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SUPREME COURT OF THE STATE OF WASHINGTON

No. 46895-6-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Petitioner.

**SUPPLEMENTAL BRIEF OF RESPONDENT
MAYTOWN SAND & GRAVEL, LLC**

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I. INTRODUCTION

In 2005, Thurston County (the “County”) granted a final Special Use Permit (the “Permit”) to mine gravel. The site had been a munitions plant and had been subject to the cleanup of contamination from that plant, and had also been logged over, farmed, drained, and the area to be mined was heavily infested with invasive species like Scotch broom. Before the permit was granted, more than half the original 1610-acre site was sold to the Department of Fish & Wildlife for a preserve, and more than 200 additional acres had been dedicated to buffers for wetlands, critical habitat, or neighboring properties, leaving a 284-acre mine area. In 2010, after receiving assurances from the County that there were no major issues regarding Permit compliance and that small changes in the Permit necessary to adjust scheduling of groundwater testing would be treated as minor amendments that would be quickly resolved without referral to a time-consuming hearing examiner or SEPA process, Maytown purchased the mine from the Port of Tacoma (the “Port”); collectively, Maytown and the Port are “Respondents”).

But, unknown to Respondents, a new set of County Commissioners came to power in 2009 who opposed mining on any terms and determined to destroy the final Permit using any means at the County’s disposal, legal or not. As detailed in the Respondent/Cross-

Appellants' Joint Response and Opening Brief before the Court of Appeals ("Maytown COA Brief"), over the course of 17 months, the accumulated abuses included a Commissioner's direction to fabricate an "emergency" to stop all activity on Maytown's property, multiple undisclosed conflicts of interest, threats to the jobs of key County staff, an invented "letter to proceed" process, undisclosed meetings with mine opponents, and an attempt to retroactively apply the County's updated Critical Areas Ordinance to the mine, despite the fact that the Permit was final years before the updated Ordinance was adopted. These outrageous tactics created a 17-month delay in the commencement of mining, which was sufficient to achieve the County Commission's goal of destroying the mine and the value of Maytown's Permit.

Concluding that the County's behavior "shocked the conscience," the jury found that the County violated Maytown's constitutional right to substantive due process and awarded Maytown \$4 million in damages under 42 U.S.C. § 1983. While not challenging the jury's factual findings, the County attacks the jury's award and the appeals court's award of attorneys' fees to Maytown under 42 U.S.C. § 1988. For the reasons set forth below, these claims are without merit.

II. ASSIGNMENT OF ERROR

Maytown assigns no error to the decision of the Court of Appeals.

III. STATEMENT OF THE CASE

The jury was instructed that only government behavior that “shocks the conscience” would violate Maytown’s substantive due process rights, the standard advocated by the County. After hearing evidence of the County’s manifold abuses over the course of a 20-day trial, the jury concluded that the County’s grossly abusive campaign to destroy Maytown’s finally approved Permit violated Maytown’s substantive due process rights, and awarded damages under 42 U.S.C. § 1983.

Because the jury was instructed as the County had requested and there was ample evidence to support the jury’s conclusion that the County’s misconduct was so outrageous as to shock the conscience, there is no warrant for this Court to disturb the jury’s verdict.

IV. ARGUMENT

A. Maytown Possessed A Valid Permit Granting It A Protected Property Interest In The Mine Which The County Grossly Violated.

A valid and final Permit was issued by the County in 2005 which, by its plain terms, permitted Maytown to “mine approximately 20.6 million cubic yards of sand and gravel” from the 284-acre mine area. Ex. 303. Relying solely on a Ninth Circuit employment rights case, *Dorr v. Butte County*, 795 F.2d 875, 876 (9th Cir. 1986), the County claims that,

because Maytown's final Permit had conditions, Maytown's property rights are not protected by the Constitution. This is wrong.

This Court has held repeatedly that when, as here, a government agency issues a final permit allowing a landowner to develop its property, a property right protected by the U.S. and Washington Constitutions is created. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 958, 954 P.2d 250 (1998) (“development rights are beyond question a valuable right in property” (citation omitted)). This is true even if the permit has conditions so long as the conditions impose “significant substantive restrictions” on government decision-making, *id.*, 134 Wn.2d at 963, so that the permit creates “a legitimate claim of entitlement.” *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998).

The same doctrine governs in the employment context relied upon by the County: while a probationary employee has no property right in employment, once the employment becomes permanent, a property right is created. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985); *Wheaton v. Webb-Petett*, 931 F.2d 613, 616–17 (9th Cir. 1991). The non-probationary right to employment, equivalent to Maytown's final, approved Permit here, cannot be denied without due process of law. *Loudermill*, 470 U.S. at 542. The fact that the government employer may deprive the employee of his or her property right in employment if the

government follows specified procedures resulting in termination does not defeat the property right. *Sanchez v. City of Santa Ana*, 915 F.2d 424, 428-29 (9th Cir. 1990); *McGraw v. City of Huntington Beach*, 882 F.2d 384, 389-90 (9th Cir. 1989). Because Maytown's property rights were established and overwhelming evidence demonstrates that the County intentionally violated those rights, the Court of Appeals acted consistently with well-established case law in upholding the jury's verdict.

If anything, the County's treatment of the Permit's conditions only illustrate its abuses of Maytown. The Permit included several conditions that require land-disturbing activities before mining could begin, such as construction and widening of roadways that would be used to haul materials from the mine, construction of a right turn pocket near the mine's access to Interstate 5, and construction of berms to contain noise. Ex. 302 at 3. But the County for seventeen months prevented Maytown from engaging in any land-disturbing activities, creating a Catch-22: Maytown could only begin land-disturbing activities after pre-mining conditions were completed, but Maytown could not satisfy pre-mining conditions without engaging in land-disturbing activities.

B. LUPA’s Statutory Exhaustion Requirement Does Not Apply To Maytown’s Section 1983 Claims.

The County’s central argument, that Respondents’ damages are barred under LUPA because of Respondents’ failure to pursue an appeal of the Hearing Examiner’s favorable decision, cannot bar Maytown’s Section 1983 claim. This is true for several reasons in addition to those set forth in the Port’s Supplemental Brief.

By its plain terms, LUPA “does not apply to . . . judicial review of . . . [c]laims provided by any law for monetary damages or compensation.” RCW 36.70C.030(c). Section 1983 is just such a law. Section 1983 provides that any U.S. citizen who is injured by “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” by anyone acting under authority of state law may sue for “redress.” 42 U.S.C. § 1983. Because Section 1983 unquestionably is a “law” providing “for monetary damages,” under LUPA’s plain terms, Maytown was not required to pursue a land use petition before seeking damages under Section 1983.

If this language is not plain enough, the same section of LUPA states that “[i]f one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, *the claims are not subject to the procedures and standards,*

including deadlines, provided in this chapter for review of the petition.” RCW 36.70C.030(c). Accordingly, even if Maytown had included its Section 1983 claim in one of its LUPA appeals,¹ LUPA deadlines and procedures would not bar the damages claim under LUPA’s plain terms. In any event, it is well established that “[t]he availability of state administrative procedures ordinarily does not foreclose resort to § 1983.” *Wilder v. Virginia Hospital Ass’n*, 496 U.S. 498, 523 (1990); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 389, 787 P.2d 1366, 1376 (1990); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21 n.11, 829 P.2d 765 (1992) (*citing Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982) (“[e]xhaustion of administrative remedies is generally not required under § 1983”). LUPA therefore does not apply to Section 1983 claims because a contrary holding would improperly “impose an exhaustion requirement on § 1983.” *Muffett v. City of Yakima*, CV-10-3092-RMP, 2011 WL 5417158, at *4 (E.D. Wash. Nov. 9, 2011).

While exhaustion requirements have been imposed on specific types of Section 1983 claims, such as Fifth Amendment takings claims,² those requirements are imposed because of the “special nature of the Just Compensation Clause” that do not apply to violations of substantive due

¹ Maytown could not have done so because most of the abuses documented at trial in this case were not discovered until after litigation commenced.

² Exhaustion does not apply even to takings claims if the government’s process is sufficiently abusive. *Sherman v. Town of Chester*, 752 F.3d 554, 561-63 (2d Cir. 2014).

process. *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006). Hence, “an action for a violation of substantive due process is ripe immediately (without regard to state remedies) because the harm occurs at the time of the violation.” *Sintra*, 119 Wn.2d at 21 n. 11 (citing *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988)). *Accord Mission Springs*, 134 Wn.2d at 964-65; *Wilkerson v. Johnson*, 699 F.2d 325, 329 (6th Cir. 1983) (“There appear to be no strong considerations of congressional or judicial policy that require the claimants to first pursue state administrative or judicial remedies” before bringing Section 1983 substantive due process claim).³

Likewise, under the Supremacy Clause, Section 1983 is the supreme law of the land. Applying LUPA’s shortened appeal deadlines to Section 1983 claims “is inconsistent in both purpose and effect with the remedial objectives of Section 1983” and, under principles of federal supremacy, LUPA’s procedural limits cannot be applied to bar Section 1983 claims. *Holy Ghost Revival Ministries v. City of Marysville*, 98 F. Supp. 3d 1153, 1164-67 (W.D. Wash. 2015).

³ *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010), is not to the contrary. There, the plaintiffs based their Section 1983 claims on violations of *procedural* due process that duplicated their claims that the permit there had been granted without following the procedural requirements of the local land use code, and therefore merely “challenged the validity” of the permit, *id.* at 405, rather than stating a distinct claim for damages, as here.

C. The Evidence Fully Supports The Jury’s Finding That The County’s Misconduct Shocks The Conscience.

The jury was instructed that it must find the County’s behavior “shocks the conscience” in order to find a violation of substantive due process. After hearing a huge volume of evidence cataloguing the County’s abuses, the jury found the County’s misconduct to be conscience-shocking. The jury’s conclusion is fully consistent with the law and the County provides no reason for this Court to invade the jury’s province.

The County does not challenge the jury’s factual findings, which are therefore “verities on appeal.” *In re Fossedal*, 189 Wn.2d 222, 232, 399 P.3d 1169, 1175 (2017). To overturn the jury’s conclusion, the County must demonstrate that the verdict was “clearly unsupported by substantial evidence.” *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937, 945 (1994). The “court will not willingly assume that the jury did not fairly and objectively consider the evidence” and “so long as there was evidence which, if believed, would support the verdict rendered,” the verdict must be upheld. *Id.* Attempts to remove substantive due process claims from the jury “must be viewed with particular skepticism” because of “[t]he importance of the specific facts and circumstances relating to the property and the facts and circumstances

relating to the governmental action” in such cases. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990).

In this case, there is voluminous evidence that fully supports the jury’s verdict. The record is replete with evidence of the County’s shocking pattern of abuse, which includes the County Commission’s direction to staff to “find me an emergency” related to endangered species in order to “basically shut down any activity at all on the Maytown property,” Tr. 852:11-853:1; 892:25-894:6, among a multitude of examples of the County’s maltreatment of Maytown. *See* Maytown COA Br. at 7-34, 39-45. The County invites the Court to ignore these abuses by focusing on the amendments Maytown requested to update the scheduling requirements for its groundwater monitoring plan, which was approved as part of the 2005 Permit. The record demonstrates that, even viewing the groundwater monitoring plan in isolation, the County abused the permitting process in a manner that shocks the conscience.

To start with, as part of the final permit issued in 2005, Maytown’s predecessor negotiated an agreement, including a groundwater management plan, that the County, as well as the Black Hills Audubon Society and the Washington Department of Fish and Wildlife and Department of Natural Resources agreed were fully adequate to protect the

environment, and to ensure that fish, wildlife and their habitats would be protected. Tr. 931:15-935:17.

But after Maytown purchased the fully permitted mine, the County refused to honor the agreed-upon groundwater monitoring plan. In February 2010, when Maytown initially planned to start mining, it already had more water quality data than was contemplated in the original permit for establishing baseline water quality conditions, Tr. 952:2-22, and there was, accordingly, no environmental justification for refusing Maytown's request for a minor amendment to reflect the delays in gathering this baseline data that occurred in the period after the Port purchased the property. Even the County admitted that the delay in groundwater monitoring had no environmental impact. Tr. 975:1-17. Nor was there any risk to groundwater quality if mining had started at that time. Tr. 957:19-21.

Nonetheless, the County used the amendments process as a pretext for imposing excessive and unreasonable requirements on Maytown that were wholly lacking an environmental justification and were not included in either the Permit or the associated Mitigated Determination of Non-Significance. Tr. 962:19-963:5. For example, despite the fact that two years' worth of data had already been gathered, the County insisted that mining be delayed until background data for the September 2010 low-

water period could be gathered, a decision that by itself delayed mining for seven to nine months with no environmental gain and no justifiable reason. Tr. 964:6-965:2.

Similarly, the County insisted that Maytown monitor 172 chemicals even though, as Maytown's groundwater expert, Charles Ellingson, testified, only five water quality parameters could conceivably be affected by gravel mining, Tr. 939:10-18, 958:17-959:25, and the added chemical monitoring requirements are appropriate for a hazardous waste landfill, not a gravel mine. Tr. 960:1-6. Ellingson, who had worked on the groundwater monitoring plan since the early 1990s and was its principal drafter, testified that these new conditions were "out-of-the-blue, blindsided-from-nowhere, extra requirements," Tr. 962:6-7, that imposed increased compliance costs on Maytown of approximately \$120,000 over 4- to 5-year period, 987:21-988:1, but produced no improvements in environmental protection, Tr. 982:8-14, 984:12-23, and merely duplicated groundwater testing that had been conducted in connection with the cleanup of contamination on the property from the munitions plant that had once been located there. Tr. 962:8-15.

The County justified these actions by intentionally misreading an isolated sentence from the original permits, Tr. 979:1-980:3, insisting on a reading that actually provided *less* environmental protection than the

original plan, Tr. 947:4-9, and then refusing to meet with Ellingson when he attempted to clear up this confusion. Tr. 972:8-25. As Ellingson testified, in his more than three decades of experience, he never saw a groundwater monitoring plan treated the way the County treated Maytown's plan. Tr. 986:5-8.

This evidence is not just sufficient to support the jury's verdict, but demonstrates overwhelmingly that the County engaged in grossly abusive and conscience-shocking conduct aimed at illegally destroying Maytown's property rights. The County's claims that this evidence is insufficient as a matter of law to establish a violation of 42 U.S.C. § 1983 is wrong, as the discussion of the case law in Maytown's COA Brief (at 78-91) demonstrates. *See also, Shanko v. Lake County*, 116 F. Supp. 3d 1055, 1065-66 (N.D. Cal. 2015); *Bagdasaryan v. City of Los Angeles*, CV 15-1008-JLS (KES), 2016 WL 3661520, at *7-8 (C.D. Cal. Mar. 9, 2016).

For the reasons described above, there is substantial evidence on the record demonstrating that the County here was not pursuing legitimate governmental purposes but was carrying out the political agenda of Maytown's opponents. The lower courts were fully justified in rejecting the County's attempts to take the question away from the jury. Indeed, to justify its misconduct, the County, relying on *dictum* in a single case from the Sixth Circuit, argues for an extreme version of substantive due process

that would find no constitutional violation even where the government's decision-making is tainted by bribery. *See* Maytown COA Br. at 90-91. This Court should reject the County's invitation to rewrite Washington's law of substantive due process in this way because it would require this Court to completely rewrite its substantive due process jurisprudence. *See Mission Springs*, 134 Wn.2d at 970; *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 651-55, 935 P.2d 555 (1997). Worse, the County's position would leave Washington's citizens without constitutional protection against even extreme abuses of government power like those documented here.

D. Maytown Is Entitled To Attorneys' Fees Under 42 U.S.C. § 1988.

Because Maytown prevailed in its claim for damages under Section 1983, both the trial court and the Court of Appeals properly awarded attorneys' fees and costs to Maytown under 42 U.S.C. § 1988. *See Westmark Development Corp. v. City of Burien*, 504 Fed. Appx. 560, 562 (9th Cir. 2013) (unpublished opinion cited under Ninth Cir. Rule 36-3). In its Petition for Review, the County asserts for the first time that the Court of Appeals (but not the trial court) erred in awarding Maytown attorneys' fees because Maytown did not include in its brief a separate section requesting fees as required by RAP 18.1. Pet. Rev. 18-19.

The County filed a 48-page reply brief at the Court of Appeals, yet did not object to the request for attorneys' fees, raising the issue for the first time in its Petition for Review to this Court. The County thus waived the issue. *See, e.g., Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350, 357 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."); *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270, 282 (1993) (same).

The County's arguments are also wrong on the merits. Maytown's principal brief included a 14-page section addressing the County's attempts to escape liability under 42 U.S.C. § 1983, specifically arguing that Maytown is "entitled to damages under 42 U.S.C. § 1983, and attorneys' fees and costs under 42 U.S.C. § 1988 because the County," acting under color of state law, "subjected Maytown to a deprivation of Maytown's Constitutional right to substantive due process." Maytown COA Br. at 78. Maytown therefore plainly satisfied RAP 18.1. *See, e.g., Bay v. Jensen*, 147 Wn. App. 641, 661, 196 P.3d 753, 763 (2008) (Rule 18.1(b) "requires argument and citation to authority to advise us of the appropriate grounds for an award of attorney fees and costs"); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 363 n.12, 110 P.3d 1145, 1152 (2005) (same).

Even if the County's claim had merit, it would fail under principles of federal supremacy. As the U.S. Supreme Court recently made clear in *James v. City of Boise*, 136 S. Ct. 685, 686, 193 L. Ed. 2d 694 (2016), Section 1988 creates a federal right to attorneys' fees for litigants who bring a successful claim under Section 1983 and state courts cannot apply state rules in a manner that defeats the federal right to attorneys' fees. *Accord Bernhardt v. County of Los Angeles*, 339 F.3d 920, 928 (9th Cir. 2003) (Section 1988 may bar a state "statute, policy, or practice" precluding payment of attorneys' fees in Section 1983 cases).

V. CONCLUSION

For the reasons stated herein, the Court should affirm the Court of Appeals and award Plaintiffs' attorneys' fees and for defending this appeal in accordance with 42 U.S.C. § 1988 and RAP 18.1(j).

DATED this 21st day of November, 2017.

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