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DIVISION II

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STATE OF WASHINGTON

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NO. 34401-7-II

IN THE
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RICHARD JOHNSON and JEANNIE JOHNSON,
husband and wife,

Appellants,

v.

UP CLOSE HOME INSPECTION, LTD, et al.

Respondents.

Appeal from the Superior Court of Washington
for Thurston County

(Thurston County Superior Court Cause No. 03 2 01944 2)

BRIEF OF RESPONDENT CITY OF OLYMPIA

W. DALE KAMERRER
Law, Lyman, Daniel,
Kamerrer & Bogdanovich, P.S.
P.O. Box 11880
Olympia, Washington 98508-1880
(360) 754-3480
Attorney for City of Olympia

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I. ISSUE RELATED TO PLAINTIFFS' ASSIGNMENT OF ERROR

The City of Olympia contends that the proper statement of the issue is: Under the facts of this case did the superior court correctly decide that the appellants failed to establish a genuine issue of material fact in support of their "failure to enforce" exception to the public duty doctrine theory?

II. COUNTER-STATEMENT OF THE CASE

The City of Olympia issued a building permit to Frank Winn on May 13, 2002, for re-roofing and construction of an addition to an existing house at 515 Eastside Street in Olympia. CP 196. Contrary to the argument of the appellants (Johnsons) that "the building official assisted Mr. Winn in redesigning the new addition's structure in a manner that would presumably meet building code requirements" (Brief of Appellant at 2), Mr. Winn testified in a deposition taken when he and Danella Donlan (the owner and seller of the house) were defendants in the case, and the City had not yet been sued, as follows:

So the initial submission or what was prepared for submission was unacceptable. And either I asked or he offered, "Well, what would be acceptable." And then he told me that a sheeted wall would be acceptable as opposed to just post and beam, so a footing with the same – a framed-in wall was acceptable, and the sheer would be picked up by the existing building.

...

So **I prepared the drawing** for what was then submitted with footing, studded walls in between the existing piers, sheeting it, and then the same addition on top of it. And that

was accepted by the City with minor tie-in requirements that they pen and inked onto the plan that I submitted to make it acceptable.

CP 108 and 109, emphasis added. Far from “redesigning” the proposed addition, the City’s employee did no more than provide minimal suggestions and annotations to plans prepared by Mr. Winn, and for which he was responsible.

After City approval of the addition work performed by Mr. Winn, the 515 Eastside house was offered for sale. Burke Long and Laura Porter offered to buy the house “around September 2002”, and they backed out of the purchase after their home inspector issued a report on the house “around October 2002”, which was five months before the Johnsons bought the house. CP 97-98.

The City had no more review or inspection involvement with the 515 Eastside Street house from the time of the Long/Porter offer to buy until after the Johnsons purchased it. CP 100 (appellants purchased the house in March 2003, and Mr. Johnson contacted Don Cole at the City Building Department “around April-May 2003”).

The Johnsons similarly overstate the uncorroborated assertion by Burke Long that he contacted the City after backing out of the purchase of the 515 Eastside Street house. The Johnsons state:

. . . Burke Long then contacted the City of Olympia’s Building Department about the home Donlan was selling. Burke Long asked specifically for the City of Olympia building official

with authority for the Donlan Home. Mr. Long informed the Olympia building official that the Donlan home was dangerous and unsafe to occupy and gave the building official the name and phone number of the home inspector they had used. The City building official Mr. Burke (sic) spoke with promised him that this would be taken care of.

Brief of Appellant, at 6. Mr. Long actually stated in his declaration of February 17, 2005 (in response to the City's motion for summary judgment):

After the report and home inspection, I also communicated these findings to the City of Olympia Community Planning and Development Department. I do not remember the person I spoke with, but I know I got through the receptionist to someone with authority. I told this person what our home inspector had discovered and warned that person from the City of Olympia that the 515 Eastside house was structurally unsafe. . . . The person who I spoke with thanked me for letting them know about this problem and said the City of Olympia would take care of it.

CP 98. Mr. Long did not say he “asked specifically for the City of Olympia building official with authority for the Donlan home.” Brief of Appellant at 6. Nor did he say in his declaration that he told the person he spoke to that “the home was dangerous and unsafe to occupy”. *Id.* And he did not say that the unidentified person to whom he spoke “promised him that this would be taken care of.” *Id.*, and see CP 98. Mr. Long speculates that he “may” have sent the City the report by the home inspector he hired. CP 98. However, there is no corroboration of such an act through proof that the City received the report, or otherwise.

There is no evidence available from employees of the City of Olympia that the telephone call from Mr. Long was received, or that a “the City will take care of it” statement was made in response to it. If the call had been received and the City’s building file on the 515 Eastside house had been examined in response, it would have revealed that a building permit had been issued for re-roofing and an addition in May, 2002, and the completed work was approved. CP 313, and Brief of Appellant at 3. Nothing in that building file would have given the City cause to further inspect the house or demand that unspecified repairs be made.

If Mr. Long truly reported to someone at the City of Olympia that his home inspector found defects in the 515 Eastside Street house, he logically would have repeated what the inspector’s report stated, since he did not claim to have personal expertise in matters of structural design and engineering. *See* CP 97-98. Importantly, that report (at CP 68-92) does not specifically identify any structural problems in the new addition to the house. Instead, it focuses on damage by “wood-boring insects,” without suggesting that those conditions were found in the new addition permitted by the City in May, 2002, and without indicating that the extent of that damage rendered the house unsafe. Notably, nothing in that report stated that any portion of the house was “dangerous and unsafe to occupy”. *Cf.*, Brief of Appellants at 6. Furthermore, no evidence exists that the person

who inspected the house and issued the report referred to by Mr. Long was qualified to state opinions on the structural stability of a building.

Burke Long and his wife, Laura Porter, are not parties to this lawsuit. They have made no claims against the City of Olympia. They are not in privity with the City or with the Johnsons. The City had no contact with the Johnsons until after they purchased the 515 Eastside house in 2003. They did not rely on any statements made by City officials in making that purchase. Nevertheless, the Johnsons contend that the City owed them a duty of care to require the house to be repaired by the person who sold it to them before they bought it based upon the telephone call Burke Long contends he made to the City after the home inspection report of October 1, 2002 was issued. *See* CP 68, and CP 154.

The Johnsons supplied the trial court with numerous declarations of persons who examined the 515 Eastside house after this action was commenced against the seller of the house and her contractor. Those examinations occurred long after the City performed inspections related to its building permit, and long after the purported Burke Long telephone call to the City. None of the defects or inadequacies in the house which are described in those declarations has any bearing on the issues in this appeal because the Johnsons claim that the City owed them a duty to require correction of the house based upon Burke Long's telephone call in October 2002, long before the opinions in those later declarations were created.

(CP 314, Fourth Amended Complaint at 3 & 4.) The declarations which are irrelevant for these reasons begin at: CP 4, CP 13, CP 35, CP 42, CP 59, CP 62, CP 65, CP 192, CP 206, and CP 245. To the extent that the following declarations make reference to those later examinations, they too are irrelevant: CP 99, CP 103, and CP 105. Moreover, those declarations are inadmissible to the extent that they state opinions of law or mixed fact and law. *See infra*, at 9.

III. ARGUMENT

A. Standard of Review.

The standard for reviewing an order on summary judgment is *de novo*, *i.e.*, the appellate court engages in the same inquiry as the trial court. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). Summary judgment is proper where the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

In a negligence action, the determination of whether an actionable duty was owed to the plaintiff represents a question of law to be decided by the court. *Kae Kim v. Budget Rent A Car Sys. Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). A question of law is also reviewed *de novo*. *Babcock*, 144 Wn.2d at 784. The existence of a duty depends on mixed considerations of logic, common sense, justice, policy, and precedent.

Keates v. City of Vancouver, 73 Wn. App. 257, 265, 869 P.2d 88 (1994).

Here, long-established precedent based upon clear policy and fundamental notions of justice proves that the City of Olympia did not owe the Johnsons an actionable duty to have ordered repair of the house they chose to purchase.

B. Summary Judgment Standards.

Summary judgment should be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR 56; *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997); *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condominium Assoc. v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In a summary judgment motion, the moving party has the initial burden of showing the absence of an issue of material fact. This may be done by presenting affidavits and depositions, which, together with the pleadings, establish that there is no genuine issue of material fact.

Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The moving party's burden can also be met by pointing out that there is a lack of evidence supporting the plaintiffs' case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Young v. Key*

Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). In this latter situation, the moving party is not required to support the motion by affidavits or other materials negating the opponents' claims. *Celotex*, 477 U.S. at 322-23; *Young*, 112 Wn.2d at 225-26; *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

In summary judgment proceedings, "(t)he facts and all reasonable inferences are considered in the light most favorable to the nonmoving party". *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999). Once the moving party's burden is met, the non-moving party must make a sufficient factual response which establishes all of the elements essential to that party's case, *i.e.*, the non-moving party may not rest upon allegations or denials, but must set forth specific facts showing the existence of a genuine issue for trial. *Young, supra*, 112 Wn.2d at 225; *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288, *review denied*, 114 Wn.2d 1023 (1990). An affiant in summary judgment proceedings must testify to facts based on personal knowledge. *Grimwood v. U. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

To defeat a motion for summary judgment, a plaintiff must do more than express an opinion or make conclusory statements. The plaintiff must establish specific and material facts to support each element of his *prima facie* case. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66-67,

837 P.2d 618 (1992). Here, there is an absence of evidence that could support the Johnsons' claim against the City.

Declarations submitted in summary judgment proceedings must set forth specific facts, not speculation or conjecture. *See Time Oil Co. v. City of Port Angeles*, 42 Wn. App. 473, 480, 712 P.2d 311 (1985). "Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); *White v. Solaegui*, 62 Wn. App. 632, 637, 815 P.2d 784 (1991) (quoting *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988)). Therefore, the Johnsons' proffered declarations of witnesses who may be experts on certain technical matters, and who attempted to define the City's legal duties in ways that are not consistent with the public duty doctrine and applicable building codes, are improper, and must be disregarded (see list of those declarations *supra* at 6). 5B Teglund, *Wash. Prac.* §704.1 (1999), and n. 1, Judicial Council Comment 704 ("... experts are not to state opinions of law or mixed fact and law.").

C. The Public Duty Doctrine.

A cause of action for negligence exists only if "the defendant owes a duty of care to plaintiff." *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983); *Bailey v. Town of Forks*, 108 Wn.2d 262,

at 266, 737 P.2d 1257 (1987). “[A] broad general responsibility to the public at large rather than to individual members of the public” does not create a duty of care. *Campbell v. City of Bellevue*, 85 Wn.2d 1, at 9, 530 P.2d 234 (1975). Accordingly, under the public duty doctrine, a public entity has a duty of care when it owes a duty “to the injured plaintiff,” but it does not have a duty of care when it owes a duty “to the public in general.” *Babcock*, 144 Wn.2d at 785; *Meany v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988).

The public duty doctrine reflects the policy that “legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens County*, 111 Wn.2d 159, at 170, 759 P.2d 447 (1988). The public duty doctrine applies when a public entity is performing a governmental function. *Bailey v. Town of Forks*, 108 Wn.2d at 268. Governmental functions are those generally performed exclusively by governmental entities. *See, e.g., Taylor*, 111 Wn.2d at 164-65 (building permits and inspections); *Hoffer v. State*, 110 Wn.2d 415, 422, 755 P.2d 781 (1988) (auditing public offices and registration of securities). Obviously, the functions of the City of Olympia which the Johnsons criticize were governmental functions, and, therefore, subject to the public duty doctrine.

Where the public duty doctrine applies, a plaintiff may establish that an exception to it exists which allows the claim to proceed to trial.

The plaintiff's Fourth Amended Complaint (CP 314), whereby they sued the City of Olympia after settling claims against the seller of the 515 Eastside house and her contractor, did not allege the existence of an exception to the public duty doctrine. In its motion for summary judgment (CP 51), the City assumed that the Johnsons would rely on the "special relationship" exception to the public duty doctrine. In response (CP 151), the Johnsons made no argument that the special relationship exception applied to the facts of this case. Instead, they argued that the "failure to enforce" exception applied. *See* CP 156.

D. Failure to Enforce Exception.

The trial court correctly concluded that the Johnsons failed to carry their burden of establishing the elements of the failure to enforce exception to the public duty doctrine. The failure to enforce exception exists when: (1) there is a statutory duty to take corrective action; (2) governmental agents responsible for enforcing the statutory requirements possess actual knowledge of a statutory violation; (3) they fail to take corrective action; and (4) the plaintiff is within the class the statute intended to protect. *Smith v. State*, 59 Wn. App. 808, at 814, 802 P.2d 133 (1991). *See also Honcoop v. State*, 111 Wn.2d 182 at 190, 759 P.2d 1188 (1988); *and Bailey v. Town of Forks*, 108 Wn.2d 262, at 268. For the failure to enforce exception to apply, government agents must have a

mandatory duty to take specific action to correct a statutory violation.

Smith v. City of Kelso, 112 Wn. App. 277, 282, 48 P.3d 372 (2002).

The failure to enforce exception is narrowly construed. *Atherton Condominium Assoc. v. Blume Dev. Co.*, *supra*, 115 Wn.2d at 531.

Plaintiffs have the burden of establishing every element of the exception.

Id.

In relation to building code inspections, the failure to enforce exception recognizes an actionable duty where a public building official has actual knowledge of an inherently dangerous and hazardous condition, is under a duty to correct the problem, and fails to meet this duty. *See Taylor v. Stevens County*, 111 Wn.2d at 171-72; *Zimbelman v. Chaussee Corp.*, 55 Wn. App. 278, 777 P.2d 32 (1989), *review denied*, 114 Wn.2d 1007, 788 P.2d 1077 (1990); and *Waite v. Whatcom Cy.*, 54 Wn. App. 682, 686, 775 P.2d 967 (1989).

E. The Appellants Failed to Show That the City had Actual Knowledge of a Statutory Violation.

“The requirement of actual knowledge does not encompass facts which the [defendant] should have known.” *Atherton Condominium Association v. Blume Dev. Co.*, *supra*, 115 Wn.2d at 532-33. Thus, a negligent failure to know is not sufficient where actual knowledge is necessary for a claim to be actionable.

In response to the City's motion for summary judgment, the Johnsons were required to show that Olympia possessed actual knowledge of building code violations at 515 Eastside. In attempting to do this, the Johnsons point to the Burke Long telephone call as evidence of that knowledge. The cases of *Zimbelman v. Chaussee Corp., supra*, and *Atherton Condominium Association v. Blume Dev. Co., supra*, are instructive in resolving the issue of whether that telephone call created actual knowledge in the City of Olympia of building code violations at 515 Eastside. In *Zimbelman*, a King County building official reviewed plans for a condominium complex. The official recognized several deviations from Uniform Building Code (UBC) requirements in the plans. The official returned the plans to the applicant with the necessary corrections noted on the face of the plans. A building permit was issued and the building was constructed and inspected. The building inspector did not note any deficiencies and did not attempt to verify if the previously noted deviations had been corrected. A certificate of occupancy was then issued. However, the building as constructed violated certain UBC standards. In finding that there was no evidence that the building official had actual knowledge of those violations, the Court of Appeals stated:

Awareness of code violations in the plans as submitted only establishes knowledge of defective plans, not knowledge of defective construction. The County cannot be charged with knowing that the contractor would fail to correct the deficiencies identified by the County in the plans. If the

County instead had required submission of amended plans which incorporated the noted corrections, the approval of such corrected plans would not be actual knowledge of the contractor's subsequent failure to build in compliance with code requirements. Even if the County failed to note some defects in the plans, this would not constitute actual knowledge of inherently dangerous and hazardous conditions created by the contractor.

Zimbelman, 55 Wn. App. at 283. Accordingly, it would be necessary for a City official to see completed construction that amounted to a code violation and understand that it was inherently dangerous and hazardous before the necessary actual knowledge would exist.

Similar to the situation in *Zimbelman*, the *Atherton* plaintiffs argued that a plan correction sheet filled out by the building official after reviewing a first set of building plans demonstrated actual knowledge of an inherently dangerous and hazardous condition at the condominium complex. The Washington Supreme Court disagreed, finding that the evidence at most pointed to constructive knowledge, which is not enough. The requirement of actual knowledge does not encompass facts which the building official should have known. *Atherton*, 115 Wn.2d at 532-33.

Here, the Burke Long telephone call could, at most, have provided information that the home inspector hired by Mr. Long had the opinion that the 515 Eastside house had defects and deficiencies. "Awareness" of that opinion, no matter how strongly stated, would not be actual knowledge of a statutory violation or of an inherently dangerous condition.

If the actual report of Mr. Long's inspector (CP 68) had been examined by building officials of the City, it would have revealed that the opinions of the inspector were that the "early 1900s" house at 515 Eastside (Brief of Appellant at 3) had wood-boring insects and some evidence of poor quality construction. CP 70. However, even this reported hearsay and opinion could not have produced actual knowledge of building code violations of an inherently dangerous condition for two reasons. First, the report did not say that the house had structural deficiencies which presented a risk of imminent collapse or immediate danger to its occupants. Second, no City official saw and understood that any such conditions existed at the house. *See* Brief of Appellant at 3-4.

As presented by the Johnsons in response to the City's motion for summary judgment, the Burke Long house inspector's report was hearsay and inadmissible in that proceeding. CR 56(e); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967). Moreover, if City building officials had seen that report, they would have had discretion to determine it provided proof of what it stated. *Smith v. Kelso*, 112 Wn. App. at 286. Thus, even if City building officials had the report, they could have rejected its minimal findings and found no reason to take any action on it.

The Johnsons failed to establish the "actual knowledge" element of the failure to enforce exception to the public duty doctrine.

F. The City did not Have a Statutory Duty to Take Corrective Action.

Even where a public official has actual knowledge that a statutory violation or an inherently dangerous and hazardous condition exists, a statute must direct the official to take specific corrective action before the “failure to enforce” exception to the public duty doctrine applies.

McKasson v. State, 55 Wn. App. 18, at 27, 776 P.2d 971 (1989) (quoting *Taylor v. Stevens County*, 111 Wn.2d at 171-72).

In other failure to enforce cases, there were clear and specific legislative directives to take particular corrective action when a statutory violation was discovered. *See Bailey v. Forks*, 108 Wn.2d at 269 (under RCW 46.61.515 and RCW 70.96A.120(2), a police officer has a mandatory duty to take a person incapacitated by alcohol into protective custody); *Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975) (a municipal electric code required an enforcement official to disconnect an illegal electrical connection); *Waite v. Whatcom County*, 54 Wn. App. 682, 686-87, 775 P.2d 967 (1989) (court assumes without citing source of mandatory duty that building inspector who approved a prohibited installation of a propane furnace in a basement “failed to meet his responsibility to correct the problem.”). In each of these failure to enforce cases, there was an identified or assumed directive to the governmental employee as to what should be done once a statutory violation was found.

However, the building codes that govern residential construction in Olympia provide no such direction.

The City of Olympia ordinances cited in the Johnsons' Response to the City's Motion for Summary Judgment before the trial court (CP 157) do not impose the requisite duty to take corrective action. In fact, those ordinances contradict the Johnsons' contention that the City had such a duty. For example, OMC 16.10.020 provides:

All buildings or structures in the City which by reason of decay, dilapidation, or damage by fire, the elements, or any other cause, are now or hereafter shall become, in the judgment of the Enforcement Officer, dangerous to the lives and safety of persons or property or unsafe for the purpose or purposes for which they are being uses, unsafe or unfit structures and premises as defined in this chapter are declared to be public nuisances.

Emphasis added. And OMC 16.10.040(b) provides in part: "The Enforcement Officer may exercise such lawful powers as may be necessary or convenient to effectuate the purposes and provisions of this chapter."

Emphasis added. OMC Sections 16.10.030 (definitions), and 16.10.050 (abatement procedures), do not alter the discretionary nature of the City's nuisance ordinances. (The foregoing cited City Code provisions are collected in Appendix A.)

The obvious discretion vested in the City's enforcement officer under these ordinances negates application of the failure to enforce

exception to the public duty doctrine in this case. As the Court of Appeals explained in *Smith v. City of Kelso, supra*:

Courts construe the failure to enforce exception narrowly. The statute must create a mandatory duty to take specific action to correct a violation. Such a duty does not exist if the statute vests the public official with broad discretion.

112 Wn. App. at 282 (citing *Atherton Condo. Ass'n v. Blume Dev. Co., supra*, 115 Wn.2d at 531; and *Forest v. State*, 62 Wn. App. 363, at 369-70, 814 P.2d 1181 (1991)).

The Uniform Building Code (adopted in RCW 19.27 for the state and all cities and counties does not require specific action to correct a violation of its provisions. See *Smith v. City of Kelso, supra*, 112 Wn. App. at 286; and *Halverson v. Dahl*, 89 Wn.2d 673, 677, n. 2, 574 P.2d 1190 (1978) (general language of building code indicating that its purpose is to protect public health and safety does not establish an actionable duty of care in the regulating government agency). Nor does any ordinance require the City to take specific action to correct a violation of its building regulations, as is evident by the Johnsons' failure to cite any such ordinance in their appeal.

It is clear that the Johnsons failed to establish the second element of the failure to enforce exception to the public duty doctrine. The trial court correctly granted summary judgment in favor of the City.

G. The Appellants are not in a Class Intended to be Protected by the Building Codes.

The fourth element of the “failure to enforce” exception to the public duty doctrine requires plaintiffs to establish that they are in the class intended to be protected by the statute on which they rely. *Smith v. State*, 59 Wn. App. 808, at 814, 802 P.2d 133 (1991); *see also Honcoop v. State*, 111 Wn.2d at 190, 759 P.2d 1188 (1988). Here, because the Johnsons claim that the City of Olympia should have required correction of defects and deficiencies in the 515 Eastside house before they purchased it, they are in a class identifiable as “prospective home buyers.”

The appellate courts of Washington have long recognized that building 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 buildings, and that they do not exist to compel local governments to enforce such codes for the benefit of individuals. *See Taylor v. Stevens County, supra*, 111 Wn.2d at 164-65, *citing Haslund v. Seattle*, 86 Wn.2d 607, 611 n. 2, 547 P.2d 1221 (1976); *Georges v. Tudor*, 16 Wn. App. 407, 409-10, 556 P.2d 564 (1976); *and Rosen v. Tacoma*, 24 Wn. App. 735, 740-41, 603 P.2d 846 (1979). Accordingly, the duty to issue building permits and conduct inspections is owed to the public at large to protect general health and safety. *Taylor v. Stevens County, supra*.

The primary purpose of the State Building Code Act (RCW 19.27), is to require that minimum performance standards and requirements for building and construction materials be applied consistently throughout the state. This is a duty which is owed to the public as a whole. *Id.*

The Johnsons cannot establish that the building codes which they criticize the City of Olympia for not enforcing to their specific benefit are intended to protect them as prospective home buyers. Accordingly, they fail in their obligation to establish the fourth element of the failure to enforce exception to the public duty doctrine.

H. The Public Duty Doctrine Should not be Abolished.

The Johnsons argue for the first time on appeal that the public duty doctrine should be abolished. They do not argue that following the long-established public duty doctrine is a manifest constitutional error.

Pursuant to RAP 2.5, such newly-raised arguments should be disregarded (*see State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (“Under Rule 2.5(a) of the Rules of Appellate Procedure . . . appellate courts will generally not consider issues raised for the first time on appeal”)), unless they involve a manifest constitutional error. RAP 2.5(a); *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993).

Nor should the Johnsons be allowed to make a constitutional error argument in reply because to do so would deprive the City of the

opportunity to argue in opposition to such a contention. *Cummins v. Lewis County*, 156 Wn.2d 844, at 851, 133 P.3d 458 (2006); *State v. Tjeerdsma*, 104 Wn. App. 878, 886, 17 P.3d 678 (2001).

Earlier attempts to argue for abolition of the public duty doctrine have been rejected by the Court of Appeals. *Moore v. Wayman*, 85 Wn. App. 710, at 710, 934 P.2d 707 (1997) *review denied* 133 Wn.2d 1019 (specifically refusing to depart from *Taylor v. Stevens County*, *supra*, *Atherton Condominium Ass'n v. Blume Development Co.*, *supra*, and *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 669 P.2d 468 (1983) (*overruled in part by Taylor v. Stevens County*, 111 Wn.2d at 168).

Controlling precedent requires application of the public duty doctrine in this case. *See State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997) (Court of Appeals is bound by decisions of the Washington Supreme Court); *Cummins v. Lewis County*, 156 Wn.2d at 857-58 (recently refusing to relax the public duty doctrine); and *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors*, *supra*, 115 Wn.2d at 530 (rejecting argument that the public duty doctrine ought not to apply to alleged negligence involving administration of building codes).

In addition, the argument that the public duty doctrine should be abolished is illogical and unjust. The public duty doctrine recognizes that governmental entities perform functions which are not duplicated by private persons. *Taylor v. Stevens County*, *supra*, 111 Wn.2d at 136-37.

The issuance of building permits and inspection of construction pursuant to those permits are prime examples of governmental functions which do not have a private counterpart. The Washington Supreme Court has recognized that the primary responsibility for assuring compliance with building codes lies with owners and builders (*Taylor v. Stevens County, supra*, 111 Wn.2d at 168), and that to pass off that responsibility to governmental agencies which, at best, perform a spot-checking function would make government the insurer of private conduct, and would relieve those who have the greatest and most direct opportunity to assure proper building construction of any duty to perform properly. This would be particularly unjust as to activities where a builder's error can be hidden from the view of inspectors, and changes can be made after a building passes inspection which make it non-compliant with applicable building codes. *See Taylor v. Stevens County, supra*, 111 Wn.2d at 164 & 170-71 (purpose of public duty doctrine is to avoid making municipalities insurers for every harm that might befall members of the public interacting with such municipalities).

The public duty doctrine avoids making governmental entities the insurers of private conduct which happens to come within the purview of governmental permitting and inspecting. It upholds the limited waiver of sovereign immunity by the Washington Legislature, which made governmental entities liable for their torts to the same extent as private

persons, but “was not intended to create new duties where none existed before.” *Meaney v. Dodd*, *supra*, 111 Wn.2d at 179; *Chambers-Castanes v. King Cy.*, *supra*, 100 Wn.2d 275, 287-88. The public duty doctrine is just and fair and should not be abolished.

IV. MOTION FOR SANCTIONS FOR FRIVOLOUS APPEAL

Pursuant to RAP 18.1 and RAP 18.9, the City of Olympia moves for an award of sanctions equal to the attorney’s fees and costs incurred by the City in defending this appeal because the appeal is frivolous. Counsel for the City is prepared to prove the amount of those fees and costs by affidavit or declaration following the Court’s ruling on this motion.

RAP 18.9 provides in pertinent part:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a), emphasis added.

To determine whether an appeal is sufficiently frivolous to warrant sanctions, the court must first consider the following: (1) a civil appellant has the right to appeal; (2) any doubt as to whether the appeal is frivolous is resolved in the appellant’s favor; (3) the court must consider the record as a whole; (4) an appeal is not frivolous simply because it is affirmed and

its arguments are rejected; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

This appeal is frivolous because the appellants have misstated the facts, as described above, and they have not cited authority supporting their arguments based upon an accurate rendition of the facts. Controlling authority has long applied the public duty doctrine to building code compliance issues, and the cases have strictly examined claims that an exception to the doctrine exists. The Johnsons have made no reasoned argument for ignoring or departing from that law in this case. The Johnsons have not cited authority supporting application of the single exception they relied on under the facts as they must be understood.

In addition, the Johnsons raise an issue for the first time on appeal without arguing or citing authority for an exception to the rule that issues so raised will not be considered, and without citing any controlling or persuasive authority supporting their argument that the public duty doctrine should be abolished. This is clearly improper.

This appeal was doomed from its inception under clearly established law. Undertaking and advancing the appeal was frivolous on the part of the Johnsons, and costly to the City of Olympia. The Court should grant the City's motion, finding that the appeal was frivolous, and

allow the City to submit proof of the costs and attorney's fees incurred in defending it.

V. CONCLUSION

The Johnsons' claims are subject to the public duty doctrine. The City of Olympia cannot be liable on those claims unless an exception to that rule of non-liability is established by competent evidence. Three of the four elements of the single exception on which the Johnsons rely cannot be established by them. Accordingly, it was proper for the trial court to have granted summary judgment dismissing this action as to the City, and that decision should be affirmed. The Johnsons' appeal is frivolous. Sanctions should be awarded equal to the City's costs and attorney's fees incurred in defending the appeal. Counsel for the City should be allowed to submit proof of those fees and costs by affidavit or declaration after the frivolous appeal issue is decided by the Court.

Respectfully submitted this 25th day of August, 2006.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.



W. Dale Kamerrer, WSBA No 8218
Attorney for Respondent, City of Olympia

APPENDIX A

16.10.020 - Nuisance declared

All buildings or structures in the City which by reason of decay, dilapidation, or damage by fire, the elements, or any other cause, are now or hereafter shall become, in the judgment of the Enforcement Officer, dangerous to the lives and safety of persons or property or unsafe for the purpose or purposes for which they are being uses, unsafe or unfit structures and premises as defined in this chapter are declared to be public nuisances.

(Ord. 5903 §1, 1999).

APPENDIX A

16.10.030 - Definitions

For purposes of this chapter, the following definitions shall apply:

A. "Abate" means to repair, replace, remove, destroy, vacate, close, or otherwise remedy a condition which constitutes a violation of this chapter by such means and in such a manner and to such an extent as is required or permitted by this chapter, as determined by the Enforcement Officer or other authorized official.

B. "Building Code" means and includes the Building Code, its components, and related codes adopted by the City of Olympia in Title 16 of the Olympia Municipal Code.

C. "City" means the City of Olympia.

D. "Enforcement Officer" means the Building Official of the City of Olympia or his or her designee.

E. "Premises" means and includes any structure, lot, parcel, real estate, or land, or portion of land whether improved or unimproved, including adjacent sidewalks and parking strips, and any lake, river, stream, drainage way, or wetland, within the territorial limits of the City.

F. "Property," unless otherwise defined or modified, includes premises and/or structures, as required by its context, and may include personal property if required by its context.

G. "Structure" means and includes any dwelling, house, shop, stable, building, or other structure.

H. "Unsafe or unfit" includes, without limitation, any of the conditions described in this subsection applicable to any dwelling, building, structure, or premises which renders it unfit for human habitation or other use. The term "unsafe or unfit" requires the enumerated conditions to be of such a degree as to be dangerous or injurious to the health and safety of the occupants of such dwelling, structure, building, or premises, or the occupants of neighboring dwellings, buildings, structures, or premises or other residents of the City:

1. Whenever any door, aisle, passageway, stairway, or other means of exit is not of sufficient width or size or is not so arranged as to provide safe and adequate means of exit in case of fire or panic.
2. Whenever the walking surface of any aisle, passageway, stairway, or other means of exit is so warped, worn, loose, torn, or otherwise unsafe as to not provide safe and adequate means of exit in case of fire or panic.
3. Whenever the stress in any materials, member, or portion thereof, due to dead and live loads, is more than one and one-half times the working stress or stresses allowed in the Building Code for new buildings of similar structure, purpose, or location.

4. Whenever any portion thereof has been damaged by fire, earthquake, wind, flood, or by any other cause, to such an extent that the structural strength or stability thereof is materially less than it was before such catastrophe and is less than the minimum requirements of the Building Code for new buildings of similar structure, purpose, or location.
5. Whenever any portion or member or appurtenance thereof is likely to fail, or to become detached or dislodged, or to collapse and thereby injure persons or damage property.
6. Whenever any portion of a building, or any member, appurtenance, or ornamentation on the exterior thereof is not sufficient strength or stability, or is not so anchored, attached, or fastened in place so as to be capable of resisting a wind pressure of one-half of that specified in the Building Code for new buildings of similar structure, purpose, or location without exceeding the working stresses permitted in the Building Code for such buildings.
7. Whenever any portion thereof has wracked, warped, buckled, or settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than is required in the case of similar new construction.
8. Whenever the building or structure, or any portion thereof, because of (i) dilapidation, deterioration, or decay; (ii) faulty construction; (iii) the removal, movement, or instability of any portion of the ground necessary for the purpose of supporting such building; (iv) the deterioration, decay, or inadequacy of its foundation; or (v) any other cause, is likely to partially or completely collapse.
9. Whenever, for any reason, the building or structure, or any portion thereof, is manifestly unsafe for the purpose for which it is being used.
10. Whenever the exterior walls or other vertical structural members list, lean, or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one-third of the base.
11. Whenever the building or structure, exclusive of the foundations, shows 33% or more damage or deterioration of its supporting member or members, or 50% damage or deterioration of its nonsupporting members, enclosing or outside walls or coverings.
12. Whenever the building or structure has been so damaged by fire, wind, earthquake, or flood, or has become so dilapidated or deteriorated as to become (i) an attractive nuisance to children; (ii) a harbor for vagrants, criminals, or immoral persons; or as to (iii) enable person to resort thereto for the purpose of committing unlawful or immoral acts.
13. Whenever any building or structure has been constructed, exists, or is maintained in violation of any specific requirement or prohibition applicable to such building or structure provided by the building regulations of this jurisdiction, as specified in the Building Code or Housing Code,

or of any law or ordinance of this state or jurisdiction relating to the condition, location, or structure of buildings.

14. Whenever any building or structure, which, whether or not erected in accordance with all applicable laws and ordinances, has in any nonsupporting part, member, or portion less than 50% or in any supporting part, member, or portion less than 66% of the (i) strength, (ii) fire-resisting qualities or characteristics, or (iii) weather-resisting qualities or characteristics required by law in the case of a newly constructed building of like area, height, and occupancy in the same location.

15. Whenever a building or structure, used or intended to be used for dwelling purposes, because of inadequate maintenance, dilapidation, decay, damage, faulty construction or arrangement, inadequate light, air, or sanitation facilities, or otherwise, is determined by the health officer to be unsanitary, unfit for human habitation, or in such a condition that is likely to cause sickness or disease.

16. Whenever a building or structure, because of obsolescence, dilapidated condition, deterioration, damage, inadequate exits, lack of sufficient fire-resistive construction, faulty electric wiring, gas connections, or heating apparatus, or other cause, is determined by the Fire Chief to be a fire hazard.

17. Whenever any building or structure is in such a condition as to constitute a public nuisance known to the common law or in equity jurisprudence.

18. Whenever any portion of a building or structure remains on a site after the demolition or destruction of the building or structure or whenever any building or structure is abandoned for a period in excess of six months so as to constitute such building or portion thereof an attractive nuisance or hazard to the public.

19. Whenever any building, structure, dwelling, or premises, or any portion thereof, is vacated, is not secured against entry, and is subject to acts of unlawful burning.

I. The terms "**owner**" and "**person**" shall have the same meanings as in the Building Code as adopted by the City of Olympia.

(Ord 6310 §18, 2004; Ord. 5903 §1, 1999).

16.10.040 - Enforcement authority and powers

A. The responsibility for administration and enforcement of this chapter, unless otherwise provided, is vested in the Enforcement Officer as defined in this chapter.

B. The Enforcement Officer may exercise such lawful powers as may be necessary or convenient to effectuate the purposes and provisions of this chapter. These powers shall include the following in addition to others herein granted:

1. To determine, pursuant to standards prescribed by the Building Code, which dwellings within the City are unfit for human habitation;
2. To determine, pursuant to standards prescribed by the Building Code, which buildings, structures, or premises are unfit for other use;
3. To administer oaths and affirmations, examine witnesses and receive evidence;
4. To investigate the dwelling or other property conditions in the City and to enter upon premises to make examinations when the Enforcement Officer has reasonable ground for believing they are unfit for human habitation, or for other use.
5. To enter upon private and public property for such purposes and other purposes of this chapter subject to the provisions of Olympia Municipal Code Section 16.10.150 and in such a manner as to cause the least possible inconvenience to the person(s) in possession, as determined by the Enforcement Officer.

(Ord. 5903 §1, 1999).

16.10.050 - Procedure to abate unsafe or unfit structures or premises

A. Complaint. If, after a preliminary investigation, the Enforcement Officer finds that any structure or premises is unsafe or unfit, he or she shall cause a written complaint to be served either personally or by certified mail with return receipt requested, upon all persons having any interest therein, as shown upon the records of the Thurston County Auditor's office, and shall post the complaint in a conspicuous place on such property. The complaint shall state in what respects such structure or premises is unsafe or unfit as defined in this chapter and may include notice of additional penalties or remedies available to the City under other provisions of the Olympia Municipal Code. If the whereabouts of any of such persons is unknown and cannot be ascertained by the Enforcement Officer in the exercise of reasonable diligence, and the Enforcement Officer makes and files with the City Clerk an affidavit to that effect, then the serving of the complaint upon such persons may be made either by personal service or by mailing a copy by certified mail, postage prepaid, return receipt requested, to each such person at the address of the premises involved in the proceedings, and mailing a copy of the complaint by first class mail to any address of each such person in the records of the County Assessor or County Auditor of Thurston County. The complaint shall contain a notice that a hearing will be held before the Enforcement Officer, at a place specified in the complaint, not less than ten days nor more than thirty days after the serving of said complaint, and that all parties in interest have the right to file an answer to the complaint, to appear in person, or otherwise, and to give testimony at the time and place in the complaint. The rules of evidence prevailing in courts of law or equity shall not be controlling hearings before the Enforcement Officer. A copy of the complaint shall be filed also with the Thurston County Auditor, and the filing of the complaint or order shall have the same force and effect as other lis pendens notices provided by law. The complaint shall be substantially in the following form:

BEFORE THE CITY OF OLYMPIA Building Official

In Re: The premises at [Address])

) No.

)

) COMPLAINT

)

TO: The Owners and Occupiers of the Premises Located at
(Address)

(List names, address, and whether owner or occupier)

This is notice to you that the premises or structure which you own or occupy is unsafe or unfit for the following reasons:

(List facts and applicable OMC code section)

A hearing shall be held at (state date, time, and place of hearing) to determine whether there is sufficient legal cause to order you to take the following action: (list actions requested; e.g. repair, secure against entry, demolition, etc.). You may file a written answer to this complaint with the Enforcement Officer by mailing or delivering it to his or her address listed below. You may also appear at the hearing with or without an attorney. Failure to answer and/or come to the hearing may result in you being required to take the action described in the previous paragraph or, failing that, paying for the City of Olympia to take that action.

DATED this day of 199 /200 .

Enforcement Officer
(Address)
(Telephone and FAX Numbers)

Personal service upon an owner or other party in interest under this chapter may be made by delivering a copy of the complaint or order to that person or by leaving the copy with a person of suitable age and discretion at the place of residence of the owner or other party in interest. The Enforcement Officer shall make and retain written proof of service of the complaint

B. Determination - Reference to Building Code. As provided in RCW 35.80.030, the Enforcement Officer may determine that a structure or premises is unsafe or unfit if he or she finds that one or more defects or conditions exist that are described in Olympia Municipal Code Section 16.10.030(H), according to minimum standards that are prescribed by the currently adopted version of the Building Code:

1. For determining the fitness or safety of a dwelling for human habitation, or any building, structure, or premises for other use;
2. For the use and occupancy of dwellings throughout the City; or
3. For the use and occupancy of any building, structure, or premises used for any other purpose.

C. General Standards. In general, the determination of whether a structure or premises should be repaired or demolished, shall be based on the following standards:

1. The degree of structural deterioration of the structure or premises, or
 2. The relationship that the estimated cost of repair bears to the value of the structure as determined by a qualified real estate appraiser engaged by the City for that purpose.
- An undertaking entered into, at, or prior to the hearing, by a party in interest creates a presumption that the structure or premises can be reasonably repaired. The failure to accomplish

such an undertaking is grounds for the Enforcement Officer to order demolition.

D. Specific Standards for Determining Safety or Fitness-Demolition or Other Remedies.

1. In reaching a judgment that a structure or premises is unsafe or unfit for human habitation, the Enforcement Officer shall consider: (a) dilapidation, (b) disrepair, (c) structural defects, (d) defects increasing the hazards of fire, accidents, or other calamities, such as parts standing or attached in such manner as to be likely to fall and cause damage or injury, (e) inadequate ventilation, (f) uncleanliness, (g) inadequate light, (h) inadequate sanitary facilities, (i) inadequate drainage, (j) substandard conditions.

2. If these or other conditions are found to exist to an extent dangerous or injurious to the health or safety of the structure's occupants, or the occupants of neighboring structures or of other residents of the City of Olympia, and if (a) structural deterioration is of such degree that (i) vertical members list, lean, or buckle to the extent that a plumb line passing through the center of gravity falls outside the middle third of its base, or (ii) thirty-three percent (33%) of the supporting members show damage or deterioration, or (b) the estimated cost of restoration exceeds sixty percent (60%) of the value of the structure, or (c) the structure has been damaged by fire or other calamity, the estimated cost of restoration exceeds thirty percent (30%) of the value of the structure and it has remained vacant for six months or more, the Enforcement Officer shall order the structure or premises demolished and the land suitably filled and cleared, or shall order the structure or premises demolished and the land suitably filled and cleared, or shall order the property immediately vacated and secured as completely as possible pending demolition. "Value" as used in this paragraph, shall be determined by reference to a current edition of "Building Valuation Data" published by the International Code Council or, if not published, as determined by the Enforcement Officer.

E. Alternative Action. If by reason of any of the above conditions, a structure is unfit, but no public necessity is found for its immediate demolition, the Enforcement Officer may take other action, such as causing the property to be cleaned, cleared, vacated, secured, or otherwise repaired, which will promote the public health, safety, or general welfare.

F. Findings and Order. If, after the required hearing, the Enforcement Officer determines that the dwelling or other structure or premises is unsafe or unfit for human habitation or that the structure or premises is unfit for other use, he or she shall make written findings of fact in support of that determination, and shall issue and cause to be served upon each owner and party in interest thereof, as provided in Subsection (A) of this section, and shall post in a conspicuous place on the property, and order which (i) requires the owner or party in interest, within the time specified in the order, to repair, alter, or improve such dwelling, structure, or premises to render it fit for human habitation, or for other appropriate use, or to vacate and close the dwelling, structure, or premises, if that course of action is deemed lawful and reasonable on the basis of the standards set forth as required in Subsections (c) and (d) of this section; or (ii) requires the owner or party in interest, within the time specified in the order,

to remove or demolish the dwelling, structure, or premises, if that course of action is deemed lawful and reasonable on the basis of those standards. An order may require the owner to take effective steps to board up or otherwise bar access to the structure or premises, if deemed necessary for public safety, pending further abatement action. The order may be in substantially the same form which appears below and may include notice of additional penalties or remedies available to the City under other provisions of this code.

BEFORE THE CITY OF OLYMPIA Building Official

In Re: The premises at [Address])

) No.

)

) ORDER OF ABATEMENT

)

On the day of , 199_/200_ at (time) at (list place, address), a hearing was held before the City of Olympia Building Official pursuant to notice given by him/her through a complaint issued on (date). (If applicable, list who appeared and short summary of testimony.) The Building Official after hearing made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. (List out)

CONCLUSIONS OF LAW

1. (List out)

Whereupon the Building Official issued the following order:

ORDER

DATED this day of 199_/200_.

Building Official
(Address)
(Telephone and FAX Numbers)

If no appeal is filed as provided in this chapter, a copy of the order shall be filed with the Thurston County Auditor, and shall be a final order.

The Enforcement Officer shall make and retain a record of service, substantially in the form prescribed in OMC 16.10.050(A), which such modifications as may be appropriate.

G. Abatement by City. If the owner, following exhaustion of his or her rights of appeal, fails to

comply with the final order to repair, alter, improve, vacate, close, remove or demolish the dwelling, structure, or premises, or to take other required action, the Enforcement Officer may direct or cause such dwelling, structure, or premises to be repaired, altered, improved, vacated, and closed, removed, or demolished, and to take such further steps as may be reasonable and necessary to prevent access to the structure or premises, for public health or safety reasons, pending abatement. The Enforcement Officer, with the assistance of the City Attorney, may apply to the Superior Court for any legal or equitable remedy to enforce his or her order.

(Ord 6310 §19, 2004; Ord. 5903 §1, 1999).

FILED
COURT OF APPEALS
DIVISION II

06 AUG 28 AM 10:37

STATE OF WASHINGTON

BY _____
DEPUTY

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

RICHARD JOHNSON and JEANNIE
JOHNSON, husband and wife,

Appellants,

vs.

UPCLOSE HOME INSPECTION LTD,
et al.,

Respondents.

NO. 34401-7-II

**DECLARATION OF FILING &
SERVICE**

PURSUANT TO RCW 9A.72.085, Linda L. Olsen declares as follows:

On Friday, August 25, 2006, I filed and served via U.S. Mail, postage prepaid, the originals and/or copies of the Brief of Respondent City of Olympia and this Declaration of Filing and Service with the Clerk of the above-entitled court and on the attorney for appellants as follows:

Joseph Scuderi
Cushman Law Office
924 Capitol Way S.
Olympia, WA 98501-8239

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

DATED this 25th day August, 2006, at Olympia, Washington.


Linda L. Olsen