

Thomas M. Schultz, Jr.  
Director  
Idaho Department of Lands  
300 N. 6<sup>th</sup> Street, Suite 103  
P. O. Box 83720  
Boise, ID 83720-5956

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of Application for a Single	)	
Family Dock, Encroachment Permit No.	)	<b>FINAL ORDER</b>
L-95-S-364A	)	
	)	
DAVID NANNI	)	
	)	
Applicant	)	
	)	
	)	
	)	
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#### I. NATURE OF PROCEEDINGS/ISSUES

An administrative hearing was held June 12, 2012, at 8:30 a.m. PDT at the Idaho Department of Lands Mica Supervisory Area Office in Coeur d'Alene, Idaho. Edward Robinson served as the Hearing Officer. The Hearing Officer issued his Recommendations on July 20, 2012.

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 contested case hearing conducted in Coeur d'Alene, Idaho on June 12, 2012.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Officer'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 Chapter 13, Title 58, 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 Officer.

**III. CONCLUSIONS OF LAW**

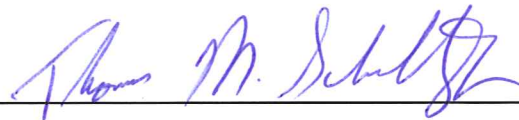
I concur with the Conclusions of Law presented by the Hearing Officer.

**IV. FINAL ORDER**

On the basis of the record, it is my order that Encroachment Permit L-95-S-364A be approved by the Mica Supervisory Area.

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 25<sup>th</sup> day of July, 2012.



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Thomas M. Schultz, Jr.  
Director

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SUPERVISORY AREA**  
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**STATE BOARD OF LAND COMMISSIONERS**  
*C. L. "Butch" Otter, Governor  
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Tom Luna, Sup't of Public Instruction*

July 23, 2012

## **MEMORANDUM**

To: Tom Schultz, Director

From: Edward Robinson, Area Manager – Pend Oreille Lake Area

Subject: Administrative Hearing - Navigational Encroachment L-95-S-364A,  
Applicant – David Nanni

### **I. INTRODUCTION**

The following document, which includes a recommendation for your consideration, was prepared following an administrative hearing conducted by the Idaho Department of Lands (IDL). The hearing was conducted on June 12, 2012, in conjunction with the processing of an encroachment permit (L-95-S-364A) on Lake Coeur d'Alene, a navigable lake in Idaho. The applicant proposes to construct a 696 square foot dock, replacing an existing dock.

Jurisdiction in this matter rest with the 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 or about April 12, 2012, David Nanni (applicant) submitted to IDL an encroachment permit application (L-95-S-364A), requesting approval to replace an existing dock with a new dock on Lake Coeur d'Alene adjacent to parcel Tax Parcel 7748, Section 17, Township 48N, Range 4W. The physical address of the property is 19730 S. Watson Road, Coeur d'Alene, Idaho.
2. Application L-95-S-364A proposes replacement of the existing dock with a new dock consisting of a 596 square foot slip dock with a 100 square foot approach for a total size of 696 square feet. The application drawing shows the specific proposed dimensions.
3. IDL initiated the processing of Application L-95-S-364A as a single family navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1305) and the associated Rules (IDAPA 20.03.04.025).

4. On May 4, 2012, the Idaho Department of Lands Mica Supervisory Area office received a signoff sheet dated April 26, 2012, from Rick Scarsella, the neighbor to the southeast of David Nanni, indicating no objection to the proposed encroachment.
5. In a letter dated May 1, 2012, in response to a Courtesy Notification of Application, Tony and Nancy Crater, neighbors immediately to the northwest of David Nanni, indicated "We understand that the new property owners have improvement rights and that they are following the Idaho Department of Land Permit requirements", but expressed concern "...with the measurements of the property owner's new dock and it's impact on the safety and protection of our recreation area." This letter also stated: "The owner's new dock will have a 30 ft. boat slip. The exit an(d) [sic] entrance for this boat slip is 23 ft. from the property line, thus indicating a boat or vessel over 23 ft. would need equally that much space to navigate in and out of the boat slip. The navigation may impact our recreation space as well as the safety of our dock and swimming area."
6. On May 24, 2012, in an email to Roger Johnson, IDL Resource Specialist, Navigable Waters, Tony Crater asked that any further correspondence related to the David Nanni dock encroachment permit be directed to Mark Kamitomo.
7. On May 25, 2012, in an email to Mark Kamitomo, Roger Johnson discussed IDAPA rules related to encroachments, some items specific related to this situation, and stated that if the objections raised by Mr. Crater were not removed in writing, IDL would be required to schedule a hearing.
8. On June 12, 2012, at approximately 8:30 a.m., IDL held an administrative hearing at the Mica Supervisory Area office in Coeur d'Alene, Idaho. Mr. Edward Robinson, Pend Oreille Lake Area Manager, served as the hearing coordinator. Those attending included: David Nanni (applicant) and his wife Anne Nanni; Sandy Young, agent for the applicant; Tony Crater, objector and owner of an adjacent riparian lot; Mark Kamitomo, counsel for Mr. Crater; Roger Johnson, IDL Lands Resource Specialist, Navigable Waters; and Jim Brady, IDL Lands Resource Specialist Senior, Navigable Waters. The hearing was recorded on audio tape and was subsequently transcribed. A portion of the beginning introductory comments were not recorded due to a technical issue, and the transcription for that portion of the hearing was prepared using the hearing script.
9. David and Anne Nanni were given opportunity to testify at the hearing. Sandy Young spoke as their representative. She testified that the application is to replace a dock, which has been in existence since 1974 and is now in disrepair, with a new dock; and that the application submitted met all IDL requirements for size and setbacks to property lines. She indicated that the planned encroachment was 23 feet from the Crater property line to the northwest, and 45 feet from the Scarsella property to the southeast, and that these dimensions



were in accordance with the IDAPA 10-foot minimum setback rule. She indicated that the total size of the dock including the gangway would be 696 square feet which was within the maximum size that IDL allows for a single family dock. She discussed the concern about the Craters' recreation area. She stated that the Nanni dock is approximately centrally located on their parcel. She described the location of the Craters' dock on the southeastern side of the Craters' property near the Crater/Nanni property line and questioned why the portion of the Crater property to the southeast was so significant to the Craters for recreation. She also submitted photos of the boats owned by Mr. and Mrs. Nanni (a 24-foot power boat and a 29-30-foot sail boat) and stated they were not out of the ordinary for boats one might see on Coeur d'Alene Lake. Ms. Young submitted the following exhibits:

Exhibit A: Photo of a damaged pile on the existing Nanni dock

Exhibit B: Aerial photo of the general area showing the Nanni property and dock in relation to neighbors

Exhibit C: Close up of Exhibit B showing primarily the Nanni and Crater docks

Exhibit D: Assessor's office photo showing the Crater property

Exhibit F: Photographs of the Nannis' boats

Exhibit G: Photo taken from Nannis' deck showing the Crater and Nanni docks

Exhibit H: Photo of the shoreline depicting a rough estimate of the Crater/Nanni property line made by Sandy Young

(Exhibit E was not submitted)

10. Tony Crater was given the opportunity to testify. Mark Kamitomo spoke as his representative. Mr. Kamitomo stated that the objection has to do with safety involved with the proposed 30-foot slip and with parking of a sailboat on the inside of that dock. He discussed that if a 29-30-foot sailboat was going to be parked on the inside of the slip, then to back it out would require that it infringe upon the littoral line of the Craters' property since there is only a 23-foot set back from the egress portion of the dock. He indicated that the Craters' have traditionally used this area for swimming, and that backing a motorized or non-motorized boat into that area would present a safety risk to people in that area. He questioned why the dock had to move forward by five feet. He discussed that if the dock was relocated closer to the Scarsella property allowing 45 feet on the egress side to the Crater littoral line that this would address the Craters' safety concerns. Mr. Kamitomo passed out a written objection to the application. The

objection argued that the department must determine the littoral rights of adjacent landowners when they contemplate issuance of a permit and that safety of the adjacent landowners needs to be taken into account. He discussed that if the dock was moved 5 to 10 feet closer to the other adjacent owner that this would satisfy the Craters' concerns. He augured that: "...IDL must weigh the risks and benefits to both Craters and the Nannis in determining whether the encroachment permit should be granted". He requested that the department deny the current proposal due to the safety risk.

11. The objection included the following exhibits:

Exhibit 1: Letter from HDB Marine with "attachment for Encroachment" form, drawing of the proposed dock, and map.

Exhibit 2: Courtesy Notification Letter from Roger Johnson, Lands Resource Specialist, to Tony Carter (Crater) [sic].

Exhibit 3: Letter from Tony and Nancy Crater to Roger Johnson (IDL) expressing concern with measurements of the proposed dock and its impact on safety and protection of their recreation area.

Exhibit 4: Letter from Sandy Young, Principle Planner with Verdis, to Mark Kamitomo, representative for Tony and Nancy Crater.

Exhibit 5: Chronology prepared by Tony Crater.

12. The hearing coordinator questioned Roger Johnson, IDL Lands Resource Specialist, about a concrete structure on the Nanni property which extends beyond the ordinary high water mark. Mr. Johnson confirmed that evidence had been presented that showed that this structure had been in place pre-Lake Protection Act and satisfied concerns that the Department had about that structure.

13. In response to a question posed by the hearing coordinator at the hearing, Roger Johnson, IDL Lands Resource Specialist, testified that the distances listed in the application to the adjacent property owners were the distances to the littoral lines. Therefore, distance from the proposed dock to the Crater littoral line is twenty-three (23) feet.

14. The hearing coordinator visited the site on Wednesday, June 20, 2012, to view the locale and the existing dock configurations.

15. The application, letters, transcript, file, and other 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 waters in the state of Idaho. IDL is the administrative agency of the Board, 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., encroachments of any kind on, in or above the beds of Lake Coeur d'Alene require a permit prior to encroaching on the lake. The applicant has littoral rights on Lake Coeur d'Alene as required by ADAPA 20.03.04.
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 and 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. The Lake Protection Act delegates no authority to IDL for the regulation of vessels. Vessels are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation, the local County Sheriff, and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act).
5. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code title 58, chapter 12, and 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 commerce, navigation, fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance by IDL with its' legislative authority is not sufficient to determine if its actions comport with the requirements of the Public Trust Doctrine.
6. Idaho Code §58-1302 (h) 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 of waters of a navigable lake.
7. Procedures, criteria and standards for single and two family docks are defined in Idaho Code § 58-1305 and IDAPA 20.03.04. The proposed encroachment meets the standards of IDAPA 20.03.04.
8. IDAPA 20.03.04.015.13.e states that it will be presumed, subject to rebuttal, that single family navigational encroachments will have an adverse effect upon littoral

rights if located closer than ten (10) feet from littoral right lines. The proposed encroachment lies 23 feet from the Crater littoral line to the North, and is 45 feet to the Scarsella littoral line to the South, it is thus presumed there will be no adverse impact.

9. The Applicant has satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1305 and IDAPA 20.03.04.

#### **IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS**

The applicant, Nanni, has submitted an application for a single family navigational encroachment. The objection raised by Crater centers on safety issues related to the location of the end of the proposed dock being twenty-three feet from the Crater littoral line and on perceived infringement of the Craters littoral rights.

Littoral rights are defined in IDAPA 20.03.04 as "The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and make use of their rights as riparian owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake."

As mentioned above, IDAPA 20.03.04.015.13.e states that encroachments will be presumed to have an adverse effect if located closer than ten (10) feet from the littoral right lines. The protestants, the Craters, have attempted to rebut this presumption by testimony and photographs concerning the use of the waters in their littoral zone for swimming, and the impact that the applicants might have on swimmer safety when navigating into the new dock. In other words, the main objection to the dock appears to be concerns for swimmer safety, and they assert that this should require the applicants to move their dock further away from the littoral zone of the Craters.

Although IDL recognizes the safety concerns expressed with the objection, IDL's role in this matter is the regulation of lake encroachments. Boat and swimmer safety is not regulated pursuant to the LPA; that is the responsibility of the local authorities. The subject dock well exceeds the minimum 10-foot setback. IDL further notes that the Craters own shoreline northwest of their dock (visible in Exhibit C provided by Sandy Young during her testimony), appears to provide ample opportunity for swimming other than the area adjacent to the property line with the applicants. The Craters' littoral rights do not grant them exclusive use to the waters in their littoral area. Those waters remain open to the public for swimming, boating, fishing, etc. The public would have a right to navigate in this area. So long as the applicants use the reasonable care that is required of all boat operators on Idaho waters, IDL does not believe the new dock will create a safety hazard. IDL thus concludes that the Craters have failed to rebut the presumption that the proposed dock will have an adverse impact on their littoral rights.



The hearing coordinator finds that the application meets the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04

Based upon the information provided to me as the hearing coordinator, 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 application L-95-S-364A submitted by the Applicant.

Dated this 23<sup>rd</sup> day of July, 2012



Edward Robinson  
Hearing Coordinator

**CERTIFICATE OF SERVICE**

I \_\_\_\_\_ HEREBY CERTIFY that on this \_\_\_\_\_ day of July, 2012, I caused to be served a true and correct copy of the forgoing document, by the method indicated:

Sandy Young  
Verdis  
602 East Garden Avenue  
Coeur d'Alene, ID 83814

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

David and Anne Nanni  
1220 East 20<sup>th</sup> Avenue  
Spokane, WA 99203

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

Mark Kamitomo  
Attorney At Law  
West 421 Riverside Avenue, Suite 1060  
Spokane, WA 99210

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

Tony Crater  
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