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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 340813

MICHAEL L. DARLAND and MYRNA DARLAND,
husband and wife, et al,

Appellants,

v.

SNOQUALMIE PASS UTILITY DISTRICT, a Washington corporation,

Defendant/Cross-Appellant.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Michael and Myrna Darland ("Darlands") own approximately 76.8 acres of unimproved real property located east of Snoqualmie Pass in Kittitas County, Washington ("the Property"). The Property includes a portion of Gold Creek on the north side of I-90 just east of the Snoqualmie Pass Summit and consists of four separate, contiguous tax parcels. The Property is situated within the service area of the Snoqualmie Pass Utility District ("District"), a Washington state municipal corporation, which owns and operates a public water and sewer system serving portions of King and Kittitas Counties. CP at 552-53. In 1989, the Board of Kittitas County Commissioners approved planned commercial zoning for the Property. CP at 554.

Darlands' predecessors paid the District the sum of at least \$492,781.37 in assessments, penalties and interest for the "special benefits" promised by the District (230.07 ERUs of water service and 38.37 ERUs of sewer service), which the District has refused to deliver. CP at 554, 556. An ERU (equivalent residential unit) is the functional equivalent of a utility connection, or hook-up for a residence. CP at 559. Indeed, the District uses these terms interchangeably. CP at 788, 803, 806, 1068.

The terminus of the water main is approximately 4,500 feet from the boundary of the Property, and the terminus of the sewer main is approximately 2,200 feet from the boundary of the Property. CP at 554, n. 6. The land

lying between these termini and the Property is privately owned by third parties. There are no public easements or other access rights to run the water and sewer mains to the Property through the private property. *Id.* Darlands filed a plat application with Kittitas County to utilize the paid-for water and sewer hook-ups, but it is impossible for them to do so without two, County-required, 60'-wide access and utility easements. CP at 729-30, 1079.

On May 16, 2005, then-presiding trial court judge, the Honorable Michael E. Cooper, entered an order granting in part plaintiffs' motion for partial summary judgment, in which he held:

1. Plaintiffs' approximately 76.8 acres of unimproved real property at issue in this litigation is ***entitled to receive*** 230.07 ERUs (equivalent residential units) of water service, at 400 gallons per day per ERU, as a special benefit under ULID No. 7, said benefit having already been paid for in full by plaintiffs and/or their predecessors-in-interest;
2. Plaintiffs' said property is also ***entitled to receive*** 38.37 ERUs (equivalent residential units) of sewer service as a special benefit under ULID No. 4, said benefit having already been paid for in full by plaintiffs and/or their predecessors-in-interest; and
3. Unresolved issues of fact and law remain for further disposition regarding the issue of whether defendant is obligated, at its sole expense, to extend water and sewer mains to the property boundaries ***so that plaintiffs can enjoy the special benefits for which they have already paid.***

CP at 562-64.¹

In his underlying Memorandum Decision, which was incorporated into his partial summary judgment order, Judge Cooper found:

In making the assessments the Board of . . . Commissioners indicated in Section 2 [of] each resolution that it gave due consideration to the 'special benefits' to be received by each lot, tract and parcel [of] land shown on [the assessment] roll, ***including the increase in fair market value of each lot, tract and parcel of land anticipated to result from the acquisition and construction of the property improvements*** in the utility local improvement district.

CP at 553 (emphasis added).

On September 29, 2005, the trial court entered an order sealing the parties' Memorandum of Agreement ("MOA"), which embodied their conditional settlement agreement. On October 4, 2005, a stipulation and order was entered staying the litigation pending the parties' efforts to implement their conditional settlement agreement, as reflected in the MOA. CP at 593-99. The purpose of the MOA was to allow the parties, in a collaborative effort, to attempt to secure the access and utility easements necessary to extend the water and sewer mains to the Property. CP at 1096-97. The procurement of

¹ Judge Cooper's order is the subject of the District's pending cross-appeal. When Judge Cooper entered his order, Louis Leclezio was also a plaintiff, along with Darlands, in the underlying action. Title to the entire Property was later quieted in favor of Darlands as against Leclezio in a cross-claim commenced by Leclezio, which was resolved in favor of Darlands after the MOA was entered into. CP at 600-632, 674-81.

these easements was a condition precedent to the MOA becoming a binding agreement. CP at 1434.

Over the next several years, Darlands, with no meaningful assistance from the District, made extensive efforts to obtain the easements necessary to allow the District to deliver the paid-for water and sewer service to the Property. CP at 1096. Unfortunately, these efforts failed. Darlands then exercised their option under the MOA to resume the litigation, whereby they sought to compel the District to use its power of eminent domain to condemn the required easements. CP at 1063-64.²

Accordingly, on January 22, 2015, after Judge Cooper had retired, Darlands filed a motion for partial summary judgment, seeking an order compelling the District to exercise its power of eminent domain to condemn two 60'-wide access and utility easements over the private land lying between the termini of the District's water and sewer main lines and the boundaries of each of the Property's four contiguous tax parcels. CP at 712-813. The purpose of the motion was to allow the Property to make beneficial use of the

² It was during the course of trying to implement the MOA that Leclezio brought a cross-claim against Darlands, which was dismissed, with prejudice, along with Leclezio's claim of any right or interest in the Property. CP at 674-81. It was also during this time that Darlands filed their plat application with Kittitas County to develop the Property, which could not be given preliminary plat approval without obtaining the access and utility easements necessary to extend water and sewer service to the Property. CP at 729-30, 774, 779.

paid-for water and sewer service under ULID Nos. 4 and 7, in accordance with Judge Cooper's order finding the Property was entitled to receive such service. *Id.*; *see also* CP at 562-64.

On April 16, 2015, the Honorable Scott R. Sparks entered his order denying Darlands' motion for the following reasons:

(1) With respect to the issue of road access to [Darlands'] property, because [the District] does not have the legal authority to exercise its powers of eminent domain to condemn property for the purpose of providing road access to [Darlands'] property, [Darlands] are not entitled to judgment against [the District] as a matter of law on that issue;

(2) With respect to the issue of extending utility service to [Darlands'] property, questions of fact exist as to (a) which party should pay for the costs of any eminent domain proceeding which may be necessary to acquire the property rights to extend utility service to [Darlands'] property and (b) which party should pay for the costs of installation of the water and sewer mains needed to extend utility service to [Darlands'] property.

CP at 1105-1107.

In light of Judge Sparks' above order, and because Darlands do not have the private power of eminent domain to condemn the easements necessary for their Property to enjoy the paid-for water and sewer service, on July 8, 2015, Darlands filed a motion for partial summary judgment seeking to recover all monies paid to the District for such service, together with

interest at the legal rate. CP at 1108-1141.³ On December 28, 2015, Judge Sparks entered an order denying Darlands' motion. CP 1505-10. On December 29, 2015, Darlands moved for reconsideration. CP at 1511-62. On January 20, 2016, Judge Sparks entered an order denying Darlands' Motion for Reconsideration. CP 1563-66.

It is Judge Sparks' denial of Darlands' two motions for partial summary judgment, and their motion for reconsideration of the second motion, that are the subject of Darlands' appeal before this Court.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding the District did not have the statutory power of eminent domain to condemn two 60'-wide access and utility easements to allow the Property to enjoy the "special benefits" for which it was assessed and for which the District was paid in full. More specifically, the trial court erred in finding that it does not have the legal authority to order the District to condemn private property for the access easements necessary to allow the Property to enjoy the paid-for "special benefits".

2. The trial court erred in finding that questions of fact exist as to

³ Darlands cannot condemn a private way of necessity under chapter 8.24 RCW, because their Property is not "landlocked" since it has a single 20'-wide access easement. CP at 758-59. See *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982). This easement, however, is not sufficient to allow the Property to make beneficial use of the paid-for 230.07 water hook-ups and 38.37 sewer hook-ups.

(a) which party should pay for the costs of an eminent domain proceeding to acquire the easements necessary to extend utility service to the Property's four tax parcels, and (b) which party should pay for the costs of installing the water and sewer mains from their termini to the boundaries of the Property's four tax parcels.

3. Alternatively, the trial court erred in finding Darlands are not entitled to reimbursement of all funds paid to the District for water and sewer service, plus interest, even though the Property cannot receive these "special benefits" which have been paid for in full.⁴

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the District have the statutory authority, under RCW 57.08.005(1), to exercise its power of eminent domain to condemn the access and utility easements necessary to allow the Property to make beneficial use of the water and sewer service for which the Property was assessed and paid for in full? (Assignment of Error No. 1)

2. Did the trial court err in denying Darlands' motion for partial summary judgment seeking to compel the District, at its sole expense, to con-

⁴ Although a resolution in favor of Darlands on the first two assignments of error might render moot the third assignment of error, Darlands ask this Court to address all three assignments of error in the event either party petitions for Supreme Court review. A resolution of all three assignments of error could also assist the parties in deciding whether to settle their long-standing dispute, rather than seek Supreme Court review.

demn the access and utility easements necessary to allow the Property to enjoy the paid-for water and sewer service? (Assignment of Error Nos. 1 and 2)

3. Did the trial court err in denying Darlands' motion for partial summary judgment requiring the District, at its sole expense, to extend the water and sewer mains to the boundaries of each of the four tax parcels comprising the Property, with sufficient capacity to deliver at least 400 gallons per day (gpd) of water per each paid-for water hook-up? (Assignment of Error No. 2)

4. Did the trial court err in denying Darlands' motion for partial summary judgment seeking a refund of all monies paid to the District for water and sewer service, under the ULID contracts with the District, together with interest, in light of the trial court's prior summary judgment order ruling that it did not have the authority to compel the District to condemn the easements necessary to allow the Property to make beneficial use of the paid-for water and sewer service? (Assignment of Error No. 3)

5. Did the trial court err in granting the District's cross-motion for summary judgment, finding the District was not obligated to refund to Darlands all monies paid to the District, together with interest, for the undeliverable water and sewer service? (Assignment of Error No. 3)

IV. STATEMENT OF THE CASE

A. Plaintiffs' Acquisition of the Property and the Formation of ULID Nos. 4 and 7.

In 1977, plaintiffs' predecessor-in-interest, Michael Graf Von Holnstein ("Von Holnstein"), acquired the property from Boise Cascade Home & Land Corporation. CP at 109. Von Holnstein was the owner of record when ULID Nos. 4 and 7 were formed in 1982 and 1987, respectively. CP at 553. On or about June 1, 1989, Von Holnstein sold the Property to Miller Shingle Company, a joint venture investment group that included Leclezio. CP at 110-14. On or about June 12, 2003, Miller Shingle Company sold the Property to Leclezio and Darlands. CP at 115-16.

On or about May 19, 1982, pursuant to Resolution No. 82-3, the District formed ULID No. 4 for the purpose of constructing certain sewer improvements within the District. CP at 129-31, 553. On or about June 24, 1987, pursuant to Resolution No. 87-17, the District formed ULID No. 7 for the purpose of constructing certain domestic water system improvements as part of a pass-wide water system. CP at 136-39, 553. In both resolutions, the District represented that "the Board of Sewer Commissioners gave due consideration to the *special benefits* to be received by each lot, tract and parcel of land shown on [the assessment] roll"; and, at Section 2 thereof, declared:

Each of the lots, tracts, parcels of land and other property shown upon the assessment roll is declared to be specially benefited by the proposed improvement in at least the

amount charged against the same and the assessments appearing against the same are in proportion to the several assessments appearing on such roll. There is levied and assessed against each lot, tract, parcel of land and other property appearing on the roll the amount finally charged against the same thereon.

CP at 130, 137, 153 (emphasis added).

Under ULID No. 4, the District assessed all property owners the sum of \$1,275 for each ERU of sewer service. The District assessed the Property on the basis of 38.37 ERUs, thus assigning 38 actual sewer hook-ups to the Property. Accordingly, the Property was assessed \$48,921.75 (38.37 x \$1,275) under ULID No. 4. CP at 100-101, 553.

Under ULID No. 7, the District assessed the Property on the basis of 230.07 ERUs of water service, thus assigning 230 actual water hook-ups to the Property. CP at 100, 554. The properties within the District were each assessed \$710 per ERU. Accordingly, the Property was assessed \$163,349.70 (230.07 x \$710) under ULID No. 7. CP at 101, 553. An ERU was defined for purposes of ULID No. 7 as the equivalent of 400 gallons per day (gpd) of water. CP at 553. Indeed, the District's own records state: "Each lot under one acre will be *guaranteed* a 400 gpd hook-up. Land over one acre will be *guaranteed* three residential equivalents (1,200 gpd) per acre." CP at 103, 147 (emphasis added).

Because Von Holnstein failed to pay the assessments levied under ULID No. 7, penalties and interest were added to the principal amount. CP at

554. Ultimately, Miller Shingle Company paid the District the sum of at least \$492,781.37 in assessments, penalties and interest for the "special benefits" (water and sewer service) conferred under ULID Nos. 4 and 7. CP at 554. All monies owed to the District by the Property owners for these "special benefits" were thus paid in full. *Id.* CP at 100-101, 554.

B. Representations Made by the District to All Property Owners Under ULID Nos. 4 and 7.

In a regular meeting of the District's Board of Commissioners, dated January 8, 1986, in which interested members of the public were present, the following discussion occurred:

Pam Nelson [the District Clerk] then stated that the Board needs to make a decision on whether or not this project for water will allow the District to give the lot owners prepaid water hook-ups. . . . The Clerk stated that if this is to be done is [sic] should be passed formerly [sic], because she does not want to have property owners calling her when they get ready to build and yelling that they have already paid for water once, why do they have to do it again. ***The Board discussed this in full and it was decided that they would grant prepaid hook-ups on the water as they already had them for the sewer from ULID No. 4.***

Superintendent Kloss then asked the Board that if the District is ***giving each lot one prepaid hook-up***, does the system have the capacity to promise them water and will it be available. The Board stated that if the pass-wide system [ULID No. 7] goes there will be enough water available

CP at 151 (emphasis added).

On July 2, 1986, the District issued a letter to all landowners, includ-

ing plaintiffs' predecessor-in-interest, Von Holnstein, in advance of the formation of ULID No. 7. The letter stated, in relevant part: "This method of payment allows all land over 1 acre to be **guaranteed** 3 residential equivalent hook-ups (1,200 gpd). Lots under 1 acre would be **entitled** to one residential equivalent hook-up." CP at 156-57. **Thus, the District was guaranteeing to each property owner 400 gpd of water for each hook-up (1,200 gpd ÷ 3).**

In a regular meeting of the District's Board of Commissioners, dated December 10, 1986, in which interested members of the public were again present, the District represented to the property owners within the boundaries of ULID Nos. 4 and 7 that the water and sewer mains would be made available to each property parcel:

The Board of Commissioners stated that this does not include any distribution system for water and that it only **runs the water mains by the property making water available to them, this is also true for sewer.**

CP at 159 (emphasis added).

The testimony of the District's then Superintendent, Richard Kloss, further confirms: "It is the responsibility of the Utility District to deliver utilities **to the boundary of the assessed properties.**" CP at 807 (emphasis added); *see also*, CP at 1067, 1073-76, 1078-79.

On June 24, 1987, a public hearing was held to finalize the assessment roll for ULID No. 7. During that hearing, the District represented that the assessments were for guaranteed hook-ups, and that the District was guar-

anteeing water by bringing the main lines past each owners' property:

Supt. Kloss: Property under one acre is entitled to one hook-up and for anything above that you have to pay a hook-up fee - *\$710 is prepaying that hook-up.*

Sec. DeBruler: *These are guaranteed hook-ups. We are guaranteeing you water. This ULID #7 is bringing water in trunk line past your property.*

CP at 167 (emphasis added). DeBruler was also a District Board member when he made the above statement. CP at 1073.

C. Additional Statements and Representations Made by the District to the Property Owners.

Von Holnstein did not want the Property included in ULID No. 7. CP at 173. When he later failed to pay the assessments levied under the ULID, the District charged him penalties and interest; and by 1989, the District had threatened to foreclose on the Property. CP at 99-100, 553-54.

In 1989, Leclezio investigated purchasing the Property from Von Holnstein. Prior to closing the deal, Leclezio examined the District's records and spoke with the District's superintendent, Mr. Kloss, regarding the status of the water and sewer services available to the Property. CP at 99-101, 142, 145, 242-43. Leclezio was provided the District's Hook-up Status Ledger, which showed the Property was entitled to receive 230 water and 38 sewer hook-ups. CP at 100, 145, 243.

Mr. Kloss represented to Leclezio that these sewer and water hook-

ups had been guaranteed by the District, and that the District had also guaranteed delivery of water and sewer lines to the boundary of each parcel of property within the District. CP at 100, 243, 1074-76, 1078. Relying on the District's express representations, Leclezio's joint venture investment group, Miller Shingle Company, purchased the Property from Von Holnstein, and agreed to pay to the District all outstanding unpaid assessments on the Property, plus the accrued penalties and interest charged thereon. CP at 99-101, 242-43, 554. The interest and penalties alone far exceeded the water and sewer assessments (\$212,271.45 in total assessments versus \$280,509.92 in penalties and interest). CP at 553-54.

D. The District Was Aware of the Property's Access Limitations When the District Formed ULID No. 7, and That the District Would Have to Acquire the Requisite Access and Utility Easements in Order For the Property to Receive the "Special Benefits" (230 Water Hook-ups and 38 Sewer Hook-ups) For Which it Had Been Assessed.

The Property was assessed and made part of ULID No. 7, over the protests of its then-owner, Von Holnstein, who objected to having the Property brought into the ULID because of its access and easement limitations. CP at 173, 1074-75. Nonetheless, the District included the Property in the formation of ULID No. 7. In doing so, the District's Board discussed the lack of access and easement issues, stating:

Commissioner DeBruler read the letter of protest from Mr. Von Holnstein aloud to the Board members. Mr. Von Holnstein's property is 76 acres, abuts Mt. Grandeur. *Mr. Von*

Holnstein wants out because he has no legal access because of easements. Supt. Kloss explained to the Board members the adjoining property owners and the neighboring easement problems. ***Easement possibilities were discussed by the Board and it was suggested the response to Mr. Von Holnstein be made as soon as possible.***

CP at 173 (emphasis added); *see also*, CP at 1072-73.

Subsequently, during the early 1990s, the District attempted to obtain the access and utility easements necessary for the Property to enjoy the special benefits conferred upon it by paying the assessments levied under ULID Nos. 4 and 7. During the 1990s, the District was actually able to obtain and record 60'-wide access and utility easements to the Property over property held by certain private parties. CP at 997-1004.

In September of 1994, the District also obtained a Quit Claim Deed from WSDOT to provide access to the Property. CP at 1011-12. The deed, however, which was not recorded, was contingent upon the District developing a road that was to be constructed, transferred to, and accepted by Kittitas County on or before September 1, 2004; otherwise, the quit claimed property would revert to and revest in the State. CP at 1011. The WSDOT Quit Claim Deed acknowledged that the State-owned lands subject to the deed "are not required for state highway purposes and are conveyed pursuant to the provisions of RCW 47.12.080." CP at 1011.

However, the easements over the privately held properties were legally defective as drafted, a fact that was known to the District but which the District failed to cure. CP at 731, 1069-70. The District also failed to construct the required road over the property quit claimed to it by WSDOT, which caused the property to revert back to the State in September of 2004. CP at 731-32. So, even though the District was aware of and took steps to fulfill its obligation to provide access and utility easements to the Property, it failed to do so, and it is this failure that prevents the Property from the use and enjoyment of the special benefits for which it was assessed and paid for.

E. Without Adequate Access and Utility Easements, the Property Has Received No Special Benefits For its Assessments.

In February of 2008, the Washington State Department of Transportation ("WSDOT"), at a time when it was considering acquiring the Property, appraised the Property at \$14,848,000. CP at 749-753. In determining the Property's fair market value, however, WSDOT's MAI appraisal was based upon the assumption that adequate easements could be obtained to develop the Property to its highest and best use. CP at 758.

Thus, unless the necessary access and utility easements are acquired, the Property will be worth no more than what it would have been worth without paying almost \$500,000 to the District for water and sewer service. Stated differently, the Property's development potential, and its highest and best

use, remain the same both before and after the assessments were paid to the District under ULID Nos. 4 and 7; that is, the Property's development is restricted to whatever can be done with a single 20'-wide access easement and no utility easements for water and sewer service. CP at 758, 1079.

V. SUMMARY OF ARGUMENT

The Property owners paid the District nearly \$500,000 under ULID Nos. 4 and 7 in order to have the guaranteed water and sewer service, consisting of 230 water hook-ups and 38 sewer hook-ups delivered to the Property as the "special benefits" purportedly conferred upon the Property when it was assessed for those "special benefits". Unless the paid-for water and sewer service can be delivered to the four parcels comprising the Property, the fair market value of the Property will not be increased as a result of the assessments that were levied and paid for under ULID Nos. 4 and 7; hence, the Property will have received no "special benefit" for paying the assessments. And the paid-for water and sewer service cannot be delivered to the Property without the access and utility easements necessary to extend the water and sewer mains required to deliver the guaranteed 230 water hook-ups and 38 sewer hook-ups.

However, the only way to obtain the requisite easements is for the District to exercise its power of eminent domain to condemn them from the landowners whose properties lie between the termini of the water and sewer

mains and the parcels comprising the Property, which the District refuses to do. Darlands, therefore, ask this Court to reverse the trial court's order, and find that (1) the District has the statutory authority to condemn the access and utility easements necessary to deliver the paid-for water and sewer service to the Property, and (2) that the District be compelled to do so.

Alternatively, since the District was paid at least \$492,781.37 in exchange for its promise to deliver the guaranteed water and sewer service to the Property, but has provided nothing in return, Darlands request that the Court reverse the trial court and order the District to refund all monies received for water and sewer service, together with interest at the legal rate.

VI. ARGUMENT

A. The Standard of Review.

All issues in this appeal arise from the trial court's summary judgment orders. An appellate court "reviews an order of summary judgment de novo. It engages in the same inquiry as the trial court, treating all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party." *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999). "On review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12.

B. The District is Contractually Obligated to Deliver 230.07 ERUs of Water Service and 38.37 ERUs of Sewer Service to the Boundary of Each Separate Tax Parcel Comprising the Property.

As Judge Cooper correctly found: "It is clear the relationship between the plaintiffs and the District is based upon the contract formed between them as a result of the ULIDs." CP at 559 (citing *Vine Street Commercial v. City of Marysville*, 98 Wn. App. 541, 549-50, 989 P.2d 1238 (1999)). The *Vine Street Commercial* Court held:

We conclude that property owners who petition for the formation of a ULID, whose properties are then assessed for the special benefits thereby accruing, and who subsequently pay their assessments in full, ***are entitled to receive the special benefits for which they have paid.*** [Footnote omitted.] In this respect, their relationship with the governing body that formed the ULID is indistinguishable from the relationship between parties who enter into individual contracts with the governing body for utility service. . . . ***In both situations, there is a contract in the usual sense of that word,*** that is, "an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts."

Id. at 549-50 (emphasis added) (quoted citations omitted).

In rejecting the City of Marysville's argument - that a ULID is not a contract but, instead, simply a mechanism for financing the infrastructure - the court stated that landowners have "the expectation that their properties will be specially benefitted by the improvement, for which they will be assessed in direct proportion to the amount of the special benefit that each of them will enjoy." *Id.* at 548. The court further stated:

It begs reason that a property owner might petition for the formation of a ULID knowing that the property will be assessed for the special benefit, and that the assessment will become a lien against the property, and then pay that assessment in full, *with any other expectation than that when the utility becomes operational he or she will be able to hook up to it - thereby realizing the full value of this special benefit.*

Id. (emphasis added).

The court concluded its opinion with the following statement:

What a municipality cannot do in the formation of a ULID it also cannot do after the fact - *it cannot, without paying compensation, retroactively impose conditions that effectively deprive property owners of the special benefits* for which they have become obligated by assessments against their properties, *after those assessments have been paid in full.*

Id. at 553 (emphasis added).

Vine Street Commercial is squarely on point. In forming ULID Nos. 4 and 7, the District assessed the Property for 38.37 ERUs of sewer service and 230.07 ERUs of water service. CP at 559, 563-64. The District also represented that the water and sewer service *was guaranteed and would be delivered to the boundary of each property parcel.* CP at 156-57, 159, 167.

Accordingly, the District must fulfill its contractual obligation to deliver the promised water and sewer service. And the only way it can do so is by condemning the two 60'-wide access and utility easements needed to allow the Property to receive the paid-for water and sewer service.

C. Unless the District Exercises its Power of Eminent Domain to Obtain the Requisite Access and Utility Easements, it Has Breached its Contractual Obligation, and the Property Has Received No "Special Benefit" From the Assessments That Were Levied Against it, and Paid in Full, Under ULID Nos. 4 and 7.

1. The District Has the Statutory Authority to Condemn Both Access and Utility Easements.

Unless the District condemns the access and utility easements necessary to deliver the paid-for water and sewer service, it will have received almost \$500,000 from the Property owners, without giving any consideration in return. The law is clear that no special benefit accrues to an owner's property that is not capable of connecting to any of the ULID improvements. "It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which does not benefit it would be pro tanto the taking of private property for public use without compensation, hence unconstitutional." *In re Jones*, 52 Wn.2d 143, 145-46, 324 P.2d 259 (1958) (quoting *In re Shilshole Ave.*, 85 Wash. 522, 537, 148 P. 781 (1915)).

"In order for a sewer to be susceptible of use to a given parcel of land, there must be access from said land to said sewer ***without passing through the property of other individuals.***" *Towers v. Tacoma*, 151 Wn. 577, 583, 276 P. 888 (1929) (emphasis added) (quoted citation omitted); *ac-*

cord, Douglass v. Spokane County, 115 Wn. App. 900, 909, 64 P.3d 71 (2003) (no special benefit accrues unless the property connects to the ULID improvements). There is no reason why the same rule should not apply here - the Darland Property is not capable of using the District's water and sewer system without passing through the property of others.

Moreover, Darlands do not have the legal authority to condemn the access and utility easements necessary to allow them to access the District's water and sewer mains. The Property is not landlocked (it has a 20' access easement); therefore, the law is clear that Darlands cannot condemn the private property of another under Washington's private condemnation statute, chapter 8.24 RCW. *See Brown v. McAnally, supra*, 97 Wn.2d at 370.

By contrast, the District has the express statutory authority to condemn the access and utility easements necessary to allow the Property to receive those "special benefits" for which it was assessed and which were paid in full. RCW 57.08.005(1) provides, in relevant part, that a water and sewer district shall have the power "[t]o acquire by purchase or condemnation, or both, all lands, property and property rights, and all water and water rights, both within or without the District necessary for its purposes. The right of eminent domain shall be exercised in the same manner and by the same procedure as provided for cities and towns"

RCW 8.12.030 empowers every city and town:

to condemn land and property, including state, county, and school lands and property for streets . . . and for the opening and widening of . . . and extending . . . of any street . . . and to damage any land or other property for such purpose . . . and to condemn land and other property . . . for sewers . . . and for aqueducts . . . and other structures for . . . conveying a supply of freshwater, and . . . for such and for any other public use after just compensation having been first made

Although Darlands' counsel could not find a Washington case squarely addressing the issue of whether the District has the statutory authority to condemn access as well as utility easements, such powers are inherently granted to cities and towns, under RCW 8.12.030; thus, they should likewise be granted to utility districts under the following plain mandate of RCW 57.08.005(1): "The [District's] right of eminent domain *shall be* exercised in the same manner and by the same procedure as provided for by cities and towns". (Emphasis added.)

Indeed, an opinion from the Washington Attorney General, dated May 19, 2008, supports the conclusion that the District does have the statutory authority to condemn both access and utility easements under the facts of this case. CP 1057-59. The Attorney General's opinion was offered in response to the following question posed by The Honorable Judy Clibborn, State Representative, 41st District: "**Does a water-sewer district have legal authority to condemn an interest in real estate for the purpose of providing right-**

of-way and access to meet local land use development codes?" The Attorney General answered the question as follows:

A water-sewer district may lawfully condemn an interest in real estate for the purpose of providing right-of-way and access to meet local land use development codes, provided that the water-sewer district is acquiring the property interest for a legitimate public purpose related to the purposes and functions of the district, and provided that the district follows the constitutional procedures for acquiring property by eminent domain. Whether a particular exercise of eminent domain would meet these standards is a question that will depend on the surrounding circumstances.⁵

Attorney General's opinions, although not controlling, "are given considerable weight." *Bates v. City of Richland*, 112 Wn. App. 919, 933, 51 P.3d 816 (Div. III 2002) (quoting *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 828, 748 P.2d 1112 (1988)). "This is especially true in the instant case given the legislature's acquiescence to the Attorney General's interpretation of [RCW 57.08.005(1)] as evidenced by its failure, in subsequent legislative sessions, to modify the statute." *Washington Educ. Ass'n v. Smith*, 96 Wn.2d 601, 606, 638 P.2d 77 (1981).⁶

⁵ A copy of the AG's Opinion is attached at Appendix 1 hereto.

⁶ The last legislative amendment to RCW 57.08.005 occurred over a year *after* the Attorney General's 2008 Opinion; and it left *unchanged* a water and sewer district's condemnation power under subsection 1. *See* Substitute House Bill 1532, Chapter 253, §1, a copy of which is attached at Appendix 2 hereto. Regarding the condemnation power of cities and towns under RCW 8.12.030, this statute has not been modified since the Attorney General's Opinion.

Moreover, nothing in the plain language of RCW 57.08.005 expressly limits the District's power of eminent domain to condemn access and utility easements necessary to deliver to the Property's parcels the paid-for water and sewer service in this case, especially since doing so serves a legitimate public purpose. Review of a statute is de novo. *Cerrillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006). In ascertaining the meaning of a statute, a court first looks to its plain language which, if not ambiguous, is to be given effect. *Id.* at 201. "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Id.* (quoted citation omitted). Courts will employ the tools of statutory construction to ascertain a statute's meaning only where it is ambiguous. *Id.*

No such ambiguity exists here regarding the District's statutory power to condemn both access and utility easements, as long as doing so is "necessary for its purposes." RCW 58.08.005(1). And there is nothing set forth in the provisions of RCW 57.08.005, which set forth the District's general powers, stating that the condemnation of access easements, which are necessary in order to deliver paid for utility services to an assessed property (230 water and 38 sewer hook-ups in this case), are not "necessary for its purposes". To hold otherwise would prohibit the District from fulfilling its contractual obligation to deliver the paid-for utility services in this case, which are necessary in order for the District to fulfill its very purpose in forming ULID No. 7; that

is, to create a comprehensive, pass-wide water delivery system. CP 136-39, 388-89, 553.

2. Providing Water and Sewer Service to the Property Serves a Legitimate Public Purpose.

As stated in *Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*, 159 Wn.2d 555, 151 P.3d 176 (2007):

The question of whether the use is really a public use is a judicial determination Washington courts have repeatedly held that condemnation of private property by public utilities . . . is a public use ***In addition, we have expressly held that a finding of public use is not defeated where alleged private use is incidental to the public use.***

Id. at 573 (emphasis added) (citations omitted).

Here, the District would be using its power of eminent domain for a legitimate public purpose related to the purposes and functions of the District. Among other things, the District received the sum of at least \$492,781.37 in assessments, penalties and interest levied against the Property. CP at 554. These funds helped pay for the ULIDs, which were constructed for the public benefit of the District and all ULID property owners, as the District's own resolutions regarding the ULIDs concede. *See, e.g.*, CP at 388-89, 1077-78. And once the Darland Property is developed to utilize the water and sewer hook-ups, the District will receive the revenue generated by the hook-ups, as

well as revenue generated from the related service connection charges and fees, all of which will benefit the entire District.

In short, just because Darland, as a private developer, would benefit from the Property receiving the guaranteed water and sewer service, this in no way undermines the fact that a public benefit was also created as a result of the ULID assessments that were paid for such service.

D. If the District Fails to Make the Paid-For Water Service Available to the Property Parcels, Darlands Are Entitled to Recover the Funds Paid to the District Under Their Claim of Unjust Enrichment.

"It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which does not benefit it would be pro tanto the taking of private property for public use without compensation, and it is unconstitutional." *In re Jones*, 52 Wn.2d at 145-46. Unless the Darland Property can actually hook-up to the District's water and sewer mains, it has received no special benefit as a result of the assessments levied against it, which were paid in full. As such, the District will be unjustly enriched if it is allowed to keep the money it received to extend the paid-for water and sewer service to the Property parcels, while giving nothing in return.

"A person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity." *Cox v. O'Brien*,

150 Wn. App. 24, 37, 206 P.3d 682 (2009). "To establish unjust enrichment, the claimant must meet three elements: (1) one party must have conferred a benefit to the other, (2) the party receiving the benefit must have knowledge of that benefit, and (3) the party receiving the benefit must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value." *Id.* Thus, unjust enrichment is a claim sounding in equity (*id.*); therefore, "the question of whether equitable relief is appropriate is a question of law", subject to de novo review. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005).

The facts in this case present a classic case of unjust enrichment. The District received at least \$492,781.37 in assessments, penalties and interest for the "special benefits" (water and sewer service) which were to be made available to the Property, but were not. The District thus received almost a half million dollars without conferring any benefit to the Property in return. And what makes the District's conduct all the more egregious is that the assessments levied against the Property under the District's ULIDS *were the second highest* among all assessed properties. CP at 1129, 1138.

E. Alternatively, Darlands Are Entitled to the Funds Paid to the District Under Their Claim For Breach of the Implied Covenant of Good Faith and Fair Dealing.

"Under Washington law, '[t]here is in every contract an implied duty of good faith and fair dealing' that 'obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.'" *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 112, 323 P.3d 1036 (2014) (quoting *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). Moreover, the *Rekhter* Court made clear that *this duty creates a separate cause of action*. Otherwise, "there could never be a violation of a duty of good faith and fair dealing unless there was also a violation of an express contract term. Such a requirement would render the good faith and fair dealing doctrine superfluous". *Rekhter*, 180 Wn.2d at 112.

Here, the District assessed the Property for 230 water and 38 sewer hook-ups, knowing that the Property could never enjoy these "special benefits" with the Property's single 20'-wide access easement; yet the District failed to obtain the easements necessary to allow the Property owners to "obtain the full benefit of performance" of the contract. CP at 173, 731-32.

F. The Doctrines of Impossibility of Performance and Rescission and Restitution Also Compel the District to Refund All Money it Received in Exchange for its Promise to Deliver Water and Sewer Service.

In light of the trial court's finding - that the District "has no legal ability to take private property for 'access'" (CP at 1106) - the doctrines of impos-

sibility of performance and/or rescission and restitution should apply to compel the District to refund the money paid to it to make water and sewer service available to the Property.

Where impossibility of performance exists, restitution of the "money had and received" is appropriate. *Coast Trading Co. v. Parmac, Inc.*, 21 Wn. App. 896, 902-903, 587 P.2d 1071 (1978); *aff'd* at 177 Wn.2d 584, 305 P.3d 230 (2013). "Washington decisions generally treat rescission and restitution as operating in tandem to produce the remedy [sought in this case]: an unwinding of the contract together with an award of whatever damages are required to restore the parties to their prior positions." *Kofmehl v. Baseline Lake, Inc.*, 167 Wn. App. 677, 690, 275 P.3d 328 (Div. III 2012).

G. The District is Estopped From Claiming it Does Not Have to Reimburse Darlands For the Money Paid to the District.

1. Equitable Estoppel. "The doctrine of equitable estoppel will be applied against the state or against a municipality or other political entity when acting in its governmental as well as when acting in its proprietary capacity, when necessary to prevent a manifest injustice and the exercise of its governmental powers will not be impaired thereby." *Finch v. Matthews*, 74 Wn.2d 161, 175, 443 P.2d 833 (1968).

"We have repeatedly held that, in its business relations with individuals, the state must not expect more favorable treatment than is fair between

men. . . . The state, in its dealings with individuals, should be held to `resolute good faith.'" *Id.* at 175. Accordingly, "[a] government agency may not repudiate one of its own regulatory interpretations after a third party has relied upon it to their detriment." *Tesoro Ref. & Mtg. Co. v. Revenue*, 164 Wn.2d 310, 323, 190 P.3d 28 (2008).

"[T]he rule is that a municipality or other governmental agency may be estopped, as right and justice may require, where the act or contract relied on to create the estoppel was within its corporate powers, although the method of exercising the power was irregular and unauthorized." *Finch*, 74 Wn.2d at 171.

This court, has long recognized that in determining what acts of a governing body are *ultra vires* and void, and thus immune from the application of the doctrine of equitable estoppel, it must distinguish those acts which are done wholly without legal authorization or in direct violation of existing statutes, from those acts which are within the scope of the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means.

Id. at 172.

Here, Darlands are *not arguing* that the District acted in an *ultra vires* manner in assessing the property under the ULIDs. Instead, they are arguing that, once the Property was brought into the ULIDs and assessed accordingly, the District was ***contractually obligated to make the promised water and sewer service equally available to all properties that were assessed at the***

same rate, as was the case here, and whose owners paid their assessments.

As Judge Cooper correctly posited:

[S]ince the District in its resolutions, both in creating the ULIDs and in confirming the assessment rolls conferred special benefits *and assessed equally on a per unit basis* each property within the ULIDs, *making the special benefit the same for each lot*, does that not presume the sewer and water mains must run to the property boundaries of each lot within the ULID? *Otherwise, the properties contiguous to the sewer and/or water mains within the ULIDs will derive a greater benefit than those more distant from the trunk lines yet pay at the same rate per unit.* The District could have adopted an assessment scheme utilizing the zone and termini method assessing the properties in accordance with the special benefits conferred on each property in proportion to the area and distance back from the trunk lines, see Hargreaves v. Mukilteo Water District, 37 Wn.2d 522, 526 (1950), *but it chose not to make that distinction.*

CP at 559-60.

Thus, although the initial act of incorporating the Property into the ULIDs was statutorily authorized, the District's subsequent conduct, in refusing to deliver the water and service to the Property parcels, commensurate with the assessments that were levied and paid, was "exercised in an irregular manner or through an unauthorized procedural means." *Finch*, 74 Wn.2d at 172. Accordingly, the doctrine of equitable estoppel should apply to preclude the District from claiming it does not have to refund the assessments. *Id.*

2. Promissory Estoppel. "There are five prerequisites for recovery in promissory estoppel: (1) A promise which (2) the promisor should

reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1994). Each of these elements is met in this case.

The District knew, before it assessed and incorporated the Property into the ULIDs, that the Property did not have the requisite access and utility easements necessary to enjoy the "special benefits" of the assessments levied against it. CP at 173, 1079. When Darland's predecessor-in-interest, Miller Shingle, purchased the Property, it did so based upon the representations of the District's then-superintendent, Richard Kloss, that the District would obtain the necessary access and utility easements to deliver the promised water and sewer service to the Property. CP at 99-101, 142, 145, 242-43.

Moreover, in forming the ULIDs, the District expressly promised that payment of the ULID assessments would entitle each property owner to receive water and sewer service commensurate with the amount of their paid assessments. CP at 130, 137, 153, 559-60. And during the public hearing on the formation of ULID No. 7, District Secretary and Board member DeBruler represented: "***These are guaranteed hook-ups. We are guaranteeing you water.*** This ULID #7 is bringing you water and trunk lines past your property." CP at 167 (emphasis added).

H. Regardless of the Theory of Recovery, Darlands, as the Fee Simple Owners of the Property, are Entitled to Recoup All Funds Paid to the District.

When Darlands purchased the Property, they acquired all ownership rights of their predecessors-in-interest. Darlands are thus entitled to receive all funds paid to the District for water and sewer service. As stated by the United States Supreme Court: "'Property' is more than just the physical thing - the land, the bricks, the mortar - it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible." *Dickman v. Commissioner*, 465 U.S. 330, 336, 104 S. Ct. 1086 (1984) (internal quotations and citation omitted).

Not surprisingly, the Washington Supreme Court adheres to this "bundle of sticks" concept of the rights inherent in real property ownership. *See, e.g., Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012) ("[p]roperty is often analogized to a bundle of sticks"); *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wn.2d 347, 367, 13 P.3d 183 (2000) (property is composed of several distinct rights, including the right to transfer the integral rights to other persons).

Accordingly, when Darlands acquired fee simple title to the Property, they concurrently acquired the entire "bundle of sticks" incidental to ownership, including all rights of their predecessors-in-interest.

I. The Funds Paid to the District Are "Liquidated"; Therefore Darlands Are Entitled to Pre-Judgment Interest at the Legal Rate.

The dates on which the Property owners paid the District for water and sewer service are fixed and certain. CP at 1129, 1141. Darlands are thus entitled to pre-judgment interest on all funds paid to the District for the undeliverable water and sewer service. Prejudgment interest is available when an amount claimed is "liquidated". *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). "A 'liquidated' claim is a claim 'where the evidence furnishes data which . . . makes it possible to compute the amount with exactness, without reliance on opinion or discretion.' . . . A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated." *Id.* (quoted citation omitted).

"An unliquidated claim, by contrast, is one 'where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.'" *Id.* at 473 (quoted citation omitted).

"Prejudgment interest awards are based on the principle that a defendant 'who retains money which he ought to pay to another should be charged interest upon it.' . . . The plaintiff should be compensated for the 'use value' of the money representing his damages for the period of time from his loss to

the date of judgment." *Id.* at 473 (quoted citations omitted). Pursuant to RCW 19.52.010(1): "Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing"

VII. CONCLUSION

In enacting ULID Nos. 4 and 7, and assessing the Property under those ULIDs, the District became contractually obligated to insure that the Property received the "special benefit" of the assessments (the delivery of 230.07 ERUs of water service and 38.37 ERUs of sewer service) once the assessments were paid in full, which they were. And the only way the Property can receive these contractual benefits is if the District exercises its power of eminent domain to acquire the two 60'-wide access and utility easements necessary to extend the water and sewer mains from their present termini to the boundaries of the four tax parcels comprising the Property. The District is likewise obligated, both by contract and case law, to extend the water and sewer mains, at its sole expense, to the boundaries of each of the Property's parcels. The trial court's contrary summary judgment orders should therefore be reversed.

Alternatively, if this Court disagrees with the above points, then Darlands should be entitled to a refund of all monies paid to the District for the undeliverable water and sewer service, together with pre- and post-

judgment interest at the legal rate.

DATED this 28 day of April, 2016.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By:



Douglas W. Nicholson, WSBA #24854
Attorney for Appellants
Michael L. Darland and Myrna Darland

CERTIFICATE OF SERVICE

I certify that on the 28th day of April, 2016, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

Attorneys for Defendant/Cross-Appellant:

Daniel Mallove

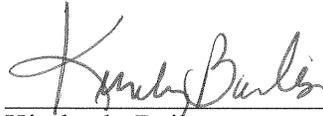
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(X) Via First-Class Mail



Kimberly Bailes

APPENDIX 1



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

May 19, 2008

The Honorable Judy Clibborn
State Representative, 41st District
P. O. Box 40600
Olympia, Washington 98504-0600

Dear Representative Clibborn:

By letter previously acknowledged, you requested an opinion on a question concerning the eminent domain powers of special purpose districts. As we indicated in previous correspondence, we have formulated the question as follows:

Does a water-sewer district have legal authority to condemn an interest in real estate for the purpose of providing right-of-way and access to meet local land use development codes?¹

BRIEF ANSWER

A water-sewer district may lawfully condemn an interest in real estate for the purpose of providing right-of-way and access to meet local land use development codes, provided that the water-sewer district is acquiring the property interest for a legitimate public purpose related to the purposes and functions of the district, and provided that the district follows the constitutional procedures for acquiring property by eminent domain. Whether a particular exercise of eminent domain would meet these standards is a question that will depend on the surrounding circumstances.

¹ The material attached to your opinion request contains factual assertions from a constituent that appear to relate to a specific situation. The Attorney General's authority to provide legal opinions to members of the state Legislature is to assist legislators in evaluating the current state of the law so they can decide whether to introduce or support new legislation. The opinions process is not well-suited to determining facts or resolving legal disputes faced by local governments or private citizens. Accordingly, this is a general discussion of the eminent domain powers of water-sewer districts and is not intended as a comment on legal options available to any particular district in any specific matter. The material enclosed with your request suggests that the issue may be the authority of a water-sewer district to acquire property, not because it is needed for the water district's own operations, but because it is needed to satisfy a landowner's land use requirements for the development of a particular property. We decline to speculate on such a fact-specific question, which would best be analyzed and discussed by the district's legal advisers and the attorneys for any private interests involved.

ATTORNEY GENERAL OF WASHINGTON

Honorable Judy Clibborn
May 19, 2008
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ANALYSIS

~~Water-sewer districts are special-purpose local government bodies whose powers and duties are generally codified in Title 57 of the Revised Code of Washington.~~² The general powers of water-sewer districts are set forth in RCW 57.08.005. Water-sewer districts have the authority to acquire, construct, and operate water distribution systems, sewer systems, and drainage systems, together with related facilities and activities. RCW 57.08.005(3), (5), (6). Water-sewer districts may also operate street-lighting utilities (RCW 57.08.060) and may, under some circumstances, generate electricity as a byproduct of other district operations. RCW 57.08.005(3), (5), (6).

A water-sewer district has express authority “to acquire by purchase or condemnation, or both, all lands, property and property rights, and all water and water rights, both within and without the district, necessary for its purposes.” RCW 57.08.005(1). With some procedural exceptions, water-sewer districts exercise their rights or eminent domain “in the same manner and by the same procedure as provided for cities and towns”. *Id.* Your question is whether a district may lawfully use its condemnation powers to acquire right-of-way and access to meet local land use development codes. The answer depends on whether the property acquisition in question is “necessary for [the district’s] purposes”, because that is the standard set forth in RCW 57.08.005.

There is no appellate case law interpreting the eminent domain language set forth in RCW 57.08.005(1) or other statutes concerning water-sewer district exercises of eminent domain power.³ However, Washington case law on eminent domain is clear that, when the Legislature has conferred eminent domain powers on a local government, those powers may be exercised so long as they are consistent with the local government’s purposes and powers as set forth in statute. Our courts have said that delegations of eminent domain power to local governments should be strictly construed. *Pub. Util. Dist. 2 of Grant Cy. v. North Am. Foreign Trade Zone Indus.*, 159 Wn.2d 555, 151 P.3d 176 (2007); *Cowlitz Cy. v. Martin*, 140 Wn. App. 170, 165 P.3d 51 (2007). There is a three-part test for determining whether a proposed condemnation is lawful: The condemning authority must prove that (1) the use is really public, that (2) the public interest requires the use, and (3) the property appropriated is necessary for that purpose. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). A condemnation of property is necessary if it is reasonably necessary under the circumstances.

² Before 1996, Washington law provided separately for water districts and sewer districts but, in that year, the Legislature created a single class of water-sewer districts which includes pre-existing water districts, pre-existing sewer districts, and new districts created since 1996. RCW 57.02.001 (Laws of 1996, ch. 230, § 101).

³ In 1978, our office expressed the view that a sewer district which has elected to maintain and operate a water supply system may acquire by condemnation existing water lines owned by a private water company. AGLO 1978 No. 36 (copy enclosed). By implication, we found that such an acquisition meets the “public purpose” requirement for the exercise of eminent domain authority.

ATTORNEY GENERAL OF WASHINGTON

Honorable Judy Clibborn

May 19, 2008

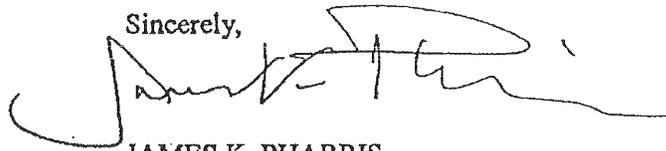
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Grant Cy. PUD 2, 159 Wn.2d at 576. The determination of necessity is a legislative question for government proposing to acquire property through eminent domain. *Id. at 575.*

All three parts of the *HTK Management* test involve applying the law to a specific fact pattern. Although the courts have not had occasion to directly find that acquisition of a water system is a public purpose, the great majority of citizens receive water through publicly-operated water systems, and this point appears to be beyond argument. Thus, if a water-sewer district is able to demonstrate that the public interest requires the acquisition of the property in question to provide a publicly-operated water system, and the district needs the additional property in order to comply with applicable land use codes relating to a district-operated system, then it seems likely that courts would find the acquisition within the district's eminent domain authority. However, the district would have to be prepared to satisfy the courts on each of the three tests identified above. It is not possible for me to know or determine all of the circumstances that conceivably would bear on these questions. Accordingly, I have discussed the legal tests that a court would use to determine the question but cannot predict how a court would resolve a particular situation.

I hope the foregoing information will prove helpful. This informal opinion will not be published as an official opinion of the Attorney General's Office.

Sincerely,



JAMES K. PHARRIS
Deputy Solicitor General
(360) 664-3027

:pmd

Enclos.

APPENDIX 2

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1532

Chapter 253, Laws of 2009

61st Legislature
2009 Regular Session

RECLAIMED WATER--WATER-SEWER DISTRICTS--AUTHORITY

EFFECTIVE DATE: 07/26/09

Passed by the House February 23, 2009
Yeas 92 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 13, 2009
Yeas 36 Nays 9

BRAD OWEN

President of the Senate

Approved April 28, 2009, 4:09 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1532** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

April 29, 2009

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1532

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

By House Local Government & Housing (originally sponsored by Representatives Rolfes, Chandler, Seaquist, Johnson, Upthegrove, Blake, and Miloscia)

READ FIRST TIME 02/17/09.

1 AN ACT Relating to authorizing water-sewer districts to construct,
2 condemn and purchase, add to, maintain, and operate systems for
3 reclaimed water; and amending RCW 57.08.005, 57.08.044, 57.08.047, and
4 57.16.010.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 57.08.005 and 2007 c 31 s 8 are each amended to read
7 as follows:

8 A district shall have the following powers:

9 (1) To acquire by purchase or condemnation, or both, all lands,
10 property and property rights, and all water and water rights, both
11 within and without the district, necessary for its purposes. The right
12 of eminent domain shall be exercised in the same manner and by the same
13 procedure as provided for cities and towns, insofar as consistent with
14 this title, except that all assessment or reassessment rolls to be
15 prepared and filed by eminent domain commissioners or commissioners
16 appointed by the court shall be prepared and filed by the district, and
17 the duties devolving upon the city treasurer are imposed upon the
18 county treasurer;

1 (2) To lease real or personal property necessary for its purposes
2 for a term of years for which that leased property may reasonably be
3 needed;

4 (3) To construct, condemn and purchase, add to, maintain, and
5 supply waterworks to furnish the district and inhabitants thereof and
6 any other persons, both within and without the district, with an ample
7 supply of water for all uses and purposes public and private with full
8 authority to regulate and control the use, content, distribution, and
9 price thereof in such a manner as is not in conflict with general law
10 and may construct, acquire, or own buildings and other necessary
11 district facilities. Where a customer connected to the district's
12 system uses the water on an intermittent or transient basis, a district
13 may charge for providing water service to such a customer, regardless
14 of the amount of water, if any, used by the customer. District
15 waterworks may include facilities which result in combined water supply
16 and electric generation, if the electricity generated thereby is a
17 byproduct of the water supply system. That electricity may be used by
18 the district or sold to any entity authorized by law to use or
19 distribute electricity. Electricity is deemed a byproduct when the
20 electrical generation is subordinate to the primary purpose of water
21 supply. For such purposes, a district may take, condemn and purchase,
22 acquire, and retain water from any public or navigable lake, river or
23 watercourse, or any underflowing water, and by means of aqueducts or
24 pipeline conduct the same throughout the district and any city or town
25 therein and carry it along and upon public highways, roads, and
26 streets, within and without such district. For the purpose of
27 constructing or laying aqueducts or pipelines, dams, or waterworks or
28 other necessary structures in storing and retaining water or for any
29 other lawful purpose such district may occupy the beds and shores up to
30 the high water mark of any such lake, river, or other watercourse, and
31 may acquire by purchase or condemnation such property or property
32 rights or privileges as may be necessary to protect its water supply
33 from pollution. For the purposes of waterworks which include
34 facilities for the generation of electricity as a byproduct, nothing in
35 this section may be construed to authorize a district to condemn
36 electric generating, transmission, or distribution rights or facilities
37 of entities authorized by law to distribute electricity, or to acquire
38 such rights or facilities without the consent of the owner;

1 (4) To purchase and take water from any municipal corporation,
2 private person, or entity. A district contiguous to Canada may
3 contract with a Canadian corporation for the purchase of water and for
4 the construction, purchase, maintenance, and supply of waterworks to
5 furnish the district and inhabitants thereof and residents of Canada
6 with an ample supply of water under the terms approved by the board of
7 commissioners;

8 (5) To construct, condemn and purchase, add to, maintain, and
9 operate systems of sewers for the purpose of furnishing the district,
10 the inhabitants thereof, and persons outside the district with an
11 adequate system of sewers for all uses and purposes, public and
12 private, including but not limited to on-site sewage disposal
13 facilities, approved septic tanks or approved septic tank systems, on-
14 site sanitary sewerage systems, inspection services and maintenance
15 services for private and public on-site systems, point and nonpoint
16 water pollution monitoring programs that are directly related to the
17 sewerage facilities and programs operated by a district, other
18 facilities, programs, and systems for the collection, interception,
19 treatment, and disposal of wastewater, and for the control of pollution
20 from wastewater with full authority to regulate the use and operation
21 thereof and the service rates to be charged. Under this chapter, after
22 July 1, 1998, any requirements for pumping the septic tank of an on-
23 site sewage system should be based, among other things, on actual
24 measurement of accumulation of sludge and scum by a trained inspector,
25 trained owner's agent, or trained owner. Training must occur in a
26 program approved by the state board of health or by a local health
27 officer. Sewage facilities may include facilities which result in
28 combined sewage disposal or treatment and electric or methane gas
29 generation, except that the electricity or methane gas generated
30 thereby is a byproduct of the system of sewers. Such electricity or
31 methane gas may be used by the district or sold to any entity
32 authorized by law to distribute electricity or methane gas.
33 Electricity and methane gas are deemed byproducts when the electrical
34 or methane gas generation is subordinate to the primary purpose of
35 sewage disposal or treatment. The district may also sell surplus
36 methane gas, which may be produced as a byproduct. For such purposes
37 a district may conduct sewage throughout the district and throughout
38 other political subdivisions within the district, and construct and lay

1 sewer pipe along and upon public highways, roads, and streets, within
2 and without the district, and condemn and purchase or acquire land and
3 rights-of-way necessary for such sewer pipe. A district may erect
4 sewage treatment plants within or without the district, and may
5 acquire, by purchase or condemnation, properties or privileges
6 necessary to be had to protect any lakes, rivers, or watercourses and
7 also other areas of land from pollution from its sewers or its sewage
8 treatment plant. For the purposes of sewage facilities which include
9 facilities that result in combined sewage disposal or treatment and
10 electric generation where the electric generation is a byproduct,
11 nothing in this section may be construed to authorize a district to
12 condemn electric generating, transmission, or distribution rights or
13 facilities of entities authorized by law to distribute electricity, or
14 to acquire such rights or facilities without the consent of the owners;

15 (6) The authority to construct, condemn and purchase, add to,
16 maintain, and operate systems of reclaimed water as authorized by
17 chapter 90.46 RCW for the purpose of furnishing the district and the
18 inhabitants thereof with reclaimed water for all authorized uses and
19 purposes, public and private, including with full authority to regulate
20 the use and operation thereof and the service rates to be charged. In
21 compliance with other sections of this chapter, a district may also
22 provide reclaimed water services to persons outside the district;

23 (7)(a) To construct, condemn and purchase, add to, maintain, and
24 operate systems of drainage for the benefit and use of the district,
25 the inhabitants thereof, and persons outside the district with an
26 adequate system of drainage, including but not limited to facilities
27 and systems for the collection, interception, treatment, and disposal
28 of storm or surface waters, and for the protection, preservation, and
29 rehabilitation of surface and underground waters, and drainage
30 facilities for public highways, streets, and roads, with full authority
31 to regulate the use and operation thereof and, except as provided in
32 (b) of this subsection, the service rates to be charged.

33 (b) The rate a district may charge under this section for storm or
34 surface water sewer systems or the portion of the rate allocable to the
35 storm or surface water sewer system of combined sanitary sewage and
36 storm or surface water sewer systems shall be reduced by a minimum of
37 ten percent for any new or remodeled commercial building that utilizes
38 a permissive rainwater harvesting system. Rainwater harvesting systems

1 shall be properly sized to utilize the available roof surface of the
2 building. The jurisdiction shall consider rate reductions in excess of
3 ten percent dependent upon the amount of rainwater harvested.

4 (c) Drainage facilities may include natural systems. Drainage
5 facilities may include facilities which result in combined drainage
6 facilities and electric generation, except that the electricity
7 generated thereby is a byproduct of the drainage system. Such
8 electricity may be used by the district or sold to any entity
9 authorized by law to distribute electricity. Electricity is deemed a
10 byproduct when the electrical generation is subordinate to the primary
11 purpose of drainage collection, disposal, and treatment. For such
12 purposes, a district may conduct storm or surface water throughout the
13 district and throughout other political subdivisions within the
14 district, construct and lay drainage pipe and culverts along and upon
15 public highways, roads, and streets, within and without the district,
16 and condemn and purchase or acquire land and rights-of-way necessary
17 for such drainage systems. A district may provide or erect facilities
18 and improvements for the treatment and disposal of storm or surface
19 water within or without the district, and may acquire, by purchase or
20 condemnation, properties or privileges necessary to be had to protect
21 any lakes, rivers, or watercourses and also other areas of land from
22 pollution from storm or surface waters. For the purposes of drainage
23 facilities which include facilities that also generate electricity as
24 a byproduct, nothing in this section may be construed to authorize a
25 district to condemn electric generating, transmission, or distribution
26 rights or facilities of entities authorized by law to distribute
27 electricity, or to acquire such rights or facilities without the
28 consent of the owners;

29 ~~((7))~~ (8) To construct, condemn, acquire, and own buildings and
30 other necessary district facilities;

31 ~~((8))~~ (9) To compel all property owners within the district
32 located within an area served by the district's system of sewers to
33 connect their private drain and sewer systems with the district's
34 system under such penalty as the commissioners shall prescribe by
35 resolution. The district may for such purpose enter upon private
36 property and connect the private drains or sewers with the district
37 system and the cost thereof shall be charged against the property owner
38 and shall be a lien upon property served;

1 (~~(9)~~) (10) Where a district contains within its borders, abuts,
2 or is located adjacent to any lake, stream, groundwater as defined by
3 RCW 90.44.035, or other waterway within the state of Washington, to
4 provide for the reduction, minimization, or elimination of pollutants
5 from those waters in accordance with the district's comprehensive plan,
6 and to issue general obligation bonds, revenue bonds, local improvement
7 district bonds, or utility local improvement bonds for the purpose of
8 paying all or any part of the cost of reducing, minimizing, or
9 eliminating the pollutants from these waters;

10 (~~(10)~~) (11) Subject to subsection (~~(6)~~) (7) of this section, to
11 fix rates and charges for water, sewer, reclaimed water, and drain
12 service supplied and to charge property owners seeking to connect to
13 the district's systems, as a condition to granting the right to so
14 connect, in addition to the cost of the connection, such reasonable
15 connection charge as the board of commissioners shall determine to be
16 proper in order that those property owners shall bear their equitable
17 share of the cost of the system. For the purposes of calculating a
18 connection charge, the board of commissioners shall determine the pro
19 rata share of the cost of existing facilities and facilities planned
20 for construction within the next ten years and contained in an adopted
21 comprehensive plan and other costs borne by the district which are
22 directly attributable to the improvements required by property owners
23 seeking to connect to the system. The cost of existing facilities
24 shall not include those portions of the system which have been donated
25 or which have been paid for by grants. The connection charge may
26 include interest charges applied from the date of construction of the
27 system until the connection, or for a period not to exceed ten years,
28 whichever is shorter, at a rate commensurate with the rate of interest
29 applicable to the district at the time of construction or major
30 rehabilitation of the system, or at the time of installation of the
31 lines to which the property owner is seeking to connect. In lieu of
32 requiring the installation of permanent local facilities not planned
33 for construction by the district, a district may permit connection to
34 the water and/or sewer systems through temporary facilities installed
35 at the property owner's expense, provided the property owner pays a
36 connection charge consistent with the provisions of this chapter and
37 agrees, in the future, to connect to permanent facilities when they are
38 installed; or a district may permit connection to the water and/or

1 sewer systems through temporary facilities and collect from property
2 owners so connecting a proportionate share of the estimated cost of
3 future local facilities needed to serve the property, as determined by
4 the district. The amount collected, including interest at a rate
5 commensurate with the rate of interest applicable to the district at
6 the time of construction of the temporary facilities, shall be held for
7 contribution to the construction of the permanent local facilities by
8 other developers or the district. The amount collected shall be deemed
9 full satisfaction of the proportionate share of the actual cost of
10 construction of the permanent local facilities. If the permanent local
11 facilities are not constructed within fifteen years of the date of
12 payment, the amount collected, including any accrued interest, shall be
13 returned to the property owner, according to the records of the county
14 auditor on the date of return. If the amount collected is returned to
15 the property owner, and permanent local facilities capable of serving
16 the property are constructed thereafter, the property owner at the time
17 of construction of such permanent local facilities shall pay a
18 proportionate share of the cost of such permanent local facilities, in
19 addition to reasonable connection charges and other charges authorized
20 by this section. A district may permit payment of the cost of
21 connection and the reasonable connection charge to be paid with
22 interest in installments over a period not exceeding fifteen years.
23 The county treasurer may charge and collect a fee of three dollars for
24 each year for the treasurer's services. Those fees shall be a charge
25 to be included as part of each annual installment, and shall be
26 credited to the county current expense fund by the county treasurer.
27 Revenues from connection charges excluding permit fees are to be
28 considered payments in aid of construction as defined by department of
29 revenue rule. Rates or charges for on-site inspection and maintenance
30 services may not be imposed under this chapter on the development,
31 construction, or reconstruction of property.

32 Before adopting on-site inspection and maintenance utility
33 services, or incorporating residences into an on-site inspection and
34 maintenance or sewer utility under this chapter, notification must be
35 provided, prior to the applicable public hearing, to all residences
36 within the proposed service area that have on-site systems permitted by
37 the local health officer. The notice must clearly state that the

1 residence is within the proposed service area and must provide
2 information on estimated rates or charges that may be imposed for the
3 service.

4 A water-sewer district shall not provide on-site sewage system
5 inspection, pumping services, or other maintenance or repair services
6 under this section using water-sewer district employees unless the on-
7 site system is connected by a publicly owned collection system to the
8 water-sewer district's sewerage system, and the on-site system
9 represents the first step in the sewage disposal process.

10 Except as otherwise provided in RCW 90.03.525, any public entity
11 and public property, including the state of Washington and state
12 property, shall be subject to rates and charges for sewer, water, storm
13 water control, drainage, and street lighting facilities to the same
14 extent private persons and private property are subject to those rates
15 and charges that are imposed by districts. In setting those rates and
16 charges, consideration may be made of in-kind services, such as stream
17 improvements or donation of property;

18 ~~((11))~~ (12) To contract with individuals, associations and
19 corporations, the state of Washington, and the United States;

20 ~~((12))~~ (13) To employ such persons as are needed to carry out the
21 district's purposes and fix salaries and any bond requirements for
22 those employees;

23 ~~((13))~~ (14) To contract for the provision of engineering, legal,
24 and other professional services as in the board of commissioner's
25 discretion is necessary in carrying out their duties;

26 ~~((14))~~ (15) To sue and be sued;

27 ~~((15))~~ (16) To loan and borrow funds and to issue bonds and
28 instruments evidencing indebtedness under chapter 57.20 RCW and other
29 applicable laws;

30 ~~((16))~~ (17) To transfer funds, real or personal property,
31 property interests, or services subject to RCW 57.08.015;

32 ~~((17))~~ (18) To levy taxes in accordance with this chapter and
33 chapters 57.04 and 57.20 RCW;

34 ~~((18))~~ (19) To provide for making local improvements and to levy
35 and collect special assessments on property benefitted thereby, and for
36 paying for the same or any portion thereof in accordance with chapter
37 57.16 RCW;

1 (~~(19)~~) (20) To establish street lighting systems under RCW
2 57.08.060;

3 (~~(20)~~) (21) To exercise such other powers as are granted to
4 water-sewer districts by this title or other applicable laws; and

5 (~~(21)~~) (22) To exercise any of the powers granted to cities and
6 counties with respect to the acquisition, construction, maintenance,
7 operation of, and fixing rates and charges for waterworks and systems
8 of sewerage and drainage.

9 **Sec. 2.** RCW 57.08.044 and 1999 c 153 s 7 are each amended to read
10 as follows:

11 A district may enter into contracts with any county, city, town, or
12 any other municipal or quasi-municipal corporation, or with any private
13 person or corporation, for the acquisition, ownership, use, and
14 operation of any property, facilities, or services, within or without
15 the district, and necessary or desirable to carry out the purposes of
16 the district. A district may provide water, reclaimed water, sewer,
17 drainage, or street lighting services to property owners in areas
18 within or without the limits of the district, except that if the area
19 to be served is located within another existing district duly
20 authorized to exercise district powers in that area, then water,
21 reclaimed water, sewer, drainage, or street lighting service may not be
22 so provided by contract or otherwise without the consent by resolution
23 of the board of commissioners of that other district.

24 **Sec. 3.** RCW 57.08.047 and 1999 c 153 s 8 are each amended to read
25 as follows:

26 The provision of water, reclaimed water, sewer, or drainage service
27 beyond the boundaries of a special purpose district or city may be
28 subject to potential review by a boundary review board under chapter
29 36.93 RCW.

30 **Sec. 4.** RCW 57.16.010 and 1997 c 447 s 18 are each amended to read
31 as follows:

32 Before ordering any improvements or submitting to vote any
33 proposition for incurring any indebtedness, the district commissioners
34 shall adopt a general comprehensive plan for the type or types of
35 facilities the district proposes to provide. A district may prepare a

1 separate general comprehensive plan for each of these services and
2 other services that districts are permitted to provide, or the district
3 may combine any or all of its comprehensive plans into a single general
4 comprehensive plan.

5 (1) For a general comprehensive plan of a water supply system, the
6 commissioners shall investigate the several portions and sections of
7 the district for the purpose of determining the present and reasonably
8 foreseeable future needs thereof; shall examine and investigate,
9 determine, and select a water supply or water supplies for such
10 district suitable and adequate for present and reasonably foreseeable
11 future needs thereof; and shall consider and determine a general system
12 or plan for acquiring such water supply or water supplies, and the
13 lands, waters, and water rights and easements necessary therefor, and
14 for retaining and storing any such waters, and erecting dams,
15 reservoirs, aqueducts, and pipe lines to convey the same throughout
16 such district. There may be included as part of the system the
17 installation of fire hydrants at suitable places throughout the
18 district. The commissioners shall determine a general comprehensive
19 plan for distributing such water throughout such portion of the
20 district as may then reasonably be served by means of subsidiary
21 aqueducts and pipe lines, and a long-term plan for financing the
22 planned projects and the method of distributing the cost and expense
23 thereof, including the creation of local improvement districts or
24 utility local improvement districts, and shall determine whether the
25 whole or part of the cost and expenses shall be paid from revenue or
26 general obligation bonds.

27 (2) For a general comprehensive plan for a sewer system, the
28 commissioners shall investigate all portions and sections of the
29 district and select a general comprehensive plan for a sewer system for
30 the district suitable and adequate for present and reasonably
31 foreseeable future needs thereof. The general comprehensive plan shall
32 provide for treatment plants and other methods and services, if any,
33 for the prevention, control, and reduction of water pollution and for
34 the treatment and disposal of sewage and industrial and other liquid
35 wastes now produced or which may reasonably be expected to be produced
36 within the district and shall, for such portions of the district as may
37 then reasonably be served, provide for the acquisition or construction
38 and installation of laterals, trunk sewers, intercepting sewers,

1 syphons, pumping stations or other sewage collection facilities, septic
2 tanks, septic tank systems or drainfields, and systems for the
3 transmission and treatment of wastewater. The general comprehensive
4 plan shall provide a long-term plan for financing the planned projects
5 and the method of distributing the cost and expense of the sewer system
6 and services, including the creation of local improvement districts or
7 utility local improvement districts; and provide whether the whole or
8 some part of the cost and expenses shall be paid from revenue or
9 general obligation bonds.

10 (3) For a general comprehensive plan for a reclaimed water system,
11 the commissioners shall investigate all portions and sections of the
12 district and select a general comprehensive plan for a reclaimed water
13 system for the district suitable and adequate for present and
14 reasonably foreseeable future needs thereof. The general comprehensive
15 plan must provide for treatment plants or the use of existing treatment
16 plants and other methods and services, if any, for reclaiming water and
17 must, for such portions of the district as may then reasonably be
18 served, provide for a general system or plan for acquiring the lands
19 and easements necessary therefor, including retaining and storing
20 reclaimed water, and for the acquisition or construction and
21 installation of mains, transmission mains, pumping stations, hydrants,
22 or other facilities and systems for the reclamation and transmission of
23 reclaimed water throughout such district for such uses, public and
24 private, as authorized by law. The general comprehensive plan must
25 provide a long-term plan for financing the planned projects and the
26 method of distributing the cost and expense of the reclaimed water
27 system and services, including the creation of local improvement
28 districts or utility local improvement districts; and provide whether
29 the whole or some part of the cost and expenses must be paid from
30 revenue or general obligation bonds.

31 (4) For a general comprehensive plan for a drainage system, the
32 commissioners shall investigate all portions and sections of the
33 district and adopt a general comprehensive plan for a drainage system
34 for the district suitable and adequate for present and future needs
35 thereof. The general comprehensive plan shall provide for a system to
36 collect, treat, and dispose of storm water or surface waters, including
37 use of natural systems and the construction or provision of culverts,
38 storm water pipes, ponds, and other systems. The general comprehensive

1 plan shall provide for a long-term plan for financing the planned
2 projects and provide for a method of distributing the cost and expense
3 of the drainage system, including local improvement districts or
4 utility local improvement districts, and provide whether the whole or
5 some part of the cost and expenses shall be paid from revenue or
6 general obligation bonds.

7 ~~((4))~~ (5) For a general comprehensive plan for street lighting,
8 the commissioners shall investigate all portions and sections of the
9 district and adopt a general comprehensive plan for street lighting for
10 the district suitable and adequate for present and future needs
11 thereof. The general comprehensive plan shall provide for a system or
12 systems of street lighting, provide for a long-term plan for financing
13 the planned projects, and provide for a method of distributing the cost
14 and expense of the street lighting system, including local improvement
15 districts or utility local improvement districts, and provide whether
16 the whole or some part of the cost and expenses shall be paid from
17 revenue or general obligation bonds.

18 ~~((5))~~ (6) The commissioners may employ such engineering and legal
19 service as in their discretion is necessary in carrying out their
20 duties.

21 ~~((6))~~ (7) Any general comprehensive plan or plans shall be
22 adopted by resolution and submitted to an engineer designated by the
23 legislative authority of the county in which fifty-one percent or more
24 of the area of the district is located, and to the director of health
25 of the county in which the district or any portion thereof is located,
26 and must be approved in writing by the engineer and director of health,
27 except that a comprehensive plan relating to street lighting shall not
28 be submitted to or approved by the director of health. The general
29 comprehensive plan shall be approved, conditionally approved, or
30 rejected by the director of health and by the designated engineer
31 within sixty days of their respective receipt of the plan. However,
32 this sixty-day time limitation may be extended by the director of
33 health or engineer for up to an additional sixty days if sufficient
34 time is not available to review adequately the general comprehensive
35 plans.

36 Before becoming effective, the general comprehensive plan shall
37 also be submitted to, and approved by resolution of, the legislative
38 authority of every county within whose boundaries all or a portion of

1 the district lies. The general comprehensive plan shall be approved,
2 conditionally approved, or rejected by each of the county legislative
3 authorities pursuant to the criteria in RCW 57.02.040 for approving the
4 formation, reorganization, annexation, consolidation, or merger of
5 districts. The resolution, ordinance, or motion of the legislative
6 body that rejects the comprehensive plan or a part thereof shall
7 specifically state in what particular the comprehensive plan or part
8 thereof rejected fails to meet these criteria. The general
9 comprehensive plan shall not provide for the extension or location of
10 facilities that are inconsistent with the requirements of RCW
11 36.70A.110. Nothing in this chapter shall preclude a county from
12 rejecting a proposed plan because it is in conflict with the criteria
13 in RCW 57.02.040. Each general comprehensive plan shall be deemed
14 approved if the county legislative authority fails to reject or
15 conditionally approve the plan within ninety days of the plan's
16 submission to the county legislative authority or within thirty days of
17 a hearing on the plan when the hearing is held within ninety days of
18 submission to the county legislative authority. However, a county
19 legislative authority may extend this ninety-day time limitation by up
20 to an additional ninety days where a finding is made that ninety days
21 is insufficient to review adequately the general comprehensive plan.
22 In addition, the commissioners and the county legislative authority may
23 mutually agree to an extension of the deadlines in this section.

24 If the district includes portions or all of one or more cities or
25 towns, the general comprehensive plan shall be submitted also to, and
26 approved by resolution of, the legislative authorities of the cities
27 and towns before becoming effective. The general comprehensive plan
28 shall be deemed approved by the city or town legislative authority if
29 the city or town legislative authority fails to reject or conditionally
30 approve the plan within ninety days of the plan's submission to the
31 city or town or within thirty days of a hearing on the plan when the
32 hearing is held within ninety days of submission to the county
33 legislative authority. However, a city or town legislative authority
34 may extend this time limitation by up to an additional ninety days
35 where a finding is made that insufficient time exists to adequately
36 review the general comprehensive plan within these time limitations.
37 In addition, the commissioners and the city or town legislative

1 authority may mutually agree to an extension of the deadlines in this
2 section.

3 Before becoming effective, the general comprehensive plan shall be
4 approved by any state agency whose approval may be required by
5 applicable law. Before becoming effective, any amendment to,
6 alteration of, or addition to, a general comprehensive plan shall also
7 be subject to such approval as if it were a new general comprehensive
8 plan. However, only if the amendment, alteration, or addition affects
9 a particular city or town, shall the amendment, alteration, or addition
10 be subject to approval by such particular city or town governing body.

Passed by the House February 23, 2009.

Passed by the Senate April 13, 2009.

Approved by the Governor April 28, 2009.

Filed in Office of Secretary of State April 29, 2009.