2-10-2010

Giltner Dairy, LLC. V. Jerome County Appellant's Brief Dckt. 36528

IN THE SUPREME COURT OF THE STATE OF IDAHO

GILTNER DAIRY, LLC, an Idaho limited liability company, Petitioner/Appellant, vs. JEROME COUNTY, a political subdivision of the State of Idaho, Respondent. 93 GOLF RANCH, LLC, Intervenor.	Supreme Court Nos. **36528-2009** Jerome County Case No. CV-08-1269

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Jerome

Honorable John K. Butler, District Judge, Presiding

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I.
STATEMENT OF THE CASE

On April 13, 2009, the Honorable John K. Butler entered an Order granting Intervenor 93 Golf Ranch, LLC's motion to dismiss the Petition for Judicial Review filed by Petitioner Giltner Dairy, LLC based on lack of jurisdiction over the subject matter of the action. *Memorandum Decision and Order Re: (1) Petitioner's Motion for Leave to File Second Amended Petition for Judicial Review; Petitioner's Motion for Stay of Proceedings; and (3) Intervenor's Motion to Dismiss.* Petitioner timely appealed the Order to this Court.

II.
CASE HISTORY

Petitioner owns and operates a dairy which is directly adjacent to the subject property. The Petitioner's operation, known as the Giltner Dairy, is approved for approximately 5,880 animal units and is fully operational. Several of the Giltner Dairy, LLC members reside on the dairy.

On July 24, 2008, Intervenor 93 Golf Ranch, LLC filed an application with the Jerome County Planning and Zoning Commission requesting a rezone which would result in amendments to the Jerome County Planning and Zoning Map. *Memorandum Decision and Order,* R. at 83. After holding several public hearings, the Commission voted to recommend that the application for rezone be denied. *Id.* at 83-84.

The Jerome County Board of Commissioners conducted a public hearing on the application for rezone on October 7, 2008. *Id.* at 84. On October 21, 2008, the Board voted to approve the application for rezone. *Id.* at 84. On November 10, 2008, the Board issued a *Memorandum Decision* approving the rezone and the resulting amendments to the Planning and

Zoning Map, and on December 15, 2008 approved Ordinance No. 2008-9 rezoning the Intervenor's property. *Id.* at 84. The effect of the amendment is to change various properties from A-1 to A-2 agricultural zoning.

As stated above, Giltner Dairy timely filed a petition for judicial review of the Board's decision, which was dismissed for lack of subject matter jurisdiction. *Petition for Judicial Review,* R. at 4-9; *Amended Petition for Judicial Review,* R. at 10-15; *Second Amended Petition for Judicial Review,* R. at 76-81. Giltner Dairy now seeks appellate review of the trial court's dismissal of the petition for judicial review.

III.
ISSUES SUBJECT TO REVIEW

1. Whether the trial court erred in holding that it lacked jurisdiction to review the decision of the Jerome County Board of Commissioners to rezone the subject property.

2. Whether the grant of a right of judicial review of acts, orders, and procedures of a county board of commissioners in I.C. § 31-1506 applies to a decision of a county board of commissioners to approve a rezone application.

IV.
STANDARD OF REVIEW

A party's right to judicial review is governed by statute. I.R.C.P. 84(a)(1); *Cobbley v. City of Challis,* 143 Idaho 130, 139 P.3d 732 (2006). The interpretation of a statute is a question of law over which this Court exercises free review. *State v. Quick Transport, Inc.,* 134 Idaho 240, 999 P.2d 895 (2000).

V.
ARGUMENTS AND AUTHORITY

A. THE TRIAL COURT ERRED IN CONCLUDING THAT I.C. § 31-1506 DOES NOT CREATE A BROAD, GENERAL RIGHT TO JUDICIAL REVIEW OF A DECISION OF A COUNTY BOARD OF COMMISSIONERS

The trial court stated in its Order that "Chapter 15, Title 31 concerns county finances and claims against the county and it does not relate to or concern planning and zoning decisions which are specifically covered by the LLUPA." *Memorandum Decision and Order*, R. at 92. This Court's precedent clearly establishes that I.C. § 31-1506 creates a broad right to judicial review of an act, order, or proceeding of a county board of commissioners, and this right is not limited to any particular subject matter.

Prior to the current version of I.C. § 31-1506, the statute was designated as I.C. § 31-1509 and in part, read as follows:

> (A)ny time within twenty (20) days after the first publication or posting of the statement, as required by section 31-819, an appeal may be taken from any act, order or proceeding of the board (of county commissioners), by any person aggrieved thereby, or by any tax payer of the county when he deems any such act, order or proceeding illegal or prejudicial to the public interests.

V-1 Oil Co. v. Bannock County, 97 Idaho 807, 809, 554 P.2d 1304, 1306 (1976) (*citing prior version of I. C. § 31-1509 renumbered as I.C. § 31-1506 in 1995*). Considering this prior version of I.C. § 31-1509, the Idaho Court of Appeals held:

> At first glance, I.C. § 31-1509 might appear to be specifically tailored to appeals from the Board of County Commissioners' decisions on county finances and claims against the county. However, a close reading discloses no language explicitly limiting the statute to such appeals. Indeed, the case-law history of the statute reveals that appeals have been allowed from a broad spectrum of decisions and orders. Because the statute on its face does not exclude any particular subject matter of appeal, and because it has been given broad construction by our Supreme Court, we are constrained to view I.C. § 31-1509 [renumbered as 31-1506] as providing a county taxpayer with the right to appeal any act, order or proceeding of the commissioners when any such

> act, order or proceeding is illegal or prejudicial to public interests.

Fox v. Board of County Commissioners, 114 Idaho 940, 763 P.2d (1988) (*overruled in part on other grounds in* 121 Idaho 684, 827 P.2d 697).

The language of I.C. § 31-1509 was thereafter amended to read in its current form in 1993 or 1994 which set forth:

> JUDICIAL REVIEW OF BOARD DECISIONS.
>
> (1) Unless otherwise provided by law, judicial review of any act, order or proceeding of the board shall be initiated by any person aggrieved thereby within the same time and in the same manner as provided in chapter 52, title 67, Idaho Code, for judicial review of actions.
>
> (2) Venue for judicial review of board actions shall be in the district court of the county governed by the board.

See S.L. 1995, ch. 61, § 11. The statute was renumbered to I.C. § 31-1506 in 1995. *Id.* Despite the change in statutory language made by the legislature, the Idaho courts have continued to construe Idaho Code § 31-1506, in its current form, as a broad grant of authority for review of county actions.

In 2003, in the case *Sandpoint Independent Highway District v. Board of County Commissioners of Bonner County*, 138 Idaho 887 (2003), this Court confirmed the current version of I.C. § 31-1506 is a broad grant of authority for judicial review. The Court held that although "Chapter 18, Title 40 of the Idaho Code which concerns dissolution of highway districts, makes no provision for the review of the Commissioners' decision," a petition for judicial review was proper in the District Court pursuant to I.C. § 31-1506. *Sandpoint Highway District*, 138 Idaho at 890 (finding subject matter jurisdiction under I.C. § 31-1506).

Similarly, in *Allen v. Blaine County*, 131 Idaho 138 (1998), this Court recognized a broad grant of authority for review under I.C. § 31-1506:

> Under the Idaho Administrative Procedure Act (IDAPA), a party who has been aggrieved by a final agency action may file a petition for review or declaratory judgment in the district court of the appropriate county after exhausting all administrative remedies. I.C. §§ 67-5270 – 5272. Under the IDAPA, "agency" is defined as "each state board, commission, department or officer authorized by law to make rules or to determine contested cases." I.C. § 67-5201(2). Although a county board of commissioners does not fall within this definition, a decision by a county board of commissioners is subject to judicial review "in the same manner as provided in [Idaho's Administrative Procedure Act]." I.C. § 31-1506(1). Thus, a county board of commissioners is treated as an administrative agency for purposes of judicial review.

Allen, 131 Idaho at 140 (*citations and quotations in original*).

This Court has further indicated that judicial review provides subject matter jurisdiction for review of any county action. In *Gibson v. Ada County Sheriff*, 139 Idaho 5 (2003), a county employee was discharged by the sheriff's department for misconduct. After administrative review by the department, she sought judicial review of her termination. *Id.* The Court found that the petitioner had no right of review of the administrative decision made by the sheriff's department. *Id.* The court then went on to hold:

> Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable.

Id. at 8 (*citations in original*). *See also* I.C. § 31-3505G (requiring additional specific appellate proceeding before board before judicial review under I.C. § 31-1506).

This finding was subsequently affirmed in a second appeal made by Gibson where the Court once again recognized:

> Idaho Code § 31-1506 provides that a person is entitled to initiate judicial review of any "act, order or proceeding" of the Board and the merits of the subject matter would be subject to review of and the IAPA standard of review would apply.

Gibson v. Ada County, 142 Idaho 746, 756 (2006). The Court found that the provisions of I.C. § 31-1506(1) were not applicable to the petitioner's case because there was no authority of the "Board of County Commissioners to review the personnel decision of other elected County officers." *Id.* Had the County Commissioners had authority to take action, the Court indicated that jurisdiction would have been appropriate.

Thus, it is well established that the right of judicial review created in I.C. § 31-1506 is a broad grant of jurisdiction to review any action, order or proceeding of a county board of commissioners and is not limited to any particular subject matter. To the extent the trial court concluded this section pertains only to county finances or claims against the county, it was in error.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT APPLICATION OF I.C. § 31-1506 TO REZONING DECISIONS OF A COUNTY BOARD OF COMMISSIONERS CONFLICTS WITH THE LOCAL LAND USE PLANNING ACT

I.C. § 31-1506 provides for judicial review of any act, order, or proceeding of a county board of commissioners "unless otherwise provided by law." The trial court concluded that this section does not provide a right to judicial review of planning and zoning decisions of a board of commissioners because these are covered under the Local Land Use Planning Act

(LLUPA), I.C. § 67-6501 et seq., and LLUPA does not provide a right of judicial review of the grant or denial of a rezone application. *Memorandum Decision and Order,* R. at 93-94.

The judicial review provision of the LLUPA is found in I.C. § 67-6521. This section sets forth procedures for persons adversely affected by the issuance or denial of a permit authorizing development. Such a person may petition the governing board to hold a hearing under § 67-6512, and after all remedies have been exhausted under local ordinances may seek judicial review as provided in chapter 52, title 67, Idaho Code, the Idaho Administrative Procedure Act. In *Giltner Dairy, LLC v. Jerome County,* 145 Idaho 630, 181 P.3d 1238 (2008), this Court held that the judicial review provisions of the LLUPA are inapplicable to a county's decision to amend a comprehensive plan map. These provisions are applicable only to "a permit required or authorized under this chapter," and "[a] request to change the comprehensive plan map is not an application for a permit." *Id.* at 633. This Court expanded on its holding in *Giltner* in *Burns Holdings, LLC v. Madison County Board of County Commissioners,* 147 Idaho 660, 214 P.3d 646 (2009). In this case, this Court held that an application for a rezone, like an application to amend a comprehensive plan map, is not a "permit authorizing development" and thus judicial review is not authorized under LLUPA. *Id.* at 649.

While it is clear under this Court's recent decisions that the LLUPA does not create a right to judicial review of a decision on an application for a rezone, this does not foreclose the possibility that other provisions of the Idaho Code may create a right to judicial review. The LLUPA establishes a set of procedures for judicial review of decisions of local governing boards concerning the permitting process, including the right to request a hearing and the right to seek judicial review of a final decision on a permit authorizing development within the

specified time frame. The LLUPA does not contain any provision that prohibits judicial review of a decision on an application for rezone, or a decision to amend a comprehensive plan map. It simply does not create a right to judicial review of these actions, because its judicial review provisions and their accompanying procedures are applicable only to decisions regarding permits. This does not create a conflict with other provisions of the code that could authorize judicial review of these actions, because the LLUPA itself is silent on whether judicial review of a rezone or comprehensive plan amendment is permissible. Specifically, I.C. § 31-1506, which creates a broad, general right to judicial review of any action or order of a board of county commissioners "unless otherwise provided by law," does not conflict with the LLUPA because the LLUPA does not provide that judicial review of an application for rezone or comprehensive plan amendment is unauthorized; it simply does not create a right to judicial review of these actions. The trial court erred in concluding that these provisions conflict with one another.

This Court has found in the past that if a statute does not create a specific right to judicial review, it is possible to resort to the general right of judicial review created by § 31-1506 if action by a county board of commissioners is involved. In *Sandpoint Independent Highway District v. Board of Commissioners of Bonner County,* discussed above, the Court applied § 31-1506 as the basis for review of the decision of a county board of commissioners to dissolve a highway district. The Court held that as chapter 18, title 40 of the Idaho Code concerning dissolution of highway districts makes no provision for judicial review, a petition for judicial review was proper in the district court under § 31-1506. *Sandpoint Highway District,* 138 Idaho at 890. Likewise, the LLUPA makes no provision for judicial review of an

application for rezone, but as an action of a county board of commissioners is involved judicial review is authorized by § 31-1506.

The trial court correctly points out that there is no case law in which I.C. § 31-1506 was used as the statutory authority for judicial review of the decision of a board of commissioners on an application for rezone. *Memorandum Decision and Order,* R. at 93. This is easily explained by the fact that prior to this Court's recent decision in *Burns Holdings, LLC v. Madison County Board of County Commissioners* such decisions were reviewable under the judicial review provisions of the LLUPA. Petitioner has sought to use § 31-1506 as an alternative basis for jurisdiction because the judicial review provisions of the LLUPA are no longer available for review of a board of commissioners' decision on an application for rezone. I.R.C.P. 84(a)(1) provides that "actions of . . . local government, its officers or its units are not subject to judicial review unless expressly authorized by statute." I.C. § 31-1506 is a statute that expressly authorizes judicial review of actions of a county board of commissioners, and no provision of the LLUPA renders it inapplicable.

VI.
CONCLUSION

Idaho Code § 31-1506 creates a broad, general right to judicial review of any act, order, or proceeding of a county board of commissioners unless otherwise provided by law. This right to judicial review is not limited to any particular subject matter, but applies across a broad spectrum of actions by a county board of commissioners. While it is now established that the judicial review provisions of the LLUPA are inoperable to provide a right of judicial review of a comprehensive plan amendment or action on an application for rezone, no provision of the

LLUPA prohibits judicial review of these actions. In the absence of a contrary provision of law, I.C. § 31-1506 provides alternative statutory authority for judicial review of a county board of commissioners action on an application for rezone.

The Order of the District Court dismissing the petition for judicial review due to lack of subject matter jurisdiction should be reversed.

DATED this 10th day of February, 2010.

WHITE PETERSON

By: _____
Davis F. VanderVelde
Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 10th day of February, 2010, I caused to be served two (2) true and correct copies of the above and foregoing instrument by the method indicated below to the following:

Board of Commissioners JEROME COUNTY CLERK 300 N. Lincoln, Room 300 Jerome, ID 83338	✓ U.S. Mail ____ Overnight Mail ____ Hand Delivery ____ Facsimile
Michael J. Seib JEROME COUNTY PROSECUTOR 233 West Main Street Jerome, ID 83338	✓ U.S. Mail ____ Overnight Mail ____ Hand Delivery ✓ Facsimile: (208) 644-2639
Gary D. Slette ROBERTSON & SLETTE, PLLC 134 Third Avenue East P.O. Box 1906 Twin Falls, ID 83303-1906	✓ U.S. Mail ____ Overnight Mail ____ Hand Delivery ✓ Facsimile: (208) 933-0701

for WHITE PETERSON

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