Rick Eichstaedt

University Legal Assistance

721 N. Cincinnati #101

Spokane, WA 99202

Phone: (509) 313-5791

**SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE county of Spokane**

|  |  |
| --- | --- |
| 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*,*  Plaintiffs,  v.  PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1; PEND OREILLE COUNTY; and HITEST SAND, INC.,  Defendants. | Case No. 18-2-02551-1  MEMORANDUM IN SUPPORT OF PLAINTIFFS’ cross motion for summary judgment and response to defendant’s motion for summary judgment |

**TABLE OF CONTENTS**

[I. INTRODUCTION 1](#_Toc530073521)

[II. STATEMENT OF UNDISPUTED FACTS 1](#_Toc530073522)

[III. STANDARD OF REVIEW 3](#_Toc530073523)

[IV. ARGUMENT AND AUTHORITY 4](#_Toc530073524)

[A. Plaintiffs Satisfy The Procedural Requirements To Obtain Declaratory Relief. 4](#_Toc530073525)

[1. A Justiciable Controversy Exists in this Matter. 4](#_Toc530073526)

[2. Plaintiffs Have Standing to Obtain Declaratory Judgment. 5](#_Toc530073527)

[a. Plaintiffs fall within in the Zone of Interest that the statute was intended to protect. 6](#_Toc530073528)

[b. Plaintiffs have an injury in fact because they were deprived of the benefit of the PUD following proper process, the PUD stripped Plaintiffs of the beneficial use of the property, and Plaintiffs bear the environmental harm of the PUD’s actions. 6](#_Toc530073529)

[3. RCW § 80.04.440 Grants Standing to Any Person. 10](#_Toc530073530)

[4. Public Importance Standing Applies to This Case. 11](#_Toc530073531)

[B. The PUD’s Laches Argument is without merit. 13](#_Toc530073532)

[C. The Purchase of the Parcel from the County by the PUD, the Sale to PacWest, and the PUD’s Resolution are *Ultra Vires* and should be declared as void. 15](#_Toc530073533)

[1. The Purchase of Parcel #19182 by the PUD from the County is *Ultra Vires*. 15](#_Toc530073534)

[2. The Sale of the Parcels by the PUD to PacWest is *Ultra Vires*. 17](#_Toc530073535)

[a. The Transaction Is Not Severable. 19](#_Toc530073536)

[3. Resolution 1399 is Void because it is *Ultra Vires*. 20](#_Toc530073537)

[V. Conclusion 21](#_Toc530073538)

**TABLE OF AUTHORITIES**

# INTRODUCTION

Last year, the Pend Oreille Public Utility District No. 1 (“PUD”) purchased a parcel of land from Pend Oreille County for the express purpose of selling the parcel, and three other parcels, to HiTest Sand (now known as “PacWest”) for the development of a silicon smelter outside of the City of Newport. The purchase of the parcel from the County and the subsequent sale to PacWest, along with the authorizing resolution, failed to comply with Washington law governing the purchase and sale of property by government entities. This case challenges these *ultra vires* actions.

Plaintiffs request this Court to enter summary judgment in Plaintiffs’ favor, deny Defendant’s motion for summary judgement, and to enter a declaratory judgment[[1]](#footnote-2) that the land transactions by Pend Oreille County and the PUD are *ultra vires* and void as a matter of law.

# STATEMENT OF UNDISPUTED FACTS

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 PacWest proposes to build in the County.Eichstaedt Decl., Ex. A. at 1. 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 Pend Oreille County. *Id.*The PUD purchased its three parcels several decades ago for other purposes that never occurred. Eichstaedt Decl., Ex. B.

On or about March 9, 2016, the PUD issued a notice of intent to declare its three parcels surplus and, at the next PUD Commissioner meeting, these three parcels were among a group of land declared surplus. Eichstaedt Decl., Ex. C, Ex. D at 5. Notice of sale for the three parcels was published on or about August 31, 2016 and September 7, 2016 and they were still for sale at the time of the letter from PacWest. Eichstaedt Decl., Ex. E.

The fourth parcel of land PacWest requested in its letter was Parcel #19182, which at the time was owned by Pend Oreille County. Eichstaedt Decl., Ex. F. In its Letter of Intent to PacWest, the PUD offered to acquire Parcel #19182 from the County and sell all four parcels (the surplus parcels and Parcel #19182) to PacWest in one transaction. Eichstaedt Decl., Ex. G at 1. The PUD’s only stated purpose for acquiring Parcel #19182 was to sell it to PacWest. *Id.* No discussion of any other purpose was 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 properties that the PUD owned at that time. Eichstaedt Decl., Ex. H at 1.

In order to effectuate the plan, the Pend Oreille County Commissioners approved Resolution 2017-22, authorizing the sale of Parcel #19182 to the PUD on June 20, 2017. Eichstaedt Decl., Ex. I. 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. Eichstaedt Decl., Ex. J. However, at the time Resolution 1399 passed allowing negotiation of the land sale, the PUD did not own Parcel #19182. Eichstaedt Decl., Ex. F. The PUD issued a check to Pend Oreille County for the purchase of Parcel #19182 on August 2, 2017. Eichstaedt Decl., Ex. K.

On or about August 10, 2017, PacWest deposited earnest money for the sale of the four parcels for the PUD. Eichstaedt Decl., Ex. L. 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. PUD Ans. ¶ 4.14. 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. Eichstaedt Decl., Ex. M.

On April 23, 2018, the Plaintiffs informed the PUD that the purchase and sale of Parcel #19182 was done in violation of the statutes. Eichstaedt Decl., Ex. N. On May 15, 2018, the PUD Commissioners passed Resolution 1411 stating they were making the determination that Parcel # 19182 was surplus, as well as affirming and ratifying the land purchase from Pend Oreille County and the entire sale of land to PacWest. Eichstaedt Decl., Ex. O.

# STANDARD OF REVIEW

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 (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 (1996) (*citing* *Marincovich v. Tarabochia,* 114 Wn.2d 271, 274 (1990)). The material facts of this case are undisputed. Therefore, this Court should grant summary judgment to Plaintiffs and declare the land transactions are void as *ultra vires*.

# ARGUMENT AND AUTHORITY

## Plaintiffs Satisfy The Procedural Requirements To Obtain Declaratory Relief.

The Uniform Declaratory Judgments Act (“UDJA”), RCW § 7.24.010 *et seq*., is designed “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.” RCW § 7.24.120. “A declaratory judgment is used to determine questions of construction or validity of a statute or ordinance.” In addition, the UDJA allows for an interested person to have any question arising under the validity of a contract determined, so long as the UDJA’s underlying requirements are met. *Id*. When a justiciable controversy exists and Plaintiffs have standing, declaratory relief is proper. *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33 (2011).

### A Justiciable Controversy Exists in this Matter.

Washington courts have held “[a] justiciable controversy is an actual, present, and existing dispute, or the mature seeds of one, which is distinguishable from a possible, dormant, hypothetical, speculative, or moot disagreement.” *Superior Asphalt & Concrete Co. Inc. v. Washington Dep't of Labor & Indus.*, 121 Wn. App. 601, 606 (2004). The fundamental question in this case is whether the land transactions failed to meet the substantive requirements of Washington law and are therefore *ultra vires*. This is a justiciable controversy and not a “potential, theoretical, abstract, or academic” question courts will avoid. *Id.* at 606.

### Plaintiffs Have Standing to Obtain Declaratory Judgment.

Standing under the UDJA has two requirements. First, a court must determine “whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question.” *Branson v. Port of Seattle*, 152 Wn.2d 862, 875–76 (2004). Second, the court determines “whether the party seeking standing has suffered from an injury in fact, economic or otherwise.” *Id.*

Here, Plaintiffs satisfy the standing requirements in three ways.[[2]](#footnote-3) First, Plaintiffs have standing as they fall within the zone of interest and have suffered injury in fact to hold standing personally in this matter. Second, the Supreme Court has expanded the issue of standing regarding public service companies, allowing RCW Title 80 to apply to entities that fall under the definitions of RCW § 80.04.010. *Fisk v. City of Kirkland*, 164 Wn.2d 891 (2008). Specifically, RCW § 80.04.440 has been used to permit standing by any person or corporation to bring suit challenging the legality of the service company’s actions. *Id.* Third, in cases where standing is uncertain, courts will proceed with declaratory relief under the public importance standing doctrine. *See* *Am. Traffic Solutions,* 163 Wn. App. at 433*.* This is because when utility districts are acting outside the authority granted to them, it is a “significant and continuing matter[] of public importance that merit[s] judicial resolution.” *Id.*

#### Plaintiffs fall within the Zone of Interest that the statute was intended to protect.

The challenged land transactions failed to comply with substantive legal requirements, including a requirement for consent of the people to surplus property. Plaintiffs fall within the zone of interest because they are customers of the PUD who have been denied an opportunity to voice their objection and are subject to the consequences of the PUD’s actions. *See e.g.,* Kardos Decl. ¶ 4, 6-7, Koenig Decl. ¶ 6, 9. Here, Plaintiffs are “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *City of Seattle v. State*, 103 Wn.2d 663, 668 (1985). Public utility districts were created to serve the people and the public interest:

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.) Both RCW § 54.16.020 and § 54.16.180 grant authority to the PUD to purchase and sell land under limited circumstances. Instead of granting general authority to do so at any time, the Legislature selected specific circumstances to protect the people it serves. As customers of the PUD, Plaintiffs fall within the zone of interest because public utility districts were created by the people and to serve people, such as Plaintiffs.

#### Plaintiffs have an injury in fact because they were deprived of the benefit of the PUD following proper process, the PUD stripped Plaintiffs of the beneficial use of the property, and Plaintiffs bear the environmental harm of the PUD’s actions.

The PUD argues Plaintiffs have not alleged “personal, substantial harm”, but this is not the requirement for injury in fact. The “injury in fact test is not meant to be a demanding requirement. Typically, if a litigant can show a potential injury is real, that injury is sufficient for standing.” *City of Burlington v. Washington State Liquor Control Bd.*, 187 Wn. App. 853, 869 (2015).

Plaintiffs have shown their injury is real and have thus met the injury in fact requirement of standing. First, when the PUD failed to follow the law in selling the property, Plaintiffs were injured because they were deprived of the benefit of the proper process for disposal of public property. *See, e.g.,* Kardos Decl. ¶ 7; Koenig Decl. ¶ 7-9; Luby Decl. ¶ 7,9; Johnson Decl. ¶ 12; James Chandler Decl. ¶ 7; Rosemary Chandler Decl. ¶ 7; Miller Decl. ¶ 7; CANSS Decl. ¶ 5; Teeples Decl. ¶ 7. As stated in the declarations, the PUD is required by law to follow certain procedures when it sells land. RCW § 54.16.180(1)-(2), (9). The procedures require public involvement whenever public land is sold, either by vote or by resolution and public hearing. *Id.* When the PUD ignored its obligations to perform either of these duties, it harmed Plaintiffs by denying their right to be involved in the process.

Second, Plaintiffs suffered injury in fact as they are customers of the PUD. Compl. ¶ 2.3-2.8. The PUD was established for the purpose of providing energy services for the customers it serves.  *See, e.g.*, Kardos Decl. ¶ 7; Koenig Decl. ¶ 7; Luby Decl. ¶ 7; Johnson Decl. ¶ 9; James Chandler Decl. ¶ 7; Rosemary Chandler Decl. ¶ 7; Miller Decl ¶ 7; CANSS Decl. ¶ 5; Teeples Decl. ¶ 7. It is afforded the power to buy and sell land for very specific energy purposes, not for private affairs. RCW § 54.16.020; RCW § 54.16.180. “Economic interests are sufficient to give standing to sue [under the Declaratory Judgment Act].” 15 Karl B. Tegland, Wash. Prac., Civil Procedure § 42.2 (2d. ed. 2017) (*citing Heavens v. King County Rural Library Dist*., 66 Wn.2d 558 (1965); *see also City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 96 (1988) (Utility ratepayers were appropriate parties in litigation over solid waste facility, because “it is the ratepayers who would ultimately pay the bills”). When the PUD failed to use the land, it purchased within its rights, or for the benefit of the people it serves, it stripped its customers of the beneficial use of the property.

Third, Plaintiffs have suffered injury in fact because of the harmful environmental effects they will be exposed to as a result of this land sale. *See Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 866 (1978) (“[T]he standing of a non-profit corporation to challenge government actions threatening environmental damage is firmly established in federal jurisprudence.”). The goal of this land sale was to facilitate the development of a silicon smelter and this smelter will result in significant pollutants harming the health and property of Plaintiffs. Organizational Plaintiffs, Responsible Growth \*NE Washington (“RG\*NEW”) and Citizens Against Newport Silicon Smelter (“CANSS”), have missions to address environmental harm and promote local sustainable growth. Johnson Decl.¶ 3-5, 8; CANSS Decl. ¶ 1.

Fourth, Plaintiffs have suffered injury in fact because RG\*NEW and CANNS have goals that are negatively impacted by the PUD’s actions. Johnson Decl.¶ 3-5, 8, 13; CANSS Decl. ¶ 1. In *Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642 (2012), the Court held a group had suffered injury in fact because the group’s goal “could reasonably be impacted” by the challenged state initiative. The court held the group had suffered an injury in fact because the interest group’s goal was to prevent substance abuse and violence, and as such, that goal could reasonably be impacted by the initiative’s impact on the State's regulation of alcohol. *Id*. Similarly, here, the goals of RG\*NEW and CANSS are to promote and encourage green and healthy growth in the community of Pend Oreille County and to act as a voice for the community and its members. *See, e.g.,* Johnson Decl. ¶ 3-5, 8, These goals are reasonably impacted by the PUD’s failure to follow required processes and its resulting land sale to PacWest for the purposes of building a smelter.

Lastly, the PUD argues this land sale was “beneficial” to the PUD, and thus its customers, because it sold the land to PacWest at a price higher than its appraised value. Even assuming this is true, it does not refute Plaintiffs’ standing. The Supreme Court held an injury to a plaintiff may exist “[r]egardless of whether these harms might be justified or offset by other societal benefits.” *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 107 (2016).

### RCW § 80.04.440 Grants Standing to Any Person.

Plaintiffs have not only demonstrated their zone of interests and injury in fact, but Plaintiffs also have express standing under RCW § 80.04.440, which provides that anyonehas the ability to challenge the actions where “any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful . . .. [and] [a]n action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction *by any person or corporation*.” RCW § 80.04.440 (emphasis added). This statute applies here because the PUD is a “public service company.”

A “public service company” is defined by the statute as “every gas company, *electrical company*, telecommunications company, wastewater company, and water company.”  RCW § 80.04.110(23) (emphasis added). Within this definition, “electrical company” is broadly defined to encompass “any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever . . . *and every city or town owning*, operating or managing any electric plant for hire within this state.” RCW § 80.04.010(12) (emphasis added). 

According to the PUD’s website and the Washington State Public Utility District services map, the PUD is a Public Service Company engaged in water, electric, and telecommunications services. Eichstaedt Decl., Ex. P.

While public utility districts are considered municipal corporations in regard to their ability to purchase and sell land, this does not preclude them from falling under Chapter 80.04 RCW as well. RCW § 54.16.180(9). The Supreme Court has expanded the applicability of Chapter 80.04 RCW, making it clear the statute applies to the PUD since it falls under the definition of a public service company. *Fisk v. City of Kirkland*, 164 Wn.2d 891 (2008). In *Fisk*, the Court said the City of Kirkland was not exempt from Chapter 80.04 RCW because it is a municipal corporation. *Id.* The Court held the plain language of the statute clearly applies to corporations that fall under the definition of Chapter 80.04 RCW even if they are considered municipal corporations. *Id.*

As a municipal corporation engaged in public service, the PUD falls under the plain language of RCW § 80.04.440. Since this statute allows standing to anyone to sue when the service company is acting unlawfully, Plaintiffs have standing required to bring this suit against the PUD.

### Public Importance Standing Applies to This Case.

Even if the Court finds Plaintiffs lack standing, the Court may still address the issues raised here because the validity of the land transactions involves significant issues of public importance that merit judicial resolution. Courts have held “even if the question of [a plaintiff’s] standing were debatable,” the court “would still address the issues presented . . . because they involve significant and continuing matters of public importance that merit judicial resolution.” *Am. Traffic* *Sol*, 163 Wn. App. at 433. Serious public importance exists when the controversy “immediately affects significant segments of the population, and has direct bearing on commerce, finance, labor, industry or agriculture generally.” *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803 (2004). Additionally, if a case is determined to be of serious public importance, requirements of standing should be applied liberally. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County,* 77 Wn.2d 94, 96 (1969).

Here, public importance standing applies because the PUD’s actions (1) impact a substantial segment of the population and (2) impact commerce, finance, labor, industry, or agriculture. The PUD “distributes electricity to approximately 8,500 customers in Pend Oreille County.”[[3]](#footnote-4) Second, decisions involving the PUD and its actions to facilitate the development of a smelter inherently impact commerce, finance, labor, and industry.

Moreover, courts have determined public importance standing can apply when there is media interest and there is a possibility the outcome could affect the activities of other public utility districts in the state. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 505 (2003). Here, there is significant interest in this matter by citizens of the County and this will have substantial impacts on the practices of other public utility districts statewide. Eichstaedt Decl., Ex. Q. There is extensive media coverage on this matter not just county-wide, but statewide and in Idaho. Eichstaedt Decl., Ex. R. Further, the PUD is one of many public utility districts around the state, all of which are regulated by the same state statutes. If the PUD is permitted to buy and sell land contrary to law, precedent will be created allowing other utility districts to do so as well. Lastly, the land sale transaction is creating a significant impact on the community by threatening to put an industrial smelter in a rural residential community.

## The PUD’s Laches Argument is without merit.

The PUD argues laches should preclude consideration of this case because Plaintiffs waited too long to file suit. However, courts have rejected laches to void actions:

If the transaction was truly void . . . **it would be subject to challenge and invalidation at any time, perhaps years later**. Any improvements made in reliance on the invalid deed would be in vain.

*S. Tacoma Way*, 169 Wn.2d at 124 (emphasis added).

Regardless, a defendant relying on laches bears the burden of proving: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing cause of action; and (3) damage to the defendant resulting from the unreasonable delay. *King Cty v. Taxpayers of King Cty.*, 133 Wn.2d 584, 642 (1997). Here,the PUD has not met its burden in proving all three elements of laches and is thus barred from using the defense of laches. *See* *Buell v. City of Bremerton*, 80 Wn.2d 518, 522 (1972) (“None of these elements alone raises the defense of laches.”).

First, the PUD has not proven Plaintiffs unreasonably delayed in commencing this cause of action. *Taxpayers of King Cty.*, 133 Wn.2d at 642. While the PUD alleges Plaintiffs waited eight months to bring this suit, they do not demonstrate how this delay is unreasonable. In finding laches applies, courts find a delay is unreasonable when the delay is a matter of years (or decades), not months. *Davidson v. State*, 116 Wn.2d 13, 27 (1991) (claim barred by laches after it have been delayed for more than 60 years); *In re Marriage of Dicus*, 110 Wn. App. 347, 357 (13-year delay). The PUD cannot simply assert that because Plaintiffs waited eight months, the delay is unreasonable. Consequently, because the PUD has failed to demonstrate how a delay of less than a year is unreasonable, it is barred from using the defense. *See* *Auto. United Trades Org*, 175 Wn.2d at 542.

Second,even if the Court finds eight months is unreasonable, the PUD has not shown it was prejudiced by the delay. *Taxpayers of King Cty.*, 133 Wn.2d at 642. The PUD makes unsupported statements that “each entity has changed their positions in reliance on the purchase and sale, including commencing development of the properties.” Defs. Mot. and Mem. for Summ. J. at 10. Such unsupported statements do not demonstrate the PUD was prejudiced as a result of an unreasonable delay. There is no evidence the PUD will be prejudiced in any way – whether development on the property occurs or not. Moreover, PacWest cannot proceed with development for months or even years -- it has applied for no permits for development and there is a myriad of permits required to be obtained prior to any development. Eichstaedt Decl., Ex. S (As many of 16 permits will be required prior to development.).

In sum, “[a]bsent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicable statute of limitations.” *In re Marriage of Capetillo*, 85 Wn. App. 311, 317 (1997). The PUD has not demonstrated “unusual circumstances” justifying the application of laches and must be barred from using this defense.

## The Purchase of the Parcel from the County by the PUD, the Sale to PacWest, and the PUD’s Resolution are *Ultra Vires* and should be declared as void.

Courts have consistently held that *“[u]ltra vires* acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed.” *South Tacoma Way, LLC.,* 169 Wn.2dat 123; *see also Noel v. Cole*, 98 Wn.2d 375 (1982) (sale of timber *ultra vires* because state failed to comply with statutory requirements and underlying policy). In the case of government entities, an illegal contract is *ultra vires* and is void. *Barnier v. City of Kent*, 44 Wn. App. 868, 873-74 (1968).

To determine if a contract is *ultra vires*, a court first determines if the action is substantively or procedurally illegal. *South Tacoma Way,* 169 Wn.2dat 122-23. A contract is *ultra vires* when “performed with no legal authority and [] characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed.” *Id.* Since the actions by PUD were more than a procedural mistake, and instead a clear act outside its statutory authority, the purchase, the sale, and the resolution are all void.

### The Purchase of Parcel #19182 by the PUD from the County is *Ultra* *Vires*.

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.” The plain language of the statute provides the purchase of land by a municipal corporation be for only energy purposes – not for acquisition and conveyance to a third party. The PUD is not a real estate agency or a real estate holding company.

The undisputed facts demonstrate 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. Eichstaedt Decl., Ex. A. Even before the PUD purchased the land, the PUD demonstrated its intent to purchase Parcel #19182 for the sole purpose of selling it to PacWest, not for an easement or any other energy purposes. *Id.* According to the letter of Intent to Sell issued by the PUD to HiTest on April 25, 2017, the PUD stated it was including Parcel #19182 in the transaction “which is currently owned by Pend Oreille County,” but could be conveyed to the PUD via an “intergovernmental transfer.” Eichstaedt Decl., Ex. A,PUD Ans. ¶ 4.7. No discussion of any other purpose, including an easement, was stated any time prior to the sale.

Citing *Sundquist Homes v. Snohomish PUD*,92 Wn. App. 950, 955 (1998), the PUD urges this Court to ignore its statutory authority and apply the holding “the rule of strict construction shall have no application to this act and the same shall be liberally construed.” Def. Mot. For Summary Judgment ¶ 16.1. Of course, a “liberal construction” does not mean clear statutory language can be ignored or set aside so any action the PUD can come up with is authorized. This reading is not a liberal construction but is a rewriting contrary to the plain language of the statutes and legislative intent. When the PUD purchased the land from Pend Oreille County, the PUD acted outside of its statutorily granted authority. 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 #19182 by the PUD from Pend Oreille County to clearly be *ultra* *vires*. RCW § 54.16.020*.*

Courts will allow a procedurally invalid, but substantially correct transaction to occur, however this *ultra vires* action is far more than a procedural issue. The PUD’s actions are distinguishable from the actions of the agency in *S. Tacoma Way* where the court found there was a general statutory authority to buy and sell land. *S. Tacoma Way,* 169 Wn.2d at 124 (holding the failure of DOT to notify abutting landowner of intent to sell state land did not render sale to purchaser *ultra vires*). The purpose of the PUD is to provide its customers with electrical service, not to engage in land transactions for the benefit of private corporations. This is demonstrated in the language of the RCW Title 54, which lists specific circumstances where authority is granted instead of a universal grant of authority to buy land. *See* RCW § 54.16.020; RCW § 54.16.180. It is undisputed the purpose of the PUD in purchasing parcel #19182 was not for energy purposes but instead for sale, which clearly makes the action *ultra vires.* Since it is *ultra vires,* this Court must deem the purchase void.

### The Sale of the Parcels by the PUD to PacWest is *Ultra Vires*.

The PUD asserts it was not required to put the sale of Parcel #19182 to a vote nor was it required to declare it surplus and pass a resolution. Defs. Mot. and Mem. for Summ. J. at 12-13. To support this assertion, the PUD relies on the argument that it is given “broad powers” to achieve its “lawful purpose.” *Id.* at 14. However, “broad powers” do not entitle the PUD to ignore explicit statutory requirements. Washington law requires the PUD 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 on the question of approval of a proposed sale shall be necessary to authorize such a sale.

RCW § 54.16.180(1).

The statute also offers an alternative, which allows the PUD to bypass the voter requirement and 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 Parcel #19182 was considered “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 it to be considered surplus. RCW § 54.16.180(2)(a)-(b).

The PUD claims that Parcel #19182 was declared surplus in its *post hoc* Resolution 1411, yet the PUD did not even own the land when it was allegedly declared surplus – it had already sold the parcel. PUD Answer ¶ 4.11, 4.17. Claiming that the parcel the PUD had already sold (without following the required statutory process) is “no longer necessary” is a clear attempt to abuse the powers granted to it for private sale purposes and cannot be permitted by this Court. The statute is clear that it only permits sales under “surplus” circumstances or by three-fifths of the voters which the PUD failed to meet.

By failing to abide by the statutory regulations, the sale of Parcel #19182 by the PUD to PacWest is *ultra vires* because the PUD lacked authority to sell land that was not properly made surplus and could not be made surplus because it did not meet the requirements as prescribed by RCW § 54.16.180. The PUD also did not follow the other approach to sell the land by allowing for three-fifths of the voters.

Lastly, courts have stated:

*Ultra vires* acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed. *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, and thus the entire sale to PacWest, by passing Resolution 1411 accordingly fails.PUD claims this “ratification” under Resolution 1411 remedies the failure to declare surplus, but this is incorrect. Defs. Mot. and Mem. for Summ. J. at 19-20. The ratification of *ultra vires* actionscannot be fixed by a *post hoc* action because this is not a merely procedural action; it is a blatant step outside authority. *See S. Tacoma Way*, 169 Wn.2d at 123.

#### 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 of contracts. 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.*, 154 Wn.2d 493, 503 (2005) (*citing* *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub 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. Eichstaedt Decl., Ex. T.Therefore, the entire contract should be voided because the illegal sale of Parcel #19182 cannot be separated from the sale of the remaining three parcels and because without a severability clause, the parties intended this sale of the land to be whole and indivisible. With no severability clause in the contract, nor objective intent demonstrated by the parties that the contract be divisible, this Court should void the entire purchase and sale agreement and not try to sever a single parcel out of a uniform transaction.

### Resolution 1399 is Void because it is *Ultra Vires*.

As a municipal corporation, the PUD “possess[es] only those powers conferred on them by the constitution, statutes, and their charters” *City of Tacoma*, 108 Wn.2d 679, 685-86 (citing 2 E. McQuillin, *Municipal Corporations* § 10.09 (3d ed. 1979)). Public utility districts are authorized to “adopt general resolutions to carry out the purposes, objects, and provision of this title.” RCW § 54.16.190. Accordingly, the PUD can only sell land to PacWest if the power is within its purposes, objects, and provisions. The purpose of the PUD is to conserve electric and water resources for the State and “supply public utility service, including water and electricity for all uses.” RCW § 54.04.020.

The Board of Commissioners of the PUD passed Resolution 1399 on August 1, 2017 purporting to allow the PUD to sell the combined four parcels to PacWest and authorized the PUD’s general manager to negotiate the sale. Eichstaedt Decl., Ex. J. This resolution is void as *ultra vires* because it is outside of the authority granted to PUD. Parcel #19182 was not declared surplus prior to sale to PacWest and was not in the PUD’s ability to sell. Therefore, it was not in the Board of Commissioners power to adopt Resolution 1399 because selling Parcel #19812 was not within the “purposes, objects, or provisions” of RCW § 54.16.190 that gives the PUD its authority. This is also the case for the PUD’s unauthorized purchase of the parcel from the County. The Legislature made it clear public utility districts can only sell land by voter approval or by decision of the board, RCW § 54.16.020, and the PUD has admitted to not holding elections on this sale of land to PacWest. PUD Answer ¶ 4.18. The PUD does not have the authority to pass resolutions purporting to give it more authority than what the Washington State Legislature has granted and as a result, this Court should declare Resolution 1399 void.

# Conclusion

For the aforementioned reasons, this Court should GRANT Plaintiff’s cross-motion for summary judgment and deny Defendant’s motion for summary judgment and declare (1) the purchase of land by PUD is void as it is *ultra vires*; (2) the sale of land to PacWest is void as it is *ultra vires*; and (3) Resolution 1399 is void a*s ultra vires*.

DATED this \_\_\_\_\_ day of November 2018.

UNIVERSITY LEGAL ASSISTANCE

By:

RICHARD K. EICHSTAEDT, WSBA # 36487

*ATTORNEYS FOR PLAINTIFF RESPONSIBLE GROWTH \*NE WASHINGTON*

By:

DYLAN A. EATON, WSBA # 34414

NORMAN M. SEMANKO (*pro hac vice pending*)

Parsons Behle & Latimer

*Attorneys for Plaintiff Citizens Against*

*Newport Silicon Smelter*

1. Plaintiffs complaint included a request for a writ of prohibition as alternative grounds for relief. As set forth below, declaratory judgment provides sufficient relief to resolve this matter and, accordingly, Plaintiffs withdraw their request for a writ of prohibition. [↑](#footnote-ref-2)
2. The Court needs only find standing for any one party to proceed. *League of Education Voters v. State*, 176 Wn.2d 808, 817 n. 3 (2013); *see also* *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497 (2007) (“Only one of the petitioners needs to have standing to permit us to consider the petition for review”). [↑](#footnote-ref-3)
3. *See* https://cnsfiber.net/CMS/42/pend-oreille-pud. The total population of Pend Oreille County is only 13,354. *See* https://www.census.gov/quickfacts/pendoreillecountywashington. [↑](#footnote-ref-4)