STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LINDA CISZEK, individually; RONALD G. WILSON and LINDA A. WILSON, husband and wife, et. Al.,

Petitioners,

vs.

BOARD OF COMMISSIONERS, KOOTENAI COUNTY, STATE OF IDAHO,

Respondent.

Case No. **CRF 2011 915**

MEMORANDUM DECISION AND ORDER DENYING MOTION TO DISMISS FILED BY BEACON WEST LLC, AND JOINED IN BY COEUR D'ALENE PAVING, INC., AND ORDER GRANTING ATTORNEY FEES AGAINST PETITIONERS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on petitioners' Ciszek, Wilsons, Doles, Andersons, Culbreths, Mouldings and Neal (collectively referred to as Ciszek) "Petition for Judicial Review" filed with this Court on January 26, 2011, against the Kootenai County Board of Commissioners (BOCC). Ciszek seeks judicial review of the BOCC's December 30, 2010, Order in which the BOCC approved an application for a Special Notice Permit to operate an asphalt batch plant on land in the mining zone. Petition for Judicial Review, Exhibit A. The Order of the BOCC approved the application with twenty enumerated conditions. *Id.* That Order specified the "applicant" was Coeur d'Alene Paving (CdA Paving). *Id.,* p. 11, part VI. In the Petition for Judicial Review, Ciszek claims to be an "affected person" under the Local Land Use and Planning Act (LLUPA). *Id.,* p. 2, ¶ 2.

On February 16, 2011, Beacon West, LLC (Beacon) filed a Notice of Special Appearance for the sole purpose of moving to dismiss Ciszek's petition. On that same date Beacon also filed its Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Affidavit of Robert Williams. Beacon owns the land upon which the asphalt batch plant would be located and the property to which the Special Notice Permit pertains. On February 23, 2011, Coeur d'Alene Paving (CdA Paving) filed its Notice of Special Appearance, and on March 3, 2011, CdA Paving joined in Beacon's motion to dismiss. CdA Paving is the applicant on the Special Notice Permit, and would operate the asphalt batch plant on Beacon's land.

On March 2, 2011, Ciszek filed its "Reply to Beacon West, LLC's Motion to Dismiss." On March 3, 2011, Ciszek moved to strike the Affidavit of Robert Williams. Then, on March 17, 2011, Beacon filed its Notice of Withdrawal of Affidavit of Robert Williams in Support of Motion to Dismiss, which rendered moot Ciszek's motion to strike.

On March 16, 2011, Beacon filed "Beacon West, LLC's Reply in Support of Motion to Dismiss."

On March 18, 2011, Ciszek filed "Ciszek's Reply to CDA Paving's Response to Petitioner's Response to Petitioner's Reply to Motion to Dismiss" and the "Affidavit of Dana L. Rayborn Wetzel in Opposition to Motion to Dismiss."

On March 22, 2011, Beacon filed its Motion to Shorten Time and Motion to Strike, and Affidavit of Michael R. Tucker in Support of Motions to Shorten Time and to Strike. The Motion to Strike is based on the fact that the day before the March 23, 2011, oral argument on its motion to dismiss, counsel for Beacon received three pleadings from Ciszek's counsel. Affidavit of Michael Tucker, p. 2, ¶ 2. Presumably, two of those pleadings were "Ciszek's Reply to CDA Paving's Response to Petitioner's

Reply to Motion to Dismiss" and the "Affidavit of Dana L. Rayborn Wetzel in Opposition to Motion to Dismiss", which were filed with the Court on March 18, 2011.

The motion to dismiss is now before the Court. Oral argument on the motion to dismiss was held on March 23, 2011. At oral argument, this Court granted Beacon's Motion to Shorten Time but denied Beacon's Motion to Strike, even though Ciszek failed to comply with I.R.C.P. 7(b)(3)(E), placing counsel for Beacon and the Court in the position of having Ciszek's late filed pleadings available to read for the first time on the day of oral argument.

At oral argument, counsel for the BOCC took no position on Beacon's motion to dismiss, and BOCC has filed no pleadings in response to the motion.

On March 30, 2011, counsel for Ciszek filed a "Certificate of Additional Law", which provided the Idaho Supreme Court opinion in *Giltner Dairy v. Jerome Co.,* 11.7 ISCR 135, 2011 Opinion No. 33 (March 17, 2011). No request was made at oral argument by counsel for Ciszek to file this pleading. No objection has been filed.

Also scheduled for oral argument on March 23, 2011, was Ciszek's motion to consolidate this case with Kootenai County Case No. CV 2009 3290, which was filed on March 3, 2011. On March 11, 2011, counsel for Ciszek sent the Court a letter indicating that the hearing on the motion to consolidate was being vacated and the motion was withdrawn because Kootenai County Case No. CV 2009 3290 had been dismissed by stipulation.

II. STANDARD OF REVIEW.

Decisions of the District Court acting in its appellate capacity under the Idaho Administrative Procedure Act (IDAPA) are reviewed directly by appellate courts. *Taylor v. Canyon County Board of Commissioners,* 147 Idaho 424, 430-31, 210 P.3d 532, 538-39 (2009). When factual issues are raised for review, appellate courts conduct an

independent review of the agency record. *Wohrle v. Kootenai County,* 147 Idaho 267, 273, 207 P.3d 998, 1004 (2009). Statutory construction is subject to free review. *City of Sun Valley v. Sun Valley, Co.,* 128 Idaho 219, 221, 912 P.2d 106, 108 (1996).

The standard governing judicial review in a case involving the Local Land Use Planning Act (LLUPA) provides that this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code §67-5279(1). Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous. 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. *Fischer v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

A county zoning board is treated as an administrative agency for the purposes of judicial review. *Chisholm v. Twin Falls,* 139 Idaho 131, 75 P.3d 185 (2003). "As administrative bodies having expertise in the zoning problems of their jurisdiction, their actions are presumptively valid." *Gordon Paving Co. v. Blaine Co. Bd. Of Comm'r.,* 98 Idaho 730, 731, 572 P.2d 164, 165 (1977). The reviewing court must limit its review to the factual record compiled in proceedings before the zoning board. *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984). The party that attacks a Board's finding must illustrate that the Board erred pursuant to I.C. § 67-5279(3) (a Board's findings may not: (1) exceed the agency's statutory authority, (2) violate statutory or constitutional provisions, (3) be made upon unlawful procedure, (4) be unsupported by substantial evidence in the record, or (5) be arbitrary, capricious, or an abuse of discretion) and a substantial right must have been prejudiced. *Price v. Payette County bd. Of Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 587 (1998).

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III. ANALYSIS OF BEACON WEST'S MOTION TO DISMISS.

Beacon contends Ciszek's Petition for Judicial Review is untimely due to Ciszek's *failure to serve* either CdA Paving or Beacon with the petition within 28 days after the agency action was ripe. Beacon West, LLC's Memorandum in Support of Motion to Dismiss, pp. 3-4. At oral argument, counsel for Beacon argued he found out Ciszek had filed a petition was only through a discussion with BOCC's counsel after the 28-day period had passed. Beacon argues under I.R.C.P. 84(b)(1), a petition for review is "commenced" when three prerequisites are satisfied: (1) filing of the petition with the Court, (2) service on the agency, and (3) service on all other parties to the proceeding before the agency. *Id.,* pp. 2-4. Beacon argues Ciszek's failure to serve the petition on CdA Paving (the special notice permit applicant) and Beacon (the owner of the subject property), results in Ciszek's petition being untimely as more than twenty-eight days have elapsed since the Board's decision was entered and Ciszek "cannot now cure its fatal defect" and thus, CdA Paving is entitled to automatic dismissal of Ciszek's petition. *Id.,* p. 3.

Beacon alternatively requests the Court dismiss Ciszek's petition pursuant to I.R.C.P. 84(n) for failure to have taken the necessary steps of the process for judicial review. *Id.,* p. 5. Beacon moves this Court for an award of attorney fees under Idaho Code § 12-121 and/or § 12-123. *Id.,* p. 8.

Ciszek replies that Beacon and CdA Paving were not designated as "parties" within the meaning of I.R.C.P. 84(b)(1). Reply to Beacon West, LLC's Motion to Dismiss, p. 2. Ciszek writes, "[t]here are no individuals identified in the Record or the

Transcript of the proceeding at issue that have been designated parties." *Id.* Ciszek quotes portions of the administrative record for the Court; these portions refer to "e^2 planning and design, llc" as the party which submitted the application, Beacon as the owner of the property, and CdA Paving as the lessor/operator and grantee of the Special Notice Permit. *Id.,* pp. 2-3. Ciszek posits that "[t]here simply are no 'parties' in a land use matter" and no property interest of Beacon was implicated by the permit in this matter. *Id.,* p. 4. At oral argument, counsel for Ciszek argued that "The parties were never designated by the commissioners or by the staff in the proceeding below, and I would find it very confusing in my practice before county commissioners and city councils and land use planning agencies, to be designated a party." At oral argument, counsel for Ciszek also argued that "I have found no case law showing that Rule 84 applies to land use planning cases", and "I find no absolute mandatory requirement that Rule 84 applies." In briefing, Ciszek writes: "No case law has been found stating or implying that Rule 84(b)(1) governs judicial review under LLUPA." Ciszek's Reply to CdA Paving's Response to Petitioner's Reply to Motion to Dismiss, pp. 3-4. This argument by Ciszek's counsel ignores the following.

The LLUPA defers to the IDAPA on appeals. Idaho Code § 67-6521(1)(d); I.C. § 67-6519(4). Under the IDAPA, I.C. §§ 67-5270 - 5279 governs judicial review. Those statutes do not discuss notice at all (except to state that a cross-petition for judicial review shall be filed within fourteen days after a party is served with a copy of the notice of the petition for judicial review. I.C. § 67-5275(2) and (3)). Since "notice" is not discussed in the IDAPA statutes, I.R.C.P. 84(a) controls:

> **Rule 84(a). Judicial Review of state agency and local government actions. (1) Scope of Rule 84.** The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. *When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard*

> *of review is provided in that statute, the Rule 84 provides the procedure for the district Court's judicial review.*

I.R.C.P. 84(a). (italics added). The Idaho Supreme Court has stated this means:

> The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review.

Euclid Avenue Trust v. City of Boise, 146 Idaho 306, 308, 193 P.3d 853, 856 (2008). Thus, Ciszek's attorney's statement at oral argument that, "I have found no case law showing that Rule 84 applies to land use planning cases", is entirely without merit.

Finally, counsel for Ciszek argued, "In this particular case over a hundred, maybe a hundred and six people testified against the location of the asphalt plant, and as such could be an 'affected person'…so if a petitioner is to file a petition under 84, rule 84 and has to under penalty of dismissal serve appropriate parties and the agency hasn't designated a party as a practical matter, I would then serve every person that appeared before the agency hearing on the theory they are in fact possible an 'affected person' and therefore a party…" First, this Court isn't being asked to decide where to draw the line. Suffice it to say, the line is drawn that **Beacon and CdA Paving are parties** since Beacon and CdA Paving were the **applicants** for this special use permit, and Ciszek is appealing from the grant of that application. Second, the definition of "affected persons" under I.C. § 67-6521 is broad, but all the statute does is define who can file a petition in a LLUPA case. Nowhere in I.C. § 67-6521 does that statute require notice to "affected persons." Thus, Ciszek's counsel's concerns of notice to hundreds of people is misplaced. Ciszek's counsel's legal argument is without merit. Notice is governed by I.C. § 67-6512 on special use permits, and must be by publication and "to property owners or purchasers of record within the land being considered, three hundred (300)

feet of the external boundaries of the land being considered, and any additional area that may be substantially impacted by the proposed special use as determined by the commission." Under this statute, as the land owner, Beacon clearly is entitled notice of the application for the special use made by CdA Paving, the applicant. Petition for Judicial Review, p. 11, part VI. If Beacon is entitled to such initial notification, why would Beacon not be entitled to notice by some other party who is appealing the granting of that application?

Beacon responds to Ciszek's reply by noting the numerous occasions Beacon and/or CdA Paving were mentioned in the administrative record as "uncontroverted evidence that Beacon West was a party". Beacon West, LLC's Reply in Support of Motion to Dismiss, pp. 3-4. Beacon argues:

> Furthermore, to accept Petitioners' interpretation of Rule 84(b)(1), a petitioner would never have to send notice to any "applicant," "property owner," "claimant" or other moving individual/entity at the agency level unless the magic word "party" were attached to that individual/entity.

Id., p. 4 (emphasis in original). This result, says Beacon, is not within the spirit of the Rules of Civil Procedure. *Id.* CdA Paving sets forth the "long and winding (and contentious) history" of the instant matter and states:

> As such, it appears a bit disingenuous for the Petitioner to argue that there are no opposing parties in this case. Attorneys for CDA Paving (applicant) and Beacon West (land owner) should not have discovered the filing of the present Petitioner [sic] for Judicial Review from third parties well after the time limits have expired. Yet, this is exactly what happened.

CdA Paving's Response to Petitioner's Reply to Motion to Dismiss, p. 3.

Idaho Rule of Civil Procedure 84(b)(1) reads:

> …a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review… Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency

> whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

I.R.C.P. 84(b)(1). Here, both the Petition for Review and Amended Petition for Review contain a certificate of service as contemplated by I.R.C.P. 5(f). However, both petitions have attached certifications which certify service only upon the Board of County Commissioners.

In *Dry Creek Partners, LLC v. Ada County Commissioners, ex rel. State,* 148 Idaho 11, 217 P.3d 1282 (2009), the Idaho Supreme Court held a petition for review under the LLUPA is only proper in cases involving affected persons who have applied for a permit and been denied, were aggrieved by the decision, or who have an interest in real property which may be adversely affected by the issuance or denial of a permit. 148 Idaho 11, 17-18, 217 P.3d 1282, 1288-89. Both Beacon and CdA Paving certainly meet that criteria.

Similarly, in *Giltner Dairy, LLC v. Jerome County,* 145 Idaho 630, 181 P.3d 1238 (2008) (*Giltner Dairy I)*, a neighboring landowner (Giltner Dairy) challenged an amendment to Jerome County's comprehensive plan map which was applicable to a neighbor's (93 Golf Ranch, LLC) property. The comprehensive plan amendment 93 Golf Ranch, LLC sought was to have Jerome County's Planning and Zoning Commission amend the comprehensive plan to indicate the suitable projected uses for 93 Golf Ranch would be consistent with the A-2 Agricultural zoning designation. 145 Idaho 630, 631, 181 P.3d 1238, 1239. The Planning and Zoning Department recommended the Board of County Commissioners deny the proposed amendment, but the County Commissioners approved the amendment. *Id.* Giltner timely filed a petition for judicial review. *Id.* The district court dismissed the petition, holding Giltner was not

aggrieved by the change in the comprehensive plan because the amendment did not operate as a legally controlling zoning law and did not require the county to change the zoning designation of 93 Golf Ranch's land. *Id.* The Idaho Supreme Court held Giltner was not an "affected person" because the amendment did not authorize any development, and an "affected person" was one with an interest in real property who could be adversely affected by issuance or denial of a permit authorizing development. 145 Idaho 630, 632-33, 181 P.3d 1238, 1240-41.

In the instant matter, Beacon and CdA Paving are not before the Court seeking to be declared an "affected person" in order to be able to file a petition for review. Rather, CdA Paving asserts it is the lessee applicant who was granted a Special Notice Permit and Beacon is the owner of the subject property who were inexplicably not served with Ciszek's Petition for Judicial Review of the Special Notice Permit which was granted. To claim, as Ciszek does, that service upon the Board of County Commissioners alone is sufficient and that there were no parties to the proceeding before the agency is inapt.

Idaho Code § 67-6521 defines an "affected person" as one with a bona fide interest in real property which may be adversely affected by: (1) approval, denial or failure to act on an application for subdivision, variance, special use permit, or other similar application; (2) approval of an ordinance establishing a zoning district, or approval or denial of an application to change a zoning district; or (3) approval or denial of an application for conditional rezoning. It is simply undeniable that both CdA Paving and Beacon meet the first category, which is found at I.C. § 67-6521(1)(a)(i). Thus, CdA Paving and Beacon are each an "affected person" under LLUPA.

Ciszek argues:

> Since the applicant is not a party under the provisions of I.R.C.P. 84(b)(1) and the Board of County Commissioners has ownership over and is required to defend the decision, it seems impertinent for a petitioner to assume that an applicant agrees to incur the costs of a legal defense by being named as a party to the appeal when a request to intervene is readily available and liberally granted.

Ciszek's Reply to CDA Paving's Response to Petitioner's Reply to Motion to Dismiss, p. 3. The inherent problem in this argument is the initial premise ("Since the applicant is not a party under the provisions of I.R.C.P. 84(b)(1)…") is flawed. CdA Paving is a "party, and Beacon is a "party". *Idaho Irrigation Co., Ltd. v. Dill,* 25 Idaho 711, 139 P. 714 (1914), cited by Ciszek and discussed below, proves that fact. CdA Paving and Beacon have an "interest in the object of the suit". 25 Idaho 711, 716. Indeed, compared to CdA Paving and Beacon, no person or entity on the face of this earth has a *paramount* "interest in the object of the suit."

Ciszek made the decision to not *serve* Beacon and CdA Paving. The language of I.R.C.P. 84(b)(1) requires service upon all parties to the proceeding before the agency. It is inescapable that CdA Paving and Beacon are parties.

In *Stateline Association for Rural Preservation v. Kootenai County,* CV 2009 10068 (First Dist. Nov. 15, 2010), this Court was faced with very similar facts: the Stateline Association petitioned for review of an Order of the County Commissioners' granting a conditional use permit as "affected persons." In that matter (unlike the instant case), although the named parties were only the Association and the County, the petition, filed on December 2, 2009, included the property owners/applicants in its certificate of service. The issue is not, as Ciszek argues, whether Ciszek should have named Beacon and CdA Paving as parties to the case, but rather whether Ciszek was obligated to serve them with Ciszek's Petition for Review because they had been parties to the action before the agency below. Having not been served with the petition,

Beacon and CdA Paving had no *formal* notice of the petition or their ability to seek to intervene in the matter. This is so despite Ciszek's counsel's February 10, 2011, email attaching a copy of the Petition for Review.

Ciszek cites *Idaho Irrigation Co., Ltd. v. Dill,* 25 Idaho 711, 139 P. 714 (1914) for the proposition that Beacon is not affected by the grant or denial of the permit and therefore "is not a party." Reply to Beacon West, LLC's Motion to Dismiss, p. 4. In *Dill,* the Idaho Supreme Court was asked whether the lower court erred in sustaining a demurrer based on the United States being a necessary party to the action. 25 Idaho 711, 716, 139 P. 174, ___ (1914). The Idaho Supreme Court stated, "[t]he term 'parties to an action' is used to designate the person or persons seeking to establish a right and the person or persons upon whom it is sought to impose a corresponding duty or liability." *Id.* The Idaho Supreme Court reversed the lower court, reasoning that whether a person is made a party depends on his interest in the object of the suit, not in the subject-matter of the suit, and determined the suit did not seek to acquire title from the government "or to foreclose any right or interest the government has in and to this land." *Id.* The Court wrote:

> Every person has a right to his day in court, and as before stated, by the allegations of the complaint it is clearly shown that the plaintiff is not seeking in any manner to cloud or interfere with the title of the United States.

Id. In the present case, Beacon and CdA Paving are (other than Ciszek) the *only* entities having "an interest in the object of the suit", because Beacon and CdA Paving *are the parties which sought* the Special Notice Permit.

Ciszek cites *Giltner Dairy v. Jerome Co.,* 11.7 ISCR 135, 2011 Opinion No. 33 (March 17, 2011) (*Giltner II*), for the proposition that the Local Land Use Planning Act cannot be supplemented by the Idaho Rules of Civil Procedure, arguing I.R.C.P. 84

does not apply to judicial review under the LLUPA. Ciszek writes: "This new case clarifies the Courts position that the Local Land Use Planning Act cannot be supplemented by other provisions of the Idaho Rules of Civil Procedure." Certificate of Additional Law, p. 2. The problem with Ciszek's argument is nowhere in *Giltner II* does the Idaho Supreme Court say that.

Giltner II does not indicate a preference between the LLUPA and the Idaho Rules of Civil Procedure. Instead, as stated at the beginning of the decision:

> The district court dismissed for lack of jurisdiction, finding that this Court's decision in *Highlands Development Corp. v. City of Boise,* 145 Idaho 958, 188 P.3d 900 (2008), precluded the use of I.C. 67-6521 to allow judicial review of the case, and that the more specific judicial review provisions of the Local Land Use Planning Act (LLUPA, I.C. §§ 67-6501 *et seq*.) controlled over the more general provisions of I.C. § 31-1506.

2011 Opinion No. 33, pp. 1-2. The Idaho Supreme Court affirmed District Court Judge John Butler in *Giltner II*.

However, the Idaho Supreme Court stated that the:

> …LLUPA affirmatively grants judicial review in specific circumstances. The logical inference from LLUPA's statutory scheme is that the legislature intended the judicial review provisions of the Act to be exclusive.

Id., p. 5. The word "exclusive" must be read in context. This Court finds that in *Giltner II,* "exclusive" means as compared to I.C. § 31-1506 (the general review statute for county commission decisions). The Idaho Supreme Court was comparing the *specific* review provisions for LLUPA decisions found in I.C. § 67-6521 to be "exclusive" as compared to the *general* review provisions of I.C. § 31-1506, and that is simply basic statutory construction. The Idaho Supreme Court in *Giltner II* was not asked to compare the LLUPA statutes to the Idaho Rules of Civil Procedure. This Court finds

that the Idaho Supreme Court would not have meant "exclusive" to also be applied to the Idaho Rules of Civil Procedure.

The Idaho Supreme Court in *Giltner II* specifically stated the LLUPA grants judicial review in specific circumstances. *Id.* This Court finds the present case is one of those circumstances. Idaho Code § 67-6521(1)(d) states that following a final decision of the commission or governing board: "An affected person aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code." This is a "matter identified in section 67-6521(1)(a), Idaho Code", because I.C. § 67-6521(1)(a)(i) covers an "…approval…upon an application for a …special use permit…" I.C. § 67-6521(1)(a)(i).

The Idaho Supreme Court in *Giltner II* stated "Idaho Code § 67-6519 and I.C. § 67-6520 authorize judicial review under the procedures described in I.C. § 67-6521." *Id.,* p. 3. Idaho Code § 67-6521 in turn specifies a party may "seek judicial review as provided by chapter 52, title 67, Idaho Code", which is the Idaho Administrative Procedure Act. *See also* I.C. § 67-6519(4). The Idaho Administrative Procedure Act is found at I.C. § 67-5201 – § 67-5292. Idaho Code § 67-5270(1) reads: "Judicial review of agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter." The IDAPA defines "party" as "…each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." I.C. § 67-5201(13). CdA Paving as the applicant, and Beacon as the landowner, are both clearly "entitled as of right to be admitted as a party." Ciszek provides no cogent argument as to why that

would not be the case. Instead, Ciszek simply argues "There are simply no 'parties' in a land use matter." Reply to Beacon West, LLC's Motion to Dismiss, p. 4. Ciszek has provided no legal authority to support that argument.

CdA Paving advocates I.R.C.P. 84(b) governs the time for filing a petition for judicial review, as well as the *process* for fling the petition: "Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of exception for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding)." I.R.C.P. 84(b). Idaho Rule of Civil Procedure 84(b) and I.C. § 67-5273 are identical in the 28-day time limit. However, the time limit is not at issue in the present case. What is at issue is the *process*, and nothing in I.C. § 67-5273 delineates the process. Idaho Rule of Civil Procedure 84(b) defines the process; that is, *how* judicial review is commenced: "…by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of exception for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency…"

Ciszek has set forth no argument as to how its decision not to include CdA Paving and Beacon complies with I.R.C.P. 17(a), regarding real parties in interest; I.R.C.P. 19(a)(1), regarding persons to be joined if feasible; and I.R.C.P. 19(a)(2), regarding indispensable parties. Instead, Ciszek simply notes CdA Paving and Beacon would have the ability to intervene as they had in the past, and that I.C. § 67-5201(13) "implies using acknowledged judicial tools such as Idaho Rules of Civil Procedure §24 which provides for intervention by right or by permission." Ciszek's Reply to CDA Paving's Response to Petitioner's Reply to Motion to Dismiss, p. 6. However, the issue

at the present time is not whether CdA Paving and Beacon *could* intervene in this lawsuit. What is at issue in Beacon's Motion to Dismiss is whether Ciszek's failure to serve Beacon and CdA Paving should result in a *dismissal* of Ciszek's petition.

Ciszek has not set forth for the Court how Beacon, the owner/lessor of the property at issue, and CdA Paving, the lessee/operator of the property, could possibly *not* have an interest in the object of the suit. Ciszek's counsel even writes in briefing: "The application was changed on July 28, 2010 to state that the applicant was Coeur d' Alene Paving Inc., and the representative was e^2 planning and design, llc, Sandy Young." Reply to Beacon West LLC's Motion to Dismiss, p. 3. Ciszek's Petition for Judicial Review seeks an order vacating the decision of the Board of County Commissioners granting CdA Paving a Special Use Permit to operate an asphalt batch plant. Petition for Judicial Review, p. 3, ¶ 1. This is the very batch plant operated by CdA Paving on the land owned by Beacon. Both Beacon and CdA Paving have a bona fide interest in the real property which would be adversely affected by the relief sought in the Petition for Review. Therefore, it follows that Beacon and CdA Paving are not only "affected persons" within the meaning of the LLUPA, they are also "parties" to the action under IDAPA (I.C. § 67-5201(13)). Although the "affected persons" definition applies to individuals entitled to seek relief via a petition for review under the LLUPA, Beacon and CdA Paving fit within a similar group, that is, individuals entitled to service under I.R.C.P. 84(b)(1) as having a bona fide interest in the property which would be adversely affected by the relief sought by Ciszek.

Ciszek's argument that: "This new case (*Giltner II*) clarifies the (Idaho Supreme) Courts(') position that the Local Land Use Planning Act cannot be supplemented by other provisions of the Idaho rules of Civil Procedure", is wholly lacking in merit. This Court finds Ciszek had to serve CdA Paving and Beacon, and did not.

The next issue becomes "What is the consequence of Ciszek's failure to serve CdA Paving and Beacon?" Beacon and CdA Paving argue Ciszek's failure to serve within the limitation set forth in I.R.C.P. 84(b)(1) should result in a dismissal of Ciszek's Petition for Judicial Review. As mentioned above, Beacon argues Ciszek's failure to serve the petition on CdA Paving and Beacon results in Ciszek's petition being untimely, as more than twenty-eight days have elapsed since the Board's decision was entered and Ciszek "cannot now cure its fatal defect" and thus, CdA Paving is entitled to automatic dismissal of Ciszek's petition. Beacon West, LLC's Memorandum in Support of Motion to Dismiss, pp. 3. That entire argument is as follows:

> A party's failure to physically "file" a petition for judicial review within the time limits prescribed shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review. IRCP 84(n). Here, Petitioner Ciszek did not and at the time of filing this motion still had not served either (1) Coeur d'Alene Paving or (2) Beacon West, LLC. As a result, by express provision of rule 84(b), Petitioner Ciszek has not "commenced" a petition for judicial review. In turn, because over twenty-eight (28) days have elapsed since the BOCC's Order, Petitioner Ciszek cannot now cure its fatal defect. Thus, as a matter of law, Petitioner's Petition for judicial review should be dismissed with prejudice.

Id., p. 4. Beacon's argument obfuscates "filing" and "service". Essentially, Beacon argues that failure to timely file a petition for judicial review is jurisdictional and results in dismissal (a correct premise), and service is part of commencing a petition for judicial review (also correct); therefore, since Ciszek failed to serve CdA and Beacon, the petition must be dismissed. The conclusion is flawed because the argument subsumes "service" as part and parcel of "filing". The two are separate.

Beacon's argument that Ciszek has not "commenced" a petition for judicial review has some merit though, which must be analyzed. Idaho Rule of Civil Procedure 84(b)(1) reads in part: "Judicial review is commenced by filing a petition for judicial review with the district court, and *the petitioner shall* ***concurrently*** *serve copies of the*

notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding)." Emphasis added. This raises two issues.

First, this Court finds this one sentence of I.R.C.P. 84(b)(1) has two phrases. The first phrase describes how judicial review is commenced, and that is by filing a petition with the district court. The second phrase describes when the petitioner shall serve (concurrently), and whom the petitioner must serve. The argument certainly could be made that this one phrase requires two things (filing the petition and concurrent service) in order to commence judicial review. That interpretation would be inconsistent with other rules of civil procedure. "A civil action is *commenced* by filing of a complaint with the court, which may be denominated as a complaint, petition or application…" I.R.C.P. 3(a). Service of process has nothing to do with *commencement* of an action. That interpretation would also be inconsistent with statutory construction. *See United States v. Mottolo,* 605 F.Supp. 898, 904, n.3 (D.N.H. 1985), a comma signals the end of an independent clause.

Second, the argument could be made that since Ciszek failed to "concurrently" serve CdA Paving and Beacon at the time Ciszek filed the petition, Ciszek failed to timely serve and, thus the case should be dismissed. However, failure to timely serve is not "jurisdictional". In a civil lawsuit, various statutes of limitation determine the last date upon which a given lawsuit may be **filed**. Failure to make that deadline is jurisdictional, and dismissal must be the result. Idaho Rule of Civil Procedure 4(a) requires service of the summons and complaint must occur within six months after filing the complaint, but failure to make that deadline is not only not jurisdictional, the deadline itself can be extended retroactively by a showing of "good cause why such service was not made within that period."

Idaho Rule of Civil Procedure 84(n) makes it clear that dismissal is the appropriate remedy for failure to timely file a petition for judicial review because such failure to timely file destroys jurisdiction. Idaho Rule of Civil Procedure 84(n) makes equally clear that "…failure of a party to take any *other* step (other than failure to timely file) in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review." In the present case, Ciszek timely filed the petition for judicial review, but Ciszek failed to "concurrently" serve CdA Paving and Beacon at the time the petition was filed.

In *Aho v. Idaho Transportation Department,* 145 Idaho 192, 177 P.3d 406 (Ct.App. 2008), the Idaho Court of Appeals held: "…dismissal is a sanction that should be used sparingly and generally only when the delay has prejudiced the opposing party." 145 Idaho 192, 194, 177 P.3d 406, 408. The cases discussed in *Aho* show a court should not dismiss a case as the sanction and "punish a period of delay" absent a finding of prejudice to the other party. 145 Idaho 192, 195, 177 P.3d 406, 409. *Aho* interpreted I.R.C.P. 84(n), and dealt with a brief that was filed six days late, which resulted in dismissal by the district court, where no prejudice was even discussed before the district court. 145 Idaho 192, 196, 177 P.3d 406, 410. Certainly failure to serve CdA Paving and Beacon is more egregious conduct than filing a brief six days late, but this Court must still analyze whether dismissal is the appropriate sanction against Ciszek. This Court determines that the less severe sanction of attorney fees is appropriate for Ciszek's failure to serve. Because Beacon's Motion to Dismiss was focused on its legal arguments, neither Beacon nor CdA paving have articulated any prejudice due to Ciszek's failure to concurrently serve them with a copy of the petition.

While this Court denies Beacon's Motion to Dismiss at the present time, Ciszek is not out of the woods as far as the potential for dismissal. Ciszek failed to concurrently serve Beacon and CdA Paving, entities which this Court finds are parties. Thus, Ciszek has failed to timely serve these parties. Ciszek must first serve these parties, then Ciszek will still need to demonstrate to this Court "good cause" for its failure to timely serve Beacon and CdA Paving. Beacon and CdA Paving will have an opportunity to demonstrate any prejudice.

Finally, Beacon alleges an alternative theory that this Court should dismiss Ciszek's petition as a sanction under I.R.C.P. 84(n). This Court has just set forth its reasons for holding dismissal is not the appropriate sanction. Below, this Court discusses why attorney fees against Ciszek (and in favor of both Beacon and CdA Paving), is the appropriate sanction.

IV. ATTORNEY FEES.

Both Ciszek and Beacon seek an order from this Court awarding them attorney fees. Ciszek fails to set forth any statutory basis for fees sought and is therefore precluded from an award. *KEB Enterprises, L.P. v. Smedley,* 140 Idaho 746, 754, 101 P.3d 690, 698 (2004) (citing *Hei v. Holzer,* 139 Idaho 81, 73 P.3d 94 (2003)) (Courts do not consider issues not supported by argument or authority.) Additionally, Ciszek is not the prevailing party at this juncture.

Even though this Court denies Beacon's Motion to Dismiss, the Court finds CdA Paving and Beacon to be prevailing parties at this point. The Idaho Supreme Court has held that the denial of a motion to dismiss does not preclude the award of attorney fees under I.C. § 12-121. *Sun Valley Shopping Ctr. Inc. v. Idaho Power Co.,* 119 87, 92, 803 P.2d 993, 998 (1991). Although Ciszek's petition is not dismissed at this point, Ciszek cannot go forward on its petition. The reason Ciszek cannot go forward at this

time is twofold: 1) Ciszek's petition has not been served, and 2) Ciszek has not proved "good cause" for Ciszek's failure to timely serve. The only reason Ciszek's incorrect legal interpretation as to who must be served was brought to light was due to Beacon's motion to dismiss. Because Ciszek's petition cannot go forward at the present time, Beacon and CdA Paving (which joined in Beacon's motion to dismiss) are the current prevailing parties.

Three theories for attorney fees are argued by Beacon: 1) I.C. § 12-121; 2) I.C. § 12-123, and I.R.C.P. 84(b)(1) and 84(n). Beacon West, LLC's Memorandum in Support of Motion to Dismiss, pp. 7-8; Beacon West, LLC's Reply in Support of Motion to Dismiss, p. 5.

First, attorney fees under I.C. § 12-121 may only be granted by the Court when it finds that the case was brought, pursued or defended frivolously, unreasonably, or without foundation. *Hossner v. Idaho Forest Indus., Inc.,* 122 Idaho 413, 835 P.2d 648 (1992). In the present case, Ciszek has not brought the petition frivolously (or at least at this juncture this Court has no basis to assess such), and Ciszek has not pursued the case frivolously (in fact, this Court essentially finds Ciszek has simply failed to pursue the case by failing to serve). While this Court finds troubling Ciszek's conduct in defending their decision not to timely serve Beacon and CdA Paving, the conduct of the parties, as opposed to the bringing, pursuing or defending of the action, cannot be the basis for the award of attorney fees under I.C. § 12-121. *Verway v. Blincoe Packing Co. Inc.,* 108 Idaho 315, 319, 698 P.2d 377, 381 (Ct.App. 1985), unless it is followed by an unreasonable prosecution or defense of the action. *O'Boskey v. First Fed. Sav. & Loan Ass'n,* 112 Idaho 1002, 1009-10, 739 P.2d 301, 308-09 (1987). Finally, I.C. § 12-

121 applies to cases as a whole and not to individual motions. *Walker v. Boozer,* 140 Idaho 451, 456, 95 P.3d 69, 74 (2004).

Second, and similarly, fees under I.C. § 12-123 are awarded as sanctions for frivolous conduct in a civil matter, and the Court may award reasonable attorney's fees to any party adversely affected by frivolous conduct. "Frivolous conduct" can be by a party or by a party's counsel, and must rise to the level that such conduct "is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." I.C. § 12-123(1)(b). As the above analysis shows, Ciszek's position regarding service quite arguably meets this standard. However, the Court need not decide that issue as I.C. § 12-123(2)(b)(i)-(iii) sets forth a procedure that must be followed, and that procedure has not been conducted in this case.

Third, attorney fees are allowed as a sanction for "failure of a party to timely take any other step in the process for judicial review…" I.R.C.P. 84(n). This Court finds Ciszek has not timely served a copy of its petition for judicial review on Beacon or CdA Paving, and thus, Ciszek failed to timely take that crucial step in the process for judicial review. The Court has considered other possible sanctions, and finds the award of attorney fees to be the most appropriate. Ciszek's decision not to serve was deliberate. Ciszek knows who the parties are and the December 30, 2010, decision by the BOCC makes that clear. Ciszek's legal arguments in the instant motion to dismiss regarding its failure to serve are not well taken. Most importantly, this is not Ciszek's first foray into unacceptable conduct. Beacon has set forth Ciszek's conduct a year ago where Ciszek failed to notify Beacon of pending motions, failed to identify the owner and applicant of the property in its petition, and failed to serve Beacon (in circumstances identical to the present motion to dismiss). Beacon West, LLC's Memorandum in Support of Motion to

Dismiss, pp. 5-7. If fees are not assessed against Ciszek, there is no indication from Ciszek's past and present conduct that Ciszek's future conduct will be anything but the same.

This Court has heard one of the four previous petitions for review brought with regard to the asphalt batch plant at issue. Because of the history of this case and the fact that the record specifically identifies CdA Paving as the applicant and grantee of the Special Notice Permit now being appealed, and identifying Beacon as the owner of the property, Ciszek's deliberate failure to serve CdA Paving and Beacon in the instant matter was unreasonable. Ciszek knew full well of the role belonging to Beacon and CdA Paving. While there has been no showing by Beacon or CdA Paving at this juncture indicating that, substantively, Ciszek's *petition* itself is frivolous, *procedurally*, Ciszek's failure to serve these known parties is unreasonable, given the fact that the asphalt batch plant desired by Beacon and CdA Paving (and permitted by the BOCC) was the *only* reason a petition was filed by Ciszek in the first place.

In *Giltner II*, the Idaho Supreme Court held attorneys fees were not warranted because the application of I.C. § 31-1506 to actions under LLUPA was a question of first impression. 2011 Opinion No. 33, pp. 5-6. In the present case, there is no such question of first impression. Ciszek's position that it need not serve CdA Paving or Beacon is simply not supported by the law. Specifically, Ciszek's reliance on *Giltner II* is a blatantly false argument to this Court.

At oral argument, counsel for Beacon cited to *Aho v. Idaho Transportation Department,* 145 Idaho 192, 177 P.3d 406 (Ct.App. 2008), in its argument that attorney's fees against Ciszek should be imposed as a sanction in an administrative review proceeding. Imposition of fees is committed to the court's discretion. 145 Idaho

192, 194, 177 P.3d 406, 408. This Court appreciates that fact and acts within the bounds of its discretion in awarding attorney fees against Ciszek in favor of both Beacon and CdA Paving. While Beacon made the motion and filed the briefs, CdA paving joined in the motion and to that extent is entitled to attorney fees due to Ciszek's failure to timely serve a copy of the petition.

The Court has considered lesser sanctions. The imposition of attorney fees is the only remedy that will deter unreasonable future conduct by Ciszek.

V. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED Beacon's Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED attorney fees are GRANTED against Ciszek and in favor of both Beacon and CdA Paving, as to all time spent on this particular petition up to the present time.

Entered this 5th day of May, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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_____
Jeanne Clausen, Deputy Clerk