

Thomas M. Schultz, Jr.  
Director  
Idaho Department of Lands  
300 N. 6<sup>th</sup> St. Ste. 103  
PO 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-884C ) **FINAL ORDER**  
 )  
Leslie Wood and Glenn Harvey dba the Lodge at )  
Sandpoint, Applicant. )  
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**I. NATURE OF PROCEEDINGS/ISSUES**

A public hearing was held on January 30, 2013 at 1:30 pm PDST at the Sandpoint area office located at 2550 Highway 2 West Sandpoint, Idaho. Sid Anderson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on February 25, 2014.

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 Sandpoint, Idaho on January 30, 2014.
- 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 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

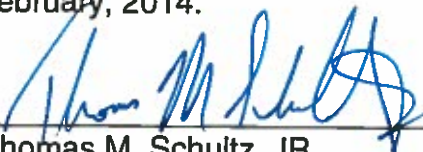
I concur with the Conclusions of Law presented by the Hearing Coordinator.

## IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-96-S-884C be approved and the permit be issued with the recommended conditions to the Applicant by the Pend Oreille Supervisory Area.

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within twenty (20) days of the date of this final order. The agency will dispose of the petition for reconsideration within thirty (30) days of its receipt, in accordance with IDAPA 20.03.04.030.09.

DATED this 28th day of February, 2014.

  
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Thomas M. Schultz, JR.,  
Director

## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

Glenn Harvey & Leslie Wood  
The Lodge at Sandpoint  
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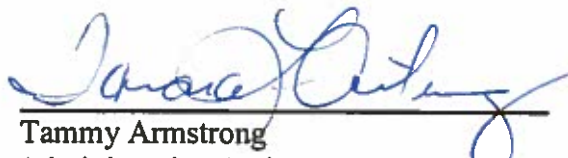
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Tammy Armstrong  
Administrative Assistant

February 25, 2014

TO: Tomas M. Schultz, Jr., Director

FROM: Sid Anderson, Public Trust Program Manager

SUBJECT: Public Hearing – Commercial Marina - Leslie Wood and Glenn Harvey  
dba The Lodge at Sandpoint - L-96-S-884C

### **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 for a commercial marina on Lake Pend Oreille, a navigable lake in Idaho. 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 November 5, 2013 Glen Harvey and Leslie Wood of The Lodge at Sandpoint (Applicant) submitted to IDL an encroachment permit application (L-96-S-884C) requesting the approval to expand and privatize a portion of an existing commercial marina on Lake Pend Oreille. The Applicant proposes an encroachment 139 feet in length by 250 feet wide, containing 13 public slips, 13 private slips, 7 public side ties, 6 private side ties for a total of 2,775 square feet of dock and a wave attenuator. Lance Lane was identified in the application as an authorized agent of Applicant.
2. IDL initiated the processing of the encroachment permit application as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On November 16, and 23, 2013, IDL published in the Bonner County Daily Bee, the required Notice of Application for the encroachment permit application submitted by the Applicant.
3. On November 6, 2013 IDL notified the following parties of the encroachment permit application submitted by Applicant and requested that the parties provide comments to IDL:
  - U.S. Army Corps of Engineers-CDA
  - Idaho Department of Fish and Game
  - Idaho Department of Environmental Quality
  - Bonner County Marine Division
  - Bonner County Public Works

- City of Dover
- Lakes Commission
- Idaho Conservation League
- Lake Pend Oreille Water keeper
- Pend Oreille Lake\*A\*Syst Coordinator
- Adjacent Neighbors

4. IDL received written responses from the Bonner County Planning Department, Idaho Department of Fish and Game, an email from Idaho Department of Water Resources, and objection letters from Patricia Sterling and Michael Sterling.

a. On November 6, 2013 IDL received an email from Idaho Department of Water Resources. The email indicated that the permit was outside of the Department of Water Resources jurisdiction and they had no further comment on the proposal.

b. On November 7, 2013 IDL received a letter from the Bonner County Planning Department. The letter stated that the Applicant is required to obtain a floodplain development permit for any man-made alteration to improved or unimproved real estate. This letter further indicated that the Applicant may be subject to the conditional use permit requirements of Bonner County.

c. On November 21, 2013 IDL received a letter from the Idaho Department of Fish and Game. The letter recommends that best management practices be applied to ensure work is done with as little disruption to aquatic environment as possible.

d. On December 17, 2013 IDL received a letter from Patricia Sterling and a letter from Michael Sterling both objecting to the proposed encroachment and requesting a public hearing. The letters identified the following concerns:

- Impacts on navigation,
- Impacts to fish and wildlife habitat,
- Impacts to aquatic life,
- Impacts to recreation,
- Impacts to water quality,
- Impacts to aesthetic beauty,
- Protection of property, and
- Other upland issues such as road traffic, parking, bathroom facility needs, garbage collection and waste disposal.

5. Based on the request by Patricia and Michael Sterling, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachment. On December 31, 2013 and January 7, 2014 IDL published the required Notice of Hearing in the Bonner County Daily Bee. The public hearing was scheduled for January 30, 2013 at 1:30 pm at the Sandpoint area office located at 2550 Highway 2 West Sandpoint, Idaho.

On January 30, 2013 IDL held a public hearing at 1:30 pm at the Sandpoint area office located at 2550 Highway 2 West Sandpoint. Sid Anderson, Program Manager for the Public Trust program, coordinated the public hearing. In attendance were Ed Robinson, IDL Area Manager; Jim Brady, IDL Navigable Waters Recourse Supervisor; Michele Anderson, IDL Interdisciplinary Program Manager; and Roger Johnson, IDL Resource Specialist Senior; Lance Lane, Agent of the Applicant; Patricia Sterling (Objector); Robert Webber, Sagle Fire district fire chief; Clair Marley, Bonner County Planning Director; Shannon Williamson, executive director of Lake Pend Oreille Water keeper; Steve Hold, President of the Board of the Lake Pend Oreille Water keeper; and four other people attended the hearing.

6. Public Testimony:

- a. Lance Lane (Agent) provided an overview of the project, the project proposal includes 13 public slips, 13 private slips, 7 public side ties and 6 private side ties for a total of 2,775 square feet of dock expanding 139 feet in length by 250 feet in width. Mr. Lane clarified that the Applicants would manage the private slips by assigning them to the lodge and they may choose to sell them with condo units if they sell the lodge in the future. The Public slips will be available for anyone who wishes to rent them.  
Mr. Lane addressed the issues that were raised in the letters from the Sterling's as follows:
  - There is no need for speed limits within the marina because it is within 200 ft no wake zone.
  - The osprey nest near the marina has not been used in five years and there is a new nest on the lodge grounds.
  - There is no problem with invasive species at this location, and if there were in the future it would be in the best interest of the marina to mitigate them.
  - A pump-out station will be installed pursuant to IDAPA 41.01.01.
  - All equipment will be fueled off-site.
  - Best management practices will be applied during construction of the marina.
- b. Patricia Sterling testified that she was concerned with many upland issues including sewage capacity, sewage handling, access, infrastructure, the restaurant, the lodge, and parking. She stated that she was concerned that there didn't seem to be a comprehensive plan for the development.
- c. Robert Webber, Sagle Fire district fire chief, testified in support of this project. He felt that the project would increase public safety, as discussions with Mr. Harvey indicate their district could be provided a slip. If in the future they were able to secure a boat, response times to their 50 miles of shoreline would be dramatically reduced. Mr. Webber also stated that up to this point, the Applicants have been compliant with all requests he has given them.



- d. Lou Goodness testified in support of the project, feeling that the benefit to the community would outweigh any negative impacts.
- e. Clair Marley, Bonner County Planning Director, submitted a letter and planning requirements for upland improvements on the site. Mrs. Marley stated the county requires a conditional use permit for upland facilities, including a marina.
- f. Shannon Williamson, Executive Director of Lake Pend Oreille Water keeper, stated concerns regarding the projects potential impact on nutrient load and water quality.
- g. Steve Hold, President of the Board of the Lake Pend Oreille Water keeper, raised concerns about the spread of invasive species.
- h. Steve Miller testified in support of the project. He felt that the project would have an overall positive impact upon the community. He also stated that since the no wake zone is from the end of docks, this proposal will reduce wave action against the shore line by extending the no wake zone out 139 feet.
- i. Lance Lane clarified that the length of the dock is proposed at 139 ft, the pilings are designed with a 12 ft span, and the attenuator is the full width of 250 ft dock with a height of 7 ft.

7. The application, notices, letters, transcript, file, previous hearing record, 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 Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). Therefore encroachments of any kind on, in or above the beds or waters of Lake Pend Oreille require an encroachment permit prior to any encroachment on the lake. The Pend Oreille River was formerly a free flowing river, the bed of which is owned by the State of Idaho. Albeni Falls Dam impounded the Pend Oreille River and raised the level of Lake Pend Oreille creating an artificial high water mark of 2,062.5.

3. IDAPA 20.03.04.012.02 requires that encroachments of any kind on, in, or above the beds of a navigable lake require a permit prior to encroaching on the lake.

4. 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.
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.
6. Idaho Code § 58-1306(e) requires that in recognition of continuing private property rights in lands lying between the natural or OHWM and the AHW, IDL shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for either a non-navigational encroachment or a commercial navigational encroachment not extending below the natural or OHWM.
7. 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 court in KEA stated that encroachment permits and submerged land leases remain subject to the public trust. 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.
8. Procedures and criteria for decisions on commercial encroachment applications are found in Idaho Code § 58-1306 and IDAPA 20.03.04.030.
9. Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the regulation of boats and water craft. Water craft are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation and local County Sheriff's Departments and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act).
10. Idaho Code § 58-1302(h) and IDAPA 20.03.04.010.15 defines encroachments in aid of navigation "means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake. The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments."" The proposed encroachment is a navigational encroachment because it is intended to support water craft and moorage.
11. IDAPA 20.03.04.010.09 defines a commercial marina as "a commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public." IDAPA 20.03.04.010.10 defines a commercial navigational encroachment as "a navigational encroachment used for commercial purposes." The proposed docks and

moorage facilities are a commercial marina.

12. DAPA 20.03.04.015.03(a) requires that commercial marinas must be open to the general public either on a first come first serve basis for free or rent, or a rent or lease agreement for a period of time not to exceed one year. 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. This change in operations must be approved by the department through a new encroachment permit prior to implementation of the change. Such as in the matter at hand as proposed, more than fifty percent of the dock spaces are open to the general public and the application thus complies with this standard (13 public slips, 13 private slips, 7 public side ties and 6 private side ties).

13. IDAPA 20.03.04.015.03(c) requires that if local city or county ordinances governing parking requirements for marinas have not been adopted, commercial marinas must provide upland parking as prescribed in this section. Bonner County has adopted ordinances governing parking requirements for marinas. As conditioned the applicants must comply with Bonner County ordinances for parking.

14. IDAPA 20.03.04.015.13 (c) requires that docks be "...constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights." The Applicant's proposal complies with this requirement.

15. IDAPA 20.03.04.015.13(d) 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..."

16. IDAPA 20.03.04.015.13(e) establishes a presumption that a commercial encroachment located closer than twenty-five (25) feet from the adjacent littoral right lines will have an adverse effect. As proposed, the docks are 25 feet from the east littoral right line and 186 feet from the west littoral right line. The Objectors have not provided any evidence to rebut the presumption of no adverse impact for the proposed.

17. IDAPA 20.03.04.60.04 limits the time for the construction of "all activities authorized within the scope of the encroachment permit must be completed within 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.

18. The Applicant has littoral rights on Lake Pend Oreille as required by IDAPA 20.03.04.

19. Idaho Code Title 67, Chapter 65, establishes the authority of city and county

governments to establish and enforce local planning and zoning laws to govern uses above the high water mark.

20. The Idaho Safe Boating Act is Idaho Code title 67, chapter 70 this chapter gives the County authority to regulate use of waterways.

21. 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**

The Applicant has submitted an application for a commercial navigational encroachment. Such an operation in this location can provide a service to members of the public outside of those who possess littoral rights.

The Objectors in writing and at the hearing identified a wide range of issues related to the proposed marina expansion. Most of the issues were related to the operations of the upland facilities above the artificial high watermark. These issues (trash, access, cross walks, restaurants, expansion of the lodge and placement of the sewer infrastructure) are outside the regulatory authority granted to IDL through the Lake Protection Act. The other concerns raised were general environmental stewardship issues which are not connected to an expansion of an existing commercial marina (invasive species, nutrient load, and wake control) and do not warrant denial of the encroachment permit.

The Objectors did not raise any specific concerns that conflicted with Idaho law governing the issuance of encroachment permits, any concerns which would cause unreasonable adverse effects upon adjacent property or undue interference with navigation, the most important factors to be considered in granting or denying an application for a commercial navigational encroachment. Idaho code § 58-1306.

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 and should be granted.

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 Pend Oreille Supervisory Area of IDL should **approve** the requested encroachment permit application as proposed by the Applicant **with the following additional conditions of approval:**

#### **Conditions of Approval**

1. The Applicant shall comply with the Bonner County ordinances governing parking requirements for marinas as noted in the letter from Bonner County Planning Department dated January 30, 2014. IDL must receive a copy of a letter of

- compliance from the Bonner County Planning Department stating that their parking requirements have been satisfied before this permit is valid.
2. Best management practices must be used in construction of the docks to ensure work is done with as little disruption to the aquatic environment as possible as recommended by the Idaho Department Fish and Game in their letter received November 21, 2013.
  3. Pump out station must be installed and maintained in accordance with IDAPA 41.01.01 and the Panhandle Health Districts requirements.
  4. The permittee shall maintain a submerged lands lease with IDL.
  5. All encroachments and required upland parking must be constructed within 3 years of issuance of the encroachment permit unless previously revoked or extended by IDL.

DATED this 25th day of February, 2014.



\_\_\_\_\_  
Sid Anderson  
Hearing Coordinator