

No. 40429-0-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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DANIEL AND LORI FISHBURN,  
Plaintiffs and Appellants,

v.

PIERCE COUNTY PLANNING AND  
LAND SERVICES DEPARTMENT,  
Defendant and Respondent;

and

TACOMA PIERCE COUNTY HEALTH DEPARTMENT,  
Defendant and Respondent.

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Brief of Respondent Tacoma Pierce County Health Department

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## **I. INTRODUCTION**

This appeal arises out of the trial court's entry of summary judgment in favor of Respondents Pierce County Planning and Land Services Department ("PALS") and Tacoma-Pierce County Health Department ("TPCHD") based on the public duty doctrine. On May 17, 2007, Appellants Daniel and Lori Fishburn (the "Fishburns") purchased the subject property on Snag Island in Pierce County, Washington for \$1,599,999. They did so without conducting an inspection or notifying TPCHD so that it could evaluate the septic system as required prior to transfer of ownership. When the Fishburns subsequently learned that the septic tank system was failing, they looked to PALS and TPCHD for recovery based on their alleged negligence in permitting and approving construction of the house and installation of the septic system two years prior to the Fishburns' purchase of the property. The trial court appropriately held that the Fishburns' claims against PALS and TPCHD were precluded by the public duty doctrine, and that no exception to the doctrine applied. The trial court also appropriately denied the Fishburns' motion for reconsideration because the "new evidence" submitted on reconsideration did not warrant a different result under the applicable legal standard. For the reasons that follow, TPCHD respectfully requests that this Court affirm the trial court's rulings.

## **II. COUNTER-STATEMENT OF ISSUES**

1. Did the trial court properly grant summary judgment in favor of PALS and TPCHD under the public duty doctrine where the Fishburns failed to point to any statute or ordinance evidencing an intent to identify and protect a particular class of persons as required under the legislative intent exception?

2. Did the trial court properly grant summary judgment in favor of PALS and TPCHD under the public duty doctrine where the Fishburns failed to establish the requisite elements of duty to enforce a statute, actual knowledge of a statutory violation, and failure to correct a violation as required under the failure to enforce exception?

3. Did the trial court properly grant summary judgment in favor of PALS and TPCHD under the public duty doctrine where the Fishburns failed to establish direct contact or privity, express assurances given by a public official, and justifiable reliance as required by the special relationship exception?

4. Should the Fishburns' argument concerning regulatory taking be rejected where they inappropriately raise it for the first time on appeal and where they cannot point to any statute, ordinance or regulation enacted after the purchase of the property that somehow changed their rights with respect to the use of same?

5. Did the trial court properly deny the Fishburns' motion for reconsideration where the purported "new evidence" did not change the trial court's analysis under the public duty doctrine?

### **III. COUNTER-STATEMENT OF CASE**

#### **A. Land Created from Dredged Material in Mid-1990's.**

In November 1994, Gary and Arlene Petersen obtained approval to develop a parcel of land east of Snag Island Drive on the shores of Lake Tapps in Pierce County, Washington. [CP 3]. The Petersens increased the size and elevation of the shoreline property by dumping fill material dredged from Lake Tapps over a period of several years. [CP 4]. The Petersens sold the undeveloped property to developer Euroway Homes, Inc., in 2004. [CP 5, 24].

#### **B. Euroway Homes, Inc. Submits Application for On-site Septic System in 2004.**

On May 11, 2004, a licensed septic designer submitted an on-site septic system design application on behalf of Euroway Homes. [CP 34, 38-39]. The application referenced soil samples logged in March 2004. [CP 38-39]. Based on the soil samples establishing appropriate soil conditions for on-site septic, TPCHD approved the application on or about August 26, 2004. [CP 35, 41-48]. The septic designer then released the design to a licensed installer hired by Euroway Homes who proceeded with the installation of the septic system. [CP 35, 50-52].

Following installation of the septic system, on April 7, 2005, the designer submitted an as-built on-site sewage system certification which stated as follows:

I hereby certify that the accompanying drawing substantially depicts the on-site sewage disposal system installed at the above-referenced address. I inspected the on-site sewage disposal system prior to backfill and final cover and determined that it appeared to comply with all requirements and restrictions of the approved on-site sewage system design.

[CP 35, 54-58]. TPCHD accepted the as-built plans and certification on or about April 28, 2005. [CP 35, 54-58].

**C. Bolens Purchase Home from Developer in 2006.**

Richard and Joell Bolen purchased the residence from Euroway Homes, Inc. on or about February 2, 2006. [CP 35, 60-62]. The Bolens resided on the property until May 17, 2007, when they sold the home to the Fishburns. [CP 35, 64-78].

**D. Fishburns Purchase Home from Bolens on May 17, 2007 Without Inspection.**

The Fishburns purchased the property from the Bolens on May 17, 2007 for \$1,599,999 without inspection. [CP 35, 64-78, 80]. The Fishburns also failed to have the septic system evaluated by TPCHD as required prior to transfer of ownership. [CP 35, 82-83]. Following their purchase of the property, the Fishburns encountered problems relating to failure of their septic system, including pooling of effluent in their yard,

flooding of their crawl space, excessive movement of the house, failed septic drain fields, flooded septic tanks and inadequate surface drainage. [CP 2]. TPCHD subsequently determined that the septic tank system was failing. [CP 244-45]. Because the Fishburns could not resolve the septic problems, the Fishburns and the Pierce County Assessor-Treasurer stipulated that the value of the property was \$2,000.00. [CP 256].

**E. Procedural History**

The Fishburns filed their First Amended Complaint against PALS and TPCHD on October 23, 2009. [CP 1-12]. The Fishburns asserted causes of action for negligence, gross negligence, nuisance and violation of RCW 64.40.020. [CP 1-12]. The Fishburns' First Amended Complaint does not include a claim for regulatory taking/violation of Fifth and Fourteenth Amendments of the United States Constitution. [CP 1-12].

On December 30, 2009, PALS and TPCHD moved for summary judgment dismissal of all of the Fishburns' claims based on the public duty doctrine. [CP 23-33]. The trial court granted PALS and TPCHD's motion for summary judgment on February 5, 2010. [CP 449-451]. On February 16, 2010, the Fishburns moved for reconsideration of the trial court's summary judgment ruling based on "newly discovered material evidence". [CP 478-493]. After considering the submissions of the parties, and hearing oral argument, the trial court denied the Fishburns'

motion for reconsideration on February 26, 2010. [CP 727-729]. This appeal followed. [CP 730-737].

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Appellate courts review the entry of summary judgment de novo, engaging in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). The purpose of a summary judgment is to avoid useless trials on issues that cannot be factually supported, or, if factually supported, could not as a matter of law lead to a result favorable to the nonmoving party. *Burris v. General Ins. Co. of America*, 16 Wn. App. 73, 553 P.2d 125 (1976). Summary judgment is appropriate where, after viewing the evidence in the light most favorable to the nonmoving party, “there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Guijosa v. WalMart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

##### **B. The Trial Court Appropriately Dismissed the Fishburns’ Claims Based on the Public Duty Doctrine.**

The Fishburns’ claims are based on theories of negligence and nuisance. [CP 1-12]. The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. *Taylor*

*v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This same threshold determination is also required in a nuisance action, which “consists in unlawfully doing an act, or *omitting to perform a duty*, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others....” RCW 7.48.120 (emphasis added). The existence of a duty is a question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. *Taylor*, 111 Wn.2d at 163. “Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).’” *Id.* (quoting *J & B Dev. Co. Inc. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)). The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability. *Id.* at 169.

There are four exceptions to the public duty doctrine in which the governmental agency acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs. *Babcock v. Mason*

*County Fire District Co. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001).

Those exceptions include (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship. Because PALS and TPCHD owed no actionable duty to the Fishburns, and because none of the exceptions to the public duty doctrine are applicable, PALS and TPCHD are entitled to summary judgment as a matter of law and the trial court's ruling should be affirmed.

1. **The Legislative Intent Exception Is Inapplicable Because the Fishburns Failed to Point to Any Statute or Ordinance Evidencing an Intent to Identify and Protect a Particular Class of Persons.**

Under the “legislative intent” exception, the public duty rule of nonliability does not apply where the Legislature enacts legislation for the protection of persons of the plaintiff's class. *Taylor*, 111 Wn.2d at 164. However, Washington courts have routinely held that governmental entities owe no duty of care to ensure compliance with statutes or codes enacted to protect the public in general. The decision in *Taylor v. Stevens County* is instructive on this point.

In *Taylor*, the buyers purchased a house from the sellers in Stevens County with the assistance of a realtor. *Id.* at 161. The sellers built the house without obtaining a building permit, but obtained one immediately prior to closing. *Id.* Before issuing the building permit, a county building inspector noted that “[t]he basic structure appeared to be

of adequate construction although cosmetic considerations were somewhat lacking. Overall the [building] appeared to be average of what may be expected in this area.” *Id.* The buyers subsequently discovered defects in the construction of their home. *Id.* at 161-62. At the buyers’ request, a county building inspector conducted an inspection and found numerous violations of the county building code. *Id.* at 162.

The buyers subsequently filed suit against the sellers, the realtor and the county. *Id.* In turn, the sellers and the realtor cross-claimed against the county for indemnity. *Id.* The county filed a CR 12(b)(6) motion to dismiss all claims against it. *Id.* The trial court granted the county’s motion and the Washington Supreme Court affirmed. *Id.*

In so ruling, the *Taylor* court analyzed the State Building Code Act, RCW 19.27, which stated as its purpose: “to promote the health, safety and welfare of the occupants or users of buildings and structures and the general public.” *Id.* at 164 (emphasis in the original). The buyers contended that the clear intent of the statute was to protect them individually. *Id.* Rejecting the buyers’ contention, the *Taylor* court held that “the duty to issue building permits and conduct inspections is to protect the health and safety of the general public.” *Id.* at 164-165 (emphasis added).

Like building codes, rules and regulations regarding sewage control apply to the general public and do not create a basis for liability

against governmental entities. In *Stannik v. Bellingham-Whatcom County District Board of Health*, 48 Wn.App. 160, 737 P.2d 1054 (1987), a homeowner sold his Whatcom-County home to Merrill Lynch in May of 1982. *Id.* at 161. The county's Board of Health performed an inspection of the home's sewage disposal system at Merrill Lynch's request. *Id.* The inspector filed a report stating that the system was working satisfactorily on that date. *Id.*

In January of 1984, the buyers entered into an agreement with Merrill Lynch to purchase the home. *Id.* As was its usual practice before closing a home loan, the buyers' mortgage company requested the Board of Health to perform an inspection of the sewage disposal system. *Id.* After being advised that the inspector had been unable to perform the requested inspection because the ground was frozen and the home was locked, the mortgage company elected to waive its customary inspection requirement and close the loan. *Id.* at 161-62. Before the closing, the mortgage company told the buyers that the inspection had not been performed, but that the system had passed inspection in 1982. *Id.* 162.

After occupying the home in February of 1984, the buyers discovered raw sewage in an open ditch on the property. *Id.* At the buyers' request, the Board of Health sent an inspector to the buyers' home. *Id.* The inspector determined that the system was not functioning satisfactorily. *Id.*

The buyers subsequently brought suit against the Board of Health, alleging that it failed to exercise reasonable care in the 1982 inspection. *Id.* The Board of Health moved for summary judgment based on the public duty doctrine, and the trial court granted the motion. *Id.* The trial court found that although the Board of Health owed a duty of due care to the party who requested the 1982 inspection, that duty did not run to subsequent purchasers such as the buyers. *Id.*

On appeal, the buyers were unable to point to any legislative enactment upon which the Board of Health's liability could be founded. *Id.* at 164. The buyers contended that at the time of the 1982 inspection, the sewage disposal system was not in compliance with the Department of Public Health's Sewage Control Rules and Regulations and that the system would not have been approved but for the inspector's negligence. However, and as recognized by the *Stannik* court, the Sewage Control Rules and Regulations were enacted in the interest of "public health, welfare and safety" in Whatcom County. *Id.* "This is precisely the sort of enactment which has been held not to create an actionable duty on the part of a governmental entity." *Id.* (citing *Honcoop v. State*, 43 Wn.App. 300, 310-11, 716 P.2d 963 (1986)); *Harley v. State*, 103 Wn.2d 768, 770-71, 785, 698 P.2d 77 (1985); *Halvorson v. Dahl*, 89 Wn.2d 673, 677 n.2, 574 P.2d 1190 (1978)). Accordingly, the *Stannik* court found the legislative

intent exception inapplicable and upheld the trial court's dismissal of the buyers' negligence action.

In the instant case, the Fishburns contend that RCW 70.118, et seq., the portion of Washington's Public Health Code applicable to "On-site sewage disposal systems", creates a special duty on the part of TPCHD to the Fishburns. However, like the building code in *Taylor* and the sewage rules and regulations in *Stannik*, the purpose of RCW 70.118, et seq., is to ensure uniform compliance and protect the members of the general public. Although the statute recognizes that over one million, two hundred thousand persons in Washington must rely on septic tank systems, it does not evidence an intent to protect a particular and circumscribed class of persons. RCW 70.118.010. On the contrary, the statute reflects an intent to protect the general public as a whole from the health hazards and water quality degradation that result from the failure of septic tank systems by encouraging alternatives to septic tanks:

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.

RCW 70.118.010.

The legislature's intent to protect the general public as a whole is further evidenced by the statute's provision allowing counties and cities to adopt more restrictive standards if they "are necessary to ensure the protection of the *public health*", and the statute's requirement that TPCHD adopt sewage disposal additives according to "whether the additive has an adverse effect *on public health* or water quality". RCW 70.118.050; 70.118.060(4). As recognized by the *Stannik* court, RCW 70.118, et seq., "this is precisely the sort of enactment which has been held not to create an actionable duty on the part of a governmental entity." 48 Wn.App. at 164. Consequently, the statute does not provide a basis for avoiding the public duty doctrine, and the trial court's entry of summary judgment in favor of PALS and TPCHD was proper.

The Fishburns' reliance on *Halvorson v. Dahl* is misplaced. In *Halvorson*, a man died in a fire in a Seattle hotel. *Id.* at 674. The man's widow sued the hotel owner as well as the city, based on the alleged failure of city officials to enforce the building, housing and safety codes and the alleged connection between that failure and the fire. *Id.* The city moved for a dismissal under CR 12(b)(6), and the motion was granted. *Id.* The Washington Supreme Court reversed the trial court's ruling, and concluded the widow's complaint stated a claim upon which relief could be granted. *Id.*

In so ruling, the *Halvorson* court determined the legislative intent exception to the public duty doctrine applied to the facts before it. *Id.* at 676. While the *Halvorson* court recognized that most codes are enacted merely for the purposes of public safety or for the general welfare, the Seattle Housing Code evidences a clear intent to identify and protect a particular and circumscribed class of persons. *Id.* at 676-77. Specifically, the Seattle Housing Code provides that the conditions and circumstances of certain buildings “are dangerous and a menace to the health, safety, morals or welfare *of the occupants of such buildings and of the public*, and accordingly it is the purpose of this code to establish minimum standards and effective means for enforcement thereof for the preservation, protection, and promotion of the public health, safety, morals and general welfare.” *Id.* at 677 (quoting Section 27.04.020 of the Seattle Housing Code) (emphasis added). Thus, the Seattle Housing Code is an ordinance enacted for the benefit of a specifically identified group of persons—the occupants of those certain buildings—“as well as, and in addition to, the general public.” *Id.* Based on the city’s long-term knowledge of, and inadequate response to, the hotel’s failure to comply with the Seattle Building Code, the *Halvorson* court concluded that the widow stated a claim upon which relief could be granted. *Id.* at 678.

Unlike the Seattle Building Code in *Halvorson*, nothing in RCW 70.118, et seq. evidences any intent, much less a clear intent, to identify

and protect a particular class of persons other than the general public. The Fishburns would have this Court believe that the Legislature intended to create an exception to the general rule of governmental immunity for the more than “one million, two hundred thousand persons” who rely on septic tank systems. This would subject governmental entities to unlimited liability and flies in the face of the policy underlying the public duty doctrine. *See Taylor*, 111 Wn.2d at 169 (recognizing the policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability). Consequently, the Fishburns’ argument concerning the legislative intent exception should be rejected, and the trial court’s order granting summary judgment in favor of PALS and TPCHD should be affirmed.

The Fishburns also allege that the legislative intent exception applies based on Pierce County Code (“PCC”) 8.36. They direct this argument solely at PALS, not at TPCHD. *See Appellants’ Brief* at pp. 28-29. That notwithstanding, PCC 8.36 does not provide a basis for liability against TPCHD *or* PALS. PCC 8.36 does not identify any particular class of individuals. Moreover, the purpose section of the PCC reflects an intent to “better protect *the public* from the harmful effects of certain violations”. PCC 1.16.010 (emphasis added). Like RCW 70.118, PCC 8.36 does not reflect an intent to protect any particular class other than the

public in general. Because the Fishburns have failed to point to any legislation upon which the liability of PALS and TPCHD can be founded, the legislative intent exception is inapplicable, and the trial court's entry of summary judgment in favor of PALS and TPCHD should be affirmed.

2. **The Failure to Enforce Exception Is Inapplicable Because the Fishburns Failed to Establish the Requisite Elements of Duty to Enforce a Statute, Actual Knowledge of a Statutory Violation, and Failure to Correct a Violation.**

The failure to enforce exception applies where (1) a public official has a duty to enforce a statute, (2) the official has actual knowledge of a statutory violation, (3) the official fails to correct the violation, and (4) the plaintiff is within the class the statute protects. *Smith v. City of Kelso*, 112 Wn.App. 277, 282, 48 P.3d 372 (2002). The plaintiff has the burden of establishing each element of the exception. *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Washington courts construe the failure to enforce exception narrowly. *Id.* The statute must create a mandatory duty to take specific action to correct a violation. *Smith*, 112 Wn.App. at 282. Such a duty does not exist if the statute vests the public official with broad discretion. *Id.*

This Court analyzed the application of the failure to enforce exception in *Smith v. Kelso*. In *Smith*, homeowners sued the City of Kelso after their homes were destroyed by a severe landslide. *Id.* at 279. The

homeowners alleged that during the 1970's, the City negligently approved the plats and building permits for their subdivisions. *Id.* The City moved for summary judgment, arguing that the public duty doctrine shielded it from liability. *Id.* at 282. In response, the homeowners argued that the City was subject to liability under the failure to enforce exception. *Id.* at 282-83. In making this argument, the homeowners relied on Kelso Municipal Code ("KMC") 13.04.516 which requires the city engineer to prepare development standards based on the topography, soil conditions, and geology of the plat area:

The city engineer shall prepare minimum installation, material, design and construction standards appropriate to the locality and the topography, soil conditions and geology of the area in which the plat is located. Said standards shall be made available to the subdivider and his agent within ten days after receipt of the proposed plat by the commission.

*Id.* at 282. The homeowners maintained that the ordinance required the City to prepare site-specific standards and that the City could not have prepared such standards without a soil and geology study. *Id.* at 283.

In looking to previous failure to enforce cases, this Court recognized that the exception is held to apply where the statute or ordinance at issue prohibited specific conduct and required a public official to take specific action to correct a violation. *Id.* For example, in *Waite v. Whatcom County*, 54 Wn.App. 682, 684-87, 775 P.2d 967 (1989), Division One held that an ordinance regulating furnace installation

supported liability against the county where the ordinance prohibited the installation of propane furnaces in basements, a county inspector approved the installation of a propane furnace in a basement, the county did not dispute that it had a responsibility to correct violations of the ordinance, and the plaintiff was subsequently injured when the furnace exploded. Similarly, the Washington Supreme Court upheld municipal liability in *Campbell v. City of Bellevue*, 85 Wn.2d 1, 3-4, 6, 13, 530 P.2d 234 (1975), where an ordinance required the electrical inspector to disconnect nonconforming lighting systems, the electrical inspector noticed a nonconforming lighting system in a creek, and the electrical inspector left a note for the homeowner but did not disconnect the wiring. A woman was killed and her son injured as a result of the wiring. *Id.* at 4. The ordinance specifically provided that “the building official shall immediately sever any unlawfully made connection of electrical equipment to the electrical current if he finds that such severing is essential to the maintenance of safety and the elimination of hazards.” *Id.* at 5. The Washington Supreme Court also upheld municipal liability in *Bailey v. Town of Forks*, 108 Wn.2d 262, 271, 737 P.2d 1257 (1987), where a police officer failed to detain an intoxicated driver. In *Bailey*, the police officer saw an intoxicated man driving from a bar just before he caused an accident that killed one person and seriously injured another.

*Id.* at 264-65. The plaintiff relied on a statute that required a police officer to detain a publicly incapacitated individual. *Id.* at 269.

In *Smith*, this Court noted that in each of the above-referenced cases, the statute or ordinance at issue regulated public conduct, such as installing a propane furnace in a basement, installing underwater wiring, and driving while intoxicated. 112 Wn.App. at 284. Moreover, and equally as important, the statute or ordinance at issue also obligated a government agency to take specific action to correct a violation of law. *Id.*

In contrast, although KMC 13.04.516 obligated the city engineer in the *Smith* case to prepare design and construction standards, it did not regulate public conduct—it required nothing of developers or homeowners. *Id.* This Court therefore concluded that the City owed no duty to the homeowners under KMC 13.04.516, and reasoned as follows:

The ordinance sets no requirements that the City can enforce against a developer or homeowner; a developer or homeowner cannot violate this ordinance. Because of this, the City cannot fail to enforce anything.

Moreover, even if we consider the ordinance to fit within the failure to enforce exception, the language is not specific enough to enforce. The homeowners are correct that the ordinance requires the city engineer to prepare standards; it says the engineer “shall” prepare standards, and we generally construe “shall” as mandatory. But the specific design and construction standards lie within the city engineer’s discretion, and he did not require site-specific soil studies. Although the homeowners contend he should

have, the ordinance creates no duty to enforce any specific requirements.

*Id.* This Court therefore held that the City was entitled to summary judgment on all of the homeowners' negligent plat approval claims pursuant to the public duty doctrine.

The Fishburns rely on PCC 8.36.110 and RCW 70.118.030(2) for their negligence claims. *See* Appellant's Brief at pp. 30, 32. PCC 8.36.110 provides in relevant part:

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.

PCC 8.36.110 also provides that TPCHD shall establish the maximum allowable density and minimum lot sizes for future development proposals, and shall establish guidelines to set such limits. PCC 8.36.110 does not, however, require a public official to take specific action to correct a violation of this provision. As recognized by the *Atherton* court, the failure to enforce exception is construed narrowly because "[t]o do otherwise would effectively overrule *Taylor* and eviscerate the policy considerations therein identified." 115 Wn.2d at 531. *Taylor* dictates that no duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes. 111 Wn.2d at 168. On the contrary, the

duty to ensure compliance rests with individual permit applicants, builders and developers. *Id.*

Moreover, PCC 8.36.110 is analogous to the ordinance addressed by this Court in *Smith* to the extent it requires TPCHD to establish standards and guidelines relating to maximum densities and minimum lot sizes, but those specific standards and guidelines lie within TPCHD's discretion. As this Court recognized, such an ordinance is not specific enough to enforce and cannot provide a basis for invoking the failure to enforce exception to the public duty doctrine. 112 Wn.App. at 284.

The Fishburns' attempt to invoke the failure to enforce exception based on RCW 70.118.030(2) is similarly flawed. RCW 70.118.030(2) provides in relevant part:

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.

*See* RCW 70.118030(2).

Like the ordinance addressed by this Court in *Smith*, RCW 70.118.030(2) sets no requirements that a local health officer can enforce against a developer or a homeowner. In other words, a developer or homeowner cannot violate this ordinance. Because of this, the TPCHD cannot fail to enforce anything. Moreover, the language of RCW 70.118.030(2) expressly provides that TPCHD use "discretionary

judgment” in implementing any corrections to failing septic tank drainfield systems. As this Court made clear in *Smith*, there can be no mandatory duty to take specific action to correct a violation where a statute vests the public official with broad discretion. 112 Wn.App. at 282.

The failure to enforce exception is also inapplicable based on the Fishburns’ failure to establish that PALS or TPCHD had any actual knowledge of a statutory violation during construction of the subject home. The Fishburns rely on the Declaration of Richard Kerin to establish the requisite “actual knowledge”. See Appellants’ Brief at pp. 30-31. Mr. Kerin, an engineer hired to facilitate the installation of a sewer system in the Bonney Lake-Lake Tapps area in the 1970s, testified that “it was well known by the mid-1970s that the soils around Lake Tapps are not suitable for the *widespread* use of septic tanks, and that the consequences of allowing continued use of on-site septic systems in that area *could be* devastating.” [CP 322 (emphasis added)]. Mr. Kerin also testified that he received a December 3, 1975, letter from R. Clifton Smith, the Director of the Environmental Health Division of the TPCHD, wherein Mr. Clifton advised Mr. Kerin as follows:

It has been necessary for the Health Department to deny septic tank applications in numerous locations and areas around Lake Tapps and in Bonney Lake because of soil topography and ground water conditions. These sites will not be buildable until sewers are available.

[CP 437]. Even viewing the facts in the light most favorable to the Fishburns, this evidence, at most, points to constructive knowledge that sites around Lake Tapps were not ideal for widespread use of septic tanks, and that certain officials were of the opinion that there were *some* locations around Lake Tapps and Bonney Lake that, because of soil topography and ground water conditions, would not be buildable until sewers were available. [CP 322; 437]. Constructive knowledge is not enough. *Atherton*, 115 Wn.2d at 532. “The requirement of actual knowledge does not encompass facts which the building official should have known.” *Id.* at 532-33. Because the Fishburns cannot satisfy their burden for invoking the failure-to-enforce exception, the public duty doctrine applies and the trial court’s entry of summary judgment in favor of PALS and TPCHD should be affirmed.

3. **The Special Relationship Exception Is Inapplicable Because the Fishburns Lack Privity with PALS and TPCHD and Any Duty Owed to the Developer or Previous Owners Does Not Run to Subsequent Purchasers.**

The Fishburns appear to have abandoned their argument that the special relationship exception applies to their claims against TPCHD, or at least to any conduct of PALS and TPCHD that took place prior to the purchase of the property. *See* Appellant’s Brief at pp. 32-34. The Fishburns now contend that the exception applies to their gross negligence

claim against PALS regarding their bulkhead and dock, and/or to the conduct of PALS and TPCHD *after* their purchase of the property. *See* Appellants' Brief at p. 34. The Fishburns therefore concede that the special relationship exception does not apply to any alleged negligent acts that pre-dated their purchase of the property. Regardless of whether the Fishburns direct their argument at PALS, TPCHD or both, or to conduct before or after the purchase of the property, the special relationship exception is inapplicable.

“The special relationship exception is a ‘focusing tool’ used to determine whether a local government ‘is under a general duty to a nebulous public or whether that duty has focused on the claimant.’” *Taylor*, 111Wn.2d at 166 (quoting *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 304-05, 669 P.2d 468 (1983)). A special relationship exists where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff. *Id.* As the *Taylor* decision makes clear, the special relationship exception has no application where, as here, a claimant alleges negligent enforcement of building or similar codes because local government owes no duty of care to ensure compliance with the codes—that duty rests with individual permit applicants, builders and developers. *Id.* at 168.

Moreover, to the extent there is any duty, that duty does not run to subsequent purchasers such as the Fishburns. *Stannik*, 48 Wn.App. at 165 (finding no special relationship existed where inspection was performed at the request of the seller more than a year and a half before the plaintiffs purchased their home). In *Pierce v. Spokane County*, 46 Wn.App. 171, 174, 730 P.2d 82 (1986), Division One held that the County's issuance of a permit to a builder did not create a special relationship between the County and a party who subsequently purchased a home from the builder. Similarly, in *Taylor*, the Washington Supreme Court held that there was a special relationship between the County and a homeowner who purchased his home the day after the County issued a building permit to his predecessor, the seller. 111 Wn.2d. at 161, 172. Because the Fishburns' allegations that PALS and TPCHD were negligent in their duties to "review, inspect, permit, endorse and approve the design and development and construction" of the subject property, and in "authorizing and permitting the development and construction of unsuitable septic drain fields, a faulty incomplete drainage system, and an inadequate foundation" all pre-dated their purchase of the property, the special relationship exception does not apply. [CP 2, 9-10].

To the extent the Fishburns' negligence claim is based on the conduct of PALS and/or TPCHD *after* the purchase of the property, the special relationship exception is still inapplicable. Where, as here, the

contacts between the public officials and the homeowners occur well after the alleged negligence took place, no special relationship is established. *Stannik*, 48 Wn.App. at 165-66. Moreover, neither PALS nor TPCHD made any express assurances to the Fishburns on which they could base reliance. Because the Fishburns have not established the existence of a special relationship with respect to the alleged negligence that pre-dated their purchase of the property or the conduct of PALS and/or TPCHD after the purchase of the property, the public duty doctrine applies and the trial court's entry of summary judgment in favor of PALS and TPCHD should be affirmed.

**C. Appellants Waived the Issue of Regulatory Taking.**

Under Washington's Rules of Appellate Procedure, "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Arguments and theories not presented to the trial court will generally not be considered on appeal. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1993). In the instant case, the Fishburns' First Amended Complaint does not contain a cause of action for regulatory taking, and the Fishburns never raised this issue to the trial court during the proceedings below. [CP 1-12, 95-120, 478-493, 708-722; RP 2/5/2010; RP 2/26/2010]. Consequently, the Fishburns failed to preserve the issue of regulatory taking for appeal, and this Court may refuse to consider the same. *See*,

*e.g.*, *Beale v. Planning Board of Rockland*, 423 Mass. 690, 671 N.E.2d 1233 (Mass. 1996) (failure of property owner to raise issue of whether city planning board’s rejection of proposed subdivision plan amounted to regulatory taking precluded him from raising issue for the first time on appeal); *Shell Island Homeowners Ass’n, Inc. v. Tomlinson*, 134 N.C.App. 286, 517 S.E.2d 401 (N.C.App. 1999) (where neither plaintiff’s original complaint nor its amended complaint alleged facts sufficient to support a claim for regulatory taking by physical invasion, the appellate court would not consider the claim for the first time on appeal); *Boyd v. County of Henrico*, 41 Va.App. 1, 581 S.E.2d 863 (Va. Ct. App. 2003) (where appellants’ argument that an ordinance constituted a regulatory taking was not raised in the trial court, it was deemed waived and the appellate court would not address the argument for the first time on appeal); *Gardner v. Board of County Commissioners of Wasatch County*, 178 P.3d 893, 902 n. 8, 596 Utah Adv. Rep. 38 (Utah 2008) (holding that a specific takings claim must have been asserted in landowners’ complaint in order to properly come before the court on appeal; fact that landowners argued that a physical taking occurred in opposition to motion for summary judgment was insufficient for preservation purposes).<sup>1</sup>

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<sup>1</sup> TPCHD is cognizant of the exception to RAP 2.5(a) that allows an appellate court to consider a “manifest error affecting a constitutional right” for the first time on appeal. However, nothing in the Fishburns’ opening brief suggests that they are invoking this exception. That

Even if the issue of regulatory taking is properly before this Court, which TPCHD maintains it is not, the Fishburns' arguments do not warrant a reversal of the trial court's rulings. The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use without just compensation." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). There are two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes: (1) where government regulations require an owner to suffer a permanent physical invasion of his or her property; and (2) where government regulations completely deprive an owner of all economically beneficial use of his or her property. *Id.* at 538. The Fishburns contend that the instant facts fall into the latter category, and rely solely on the decision in *Lucas v. South Carolina Coastal*

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notwithstanding, the Fishburns have not and cannot make the requisite showing warranting review of the regulatory taking issue for the first time on appeal. To satisfy the exception to RAP 2.5(a), an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010). An error is manifest if it results in actual prejudice. *Id.* at 99. An appellant who claims manifest constitutional error must show that the outcome likely would have been different but for the error. *State v. Warren*, 134 Wn.App. 44, 57, 138 P.3d 1081 (2006). Because the Fishburns cannot state a claim for regulatory taking, the outcome of the summary judgment proceedings would not have been any different had the trial court considered the regulatory taking issue. Consequently, there can be no manifest error, and the Fishburns are precluded from raising this issue for the first time on appeal.

*Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The facts of *Lucas* are readily distinguishable from the instant facts.

In *Lucas*, the petitioner purchased two residential lots on the coast of South Carolina for \$975,000 with the intention of building single-family homes—a permissible use at the time of the purchase. *Id.* at 1006-07. Two years *after* the purchase, the South Carolina Legislature enacted the Beachfront Management Act (the “Act”) which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. *Id.* at 1007. The trial court found that this prohibition rendered the petitioner’s parcels “valueless”. *Id.* The United States Supreme Court agreed, and concluded that the Act accomplished a regulatory taking of the petitioner’s property warranting just compensation. *Id.* at 1029-30. In so ruling, the Supreme Court reasoned that the Act proscribed a productive use that was previously permissible under relevant property and nuisance principles, and effectively prevented all economically beneficial use of the land. *Id.*

Unlike the South Carolina Legislature in *Lucas*, no Washington state or local legislature enacted a regulation that proscribed the Fishburns from a productive use of their property that existed at the time of purchase. Indeed, the Fishburns purchased the subject property in 2007 and point to no subsequently enacted statute, ordinance or regulation that somehow changed their rights with respect to the use of their property. Instead, the

Fishburns merely claim their home lost its value because PALS and TPCHD *negligently* “*applied, misapplied, and/or failed to apply their respective rules and regulations*” in permitting and approving the septic system prior to their purchase of the home. *See* Brief of Appellant at p. 36 (emphasis added). The Fishburns concede the heart of their purported regulatory taking claim is that they “lost their home because they unknowingly purchased it with a septic system that the defendants approved, but which should never have been permitted.” *Id.* The Fishburns cannot avoid the operation of the public duty doctrine by an eleventh hour attempt to re-characterize their negligence claims as a regulatory taking claim. Because the Fishburns waived this issue by failing to preserve it for appeal, and because the facts of this case do not provide a basis for a regulatory taking claim, the trial court’s summary judgment ruling should be affirmed.

**D. The Trial Court Properly Denied the Fishburns’ Motion for Reconsideration because the Purported “New Evidence” Does Not Change the Result Under the Public Duty Doctrine.**

Appellate courts review orders on motions for reconsideration under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A discretionary determination should not be disturbed on appeal except on a clear showing that the decision is manifestly unreasonable or based on

untenable grounds or untenable reasons. *Id.* at 684-85. “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)).

In the instant case, the Fishburns have failed to establish that the trial court abused its discretion in denying their motion for reconsideration. The Fishburns’ motion was based on newly discovered evidence—namely, that the TPCHD inspector who inspected the final installation of the septic system allegedly falsified his report and approved the system’s installation based on “as-built” drawings that did not then exist.<sup>2</sup> [CP 486-490]. PALS and TPCHD also submitted declarations in opposition to the Fishburns’ motion. [CP 564-570, 571-583, 600-617].

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<sup>2</sup> In the conclusion to their opening brief, the Fishburns ask this Court to rule that they have a valid claim for fraud against PALS and TPCHD based on the “new evidence”, that they 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 do not apply to their purported fraud claim. *See* Appellants’ Brief at p. 42. The Fishburns never moved to amend their complaint below, and the appellate court is not the appropriate avenue for obtaining an amendment of the pleadings. To the extent the Fishburns contend that the alleged fraud provides a basis for overturning the trial court’s ruling on reconsideration, the Fishburns

This new evidence does not change the fact that the Fishburns' claims are barred by the public duty doctrine. The Fishburns still cannot point to any statute or ordinance evidencing an intent to identify and protect them, still can not establish a duty to enforce a statute, actual knowledge of a statutory violation and failure to correct a violation, and still cannot avoid the fact that they lacked privity with PALS and TPCHD and that any duty to the developer or previous property owners does not run to subsequent purchasers.

The Fishburns' contention that the trial court failed to consider the new evidence is not borne out by the record. *See* Appellants' Brief at p. 40. The trial court's February 26, 2010, Order expressly states that the court reviewed the declarations submitted on reconsideration. [CP 727-28]. Moreover, the Fishburns' assertion that the trial court denied their motion for reconsideration based solely on a finding that no special relationship existed, and erroneously applied the "special relationship" condition on the legislative intent and failure to enforce exceptions to the public duty doctrine, is likewise unsupported. *See* Appellants' Brief at pp. 40-41. The fact that the trial court focused on the special relationship exception during its oral ruling does not suggest that the trial court did not understand the requirements of the legislative intent and failure to enforce

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have failed to identify this issue in their assignments of error and this Court need not consider the same.

exceptions. All of the exceptions were fully briefed by the parties and discussed during counsels' oral arguments. [CP 23-33, 95-120, 440-448, 478-493, 553-563, 584-599, 708-722; RP 2/5/2010; RP 2/26/2010]. Indeed, the trial court stated during the oral ruling that "[t]his 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." [RP 2/26/2010 at 13: 22-25 (emphasis added)]. These statements demonstrate that the trial court's ruling was not based on the inapplicability of any single exception.

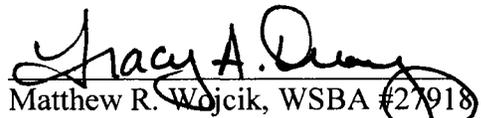
Similarly, the trial court's February 26, 2010, Order gives no indication that it was based on the inapplicability of any exception in particular. [CP 727-28]. Because the new evidence presented on reconsideration did nothing to affect the trial court's analysis under the public duty doctrine, and because the public duty doctrine is the correct legal standard, the trial court did not abuse its discretion and the order denying reconsideration should be affirmed.

**V. CONCLUSION**

For the foregoing reasons, PALS and TPCHD are entitled to summary judgment under the public duty doctrine, and the rulings of the trial court should be affirmed.

Respectfully submitted this 7<sup>th</sup> day of July, 2010

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No. 40429-0-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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DANIEL AND LORI FISHBURN,  
Plaintiffs and Appellants,

v.

PIERCE COUNTY PLANNING AND  
LAND SERVICES DEPARTMENT,  
Defendant and Respondent;

and

TACOMA PIERCE COUNTY HEALTH DEPARTMENT,  
Defendant and Respondent.

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**CERTIFICATE OF SERVICE**

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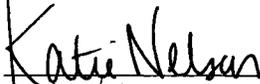
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CERTIFICATE OF SERVICE

I hereby certify that on the 7<sup>th</sup> day of July 2010, I caused a true and correct copy of the *Brief of Respondent TPCHD* to be delivered to the following counsel of record:

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