Thomas M. Schultz, Jr.
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-95-S-5456	)	**FINAL ORDER**
Gary Schenkenberger	)	
	)	
Applicant.	)	
_____	)	

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on September 21, 2011 at 2:00 pm PDT at the IDL Mica Supervisory Office in Coeur d'Alene, Idaho. Kenneth E. Ockfen served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on October 31, 2011.

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

- I have read the transcript of the public hearing conducted in Coeur d'Alene, Idaho on September 21, 2011.
- 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 docks, 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.

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-95-S-5456 be approved and the permit be issued by the Mica Supervisory Area to the Applicant.

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 the 7th day of November, 2011.

Thomas M. Schultz, Jr.
Director

October 31, 2011

MEMORANDUM

TO: Tom Schultz, Director

FROM: Kenneth E. Ockfen, St. Joe Area Manager

SUBJECT: Public Hearing – Navigational Encroachment L-95-S-5456 for Gary Schenkenberger

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-95-S-5456) on Lake Coeur d'Alene, a navigable lake in Idaho. The application proposes to construct a single family dock. 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. According to a recorded quick claim deed, instrument number 142668 was recorded in the Kootenai County Recorder's Office on November 1, 1995, creating parcel 48N04W-14-4970 which contains 7,200 square feet and has approximately 75 feet of water front on Lake Coeur d'Alene.

2. On July 27, 2011, Gary Schenkenberger (Applicant) submitted to IDL an encroachment permit application (L-95-S-5456) requesting approval to construct an encroachment adjacent to parcel 48N04W-14-4970 on Lake Coeur d'Alene. Please refer to Attachment 1 for a list of the application materials.

3. Application L-95-S-5456 proposes installation and maintenance of a single family dock consisting of;
   a. 4' x 20' pier,
   b. 3' x 17' gangway,
   c. An "L" shaped dock, one leg 8'x30' and the other leg 10'x30'.

4. IDL initiated the processing of Application L-95-S-5456 as a noncommercial navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1305) and the associated Rules (IDAPA 20.03.04.025).

5. IDL notified the adjacent littoral landowners in writing on August 3, 2011.

6. IDL was notified on August 9, 2011 by both adjacent littoral landowners of their objections to this project. IDL responded by scheduling a public hearing in accordance with IDAPA 20.03.04.025.04.

7. The following substantive written comments were received by IDL from the public. These comments focused on the lot owned by Mr. Schenkenberger and whether it was validly created.

    a) Leslie Sturdivant submitted written comments on August 9, 2011, in which she points out that at the time the lot was created in 1995 it was 7,200 square feet in size, which did not conform to the existing ordinance (subdivision ordinance 26A, passed in 1973 required lots to be 8,250 square feet in size). She further points out that the parcel was recognized by Kootenai County Building and Zoning Department as "unbuildable" because it did not meet the minimum size requirement. She included selected pages of the 1973 and 2007 county ordinances relating to this topic.

    b) Chuck Hilliard submitted a June 7, 2005 e-mail sent by Dan Martinsen, Assistant Planner for Kootenai County Building and Planning Department, to Leslie Sturdivant. . Mr. Martinsen stated that no structures, accessory structures or RV use were allowed on the parcel.

8. On September 21, 2011 IDL held a public hearing at 2:00 pm in the IDL Mica Area Office in Coeur d'Alene, Idaho. Mr. Kenneth E. Ockfen, St. Joe Area Manager served as the hearing coordinator. Those attending were Jim Brady, IDL Navigable Waters Specialist Sr.; Mike Denney, IDL Area Manager for Mica Supervisory Area; Gary Schenkenberger, Applicant; and Chuck Hilliard, owner of an adjacent littoral lot. Mr. Hilliard was also represented Leslie Sturdivant, the owner of the other adjacent littoral lot. The public hearing was recorded on audio tape and was subsequently transcribed.

    a. The Applicant, Mr. Schenkenberger, was given an opportunity to provide a brief description of his proposed project. Mr. Schenkenberger felt that the purpose and the physical dimensions and components of his proposed single family dock were adequately described in the application and did not know what further detail he could provide. However, he did wish to address the legitimacy of his lot. He stated that at the time he purchased the property he was aware that the county would not issue a building permit because of the lot size, but he had the understanding that a dock would be allowed. He went on to say that he started this application process two years ago, but the process stopped when he was told he had an illegally created lot. He said recently that the county staff was very apologetic when they realized that someone on their staff several years ago had erroneously placed a note on the title of this parcel indicating his lot was illegally created. Through research with the county, he learned that his lot was created on November 1, 1995 before the November 17, 1995 ordinance. The November 17, 1995 ordinance would not have allowed the creation of a lot the size of the subject property.

Mr. Schenkenberger stated that in further discussions with the county planning and zoning staff (as recently as the morning of the hearing), that he had been told by the county that he could place a shed on his lot, providing it was smaller than the minimum size requiring a building permit. He also felt that he had a right to enjoy his property, including pitching a tent and camping. In response to concerns about sanitation, he said that two years ago when he first applied for the dock, someone was interested in buying the lot with a dock for mooring a house boat which was self contained. He also pointed out that there are numerous properties around the lake that make use of port-a-potties because they can't get septic permits.

b. Mr. Hilliard testified in opposition. He also spoke on behalf of Leslie Sturdivant, the other adjacent landowner. His comments reflected primarily two concerns, sanitation and property values. Mr. Hilliard expressed great concern that the parcel currently owned by Mr. Schenkenberger had been created in 1995 under subdivision ordinance 26A (passed in 1973), but did not meet the minimum size required by that ordinance. He made reference to a written comment he received from Dan Martinson, Assistant Planner in 2005 indicating he (Martinson) had gotten a consensus vote that no structures, accessory structures, decks, sheds, RV's were allowed on this illegal, non-conforming lot. Mr. Hilliard argued that even port-a-potties should not be allowed. Mr. Hilliard felt that any use of the property would produce a sanitation concern, pollute the lake, and anything left behind would be an eye sore. Mr. Hilliard argued that any use of the parcel would lower the values of adjacent properties.

9. Three documents were submitted to the Hearing Coordinator by the Applicant, and were identified as;
    - Quitclaim Deed – 1420668
    - Exhibit A- File Number: 57798
    - Ordinance No. 401/Case No. OA-133-06 (Zoning Ordinance Amendments) page 12 of 128 Dated May 24, 2007

10. Six documents were submitted to the Hearing Coordinator by Mr. Hilliard, and were identified as;
    - Comments with embedded documents (5 pages) and labeled as "submitted by Chuck Hilliard".
    - Document labeled as "1973 zoning ordinance #11" (3 pages)
    - Ordinance No. 401/Case No. OA-133-06 (Zoning Ordinance Amendments) pages 33-36 of 128 Dated May 24, 2007
    - Assessor Land and Title History – Serial #146565
    - E-mail from Dan Martinsen, time dated 6/7/2005 10:32am
    - E-mail from Ben Tarbutton, time dated 1/8/2008 1:13pm

11. The application, notices, letters, transcript, file, documents referenced herein and all associated documents are incorporated into this record by reference.

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 Coeur d'Alene 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. Idaho Code § 58-1302(h) and IDAPA 20.03.04.010.15 defines navigational encroachments as docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake.

5. 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 landowners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.

6. 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. Procedures and criteria for decisions on noncommercial navigational encroachment applications are found in Idaho Code § 58-1305 and IDAPA 20.03.04. As evidenced in the record, all of the procedural items in processing the application have been satisfied for a single family dock.

8. IDAPA 20.03.04.010.33 defines Riparian or Littoral Owner as the fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant. The record shows that Mr. Schenkenberger is a littoral owner, as he owns parcel 48N04W-14-4970 which is immediately adjacent to Lake Coeur d'Alene.

9. IDAPA 20.03.04.010.36 defines single family Dock as a structure providing noncommercial moorage that serves one (1) waterfront owner whose waterfront footage is no less than twenty-five (25) feet. The record shows that, the site has seventy five feet of water frontage and thus satisfies this criterion.

10. IDAPA 20.03.04.015.13.b limits the surface decking area of a single family dock to seven hundred (700) square feet. The proposed dock does not exceed seven hundred square feet.

11. IDAPA 20.03.04.015.13.e establishes a presumption that a single family encroachment located closer than ten (10) feet from an adjacent littoral property will have an adverse effect. The applicant's proposed dock will be 35 feet from one property line and 10 feet from the other property line. The proposed dock is not less than ten (10) feet from the adjacent littoral properties and thus, it is presumed there will be no adverse impact. There is no evidence that the dock itself will have an adverse impact.

12. IDAPA 20.03.04.015.13d provides the that docks, piers, or other works may extend to a length that will provide access to a water depth that will afford sufficient draft for water craft customarily in use on the particular body of water, except that no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director. The existing line of navigability has been established for this area by previously approved encroachments and by existing uses. The applicant's dock as proposed does not extend beyond the established line of navigability.

13. IDAPA 20.03.04.60.04. Limits the time for the construction of all activities authorized within the scope of the encroachment permit to three (3) years of issuance date. If the activities are not completed within three (3) years, the permit shall automatically expire unless it was previously revoked or extended by the department. As conditioned the applicant has three (3) years to construct the proposed encroachments.

14. The pertinent part of Kootenai County Zoning Ordinance No. 401 definition of Lot is subsection B, which reads as follows:

> *"Lot - For purposes of this title, a lot shall meet one of the following criteria...*
> *B. A lot created after January 3, 1973, and prior to November, 17, 1995, that was not created by the County's subdivision process, that is described by metes and bounds or aliquot parts, the conveyance and description of which has been so recorded in the Kootenai County Clerk and Recorder's Office, and that has duly recorded legal access to a public road. Access to the lot shall meet "Access Roadway/Driveway Standards for Residential Properties" or as approved by the applicable Fire Protection District. In cases where width is*

fixed by easement, or where topographic features present an undue hardship, a variance may be applied for as set forth in Chapter 23 of this title ; Or...".

The subject parcel was created by a deed recorded in the Kootenai County Recorder's office after January 3, 1973, and prior to November, 17, 1995 with a metes and bounds description. This conforms to subset section B of the Kootenai County definition of a lot and therefore, the lot is deemed a legally created lot.

15. Standard Term 7 of IDL Encroachment Permits states that permits are not valid until an identification number is displayed on the outermost area of the encroachment.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

The focus of the objections centered on whether or not the parcel owned by Mr. Schenkenberger was buildable and legally created. Since the parcel meets the local jurisdiction's definition of a lot, it is considered a legal lot. The fact that the applicant cannot build on the lot does not remove the littoral rights associated with the property. The property owner does have the right to apply for an encroachment in accordance with the Lake Protection Act.

Additional issues raised during the hearing were sanitation and what upland uses are permitted. These issues are outside the jurisdiction of IDL.

The applicant is applying for a single family encroachment on a legally created waterfront parcel. The proposed encroachment is within the littoral rights of the applicant and complies with the IDL's dock standards under the Lake Protection Act.

Based upon the information provided to me as the hearing coordinator and the findings of fact and the conclusions of law contained herein, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should approve encroachment permit L-95-S-5456, with the following conditions:

Conditions of Approval

1. The encroachment must be constructed within three years of issuance of the encroachment permit.
2. The encroachment permit number must be clearly displayed on the outermost part of the encroachment.

Dated this 31st day of October, 2011.

Kenneth E. Ockfen
Hearing Coordinator

Attachment 1
Application Materials for Permit Application L-95-S-5456

The application contained the following documents:

A. Joint Application for Permits. A two page document with e-mail cover letter.
B. Kootenai County Assessment record for Parcel #48N04W144970, One page.
C. Tax Lot Plat SW ¼ Sec. 14 Twp. 48N. R. 4W.B.M., One page.
D. Aerial Photo with Scale and Site Information.
E. Diagram of the single family dock with dimensions, One page.

Attachment 2
Notification and Consent Forms

F. Courtesy Notifications of Application for Encroachment. Two pages.
G. Consent Form – Received from L. Sturdivant. Two pages.
H. Consent Form – Received from C. Hilliard Two pages.

Attachment 3
Correspondence

I. Letter from Leslie Sturdivant dated 8/9/11 with attachments. Eleven pages.
J. E-mail from Chuck Hilliard – "Dan Martinson 2005 e-mail". Two pages.
K. Hand written note from Ben Tarbutton dated 10/1/2010. One page.
L. E-mail sent by J. Brady to Roger Jansson.
M. E-mail sent by J. Brady to Ms. Sturdivant and Mr. Hilliard.
N. E-mail from J. Brady to Chuck Hilliard dated 9/20/11.
O. E-mail from L. Sturdivant to J. Brady dated 9/20/11.

Attachment 4
Miscellaneous

P. Screen print of County record. One page.

Attachment 5
Documents submitted at Public Hearing

Q. Documents submitted by Mr. Schenkenberger. Three pages.
R. Documents submitted by Mr. Hilliard. Seventeen pages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2011, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Gary Schenkenberger
1045 N. 21st Street
Coeur d'Alene, ID 83814

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

Charles Hilliard
330 SW Prairie Ct.
Pullman, WA 99163

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

Leslie Sturdivant
3228 W. Cora Ave.
Spokane, WA 99205

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

KENNETH E. OCKFEN
IDL, St. Joe Area Manager