

No. 40429-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DANIEL AND LORI FISHBURN,

Appellants,

v.

PIERCE COUNTY PLANNING AND
LAND SERVICES DEPARTMENT,

and

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT,

Respondents.

BRIEF OF APPELLANT

David M. von Beck, WSBA# 26166
Attorney for Appellants,
Daniel and Lori Fishburn

LEVY • VON BECK & ASSOCIATES, P.S.
600 University Street, Suite 3300
Seattle, Washington 98101
(206) 626-5444

2010 MAY -7 PM 3:39
FILED
COURT OF APPEALS
DIVISION TWO
STATE OF WASHINGTON
MAY 10 AM 9:08
BY [Signature]

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. ASSIGNMENTS OF ERROR | 1 |
| <i>Assignments of Error</i> | |
| No. 1 | 2 |
| No. 2 | 2 |
| <i>Issues Pertaining to Assignments of Error</i> | |
| No. 1 | 2 |
| No. 2 | 2 |
| No. 3 | 2 |
| No. 4 | 3 |
| No. 5 | 3 |
| III. STATEMENT OF THE CASE | 3 |
| IV. SUMMARY OF ARGUMENT | 22 |
| V. ARGUMENT | 23 |
| A. The Trial Court Erred in Granting Defendants’ Motion for Summary Judgment and Dismissing Plaintiffs’ Complaint With Prejudice Because the Public Duty Doctrine Does Not Bar Plaintiffs’ Claims. Three Separate Exceptions to the Public Duty Doctrine Apply to Plaintiffs’ Claims Under the Facts of This Case. | 23 |
| 1. Standard of Review | 23 |

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Atherton Condominium Apartment-Owners Ass'n v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990)..... n.1, 24 nn.130-131 & 134, 25 n. 136

Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 220 P.3d 1214 (2009)..... 24 n.133

Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007)..... 1 n.1

City of Pasco v. Public Employment Relations Commission, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)..... 26 n.142

Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006)..... 25 n.138

Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)..... 26 nn.143-144

Dix v. ICT Group, Inc., 160 Wn.2d 826, 161 P.3d 1016 (2007)..... 37 n.178

Egbert v. Way, 15 Wn. App. 76, 546 P.2d 1246 (1976)..... 23 n.128

Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978)..... 26 n.141, 27 & nn.145-146, 30 & n.155

Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 93 P.3d 108 (2004)..... 24 n.129

Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2001).... 25 n.135

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005)..... 35 n.170

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)..... 36 & nn.173-174

| | <u>Page(s)</u> |
|---|--------------------|
| <i>Mitchell v. Washington State Institute of Public Policy</i> , 153 Wn. App. 803, 225 P.3d 280 (2009)..... | 37 n.177 |
| <i>Moore v. Wayman</i> , 85 Wn. App. 710, 722-23 (1997) (citing <i>Bailey v. Forks</i> , 108 Wn.2d 262, 268-69 (1987))..... | 30 n.154, 41 n.195 |
| <i>Stannik v. Bellingham-Whatcom County Board of Health</i> , 48 Wn. App. 160, 737 P.2d 1054 (1987)..... | 26 n.140 |
| <i>Taylor v. Stevens County</i> , 111 Wn.2d 159, 759 P.2d 447 (1988)..... | 41 n.195 |

Constitution

Constitution of the United States

| | |
|-----------------------------|----------|
| Amend. V, cl. 3 | 35 n.168 |
| Amend. XIV, §1, cl. 3 | 35 n.169 |

Statutes and Rules

Superior Court Civil Rules

| | |
|----------------|----------|
| CR 56(c) | 24 n.132 |
|----------------|----------|

Pierce County Code

| | |
|--------------------|--------------|
| PCC 1.16.010 | 2, 28 |
| Ch. 8.36 | 2, 28 |
| PCC 8.36.110 | 29 n.152, 30 |
| PCC 8.36.140 | 29 n.153 |

(continued)

| | <u>Page(s)</u> |
|--------------------------------|----------------|
| Revised Code of Washington | |
| Ch. 70.118 RCW | 26 |
| RCW 70.118.010 | 2, 26, 27 |
| RCW 70.118.030(1) | 28 n.147 |
| RCW 70.118.040 | 28 n.150 |
| RCW 70.118.130 | 28 n.149 |
| Washington Administrative Code | |
| WAC 246-272A-0234 | 40 n.187 |

I. INTRODUCTION

This case presents the ultimate question of whether there is a remedy for plaintiffs' total loss of their home and property resulting from the irreversible failure of their on-site sewage disposal system, where the system was built with permits that the defendants knew they should not have issued for a system defendants did not even bother to inspect, and where after the system's failure and the discovery of other serious defects with the home that should never have been permitted by defendants at the time of construction, defendants reneged on repeated promises to address the failure, and rejected all efforts of the plaintiffs to obtain defendants' approval of an alternate sewage disposal system. By erroneously concluding that plaintiffs had no remedy against the defendants,¹ the trial court's decision allowed the defendants' actions to effect a regulatory taking in violation of plaintiff's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

II. ASSIGNMENTS OF ERROR

Assignments of Error

¹ In ruling against plaintiffs on defendants' motion for summary judgment, the trial court admitted to being "astonished not to see the seller of the house and the developer in this lawsuit" and a claim "for negligent construction." (RP [February 5, 2010 Verbatim Report of Proceedings] 19:9-12.) In Washington, however, there is no claim for negligent construction against a builder vendor if, as here, the claim upon which the plaintiffs are suing is for economic damages only (*Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 626-27, 799 P.2d 250 (1990)), and a claim against the seller is precluded by *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).

No. 1. The trial court erred in entering the Order of February 5, 2010, granting defendants' Motion for Summary Judgment on all of plaintiffs' claims.

No. 2. The trial court erred in entering the Order of February 26, 2010, denying plaintiffs' Motion for Reconsideration.

Issues Pertaining to Assignments of Error

No. 1. Whether the legislative intent exception to the public duty doctrine applies to plaintiffs' claims for negligence, gross negligence, and nuisance against defendant Pierce County Planning and Land Services Department ("PALS") based on the Pierce County Code § 1.16.010 and Ch. 8.36 ("On-Site Sewage Disposal Systems"), and against defendant Tacoma-Pierce County Health Department ("TPCHD") based on RCW 70.118.010 and TPCHD's related statutory powers of enforcement.

No. 2. Whether the failure to enforce exception to the public duty doctrine applies to plaintiffs' claims against the defendants for negligence, gross negligence, and nuisance because plaintiffs' evidence of the defendants' actual knowledge of code violations in their approval and inspection of the design and installation of plaintiffs' septic system establishes the exception as a matter of law.

No. 3. Whether the special relationship exception to the public duty doctrine applies to plaintiffs' claim against PALS for gross

negligence because plaintiffs showed sufficient contacts with PALS after plaintiffs' purchase of their home and property to establish the exception as a matter of law.

No. 4. Whether the trial court erred by concluding plaintiffs had no remedy and dismissing plaintiffs' action with prejudice where the defendants' actions in applying their respective regulations and procedures constituted a regulatory taking in violation of plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution.

No. 5. Whether the trial court abused its discretion in denying plaintiffs' motion for reconsideration by failing to consider the legal significance of the new evidence presented by both plaintiffs and defendants as establishing triable issues of fact on the failure to enforce exception to the public duty doctrine.

III. STATEMENT OF THE CASE

In May 2007, plaintiffs, Dan and Lori Fishburn, purchased a waterfront home and property (the "Property") situated on the isthmus of Snag Island, on the Lake Tapps waterfront in Pierce County.² The purchase price was nearly \$1.6 million.³ Photographs of the Property, part of the "Cove Estates" plat, show a large home and substantial lawn

² CP 122, at ¶4.

³ CP 64.

abutting an expansive stretch of shoreline.⁴ The Property was developed in 2003-05 by Euro-Way Homes, Inc. (“Euro-Way”), which then sold it in 2005 to Richard and Joelle Bolen, who in turn sold to the Fishburns in 2007.⁵

The Fishburn family moved into the home in August 2007, but within only a few months, Mr. Fishburn discovered the first of several serious problems with the Property⁶ that ultimately rendered it uninhabitable and worthless.⁷ In May 2009, the Pierce County Assessor’s Office re-valued the Property at \$2,000 -- and that amount was agreed upon only to keep the Property on the tax rolls so that the assessor could track the Property in hopes of preventing any future development or use of this parcel.⁸

In the fall of 2007, Mr. Fishburn first noticed a substantial amount of water pooling on his front lawn.⁹ Mr. Fishburn, having been in the construction industry for over 25 years at the time,¹⁰ attempted to fix this water drainage problem first by aerating the lawn -- which proved impossible because of the hardpan he discovered immediately below the

⁴ CP 283-85.

⁵ CP 25, 60-62, 64.

⁶ CP 122, at ¶¶5-6.

⁷ CP 136, at ¶¶62-63.

⁸ CP *Id.*, at ¶63; CP 256.

⁹ CP 122, at ¶5.

¹⁰ CP 121-22, at ¶¶2-3.

sod and the related shallowness of the irrigation system -- and then by de-thatching the lawn. These efforts did not solve the problem.¹¹

In December of 2007, Mr. Fishburn discovered over two feet of standing water in the crawlspace,¹² and large gaps under the home's foundation.¹³ By then, the ground under and around the house was saturated. Within weeks of the discovery that the crawlspace was filled with water, the soil in the area between the house and the lake sloughed off and slid into the boatlifts and dock, causing damage to the piling, lifts, and dock, and sending sandy silt into the lake.¹⁴

In February 2008, Mr. Fishburn tried to install a combination of French drains and dry wells, but this proved impossible because, as he quickly discovered, a large portion of the yard contains "soil stabilizer" only a few inches under the landscaping.¹⁵ The soil stabilizer, also known as "soil cement," is made of cement and clay and cannot be broken up even by a medium-sized excavator.¹⁶ Mr. Fishburn also sought to stem the soil slides into the lake and eliminate further damage to the dock by installing an emergency bulkhead in the area of the soil slide.¹⁷

¹¹ CP 122, at ¶5.

¹² CP *Id.*, at ¶6; CP 148-51.

¹³ CP 124, at ¶11; CP 148-51.

¹⁴ CP 122, at ¶6.

¹⁵ CP 122-23, at ¶7.

¹⁶ CP 123, at ¶7.

¹⁷ CP 124, at ¶13.

In early March 2008, while Mr. Fishburn was still busy trying to install drains and address the soil slide that had occurred earlier that winter,¹⁸ his neighbor Dave Stinson approached him and showed him photographs that Mr. Stinson had taken while the Fishburn home and an adjacent home were being built by Euro-Way Homes in 2004.¹⁹ Mr. Fishburn was shocked at what he saw in the photos. The area on which the home was to be built was excavated to an elevation that was below the high-water level of Lake Tapps. As a result, the wooden forms for the foundation footings were literally floating.²⁰

Mr. Stinson told Mr. Fishburn that he and his wife, Sherrie Stinson, had written to PALS several times between 1994 and 2001 regarding these very serious site conditions and the impropriety of allowing construction on the Property.²¹ And indeed, the Stinsons' letters and photographs,²² as well as notes from a PALS biologist's interviews of neighbors who complained back in the 1990s about obvious problems with the Property,²³ were eventually produced by PALS in this litigation.²⁴

After hearing from Mr. Stinson and seeing the photographs

¹⁸ CP 125, at ¶15.

¹⁹ CP 123, at ¶9.

²⁰ CP 139.

²¹ CP 123, at ¶10.

²² CP 141-46.

²³ CP 297-99.

²⁴ CP 123, at ¶10, CP 280, at ¶4.

showing that the house may have been built at an elevation lower than Lake Tapps,²⁵ Mr. Fishburn went back into his crawlspace to investigate further.²⁶ He pulled back a black plastic tarp and discovered quarry spalls (rock riprap taken from a quarry) and more water underneath the tarp.²⁷ There were huge gaps between the poured foundation walls and the underlying quarry spalls, so that Mr. Fishburn could literally put his arm under the foundation wall from the inside of the crawlspace and reach the dirt on the other side of the foundation.²⁸ He took photographs of this condition.²⁹

Mr. Fishburn then discovered that the downspouts from the roof gutters did not drain to the lake but simply terminated under the cement slab and on top of the quarry spalls in the crawlspace.³⁰ He ran water from a hose down through the downspouts and could see and hear the water filling the crawlspace.³¹ He also discovered that footing drains were not installed.³² Again, he photographed these conditions.³³

Plaintiffs' Contacts with Defendant PALS Begin

On March 13, 2008, David McCurdy of PALS called Mr. Fishburn

²⁵ CP 123, at ¶9.

²⁶ CP 124, at ¶11.

²⁷ *Id.*

²⁸ *Id.*

²⁹ CP 148-51.

³⁰ CP 124, at ¶12.

³¹ *Id.*

³² *Id.*

³³ CP 153-56.

regarding a complaint that had been made to PALS about the drainage work that Mr. Fishburn was doing on the Property. Mr. Fishburn explained to Mr. McCurdy that he had discovered improper drainage, illegal grading, and illegal fill material on the Property. Mr. McCurdy was unwilling to discuss the code violations on the Property. Later that day, Mr. McCurdy issued a Notice of Violation.³⁴ The accompanying Stop Work Order described the Fishburns' violation as disturbing 6,000 square feet of lawn and creating 400 square feet of impervious surface.³⁵

After receiving the Notice, Mr. Fishburn contacted PALS' Assistant Director, Gordon Aleshire, and requested a meeting to discuss it. Meanwhile, the soil saturation problems on the Property were so severe that a bulldozer literally sank down into the ground as if in quicksand.³⁶

On March 18, 2008, PALS inspector Thomas Eddy came to the Property.³⁷ Mr. Fishburn showed him the problems with the soil saturation, the soil cement, and the presence of illegal fill on the Property. He also showed Mr. Eddy that the emergency bulkhead was installed only in the area where there had recently been landslides that resulted in damage.³⁸

³⁴ CP 158.

³⁵ CP 129, at ¶¶35-36; CP 180.

³⁶ CP 160-63.

³⁷ CP 125, at ¶16.

³⁸ CP *Id.*, at ¶¶16-17.

Mr. Fishburn and the PALS inspector toured the Property and agreed that, because of the grading around the house, water would flow toward the house rather than away from it.³⁹ Mr. Fishburn was concerned about all of these problems, and he asked for help from PALS, which is the Pierce County agency that was and is responsible for inspecting and approving construction on the Property.⁴⁰ Mr. Fishburn asked Mr. Eddy if he would look at the crawlspace to see the quarry spalls. Mr. Eddy declined.⁴¹

On March 20, 2008, Mr. Fishburn met at the Property with PALS representatives Gordon Aleshire, David Acree, Stephen Widener, Roger Jernegan, and Lorrie Chase.⁴² He described the history of the Property, including problems with apparently illegal fill,⁴³ the absence of drains, code violations, and the presence of soil stabilizer.⁴⁴ He asked Mr. Aleshire to issue an exemption (conditional use permit) for the dock and bulkhead, and to allow extension of the bulkhead to further protect the Property.⁴⁵ Mr. Aleshire directed Ms. Chase to issue these to protect the Property.⁴⁶

³⁹ CP *Id.*, at ¶17.

⁴⁰ CP 126-27, at ¶21.

⁴¹ CP 126, at ¶20.

⁴² CP *Id.*, at ¶21.

⁴³ CP 297-99.

⁴⁴ CP 126, at ¶21.

⁴⁵ CP 126-27, at ¶21.

⁴⁶ CP 126-27, at ¶21.

On the morning of March 26, 2008, Gordon Aleshire of PALS sent Mr. Fishburn an e-mail, copied to certain PALS personnel including Lorrie Chase, stating that he would like to meet to resolve the bulkhead issue.⁴⁷ But then, later that same day, Mr. Aleshire sent an e-mail stating without explanation that he believed they had “reached an impasse,” and that Mr. Fishburn needed to file an appeal of the Notice of Violation.⁴⁸

The next day, March 27, 2008, Mr. Fishburn appealed the Notice of Violation to PALS.⁴⁹ Later that same day while in the PALS offices, he encountered PALS Director Chuck Kleeburg, who advised him that he should *not* file the appeal but rather should seek a settlement agreement with the County Prosecutors.⁵⁰ Mr. Fishburn sent an e-mail to Mr. Kleeburg the next day referencing this conversation and requesting the names of the prosecutors he had mentioned.⁵¹ Mr. Kleeburg responded the following day.⁵² Evidence produced in the underlying litigation revealed that the March 27, 2008 chance encounter between Mr. Fishburn and Chuck Kleeberg at PALS was not the first time Mr. Kleeberg had heard of Mr. Fishburn or considered his plight. In an earlier, internal e-mail about the Property, Mr. Kleeberg wrote to Gordon Aleshire, “We do

⁴⁷ CP 167.

⁴⁸ CP 169.

⁴⁹ CP 174.

⁵⁰ CP 128, at ¶28.

⁵¹ CP 176.

⁵² CP 178.

believe it would be nice to remove the shoreline regs from Tapps.”⁵³

On April 2, 2008, Matt Shaw of PALS contacted Mr. Fishburn to discuss an inspection that Mr. Shaw intended to conduct at the Property.⁵⁴ They discussed the inspection and its purpose, and Mr. Fishburn sent a confirming e-mail to Mr. Shaw’s superior, Mr. Aleshire.⁵⁵

On April 3, 2008, a Stop Work Order was stapled to a stake placed in the Fishburns’ front yard.⁵⁶ The Stop Work Order stated, “A Correction Notice will be mailed certified to the listed property owner as a follow-up to this ‘Stop Work’ order. The certified notice will explain the permit requirements to resolve this violation.”⁵⁷

By this time, Mr. Fishburn had been given at least five different and conflicting mandates by various PALS representatives: 1) You are in violation⁵⁸; 2) We will provide the necessary exemption and extension⁵⁹; 3) We have reached an impasse and you should appeal⁶⁰; 4) You should not appeal but should contact the prosecutor’s office to resolve the issue⁶¹; and 5) PALS needs to conduct further inspections and will provide the

⁵³ CP 306.

⁵⁴ CP 128, at ¶30.

⁵⁵ CP 182-84.

⁵⁶ CP 128, at ¶31; CP 180.

⁵⁷ CP 180.

⁵⁸ CP 124, at ¶13; CP 158.

⁵⁹ CP 126-27, at ¶21.

⁶⁰ CP 169.

⁶¹ CP 128, at ¶28.

expedited permits requirements necessary for resolution.⁶² Mr. Fishburn relied in turn on each of these instructions and assurances by the PALS representatives, only to be told by yet another PALS representative that the prior assurance was, essentially, inaccurate.

On April 21, 2008, Mr. Fishburn submitted an administrative appeal of the Notice of Violation on the form provided on the PALS website.⁶³

Around the same time that he filed the Appeal, Mr. Fishburn received the Correction Notice.⁶⁴ Strangely, the Correction Notice made an entirely different allegation than that in the original Notice of Violation. Whereas the original Notice of Violation asserted that Mr. Fishburn was disturbing 6,000 square feet of lawn and creating 400 square feet of impervious surface,⁶⁵ the Correction Notice alleged he was importing 800 cubic yards of fill material.⁶⁶ This new allegation was completely false.⁶⁷

Between May and November 2008, Mr. Fishburn attempted to remove the water from his home's crawlspace by removing quarry spalls by hand and installing sump pumps, piping, dehumidifiers, commercial

⁶² *Id.*, at ¶30.

⁶³ CP 191.

⁶⁴ CP 193-97.

⁶⁵ CP 180.

⁶⁶ CP 129, at ¶¶35-36; CP 193-97.

⁶⁷ CP 129, at ¶36.

blowers, and even pond liner.⁶⁸ The Fishburns retained engineers and an architect to determine if the soils were suitable to keep the house in the same location, or if the house had to be moved or lifted.⁶⁹ Based on their analysis,⁷⁰ Mr. Fishburn informed Gordon Aleshire of PALS that the only viable solution was to move and raise the house, and Mr. Aleshire promised Mr. Fishburn that PALS would expedite any repair permits.⁷¹ Mr. Aleshire later confirmed he had made this promise, in an internal e-mail to assistant prosecuting attorney Cort O'Connor of Pierce County.⁷² Yet, less than a week later, after promising Mr. Fishburn that he would meet with him to discuss the permits and moving the home, Mr. Aleshire cancelled the scheduled meeting.⁷³ Mr. Aleshire and PALS ultimately never assisted the Fishburns in obtaining the necessary repair permits.

After much additional effort and expense, the architect and engineers retained by the Fishburns concluded that any effort to move or lift the house would be futile because they had discovered that the septic system was below the high-water level of the lake, so the Property could never support a drainfield.⁷⁴ The septic system had failed catastrophically,

⁶⁸ CP 130, at ¶38; *see also* CP 201-04.

⁶⁹ CP 130, at ¶39.

⁷⁰ CP 206-08.

⁷¹ CP 131, at ¶40.

⁷² CP 308-09.

⁷³ CP 131, at ¶40.

⁷⁴ CP 210-12.

which meant that the “water” Mr. Fishburn had seen pooling in his front yard in the fall of 2007 was in fact sewage from the failed septic drainfield.⁷⁵

Plaintiffs’ Contacts with Defendant TPCHD Begin

In November of 2008, Ron Howard of TPCHD visited the Fishburn home.⁷⁶ Mr. Fishburn explained to Mr. Howard that his experts had discovered that the septic system had failed, that the designated reserve drainfield was in fact located in the original location specified for the primary drainfield (which was in fact unusable due to soil cement and fill), and that it appeared the original septic system plans were not followed.⁷⁷ Mr. Howard advised Mr. Fishburn to contact an approved septic contractor to investigate, and so Mr. Fishburn promptly contacted Flohawk to inspect the septic system and sign a Report of System Status.⁷⁸

On November 12, 2008, Flohawk tested the septic system on the Property by conducting a dye test to determine if the drainfields were functioning properly.⁷⁹ Within minutes, the entire front yard was a brilliant fluorescent green, indicating that the drainfields had failed.⁸⁰ A short time later, Mr. Fishburn met with Vergia Seabrook, an

⁷⁵ CP 131, at ¶41; CP 210-11.

⁷⁶ CP 132, at ¶47.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*, at ¶48.

⁸⁰ CP 226-30.

Environmental Health Specialist II with TPCHD, and he gave her a copy of Flohawk's report.⁸¹ Ms. Seabrook reviewed the report and immediately told Mr. Fishburn he would have to move his family out of the home.

Later that same day, Mr. Fishburn drafted an e-mail to Ms. Seabrook summarizing their meeting and requesting that TPCHD perform a site inspection.⁸² He also attached pictures of the green dye test performed by Flohawk.⁸³

Within days, Ron Howard returned to the Property with a second TPCHD representative, Miranda Heimbuch, for a follow-up inspection, so that TPCHD could issue a report on how to remedy the problem.⁸⁴ Mr. Howard conducted his own dye test and, sure enough, within minutes of his dropping dye in the septic system, the front lawn turned fluorescent green.⁸⁵ Although Mr. Howard had no camera to document the results of the test, Mr. Fishburn did take photographs, and he promptly e-mailed those pictures and a summary of the inspection to Vergia Seabrook at TPCHD.⁸⁶ Mr. Fishburn then awaited the promised report from TPCHD directing him how to proceed.

That evening, Mr. Fishburn received a fax from Mr. Howard titled,

⁸¹ CP 132, at ¶49; CP 221.

⁸² CP 132, at ¶50; CP 223-24.

⁸³ CP 132, at ¶50; CP 226-30.

⁸⁴ CP 132, at ¶51.

⁸⁵ *Id.*

⁸⁶ *Id.*; CP 232-37, 239-40.

“Notification Memo,” which stated “the Report of System Status submitted on November 12, 2008 for this property cannot be issued at this time.”⁸⁷ No explanation was given.

On November 22, 2008, based on the directive from TPCHD’s Vergia Seabrook,⁸⁸ the Fishburns moved out of their home on an emergency basis, still awaiting the promised report from TPCHD as to the status of, and necessary corrective measures for, the septic system on the Property.⁸⁹

On December 8, 2008, Mr. Fishburn received an e-mail from Dave Lenning of the Washington State Department of Health (“DOH”).⁹⁰ Mr. Fishburn had made an inquiry to DOH because TPCHD had failed to provide him the promised direction as to how to proceed. Mr. Lenning, in an e-mail copied to several representatives of TPCHD, advised Mr. Fishburn that the home was inspected again by TPCHD on December 2, 2008 and it was determined the system was currently failing.⁹¹ This news of a second inspection surprised Mr. Fishburn because the Property was enclosed by a chain link fence with an eight-foot-tall electric gate at the driveway, and the Fishburns had never received notice that a second

⁸⁷ CP 132, at ¶52; CP 242.

⁸⁸ CP 132, at ¶49.

⁸⁹ CP 133, at ¶53.

⁹⁰ CP 134, at ¶56.

⁹¹ CP 244-45.

inspection would occur at the Property, nor had they authorized one.⁹²

Mr. Fishburn therefore returned to the Property to determine how the TPCHD inspector could have gained access.⁹³ He discovered that part of the chain link fence had been torn down, and that the septic tank lid, which he had previously secured with screws, had been removed and left beside the tank.⁹⁴ He re-secured the lid and, concerned that if the septic tank lid were left off again he could be subject to liability for any resulting injury to people or animals that wandered onto the Property, he notified TPCHD to contact him before entering or altering the Property again.⁹⁵

The December 8, 2008 response that Mr. Fishburn received from Dave Lenning at DOH, copied to several people at TPCHD, reinforced what Mr. Fishburn had already been led to believe by TPCHD -- namely, that TPCHD would provide the Fishburns a report and assist with finding a means of correcting the failure of their septic system. Wrote Mr. Lenning:

When a system fails, TPCHD's priority is to work with the system owner to make a repair. We understand that TPCHD staff has explained the requirements and process for addressing the repair of your system. We encourage you to work with TPCHD staff to determine the best course of action to correct the failing system.⁹⁶

⁹² CP 135, at ¶57.

⁹³ CP *Id.*, at ¶58.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See* CP 244-45.

Mr. Fishburn certainly did try to “work with TPCHD staff to determine the best course of action to correct the failing system,” but TPCHD, which had originally approved the septic system on the Property, now rejected every single remedy from every source, including TPCHD’s own proposals:

- When TPCHD representatives Ron Howard and Miranda Heimbuch were on site for their follow-up inspection in November 2008, they initially suggested that the septic effluent ponding below the failed drainfield was probably harmless. (It looked no different than water.) In response, Mr. Fishburn suggested that if that were the case, he could simply run a drain from the septic tank to Lake Tapps. Mr. Howard and Ms. Heimbuch quickly (and understandably) rejected that proposal and reversed their position regarding the danger posed by the effluent.⁹⁷
- Mr. Fishburn contacted the Washington Department of Ecology, where a representative confirmed that Ecology would issue a surface water discharge permit to TPCHD for the Property if the septic effluent was adequately treated on site. TPCHD rejected this, saying that it was too expensive and that, if TPCHD allowed this on the Fishburn Property, every resident on Snag Island, Tapps Island, and the rest of the lake would demand the same system be installed on their property.⁹⁸
- At one point, Ron Howard of TPCHD proposed replacing the septic drainfield with an above-ground 10’x10’x20’ storage tank that would be pumped and

⁹⁷ CP 133, at ¶54.a.

⁹⁸ CP 134, at ¶54.b.

hauled off site on a regular basis. Although the Fishburns initially blanched at the thought of installing such an unattractive structure on the Property, they were willing to try anything. But when Mr. Fishburn discussed this possible remedy with Mr. Howard's superiors at TPCHD, they rejected it out of hand.⁹⁹

- Mr. Fishburn even proposed a new, high-tech drip irrigation system to disseminate the septic tank discharge on the Property. TPCHD rejected this proposal.¹⁰⁰

On January 8, 2009, Maggie Phipps of TPCHD issued a Violation Notice for Failed Septic System.¹⁰¹ The Notice referenced the code requirement of "Native, Undisturbed, Unsaturated Soil" for an on-site septic system.¹⁰² Following the directions on the Violation Notice, Mr. Fishburn called Ms. Phipps and left her a message, asking for help in determining how he could create native, undisturbed, unsaturated soils on the Property. She did not respond.¹⁰³

On February 17, 2009, Maggie Phipps of TPCHD transmitted a Second Violation Notice for Failed Septic System.¹⁰⁴ Mr. Fishburn called Ms. Phipps several times and again left messages requesting that she contact him. She did not respond.¹⁰⁵

⁹⁹ *Id.*, at ¶54.c.

¹⁰⁰ *Id.*, at ¶54.d.

¹⁰¹ CP 135, at ¶59; CP 247-48.

¹⁰² CP 247-48.

¹⁰³ CP 135, at ¶59.

¹⁰⁴ *Id.*, at ¶60; CP 250-51.

¹⁰⁵ CP 135, at ¶60.

On June 3, 2009, Ms. Phipps called Mr. Fishburn to determine if he and his family were occupying the home. He told her that they had evacuated the home many months earlier per TPCHD's direction.¹⁰⁶ Later that same day, TPCHD posted a "Do Not Occupy" sign on the Fishburns' front gate.¹⁰⁷

The Pierce County Assessor Determines the Property Is Worthless.

In June of 2008, Mr. Fishburn filed a taxpayer's claim with the Pierce County Assessor's Office for Reduction of Assessments Resulting from Destroyed Property.¹⁰⁸ In October of 2008, the Fishburns appealed to the Pierce County Board of Equalization to have their property taxes reduced based on the catastrophic conditions that were becoming increasingly well understood as the weeks and months went on.¹⁰⁹

In May of 2009, the Washington Board of Tax Appeals finally heard the Fishburns' appeal regarding the valuation of the Property.¹¹⁰ The Board concluded that the house and land each had a *negative value* due to the potential liabilities and because the Property never has had, and never can have, an allowable, functioning septic system.¹¹¹ The Board hearing examiner suggested that the Fishburns stipulate to a determination

¹⁰⁶ CP 136, at ¶64.

¹⁰⁷ *Id.*, at ¶65; CP 260.

¹⁰⁸ CP 131, at ¶42; CP 214.

¹⁰⁹ *Id.*, at ¶44.

¹¹⁰ CP 136, at ¶62.

¹¹¹ *Id.*, at ¶63.

that the home and land were each worth \$1,000 to ensure the Property will not be lost from the tax rolls.¹¹² The Fishburns stipulated to this amount.¹¹³ Notably, at the outset of the hearing, the hearing examiner also indicated that the Fishburns were “not on a level playing field” due to both PALS’ and TPCHD’s failure to provide complete files on the Property as the Fishburns and the Assessor’s Office had requested.¹¹⁴ Indeed, a PALS representative had previously confirmed in writing that Mr. Fishburn had not been given the wetland file he had requested.¹¹⁵

Proceedings Below

The Fishburns filed this lawsuit in April 2009. Pursuant to a stipulated order, plaintiffs’ First Amended Complaint was filed on October 23, 2009.¹¹⁶ Defendant TPCHD filed its Answer on November 10, 2009.¹¹⁷ Defendant PALS served its Answer on January 6, 2010.¹¹⁸

On December 31, 2010, defendants filed a Motion for Summary Judgment Dismissal Based on Public Duty Doctrine.¹¹⁹ Plaintiffs submitted responsive materials¹²⁰ and defendants submitted their reply.¹²¹

¹¹² *Id.*

¹¹³ CP 256-58.

¹¹⁴ CP 274-77.

¹¹⁵ CP 165.

¹¹⁶ CP 1-12.

¹¹⁷ CP 13-22.

¹¹⁸ CP 84-94.

¹¹⁹ CP 23-33.

¹²⁰ CP 95-439.

¹²¹ CP 440-48.

On February 5, 2010, the trial court granted defendants' motion for summary judgment, dismissing all of plaintiffs' claims.¹²²

Thereafter, plaintiffs discovered new evidence of wrongdoing, including possible fraud, by defendant TPCHD in approving the septic system on the Property, and presented this evidence to the trial court in connection with their Motion for Reconsideration filed on February 16, 2010.¹²³ Defendants also submitted new evidence in the form of declarations¹²⁴ that contradicted other evidence before the trial court.¹²⁵

On February 26, 2010, the trial court denied plaintiffs' Motion for Reconsideration.¹²⁶ Plaintiffs filed their Notice of Appeal of the trial court's grant of defendants' Motion for Summary Judgment and its denial of plaintiffs' Motion for Reconsideration on March 4, 2010.¹²⁷

IV. SUMMARY OF ARGUMENT

The trial court included no findings of fact or conclusions of law in either its order granting the defendants' motion for summary judgment or its order denying plaintiffs' motion for reconsideration of the grant of

¹²² CP 449-51.

¹²³ CP 486-90, 496-99.

¹²⁴ CP 564-70, 600-17.

¹²⁵ CP 131, at ¶40; CP 167, 437, 524, 532.

¹²⁶ CP 727-29.

¹²⁷ CP 730-37.

summary judgment. However, the trial court's oral rulings¹²⁸ make clear that the court concluded as a matter of law that no exception to the Public Duty Doctrine applied to allow plaintiffs' claims to proceed against the defendants, and that plaintiffs were without a remedy for the total loss of their Property.

In its rulings, the trial court erred by concluding that neither the "legislative intent" exception nor the "failure to enforce" exception to the public duty doctrine applied to plaintiffs' claims for negligence, gross negligence, and nuisance. The trial court further erred by concluding that the "special relationship" exception to the public duty doctrine did not apply to plaintiffs' claim for gross negligence against defendant PALS.

V. **ARGUMENT**

A. **The Trial Court Erred in Granting Defendants' Motion for Summary Judgment and Dismissing Plaintiffs' Complaint With Prejudice Because the Public Duty Doctrine Does Not Bar Plaintiffs' Claims. Three Separate Exceptions to the Public Duty Doctrine Apply to Plaintiffs' Claims Under the Facts of This Case.**

1. **Standard of Review**

The appellate court reviews trial court orders granting summary judgment dismissal *de novo*, engaging in the same inquiry as the trial

¹²⁸ To aid the appellate court in discovering the specifics behind a trial court's general finding, the appellate court may turn to the trial court's oral opinion. *Egbert v. Way*, 15 Wn. App. 76, 78, 546 P.2d 1246 (1976).

court.¹²⁹ On a motion for summary judgment, the burden is on the moving party to demonstrate (1) that there is no genuine issue of material fact and (2) that summary judgment is proper as a matter of law.¹³⁰

The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, [the court] consider[s] all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.¹³¹

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹³² The moving party has the burden of establishing the absence of an issue of material fact.¹³³

2. Exceptions to the Public Duty Doctrine

The elements of a claim for negligence¹³⁴ against a governmental

¹²⁹ *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

¹³⁰ *Atherton Condominium Apartment-Owners Ass’n v. Blume Development Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990).

¹³¹ *Id.*, 115 Wn.2d at 516.

¹³² CR 56(c).

¹³³ *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 611, 220 P.3d 1214 (2009).

¹³⁴ Plaintiffs’ Amended Complaint includes claims against the defendants for negligence, gross negligence, and nuisance. At the time the trial court ruled on defendants’ Motion for Summary Judgment, plaintiffs’ nuisance claim was based entirely on the defendants’ negligence. “[W]here the alleged nuisance is the result of the defendant’s alleged negligent conduct, rules of negligence are applied. *Atherton*, 115 Wn.2d at 527 (citing *Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985), *review denied*, 106 Wn.2d 1004 (1986)).

entity are the same as the elements of such a claim against any other type of defendant: Duty, breach, damages, and causation.¹³⁵ Where the negligence of a governmental entity is at issue, however, “the public duty doctrine is employed to determine if the alleged ‘duty is one owed to a nebulous public or whether that duty is owed to a particular individual’.”¹³⁶ There are four common law exceptions to the public duty doctrine: (1) special relationship, (2) legislative intent, (3) failure to enforce, and (4) the rescue doctrine.¹³⁷ If any one of these exceptions applies, the governmental entity will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs.¹³⁸

The trial court concluded as a matter of law that no exception to the public duty doctrine applied to any of plaintiffs’ claims.¹³⁹ In so doing, the trial court erred because three of the four exceptions to the public duty doctrine apply to plaintiffs’ claims in this case.

Issue No. 1

The legislative intent exception applies to plaintiffs’ claims against the defendants for negligence, gross negligence, and nuisance.

¹³⁵ *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2001).

¹³⁶ *Atherton*, 115 Wn.2d at 529 (citing *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988)).

¹³⁷ The rescue doctrine is not at issue in this case.

¹³⁸ *Cummins v. Lewis County*, 156 Wn.2d 844, 853 & n.7, 133 P.3d 458 (2006).

¹³⁹ RP [February 5, 2010 Verbatim Report of Proceedings] 18; RP [February 26, 2010 Verbatim Report of Proceedings] 13-14.

ordinance indicates a ‘clear intent’ to identify and protect a ‘particular and circumscribed class of persons’ of which the plaintiff is a member.”¹⁴⁰ In *Halvorson v. Dahl*,¹⁴¹ the court determined that section 27.04.020 of the Seattle Building Code evidenced a clear intent to protect the occupants of a specific class of buildings, *i.e.*, those that were “unfit for human habitation, substandard, deteriorating, in danger of causing or contributing to the creation of slums or otherwise blighted areas, and inimical to the health, safety and welfare of the occupants thereof and of the public.”

Questions of statutory construction are reviewed *de novo*.¹⁴² The court’s “fundamental obligation is to give effect to the legislature’s intent.”¹⁴³ In determining a statute’s legislative intent, the court may look not only to the words in the statute, but to “related statutes which disclose legislative intent about the provision in question.”¹⁴⁴

Legislative Intent as to Plaintiffs’ Claims Against TPCHD

Chapter 70.118 RCW of the Public Health Code, “On-site sewage disposal systems,” applies to the facts of this case. RCW 70.118.010, “Legislative declaration,” provides:

¹⁴⁰ *Stannik v. Bellingham-Whatcom County Board of Health*, 48 Wn. App. 160, 164, 737 P.2d 1054 (1987) (citing *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978)).

¹⁴¹ 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

¹⁴² *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

¹⁴³ *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

¹⁴⁴ *Id.*, 146 Wn.2d at 11.

The legislature finds that over one million, two hundred thousand persons in the state are not served by sanitary sewers and that they must rely on septic tank systems. The failure of large numbers of such systems has resulted in significant health hazards, loss of property values, and water quality degradation.

Like Seattle Building Code section 27.04.020, which was at issue in *Halvorson*, RCW 70.118.010 “identifies conditions and circumstances”¹⁴⁵ that are applicable to a “particular and circumscribed class of persons,”¹⁴⁶ *i.e.*, those with no access to sanitary sewers who must rely on on-site septic systems that have a high likelihood of failure and which place these individuals at risk of “significant health hazards” and “loss of property values.” This language describes the particular and circumscribed group of homeowners with septic systems -- to which plaintiffs belong -- rather than the general public. The legislative language at issue here is therefore comparable in scope to the Seattle Building Code section at issue in *Halvorson*.

Further evidence of legislative intent to create a special duty toward individuals who must rely on on-site sewage disposal systems can be found in the legislatively-imposed mandatory duties of health departments to identify failing systems and “use reasonable effort to

¹⁴⁵ See *Halvorson*, 89 Wn.2d at 677.

¹⁴⁶ *Id.* at 676.

determine new failures.”¹⁴⁷ These duties are augmented by the legislatively-granted power to obtain search warrants to carry out this duty.¹⁴⁸ Local health departments are also empowered to issue civil penalties for violations of on-site sewage disposal system regulations¹⁴⁹ and to waive sections of local building and plumbing codes that might prohibit correction of failed systems.¹⁵⁰

Legislative Intent as to Plaintiffs’ Claims Against PALS

The legislative intent exception applies to plaintiffs’ claims against PALS based on the Pierce County Code (“PCC”). PCC 1.16.010 provides:

It is imperative that certain Pierce County Code provisions, permits and permit conditions, and Hearing Examiner decisions are properly enforced. To better accomplish this goal, Pierce County has designated certain violations of the Pierce County Code, permits and permit conditions, and Hearing Examiner decisions to be civil infractions pursuant to Chapter 7.80 RCW.¹⁵¹

One such imperative chapter of the Pierce County Code is Chapter 8.36, “On-Site Sewage Disposal Systems.” The chapter limits on-site sewage system installations to parcels that “have a sufficient amount of area with proper soils in which sewage can be retained and treated

¹⁴⁷ RCW 70.118.030(1).

¹⁴⁸ *Id.*

¹⁴⁹ RCW 70.118.130.

¹⁵⁰ RCW 70.118.040.

¹⁵¹ Emphasis added.

properly on-site.”¹⁵² Anyone who fails to comply with the chapter is guilty of a gross misdemeanor.¹⁵³

Clearly, plaintiffs’ claims in this case are not based on the defendants’ violations of general provisions of the Public Health Code or the State Building Code. Rather, their claims are based on the provisions relating specifically to on-site sewage disposal systems that have been enacted primarily to protect those who are -- as plaintiffs were -- dependant on such systems, and only secondarily to protect the general public from known potential hazards. The trial court should have held as a matter of law that the legislative intent exception to the public duty doctrine applies to plaintiffs’ claims against the defendants for negligence, gross negligence, and nuisance. The trial court erred in failing to do so and in dismissing plaintiffs’ claims with prejudice.

Issue No. 2

The failure to enforce exception applies to plaintiffs’ claims against the defendants for negligence, gross negligence, and nuisance.

The failure to enforce exception applies where a governmental agent has actual knowledge of a statutory violation, but fails to take corrective action despite the statutory duty to do so. “When a governmental agent knows of the violation, a duty of care runs to all

¹⁵² PCC 8.36.110.

¹⁵³ PCC 8.36.140.

persons within the protected class, not merely those who have had direct contact with the governmental entity.”¹⁵⁴

In *Halvorson*, the court held that the plaintiff could state a claim for failure to enforce the Seattle Housing Code if she could demonstrate “culpable neglect regarding, or indifference to” the City’s duty to enforce the Code. The *Halvorson* court found that “[t]hat requirement [wa]s adequately met . . . by appellant’s allegations that the City had been aware of the deficiency in the structure for 6 years, and had undertaken to force compliance on several occasions but had never followed through.”¹⁵⁵

In this case, the evidence before the trial court showed that both PALS and TPCHD had actual knowledge -- in fact, had known for decades -- that the soil on which the defendants approved installation of the plaintiffs’ on-site septic system would not support such a system, and thus would violate PCC 8.36.110. Richard Kerin, a civil engineer who participated in preparing a “ ‘201’ Sewer Facilities Plan” for Pierce County dated April 1976, stated in his declaration: “[I]t was well known by the mid-1970’s that the soils around Lake Tapps are not suitable for the

¹⁵⁴ *Moore v. Wayman*, 85 Wn. App. 710, 722-23, 934 P.2d 707 (1997) (citing *Bailey v. Forks*, 108 Wn.2d 262, 268-69, 737 P.2d 1257 (1987)). To the extent that plaintiffs’ claims against PALS are construed as building code violations, plaintiffs must also show that the violations “constituted ‘an inherently dangerous and hazardous condition.’” *Id.* (quoting *Atherton*, 115 Wn.2d at 531). However, defendants have not asserted, nor could they, that the total failure of an on-site sewage disposal system does not constitute “an inherently dangerous and hazardous condition.”

¹⁵⁵ 89 Wn.2d at 677-78.

widespread use of septic tanks, and that the consequences of allowing continued use of on-site septic systems in that area could be devastating.”¹⁵⁶

PALS acknowledged reviewing the report and agreeing with its projections.¹⁵⁷ TPCHD had provided input to the report. In a letter to Mr. Kerin,¹⁵⁸ TPCHD had advised him:

The soils in the Bonney Lake - Lake Tapps area are characterized by permeable soils generally to a depth of twenty four to forty eight inches underlaid by semi-compact hardpan and are regarded by the Tacoma-Pierce County Health Department as “marginal” for septic tank sewage disposal.

In the winter season, the rate of rainfall exceeds the ability of the semi-compact hardpan to absorb the rain, consequently the ground water table rises in some instances, flooding into the ground area where the septic tank drainfield is located.

. . . These sites will not be buildable until sewers are available.¹⁵⁹

Nevertheless, the defendants approved the installation of plaintiffs’ on-site septic system despite knowledge of the unacceptable soil conditions that should have prevented approval of such systems in

¹⁵⁶ CP 322. The Sewer Facilities Plan itself stated (at CP 337):

Almost all of the soils in the study are classified by the U.S. Soil Conservation Service as having moderate to severe limitations for use as septic drainfields. . . . Localized areas are experiencing septic tank failures. This is especially serious after heavy rains. Alternate drainfield sites are being sought in several cases due to failure of original drainfields.

¹⁵⁷ CP 439.

¹⁵⁸ CP 437.

¹⁵⁹ Emphasis added.

general,¹⁶⁰ and on the plaintiffs' Property in particular.¹⁶¹ Not surprisingly, in less than three years after occupancy, the system had failed completely. Thereafter, TPCHD failed to comply with its obligations under RCW 70.118.030(2) to "implement corrections." Instead it rejected all proposals to "specify[] nonwater-carried sewage disposal devices or other alternative methods of treatment and effluent disposal." Thus was plaintiffs' Property -- for which they paid nearly \$1.6 million -- rendered uninhabitable and worthless.

In view of the evidence before the trial court, it should have found as a matter of law that the failure to enforce exception applied to plaintiffs' claims. At the very least, the evidence established triable issues of fact on the question. It was therefore error for the trial court to dismiss plaintiffs' negligence-based claims against the defendants with prejudice.

Issue No. 3

The special relationship exception applies to plaintiffs' claim against defendant PALS for gross negligence.

In their Motion for Summary Judgment, defendants argued that

¹⁶⁰ CP 295, 297-99.

¹⁶¹ See CP 145-46:

Lots #1, & #2 on the most northwestern portion of the map inclosed[sic] is primarily fill, brought in by the owner & has a very low water table. I'm sure there would be water in the crawl space of any homes build on these lots if approved. Especially if the Lake is at full level year round. (Which, is being considered by Puget Power.)

CP 145 references CP 144 dated 1/13/95. The plaintiffs' home was built on Lot #1. See also CP 301.

plaintiffs could not show a “special relationship” with the defendants¹⁶² because the defendants’ alleged negligent acts all pre-dated the plaintiffs’ purchase of the Property.¹⁶³ Plaintiffs assumed, therefore, that the defendants did not intend their Motion for Summary Judgment to apply to the plaintiffs’ gross negligence claim that in fact is based in part on defendant PALS’ direct dealings with plaintiffs in connection with emergency repairs to their Property required by the failure of their septic system.¹⁶⁴

In his Declaration and Exhibits filed in opposition to the defendants’ Motion for Summary Judgment,¹⁶⁵ Mr. Fishburn detailed and documented the numerous contacts with TPCHD and PALS personnel he had in which they gave him conflicting information, assured him they would work with him, promised him an exemption and expedited permits, then changed their minds about working with him, about the exemption

¹⁶² CP 24 (“Plaintiffs can point to no facts giving rise to the special relationship exception to the Public Duty Doctrine.”)

¹⁶³ CP 30-31.

¹⁶⁴ CP 32-33:

In the present case, the Fishburns allege that Defendants were negligent in their duties to ‘review, inspect, permit, endorse and approve the design and development and construction’ of the subject property. By Plaintiffs’ own admissions, these alleged acts and omissions occurred prior to their purchase on May 17, 2007.

... [T]o the extent a “special relationship” existed between Defendants and the homeowners at the time of the alleged acts and omissions, that special relationship did not run to the Fishburns as subsequent purchasers. Accordingly, the Public Duty Doctrine bars Plaintiffs’ claims against Defendants.

Footnote omitted.

¹⁶⁵ CP121-260.

and permits, about whether or not plaintiffs had to file and administrative appeal, and even about with whom Mr. Fishburn could and could not speak.¹⁶⁶

The trial court could and should have found as a matter of law that those contacts reflected the inquiries made and express assurances given that establish an actionable special relationship between plaintiffs and PALS as to the plaintiffs' gross negligence claim regarding their bulkhead and dock. At the very least, the evidence provided by Mr. Fishburn's Declaration¹⁶⁷ taken in the light most favorable to the plaintiffs established triable issues of fact as to the existence of a special relationship between plaintiffs and the defendants with respect to their claim based on the defendants' conduct after plaintiffs purchased their Property. The trial court therefore erred in dismissing plaintiffs' claim for gross negligence.

3. Regulatory Taking

Issue No. 4

The defendants' actions in applying their respective regulations and procedures to the Fishburns' Property constituted a regulatory taking in violation of the plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property for public use without

¹⁶⁶ See, e.g., CP 125-29, 180, 193.

¹⁶⁷ CP 121-260.

“just compensation.”¹⁶⁸ The Fifth Amendment’s prohibition of governmental taking without just compensation is deemed incorporated in the Due Process Clause of the Fourteenth Amendment,¹⁶⁹ and hence applies as well to state governmental action.

“Regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes . . . where regulations completely deprive an owner of ‘all economically beneficial us[e] of her property’.”¹⁷⁰ Here, the plaintiffs were the innocent purchasers of a home for which defendants had approved an on-site septic system that they knew, given the soil conditions on plaintiffs’ Property, could not properly function. Defendants then gave final approval of the installed system without inspecting it. And defendants rejected every proposal put forward by plaintiffs -- and supplied none of their own -- for an alternative sewage disposal system that would allow plaintiffs to use their Property.¹⁷¹

The Property has been posted as unfit for human occupation,¹⁷² and has been valued by the local tax authorities as essentially worthless.¹⁷³ The plaintiffs have lost all use of the Property and have lost their entire

¹⁶⁸ U.S. Const. amend. V, cl. 3.

¹⁶⁹ U.S. Const. amend. XIV, §1, cl. 3.

¹⁷⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)).

¹⁷¹ CP 133-34.

¹⁷² CP 260.

¹⁷³ CP 257.

investment in it. Under the circumstances, there can be no question that the defendants have effected a total regulatory taking and plaintiffs must be compensated for it.

The United States Supreme Court dealt with a very similar situation in *Lucas v. South Carolina Coastal Council*.¹⁷⁴ There, the plaintiff had paid \$975,000 in 1986 to purchase two residential lots on the Isle of Palms in South Carolina on which he intended to build single-family homes. However, in 1988, the state enacted a Beachfront Management Act that effectively barred the plaintiff from erecting any permanent habitable structures on his two parcels. A state trial court determined that the two lots were thereby rendered “valueless.” The United States Supreme Court held that because the Beachfront Management Act barred plaintiff from any economically beneficial use of his property, the Fifth Amendment prohibition on uncompensated taking was violated.¹⁷⁵

Here, defendants have applied, misapplied, and/or failed to apply their respective rules and regulations with the result that plaintiffs from any economically beneficial use of their Property. Plaintiffs have lost their home because they unknowingly purchased it with a septic system that the defendants approved, but which should never have been permitted.

¹⁷⁴ 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

¹⁷⁵ *Id.*, 505 U.S. at 1019.

And now, existing rules and regulations permit no alternative. The trial court acknowledged that it was a “harsh result[]”¹⁷⁶ for plaintiffs to be left without a remedy. Fortunately, and for good reason, it is too harsh a remedy to pass Constitutional muster, and plaintiffs must now be allowed to pursue their Constitutional remedy against the defendants.

B. The Trial Court Abused Its Discretion in Denying Plaintiffs’ Motion for Reconsideration Because New Evidence Presented by Both Plaintiffs and Defendants Established Triable Issues of Material Fact as to Elements of Plaintiffs’ Claims.

1. Standard of Review

The appellate court reviews a trial court’s decision to deny a reconsideration motion for an abuse of discretion.¹⁷⁷ “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. . . . [Or i]f the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.”¹⁷⁸

2. New Evidence Presented by Both Plaintiffs and Defendants

¹⁷⁶ RP [February 5, 2010 Verbatim Report of Proceedings] 18:18.

¹⁷⁷ *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 832, 225 P.3d 280 (2009) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002)).

¹⁷⁸ *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (citations to *Washington State Physicians Insurance Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993), and *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) omitted).

Issue No. 5

The trial court abused its discretion in denying plaintiffs' motion for reconsideration by failing to consider the legal significance of the new evidence presented by both plaintiffs and defendants as establishing triable issues of fact on the failure to enforce exception to the public duty doctrine.

Evidence Presented by Plaintiffs

In connection with their Motion for Reconsideration, plaintiffs presented newly-discovered evidence showing that the TPCHD inspector who had ostensibly inspected the final installation of the septic system on plaintiffs' Property in fact falsified his inspection report, and approved the system's installation based on "as-built" drawings that did not then exist. Specifically, plaintiffs' evidence showed that Chet Morris of TPCHD lied about a locked gate having prevented him from inspecting the construction of the septic system on the Fishburn Property where there was then no gate, and recommended approval of the installation based on the as-builts instead,¹⁷⁹ at a time when the as-builts did not exist.¹⁸⁰ Moreover, the evidence that TPCHD approved the septic system on the Property without ever inspecting the installation¹⁸¹ is undisputed, as are the facts that the

¹⁷⁹ See CP 526, dated 2/28/05; see also CP 500, 534.

¹⁸⁰ See CP 532, dated 4/28/05.

¹⁸¹ CP 526.

system itself did not conform to the design approved by TPCHD¹⁸² and that it was installed in a location where none of the required test pits had been drilled.¹⁸³

Evidence Presented by Defendants

TPCHD submitted the Declaration of John E. Zipper,¹⁸⁴ a consulting civil engineer. Mr. Zipper did not take any of his own soil samples nor did he perform any of his own tests. Instead, Mr. Zipper accepted TPCHD's data, notably test pit and soil log data prepared for TPCHD by Ron Hulin, who subsequently had his On-Site Septic System Designer's license revoked for fraudulently passing himself off as a "licensed designer" (using a bogus certificate number), and for engaging in other unprofessional conduct.¹⁸⁵ Based on this "evidence" from the now-defrocked Ron Hulin, Mr. Zipper concluded that there was "no evidence that the soil on the subject property was inappropriate for installation of a properly designed septic system."¹⁸⁶

Mr. Zipper's conclusion, however, directly contradicts TPCHD's

¹⁸² CP 522, dated 05/12/04 (showing test pits), CP 524 dated 08/26/04 (approved drawing, which clearly shows TP-4 has been "moved" from its location in CP 522, and a second, unlabeled "test pit" is now shown in the relocated reserve drainfield).

¹⁸³ CP 532.

¹⁸⁴ CP 600-17.

¹⁸⁵ CP 726. Mr. Hulin's name appears at the top of the soil logs on CP 611.

¹⁸⁶ CP 602.

own records indicating that two of the test pits failed,¹⁸⁷ and that no test pits were ever drilled in the location where the primary drainfield was installed,¹⁸⁸ as required by TPCHD's own rules.¹⁸⁹ It also directly contradicts evidence showing that as long ago as 1975, both TPCHD and PALS had actual knowledge that the soil and water conditions in the area where plaintiffs' home was eventually built could not ever support a septic system.¹⁹⁰

PALS also submitted the declaration of Gordon Aleshire directly contradicting¹⁹¹ Mr. Fishburn's testimony¹⁹² and related evidence¹⁹³ that PALS had agreed to accept Mr. Fishburn's oral application for a permit.

It is clear that the trial court failed to consider the new evidence presented by both plaintiffs and defendants, ignored material questions of fact in dispute, and denied plaintiffs' motion for reconsideration based solely on an implicit finding that no special relationship existed between the defendants and the plaintiffs:

¹⁸⁷ See handwritten notes on CP 522 indicating that test pits 1 and 2 had only 14 and 25 inches of soil, respectively, above the fill. WAC 246-272A-0234 requires at least 26" of soil above the fill.

¹⁸⁸ CP 522, dated 05/12/04 (showing test pits); CP 524 dated 08/26/04 (approved drawing, which clearly shows TP-4 has been "moved" from its location in CP 522, and a second, unlabeled "test pit" is now shown in the relocated reserve drainfield); CP 532 (As Built drawing).

¹⁸⁹ CP 537-39 (Tacoma-Pierce County Board of Health Resolution No. 2002-3411 – Land Use Regulation, at §12.3.a.9 (p. 58) and §12.3.b.2.F (p. 60)).

¹⁹⁰ E.g., CP 437, 439.

¹⁹¹ CP 565.

¹⁹² CP 131, at ¶40.

¹⁹³ CP 167.

The Court's going to deny the motion for reconsideration. This is a case that's going to have to go to the appellate courts, and they're going to have to determine whether or not there is some exception here. I don't see one under the Public Duty Doctrine. They're going to have to take a look at it and perhaps, you know, expand their case law; but the bottom line is: The property was developed. It was sold to a developer. They put in and built a house. That was sold to someone else; and then subsequently, the Fishburns bought it; and so when all the County's platting services were being done, it was with two owners back, not the Fishburns; so at this point, I don't think I have the jurisdiction to change the case law; so I'll deny the motion.¹⁹⁴

Except for the rescue doctrine, which is not applicable, the only exception to the public duty doctrine that requires contemporaneous contact between the plaintiff and the public entity when the situation giving rise to the plaintiff's damages was created is the special relationship exception.¹⁹⁵ In other words, as indicated by the trial court's own statement at the time of its ruling, the court erroneously applied a "special relationship" condition on the legislative intent and failure to enforce exceptions to the public duty doctrine. Finding no special relationship – despite none being required – the court ruled that these exceptions did not apply.

Clearly, the trial court failed to consider the implication of the parties' new evidence relating to the failure to enforce exception to the

¹⁹⁴ RP [February 26, 2010 Verbatim Report of Proceedings] 13-14.

¹⁹⁵ The legislative intent exception is determined as a matter of law based on the wording of the statute or code (*see, e.g., Taylor v. Stevens County*, 111 Wn.2d 159, 164-65, 759 P.2d 447 (1988)); the failure to enforce exception applies even to those having no direct contact with the public entity (*Moore v. Wayman*, 85 Wn. App. at 722-23).

Public Duty Doctrine. The deliberate falsification of TPCHD's 2/28/05 report of the inspection of the plaintiffs' septic system and TPCHD's new expert opinion that the soil on the plaintiffs' Property could support the septic system that failed within four years of being installed compel at the very least the finding of a triable issue of fact on the failure to enforce exception.

VI. CONCLUSION

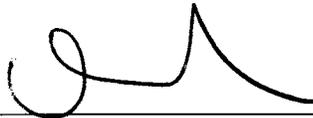
Based on the facts and the law presented above, plaintiffs respectfully request this Court to:

- (1) Reverse the trial court's order granting summary judgment in favor of defendants and remand for further proceedings;
- (2) Rule that (a) the special relationship exception to the public duty doctrine applies to plaintiffs' claims against the defendants based on gross negligence, and (b) the legislative intent and failure to enforce exceptions apply to plaintiffs' claims against the defendants based on negligence and nuisance;
- (3) Rule that plaintiffs have a valid claim for fraud against the defendants based on their newly discovered evidence that the report of the final inspection of their septic system was falsified, that plaintiffs should be allowed to amend their Complaint to plead a claim for fraud, and that the legislative intent and failure to enforce exceptions to the public duty doctrine apply to their fraud claim; and
- (4) Rule that plaintiffs have a valid claim against the defendants under the Fifth and Fourteenth Amendments to the United States Constitution for an as-applied regulatory taking and should be allowed to amend their Complaint to plead the claim.

May 5, 2010.

Respectfully submitted,

LEVY • VON BECK & ASSOCIATES, P.S.

A handwritten signature in black ink, appearing to read 'David M. von Beck', written over a horizontal line.

David M. von Beck, WSBA# 26166
600 University Street, Suite 3300
Seattle, Washington 98101
(206) 626-5444

Attorneys for Appellants,
Daniel and Lori Fishburn

VII. APPENDICES

APPENDIX A

Amendments V and XIV
to the
United States Constitution

Chapter 1.16

CIVIL INFRACTIONS

1.16.010 Purpose.

It is imperative that certain Pierce County Code provisions, permits and permit conditions, and Hearing Examiner decisions are properly enforced. To better accomplish this goal, Pierce County has designated certain violations of the Pierce County Code, permits and permit conditions, and Hearing Examiner decisions to be civil infractions pursuant to Chapter 7.80 RCW. The purpose of this Chapter is remedial. Use of the civil infraction procedure, as set forth in this Chapter, will better protect the public from the harmful effects of certain violations of the Pierce County Code, permits and permit conditions, and Hearing Examiner decisions, will aid and streamline enforcement, and will partially reimburse the County for the expenses of enforcement and the related judicial process. (Ord. 91-187 § 1 (part), 1992)

Chapter 8.36

ON-SITE SEWAGE DISPOSAL SYSTEMS

8.36.110 Density and Minimum Lot Size.

On-site sewage disposal systems shall be installed on lots, parcels, or tracts that have a sufficient amount of area with proper soils in which sewage can be retained and treated properly on-site. In this regard, the Board of Health shall establish the maximum allowable density and minimum lot sizes for future development proposals. The Board shall also establish guidelines to set such limits. (Ord. 86-125 § 1 (part), 1986)

8.36.140 Penalties.

Any person violating or failing to comply with any of the provisions of this Chapter, the Board of Health Rules and Regulations, or any lawful order of the Health Officer shall upon conviction be deemed guilty of a misdemeanor. Any person found guilty of a violation shall be deemed guilty of a separate offense for every day during any portion of which any violation of this Chapter, or Board of Health Rules and Regulations, or any lawful order of the Health Officer is committed, continued, or permitted. (Ord. 86-125 § 1 (part), 1986)

APPENDIX C

Sections of

Ch. 70.118

Cited

RCW 70.118.010

Legislative declaration.

The legislature finds that over one million, two hundred thousand persons in the state are not served by sanitary sewers and that they must rely on septic tank systems. The failure of large numbers of such systems has resulted in significant health hazards, loss of property values, and water quality degradation. The legislature further finds that failure of such systems could be reduced by utilization of nonwater-carried sewage disposal systems, or other alternative methods of effluent disposal, as a correctional measure. Waste water volume diminution and disposal of most of the high bacterial waste through composting or other alternative methods of effluent disposal would result in restorative improvement or correction of existing substandard systems.

[1977 ex.s. c 133 § 1.]

RCW 70.118.030

Local boards of health — Administrative search warrant — Administrative plan — Corrections.

(1) Local boards of health shall identify failing septic tank drainfield systems in the normal manner and will use reasonable effort to determine new failures. The local health officer, environmental health director, or equivalent officer may apply for an administrative search warrant to a court official authorized to issue a criminal search warrant. The warrant may only be applied for after the local health officer or the health officer's designee has requested inspection of the person's property under the specific administrative plan required in this section, and the person has refused the health officer or the health officer's designee access to the person's property. Timely notice must be given to any affected person that a warrant is being requested and that the person may be present at any court proceeding to consider the requested search warrant. The court official may issue the warrant upon probable cause. A request for a search warrant must show [that] the inspection, examination, test, or sampling is in response to pollution in commercial or recreational shellfish harvesting areas or pollution in fresh water. A specific administrative plan must be developed expressly in response to the pollution. The local health officer, environmental health director, or equivalent officer shall submit the plan to the court as part of the justification for the warrant, along with specific evidence showing that it is reasonable to believe pollution is coming from the septic system on the property to be accessed for inspection. The plan must include each of the following elements:

- (a) The overall goal of the inspection;
- (b) The location and identification by address of the properties being authorized for inspection;
- (c) Requirements for giving the person owning the property and the person occupying the property if it is someone other than the owner, notice of the plan, its provisions, and times of any inspections;
- (d) The survey procedures to be used in the inspection;
- (e) The criteria that would be used to define an on-site sewage system

failure; and

(f) The follow-up actions that would be pursued once an on-site sewage system failure has been identified and confirmed.

(2) Discretionary judgment will be made in implementing corrections by specifying nonwater-carried sewage disposal devices or other alternative methods of treatment and effluent disposal as a measure of ameliorating existing substandard conditions. Local regulations shall be consistent with the intent and purposes stated in this section.

[1998 c 152 § 1; 1977 ex.s. c 133 § 3.]

RCW 70.118.040

Local boards of health — Authority to waive sections of local plumbing and/or building codes.

With the advice of the secretary of the department of health, local boards of health are hereby authorized to waive applicable sections of local plumbing and/or building codes that might prohibit the use of an alternative method for correcting a failure.

[1991 c 3 § 368; 1977 ex.s. c 133 § 4.]

RCW 70.118.130

Civil penalties.

A local health officer who is responsible for administering and enforcing regulations regarding on-site sewage disposal systems is authorized to issue civil penalties for violations of those regulations under the same limitations and requirements imposed on the department under RCW 70.118B.050, except that the amount of a penalty shall not exceed one thousand dollars per day for every violation, and judgments shall be entered in the name of the local health jurisdiction and penalties shall be placed into the general fund or funds of the entity or entities operating the local health jurisdiction.

[2007 c 343 § 9.]

APPENDIX D

Washington Administrative Code

Section Cited

WAC 246-272A-0234

Design requirements — Soil dispersal components.

(1) All soil dispersal components, except one using a subsurface dripline product, shall be designed to meet the following requirements:

(a) Maximum hydraulic loading rates shall be based on the rates described in Table VIII;

TABLE VIII

Maximum Hydraulic Loading Rate

| Soil Type | Soil Textural Classification Description | Loading Rate for Residential Effluent Using Gravity or Pressure Distribution gal./sq. ft./day |
|------------------|--|--|
| 1 | Gravelly and very gravelly coarse sands, all extremely gravelly soils excluding soil types 5 & 6, all soil types with greater than or equal to 90% rock fragments. | 1.0 |
| 2 | Coarse sands. | 1.0 |
| 3 | Medium sands, loamy coarse sands, loamy medium sands. | 0.8 |

| | | |
|---|---|--------------|
| 4 | Fine sands, loamy fine sands, sandy loams, loams. | 0.6 |
| 5 | Very fine sands, loamy very fine sands; or silt loams, sandy clay loams, clay loams and silty clay loams with a moderate structure or strong structure (excluding a platy structure). | 0.4 |
| 6 | Other silt loams, sandy clay loams, clay loams, silty clay loams. | 0.2 |
| 7 | Sandy clay, clay, silty clay and strongly cemented firm soils, soil with a moderate or strong platy structure, any soil with a massive structure, any soil with appreciable amounts of expanding clays. | Not suitable |

- (b) Calculation of the absorption area is based on:
 - (i) The design flow in WAC 246-272A-0230 (2); and
 - (ii) Loading rates equal to or less than those in Table VIII applied to the infiltrative surface of the soil dispersal component or the finest textured soil within the vertical separation selected by the designer, whichever has the finest texture.
- (c) Requirements for the method of distribution shall correspond to those in Table VI.
- (d) Soil dispersal components having daily design flow between one thousand and three thousand five hundred gallons of sewage per day shall:
 - (i) Only be located in soil types 1-5;
 - (ii) Only be located on slopes of less than thirty percent, or seventeen degrees; and
 - (iii) Have pressure distribution including time dosing.
- (2) All soil dispersal components using a subsurface dripline product must be designed to meet the following requirements:
 - (a) Calculation of the absorption area is based on:
 - (i) The design flow in WAC 246-272A-0230 (2);
 - (ii) Loading rates that are dependent on the soil type, other soil and site characteristics, and the spacing of dripline and emitters;
 - (b) The dripline must be installed a minimum of six inches into original, undisturbed soil;
 - (c) Timed dosing; and
 - (d) Soil dispersal components having daily design flows greater than one thousand gallons of sewage per day may:

- (i) Only be located in soil types 1-5;
 - (ii) Only be located on slopes of less than thirty percent, or seventeen degrees.
- (3) All SSAS shall meet the following requirements:
- (a) The infiltrative surface may not be deeper than three feet below the finished grade, except under special conditions approved by the local health officer. The depth of such system shall not exceed ten feet from the finished grade;
 - (b) A minimum of six inches of sidewall must be located in original undisturbed soil;
 - (c) Beds are only designed in soil types 1, 2, 3 or in fine sands with a width not exceeding ten feet;
 - (d) Individual laterals greater than one hundred feet in length must use pressure distribution;
 - (e) A layer of between six and twenty-four inches of cover material;
and
 - (f) Other features shall conform with the "*On-site Wastewater Treatment Systems Manual*," United States Environmental Protection Agency EPA-625/R-00/008 February 2002 (available upon request to the department) except where modified by, or in conflict with this section or local regulations.
- (4) For SSAS with drainrock and distribution pipe:
- (a) A minimum of two inches of drainrock is required above the distribution pipe;
 - (b) The sidewall below the invert of the distribution pipe is located in original undisturbed soil.
- (5) The local health officer may allow the infiltrative surface area in a SSAS to include six inches of the SSAS sidewall height when meeting the required absorption area where total recharge by annual precipitation and

irrigation is less than twelve inches per year.

(6) The local health officer may permit systems consisting solely of a septic tank and a gravity SSAS in soil type 1 if all the following criteria are met:

(a) The system serves a single-family residence;

(b) The lot size is greater than two and one-half acres;

(c) Annual precipitation in the region is less than twenty-five inches per year as described by "*Washington Climate*" published jointly by the Cooperative Extension Service, College of Agriculture, and Washington State University (available for inspection at Washington state libraries);

(d) The system is located outside the twelve counties bordering Puget Sound; and

(e) The geologic conditions beneath the dispersal component must satisfy the minimum unsaturated depth requirements to ground water as determined by the local health officer. The method for determination is described by "*Design Guideline for Gravity Systems in Soil Type 1*" (available upon request to the department).

(7) The local health officer may increase the loading rate in Table VIII up to a factor of two for soil types 1-4 and up to a factor of 1.5 for soil types 5 and 6 if a product tested to meet treatment level D is used. This reduction may not be combined with any other SSAS size reductions.

(8)(a) The primary and reserve areas must be sized to at least one hundred percent of the loading rates listed in Table VIII.

(b) However, the local health officer may allow a legal lot of record created prior to the effective date of this chapter that cannot meet this primary and reserve area requirement to be developed if all the following conditions are met:

(i) The lot cannot meet the minimum primary and reserve area requirements due to the loading rates for medium sand, fine sand and very fine sand listed in Table VIII of this chapter;

(ii) The primary and reserve areas are sufficient to allow installation of a SSAS using maximum loading rates of 1.0 gallons/square foot per day for medium sand, 0.8 gallons/square foot/day for fine sand, and 0.6 gallons/square foot/day for very fine sand; and

(iii) A treatment product meeting at least Treatment Level D and pressure distribution with timed-dosing is used.

[Statutory Authority: RCW 43.20.050. 05-15-119, § 246-272A-0234, filed 7/18/05, effective 7/1/07.]

NO. 40429-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DANIEL FISHBURN and LORI FISHBURN,

Appellants,

v.

PIERCE COUNTY PLANNING AND
LAND SERVICES DEPARTMENT;

and

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT (a.k.a.
TACOMA/PIERCE COUNTY HEALTH DEPARTMENT, a.k.a.
PIERCE COUNTY HEALTH DEPARTMENT),

Respondents.

FILED
COURT OF APPEALS
DIVISION II
10 MAY 19 PM 1:59
STATE OF WASHINGTON
BY 

PROOF OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on May 7, 2010, I dispatched true copies of the following document:

BRIEF OF APPELLANT

via ABC Legal Messengers for delivery the same date to defendants'

counsel:

Ronald L. Williams, WSBA #13927
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Counsel for Pierce County Planning and
Land Services Department

Matthew R. Wojcik, WSBA# 27918
Daniel F. Mullin, WSBA# 12768
Mullin Law Group PLLC
101 Yesler Way, Suite 400
Seattle, Washington 98104
Counsel for Tacoma-Pierce County Health Department

DATED this 18th day of May, 2010.



Stacy L. Clirehugh
Legal Assistant