

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM IV
CAUSE NO. 49D04-0702-MI-006585

JENNIFER HAWKINS, G. TERRY HAWKINS)
and MARTHA WENTWORTH,)

Petitioners,)

VS.)

NATURAL RESOURCES COMMISSION OF)
THE STATE OF INDIANA, as ultimate)
authority for the INDIANA DEPARTMENT OF)
NATURAL RESOURCES,)

Respondents.)

FILED

137

NOV 7 2008

CLARENCE A. WALKER
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Petitioners, Jennifer Hawkins, *et al.*, filed with this Court a “Verified Petition for Judicial Review” (“Petition”) of a Final Order of the Indiana Natural Resources Commission (“the NRC”) to which Respondents, Indiana Department of Natural Resources (“IDNR”), *et al.*, answered and opposed. Following oral argument before this Court and the Court’s consideration of the briefs and the administrative record in this case, the Court hereby issues its Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On February 16, 2007, Petitioners filed the Petition with this Court. Petitioners allege that the NRC’s January 17, 2007, “Findings of Fact and Conclusions of Law with Final

SG/SA

Order” (“Final Order”), which Final Order is challenged in their Petition, is in violation of the Administrative Orders and Procedures Act (“AOPA”), Ind. Code § 4-21.5-1-1 *et seq.*

2. Petitioners challenge the Final Order on grounds of unlawful shifting of the burden of proof, failure to provide notice, and failure to follow applicable regulatory and procedural standards.

3. The parties do not dispute the procedural background of this case, which is covered in the parties’ briefs and in the administrative record. Stephen Jansing, an owner of a parcel of land in LaGrange County, Indiana, along Dallas Lake, filed an application with IDNR for a license to dredge the lakebed adjacent to his property so that he could repair and replace permanent structures within IDNR’s jurisdiction, including a pier, a seawall, and a boat well. IDNR denied the application and Jansing sought administrative review. Petitioners in this case. Jansing’s neighbors, who had originally objected to his application, moved to intervene as parties in his administrative review petition, and the NRC granted their motion.

Thereafter, IDNR and Jansing reached a proposed settlement modifying Jansing’s original project description as provided in Petitioners’ Petition, which settlement the parties refer to as the “Amended Project Description” or “APD.” The NRC approved the APD in its Final Order, but limited the dimensions of the boathouse. Because Petitioners objected to the APD and believe their procedural and substantive rights were violated, this Petition ensued.

CONCLUSIONS OF LAW

4. Judicial review of the Final Order is subject to the review standards in AOPA, Ind. Code § 4-21.5-5-14, which provides:

Burden of proof; standards of review

Sec.14 (a) The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(c) The court shall make findings of fact on each material issue on which the court's decision is based.

(d) The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence.

If Petitioners satisfy these review standards, the Court may proceed under Ind. Code § 4-21.5-15, which states:

Disposition

Sec.15 If the court finds that a person has been prejudiced under section 14 of this chapter, the court may set aside an agency action and:

(1) remand the case to the agency for further proceedings; or

(2) compel agency action that has been unreasonably delayed or unlawfully withheld.

5. The standards for judicial review of final administrative orders are clear. "If there is any substantial evidence to support the finding of the board or agency, the court may not disturb the board's or agency's determination." *Medical Licensing Bd. Of Indiana v. Robertson*, 563 N.E.2d 168, 173 (Ind. App. 1990). "The party seeking judicial review bears the burden of demonstrating that the agency's action is invalid." *Metropolitan School Dist. of Southwest Allen County v. Allen County*, 753 N.E.2d 59, 62-63 (Ind. App. 2001).

6. The Court gives "considerable weight" to agency decisions. *Taylor v. Ind. Family & Social Services Admin.*, 699 N.E.2d 1186, 1191 (Ind. App. 1998). An administrative agency is

to be given great deference to the interpretation of the statutes it enforces “in light of its expertise in its given area.” *Bowles v. Griffin Indus.*, 855 N.E.2d 315, 320 (Ind. App. 2006). “The court must review the record of proceedings in the light most favorable to the administrative proceeding.” *Brennan v. Bd. of Zoning Appeals of Evansville & Vanderburgh County*, 695 N.E.2d 983, 985 (Ind. App. 1998).

7. Petitioners argue that the Final Order must be reversed and remanded because the NRC did not comply with Ind. Code § 4-21.5-3-14(c) on the issue of Petitioners’ burden of persuasion and of going forward with their case during the administrative proceedings. Specifically, Petitioners allege procedural error in the NRC’s finding that Petitioners bore the burden of persuasion and the burden of going forward in the hearing on the merits of the Jansing appeal, particularly with regard to approval of the APD. Petitioners view this as an improper shift in burden and allege that they have been prejudiced by the Final Order.

8. Ind. Code § 4-21.5-3-14(c), provides in pertinent part:

(c) At each stage of the proceeding, the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense. Before the hearing on which the party intends to assert it, a party shall, to the extent possible, disclose any affirmative defense specified by law on which the party intends to rely. If a prehearing conference is held in the proceeding, a party notified of the conference shall disclose the party's affirmative defense in the conference. [Emphasis added.]

9. Petitioners sought to intervene in this case, and the NRC granted intervention. Petitioners continued to participate as parties to this action and objected once IDNR and Jansing reached tentative agreement on the APD. Due to this objection, the administrative law judge (“ALJ”) ruled that Petitioners would need to satisfy their burden of persuading the NRC that their objection was justified. Petitioners were then required to support their objection in order to prove the value of their claim before the NRC and parties to this action. The ALJ gave

Petitioners the option of starting the permit process over or proceeding to a contested hearing. Petitioners chose to have a contested hearing and an opportunity to be heard and did in fact have a hearing. The ALJ was not satisfied that Petitioners were able to satisfy the burden of proof. Their concerns were aired and considered first by the ALJ, then by the NRC. Therefore, the Court finds that the NRC committed no error in this regard.

10. At oral argument, Petitioners conceded that the other issues raised in their Petition – IDNR’s alleged failure to require notice and a hearing, violation of the Public Trust Doctrine, consideration of Natural Scenic Beauty, various factual findings reviewed and ruled upon by the NRC, the cumulative effect of the project, and exclusive use of the lake – were raised because the NRC unlawfully placed the burden of proof or persuasion upon Petitioners. Therefore, the Court, having found that the NRC did not improperly shift the burden of proof or persuasion, and observing that there are no other legal issues affecting the validity of the NRC’s Final Order and its compliance with AOPA, the Court rules against Petitioners.

ORDER

IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the Court hereby DENIES Petitioners’ “Verified Petition for Judicial Review” and upholds the subject Final Order of the NRC.

SO ORDERED this 7 day of November, 2008



HONORABLE CYNTHIA J. AYERS, JUDGE
Marion County Superior Court
Civil Division, Room IV

DISTRIBUTION:

William W. Barrett
Williams Hewitt Barrett & Wilkowski, LLP
600 North Emerson Avenue
P.O. Box 405
Greenwood, IN 46142

Gary Bippus
Indiana Attorney General's Office
302 W. Washington St., 5th Floor
Indianapolis, IN 46204

Steven D. Griffin
Indiana Attorney General's Office
302 W. Washington St., 5th Floor
Indianapolis, IN 46204