

FILED

JUL 29 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 340813

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

Appellants,

v.

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

SNOQUALMIE PASS UTILITY DISTRICT'S REPLY BRIEF
ON CROSS-APPEAL

Daniel P. Mallove, WSBA #13158
Scott R. Sawyer, WSBA #20582
Law Office of Daniel P. Mallove, PLLC
2003 Western Avenue, Suite 400
Seattle, WA 98121
(206) 239-9933

TABLE OF CONTENTS

I. INTRODUCTION 1

II. DARLANDS' ARGUMENT ABOUT THIER PREDECESSOR "NOT KNOWING OF THE EXTENT OF THE ULID NO. 7 IMPROVEMENTS UNTIL WELL AFTER EXPIRATION OF THE STATUTORY 10-DAY APPEAL REQUIREMENT" IS STILL AN IMPERMISSIBLE COLLATERAL ATTACK..... 2

III. THE TRIAL COURT CORRECTLY FOUND THE PROPERTY WAS "SPECIALLY BENEFITTED" BY BEING INCLUDED IN ULID NOS. 4 AND 7 4

A. The Resolutions Creating ULID Nos. 4 and 7 do not State that Water or Sewer Lines would be Delivered to the Boundary of all Properties within the ULIDs.....6

B. “Available” does not mean “Delivered to your Property Line” 7

C. The Alleged “Guarantee” – to “Brin[g] Water in Trunk Lines Past [Darlands’] Property” – is Manufactured, and didn’t Happen 8

D. No “Post-ULID Admissions” were made that Water would be Delivered to all Property Boundaries..... 11

E. Mr. Kloss had no Authority, Ostensible or Otherwise, to Alter the Improvements Specified in Resolutions 13

F. Darlands’ Reliance on *Towers v. Tacoma*, *Monk v. Ballard*, and *Douglass v. Spokane County* is Misplaced..... 13

G. Darlands also Fail to Establish that there was no Increase in the Fair Market Value of the Property by being Included in the ULIDs 16

IV. THE DISTRICT CANNOT CONDEMN PRIVATE OR PUBLIC PROPERTY, JUST SO DARLANDS CAN OBTAIN AN ECONOMIC GAIN FROM THEIR SPECULATIVE PURCHASE OF THE SUBJECT PROPERTIES 19

A. Darland, not the District, Needs the 60'-Wide Access Easements to Darland's Property 19

B. The Washington Cases Cited by Darlands do not Support their Argument that the Access Roads are for a "Public Use" 20

V. CONCLUSION 24

TABLE OF AUTHORITIES

<i>Douglass v. Spokane County</i>	14-16
<i>Fisher Bros. Corp. v. Des Moines Sewer District</i> , 97 Wn.2d 227, 643 P.2d 436 (1982).....	1
<i>Funk v. City of Duvall</i> , 126 Wn. App. 920, 109 P.3d 844 (2005)	6, 7
<i>Heavens v. King County Rural Library District</i> , 66 Wn.2d 558, 563, 404 P.2d 453 (1965)	17
<i>Holmes Harbor Sewer District</i> , 155 Wn.2d 858 (2005).....	22-24
<i>Little Deli Mart v. City of Kent</i> , 108 Wn. App. 1, 32 P.3d 286 (2001)	3
<i>Monk v. Ballard</i> , 42 Wash. 35 (1906)	14-16
<i>Patchell v. City of Puyallup</i> , 37 Wn. App. 434, 682 P.2d 913 (1984)	1
<i>State v. Evans</i> , 136 Wn.2d 811, 817 (1998)	21
<i>Stoddard v. King County</i> , 22 Wn.2d 868, 882, 886-87, 158 P.2d 78 (1945)	13
<i>Towers v. City of Tacoma</i> , 151 Wash. 577 (1929).....	14-16
<i>Town of Steilacoom</i> , 69 Wn.2d 705 (1966).....	22, 23
<i>Udall v. Escrow</i> , 159 Wn.2d 903, 913 (2007).....	13
<i>Vine Street Commercial Partnership v. City of Marysville</i> , 98 Wn. App. 541, 989 P.2d 1238 (1999), rev. denied, 141 Wn.2d. 1006, (2000)	6

RULES AND STATUTES

Chapter 56 RCW 1

Chapter 57 RCW 1

RCW 35.44.190 4

RCW 43.20.260 12

RCW 56.20.070 1, 24

RCW 57.08.005 21

RCW 57.08.081(1) 24

RCW 57.16.050 1

RCW 57.16.060 6

RCW 57.16.090 2, 4, 17, 18, 25

RCW 57.16.100 1, 17, 24

I. INTRODUCTION

Darlands have no means to challenge the “special benefits” conferred by ULID Nos. 4 and 7 – formed 34 and 29 years ago respectively – under established Washington law. The issue is:

Is Darland conclusively barred from now contesting the sufficiency of the “special benefit” conferred on the subject property, including whether the water and sewer main lines should be extended to the property boundary, because Darland’s predecessor-in-interest failed to appeal the District’s assessment as provided in R.C.W. 57.16.090?¹

Darlands’ reply is telling. Instead of responding to the District’s arguments and authorities, Darlands attempt to characterize the issue as “not challenging the validity of the ULID,” but claiming that “the District breached its legal and contractual obligations to make the paid-for water and sewer service ‘available’ to their property parcels.” Further:

¹ The legal authority possessed by water and sewer districts to establish local improvement districts (“LID”) within their boundaries is pursuant to RCW 57.16.050. At the time ULID Nos. 4 (1982) and 7 (1987) were established, water districts and sewer districts were treated separately under the then existing statutes. *See*, former Chapter 56 RCW and Chapter 57 RCW. Effective July 1, 1997, Chapter 56 RCW and Chapter 57 RCW were combined into the current Chapter 57 RCW. The statutory process dealing with local improvement districts for water and sewer districts, has not changed substantially with the merging of Chapters 56 and 57 RCW. The Washington Supreme Court has held that RCW 56.20.070 (the predecessor to RCW 57.16.100) bars any other or collateral action by any protesting property owner challenging the local improvement district or the assessment to any property contained therein. Subsequent cases which have addressed this issue have similarly held that the property owner must substantially comply with the applicable statutes concerning any contest to the creation of a local improvement district or the assessments therein. *See, Fisher Bros. Corp. v. Des Moines Sewer District*, 97 Wn.2d 227, 643 P.2d 436 (1982); *Patchell v. City of Puyallup*, 37 Wn. App. 434, 682 P.2d 913 (1984).

...there was no possible way for any assessed property owner to know that the District never intended to fulfill its promise to make water and sewer service available to his or her property within the 10-day deadline for filing an appeal under 57.16.090....To accept the District's argument...would set a **dangerous precedent**. It would allow any water and sewer district to make promises to induce property owners to accept their properties being assessed, and brought into a ULID, without protest, and later rescind its promises after the 10-day window to appeal had lapsed.

As shown below, the "dangerous precedent" is the one being advocated by the Darlands. It makes absolutely no sense, and is contrary to Washington Law, to allow a property owner to come into Court seventeen years² after a ULID is created, and the final assessment roll confirmed, and argue that his property has not been "specially benefitted" by the improvements under that ULID.

II. DARLANDS' ARGUMENT ABOUT THEIR PREDECESSOR "NOT KNOWING OF THE EXTENT OF THE ULID NO. 7 IMPROVEMENTS UNTIL WELL AFTER EXPIRATION OF THE STATUTORY 10-DAY APPEAL REQUIREMENT" IS STILL AN IMPERMISSIBLE COLLATERAL ATTACK

In their Reply, Darlands are still attempting to collaterally attack the ULID proceedings, although claiming not to do so. That the District's

² Seventeen years in the case of ULID No. 7, and 22 years in the case of ULID No. 4. Darlands filed their lawsuit in 2004.

public improvements had not been completely constructed at the time of the assessments, or within the 10-day appeal period following confirmation of the final assessment roll, is irrelevant. The public improvements were constructed as designed and known at the time of the ULID assessment proceedings. And under clear precedent, there is no claim that such a process is in any way actionable. *Little Deli Mart v. City of Kent*, 108 Wn. App. 1, 32 P.3d 286 (2001).

In *Little Deli Mart*, the property owner sued the City of Kent for an assessment made to construct an arterial road improvement. Although the owner missed the statutory appeal deadline, it sued the City collaterally because the assessment came before completion of the improvement. The trial court dismissed the case, and the Court of Appeal affirmed stating:

“...[The] assessments must be in accordance with "the special benefits conferred" upon all property included within the LID. Contrary to **Little Deli's** contentions, **such benefits need not have accrued before the City may levy assessments. Special benefits include the "opportunity to benefit" so long as the opportunity is not speculative.**”

Id., 108 Wn.App. at 7, emphasis added.

Here, the description of the public improvements, and the improvements’ plans and locations, were all part of the assessment proceedings for ULID Nos. 4 and 7. (CP 360-361, 388-393, 1827-1834) If

Darlands' predecessor (Von Holnstein) had a concern that improvements thereunder did not include running water or sewer service lines all the way to his property line, and therefore the property was not specially benefitted, that should have been raised by a timely protest and appeal. RCW 57.16.090; *see also*, RCW 35.44.190 (relating to city LIDs). If, by the passage of time,³ Darlands are now unable to obtain (1) the easements and rights of way necessary to extend water and sewer lines to their property, or (2) the two 60 foot-wide access roads to satisfy the County land use requirements, that is not the District's responsibility. The District is only responsible for constructing the ULID's public utility improvements.

III. THE TRIAL COURT CORRECTLY FOUND THE PROPERTY WAS "SPECIALLY BENEFITTED" BY BEING INCLUDED IN ULID NOS. 4 AND 7

Darlands argue that their property has not been "specially benefitted" unless the District is compelled, more than 30 years after the improvements under the ULIDs were made, to extend water and sewer lines to their property boundary. Their argument can be summarized as follows:

1. The District told property owners that ULID No. 7 would make water "available" to their properties;

³ Not to mention failing to ask anyone at the District prior to the June 2003 purchase whether the District would extend water and sewer lines all the way to their landlocked parcels.

2. In the case of Darlands' four parcels, totaling 76.8 acres, the 230.07 water and 38.37 sewer connections are not "available" to them, because the District's water and sewer lines do not extend to their property boundary;
3. The connections are also not "available" to use because Kittitas County requires them to have two 60 foot-wide "access" roads, easements for which they are unable to obtain from neighboring property owners;
4. To allow Darlands to use their water and sewer connections, therefore, the District must (a) use its power of eminent domain to secure for them the two 60-foot wide access roads required by Kittitas County, and (b) extend the water and sewer lines to their property; or
5. Alternatively, the District should refund, with interest, the amount of the assessments paid by Darlands' predecessors.

The record below shows conclusively that the subject properties were "specially benefitted" by being included within the ULIDs. (*See* District's Cross-Appeal at pp. 14-19, CP 558-559) Before the ULIDs, the properties would have to rely on well water and septic for development purposes. After being included within the ULIDs, the properties could connect to the District's water and sewer systems, provided the property owner took the necessary steps to obtain the utility easements, entered the necessary "developer extension agreement" with the District, and pay to extend water and sewer lines from their *termini* to the subject properties. (CP 994) They also obtained the right to receive 38.37 sewer connections, and 230.07 water connections.

A. The Resolutions Creating ULID Nos. 4 and 7 do not State that Water or Sewer Lines would be Delivered to the Boundary of all Properties within the ULIDs

The resolutions⁴ creating ULID Nos. 4 and 7 do not promise that the improvements will bring water or sewer connections to the property line of each parcel within the ULID area. First, ULID No. 4 did not extend any sewer lines. Second, Resolutions 87-3 and 87-9 for ULID no. 7 state the water main extension will be “**as shown and described in the Exhibit A,**” a map present at all ULID meetings, describing the route of the water main and clearly indicating its *terminus* was several thousand feet from the boundary of Darlands’ property.⁵ (CP 360-361, 388-393, 1827-1834.) It is undisputed that the Resolution 87-9 limited the water main extension in this way.

⁴ Formation of the ULIDs, and the payment of assessments by property owners, creates a contractual relationship. *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 541, 989 P.2d 1238 (1999), rev. denied, 141 Wn.2d. 1006, (2000). The terms and conditions of that contractual relationship, however, are based solely upon the language of the ordinance or resolution creating the ULID. *Funk v. City of Duvall*, 126 Wn. App. 920, 109 P.3d 844 (2005). (emphasis added)

⁵ At pp. 37-38 of their Reply, Darlands argue: “How would any of the affected landowners who were not present at the public hearing be aware of the map?” (Darland Reply at pp. 37-38) Darlands essentially challenge whether the District complied with due process requirements and notice requirements governing the ULIDs. See RCW 57.16.060. The argument is easily addressed. Darland does not say the District failed to follow any part of *RCW 57.16.060*. In fact the District did, and the trial court so found. Darland offers no authority for the proposition that a property owner, who receives notice of a public hearing for the formation of a ULID, can choose to stay home and expect that all materials will be sent to her for review. Rather, the statute provides the notice which the District must supply to property owners, and the trial court found the District provided it.

B. “Available” does not mean “Delivered to your Property Line”

Because they were not present during the formation of the ULIDs, Darlands rely on excerpted District meeting minutes to find support for their “interpretation” of improvements “promised” by the ULIDs, even though the Resolutions themselves do not promise extension of water lines to the boundary of each parcel. Darlands’ argument relies on equating the term “available” with “delivered to owners’ property lines.” At pp. 6-17 of their Reply Brief, they set forth excerpts from meeting minutes held contemporaneous with the creation of ULID No. 7 to support this. Because the District said that ULID No. 7 would make water “available to all properties within the ULID” they argue, it was promising that it would “construct water lines to all properties within the ULID.”

This argument is easily dispelled. First, the language of the Resolutions themselves control under *Funk v. City of Duvall*, and none of the Resolutions passed in connection with the ULIDs promise this. Second, it is undisputed that the District’s water main extension under ULID No. 7 was limited by its bonding capacity. (CP 362-363) The length and path of the water main extension was described in “Exhibit A” (the map), and brought to meetings for property owners to see. (CP 361) Properties adjacent to the water main extension, as well as properties lying

some distance from the extension, were all “specially benefitted” by virtue of (1) having received ERU connections giving them the right to connect to the District’s water supply, and (2) having the water main extended much nearer to their properties. Creation of the ULIDs, however, did not eliminate the responsibility of owners like Count Von Holnstein, and his successors, to obtain the easements necessary to extend the water lines from the new *terminus* to their landlocked parcels. Otherwise, the landlocked property owners, who purchased acreage cheaply precisely because it lay some distance from public roads and existing water and sewer improvements, would receive a much greater benefit if the District were required, as Darlands argue, to condemn access roads and utility easements and run new water lines to their property boundaries.

C. The Alleged “Guarantee” – to “Brin[g] Water in Trunk Lines Past [Darlands’] Property” – is Manufactured, and didn’t Happen

At pp. 6-9, 14, and 21, of their Reply Brief, Darlands offer excerpts from meeting minutes to show the District “promised” or “guaranteed” to extend water and sewer lines to the boundaries of the owners’ properties. Those statements were made during meetings related to the formation of ULID No. 7 (in 1987).⁶ Darlands rely heavily on the

⁶ The argument is stretched to the point of fallacy as it relates to ULID No. 4. Darlands cite only to excerpts of meetings held on January 8, 1986, July 25, 1986, June 24, 1987, and July 31 1987, all 4-5 years after the improvements under ULID No.4 were made.

following statement made by Commissioner DeBruler at the June 24, 1987 public hearing on confirmation of the “Final Assessment Roll” for ULID No. 7:⁷

“These are guaranteed hookups. We are guaranteeing you water. This ULID # 7 is bringing water in trunk lines past your property.” (CP 167, CP 1800)

Taken out of context, as Darlands have done, this has some appeal. Placed in the context of the entire meeting, and the argument crumbles. It is undisputed that the owner of the subject property at the time, Count Von Holnstein, did not attend the hearing, and neither did his representatives. The meeting began with a question from one of the attendees:

Erling Johnson: Can I get a clarification?
What is ULID #7?

Pres. Craven: ULID # 7 is the installation of a water trunk line from the top of the mountain down along the highway to the Hyak area across the highway to the – what’s the area?

Supt. Kloss: Yellowstone Trail.

Pres. Craven: Yellowstone Trail. It will tie the whole mountain together into one complete water system. The trunk line at the present time – well 2 years ago – we installed a trunk line from the Alpental area

Because ULID No. 4 only paid for construction of a sewage treatment plant, no sewer lines were extended. Those statements cannot be used to support Darlands’ argument that the District intended to extend a sewer line (in 1982) to the property.

⁷ CP 1786-1803

from the wells in Alpental and the storage tanks in Alpental, to the Summit right outside this building. This ULID takes that trunk line from right outside this building down the pass to the Hyak area to the Yellowstone Trail area. It installs three 150,000 gallon storage tanks... (CP 1787-88)

The “Yellowstone Trail” area, and the terminus of the water main extension under ULID No. 7, is approximately 4500 feet from the south corner of the subject property, and well north of it. (CP 1770, 1474-76)

Later, at the same meeting, Commissioner De Bruler responded to a specific question from a specific property owner, John Hight:

John Hight: I have a question. With a piece of property big enough to split and divide into another lot, will I have to pay the \$710 two times?

Pres. Craven: You will have to pay another \$710.

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

Sec. De Brueler: These are guaranteed hook-ups. We are guarantying you water. *This ULID No. 7 is bringing water in trunk lines past your property.*

John Hight: You answered my question.
(CP 1800)

Mr. Hight's property was one of the few properties in the ULID that directly abutted the public right-of-way in which the water transmission main was located. (CP 1771). Thus, Commissioner De Bruler's statement, made directly to Mr. Hight, that the District was bringing the water main "past his property" was completely accurate. It was not, as argued by Darlands, a representation to every property owner in the ULID that the improvement would "bring water in trunk lines past their properties." Given President Craven's earlier description of the limitation on the water main extension *at the same meeting*, it is unreasonable and inappropriate to construe the statement made to Mr. Hight as Darland suggests.⁸ Even if it could be construed as a "promise," neither Von Holstein, nor any of his representatives were at this meeting, and so could not have relied upon it.

D. No "Post-ULID Admissions" were made that Water would be Delivered to Darlands' Property Boundary

Darland also argues that the District has "admitted," by virtue of correspondence to the WSDOT in 2007 and 2010,⁹ that it has a "statutory

⁸ It should be repeated that plaintiff cannot identify any similar alleged representations regarding extending sewer lines.

⁹ These documents were submitted and attached to a Declaration from Mr. Nicholson in support of Darlands' Reply to the District's Opposition to their Motion for Partial

and contractual obligation to provide for the extension of utility service to the Darland property...” (Darland Reply at pp. 9-11.) These letters were explained during the hearing on the summary judgment motions before Judge Sparks. To begin, these letters were sent at a time when the MOA was in place (2005-2014), and the parties had agreed to work cooperatively to try to obtain the access and utility easements to the Darlands’ property. (See District’s Opening Brief on Cross-Appeal at pp.11-12) The “contractual” obligation, refers to the MOA which was in place at the time, and bound the parties.

As for the “statutory” obligation, this refers to RCW 43.20.260, which was enacted in 2003. Under this statute, a municipal water supplier has a “duty to serve” property if it is located within the purveyor’s approved and designated retail water service area. That does not mean, however, that the purveyor must extend its water system to the property. As set forth above, District policy provides that it is the property owner’s responsibility to obtain the utility easements, enter the necessary “developer extension agreement” with the District, and pay to extend water and sewer lines from its *terminus* to the subject properties. (CP 994) Accordingly, there were no “admissions” by the District to the WSDOT

Summary Judgment filed November 13, 2015, giving the District no opportunity to respond to them in writing before hearing on the cross-motions for summary judgment.

that it has a duty to extend its water or sewer mains to the Darlands' property.

E. Mr. Kloss had no Authority, Ostensible or Otherwise, to Alter the Improvements Specified in Resolutions

Darlands also offer the Declaration of Richard Kloss for their unique interpretation that the subject ULIDs promised to extend water and sewer lines to the subject properties was. (Darlands' Reply at 21, CP 240-243) Respondents have conclusively set forth why the *ultra vires* statements and actions made by former Superintendent Kloss do not bind the District. (District's Cross-Appeal at pp. 19-21, CP 822-825) In response, Darland offers 5 pages of argument as to why this Court should ignore *Stoddard v. King County*, 22 Wn.2d 868, 882, 886-87, 158 P.2d 78 (1945), and that Kloss had "at least ostensible authority [to bind the District]." However, Darland offers no contrary authority to *Stoddard* other than citation to *Udall v. Escrow*, 159 Wn.2d 903, 913 (2007). That case does not involve a municipal corporation or governmental entity, and merely repeats the accepted doctrine of apparent authority as it applies outside that context. Accordingly, there is no merit to this argument.

F. Darlands' Reliance on *Towers v. Tacoma*, *Monk v. Ballard*, and *Douglass v. Spokane County* is Misplaced

Darlands attempt to boost their "availability = delivered" argument by also arguing that "the law" requires the District to deliver

water and sewer lines to their property. Citing *dicta* from *Monk v. Ballard*, 42 Wash. 35 (1906), and *Towers v. City of Tacoma*, 151 Wash. 577 (1929), they argue that “[I]n 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.” The cases are easily distinguished.

In *Monk v. Ballard*, the appellants were assessed for a sewer improvement. The ordinance provided that costs would be assessed “against all the property within said district which is *contiguous or approximate to such streets in which such main sewer is placed...*” Appellants contested the assessment as their property lay in tide lands, and was not “contiguous or approximate to” any street carrying the sewer line. Based on the specific language of the ordinance, the Supreme Court agreed and found that the location of the new sewer line was not “approximate” to the appellant’s properties. The Court made the statement quoted by Darlands as *dictum*, adding “...we do not believe it can be deemed to be ‘approximate’ *within the meaning of the statute in question.*” *Id.* at 42. Here, Darland points to no similar language in the Resolutions creating ULID No. 7 that the water main extension would be “contiguous or approximate” to the subject property.

In *Towers*, the City of Tacoma created an LID to construct a trunk sewer to serve properties located within the boundaries of the LID. All property within the LID was assessed by the same method: on the basis of area alone. The Court found that the governing statute provided for assessing owners differently based on proximity to the improvement, and that the appellants' were improperly assessed. *See*, 151 Wash. at 580-81. The Court then repeated the *dictum* from *Monk*, prefacing it with "...in that case it was pertinently remarked..." Accordingly, the statement quoted from *Monk*, and repeated in *Towers*, is not a "rule of law" as Darland argues. It is *dictum* with no application to this case.

In *Douglass v. Spokane County*, 115 Wash. App. 900 (2003), the appellants were assessed in 1996 when the County expanded the sewer service to the west of their property, but did not directly benefit the appellants. The appellants received sewer service under a ULID in 1984, and conceded that they were specially benefitted thereby. The new ULID did not accept any flow from their property. The appellants timely appealed the assessments to Superior Court. The Superior Court agreed with the appellants and annulled the assessments, finding that the appellants' property was not benefitted under the 1996 assessment. On appeal, this Court agreed finding that appellants could not have benefitted under the 1996 ULID, because they were already enjoying sewer service

under the previous ULID. Darland's citation to this case is mystifying, as it does nothing to establish either (1) that the District was required under ULID Nos. 4 and 7 to extend the water and sewer lines to their landlocked parcels, (2) that their properties were not specially benefitted under the ULIDs, or (3) that there is a requirement under Washington law that all water and sewer ULIDs extend water and sewer service to the property boundary of landlocked parcels.

Accordingly, neither the *Towers. Monk*, nor *Douglass* decisions stand for the proposition stated by Darland. Rather, the cases stand for the proposition that (1) to challenge a ULID assessment, one must follow the statutory procedures provided for protest and appeal, and (2) that whether there has been a special benefit depends on the language of the particular resolutions or ordinances creating and governing the specific ULID.

G. Darlands also Fail to Establish that there was no Increase in the Fair Market Value of the Property by being Included in the ULIDs

Darlands argue that there was no "special benefit" conferred by the ULIDs unless there has been a corresponding increase in "fair market value" to the benefitted property. Indeed, under Washington law, special benefits are measured as

“the difference between the fair market value of the property immediately after the special benefits have attached and its fair market value before they have attached.”

Heavens v. King County Rural Library District, 66 Wn2d 558, 564 (1966).

Darlands offer no competent evidence to support this argument. At p. 3 of their Reply Brief, they refer to a 2008 “WSDOT/MAI” appraisal. The District objected to that appraisal at the time it was submitted as hearsay, irrelevant, and not being properly authenticated. (See CP 833-834) Facially, it fails the *Heavens v. King County* test of determining “the fair market value immediately after the special benefits have attached and its fair market value before they have attached,” because it was performed in 2008. At pp. 35-36, Darlands simply argue that the purchase price paid by the successive owners does not indicate an increase.

This argument highlights why challenges to ULID assessments must be made as provided under RCW 57.16.090-100. It is at that point – during the period provided after confirmation of the final assessment roll – that a property owner can bring an expert appraiser to court, and offer testimony that the improvements proposed under the ULID will not increase the fair market value of her property. The statute allows a superior court judge to hear the testimony in an accelerated proceeding,

and make a determination as to the “special benefit” conferred upon that owner’s property by virtue of being included in the ULID. If the property owner follows these steps,

“the judgment of the court shall confirm, unless the court shall find from the evidence that such assessment is either founded upon a fundamentally wrong basis or a decision of the board of commissioners thereon was arbitrary or capricious, or both, in which event the judgment of the court shall correct, modify, or annul the assessment insofar as it affects the property of the appellant.”

RCW 57.16.090. This allows a municipal corporation, like the District, to have certainty regarding the bonding needed for its projects, and to revise assessments in such a way that the specially benefitted properties will provide the revenue needed to retire the bonds.

To accept Darland’s argument, would allow a successor owner of a property to come in at any time (here 22 years after the final assessment role was confirmed for ULID No. 4), and argue (1) that the “special benefit” the property received wasn’t adequate, and (2) demanding return of assessments paid by a predecessor owner. This is completely antithetical to the statutory scheme imposed by the legislature to resolve challenges to ULID assessments.

IV. THE DISTRICT CANNOT CONDEMN PRIVATE OR PUBLIC PROPERTY, JUST SO DARLANDS CAN OBTAIN AN ECONOMIC GAIN FROM THEIR SPECULATIVE PURCHASE OF THE SUBJECT PROPERTIES

Having addressed Darlands' arguments as to the extent of the "special benefits" conferred under ULID Nos. 4 and 7, and their failure to timely contest the special benefits as provided by statute, the District now responds to Darlands' argument that the District must condemn access easements to their property. (Darlands Reply Brief at pp. 21-29) After purchasing the subject properties without proper due diligence, and realizing that the access and utility easements promised by Mr. Leclezio could not be obtained to allow development of their "Snocadia" project, Darlands argue that it is *the District's* responsibility to obtain those easements. The trial court disagreed.

A. Darland, not the District, needs the 60'-wide access Easements to Darland's Property.

Two 60'-wide access roads are required by Kittitas County for the development Darlands propose. As stated in Mr. Darland's email to the District's superintendent, Terry Lenihan, on May 4, 2006:

"I made contact with Mark Lusier of Wells Fargo Bank who handles the estate of Mary McBride. I told him what we needed regarding the easement for utilities and the 60 [foot] overall easement which is necessary for a development capable of

utilizing the 230 water and sewer hookups. Mr. Lusier mentioned that Mrs. McBride did not like the idea of a 60 foot easement and the potential traffic this would generate...*I also told him that water and sewer are of no value to me or to the property if I cannot use them due to a lack of a road access that meets the County Standard for a subdivision of that size. The width necessary for approval is 60 feet.*"

(CP 1964, emphasis added) The trial court saw through Darlands' transparent attempt to compel the District to obtain the access easements to their landlocked property, just so they could further their private development plans. It properly held that the District had no authority to condemn private land for private purposes. (CP 1103-1104)

B. The Washington Cases Cited by Darlands do not Support their Argument that the Access Roads are for a "Public Use."

Darlands argue that "the law is clear that, although condemning the required access easements will benefit Darland as a private developer, as long as there is sufficient benefit to the District, which there is in this case, the "public use" requirement has been met." (Darlands' Reply at 23) They suggest the condemnation of two 60'-wide access roads is an "incidental private benefit" to Darland, intimating that the primary result would be a "public benefit" to the District. Not so under Washington law.

The District's power of eminent domain is set forth by statute, and exercise of that power must be "necessary for [the District's] purposes." RCW 57.08.005. It is Darlands who need the two access roads to their property, not the District.¹⁰ Accordingly, it would be improper for the District to use its power of eminent domain just to benefit Darlands' private development aspirations.

The District also disagrees that use of its condemnation power would satisfy the requirement of "Public Use."¹¹ In addition to examining a governmental entity's statutory authority to condemn property, courts employ a three part test to determine the validity of an eminent domain action. The Court must find that (1) the use is really a public use, (2) the public interest requires it, and (3) the property appropriated is necessary to facilitate the public use. *State v. Evans*, 136 Wn.2d 811, 817 (1998). Thus, the District must have the express statutory power to condemn the

¹⁰ A 20'-wide right-of-way has served the landlocked properties since 1986. CP at 866, 915. Soon after the MOA was entered in 2005, the District was advised by the State Department of Transportation in September 2007 that it would grant a utility easement in the same 20'-wide right-of-way which has served the landlocked properties since 1986. CP 966, 978. However, the issue is not obtaining easements for utilities, which the State was willing to consider. The issue is requiring the District to use its powers of eminent domain to condemn access roads to Darlands' property.

¹¹ Normally, it is the water and/or sewer district which argues affirmatively that it has the power of eminent domain to condemn private land for public use. Here, the District does not believe it would be proper to exercise its statutory condemnation powers to obtain two access easements to Darlands' property. This is an argument which the District, and its counsel, find very strange to have to make.

property, and the District's asserted purpose for the proposed acquisition must be a "public use."

In its Cross-Appeal, the District has set forth why it cannot satisfy the "public use" requirement. Darlands have requested that the District condemn either an easement or fee simple interest in two 60-foot wide strips of property for the purpose of providing road access to his property. In response, Darlands cite two cases (*Town of Steilacoom* and *Holmes Harbor*) attempting to show why the "Public Use" requirement is met. These cases are distinguishable.

In *Town of Steilacoom*, 69 Wn.2d 705 (1966), a property owner appealed a determination of "public use and necessity" given to a sewer line extension project by Steilacoom. The extension was pursuant to an agreement between the developer and Steilacoom, under which the developer agreed to pay for construction of a sewer line to his proposed development, including the costs of any condemnation awards Steilacoom would have to pay to property owners to acquire easements over their properties. One property owner, Thompson, contested the determination of "public use and necessity," claiming that the new sewer line only benefitted the private builder. The Supreme Court found that a public benefit was derived from having all of the homes in the new development connected to a sanitary sewer, as opposed to individual septic systems,

thereby avoiding potential pollution problems. It also found that had Steilacoom acted on its own to finance the sewer extension with municipal funds, it would have had the power of condemnation.

Town of Steilacoom is readily distinguished from the instant case. Here there was no agreement between the District and Darland, or the District and any other property owner, to extend water and sewer lines to individual property boundaries within the ULID Nos. 4 and 7. Unlike the sewer line easements in that case, this case involves a request by the developer/Darland to condemn two 60'-wide access roads to his property to satisfy Kittitas County land use requirements. Finally, unlike the *Town of Steilacoom* case, where the developer and the municipality stipulated that the condemnation powers were being exercised in furtherance of "public use and necessity," here the District does not agree that condemning the access roads is for public use.

The *Holmes Harbor Sewer District*, 155 Wn.2d 858 (2005), case is inapposite. The issue on appeal was whether owners of unimproved lots within a golf course development could be charged monthly sewer charges when they were not connected to the system, and generated no sewage. Under the ULID formed by the Holmes Harbor Sewer District, the sewer lines were extended to each lot. However, the petitioner (a builder which owned 80 lots) had not connected any of those lots to the sewer lines.

Nevertheless, it was charged monthly sewer charges. The Supreme Court held that the owner of the unimproved lots could not be charged for sewer service if they had not connected:

“Given that the properties at issue are not improved, are not connected to the sewer system, and have no guaranteed right to connect upon improvement, we find that sewer service is not available to the properties under RCW 57.08.081(1). Accordingly, we find the charges imposed by the District on the properties at issue are not authorized by RCW 57.08.081(1).”

Id. at 866.

The District has not charged Darland monthly sewer charges, and the case has no relevance or similarity to the issues raised on appeal.

V. CONCLUSION

The trial court properly dismissed Darlands’ claims against the District on summary judgment. Their suit is an impermissible collateral attack on the sufficiency of the special benefits conferred upon their property by the District’s ULID Nos. 4 and 7. RCW 56.20.070 (the predecessor to RCW 57.16.100) barred any such collateral attacks by any protesting property owner challenging the local improvement district, or the assessment of any property contained therein. There is no theory or basis under Washington law (1) allowing Darlands to contest the sufficiency of the special benefits received under the ULIDs, or (2)

allowing a refund of the assessments paid by his predecessors, because Darlands' predecessor, Count Von Holnstein, failed to challenge the assessments under ULID Nos. 4 and 7 as provided by the predecessor statute to RCW 57.16.090. Furthermore, the record below supports the decision of the trial court that the subject property was specially benefitted by the improvements made under those ULIDs. Darlands' attempts to "re-write" those benefits and improvements for their own economic benefit, after 22 years (in the case of ULID No. 4) and 17 years (in the case of ULID), must be rejected, and the decision of the trial court granting the District's motions for summary judgment affirmed.

RESPECTFULLY SUBMITTED this 28th day of July, 2016.

LAW OFFICE OF DANIEL P. MALLOVE, PLLC

By: 

Scott A. Sawyer, WSBA #20582
Daniel P. Mallove, WSBA #13158
Attorneys for Respondent/Cross-Appellant
Snoqualmie Pass Utility District

DECLARATION OF SERVICE

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

Douglas W. Nicholson
Lathrop, Winbauer, Harrel,
Slothower & Denison L.L.P.
201 West 7th Avenue
Ellensburg, WA 98926

DATED at Seattle, Washington this 28th day of July, 2016.

LAW OFFICE OF DANEIL P. MALLOVE, PLLC



Meredith M. Klein, Legal Assistant