73208-1

73208-1

NO. 73208-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KENNETH EMERSON and KELLY EMERSON,

Appellants,

v.

ISLAND COUNTY,

Respondent,

BRIEF OF RESPONDENT ISLAND COUNTY

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I. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Respondent Island County believes the issues pertaining to the assignment of errors may best be stated as follows:

A. Whether the trial court properly dismissed Emerson's claim under RCW 64.40, when the claim did not arise from a final decision by the Island County Board of County Commissioners.

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

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

D. Whether the claim for regulatory taking was properly dismissed because (1) a "site inspection" permit requirement does not rise to the level of a constitutional taking; (2) a site inspection requirement does not infringe a fundamental attribute of ownership; (3) the burden of a site inspection relative to a building permit application does not outweigh the public's interest in protection of critical areas; and (4) the Emerson property was not deprived of all economic value.

E. Whether the takings claim was subject to dismissal for the further reason that the claim was not ripe.

F. Whether the Section 1983 claim was barred by (1) the absence of a constitutionally protected property interest; (2) the absence of an unconstitutional county policy; and (3) the absence of conduct "shocking to the conscience."

G. Whether the fraud claim was properly dismissed based on the express terms of the settlement agreement and the absence of any of the nine elements required for a fraud claim.

II. COUNTERSTATEMENT OF THE CASE

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

This current lawsuit was filed in November 2013, arising from Island County's determination that a wetland report submitted on behalf of Emerson did not comply with applicable methodologies and standards, and that therefore a Critical Areas Specialist from the County or the Washington Department of Ecology (DOE) would need to inspect the

property before a building permit could be issued. Emerson denied repeated requests and suggestions by Island County that the dispute could be easily resolved by an inspection, and stubbornly refused access to the property. (CP 140-212).

The Emerson home on Camano Island was constructed in 1995. In June 2008, Emerson applied for a permit to construct a garage on the property. As a part of that project review, a brief critical areas review was performed by the Island County Department of Planning and Community Development ("Planning"). Potential wetlands on the property were identified and a rough drawing was prepared which indicated the approximate location of the potential wetlands. The proposed garage was not within the wetland buffer, however, and therefore the garage did not implicate wetland setbacks. Emerson was expressly advised in the garage permit, however, that no additional new structures could be built without further critical areas review. (CP 660).

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

In August 2010, Emerson began construction of a sunroom addition to the home. No permit applications were submitted to the

County prior to commencement of construction, despite the fact that Kenneth Emerson has been a contractor for decades, and Kelly Emerson had also worked extensively in the construction industry, and she was running for Island County Commissioner. (CP 665, 668). Mr. Emerson testified that he decided to "take the risk" of undertaking the project without permits. (CP 664, 686).

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

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

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

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

In July 2011, Emerson submitted a wetlands report in an effort to obtain a building permit from Island County for the sunroom addition. Island County had concerns that the report did not comply with accepted methodologies. It sent the wetland report to DOE to verify whether the report met the criteria in Washington state for wetland reports. DOE concluded that the wetland report did not comply with federal and state standards. (CP 16).

Emerson and the County continued to have periodic discussions with respect to the issuance of a building permit for the home addition. Because Kelly Emerson became an Island County Commissioner in 2011, the Prosecutor's Office retained an outside prosecutor, Justin Kasting of Snohomish County, to represent the Department of Planning and Community Development ("Planning") in its negotiations with Emerson's attorney over the permitting issues. Throughout 2013 Mr. Kasting

repeatedly advised Emerson's attorney that the dispute could likely be resolved quickly and without cost to the Emersons, if they would simply allow a site inspection for critical areas by a County or DOE wetlands inspector. More than ten (10) letters and/or phone communications were made during calendar year 2013 conveying this simple solution. (CP 669-670). Similar offers were made by Ecology to conduct an inspection at no cost. Emerson persisted, however, in denying access to County or state inspectors. (CP 671-674).

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

On March 29, 2013, the Planning Department formally denied the Emerson building permit application submitted on August 31, 2010, based on Emerson's refusal to allow the County or DOE to inspect the property for potential critical areas issues. Emerson appealed that decision to the Island County Board of County Commissioners (BOCC). (CP 17). However, the Planning Department and Emerson agreed to a continuance

of the appeal to allow additional time for settlement discussions. On June 28, 2013, the parties entered into a Settlement Agreement. (CP 23-29). As a part of that agreement, the County agreed to issue an Enforcement Order that modified the previous orders and contained terms that Emerson was required to complete, i.e., the payment of a reduced fine of $5,000 (reduced from more than $37,000), and the submission of a new wetlands report within 60 days. The Agreement provided that the new wetland report would have to strictly comply with the requirements of DOE's Wetland Manual. The Agreement provided that the Island County Planning Department could seek independent third party review of a new wetland report if it reasonably determined that accepted methodologies were not strictly followed. (Settlement Agreement, ¶ 4.1). (CP 26). Emerson withdrew his appeals of the enforcement orders and the denial of the building permit.

Emerson submitted the new wetland report on or about August 27, 2013. The County determined that the methodology of the wetland report was not in compliance with federal and state standards. The County forwarded the wetland report to DOE for third party review. DOE wetlands specialists evaluated the report and issued a letter report which agreed with the County that the wetland report issued on behalf of Emerson was *not* in compliance with state and federal standards.

(Exhibit 12 to Kasting declaration). (CP 202-206). The County forwarded DOE's letter to Emerson's attorney, and again restated that the wetland issue could be easily resolved without cost to Emerson by allowing a County or DOE wetland specialist to inspect the site. Emerson persisted in his refusal to allow an inspection, and his attorney declared the Settlement Agreement in default in September 2013. (CP 18, 675-676).

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

By August of 2014, in the face of repeated refusals by Emerson to voluntarily allow a wetlands inspection, the County's litigation attorney Mark Johnsen submitted a formal Request for Inspection of Property under CR 34(a)(2). For the first time, Emerson agreed to a site inspection, including participation by a County Critical Areas Specialist. An inspection was undertaken on October 7, 2014 by County wetlands specialists who examined the property and took numerous soil and vegetation samples. (CP 679). Approximately three weeks later, wetlands

specialist Tess Cooper issued a letter report concluding that no wetlands on the property would be impacted by Emerson's home addition. Emerson was advised that the building permit was available to be picked up. Emerson has declined to pick up the permit or proceed with construction. (CP 680).

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

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

Following mediation, the parties agreed that the remaining breach of contract claim would be dismissed from the Superior Court action, and instead would be subject to arbitration. (CP 647-648). Emerson reserved

the right to pursue an appeal of the dismissal of the other claims.[1] The Notice of Appeal was filed on March 19, 2015.

III. ARGUMENT

A. The 64.40 Claim Was Subject to Dismissal Based on a Variety of Grounds.

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

The trial court had no difficulty in concluding that Emerson's claim under RCW 64.40 was subject to dismissal. Indeed, Emerson's assertion of a claim under that statute suggests a misunderstanding of its narrow application. At common law, damages were ordinarily not recoverable based on alleged errors by government employees in connection with processing building and land use permits. RCW 64.40, which was enacted by the Legislature in 1982, provides a limited remedy for a permit applicant whose permit has been subject to an arbitrary and capricious or knowingly unlawful decision by a local government. Under the express language of the statute, however, liability may arise only from an improper final decision by a local government's highest decision making body. The key operative language of the statute is found at RCW 64.40.020(1):

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[1] The Motion for Reconsideration did not allege error in connection with the trial court's dismissal of the fraud claim and the Section 1983 claim. Emerson seeks to revive those claims, however, in this appeal.

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

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

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

(Emphasis added).

Thus, in this case Emerson would have standing to assert a claim under RCW 64.40 only if a "final decision" by Island County (i.e., a decision by a Hearings Examiner or the Board of County Commissioners) was arbitrary and capricious or knowingly unlawful. Simply stated, there was no "act" by Island County, within the narrow definition of RCW 64.40.010(6). *Callfas v. Dept. of Construction and Land Use*, 129 Wn. App. 579, 592, 120 P.3d 110 (2005).

It is undisputed that the Board of County Commissioners did not make any decision on Emerson's building permit application. The actions

of which Emerson complains were undertaken by planning staff, and were not appealed to a Hearing Examiner, nor to the BOCC. (670-671). Yet preliminary actions by County staff cannot be the basis for a claim under RCW 64.40.

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

2. Emerson Failed to Exhaust Administrative Remedies.

A corollary to the rule that only a "final decision" by a local government can give rise to liability under 64.40 is the principle of exhaustion of administrative remedies. RCW 64.40.030 unambiguously provides that a claim under the statute may be commenced only within 30 days after the applicant for a permit has exhausted all administrative remedies:

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

The Washington courts have construed the language of 64.40.030 strictly. If the statutory action is not commenced within 30 days following the final administrative action of the County, dismissal is required. The statute carries an exhaustion requirement which is mandatory. *Smoke v. Seattle*, 132 Wn.2d 214, 221-22, 937 P.2d 186 (1997).

In this case, Emerson did not perfect an administrative appeal of the County's decision not to grant a permit until a site inspection was conducted. Neither the Island County Hearing Examiner nor the Board of County Commissioners heard an appeal by Emerson. Therefore, under the unambiguous language of the statute and its construction by the courts, the 64.40 claim was subject to dismissal based on failure to exhaust remedies.

There is abundant caselaw confirming that an action under 64.40 must be dismissed if it is filed before all administrative remedies have been exhausted. In *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153, the Ninth Circuit Court of Appeals held that a claim under 64.40 was properly dismissed, where the plaintiffs had failed to wait until administrative remedies had all been exhausted before filing their claim. 126 F.3d at 1130. Exhaustion of remedies was also applied as a bar to a 64.40 claim by the Court of Appeals in *Westway Construction v.*

Benton County, 136 Wn. App. 859, 866-67, 151 P.3d 2004 (2006), where the plaintiff filed suit without first exhausting all administrative appeals.

Emerson argues that the exhaustion requirement under RCW 64.40 should not be applied because his claim against Island County arises from a settlement agreement rather than the denial of a building permit per se. But if that is the case, then the remedy is a breach of contract claim, not the limited statutory remedy under 64.40.[2] Following the breakdown of the settlement agreement in the fall of 2013, Emerson could have either reactivated his appeal of the building permit denial, or sought a new appeal of the wetlands inspection condition that the County was imposing. He declined to do either, and instead filed his action for damages in Island County Superior Court without exhausting administrative remedies. This was fatal to any claim under RCW 64.40.

Emerson's reliance on *Saben v. Skagit County*, 136 Wn. App. 859 (2006) is misplaced. In *Saben*, the plaintiff *did* appeal the permit denial to the Hearing Examiner, and then to the BOCC. Further, *Saben did* file a timely action under RCW 64.40. 136 Wn. App. at 873-74. In this case, by contrast, there was no timely exhaustion of administrative remedies and no timely filing of an action under RCW 64.40. (See, Section 3, below).

[2] As noted above, the trial court did not grant summary judgment with respect to the breach of contract claim. The parties subsequently agreed that the breach of contract claim could be resolved through arbitration. (CP 647-648).

3. The 64.40 Claim Was Also Barred by Limitations.

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

As Emerson admits in his Complaint at paragraph 26, he sent written notice of the Planning Department's alleged default under the Settlement Agreement on September 16, 2013. (CP 18). Yet the 64.40 action was not filed until November 5, 2013, beyond the narrow 30 day limitations period for a claim under the statute. Therefore, in addition to absence of standing and failure to exhaust remedies, Emerson's statutory claim would also be barred by limitations. RCW 64.40.030; *Westway Construction*, *supra*, 136 Wn. App. at 867. The trial court's dismissal of the 64.40 claim should be affirmed.

B. A Site Inspection Permit Condition Does Not Give Rise to a Constitutional Takings Claim.

1. No Court Has Held That a Regulatory Taking Could Arise From a Mere Permit Requirement for a Site Inspection.

The trial court properly dismissed Emerson's regulatory takings claim. In its motion for summary judgment, Island County pointed out that a mere delay or conditional denial of a land use permit does not ordinarily fall within the rubric of a constitutional takings analysis. *See*, *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regulatory Planning Agency*, 535 U.S. 302, 322-25, 122 S. Ct. 1465 (2002). This is especially true where the plaintiff has refused to allow the permitting process to proceed, by prohibiting a site inspection by a government official.

In its summary judgment brief, Island County argued that there appeared to be no case nationwide in which a constitutional taking had been found based on a mere condition that a landowner provide access to an inspector before a building permit was issued. Not surprisingly, in his response, Emerson cited no regulatory takings claim based on similar facts. Nor is any such authority cited in Appellant's Brief herein.

It is not disputed that Emerson was repeatedly advised that issuance of a building permit would be likely, after a wetlands specialist from Island County or the Washington Department of Ecology was afforded an opportunity to inspect the property to confirm that critical

areas would not be negatively impacted by the house addition. As even Kelly Emerson acknowledged in her deposition, requiring access to the subject property in connection with a permit application is typical and valid in jurisdictions throughout the United States. (CP 669). Such a requirement could not conceivably give rise to a claim for damages under the Takings Clause of the state Constitution.

2. Requiring a Site Inspection as a Condition of Permit Issuance Does Not Destroy a Fundamental Attribute of Ownership.

Emerson's attorney admitted at the summary judgment hearing that the takings claim was an "as applied" challenge. As such, the claim was properly dismissed because merely allowing a wetlands inspection did not destroy or impair a fundamental attribute of Emerson's ownership; nor could it outweigh the public interest in protection of critical areas. Therefore, as the trial court properly held, the elements for a regulatory takings claim were not met as a matter of law. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 760-61, 265 P.3d 207 (2011).

It would indeed be an incongruous result if a mere site inspection for a building permit could be thwarted by an applicant under the guise of a regulatory takings claim. If that was the law, cities, counties and state governments would have virtually no ability to inspect a permit applicant's property to determine compliance with applicable building,

land use and critical areas regulations. The trial court appropriately held that the strict requirements for an "as applied" regulatory takings challenge had not been met.

3. A Temporary Taking Requires Denial of All Economical Use of the Property.

As Island County argued in its Motion for Summary Judgment, a further basis for dismissal of the regulatory taking claim was the acknowledgment that the wetland inspection condition did not destroy all economic value of the Emerson property. As Kelly Emerson admitted in her deposition, she continued to live in the house throughout the period that the dispute over the wetlands inspection existed. (CP 668).

It was also undisputed that after Emerson finally allowed the County to perform a complete wetland inspection, the permit was promptly issued. Thus, any purported restriction was temporary at best. The courts will not generally recognize a temporary taking unless it destroys all economical use of the property:

> . . . Washington's taking caselaw, like federal caselaw, does recognize that a "temporary taking" of property may occur in the context of *governmental regulation of property*. Washington caselaw also makes clear that to be a compensable temporary regulatory taking, the government regulation must "deny a landowner all economical use of his or her property." *Guimont v. Clarke*, 121 Wn.2d 586, 598, n.3, 854 P.2d 1 (Wash. 1993) . . . .

Pande Cameron and Co. of Seattle v. Central Puget Sound Regional Transit Authority, 610 F. Supp. 2d 1288, 1302 (W.D. WA 2009).

The trial court correctly held that the temporary delay in issuance of a permit, until plaintiffs agreed to allow a critical areas inspection by the County or by DOE, did not constitute a compensable taking.

4. The Takings Claim Was Subject to Dismissal for the Further Reason That It Was Not Ripe.

An additional basis for dismissing the regulatory takings claim was the absence of ripeness. At the time the lawsuit was filed, the County had not had an opportunity to undertake a complete wetland inspection of the property and determine if any wetlands regulations would affect the development. As the County repeatedly stressed in its summary judgment motion, Emerson refused to allow the County or the Washington Department of Ecology access to the property, which would have allowed a determination as to whether wetlands regulations would have any impact on the proposed home addition. (CP 669-676). We now know that the County determined following its October 2014 inspection that wetlands would not be impacted by the proposed development. Before that inspection and analysis had occurred, the parties did not know if Island County wetland regulations would impair or restrict Emerson's ability to construct the proposed home addition. Thus, the takings claim asserted in

the September 2013 Complaint was unripe, as a matter of law. As the Court of Appeals held in *City of Bonney Lake*, *supra*:

> Ripeness is a hurdle that requires the basic facts underlying a dispute to be resolved before the dispute reaches court. Courts cannot reach just and accurate results if neither the size of the parcels nor the permitted uses thereon are reasonably known before trial.

164 Wn. App. at 767.

As the Washington Supreme Court held *In Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 79-81, 768 P.2d 462 (1984) a takings claim is premature when it was filed before it had been finally determined what could be built on the property under the challenged regulation. In this case, the Emersons were required to allow the County to inspect the property and determine the effect, if any, of wetlands regulations on their proposed home addition. We now know that those wetlands regulations placed no restriction on the development and, therefore, the takings claim was subject to dismissal as a matter of law.

5. An Appellate Court May Affirm Summary Judgment on Any Legal Grounds Supported by the Record.

In Appellant's Brief, Emerson contends that Island County failed to make a proper argument for dismissal of the takings claim. Thus, he argues, the trial court had no legal grounds to grant dismissal of the takings claim. The argument is curious, in that the County made a

detailed and multi-faceted argument in support of dismissal of the takings claim, and the plaintiffs failed to provide any meaningful response. The suggestion that it was the County that failed to address the takings claim at the trial court level is demonstrably incorrect.

In its Motion for Summary Judgment, Island County argued at pages 23 and 24 that the takings claim should be dismissed in its entirety "based on multiple grounds," citing several cases to support dismissal. The County pointed out that mere delay or conditional denial of a land use permit does not fall within the rubric of a takings analysis. The County asserted that no case in the country had ever found a taking based on a site inspection requirement in a permit. The County also argued in effect that the claim was not ripe, because the landowner had refused to allow the County to enter the property to determine if the wetland regulations would in fact impact the proposed construction. (CP 89). The County then went on to argue that the wetland inspection requirement did not deny all economically viable use of the plaintiff's property. (CP 89-90).

In response to the County's motion for dismissal of the takings claim, Emerson offered no meaningful legal argument. Indeed, in his 24-page Response Brief, Emerson devoted only *four sentences* to the takings claim, citing only one case (erroneously) for the proposition that the state constitution provides greater protection than the U.S.

Constitution. (CP 236). The County pointed out in its Reply Brief that the federal constitution provides at least as much protection in the context of a regulatory taking, and the trial court agreed. (CP 619). Emerson offered no other basis to warrant denial of the County's motion to dismiss the takings claim.

Contrary to the suggestion in the Emerson brief, Island County had no obligation to make a legal argument for Emerson, e.g., by speculating as to whether Emerson was asserting a facial or an "as applied" claim. Island County argued for dismissal of the takings claim in its entirety. A moving party may meet its initial burden under CR 56 by "showing," i.e., by pointing out to the Court, that there is an absence of evidence and legal authority to support the non-moving party's case. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, fn.1 (1989). The burden then shifts to the non-moving party to show why summary judgment should not be granted. *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 223, 254 P.3d 778 (2011). Emerson failed in his response to Island County's summary judgment motion to make any legitimate legal argument in support of the takings claim.

Emerson's reliance on *White v. Kent Medical Center*, 61 Wn. App. 163, 810 P.2d 4 (1991) is misplaced. In that case, the party moving for summary judgment did not raise or address in any way the legal defense of

proximate cause in its motion, but only in its reply brief. Because proximate causation was not even raised in the summary judgment motion, the trial court held it should not be raised for the first time in a reply brief. In contrast, in its Motion for Summary Judgment herein, Island County expressly sought dismissal of the takings claim and provided a multi-faceted argument as to why the claim should be dismissed in its entirety. The fact that the trial court may have added clarification in her oral remarks regarding the basis for her ruling in no way invalidates the decision.

Moreover, in evaluating the trial court's dismissal of the takings claim, this Court may affirm on any theory supported by the record. RAP 2.5(a); *Home Realty Lynnwood v. Walsh*, 146 Wn. App. 231, 240, 189 P.3d 253 (2008); *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866, n.7, 103 P.3d 244 (2004). Thus, although the trial court did not directly address the absence of ripeness in connection with the takings claim, that issue was certainly presented in the County's motion with respect to the RCW 64.40 claim. (CP 80). The record before the trial court on summary judgment was replete with evidence and argument that Emerson's damages lawsuit was not ripe because (a) he had not perfected an appeal of a permit denial; and (b) the lawsuit was filed before the County had been allowed to determine whether the proposed sunroom

addition would be impacted by wetland buffers. (CP 670-671, 676). Because the absence of ripeness is a defense to both the 64.40 claim and the taking claims, this Court can affirm the summary judgment on ripeness grounds, in addition to all of the other legal grounds for dismissal.

C. The Fraud Claim is Barred by the Express Language of the Contract, and the Absence of the Required Elements of Fraud.

1. The Contract Expressly Refutes the Fraud Claim.

Emerson also sought recovery under a theory of "fraud in the inducement/fraudulent misrepresentation." Paragraph 61 of the Complaint alleges "The Department represented to the Emersons that if they agreed to pay $5,000 and obtain a new wetland report from a qualified expert, that the Department would issue the building permit without further delay." (CP 20).

That allegation is incorrect. As explained above, the Settlement Agreement expressly provided that the County could seek third-party review if it reasonably determined that proper methodologies had not been followed. (CP 26). Thus, there was no evidentiary basis for Emerson's fraud claim. But additionally, by the very language of the Settlement Agreement signed by the Emersons, they acknowledged and agreed that *no representation* was made by the County upon which they could rely:

> **8. 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.* (Emphasis added).

(CP 27). By expressly acknowledging and admitting in the signed agreement that no representations "of any kind or nature" were made by the County relative to permits or approvals, the plaintiffs have foreclosed recovery under fraud as a matter of law.

2. The Nine Required Elements for a Fraud Claim are Not Present.

Even if the Emersons had not admitted that no representations were made in connection with the settlement agreement, their fraud claim would be subject to dismissal for the further reason that they could not establish the nine required elements for fraud, especially under the heightened "clear, cogent and convincing evidence" standard, including:

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

WPI 160.01. Each of these elements must be proved by "clear, cogent and convincing" evidence. WPI 160.02; *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P. 2d 194 (1996).

Here, none of the critical elements could be proved, especially in light of the language of the Settlement Agreement, wherein the parties expressly agreed that no representations had been made upon which Emerson could rely. Even Ms. Emerson acknowledged in sworn testimony that there was no intentional misrepresentation. (CP 678-679). What Emerson complains of in this case is the County's determination In August 2013 that it needed verification from DOE as to whether the wetland methodology used by plaintiffs' expert was appropriate. There was nothing about the County's action to indicate a material and intentional misrepresentation of an existing fact. At most, there may be a disagreement as to the circumstances under which the County would seek third party (DOE) review. Such a disagreement cannot constitute an (a) *intentional*, (b) *misrepresentation* of (c) *existing fact*.

At the time the Settlement Agreement was entered into, the Emersons had not even submitted their wetland report, and therefore the County could not have known what its response to that report would be. Thus, there could be no misrepresentation of *existing fact* but, at most, an expectation as to something that might occur in the future. Importantly, a

misrepresentation supporting a fraud claim cannot arise from a prediction or promise of what may happen in the future:

> Where the fulfillment or satisfaction of the thing represented depends on a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, *then the representation is not an existing fact.* (Emphasis added).

Nyquist v. Foster, 44 Wn.2d 465, 471, 268 P.2d 442 (1954). In such circumstances, a fraud claim is without merit, and must be dismissed. *West Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 206, 48 P.3d 999 (2002); *Segal Co. v. Amazon.com*, 280 F. Supp.2d 1229, 1232 (W.D. WA 2013). Moreover, in light of the express language of the Settlement Agreement, acknowledging that no representations were made by the County, the elements of "reliance" and "right to rely" are absent as a matter of law.

Based on the express admissions in the Settlement Agreement, and the absence of competent proof of the nine elements of fraud by "clear, cogent and convincing" evidence, dismissal of the fraud claim was appropriate.

D. The Section 1983 Claim is Barred on Several Grounds.

In addition to seeking recovery under RCW 64.40, the Emersons also sought recovery under 42 U.S.C. § 1983, based on an alleged

violation of their due process rights. But the Emersons cannot satisfy any of the criteria for recovery under Section 1983. It should first be noted that Section 1983 does not create any substantive rights. Rather, it provides a remedy where a plaintiff shows a violation of rights created by the constitution or statutes. *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807 (1994). To support their federal claim under Section 1983, the plaintiffs allege that their right to due process was violated by the County's alleged non-compliance with the Settlement Agreement. (*See*, Complaint, ¶¶ 67 and 68). (CP 21). As the County argued below, the federal claim is barred by multiple dispositive defenses.

1. Only a Permit Decision from the BOCC Could Expose the County to Liability Under Section 1983.

Just as only the action of the Board of County Commissioners could give rise to County liability under RCW 64.40, so too, any claim under 42 U.S.C. § 1983 would have to be based on an unlawful permit decision by the Island County BOCC. For Section 1983 liability in the land use context, it must be shown that an allegedly wrongful decision was made by the person or board with "final policymaking authority for the municipality." Liability under Section 1983 cannot be based on *respondeat superior*. *See*, *City of St. Louis v. Praprotnik*, 108 S. Ct. 915,

926, 485 U.S. 112, 127 (1988); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 122, 829 P.2d 746 (1992), *cert. denied*, 113 S. Ct. 1044.

As the Supreme Court explained in *Praprotnik*, liability under Section 1983 may only arise from an unconstitutional county-wide *policy*. County policies are created by the legislative authority of the county (the BOCC). To constitute government "policy," an act must be taken by the government's highest policymaker in that field. 108 S. Ct. at 926.

Thus, whether the Planning Department acted correctly in connection with its building permit denial and wetlands report requirements, is not material to County liability under Section 1983. In order to recover under this statute, the Emersons would have to show that their constitutional rights were infringed by an unconstitutional Island County *policy*. *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2nd Cir. 1995). Here, there is no evidence that the Emersons were damaged by an unconstitutional county-wide policy. (CP 678-679). They never even perfected an appeal to the BOCC. Therefore, Section 1983 may not be invoked by the Emersons to support a damage claim.

To support the Section 1983 claim, Emerson relies entirely on *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998), a case which is easily distinguishable. The plaintiff in *Mission Springs* obtained building permit approval from the Department of Community

Development and from the Hearing Examiner. After the permit was approved and ready to be issued, the City Council blocked its issuance, even though the city code did not give the Council any role in the permit review process. The Council's action was taken despite the prosecutor's express warning that the council was violating the law. Liability in *Mission Springs* was based on the City Council's illegal interference with the statutory permit review process. *Id.* at 954-57, 961. Because the illegal action was undertaken by the City Council, there were grounds to conclude the action constituted an unconstitutional policy decision.

In this case there was no action by the BOCC (or even the Hearing Examiner). The imposition of the "wetlands inspection" condition by staff could not conceivably meet the "unconstitutional county policy" element for a due process claim under Section 1983. Significantly, in their Opening Brief, the Emersons acknowledged that their Section 1983 claim is not based on denial of a permit; nor is it based on any Island County policies. Instead, they argue it is based on the settlement agreement. (Appellant's Brief, p. 28). This admission effectively forecloses any claim under Section 1983. The plaintiffs' breach of contract claim was not dismissed by the trial court, and there is nothing in that claim that would rise to the level of a federal claim under Section 1983.

2. The Plaintiffs Had No Constitutionally Protected "Property Interest" Which Was Infringed.

An additional basis for dismissal of the due process claim under Section 1983 is the absence of a constitutionally protected "property interest." Plaintiffs allege that the County should not have required independent third party review of the wetlands analysis performed by their consultant. But they do not dispute that construction of their home addition was undertaken without first applying for a building permit. Nor do they deny that they refused for several years to give permission for a wetland specialist from Island County or DOE to enter the property and determine if wetlands would in fact be impacted by the construction. (CP 670-672).

Under these undisputed facts, there was no violation of any constitutionally protected "property interest" upon which a due process claim could rest. A party seeking recovery under 42 U.S.C. §1983 based on an alleged deprivation of due process must first establish that he was deprived of a constitutionally protected property interest. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). Such a property interest can only be present where an individual has a "reasonable expectation of entitlement created and defined by an independent source" such as federal or state law. *Id.* A "property

interest" will not be found in the permitting context where the decision maker had discretion in weighing the evidence and making a decision. *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 756, 125 S. Ct. 2796 (2005). Generally, a first time applicant for a building permit has no property interest in the permit. *Media Group v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2002). This is especially true when the plaintiff had commenced construction without first applying for a permit, and then refused access for an inspection.

Emerson contends that the County's procedure for evaluating code compliance (with critical areas regulations) was unlawful. They allege the County had no right to require a site inspection before construction could resume. They offer no case authority supporting this argument. Furthermore, there is no constitutionally protected property interest in *procedures* relating to building inspections:

> The mere existence of procedures for obtaining a permit or certificate do not, in and of themselves, create constitutional property interests. Were we to hold otherwise, aggrieved property owners would be empowered to bring constitutional challenges at virtually every stage of the building process against municipalities.

Zahra v. Town of Southold, 48 F.3d 674, 682 (2nd Cir. 1995).

The fact that Emerson owned the land upon which the unpermitted addition was being built does not give rise to a constitutionally protected

"property interest" in constructing a home addition without permits or inspections. No court has held that a property owner has a constitutional right to violate state and local building and land use regulations. In *Rodriguez v. Margotta*, 71 F. Supp.2d 289 (S.D.N.Y. 1999) the plaintiff contractor brought an action against a municipality and its inspector for alleged unlawful inspections and issuance of notices of infractions. The Court dismissed the Section 1983 claim because plaintiff had no constitutionally protected property right in the procedures relating to building inspections:

> In a recent case, the Second Circuit held that there is no protected property interest in the procedures relating to obtaining building inspections or in the procedures themselves. [Citation omitted]. Plaintiff therefore had no property right to the inspections in question. Furthermore, on the evidence, the plaintiff has suffered no deprivation. All the permits and certificates of occupancy he requested were granted, once compliance with the village and state codes had been shown.

Id. at 296. Courts sitting in Washington have reached similar conclusions. In *Scott v. City of Seattle*, 99 F. Supp.2d 1263, 1268 (W.D. WA. 1999) the court held that the owners of houseboats did not have a property interest in being free from municipal code regulation, and no due process violation occurred when a Notice of Violation was posted on their property. Similarly, in this case the Emersons had no constitutionally protected property interest in obtaining a building permit without allowing the

County to have access to their property for inspection. Therefore, the due process claim under Section 1983 fails, as a matter of law.

3. Plaintiffs Cannot Meet the Extraordinary Standard for Establishing a Violation of Substantive Due Process.

Even if the Emersons could show an unconstitutional County policy; and even if they could show that they possessed a constitutionally protected "property interest" in obtaining a permit without a County inspection, their due process claim under Section 1983 would still be groundless.

The Emersons surely are not contending that they were denied *procedural* due process, as they were aware of their appeal rights when their permit was denied.[3] The fact that they failed to avail themselves of administrative and judicial appeal remedies does not give rise to a violation of procedural due process. If appeal remedies are available, there is no violation of procedural due process actionable under Section 1983. As the Court held in *Systems Amusements, Inc. v. State*, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972):

> Plaintiff misconstrues the basic nature of the due process clause. The clause is a protection against arbitrary action by the state; but if a person has his day in court, he has not been deprived of due process.

[3] Ms. Emerson was a County Commissioner from 2009 – 2013, and admits she was aware of her right to appeal the permit denials to the Hearing Examiner. (CP 670-671).

Accord, *Bay Industries, Inc. v. Jefferson County*, 33 Wn. App. 239, 242, 653 P.2d 1355 (1982). Moreover, as the Supreme Court has stressed, the fact that it takes more than one hearing for an individual to obtain relief does not create a due process claim under Section 1983:

> The constitutional violation actionable under Section 1983 is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide due process.

Zinermon v. Burch, 494 U.S. 108, 126, 110 S. Ct. 975, 983 (1990).

It appears that the Emersons were seeking to base their Section 1983 claim on a theory of *substantive* due process. But this suggests a misunderstanding of the extremely high standard which must be met for a substantive due process violation. As the Ninth Circuit Court of Appeals held in *Halverson v. Skagit County*, 42 F.3d 1257 (9th Cir. 1994), there is a strong presumption that a rational basis existed for a municipality's land use action:

> Thus, in choosing to base their claim for compensation on an alleged violation of due process, the plaintiffs shoulder a heavy burden. In order to survive the County's summary judgment motion, the plaintiff must demonstrate the irrational nature of the County's actions by showing that the County "could have had no legitimate reason for its decision." *Kawaoka*, 17 F.3d at 1234. 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.

42 F.3d at 1262. (Emphasis by 9th Circuit). Indeed, the Supreme Court has made clear that a violation of substantive due process in this context will not be found absent conduct which is "shocking to the contemporary conscience." *See*, *County of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S. Ct. 1708 (1998). The Ninth Circuit Court of Appeals characterized the standard in *Shanks v. Dressel*, 540 F.3d 1082 (9th Cir. 2008):

> When executive action like a discrete permitting decision is at issue, only "egregious official conduct can be said to be arbitrary in the constitutional sense." It must amount to an "abuse of power" lacking in a "reasonable justification in the service of a legitimate governmental objective." Lewis, 523 U.S. at 846.

540 F.3d at 1088. Clearly, nothing even approaching that standard occurred here. Ms. Emerson admitted she had no reason to believe that the County and DOE wetlands specialists were not acting in good faith. (CP 674, 678). Indeed, it would be impossible to conclude that the County's actions were actionable, in view of DOE's concurrence with the County's determination that Emerson's wetland submittals did not comply with state and federal standards.

Based on the above authority, dismissal of the Emersons' due process claim under Section 1983 was appropriate.

IV. CONCLUSION

The trial court properly dismissed all claims for damages in this lawsuit, other than the "breach of contract" claim which the parties agreed could be resolved through arbitration. This Court should affirm the dismissal of the other damages claims.

Respectfully submitted this 28th day of September, 2015.

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CERTIFICATE OF SERVICE

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

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

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

Dated at Seattle, Washington on Sept. 29, 2015.

Nancy Randall

Nancy Randall