NO. 93050-3

SUPREME COURT
STATE OF WASHINGTON

KENNETH EMERSON and KELLY EMERSON,

Petitioners,

v.

ISLAND COUNTY,

Respondent,

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Island County was the defendant below, and the Respondent in the Court of Appeals. Island County urges the Supreme Court to deny discretionary review.

II. ISSUES PRESENTED FOR REVIEW

Respondent Island County believes the issues presented for review may best be stated as follows:

A. Whether Supreme Court review is necessary, when the Court of Appeals' unanimous decision was in conformance with the statutory language of RCW 64.40 and settled case law regarding the statute's strict conditions.

B. Whether the Court of Appeals properly affirmed the dismissal of Emerson's claim under RCW 64.40, when the claim did not arise from a final decision by the Island County Board of County Commissioners.

C. Whether the 64.40 claim was subject to dismissal based on Emerson's failure to exhaust administrative remedies.

D. Whether the 64.40 claim was also subject to dismissal based on Emerson's failure to comply with the statute's narrow 30 day limitations period.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

This appeal arises from the second lawsuit filed by Kenneth and Kelly Emerson ("Emerson") against Island County arising from their construction of a home addition without any permits or approvals, and their refusal for several years to allow an Island County Critical Areas Specialist to inspect the property for potential wetlands. The first lawsuit, filed in Island County Superior Court in 2010, was dismissed with prejudice in 2011 by the Honorable Alan Hancock, who found that none of Emerson's claims had merit. (CP 684-705).

The current lawsuit was filed in November 2013, arising from Island County's determination that a wetland report submitted on behalf of Emerson did not comply with applicable methodologies and standards, and that therefore a Critical Areas Specialist from the County or the Washington Department of Ecology (DOE) would need to inspect the property before a building permit could be issued. Emerson denied repeated requests and suggestions by Island County that the dispute could be easily resolved by an inspection, and stubbornly refused access to the property to any County or state employee. (CP 140-212).

The Emerson home on Camano Island was constructed in 1995. In June 2008, Emerson applied for a permit to construct a garage on the

property. As a part of that project review, a brief critical areas review was performed by the Island County Department of Planning and Community Development ("Planning"). *Possible* wetlands in a ravine on the property were observed and a rough drawing was prepared which indicated the approximate location of the potential wetlands. The proposed garage was not within the wetland buffer, however, and therefore the garage did not implicate wetland setbacks. Emerson was expressly advised in the garage permit, however, that no additional new structures could be built without further critical areas review. (CP 660).

Between 2008 and 2010, Emerson added a number of improvements to the residence, without applying for permits or notifying Island County. These improvements included a greenhouse, a deck and patio, and a retaining wall. (CP 660).

In August 2010, Emerson began construction of a sunroom addition to the home. No permit applications were submitted to the County prior to commencement of construction, despite the fact that Kenneth Emerson has been a contractor for decades, and Kelly Emerson had also worked extensively in the construction industry, and she was running for Island County Commissioner. (CP 665, 668). Mr. Emerson

testified that he decided to "take the risk" of undertaking the project without permits. (CP 664, 686).[1]

A neighbor observed the construction on the Emerson house, and notified Island County. Inspector Ron Slechta went to the property, took photographs and left a Stop Work Order. The next day, Mr. Emerson came into Mr. Slechta's office, apologized for undertaking construction without permits, and filled out forms to obtain after-the-fact permits. (CP 663-664).

The County advised Emerson that he would need to submit engineering drawings and a wetlands report to help the County evaluate any impact on critical areas of the sunroom addition. (CP 664-665). The County's instructions were defied by Emerson. The requested documents were not submitted. Therefore, the County sent an Order of Enforcement to Emerson on or about November 1, 2010. Emerson did not appeal that Order, but instead filed a lawsuit for damages in Island County Superior Court, Cause No. 10-2-00915-3. (CP 667).

The first lawsuit sought damages under a variety of legal theories, and also sought injunctive relief against Island County, i.e., issuance of a

[1] The Petition for Review inaccurately states that the construction of the sunroom addition involved only "preparatory work." Petition, p. 3. In reality, the record showed that Mr. Emerson had already framed out the sunroom addition at the time a neighbor observed the active construction and reported the unpermitted work. (CP 122). *See* Court of Appeals Decision, p. 2.

building permit for the sunroom. After discovery was undertaken, Island County filed a Motion for Summary Judgment, seeking dismissal of all of Emerson's claims for damages and injunctive relief. On May 27, 2011, Judge Alan Hancock issued an extensive Memorandum Decision granting Island County's Motion for Summary Judgment. An Order of Dismissal was signed by Judge Hancock on or about June 7, 2011. (CP 704-705). The dismissal order was not appealed.

Emerson and the County continued to have periodic discussions with respect to the issuance of a building permit for the home addition. Because Kelly Emerson became an Island County Commissioner in 2011, the Prosecutor's Office retained an outside prosecutor, Justin Kasting of Snohomish County, to represent the Department of Planning and Community Development ("Planning") in its negotiations with Emerson's attorney over the permitting issues. Throughout 2013 Mr. Kasting repeatedly advised Emerson's attorney that the dispute could likely be resolved quickly and without cost to the Emersons, if they would simply allow a site inspection for critical areas by a County or DOE wetlands inspector. More than ten (10) letters and/or phone communications were made during calendar year 2013 conveying this simple solution. (CP 669-670). Similar offers were made by Ecology to conduct an inspection at no

cost. Emerson persisted, however, in denying access to County or state inspectors. (CP 671-674).

In March 2013, Emerson asked the Planning Department to issue a formal decision on the 2010 building permit application, so that it could be appealed. In response to that request, on March 28, 2013, the Planning Department issued a second supplemental enforcement order to Emerson, asserting that the violations alleged in the initial order remained on the property, and ordering them to pay a civil fine. The Emersons appealed the order to the Island County Hearing Examiner. (CP 17).

On March 29, 2013, the Planning Department formally denied the Emerson building permit application submitted on August 31, 2010, based on Emerson's refusal to allow the County or DOE to inspect the property for potential critical areas issues. Emerson appealed that decision to the Island County Board of County Commissioners (BOCC). (CP 17). However, the Planning Department and Emerson agreed to a continuance of the appeal to allow additional time for settlement discussions. On June 28, 2013, the parties entered into a Settlement Agreement. (CP 23-29). As a part of that agreement, the County agreed to issue an Enforcement Order that modified the previous orders and contained terms that Emerson was required to complete, i.e., the payment of a reduced fine of $5,000 (reduced from more than $37,000), and the submission of a new

wetlands report within 60 days. The Agreement provided that the new wetland report would have to "strictly comply" with the requirements of DOE's Wetland Manual. The Agreement provided that the Island County Planning Department could seek independent third party review of a new wetland report if it reasonably determined that accepted methodologies were not strictly followed. (Settlement Agreement, ¶ 4.1). (CP 26). Emerson withdrew his appeals of the enforcement orders and the denial of the building permit.

Emerson submitted the new wetland report on or about August 27, 2013. The County determined that the methodology of the wetland report was not in compliance with federal and state standards. The County forwarded the wetland report to DOE for third party review. DOE wetlands specialists evaluated the report and issued a letter report which agreed with the County that the wetland report issued on behalf of Emerson was *not* in compliance with state and federal standards. (CP 202-206). The County forwarded DOE's letter to Emerson's attorney, and again restated that the wetland issue could be easily resolved without cost to Emerson by allowing a County or DOE wetland specialist to inspect the site. Emerson persisted in his refusal to allow an inspection, and his attorney declared the Settlement Agreement in default in September 2013. (CP 18, 675-676).

B. Procedural Background.

Notwithstanding the failure of the settlement agreement to resolve the permit issues, Emerson did not seek to reactivate his appeal of the permit denial to the Hearing Examiner or otherwise obtain a final decision from the BOCC. Instead, this lawsuit was filed on or about November 5, 2013, seeking injunctive relief (i.e., issuance of the building permit) and recovery of damages under a variety of legal theories. (CP 14-22).

By August of 2014, in the face of repeated refusals by Emerson to voluntarily allow a wetlands inspection, the County's litigation attorney Mark Johnsen submitted a formal Request for Inspection of Property under CR 34(a)(2). For the first time, Emerson agreed to a site inspection, including participation by an Island County Critical Areas Specialist. An inspection was undertaken on October 7, 2014 by County wetlands specialists who examined the property and took numerous soil and vegetation samples. (CP 679). Approximately three weeks later, wetlands specialist Tess Cooper issued a letter report concluding that no wetlands on the property would be impacted by Emerson's home addition. Emerson was advised that the building permit was available to be picked up. Emerson declined to pick up the permit or proceed with construction. (CP 680).

Notwithstanding issuance of the permit, the Emersons announced their intention to continue to pursue this lawsuit. Island County filed a Motion for Summary Judgment which sought dismissal of all claims, based on a variety of legal defenses. The motion was heard by King County Superior Court Judge Kimberly Prochnau on January 23, 2015. At the conclusion of the hearing, the court entered an Order dismissing all claims, other than the claim for breach of contract (i.e., the June 2013 Settlement Agreement). (CP 632-634).

Emerson filed a Motion for Reconsideration, asking Judge Prochnau to revisit her dismissal of the RCW 64.40 claim and the regulatory takings claim. The Motion for Reconsideration was denied. (CP 645-646).

Following mediation, the parties agreed that the remaining breach of contract claim would be dismissed from the Superior Court action, and instead would be subject to arbitration. (CP 647-648). Emerson reserved the right to pursue an appeal of the dismissal of the other claims. The Appeal was heard by the Court of Appeals, Division I, on March 1, 2016. Less than a month later, the Court of Appeals delivered a unanimous decision affirming the trial court on all counts. This Petition for Review by Emerson was filed on April 26, 2016.

IV. ARGUMENT

Respondent Island County submits that there is no need for Supreme Court review of the unanimous decision of the Court of Appeals. The issues raised by Emerson have already been addressed in a thoughtful decision by King County Superior Court Judge Kimberly Prochnau, and by a panel of the Court of Appeals. The decision of the Court of Appeals is in conformance with the express language of RCW 64.40, as well as applicable case law handed down by this Court and by the Washington Court of Appeals. The Petition for Review should be denied.

A. The 64.40 Claim Was Subject to Dismissal Based on Multiple Grounds.

1. Only a Final Decision by a Local Government's Highest Decision Maker is Actionable Under RCW 64.40.

The trial court and the Court of Appeals had no difficulty in concluding that Emerson's claim under RCW 64.40 was subject to dismissal. Indeed, Emerson's assertion of a claim under that statute suggests a misunderstanding of its narrow application. At common law, damages were ordinarily not recoverable based on alleged errors by government employees in connection with processing building and land use permits. RCW 64.40, which was enacted by the Legislature in 1982, provides a *limited remedy* for a permit applicant whose permit has been subject to an arbitrary and capricious or knowingly unlawful decision by a

local government. Under the express language of the statute, however, liability may arise only from an improper "final decision" by a local government's highest decision making body. The key operative language of the statute is found at RCW 64.40.020(1):

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from *acts of an agency* which are arbitrary, capricious, unlawful or exceed lawful authority. . . .

(Emphasis added). To determine the basis for relief under the statute, one must examine the statutory definitions of the terms "act" and "agency." Those definitions are set forth in RCW 64.40.010 as follows:

> (1) "Agency" means the State of Washington, any of its political subdivisions, including any city, town or *county*, and any other political body exercising regulatory authority or control over the use of real property in the state.
>
> * * *
>
> (6) "Act" means a *final decision by an agency* which places requirements, limitations or conditions upon the use of real property.

(Emphasis added).

Thus, in this case Emerson would have standing to assert a claim under RCW 64.40 only if a "final decision" by Island County (i.e., a decision by a Hearings Examiner or the Board of County Commissioners) was arbitrary and capricious or knowingly unlawful. Simply stated, there was no "act" by Island County, within the narrow definition of RCW

64.40.010(6). *Callfas v. Dept. of Construction and Land Use*, 129 Wn. App. 579, 592, 120 P.3d 110 (2005).

It is undisputed that the Board of County Commissioners did not make any decision on Emerson's building permit application. The actions of which Emerson complains (an alleged breach of a settlement agreement) were undertaken by planning staff, and were not appealed to a Hearing Examiner, nor to the BOCC. (670-671). Yet it is settled that preliminary actions by County staff cannot be the basis for a claim under RCW 64.40.

Recognizing that there was no decision by the BOCC (or by the Hearing Examiner) relating to Emerson's permit application, Emerson argues that he is challenging the permitting process and the Settlement Agreement under 64.40. But in so doing, Emerson effectively acknowledges that he has no standing to bring a claim under 64.40. The suggestion by Emerson that he is not challenging a permit decision by the BOCC but rather raising generalized frustration in connection with his dealings with Island County fails to state a claim under 64.40. *Callfas v. Department of Construction and Land Use*, *supra*, 129 Wn. App. at 592-93.

2. Emerson Failed to Exhaust Administrative Remedies.

A corollary to the rule that only a "final decision" by a local government can give rise to liability under 64.40 is the requirement of exhaustion of administrative remedies. Emerson argues that he was not required to exhaust administrative remedies before pursuing a 64.40 claim. His argument was property rejected by the trial court and by the Court of Appeals. RCW 64.40.030 unambiguously provides that a claim under the statute may be commenced only within 30 days after the applicant for a permit has exhausted all administrative remedies:

> Any action to assert claims under the provisions of this chapter shall be commenced only within 30 days after all administrative remedies have been exhausted.

The Washington courts have construed the language of 64.40.030 strictly. If the statutory action is not commenced within 30 days following the final administrative action of the County, dismissal is required. The statute carries an exhaustion requirement which is mandatory. Curiously, Emerson seeks to rely on *Smoke v. Seattle*, 132 Wn.2d 214, 221-22, 937 P.2d 186 (1997), a case in which this Court stressed that the exhaustion requirement under 64.40 is mandatory:

> On its face, RCW 64.40.030 unambiguously imposes an exhaustion prerequisite to damages actions. The plain language "after all administrative remedies have been exhausted" expresses no meaning other than an exhaustion requirement.

Id. at 221. The reason why failure to exhaust did not apply in the *Smoke* case is that there was no statutory appeal remedy available to the plaintiff when he received a denial of his building permits by the City of Seattle. In contrast, it is undisputed that appeal remedies were available to Emerson in this case. Indeed, Emerson initiated appeals to the Hearing Examiner and the Board of County Commissioners, but voluntarily dropped those appeals in exchange for a settlement agreement which substantially reduced the amount of the penalty for building permit violations, and afforded Emerson a breach of contract remedy if he believed that the County had breached the agreement.[2]

Emerson did not perfect an administrative appeal of the County's decision not to grant a permit until a site inspection was conducted. Neither the Island County Hearing Examiner nor the Board of County Commissioners heard an appeal by Emerson. Therefore, under the unambiguous language of the statute and its construction by the courts, there was no "Act" under RCW 64.40.010(6), and the 64.40 claim was subject to dismissal based on failure to exhaust remedies.

There is abundant caselaw confirming that an action under 64.40 must be dismissed if it is filed before all administrative remedies have

[2] It should again be stressed that the breach of contract claim was *not* dismissed by the Court, but rather was subject to arbitration.

been exhausted. In *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153, the Ninth Circuit Court of Appeals held that a claim under 64.40 was properly dismissed, where the plaintiffs had failed to wait until administrative remedies had all been exhausted before filing their claim. 126 F.3d at 1130. Exhaustion of remedies was also applied as a bar to a 64.40 claim by the Court of Appeals in *Westway Construction v. Benton County*, 136 Wn. App. 859, 866-67, 151 P.3d 2004 (2006), where the plaintiff filed suit without first exhausting all administrative appeals.

Emerson argues that the exhaustion requirement under RCW 64.40 should not be applied because his claim against Island County arises from a settlement agreement rather than the denial of a building permit per se. But if that is the case, then the remedy is a *breach of contract claim*, not the limited statutory remedy under 64.40. Following the breakdown of the settlement agreement in the fall of 2013, Emerson could have either reactivated his appeal of the building permit denial, or sought a new appeal of the wetland inspection condition that the County was imposing. He declined to do either, and instead filed his action for damages in Island County Superior Court without exhausting administrative remedies. This was fatal to any claim under RCW 64.40.

Emerson's reliance on *Saben v. Skagit County*, 136 Wn. App. 859 (2006) is misplaced. As the Court of Appeals noted in this case, Saben *did*

appeal the denial of his permit to the Hearing Examiner, and then to the BOCC. Further, Saben *did* file a timely action under RCW 64.40. 136 Wn. App. at 873-74. In this case, by contrast, there was no timely exhaustion of administrative remedies and no timely filing of an action under RCW 64.40. (See, Section 3, below).

3. The 64.40 Claim Was Also Barred by Limitations.

Even if one accepted Emerson's strained argument that he effectively exhausted administrative remedies by declaring a default in the Settlement Agreement, he failed to file his action under 64.40 within thirty (30) days after the default declaration. Thus, even if a 64.40 claim could arise from a staff decision (it cannot), and even if there were no exhaustion requirement in the statute (there is), the 64.40 action would still be subject to dismissal based on limitations.

As Emerson admits in his Complaint at paragraph 26, he sent written notice of the Planning Department's alleged default under the Settlement Agreement on September 16, 2013. (CP 18). Yet the 64.40 action was not filed until November 5, 2013, beyond the narrow 30 day limitations period for a claim under the statute. Therefore, in addition to absence of standing and failure to exhaust remedies, Emerson's statutory claim was also barred by limitations. RCW 64.40.030; *Westway*

Construction, *supra*, 136 Wn. App. at 867; *Callfas*, *supra*, 129 Wn. App. 592-93.

V. CONCLUSION

The Court of Appeals' decision in this case was in conformance with the express language of RCW 64.40, as well as settled caselaw as announced by the Washington Supreme Court in *Smoke*, and by the Court of Appeals in *Callfas* and *Westway Construction* and *Saben*. This Court should deny discretionary review.

Respectfully submitted this 6th day of May, 2016.

KARR TUTTLE CAMPBELL

By: _____
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on the parties of record as stated below in the manner indicated:

Justin D. Park 155 – 108th Ave NE, Suite 202 Bellevue, WA 98004-5901 ***Attorney for Appellants***	☐ ☐ ☒ ☐ ☐	Via Hand Delivery Via Facsimile Via U.S. Mail Via Overnight Mail Via E-mail

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

Dated at Seattle, Washington on May 6, 2016.

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