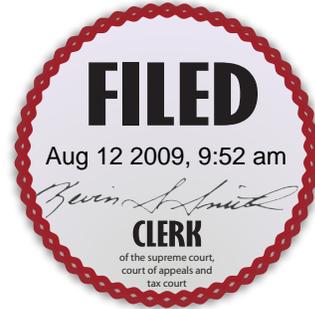


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

SCOTT STITES, DAVID M. RELUE)
and PETER J. WALTERS,)

Appellants-Petitioners,)

vs.)

INDIANA DEPARTMENT OF NATURAL)
RESOURCES and RCI DEVELOPMENT, LLC,)

Appellees-Respondents.)

No. 76A03-0902-CV-71

APPEAL FROM THE STEUBEN CIRCUIT COURT

August 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants Scott Stites, David M. Relue, and Peter J. Walters (collectively, “Appellants”) appeal the trial court’s order dismissing their petition for judicial review of an agency decision by Appellee the Indiana Department of Natural Resources (“DNR”) for lack of jurisdiction. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 18, 2008, DNR issued its Notice of Final Order granting RCI Development, LLC (“RCI”) a license to construct a group pier on Crooked Lake in Steuben County. Appellants filed a petition for judicial review of DNR’s order on August 18, 2008. The petition was signed by the Appellants but did not contain any verification that the petition had been signed under the penalty of perjury.

On September 26, 2008, the trial court, *sua sponte*, scheduled a hearing for November 18, 2008, the purpose of which was to determine whether the “case ... should be dismissed for lack of subject matter jurisdiction, on account of what appears to the Court to be an unverified petition for judicial review having been filed contrary to Ind. Code 4-21.5-5-7.” Appellees’ App. p. 1. On October 1, 2008, Appellants filed a motion to amend their petition for judicial review to include, “I affirm under the pains and penalties of perjury that the

foregoing representations are true and correct to the best of my knowledge and beliefs.” Appellants’ App. p. 38. Both RCI and the DNR subsequently filed objections to Appellants’ motion. On December 19, 2008, the trial court issued an order denying Appellants’ motion to amend their petition for judicial review and dismissing the case, *sua sponte*, for lack of subject matter jurisdiction. This appeal follows.

DISCUSSION AND DECISION

Appellants claim that the trial court abused its discretion by dismissing the case for lack of jurisdiction without first granting Appellants the opportunity to amend their petition to comply with the requirements of the Administrative Orders and Procedures Act (“AOPA”).¹ Our standard of review of a trial court’s ruling on a motion to dismiss a petition for jurisdictional grounds depends upon whether the trial court resolved disputed facts, and if so, whether the trial court conducted an evidentiary hearing or ruled on a paper record. *Wrogeman v. Roob*, 877 N.E.2d 219, 220 (Ind. Ct. App. 2007) (citing *Izaak Walton League of Am., Inc. v. DeKalb County Surveyor’s Office*, 850 N.E.2d 957, 962-63 (Ind. Ct. App. 2006)). We review *de novo* a ruling on a motion to dismiss for lack of jurisdiction if the facts are not in dispute or the trial court rules on a paper record. *Id.* Here, the underlying facts surrounding the trial court’s order dismissing Appellants’ petition for judicial review are not in dispute. Therefore, we review the trial court’s dismissal of Appellants’ petition *de novo*. *Id.*

¹ To the extent that Appellants rely on *Turner v. Franklin County Four Wheelers Inc.*, 889 N.E.2d 903 (Ind. Ct. App. 2008), to support of their claim that the trial court abused its discretion in denying their motion to amend their petition, we find *Turner* to be inapplicable to the instant matter because in *Turner*, the Plaintiff’s claim was unrelated to review of an agency decision and thus was not governed by AOPA.

Judicial review of an agency action is governed by the AOPA. *See* Ind. Code § 4-21.5-5-1, *et seq.* (2008). Indiana Code section 4-21.5-5-4(b) provides that a petitioner seeking judicial review of an agency decision must file a timely petition for judicial review. “A petition for review is timely only if it is filed within thirty (30) days after the date that notice of the agency action that is the subject of the petition for judicial review was served.” Ind. Code § 4-21.5-5-5. Failure to timely file a petition for review results in waiver of the petitioner’s right to judicial review if the person fails to file a timely petition for review. Ind. Code § 4-21.5-5-4(b).

Indiana Code section 4-21.5-5-7(b) provides that a timely filed petition for review of an agency action must be verified. “‘Verified’, when applied to pleadings, means supported by oath or affirmation in writing.” Ind. Code § 1-1-4-5 (2008). “Verification is an essential part of the petition for judicial review of an administrative action.” *Kemp v. Family and Soc. Servs.*, 693 N.E.2d 641, 644 (Ind. Ct. App. 1998), *trans. denied*. Indiana Trial Rule 11(B) provides that when it is required that a petition be verified, “[I]t shall be sufficient if the subscriber simply affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language: ‘I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.’” A signature alone, however, does not constitute a proper verification under Trial Rule 11(B). *Bakos v. Dep’t of Local Gov’t Fin.*, 848 N.E.2d 377, 379 (Ind. Tax 2006); *Kemp*, 693 N.E.2d at 643-44.

In *Hoosier Environmental Council v. Department of Natural Resources*, 673 N.E.2d 811 (Ind. Ct. App. 1996), *trans. denied*, this court was faced with the question of whether

Indiana Code section 4-21.5-5 *et seq.* requires a party to file a verified petition within the statutory allotted thirty days to initiate judicial review of an agency decision. Upon considering Indiana Code section 4-21.5-5 *et seq.* as a whole, we concluded as follows:

Although Indiana Code section 4-21.5-5 does not expressly state that a petitioner must file a verified petition with thirty days, it is clear from reviewing the statute as a whole that a party must do so.... Permitting a party to amend an otherwise noncompliant petition, after the thirty day period has elapsed, would make the thirty day requirement ineffective.... Therefore, we interpret [Indiana Code section 4-21.5-5 *et seq.*] to require that a party must file a *verified* petition within thirty days to initiate judicial review of an agency decision.

Hoosier Env't'l Council, 673 N.E.2d at 815 (emphasis in original).

In applying this interpretation to the facts, we concluded as follows:

Although the unverified petition was timely filed, at the time HEC sought to amend its petition, the thirty day period had expired. As such, HEC's amended petition could not relate back to the initial petition because there being no timely filing, there is nothing which an amended pleading could relate back to. Because HEC failed to comply with the statute, the trial court never obtained jurisdiction over the case.

Id. at 815-816 (quotations omitted).

Here, it is undisputed that Appellants' petition lacked verification as required by Indiana Code Section 4-21.5-5-7(b). It is also undisputed that Appellants did not file a motion to amend their petition to include verification until October 1, 2008, nearly a month and a half after the conclusion of the statutorily allotted thirty-day period in which they could file a petition for judicial review of the DNR's order. Because Appellants' defect was left uncured when the statutory thirty-day period for filing Appellants' petition elapsed, we conclude that the trial court properly dismissed Appellants' petition for judicial review for

lack of jurisdiction. *See Kemp*, 693 N.E.2d at 644; *Hoosier Envt'l Council*, 673 N.E.2d at 815-16.

The judgment of the trial court is affirmed.

CRONE, J., and BROWN, J., concur.