3-30-2010

Giltner Dairy, LLC. V. Jerome County Appellant's Reply 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 REPLY TO RESPONDENT'S AND INTERVENOR-RESPONDENT'S BRIEFS

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. INTRODUCTION

On March 8, 2010, 93 Golf Ranch, LLC the Intervenor in this matter, filed its *Intervenor-Respondent's Brief.* Thereafter, on March 9, 2010 Jerome County, Respondent herein, submitted its *Respondent's Brief.* This brief replies to both the Respondent's and Intervenor-Respondent's briefs.

II. ARGUMENTS IN REPLY

A. Idaho Code § 31-1506 does authorize judicial review of quasi-judicial decisions of county boards of commissioners.

Intervenor-Respondent 93 Golf Ranch argues that I.C. § 31-1506 was intended to review administrative decisions of a county board of commissioners only, and not quasi-judicial decisions. It is not entirely clear what Golf Ranch means in drawing a distinction between "administrative" decisions and "quasi-judicial" decisions; it is a basic principle of administrative law that one of the tasks of administrative agencies is to adjudicate those matters placed within their jurisdiction by their enabling statute. *See, e.g., Afton Energy, Inc. v. Idaho Power Co.,* 111 Idaho 925, 928, 729 P.2d 400 (1986). In some of their duties, county boards of commissioners act as administrative bodies authorized to determine contested cases and thus exercise certain quasi-judicial functions. *IHC Hospital, Inc. v. Board of Commissioners,* 108 Idaho 136, 697 P.2d 1150 (1985). If Golf Ranch argues that I.C. § 31-1506 cannot be used to review decisions in which a county board of commissioners applies existing law to facts to resolve a dispute

placed before it, its argument contradicts both the plain language of the statute and the way § 31-1506 and its predecessor statutes have been applied in the past.

First, the plain language of I.C. § 31-1506 authorizes judicial review under the Administrative Procedure Act of "any act, order or proceeding of the board. . . by any person aggrieved thereby." Nothing in the language of the statute limits its application to any particular set of a county board's acts, orders, or proceedings, and nothing excludes quasi-judicial acts, orders or proceedings from its application.

Second, I.C. § 31-1506 or its predecessor statutes have been applied in cases stretching back over a century to authorize judicial review of county actions that can only be characterized as quasi-judicial. For example, in *Latah County v. Hasfurther*, 12 Idaho 797, 88 P. 433 (1907), the court conducted judicial review under a predecessor statute of § 31-1506 of a county order to open a private road and award damages to the owner of the road. In *Fox v. Boundary County Board of Commissioners,* 114 Idaho 940, 763 P.2d 313 (Ct. App. 1988), the Court of Appeals held that judicial review was authorized for a county's determination that a tavern was eligible for a beer license under I.C. § 23-1015. And in *Application of Bennion,* 97 Idaho 764, 554 P.2d 942 (1976), a case bearing some resemblance to the present case, judicial review was conducted under a predecessor statute of § 31-1506 of a county order approving a planned unit development. The argument of Golf Ranch that I.C. § 31-1506 has no application to quasi-judicial decisions of county boards is without merit.

B. This Court's decision in *Burns Holdings* did not hold that no statute authorizes judicial review of a county board of commissioners' rezone decision.

Intervenor-Respondent 93 Golf Ranch places great weight on a statement in *Burns Holdings, LLC v. Madison County Board of Commissioners,* 147 Idaho 660, 214 P.3d 646 (2009) that "there is no specific grant of authority to review the Board's action with respect to the request for rezone, and we may not assume the role of the legislature and grant that authority to ourselves." *Intervenor's Brief,* p. 4. However, *Burns Holdings* did not hold that no statute in the Idaho Code authorizes judicial review of a county's rezone decision. It simply held that the judicial review provisions of the Local Land Use Planning Act (LLUPA) on which *Burns Holdings* relied do not authorize judicial review of a rezone, because these provisions are limited to decisions on permits authorizing development. *Burns Holdings,* 147 Idaho at 663. The issue of whether statutory authority for judicial review existed pursuant to I.C. § 31-1506 was not raised, briefed or argued in *Burns Holdings*, and was not discussed in the Court's opinion. This Court does not review issues not presented in the statement of issues or argued by either party in their briefs. *Rhead v. Hartford Ins. Co. of the Midwest,* 135 Idaho 446, 452, 19 P.3d 760 (2001). As the issue was not raised in the case, *Burns Holdings* could not have held that I.C. § 31-1506 does not authorize judicial review of a county board's rezone decision.

C. Giltner did assert in its petition for judicial review that the rezone decision of Jerome County was illegal.

Intervenor 93 Golf Ranch claims that Giltner has not asserted that the decision of Jerome County was "illegal or prejudicial to the public interest." *Intervenor's Brief,* p. 2. Golf Ranch quotes the statement in *Fox v. Boundary County Board of Commissioners,* 114 Idaho 940, 943, 763 P.2d 313, 316 (Ct. App. 1988) that § 31-1509 (the predecessor statute to § 31-1506) provides a county taxpayer with the right to appeal any act, order or proceeding of the board "when any such act, order or proceeding is illegal or prejudicial to the public interest." Under this standard, Golf Ranch argues, a petitioner must allege that a board action is either illegal or prejudicial to the public interest.

Giltner did make such an assertion in its petition for judicial review. Giltner stated in its petition that "Respondent's actions are in excess of the statutory authority of the Jerome County Commissioners, were made upon unlawful procedure, and are arbitrary, capricious, and an abuse of discretion." *R. at 4-9, 10-15.* An allegation that the Board's actions were in excess of statutory authority and made upon unlawful procedure is clearly an assertion of the illegality of those actions.

D. Any disparity between review of county and city land use decisions that would result from the application of I.C. § 31-1506 to county land use decisions is a result of a positive legislative choice to subject the acts, orders and proceedings of county boards of commissioners to judicial review.

Intervenor 93 Golf Ranch argues it would create an "untenable situation" if zoning decisions of counties could be reviewed and zoning decisions of cities could not be reviewed. *Intervenor's Brief*, p. 4. However, any inconsistency between the availability of judicial review for county zoning decisions and city zoning decisions would simply be a result of a legislative decision to enact a statute subjecting decisions of county boards of commissioners to judicial review. The legislature provided for judicial review of decisions on permits of both cities and counties in the LLUPA. It did not provide in the LLUPA for judicial review of rezone decisions of either counties or cities, but another statute subjects county board decisions generally to judicial review. Golf Ranch's objection that cities and counties would, therefore, be treated differently would apply equally to any other matter that could be brought before a county board or city council, as a decision would be reviewable under § 31-1506 if it issued from a county board, but in the absence of specific judicial review provisions unreviewable if it issued from a city council.

It does not matter that the availability of review under § 31-1506 would create the asymmetric result that county board rezone decisions would be reviewable while city council rezone decisions would not be reviewable. The legislature chose to enact a statute allowing review of county board decisions generally while it has not enacted a similar statute allowing

review of city council decisions. Unless prohibition is found in the Idaho Constitution, the Idaho legislature has plenary authority to legislate on any subject. *Flores v. State,* 109 Idaho 182, 706 P.2d 71 (1985). The Respondents have stated no reason why the legislature could not choose to subject the "acts, orders and proceedings" of a county board of commissioners to judicial review without providing for similar review of decisions of city councils.

E. No provision of the LLUPA triggers the "otherwise provided by law" exception contained in I.C. § 31-1506.

Respondent Jerome County places great emphasis on the number of provisions in the LLUPA containing language relating to judicial review. Jerome County essentially argues that the legislature "surgically inserted" judicial review language in LLUPA provisions governing those matters it wished to be subject to judicial review, and omitted judicial review language from those provisions it did not wish to be subject to judicial review. *Respondent's Brief,* pp. 3-5. If the legislature really intended to permit judicial review only of those matters governed by provisions that contain judicial review language, it could then be concluded that the legislature intended no judicial review of a grant or denial of a special use permit, governed by § 67-6512, because that section contains no "judicial verbiage." The legislature presumably would also have intended to prohibit judicial review of the grant or denial of subdivision permits under § 67-6513, and planned unit development permits under § 67-6515, because neither of these sections specifically authorizes judicial review. The judicial review provision contained in I.C. § 67-6521, which authorizes judicial review of all decisions relating to permits under the LLUPA,

would be rendered a nullity. In construing a statute, it should not be presumed that the legislature enacted meaningless provisions, and effect should be given to all provisions of the statute so that no part is rendered superfluous or insignificant. *Brown v. Caldwell School District No. 132,* 127 Idaho 112, 117, 898 P.2d 43 (1995). The legislature must have intended that § 67-6521 be applicable to all sections of the LLUPA relating to permits, whether or not those individual sections contain references to judicial review.

Likewise, the legislature would not have enacted I.C. § 31-1506 if, as Jerome County suggests, it did not intend it to be applicable to matters where specific authorization of judicial review is absent. The legislature provided a process for judicial review of decisions relating to permits in the LLUPA, but did not provide a specific process for judicial review of rezone decisions. "[A] particular pertinent statute will prevail over a general pertinent statute, *but only* 'to the extent of any necessary repugnancy between them', or 'in case of necessary conflict', or if the particular and the general statute 'are necessarily inconsistent.'" *Christensen v. West,* 92 Idaho 87, 90-91, 437 P.2d 359 (1968) (emphasis in original). Regardless of how many judicial review provisions the LLUPA contains, it does not contain a single provision that prohibits judicial review of rezone decisions. If the legislature truly intended to prohibit any judicial review of a rezone, it could have included in the LLUPA a specific prohibition of judicial review of a rezone, but it did not.

There is no reason why multiple "gateways" to judicial review under the Administrative Procedure Act cannot exist. *Fox v. Boundary County Board of Comm'rs,* 114 Idaho 940, 942,

763 P.2d 313, 316 (Ct. App. 1988). In *Fox,* the Court of Appeals held that a judicial review provision in I.C. § 23-1015 only provided judicial review for an applicant for a beer license, and not for any other affected person. However, it held that I.C. § 31-1509 did provide a right to judicial review for a county taxpayer aggrieved by the decision. *Id.* at 943. If the LLUPA does not create a right to judicial review of a rezone, § 31-1506 does create such a right for a party aggrieved by the rezone decision of a county board "unless otherwise provided by law." The LLUPA does not provide otherwise.

F. Intervenor-Respondent 93 Golf Ranch is not entitled to attorney's fees on appeal.

Intervenor-Respondent 93 Golf Ranch claims it should be awarded attorney's fees under I.A.R. 11.2. That rule provides that attorney's fees may be awarded on appeal against a party whose appeal is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and is interposed for an improper purpose such as to harass or cause unnecessary delay. As discussed above, contrary to Golf Ranch's assertions no decision of this Court has held that judicial review of a county rezone decision is not available under I.C. § 31-1506. Giltner has presented a novel issue on appeal of whether or not I.C. § 31-1506 authorizes judicial review of the rezone decision of a county board of commissioners, and, therefore, an award of attorney's fees is not appropriate.

III. CONCLUSION

For the foregoing reasons, Giltner respectfully requests that the trial court's order dismissing its Petition for Judicial Review be reversed, and that costs and fees be denied to Respondents.

DATED this 30 day of March, 2010.

WHITE PETERSON

Davis F. VanderVelde
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 30th day of March, 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	_X_ U.S. Mail _____ Overnight Mail _____ Hand Delivery _____ Facsimile
Michael J. Seib JEROME COUNTY PROSECUTOR 233 West Main Street Jerome, ID 83338	_X_ U.S. Mail _____ Overnight Mail _____ Hand Delivery _X_ Facsimile: (208) 644-2639
Gary D. Slette ROBERTSON & SLETTE, PLLC 134 Third Avenue East P.O. Box 1906 Twin Falls, ID 83303-1906	_X_ U.S. Mail _____ Overnight Mail _____ Hand Delivery _X_ Facsimile: (208) 933-0701

for WHITE PETERSON

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