The Curious Case of Idaho Code Section 12-117

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The landscape of petitions for judicial review of agency and local government actions has shifted recently on a number of fronts. For example, the scope of a court's review of local government land-use decisions narrowed considerably in 2008 with *Burns Holdings* and its accompanying cases.[1] Until H.B. 605 was enacted in 2010,[2] land-use practitioners had significant reason to question whether petitions for judicial review would be available for a number of different local government land-use approvals.

Recently, the Idaho Supreme Court and the Idaho Legislature have been engaged in yet another back-and-forth affecting petitions for judicial review of agency and local government actions. This time, the question deals with Idaho Code Section 12-117 and the ability to seek awards of attorney fees under that statute.


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Participants in petitions for judicial review have regularly relied on Section 12-117; however, recent Idaho Supreme Court decisions have determined that Section 12-117 is no longer available in that context. Meanwhile, efforts at the Idaho Legislature reveal an apparent disconnect between legislative intent and the Idaho Supreme Court's interpretation of the actual language of enacted legislation. This article describes the dilemma participants face as a result of this disconnect and urges a "fix" in the next legislative term that will restore this important check on abuse of the judicial process.

Background

Idaho Code Section 12-117 allows for awards of attorney fees against a nonprevailing party in an action involving "a state agency or political subdivision" if the court "finds that the nonprevailing party acted without a reasonable basis in fact or law."[3] It also allows for an award of fees if the nonprevailing party acts without a reasonable basis with respect to any portion of the case.[4] Courts have relied on these checks on actions "without a reasonable basis in fact or law" to punish misuse of the courts (or, in the case of local governments, their authority over land-use approvals) in cases involving a "political subdivision" of the state.[5]

The types of cases where Section 12-117 has been regularly employed are varied. Land-use entitlements are a prominent example. These are often proceedings at the frontier of law and politics and controversial decisions are regularly challenged through petitions for judicial review. Unfortunately, high stakes may mean neighbors or applicants may be willing to challenge a decision without a firm basis, or local governments, under pressure, may issue decisions that overlook significant evidence or ignore ordinance requirements, knowing that the likely outcome is simply a remand back to the local elected officials to "get it right" in a new decision.

Very similar pressures arise in petitions for judicial review of decisions by administrative agencies more generally (as opposed to local municipal bodies). A prominent recent example was the *Laughy* case, in which individuals living and operating businesses along the Highway 12 corridor challenged permits issued to ConocoPhillips Company by the Idaho Transportation Department.[6] In *Laughy*, both ConocoPhillips and the neighbors applied for fees under Section 12-117. Yet, for reasons explained more fully below, the Supreme Court ruled that, despite a history of use in just this context, Section 12-117 was no longer available in petitions for judicial review of agency actions.

Rammell and the 2010 legislative response

The litigants in *Laughy* likely expected to be able to rely on Section 12-117 because of its regular presence in petitions for judicial review for many years. All of that changed when the Idaho Supreme Court heard *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415, 210 P.3d 523 (2009).

In *Rammell*, the Supreme Court changed its prior position regarding the authority of "administrative agencies" to award attorneys' fees in an "administrative proceeding," holding that Section 12-117 only allowed a "court"—not an agency—to award fees. The Court also relied on the label contained in the then-effective language of the statute ("any administrative or civil judicial proceeding") to conclude that fees could not be granted directly by an administrative entity:

> Because the prior version of [Section] 12-117(1) authorized courts to award fees in "any administrative or civil judicial proceeding," it was evident that the courts of this state were to have some power to award attorney fees in judicial actions relating to administrative proceedings. Since the Legislature provided no mechanism for courts to award fees in administrative proceedings, it must have only meant to allow fee awards in appeals from administrative decisions.[7]

The Idaho legislature reacted swiftly to *Rammell* by amending Section 12-117 with retroactive effect. House Bill 421 was intended to "restore the law as it [had] existed since 1989...,"[8] because it would "permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases."[9] The clear intent of H.B. 421 as expressed in the Statement of Purpose was to restore the *status quo ante*—not to further limit Section 12-117's use in these settings.

Smith v. Washington County

Not long thereafter, the Idaho Supreme Court interpreted the new language of Section 12-117. The result was not what H.B. 421's drafters anticipated.

In *Smith v. Washington County Idaho*, 150 Idaho 388, 247 P.3d 615 (2010), an applicant convinced the lower court to overturn a county's decision not to grant a building permit. The subject of the appeal

was whether attorney fees should have been awarded to the applicant where "the Board had delayed [the applicant's] application for too long and had denied the permit arbitrarily."[10]

The Idaho Supreme Court denied the award of attorney fees because, in the Court's view, Section 12-117 (as amended by H.B. 421) no longer allows for an award of attorney fees by a court hearing a petition for judicial review of an agency decision. The Court reached this conclusion based upon two rulings. The Court looked, first, to the amended language of Section 12-117(1), which now states:

> Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, 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.[11]

The Court focused on new language indicating fees may be awarded by "the state agency or political subdivision or the court, as the case may be," which the Court interpreted to mean "that only the relevant adjudicative body—the agency in an administrative proceeding or the court in a judicial proceeding—may award the attorney fees."[12] In other words, a reviewing court no longer has the ability to award fees—only the body that hears the original application may do so.

The second prong of the Court's analysis was based upon its often-repeated refrain that petitions for judicial review are not "civil judicial proceedings" because they are not initiated with a "complaint filed in court."[13] The Court concluded that petitions for judicial review no longer fall within the purview of Section 12-117 because, "[b]y separating 'administrative proceedings' from 'civil judicial proceedings,' the Legislature signaled that the courts should no longer be able to award fees in administrative judicial proceedings such as this one."[14]

Legislative help did not arrive in the 2011 session

The *Smith* decision prompted additional legislative action—this time during the 2011 Idaho legislature. As unmistakably expressed in its Statement of Purpose, House Bill 209[15] was a reaction to *Smith*:

> Until the summer of 2009, Idaho Code Section 12-117 was interpreted by the Idaho Supreme Court to allow an award of attorney fees and costs to the prevailing party in administrative cases if the non-prevailing party acted without a reasonable basis in fact or law. Following an Idaho Supreme Court ruling in the summer of 2009, which reinterpreted the statute to bar such awards, HB 421 was passed by the 2010 Legislature and signed into law with the objective of allowing such awards at all stages of an administrative proceeding, including on appeal to the courts. Nonetheless, on October 6, 2010, the Idaho Supreme Court ruled that the 2010 amendments did not accomplish this objective. (See Smith v. Washington County, 149 Idaho 787, 241 P.3d 960 (2010)). This bill adds additional language to Idaho Code Section 12-117 to correct this situation....

Unfortunately, however, rather than focusing solely on the fix needed to address the attorney fees issue, House Bill 209 also attempted to cover other ground. For example, it included a provision *requiring* an award of attorney fees in cases involving government entities as adverse parties. It is unclear whether this additional language caused a problem for the legislation; what is known is that House Bill 209 stalled in the Senate Judiciary Committee. A "fix" restoring the ability to seek attorney fees in petitions for judicial review has still not occurred.

In the meantime, the Idaho Supreme Court has repeatedly relied on *Smith* to reject requests for attorney fees under Section 12-117,[16] despite calls by litigants, including local governments, for the Court to reconsider its conclusion in *Smith* in light of the legislative history of H.B. 421. To date, the Court has refused to do so, holding that the plain language of H.B. 421 requires the result reached by the Court.[17]

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A "fix" in 2012?

Another attempt at resolving this situation is expected in the 2012 legislative session. Resolution of what is, on its face, a simple issue is imperative not only for all applicants, but also for agencies and local governments who would like the more straightforward path to attorneys' fees that Section 12-117 can provide.

A relatively simple amendment of the form noted below would, in this author's opinion, resolve the issue. Blacklined language from the existing statute (in relevant part) is suggested below.

The primary change needed removes the modifiers of the word "proceeding" that created the distinction confronted by the Supreme Court in *Smith*:

> 12-117. Attorney's fees, witness fees and expenses awarded in certain instances.
> (1) Unless otherwise provided by statute, in any ~~administrative proceeding or civil judicial~~ proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court hearing the proceeding, ~~as the case may be~~, 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.

A similar change (deleting the modifiers of the word "proceeding") would also be needed in sub-section 2:

> (2) If a party to ~~an administrative proceeding or to~~ a ~~civil judicial~~ proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, ~~as the case may be,~~ including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

These modifications alone may be enough to remedy the issue confronted by the Supreme Court in *Smith*; however, for good measure, the legislature may consider making the word, "proceeding" a defined term, as follows:

(4) For the purposes of this section:
(a) "Person" shall mean any individual, partnership, corporation, association or any other private organization;
(b) "Political subdivision" shall mean a city, a county or any taxing district.
(c) "Proceeding" shall include: any administrative proceeding, administrative judicial proceeding, civil judicial proceeding, or petition for judicial review; or any appeal from any administrative proceeding, administrative judicial proceeding, civil judicial proceeding, or petition for judicial review.
~~(c)~~(d) "State agency" shall mean any agency as defined in section 67-5201, Idaho Code.

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Conclusion

Section 12-117 is an important deterrent against abuse of the process provided for challenging agency decisions, generally, and local government land-use decisions, in particular. It is hoped that legislative efforts to address the interpretation of Section 12-117 after *Smith* will be successful in the 2012 Idaho legislative session.

About the Author

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Endnotes

[1] *Burns Holdings, LLC v. Madison County Bd. of County Com'rs*, 147 Idaho 660, 214 P.3d 646 (2008). *See also Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008); *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008); *Taylor v. Canyon County Board of Comm'rs*, 147 Idaho 424, 210 P.3d 532 (2009).

[2] H.B. 605, Sixtieth Legislature, 2d. Regular Session (Idaho 2010). H.B. 605 clarified the situation by stating the Legislature's intent that all "applications for zoning changes, subdivisions, variances, special use permits and such other similar applications required or authorized pursuant to [LLUPA]" would be eligible for judicial review—not simply those "permits" specifically identified as such by LLUPA.

[3] I.C. § 12-117(1).

[4] I.C. § 12-117(2).

[5] *See, e.g., Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005); *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 39 P.3d 606 (2001).

[6] *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 243 P.3d 1055 (2010).

[7] *Smith v. Washington County, Idaho*, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010).

[8] *Id.*

[9] H.B. 421, Sixtieth Legislature, 2d. Regular Session (Idaho 2010).

[10] *Smith*, 150 Idaho at 390, 247 P.3d at 617.

[11] I.C. § 12-117(1).

[12] *Smith*, 150 Idaho at 391, 247 P.3d at 618

[13] *Id.* citing *Sanchez v. State*, 143 Idaho 239, 243, 141 P.3d 1108, 1112 (2006); *Neighbors for Responsible Growth v. Kootenai Cnty.*, 147 Idaho 173, 176 n. 1, 207 P.3d 149, 152 n. 1 (2009). This same reasoning was used in *Laughy* to deny a claim for attorney fees under Idaho Code Section 12-121, which allows for such awards "[i]n any civil action." *Laughy*, 149 Idaho at 877.

[14] *Id.* Even worse for the applicant in *Smith* is the fact that the case was originally styled as a petition for a writ of mandate, then converted by the Court to a petition for judicial review. The Court notes that "Smith... never challenged the district court's decision to treat his initial motion for mandamus relief as a petition for judicial review." Whether Smith should (or could) have known that such a challenge would be necessary is a difficult question in light of prior decisions permitting awards of attorney fees in petitions for judicial review.

[15] H.B. 209, Sixty-First Legislature, 1st Regular Session (Idaho 2011).

[16] *See, e.g., Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 245 P.3d 983 (2010); *St. Luke's Magic Valley Regional Medical Center, Ltd. V. Board of County Comm'rs of Gooding County*, 150 Idaho 484, 248 P.3d 735 (2011); *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666 (2011); *In re City of Shelley*, 151 Idaho 289, 255 P.3d 1175 (2011); *Locker v. How Soel, Inc.*, 151 Idaho 696, 263 P.3d 750 (2011).

[17] *See Sopatyk v. Lemhi County*, No. 37186, 2011 WL 5375190, at *7-9 (2011). The Court also decided not to overturn *Smith* because, in the Court's opinion, "there is no obvious principle of justice at stake here" because, "[h]aving allowed parties to bring petitions for judicial review in the first place, the Legislature could reasonably have intended to withhold fee awards in such cases. No fundamental principle of law requires attorney's fees in judicial review of administrative decisions, nor is there any basic injustice in requiring parties to pay their own attorneys." *Id.* at *9. Another case also deserves brief mention. In *Jasso v. Camas County*, No. 37258, 2011 WL 5299710 (2011), an applicant obtained an award of attorney fees from the district court based upon the court's review of a denial of a preliminary plat. Although the award was given prior to the enactment of H.B. 421, H.B. 421 was enacted with *retroactive* effect. The Court relied upon this retroactive effect in order to overturn the award.