Filed:02/05/2020 15:49:01
First Judicial District, Bonner County
Michael W Rosedale, Clerk of the Court
By: Deputy Clerk - Oppelt, Linda

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

CITIZENS AGAINST LINSCOTT/ INTERSTATE ASPHALT PLANT, An unincorporated non-profit association organized under the laws of the State of Idaho Petitioners, v. BONNER COUNTY BOARD OF COMMISSIONERS, a public agency of the State of Idaho Respondent, FRANK E. LINSCOTT and CAROL LINSCOTT; INTERSTATE CONCRETE & ASPHALT COMPANY COMPANY Intervenors.	CASE NO. CV09-19-629 OPINION AND ORDER ON PETITION FOR JUDICIAL REVIEW

This matter is before the Court on petition for judicial review. A hearing was held on the matter on December 13, 2019. The Petitioner was represented by Gary Allen. The Respondent Bonner County was represented by Bonner County Deputy Prosecutor William Wilson. The Intervenors Frank and Carol Linscott were represented by John Finney. The Intervenor Interstate Concrete & Asphalt was represented by Elizabeth Tellessen. The Court having reviewed the briefs of the parties, having heard arguments of counsel, and being fully advised in this matter, hereby renders its decision.

FACTUAL BACKGROUND

On August 8, 2018, Frank and Carol Linscott (the Linscotts) and Interstate Concrete and Asphalt Company (Interstate) jointly applied for a conditional use permit to move the Interstate asphalt batch plant located within the city limits of Sandpoint, to the Linscott gravel pit located in Sagle, Idaho. The CUP was approved by the Bonner County Planning and Zoning Commission (the Commission) on November 15, 2018. On December 11, 2018, several of the landowners adjacent to Linscotts' gravel pit appealed the decision of the Commission to the Bonner County Board of Commissioners (the Board).[1] The Board held a hearing on the matter on January 11, 2019, and voted to approve the CUP. The Board later issued a written ruling to that effect on January 14, 2019. The landowners sought reconsideration of the Boards decision on January 24, 2019.

On March 22, 2019, the Board held a hearing on the motion to reconsider. During that hearing, the Board limited its reconsideration to one issue: non-conforming land use.[2] On March 25, 2019, the Board approved the CUP. On May 1, 2019, Citizens Against Linscott/Interstate Asphalt Plant (Citizens), filed this petition for judicial review.[3]

STANDARD OF REVIEW

> The Local Land Use Planning Act (LLUPA) allows judicial review of an approval or denial of a land use application for an affected person, as provided for in the Idaho Administrative Procedural Act (IDAPA). Idaho Code § 67–6521(1)(d). This Court has stated that for the purposes of judicial review of LLUPA decisions, where a board of county commissioners makes a land use decision, it will be treated as a government agency under IDAPA.

---

[1] *Agency Record*, at 1115.

[2] The Board limited reconsideration to this issue on the recommendation of the Bonner County Planning Director. *Record*, at 1021.

[3] The petitioner is an unincorporated non-profit association whose membership includes the landowners who previously challenged the issuance of the CUP. It is unclear from the record when this entity was formed or at what point it began to represent the interests of the landowners. However the record does show this occurred at some point prior to the Board's hearing on reconsideration. *Agency Record*, at 362.

In re Jerome Cty. Bd. of Comm'rs, 153 Idaho 298, 307, 281 P.3d 1076, 1085 (2012)(internal citations omitted).

In a judicial review under the Administrative Procedures Act, a district court may not substitute its judgment for that of the agency as to the weight of the evidence presented. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262 (1998); I.C. § 67-5279(1). "The court will defer to the agency's findings of fact unless those findings are clearly erroneous; the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record." *Id.*

An agency's decision will be set aside if it (a) violates constitutional or statutory provisions; (b) exceeds the Commissioners' statutory authority; (c) is made upon unlawful procedures; (d) is not supported by substantial evidence on the record as a whole; or (e) is arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Nevertheless, even if a court finds the agency decision to violate the provisions of I.C. §67-5279(3), the decision of the agency will be affirmed unless substantial rights of the petitioners have been prejudiced. I.C. § 67-5279(4). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279.

ANALYSIS

Citizens raises three issues on judicial review: 1) that the 2018 amendment to BCRC §12-336 was not lawfully enacted;[4] 2) that the decision by the Board did not comply with the ordinance; and 3) that Citizens is entitled to attorney's fees.[5] The Intervenors Interstate and the

[4] This code details the standards for permitting an asphalt batch plant. This code was amended on May 23, 2018 through Bonner County Ordinance 557. The language of the amendment formed the basis for the approval of the CUP at issue.

[5] *Memorandum in Support of Petitioner's Petition for Judicial Review*, at 9.

Linscotts assert that Citizens lacks standing to bring the petition.[6] The Linscotts independently assert that the petition was not timely filed and that the failure to properly serve them prevents Citizens from obtaining relief in the matter. Bonner County and Interstate request an award of fees and costs.

1. Standing

The Linscotts and Interstate both assert that Citizens does not have standing to challenge the decision of the Board. Both parties cite I.C. §30-27-105 which states that an unincorporated non-profit association is an entity distinct from its members and managers. That statute came into effect July 1, 2015, repealing I.C. §§ 53 – 701-717, the previous provisions governing such associations.

The Idaho Supreme Court has previously stated that " As applied to associations seeking standing for its members, this Court considers whether the association has alleged that at least one of its members face injury and could meet the requirements of standing on an individual basis." *In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho at 308, 281 P.3d at 1086.

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus, 127 Idaho 239, 241, 899 P.2d 949, 951 (1995)(citing *Warth v. Seldin*, 422 U.S. 490,511, 95 S.Ct. 2197, 2211-12, 45 L.Ed.2d 343 (1975).

While the Intervenors argue that the 2015 repeal of I.C. §53-707 served to remove an unincorporated non-profit association's standing through its members, Idaho's Appellate Courts

[6] *Intervenor Linscotts Respondent's Brief*, at 14; *Intervenor Interstate Concrete and Asphalt Company's Opposition to Petition for Judicial Review*, at 14.

have yet to express such a holding. Additionally, Idaho's Appellate Courts have determined associational standing independent of specific grants in Idaho Code. The Court does not find such a prohibition on associational standing to be present in the language of I.C. §30-27-105.

Here it is clear the membership of Citizen's consists of landowners immediately adjacent to the gravel pit. Those landowners have previously challenged the issuance of the CUP on numerous claims of potential injury. As Citizens seeks an order reversing the granting of the CUP, the relief sought does not require individual participation of any of its members. Accordingly, Citizens has standing to bring this action on behalf of its members.

2. Service

The Linscotts assert that the failure of Citizens to serve notice of the petition on them prevents Citizen's from obtaining relief.[7] I.R.C.P. 84(d) states:

> When the petition for judicial review is filed, the petitioner must serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency

While Citizens failed to serve the notice of petition on the Linscotts, this defect in service is not, as the Linscotts assert, automatically fatal to their petition. I.R.C.P. 84(n) states:

> The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules is jurisdictional and will cause automatic dismissal of the petition for judicial review on motion of any party, or on initiative of the district court. Failure of a party to timely take any other step in the process for judicial review will not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

While the Linscotts should have been served notice at the beginning of this action, the failure to do so was harmless error and has not fundamentally affected the Linscotts ability to be heard. The Linscotts filed a motion to intervene on August 1, 2019. After that motion was

[7] *Intervenor Linscotts Respondent's Brief*, at 23-24.

granted on August 19, 2019, the Linscotts filed an extensive brief in opposition to Citizens' petition. Counsel for the Linscotts appeared at the hearing on the petition and presented argument in opposition. Therefore the Court does not find dismissal due to lack of service to be appropriate in this matter.

3. Timeliness

The Linscotts argue that the petition was not timely filed and that the actual filing date does not relate back.[8] The Linscotts assert that once the Board issued its original decision, the 28 day period in which to file a petition for judicial review began to toll. The Linscotts further assert that the subsequent filing of a motion for reconsideration did not reset the tolling of the 28 day period but only stopped the tolling until the Board issued its decision. The Linscotts argue that as ten days elapsed between the initial decision of the Board and the filing of the motion for reconsideration, Citizens only had 18 days to file the petition after the Board ruled on the motion.

I.C. §67-5273(3) states:

> A petition for judicial review of a final agency action other than a rule or order must be filed within twenty-eight (28) days of the agency action, except as provided by other provision of law. The time for filing a petition for review shall be extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are clearly not frivolous or repetitious. A cross-petition for judicial review may be filed within fourteen (14) days after a party is served with a copy of the notice of the petition for judicial review.

I.C. §67-6521(d) contains similar tolling provisions when challenging the issuance of a special use permit stating:

> An affected person aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, 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.

[8] *Intervenor Linscotts Respondent's Brief*, at 18-23.

Here Citizens timely filed their motion for reconsideration with the Board. This motion was among the various administrative remedies that Citizens rightly attempted to exhaust before the filing of a petition for review. Therefore, the time for filing the petition for judicial review did not begin to toll until after the issuance of the Boards order on the motion for reconsideration. The Linscotts remaining argument concerning the timeliness of the electronically filed petition has been previously addressed by this Court in its *Opinion and Order on Motion to Dismiss* issued on July 26, 2019, and need not be restated here. Accordingly, the Court finds that Citizens' petition was timely filed.

4. Enactment of the 2018 Amendment

Citizens asserts that the 2018 amendment (the Amendment) to BCRC 12-336 was unlawfully adopted. The Amendment permitted asphalt plants in agricultural and residential zones if located in an active gravel pit. Citizens argues that the Amendment was unlawfully enacted and void. Accordingly, Citizens contends that any decision made by the Board in reliance on the Amendment should be reversed.

"Promulgation or enactment of general zoning plans and ordinances is legislative action." *Burt v. City of Idaho Falls*, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983). Legislative activity is not subject to direct judicial review. *Id.* at 66, 665 P.2d at 1076.[9]

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

I.C. § 67-5278

[9] "Direct judicial review in this case means an appellate process by which land use decisions by local authorities are appealed to a judicial forum. While we hold that 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."

Burt, 105 Idaho at 66, 665 P.2d at 1076, n. 2

Citizens' argument rests on a conclusory belief that the Amendment is invalid. However, Citizens has not sought such a declaratory ruling prior to filing this petition for review. While the Court understands the basis for Citizens' arguments concerning the validity of the amendment, a challenge to the validity of the amendment should have been brought as a declaratory action, separate from the petition for judicial review.[10] Accordingly, the Court is constrained from considering the validity of the amendment on review.

5. The Board's decision

Citizens assert that the Board's decision did not comply with the ordinance and that the gravel pit's noncompliance with other Bonner County land ordinances prevents the issuance of the CUP pursuant to the provisions of BCRC 12-130, which states in pertinent part:

> The Planning Director shall not issue a permit unless the intended uses of the buildings and land conform in all respects with the provisions of this title.

On appeal from the decision of the Commission, the Board determined that the issuance of the CUP complied with all Bonner County Ordinances.[11] Citizens challenged that determination in a motion to reconsider. The Board determined that the gravel pit's "non-conforming use" was not at issue, as the relationship between the gravel pit and the batch plant was a physical one and that the use of the gravel pit, non-conforming or otherwise, had no bearing on the decision as BCRC 12-336(22) only required the gravel pit to be active.[12] Further, the Board determined that the addition of the batch plant would

---

[10] "...we are constrained to hold that actions seeking civil damages or declaratory relief may not be combined with petitions for judicial review under IDAPA." *Euclid Ave. Tr. v. City of Boise*, 146 Idaho 306, 309, 193 P.3d 853, 856 (2008).

[11] *Record*, at 997.

[12] *Transcript of March 22, 2019 Hearing on Motion to Reconsider*, at 66-68; *Record*, at 995.

not expand on the alleged nonconforming use of the gravel pit, as Bonner County BCRC §12-821 distinguishes prohibited/ nonconforming use from conditionally permitted use.[13]

Citizens offers extensive argument concerning the gravel pit's violations of Bonner County Ordinances. However, no such determination has ever been reached as no party has filed an action with the Bonner County Prosecutor to enforce those ordinances. On review this Court is constrained to review the decision of The Board on clearly defined criteria. The Court is not empowered to render a legal conclusion on a property's compliance with county ordinances when the issue has not been properly raised below.

The Board determined that Bonner County Code only required that the gravel pit be active in order to permit the installation of a batch plant. The Board determined that the gravel pit had been active for over 40 years and therefore Bonner County Code allowed for the addition of the asphalt batch plant. The Board further reasoned that the CUP did not unlawfully expand the pit's alleged non-conforming use as a conditionally permitted use was not a non-conforming use under Bonner County Code.

This Court will defer to the Board's interpretation and application of its own zoning ordinances unless they are capricious, arbitrary or discriminatory. *In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho at 308, 281 P.3d at 1086 (2012). In reviewing the Board's decision with such deference, the Court is unable to find error. Accordingly, the decision of the Board is affirmed.

6. Attorney's fees

Both Bonner County and Interstate have requested attorney's fees in this matter pursuant to I.C. §12-117 and I.C. §12-121 respectively.[14]

---

[13] *Record*, at 995.

A. Bonner County

I.C. §12-117 states:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

As the Court has affirmed the decision of the Board, Bonner County is clearly a prevailing party in this matter. Bonner County argues that Citizens' petition was part of a repeated attempt to "discredit the County's interpretation of its own ordinances"; and therefore this petition was brought without reasonable basis in fact or law. [15] However, the Court finds that that Citizens did raise legitimate issues in its petition, and therefore did not file the petition without reasonable basis in fact or law. Therefore, Bonner County's motion for fees is denied.

B. Interstate

Interstate requests attorney fees pursuant to I.C§12-121 which states:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

The Court finds that a similar analysis supports denial of an award of fees to Interstate. While Citizens' petition was ultimately unsuccessful, the Court finds it raised sufficient novel issues and therefore was not brought frivolously, unreasonably, or without foundation. Interstate's motion for fees is denied.

---

[14] The Linscotts did not seek attorney's fees in the matter under the belief that they were precluded from requesting them as interveners. *Intervener Linscotts Respondent's Brief*, at 9.
[15] *Respondent's Brief*, at 15.

ORDER

IT IS HEREBY ORDERED that the decision of the Bonner County Board of Commissioners is AFFIRMED. IT IS FURTHER ORDERED that Bonner County's request for fees is DENIED. IT IS FURTHER ORDERED that Interstate's request for fees is DENIED.

Dated this 5 day of February 2020.

JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON PETION FOR JUDICIAL REVIEW was:

E-Mailed by the undersigned this Signed: 2/5/2020 03:50 PM, to:

William Wilson: prosefile@bonnercountyid.gov

Gary Allen: garyallen@givenspursley.com

Elizabeth Tellessen: eat@winstoncashatt.com

John Finney: johnfinney@finneylaw.net

By: Linda Oppelt
Deputy