

GEORGE B. BACON
Director
Idaho Department of Lands
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BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No)
L-96-S-116J – Harborview Village Condominium) **FINAL ORDER**
Owners Association, Inc.)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A hearing was held on June 1, 2009 at 6:00 pm PST at the Timber Lake High School in Spirit Lake, Idaho. Carl Ritchie served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on July 17, 2009.

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 hearing conducted in Spirit Lake, Idaho on June 1, 2009.
- 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 facilities, placed on the 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. However, I did find the information in items 11 and 13, regarding parking requirements, unclear. To clarify, when calculating the percent of moorage for purposes of determining what part of a marina is private and what part is public, one float home slip equals two boat slips (IDAPA 20.03.04.015.03.g). For purposes of calculating the total number of parking spaces required, the marina is viewed as a whole (IDAPA 20.03.04.015.03.c). No distinction is made between public and private parking. In this case, the marina as a whole requires 63 parking spaces, or one parking space for every two slips, regardless of whether they are a boat slip or a float home slip. Of those 63 required parking spaces, the Hearing Coordinator indicates the permit application proposes 50 parking spaces for 101 public slips and 13 parking spaces for 24 private slips, giving the rounding error to the private side of the equation. However, in actuality, there are 74 parking spaces available, and the applicant proposes 24 parking spots for the 24 private slips.

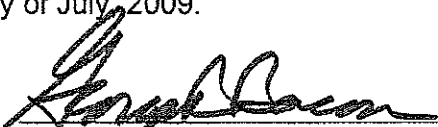
IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permits L-96-S-116J be approved by the Pend Oreille Lake Supervisory Area with the following conditions:

1. As stated above, for purposes of calculating the total number of parking spaces required, the marina is viewed as a whole (IDAPA 20.03.04.015.03.c). Contrary to the proposal in the permit application, the rounding error must be made to the benefit of the public. The permit will require one full parking space for every two public slips or fraction thereof. In this case, 101 public slips require 51 public parking spaces.
2. Other conditions deemed applicable by the Pend Oreille Lake Supervisory Area, especially those that will help protect the kokanee spawning, incubation and emergence periods.

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 20.03.04.025.09.

DATED this 23RD day of July, 2009.



GEORGE B. BACON,
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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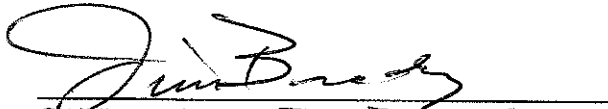
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Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

July 17, 2009

MEMORANDUM

TO: George B. Bacon, Director

FROM: Carl Ritchie, Lands Resource Specialist, Sr.

SUBJECT: Recommended Order – Navigational Encroachment L-96-S-116J for Harborview Condominium Owners Association, Inc.

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 encroachment permit (L-96-S-116J) on Lake Pend Oreille, a navigable lake in Idaho.

The application proposes the privatization of 12 boat moorage slips, 12 float homes and the replacement and repositioning of an existing float home sewer line at Boileau's Marina. 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 April 29, 2009, Harborview Village Condominium Owners Association, Inc. (Applicant) submitted to IDL a revised encroachment application (L-96-S-116J) requesting approval to construct encroachments on Lake Pend Oreille. The application, with supporting material, is incorporated into this document by reference.
2. The L-96-S-116J application proposes to convert 12 float home slips and 12 boat slips from public to private moorage. Attachments A and B of application (L-96-S-116J) contain a description of the proposed changes including map pages 1 through 7. Additional Exhibits A through D contain information regarding the proposed condominium project.

3. "Permit Exhibit A" for the L-96-S-116J application is a copy of the Recorded Master Declaration Submitting Harborview Village to Condominium and First Phase Supplemental Declaration for Float Home Parking Unit. Within this document are Exhibit A, Harborview Village legal description; Exhibit B, Articles of Incorporation of Harborview Village Condominiums Owners Association, Inc.; Exhibit C, Bylaws of Harborview Village Condominiums Owners Association, Inc. and Exhibit D, untitled showing the initial common area percentage assigned to the individual units of the Harborview Village Condominium.

4. "Permit Exhibit B" is a recorded Second Supplement to Harborview Village Declaration Submitting Waterford Parking Condominiums to Condominium Ownership. The document describes the air space for each of the parking units in the proposed 99 unit parking lot. It also includes a list of the parking units and their assignments for either private or public use. Units 1 through 45 are designated private, units 46 through 97 are designated public. Units 98 and 99 are reserved parking and will be considered private use. Included is a written survey description of the proposed parking area (Waterford Parking Condominiums). A registered littoral plat has been submitted by error for what should be the parking lot plat.

5. "Permit Exhibit C", Waterford Parking Condominiums is a registered, October 30, 2008, plat and parking lot design depicting the location and parking unit size for the proposed 99 unit parking facility. On sheet 2 of 7 of this exhibit, the marina is displayed in a configuration showing 28 private boat slip moorages and 17 private float homes. The map as shown in Attachment A, sheet 3 of 7, April 29, 2009, is the proposed privatization layout for the marina including 12 private moorages and 12 private float homes.

6. "Permit Exhibit D" includes recorded Quitclaim Deeds granting the littoral rights to Waterford Park Homes, LLC and then to Harborview Village Condominiums Owners Association, Inc. with a written survey description and registered plat map.

7. IDL initiated the processing of L-96-S-116J as an encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated rules (IDAPA 20.03.04.030). On May 2, 2009, and May 9, 2009, IDL published the required Notice of Application in the Coeur d'Alene Press newspaper for the encroachment permit application submitted by the Applicant. The Notice of Application is incorporated into this document by reference.

8. In a letter dated May 1, 2009, IDL notified several agencies, organizations and persons of the notice of encroachment permit application and public hearing submitted by the 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 and Planning
- 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. The following comments were received prior to the scheduled public hearing:

a. On April 24, 2009, IDL received a letter from US Army Corp of Engineers granting an authorization of the subject permit application with stipulations. Authorization was given for maintenance work including: sewer line upgrade, remodel of boat sheds, repair of a fire damaged building and replacement of damaged pilings. The letter is incorporated into this document by reference.

b. IDL received a letter dated April 30, 2009, from Panhandle Health District 1 stating the proposed pump-out station needs a permit and an onsite engineering review by the Idaho Department of Environmental Quality (IDEQ). The IDEQ also required plans, review, and approval for the proposed sewer line. The letter is incorporated into this document by reference.

c. On May 1, 2009, IDL e-mailed the Applicant advising of a change in date for the public hearing to June 1, 2009, at Timber Lake High School. The e-mail is incorporated into this document by reference.

d. IDL received an e-mail May 4, 2009, from the Applicant about a meeting he had with members of the Kootenai County Building and Planning Department concerning the parking lot proposal. The e-mail is incorporated into this document by reference.

e. On May 5, 2009, IDL received an e-mail from the Applicant stating the un-permitted swim dock as addressed during the December 15, 2008 hearing had been removed from Lake Pend Oreille. The e-mail is incorporated into this document by reference.

f. IDL received a letter dated May 12, 2009, from the Kootenai County Building and Planning Department (KCBPD). Included with the letter are a conditional use

permit application, and narrative and photos submitted by the Applicant. The Applicant proposes to convert an approved 74 parking space lot to 99 parking spaces. Of the 99 parking spaces 87 would be utilized for Boileau's Marina parking and 12 for Harborview Marina parking. The letter, application, and attachments are incorporated into this document by reference.

g. On May 18, 2009, IDL received a letter from George Grandy, Chair, Development Analysis Committee, Bayview Chamber of Commerce recommending disapproval of the application as the IDL protects Idaho's natural resources for maximum returns to beneficiary institutions such as the using public. The letter is incorporated into this document by reference.

h. On May 26, 2009, IDL received a fax from Chuck Waller, Chairman of Bayview Water and Sewer District. The letter states Harborview Condos, Phase 1 proposal meets sewer district requirements, but there are no additional sewer services for additional float homes. Included is a table of Equivalent Residence (ER) counts for Boileau's Resort. This table indicated that there will be a 0.4 unused ER balance with the current proposal. This fax is incorporated into this document by reference.

i. On May 27, 2009, IDL received an e-mail from Tom Reed requesting that he be mailed a copy of the proceedings. This E-mail is incorporated into this document by reference.

j. On May 29, 2009, IDL received a letter from KCBPD, Ben Tarbutton, Planner II, stating:

- The Applicant had submitted a Conditional Use permit application to convert the 74 parking space area to 99 parking spaces.
- The Applicant had relinquished the building permit for the condos at Harborview Marina that created 45 parking spaces at Harborview Marina.
- The Applicant should contact the KCBPD to inquire if a site disturbance permit is required and that may include a 25 foot vegetative buffer zone.

The letter is incorporated into this document by reference.

k. IDL received a letter dated May 31, 2009, from Idaho Fish and Game. They expressed their desire that Kokanee spawning beds not be negatively impacted. They suggested several BMP measures that should be considered with permit issuance including: silt curtains, re-contouring of any disturbed lakebed, control of work docks, containment of debris, a mid-November to June timing restriction (no construction or installation during this period), and IDEQ approval of the pump-out station. The letter is incorporated into this document by reference.

l. On June 1, 2009, IDL received (3) e-mails from Norma Jean Knowles, David Wass and Scenic Bay Marina supporting the privatization of Boileau's Marina. Also, (2) e-mails in non-support of marina privatization were received from Powell and Lyn Shoemaker and Jim and Jamie Berube. The e-mails are incorporated into this document by reference.

10. On June 1, 2009, IDL held a public hearing at 6:00 pm in the Timber Lake High School in Spirit Lake, Idaho. Mr. Carl Ritchie, IDL Lands Coordinator/Navigable Waters Specialist served as hearing coordinator. In attendance were Mr. Ed Robinson, IDL Pend Oreille Lake Area Manager; Mr. Jim Brady, IDL Navigable Water Specialist; Mr. Dennis Scott, representing applicant; and twenty-seven (27) 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 testimony of Mr. Scott, provided an overview and power point presentation of the project. Application L-96-S-116J is a revision of L-96-116I that proposes to privatize 12 existing float home slips and 12 existing boat slips and replace a sewer line to service a relocated float home. The sewer line was previously approved under application L-96-S-116I, on January 14, 2009, but other aspects of that application were denied. The revised application L-96-S-116J clarifies several concerns and conflicting information documented during consideration of the previous application.
 - i. Mr. Scott stated the littoral rights issue is resolved. All littoral rights have been assigned to the Association (Harborview Condominium Owners Association, Inc.).
 - ii. The small swim dock that was in violation of the existing permit has been removed from Lake Pend Oreille.
 - iii. During processing of the previous application, L-96-S-116I, it appeared that the parking necessary for Boileau's marina, which uses part of the same parking lot as Harborview marina, would invalidate the Harborview permit because the combined amount of parking for the two marinas would exceed what was available. Mr. Scott indicated that no conflict exists. Boileau's Marina has 113 slips and 12 float homes. A single float home is equal to two (2) boat slips, therefore, the 12 float homes equate to 24 boat slips. In total there are 137 slips. The privatization would convert 36 slips (12 boat slips and 12 float homes X 2) to private use. This would convert 26.2% of Boileau's Marina to private use based on total slip count. IDAPA rule does not state what portion of a marina is made private, but if a portion is privatized a condominium association, co-op, or other entity that owns and manages the marina, littoral rights, and upland property sufficient to operate a marina must be created. Harborview Village Condominium Owners Association Inc, is privatizing the docks through a condominium process. The necessary parking spaces (24) as identified in an adjacent parking lot are condominiumized. A specific parking space can be purchased with a boat slip assigned to that space. Some of the spaces need to be available for public use. Management of the parking spaces will be through the Harborview Village Condominium Owners Association (Association).
 - iv. The Association's Master Declaration and Second Supplemental Declaration is part of the application with specific procedures in the application's condominium documents. The Association is owner of the littoral rights and the private submerged lands documented in Permit

Exhibit D of the application. When comparing private moorage, with public moorage they must be of similar size and quality. Comparisons are difficult and could comingle private with public moorage. The Applicant does not believe the rule was intended to require an exact one to one comparison. The Applicant feels the IDL recognizes the desirability of privatizing portions of marinas. This would help with upkeep, maintenance and safety. Related to the parking issue, commercial marinas must provide a minimum amount of upland parking of one (1) parking space per two (2) watercraft moorages. The marina has 113 moorages and 12 float homes, totaling 137 slips. This requires a minimum of 63 parking spaces. The marina has a nearby approved site with 74 parking spaces. This is adequate parking for Boileau's as a public marina. Mr. Scott indicated that there is no parking conflict with Harborview Marina, encroachment permit (L-96-S-74L). Harborview Marina is permitted for 52 moorages and 20 float homes, totaling 72 moorages. This requires 36 parking spaces. At the Harborview Marina site there are 25 platted and 9 un-platted parking spaces, totaling 34. Only 2 additional parking spaces are required at Boileau's Marina parking site, where 11 are available. Therefore, there are no parking conflicts.

- v. Commercial marinas require a boat pump-out system. Boileau's Marina is proposing to install a pump-out system. The system can be connected to a vacated sewer line from a relocated float home.
- vi. The placement of privacy gates is proposed to separate the marina's public and private portions. Most of the boat moorages would be open to the public. Public access would be denied in the private portion. Regulations do not state the public has a right to wander around docks and boat slips. There is a fear of vandalism if left open to the general public. Most public marinas in Idaho have restricted gate access.
- vii. In coordination with the Fire District, Mr. Scott state that they have agreed to install the appropriate number of fire extinguishers at the marina by July 30, 2009, and submit a plan for dry fire lines, notifications, power shut-off labels and addresses to be approved by July 1, 2009, with implementation within 5 years or the sale of the last private parking space, whichever occurs first.
- viii. The Application is for 12 float homes. Some plat maps show 17 float homes. The additional float homes are possible future plans to be addressed by a future permit application.
- ix. The applicant has made Conditional use permit application to Kootenai County Planning to enlarge the existing 74 space parking lot to 102 parking spaces, which includes 3 handicap spaces.

Mr. Scott summarized his presentation by indicating that all prior concerns have been addressed, and the permit should be approved. Mr. Scott's narrative and power point outline 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 eight (8) individuals. George Grandy, representing the Bayview Chamber of Commerce, Development Analysis Committee, and Skip Wilcox, stated that marina parking is not sufficient. There is a conflict between the parking space exhibits and the parking space language. They feel the literal interpretation of IDAPA 20.03.04.015.03(c) is flawed. When the rule is to have shared parking, not all marina patrons require parking at the same time.
- i. A distinction must be made between public and private slips when parking is sold in a condo association. When parking spaces are sold, the space is forever removed from use by the public portion of the marina. Mr. Grandy stated that 77 parking spaces are required at the Boileau's lot (24 private, 50 public, 3 private-other use). He stated that IDL should deny the application as the parking lot should have 77 spaces and only 74 spaces are available.
 - ii. The proposed 99 parking space plan (102 with 3 handicap parking) designates 45 spaces to Boileau's private slips, 12 spaces to Harborview Marina, and 42 spaces to Boileau's public slips. Permit (L96-S-74L) was approved based on Harborview Marina parking at Boileau's lot. Application (L-96-S-116J) has no Harborview parking at Boileau's lot. This application for parking would make Harborview Marina's parking out of compliance. Harborview Marina parking is not sufficient. There are 45 spaces available and 50 needed.
 - iii. A County site development permit is required to increase the size of the Harborview Marina parking lot from 25 to 45 parking spaces. Harborview Marina plans to sell 25 parking spaces at their lot. Some parking spaces are not available due to the office building. The additional expansion permitted at Harborview Marina will require 50 spaces.
- c. Ken Saunders made a comparison of public and private moorages and float homes based on total square foot coverage. Included were the gas and patio docks and all gated approaches within the marina's private section. Mr. Saunders calculation indicates that the Applicant's calculations are flawed based on total square feet coverage. The marina's privatized portion would be 58% and not 29.2% as stated by the Applicant. He quoted IDAPA 20.03.04 § 015.03g, and feels that 2 average boat slips do not equal 1 float home. The application did not actually use the private area square foot calculation, so public and private moorage was not compared. Mr. Saunders stated that you must use actual square foot coverage for comparison because the patio/gas dock leases make them private. He also stated that all private areas gated off should be included in the total square foot calculation.
- d. Mr. Hobart Jenkins indicated that there are discrepancies between the sewer district records and what was presented in the application. These discrepancies need to be reconciled prior to any activity by IDL.

- e. Kathy Ellis indicated that the property rights associated with Boileau's Marina are confusing. She stated Boileau's Marina only has 21.62 feet of lake 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. She indicated that due to various property transactions, the marina has no legal access from the upland because there are no easements for float home owners or boats from the nearest public street. She noted that the ownership interest presented in Exhibit B, the Second supplement, adds up to 1% not 100%, and if that is the case, IDL does not know who controls the marina. She suggested the application should be denied.
- f. Mr. Jim MacDonald stated Waterford has not put in promised pump-out stations at the three marinas operated by the Applicant.
- g. Mr. Robert Brooke mentioned the parking concern, promises of pump-outs, intertwined ownerships and stated permits should not be issued with conditions.
- h. Mr. Mike Lee feels developers should follow rules and preserve the quality of the lake. He stated that Bayview Creek which runs under the parking lot in a culvert should be brought to the surface. It was once a spawning stream.

Exhibits from Mr. Grandy, Mr. Wilcox, Ms. Ellis, Mr. Hobart, and Mr. Saunders and are incorporated into this document by reference.

- 11. Public testimony in support of the project was presented by three (3) individuals:
 - a. Bert Batchelder stated that he is a Boileau's float home owner. He is mainly concerned that the state should protect the float home owners and purchasers.
 - b. Fritz Sander is a Boileau's float home owner and feels privatization works. Security is high on peoples mind. If they purchase or rent they want it secure.
 - c. Kevin Holt clarified that the access for both public and private patrons is provided by a public access easement across a small piece of property. He also addressed the question Kathy Ellis raised related to the governing documents and the number of votes (see discussion of 1% versus 100% under 10. E. above). The one vote is actually 100 percent of the votes.

III. CONCLUSION 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.
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. IDAPA 20.03.04.015.03(e) states "Commercial marinas must have a minimum of fifty percent (50%) of their moorage available for use by the general public."
9. 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."
10. 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."
11. The marina contains 113 boat slips and 12 float home 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).
12. The Applicant proposes to privatize 12 boat slips and 12 float homes at Boileau's Marina. The controlling entity is the Harborview Village Condominium Owners Association, Inc. which is registered with the Secretary of State of the State of Idaho.

Ownership of the boat slips and float homes will be through the purchase of individual parking spaces at Boileau's parking facility. Through the ownership of a parking space, the purchaser will have exclusive use of a boat slip or float home in a privatized portion of the marina.

13. Boileau's Marina parking lot has 74 approved parking spaces. With the sale of 24 parking spaces during the marina's privatization, 50 parking spaces will remain available for public marina use. The privatization of 12 boat slips and 12 float homes (12 + 24 = 36 slips) at Boileau's Marina reduces the number of publicly offered boat slips from 137 to 101. The 50 available upland vehicle parking spaces will satisfy public parking needs, even if all privatized parking spaces are removed from the equation.
14. Testimony from several individuals addressed the question of how many spaces in the Boileau's parking area should be dedicated to Harborview Marina (permit number L-96-S-74L). It was confirmed with IDL staff at the Pend Oreille office that there currently is adequate parking for Harborview Marina separate of Boileau's. The Kootenai County letter dated May 29, 2009, adds additional guidance that parking is adequate at Harborview Marina. Testimony related to a lack of adequate parking at Harborview Marina is in error and will be disregarded when reviewing the application at hand.
15. George Grandy's letter dated May 18, 2009, stating IDL's Mission Statement includes protection of Idaho's natural resources for maximum returns to beneficiary institutions such as the using public is in error. Public Trust Land, bed of Lake Pend Oreille, is not a beneficiary institution and will be disregarded when reviewing the application at hand.
16. George Grandy's testimony and exhibit at the June 1, 2009, hearing indicated the need for 77 parking spaces for Boileau's Marina. The additional parking spaces are presumed to be used by employees for businesses associated with the marina's operation. It is not unusual for commercial marinas to employ people for their daily operations. The current commercial marina parking rules (one parking space per two watercraft moorages) take into account the reality that many commercial marinas have some associated add-on business. Consequently, this hearing officer calculates the total parking spaces needed with this application at Boileau's to be 74 rather than 77. As Mr. Grandy and Mr. Wilcox noted in their testimonies, the Applicant has applied for a conditional use permit to expand the marina's parking to 102 spaces. References to the application's exhibits B, D and sheet 4 of 7 are either descriptions, plats or design plans for a future expansion, either waterward or upland, and have no bearing concerning this application.
17. Mr. Ken Saunders feels the amount of public moorage vs. private moorage as required in IDAPA20.03.04 §015.03g is flawed. He believes the application's public vs. private area calculations to be incorrect. This hearing officer concludes the Applicant has made sufficient effort to keep moorages at Boileau's Marina greater than 50% for public use. (My estimate is approximately 74% public moorage by slip

count and approximately 60% public moorage by dripline area.) The public and private moorages are comparable and similar in size. As part of the public vs. private issue are the patio (restaurant) dock and gas dock, which Mr. Saunders considers to be private as they are on greater than one year leases. Both facilities offer services to the general public and are typical business operations associated with a commercial marina and would be considered a part of the marina's public use area.

18. Ms. Kathy Ellis feels that public access to the marina could be restricted as a small portion of the upland has been deeded to Watermill, LLC. The approach to Boileau's Marina is attached to the upland strip of land. It appears that the change in upland ownership from Waterford Park Homes, LLC to Watermill, LLC, both registered companies in Idaho, secures an upland easement over Boileau's Resort Condominium property. The instrument would secure ingress and egress for the public enjoyment of Boileau's Marina.
19. IDAPA 20.03.04.015.03.i states, "Commercial marinas with private moorage must form a condominium association, co-op, or other entity that owns and manage the marina. Littoral rights, upland property sufficient to maintain and operate a marina, and private submerged land, if present." The applicant, Harborview Village Condominium Owners Association, Inc., owns the littoral and private submerged land immediately adjacent to the marina. The various filing of deeds for littoral rights and private submerged land to Harborview Village Condominium Owners Association is sufficient to maintain and operate a marina. As long as the public portions of the marina are kept open for public use and the applicable rules are followed, the Idaho Department of Lands could accept the applicant's corporate structure as presented in the application.
20. IDAPA 20.03.04.020.02 states in part "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."
21. The application, permit exhibit D, Littoral Rights Document through quitclaim deeds has granted to Harborview Village Condominium Owners Association the littoral rights and private submerged land adjoining Boileau's Marina. IDAPA 20.03.04.020.07(a) states in part that an application must include:
 - Copy of most recent survey or county plat showing the full extent of the applicant's lot and the adjacent littoral lots.
 - Proof of current ownership or control of littoral property or littoral rights. The area of granted littoral rights that pertains to this application 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.Proof of satisfaction of these requirements was submitted with the application.

22. Additional conclusions related to issues brought up at the hearing include:

- a. The sewer ER requirements as submitted by Chuck Waller, Chairman of the Bayview Water and Sewer District, indicate Boileau's Resort (marina) will have 0.4 unused ER's after this proposal and would be in compliance with sewer district requirements.
 - b. Mr. Jim MacDonald commented on the need to put in boat pump-out stations at the applicant's three marinas properties. A requirement of Panhandle Health is that all commercial marinas are to have a boat pump-out station. The application addresses the installation of a boat pump-out system as part of the marina's gas dock facility.
23. The Applicant and IDL satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1306 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application for the partial privatization of a commercial marina, relocation of a float home sewer line and the installation of a boat pump-out station 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 Applicant's request to **partially privatize (12 boat moorage slips and 12 float homes) a commercial marina and install a new pump-out station** as part of the commercial marina facility.

I also recommend that permit conditions include measures to protect water quality that adequately address input from agencies including sewage disposal requirements from IDEQ and Panhandle health.

DATED this 21 day of July, 2009



Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23RD day of July, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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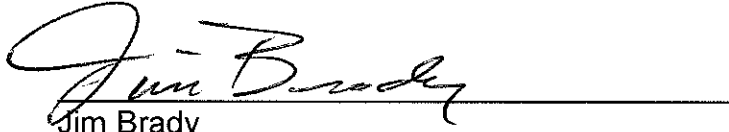
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