20160089
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STATE OF NORTH DAKOTA

Case No. 20160089

STATE OF NORTH DAKOTA
IN SUPREME COURT

Western Petroleum, LLC, and Maxum Petroleum Operating Company, Inc., d/b/a Pilot Logistics Services,

Appellants,

v.

Williams County Board of Commissioners,

Appellee.

APPELLANTS' REPLY BRIEF

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I. THE COMMISSIONERS DO NOT PROPERLY CITE FACTS.

[¶1] In its brief, Appellee cited numerous alleged "facts" that were not in either of the parties' appendices. Appellee also neglected to cite to any docket entries for a large portion of their "facts."

[¶2] Rule 28(f) of the North Dakota Rule of Appellate Procedure provides that "[i]f references are made in the briefs to parts of the record not reproduced in the appendix, the references must be to the docket number of that part of the record." N.D. R. App. Pro. 28(f). "On appeal from a decision of a county commission, a reconsideration of evidence is limited to the extent that such evidence was presented to the county commission." *Dahm v. Stark County Board of County Comm'rs*, 841 N.W.2d 416 (N.D. 2013).

[¶3] By presenting new and uncited "facts," Appellee seeks reconsideration of the evidence despite arguing the opposite at the District Court level. For example, the Commissioners filed "Williams County Board of Commissioners Objections to Appellant's Record on Appeal" with the District Court. (*See* District Court Doc. ID #28.) There, Appellee argued:

> Appellants [Pilot] seek to introduce additional evidentiary matters not presented to the local governing bodies for their consideration in making the decisions now being challenged. If the Court were to permit inclusion of such additional materials into the record on appeal, the Court would, in essence, not be judging whether the challenged decisions were arbitrary, capricious, or unreasonable, or not supported by substantial evidence, based upon the evidence considered by the local governing bodies, but rather whether such challenged decisions met the applicable standard based upon extraneous information that was not presented to them for consideration.

(*Id.* at 3.)

[¶4] In its initial brief, Appellants cited to documents contained in the "official" record on appeal. Appellee chose to ignore its own warnings in filing its brief to this Court. Despite arguing for the District Court to exclude documents and references to documents that were not previously presented, in its brief, Appellee has reversed course and referenced documents that were not presented to the local governing body.

[¶5] For example, paragraphs 9 and 10 Appellee's brief recites allegations that are not part of the official record, and are not in the appendix or the docket. The Commissioners claim in paragraph 15 that "Appellants have admitted in pending federal litigation between the parties that a copy of the Memorandum was received by counsel for Appellants on June 30, 2014, over a week before BOCC meeting [sic] on July 8, 2014, where it was discussed." (Appellee's Brief at ¶ 15.) This "fact" has no citation to the record and the Court should strike it as a result thereof. Paragraph 17 is also full of unsupported and uncited "facts" that should be stricken because they are not part of the record.

[¶6] Appellee also makes the bald allegation that "through discovery in the pending federal case involving the parties," Appellants purchased the assets of Western Petroleum, LLC, in February 2012. (Appellee's Brief at ¶ 21.) Discovery in the federal case was never part of the record in this case. As such, this Court should strike all of these alleged "facts" that contain no citation to the record.

II. THE COMMISSIONERS ASSESSED TWO ARBITRARY, CAPRICIOUS AND UNREASOANBLE PENALTIES.

[¶7] Appellee argues that (1) the $1,880,050.00 penalty was not a penalty, but rather a "compromise," and that (2) neither of the penalties were arbitrary, capricious and/or unreasonable. (Appellee's Brief at ¶¶ 33-51.)

[¶8] "A county board's interpretation of a statute… is fully reviewable, and a board's failure to correctly interpret and apply controlling law is arbitrary, capricious, and unreasonable." *Plains Marketing, LP v. Mountrail County Bd. Of County Com'rs*, 879 N.W.2d 75, 79 (N.D. 2016). Statutory interpretation is a question of law, which is fully reviewable on appeal. *Nelson v. Johnson*, 778 N.W.2d 773, 776-77 (N.D. 2010). Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. *Zajac v. Traill County Water Resource District*, 2016 WL 3582114 (N.D. June 30, 2016). If the language of a statute is clear and unambiguous, "the letter of the [the statute] is not to be disregarded under the pretext of pursuing its spirt." *Id*.

[¶9] The plain language of the Regulations is unambiguous and was not properly interpreted when Appellee calculated the penalties at issue in this case.

A. The $1,880,050.00 Penalty was an Arbitrary, Capricious and Unreasonable Penalty- not a Compromise.

[¶10] Appellee imposed two (2) penalties against Appellants -- not one (1), as Appellee now alleges. The minutes of the July 8, 2014, Commissioners' meeting reflects this. (App. Apx. 063.) The transcript of this meeting reveals that the alleged "compromise" was actually the first of two (2) penalties imposed against Appellants. In his motion to impose the first penalty, Commissioner Hanson clearly stated "I'll still make a motion that we go with the fine [not a compromise] that the committee came up with, the 1.885 million." (App. Apx. 81.)

[¶11] Not only did Appellee impose $1,885,050.00 as a penalty, but Appellee acted unlawfully in doing so. For example, the Commissioners calculated the $1,885,000.00 penalty using arbitrary rental rates and an arbitrary percentage of a previously threatened

arbitrary penalty amount. (App. Apx., pp. 66-67.) Even a cursory review of the Regulations makes clear that there is no basis for using rental rates and percentages of previously threatened penalties to calculate civil penalties for violations of the Regulations. When the Commissioners did just that, they acted in a matter which was arbitrary, capricious and unreasonable, in violation of North Dakota law.

B. The Second Penalty was Arbitrary, Capricious and Unreasonable.

[¶12] Appellee incorrectly interpreted the Regulations in calculating the second penalty amount ($29,635,000.00) as well. (App. Apx., pp. 80-83.) In calculating the second penalty, Appellee arbitrarily decided to use a "per unit/per day" calculation method. (*Id*.) Appellee penalized Appellants $1,939,000.00 for having mobile homes with an expired CUP. (*Id*.) Appellee also penalized Appellants $25,680,000.00 for having RVs, and another $2,016,000.00 for having permanent homes with an expired CUP. The total of these arbitrary amounts was the second penalty of $29,635,000.00. (*Id*.)

[¶13] The Regulations make clear that civil penalties are to be calculated as $1,000.00 per violation -- the violation was operating a temporary housing facility with a valid CUP, regardless of the types or amounts of units on the property. The Regulations allow the penalty to accrue at a rate of $1,000.00 per day until the violation is cured, which in this case was the issuance of a new CUP on June 10, 2014. Appellee failed to properly interpret and apply the Regulations in calculating the second penalty, as Appellee did with the first.

C. Appellee's Interpretation is Not Reasonable because it has Always Interpreted the Regulations the Same Way.

[¶14] Appellee argues that they have always interpreted the Regulations by imposing penalties of more than $1,000.00 per day for an unlawful temporary housing facility. In

its brief, Appellee cites no case law to support this argument. Instead, Appellee asks this Court to affirm the District Court simply because the Commissioners have always interpreted the Regulations that way without any legal authority for that proposition. This Court should reject Appellee's arguments that because it has always interpreted the Regulations in the same unlawful manner, then its interpretation must be reasonable in this case.

III. THE PENALTIES WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

[¶15] Appellee argues that there was substantial evidence to support the penalties in this case. (Appellee's Brief at ¶¶ 50, 51.)

[¶16] Under North Dakota law, Appellee must show that there is substantial evidence to support the penalties, even if they were calculated using a proper interpretation of the Regulations. *Tibert v. City of Minot*, 720 N.W.2d 921 (N.D. 2006). An action taken by the Commissioners without substantial evidence must be overturned. *Id*. The penalties lacked substantial evidence in at least four different ways.

[¶17] First, Appellee lacked substantial evidence of the number of units on the property and the time period of violations. In calculating the first penalty, Appellee speculated about rental rates that could be arbitrarily charged for the mobile homes, permanent homes and RVs on the property. (App. Apx. 66-67.) The Commissioners had no evidence to support these arbitrary rental rates.

[¶18] Appellee also lacked evidence regarding the number of units on the property during the violation period. The only evidence Appellee had regarding the number of units was a Staff Report that identified thirty RVs on the property. (App. Apx. 066-067.)

However, both penalties were based on forty (40) RVs. As such, appellee did not have substantial evidence in this regard.

[¶19] Third, the Commissioners lacked substantial evidence regarding the number of days the property was in violation of the Regulations. Appellee penalized Appellants for twenty-four months for the RVs when the evidence was that the RVs were on the property for only twenty-one months without a CUP. (App. Apx. 66-67.)

[¶20] Finally, the Commissioners lacked substantial evidence to support the number of days the mobile homes were on the property without a CUP by calculating the penalties based on twelve months when the evidence was that mobile homes were on the property for only ten months and four days without a CUP. As such, the penalties are not supported by substantial evidence.

IV. APPELLANTS HAD NO OPPORTUNITY TO PARITICIPATE IN THE PENALTY COMMITTEE MEETING.

[¶21] Appellee argues that there was no due process violation with respect to how it calculated the penalties. Specifically, Appellee argues that "[b]y failing to even assert there was an error as to the number of temporary housing units used in the civil penalty calculations, [Appellants] waive[] any such argument." (Appellee's Brief at ¶ 50.) "On appeal from a decision of a county commission, a reconsideration of evidence is limited to the extent that such evidence was presented to the county commission." *Dahm*, 841 N.W.2d 416.

[¶22] Here, Appellee prohibited Appellants from having an opportunity to participate in the "penalty committee" meeting when the Commissioners calculated the first penalty. Appellants were not notified of the penalty committee meeting, nor were they invited to present any evidence, documents or testimony at the secret meeting. The only

information that Appellants received regarding the meeting was when the penalty committee's recommendation was presented to Appellants less than twenty-four hours before the next Commissioners' meeting. Appellee's exclusion of Appellants from the penalty committee meeting prevented them from presenting evidence that would have impacted Appellee's decisions and thus its due process rights were violated in this case.

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Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **July 14, 2016**, he prepared the **Appellants' Reply Brief,** case number **20160089**, and served **1** copy of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

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Subscribed and sworn to before me on
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Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **July 14, 2016**, he prepared the **Appellants' Reply Brief,** case number **20160089,** and filed **8** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

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Subscribed and sworn to before me on
July 14, 2016

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