STATE OF INDIANA) MARION SUPERIOR COURT
) ss: CIVIL DIVISION 12
COUNTY OF MARION) CAUSE NO. 49D12-1108-MI-031834

JOHN ANEVSKI,

Petitioner,

vs.

INDIANA OFFICE OF, ENVIRONMENTAL ADJUDICATION; and INDIANA DEPARTMENT OF, ENVIRONMENTAL MANAGEMENT,

Respondents.

FILED
(264) JUN 12 2012
Elizabeth L White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
ON PETITION FOR JUDICIAL REVIEW ON COUNT XIII

This case is before the Court on Petitioner, John Anevski's ("Anevski") Petition for Judicial Review, which was filed on August 18, 2011 and entitled "Complaint and Verified Petition for Review." This document contains sixteen Counts and are as follows: Count I: Preclusion; Count II: Statute of Limitations; Count III: Breach of Contract; Count IV: Failure to Apply a Preponderance of the Evidence Standard; Count V: Compliance with Erosion Control Plan; Count VI: Absence of Ascertainable Standards, Retroactive Regulation, Unconstitutionality; Count VII: Improper Penalty; Count VIII: Waiver; Count VIIII: Estoppel; Count X: Hearsay; Count XI: Wrongful Injunction; Count XII: Declaratory Judgment; Count XIII: Statutory Factors under IC 4-21.5-5-14; Count XIV: Abuse of Process; Count XV: Detrimental Reliance; and Count XVI: Fraud.

On March 15, 2012 Anevski filed his Brief in Support of his Petition for Judicial Review. Respondent, Indiana Department of Environmental Management ("IDEM"), filed their Response

in Opposition to Anevski's Brief in Support of his Petition for Review on April 13, 2012, and Respondent; Indiana Office of Environmental Adjudication ("OEA"), on April 16, 2012 filed its Brief in Opposition to Anevski's Petition for Judicial Review. On April 26, 2012, Anevski replied to these motions when he filed his Reply in Support of his Petition for Judicial Review.

The Court having reviewed the pleadings and administrative record in this matter, hereby issues the following Findings of Fact, Conclusions of Law and Judgment Order:

FINDINGS OF FACT

1. John Anevski ("Anevski") owns property in Lawrenceburg, Indiana, where he built a small shopping center. His project area included the initial construction of the shopping center ("JTS Plaza"), the work done by the utility company ("Rough Grading"), and the eventual expansion of the shopping center ("JTS Plaza Expansion").
2. Anevski signed an Agreed Order in November 2002 written by the Indiana Department of Environmental Adjudication ("IDEM") for the project site after IDEM found that Anevski failed to assure that erosion control measures were implemented and maintained at the site and that off-site sedimentation did not occur during the period of construction activity from March 1, 2001 to November 27, 2001. (2002 Agreed Order). Specifically, disturbed areas had not been adequately protected through seeding or other appropriate erosion and sediment control measures, storm drains and outlets had been inadequately stabilized, existing erosion control measures were not maintained, and the site conditions presented a high potential for off-site sedimentation.
3. The 2002 Agreed Order required that an erosion control plan be submitted before any additional earth disturbance was made by Anevski. It also required that Anevski inspect the site twice per month and after rainfall events to ensure that all erosion and sediment

control measures were properly maintained. The Agreed 2002 Order required Anevski to pay a civil penalty of $17,400.00.

4. In November of 2004, IDEM filed a Verified Petition for Civil Enforcement in the Dearborn Circuit Court to enforce the 2002 Agreed Order. They eventually sought dismissal without prejudice, but on July 17, 2007, the trial judge instead dismissed the case with prejudice.

5. On February 18, 2005, IDEM issued to Anevski an Amended Notice of Violation, amending a Notice of Violation issued January 21, 2004. In the Amended Notice of Violation, for the Rough Grading area, IDEM stated based on inspections between June 12, 2003 and August 19, 2004, Anevski failed to assure that erosion control measures were implemented and maintained at the site. Based on inspections occurring from October 16, 2003 to August 19, 2004, Anevski failed to assure that off-site sedimentation did not occur during the period of construction activity. (Amended Notice of Violation).

6. In the Amended Notice of Violation for the JTS Plaza Expansion site, based on inspections conducted on October 16, 2003, March 18, 2004, and August 19, 2004, IDEM cited Anevski for failure to assure that erosion control measures were implemented and maintained at the site, and that based on the October and March inspections, Anevski failed to assure that off-site sedimentation did not occur during the period of construction activity at the JTS Plaza Expansion project. Then, on May 9, 2006, IDEM issued Anevski a Notice and Order of the Commissioner, regarding erosion control procedure violations at the Rough Grading project and at the JTS Plaza Expansion. This adopted the Amended Notice of Violations issued on February 18, 2005.

7. Anevski filed a motion for summary judgment in the agency proceedings but the OEA denied it on January 24, 2008, issuing its Findings of Fact, Conclusions of Law and Order on the same day.

8. On June 24, 2011, the final evidentiary hearing was held before the OEA. On July 20, 2011, OEA issued its Findings of Fact, Conclusions of Law, and Final Order ("final order') in favor of IDEM. In the final order, OEA's Environmental Law Judge ordered the following: 1) John Anevski and Anevski Commercial Development, a/k/a J.A. Development, is in violation of 327 IAC 15-5-7(d), 327 IAC 15-5-7(b) and 327 IAC 15-5-7(c); 2) Anevski is assessed a penalty of Seventeen Thousand and Five Hundred Dollars ($17,500.00) to be paid within thirty (30) days of the effective date of this Order. This penalty shall be paid to the Environmental Management Special Fund in accordance with Paragraph 13 of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management; and 3) Anevski is further ordered to comply with Paragraph 1, 2, 3, 4, 5, 5, 6, 7, 8, 9, 10 and 11 of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management issued on May 10, 2006.

CONCLUSIONS OF LAW

1. The Administrative Orders and Procedures Act ("AOPA"), specifically Indiana Code § 4-21.5-5-14, allows a court to grant relief on judicial review when the party petitioning for review demonstrates that it was prejudiced by agency action that was:

> (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 limitation, or short of statutory right;

> (4) Without observance of procedure required by law; or (5) Unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14.

2. Petitioner carries the burden of demonstrating the invalidity of the agency action in this case. *Id.*

3. An agency action is arbitrary and capricious if it constitutes a willful or unreasonable action, is without consideration and in disregard of the facts and circumstances of the case, or is without some basis that would lead a reasonable and honest person to such action. *Ind. Bd. of Pharm. v. Crick*, 433 N.E.2d 32, 39 (Ind. Ct. App. 1982); *Ind. Civil Rights Comm'n v. Sutherland Lumber*, 394 N.E.2d 949 (Ind. Ct. App. 1979).

4. An action is arbitrary and capricious where there is no reasonable basis for action. *Family and Soc. Serv. Admin. v. Boise,* 667 N.E.2d 753, 754 (Ind. Ct. App. 1996).

5. Substantial evidence requires something "more than a scintilla, but something less than a preponderance of the evidence." *State v. Carmel Healthcare Mgmt., Inc.,* 660 N.E.2d 1379, 1384 (Ind. Ct. App. 1996); *Ind. Dep't of Natural Res. v. Lehman*, 378 N.E.2d 31, 36 (Ind. Ct. App. 1978); *see also, Bivens v. State,* 642 N.E.2d 928, 949-50 (Ind. 1994) (stating that to establish by a preponderance of the evidence means that something is more likely true than not true).

6. "Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *City of Indianapolis v. Woods,* 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998). "If a reasonable person would conclude that the evidence and the logical and reasonable inferences therefrom are of such a substantial character and probative value so as to support the administrative determination, then the substantial

evidence standard of I.C. §4-21.5-5-14(d)(5) is met." *Indiana Civil Rights Comm'n v. Weingart, Inc.*, 588 N.E.2d 1288, 1289 (Ind. Ct. App. 1992).

7. In order to determine if the agency's action is supported by substantial evidence, the Court should look at the evidence as a whole. *City of Indianapolis v. Hargis*, 588 N.E.2d 496, 498 (Ind. 1992)(determining that "unsupported by substantial evidence," as it relates to judicial review of Pension Board decisions, means that "a reviewing court may vacate a board's decision only if the evidence, when viewed as a whole, demonstrates that the conclusions reached by the board are clearly erroneous").

8. When reviewing agency conclusions of law, "the court is not bound by the agency's interpretations of law, and is free to determine any legal question which arises out of an administrative action." *Hamilton County Dep't of Pub. Welfare v. Smith*, 567 N.E.2d 165, 168 (Ind. Ct. App. 1991).

9. However, "when a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless that interpretation is inconsistent with the statute itself." *Ind. Dep't of Envtl. Mgmt v. Constr. Mgmt. Ass'n, L.L.C.*, 890 N.E.2d 107, 112-113 (Ind. Ct. App. 2008).

10. Where both an agency and a petitioner offer plausible interpretations of a statute that the agency is responsible for interpreting, a court reviewing an administrative action should defer to the agency's interpretation. *Sullivan v. Day*, 681 N.E.2d 713, 716 (Ind. 1997).

11. The deference to an agency's action is due to the expertise of the agency. *Shaffer v. State*, 795 N.E.2d 1072 (Ind. Ct. App. 2003) ("the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public

reliance on agency interpretations.") (*quoting Ind. Wholesale Wine v. State ex rel. Ind. Alcoholic Beverage Comm'n,* 695 N.E.2d 99, 105 (Ind. 1998)). An interpretation of statutes and regulations by an administrative agency charged with the duty of enforcing those regulations and statutes is entitled to great weight unless this interpretation would be inconsistent with the law itself. *LTV Steel Co. v. Griffin,* 730 N.E.2d 1251, 1257 (Ind. 2000).

12. "While due process is required in adjudicatory administrative proceedings, such proceedings are not required to be conducted with all of the procedural safeguards afforded by judicial proceedings .... We accept a lower standard in proceedings before administrative bodies because it would be unworkable to do otherwise." *State ex rel. Newton v. Bd. of Sch. Trustees of Metro. Sch. Dist. of Wabash County,* 460 N.E.2d 533, 543 (Ind. Ct. App. 1984).

13. *I.C.§ 4-21.5-3-26* addresses the conduct of administrative hearings and addresses the evidence which may be presented. *I.C.§ 4-21.5-3-26* states as follows:

> "(a) This section and section 25 of this chapter govern the conduct of any hearing conducted by an administrative law judge. Upon proper objection, the administrative law judge shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts. In the absence of proper objection, the administrative law judge may exclude objectionable evidence. The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence.
>
> (b) All testimony of parties and witnesses must be made under oath or affirmation.
>
> (c) Statements presented by nonparties in accordance with section 25 of this chapter may be received as evidence.
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> (d) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

(e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original if available.

(f) Official notice may be taken of the following:

(1) Any fact that could be judicially noticed in the courts.

(2) The record of other proceedings before the agency.

(3) Technical or scientific matters within the agency's specialized knowledge.

(4) Codes or standards that have been adopted by an agency of the United States or this state.

(g) Parties must be:

(1) notified before or during the hearing, or before the issuance of any order that is based in whole or in part on facts or material noticed under subsection (f), of the specific facts or material noticed, and the source of the facts or material noticed, including any staff memoranda and data; and

(2) afforded an opportunity to contest and rebut the facts or material noticed under subsection (f)."

14. "The order of an administrative tribunal must be based on evidence produced at the hearing where there is an opportunity for all interested parties to offer evidence, cross-examine witnesses, and argue their positions." *Oriental Health Spa v. City of Fort Wayne*, 526 N.E.2d 1019, 1022 (Ind. Ct. App. 1988). "Thus, an agency must base its decision on evidence received during the administrative hearing." *Ind. Civil Rights omm'n*, N.E.2d 518 at 527.

15. "A claim is barred by the doctrine of res judicata if the following four requirements are met: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the prior action must have been between the same parties to

the present suit or their privies." *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002 (Ind. Ct. App. 2003). "A dismissal with prejudice is conclusive of the rights of the parties and is res judicata as to any questions that might have been litigated." *Id.* at 1002-1003.

16. *I.C. § 13-30-4-1* states (effective through May 31, 2012 and current when IDEM and OEA took action in this administrative matter):

> "(a) Subject to IC 13-14-6 and except as provided in IC 13-23-14-2 and IC 13-23-14-3, a person who violates:
> (1) any provision of:
> (A) environmental management laws;
> (B) air pollution control laws;
> (C) water pollution control laws;
> (D) IC 13-18-14-1; or
> (E) a rule or standard adopted by one (1) of the boards; or
> (2) any determination, permit, or order made or issued by the commissioner under:
> (A) environmental management laws or IC 13-7 (before its repeal);
> (B) air pollution control laws or IC 13-1-1 (before its repeal); or
> (C) water pollution control laws or IC 13-1-3 (before its repeal); is liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) per day of any violation.
> (b) The department may:
> (1) recover the civil penalty described in subsection (a) in a civil action commenced in any court with jurisdiction; and
> (2) request in the action that the person be enjoined from continuing the violation."

I.C. § 13-30-3-5 provides:

> "(a) Except as otherwise provided in:
> (1) a notice issued under section 4 of this chapter; or
> (2) a law relating to emergency orders; an order of the commissioner under this chapter takes effect twenty (20) days after the alleged violator receives the notice, unless the alleged violator requests under subsection (b) a review

of the order before the twentieth day after receiving the notice.
(b) To request a review of the order, the alleged violator must:
(1) file a written request with the office of environmental adjudication under IC 4-21.5-7; and
(2) serve a copy of the request on the commissioner.
(c) If a review of an order is requested under this section, the office of environmental adjudication established under IC 4-21.5-7 shall review the order under IC 4-21.5."

17. The above two statues give IDEM two separate and distinct types of enforcement authority. Under *I.C.§ 13-30-4-1(b)*, IDEM has the option of filing a Petition for Civil Enforcement in a county court to enforce duly issued administrative orders. It was pursuant to this authority that IDEM filed a Petition for Civil Enforcement in the Dearborn Circuit Court to enforce the 2002 Agreed Order entered into by itself and Anevski.
18. Separate and distinct from IDEM's civil enforcement authority under *I.C. § 13-30-4-1(b)*, is its authority under *I.C. § 13-30-3-5* to issue administrative orders which may be appealed to OEA. It is under this authority that IDEM issued its 2006 Commissioner's Order, which was upheld by OEA in the Final Order dated July 20, 2011. The issuance of the 2006 Commissioner's Order was under a completely different statutory scheme than were the proceedings in the Dearborn Circuit Court.
19. Anevski contends that IDEM is barred from re-litigating claims that were raised or could have been raised when IDEM's petition for civil enforcement was dismissed with prejudice from the Dearborn Circuit Court. He contends that because the claims made in the 2006 Commissioner's Order before the OEA are almost verbatim to those filed in the 2002 Agreed Order before the Dearborn Circuit Court, that since the site condition at the time of the agency filing is the same or an improvement over the site condition at the

time of the action filed in court, and that because IDEM is again claiming the exact same facts with no new construction activity, there is no new regulatory violation that IDEM can litigate before the OEA. Anevski is correct in that IDEM cannot bring any new claims based on the 2002 Agreed Order because of the dismissal with prejudice from the Dearborn Circuit Court. In addition, OEA and IDEM agree that *res judicata* prohibits further litigation on the 2002 Agreed Order.

20. However, this Court finds Anevski's argument that he cannot be investigated for future violations of the same issue to violate public policy. Anevski under his interpretation would be free to disregard the same environmental regulations time and time again without any retribution. Even though the 2006 Commissioner's Order and the 2002 Agreed Order are based on the same erosion and sedimentation control deficiencies on the same property with the same owner, the 2006 Commissioner's Order was a future violation that cannot be barred by *res judicata*. The principles of *res judicata* have not been satisfied regarding whether the matter now in issue was, or could have been, determined in the prior action because there were violations found from inspections conducted after the 2002 Agreed Order was entered. An enforcement action merely determine whether the parties have complied with the agency order and enforces the agency order if compliance has not occurred. The 2006 Commissioner's Order was based on investigations conducted between December 22, 2003 and August 19, 2004, all after those which were the basis of the 2002 Agreed Order. Furthermore, Anevski has failed to show: 1) that this agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) that it is contrary to constitutional right, power, privilege, or immunity; 3) that it is in excess of statutory jurisdiction, authority, or

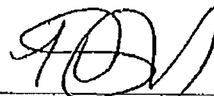
limitation, or short of statutory right; 4) that it is without observance to procedure required by law; or 5) that it is unsupported by substantial evidence. Thus, this Court hereby DENIES Anevski's Petition for Judicial Review on Count XIII, and finds that *res judicata* does not bar IDEM from proceeding with its 2006 Commissioner's Order before the OEA.

21. Finally, this Court points out that I.C. § 4-21.5-5-14 only allows a court to grant relief on a Petition for Judicial Review when the party petitioning for review demonstrates that the agency's decision was (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 limitation, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. It does not permit the filing of a Complaint with other allegations not permitted under the law.

ORDER

This Court hereby DENIES Anevski's Petition for Judicial Review on Count XIII and enters Judgment in favor of IDEM and OEA.

SO ORDERED, ADJUGED, AND DECREED THIS 12th DAY OF JUNE 2012.



HEATHER WELCH, JUDGE
Marion Superior Court
Civil 12

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