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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 360024

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

Appellants,

v.

SNOQUALMIE PASS UTILITY DISTRICT, a Washington corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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I. SUMMARY OF REPLY

The Statute of Limitations on Darlands' Claims Did Not Begin Running Upon the Formation of the ULIDs. The District fails to meaningfully respond to the arguments in Darland's opening brief. The District argues that the statute of limitations on each of Darlands' claims began to run in the 1980s, immediately *upon the formation* of the relevant water and sewer ULIDs. But Darlands are not challenging the ULID assessments. Instead, Darlands challenge the District's repudiation in 2001 of its contractual obligation to provide water and sewer service. As a matter of law, until a landowner pays the assessments levied against his or her property for water and sewer service, the District has no duty to provide such service, and the landowner cannot seek judicial relief for the District's failure to do so. Here, the District breached this duty for the first time in 2001, and Darlands' complaint was filed within three years thereafter.¹

Darlands are Not Challenging the Formation of the ULIDs. The District conflates two statute of limitations issues: the initial 10-day win-

¹The District mistakenly argues that the Darlands' negligence claim is governed by the two year statute of limitations under RCW 4.16.130, for "injury to property." See Respondent's brief ("RB") at 15. Darlands' negligence claim, however, is not for injury to real property; instead, it is based upon the District's negligent failure to take the steps necessary to deliver to the Property the special benefits it was entitled to receive. CP 211. The case relied upon by the District, *Wolfe v. Dep't of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013), involved an actual physical injury to real property (erosion causing loss of soil), which does not exist here.

dow, under RCW 57.16.090, for challenging the formation of a ULID and the levying of assessments, and the statutes of limitations that apply to the individual claims alleged by Darlands, which are set forth in chapter 4.16 RCW. Darlands' claims presume the validity of the ULIDs and the assessments, which guaranteed Darlands their water and sewer hookups. The District's discussion regarding the formation of the ULIDs should thus be disregarded.

Darlands Acquired Contractual Rights Based on the ULIDs When They Purchased the Property. The District asserts that Darlands acquired no contractual rights, but this ignores both the record and governing law. The record shows that (1) Leclezio was a plaintiff, along with Darlands, when the original complaint was filed (CP 1); and (2) the Bargain and Sale Deed, pursuant to which Darlands and Leclezio acquired title to the Property from Miller Shingle, expressly conveyed all "Snoqualmie Pass Utility District water and sewer hook-ups, (believed, without warranty by Grantor, to consist of 230 water hook-ups and 38 sewer hook-ups)." *See* Darlands' Opening Brief ("Op. Br.") at 9. The controlling law here involves the "bundle of sticks" (or rights) inherent in property ownership that, unless expressly reserved, run with the land and are conveyed to a subsequent purchaser. *See* Op. Br. at 27. The "subsequent purchaser rule" does not bar Darlands' inverse condemnation claim.

The Evidence in the Record and the Law Demonstrate that the District Is Responsible for Extending Water and Sewer Lines to the Darlands' Property. The District's argument, that Darlands are responsible for extending the District's water and sewer lines to their Property parcels, conflates two distinct situations. The first situation is where a landowner *has not* been assessed for water and sewer service, and has thus *never paid* for such service; the second situation is where a landowner's property has been assessed for water and sewer service, *and the landowner has paid the assessments for such service.* In the first situation, having never paid for such service, the landowner must bring the District's water and sewer lines to his or her property boundaries. In the second situation, however, because the landowner has paid the assessments levied by the District for water and sewer service, the District must ensure that the landowner receives the benefit of the bargain (i.e., the paid-for water and sewer service) and bring the water and sewer lines to the landowner's property boundaries.

Here, Darlands cannot receive the benefit of the bargain unless the District condemns the utility easements. These easements are necessary to extend the District's water and sewer mainlines over the privately held land lying between their termini and the Darland Property.

This Court's Prior Opinion Does not Bar Darlands' Unjust Enrichment Claim. This Court did not address Darlands' unjust enrichment claim in the prior appeal. Instead, the Court held that Darlands could not seek a refund of the assessments because such a refund claim was untimely under RCW 57.16.100(1). *See* Prior Opinion at 30 (CP 256). Darlands' unjust enrichment claim is distinct from a claim for a refund. It seeks a remedy for the District's refusal in 2001 to provide water and sewer service.

Moreover, after this case was remanded to the trial court, the District took a new position—that the trial court was constitutionally barred from ordering the District, a legislative body, to exercise its power of eminent domain to condemn the utility easements. If the District is correct, this would allow the District to keep the approximately \$500,000 it was paid for water and sewer service, without having to provide such service. This result would present a classic case of unjust enrichment.

II. ARGUMENT

A. The District's Response Rests Upon the False Premise That the Statute of Limitations on All of Darlands' Claims Began to Run Immediately Upon the Formation of the ULIDs in Question.²

² The District's position is clear from numerous statements in its brief. *See, e.g.*, RB at 3-4 (ULID No. 4 was formed in 1983, and ULID No. 7 was formed in 1987; therefore, "[a]s a matter of simple math, even the six-year SOL (for contracts) ran on ULID 4 by 1989, and on the 1987 ULID 7 by 1993"); RB at 10 ("the SOL on the ULID contracts accrued in 1983 [when ULID No. 4 was formed] and 1987 [when ULID No. 7 was formed], and thus ran in 1989 and 1993").

1. No Property Owner Could Seek Judicial Relief for the District's Failure to Supply Utility Services Until the Assessments Levied Against the Property Had Been Paid in Full.

The District's position—that the statute of limitations began running upon the ULIDs' formation—ignores the legal reality that the property owners were not entitled to water and sewer service until they paid the assessments in full. The District had no duty to deliver any water or sewer service to the Property until the assessments were paid.

Once the District levied the assessments, it had a lien against the Property in the amount of the assessments and, if the assessments were not timely paid, the District had the statutory right to foreclose on the Property. *See, e.g.*, RCW 57.16.050(2) (allowing the District to form a ULID and levy assessments to pay for it); RCW 57.16.150 (allowing the District to recover delinquent assessments in a judgment foreclosing special assessments).

As this Court previously recognized, Darlands' predecessor, Von Holnstein, faced foreclosure on his unpaid assessments when Miller Shingle purchased the Property in 1989. Miller Shingle paid all arrearages necessary to prevent foreclosure. *See* Prior Opinion at 7, 9 (CP 233, 235). Moreover, because Von Holnstein failed to challenge the validity of the assessments, he had no defense to a foreclosure proceeding. *See* RCW 57.16.100(1); CP 383-84; Prior Opinion at 7, 32-33 (CP 233, 258-59). In

short, because Von Holnstein had not paid the assessments, he had no right to apply to a court for relief, which is the touchstone for the running of the statute of limitations on a cause of action. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006) ("Statutes of limitations do not begin to run until a cause of action accrues. . . . [u]sually . . . when the party has the right to apply to a court for relief."). Nevertheless, the District contends that the statute of limitations began to run upon the formation of the ULIDs, before the assessments were paid.

Washington case law shows that the District's argument is wrong. In *Vine Street Commercial Partnership v. City of Marysville*, the Court of Appeals recognized that a property owner is entitled to receive special benefits from a ULID assessment only after those assessments are paid in full. 98 Wn. App. 541, 549-50, 989 P.2d 1238 (1999) (upon the formation of a ULID, property owners "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" (emphasis added)); *see also Holmes Harbor Sewer Dist. v. Frontier Bank*, 123 Wn. App. 45, 56, 96 P.3d 442 (2004) ("By paying the initial assessment for the capital costs, [the property owners] obtained an enforceable right to receive the special benefits for which they have

paid."), *rev'd on other grounds*, 155 Wn.2d 858, 123 P.3d 823 (2005).³

This language also means that a property owner cannot sue to receive the special benefits until after the assessments are paid. Otherwise, a landowner could sue the District for utility services even if the landowner never paid the assessments.

2. *Under the Law of the Case Doctrine, the Earliest the Statute of Limitations Could Have Begun Running Was in 2001, Within Three Years of the 2004 Filing of the Complaint; Thus, Darlands' Claims Are Not Time-Barred.*

Even if an argument existed that the statute of limitations began running upon the ULIDs' formation, the law of the case doctrine forecloses this argument. Citing *Vine Street Commercial*, Judge Cooper held that when Miller Shingle purchased the Property ***and paid all delinquent assessments***, a contract was formed with the District, pursuant to which the Property was "entitled to receive 230.07 ERUs of water service at 400 gallons per day per ERU and 38.37 ERUs of sewer service as a special benefit under ULID Nos. 7 and 4." CP 684⁴; CP 674-75⁵.

³ The District mistakenly argues that, because "[t]he ULIDs are the entire source of [Darlands'] predecessors' problems," Darlands' predecessors' claim was for a suit "on the ULIDs" themselves, which arose upon their formation. See RB at 13-14, 26. However, a ULID ("Utility Limited Improvement District") is, by definition, a District-controlled entity comprised of property within the District; therefore, it is only the District's duties under the ULID, not the ULID itself, that can be breached by the District. See RCW 57.16.050(2) ("A district may establish a utility local improvement district [within its territory] . . ."). Further, Darlands are challenging the District's post-formation duties.

⁴Judge Cooper's 2005 memorandum decision.

⁵Judge Cooper's summary judgment order, incorporating his memorandum decision.

Judge Cooper made clear that the earliest date on which the right to seek judicial relief accrued was when the District issued its letter dated July 18, 2001, to Leclezio, stating, for the first time, its position that (1) the paid-for assessments did not entitle the Property to 230 water and 38 sewer hook-ups, and (2) the District had no obligation to extend the water and sewer mains to the Property. CP 679.⁶ This Court adopted these same facts in affirming Judge Cooper's decision. *See* Prior Opinion at 11-12 (CP 237-38).

Judge Cooper's holding—that the Darland Property was entitled to receive 230 water and 38 sewer hook-ups *upon payment* in full of the delinquent assessments—became the law of the case when this Court affirmed it; therefore, it may not be relitigated. *State v. Worl*, 129 Wn.2d 416, 424-25, 918 P.2d 905 (1996). Likewise, the "law of the case bars new arguments attacking the *factual* basis of [a] holding in the first appeal when the issue could have been determined had it been presented." *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621, 639 (2018) (emphasis added) (citing *State v. Clark*, 143 Wn.2d 731, 745-46, 24 P.3d 1006 (2001)).

Here, the factual basis for Judge Cooper's holding included that Darlands were not challenging the validity of the ULIDs, or the assess-

⁶ The District is simply incorrect in stating that this 2001 letter was not a refusal to provide hookups. RB at 12. Moreover, Judge Cooper acknowledged that these facts were unconverted. CP 677, 679.

ments levied thereunder. This led him to reject the District's argument that the 10-day limitation period under RCW 57.16.090 applied in this case. Instead, Darlands sought to obtain the benefit of the bargain from paying the assessments. CP 683-84.⁷ And, in its ruling affirming Judge Cooper's decision, this Court stated as follows: "Assuming that the utility district considers a ruling that RCW 57.16.100 bars [the] Darland[s] from challenging the ULID assessments also constitutes a ruling dismissing the Darlands' breach of contract claim, we disagree." Prior Opinion at 28 (CP 254). "A 2005 court order affirmed the utility district's obligation to supply water and sewer services." *Id.* at 36 (CP 262).

Accordingly, the law of the case bars the District's current argument—that the statute of limitations began running upon the ULIDs' formation. Instead, the law of the case dictates that the harm occurred in 2001, when the District announced that it would not fulfill its contractual obligations. *See Worl*, 129 Wn.2d at 425.

⁷ The District suggests that Judge Cooper's memorandum decision did not require the District to provide water and sewer service (*see, e.g.*, RB at 4). This is incorrect. If Judge Cooper had found that Darlands' claims were barred, because their predecessor, Von Holnstein, failed to challenge the validity of the ULIDs and the assessments under RCW 57.16.090, he could not have held that the Darland Property parcels were entitled to receive 230.07 ERUs of water service (at 400 gpd per ERU) and 38.37 ERUs of sewer service, as special benefits under ULID Nos. 7 and 4. CP 674-75. To the extent the District identifies any language in Judge Cooper's summary judgment order that indicates otherwise, this language is, at best, inapposite *dicta*; that is, the court's musings or statements in a case that are not necessary to its holding. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013).

3. *The District Cannot Avoid the Law of the Case Doctrine.*

The District attempts to circumvent the law of the case doctrine by arguing that "[t]he trial court's 2005 and 2015 partial summary judgment orders were not final orders"; therefore, "[t]he trial court was well within its discretion to address the SOL, and even to revise its prior, non-final orders." *See* Respondent's Br. ("RB") at 25. The District's argument is misplaced, because it overlooks the fact that a 2015 summary judgment order ***dismissed the entire case***. *See* Prior Opinion at 23-24 (CP 249-50).

Because this second 2015 summary judgment order resulted in the termination of the entire case, the prior 2005 and 2015 summary judgment orders were no longer interlocutory, and the parties were entitled to appeal them as a matter of right under RAP 2.2(a)(1). Accordingly, once this Court affirmed Judge Cooper's 2005 summary judgment order, it became the law of the case on remand. *Worl*, 129 Wn.2d at 425 (the law of the case doctrine applies where the decision in the first appeal was not clearly erroneous and applying the doctrine would not be manifestly unjust); *see also Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300-01, 840 P.2d 860 (1992) (the trial court loses authority to modify an interlocutory summary judgment order after a final, appealable decision has been entered).

Nonetheless, the District raises the following specious argument:

As for the 2005 trial court decision, the Darlands erroneously rely on a ***factual*** statement in the 2005 letter opinion.

BA 25. The *law* of the case doctrine does not apply to facts - particularly where, as here, the trial court was ruling on summary judgment, so any findings would be superfluous.

See RB 24 (emphasis in the original) (citing CR 56).

The "2005 letter opinion" referred to by the District is actually Judge Cooper's 2005 memorandum decision, which was incorporated in full into his summary judgment order, and affirmed by this Court's Prior Opinion. The "factual statement" referred to by the District is Judge Cooper's determination, adopted by this Court, that the District (in its 2001 letter) took the position that paying the assessments did not entitle the Property to a guarantee of 230 water and 38 sewer hook-ups. See Op. Br. at 25 (citing CP 674-75, 679, and 684; Prior Opinion at 11, 37). Because Judge Cooper's determination was an integral part of his 2005 order (CP 674-75, 678-79, 684), the District is barred by the law of the case from attacking it on remand and in this appeal. *Worl*, 129 Wn.2d at 425; *Gregory*, 427 P.3d at 639.⁸

⁸ The District simply mischaracterizes Judge Cooper's holding—that the Property was entitled to receive 230 water and 38 sewer hook-ups—as a "factual statement," which it is not. In any event, because this Court previously upheld Judge Cooper's 2005 order on this specific issue, it is the law of the case on remand. See Prior Opinion at 36 (CP 262) ("**A 2005 court order affirmed the utility district's obligation to supply water and sewer services.**") (emphasis added); *id.* at 37 (CP 263) ("We affirm the trial court's 2005 . . . summary judgment order[.]"). Even if this was a "factual statement," it was uncontroverted below (CP 677) and cannot be challenged by the District for the first time on appeal.

The law of the case doctrine also bars the District from relitigating those issues "which might have been determined had they been presented" in the first appeal, where "there is no substantial change in the evidence at a second determination of the cause." *Worl*, 129 Wn.2d at 425. The doctrine thus bars the District's statute of limitations arguments, which the District raised in its cross-motion for partial summary judgment, the subject of the prior appeal in this case. CP 726-52; Prior Opinion at 23 (CP 249). And the District has not shown that there has been any change in relevant evidence since the Prior Opinion.

The District nonetheless argues that the doctrine does not apply, because "the 2017 trial court had discretion to address the SOL issue under RAP 2.5(c)(1)." RB at 24 (citing *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)). The District's reliance on RAP 2.5(c)(1) and *Barberio* is misplaced. To begin with, RAP 2.5(c)(1) does not apply here. "An issue that could have been appealed in an earlier proceeding is reviewable under RAP 2.5(c)(1) in a later appeal following remand of the case *only* if the trial court, on remand and in the exercise of its own independent judgment, considered and ruled again on that issue." *Gregory*, 427 P.3d at 639 (emphasis in the original) (citing *Barberio*, 121 Wn.2d at 50).

Although Judge Sparks may have exercised his "own independent judgment" in ruling on the District's statute of limitations arguments on remand, the District admits that those arguments *were never previously "considered and ruled on"* by Judge Sparks. *See* RB at 23-24. The District has thus failed to meet the second prong necessary to invoke RAP 2.5(c)(1)'s exception to the law of the case doctrine: that the trial court, prior to the first appeal, ruled on an issue to which error was not assigned in the first appeal. *Gregory*, 427 P.3d at 639; *Barberio*, 121 Wn.2d at 50-51.⁹

Moreover, the *Barberio* Court's holding fails to support the District's argument. *Barberio* makes clear that RAP 2.5(c)(1) is discretionary and that justice is better served if the doctrine is invoked to bar a party from raising an issue where the party has unduly delayed in doing so:

This case well illustrates the necessity of the rule which denies review at this late stage. The issue presented was a clear and obvious issue which could have been decided in 1990 in the first appeal. Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this Court, and allied staff, have had to deal with the procedural morass, all of which could have been avoided had the matter been raised

⁹ The District mistakenly argues that *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005), allows a party to avoid the law of the case doctrine where "the issue on appeal involves the threshold determination of whether plaintiff possesses a cause of action." RB at 22-23. In *Roberson*, however, the substantive law had changed between the first and second appeals, thus invalidating the decision in the first appeal. 156 Wn.2d at 35 ("We hold that the law of the case doctrine does not preclude successive appellate review . . . in light of intervening precedent from this court."). Here, by contrast, there has been no change in the controlling substantive law.

when it should have been in the first appeal. *In the interest of judicial economy, already too much wasted, we hereby affirm the Court of Appeals without further proceedings.*

121 Wn.2d at 52 (emphasis added).

The law of the case doctrine is thus intended to afford a measure of finality to contested issues and bring litigation to an end. *Id.*; *see also Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 55, 366 P.3d 1246 (2015). "The law encourages resolution of appealable issues during the first appeal." *State v. Fort*, 190 Wn. App. 202, 234, 360 P.3d 820 (2015) (citing *Barberio*, 121 Wn.2d at 52).

Over 14 years have passed since this protracted litigation was first commenced in 2004. *See* Prior Opinion at 14 (CP 240). The District delayed raising its statute of limitations arguments until it filed its 2015 cross-motion for partial summary judgment (CP 726-52). There is no reason why it could not have raised these arguments in its assignments of error in its 2016 cross-appeal. CP 791, 799. The law of the case doctrine precludes it from doing so now.

B. The District Misconstrues its Own Governing Documents.

The District asserts that "[t]he ULIDs nowhere 'guarantee' to connect sewer or water to properties thousands of feet from the mains. . . . On the contrary, ULID 7 plainly states that line extensions are the financial responsibility of the property owners." RB at 16 (citing CP 390-94). The

District's citation to the record misrepresents the facts. Clerk's Papers 390-94 is not taken from ULID No. 7; instead, it is taken from the District's 1988 Water Administration Code. CP 369-414. Moreover, CP 390-94 addresses line extensions by developers who seek to connect to the District's water system, but who *have not been assessed and paid* for such service.

By contrast, the District's own resolutions, administrative codes, meeting minutes, and representations to the landowners under ULID Nos. 4 and 7 show that it is the District's obligation to extend the water and sewer service to those landowners who have paid the ULID assessments. CP 25-26, 43, 68-70, 99, 116, 120, 136, 138, 369-76, 595-600, 604, 608, 613-22, 624, 631, 1219, 1257-88, 1385-1517; Prior Opinion at 4-8 (CP 230-35).¹⁰

C. The Court Has the Authority to Order the District to Condemn Utility Easements to the Darlands' Property.

The District relies on a single case to argue that the Court lacks authority to require the District to condemn utility easements to the Darland Property. But the case, *Snider v. Board of County Commissioners of Walla Walla County*, is readily distinguishable and inapposite. 85 Wn.

¹⁰ Ironically, the District cites to its letter to Leclizio, dated July 18, 2001, to support its contrary argument (RB 27); yet it is this very letter, including the resolutions cited therein, that Judge Cooper found to be the first time the District refused to provide the Property with the 230 water and 38 sewer hook-ups it was entitled to receive. CP 679; *see also* CP 674-75, 684, and Prior Opinion at 11 (CP 237).

App. 371, 379, 932 P.2d 704 (1997). The court in *Snider* explicitly limited the scope of its holding to the unique facts of that case, which do not exist here: “The legislative power of eminent domain, *in the context of this case*, should remain inviolate securely within the core function of the Board [of County Commissioners]. The superior court should not have required the Board to exercise its power of eminent domain.” *Id.* (emphasis added).

In *Snider*, the Walla Walla Board of County Commissioners approved a developer’s preliminary plat for a subdivision and imposed six conditions on the development. *Id.* at 374. The developer petitioned the Superior Court for a writ of review challenging two of the conditions. *Id.* The Superior Court determined that the condition requiring the developer to obtain rights-of-way from adjoining property owners was arbitrary and capricious. *Id.* Consequently, the Superior Court modified the condition to require that the Board exercise its eminent domain power to acquire the rights-of-way for the developer. *Id.* The Board appealed, arguing that the Superior Court exceeded its authority by modifying the condition to require the Board to exercise its power of eminent domain. *Id.* The Court of Appeals held that the Superior Court did not have authority to modify the condition to require the Board to exercise its power of eminent domain. *Id.* at 378.

In contrast with *Snider*, the following facts demonstrate why condemnation is appropriate here. First, the law of the case holds that the Darland Property parcels are entitled to receive 230 water hook-ups (at 400 gpd per hook-up) and 38 sewer hook-ups. The District seeks to render this entitlement meaningless by refusing to condemn utility easements. If courts lack the authority to order the District to utilize its powers of eminent domain under these circumstances, the District will be allowed to avoid the legal consequences of its misconduct, and be unjustly enriched in the process.

Second, the Darland Property was assessed for water and sewer service, and those assessments have been paid in full, thus creating a contractual relationship between the parties, the nature of which is well-articulated in *Vine Street Commercial*, 98 Wn. App. at 549-50, and in Judge Cooper's 2005 memorandum decision: Darlands "are entitled to receive the special benefits for which they have paid." CP 684 (citing *Vine Street Commercial*).

Third, the land lying between the termini of the District's water and sewer mains and the boundaries of Darlands' Property parcels is held in private ownership, with the District alone having the power of eminent domain to obtain the easements where the intervening landowners are un-

willing to sell or otherwise convey them. CP 679 n. 6; RCW 57.08.005(1).

Fourth, the District's actions have created an expectation that the property owners paying their assessments would be entitled to receive the water and sewer hookups according to their assessments. This expectation is based on the relevant Resolutions; the District's representation to the ULID No. 7 revenue bond holders in forming the "pass-wide" water system under ULID No. 7; its representations to the affected property owners in connection with the formation of ULID No. 7 regarding their assessments guaranteeing them prepaid water hook-ups and bringing the main lines past their property; and the District's representations to WSDOT that it had a "*statutory and contractual obligation*" to provide water and sewer service to the Darland Property. CP 1466; *accord* CP 68-70, 116, 136, 138, 595-600, 624, 631, 1257-88, 1390-94, 1400-02, 1465-76, 1478-80, 1482-89.¹¹

¹¹ The District raises two additional, but baseless arguments. First, the District argues that this issue should not be reached because the trial court did not address it. RB 29. But the trial court failed to address this issue only because it denied Darlands' summary judgment motion based on the statute of limitations. Accordingly, because the trial court erred in denying Darlands' summary judgment, and because review is *de novo*, this Court can decide the issue, and rule in Darlands' favor, on any grounds supported by the record. *Int'l Bhd. of Elec. Workers, Local Union No. 46 v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000). The District's second argument—that Darlands' appeal on this issue arises from "an untimely motion for reconsideration"; thus, "mak[ing] their appeal on this issue untimely too" (RB at 30)—was also raised before the trial court, and implicitly rejected when the court declined to address it. CP 1374-75, 1533-40, 1545-50.

In short, the unique facts of this case readily distinguish *Snider* and illustrate why, under *Nagatani and Levine*, a trial court may require the District to exercise its power of eminent domain. *See* Op. Br. at 31-33.

D. The "Subsequent Purchaser Doctrine" Does Not Bar Darlands' Inverse Condemnation Claim.

The District's argument regarding the subsequent purchaser doctrine argument is misplaced. As even the District recognizes, an exception to the subsequent purchaser doctrine exists where a prior owner expressly conveys rights related to the relevant property damages. *See* RB at 17-18. The Bargain and Sale Deed pursuant to which Darlands acquired title to the Property (at which time Leclezio also had an ownership interest), "expressly conveyed" to Leclezio and Darlands "all timber, mineral rights, water rights, utilities, including Snoqualmie Pass Utility District water and sewer hook-ups, (believed, without warranty by grantor, to consist of 230 water hook-ups and 38 sewer hook-ups) and all rights in and to the [Property]." CP 84; *see also* CP 239 (Prior Opinion at 13, quoting the same language from the deed, and discussing Darlands' and Leclezio's respec-

tive ownership interest).¹²

Further, Leclezio and Darlands were both plaintiffs when the original complaint was filed in this case on July 14, 2004. CP 1. In short, because the *gravamen* of Darlands' inverse condemnation claim is the diminution in value of the Property arising from the District's failure to provide the Property with the "38.37 ERUs of sewer service, and 230.7 ERUs of water service, based upon an ERU factor of 400 gpd per hook-up," which Darlands allege was "a vested right" the Property was entitled "to receive," being "appurtenant to the real property" (CP 211-12), the claim is not barred by the subsequent purchaser doctrine. *Leuthold v. Davis*, 56 Wn.2d 710, 713, 355 P.2d 6 (1960) (a deed of conveyance transfers rights appurtenant to the real property that are not expressly reserved).

Even the cases cited by the District recognize an exception to the doctrine where "***additional government action*** caus[es] a measurable decline in market value" during the claimant's ownership." RB at 17-18 (emphasis in the original). See *Hoover v. Pierce County*, 79 Wn. App.

¹² In addition, the trial court could not have granted summary judgment to the District based on the subsequent purchaser doctrine because of a genuine issue of material fact. The doctrine is premised, in part, on the premise that "a subsequent purchaser pays a price that presumably reflects the diminished property value in light of [an] earlier taking," which means the subsequent purchaser faces no loss in value. *Wolfe*, 173 Wn. App. at 308 (internal citations omitted). The bargain and sale deed quoted above calls this presumption into question because it shows that Darlands expected to receive the water and sewer hookups and that these hookups were factored into the purchase price. At minimum, this evidence raises a genuine issue of material fact that precluded summary judgment on this issue.

427, 903 P.2d 464 (1995), and *Wolfe v. Department of Transportation*, 173 Wn. App. 302, 293 P.3d 1244 (2013). Such “additional government action” is present here. Leclizio had an ownership interest in the Property on July 18, 2001, when the District took the action harming the Property (i.e., asserting that “the assessments it imposed, and which had been paid in full, did not entitle the property to a guarantee of 230 water and 38 sewer hook-ups.”) CP 679. Accordingly, even if an inverse condemnation claim accrued upon the formation of the ULIDs in the 1980s, the District’s subsequent acts in 2001 constitute “additional government action,” thus avoiding the bar of the subsequent purchaser doctrine. *Hoover*, 79 Wn. App. at 428-29 (even if a prior “taking” occurred during prior ownership, additional governmental action causing a decline in market value avoids the subsequent purchaser rule’s bar); *Maytown Sand and Gravel, LLC v. Thurston Cnty.*, 191 Wn.2d 392, 429-31, 423 P.3d 223 (2018) (constitutionally protected property interests include all benefits to which there is a legitimate claim of entitlement).

In any event, because the District previously raised the subsequent purchaser doctrine as a defense during the 2015 summary judgment proceedings (CP 741-43), and could thus have asserted it in the prior appeal (but did not), the District is now barred by the law of the case doctrine from trying to re-litigate this issue. *Worl*, 129 Wn.2d at 424-25.

E. The District Is Not Entitled to Summary Judgment Dismissal of Darlands' Unjust Enrichment Claim.

The District claims that Darlands' unjust enrichment claim is barred because this Court affirmed the dismissal of Darlands' request for reimbursement of assessments. This Court's prior decision, however, was based exclusively on the ground that Darlands' claim for a refund of the assessments was untimely under RCW 57.16.100(1). *See* Prior Opinion at 30 (CP 256). In reaching its decision, this Court noted: "The gist of [Darlands'] argument is that the [District] erroneously assessed the land because the land receives no benefit from the ULIDs." *Id.* at 34 (CP 260).¹³

The Court further noted that "the remedy for any breach of a promise is not a refund of the assessment, but an order compelling fulfillment of the promise or an award of contract damages. Although the utility district uttered comments years after the assessment that it might not provide services, *the District now remains willing for the Darlands to tie to the utility's lines*. A 2005 court order affirmed the utility district's obligation to supply water and sewer services." *Id.* at 36 (CP 262) (emphasis added).

However, new facts have emerged on remand. Contrary to the position it took in the prior appeal, the District now asserts, for the first time, that it will not allow the Darlands to tie to the District's utility's lines

¹³ As previously stated, the gist of Darlands' argument *is not* that their Property was erroneously assessed. Instead, it is that their Property has never received the benefit of the bargain in exchange for paying the assessments (i.e., the water and sewer hook-ups).

or honor Judge Cooper's 2005 order, because it refuses to exercise its power of eminent domain to condemn the utility easements. CP 541; RB at 31-32. These easements are necessary to extend the District's utility service to the Darland Property parcels.

F. Darlands' Promissory Estoppel Claim Is Not Barred.

The District argues that Darlands' promissory estoppel claim is barred, because "the doctrine of promissory estoppel does not apply where a contract governs." RB at 18 (quoting *Spectrum Glass Co., Inc. v. PUD No. 1 of Snohomish Cnty.*, 129 Wn. App. 303, 317, 119 P.3d 854 (2005)). This argument fails for two reasons. First, *Spectrum Glass* involved a contract, the express terms of which mandated dismissal of the case, and there were no promises outside of the contract to support a promissory estoppel claim. *Id.* at 317-18. Second, Darlands' case was not dismissed based upon the parties' contract, and the District made additional promises and representations, both before and after the contract was formed. *See, e.g.*, CP 68-71, 126, 136, 1257-88, 1465-76, 1484-89; Prior Opinion at 4-10, 18-20 (CP 230-36, 244-46).

Accordingly, because this case was dismissed solely on statute of limitation grounds, on summary judgment, there was no bar to Darlands' pleading alternative theories of relief, in accordance with CR 8(a). In other words, no election of remedies was required. *See* CR 8(e)(2); *Jacob's*

Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 756, 162 P.3d 1153 (2007) (under CR 8(e)(2), "multiple claims may be made in a single lawsuit"; therefore, the trial court erred "in dismissing SSB's breach of contract claim on summary judgment" on the ground that "any damages suffered as a result of the alleged breach of contract were duplicative of those amounts sought pursuant to the indemnity claim.").¹⁴

G. The Court May Revisit Its Prior Decision and Decide Whether the District Can Condemn Access Easements to the Property.

The District fails to cite any authority for its argument that it lacks authority to condemn access easements to the Property. *See* RB 32-33. This failure alone is reason to disregard it. *Newell v. Newell*, 117 Wn. App. 711, 721 n. 17, 72 P.3d 1130 (2003). Regardless, the District's argument is misplaced.

The District argues that, because this Court found that Darlands inadequately briefed the issue in the prior appeal, the law of the case doctrine does not apply; therefore, "[t]his Court cannot simply change its prior decision." RB at 32. As already noted, however, the Court's prior finding

¹⁴ The District misconstrues the record by suggesting that Judge Cooper's 2005 ruling held that a contract was formed merely because of the ULIDs. RB at 18-19. In fact, Judge Cooper, citing *Vine Street Commercial*, made clear that the contract was not formed **until the assessments levied under the ULIDs had been paid in full**. Compare RB at 19 with Judge Cooper's 2005 memorandum decision (CP 443). It is also significant to note that Darlands' promissory estoppel claim is based upon the District's promises and representations made **over and above** those contained in the resolutions forming the ULIDs in question. *See* Prior Opinion at 4-10 (CP 230-36) and 19-20 (CP 245-46); *see also* CP 67-144, 1257-1288; CP 1474-76; CP 1390-94; CP 1484-89.

was incorrect. *See* Op. Br. at 34-36. Accordingly, justice would best be served if this Court were to revisit and decide the issue, which it has the authority to do. *Folson v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).

III. CONCLUSION

The trial court's order dismissing Darlands' claims as time-barred should be reversed and the case should be remanded for further proceedings, as requested at pages 40-41 of Darlands' opening brief.

DATED this 14th day of January, 2019.

Respectfully submitted,

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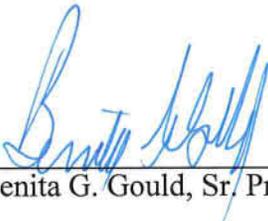
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