

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th St., STE 103
P.O. Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. L-96-S-51G) **FINAL ORDER**
Vista Bay Village Condominium)
Association)
)
Applicant)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on June 8, 2010 at 6:00 pm PST at the Idaho Department of Lands Staff Office in Coeur d’Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on July 1, 2010.

My responsibility is to render a decision on the behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I have relied on the record provided. Specifically;

- I have read the transcript of the public hearing conducted in Coeur d’Alene, Idaho on June 8, 2010.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator’s Recommendations in light of the entire record.

Encroachments, including commercial marinas, placed on navigable waters require a permit issued by the Idaho Department of Lands pursuant to the requirements of Title 58, Chapter 13, Idaho Code, and the Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04, as promulgated by the State Board of Land Commissioners.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Coordinator.

III. CONCLUSIONS OF LAW

I concur with the Conclusions of Law presented by the Hearing Coordinator.

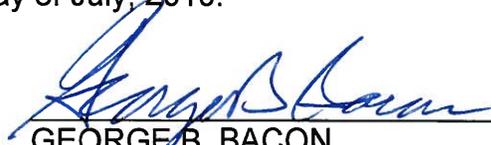
IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-96-S-51G **be approved** by the Pend Oreille Supervisory Area after the following has occurred:

- Applicant will perform all needed permit and lease assignments prior to the permit being issued.

This is a final order of the agency. If the Applicant, or a party who appeared at the hearing, is aggrieved by the director's final decision, they shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed. A notice of appeal must be filed within thirty (30) days from the date of the final decision in accordance with IDAPA 20.03.04.030.09.

DATED this 8 day of July, 2010.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Dennis Scott
Vista Bay Village Condominium
Association
PO Box 339
Bayview, ID 83803

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- Hand Delivery
- Federal Express
- Facsimile: _____
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Bob Brooke
c/o Ken Saunders
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ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals

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GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
C. L. "Butch" Otter, Governor
Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

July 1st, 2010

MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Public Hearing – Navigational Encroachment L-96-S-51G for Vista Bay Village Condominium Association

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL). The public hearing was conducted in conjunction with the processing of an encroachment permit (L-96-S-51G) on Lake Pend Oreille, a navigable lake in Idaho. The application proposes to create six (6) additional private boat moorages and two (2) additional public boat moorages, remove some piling, and add a ramp for access. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers the State Board of Land Commissioners to regulate, control, and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho.

II. FINDINGS OF FACT

1. On March 22nd, 2010, Vista Bay Village Condominium Association (Applicant) submitted to IDL an encroachment permit application (L-96-S-51G) requesting approval to construct encroachments on Lake Pend Oreille. The application is incorporated into this document by reference.
2. L-96-S-51G proposes the following actions:
 - a. Constructing eight (8) slips measuring twelve (12) feet by thirty five (35) feet on the north side of the north breakwater. This is designated E Dock.
 - b. Constructing a ramp to access E Dock from shore.
 - c. Removing a dolphin from the east end of E Dock and a piling from the west

end.

- d. Designating six (6) of the eight (8) slips as private.
- e. Adding additional upland parking.

3. IDL initiated the processing of L-96-S-51G as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). The Applicant requested that a hearing be scheduled. On April 4th, 2010 and April 11th, 2010, IDL published a joint Notice of Application and Notice of Public Hearing in the Coeur d'Alene Press newspaper for the encroachment permit application submitted by Applicant. The Notice of Application and Public Hearing is incorporated into this document by reference.

4. In a letter dated April 28th, 2010, IDL notified several agencies, organizations, and persons of the encroachment permit application and the scheduled hearing, and requested that the parties provide comments to IDL. Those notified included:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- US Army Corps of Engineers
- Kootenai County Parks, Recreation, and Waterways
- Kootenai County Marine Division
- Kootenai County Building & Planning & Zoning
- Kootenai Environmental Alliance
- Panhandle Health District 1
- Tri-State Water Quality Council
- Lakes Commission
- Bayview Chamber of Commerce
- Bayview Water and Sewer
- Bayview Community Council
- Waterford Park Homes, LLC
- U.S. Navy
- JD's Scenic Bay Marina
- Timberlake Fire District
- McDonald's Hudson's Bay Resort
- Darrell Foreman
- Eve Stacy

The letter is incorporated into this document by reference.

7. The following issues were raised in comments received prior to the scheduled public hearing. All the letters and emails are incorporated into this document by reference.

- a. Parking at Vista Bay marina. Bob Brooke requested a copy of the prior application, L-96-S-51F, any approvals regarding parking following the approval of that application, and other documents related to the encroachment permit and

the submerged lands lease. Those requested documents are incorporated by reference and include:

- Permit L-96-S-54F dated November 21, 2008 sent to Watermill, LLC.
- Application for L-96-S-54F dated July 14, 2008 sent by Watermill, LLC.
- The parking plan and public/private designations dated November 19, 2008 from Waterford Parks Homes, LLC/Vista Bay Resort.
- Lease adjustment for submerged lands lease B-2071 and cover letter to Watermill, LLC dated May 18, 2010.
- Submerged lands lease B-2071 issued to Waterford Park Homes, LLC.
- Gross receipts reports for 2008 and 2009 from Watermill, LLC

Mr. Brooke stated that parking is barely adequate to meet the required standards, and can only be met in practice if the parking spaces are clearly marked on the ground. He expressed concern that a sign on a post was not effective in achieving optimum use of the parking areas. Mr. Brooke also desired a final parking plan for the marina, as required by a condition of approval for the prior application.

Ben Tarbutton with Kootenai County Building & Planning Department stated that the proposal met the County's minimum parking requirements. The new and existing parking lots, however, must be paved and landscaped, and stormwater must be controlled. In addition, the condominium plat must be modified. Mr. Tarbutton requested that the following condition be placed on the application if it were to be approved: "Prior to the construction of the eight (8) boat slip dock, parking requirements must be met; including, but not limited to completing the necessary Condo Plat alterations and constructing the minimum necessary parking facilities (either temporary or permanent) pursuant to the County Design Standards."

- b. Square footage for private dock space and public dock space is not clear. Ken Saunders exchanged a series of e-mails with IDL staff and Dennis Scott (applicant's representative) during the public comment period prior to the scheduled public hearing. Mr. Saunders indicated that the application did not provide adequate information to designate which docks were private or public, and the application did not clearly state how the private and public dock square footage was calculated. Mr. Scott provided a method to calculate the square footage, and IDL staff clarified that the application for L-96-S-51G does state which docks are private and which are public.
- c. Spawning gravels are within the project area. Charles E. Corsi with the Idaho Department of Fish and Game stated that the gravel shoreline in this area was an important kokanee spawning area. The proposed construction dates from July to October are within the work window established to protect the kokanee. Mr. Corsi also expressed concern that no specific sediment control steps are outlined in the application. He stated that specific BMPs should be described, and that any spawning gravels displaced or altered be restored prior to spawning season in November.

- d. A series of letters and emails between the Timberlake Fire Protection District (TFPD), the Applicant, and IDL discussed fire protection in regards to the application. TFPD had seven (7) conditions that needed to be met prior to the eight (8) slips being constructed:
- If Dock E will have electricity, a shut off must be installed in a fire district approved location.
 - Slips shall be identified by a number visible at the slip location, and the fire district will be provided with a diagram showing the slip numbers.
 - Dock E may not have a gate unless it is approved by the fire district.
 - A fire district approved poster meeting their requirements of "Posted Information for Users" shall be conspicuously located at the entrance to Dock E.
 - A fire or emergency signal approved by the fire district is required for Dock E.
 - All new construction for the boat slips must be with non-combustible materials, and awnings or fabric coverings must be reviewed and approved by the fire district.
 - Fire lanes shall be clearly marked with signs and striping, and no parking is allowed in the fire lane.

8. On June 8th, 2010 IDL held a public hearing at 6:00 pm Pacific Daylight Time, 7:00 pm Mountain Daylight Time, in the IDL Staff Office in Coeur d'Alene, Idaho. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager served as hearing coordinator via video conference from Boise. Those attending in Coeur d'Alene were Mr. Jim Brady, IDL Navigable Waters Specialist; Mr. Ed Robinson, IDL Area Manager for Pend Oreille Supervisory Area; Mr. Dennis Scott, representing Applicant; and seven (7) members of the public. The public hearing was recorded and subsequently transcribed. The transcript of the public hearing is incorporated into this document by reference.

a. The Applicant, through the testimony of Mr. Scott, provided a brief description of the project. A Powerpoint presentation used by Mr. Scott is hereby incorporated by reference. Mr. Scott stated that the proposed project involved constructing an eight slip dock on the east dock, or Dock E, where the pump out station is located. The slips would measure 12 feet by 35 feet. Decking materials would allow 60% light penetration. The slips would be attached to Dock E with chains and will not require any additional piling to be installed. A gangway to allow access from shore would also be constructed. The concrete landing on shore would be constructed above the high water mark, and is allowed within Kootenai County's shoreline buffer. Silt fences will be used to prevent sediment from reaching the lake. In addition, the southern steel pile on Dock E will be cut off to accommodate the gangway, and a steel dolphin at the north end of the dock will be cut off at the lake bottom.

Mr. Scott stated that the main issue was parking. A total of fifty one (51) parking spaces are proposed. Six (6) of those spaces are designated as private and will cover the parking requirement for six (6) new private slips. These parking

spaces will eventually be under three duplexes planned for this northwestern portion of the property. Parking for the remaining ninety (90) boat slips is provided by forty five (45) parking spaces available to anyone. They are discussing the possible need for a revised condo plat with Kootenai County, and will meet whatever requirements are imposed by the County.

Mr. Scott then explained that two (2) of the new slips would be public, and six (6) would be private. This creates a total of fifty four (54) public slips and forty two (42) private slips, or 43.75% private. Based on dock area, a total of 32,686 square feet of marina dock space would have 16,223 square feet of private dock. That indicates a 49.63% private ownership. This calculation did not include either the main gangway from the lounge area to the outer boat slips or the boardwalk. The applicant was unable to provide the square footage of moorage space.

Mr. Scott also stated that fire protection is being provided to satisfy the fire chief. Two (2) fire extinguishers are present on Dock E for the boat owners. The distance to the end of the dock is less than 250 feet and a fire hydrant is located on shore near the dock.

Mr. Scott asserted that the Applicant owns the littoral rights and the property at the Vista Bay Marina. An assignment is needed from Watermill to the Applicant.

Mr. Scott said that about 50% of the public moorage is rented for the current season, and the 10-foot by 23-foot slips are in the most demand. No one looking for space has been turned away due to a lack of public moorage. Most marinas have vacancies due to the economy.

In response to some questions, Mr. Scott stated that very little use occurs at Vista Bay Marina in winter. The cold weather would cause a functioning pump out to freeze and break unless it was heated. A more accessible location at Boileau's is scheduled to get a pump out that could be open more hours. Mr. Scott also stated that the pipe at the Vista Bay pump out has not broken. The weights holding it in place somehow moved and air in the line caused it to float to the surface. It is a maintenance issue.

b. Public testimony was provided by Bob Brooke with the Bayview Chamber of Commerce Development Analysis Committee. A Powerpoint presentation used by Mr. Brooke is hereby incorporated by reference. Mr. Brooke stated that his comments dealt mostly with process. The prior decision for application L-95-S-51F required several actions to occur, and it is not clear that they have occurred. The current application should not be considered until the prior conditions of approval for L-95-S-54F have been met. The new application only confuses the issues more. In addition, several others actions appear to be needed before IDL should review the current application. Following is a summary of his testimony regarding the current application.

- i. **Public/Private Comparison.** Mr. Brooke stated that the conditions of approval for L-95-S-54F required a final public/private moorage breakout be submitted to IDL. This condition has not been fulfilled. Furthermore, the rules required the public-private comparison to be made on moorage and not dock area. The applicant's comparisons are based on dock area and not moorage area. The marina map clearly reveals the public moorage area is not equal to the private moorage area.
- ii. **Parking Plan.** Mr. Brooke stated that the conditions of approval for L-95-S-54F required the applicant to file a final parking plan with IDL. This condition has not been fulfilled. The parking plan in the current application appears to meet the requirements for IDL and the county, but the county also needs to approve it. If a conflict occurs between the county and IDL requirements, then the IDL rules state that the county's requirements will take precedent.
- iii. **Status of Permittee.** Mr. Brooke stated that the current permittee is Watermill, and the current lessee is Waterford Park Homes. This brings up the questions of whether or not the littoral rights are owned by the applicant and whether the applicant is a legal business entity. It is unknown if the applicant is registered with the Idaho Secretary of State.
- iv. **County Requirements Must Be Met First.** Mr. Brooke stated that IDL should only approve applications that clearly meet the county's requirements. Applications should not be approved by IDL until the county has reviewed the application and given any needed approvals. Condo plat changes and a site disturbance permit are both needed from Kootenai County for this application, and must be approved prior to construction. Mr. Brooke believes that slips should not be sold until the county approvals are completed because their review may not allow the project to proceed. Since slips cannot be sold until after the IDL permit is obtained, it makes more sense to have the IDL permit process after the county process.
- v. **Fire Protection.** Mr. Brooke stated that a turn-around is required by the fire district in addition to some other issues. A project schedule should be provided to IDL and the county and then followed accurately.
- vi. **Pump Out Station.** Mr. Brooke stated that the IDL rules require a pump out station, but do not state what time of year it should be available. He believes it should be available all year. It has not been available in the winter, and a number of boats do use the lake in the winter. These users may have to dump into the lake if no pump out is available. Also, the pipe has broken loose twice and floated to the surface. The applicant should be required to anchor the pipe so it is not a hazard to navigation.
- vii. **Incomplete Applications Increase IDL's Workload.** Mr. Brooke stated

that approving applications with many conditions is not efficient for IDL. The conditions require follow up visits and documentation.

9. The application, Recommendation, and Final Order for L-96-S-54F was referenced several times in the hearing. Those documents, and all supporting materials, are incorporated into this document by reference.

10. The final parking plan required by the Final Order for L-96-S-54F was submitted by the applicant with a letter dated November 19, 2008. This was prior to that permit being issued. This letter also clearly delineated that Docks A and B are public, and Docks C and D are private. This letter was part of a public records request for the current application and has already been incorporated by reference in 7a above.

11. A lease adjustment for the private moorage authorized by L-96-S-54F was completed on June 2, 2010. This adjustment was incorporated by reference in 7a above. The lease adjustment was to Watermill, LLC, who is the current lessee of record.

12. The Hearing Coordinator takes administrative notice that the applicant for the current application is registered with the Idaho Secretary of State as a corporate homeowners association.

13. The 19 side ties were not considered to be moorage by the applicant when processing the L-96-S-54F application because they are only for day use, a boat launch is not present at the Vista Bay Marina, and no parking is provided for the side ties.

14. No additional information on the side ties was included in the current application.

15. To compare the amount of public and private moorage for the current application, the applicant used the number of slips and came up with 56.25% public usage. The applicant also used the dock square footage and came up with 50.37% public usage. Although the applicant's presentation stated that "slip area" and "berthing area" were calculated, the calculations were clearly based on dock square footage.

16. The conclusions in the prior Recommendation for L-96-S-54F recognized that the moorage privatization was being proposed for an existing marina. That created some challenges for the applicant to meet the requirements of similar size and quality and to have a marina that made sense from a logistical and business standpoint. The hearing coordinator determined that application L-96-S-54F met the requirement of similar size and quality given the limitations of the existing marina.

17. Any Findings of Fact that are later found to be Conclusions of Law shall be treated as such.

III. CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (Board) is designated in Idaho Code § 58-104(9) and § 58-1303 to regulate, control and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho. IDL is the administrative agency of the Board, as per Idaho Code § 58-119.
2. Lake Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.012.02, encroachments of any kind on, in, or above the beds of a navigable lake require a permit prior to encroaching on the lake.
3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. These values must be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.
4. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through 1203. This statute protects the property rights of private land owners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.
5. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The Supreme Court in KEA determined that public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance of IDL with its' legislative authority is not sufficient to determine if their actions comport with the requirements of the Public Trust Doctrine.
6. IDAPA 20.03.04.015.03(a) requires a minimum of fifty percent (50%) of commercial marina moorage to be available for use by the general public.
7. IDAPA 20.03.04.015.03(g) requires the public moorage to be of similar size and quality as private moorage.
8. IDAPA 20.03.04.015.03(c) requires commercial marinas to provide at least one (1) parking space per two (2) public watercraft moorages, and one (1) parking space per one (1) private watercraft moorages if the private moorage is tied to a specific parking space. This rule also states that local city or county ordinances governing parking requirements for marinas will take precedence over this rule if local ordinances have been enacted.
9. IDAPA 20.03.04.010.22 defines moorage as "a place to secure float homes and watercraft including, but not limited to, boats, personal watercraft, jet skis, etc."

10. IDAPA 20.03.04.020.03 states that those rules do not excuse an encroachment applicant from obtaining any additional approvals lawfully required by federal, local or other state agencies.
11. Term 10 of the current permit states “This permit does not relieve the Permittee from obtaining additional local or federal permits as required.”
12. Term 7A of lease B-2071 requires the lessee to comply with the requirements of all federal, state, and local authorities.
13. IDAPA 20.03.04 does not require county site development permits to precede an encroachment permit.
14. IDAPA 20.03.04 does not require fire protection for commercial marinas.
15. IDAPA 20.03.04 does not require pump out stations for commercial marinas.
16. Any Conclusions of Law that are later found to be Findings of Fact shall be treated as such.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Several of the objections dealt with matters outside the jurisdiction of the Idaho Department of Lands. These include county approvals, fire protection, and winter use of pump out stations. These objections will not be discussed any further because the Lake Protection Act and associated administrative rules do not give any specific authority to IDL for those matters.

Other objections were answered through testimony or the administrative record. These include concerns about sediment control, clear designations of public and private moorage, requirements from the approval of L-96-S-54F, parking plan, legal status of Applicant, ownership of littoral rights, and loose pipes at the pump out station.

The remaining substantive issues are the amount of public moorage, similar size and quality of public and private moorage, the need for county approvals to come prior to encroachment permit approval, and the need for an assignment.

Amount of Public Moorage

The definition of moorage in IDAPA 20.03.04.010.22 makes it clear that the minimum requirement of 50% of the moorage to be available for use by the public is based on the number of moorages and not on dock square footage. Moorage square footage could be a factor to consider in some circumstances, but given the type of slip that is in demand for rental, moorage square footage does not appear to be relevant in this instance. Therefore, the number of public moorages and private moorages is the

relevant comparison and the application satisfies the minimum requirement of 50% public moorage.

Similar Size and Quality

This issue was also brought up when L-96-S-54F was approved, and therefore will not be revisited for the majority of the marina. The only proposed change to moorage since that approval has been the additional slips on Dock E. All of the proposed slips are the same size, so the requirement for similar size and quality has been satisfied for the current application.

County Approval Prior to Encroachment Permit Approval

While some states' trust land management agencies specifically require an applicant to obtain local permits, Idaho is not one of those states. This does create a situation where IDL could approve an application and a local agency could deny it. That is the prerogative of the local agency and the IDL approval does not give a permittee any authority to ignore the requirements of local agencies. In fact, the encroachment permits and leases have standard terms that specifically state other permits may be needed. The Applicant may be risking delays by not obtaining permits in a specific sequence, but that is their risk to take. If construction starts without the other needed federal, state, or local permits, then those other agencies can issue a stop work order. For this application, IDL has no basis in statute or rule to withhold encroachment permit approval until county approvals are obtained.

Assignment

An assignment of the current permit and submerged lands lease from Watermill, LLC to the Applicant does appear to be needed. This is a routine administrative task, but it must be completed prior to any permits or lease adjustments being issued to the Applicant.

Recommendations

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application for the commercial marina meets all the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Director of IDL issue a Final Order stating that the Pend Oreille Supervisory Area of IDL should approve the encroachment permit application after the following action has occurred:

- Applicant will perform all needed permit and lease assignments prior to the permit being issued.

DATED this 1st day of July, 2010.



ERIC WILSON
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Dennis Scott
Vista Bay Village Condominium
Association
PO Box 339
Bayview, ID 83803

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ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals