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No. 40429-0-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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DANIEL AND LORI FISHBURN,

Appellants,

v.

PIERCE COUNTY PLANNING AND  
LAND SERVICES DEPARTMENT,

and

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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Appellants, Daniel and Lori Fishburn (“Fishburns”), reply to the Briefs of Respondents Pierce County Planning and Land Services Department (“PALS”) and Tacoma-Pierce County Health Department (“TPCHD”).

**I. STATEMENT OF THE CASE**

Not surprisingly, the defendants have a different take on the facts of this case than the Fishburns do. The Fishburns purchased a home that was constructed on illegal fill<sup>1</sup> and with an on-site sewage disposal system (“septic system”) that was not only *not* constructed per the approved design,<sup>2</sup> but which as installed violated design regulations by failing to have a reserve drainfield.<sup>3</sup>

Upon discovering catastrophic drainage problems on the property (including flooding of the home’s crawlspace<sup>4</sup>), Mr. Fishburn installed the bulkhead referred to in PALS’ Notice of Violation<sup>5</sup> as an emergency solution.<sup>6</sup> At page 4 of its Brief, PALS states that the work Mr. Fishburn was undertaking “required permits.” However, as Mr. Fishburn had previously informed PALS’ Assistant Director Gordon Aleshire, this emergency work was covered by the Pierce County Code exemptions from

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<sup>1</sup> CP 208, 210.

<sup>2</sup> CP 211.

<sup>3</sup> Appendix A.

<sup>4</sup> CP 122.

<sup>5</sup> CP 158.

<sup>6</sup> CP 122-23. Note that the dock referred to in the Notice of Violation had been constructed by the previous owner and did not figure further in this matter.

building permits.<sup>7</sup>

After discovering issues with their septic system, the Fishburns had tests performed<sup>8</sup> and hired consulting architects and engineers.<sup>9</sup> At page 4 of its Brief, PALS states that one of the Fishburns' independent tests "revealed the septic system was failing, and the Fishburns moved out." PALS fails to note that the Fishburns moved out because Vergia Seabrook, Environmental Health Specialist II with TPCHD, reviewed the "independent assessment" and told the Fishburns they had to move out.<sup>10</sup>

One of the possible solutions that the Fishburns and their consultants considered to solve the drainage problem was to raise and move the house.<sup>11</sup> At page 11 of its Brief, PALS states that "plaintiffs' architect *later concluded that it would be impossible to move and raise their house.*"<sup>12</sup> In fact, the architect came to no such conclusion. Rather, what the Fishburns' consultant concluded was that it would be futile<sup>13</sup> to raise the house because the septic system's only "drainfield had failed or was never functioning in the first place . . . [and] there [was] no other place on the lot to construct a drainfield."<sup>14</sup> The architect also noted that "[t]he septic system drainfield was not installed in the allowed primary

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<sup>7</sup> CP 182-84.

<sup>8</sup> CP 132, 221.

<sup>9</sup> CP 206-08, 210-12.

<sup>10</sup> CP 132.

<sup>11</sup> CP 208.

<sup>12</sup> Emphasis added.

<sup>13</sup> As PALS correctly stated in its Brief at p. 4.

<sup>14</sup> CP 211; *see also* CP 208.

drainfield area as shown on [the] approved original design but in the reserve area.”<sup>15</sup> In fact, the existing septic system was below the high water mark of Lake Tapps<sup>16</sup> and failed to include the required two drainfields.<sup>17</sup>

At page 5 of its Brief, TPCHD states that “the *Fishburns could not resolve the septic problems.*” In reality, the Fishburns went to great lengths to find a fix to the catastrophic failure of their septic system, but TPCHD rejected<sup>18</sup> implementation of any of the possible solutions suggested by plaintiffs’ engineers<sup>19</sup> and defendants’ own personnel.<sup>20</sup> The reason, of course, is that *no* solution is possible because the property is, and always has been, unsuitable both for the construction of a house and for the installation of a septic system under applicable regulations.

## II. ARGUMENT

### A. **Issue No. 1: The Legislative Intent Exception to the Public Duty Doctrine Applies to the Fishburns’ Claims.**

All the parties rely on *Taylor v. Stevens County*,<sup>21</sup> which holds that under the legislative intent exception to the Public Duty Doctrine, “the public duty rule of non-liability does not apply where the Legislature

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<sup>15</sup> CP 211.

<sup>16</sup> CP 131, 206.

<sup>17</sup> See Appendix A.

<sup>18</sup> CP 133-34.

<sup>19</sup> CP 133-34, 210-12

<sup>20</sup> CP 240.

<sup>21</sup> 111 Wn.2d 159, 759 P.2d 447 (1988), cited in PALS’ Brief at 6-7, 14-15, and TPCHD’s Brief at 6-7, 8-9.

enacts legislation for the protection of persons of the plaintiff's class."<sup>22</sup> Furthermore, all parties agree that the Washington Supreme Court's opinion in *Taylor* relied on and reaffirmed the holding in *Halvorson v. Dahl*<sup>23</sup> that a public entity can be held liable for negligence if the statute or code at issue "by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons."<sup>24</sup> What PALS and TPCHD dispute is that the legislative exception to the Public Duty Doctrine applies in this case under Pierce County Code § 1.16.010<sup>25</sup> and Ch. 8.36<sup>26</sup> ("On-Site Sewage Disposal Systems") and under RCW 70.118.010.<sup>27</sup>

In *Taylor*, the Washington Supreme Court drew a distinction between the State Building Code at issue in that case and the Seattle Housing Code at issue in *Halvorson*. The purpose of the State Building Code, RCW 19.27.020, was "[t]o promote the health, safety and welfare of the occupants or users of buildings and structures and the general public."<sup>28</sup> By contrast, Seattle Housing Code section 27.04.020, provided for protection of a particular class of persons:

There exist, within the city of Seattle, dwellings and other buildings or portions thereof, occupied or designed for human habitation together with appurtenant structures and premises, which are unfit for human habitation,

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<sup>22</sup> PALS' Brief at 5; *Taylor v. Stevens County*, 111 Wn.2d 159, 164, 759 P.2d 447 (1988).

<sup>23</sup> 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

<sup>24</sup> *Id.*

<sup>25</sup> See Appendix B.

<sup>26</sup> *Id.*

<sup>27</sup> See Appendix C.

<sup>28</sup> *Taylor*, 111 Wn.2d at 164.

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.<sup>29</sup>

RCW 70.118.010, which applies in this case, reads in part as follows:

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

(Emphasis added.) This language is analogous to that of the statute in *Halvorson*. It describes the “conditions and circumstances . . . dangerous and a menace to the health, safety, morals or welfare of”<sup>30</sup> those who are dependent on septic systems (“significant health hazards, loss of property values, and water quality degradation”) and indicates the need to develop correctional measures for existing substandard systems, analogous to the goal of the Seattle Building Code in providing “effective means for

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<sup>29</sup> *Halvorson*, 89 Wn.2d at 677 n.1.

<sup>30</sup> *Id.* at 676 n.1.

enforcement of minimum standards.”<sup>31</sup> Therefore, like the Seattle Housing Code, RCW Ch. 70.118 was enacted for the benefit of a specifically identified group of persons, *i.e.*, those totally dependent on septic systems.

Despite the statute’s language, TPCHD argues that RCW 70.118.010 protects the “members of the general public.”<sup>32</sup> But neither RCW 70.118.010 nor any other provision in Ch. 70.118 RCW includes a reference to the public, the public health and welfare, or even to the general citizenry of the State of Washington. And, clearly, the Legislature knows how to indicate an intent to protect the general public.<sup>33</sup>

TPCHD further argues that because RCW 70.118.010 does not reference the general public in addition to the specific class, it must apply to the general public only.<sup>34</sup> But if this were true, then the Court would have to interpret such statutes as Ch. 70.92 RCW -- whose “Legislative intent” section, RCW 70.92.100, reads, “It is the intent of the legislature that, notwithstanding any law to the contrary, plans and specifications for the erection of buildings through the use of public or private funds shall make special provisions for elderly or physically disabled persons” -- as providing for the welfare of the general public only.

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<sup>31</sup> *Id.*

<sup>32</sup> TPCHD’s Brief at 12.

<sup>33</sup> *See, e.g.*, RCW 70.118A.010, On-site sewage disposal systems - marine recovery areas, and RCW 70.118B.050, Large on-site sewage disposal systems, which both refer to protection of the public health in general.

<sup>34</sup> TPCHD’s Brief at 14.

Both PALS and TPCHD also rely on *Stannik v. Bellingham-Whatcom County District Board of Health*.<sup>35</sup> PALS argues that *Stannik* stands for the proposition that “[l]ike building codes, sewage control rules and regulations serve the public generally, and do not create an actionable duty on governmental entities.”<sup>36</sup> *Stannik* certainly stands for the general rule of non-enforceability of building codes and regulations, but it lends no support to the defendants’ claim that all sewage control rules, including RCW 70.118.010, do not satisfy the requirements of the legislative intent exception. *Stannik* was analyzing only the Whatcom County Sewage Control rules, and did not even mention RCW 70.118.010 *et seq.*<sup>37</sup>

The legislative intent exception to the Public Duty Doctrine applies to the Fishburns’ claims against TPCHD because the Fishburns fall within the particular and circumscribed class of persons who are not served by sanitary sewers and who therefore *must* rely on on-site sewage systems described in RCW 70.118.010. The facts also show that the Fishburns suffered the precise type of harm the statute addresses:

- “significant health hazards” -- in fact, the danger to the Fishburn family’s health was so great that they were required *by TPCHD* to vacate their home on an emergent basis<sup>38</sup>;

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<sup>35</sup> 48 Wn. App. 160, 737 P.2d 1054 (1987).

<sup>36</sup> PALS Brief at 15.

<sup>37</sup> *Stannik*, 48 Wn. App. 160, *passim*.

<sup>38</sup> CP 132, 136, 260.

- “loss of property values” -- the Fishburns’ home and property, which they purchased for \$1.6 million, became completely worthless<sup>39</sup>; and
- “water quality degradation” -- the failure of their on-site septic system adversely affected their well water.<sup>40</sup>

TPCHD argues that the Fishburns’ “claim must fail because they cannot show any underlying violation exists.” However, the Fishburns presented evidence to show that TPCHD approved the Fishburns’ septic system based on “as-built” drawings despite TPCHD having already determined that the soil in the area of the primary drainfield area was unsuitable.<sup>41</sup> This left the system without a reserve drainfield, which is a violation of Tacoma-Pierce County Board of Health Resolution No. 2002-3411 – Land Use Regulation, at 14.1.c.,<sup>42</sup> and thus TPCHD violated its duty to condition its approval of on-site sewage systems on compliance with applicable standards. Furthermore, the system was approved when the as-built did not comply with the approved design.<sup>43</sup>

PALS, although not TPCHD, argues that the Fishburns’ claims must fail because TPCHD “exercised discretionary judgment in

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<sup>39</sup> CP 136, 257.

<sup>40</sup> Note that the Fishburns’ failed on-site septic system also affected the quality of its well water. CP 240.

<sup>41</sup> CP 369, referencing the impermeable hardpan as found on the Fishburns’ property.

<sup>42</sup> See Appendix A.

<sup>43</sup> CP 211.

implementing corrections;”<sup>44</sup> and accordingly “rejected each and every proposal as unfeasible.”<sup>45</sup> However, TPCHD did not implement any corrections. And there is no evidence that TPCHD concluded that each and every proposal put forward was not feasible. In fact, TPCHD told Mr. Fishburn that its reason for rejecting his proposal for on-site treatment of septic effluent was that if TPCHD allowed it on the Fishburn property, all the other residents would want it, too.<sup>46</sup>

Finally, PALS argues that even “if a violation did exist, it is not causally related to” the plaintiffs’ property damage.<sup>47</sup> However, the Fishburns do not allege, as PALS suggests, that the “emails and phone calls the plaintiff had with the County”<sup>48</sup> were the cause of their damages, but rather that they are evidence of the defendants’ actions -- or inaction -- that caused the Fishburns’ damages.

**B. Issue No. 2: The Failure to Enforce Exception to the Public Duty Doctrine Applies to the Fishburns’ Claims.**

The parties agree that the failure to enforce exception has at least three elements: (1) the defendant has actual knowledge of an inherently dangerous and hazardous condition that violates a statute, (2) the defendant has a statutory duty to correct the problem, and (3) the

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<sup>44</sup> PALS’ Brief at 18.

<sup>45</sup> *Id.*

<sup>46</sup> CP 134.

<sup>47</sup> PALS’ Brief at 18.

<sup>48</sup> *Id.* at 19.

defendant has failed to meet that duty.<sup>49</sup> TPCHD adds a fourth element, *i.e.*, that the plaintiff is within the class the statute protects.<sup>50</sup> This fourth element must not be confused with the “particular and circumscribed” class that must exist for the legislative intent exception to apply. *Campbell v. City of Bellevue*,<sup>51</sup> from which this element apparently derived,<sup>52</sup> reveals that the plaintiff must to be within the class of people affected by the dangerous condition created by violation of the statute. Here, the Fishburns certainly fall within the class of persons affected by the defendants’ failure to enforce their statutory duties because the drainage problems and failed septic system in question created the inherently dangerous condition on the Fishburns’ own property.

PALS argues that the facts alleged in the Fishburns’ complaint are “legally insufficient to support a claim of actual knowledge of an inherently dangerous condition at the time permits were issued.”<sup>53</sup> However, the Fishburns are appealing the trial court’s decision on a motion for summary judgment, where the Fishburns’ burden was to establish a triable issue of fact as to the elements of their claims.

It is undisputed that PALS not only allowed but directed the

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<sup>49</sup> See *id.* at 19, citing *Moore v. Wayman*, 85 Wn. App. 710, 722-23, 934 P.2d 707 (1997) (citing *Bailey v. Forks*, 85 Wn. App. 262, 268-69, 737 P.2d 1257 (1987)); TPCHD’s Brief at 16.

<sup>50</sup> TPCHD’s Brief at 16.

<sup>51</sup> 85 Wn.2d 1, 530 P.2d 234 (1975).

<sup>52</sup> See *Smith v. City of Kelso*, 112 Wn. App. 277, 282, 48 P.3d 372 (2002).

<sup>53</sup> *Id.* at 20.

foundation be built on quarry spalls, below the high-water mark of Lake Tapps.<sup>54</sup> PALS approved construction despite knowing that the grade of the soil around the house sloped toward it instead of away from it in violation of section R401.3 of the International Residential Code (“IRC”),<sup>55</sup> and that no foundation drains had been installed as required by IRC section R405.1.<sup>56</sup> These violations resulted in the flooding of the crawlspace and growth of mold in the house,<sup>57</sup> both inherently dangerous conditions. Under PCC §§ 1.16.010<sup>58</sup> and 17C.10.050,<sup>59</sup> PALS had the duty to enforce, *i.e.*, to take steps to correct, these violations, but did not do so.

TPCHD argues that the failure to enforce exception does not apply to plaintiffs’ claims because the requirement in PCC 8.36.110 is “analogous to the ordinance addressed by this Court in *Smith* [*v. City of Kelso*].”<sup>60</sup> In *Smith*, the Court found that “the specific design and construction standards [lay] within the city engineer’s discretion, and he did not require site-specific soil studies.”<sup>62</sup> It further found that “the ordinance set[] no requirements that the City [could] enforce against a

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<sup>54</sup> CP 139.

<sup>55</sup> See Appendix D. See also CP 124-126.

<sup>56</sup> See Appendix D.

<sup>57</sup> CP 122, 130, 207.

<sup>58</sup> See Appendix B.

<sup>59</sup> *Id.*

<sup>60</sup> 112 Wn. App. 277, 48 P.3d 372 (2002).

<sup>61</sup> TPCHD’s Brief at 21.

<sup>62</sup> *Smith*, 112 Wn. App. at 284.

developer or homeowner; a developer or homeowner cannot violate this ordinance.”

In this case, however, the specific design and construction standards were not within Pierce County’s discretion, nor was TPCHD without an enforcement mechanism. Pierce County Code § 8.36.080(D)<sup>63</sup> provides:

Design for an on-site sewage disposal system shall be made to the Health Officer who *must deny the application* if the design is not adequate for safe and healthful operation of the system and/or does not meet the requirements of this Chapter, the Rules and Regulations of the Board of Health, and WAC 248-96 [now WAC 246-272A].<sup>64</sup>

This section of the Pierce County Code incorporates, *inter alia*, the very detailed design specifications and standards set out (now) in WAC 246-272A-0200 through -0238.<sup>65</sup>

Moreover, this requirement for denial of the application is ministerial, not discretionary. Therefore, PALS’s argument that the failure to enforce exception does not apply because the Code could not be enforced against a developer or homeowner<sup>66</sup> is without merit. Requiring the denial of an application that does not meet requirements is the same as enforcing the design specifications and standards.

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<sup>63</sup> See Appendix B.

<sup>64</sup> See Appendix B (Pierce County Code § 8.36.080, “Design”), which incorporates WAC 248-96. WAC 248-96 was subsequently recodified in WAC 246-272, then repealed effective 9/15/05, and thereafter promulgated in WAC 246-272A. See Appendix E.

<sup>65</sup> See Appendix E.

<sup>66</sup> PALS’ Brief at 22-23.

TPCHD also argues that it had no duty to take specific action to correct a violation.<sup>67</sup> But the plain language of RCW 70.118.030(2)<sup>68</sup> requires TPCHD to work toward correcting violations, although it provides for discretionary judgment in determining how to implement corrections.

There is no dispute that the defendants failed to enforce any and all violations of statutes and codes that were intended to, and would have, prevented or corrected the resulting problems that drove the plaintiffs from their home and rendered it worthless. Consequently, PALS's and TPCHD's arguments that they had no duty to enforce the standards they were created to enforce,<sup>69</sup> and to correct violations that produce inherently dangerous conditions such as those that developed on the Fishburns' property, lack merit. At a minimum, there are triable issues of fact and therefore the trial court erred in finding that the failure to enforce exception to the public duty doctrine does not apply as a matter of law.

**C. Issue No. 3: The Special Relationship Exception to the Public Duty Doctrine Applies to the Fishburns' Claims Against PALS.**

PALS argues that “[t]he Fishburns cannot show a special relationship existed because they had no direct contact with the defendants

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<sup>67</sup> TPCHD's Brief at 22.

<sup>68</sup> See Appendix C.

<sup>69</sup> See Appendix B (PCC 18.140.040 (“It shall be the duty of the Planning and Land Services (PALS) Department to enforce the provisions of the Pierce County Development Regulations.”)); See Appendix C (RCW 70.05.070 (“The local head officer . . . shall: \* \* \* (1) Enforce . . . the public health statutes of the state”)).

when the alleged negligence occurred.”<sup>70</sup> However, Mr. Fishburn had numerous contacts with PALS’ personnel while he was attempting emergency repairs to his property in hopes of correcting the flooding and drainage problems that directly resulted from construction of the Fishburns’ house on unsuitable soil. Mr. Fishburn talked or otherwise communicated with PALS’ employees David McCurdy,<sup>71</sup> Gordon Aleshire (its Assistant Director),<sup>72</sup> Thomas Eddy,<sup>73</sup> David Acree,<sup>74</sup> Stephen Widener,<sup>75</sup> Roger Jernegan,<sup>76</sup> Lorrie Chase,<sup>77</sup> Chuck Kleeburg,<sup>78</sup> Matt Shaw,<sup>79</sup> and finally PALS’ attorney, Cort O’Connor.<sup>80</sup> After Mr. McCurdy issued a Notice of Violation asserting that permits were required for the emergency mitigation work Mr. Fishburn was performing on his property,<sup>81</sup> Mr. Fishburn met with Mr. Aleshire (and others), who assured Mr. Fishburn that an exemption and any necessary permits would be expedited.<sup>82</sup> Then about a week later, Mr. Aleshire canceled a meeting scheduled with Mr. Fishburn, alleging an “impasse.”<sup>83</sup> Upon Mr.

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<sup>70</sup> PALS’ Brief at 8.

<sup>71</sup> CP 124.

<sup>72</sup> CP 125-29.

<sup>73</sup> CP 125-26.

<sup>74</sup> CP 126.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> CP 126-27.

<sup>78</sup> CP 128.

<sup>79</sup> *Id.*

<sup>80</sup> CP 129.

<sup>81</sup> CP 158.

<sup>82</sup> CP 126-27.

<sup>83</sup> CP 169, *see also* CP 127.

Aleshire's advice, Mr. Fishburn appealed the Notice of Violation,<sup>84</sup> only to be told by Mr. Kleeburg to contact the County prosecutors to seek a settlement.<sup>85</sup> The next day, Mr. Kleeburg changed his mind, indicating his belief that settlement was not an option after all.<sup>86</sup> A few days later, Mr. Shaw posted a stop work notice on the Fishburns' property, referencing a Correction Notice that would follow "explain[ing] the permit requirements to resolve this violation."<sup>87</sup> Mr. Aleshire refused to speak with Mr. Fishburn about the Correction Notice and referred him to Mr. O'Connor, PALS' attorney.<sup>88</sup> Then the Correction Notice arrived with an entirely different -- and untrue -- allegation of what Mr. Fishburn was doing on his property.<sup>89</sup>

PALS does not dispute this sequence of events, nor does it attempt to explain the obvious discrepancies between the Notice of Violation and the Correction Notice, or how Mr. Fishburn was expected to figure out what to do without communicating directly with PALS and getting responsive answers. Even Mr. Aleshire admits to assuring Mr. Fishburn on March 20, 2008 that necessary permits would be expedited.<sup>90</sup> But less than a week later, on March 26, 2008, Mr. Fishburn was forbidden from

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<sup>84</sup> CP 174, *see* CP 128.

<sup>85</sup> CP 128.

<sup>86</sup> *Id.*

<sup>87</sup> CP 180, *see* CP 128-29.

<sup>88</sup> CP 129, 186.

<sup>89</sup> CP 193-97; *see* CP 129.

<sup>90</sup> CP 565.

contacting PALS personnel, except its attorney.<sup>91</sup> PALS argues on behalf of TPCHD that “[n]othing short of an utter failure to communicate with plaintiffs in regard to the septic system failure would constitute a violation” of TPCHD’s statutory duties. Yet the uncontroverted evidence plaintiffs submitted in response to defendants’ summary judgment motion shows that this is exactly what PALS did in its dealings with the Fishburns: after making numerous contacts that included express assurances on which Daniel Fishburn relied, PALS handed the matter over to counsel and refused to communicate further, thereby -- based on PALS’ own standards -- violating its duty to the Fishburns.

**D. Issue No. 4: The Fishburns Have a Valid Claim  
Based on an As-Applied Regulatory Taking.**

*An As-Applied Regulatory Taking Will Lie Even  
Where There Has Been No Change in Regulations.*

Both PALS and TPCHD argue that the Fishburns cannot state a valid regulatory taking claim because they assert that such a claim turns on a change of regulations after the time of investment in the property.<sup>92</sup> This is not true. As this Court noted in *Burton v. Clark County*,<sup>93</sup>

The government may “take” private land for public use with or without formal condemnation proceedings. The nature of its conduct may be a physical act such as invading and occupying the land; a legislative act such as enacting a

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<sup>91</sup> CP 127.

<sup>92</sup> PALS’ Brief at 27; TPCHD’s Brief at 29.

<sup>93</sup> 91 Wn. App. 505, 515-16, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015 (1999) (footnotes omitted, emphasis added).

statute, ordinance or regulation; or a quasi-judicial act such as denying or conditioning a development permit.

As examples of cases in this latter category, this Court cited *Dolan v. City of Tigard*,<sup>94</sup> *Nollan v. California Coastal Commission*,<sup>95</sup> and *Sparks v. Douglas County*.<sup>96</sup> All of these were cases in which the public entity conditioned approval of the plaintiffs' permits for property improvements on the dedication of a portion of the property to public use. No changes in regulations were involved.

This latter category of takings cases stems from the public entity's application of currently-existing regulations, no matter when they were enacted, to a particular set of facts, and is referred to as "as-applied" taking cases, the type presented in *Lucas v. South Carolina Coastal Council*.<sup>97</sup> Whether an unconstitutional taking has occurred flows from the analysis of a taking as beginning not with a determination of when a particular regulation was enacted, but, as *Lucas* instructs, with a determination of what the "bundle of rights" was that the plaintiff had before and after the public entity's actions.<sup>98</sup>

When the Fishburns purchased the property at issue in this action, they acquired a house with a permitted septic system. Upon failure of the

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<sup>94</sup> 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

<sup>95</sup> 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

<sup>96</sup> 127 Wn.2d 901, 904 P.2d 738 (1995).

<sup>97</sup> 505 U.S. 1003, 1066 n.4, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (Stevens, J. dissenting) ("Here, of course, Lucas has brought an as-applied challenge.")

<sup>98</sup> *Id.*, 505 U.S. at 1027.

septic system, plaintiffs discovered that the house had been built on illegal fill,<sup>99</sup> and that the septic system had been installed according to a design that had not been approved<sup>100</sup> and on property that had room for at most only one drainfield, not the required two.<sup>101</sup> As defendants have noted, the same regulations that were in existence when the house and its septic system were permitted are the ones that currently apply. They are also the same regulations that defendants have now applied to prevent the Fishburns from being able to fix their problems. There is no dispute that because the problems have not been fixed, the Fishburns' home has been condemned and declared worthless, and they have lost their investment.

[T]he Fifth Amendment is violated when land use regulation “does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*”<sup>102</sup> Defendants do not even suggest that there might be some economically viable use of the Fishburn property. Accordingly, because the Fishburns have suffered a total regulatory taking, they are entitled to just compensation from the defendants.<sup>103</sup>

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<sup>99</sup> CP 208, 210.

<sup>100</sup> CP 524.

<sup>101</sup> See Appendix A (Tacoma-Pierce County Board of Health Resolution No. 2002-3411 – Land Use Regulation 14.1.c “Reserve Area”).

<sup>102</sup> *Lucas*, 505 U.S. at 1016 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (citations omitted) (emphasis added by the *Lucas* Court)).

<sup>103</sup> *Id.* at 1026 (referring to the Court’s “categorical rule that regulatory takings must be compensated”).

*The Fishburns have not waived their  
regulatory taking claim.*

Although it is true that the Fishburns' First Amended Complaint does not include a cause of action for regulatory taking *per se*, it is also true that the Complaint does contain allegations that support such a cause of action:

The plaintiffs' damages are a result of these careless negligent actions and related events at the property; plaintiffs have suffered *the complete loss of their home and property.*<sup>104</sup>

The failed septic system . . . *essentially and completely interferes with their free use and comfortable enjoyment of their Property.*<sup>105</sup>

*The Property is a total loss*, and these defendants should have never allowed construction to take place on the Property in the first place. In addition to the numerous problems with the home, the property is without a viable drain field for septic disposal, and no other septic disposal options are available.<sup>106</sup>

And it is also true that the Fishburns presented to the trial court all of the facts upon which the claim is based:

The County has concluded that because this property never should have been developed and allowed to be developed by these agencies because the house never should have been built on this property, it is worth less than zero. This is a property that these folks purchased for \$1.6 million. They have been constructively evicted from it, and this agency concluded -- this County concluded that it's worthless.<sup>107</sup>

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<sup>104</sup> CP 10, ¶37 (emphasis added).

<sup>105</sup> *Id.*, ¶38 (emphasis added).

<sup>106</sup> CP 11, ¶43 (emphasis added).

<sup>107</sup> RP [February 5, 2010 Verbatim Report of Proceedings] 15:10-17.

TPCHD concedes that RAP 2.5(a) “allows an appellate court to consider a ‘manifest error affecting a constitutional right’ for the first time on appeal” if “the error is manifest” and “the error is truly of constitutional dimension.”<sup>108</sup> TPCHD does not appear to dispute that a regulatory taking is “truly of constitutional dimension.” TPCHD argues, however, that “there can be no manifest error” because, it asserts, the Fishburns cannot state a claim for regulatory taking and therefore even if the trial court had considered the issue, it would still have granted summary judgment in favor of the defendants.<sup>109</sup> But as demonstrated in the preceding subsection, the Fishburns *can* state a valid claim for an as-applied taking. Further, the trial court’s decision that the defendants owed the Fishburns no duty of any sort and are not liable for any of their damages only confirms the totality of the Fishburns’ loss.

In any case, an appellate court has discretion to consider any new issue raised for the first time on appeal. RAP 2.5(a) “is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level.”<sup>110</sup> Particularly,

if an issue raised for the first time on appeal is “arguably related” to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories

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<sup>108</sup> TPCHD’s Brief at 27 n.1 (citing *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010)).

<sup>109</sup> *Id.*

<sup>110</sup> *Pulcino v. Federal Express*, 141 Wn.2d 629, 649, 9 P.3d 787 (2000).

for the first time on appeal.<sup>111</sup>

Based on the undisputed facts, the relationship of a regulatory taking theory to the issues raised in the trial court is compelling, and the Court should exercise its discretion to review this issue.

**E. Issue No. 5: The Trial Court Abused Its Discretion in Denying Plaintiffs' Motion for Reconsideration.**

PALS characterizes the trial court's oral rulings as concluding that no exception to the Public Duty Doctrine applied in this case.<sup>112</sup> TPCHD states that "the trial court's ruling gives no indication that it was based on the inapplicability of any exception in particular."<sup>113</sup> In fact, however, the trial court's rulings show that it focused exclusively on the special relationship exception:

[E]verboddy that buys a house or a building or other structure, *no matter how long that building has been standing*, if it turns out that the permits should not have been issued, I mean, you could be, potentially, setting up people, you know, *for years* coming back after the County . . . .<sup>114</sup>

*[W]hen all the County's platting services were being done*, it was with two owners back, not the Fishburns . . . .<sup>115</sup>

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<sup>111</sup> *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) (citing *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, [872 n.1,] 751 P.2d 329 (1988)).

<sup>112</sup> PALS' Brief at 29 ("The trial court properly ruled none of the exceptions to the public duty doctrine applies in this case.").

<sup>113</sup> TPCHD's Brief at 33.

<sup>114</sup> RP [February 5, 2010 Verbatim Report of Proceedings] 18:24-19:4 (hearing on defendants' Motion for Summary Judgment) (emphasis added).

<sup>115</sup> RP [February 26, 2010 Verbatim Report of Proceedings] 14:5-7 (hearing on plaintiffs' Motion for Reconsideration) (emphasis added).

Whether the Fishburns had contact with the County when their house was constructed has nothing to do with whether or not defendants owed (owe) the Fishburns a duty of care in correcting the resulting and presently-existing problems -- a failed septic system, flooded crawlspace, and mold infestation. There is nothing in the record to suggest that the trial court considered the applicability of any of the exceptions to the Public Duty Doctrine to the Fishburns' allegations and evidence of the defendants' actions in dealing with the plaintiffs' attempts *to correct the problems* that defendants had created in the first place. The trial court's failure to do so was manifestly unreasonable and therefore an abuse of discretion.<sup>116</sup>

In particular, the Fishburns asked the trial court to reconsider its decision to dismiss their claim against PALS for gross negligence and violation of RCW 64.40.020.<sup>117</sup> These claims are based on the Fishburns' contacts with PALS *after* they purchased the property. The trial court's failure to consider application of exceptions to the Public Duty Doctrine defense to the Fishburns' claims based on their post-purchase contacts with the defendants is untenable, and therefore an abuse of discretion.<sup>118</sup>

Furthermore, there can be no question that the defendants' Motion for Summary Judgment Dismissal *Based on Public Duty Doctrine*<sup>119</sup> did *not* put at issue the Fishburns' claim under RCW 64.40.020, which

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<sup>116</sup> See *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

<sup>117</sup> CP 479-80.

<sup>118</sup> See *Dix*, 160 Wn.2d at 833.

<sup>119</sup> CP 23 (emphasis added).

protects applicants for permits from the “arbitrary, capricious, [or] unlawful” acts of a public agency.<sup>120</sup> The defendants did not mention the claim in either their Motion for Summary Judgment or Reply brief. Furthermore, the trial court did not address the claim in her rulings on either the defendants’ summary judgment motion or on the Fishburns’ Motion for Reconsideration. And plaintiffs could find no Washington decision holding that the Public Duty Doctrine applies to claims under RCW 64.40.020.

The Fishburns’ claim under RCW 64.40.020 was based on PALS’ position that the Fishburns required a permit to make emergency repairs involving their bulkhead. Although the Fishburns’ disputed that a permit was required,<sup>121</sup> Mr. Fishburn’s testimony<sup>122</sup> and related evidence<sup>123</sup> showed that PALS agreed to accept and expedite an oral permit application from him. PALS submitted the declaration of Gordon Aleshire directly contradicting<sup>124</sup> the plaintiffs’ evidence. This created a triable issue of fact as to the validity of this claim. The trial court therefore abused its discretion in dismissing this claim where a clear issue of fact remained to be resolved, and abused its discretion in dismissing plaintiffs’ gross negligence claim to the extent it involved the actions of

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<sup>120</sup> RCW 64.40.020(1).

<sup>121</sup> CP 182-84.

<sup>122</sup> CP 131, at §40.

<sup>123</sup> CP 167.

<sup>124</sup> CP 565, at ll. 15-16.

the defendants after the Fishburns purchased their house.

As to the newly discovered evidence that the plaintiffs presented on their Motion for Reconsideration, PALS concedes that “it relates . . . to the defendants’ knowledge with regard to the soil and water conditions at the time the septic system was approved” and that if the facts can be established, they may be able to satisfy the first element of the failure to enforce exception, *i.e.*, the public entity’s “actual knowledge of an inherently dangerous and hazardous condition.”<sup>125</sup> PALS nevertheless argues that the defendants had no enforcement duty.<sup>126</sup> But in their Motion for Reconsideration, the plaintiffs cited statutes that require both PALS and TPCHD to enforce applicable standards and correct violations.<sup>127</sup> Again, however, the trial court apparently failed to even consider the Fishburns’ new evidence as creating a triable issue of fact as to the failure to enforce exception. Such failure was manifestly unreasonable, and as such was an abuse of the trial court’s discretion.<sup>128</sup>

## **VI. CONCLUSION**

Based on the foregoing, plaintiffs again respectfully request this Court to:

- (1) Reverse the trial court’s order granting summary judgment

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<sup>125</sup> PALS Brief at 30.

<sup>126</sup> PALS apparently concedes that the third element of the exception, failure to perform the duty, is also satisfied. *See id.*

<sup>127</sup> CP 481.

<sup>128</sup> *Dix*, 160 Wn.2d at 833 (application of incorrect legal analysis constitutes abuse of discretion).

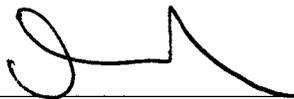
in favor of defendants and remand for further proceedings;

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

August 5<sup>th</sup>, 2010.

Respectfully submitted,

LEVY • VON BECK & ASSOCIATES, P.S.



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**VII. APPENDICES**

**APPENDIX A**

Tacoma-Pierce County Board of Health Resolution No. 2002-  
3411 – Land Use Regulation  
Sections Cited

## **14. APPROVAL OF CONVENTIONAL OSS FOR NEW DEVELOPMENT.**

### **14.1. Site Evaluation.**

The site proposed by an *OSS* design must meet the following criteria:

#### **14.1.a. Slope.**

The slope of the site must be less than 45 percent (24 degrees).

#### **14.1.b. Restrictions.**

The site may not be subject to:

##### **14.1.b.1.**

Encroachment by buildings or construction such as placement of swimming pools, power poles and underground utilities;

##### **14.1.b.2.**

Cover by impervious material;

##### **14.1.b.3.**

Vehicular traffic; or

##### **14.1.b.4.**

Other activities that would adversely affect the soil or the performance of the *OSS*.

#### **14.1.c. Reserve Area.**

The site shall offer and designate sufficient reserve area for a replacement *disposal component* able to treat and dispose of the entire design flow.

#### **14.1.d. Stability.**

The land at the site must be stable.

#### **14.1.e. Drainage.**

The surface drainage at the site must flow away from the site.

### **14.2. Soil Evaluation.**

#### **14.2.a. Evaluators.**

The Director of Health shall permit only Professional Engineers, Licensed Designers, and Certified Professional Soil Scientists to perform soil and site evaluations.

**14.2.b. Findings.**

The person evaluating the soil and site shall record:

**14.2.b.1.**

Enough soil logs to evaluate conditions within both the initial *disposal component* and the *reserve area*.

**14.2.b.2.**

The *ground water* conditions, the date of the observation, and the height of the highest seasonal *water table*.

**14.2.b.3.**

The topography of the site.

**14.2.b.4.**

The drainage characteristics of the site.

**14.2.b.5.**

The existence of structurally deficient soils subject to major wind or water erosion events such as slide zones and dunes.

**14.2.b.6.**

The existence of designated flood plains.

**14.2.b.7.**

The location of existing encumbrances and physical features that affect system placement including without limitation:

**14.2.b.7.A.**

*Wells* and suction lines;

**14.2.b.7.B.**

Water sources and supply lines;

**14.2.b.7.C.**

Surface water;

**14.2.b.7.D.**

*Abandoned wells*;

**14.2.b.7.E.**

Outcrops of bedrock and restrictive layers;

**14.2.b.7.F.**

Buildings;

**14.2.b.7.G.**

Property lines and lines of easement;

**14.2.b.7.H.**

Interceptors such as footing drains, curtain drains and drainage ditches;

**14.2.b.7.I.**

Cuts, banks, and fills;

**14.2.b.7.J.**

Driveways and parking areas;

**14.2.b.7.K.**

Existing *OSSs*; and

**14.2.b.7.L.**

Underground utilities.

**14.2.c. Methods.**

The person evaluating the soil and site shall

**14.2.c.1.**

Use the soil names and particle size limits of the United States Department of

**14.2.c.2.**

Determine texture, structure, compaction and other soil characteristics that affect the treatment and water movement potential of the soil by using normal field and laboratory procedures such as particle size analysis.

**14.2.c.3.**

Classify the soil as:

**14.2.c.3.A.**

1A Either (a) *very gravelly* coarse sands or coarser  
(b) any *extremely gravelly*

soil.

**14.2.c.3.B.**

1B: *Very gravelly* medium sand, *very gravelly* fine sand, *very gravelly* loamy sands.

**14.2.c.3.C.**

2A: Coarse sands (also includes ASTM C-33 sand).

**14.2.c.3.D.**

2B: Medium sands.

**14.2.c.3.E.**

3: Fine sands, loamy coarse sands, loamy medium sands.

**14.2.c.3.F.**

4: Very fine sands, loamy fine sands, loamy very fine sands, sandy loams, loams.

**14.2.c.3.G.**

5: Silt loams that are porous and have well developed structure.

**14.2.d. Restriction.**

Because sandy clay, clay, silty clay, and strongly cemented or firm soils are unsuitable to use for treatment or disposal, the *TPCHD* may not approve *OSS* disposal units in these soils.

**14.2.e. Additional Information.**

The *TPCHD* may require any other soil and site information affecting location, design, or installation.

**14.2.f. Previous Evaluation.**

The *TPCHD* may reduce the required number of soil logs for an *OSS* to serve a single family residence if adequate soils information has previously been developed.

**14.3. Vertical Separation of OSS Components.**

**14.3.a. Conventional Gravity Drain Fields.**

*Conventional gravity* drain fields must have at least three feet of undisturbed, native soil of type 2 through 5 between

the bottom of the drain field and the first *water table* or restrictive layer.

**14.3.b. Conventional Pressure Distribution Drain Fields.**

*Conventional pressure distribution* drain fields must have at least two feet of undisturbed, native soil of type 2 through 5 between the bottom of the drain field and the first *water table* or restrictive layer.

**14.3.c. Other Designs.**

The *TPCHD* shall determine the required *vertical separation* for systems with other designs depending upon the quantity and character of the expected flows, the characteristics of the site, and the technology to be used. The *TPCHD* may not approve a new *OSS* with less than 12 inches *vertical separation*.

**14.3.d. Seasonal Water Table Evaluation.**

If the *Designer* cannot provide sufficient information to determine the highest seasonal *water table*, the *TPCHD* may require *water table* measurements to be recorded during months of probable high *water table* conditions. Following such measurements, the *TPCHD* shall render a decision on the height of the *water table* under precipitation conditions typical for the region within twelve months of receiving the *application*. If the twelve months following the *application* include significant periods of drought that lowered seasonal *water tables* below typical levels, then the *TPCHD* may estimate the height of the seasonal *water table* would attain during more typical conditions.

## **APPENDIX B**

Pierce County Code  
Sections Cited

***Chapter 1.16***

***CIVIL INFRACTIONS***

**1.16.010 Purpose**

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

*Chapter 8.36*

***ON-SITE SEWAGE DISPOSAL SYSTEMS***

**8.36.080 Design**

- A. The Board of Health shall establish the design criteria for the submittal of all on-site sewage disposal applications.
- B. On-site sewage disposal systems shall be designed by a sewage disposal system designer, certified as provided for in Section 8.36.070 of this Chapter and the Rules and Regulations as adopted by the Board of Health.
- C. The Board of Health shall establish guidelines for design application renewals and application extensions.
- D. Design for an on-site sewage disposal system shall be made to the Health Officer who must deny the application if the design is not adequate for safe and healthful operation of the system and/or does not meet the requirements of this Chapter, the Rules and Regulations of the Board of Health, and WAC 248-96.
- E. Design of on-site sewage disposal systems shall be such as to accommodate all sewage from the building and premises to be served.

(Ord. 86-125 § 1 (part), 1986)

**8.36.110 Density and Minimum Lot Size.**

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

(Ord. 86-125 § 1 (part), 1986)

*Title 17C*

***CONSTRUCTION AND INFRASTRUCTURE REGULATIONS -  
BUILDING AND FIRE CODES***

**17C.10.050 Violations and Penalties**

- A. **Misdemeanor.** It shall be a misdemeanor for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or structure or cause or permit the same to be done in violation of the codes named in PCC 17C.10.010. It shall also be a misdemeanor for any person, firm or corporation to fail to comply with a lawfully issued written order of the Building Official. A misdemeanor under this Code shall be punishable by a fine of not more than \$1,000.00, or by imprisonment for not more than 90 days, or by both fine and imprisonment. The imposition of a penalty for any violation shall not excuse the violation or allow it to continue. Each person, firm or corporation found guilty of a misdemeanor shall be deemed guilty of a separate offense for each day during any portion of which any violation of any provision of this Code is committed, continued or permitted by such person, firm or corporation and shall be punishable as provided in this Section.
- B. **Civil Infraction.** Failure to comply with any permit or written order or decision issued pursuant to the Construction and Infrastructure Regulations in Title 17C PCC constitutes a Class 1 civil infraction as defined in Chapter 1.16 PCC. It shall be a separate offense for any person not authorized by the Building Official to remove, mutilate, destroy, or conceal any notice issued or posted by the Building Official, or his or her representative, pursuant to the provisions of this Code.
- C. **Title Notification.** In addition to any other sanction or remedial procedure which may be available in any of the codes named in 17C.10.010 of the Pierce County Code, the Building Official may record a Certificate of Noncompliance on the parcel upon which the violation is located. Once the violation has been remedied, the Building Official shall record a Certificate of Compliance. Prior to recording a Certificate of Noncompliance, the Building Official shall provide written notice of intent to record to the property owner. Notice shall be delivered either personally or by mailing a copy of such notice by certified mail, postage prepaid, return receipt requested to the address of the owner as shown on the Assessor's tax record. The property owner may appeal the notice

of intent to record a Certificate of Noncompliance to the Building Official. The appeal must be filed within 14 days of the date of written notice of intent to record.

(Ord. 2007-55s § 1 (part), 2007; Ord. 2004-30s § 6 (part), 2004; Ord. 99-24S § 11 (part), 1999)

**COMPLIANCE**

**18.140.040 General Enforcement Provisions**

- A. **Responsibility of Enforcement.** It shall be the duty of the Planning and Land Services (PALS) Department to enforce the provisions of the Pierce County Development Regulations.
- B. **Notice and Orders to Correct, Stop Work Orders or Any Other Written Order.**
  - 1. **Authority.** The Building Official, Fire Marshal, Planning Director, Sheriff, or their respective designees including, but not limited to, Building Inspectors, Code Enforcement Officers, Environmental Biologists, and Development Engineering staff, are hereby authorized to issue a Notice and Order to Correct, Stop Work Order, or any other written Order when any person, firm, corporation or agent thereof, has erected or maintained any building or structure, or conducted any land use or activity contrary to any provision of the Pierce County Development Regulations.
  - 2. **Orders.** Notice and Orders to Correct, Stop Work Orders, or any other written Orders shall be obeyed upon issuance of the Order. Such Order shall specify each violation by reference to the specific Title, Chapter, and Section or by reference to the approved permit. Such Order shall state that failure to comply with such Notice and Order to Correct or Stop Work Order may result in the filing of criminal misdemeanor charges as set forth in PCC 18.140.050.
- C. **Cease and Desist Orders.**
  - 1. **Authority.** The Building Official, Fire Marshal, Planning Director, Sheriff, or their respective designees including, but not limited to, Building Inspectors, Code Enforcement Officers, Environmental Biologists, and Development Engineering staff, are hereby authorized to issue a Cease and Desist Order when any person, firm, corporation, or agent thereof is making or partaking in any use of land, development, or any activity which is not permitted by the Pierce County Development Regulations.
  - 2. **Orders.** Cease and Desist Orders shall be obeyed immediately and all activity shall cease upon issuance of the Order. The Order shall specify each violation by reference to the specific Title, Chapter, and Section or by

reference to the approved permit. The Order shall state that a hearing may be requested as specified in PCC 1.22.090, Appeals of an Administrative Determination.

3. **Appeals and Decisions.** Appeals of Cease and Desist Orders shall proceed according to PCC 1.22.090, Pierce County Hearing Examiner Code. After hearing said matter, the Examiner shall issue a decision upholding, revoking, or modifying the prior Order. The decision of the Examiner is final and conclusive unless said matter is determined otherwise by the appropriate court.

**D. Additional Enforcement Powers.**

1. The County may require the property owner to remove or replace illegal earthwork, structures, or appurtenances (such as on-site septic systems or wells), and reclaim any illegally graded parcel. Earth material brought onto a parcel must be removed to a properly-permitted disposal site.
2. The County may remove, correct, or replace any illegal or improperly placed earthwork or constructed facility, structure or appurtenances (such as on-site septic systems or wells), or portion thereof.
  - a. Earth materials brought onto a parcel must be removed to a properly-permitted disposal site.
  - b. All expenses incurred by the County shall be paid by the property owner. If Pierce County is required to bring an action to recover such costs, the County will recover reasonable attorney's fees and interest at 12 percent per annum to run from the date the work was completed by the County. Applicants must agree to this provision as a condition of issuance of any permit authorized by the Development Regulations.
  - c. The County is authorized to make inspections and as required to enforce these Regulations. The County representative must be able to present proper credentials and identification before entering onto private property.
3. The County may record a Notice of Non-Compliance with the Pierce County Auditor against the property on which a violation has taken place. A Notice of Non-Compliance will be recorded only after other resolution remedies have been unsuccessfully pursued. A Notice of Non-Compliance is recorded on the title to notify any interested parties or lenders that a violation exists on the property and removal of such notice will be subject to the following:

- a. The enforcement action and associated penalties have been dismissed or decided in favor of the person to whom the violation notice was issued; or
- b. Any monetary penalty assessed for the violation has been paid and the violation has been remedied to the satisfaction of the County (i.e., final inspections have occurred or approvals have been granted).
- c. Once either a. or b. above has occurred, the County shall file a Notice of Compliance with the Pierce County Auditor that states the violation has been resolved and the Notice of Non-Compliance is no longer valid.

(Ord. 2009-18s3 § 1 (part), 2009; Ord. 2004-58s § 1 (part), 2004; Ord. 99-86 § 2, 1999; Ord.97-84 § 1 (part), 1997)

## **APPENDIX C**

Revised Code of Washington  
Sections Cited

**RCW 64.40.020**

**Applicant for permit — Actions for damages from governmental actions.**

(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law:

PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

(3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.

(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

[1982 c 232 § 2.]

**RCW 70.05.070**

**Local health officer — Powers and duties.**

The local health officer, acting under the direction of the local board of health or under direction of the administrative officer appointed under RCW 70.05.040 or 70.05.035, if any, shall:

- (1) Enforce the public health statutes of the state, rules of the state board of health and the secretary of health, and all local health rules, regulations and ordinances within his or her jurisdiction including imposition of penalties authorized under RCW 70.119A.030 and 70.118.130, the confidentiality provisions in RCW 70.24.105 and rules adopted to implement those provisions, and filing of actions authorized by RCW 43.70.190;
- (2) Take such action as is necessary to maintain health and sanitation supervision over the territory within his or her jurisdiction;
- (3) Control and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction;
- (4) Inform the public as to the causes, nature, and prevention of disease and disability and the preservation, promotion and improvement of health within his or her jurisdiction;
- (5) Prevent, control or abate nuisances which are detrimental to the public health;
- (6) Attend all conferences called by the secretary of health or his or her authorized representative;
- (7) Collect such fees as are established by the state board of health or the local board of health for the issuance or renewal of licenses or permits or such other fees as may be authorized by law or by the rules of the state board of health;
- (8) Inspect, as necessary, expansion or modification of existing public water systems, and the construction of new public water systems, to assure that the expansion, modification, or construction conforms to system design and plans;

(9) Take such measures as he or she deems necessary in order to promote the public health, to participate in the establishment of health educational or training activities, and to authorize the attendance of employees of the local health department or individuals engaged in community health programs related to or part of the programs of the local health department.

[2007 c 343 § 10; 1999 c 391 § 5; 1993 c 492 § 239; 1991 c 3 § 309; 1990 c 133 § 10; 1984 c 25 § 7; 1979 c 141 § 80; 1967 ex.s. c 51 § 12.]

**RCW 70.118.010**

**Legislative declaration.**

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

[1977 ex.s. c 133 § 1.]

**RCW 70.118.030**

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

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

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

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

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

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

**RCW 70.118A.010**

**Findings — Purpose.**

The legislature finds that:

(1) Hood Canal and other marine waters in Puget Sound are at risk of severe loss of marine life from low-dissolved oxygen. The increased input of human-influenced nutrients, especially nitrogen, is a factor causing this low-dissolved oxygen condition in some of Puget Sound's waters, in addition to such natural factors as poor overall water circulation and stratification that discourages mixing of surface-to-deeper waters;

(2) A significant portion of the state's residents live in homes served by on-site sewage disposal systems, and many new residences will be served by these systems;

(3) Properly functioning on-site sewage disposal systems largely protect water quality. However, improperly functioning on-site sewage disposal systems in marine recovery areas may contaminate surface water, causing public health problems;

(4) Local programs designed to identify and correct failing on-site sewage disposal systems have proven effective in reducing and eliminating public health hazards, improving water quality, and reopening previously closed shellfish areas; and

(5) State water quality monitoring data and analysis can help to focus these enhanced local programs on specific geographic areas that are sources of pollutants degrading Puget Sound waters.

Therefore, it is the purpose of this chapter to authorize enhanced local programs in marine recovery areas to inventory existing on-site sewage disposal systems, to identify the location of all on-site sewage disposal systems in marine recovery areas, to require inspection of on-site sewage disposal systems and repairs to failing systems, to develop electronic data systems capable of sharing information regarding on-site sewage disposal systems, and to monitor these programs to ensure that they are working to protect public health and Puget Sound water quality.

[2006 c 18 § 1.]

**RCW 70.118B.005**

**Findings.**

The legislature finds that:

(1) Protection of the environment and public health requires properly designed, operated, and maintained on-site sewage systems. Failure of those systems can pose certain health and environmental hazards if sewage leaks above ground or if untreated sewage reaches surface or groundwater.

(2) Chapter 70.118A RCW provides a framework for ongoing management of on-site sewage systems located in marine recovery areas and regulated by local health jurisdictions under state board of health rules. This chapter will provide a framework for comprehensive management of large on-site sewage systems statewide.

(3) The primary purpose of this chapter is to establish, in a single state agency, comprehensive regulation of the design, operation, and maintenance of large on-site sewage systems, and their operators, that provides both public health and environmental protection. To accomplish these purposes, this chapter provides for:

(a) The permitting and continuing oversight of large on-site sewage systems;

(b) The establishment by the department of standards and rules for the siting, design, construction, installation, operation, maintenance, and repair of large on-site sewage systems; and

(c) The enforcement by the department of the standards and rules established under this chapter.

[2007 c 343 § 1.]

## **APPENDIX D**

### International Residential Code Sections Cited

**R401.3 Drainage.** Surface drainage shall be diverted to a storm sewer conveyance or other approved point of collection so as to not create a hazard. Lots shall be graded to drain surface water away from foundation walls. The grade shall fall a minimum of 6 inches (152 mm) within the first 10 feet(3048 mm).

**R405.1 Concrete or masonry foundations.** Drains shall be provided around all concrete or masonry foundations that retain earth and enclose habitable or usable spaces located below grade. Drainage tiles, gravel or crushed stone drains, perforated pipe or other approved systems or materials shall be installed at or below the area to be protected and shall discharge by gravity or mechanical means into an approved drainage system. Gravel or crushed stone drains shall extend at least 1 foot (305 mm) beyond the outside edge of the footing and 6 inches (152 mm) above the top of the footing and be covered with an approved filter membrane material. The top of open joints of drain tiles shall be protected with strips of building paper, and the drainage tiles or perforated pipe shall be placed on a minimum of 2 inches (51 mm) of washed gravel or crushed rock at least one sieve size.

## **APPENDIX E**

Washington Administrative Code  
Sections Cited

**WAC 246-272A-0234**

**Design requirements — Soil dispersal components.**

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

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

**TABLE VIII**

**Maximum Hydraulic Loading Rate**

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

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

	amounts of expanding clays.	
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(b) Calculation of the absorption area is based on:

(i) The design flow in WAC 246-272A-0230(2); and

(ii) Loading rates equal to or less than those in Table VIII applied to the infiltrative surface of the soil dispersal component or the finest textured soil within the vertical separation selected by the designer, whichever has the finest texture.

(c) Requirements for the method of distribution shall correspond to those in Table VI.

(d) Soil dispersal components having daily design flow between one thousand and three thousand five hundred gallons of sewage per day shall:

(i) Only be located in soil types 1-5;

(ii) Only be located on slopes of less than thirty percent, or seventeen degrees; and

(iii) Have pressure distribution including time dosing.

(2) All soil dispersal components using a subsurface dripline product must be designed to meet the following requirements:

(a) Calculation of the absorption area is based on:

(i) The design flow in WAC 246-272A-0230(2);

(ii) Loading rates that are dependent on the soil type, other soil and site characteristics, and the spacing of dripline and emitters;

(b) The dripline must be installed a minimum of six inches into original, undisturbed soil;

(c) Timed dosing; and

(d) Soil dispersal components having daily design flows greater than one thousand gallons of sewage per day may:

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

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

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

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

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

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

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

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

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

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

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

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

gallons/square foot/day for very fine sand; and

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

AUG 06 2010

NO. 40429-0-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

DANIEL FISHBURN and LORI FISHBURN,

Appellants,

v.

PIERCE COUNTY PLANNING AND  
LAND SERVICES DEPARTMENT;

and

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

Respondents.

FILED  
COURT OF APPEALS  
10 AUG 9 AM 9:00  
BY [Signature]

PROOF OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on August 6<sup>th</sup>, 2010, I dispatched true copies of the following document:

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

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DATED this 6<sup>th</sup> day of August, 2010.

  
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