8-12-2014

Arnold v. City of Stanley Respondent's Brief Dckt. 41600

In the Supreme Court of the State of Idaho

Supreme Court Case No. 43610-2013
41600

THOMAS ARNOLD and REBECCA ARNOLD,

Plaintiffs-Appellants

vs.

CITY OF STANLEY, a political subdivision in the State of Idaho,

Defendant-Respondent.

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Custer County
Case No. CV 2012-142
Hon. Alan C. Stephens, presiding

Attorney for Defendant - Respondent on Appea

Paul J. Fitzer, ISB No. 5675
MOORE SMITH BUXTON & TURCKE, CHTD.
950 West Bannock Street, Suite #520
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: pjf@msbtlaw.com

Attorneys for Plaintiff - Appellant:

Thomas J. Lloyd, III
GREENER BURKE SHOEMAKER
OBERRECHT, P.A.
950 W Bannock St, Ste 950
Boise, ID 83702
Telephone: (208) 319-2600 Ext.
Facsimile: (208) 319-2601
Email: tlloyd@greenerlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I.
STATEMENT OF THE CASE

Tom and Rebecca Arnold ("Arnold") appeal the district court's decision granting summary judgment to the City of Stanley ("City) on the basis that Arnold lacked standing to challenge various Open Meetings Act violations[1] pursuant to Idaho Code §67-2347(6) where Arnold failed to allege much less prove that she was "*affected by a violation* of the provisions of this act".[2] The alleged violations pertained solely to the City's commencement of a public meeting/hearing earlier than as noticed. Because Arnold did not attend the meeting at all nor attempt to attend instead relying upon her written testimony which was read into the record, the district court found nothing in the record to support a claim that Arnold was affected by the early starting time.

> This is not a case where a party planned on making comment but was unable to do so because of the early starting time. On the contrary, there is no evidence that Plaintiffs would have made additional comment as to the matters before the City but for the early starting times. As to Plaintiffs, the early start times were inconsequential and as such, Plaintiffs were not adversely affected by the violation. [3]

Because the essential nexus; i.e. fairly traceable causal connection between the injury and the challenged conduct[4] is absent, Arnold did not have standing to use Idaho Code §67-2347(6) open meetings action as a means to substantively challenge a disfavored zoning ordinance provision.

---

[1] Idaho Code §§67-2340 to 67-2347.
[2] Idaho Code §67-2347(6) (emphasis added)
[3] R. 183, L. 1-5.
[4] *Rural Kootenai Org., v. Board of Com'rs,* 133 Idaho 833, 841, 993 P.2d 596, 604 (1999); *Student Loan Fund of Idaho, Inc. v. Payette County,* 125 Idaho 824, 828, 875 P.2d 236, 238 (Ct. App. 1994). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

On appeal, Arnold concedes that her ability to attend/testify at the hearing was not frustrated by the early meeting times. Rather, against the plain unequivocal text, she wishes to limit this Court's inquiry to only two words: "affected by". She believes the plain text should be interpreted to provide standing to any "property owner whose property interests are actually adversely affected by the governmental action taken in violation of the Open Meeting Law."[5] Her argument that standing is afforded to not only those affected by a violation of the open meetings laws, but to those affected by the underlying legislation under consideration is without a reasonable basis in fact or law.

Procedural due process rights, of which the open meetings laws seek to preserve, protects the procedural rights of the particular litigant to attend and participate in a public meeting. Merely because Citizen A was prevented from testifying due to an early meeting time does not vest citizens B through Z with standing pursuant to Idaho Code §67-2347(6)merely because they allege the underlying zoning ordinance impacts their development rights. If the ordinance amounts to a taking of one's property or is otherwise arbitrary and capriciousness, there are independent actions to substantively challenge an ordinance. The Open Meetings Act is not a forum to do an end-around the basic law of standing requiring a causal nexus between the injury/prejudice suffered and the complained of procedural error. This is a basic foundation of law governing what is and what is not a justiciable case or controversy.

[5] Appellants Opening Brief, p. 13, l. 3-4.

A. Statement of Pertinent Facts.

As clearly depicted on the duly posted and published meeting notices,[6] agenda,[7] the duly adopted meeting minutes, [8] and the transcript, [9] the council meeting for August 9, 2012 began at 5:03 p.m. and continued until its adjournment at 6:55 p.m. The City Clerk emailed Arnold a copy of the agenda, a copy of the proposed Ordinance 188 FY13 Budget, and the proposed Zoning Ordinance 189 on August 7th, 2012.[10] Arnold in turn requested that the City Clerk read her written testimony into the record, which he did. [11] Arnold sought to enjoin the entirety of City's annual budget for 2013 based solely upon the City's purported failure to publish and post legal notice for what Arnold refers to as the "5:25 p.m. Hearing". The notices and agenda advertised a public hearing to take place on August 9, 2012 at 5:30 p.m. for the public to provide comment on Ordinance 188 regarding the City of Stanley's FY2013 Budget. Because the hearing began five minutes early ("5:25"), Arnold asserted that the district court erred in failing to declare the City's annual budget void. Arnold appears to concede this issue on appeal. Similarly with regard to Ordinance 189, the notices and agenda advertised a public hearing at 5:00 p.m. The City Council's deliberation of Ordinance 189 was to take place on the City's regular agenda which was advertised to begin at 6:00 p.m. [12] The public hearing began at 5:03

---

[6] R. 101, 103.
[7] R. 105-107. The duly published agenda provided notice of three public hearings to take place on August 9, 2012, to wit: 1) 5:00 p.m. for public comment on Ordinance 189l; 2) 5:15 pm for public comment on variance application; and 3) 5:30 pm for public comment on the City of Stanley Budget for FY 2013.
[8] R. 109-114.
[9] R. 130-137
[10] R. 144
[11] R. 105-107, 109
[12] R. 101, 105.

p.m.[13] At the close of the public hearings, the City opened the general meeting at 5:31 p.m. We do not know exactly when the City Council deliberated on Ordinance 189 except that it was between 5:31 p.m. and 6:55 p.m. Ordinance 189 was the 14th out of 18 agenda items. The most pertinent fact in this action is that Arnold did not to attend the meeting at all whether at 5 p.m. 5:30 p.m., or 6:55 p.m.[14] However, whether 5:00, 5:03, 5:31, 6:00 or up to adjournment at 6:55, and there is no evidence that she was deprived of a right to address any of the items on the agenda. Nonetheless, Arnold contends that the mere existence of the open meetings violation is a trigger or a gate-key to attacking the underlying zoning ordinance to anyone who believes the zoning ordinance text might impact her development rights.[15]

II.
ATTORNEY FEES ON APPEAL

The City seeks attorney fees and costs incurred in defending this action on appeal in accordance with Idaho Code §12-117 and Idaho Appellate Rules 40 and 41 for the reason that Arnold brought this cause of action without a reasonable basis in fact or law nor reasonable extension thereof.

---

[13] R. 109.

[14] R. 109-114.

[15] On page 5 of her brief, Arnold claims that a zoning provision setting a minimum lot width with street frontage renders her lot "unbuildable" and that this fact is undisputed (see also page 1). This fact is most certainly disputed and her legal conclusion is spurious. Notably, at the hearing Council Member Botti read into the record a prepared statement addressing this issue. R. 117. Any preexisting lot that does not have the requisite minimum street frontage is grandfathered in as a vested right. Whether it be side setbacks, lot widths, street frontage, the law is abundantly clear that the myriad of lots that came into existence after WWII that do not meet "modern" setback / width requirements are nonetheless buildable. To rule otherwise would amount to a taking. This is all academic. Arnold has not applied for and been denied a building permit and thus any takings claim is not as yet ripe nor has Arnold brought a substantive challenge to the ordinance itself. Rather, this action is limited to what harm if any she has suffered by virtue of starting the meeting earlier than advertised.

III.
ARGUMENT

A. The District Court correctly determined that Arnold lacks standing to challenge an open meetings violation where there is no evidence that she was affected by the alleged violation, i.e. early meeting times.

Arnold appeals the district court's decision that she lacks standing to allege various violations of the open meetings laws pursuant to Idaho Code §67-2347(6) as a means to overturn a disfavored zoning ordinance where she was unaffected by the city's commencement of the meeting earlier than noticed. The threshold issue in this case turns upon the district court's interpretation of Idaho Code §67-2347(6) which empowers a private right of action for "[a]ny person *affected by a violation* of the provisions of this act". (emphasis added). Arnold wishes to take the two words "affected by" out of context by arguing that standing is afforded not only to one affected by a violation of the act, but to any "property owner whose property interests are actually adversely affected by the governmental action taken in violation of the Open Meeting Law."[16]

1. Standard of Review

This Court exercises free review over matters of statutory interpretation.[17] The interpretation of a statute

> must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.[18]

---

[16] Appellants Opening Brief, p. 13, l. 3-4.
[17] *KGF Dev., LLC v. City of Ketchum*, 149 Idaho 524, 527, 236 P.3d 1284, 1287 (2010) (quoting *State v. Doe*, 147 Idaho 326, 327, 208 P.3d 730, 731 (2009))
[18] *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)).

"We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature."[19]

2. "...affected by a *violation* of the ... [open meetings] act

That the hearings/deliberations began early is not at issue. The notice and agenda advertised a public hearing to begin at 5:00 p.m. for public comment on Ordinance 189; a zoning ordinance. It began at 5:03 where notably the City Clerk read into the record Arnold's written testimony. Similarly the duly published notice and agenda advertised a public hearing to begin at 5:30 p.m. for public comment on Ordinance 188 City of Stanley Budget for FY 2013. It began at 5:25. The agenda additionally stated that the City Council's deliberation of Ordinance 188 and 189 would occur during the regular council meeting beginning at 6:00 p.m. However, soon after the public hearing was closed, the City convened the regular meeting at 5:31 p.m. which later adjourned at 6:55 pm. We do not know exactly when the deliberations of Ordinance 188 and 189 occurred in that time frame. What we do know is that Arnold did not attend at any point that evening.

3. Fairly Traceable Causal Connection: Standing is afforded only to those affected by the open meetings act violation

Arnold spends considerable time in her brief articulating the spirit and purpose of the open meetings laws which she articulates were intended to "afford broad protections ... ensuring access to meetings". Ensuring a citizen's access / participation to a public meeting reflects a

[19] *Verska*, 151 Idaho at 893, 265 P.3d at 506 (quoting *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

citizen's procedural due process right. Due process rights derive from the Fifth Amendment of the U.S. Constitution, applicable to the states via the Fourteenth Amendment. Idaho's Constitution also guarantees due process. As its name implies, procedural due process deals with the procedural rights of the particular litigant. Quite the opposite from Arnold's assertion, due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation.[20] Procedural due process requires some process to ensure that the individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard.[21]

Arnold does not assert that she was denied access to a meeting and therefore the district court correctly determined that Arnold was not affected by the open meetings violation; the early starting times. Put simply, she did not attend the meeting instead relying upon her written testimony which was read into the record. Thus, whether at 5:00 p.m., 5:03 p.m., 5:25 p.m., 5:30 p.m., or up to adjournment at 6:55 pm, Arnold was not affected by the early starting times. As the district court reasoned,

> The alleged violation necessarily refers to the starting time of the hearings, not the ultimate action taken at the hearing. Here, there is nothing in the record to support a claim that the Plaintiffs were affected by the early starting time. This is not a case where a party planned on making public comment but was unable to do so because of the early starting time. On the contrary, there is no evidence that Plaintiffs would have made additional comment as to the matters before the City but for the early starting times. As to Plaintiffs, the early start times were
>
> violation. ... While the evidence establishes that the subject meetings were started early contrary to public notice, there is no evidence that the early start times had

[20] *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006).
[21] *Id.*

> an effect on Plaintiffs' ability to be present at the meetings and/or be heard. As such, Plaintiffs are not an "affected party" and do not have standing under § 67-2347(6) to seek to void the action taken at the meeting.

While the statute clearly limits standing to one affected by a violation of the act; the early meeting time is seemingly irrelevant to Arnold. Rather, Arnold is dissatisfied, "actually affected", with the result; the zoning ordinance itself. Arnold asserts that the district court interpreted Idaho Code §67-2347(6) too narrowly. Apparently conceding that the early starting times did not affect her ability to testify or attend the meeting, she nonetheless asserts that standing under §67-2347(6) is not limited to those "affected" by the open meeting act violation. Without citing to a case in support, Arnold asserts that the two words: "affected by" should be extended to any property owner dissatisfied or "actually affected" by the underlying substantive result; the text of the zoning ordinance. This virtually throws open the courthouse doors. Although a citizen may have attended and testified at a hearing for a proposed zoning ordinance amendment, standing would nonetheless be afforded under Idaho Code §67-2347(6) as a means to substantively challenge a zoning ordinance regardless of whether there is causal connection between the procedural error and individual litigant's prejudice to a substantial right to attend the hearing. The mere existence of a procedural error becomes a pretense to overturn the ordinance itself.

Arnold's interpretation is inconsistent with the plain text of Idaho Code §67-2347(6) and the considerable case precedent governing the law of standing. The statute unequivocally limits standing to those affected by a violation of the act not to those incidentally affected, even harmed, by the underlying zoning legislation. While it is understood that Arnold disagrees with

the legislative zoning enactment, she was unaffected by the early starting time as she did not attend the hearing but ably cited her reasons against the zoning amendment in writing which was read into the record. As this Court noted in *Halvorson v. North Latah County Highway District,* 151 Idaho 196, 204, 254 P.3d 497, 505 (2011), the right to procedural due process does not require that the challenging party prevail on an issue; merely that they have notice and opportunity to be heard. Arnold readily points out that the open meetings laws exist to ensure the public's access to a public meeting/hearing, but she fails to understand that where she has exercised this right, the open meetings laws are not the proper medium to substantively challenge the results of the legislative zoning enactment.

The required causal connection between the injury and the complained conduct is grounded in Idaho's case law. It is not enough for Arnold to merely allege an open meetings act procedural error to overturn a law. To have standing, the attacking party bears the burden to allege and thereafter demonstrate not only that the governing board erred procedurally but how *her* right to procedural due process has been deprived[22] *by virtue of* the challenged governmental

---

[22] Under the well-established U.S. Supreme Court precedent of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the constitutional requirements to establish Article III standing boil down to three requirements: injury in fact, causation, and redressability.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection ... Third, it must be "likely," as opposed to "speculative," that the injury will be "redressed by a favorable decision."

Id. Arnold believes that the open meetings law operate outside a particular litigant's Article III standing may be totally dispensed with.

conduct.[23] Similarly, Idaho Code §67-2347(6) standing is afforded only to one "affected by a violation ... of the act". Arnold's claim lacks the essential causality or nexus linking the alleged harm to the complained of conduct.

4. Injury / Redressability: The means to attack the validity of an ordinance

Having failed to attend the meeting nor been denied an attempt at so doing, Arnold is not affected by a violation of the open meetings act and thus she lacks standing under Idaho Code §67-2347(6) to bring such a *procedural* challenge.[24] Rather, her injury, if any, is attributable to the text of the zoning ordinance itself; a *substantive* challenge to the zoning ordinance, which she claims has adversely affected her development rights. In other words, it is not the City's violation of the open meetings laws that have adversely affected her development rights, but the text of the zoning ordinance itself; the validity of which may be challenged in a takings action or declaratory judgment action; not pursuant to Idaho Code §67-2347(6). Further, since Arnold

---

[23] *Ciszek v. Kootenai County,* 151 Idaho 123, 133-134, 254 P.3d 24, 34-35 (2011); In *Ciszek v. Kootenai County,* the Supreme Court held that while Ciszek may have had standing to challenge a rezone of contiguous parcels for alleged procedural violations, this did not equate to a plaintiff's denial of due process or entitlement to injunctive relief.

> [T]here is no allegation that Appellants did not receive notice of the hearings or that they were unable to attend and speak at the hearings like the petitioner in *Gay.* ... "Appellants were given adequate opportunity to express their views. There simply is no ground to claim that Appellants' due process rights were violated by the procedure employed.

151 Idaho at 130, 254 P.3d at 31; See also *Cowan v. Bd. Of Comm'rs of Fremont County,* 143 Idaho 501, 513, 148 P.3d 1247, 1259 (2006). In *Cowan*, the court noted:

> [T]he Board concedes that both notices were defective. Nonetheless, Cowan has failed to demonstrate that his substantial rights were prejudiced by either defective notice. First, Cowan's counsel attended the ... hearing and submitted a brief objecting to notice. Moreover, Cowan spoke against the application at that hearing. Therefore, even if the notice were defective, Cowan has failed to demonstrate how this defect prejudiced his substantial rights since he clearly had notice of the meeting.

Id.

was not affected by the early meeting, her "injury" cannot be redressed by a favorable decision insofar as she been afforded all of the due process that she is entitled.

IV.
ATTORNEY FEES

The City may recover their reasonable costs and attorney fees pursuant to Idaho Appellate Rules 40 and 41 and Idaho Code §12-117 where it can show that the non-prevailing party acted "without a reasonable basis in fact or law".[25] Idaho Code §67-2347(6) is clear and unequivocal affording standing only to one affected by a violation of the open meetings act.[26] Ignoring the plain and unambiguous statutory text, Arnold merely takes the two words "affected by" out of context rationalizing that standing ought to be afforded to any "property owner whose property interests are actually adversely affected by the governmental action taken in violation of the Open Meeting Law."[27] Given the plethora of case law requiring a causal connection between the alleged injury / deprivation of a right and the complained conduct, Arnold knowingly brings this action under false pretenses.

The question presented to the district court is whether Arnold was "affected by a violation of the... act." The alleged violation is an early meeting time. Arnold fails to allege much less demonstrate that she was affected by the early meeting time. She did not attend the public meeting at all and therefore whether the meeting/hearings began earlier than noticed is of no consequence to Arnold. Thus, there is no reasonable basis in fact or law. At best, her

[25] *Alpine Village Co. v. City of McCall,* 303 P.3d 617, 154 Idaho 930 (2013)
[26] See *Gardiner v. Boundary County,* 148 Idaho 764, 229 P.3d 369 (2010) where the Board ignored the plain and unambiguous text of Idaho Code 67-6512; See also *Lattin v. Adams County,* 149 Idaho 497, 236 P.3d 1257 (2010).
[27] Appellants Opening Brief, p. 13, l. 3-4.

development rights have been impacted by virtue of the text of the zoning ordinance, which she ably addressed in her written testimony. If she can make a case that the zoning ordinance amounts to a taking of her property or is otherwise arbitrary and capricious then she can readily bring such an action.

However, there can be no reasonable argument in fact or law that Idaho Code §67-2347(6) can perform an end-around of this process by utilizing an unrelated *di minimus* procedural error to overturn a zoning ordinance. The effect would be to throw open the courthouse doors to any litigant who, although unable to prevail in a takings claim, can nonetheless challenge an ordinance under a false pretense. The open meeting laws merely ensure the forum; the right of a citizen to have notice and an opportunity to be heard at that forum. Having exercised this right, Arnold now is attempting to clothe her dissatisfaction with the zoning ordinance in this procedural challenge. The district court correctly granted summary judgment in favor of the City and Arnold lacks a reasonable basis in fact or law on appeal.

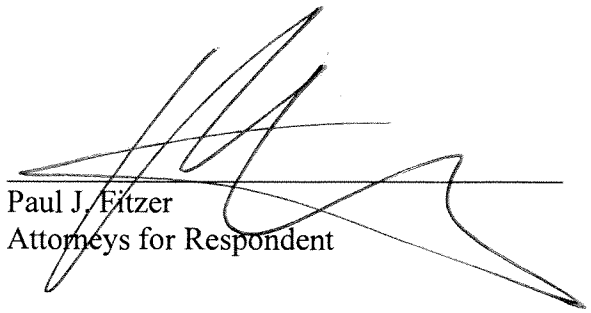
V.
CONCLUSION

The City requests that this Court affirm the district court's summary judgment order dismissing this cause of action and award the City its reasonable costs and attorney fees and costs incurred in this matter pursuant to Idaho Code §12-117, and Idaho Appellate Rules 40 and 41.

* * *

August 12, 2014

MOORE SMITH BUXTON & TURCKE, CHTD.



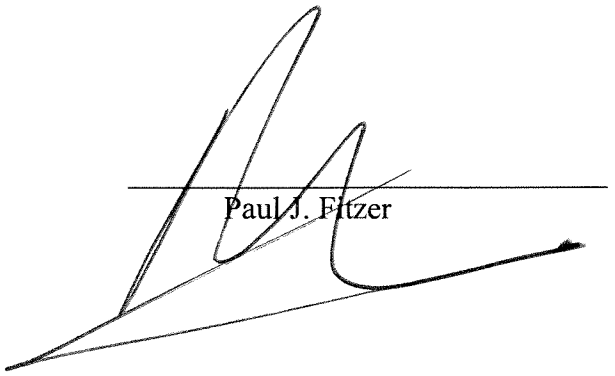
Paul J. Fitzer
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of August 2014, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** by the method indicated below, and addressed to the following:

Fredric V. Shoemaker
GREENER BURKE SHOEMAKER
OBERRECHT, P.A.
950 W Bannock St, Ste 950
Boise, ID 83702

x Mailed
___ Facsimile
___ Hand-delivered
x E-Mail: fshoemaker@greenerlaw.com



Paul J. Fitzer