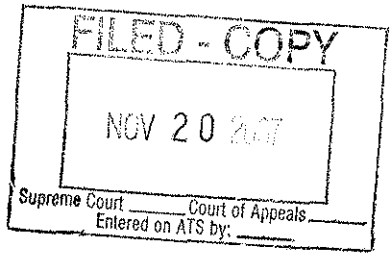
11-20-2007

Lochsa Falls v. Idaho State Dept. of Transportation Appellant's Reply Brief Dckt. 34039

IN THE SUPREME COURT OF THE STATE OF IDAHO

LOCHSA FALLS, L.L.C., an Idaho limited liability company, Plaintiff-Appellant, v. STATE OF IDAHO, IDAHO TRANSPORTATION DEPARTMENT, Defendant-Respondent,	)	Docket No. 34039



REPLY BRIEF OF APPELLANT, LOCHSA FALLS, L.L.C.

Appeal from the District Court for the Fourth Judicial District for Ada County
Honorable Michael McLaughlin Presiding

Brian F. McColl
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, Idaho 83701-1544
Attorney for Appellant

Steven M. Parry
Deputy Attorney General
Office of the Attorney General
3311 W. State Street
P.O. Box 7129
Boise, Idaho 83707-1129
Attorney for Defendant/Respondent

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I. STATEMENT OF THE FACTS.

Appellant Lochsa Falls, L.L.C. (hereinafter "Locsha Falls"), submitted a preliminary plat for its entire subdivision and obtained approval from the City of Meridian. The preliminary plat clearly showed that there would be an access road intersecting with Chinden Boulevard. Lochsa Falls then began constructing the subdivision in phases. It completed 11 of 12 phases of the subdivision, including constructing and/or putting in place the road that connected the subdivision to Chinden Boulevard. (R. 84). After obtaining final plat approval on the final, twelfth phase, Lochsa Falls was told that it could not obtain building permits until it obtained a permit from the Respondent State of Idaho, Idaho Transportation Department (hereinafter "ITD") to access Chinden Boulevard. (R. 83-85). Lochsa Falls then began the application process and was required as part of that process to obtain and attach a traffic study to its application. (R. 43). The engineer who performed the traffic study recommended that a traffic signal be installed. (R. 39). In completing the application for permission to access Chinden Boulevard, Lochsa Falls was required to sign a statement that states:

> I certify that I am the Owner or Authorized Representative of the property to be served and request permission to construct the above facilities within the State Highway Rights-of-Way in accordance with the General Provisions printed on the reverse side of this form, the Special Provisions, and the Plans made a part of this permit. This permit SHALL BE VOID if all work is not completed and the Department has not made final inspection and approval within one year of the issuance date.

(R. 43). However, the application does not have any "facilities" described above the signature line. On or about November 19, 2004, ITD issued a permit to Locsha Falls "to perform the work described." The only work described is contained on a separate piece of paper entitled

"Special Provisions." (R. 44). The work described in the Special Provisions was not volunteered by Lochsa Falls, rather it was imposed by ITD. (R. 44) Specifically ITD required that Locsha Falls design and construct a traffic signal, a center turn lane, and a deceleration lane at the intersection of its subdivision and Chinden Blvd. Lochsa Falls had to provide a performance bond in the amount of $180,000 prior to beginning work. (R. 44). Lochsa Falls performed the work and provided the performance bond under protest. (R. 87).

Lochsa Falls did not view its application to obtain access to Chinden Boulevard as a purchase and sale arrangement. Lochsa Falls owned and was developing the land adjacent to the State highway. Lochsa Falls' access road connecting to Chinden Boulevard was entirely within Lochsa Falls' property boundaries. Lochsa Falls to its knowledge was not purchasing any land and it has not received, to date, any deed to property.

II. ARGUMENT.

A. *THE TRAFFIC SIGNAL BENEFITS THE PUBLIC AT LARGE.*

ITD argues: "The performance bond and the costs of constructing the new intersection are for the benefit of the property Lochsa Falls is developing. These items are not taxes or impact fees of any sort. In exchange for a property owner obtaining the right to use and improve ITD property for its benefit and ultimately obtaining a deeded right of access, ITD requires that the improvements built on state property meet state safety and design standards." This argument is wrong for three reasons: (1) all members of the public will benefit from this traffic signal, (2) this is a tax and/or an impact fee, and (3) Lochsa Falls has not and will not receive a property right.

First, all members of the traveling public will benefit from this traffic signal and other improvements not just those who live in Lochsa Falls' subdivision. Persons living both within and without the subdivision will benefit from the fact that cars coming from the subdivision are not turning into traffic traveling at 55 miles per hour. The entire traveling public will be safer with the signal and other improvements in place. Lochsa Falls is not contesting that fact. Lochsa Falls is contesting the fact that it as the developer is bearing the cost of keeping the traveling public safe. Even those persons living in the subdivision are not paying for the right to access Chinden Boulevard safely, the developer is bearing the entire cost. (R. 83).

Second, this is either a tax or an impact fee. As argued previously taxes are revenue raising measures. In this case, ITD raised revenue to cover the cost of constructing a traffic signal and making improvements to the highway by making Lochsa Falls construct the signal and other improvements at its own expense. Alternatively, the condition to construct the signal and other improvements was the imposition of an impact fee. Impact fees are fees/taxes imposed on land developers to cover the costs of infrastructure and related services that would otherwise have to be provided by the government. In this case, again, ITD covered the cost of infrastructure by requiring Lochsa Falls to construct a new intersection and a traffic signal. ITD clearly does not have and has not even argued that it has the authority to tax or to impose impact fees.

Third, Lochsa Falls is not receiving a property right. The State is retaining ownership to Chinden Boulevard and the traffic signal or perhaps ultimately the Ada County Highway District will obtain some new property interest in the intersection. Lochsa Falls, however, is not

obtaining any special right that other members of the general traveling public are being denied. Lochsa Falls is not being given the right to tell others that they cannot use the traffic signal or intersection. A "property right" has to include within it "the right to exclude others." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Even assuming that this is some type of property transfer, there does not appear to be any authority given by the Legislature to ITD to sell "deeded rights of access" to state highways. It is true that the Legislature has given the Idaho Transportation Board the power to designate state highways or parts of them as controlled-access facilities. Idaho Code § 40-310(9). However, the Legislature seems only to have given ITD the power to regulate or prohibit the use of those controlled access highways "by a class or kind of traffic which is incompatible with the normal and safe movement of traffic." Idaho Code § 49-202(23). It does not appear that the Legislature has granted ITD the right to require those traveling to and from Lochsa Falls' subdivision to pay for access and yet allow other members of the public to have free access, e.g., homeowners in adjoining subdivisions who will utilize this traffic signal are not being required to contribute at all to the cost of the new intersection and traffic signal.

Therefore, Lochsa Falls asks this Court to find that the new intersection and signal benefit the public at large and that such a benefit cannot be paid for at the expense of one developer. Lochsa Falls asks this Court to find that the conditions placed on Lochsa Falls during the application process amounted to a tax and/or impact fee and/or a taking without just compensation.

B. *TRUE, EXHAUSTION WAS THE ISSUE, SO ALSO WERE THE EXCEPTIONS TO THE EXHAUSTION DOCTRINE.*

ITD argues that exhaustion of administrative remedies is the only issue that is before the Supreme Court. Lochsa Falls is arguing that this is a case that falls within the exceptions to the exhaustion doctrine. Lochsa Falls has identified a number of exceptions that might apply to this case. Rather than rehearse them all, Lochsa Falls will touch on just a few:

1. ITD Does Not Have Authority to Tax.

Lochsa Falls recognizes that "As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts." Arnzen v. State, 123 Idaho 899, 854 P.2d 242 (1993). However, there is an exception when the agency acts outside its authority. KMST, LLC v. County of Ada, 138 Idaho 577, 583(2003). Lochsa Falls' case falls within this exception. ITD acted outside its authority. The Legislature has not given ITD the power to tax or to impose impact fees. Thus, Lochsa Falls should not have to exhaust its administrative remedies as ITD is palpably without jurisdiction to impose such taxes.

2. The IDAPA Rules are Facially Unconstitutional.

Second, In Park v. Banbury, 149 P.3d 851, 857, 2006 Ida. LEXIS 159 (2006) this Court recognized:

> Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so. In *McCuskey*, the Court recognized an exception where the property owner was challenging the validity of the zoning ordinance itself rather than a decision of the zoning authority. *123 Idaho at 660, 851 P.2d at 956*; *cf. Regan, 140 Idaho at 725, 100 P.3d at 619* (finding an adequate administrative remedy where the party was challenging the interpretation rather than the constitutionality of the statute at issue).

Id. at 857 (emphasis added). Lochsa Falls is arguing that IDAPA 39.03.42.700, the administrative rule requiring developers to pay for traffic signals and other improvements, is invalid on its face, as ITD has not received authority from the Legislature to impose taxes or impact fees, and further the rule allows a taking without just compensation.

ITD argues that if this were a facial challenge Lochsa Falls would have the burden of showing that there is no set of circumstances under which the law would be valid. Lochsa Falls has established this point. The Legislature has never authorized ITD to impose taxes or impact fees, and the IDAPA regulation at issue states that ITD can require developers to pay for construction of highway modifications or improvements. ITD requiring applicants to pay for highway modifications or improvements under any set of circumstances would be an invalid exercise of the taxation power.

3. Lochsa Falls has not Waived its Rights to Challenge the IDAPA Rule.

ITD argues that Lochsa Falls somehow offered to pay for the construction of a new intersection and traffic signal. This is absolutely not the case. As part of the application process, ITD required Lochsa Falls to have a traffic study performed. IDAPA 39.03.42.301. That study recommended a new traffic signal. Despite that recommendation, ITD had the final decision making authority regarding whether to require a traffic signal as a condition of the access permit. Id., see also, IDAPA 39.03.42.700. Lochsa Falls did construct the signal and did provide a performance bond. This, however, was all done under protest. (R. 87). It was by no means volunteered as was the case in KMST LLC v. County of Ada, 138 Idaho 577 (2003).

III. CONCLUSION.

For the foregoing reasons, Lochsa Falls respectfully requests that this Court find that IDAPA 39.03.42.700 is facially invalid to the extent it requires a developer to pay all costs associated with making improvements to state highways. Further, Appellant requests that this Court find that Appellant was not required to exhaust its administrative remedies.

DATED This 20th day of November 2007.

WILSON & McCOLL

By _____
Brian F. McColl
Attorney for Appellant Lochsa Falls, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 2007, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

Steven M. Parry
Deputy Attorney General
Office of the Attorney General
3311 W. State Street
Boise, Idaho 83707-1129

X U.S. Mail
____ Overnight Mail
____ Hand Delivery
____ Fax

Brian F. McColl