No.

THE SUPREME COURT
STATE OF WASHINGTON

KENNETH EMERSON and KELLY EMERSON, *Petitioners,*

v.

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioners Kenneth and Kelly Emerson ask this Court to accept review of a portion of the Court of Appeals decision designated below.

II. COURT OF APPEALS DECISION.

The decision of the Court of Appeals, Division One, was filed on March 28, 2016. A copy of the decision is included in the Appendix at pages A-1 through A-15. The decision is currently unpublished, though a third party, the City of Richland, Washington, filed a Motion to Publish the decision on April 12, 2016, which motion is attached in Appendix B.

III. ISSUE PRESENTED FOR REVIEW.

Are the Petitioner's claims under RCW Chap. 64.40 exempt from the administrative exhaustion requirement of RCW 64.40.020 when:

- A written settlement agreement providing for a specific remedy (Superior Court action) in the event of a dispute existed;
- No final, appealable order ever existed ; and
- No procedure for returning the action to the Hearing Examiner or any other administrative remedy existed?

IV. STATEMENT OF THE CASE.

A. Factual Background.

The Emersons are the owners of the home and real property located at 680 Trillium Place (a private road), Camano Island, Washington

(the "Property"). CP357, 425. The Property is sloped and upland and sits on a very wooded, nearly 5 acre parcel. CP357, 425. The seller's disclosure statement from the 2007 purchase by the Emersons answered the question "Are there any shorelines, wetlands, floodplains, or critical areas on the property?" with the answer "No." CP435 Although no wetland investigation was necessary to comply with this code, unbeknownst to the Emersons, the Island County Planning Department (the "Department") randomly sent a staff person, Christopher Luerkens, to the Property to investigate a permitted garage. CP240-48.

Notwithstanding that Mr. Luerkens did not have the required University of Washington wetland certificate (CP242), and with absolutely no supporting evidence or field indicator worksheets (an absolute requirement in order to make a genuine wetlands finding), no site specific description of the area, and no effort to contact the homeowners, *see* CP240-248, Island County allowed him to declare that the Emersons had a "wetland" on the Property in an area that had previously been identified by County staff as a "drainage swale, no wetlands."

On a Saturday in late August 2010, Ken Emerson took preliminary steps towards construction of a covered porch, within the existing footprint and at the rear of their home (the "Project"). CP426. At the time, Mr. Emerson was ready to file a building permit application the following

week, but he elected to perform preparatory work to take advantage of favorable weather. CP426. On that same day, an allegedly anonymous complaint was made not to the Department, but to Mrs. Emerson's political opponent for Island County Commissioner, who informed the Department about alleged damage to a creek and wetlands from Mr. Emerson's work that day. CP 358-59. .

Within 48 hours of Mr. Emerson commencing work on the Project, and without any attempt by the Department to contact the property owner to verify any facts, the Department had performed a site visit (on August 30) (CP262) and posted a Stop Work Order on the Property (also dated August 30, 2010). CP358.

On August 31, 2010—only three days after performing a few tasks and one day after receiving the Stop Work Order— Mr. Emerson submitted a building permit application for the Project (Building Permit Application #10-0201C) (the "Permit"). CP426,438-42. Mr. Emerson also submitted a Field Indicators Worksheet (the required wetland investigation per ICC-17.02A.090(C)(1)-(3)) that showed no wetlands exist on the Property. CP438-42. Despite this, the Department demanded staff be allowed on the property to perform their own wetland investigation.

A look at the historical documents available from Island County on the Property is telling. Adequate data gathering (as required by the Army

Corps of Engineers manual) would have shown recorded County documents from as recent as 1993 and 94 (the original plat subdivision) showing that the area is a natural drainage swale and stating "no wetlands" several times. CP443-51.

On September 16, 2010, a representative from the Department conducted a site visit to the Property. Mr. Emerson was in attendance for this visit and observed the staff carrying a document detailing roughly where the alleged "wetland" could be found. Mr. Emerson had never before seen this document. The Department rep dug a couple of holes, stated they concurred with the 2008 findings of a wetland and/or stream being on the Property, and once again provided no documentation of their work. CP426.

The Emersons, certain there were no wetlands on the property, first brought action against the individuals involved in what appeared to them to be an obvious abuse of power. They were careful not to include the County in this claim. CP358. The Emersons also hired a hydrogeologist, as had been suggested, but before they were able to produce the report, the Department issued a final order of enforcement on or about November 1, 2010. The Emersons were expecting the law suit they had filed to stop any action from the County until it was decided whether or not the individuals were acting in the spirit of the law. Instead, this order, once again lacking

any supporting evidence, expanded the 2008 allegations of a wetland to include a stream and claimed damages to both from the Emersons' work on the back porch. CP358-59. Even though the project work was within the existing footprint of the home, the Department would not issue nor deny the permit at this time. CP358-59.

The Emersons were devastated by the potential for damage to the value of their property should the County prevail. If it were somehow determined that a stream and/or wetland was on their property, it could mean a loss of up to 99,000 square feet of their lot. CP427.

The Emersons added Island County to their lawsuit in January 2011. CP359. By the time the Court had considered Island County's summary judgment motion, the only claims the Emersons' counsel actively pursued were claims for trespass, for violation of the Fourth Amendment, and for injunctive relief. CP359.

A written statement from the Emersons' hydrogeologist stating he found no wetlands on the property was not allowed into the case. The judge did declare a final decision had been made on the wetland, which left the Emersons with no opportunity to appeal. However, the judge also stated both orally and in his written decision that it was within the authority of the planning director to amend the enforcement order based on new evidence. Ultimately, summary judgment was granted in Island

County's favor on May 27, 2011, and the case was dismissed on June 7, 2011. CP359. On July 26, 2011, and pursuant to the Department's orders, the Emersons submitted a wetlands report prepared by a qualified consultant. CP427, 461-596. As expected, the wetland report scientifically showed that no wetlands exist on the Property. CP427, 461-596. On August 9, 2011, the Department forwarded the wetland report to the Washington State Department of Ecology ("Ecology") for third party peer review by unlicensed staff with no explanation as to why such peer review was necessary. The matter was forwarded to Ecology with a letter that mischaracterized the Emersons' past claims against the County. Ecology then backed up its County colleagues by conveniently finding that the Emersons' report was somehow unreliable. CP427.

Still trying their best to comply with their purported obligations, the Emersons retained another licensed and qualified independent expert, Mr. Ed Kilduff, who performed a peer review of the first wetlands report. After reviewing the first report and performing site visit, Mr. Kilduff concluded that no wetlands exist on the Property. The Emersons submitted Mr. Kilduff's report to the County on January 4, 2012. CP427-29, 597-607. Despite the Emersons' third party review, the Department (via another round of review by Ecology) rejected Mr. Kilduff's findings on February 6, 2012. CP428-29.

As of this point in late 2012, the Planning Director had not yet officially denied the Permit, and so the Emersons could not yet appeal the decision involved. On March 28, 2013, the Department issued a second supplemental enforcement order wherein it renewed its allegations that the Project could not proceed because of a wetland on the property, ordered the Emersons to pay a civil fine, and began processing a lien against their property. CP358, 365-67. On the next day, the Department—for the first time—denied the Permit. CP358. The Emersons timely appealed both the second supplemental enforcement order and the Department's denial of the Permit to the Island County Hearing Examiner. CP358.

B. The Settlement Agreement.

During the pendency of the two appeals, the Parties engaged in what appeared to the Emersons to be productive settlement discussions that would ultimately lead to issuance of the Permit. At that same time, the Emersons, coming from a scientific background, continued with the lawsuit, confident science would establish the non-existence of a wetland.

A third state licensed geologist, this time one from Island County's own list of qualified wetland scientists. She also had Mr. Kilduff back on the property to take soil samples and have them tested for "hydric" qualities, a mandatory finding to establish wetlands. She then authored a July 6, 2013 *Narrative on Soil Studies done on Emerson property Camano*

Island which was submitted to the County for clarity and included the results from a laboratory with accreditation from Ecology showing no qualities of hydric soil from the samples taken on her property. CP360.

On June 28, 2013, the Parties entered into a Settlement Agreement (the "Agreement") that is the subject of this case. CP249-82. Pursuant to the Agreement, the Emersons agreed to drop their two appeals, pay a civil penalty of $5,000, and obtain a *third* professionally prepared wetlands report on the Property. CP249-82. Among other things, the Department agreed to *resume processing* the Emersons' application for the Permit (Building Permit Application #10-0201C which was originally filed on August 31, 2010 and denied on March 29, 2013) *in good faith*. CP252.

Given the Emersons' concerns regarding Defendant's previous rejection of their two wetlands reports, the Emersons included on a provision that limited the County's ability to arbitrarily conclude that their *third* wetlands report was deficient. As such, the Parties' agreed that the County could "only seek independent third-party review of the new wetland investigation if it reasonably determines the [appropriate] methodologies...were not strictly followed during preparation of the new wetland investigation." The County agreed to this term.
CP252, 254.

Thus, upon submission of a third wetlands report that complied with the Agreement and showed that no wetlands exist on the Property, the County's obligation to process the application in good faith should have resulted in issuance of the Permit. CP252. If no wetland existed as shown by the Emersons' third report, the Department had no discretion to deny the permit; it was required to fulfill its obligations and issue the permit per its ministerial duty. Indeed, it was presupposed that the Department would issue the Permit after the Emersons submitted their third wetlands report.

At the end of July 2013, the $5,000 payment was made on time to the Department. On August 27, 2013 and pursuant to the Agreement, the Emersons submitted a third wetlands report prepared by Rone Brewer of Sound Ecological Endeavors (the "Report"). CP283-317. The Report was prepared based on the methodologies required by Ecology and the United States Army Corps of Engineers in the 1987 Corps of Engineers Wetland Delineation Manual and the 2010 Western Mountains, Valleys, and Coast Interim Regional Supplement to the Manual. CP608-9. Accompanying this report was a second peer review of the previous report, this one by a wetland expert who is on Island County's list of approved wetlands experts, as well as some supplemental literature. This analysis concurred with the first report-- no wetlands. CP360.

On September 16, 2013, the Emersons' counsel provided notice to the County of its failure to comply with the Settlement Agreement, as required in the Agreement. CP317. The County continued its refusal to comply with the Settlement Agreement. CP318-42. As a result, the Emersons filed this action on November 5, 2013, to obtain various remedies arising out of the County's conduct that occurred after the Emersons' first action was dismissed.

On September 23, 2013, the Department requested clarification of the Report to which the Emersons voluntarily complied, providing Mr. Brewer's responses on October 16, 2013. CP318-41, 360. By November 2013, it was apparent that the County was not processing the application in good faith.

Eight days *after* the Emersons commenced this action, the County once again submitted the Report to Ecology for a third party review without documented justification for that review. CP343-49.

Nine months after the Emersons commenced this action—in August 2014—the County finally requested a site visit per the rules of discovery. CP350-52. For the first time, the County had a legal right to enter the Emersons property for purposes of such a visit. Of course, the Emersons complied and the inspection occurred on October 7, 2014. Consequently, the County's own expert reached the same conclusion as the Emersons'

previous three reports: no wetlands exist on the Property. CP72-3, 353-56. Thereafter, the Department made the Permit available to the Emersons, however, the Department has not yet amended the Enforcement order which could give the Emersons certainty for disclosure on upcoming seller's statements or corrected the erroneous statements on the 2008 Permit. CP239

C. Procedural History.

On December 11, 2014, the County filed its motion for Summary Judgment. CP67-212. The Emersons filed their response on January 5, 2015. CP213-614. The County's Reply was filed on January 12, 2015. CP615-28.

On January 23, 2015, oral argument was held and Judge Kimberly Prochnau ruled on the case from the bench. RP1-48. Judge Prochnau dismissed the Emersons' causes of action based on RCW 64.40, §1983, the Takings clause and fraud/misrepresentation by order of January 28, 2015 (CP632-5) for reasons that will be discussed below.

The Emersons moved for reconsideration on February 2, 2015 (CP636-42), which motion was denied with no request for a response on February 5, 2015. CP645. The Order that ended the trial court case fully was entered on February 23, 2015. CP647-8.

The Emersons filed their Notice of Appeal to the Division I Court of Appeals in a timely manner on March 19, 2015. CP649-653. The parties briefed the case fully and a hearing was held on March 1, 2016. The Court of Appeals issued its decision on March 28, 2016 (the "Decision"). See Appendix.

IV. ARGUMENT AS TO WHY REVIEW SHOULD BE ACCEPTED.

Three of the bases named in RAP 13.4(b) apply to the Emerson matter and make review of this case by the Supreme Court appropriate: (1) the decision of Appellate Court conflicts with the decision in *Smoke v. City of Seattle,* 132 Wn.2d 214, 937 P.2d 186 (1997); (2) the decision of the Appellant Court conflicts with the decision in *Saben v. Skagit County*, 136 Wn.App. 869, 152 P.3d 1034 (2006); and (3) the petition involves an issue (the applicability of RCW Chap. 64.40 to settlement agreements in development situations) of substantial public interest that should be determined by the Supreme Court.

A. The Decision flies in the face of the exceptions to the exhaustion requirement identified in the *Smoke* case.

Assuming, *arguendo*, that the Emersons were subject to a requirement to exhaust administrative remedies, the trial court, and now the Court of Appeals, erred by not applying the exceptions to the

exhaustion requirement set forth in *Smoke v. City of Seattle*, 132 Wn.2d 214, 221-22, 937 P.2d 186 (1997).

"No exhaustion requirement arises...without the issuance of a final, appealable order." *Smoke*, 132 Wn. 2d at 222. Additionally, there is no exhaustion requirement if there are no administrative remedies available to the aggrieved party. *Id.*

The Emersons were under no obligation to exhaust administrative procedures because Defendant never issued a final, appealable order once it resumed processing the Application pursuant to the Settlement Agreement.[1] In fact, this lawsuit arose from Defendant's failure to process the Application or otherwise issue an order pursuant to the terms of the Agreement. CP4-8. This fact is undisputed.

So in a case with no dispute that there is no final, appealable order, the Court of Appeals ruled that the exhaustion requirement still applies. This is a direct conflict with *Smoke*.

The Court of Appeals reasoning was that the Emersons did not obtain such an order. However, the Emersons had two valid reasons for not doing so: (1) they entered into a settlement agreement with the County that provided for a process in the event of a further dispute; and (2) there is simply no procedural methodology under which the Emersons had the

[1] Which is one instance of where this case differs from *Saben*.

right to "reopen" or "restart" the proceedings before the Island County Hearing Examiner or Board of County Commissioners.

Under Island County Code ("ICC") section 16.19.190, the appeals in this matter to the Island County Board of County Commissioners (a Type I decision) and the Hearing Examiner (a Type II decision) are automatically denied unless a Statement of Appeal is filed with the appropriate agency no less than fourteen (14) days after the mailing of the Director's decision. ICC 16.19.190(A)(2), (B)(1). These original dates passed back in April of 2013 base on the Director's letter of March 28, 2013.

The default by the County was not accompanied by any letter from the Director that established a timeline under which some theoretical appeal to a Hearing Examiner could have taken place, and even if it had, the violation of a settlement agreement with the County is not a decision that is listed in ICC 16.19.190 from which an appeal can be taken.

Specifically, the terms of the Settlement Agreement did not contemplate the resurrection of the appeal to the Hearing Examiner. Section 7 provided that "any action arising out of this Agreement shall be in the Superior Court of the State of Washington, in and for King or Kitsap Counties." This term is not optional or subject to any condition. In the event of default, the parties are ***must*** bring suit in the Superior Court.

CP253. To that end, the second exception outlined in *Smoke* is also applicable under the facts of this case.

With no final order, no available other remedy, and an Agreement providing a site for decision making in this matter, the Court of Appeals decision that the exceptions to the exhaustion requirement of RCW 64.40 as identified in the *Smoke* case do not apply here is in direct conflict. Review of this case by the Supreme Court is therefore appropriate.

B. The Decision conflicts with the *Saben* case by assuming that said case imposed an exhaustion requirement.

Relying on *Saben v. Skagit County*, 136 Wn.App. 869, 152 P.3d 1034 (2006), the Trial Court dismissed the Emersons' claim under RCW 64.40.020 because the Emersons' purportedly failed to exhaust administrative remedies. RP43. The trial court misapplied the facts and the holding in *Saben* to impose a non-existent administrative exhaustion requirement on the Emersons.

A careful reading of *Saben* shows it <u>does not</u> impose a mandatory administrative remedy exhaustion requirement, and, in fact, the case is remarkably on point and actually supports the Emersons' claim. In the *Saben* case, the plaintiff property owners applied for a building permit to construct a residence on their property. *Saben*, *supra* at 872-73. They also applied for permits to build a garage, shop, and septic system. *Id.*

Initially, the County issued the garage, shop, and septic permits. *Id.* However, subsequently, the County denied the residence permit and then revoked the three other permits. *Id.* The County made its decision after interpreting two conflicting ordinances. *Id.*

The Sabens appealed. *Id.* During the pendency of their appeal, their attorney reached an oral (and at least partially written) agreement with the County wherein the County agreed to reinstate the three revoked permits and grant the residence permit so long as the Sabens complied with certain provisions in the County Code. *Id.* at 873. In turn, the Sabens agreed to withdraw their appeal. *Id.* Shortly after the Sabens dropped their appeal, the County disregarded the agreement and denied the residence permit. *Id.* The Sabens then commenced an action and sought damages for breach of contract and violation of RCW 64.40.020.

The trial court ultimately ruled and the Court of Appeals affirmed that Skagit County had breached the settlement agreement and violated RCW 64.40.020 because of the following action:

> The county adopted an interpretation and made an agreement based upon it. Then, unilaterally, it disregarded that interpretation, disregarded its agreement, and disregarded the consequences to the Sabens, who acted in reliance upon it. We agree with the trial court that the county acted arbitrarily and capriciously.

Saben, supra at 878.

It is true the Sabens filed an appeal with the County Hearing Examiner after the County denied the residence permit in breach of the settlement agreement, *id.* at 873, but that fact *had absolutely no bearing* on the Court's ultimate decision to uphold the RCW 64.40 claim. The *Saben* Court made only passing mention to the administrative appeal at all. There was no analysis of whether or not the exhaustion requirement was fulfilled. The Hearing Examiner in the *Saben* matter did not rule on the RCW 64.40 claim, because there was no jurisdiction to hear that claim in any other venue than the Superior Court. *Id.* at 873.

The Sabens merely made the appeal prior to commencing their action because there was considerable argument about whether a settlement agreement even existed, as it consisted of a series of emails rather than a formal settlement agreement (as here). In any event, the hearing examiner "lacked the jurisdiction to address the settlement, estoppel, or damages claims" which necessarily included the RCW 64.40 claim. *Id*

Therefore, the ultimate issue in *Saben* was whether the breach of a settlement agreement can be the basis for an RCW 64.40 claim. *Saben* unquestionably held that the answer is yes. In a situation strikingly similar the one found in *Saben*, the Emersons' RCW 64.40 claim arises out of the County's actions with regard to its obligation to process their application

under the Settlement Agreement. Accordingly, the Trial Court erred by ruling that the Emersons' RCW 64.40 claim was barred because they did not exhaust administrative remedies.

In effect, by ruling that the Emersons had to exhaust administrative remedies for an RCW 64.40 claim based on the County's arbitrary actions in execution of the Settlement Agreement and in the absence of a final order, the Trial Court created a loophole, a pseudo-immunity from RCW 64.40 claims. Following the Trial Court's reasoning, apparently the County can secure this immunity for itself by settling claims that require dismissal of administrative actions, and then breaching the Settlement Agreement. This Court must not turn such a loophole into precedent.

In sum, *Saben* established that there is no administrative exhaustion requirement for RCW 64.40 claims that are based on arbitrary and capricious actions relating to a settlement agreement involving the issuance of a permit. The Court of Appeals decided the Emerson case, which was in a nearly identical fact pattern, in exactly the opposite manner as the *Saben* case. This is a direct conflict that deserves review.

C. The currently pending motion to publish shows how this case is one of "substantial public interest."

RAP 13.4(b)(4) provides for review of cases that present "substantial public interest." The Court has applied this provision in situations where a

decision has the potential to affect multiple actions not only statewide, but as local as across a single County. *See, e.g. State v. Watson,* 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (*holding* that an appeal that could impact every DOSA sentence in Pierce County after a particular date is of "substantial public interest"). It is generally difficult to make arguments about public interest when there is no input from the general public on which to draw. However, in this matter, we have a great advantage. A third party, the City of Richland, Washington, has filed a motion seeking to have the Decision published. A look to this motion, attached as Appendix B-1 through B-9 is most illustrative on this point.

Planning departments and developers state wide run into the issue of what to do in situations where a compromise is reached. How a party deals with a potential breach of that compromise is an important issue. In particular, Richmond noted that the Decision's holding "that the settlement agreement's venue clause did not excuse the exhaustion of administrative remedies requirement of RCW 64.40.030" was "an important development in the law." Appendix B-5. It further referred to this decision as "a useful counterpoint" to the *Saben* decision discussed above. Appendix B-5.

Clarity in relationships with governmental entities is a worthy value to which the law can aspire. Hearing this case will provide counties,

municipalities, and developers with further clarity as to the relative risks faced by parties in entering into agreements with governmental entities. As stated in the Richmond motion, review of this case will provide "greater predictability in assessing when local government delay is likely to be actionable." Appendix B-7. Such predictability is a desirable outcome.

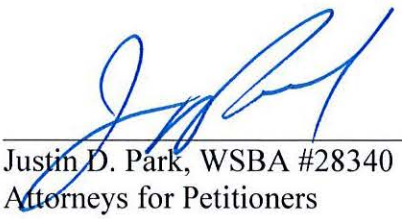
The issue of when a local government is liable under an agreement it enters into is an important one, and one from which the state as a whole can benefit. This case therefore presents an issue of "substantial public interest" and review is appropriate.

VI. CONCLUSION

The Decision directly conflicts with the *Smoke* and *Saben* cases. These two cases form the backbone of RCW Chap. 64.40 jurisprudence where applicable to settlement agreements entered into by local governments. Given the public significance of the impact of such cases, this case should be accepted for review by this Court.

RESPECTFULLY SUBMITTED this 26th day of April, 2016.

ROMERO PARK P.S.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KENNETH EMERSON and KELLY EMERSON, a married couple,	)	No. 73208-1-I
Appellants,	)	DIVISION ONE
v.	)	
ISLAND COUNTY, a political subdivision of the State of Washington,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: March 28, 2016

BECKER, J. — Kenneth and Kelly Emerson applied for a permit to build an addition on to their Island County home. Island County issued the permit after lengthy wrangling over whether there was a wetland on the property. The Emersons filed suit seeking damages for the delay. They now appeal from an order granting summary judgment to the county. We affirm.

The purpose of summary judgment is to avoid a useless trial. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12, 721 P.2d 1 (1986). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Any doubt as to the existence of a genuine issue of material fact is resolved against the moving

party. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). But the existence of a material fact cannot be hypothetical. "The adverse party must set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them." Seven Gables, 106 Wn.2d at 12-13.

We review the facts in the light most favorable to the Emersons. In late August 2010, Kenneth Emerson started constructing a sunroom addition to the Emersons' Camano Island home. He did not obtain a permit for this work. Someone who observed the construction anonymously notified Kelly Emerson's opponent in the then upcoming election for Island County Commissioner. A complaint, alleging damage to wetlands, reached the Island County Department of Planning and Community Development. The county dispatched an inspector to the Emerson property. No one was home. The inspector observed the framed addition at the back of the home and stapled a stop work order to the framing.

On August 31, 2010, Kenneth Emerson went to the county permitting office. He filled out and filed forms to obtain an after-the-fact building permit for the addition. On one of the forms, he stated that no wetlands existed on the Emerson property. On September 16 and September 23, 2010, the county sent letters stating that the county had information indicating the presence of a wetland on the Emersons' property.

The Emersons received a notice of violation letter on October 1, 2016. The letter offered the opportunity to come into compliance within 30 days by

submitting a wetland report. The letter indicated that failure to come into compliance would result in an enforcement order and civil fines.

The Emersons did not submit a wetland report. Feeling certain there were no wetlands on the property, they filed a lawsuit against individuals they believed were engaging in a misuse of power to discredit Kelly Emerson's political campaign. Later, they added the county as a defendant.

In November 2010, the county sent an enforcement order to the Emersons. The order advised the Emersons that they needed to submit a wetland report within 30 days. It stated that civil fines would be imposed if they failed to comply.

In January 2011, the county issued a supplemental enforcement order. The supplemental order repeated the demand for a wetland report and assessed a civil penalty of $37,000 against the Emersons.

In May 2011, the trial court entered summary judgment and dismissed the Emersons' lawsuit. The summary judgment was not appealed.

In June 2011, the Emersons retained SNR Co. to determine whether wetlands were on their property. SNR concluded no wetlands were present.

In July 2011, the Emersons submitted the SNR report to the county. The county expressed concern with the methodologies used by SNR and forwarded the report to the Department of Ecology for a second opinion.

In December 2011, the Emersons were told the SNR report did not comply with federal and state standards. The Emersons retained a second expert, Ed Kilduff, to perform a peer review of the SNR report. Kilduff criticized the

Department of Ecology for comments that "appear to deliberately misunderstand some of SNR's points for the purpose of manufacturing controversy."

The Emersons presented Kilduff's peer review to the county. Again, the county sought assistance from the Department of Ecology. In early 2012, the Department of Ecology concluded that Kilduff's peer review was unpersuasive because it lacked site specific information. The Department of Ecology recommended that state or county staff perform an onsite inspection at no cost to the Emersons. The inspection would facilitate a final determination regarding the presence or absence of regulated wetlands on the Emersons' property. The Emersons rejected the suggestion. The Emersons did not believe the state or the county could make an unbiased determination as to the existence of wetlands on their property.

In early 2013, the Emersons were repeatedly advised that the dispute could be resolved quickly and without cost if the county or the state was allowed to inspect the Emerson property. More than 10 letters and phone calls conveyed this recommendation to the Emersons. The Emersons refused to allow inspection.

On March 28, 2013, the county issued a second supplemental enforcement order. The second supplemental order asserted the violations listed in the initial enforcement order, noted the previous imposition of a $37,000 civil fine, and stated that a lien would be placed on the Emersons' property if the Emersons did not submit a proper wetland report. On March 29, 2013, the

county denied the Emersons' 2010 permit application. The Emersons appealed the denial and the second supplemental enforcement order.

In June 2013, the parties executed a settlement agreement. Under the terms of the agreement, the Emersons agreed to pay a reduced fine of $5,000, submit a wetland report that strictly complied with the Department of Ecology wetland manual, and withdraw their administrative appeal. The fine was to be paid within 30 days of the execution of the settlement agreement, and the wetland report was to be submitted within 60 days after execution. Upon withdrawal of the appeal, the county would return a substantial portion of the administrative appeal fees. Upon submission of the new wetland report, the county would process the permit application in good faith. The agreement allowed the county to obtain third party review of the new wetland report but only if the county reasonably determined that the report did not strictly comply with the Department of Ecology's wetland manual.

The Emersons paid the fine and withdrew their administrative appeal as required by the agreement. After retaining a third expert, the Emersons submitted a wetland report to the county on August 27, 2013.

On September 16, 2013, the Emersons e-mailed the county, stating that the county would be in default if a permit was not issued in 10 days. On September 23, 2013, the county asked the Emersons to clarify certain aspects of their wetland report.

On October 16, 2013, the Emersons submitted supplemental responses from their expert without waiving their previous claim of default. That same day,

the county renewed its request to inspect the Emerson property. On October 18, 2013, the Emersons rejected the request and declared a breach of the settlement agreement.

The Emersons initiated this lawsuit in November 2013. Their complaint demanded damages and injunctive relief under a variety of legal theories, including breach of the settlement agreement. The county forwarded the Emersons' wetland report and supplemental responses to the Department of Ecology approximately one week after the Emersons filed the complaint. The Department of Ecology determined that the Emersons' report did not comply with the wetland manual.

In October 2014, the county inspected the Emerson property under CR 34(a)(2), the discovery rule that authorizes a litigant to request permission for entry onto designated land possessed by the responding party. No wetlands were found. The county issued the building permit.

The parties agreed to arbitration of the breach of contract claim. The trial court dismissed all the other claims on summary judgment. The Emersons moved for reconsideration. Their motion was denied.

The Emersons ask this court to reinstate their claims under RCW 64.40.020, under the takings clause of the Washington Constitution, under 42 U.S.C. § 1983 for substantive due process violations, and for common law fraud.

RCW 64.40.020

RCW 64.40.020 grants permit applicants a limited cause of action for damages if an agency's permitting actions are arbitrary, capricious, unlawful, or

otherwise exceed its lawful authority, or if an agency fails to act within time limits established by law. See Birnbaum v. Pierce County, 167 Wn. App. 728, 734, 274 P.3d 1070 (2012).

> **Applicant for permit—Actions for damages from governmental actions.**
>
> (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.
>
> (2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.
>
> (3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.
>
> (4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

RCW 64.40.020. Any action brought under chapter 64.40 RCW "shall be commenced only within thirty days after all administrative remedies have been exhausted." RCW 64.40.030.

The county's motion for summary judgment argued that the Emersons failed to exhaust their administrative remedies. The county also sought dismissal under the 30-day limitations period.

The Emersons responded that they had no obligation to exhaust their administrative remedies because the county had not issued a final order when they brought this lawsuit, there were no administrative remedies available to them under the settlement agreement, and the county lacked the institutional

competence to resolve the dispute. The Emersons cited Saben v. Skagit County, 136 Wn. App. 869, 152 P.3d 1034 (2006).

The trial court dismissed the Emersons' RCW 64.40 claim for failure to exhaust administrative remedies.

The Emersons argue, citing Saben, that there is no exhaustion requirement under RCW 64.40 when a claim stems from a settlement agreement. That is not the holding of Saben.

In Saben, Skagit County denied the Sabens a permit. The Sabens filed an administrative appeal. Saben, 136 Wn. App. at 872. It was agreed that Skagit County would issue the permit if the Sabens complied with certain laws and withdrew their appeal. The Sabens complied, but Skagit County refused to issue the permit. The Sabens filed another administrative appeal and brought an action for damages under RCW 64.40. Saben, 136 Wn. App. at 873-74. The superior court granted summary judgment for the Sabens, ruling that the county was bound by its settlement agreement to issue the permit and finding the county liable for damages. This court affirmed. "The county adopted an interpretation and made an agreement based on it. Then, unilaterally, it disregarded that interpretation, disregarded its agreement, and disregarded the consequences to the Sabens, who acted in reliance upon it." Saben, 136 Wn. App. at 878.

Nothing in Saben excuses a plaintiff from the statutory requirement to exhaust administrative remedies before bringing suit. The exhaustion requirement established by RCW 64.40.030 was not at issue.

The Emersons alternatively contend that their claim is supported by Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997). In Smoke, the city of Seattle sent a letter (the Mills letter) denying land use and building permits to a set of plaintiffs. The letter informed the plaintiffs of their option to apply for a legal building site letter or a formal building cite code interpretation by the director. Neither a building site letter nor an interpretation by the director was a required component of the city's application process. Smoke, 132 Wn.2d at 218. The plaintiffs brought an action against the city under RCW 64.40 without seeking a building site letter or a director's interpretation. Smoke, 132 Wn.2d at 220.

The case reached our Supreme Court, where the issue was whether the plaintiffs could claim damages under RCW 64.40. The court first held that the statute unambiguously requires exhaustion of administrative remedies. Smoke, 132 Wn.2d at 221-22. The next question was whether the plaintiffs had an unexhausted remedy. "No exhaustion requirement arises . . . without the issuance of a final, appealable order. Thus, we must first determine whether the Mills letter constituted a final decision by the City." Smoke, 132 Wn.2d at 222 (citation omitted). The court concluded that the plaintiffs did not have to pursue a site letter or a director's interpretation because neither option could have reversed the decision to deny the permits. Because there was no further administrative remedy after the Mills letter, the Mills letter was a final and appealable decision denying the permits. Smoke, 132 Wn.2d at 226-27.

The Emersons contend that by entering into the settlement agreement, they became like the plaintiffs in Smoke in that they had no further administrative remedies. This case is factually unlike Smoke because the Emersons did not obtain a final, appealable order. They withdrew their appeal.

The county contends that if the Emersons wanted to pursue a remedy under RCW 64.40 in addition to pursuing a breach of contract action, the Emersons could have either reactivated their appeal of the building permit denial or sought a new appeal of the wetlands inspection condition that the county was imposing. The Emersons respond that there was no way for them to reactivate their appeal or seek a new appeal because the terms of the settlement agreement did not permit them to pursue an administrative remedy. They rely on the venue provision stating that Island County Superior Court would be the venue for any "action" arising out of the agreement:

> **Governing Law and Venue.** This agreement shall be governed by and interpreted in accordance with the laws of the State of Washington. The venue for any action arising out of this Agreement shall be in the Superior Court of the State of Washington, in and for Island County.

The Emersons contend that the venue provision amounted to an agreement to exchange administrative remedies for a judicial action.

Settlement agreements are governed by general principles of contract law. Saben, 136 Wn. App. at 876. The touchstone of contract interpretation is the parties' intent. Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). A settlement agreement listing the superior court as the venue for an "action" does not evidence an intent to waive

the exhaustion requirement in RCW 64.40.030. The venue provision does not refer to the administrative process or exhaustion of administrative remedies.

The Emersons did not obtain a final, appealable, administrative order denying their permit either before or after bringing this lawsuit. By bringing suit before obtaining a final, appealable order, the Emersons deprived the county of the opportunity to correct its own mistakes, which is "one of the primary purposes of the doctrine to exhaust administrative remedies." Smoke, 132 Wn.2d at 226. We conclude the Emersons' RCW 64.40 claim was properly dismissed for failure to exhaust administrative remedies.

TAKINGS

The Emersons contend that they have a triable takings claim against the county under the Washington Constitution.

> **Count 3: Takings under State Constitution**
>
> 38. Plaintiffs reallege paragraphs 1-26 as if fully set forth herein.
>
> 39. The Washington State Constitution provides, "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner." Const. Art. I, § 16.
>
> 40. By virtue of the actions complained above the Department has taken or damaged the Emersons' Property without just compensation.
>
> 41. As a result of this taking, the Emersons have suffered significant damage in an amount to be proven at trial.

The county's motion for summary judgment argued that a permitting delay cannot amount to a constitutional taking. The county also argued that no taking occurred because the Emerson property did not suffer total economic deprivation.

In response, the Emersons argued only that the Washington Constitution provides "more protection" than its federal counterpart. The entirety of the Emerson's response regarding their takings claim states:

> The Emersons' third count, "Takings under the state Constitution," seeks damages for Defendant's violation of Article I, § 16 of the Washington State Constitution. Defendant has moved for summary judgment of a claim for takings under the Federal constitution—a claim that is not before the court. Defendant provides no authority or discussion regarding the Emersons' claim under the State constitution, which, under well settled case law, affords citizens with more protection than that guaranteed by the Federal Constitution. See, e.g., [Manufactured] Hous[.] Cmtys. of Wash. v. State, 142 Wn.2d 347, 360-61, 13 P.3d 183 (2000). Accordingly, Defendant has failed to meet its burden and the motion must be denied.

The Emersons offered no other basis for denying the county's motion with regard to their takings claim. The county pointed out in its reply that the federal constitution provides at least as much protection in the context of a regulatory taking.

The Emersons argue on appeal that the trial court impermissibly dismissed their takings claim under a theory not originally briefed in the county's opening memorandum. They cite White v. Kent Medical Center, Inc., 61 Wn. App. 163, 810 P.2d 4 (1991).

This case is not controlled by White. The county's reply did not present new theories for summary judgment. The problem for the Emersons is that they did not substantively respond to the county's motion to dismiss the takings claim. Because the Emersons failed to provide any substantive argument to demonstrate a genuine issue of material fact under CR 56, the trial court properly dismissed the takings claim.

SUBSTANTIVE DUE PROCESS

The Emersons further contend that they have a triable substantive due process claim under 42 U.S.C § 1983, based on the county's delay in processing their application pursuant to the settlement agreement.

"Arbitrary or irrational refusal or interference with processing a land use permit violates substantive due process." Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 970, 954 P.2d 250 (1998). When executive action like a permitting decision is at issue, only egregious official conduct can be said to be arbitrary in the constitutional sense. Official conduct is arbitrary in the constitutional sense if it amounts to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective. Shanks v. Dressel, 540 F.3d 1082, 1088 (9th Cir. 2008). If it is at least fairly debatable that the county's conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process. Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir. 1994).

When all inferences are drawn in the Emersons' favor, the county's actions in reprocessing the Emersons' application do not amount to a substantive due process violation. The county's actions were directly related to determining whether wetlands were on the Emerson property. We affirm the dismissal of the Emersons' substantive due process claims.

FRAUD

The Emersons' complaint alleges that the county fraudulently induced them to enter into a settlement agreement the county did not intend to honor. They contend the court erred in dismissing this claim.

To state a claim for fraud, a plaintiff must satisfy the following nine elements:

> (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation, and (9) damages suffered by the plaintiff.

W. Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 206, 48 P.3d 997 (2002).

In the settlement agreement, the county promised to issue a permit to the Emersons only if they submitted a wetland report that strictly followed certain methodologies. The parties agreed to a disclaimer clause stating that nothing in the agreement should be construed as a guarantee of approval or as constituting a "representation" by the county:

> **Disclaimer by Department.** Nothing in this Agreement shall be construed as a waiver by the County of any permit requirements applicable to the Emersons construction activities on the Property pursuant to the County Code or other applicable laws, rules, or regulations. Nothing in this Agreement shall be construed as guaranteeing the availability of any permits or approvals regarding said activities. Nothing in this Agreement shall be construed as constituting a representation of any kind or nature by the County, or any official or employee thereof.

The Emersons contend that the county should not be allowed to contract around its duty to be truthful in negotiations because this "would sanction

fraudulent and generally deceptive behavior." The Emersons cite no authority for this argument. They do not explain how a court can enforce a written agreement as if it guaranteed a permit when the agreement expressly states it is not a guarantee. Also, the Emersons overlook the principle that promises of future performance are not representations of existing fact. See W. Coast, 112 Wn. App. at 206.

The Emersons have not created an issue of material fact to establish that the county made a materially false representation. They fail to show why the disclaimer does not control. The trial court properly granted summary judgment on the Emersons' claim of fraudulent inducement.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Ian, J.

NO. 73208-1-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

KENNETH EMERSON and KELLY EMERSON, a married couple,	)	
	)	MOTION OF NONPARTY
Appellants,	)	TO PUBLISH
	)	
v.	)	
	)	
ISLAND COUNTY, a political subdivision of the State of Washington,	)	
	)	
Respondent.	)	
	)	

I. IDENTITY OF MOVING PARTY

This motion is presented by the City of Richland, Washington, a nonparty to this action (the "City").

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e), the City moves the Court to publish in its entirety the unpublished opinion filed in this matter on March 28, 2016 (the "Opinion").

III. BACKGROUND AND STATEMENT OF APPLICANT'S INTEREST

The dispute arose in the context of a public agency's environmental review process. In August 2010, the appellants, Kenneth and Kelly Emerson, applied for a permit to construct a sunroom addition to their home. The Emersons initially refused to comply with requests of respondent Island County (herein the "County") for information relating to the possible existence of wetlands on the property. After the County imposed civil fines, the Emersons provided some but not all information sought by the County.

In March 2013 the County denied the Emersons' permit application. The Emersons appealed the denial as well as an enforcement order and penalty. Opinion, at 5. The parties thereafter reached a settlement agreement. Under the terms of the agreement, the Emersons would pay a reduced fine, submit a new wetland report, and withdraw their administrative appeal. *Id.* The County agreed to return part of the Emersons' appeal fee and, upon receipt of the new wetland report, process the permit application in good faith. *Id.*

The Emersons produced a new wetland report to the County. The County asked for clarification of certain aspects of the report. The County then requested to inspect the property. The Emersons denied

the request and declared a breach of the settlement agreement. *Id.*, at 6. The Emersons sought damages and injunctive relief under a variety of legal theories. *Id.*

In October 2014, Island County inspected the property, determined that no wetlands were present, and issued the permit sought by the Emersons.

The parties agreed to arbitrate the Emersons' breach of contract claim. All other claims brought by the Emersons were dismissed by the trial court on summary judgment. *Id.*

On appeal, the Emersons asked the Court to reinstate their claims based on RCW 64.40.020, the takings clause of the Washington Constitution, 42 U.S.C. § 1983 for substantive due process violations, and for common law fraud.

Under existing law, a plaintiff who brings a claim under RCW 64.40.020 must exhaust all administrative remedies. RCW 64.40.030. The Emersons argued that they had no obligation to exhaust administrative remedies because the County had not issued a final order when they brought the lawsuit, the settlement agreement afforded them no administrative remedies, and the County lacked the institutional competence to resolve the dispute. Opinion, at 7-8.

In its Opinion, the Court affirmed the trial court on all grounds. With respect to the Ch. 64.40 RCW claim, the Court concluded that "[b]y bringing suit before obtaining a final, appealable order, the Emersons deprived the county of the opportunity to correct its own mistakes, which is 'one of the primary purposes of the doctrine to exhaust administrative remedies.'" Opinion, at 11 (*quoting Smoke v. City of Seattle*, 132 Wn.2d 214, 226, 937 P.2d 186 (1997)).

The City of Richland is a municipal entity organized under the laws of the State of Washington. The City is also the defendant in a matter currently pending in Benton County Superior Court: *Duane Smith v. City of Richland*, cause no. 16-2-00620-2. The lawsuit contains allegations relating to the City's environmental review processes with respect to a proposed residential development. The City engaged in protracted correspondence with the developer about the possible existence of wetlands on the proposed development site. The City ultimately issued a determination of significance pursuant to the State Environmental Policy Act (SEPA), Ch. 43.21C RCW.

The plaintiff has alleged that the City lacked jurisdiction to consider the environmental impacts of the development proposal on what plaintiff contends to be non-regulated wetlands. *See* **Appendix**

A. The plaintiff alleges that the City's determination of significance is illegal, arbitrary, and capricious. *Id.*

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Opinion and its analysis are unique.

The Opinion clarifies the law on important questions that arise when allegations of government delay are asserted in the context of the SEPA-mandated environmental review process. The Opinion restates existing law in noting that a plaintiff who brings a claim under Ch. 64.40 RCW must establish that a government entity issued a final, appealable, administrative order before bringing a claim. Opinion, at 11.

But more importantly, the Opinion applies the statutory requirements of Ch. 64.40 RCW in the context of a failed settlement agreement. The Opinion holds that the settlement agreement's venue clause did not excuse the exhaustion of administrative remedies requirement of RCW 64.40.030. This is an important development in the law. The Opinion represents a useful counterpoint to *Saben v. Skagit County*, 136 Wn. App. 869, 152 P.3d 1034 (2007), where the agency allegedly breached a settlement agreement and denied a permit application.

The Opinion advances the state of the law on Ch. 64.40 delay claims, particularly where such claims are directed at conduct of a government agency undertaken pursuant to obligations imposed by SEPA. The Opinion provides helpful analytic guideposts for land use applicants and agencies navigating the SEPA process and the disputes that can arise as part of that process. Although the case is fact-specific in some respects, the jurisprudential value of the Opinion is high for municipalities that must repeatedly make tough decisions balancing the rights of developers with the expectations of SEPA and the project review process.

B. The Opinion is of general public importance, and especially so for the administration of land use regulations by local government entities.

Many processes relating to development permits and environmental review take time to perform properly. A local government entity that fulfills its obligations under SEPA may be placed in a role that is contrary to the wishes of a developer or permit applicant. It has been noted, for instance, that the demands of SEPA are "more than merely a stirring maxim or artful slogan." *The Lands Council v. Washington State Parks & Recreation Comm'n*, 176 Wn. App. 787, 808, 309 P.3d 734 (2013). Allegations of delay may follow.

The parties may try to resolve these disputes without litigation. The Opinion helps determine when, in such contexts, allegations of delay may establish a cause of action under Ch. 64.40 RCW.

Claims against local agencies under Ch. 64.40 RCW based on delay have state-wide and ongoing significance. Local government entities must not shirk their obligation to fulfill various forms of permit and environmental review processes. Developers and permit applicants should have greater predictability in assessing when local government delay is likely to be actionable. Because of the extensive regulations for land use review in Washington, the Opinion is less fact-limited and is of greater general applicability than the Court may have first realized. Publication would have long-standing value for courts and for the conduct of local government land use affairs.

An additional reported decision addressing a new set of facts, even if the specific facts of this case are unlikely to recur, will be helpful to land use review participants. This will reduce uncertainty in at least some situations and may help avoid expenses of unnecessary litigation. This is especially true because these cases do not come before the courts frequently.

The Opinion does not conflict with any known prior opinion of the Court of Appeals or the Supreme Court.

V. CONCLUSION

The Opinion is significant to litigants with claims arising from government delay. The Opinion is also significant to any person or entity involved in land use review in Washington.

Accordingly, the City requests that this Court grant its motion to publish the entirety of its Opinion in this case, in accordance with RAP 12.3(e).

VI. APPENDIX

A. Application for Constitutional Writ of Review in Benton County Superior Court cause no. 16-2-00620-2.

DATED THIS 12th day of April, 2016.

MENKE JACKSON BEYER, LLP

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CERTIFICATE OF SERVICE

On this day set forth below, I sent, in the manner indicated, a true and accurate copy of: MOTION OF NONPARTY TO PUBLISH to the following parties:

Mr. Justin D. Park Romero Park P.S. Columbia West Building 155 - 108th Ave N.E. Suite 202 Bellevue, WA 98004	VIA EMAIL: jpark@romeropark.com
Mr. Mark R. Johnsen Karr Tuttle Campbell 701 Fifth Ave. Suite 3300 Seattle, WA 98104	VIA EMAIL: mjohnsen@karrtuttle.com

Original filed with:

Clerk of the Court Division I Court of Appeals Union Square 600 University St Seattle, WA 98101-1176	VIA ELECTRONIC FILING

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

Dated this 12TH day of April, 2016.

Kathy Lyczewski