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6 SUPERIOR COURT FOR THE STATE OF WASHINGTON  
7 IN AND FOR THE COUNTY OF SPOKANE

8 RESPONSIBLE GROWTH \*NE WASHINGTON;  
9 CITIZENS AGAINST NEWPORT SILICON  
10 SMELTER; THEODORE & PHYLLIS KARDOS;  
11 DENISE D. TEEPLES; GRETCHEN L. KOENIG;  
12 SHERYL L. MILLER; JAMES W. &  
13 ROSEMARY CHANDLER; AND PAMELA  
14 BYERS LUBY,

Plaintiffs,

v.

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

Defendants.

Case No. 18-2-02551-1

**RESPONSE TO DEFENDANT HITEST  
SAND, INC'S MOTION FOR  
SUMMARY JUDGMENT**

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**I. INTRODUCTION**

Defendant HiTest Sand, Inc. (“HiTest”) moves this Court for summary judgment arguing that this Court cannot invalidate the land transactions at issue in this proceeding because it is a “bona fide purchaser” of the property. However, the Public Utility District’s (“PUD”) purchase and sale of land cannot be deemed mere procedural inadequacies. The PUD’s actions were beyond its statutory authority, its actions were *ultra vires*. Because the PUD’s purchase and sale of the land was *ultra vires*, HiTest may not rely on the bona fide purchaser doctrine to enforce the land sale.

1 **II. ARGUMENT AND AUTHORITY**

2 While it is well established in Washington that a purchaser may rely on the bona fide  
3 purchaser doctrine to enforce a land sale, such reliance is not permissible when the land sale itself  
4 was done *ultra vires* or when procedural irregularities undermine the statutes policy. *S. Tacoma*  
5 *Way, LLC v. State*, 169 Wash. 2d 118, 120 (2010), *see also Noel v. Cole*, 98 Wn.2d 375, 379-80  
6 (1982); *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874 (1984); *Finch*  
7 *v. Matthews*, 74 Wn.2d 161, 169-70 (1968); *Edwards v. Renton*, 61 Wn.2d 598, 602-03 (1965).  
8 Void title “cannot be passed to any buyer (regardless of good faith status) because of the *nemo dat*  
9 *quod non habet* (“he who hath not cannot give”) rule.” *State v. Mermis*, 105 Wn. App. 738, 748  
10 at n. 27 (2001).

11 Here, HiTest relies solely on *S. Tacoma Way, LLC*, for its position that even if the PUD’s  
12 sale of the property was procedurally deficient, it should be enforced under the bona fide purchaser  
13 doctrine. However, contrary to HiTest’s assertion, *S. Tacoma Way, LLC* is not on point because  
14 the facts here are clearly distinguishable: here, the PUD’s actions were *ultra vires*, not a simple  
15 procedural mistake.

16 In *S. Tacoma Way, LLC*, the Department of Transportation (“DOT”) had sold surplus land  
17 to an abutting landowner, but the land sale was challenged as *ultra vires* because DOT failed to  
18 give notice to all abutting landowners of the surplus land, as was statutorily required. 169 Wash.  
19 2d at 120. The Supreme Court found that the DOT had “mistakenly” believed that there was only  
20 one abutting landowner and held that this mistake in failing to notify all the other landowners was  
21 a simple procedural defect, not an *ultra vires* act. *Id* at 120-121. In making this finding, the Court  
22 made clear the distinction between procedural defects and *ultra vires* acts. While the bona fide  
23

1 purchaser doctrine *may* be used to enforce a procedurally irregular land sale, it cannot be used  
2 when the land sale is *ultra vires*. *Id.*

3 The PUD’s actions here are distinguishable from those in *S. Tacoma Way*. This is not a  
4 case of a simple mistaken belief that led to a procedural defect in a land sale. Here, the PUD acted  
5 without statutory authority when it purchased the land from Pend Oreille County (“County”).  
6 Then, because that act was *ultra vires* and thus void, it did not have the statutory authority to sell  
7 that land to HiTest. This makes the land sale to HiTest also *ultra vires*.

8 HiTest may not use the bona fide purchaser doctrine because the so-called “procedural  
9 defects” that occurred undermine the policy behind the statutory procedures. *S. Tacoma Way*,  
10 *LLC*, 169 Wash. 2d at 128, fn. 5; *see also Noel v. Cole*, 98 Wn.2d 375 (1982) (sale of timber *ultra*  
11 *vires* because state failed to comply with statutory requirements and underlying policy)  
12 (superseded by statute on other grounds); *Responsible Urban Growth Grp. v. City of Kent*, 123  
13 Wash.2d 376, 381, 389–90, 868 P.2d 861 (1994) (Court invalidated a rezone and voiding a  
14 building permit issued under that rezone when the rezone failed to meet statutory and due process  
15 notice requirements).

16 **A. The PUD’s land sale to HiTest was outside of the PUD’s statutory authority; an *ultra***  
17 ***vires* act that cannot be enforced under the bona fide purchaser doctrine.**

18 The PUD’s purchase of Parcel #19182 from the County was *ultra vires*, making the sale of  
19 the land to HiTest *ultra vires*. The PUD may only purchase land under limited circumstances as  
20 clearly laid out in statute. *See* RCW § 54.16.020. The plain language of RCW § 54.16.020 requires  
21 that the purchase of land by a municipal corporation be for only energy purposes – not for  
22 acquisition and conveyance to a third party. The PUD does not have general authority to buy and  
23 sell land, distinguishing the PUD from the DOT agency in *S. Tacoma Way*. 169 Wn.2d at 124.

1 The undisputed facts demonstrate that the PUD did not purchase Parcel #19182 from the  
2 County for energy purposes. As laid out in Plaintiffs' Cross Motion for Summary Judgment and  
3 Response, even before the PUD purchased Parcel #19182 from the County, the PUD demonstrated  
4 its intent to purchase that land for the sole purpose of selling it to HiTest, not for an easement or  
5 any other energy purposes. The PUD's Letter of Intent to Sell issued by the PUD to HiTest on  
6 April 25, 2017 stated it was including Parcel #19182 in the transaction "which is currently owned  
7 by Pend Oreille County," but could be conveyed to the PUD via an "intergovernmental transfer."  
8 Eichstaedt Decl., Ex. A; PUD Ans. ¶ 4.7. No discussion of an energy purpose, including an  
9 easement, was stated any time prior to the sale. Accordingly, the purchase was done *ultra vires*.

10 When the PUD purchased the land from the County, the PUD acted outside of its statutorily  
11 granted authority making it purchase *ultra vires* and therefore void. RCW § 54.16.020. Since the  
12 purchase of the land from the County is void, its subsequent sale of that land to HiTest was done  
13 outside of its authority, and also is *ultra vires*. Accordingly, HiTest may not rely on the bona fide  
14 purchaser doctrine to enforce the *ultra vires* land sale.

15 **B. Even if the PUD's actions were procedural defects, it is still *ultra vires* because the**  
16 **defects undermines the policy behind the procedural requirements.**

17 Even assuming *arguendo* that the PUD had authority to sell Parcel #19182, it failed to  
18 follow its explicit statutory procedural requirements when selling the land. The PUD's failure to  
19 follow procedural requirements undermined the policy behind the statutory procedures, making  
20 the bona fide purchaser doctrine inapplicable. *S. Tacoma Way LLC*. 169 Wash. 2d at 127; *see*  
21 *also Noel*, 98 Wash. 2d at 380 (sale of timber *ultra vires* because state failed to comply with  
22 statutory requirements and underlying policy) (superseded by statute on other grounds).

1 In *S. Tacoma Way, LLC*, the Court made clear that the bona fide purchaser doctrine may  
2 not be used where the procedural defects “undermine the policies behind the statutory procedure.”  
3 169 Wash. 2d at 127. Here, if the PUD’s actions undermine the policies underlying the statute.

4 Washington law clearly lays out the PUD’s procedural requirements for selling land. The  
5 PUD is allowed to sell land only after three fifths voter approval. RCW § 54.16.180(1). The  
6 statute also offers an alternative, which allows the PUD to bypass the voter requirement and sell  
7 land that has become “unserviceable, inadequate, obsolete, worn out or unfit to be used in the  
8 operations of the system and which is no longer necessary, material to, and useful in such  
9 operations” for the PUD. RCW § 54.16.180(2)(a)-(b). There is no evidence Parcel #19182 was  
10 considered “unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of  
11 the system and which is no longer necessary, material to, and useful in such operations” for it to  
12 be considered surplus. RCW § 54.16.180(2)(a)-(b).

13 The PUD claims that Parcel #19182 was declared surplus in its *post hoc* Resolution 1411,  
14 but the PUD did not even own the land when it was allegedly declared surplus – *it had already*  
15 *sold the parcel*. PUD Answer ¶ 4.11, 4.17. Claiming that the parcel the PUD had already sold  
16 (without following the required statutory process) is “no longer necessary” is a clear attempt to  
17 abuse the powers granted to it in order to benefit a private company. The statute only permits sales  
18 under “surplus” circumstances or by three-fifths of the voters which the PUD failed to meet.

19 The underlying policy behind these statutory requirements is evident by looking at the  
20 legislative history of this statute. Public utility districts were created to serve the people and the  
21 public interest, not private companies:

22 The purpose of this act is to authorize the establishment of public utility districts to  
23 conserve the water and power resources of the State of Washington *for the benefit*

1           *of the people thereof*, and to supply public utility service, including water and  
2           electricity for all uses.

3           Laws of 1931, ch. 1, § 1 (emphasis added). The plain language of both RCW § 54.16.020 and  
4           RCW § 54.16.180 restricts the PUD's authority to purchase and sell land to very limited  
5           circumstances. Instead of granting general authority to do so at any time, the Legislature selected  
6           specific circumstances to protect the people it serves. The PUD ignored these statutory  
7           requirements and did not serve the people and the public interest; it served HiTest's interests.

8           By failing to abide by these explicit statutory requirements, the PUD undermined the policy  
9           behind these requirements which makes the sale *ultra vires*. *S. Tacoma Way, LLC v. State*, 169  
10          Wash. 2d 118, 128 (2010), *see also Noel v. Cole*, 98 Wn.2d 375 (1982) (sale of timber *ultra vires*  
11          because state failed to comply with statutory requirements and underlying policy) (superseded by  
12          statute on other grounds).

13          **C.     HiTest likely has a remedy to address its injury if this Court declared that the  
14          transactions are void.**


15          HiTest is not without a remedy for the *ultra vires* government actions. Although a void  
16          transaction should not be enforced under the bona fide purchaser doctrine, other forms of equitable  
17          compensation are often available. Washington law supports an equitable claim for restitution or  
18          unjust enrichment against an agency that acts *ultra vires* and thereby renders a contract void.  
19          *Abrams v. Seattle*, 173 Wash. 495, 500-01 (1933); *Jones v. Centralia*, 157 Wash. 194, 223-24  
20          (1930); *Kerr v. King County*, 42 Wn.2d 845 (1953); *Batcheller v. Westport*, 39 Wn.2d 338 (1951).  
21          Therefore, in certain circumstances, a government entity may become equitably obligated to an  
22          innocent party with whom the entity has done illegal business, even when the contract is void.  
23          *Edwards v. Renton*, 61 Wn.2d 598, 603 (1965). However, that remedy is not enforcement of the  
24          contract. *Id.* at 602-03.


1 **III. CONCLUSION**

2 For the aforementioned reasons, this Court should GRANT Plaintiff’s cross-motion for  
3 summary judgment and deny Defendant’s motion for summary judgment and declare (1) the  
4 purchase and sale of land by PUD is void as it is *ultra vires* and (2) that HiTest may not enforce  
5 the sale under the bona fide purchaser doctrine.


6 DATED this 14<sup>th</sup> day of December 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December 2018, a true and correct copy of the foregoing was delivered to the following persons in the manner indicated:

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16 EXECUTED this 14<sup>th</sup> day of December, 2018, at Spokane, Washington.

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