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NO. 51501-6-II

**DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON**

CITY OF PUYALLUP,

APPELLANT

V.

**PIERCE COUNTY, KNUTSON FARMS, INC. and RUNNING
BEAR DEVELOPMENT PARTNERS, LLC,**

RESPONDENT.

**(OFFERED) AMICUS BRIEF BY BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, WASHINGTON REALTORS®,
AND TACOMA PIERCE COUNTY ASSOCIATION OF
REALTORS®**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....v

I. INTRODUCTION 1

II. IDENTITY OF THE MOVING PARTIES 2

III. ISSUES OF CONCERN TO AMICI CURIAE 4

IV. STATEMENT OF THE CASE 4

V. ANALYSIS 4

 A. Puyallup’s position is counter to clear Washington law that establishes a hierarchal process to determine lead agency status, establishes Pierce County as proper jurisdiction with lead agency status.....4

 1. SEPA Rules Include a Clear Hierarchal Process to Determine Lead Agency Status..... 6

 2. Puyallup Doesn’t Qualify As SEPA Lead Agency..... 8

 3. Puyallup’s Argument that it is a Lead Agency does not address applicable SEPA criteria and is not persuasive.....10

 B. Puyallup Failed to Reach Agreement On Co Lead Agency Status.....12

 a. By Agreement of all agencies with jurisdiction..... 12

 b. By Agreement between two co-lead agencies. 12

 C. Puyallup’s position plays havoc with Washington state policy that favors finality in land use decisions.....13

 1. Washington Law Promotes Finality in Land Use Decisions. 13

VI. CONCLUSION18

TABLE OF AUTHORITIES

CASES

<i>Abbey Rd. Grp., LLC v. City of Bonne y Lake</i> , 167 Wash.2d 242, 251, 218 P.3d 180 (2009)	16
<i>Asche v. Bloomquist (2006)</i> 133 P.3d 475.....	18
<i>Chelan County v. Nykreim</i> , 146 Wash.2d 904, 929, 52 P.3d 1 (2002)	14, 15, 18
<i>Clark County Pub. Util. Dist. No. 1 v. Wilkinson</i> , 139 Wash.2d 840, 991 P.2d 1161 (2000)	15
<i>Columbia River Gorge Commission vs. Chelan County</i> , 141 Wn.2d 169 , 175-76, 4 P.3d 123 (2000).....	14
<i>Deschenes v. King County</i> , 83 Wn.2d 714, 717, 521 P.2d 1181 (1974)	14, 15
<i>Durland v. San Juan County</i> , 182 Wn.2d 55, 340 P.3d 191 (2014) ..	15
<i>Erickson & Assocs., Inc. v. McLerran</i> , 123 Wn.2d 864, 873, 872 P.2d 1090 (1994)	17
<i>Habitat Watch v. Skagit County</i> , 155 Wash.2d 397, 120 P.3d 56 (2005)	18
<i>Hull v. Hunt</i> , 53 Wash.2d 125, 130, 331 P.2d 856 (1958)	16
<i>Noble Manor Co. v. Pierce County</i> , 133 Wn.2d 269, 278, 943 P.2d 1378 (1997)	16
<i>Pierce v. King County</i> , 62 Wn.2d 324 , 334, 382 P.2d 628 (1963) .	18
<i>Samuel's Furniture, Inc. v. Dep't. of Ecology</i> , 147 Wn.2d 440, 458, 54 P.3d 1194 (2002)	17
<i>Skamania County v. Columbia River Gorge Comm'n</i> , 144 Wn.2d 30, 49, 26 P.3d 241 (2001)	18
<i>Town of Woodway v. Snohomish County</i> , 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014)	16
<i>Valley View Indus. Park v. City of Redmond</i> , 107 Wash.2d 621, 637, 733 P.2d 182 (1987)	17
<i>West Main Assocs. v. City of Bellevue</i> , 106 Wn.2d 47, 51, 720 P.2d 782 (1986).....	17

STATUTES

Chapter 43.21C RCW	5
--------------------------	---

REGULATIONS

Chapter 197-11 WAC.....	5
WAC 197-11-340.....	2
WAC 197-11-340 (2)(a)	2

WAC 197-11-714.....	6
WAC 197-11-760.....	8
WAC 197-11-922 through 948.....	6
WAC 197-11-924.....	7
WAC 197-11-926.....	7
WAC 197-11-932.....	7, 8, 10, 11
WAC 197-11-934.....	8
WAC 197-11-936.....	7
WAC 197-11-938.....	7
WAC 197-11-942.....	12
WAC 197-11-944.....	10, 12
WAC 197-11-948.....	2, 10, 13

I. INTRODUCTION

Washington REALTORS® (“WA Realtors”), Building Industry Association of Washington (“BIAW”) and Tacoma Pierce County REALTORS® (TPCAR) previously filed a Motion for Extension of Time to file Amici Brief, and a Motion for Leave to File Amici Brief. BIAW, WA Realtors, and TPCAR respectfully file this Amici Brief for the Court’s consideration, upon the Court’s ruling on the two above-mentioned Motions.

Reaching finality in land use permitting and the environmental review process is vitally important to BIAW, WA Realtors and TPCAR members and other land owners in Tacoma, Pierce County, and statewide. The transparency and predictability of land use regulations plays an important role in the ability to buy land and construct and purchase quality homes at reasonable prices. If approaches to regulations/SEPA mitigation measures are allowed to change or are subject to duplicative and additional environmental processing, already hefty development costs increase substantially as a result. Land use finality is critical for BIAW, WA Realtors and TPCAR members and clients and for land owners statewide to predict with certainty which (and how many) SEPA lead agencies and mitigation philosophies will apply to their

projects.

BIAW, WA Realtors and TPCAR urges the Court to reject Puyallup's reading of the WAC 197-11-948¹, in this case, (1) as it is not supported by law, and is wholly inconsistent and would adversely impact Washington state legal policies that favor finality in land use decisions, and (2) because Puyallup's read of WAC 197-11-948 is counter to clear Washington law that establishes a hierarchal process to determine State Environmental Policy Act (SEPA) lead agency status; which under present facts, establishes Pierce County as proper jurisdiction with lead agency status for the Project that is subject of this suit.

II. IDENTITY OF THE MOVING PARTIES

The BIAW represents over 7,500-member companies who employ nearly 200,000 residents of Washington. BIAW's members engage in every aspect of residential building- from site development to remodeling. They regularly invest valuable time and thousands of dollars into developing site plans based on

¹ WAC 197-11-948, in relevant part, "(1) An agency with jurisdiction over a proposal, upon review of a DNS (WAC 197-11-340) may transmit to the initial lead agency a completed 'Notice of assumption of lead agency status.' This notice shall be substantially similar to the form in WAC 197-11-985. Assumption of lead agency status shall occur only within the fourteen-day comment period on a DNS issued under WAC 197-11-340 (2)(a), or during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used". (Emphasis added.)

established zoning and other land use regulations that they should reasonably be allowed to rely on when planning for the development of their land.

WA REALTORS is one of the largest business trade associations in Washington State. Its members are in every community and interact with hundreds of thousands of property owners throughout the State annually. Washington REALTORS® advocate on policy positions on issues that affect the real estate transaction, the cost and supply of housing, and land development. While most real estate transactions involve residential properties, the commercial and industrial real estate sector is an important part of Washington's real estate industry. In addition, commercial and industrial real estate development, leasing, and sales are critically linked to the economic destiny and the quality of life in Washington state.

TPCAR is an Industry Association organizationally established in the State of Washington on June 20, 1906. TPCAR unites real estate professionals in Pierce County, serving as resource and local political advocate for the mutual benefit of REALTORS® and their clients. TPCAR members are actively involved in the legislative and political process. Through its Government Affairs program, TPCAR

reviews, prioritizes, monitors and drafts legislation; directs lobbying efforts in both promoting and opposing issues; analyzes new issues and makes recommendations regarding actions and positions municipal corporation of the State of Washington.

III. ISSUES OF CONCERN TO AMICI CURIAE

1. Should Puyallup's appeal be denied where Puyallup's position on State Environmental Policy Act (SEPA) lead agency status is counter to clear Washington law that establishes a clear hierarchal process to determine lead agency status? **YES.**
2. Should Puyallup's appeal be denied where undisputed facts applied to SEPA regulations establish Pierce County as proper jurisdiction with lead agency status? **YES.**
3. Should Puyallup's appeal be denied where Puyallup's position plays havoc with strong Washington state policy that favors finality in land use decisions? **YES.**

IV. STATEMENT OF THE CASE

BIAW, WA Realtors and TPCAR adopt by reference as if fully set forth herein the Facts/Statement of the case as presented by Knutson Farms, Inc. and Running Bear Development Partners, LLC's in their Briefs on file with this Court.

V. ANALYSIS

A. Puyallup's position is counter to clear Washington law that establishes a hierarchal process to determine lead agency status, establishes Pierce County as proper jurisdiction with lead agency status.

The practical reality of developing real property requires that

the regulations and SEPA² mitigation measures that will apply to a development project must be fixed at some point in time in order for the project to move forward with certainty. Developing real property is expensive, difficult, and often takes years to plan, permit, and construct.

If, after an intensive environmental review process overseen by one government, a new local government was arbitrarily allowed to take over and impose new process or new interpretations of SEPA mitigation measures or development regulations, that abrupt change can frustrate the reasonable expectations of property owners in the timely process of developing their land and reaching permit finality.

Both governments and property owners have important interests at stake that need to be balanced. On the one hand, due process requires that at some fixed point in time property owners should know which regulations and agency philosophies will apply to their development projects in order to plan and implement those projects in a predictable manner. On the other hand, multiple governments may play a role in the ultimate shaping of a specific proposal.

² *State Environmental Policy Act*, Chapter 43.21C RCW, as implemented by Chapter 197-11 WAC.

Fortunately, the Washington legislature, when adopting and refining SEPA, did not neglect to address the issue of unilateral assumption of SEPA lead agency status, as confronts the Court here today.

1. SEPA Rules Include a Clear Hierarchal Process to Determine Lead Agency Status.

Lead agency status is determined according to WAC 197-11-922 through 948. An “***Agency with jurisdiction***” means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal). The term does not include agencies with lesser jurisdiction over a Project, including an agency authorized to adopt rules or standards of general applicability that could apply to a proposal, when no license or approval is required from the agency for the specific proposal. The term also does not include a local, state, or federal agency involved in approving a grant or loan, that serves only as a conduit between the primary administering agency and the recipient of the grant or loan. See: WAC 197-11-714 *Agency*.

Determining who is qualified to act as the lead agency is defined by the total proposal and identifying all necessary permits. SEPA thus regulates and limits agencies qualified to be or here, assume, lead agency status by limited that role to agency that have the

greatest level of permitting authority. The following criteria are listed in the order of priority:

- If the proposal fits any of the criteria described in WAC 197-11-938, "Lead agencies for specific projects," the agency listed shall be lead.
- If the proponent is a non-federal government agency within Washington State, that agency shall be lead for the proposal [WAC 197-11-926].
- For private proposals requiring a license from a city or county, the lead agency is the city or county where the greatest portion of the project is located [WAC 197-11-932].
- If a city or county license is not needed, another local agency (for instance a local air authority) that has jurisdiction will be lead.
- If there is no local agency with jurisdiction, one of the state agencies with a license to issue will be lead, based on the priority set in WAC 197-11-936.

Usually the agency that receives the first application for a proposal is responsible for determining who is lead agency [WAC 197-11-924] and notifying them of the proposal.

"License" means any form of written permission given to any person, organization, or agency to engage in any activity, as required by law or agency rule. A license includes all or part of an agency permit, certificate, approval, registration, charter, or plat approvals or rezones to facilitate a particular proposal. The term does not include a license required solely for revenue purposes. See:

WAC 197-11-760- *License*.

2. Puyallup Doesn't Qualify As SEPA Lead Agency

For Puyallup to qualify as the Lead Agency, pursuant to SEPA's clear rules for determining Lead Agency status, Puyallup would have to establish facts which simply are not present here:

(a) The proposed private Project would have to have required permits or licenses from:

(i) only Puyallup and

(ii) one or more state agencies, (but not the county). See

WAC 197-11-934- *Lead agency for private projects requiring licenses from a local agency, not a county/city, and one or more state agencies, **OR***

(b) The proposed private Project would have to have required permits or licenses from:

(i) Both the County and Puyallup, and

(ii) the greatest portion of the proposed project area, as measured in square feet would have to be located in Puyallup. See WAC 197-11-932 *Lead agency for private projects requiring licenses from more than one agency, when one of the agencies is a county/city*, which states that for “proposals for private projects that require nonexempt licenses from more than one agency, when

at least one of the agencies requiring such a license is a county/city, the lead agency shall be that county/city within whose jurisdiction is located the greatest portion of the proposed project area, as measured in square feet. For the purposes of this section, the jurisdiction of a county shall not include the areas within the limits of cities or towns within such county.”

Neither set of qualifying criteria is met here. The Project is entirely located within the County. “No portion of the Project is within Puyallup city limits. Though the Knutson property borders the Puyallup city limits, no portion of the property is situated within the City. Development of the Knutson property is thus governed by the Pierce County Code. Pierce County designated the property under the Growth Management Act as an urban area in 1994 and it is zoned Employment Center (“EC”).³

Puyallup concedes as much: the site is “...immediately adjacent to the current City limits,” and “Because the short plat applications underlying the proposal are within Pierce County’s regulatory jurisdiction, Pierce County acted as the initial SEPA “lead agency”

³ *Lucero Dec.*, ¶ 6 CP 221, dated August 25, 2017 on file herein. And see “Here Pierce County is the jurisdiction to receive all applications for this proposal and, the proposed project is wholly within unincorporated Pierce County, so it appropriately was the Lead Agency for the proposed Knutson Farms Industrial Park.” *Knutson Farms Inc., et al’s Motion For Summary Judgment at 21. CP 493*

for the project.”⁴ Thus, the undisputed facts show that this is a “private project,” which “requires nonexempt licenses from more than one agency, when at least one of the agencies requiring such a license is a county/city”, and “the greatest portion of the proposed project area, as measured in square feet” is in the County. Under these facts, as applied to WAC 197-11-932, the County is the undisputable lead agency.

3. Puyallup’s Argument that it is a Lead Agency does not address applicable SEPA criteria and is not persuasive.

Puyallup argues it attempted to reach agreement whereby the County and Puyallup would be “Co-lead agents”, but the County disagreed.

The City offered early on to participate with the County as a SEPA “co-lead agency” under WAC 197-11-944. *Eglick Dec. Exs. F, G, H*. The City also cautioned the County that it would assume SEPA lead agency status under WAC 197-11-948 if necessary to ensure that the impacts of the proposal, alternatives, and mitigation were fully explored. *Eglick Dec. Exs. G & H*. Despite these and other warnings, the County declined the City’s requests for preparation of an EIS and for co-lead agency cooperation, and ignored the City’s warning that if necessary it would assume SEPA lead agency status. Answers at ¶ 20; *Eglick Dec. Ex. I*.⁵

However, when requesting to be added as a co-lead agency, the requestor should logically describe why it meets the qualifying

⁴ *Plaintiff City of Puyallup’s Motion For Summary Judgment* at 1-2. CP 101-102

⁵ CP 183-4 *Plaintiff City of Puyallup’s Motion For Summary Judgment* at 4-5. CP 104-105

SEPA criteria to be a lead agency. The Court should carefully review the *Eglick Dec. Exs. F, G, H*, CP 169-181 cited by Puyallup, which consist of three letters from Puyallup's outside land use attorney to the County.⁶ Nowhere does Puyallup describe its reasoning as to how Puyallup qualifies for lead agency status, as defined in the SEPA regulations. Pierce County acted reasonably in retaining its lead agency status, given that this information was lacking.

Similarly, Puyallup's arguments speak much to its role as a Sewer and Water provider, but does not anywhere address how these facts overcome the clear mandate of WAC 197-11-932 *Lead agency for private projects requiring licenses from more than one agency, when one of the agencies is a county/city*, which states that for "proposals for private projects that require nonexempt licenses from more than one agency, when at least one of the agencies requiring such a license is a county/city, the lead agency shall be that county/city within whose jurisdiction is located the greatest portion of the proposed project area, as measured in square feet. For the purposes of this section, the jurisdiction of a county shall not include the areas within the limits of cities or towns within

⁶ CP 169-70 Exhibit F is Peter J. Eglick's June 22, 2016 letter to Pierce County Planning & Land Services Director Dennis Hanberg; CP 172-176 Exhibit G is Peter J. Eglick's July 18, 2016 letter to Pierce County Planning & Land Services Project Manager Marcia Lucero; CP 178-181 Exhibit H is Peter J. Eglick's November 7, 2016 letter to Pierce County Planning & Land Services.

such county.” These criteria are fully answered as Puyallup concedes that “the short plat applications underlying the proposal are within Pierce County’s regulatory jurisdiction...”⁷

B. Puyallup Failed to Reach Agreement On Co Lead Agency Status.

Alternatively, Puyallup could have, but did **not**, achieve lead agency or co-lead agency status through reaching a negotiated agreement in one of the following ways:

a. **By Agreement of all agencies with jurisdiction.**

Puyallup could have attained lead or co-lead agency status agency as long as all agencies with jurisdiction agree [WAC 197-11-942]. If parties had agreed, the lead of co-lead agency is **not** required to have jurisdiction on the proposal. *Id.*

b. **By Agreement between two co-lead agencies.**

Two or more agencies may become "co-lead" agencies if both agencies agree. The co-lead agencies can either share or divide up responsibilities of the lead agency. One of the agencies is named "nominal lead" and is responsible for complying with the procedural requirements of SEPA [WAC 197-11-944]. All agencies sharing lead agency status are responsible for the completeness and

⁷ Plaintiff City of Puyallup’s Motion For Summary Judgment at 1-2. CP 101-102

accuracy of the environmental document(s). Other agencies with jurisdiction are required to be notified of the agreement and determination of the nominal lead agency.

Using this process, Puyallup could have carved out particular areas of the SEPA review for which it would be primarily responsible or would share with the County. But no such agreement was reached.⁸

C. Puyallup’s position plays havoc with Washington state policy that favors finality in land use decisions.

1. Washington Law Promotes Finality in Land Use Decisions.

Puyallup’s position which allows unilateral takeover of Pierce County’s SEPA processing by a lead agency unqualified under WAC 197-11- 948 is directly contrary to Washington law’s strong policy which favors finality in land use decisions. The memberships of BIAW, WA Realtors and TPCAR are particularly adversely impacted

⁸ Applicant Knutson describes that “The City of Puyallup, on the other hand, was unwilling to meet with Knutson or its consultants to discuss their concerns and potential mitigation. The City likewise was unwilling to engage in meaningful dialogue with the County to discuss potential impact mitigation measures (Berry Dec., ¶ 11, CP 356 *Lucero Dec.*, ¶¶ 20-21.)” CP 224-5, while “Knutson was able to work directly with the City of Sumner to address their traffic impact concerns.” (Berry Dec. ¶ 10, CP 356 *Lucero Dec.*, ¶ 19, CP 224 Exs. 5, 6. *Knutson Farms Inc., et al’s Motion For Summary Judgment* at 14. CP 486

when decisions on land use and permits languish in the Courts over such SEPA jurisdictional spats that Puyallup now pursues.

Washington's strong policy of land use finality would be substantially eroded if the Court endorsed Puyallup's view of who can qualify to assume SEPA lead agency status; the certainty that policy provides would be lost.

The Supreme Court recognizes a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.... To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit." *Columbia River Gorge Commission vs. Chelan County*, 141 Wn.2d 169 , 175-76, 4 P.3d 123 (2000), quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974).

Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner. *Chelan County v. Nykreim*, 146 Wash.2d 904, 929, 52 P.3d 1 (2002).

The Washington Supreme Court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government. *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014).

"[L]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner." *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002).

Finality is important because "[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property." *Deschenes v. King County*, 83 Wash.2d 714, 717, 521 P.2d 1181 (1974), overruled in part by *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wash.2d 840, 991 P.2d 1161 (2000).

Numerous Washington land use laws and doctrines reflect this state's unwavering commitment to finality in land use decisions. For instance, Washington's strong support for finality in land use manifests its self in Washington's vested rights doctrine. The vested rights doctrine generally provides that certain land development

applications must be processed under the land use regulations in effect when the application was submitted, regardless of subsequent changes to those regulations. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014).

Washington's vested rights doctrine strongly protects the right to develop property, in reliance on finality of those decisions. Development rights “vest” on a date certain – when a complete development application is submitted. *Id.* The purpose of the vested rights doctrine is to provide certainty to developers and to provide some protection against fluctuating land use policy. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165 (2014), *Abbey Rd. Grp., LLC v. City of Bonne y Lake*, 167 Wash.2d 242, 251, 218 P.3d 180 (2009); *Hull v. Hunt*, 53 Wash.2d 125, 130, 331 P.2d 856 (1958). *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997).

Under the date certain standard, developers are entitled “to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations.” *Abbey Rd. Grp.*, 167 Wash.2d at 250, 218 P.3d 180. “Washington's rule is the minority rule, and it offers [greater]

protection of [developers'] rights than the rule generally applied in other jurisdictions.” *Id.*

In *Erickson & Assocs., Inc. v. McLerran*, the Supreme Court supported finality of land use decisions when upholding vested rights, in recognition that the doctrine places limits on municipal discretion and permits landowners or developers “to plan their conduct with reasonable certainty of the legal consequences.” 123 Wn.2d 864, 873, 872 P.2d 1090 (1994) (quoting *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986)).

The same principles apply to support finality for review under SEPA. Washington recognizes that development rights are valuable property interests, and that this doctrine ensures that “new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.” *Id.* at 251, 218 P.3d 180 (quoting *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 637, 733 P.2d 182 (1987)).

And, Washington Courts give strict enforcement to appeal procedures to honor strong policies favoring finality in land use decisions and security for landowners proceeding with property development. *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Chelan County v. Nykreim*,

146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005), *Asche v. Bloomquist* (2006) 133 P.3d 475.⁹

The rationale supporting finality in land use decision is not unlike when judicial decisions are at issue, finality principles often close the door to judicial reconsideration of previously decided matters. When two parties have obtained judicial resolution of their dispute, claim preclusion and issue preclusion principles bind both the parties and a subsequent court to that resolution, even if the court believes the prior court's decision was incorrect on the facts or the law. In the interest of conserving the resources of all parties—landowners, neighbors, and local decision makers—SEPA review should be undertaken once, not multiple times.

VI. CONCLUSION

Puyallup's position is counter to clear Washington law that establishes a hierarchal process to determine lead agency status,

⁹ The Washington Supreme Court has held that "even illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005). even illegal decisions must be challenged in a timely, appropriate manner. *See Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963) (holding that even though a county resolution constituted illegal spot zoning and was therefore void ab initio, the applicable limitations period "begins with acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law.").

which under present facts establishes Pierce County as proper jurisdiction with lead agency status. Washington's strong policy of land use finality would be substantially eroded if the Court endorsed Puyallup's view of who can qualify to assume SEPA lead agency status; the certainty that policy provides would be lost.

For the reasons stated above, BIAW WA Realtors and TPCAR respectfully urges this Court to deny Puyallup's appeal.

DATED this 18th day of May 2018.

GOODSTEIN LAW GROUP PLLC

By *Carolyn A. Lake*
Carolyn A. Lake, WSBA # 13980
Attorneys for BIAW, WA Realtors, &
TPCAR

DECLARATION

Carolyn A. Lake declares under penalty of perjury under the laws of the State of Washington that the facts as stated in the foregoing motion are true and correct.

Dated this 18th day of May, 2018 at Tacoma, Washington.

By: *s/ Carolyn A. Lake*
Carolyn A. Lake, WSBA #13980

DECLARATION OF SERVICE

On said day below, I electronically filed this document with the Court of Appeals, Division II, and served a true and correct copy of this document to the following parties through their counsel of record via e- service and email:

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I make this declaration subject to penalty of perjury under the laws of the State of Washington.

Dated this 18th day of May, 2018 at Tacoma, Washington.

By: *s/ Carolyn A. Lake*

Carolyn A. Lake, WSBA #13980

GOODSTEIN LAW GROUP PLLC

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