

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-1161) **FINAL ORDER**
Waterford Park Homes, LLC)
)
Applicant)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on December 15, 2008 at 6:00 pm PST at the Timberlake High School in Spirit Lake, Idaho. Eric Wilson served as Hearing Coordinator. The hearing record was kept open until December 22, 2008. The Hearing Coordinator issued his Recommendations on January 13th, 2008.

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 Spirit Lake, Idaho on December 15, 2008.
- 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

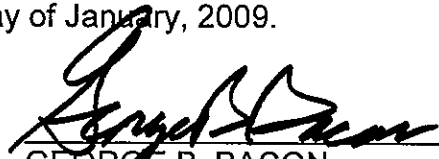
I concur with the Conclusions of Law presented by the Hearing Coordinator.

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-96-S-1161 be denied. Furthermore, it is my order that the Applicant remove all unauthorized encroachments adjacent to Lot 8, Block 28 in Bayview from Lake Pend Oreille by June 1, 2009 or an administrative penalty in the amount of \$1,000 (One Thousand Dollars) will be assessed pursuant to I.C. 58-1308.

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 16 day of January, 2009.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

- | | |
|--|---|
| Steve Schuster
Idaho Department of Lands
300 N. 6 th St. Ste. 103
PO Box 83720
Boise, ID 83720-0050 | <input type="checkbox"/> U.S. Mail, postage prepaid
<input checked="" type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Dennis Scott
Waterford Park Homes, LLC
PO Box 339
Bayview, ID 83803 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
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<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| George Grandy
PO Box 121
Bayview, ID 83803 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Skip Wilcox
PO Box 716
Bayview, ID 83803 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Kathleen Ellis
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Bayview, ID 83803 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
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<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Robert Hammell
16395 4 th St.
Bayview, ID 83803 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Robert Brooke
2933 East Point Hayden Dr.
Hayden Lake, ID 83835-9537 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
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Dale Haalund
11648 North Bruss Road
Rathdrum, ID 83858-7665

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Bert Batchelder
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Nikki Reeds
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James Wilkuski
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Ken Saunders
PO Box 297
Bayview, ID 83803

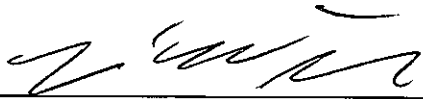
- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

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Idaho Department of Lands
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Sandpoint, ID 83864-7305

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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

January 14th, 2009

MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Public Hearing – Navigational Encroachment L-96-S-116I for Waterford Park Homes, LLC

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-116I) on Lake Pend Oreille, a navigable lake in Idaho. The application proposes to convert some of the moorage at a commercial marina to private use and add one additional sewer line for a relocated float home. 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 September 25th, 2008, Waterford Park Homes, LLC (Applicant) submitted to IDL an encroachment permit applications (L-96-S-116I) requesting approval to construct encroachments on Lake Pend Oreille. The application is incorporated into this document by reference.
2. L-96-S-116I proposes to convert 12 float home slips and 28 boat slips from public to private moorage and place an additional sewer line on the lake bed to serve a relocated float home. Attachments A and B of the application contains a description of the proposed changes. Exhibits 1 through 3 are maps and drawings to support Attachments A and B. Exhibits A through D contain information regarding the proposed condominium project.

3. Exhibit B for the L-96-S-116I application was a copy of the recorded Master Declaration Submitting Harborview Village to Condominium Ownership (Master Declaration) and First Phase Supplemental Declaration for Float Home Parking Unit (First Supplement). Exhibit A of the First Supplement was a legal description. This description, however, did not have an accompanying plat, which made the location of the 25 condominium parking spaces unclear. These 25 spaces appear to be at the Harborview facility in Tax #4884 as described in Exhibit A of the First Supplement and as shown in Exhibit 1 of the L-96-S-116I application. Waterford Park Homes, LLC is the declarant for this condominium project.

4. Exhibit C of the L-96-S-116I application was a copy of the unrecorded Second Supplement to Harborview Village Declaration Submitting Waterford Parking Condominiums to Condominium Ownership (Second Supplement). Exhibit A of the Second Supplement was a legal description. This legal description, however, did not include the littoral area associated with the Boileau's Marina. It only described the parking lot proposed for condominium ownership.

5. Exhibit D of the L-96-S-116I application was 14 sheets of unrecorded plats for the Waterford Parking Condominiums. These plats described the parking lot in Lots 1 through 15 in Block 23 of Bayview in great detail. This parking lot contained 99 parking spaces. The plats also showed a planned layout of Boileau's Marina. The design is different than the existing design depicted in Exhibits 1 and 1.1 of the L-96-S-116I application. 17 float homes are in Exhibit D instead of the 12 or 13 shown in Exhibits 1 and 1.1, and the Shed 20 slips in Exhibit D are modified from those shown in Exhibits 1 and 1.1. The marina is located in front of the north 50 feet of Lot 6, all of lots 7 and 8, and most of Lot 9, all in Block 28 of Bayview. Aside from the approach to the existing docks, no other structure extends from the lake shore adjacent to the marina. An "Existing Swale" is visible in parts of Lot 8 and 9, Block 28 of Bayview in the littoral area adjacent to Boileau's Marina.

6. Exhibit 2 of the L-96-S-116I application shows 102 parking spaces in Lots 1 through 15, Block 23 of Bayview. 19 of those are for the Harborview Marina, and 83 are for Boileau's Marina. Exhibit C (Second Supplement) and D (Plats for Second Supplement) of the L-96-S-116I application shows 99 parking spaces.

7. IDL initiated the processing of L-96-S-116I as encroachments pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On September 27th, 2008 and October 4th, 2008, IDL published the required Notice of Application in the Coeur d'Alene Press newspaper for the encroachment permit applications submitted by Applicant. The Notice of Application is incorporated into this document by reference.

8. In a letter dated September 29th, 2008, IDL notified several agencies, organizations, and persons of the encroachment permit applications submitted by Applicant 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
- Idaho Conservation League
- Timberlake Fire Protection District
- Adjacent Neighbors

The letter is incorporated into this document by reference.

9. IDL received a request for a hearing from the applicant on October 7th. Four other letters from members of the public were received before October 29th, 2008, the deadline for hearing requests. A letter from Timberlake Fire Protection District expressed several concerns relating to compliance with fire codes. Two letters from the Bayview Chamber of Commerce stated several objections to the application based on differences between public and private moorage, a lack of consistency in the number of float homes being proposed, a lack of adequate parking for Boileau's Marina and the adjacent Harborview Marina, and a failure to record the final condominium documents with Kootenai County. The Idaho Department of Fish and Game submitted a letter stating that the lake bottom should be restored after the sewer line was installed, and the number of float homes was not consistent throughout the application. These letters are incorporated into this document by reference.

10. Based on a request by the applicant, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachments. The public hearing was scheduled for 6:00 pm on December 15th, 2008 at Timberlake High School in Spirit Lake, Idaho. On November 12th and 19th, 2008 IDL published the

required Notice of Hearing in the Coeur d'Alene Press. The Notice of Hearing is incorporated into this document by reference.

11. In a letter dated November 11th, 2008 IDL notified the following agencies and individuals of the scheduled hearing:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- U.S. 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
- Captains Wheel
- Timberlake Fire Protection District

The letter is incorporated into this document by reference.

12. The following comments were received prior to the scheduled public hearing:

- a. On November 26th, 2008 IDL received an e-mail from Dennis Scott, representing the applicant, which requested permission from Nick Snyder at Kootenai County Parks and Waterways to cross the county's riparian area with the sewer line in the application. A map of the proposed sewer line was included. The e-mail and attachment are incorporated into this document by reference.
- b. On November 28th, 2008 IDL received an e-mail from Tom Reeds asking several questions regarding privatization. The e-mail is incorporated into this document by reference.
- c. IDL received a copy of a letter dated December 2nd, 2008 from Nick Snyder (Director of Kootenai County Parks and Waterways) to Dennis Scott, the applicant. The letter stated that the proposed sewer line would not adversely affect the public boat launch, and a Commercial Use Permit would be needed from the county. The letter is incorporated into this document by reference.
- d. IDL received a letter dated December 12th, 2008 from Kootenai County Building & Planning Department. The letter stated that the proposed changes to the

current parking area would require a conditional use permit as well as a revised storm water plan and a revised landscape and parking plan that met applicable county ordinances. The letter is incorporated into this document by reference.

13. On December 15th, 2008 IDL held a public hearing at 6:00 pm in the Timberlake High School in Spirit Lake, Idaho. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager, served as hearing coordinator. In attendance were Mr. Jim Brady, IDL Navigable Waters Specialist; Mr. Dennis Scott, representing Applicant; and twenty six (26) members of the public. The public hearing was recorded on audio tape and was 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 overview of the project. The application proposes to privatize 12 existing float home slips and 28 existing boat slips, as well as add an additional sewer line to service a relocated float home. Mr. Scott stated that the rules regarding privatization were not very specific, and they propose to use condominiumized parking lots for the application. He also stated that Boileau's Marina has 113 boat slips and 12 float homes, so by three different methods of comparison, the proposed private use is less than 50%. Keeping in mind that one private float home slip is considered the equivalent of two corresponding public boat slips, their proposal would have 52 private slips (12 float homes and 28 boat slips) and 85 public slips. This results in 38% of the slips being private. Based on slip lengths, approximately 41% of the total slip lengths would be private. Based on total slip area, approximately 49% of the total slip area would be private. Mr. Scott also stated that the most demand is for small and medium sized boat slips, so the remaining public slips are the ones most desired by the summer user. Those who own larger boats prefer to own their moorage space. The quality of the public and private slips is similar based on power, covers, and condition. A complete marina rebuild would be needed to ensure that the public and private moorage was the same in terms of quality or quantity and to achieve the general plan that is envisioned. The proposed plan meets the intent of the similar size and quality rule. In regards to parking, Mr. Scott stated that 69 spaces are required for the application, and 83 spaces are being made available at the designated 99-space lot one block away. Twenty five parking spaces at Harborview fulfill some of the Harborview parking requirements. The same parking lot in the current application for Boileau's Marina does supply some additional parking for Harborview. While some of the documents may show more than 12 float homes, only the existing 12 float homes are involved with this application. The extra float home shown in one document was an error, and the 17 float homes shown in the condominium documents is for a future expansion that will be permitted through IDL at a later date. It was included in the documents because they were recorded at the county and that is their long-term plan. Mr. Scott also stated that the Second Supplement to Harborview Village was recorded at the county on November 20, 2008, contrary to the testimony given by others at the hearing. Exhibits from Mr. Scott were entered into the record at the hearing and are incorporated into this document by reference.

b. Public testimony in opposition to the project was presented by seven (7) individuals. George Grandy, representing the Bayview Chamber of Commerce Development Analysis Committee, and Skip Wilcox stated that the size and quality of the slips were inconsistent between the public and private slips. Mr. Grandy claimed that the seasonal slips should not be included in the evaluation of size and quality. When questioned, Mr. Wilcox stated that equal did not have the same meaning as similar. Mr. Grandy also stated that large public slips are very limited in number. Mr. Grandy and Mr. Wilcox stated that the number of float homes in the application was not consistent. Mr. Wilcox also stated that the bath house shown on Exhibit D is not permitted, and all application and condominium documents should be the same. Mr. Grandy stated the only explicit approval given for the application should be for the public/private split and not for the marina expansion suggested by the Second Supplement. Mr. Grandy and Mr. Wilcox stated that the designated parking was inadequate because the Harborview Marina (L-96-S-74L) needed 25 of the spaces. Mr. Wilcox claimed that the Second Supplement required 77 boat slips to share one parking space. Thomas Lloyd also stated that the parking was inadequate. Mr. Lloyd stated that the condominium documents require 157 parking spaces, but IDL could only require 137 parking spaces. Mr. Grandy stated that the recorded documents are different than the ones submitted in the application. Ms. Ellis also stated that the condominium documents had not been recorded as of Friday, December 12th, 2008. Mr. Grandy stated that nothing should be approved until the condominium documents are approved by the county. Mr. Wilcox stated that the 25 public votes versus the 124 private votes for marina management was not equitable. Kathleen Ellis stated that the marina only has 21.62 feet of frontage on Lot 6, and the property in front of Boileau's Condos was previously sold and those littoral rights are not dedicated to the marina, which suggests that the application does not meet the requirements of IDAPA 20.03.04.015.03(i). Mr. Grandy and Ms. Ellis also stated concerns that approval of this application would somehow approve the privatization plan of Harborview Marina that is related through the condominium declarations. Robert Hammell stated that property taxes will rise if the project proceeds. Robert Brooke stated that three people at the top control all condo associations and can override all decisions. Mr. Brooke also pointed out that the property was apparently for sale and asked how that was possible. Mr. Grandy also stated that the public portion of the marina was for sale and that management of the public portion of the marina was not addressed in the application. Nikki Reeds stated that she was a float home owner and wondered what people would receive with their slip purchase. Exhibits from Ms. Ellis, Mr. Wilcox, and Mr. Grandy were entered into the record at the hearing and are incorporated into this document by reference.

c. Public testimony in support of the project was presented by three (3) individuals. Dale Haalund stated that the public and private slips were comparable. Bert Batchelder stated that he is a Boileau's float home owner, he has mixed feelings about the privatization, and he is mainly concerned that the state should protect the float home owners and purchasers. Fritz Sander stated

that he was also a Boileau's float home owner, and the public and private moorage in the proposal was similar. Mr. Sander also stated that people are buying smaller boats similar to the trend of smaller cars.

d. Mr. Powell Shoemaker submitted a letter at the hearing on behalf of the Idaho Floating Homes Association. The letter stated opposition to the application due to errors, inconsistencies, and misleading information. The letter also stated concern with the lack of parity in size and quality between public and private slips. The letter was entered into the record at the hearing and is incorporated into this document by reference.

e. The hearing coordinator questioned the applicant about the lack of proof of littoral rights associated with this application, as well as the lack of recorded documents relating to the application. The applicant stated that the documents showing proof of littoral ownership within the recently recorded condominium declaration (Second Supplement) were in his office, he just did not bring them to the hearing. The hearing coordinator instructed the applicant to give those documents to IDL by 5 pm on the following day, December 16th, 2008. The documents would then be distributed to, and posted for review by, the other hearing attendees. All parties could then submit additional comments into the record by 5 pm on Monday, December 22nd, 2008. The record would then close on that day and a decision would follow within 30 days, or January 21st, 2008. The hearing attendees agreed to the above timeline as a way to receive, evaluate, and comment on information that should have been in the original application.

14. Several documents were submitted by the applicant and others on or before 5 pm (Pacific Time) on Monday, December 22nd, 2008. All of the following documents are incorporated into this document by reference as are the e-mails that accompanied the submittals:

- a. The applicant submitted the following documents on Tuesday, December 16th, 2008, and they were distributed to hearing attendees and posted on the IDL internet site on December 17th, 2008:
 - i. A cover letter explaining the situation with the littoral rights. The letter states that Mr. Scott was in error at the hearing, and the littoral rights at that time were in the name of Waterford Park Homes, LLC. Mr. Scott then executed a quitclaim deed on December 16th, 2008 that deeded the littoral rights in front of the Boileau's Resort Condominiums from Waterford Park Homes, LLC to the Harborview Village Condominiums Owners Associations, Inc. A copy of the recorded Second Supplement was not sent at this time.
 - ii. A copy of a six-page quitclaim deed dated December 16th, 2008 that gave the littoral rights in the north 50.16 feet of Lot 6, all of Lot 7, and the south 39.8 feet of Lot 8 in Block 28 of Bayview to Harborview Village Condominiums Owners Association, Inc. No mention is made of the remainder of Lot 8 or Lot 9.

- b. Sheryl Puckett sent an e-mail on December 17th, 2008 stating that approval of the application would not be fair because the size and quantity of the public slips do not meet the requirements, the parking is inadequate, the relationship between Harborview and Boileau's is not addressed, and the marina is up for sale.
- c. In response to e-mail inquiries from hearing attendees, the applicant supplied the following documents on December 17th, 2008, and they were distributed to hearing attendees and posted on the IDL internet site on the same date:
 - i. A copy of seven sheets of recorded plats related to the Waterford Parking Condominiums.
 - ii. A copy of a survey plat showing the littoral area described in the quitclaim deed. The described littoral property includes the northern 50.16 feet of Lot 6, all of Lot 7, and the southern 39.8 feet of Lot 8 in Block 28 of Bayview.
- d. An e-mail from Jim Brady stating that some hearing attendees were objecting to the tardiness of the applicant's submittals.
- e. An e-mail from James Wilkuski was received on December 22nd, 2008. Mr. Wilkuski stated that many of the objections brought forth in the hearing were off subject. He also expressed a general frustration with the lack of direct communication between the objectors and the applicant.
- f. A letter with attachments was received on December 22nd, 2008 from George Grandy representing the Bayview Chamber of Commerce Development Analysis Committee. Mr. Grandy stated that only the information related to littoral rights had been submitted as agreed to by the applicant. The recorded Second Supplement was not submitted in a timely manner by the applicant, and was independently obtained by his committee. After reviewing all the documents, Mr. Grandy still recommended denial of the application due to substantial changes to the recorded documents, inadequate treatment of littoral rights, nonconformance with Kootenai County ordinances, inconsistencies between the application and condominium documents, inadequate parking, disparities between the size and quality of public and private slips, and an advertised sale of the marina. The attachments included the recorded Second Supplement with the associated seven plat drawings, and two plat drawings from Boileau's Resort Condominiums.
- g. A letter and a copy of the recorded Second Supplement was received on December 22nd, 2008 from Dennis Scott representing the applicant. The letter was largely a rebuttal of the public testimony given by Ms. Ellis, Mr. Wilcox, and Mr. Grandy. The frontage dedicated to the homeowners association is over 180 feet. Harborview Village Condominiums Owners Association, Inc. is registered with the State of Idaho. The Second

Supplement to Harborview Village is recorded at the county. Privatization of slips at Harborview Marina was done legally prior to the effective date of the new rules. The size and quality of public versus private slips must only be similar, not equal, and that requirement has been met. The apparent discrepancy between the numbers of float homes in the application is due to the future plans included in the condominium documents. The actual application is only for the 12 existing float homes. Mr. Wilcox's analysis of needed parking spaces includes spaces that are not required by the Idaho Department of Lands, and the application provides adequate parking for the existing float homes and slips. Mr. Scott stated that the observation claiming 77 boat slips share one parking space was not true. The advertisement of sale mentioned during the hearing by Mr. Grady was actually the parking space that provided control of the public slips.

- h. E-mails were received from Ken Saunders and Robert Brooke on December 22nd, 2008. They stated that the applicant was six days tardy in submitting the recorded Second Supplement. This has prevented adequate review and comment by members of the public, and therefore the application should be denied.
 - i. An e-mail was received from Ken Saunders on December 22nd, 2008. Mr. Saunders stated that the recorded Second Supplement is substantially different from the one in the application. Ownership interest and voting rights for Units 98 and 99 were reduced such that the public slips only have 25 out of 206 total votes. In addition, Mr. Saunders stated the amount of common ownership associated with each parking space is unclear by two decimal points (1% versus 100%).
 - j. An e-mail was received from Dennis Scott on December 22nd, 2008. Mr. Scott stated that many of the objections do not relate to the application, and this level of scrutiny could discourage future applications for privatization.
 - k. Another e-mail was received from Robert Brooke on December 22nd, 2008. Mr. Brooke stated that it was not possible for the public moorage to be sold separately and still meet the requirements of IDAPA 20.03.04.015.03(i). He also stated that the requirement for similar size and quality of public and private slips had not been met. Mr. Brooke also stated that the proposal still provided inadequate parking according to IDL and Kootenai County standards. He also stated that the quit claim deed for littoral rights was executed the day after the hearing and conveyed the littoral rights to an entity different than the one that should own the marina. Lastly, Mr. Brooke points out that the December 16th, 2008 letter from Dennis Scott and the associated quit claim deed may indicate some irregular permitting activities.
15. The Second Supplement was recorded on November 20, 2008 in Kootenai County. The plats for the recorded Second Supplement show 99 parking spaces, and

not 102 as shown in the L-96-S-1161 application. 83 of these spaces are for Boileau's, as per statements by Mr. Scott at the hearing. This would leave only 16 spaces available for use by Harborview Marina, and not 19 as stated in the L-96-S-1161 application.

16. The recorded Second Supplement had the following changes from the Second Supplement that was submitted with the application:

- Subsection 36.1.3 was added. This subsection describes the typical dimensions of Units (parking spaces) 62 through 64.
- Article 43 was added. This article states that all the public slips are dedicated to the owners of Units (parking spaces) 98 and 99 for use as a commercial marina.
- Exhibit B was modified to increase the percentage of common ownership associated with Units 98 (from 0.0448 up to 0.0648) and 99 (from 0.02 up to 0.06), and to decrease the number of votes assigned to Unit 99 (from 10 down to 5).
- Exhibit A was modified from 14 pages to 7 pages. Sheets 2 through 4 were consolidated onto sheet 2 of the recorded plat, sheets 5 through 7 were consolidated onto sheet 3 of the recorded plat, sheets 8 through 11 were consolidated onto sheet 4 of the recorded plat, and sheets 12 through 14 became sheets 5 through 7, respectively, of the recorded plat.

17. Page 2 of the applicant's hearing exhibits contains a table of the existing moorage at Boileau's Marina. The proposed private boat slips are 12 feet wide and 29.5 feet long and covered. Eight of the proposed covered public slips are larger than 12'x29.5', with widths of 12 to 25 feet and lengths of 32 to 45 feet. Fifteen of the proposed covered public slips are slightly smaller than 12'x29.5', with widths of 10 to 11 feet and lengths of 20 to 36 feet. The remainder of the proposed public slips, 62 total, are 10 feet or less in width and 28.5 feet or less in length. All but 11 are covered.

18. Sheet one of the recorded plats associated with Boileau's Resort Condominiums show Boileau's Marina as being in front of the north 50 feet of Lot 6, all of Lots 7 and 8, and most of Lot 9 in Block 28 of Bayview.

19. Sheets 2 and 3 of the recorded plats associated with the Second Supplement for Waterford Parking Condominiums also show Boileau's Marina as being in front of the north 50 feet of Lot 6, all of Lots 7 and 8, and most of Lot 9 in Block 28 of Bayview. Sheet 3 of the Second Supplement plats also shows an "Existing Swale" in Lots 8 and 9 in Block 28 of Bayview.

20. A slide of an aerial photo labeled "Marina appearance today" in the presentation given by Dennis Scott shows a small dock extending into the lake from Lot 8 in Block 28 of Bayview. This dock is not shown on any of the permit drawings nor mentioned in any of the application materials.

21. The Harborview Marina permit (L-96-S-74L) required 25 parking spaces for boat moorage. These parking spaces were identified as being located in Lots 1 through 15 in Block 23 of Bayview. The application for L-96-S-74L stated that 69 parking spaces in this lot were for Harborview, and only 14 were for Boileau's.

22. The First Supplement for Harborview was recorded on August 21, 2007. The revised IDAPA rule 20.03.04 was not effective until April 2, 2008, so the Harborview slip sales occurred prior to any authority to regulate such activities under IDAPA 20.03.04.

23. No objections were received related to the new sewer line for the relocated float home.

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. Any decision made on the Boileau's Marina encroachment application (L-96-S-116I) will not constitute approval or denial of any activities at the Harborview Marina

done under encroachment permit L-96-S-74L.

7. IDAPA 20.03.04.015.03(c) states "Commercial marinas shall provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) watercraft moorages, and one (1) parking space per two (2) float home moorages. Local city or county ordinances governing parking requirements for marinas will apply if such have been enacted."

8. The marina contains 113 boat slips and 12 float homes slips, which requires 63 parking spaces. No distinction is made between public and private slips for the parking requirement in IDAPA 20.03.04.015.03(c).

9. The claim that 77 boat slips would share one parking space is erroneous. 83 parking spaces are dedicated to use by Boileau's Marina, and the majority of those are for use by the commercial marina. Only the parking for Boileau's Marina can be evaluated for this application, and parking requirements for other condominiums and other purposes are under the jurisdiction of Kootenai County. George Grandy's letter of December 22nd, 2008 attempted to determine the number of parking spaces that Kootenai County would require. His determination relied on many assumptions that were not verified by a county official, so the accuracy of this determination is unknown. Lacking any official determination from the county, who was supplied notice of the application, the basic parking requirements of IDAPA 20.03.04.015.03(c) are the only requirements that the Idaho Department of Lands can evaluate at the current time.

10. The number of parking spaces provided in Lots 1 through 15, Block 23 of Bayview is not consistent throughout the application, and no explanation was given for the inconsistencies. The main application included a drawing with 102 parking spaces (Exhibit 2), but Exhibits C and D of the application (Second Supplement to Harborview Village Declaration Submitting Waterford Parking Condominiums to Condominium Ownership and associated plats) indicates that 99 parking spaces are present. The applicant at the hearing stated that 99 spaces would be present. In either case, the requirements of IDAPA 20.03.04.015.03(c) appear to be satisfied for the current application.

11. An existing permit for the adjacent Harborview Marina (L-96-S-74L), also owned by applicant, required at least 25 parking spaces in Lots 1 through 15, Block 23 of Bayview. Exhibit 2 of the current application for L-96-S-116I indicates 19 out of 102 spaces are designated for Harborview, but Exhibit C suggests that only 16 (99 total subtract 83 for Boileau's) will be available for use by customers outside of the Boileau's Marina. The Idaho Department of Lands should not approve the Boileau's permit when that approval would have the effect of making the Harborview permit out of compliance. The lack of an explanation for the inconsistencies between drawings and the apparent conflict between the two marinas over adequate parking indicates that the parking plan for Boileau's Marina needs more work. The December 12th, 2008 letter from the Kootenai County Building and Planning also indicates that the parking plan must be revised in order to conform to the local ordinances.

12. Several objectors stated that the application was for 12, 13, or 17 float homes depending on which document or drawing was examined. Attachment A of the application clearly stated, and the applicant clearly stated at the hearing, that only the existing 12 float homes were included in the application. Exhibit 1 in the application had mislabeled a boat house as a float home. Plat drawings for the Second Supplement (Exhibit D) had 17 float homes. The Second Supplement drawings also had a bathhouse and extended the boat shed fingers, neither of which was in Exhibits 1 through 3. The main purpose for including the Second Supplement (Exhibits C and D) in the application was to reveal how the condominium plans complied with the requirements for creating private moorage in a commercial marina. The Second Supplement was initially required for county approval and to comply with state laws regarding condominium developments, and that remains the primary purpose of the Second Supplement. The Second Supplement was described by the applicant during the hearing as showing a desired future build out beyond what was actually being applied for under the encroachment permit at the current time. While this explanation would have been helpful in the application itself, the lesser number of float homes (12), no bath house, and no finger extensions is the most restrictive option and the permit would be written to specifically allow only the 12 existing float homes, 113 boat slips, and other existing encroachments. As a result, the apparent inconsistencies are not sufficient reason to deny the permit. As stated by the applicant at the hearing, the only changes being proposed from the current operation is to privatize 12 float homes and 28 boat slips and to construct one new sewer line for a relocated float home. Based on that statement and the materials submitted, no other changes from the existing permit are under consideration for this application.

13. IDAPA 20.03.04.015.03(e) states "Commercial marinas must have a minimum of fifty percent (50%) of their boat moorage available for use by the general public."

14. IDAPA 20.03.04.015.03(j) states in part "Existing commercial marinas that desire to change their operations and convert some of their moorage to private use must keep at least fifty percent (50%) of their moorage available for use by the general public."

15. The applicant supplied three different methods to compare the amount of public and private moorage, and these methods indicated that the public moorage constituted from 52% to 62% of the total moorage at Boileau's Marina and therefore met the minimum requirement of 50% public moorage.

16. IDAPA 20.03.04.015.03(h) states "When private moorage is permitted, the public moorage must be of similar size and quality as private moorage, except for float home moorage as provided in Paragraph 015.03.g. of these rules."

17. As noted by Skip Wilcox at the hearing, "similar" does not have the same meaning as "equal". 23 of the proposed public slips have a similar size to the 28 proposed private slips, and all of these slips are covered. This indicates that the size and quality of the public and private moorage is similar, and IDAPA 20.03.04.015.03(h)

does not require the size and quality to be equal. The current use of the slips (seasonal or rented) is not a factor to be used in the determination. As stated by the applicant, reconstruction of the marina would be required to make the moorage sizes more equitable. The applicant and Fritz Sander stated that small to medium sized slips are in more demand by the public, so public access does not appear to be unduly affected.

18. IDAPA 20.03.04.015.03(i) states in part “Commercial marinas with private moorage must form a condominium association, co-op, or other entity that owns and manages the marina, littoral rights, upland property sufficient to maintain and operate a marina, and private submerged land, if present. This entity is responsible for obtaining and maintaining an encroachment permit under these rules and a submerged lands lease under IDAPA 20.03.17...”

19. Approximately 0.019 acres in the north 50 feet of Lot 6, Block 28 of Bayview, also described in the December 16, 2008 quitclaim deed, and the 99 or 102 parking spaces has been designated “to maintain and operate a marina” as required by IDAPA 20.03.04.015.03(i).

20. A clear explanation of the association structure was not provided in the application, so a summary is herein attempted to evaluate whether the association structure and application meet various requirements of IDAPA 20.03.04.

Waterford Park Home, LLC is the declarant of Harborview Village, a four-phase condominium project. The Harborview Village Condominiums Owners Association, Inc. is the overarching management association and it is registered with the Idaho Secretary of State. This association is controlled by a three-person Board of Directors. The initial, or interim, directors are appointed by Waterford Park Homes, the declarant. After 75 percent of all the units are sold, or 10 years from the date the first unit was sold, a meeting of the entire association may be called so that new directors can be elected by the members. This provides for a transition of control from the declarant to the association members after the project becomes self sufficient. Membership in the association is through four sub-associations that are formed in separate phases of the project. Each sub-association has a committee that is responsible for management and upkeep of the respective project phases. Decisions by a committee may be overruled by the Board of Directors. Each committee must include at least one member from the Board of Directors. Everyone who purchases a condominium unit is considered to be both a member of the sub-association as well as a member of the larger Harborview Village Condominiums Owners Association, Inc. Waterford Park Homes, LLC owns some of the units, and is therefore also a member of the association.

Phase one was Harborview Float Home Condominiums, and it involved the float homes at Harborview Marina. This phase was recorded with the initial condominium declaration on August 21, 2007. Since this was prior to the adoption of the revised Lake Protection Rules, phase one cannot be held to the same standards that phase two is. The former rules did not address this type of ownership within a commercial marina, so no permitting was required for implementation. The encroachment permit for Harborview Marina is still with Waterford Park Homes, LLC.

Phase two is the current application for Waterford Parking Condominiums. It was

recorded on November 20, 2008 and is subject to the revised Lake Protection Rules. It involves float homes and boat slips at Boileau's Marina. The encroachment permit is still with Waterford Park Homes, LLC.

The other two phases do not appear to involve lake encroachments, and the Idaho Department of Lands has no information on them.

The interrelationship of Waterford Park Homes, LLC and the Harborview Village condominium associations are not well explained in the application, but it appears to be a functional and legal condominium project. The marina operator will have to work in conjunction with the associations for management and maintenance activities, which would be needed regardless of what governing structures were put in place. As long as the public portions of the marinas are kept open for public use and the applicable rules are followed, the Idaho Department of Lands could accept the proposed corporate structures, voting rules, and ownership percentages as presented by the applicant.

21. The addition of Article 43 to the recorded Second Supplement made the continued presence of a commercial marina more explicit in the applicant's plans. Some objectors stated that operation of the public marina portion of Boileau's was not sufficiently explained. While the discussion was admittedly brief, the applicant stated that the remaining 85 boat slips would remain available for public use. If the Idaho Department of Lands suspects that this is not the case in the future, then administrative remedies such as permit revocation may be used to bring the marina back into compliance with the terms of the permit and the Lake Protection Rules. The other changes made to the recorded Second Supplement are not substantive with respect to the requirements of IDAPA 20.03.04.

22. IDAPA 20.03.04.020.02 states "Only persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits. A person who has been specifically granted littoral rights or dock rights from a littoral owner shall also be eligible for an encroachment permit; the grantor of such littoral rights, however, shall no longer be eligible to apply for an encroachment permit."

23. IDAPA 20.03.04.020.07(a) states in part that an application must include:

- ii. Copy of most recent survey or county plat showing the full extent of the applicant's lot and the adjacent littoral lots.
- iii. Proof of current ownership or control of littoral property or littoral rights.

24. The quit claim deed for littoral rights that was executed on December 16, 2008 placed the littoral rights for the northern part of Lot 6, all of Lot 7, and the south part of Lot 8, Block 28 of Bayview under the control of the Harborview Village Condominiums Owners Association, Inc. The language in the quit claim deed, Master Declaration, and the Second Supplement appears to contain sufficient reservations for Waterford Park Homes, LLC to remain the legal applicant for L-96-S-1161. In conformance with IDAPA 20.03.04.020.02, however, Harborview Village Condominiums Owners Association, Inc. will not be able to apply for future encroachment permits along the littoral area occupied by Boileau's Marina due to the reservations retained by Waterford Park Homes, LLC under the quit claim deed dated December 16, 2008. The littoral rights behind the entire foot print of Boileau's Marina must be owned or controlled by the applicant.

25. The applicant did not include information on ownership or control of littoral property or littoral rights of the northern portion of Lot 8 and most of Lot 9, Block 28 of Bayview. Boileau's Marina is clearly in front of these lots. The applicant, in his letter dated December 16, 2008, admitted to not having any proof of littoral rights for Boileau's Marina prior to the hearing, and could only provide information on littoral ownership or control for the northern part of Lot 6, all of Lot 7, and the south part of Lot 8, Block 28 of Bayview.

26. A potentially illegal dock extends out from Lot 8, Block 28 of Bayview. The location is indicated by the aerial photo provide by applicant at the hearing. The "Existing Swale" shown in Exhibit D of the application is also visible in the aerial photo and provides a point of reference for the dock location. The owner of this small dock is unknown, but based on the evidence presented in the application and information obtained through the public hearing process this dock is not a part of the existing or proposed Boileau's Marina and therefore it is not a legal dock.

27. The Applicant did not satisfy all procedural requirements in the processing of the application included in Idaho Code § 58-1306 and IDAPA 20.03.04. When asked to provide specific documentation by a specific date following the hearing, as agreed to by the applicant and the other hearing attendees, some of the requested documents were sent to the Idaho Department of Lands six days past the specified date.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Based upon the information provided to me as the hearing coordinator, the fact that the proposed parking plan for L-96-S-116I would conflict with the existing L-96-S-74L permit for Harborview, the fact that the dedication of littoral rights adjacent to Boileau's Marina is incomplete, the fact that an apparent violation is occurring with the small dock attached to Lot 8, and the fact that the applicant did not submit the requested post-hearing documents as agreed to, I recommend that the Director of IDL issue a Final Order stating that the Pend Oreille Supervisory Area of IDL should **deny** the encroachment permit application for privatization submitted by the Applicants, and **approve** the encroachment permit application for installation of the new sewer line. The dock attached to Lot 8, Block 28 of Bayview must also be removed from the water as soon as possible, but no later than June 1, 2009. Pursuant to I.C. 58-1308, failure to remove this dock by June 1, 2009 will result in the issuance of an administrative penalty in the amount of \$1,000 (One Thousand Dollars).

DATED this 14th day of January, 2009.



ERIC WILSON
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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