SUPERIOR COURT OF WASHINGTON
IN AND FOR SPOKANE COUNTY

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,

Petitioners-Plaintiffs,

v.

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

Respondents-Defendants.

No. 18202551-1

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pend Oreille Public Utility District No. 1 ("District") respectfully submits this Reply Memorandum in support of its Motion for Summary Judgment, and in opposition to plaintiffs' cross-motion for summary judgment.[1]

Plaintiffs bear the burden of proof in this case. Consequently, to withstand the District's motion against plaintiffs' claims that the District's purchase and sale of Parcel No. 19182 were *ultra vires* acts, plaintiffs were required to produce *admissible evidence* sufficient to prove their allegations that (1) the District purchased Parcel No. 19182 "solely" to sell to HiTest, and (2) the property was still necessary to the District's operations when it was sold. Plaintiffs' submission does not sustain that burden. Moreover, plaintiffs do not even address the District's record evidence, which proved that the District acquired Parcel No. 19182 to ensure an easement for its distribution lines, and once the District had secured its easement, the property was no longer useful to the District. There is no genuine issue of material fact regarding plaintiffs' claims, and the District's motion for summary judgment should be granted.

II. UNDISPUTED MATERIAL FACTS

The District's Motion was properly supported by the sworn Declarations of Amber Orr and Colin Willenbrock. Ms. Orr's Declaration confirms her specific recollection of conversations with District staff in the summer of 2017, "where we discussed the existing underground electrical distribution line and the need to specifically reserve an express easement across the western portion of Parcel No. 19182, as part of the potential land sale to HiTest." Orr Decl., ¶ 5. Ms. Orr also explained that the District had not required an easement while the property was publicly owned, but that:

> "when HiTest expressed its interest in acquiring the District properties and the County parcel, I believed it would be easier for the District to obtain the easement

[1] Plaintiffs concede the District's motion for summary judgment against their claim for a "writ of prohibition." Response, p. 1 n. 1. Consequently, the Court should enter summary judgment against that claim, and this Reply will focus on plaintiffs' claims for declaratory relief.

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by reservation rather than trying to negotiate an easement from a future customer. It was for that reason that the District acquired Parcel No. 19182 before selling it as surplus once the easement was reserved." *Id.* ¶ 8.

Mr. Willenbrock's Declaration confirms that "[t]he District sought to acquire Parcel No. 19182 from Pend Oreille County to reserve an express easement on that property." Willenbrock Decl., ¶ 11. He also confirmed that Parcel No. 19182 was no longer necessary or useful in the District's operations once the District had secured its distribution line easement. *Id.* ¶¶ 15, 17.

Plaintiffs' response ignores that evidence, and relies on two letters as proof of the District's supposed "purpose" in acquiring Parcel No. 19182: an April 18, 2017 letter from HiTest to the District requesting electrical service;[2] and the District's April 25, 2017 Letter of Intent to HiTest.[3] *HiTest's* letter expressed its interest in acquiring four parcels of property and requested service to the same. The *District's* letter "outlines some of the major terms and conditions under which Public Utility District No. 1 of Pend Oreille County ("District") proposes to enter negotiations to sell the property described below to HiTest." *Id.* However, neither letter makes *any* statement regarding the District's purpose for acquiring Parcel No. 19182, at all. Plaintiffs offer no other evidence to sustain their burden of proof on this claim.

Plaintiffs argue, without any admissible evidentiary basis, that "[n]o discussion of any other purpose was stated prior to the sale."[4] But plaintiffs do not even try to explain how this supposed "lack off prior discussion" creates a genuine issue of fact for trial: they do not pretend that a "lack of prior discussion" might impeach Orr's and Willenbrock's sworn testimony about the District's purpose, nor do they identify any reason why the District would preview its own internal business strategy to its counterpart in a proposed commercial transaction. In short, plaintiffs do not demonstrate that a "lack of prior discussion" might prove their claims, and they

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[2] Ex. A to Eichstaedt Decl.
[3] The Letter of Intent was attached as Ex. G to Eichstaedt's Declaration. Plaintiffs' Response incorrectly identifies it as Ex. A. Response, p. 14:3.
[4] Response, pp. 2:10-11; 14:3-4.

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certainly do not submit evidence sufficient to carry their burden of proof at trial. Consequently, there is no genuine issue of material fact regarding plaintiffs' unsupported allegations.

III. DISCUSSION

Plaintiffs seek declaratory judgment invalidating the District's purchase of Parcel No. 19182 from Pend Oreille County, and its subsequent sale of property to HiTest Inc. Summary judgment is proper against both of these claims.

A. Plaintiffs needed to present admissible evidence sufficient to prove their claims.

Plaintiffs bear the burden of proof on their claims that the District's purchase and sale of Parcel No. 19182 were *ultra vires* acts. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 595, 949 P.2d 1260 (1997) ("the plaintiff in a declaratory judgment suit under RCW 7.24 has the burden of proof")[5]; *Twisp v. Methow Valley Irrigation Dist.*, 32 Wn. App 132, 135, 646 P.2d 149 (1982) (party claiming municipal deeds were *ultra vires* had burden to prove noncompliance with statute); *Henry v. Oakville*, 30 Wn. App. 240, 246-47, 633 P.2d 892 (1981) (party challenging municipal action must rebut presumed validity)[6]; *Truitt v. Truitt*, 100 Wash. 608, 171 P. 532 (1918) (party challenging validity of a deed bears the burden of proof).

The District's motion challenged plaintiffs' ability to sustain their burden of proof. Consequently, plaintiffs were required to submit *admissible evidence* sufficient to prove that the District's purchase and sale of Parcel No. 19182 were *ultra vires* acts. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). They did not sustain that burden.

B. Summary judgment must be granted against plaintiffs' claim regarding the District's *purchase* of Parcel No. 19182; the District is authorized to purchase property and secure easements for its distribution lines, and the District's evidence of that purpose is undisputed.

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[5] Citing *Taylor v. State*, 29 Wn.2d 638, 641, 188 P.2d 671 (1948) and *Washington Beauty College v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938).

[6] Citing 56 Am. Jur. 2d *Municipal Corporations* §§ 355, 382 (1971), *Seattle v. Wright*, 72 Wn.2d 556, 559, 433 P.2d 906 (1967), and *LaMon v. Westport*, 22 Wn. App. 215, 219, 588 P.2d 1205 (1978).

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Plaintiffs' challenge to the District's *purchase* of Parcel No. 19182 relies upon their conclusory and inadmissible allegation that "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."[7] The District's purpose for acquiring Parcel No. 19182, however, is established by the sworn testimony of Amber Orr and Colin Willenbrock.[8] Ms. Orr specifically recounts how District staff anticipated the need to secure an easement across Parcel No. 19182 for existing distribution lines,[9] and she explains how, in their business judgment, it was preferable to do so by purchasing the property and reserving the easement rather than by trying to obtain it through purchase or condemnation from a private owner. Orr Decl., ¶¶ 5, 8.[10] Mr. Willenbrock confirms that evidence. Willenbrock Decl., ¶ 11. Plaintiffs' response simply ignores the District's evidence.

To prove their allegations of the District's supposed "purpose" in acquiring Parcel No. 19182, plaintiffs cite an April 18, 2017 letter from HiTest to the District requesting electrical service,[11] and the District's April 25, 2017 Letter of Intent to HiTest.[12] Of course, *HiTest's* letter

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[7] Response, p. 13:18-20.

[8] A PUD's purpose and objectives are properly proven by the testimony of district officials. *See State ex rel. Public Util. Dist. v. Schwab*, 40 Wn.2d 814, 821, 246 P.2d 1081 (1952) (citing testimony of district officials as proof of district's purpose and objectives).

[9] The District has express statutory authority to acquire real property—like Parcel #19182--as needed to ensure easements for its distribution lines. R.C.W. 54.16.020 (authorizing acquisition of property for easements and rights-of-way); R.C.W. 56.16.040 (granting power to purchase or acquire transmission and distribution lines); R.C.W. 54.16.090 (allowing the District to acquire real property "necessary *or convenient* for its purposes."

[10] So there is no confusion, the Court must reject plaintiffs' implied invitation to "second guess" the District's business strategy. A Public Utility District's operational strategies must be respected by the courts, absent proof that they are arbitrary and capricious. *Public Utility Dist. v. Taxpayers & Ratepayers*, 78 Wn.2d 724, 730, 479 P.2d 61 (1971); *see also State ex rel. Public Util. Dist. v. Schwab,* 40 Wn.2d 814, 824, 246 P.2d 1081 (1952) (court could not second-guess District's judgment in forecasting future operational needs). Washington law is also clear that the propriety of municipal action is determined by its primary purpose or objective, not by its ancillary consequences. *See Public Util. Dist. v. Taxpayers & Ratepayers, supra* (incidental sale of power to federal government for 12 years did not invalidate contract, because primary purpose was properly the acquisition of power for future needs), *accord Ferlin v. Chuckanut Cmty. Forest Park Dist.*, 1 Wn. App.2d 102, 108-09, 404 P.3d 90 (2017).

[11] Ex. A to Eichstaedt Decl.

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provides no evidence of the *District's* reason for purchasing Parcel No. 19182--it merely asserts HiTest's interest in acquiring property for its facility. As to the *District's* letter, plaintiffs correctly note that it does not discuss the District's intent to buy Parcel No. 19182 to secure an easement for its distribution lines. Plaintiffs do not explain, however, why the District *would* disclose its internal business strategy in a letter to HiTest, and they cannot point to *one word* in the letter that is actually inconsistent with Orr and Willenbrock's sworn testimony. In short, plaintiffs would have the Court disregard the undisputed testimony of two District employees simply because the District did not "preview" its transactional strategy to its counterparty. That fact, however, does not disprove the District's evidence, let alone prove a contrary intent.

Plaintiffs bear the burden of proof on their claims. To prove the purchase of Parcel No. 19182 was *ultra vires*, plaintiffs must show noncompliance with the R.C.W. 54.16. *Twisp v. Methow Valley Irr. Dist.*, 32 Wn. App. 132, 135, 646 P.2d 149 (1982). There is ***no*** record evidence supporting plaintiffs' claim that the District acquired Parcel No. 19182 solely to sell it to HiTest. The mere (and unsurprising) fact that the District's letter to HiTest does not disclose its internal business strategy certainly does not prove plaintiffs' claim. Because the District is clearly authorized to acquire property and secure easements for its distribution lines, and because the District's evidence of that purpose is undisputed, summary judgment must be granted against plaintiffs' claim regarding the *purchase* of Parcel No. 19182.

C. Summary judgment must be also granted against plaintiffs' claim regarding the District's *sale* of Parcel No. 19182; R.C.W. 54.16.180(2)(b) empowers the District to sell property that is no longer needed, and neither a vote nor a declaration that property is surplus is required.

The plain language of R.C.W. 54.16.180(2)[13] clearly empowers the District to dispose of property that is no longer necessary to its operations. It does not require approval by the District's voters, and it does not require a declaration that property is "surplus," like some other

[12] Ex. G to Eichstaedt Decl.
[13] The full text of the statute is set forth in Appendix A to this Reply Memorandum.

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statutes (e.g., RCW 36.34.050 (counties must make written findings following hearing); RCW 35.94.040 (written resolution of surplus required of city municipal utility)). The Court must apply the plain language of the statute as written, and it cannot read a procedural requirement into the statute where none exists. *C.f. CLEAN v. City of Spokane*, 133 Wn.2d 455, 464, 947 P.2d 1169 (1997) (statute allowing operation of parking facilities in accordance with provisions authorizing facilities commission did not require creation of facilities commission).[14]

Plaintiffs' Response does not dispute the District's interpretation of this unambiguous statute. Instead, plaintiffs incorrectly claim that "[t]here is no evidence Parcel #19182 was considered 'unserviceable . . . or unfit to be used in the operations of the system."[15] Of course, that argument improperly attempts to shift the burden on this motion: it is not the District's burden to prove that the property *was* considered unserviceable, it is plaintiffs' burden to prove it was *not*. Plaintiffs' confusion is immaterial, though, because the truth is that the District's initial submission includes Mr. Willenbrock's sworn testimony proving this precise fact:

> 15. **Parcel No. 19182, once subject to the easement, was no longer necessary or useful in the District's operations.**
> 16. I attended the Board's regularly scheduled meeting on August 1, 2017. During the regularly scheduled meeting of the District's Board of Commissioners, held August 1, 2017, the attending public was given the opportunity to be heard on the matter of the sale of the District Properties and Parcel No. 19182 to HiTest. A true and correct copy of the minutes of this meeting is attached as Ex. H.
> 17. After extensive discussion, the District's Board of Commissioners determined that Parcel No. 19182, once subject to the easement, was unfit for and no longer necessary or useful in system operations, such that it should be sold for its fair market value.

Because plaintiffs' only argument against the sale of Parcel No. 19182 is factually incorrect, summary judgment should be granted against this claim.

Plaintiffs' Response also ignores the District's argument that the sale is not invalid even *if* the court were to assume (for the sake of argument) that the statute required a resolution that

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[14] *See also* District's Motion and Memorandum, p. 16, n. 10 for citation to other statutes requiring a declaration of surplus property prior to sale.
[15] Response, p. 15:19-22.

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the property was "surplus." R.C.W. 54.16.180(2)(b) clearly allows the District to sell or dispose of unnecessary property. Consequently, the District's sale of Parcel No. 19182 is not *ultra vires*, even if there was a procedural irregularity (although there was not), and plaintiffs' request for a declaration of invalidity should also be denied for the reasons set forth in *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). Finally, summary judgment should be granted because the sale was ratified in any event.

The District rests on its opening papers regarding plaintiffs' lack of standing and laches in bringing this action.[16] Plaintiffs' Response fails to prove that they have suffered any "injury in fact" from the purchase or sale of Parcel No. 19182 (or the other District properties). Plaintiffs allege that they were "injured" by the alleged violations of R.C.W. 54.16.020 and .180, but that argument both assumes the validity of plaintiffs' unsupported allegations and misses the mark on their burden—they must prove an actual injury *from the fact of purchase or sale* to challenge they municipal conduct. Plaintiffs' only response to the District's laches argument is an unsupported argument that laches requires more than a year's delay. In truth, it is prejudice that is dispositive, not time, and HiTest's motion for summary judgment amply demonstrates the prejudice that would be caused by the plaintiffs' delay in filing suit if the Court were to entertain their claims. Summary judgment should be entered against the Complaint and all claims therein.

IV. CONCLUSION

Plaintiffs submit no evidence sufficient to prove their claims that the purchase and sale of Parcel No. 19182 were *ultra vires* acts. The District's evidence that the purchase and sale were lawful is undisputed. Summary judgment must be entered against the claims.

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[16] Plaintiffs' response at pp. 8-9 invokes RCW 80.04.440. However, Title 80 RCW pertains to the Washington Utilities and Transportation Commission, which does not regulate PUDs. Plaintiffs' reliance on RCW 80.04.440 is misplaced, as it applies to "public service companies" which are defined to include "every…electrical company…" RCW 80.04.010(23). "Electrical company" is defined to expressly *exclude* any "state or local public agency, municipal corporation, or quasi municipal corporation engaged in the sale or distribution of electrical energy…" RCW 80.04.010(12).

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DATED this 14th day of December, 2018.

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APPENDIX A

R.C.W. 54.16.180 provides:

(1) 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 on the question of approval of a proposed sale shall be necessary to authorize such a sale.

(2) **A district may, without the approval of the voters, sell, convey, lease, or otherwise dispose of all or any part of the property owned by it that is located**:

(a) Outside its boundaries, to another public utility district, city, town or other municipal corporation; or

(b) **Within or without its boundaries, which has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system and which is no longer necessary, material to, and useful in such operations, to any person or public body**. (Emphasis supplied)

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 14th day of December, 2018, I caused the foregoing document to be served on the parties as indicated below.

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