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<p>IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,</p> <p style="text-align: center;">Complainant,</p> <p>vs.</p> <p>Chad and Teresa Karupiah, and Chris Gormsen, individually and dba Boileau's Buttonhook Inn, aka The Buttonhook Restaurant, aka [the] Buttonhook Premise Location: 34076 N. Main, Bayview, ID,</p> <p style="text-align: center;">Respondents.</p>	<p>Case No. 18ABC008</p> <p>FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY DECISION</p>
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This matter, having been fully submitted to Tara Malek, the designated Hearing Officer for the Idaho State Police, and oral argument and briefing having been submitted by the respective parties, the Hearing Officer hereby renders the following Findings of Fact and Conclusions of Law. In making its Findings of Fact and Conclusions of Law, the Hearing Officer reviewed and considered the Agency Records (consisting of 711 pages); the Agency's Motion for Summary Judgment (consisting of 3 pages); the Memorandum in Support of the Agency's Motion for Summary Judgment (consisting of 20 pages); the Respondents' Opposing Memorandum (consisting of 27 pages); the Declaration of John F. Magnuson (consisting of 182 pages); the Declaration of Chan Karupiah (consisting of 28 pages); and the Agency's Reply to Respondents' Opposing Memorandum (consisting of 43 pages).

1. OBJECTIONS TO DECLARATIONS AND EXHIBITS

Idaho State Police, Alcohol Beverage Control (“ABC”) makes a number of objections to Buttonhooks submissions and requests a ruling by the Hearing Officer. *Agency’s Reply to Resp.’s Opp’n Mem.*, at 2. Evidence may be excluded by the Hearing Officer if it is deemed irrelevant or inadmissible. *See Soong v. Idaho Dept. of Health and Welfare*, 132 Idaho 166, 169 (1998), Idaho Admin. Code r. 04.11.01.600. Idaho Rule of Evidence 401 provides that “relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” IRE 401. ABC argues that the only facts of consequence are whether the Buttonhook qualifies as a waterfront resort pursuant to Idaho Code 23-948. The Hearing Officer disagrees that this is the only fact of consequence. Both sides have requested attorney’s fees and costs in this matter and Buttonhook as alleged that ABC’s position and the manner that the application for a resort liquor license were processed was arbitrary, capricious and constituted an abuse of discretion. As such, the facts of consequence are larger in scope than represented by ABC and, the history of the party’s interaction as they relate to the resort liquor license are relevant to the issues the Hearing Officer is being asked to decide. As such, the Hearing Officer rules on ABC’s Objections as to the submissions by Buttonhook as follows:

a) Objections to Mr. Karupiah’s Declaration and Exhibits

Objections as to Mr. Karupiah’s Declaration paragraphs 2-4 and Exhibit A are overruled. The facts of consequence include Mr. Karupiah’s relation to Floating Patio, LLC , the location of the Floating Patio, LLC, and the character of the property.

The objection to paragraph 5 is overruled. The history of the parties as it relates to resort liquor licenses is relevant, as is ABC's prior positions and interpretations of the deficiencies in the Buttonhook's application for a liquor license.

The objection to paragraph 6 is sustained. A copy of the Court's Memorandum Decision and Order was attached as Exhibit E to the Declaration of John Magnuson and included in the agency record. That decision in its entirety was reviewed by the Hearing Officer. Mr. Karupiah's interpretation of that decision is not relevant.

The objection to paragraph 9 and Exhibit B referenced therein is overruled. The information is relevant to the issues argued by both parties in their briefing. The statements therein have been considered in conjunction with the agency record and given the appropriate weight.

The objection to paragraphs 10-16 and exhibits B, C, E, F, G, H, I are overruled. The information is relevant to the issues presented by both parties for decision by the Hearing Officer.

The objection to paragraph 17 is in part, overruled. Mr. Karupiah's final sentence beginning with "this was necessary..." is sustained as being speculative.

The objection to paragraph 18 and Exhibit J is overruled. The information is relevant to the issues presented by both parties for decision by the Hearing Officer.

The objection to paragraph 19, Exhibit D is sustained. The information is not relevant to the issues presented for decision by the Hearing Officer.

The objection to paragraph 20 and exhibit K is overruled.

The objection to paragraph 21 is overruled. The Hearing Officer has considered this statement in conjunction with the agency record and has given it the weight it deserves.

b) Objections to Mr. Magnuson's Declaration and Exhibits.

The objection to paragraphs 3-7 and the accompanying exhibits A, B.

The objection to paragraph 8 and both exhibits marked C are sustained. The motion to dismiss and the Court's decision thereon are not relevant to the issues presented here.

The objections to paragraph 9-13 and all exhibits marked D, E, F, G, H, I are overruled.

The objections to the additional exhibits marked I-Q which are not referenced in Mr. Magnuson's declaration but were attached to his declaration are sustained. There is no foundation for these exhibits.

2. FINDINGS OF FACT

Respondents Chan and Teresa Karupiah are the members of Floating Patio, LLC. The Floating Patio is a waterfront restaurant and the licensee under a waterfront resort liquor license. *Decl. Chan Karupiah* (Karupiah Decl.), ¶ 2. The Floating Patio is located in the town of Bayview, Idaho at the southern end of Lake Pend Oreille. The Floating Patio consists of 200 feet of lake frontage, a 3,100 square foot restaurant and bar, public launching facilities and a parking lot with fifty parking spaces for cars. *Karupiah Decl., Ex. A.* The parking spaces allocated for the Floating Patio are located across Lakeside Avenue, a public street. *Id.* Boileau's Buttonhook is a restaurant situated to the south of Lakeside Avenue. *Id., at Ex. B.* Lakeside Avenue separates Buttonhook from the Floating Patio facilities and is owned by Lakes Highway District. *Id. at Ex. B, C.* Buttonhook's facility consists of 3,100 square feet of restaurant/bar space. To the north of Buttonhook is a parking lot with 25 parking spaces allocated for Buttonhook. This is the same parking lot which contains the fifty parking spaces for the Floating Patio. *Karupiah Decl. at ¶ 9.*

Prior to May 2010, Robert Holland owned Boileau's Marina, LLC, an entity which held a waterfront resort liquor license (License No. 2743). *Decl. John Magnuson* ("Magnuson Decl.)

Ex. F, p. 2. The license authorized the sale of liquor at both the Floating Patio and Buttonhook. *Id.* After May 2010, Mr. Karupiah, through an entity he owned, acquired Mr. Holland's membership units in Boileau's Marina, LLC. *Id.* The membership units were ultimately assigned to Mr. Karupiah. *Id.*

Boileau's Marina, LLC submitted an application for the renewal of License No. 2743 prior to the February 28, 2011 expiration date of the license. *Magnuson Decl.*, *Ex. F*, p. 2. ABC returned the application stating that it was incomplete. Boileau's Marina failed to submit its completed application timely and as a result, License No. 2743 expired. *Id.*

Boileau's Marina submitted a new application for the joint licensure of the Floating Patio and Buttonhook in the fall of 2011. *Magnuson Decl.*, *Ex. F*, p. 2. ABC denied the application on the basis that neither the Floating Patio nor Buttonhook met the requirements of § 23-948. *Id.* ABC explained that the Floating Patio lacked the required paved or graveled fifty parking spaces, and may not have the 3,000 square foot public use space requirement and Buttonhook did not have the required boat launching facilities and required water frontage property. *Id.* According to ABC, the Buttonhook did not meet the requirements of Idaho Code § 23-948 because it was not on the waterfront and the boat launch and the dock were not on property that was contiguous to the Buttonhook. *Id.* at p. 3.

On January 29, 2013, Boileau's Marina submitted a new application for a waterfront resort liquor license but only for the Floating Patio. *Magnuson Decl.*, *Ex. A*; *Exhibit F*, p. 3. With the application, counsel for Boileau's submitted a letter with a legal analysis as to the meaning of contiguity. *Magnuson Decl.*, *Exhibit F*, p.3. On June 10, 2013, ABC denied Boileau's application because the Floating Patio lacked the 3,000 square foot public use floor space requirement per Idaho Code §23-948. *Id.* On July 1, 2013, the Floating Patio was leased to Respondent George

Gormsen. *Id.* Mr. Gormsen submitted another application for a resort liquor license on September 27, 2013. *Id.* ABC denied the application on November 21, 2013 for the same reason that it was denied on June 10, 2013; the facility lacked the requisite public use floor space. *Id.* On February 21, 2014, Mr. Gormsen provided additional documentation showing that the Floating Patio facility now had the requisite 3,000 square foot public use floor space. *Id.* at p. 4. As a result, on March 1, 2014, ABC issued the Floating Patio a waterfront resort liquor license (License No. 15923). *Id.*

Approximately two years later in 2016, Floating Patio, LLC submitted an application to amend License No. 15923 to add Buttonhook. *Magnuson Decl, Ex. F*, p. 4. On May 3, 2016, ABC denied the application to amend the Floating Patio's license to add Buttonhook. *Id.*

Based on this denial, the Floating Patio filed a Petition for Judicial Review. Four issues were presented for the Court's review: 1) whether ABC's interpretation of "contiguous" as used in Idaho Code §23-948 was entitled to deference; 2) whether ABC's denial of Floating Patio's application to amend their license to add Buttonhook was arbitrary, capricious, and/or an abuse of discretion; 3) whether the Floating Patio's petition for judicial review was barred by collateral estoppel; and 4) whether either party was entitled to attorney's fees. R. DDDDDDDDD at 8. The heart of the dispute was to the meaning of the word "contiguous" as used in the statute. The Court noted in a footnote that, "[w]hile 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." *Id.* at 9. ABC defined contiguous as meaning "touching at a point or along a boundary; adjoining." *Id.* at 9. The definition of the term "waterfront resort" was never an issue before the Court. *Id.* The Court ultimately found ABC's interpretation of the word "contiguous" reasonable and entitled to deference. *Id.* at 27. The Court also found that ABC's

denial of the Floating Patio’s application to amend was not arbitrary, capricious, and/or an abuse of discretion because it was consistent with its interpretation of the word “contiguous”. Finally, the Court found that ABC’s petition was not barred by collateral estoppel and denied an award of attorney’s fees to either party. *Id.*

Subsequently, Mr. Chan contacted and secured from the Lakes Highway District (LHD), a portion of Lakeside Avenue. LHD is the owner of Lakeside Avenue. *Dec. Chan Karupiah* at ¶ 17.

On January 18, 2018, LHD recorded a Special Warranty Deed (“the Deed”). R. GGG. The Deed gave Mr. Chan a ten-foot strip of Lakeside Avenue. This strip of land physically connected the Buttonhook to the waterfront properties owned by Mr. Chan on the east side of Lakeside Avenue. The Deed also qualified the grant and provided that if a resort liquor license was not granted within twelve months of the execution of the Deed, the ten-foot strip of lawn would revert back to the Grantor or its successor in fee simple. *Id.*

On March 22, 2018 Respondent Chris Gormsen filed an application for a resort liquor license for the Buttonhook. R. IIIII. Mr. Gormsen had leased the facilities and properties encompassed by Buttonhook’s application. R. SSSSS-VVVVV. In the application, Buttonhook was comprised as being a 3,100 square foot facility, 200 feet of waterfront with public docking connected to the Buttonhook facility by the 10 foot strip conveyed by LHD, 25 parking spaces on the waterfront strip, and twenty five parking spaces in the parking lot adjacent to, and north of, Buttonhook. See R. MMMMM-RRRRR, WWWWW-YYYYY. ABC denied the application in a letter dated April 13, 2018. R. HHHHH. In the letter signed by Captain Brad Doty the Bureau Chief of ABC, he provided the basis for the denial as follows:

During the bureau’s review and processing of the application it was determined that part of the parking spaces described on the application are already allocated

to another liquor licensee. There is a discrepancy between the lease of parking spaces and the diagram provided. The location of Boileaus Button Hook does not appear to be comprised of 200 feet of lake frontage property according to the diagram you submitted with blue lines. Should you chose [sic] to resubmit your application, please explain in detail the diagram with labels. You must complete your application on the enclosed updated license application.

Id. On April 25, 2018, Respondent Gormsen resubmitted his application for a resort liquor license¹. R. SSS. In a letter dated April 19, 2018, counsel for Buttonhook, John Magnuson responded to the issues raised by ABC in their April 13, 2018 letter. *See* R. OOOO. Enclosed with the letter, Mr. Magnuson included a plat of the Waterford Parking Condominiums and two separate Warranty Deeds showing that Mr. Karupiah owned 99 condominiumized parking spaces in the Waterford Parking Condominiums Plat. Mr. Magnuson wrote:

Your reference to a prior lease of some of these parking spaces is presumed to be a reference to the lease related to the Floating Patio premises. That lease pertained only to Parking Units 1-45, 47-50, and 59-61. These specific condominiumized parking spaces constitute fifty-two (52) parking spaces utilized by the Floating Patio.

The Lease Agreement between Mr. Karupiah and Mr. Gormsen, submitted as part of the current application package, encompasses Parking Units 75-99. These are parking units separate and apart from those leased as part of the Floating Patio license. These units are, as condominiums, each separately owned by Mr. Karupiah and are not otherwise leased to the Floating Patio. They were acquired by Mr. Karupiah under the January 2, 2015 Deed attached hereto as Exhibit C. These are the 25 parking spaces show in Mr. Gormsen's March 22, 2018 (and April 9, 2018) submittal as being immediately adjacent to the Buttonhook restaurant.

R. OOOO. Mr. Magnuson then provided a separate schematic showing 25 additional parking spaces across the street from Buttonhook and a map prepared by the Kootenai County Tax Records Division annotated showing the ten foot conveyance by LHD. R. YYYY-AAAAA. Mr. Magnuson also provided information responding to ABC's question as to whether or not the

¹ The application was signed and dated April 14, 2018.

waterfront parcel included 200 feet of frontage. Mr. Magnuson explained that Mr. Karupiah, owner of that parcel had leased it to the Harborview Village Condominium Owners Association who had then leased those littoral rights to Mr. Gormsen. R. ZZZZ-DDDDD. Finally, Mr. Magnuson included a letter from Drew Dittman, P.E., a licensed engineer who attested that the property from which littoral rights were conveyed, had more than two hundred feet of littoral frontage. R. GGGGG. ABC returned the application and asked for an additional copy of the floor plans and questioned whether the LHD's Special Warranty Deed conveying the ten-foot strip of land could be leased to a third-party (Mr. Gormsen). R. Ex. OOO.

On June 1, 2018 Mr. Gormsen resubmitted his application along with a letter from Mr. Magnuson and enclosed:

- Mr. Gormsen's Liquor License Application;
- Mr. Gormsen's fingerprint card;
- Two checks for the applicable fees;
- Mr. Gormsen's Idaho State Tax Commission Seller's Permit;
- Mr. Gormsen's lease for the Buttonhook property, 25 parking spaces (Parking Units 75099) created by the Waterform Parking Condominiums Plat, a lease of the strip of land conveyed by LHD, a lease of the parkel with more than 200 feet of waterfront and the 25 additional parking spaces;
- The Buttonhook's food menu;
- The Buttonhook's approval for food sales from Panhandle Health District.

R. DDD. Mr. Magnuson recited the history of the applications and ABC's questions to date in the same letter. *Id.* On June 7, 2018, the application was again returned with denial letter.

Magnuson Dec. at Ex. H. ABC cited four issues it believed remained unresolved and which provided the basis of the denial of the resort license:

- 1) LHD's Special Warranty Deed to Mr. Chan did not extend to Mr. Gormsen;
- 2) LHD's Special Warranty Deed granting a strip of land across Lakeside Avenue bypassed the parcel line of the boat launching parcel without touching it thereby defeating contiguity;
- 3) The parking spaces designated for Buttonhook were also assigned to the Floating Patio;
- 4) Buttonhook did not actually "sit" on 200 feet of lake frontage.

Id. On June 19, 2018 Susan Weeks, attorney for LHD provided a letter to ABC advising them that the Special Warranty Deed Conditions “...remain viable in a lease arrangement.” R. LLL. On June 22, 2018 Mr. Magnuson returned the application to ABC with another cover letter addressing the issues raised by ABC in its June 7, 2018 letter. R. J. On June 29, 2018 ABC wrote Mr. Magnuson advising him that they disagreed with his interpretation and position that Mr. Karupiah and Mr. Gormsen’s Buttonhook facility meet the requirements of Idaho Code §23-948 and that a hearing officer would be assigned. R. I.

3. STANDARD FOR SUMMARY JUDGMENT

“Summary judgment is proper when the ‘pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007), (quoting I.R.C.P. 56(c)). The moving party has the burden to prove that no genuine issues of material fact exist and that judgment as a matter of law is appropriate. *Cafferty v. State. Dept. of Transp., Div of Motor Vehicle Servs.*, 144 Idaho 324, 327, 160 O.3d 763, 766 (2007). When there is no jury trial and the Hearing Officer will act as the trier of fact, the Hearing Officer “is not necessarily constrained to draw inferences in favor of the nonmoving party. Rather, the [Hearing Officer] may draw those inferences which he or she deems most probable on uncontroverted facts.” *Stillman v. First National Bank of North Idaho*, 117 Idaho 642, 643, 791 P.2d 23, 24 (Ct.App. 1990), *citing Argyle v. Slemaker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App. 1984). This is because where the evidentiary facts are not disputed and the Hearing Officer rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting

inferences because the Hearing Officer alone will be responsible for resolving the conflict between those inferences. *See, Pierson v. Jones*, 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981).

4. LAW AND AUTHORITY

Article III Section 24. PROMOTION OF TEMPERANCE AND MORALITY. The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.

Idaho Const. art. III, § 24.

Article III Section 26 (Idaho Constitution). POWER AND AUTHORITY OVER INTOXICATING LIQUORS. From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have the full power and authority to permit, control and regular or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

Idaho Const. art. III, § 26.

Idaho Code 23-901. DECLARATION OF POLICY-RETAIL SALE OF LIQUOR. It is hereby declared as the policy of the state of Idaho that it is necessary to further regulate and control the sale and distribution within the state of alcoholic beverages and to eliminate certain illegal traffic in liquor now existing and to insure the entire control of the sale of liquor it is advisable and necessary, in addition to the operation of the state liquor stores now provided by law, that the director of the Idaho state police and the county commissioners and the councils of cities in the state of Idaho be empowered and authorized to grant licenses to persons qualified under this act to sell liquor purchased by them at state liquor stores at retail posted prices in accordance with this act and under the rules promulgated by said director and under his strict supervision and control and to provide severe penalty for the sale of liquor except by and in state liquor stores and by persons licensed under this act. The restrictions, rules, and provisions contained in this act are enacted by the legislature for the protection, health, welfare and safety of the people of the state of Idaho and for the purpose of promoting and encouraging temperance in the use of alcoholic beverages within the state of Idaho.

Idaho Code Ann. § 23-901 (West).

Idaho Code 23-902. DEFINITIONS. (21) All other words and phrases used in this chapter, the definitions of which are not herein given, shall be given their ordinary and commonly understood and acceptable meanings.

Idaho Code Ann. § 23-902 (West).

Idaho Code 23-903. LICENSE TO RETAIL LIQUOR. (1) The director of the Idaho state police is hereby empowered, authorized, and directed to issue licenses to qualified applicants, as herein provided, whereby the licensee shall be authorized and permitted to sell liquor by the drink at retail and, upon the issuance of such license, the licensee therein named shall be authorized to sell liquor at retail by the drink, but only in accordance with the rules promulgated by the director and the provisions of this chapter.

Idaho Code Ann. § 23-903 (West).

Idaho Code 23-907. INVESTIGATION OF APPLICATIONS. (1) Upon receipt of an application for a license under this act, accompanied by the necessary license fee, the director, within ninety (90) days thereafter, shall cause to be made a thorough investigation of all matters pertaining thereto. The investigation shall include a fingerprint-based criminal history check of the Idaho central criminal history database and the federal bureau of investigation criminal history database. Each person listed as an applicant on an initial application shall submit a full set of fingerprints and the fee to cover the cost of the criminal history background check for such person with the application. If the director shall determine that the contents of the application are true, that such applicant is qualified to receive a license, that his premises are suitable for the carrying on of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, he shall issue such license; otherwise the application shall be denied and the license fee, less the costs and expenses of investigation, returned to the applicant.

Idaho Code Ann. § 23-907 (West).

Idaho Code 32-933. SUSPENSION, REVOCATION, AND REFUSAL TO RENEW LICENSES. (1) The director may suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the provisions of this chapter or rules and regulations promulgated by the director or the state tax commission pursuant to the terms and conditions of this chapter. Procedures for the suspension, revocation, or refusal to grant or renew licenses issued under this chapter shall be in accordance with the provisions of chapter 52, title 67, Idaho Code.

Idaho Code Ann. § 23-933 (West).

Idaho Code §23-948. WATERFRONT RESORTS-LICENSING EVEN IF OUTSIDE CORPORATE LIMITS OF CITY. ...For the purpose of this section, 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 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 contiguous 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:

- (1) Hotel or motel accommodations for not less than fifty (50) persons, including a full-service restaurant that serves regularly at least two (2) meals per day to the public during a continuous period of at least four (4) months per year; or
- (2) A building of not less than three thousand (3,000) square feet of public use floor space, including a full-service restaurant that 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 parking for fifty (50) automobiles on the operator's owned or leased property and any contiguous property upon which are the docks or boat launching facilities described above...

Idaho Code Ann. § 23-948 (West).

IDAPA 11.05.01.003. ADMINISTRATIVE APPEALS. Administrative appeals under this chapter are governed by the rules of administrative procedure of the Attorney General, IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General".

Idaho Admin. Code r. 11.05.01.003.

IDAPA 04.11.01.415. CHALLENGES TO STATUTES (RULE 415). A hearing officer in a contested case has no authority to declare a statute unconstitutional. However, when a court of competent jurisdiction whose decisions are binding precedent in the state of Idaho has declared a statute unconstitutional, or when a federal authority has preempted a state statute or rule, and the hearing officer finds that the same state statute or rule or a substantively identical state statute or rule that would otherwise apply has been challenged in the proceeding before the hearing officer, then the hearing officer shall apply the precedent of the court or the preemptive action of the federal authority to the proceeding before the hearing officer and decide the proceeding before the hearing officer in accordance with the precedent of the court or the preemptive action of the federal authority. (3-24-93).

Idaho Admin. Code r. 04.11.01.415.

5. ANALYSIS

ABC has determined that Buttonhook does not qualify as a waterfront resort such that it can receive a waterfront resort liquor license. ABC argues that to qualify for a waterfront resort liquor license, the resort must actually “sit” on the waterfront. *See, Agency’s Mem. in Supp. of Mot. for Summ. J.*, at 8. Buttonhook argues that its property is now contiguous to at least 200 feet of waterfront and accordingly, that it meets the water front requirement under § 23-948. Buttonhook further argues that ABC has changed its position as to the waterfront requirement from the position it took in CV-16-4100.

Under the Idaho Administrative Procedures Act, an agency’s determination shall be upheld unless the agent’s decision: 1) violates statutory or constitutional provisions; 2) exceeds the agency’s statutory authority; 3) is made upon unlawful procedure; 4) is not supported by substantial evidence on the record as a whole; 5) or is arbitrary, capricious, or an abuse of discretion. *See Idaho Code Ann. § 67-5279(3)* (West). Respondents must also demonstrate that a substantial right has been prejudiced. *Idaho Code Ann. § 67-5279(4)*; *See Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 947 (2010).

To determine the level of deference appropriate to an agency’s interpretation, Idaho courts have applied the following four-pronged test: 1) the agency is responsible for the administration of the rule in issue; 2) the agency’s construction is reasonable; 3) the language of the rule does not expressly treat the matter at issue; and 4) any of the rationales underlying the rule of agency deference are present. *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3 (2010), (citing *Preston v. Idaho State Tax Comm’n*, 131 Idaho 502, 504 (1998)).

a) Deference must be given to ABC’s Interpretation of “waterfront” and “comprise”.

Turning to the four pronged test set out in *Duncan*, ABC's interpretation of "waterfront" and "comprise" must be given deference. The first prong is met here. ABC is the agency responsible for the administration of the rule at issue. Idaho Code §23-901; Idaho Code §23-933, Idaho Admin. Code r. 11.05.11.011.02.

The next issue is whether ABC's construction is reasonable. The Hearing Officer finds that it is. Questions of statutory interpretation begin with a reading of a statute's plain language. *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). The purpose of statutory interpretation is to discover the intent of the legislature in adopting the statute. *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011). When interpreting the statute, the court reviews "... the statute as a whole, and gives words their plain, usual, and ordinary meanings." *State v. Taylor*, 160 Idaho 381, 385, 373 P.3d 699, 703 (2016), (citing *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015)). If the statutory language is unambiguous, there is no need to utilize other rules of statutory construction because the legislature has clearly expressed its intent and that intent must be given effect. *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015).

The terms "waterfront" and "comprise" are not found in the statutory definitions of title 23 chapter 9 of the Idaho Code. Idaho Code § 23-902 provides that "[a]ll other words and phrases used in this chapter, the definitions of which are not herein given, shall be given their ordinary and commonly understood and acceptable meanings." ABC relies on the definition of waterfront found in Black's Law Dictionary. The term waterfront means "[l]and or land with buildings fronting a body of water." *Black's Law Dictionary* 1623 (Bryan A. Garner ed., 8th ed., West 2004). ABC also interprets the second term "comprise" as meaning "(1) to include esp. within a particular scope...5) to consist of: be made up of..." and cites to Webster's New International Dictionary.

Buttonhook argues that the term waterfront is already defined in Idaho Code §23-948 as real property which has:

- 1) not less than two hundred (200) feet of lake-frontage
- 2) suitable docks or permanent improved boat launching facilities.
- 3) a building of not less than three thousand (3000) 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.
- 4) Paved or gravel parking for fifty (50) automobiles on the operator's owned or leased property and any contiguous property upon which the docks are located.

See Resp. 't Opp'n Mem. at 18, citing I.C. §23-948(a). Specifically, Buttonhook seems to argue that the phrase “[f]or the purpose of this section, a waterfront resort shall comprise of...” is synonymous with the phrase “for the purpose of this section, the term waterfront resort means”. However, the legislature did not include the word “means” in this section as it has done in other sections of code. *See e.g.*, Idaho Code Ann. § 63-604(7)(a) (West) (“Contiguous” 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.”); Idaho Code Ann. § 67-5340 (West) (“For the purposes of this section, “serious injury” means an injury which...”; Idaho Code Ann. § 33-1272 (West) (“As used in this act:(1) “Professional employee” means any certificated employee of a school district...”). Accordingly, the term “waterfront” itself must be separately defined in order to comply with the directive of 23-902 (“all other words and phrases...shall be given their ordinary and commonly understood and acceptable meanings.” I.C. §23-902. In addition, it is notable that the word “contiguous” is used only once in the statutory language and references the physical location of the real property in relation to the boat launching and dock facilities. I.C. §23-948(a)(2). The word is not used in any other section of the statute and glaringly missing from the language dealing with the 200 feet of waterfront requirement. ABC’s interpretation of the word “waterfront” is reasonable.

Similarly, ABC's interpretation of "comprise" is also reasonable. ABC cites to Webster's Dictionary for its definition of "comprise". *Agency's Mem.* at 9. Webster's defines "comprise" as meaning "...1) to include esp. within a particular scope...5) to consist of: be made up of...". *Id.* When read in conjunction, ABC's interpretation of the statute makes sense: Besides fronting a body of water, a waterfront resort must meet additional requirements in order to qualify for a resort liquor license.

The third prong requires an evaluation of whether the statute expressly treats the matter at issue. The purpose of the third prong of this inquiry is to ensure that clear intent of the legislature is given affect. *See J.R. Simplot Co., Inc.* 120 Idaho at 862, 820 P.3d at 1219 (citing *Chevront, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-843 (1984)(footnotes omitted)). The statute at issue does not define either "waterfront" or "comprise". ABC's interpretation does not contradict any definition found in Title 23 Chapter 9 nor does it contradict any unambiguously expressed intent of the Idaho legislature. ABC separately points to the legislative history of §23-948 as supporting its interpretation. *Agency's Memorandum* at 12-13. The legislative committee's proposed language in 1985's Appendix C, which sought to amend the statute compared to the now existing law indicates that there was an effort to amend the language of the statute to allow an exception for liquor licenses for "resort communities" which would have eliminated the lake-frontage requirement. R. EEEEEEEEE and FFFFFFFF. Accordingly, the third prong is met.

Finally, the fourth prong requires a determination of whether any of the rationales underlying the rule of agency deference are present. There are five rationales underlying the rule of agency deference:

- 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 of the supporting rationes 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 any cogent reasons for departing from the agency interpretation exist with 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.

ABC argues, and the Hearing Officer agrees, that the first three rationales are present in this matter: reliance on the agency's expertise in interpretation of the statute, a practical interpretation of the statutes exists and the presumption of legislative acquiescence. *Agency's Mem.* at 13.

The first rationale, that a practical interpretation exists, is persuasive. ABC interprets the statute at issue as requiring a resort to actually sit on lake front property. ABC argues that adopting Buttonhook's interpretation would lead to absurd results and a slippery slope as to the appropriate or acceptable distance of real property to the water. The Hearing Officer agrees. Adoption of Buttonhook's interpretation of the statute would result in a slippery slope. It would also require ignoring the plain meaning of the word "waterfront" in the statute an action which

would clearly violate the mandate of Idaho Code §23-902(21) (“All other words and phrases used in this chapter, the definitions of which are not herein given, *shall* be given their ordinary and commonly understood and acceptable meanings.”).

In addition, the second rationale is also present: the presumption of legislative acquiescence. A finding of legislative acquiescence requires more than silence or a mere reenactment of the statute to evidence actual legislative intent. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505–06, 960 P.2d 185, 188–89 (1998). Here, something more exists. The Legislative Committee’s proposed language in 1985’s Appendix C, amending Idaho Code §23-948 compared to the enacted legislation in 1986 evidences the legislature’s intent that a resort should be positioned on lake frontage. R. EEEEEEEEE and FFFFFFFF. The text of the proposed amendment provided an exception for what was termed as “resort communities” which would have eliminated the requirement of lake frontage. *Id.* The amendment never passed. Accordingly, the intent of the legislature by not passing the amendment seems clear: a waterfront resort must be positioned on actual waterfront. Legislative acquiescence on this issue exists. Finally, the third rationale, reliance on the agency’s expertise in interpreting the statute also exists here. As explained, *supra*, ABC is the agency with the authority to interpret the waterfront resort statute.

b. ABC’s Actions are not Arbitrary, Capricious nor an Abuse of Discretion.

The Idaho Supreme Court has held that “[a]n action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *A & B Irr. Dist. v. Idaho Dep’t Of Water Res.*, 153 Idaho 500, 511, 284 P.3d 225, 236 (2012)(internal citations omitted).

Buttonhook argues that ABC’s position as to “contiguity” and “waterfront” is arbitrary, capricious and constitutes an abuse of discretion. *Resp.’s Opp’n Mem.* at 20. Specifically,

Buttonhook argues that ABC has fundamentally changed its position as to the waterfront requirement from case CV16-4100. Specifically, Buttonhook argues that in CV16-4100, ABC advanced an argument “...that the only impediment to the Buttonhook’s contiguity with the required waterfront footage was Lakeside Avenue.” *Id.* The Hearing Officer has reviewed Exhibit E to the Declaration of John Magnuson which provides ABC’s Responsive Brief in Opposition to Petition for Judicial Review. As to the waterfront requirement ABC argued that,

[a]dditionally, because there was (and still is) no contiguity between the Button Hook and the Floating Patio. [sic] ABC believed that the Button Hook itself, did not have the statutorily required 200 ft. of shoreline, and a contiguous boat launching facility (or docks) as set forth in Idaho Code 23-948.

ABC further argued that “ABC Spec. Adams specifically told Karupiah at the time, that the Button Hook was not contiguous to the required boat launching facilities; nor did the Button Hook have the required 200 feet of water frontage property, as a county public right-of-way (Lakeside Avenue) separated it from both requirements.” *Id.* at 6. Additionally, ABC wrote “[t]he reasons for disqualification remained the same. i.e. the Button Hook was not contiguous (because of Lakeside Avenue) to the Floating Patio’s location (where a boat launching facility or docks exist); and the Button Hook did not sit on 200 feet of shoreline property.” *Id.* at 11. These arguments demonstrate consistency with ABC’s position in the matter at hand. The Hearing Officer interprets each one of these statements as meaning that a physical barrier, Lakeside Avenue, prevented Buttonhook from actually “sitting” on lakefront property. In addition, as discussed in the Findings of Fact, the central disagreement between the parties in the District Court case was as to the meaning of “contiguity” and whether Lakeside Avenue deprived Buttonhook of contiguity between the actual premises and the boat docks. The term “waterfront” was never defined and remains a separate and distinct statutory requirement that must be met pursuant to Idaho Code § 23-948. ABC provided notice to Respondents of all the deficiencies in

the application and reiterated the lake frontage requirement. R. HHHH. While Respondents were able to cure some of the deficiencies, the lake frontage requirement could not and was not cured. Respondents argue that “littoral” water frontage meets the requirements of § 23-948 however, the term “littoral” is not included in that section of statute. As such, the words used must be given their ordinary meaning. As such, ABC’s actions and positions cannot be said to be arbitrary or capricious.

Respondents also take issue with the “method and manner” by which ABC processed the application for a resort license and claim that it was arbitrary and capricious. *Resp.’s Opp’n. Mem.* at 23-24. In support of its claims, Respondents provide ten factual allegations:

1. ABC told Judge Mitchell and Chan that the Buttonhook was not contiguous to its 200 feet of waterfront because the property was bisected by Lakeside Avenue;
2. Chan acquired fee title to 10 feet of Lakeside Avenue, rendering the Buttonhook and its 200 feet of waterfront contiguous as defined by ABC;
3. ABC, after returning the application three times, suggested for the first time that perhaps Chan could not lease the 10 foot strip to an operator of the Buttonhook;
4. the attorney for LHD specifically advised ABC, in response, that a lease of the strip was permissible;
5. ABC ignored all information provided to it, including LHD’s position statement through counsel, and advised Chan that the application failed for some unspecified and amorphous reasons;
6. ABC knew that if it ran out the clock, by the one year anniversary of LHD’s Special Warranty Deed, that title to the strip of land would revert to LHD;

7. After telling Chan a Hearing Officer was necessary, and while refusing to state the bases for the denial notwithstanding Chan's request, ABC did nothing, despite repeated requests, to administratively advance the matter;
8. Chan was required to go to LHD and ask for an amendment to the "special Warranty Deed," to extend the terms under which he could obtain a liquor license for an indefinite period of time. Chan succeeded.
9. On January 28, 2019, Chan advised ABC that the one year deadline under the "special Warranty Deed" no longer applied.
10. Miraculously, two days later, ABC reached out for the first time in seven (7) months with information on the hearing process.

Resp. 't Opp'n Mem. at 24. ABC in its Reply, provided responses to each point. *Agency's Reply to Resp. 't Opp'n Mem.* at 30.

As to the first point, as discussed *supra*, the Hearing Officer finds that the definition of "waterfront" was not an issue that was discussed in any detail in the District Court case. In addition, ABC's position, based on the copies of the briefs provided by Respondents, indicates that their position has been consistent; Buttonhook did not have 200 feet of actual lake frontage. The issue of contiguity discussed in the District Court case was in relation to the boat launch and boat docks. R. DDDDDDDD, at 19. As to the second point, while the 10 foot strip of land conveyed by the Special Warranty Deed served as a bridge between the Buttonhook premises and the waterfront, there is a separate requirement that the resort (ie Buttonhook) actually be located on the water pursuant to the common definition of the word "waterfront". *See* Idaho Code Ann. §23-948 (West). In regards to the third bullet point, there was a delay in requesting clarification regarding the legal rights held by Mr. Gormsen under the Special Warranty Deed.

Nonetheless, the question was not improper and, ABC invited supplemental documentation to be submitted showing that Mr. Gormsen did have the rights conveyed to Mr. Karupiah under the Deed. As to the fourth bullet point, it seems that by the time a letter was sent by LHD's counsel addressing the issue of the rights leased under the Special Warranty Deed, the resort liquor license application had already been returned to Mr. Gormsen. *See* R. LLL-MMM. Respondents' fifth bullet point alleges that ABC ignored the information provided to it, however, on the contrary the agency record indicates that ABC followed up with Respondents as to the information provided to it and sought clarification as to deficiencies in the application. *See e.g.* R. HHHHH. As to the sixth basis, Respondents ask the Hearing Officer to infer that ABC intentionally drew out the application process to "run out the clock" on the Special Warranty Deed. There is nothing in the record which would allow the Hearing Officer to find that any delay in the application procedure was a deliberate act intended to place Respondents at some sort of disadvantage². The seventh basis is similar to the sixth. Respondents assert that ABC refused to state the basis for the denial of the application and failed to take any action to advance the matter forward. The Agency Record supports the fact that Respondents were notified as to the basis for the denial of the application. R. HHHHH. The Hearing Officer was subsequently appointed, and the parties were given the opportunity to both brief and argue the merits of their cases. The eighth, ninth and tenth bullet points seem to be an argument for the proposition that that ABC's actions were intentionally taken to place Respondents at a disadvantage. Neither the Agency Record, nor any of the additional materials provided as exhibits by Respondents would allow the Hearing Officer to make such a conclusion.

² As noted below, the Hearing Officer has sustained in part ABC's objection to paragraph 17 of Mr. Karupia's declaration which includes speculation and inferences not supported by the record. Bullet points six through seven seem to be related to the stricken portion of the declaration although no citations to the record were provided by Respondents in their bullet pointed arguments.

c) The Respondents' Substantial Rights have not been Prejudiced.

The Idaho Supreme Court has held that,

[a] liquor license is simply the grant or permission under governmental authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful; it is a privilege rather than a natural right and is personal to the licensee; it is neither a right of property nor a contract, or a contract right.

BHA Invs., Inc., 138 Idaho at 354–55, 63 P.3d at 480–81 (quoting *Nampa Lodge No. 1389, Benev. and P.O. of E. of U.S. v. Smylie*, 71 Idaho 212, 215–16, 229 P.2d 991, 993 (1951)).

Accordingly, “...one who procures a state ... license takes it subject to the provisions of the statute under which the license is granted.” *Nampa Lodge*, 71 Idaho at 216, 229 P.2d at 993.

Respondents provide no legal authority which would support their position that the denial of a liquor license somehow affects a substantial right. Respondents instead argue generally that because they believe they meet the requirements of Idaho Code §23-948 and ABC is taking a position contrary to prior judicial proceedings, they have been deprived of their due process rights. However, the record reflects that ABC’s position is not contrary to the prior judicial proceedings. Further, Respondents have had the opportunity to contest the denial of a liquor license. Accordingly, no substantial rights of Respondents have been prejudiced.

6. ATTORNEY’S FEES AND COSTS

Idaho Code §12-117 provides the following

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney’s fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered action without a reasonable basis in fact or law.

Idaho Code Ann. §12-117(1) (West). Both parties request an award of attorney’s fees and costs. The Idaho Supreme Court has explained that Idaho Code §12-117’s purpose is two-

fold: “(1) to serve as a deterrent to groundless or arbitrary agency action; and 2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never ha[ve] made.” *Bogner v. State Dep’t of Rev. & Taxation*, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984). On issues of first impression, a party is not entitled to attorney’s fees. *See Karel v. Department of Finance*, 144 Idaho 379, 162 P.3d 758 (2007). Because Respondents are not the prevailing party, they are not entitled to an award of attorney’s fees. However, it cannot be said that Respondents acted without a reasonable basis in fact or law such that an award of attorney’s fees against them would be appropriate. The interpretation of the term “waterfront” as used in §23-948 is a matter of first impression. Accordingly, no award of fees is warranted.

7. CONCLUSION

ABC’s denial of a waterfront resort liquor license was not arbitrary, capricious, or unsupported by substantial evidence.

PRELIMINARY DECISION AND APPEAL RIGHTS

The weight of the evidence supports ABC’s refusal to grant the liquor license to the Respondents, therefore ABC’s action is hereby **AFFIRMED** and summary judgment is **GRANTED** in favor of ABC.

Pursuant to Idaho Code § 67-5243 this decision is a **PRELIMINARY ORDER**. It can and will become final without further action of the agency unless either party petitions for reconsideration before the Hearing Officer issued this Preliminary Order or appeals to the Direction of the Idaho State Police. Either party may file a motion for reconsideration of this Preliminary Order with the Hearing Officer issuing this Order within fourteen (14) days of the

service date of this Order. The Hearing Officer issuing this Order will dispose of the petition for reconsideration with twenty-one days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code Ann. § 67-5243(3) (West).

Within fourteen (14) days after (a) the service date of this Preliminary Order, (b) the service date of the denial of a petition for reconsideration from this Preliminary Order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this Preliminary Order, any party may in writing appeal or take exceptions to any party of the Preliminary Order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this Preliminary Order will become a final order of the agency.

If any party appeals or takes exceptions to this Preliminary Order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the Preliminary Order shall be filed with the agency head (or designee). The agency head (or designee) may review the Preliminary Order on its own motion.

If the agency head (or designee) grants a petition to review the Preliminary Order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the Preliminary Order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this Preliminary Order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued order in this case to district court by filing a petition in the district court of the county in which: i. a hearing was held, ii. the final agency action was taken, iii. the party seeking review of the order resides, or operates its principal place of business in Idaho, or the real property or personal property that was the subject of the agency action is located.

This appeal must be filed within twenty-eighth days of this Preliminary Order becoming final. *See* Idaho Code Ann. § 67-5273 (West). The filing of an appeal to district court does not itself stay the effectively or enforcement of the order under appeal.

IT IS SO ORDERED: DECEMBER 16, 2019.

By: /s/ Tara Malek
TARA MALEK, ISB #8709
Hearing Officer

CERTIFICATE OF SERVICE

On the 16th day of December, 2019, I caused copies of the foregoing document to be served by the following methods on the parties listed below as follows, which is the last known address for the listed party:

<p>JOHN F. MAGNUSON P.O. Box 2350 1250 Northwood Center Court, Suite A Coeur d'Alene, ID 83814 Phone: (208) 667-0100 Fax: (208) 667-0500 <i>Attorney for Respondents</i></p>	<p><input type="checkbox"/> By Hand Delivery <input type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Email: john@magnusononline.com <input type="checkbox"/> By iCourt</p>
<p>CHERYL RAMBO Deputy Attorney General Idaho State Police 700 S. Stratford Drive Meridian, Idaho 83642 Phone: (208) 884-7050 Fax: (208) 884-7228 <i>Attorney for ABC</i></p>	<p><input type="checkbox"/> By Hand Delivery <input type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Email: cheryl.rambo@isp.idaho.gov <input type="checkbox"/> By iCourt</p>

/s/Lauren Smyser
Lauren Smyser