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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Brad Thies, Deputy Clerk

Docket No. 48799-2021

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.

v.

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.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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

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INTRODUCTION

In 2005, the Valley Club conveyed certain property rights in Parcel C to the County. The conveyance was "according to the official plat" that had been submitted by the Valley Club and approved by the County. On its face, the plat had a simple label for Parcel C—public use. But both the Valley Club and the County understood the intent behind this label. As the District Court put it, the express language of all of the decision documents leading up to the Final Plat consistently demonstrated the intent behind Parcel C's "public use" label. (R. at 960.) Parcel C was to be put toward some form of open space or recreational use.

Ten years later, the County wanted housing built on Parcel C, and it saw the "public use" label as an opening. After all, if a city could build a Pfizer research facility under the guise of "public use," surely the County could build a duplex. *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005). Never mind the prior agreement it had reached with the Valley Club. Never mind the unequivocal documentary and recorded evidence of that agreement. Never mind the County's own institutional memory of that agreement. The Final Plat said "public use," and for the County, that was close enough to a blank check.

It should not have taken years of litigation and related fees and costs to reverse the County's decision to issue a building permit for Parcel C. The County should have known from the beginning that it lacked the discretion and authority to do so. The County had all of the relevant evidence before it in 2015 when it made its mistaken decision. It should have seen its error and denied the permit long before any of the legal issues in this case arose. Accordingly, it was an abuse of discretion on the District Court's part to deny Plaintiffs their attorneys' fees under Idaho Code § 12-117 when the evidence demonstrates that the County had no reasonable basis for its position. Plaintiffs are entitled to the fees and costs incurred to obtain this long-belated course correction.

Plaintiffs also brought a § 1983 claim against the County for the actions it took in response to Plaintiffs' appeal of the building permit's approval. The District Court dismissed this claim, concluding that Plaintiffs had no protectable property interest in the building permit. This dismissal was in error, as Plaintiffs had a legitimate claim of entitlement to the denial of a building permit that the County had no discretion or authority to approve. In short, the County lacks the requisite property rights to approve a building permit for Parcel C that does not conform with the parcel's limited use for open space and recreation.

ARGUMENT

A. Plaintiffs had a legitimate claim of entitlement to the denial of ARCH's building permit.

Federal law on § 1983 claims holds, for a person "[t]o have a property interest in a benefit," that person must have a "legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). "A constitutionally protected property interest in a land use permit exists where state law gives rise to a 'legitimate claim of entitlement' to the permit." *Burch v. Smathers*, 990 F.Supp.2d 1063, 1071 (D. Idaho 2014). That legitimate claim of entitlement can exist "where state law significantly limits the decision maker's discretion or where the decision maker's policies and practices create a de facto property interest." *Id.* at 1072. Put simply, the rule holds that if obtaining a building permit is a mere matter of submitting an application that checks all the right boxes, with the County having no discretion to approve or reject the application otherwise, then an applicant with a proper application has a legitimate claim of entitlement to that permit—i.e. has a property interest.

Naturally, the typical dispute under this rule involves the denial of a permit to which the applicant had a legitimate claim of entitlement. Here, however, the applicant's (ARCH's) permit was approved, but Plaintiffs had a legitimate claim of entitlement to its being denied. Plaintiffs

were entitled to the denial because under applicable state law and other authority, the County did not have the discretion or authority to approve a building permit for the construction of a nonconforming structure on a parcel reserved for open space and recreational use. Because of this severely limited discretion, Plaintiffs had a legitimate claim of entitlement to the denial of ARCH's building permit application.

On July 22, 2005, the Valley Club, by way of a Warranty Deed, conveyed to the County Parcel C of the Valley Club West Nine P.U.D. (R. at 61.) Importantly, this conveyance was "according to the official plat thereof[.]" *Id*. The County ignores this language and perceives the conveyance as a blank check. It believes, both at the time it coordinated with ARCH to put Parcel C to a nonconforming use and now, that upon its receipt of the warranty deed it was free to do whatever it pleased with Parcel C. This belief is based largely on an erroneous application of the boundless definition of "public use" under 5th Amendment takings jurisprudence. The belief is also held in willful ignorance to the relevant agreements entered into between the County and the Valley Club regarding the intended use of Parcel C.

The District Court accurately recognized the limitations placed on the County's use of Parcel C. It held:

> 10. When a plat designates the use of a property to be transferred to a public agency, subject to a restriction such as the public use restriction in this case, **the property interest transferred is an easement** and "does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple." *Neider v. Shaw*, 138 Idaho 503, 507 (2003); I.C. § 50-1312. Further, **the easement is limited to the purposes set forth on the plat**. *Mochel v. Cleveland*, 51 Idaho 468 (1930).
>
> 11. In this case, Parcel C was created by the Final Plat and transferred to the County by deed rather than by effect of statute. The intent of the parties as to both the Final Plat and the Parcel C deed was to restrict Parcel C to "Public Use" as the Court has interpreted that term. *See Neider*, 138 Idaho at 507 (transfer of

> property interest to public entity conveys only property interests needed for the intended public use).
>
> 12. Therefore, **the County received only an easement from the Valley Club to construct and maintain open space and/or recreational uses on Parcel C**. As the County's property rights were so limited, it could not and did not transfer to BCHA or ARCH property rights sufficient to construct and/or maintain community housing on Parcel C.
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> 13. As a result, **the County's issuance of Building Permit #2017-157 was unlawful because the applicant did not own the property rights necessary to construct community housing on Parcel C**.

(R. 966-67) (emphases added).

In short, the County's discretion to grant any sort of building permit for Parcel C was and is heavily curtailed by the agreement it made with the Valley Club to maintain Parcel C for open space and recreational use. The County has never had the discretion or authority to grant a building permit for the construction of anything on Parcel C that is inconsistent with that intended use. All other rights with regard to construction or use of Parcel C in a manner inconsistent with the County's easement right was retained by the grantor—the Valley Club. The County has never had the discretion or authority to exercise these rights itself.

Because of the County's severely limited discretion with regards to building permit applications for Parcel C, Plaintiffs had a legitimate claim of entitlement to the County's rejection of any application for a building permit that was inconsistent with Parcel C's intended use. Plaintiffs themselves had such a claim because the recording of a plat that designates areas for public use provides the public with a "determinable fee" in those areas. *Mochel*, 51 Idaho 468, ___, 5 P.2d 549, 553 (1930); *see also* Idaho Code § 50-1312. As members of the public, and

especially as owners of nearby property,[1] Plaintiffs had a cognizable interest in the preservation of Parcel C for its intended use—open space and recreation.

Tidwell also had a personal stake in the approved building permit because she was (and is) a member of the Valley Club, the entity with the reversionary interest in Parcel C. (R. at 563.) Tidwell has a "Full Golf Membership" at the Valley Club, which is a "proprietary membership with voting rights." (R. at 570.) As a "Full Golf Member," the Valley Club can levy assessments against her to pay for improvements to the Valley Club's property. (R. at 563.) In short, Tidwell's membership in the Valley Club links her directly to the Valley Club's own property rights. As stated, the Valley Club conveyed only an easement to the County in 2005, retaining all other rights with regard to Parcel C. Thus, the County's issuance of a building permit that exceeded the County's own rights in Parcel C did so at the expense of the rights of the Valley Club and its members, including Tidwell.

Accordingly, Plaintiffs' allegations in the Complaint show a legitimate claim of entitlement sufficient to support a § 1983 claim. As the other elements of a viable § 1983 claim were met, it was error for the District Court to dismiss the claim.

B. The *Shanks* and *Gagliardi* cases do not require dismissal of Plaintiffs' § 1983 claim.

In response to Plaintiffs' cross-appeal, the County relies heavily on two cases—*Shanks v. Dressel*, 540 F.3d 1082 (9th Cir. 2008), and *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2nd Cir. 1994).[2] Neither case is binding, nor do they recommend a holding in the County's favor. In

[1] At the relevant time, of course.

[2] It should be noted that while the Appellants/Cross-Respondents' Response Brief was timely filed—28 days after the service of the Opening Brief of Respondents/Cross-Appellants—Appellants' Reply Brief was not. This brief was due **21** days after service of the Response Brief of Respondents, on November 23, 2021. Idaho Appellate Rule 34(c). Instead, Appellants' Reply Brief was filed a week late, on November 30, 2020, alongside Appellants/Cross-Respondents'

both cases, the § 1983 claimants contended that they had a protectable property interest in the proper enforcement of or compliance with certain local government code regulations. In both cases, the courts determined that no such property interest existed because the respective codes conferred substantial discretion to the local government body. Had the respective government authorities in these cases been limited in their discretion, both the *Shanks* and *Gagliardi* courts would have likely ruled differently.

As the *Gagliardi* court put it, "[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." 18 F.3d at 192 (internal quotations omitted). Such is the case here. Had the County not ignored the restrictions on the use of Parcel C that it had itself imposed following the West Nine PUD approval, the County would have had no choice but to deny the building permit to ARCH and afford Plaintiffs both the result and the process they were due.

In short, because the local government bodies in *Shanks* and *Gagliardi* had sufficient discretion in their decisions, whereas the County here did not, the principle taken from those cases is more instructive than the holding. Both cases espouse the key principle of limited discretion as creating a protectable property interest. While significant discretion was permitted for the government actions complained of in *Shanks* and *Gagliardi*, just the opposite is true here. The County never had the discretion or authority to authorize construction of a structure for which both the County and applicant lacked the property rights to construct on Parcel C. The

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Response Brief. The Court has discretion to determine the appropriate sanction for an untimely brief, pursuant to Idaho Appellate Rule 21. At the very least, the late filing should limit the recovery of attorneys' fees by Appellants/Cross-Respondents, if any are granted in the first place. *See Petition of Felton*, 79 Idaho 325, 334, 316 P.2d 1064, 1068 (1957); *see also Fisher v. Fisher*, 84 Idaho 303, 309, 371 P.2d 847, 850 (1962).

County could no more approve ARCH's construction of residential structures on Parcel C than it could in the Chief Justice's front yard. Accordingly, *Shanks* and *Gagliardi* do not prevent the Plaintiffs' action from moving forward. Instead, they provide the key principle on which Plaintiffs' claim relies.

The County focuses much of its analysis on the discretion granted to it in the typical process for the issuance of building permits. And there may very well be significant discretion granted to the County in that process. In this particular case, however, where the County did not own Parcel C but merely maintained an easement for open space and recreational use for the benefit of the public, including Plaintiffs, the County had neither the discretion nor the authority to issue a building permit that surpassed the applicant's limited rights in the property. According to the International Building Code, only an "owner" of the relevant property can apply for and obtain a building permit. International Building Code (2018) § 105.1 (adopted by Blaine County Code § 7-1-2(A)). Neither the County nor ARCH had a sufficient ownership interest in Parcel C for a legitimate building permit to be issued.

C. It was an abuse of discretion to deny Plaintiffs their attorneys' fees because those fees were incurred correcting a governmental overreach that should have never happened.

The ultimate issue in this case is not complex from a factual standpoint. With regards to Plaintiffs' request for fees, the District Court concluded that the County had not "acted without reasonable basis in fact or law." (Addendum to Clerk's Record at 11.) But the error in this conclusion is belied by one of the District Court's key findings:

> 52. **The <u>express</u> language of <u>all</u> of the decision documents** (the P&Z Findings and Conclusions; the Preliminary Plat Decision; the Final Plat Staff Report; and the Final Plat Decision) together with the May 19 Recording **demonstrate that the parties <u>consistently</u> intended to limit Parcel C to open space or recreational use and <u>never wavered from that intent</u>**.

(R. at 960 (emphases added)). The unequivocal character of this finding by the District Court cannot be understated. The District Court did not conclude that *some* of the documentary evidence *implicitly* supported Plaintiffs' position that Parcel C was to be reserved for open space and recreational use. It concluded that the *express* language of *all* of that documentary evidence supported Plaintiffs' position. Moreover, there was nothing in that documentary evidence suggesting the parties considered using Parcel C for something else, and then ultimately reverted to their initial intent of maintaining it for open space and recreational use, such that there may be confusion upon reviewing the evidence. Instead, the parties *consistently* intended Parcel C to be used for those purposes and "never wavered from that intent." This statement cannot be passed off as mere hyperbole on the District Court's part. The District Court's Findings of Fact detail the extensive documentary record that support this unequivocal conclusion.

In 2015, when ARCH approached the County with a request to build on Parcel C, all of this documentary evidence was in the County's possession and at its disposal. When the County began making moves towards permitting ARCH's proposed construction, the Valley Club, Tidwell, and other landowners challenged the legality of the decision. At any point of this process the County could have reviewed the documentary evidence supporting Parcel C's "public use" designation on the Final Plat. It could have investigated the correct intent of the parties with regards to Parcel C's use. Had it done so, it would have found what the District Court ultimately found at trial: express language in all of the decision documents demonstrating that the parties consistently intended to limit Parcel C to open space or recreational use and never wavered from that intent.

Of course, the County did not need to rely solely on the documentary evidence to reach this obvious conclusion. Both the Planning and Zoning Administrator and County's counsel were deeply involved in both decisions in 2005 and 2015, as well as later activities to transfer Parcel C

to the BCHA, lease it to ARCH, and approve the construction of residential structures on it. The County knew full well what had happened in 2005 and chose to ignore it.

Other glaring issues demonstrate just how much the County shut its eyes to the apparent limitations on Parcel C. First, the underlying zoning for Parcel C and the whole West Nine P.U.D. was R-2, which allowed only one residential unit per two acres. (R. at 947.) Parcel C is only a half-acre lot, and no exception or variance had ever been made previously to permit a structure on the lot. Second, lots with a septic tank drain field sewage system have a minimum size of one acre, which means that Parcel C is too small for ARCH's intended use. (R. at 954.) No exception or variance had ever been made previously regarding this issue for Parcel C. And third, no analysis regarding the sufficiency of water supplies for Parcel C was ever performed. (R. at 953.) Such analysis is required prior to approving housing units on a plat or PUD. The obvious inference is that neither party ever intended for there to be any housing units on Parcel C. But none of this mattered to a county that had already made up its mind. The County held public hearings on the proposed construction for Parcel C and held an appeal hearing for Tidwell's appeal of the building permit, but those procedures were wasted time in the face of the County's predestined conclusion.

Rather than investigate in good faith the parties' intent for Parcel C, the County focused only on what it wanted to see: the "public use" label on the Final Plat and the boundless definition given to that phrase in unrelated 5th Amendment takings jurisprudence. It took years of litigation and a court judgment to reach a conclusion that the County could not have missed had it conducted a good faith review on its own. This was a mistake the County "should never have made." *Galvin v. City of Middleton*, 164 Idaho 642, 647, 434 P.3d 817, 822 (2018). And Plaintiffs have incurred substantial expenses to establish the mistake and reach this conclusion. It

was unreasonable and an abuse of the District Court's discretion to find the evidence so overwhelmingly in Plaintiffs' favor, only to deny Plaintiffs their attorneys' fees.[3]

The County claims that the District Court's "flip flop" on the central issue in this case weighs heavily on the attorney's fees question. Appellants/Cross-Respondents' Response Brief at 11. But this line of argument is misleading. The District Court did not initially "agree" with the County's expansive interpretation of "public use" because it had reviewed the relevant facts and found them weighing in the County's favor. Instead, the District Court sided with the County at first because it erroneously considered and relied on the County's own 2015 Land Use Opinion, as well as cherry-picked definitions of "public use" found in the Idaho Code. (R. at 442-43.) Later, when the facts and evidence were finally all before the Court, the same facts and evidence that were *always* before the County, the Court concluded unequivocally that the express language of all of the decision documents demonstrate the parties' consistent and unwavering intent to reserve Parcel C for open or recreational use. (R. at 960.)

The only reason the District Court went along with the County's position at first blush is because it was caught up in the County's own smoke and mirrors; namely, the notion that the County could unilaterally determine what it intended for Parcel C 10 years after the fact, the application of irrelevant jurisprudence interpreting the 5th Amendment's "public use" clause, and the application of cherry-picked provisions in the Idaho Code using the phrase "public use." The District Court ultimately recognized its mistake and properly reversed its prior decision.

[3] Appellants contend that Plaintiffs' Opening Brief "lacks any mention or reference to the three-pronged analysis required to effectively analyze an abuse of discretion claim." Appellants/Cross-Respondents' Response Brief at p. 10. They call this a "glaring omission" that is "fatal" to Plaintiffs' claim. *Id*. But Appellants are mistaken. The referenced three-pronged standard for abuse of discretion is contained in the "Standard of Review" section of Plaintiffs' Opening Brief. Plaintiffs' analysis otherwise focuses on the same issues that Appellants' does, the relevant standard under Idaho Code § 12-117 and *Galvin*.

And, again, once all the evidence and facts were before the Court, the same evidence and facts that were always in the County's possession, the Court's conclusion was unequivocal.

It is also inappropriate for the District Court or the County to point to other legal issues that have arisen in this case, like standing, as a basis for why Plaintiffs should not obtain their attorneys' fees. None of these issues would have arisen at all had the County corrected its mistake in the first place and concluded that the building permit for Parcel C could not be properly issued. Plaintiffs are entitled to the attorneys' fees incurred to rectify the County's original mistake.

D. There is no basis to grant attorney's fees to the County for its defense against the appeal of an issue of first impression.

Plaintiffs' § 1983 claim presents an issue of first impression in Idaho. Even the County admits "there is a dearth of case law directly on point[.]" Appellants/Cross-Respondents' Response Brief at p. 6 n. 4. Notably, no authority on point exists in Idaho, rendering the issue one of first impression for this Court. "A party is not entitled to attorney's fees if the issue is one of first impression in Idaho." *Westover v. Cundick*, 161 Idaho 933, 937, 393 P.3d 593, 597 (2017) (quoting *Fuchs v. State, Dep't of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 632, 272, P.3d 1257, 1263 (2012)). Accordingly, the County is not entitled to any attorney's fees it may have incurred in defending against this cross-appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the dismissal of Plaintiffs' § 1983 claim and remand it for further proceedings. Plaintiffs also request that the Court reverse the denial of Plaintiffs' fees and costs.

Respectfully submitted on December 21, 2021.

GIVENS PURSLEY LLP

/s/ *Gary G. Allen*
Gary G. Allen

Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2021, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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