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No. 93050-3

THE SUPREME COURT
STATE OF WASHINGTON

KENNETH EMERSON and KELLY EMERSON, *Petitioners*,

v.

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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

 ORIGINAL

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I. REPLY ARGUMENT

Pursuant to RAP 13.4(d) this Reply brief addresses “only the new issues raised in the answer.” The Answer filed by Island County raises one new issue: an allegation that the Emersons’ RCW Chap. 64.40 claim is barred by the 30 day time limitation contained in RCW 64.40.030.

1. The time limitation issue has nothing to do with whether this Court should accept review of the underlying decision.

Neither the Trial Court nor the Court of Appeals decided this case based upon the time portion of the limitation on action set forth in RCW 64.40.030. RP43, Decision, p. 11¹. Both courts decided this issue solely on the exhaustion of remedies term of RCW 64.40.030. This is the issue before this Court, whether the Appellate Court’s decision meets the criteria of RAP 13.4(b).

Whether or not the 30 day limitation applies in this case (and there are very good reasons why it should not apply as set forth below), the raising of that issue has no bearing on whether the criteria of RAP 13.4(b) are met as set forth in the Petition for Review.

2. The County’s argument on the time limitation leaves out nearly all significant facts.

The County presents the facts on this issue thusly: a demand letter was sent on September 16, 2013 and the lawsuit was begun on November

¹ The Decision of the Appellate Court is attached as Exhibit A to the Petition for Review.

5, 2013. Therefore, the County opines, the 30 day limit was exceeded.

This analysis leaves out all of the significant facts.

In truth, the facts are thus:

- a. On Sept. 16, 2013, the Emersons' counsel sent a letter to County, declaring a default if the County did not take action within 10 days (September 26, 2013). CP317.
- b. On September 23, 2013, the County responded by requesting further information from Mr. Rone Brewer, the Emersons' wetlands scientist. CP360.
- c. On October 7, 2013, counsel for the County conversed with counsel for the Emersons about the need for responses to the County's request for further information. CP196.
- d. On October 16, 2013, the Emersons provided Mr. Brewer's responses to the County's requests. CP318-41.
- e. That same day, the County responded with yet another request to inspect the Property. CP198.
- f. On October 18, 2013, the Emersons rejected that request and declared a breach of the settlement agreement. CP200.
- g. The lawsuit was filed/served on November 5, 2013.

The actual facts are far more complex than those selectively alleged by the County. The functional date for any analysis in this matter is

October 16, 2013, the date on which the County defaulted. The suit was filed well within 30 days.

3. The County's argument about time limitations acknowledges that the refusal to grant the permit after receiving answers to the County's questions was an "act" under RCW64.40.

An "Act" which triggers the 30 day limitation under RCW 64.40.010(6) includes "the failure of an agency to act within time limits established by law in response to a property owner's application for a permit." Agreements to extend time for decisions or to impose conditions extend the time for calculating the "Act." RCW 64.40.010(6).

Here, the September 16th letter established the 26th as the deadline for the County to issue the permit under the terms of the Settlement Agreement. The County's questions and the response thereto show an agreement to extend that time period. The County's refusal to grant the permit, once the agreed upon exchanges of information were completed, as of October 16 was the "Act" that started the time period running.

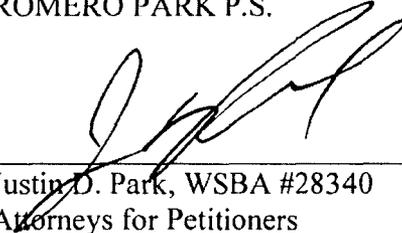
In *Smoke v. City of Seattle*, 134 Wn.2d 214, 937 P.2d 186 (1997), the "Act" was an opinion letter from a City Attorney. *Smoke* at 222-27. In *Callfas v. Dept. of Const. and Land Use*, 129 Wn.App. 579, 120 P.3d 110 (2005), a case cited by the City in their argument for application of the time limitation, a party was denied an RCW 64.40 claim because (in

part) they were suing on an open application for a permit, and could not identify the “Act” in question. *Callfas* at 590-98.

Here, the County’s argument for the imposition of the 30-day time limitation demonstrates how the decision of the County to refuse to issue the permit was an “Act” under RCW64.40.010(6). The definition of “Act” shows that they merely have the important date wrong. The critical date is October 16, 2013. The lawsuit was filed within the 30 day period, and the County has acknowledged their decision as an “Act” under the statute.

RESPECTFULLY SUBMITTED this 24th day of May, 2016.

ROMERO PARK P.S.



Justin D. Park, WSBA #28340
Attorneys for Petitioners

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**PROOF OF SERVICE FOR REPLY TO ANSWER FOR PETITION
FOR REVIEW**

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

 ORIGINAL

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 24th day of May, 2016, I served the foregoing document(s) described below:

PETITION FOR REVIEW

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 24th day of May, 2016, at Bellevue,
Washington.


Samantha Prendergast
Legal Assistant

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From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, May 24, 2016 10:56 AM
To: 'Samantha Prendergast'
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Subject: RE: Kenneth and Kelly Emerson v. Island County, Case No. 93050-3

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Cc: Justin Park <jpark@romeropark.com>
Subject: Kenneth and Kelly Emerson v. Island County, Case No. 93050-3

Good morning,

Attached please find for filing the Reply to the Answer to the Petition for Review, in the matter of Kenneth and Kelly Emerson v. Island County, Case No. 93050-3.

Thank you,

Samantha Prendergast, Legal Assistant
ROMERO PARK P.S.

Northwest Office
155 108th Ave. NE, Suite 202
Bellevue, WA 98004
(425) 450-5000 Telephone
(425) 450-0728 Facsimile

California Office
16935 W. Bernardo Dr., Suite 260
San Diego, CA 92127
(858) 592-0065 Telephone

