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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

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

Appellants,

v.

SNOQUALMIE PASS UTILITY DISTRICT, a Washington corporation,  
Defendant/Cross-Appellant.

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SNOQUALMIE PASS UTILITY DISTRICT'S BRIEF  
ON CROSS-APPEAL

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## I. INTRODUCTION

After purchasing their 76.8 acre property in 2003, which they admit was without proper due diligence, appellants Michael and Myrna Darland (“Darland”) learned that they lacked easements necessary to develop the property in the manner they wished. The easements were necessary for both County-required access roads to the landlocked property, and to allow them to extend water and sewer lines to their property. Darland then sued Snoqualmie Pass Utility District (“the District”) claiming that because their predecessors paid for water and sewer connections under ULID nos. 4 and 7, the District was required to (1) obtain easements sufficient to allow the 60-foot wide access roads to their property, and (2) extend the water and sewer lines from their termination points (at District expense) to their property. Dismissing Darland’s claims on summary judgment, the trial court determined that when the Darlands purchased the subject property:

[t]he overall condition of the property was known, or should have been known, to plaintiff when it was purchased. The price of the property when plaintiffs purchased it necessarily included every facet of that property; and every tort, contract, easement, or other legal burden cognizable at law was transferred with the property to the plaintiffs when they took that deed. There was then, and there is now no cognizable claim for recoupment of previously paid ULID assessments. CP at 1509-10.

Simply put, there is no theory or basis under Washington law (1) allowing Darland to contest the sufficiency of the special benefits received under the ULID nos. 4 and 7, or (2) allowing a refund of the assessments paid by his predecessors.

## II. ASSIGNMENTS OF ERROR

The trial court erred in denying the District's August 2005 "Motion for Partial Summary Judgment Re: Water and Sewer Main Extension."<sup>1</sup> Specifically, it erred in failing to find as a matter of law:

(1) that Darlands are conclusively barred under RCW 57.16.100(1) from contesting the special benefits conferred on their property in relation to the amount of assessment paid under ULID nos. 4 and 7, given that their predecessor-in-interest did not timely file any appeal pursuant to RCW 57.16.090; and

(2) that the District has no duty to extend the existing water and sewer lines to Darland's property under ULID nos. 4 and 7.

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<sup>1</sup> Although Judge Cooper denied this motion without explanation on September 15, 2005 (CP at 1903-05), Judge Sparks appears to have granted summary judgment to the District based on similar arguments in his Order of December 28, 2015. To the extent Darland appeals the dismissal of their claims on the basis that they are barred by RCW 57.16.090, the District cross-appeals the order of Judge Cooper which dismissed the District's similar motion in 2005.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is the challenge of a property owner to a ULID assessment, including a challenge to the sufficiency of the “special benefit” conferred upon the property, limited to the statutory procedure set forth in R.C.W 57.16.090?
2. Did the trial court err in denying the District’s August, 2015 “Motion for Partial Summary Re Water and Sewer Main Extension” because Darland’s predecessor-in-interest failed to appeal the District Board’s decision regarding his assessments under ULID nos. 4 and 7 within the time periods established by R.C.W 57.16.090?
3. Is Darland conclusively barred from now contesting the sufficiency of the “special benefit” conferred on the subject property, including whether the water and sewer main lines should be extended to the property boundary, because Darland’s predecessor-in-interest failed to appeal the District’s assessment as provided in R.C.W 57.16.090?

### **IV. STATEMENT OF THE CASE**

#### **A. Formation of ULID Nos. 4 and 7 for Water and Sewer Improvements within SPUD.**

Two ULIDs formed by the District are at issue here. In May 1982, the District formed ULID No. 4 for the purpose of installing a sewage treatment plant. CP at 553, 358. No sewer line extensions were part of the ULID. The subject property was assessed a total of \$48,921.75 pursuant to ULID No. 4, and the right to 38.37 sewer connections was obtained by dividing the amount of the assessment by the existing connection charge of \$1,275.00. CP at 553.

The District formed ULID No. 7 in 1987. The purpose of ULID No.7 was to install a new water transmission main and two storage tanks. CP at 1770. The new water main began at the Snoqualmie Summit area and ran approximately 4 miles down the Pass, following Interstate 90 and terminated across from the Hyak Estate Area on the Northeast side of I-90. This is approximately 4500 feet from the south corner of the Darland property. CP at 1770. The water main extension began in the summer of 1987, and was completed in the spring of 1988. CP at 1771.

At all meetings in which the formation of ULID No. 7 was discussed, there was a Map showing the proposed route of the new water main. CP at 360, 361. The *terminus* of the new water main was determined by the amount of the District's bonding capacity which was available to the District to pay for the project. CP at 362-63.

**B. Ownership of the Subject Parcels Before, During, and After Formation of the ULIDs.**

At the time ULID nos. 4 and 7 were formed, the subject property, consisting of four parcels totaling 76.8 acres, was owned by a German national: Michael Graf Von Holnstein. CP at 552, 553. Prior to formation of the ULIDs, Von Holnstein submitted a "Gold Creek Preliminary Plat" to Kittitas County. By September 18, 1978, the Kittitas County

Commissioners had given preliminary approval for the development of a 100 lot subdivision on the property on subject to:

1. *Access road to the development from the frontage road shall be dedicated 60 foot right of way...*"

5. *The subdivision shall be serviced with community water and the final approval shall not be given until the sewer system is hooked up with the Sewer District No. 1 on the District's expanded plan. The subdivision roads shall be constructed according to recreation standards recommended by the County Engineer. CP at 1186-1188.*

Von Holnstein made no objection or protest to the assessment he received under ULID No. 4. CP 359-60. Indeed, becoming part of ULID No. 4 helped to satisfy one of the conditions placed upon development of the plat by the Kittitas County Commissioners: allowing connection to the District's sewer system.

When ULID No. 7 was being formed, Von Holnstein made a written protest to the District Board of Commissioners, but did not ask to opt out. The Commissioners voted to include his property within ULID No. 7. CP at 364-65, 553-54. Von Holnstein never took the position that the District's assessments were unfair or inappropriate. He also failed to appeal the matter to Superior Court after confirmation of the assessment role. CP at 555.<sup>2</sup>

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<sup>2</sup> As set forth, *infra*, Washington law makes it clear that if (1) a property owner is dissatisfied with his assessment method or (2) believes the assessment was unfair in

Von Holnstein failed to pay the assessments for ULID no. 7 and the District began the process of foreclosing on his property in order to recover the amount of unpaid assessments. He then sold the property to Miller Shingle on June 1, 1989. Miller Shingle was part of a joint venture with Louis Leclezio. CP 553-54. After Miller Shingle purchased the property, it paid the assessments over several years to the Kittitas County Treasurer's office. CP at 554. There is no evidence that Miller Shingle ever contested the amount of the assessments, or the special benefits provided to its property under ULID nos. 4 and 7.

Miller Shingle applied for a re-zone of the property from "forest and range" to "planned commercial zoning." On September 12, 1989 the Board of Kittitas County Commissioners approved the adoption of Planned Commercial Zoning for the property. This was done under Ordinance No. 89-Z1. CP at 554, 1192.

In June 2003, Miller Shingle sold the property to Darland. CP at 553. At the time of the sale, all ULID assessments had been paid. In June 2003, the improvements to the District's sewer system under ULID no. 4 had been in place since 1982 (21 years). The improvements to the District's water system under ULID No. 7 had been in place since 1988 (15 years).

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relation to the special benefit he received, his remedy is to appeal the District's decision to Superior Court pursuant to RCW 57.16.062 and 57.16.090.

**C. History of the Access Issue.**

1. Miller Shingle Efforts to Obtain Access Easements to the Landlocked Parcels.

Beginning in the early 1990s, Louis Leclezio (Miller Shingle's joint venturer) attempted, unsuccessfully, to obtain the required 60-foot “access” right-of-way from approximately I-90 to the boundary of the subject property. CP at 866, 915. The length of the right-of-way sought was approximately 640 feet long, and followed the route of the “Old Sunset Highway” on which Miller Shingle’s predecessor, Von Holnstein, had secured a 20-foot wide right-of-way in 1986 from the State of Washington. CP at 866, 915.

In 1994, unbeknownst to the District Commissioners, former District Superintendent Richard Kloss began working with Leclezio to obtain the same right of way. Kloss admits that he got involved in this “on his own.” CP 846, 864. Kloss then proceeded in 1994, without notifying the Board of Commissioners, to commit the District as a Grantee to three different Quitclaim deeds from property owners abutting the Old Sunset Highway: Kerslake, Mathieu, and the State. CP at 991-993, 996-1001, and 1010-1012. These quitclaim deeds obligated the District, “or its assigns,” to build a road in the easements granted to the District.

Kloss personally typed up the Quitclaim deeds transferring rights-of-way from third parties to the District. CP at 872, 879, and 880. He testified he didn't submit these to the District's Commissioners for review after he typed them up. CP at 872. He says he "probably ran them by the District's attorneys." Id. However, review of the billing records of the District's attorneys at this time show no such consultations with the District's attorneys. CP at 967-68. Kloss testified that he "felt" he could sign a quitclaim deed – making the District the Grantee of an obligation to build a 640 foot road to the Miller Shingle property – without approval of the Board of Commissioners. CP at 884.

Kloss was never authorized by the Commissioners to do this. Any and all matters related to the procurement of easements, or quitclaim deeds, must occur by approval of the Board of Commissioners. They must be discussed and voted on by the Commissioners at Board meetings. CP at 993. There is nothing in the Board of Commissioners' meeting minutes, from 1990 until Mr. Kloss' retirement in July 2000, which shows that the subject of these quitclaim deeds was even raised. They were never voted upon or authorized by the District. CP at 993-94. On June 26, 2000, in the week before his retirement on July 1, 2000, Mr. Kloss quitclaimed two of the three easements he received from the abutting property owners back

to them. CP at 1002-1009. Again, he did so without knowledge or approval of the Board of Commissioners. CP at 993.

2. Darland efforts to Obtain Access Easements to their Parcels.

When Darland purchased the landlocked parcels from Leclezio and Miller Shingle in June 2003, they were well aware of the need for both (1) “road access” to the property, and (2) utilities, including water and sewer, in order to develop the property. However, they did little due diligence before purchasing the parcels. Darland relied on the representations of Mr. Leclezio concerning access to the property, and Leclezio lied to him. As stated in Mr. Darland’s Declaration of September 2, 2011:<sup>3</sup>

2. I purchased this commercial property in 2003...Eight years and two months later I remain unable to use this property for the commercial uses it was represented by Leclezio to have. Chief among the false items related to me by Leclezio was the availability of water and sewer trunk lines at the property boundary, availability of 230 water and 38 sewer hookups, utility access **and a 60 foot wide access to enable legal use of more than three lots on the entire 76.8 acre property...** ...

5. Leclezio [represented] to me that the property had to be purchased from Miller Shingle no later than June 9, 2003, which gave four business days out of the 6 remaining days to complete my due diligence.”

6. **I recognized that complete due diligence could not be reliably conducted in that short time considering the fact that I was also engaged during the same and following week in completing a major land purchase in Chile, South America.”**

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<sup>3</sup> CP at 1906-1913.

7. I made an offer, through Popp, to purchase the property subject to the five important conditions, which Leclezio stated were attributes of the property he was offering. Those conditions were:

a. **A 60-foot wide access from the U.S. Forest Service Road to the property boundary;**

b. Water and sewer trunk lines to the property boundary at the cost of the SPUD with no additional cost to me.

c. 230 water and 38 sewer hookups that would be immediately made available by SPUD at no additional cost to me....

8. My offer, through Popp to Leclezio, stated that if my inspection of the property proved satisfactory, and all five of these pre-sale-attributes of the property, as described above, were proved true, I would then release a 26-acre portion (not including any of the water and sewer hookups) of the 76.8 acre property to Leclezio through a quitclaim deed which I would file in escrow with the title company in signed form. If any of one or all of these attributes were found not to be as represented, then all of the property would remain in my name....

18. Shortly after buying the property Leclezio and I traveled to visit the SPUD on Snoqualmie pass. I learned that day that SPUD did not intend to bring water and sewer trunk lines to the property boundary as represented by Leclezio. I also learned that the SPUD would not provide me with a letter guaranteeing that SPUD would provide water for 230 water and 38 sewer hookups to the property. **I later learned that Leclezio was aware of these facts at the time he sold the property to me...**

21(c.) **There has never been a 60-foot wide right of way into the property. I later learned, from Miller Shingle, that Leclezio had not been able to secure such a 60-foot right of way in spite of years of his effort trying to do so. (emphasis added)**

To summarize, Darland admits never confirming the availability of road access and utility service before purchasing the property. They relied

on Leclezio's representations as to access when purchasing the property. Before purchase, Darland never spoke with anyone at Kittitas County or the District about the status of the water and sewer connections, or if they would be delivered at District expense to his landlocked parcels. CP at 929-930. Given the uncertainty as to water and sewer access when they purchased the property, Darland structured the purchase of the property to give Leclezio a quitclaim deed of 26 acres, to be released from escrow if Leclezio could acquire the necessary access and utility easements. CP at 935.

**D. Darland's Suit Against the District.**

After acquiring the subject properties, Darland demanded water and sewer connections from the District. They were told the District would not extend the water and sewer lines to the property, contrary to what Leclezio had told them. CP at 1911. It is, and always has been, the property owner's responsibility to acquire the necessary easements and to extend the water and sewer lines to the parcels. CP at 994. Darland and Leclezio sued the District in 2004. The litigation was then stayed in September 2005, while Darland and the District worked under a Memorandum of Understanding ("MOA"). The "MOA" was a settlement agreement between plaintiffs and the District. It set forth certain duties and responsibilities concerning Darland's property. Each party had

separate responsibilities under the MOA to seek necessary right-of-way permits and related easements. The District had responsibility to act as the lead agency for purposes of obtaining the *utility related* rights-of-way, easements, and permits. Darland had responsibility to act as the lead agency to obtain all *access related* easements and permits, primarily in the form of two 60-foot wide access roads to the property which meets all applicable county requirements for development purposes. CP at 962-963.

In order for the utilities to be extended for the proposed 230 ERUs, Darland first needed development approval from Kittitas County for the project. Approval depended on Darland obtaining two 60'-wide "access roads" by purchasing easements from neighboring property owners. Despite the parties' efforts, on November 16, 2006, the Washington State Department of Transportation ("DOT") informed Darland that it would not grant them any easements for *access* roads on its property. CP at 964, 979-81. Then, on September 17, 2007, DOT informed the District that it was unwilling to convey any additional easement width, or expand the use of the 20'-wide existing easement for a utility easement, beyond serving the original four parcels for ingress and egress. CP at 963-64, 977-78.

**E. Resumption of the Litigation and Dismissal of Darland's Claims.**

In February 2015, after terminating the MOA and lifting the litigation stay, Darland moved the trial court to “compel” the District to use its statutory powers of eminent domain to condemn access easements to his property. The District opposed this motion, arguing that it had no statutory authority to condemn state or private property in order for a private landowner to obtain County-mandated “access roads” as a condition to development. Judge Sparks agreed, holding that “[the District] does not have legal authority to exercise its powers of eminent domain to condemn private property for the purpose of providing road access to [Darlands’] property.” CP at 1105-1107

Unable to compel the District to use its power of eminent to obtain the access easements required by Kittitas County, Darland then moved for summary judgment to have the District reimburse the assessments paid by their predecessors. Arguing “unjust enrichment,” Darland argued that the District collected assessments but did not provide water and sewer connections. The District cross-moved for summary judgment arguing that there was no theory upon which Darland could obtain reimbursement of assessments which had been paid by their predecessors over 15 years prior. The trial court granted summary judgment to the District.

#### IV. ARGUMENT

Darland claims that the District has a duty to extend the water and sewer lines to their property, otherwise their property has not been “specially benefitted” by ULID mos. 4 and 7. They argue, either: (1) the District must be compelled to extend these lines by utilizing its statutory power of eminent domain to condemn public and private property which lies between the present *termini* of those lines and their property, or (2) they must be refunded the assessments paid by Miller Shingle under various legal theories. As the trial court correctly ruled, these claims fail as a matter of law.

**A. Under Washington Law, and as Ordered by the Trial Court, the Subject Property was Specially Benefitted by ULIDs Nos. 4 and 7.**

The essence of Darland’s argument on appeal is that, in exchange for the assessments paid by his predecessors under ULID nos. 4 and 7 before they acquired the properties, the District is required to extend its water and sewer main lines all the way from the present *termini* of those lines to Darland’s property boundary – at District expense. Otherwise, they argue, there has been no “special benefit” to their property. This argument is contrary to established Washington law.

1. The District delivered the Improvements set forth in the Resolutions creating ULID Nos. 4 and 7.

The District acknowledges that the formation of the ULIDs, and the payment of assessments by property owners, creates a contractual relationship. *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 541, 989 P.2d 1238 (1999), rev. denied, 141 Wn.2d. 1006, (2000). The terms and conditions of that contractual relationship, however, are based solely upon the language of the ordinance or resolution creating the ULID. *Funk v. City of Duvall*, 126 Wn. App. 920, 109 P.3d 844 (2005).

Neither of the District Resolutions creating ULID nos. 4 and 7 makes any express or implied promise to extend the *termini* of the water transmission main or the sewer main to the boundary of the subject property – or to the boundary of any specific property in the District. First, Resolution 81-3 (creating ULID no. 4) is only for the purpose of constructing a sewage treatment plant. CP at 1779-1784, 358, 553. ULID no. 4 did not construct or extend any sewer mains.

With respect to ULID no. 7, Resolution 87-9 provides as follows:

The acquisition and construction of a portion of the general comprehensive plan of water supply for the District as adopted by Resolutions Nos. 86-1 and 86-4 and applicable

to Utility Local Improvement District No. 7 hereinafter described are ordered to be carried out. **Those improvements consisting of the construction and installation of water mains, water tanks, pressure reducing stations and appurtenances as shown and described in Exhibit A attached hereto and by this reference made a part hereof.** (emphasis added)

CP at 1827-34. This Resolution language specifically provides that the improvements under ULID no. 7, including the construction and installation of the water mains, is “**as shown and described in the Exhibit A**” to the Resolution. “Exhibit A” is a map, and clearly describes the route of the water main and clearly indicates its *terminus* is several thousand feet from the boundary of plaintiffs’ property. CP at 1834. The length of the extension was determined by the amount of the District’s bonding capacity at the time. CP at 362-63. There is no language in the Resolution, or in the incorporated map, that states that the water main will extend to the boundary of Darland’s property or to the boundary of any other property in the ULID. In fact, a simple review of the map indicates that the new water main does *not* run to the boundary of *the majority* of the properties in the ULID, but rather runs only in the vicinity of those properties.<sup>4</sup>

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<sup>4</sup> Clearly there was never any plan to run the water main along the boundary of every property. Rather distribution systems were required to be run from specific properties to connect to the water main. CP at 1771-72.

Accordingly, under *Vine Street* and *Funk*, the District has made the very improvements for water and sewer service set forth in its Resolutions. From there, it has always been the obligation of an individual property owner to construct whatever service or distribution lines are needed to deliver water or sewer service from the District's main line to each separate property or undeveloped tract of property. CP at 1771-72. Thus, as a matter of law, the District has no duty to extend the terminus of the water or sewer mains to the subject property.

2. Darland's Property received a Special Benefit by becoming part of ULID Nos. 4 and 7.

Under RCW 57.08.005, the powers of a water and sewer District are specifically enumerated. Included is the power "[t]o provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof in accordance with chapter 57.16 RCW. *RCW 57.08.005(19)* A property assessed under a ULID must receive a "special benefit." To be considered "special", these benefits must be substantially more intense to the specific properties assessed within the improvement area than to the rest of the municipality (outside the improvement area). *Heavens v. King County Rural Library District*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965).

The appropriate inquiry for the Court is whether the ULID improvements specially benefited the properties located within ULID nos. 4 and 7 by appropriately increasing the market value of those properties. The benefit from the public improvement is fixed at the time the final assessment roll is confirmed. *RCW 57.16.100(1)* A property within the assessment district may or may not choose to use the benefit at that time. *See, e.g., Funk, supra*, (many vacant properties deferred for years connection to sewer system). That is not in control of the municipality or district (except in the case a municipality mandates connection of improved property to the utility system – see e.g., *RCW 57.08.005 (9)*).

Here, the benefits deriving from the ULIDs no. 4 and 7 were fixed in 1982 and 1987, respectively. CP at 1198. The trial court found there was no appeal by the properties' prior owner (Von Holnstein) from the ULID assessments fixed by the District against the property. CP at 555, 558. The Court further found that the District "followed all proper procedures and conferred special benefits on the plaintiffs' property." And, the Court found that the properties were entitled to receive 230.07 water (at 400 gallons per day) and 38.37 sewer ERUs, and the properties were specially benefitted by the availability of the water and sewer services. CP at 558-59.

In other words, the special benefit each property acquired was feasible access to a public water and sewer system. Prior to ULID no. 7, Darland's property had no feasible access to any public water system. Without the construction of the water transmission main, Darland's property (and other properties located in ULID no. 7) was limited to obtaining water by private well. Similarly, ULID no. 4 made access to a public sewer system feasible for those properties located within the boundaries of the ULID – as opposed to being dependent upon a private septic system. Without access to public water and sewer, Kittitas County would not authorize more substantial development of the subject property. Thus, (1) the construction of a water main that began over 4 miles away from Darlands' property and terminated 4,500 feet from their property, and (2) a sewer line that ended 2,200 feet from Darlands' property clearly conferred a "special benefit" by creating more feasible access to public water and sewer which previously did not exist.

3. The District made no other promises outside the ULIDs that it would extend the water and sewer lines to the boundary of Darland's property, or any Landlocked property.

Darland argues at p. 11-14 of his Opening Brief that statements made by District Commissioners, or by former Superintendent Richard Kloss, show that the District intended to extend water and sewer service

“to the property boundary” of each individual lot within the geographic areas of the ULIDs. This argument was repeatedly refuted below.

Darland relies heavily on the Declarations of Richard Kloss, a former Superintendent of the District. Mr. Kloss worked at the District from 1973 to July 1, 2000. He made the statement that “[i]t is the responsibility of the Utility District to deliver the utilities to the boundary of the assessed properties.” in support of various Darland motions below. Mr. Kloss’ statement is not supported by the Resolutions approving the ULIDs themselves, and contradicts long established District policies.

The Snoqualmie Pass Utility District is a governmental body comprised of a Board of three publicly elected commissioners, similar to a board of county commissioners, and can act authoritatively only by adopting formal resolutions, passed by a majority of the Board. RCW 57.12.010; *see also, Stoddard v. King County*, 22 Wn.2d 868, 882, 158 P.2d 78 (1945). The principle is well established that a public or governmental corporation such as a municipal corporation is not estopped by the acts of its officers when they exceed their powers. *Stoddard, supra*, 22 Wn.2d at 886-87 (1945); *State ex rel Bain v. Clallam County Bd. Of County Commissioners*, 77 Wn.2d 542, 549 (1970).

Mr. Kloss’ actions in seeking to acquire an access right of way for the Miller Shingle property, and to execute quitclaim deeds on behalf of

the District, were without the District's knowledge or approval, and cannot as a matter of law bind the District under Washington law.<sup>5</sup>

**B. Under Washington Law, There is no Basis for a Refund of Assessments because Darland's predecessors failed to challenge the Assessments under ULID Nos. 4 and 7 as provided in RCW 57.16.090.<sup>6</sup>**

Darland argues that because they are unable to use water and sewer connections for which their predecessors were assessed, due to their inability to obtain rights-of-way to their property more than 15 years after the assessments were made, they should receive a refund or the District will have been "unjustly enriched." This would violate Washington law.

1. The Legislature has Narrowly Limited Challenges to ULID Assessments.

Washington, like most states, limits challenges to LID assessments to specific processes. The general principle regarding finality of assessments is stated as follows:

"A property owner has the right to challenge any assessment at the time and in the manner provided by statute. The manner of his protest, however, should conform with the applicable statute; for instance, as to the time of making the protest."

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<sup>5</sup> See discussion of facts related to these actions at pp. 7-9, under the "History of Access Issue" heading.

<sup>6</sup> In support of its argument why no refund of assessments is available under Washington law, the District supplied the trial court, without objection, the expert Declaration of P. Stephen DiJulio. Mr. DiJulio is a pre-eminent practitioner in the area of ULID law, and sets forth in his Declaration why Plaintiffs' request for a refund of ULID assessments has no basis under Washington law. See CP 1193-1214.

3 E.C. Yoakley, *Municipal Corporations*, Section 556 at 436 (1958)

The Legislature has authorized only one cause of action for an assessment challenge, a statutory appeal:

The decision of the district board of commissioners upon any objections made within the time and in the manner herein prescribed may be reviewed by the superior court upon an appeal thereto taken in the following manner. **The appeal shall be made by filing written notice of appeal with the secretary of the board of commissioners and with the clerk of the superior court in the county in which the real property is situated within ten days after publication of a notice that the resolution confirming such assessment roll has been adopted, and such notice of appeal shall describe the property and set forth the objections of such appellant to such assessment. . . .** The superior court shall, at such time or at such further time as may be fixed by order of the court, hear and determine such appeal without a jury. . . . The judgment of the court shall confirm, unless the court shall find from the evidence that such assessment is either founded upon a fundamentally wrong basis or a decision of the board of commissioners thereon was arbitrary or capricious, or both, in which event the judgment of the court shall correct, modify, or annul the assessment insofar as it affects the property of the appellant.

R.C.W 57.16.090 (emphasis supplied)

To further emphasize the limitation on assessment challenges, the Legislature provides:

Whenever any assessment roll for local improvements shall have been confirmed by the district board of commissioners, the regularity, validity, and correctness of the proceedings relating to the improvements, and to the assessment therefor, including the action of the district

commissioners upon the assessment roll and the confirmation thereof, **shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned** in any proceeding whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this chapter, and not appealing from the action of the commissioners in confirming such assessment roll in the manner and within the time in this chapter provided. **No proceedings of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment**, or the sale of property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor.

RCW 57.16.100(1) (emphasis supplied).

In the case of this challenge to the District assessments under ULID nos. 4 and 7, the trial court determined that all proper procedure was followed and the properties were specially benefitted. Darland would have the court adjudicate facts regarding the extent of the “special benefit” long after the time authorized by the Legislature. This violates established rules.<sup>7</sup>

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<sup>7</sup> Indeed, not a single reported Washington decision allows challenging the sufficiency of a “special benefit” under a ULID, including the refund of assessments, outside the statutory procedures. All discuss the sufficiency of the “special benefit” within the context of an appeal of the assessment under RCW 57.16.090, or its counterpart for cities and towns: RCW 35.44. See e.g., *Hargreaves v. City of Mukilteo*, 37 Wn.2d 522 (1950), (property owners “*appealed from an order of the Mukilteo Water District...confirming an assessment role.*”); *Time Oil Company v. City of Port Angeles*, 42 Wash.App. 473, 475-76 (Div. 2, 1985), (“...Time Oil’s attorney asked the council to reopen the public hearing to consider additional information on Time Oil’s behalf. The council refused, denied

The purpose of the statutory requirement for prompt appeal of assessments is to identify risks to the bond holders whose recourse is against those assessments. RCW 57.20.090 (LID bond holders “shall not have any claim therefor against the district by which the same is issued, except for payment from the special assessments made for the improvement for which the local improvement bonds were issued”). Had Darland’s predecessor, Von Holnstein, timely challenged his assessments, that risk would have been disclosed to prospective bond purchasers. Because there was no challenge by Von Holnstein, that issue was not identified to bond buyers. The public water and sewer projects were built; the assessments levied and collected; and, the bonds paid off. There is no further financing or funds related to the LIDs.

2. Darland May Not Collaterally Attack Either the Sufficiency of the Special Benefit or the Assessments Made over 27 Years Ago.

The prohibition on collateral attacks to LID assessments was reaffirmed by the Washington Supreme Court in *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 119 P.3d 325 (2005). In that case,

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all protests, and adopted the ordinance as written, thereby confirming the assessment role. *On Time Oil’s appeal*, the Superior Court, also confirmed the assessment.”); *Hasit LLC v. City of Edgewood LID No. 1*, 179 Wn. App. 917, 932 (Div.2, 2014), (after the Edgewood City Council voted on an ordinance to confirm an assessment roll for a new sewer system, and the ordinance took effect August 1, 2011, nine protesting owners *timely appealed* the Council’s decision to Pierce County Superior Court pursuant to RCW 35.44.250, alleging both substantive defects in the appraiser’s assessment and flaws in the protest procedures.) (emphasis added)

the court held that assessments could not be collaterally attacked outside of the proper statutory procedure unless there was a failure of notice or the entire LID was illegal:

Tiffany is challenging the amount and methodology used to arrive at the amount for a specific assessment, arguing it is excessive. It does not, and cannot, contend that the entire LID is illegal and without basis. There was no jurisdictional defect that would allow for an exercise of jurisdiction despite failure to follow the requisite statutory procedure. Tiffany was required to use the prescribed statutory procedure for challenging the assessment and it failed to do so. Accordingly, the assessment is conclusively correct and “cannot in any manner be contested or questioned in any proceeding by any person.” RCW 35.44.190. Thus, the superior court properly determined that it did not have jurisdiction to determine whether the assessment was correct. Under RCW 35.44.190, the assessment stands as a proper measure of the special benefits received.

*Tiffany Family Trust*, 155 Wn.2d at 237-238 (footnotes omitted). Indeed, even claims of constitutional violations are not sufficient for a collateral attack in the absence of illegality of the LID or failure of notice. *Id.* This is in accord with prior Washington law and the law in other jurisdictions that have considered the issue. *See, e.g., Hoffman v. City of Red Bluff*, 63 Cal. 2d 584, 407 P.2d 857, 47 Cal. Rptr. 553 (1965).

Here, long after the assessments were confirmed under the statutorily-mandated process (and after the assessments were paid), Darland seeks to collaterally attack the assessments and seeks a refund.

Washington statutes and courts do not permit such attacks. Darland cannot demonstrate any better basis for not filing a timely appeal or any other basis for a delayed challenge than did the plaintiffs in *Tiffany Family Trust Corp.*

3. There is no Refund (With Interest) Available Under Washington Law.

Just as collateral attacks on assessments are prohibited, so are refunds or other repayments of assessments when not specifically authorized by statute. Again, this follows the earlier cited authority that LIDs are purely statutory financing mechanisms. The Supreme Court set out this principle in *City of Longview v. Longview Co.*, 21 Wn.2d 248, 150 P.2d 395 (1944). As here, there was no appeal from LID assessments, but later on demand of a property within the LIDs, payments were made by the Treasurer and the LID bond-holders challenged the action. The Court began with the regularly stated rule (discussed above):

We have repeatedly held that, in view of the explicit terms of this statute, none but jurisdictional defects in the proceedings will serve to defeat an assessment upon property of an owner who has failed to file objections to the confirmation of the assessment roll. Objections that an assessment was made without regard to benefits, or in excess of benefits, or in excess of actual cost of the improvement, or in excess of charter limitations, are not jurisdictional and will not serve to defeat the assessment.

*Id.*, at 252 (citations omitted). The Court then found no basis for the claim of the property owner. There was or was not a challenge to the

assessments. If it was a challenge to the assessments, it was too late to assert:

Now, we can see no practical difference in the situation presented here from that if The Longview Company were resisting the payment of assessments on its property in the first instance. In the ultimate, its right to retain the refunds must rest upon the theory that assessments upon its properties exceeded benefits and exceeded the cost of improvements.

*Id.*, at 253. The Court found no statutory basis for the City payment to the Longview Company after the Company's payment of assessments and while bonds were outstanding. And then, only excess LID funds could be refunded. *Id.*

Where the Legislature has provided for refunds or repayments of collected assessments, it has specifically stated. Most specifically for cities, the Legislature has authorized **excess funds** to be refunded to properties within an LID after bonds are paid. RCW 35.45.090 provides for refunds on demand of assessment payers "after the payment of the whole cost and expense of such improvement, in excess of the total sum required to defray all the expenditures by such municipal corporation on account thereof . . . ." When an LID is backed by a guarantee fund, even this option is eliminated:

The provisions of this chapter relating to the refund of excess local improvement district funds shall not apply to any district whose obligations are guaranteed by the local improvement guaranty fund.

*Id.* And, there is not a refund statute for utility districts, comparable to the city statute at RCW 35.45.090. In conclusion, Darland has no basis under Washington law for a refund of the assessments paid by Miller Shingle under ULID nos. 4 and 7.

4. Darland's Claims for a Refund Under Various Theories are Precluded Under Washington Law, Because no Appeal was Taken Pursuant to RCW 57.16.090.

Darland argues that unless the District extends the water and sewer lines to their property boundary, the District owes them a “refund” of assessments paid by his predecessors, with interest. Darland’s argues that a refund should be paid under the legal theories of (1) unjust enrichment, (2) breach of the implied covenant of good faith and fair dealing, (3) impossibility of performance/rescission/restoration, (4) equitable estoppel, and (5) promissory estoppel. As set forth above, Washington law precludes collateral attack on the sufficiency of the “special benefits” conferred under ULID nos. 4 and 7.

**C. Well Established Law Precludes the District from Using its Powers of Eminent Domain to Obtain Access Easements to Private Property.**

Darland argues that it is the District’s “contractual obligation” to acquire by eminent domain the road access needed for his private development: “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 Property owners, without giving any consideration in return.” Darland’s Brief at p.21. As shown above, consideration *was* given for the assessments paid by Darland’s predecessors, and the property *was* specially benefitted by ULID nos. 4 and 7 in 1982 and 1987, respectively. More troubling is Darland’s misapprehension of Washington law as it relates to the District’s power of eminent domain.

1. The District’s Statutory Eminent Domain Powers.

A municipal corporation, such as a water and sewer district, does not have the inherent power of eminent domain. It may exercise that power only when it is expressly authorized to do so by the state legislature. *In re Condemnation Petition of Seattle Monorail Authority*, 155 Wn.2d 612, 622 (2005); *Tacoma v. Welcker*, 65 Wn.2d 677, 683 (1965). Ordinarily the legislature must grant the municipal corporation the authority to condemn property for a particular purpose in order for the courts to allow condemnation for that purpose. *In re Seattle*, 104 Wn.2d 621 (1985). Statutes granting the power of eminent domain are strictly construed, although the statutes will not be so strictly construed as to defeat the purpose of the legislative grant. *In re the Condemnation Petition of Seattle Monorail Authority*, 155 Wn.2d at 622.

The District operates under Title 57 RCW. The District's authority is stated primarily in RCW 57.08.005. That statute begins with the following:

“A district shall have the following powers:

1. 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**. The right of eminent domain shall be exercised in the same manner and by the same procedure as provided for cities and towns, and so far as consistent with this title, ...” (emphasis in bold)

RCW 57.08.005 grants express condemnation authority in several specific situations. For instance, the District clearly has the authority to condemn property for the purpose of installing water or sewer lines and other utility facilities on property, and the District clearly has the express authority to condemn land and interest in land for that purpose. *See* RCW 57.08.005(1), (3), (5), and (7). However, none of these statutory provisions grant the District the authority to condemn land for the purpose of *providing road access* to privately owned property. While RCW 57.08.005(1) is broadly worded to authorize a water-sewer district to condemn “all lands, property and property rights, ... **necessary for its purposes**,” *there is no statute that provides a Water-Sewer District with authority to construct, operate, and maintain a public road or street that provides access to a private non-district property*. In other words, the

construction, operation, and maintenance of public streets, to provide access to private, non-district property, is not a proper “purpose” of a Water-Sewer District. Therefore, RCW 57.08.005(1) cannot be relied upon as the requisite express statutory authority for the District to condemn either an easement or fee simple interest in land for the purpose of providing access to Darland’s property.

Accordingly, the statutes governing the District’s condemnation authority make clear that the District does not have the statutory authority to condemn property to provide access to private property.

2. Darland’s Construction of the Authority Granted Under RCW 57.08.005 Misapprehends the interplay with RCW 8.12.030.

Darland argues, incorrectly, that the “in the same manner and by the same procedure” language found in RCW 57.08.005(1) means that the District may exercise condemnation authority coextensive with “cities and towns,” and, therefore, that it can condemn property for “streets.” A careful review of RCW 57.08.005, however, shows this isn’t a proper construction. In RCW 57.08.005, the Legislature has granted Water and Sewer Districts condemnation powers for certain enumerated and limited purposes. *See* RCW 57.08.005(1), (3), (5), (6), (7) and (8). The “in the same manner and by the same procedure” language can only refer to the mechanics of exercising the power of eminent domain through legal

action. It does not make a Water and Sewer District a “general purpose” government like a City or town, which can condemn land for many more government functions like Police Departments, Fire Departments, etc...

3. The District’s Condemnation Action Must be for “Public Use.”

In addition to examining a governmental entity’s statutory authority to condemn property, courts employ a three part test to determine the validity of an eminent domain action. The Court must find that (1) the use is really a public use, (2) the public interest requires it, and (3) the property appropriated is necessary to facilitate the public use. *State v. Evans*, 136 Wn.2d 811, 817 (1998). Thus, the District must have the express statutory power to condemn the property, and the District’s asserted purpose for the proposed acquisition must be a “public use.”

The constitution prohibits the taking of private property for a private use. *State v. Evans*, 136 Wn.2d at 817; *In re Seattle*, 96 Wn.2d at 624 (1981). In *In Re Seattle*, the Court explained:

“If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked. State, ex rel., Puget Sound Power and Light Company v. Superior Court, 133 Wn. 308, 233 P. 651 (1925). Therefore, where the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use.”

The Court found that the City had attempted to condemn property for a public park/plaza, public parking, monorail station, and private retail and cinema space in buildings, the City's condemnation action was for a "private use" as the City had no authority to condemn property for a retail shopping center.

In addition, if a condemnation action really serves private interests, by accomplishing what the private property owner could not accomplish on its own, then the condemnation action is for a private use, not a public use. In *King County v. Theilman*, 59 Wn.2d 586 (1962), a developer owned two adjacent parcels of property, one of which abutted on a County road. If the developer provided access to the land-locked parcel by dedicating a road through the parcel that abutted the road, that abutting parcel would lose several potential lots. The developer convinced the County to bring a condemnation action to condemn an access road across a third parcel owned by a private property owner (Theilman). The Supreme Court found that the County's condemnation action was really for a private use stating:

"The ultimate effect is to allow a neighboring land developer to take private property for a private use. This action is the County's in name only. It had no funds budgeted either to acquire relator's land or to build the road across it."

*King County v. Theilman*, 59 Wn.2d at 595-596.

Here, Darland has requested that the District condemn either an easement or fee simple interest in two 60-foot wide strips of property for the purpose of providing road access to his property. Under *King County v. Theilman, supra*, the District's condemnation action would allow a private party (Darland) to do indirectly that which the law prevents them from doing directly, and therefore is for private use.

4. Darland's Selective Reading of the "Opinion" of the Attorney General Offers no Support for their Position.

Darland argues that a May 19, 2008 letter from the Attorney General's office to State Rep. Judith Clibborn "supports the conclusion that the District does have the statutory authority to condemn both access and utility easements under the facts of this case." If one actually reads the letter, which is not an "Attorney General Opinion,"<sup>8</sup> one discovers that the writer clearly states that "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." The writer concludes that the answer depends on "applying the law to a specific fact pattern," and does not, as Darland states, "support the conclusion that the District does have the statutory authority to condemn access to as well as utility easements under the facts of this case." In

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<sup>8</sup> As the letter itself states on p.3: "This informal opinion will not be published as an official opinion of the Attorney General's Office." CP at 1059.

fact, the District has shown, and the trial court agreed, that it does not have such authority.

**D. The Various Legal Theories Darland Offers to Support their Claim of a Refund, are also Barred on Substantive and Statute of Limitations Grounds.**

At pages 27-34 of Darland's brief, they set forth several legal theories under which they claim a refund of assessments paid by their predecessors. As set forth at pp. 20-29, *supra*, RCW 57.16.100 precludes such claims. However, Darland's claims are also precluded on substantive and statute of limitations grounds.

1. Darland's "Unjust Enrichment" Claim Should be Dismissed Because the District has not been Unjustly Enriched; it has Used the Assessments to Make the Improvements it Promised to the Water and Sewer Systems. Their Claim is also Barred by the 3 Year Statute of Limitations.

Darland makes a relatively simplistic argument about the District being "unjustly enriched" by not providing water and sewer connections to their property. Because (1) their predecessors paid for the assessments, and (2) since they can't obtain the access easements to develop their property, that (3) the District should refund them the assessments paid by their predecessors.

Nothing in the Resolutions creating ULID nos. 4 and 7 states that that water and sewer trunk lines will be brought to the property lines of

landlocked parcels such as the subject property. In the case of ULID no. 4, there *was no sewer line extension at all*. The ULID was formed to build a sewage treatment plant. In the case of ULID no. 7, the assessments were used to fund a water main extension of a prescribed length, as indicated by a Map attached to Resolution no. 87-9, and as limited by the District's bonding capacity. CP at 360-63, 1773, 1825-34.

Thus, there has been no "unjust enrichment" to the District. The assessments funded the bonding used to complete construction of the ULIDs. The sewer treatment plant was built, and the water main was extended. Water and sewer connections are available to all those who were assessed under the ULIDs. The fact that Darland, and their predecessors, failed to obtain the required access easements in the 27 years after formation of the ULIDs is unfortunate for their development plans, as is the change in planning by the WSDOT in that area. In addition, Washington law does not allow the refund of assessments.

Finally, Darland's unjust enrichment claim is barred by the 3 year statute of limitations.<sup>9</sup> The special benefit under a ULID is fixed at the time the final assessment roll is confirmed. RCW 57.16.100(1) Even if a collateral action based on "unjust enrichment" were permitted, the statute

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<sup>9</sup> The 3-year statute of limitations applicable to actions on unwritten contracts applies to an action for unjust enrichment. *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 850, 583 P.2d 1239 (1978).

of limitation on this claim would have run in 1985 with respect to ULID no. 4, and 1990 with respect to ULID no. 7.

2. The District has not Breached the Covenant of Good Faith and Fair Dealing Inherent in Every Contract. Even if it had, the Claim is Barred by the Three Year Statute of Limitations.

Darland also asserted a cause of action against the District for “breach of the duty of good faith and fair dealing in every contract,” arguing the District assessed Von Holnstein’s property for water and sewer connections “knowing that the Property could never enjoy these ‘special benefits’ with the Property’s single 20’-wide easement...” CP at 1120. The implied duty of good faith and fair dealing in every contract “obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991). The duty does not inject substantive terms into a contract; rather, “it requires only that the parties perform in good faith the obligations imposed by their agreement.” *Id.* Thus, the duty arises “only in connection with terms agreed to by the parties.” *Id.* There is not a “free-floating duty of good faith unattached to the underlying legal document.” *See id.* at 570, 807 P.2d 356. “If no contractual duty exists, there is nothing that must be performed in good

faith.” *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wash.App. 192, 197, 49 P.3d 912 (2002).

- a. Darland has no Standing to Assert this Claim.

Darland has no standing to assert a tort claim on behalf of a prior owner. They did not participate in the ULID process, Von Holnstein did. To the extent there was a “contract” by virtue of the ULID formation and assessment of Von Holnstein’s property, the parties to the “contract” were (1) the District and (2) Von Holnstein. Darland is in no position to determine whether the District acted in bad faith when it included Von Holnstein’s property within the ULID. They offer no evidence that they have been assigned this claim by Von Holnstein. Accordingly, their claim should be dismissed.

- b. Darland’s Claim is Barred by the Three Year Statute of Limitations.

Under Washington law, claims for the breach of good faith and fair dealing must be brought within 3 years. *RCW 4.16.080*. Even if Darland had been assigned this claim by Von Holnstein, the time to bring it has long since passed. This claim must also be dismissed under the 3 year statute for bad faith claims.

c. There is no Evidence of Bad Faith Conduct by the District in Forming the ULIDs.

Darland offers no evidence to demonstrate how the District acted in bad faith towards Von Holnstein during the creation of the ULIDs. He simply argues: “the District assessed the property for 230 water and 38 sewer hookups knowing that the property could never enjoy these ‘special benefits’ with the property’s single 20’-wide easement; yet the District failed to obtain the easements necessary to allow the property owners to obtain the full benefit of the performance” of the contract.” As for ULID No. 4, this is--again--difficult to comprehend. Von Holnstein’s property was already within the District’s ULID boundaries by virtue of being part of ULID no. 4. The very improvement specified under ULID no. 4 – construction of a sewer treatment plant – was built. CP at 358. ULID no. 4 was never intended to extend any sewer lines. Furthermore, neither Von Holnstein nor Miller Shingle ever objected to the formation of ULID no. 4. CP at 359-60.

As for ULID no. 7, the water transmission main was extended as indicated on the map and engineering drawings. When the formation of ULID No. 7 was taking place, the District acknowledged during a meeting of the Board of Commissioners that it had received a letter from Von Holnstein’s representative objecting to being included in the ULID. The

letter indicated that Von Holnstein or his lawyer would follow-up with the District, but never did. CP at 364, 420-22. As Judge Cooper found, however, “[a]lthough plaintiffs’ predecessor protested through an agent either the creation of the assessment, the protest was rejected and the plaintiffs’ predecessor never pursued his remedy of review codified now in RCW 57.16.090.” CP at 558. In addition, the trial ruled that the subject property was specially benefitted. CP at 559, 589. Accordingly, just because the District rejected Von Holnstein’s protest does not mean it acted in bad faith. It rejected several other protests as well, and some of those property owners did pursue remedies under RCW 57.16.090. This cause of action must also be dismissed as a matter of law because there is no evidence that the District acted in bad faith when dealing with Von Holnstein.

3. Darland’s Argument that They are Owed a Refund Under the Doctrine of “Impossibility of Performance” is Contrary to Washington Law.

Darland argues at pp. 29-30 that “where impossibility of performance exists, restitution of the ‘money had and received’ is appropriate.” Plaintiffs misapply Washington law as it relates to this doctrine.

Under the doctrine of “impossibility of performance,” a party’s performance of a contract is excused if (1) his principal purpose is

frustrated (2) without his fault (3) by the occurrence of an event, (4) the non-occurrence of which was a basic assumption on which the contract was made.<sup>10</sup> The purpose that is frustrated must have been a “principal purpose” of the contract that is frustrated. It is not enough that the party had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, *as both parties understand*, without it the transaction would make little sense.<sup>11</sup> The doctrine of impossibility requires more than a showing that a specific event was unforeseeable. The Court’s focus will be on whether “the assumed possibility of a desired object to be attained by either party forms the basis on which both parties enter into it.”<sup>12</sup>

Here it is undisputed that Darland did not purchase the subject property until June 2003, some 15 years after the improvements were made under ULID nos. 4 and 7. To the extent the ULIDs as “contracts,” they had no participation in the formation of those contracts. Their property was owned by Von Holnstein at the time. The “special benefits” conferred by the ULIDs were fixed in 1982 and 1987, respectively. Accordingly, the fact that they were unable after 2003 to obtain access easements to their property, and thus develop their property commercially,

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<sup>10</sup> Restatement (Second) of Contracts, Section 265 (1981).

<sup>11</sup> Restatement (Second) of Contracts, Section 265, comment a (1981).

<sup>12</sup> *Weyerheuser Real Estate Co. v. Stoneway Concrete Inc.*, 96 Wn.2d 58 (1981).

was not an “occurrence” or “desired object” which the District understood to be a condition of the ULID. In fact, all the evidence is to the contrary.

As Judge Cooper found:

Although Mr. Von Holnstein made a written protest to the District Board of Commissioners about ULID No. 7, the District Commissioners voted to include his property within the ULID. Mr. Von Holnstein never took the position that the District’s assessments were unfair or inappropriate. He also failed to appeal the matter to Superior Court. CP at 555.

This is similar to the case of *Felt v. McCarthy*, 78 Wash.App. 362, 366 (Div.1, 1995). There, a buyer purchased a 9 acre parcel in 1986 with an intent to develop it into a business park. The buyer, an attorney, purchased the property on a land sale contract. After purchasing the property, wetlands legislation enacted by Snohomish County in 1987 rendered 90 per cent of the property undevelopable. The buyer stopped making payments on the note to the seller, and the seller sued. The buyer, McCarthy, asserted the defense of “impossibility of performance,” claiming the wetlands legislation came as a complete surprise, and that his performance on the contract should be excused. The trial court granted summary judgment for the seller, and the Court of Appeal, Division 1, affirmed.

The Court of Appeals began by stating the general rule that the risk of loss from a change in zoning regulation is foreseeable, and the buyer

assumes the risk that such a change will take place.<sup>13</sup> Continuing, it stated that “[t]he more fundamental inquiry is whether the ‘the assumed possibility of a desired object to be attained by either party forms the basis *on which both parties* enter into it. The object must be so completely the basis of the contract that, *as both parties understand*, without it the transaction would make little sense.”<sup>14</sup> It then noted that there was no evidence that the seller had specifically entered the contract on the condition that McCarthy would be able to develop his property as intended.

Here, there is no evidence that the District considered access to the Plaintiffs’ property as being relevant when including the Von Holnstein property in ULID nos. 4 and 7. Darland fails in their burden to show that it was. The only evidence presented shows that a written protest was made by Von Holnstein’s representative, Conifer Northwest, to being included in ULID no. 7, with the promise to provide additional information from Von Holnstein. However, nothing further was received, and the property was included in ULID no. 7.

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<sup>13</sup> *Felt*, 78 Wash.App. at 366, citing *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 586 P.2d 978, 984 (1978)

<sup>14</sup> *Id.* at p. 367.

Darland admits that they purchased the property in 2003 without proper due diligence.<sup>15</sup> They paid \$675,000 for nearly 80 acres at Snoqualmie Pass, based on various representations from Louis Leclezio about water and sewer connections and access to the property. CP 1370-1378. They did not speak with anyone at the District, and learned after the fact that Leclezio had lied to them. Under *Felt v. McCarthy*, there wasn't any understanding as between Darland and the District that their inability to obtain road access to their property would jeopardize their ability to receive water and sewer connections, requiring a refund. Rather, Darland took a \$675,000.00 gamble on the subject property based on the misrepresentations of Louis Leclezio, and later discovered they wouldn't be able to develop the property the way they envisioned.

4. Darland's Claims of Equitable and Promissory Estoppel were properly Dismissed as a Matter of Law.

Darland argues that the District is "equitably estopped" from opposing reimbursement of prior assessments because, under the ULIDs, the District somehow failed "to make the water and sewer services equally available to all property owners at the same rate." This argument must be rejected for several reasons. First, it misstates the facts. The District did make the water and sewer connections available to all property owners

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<sup>15</sup> See discussion at p.3:9-11, *supra*.

within the ULID at the same rate. That rate for ULID no. 4 was \$1275 per connection. CP at 358, 559. Under ULID no. 7, property owners were assessed at \$710 per connection. CP at 363, 559.

Darland cites *Finch v. Matthews*, 74 Wn.2d 161, 175 (1968), arguing that after the ULID was created, the District somehow conducted itself in an “unauthorized and irregular manner” by not “mak[ing] water and sewer service available to the property,” and thereby estopping the District from retaining the assessments which were paid over 25 years ago. The *Finch* decision actually supports the District.

*Finch* stands for the proposition that a governmental entity will be estopped from preventing a manifest injustice if the entity has acted within its governmental powers, but the method of exercising the power was “irregular or unauthorized.” By contrast, Darland’s claim is completely different. Darland admits the District acted within its powers in forming the ULIDs at issue. They claim, however, that the District acted “irregularly” when it didn’t bring the water and sewer to their property line. But that was never contemplated under either ULID. Accordingly, there is no “manifest injustice” to Plaintiffs which compels the same outcome as in the *Finch* case. Darland’s equitable estoppel claim fails as a matter of law.

As for their “promissory estoppel” claim, Darland correctly states the elements of that claim, including a “promise by the promisor” that causes the “promisee” to change position. Darland then identifies the “promise” as being “the representation of the District’s then-superintendent, Richard Kloss, [to Miller Shingle] that the District would obtain the necessary access and utility easements to deliver the promised water and sewer service to the property.” (Darland’s Brief at 33)

This argument fails for several reasons. First, the alleged “representations” were not made to Darland, but to their predecessor. Second, Darland admits in a sworn testimony that, prior to purchasing the property, they never asked anyone at the District about the water and sewer connections, *but relied on the representations of Louis Leclezio*. CP at 1906-1913, CP at 929-930. Given the uncertainty as to water and sewer access when they purchased the property, Darland actually structured the purchase of the property to give Leclezio a quitclaim deed of 26 acres, to be released from escrow if Leclezio could acquire the necessary access and utility easements. CP at 935. Finally, any such representations by Kloss were *ultra vires*, and do not bind the District under *Stoddard v. King County*. (See discussion *supra* at pp. 6-8, 19-20, 20-23)

V. CONCLUSION

Under Washington law, ULID nos. 4 and 7 were properly formed by the District, and the subject property was specially benefitted by the availability of the water and sewer services, and being entitled to receive 230.07 water (at 400 gallons per day) and 38.37 sewer ERUs. CP at 558-59. Once the final assessment rolls were confirmed, the only means for challenging the assessments, or the adequacy or sufficiency of the special benefits conferred under the ULIDs, was through the appeal procedure in RCW 57.16.090. This was never done, making the assessments "...conclusive in all things upon all parties, [which] cannot in any manner be contested or questioned in any proceeding whatsoever..." RCW 57.16.100(1) Accordingly, all of Darland's claims concerning (1) the adequacy of the special benefits conferred, (2) the necessity of compelling the District to use its power of eminent domain, and (3) having the District extend its water and sewer mains, were properly dismissed below.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2016.

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By: \_\_\_\_\_

  
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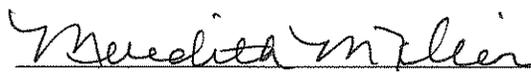
**DECLARATION OF SERVICE**

I, Meredith M. Klein, a resident of the County of King, declare under penalty of perjury under the laws of the State of Washington that on this date I caused a true and correct copy of Snoqualmie Pass Utility District's Brief on Cross-Appeal to be sent out for delivery by FedEx Priority Overnight, addressed to the following:

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DATED at Seattle, Washington this 26<sup>th</sup> day of May, 2016.

LAW OFFICE OF DANEIL P. MALLOVE, PLLC



Meredith M. Klein, Legal Assistant