STATE OF IDAHO
County of BONNER )ss

FILED_____

AT_____ O'Clock _____M

CLERK, DISTRICT COURT

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Deputy

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

**WATERFRONT PROPERTY MANAGEMENT, LLC., an Idaho LLC, and R&S PROPERTIES, an Idaho Limited Partnership,**

Petitioners,

vs.

**STATE OF IDAHO, BD. OF LAND COMMISSIONERS, DEPT. OF LANDS, and the STATE OF IDAHO TRANSP. DEPT.,**

Respondents.

Case No. **S CV 2007 23**

**MEMORANDUM DECISION AND ORDER ON PETITIONER'S "OBJECTION TO RECORD AND ALTERNATIVELY MOTION TO AUGMENT RECORD"**

## I. INTRODUCTION AND BACKGROUND.

On May 22, 2008, petitioners filed an "Objection to Record and Alternative Motion to Augment Record". Petitioners want all of the record from the 2004 application to be considered by this Court, not just the 2006 application which is before the Court on judicial review. Objection to Record and Alternative Motion to Augment Record, p. 3.

On June 5, 2008, the respondent State of Idaho Board of Land Commissioners, Department of Lands (IDL) filed its "Response to Objection to Record and Objection to Motion to Augment Record", and the respondent State of Idaho Transportation Department (ITD) filed the "ITD's Response to Petitioners' Objection to Record and Alternative Motion to Augment the Record." Both respondents want this Court to only consider certain specific documents from the

2004 application to be considered in this Court's review of the 2006 application. Those are documents that were actually referenced in the 2006 application.

The Court presently has under advisement Petitioners' "Supplemental Motion for Stay Pending Judicial Review", filed on April 2, 2008. Oral argument on that motion was held on April 23, 2008, and the matter was taken under advisement by this Court as of May 2, 2008, when the parties filed their final briefs on that issue. Before the Court could make a decision on Peititioners' Supplemental Motion for Stay Pending Judicial Review, the petitioners filed this "Objection to Record and Alternative Motion to Augment Record" on May 22, 2008. Because the Court's decision on the Petitioners' Supplemental Motion for Stay Pending Judicial Review could be affected by "what is to be reviewed" by the Court, the Court will address petitioners' Objection to Record and Alternative Motion to Augment Record before deciding the petitioners' Supplemental Motion for Stay Pending Judicial Review. Petitioners' "Brief Regarding Standing/Jurisdiction/Etc.", filed April 30, 2008, at page 14, places the 2004 ITD application at issue on the Supplemental Motion for Stay Pending Judicial Review.

**II. ANALYSIS.**

On May 12, 2008, respondent IDL filed its "Notice of Lodging of Transcripts and Record on Appeal With the Agency Pursuant to IRCP 84 (j)" and "Certificate of Record on Appeal". Idaho Rule of Civil Procedure 84(j) states:

> (j)The notice shall inform the parties before the agency that they pick up a copy of the transcript and record at the agency and that the parties have fourteen (14) days from the date of the mailing of the notice in which to file with the agency any objections, and the notice shall further advise the petitioner to pay the balance of the fees for the preparation of the transcript, if any, and the record, if any, before the copy of the transcript and record will be delivered to the petitioner…….Any party may object to the transcript and record with fourteen (14) days from the date of mailing of the notice of the parties that the transcript and record has been lodged with the agency. Upon failure of the parties to file an objection within that time period, the transcript and record shall be deemed settled. Any objection made to a transcript and record shall be determined by the agency within fourteen (14) days of receipt thereof. The agency's decision on the objection and all

> evidence, exhibits, and written presentations on the objection shall be included in the record on petition for review.

This record on appeal contains all the documents to be reviewed by the court including some documents that were used in the 2004 application process. Those documents from the 2004 application are: the EIS (Environmental Impact Statement), ROS (Record of Decision), EA (Environmental Assessment), BA (Biological Assessment), FONSI (Finding of No Significant Impact), Application for Encroachment Permit # L-96-S-1640, and Previous IDL decisions on this permit. IDL October 5, 2007, Recommended Decision at 2, (¶2), as adopted by the October 11, 2007, IDL Final Order. ITD's Response to Petitioners' Objection to Record, p. 4. Certificate of Record on Appeal, p. 8, ¶¶ IV.A, V.A, V.B, pp. 9-10 ¶¶ VII. A-K. These documents are the basis for petitioners' Objection to Record and Alternatively Motion to Augment Record. Pursuant to IRCP 84 (j), petitioners filed their objection on May 22, 2008, timely complying with the rule.

In their Objection to Record and Alternatively Motion to Augment Record, petitioners assert that the respondent IDL should not be allowed to include only portions of the 2004 application documents, and petitioners ask this Court to alternatively augment the record to include the entirety of the 2004 application documents. Objection to Record and Alternatively Motion to Augment Record, pp. 2-3. Petitioners argue respondents should not be allowed to rely upon the record of the 2004 application because that application was withdrawn and never had a final decision made by judicial review. *Id*. p. 2. In response, IDL argues portions of the record that contain the 2004 application documents should be allowed because they were used in reference when making decision on the 2006 application. IDL's Response to Objection to Record and Objection to Augment Record, p. 3. IDL states that because these specific documents were referenced in the 2006 application decision, only these documents should be

included in the judicial review before this Court. *Id*. p. 4 ¶ 2. IDL relies upon I.C. § 67-5277, "Judicial Review of Issues of Fact", which reads:

> Judicial review shall be conducted by the court without a jury. Unless otherwise provided by statute, judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67- 5276, Idaho Code.

This statute limits the authority of this Court to those documents contained in the agency record unless otherwise provided by statute but does allow this Court to supplement the record with additional evidence pursuant to I.C. § 67-5276, "Additional Evidence" which reads:

> (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:
>
> (a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional fact-finding.
>
> (b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

Under that statute, petitioners need to show two things: (1) the "additional evidence is material, (and (2)) relates to the validity of the agency action" *plus,* one of two other things: "there were good reasons for failure to present (this additional evidence) in the proceeding before the agency", or, "there were alleged irregularities in the procedure before the agency." These exceptions have been recognized as the sole basis for a district court to allow augmentation of the record. *Lane Ranch Partnership v. City of Sun Valley,* 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). The IDL argues petitioners have not met these elements required by I.C. § 67-5276, and therefore should not be permitted to have additional evidence presented to this Court for judicial review. IDL's Response to Objection to Record and Objection to Augment Record, p. 6. This Court agrees. In their Objection to Record and Alternatively Motion to Augment Record, petitioners do not provide any specific evidence pursuant to that statute which would support their position.

Respondent, IDL, and Petitioners reference I.R.C.P. 84(l) which states "any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court to do so with in a 21 day time frame." *Id.* p. 5; Petitioners' Objection to Record and Alternatively Motion to Augment Record, p. 1. The timeliness of the motion is a non-issue because petitioners filed their Objection to Record and Alternatively Motion to Augment Record ten days after the record was presented to the Court.

Idaho Code § 67-5276 limits the augmentation of the record to those "additional materials presented to the agency." Thus, because the entire 2004 application record was not presented to the agency in the 2006 application, it should not be included in the record for judicial review.

In support of their position that the entire 2004 application documents should not be included, both respondents IDL and ITD cite *Crown Point Development, Inc. v. City of Sun Valley,* 144 Idaho 72, 156 P.3d 573 (2007). IDL's Response to Objection to Record and Objection to Motion to Augment Record, p. 6; ITD's Response to Petitioners' Objection to Record and Alternative Motion to Augment the Record, p. 3. *Crown Point* is on point and provides this Court with guidance in deciding petitioners' Objection to Record and Alternative Motion to Augment the Record. *Crown Point* was before the Idaho Supreme Court following an appeal from a district court decision which allowed augmentation of the record and additionally required the agency to issue a permit to the plaintiffs. 144 Idaho 72, 76, 156 P.3d 573, 577. This permit had been previously denied and was before the district court for judicial review. *Id.* The Idaho Supreme Court held the district court abused its discretion when it did not remand the proceedings to the agency for additional review after it allowed additional evidence to be added to the record. *Id.* The Idaho Supreme Court found "the district court correctly perceived the issue as one of discretion; it is not mandatory to allow additional evidence." *Id*. Additionally the

Idaho Supreme Court stated, "generally judicial review is confined to the agency record unless the party requesting the additional evidence complies with one of the two statutory exceptions in I.C. § 67-5276." *Id.*, citing *Petersen v. Franklin County*, 130 Idaho 176, 186, 938 P.2d 1214, 1224 (1997). As quoted above, those statutory exceptions include good reason for not including the additional evidence to the agency in the proceeding or alleged irregularities in procedure before the agency. I.C § 67-5276. In the present case, petitioners in their Objection to Record and Alternatively Motion to Augment Record do not address their reasoning for inclusion of additional evidence. Accordingly, the petitioners have not given a reason to utilize an exception provided under I.C. § 67-5276. *Crown Point* and its interpretation of I.C. § 67-5276 was recently reaffirmed by the Idaho Supreme Court in *Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487 (2008), where the they held that the petitioner did not provide good reasons for augmenting or prove any irregularities in the agencies' decision, thus not permitting the petitioner to augment the record.

The Idaho Supreme Court has also addressed the issue of inclusion in the agency's (City of Sun Valley) record, previously reviewed documents from earlier applications. *Crown Point*, 144 Idaho 72, 76, 156 P.3d 573, 577. "The factual findings demonstrate that the City (respondent) only considered information relating to Phase 1-4 to the degree such information was presented to the City in Phase 5 proceedings." *Id.* The Idaho Supreme Court was referring to the review of old information included on a map that was used in the agency's new decision on a subsequent application. *Id.* There was sufficient evidence that the City of Sun Valley only reviewed those old documents to the extent they were actually presented to the City of Sun Valley when rendering its decision on the new application. *Id.*

As noted by the ITD, "Admitting additional evidence when procedural irregularities are not alleged in essence results in a trial de novo and [the Idaho Supreme Court has stated that on

an appeal from an administrative agency 'a trial de novo is not a possible course of action.'" *Clow v. Board of County Commissioners,* 105 Idaho 714-716, 672 P.2d 1044, 1040 (1983), *citing Hill v. Board of County Commissioners,* 101 Idaho 850, 852, 623 P.2d 462, 464 (1981). ITD's Response to Petitioner's Objection to Record, p. 5.

In conclusion, petitioners do not meet the requirements of I.C. § 67-5276 to have the 2006 agency record augmented with the *entire* 2004 record. Petitioners do not provide evidence that the agency abused its power when it used limited and specific previous documents in its 2006 decision. These documents included information only relevant to assist in the 2006 decision and are not disputed directly by the petitioners. Although allowing the record to be augmented is in the discretion of this Court, this Court is bound by statutory requirements that require petitioners to present evidence to support their motion. Only when there is sufficient evidence presented to this Court in support of such a motion can this Court use its discretion to allow the record to be augmented. Additionally, petitioners' objection to the record based upon the inclusion of some 2004 documents in the 2006 agency record is not adequate grounds for a successful objection.

**III. ORDER.**

IT IS HEREBY ORDERED petitioners' Objection to the Record is OVERRULED, and petitioners' alternative Motion to Augment Record is DENIED.

Entered this 20th day of June, 2008.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _____ day of June, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| Lawyer | Fax # | Lawyer | Fax # |
|---|---|---|---|
| John A. Finney | (208) 263 8211 | Clive Strong, Steven J. Schuster | (208) 334-2297 |
| Murray Feldman, Mary v. York | (208) 343-8869 | | |

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Jeanne Clausen, Deputy Clerk