

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	Case No. PH-2017-PUB-22-001
)	
Encroachment Permit Application)	FINAL ORDER
No. L-95-S-0496E.)	
)	
The Lodge at Carlin Bay, Inc.,)	
Applicant.)	
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I. NATURE OF PROCEEDINGS/ISSUES

Encroachments, including docks, placed on navigable waters require a permit issued by the Idaho Department of Lands (IDL) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code, and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

The Lodge at Carlin Bay, Inc. (Applicant), applied for an encroachment permit for a commercial marina on February 17, 2017. A public hearing was held on May 10, 2017 at the IDL Coeur d’Alene staff office. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Findings of Fact, Conclusions of Law, and Recommendation (Recommendation) on June 7, 2017.

My responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 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 for this matter. Specifically,

- I have read the transcript of the public hearing conducted in Coeur d’Alene, Idaho on May 10, 2017.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator’s Recommendation in light of the entire record.

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

I conclude the Hearing Coordinator’s Recommendation is based on substantial evidence in the record, and I adopt the Recommendation as my decision in this matter. The Recommendation is incorporated by reference herein and attached to this Final Order. The Applicant is qualified to make application for a commercial marina encroachment permit, and the proposed encroachment is in conformance with the applicable standards.

On the basis of the record, it is my order that Encroachment Permit No. L-95-S-0496E is approved by IDL with a five year sunset period for construction.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, the Applicant or any aggrieved party who appeared at the hearing shall have the right to have the proceedings and Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this Final Order. Because this Order is for approval of a permit, any party appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c).

DATED this 8th day of June, 2017.



TOM M. SCHULTZ, JR.
Director, Department of Lands

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	Case No. PH-2017-PUB-22-001
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Encroachment Permit Application)	PRELIMINARY ORDER
No. L-95-S-0496E)	
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The Lodge at Carlin Bay, Inc.,)	
Applicant.)	
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I. BACKGROUND

On February 17, 2017, The Lodge at Carlin Bay, Inc., (Applicant) submitted to the Idaho Department of Lands (IDL) an encroachment permit application, identified as number L-95-S-0496E (Application), requesting approval to reconstruct portions of a commercial marina on Lake Coeur d'Alene. The new construction consists of a 70-foot by 300-foot dock with 30 slips (Dock B), a new 24-foot by 140-foot multi-purpose dock, and a new water intake line for fire suppression. In addition, the existing Docks B and C would be removed, as would a boardwalk connecting Docks A and B and a gas dock. The existing 500-foot long breakwater and 33 slip Dock A would be unaffected. Agency Record (AR), Docs. 1 and 2.

In a letter dated March 3, 2017, IDL provided notice of the Application to several government agencies, the Idaho Conservation League, and the adjacent neighbors in accordance with IDAPA 20.03.04.030.03. AR, Docs 4 and 5. IDL also caused a Notice of Application to be published in the *Coeur d'Alene Press* on March 9 and 16, 2017, pursuant to Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01. AR, Doc. 7.

On March 29, 2017, IDL received an objection to the Application and a request for a hearing from Dean Biernacki. AR, Doc. 8. IDL also received a number of comments or letters in support, which are described below in Finding of Fact 1. In accordance with Idaho Code § 58-1306(c) and IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed commercial marina. A Notice of Hearing was sent on April 17, 2017 to the Applicant, the party requesting the hearing, the responding parties, and the same agencies and individuals that received the prior notification of application dated March 3, 2017. AR, Doc. 27. The public hearing was scheduled for 6:00 pm on May 10, 2017, in the Sundance Room at the Idaho Department of Lands staff office located at 3284 W. Industrial Loop, Coeur d'Alene, Idaho.

IDL received a series of emails dated April 24, 2017 from Mr. Biernacki and the Applicant regarding the status of piling installation. The emails are incorporated into this document by reference. AR, Docs. 26.

IDL received a letter dated April 26, 2017 from the Applicant requesting a reconsideration of the necessity of the current permitting process. The Applicant claims that the proposed changes fall under dock reconfiguration as described in IDAPA 20.03.04.020.05. The letter is incorporated into this document by reference. AR, Doc. 28.

IDL staff responded to the Applicant's April 26, 2017 letter with an email dated May 4, 2017. The email explained that the proposed changes did not appear to fall under the requirements of a reconfiguration, and the public hearing would proceed as planned. The email is incorporated into this document by reference. AR, Doc. 29.

On May 10, 2017 IDL held a public hearing at 6:00 pm in IDL's Coeur d'Alene office. In attendance were Mr. Jim Brady, IDL Resource Supervisor; Mr. Edwin Holmes, representing the Applicant; 11 members of the public who testified, and 10 members of the public who did not testify. The public hearing was digitally recorded and subsequently transcribed. The transcription is incorporated into this document by reference. AR, Doc. 35

II. FINDINGS OF FACT

1. IDL received sixteen (16) letters or emails from agencies, neighbors, and members of the public prior to April 7, 2017, the deadline for hearing requests. One more was received after this deadline. All of these letters and emails are incorporated by reference into this document. AR, Docs. 6, 8 through 19, 21 through 23, and 25. Fifteen comments were in support of the Application, one comment was neutral, and one comment objected. In addition to the hearing request, these letters generally covered the following topics:

- a. A pump out station for holding tanks is required by Panhandle Health District, as is shore-based bathroom facilities.
- b. The proposed docks will increase boat traffic in Carlin Bay.
- c. Additional law enforcement and emergency services will be needed.
- d. Parking and vehicle traffic problems will be increased.
- e. The multi-use dock is an event dock, or a party dock, with alcohol consumption and IDL needs to restrict these uses.
- f. The multi-purpose dock is a welcome addition in this area, and will provide a family-oriented, publicly-accessible facility for gatherings and socializing.
- g. Loud music and other potential issues will be kept in check by the new manager.
- h. More publicly available spaces in this area of the lake are needed, so the proposed marina is a welcome addition.

2. At the May 10, 2017 hearing, Mr. Holmes provided an overview of the Applicant's project. AR, Doc 35. This Application includes an existing 500-foot long breakwater, the existing Dock A with 33 slips, a new multi-purpose dock, a new 8 to 12-inch diameter pipe for fire suppression, and a reconfigured Dock B with 30 slips. The slips in the proposed Dock B will be 25 feet long and 10 feet wide. The old Docks B and C will be removed, as will a boardwalk connecting Docks A and B and the existing gas dock. The applicant also requests a five-year window to complete the work under this permit instead of the standard 3 year time limit. Dock B construction is not scheduled until 2019, so the remainder of the project may need more than three years to be completed. The new gas dock will have a spill containment kit. The waterline will not have a submerged pump, as the pump will be located on the upland.

Mr. Holmes stated that the multi-purpose dock has both navigational and non-navigational uses. It will, however be contained within the current boundaries of the marina. This dock will provide lake access for the general public, which is becoming increasingly rare. This portion of the marina will be a pier structure, so it will be able to support the weight of the events taking place. It will also have approximately seven side ties, which is similar to the number present on the former boardwalk. Many community members have agreed that this multi-purpose dock is needed for better public access to the lake. Many types of events may take place on the multi-purpose dock, and the Applicant does not see any difference between an event dock and a multi-purpose dock. As stated in Idaho Code § 58-1306(e), only unreasonable effects on adjacent neighbors and undue interference with navigation are reasons for denying the Application.

In response to a question regarding a septic pump out for boats, Mr. Holmes stated that the county facility next door had a pump out station. Mr. Holmes also stated that due to a miscommunication, some work had already started. The boardwalk between Docks A and B had already been removed, and some piling had been placed for the multi-purpose dock. Work has stopped, as requested by IDL, pending the completion of permit processing.

3. Eleven members of the public testified at the hearing. Seven were in support of the Application, two were neutral, and two were opposed. The majority of the testimony presented by neighbors and members of the public was in support of the proposed dock. AR, Doc. 35. Four of the speakers also gave written materials, which are incorporated into this document by reference. AR, Docs. 31 through 34.

4. The main issues driving the objections in testimony are as follows:

- a. The proposed docks will increase boat traffic in Carlin Bay.
- b. Additional law enforcement and emergency services will be needed.
- c. Parking and vehicle traffic problems will be increased.
- d. The multi-use dock is an event dock, or a party dock, with alcohol consumption and IDL needs to restrict these uses.
- e. The multi-use dock will not be usable year-round due to the placement on piling, so it will interfere with the adjacent county launch ramp and docks.
- f. The uses of the event dock are regulated by Kootenai County, but coordination with IDL is still needed.
- g. It is not known if the event dock will be able to structurally support the people attending the events.
- h. Security, parking, lighting, and other issues related to the event dock must be addressed.
- i. The applicant may not have sufficient littoral frontage.
- j. Restroom facilities will be required.

- k. An event dock is not defined, and it is uncertain if a multi-purpose dock is the same as an event dock.
 - l. Parking on the other side of Highway 97 will exacerbate traffic, pedestrian, and congestion issues.
 - m. The nearby gas dock could leak and cause a fire at the event dock.
5. The main points in testimony supporting the application are as follows:
- a. The multi-purpose dock is a welcome addition in this area, and will provide a family-oriented, publicly-accessible facility for gatherings and socializing.
 - b. Loud music and other potential issues will be kept in check by the new manager.
 - c. Loud music in the past is mostly from the sound systems on boats.
 - d. More publicly available spaces in this area of the lake are needed, so the proposed marina is a welcome addition.
 - e. This is the only public facility between Coeur d'Alene and Rockford/Harrison.
 - f. This will be an asset to the people who live on the east side of the lake.
 - g. The marina will add to the economic development of the area and will be good for tourism.
6. Several parties at the hearing testified that this public facility with the multi-purpose dock is needed for public access to the lake. These included Mr. Rife, the Howells, Mr. Garvey, Mr. Covey, Mr. Sebby, and Mr. Johnston. Mr. Holmes, representing the Applicant, also stated that "Basically, if you do not own a lakefront property, if you do not own a boat, or if you're not a member of a private club with a private dock, gaining access to Lake Coeur d'Alene is getting harder and harder." AR, Doc. 35. Mr. Rife also submitted a letter at the hearing that clearly stated Carlin Bay is the only public facility between the City of Coeur d'Alene and Rockford or Harrison. AR, Doc. 33.
7. No objections have been brought forward by the two adjacent landowners, identified in the Application as Kootenai County to the west and SWD Harrison LLC to the east.
8. The Application was approved by the littoral owner, Carlin Bay Resort, LLC. AR, Docs 1 and 31.
9. The Application appears to show the new docks within the footprint of the prior encroachment permit. The applicant confirmed that the rebuilt docks would be within the same footprint of the pre-existing docks. AR, Docs. 28 and 35.
10. As described in the Application, the multi-purpose dock actually has three parts:
- a. 24-foot by 30-foot gas dock;

- b. 24-foot by 10-foot approach to Dock A; and
- c. 24-foot by 100-foot multi-purpose area.

11. Judicial notice is taken that the town of Coeur d'Alene is at the north end of Lake Coeur d'Alene, and the town of Harrison is near the south end of the lake approximately 15 air miles from Coeur d'Alene. In addition, Rockford Bay is approximately 12 miles south of Coeur d'Alene, and that is where Shooters Bar and Grill is that is mentioned by Mr. Garvey in his testimony. AR, Doc. 35. Carlin Bay is approximately 9 air miles south of Coeur d'Alene on the east side of the lake, whereas Rockford Bay is on the west side of the lake. Lastly, Carlin Bay is approximately six miles across the lake from Rockford Bay.

III. ANALYSIS AND CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (Board) is authorized 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.
2. IDL is the administrative agency of the Board. Idaho Code § 58-119.
3. Lake Coeur d'Alene is a navigable lake as defined by Idaho Code § 58-1302(a).
4. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property, and the public trust values 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.
5. No encroachments on, in, or above the waters of any navigable lake in Idaho shall be constructed until approval has been granted pursuant to the Idaho Lake Protection Act, Idaho Code § 58-1301 *et seq* (LPA).
6. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through -1203.
7. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth by the Idaho Supreme Court on *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983) (KEA), and subsequent cases. The court stated that mere compliance of IDL with its legislative authority is not sufficient to determine if its actions comport with the requirements of the public trust doctrine. *Id.* at 632, 671 P.2d at 1095.
8. Idaho Code § 58-1304 gives IDL authority to adopt such rules and regulations as are necessary to implement the LPA. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* ("Rules").
9. IDAPA 20.03.04.030.02, Encroachments Not in Aid of Navigation, states "Encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or

social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.”

10. A “commercial marina” is defined by IDAPA 20.03.04.010.09 as “[a]commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public.”

11. Pursuant to IDAPA 20.03.04.060.04 the Applicant may request, and IDL may grant, permission for a sunset period greater than three years.

12. IDAPA 20.03.04.020.02 states “Only persons who are riparian owners or lessees of a riparian owner shall be eligible to apply for encroachment permits.” IDAPA 20.03.04.020.07.b states in part “When the littoral owner is not the applicant, the application shall bear the owner’s signature as approving the encroachment prior to filing.”

13. IDL initiated processing of the Application pursuant to Idaho Code § 58-1306 and the related administrative rules, IDAPA 20.03.04, Rules for the Regulation of the Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho.

14. The littoral owner is not the applicant in this case, but the Applicant has leased all the littoral rights from the owner and secured the owner’s approval of the proposed encroachment. AR, Docs 1 and 31.

15. The Application is for a commercial marina, as defined in IDAPA 20.03.04.010.09. In addition to providing moorage for rent or for free, the marina will sell gas. The Applicant also runs a restaurant and bar on the uplands adjacent to the marina, and the marina will provide moorage for patrons who boat in to this establishment. AR, Doc. 1.

16. The new encroachments are all landward of the existing Dock A, and fall within the prior footprint of the marina. AR, Doc. 1.

17. Applicant’s proposal contains both navigational and nonnavigational encroachments. The rebuilt Dock B is navigational, but the waterline is nonnavigational and the multi-purpose dock has both navigational and nonnavigational uses.

18. The Application does not appear to increase moorage at the marina, so it is uncertain if the new docks will increase boat traffic as alleged by some objectors. The proposed B Dock will have 30 slips, which is the sum total of the former B Dock (24 slips) and the former C Dock (6 slips). In addition, the Applicant stated that the number of side ties on the proposed multi-purpose dock will be similar to the number of side ties present on the former boardwalk between A and B Docks. AR, Docs. 1 and 35.

19. Testimony was provided that alleged the proposed docks would impact the neighbors’ littoral rights and navigation in Carlin Bay. AR, Doc.35. The potentially affected neighbors adjacent to the marina, however, did not offer any written or oral testimony regarding impacts to their littoral rights. In addition, the diagrams in the Application show that the proposed docks occupy essentially the same space as the previous docks. No drawings or other evidence was presented that supported the allegations of impacts to littoral rights and navigation. I find that the proposed docks do not impact the neighbors’ littoral rights or navigation in Carlin Bay.

20. The proposed waterline will be used for fire protection, and no testimony was given in opposition to it. The waterline will be eight to twelve inches in diameter, and will be placed under or adjacent to the Dock A approach for a distance of approximately 75 feet. The end of the pipe will be screened and placed below the winter pool level. AR, Docs 1 and 35. No testimony or evidence was given that suggests the waterline would impact navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, or water quality. Fire protection is a public benefit for the owners and patrons of the marina, as well as the neighboring property owners.

21. I find that the Applicant has provided sufficient justification for the waterline, and the fire protection purpose will provide significant economic and social benefits to the general public.

22. The terms "multi-purpose dock", "multi-use dock", and "event dock" are not defined in the LPA or the Rules. The Applicant stated that this was just a matter of semantics and the name itself was not important. It would be used for a variety of activities and purposes. AR, Doc.35.

23. The gas dock, Dock A approach, and side ties are navigational uses of the multi-purpose dock.

24. The applicant also proposes to use a 24-foot by 100-foot portion of the multi-purpose dock for nonnavigational uses such as family events, yoga classes, weddings, reunions, etc. AR, Docs 1 and 35. The multi-purpose dock would be open for public access by boat or from land.

25. Written comments and testimony suggests that a significant demand exists for public spaces such as the multi-purpose dock. AR, Docs. 1, 9, 10, 11, 12, 14, 19, 21, 22, 23, 25, 32, 33, 34, and 35. Between the towns of Coeur d'Alene at the north end of the lake and Harrison near the south end, only Rockford and Carlin Bays provide this type of public access to Lake Coeur d'Alene. Rockford and Carlin Bays are only about 6 miles apart, so their boating patrons may overlap. Rockford Bay and Carlin Bay are on opposite sides of the lake, however, so they may be serving different local residents or traveling members of the public that access the lake by land. These land-based patrons have fewer options to experience the lake in a similar venue that is accessible to the general public.

26. No testimony or evidence was provided that the multi-purpose dock will harm fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, or water quality.

27. I find that the multi-purpose dock does not significantly impact public trust values, and that the multi-purpose dock provides major economic and social benefits to the general public.

28. Public comments addressed several issues that are outside the authority of IDL. IDL is authorized to regulate and control the use or disposition of lands in, on or above the beds of navigable lakes in the State of Idaho, to the natural or ordinary high water mark, or to the artificial high water mark, if there is one. See I.C. §§ 58-104(9)(a) and -1303. IDL does not have authority to regulate or address potential issues lying above the artificial or ordinary high water mark. These issues include:

- a. Regulation of boat traffic. Any regulation of watercraft, their use, or consequences of their use is accomplished pursuant to Title 67, Chapter 70, Idaho Code, and through the adoption of local ordinances allowed by that statute.

- b. Roads and road safety related to encroachments. These issues must be addressed by the Idaho Transportation Department and the local Highway District.
- c. Upland restroom facilities, lighting, law enforcement, security, emergency services, parking, fire hazard, event types, and similar issues. Kootenai County has regulations that apply to most, if not all, of these issues.

IV. PRELIMINARY ORDER

Based on the evidence in the record and the foregoing analysis, I recommend that the Director of IDL approve Encroachment Permit Application No. L-95-S-0496E with a five year sunset period for construction.

DATED this 7th day of June, 2017



ERIC WILSON
IDL Resource Protection and Assistance Bureau Chief

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In the Matter of Encroachment Permit Application L-95-S-0496E

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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of June, 2017. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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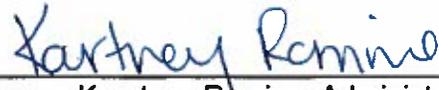
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