3-10-2010

Giltner Dairy, LLC. V. Jerome County Respondent's Brief 2 Dckt. 36528

IN THE SUPREME COURT OF THE STATE OF IDAHO

GILTNER DAIRY, LLC, an Idaho Limited Liability Company,	)	
	)	Supreme Court Nos. 36528-2009
Petitioner/Appellant,	)	Jerome County case No. CV-08-1269
v.	)	
JEROME COUNTY, a Political Subdivision of the State of Idaho,	)	
Respondent.	)	
93 GOLF RANCH, LLC,	)	
Intervenor.	)	

RESPONDENT'S BRIEF

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

The Honorable John K. Butler, District Judge, Presiding

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STATEMENT OF THE CASE

Petitioner/Appellant ("Giltner") sought judicial review of a zoning decision by the Jerome County Board of Commissioners ("Board") pursuant to Idaho Code Section 31-1506. Intervenor 93 Golf Ranch, LLC's brought a motion to dismiss Giltner's petition, which was granted by the district court on the basis of lack of subject matter jurisdiction.

ARGUMENT

Giltner raises only two issues on appeal. Jerome County addresses only the second issue (whether I.C. § 31-1506 applies to zoning decision by a board of county commissioners), as it is dispositive of the case.

Giltner seeks judicial review of a zoning decision pursuant to Idaho Code Section 31-1506; and does so after first recognizing that the "judicial review provisions of the LLUPA are no longer available for review of a board of commissioners' decision on an application for rezone." (*Appellant's Brief*, at 9; referencing *Burns Holdings, LLC v. Madison County Board of County Commissioners*, 147 Idaho 660, 21 P.3d 646 (2009) and *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008)). Giltner also states that "[t]he judicial review provision of the LLUPA is found in I.C. § 67-6521." (*Appellant's Brief*, at 7). This statement however, is not necessarily correct in that 67-6521 is not the *only* judicial review provision in LLUPA. Idaho Code Section 67-6519(4) and 67-6520 also provide judicial review procedures for decisions on permits, both essentially identical to 67-6521. Section 67-6535(c) is also a "judicial-review provision" in that it provides instruction to courts when engaged in such review. Furthermore, section 67-6507 allows a planning, zoning or planning and zoning commission "to seek judicial process" when necessary. Section 67-6511(d) gives a property owner standing in court to enforce a certain provision of that statute, and 67-6533(d) discusses the authority of a court to issue temporary restraining orders in matters involved with that section. Finally, and at least along the lines of dispute resolution, 67-6510 provides for mediation procedures for land use matters.

There are two points being made here for consideration. The first is that all these judicial mentioning provisions of LLUPA show it to have many more provisions relating to judicial review than just simply section 67-6521 (as Giltner at least implies). Second (and much more importantly), the specific referencing of the various judicial processes in these several sections shows that the legislature had judicial review/process in mind and inserted it throughout LLUPA, but only in those provisions where it specifically intended. Of real significance is the fact that no less than three times, in three different statutes, does the legislature specifically limit judicial review per the APA to permit decisions only.[1]

The remaining "judicial-process" sections of LLUPA (cited above) reference other kinds of processes that may not pertain to APA review, but nonetheless, still do not expand past the "permit-issuance" limitations set by the three statutes noted in the above footnote. The fact that these other sections do not reference APA review, but do reference some form of judicial process, may be all the more significant in showing that the legislature wanted to limit APA review to only those areas where it so in fact specified. That is, in these statutes that do not pertain to permit issuance, but where the legislature obviously felt some kind of judicial process needed to apply, it went ahead and authorized such, but not by simply reiterating the language of the footnoted statutes.

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[1] I.C. § 67-6519 - An applicant denied a permit or aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code.

I.C. § 67-6520 - An applicant denied a permit or aggrieved by a decision may within twenty-eight (28) days after all appellate remedies have been exhausted under local ordinance seek judicial review as provided by chapter 52, title 67, Idaho Code.

I.C. § 67-652I- An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code.

Instead, the legislature specifically provided for a form of judicial process thought needed, but steered clear of APA review. This results in showing a conscious effort by the legislature to limit one's ability to obtain APA review.

As to those remaining statutes of LLUPA that are silent to any type of judicial verbiage (APA language or otherwise), the legislature was clearly intending that the subject matter of these statutes would not be subject to judicial review. This clarity stems from the legislative intent cannon that holds:

> Statues that are *in pari materia* must be construed together to effect legislative intent. Statutes are *in pari materia* if they relate to the same subject. Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.

City of Sandpoint v. Sandpoint Independent Highway Dist., 139 Idaho 65, 68, 72 P.3d 906, 909 (2003) (emphasis added; citations omitted).

The statutes of LLUPA obviously all relate to the same subject matter of land use, and must therefore be construed together. In doing this, it is first noted that there are the eight separate statutes pointed to above that reference some form of judicial process. The *omission* of "judicial process" language from the remaining statutes of LLUPA, becomes quite significant as it shows a specific intent by the legislature that is completely opposite from the intent of the eight "judicial-process/review" statutes. This clearly being that those provisions of LLUPA that do not contain specified judicial review/process language were not intended by the legislature to be subject to direct judicial review via the APA.[2]

[2] This said with the understanding that these provisions still may be subject to collateral actions. *See Burt v. City of Idaho Falls*, 105 Idaho 65 (1983), holding that while a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.

This analysis of the legislature's intent is even more firmly cemented in regard to section 67-6511 because it is one of the eight LLUPA statutes that contain judicial-process verbiage. Real significance arises from the fact that it is sections 67-6511(a) and (b) that ultimately provided the basis for the Board's zoning decision that Giltner now challenges. Although these two subsections do not contain any judicial verbiage, paragraph (d) of 67-6511 does, albeit not of the nature that is of any help to Giltner's present attempt to obtain judicial review.[3] Nevertheless, the fact that such verbiage is in one of the provisions of 67-6511, but omitted from the remaining three (a, b and c), causes the above analysis of legislative intent (stemming from *City of Sandpoint, supra*) to be focused specifically down to the exact statute at issue.

As indicated, an examination of 67-6511 on its face shows only the last paragraph of that statute (subsection (d)) to contain any judicial verbiage. This reveals that the legislature, in drafting the whole of 67-6511, surgically inserted such judicial verbiage into the statute so that it only applied to those limited circumstances stemming from paragraph (d). Going further, and examining 67-6511 through the application of *City of Sandpoint, supra*, it is plain that because no judicial verbiage is contained within the parameters of paragraphs (a), (b) and (c), the legislature simply did not intend any form of judicial process be available to any circumstances/decisions arising from those three subsections.

The existing language found in section 67-6511(d) becomes even more problematic for Giltner when its arguments concerning Idaho Code Section 31-1506 are examined. This is because it (I.C. § 31-1506) holds in pertinent part:

[3] I.C. § 67-6511(d) gives a property owner standing in court to enforce the provisions of that subsection.

> *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.

(I.C. § 31-1506; emphasis added). The emphasized language is the limiting portion of the statute that controls or determines when the parameters of 31-1506 can be applied. That is to say, not every single act, order or proceeding of a board can be judicially reviewed pursuant this 31-1506. Instead, only those actions of the board that do not fall within the *parameters* of some other statute that concerns judicial review. It must further be kept in mind (as analyzed above) that such *parameters* are capable of extending beyond the specific statute itself. In some instances (like the one at hand), the judicial review procedures being "*otherwise provided*," may be provided by not being provided. That is, by not including verbiage in a statute that specifically prohibits direct judicial review, the legislature (under certain circumstances) is in fact intending that the absence of the verbiage is in fact the prohibition against the statue being subject to such review. In this regard then, the "non-specifying" statute itself *otherwise provides* for purposes of determining 31-1506 applicability.

With the issue at hand, it is clear that LLUPA (and 67-6511 on its own) does *otherwise provide* the procedures/requirements for judicial review, as there are several provisions within the act (and one within the statute itself) that discuss the parameters of such review. As discussed above, the absence of such judicial verbiage from the remaining statutes or provisions of LLUPA, show that they were indirectly being prohibited from any kind of judicial review or process. Regardless, whether the challenged zoning decision is viewed as falling within the parameters of those statutes that contain specific judicial review language, or those that don't (or the parameters of

both), the fact remains that judicial review procedures are in fact otherwise provided for zoning decisions stemming from LLUPA and section 67-6511 specifically. Accordingly, the limiting language of 31-1506 is triggered and its provisions prevented from being applied to the Board's zoning decision as argued by Giltner.

In sum, Giltner is simply in error in its implication that LLUPA has only one judicial review provision, as there are several. Further, Giltner is in error in its claim that judicial review of zoning decisions is not prohibited by any provision of LLUPA. It is the very omission of such judicial review language from 67-6511 that in fact prohibits judicial review of zoning decisions. Because LLUPA does otherwise provide for judicial review procedures, the limiting language of the very statute that Giltner attempts to reach the APA with activates and prevents such from being accomplished.

If section 31-1506's applicability to this matter is still questioned, then another prong of statutory interpretation that should be considered is that which examines legislative history. To this regard, Idaho courts have held that if a "statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean. To determine that intent, we examine...[among other things, the statute's] legislative history. *City of Sandpoint, supra,* 139 Idaho at 68, 72 P.3d at 909.

In examining the history of 31-1506, the *Statement of Purpose* behind the statute is first noted. It reads:

> The purpose of this bill is to provide for the appeal of county commissioner decisions in the same manner as judicial review of actions under the Administrative Procedure Act (APA), chapter 52, title 67, Idaho Code.
>
> The current process for appeals is archaic and *inconsistent with other sections of county law. The planning and zoning and medical indigency appeals are conducted as appeals under the APA.*

> The current process of appellate procedure makes the district judge the fourth or "super" commissioner with the ability to overrule the factual determinations and judgments of three individuals.
>
> The *types of decisions that are appealed are administrative or executive in nature* and the more appropriate method would be to use the APA. This method of appeal will protect the rights of those affected by county commission decisions while giving consideration to county commission judgments.

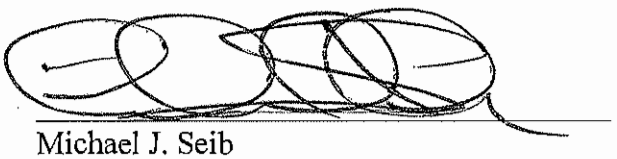
S.L. 1993, ch. 103, § 2 (emphasis added). The emphasized language in the second paragraph shows that the legislature clearly viewed planning and zoning and medical indigency as established areas of law, separate from those that 31-1506 was intended to involve. Also evident is the view that the existing planning and zoning (and medical indigency) procedures for utilizing the APA were considered so proficient and well working that such could serve as an example of how to structure procedures for those areas of law *outside* planning and zoning. The legislature obviously viewed planning and zoning as an area of law not in need of strengthening by the 31-1506 provisions. In other words, there was no recognized deficiency in LLUPA that 31-1506 was intended to fix. Instead, it was meant to provide relief to those other areas of county law that were in fact "broken" by not having APA access. Because planning and zoning already did, the provisions of 31-1506 were not meant to apply to it.

The *other* areas of law that 31-1506 was designed for are identified in the emphasized language in the forth paragraph of the cited *Statement of Purpose*. This language states that the "types of decisions that are appealed [pursuant to 31-1506] are administrative or executive in nature. S.L. 1993, ch. 103, § 2. Zoning decisions under LLUPA are for the most part legislative, which further demonstrates the intended non-applicability of 31-1506 to such decisions.

CONCLUSION

For the reasons stated above, the Petitioner's application for judicial review should be dismissed and the Board's decisions in this matter should be affirmed.

RESPECTFULLY SUBMITTED this 7 day of March 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March 2010, I served two (2) true and correct copies of the within and foregoing document by the method indicated below to the following:

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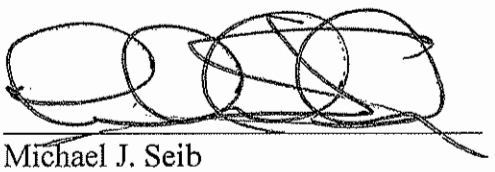

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