Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey

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Preston Construction Company (Preston) is a well-known development and construction firm in Daniellville, a hypothetical incorporated municipality. In 1982, Preston acquired a lot in downtown Daniellville on which it planned to construct a five-story office building.

Preston submitted a plot plan and building permit application in order to begin construction. Daniellville has set fifty feet as the minimum right-of-way along access streets such as First Avenue. The existing right-of-way along First Avenue abutting the Preston lot is only thirty feet. Even though Preston’s application failed to provide for a sufficient setback, the building permit was approved and Preston began construction.

As required by the building code, Preston requested a foundation and setback inspection upon completion of the foundation. An inspector examined the construction and approved the foundation and setback. Preston continued construction for several weeks at considerable expense before the improper setback was brought to the attention of the municipality. Daniellville promptly issued a stop-work order and directed Preston to relocate the building to provide for the proper setback.

Preston brought suit alleging that Daniellville was negligent in administering its building and zoning codes and demanded compensation for the relocation of the building. In its answer, Daniellville raised the absolute defense of governmental immunity. In the alternative, Daniellville asserted that the duty established in zoning and building codes runs only to the public as a whole and not to any particular individual. Therefore, Daniellville breached no duty upon which Preston could recover.

Actions alleging municipal tort liability for negligent administration of building and zoning codes are part of the current judicial and legislative trend to abolish municipal tort immunity. In surveying how such actions are treated, this Comment briefly examines the historical background of

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2. The plot plan and building permit application submitted by Preston provided for a 10-foot setback from the existing right-of-way rather than the 20 feet required.
3. In addition, Daniellville would probably assert that the issuance of building permits is a discretionary function and is therefore immune from tort liability. See infra notes 40-44 and accompanying text (discussion of the discretionary function exception).
4. This defense is commonly referred to as the public duty doctrine. This nomenclature, however, is misleading. It implies that this defense is unique to governmental tortfeasors. Rather, this defense is a basic tenet of tort law. See infra Part III. This Comment, nonetheless, will refer to this defense as the public duty doctrine in the interests of simplicity.
governmental immunity. It then categorizes the states according to the scope of governmental tort immunity currently recognized. After establishing these categories, this Comment applies the law under each category to the facts of Preston v. City of Danielleville, the hypothetical case. It then analyzes the public duty defense raised by the municipality, focusing on the origin of the defense and on its continued use as a municipal defense to negligence actions. This Comment concludes by recommending one type of governmental tort claims act which best balances the equities between the injured individual and the municipality.

I. HISTORICAL BACKGROUND OF GOVERNMENTAL IMMUNITY

The doctrine of governmental tort immunity or sovereign immunity developed from the ancient maxim rex non potest peccare ("the King can do no wrong"). The first judicial extension of this immunity to a local governmental entity was in Russell v. Men of Devon. The Russell rule was introduced in the United States in 1812 and was soon adopted by most of the courts in the United States.
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Although the early cases introducing governmental tort immunity lacked a sound analytic framework, courts evolved justifications in subsequent case law. Courts justified municipal tort immunity on the following grounds: (1) a municipality derives no pecuniary benefit from the exercise of public functions; (2) the doctrine of respondeat superior is inapplicable because municipal officers and employees are agents of the state and not of the municipality when exercising public governmental duties; (3) taxes raised for the public good should not be diverted to the payment of private losses; and (4) a municipality should not be held liable for torts committed in the performance of duties imposed on it by the legislature.

To alleviate the sometimes harsh results produced by municipal tort immunity, the courts created numerous exceptions. The most prevalent exception was the governmental/proprietary dichotomy. Under this dichotomy, courts first categorized municipal functions as either "governmental" or "proprietary": if the function fell in the latter category, the municipality was treated as a private corporation and held liable for its torts to the same extent as a private corporation; if the function fell in the former category, the municipality was treated as an arm of the state, and was entitled to share the immunity traditionally accorded the sovereign.

The test frequently used to categorize municipal functions was whether the activity was designed to benefit the general public rather than merely the municipality. If the activity benefited the general public, then it was classified as governmental. This nebulous test allowed courts to engage in arbitrary line drawing as they attempted to categorize specific municipal activities. This confusion resulted in "great inequities and incongruities" in municipal tort liability, and provided much of the impetus for the current movement to restrict or abolish the doctrine of municipal tort immunity.

11. See supra notes 7-8.
13. For example, a municipality could be held liable if it created or maintained a nuisance, even in the course of a "governmental" function. See, e.g., Lund v. Seattle, 99 Wash. 300, 169 P. 820 (1928) (city liable to claimant who fell over wire fence which the city had allowed to be constructed in the street).
15. See 18 E. McQUILLIN, supra note 14, § 53.24.
16. Id. at 105. Commentators generally agree that the governmental/proprietary dichotomy is "one of the most unsatisfactory known to the law." 3 K. DAVIS, supra note 7, § 25.07, at 460. See, e.g., Borchard, supra note 7, at 135-36; Barnett, supra note 8, at 269-70.
II. CLASSIFICATION OF STATES ACCORDING TO THE SCOPE OF MUNICIPAL TORT IMMUNITY

The modern trend in most states is to waive, to some degree, the tort immunity previously enjoyed by its political subdivisions. The states, however, follow diverse approaches to municipal tort liability. At one end of the spectrum are states that retain traditional municipal tort immunity, subject only to isolated statutory waivers. At the other end of the spectrum are states that have adopted a blanket or unqualified waiver of municipal tort immunity. In these states a municipality is liable for its torts "to the same extent as if [it] were a private person or corporation." Between these two polar extremes are states that have adopted either a closed-ended or an open-ended tort claims act. A closed-ended approach establishes general municipal immunity with an extensive list of exceptions. An open-ended approach, on the other hand, makes a municipality generally liable but provides for specific immune activities.

A. Traditional Governmental Tort Immunity

Thirteen states have retained the traditional common law notion that a municipality is immune from tort liability. These states, however, maintain the governmental/proprietary dichotomy when determining mu-

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17. See infra note 22 (table listing the number of states which have abolished or modified municipal tort immunity).
18. See infra notes 23–24 and accompanying text.
19. See infra notes 49–51 and accompanying text.
21. See infra notes 29 & 32–34 and accompanying text.
22. See infra notes 36–38 and accompanying text. In summary form, the categories of states are as follows:

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>NUMBER OF STATES</th>
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<tbody>
<tr>
<td>A. Traditional Immunity</td>
<td>11</td>
</tr>
<tr>
<td>B. Closed-Ended</td>
<td>11</td>
</tr>
<tr>
<td>C. Open-Ended</td>
<td>13</td>
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<tr>
<td>D. Blanket Waiver</td>
<td>15</td>
</tr>
</tbody>
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Included within this category are states which have enacted minor statutory exceptions to the general rule of municipal immunity. The most common is liability for negligent operation of motor vehicles. See, e.g., ARK. STAT. ANN. § 12-2903 (1979); MD. ANN. CODE art. 23A, § 1B(b) (1981); N.H. REV. STAT. ANN. § 507-B:2 (Supp. 1979); S.C. CODE ANN. § 15-77-230 (Supp. 1979).
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In these states, therefore, Preston's recovery of monetary damages turns on whether the issuance of building permits is a governmental or a proprietary function. Courts have taken numerous approaches in determining whether a particular activity is governmental. Regardless of the approach taken, courts have generally classified issuance of permits as a governmental activity. The rationale most often asserted is that the purpose of building permits is to force compliance with building and zoning codes for the welfare of the community. In these states, therefore, Preston would not recover monetary damages for erroneous issuance of a building permit unless the municipality had waived its immunity.

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25. One common test is to classify as governmental those functions and activities which only a municipality can adequately perform. See W. PROSSER, supra note 8, § 131, at 979-81. Another common test is to determine whether the activity is to benefit the general public rather than merely the municipality. See 18 E. McQUIILUlR, supra note 14, § 53.24.


27. See 9 E. McQUIILULN, supra note 14, § 26.200; 7 id. § 24.507. For example, in E. Eyring & Sons Co. v. Baltimore, 253 Md. 380, 252 A.2d 824 (1969), an action was brought against the city after the collapse of a church roof which resulted in numerous injuries to the worshippers. The plaintiff alleged that the city's Bureau of Building Inspection had failed to properly inspect and supervise the construction of the church to insure compliance with the applicable provisions of the building code. The court applied a three-part test to determine whether the enforcement of building codes is a governmental function:

(1) Is the act in question sanctioned by legislative authority?
(2) Is the act solely for the public benefit with no profit inuring to the municipality?
(3) Does the act tend to benefit the public health and welfare? Id. at 825.

Applying this test, the court first found that the acts of the Bureau were sanctioned by legislative authority. Id. at 826. Second, the court held that although the Bureau charged a fee for permits, it was not engaged in a profit-making business because the fee was designed to only cover the estimated costs of the services. Id. Finally, the court held that the benefits of building regulations do not inure to private individuals but rather to the general public. Id. The court concluded that the issuance of building permits and inspections for compliance were purely governmental functions for which the city was immune from tort liability. Id.

28. In several states, a municipality waives its immunity if it has purchased liability insurance covering the activity, but only to the extent of the insurance. See, e.g., Miss. Code Ann. § 21-15-6 (Supp. 1982); N.H. Rev. Stat. Ann. § 412:3 (Supp. 1979); N.C. Gen. Stat. § 160A-485 (1976); S.D. Comp. Laws Ann. §§ 9-12-7 (1981); Vt. Stat. Ann. tit. 29, § 1403 (Supp. 1982). Three reasons have been given for why a municipality would buy insurance: (1) to cover proprietary functions and those areas in which immunity never existed; (2) to provide for a secure working environment for municipal employees by removing the threat of personal liability; and (3) to protect the public from harm. Harper, Statutory Waiver of Municipal Immunity Upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis, 4 Campbell L. Rev. 41, 72 (1981).
B. Closed-Ended Governmental Tort Claims Acts

Eleven states have enacted legislation that makes municipalities generally immune from tort liability subject to an extensive list of exceptions.\footnote{29. See CAL. GOV'T CODE § 815 (West 1980); COLO. REV. STAT. § 24-10-106 (1982); DEL. CODE ANN. tit. 10, § 4011 (Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 8103 (1980); NEB. REV. STAT. § 23-2401 (1977); N.J. STAT. ANN. § 59:1-2 (West 1982); N.M. STAT. ANN. § 41-4-2 (1978); TENN. CODE ANN. § 29-20-201 (1980); TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970); UTAH CODE ANN. § 63-30-3 (1968); WYO. STAT. § 1-39-104 (Supp. 1980).}

Under this approach, immunity is the rule and liability the exception. This approach prevents courts from accepting "novel causes of action against public entities."\footnote{30. N.J. STAT. ANN. § 59:2-1 comment (West 1982).} Therefore, an action against a municipality alleging negligent issuance of a building permit would be barred unless an exception encompassed such an action. In the absence of an exception, Preston could not recover monetary damages.\footnote{31. This would be the result in Colorado, Delaware, Maine, New Mexico, Texas, and Wyoming.}

In five of these states, the statutory declaration of immunity is followed by an exception creating governmental liability for tortious acts or omissions of employees committed within the scope of their employment.\footnote{32. The New Jersey statute, for example, provides that: "a public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." N.J. STAT. ANN. § 59:2-2(a) (West 1982). Accord CAL. GOV'T CODE § 815.2 (West 1980); NEB. REV. STAT. §§ 23-2402(4), -2407 (1977); TENN. CODE ANN. § 29-20-205 (1980); UTAH CODE ANN. § 63-30-10 (Supp. 1981). In this respect, these statutes resemble an open-ended approach. See infra note 36.}

This provision is broad enough to permit a claim against the municipality for negligent administration of building and zoning codes. These states, however, have enacted extensive statutory limits on this broad waiver of immunity. One such limit provides that a public entity is immune from liability for an injury caused by the issuance or revocation of any permit.\footnote{33. The New Jersey statute is typical: A public entity is not liable for an injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." N.J. STAT. ANN. § 59:2-2(a) (West 1982). Accord CAL. GOV'T CODE § 815.2 (West 1980); NEB. REV. STAT. §§ 23-2402(4), -2407 (1977); TENN. CODE ANN. § 29-20-205 (1980); UTAH CODE ANN. § 63-30-10 (Supp. 1981). In this respect, these statutes resemble an open-ended approach. See infra note 36.} This exception represents a legislative decision to encourage per-
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mit issuance and enforcement by preventing tort liability. Based on this legislative mandate, courts have refused to impose liability on municipalities for negligent issuance of building permits.

Therefore, in states adopting a closed-ended tort claims act, Preston could not recover for erroneous issuance of a building permit unless there is an express waiver of statutory immunity.

C. Open-Ended Governmental Tort Claims Acts

Thirteen states have enacted legislation that waives governmental immunity subject to numerous specific exceptions. The open-ended approach differs from the closed-ended approach in two ways. First, by making liability the rule and immunity the exception, the open-ended approach affords a municipality less protection. Second, the open-ended approach shifts the power to delineate the scope of municipal tort liability to the judiciary.

Under the open-ended approach, the burden is on the governmental tortfeasor to establish that the claim is covered by one of the specific grants of immunity. The battleground between claimants and govern-


34. N.J. STAT. ANN. § 59:2-5 comment (West 1982).

35. This provision has been construed as an absolute immunity to suit. See, e.g., McGowan v. Borough of Eatontown, 151 N.J. Super. 440, 376 A.2d 1327, 1331 (1977) (state immune from suit alleging improper approval of construction of a driveway); Davis v. Metropolitan Gov't of Nashville, 620 S.W.2d 532, 536 (Tenn. App. 1981) (no legal grounds for plaintiff's action alleging negligent enforcement of zoning ordinance).

Interestingly, California courts have held that the licensing immunity is a specific application of discretionary immunity and therefore does not preclude liability if issuance or revocation of the permit is a nondiscretionary ministerial act. See Morris v. County of Marin, 18 Cal. 3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977), Slagle Const. Co. v. Contra Costa County, 67 Cal. App. 3d 559, 136 Cal. Rptr. 748 (1977).

36. The Oklahoma statute waiving governmental immunity is typical: "Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act." OKLA. STAT. ANN. tit. 51, § 153 (West Supp. 1982). Accord ALASKA STAT. § 9.65.070 (Supp. 1982); IDAHO CODE § 6-903(a) (Supp. 1982); ILL. ANN. STAT. ch. 85, § 2-101 (Smith-Hurd 1969); IND. CODE ANN. § 34-4-16.5 (Burns Supp. 1982); IOWA CODE ANN. § 613A.2 (West Supp. 1982); KAN. STAT. ANN. § 75-6103 (Supp. 1982); MASS. ANN. LAWS ch. 258, § 2 (Michie/Law. Co-op. 1980); MINN. STAT. ANN. § 466.02 (West 1977); MONT. CODE ANN. § 2-9-102 (1981); NEV. REV. STAT. § 41.031 (1967); N.D. CENT. CODE § 32-12.1-03 (Supp. 1981); OR. REV. STAT. § 30.265 (1981).

37. The immunities commonly granted in open-ended tort claims acts can be broken down into two general categories. The first category contains the traditional exceptions from governmental liability. This category includes immunity for acts and omissions constituting the exercise of a legislative or judicial function, or constituting the exercise of a discretionary function. See, e.g., ALASKA STAT. § 9.65.070(d)(2) (Supp. 1982); IDAHO CODE § 6-904(1) (Supp. 1982); IND. CODE ANN. § 34-4-16.5(3)-(6) (Burns Supp. 1982); KAN. STAT. ANN. § 75-6104(a)-(d) (Supp. 1982); MASS. ANN. LAWS ch. 258, § 10(a), (b) (Michie/Law. Co-op. 1980); MINN. STAT. ANN. § 466-03(5), (6) (West
mental defendants, therefore, focuses on the construction of these exceptions. Five of these states specifically immunize a municipality from claims arising from the issuance or revocation of any permit. Preston could not recover from a municipality in these states.

In the states that do not expressly bar an action against a public entity for erroneous issuance of building permits, the municipality is subject to liability unless another exception covers the conduct. The exception most commonly asserted by municipalities is that issuance of building permits is a discretionary function. Under this exception, a municipality is immune from tort liability if the negligence arises out of a discretionary act by an official charged with formulating government policy. This exception describes a circumstance where no duty is owed by the governmental entity to an individual member of the public. This exception also represents a legislative policy determination that permit issuance and enforcement should be encouraged rather than discouraged by the threat of civil tort liability. See supra note 37.


39. See, e.g., U-Haul Co. v. Town of Cicero, 410 N.E.2d 286 (Ill. App. 1980) (city immune from action alleging that a special use permit was improperly denied causing the plaintiff monetary damages from delayed operation of business).

40. Most open-ended states have codified a discretionary function exception. See, e.g., IDAHO CODE § 6-904(1) (Supp. 1982); KAN. STAT. ANN. § 75-6104(d) (Supp. 1982); MASS. ANN. LAWS ch. 258, § 10(b) (Michie/Law. Co-op. 1980); MNN. STAT. ANN. § 466-03(6) (1977); NEV. REV. STAT. § 41.032(2) (1967); OR. REV. STAT. § 30.265(3)(c) (1981).

41. There are currently two lines of analysis defining the scope of the discretionary function exception. One line of analysis makes a distinction between the “planning” and “operational” levels of decisionmaking by governmental entities. See Johnson v. State, 69 Cal. 2d 782, 782, 447 P.2d 352, 352, 73 Cal. Rptr. 240, 240 (1968); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1010 (Fla. 1979). This planning/operational test focuses on the status of the decisionmaker rather than on the type of the decision. See Dalehite v. United States, 346 U.S. 15 (1953).

The other line of analysis focuses on the type of decision made, rather than on the decisionmaker. See Evangelical United Brethren Church of Adna v. State, 67 Wn. 2d 246, 245, 407 P.2d 440, 445 (1965). The Evangelical court proposed a four-part test to draw a line that would preserve immunity for “truly discretionary” functions:

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
2. Is the questioned act, omission, or decision 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?
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tion is intended to prevent a court from substituting its judgment for that of the legislature or executive. A public entity, however, is liable for torts arising out of a ministerial act which involves policy execution as opposed to policy formulation. Drawing the line between discretionary and ministerial functions has been a fertile ground of conflict. Not surprisingly, the case law is split on whether the issuance of building permits is a discretionary function.

Despite the broad waiver of immunity in open-ended tort claims acts, courts are reluctant to impose municipal tort liability for injuries arising out of certain municipal activities, even though the conduct is not immunized by statute. Courts often use the public duty doctrine to limit municipal tort liability. This doctrine provides that a municipality, or any governmental entity, performing certain public functions owes a duty only to the general public and not to any particular individual. Any claim against the municipality alleging negligent performance of one of these functions, therefore, is dismissed because of the absence of a legal

(3) Does the act, omission, or decision require the exercise or 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, omission, or decision? Id. at 255, 407 P.2d at 445. Each question must be answered in the affirmative if the act, omission, or decision is to be classified as a discretionary governmental process. Id.

A full discussion of the discretionary function exception is beyond the scope of this Comment.


43. Owen v. City of Independence, 445 U.S. 622, 648 n.31 (1979) (noting that, much like the governmental/proprietary dichotomy in the sovereign immunity doctrine, the line between discretionary and ministerial functions is difficult to discern).


45. See, e.g., Hannon v. Counihan, 54 Ill. App. 3d 509, 369 N.E.2d 917, 922 (1977) (failure of municipality to properly enforce building codes did not give rise to a cause of action); Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 804 (Minn. 1979) (municipality not liable for negligent inspection because no common law duty to inspect and correct the fire code violations of a third person).

46. See infra notes 59–60 and accompanying text.

47. See infra note 59 and accompanying text.
duty owed to the claimant. Therefore, even without a provision granting tort immunity to governmental entities for permit issuance, Preston might not recover damages in an open-ended tort claims state.

D. Blanket Waivers of Governmental Immunity

Fifteen states have abolished the traditional doctrine of governmental immunity without listing specific qualifications. In general, the abolition of governmental immunity occurred in either of two ways. In most of these states the judiciary abolished the doctrine because of dissatisfaction with the archaic justifications for governmental immunity. After judicial abolition of governmental immunity, the legislatures failed to take affirmative action addressing the scope of governmental tort liability. In a few of these states, the legislature initiated the change from governmental immunity by adopting a tort claims act. These acts make municipalities "liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation." 51

Under either approach, the judiciary is left with the task of defining the scope of governmental liability on a case-by-case basis. Courts have experienced great difficulty, however, in resolving the proper scope of governmental liability. This has resulted in extensive and expensive litigation as claimants continually test the scope of governmental tort liability. 52

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50. Several legislatures, however, did enact statutory limits on the amount recoverable. See, e.g., KY REV. STAT. ANN § 44.070 (Baldwin 1980) (no recovery for pain and suffering; single claim not to exceed $50,000); WIS. STAT. ANN. § 893.82 (West Supp. 1982) (recovery limited to $250,000).


52. The underlying problem of the blanket-waiver approach is essentially two-fold. First, unlike closed-ended statutes, there are no clear and definite guidelines for a court to follow. See supra notes 29-35 and accompanying text. Second, the courts are faced with the inherent difficulty of trying to apply ordinary concepts of tort law, which developed in the context of litigation between private persons, to public entities.

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A municipality in a blanket-waiver state would be subject to potential liability for erroneous issuance of building permits in the absence of other doctrines. Notwithstanding this blanket waiver of immunity, courts have recognized the necessity of limiting liability. As with open-ended acts, these courts have often turned to the public duty doctrine as a "tool" to limit liability. Therefore, Preston may be unable to recover monetary damages notwithstanding the blanket waiver of immunity.

III. JUDICIAL LIMITATIONS OF GOVERNMENTAL TORT LIABILITY

Prior to the abrogation of governmental immunity, courts had no cause to apply traditional negligence concepts to a governmental tortfeasor. It is not surprising, therefore, that the demise of sovereign immunity signalled the application of traditional tort principles to governmental tortfeasors. From this union, the public duty doctrine was born. The doctrine is

Because of the government's unique role and function in society, the rationales which support tort liability for private entities often do not support liability for public entities. Unlike a private individual, a municipality has mandatory duties to engage in numerous activities which it cannot refuse simply because the risk of potential tort liability is too great. For example, public entities perform functions for the public health and welfare which should be encouraged rather than discouraged by the imposition of tort liability. See supra notes 29-35 and accompanying text.

53. See, e.g., Rich v. City of Mobile, 410 So. 2d 385, 387-88 (Ala. 1982) (public service activities are "so laden with the public interest as to outweigh the incidental duty to individual citizens"); Georges v. Tudor, 16 Wn. App. 407, 410, 556 P.2d 564, 566-67 (1976) (municipality should not be "a guarantor of each and every construction project").

54. See infra Part III.

55. This is best illustrated by the development of the public duty doctrine in New York, the first state to abolish sovereign immunity. N.Y. CT. CL. ACT art. II, § 8 (McKinney 1963). The New York tort claims act holds governmental entities to the same standards of tort liability as a private person. Id. In response to the legislative failure to define the scope of governmental tort liability, the New York courts developed the public duty doctrine.

In the seminal case of H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928), the plaintiff sued a public service corporation for negligently failing to supply sufficient water to quell a fire on the plaintiff's premises. Justice Cardozo, writing for the majority, found that the claim did not state a cause of action because the failure to supply water for fire-fighting purposes was a denial of a benefit owed to the general public, not to the individual plaintiff. Id. at 164-65, 159 N.E. at 897.

Subsequently, the New York courts applied the public duty doctrine to cases alleging negligent building and fire inspection. For example, in Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965), the New York Court of Appeals held that the failure of a fire captain to enforce the fire prevention code did not create a legal cause of action for a plaintiff injured in a subsequent fire. The court based its finding of nonliability on the absence of a duty owed to the individual plaintiff. Id. at 637, 256 N.Y.S.2d at 598.

As other states followed New York's lead in abolishing sovereign immunity, they also adopted the New York courts' traditional formulation of the public duty doctrine. See, e.g., Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059, 1063 (1973) (denying plaintiff's claim for negligent inspections by the city because the duty to enforce a law is owed to the general public and is not actionable by any individual); Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 199
prevalent in those states which have adopted either an open-ended tort claims act or have a blanket waiver of governmental immunity because the legislatures failed to define the scope of governmental tort liability. This legislative failure forces the courts to draw a line between denying compensation to the victims of negligent public employees and unduly interfering with the desirable purposes for which municipalities exist.

Most courts have attempted to shape the contours of governmental tort liability in these states by applying the public duty doctrine. In a few states, however, courts have rejected the public duty doctrine and have applied a foreseeability standard. In general, governmental tort liability for erroneous issuance of building permits reflects this division of authority. Preston’s recovery of damages, therefore, turns on whether the particular court applies the public duty doctrine or the foreseeability approach.

A. The Public Duty Doctrine

The public duty doctrine provides that a claimant who is alleging inadequate performance of a governmental activity has the burden to show that the municipality owed a duty to the claimant and not solely to the general public when performing the activity in question. If the activity is designed solely for the benefit of the general public, the cause of action fails for lack of a legal duty owed to the claimant.

Under the public duty doctrine a municipality is generally not liable for negligent issuance of building permits. Applying this doctrine, courts first

N.W.2d 158, 160 (1972) (affirming dismissal of a suit against the city for alleged negligence in issuing a building permit because the plaintiffs failed to show a breach of some duty owed them in their individual capacities).

56. See supra note 55. This is true to a lesser extent in states with open-ended acts. Open-ended acts leave less room for courts to use the public duty doctrine because of the specific grants of immunity. See supra notes 37–44 and accompanying text.


58. See infra note 76.

59. See, e.g., Hannon v. Counihan, 54 Ill. App. 3d 509, 369 N.E.2d 917, 921–22 (1977) (failure of municipality to properly enforce building codes did not give rise to a cause of action because duty to enforce the codes was owed to the general public); Hage v. Stade, 304 N.W.2d 283, 287 (Minn. 1981) (fire inspection statute protects the public as a whole and therefore plaintiffs had no cause of action for alleged negligent performance of fire inspection duties). See generally supra note 55 (cases applying the public duty doctrine).

60. See supra note 59.
look to the purpose of the building codes to determine whether the municipality owes a specific duty to the plaintiff. Traditionally, courts have held that building codes are enacted for the benefit of the public and that the issuance of building permits is merely a device to ensure compliance with the building codes. Therefore, a claimant's cause of action will fail for the lack of a legal duty owed. Courts, however, have created two limited exceptions in the public duty doctrine where the claimant establishes either: (1) a "clear intent" in the statute to benefit a particular class of individuals, or (2) a "special relationship" with the municipality.

The first exception applies if the claimant can establish that the statute reveals a "clear intent" to identify and protect a particular class of individuals and the claimant is within the protected class. For example, in Halvorson v. Dahl, the widow of a man killed in a hotel fire brought a wrongful death action against the city alleging failure of the city to properly enforce the applicable housing codes. The court found a "clear intent" in the stated purpose of the housing code to protect the welfare of building occupants. That purpose was to identify "conditions and circumstances [that] are dangerous and a menace to the health, safety, morals or welfare of the occupants of such buildings and of the public."

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61. For example, in Dinsky v. Town of Framingham, 386 Mass. 801, 438 N.E.2d 51 (1982), the plaintiffs sued the municipality alleging negligence in the issuance of building permits. The court first looked at the State Building Code for language indicating a legislative intent to create private causes of action for negligence in the issuance of building permits. Id. at 55. Relying on the stated purpose of the code to "insure public safety, health, and welfare," the court held that there was no legislative intent to impose a duty in favor of individual property owners. Id. at 55-56.


63. See Halvorson v. Dahl, 89 Wn. 2d 673, 574 P.2d 1190 (1978). Cf. Gordon v. Holt, 65 A.D.2d 344, 412 N.Y.S.2d 534 (1979) (a city building code, similar to the one relied on in Halvorson, was construed as declaring only a general duty to the public and not to the injured tenants).

64. 89 Wn. 2d 673, 574 P.2d 1190 (1978).

65. Id. at 677, 574 P.2d at 1193.


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, substandard, deteriorating, in danger of causing or contributing to the creation of slums or otherwise blighted areas, and inimical to the health, safety and welfare of the occupants thereof and of the public.

. . .

Such conditions and circumstances are dangerous and a menace to the health, safety, morals or welfare of the occupants of such buildings and of the public, and accordingly it is the purpose of this code to establish minimum standards and effective means for enforcement thereof for the preservation, protection, and promotion of the public health, safety, morals and general welfare.

Id.
Because of such "clear intent," the municipality was found to owe a duty to the decedent.

Most building codes, though, are drafted to emphasize the benefit to the "public safety, health, and welfare" and not the benefit to a particular class of individuals. Courts, therefore, must stretch the statutory language in order to find a "clear intent" to benefit a particular class. Courts have been unwilling to stretch the language of building codes, and claimants have been unsuccessful in asserting a duty based on the statutory language.

The second limited exception to the public duty doctrine applies where a claimant can show a "special relationship" with the municipality. Courts have found a "special relationship" where agents of a municipality have knowledge of facts which constitute a statutory violation, a private party relies on assurances that the situation will be corrected, and the agents fail to take corrective action, causing an injury to the private party. The existence of a "special relationship" is best illustrated in Campbell v. City of Bellevue. In Campbell, the plaintiff requested an inspection of the neighbor's premises after discovering an electric current in a creek on nearby property. The city's electrical inspector found code violations in the outdoor wiring strung through the creek and notified the neighbor of the violations. The inspector, however, failed to initiate cor-

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67. See, e.g., KING COUNTY, WASH., CODE § 21.02.010 (1981), which provides:
   An official land use control . . . is adopted and established to serve the public health, safety and general welfare and to provide the economic and social and aesthetic advantages resulting from an orderly planned use of land resources and represents one means of carrying out the general purposes set forth and defined in the comprehensive plan of King County.

Although the Halvorson court found that the Seattle Housing Code evidenced a "clear intent" to benefit a particular class of individuals, it also noted that "most codes are enacted merely for purposes of public safety or for the general welfare." 89 Wn. 2d 673, 677, 574 P.2d 1190, 1193 (1978). See supra note 65. By proper drafting of a code or ordinance, a municipality may be able to ensure that it will be construed as benefiting the public generally.

68. This author knows of no case where an injured permit holder has successfully sought relief for negligent issuance of a building permit based on the "clear intent" of the building code. See supra note 62 (cases finding no "clear intent").


70. 85 Wn. 2d 1, 530 P.2d 234 (1975).
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The plaintiff's wife was later electrocuted while attempting to save her son, who had fallen into the "hot" creek. The plaintiff claimed that the city was liable because the inspector had failed to properly enforce the city's electrical safety regulations. Although recognizing the public duty doctrine, the court found a "special relationship" between the injured plaintiff and agents of the municipality.

Even though the "special relationship" exception gives a court greater opportunity to impose a duty on the municipality running to the claimant, courts have been reluctant to do so. Most courts have required additional indicia of an undertaking by a government employee or some other extraordinary circumstances. An action for negligent issuance of a building permit rarely, if ever, presents to the court any extraordinary circum-

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71. Id. at 4, 530 P.2d at 236.
72. Id. at 5, 530 P.2d at 236.
73. Id. at 10, 530 P.2d at 239. Campbell, however, is one of the limited number of cases in which a court has found a "special relationship." See infra notes 74–75.
74. Otherwise, the "special relationship" exception would emasculate the public duty doctrine. A distillation of the principles underlying court decisions permitting recovery on the grounds of a "special relationship" reveals several recurring factors.

First, when there is present an inherently dangerous or imminently hazardous condition, there is a greater responsibility on the government to act properly. Compare Runkel v. City of New York, 282 A.D. 173, 123 N.Y.S.2d 489 (1953) aff'd and modified sub nom. Runkel v. Homelsky, 286 A.D. 1101, 145 N.Y.S.2d 729 (1955), aff'd, 3 N.Y.2d 857, 146 N.Y.S.2d 23, 166 N.Y.S.2d 307 (1957) (city held liable to plaintiffs buried in a collapsed building where city inspector had found building to be dangerous, unsafe, in danger of collapse, and calling for demolition or securing, but took no action) with Sanchez v. Village of Liberty, 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1977), modified, 44 N.Y.2d 817, 377 N.E.2d 748, 406 N.Y.S.2d 295 (1978) (court denied plaintiffs' action for wrongful death after a fire in a multiple dwelling alleging that the building inspector was incompetent and the building violated statutes and ordinances because no "special relationship" existed and the building was not found to be a dangerous instrumentality).

Second, if the danger presented is open, obvious, and requiring immediate government action, the municipality bears a greater responsibility to the individual. Compare Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (city subject to liability for failure to provide police protection where the police were notified that the decedent had received death threats for having supplied information leading to the arrest of a well-known criminal) with Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (although plaintiff had received threats and notified police, plaintiff had no cause of action against police when lye was thrown in her face, blinding her, because the danger was not imminent and pressing).

Finally, if the individual claimant actually relies on the municipality's representations and conduct, then the responsibility of the municipality for the protection of the individual is increased. Compare Smullen v. City of New York, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (city held liable where blatant violations of code covering excavations existed, city inspector had told plaintiff's decedent that the "trench was pretty solid there" and did not need to be shored, and the trench collapsed) with Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (plaintiff's argument that he relied on the fire department to detect unsafe conditions held to be insufficient to establish a "special relationship").

When one or more of these principles is present a "special relationship" is likely to be found and thereby impose a duty on a municipality running to the individual claimant.
stances or any additional indicia of an undertaking necessary to support a finding of a "special relationship." 75

Because courts have construed the exceptions to the public duty doctrine very narrowly, the doctrine has become a very successful municipal defense to tort liability. In most blanket-waiver states, therefore, Preston’s action for negligent issuance of building permits will fail for lack of a legal duty.

B. The Foreseeability Approach

The success of the public duty doctrine as a municipal defense has caused a few courts to hold that the doctrine is a vestige of sovereign immunity rather than a traditional negligence concept. 76 Accordingly, these courts assert that the public duty doctrine is contrary to statutes abolishing sovereign immunity and necessarily must be rejected. 77 Under

75. See supra note 74. For example, in Industrial Hydraulics v. Aberdeen, 27 Wn. App. 123, 619 P.2d 980 (1980), the holder of a building permit which violated a city building regulation brought a negligence action against the city for damages arising from the city’s revocation of the permit. The court denied recovery because the building inspector simply missed the nonconformity in issuing the building permit, and the plaintiff made no specific inquiry concerning the nonconforming plans. Id. at 126, 619 P.2d at 982. Cf. Rodgers v. Toppenish, 23 Wn. App. 554, 560-61, 596 P.2d 1096, 1100 (1979), reh’g denied, 92 Wn. 2d 1030 (1979) (specific inquiries to the zoning administrator concerning information solely within the knowledge of the zoning administrator held sufficient to establish a "special relationship").


77. In the leading case of Adams v. State, 555 P.2d 235 (Alaska 1976), the Alaska Supreme Court held that the plaintiffs could recover for the wrongful deaths of hotel guests proximately caused by the state’s negligent fire inspection. The Adams court did not reach the issue of whether the state had a statutory duty. Id. at 240. Rather, the court found that the state had breached a common law duty of care assumed as a result of its "affirmative conduct." Id.

The court found an assumed duty based on the evidence that: (1) the inspector had undertaken an inspection of the hotel and had discovered several fire code violations; (2) the inspector had promised the hotel owner a more formal notification of fire code violations and failed to do so; and (3) the failure of the inspector to take the mandatory follow-up procedures increased the risk of harm to the hotel owner, as well as to the occupants. Id.

The Adams court’s decision to abrogate the public duty doctrine was predicated on the questionable assumption that otherwise the plaintiffs would be without a remedy. This assumption was questionable because the facts of the case support a finding of a "special relationship." See supra notes 69-74 and accompanying text.

The Adams analysis has influenced several other courts. For example, the Oregon Supreme Court in Brennen v. City of Eugene, 285 Or. 401, 591 P.2d 719, 723-25 (1979), rejected the public duty doctrine and imposed liability on the municipality for damages resulting from the negligent issuance of a taxicab license to an applicant who lacked the minimum liability insurance required by municipal ordinance. In so holding, the court rejected the municipality’s argument that abolishing the public duty doctrine would result in the municipality becoming an insurer of all its citizens. Id. But cf. Georges v. Tudor, 16 Wn. App. 407, 410, 556 P.2d. 564, 566-67 (1976) (abolishing the public duty
this minority position, courts define the scope of governmental duty in terms of foreseeability.\textsuperscript{78} If it is foreseeable that a government employee's negligent performance of a statutory duty might result in harm to someone, then the municipality will be held liable.\textsuperscript{79}

Under this minority position, courts have held that the approval of a building permit which does not comply with the applicable building and zoning codes creates a foreseeable risk of harm to the permit holder.\textsuperscript{80} Thus, a municipality owes a duty of due care to each and every permit applicant, and a breach thereof will result in potential liability. This minority position, therefore, expands governmental tort liability beyond the limits proscribed under the traditional public duty approach. Preston, doctrine would cause the municipality to become "a guarantor of each and every construction project".

More recently, in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1016 (Fla. 1979), the Florida Supreme Court held that the public duty doctrine, sovereign immunity, did not survive Florida's recently enacted tort claims act.


\textsuperscript{79} In Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976), the claimant, a tenant of a building destroyed by fire, sued the city alleging that a negligent building inspection caused the fire. The Wisconsin Supreme Court, after rejecting the public duty doctrine, found that it was foreseeable that a building inspector's negligence might result in harm to someone. \textit{Id.} at 139.
The Coffey court, however, reserved the right to deny recovery on the ground of public policy if:

1. The injury is too remote from the negligence; or
2. The injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or
3. In retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or
4. Because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or
5. Because allowance of recovery would be too likely to open the way for fraudulent claims; or
6. Allowance of recovery would enter a field that has no sensible or just stopping point.

\textit{Id.} at 140. By reserving this power, the court is, in effect, making the same determination as courts which apply the public duty doctrine.

The Coffey policy considerations were subsequently applied in an action alleging negligent approval of a building permit and negligent inspection. Hawes v. Germantown Mutual Ins. Co., 103 Wis. 2d 524, 309 N.W.2d 356 (1981). In Hawes, the court held that "[p]ublic policy does not preclude municipal liability for approval of plans and construction containing specific code violations where the injury is directly attributable to easily discoverable violations." \textit{Id.} at 363 (footnote omitted).

\textsuperscript{80} See Dykeman v. State, 39 Or. App. 629, 593 P.2d 1183 (1979); J & B Dev. Co. v. King County, 29 Wn. App. 942, 631 P.2d 1002 (1981), review granted, 97 Wn. 2d 1001 (1982). In J & B, the plaintiff's claim arose from the issuance of a building permit which did not comply with the local zoning laws. The plaintiff began construction based on the permit only to have a stop-work order issued later because the building did not comply with the zoning code. The plaintiff brought suit to recover the costs of relocation.

The Washington Court of Appeals held that the county was liable in tort to private individuals for negligently administering zoning and building codes. \textit{Id.} at 955, 631 P.2d at 1010. In reaching this conclusion, the court first rejected the public duty doctrine on the ground that it was inconsistent with the blanket waiver of governmental immunity found in the Washington Tort Claims Act. \textit{Id.} at 950, 631 P.2d at 1007. After rejecting the public duty doctrine, the court held that the issuance of permits created a foreseeable risk of harm to the permit holder and thus the county owed a duty of care to the plaintiff. \textit{Id.} at 955, 631 P.2d at 1010.
therefore, would probably recover monetary damages for erroneous issuance of the building permit under the minority position.

C. Analysis of the Conflicting Positions

The minority position is premised on the perceived legislative purpose behind blanket waiver tort claims acts: equating tort liability of public entities with private entities. The minority position rejects the public duty doctrine as inconsistent with this premise and substitutes a foreseeability test. Analysis reveals that the minority position is deficient in two respects. First, the minority position wrongfully expands municipal tort liability beyond that imposed on private tortfeasors. Second, the expansion of governmental tort liability resulting from adopting the minority position is a poor public policy.

1. Consistency with Blanket Waiver Tort Claims Acts and Traditional Tort Principles

Blanket-waiver and open-ended governmental tort claims acts make a municipality generally liable for its torts "to the same extent as if [it] were a private person or corporation." These statutes seek to subject municipalities to the same common law tort principles applied to private individuals. Although the minority position attempts to equate the tort liability of municipalities with that of private individuals, examination of standard tort principles reveals that the minority position actually expands municipal liability beyond that of a similarly situated private individual.


82. A majority of courts have held that a blanket-waiver or open-ended act is not intended to create any new causes of action against municipalities. See, e.g., Duran v. City of Tucson, 20 Ariz. App. 22, 24, 509 P.2d 1059, 1061 (1973) ("Abrogation of the doctrine of governmental immunity removes the defense of immunity, but does not create any new liability for a municipality."); Hannon v. Courihan, 54 Ill. App. 3d 509, 369 N.E.2d 917, 919 (1977) (Illinois Tort Immunity Act "does not create any new liabilities for negligent acts or omissions which did not previously exist"); Grogan v. Commonwealth, 577 S.W.2d 4, 5 (Ky.), cert. denied, 444 U.S. 835 (1979) (erasing the arbitrary distinction between governmental and proprietary activities "did not purport to create new torts"); Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 199 N.W.2d 158, 159-60 (1972) ("[T]he statutory provisions merely removed the defense of immunity. They did not create any new liability for a municipality."); LaPlante v. State, 85 Wn. 2d 154, 159, 531 P.2d 299, 302 (1975) (provides a remedy, not a right to recover). But cf. Wilson v. Nepstad, 282 N.W.2d 664, 669 (Iowa 1979) (special nature of Iowa statute abolishing governmental immunity construed as creating a new cause of action).

Interestingly, the Federal Tort Claims Act is construed as involving "not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." Feres v. United States, 340 U.S. 135, 141 (1950).
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One of the prerequisites to a negligence action is a duty of care owed by the defendant to the plaintiff. This duty of care may exist in common law or be created by statute. In both instances, under orthodox tort principles, the defendant is not liable if the duty breached was owed to the general public and not to a particular individual or class. Under the minority position, however, a municipality would be liable to all permittees regardless of whether the duty was owed solely to the general public.

Under the minority position, courts find that municipalities owe a common law duty to permit applicants based upon the applicant’s foreseeable reliance on the permit. This position is intuitively appealing, as it mirrors hornbook law that liability exists when one undertakes to render services for the protection of another if: (1) the failure to exercise reasonable care increases the risk of harm, or (2) the harm is suffered because of the other’s reliance upon the undertaking.

Under this common law doctrine, the threshold determination is whether one party has undertaken to render services to benefit another. The minority position assumes that a local government, by enforcing its building and zoning codes, is rendering a service for the benefit of the particular party and not just for the general public. This assumption is inconsistent with the purpose of building and zoning codes which is to carry out the public will by regulating building and construction within the community. These codes secure to the community as a whole the benefits of relatively safe structures and a well-ordered community plan. A local government issuing building permits is not undertaking to

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83. See W. PROSSER, supra note 8, § 30, at 143.
84. See generally W. PROSSER, supra note 8, § 53, at 325 (quoting F. POLLOCK, LAW OF TORTS 468 (13th ed. 1929) ("Negligence in the air, so to speak, will not do.").
86. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965). The "special relationship" exception to the public duty doctrine is closely analogous to the position taken in § 323 of the Restatement. See supra notes 69–75 and accompanying text.
88. 18 E. McQuillin, supra note 14, at 100.

In order to secure this benefit, the local government must retain the right to inspect for compliance and to revoke the building permit for noncompliance. See, e.g., KING COUNTY, WASH., CODE §§ 23.16.010, 020 (1981).

In Washington, the general rule is that a permit issued under a mistake of fact or in violation of the law gives the permittee no vested rights and is revocable, regardless of the source and nature of the defect. See Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 483–84, 513 P.2d 36, 42 (1973); Nolan v. Blackwell, 123 Wash. 504, 505–06, 212 P. 1048, 1048–49 (1923). See generally Comment, Washington’s Zoning Vested Rights Doctrine, 57 WASH. L. REV. 139, 143–44 (1981) (discussing the sources and significance of a noncomplying permit).

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render a service to the permittee, but rather to protect the welfare of the community. Therefore, contrary to the minority position, a tort action by a permittee based solely upon the municipality's issuance of permits and inspection should fail for lack of a legal duty.

The minority position is also inconsistent with analogous cases involving private safety inspections. In cases involving safety inspections by private insurers, recovery turns on whether the private safety inspector has undertaken to render a benefit to the insured. Most courts hold that mere performance of a safety inspection is insufficient to show that the private safety inspector has undertaken to render a benefit to the insured. Applying the minority position to these cases would impose lia-

90. Provisions for permits and inspections are to enable enforcement of the laws; they are not a benefit to a private developer. Instead of conferring a benefit, zoning and building codes act as a limitation on the ability of a landowner to develop his or her property.

91. This assumes the absence of any additional indications of an undertaking to benefit the particular individual, either expressed in the ordinances or found in an assumption of a "special relationship." See supra notes 67-68 & 74-75 and accompanying text.

92. Whether private safety inspection cases are relevant in governmental inspection cases is subject to dispute. The fundamental difference between the two is that private inspectors undertake inspections to lower the insurer's possibility of loss, whereas government inspectors conduct inspections to protect the public welfare. Compare Wilson v. Nepstad, 282 N.W.2d 664, 673 (Iowa 1979) (court relied on cases holding private insurers who voluntarily inspect liable for negligent inspections as support for holding municipalities liable for breach of statutory duties to inspect) with Grogan v. Commonwealth, 577 S.W.2d 4, 6 (Ky.), cert. denied, 444 U.S. 835 (1979) ("in delineating the areas and extent of public responsibility we are dealing with a subject quite apart and different from the world of individual and corporate relationships"). Logically, private inspectors should be held to a higher standard because they undertake inspections for pecuniary reasons. The minority position, however, does just the opposite.


94. See id. The approach taken in private inspection cases is similar to the approach taken to determine whether a "special relationship" has arisen between a claimant and a municipality. Compare Nelson v. Union Wire Rope Corp., 31 Ill. 2d. 69, 199 N.E.2d 769 (1964) (insurer held to have undertaken to render a service to the insured when the evidence showed: regular and periodic inspections, reports and recommendations to the insured, and representations by the insurer that the insured would receive extra safety benefits) and Hill v. United States Fidelity and Guar. Co., 428 F.2d 112 (5th Cir. 1970), cert. denied, 400 U.S. 1008 (1971) (insurer who carried fire insurance and worker's compensation policies covering a hotel and who made periodic inspections and recommendations to the hotel owners could be held liable for negligently conducted inspections) with Viducich v. Greater New York Mutual Ins. Co., 80 N.J. Super. 15, 192 A.2d 596 (1963) (no recovery for an allegedly negligent inspection when the insurer had conducted only one inspection of the machinery which injured the plaintiff) and Smith v. Allendale Mutual Ins. Co., 410 Mich. 685, 303 N.W.2d 702, 706 (1981) ("An insurer's inspection of an insured's premises for fire hazards does not in itself demonstrate an undertaking to render . . . services to the insured.").

The reasons commonly given to support the requirement of additional conduct are: (1) public policy should encourage inspections because they reduce the number of injury-causing accidents, and (2) imposing liability will substantially increase the premiums and not improve the safety of the premises, Smith v. Allendale Mutual Ins. Co., 410 Mich. 685, 303 N.W.2d 702, 721 (1981).

Based on the same rationales, the federal courts have consistently held that mere acquiescence or approval by a government inspector, without additional actions, is insufficient to impose liability
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...ility on the private insurer because it is presumed that the insurer has undertaken to render a benefit. The minority position, therefore, creates a broader duty for local governments than for private parties, a result inconsistent with the legislative intent behind blanket waiver tort claims acts to equate public liability with private liability.95

In addition to unjustifiably expanding the common law duties of municipalities, the minority position also expands their statutory duties beyond those imposed on private entities. In a tort action for breach of a statutory duty between private parties the traditional common law rule is that a statutory duty only extends to: (1) persons in the class protected by the statute, and (2) persons harmed by a hazard the statute was intended to prevent.96 The scope of a statutory duty is dependent upon the language and purpose of the statute.97 Some statutes, although regulating public or private conduct, create no duty toward any particular class of individuals.98 These statutes protect only the interests of the state or the community at large. Therefore, in an action involving only private parties, if the statute’s exclusive purpose is to secure a public benefit, then it does not create a duty enforceable in tort by any particular class of individuals.99

...upon the government. See Beason v. United States, 396 F.2d 2 (5th Cir. 1968); Roberson v. United States, 382 F.2d 714 (9th Cir. 1967); Lipka v. United States, 369 F.2d 288 (2d Cir. 1966); Lewis v. United States, 501 F. Supp. 39 (D. Nev. 1980); Johnson v. United States, 461 F. Supp. 991 (N.D. Fla. 1978).

95. See supra note 82.

96. See W. PROSSER, supra note 8, at 190-97. This Comment will discuss only the first limitation on the scope of a statutory duty because the public duty doctrine derives, in part, from this limitation.

97. Id. at 191.

98. The Restatement (Second) of Torts provides: The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively 

(a) to protect the interests of the state or any subdivision of it as such, or 
(b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or 
(c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public.

RESTATEMENT (SECOND) OF TORTS § 288 (1965). See also W. PROSSER, supra note 8, at 192 (illustrations of statutes which afford no basis for the creation of a duty of due care toward any particular person).

99. A common example is a municipal snow removal ordinance. This type of ordinance typically requires the owner or occupier of a building to clear the abutting public sidewalks of snow and ice. A person injured by falling on an ice-covered sidewalk that the abutting owner failed to keep clear does not have a cause of action against the property owner based on the municipal ordinance. The rationale behind denying the injured plaintiff a cause of action against the private defendant is that snow removal ordinances are enacted for the benefit of the municipality as an entity. See, e.g., Gardner v. Kendrick, 7 Wn. App. 852, 303 P.2d 134 (1972). See generally Annot., 82 A.L.R.2d 998 (1962) (discussion of cases addressing the issue of tort liability for failure to comply with municipal snow removal ordinances).
To effectuate the legislative intent to equate governmental and private tort liability, the same statutory duty principles should logically apply to both public and private defendants. The public duty doctrine accomplishes this result. Under the public duty doctrine, courts first look at the statute for evidence of legislative intent to protect a particular class, and finding none, refuse to impose liability on a municipality.\footnote{100. See supra note 61 and accompanying text.} Under the minority position, on the other hand, courts do not analyze the language of the building code. Rather these courts hold that the language and purpose of the code are immaterial, as the existing public duty is held to be a private duty as well.\footnote{101. In J & B Dev. v. King County, 29 Wn. App. 942, 631 P.2d 1002 (1981), review granted, 97 Wn. 2d 1001 (1982), for example, the court held that the plaintiff had a cause of action against the county notwithstanding the stated purpose of the King County Code to “serve the public health, safety, and general welfare.” Id. at 951, 631 P.2d at 1008. The J & B court did not, as required by traditional tort principles, analyze the language of the code to determine whether the code is designed to benefit a particular class of persons or whether it is designed to benefit the general public. 102. W. PROSSER, supra note 8, at 325–26. See Haslund v. Seattle, 86 Wn. 2d 607, 611–12, 547 P.2d 1221, 1224–25 (1976).} This result clearly extends governmental liability beyond traditional tort boundaries, in effect creating a new cause of action when there is a public defendant.

The minority position, therefore, is inconsistent with a blanket waiver of governmental immunity because it expands tort liability beyond that imposed on private tortfeasors. The public duty doctrine, on the other hand, complies with traditional tort principles and thus fulfills the legislative intent.

2. Public Policy Considerations

Public policy considerations are of primary importance in establishing a duty of due care. As one commentator has noted: “[i]t should be recognized that ‘duty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”\footnote{102. W. PROSSER, supra note 8, at 325–26. See Haslund v. Seattle, 86 Wn. 2d 607, 611–12, 547 P.2d 1221, 1224–25 (1976).} The minority position emphasizes two policy considerations in support of expanding governmental tort liability. The first is that governmental tort liability will deter government officials and employees from approaching their duties “fri-volously.”\footnote{103. J & B Dev. v. King County, 29 Wn. App. 942, 955, 631 P.2d 1002, 1010 (1981), review granted, 97 Wn. 2d 1001 (1982). See Stewart v. Schmieder, 386 So. 2d 1351, 1357 (La. 1980).} The second is that it is undesirable to place the risk of erroneous permit issuance on the developer.\footnote{104. J & B Dev. v. King County, 29 Wn. App. 942, 955, 631 P.2d 1002, 1010 (1981), review granted, 97 Wn. 2d 1001 (1982).} A more complete analysis,
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however, reveals that neither policy consideration justifies establishing a duty owed by local governments to building permit applicants.

First, it is questionable whether tort liability will deter governmental officials from approaching their jobs "frivolously." Although some commentators have argued that tort liability will lead municipalities to upgrade their training programs and better supervise existing activities, this result is unlikely to materialize. Implicit in the minority's reasoning is the assumption that local governments are financially able to upgrade their permit and inspection departments. This assumption is questionable. The costs of expanding their departments and training programs could be extremely high. It is unlikely that the funds necessary for such programs will be available because of the fiscal problems currently facing many municipalities.

Local governments would then face a dilemma because of their unique position in administering building and zoning codes. On the one hand, local governments have an unavoidable legal duty to process building permit applications, despite the accompanying risk of liability. Thus, the municipality would face the prospect of expansive tort liability. On the other hand, because of the voters' refusal to authorize adequate revenues, the municipality would lack the finances to upgrade programs in order to avoid liability. Such fiscal constraints will limit the courts' ability to deter "frivolous" government action.

105. Several commentators have argued that the most promising way to effectuate responsible municipal actions is to impose liability on the governmental unit. See Note, State Tort Liability for Negligent Fire Inspection, 13 COLUM. J.L. & SOC. PROBS. 303, 350 (1977); Note, Municipal Corporations—Tort Liability—Municipality Held Not Liable for Negligent Inspection Absent a Special Duty to Individual Members of the Public, 3 HAMLIN L. REV. 231, 240 (1980).

106. Many municipalities use spot enforcement systems to check compliance with building permits. These systems are designed to detect as many violations as possible subject to the manpower and budgetary restraints on the local government; they are not designed to detect every violation. The minority position, however, makes the spot enforcement system inadequate to satisfy the obligation imposed upon the local government. Under the minority position, the municipality will, in effect, be required to ensure that all building permits are in compliance with the applicable codes and ordinances. In order to meet this burden, municipalities will have to hire additional personnel which will result in higher payroll expenses.

107. When a builder submits a permit application that complies with the applicable building and zoning ordinances, the builder has a legal right to the permit and can secure a writ of mandamus to compel the municipality to issue it. See 3 A. Rathkoff, THE LAW OF ZONING AND PLANNING § 44.05(4) (1975).

In this respect, local governments differ from private entities. A private insurance company, for example, can independently appraise the potential risk involved in conducting safety inspections compared to the potential savings from fewer claims and choose whether to act or not. This option is unavailable to local governments which have a legal duty to act once a zoning or building code is enacted. Furthermore, most municipalities have adopted some type of building or zoning code and are politically unable to abandon such codes because they have become an integral part of the community's development.
Second, the risk of erroneous permit issuance properly falls on the developer. Developers are under a legal duty to comply with the relevant building and zoning codes in their permit applications. The local government's duty is merely secondary: to encourage the developer to voluntarily comply with the applicable building and zoning codes. The risk of erroneous permit issuance must fall on the developer in order to provide an economic incentive to initially comply with the codes. Under the minority position, this incentive is removed from the developer and the primary responsibility to insure compliance is shifted to the municipality.

This shift in responsibility provides an economic disincentive to private contractors to conduct their own examination of the building and zoning codes. Instead, developers can rely on the municipality to insure that the permit application complies with all relevant codes and ordinances, secure in the knowledge that if the public official failed to discover all the errors in the submitted application, the developer would be indemnified for any resulting losses. This result clearly places an unreasonable burden on a municipality in light of the socially desirable goals accomplished by permit issuance and inspection. Therefore, the policy rationales posited by courts do not support the expansion of tort liability under the minority approach.

In summary, the minority position is inconsistent with its basic purpose: to equate governmental tort liability with that of similarly situated private individuals. Rather than equating tort liability, the minority position creates new causes of action when a governmental entity is a defendant, a result not envisioned by the state legislatures when enacting blanket-waiver tort claims acts. The public duty doctrine, on the other hand, is consistent with a blanket waiver of governmental immunity because it extends traditional tort principles to actions against municipalities. By applying the doctrine, courts are able to effectuate the legislature's intent to treat governmental and private tortfeasors equally.

108. See supra note 89 (an invalid permit vests no rights in the developer).
110. In addition, a separation of powers problem could arise under the minority position. By applying a "reasonableness" test, courts would be forced to supervise the operations of local government. For example, some of the issues the courts would be forced to decide are: (1) how many persons should be assigned to the permit department; (2) how many persons are required to enforce permits; and (3) what should be the requisite training and education of such persons. These determinations are beyond the proper role of the judiciary and are best made by the local government to which they are committed.
111. See supra note 82.
IV. CONCLUSION

A comparison of decisions under the specific and well-defined closed-ended tort claims acts with decisions under the general and undefined blanket-waiver approach yields interesting results. In general, the courts in blanket-waiver states have limited the scope of government liability almost to the same extent as those in closed-ended states. The courts reached this result by using the public duty doctrine.

Despite reaching nearly the same results, the application of the public duty doctrine has created several problems for municipal planners. First, the lack of explicit legislative limitations coupled with an undefined statutory or judicial waiver of governmental immunity has resulted in numerous judicial exceptions\textsuperscript{112} and conflicting opinions.\textsuperscript{113} Because of the uncertain and unsettled scope of governmental tort liability in these states, it is difficult, if not impossible, for municipalities to properly allocate their limited fiscal resources. The absence of specific liability limits creates new costs for municipalities: costs not only in the form of tort judgments but also costs from claim payments, investigation and litigation expenses, and the unknown costs of services foregone because of the uncertain scope of governmental liability.\textsuperscript{114}

Some commentators argue that this burden can be spread effectively over the entire community through the use of liability insurance.\textsuperscript{115} Adequate insurance, however, is often unavailable or unaffordable.\textsuperscript{116} Insurance companies are unwilling to insure municipalities because of the uncertain and unascertainable scope of potential tort liability.\textsuperscript{117} This uncertainty has been increased by the recent decisions rejecting the public duty doctrine and expanding governmental tort liability.\textsuperscript{118} At a minimum, the insurance companies will charge extremely high rates to compensate for the uncertainty. Because municipalities have limited revenue

\textsuperscript{112} See generally supra notes 63–75 and accompanying text (discussing the exceptions to the public duty doctrine).

\textsuperscript{113} See generally supra Part IIIB (recent decisions rejecting the public duty doctrine have added to the uncertainty surrounding the scope of municipal tort liability).

\textsuperscript{114} Smith, Insurance and the Texas Tort Claims Act, 49 Tex. L. Rev. 445, 449 (1971).


\textsuperscript{117} In the insurance industry, making a profit depends on the long-range certainty of income exceeding payments. Because the scope of governmental liability is uncertain in blanket-waiver states, insurance companies are naturally reluctant to insure municipalities. See id.; Smith, supra note 114, at 450; Vitullo & Peters, Intergovernmental Cooperation and the Municipal Insurance Crisis, 30 DePaul L. Rev. 325, 329 (1981).

\textsuperscript{118} See supra Part IIIB.
sources, they would be forced either to decrease social services or to increase local taxes.  

Only a comprehensive legislative plan outlining the contours of governmental tort liability will ameliorate these problems. This Comment recommends the closed-ended approach. This approach is superior in several respects.

First, by preventing courts from adopting "novel causes of action," the closed-ended approach fosters greater certainty in the area of municipal tort liability. Decisions regarding liability are made on a firm statutory base rather than on a case-by-case judicial interpretation. This, in turn, leads to greater predictability of governmental liability which will allow municipalities to obtain realistically priced insurance and to properly budget for potential liabilities.

Second, under this approach, the legislature weighs all the competing policy considerations for imposing liability on specific governmental activities. The legislature, through its use of committee hearings and reports, is in the best position to consider the broad ramifications of restricting or expanding governmental tort liability.

Third, the specific detailed exceptions found in a closed-ended tort claims act protect a municipality from the need to insure against other unspecified risks. The detailed exceptions also serve to avoid expensive litigation over the scope of governmental tort liability. Finally, the detailed exceptions provide guidelines for a municipality when considering to undertake additional activities to further the public welfare.

This Comment advocates that municipalities should be immune from tort liability for issuing building permits. Building permit enforcement secures a safe and well ordered community which benefits the public in general. Therefore, it should be encouraged rather than discouraged by the imposition of tort liability. An individual injured by the negligent issuance of a building permit has other methods of recourse through existing administrative or judicial proceedings. Balancing the equities be-

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This problem is avoided, to a small extent, in those states which have imposed statutory limits on tort recoveries against municipalities. See, e.g., FLA. STAT. § 768.28(5) (1979); ILL. REV. STAT ch. 85, § 2-102 (1975); MINN. STAT. § 466.04 (1978); OR. REV. STAT. § 30.270(1) (1977); WIS. STAT. § 893.80(3) (Supp. 1982). Although the amount of a claim of a single individual or a claim arising out of a single occurrence is limited by statute, it is still uncertain when and how often a municipality will be subject to tort liability in blanket-waiver states. It appears, therefore, that liability limits are not the answer to the dilemma facing local governmental entities.

120. See N.J. STAT. ANN. § 59:2-1 comment (1982).

121. A number of jurisdictions have held that a municipality is estopped from revoking a building permit when an official, acting within the scope of his or her authority, has issued a permit by
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tween the injured individual and the social utility of building permit enforcement, therefore, weighs in favor of governmental immunity.

Scott J. Borth

mistake. See, e.g., Pioneer Trust and Savings Bank v. County of Cook, 71 Ill. App. 3d 510, 377 N.E.2d 21 (1978); Key Petroleum, Inc. v. Housing Auth., 357 So. 2d 920 (Miss. 1977). A permit holder also has a right to have the stop-work order reviewed by a board of appeals. See 4 A. RATH-KOFF, supra note 107, § 49.09.