County (the “County”), and HiTest Sand, Inc. (“PacWest”), are parties to an *Ultra Vires* transfer of land that occurred in 2017.  The PUD's governing authority, RCW 54.16, is clear and the Appellants ask this Court to reverse the Superior Court’s order granting summary judgement in favor of Respondents, and instead grant a motion of summary judgment in favor of the Appellant.

First, Appellants ask this Court to rule that the Respondent PUD acted beyond its authority to acquire land granted under RCW § 54.16.020.  The undisputed facts demonstrate that the PUD purchased land (Parcel #19182) from the County for the sole purpose of reselling it as part of a larger land package to PacWest.  The purpose of this land purchase was beyond the scope provided to the PUD by the RCW, and therefore is u*ltra vires*.

Second, Appellants ask this Court to rule that the PUD acted beyond its authority again when it subsequently sold the land it purchased from the County to PacWest.  The undisputed facts demonstrate the PUD never declared Parcel #19182 as surplus prior to the sale, nor did they put the sale up for a vote of approval by district citizens as is required by RCW 54.16.180.  Because the PUD acted beyond its authority to sell or convey land to PacWest, the act was therefore u*ltra vires*.

Based on the evidence, Appellants ask the Court to rule that the Superior Court erred and to find that the PUD committed multiple *ultra vires* acts. The entire transfer of land between the three Respondent parties should be deemed void, the summary judgment order of the Superior Court should be reversed, and summary judgment should be granted in favor of Appellants.

1. **ASSIGNMENTS OF ERROR, ISSUES, AND BRIEF ANSWERS**

**Assignment of Error 1:** The Court erred in granting summary judgment because the PUD’s acts of purchasing and selling Parcel 19182 were clearly Ultra Vires.

**Assignment of Error 2:** The Superior Court erred in finding “A government action is truly *ultra vires* only if the agency was without authority to perform the action.”

**Issue 1:** Did the Superior Court erroneously interpret Washington case law when they failed to acknowledge that even when an agency acts with authority, the act can in fact still be *ultra vires*? Yes.

**Assignment of Error 3:** The Superior Court erred in finding that “there is no indication the District operated outside the scope of its authority to purchase and sell property no longer useful.” CP, at 453.

**Issue 2:** When viewed in light of the whole record before the court, as well as the law presented in RCW 54.16.020, was the Court’s finding of fact in assignment of error 3 erroneous? Yes.

**Assignment of Error 4:** The Superior Court erred in finding that “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.” CP, at 453.

**Issue 3:** When viewed in light of the whole record before the court, was the finding of fact in assignment of error 3 supported by the evidence? No.

**Assignment of Error 5:** The Superior Court erred in failing to conclude that even if the PUD had the authority to purchase Parcel 19182, their acts became ultra vires when they violated existing state statute, RCW § 54.16.020.

**Issue 4:** When viewed in the light of both existing statutes and case law, did the Superior Court err in failing to conclude the acts of the PUD *ultra vires* due to their blatant violations of RCW § 54.16.020? Yes.

**Assignment of Error 6:** The Superior Court erred in failing to acknowledge that because the PUD did not declare Parcel 19182 “surplus” before selling it to PacWest, they violated RCW § 54.16.180 and the sale should be considered *ultra vires* and void.

**Issue 5:** When viewed in light of RCW § 54.16.180, did the Superior Court err in failing to conclude that because the PUD did not declare Parcel 19182 Surplus before selling it, the sale should be considered *ultra vires* and void? Yes.

**Assignment of Error 7:** The Superior Court Erred in failing to consider that even if the PUD’s actions were not ultra vires, their procedural failures regarding the purchase and sale of Parcel 19182 contravene the purpose of the law and therefore should be considered void.

**Issue 6**: When viewed in light of Washington case law and precedent, did the Superior Court err in failing to conclude that because the procedural failures of the PUD contravened the underlying purpose of numerous laws under RCW Title 54, both the purchase and sale of Parcel 19182 should be considered void? Yes.

**Assignment of Error 8:** The Superior Court erred in failing to grant the Appellant’s cross motion for summary judgment.

**Issue 7:** Based on existing statutes and case law, as well as the evidence in the record, did the Superior Court err in failing to grant the Appellants cross motion for summary judgment? Yes.

1. **STATEMENT OF THE CASE**

On March 19, 2019, the Superior Court found the facts below were undisputed and that Respondent’s were entitled to summary judgment against the Appellant’s complaint and all claims therein. The Court stated that the PUD’s acts in the purchase and sale of Parcel #19182 were not considered *ultra vires*. Any procedural irregularities claimed in the transaction were cured by the PUD’s retroactive ratification of Resolutions 2017-22, 1399, and 1411. Furthermore, PacWest was stated as being protected by the bona fide purchaser doctrine thereby affirming the transaction. The Appellants have come to appeal the Superior Courts order granting summary judgment to the Respondent’s.

On April 18, 2017, PacWest sent a letter to the PUD inquiring about the purchase of land and, potentially, requesting electrical service from the PUD for a silicon smelter that PacWest proposes to build in the County. CP, at 103-104, 253. PacWest was interested in the purchase of four individual parcels of land, three of which were owned by the PUD, parcels #17036, #19183, and #19193, and a fourth owned by the County. CP, at 103-104, 253*.*The PUD purchased its three parcels several decades ago for other purposes that never occurred. CP, at 257.

On or about March 9, 2016, the PUD issued a public notice of intent to declare its three parcels surplus. At the next PUD Commissioner meeting, these three parcels were among a group of land declared surplus. CP, at 98, 259, 265. Public notice of sale for the three parcels was published on or about August 31, 2016 and September 7, 2016. CP, at 101, 268. These three parcels were still for sale at the time of the letter from PacWest. CP, at 101, 268.

The fourth parcel of land PacWest requested in its letter was parcel #19182, which at the time was owned by the County. CP, at 270. In its Letter of Intent to PacWest on April 25, 2017, the PUD offered to acquire Parcel #19182 from the County and then sell all four parcels (the surplus parcels and Parcel #19182) to PacWest in a one transaction. CP, at 110-113, 272-275. The PUD did not own Parcel #19182 at the time they offered to sell it to PacWest. CP, at 103-104, 253. The PUD’s only stated purpose for acquiring Parcel #19182 was to sell it to PacWest. CP, at 110-113, 272-275. The retention of an easement was never stated prior to the sale. Later, on or about June 16, 2017, the PUD sent PacWest a revised Letter of Intent which only included the three surplus parcels that the PUD owned at that time. CP, at 115-116, 277-278. This revised letter retroactively removed Parcel # 19182 that was included in the letter dated April 25. CP, at 115-116, 277-278.

On June 20, 2017, the County Commissioners approved Resolution 2017-22, authorizing the sale of Parcel #19182 to the PUD in order to effectuate the plan. CP, at 106-107, 280-281. Then on August 1, 2017, the PUD passed Resolution 1399 authorizing its General Manager to negotiate with PacWest for the sale of the combined four parcels. CP, at 132-133, 283-284. However, at the time Resolution 1399 passed allowing negotiation of the land sale, the PUD did not own Parcel #19182. CP, at 103-104, 253 (emphasis added). The PUD issued a check to the County for the purchase of Parcel #19182 on August 2, 2017. CP, at 135, 286.

On or about August 10, 2017, PacWest deposited earnest money for the sale of the packaged parcels from the PUD. CP, at 288-289. The Purchase and Sale Agreement between the PUD and PacWest for the sale of the four parcels was completed on or about August 21, 2017. CP, at 141-147, 317-320. On September 18, 2017, a Special Warranty Deed was recorded with the County Auditor combining all four parcels of land into a single deed owned by PacWest. CP, at 149-150.

On September 19, 2017, the PUD issued a press release regarding the sale of the land to PacWest. CP, at 157-158. The PUD press release stated, “the PUD officially acquired the adjacent county property with the intent to sell the entire package to HiTest.” CP, at 157-158 (emphasis added)*.* The mentioned adjacent county property is referring to Parcel #19182. CP, at 157-158.

On April 23, 2018, the Appellants informed the PUD that the purchase and sale of Parcel #19182 was done in violation of several Washington statutes. CP, at 296-297. On May 14, 2018, the PUD recorded a corrected Special Warranty Deed after receiving the Appellant’s letter regarding these violations. CP, at 152-155, 291-294. This corrected Special Warranty Deed added a utility easement to Parcel #19182. CP, at 152-155, 291-294*.*The addition of the easement came nearly eight months after the property had been sold to PacWest.

On May 15, 2018, the PUD Commissioners passed Resolution 1411 stating they were making the determination that Parcel #19182 was surplus. CP at 173-175, 299-301. This determination was made retroactively after the sale was already completed and the deed recorded in PacWest’s name. CP at 173-175, 299-301. Resolution 1411 also affirmed and ratified the land purchase from the County and the entire sale of land to PacWest. CP at 173-175, 299-301.

1. **STANDARD OF REVIEW**

Declaratory judgment is subject to appellate review like any other final judgment. Karl B. Tegland, 15 Washington Practice: Civil Procedure sec. 42.27, at 170 (1st ed.2003).  RCW 7.24.070, of the Uniform Declaratory Judgments Act, states, “All orders, judgments and decrees under this chapter may be reviewed as other orders, judgments and decrees.”

No special procedures or standards of review apply. *City of Spokane v. Spokane Civil Serv. Comm'n*, 98 Wn. App. 574, 578, 989 P.2d 1245 (1999), review denied, 141 Wn.2d 1013 (2000).  Appellate courts will not disturb findings of fact supported by substantial evidence. *See Nollette v. Christianson*, 115 Wn.2d 594, 800 P.2d 359 (1990).  In reviewing the superior court’s findings and conclusions, an appellate court must determine whether substantial evidence supports its findings of fact and, in turn, whether the findings support the conclusions of law. *Pilcher v. Dep't of Revenue*, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), *review denied*, 149 Wn.2d 1004 (2003).

Here, Respondent has failed to meet this standard; a decision reversing the Superior Court’s order granting summary judgment to the Respondent is warranted.

1. **ARGUMENT**
2. **The Superior Court erred in finding “A government action is truly ultra vires only if the agency was without authority to perform the action.”**

Washington courts have consistently identified two types of *ultra vires* acts that can be committed by a municipal corporation. *Wendel v. Spokane County*, 27 Wn. 121, 124, 67 P. 576, 577 (1902). The state Supreme Court has distinguished between acts which are done wholly without statutory authority, and those which are done with authority but in direct violation of another existing statute. *Johnson v. Cent. Valley Sch. Dist. No. 356*, 97 Wash.2d 419, 433, 645 P.2d 1088, 1097 (1982). *See also* *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245, 248 (1982) (Holding that although the Department of Natural Resources had the general authority to enter into timber sales contracts, failure to prepare an environmental impact statement violated existing state law and therefore made the act *ultra vires*). Our state Supreme Court considers both of these acts to be *ultra vires. Id.*

The PUD qualifies as a municipal corporation. In determining whether the act of the PUD is *ultra vires*, the court must examine whether the act was either “done without legal authorization” OR “done…in direction violation of existing statutes.” *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 165, 43 P.3d 1250, 1257 (2002) (emphasis added). Essentially, the PUD commits an *ultra vires* act when they go beyond the scope of their legal power or violate state law while acting within the scope of their power. *Id*.

1. **The Superior Court erred in finding that “there is no indication the District operated outside the scope of its authority to purchase and sell property no longer useful.”**

RCW § 54.16.020 states a public utility district “may…purchase, acquire, lease, add to, maintain, operate, develop, and regulate all lands, property, property rights…and systems for generating electric energy by water power, steam, or other methods.” This statute is unambiguous, and the legislatures intent is clear. “The court’s fundamental duty is to ascertain and carry out the intent of the Legislature. An unambiguous statute is not subject to judicial interpretation, and the statute’s meaning is derived solely from its language.” *Spence v. Kaminski*, 103 Wn. App. 325, 333 (2000) (citing *State v. Chester*, 133 Wn.2d 15, 21 (1997)). The plain language of the statute provides the PUD may only purchase land for energy related purposes. RCW § 54.16.020. There is no law granting them authority to acquire land for the purpose of conveying it to a third party. The PUD is not a real estate agency or a real estate holding company.

1. **The Superior Court erred in finding that “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.”**

The undisputed facts demonstrate the PUD purchased Parcel 19182 from the County in order to sell it as part of a larger land transaction to PacWest. CP, at 103-104, 253. The PUD asserts that the purpose for purchasing Parcel 19182 from the County was to obtain an easement. CP, at 79, 87-88. The record does not support this assertion. CP, at 89, 153-154, 157, 161. A PacWest press release from October 13, 2017 referring to Parcel 19182 states, “the site includes a 13-acre parcel that the County sold to the PUD so that the property could be marketed together” (emphasis added).[[1]](#footnote-1) CP, at 161. Additionally, a PUD press release on September 19, 2017, states, “the PUD officially acquired the adjacent county property [Parcel 19182] with the intent to sell the entire package to HiTest” CP, at 157 (emphasis added). Note that there was no mention of an easement in either instance. Both press releases speak to the PUD’s primary reason for purchasing Parcel 19182.

Furthermore, the PUD never reserved an easement on the land when they purchased Parcel 19182 on August 2, 2017, and subsequently sold it to PacWest on September 19, 2017. CP, at 149-150 (emphasis added). The record reflects that the Special Warranty Deed for the purchase and sale of the land from the PUD to PacWest reserved no easement on Parcel 19182. CP, at 149-150. In fact, the easement that the PUD asserts was the sole reason they bought Parcel 19182 was not obtained until eight months after the land was sold to PacWest. This came in the form of a corrected Special Warranty Deed. CP, at 153. Note this corrected Special Warranty Deed was sought by the PUD less than a month after University Legal Assistance (“ULA”) sent a letter informing them that the land transfer was in fact illegal. This timeline of events highlights that the addition of an easement to Parcel 19182 was *ex post facto*. The does not support the PUD’s contention that Parcel 19182 was purchased for the purpose of retaining an easement.

RCW § 54.16.020 gives the PUD the authority to purchase land for energy purposes only. Because the PUD purchased Parcel 19182 for purposes other than producing energy, they acted wholly outside their authority and the transaction should be considered *ultra vires*.

1. **The Superior Court erred in failing to conclude that even if the PUD had authority to purchase Parcel 19182, their acts became ultra vires when they violated existing statute RCW § 54.16.020.**

As noted above, just because the PUD has the general authority to act in a certain manner does not mean that their actions cannot be *ultra vires*. *Wendel,* 27 Wn. at 124, 67 P. at 577. The Respondent’s will assert that the general authority to purchase land as a municipal corporation means their actions in this case cannot be *ultra vires*. They will use *S. Tacoma Way, LLC v. State* to justify this assertion. CP, at 71. However, the full legal context of *S. Tacoma Way* shows it is distinguishable from our case. In *S. Tacoma Way*, the Court was faced with a municipal corporation which had committed several procedural errors in the sale of land that it owned. *Id*. 169 Wn.2d 118, 121, 233 P.3d 871, 872 (2010). That case is distinguishable from ours in that we are faced with a municipal corporation which committed blatant statutory violations when they purchased Parcel 19182 from the County.

The Respondent’s will argue that Title 54 of the RCW grants them broad powers and authority, and that Title 54 should be liberally construed by the Court. CP, at 68. However, liberally construing granted authority does not mean ignoring clear violations of the law. The broad authority of public utility districts was examined in *Puget Sound Power & Light Co. v. Pub. Util. Dist. No. 1*, in which that Court stated a PUD “is implicitly authorized to make all contracts and to engage in any undertaking which is necessary to render the system efficient and beneficial to the public…absent statutory or case law violations” (emphasis added). *Id*. 17 Wn. App. 861, 864, 565 P.2d 1221 (1977).

Washington case law is clear in that even where statutory authority exists, violation of existing statutes while exercising that authority renders the act *ultra vires*. *Miller*, at 165, 43 P.3d at 1257. No matter how liberally the powers granted by Title 54 are construed, it is clear the PUD violated RCW 54.16.020. As noted above, the PUD claims to have bought Parcel 19182 for the purpose of retaining an easement. CP, at 79, 87-88. However, as already shown, the timeline of events in this case simply does not support this claim. If the PUD truly bought Parcel 19182 to retain an easement, they would have sought such an easement prior to selling the land to PacWest. Instead, the easement was retained by the PUD eight months after the sale, and less than a month after they learned of the illegality of the land transfer. CP, at 154, 296-297.

1. **The Superior Court erred in failing to conclude that the sale of Parcel 19182 was in direct violation of RCW § 54.16.180 and therefor ultra vires and void because of the PUD’s failure to declare the parcel “surplus” before its sale PacWest.**

The PUD asserts it was not required to put the sale of Parcel 19182 to a vote nor was it required to pass a resolution declaring it surplus. CP, at 66-67.  Once again, to support this assertion, the PUD relies on the argument that it is given “broad powers” to achieve its “lawful purpose.” CP, at 68.  Washington law authorizes the PUD to sell land only after three fifths voter approval:

A district may sell and convey, lease, or otherwise dispose of all or any part of its works, plants, systems, utilities and properties, after proceedings and approval by the voters of the district, as provided for the lease or disposition of like properties and facilities owned by cities and towns. The affirmative vote of three fifths of the voters voting at an election of the question of approval of a proposed sale shall be necessary to authorize such a sale.

RCW § 54.16.180 (1).

The statute also allows the PUD to bypass the voter requirement to sell land that 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” for the PUD. § 54.16.180 (2) (a-b). The record does not support the notion that Parcel 19182 was considered surplus due to it being “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.” *Id.*

            The PUD claims that Parcel 19182 was declared surplus in its *post hoc*Resolution No. 1411, yet the PUD did not own the land when it was allegedly declared surplus - it had already sold the parcel to PacWest eight months earlier. CP, at 90. Allowing the PUD to declare a parcel which they already sold (without following the required statutory process) as being “no longer necessary” is a clear attempt to abuse their granted authority. The PUD would their authority extended to apply to private land transactions. The court cannot allow this. The statute is clear that it only permits sales under “surplus” circumstances or by three-fifths voter approval. The failed to meet PUD either requirement.

            By failing to abide by the statutory requirements, the sale of Parcel 19182 by the PUD to PacWest is *ultra vires*.  In *Adamson v. Port of Bellingham*, the Court stated, “an agreement may be ultra vires because the substance of the contract was outside of the agent's authority, or because the agent failed to follow statutorily required procedures for entering into the contract.”  *Id.* 192 Wn. App. 921, 926, 374 P.3d 170, 173 (2016); *see also Noel*, at 379, 655 P.2d at 248.Here, the PUD lacked authority to sell land that was not declared surplus.  RCW § 54.16.180.  Furthermore, the land could not be declared surplus after the fact because it failed to meet the requirements under § 53.16.180. *Id*. The PUD also disregarded the alternative approach of acquiring a three-fifths voter approval to agree with the transaction.

              The Washington Supreme Court has been clear that “*Ultra vires*acts cannot be validated by later ratification or events.” *S. Tacoma Way,*169 Wn.2d at 123. The PUD’s attempt to legitimize the sale of Parcel 19182 through the *ex post facto* approval of Resolution 1411 accordingly fails. The PUD claims the “ratification” under Resolution 1411 remedies the failure to declare the parcel surplus, however this is incorrect. CP, at 73. The ratification of *ultra vires* acts cannot be fixed by an *ex post facto* action. *S. Tacoma Way,*at 123, 233 P.3d at…As stated, this is not a mere procedural error that can be fixed. It is a blatant step outside statutory authority. *S. Tacoma Way,*169 Wn.2d at 123.

* + 1. ***The Transaction Is Not Severable***

The divisibility of a contract is dependent on the intent of the parties when the contract was formed. *Saletic v. Stamnes,* 51 Wn.2d 696, 699 (1958). When looking at contracts, “Washington continues to follow the objective manifestation theory…under this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst Commc’ns, Inc. v. Seattle Times Co. of Seattle,* 62 Wn. App. 593, 602 (1991).

The contract for sale of the four land parcels from the PUD to PacWest does not include a severability clause. CP, at 317-320. This clause would allow the severance of Parcel 19182 from the transaction due to its illegality. Because the clause was omitted, the entire contract should be considered void. Without a severability clause, the parties intended this sale of the land to be whole and indivisible. Without both the clause and the objective intent shown by the parties that the contract be divisible, this Court should void the entire purchase and sale. Overall, the Court should not try to sever Parcel 19182 out of an otherwise uniform transaction.

1. **The Superior Court Erred in failing to consider that even if the PUD’s actions were not ultra vires, their procedural failures regarding the purchase and sale of Parcel 19182 contravene the purpose of the law and therefore should be considered void.**

Our state Supreme Court has distinguished between acts which are *ultra vires*and those which are procedurally invalid but do not rise to the level of being *ultra vires*. *S. Tacoma Way*, at 126, 233 P.3d at 875.  Though they are distinct findings evaluated dependent on the type of action taken by a municipal corporation, procedurally invalid actions can be still be considered void by the court.  *Id*.  When acts are procedurally invalid yet not *ultra vires*, the court must determine whether or not this procedurally invalid act contravened the underlying portion of the law which lays out the procedure.  *Jones v. Renton Sch. Dist. No. 403*, 2016 WL 2654573 at 4 (Wash. Ct. App. May 9, 2016). Because the PUD’s failure to follow the procedural requirements contravenes the underlying policy of both RCW § 54.16.180 and § 54.16.020, the land transaction must be considered void.

The underlying policy of RCW § 54.16.020 is one of accountability to the taxpayers that live in each utility district.  The law states in part that a public utility district “may…purchase, acquire, lease, add to, maintain, operate, develop, and regulate all lands, property, property rights…and systems for generating electric energy by water power, steam, or other methods.”  RCW § 54.16.020.  This law squarely seeks to ensure that any land purchased using taxpayer money is strictly for the PUD purposes laid out in Title 54. *Id*.  Any land purchase which deviates in purpose from furthering the mission of a PUD is a blatant abuse of taxpayer dollars.  In our case, the record shows that Parcel 19182 was purchased by the PUD “with the intent to sell the entire package to HiTest.”  CP, at 157.  Any claim made by the PUD regarding the purchase of Parcel 19182 for an easement is clearly contradicted by the timeline in the record.  CP, at 153-154.  Because the purchase of Parcel 19182 clearly contravenes RCW § 54.16.020, the act must be considered void.

Moreover, the underlying policy of RCW § 54.16.180 is not only one of accountability to the taxpayers, but also one intended to prevent any fraudulent or collusive behavior by the PUD.  The law is specifically tailored to govern the sale or disposal of land by the PUD.  RCW § 54.16.180.  As stated earlier, the law in part states that land can be disposed of or sold by the PUD after three fifths voter approval by the taxpayers in the district, or if the land had been previously declared “surplus.”  *Id.*

The policy underlying the law is, in our context, to prevent the PUD from fraudulently colluding with a private company such as PacWest. *Id*.  PacWest was likely aware that if they were to purchase Parcel 19182 from the county, the process would involve a public auction.  RCW § 35.36.150.  In short, the process for PacWest to buy the land from the County was onerous and created the possibility they could be outbid at a public auction.  However, an exception to this law requiring a public auction is when the land changes hands through an intergovernmental transfer.  *Id*.  This is why on April 18, 2017, PacWest sent a letter to the PUD inquiring about Parcel 19182 along with the other three parcels in the land transaction.  CP, at 103.  PacWest was aware that Parcel 19182 was in fact owned by the County and not the PUD. *Id*.  Nonetheless, PacWest never inquired with the County about purchasing the land directly from them. *Id.*  Additionally, and in response to the letter from PacWest, the PUD followed up with an April 25, 2017 letter in which they stated, “one parcel of 13.83 acres (Property ID # 19182) which is currently owned by Pend Oreille County, is eligible to be surplused and conveyed to the District through intergovernmental transfer.”  CP, at 110.

These letters are not the communications of good faith buyers and sellers. Rather, the letters portray a government body and a private corporation seeking to expedite a land transaction by avoiding public auction, and by avoiding the public accountability by having the sale approved via a three fifths vote.  These actions by the PUD show a clear contravention to the policy underlying RCW § 54.16.180. Therefore, the Court must consider the land transfer void.

1. **The Superior Court erred in failing to grant the Appellant’s cross motion for summary judgment.**

Summary judgment is warranted when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” CR 56(c).  A material fact is one upon which the outcome of the litigation depends in whole or in part.  *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147, 157 (1977).  If there is but one conclusion that can be reached, the court must grant summary judgment.  *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455, 461 (1996).  The material facts in this case are undisputed.   Based on the evidence in the record, this Court should reverse the Superior Court’s order denying the Appellant’s cross motion for summary judgment.

1. **CONCLUSION**

For the aforementioned reasons, this Court should GRANT the Appellant’s appeal from the Superior Court’s order granting summary judgment to the Respondent’s. We respectfully request this Court to reverse that order and grant the Appellant’s cross motion for summary judgment, or to remand the matter back to the Superior Court for action consistent with the law.

Respectfully submitted this [ ] day of [ ], 2019.

*s/ Rick K. Eichstaedt*

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**CERTIFICATE OF SERVICE**

I hereby certify that on June \_\_\_\_\_, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered eportal users will be served by the appellant system.

s/*Vicki L Yount*

Vicki L Yount

Paralegal, SCBA 136

1. The quoted line appears in the original PacWest press release. In this same press release in the record, used in the Declaration of F. Colin Willenbrock, this line does not appear. Note that it is the only line missing from the original document. See <http://pocedc.org/wp-content/uploads/2017/03/HiTestSilicon-PressRelease20171003.pdf> [↑](#footnote-ref-1)