6-21-2018

Aspen Park, Inc. v. Bonneville County Respondent's Brief Dckt. 45679

IN THE SUPREME COURT OF THE STATE OF IDAHO

ASPEN PARK, INC., Plaintiff-Appellant, v. BONNEVILLE COUNTY, Defendant-Respondent.	Docket No. 45679

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville, Case No. CV-2017-3587

Honorable Judge Joel E. Tingey, Presiding District Judge

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STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal filed by Aspen Park, Inc. requesting this Court reverse the district court's ruling (Honorable Joel E. Tingey) on summary judgment in favor of Bonneville County. The district court correctly held that the plain language of I.C. § 63-602GG precluded Appellant from qualifying for a low-income housing property tax exemption where not all of Appellant's units were dedicated to that purpose. Instead, Appellant leases some of its units to tenants who are not considered low-income, as prescribed by statute.

B. Course of Proceedings

On March 10, 2016, Appellant requested a property tax exemption from Bonneville County under I.C. § 602GG. Sitting as a Board of Equalization, the Bonneville County Commissioners denied this request on May 9, 2016. R. pp. 15-17.

Appellant then appealed to the Idaho Board of Tax Appeals on June 28, 2016. R. p. 13. After hearing, the Idaho Board of Tax Appeals reversed the Board of County Commissioners, asserting that the tax exemption was proper. R. pp. 429-437. However, Bonneville County filed for reconsideration on April 5, 2017. R. pp. 440-443. After considering briefing from both parties, the Idaho Board of Tax Appeals reversed itself, holding that because not all of the units were dedicated to low income housing, the property tax exemption was inappropriate. R. pp. 457-464. Appellant moved for reconsideration of this decision on May 8, 2017, claiming the statute was ambiguous. R. pp. 466-469. But the Idaho Board of Tax Appeals disagreed and denied reconsideration. R. pp. 493-494.

On June 20, 2017, Petitioner filed for Judicial Review before the Seventh Judicial District Court. R. pp. 497-499. On September 8, 2017, Bonneville County moved for summary

judgment, alleging no issue of material fact existed, and that the issues before the district court pertained only to application of law to the facts. R. p. 901. After much briefing and argument on summary judgment, the Honorable Joel E. Tingey agreed with Bonneville County that Appellant's use of its property was not consistent with the non-profit low-income property tax exemption statute because Appellant was not using all of its property for low-income housing. R. pp. 961-967.

Judgment was entered on October 23, 2017. R. p. 969.

On December 1, 2017, Appellant timely appealed to this Court. R. p. 971-974.

C. Statement of Facts

The facts are not in dispute. Appellant is a 501(c)(3) non-profit organization for income tax purposes. R. p. 48. Appellant owns 72 units. *Id.* Appellant also is also subject to a Section 42 regulatory agreement that on page 5 requires 76% of Appellant's units (not less than 54 units) remain designated as low-income units. *See Regulatory Agreement* R. pp. 70-92, *Agreement of Limited Partnership* R. pp. 94-157, *Redemption Agreement* R. pp. 172-186. This agreement remains in place until 2023 (15 year compliance period plus another 15 years after the compliance period). R. p. 77. Appellant even recently acknowledges its property is Section 42 housing. R. p. 423. Despite its designation as Section 42 housing, Appellant filed a request for a complete property tax exemption as a non-profit organization under I.C. § 63-602GG rather than requesting property tax relief as Section 42 housing under I.C. §63-205A.

Of Appellants 72 units, Appellants represented that as of June 15, 2016, these units were occupied as follows:

ASPEN PARK	
Median Income	**% of Units (# of Units)**
≥ 60%	**≈ 16.66% (12 Units)**
≤ 60% - > 50%	≈ 8.33% (6 Units)
≤ 50% - > 30%	≈ 34.72% (25 Units)
≤ 30%	≈ 27.77% (20 Units)
Vacant	≈ 12.50% (9 Units)
TOTAL UNITS	100% (72 Total Units)

R. p. 33-35.[1] Appellant acknowledges that 12 units have been rented to individuals whose income exceeds the 60% county median income threshold. *See Appellant's Brief*, p. 3.

Because these 12 units exceed the low income classifications contained in I.C. § 63-602GG, Appellant has been denied a tax exemption.

ISSUE ON APPEAL

Is Appellant entitled to the property tax exemption where Appellant fails to meet the statutory burden of having "all" of its units dedicated to low income housing?

STANDARD OF REVIEW

"Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

[1] Please note that prior versions of Respondent's calculations presented to the lower court referred to the apartment counts that are contained on R. p. 192-195, which only account for between 62 and 63 units—likely due to vacancies. Apparently, the chart on R. p. 33-35 includes all 72 units. Though the percentages change slightly due to the charts that are used, the principles outlined in this brief remain the same, as a number of the units are rented to individuals whose income exceed the 60% of the county median income.

that the moving party is entitled to a judgment as a matter of law.'" I.R.C.P. 56(c); *Arreguin v. Farmers Ins. Co. of Idaho,* 145 Idaho 459, 460, 180 P.3d 498, 500 (2008).

Once the moving party establishes the absence of a genuine issue the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact. *Thomson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 530-31, 887P.2d 1034, 1037-38 (1994).

Summary judgment is mandated when a party is entitled to judgment as a matter of law. I.R.C.P. 56(a); *Myers v. A.O. Smith Harvestor Products, Inc.,* 114 Idaho 432, 437 (Ct. App. 1988), meaning that if there is no cognizable defense, then there are no genuine issues of material fact and as a matter of law, the motion for summary judgment should be granted.

Further,

> Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder. *Cameron v. Neal,* 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997). This Court exercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences.

P.O. Ventures, Inc. v. Loucks Family Irrevocable Tr., 144 Idaho 233, 237, 159 P.3d 870, 874 (2007).

ARGUMENT

I. SEPARATION OF POWERS PRECLUDES THIS COURT FROM DEVISING AN INTERPRETATION NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE STATUTE.

This case is essentially one of statutory interpretation and the separation of powers. Appellants request this Court enforce an *interpretation* of statute, rather than follow the *plain language* of the statute enacted by the legislature. In short, Appellants request that this Court legislate. The Constitution of the State of Idaho mandates:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Idaho Const. Art. II, § 1. This constitutional article is consistent with the United States Supreme Court decision of *Marbury v. Madison*, 5 U.S. 137, 148 and 176. 2 L. Ed. 60 (1803). Eighty-seven (87) years before Idaho became a state, the United States Supreme Court held the Constitution of the United States confers original jurisdiction to one of three branches of government, which are not to be encroached upon by other branches. "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? [. . .] The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." *Id.* at 176–77. Perhaps not so eloquently restated, our constitution is either the supreme law of the land or it isn't. If the supreme law of the land establishes boundaries, each branch of government is to act within those tried and true boundaries, not beyond them.

The Constitution of the State of Idaho establishes the same separation of powers boundaries as the United States. It empowers the legislature to enact laws and the courts to interpret and enforce the laws. Idaho Const. Art. III and V. It is therefore imperative courts resist the temptation of delving into the power of legislating.

This Court has appropriately remained sensitive to this separation of powers and enforcing the intent of the legislature by following the plain language of the statutes:

> The interpretation of a statute is a question of law over which we exercise free review. *State v. Schwartz,* 139 Idaho 360, 79 P.3d 719

> (2003). It 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. *Id.* If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. *Id.* [. . .] If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial. *Id.*

State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004) *abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011).

Citing several Idaho Supreme Court decisions, the Idaho Court of Appeals also reasoned:

> The interpretation of a statute begins with its literal words. Those words must be given their plain, obvious, and rational meaning. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. A statute is ambiguous where the language is capable of more than one *reasonable* construction. Ambiguity is not established merely because different interpretations are presented by the parties. If that were the test then all statutes whose meanings are contested in litigation could be considered ambiguous. **"[A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it."** *2007 Legendary Motorcycle,* 154 Idaho at 354, 298 P.3d at 248.

Bonner Cty. v. Cunningham, 156 Idaho 291, 295, 323 P.3d 1252, 1256 (Ct. App. 2014) (*Citations omitted, bold emphasis added*); *see also Verska*, 151 Idaho at 892, 265 P.3d at 505.

In 2011, this Court also clarified this principal while still affirming the constitutional principal of separation of powers:

> [W]e have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City,* 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Indeed, the contention that we could revise an unambiguous statute because we believed it was absurd or would produce absurd results is itself illogical. "A statute is ambiguous where the language

> is capable of more than one reasonable construction." *Porter v. Board of Trustees, Preston School Dist. No. 201,* 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). An unambiguous statute would have only one reasonable interpretation.

Verska, 151 Idaho at 896, 265 P.3d at 509.

In this case, Appellant requests this Court cross the boundary between the judicial and legislative branches of government by using astute minds to devise an interpretation of a very plain statute. Instead, this Court should follow the plain language of the statute.

II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES 100% OF THE HOUSING UNITS BE RENTED BY LOW INCOME OCCUPANTS.

Because Appellant has not dedicated all of its units to low income housing, it is not entitled to the low-income housing property tax exemption under I.C. § 63-602GG.

Before getting stuck in a mire of federal regulations regarding safe harbors that are not controlling over state law, it is imperative to remember this case is about the exemption of ***property*** taxes imposed by Idaho counties, NOT the exemption of ***income*** taxes imposed by the federal government[2]. Understanding this distinction debunks the temptation to consider federal regulations that muddy and then interpret an otherwise plain state statute.

I.C. § 63-603GG allows county commissioners to grant a local property tax exemption for properties belonging to non-profit companies that are entirely dedicated to low income housing. The statute plainly defines ***how*** this dedication takes place:

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[2] Appellant improperly addresses whether its organization falls under safe harbors of § 501(c)(3). A 501(c)(3) designation is merely a threshold requirement to even apply for this property tax exemption. *See* I.C. § 63-602GG(2)(b). Instead, the property tax exemption statute focuses on the actual practices and performance of the 501(c)(3) organization. Bonneville County does not contest Appellant's 501(c)(3) designation. Instead, Appellant simply fails to meet the performance requirements of the property tax exemption statute.

> (3) In order to qualify for the exemption provided in this section, the low-income housing property **shall** meet the following qualifications:
>
> [. . .]
>
> (c) Except for a manager's unit, **ALL of the housing units** in the low-income housing property **are dedicated to low-income housing IN THE FOLLOWING MANNER**: Fifty-five percent (**55%**) of the **units** shall be **rented** to those earning sixty percent (60%) or less of the median income for the county in which the housing is located; twenty percent (**20%**) of the **units** shall be **rented** to those earning fifty percent (50%) or less of the median income of the county in which the housing is located; **AND** twenty-five percent (**25%**) of the **units** shall be **rented** to those earning thirty percent (30%) or less of the median income for the county in which the housing is located.

I.C. § 603GG(c)(3). *Emphasis added.*

A. Denial of the Property Tax Exemption Was Appropriate Where the Statute is Conjunctive, Not Disjunctive.

Three key words in this statute require that property tax applicants must be completely committed to low income housing with all of their units to qualify for the property tax exemption: "ALL", "AND", and "SHALL". Why would the statute say "ALL of the housing units" if the legislature really meant "some" or "most" of the housing units? Why would the statute use the conjunctive word "AND" when connecting the income classifications if the legislature really meant to use the disjunctive term "or"? Why would the statute say "SHALL", if the legislature really meant "should" or "may"? The legislature did not err in its language. It can be no coincidence with words like "all", "and", and "shall" that the sum total of the percentages of both the units and the income classifications in the statute add up to exactly 100% in order to qualify for the exemption. Clearly the legislature meant what it said.

Appellant argues that it qualifies for this exemption when Appellant rents 12 of its 72 units (about 17%) to individuals who exceed the 60% of the county median income. The demographics of Appellant's units are as follows:

ASPEN PARK	
Median Income	**% of Units (# of Units)**
≥ 60%	**≈ 16.66% (12 Units)**
≤ 60% - > 50%	≈ 8.33% (6 Units)
≤ 50% - > 30%	≈ 34.72% (25 Units)
≤ 30%	≈ 27.77% (20 Units)
Vacant	≈ 12.50% (9 Units)
TOTAL UNITS	100% (72 Total Units)

In this manner, not all of the units are used for low income housing. In fact, about 17% of the units are **not** used for low-income housing. Therefore, the property tax exemption cannot apply.

Appellant has argued an application of this statute to "all of the housing units" is unreasonable, as doing so would require 100% occupancy of the units. We must presume the legislature meant what it said. Whether and how units will qualify for this property tax exemption is an operational business consideration that a landlord has to make before he/she/it can rely on the exemption. The language of the statute does not permit or require the County to consider market conditions in deciding whether or not to grant the exemption.

Regardless, perhaps an argument could be made that the focus of the statute is on the allocation of units to certain income classes and not necessarily on occupancy. Under this

argument, even vacant units would be dedicated to be rented by low-income occupants so long as none of the units rented exceed the 60%, 50% and 30% income thresholds prescribed by statute. For example, consider a 100 unit apartment complex. As long as the landlord does not allow more than 55 of the apartments to be rented to those making above 60% of the county median income, does not allow more than 75 apartments to be rented to those making above 50% of the county median income, and ensures the remaining 25 apartments are either occupied by or remain open only for those that do not make above 30% of the county median income, that low-income housing unit may qualify for the exemption. In such a manner, 100% of the units are rented to or available for those in the qualifying income classes. By focusing on the allocation of the units as directed by the statute, landlords might avoid the precarious situation of the ebbs and flows of tenants vacating and leaving the landlord in non-compliance. True, landlords are tasked with filling voids with low-income tenants from certain income classes—but this only furthers the mission/policy of ensuring low income housing remains available for those in need as prescribed by the legislature.

Even if this vacancy argument were a valid approach, in no event does Appellant's set of facts comply with that argument or with the plain language of the statute, where 17% of the units are rented to those who exceed the 60% county median income threshold. If a landlord accepts a tenant that is not considered low income, that landlord *voluntarily* jeopardizes his/her/its potential property tax exemption. Making this decision may not necessarily disqualify a landlord from receiving the *income* tax exemption, but it clearly violates the plain language of I.C. § 63-602GG pertaining to the *property* tax exemption. Importantly, not "all" of the units are dedicated to low income housing when 30, 17, or even 5 percent of the units are not.

In this case, not only do 17% of the tenants exceed the 60% income threshold, one of the tenants actually exceeds 100% of the county median income. R. p. 33. These practices are clearly not permitted by the plain language of the statute. By leasing to those tenants, Appellant has made a conscious decision to not dedicate "all" of its units to low-income housing as defined in I.C. 63- §602GG, and therefore jeopardized its own property tax exemption. Appellant still may qualify for income tax exemptions under federal law, but not the property tax exemption.

B. The Plain Language of I.C. § 63-602GG Requires 100% Compliance, Not Righteous Aspirations.

It is truly admirable that Appellant aspires to the ideal of making its units available to those renters who may qualify as low-income tenants. But the low-income housing property tax exemption is not an entitlement for those with good intentions. Instead, if Appellant does not want to pay property taxes, the legislature has clearly outlined *how* to dedicate the property to obtain the property tax exemption by using the key phrase **"in the following manner:"**. I.C. §. 63-602GG(3)(c). (*Emphasis added*). The legislature could not have been clearer in saying "non-profit organizations, this is how you earn the property tax exemption:" and then outlines three income classes that "*all* of the housing *units*" must meet. *Id.* (*Emphasis added*).

If the non-profit organization fails to comply, there is no penalty; instead the organization simply has to pay property taxes like everyone else. Nonprofit organizations must remain vigilant in selecting only from the low-income classes identified in the statute if it seeks to obtain the property tax exemption.

Appellant argues that so long as each income classification is met individually, then Appellant is entitled to the tax exemption. Using this disjunctive reading, only 55% of the units would be required to be used for low-income housing as each subsequent income category can

be contained within the prior category (a 30% or less and 50% or less of the median county income is also contained in within the 60% *or less* of the median county income). Appellant's reading would therefore mean that 45% of the units, nearly half, do not need to be used for low-income tenants. This is in direct contradiction to the statutes' use of the word "all".

Other charitable and non-profit organizations do not receive similar treatment when they are not using 100% of their property toward their cause. As further evidence the legislature meant what it said in stating "all" of the units must comply, consider I.C. § 63-602C. That statute allows non-profit companies and charitable organizations to apply for a property tax exemption, but only to the extent the non-profit company is using its property consistent with its purposes and not for business purposes that derive a revenue. *Id.* For example, a church that leases out 10% of its space for a bakery would only be permitted up to a 90% exemption. If the Idaho Legislature wanted to adopt such a model for low-income housing, it is free to do so. In that event, Appellant would be permitted up to an 83% exemption but would pay property tax on the remaining 17% that it leases out to those tenants who are not low income. However, this is not what the statute currently says. Instead, I.C. § 63-602GG says "all" of the units must be rented to the three identified income classes.

It is clear that any redress Appellant seeks to change this language or interpret it differently should be placed before the legislature that can change the laws, not the courts that cannot.

III. APPELLANT MUST TERMINATE ITS REGULATORY AGREEMENT TO APPLY FOR THE I.C. § 63-602GG PROPERTY TAX EXEMPTION.

Appellant has elected to qualify as Section 42 housing and is subject to a regulatory agreement. *See Regulatory Agreement* R. pp. 70-92, *Agreement of Limited Partnership* R. pp.

94-157, *Redemption Agreement* R. pp. 172-186. Property tax relief for "Section 42 low-income" housing is considered under I.C. § 63-205A, which allows for reduction in value for tax assessment purposes. Appellants therefore inappropriately requested an exemption for "nonprofit low-income housing" under I.C. § 63-602GG where the legislature clearly provided another section under which Appellants should seek relief. Conversely, I.C. § 63-602GG pertains to those "non-profit" organizations that are not section 42 housing. Why else would there be two entirely different statutes?

As a result, until Appellant terminates its regulatory agreement and reapplies meeting the specifications above, an exemption under I.C. § 62-602GG must be denied.

IV. CITATION TO IDAHO HOUSING AND FINANCE STATUTES IS INAPPLICABLE.

Appellant relies heavily on cross referencing I.C. § 603GG(c)(3) with I.C. § 67-6201(c), which deals exclusively with Idaho Housing and Finance (IHFA) properties. The problem with this argument is the same as the Section 42 housing argument: Idaho has its own IHFA exemption under I.C. § 67-6208. Further, this code chapter (I.C. § 67-6201 *et. seq.*) is only to be applied to IHFA properties. The property at issue here, however, is owned by Aspen Park, Inc., which is not an IHFA property.

Where the plain language of both statutes is clear about their scope of property covered, attempting to read these statutes together only creates unnecessary confusion.

V. PROPERTY TAX EXEMPTIONS ARE NOT PRESUMED. INSTEAD THE TAXPAYER MUST MEET THE BURDEN OF PROOF.

To obtain a property tax exemption, the burden of proof falls on the taxpayer to make the showing that a tax exemption applies. *See Sunset Mem'l Gardens, Inc. v. Idaho State Tax Comm'n*, 80 Idaho 206, 219, 327 P.2d 766, 774 (1958). "Exemptions are never presumed. The

burden is on a claimant to establish clearly a right to exemption. It must be in terms so specific and certain as to leave no room for doubt." *Id. referencing Bistline v. Bassett*, 47 Idaho 66, 272 P. 696, 62 A.L.R. 323. "The basis of tax exemptions is the accomplishment of public purpose and not the favoring of particular persons or corporations at the expense of taxpayers generally." *Id.* Further,

> All tax exemption statutes be strictly and narrowly construed against the taxpayer, who must show a clear entitlement, and in favor of the state. Courts may not presume exemptions, nor may they extend an exemption by judicial construction where not specifically authorized.

Ada Cty. Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993).

In this case, it is clear that 100% of the units are not dedicated to low-income housing where 17% of them are leased to tenants that exceed the 60% county median income threshold.

CONCLUSION

Unfortunately, Appellant fails to dedicate "all" of its housing units to low-income housing in the "manner" prescribed statute. Therefore, the property tax exemption must be denied.

Reliance on an interpretation, albeit from astute minds, that allows up to 45% of the units to be rented by non-low-income occupants does not follow the plain language of the statute and is misplaced. Further, Appellant's argument flies in the face of performance-based tax exemptions for other valuable non-profit and charitable organizations such as I.C. § 63-602C, which requires a deduction from the exemption for uses that violate the non-profit purpose of the organization. Clearly the legislature could not have felt so strongly about low-income housing that low-income housing units only have to dedicate a little more than half of its units to a low-

income purpose in order to obtain a complete exemption. For this reason, not only did the legislature use the term "all" of the housing units, it also dictated the manner in which "all" (100%) of the "units shall be rented." I.C. § 63-602GG(c)(3).

While unfortunate for Appellants, the practical effect of this denial is that Appellant must pay property taxes—not file for bankruptcy, forego its income tax exemption, or be precluded from applying for other tax exemptions for which it may otherwise qualify. A request for a different result should be presented to the legislature. Until then, however, the statute is clear.

Where the facts are not in dispute and the statute and standards of law are clear the District Court's decision must be affirmed and the tax exemption denied.

ATTORNEYS FEES

Where the statutory language of I.C. § 63-602GG is clear and unambiguous, and where it is clear Appellant's redress can only be sought through the legislature for a change in the law, Appellant should be required to pay Bonneville County's costs and attorneys fees pursuant to I.C. § 12-117, I.C. § 12-121, I.R.C.P. 54(d) and (e), and I.A.R. 40 and 41.

DATED this 21 day of June, 2018.

WESTON S. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of June, 2018, I served a true and correct copy of the foregoing document upon the following:

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