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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 346064

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALLAN and GINA MARGITAN, Appellants

vs.

SPOKANE REGIONAL HEALTH DISTRICT and SPOKANE
REGIONAL HEALTH DISTRICT BOARD OF HEALTH,
Respondents,

and

MARK and JENNIFER HANNA, Respondents.

BRIEF OF RESPONDENTS SPOKANE REGIONAL HEALTH
DISTRICT and SPOKANE REGIONAL HEALTH DISTRICT
BOARD OF HEALTH

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I. INTRODUCTION

The trial court properly granted Spokane Regional Health District's (SRHD) and the SRHD Board of Health's (SRHDBOH) motions for summary judgment because no genuine issue of material fact exists as to any of Margitans' claims. SRHD's¹ Agreement with Hannas regarding the timing of the removal of their drain field from the easement does not constitute an unconstitutional taking of the easement. Dismissal of the negligence claims was proper because none of the exceptions to the public duty doctrine applied. The trial court properly held that there is no recognized cause of action for intentional refusal to enforce the on-site sewage regulations of the Washington Administrative Code. Because SRHD did not interfere with Margitans' alleged business expectancy by an improper means or for an improper purpose, dismissal of the claim for intentional interference with a business expectancy was also proper.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Allan and Gina Margitan (Margitans) previously sought judicial review of SRHD's administrative decision regarding Mark and Jennifer

¹ SRHD denotes both Spokane Regional Health District and the Board of Health for Spokane Regional Health District unless otherwise stated.

Hanna's on-site septic system and drain field. CP 70-71. On September 15, 2014, Spokane County Superior Court Judge John O. Cooney dismissed Margitans' Petition for Review on the basis that they lacked standing to bring the Petition. CP 70-71. Specifically, Judge Cooney held that Margitans had not suffered an injury-in-fact and had not been aggrieved or adversely affected by the actions of SRHD. CP 70-71. Margitans appealed to the Division III Court of Appeals, which affirmed the trial court's decision on January 21, 2016. *Margitan v. Spokane Regional Health District*, 192 Wn.App. 1024 (2016)(unpublished).

On February 13, 2015, Margitans filed a civil suit against SRHD. CP 3-28. Margitans amended their Complaint to allege additional claims on July 11, 2016. CP 1501-1515. Ultimately, Margitans asserted the following causes of action against SRHD.

1. Intentional Failure to Enforce and Intentional Failure to Timely Enforce WAC 246-272A-0210 (Causes of Action 1 and 7).
2. Negligent Failure to Enforce and Negligent Failure to Timely Enforce WAC 246-272A-0210 (Causes of Action 2 and 6).
3. Intentional Interference with a Business Expectancy (Cause of Action 4); and

4. Unconstitutional Taking (Cause of Action 8).

CP 1501-1515. After extensive briefing and argument, the trial judge granted summary judgment in favor of SRHD on all claims. This appeal of the summary judgment orders followed.

B. RELEVANT FACTS

On or about June 6, 2002, Hannas submitted Application For On-Site Sewage System No. 02-4270 to SRHD. CP 72, 76. Hannas sought to install a septic tank and drain field on property located at 14418 W. Charles Road in Nine Mile Falls, Washington. CP 72, 76. The proposed septic tank and drain field drawing submitted to SRHD indicated there was a 20-foot easement running along the southern side of Hannas' property. CP 73, 78. Based on SRHD's review of the design plan submitted, SRHD issued Permit No. 02-4270 on January 10, 2003. CP 73, 80.

On or about March 11, 2003, Hannas submitted an As-Built drawing for the septic tank and drain field for Permit No. 02-4270. CP 73, 82. The As-Built drawing also reflected that there was a 20-foot easement running along the southern side of Hanna's property. CP 82.

Approximately ten years later, Appellant Allan Margitan submitted a complaint to SRHD alleging that the Hannas drain field was improperly

located on an easement. CP 73. Appellants Allan and Gina Margitan own the parcels on either side of the Hannas' property. CP 73. Steve Holderby investigated Margitans' complaint, and discovered that instead of a 20-foot easement, Hannas' property was subject to a 40-foot easement along the southern side of the property. CP 73. Based on the depiction of the location of the drain field on the As-Built drawing, the existing drain field appeared to be located partially within the 40-foot easement. CP 73, 82. WAC 246-272A-0210 requires a horizontal separation of five feet between a drain field and any easement.

Margitans also notified SRHD that litigation was ongoing between Hannas and Margitans. CP 73. The case was captioned *Mark and Jennifer Hanna v. Allan and Gina Margitan*, Spokane County Superior Court Cause No. 12-02-04045-6. CP 73. On August 7, 2013, Margitans provided SRHD with a copy of Spokane County Superior Court Judge Linda G. Tompkins' *Order on Reconsideration and Injunction* dated August 6, 2013. CP 73, 84-87, 439. Judge Tompkins' Order stated, in relevant part:

[T]his court vacates its July 19, 2013 oral ruling and determines that there is sufficient cause shown to alter the court's May 24, 2013 Summary Judgment Order in this case as follows:

Ruling 3. Add. Questions of material fact exist as to the existence and nature of any related significant property interest of unjoined parties.

Ruling 6. Delete second sentence and add: Questions of material fact exist as to any private and public grants of easements by the parties and the county processes available to validate easements over property subject to Short Plat 1227-00.

....

IT IS FURTHER ORDERED THAT the parties are to honor the 40-foot wide easement depicted in Short Plat 1227-00 without inhibiting access thereon by any party. Further, as of the date of this order, the status quo shall be preserved regarding all other party and third-party access pending further court order.

CP 85-86.

On October 18, 2013, SRHD and Hannas entered into a written, recorded Agreement in which Hannas were required to bring the nonconforming on-site system into compliance. CP 74, 89-91. In part, the Agreement requires Hannas to submit an Application to SRHD to relocate the drain field or otherwise bring the system into compliance within thirty (30) days of the completion of the litigation regarding the existence and location of the additional easements. CP 74, 91. The Agreement further requires Hannas to complete the installation of the system within sixty

days of SRHD's approval of the Application. CP 91. SRHD concluded that there was no imminent public health risk presented as a result of the encroachment of the drain field into the easement. CP 91.

On December 4, 2013 (more than a month after the Agreement between SRHD and Hannas), Margitans notified SRHD for the first time that Hannas' drain field may also be within ten (10) feet of the water line serving Parcel 3. CP 737, 746-47, 744. Margitans' letter does not mention an issue with the Certificate of Occupancy for the property. CP 746-47.

Nonetheless, SRHD's counsel sent a letter to Hannas' counsel requesting documentation of the location of the water line by January 20, 2014. CP 942. Unfortunately, due in part to the lack of records and the fact that the pipe was plastic, the location of the water line was not able to be fixed until much later. CP 955. On July 15, 2014, Hannas' counsel sent an email to SRHD's counsel stating in part:

We are having trouble finding someone who can accurately locate the plastic pipe without mistakenly rupturing the water line. Everyone we contacted are [sic] afraid. It would be easier if the pipe were metal. And there are no records from the excavator exactly where the pipe was laid.

CP 955.

Spokane County Building and Planning first declined to issue the Certificate of Occupancy on September 3, 2014 – more than a year after the SRHD/Hanna Agreement. CP 737, 749. Specifically, the Comments section of the Inspection Results document prepared by Spokane County Building and Planning on September 3, 2014 states

1) You have notified us of the encroachment of a septic drain field into the restricted zone of your water supply line which you claim endangers your potable water supply. You have also provided us corroboration of the issue through copies of SRHD documentation. A Certificate of Occupancy can be issued upon receipt of documentation (SRHD and/or water purveyor) accepting the water line and it's [sic] adequacy for residential use.

CP 737, 749. The Spokane Building and Planning Inspector, Tim Utley, testified that the first time he spoke to Allan Margitan regarding the water to the property was between June and August of 2014. CP 1265, 1269-71. During his deposition, Mr. Utley testified that he would have issued the Certificate of Occupancy for Margitans' property if the water to the home had been running and the Short Plat indicated it was potable. CP 1516, 1521, p. 41. The Short Plat for the property indicates on its face that public water was required and private wells and water systems were prohibited. CP 13. The only remaining reason that the Certificate of

Occupancy was not issued is because Margitan hadn't turned on the water within the home.

On June 15, 2016, Shawn Rushing testified that he used a tracer wire to locate the water line and determined there was a fourteen-foot separation between the water line and the drain field at the closest point. CP 1273, 1275, p. 43, lines 3-14. Mr. Rushing testified as follows:

Q And where approximately on there was the water line? Can you tell me?

A Well, we took a measurement when we were done from these – these are indications of where the field actually was. After – when I located it I put my marks dead center between those two sides of the ditch because that's generally where the pipe was laid.

Q Okay.

A But from the edge of the ditch we marked to the water line. And I think it was, like, 14 feet from the edge of the ditch, which is the furthest out that the pipe could have been.

...

Q And so after you had located the ditch, and you had drawn the line for the water line, --

A. Uh-huh.

Q --then you measured between the two, and that was 14 feet?

A Right. Yeah, I believe it was at – the closest was 14 feet. It came at an angle towards the water line, but the closest – and I can tell where the ditch ends. And the actual septic could be three feet back from where the edge of the ditch is because they generally overdig.

CP 1266, 1274, pp. 15-16.

Prior to Utley's inspection and Rushing's location of the water line, Margitan asked the SRHD Health Officer to review the issues related to the Hannas' drain field. On January 27, 2014, Dr. Joel McCullough, Health Officer for Spokane Regional Health District, issued his determination. CP 58, 61-62. Due to a lack of evidence as to the water line, Dr. McCullough was unable to conclude that Hannas' drain field failed to comply with the WAC regulations requiring a ten-foot horizontal separation between the drain field and the water line. CP 58, 61-62.

Margitans appealed Dr. McCullough's decision to the SRHD Board of Health. After an adjudicatory hearing, the SRHD Board of Health found that there was insufficient evidence presented to establish the location of the pressurized water line, and that the public health risk presented by the alleged location of the drain field within ten feet of the pressurized water line was minimal. CP 59, 66-67. Specifically, a breach of the water line would

have to occur near the drain field, the water line would have to lose pressure, and there would have to be contamination of the water line which included pathogens. CP 59, 66-67. The Board of Health for SRHD found that a loss of water pressure would be observable in the Margitan house, allowing for mitigation of any risk of harm. CP 59, 66-67. The Board also upheld the Health Officer's request that Hannas provide additional information as to the precise location of the water line. CP 59, 66-67.

On May 22, 2014, Margitans filed a Petition for Review of the SRHD Board of Health's decision with the Spokane County Superior Court. On September 15, 2014, Judge John Cooney ruled that Margitans lacked standing and dismissed the petition for review. CP 70-71. On October 28, 2014, Margitans appealed Judge Cooney's decision to the Court of Appeals for Division III. On January 21, 2016, this Court affirmed the trial court's decision. *Margitan v. Spokane Regional Health District*, 192 Wn.App. 1024 (2016)(unpublished).

There was also an appeal filed with respect to the action originally filed by Hannas against Margitans. This Court's decision in that matter was issued on April 28, 2016 and the mandate issued on July 22, 2016. *Hanna v. Margitan*, 193 Wn.App. 596, 373 P.3d 300 (2016).

III. ARGUMENT

A. STANDARD OF REVIEW

Appellate review of a summary judgment order is de novo, and considers all evidence and reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment is properly ordered when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

B. THE TRIAL COURT PROPERLY DISMISSED MARGITANS' CLAIM THAT SRHD ENGAGED IN A TEMPORARY UNCONSTITUTIONAL TAKING OF THE EASEMENT ACROSS HANNAS' PROPERTY.

Margitans' argument that the trial court erred when it dismissed their temporary unconstitutional taking claim is both factually and legally erroneous. First, SRHD entered into the Agreement with the Hannas prior to knowing that there was an alleged issue with the water line. Second, the Spokane County Building and Planning Department denied Margitans'

Certificate of Occupancy because Margitans had not turned on the water to the residence – not because the Hannas’ drain field was within the easement. Third, the expert locator, Shawn Rushing, determined that the required horizontal separation between the water line and the drain field was met. Finally, the legal authorities cited by Margitans do not support their argument.

1. Nature of Margitans’ Interest in the Easement on Hannas’ Property.

As an initial matter, it is important to delineate the nature of the interest at issue. There is a forty-foot easement over Hannas’ property for “ingress, egress and utilities”. CP 13. An easement allows the holder to go upon land possessed by another. *Dickson v. Kates*, 132 Wn.App. 724, 133 P.3d 498 (2006), citing 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL PROPERTY LAW, § 2.1, at 80 (2004). “An easement is a ‘right, distinct from ownership, to use in some way the land of another, without compensation.” *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986).

These legal authorities illustrate that Margitans do not own the property represented by the easement, but rather they have the right to use forty feet of Hanna’s property for ingress, egress and utilities. “The fundamental distinction between the rights embodied in easements . . . and

the right of possession is that the latter gives the owner the legal right to exclude all persons from all parts of the land, whereas the holder of an easement . . . may only prevent other persons from interfering with its limited purposes.” 17 WILLIAM STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE § 2.1 (2016).

Moreover, as the Court noted in *Margitan v. Spokane Reg'l Health District*, 192 Wn. App. 1024 (2016)(unpublished), Margitans do not have a right to exclusive possession of the entire forty-foot easement, because an easement does not grant the owner a right to exclusive use of the property. Margitans' interest is limited to preventing others from interfering with their ability to use the easement for ingress, egress and utilities. It is not “Margitans' easement”, but rather, Margitans have the right to use that portion of Hannas property for limited purposes, along with other utility providers.

2. Unconstitutional Taking Jurisprudence.

Having defined the nature of Margitans' interest in the easement, the next inquiry is whether SRHD has engaged in an unconstitutional taking of Margitans' right to use the easement for ingress, egress and utilities. Both the federal and state constitutions prohibit taking without compensation. The United States Constitution, U.S. Const. amend. 5,

states, in relevant part, “nor shall private property be taken for public use, without just compensation”. Similarly, the Washington State Constitution states that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made . . .”. Const. art. 1, § 16. The current state of the jurisprudence with respect to governmental taking of private property was summarized in *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1, 38-39 (2015) as follows:

Under existing Washington and federal law, a police power measure can violate article I, section 16 of the Washington State Constitution or the Fifth Amendment of the United States Constitution and thus be subject to a takings challenge when (1) a regulation affects a total taking of all economically viable use of one’s property; (2) the regulation has resulted in an actual physical invasion of one’s property; (3) a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others, and to dispose of the property); or (4) the regulations were employed to enhance the value of publicly held property.

(Citations omitted). Options (1) and (4) are not at issue, because Margitans do not contend that they have been deprived of all economically viable use of the easement, and the property is not publicly held. For the reasons set forth below, Margitans failed to create an issue of fact as to a

physical invasion of their interest in the easement or that a fundamental attribute of their interest has been destroyed.

3. No Unconstitutional Taking Has Occurred.

Margitans first rely on the case of *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990), to support their allegation that a fundamental attribute of their interest in the property was destroyed. In *Presbytery*, the Church purchased a single-family residence on 4.5 acres for the purpose of building a church. After the purchase, the *Presbytery* discovered that a portion of the property constituted protected wetlands, and as a result building a church would not be allowed. The *Presbytery* claimed that the County's wetland regulations amounted to a taking of the property requiring compensation.

To determine whether a taking occurred, the Washington Supreme Court stated:

If we . . . determine that the challenged regulation goes beyond preventing a public harm to actually enhance a publicly owned right in property, or if we determine that the regulation denies the owner a fundamental attribute of ownership, it then becomes necessary to determine whether the regulation effects a "taking" in violation of the Fifth and Fourteenth Amendments and Const. art. 1, § 16.

Id., 114 Wn.2d at 333. In the present case, Hannas represented to SRHD in their 2002 application to install the on-site system that there was a twenty-foot easement, rather than a forty-foot easement. Based on the information Hannas submitted, SRHD permitted the system. It was not until Margitans' complaint in 2013 that SRHD became aware of the forty-foot easement. Once SRHD became aware of the improper placement of the drain field, it entered into an Agreement with Hannas in which Hannas agreed to relocate the drain field once other easements on the property, if any, were identified. At the time of that Agreement, no one had raised the issue of the horizontal separation between the drain field and the water line.

The question then, is whether the decision to delay the relocation of the drain field either enhanced a publicly owned right in the property or denied Margitans a fundamental attribute of ownership.² There was no public ownership of the property and the existence of the drain field in the easement did not prevent Margitan from using the easement for ingress, egress or utilities. Margitans have been able to access their property, and his water line exists in the easement. Spokane County Building and

² The allegations in Margitans' Complaint are exclusively couched in terms of a delay. CP 1501-1515.

Planning would have issued a Certificate of Occupancy had Margitan turned on the water in the house at the time of the inspection. CP 1516, 1521, p.41. Consequently, there can be no unconstitutional taking.

Margitan's next contention is that a taking can be either permanent or temporary, and they rely on *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984). *Brief of Appellants Allan and Gina Margitan*, p. 15. In *Miotke*, the City discharged raw sewage into the Spokane river while a new sewage treatment facility was under construction. The plaintiffs were waterfront property owners on the river, who sued for an injunction and damages resulting from the sewage discharge. One of the plaintiffs' claims was that the sewage discharge amounted to a taking of their property. The City defended on the basis that the discharge was temporary, and therefore could not constitute a taking of the property.

As support for their position that a taking can be temporary, Margitan's cite to language from the dissenting opinion in *Miotke* as though it were the majority opinion. However, the majority opinion in *Miotke* succinctly stated "[a] constitutional taking is a permanent (or recurring) invasion of a property right." *Miotke v. City of Spokane*, 101 Wn.2d 307, 334, 678 P.2d 803 (1984). Hannas constructed the drain field in the easement, not SRHD, and the Agreement between SRHD and

Hannas clearly requires Hannas to remove the drain field from the easement once the existence and location of other easements is determined. SRHD's temporary extension of time in which the Hannas system must be brought into compliance with the on-site regulations does not constitute an unconstitutional taking.

In *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1, 41, 352 P.3d 807 (2015), Division II directly addressed the issue of whether governmental delay can support a claim of taking. Woods View argued that the County had engaged in "a set of guerilla [sic] tactics unreasonably intended to hold up and prevent construction of a project" and that the County's actions constituted a taking. The Court stated that it had found no authority for the position that governmental delay constitutes a taking, and held that no taking had occurred as a matter of law. *Id.*

Nor does *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982) support Margitans' taking argument. In *Loretto*, New York law required a landlord to allow the cable company to install cable lines on their building. One affected building owner filed a class action, alleging that New York's regulation constituted a taking. The United States Supreme Court concluded that "a permanent physical occupation authorized by the government constitutes a taking. *Id.* 458

U.S. at 426. The current case is distinguishable because SRHD did not knowingly authorize placement of the drain field within the easement and the existence of the drain field in the easement is temporary.

Because there is no public interest in Hannas' property or the easement, SRHD has not interfered with Margitans use of the property for ingress, egress or utilities, and the delay in compliance is temporary, the trial court properly concluded that no taking in violation of the state or federal constitutions had occurred. SRHD respectfully requests that the trial court's decision be affirmed.

C. THE SUPERIOR COURT PROPERLY DISMISSED MARGITANS' NEGLIGENCE CLAIMS PURSUANT TO THE PUBLIC DUTY DOCTRINE.

To prove negligence, a plaintiff must show that the defendant (1) had a duty to the plaintiff, (2) breached that duty, and (3) proximately caused the plaintiff's injuries by the breach. *Smith v. City of Kelso*, 112 Wn.App. 277, 48 P.3d 372 (2002). The trial court properly granted summary judgment in favor of SRHD because Margitans could not establish a genuine issue of material fact as to the requisite elements of a negligence claim.

1. SRHD Did Not Owe A Duty To Margitans.

The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. *Woods View II, LLC v.*

Kitsap County, 188 Wn.App. 1, 352 P.3d 807 (2015). It is fundamental that for a cause of action for negligence to lie, the party charged with negligence must owe a duty of care to the one injured. *Stannik v. Bellingham-Whatcom County Dist. Bd. of Health*, 48 Wn.App. 160, 163, 737 P.2d 1054 (1987). Whether a duty exists is a question of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999). Where the defendant is a governmental entity, the public duty doctrine governs whether an actionable duty exists.

The public duty doctrine provides that a governmental entity is not liable for negligence unless the entity owes a duty to the plaintiff as an individual rather than to the public in general. *West Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 207, 48 P.3d 997 (2002). Traditionally, regulatory statutes and municipal laws impose duties on public officials owed to the public as a whole, and not to specific individuals. *Mull v. City of Bellevue*, 64 Wn.App. 245, 252, 823 P.2d 1152 (1992). Similarly, land use and building regulations impose duties owed only to the public at large. *Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 102 Wn.App. 599, 607, 9 P.3d 879 (2000).

There are four exceptions to the public duty doctrine: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine and (4) a special relationship. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774,

785-86, 30 P.3d 1261 (2001). The question of whether the public duty doctrine applies is another way of asking whether the entity had a duty to the plaintiff. *Caulfield v. Kitsap County*, 108 Wn.App. 242, 29 P.3d 738 (2001). Margitans do not contend that the rescue doctrine exception applies, and for the reasons set forth below, the legislative, failure to enforce and special relationship exceptions do not apply either.

2. Legislative Intent Exception

The legislative intent exception applies where legislation, by its terms, evidences a clear intent to identify and protect a particular class of persons rather than the general public. *Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 102 Wn.App. 599, 607-08, 9 P.3d 879 (2000). The intent to identify and protect a particular class of persons must be clearly expressed within the legislation, it may not be implied. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998). Where the purpose of a regulation is protect the health, safety and welfare of the general public, and not a particular person or class, the exception is not applicable. *Id.*

In the present case, the legislature has clearly stated that the purpose of the regulations governing on-site septic systems is protection of the public health in general. RCW § 43.20.050(2)(c) and (3) state:

(2) *In order to protect the public health,*
the state board of health shall:

(c) Adopt rules and standards for prevention, control, and abatement of health hazards and nuisances related to the disposal of human and animal excreta and animal remains.

(3) The state board shall adopt rules for the design, construction, installation, operation, and maintenance of those on-site sewage systems with design flows of less than three thousand five hundred gallons per day.

(Emphasis Added). Consistent with this directive from the legislature, the Washington State Department of Health developed the regulations governing on-site septic systems set forth in WAC 246-272A. WAC 246-272A-0001 states as follows:

Purpose, objectives, and authority.

(1) The purpose of this chapter is to protect the public health by minimizing:

(a) The potential for public exposure to sewage from on-site sewage systems; and

(b) Adverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters.

The purpose of the regulations governing on-site sewage systems is to protect the health and well-being of the general public, not a particular person or class. Absent a specific delineation of a class to which Margitans

belong, the legislative intent exception is inapplicable.

Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978), cited by Margitans, supports SRHD's position. In *Halvorson*, the plaintiff claimed that the City of Seattle was negligent in its enforcement of the City housing code, resulting in the death of her husband in a hotel fire. The declaration of purpose in the City of Seattle's Housing Code stated:

There exist, within the City of Seattle, dwellings and other buildings or portions thereof, occupied and designed for human habitation together with appurtenant structures and premises, which are unfit for human habitation, substandard, deteriorating, in danger of causing or contributing to the creation of slums or otherwise blighted areas, and inimical to the health, safety and welfare of the occupants thereof and of the public.

....

Such conditions and circumstances 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 purposes 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.

Halvorson, 89 Wn.2d at 677, fn 1, citing Seattle Housing Code, Section 27.04.020 (Emphasis Added). The *Halvorson* Court found this ordinance to have been “enacted for the benefit of a specifically identified group of persons as well as, and in addition to, the general public.” *Halvorson*, 89 Wn.2d at 677. No such language appears in the either RCW § 43.20.050 or WAC 246-272A-0001.

Margitans’ reliance on *Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975) is misplaced. In *Campbell*, the City of Bellevue’s electrical inspector was aware of a nonconforming electrical system for underwater lighting in a stream, but did not follow the mandate in the City’s ordinance requiring him to sever or disconnect the electrical system until it was brought into compliance. The plaintiffs, who resided on a neighboring property, were injured when they fell into the stream and were electrocuted. Bellevue Municipal Code § 16.32.090 in effect at the time stated:

In order to safeguard persons and property from the danger incident to unsafe or improperly installed electrical equipment, 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.

(Emphasis added.) The Court found that the language in the ordinance was “designed for the protection of the general public but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved.” *Campbell*, 85 Wn.2d at 13. No such language appears in RCW § 43.20.050 or WAC 246-272A-0001. Further, neither the deposition testimony of Steve Holderby nor the requirements for construction of an on-site system set forth in WAC 246-272A-0210 constitute a statement of **legislative** intent identifying a specific class of persons to be protected.

The legislative intent provisions of RCW § 43.20.050 and WAC 246-272A-0001 contain no identification of a specifically identified group of persons to be protected beyond the general public. Consequently, the trial court properly determined that the legislative intent exception to the public duty doctrine did not apply.

3. Failure to Enforce Exception.

The failure to enforce exception applies when (1) governmental agents responsible for enforcing statutory requirements, (2) possess actual knowledge of a statutory violation, (3) fail to take corrective action despite a statutory duty to do so, and (4) the plaintiff is within the class the statute intended to protect. *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1,

352 P.3d 807 (2015). Only when each of the elements are met does the public official have a duty to the plaintiff. *Smith v. City of Kelso*, 112 Wn.App. 277, 48 P.3d 372 (2002). Liability does not attach unless the government's failure to act was unreasonable considering the level of risk involved. *Id.*

The failure to enforce exception is narrowly construed so as to avoid dissuading public officials from carrying out their public duties. *Atherton Condominium Apartment Owner's Assoc. v. Blume Development Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Where a public official has broad discretion, a duty does not exist. *Smith v. City of Kelso*, 112 Wn.App. 277, 48 P.3d 372 (2002). In the context of building codes, the Washington Supreme Court has stated that the purpose of such codes is to protect the public safety, health and welfare, not to protect individuals from economic loss caused by public officials while carrying on public duties. *Taylor v. Stevens County*, 111 Wn.2d 159, 169, 759 P.2d 447 (1998).

The failure to enforce exception does not apply because (1) SRHD's broad discretion prevents a duty from arising; (2) SRHD took appropriate corrective action when it became aware that Hannas' drain field was not five feet away from an easement; and (3) SRHD does not have actual knowledge of a statutory violation of the requirement of a ten-

foot separation between the Hannas' drain field and the pressurized water line.

a. *The Broad Discretion Vested in SRHD Prevents a Duty from Arising.*

Where a public official has broad discretion, a duty does not arise under the failure to enforce exception. *Smith v. Kelso*, 112 Wn. App. 277, 48 P.3d 372 (2002). WAC 246-272A-0430 gives SRHD broad discretion with respect to the correction of non-conforming systems.

b. *The Drain Field Within the Easement.*

SRHD's broad power to resolve non-conforming systems authorizes the SRHD/Hanna Agreement. WAC 246-272A-0430(2) states that:

When a person violates the provisions under this chapter, the department, local health officer, local prosecutor's office or office of the attorney general may initiate enforcement or disciplinary actions, or any other legal proceeding authorized by law including, but not limited to, any one or a combination of the following:

(b) Orders directed to the owner and/or operator of the OSS and/or person causing or responsible for the violation of the rules of chapter 246-272A WAC.

Orders authorized under that section include "[o]rders requiring corrective measures necessary to effect compliance with 246-272A WAC which may include a compliance schedule. WAC 246-272A-0430(3). Here, the SRHD

and the Hannas entered into a written agreement requiring that the drain field be brought into compliance once the litigation pending between the Margitans and Hannas regarding other easements was concluded. This Agreement was signed by the parties and recorded. The Agreement also provides that should a public health risk arise, SRHD could modify the Agreement. The Agreement was an appropriate exercise of the discretion vested in the health officer given the relevant facts – no public health risk and ongoing uncertainty as to the existence and or location of other easements on the property.

In addressing the SRHD/Hanna Agreement in *Margitan v. Spokane Reg'l Health Dist.*, 192 Wn.App. 1024 (2016)(unpublished), the Court stated:

[T]he proximate location of a drain field does not by itself render a water supply unsafe. Therefore, the drain field's location within the easement does not equate to a denial of a certificate of occupancy.

Moreover, Spokane County Building and Planning did not make a determination regarding the Certificate of Occupancy until September 2014 – almost a year after the SRHD/Hanna Agreement. CP 737, 749.

Margitans contend that the SRHD/Hanna Agreement is not a proper “compliance order” under WAC 246-272A-0430(2)(b). This argument puts

form over substance. WAC 246-272A-0430(2) states:

When a person violates the provisions under this chapter, the . . . local health officer . . . may initiate enforcement or disciplinary actions, or any other legal proceeding authorized by law, ***including but not limited to***, any one or a combination of the following:

(Emphasis added). Margitans attempt to challenge the SRHD/Hanna Agreement fails to acknowledge that SRHD is not limited to issuing an order as enumerated in the WAC 246-272A. Consequently, whether the Agreement included an effective date, a specific time of compliance, notice of consequences or personal service are not dispositive of whether SRHD has taken corrective action as contemplated by the failure to enforce exception to the public duty doctrine.

c. *Pressurized Water Line.*

One of the conditions precedent to the application of the failure to enforce exception is “actual knowledge of a statutory violation”. Here, the evidence is precisely to the contrary. Shawn Rushing testified that the separation between the water line and the drain field was fourteen feet. CP 1273, 1274-1275. Margitan presented no evidence that the required ten-foot horizontal separation between a water line and a drain field was not met. As this Court noted in *Margitan v. Spokane Reg’l Health District*, 192 Wn.App. 1024 (2016)(unpublished), “an administrative agency cannot order corrective

action when it lacks evidence of an infraction.”

SRHD has actual knowledge of one violation – the installation of a drain field within an easement – and has taken appropriate action. SRHD does not have actual knowledge that there is an insufficient horizontal separation between the water line and the drain field. Consequently, Margitans cannot establish the failure to enforce exception to the public duty doctrine and SRHD has no duty to Margitans.

4. *Special Relationship Exception*

“The special relationship exception is a ‘focusing tool’ used to determine whether a local government is under a duty to the nebulous public or whether that duty has focused on the claimant.” *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). The special relationship exception requires proof of three elements:

1. direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public;
2. express assurances given by a public official in response to a specific inquiry, which
3. give rise to justifiable reliance on the part of the plaintiff.

Id. None of the required elements are present in this case.

1. Privity

The term privity is construed broadly and refers to the health district and any reasonably foreseeable plaintiff. *Babcock*, 144 Wn.2d at 787. Ordinarily, a permit applicant is responsible for ensuring his or her own compliance with codes, regulations and ordinances. *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988)(building permit applicant). Recognized policy reasons exist for refusing to transfer liability to a local government. For example, the regulatory codes are designed to protect the general public, and not individuals such as Margitans from economic loss caused by public officials. Budgetary and personnel constraints make it unreasonable to place the burden of ensuring compliance upon the local government. Further, a developer has a legal obligation to comply with the statutes regardless of approval of plans. Finally, it is imprudent to shift the risk of erroneous permit issuance and inspections to local governments. *Mull v. City of Bellevue*, 64 Wn.App. 245, 255, 823 P.2d 1152 (1992). Each of these policy considerations weigh against the shifting of liability to SRHD.

2. Express Assurances.

To establish the second element requiring express assurances, Margitans must establish that there was “a direct inquiry . . . by an individual

and incorrect information is clearly set forth by the government.” *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1, 352 P.3d 807 (2015). To be express, an assurance must be unequivocal and promise that a government official will act in a specific way. *Id.*

In this case, there is no evidence of an unequivocal, specific assurance from SRHD that it would act in a certain way in response to a specific inquiry from Margitans. SRHD’s communications with Margitan do not constitute express assurances of any certain action. In fact, as of August 30, 2013, SRHD was still gathering information regarding the complaint. The letter to Hannas on August 30, 2013 requests information confirming the location of the system and that a five-foot separation exists. CP 491. Margitan does not contend he had any communication with SRHD after August 30, 2013.

Of the alleged assurances, most are simply statements of Holderby’s position at the health district or what is allowed or prohibited by the on-site regulations. A few allegations relate to estimates of time within which action may occur if in fact violations were found to exist. None of these alleged statements constitute an unequivocal promise to act in a specific way. At most, such estimates of a possible time frame were implied assurances, which are not sufficient to give rise to a governmental

duty. *Cummins v. Lewis County*, 156 Wn.2d 844, 856, 133 P.3d 458 (2006).

Munich v. Skagit Emergency Communications Ctr., 175 Wn.2d 871, 288 P.3d 328 (2012) is distinguishable. In *Munich*, the Court held that the Skagit County 911 dispatcher's failure to properly code an emergency call as priority one, resulting in the ultimate murder of the caller, satisfied the special relationship exception. The court pointed out the important differences between building code cases and 911 cases. "In 911 cases, the plaintiff relies not only on the information contained in the assurance, but also on the fulfillment of the action promised in the assurance." *Munich v. Skagit Emergency Communications Ctr.*, 175 Wn.2d 871, 882, 288 P.3d 328 (2012). The present case is more like a building code case, where the courts have continued to require proof of incorrect information at the time the alleged assurance was made. *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1, 352 P.3d 807 (2015).

3. Justifiable Reliance

While justifiable reliance is not usually amenable to determination on summary judgment, the present facts are such that there can be no genuine issue of material fact as to reliance. Margitans could not have justifiably relied on the alleged assurances by Holderby. First, Spokane

County Building and Planning had not yet made a decision as to the denial of the Certificate of Occupancy. CP 737, 749. Second, the timelines allegedly provided by Holderby were vague, and were couched in terms of a few weeks. When the system was not removed within that time frame, and Margitans became aware of the terms of the Agreement between Hannas and SRHD, there could be no justifiable reliance.

Because Margitans failed to create a genuine issue of material fact concerning an express assurance to a direct inquiry, the trial court correctly determined that the special relationship exception did not apply.

D. THE TRIAL COURT PROPERLY DISMISSED MARGITANS' CLAIMS ALLEGING THAT SRHD INTENTIONALLY FAILED TO ENFORCE WAC 242-276A-0210.

Margitans also alleged causes of action for “intentional refusal to enforce WAC 246-272A-0210” and “intentional refusal to timely enforce WAC 246-272A-0210”. SRHD has been unable to locate any case law in support of such a theory against a governmental entity. Margitans’ citation to RCW § 4.96.010 is not helpful. The issue is whether there is a cause of action for intentional failure to enforce the on-site regulations, not whether a governmental entity can be held liable for its tortious acts.

Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983), involved recognized causes of action for false arrest, false imprisonment,

malicious prosecution, libel and slander. Margitans' reference to the court's opinion in *Bender* is wholly out of context. The *Bender* court stated "[t]he gist of an action for false arrest or false imprisonment is the unlawful violation of a person's right of personal liberty or the restraining of that person without legal authority". *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). The court then contrasted that with malicious prosecution, which "does not necessarily involve an interference with personal liberty, but rests on malice and want of probable cause." *Id.* *Bender* did not address a generic intentional tort.

The issue in *Birklid v. The Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995), was whether, and under what circumstances, an employee injured on the job could avoid the worker's compensation immunity enjoyed by employers and assert a claim for damages. The court held that such a cause of action existed where there was a deliberate intent to injure the employee by the employer. SRHD has located no case where the *Birklid* decision was used as a basis for a generic intentional tort. Further, at the time of the SRHD/Hanna Agreement, Margitans had not raised the water line issue, and Spokane County Building and Planning had not yet declined to issue the Certificate of Occupancy. CP 737, 749. Absent those events, it would be impossible for SRHD to have "known" that the Agreement temporarily

allowing the drain field to remain in the easement would impact the certificate of occupancy. And in fact, it did not. Spokane County Building and Planning refused to issue the Certificate of Occupancy because the water was not running in the residence, not because of the drain field in the easement. CP 1516, 1521, p. 41. Margitans' allegations regarding the water arose out of his own unsubstantiated fears that there might be an issue with the water due to the possibility that there was less than ten feet of separation between the drain field and the water line.

Because there is no recognized cause of action for an intentional failure to enforce WAC 242-276A-0210 and SRHD has taken proper enforcement action against the only known violation of the on-site regulations, dismissal was proper.

E. THE TRIAL COURT PROPERLY DISMISSED
MARGITANS' INTENTIONAL INTERFERENCE
WITH A BUSINESS EXPECTANCY CLAIM

Margitans alleged that SRHD intentionally interfered with Margitans' business expectancy by "fail[ing] to ensure the Hanna's onsite septic system and drain field had the required separation from the Margitan's waterline". CP 1510-1511, ¶¶ 5.2, 5.3 (Emphasis omitted). Margitans' claim was properly dismissed because they are unable to establish a genuine issue of material fact as to each of the required elements of a claim for

intentional interference with a business expectancy.

1. Elements.

To succeed on their claim of intentional interference with a business expectancy, Margitans must prove each of the following five elements:

1. That a valid contractual relationship or business expectancy existed;
2. That the defendant knew of that relationship or expectancy;
3. That the defendant intentionally interfered by inducing or causing a breach of that relationship or expectancy;
4. That the defendant interfered with an improper purpose or by improper means; and
5. That damage to the plaintiff resulted from the interference.

Libera v. City of Port Angeles, 178 Wn.App. 669, 676, 316 P.3d 1064

(2013), citing *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006).

2. SRHD Has No Enforcement Authority With Respect to the Water Line Because There is No Evidence of a Violation of the Horizontal Separation Requirement.

As an initial matter, SRHD has no authority to enforce compliance because there has been no evidence presented establishing that the horizontal

separation between the water line and the drain field is less than ten feet. To the contrary, the evidence indicates that the horizontal separation is fourteen feet. CP 1273, 1274-75. Absent authority to act, SRHD cannot be found liable for intentionally interfering based on the water line. The Division III Court of Appeals recognized this result in *Margitan v. Spokane Regional Health District*, 192 Wn.App. 1024 (2016)(Unpublished)(“An administrative agency cannot order corrective action when it lacks evidence of an infraction.”) Tim Utley, the building inspector for the Spokane County Building and Planning Department for Margitans’ remodel of the home on Parcel 3, testified as follows:

Q. I believe you indicated earlier in your testimony that Mr. Margitan indicated to you that he was not comfortable that the water was potable. Is that correct?

A. Yes, ma’am.

Q. Did he tell you why he was not comfortable with the potability of the water to Parcel 3?

A. Here’s where it gets – he said he felt that the – it was close to a septic line above, or a septic drain field, whatever it is, okay in the easement of Parcel 2.

And I said, “Well, then, just get something that – from your purveyor that says it’s potable. You know, somebody, tell me its good water. I don’t care who it is.”

Q. Did you have – do you have any recollection of approximately when you had that conversation with Mr. Margitan?

A. It was, like I say, earlier. I believe it was somewhere around – they did insulation – 6/30 of 2014. And two months later we were trying to final. So it was somewhere in that vicinity, I believe.

Q. Okay. So somewhere between June of 2014 and –

A. And when he tried to get his final in eight of 2014.

Q. And would that be the first time that the two of you had ever discussed the issue of the water, to the best of your recollection?

A. To the best of my recollection, yeah, I think so.

CP 1265, 1269-71.

If the building inspector didn't even discuss the issue of the water to Parcel 3 with Margitan until the summer of 2014, it is impossible for Margitan to have conveyed the County's refusal to SRHD in 2013 as alleged by Margitans.

Margitans' only remaining potential support for their claim of intentional interference is the SRHD/Hanna Agreement regarding the location of the drain field within an easement. However, none of the

elements required to prove a claim of intentional interference with a business expectancy can be met based on the SRHD/Hanna Agreement. Without conceding the existence of any element, SRHD will focus the second element, knowledge, and the fourth element, improper purpose and means.

3. SRHD Did Not Have Knowledge of the Business Expectancy at the Time of Installation of the SRHD/Hanna Agreement.

Even if SRHD had authority to enforce, it did not have knowledge of Margitans' alleged business expectancy at any relevant time. SRHD did not have knowledge of Margitans' business expectancy at the time the drain field was installed in approximately 2003 and it did not have knowledge at the time of the SRHD/Hannas Agreement in October 2013.

SRHD did not have knowledge of Margitans' alleged business expectancy at the time Hannas installed their drain field. Hannas installed the drain field in approximately 2003. CP 73, 82. Margitans didn't even purchase Parcel 3 until 2010. CP 990. There is no way SRHD could have had knowledge of Margitans' intent to buy Parcel 3, renovate it and rent it out eight years before Margitans even purchased the property.

Nor could SRHD have had knowledge that a delay in bringing the drain field into compliance with the easement set back rules would impact the Certificate of Occupancy at the time of the Agreement with Hannas in October 2013. First, Margitans didn't even raise the issue of the water line

until December 2013. CP 737, 746-47. Margitans' letter dated November 29, 2013 represents that Parcel 3 is his residence. CP 737, 746-47. The letter does not state that Margitan intends to rent out the property. CP 737, 746-47. The Building and Planning Department did not notify Margitan that it wouldn't issue the Certificate of Occupancy until September 2014 – almost a year after the SRHD/Hanna Agreement. CP 737, 749. The inspector, Tim Utley, confirmed that had the water been running in the home, he would have issued the Certificate of Occupancy. CP 1516, 1521, p. 41. Given the documentary evidence establishing the time line and sequence of events, it is impossible for SRHD to have had the required knowledge.

4. SRHD Did Not Act for An Improper Purpose or By Improper Means.

Nor is there any evidence to support Margitans' allegation that SRHD acted with an improper purpose or by improper means. Where a governmental entity is the alleged tortfeasor, proving improper purpose requires proof that the government delayed for the purpose of preventing plaintiff's land development. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804-06, 144 P.3d 276 (2006). "Interference with an improper purpose means interference with an intent to harm the [plaintiff]". *Westmark Development Corporation v. City of Burien*, 149 Wn.App. 540, 558, 166 P.3d 813 (2007).

Proof of improper means requires evidence that the governmental entity arbitrarily singled out the plaintiff or a type of plaintiff for delay. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804-06, 144 P.3d 276 (2006).

For example, in *Libera v. City of Port Angeles*, 178 Wn.App. 669, 676, 316 P.3d 1064 (2013), the Plaintiff alleged that the City improperly delayed connecting his property to the storm drain. However, Plaintiff was unable to articulate a reason why the City would not want to see his business open, or present evidence indicating a disparity between his experience and that of others working with the City. Because Libera could not establish either an improper purpose or means, summary judgment in favor of the City was proper. Conversely, in *Westmark Development Corporation v. City of Burien*, 149 Wn.App. 540, 166 P.3d 813 (2007), the plaintiff presented evidence that the City of Burien delayed review of Westmark's project because it was a planned apartment building and the state representative was opposed to the project.

There is no evidence indicating that SRHD acted with the intent to harm Margitans or that it didn't want Margitans' renovation of the home on Parcel 3 to proceed. As noted above, SRHD cannot force a relocation of the drain field based on the requirement of a separation of ten feet between a water line and a drain field because there is no evidence of a regulatory

violation. There can be no intent to harm where there is no authority to act. Further, SRHD could not have intended to harm Margitans by interfering with their plans to renovate and rent Parcel 3 when it entered into the SRHD/Hanna Agreement in October 2013 because it did not know of any potential impact on a Certificate of Occupancy. And, as it turns out, the existence of the drain field in the easement was not the reason the Certificate of Occupancy was delayed.

Margitans' claim that SRHD was aware of the Margitans' business plans for a high end rental property on Parcel 3 is disingenuous at best. Margitans represent to the Court that they intended to use the property as a rental from the time it was purchased in 2010. They further contend that they discussed this plan with SRHD.

In fact, what Allan Margitan represented to SRHD was that he intended to use the property as a single-family residence. On October 3, 2011, Allan Margitan submitted an Application for On-Site Sewage System No. 11-11120 with respect to 14404 W. Charles Road (Parcel 3). CP 1266, 1277-78. That Application, which is signed by Allan Margitan, specifically states that the property is to be used as a single-family residence. CP 1266, 1277-78. Similarly, the Permit for On-Site Sewage System issued for Parcel 3 was for use as a single-family residence. CP 1278. Had use as a rental

property been intended, the septic system would likely have had to have been designed with a larger capacity.

Further, Gina Margitan's deposition testimony is wholly inconsistent with the position Allan Margitan is now asserting.

Q Okay. All right. If I could now direct your attention to Paragraph 1 on Page 9. You allege damages for the loss of use of your home located on Parcel 3; correct?

A Yes. Correct.

Q How much money do you content[sic], are you claiming for loss of use of that home.

A I cannot tell you at this time.

Q Was, is there anything beyond not being able to live in the house that you want to live in that I'm missing there?

A We have some, we have someone working on that for us right now figuring out what we're spending, and just keeping to the point *where we can occupy it when we get good water.*

CP 1266, 1279-1281. Mrs. Margitan further stated:

Q So had you moved into the home on Parcel 3, what were you going to do with the home that you're currently living in?

A We would either sell it or rent it.

Q Since the remodeling started in 2011,

have you at anytime [sic] attempted to rent the house on Parcel 3?

A No.

CP 1282. The information provided by Margitans to SRHD was that they intended to use the home on Parcel 3 as a single-family residence. SRHD could not have had knowledge of the intended rental of Parcel 3 when the documentary evidence submitted by Plaintiff Allan Margitan was that he intended to use it as a residence.

Instead of addressing improper purpose, Margitans argue that an easement is a property right protected by the United States and Washington Constitutions. However, Margitans fail to provide any evidence establishing that SRHD took any action with the purpose of preventing Margitans' remodel on Parcel 3 or that SRHD had any intent to harm Margitans.

Nor did Margitans submit evidence to create a genuine issue of material fact as to improper means. Proof of improper means requires evidence that the governmental entity arbitrarily singled out the plaintiff or a type of plaintiff for delay. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804-06, 144 P.3d 276 (2006). Margitans' sole response is that the SRHD/Hanna Agreement interfered with Margitans' use of the easement and is therefore an improper means. First, SRHD's Agreement with the Hannas was a proper use of its enforcement authority, and was therefore not arbitrary.

Second, the Agreement only related to the temporary existence of the drain field in the easement, which did not impact Margitans ability to use the easement for ingress, egress or utilities. In fact, all of those uses have continued. Third, Margitans' unilateral determination of a potential risk to potability based on speculation as to the location of the water line (which turned out to be wrong) does not equate to improper means by SRHD.

Margitans' reliance on *Littlefair v. Schulze*, 169 Wn.App. 659, 278 P.3d 218 (2012) does not advance their position. *Littlefair* involved the legality of the construction of a fence within the easement. The Court held that the fence must be removed because it violated the Skamania County Code which prohibited the construction of any structure, including a fence, within an easement. The Skamania Code did not provide for broad discretion in enforcement such as that found in the Washington Administrative Code sections governing on-site systems. *Littlefair* is not applicable to these facts.

Because Margitans cannot establish all of the required elements of a claim for intentional interference with a business necessity, summary judgment in favor of SRHD was proper.

F. SRHD IS ENTITLED TO AN AWARD OF
REASONABLE ATTORNEY'S FEES AND COSTS.

SRHD respectfully requests an award of reasonable attorney's fees and costs pursuant to RAP 14.2, RAP 18.1, RCW § 4.84.370, and RCW § 4.84.030. RCW § 4.84.370 provides that if a party substantially prevailed in all prior judicial proceedings involving a land use decision, the party is entitled to an award of reasonable attorney's fees and costs. RCW § 4.84.370; *Bellevue Farm Owners Ass'n. v. State of Washington Shorelines Hearings Bd.*, 100 Wn.App. 341, 997 P.2d 380, *review denied*, 142 Wn.2d 1014, 16 P.3d 1265 (2000). Land use decisions are not limited to those set forth in RCW § 4.84.370, but extend to similar land use decisions. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 701-02, 169 P.3d 14 (2007). Although this is not an action under LUPA, the controlling issue is the propriety of SRHD's decision regarding the location of on-site sewage system. Should this Court determine that the Superior Court properly dismissed Margitan's appeal, SRHD will have prevailed on the

merits in all prior judicial proceedings, thereby meeting the standard set forth in RCW § 4.84.370.

V. CONCLUSION

For the reasons set forth above, SRHD requests that the decision of the Superior Court be affirmed.

Dated this 6th day of March, 2017.

Respectfully Submitted,



Michelle K. Fossum
Attorney for Respondent SRHD and
SRHD Board of Health
WSBA No. 20249

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, residing in Spokane County, Washington, over the age of 18 years, not a party to the above-captioned matter and qualified to give the following testimony:

That on March 6th, 2017 I served a copy of Respondent's [SRHD]

Brief in the manner indicating:

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DATED this 6th day of March, 2017, at Spokane, Washington.

Gina Christensen
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