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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.

AMENDED OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION¹

For almost three decades, Appellants Michael and Myrna Darland (“Darlands”), or their predecessor-in-interest, have been trying to get the benefit of the bargain from Respondent Snoqualmie Pass Utility District (the “District”) for water and sewer service to their 76.8 acres of unimproved real property, located in Kittitas County, Washington, which is comprised of four contiguous tax parcels (the “Property”). Like Darlands, their predecessor-in-interest, Miller Shingle Company (“Miller”), purchased the Property in order to develop it. CP at 68-70.

At the time Miller sought to purchase the Property, the District was threatening foreclosure against then-owner, Von Holnstein, because he had not paid the outstanding water and sewer assessments that the District levied against the Property. *Id.* Accordingly, prior to purchasing the Property in 1989, Miller's joint venture partner, Louis Leclezio (“Leclezio”), conducted a thorough due diligence regarding what Miller would receive if it purchased the Property from Von Holnstein and paid to the District all delinquent assessments, penalties and interest. *Id.*; Prior Opinion at 7-8 (CP at 233-234).

As part of his due diligence, Leclezio confirmed with the District that, upon payment of the delinquent assessments (including penalties and inter-

¹ This is the second appeal to this Court. The first appeal resulted in this Court's Unpublished Opinion (No. 34081-3-III) filed April 4, 2017 (the “Prior Opinion”).

est), the Property would be guaranteed to receive 230 water hook-ups, and 38 sewer hook-ups, and that the District would extend its water and sewer mainlines to the Property. Relying upon these representations, Miller paid to the District the total sum of \$492,781.37, which represented the full amount owed. Prior Opinion at 9 (CP at 235).

Unfortunately, in 2001, the District reversed course and declared that the Property had no guaranteed water or sewer hook-ups. CP at 71. This was the first time the District took the position that it did not have to provide water and sewer service to the Property. *Id.* As a result, in 2004, within three years of learning of the District's position, Darlands and Leclezio (who still had an interest in title to the Property at the time) sued the District, in order to get the promised water and sewer service. CP at 1-18.

Despite these facts, the trial court dismissed this case on summary judgment, based solely on the ground that all claims against the District are barred by the applicable statute of limitations. The trial court erroneously reasoned that any claims, whether sounding in contract or tort, accrued in the 1980s, although it failed to clarify when or why this occurred. CP at 1539-40. But this reasoning disregards the undisputed fact that the District first refused to provide water and sewer service in 2001.

Critically, it was this refusal in 2001 that triggered the running of any potential statute of limitations, because this was the first time any property owner could have brought a claim against the District. Had a complaint been filed before the District's refusal in 2001, the action would have been dismissed on ripeness grounds. Because the original complaint was filed within three years, which is the shortest applicable statute of limitations in this case, the trial court erred in dismissing Darlands' claims.

This appeal arises from the trial court's summary judgment order granting the District's motion for partial summary judgment, dismissing Darlands' claims as being time-barred. And because the trial court's order also denied Darlands' motion for partial summary judgment, they appeal this aspect of the order as well. Darlands' motion sought to compel the District to use its statutory power of eminent domain to condemn the utility easements necessary to extend the District's water and sewer mainlines to the boundaries of the Darland Property parcels. Without such easements, Darlands cannot utilize the 230 water hook-ups and 38 sewer hook-ups, because the land lying between the termini of the District's water and sewer mainlines and the Property is privately owned. CP at 71. This Court previously held that Darlands are entitled to receive these hook-ups. *See* Prior Opinion at 17, 37.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Darlands' first amended

complaint, with prejudice, on the ground that all claims asserted therein are barred by the applicable statute of limitations.

2. In denying Darlands' motion for partial summary judgment, the trial court erred by not finding that the District has the legal authority to condemn the utility easements necessary to deliver to the Darland Property parcels the 230 water hook-ups (at 400 gpd) and 38 sewer hook-ups, which those parcels are entitled to receive, as a matter of law, pursuant to this Court's prior decision in this case.

3. Likewise, the trial court erred by not finding that the District must exercise its statutory power of eminent domain to condemn the utility easements at issue in this case.

4. Because this Court's prior decision—to not address the issue of whether the District has the legal authority to condemn private property for access easements, under the unique facts of this case—was based on an incorrect premise, and because deciding this issue would serve the interests of justice, the Court should "review the propriety of [its] earlier decision", pursuant to RAP 2.5(c)(2).²

² Darlands are mindful of the fact that they previously sought reconsideration of this issue, which the Court denied; they respectfully submit, however, that RAP 2.5(c) allows them an opportunity to revisit the issue.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1: Did the trial court err in granting the District's motion for partial summary dismissal of Darlands' first amended complaint on statute of limitations grounds where Darlands filed their original complaint within three years of the District's misconduct?

Sub-Issue No. 1: Did the trial court violate the law of the case doctrine in dismissing Darlands' claims as being time-barred?

Sub-Issue No. 2: Are Darlands' breach of contract claims barred by the six-year statute of limitations?

Sub-Issue No. 3: Is Darlands' declaratory judgment claim barred by the six-year statute of limitations for breach of contract claims?

Sub-Issue No. 4: Is Darlands' claim for breach of the implied covenant of good faith and fair dealing barred by the applicable three-year statute of limitations?

Sub-Issue No. 5: Is Darlands' unjust enrichment claim barred under the three-year statute of limitations?

Sub-Issue No. 6: Did the trial court err in dismissing Darlands' first amended complaint, when that pleading asserted a claim for negligence, which was neither raised in the District's motion for partial summary judgment, nor specifically addressed in the trial court's summary judgment order?

Sub-Issue No. 7: Did the trial court violate the relation back doctrine in dismissing Darlands' claims for breach of the implied covenant of good faith and fair dealing and for unjust enrichment?

Issue No. 2: Did the trial court err in denying Darlands' motion for partial summary judgment, especially since the law of the case doctrine barred the trial court from considering the District's statute of limitations arguments, none of which had any merit to begin with.

Issue No. 3 Did the trial court err by not addressing and granting Darlands' motion for partial summary judgment on the following issue: Does the District have the legal authority to condemn the utility easements necessary to deliver to the Darland Property parcels the 230 water hook-ups (at 400 gpd) and 38 sewer hook-ups, which those parcels are entitled to receive, as a matter of law, pursuant to this Court's prior decision, which is now the law of the case?

Issue No. 4: Did the trial court err by not addressing and granting Darlands' motion for partial summary judgment on the following issue: Must the District exercise its statutory power of eminent domain to condemn the utility easements at issue in this case?

Issue No. 5: Pursuant to RAP 2.5(c), should this Court review the propriety of its earlier decision in which it declined to address Darlands' argument that

the District has the statutory authority to condemn access easements under the unique facts of this case?

IV. STATEMENT OF THE CASE

A. Overview.

This Court's Prior Opinion sets forth in detail most of the salient facts and procedural history necessary for it to decide the instant appeal. Prior Opinion at 2-24. With but one minor exception, Darlands adopt, as an accurate statement of the case, those facts and procedural history. The sole exception is the following sentence, at page 4 of the Court's decision: "Michael and Myrna Darland challenge assessments for ULID Nos. 4 and 7." To the extent this sentence implies that Darlands have at any time challenged the validity of the assessments themselves, it is incorrect.

Indeed, Darlands' entire position has always presumed, and relied upon, the validity of the assessments themselves, as it was the payment of these assessments, together with penalties and interest, that gives rise to the District's contractual obligations under *Vine Street Commercial v. City of Marysville*, 98 Wn. App. 541, 549-50, 989 P.2d 1238 (1999), *review denied* 141 Wn.2d 1006, 10 P.3d 1075 (2000). A prior trial court ruling in this case by Judge Cooper, which was affirmed by this Court in the prior appeal, makes this abundantly clear. As Judge Cooper found:

[P]laintiffs' predecessor never pursued his remedy of review

codified now in RCW 57.16.090. Therefore, pursuant to what is now codified as RCW 57.16.100 once the assessment roll for the local improvements was confirmed by the District, the regularity, validity and correctness of the proceedings related to the improvements, and to the assessments therefore shall be conclusive in all things upon the parties. *The issue for the court, then, is how plaintiff's property has been specially benefited, not whether it has been specially benefited.*

It is clear the relationship between the plaintiffs and the District is based upon the contract formed between them as a result of the ULIDs. See Vine Street Commercial v. City of Marysville, 98 Wn. App. 541, 549-50 (1999). *The plaintiffs, whose property was assessed with the special benefits thereby accruing, and who subsequently paid their assessments in full, are entitled to receive the special benefits for which they have paid . . .* The court concludes, therefore, plaintiffs are 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 at 674, 683-84 (emphasis added); Prior Opinion at 37.³

With the above in mind, this brief will now address the facts in the record establishing that the trial court erred in dismissing Darlands' claims as being time-barred.

B. The Facts Necessary for This Court to Find That the Trial Court Erred in Dismissing Darlands' First Amended Complaint on the Sole Ground That All Claims Alleged Therein Are Time-Barred.

1. The Parties and the Pleadings.

The plaintiffs in the original complaint were Darlands and Leclezio.

³ The terms "ERU" and "hook-up" are used interchangeably. CP at 679, 1509.

CP at 1-2; Prior Opinion at 14. The Bargain and Sale Deed, pursuant to which Miller Shingle Company conveyed to Darlands and Leclezio title to the Property, also included the conveyance of "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)." CP at 84; Prior Opinion at 13. Thereafter, Leclezio filed a cross-claim against Darlands, which ultimately ended in a judgment in Darlands' favor, which, *inter alia*, quieted title to the Property in their favor, and eliminated any interest Leclezio might have. CP at 197-200; *see also*, Prior Opinion at 21. Subsequently, on August 20, 2014, Darlands filed their first amended complaint against the District. CP at 201-215; *see also*, Prior Opinion at 21.

2. Analysis of the Original and First Amended Complaints.⁴

Both pleadings alleged the following claims for relief:

Declaratory Judgment (that the Property is entitled to receive 38.37 ERUs of sewer service and 230.07 ERUs of water service; and that the District must construct the improvements necessary to provide such water and sewer service) (*compare* CP at 8-9 *with* CP at 208-209);

⁴ *See* CP at 1-64 (the original complaint); CP 201-215 (the first amended complaint).

Inverse Condemnation (with "damages in an amount equal to the diminution in value of the Subject Property with, and without, said water and sewer services together with such statutory damages and penalties as provided in RCW 8.25.075(3)") (*compare* CP at 10-11 *with* CP at 211-12);

Breach of Contract (based upon the District's failure to deliver the water and sewer service it is contractually obligated to provide) (*compare* CP 11-13 *with* CP at 209-10); and

Estoppel (to prevent the District from rescinding its promise to provide the water and sewer service) (*compare* CP at 13-14 *with* CP 212-13).

Darlands' first amended complaint further alleged the following three causes of action that are either the same as, or clearly relate to or arise from, the allegations in their original complaint:

(1) Breach of the Implied Covenant of Good Faith and Fair Dealing (based on the District's failure to perform its contractual and statutory obligation to make the paid-for water and sewer service available to the Property) (CP at 209-10);

(2) Negligence (based on the District's failure to take the steps necessary to ensure that it could deliver to the Property the water and sewer service it is entitled to receive) (CP at 211); and;

(3) Unjust Enrichment (seeking restoration of the funds paid to the District for water and sewer service, based on the District's refusal and/or failure to deliver such service to the Property) (CP at 213).

3. All Claims Asserted Against the District Accrued on or After July 18, 2001; and the Original Complaint Was Filed Less Than Three Years Later, on July 14, 2004.

The first indication in the record that the District might not deliver the paid-for water and sewer service to the Darland Property parcels was on July 18, 2001; and the original Leclezio/Darland complaint was filed within three years of that date, on July 14, 2004. See Leclezio decl. at ¶¶13, 14 and Ex. D (CP at 70-71, 90-91). Likewise, in Judge Cooper's 2005 memorandum decision, which was incorporated in full into his 2005 summary judgment order (CP at 674), he specifically found:

By a letter dated July 18, 2001, the District declined to confirm the availability of water and sewer hook-ups to the property and instead referred Leclezio to the newly adopted resolution imposing a temporary moratorium upon the issuance of any new certificates of availability for water. *With this letter the District has taken the position the assessments it imposed and which have been paid in full, did not entitle the property to a guarantee of 230 water and 38 sewer hook-ups. Since that letter is also the District's position that it has no obligation to extend water and sewer mains from the present terminus to at least the boundary of the four separate parcels comprising the property.*

CP at 679 (emphasis added).⁵

⁵ At page 11 of its Prior Opinion, this Court adopted Judge Cooper's above findings.

It is uncontroverted that the original complaint was filed on July 14, 2004. CP at 1. This was within three years of the letter of July 18, 2001, which Judge Cooper identified, in his above-quoted decision, as being the first time the District stated that it might not live up to its contractual obligation to deliver the paid-for water and sewer service to the Property.

V. SUMMARY OF ARGUMENT

The law of the case doctrine bars the District from again raising its statute of limitations arguments, which were first raised below in its 2015 cross-motion for partial summary judgment, as well as in the prior appeal. This legal issue aside, Darlands' claims are not time-barred, because the first indication that any claims raised by Darlands had accrued against the District occurred on July 18, 2001, and Darlands filed their original complaint on July 14, 2001, less than three years later. There is no dispute that the first amended complaint relates back to this original complaint. No applicable statute of limitations in this case is less than three years. Accordingly, none of Darlands' claims are time-barred. The trial court's summary judgment order granting the District's motion for partial summary judgment, which dismissed Darlands' claims solely because they are time-barred, must therefore be reversed.

The trial court's denial of Darlands' motion for partial summary judgment should also be reversed because, as a matter of law, the District must exercise its statutory power of eminent domain to condemn the utility easements at issue in this case. Otherwise, the Darland Property parcels cannot realize the contractual benefits they are entitled to receive as a result of this Court's prior decision affirming Judge Cooper's 2005 order, which held that the Darland Property parcels are entitled to receive 230 water hook-ups (at 400 gpd) and 38 sewer hook-ups.

Moreover, if this Court fails to address this issue now, in light of the District's arguments—that it has no duty to extend its water and sewer lines to the boundaries of the Property parcels, and even if it did, the trial court has no authority to compel it to condemn the necessary easements—the parties will no doubt be back before this Court in yet a third appeal to decide this very issue (assuming the Court reverses the order now on appeal, as it should).

Finally, under RAP 2.5(c)(2), this Court should "review the propriety of [its] earlier decision in this case", wherein it declined to rule on the following issue raised by Darlands, which was supported by both evidence in the record and relevant legal authorities: whether the District has the statutory authority to condemn access easements under the unique facts of this case, since without such easements the Darland Property parcels cannot be developed to utilize more than four of the 230 water hook-ups and 38 sewer hook-

ups they are entitled to receive under the law of the case doctrine.

VI. ARGUMENT

A. The Standard of Review.

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

B. All of Darlands' Claims Were Timely Filed.

1. Darlands' Claims Did Not Accrue Until the District Refused to Provide Water Services on July 18, 2001.

In granting summary judgment to the District, the trial court erroneously concluded that all of Darlands' claims accrued in the 1980s when the ULIDs were formed and when the Property was assessed. CP at 1551. The trial court's reasoning is captured in its statement that "[a]ny claims regarding the district's actions in the 1980s are simply barred." *Id.* The trial court failed to recognize the critical fact that Darlands are not suing based on the District's actions in the 1980s. Rather, Darlands are suing the District based

on its actions in 2001, when the District—for the first time—declared it was unwilling to provide water services to the Property. CP at 71, 303.

“Statute of limitations do not begin to run until a cause of action accrues.” 1000 *Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006) (citing RCW 4.16.005). Generally, claims accrue when “the party has the right to apply to a court for relief.” *Id.*⁶ None of Darlands’ claims accrued until July 18, 2001, because, prior to this date, Darlands had no right to apply to the court for relief. As discussed in greater detail below, there was neither breach of contract nor any other claim for relief available to Darlands (or their predecessors-in-interest) prior to this date.

If Darlands were challenging the validity of the initial ULID assessments from the 1980s, then the trial court’s reasoning would apply. But, as already explained, Darlands are not challenging the assessments. Accordingly, the trial court applied the wrong accrual date to Darlands’ claims and, as a result, mistakenly dismissed them.

2. Darlands' Breach of Contract Claim Was Timely Filed.

"The statute of limitations in a contract action begins to run at the time of the breach." *City of Algona v. City of Pacific*, 35 Wn. App. 517, 521,

⁶ This general rule only changes when the discovery rule applies - i.e., when the "plaintiff knows or has reason to know the factual basis for his or her claim." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 160, 293 P.3d 407 (2013).

667 P.2d 1124 (1983). The District admits that Darlands' breach of contract claim is subject to the six-year limitations period under RCW 4.16.040(1). CP at 356-57. The District first breached the parties' contract on July 18, 2001 (CP at 679), and Darlands and Leclezio filed their complaint, which included the breach of contract claim, less than three years later, on July 14, 2004 (CP at 1); it was thus timely filed.

Prior to this breach, Darlands could not have sued. To hold otherwise would be to create a new rule under Washington law that parties must sue within six years of contract formation as opposed to six years from the breach of contract. This is contrary to Washington law. *City of Algona*, 35 Wn. App. at 521; *1000 Virginia Ltd. P'ship*, 158 Wn.2d at 575.

Moreover, in its post-remand briefing, the District asserted a brand new position that constitutes a further breach of both the District's contract with Darlands and the implied covenant of good faith and fair dealing. Although the District has the statutory power of eminent domain to condemn utility easements, the District now refuses to exercise that power in this case, and further contends that the courts have no authority to compel it to do so. CP at 528, 541-42. The District's latest position is deliberately designed to ensure that the Darland Property parcels will never receive the water and sewer service to which Judge Cooper and this Court found they were entitled (e.g., 230 water hook-ups, at 400 gpd per hook-up, and 38 sewer hook-ups).

3. Darlands' Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Is Not Barred by the Three-Year Statute of Limitations.

"Under Washington law '[t]here is in every contract an implied duty of good faith and fair dealing' that 'obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.'" *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 112, 323 P.3d 1036 (2014) (quoted citation omitted). This duty can create an independent cause of action, which does not require the breach of a contract provision. *Id.* at 111-12. Otherwise, "there could never be a violation of a duty of good faith and fair dealing unless there were also a violation of an express contract term. Such a requirement would render the good faith and fair dealing doctrine superfluous." *Id.* at 112. Because this claim sounds in tort, the statute of limitations is three years. RCW 4.16.080(2); *Bennett v. Computer Task Group, Inc.*, 112 Wn. App. 102, 111-12, 47 P.3d 594 (2002). The District admitted this fact in its motion for partial summary judgment on this issue. CP at 363.

Although it was not alleged in the original complaint, which was filed on July 14, 2004, this tort claim benefits from the relation back doctrine; thus, for statute of limitations purposes, it is treated as if it were filed on July 14, 2004. Under the relation back doctrine, as long as the newly asserted claim arises out of the same factual allegations as stated in the original complaint, it will survive a statute of limitations defense. CR 15(c); *Haberman v.*

WPPSS, 109 Wn.2d 107, 172, 744 P.2d 1032, 750 P.2d 254 (1987). Darlands' claim for breach of the implied covenant of good faith and fair dealing, as set forth in their first amended complaint, arises out of the same allegations stated in Darlands' original complaint, particularly the claim for breach of contract. *Compare* CP at 1-18 *with* CP at 201-215.

As with their breach of contract claim, Darlands' claim for breach of the implied covenant of good faith and fair dealing arises from the District's refusal to confirm that the Darland Property parcels are entitled to receive 230 water hook-ups and 38 sewer hook-ups, and the District's refusal to extend the utility service to the boundaries of those parcels. *Id.* The District's refusal first occurred with the District's letter dated July 18, 2001. CP at 679. Darlands filed their original complaint within three years of that date, on July 14, 2004. CP at 1. Accordingly, the claim is not time-barred.

Moreover, prior to the Washington Supreme Court's 2014 *Rekhter* decision, the courts of this state did not recognize a claim for breach of the implied covenant of good faith and fair dealing as a stand-alone cause of action that could exist independent of the breach of a specific contract term. *See, e.g., Donald B. Murphy Contractors, Inc., v. King County*, 112 Wn. App. 192, 197, 49 P.3d 912 (2002). As such, there was no reason for Darlands to assert this claim in the 2004 original complaint, as it did not create a separate claim upon which relief could be granted.

Furthermore, as previously stated, in December of 2017, the District again breached the implied covenant of good faith and fair dealing, by declaring that (1) it refuses to exercise its power of eminent domain to condemn utility easements necessary to extend water and sewer service to the Darland Property parcels, and (2) the trial court has no authority to compel it to do so. CP at 541-42. Simply stated, the District has now gone out of its way to do whatever it can to ensure that Darlands do not receive the benefit of the bargain to which they are entitled (e.g., 230 water hook-ups, at 400 gpd, and 38 sewer hook-ups). The District's latest conduct epitomizes a breach of the implied covenant of good faith and fair dealing. *See Rekhter*, 180 Wn.2d at 112 (holding that defendants duty of good faith and fair dealing arose with respect to its discretionary authority to determine a future contract term).

4. The Trial Court Erred in Dismissing Darlands' Entire Complaint as Being Time-Barred, Because the District Never Sought to Dismiss Darlands' Claim for Negligence in this Basis.

Darlands' first amended complaint states a separate claim for negligence. CP at 201, 211. In its motion for summary judgment, however, the District never sought to dismiss this claim. CP at 343-366. This fact aside, the statute of limitations on a negligence claim does not begin to run until three years after "the plaintiff suffers injury or damage"; however, the three-year limitations period is tolled "until the plaintiff knows, or through the exercise of due diligence, should have known all the facts necessary to establish

a legal claim." *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000).

The original complaint was filed within three years of July 18, 2001, the date on which the District first indicated that it might not deliver the paid-for water and sewer service to the Property. CP at 679. Although the negligence claim was not alleged until Darlands filed their first amended complaint, because the claim arises from allegations of the original complaint, it relates back to that complaint. Darlands' negligence claim is stated in the first amended complaint as follows:

6.2 The District owed a duty to Darland to take the steps necessary to ensure that it could deliver to the Subject Property those special benefits conferred upon the Subject Property pursuant to the District's representations, promises and Resolutions it adopted in connection with the formation of ULID #s 4 and 7, and as ratified by its subsequent conduct.

6.3 The District negligently breached its duties to Darland.

6.4 As a result of the District's negligence, Darland has sustained damages in an amount to be proven at the time of trial.

CP at 211.

A comparison of the allegations set forth at paragraphs 1.1 through 4.4 of the first amended complaint (CP at 201-209) with paragraphs 1.1 through 3.18 of the original complaint (CP at 1-8) establish that the relation back doctrine applies to Darlands' negligence claim; it is therefore not time barred. *See* CR 15(c); *Haberman*, 109 Wn.2d at 172.

5. The Remaining Claims Alleged in the First Amended Complaint—Declaratory Judgment, Inverse Condemnation, Estoppel, and Unjust Enrichment—Are All Within the Applicable Statute of Limitations.

Three of these four claims—declaratory judgment, inverse condemnation, and estoppel—were alleged in both the original and first amended complaint. (*Compare* CP 1-11 *with* CP 201-213.) Accordingly, because the original complaint was filed within three years of these claims accruing, they are not time-barred.⁷

Moreover, the District *never argued* to the trial court that Darlands' inverse condemnation and estoppel claims are time barred, or even set forth what the applicable statute of limitations would be, if any. CP 346-50, 363.⁸ Accordingly, as with Darlands' negligence claim, the trial court erred, as a matter of law, in dismissing these claims as being time-barred.

This conclusion would be the same even if the District had raised a statute of limitations argument as to the inverse condemnation and estoppel claims. A review of chapter 4.16 RCW, which sets forth the various statute

⁷ In fact, Darlands could have filed their declaratory judgment action within six years of the accrual date, because, as the District admitted below, the action is governed by the six-year statute of limitations. *See* CP at 358-60 (quoting *Schreiner Farms*, 173 Wn. App. at 160).

⁸ The District improperly characterizes Darlands' estoppel claim as one for "Equitable Estoppel" (CP at 347, 363); however, a review of this claim, as set forth in both the original and first amended complaints, establishes that the claim is more properly characterized as one for promissory estoppel. *See* CP 13-14, 212-213.

of limitations periods and when they apply, indicates that only the three-year limitation period under RCW 4.16.080(3) applies to these claims.⁹

Regarding the final claim alleged in the first amended complaint—for unjust enrichment—although it was not alleged in the original complaint, it clearly arises from the facts alleged in that complaint. Darlands' claim for unjust enrichment alleges, in relevant part:

9.2 As a result of the District's refusal and/or failure to deliver the special benefits for which the Subject Property was assessed and paid for, the District has been unjustly enriched by the amount of the assessments, penalties, and interest it received relating to the Subject Property. Said amounts, together with pre-judgment interest, should be disgorged and restored to Darland.

CP at 213.

The above-quoted unjust enrichment claim flows directly from paragraphs 3.1 through 8.7 of the original complaint (CP 1-14), which are substantially restated at paragraphs 1.1 through 8.6 of the first amended complaint (CP 201-213). Accordingly, it falls within the purview of the relation back doctrine under CR 15(c), so that it is considered to have been filed as of the date of the filing of the original complaint, which was July 14, 2004. CP at 1. It is uncontroverted that the original complaint was filed within three

⁹ RCW 4.16.080(3) states, in relevant part, that the three-year statute of limitations applies to "an action upon a contract *or liability*, express or implied, which is not in writing, and does not arise out of any written instrument". (Emphasis added.)

years of the accrual of the unjust enrichment claim (*see* CP at 679); the District admits "the three year statute of limitations" applies to that claim (CP at 347); therefore, it is not time-barred.¹⁰

C. The Trial Court Erred in Disregarding the Law of the Case Doctrines, Which Would Have Precluded Summary Judgment Dismissal of Darlands' Complaint.

The trial court completely disregarded Darlands' arguments as to why the law of the case doctrine precludes the District from asserting its statute of limitations arguments. Under the law of the case doctrine, "questions determined on appeal, *or which might have been determined had they been presented*, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause." *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (emphasis added). "Under the doctrine of 'law of the case' as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled.'" *Id.* at 424 (quoted citation omitted). "In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process." *Roberson v.*

¹⁰ Because the unjust enrichment claim sounds in equity, *Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258 (2008), it cannot be subject to a statute of limitations that is shorter than the three year limitations period under RCW 4.16.080(3). *See, e.g., Auve v. Wenzlaff*, 162 Wash. 368, 374, 298 P. 686 (1931) ("We have always held that as to the defense of laches in equity, generally, we will be bound by the statute of limitations at law, unless some special reason is shown why a shorter period should be enforced.").

Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

The doctrine applies here in two ways to bar the District's statute of limitations arguments. First, in its 2015 cross-motion for partial summary judgment, the District argued that Darlands' following claims were all time-barred: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) estoppel; and (5) unjust enrichment. CP at 744-52. The District also admits that it later raised its statute of limitations arguments in the first appeal, and then again post-remand. Indeed, as the District stated in its "Motion for Partial Summary Judgment on Statute of Limitations and Other Grounds", filed November 22, 2017:

In its 'Cross-Motion for Summary Judgment' before this Court in November of 2015, the District argued that Darlands' claim should be dismissed on numerous grounds, ***including statute of limitations*** and 'standing' grounds. . . . This Court's December 9, 2015 letter decision granting the District's Cross-Motion for Summary Judgment, and the subsequent Order regarding the same, failed to specifically note whether it was granting summary judgment on the basis of the District's individual statute of limitations, standing, and other substantive defenses.

Thereafter, plaintiffs appealed the summary judgment dismissal of their claims. Although ***the District argued these issues on appeal***, the Court of Appeals did not specifically address all of those arguments.

CP at 343-44 (emphasis added); *see also*, District's Brief on Cross-Appeal

(CP at 791, 835 *et seq.*). If the District wanted this Court to address its statute of limitations arguments, it should have filed a motion for reconsideration under RAP 12.4, or a petition for Supreme Court review under RAP 13.3. Because it failed to do so, the law of the case doctrine bars the District from raising the statute of limitations argument again in this second appeal. *Worl*, 129 Wn.2d at 424.

Second, the law of the case doctrine means that the District's first potentially actionable conduct did not occur until July 18, 2001. Judge Cooper's 2005 decision was affirmed by this Court. Judge Cooper wrote:

With [its `letter dated July 18, 2001'] the District has taken a position the assessments it has imposed and which have been paid in full, did not entitle the property to a guarantee of 230 water and 38 sewer hook-ups. Since that letter it is also the District's position that it has no obligation to extend water and sewer mains from the present terminus to at least the boundary of the four separate parcels comprising the property.

CP at 679; *see also*, CP at 674, and Prior Opinion at 11, 37.

Judge Cooper's above-decision was part of his holding that the Darland Property parcels are entitled to receive 230 water hook-ups, and 38 sewer hook-ups (CP at 674-75, 684), as the result of the contract formed when the District was paid for those hook-ups, which is now the law of the case. *Worl*, 129 Wn.2d at 424-25. Accordingly, because Judge Cooper's holding includes a finding that the District's first actionable conduct occurred on July 18, 2001, and because Darlands filed suit within three years of that date (CP

at 1), none of their claims are time-barred. *Id.*

D. The Basis for the Trial Court's Decision Is Confusing, Because it Strongly Suggests That Darlands' Claims May Not Be Time-Barred After All and Relies on "Facts" Not Found in the Record.

The trial court explained the basis of its order in its letter ruling, which was incorporated into its summary judgment order. CP at 1537-38.

The trial court's letter ruling stated, in relevant part:

ULID 4 was formed in 1982 and completed in 1983. ULID 7 was formed in 1987 and completed in 1988. These actions burdened and benefited the subject property, but do not burden or benefit the plaintiffs, because the plaintiffs did not purchase the property until 2003. *Any contract claim the subject property owner may have had was extinguished by the statute of limitations years before plaintiffs ever acquired the property.* Therefore plaintiffs' claims stemming from any contract theory are simply not now justiciable. *Similarly, since defendant has never done anything to the plaintiffs themselves, there could be no action available under any theory of tort either.* While Judge Cooper and the undersigned may have stated and/or ruled that a trial was necessary to determine the rights between the parties, those statements and/or rulings were simply incorrect when viewed with the statute of limitation concepts in mind. Any claims regarding the district's actions in the 1980s are simply barred.

Viewed with limitation of actions principles in mind, *the only issue that has ever been justiciable in this case is whether the subject property is entitled to the special benefits promised under ULID 4 and ULID 7.* That issue has been settled.

The property is entitled to those benefits. To date, plaintiffs have never properly attempted to access these benefits. They have never submitted a properly engineered application to the District for approval. *If such an application was submitted and unreasonably rejected, it seems that plaintiffs could then sue to enforce their rights.* But at this point, *the Court can provide no relief to either party beyond what has al-*

ready been provided. The lawsuit should be dismissed.

CP at 1539-40 (emphasis added).

The above highlighted sentences from the first paragraph of the trial court's decision reveal the source of its error. Specifically, it appears that the trial court focused exclusively on the first amended complaint, in which Darlands were the only plaintiffs. CP at 201. By ignoring the original complaint, the trial court disregarded the following critical facts for statute of limitations purposes: Leclezio, who was also a plaintiff in the original complaint, had a continuous ownership interest in the Property, which began when his joint venturer, Miller, purchased it in 1989, and continued until his subsequent cross-claim against Darlands was dismissed long after the original complaint was filed. CP at 1, 68, 84, 197-200, 678.

Likewise, the trial court disregarded the fact that Darlands acquired the entire "bundle of sticks" inherent in property ownership, including the right to the water and sewer hook-ups, when they obtained Leclezio's interest in the Property pursuant to the 2011 judgment quieting title in Darlands' favor. CP at 197-200; *see also, Mfd. Hous. Cmty of Wash. v. State*, 142 Wn.2d 347, 366, 13 P.3d (2000).

The above-highlighted sentences from the last paragraph of the trial court's decision are a source of great confusion. To begin with, the ruling states that Darlands are entitled to the benefits of their paid assessments, but

dismisses their case; it also strongly suggests that Darlands' claims may not be time-barred after all, and yet dismisses their lawsuit on this basis.

Moreover, there is nothing in the record to support the trial court's assertion that Darlands "have never properly attempted to access [those] benefits", which it is "entitled" to receive "under ULID 4 and ULID 7." To the contrary, this Court's prior decision addressed at length the efforts Darlands and their predecessors-in-interest made to receive the benefits to which the Property is entitled under ULID Nos. 4 and 7. *See* Prior Opinion at 7-23.

Likewise, there is nothing in the record to support the trial court's equally conclusory assertion that Darlands "have never submitted a properly engineered application to the District for approval," but [i]f such an application was submitted and reasonably rejected, it seems that [Darlands] could then sue to enforce their rights."¹¹ Even if there were such a requirement, it would make no sense for Darlands to submit "a properly engineered application to the District for approval," when the District has now made it clear that (1) the District will not exercise its power of eminent domain to condemn utility easements necessary to extend its water and sewer main lines to the Darland Property parcels; and (2) the trial court has no authority to compel it

¹¹ Counsel for Darlands can find nothing in the record establishing that the District has ever required Darlands to submit "a proper engineered application to the District for approval." Accordingly, Darlands invite the District's counsel to point out where in the record it exists, if it even does.

to do so. CP at 541.

E. Because There Is No Basis in Fact or Law to Warrant Dismissing Darlands' Claims as Being Time-Barred, the Trial Court Erred by Not Finding That the District Must Exercise its Power of Eminent Domain to Condemn the Utility Easements at Issue in This Case.

Review of a summary judgment order is de novo. *Enterprise Leasing, Inc.*, 139 Wn.2d at 551. All relevant issues concerning the exercise of the District's statutory authority to condemn utility easements have been thoroughly briefed by both parties. For these reasons, and to avoid the likelihood of having to eventually decide the issues in yet another appeal if this Court reverses the trial court's order dismissing Darlands' claims, this Court should address and resolve them now.¹²

1. The District Admits it Has the Statutory Authority to Condemn Utility Easements.

In the District's own words:

The District clearly has the authority to condemn property for the purpose of installing water and 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).

CP at 534.

¹² The relevant portions of the record are found at CP at 264-296 (Darlands' mot. for part. SJ); CP at 297-342 (decl. of Darlands' counsel in support of their SJ mot.); CP at 528-544 (District's response to Darlands' mot. for part. SJ); CP at 545-557 (decl. of Scott Sawyer in support of District's response); CP at 1365-1384 (Darlands' reply to District's response); CP at 1385-1523 (decl. of Doug Nicholson in support of Darlands' reply); CP at 1524-1530 (decl. of Aaron Millstein in support of Darlands' reply).

The issues then are whether the District is obligated to use its power of eminent domain to condemn the utility easements at issue in this case and, if so, whether a court has the authority to compel it to do so. Both issues must be resolved in Darlands' favor.

2. The District Has the Duty to Condemn the Utility Easements Necessary to Extend its Water and Sewer Lines to the Darland Property Parcels; Otherwise, Those Parcels Can Never Receive the 230 Water Hook-ups and 38 Sewer Hook-ups They are Entitled to Receive, Which is Now the Law of the Case.

This Court upheld Judge Cooper's 2005 order, and Judge Sparks' 2015 order, which means that, under the law of the case doctrine, the Darland Property parcels are entitled to receive 230 water hook-ups and 38 sewer hook-ups. *See* Prior Opinion at 17, 21-22, 37. The Court's Prior Opinion also sets forth all of the facts necessary to establish that the District is contractually and legally obligated to condemn the utility easements in question. *Id.* at 2-22. Among other things, this Court noted that, on August 24, 2007, the District's counsel, John Milne, sent a letter to the Department of Transportation in which he "recognized a contractual obligation of the utility district to provide an extension of the utility services to the Darlands' land and the need for the extension of the utility easement to fulfill this duty." *Id.* at 19. This Court also cited to Judge Sparks' letter memorandum explaining his 2015 summary judgment order, in which he stated, in relevant part:

While it may ultimately be determined after trial that defendant should pay for the legal costs of the eminent domain proceeding and that plaintiffs should pay for the 'dirt work' (trenching and pipe costs), the court could also fashion some other sort of remedy. *In any event, it does seem beyond dispute that defendant shall have to, whether it wishes or not exercise its power of eminent domain to ensure that plaintiff has access to the sewer and water benefits already paid for.* 'In order for a sewer to be susceptible of use to a given parcel of land, there must be access from said land to said sewer without passing through the property of other individuals.' [Judge Cooper's] *Memorandum Decision*, page 9 (quoting *Towers v. Tacoma*, 151 Wash. 577, 583 (1929).

Id. at 22 (emphasis added).¹³

Regarding Judge Cooper's 2005 order, this Court further stated: "A 2005 court order affirmed the utility district's obligation to supply water and sewer services." *Id.* at 36. The law of the case doctrine thus bars the District from now claiming that it has no such obligation. *Worl*, 129 Wn.2d at 424.

3. The Trial Court Has the Authority to Order the District to Use its Power of Eminent Domain Under the Facts of This Case.

The trial court has the authority to require the District to exercise its power of eminent domain under the facts of this case. "[W]hen faced with a particularly egregious action by a local government, the courts have not hesitated in directing specific conduct." P. Stephen DiJulio, 1 Wash. Administra-

¹³ It is undisputed that the land lying between the Darland Property parcels and the termini of the District's water and sewer lines is held in private ownership. CP at 303, n. 6. Unlike the District, Darlands do not have the legal authority to condemn the utility easements necessary to develop their property to utilize the 230 water hook-ups and 38 sewer hook-ups. See, e.g., *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982).

tive Law Practice Manual §14.07[A] (2017).¹⁴ "Mistakes may result in controlling judicial decision, notwithstanding the doctrine of separation of powers." *Id.* Thus, under the appropriate circumstances, which exist here, Washington courts will order local governments to take specific action, even if the action is ordinarily within the local government's discretion. *See Levine v. Jefferson Cty.*, 116 Wn.2d 575, 807 P.2d 363 (1991); *Nagatani Bros., Inc. v. Skagit Cty. Bd. of Comm'rs*, 108 Wn.2d 477, 483, 739 P.2d 696 (1987).

For instance, in *Nagatani*, the Washington Supreme Court reviewed the Skagit County Board of Commissioner's decision to deny a landowner's plat application. 108 Wn.2d at 478. The Supreme Court agreed with the Court of Appeals that the county's reasons for denying the application were invalid. *Id.* However, instead of remanding and allowing for further county review (as the Court of Appeals had ordered), the Supreme Court remanded with instructions to the county directing it to approve the plat. *Id.* at 483. The Court refused to provide the county another opportunity to review the plat because the record was wholly devoid of any evidence to support the county's basis for disapproving the plat. *Id.* at 481-82.

Similarly, in *Levine*, the Washington Supreme Court required Jefferson County to issue a building permit without the mitigative restrictions that

¹⁴ A copy of the relevant excerpt from Mr. DiJulio's treatise is found at CP 1527-30.

the county had sought to impose. 116 Wn.2d at 581-82. The Court relied on *Nagatani* and rejected the county's request for remand for further proceedings because the record lacked any evidence to support imposing mitigative restrictions as the county wanted. *Id.* at 579-81.

Both *Nagatani* and *Levine* illustrate that where a local government fails to properly exercise its discretionary authority without evidence to support its decision, a court may order specific relief. Such is the case here because: (1) the District alone has the authority to condemn easements across the intervening landowners' properties; (2) the Darland Property has been assessed for water and sewer service, and the assessments have been paid in full; (3) the District's actions have created an expectation of receiving water and sewer hook-ups upon payment of the assessments; and (4) the law of the case holds that the Darland Property is entitled to receive 230 water hook-ups and 38 sewer hook-ups, as previously discussed.

What is particularly egregious here is the position first taken by the District in the trial court following remand: that it has no duty to condemn the utility easements necessary to deliver water and sewer service to the Darland Property parcels; and, even if it did, the trial court is powerless to order it to do so. CP at 541.

F. Pursuant to RAP 2.5(c), This Court Should Grant Darlands' Request that it Review its Earlier Decision Declining to Decide Whether the District Has the Authority to Condemn Access Easements Under the Unique Facts of This Case.

This Court has the authority to review its prior decision in this matter under RAP 2.5(c)(2). Under RAP 2.5(c)(2), "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." As stated in *Folsom v. Cnty. of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988), "[r]econsideration of an identical legal issue in a subsequent appeal of the same case will be granted where the holding of a prior appeal is clearly erroneous and the application of the [law of the case] doctrine would result in manifest injustice."

This Court previously declined to decide the issue of whether the District has the authority, under the particular facts of this case, to condemn access easements to the Darland Property parcels. In doing so, this Court incorrectly found that "the Darlands impart no evidence that the utility district represented that it would provide access easements for SnoCadia"; further, "Darlands cite no authority for this argument." Darlands did, however, provide evidence of such promises by the District, as well as legal authorities to support their position. *See* Darlands' opening brief in the prior appeal, filed with

this Court on May 2, 2016, at 14-26, and Darlands' reply brief at 15-29 (*see* especially, *id.* at 15-20 regarding District Superintendent Kloss' acts and his authority to bind the District).¹⁵

Moreover, this Court's Prior Opinion specifically refers to evidence in the record of the District's promises to obtain access easements. For example, after discussing at length the due diligence that Darlands' immediate predecessor-in-interest conducted before paying the District all assessments, penalties, and interest owed on the Property (Prior Opinion at 7-10), the Court noted that, "[f]rom 1991 to 2000, [District] Superintendent Richard Kloss procured several quit claim transfers that granted the sewer district road and utility access to the Miller Shingle Company's 76.8 acres [the Property]." Prior Opinion at 9 (underscoring added). Mr. Kloss, as the District's Superintendent, had the ostensible authority to bind the District in its dealings with third parties, including Leclezio. *Udal v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 913, 154 P.3d 882 (2007). ("An agent has apparent authority when a third party reasonably believes the agent has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.")

Furthermore, the District could not fulfill its promises to Leclezio—who jointly owned the Property with Darlands when the original complaint

¹⁵ Darlands' reply brief is part of the record below (*see* CP at 850-905).

was filed—unless the Property could be developed to utilize the 230 water and 38 sewer hook-ups, which required at least one 60'-wide access easement. CP at 68-70, 84, 1078-79. Likewise, without such access easement(s), Judge Cooper's 2005 order, which was affirmed by this Court, would be meaningless. *See* Prior Opinion at 17, 36-37.

Simply put, unless the District condemns the access easements necessary to allow the Property to utilize the paid-for utility hook-ups, pursuant to RCW 57.08.005(1), the chance of the Darlands ever being able to use the hook-ups is speculative or conjectural, since they cannot condemn a private easement in this case. *See Brown*, 97 Wn.2d at 370; *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965) ("The actual benefit to the land [assessed under a ULID] must be actual, physical and material, and not merely speculative or conjectural.").

At pages 22-27 of their prior opening brief, and at pages 23-26 of their prior reply brief on appeal, Darlands set forth the legal authority supporting their argument that, under the facts of this case, the District has the power to condemn the access easements necessary to allow them to utilize the 230 water hook-ups and 38 sewer hook-ups they are entitled to receive, which will now be summarized. RCW 57.08.005(1) states a District "shall have" the power to condemn "all lands, property and property rights . . . necessary for its purposes . . . [which] shall be exercised in the same manner and by the

same procedure as provided for cities and towns." RCW 8.12.030 empowers every city and town to condemn land for water and sewer systems, "*and for other public use.*" (Italics added.) RCW 57.02.030 mandates: "The rule of strict construction shall not apply to this statute, which shall be liberally construed to carry out its purposes and objects." The District thus has broad authority to condemn all lands "necessary for its purposes"

Condemning the required access easements is "necessary for [the District's] purposes" in several ways. To begin with, they are necessary in order for the District to fulfill its contractual obligation to Darlands, as found by Judge Cooper's 2005 summary judgment order affirmed by this Court. *See* Prior Opinion at 17, 37. The District also represented to WSDOT: "The 230 water and sewer connections sought by Mr. Darland would increase, by approximately fifty percent (50%) SPUD's total water and sewer connections, and the corresponding revenue to SPUD generated thereby." CP at 1474.

Thus, the "public use" requirement necessary to condemn private property by a public utility district has been met in this case, further establishing the "necessary for its purposes" element of RCW 57.08.005. The fact that Darlands will also benefit from the condemnation proceeding is of no consequence in this regard. *Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 573, 151 P.3d

176 (2007) ("we have expressly held that a finding of public use is not defeated where alleged private use is incidental to public use").

Darlands also directed this Court to an opinion from the Washington Attorney General responding to the following question: "Does a water-sewer district have legal authority to condemn an interest in real estate for the purpose of providing right-of-way and access to meet local land use development codes?" The Attorney General answered the question as follows:

A water-sewer district may lawfully condemn an interest in real estate for the purpose of providing right-of-way and access to meet local land use development codes, provided that the water-sewer district is acquiring the property interest for a legitimate public purpose related to the purposes and functions of the district, and provided that the district follows the constitutional procedures for acquiring property by eminent domain. ***Whether a particular exercise of eminent domain would meet these standards is a question that will depend on the surrounding circumstances.*** (Emphasis added.)¹⁶

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

¹⁶ A copy of the AG's Opinion is attached at Appendix 1 hereto.

subsequent legislative sessions, to modify the statute." *Washington Educ. Ass'n v. Smith*, 96 Wn.2d 601, 606, 638 P.2d 77 (1981).¹⁷

Moreover, nothing in the plain language of RCW 57.08.005 expressly prohibits the District from exercising its power of eminent domain to condemn the access easements necessary in this case to deliver to the Property the paid-for water and sewer service, especially since doing so serves a legitimate public purpose. If the plain language of a statute is not ambiguous, it is to be given effect as written. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Id.* (internal quotation marks and citation omitted).

No ambiguity exists here regarding the District's statutory power to condemn access easements, under the unique facts of this case, since doing so is "necessary for its purposes." *See* RCW 57.08.005(1). To hold otherwise would preclude the District from fulfilling its contractual obligation to deliver to the Darland Property the 230 water and 38 sewer hookups, which are also necessary in order for the District to fulfill its very purpose in forming ULID

¹⁷ Although the last legislative amendment to RCW 57.08.005 occurred over a year after the Attorney General's 2008 Opinion, it left *unchanged* a water and sewer district's condemnation power under subsection 1. *See* Substitute House Bill 1532, Chapter 253, §1, a copy of which is attached at Appendix 2 hereto. Regarding the condemnation power of cities and towns under RCW 8.12.030, this statute has not been modified since the AG's Opinion.

No. 7, which was to create a comprehensive, pass-wide water delivery system for the benefit of all assessed property owners. CP at 1505, 1392-93.

VI. CONCLUSION

In sum, the trial court's order dismissing Darlands' claims as time-barred should be reversed, because Darlands filed their original complaint within three years of the District's actionable misconduct in 2001. The trial court erred in concluding that any potential claims Darlands are currently asserting would have begun accruing for statute of limitations purposes in the 1980s. Therefore, the case should be remanded for further proceedings, including resolution of the following issues:

1. Which party should pay the costs of the District's eminent domain proceeding, and any associated "takings" damages resulting therefrom, in order to condemn the access and utility easements necessary to extend the District's water and sewer main lines from their present termini to the boundaries of the Darland Property parcels?

2. Which party should pay for the actual costs associated with physically extending the District's water and sewer main lines to the Darland Property parcels, in order for them to receive the special benefits that have

already been paid for (e.g., the water and sewer hook-ups, as set forth in Judge Cooper's 2005 order)?

DATED this 8th day of February, 2019.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: 

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Co-Counsel for Appellants,
Michael L. Darland and Myrna Darland

K&L GATES

By: 

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Co-Counsel for Appellants,
Michael L. Darland and Myrna Darland

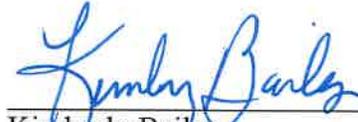
CERTIFICATE OF SERVICE

I certify that on the 11th day of February, 2019, I caused a true and correct copy of this document to be filed and served on the following Attorneys for Respondent via the Washington State Appellate Court's Secure Portal Electronic Filing System:

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Kimberly Baijes

APPENDIX 1



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

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

May 19, 2008

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

Dear Representative Clibborn:

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

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

BRIEF ANSWER

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

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

ATTORNEY GENERAL OF WASHINGTON

Honorable Judy Clibborn
May 19, 2008
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ANALYSIS

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

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

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

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

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

ATTORNEY GENERAL OF WASHINGTON

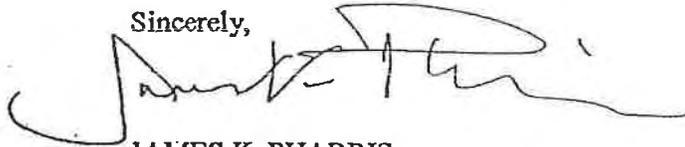
Honorable Judy Clibborn
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Grant Cy. PUD 2, 159 Wn.2d at 576. The determination of necessity is a legislative question for government proposing to acquire property through eminent domain. *Id.* at 575.

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

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

Sincerely,



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

:pmd

Enclos.

APPENDIX 2

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1532

Chapter 253, Laws of 2009

61st Legislature
2009 Regular Session

RECLAIMED WATER--WATER-SEWER DISTRICTS--AUTHORITY

EFFECTIVE DATE: 07/26/09

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

FRANK CHOPP

Speaker of the House of Representatives

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

BRAD OWEN

President of the Senate

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

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

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

BARBARA BAKER

Chief Clerk

FILED

April 29, 2009

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1532

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

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

READ FIRST TIME 02/17/09.

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

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

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

8 A district shall have the following powers:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Passed by the House February 23, 2009.

Passed by the Senate April 13, 2009.

Approved by the Governor April 28, 2009.

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

LATHROP, WINBAUER, HARREL, SLOTHOWER & DENISON LP

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Refiling of Amended Opening Brief of Appellants to include Appendices that were inadvertently left off of filing on 2/8/19

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