

DA 17-0662

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 148N

PATRICK W. ELLIOTT, and DONALD D. MONDUL,

Petitioners and Appellants,

v.

POWELL COUNTY PLANNING BOARD,

Respondent and Appellee.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Powell, Cause No. DV 17-22
Honorable Ray Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Patrick W. Elliot, Self-Represented, Seeley Lake, Montana

Donald D. Mondul, Self-Represented, Seeley Lake, Montana

For Appellee:

Lewis K. Smith, Powell County Attorney, Deer Lodge, Montana

Submitted on Briefs: April 18, 2018

Decided: June 12, 2018

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 In February 2017, the Powell County Planning Board (the "Board") approved a conditional use permit for a sand and gravel pit in Powell County, adjacent to the Double Arrow Ranch housing development ("Double Arrow") located in Missoula County. Patrick Elliott and Donald Mondul, Double Arrow residents, filed a petition in the Third Judicial District Court to rescind and nullify the Board's decision to issue the permit. Elliott and Mondul argued that the statute on which the Board relied, § 76-2-209(3), MCA, is unconstitutional. The District Court held a hearing and upheld the Board's decision. Elliott and Mondul appeal the District Court's ruling. We affirm.

¶3 LHC, Inc. ("LHC"), on behalf of the Birdhead Company, requested a conditional use permit to operate a sand and gravel pit on land near Seeley Lake, adjacent to Double Arrow. The proposed pit site is zoned by Powell County for agricultural use. Double Arrow has no county zoning designation. After public comment from many Double Arrow residents and other citizens, the Board denied the conditional use permit, stating in its written order that the pit "is incompatible with the neighboring subdivision, has an

inadequate and unsafe access, and presents a threat of groundwater contamination to the neighboring subdivision.”

¶4 LHC requested the Board to reconsider its denial of the permit, arguing that § 76-2-209(3), MCA, prevents county zoning regulations from prohibiting sand and gravel mining operations in any area zoned other than residential. The Board reconsidered its action and voted to approve the permit. It attached conditions to the permit requiring that all site activities comply with applicable federal and state regulations, specifically “requirements associated with the Opencut Mining Act.”

¶5 In support of their petition to rescind and nullify the permit, Elliott and Mondul argued to the District Court that § 76-2-209(3), MCA, is unconstitutional because it violates the right to a clean and healthful environment guaranteed under Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. They argued that the statute forced the Board to automatically approve the permit despite the operation’s incompatibility with Double Arrow and potential environmental threats. They also argued that the Board’s conditions may not be enough to ensure a clean and healthful environment. The District Court determined that Elliott and Mondul did not prove beyond a reasonable doubt that the statute is unconstitutional as interpreted (on its face) or as applied to the facts of their case.

¶6 This Court exercises plenary review of constitutional issues. *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131. The constitutionality of a statute is presumed unless it conflicts with the constitution beyond a

reasonable doubt. *Mont. Cannabis Indus. Ass'n*, ¶ 12. The party challenging the constitutionality of a statute bears the burden of proof. *Mont. Cannabis Indus. Ass'n*, ¶ 12. We review for correctness a district court's decisions on constitutional issues. *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231.

¶7 Analysis of a facial challenge differs from that of an as-applied challenge. *Mont. Cannabis Indus. Ass'n*, ¶ 14. A facial challenge requires proof that no circumstances exist under which a statute would be constitutional. *Mont. Cannabis Indus. Ass'n*, ¶ 14. An as-applied challenge examines the application of a statute as applied in a given set of circumstances. *Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs*, 2016 MT 325, ¶ 45, 385 Mont. 505, 386 P.3d 567.

¶8 Section 76-2-209, MCA, governs county zoning of natural resources. Section 76-2-209(2), MCA, allows zoning regulations to reasonably condition or prohibit sand and gravel mining in areas that are zoned residential. Section 76-2-209(3), MCA, allows zoning regulations to reasonably condition, but not to prohibit, sand and gravel mining in areas that are not zoned residential.

¶9 Title 82, chapter 4, part 4, MCA, regulates opencut mining such as the proposed sand and gravel operation in this case. Section 82-4-402(1), MCA, states:

The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted The Opencut Mining Act. It is the legislature's intent that the requirements of this part provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The Opencut Mining Act regulates permitting of opencut mines by the Montana Department of Environmental Quality (“DEQ”) to ensure that the constitutional guarantee to a clean and healthful environment is fulfilled. DEQ may not grant a permit unless the application contains a complete plan of operation that addresses how the proposed permittee will comply with multiple requirements established to prevent damage and harm. *Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm’n*, 2012 MT 272, ¶ 38, 367 Mont. 130, 290 P.3d 691. DEQ “‘may not accept a plan of operation *unless*’ the plan meets the fourteen requirements listed in § 82-4-434(3)(a)-(n), MCA.” *Helena Sand & Gravel, Inc.*, ¶ 38 (quoting § 82-4-434, MCA, and supplying emphases). “The language of the statutes makes clear that an applicant is not entitled to a permit unless the application is ‘complete’ and DEQ determines that the application is ‘acceptable.’” *Helena Sand & Gravel, Inc.*, ¶ 38 (quoting § 82-4-432(4)(b)(i), MCA). If DEQ finds any requirements lacking, such as a plan for groundwater protection, the permit will not move forward. *Helena Sand & Gravel, Inc.*, ¶ 39.

¶10 Elliott and Mondul argued at the District Court hearing that § 76-2-209(3), MCA, is unconstitutional because it absolutely prevents the prohibition of sand and gravel mining operations on land that is not residential; they posit that situations may exist where no conditions placed on the operations can “fix” a threat or injury to a clean and healthful environment. To sustain a facial challenge, Elliott and Mondul needed to demonstrate that conditions on a permit issued under § 76-2-209(3), MCA, could not

protect the right to a clean and healthful environment under any circumstances. They did not do so. Nor did Elliott and Mondul present evidence that the conditions the Board attached to the permit at issue, which included the opencut mining requirements imposed by DEQ, would infringe their constitutional right to a clean and healthful environment. As a result, they have not established beyond a reasonable doubt that § 76-2-209(3), MCA, is unconstitutional either on its face or as applied to their case.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's order is affirmed.

/S/ BETH BAKER

We Concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE