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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BLAINE COUNTY, a political subdivision of the State of Idaho; ARCH COMMUNITY HOUSING TRUST, INC., an Idaho corporation; BLAINE COUNTY HOUSING AUTHORITY, a public agency of the State of Idaho; and John Does 1-5,

Appellants/Cross-Respondents,

vs.

KIKI LESLIE A. TIDWELL, an individual; and THE MADISON JEAN TIDWELL QUALIFIED SUBCHAPTER S TRUST, a legal entity organized under the laws of the State of Idaho,

Respondents/Cross-Appellants.

Docket No. 48799-2021
Blaine County Case No. CV07-18-551

APPELLANTS/CROSS-RESPONDENTS' RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE MICHAEL P. TRIBE
District Judge, Presiding

James R. Laski, ISBN 5429
Heather E. O'Leary, ISBN 8693
Lawson Laski Clark, PLLC
675 Sun Valley Road, Suite A
P.O. Box 3310
Ketchum, ID 83340
efiling@lawsonlaski.com

Matthew Fredback, ISBN 7262
Timothy King Graves, ISBN 5556
Blaine County Prosecuting Attorney
219 1st Avenue South, Suite 201
Hailey, Idaho 83333
blainecountyprosecutor@co.blaine.id.us

Attorneys for Appellants/Cross-Respondents

Gary G. Allen, ISBN 4366
Givens Pursley LLP
601 W. Bannock
P.O. Box 2720
Boise, ID 83701-2720
garyallen@givenspursley.com

Attorneys for Respondents/Cross-Appellants

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III. STATEMENT OF THE CASE

A. Nature of the Case

This case involves an appeal of an administrative decision to issue a building permit to ARCH Community Housing Trust ("ARCH") to build a duplex on real property owned by the Blaine County Housing Authority ("BCHA"). The property in question is one of two "Public Use" parcels that were dedicated and conveyed to Blaine County ("the County") as part of the approval of the Valley Club West Nine PUD Subdivision in 2005. After deeming that affordable housing was a valid public use, Blaine County transferred the "Public Use" parcels to BCHA in 2015. BCHA subsequently entered into an agreement with ARCH to develop one of the parcels (Parcel C) for affordable housing, and ARCH was granted a building permit.

Respondents and Cross-Appellants Kiki Leslie Tidwell and the Madison Jean Tidwell Qualified Subchapter S Trust ("Tidwell") then appealed the issuance of the ARCH building permit, and, following appeal proceedings before the Board of County Commissioners ("Board"), the Board rejected her appeal in a written decision. Tidwell sued, and brought a claim pursuant to 42 U.S.C. Section 1983 ("Section 1983") in her Complaint. Tidwell's Section 1983 claim was dismissed by the District Court and the case proceeded through various summary judgment motions, culminating in a Court trial. Following Judgment, Tidwell requested attorney fees, which the District Court denied. The County Defendants appealed several of the District Court's decisions to this Court, and Tidwell has cross-appealed the District Court's decisions dismissing the Section 1983 claim and its denial of Tidwell's request for attorney fees.

B. Facts and Course of Proceedings[1]

The "Public Use" Parcels were dedicated to Blaine County by Final Plat and Warranty Deed in 2005. (R. Pls', Exh. 22; R. Defs'. Exh. R). In September 2015, the Board approved Blaine County Resolution 2015-32, which determined that affordable housing was a suitable "Public Use" and conveyed "Public Use" Parcels B and C to BCHA for the express purpose of developing affordable housing. (R. at 26, ¶ 39; R. at 96-97). Following the transfer of the "Public Use" Parcels, BCHA entered into an agreement with ARCH to construct affordable housing on Parcel B. (R. at 97). A deed-restricted affordable housing unit was relocated onto Parcel B in 2015. (R. at 97). On April 20, 2016, BCHA entered into a Ground Lease with ARCH to construct an affordable housing duplex on Parcel C. (R. at 149). The Blaine County Land Use and Building Services Department issued a building permit to ARCH to construct the duplex on or around February 6, 2018. (R. at 149).

Tidwell appealed the issuance of the ARCH building permit to the Board. (R. at 28, ¶ 48). Tidwell was granted briefing and argument before the Board at an appeal hearing, after which the Board issued a written decision on June 5, 2018, affirming issuance of the building permit. (R. at 28, ¶ 54). On June 12, 2018, the Board issued a revised decision affirming issuance of the building permit to ARCH. (R. at 28, ¶ 55). Thereafter, on September 14, 2018, Tidwell filed a Petition for Judicial Review of the revised decision, which was later withdrawn. Tidwell then filed the lawsuit which is the basis for this appeal. In her Complaint, Tidwell asserted claims for injunctive and declaratory relief as well as damages pursuant to Section 1983. On December 10, 2018, the County filed a motion to dismiss Tidwell's Section 1983 claim. (R. at 251-264). The District Court granted the County's Motion to Dismiss the Section 1983 claim on March 5, 2019.

[1] For a more detailed statement of facts and course of proceedings, please refer to the Appellants' Opening Brief.

The District Court granted, then reconsidered, and then denied the County Defendant's Motion for Summary Judgment on whether the Final Plat and Warranty Deed, which conveyed Parcels B and C for "Public Use", was unambiguous. (R. at 371-375, 439-445). The District Court then denied Tidwell's Motion for Summary Judgment that the "Public Use" dedication actually meant "for open space and recreational use", determining that "Public Use" was ambiguous. (R. at 762-777). A court trial was then held before the District Court on what "Public Use" meant, and despite evidence demonstrating that "Public Use" simply means "Public Use", the District Court ultimately found that "Public Use" actually means "for open space and recreational use". (R. at 945-972). Following the District Court's Judgment, Tidwell requested that the District Court award her attorneys' fees. (R. at 973-1055). The District Court denied the request for fees, and this appeal followed. (Addendum to Clerk's Record at 9-14).

IV. ISSUES PRESENTED

1. **Whether the District Court erred in Dismissing Tidwell's Procedural Due Process Violation Claim Under 42 U.S.C. § 1983; and**

2. **Whether the District Court Abused its Discretion by Denying Tidwell Her Attorneys' Fees Under Idaho Code § 12-117.**

V. STANDARD OF REVIEW

There are two separate issues addressed in this Brief.[2] The first issue concerns the District Court's dismissal of Tidwell's Section 1983 claim pursuant to Idaho Rule of Civil Procedure 12(b)(6). The second issue regards the District Court's denial of Tidwell's request for attorney fees. Two separate standards of review apply to these claims.

In reviewing a ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the question is whether the non-movant has alleged sufficient facts in support of his

[2] Tidwell's Section 1983 claim was only brought against the County, and did not name BCHA or ARCH. Similarly, Tidwell only sought attorneys' fees against the County. Since the County is the only County Defendant affected by these arguments, the County is responding to these claims on its own.

claim which, if true, would entitle him to relief. *Rincover v. State, Dep't of Fin., Sec. Bureau*, 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996). A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated. *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010). In reviewing such motions, the issue is not whether the plaintiffs will ultimately prevail, but whether the plaintiffs are entitled to offer evidence to support their claims. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Finally, it is not enough for a complaint to make conclusory allegations. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 136–37, 106 P.3d 455, 462–63 (2005). Although the non-movant is entitled to have his factual assertions treated as true, this privilege does not extend to the conclusions of law the non-movant hopes the court to draw from those facts. *Id*. It is for the court to decide whether those facts, even if true, can reasonably be seen to infer the legal conclusions sought by the plaintiffs. *Id*.

Consideration of a request for attorney fees involves an exercise of the district court's discretion, and a district court's exercise of discretion will be upheld absent a showing of abuse of discretion. *Schneider v. Howe*, 142 Idaho 767, 771, 133 P.3d 1232, 1236 (2006). Whether a district court abused its discretion is a three-pronged inquiry to determine whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. *Id*. The appellant bears the burden of showing that the trial court abused its discretion. *Schweitzer Basin Water Company v. Schweitzer Fire District*, 163 Idaho 186, 189, 408 P.3d 1258, 1261 (2017).

VI. ARGUMENT

1. The District Court Properly Dismissed Tidwell's Section 1983 Claim

"There are two threshold requirements for a '§ 1983' claim. First, a person must act under color of state law when committing the challenged act. Second, the claimant must establish that the conduct deprived the claimant of a constitutionally protected right, privilege, or immunity." *Dana, Larson, Roubal & Assocs. v. Bd. of Comm'rs of Canyon Cty*., 124 Idaho 794, 798, 864 P.2d 632, 636 (Ct. App. 1993); *see also Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). Before considering the "difficult" question of what constitutes state action, "the plaintiff must first establish that he has been "deprived" of a constitutionally protected right in order to establish a cause of action under 42 U.S.C. § 1983." *DeMoss v. City of Coeur D'Alene*, 118 Idaho 176, 179, 795 P.2d 875, 878 (1990). Thus, if Tidwell has no right "secured by the Constitution and laws" of the United States, then the Court need not reach the issue of whether the County was acting under color of state law. *See Id.* at 179–80. As will be discussed below, the District Court correctly determined that Tidwell failed to show that she was deprived of a constitutionally protected right and properly dismissed her Section 1983 claim. (R. at 364).

A. Tidwell Does Not Have a Constitutionally Protected Property Interest

The complained-of action in this case is the issuance of a building permit to ARCH to construct a duplex on Parcel C, and Tidwell's claims that she was treated unfairly in that process. In order to plead a plausible Section 1983 claim, Tidwell must first establish that she has a property interest at stake, and second, that she has an entitlement to a particular result. The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Roth*, 408 U.S. at 569. Only after a court finds a liberty or property interest will it reach the next step of the analysis, in which it determines what process is due. *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 226,

970 P.2d 14, 19 (1998). Regarding this property interest, the United States Supreme Court explained in *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. ....
>
> Property interests, of course, are not created by the Constitution. Rather, their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules and understandings that secure certain benefits and that support claims of entitlement to those benefits.

See also Dana, Larson, Roubal & Assocs., 124 Idaho at 799, 864 P.2d at 637.

Tidwell has failed to allege that she has some property interest at stake in the outcome of the building permit or appeal that could establish a plausible Section 1983 claim. The underlying ground upon which the "Public Use" parcels sit is owned by BCHA, and ARCH was the building permit applicant, thus Tidwell lacks any discernable interest in either the real property or permit in question.[3] Her interest, at best, is that she opposes affordable housing on the "Public Use" Parcels, and hoped that the County would deny ARCH's building permit application. *See Maresh*, 132 Idaho at 226 (hope is not a property right and the frustration of such a hope does not trigger the right to a hearing). Her intangible interest simply is not enough to give wings to her Section 1983 claim.

Cases from the Ninth and Second Circuits support the District Court's dismissal of Tidwell's vague and abstract Section 1983 claim. *See Shanks v. Dressel*, 540 F.3d 1082, 1091 (9th Cir. 2008); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994).[4] In *Shanks*, the City of Spokane granted the Dressels a building permit to construct a duplex addition to their residence

[3] Tidwell does not own any property adjacent to, or anywhere near the "Public Use" Parcels. *See* Notification Pursuant to *Martin v. Camas County Ex. Rel. Board of Commissioners*, at 2-3. Similarly, Tidwell's golf membership does not confer any entitlement in the building permit proceedings.

[4] Because Tidwell's lack of entitlement is so clear and obvious, there is a dearth of case law directly on point, as demonstrated by the complete lack of case law in support of Tidwell's Section 1983 claim.

that was located within a historic district. *Shanks*, 540 F.3d at 1084-85. A neighborhood group sued Spokane, alleging a Section 1983 claim that the Dressels' construction compromised the historic character of the area, resulting in harm to its cultural, recreational, aesthetic, and economic interests.[5] *Id*. at 1085-86. On the question of whether the neighborhood group had demonstrated a constitutionally protected interest, the *Shanks* Court questioned whether neighboring properties ***would ever*** be able to establish a constitutionally protected interest since they lack any tangible property interest in the proceedings. *Id.* at 1090. The *Shanks* Court then concluded that the municipal code did not create a constitutionally cognizable property interest in the denial of a third party's building permit and that absent a property interest in the outcome of the process, the neighborhood group was not constitutionally entitled to insist on a particular result. *Id*. at 1091-92. Ultimately, the *Shanks* Court determined that the neighborhood group "does not have a legitimate claim of entitlement to the denial of the [developer's] permit." *Id*. at 1091.

In *Gagliardi*, the Gagliardis filed a Section 1983 action against the City of Pawling alleging that the City had violated their substantive and procedural due process rights in processing the development requests by a neighboring plastics factory (Lumelite). *Gagliardi*, 18 F.3d at 189-90. The Gagliardis contended that they had a property interest in the proper enforcement of local ordinances as applied to Lumelite's property. *Id*. at 191. After recognizing that the Gagliardis' claims were "rather unique" to the typical situation where a property owner is denied a permit to develop their property, the Court affirmed the dismissal of the Gagliardis' Section 1983 claim because they had not established a deprivation of a protected right. *Id*. at 192-93. Since the Gagliardis lacked a property

[5] Tidwell has asserted similar grievances. Notably, Tidwell has falsely alleged, "As nearby landowners, Plaintiffs' property values could be negatively affected by a nonconforming use that conflicts with the rural character of the area . . . The County has diminished the real property owned by Plaintiffs." (*See Opening Brief of Respondents/Cross-Appellants* ("Opening Brief") at 11).

interest in the enforcement of the zoning laws, they were unable to state an actionable Section 1983 claim for deprivation of procedural due process. *Id*. at 193.

As these cases illustrate, Tidwell lacks a protected property interest in the demanded denial of a building permit to ARCH, the "proper" application of the Blaine County Code, or in enforcing the District Court's Judgment (as she claims in her Opening Brief). To the extent Tidwell has an interest in the proceedings, it is merely as a disgruntled citizen, and her abstract desire to see another party's building permit fail is insufficient to invoke Section 1983 liability. Tidwell has therefore failed to establish a deprivation of a protected property interest. Thus, the District Court properly dismissed her Section 1983 claim.

Even assuming, *arguendo,* that Tidwell possessed a sufficient property right, *Shanks*, *Gagliardi*, and a host of other cases characterize the issuance or denial of a building permit as a discretionary act for which there is no "unilateral expectation" or "legitimate claim of entitlement" to a particular result. *See Roth*, 408 U.S. at 577, 92 S.Ct. at 2709; *Dana, Larson, Roubal & Assocs*., 124 Idaho at 799, 864 P.2d at 637; *see also RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911, 919 (2d. Cir. 1989) (finding "as a matter of law" that the developer held no entitlement or property interest in the issuance of a building permit). This discretionary act destroys any expectation, real or imagined, that Tidwell was entitled to the denial of the building permit. On this point, the *Gagliardi* Court explained:

> A plaintiff has a legitimate claim of entitlement to a particular benefit if, absent the alleged denial of due process, there is a certainty or a very strong likelihood that the benefit would have been granted. Where a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit. An entitlement to a benefit arises only when the discretion of the issuing agency is so narrowly circumscribed as to virtually assure conferral of the benefit. The issue of whether an individual has such a property interest is a question of law since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise.

Id. at 192 (citations and quotations omitted, and *emphasis added*); *See also Shanks* 540 F.3d at 1091 ("Only if the governing statute compels a result 'upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body,' does it create a constitutionally protected property interest").

Here, there is no statutorily prescribed, formal process that limits the discretion of the County in issuing building permits and hearing administrative appeals.[6] *See Doran v. Houle*, 721 F.2d 1182, 1184–85 (9th Cir. 1983); BCC § 9-3-5(B) (requiring Land Use Administrator to conduct administrative review of building permit applications); BCC § 9-32-2(C) (In considering appeal of decision of Administrator, Board shall affirm, reverse, or modify the Administrator's decision). Instead, the Land Use Administrator and the Board have clear discretion throughout the process, which led the District Court to correctly conclude that there was no entitlement to any particular outcome in the building permit proceedings. (R. at 364). Clearly, Tidwell lacks any protected property interest or entitlement, and the District Court properly dismissed her Section 1983 claim.

B. The Court Can Avoid the Color of State Law Prong Entirely

Putting the cart before the horse, Tidwell alleges that the County acted under color of state law when it, directly and in concert with ARCH and BCHA, issued a building permit for construction of the duplex on "Public Use" Parcel C. (Opening Brief at 7-8). This Court, however, has previously determined that before considering the "difficult" question of what constitutes state action, "the plaintiff must first establish that he has been "deprived" of a constitutionally protected right. *See DeMoss*, 118 Idaho at 179. If the plaintiff fails to establish a deprivation of a right, then there is no need to consider whether the County acted under color of state law. *Id*. at 179–80.

[6] Tidwell has failed to produce any Idaho authority that limits the discretion of the County in issuing building permits and hearing administrative appeals.

As asserted above, Tidwell completely failed to establish that she has been deprived of a constitutionally protected right or entitlement. She lacks both an interest in the proceedings, and has failed to establish that the Land Use Administrator and the Board lacked discretion during the building permit process and appeal. Since Tidwell lacks a constitutionally protected right, the Court need not reach the secondary question of whether the County acted under color of state law.[7]

2. The District Court Properly Denied Tidwell's Request for Attorneys' Fees

As set forth in County Defendants' Opening Brief, Tidwell lacked standing to bring her claims before the District Court, and similarly, she lacks standing to pursue this appeal. Despite this, Tidwell claims that the District Court abused its discretion in denying her request for attorney's fees, but she fails to explain exactly how the District Court abused its discretion. Specifically, Tidwell's Opening Brief lacks any mention or reference to the three-pronged analysis required to effectively analyze an abuse of discretion claim. *See Schneider,* 142 Idaho at 771; 133 P.3d at 1236. Failing to demonstrate that an abuse of discretion occurred under any part of that test is fatal to any argument that the District Court abused its discretion. *Rouwenhorst v. Gem County,* 168 Idaho 657, ___, 485 P.3d 153, 163 (2021). Consequently, Tidwell's appeal of this issue collapses before reaching the starting gate. In spite of this glaring omission, the County maintains that the District Court properly denied Tidwell's request for attorney fees.

Idaho Code Section 12-117 is the exclusive means for awarding attorney fees in cases involving a private person(s) and a governmental entity. *See City of Osburn v. Randel*, 152 Idaho 906,

[7] Regardless, the County did not act under color of state law here as it lacked control over the land (BCHA) and the building permit (ARCH). While Tidwell argues that the County, ARCH, and BCHA acted "in concert", Tidwell has provided no evidence showing that the County "deliberately" participated with ARCH and BCHA with the express purpose of violating her civil rights. *See Fonda v. Gray,* 707 F.2d 435, 438 (9th Cir. 1983) (there was no showing that the Banks "deliberately" participated with the government with the purpose of violating Fonda's civil rights, or that they knew of the alleged objective).

910, 277 P.3d 353, 357 (2012). To consider Tidwell's request, this Court must apply the standard set forth in Idaho Code Section 12-117(1), which provides as follows,

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Applying this standard to the facts of this case, it is clear that the County did not defend this case without a reasonable basis in fact or law. *See Ada County v. Browning*, 168 Idaho 856, ___, 489 P.3d 443, 448 (2021) (recognizing "the high bar it takes for a court to conclude that an issue was pursued without a reasonable basis in law or fact.")

On March 5, 2019, the District Court granted Defendants' Motion for Partial Summary Judgment, declaring that the term "Public Use", as set forth on the Final Plat and Deed, was unambiguous, and applying the merger doctrine to preclude the consideration of extrinsic evidence. In so ruling, the Court determined that:

> The Final Plat and Deed label Parcel C as "Public Use" with no more specific reference to its intended purpose. Had a narrower use been the intent of the parties such language could have been included in the recorded instruments.

(R. at 371-375). This decision essentially adopted the County Defendants' position applying the merger doctrine to enforce the clear language of the recorded Plat and Deed and effectively disposed of this cause of action in County Defendants' favor. In other words, the County Defendants fully prevailed in this case. Subsequently, however, the District Court reconsidered its decision and reversed itself, declaring that the term "Public Use" in the Warranty Deed and Final Plat was ambiguous, which necessitated a full trial. The District Court's "flip flop" on the central issue in this case weighs heavily on the attorney fees question.

The District Court's reversal of its own interpretation of "Public Use" demonstrates that the District Court believed that there were very close factual and legal issues in this case. Factually, the County Defendants relied upon the plain and obvious depiction of Parcel C as being for "Public Use" on both the Final Plat and the Warranty Deed. Legally, the County Defendants questioned Tidwell's standing throughout these proceedings, relied upon various cases applying the merger doctrine, and provided the Court with statutory proof that affordable housing is considered a "Public Use" under Idaho law. *See* I.C. 31-3404. Recognizing this factual and legal support, the District Court consistently recognized that the County and County Defendants defended this matter with a reasonable basis in fact and law.

In the *Order on Plaintiffs' Request for Costs and Fees*, the District Court expressly found that the County did not act without a reasonable basis in fact or law by stating:

> The Findings of Fact and Conclusions of Law issued by this Court in March, as well as the procedural history of this case, outline the necessity of clarifying the ambiguity identified in the Final Plat at issue. The Court does not find that the non-prevailing party acted without reasonable basis in fact or law. Thus, attorney's fees as requested by the Plaintiffs are denied.

(Addendum to Clerk's Record at 11). Similarly, throughout the proceedings, the District Court acknowledged that the issues were appropriate and likely for appellate review. In its *Oral Ruling On Plaintiffs' Motion for Preliminary Injunction*, the District Court explained, "So the Court perceives that there are complex issues of law and fact which are not free from doubt" (Oral Ruling on Pls.' Mot. Prelim. Inj. Tr. 11:19-23, Oct. 30, 2018). The District Court's repeated recognition of the "complex" factual and legal issues in this case supports its decision to not award fees, and it properly exercised its discretion in doing so.

The County Defendants' appeal clearly demonstrates that they disagree with several of the District Court's ultimate conclusions, but the District Court did not err when it found that the

County defended this matter with a reasonable basis in fact and law. Thus, the District Court was correct in refusing to award Tidwell her attorney fees and did not abuse its discretion.

VII. ATTORNEY FEES AND COSTS ON APPEAL

The County requests its reasonable attorneys' fees and costs as allowed under Idaho Code Section 12-117 and 42 U.S.C. Section 1988. Idaho Code Section 12-117 authorizes the Court to award attorney fees in proceedings between persons and state agencies or political subdivisions, when a non-prevailing party acts without a reasonable legal or factual basis. I.C. § 12-117. "The dual purpose of I.C. § 12-117 is to (1) deter groundless or arbitrary agency action; and (2) to provide 'a remedy for persons who have borne an unfair and unjustified financial burden attempting to correct mistakes agencies should never have made.'" *Flying A Ranch, Inc. v. County Commissioners of Fremont County*, 157 Idaho 937, 342 P.3d 649, 655 (2015) (*quoting Fuchs v. Idaho State Police, Alcohol Beverage Control,* 153 Idaho 114, 117, 279 P.3d 100, 103 (2012)). 42 U.S.C. Section 1988 provides that in an action brought pursuant to Section 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *James v. City of Boise*, 160 Idaho 466, 487, 376 P.3d 33, 54 (2016). Attorney fees cannot be awarded to a prevailing defendant in a case brought pursuant to Section 1983 unless the plaintiff's action was frivolous, unreasonable, or without foundation. *Id*. at 55 (*citing Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178 (1980).

As argued above, Tidwell failed to state a plausible Section 1983 claim before the District Court, and has repeated those baseless assertions before this Court. Her conclusory and vague allegations fall well short of establishing a protected property interest. In making her Section 1983 claim, Tidwell ignored clear case law in Idaho, the Ninth Circuit, other federal Circuits, and the United States Supreme Court. *See DeMoss*, 118 Idaho at 179, 795 P.2d at 878; *Dana, Larson, Roubal & Assocs*., 124 Idaho at 798, 864 P.2d at 636; *Shanks*, 540 F.3d at 1087. Tidwell has also

failed to present any case law in support of her imaginary property interests. *See James*, 160 Idaho at 55 (Attorneys fees were awarded against the plaintiff because it was clear that her claim would be barred by qualified immunity under the clearly established law of the Ninth Circuit and she failed to cite any law to the contrary). The County has expended substantial efforts in defending this meritless and baseless claim. As a consequence, the County believes that Tidwell's Section 1983 claim was brought frivolously, unreasonably, without foundation, and without a reasonable basis in fact or law, and that the County should be awarded its attorney fees in accordance with 42 U.S.C. Section 1988 and Idaho Code Section 12-117(1).

Similarly, Tidwell lacks standing, has failed to recognize that the District Court's decision refusing to award attorney fees was an exercise in discretion, and has wholly failed to even discuss the standard required to review that perceived abuse of discretion. Tidwell has also ignored the District Court's repeated statements recognizing the legal and factual complexity of this case, as well as the District Court's one hundred and eighty degree change in ruling for, and then against, County Defendants on the central issue. Instead, Tidwell's Opening Brief engages in slanderous hyperbole implying "abuses of power" and "governmental overreach" from the County Defendants' efforts to build a single duplex of affordable housing on publicly owned property. Histrionics aside, Tidwell has not pursued this appeal with a reasonable basis in fact or law, and Blaine County should be awarded its attorney fees in having to respond to this claim pursuant to Idaho Code Section 12-117(1).

VIII. CONCLUSION

For the foregoing reasons, the County respectfully requests that this Court dismiss this appeal for lack of standing, or in the alternative, affirm the District Court's decision dismissing Tidwell's Section 1983 claim and rejecting her request for attorney's fees. Further, the County

requests that the Court award it its attorney fees in accordance with 42 U.S.C. Section 1988 and Idaho Code Section 12-117(1).

DATED this 30th day of November, 2021.

BLAINE COUNTY

By: /s/ *Timothy K. Graves*
Timothy K. Graves
Attorney for Blaine County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November, 2021, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

James R. Laski, Esq.
Heather E. O'Leary, Esq.
Lawson Laski Clark, PLLC
675 Sun Valley Road, Suite A
P.O. Box 3310
Ketchum, ID 83340

iCourt E-Filing System:
jrl@lawsonlaski.com
heo@lawsonlaski.com
efiling@lawsonlaski.com

Gary G. Allen, Esq.
Givens Pursley LLP
601 W. Bannock
P.O. Box 2720
Boise, ID 83701-2720

iCourt E-Filing System:
garyallen@givenspursley.com
dongray@givenspursley.com
tmh@givenspursley.com

/s/ Jacki Strope
Jacki Strope, Legal Secretary