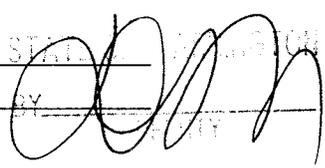


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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

DANIEL AND LORI FISHBURN, Appellants,

v.

PIERCE COUNTY PLANNING AND LAND SERVICES
DEPARTMENT and TACOMA-PIERCE COUNTY HEALTH
DEPARTMENT, Respondents.

**BRIEF OF RESPONDENT PIERCE COUNTY PLANNING AND
LAND SERVICES DEPARTMENT**

MARK LINDQUIST
Prosecuting Attorney

By
RONALD L. WILLIAMS
Deputy Prosecuting Attorney
Attorneys for Respondent,
Pierce County Planning and
Land Services

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-3612

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES ON APPEAL	1
II. STATEMENT OF THE CASE	1
A. PROCEDURAL HISTORY.....	1
B. STATEMENT OF FACTS.....	2
III. ARGUMENT	5
A. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS CASE BECAUSE THERE ARE NO APPLICABLE EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE BARRING THE PLAINTIFFS' CLAIMS	5
1. <u>The Special Relationship Exception to the Public Duty Doctrine Does Not Apply Here Because the Plaintiffs Are the Subsequent Purchasers of the Home.</u>	7
2. <u>The Legislative Intent Exception to the Public Duty Doctrine Does Not Apply Here Because the Statutes at Issue Do Not Include a Clear Intent to Protect the Plaintiffs.</u>	13
3. <u>The Failure to Enforce Exception to the Public Duty Doctrine Does Not Apply Here Because the Regulations at Issue Are Highly Discretionary.</u>	19

B. THERE IS NO COLORABLE REGULATORY
TAKING CLAIM BECAUSE THE
REGULATIONS AT ISSUE NEVER CHANGED
DURING THE TIME THE FISHBURNS OWNED
THE PROPERTY 26

C. IT WAS NOT ABUSE OF DISCRETION TO
DENY THE PLAINTIFFS' MOTION FOR
RECONSIDERATION BECAUSE,
REGARDLESS OF ANY NEW EVIDENCE,
THE CLAIMS ARE BARRED BY THE
PUBLIC DUTY DOCTRINE 28

IV. CONCLUSION 31

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State Cases

<i>Atherton Condominium Apartment-Owners Ass'n v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	<i>passim</i>
<i>Babcock v. Mason County Fire Dist. No. 6</i> , 144 Wn.2d 774, 30 P.3d 1261 (2001).....	5, 7
<i>Bailey v. Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	19
<i>Burris v. General Ins. Co. of America</i> , 16 Wn. App. 73, 553 P.2d 125 (1976).....	6
<i>Campbell v. City of Bellevue</i> , 85 Wn.2d 1, 530 P.2d 234 (1975).....	21, 22, 23
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978).....	<i>passim</i>
<i>J & B Dev. Co. v. King Cy.</i> , 100 Wn.2d 299, 669 P.2d 468, 41 A.L.R.4th 86 (1983).....	7, 8
<i>Moore v. Wayman</i> , 85 Wn. App. 710, 934 P.2d 707 (1997).....	19, 20, 21, 30
<i>Ravenscroft v. Washington Water Power Co.</i> , 87 Wn. App. 402, 416, 942 P.2d 991 (1997).....	22
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	28

Smith v. City of Kelso,
112 Wn. App. 277, 48 P.3d 372 (2002).22, 23, 24

*Stannik v. Bellingham-Whatcom County Dist.
Board of Health*,
48 Wn. App. 160, 737 P.2d 1054 (1987). 9, 10, 15, 25

Taylor v. Stevens County,
111 Wn.2d 159, 759 P.2d 447 (1988). *passim*

*Washington State Physicians Insurance Exchange
& Ass'n v. Fisons Corp.*,
122 Wn.2d 299, 858 P.2d 1054 (1993). 29

Other Cases

Armstrong v. U.S.,
364 U.S. 40, 80 S.Ct. 1563,
4 L.Ed. 1554 (1960). 26

Lingle v. Chevron,
544 U.S. 528, 125 S.Ct. 2074 (2005). 27

Lucas v. South Carolina Coastal Council,
505 U.S. 1003, 112 S.Ct. 2886,
120 L.Ed.2d 798 (1992).26, 27, 28

Constitutional Provisions

U.S. Const. amend. V 26

Statutes and Court Rules

Superior Court Civil Rules

CR 56(c). 6

Pierce County Code

PCC 1.16.010 16

PCC 8.36	16
PCC 8.36.010 §E	23
PCC 8.36.030	16
PCC 8.36.050	16
PCC 8.36.110	20, 21, 22, 23
<u>Revised Code of Washington</u>	
RCW 70.118.010	17, 18
RCW 70.118.030	18
RCW 70.118.040	18
RCW 70.118.050	18

I. ISSUES ON APPEAL

1. Whether the plaintiffs' claims are barred by the public duty doctrine where the defendants are government entities, the cause of action is negligence, and the plaintiffs are the subsequent purchasers of the property at issue. (Assignment of error 1.)

2. Whether a regulatory takings claim is legally insufficient where the regulations at issue never changed during the plaintiffs' ownership of the property at issue. (Assignment of error 1.)

3. Whether the trial court acted within its discretion in denying the plaintiffs' motion for reconsideration where the newly proffered evidence did not affect the legal reasoning of the trial court. (Assignment of error 2.)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Daniel and Lori Fishburn filed suit against Pierce County Planning and Land Services Department (PALS) and Tacoma-Pierce County Health Department (TPCHD) on April 29, 2009. CP 1. These two government agencies are separate legal entities, and were represented by separate counsel below. *Id.* at 33. The plaintiffs' claims of negligence, gross negligence, and nuisance relate to a residence located at 21517 Snag Island Drive on the shores of Lake Tapps in Pierce County, Washington.

Id. at 2. PALS and TPCHD jointly moved for summary judgment based on the public duty doctrine. *Id.* at 33. The trial court granted summary judgment on February 5, 2010. *Id.* at 449-51. Plaintiffs timely moved for reconsideration, which the trial court denied on February 26, 2010. *Id.* at 727-29. Plaintiffs then filed notice of appeal on March 4, 2010. *Id.* at 730-37.

B. STATEMENT OF THE FACTS

The parcel of land at issue here was developed by Gary and Arlene Petersen. CP 3. In November 1994, the Petersens (owners of Petersen Brothers, Inc., construction company) sought approval to develop a stretch of shoreline east of Snag Island Drive. *Id.* 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. *Id.* at 4. They then sold the undeveloped property to developer Euroway Homes, Inc., in 2004. *Id.* at 24-25.

On May 11, 2004, a licensed septic designer submitted an on-site septic system design application on behalf of Euroway Homes. The application referenced soil samples logged in March 2004. *Id.* Based on the soil samples establishing appropriate soil conditions for on-site septic, TPCHD approved the application. *Id.* The septic designer then released

the design to a licensed installer who proceeded installing the septic system on behalf of Euroway Homes. *Id.*

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

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.

Id. TPCHD accepted the as-built plans and certification on April 28, 2005. *Id.*

Richard and Joell Bolen then purchased the residence from Euroway Homes, Inc., on January 31, 2006. *Id.* The Bolens resided on the property until May 17, 2007. *Id.* at 96. The plaintiffs, Daniel and Lori Fishburn, purchased the property from the Bolens on May 17, 2007, for \$1,599,999. *Id.* Though Mr. Fishburn had worked in the construction industry for over 25 years, *id.* at 97, he waived inspection when he purchased the almost 1.6 million dollar home. *Id.* at 25.

Subsequently, Mr. Fishburn discovered problems with the property, including a failing septic system, which led to the filing of the instant case. *Id.* at 2. He then undertook to make "emergency" repairs by

installing a bulkhead in the area of the soil slide. *Id.* at 97. However, Mr. Fishburn was contacted by defendant PALS representative, David McCurdy, about a complaint PALS received in reference to the work Mr. Fishburn was doing on his property. *Id.* at 99. Mr. McCurdy issued the plaintiff a notice of a violation, *Id.*, as the work the plaintiff was doing required permits. *Id.* at 101.

Mr. Fishburn never obtained any permits to continue the work on his home, as his architect determined lifting the house to fix the problems would be futile. *Id.* at 103. Later, Ron Howard, from defendant TPCHD, contacted the plaintiff. *Id.* On Mr. Howard's advice, Mr. Fishburn had his septic system evaluated. *Id.* The independent assessment revealed the septic system was failing, and the Fishburns moved out. *Id.* at 103-104.

A couple weeks later Mr. Fishburn exchanged correspondence with Mr. Dave Lennig from the Washington State Department of Health. *Id.* at 105-06. The Washington State Department of Health is not a party to this action. *See id.* at 1. The next month, TPCHD employee Maggie Phipps issued a Violation Notice for Failed Septic System. *Id.* at 106. The only conversation Ms. Phipps had with Mr. Fishburn was to inquire whether Mr. Fishburn was still occupying the home. *Id.* at 107. Mr. Fishburn indicated he moved out several months earlier, and then TPCHD posted a Do Not Occupy sign on the Fishburns' front gate. *Id.*

Plaintiffs' First Amended Complaint contains several pages of factual allegations regarding the subject property dating back to 1993. *Id.* at 1-12. Boiled down, plaintiffs' claims against defendants are based on their alleged acts or omissions in reviewing, inspecting, permitting, endorsing, and/or approving the design, development, and construction of the subject property, *id.* at 9, and/or "authorizing and permitting the development and construction of unsuitable septic drain fields, a faulty incomplete drainage system, and an inadequate foundation." *Id.* at 10.

It is undisputed that both Tacoma-Pierce County Health Department and Pierce County Planning and Land Services Department are governmental entities. For purposes of this Motion, defendants do not dispute that these alleged activities were official functions of one or both defendants. *See id.* at 2-12. Plaintiffs can produce no evidence otherwise. *See id.*

III. ARGUMENT

A. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS CASE BECAUSE THERE ARE NO APPLICABLE EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE BARRING THE PLAINTIFFS' CLAIMS.

Appeals of a motion for summary judgment are reviewed de novo. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). The purpose of 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. *Burriss v. General Ins. Co. of America*, 16 Wn. App. 73, 75, 553 P.2d 125 (1976). Summary judgment is required where, after viewing the evidence in the light most favorable to the nonmoving party, the pleadings, discovery, affidavits, and any other relevant documents demonstrate that there are no issues of material fact to be decided and that the moving party is entitled to a judgment as a matter of law. CR 56(c).

Furthermore, "[t]he 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). The existence of a duty is a question of law. In general, a local government does not owe a duty to ensure compliance with building codes to a claimant alleging negligence. Rather, "[t]he duty to ensure compliance rests with individual permit applicants, builders and developers." *Id.* at 168.

Moreover, where the defendant is a governmental entity, a duty must be owed to the injured plaintiff individually. This principle is expressed in the public duty doctrine. *Id.* 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. v. King Cy.*, 100 Wn.2d 299, 303, 669 P.2d 468, 41 A.L.R.4th 86 (1983)). The underlying policy is that building codes or other legislative enactments for the public welfare should not be discouraged by subjecting the government to unlimited liability. *Id.* at 170. Because the defendants are both governmental entities and the plaintiffs' claims are rooted in negligent performance of official duties, CP 9-10, the public duty doctrine applies here.

Despite the applicability of the public duty doctrine, a plaintiff may establish a particularized duty under four possible exceptions, including: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship. *Babcock*, 144 Wn.2d at 785-86. Here, the plaintiffs mistakenly claim the special relationship exception, the legislative intent exception, and the failure to enforce exception create an individual duty the defendants owed toward the plaintiff, but none of these exceptions is applicable.

1. The special relationship exception to the public duty doctrine does not apply here because the plaintiffs are the subsequent purchasers of the home.

"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, 111 Wn.2d at 166 (quoting *J & B Dev. Co.*, 100 Wn.2d at 304-05).

A special relationship arises 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; *See also J & B Dev. Co.*, 100 Wn.2d at 307. The Fishburns cannot show a special relationship existed because they had no direct contact with the defendants when the alleged negligence occurred. Because there was no contact, there could not have been any express assurances giving rise to justifiable reliance.

First, no duty existed under the special relationship exception because there were no express assurances made by the County at the time the permits were issued and simply approving the permit is not enough. The mere "[i]ssuance of a building permit does not imply that the plans submitted are in compliance with all applicable codes Building permits and building code inspections only authorize construction to proceed; they do not guarantee that all provisions of all applicable codes have been complied with." *Taylor*, 111 Wn.2d at 167. In this case plaintiffs cannot establish a special relationship between the County and builders because there is no indication the County made any express

assurances to the builders at the time of permitting, CP 5-7, and simply issuing the permits is not enough.

Second, any duty arising from a request for information or building permit application does not run to subsequent purchases of property. In *Taylor*, the court held that no special relationship existed between the government and subsequent purchasers of the property when the property was purchased only one day after the building permit was issued, and the buyers were the first occupants of the house. 111 Wn.2d at 172. The *Taylor*'s negligence action was therefore barred by the public duty doctrine. *Id*; See also *Stannik v. Bellingham-Whatcom County Dist. Board of Health*, 48 Wn. App. 160, 165-166, 737 P.2d 1054 (1987) (holding no special relationship existed where the claimants purchased the property more than a year and a half after a county inspection). In the present case, the Fishburns allege the defendants were negligent in their duties to "review, inspect, permit, endorse and approve the design and development and construction" of the subject property. CP 9. By the plaintiffs' own admissions, these alleged acts and omissions occurred prior to their purchase on May 17, 2007. See *id* at 2, 9. The Fishburns also allege that defendants were negligent in "authorizing and permitting the development and construction of unsuitable septic drain fields, a faulty incomplete drainage system, and an inadequate foundation." *Id.* at

10. Again, plaintiffs acknowledge that these alleged acts and omissions occurred prior to their purchase on May 17, 2007. *See id.* at 2, 10. Specifically, the septic system was installed on April 7, 2005, and approved on April 28, 2005. *Id.* at 25. Like the *Taylor*s, plaintiffs here allege negligence that occurred before they purchased the property at issue. Therefore, any duty owed at the time of the negligence did not run to the plaintiffs.

Third, a special relationship in a negligent permitting case cannot arise out of contacts occurring after the alleged negligence. A breach of duty cannot occur before a duty arises. *See e.g. Stannik*, 48 Wn. App. 160 (finding no special relationship because any assurances concerning the alleged negligence were made to prior owners).

Additionally, even if the plaintiffs intended their negligence claim to be based on the conduct of defendants in their subsequent dealings with the plaintiff in connection with the emergency repairs Mr. Fishburn started without a permit, CP 97, this conduct does not support finding a special relationship. First, the claim cannot be based on subsequent dealings with PALS because there is no causal relationship between these communications and the property damage. Second, plaintiffs have not cited any express assurances by either defendant. Finally, plaintiff cannot

demonstrate reliance on what he describes as "conflicting" information he received from defendants.

First, the septic system was failing due to the faulty design and installation, *see* CP 2-12, not due to emails and phone calls the plaintiffs had with the County. The property damage was occurring even before the plaintiffs' contacts with PALS and TPCHD and continued to occur after. *See id.* Therefore, there can be no causation with respect to these communications.

Second, to the extent plaintiffs' claims are based on their later dealings with PALS and TPCHD, defendants made no express assurances on which plaintiffs could base reliance. The most plaintiffs can show is that (1) They had contact with PALS regarding possible code violations relating to plaintiffs' efforts to deal with the flooding on their property, CP 99-103; (2) they had contact with TPCHD regarding the failure of their septic system. *Id.* at 103-107. With respect to these contacts, plaintiffs do not cite to any final express assurances. *See id.* at 99-107. Although plaintiffs state that PALS' Assistant Director promised to expedite any permits plaintiffs would need to move and raise their house, plaintiffs' architect later concluded that it would be impossible to move and raise their house. *Id.* at 103. Thus, any assurances by the Assistant Director relating to permitting were rendered moot. Moreover, although plaintiffs

did have some contact with TPCHD officials regarding their septic system, they moved out of their house *before* receiving a final "Report of System Status" from TPCHD. *Id.* at 104-107. Although plaintiff alleges that a Mr. Dave Lenning at DOH gave him assurances that TPCHD would assist them with correcting their septic failure, these "assurances" were hardly express. Mr. Lenning's email stated that "TPCHD's priority is to work with the system owner to make a repair" and encouraged plaintiffs "to work with TPCHD staff to determine the best course of action to correct the failing system." *Id.* at 106. Moreover, even if these statements constitute "express assurances", DOH is not a party to this action and cannot bind TPCHD. Indeed, TPCHD apparently declined to give plaintiff any express assurances regarding how to repair his septic system. *See id.* at 106-07 (alleging TPCHD employee Maggie Phipps did not respond to plaintiffs' requests for help in complying with TPCHD requirements).

Third, even if these communications constituted express assurances, plaintiffs' actions conclusively demonstrate that they did not rely on them. For instance, plaintiffs allege that defendants gave them *conflicting* information. *See id.* at 100 (alleging that PALS told Mr. Fishburn that they would like to resolve the bulkhead issue and later told him that they had reached an impasse); *Id.* (alleging that PALS'

Assistant Director told him to file an appeal and then the Director told him not to file an appeal); *Id.* at 101 (alleging that PALS told plaintiffs further inspections would be needed after PALS Director contacted plaintiffs about a possible settlement). Indeed, plaintiffs called numerous officials within PALS and TPCHD to verify this conflicting information or request a second opinion. *See id.* at 99 (calling the PALS Assistant Director to discuss code violations after a PALS employee was "unwilling to discuss the code violations"); *Id.* at 104 (drafting an e-mail to TPCHD employee Vergia Seabrook to request a site inspection after she allegedly told him to move his family out of the home).

Finally, plaintiffs' contacts with both agencies occurred several years after the construction of the subject property. Thus, it is impossible that plaintiffs reasonably relied on any assurances with respect to conditions that allegedly caused the damage to their property. Ultimately, plaintiffs fail to establish the elements of the special relationship exception with respect to either the alleged negligent permitting or to defendants' later dealings with the plaintiff.

2. The legislative intent exception to the public duty doctrine does not apply here because the statutes at issue do not include a clear intent to protect the plaintiffs.

For the legislative intent exception to be applicable, the terms of the municipal code at issue must evidence "a clear intent to identify and protect a particular and circumscribed class of persons." *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). For example, the Washington Supreme Court held the legislative intent exception applied to occupants of buildings where the *housing code* included the language, "identify 'conditions and circumstances [which] are dangerous and a menace to health, safety, morals, or welfare of *the occupants* of such buildings and of the public'." *Taylor*, 111 Wn.2d a 165 (quoting *Halvorson*, 89 Wn.2d 673, 677 n. 1, 574 P.2d 1190 (1978)). In *Halvorson*, the plaintiff was suing the City of Seattle based on the alleged negligence of city officials in enforcing building, housing, and safety codes that resulted in the death of her husband in a hotel fire. 89 Wn.2d at 675-76.

However, the mere fact that the state or county has deemed an issue important does not by itself establish municipal liability. The Washington Supreme Court distinguished housing code violations, like in *Halvorson*, from the building code violations alleged in *Taylor* and declined to extend the exception to building permit applications. "[B]uilding codes, the issuance of building permits, and building inspections are devices used to secure to local government the consistent compliance with zoning and other land use regulations and code

provisions governing the design and structure of building." *Taylor*, 111 Wn.2d at 164. In *Taylor*, homeowners brought an action against the sellers, the realtor, and the county claiming that the sellers built the house without first obtaining a building permit. *Id.* at 161. The Supreme Court found the legislative purpose, "to promote the health, safety and welfare of the occupants or users of buildings and structures and the general public," was only directed at the health and safety of the general public. *Id.* at 164-65. Unlike *Halvorson*, where the primary purpose of the housing code was to protect occupants of substandard buildings, the primary purpose of the statute in *Taylor* was to establish minimum standards for building that could be applied throughout the state. Despite the language about *occupants* and *users* of buildings, the statute did not give rise to the legislative intent exception. *Id.* at 165.

Like building codes, sewage control rules and regulations serve the public generally, and do not create an actionable duty on governmental entities. In *Stannik*, the plaintiffs argued that at the time the county inspected the sewage system it was not in compliance with regulations and that the county official was negligent to approve the system. The court held the interest of "public health, welfare, and safety" was not enough to create an actionable duty on the part of the government, and thus sewage control rules did not give rise to the legislative intent exception. *Stannik*,

48 Wn. App. at 164. Similarly, plaintiffs admit their argument for the legislative intent exception rests on sewage disposal rules. Brief of Appellant at 29. Accordingly, the legislative intent exception is not appropriate in this case.

Furthermore, neither of the municipal ordinances plaintiffs cite have any language identifying a particular group of people, so the legislative intent exception does not apply. Though it is "imperative that certain Pierce County Code provisions, permits and permit conditions . . . are properly enforced," PCC 1.16.010, this language does not identify any individuals or even the general public. In fact, PCC 1.16.010 refers to much more than just the sewage regulations, *see id.*, and therefore cannot be intended to "protect those who are – as plaintiffs were – dependant on such systems." Brief of Appellant at 29. Also, the municipal ordinance regulating on-site sewage disposal systems does not include a legislative intent section and does not identify a particular group of people. *See* PCC 8.36. Additionally, the Pierce County sewage regulations govern "places of business, and other buildings or places where persons congregate, reside or are employed," not just those residences that are dependant on septic systems. PCC 8.36.050. And, this municipal ordinance is inapplicable with respect to defendant PALS, as the Health Officer is in charge of enforcement of this code. PCC 8.36.030. Like the Building

Code Act at issue in *Taylor*, 111 Wn.2d at 164-65, both municipal provisions apply to ensure uniform compliance and protect members of the public. Thus, the legislative intent exception does not apply in this case.

Similarly, RCW 70.118.010 does not create a particular class of persons singled out for protection to invoke the legislative intent exception. Though the legislative intent section recognizes that over 1,200,000 people in Washington rely on septic systems, it goes on to clarify the intent is not to create a governmental duty to protect those individuals by enforcing the regulations on septic systems, but to encourage 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. This section notes the problems caused by failing septic system and authorizes alternative solutions throughout the state; not like *Halvorson*, in which the regulations existed to protect the *occupants* of buildings from slum lords. 89 Wn.2d at 677. Thus, the legislative intent exception does not apply with respect to this statute either.

Even if RCW 70.118.010 created a group singled out for individual protection, the plaintiffs' claim must fail because they cannot show any underlying violation exists. In fact, plaintiffs did not even argue any particular violation of this statute. Brief of Appellant at 26-28. Nor do the facts support a violation argument because defendant TPCHD did determine that the plaintiffs' septic system was failing and did exercise discretionary judgment in implementing corrections. Ron Howard of TPCHD conducted a dye test, and Mr. Fishburn received a fax later that evening from TPCHD. CP at 104. Mr. Fishburn continued to have communications regarding possible solutions to the problems with his septic system. *Id.* at 106. That fact that TPCHD used discretion and rejected each proposal as unfeasible is not a violation. TPCHD is not required to waive a magic wand and develop a comprehensive solution for a problem that may not even have a solution; rather, their role under this statute is highly discretionary. *See* RCW 70.118.030-050. Nothing short of an utter failure to communicate with plaintiffs in regards to their septic system failure would constitute a violation. Plaintiff does not allege this was the case, but instead claim they received conflicting information. CP 100.

Still, if a violation did exist, it is not causally related to the property damage in plaintiffs' claim. Like with the special relationship

exception, the septic system was failing due to the faulty design and installation, not due to emails and phone calls the plaintiff had with the County. The property damage was occurring even before the plaintiffs' contacts with TPCHD and continued to occur after. Therefore, there can be no causation with respect to these communications and the underlying claim of negligence must fail.

3. The Failure to Enforce Exception to the Public Duty Doctrine Does Not Apply Here Because the Regulations at Issue Are Highly Discretionary.

The failure to enforce exception to the public duty doctrine does not apply unless a public official 1) has actual knowledge of an inherently dangerous and hazardous condition, 2) is under a duty to correct the problem, and 3) fails to meet this duty. *See e.g. 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)). The party claiming the exception has the burden to establish each of the three elements. Additionally, the Washington Supreme Court has stated, "we construe this exception narrowly. To do otherwise would effectively overrule *Taylor* and eviscerate the policy considerations therein identified." *Atherton Condominium Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). In *Taylor*, the court recognized "[t]he duty to ensure compliance rests with individual permit applicants, builders and

developers [L]ocal government owes no duty of care to ensure compliance with codes." *Id.* at 530 (quoting *Taylor*, 111 Wn.2d at 168). Plaintiffs rely only on PCC 8.36.110 and RCW 70.118.030(2) as the specific statutes the defendants allegedly failed to enforce. Brief of Appellant at 30, 32. However, plaintiffs cannot meet the elements of the failure to enforce exception as to either of these provisions, and therefore cannot overcome the strong policy announced in *Taylor* against holding local government liable for permitting decisions.

Plaintiffs' complaint is legally insufficient to support a claim of actual knowledge of an inherently dangerous condition at the time permits were issued because the evidence, taken in the light most favorable to plaintiffs, shows only that PALS and TPCHD should have known of the dangerous condition. Similarly, in *Atherton*, the Washington Supreme Court declined to find the failure to enforce exception applied because "the requirement of actual knowledge does not encompass facts which the building official should have known." 115 Wn.2d at 532-33. There, the City of Lynwood received building plans, noted violations and sent a plan correction sheet to the builder. However, the court ruled that the notations did not constitute actual knowledge of an inherently dangerous condition as the building was actually constructed. *Id.* at 532. *See also Moore*, 85 Wn. App. at 723 (finding that although the building inspectors noted

several code violations in their reports, the notes were not evidence that the inspectors knew the conditions still existed at the time the home was completed). Similarly, in detailing the decades' long history of development in the Lake Tapps area, plaintiffs fail to allege that defendants had actual knowledge that any particular statute was violated in the construction of the subject property. *See* CP 1-12. The most they can show is that certain officials were of the opinion that sites around Lake Tapps would not be buildable until sewers were available. *Id.* at 115-16. Under the reasoning from *Atherton* and *Moore*, this is legally insufficient to show that the officials reviewing the permits at issue knew the system violated PCC 8.36.110. That responsibility would fall on the builder. *Atherton*, 115 Wn.2d at 531.

Additionally, the failure to enforce exception applies only where the language of the statute includes a ministerial duty to correct a dangerous condition. For example, where an electrical inspector knows of a code violation in a lighting system that creates an extremely dangerous condition to neighbors, the city may be liable. *Campbell v. City of Bellevue*, 85 Wn.2d 1, 13, 530 P.2d 234 (1975). In *Campbell*, the failure to enforce exception applied because the electrical inspector failed to comply with a city ordinance directing that he disconnect the lighting system causing the dangerous condition. *Id.* The court recognized this

situation is different than "functions not involving executive or administrative discretion to be performed pursuant to statutory direction." *Id.* at 12; *See also Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372 (2002) (finding the language in the statute is not specific enough to enforce where the mandatory duty to prepare standards includes discretion in the specific design and construction standards adopted); *Ravenscroft v. Washington Water Power Co.*, 87 Wn. App. 402, 416, 942 P.2d 991 (1997) (holding the failure to enforce exception did not apply because the statutes at issue did not include a directive to undertake specific corrective action). Neither of the codes plaintiffs argue on appeal includes ministerial duties akin to the kind contemplated in *Atherton*; therefore, they cannot support the failure to enforce exception.

First, with respect to the argument that the defendants failed to enforce PCC 8.36.110, this statute does not include any language requiring a specific action of the Health Officer in the event of an unsafe condition. Rather, it calls for the Health Officer to establish "maximum allowable density and minimum lot sizes for future development proposals," and grants the Health Officer *discretion* in what standards to include in the guidelines. PCC 8.36.110. Therefore, this statute instills in the Health Officer discretion to perform his job functions, and does not create a ministerial duty, as the statute in *Campbell* did. 85 Wn.2d at 13. Instead,

the sewage regulations are more like *Smith* because they require the county to establish guidelines, but do not proscribe specific corrective action if the guidelines are not followed. PCC 8.36.110; *Smith*, 112 Wn. App. at 284. Therefore, the defendants were under no duty to the plaintiffs under this statute and were entitled to summary judgment on all of the negligent permitting claims.

It is unnecessary to determine whether the plaintiff has met the third element of the failure to enforce exception under this statute because the defendants cannot fail to meet a duty that does not exist in the first place. Moreover, this regulation specifically charges TPCHD with compliance and is irrelevant with respect to defendant PALS. *See* PCC 8.36.010 § E.

Similarly, defendant TPCHD does not owe plaintiffs a duty under RCW 70.118.030(2) because this statute is also devoid any ministerial direction to a government official. Plaintiffs baldly allege that defendant "TPCHD failed to comply with its obligations under RCW 70.118.030(2) to 'implement corrections.'" Brief of Appellant at 32. But, this section specifically identifies itself as discretionary, and is therefore distinguishable from the ministerial duties evident in *Campbell*. "*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." RCW 70.118.030(2) (emphasis added). The fact that the legislature included the words "discretionary judgment" in the text of the statute indicates a policy preference against creating any specific duty to act that might result in government liability. Instead, RCW 70.118.030(2) is like the statute in *Smith* that required the city to establish standards, but did not require specific corrective action. *Smith*, 112 Wn. App. at 284. Therefore, TPCHD did not have a duty toward plaintiffs under this statute and was entitled to summary judgment. This is consistent with the Washington Supreme Court mandate from *Atherton* that the failure to enforce exception be construed narrowly. 115 Wn.2d at 531.

Moreover, even if the failure to enforce exception applied with respect to this statute, defendant PALS was not under a duty to enforce any provisions. And, to the extent defendant TPCHD had a duty to enforce this statute; it does not apply to the alleged negligent permitting at the time that the house was built, which the plaintiffs claim was the source of their injury. CP 10-12. Therefore, there is no causation with respect to this statute.

In addition, failure to enforce claims cannot be supported merely by alleging "culpable neglect regarding, or indifference to" a duty to

enforce, as the plaintiffs suggest by relying on *Halvorson*. Brief of Appellant at 30. *Halvorson* did not address the failure to enforce exception. Rather, the plaintiff in that case was arguing the legislative intent exception to the public duty doctrine, which the court held applied in that case. Accordingly, the court found a duty on the part of the government under the statute to protect the occupants of buildings governed by that particular provision of the housing code. *Halvorson*, 89 Wn.2d at 676-77. No such duty exists in this case, as the legislative intent of the building and sewage codes is not to protect a particular group of citizens. *See Taylor*, 111 Wn.2d at 164-65 (finding the legislative intent of the building code was only directed at the health and safety of the general public); *Stannik*, 48 Wn. App. at 164 (holding the interest of "public health, welfare, and safety" was not enough to create an actionable duty on the part of the government with respect to sewage regulations). Furthermore, the language requiring the plaintiff to demonstrate "culpable neglect regarding, or indifference to, that noncompliance" clarifies the pleading requirement she must meet to show a claim upon which relief can be granted, as the court already held the legislative intent exception applied and the public duty doctrine did not bar her claim. *Halvorson*, 89 Wn.2d at 678. The plaintiff was not arguing, nor did the court consider

individually, the failure to enforce exception. *Id.* at 676-78. Therefore, this language does not apply to the failure to enforce exception.

Ultimately, plaintiffs rely on two statutes to support their failure to enforce argument, but cannot meet the three elements of failure to enforce as to either one of them. Most notably, neither statute creates any duty to act. Therefore, the failure to enforce exception does not apply in this case.

B. THERE IS NO COLORABLE REGULATORY TAKING CLAIM BECAUSE THE REGULATIONS AT ISSUE NEVER CHANGED DURING THE TIME THE FISHBURNS OWNED THE PROPERTY.

The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without providing just compensation. U.S. Const. amend. V. The takings clause exists to ensure fairness and prevent Government from imposing burdens on some citizens that should be borne by the public in general. *Armstrong v. U.S.*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed. 1554 (1960). The Supreme Court has generally declined to adopt a set formula to determine when a regulation goes too far and becomes taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). However, *per se* regulatory taking occurs when a government regulation, "denies an owner economically viable use of his land." *Lucas*, 505 U.S. at 1016. "[T]he government must pay just compensation for such 'total

regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property." *Lingle v. Chevron*, 544 U.S. 528, 538, 125 S.Ct. 2074 (2005) (quoting *Lucas*, 505 U.S. at 1026-32).

A regulatory takings claim cannot lie where the regulations existed at the time of investment in the property. In *Lucas*, the plaintiff brought a regulatory takings claim for a change in beachfront zoning laws that allegedly deprived him of all "economically viable use" of his property. Mr. Lucas purchased the property in 1986, with the intention to build homes there. The regulations changed in 1988, preventing him from acting on his intention to build. *Lucas*, 505 U.S. at 1003. In discussing the circumstances under which the government may resist paying compensation for total regulatory taking, the Supreme Court focused on whether the proscribed land use was part of the owner's rights to begin with. *See id.* at 1027. Unlike Mr. Lucas, plaintiffs in this case purchased the property in 2007 and allege no intervening change in regulations. Brief of Appellant at 34-37. Instead, plaintiffs base their regulatory taking claim on defendants' actions in permitting the property and later enforcing the same permitting requirements with respect to repairs on the property. Brief of Appellant at 36. Thus, plaintiffs' rights under the applicable regulations have not changed, even though this is the first time plaintiffs

are confronted with the requirement that they get a permit for some repairs.

Plaintiffs offer no case law, aside from *Lucas*, which is not analogous to these facts, to support their claim that taking occurs without a change in regulations that negatively affects the property value. Rather, plaintiffs admit 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.* (emphasis added). Regulatory taking cannot be a cloak to disguise the underlying claim of negligence and escape operation of the public duty doctrine.

C. IT WAS NOT ABUSE OF DISCRETION TO DENY THE PLAINTIFFS' MOTION FOR RECONSIDERATION BECAUSE, REGARDLESS OF ANY NEW EVIDENCE, THE CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE.

Appeals from a motion for reconsideration are reviewed under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). The decision of the trial court will not be overturned unless it is "manifestly unreasonable or based on untenable grounds." One such example is when a decision is based on an erroneous view of the law. However, the abuse of discretion standard still embraces a policy of deference toward the judicial actor who is in a better position to decide contested issues. *Washington State*

Physicians Insurance Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The trial court's decision was not based on an erroneous view of the law because the trial court properly ruled none of the exceptions to the public duty doctrine applies in this case. As the plaintiffs point out, the trial court denied the motion for reconsideration because the trial judge did not see an exception to the public duty doctrine. Brief of Appellant at 41. The court merely highlighted the fact that plaintiffs' new evidence does not change the fact that they are the subsequent purchasers of the home and therefore could not have had a special relationship with defendants, at least as the law exists now.

Although the trial judge focused on the inapplicability of the special relationship exception, this does not indicate the trial judge misunderstood the legal requirements for the failure to enforce or legislative intent exceptions. At the most, the oral rulings from February 26, 2010, demonstrate the trial judge viewed the special relationship exception as the plaintiffs' best argument for a change in the law and addressed that one specifically. *See* RP 13-14. As discussed above, the legislative intent and failure to enforce exceptions do not apply here, so the trial court's ruling was correct.

The failure to enforce exception does not apply as a matter of law, so the sufficiency of the pleadings and the weight of the evidence is irrelevant. The new evidence the plaintiff points to relates only to the defendants' knowledge with regard to the soil and water conditions at the time the septic system was approved. *See* Brief of Appellant at 38-40. Assuming, *arguendo*, that plaintiffs can establish these facts, they may be able to meet the first element of the failure to enforce exception: the public official has actual knowledge of an inherently dangerous and hazardous condition. *Moore*, 85 Wn. App. at 722-23. However, the failure to enforce exception to the public duty doctrine does not apply unless a public official also 2) is under a duty to correct the problem, and 3) fails to meet this duty. *Id.* The new facts plaintiffs cite do not affect the duty of the defendants under the statutes the defendants allegedly failed to enforce. As discussed above, the defendants are not under a particularized duty to enforce the two statutes plaintiffs are arguing on appeal. Therefore, the introduction of "new evidence" would not affect the legal reasoning of the trial court, which means the trial court did not abuse its discretion by denying the motion for reconsideration.

Similarly, the new evidence plaintiffs argue does not have any relation to the legislative intent of the statutes at issue. Thus, it was not abuse of discretion to deny the motion for reconsideration because the new

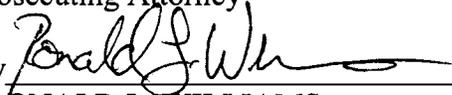
evidence did not affect the legal reasoning of the court in relation to the legislative intent exception.

IV. CONCLUSION

For the reasons stated of above, the defendants respectfully request this court to affirm the sound judgment of the trial court.

DATED: June 7, 2010

MARK LINDQUIST
Prosecuting Attorney

By 
RONALD L. WILLIAMS
Deputy Prosecuting Attorney
Attorneys for Respondent PALS
Ph: (253)798-3612 / WSB # 13927

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STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

DANIEL and LORI FISHBURN, a married
couple,

Appellants, NO. 40429-0-II

vs.

CERTIFICATE OF SERVICE

PIERCE COUNTY PLANNING AND
LAND SERVICES DEPARTMENT and
TACOMA-PIERCE COUNTY HEALTH
DEPARTMENT,

Respondents.

The undersigned declares that I am over the age of 18 years, not a party to this action,
and competent to be a witness herein. On June 7, 2010, I delivered the Brief of Respondent
Pierce County Planning and Land Services Department to the US Postal Service, postage
prepaid, with appropriate instruction to forward the same to:

David von Beck
Michael J. Yoder
LEVY VON BECK & ASSOCIATES, P.S.
600 University Street, Suite 3300
Seattle, WA 98101

ORIGINAL

1 Daniel F. Mullin
2 Matthew R. Wojcik
3 MULLIN LAW GROUP PLLC
4 101 Yesler Way, Suite 400
5 Seattle, WA 98104

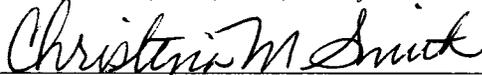
6 I declare under penalty of perjury under the laws of the State of Washington that the
7 foregoing is true and correct.

8 DATED this 8th day of June, 2010.

9 
10 CHRISTINA M. SMITH

11
12
13
14 **Certificate of Service**

15 I certify that on June 8, 2010, I deposited in the United States
16 mail a copy of this document to the following attorneys of
17 record: von Beck, Yoder, Mullin, and Wojcik.

18 

19 CHRISTINA M. SMITH, Pierce County Prosecutor's Office,
20 Attorneys for Respondent Pierce County Planning and Land
21 Services

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