**Case No. 367363-III**

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

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

Appellants,

v.

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

Respondents.

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# BRIEF OF APPELLANTS

**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 BUYERS LUBY.**

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## I. 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 urge this Court to uphold the rule of law regarding Public Utility Districts in Washington State and determine that the action of the Pend Oreille Public Utility District No. 1 was *ultra vires* and void.

Respondents, Pend Oreille Public Utility District No. 1 (the "PUD"), Pend Oreille County (the "County"), and HiTest Sand, Inc. ("PacWest")[1], are parties to an *ultra vires* transfer of land that occurred in 2017. The PUD's governing authority, RCW 54.16, is unambiguous and 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 Appellants. As argued below, Respondents' rely nearly exclusively on after-the-fact actions and documents to assert that the PUD's actions were valid. However, as discussed, both the law and record in this matter support Appellants' argument.

[1] During the course of the litigation, HiTest changed its name to "PacWest."

First, Appellants urge this Court to determine that the PUD acted beyond its authority to acquire land granted under RCW 54.16.020. The undisputed facts demonstrate that the PUD purchased land (Parcel No. 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 54.16.020, and therefore is *ultra vires*.

Second, Appellants urge this Court to determine 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 No. 19182 as surplus prior to the sale, nor did it 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 sale was therefore *ultra 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 Respondents 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.

## II. ASSIGNMENTS OF ERROR, ISSUES, AND BRIEF ANSWERS

**Assignment of Error 1:** 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 law when it failed to acknowledge that even when an agency acts with authority, the action can in fact still be *ultra vires*? Yes.

**Assignment of Error 2:** The Superior Court erred in finding that the purchase of Parcel No. 19182 by the PUD from the County was not an *ultra vires* act.

**Issue 2:** Based on the evidence before the Court as well as the existing case law and precedent, was the Superior Court's finding that, the purchase of Parcel No. 19182 by the PUD was not an *ultra vires* act, erroneous? 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 453.

**Issue 3:** When viewed in light of the whole record before the court, as well as the law presented in RCW 54.16.020, was the Superior Court's finding of fact that "there is no indication the District operated outside the scope of its authority to purchase and sell property no longer useful" 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 453.

**Issue 4:** When viewed in light of the whole record before the court, was the finding of fact "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" 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 No. 19182, its actions became *ultra vires* when it violated existing state statute, RCW 54.16.020.

**Issue 5:** 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 its 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 No. 19182 "surplus" before selling it to PacWest, it violated RCW 54.16.180 and the sale should be considered *ultra vires* and void.

**Issue 6:** 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 No. 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*; its procedural failures regarding the purchase and sale of Parcel No. 19182 contravene the purpose of the law and therefore should be considered void.

**Issue 7**: 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 No. 19182 should be considered void? Yes.

## III. STATEMENT OF THE CASE

On March 19, 2019, the Spokane County Superior Court found the facts below were undisputed and that Respondents' were entitled to summary judgment against the Appellants' complaint and all claims therein. The court stated that the PUD's actions in the purchase and sale of Parcel No. 19182 were not *ultra vires*. CP 454. However, the court acknowledged, "the process surrounding Parcel No. 19182 can be described as unusual or irregular." CP 453. Any procedural irregularities claimed in the transaction were cured by the PUD's retroactive ratification of Resolutions 2017-22, 1399, and 1411. [CITE] Furthermore, the Court found that PacWest was a bona fide purchaser doctrine thereby affirming the transaction. CP 469. Appellants appeal the Superior Court's order granting summary judgment to the Respondents.

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 103-104, 253. PacWest was interested in the purchase of four individual parcels of land, three of which were owned by the PUD, parcels No. 17036, No. 19183, and No. 19193, and a fourth (Parcel No. 19182) owned by the County. CP 103-104, 253. The PUD purchased its three

parcels several decades ago for other purposes that never occurred. CP 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 98, 259, 265. Public notice of sale for the three parcels was published on or about August 31, 2016 and September 7, 2016. CP 101, 268. These three parcels were still for sale at the time of the April 18, 2017 letter from PacWest. CP 101, 268.

The fourth parcel of land PacWest requested in its letter was parcel No. 19182, which at the time was owned by the County. CP 270. In its Letter of Intent to PacWest on April 25, 2017, the PUD offered to acquire Parcel No. 19182 from the County and then sell all four parcels (the surplus parcels and Parcel No. 19182) to PacWest in a one transaction. CP 110-113, 272-275.

The PUD did not own Parcel No. 19182 at the time it offered to sell it to PacWest. CP 103-104, 253. The PUD did not own Parcel No. 19182 when the other parcels were declared surplus on March 15, 2016. CP 98. The PUD's only stated purpose for acquiring Parcel No. 19182 was to sell it to PacWest. CP 110-113, 272-275. The retention of an easement was never stated prior to the sale. The minutes of the PUD Commission do

not indicate any desire to retain an easement. CP 127-130. No documents that existed prior to or at the time of the sale indicate a desire by the PUD to retain an easement.

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 115-116, 277-278. The revised Letter of Intent retroactively removed Parcel No. 19182 that was included in the letter dated April 25. CP 115-116, 277-278.

On June 20, 2017, the County Commissioners approved Resolution 2017-22, authorizing the sale of Parcel No. 19182 to the PUD in order to effectuate the sale. CP 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 132-133, 283-284. However, at the time Resolution 1399 passed allowing negotiation of the land sale, the PUD did not own Parcel No. 19182. CP 103-104, 253. The PUD Commissioners also passed this resolution having never declared Parcel No. 19182 as surplus. CP 132-133. The PUD issued a check to the County for the purchase of Parcel No. 19182 on August 2, 2017. CP 135, 286.

On or about August 10, 2017, PacWest deposited earnest money for the sale of the packaged parcels from the PUD. CP 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 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 149-150. No documents prior to or at the time of the sale indicate that Parcel No. 19182 was surplus.

On September 19, 2017, the PUD issued a press release regarding the sale of the land to PacWest. CP 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 157-158 (emphasis added).[2] The mentioned adjacent County property is referring to Parcel No. 19182. CP 157-158.

On April 23, 2018, the Appellants sent a letter to the PUD informing it that the purchase and sale of Parcel No. 19182 was done in violation of several Washington statutes. CP 296-297. No response was sent to the Appellants' letter. Instead, on May 14, 2018, the PUD recorded a corrected Special Warranty Deed after receiving the Appellants' letter regarding these violations. CP 152-155, 291-294. This corrected Special

[2] While not part of the record, the original press release for the sale available on the PUD's website states, "the site includes a 13-acre parcel that the County sold to the PUD so that the property could be marketed together." Available at http://pocedc.org/wp-content/uploads/2017/03/HiTestSilicon-PressRelease20171003.pdf.

Warranty Deed added a utility easement to Parcel No. 19182. CP 152-155, 291-294. The addition of the easement came nearly eight months after the property had been sold to PacWest and was the first mention of an easement on the property in the record.

On May 15, 2018, the PUD Commissioners passed Resolution 1411 stating it was making the determination that Parcel No. 19182 was surplus. CP 173-175, 299-301. This was the first action of the PUD declaring the property surplus and was made retroactively nearly eight months after the sale was already completed and the deed recorded in PacWest's name. CP 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 173-175, 299-301.

## IV. STANDARD OF REVIEW

Declaratory judgment is subject to appellate review like any other final judgment. 15 Douglas J. Ende, Wash. Prac., Civil Procedure § 42.27 (3d ed. 2018). The Uniform Declaratory Judgments Act, RCW 7.24.070, 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. *Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359, 362 (1990). In reviewing a 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, 951 (2002), *review denied*, 149 Wn.2d 1004 (2003).

Here, Respondents' have failed to meet this standard; a decision reversing the Superior Court's order granting summary judgment to the Respondents' is warranted.

## V. ARGUMENT

### A. THE SUPERIOR COURT ERRED IN FINDING "A GOVERNMENT ACTION IS TRULY *ULTRA VIRES* ONLY IF THE AGENCY WAS WITHOUT AUTHORITY TO PERFORM THE ACTION."

The Superior Court erred when it found that although the land transaction was procedurally irregular, it was not *ultra vires*. CP 453. To the contrary, 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 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 Wn.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*). The Supreme Court considers both of these actions to be *ultra vires. Id.*

In determining whether the act of the PUD is *ultra vires*, a 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). The PUD commits an *ultra vires* act when it goes beyond the scope of its legal power or violates state law while acting within the scope of its power. *Id*.

### B. THE SUPERIOR COURT ERRED IN FINDING THAT THE PURCHASE OF PARCEL NO. 19182 BY THE PUD FROM THE COUNTY WAS NOT AN *ULTRA VIRES* ACT.

The purchase of Parcel No. 19182 by the PUD from the County was clearly *ultra vires*. For the following reasons, the Superior Court erred in failing to consider the purchase of Parcel No. 19182 *ultra vires* and void.

### *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."*

The Superior Court erred in finding that the PUD did not operate outside its granted authority. CP 454. To the contrary, the PUD is only granted authority to purchase land for energy related purposes. RCW 54.16.020.

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, 12 P.3d 1030, 1035 (2000) (citing *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374, 1377 (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.

### 2. *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 Superior Court erred in finding that there was no evidence presented that contraverts that Parcel No. 19182 was bought for easement purposes. CP 453. To the contrary, the undisputed facts demonstrate the PUD purchased Parcel No. 19182 from the County in order to sell it as part of a larger land transaction to PacWest. CP 103-104, 253. The PUD asserts that the purpose for purchasing Parcel No. 19182 from the County was to obtain an easement. CP 79, 87-88. The record does not support this assertion. CP 89, 153-154, 157, 161.

A PUD press release on September 19, 2017, states, "the PUD officially acquired the adjacent county property [Parcel No. 19182] with the intent to sell the entire package to HiTest." CP 157 (emphasis added). Additionally, a PacWest press release from October 13, 2017 similarly makes no mention of an easement.[3] There was no mention of an easement

[3] This unaltered version of the Press Release not in the record stated "The site includes a 13-acre parcel that the County sold to the PUD so that the property could be marketed together." However, in this same press release in the record, used in the Declaration of 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.

in either instance. Both press releases speak to the PUD's primary reason for purchasing Parcel No. 19182.

The PUD has also argued (and likely will again) that the reason no easement was mentioned was because it did not want to reveal its internal business strategy. CP 344. However, as the PUD is aware, it is a municipal corporation, which operates to serve the people. The contention that revealing the primary reason for the land transaction would reveal internal business strategies shows a lack of transparency. Furthermore, easements are not an internal business strategy; they are part of public record. There is nothing "internal" about the acquisition of an easement.

Furthermore and most notably, the PUD never reserved an easement on the land when it purchased Parcel No. 19182 on August 2, 2017, and subsequently sold it to PacWest on September 19, 2017. CP 149-150. 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 No. 19182. CP 149-150. In fact, the easement that the PUD asserts was the sole reason it bought Parcel No. 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 153. The easement was raised for the first time less than a month after Appellants' counsel sent a letter informing the PUD that the land transfer was in fact illegal.

This timeline of events highlights that the addition of an easement to Parcel No. 19182 was *ex post facto*. The record does not support the PUD's contention that Parcel No. 19182 was purchased for the purpose of retaining an easement.

At the Superior Court, Respondents pointed to a declaration of Colin Willenbrock, which stated, "the District sought to acquire Parcel No. 19182 from the County to reserve an express easement on that property." CP 87. Additionally, they also pointed to the Declaration of Amber Orr, in which she recalled conversations from roughly two years ago regarding an easement. Neither declaration is supported by the record – no minutes of the PUD Commission or any other documents contemporaneous with the sale indicate any desire on the part of the PUD to obtain an easement.

Simply stated, the PUD should be able to point to evidence in the record regarding their intention to retain an easement. It cannot. As a municipal corporation, PUD's are subject to the requirements of the Open Public Meetings Act ("OPMA"). RCW 42.30. The OPMA requires that meetings during which "action" is taken be open to the public. RCW 42.30.030. No "action" of any kind regarding an easement on Parcel No.

19182 was taken at an open public meeting.[4] It is undisputed that absolutely no public discussion occurred on the need for an easement on Parcel No. 19182.

Furthermore, RCW 54.12.090 states in part that "all proceedings of the Commission shall be by motion or resolution, recorded in its minutes books, which shall be public records." It is undisputed that absolutely no motion, resolution, or minutes that memorialize the need for an easement or that the PUD reserved an easement on Parcel No. 19182. No easement was discussed in any PUD documents any time prior to or at the time of sale. CP 361.

RCW 54.16.020 gives the PUD the authority to purchase land for energy purposes only. Because the PUD purchased Parcel No. 19182 for purposes other than producing energy, it acted wholly outside its authority and the transaction should be considered *ultra vires*. Following the legal guidance provided by the OPMA and RCW 54.12.090, if the PUD truly bought Parcel No. 19182 solely to retain an easement, why was it only discussed *ex post facto* of the sale, at which point the public had no opportunity to be included in such discussions? Again, the PUD's claim

[4] We are not alleging a violation of OPMA. We are demonstrating a lack of evidence in the record to support any assertion of an easement.

that it was never discussed because it did not want to reveal its internal business strategy is without merit.

### *3. The Superior Court erred in failing to conclude that even if the PUD had authority to purchase Parcel No. 19182, its acts became ultra vires when it violated existing statute RCW 54.16.020.*

The Superior Court erred in failing to consider that the statutory violations committed by the PUD rendered the land transaction *ultra vires*, CP 454. As noted above, the PUD has the authority to purchase land (under limited circumstances), but this does not mean its actions in a land transaction cannot be *ultra vires*. *Wendel,* 27 Wn. at 124, 67 P. at 577. The PUD will assert that the general authority to purchase land as a municipal corporation means its actions in this case cannot be *ultra vires*. Respondents rely on *S. Tacoma Way, LLC v. State,* 169 Wn.2d 118, 121, 233 P.3d 871, 872 (2010) to support its argument. CP 71. However, *S. Tacoma Way* is distinguishable from this matter.

The PUD does not have general authority to buy and sell land, distinguishing the PUD from the Department of Transportation's authority discussed in *S. Tacoma Way.* In that case, the Supreme Court was faced with a municipal corporation, which had committed several *procedural errors* in a land transaction. *S. Tacoma Way, LLC v. State,* 169 Wn.2d at 121, 233 P.3d at 872. That case is also distinguishable from ours in that

this Court is faced with a municipal corporation, which committed *statutory violations* when it purchased Parcel No. 19182 from the County. RCW 54.16.020.

Respondents also argued to the Superior Court that Title 54 of the RCW grants them broad powers and authority, and that it should be liberally construed. CP 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." 17 Wn. App. 861, 864, 565 P.2d 1221 (1977). In the case of government entities, an illegal contract is *ultra vires* and void. *Barnier v. City of Kent,* 44 Wn. App. 868, 873-74, 723 P.2d 1167, 1171 (1968).

Respondents also argued below that the Appellants failed to state any claim or make any argument that the County's sale of Parcel No. 19182 to the District is *ultra vires*. CP 354. However, Appellants do not assert the County lacked any authority to sell the property. Appellants assert the PUD lacked the authority to purchase that property. When the PUD purchased the land from the County, the PUD acted outside of its

statutorily granted authority. As stated above, 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 to clearly be *ultra vires*. RCW 54.16.020.

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*, 111 Wn. App. 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 also claims to have bought Parcel No. 19182 for the sole purpose of retaining an easement. CP 79, 87-88. However, as already shown, the timeline of events simply does not support this claim. If the PUD truly bought Parcel No. 19182 to retain an easement, it is only common sense that it would have sought such an easement prior to selling the land to PacWest and would have inserted that easement into the original Special Warranty deed. Instead, the easement was retained by the PUD eight months after the sale in a corrected deed. CP 154, 296-297. Furthermore, this correction came less than a month after the PUD was put on notice of legal issues regarding the land transfer from University Legal Assistance ("ULA") letter. CP 154, 296-297.

Accordingly, the actions of the PUD render the transaction with the County void and the property should properly revert to County ownership.

#### *4. The Superior Court erred in failing to consider that even if the PUD's purchase of Parcel No. 19182 was not ultra vires, the purchase contravened the underlying purpose of RCW 54.16.020 and should be considered void.*

The 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*, 169 Wn.2d at 126, 233 P.3d at 875. Though they are distinct findings evaluated dependently 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. *S. Tacoma Way*, 169 Wn.2d at 124, 233 P.3d at 874; s*ee also Jones v. Renton Sch. Dist. No. 403*, 2016 WL 2654573 at 4 (Wash. Ct. App. May 9, 2016).[5] Because the PUD's failure to follow the procedural requirements contravenes the underlying policy of 54.16.020, the purchase of Parcel No. 19182 by the PUD must be considered void.

[5] This is an unpublished opinion provided for its persuasive value per GR 14.1(a).

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 public utility district, is an abuse of taxpayer dollars.

Public utility districts were created to serve the people and the public interest, not private companies:

> The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington *for the benefit of the people thereof*, and to supply public utility service, including water and electricity for all uses.

Laws of 1931, ch. 1, 1 (emphasis added). The plain language of RCW 54.16.020 restricts the PUD's authority to purchase land to very limited circumstances. Instead of granting general authority to do so at any time, the Legislature selected specific circumstances to protect the people it serves. The PUD ignored these statutory requirements and did not serve the people and the public interest; it served PacWest's interests.

Here, the record shows that Parcel No. 19182 was purchased by the PUD "with the intent to sell the entire package to HiTest." CP 157. Any claim made by the PUD regarding the purchase of Parcel No. 19182 for an easement is contradicted by the timeline in the record. CP 153-154. Because the purchase of Parcel No. 19182 contravenes RCW 54.16.020, the purchase must be considered void.

### C. THE SUPERIOR COURT ERRED IN FAILING TO CONCLUDE THAT THE SALE OF PARCEL NO. 19182 WAS IN DIRECT VIOLATION OF RCW 54.16.180 AND THEREFORE *ULTRA VIRES* AND VOID BECAUSE OF THE PUD'S FAILURE TO DECLARE THE PARCEL "SURPLUS" BEFORE ITS SALE TO PACWEST.

The Superior Court erred in concluding that the PUD's failure to declare Parcel No. 19182 surplus before sale did not render the transaction *ultra vires*. CP 453. This is incorrect because the RCW requires either the Parcel receive three-fifths voter approval for sale, or be declared surplus at an open public meeting. RCW 54.16.180.

The PUD asserted it was not required to put the sale of Parcel No. 19182 to a vote nor was it required to pass a resolution declaring it surplus. CP 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 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. RCW 54.16.180 (2) (a-b). There is no evidence in the record that there was any action taken to determine that the Parcel No. 19182 was "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" until eight months after the sale.

Parcel No. 19182 was declared surplus only in its *ex post facto* Resolution 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 90. Allowing the PUD to declare a parcel, which it already sold (without following the required statutory process) as being "no longer necessary", would be allowing a clear attempt to abuse its

granted authority. The PUD would have its authority extended to apply to private land transactions. The statute is clear that it only permits sales under "surplus" circumstances or by three-fifths voter approval. The PUD failed to meet either requirement.

By failing to abide by the statutory requirements, the sale of Parcel No. 19182 by the PUD to PacWest is *ultra vires*. In *Adamson v. Port of Bellingham*, the court stated, "[A]n 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." 192 Wn. App. 921, 926, 374 P.3d 170, 173 (2016); *see also Noel*, 98 W.2d 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 RCW 54.16.180. *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 "*[u]ltra vires* acts cannot be validated by later ratification or events." *S. Tacoma Way,* 169 Wn.2d at 123, 233 P.3d at 875. The PUD's attempt to legitimize the sale of Parcel No. 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 73. The ratification of *ultra vires* acts cannot be fixed by an *ex post facto* action. *Id.* As stated, this is not a mere procedural error that can be fixed. It is a blatant step outside statutory authority. *Id*. Retroactive ratifications such as this one will deprive District voters of the opportunity to be heard before the sale of land has been completed.

### *1. Only the PUD Commission can authorize the sale of surplus property in an open meeting and past practice supports this.*

Respondents argued below that RCW 54.16.180 does not require any land to be declared surplus prior to disposing of it. However, this argument is incorrect. This notion ignores both the plain language of Washington law and best practice of the PUD.

First, while the PUD has the power to sell surplus land, that power is vested in the PUD Commission and carries the requirements that come 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." All proceedings of the Commission shall be by motion or resolution, recorded in its minute books, which shall be public record. *Id.*

The very actions of the PUD regarding this land transfer show its awareness that property must be declared surplus at an open public meeting before being sold. In discussing the sale of the other three parcels, PUD General Manager Colin Willenbrock states in his declaration: "The District's Board declared Properties as surplus to the District's needs at a public meeting on March 15, 2016." CP 87. Additionally, the PUD's assertion that it did not need to declare Parcel No. 19182 surplus before selling it is directly contradicted by the fact that eight months after the parcel had been sold to PacWest, the PUD adopted a resolution retroactively declaring Parcel No. 19182 to be surplus. CP 90.

Second, as discussed above, the action must be taken in a public meeting. As a municipal corporation, PUDs are subject to the requirements of the OPMA. RCW 42.30. The OPMA requires that meetings during which "action" is taken be open to the public. RCW 42.30.030. Action taken at a meeting in violation of this provision is deemed null and void. *Id.*[6]

The requirements of the OPMA are echoed by laws governing PUDs. RCW 54.12.090 states, in part, that "all proceedings of the Commission shall be by motion or resolution, recorded in its minutes

[6] Again, we are not alleging a violation of OPMA in this instance, we assert that the PUD that official actions, including declaring property surplus, must be done at an open public meeting.

books, which shall be public records." The PUD has not and cannot point to an action of the Commission during an open meeting declaring the property surplus. Although the PUD can point to a meeting on August 1, 2017, in which the sale of Parcel No. 19182 was allegedly discussed, there was no mention of the property being surplused in the minutes and no action was recorded. CP 127-130. A review of the PUD Commission's minutes, including one provided in the record by the PUD, indicates that it is common practice for the Commission: (1) to declare property surplus; (2) in writing at an open meeting; (3) by Commission vote. CP 128 (Declaration of Colin Willenbrock, Ex. H, which shows a vote to surplus fleet vehicles).

**2.** ***The Superior Court erred in failing to consider that even if the PUD's sale of Parcel No. 19182 to PacWest was not ultra vires, the sale contravened the underlying purpose of RCW 54.16.180 and should be considered void.***

As noted above, the 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*, 169 Wn.2d at 126, 233 P.3d at 875. Again, however, even when an act is deemed to only be procedurally invalid, it must be considered void if the procedural failures contravene the underlying purpose of the law. *Id.*

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. *Id*. 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. RCW 54.16.180. PacWest was likely aware that if it were to purchase Parcel No. 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 could have created the possibility it 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 No. 19182 along with the other three parcels in the land transaction. CP 103. PacWest was aware that Parcel No. 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 it stated, "one parcel of 13.83 acres (Property ID No. 19182) which is currently owned by Pend Oreille County, is eligible to be surplused and conveyed to the District through intergovernmental transfer." CP 110.

These letters are not 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 contravention to the policy underlying RCW 54.16.180. Therefore, the Court must consider the land transfer void.

## VI. CONCLUSION

To support its case, the PUD relies wholly and exclusively on after-the-fact statement and actions to justify its past violations of the law. Furthermore, the PUD erroneously interprets and bends Washington case law in order to steer the arguments in this case away from its statutory violations and to expand its authority. The facts of this case indicate that Parcel No. 19182 was not bought for the purpose of reserving an easement. Likewise, there is no evidence that Parcel No. 19182 was declared surplus before its sale to PacWest. The actions of the PUD are

both *ultra vires* and contravene the underlying purpose of RCW Title 54. Based on the record, this Court should reverse the Superior Court's order denying the Appellant's cross motion for summary judgment.

Respectfully submitted this 24th day of July, 2019.

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

I hereby certify that on July 24, 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.

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