73208-1

73208-1

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
Respondents.

APPELLANT'S BRIEF

Justin D. Park, WSBA# 28340
ROMERO PARK P.S.
Attorneys for Appellants Kenneth and Kelly Emerson
Columbia West Building
155 – 108th Ave N.E. Suite 202
Bellevue, WA 98004
(425) 450-5000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

This is an action relating to Plaintiffs Kenneth and Kelly Emersons' tortured experience obtaining a building permit from Defendant Island County (the "County"). Despite the County's bad-faith actions relating to the permit process and the Parties' ultimate settlement agreement that required the County to issue the Permit, the Emersons had to assert claims against the County to spur it into fulfilling its statutory and contractual obligations. There is evidence that the County acted arbitrarily and capriciously throughout the process before finally issuing the permit.

After the Emersons asserted various claims arising from the County's unjustifiable refusal to issue the building permit pursuant to the settlement agreement, Island County moved for summary judgment under CR 56. The Emersons objected to the County's motion on grounds it failed to introduce admissible evidence or otherwise meet its burden on summary judgment. The Emersons also provided argument as to why the County's motion should fail as a matter of law, and they submitted evidence that established that triable issues of fact existed. Notwithstanding these submissions, the Trial Court granted the County's motion and then denied the Emersons' subsequent motion for reconsideration. This appeal followed.

ASSIGNMENT OF ERROR

1. The trial court erred by granting the County's Motion for summary judgment on the Emersons' claims for violation of RCW 64.40.020, for takings under the State Constitution, for violation of 42 U.S.C. § 1983, and for fraud.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Emersons were required to exhaust any purported administrative remedies prior to asserting their claim under RCW 64.40.020 when there was no decision that could be appealed to the hearing examiner and the claim was based on a contract.

2. Whether the trial court erred by dismissing the Emersons' claim for takings under the State Constitution based on an argument that was not raised by the County in any pleading..

3. Whether the County's arbitrary or irrational refusal to process the Emersons' building permit gives rise to a claim under 42 U.S.C. § 1983 when the settlement agreement made the issuance of the Permit a purely ministerial task.

4. Whether the trial court erred by dismissing the Emersons' claim for fraud/misrepresentation on an argument that was not raised by the County in any pleading.

STATEMENT OF THE CASE

A. Factual Background.

This matter has a long history that led to the current case, a discussion of which will be useful to the Court. 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 at an elevation roughly halfway between sea level and the peak of the island. The home was built in 1995 by previous owners. It sits on a very wooded, nearly 5 acre parcel and cannot be seen from any public road. CP357, 425. The seller's disclosure statement from the 2007 purchase by the Emersons answers the question "Are there any shorelines, wetlands, floodplains, or critical areas on the property?" with the answer "No." CP435. In June 2008, the Emersons had a contractor build an unattached garage on the Property. The garage was permitted under the 2008 "Old Critical Areas Ordinance" of Island County Code ICC-17.02. CP426. Although there was no wetland investigation necessary to comply with this code, unbeknownst to the Emersons, the Island County Planning Department (the "Department") with an action described as "random" sent a staff person, Christopher Luerkens, to the property to investigate. CP240-48.

Notwithstanding that Mr. Luerkens had only taken 1 of the 3 quarters necessary to obtain the 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,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.

At that time, Mrs. Emerson was in the middle of running as a candidate for Island County Commissioner (an election she eventually won). CP358.

On that August 2010 Saturday, an allegedly anonymous complaint was made, not to the Department, but to Mrs. Emersons' opponent in the upcoming election. CP358. This complaint alleged damage to wetlands

and a creek from the work Mr. Emerson had begun even though all of Mr. Emerson's work was within the footprint of the pre-existing patio on the Emersons' home. CP359.

Just weeks after he finished the primary election nearly 10 percentage points behind Mrs. Emerson in the polls, Mrs. Emerson's opponent informed the Department of the complaint and it immediately (within 24 hours) performed an investigation. CP358.

Within 48 hours of Mr. Emerson commencing work on the Project, 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. This even though the written complaint was not logged at the Department until September 2, 2010, resulting in a letter sent on September 2, 2010 describing that the Department had a "significant backlog of pending complaints." CP364.

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. Had the department done adequate data gathering (as required by the Army Corps of Engineers manual) they would have found a listing on 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.

Within months of the Emersons applying for their building permit, the adjacent neighbors, who would have shared wetland and stream buffers if any existed, applied for a permit to build a large unattached structure on their property, and nearer to the alleged critical area than the Emersons. The field indicator worksheet submitted by that owner stating no wetlands on their property was found adequate for their application and their permit was approved accordingly. CP452-60.

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 findings of 2008 of a wetland and/or stream

being on the Property, and once again provided no documentation of their work. They did inform Mr. Emerson if he wished to dispute their findings, he should hire a hydrogeologist. 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. They intended to prove those individuals ignored the Emersons' rights in trying to create an "October surprise" in an attempt to derail Mrs. Emerson's campaign. Indeed, Mrs. Emerson's election opponent brought up the Stop Work order at a number of public forums. 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.

Upon the misguided advice of prior counsel, the Emersons added Island County to their lawsuit in January 2011, which sought relief for numerous claims that were mostly abandoned as the lawsuit moved forward. CP359. By the time the Court heard 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 Emerson's 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. 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 background of science (both are Electricians), were convinced that their scientists were right and so they continued on the path to proving so. Mrs. Emerson began spending nearly all her free time doing extensive studies of wetlands and particularly of the methods prescribed in the manual. The more she searched, the more it confirmed her belief of the accuracy of her scientists. CP358-59.

So she sought after 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 $5000 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 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.

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. Specifically, the Emersons sought damages for breach of contract, violations of RCW 64.40.020 and 42 U.S.C. § 1983, and takings under the Washington state constitution. CP1-43. The Emersons also originally sought various forms of injunctive relief such as a writ of mandamus and specific performance to compel Defendant to perform its obligations under the Agreement. CP1-43.

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. The inspection occurred on October 7, 2014, and 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. This appeal followed.

ARGUMENT

A. STANDARD OF REVIEW

The review of a grant of summary judgment is de novo. *Bank of Am. V. David W. Hubert, P.C.*, 153 Wn.2d 102, 111, 101 P.3d 409 (2004). The Court is to engage in the same inquiry as the trial court. *State v. Kaiser,* 161 Wn.App. 705, 718, 254 P.3d 850 (1978); *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 363 (2005). No deference is to be given to the trial court's findings and determinations. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 869 (1978) (emphasis added).

Accordingly, this Court should examine the pleadings, affidavits,

depositions, and admissions properly before the Court to determine whether a genuine issue of material fact exists. CR 56(c); *Carlsen v. Wackenhut Corporation*, 73 Wn.App. 247, 252, 868 P.2d 882 (1994). The initial burden to prove a lack of genuine issue of material fact lies with the moving party, and only if the moving party meets that initial burden does the non-moving party then have an obligation to demonstrate the existence of a genuine issue of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party does not come forward with specific, admissible evidence to meet this initial burden, the non-moving party is not required to combat the conclusory statements by the moving party. *See id*; CR 56(e).

When determining whether the moving party has met his initial burden, the court may not consider inadmissible evidence regardless of whether the non-moving party objects to such evidence. *Davis v. W. One Auto. Grp.*, 140 Wn.App. 449, 455 fn.1, 166 P.3d 807 (2007); *Cano-Garcia v. King Cnty.*, 168 Wn.App. 223, 249, 277 P.3d 34 (2012). Perhaps most importantly, the Court must consider all facts, *as well as all reasonable inferences from those facts*, in a light most favorable to the non-moving party when determining if an issue of fact exists. *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992); *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

B. THE EMERSONS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO ASSERTING THEIR CLAIM UNDER RCW 64.40.020.

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. Besides misapplying *Saben*, the Trial Court also failed to consider exceptions to the purported administrative exhaustion requirement, assuming *arguendo*, one existed in the first place.

A careful reading of *Saben* shows it does not 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. *Id.* 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 upheld 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 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. *Saben* also makes it clear that there is no administrative exhaustion requirement when the basis for an RCW 64.40 claim is action relating to the breach of a settlement agreement. Strikingly similar to *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.

Even if such a requirement existed, the trial court further erred by not considering the exceptions to the exhaustion requirement. A discussion of the exceptions is set forth in *Smoke v. City of Seattle*, 132 Wn.2d 214,

221-22, 937 P.2d 186 (1997), a case that the Emersons heavily relied upon in their opposition and that the Trial Court did not address.

"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 after it resumed processing the Application pursuant to the Settlement Agreement.[1] In fact, this lawsuit arose from Defendants' failure to process the Application or otherwise issue an order pursuant to the terms of the Agreement. CP4-8. This fact cannot be disputed.

Perhaps the County and the Trial Court believed that once the Settlement Agreement was breached that the Emersons could somehow resurrect their prior appeal to the Island County Hearing Examiner which was timely filed based on the County's decision to deny the Emersons' building permit on March 28, 2013. CP4. But no party has alleged or put forth any case, County code section, or other mechanism whereby an appeal, once dismissed, may be refiled. There is no legal basis for tolling of a statute of limitations or any such remedy.

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

Specifically, the terms of the Settlement Agreement do not contemplate the resurrection of the appeal to the Hearing Examiner. They provide that 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.

The Settlement Agreement contains a forum selection clause that required *any* action arising out of the Agreement to be filed in the Superior Court.[2] CP253. The RCW 60.40 claim is an action arising out of the relationship created by the Agreement and, therefore, the Agreement requires the dispute to be heard by the courts without any administrative review even if there was a final order triggering the exhaustion requirement (which there was not).

The Parties agreed to exchange their administrative remedies for the terms of the Settlement Agreement when it was made. Another way to put this argument is to ask, what would be the administrative remedy that the Emersons could have sought? Simply put, there is none. The terms of the Settlement Agreement control.

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

[2] Indeed, it is easily foreseeable that had the Emersons proceeded to try and resurrect the Hearing Examiner appeal, the County would have opposed it based on the forum selection clause.

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. Even if there was an exhaustion requirement, it did not apply here because there was never an appealable order nor an available administrative remedy.

C. THE TRIAL COURT ERRED BY DISMISSING THE EMERSONS' CLAIM FOR TAKINGS UNDER THE STATE CONSTITUTION BY RULING ON ARGUMENTS THAT WERE NOT ADDRESSED BY THE COUNTY IN ITS OPENING MEMORANDUM OR OTHERWISE

As noted above, the party moving for summary judgment bears the initial burden of proving the absence of any material facts; only if the moving party meets this initial burden does the non-moving party have an obligation to demonstrate the existence of a genuine issue of fact. *Young, supra*; *see* CR 56.

To meet its initial burden, the moving party must raise all of the issues it believes it is entitled to summary judgment in its opening memorandum. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn.App. 163, 168-69, 810 P.2d 4 (1991). The moving party is not allowed to raise new issues in its rebuttal materials (or otherwise) because the non-moving party would be deprived of an opportunity to respond. *Id. A fortiori*, a non-moving party is not allowed to rely on arguments that are raised for the first time during oral argument. Consideration of arguments not raised by the moving party in its opening memorandum is an error of law. *Id.*

If a moving party seeks to rely on legal theories that are not addressed in its opening memorandum, the proper procedure is for the moving party is to strike and refile its motion, or to raise the new issues in another hearing at a later date. *Id.* at 169. This ensures that the non-moving party is not deprived of an entire cause of action without ever having a meaningful opportunity to respond as to why there is a triable issue of fact with respect to the claim.

To attempt meet its initial burden with respect to the Emersons' third claim, "Takings under State Constitution," the County merely argued that under Federal law "[a] regulatory taking will not be found absent a showing that the regulation denied the owner of all economically viable use of his property or violated a fundamental attribute of ownership."

CP90. The County further argued that because Emersons were able to live on their property during the dispute, they allegedly cannot have been denied all economically viable uses. CP90. Thus, the scope of the County's motion was limited to a takings claim under the Federal Constitution based on the specific terms it alleged.

Besides overlooking the fact that the County moved for summary judgment of a takings claim under the Federal Constitution when the Emersons' claim is based on the State Constitution,[3] the Trial Court also raised and then ignored the fact that the County moved for summary judgment of a facial takings claim (i.e., a claim that arises when the government deprives an owner of all economically viable uses of his or her property). RP46-7.

Instead, the Trial Court, *sua sponte*, analyzed whether an as applied takings claim occurred. RP46-7. The two types of takings claims, "facial" and "as applied", involve two distinct factual and legal inquiries. *See Thun v. City of Bonney Lake*, 164 Wn.App. 756, 759-761, 265 P.3d 207 (2011). A facial takings claim requires a showing that a challenged regulation "destroys a fundamental attribute of property ownership." *Id.* at 759. "This threshold is satisfied by showing that the regulation constitutes

[3] In other words, the County moved for summary judgment on a claim that was not before the Court. It exclusively cited and discussed federal law. It did not mention, let alone analyze a takings claim under State law in its opening memorandum. The motion should have been denied on this basis alone.

a physical invasion of the property by the government or by showing that the regulation denies all economically viable use of the property." *Id.* at 759-60 (emphasis added).

On the other hand, "as applied" takings claims require a distinctly different showing. The test for determining whether there was an "as applied" taking is much more complex. *See id.* at 760. Such claims require a showing that the challenged regulation goes beyond preventing a public harm to confer a public benefit, or infringes on (rather than destroys) a fundamental attribute of ownership." *Id.* "If the regulation confers a public benefit or infringes on a fundamental attribute of ownership, [courts] analyze whether the regulation advances a legitimate state interest." *Id.* (noting that State law is different than Federal law with respect to this element).

If the regulation does not satisfy this test, there has been an "as applied" taking. *Id.* If there is a legitimate state interest advanced by the regulation, courts consider the economic impact on the landowner by analyzing (1) the regulation's economic impact on the property, (2) the extent of the regulation's interference with investment-backed expectations, and (3) the character of the government action." *Id.* at 760-61. Therefore, even if there is a legitimate state interest advanced, there may nevertheless be a taking if the economic impact on the landowner

outweighs the public benefit conferred. *Id.* at 761. This is a test that weighs the economic impact to the owner against the public benefit, a considerably different test than whether "all" economic impact was stripped from the owner, the test that was argued by the County.

Boiled down to its essence, a facial claim requires determining whether a state actor physically appropriated private property or whether its regulations denied all economically viable uses. *See id.* at 759-60. If there is no physical taking or denial of all economically viable uses, then the claim made is an "as applied" taking, and the different analysis is applied

The County did not address the issue of an "as applied" claim in any of its briefing (let alone a claim under the State Constitution). Neither did any party address the factors of an as applied takings claim in oral argument. The Trial Court specifically (and correctly) made a determination that the Emersons' takings claim was an "as applied" claim. RP46. Once the Trial Court determined that the Emersons' claim was an "as applied" takings claim rather than a "facial" takings claim, it should have immediately denied the motion because the County moved for summary judgment on a claim not before the Court. Instead, the Court committed error by raising, analyzing, and then ruling on an issue that was

never before the Trial Court (and certainly not in the County's opening memorandum as all issues must be). *White, supra,* 61 Wn.App. at 169.

In sum, the County effectively moved for summary judgment of a facial takings claim under the Federal Constitution. The County never moved for summary judgment of an as applied takings claim under the State Constitution, and it was error for the Trial Court to raise the issue on its own at oral argument and then dismiss the Emersons' claim on that basis without any opportunity to respond.

D. THE COUNTY'S ARBITRARY AND IRRATIONAL REFUSAL TO PROCESS THE EMERSONS' BUILDING PERMIT GIVES RISE TO A CLAIM UNDER 42 U.S.C. § 1983.

Once again, the Trial Court committed error by ruling on an issue that was not properly before the Court. The County challenged the Emersons' claim for violation of 42 U.S.C. § 1983 on various misguided grounds. In short, the County argued the Emersons' 1983 claim was based on its denial of their permit on March 28, 2013, and its subsequent procedures relating to issuance of the permit. Specifically, the County argued that a Section 1983 claim "would have to be based on an unlawful permit decision by the Island County BOCC" and that the Emerson's claim must fail because they allegedly cannot show that their constitutional rights were infringed by an unconstitutional Island County

policy. CP109. The arguments completely miss the mark and are purely hypothetical.

The Emerson's 1983 claim is not based on the County's denial of the permit (which was later retracted when the County resumed processing the application per the Agreement), any of Island County's policies, or any other routine procedures associated with issuance of a building permit. The Emersons claim is based on the County's arbitrary and irrational delays and interference with processing of their land use permit pursuant to the Settlement Agreement. This should have been the end of the Trial Court's inquiry; it should not have moved on to address issues that the County never raised in its opening memorandum. *White, supra.*

But the trial court did not end its inquiry and deny the motion, it cited *Lutheran Daycare v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1991) and stated that "a local government unit can be liable under section 1983 only where an officer is the final policy maker and is the one making the decision, or not making the decision, acting in an area in which the officer could under established local government policy." RP45. It then dismissed the claim after ruling that the Emerson's theory of the County "dragging its feet for either benign or not so benign reasons" did not rise to the "level of a 1983 action." RP45.

The Trial Court did not consider another Washington Supreme Court case, *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998), which was rendered seven years after *Lutheran Daycare* and other relevant caselaw cited in the Emersons' opposition.

"[P]rocedural rights respecting permit issuance create property rights when they impose significant substantive restrictions on decision making." *Id.* at 963. Where discretion to approve or deny a land use permit is limited, a county's interference or unreasonable delay in issuance of a permit amounts to a violation of due process of law. *See id.* at 970. In other words, delaying or refusing to issue a permit to which a person is lawfully entitled violates the applicant's statutory and constitutional rights if applicant has a vested right to the permit or has satisfied all relevant statutory and ordinance criteria and is thus entitled to it. *Id.* at 959-60. Further, "[u]nder § 1983, substantive due process is denied if the local jurisdiction makes a land use decision irrationally, arbitrarily, and capriciously, its decision utterly fails to serve a legitimate governmental purpose, or was tainted by improper motive." *Cox v. City of Lynnwood*, 72 Wn.App. 1, 9, 863 P.2d 578 (1993).

It is undisputed that an applicant for a building permit is entitled to its immediate issuance upon satisfaction of relevant ordinances and criteria. *Mission Springs, supra* at 960. Issuance of such a permit is not a

matter of discretion, but it is ministerial. *Id.* Simply put, neither a "building permit, nor any other ministerial permit may be withheld at the discretion of a local official to allow time to undertake further study." *Id.* at 961.

The Emersons were entitled to receive their building permit once they submitted the Report and fulfilled their remaining obligations under the Agreement (paying a $5000 fee and dropping their administrative appeals). Like any other building permit application, issuance of the Emerson's permit was purely a ministerial task.

However, the County continuously delayed its processing of the application for years for no lawful reason. Despite the fact that the Report (filed as required by the Settlement Agreement) complied with the Settlement Agreement, the County refused to process the application and demanded to inspect the property to perform its own study before it would issue the permit.[4] Further, it withheld issuance of the Permit when it unreasonably determined that the Report was not in compliance with the Settlement Agreement. In addition, the Emersons have continuously maintained that the County delayed processing and issuance of the Permit

[4] To this day, the County has yet to cite any authority that gives it the right to demand a site visit and the Emersons an obligation to comply as a prerequisite to issuance of the permit.

because of politically motivated reasons, an improper motive that is similar to the violations of Section 1983 in *Mission Springs.*

Under the circumstances created by the County's delays, bad-faith processing of the application, and unreasonable determination that the Report was not in compliance with the Settlement Agreement, questions of fact existed regarding whether the County's actions were arbitrary, irrational, or caused by improper motives. *See Mission Springs*, 134 Wn.2d at 970. Accordingly, the trial court erred in granting summary judgment of the Emersons' 1983 claim.

E. THE TRIAL COURT DECIDED THE FRAUD CLAIM ON ANOTHER ISSUE THAT WAS NOT RAISED OR BRIEFED BY THE PARTIES.

The County argued that the Emersons' claim for fraud/misrepresentation should be dismissed because a "no representation" clause in the Agreement allegedly precludes a claim for fraud. CP106. Unsurprisingly, the County did not cite any authority for this proposition, nor have the Emersons found any. To allow a party to contract around its extra contractual duty to be truthful in negotiations would sanction fraudulent and generally deceptive behavior. The purported "no representation" clause in the Agreement should have no effect on the Emersons' claim for fraud, and thus to the extent the Trial Court relied upon that clause, the ruling should be overturned.

But the Trial Court actually dismissed the Fraud claim because it found no evidence of intent by the County when entering the Settlement Agreement to withhold the Permit from the Emersons. RP44. However, once again, the Trial Court made a decision based on an argument that was not presented by the County in its motion materials. The moving party must raise *all* of the issues it believes it is entitled to summary judgment in its opening memorandum. *White,* 61 Wn.App. at 168.

In its initial briefing, the County argued only one of the nine elements of a fraud/misrepresentation claim: "There was nothing about the County's action to indicate a material and intentional misrepresentation of an existing fact." CP107. As a result, the Emersons responded only to this issue in their materials. CP233. However, the judge at the hearing in this matter completely ignored the issue raised and briefed by the parties in favor of her analysis of the intent of the County when entering the Settlement Agreement (RP44), an issue not raised by any party in briefing.

Indeed, the Trial Court raised the issue of intent in the oral argument and forced counsel for the Emersons to address it on the fly and in person for the very first time. RP24-5. Under the law of summary judgment, the Emersons were entitled to proper briefing of this issue, if in fact it was to be an issue the County would rely on in its motion. The

Emersons had no such opportunity, and so this decision should be overturned.

CONCLUSION

One fact is important to recall in this case: there are and never have been any wetlands that would affect the Permit on the Emerson Property. The original development documents from 1994 available to the County showed no wetlands, and the County has never, ever had any expert who said otherwise.

The Trial Court went far beyond the scope of the moving papers in its ruling. As seen above, there are valid reasons why the Trial Court's analysis is flawed and should fail. Not the least of which is that the Emersons deserve a full and fair opportunity to brief and argue the issues involved here.

For the reasons stated herein, this Court should reverse the dismissals of the Emersons' claims for violation of RCW 64.40.020, for takings under the State Constitution, for violation of 42 U.S.C. § 1983, and for fraud.

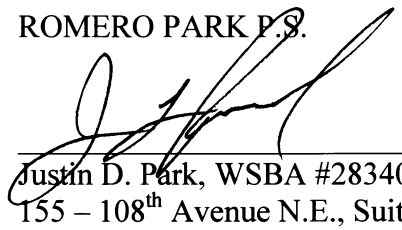
//

//

//

Respectfully submitted this 17th day of August 2015.

ROMERO PARK P.S.

By: 

Justin D. Park, WSBA #28340
155 – 108th Avenue N.E., Suite 202
Bellevue, WA 98004-5901
(425) 450-5000
Attorneys for Appellants

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
Respondents.

PROOF OF SERVICE FOR APPELLATE BREIF

Justin D. Park, WSBA# 28340
ROMERO PARK P.S.
Attorneys for Appellants Kenneth and Kelly Emerson
Columbia West Building
155 – 108th Ave N.E. Suite 202
Bellevue, WA 98004
(425) 450-5000

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 17th day of August, 2015, I served the foregoing document(s) described below:

APPELLATE BRIEF

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

Mark R. Johnsen
Karr Tuttle Campbell
701 Fifth Ave. Suite 3300
Seattle, WA 98104
mjohnson@karrtuttle.com

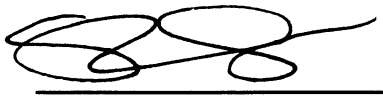
_____ **(BY MAIL)** I caused said envelope(s) with first class postage prepaid to be placed in the United States mail at Bellevue, Washington.

_____ **(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 17th day of August, 2015, at Bellevue, Washington.



Stephanie Stillwell
Legal Assistant