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No. 73208-1-I

THE COURT OF APPEALS, DIVISION I

IN THE STATE OF WASHINGTON

KENNETH EMERSON and KELLY EMERSON, *Appellants*,

v.

ISLAND COUNTY, a political subdivision of the State of Washington
Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY

Like its motion for summary judgment, the County's arguments in opposition to the Emersons' appeal are replete with red herrings and discussions of issues that were never raised below and are not before the Court now. It hopes to obfuscate truth and the law by arguing the Emersons are somehow responsible for their own grievances and by supporting its distorted view of the facts with irrelevant law from other jurisdictions. The Court should not be misled by the County's tactics.

The central claims in this case arise from the County's arbitrary and capricious actions relating to the processing and issuance of a Type 1 *ministerial* building permit. While the County is obligated to issue ministerial building permits as a matter of right once a complete application is submitted, the County departed from its procedures to single out the Emersons for unknown and possibly politically-motivated reasons. The Emersons have endured a tortured process involving four site visits by the County, three wetlands reports that unanimously confirm that no wetlands exist on their property, and years of litigation culminating in a settlement agreement that the County apparently had no intention of honoring.

This action ensued after the Emersons declared that the County was in breach of the Settlement Agreement. The trial court dismissed the

Emersons' claims on various erroneous grounds without appropriate consideration. It conflated various legal principals, raised issues *sua sponte* to make up for the County's shortcomings in its motion, and gave inferences to the County that should have been afforded to the Emersons. Upon review, the trial court's dismissal of the Emersons' causes of action for violation of RCW 64.40.020, takings, fraud, and deprivation of substantive due process under 42 U.S.C. §1983 must be reversed.

ARGUMENT

I. The Emersons' RCW 64.40.020 Claim.

The trial court dismissed the Emersons' RCW 64.40.020 claim on grounds that they had allegedly failed to exhaust a purported administrative remedy requirement; it did not reach any other issues relating to the claim. (RP 43:7-44:1.) In opposition to this appeal, the County addresses the administrative exhaustion issue but it also raises two new additional issues: that the County allegedly did not perform an "act" that could give rise to liability under 64.40; and that the Emersons' claim is allegedly barred by limitations. As these arguments are raised for the first time on appeal, this Court should reject them without consideration. *See e.g.,* RAP 2.5(a); *Karlberg v. Otten,* 167 Wn.App. 522, 531-2, 280 P.3d 1123 (2012).

1. The County's failure to act is considered an "Act" for purposes of liability under RCW 64.40.020.

As a threshold matter, the County first argues it cannot be liable under RCW 64.40 because it allegedly did not perform an "act."[1] The County's argument on this issue is deceptive. The County accurately cites the statutory definition of an act as "a *final decision by an agency* which places requirements, limitations or conditions upon the use of real property"[2] (quoting RCW 64.40.010(6)). Then, because the County's hearings examiner or board of commissioners did not issue a decision on the permit, the County concludes it cannot possibly be liable without such a "final decision."[3]

The problem with the County's logic, however, is that its premise is based on a willful ignorance of the statutory definition of an "act" and the interpreting caselaw that govern when agencies like the County can be

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[1] The County raises its "failure to act" issue for the first time on appeal; it was never addressed in its summary judgment moving papers or otherwise presented to the trial court. On that ground alone, the Court should refuse to consider the argument. (*Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351.) Indeed, the County tacitly admitted that it performed an "act" when it alleged the Emersons' claim was barred because they failed to commence a claim within 30 days of a final administrative decision.

[2] Respondent's Brief, p. 10, emphasis in original.

[3] The County is patently wrong with respect to who must issue a final decision on its behalf. A planning commissioner or hearing examiner will only make a final decision for Type IV applications. Whereas here, final decisions for Type I applications—which are ministerial decisions—are made by a planning director or public works director. (ICC 16.19.040.)

liable under RCW 64.40. In other words, the County only provides half the definition of an "act" in order to make its argument seem plausible.

Under RCW 64.40.010(6), an agency is *also* deemed to have "acted" if it *fails to act* "within the time limits established by law in response to a property owner's application for a permit." Under RCW 36.70B.080, the County had no more than 120 days to render a final decision on the Emersons' permit once it resumed processing it pursuant to the Settlement Agreement dated June 28, 2015. *See* Island County Code ("ICC"), 16.19.100. By October 26, it had unreasonably, arbitrarily, and capriciously determined that the Emersons' wetlands report did not "strictly" follow certain guidelines pursuant to the Settlement Agreement and it failed to issue a final decision. Thus, the County failed to act as required by law and its inaction gives rise to damages under RCW64.40.

2. The Emersons were not required to exhaust any administrative remedies before commencing an action for damages under RCW 64.40.

The County also attempts to evade liability on grounds that the Emersons allegedly failed to exhaust administrative remedies prior to filing their claim for damages under RCW 64.40. The trial court erred as a matter of law in concluding this was true.

As a general rule, aggrieved property owners are required to first exhaust administrative remedies prior to filing suit for damages under

RCW 64.40. *See* RCW 64.40.030. It is undisputed that the Emersons did not file an administrative appeal following their determination that the County was not processing their application in good faith pursuant to the Settlement Agreement. However, this lack of a filing is not fatal to their claim, because the Emersons' situation falls within a stated exception to this rule, and complies with the actual terms of the Settlement Agreement. Tellingly, the County fails to address any of the *exceptions* to the general administrative exhaustion requirement outlined in *Smoke v. Seattle*, 132 Wn.2d 214, 221-22, 937 P.2d 186 (1997).[4] The trial court also failed to address any of the exceptions to the administrative exhaustion requirement.

First, as here, "[n]o exhaustion requirement arises without the issuance of a final, appealable order." *Smoke*, 132 Wn.2d at 222. A final appealable order is one that "fixes a legal relationship as a consummation of the administrative process." *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182, 190 (1987). The decision must be clearly understandable as a final determination of rights. *Id.* Again, it is undisputed that the County never issued a final, appealable order once it resumed processing the application after execution of the

[4] This fact is surprising given that the County cites *Smoke* for the general rule. Yet again, however, the County only provides a portion of the law in hopes of misleading this Court—like the trial court—into an erroneous ruling.

Settlement Agreement. Without such an order, the Emersons were not required to exhaust any administrative remedies.

Second, there is no exhaustion requirement if there are no administrative remedies available to the aggrieved party. *Smoke*, 132 Wn.2d at 222. The Emersons were without administrative remedies for a myriad of reasons. As a threshold matter, there was no final decision to appeal, so there could not have logically been an administrative remedy to pursue. Moreover, as discussed in more detail below, the Settlement Agreement itself dictated the proper procedure in the event of a default. The Settlement Agreement contained a forum selection clause limiting venue for "any action arising out of [the] Agreement" to a Superior Court within Island County.[5] CP253. Even if there were a remedy available, the Emersons could not have sought it through the administrative process without violating the Settlement Agreement.

To that end, the administrative process would have been futile because the hearing examiner lacked the jurisdiction to address the Emersons' intertwined claims for damages arising from the County's breach of the Settlement Agreement. *See Saben v. Skagit County*, 136 Wn.App. 869, 873, 152 P.3d 1034 (2006).

[5] The Parties later stipulated to venue in King County.

Finally, *Saben* supports the conclusion that no administrative exhaustion requirement arises in the first place when an agency never issues a final, appealable order *after* it resumes processing an application pursuant to a settlement agreement. This is particularly true in circumstances such as these where the Parties agreed to limit venue for any and all claims and where the County also agreed that the Emersons would preserve all rights to any and all remedies available in law or equity. CP253. When the Settlement Agreement's remedy provision and venue provision are read in conjunction, it is clear that the Parties unambiguously contemplated that upon a default, the Emersons could only assert claims in the Superior Court. The County should not now be allowed to argue otherwise.

3. The 64.40 Claim is not Barred by Limitations.

When moving for summary judgment, the County argued that the Emersons' RCW 64.40 claim was barred because they failed to file an action within 30 days of a final decision. Conveniently, it now argues there was never a final decision to begin with but that perhaps the Emersons should have been required to file their 64.40 action within thirty days after declaring that the County was in default. Not surprisingly, the County cannot and does not cite any authority for the proposition.

Because the Emersons' claim is based on the County's *failure to act*, the earliest the claim arose was October 26, 2013 (i.e., 120 days after the County resumed processing the application pursuant to the Settlement Agreement). If a 30-day limitations period is applied, the limitations period would have lapsed on November 25, 2013. The Emersons commenced their claim on November 5, 2013, well within any limitations period assuming, *arguendo*, one existed in the first place. *See Birnbaum v. Pierce County*, 167 Wn.App. 728, 733-34, 274 P.3d 1070 (2012).

II. The Emersons' As-Applied Taking Claim.

The County urges the Court to uphold the trial court's dismissal of the Emersons' takings claim under the Washington Constitution because a site inspection requirement cannot allegedly give rise to a takings claim, because a temporary taking purportedly requires denial of all economic use of the subject property, and because the claim was allegedly not ripe. Putting aside the fact that the arguments are meritless, the arguments were never presented to the trial court.

1. The County did not raise any of its arguments in the Trial Court.

It is axiomatic that a party moving for summary judgment must raise all of the arguments it seeks to rely upon in its moving papers. *See White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn.App. 163, 168-69, 810 P.2d 4

(1991). Any arguments raised for the first time in a reply brief, at oral argument, or even on appeal must be disregarded. *Id.* This ensures fairness in the proceedings to the non-moving party; without it, the non-moving party will be deprived of its opportunity to adequately respond.

Even a cursory reading of the County's motion for summary judgment shows that it specifically moved for summary judgment of a facial takings claim—a claim that was not set forth in the pleadings or otherwise even before the Court! CP90. At oral argument, the Court *sua sponte* raised the issue of whether the Emersons' claim was a facial or as-applied takings claim. RP46-7. Upon affirmation that the claim was an as-applied takings claim the Court determined that the County had met its burden of showing that no triable issue of fact existed.

In other words, the trial court ignored the fact that the County moved for summary judgment of a claim not before the Court and then made a factual inquiry into a separate claim without affording the Emersons *any opportunity* to respond. In doing so, it committed reversible error.

In opposition to the Emersons' appeal, the County simply argues it made a "detailed and multi-faceted argument in support of the takings claim" as though its blanket conclusory statement can somehow cure the court's error. In reality, the County made no arguments at all with regards

to a facial takings claim. That is exactly why it simply argues that it made "multi-faceted" arguments without bothering to explain them or state how they could even have put the Emersons on notice that it was moving for summary judgment of an as-applied claim.

As noted in the Brief of Appellant, as-applied takings claims and facial takings claims involve distinct factual and legal inquiries. (*See Thun v. City of Bonney Lake*, 164 Wn.App. 756, 759-61, 265 P.3d 207 (2011). To that end, moving for summary judgment by providing legal authority for a facial takings claim cannot also serve to encompass an as-applied takings claim without so much as a mention of the latter. *See, e.g. White*, 61 Wn.App. at 168-69. In actuality, the two distinct claims only share the "takings" surname.

When the County moved for summary judgment of a facial takings claim, the Emersons were under no obligation to point out its error and then effectively correct that error by introducing evidence relating to an as-applied takings claim. The trial court's ruling effectively imposed this duty upon the Emersons and the ruling must be reversed to afford the Emersons an opportunity to produce evidence and respond to the arguments.

2. The County continues to conflate the distinction between a Facial Takings claim and an As-Applied Takings claim.

On appeal, the County continues to address a facial takings claim by arguing that dismissal was proper because the purported site inspection condition did not allegedly destroy a fundamental attribute of ownership or deny the Emersons the all economical use of their property. Once again, it fails to address an as-applied takings claim entirely.

The inquiry for a facial regulatory taking claim is wholly irrelevant to whether an as-applied takings occurred under the circumstances: Facial takings claims *require denial* of all economically viable uses of property; as-applied takings claims merely require an *infringement* upon a fundamental attribute of ownership in addition to several other factors. *Thun*, 164 Wn.App. at 759-60. Likewise, an inquiry into whether there has been a temporary taking limited to facial takings claims, as temporary takings claims are a subset of facial claims. *See id.* at 765; *Guimont v. Clarke*, 121 Wn.2d 586, 598 & FN.3, 854 P.2d 1, 8 (1993). The County's arguments are nothing more than a red herring.

3. The Emersons' Taking Claim is Ripe.

The County also raises the argument of ripeness for the first time on appeal. It argues the claim was not ripe because the Parties did not know whether the County's wetlands regulations would impair or restrict

the Emersons' ability to construct their addition. Presumably, the County relies on *Thun,* wherein the Court ruled that "where there is some uncertainty as to the effect of the challenged regulations, a takings claim is unripe and the plaintiff must allow the government to reach a final decision regarding how said regulations apply. *Thun*, 164 Wn.App.765-66. The County's argument fails because they misidentify the nature of the Emersons' claim.

The Emersons are not challenging an underlying wetlands regulation; they are challenging the County's arbitrary decision to impose a requirement of an additional site visit after the initial site visit is performed without a legal basis for doing so (which, of course, also amounted to a breach of the Settlement Agreement). In all, these acts amount to an irrational delay with processing their permit application. As such, any administrative proceedings to address these issues would have been futile. *See Thun*, 164 Wn.App. at 765-66 ("[W]hen there is no uncertainty about how the challenged regulations apply, further administrative proceedings are futile and the claim is ripe."). An attempt to commence an administrative proceeding would also have been futile because it would have been a breach of the venue provision in the Settlement Agreement.

III. The Emersons' Fraud Claim.

Like the Emerson's as-applied takings claim, the trial court also expanded the scope of its inquiry to make up for the County's shortcomings in its motion for summary judgment. In its motion, the County argued that a "no representation clause" in a contract precludes a subsequent claim for fraudulent inducement. It does not cite any authority for the proposition, and the Emersons have not found any either. That fact is not surprising. If a "no reliance" provision can exculpate a party from its fraudulent representations, courts upholding the provision would sanction fraudulent and deceptive behavior.

Likewise, it is disingenuous for the County to argue that it did not make any actionable representations notwithstanding its misguided reliance on the "no reliance" provision. The County promised to process the Emersons' application in good faith once they dropped their pending appeals and submitted a new wetlands report. There was ample evidence given the Parties' course of dealings to give rise to the inference that the County never had any intention of performing. The County's inducement without a present intention of performing supports a claim for fraud. *Hewett v. Dole*, 69 Wash. 163, 170, 124 P. 374, 377 (1912). It would be a manifestly unjust result if the law did not recognize such a claim.

The remaining elements of fraud were not addressed by the County in its motion or by the trial court at any time; they should not be considered here for the first time on appeal. *White v. Kent Med. Ctr., Inc., P.S., supra.*

IV. The Emersons' 1983 Claim.

In opposition of the Emersons' 42 U.S.C. §1983 claim, the County argues that the Emersons did not have a constitutionally protected property interest in a building permit; that the County could only be liable if the Board of County Commissioners engaged in an unlawful act; and that the Emersons allegedly cannot meet the applicable standard for substantive due process claims. Each argument is spurious and fails as a matter of law.

1. The Emersons had a vested property right in the procedure for and issuance of their building permit.

Rather than addressing the central issue of whether the Emersons had a property right in the issuance of their building permit, the County tries to obfuscate the facts by citing irrelevant authorities and arguing that the Emersons did not have a property right in either the procedure for or issuance of their permit. The County is mistaken.

"The right to use and enjoy land is a property right." *Mission Springs, Inc. v. City of Spokane,* 134 Wn.2d 947, 961, 963, 954 P.2d 250

(1998); *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 636-37, 733 P.2d 182 (1987). "Moreover, procedural rights respecting permit issuance create property rights when they impose significant substantive restrictions on decision making." *Mission Springs, Inc.*, 134 Wn.2d at 963 (*citing Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 646, 62 (9th Cir. 1994) "Procedural permitted requirements may transform a unilateral expectation into a property interest if the procedural requirements are intended to be a significant substantive restriction on decision making.").

It is undisputed that the Emersons applied for a Type 1 building permit. Issuance of the permit was a ministerial act by the County. *See Mission Springs, supra* at 961; ICC 16.19.040. Upon compliance with the County's ordinances, it was *obligated* to issue the permit and it had no discretion to do otherwise. *Mission Springs* at 960-61. Accordingly, the Emersons had a property interest in both the procedure for and issuance of their building permit.

2. The County is liable for its agents' unlawful conduct.

Second, the County argues that it cannot be liable under the doctrine of respondeat superior and that it could only be liable if its highest authorized officials, the Board of County Commissioners, created an unlawful county wide policy. That is not the law.

While it is true that municipalities cannot be held liable on the basis of respondeat superior, municipalities can only act through their agents and officials. *Matter of Estate of Hansen*, 81 Wn.App. 270, 285-86, 914 P.2d 127 (1996). Thus, appropriate inquiry is whether the agent who caused the injury was an authorized decision maker who had final authority to act. In other words, "[w]hen a local governmental unit chooses to exercise its power by delegating to officials the final authority to act in a particular manner, the policymaker acts on behalf of the local government in that manner. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 120-21; 829 P.2d 746 (1992). If any such agent performs an unlawful act under color of a policy or custom or usage of the city, or that the agent adopted an unlawful course of action tailored to the particular situation, the County may be liable. *See Matter of Estate of Hansen*, 81 Wn.App. at 285-86.

Here, the County delegates the final decision making authority to grant or deny Type 1 building permits to its lower ranking officials because the permits involve ministerial acts. *See* ICC 16.19.040. Since such officials are delegated the final decision making authority on the

matter, they are authorized to act on behalf of the County and their unlawful actions will be attributed to it.[6]

Contrary to the County's brief and dismissive discussion of *Mission Springs*, the case authorizes substantive due process claims where there is an "[a]rbitrary or irrational refusal or interference with *processing a land use permit.*" *Mission Springs, supra* at 970. And because the County's officials who were authorized to act on its behalf with regards to processing the ministerial application elected to withhold issuance of the permit while arbitrarily and capriciously imposing site inspection conditions (which were also a violation of the Settlement Agreement) without a legal basis for doing so, the County is liable for its authorized officials' unlawful acts.

3. A triable issue of fact exists with regards to whether the County's acts were arbitrary and capricious.

In its opposition, the County argues the Emersons cannot meet the standard for establishing a substantive due process claim. Whether the appropriate standard can be *established* was not at issue in the motion for summary judgment, however. At issue was whether a triable issue of fact existed with regards to whether the County acted arbitrarily or

[6] The County admitted in its motion for summary judgment that its Planning Department (the entity who decision making authority is delegated to) was responsible for the processing issues that gave rise to the Emersons' 1983 claim. CP109.

capriciously with regards to the processing and issuance of the Emersons' ministerial building permit.

There was overwhelming evidence that the County acted arbitrarily and capriciously. (The Court did not reach this issue because it erroneously granted the motion on grounds that only the Board's actions could give rise to liability.) For instance, the inferences support a finding that the County's actions were politically motivated. There is no logical explanation for why the County continued to conclude there was a wetlands on the Emersons' property after it had performed three prior site visits and received three reports from the Emersons indicating that no wetlands existed. The County even entered into a settlement agreement with the Emersons whereby it agreed to process the permit in good faith. Because issuance of a permit is a ministerial act, submission of the report pursuant to the Settlement Agreement would necessarily result in issuance of the permit.

With regards to that report, the County's ability to have the report reviewed by a third party was limited to circumstances where it "reasonably determine[d] the [appropriate] methodologies . . . were not strictly followed." The Emersons' experts provided cumulative testimony through declarations that the report adhered to any and all applicable requirements. Yet the County almost immediately sent the report to a

third party without ever offering an explanation as to why it reasonably believed the report was deficient. The reasonable inferences from the County's actions—which must be afforded to the Emersons upon review of a summary judgment motion—support the finding that the County acted arbitrarily and capriciously with respect to the review and issuance of their permit. As such, a triable issue of fact exists and the trial court's ruling must be reversed.

CONCLUSION

Summary judgment cannot serve as a substitute for trial. This is particularly true when the moving party failed to raise several issues in the trial court and where the trial court took it upon itself to expand the scope of the motion without even affording the non-moving party a continuance to prepare a defense. For this reason and the reasons discussed in the Emersons' opening and reply briefs, the Court should reverse the dismissals of the Emersons' claims for violations of RCW 64.40.020, for takings under the State Constitution, for violation of 42 U.S.C. § 1983, and for fraud.

Respectfully submitted this 29th day of October 2015.

ROMERO PARK P.S.

By: _____

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PROOF OF SERVICE FOR APPELLANTS' REPLY BRIEF

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PROOF OF SERVICE

STATE OF WASHINGTON, COUNTY OF KING

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 155 – 108th Avenue NE, Suite 202, Bellevue, Washington 98004.

On the 29th day of October, 2015, I served the foregoing document(s) described below:

APPELLANTS' REPLY BRIEF

on the interested parties in this action by sending true copies thereof addressed to:

Mark R. Johnsen
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Seattle, WA 98104
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_____ **(BY MAIL)** I caused said envelope(s) with first class postage prepaid to be placed in the United States mail at Bellevue, Washington.

_____ **(BY PERSONAL SERVICE)** I caused said envelope(s) to be delivered by hand to the office or the residence of the addressee as shown above.

XXX (BY ELECTRONIC TRANSMISSION) I caused a true and complete copy of the document described above to be transmitted via e-mail to the email addresses set forth below the name(s) of the person(s) set forth above.

XXX **(STATE)** I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on the 29th day of October, 2015, at Bellevue, Washington.

Kathy Koback
Legal Assistant