STATE OF IDAHO)
County of KOOTENAI)ss

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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 KOOTENAI

FLOATING PATIO, LLC, an Idaho limited liability company,, *Petitioner*, vs. **IDAHO STATE POLICE (ALCOHOL BEVERAGE CONTROL BUREAU),** *Respondent*.	Case No. **CV 2016 4100** **MEMORANDUM DECISION AND ORDER ON APPEAL FROM AGENCY DECISION**

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This matter is before the Court on petitioner Floating Patio, LLC's Petition for Judicial Review of a final agency decision of the Idaho State Police's Alcohol Beverage Control Bureau (ABC). The final agency decision [per this Court's Order Re: Respondent's Motion to Dismiss, Nov. 18, 2016, discussed below] in this case was issued in a May 3, 2016, letter in which ABC denied Floating Patio, LLC's application to amend License No. 15923 to add an additional premise, the Buttonhook Restaurant (Buttonhook facility) located at 34076 N. Main Avenue, Bayview, Idaho. A.R. ex. aa. License No. 15923 is a Retail Alcohol Beverage License (referred to herein as a waterfront resort liquor license) issued to Floating Patio, LLC pursuant to Idaho Code § 23-948 for its Floating Patio facility located at 16862 E. Boileaus, G Dock, Bayview, Idaho. A.R. ex. v. The relevant facts in this case are summarized below and are supported by the agency record unless otherwise noted.

Prior to May 2010, Boileau's Marina, LLC (Boileau's Marina), owned by Robert Holland, held a waterfront resort liquor license (License No. 2743) permitting it to sell liquor at both the Floating Patio facility and the Buttonhook facility. A.R. ex. a, g; *see also* Pet'r's Opening Br. Appeal 4; Resp't Br. 5. In May 2010, Robert Holland assigned his membership units in Boileau's Marina to JD Resort, Inc. A.R. ex. g. That assignment included License No. 2743. *Id.* According to Floating Patio, LLC's briefing, on July 29, 2011, JD Resort, Inc. assigned those membership units to Chan Karupiah. Pet'r's Reply Br. Appeal 3. At some point in time between May 2010 and November 18, 2011, Boileau's Marina failed to timely submit its renewal application for License No. 2743 and, as a result, License No. 2743 expired by operation of law.[1]

Because License No. 2743 expired, Boileau's Marina submitted a new application[2] for a waterfront resort liquor license for the Floating Patio facility and the Buttonhook facility. A.R. ex. a. On November 18, 2011, ABC denied that application. *Id.* In doing so, ABC stated that neither facility met the requirements of Idaho Code § 23-948. *Id.* Specifically, the Floating Patio facility did not meet the statute's requirements because Lakeside Avenue, a public right of way, deprived the Floating Patio facility of contiguity with its parking lot. *Id.* ABC also noted that the Floating Patio facility might not meet the 3,000 square feet public use space requirement. *Id.* On the

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[1] In its Reply Brief, ABC states that License No. 2743 expired by operation of law in April 2011. It cites to exhibit a of the agency record for that proposition. However, the Court is unable to confirm that date. Likewise, in Petitioner's Opening Brief on Appeal, Floating Patio, LLC states that Boileau's Marina submitted an application to renew License No. 2743 prior to the February 28, 2011, expiration date, but because the application was incomplete, ABC requested additional information. According to Floating Patio, LLC, Boileau's Marina was unable to provide ABC with the requested information prior to License No. 2743's expiration date and, as a result, License No. 2743 expired. Pet'r's Opening Br. Appeal 4–5. It appears that this proposition is not fully supported by the agency record.

[2] This application is not a part of the agency record, but the letter denying the

other hand, according to ABC, the Buttonhook facility did not meet statutory requirements, in part, because it was not on the waterfront and its boat launching and dock facilities were not on property contiguous to the Buttonhook facility. *Id.*

On January 29, 2013, ABC received a new waterfront resort liquor license application from Boileau's Marina for Boileau's Marina's Floating Patio facility. A.R. ex. f. On February 1, 2013, counsel for Boileau's Marina submitted a letter to ABC to supplement that application. A.R. ex. b. In the letter, counsel summarized ABC's reasons for denying Boileau's Marina's prior application (as related in the November 18, 2011 letter) and offered its own analysis as to whether the Floating Patio facility met the requirements of Idaho Code § 23-948, focusing its analysis on the meaning of contiguous. *Id.* On May 21, 2013, Lead Deputy Attorney General Stephanie Altig (Altig) emailed counsel for Boileau's Marina in order to arrange an inspection of the Floating Patio facility—the inspection was needed to determine whether the Floating Patio facility had 3,000 square feet of public use floor space as required by statute.[3] A.R. ex. q. On June 10, 2013, ABC denied the application (received January 29, 2013) it had received from Boileau's Marina, because the Floating Patio facility did not meet the 3,000 square feet public use floor space requirement per Idaho Code § 23-948. A.R. ex. c, e.

On July 1, 2013, JD Resort, Inc. leased the Floating Patio facility to George C. Gormsen (Gormsen). A.R. ex. i. On September 27, 2013, ABC received a new waterfront resort liquor license application from Gormsen for the Floating Patio facility. *Id.* ABC denied Gormsen's application on November 21, 2013, stating that the Floating

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application is included in the agency record as exhibit a.

[3] This email from Altig is found in exhibit q of the agency record. It was appended to a waterfront resort liquor license application submitted in 2015.

Patio facility did not meet the public use floor space requirement per Idaho Code § 23-948. A.R. ex. j.

On February 21, 2014, ABC received floor plans and square footage documents from Gormsen. A.R. ex. k. The documentation was related to the Floating Patio facility and indicated that the Floating Patio facility now met the 3,000 square feet of public use floor space requirement. *Id.* ABC apparently agreed because, on approximately March 1, 2014, it issued Gormsen a waterfront resort liquor license (License No. 15923) for the Floating Patio facility. A.R. ex. n. On approximately October 15, 2015, Gormsen assigned its rights, including License No. 15923, to Floating Patio, LLC. A.R. ex. u. License No. 15923 was renewed in 2016 and 2017. A.R. ex. p, v.

On April 1, 2015, Chan Karupiah[4] leased the Buttonhook facility to Lloyd Roath (Roath). A.R. ex. r. Shortly thereafter, on April 17, 2015, ABC received an application for a waterfront resort liquor license from Roath for the Buttonhook facility. A.R. ex. q. On July 2, 2015, ABC denied Roath's application, stating that the Buttonhook facility "did not meet the qualifications for parking at this time." A.R. ex. s. Roath subsequently applied for and was granted a beer and wine license for the Buttonhook facility. A.R. ex. r.

In early 2016, Floating Patio, LLC,[5] which held License No. 15923, submitted an application to amend License No. 15923—its waterfront resort liquor license for the

[4] In Petitioner's Reply Brief on Appeal, Floating Patio, LLC explains that the "membership units in Boileau's Marina were held by Robert Holland's two separate LLCs. Those two LLCs assigned the membership units to JD Resort, Inc. 'or its assigns.' JD Resort, Inc. assigned the membership units to Chan Karupiah, individually." Pet'r's Reply Br. Appeal 3 fn. 1. Evidence that JD Resort, Inc. assigned those membership units to Chan Karupiah does not appear to be part of the agency record in this case.

[5] Presumably, Floating Patio, LLC has the authority to include the Buttonhook facility in its application to amend. There is an affidavit from Chan Karupiah, who as explained in footnote 4 holds the membership units in both facilities, indicating that he

Floating Patio facility—to include the Buttonhook facility. [That application is not a part of the agency record in this case, but was considered by the Court as part of the Motion to Augment.] However, in briefings, Floating Patio, LLC indicates that it submitted its application to amend License No. 15923 on March 11, 2016. Pet'r's Reply Br. Appeal 7. ABC does not recall precisely when Floating Patio, LLC submitted its application to amend License No. 15923 but suggests that Floating Patio, LLC did so sometime between January 28, 2016 and May 3, 2016. Resp't Br. 11. Regardless, on May 3, 2016, ABC denied Floating Patio, LLC's application to amend License No. 15923 to include the Buttonhook facility. A.R. ex. aa.

On May 31, 2016, Floating Patio, LLC filed a Petition for Judicial Review in response to ABC's May 3, 2016 letter denying its application to amend License No. 15923. In that Petition, Floating Patio, LLC requested attorney fees under I.C. § 12-117 and § 12-121 as well as I.R.C.P. 54. On June 13, 2016, ABC filed a Motion and Memorandum in Support of Dismissal of Petition for Judicial Review pursuant to I.R.C.P. 84(n). ABC filed an amended Motion and Memorandum on June 15, 2016. On September 6, 2016, Floating Patio, LLC filed a Memorandum in Opposition to Respondent's Motion to Dismiss Petition for Judicial Review Pursuant to I.R.C.P. 84(n) and a Declaration of John F. Magnuson in Opposition to the Motion to Dismiss Petition for Judicial Review Pursuant to I.R.C.P. 84(n). A hearing on ABC's Motion to Dismiss

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entered into a lease with Floating Patio, LLC. A.R. ex. t. However, that lease does not appear to be a part of the agency record.

Counsel for Floating Patio LLC states that Floating Patio was organized on December 18, 2015. Pet'r's Reply Br. Appeal 7. The Court can find no proof in the agency record. However, other than for clarity, the Court finds such does not really matter for purposes of this decision. Interestingly, Gormsen appears to have assigned his interest in the Floating Patio facility's license prior to Floating Patio, LLC's organization; i.e., the assignment agreement is dated 10-15-2015 and per counsel for Floating Patio LLC, Floating Patio, LLC was organized in December 2015.

was held on November 1, 2016. On November 18, 2016, this Court issued an Order denying ABC's Motion to Dismiss. In that Order, the Court found: (1) the May 3, 2016 letter from Altig was a final agency action for purposes of appeal under the Idaho Administrative Procedures Act, I.C. § 67-5201, et seq.; (2) Floating Patio, LLC's appeal from Altig's May 3, 2016, letter was timely; and (3) the November 18, 2011, letter from ABC is not dispositive of "agency action" for purposes of proceeding with this appeal. Order Re: Resp't Mot. Dismiss, Nov. 18, 2016.

On January 25, 2017, Floating Patio, LLC filed a Notice of Hearing and Motion for Leave to Present Additional Evidence. On March 10, 2017, ABC filed a Memorandum in Opposition to Motion to Augment. Floating Patio, LLC filed a Reply Brief in Support of Motion for Leave to Present Additional Evidence on March 15, 2017. A hearing on that motion was held on March 22, 2017. After hearing argument, the Court granted Floating Patio LLC's Motion for Leave to Present Additional Evidence.

Also on January 25, 2017, Floating Patio, LLC filed its Opening Brief on Appeal. On February 27, 2017, ABC filed ABC's Responsive Brief in Opposition to Petition for Judicial Review. In that brief, ABC requests attorney fees, also citing to I.C. § 12-117. ABC Resp. Br. Opp. Pet. Rev. 14, 16, 26. On March 13, 2017, Floating Patio, LLC filed Petitioner's Reply Brief on Appeal. The hearing on appeal was also held on March 22, 2017. At the conclusion of that hearing the Court took the appeal under advisement.

II. STANDARD OF REVIEW.

The Idaho Administrative Procedures Act (IDAPA) governs judicial review of ABC's decision to suspend, revoke, or refuse to grant or renew a party's waterfront resort liquor license. I.C. §§ 23-933, 67-5270. In an appeal from an agency decision, the district court acts in an appellate capacity. When doing so, the district court's review is limited to the agency record and it does not substitute its judgment for that of

the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279. Instead, it defers to the agency's findings of fact unless they are clearly erroneous. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002). "In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Id.* (citing *Urrutia v. Blaine Cty. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000)).

The district court may overturn an agency's decision if the party challenging the agency action demonstrates that the agency erred as provided in Idaho Code § 67-5279(3) and the agency's decision prejudiced a substantial right of the party. I.C. § 67-5279(3), (4); *Price v. Payette Cty. Bd. of Cty. Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Bobeck v. Idaho Transp. Dep't*, 159 Idaho 539, 542, 363 P.3d 861, 864 (Ct. App. 2015). Idaho Code § 67-5279(3) requires the district court to affirm the agency action unless it finds that the agency's finding, inferences, conclusions, or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3). If the agency's decision is not affirmed on appeal, it must be set aside and remanded for further proceedings as necessary. *Id.*

When an agency interprets a statute, the district court applies a four-pronged test to "determine the appropriate level of deference to the agency interpretation." *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010). The court must determine whether:

> (1) the agency is responsible for administration of the [statute or] rule in issue; (2) the agency's construction is reasonable; (3) the language of the [statute or] rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the [statute or] rule of agency deference are present.

Id. (citing *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998)). "If the four-prong test is met, then courts must give 'considerable weight' to the agency's interpretation of the statute." *Preston*, 131 Idaho at 504, 960 P.2d at 187. If not, the agency interpretation of the statute is left to its persuasive force. *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 863, 820 P.2d 1206, 1220 (1991)

III. ANALYSIS.

The Court finds there appear to be four primary issues on appeal. The first issue is whether ABC's interpretation of "contiguous" as used in Idaho Code § 23-948 is entitled to deference. The second issue is whether ABC's denial of Floating Patio, LLC's application to amend License No. 15923 was arbitrary, capricious, and/or an abuse of discretion. The third issue is whether Floating Patio, LLC's Petition for Judicial Review is barred by collateral estoppel. Lastly, the fourth issue is whether either party is entitled to attorney's fees. Each issue on appeal is discussed separately below.

A. ABC's Interpretation of "Contiguous" is Entitled to Deference, and is "A Practical Interpretation" Which Must be Upheld.

In this case, ABC is interpreting the meaning of "contiguous" as contained in Idaho Code § 23-948. That statute provides:

> (a) . . . . [A] waterfront resort shall comprise real property with not less than two hundred (200) feet of lake frontage upon a lake or reservoir as defined by the army corps of engineers of not less than one hundred and sixty (160) acres, or river frontage upon a river with at least an average six (6) months' flow of eleven thousand (11,000) cubic feet per second, **and** shall be open to the public, where people assemble for the purpose of vacationing, boating or fishing, **and** each waterfront resort must have suitable docks or permanent improved boat launching facilities not less than sixteen (16) feet in width on property owned or leased by the resort operator **or on property <u>contiguous</u> thereto** owned by this state or the

> federal government open to the public for recreational uses for the purpose of caring for vacationers, or other recreational users **and** either of the following:
>
> > . . . .
> > (2) A building of not less than three thousand (3,000) square feet of public use floor space, including a full service restaurant which serves regularly at least two (2) meals per day to the public during a continuous period of at least four (4) months per year **and** paved or gravelled [sic] parking for fifty (50) automobiles on the operator's owned or leased property **and** any **<u>contiguous</u>** property upon which are the docks or boat launching facilities described above.

Idaho Code Ann. § 23-948 (emphasis added). ABC defines contiguous[6] in the context of this statute to mean: "touching at a point or along a boundary; adjoining." A.R. ex. aa.

As noted above, when an agency interprets a statute, the Court applies a four-pronged test to determine the appropriate level of dereference due the agency's interpretation. That test, from *Duncan*, is whether:

> (1) the agency is responsible for administration of the [statute or] rule in issue; (2) the agency's construction is reasonable, (3) the language of the [statute or] rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the [statute or] rule of agency deference are present.

The Court concludes this is the appropriate test for agency's statutory interpretation, when, as in this case, ABC is the agency entrusted with responsibility of administering a statute, and the deference is based on agency expertise. *J.R. Simplot Co.,* 120 Idaho

[6] While the parties dispute the meaning of contiguous, they do not seem to dispute whether the statute requires contiguity between the waterfront resort and its boat launching and dock facilities. Idaho Code § 23-948(a), which requires "docks or permanent improved boat launching facilities . . . on property owned or leased by the resort operator **or on property contiguous thereto owned by this state or the federal government**," suggests that contiguity is only required if the boat launching and dock facilities are located on state and federal land. However, Idaho Code § 23-948(a)(2) seems to require the boat launching and dock facilities, regardless of who owns the underlying property, to be contiguous to the waterfront resort (i.e., "any contiguous property upon which are the docks or boat launching facilities described above").

at 862–863, 820 P.2d at 1219–1220 (1991); *Plummer v. City of Fruitland*, 140 Idaho 1, 6, 89 P.3d 841, 846 (2003), *on reh'g,* 139 Idaho 810, 87 P.3d 297 (2004).

In its briefing, Floating Patio, LLC does not discuss whether ABC's interpretation of "contiguity" satisfies this test. However, it does argue that the interpretation is arbitrary, capricious, absurd, and unreasonable. Pet'r's Opening Br. Appeal 14–15; Pet'r's Reply Br. Appeal 10–13. Clearly, Floating Patio, LLC is challenging ABC's interpretation of contiguity, and thus, the interpretation of the statute. ABC does discuss whether its interpretation of "contiguity" satisfied the four-pronged test in its Respondent's Brief. *See* Resp't Br. 16–23.

Before discussing the four-pronged test, the Court will discuss Floating Patio LLC's argument that the Idaho Legislature has defined "contiguity." Floating Patio argues that under I.C. § 63-604(7)(a) "contiguity" "means being in actual contact or touching along a boundary or at a point, except no area of land shall be considered not contiguous solely by reason of a roadway or other right-of-way." Pet'r's Opening Br. Appeal 6, 16, 17; Pet'r's Reply Br. Appeal, p. 11. ABC did not respond to this argument in its briefing. Certainly, the Idaho Legislature has defined "contiguity" in that statute, but for several reasons, this Court finds that the legislature's definition does not apply to this case. First, the statute itself limits the definition of "contiguity" to I.C. § 63-604, as subsection (7) begins with the language "As used in this section." Second, that subsection is part of a statue titled, "Land actively devoted to agriculture defined." That statute is part of Chapter 6 which is "Exemptions from Taxation" for real property, which is in turn part of Title 63 which is "Revenue and Taxation." Taxation of real agricultural property is not the same as determining who gets a resort property liquor license, so even by analogy the definition does not apply to this case. Finally, judicial interpretation of statutory construction is governed by strict rules. Reaching out to another non-

analogous portion of the Idaho Code is not one of those strict rules of statutory construction. Doing so would not be following the four-pronged test.

Applying the four-pronged test to the instant case, the Court first finds that ABC is the agency responsible for the administration of Title 23, Chapter 9 of the Idaho Code. I.C. 23-901 (empowering the director of the Idaho State Police to grant licenses to sell liquor and other duties); IDAPA 11.05.11.011.02 (delegating that authority to ABC).

Second, the Court finds ABC's interpretation of contiguous to be reasonable. In *J.R. Simplot Co., Inc. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991), the Idaho Supreme Court observed that:

> This requirement [the second prong] was recognized at the beginning of our case law when in *State v. Omaechevviaria,* 27 Idaho 797, 152 P. 280 (1915), we indicated that deference would not be appropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no weight or consideration."

Id. at 862, 820 P.2d at 1219 (citing *State v. Omaechevviaria*, 27 Idaho 797, 803, 152 P. 280, 281 (1915) and *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940)). ABC defines contiguous to mean "touching at a point or along a boundary; adjoining." A.R. ex. aa. ABC cites to the Ninth Edition of Black's Law Dictionary for that definition, and cites to three online dictionaries for additional support. *Id.* Additionally, ABC notes that Idaho Code §§ 23-902 and 23-942 do not define contiguous, but Idaho Code § 23-902(17) instructs it to give undefined words and phrases used in Title 23, Chapter 9, their "ordinary and commonly understood and acceptable meanings." *Id.* (quoting I.C. § 23-902(17)). By relying on a dictionary definition, ABC has given the word contiguous its ordinary meaning as required by statute. Moreover, ABC's use of the dictionary

definition of contiguous means that its interpretation is not obscure or doubtful. Thus, its interpretation is reasonable under the second prong.

Third, the Court finds that the language of the statute does not expressly treat the matter at issue because the statute does not define contiguous. "An agency construction will not be followed if it contradicts the clear expressions of the legislature because 'the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *J.R. Simplot Co., Inc.*, 120 Idaho at 862, 820 P.2d at 1219 (citing *Chevron,U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984) (footnotes omitted)). Idaho Code §§ 23-902 and 23-942 list definitions applicable to words and phrases used in Title 23, Chapter 9 of the Idaho Code. Contiguous is not defined and, as a result, ABC's interpretation of contiguous does not contradict the unambiguously expressed intent of the Idaho legislature.

Lastly, the fourth prong of the test requires the Court to determine whether any of the rationales underlying the rule of agency deference are present. There are five rationales underlying the rule of agency deference. *Preston*, 131 Idaho at 505, 960 P.2d at 188. Those underlying rationales include: "(1) that a practical interpretation of the [statute] exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the [statute]; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation." *Duncan*, 149 Idaho at 3, 232 P.3d at 324 (citing *Preston*, 131 Idaho at 505, 960 P.2d at 188).

> If the underlying rationales are absent then their absence may present "cogent reasons" justifying the court in adopting a statutory construction which differs from that of the agency.
>
> When some of the rationales underlying the rule exist but other rationales are absent, a balancing is necessary because all of the supporting rationales may not be weighted equally. Therefore, the

> absence of one rationale in the presence of others could, in an appropriate case, still present a "cogent reason" for departing from the agency's statutory construction. Because these rationales are important in determining whether cogent reasons exist for departing from an agency interpretation, we disapprove of the practice of merely concluding that cogent reasons for departing from the agency interpretation exist without any further explanation. If one or more of the rationales underlying the rule are present, and no "cogent reason" exists for denying the agency some deference, the court should afford "considerable weight" to the agency's statutory interpretation. If, on the other hand, a court concludes that the agency is not entitled to receive considerable weight to its interpretation based on the lack of justifying rationales for deference, then the agency's interpretation will be left to its persuasive force.

J.R. Simplot Co., 120 Idaho at 862–63, 820 P.2d at 1219–20.

As noted by ABC, two of the five underlying rationales appear to be present in this case: a practical interpretation of the statute exists and the presumption of legislative acquiescence. ABC's Resp. Br. Opp. Pet. Jud Rev. 20. Keep in mind, ABC only need to prove one of the rationales exist in order for its interpretation to be given "considerable weight."

The first rationale, a practical interpretation of the statute exists, "apparently refers to the fact that statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation." *Id.* at 858, 820 P.2d at 1215. Floating Patio, LLC cites three sources to bolster its interpretation that "contiguous" does not require actual contact or touching. Pet. Op. Br. App. 6. Idaho Code § 63-604 reads "'Contiguous' means being in actual contact of touching along a boundary or at a point, except no area of land shall be considered not contiguous solely by reason of a roadway or other right-of-way." In *Mountain Restaurant Corp. v. Parkcenter Mall Associates,* 122 Idaho 261, 833 P. 2d 119 (Ct. App. 1992), the Idaho Court of Appeals held that "contiguous" parking need not be "adjacent," but could be satisfied by parking that was "sufficiently close in proximity." Finally, Black's Law Dictionary (4th Edition) defines contiguous as "in close proximity;

near, though not in contact, neighboring; adjoining; near in succession; in actual close contact; touching; bounded or traversed by." Pet. Op. Br. App. 6. On the other hand, ABC interprets contiguous to require physical touching between the Buttonhook facility and the property on which the boat launching and dock facilities are located. ABC's Resp. Br. Opp. Pet. Jud. Rev.16-23. The initial specific bases are found not in ABC's briefing on appeal, but in ABC's May 3, 2016, decision, the letter from Sephanie Altig to John Magnson, counsel for Floating Patio, LLC:

> You provide a definition of "contiguous" from Black's Law Dictionary as cited in *Town of Lyons v. City of Lake Geneva*, 202 N.W.2d 228, 235 (Wisc. 1973). Not only does Wisconsin case law from 1973 not bind ABC in any way, Black's Law Dictionary cited in this case is from the Fourth Edition. I have the current Ninth Edition of Black's Law Dictionary on my desk. It defines "contiguous" as "touching at a point or along a boundary, ADJOINING < Texas and Oklahoma are contiguous>." Black's Law Dictionary 362 (Bryant A. Garner 9th ed. West 2009) This is the definition ABC uses. It is within its discretion under Idaho Code § 23-902(17) and it is consistent with commonly understood and acceptable definitions in ordinary non-legal dictionaries. See for example: http:www/oxforddictionaries.com/us/definition/american_english/contiguous; http:www/merriam-webster.com/dictionary/contiguous; and http:www/thefreedictionary.com/contiguous.

Pet. Jud. Rev., Ex. A, 2; AR Ex. aa, 2. In ABC's briefing, it provides additional support for its interpretation that contiguous requires touching. ABC's Resp. Br. Opp. Pet. Jud Rev. 16-23. ABC then argues, "the practical interpretation by ABC is the more reasonable interpretation" than that of Floating Patio, LLC. *Id.* at 20. Keep in mind that the criteria under *Preston* is merely that a practical interpretation of the statute exists. The Court need not weigh the practicality of ABC's interpretation versus the practicality of Floating Patio, LLC's interpretation. The Court finds each parties' interpretation to be practical. Floating Patio, LLC's interpretation is practical as applied in this case, where the resort is not far from the water, and is contiguous, as defined by Floating Patio, LLC's sources. ABC's interpretation is also practical. Arguably, ABC's interpretation is

more practical than the interpretation offered by Floating Patio, LLC. ABC points out that, "The name waterfront-resort implies just that, the resort is to be on the waterfront!" *Id.* at 19. This is similar to ABC's argument on its Motion to Dismiss, "Thus, why even have waterfront resort licenses to begin with, if your licensed premises is not actually fronting on a body of water as envisioned by the law?" ABC's Rep. to the Floating Patio's Mem. 5. Another argument made by ABC on its Motion to Dismiss is also persuasive. As ABC pointed out, Floating Patio, LLC's interpretation of "contiguous" would allow a resort at some distance from boat launching and dock facilities to qualify for a waterfront resort liquor license. *Id.* As pointed out by ABC, while across the road in the present case is certainly near, allowing a license in this case begins the slippery slope of allowing a waterfront licenses in the future to resorts even further away. *Id.* The Court finds ABC's interpretation of "contiguous" in Idaho Code § 23-948 to be "a practical interpretation."

The second rational is the presumption of legislative acquiescence, which appears to be present in this case. ABC argues:

> Secondly, the legislature's 1985 council committee appears to have discussed, more than once, for allowing a scheme like the one Karupiah [Floating Patio, LLC] argues for. However, the final word by the Idaho Legislature is demonstrated by the passage of Senate Bill 1412 in 1986.
>
> Therein, the lake or resort community specialty license language was removed from Appendix C. Instead, the Idaho Legislature enacted legislation requiring "each" waterfront resort to have suitable docks or permanent improved boat launching facilities (either owned or leased by the resort operator) or on property contiguous thereto (the waterfront resort) owned by the state of Idaho or federal government. Idaho Code § 23-948(a). This is clear legislative direction, that piggy-backing onto another's waterfront-resort license was not to be allowed, as indicated by the word, "each."

ABC's Resp. Br. Opp. Pet. Jud Rev. 20-21. The Court finds the presumption of legislative acquiescence appears to be present in this case. A finding of legislative acquiescence requires "something more than mere [legislative] silence" or inaction.

J. R. Simplot Co., 120 Idaho at 864, 820 P.2d at 1221 (citations omitted) (stating that "legislative inaction is a weak reed upon which to lean in determining legislative intent"). Further, "merely reenacting [a] statute after it has received an agency construction" is generally insufficient to determine legislative intent. *Id.* (noting that "something more" is required). In *Preston v. Idaho State Tax Commission*, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998), the Idaho Supreme Court found that when the Idaho legislature repealed the statute at issue, it evidenced its intent with respect to the statute's interpretation and the State Tax Commission's interpretation was consistent with that intent. *Id.* at 506, 960 P.2d at 189. In this case, in 1985, the Idaho legislature considered an amendment to Idaho Code § 23-948. The proposed legislation would have permitted "lake and frontage resorts" within a "recognized resort community" to qualify for a retail liquor license. Idaho Legislative Council Comm. on Alcoholic Beverages 13, app. C (Oct. 1985). In 1986, the Idaho legislature amended Idaho Code § 23-948. In doing so, it appears to have rejected (albeit by silence) the 1985 proposal to extend liquor licenses to "lake and frontage resorts" within a "recognized resort community." S. 1412, 2d Reg. Sess. (Idaho 1986). Instead, the 1986 legislature implemented new requirements, including the contiguity requirement at issue here. In any event, the Court finds the Idaho Legislature has connected the water with the resort which has the liquor license via the contiguity requirement. The presumption of legislative acquiescence is present in this case.

B. ABC's Actions are not Arbitrary, Capricious, and/or an Abuse of its Discretion.

Floating Patio, LLC argues that ABC's denial of its application to amend its waterfront resort liquor license was arbitrary and capricious because that decision is based on an inconsistent application of the contiguity requirement contained in Idaho

Code § 23-947. Specifically, Floating Patio, LLC points out that ABC issued Floating Patio, LLC a waterfront resort liquor license for its Floating Patio facility despite the fact that Lakeside Avenue separated the Floating Patio facility from its parking lot. Pet'r's Opening Br. Appeal 19–20. In contrast, ABC denied Floating Patio, LLC's request to amend its waterfront resort liquor license for its Floating Patio facility to include the Buttonhook facility because Lakeside Avenue separated the Buttonhook facility from the boat launching and dock facilities. *Id.* In other words, according to Floating Patio, LLC, "ABC would have this Court believe that properties on the east side of Lakeside Avenue (the Floating Patio facility) are not deprived of contiguity to properties on the west side of Lakeside Avenue (the parking lot), but properties on the west side of Lakeside Avenue (the Buttonhook) are deprived of contiguity with the east side of Lakeside Avenue (the Floating Patio)." *Id.* at 20. (emphasis in original).

Floating Patio, LLC appears to misunderstand the reason why ABC granted it a waterfront resort liquor license for its Floating Patio facility and denied its application to amend that license to include the Buttonhook facility. In its letter denying Floating Patio, LLC's application, ABC explained that Idaho Code § 23-948 **does not require contiguity** between the waterfront resort and parking lot, but **does require contiguity** between the waterfront resort and the boat launching and dock facilities. A.R. ex. aa. It pointed out that the Buttonhook facility was not contiguous to the boat launching and dock facilities, stating:

> [The Buttonhook facility] is surrounded on three sides by public roads including the one known as "Lakeside Avenue" that separates it from not only the boat launching and dock facilities, but also from required waterfront. . . .

Id. With regard to the Floating Patio facility, ABC stated:

> . . . . To be clear, current ABC management does not read Idaho Code § 23-948(a)(2) as requiring the parking area to be contiguous to the

> waterfront resort property itself because the statute only requires '…paved or gravelled [sic] parking for fifty (50) automobiles on the operator's owned or leased property…' without the requirement for contiguity.

Id. Clearly ABC concluded that Idaho Code § 23-948 does not require contiguity between the waterfront resort and parking lot and, as a result, the fact that Lakeside Avenue separated the Floating Patio facility from its parking lot was irrelevant. Likewise, because, according to ABC, that same statute requires contiguity between the waterfront resort and its boat launching and dock facilities, the fact that Lakeside Avenue separated the Buttonhook from its boat launching and dock facilities was relevant to whether statutory requirements were satisfied. In its decision, ABC concluded that Lakeside Avenue deprived the Buttonhook facility of contiguity, defined by ABC to require touching, with the boat launching and dock facilities and, as a result, the Buttonhook facility did not satisfy the statutory requirements of I.C. § 23-947. As explained, that determination is not inconsistent with ABC's decision to license the Floating Patio facility and, as a result, the Court finds that ABC's decision was not arbitrary, capricious, or an abuse of discretion.

Floating Patio, LLC also argues that ABC previously adopted Floating Patio, LLC's proposed definition of contiguous[7] and that by refusing to apply that definition to its application to amend its waterfront resort liquor license, ABC has acted arbitrarily and capriciously. To support its argument that ABC previously adopted its definition of contiguous, Floating Patio, LLC points to a November 18, 2011 letter from ABC to Kevin P. Holt, counsel for Boileau's Marina, in which both the Floating Patio and the Buttonhook facilities were denied a waterfront resort liquor license, a letter dated February 1, 2013, from counsel for Boileau's Marina to ABC providing its interpretation

[7] That definition was proposed by counsel for Boileau's Marina, LLC, Floating Patio, LLC's predecessor. According to Floating Patio, LLC, ABC concluded that "a public right-of-

of the contiguity requirement,[8] and an email dated May 21, 2013, from Altig to counsel for Boileau's Marina regarding the Floating Patio facility and the status of its application for a waterfront resort liquor license. A.R. ex. a, b, q.

In the November 18, 2011 letter, ABC explained the reasons it denied the Floating Patio facility a waterfront resort liquor license:

> While the Floating Patio [facility] does meet part of the qualifications regarding enough boat launching facilities and at least the required water frontage property, the Floating Patio [facility] does not meet the qualification of having the 'paved or gravelled [sic] parking for fifty (50) automobiles on the operators' owned or leased property and any contiguous property upon which are the docks or boat launching facilities described above.'
>
> In this case, the property with the boat launching facilities does not have the required parking area(s). At this time, it is undeterminable if the Floating Patio has the required 3,000 square feet of public use space but this requirement is currently moot if the other requirement, available parking area(s), cannot be met. . . .

A.R. ex. a. It also explained why it denied the Buttonhook facility a waterfront resort liquor license:

> The Buttonhook does not have the required boat launching facilities and required water frontage property because these areas are not owned, leased, or contiguous property. Lakeside Avenue, a public right-of-way owned and maintained by the Kootenai Highway District, separates the Buttonhook property from the required boat launching facilities and required water frontage property.

Id.

In the letter dated February 1, 2013, counsel for Boileau's Marina provided an analysis of the meaning of "contiguous" by citing to Idaho Code § 64-603(7) and various cases. A.R. ex. b. Based on that analysis, counsel asserted that ABC's definition of contiguous was incorrect. *Id.* On May 21, 2013, Altig emailed Magnuson as follows:

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way does not deprive properties on either side of 'contiguity'." Pet'r's Br. Appeal 18.

[8] This letter was provided as a supplement to Boileau's Marina, LLC, application for waterfront resort liquor license for its Floating Patio facility, submitted January 25, 2013.

> I've discussed this application with Lt. Wheatley. He advised that ABC still has a question whether the premises meets the 3,000 sf requirement of public use floor space under IC 23-948. ABC Det. Tim Snell wants to personally inspect the "public use floor space" as to date he has not been able to access the interior of the building. Who should he contact for that purpose? Other than this square foot requirement, Lt. Wheatley says everything else is in order.

A.R. ex. q. Based on this series of communications, Floating Patio, LLC asserts the following:

> ABC denied the initial application to license both premises on the basis that Lakeside Avenue deprived properties on either side of contiguity. After receiving authorities that suggested a public right-of-way does not deprive properties on either side of "contiguity," authorities which included Idaho statutory law, and case law in analogous circumstances, ABC issued a license for the Floating Patio [facility]. That license, coupled with ABC's contemporaneous acknowledgment that there were no other issues (which would include [the] contiguity issue), establishes, without question, that Lakeside Avenue does not deprive properties on either side of contiguity. Otherwise ABC would not have issued [the] Floating Patio [facility] its license (which remains valid and in effect).

Pet'r's Opening Br. Appeal 19.

ABC rejects that argument and denies accepting Floating Patio, LLC's definition of contiguous. ABC acknowledges the letters and email referenced above. However, with respect to the 2011 letter requiring contiguity between the Floating Patio facility and its parking lot, ABC disavowed that conclusion, explaining that it later determined that contiguity was no longer an issue because it re-examined Idaho Code § 23-948 and concluded that the statute did not require the waterfront resort to be contiguous to the parking lot. ABC states: "ABC did not change its determination as to contiguity due to anything submitted by [Floating Patio, LLC], it merely corrected itself and applied the existing law for the parking lot requirement." Resp't Br. 23.

ABC's argument is persuasive. The agency record does not support Floating Patio, LLC's argument that ABC accepted its definition of contiguous (as provided in the February 1, 2013 letter). While ABC's silence with respect to the February 1, 2013

letter and its subsequent grant of a waterfront resort liquor license for the Floating Patio, LLC might suggest that ABC accepted Floating Patio, LLC's definition, the more plausible explanation, in light of the statutory language, is that ABC simply corrected itself and applied the plain language of the statute to the Floating Patio facility. That being the case, the Court finds that ABC did not accept the definition of contiguous advanced by Floating Patio, LLC and, therefore, its refusal to apply that definition to the Buttonhook facility was not arbitrary or capricious.

Third, in its Reply Brief, Floating Patio, LLC asks this Court to "not lose sight of the fact that both the Buttonhook [facility] and the Floating Patio [facility] were previously licensed under the very same statute." Pet'r's Reply Br. Appeal 12. However, it appears from the agency record that both facilities were licensed in accordance with the "grandfather clause" contained in Idaho Code § 23-903, and not because the facilities complied with the statutory requirements of Idaho Code § 23-947. A.R. ex. a. Thus, Floating Patio, LLC's argument that Lakeside Avenue didn't deprive either property of contiguity prior to 2011 (as evidenced by an approved waterfront resort liquor license), but now does, is unpersuasive.

Because this Court finds that ABC's Interpretation of "Contiguous" is entitled to deference, and is "a practical interpretation", and because this Court finds ABC's decision was not arbitrary, capricious, and/or an abuse of discretion, the Court finds that ABC did not err in its decision of May 3, 2016. A.R. ex. aa. As such, the decision of ABC is affirmed. Accordingly, the Court will not address the secondary issue if error was found, that being whether agency's decision prejudiced a substantial right of the party. I.C. § 67-5279(3), (4); *Price*, 131 Idaho at 429, 958 P.2d at 586; *Bobeck*, 159 Idaho at 542, 363 P.3d at 864.

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C. Res Judicata does not Bar Floating Patio, LLCs' Petition for Judicial Review.

ABC argues that Floating Patio, LLC's Petition for Judicial Review is barred by *res judicata* and, specifically, collateral estoppel, otherwise known as issue preclusion. Resp't Br. 23–26. *Res Judicata* includes both claim preclusion and issue preclusion. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). Claim preclusion is a bar to subsequent litigation where three requirements are met: (1) the same parties; (2) the same claim; and (3) a final judgment. *Id.* Issue preclusion bars relitigation of an issue determined in a previous proceeding where: (1) the party against whom the previous decision was asserted had a full and fair opportunity to litigate the issue, (2) the issue decided was identical to the issue presented in the current matter, (3) the issue sought to be precluded was actually decided in the prior litigation, (4) there was a final judgment on the merits in the prior litigation, and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Id.* at 124, 157 P.3d at 618. "[I]issue preclusion is not limited to those situations in which the same issue is before two *courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015) (emphasis in original).

Here, ABC argues that Floating Patio, LLC is barred from bringing a Petition for Judicial Review in this case because ABC denied a waterfront resort liquor license for the Buttonhook facility on three separate occasions, those applications were denied because the Buttonhook facility lacked contiguity with its boat launching and dock facilities, and, in all three administrative proceedings, Chan Karupiah was a party or in privity with a party in those prior proceedings. The three applications ABC denied are as follows: (1) ABC denied applicant Boileau's Marina's application on November 11,

2011, and, at that time, Chan Karupiah[9] held the membership units in Boileau's Marina; A.R. ex. g; (2) ABC denied applicant Lloyd Roath's (Roath) application on July 2, 2015 and Roath was leasing the Buttonhook facility from Chan Karupiah; A.R. ex. r; and (3) ABC denied Floating Patio, LLC's application on May 3, 2016, and, at that time, Chan Karupiah was the managing member of Floating Patio, LLC. A.R. ex. t, aa.

As an initial matter, according to the agency record, ABC denied Roath's application because the Buttonhook facility did not meet the parking requirements of Idaho Code § 23-948. A.R. ex. s. The Court finds no support in the agency record for concluding that ABC denied Roath's application because the Buttonhook facility lacked contiguity with its boat launching and dock facilities. As a result, the issue decided when ABC denied Roath's application is related to parking and, therefore, is not identical to the issue presented in this case (i.e., contiguity). Additionally, the issue ABC wants precluded (i.e., contiguity) was not decided when it denied Roath's application. Thus, ABC's denial of Roath's application is not a bar to the present litigation. That leaves the Court to determine whether ABC's decision to deny Boileau's Marina's application for a waterfront resort liquor license in November 2011 precludes Floating Patio, LLC from litigating the present case.

In turn, the primary question appears to be whether Floating Patio, LLC, the petitioner in this case, which was not a party to ABC's prior decision, is in privity with Boileau's Marina, the party in the prior case. ABC argues that privity is present because Chan Karupiah was the managing member of Floating Patio, LLC and he was a member of Boileau's Marina. Floating Patio, LLC disagrees and argues that there is

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[9] As mentioned above in footnote 4, it does not seem clear from the record whether Karupiah or JD Resort Inc. held the membership units in Boileau's Marina, but that lack of clarity does not impact this Court's decision.

no identity of parties because Floating Patio, LLC and Boileau's Marina are distinct legal entities. Pet'r's Reply Br. 14.

The Idaho Supreme Court has held that a party is in privity with another when "he derives his interest from one who was a party" to the former action. *Kite v. Eckley*, 48 Idaho 454, 459, 282 P. 868, 869 (1929); *Foster v. City of St. Anthony,* 122 Idaho 883, 887, 841 P.2d 413, 418 (1992). In other words, "[p]rivity exists where an entity not a party to the previous action is 'so identified in interest with' an entity that was a party to the previous litigation 'that he represents precisely the same right in respect to the subject matter involved.'" *Silver Eagle Mining Co. v. State*, 153 Idaho 176, 180, 280 P.3d 679, 683 (2012) (quoting *Headwaters Inc. v. U.S. Forest Serv.,* 399 F.3d 1047, 1052–53 (9th Cir. 2005)). *Foster v. City of St. Anthony*, 122 Idaho 883, 841 P.2d 413 (1992), provides a summary of cases in which the Idaho Supreme Court has examined the issue of privity. *Id.* at 887, 841 P.2d at 418 (citing *First Nat'l Bank v. Hays*, 7 Idaho 139, 61 P. 287 (1900) (grantees were privies to a judgment lien entered against their grantor); *Schuler v. Ford*, 10 Idaho 739, 80 P. 219 (1905) (party in possession of land under contract to purchase is not in privity with seller where action against seller commenced after contract of sale was signed); *Smith v. Kessler*, 22 Idaho 589, 127 P. 172 (1912) (assignee of tax sale certificate is in privity with assignor); *Collard v. Universal Auto. Ins. Co.*, 55 Idaho 560, 45 P.2d 288 (1935) (injured passenger in automobile accident not in privity with driver of automobile); *Kite v. Eckley,* 48 Idaho 454, 282 P. 868 (1929) (beneficiaries of trust not in privity with trustee); *Smith v. Smith,* 67 Idaho 349, 180 P.2d 853 (1947) (natural father of child adopted without notice to him was not in privity with natural mother who was given notice)).

However, it does not appear that the Idaho Supreme Court has addressed whether a member of an LLC is in privity with that LLC, nor whether an LLC is in privity with another LLC, where those two LLCs share a member. Other jurisdictions have reached differing conclusions regarding whether a member of an LLC is in privity with that LLC. *See, e.g.*, *Price v. Indep. Fed. Sav. Bank*, 110 A.3d 567, 573 (D.C.) (holding that "an owner or member who holds himself out as an LLC's representative in connection with litigation is in privity with the LLC with respect to that litigation"); *Goodman Ball, Inc. v. Mach II Aviation, Inc.*, No. C 10-01249 WHA, 2010 WL 4807090, at *5 (N.D. Cal. Nov. 19, 2010) (explaining that, in the context of a corporation, "'[w]hen a person owns most or all of the shares in a corporation and controls the affairs of the corporation, it is presumed that in any litigation involving that corporation the individual has sufficient commonality of interest' for *res judicata* to attach to the individual" (citing *In re Gottheiner,* 703 F.2d 1136, 1140 (9th Cir.1983)); *but see McNeil Interests, Inc. v. Quisenberry*, 407 S.W.3d 381, 387–90 (Tex. App. 2013) (concluding there was no privity between an LLC and a member); *Collier v. Greenbrier Developers, LLC*, 358 S.W.3d 195, 200–01 (Tenn. Ct. App. 2009) (holding that the sole member of an LLC is not "*ipso facto*" in privity with the LLC because, to do so, "would erode the protections afforded by the LLC construct"). There does not appear to be any case law on whether an LLC is in privity with another LLC, where those two LLCs share a member, which is the situation presented in this case.

Based on the review above of Idaho cases and caselaw from other jurisdictions, this Court finds that there is no privity between Floating Patio, LLC and Boileau's Marina. First, as noted, ABC has cited no case law to support its position that Floating Patio, LLC and Boileau's Marina are in privity. Indeed, it has cited no case law for the

proposition that Chan Karupiah is in privity to either LLC. Second, the Court has found no case law for the proposition that two LLCs, with a shared member, are in privity. Third, as Floating Patio, LLC argues, to find privity between two distinct LLCs, by way of their respective member(s), seems to ignore not only the fact that the two LLCs are distinct legal entities, but that an LLC is a "separate entity from its members." *Washington Fed. Sav. v. Van Engelen*, 153 Idaho 648, 654, 289 P.3d 50, 56 (2012) (*Vanderford Co. v. Knudson,* 144 Idaho 547, 556–57, 165 P.3d 261, 270–71 (2007)). Because the Court finds that Floating Patio, LLC and Boileau's Marina are not the same party, Floating Patio, LLC is not barred by *res judicata* from litigating this case

D. Attorney's Fees

Both Floating Patio, LLC and ABC have requested attorney fees pursuant to Idaho Code § 12-117. "A trial court's determination whether to award fees under Section 12–117 is reviewed for an abuse of discretion." *Bonner Cty. v. Cunningham*, 156 Idaho 291, 294, 323 P.3d 1252, 1255 (Ct. App. 2014) (citing *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012); *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 208, 254 P.3d 497, 509 (2011)). Idaho Code § 12-117 permits courts to award fees for petitions for judicial review from administrative decisions. *Smith v. Washington Cty. Idaho*, 150 Idaho 388, 390, 247 P.3d 615, 617 (2010). That statute provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, 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.

I.C. § 12-117. A two-part test is used to determine whether a party is entitled to attorney fees: "the party seeking fees must be the prevailing party and the losing party

must have acted without a reasonable basis in fact or law." *Rowley v. Ada Cty. Highway Dist.*, 156 Idaho 275, 282, 322 P.3d 1008, 1015 (2014).

The Court finds ABC to be the prevailing party and that Floating Patio, LLC is not the prevailing party. Because Floating Patio, LLC is the non-prevailing party, it is not entitled to attorney fees under Idaho Code § 12-117.

Since ABC is the prevailing party, in order for the Court to award ABC attorney fees, Floating Patio, LLC must have acted without a reasonable basis in fact or law. This is primarily a case of an agency interpreting its own statute. Interpretation of a statute is a question of law. The statute interpreted in this case is probably ambiguous because the word "contiguous" is legitimately capable of two different meanings, or at least capable of different meanings based upon definition sources. Because the statute interpreted is ambiguous as to the meaning of "contiguous," the Court cannot say that Floating Patio, LLC acted without a reasonable basis in fact or law. *See City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *Wheeler v. Idaho Dep't Health & Welfare*, 147 Idaho 257, 266–67, 207 P.3d 988, 997–98 (2009). Accordingly, this Court exercises its discretion and finds ABC is not entitled to attorney fees even though it is the prevailing party. Additionally, throughout the course of the litigation, Floating Patio, LLC prevailed against ABC on its Motion to Dismiss, and prevailed as against ABC's argument on appeal that Floating Patio LLC, is barred by *res judicata.*

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court finds that ABC's interpretation of contiguous is reasonable and entitled to deference, ABC did not act arbitrarily, capriciously, or abused its discretion, collateral estoppel is not a bar to the present litigation, and neither party is entitled to attorney fees.

IT IS HEREBY ORDERED the decision of Respondent ABC dated May 3, 2016, is AFFIRMED.

IT IS FURTHER ORDERED that Respondent ABC is the prevailing party, but as such, ABC is not entitled to attorney fees against Petitioner Floating Patio, LLC.

IT IS FURTHER ORDERED that counsel for Respondent ABC prepare a judgment in conformity with this decision and order.

Entered this 19th day of April, 2017.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of April, 2017, 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 #
Cheryl Rambo	208 884-7228	John F. Magnuson	208 667-0500

____
Jeanne Clausen, Deputy Clerk