The Public Duty Doctrine and Municipal Liability for Negligent Administration of Zoning Codes

Shelly K. Speir*

[T]he drastic social and economic changes that have taken place since the public duty doctrine's birth in the nineteenth century warrant that it follow the doctrine of sovereign immunity into the 'dustheap of history.'

Imagine that you own a piece of property on which you would like to build a small "Mom and Pop" grocery store. You are aware that there are probably laws that regulate your lot, so you go to the city's planning department to find out how your lot is zoned. The department secretary assures you that your lot is zoned "commercial." Elated, you apply for a building permit, which requires you to certify that your store will comply with all of the applicable zoning and building codes. You sign the application and a few weeks later receive a building permit.

You proceed with construction. Periodically, your work is inspected by a city official who tells you that everything appears to be in compliance, and so you continue your work. On the day you finish construction, you are served with notice that your neighbors are suing you for violating the zoning code—it turns out that your lot is actually zoned "single-family residential." You also receive a letter from the city informing you that your building permit has been revoked. That same day, another city inspector looks at the store and finds numerous violations of the building code. Immensely frustrated, you decide to sue the city because you feel that this whole mess is the city's fault.

Will your allegation of negligence as to the secretary's initial statement find redress in the courts? Will the inspector's continued

* J.D. 1997, Seattle University School of Law; M.A.T. 1992, University of Alaska, Anchorage; B.F.A. 1989, University of Utah. The author would like to thank Bob Jansen for his help in constructing the hypothetical; David Ruzumna and Karin Treadwell for their persistence in editing this article; and Professor Richard Settle for his encouragement, keen insight, and rapier wit.


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assurances of compliance give rise to a cause of action? Is the city's issuance and subsequent revocation of the building permit actionable? The answer to these questions may depend on whether or not Washington courts continue to use what is termed the "public duty doctrine" when analyzing zoning code cases.

This Comment first provides a brief background of the development of the public duty doctrine. Part II discusses the two major types of zoning cases: those involving negligent misstatements and those involving negligent issuance of permits or inspections. The use of the public duty doctrine in both types of cases is then analyzed under relevant Washington case law. Part III argues for the abolition of the public duty doctrine and Part IV concludes.

I. THE INTRODUCTION AND DEVELOPMENT OF THE PUBLIC DUTY DOCTRINE IN WASHINGTON

Prior to 1961, Washington municipalities enjoyed total immunity from suit as political subdivisions of the state. Following a national trend that began in New York, the Washington Legislature abolished state sovereign immunity in 1961. In Kelso v. Tacoma, the Washington Supreme Court extended application of that statute to municipalities, thus establishing what this Comment refers to as the liability rule: "The doctrine of governmental immunity [is] not preserved to the municipal branches of government." The legislature eventually affirmed the court's interpretation, specifically abolishing governmental immunity for municipalities.

However, the Washington Supreme Court recognized that the statutes abrogating immunity should "not render the state liable for every harm that may flow from governmental action. . . . [T]here must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort

4. Id. at 918-19, 390 P.2d at 6.
5. WASH. REV. CODE § 4.96.010(1) (1995) provides:
All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.
(emphasis added).
liability. . . ." To protect governmental entities, the court carved out a "discretionary act" exception to the liability rule in the seminal cases of *Evangelical United Brethren Church of Adna v. State*7 and *King v. Seattle.8* Under the discretionary act exception, municipalities were still immune from suit if their acts were discretionary (done at the planning level) rather than ministerial (done at the operational level).9 If a municipality's acts were ministerial, then it was not immune from suit, and a court could proceed with a traditional analysis of tort liability.10

Under *Evangelical* and *King*, then, a court tests for municipal liability in two steps. First, the court determines whether the government's act was discretionary or ministerial. If discretionary, the government is immune. If the act was ministerial, then the court moves to the second step and determines liability using the traditional tort law concepts of duty, foreseeability, breach, and causation. The following is a diagram of the *Evangelical/King* test:

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<th>Step 1</th>
<th>Was the municipality's act discretionary or ministerial?</th>
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<tr>
<td>Step 2 (If the act was ministerial)</td>
<td>Tort law analysis—duty, foreseeability, breach, causation.</td>
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Despite the clear precedent set by these early cases, this test was altered dramatically in *Campbell v. Bellevue.11* There, the plaintiff successfully sued the City of Bellevue for negligent administration of

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8. 84 Wash. 2d 239, 525 P.2d 228 (1974).
9. Id. at 245, 525 P.2d at 232. The factors that must be considered to determine whether an act is discretionary are: (1) Does the challenged act necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act? *Id.* If all the questions can be answered affirmatively, the act is discretionary. *Id.*
10. *See, e.g.*, *King*, 84 Wash. 2d 239, 525 P.2d 228.
11. 85 Wash. 2d 1, 530 P.2d 234 (1975).
its electrical codes. In its discussion of the city's culpability, the *Campbell* court quickly passed over both the liability rule and the discretionary act exception, and omitted the tort law analysis. The court simply turned to New York case law, which relied on the public duty doctrine, to resolve the liability issue.

When New York first abolished sovereign immunity, its courts adopted the public duty doctrine as a method of protecting governmental entities from otherwise unlimited liability. While the purpose of limiting liability mirrored that of Washington's discretionary act exception, the public duty doctrine followed a substantially different line of reasoning. The basic premise of the doctrine is that a duty to the public is a duty to no one, because governments should not be punished for performing the duties that the legislature has imposed on them. Thus, the public duty doctrine focuses on the relationship between the governmental entity and the individual plaintiff as a member of the public, rather than on the characterization of the allegedly tortious conduct as either discretionary or ministerial.

The *Campbell* court did not reveal why it chose to adopt the public duty doctrine instead of following the *Evangelical/King* precedent. *Campbell* has never been overruled on that point, and, although heavily criticized by judges and commentators, the public duty doctrine has never been formally disavowed by Washington courts. Subsequent case law has been grossly inconsistent, with the Washington Supreme Court itself vacillating between the *Evangelical/King* test and the public duty doctrine nearly on a case-by-case

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12. *Id.* at 5, 530 P.2d at 236.
13. *Id.* at 10, 530 P.2d at 239.
14. *Id.*
17. See Borth, *supra* note 2, at 539.
19. The court merely stated: "We have no particular quarrel at this time with the general premise on which the [New York] cases relied upon by the City stand . . . ." *Campbell*, 85 Wash. 2d at 9, 530 P.2d at 239.
basis. This inconsistent application is vividly illustrated by the way courts analyze cases involving negligent administration of zoning codes.

II. THE PUBLIC DUTY DOCTRINE IN ZONING CASES

There are two general types of zoning cases to which the public duty doctrine has been applied: those dealing with negligent misstatements of zoning codes and those dealing with negligent issuance of permits or negligent inspections. The public duty doctrine has been used to analyze municipal liability in both types, but because the supposed justifications for applying the doctrine in each type is different, they will be discussed separately.

A. Negligent Misstatements of Zoning Codes

Washington courts have dealt with negligent misstatements of zoning codes three times, each time handling the liability issue differently. Both Rogers v. Toppenish and Sundberg v. Evans combined the Evangelical/King test and the public duty doctrine, resulting in hybrid analyses, while Mull v. Bellevue relied solely on

20. Cases fall into three general categories: those that use the Evangelical/King test, those that use the public duty doctrine, and those that combine the two into a hybrid analysis. In the first category, only King, decided one year before Campbell, dealt with zoning regulation. See King, 84 Wash. 2d 239, 525 P.2d 228 (wrongful refusal to issue street use and building permits). The other cases in that category involve everything from false arrest (Bender v. Seattle, 99 Wash. 2d 582, 664 P.2d 492 (1983)) to negligent design of a railroad crossing (Riley v. Burlington N., 27 Wash. App. 11, 615 P.2d 516 (1980)).


the public duty doctrine. Following a summary of the facts of these cases, the policy considerations justifying the use of the public duty doctrine in negligent misstatement cases will be evaluated, and then each case will be reanalyzed using the Evangelical/King test.

1. Case Analyses

a. Rogers v. Toppenish

In Rogers, a buyer asked the city building inspector whether an available parcel was zoned for apartment houses.24 The building inspector said that it was, and the buyer purchased the parcel relying on that representation; a building permit was duly issued.25 After complaints from neighbors, the city manager informed the buyer that the parcel was in fact zoned for single-family residences or duplexes and therefore rescinded the building permit.26 After trying unsuccessfully to have the parcel rezoned, the buyer brought suit against the city and the building inspector based on negligent representation.27

In its analysis, the court completed the first step of the Evangelical/King test by noting that, although sovereign immunity had been abolished, there was an exception for discretionary acts.28 The court found that the city exercised its discretion when it created a planning commission and regulated land and building structures through ordinances. Therefore, under the exception, the city was immune from suit.29

The court next cited Campbell's use of the public duty doctrine, but found it did not apply because the community's land-use plan directly affected a protected class.30 Unfortunately, the court never specified which class the land use plan purportedly protected. The court bolstered its conclusion with a tort law analysis (the second step of the Evangelical/King test) which included a public policy discussion of municipal duty.31 Based on that discussion, the court found that

25. Id.
26. Id. at 555-56, 596 P.2d at 1097.
27. Id. at 557, 596 P.2d 1097-98.
28. Id. at 558, 596 P.2d at 1098. See supra note 9 for list of factors used in determining if an act is discretionary.
29. Id. at 559, 596 P.2d at 1098.
30. Id. at 560, 596 P.2d at 1099. The "protected class" exception to the public duty doctrine was first used in Halvorson v. Dahl and allows liability to be based on a municipal code if that code, by its terms, evidences a clear intent to identify and protect a particular and circumscribed class of persons. Halvorson v. Dahl, 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978).
when a buyer inquires as to the zoning classification of a parcel, the zoning administrator has a duty to answer accurately because the response is ministerial, not discretionary.  

The court finished its analysis by applying the "special relationship" exception to the public duty doctrine, finding that a special relationship existed between the buyer and the building inspector.  

Compared to the straightforward two-part Evangelical/King test, the Rogers court's analysis appears more muddled:

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<th>Evangelical/King</th>
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<td>Step 1</td>
<td>Was the municipality's act discretionary or ministerial?</td>
<td>Was the municipality's act discretionary or ministerial?</td>
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<td></td>
<td>Does the public duty doctrine apply?</td>
</tr>
<tr>
<td>Step 2</td>
<td>Tort law analysis—duty, foreseeability, breach, causation</td>
<td>(If not) Tort law analysis—duty, foreseeability, breach, causation</td>
</tr>
<tr>
<td>(If the act was ministerial)</td>
<td></td>
<td>Do any exceptions to the public duty doctrine apply?</td>
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The result of the court's convoluted logic was that the municipality owed a duty to the buyer to answer questions accurately, and when this duty was breached both the city and the building inspector could be held liable.  

32. *Id.* See discussion supra note 9.  
33. Rogers, 23 Wash. App. at 561, 596 P.2d at 1100. The special relationship exception was applied in Campbell and allows for municipal liability where a relationship exists or has developed between an injured plaintiff and agents of the municipality, creating a duty to perform a mandated act for the benefit of particular persons or class of persons. Campbell, 85 Wash. 2d at 9-10, 530 P.2d at 239. The current test is found in Taylor: There is a special relationship where (1) there is privity or direct contact between the public official and the plaintiff; (2) the public official gives express assurances; and (3) the plaintiff justifiably relies on those assurances. Taylor, 111 Wash. 2d at 166, 759 P.2d at 451.  
34. Rogers, 23 Wash. App. at 561, 596 P.2d at 1100.
b. Sundberg v. Evans

In Sundberg, a couple asked a secretary in the county planning department whether a piece of property they wanted to buy was zoned commercial. While the zoning map gave a recreational designation, the comprehensive plat indicated that the property was commercial. The couple claimed that the secretary assured them that the lots were zoned commercial and that they relied on this information when they purchased the property. When the Board of Adjustment denied approval of the couple’s building site plan due to noncompliance with zoning regulations, the couple sued the secretary and the county on negligent representation grounds.

Like Rogers, the Sundberg court incorporated the public duty doctrine into its analysis. It asked first whether the county had a duty. To answer the question, the court turned to Rogers to find that the county did have a duty to provide accurate information if the couple asked and if the secretary chose to answer. Second, the court went to the first step of the Evangelical/King test and found that the secretary’s acts were ministerial, and therefore not protected from liability. Finally, on finding the acts were ministerial, the court queried whether they were in response to a public or individual duty. For the last question, the court noted that the special relationship exception to the public duty doctrine might apply, but the court remanded the case on this issue due to the insufficient record before it. On remand, the trial court was to determine whether the secretary had given express assurances or merely opinions, and whether the couple could reasonably have relied on those representations.

In the end, the Sundberg case nearly turned the Evangelical/King test on its head:

35. 78 Wash. App. at 618, 897 P.2d at 1286.
36. Id.
37. Id. at 619, 897 P.2d at 1286.
38. Id.
39. Id. at 622, 897 P.2d at 1288. The court’s analysis leaves open the question of whether a municipality has a duty to answer direct zoning inquiries, or whether a plaintiff who makes an inquiry may rely on the municipality’s “non-answer.” But cf. Rogers, 23 Wash. App. at 560, 596 P.2d at 1099 (administrator has a duty to answer because the response is ministerial).
40. Sundberg, 78 Wash. App. at 622-23, 897 P.2d at 1288. See supra note 9 for list of factors courts should consider.
41. Id. at 621, 897 P.2d at 1287.
42. Id. at 623-24, 897 P.2d at 1289.
43. Id.
Step 1

<table>
<thead>
<tr>
<th>Evangelical/King</th>
<th>Sundberg</th>
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| Was the municipali-
| ty's act discretionary 
or ministerial? | Was the municipali-
| ty's act discretionary 
or ministerial? | (If ministerial) Do any exceptions to the public duty doctrine apply? |

Step 2

(If the act was ministerial)

| Tort law analysis—duty, foreseeability, breach, causation |

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c. Mull v. Bellevue

A developer in Mull submitted to the City of Bellevue plans for the construction of three office buildings. Despite having exceeded the maximum allowable height on one of the buildings, the developer was issued a permit and began construction. Later, after changing the plans to allow for a deeper basement and added height, the developer again requested and again was granted permission to continue construction. During this process he received personal assurances from an employee at the city's Design and Development Department that the change in building height was not significant and would not require additional review. Upon inspection, however, city officials determined that the building would be too tall and issued a stop work order. The developer filed a negligence claim against the city.

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44. Mull, 64 Wash. App. at 246, 823 P.2d at 1153.
45. Id. at 247-48, 823 P.2d at 1154.
46. Id. at 249-50, 823 P.2d at 1155.
47. Id. at 248, 823 P.2d at 1154.
48. Id. at 250, 823 P.2d at 1155.
49. Id.
Unlike Rogers and Sundberg, the Mull court used only the public duty doctrine to analyze liability.\(^5\) Because the city did not owe the developer a duty, the court had no need for further analysis. Although the court tiptoed around a discussion of tort principles, nowhere in its opinion did it address the Evangelical/King test.

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<th>Evangelical/King</th>
<th>Mull</th>
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<tbody>
<tr>
<td>Step 1</td>
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<tr>
<td>Step 2 (If the act was ministerial)</td>
<td>Tort law analysis—duty, foreseeability, breach, causation</td>
<td>Did the municipality owe an individual duty?</td>
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2. Public Policy Analysis

As noted by the Rogers and Mull courts, the general policy supporting use of the public duty doctrine in negligent misstatement cases is that municipalities should not be discouraged from enacting legislation (like zoning laws) for the public welfare.\(^5\) But this argument assumes that without the public duty doctrine municipalities would lack protection from the numerous lawsuits that would inevitably arise. Not only is this assumption exaggerated,\(^5\) it also completely ignores the discretionary act exception.

The purpose of the discretionary act exception is two-fold: First, it protects municipalities from liability at the policy implementation level,\(^5\) and second, it prevents taxes raised for the public good from being diverted to pay for private losses.\(^5\)

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50. Id. at 251, 823 P.2d at 1155-56.
51. Rogers, 23 Wash. App. at 559, 596 P.2d at 1099; Mull, 64 Wash. App. at 256, 823 P.2d at 1158.
52. See Myers, supra note 18, at 541.
53. Evangelical, 67 Wash. 2d at 254, 407 P.2d at 444.
54. See Borth, supra note 2, at 539.
Technically, the discretionary act exception is distinguishable from the public duty doctrine because it holds municipalities immune even if they breach an existing duty. In contrast, the public duty doctrine prevents liability because no duty is held to exist. In spite of this theoretical difference, however, the result is the same: Governments can govern without fear of tort liability. Because the Evangelical/King test by itself adequately protects municipalities' governmental and financial interests, the public duty doctrine is redundant.55

The Mull court listed three specific policy arguments in support of using the public duty doctrine in negligent misstatement cases. The first asserted policy is that zoning codes are designed to protect public health and safety, not to protect individuals from economic loss caused by public officials.56 This contention is invalid for two reasons. First, because the act of passing zoning legislation would be considered discretionary,57 legislators would already be immune from suit under Evangelical and King. As for administrators, they could be liable for negligent misstatements under both the Evangelical/King test and the public duty doctrine, either because the act is ministerial58 or because the special relationship exception59 could apply. Thus, municipalities receive no greater protection from liability under the public duty doctrine than they do under the Evangelical/King test.

Additionally, the policy argument is invalid because the idea that a duty to the public is a duty to no one is illogical.60 Logic would in fact suggest that a duty to the public is a duty to everyone. Since municipalities are statutorily liable to the same extent as private individuals,61 it follows that municipalities should have a duty to give correct information when answering direct zoning questions. It is more congruent with legislative intent that municipalities be held to the same reasonable care standard62 as the individuals they serve.

This first policy consideration is most appropriately discussed in the tort analysis phase of the Evangelical/King test. Unfortunately, the public duty doctrine does not permit any discussion of foreseeability. The only way a plaintiff can successfully hold a municipality liable for its negligent misstatements under the public duty doctrine is by

55. See Myers, supra note 18, at 537.
56. Mull, 64 Wash. App. at 255, 823 P.2d at 1158.
57. See supra note 8.
58. Id. See also Sundberg, 78 Wash. App. at 622, 897 P.2d at 1288.
59. See discussion supra note 33.
60. See Rogers, 23 Wash. App. at 559 n.4, 596 P.2d at 1099 n.4.
61. See WASH. REV. CODE § 4.96.010.
62. See Myers, supra note 18, at 539.
satisfying the requirements of the special relationship exception. The public duty doctrine is therefore inappropriate for negligent misstatement cases because it ignores legislative intent and makes relief dependent on the relationship between the plaintiff and the municipality, that is, on the nature of the duty, rather than satisfaction of the other traditional tort law principles such as foreseeability and causation.

The second of Mull's specific policy considerations favoring the use of the public duty doctrine in negligent misstatement cases maintains that it is unreasonable to place the burden of ensuring compliance with zoning codes on municipalities. Budgetary and personnel constraints would supposedly present too great a cost with too little public benefit.

But this argument overlooks the difference between negligent permit issuance and inspection cases and negligent misstatement cases. In negligent misstatement cases, the cost of ensuring compliance is merely prevention of employee misstatements so that later, more expensive corrective measures (e.g., litigation or demolition of a building) are not necessary. Municipalities are in the best position to bear this risk because they have direct control over the behavior of their employees. Municipalities can also purchase liability insurance or impose limits on damage awards. The benefits of preventing employee misstatements include increased reliability of municipal employees, consistent application of zoning laws, greater predictability for developers who must comply with zoning codes, and increased compliance of developers. Thus, because it permits municipalities to operate inefficiently, the use of the public duty doctrine in negligent misstatement cases is not supported by a balancing of costs and benefits to the municipality.

As for the municipality vis-a-vis the public, if the public shares the benefit of a municipal act, then the public should share the cost of that act. If the public benefits by having its zoning questions answered by municipal employees, then the public should pay for that service by allowing municipalities to reimburse the victims of their

63. See discussion supra note 33.
64. Mull, 64 Wash. App. at 255, 823 P.2d at 1158.
65. Id.
66. In practical terms, effective prevention could be as simple as limiting the types of municipal employees that could answer citizen inquiries, or as extensive as employee training programs.
67. See Myers, supra note 18, at 541.
68. Kelso, 63 Wash. 2d at 914-15, 390 P.2d at 4.
negligent zoning misstatements, so that the victims do not bear the entire cost of the service. Thus, the public duty doctrine should not be employed in negligent misstatement cases because the costs of employee misstatements are thereby shifted from the general public to the victims of municipal negligence.

Mull's third policy argument in support of the public duty doctrine is that holding municipalities liable in negligent misstatement cases would remove citizens' incentive to conduct their own review of the zoning code to ensure compliance. However, this argument ignores the fact that citizens must still comply with zoning regulations to obtain permits and to pass inspections. If municipalities were liable for negligent misstatements, a citizen's desire to obtain permit and inspection approval would still provide an incentive to conduct reviews of the zoning code. Municipal liability may even increase this incentive because citizens would be assured that inquiries they presented during their review would be answered with reasonable accuracy, thus raising their chances of gaining permit or inspection approval. Additionally, because Washington is a comparative negligence state, citizens could risk losing any chance of recovering damages if they did not act reasonably in their attempts to comply with local zoning codes. Dispensing with the public duty doctrine would not discourage citizens from reviewing zoning codes. It would only provide an incentive for municipalities to give correct responses to citizen inquiries.

3. Traditional Tort Law Analysis

Former Justice Utter suggested that a traditional tort law analysis should replace the public duty doctrine. The main difference between the two analyses lies in the way they define duty. Traditional tort law imposes a duty upon everyone to use reasonable care when an action creates a foreseeable risk of harm to some person or class of persons; under the public duty doctrine, on the other hand, duty arises through the relationship between the municipality and the plaintiff.

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69. Id.
70. Mull, 64 Wash. App. at 255-56, 823 P.2d at 1158. But the Mull court itself acknowledged that when a municipality negligently supplies erroneous information on which a landowner reasonably relies, the municipality may be held liable. Id. at n.4.
71. See infra text accompanying notes 99-101.
72. Taylor, 111 Wash. 2d at 172-73, 759 P.2d at 454 (Utter, J., concurring); Chambers-Castanes, 100 Wash. 2d at 290, 669 P.2d at 460 (Utter, J., concurring).
73. Myers, supra note 18, at 539.
Had the Rogers, Sundberg, and Mull courts substituted traditional tort law principles for the public duty doctrine, their analyses would have been clearer and more consistent. Their use of the public duty doctrine only clouded the issues and was neither necessary nor helpful to the resolution of the cases.

In Rogers, the court was correct when it began with the liability rule and the discretionary act exception. This was consistent with both the statutes and the Evangelical/King test. However, the court stretched the liability rule too far when it considered the city's acts of creating a planning commission and regulating land and building structures. Instead, the Rogers court should have recognized that the inspector specifically told the buyer that the property was zoned for apartment houses. Since the error occurred at the operational level, it was ministerial and the city would not have been immune from suit. The court could then have proceeded to the second step of the Evangelical/King test and examined the duty issue without ever mentioning the public duty doctrine.

In its tort law analysis, the court should have limited the city's duty with a discussion of foreseeability and public policy considerations. Because the buyer made a direct inquiry of the city building inspector (who should be required to provide correct information), the court would probably have found that the city owed the buyer a duty to answer his question correctly. After finding a duty, the court should then have looked for a breach. Since the inspector's statements were incorrect, this element would probably have been satisfied. The court's next step would have been to determine whether the city's breach was the cause in fact and proximate cause of the harm to the buyer. Because the buyer would probably not have purchased the property had he known its true zoning designation, and because there were no superseding causes to break the chain of causation, the city's breach probably satisfied both aspects of causation. The court could then have concluded that the municipality was liable. By following the Evangelical/King test, it could have produced a fair result without introducing extraneous law.

Unlike Rogers, the Sundberg court erred in asking a duty question at the outset of its analysis. Instead, it should have initially used the liability rule and the discretionary act exception to determine whether

74. See WASH. REV. CODE § 4.92.090 (1995); WASH. REV. CODE 4.96.010 (1995); Kelso, 63 Wash. 2d at 918-19, 390 P.2d at 6; Evangelical, 67 Wash. 2d at 253-55, 407 P.2d at 444-45; King, 84 Wash. 2d at 245, 525 P.2d at 232; Borth, supra note 2, at 547 n.55.

75. See Rogers, 23 Wash. App. at 560, 596 P.2d at 1099.
the county was immune to suit, as required by the Evangelical/King test. Since the negligent act in Sundberg occurred at the operational level, as in Mull, the secretary's response to the couple's question was ministerial and the county should not have been immune.

Under the second step of the Evangelical/King test, the court should have turned to Rogers and public policy to determine if the county owed the couple a duty. Due to the similar fact pattern in Rogers, the court should have found that a duty was owed. Continuing with a traditional tort law analysis, the court should have then decided whether the duty was breached. Based on the insufficient record before it, the court probably would not have been able to determine as a matter of law whether the secretary's statements were incorrect. On remand to the lower court, however, such a determination could be made and the court could proceed with the remaining question of causation. The court could have made its decision without ever mentioning the public duty doctrine or breaking from the Evangelical or King precedent.

The Mull opinion should also have begun like Rogers, using the liability rule and the discretionary act exception to determine if the city was immune. Since the city's negligence occurred at the operational level when it advised the developer that the changes in building height were insignificant, its acts were ministerial and it would not have been immune to suit.

Again, the court should then have moved to a traditional tort law analysis under the second step of the Evangelical/King test. Had the court looked for a duty, under Rogers it would have found that the city employee had a duty to give correct information. The court should then have looked for a breach of duty, which it could have found since the employee gave incorrect information. Since the developer asked the employee direct questions and was given incorrect answers upon which he relied, the city's breach was probably the cause in fact of the developer's injury.

In considering whether the city's breach was the proximate cause of the injury, however, the court may have found superseding causes that would have broken the chain of liability. For example, the developer never specifically asked the city what the maximum allowable building height was, nor did he ever attempt to find the answer himself. The revised plans he submitted to the city also did not show the actual height of the building, so that it would have been impossible for the city independently to discover his noncompliance with the zoning code. The court might have found that the developer's contributory negligence excused the city from liability. This
result would have been fair, efficient, and consistent with traditional tort law principles.

B. Negligent Issuance of Building Permits and Negligent Inspections

The second type of zoning case which the use of the public duty doctrine has muddled involves negligent permit issuance or inspection. Unfortunately, Washington courts have applied the Evangelical/King test just as inconsistently here as in the negligent misstatement cases. Within this type of case, King v. Seattle\(^76\) helped establish the Evangelical/King test, while Taylor v. Stevens County\(^77\) and Meaney v. Dodd\(^78\) relied on the public duty doctrine.

As in previous section, a summary of the facts of these cases will be followed by a discussion of public policy and the substitution of a tort law analysis.

1. Case Analyses

a. King v. Seattle

In King, a couple purchased lots in Seattle and with plans to construct an office building.\(^79\) In order to obtain a building permit, the couple was first required to secure a street use permit from the city.\(^80\) The city denied the couple's street use application because it believed the permit might conflict with a pending local improvement district plan.\(^81\) Because the street use permit had been denied, the couple's building permit was also denied.\(^82\) Eventually, due to unrelated complications, the couple abandoned the project, ceased making payments on the lots, and quitclaimed their interest in the property to the vendor.\(^83\) The couple sued the city for the resulting loss of profit.\(^84\)

The court began its analysis with the liability rule, then moved into a discussion of the discretionary act exception. The court found that because the city had not made a "policy decision" that included a conscious balancing of risks and advantages when it denied the

\(^76\) 84 Wash. 2d 239, 525 P.2d 228 (1974).
\(^78\) 111 Wash. 2d 174, 759 P.2d 455 (1988).
\(^79\) King, 84 Wash. 2d at 241, 525 P.2d at 230.
\(^80\) Id.
\(^81\) Id.
\(^82\) Id.
\(^83\) King, 84 Wash. 2d at 242, 525 P.2d at 230.
\(^84\) Id. at 242, 525 P.2d at 230-31.
permits, the city was not immune from suit. The court proceeded to a tort law analysis, beginning with a discussion of foreseeability. Because the risk of economic loss due to delay, increased prices, accumulated interest on borrowed money, and other factors were foreseeable, the court found that the city owed the couple a duty to act reasonably. Since the city did not reasonably protect the couple from economic harm, the city breached its duty. Although the court found that the city’s acts were the cause in fact of the couple’s injury, the city’s acts were not the proximate cause because the couple did not mitigate their damages. The city was therefore not liable.

b. *Taylor v. Stevens County*

In *Taylor*, a couple purchased a home that had been built before obtaining a building permit. Before the sale, the sellers applied for a permit; although the house was still unfinished, the county building inspector noted that the "structure appeared to be of adequate construction" and the county approved the permit. Later, the buyers discovered construction defects and had the house reinspected. The inspector found numerous violations of the building code. The couple sued the county for negligent issuance of a building permit and negligent inspection.

The *Taylor* court ignored the *Evangelical/King* test altogether and immediately turned to the public duty doctrine to evaluate the couple’s claim. The court tried to characterize its analysis in terms of tort law concepts, calling its discussion of the public duty doctrine a "basic principle of negligence law." However, instead of doing an actual assessment of duty, the court cited the protected class exception and found that the county’s building codes were not intended to protect a

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85. *King*, 84 Wash. 2d at 246-47, 525 P.2d at 233. The court did not make a specific finding as to whether the act of denying a building or street use permit was discretionary because a lower court had ruled that the city’s decision was arbitrary and capricious. *Id.* at 247, 525 P.2d at 233.

86. *Id.* at 248, 525 P.2d at 234.
87. *Id.* at 249, 525 P.2d at 234.
88. *Id.*
89. *King*, 84 Wash. 2d at 249, 525 P.2d at 234.
90. *Id.* at 250, 525 P.2d at 235.
92. *Id.* at 161, 759 P.2d at 449.
93. *Id.* at 161-62, 759 P.2d at 449.
94. *Id.* at 162, 759 P.2d at 449.
95. *Taylor*, 111 Wash. 2d at 162, 759 P.2d at 449.
96. *Id.* at 163, 759 P.2d at 449.
particular class. The court then examined the requirements of the special relationship exception, but eventually based its holding on public policy. The court opined that the issuance of a building permit was not an "official action" and did not imply that the plans submitted in an application complied with the relevant regulations. The court found that the duty to ensure compliance should rest with the applicant, so that the county was not required to check the seller's building permit or do a reasonable building inspection. The court's analysis looked nothing like the Evangelical/King test:

<table>
<thead>
<tr>
<th>Step 1</th>
<th>Evangelical/King</th>
<th>Taylor</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Was the municipali-ty's act discretionary or ministerial?</td>
<td></td>
</tr>
<tr>
<td>Step 2</td>
<td>Tort law analysis—duty, foreseeability, breach, causation</td>
<td>Does an exception to the public duty doctrine apply?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Does public policy support the finding of a duty?</td>
</tr>
</tbody>
</table>

The result was that the county was not liable to the couple.

97. Id. at 164-66, 759 P.2d at 450-51. See supra note 30. One wonders how a statute can possibly protect the public health, safety, and welfare when the county does not have a duty to enforce the statute for the benefit of individuals. See Taylor, 111 Wash. 2d at 164, 759 P.2d at 450.

98. Id. at 166-71, 759 P.2d at 451-53. See discussion supra note 33. The court thereby overruled J & B Development Co. on this point. See J & B Dev. Co., 100 Wash. 2d at 306-07, 669 P.2d at 473.


100. Id. at 168-69, 759 P.2d at 452-53.

101. Id. at 172, 759 P.2d at 454.
c. Meaney v. Dodd

In Meaney, Dodd applied for a special use permit to operate a sawmill on his property. During the application process, he asked county employees for assistance in assuring his proposal complied with county regulations, but did not make any specific inquiries regarding noise level regulations. The county zoning administrator checked the application against the zoning regulations and visited Dodd's property, but because the sawmill had not yet been built, the administrator could not determine how much noise it would produce.

Dodd's application for a special use permit was approved, and he then obtained a building permit to construct the sawmill. During the next year and a half, neighbors complained that the sawmill exceeded the noise level allowed in the zoning code. Eventually, the noise level was measured and Dodd was ordered to cease operation until he complied with the level set in the code. However, because of the location and design of the sawmill, Dodd was unable to comply, and his special use permit was revoked. Dodd sued the county for negligent misrepresentation and negligent issuance of special use and building permits.

Like the Taylor court, the Meaney court did not mention the Evangelical/King test. Instead, it based its decision solely on the public duty doctrine. The court noted that there were several exceptions to the doctrine, but found that the special relationship exception was the only one applicable. Based on Taylor's public policy analysis and the fact that Dodd did not make any direct inquiries regarding noise levels, the court decided that no special relationship was established and that the county had no duty to give correct information. Furthermore, because Dodd never provided the anticipated noise level in his application, and because a government should be able to rely on the statements of a permit applicant, again no

102. Meaney, 111 Wash. 2d at 175, 759 P.2d at 456.
103. Id.
104. Id. at 176, 759 P.2d at 456.
105. Id.
106. Meaney, 111 Wash. 2d at 176, 759 P.2d at 456.
107. Id.
108. Id. at 176-77, 759 P.2d at 456.
109. Id. at 177, 759 P.2d at 456.
110. Meaney, 111 Wash. 2d at 178, 759 P.2d at 457.
111. Id. at 178-79, 759 P.2d at 457.
112. Id. at 180-81, 759 P.2d at 458-59. The court thereby overruled J & B Development Co. on these two points. See J & B Dev. Co., 100 Wash. 2d at 305, 305-08, 669 P.2d at 472-73.
The court’s analysis was exactly the same as Taylor:

<table>
<thead>
<tr>
<th>Step 1</th>
<th>Step 2 (If the act was ministerial)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Evangelical/King</strong></td>
<td><strong>Meaney</strong></td>
</tr>
<tr>
<td>Was the municipality’s act discretionary or ministerial?</td>
<td>Tort law analysis—duty, foreseeability, breach, causation</td>
</tr>
<tr>
<td></td>
<td>Does an exception to the public duty doctrine apply?</td>
</tr>
<tr>
<td></td>
<td>Do public policy support the finding of a duty?</td>
</tr>
</tbody>
</table>

The county was therefore not liable on either of Dodd’s claims.114

2. Public Policy Analysis

The central reason that the public duty doctrine is used in negligent permit issuance and inspection cases is to shift the burden of zoning code compliance to the permit applicant.115 Under this theory, the duty to comply properly rests with the applicant not only because of budgetary and personnel constraints, but also because the applicant is in a better position to prevent any harm to foreseeable plaintiffs.116 This argument is also consistent with Washington’s vested rights doctrine, which protects a builder’s right to develop land only if the builder’s permit is in full compliance with zoning and

114. *Id.* at 181, 759 P.2d at 459.
116. *Taylor*, 111 Wash. 2d at 169, 759 P.2d at 452. See also *Meaney*, 111 Wash. 2d at 180, 759 P.2d at 458.
building codes in effect at the time the permit application is submitted.\(^\text{117}\)

However, the idea of shifting the burden of compliance to applicants can only be considered under the \textit{Evangelical/King} test.\(^\text{118}\) Under \textit{Evangelical} and \textit{King}, a court is free to consider the effects of public policy on duty and the foreseeability of harm to the plaintiffs. Factors such as budgetary and personnel constraints and the ease of preventing harm are easily incorporated into such discussions. However, a technical application of the public duty doctrine, with its strict emphasis on the relationship of the plaintiff to the municipality,\(^\text{119}\) does not allow public policy to affect the determination of liability.

It may be pointed out that \textit{Rogers} and \textit{Taylor}, both of which used the public duty doctrine, also relied heavily on policy considerations. \textit{Rogers} looked at the policy behind an administrator's duty to answer direct inquiries correctly,\(^\text{120}\) while \textit{Taylor} examined the policy behind holding permit applicants responsible for compliance with zoning codes.\(^\text{121}\) But the problem in those cases was not the courts' consideration of policy; it was the fact that both courts considered policy under the guise of the public duty doctrine. Had the courts applied the \textit{Evangelical/King} test, they would have been able to discuss public policy as part of a traditional tort law analysis. That the courts did not explicitly follow the \textit{Evangelical/King} precedent only confused their analyses. Because the public duty doctrine is not as policy sensitive as tort analysis, it should not be used to decide negligent permit issuance/inspection cases that typically have depended on public policy for resolution.

3. Traditional Tort Law Analysis

The \textit{King} case helped establish the proper analysis for negligent permit issuance or inspection cases. The opinion began with a discussion of the liability rule and the discretionary act exception, followed by a traditional tort law analysis including foreseeability, duty, breach, and causation. As it stands, the opinion is a model of how the \textit{Evangelical/King} test should be applied. In the remainder of this

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\(^{117}\) \textit{Taylor}, 111 Wash. 2d at 169, 759 P.2d at 452-53.


\(^{119}\) See discussion supra note 33.

\(^{120}\) \textit{Rogers}, 23 Wash. App. at 560, 596 P.2d at 1099.

\(^{121}\) \textit{Taylor}, 111 Wash. 2d at 167-71, 759 P.2d at 451-54.
section, the Taylor and Meaney cases are re-analyzed under the precedent set by King.

The Taylor opinion should have started with the liability rule and the discretionary act exception. Because neither the issuance of a building permit nor inspection involves the implementation of governmental policy,\(^\text{122}\) the court should have found the county's actions ministerial and not immune. The court should then have done a tort law analysis under the second step of the Evangelical/King test, starting with a discussion of duty. Based on the court's discussion of public policy, it probably would have found that the county did not owe the couple a duty to check the sellers' permit application or to do a reasonable inspection. Without a duty, there could be no liability, and the court could have ended its discussion. The public duty doctrine only clouded the analysis.

For the claim of negligent representation, the Meaney opinion should have similarly started with the liability rule and the discretionary act exception. Because answering a zoning question is ministerial and does not involve policy implementation,\(^\text{123}\) the court probably would have found that the county was not immune from suit. The court should have then performed the second step of the Evangelical/King test, a tort law analysis. In its consideration of whether the county had a duty to answer Dodd's questions, the court should have looked back at Rogers and the public policy behind holding municipalities liable for negligent misstatements. Because Dodd did not make a direct inquiry regarding noise level regulations, the court probably would have found that the county had no duty to answer his questions correctly.

As for the claim of negligent issuance of special use and building permits, the Meaney court would probably have found that the county was not immune because permit issuance does not involve policy determination, and is thereby ministerial.\(^\text{124}\) Moving into the tort law analysis as required by Evangelical/King, the court should have considered the public policies behind holding a municipality liable for issuing invalid permits. Because of the municipal budgetary and personnel constraints, the right of the municipality to rely on an applicant's statements, and the superior ability of applicants to prevent foreseeable harm, the court would probably have found that the county

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122. See discussion supra note 9.
123. Rogers, 23 Wash. App. at 560, 596 P.2d at 1099; Sundberg, 78 Wash. App. at 622, 897 P.2d at 1288.
had no duty to check Dodd's permits for compliance with the zoning regulations. The court could have ended its analysis at that point. Use of the Evangelical/King test would have allowed the Meaney court to analyze both of Dodd's claims consistently and give full consideration to public policy. Use of the public duty doctrine again only confused the opinion.

III. ABOLITION OF THE PUBLIC DUTY DOCTRINE

A small but growing minority of jurisdictions have explicitly abolished the public duty doctrine.\(^{125}\) Alaska, Arizona, Colorado, Florida, Iowa, Massachusetts, Nebraska, New Hampshire, New Mexico, Oregon, Wisconsin, and Wyoming have all rejected the doctrine in favor of traditional tort law analyses.\(^{126}\) In those states, the public duty doctrine is often seen as another form of sovereign immunity which has already been statutorily abolished.\(^{127}\) Many states that still adhere to the public duty doctrine only apply it in statutorily prescribed situations, such as police assistance cases.

Several arguments support the abolition of the public duty doctrine in Washington. First, the doctrine has been weakened through the constant creation of exceptions.\(^{128}\) There is no reason to continue to invoke a rule that has been "swallowed." Second, though unwilling to admit it, the Washington Supreme Court has applied tort law analyses to cases that it insisted rest on exceptions to the public duty doctrine.\(^{129}\) Explicit use of tort law principles to resolve these cases would prevent any further confusion regarding municipal duty. Finally, according to former Justice Utter, the public duty doctrine is a limited form of sovereign immunity which imposes a presumption against the existence of a duty and contradicts the Washington Law that expressly provides that municipalities are to be held liable to the

125. McMillan, supra note 1, at 520.

126. Id.; Amy Beth Novit, Comment, Tort Law—Abrogating the Massachusetts Public Duty Rule—Jean W. v. Commonwealth, 27 SUFFOLK U. L. REV. 986 (1993); Maple v. Omaha, 384 N.W.2d 254, 256 (Neb. 1986) (no requirement that the negligent act complained of be performed by such municipal employee in furtherance of a private duty owed to the claimant as opposed to a duty owed to the claimant and public generally); Doucette v. Town of Bristol, 635 A.2d 1387, 1388 (N.H. 1993) ("the rule is no longer viable in this State").

127. See McMillan, supra note 1, at 520.

128. Julie A. Lawry, Comment, Municipal Liability, 19 GONZ. L. REV. 727, 728 (1983-84). Note that in the first Washington case which used the doctrine, Campbell, the court applied the special relationship exception to find liability. Campbell, 85 Wash. 2d at 10, 530 P.2d at 239. The public duty doctrine has never been applied without any of its exceptions in a Washington zoning case.

129. See, e.g., Campbell, 85 Wash. 2d 1, 530 P.2d 234.
same extent as private individuals. The public duty doctrine should be abandoned because it flouts legislative intent.

IV. CONCLUSION

Before the public duty doctrine was introduced in Washington, courts determined municipal liability by using the two-part Evangelical/King test. The public duty doctrine was not supported by case law and legislation of the 1960s, and its introduction in Campbell was a jurisprudential anomaly. Today, the doctrine unnecessarily complicates what once was, and could be again, a straightforward analysis. The public duty doctrine is inappropriate for zoning cases because it does not provide any additional protection for municipalities, it ignores legislative intent, it makes relief dependent on the relationship of the plaintiff to the municipality, it permits municipalities to operate inefficiently, and it allocates the burden of municipal negligence solely to the victims. The doctrine should be abolished and Washington courts should return to the soundness and simplicity of the Evangelical/King test to determine municipal liability for negligent administration of zoning codes.

130. Chambers-Castanes, 100 Wash. 2d at 291, 669 P.2d at 461.