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!rlm\gds\natguard\petitioners reply brief

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

* * * * * * * * * * *

NATURAL GUARDIAN LIMITED PARTNERSHIP, an Idaho Limited Partnership; STAN HAWKINS and LINN HAWKINS, husband and wife; LOUIS MORALES, JR. and SUSAN M. MORALES, husband and wife; and LAVAR GROVER and JEANNETTE GROVER, husband and wife, Petitioners, v. BINGHAM COUNTY, IDAHO, By and through its duly elected Board of Commissioners, Respondent. RIDGELINE ENERGY, LLC, Intervenor/Respondent.	Case No. CV-08-2059 PETITIONERS' REPLY BRIEF

A. **Standard of Review.**

Although there seems to be some degree of confusion on the part of Bingham County relative to the role of the Commission and the Board, it is imperative to fully comprehend their respective functions. As noted by Ridgeline, the Commission was statutorily empowered and authorized to make a final decision on Ridgeline's special use permit application. The Board's role was limited to making a review on the record, and to apply the same standard of review as would a reviewing court. The Board's function is not to substitute its judgment for that of the Commission; rather, the Board was to review the matter based on the record to determine if evidence existed to support the decision, or if it was made upon unlawful procedure, or was arbitrary or capricious. As noted in the County's brief, the Board apparently saw its function as being broader on the belief that it had received only a recommendation from the Commission. (Respondent's Brief at p.6). Two of the three Commissioners expressed their opinion during the appeal hearing that even if there had been a vote to deny the permit, their decision would still be the same. *Id.* The Board apparently perceived it had unfettered discretion to substitute its decision, without regard to the notice or the procedures employed by the Commission. As the Idaho Supreme Court stated in *Ready-to-Pour, Inc. v. McCoy*, 95 Idaho 510, 511, P.2d 792 (1973):

> This Court has continually upheld the validity of actions of zoning boards whenever they are free from capriciousness, arbitrariness, or discrimination. There is a strong presumption in favor of the validity of actions of zoning boards and such presumptions can only be overcome by a showing that the ordinance as applied is confiscatory, arbitrary, unreasonable and capricious.

95 Idaho at 515. Rather than reviewing the Commission's action under those standards, the Board ignored (a) the arbitrary and capricious application of the Commission's Bylaws; (b) the fact that the proposed use was not identified as a special use in the BCZO; and (c) the rather arbitrary and capricious determination that a utility-grade energy project was an agricultural processing use, and concluded that it would have made no difference how the Commission had voted. In its "review", the Board simply opted to ignore fundamental due process issues at the Commission level in order to reach an ultimate conclusion at the Board level. Had the Board considered the erroneous application

of the Bylaws in its review, it would necessarily had to have concluded that the special use permit which had been approved by the Commission would have been deemed a denial pursuant to section 2 of Bingham County Ordinance No. 2004-06. Somewhat amazingly, Commissioner Carter stated:

> I, I don't think that anything that we've learned will change the facts that exist on, the case. I don't think that either side, whether he [Commissioner Blake] had voted -- hypothetically, as we look back, if had voted against it, it won't the change the facts that we're considering at this point; and I don't think that implies prejudice to, to either party.

Tr., p. 828, ll. 19-25, and p. 829, l.1. Immediately following that statement, Commissioner Jolley stated:

> If it would have been a unanimous turndown or approval, I think it would be different. But the Board is split, and it's even – pretty well even.

Tr., p. 829, ll. 6-9. In other words, if the vote had been split, and Ridgeline had necessarily been placed in the position of being the appellant, given the provisions of Bingham County Ordinance No. 2004-06, the Board would affirm the Commission's decision based on deference. Petitioners contend that the Board simply misapprehended its role in reviewing the record of this matter as prescribed in section 6 of Bingham County Ordinance No. 2004-06. In *Marsha Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007), the Idaho Supreme Court considered a case in which the city council overturned a decision made by the planning and zoning commission granting a special use permit. However, the Court specifically found in that case that the council, in interpreting its ordinance, retained the power to conduct a *de novo* review of the application. 159 P.3d at 847. Unlike the instant case, the County and Ridgeline have both expressly acknowledged that the Board's review which was to be undertaken pursuant to the BCZO was necessarily confined to a review on the record. The Board was advised in detail by both the Planning and Zoning Administrator and the Bingham County Prosecutor of the procedural irregularities that existed at the Commission level regarding the Bylaws, a fact which went to the very heart of the approval of this application. The Board simply chose to ignore the information. As to the legal issue regarding the LLUPA's requirement that the proposed use had to be conditionally permitted by the terms of the ordinance, the Board dismissed that issue on the apparent belief that the zoning administrator could unilaterally

decide what uses might be deemed to constitute special uses. Even the County's own ordinance defines a special use as a use "permitted within a district . . . that requires a special use permit." In discussing "wind farm" use, Commissioner Jolley went so far as to state:

> I don't know where's he referring to that we have zoned – Bingham County zoned appropriate for a wind farm. I don't – because we've never discussed wind farms. I don't know where that is.

Tr., p. 642, ll. 21-24. Finally, the Board further chose to ignore the strained interpretation accorded to the proposed special use as an agricultural processing facility. Board member Carter expressly stated during one of the appeal hearings, ". . . I don't think it can be justified as an agriculture operation." Tr., p. 586, ll. 13-14. Rather, the Board opted in favor of allowing the administrator to "interpret the flavor of a special use", as opposed to amending the ordinance. Tr., p. 617, l. 21. While the Petitioners acknowledge deference to the decisions of zoning boards, that deference will not be accorded to an action that is arbitrary or capricious. The failure of a local government to abide by the terms of the LLUPA, and even its own zoning ordinance, should not be sanctioned by this court.

B. **Issues on Appeal.**

Bingham County has expressly acknowledged the scope and extent of the issues raised on appeal by the Petitioners to the Board. *See* Respondent's Brief at pp. 4-5. For the County to now assert that each of the issues itemized in the Petitioners' Memorandum were not raised on appeal is mildly disingenuous. Ridgeline has apparently fallen into the same camp as the County by asserting that posting issues, notice issues and issues relative to the improper application of the Bylaws were not raised in Petitioners' Notice of Appeal. On this count, both the County and Ridgeline are in error. The court is urged to recall that Petitioners were required to operate in a vacuum without any findings of fact or conclusions of law prior to filing their appeals. When questioned by the Board as to why it had no findings of fact during the Board's appeal hearing, Ms. Halstead acknowledged that the findings had still not been completed, even at the time of the second hearing before the Board. Tr., p. 614, ll. 14-18. Deputy Prosecuting Attorney Eileen McGovern followed up with her explanation that even though the appellants had only ten days in which to file their appeal, and to gather everything they needed, that was simply "not a sufficient amount of time to get the Findings of Fact and Conclusions of Law." Tr., p. 615, ll. 9-15. In other words, the Petitioners were simply required to

speculate as to the basis for the Commission's decision, except to the extent that they might have recalled what had been stated during the Commission's deliberations. No minutes or written evidence of the decision would be provided prior to the time the Petitioners had to perfect their appeal, despite the requirements of section 3.0 and 3.1 of Bingham County Ordinance No. 2004-06. Consequently, the issues expressly articulated in the Petitioners' appeals to the Board were broadly written, and encompassed each and every one of the issues raised in the Petitioners' Memorandum. Curiously, Bingham County asserts that the case of *Cowan v. Board of Comm'rs of Freemont County*, 143 Idaho 501, 148 P.3d 1247 (2006) somehow supports its contention that the Petitioners herein are attempting to raise issues not asserted in the appeal to the Board. Just as in *Cowan, supra*, the Petitioners did include each and every issue identified in their Memorandum in the Notices of Appeal. *See* R., pp. 915-945. Quite honestly, Petitioners do not understand how Bingham County can make that argument in light of the breadth of the issues asserted in the record which were intended to mirror the provisions of the Administrative Procedures Act. R., pp. 937-38. *See* Idaho Code § 67-5279. Just as Mr. Cowan preserved his ability to raise issues on appeal by presenting them to the board, so to did the Petitioners.

It should also be noted that the *Cowan* court observed:

> Idaho law and [the FCDC] prescribe the requirements for notice of public meetings and hearings . . . .

148 P.3d at 1259. The court in this case will necessarily have to grapple with Bingham County's posting of the individual parcels and the "summary of the proposal" as required by both Idaho Code § 67-6512(b) and BCZO § 10.4. It is interesting to note that in Ridgeline's brief, Ridgeline provided a summary of the project. In addition to the construction of "up to 150 turbines with a maximum height of 492 feet," Ridgeline also observed:

> In addition, the Project will require a system of access roads, electrical collection systems, substations, transmission systems, up to three operations and maintenance buildings and permanent meteorological towers.

Ridgeline's Memorandum at p. 2. Ridgeline then continued in its brief to assert that the notice which was given by the County was a "general description" of the project, apparently intimating to the court that consideration of a special use permit to "place windmills", as stated in the County's notice, met

the LLUPA requirements. It seems patently obvious that Ridgeline's description of its project on page 2 of its brief is totally inconsistent with the summary provided by the County in its notice. R., p. 191. Since notice in conformity with the statute is a prerequisite to the proper exercise of jurisdiction, the Petitioners assert that a reversal of the decision in this case is warranted on that basis.

C. Administrative Interpretation.

In its brief, Bingham County has stated:

> In the present case, a wind energy facility or wind farm is not specifically mentioned in the official schedule found in the BCZO.

Respondent's Brief at p. 10. Petitioners agree with that statement. Ridgeline also agrees. R., p. 25 at § 2.1. Idaho Code § 67-6512(a) provides for the granting of a special use permit to an applicant only "if the proposed use is conditionally permitted by the terms of the ordinance." Bingham County would apparently contend that it is entitled to contradict the LLUPA by the passage of a zoning ordinance which would allow the administrator to "interpret the flavor of a special use permit." Tr., p. 617, ll. 20-21. The mere fact that the zoning administrator felt that 150 wind turbines, 3 electrical substations, and 3 five-acre maintenance facilities with support, maintenance and office buildings had the "flavor" of other special uses expressly identified in the ordinance does not meet the requirements of LLUPA.

Blair Grover, testifying on behalf of Petitioners' Stan Hawkins and LaVar Grover, testified that power production was an industrial use, and not an agricultural use. Whether it was light industrial or heavy industrial, it was a use that clearly was not permitted in the NR/A zoning district of Bingham County. Furthermore, he testified that given a legal description consisting of more than 20,000 acres, there was no way to determine where the wind turbines and the ancillary facilities, substations, power lines and roads would be placed, and that as a consequence, there was no ability for a property owner to determine where or what impacts would be visited on their adjoining property. Tr., p. 325, ll. 5-21. This shortcoming was raised by numerous participants in the hearing, including the Petitioners, as being inconsistent with section 10.2.6 of the BCZO requirements regarding the content of the application. Showing yellow dots as the approximate location of wind turbines hardly complied with the required site plan drawing depicting "all buildings, parking and loading areas, traffic access and traffic circulation, service areas, utilities and signs." BCZO at p. 10-

1. Given the scale, the yellow dots might be hundreds of yards in diameter, and they are still an approximation at best. Board Chairman Brower acknowledged that the site plan showed only "the yellow dots in the areas where the proposes turbine locations would be. It is true that they are not ground specific at this point." Tr., p. 588, ll. 10-13. Even indulging Ridgeline and the County in the benefit of the doubt that the "yellow dot theory" met the stated requirements of the ordinance, the court needs to consider the remainder of the project as described by Ridgeline in its brief:

> 1. A system of access roads (actually 81 miles of roads, **24 miles of which would be new roads.**)
>
> 2. Electrical collection systems (a less offensive way to say a network of overhead and underground electrical lines running to substations.)
>
> 3. Substations in a fenced area containing transformers, switching equipment, control house and parking area, each of which would be approximately two acres in size.
>
> 4. Transmissions systems (a benign term, but according to Ridgeline, the term means "overhead transmission line". Those "transmissions systems" would be in a "transmission corridor" approximately 500 feet in width.)
>
> 5. Operations and maintenance buildings (in actuality, these three facilities would each be up to five acres in size and contain storage and living areas, thus requiring wells and septic drainfields.)

(Emphasis added). R., pp. 15-17. Ridgeline's Memorandum at p. 2. A fundamental right of the Petitioners is for an applicant to meet the application criteria of the BCZO in order to ascertain the impacts on its adjoining property. It is fundamentally impossible for the Petitioners to have analyzed all of the actual harm that might befall them as a result of having their property being located next to a possible windtower location, under a high voltage transmission line, next to a power substation, or next to a five-acre operation, maintenance facility and living quarters. The sketchy information provided by the applicant did not meet the criteria of the BCZO, and deprived the Petitioners of a meaningful opportunity to analyze the totality of impacts to their property. Both the Commission and the Board acknowledged that the grant of a special use permit on 20,000 acres for unspecified uses at

unspecified locations was an anomaly in terms of the County's prior zoning actions. Instead of dealing with the issue, they chose to ignore it in favor of expedience. As stated by a member of the public who participated at the hearing before the Commission:

> Also giving a blanket zoning, being able to place them anywhere they want, and not take into consideration smaller property owners or strategic property owners would [not] be a wise thing for the, for the Commission to do because you could have specific sites that really impact a lot of people in a negative way.
>
> I think that every single one of them [turbines] should be given a site review. You're not going to allow me as a developer to come in and say I'm going to put a 40-story building there; but yet you're going to give the same type of use, the same height – that's the proposal here – anywhere up there they want to do it. Doesn't make any sense.

Tr., p. 225, ll. 16-25, and p. 226, ll. 1-4. Clearly, one of the Petitioners' fundamental rights was to have full knowledge of where the project facilities would be located in order to ascertain harm or negative consequences that might affect them and their property. As such, the Petitioners are clearly entitled to a remedy, which in this case, is a reversal of the County's decision.

The suggestion that the zoning administrator's determination that the proposed use was supported by "prudence" falls short of the mark. *See* Respondent's Brief at p. 11. While everyone would suggest that the County should act in a prudent fashion, Bingham County is also required to act in accordance with the enabling legislation of LLUPA. Although the County acknowledges the language of Idaho Code § 67-6512(b) in its brief (*Id.*), it chose to ignore it when processing Ridgeline's application. In addition to LLUPA, the court is directed to Bingham County's own zoning ordinance definitions which defines a "special use" as:

> Use of a structure or use of land **permitted within a district** other than a principally permitted use that requires a Special Use Permit and approval of the Commission and may be subject to limitations and conditions.

(Emphasis added). BZCO at p. 2-22. The County's own ordinance, not unlike LLUPA, requires such a use to be identified as a use within the district. The appropriate course of action would have been for Ridgeline or the County to seek a text amendment to its zoning ordinance if the proposed use was

not identified in accordance with Idaho Code § 67-6512(a). This is precisely the advice that was provided to the Commission by the representative of Petitioners Louis and Susan Morales when he advised the Commission:

> We shouldn't be here on a special use. If they want to put in a power plant, a windmill power plant – it's not a farm – they need to ask for a zone change . . . – not a special use permit. They have to ask for a zone change, or they have to ask the Commissioners to change our ordinances.

Tr., p. 331, ll. 17-23. Continuing, he stated:

> We have to rely upon the law, which is given to us, which is the Zoning Ordinances.

Tr., p. 332, ll. 3-4.

Ridgeline further argues in its brief that its proposed project would also constitute a "public service facility", a permit that it never sought, and one which it could not have received. Ridgeline Memorandum at p. 16. That issue was fully briefed in Petitioners' Opening Memorandum, but at some point in time, both Ridgeline and Bingham County need to acknowledge that the term "public" does not apply to Ridgeline's private utility-grade energy generation project. It clearly was not designed as a "government-owned or operated facility" as defined in the BCZO.

D. Ownership Requirements for Special Use Permit Application.

Bingham County acknowledges that the BCZO provides that a special use permit application may only be filed by the property owner *or by the occupant with owner approval.* (Emphasis in original). Respondent's Brief at p. 14. Bingham County has asserted in its brief that "Ridgeline is technically an occupant". Respondent's Brief at p. 14. However, in testimony before the Commission, the following colloquy occurred:

> COMMISSIONER TURPIN: As a – as the Ridgeline people that you are representing, do you – are you a property owner in this 20,000 acres?
>
> MR. RICH RAYHILL: We are not.
>
> COMMISSIONER TURPIN: Do you currently occupy any of that property?

MR. RICH RAYHILL: We do not.

Tr., p. 488, ll. 11-17.

While it seems clear that the ownership issue was not satisfied for the private landowners, it is abundantly clear that the ownership issue was never met for the public landowners. Ridgeline asserts in its brief that "it obtained authority from all existing landowners within the Project area to act as their representative in making the Application." Ridgeline Memorandum at p. 3. The Petitioners clearly do not agree with that statement, and chances are good that the United States Bureau of Land Management would also take issue with that assertion. Nothing in the correspondence from the United States Bureau of Land Management (R., p. 73) or the State of Idaho (R., p. 74) constituted an approval, either express or implied, of the requisite possessory interest in such property. Bingham County asserts that the "strangeness [of the Petitioners' arguments] lies with the fact that county zoning ordinances do not encompass issues involving federal land." Respondent's Brief at p. 15. While the federal government may or may not be required to meet local land use zoning requirements, that issue cannot be confused with the County's inability to grant a special use permit to a private entity on state or federal land without the express consent or approval of either governmental entity. Bingham County is mixing apples with oranges when it makes that assertion. Simply stated, the ordinance requires an applicant to be an owner, or an occupant with owner approval. As to the public lands, Ridgeline clearly failed to satisfy such criteria.

E. The Denial of Chairman Blake's Vote.

Both Bingham County and Ridgeline contend that this matter has been improperly raised before this court because it was never raised as an issue on appeal. First and foremost, the Petitioners have asserted that the decision of the Commission was made upon unlawful procedure. Specific reference was made to the fact that the Chairman did not vote on the matter in the appeal filed by LaVar Grover and Stan Hawkins. R., p. 917. Deputy Prosecuting Attorney Eileen McGovern informed the Board:

> In the beginning of the LaVar Grover and Stan Hawkins appeal, the second paragraph, it discusses that the Chairman did not vote.
>
> **This is an issue that obviously has been brought up on**

appeal because here it is.

(Emphasis added). Tr., p. 812, ll. 17-21. A discussion ensued on the topic which took the next 16 pages of the transcript. Bingham County's assertion that this matter was not raised on appeal is facially contradicted by the record, and the testimony of its own deputy prosecuting attorney in the transcript. The Petitioners are left to wonder what more Bingham County wants or needs in order to identify issues on appeal. Bingham County has cited *Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487 (2008) for the proposition that a procedural irregularity would not require a reversal of a county's decision. Unlike this case, *Spencer* involved a *de novo* hearing as opposed to a review of the record on appeal. Petitioners understand the logic behind *Spencer*, but believe it is inapplicable to the facts of this case. Clearly, had the Commission followed its own Bylaws in this proceeding, a totally different result would have occurred relative to Ridgeline's application. The County has suggested that no substantial rights of the Petitioners have been prejudiced, however, requiring them to pursue an appeal, with the consequent expenditures necessitated being the appellants, it is clear that substantial rights of the Petitioners have been affected. Had the County staff properly advised the Commission as to the correct voting protocol under the Bylaws officially adopted by the Board, the Petitioners would never have been placed in the position of being appellants. The dialogue between Commissioner Blake and the planning staff provides clear evidence of the faulty advice that had been provided to the Commission. Ms. Halstead acknowledged that the Board had adopted the Bylaws in August of 2007. Tr., p. 743, l. 25, and p. 744, l. 1. Continuing, Ms. Halstead offered the following excuse:

> And, as you know, reading through all of these ordinances, there are sometimes that you do not remember every aspect of every ordinance . . . .
>
> It was just something that got overlooked.

Tr., p. 745, ll. 13-19. Incredibly, Bingham County chooses to classify this procedural error as a "minor irregularity", however, that "irregularity" happens to contravene due process, and the adopted Bylaws of the Commission and Bingham County Ordinance No. 2004-06. It is indeed interesting to hear a county espouse the position that when it violates its very own laws, it is nothing more than a "minor irregularity". Suggesting that the issue is a "minor irregularity" is one thing; suggesting that

the issue was never raised on appeal when the transcript evidences otherwise, is another matter. Petitioners contend that both assertions on the part of Bingham County are disingenuous and legally unsustainable.

F. Conflict of Interest.

Section 6 of Ordinance No. 2004-06 compels the Board to allow presentation of evidence relative to alleged conflicts of interest. The alleged conflict of Commissioner Sorensen has been fully briefed in the Petitioners' Memorandum at pages 34 through 37. When the Petitioners sought to include evidence and comments regarding Commissioner Sorensen's alleged conflict on the Board's remand, the information was refused on the basis that the planning administrator felt that the remand pertained solely to Commissioner Kohler's potential conflict. The Petitioners' attempts to include evidence for the Board's review on appeal relative to Commissioner Sorensen were soundly rebuffed when staff unilaterally redacted and blacked out portions of evidence to be provided to Bingham County. *See* R., p. 1017-18. Why Bingham County chose not to allow the presentation of that evidence when Ordinance No. 2004-06 clearly contemplates otherwise, is inexplicable. Again, Petitioners contend that the Board's "review" was not so much a review rather than a means to an end. Had they considered the faulty procedures employed by the Commission, and the arbitrariness of the application of the County's ordinances, a totally different result would have ensued.

The fact that members of the Commission took a vote to determine if a conflict of interest existed on the part of one of their own is not dispositive of the conflict issue. Section 6 of Bingham County Ordinance 2004-06 contains mandatory language that obligated the County to allow presentation of evidence relative to an alleged conflict of interest. By blacking out the information relative to Commissioner Sorensen, the administrative staff effectively precluded the presentation of any such evidence. R., pp. 1017-18.

G. The Findings of Fact.

Bingham County tends to ignore the reality of the untimely adoption of the Commission Findings of Fact and Conclusions of Law (a) well after the appeal had been perfected by the Petitioners and, (b) subsequent to the second hearing on appeal by the Board. The court can ascertain for itself if Commissioner Nelson's motion to approve the application ostensibly addressed all of the criteria in BCZO § 10. *See* R., pp. 560-67. It did not. Her determination that a "wind farm" with

multiple substations, operations and maintenance buildings, office buildings and inhabited structures constituted an "agricultural-related processing" use still begs the question of common sense in the application of a zoning ordinance. The elasticity of interpretation has been stretched to a point where it lacks all credibility.

Bingham County refers frequently to opinions expressed by Commissioner Hortense Nelson during the hearing when each Commissioner gave their individual observations relative to the application. Commissioner Nelson stated at the conclusion of her observations that they were just her opinions. Tr., p. 544, l. 18. Bingham County attempts to erroneously import Commissioner Nelson's opinions into the findings for the motion for approval of the application. For example, Bingham County has cited Commissioner Nelson's opinions pertaining to BCZO § 10.3.3 on page 541 of the transcript, and then proceeded to assert that those opinions were included in her motion "to grant the petition [sic - permit]" which took place on pages 560 through 567 of the transcript. *See* Respondent's Brief at p. 25. The same is true for her opinion relative to section 10.3.5 of the ordinance at pages 542 and 543 of the transcript. Bingham County specifically asserted that was part of "Commissioner Nelson's adopted motion to grant the permit", but the referenced quotation proceeds the motion by some 20 pages in the transcript. Respondent's Brief at p. 27. Those statements were never included in the motion to approve the special use permit, and the Petitioners contend that the County is a bit more than overzealous in asserting to this court that they were part of the Commissioner's official motion. It appears that Ridgeline has also fallen into the same pattern as the County by making the very same arguments in its brief, at p. 6. It is one thing to quote from the transcript of a proceeding, but it quite another thing to extract portions of the transcript wherein a member has expressed an opinion, and then import those sections as being a true part of the transcript of the motion and findings. Ridgeline expressly makes reference to Commissioner Nelson's opinions in the transcript at pages 536 through 544, but acknowledges that the motion to approve the application took place in the transcript at pages 560 through 568. *See* Ridgeline Memorandum at p. 7. This "cut and paste" theory would defy the very logic for having a transcript.

Finally, the County cavalierly asserts that Findings of Fact and Conclusions of Law do not have to be prepared before the appeal period lapses.

MS. MCGOVERN: That's correct. There, there's nothing that

> requires that the Findings of Fact and Conclusions of Law be completed before the appeal period, period is due.

Tr., p. 615, ll. 18-21. The Petitioners specifically asserted in the Notices of Appeal that requiring an appeal to be taken before either meeting minutes or findings were available raised issues relative to due process of law. R., p. 927 and R., p. 938. Section 3.1 of Bingham County Ordinance 2004-06 requires Findings of Fact to comply with Idaho Code § 67-6535. The County's posture in this regard is simply untenable.

G. Attorney Fees.

Because this matter is not a "civil action", Idaho Code § 12-121 cannot be applicable to this case as asserted by both Bingham County and Ridgeline. *See, e.g.,* footnote 1 of *Neighbors for Responsible Growth v. Kootenai County*, Docket Nos. 34591 and 34592 (Id. Sup. Ct., April 6, 2009). Petitioners have raised genuine factual and legal issues, and Bingham County cannot show that it is entitled to an award of attorney fees pursuant to Idaho Code § 12-117.

Ridgeline's claim to attorney fees is equally unfounded. Idaho Code § 12-121 is not applicable to the facts of this case. Because Idaho Code § 12-117 pertains strictly to a case "involving as adverse parties . . . a county . . . and a person", the Idaho Supreme Court interprets that code section as being inapplicable to Ridgeline in the instant situation. *See Neighbors, supra,* at p. 7. Petitioners renew their argument that Bingham County has acted without a reasonable basis in either fact or law in this matter, and that fees should be awarded to them.

CONCLUSION

Petitioners are flattered that Bingham County believes that the Petitioners' brief was very well written and thought out. However, in asserting that the brief is a "beautiful architectural structure which rests upon a weak and sandy foundation", Bingham County may have overlooked the fact that it was its own decision that was built upon a weak foundation, and not the arguments of the Petitioners. The mere suggestion that a utility-grade energy generation facility, with all of its attendant ancillary structures, substations, power lines, maintenance/living quarters, and roads constituted an agricultural processing use is absurd. Suggesting that the County planning administrator can interpret the flavor of an application so as to contradict the express requirements of Idaho Code § 67-6512(a) is equally ludicrous, and somewhat arrogant. Sanctioning the County's

disregard of its own procedure and Bylaws, and then advocating that such action is only a "minor irregularity", falls within the category of specious logic. The County advocates that "prudence" was the basis for making its decision. Approving a special use permit for a use that was not identified in the ordinance seems both imprudent, *per se*, and a violation of LLUPA. The Petitioners contend that the court will be guided by the application of the law rather than a strained interpretation such as Bingham County believes is appropriate.

The County acted without a reasonable basis in fact or law, and its decision should be vacated in all respects. Attorney fees should be awarded to the Petitioners.

RESPECTFULLY SUBMITTED this 17 day of July, 2009.

ROBERTSON & SLETTE, PLLC

By: _____
Gary D. Slette

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17 day of July, 2009, he caused a true and correct copy of the foregoing instrument to be served upon the following persons in the following manner:

J. Scott Andrew / Mark Cornelison	[ ]	Hand Deliver
Bingham Co. Prosecutor's Office	[x]	U.S. Mail
501 N. Maple, Ste. 302	[ ]	Overnight Courier
Blackfoot, ID 83221	[ ]	Facsimile Transmission
		208-785-5199

C. Timothy Hopkins	[ ]	Hand Deliver
Hopkins Roden Crockett Hansen	[x]	U.S. Mail
PO Box 51219	[ ]	Overnight Courier
Idaho Falls, ID 83405-1219	[ ]	Facsimile Transmission
		208-523-4474

_____
Gary D. Slette