

David E. Wynkoop
SHERER & WYNKOOP, LLP
730 N. Main St.
P.O. Box 31
Meridian, Idaho 83680
208-887-4800
208-887-4865
dwynkooplaw@gmail.com

**BEFORE THE IDAHO STATE POLICE ALCOHOL BEVERAGE CONTROL
STATE OF IDAHO, COUNTY OF ADA**

)	
)	Case No. 19-ABC-022
IN RE:)	
)	FINDINGS OF FACT,
Long Bridge Grill Inc.)	CONCLUSIONS OF LAW AND
dba Long Bridge Grill,)	PRELIMINARY ORDER
Premises No. 7B-123,)	
License No. 3146,)	
)	
Petitioner.)	
_____)	

This is a contested case proceeding, conducted pursuant to the Administrative Procedures Act, Idaho Code Title 67, Chapter 52 (APA), and the Idaho Liquor Act, Idaho Code Title 23.

This proceeding was commenced by Petitioner Long Bridge Grill, Inc. (Long Bridge). Long Bridge filed a Petition for Review of Denial of Transfer on October 30, 2019 (Petition). In the Petition, Long Bridge asserts that the Idaho State Police, Alcohol Beverage Control (ABC) unlawfully failed to approve the transfer of the Long Bridge waterfront resort liquor license (License). ABC's decision to deny the application for transfer of the License from Long Bridge to AJ & AM, LLC (AJ & AM) was based on ABC's investigation of the Long Bridge premises (Premises) and ABC's conclusion that the Premises does not meet the statutory requirements to qualify for a waterfront resort liquor license. On or about December 12, 2019, the undersigned

was duly appointed to serve as Hearing Officer, conduct an evidentiary hearing and issue a preliminary decision as provided for in the APA.

A scheduling conference was held on December 30, 2019 with James G. Reid of Kaufman Reid, PLLC appearing as attorney for Long Bridge and Cheryl E. Rambo, Deputy Attorney General, appearing as attorney for ABC. A Scheduling Order and Order Governing Proceedings was entered on December 30, 2019 setting the date for the evidentiary hearing and providing for disclosures of witnesses, exhibits and for the filing of pre-hearing memoranda.

An evidentiary hearing was held on January 22, 2020 and January 23, 2020. Both parties introduced exhibits into evidence and presented the testimony of witnesses. ABC presented the testimony of Bonita Deis, Joan McGowan, Le Carlton Hardin, Leslie Lehman, Rocky Gripton and Bradley C. Doty. Long Bridge presented the testimony of Ellen Maddux, Dan Maddux, and Harveer (Deepa) Nagra. Both parties cross-examined the other party's witnesses. ABC Exhibits 1-62¹ and Long Bridge Exhibits A-D were admitted into evidence. This matter was formally submitted to the Hearing Officer on February 18, 2020 upon the receipt of both parties' Post-Hearing memoranda.

Having carefully reviewed the exhibits, pre-hearing briefs, the transcript, and the post hearing memoranda, these Findings of Fact, Conclusions of Law and Preliminary Order are hereby entered.

¹ ABC's exhibits also constitute the Agency Record considered by ABC in its decision to deny the transfer application. ABC's Closing Argument referenced page numbers, but the page numbers are not included on the Exhibits introduced into evidence. Many of the ABC exhibits have numerous sub-parts and those sub-parts will be referenced herein where relevant. Exhibits will be referred to as Exh. ____.

FINDINGS OF FACT

Conveyances of the Premises, etc.

1. On September 25, 1970, Mel and Millie Jukich conveyed by warranty deed to Bruce and Zecla David, Lot 18, and portions of Lots 17 and 19 of Block 8 (the Premises), and “an easement for ingress and egress over and across the following described property over Lot 17 of Block 9,”...(Access Easement) “together with the right to use, for resort purposes, the lakeshore for a distance of 200 feet West of the East line of said Lot 17” (also within Block 9, hereafter Right to Use). The Access Easement was described as crossing a portion of Lot 17, Block 9, five feet in width. Exh. 3. This conveyance was recorded as Instrument No. 129714 (the 1970 Deed). At the time of this conveyance, the Jukiches also owned both the Premises and the Lots, potentially subject to the Access Easement and the Right to Use. (See Finding of Fact #14).² It is important to understand that the Premises location is within Block 8 of the platted subdivision, whereas the Lots potentially subject to the Access Easement and the Right to Use are located within Block 9 of the subdivision. See Exh. 13.01 for a copy of the plat. The Jukiches apparently retained ownership of Lots 17, 18, 19 and 20, Block 9, which were made subject to the Access Easement and the Right to Use by the 1970 Deed. In other words, prior to the 1970 Deed, Jukiches owned the Lots and the Premises, but after the 1970 Deed, the ownership of the Premises became severed from the ownership of the Lots potentially subject to the Access Easement and the Right to Use. The Access Easement is essential to the Premises qualifying for a waterfront resort liquor license since the Premises is not located on the waterfront but is approximately 1900 feet from the waterfront. The public and Long Bridge

² All lots and blocks referred to herein mean lots and blocks located in Lakeside Place Addition Subdivision as recorded in Book 1 of Plats, Records of Bonner County, Idaho. The Premises and the Lots are located just south of the long bridge on Idaho Highway 95, south of Sandpoint, Idaho.

patrons and owners can only access the Right to Use lakefront area by using the Access Easement.

2. In March 1978, Bruce and Zeola David conveyed by Warranty Deed their interest in the Premises to Paul and Hallie Webber, and Randolph and Sally Marston, together with the Access Easement and “TOGETHER WITH the right to use, for resort purposes, the lakeshore for a distance of 200 feet West of the East line of said Lot 17.” Exh. 4. The plat placed in the record as Exh. 13.01 shows Lots 17, 18, 19 and 20 situated along the lake to be long and narrow. The exact width of the Lots abutting the waterfront cannot be determined from Exh. 13.01, but it appears that the width of each lot is about 50 to 55 feet, resulting in the Right to Use purportedly encumbering Lots 17, 18, 19 and 20 of Block 9. It is unclear if the Right to Use is an assignable real property easement or is a right personal to the original Grantees—the Davids.

3. On May 1, 1984, the Marstons conveyed their interest in the Premises to Wagon Bridge, Inc. by Warranty Deed, Instrument No. 285955. Exh. 48.06.004. No reference is made in the 1984 Deed to the Access Easement or the Right to Use. The likely result of this failure to convey the Access Easement and the Right to Use is that both rights remained with the Davids or the Marstons, or both rights terminated at this time. It is unclear from the record what happened to the real property interests of the Webbers in and to the Premises, referenced in the March 1978 Deed.

4. On October 1, 1985, Wagon Bridge, Inc. conveyed a Warranty Deed to Walter Fette which describes the Premises, together with the Access Easement, and the Right to Use. Exh. 48.06.005. It is unclear whether Wagon Bridge, Inc. owned the Access Easement or the Right to Use, and thus whether Wagon Bridge, Inc. had the legal right to convey the Access Easement and the Right to Use to Mr. Fette. (However, *see* Finding of Fact #18 regarding the

possible recreation of the Access Easement and the Right to Use by virtue of the April 17, 1995 Easement Agreement.)

5. On February 22, 1997, Walter Fette entered into a lease agreement to lease the Premises to Long Bridge and Ellen and Dan Maddux, shareholders of Long Bridge. Exh. 35.01. The legal description to the lease agreement referenced the Access Easement attached to Lot 17, even though by this time the Access Easement had been relocated to Lot 20A. (*See* Finding of Fact #18). The agreement also referenced the right to use the lakeshore “200 feet West of the East line of Lot 17”, which had also been relocated by this time to “200 feet East of the West line of said Lot 20A”.

6. On April 5, 1999, Long Bridge and the Madduxes renewed their lease agreement with Walter Fette to continue to operate the Long Bridge Grill and utilize the License for another five years. Exh. 40.02. The lease agreement references Exhibit A from the 1997 Lease Agreement, which contained incorrect descriptions of the location of the Access Easement and the Right to Use. Exh.40.01.

7. On February 1, 2005, Walter Fette conveyed the Premises to Daniel and Ellen Maddux. Exh. 48.21. The Access Easement is included in the legal description and is correctly identified as relocated to Lot 20A. The Right to Use was also included and correctly referenced as “200 feet East of the West line of said Lot 20A”. No reference is made to the Right to Use encumbering Lots 17A, 18A or 19A.

8. On February 8, 2006, the Madduxes applied for a permit from the Idaho State Department of Lands for a commercial boat dock, which application was denied. Exh. B.

9. On May 27, 2009, the Madduxes were granted a permit by the Idaho Transportation Department to widen, flatten, remove trees from and maintain the five-foot

Access Easement by taking access from State Highway 95. The Madduxes attached the Easement Agreement Instrument Number 491649 to the permit application. Exhs. A and 48.29. (See Finding of Fact #18).

10. There were no useable public boat docks within or near the 200 foot Right to Use area when Dan and Ellen Maddux leased the Premises in 1997, or in 2005 when they purchased the Premises. Tr., at 103, ll. 15-18; 158, ll. 23-25; 159, ll. 1-7.

11. The Madduxes had a floating dock on or near the Right to Use area for some period of time about 2004 for their personal use, but it was not a public boat dock. Tr., at 110, ll. 18-25; 111, ll. 1-6.

12. On May 30, 2019, the Madduxes entered into a commercial real estate purchase and sale agreement with AJR, LLC. Exh. 61.08. The Agreement purports to include the Access Easement and the 200 foot Right to Use. The Buyer's name was later amended to AJ & AM. Exh. 44.07. The sale of the Premises from Long Bridge to AJ & AM was later finalized. The purchase price for the sale of Long Bridge and the License was \$550,000. The Madduxes later refunded \$75,000 to AJ & AM when it became apparent ABC would not approve the transfer of the License.

Conveyances of Lots Potentially Subject to the Right to Use and the Access Easement

13. In 1957, a home was built on Lot 17, Block 9 (later to become Lot 17A through a replat). A private single residence boat dock was later built in 1995 extending from Lot 17 into Lake Pend Orielle (Lake). Exhibit (Exh.) 48.14.

14. In October 1978, Mel and Mille Jukich conveyed their interest in Lots 17, 18, 19, 20 and 21, Block 9, to Scott and Erica Glickenhau by Warranty Deed. The October 1978 deed states that the conveyance is "SUBJECT to easement for the purpose of ingress and egress across

the East 5 feet of Lot 17 as set forth in Warranty Deed recorded September 29, 1970 as Instrument No. 129714” ... Exh. 5. [the 1970 Deed]. The Right to Use is not identified in the October 1978 Jukich deed to the Glickenhauses.

15. Based on the documents introduced into evidence, as of October 1978, the Glickenhauses owned Lots 17, 18, 19, 20 and 21 of Block 9, and Lot 17 was apparently subject to the Access Easement. It is unclear if the Glickenhaus’s ownership of the Lots was subject to the Right to Use. At this time only Lot 17 had a structure constructed on it. Lots 18, 19, 20 and 21 remained bare ground. Based on the documents in the record, the present owners of Lots 17A, 18A, 19A and 20A, Block 9, derive their interests from the Glickenhauses.

16. On December 20, 1994, the Glickenhauses replatted Lots 17, 18, 19, 20 and 21, Block 9, into Lots 17A, 18A, 19A and 20A. The new plat showed the 5-foot Access Easement on Lot 17A but does not show the 200-foot Right to Use as encumbering any of these Lots. Exhs. 47.04 and 47.05.

17. On January 19, 1995, the Glickenhauses conveyed to Lakeshore Builders, Inc. by Warranty Deed, Instrument Number 459185, Lots 17A and 18A of the replat “subject to the right regarding resort use reserved in (the 1970 Deed) but specifically not subject to the easement set forth therein.” Exh. 59.05. This deed reservation may have partially recreated the Right to Use but if it did, it was only with respect to Lots 17A and 18A and not Lots 19A or 20A. Thus the Right to Use area was considerably less than 200 feet if it remained in effect at all, because of the chain of title issues.

18. On April 17, 1995, the Glickenhauses entered into an Easement Agreement with Walter Fette, to relocate the Access Easement from Lot 17A to the West Line of Lot 20A. Exh. 59.06, recorded on September 12, 1996 as Instrument No. 491649. The new easement document

also refers to the right to use “200 feet East of the West line of said Lot 20A (formerly 200 feet West of East line of Lot 17). This Easement Agreement likely recreated the Access Easement and moved it to Lot 20A. The agreement may also have recreated and relocated the Right to Use and reinstated the Right to Use area to a full 200 feet.

19. In 1997, a home was built on Lot 18A. A private single residence boat dock was later built on Lot 18A in 2000. R 48.14. Prior to 1997, no houses or structures were located on Lots 18A, 19A, or 20A.

20. On March 3, 1997, Lakeshore Builders, Inc. conveyed Lot 17A to Terrence and Bonita Deis, by Warranty Deed, recorded as Instrument Number 500289. Exh. 56.02, p. 190. There is no reservation in this deed of the 200-foot Right to Use or mention of the April 17, 1995 Easement Agreement. Exh. 56.02.001.

21. In October 1999, the Glickenhauses conveyed Lots 19A and 20A to the Kreps Pension Fund, by Warranty Deed, Instrument Number 00023444. Exh. 59.04. The October 1999 Deed did not contain a reservation for the Access Agreement or the Right to Use, and did not mention the April 17, 1995 Easement Agreement.

22. In 2007, a home and a private boat dock were built on Lot 19A. Exh. 48.14.

23. In 2008, a home and a private boat dock were built on Lot 20A. Exh. 48.14.

24. On June 10, 2011, the Kreps Pension Fund quitclaimed Lots 19A and 20A to Janis and Rudolph Kreps by Instrument Number 810846. Exh. 59.03. The June 2011 Deed did not contain a reservation for the Access Easement or the Right to Use and did not mention the April 17, 1995 Easement Agreement.

25. On November 14, 2013, Rudolph and Janis Kreps conveyed Lot 20A to Le Carlton Hardin and Rochelle Ruen by Warranty Deed, Instrument Number 853125. The

November 2013 Warranty Deed did not contain a reservation for the Access Easement or the Right to Use and did not mention the April 17, 1995 Easement Agreement. The November 2013 Deed does state in the pre-printed form language that it is subject to “all easements.” Exh.59.02. Lot 20A may have remained encumbered by the Access Easement by virtue of the April 17, 1995 Easement Agreement.

26. On August 30, 2016, Joan McGowen, became the sole owner of Lot 18A through a probate action, Instrument Number 894219, based on a Decree Vesting Estate in Surviving spouse. Exh. 57.02.0002. No reference is made to the Right to Use, being a reservation to her ownership of Lot 18A.

27. On February 1, 2019, Janis and Rudolph Kreps conveyed Lot 19A to Mark and Rodelyn Miner by Warranty Deed, Instrument Number 934018. Exh. 58.02. The Deed did not contain a reservation for the Right to Use, but did have an exception for “reservations, easements” in the pre-printed form language.

28. There is an annual public swim event where participants utilize the Access Easement and the Right to Use area which draws crowds of people.

29. The 200-foot Right to Use area potentially across Lots 17A, 18A, 19A and 20A is now encumbered by four private boat docks, fences and landscaping, and is further restricted by property owners who believe the Right to Use does not encumber their property.

Liquor License Transfers

30. In 1979, Randolph and Sally Marsten applied for a renewal of a liquor license associated with the Premises. Exh. 48.28. The renewal application has handwriting on it indicating that the 1978 license had been held by Bruce David for “most of 1978.” *Id.* This suggests there was a transfer of the liquor license in 1978 from Bruce David to the Marstens.

The Premises is located approximately 1900 feet from the shore of Lake Pend Orielle and so could not qualify for a waterfront resort license, unless the Access Easement and the Right to Use were fully maintained and accessible by patrons of Long Bridge or its predecessors and by the public.

31. On October 29, 1993, Fred Palmer, an attorney representing Walter Fette, wrote a letter to Clayne Zollinger, Deputy Attorney General, attorney for the Department of Law Enforcement in which he implied that there were “docks” located within the 200-foot Right to Use. Exh. 8. Mr. Palmer asked the Department of Law Enforcement (now ABC) to acknowledge that the “following language was within the meaning of Idaho Code §23-948...use by patrons of Longhorn Restaurant (Long Bridge’s predecessor) of not more than two docks located within said 200 feet of lake frontage...” Given the context of Mr. Palmer’s letter, this language constituted a representation, on behalf of Walter Fette, that there were two docks located within the 200 foot Right to Use area.

32. In 1994, the Glickenhauses and the Fettes filed with the Idaho Department of Law Enforcement Director a Petition with proposed easement language and sought a ruling that the proposed language would not affect the validity of the License. Declaratory Ruling 94-002. Exh. 48.06.

33. On December 16, 1994, Idaho Department of Law Enforcement Director Richard Cade issued the first Declaratory Ruling (the 1994 Declaratory Ruling), Exh. 48.06. In the 1994 Ruling, Director Cade acknowledged that Long Bridge predecessor, Longhorn Barbeque, had held a waterfront resort liquor license “since 1979”. The 1994 Declaratory Ruling references the Access Easement and the “right to use for resort purposes” two hundred feet of lake frontage. Director Cade ruled based upon Idaho Code Section 23-903 that since the waterfront resort

license had been in effect for ten years, the license could be re-issued since no circumstances had changed. Director Cade acknowledged “Reasonable minds may differ as to whether a waterfront resort license would be issued today if made for the first time under the circumstances of this case.” However, because the license had been in effect for “more than ten years (it) is deemed to have been validly issued and may be reissued from year to year as long as the circumstances giving rise to its issuance remain unchanged.” “However, if the special characteristics that originally qualify a licensee for a license are lost, then the protection of the ten year period of repose is also lost...” (emphasis added). Director Cade also stated that the proposed diminution to the 200-foot Right to Use would result in the loss of the waterfront resort license. Further, the “two hundred feet of lake frontage must be open to the public for the purpose of ‘vacationing, boating or fishing’, etc.” Director Cade specifically ruled that a proposed reduction of the Right to Use from 200 feet to ten feet would result in loss of the waterfront resort license. The “Longhorn Barbeque was issued a waterfront resort license in 1979 and thereafter based upon its possession of an easement for the use of nearby Lake Pend Orielle.” Declaratory Ruling 94-002, at 1. Exh. 48.06.

34. In 1994, Walter Fette transferred the License to Duke Enterprises, Inc., an entity apparently related to or owned by Walter Fette. While the 1994 transfer application is not in the record, a renewal application was made for the License by Duke Enterprises, Inc., and Walter Fette is listed in the section for background checks. Exh. 11.

35. On February 10, 1995, new Idaho State Police Director Robert Sobba³ responded to a January 9, 1995 letter from Fred Palmer, attorney for Walter Fette, reiterating the State’s understanding that the two hundred feet of lakefront remains available for water front resort

³ Apparently, the Department of Law Enforcement Director is the same office as the Director of Idaho State Police.

purposes and that patrons will still have access to the lake shore without restriction. Exh. 48.10. Director Sobba stated that the relocation of the Access Easement from Lot 17A to Lot 20A, by itself, would not affect the validity of the License.

36. On April 17, 1995, attorney Fred Palmer, acting on behalf of Walter Fette, requested a second declaratory ruling from Director Sobba regarding relocation of the Access Easement from Lot 17A to the West side of Lot 20A. Exh.48.08. Mr. Palmer sought a formal ruling that the Access Easement relocation would not affect the validity of the License pursuant to Idaho Code Section 23-903. Exh. 48.05. Specifically, attorney Palmer sought a declaration from the Director that the easement providing for “access to the lake shore along a five foot wide easement comprising the westernmost five feet of lot 20A” and also providing “for the right to use, for resort purposes the lake shore for a distance of 200 feet East and the West line of lot 20A” would not affect the License status. Exh. 48.05 at 2. The Director attached the 1994 Declaratory Ruling, incorporated it by reference, and adopted its facts. *See* Declaratory Ruling 95-001 (“1995 Declaratory Ruling”). The Director concluded in the 1995 Declaratory Ruling that there was no reduction in rights attributable to the relocation of the Access Easement and the slight relocation of the Right to Use, and that it “would be sufficient to permit Duke’s Enterprises, Inc. dba Longhorn Barbeque to retain its qualification for a waterfront resort liquor license under Idaho Code § 23-948.” Exh. 48.05, p. 3.

37. From 1995 through February 1997, Walter Fette personally, or through Duke Enterprises, Inc., a corporation he owned or controlled, utilized the License at the Premises. Exh. 19.

38. On March 5, 1997, Long Bridge submitted to ABC a transfer application of the License to Long Bridge, declaring there had been no changes to the business. Exh. 32. The

transfer application references Exhibit A from the 1997 Lease Agreement wherein Lot 17 is mistakenly identified for access to the Lake, even though by this time the Access Easement had been relocated to Lot 20A. Lots 18, 19, and 20 were not identified as encumbered by the 200-foot Right to Use. Exh. 40.01.

39. Long Bridge was issued a Temporary Permit on March 13, 1997. Exh.33.

40. On March 14, 1997, Special Agent Thomas McBeal inspected the Premises as a waterfront resort. Included on the inspection sheet was the disclaimer that “This is not a guarantee that a special license will be issued...” Exh. 34.

41. The original license and subsequent licenses, including the 2019 License, indicate on their face that the License is for a “Waterfront Resort.” *Id.*

42. Since at least 1979, Long Bridge and its predecessors (including the Longhorn Barbecue) have held the License by virtue of the status of the Premises as waterfront resort.

43. The License has been renewed annually and has been previously transferred at least five times since 1978: (1) the License was transferred from Bruce David to the Marstens in 1978 (Exh. 48.28); (2) the License was transferred from the Marstens to Wagon Bridge, Inc. in 1984 (Exh. 48.06.005); (3) the License was transferred from Wagon Bridge, Inc. to Walter Fette in 1985. Exh. 48.06.005; (4) the License was transferred from Walter Fette to Duke Enterprises, Inc., sometime between 1985 and 1994. Exh. 11; (5) the License was leased and transferred in 1997 and later sold in 1999 by Duke Enterprises, Inc. to the Madduxes (Tr., at 158, ll. 3-7; Exh. 37) The renewals and transfer appear to have been approved, or at least not disapproved, by ABC.

Chronology of the Current License and the Attempted Transfer

44. The current owner of License No. 3146 is Long Bridge. Dan and Ellen Maddux are shareholders of Long Bridge.

45. In 1997, Long Bridge leased the Premises from Walter Fette and utilized the License, with ABC's approval.

46. In 2005, the Madduxes purchased the Premises from Walter Fette and ABC approved the transfer of the License to Long Bridge. Long Bridge has held License No. 3146 since March 24, 1997, and has successfully renewed it annually to the present time. *See* Exh. 47.8.

47. In 2019, Long Bridge filled out documentation to attempt to transfer the License to AJ & AM as part of a sale of the business of Long Bridge. Transfer Application, Exh. 44.

48. Deepa Nagra, the daughter of one of the members of AJ & AM, assisted with the purchase of the Premises and the application for transfer of the License and testified at the hearing in this matter.

49. Prior to the purchase of the Premises by AJ & AM, Ms. Nagra visited the Premises and saw a copy of the License. Tr. at 65, ll. 18-22; 32, ll. 21-24.

50. An application for transfer of the License was sent to ABC and was returned to the applicant in July 2019. Applicant Return Record, Exh. 43.

51. Ms. Nagra advised Kari Cussins at ABC that a new application for transfer of the License would be submitted and that Ms. Nagra would be handling it herself. Tr. at 34, ll. 7-13.

52. On August 5, 2019, a License transfer application was submitted to ABC by Ms. Nagra, accompanied with a diagram of the lakefront access, which showed a line at the lakefront representing "the right to use for resort purposes 200 Ft of Lakefront." Exh.44.12. The colored

line extended across the frontage of Lot 20A and part way onto Lot 19A. As shown on this diagram, the right to use was well short of 200 feet.

53. The diagram caused ABC investigators to question whether there was actually 200 feet of lakefront for public use.

54. After submitting the application, AJ & AM was provided with a temporary license on or about August 19 or 20, 2019. Tr. at 29, ll. 23-25.

55. The Applicant Return Record attaching the temporary permit listed a few things that needed to be taken care of before a final license could be issued, including: (1) the temporary license had to be posted and the original license had to be signed by the owner and returned; (2) ABC requested a new warranty deed, a copy of the county assessor's report and a signed bill of sale for the License; and (3) an addendum to the purchase and sale agreement showing Long Bridge as the seller and/or the transferor of the License. Exh. 45.

56. Neither the transfer application nor the Applicant Return Record stated that there was any problem with the property's characteristics so as to be eligible for a waterfront resort liquor license, such as the lack of docks or adequate parking spaces. Exh. 45.

57. The first time AJ & AM was notified by ABC that there was a problem qualifying as a waterfront resort property was on August 29, 2019, when Kari Cussins emailed Ms. Nagra informing her that the pre-licensing inspection found that the property did not meet the requirements for a waterfront resort liquor license. Tr., at 42, 22-25; Exh. 44.16.

58. Ms. Nagra called ABC and spoke with Kari Cussins and Nichole Harvey. Tr., at 43, ll. 13-15, and in that conversation a reason given for why the property did not qualify as a waterfront resort was that there was a public road, Lakewood Drive or Lakewood Road, which intersected the Access Easement. Tr., at 44, ll. 21-25, 57.

59. On July 11, 2019, ABC sent an applicant return record back to AJ & AM, outlining deficiencies in the transfer application and stating “Premises not qualified for license type.”. Exh. 43.

60. On August 8, 2019, AJ & AM reapplied for the transfer of the License. Exh. 44.

61. On August 19, 2019, ABC sent another applicant return record back to AJ & AM, asking for additional information. Exh. 45.

62. On August 20, 2019, ABC Detective Leslie Lehman was assigned to investigate the License transfer application from Long Bridge to AJ & AM. Exh. 47.01

63. On August 21, 2019, Det. Lehman sent a Google Maps aerial photo (Exh. 44.15) with notes of her initial premises inspection to ABC licensing staff. Det. Lehman sought additional information from AJ & AM.

64. On August 29, 2019, ABC License Specialist, Karri Cussins emailed Ms. Nagra and copied ABC staff, Nichole Harvey, Rocky Gripton, Charles Ketchum, Bradley Doty and Leslie Lehman. Ms. Cussins stated that the pre-licensing inspection shows the waterfront resort requirements were not met and offered AJ & AM a beer and wine license. Exh. 44.16.

65. On August 30, 2019, ABC Licensing and Litigation Manager, Nichole Harvey had an email exchange with Ms. Nagra and provided the statutes that pertain to waterfront resort liquor licenses. Exh. 44.17.

66. On September 3, 2019, Ms. Nagra contacted Ms. Harvey. Ms. Nagra provided her opinion of what the 1994 and 1995 Declaratory Rulings meant and what the statutory term “grandfathering” means and that the License should be transferred to AJ & AM. Exh. 44.17. Ms. Nagra is an attorney licensed in Washington but not in Idaho.⁴

⁴ The Hearing Officer ruled at the hearing that Ms. Nagra could testify with respect to her opinions as a lay person, but not with respect to her legal opinion since she is not licensed as an attorney in Idaho.

67. On September 4, 2019, Ms. Harvey passed along the information from Ms. Nagra to ABC Sergeant Rocky Gripton and Det. Lehman for additional follow-up. Exh. 48.35.

68. Det. Lehman, reviewed the application when she received it on August 20, 2019, and visited the property on September 4 (Tr. at 243, l. 1.), and later on September 10 and 12, 2019.

69. On September 4, 2019 thru September 12, 2019, Det. Lehman received documents from ABC licensing staff that were provided by AJ & AM. Based upon these documents, Det. Lehman investigated the transfer application further. Exhs. 47.02, 47.03, 47.04, 47.05 and 47.06. Det. Lehman also took photographs of the area around the Long Bridge Grill Premises and Lots 17A-20A. Exh. 47.07. Det. Lehman made a number of conclusions in her investigative report. Exhs. 47.01 through 47.07, which conclusions the Hearing Officer finds to be credible, including:

A. Based upon Bonner County GIS records, the Right to Use the lakeshore would need to encompass Lots 20, 19A, 18A and 17A in order to account for 200 feet of lake frontage, since these lots are approximately 55 feet wide where they meet the lakeshore.

B. On September 4, 2019, the Access Easement was encumbered by barrier fencing and boulders, was overgrown and difficult to traverse on foot. The Access Easement could not be traversed by a person in a wheelchair.

C. The owners of Lots 17A and 18A believe the right of Long Bridge to use the waterfront no longer is in effect.

D. The docks attached to Lots 17A, 18A, 19A and 20A are private and not available for public use.

The pictures taken by Det. Lehman on September 4, 10 and 12, 2019 corroborate her opinion that the Access Easement was barely traversable on foot and the Access Easement area was quite overgrown and appeared to have had little, if any recent use or maintenance.

70. ABC investigator, Sgt. Gripton, initiated his investigation of the transfer application on September 4, 2019 (Vol. II. Tr. at 13, ll. 7-11) and continued his investigation through September 13, 2019, and again in November 2019. Exhs. 48.02 – 48.47.

71. Sgt. Gripton (now Lt. Gripton) credibly concluded that the area of the 200-foot lakeshore Right to Use could not now be used by the public for recreation or vacationing purposes, and the Access Easement is uneven and overgrown with trees and brush, and obstructed with rocks. Tr. II, p. 10, ll. 8-11.

72. On September 5, 2019, Ms. Harvey, emailed Ms. Nagra and asked for copies of recorded easements, etc. Exh. 46.

73. Ms. Nagra called Captain Doty about September 7, 2019, regarding the denial email and spoke with him by phone. In this conversation, Capt. Doty explained that he believed the 1994 and 1995 Declaratory Rulings conflicted, and that just because ABC may have made errors in the past in transferring the License, that did not mean he would continue to make those errors. Tr., at 56, ll. 8-15; 60, ll. 6-14.

74. On October 10, 2019, ABC Capt. Doty emailed the Madduxes asking them to call him the next morning. Exh. 54.

75. On October 11, 2019, the Madduxes responded to Capt. Doty's email. Exh. 54.

76. In an email from Capt. Doty to Long Bridge on October 11, 2019, Capt. Doty wrote: "My answer is the same. The license in question does not qualify as a Waterfront resort license. I denied the transfer based on the law." Exh. 54.

77. On October 30, 2019, the Madduxes sought review of the agency's denial of the transfer application. Exh. 61.

78. Dan and Ellen Maddux have performed some maintenance on the Access Easement over the years. By early September 2019, the Access Easement had not been recently maintained, was obstructed by rocks, brush and trees, had had little use, was barely traversable by foot, and was not useable by a person in a wheelchair.

Legal Issues

- 1. Did ABC properly deny the request to transfer the License from Long Bridge to AJ & AM?**
- 2. Is ABC estopped from denying the request to transfer the License from Long Bridge to AJ & AM?**

Relevant Law

Idaho's Constitution and the Liquor Control Act provide legal parameters for regulation of the sale and use of liquor in Idaho as follows:

Idaho Constitution Art. III, Section 24. PROMOTION OF TEMPERANCE AND MORALITY. The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.

Idaho Constitution Art. III Section 26. POWER AND AUTHORITY OVER INTOXICATING LIQUORS. From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

23-901. DECLARATION OF POLICY — RETAIL SALE OF LIQUOR. It is hereby declared as the policy of the state of Idaho that it is necessary to further regulate and control the sale and distribution within the state of alcoholic beverages and to eliminate certain illegal traffic in liquor now existing and to insure the entire control of the sale of liquor it is advisable and necessary, in addition to the operation of the state liquor stores now provided by law, that the director of the Idaho state police and the county

commissioners and the councils of cities in the state of Idaho be empowered and authorized to grant licenses to persons qualified under this act to sell liquor purchased by them at state liquor stores at retail posted prices in accordance with this act and under the rules promulgated by said director and under his strict supervision and control and to provide severe penalty for the sale of liquor except by and in state liquor stores and by persons licensed under this act. ***The restrictions, rules, and provisions contained in this act are enacted by the legislature for the protection, health, welfare and safety of the people of the state of Idaho and for the purpose of promoting and encouraging temperance in the use of alcoholic beverages within the state of Idaho.***

23-902(21) All other words and phrases used in this chapter, the definitions of which are not herein given, shall be given their ordinary and commonly understood and acceptable meanings.

23-903. LICENSE TO RETAIL LIQUOR. (1) The director of the Idaho state police is hereby empowered, authorized, and directed to issue licenses to qualified applicants, as herein provided, whereby the licensee shall be authorized and permitted to sell liquor by the drink at retail and, upon the issuance of such license, the licensee therein named shall be authorized to sell liquor at retail by the drink, ***but only in accordance with the rules promulgated by the director and the provisions of this chapter... Any license issued and which has remained in effect at its location for a consecutive period of ten (10) years or more shall be deemed to have been validly issued and may be renewed from year to year provided however,... and, if the premises required special characteristics for original licensure, ... that said premises continue to have such special characteristics at the time of the application for renewal***

23-905. APPLICATION FOR LICENSES — PENALTY FOR FALSE STATEMENTS. Prior to the issuance of a license as herein provided, the applicant shall file with the director an application, in writing, signed by the applicant and containing such information and statements relative to the applicant and the premises where the liquor is to be sold as may be required by the director. ***The application shall be verified by the affidavit of the person making the same before a person authorized to administer oaths and shall be accompanied with the license fee herein required.***

In addition to setting forth the qualifications required by other provisions of this act, the application must show:

(1) **A detailed description of the premises for which a license is sought and its location.**

If any false statement is made in any part of said application, or any subsequent report, the applicant, or applicants, shall be deemed guilty of a

felony and upon conviction thereof shall be imprisoned in the state prison for not less than one (1) year nor more than five (5) years and fined not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000), or both such fine and imprisonment.

23-907. INVESTIGATION OF APPLICATIONS. *Upon receipt of an application for a license under this act, accompanied by the necessary license fee, the director, within ninety (90) days thereafter, shall cause to be made a thorough investigation of all matters pertaining thereto.* The investigation shall include a fingerprint-based criminal history check of the Idaho central criminal history database and the federal bureau of investigation criminal history database. Each person listed as an applicant on an initial application shall submit a full set of fingerprints and the fee to cover the cost of the criminal history background check for such person with the application. If the director shall determine that the contents of the application are true, that such applicant is qualified to receive a license, *that his premises are suitable for the carrying on of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, he shall issue such license; otherwise the application shall be denied and the license fee, less the costs and expenses of investigation, returned to the applicant.*

23-908. FORM OF LICENSE — AUTHORITY — EXPIRATION — LIMITATIONS.

(2) An application to transfer any license issued pursuant to chapter 9, title 23, Idaho Code, shall be made to the director. Upon receipt of such an application, the director shall make the same investigation and determinations with respect to the transferee as are required by section 23-907, Idaho Code, *and if the director shall determine that all of the conditions required of a licensee under chapter 9, title 23, Idaho Code, have been met by the proposed transferee, then the license shall be indorsed over to the proposed transferee by said licensee ...*

23-933. SUSPENSION, REVOCATION, AND REFUSAL TO RENEW LICENSES. (1) The director may suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or *failure to comply with the provisions of this chapter or rules and regulations promulgated by the director....* Procedures for the suspension, revocation, or refusal to grant or renew licenses issued under this chapter shall be in accordance with the provisions of chapter 52, title 67, Idaho Code.

23-948 — WATERFRONT RESORTS — LICENSING EVEN IF OUTSIDE CORPORATE LIMITS OF CITY. (a) Nothing contained in section 23-903, Idaho Code, shall prohibit the issuance of a license to the owner, operator or lessee of a waterfront resort, even if situated outside the incorporated limits of a city. The provisions of section 23-910, Idaho Code,

shall apply to licenses issued under the provisions of this section. For the purpose of this section, **a waterfront resort shall comprise real property with not less than two hundred (200) feet of lake frontage** upon a lake or reservoir as defined by the army corps of engineers of not less than one hundred sixty (160) acres, or river frontage upon a river with at least an average six (6) months' flow of eleven thousand (11,000) cubic feet per second, **and shall be open to the public, where people assemble for the purpose of vacationing, boating or fishing, and each waterfront resort must have suitable docks or permanent improved boat launching facilities** not less than sixteen (16) feet in width on property owned or leased by the resort operator or on property contiguous thereto owned by this state or the federal government **open to the public for recreational uses for the purpose of caring for vacationers, or other recreational users and either of the following:**

(1) Hotel or motel accommodations for not less than fifty (50) persons, including a full-service restaurant that serves regularly at least two (2) meals per day to the public during a continuous period of at least four (4) months per year; or

(2) A building of not less than three thousand (3,000) square feet of public use floor space, including a full-service restaurant that serves regularly at least two (2) meals per day to the public during a continuous period of at least four (4) months per year and **paved or gravelled parking for fifty (50) automobiles on the operator's owned or leased property** and any contiguous property upon which are the docks or boat launching facilities described above.

[The bolding of the statutory language is not in the original, but is to emphasize the language particularly relevant to this proceeding.]

Through the years, the Idaho Supreme Court has repeatedly weighed in on the nature of rights conferred by a liquor license.

As between liquor licensees and the State, a liquor license is a mere privilege to be enjoyed while the conditions and restrictions imposed by the state are complied with. *Nampa Lodge No. 1389 B.P.O.E. v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951). No one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors. *Uptick Corporation v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 91982); *Gartland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951). The terms and conditions under which a liquor license is granted are

subject to the pleasure of the legislature. *State, ex rel v. Pierandozzi*, 117 Idaho 1, 784 P.2d 331 (1989).

The Idaho Supreme Court held that,

[a] liquor license is simply the grant or permission under governmental authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful; it is a privilege rather than a natural right and is personal to the licensee; it is neither a right of property nor a contract, or a contract right.

BHA Invs., Inc., 138 Idaho at 354-55, 63 P.3d at 480-81 (quoting *Nampa Lodge No. 1389, Benev. and P.O. of E. of U.S. v. Smylie*, 71 Idaho 212, 215-16, 229 P.2d 991, 993 (1951)). Accordingly, “...one who procures a state...license takes it subject to the provisions of the statute under which the license is granted.” *Nampa Lodge*, 71 Idaho at 216, 229. P.2d at 993. *See also Uptick Corp. v. Ahlin*, 103 Idaho 364, 367-369, 647 P.2d 1236, 1240-1242 (1982) (holding a liquor license is a mere privilege to be enjoyed while the conditions and restrictions imposed by the state are complied with.)

ANALYSIS

Long Bridge asks in its Petition that ABC’s decision to deny the transfer of the License from Long Bridge to AJ & AM be reversed by the Director.

ABC denied the transfer application based on its determination that as of the date of the transfer application, the Premises does not qualify for the special characteristics of a waterfront liquor license as provided for in Idaho Code Section 23-948. Upon investigation, ABC determined that the Long Bridge Premises did not have two hundred feet of lake frontage, the Access Easement did not provide adequate access to the Right to Use area, and the Premises did not have suitable docks or permanent improved boat launching facilities. Also, at the hearing, ABC asserted that the Premises lacks fifty parking spaces.

A waterfront resort liquor license is a special category of license. Idaho Code Section 93-948 sets out legislative intent. There must be two hundred feet of lake frontage “open to the public, where people assemble for the purposes of vacationing, boating, or fishing...and open to the public for recreational uses for the purpose of caring for vacationers, or other recreational uses...” In the case of Long Bridge, the Premises are not situated on the Lake. Rather, the public and Long Bridge patrons must use a foot path along a 5-foot easement, approximately 1900 feet in length to access the Lake. Once at the Lake, there may be a 200-foot Right to Use, but the possible Right of Use area is encumbered by four private boat docks, landscaping, fences and unfriendly lot owners who believe the public and Long Bridge patrons have no right to use their lots. There are no public docks or improved launching facilities. It is clear that the Premises does not qualify for waterfront resort license based on the statutory language or based on legislative intent. Long Bridge concedes that the statutory requirement for public docks or boat launching facilities is not met. It is undisputed that if ABC were considering a new application for a new waterfront resort liquor license at the Premises, the license application should be denied because the special characteristics required in Idaho Code Section 93-948 are not met.

Long Bridge correctly argues that the inquiry cannot end with Idaho Code Section 23-948. Rather, Long Bridge asserts that its rights to a waterfront resort license are grandfathered by Idaho Code Section 23-903 based on the undisputed fact that a waterfront resort license has remained in effect at the Premises for a consecutive period of more than ten years. Long Bridge further asserts that since it has vested rights to a waterfront resort license pursuant to Idaho Code Section 23-903, that it has a right to transfer its waterfront resort license to AJ & AM. While Long Bridge concedes that the Premises does not have docks or boat launching facilities, Long

Bridge argues that the Premises has not had docks or boat launching facilities since at least 1997 when Long Bridge first leased the Premises.

ABC rebuts Long Bridges' 23-903 argument by asserting that the required special characteristics of the original license are no longer met. ABC notes that there are material changed circumstances since the Declaratory Rulings were issued and since Long Bridge first leased the Premises, and as a result of the material changes to the special characteristics of the waterfront resort license, the transfer application from Long Bridge to AJ & AM was properly denied.

Pursuant to Idaho Code Section 23-903, the analysis must be focused not on whether Long Bridge or AJ & AM meets the requirements for the issuance of a waterfront resort liquor license today. Nor is it relevant whether ABC properly issued a waterfront liquor license to Long Bridge and its predecessors in the past. Probably it did not. Rather, since this waterfront resort liquor license has been in effect for more than ten years, the analysis must focus on "the required characteristics (of the premises) for original licensure...(and whether) said premises continue to have such special characteristics at the time of the application for renewal." Idaho Code Section 23-903. The issue becomes whether these "special characteristic(s) for original license" have changed. The issues in dispute include: 1) whether there has been a change to the Right to Use two hundred feet of Lake frontage; 2) whether there has been a change to the "suitable docks or boat launching facilities"; 3) whether there has been a change to the ability of the public and Long Bridge patrons to access the Right to Use area via the Access Easement; and 4) whether there has been a change to the availability at the Premises of "parking for fifty (50) automobiles."

I. Right to Use Lakefront

Mel and Mellie Jukich first created the “right to use, for resort purposes, the lakeshore for a distance of 200 feet West of the East line of said Lot 17.” Exh. 3. This Right to Use was granted on September 25, 1970 to Bruce and Zecla David as part of the conveyance of the Premises. Previously, Jukiches owned both the land where the Premises is located and the land where the Block 9 Lots are located. After the 1970 Deed, the ownership of the Premises and the ownership of the Block 9 Lots became separated. In March 1978, the Premises and Right to Use was conveyed by the Davids to the Webbers and Marstons. On May 1, 1984, Marstons conveyed their interest in the Premises to Wagon Bridge, Inc., but this 1984 conveyance does not include any reference to the Right to Use. It is not in the record what happened to the Webbers’ interest in the Premises, the Access Easement or the Right to Use. On October 1, 1985, Wagon Bridge, Inc. conveyed the Premises to Walter Fette and purported to convey the Right to Use and the Access Easement. It is unclear whether Wagon Bridge had the legal authority on October 1, 1985 to convey the Right to Use to Mr. Fette since the Right to Use may not have been properly conveyed to Wagon Bridge. With respect to the Right to Use, based upon the documents in the record, there appears to have been a break in the chain of title on May 1, 1984. Also, it is unclear if the Right to Use was a conveyable real property interest or was a right personal to the Davids and/or the Marstons.

On December 20, 1994, Glickenhauses were owners of the Lots 17, 18, 19 and 20. The Glickenhauses replatted Lots 17, 18, 19 and 20 into Lots 17A, 18A, 19A and 20A. Significantly, the Right to Use is not mentioned or shown on the replat. However, on January 19, 1995, the Glickenhauses conveyed newly replatted Lots 17A and 18A to Lakeshore Builders, Inc. The January 1995 deed was conveyed “subject to the right regarding resort use reserved in” the 1970

Deed. By this date, it is unclear whether the Right to Use was still owned by the current owner of the Premises or was personal to one of the prior owners. Therefore, it is unclear what the effect was of the Glickenhauses' reservation of the Right to Use in the January 19, 1995 deed. As of January 19, 1995, it is unclear, based on the documents in evidence in this proceeding, if the 200-foot Right to Use the lakeshore was owned by the owners of the Premises, or was personal to prior owners, or had ceased to exist.

Also, from the way the Right to Use language is phrased in the 1970 Deed, it is unclear if the Right to Use is a real property interest, i.e. an easement, or was a personal right belonging to prior owner(s) of the Premises. Moreover, even if the Right to Use can be properly characterized as an easement, it is unclear if the easement was appurtenant to the Premises or was a personal right of prior owner(s) of the Premises. If the Right to Use was appurtenant, it would be a real property interest which could be conveyed together with the Premises. Based on the phrasing in the 1970 Deed, the Right to Use may have been an easement in gross (if it is an easement at all), in which case the right belonged personally to the Davids and so could not be conveyed together with the Premises, and, if so, the Right to Use the lakefront no longer existed as of May 1, 1984. The attempt by Glickenhauses to acknowledge or recreate the Right to Use in the January 19, 1995 Deed may not have had any legal effect. Even if it was effective, it only was effective at most as to newly replatted Lots 17A and 18A. Thus, there would have been less than 200 feet of lake frontage associated with any Right to Use.

The focus must then shift to the April 17, 1995 Easement Agreement entered into between the Glickenhauses, as owners of the Lots, and Walter Fette, the owner of the Premises. *See* Finding of Fact #18. This Easement Agreement purports to recreate and relocate the Access Easement (from Lot 17 to Lot 20A) and the Right to Use (from 200 feet West of the East Line of

Lot 17, to 200 feet East of the West line of Lot 20A). With respect to the Access Easement, this relocation may have been effective. Glickenhauses still owned Lots 19A and 20A. Thus, the Glickenhauses could choose to encumber Lot 20A with the relocated Access Easement. Also, they could re-encumber Lots 19A and 20A with the Right to Use. However, with respect to the Right to Use, it remains unclear whether the recreated Right to Use is personal to Walter Fette, the owner of the Premises on April 17, 1995, or whether the Right to Use is a real property interest which runs with the Premises. If the Right to Use was personal to Walter Fette, then he had no legal authority to convey the Right to Use to the Madduxes.

This is an administrative proceeding to determine the validity of ABC's decision to deny the transfer application from Long Bridge to AJ & AM. This is not a quiet title action nor a declaratory judgment action. The owners and others with an interest in Lots 17A, 18A, 19A and 20A are not parties. Some of those owners testified to their belief that the Right to Use no longer exists. Their belief may be supported by the fact that later conveyances of the Block 9 Lots do not reference the Right to Use as an encumbrance. These Lot owners believe they have the right to exclude the public. There is no evidence in the record that Long Bridge sought to protect the 200-foot Right to Use as against the owners of Lots 17A, 18A, 19A and 20A by filing a judicial action to clarify whether the Right to Use in favor of Long Bridge is legally viable.

This Hearing Officer is not in a position to rule on whether the Right to Use the 200 feet remains in effect. Such a decision can only be rendered by a court of competent jurisdiction with all parties claiming any interest in the Block 9 Lots being included as parties. For purposes of this proceeding, the most that can be said is that it is unclear whether the Right to Use 200 feet of lakeshore by owners and patrons of the Premises and the public is in force.

One thing that is clear is that four private docks now encumber the two-hundred-foot Right to Use area, three of which were constructed between 2000 and 2008. There is no evidence that Long Bridge sought to prevent construction of these private docks. Additionally, there was credible testimony that landscaping and fencing now encumber the 200 feet Right to Use area. Several lot owners testified to their belief that they have the right to encumber the Right to Use and to exclude the public from use of the 200-foot Lake shore area.

By 1995, only one house had been built on the Lots in question. If patrons of Long Bridge and its predecessors desired to use the lakeshore, there was little, if any, practical impediment to them doing so. They could easily travel from the Premises to the Lake. Now structures are built on each of the four narrow, 50-55 foot Lots, which structures occupy nearly the entire width of the Lots, together with landscaping and fences. Thus, owners and patrons of Long Bridge and the public in general can no longer use the 200 feet of the Lake shore as a practical matter. The public may be able to access the Lake shore via the Access Easement or via Highway 95 and/or the bike path that runs along Highway 95 parallel to the Access Easement. But when they arrive at the Lake, they cannot utilize two hundred feet of Lake frontage for vacationing, boating or fishing. At most the public and Long Bridge patrons can utilize “200 feet East of the West line of said Lot 20A” (Exh. 59.06) less the dimensions of the four private docks and less landscaping and fences.

In conclusion, there are now material changes in the special characteristics which existed when the License was originally granted. It is now unclear whether there is any right to use the lakeshore. It can no longer be said that “200 feet of lake frontage” is “open to the public, for people to assemble for the purposes of vacationing, boating or fishing”. For this reason, not only should a new waterfront resort liquor license not be granted pursuant to Idaho Code Section

23-948, but also it was appropriate for ABC to conclude that Long Bridge and AJ & AM are not eligible to transfer the License pursuant to Idaho Code Section 23-903 for the reason that the special characteristics required to maintain a waterfront resort license have materially changed.

2. Boat Docks

ABC next contends that there has been a material change in the special circumstances of the License with respect to the presence of boat docks within the 200 foot lakeshore Right to Use. Long Bridge responds that there were never any public boat docks located within the Right to Use area and so there has been no material change. There is no dispute that Idaho Code Section 23-948 requires that “each waterfront resort must have suitable (public) docks or permanent improved boat launching facilities...”. It is undisputed that today there are no public boat docks or improved boat launching facilities within the Right to Use area. It is also undisputed that there have been no such docks or launching facilities for quite some time.

The earliest mention of docks in the record is contained in the October 29, 1993 correspondence from Fred Palmer, writing on behalf of Walter Fette to Idaho State Police attorney Clayne Zollinger, Deputy Attorney General. Mr. Palmer implied that public docks were within the 200 foot area by directing Idaho State Police to make the assumption the boat docks were present in the Right to Use area. By 1993, the License had been in effect for at least ten years, likely going back to 1970 when Jukiches conveyed the Premises, the Access Easement, and the Right to Use to the Davids.

Based on the representations from Mr. Fette’s attorney, Director Cade ruled in the 1994 Declaratory Ruling that the Premises met the special characteristics to qualify for a waterfront resort liquor license based upon Idaho Code Section 23-903, since the License had been in effect

for more than ten years. Because the Right to Use area was located a substantial distance (approximately 1900 feet) from the Premises, Director Cade stated that a waterfront resort license would likely not be granted if being considered anew in 1994, pursuant to Idaho Code Section 23-948. Rather, the Director reasoned that the license should be recognized pursuant to Idaho Code Section 23-903 since it had already been in effect for at least ten years. Director Cade must have understood, based upon the representations from Walter Fette's attorney, that the special characteristics for issuance of a waterfront license were met, including the presence of boat docks. It is undisputed that there were never improved public boat launching facilities at this site. Thus, Director Cade could only have issued the 1994 Declaratory Ruling based on his understanding that public docks were located within the 200-foot lakeshore Right to Use area.

The Madduxes both initially testified that, to the best of their knowledge, there had never been any public docks associated with the Right to Use area. However, the Madduxes did not become aware of the Premises until 1997 when they first leased the Premises from Mr. Fette. They were not familiar with the Premises prior to their 1997 lease agreement. They could not have known whether docks were present within the Right to Use area prior to 1997. Evidence tending to contradict the Madduxes' testimony about public docks never being at the site includes: 1) Joan McGowen testified that at least one boat dock was present in 1996 (the year before the Madduxes leased the Premises); 2) Bonita Deis testified a dock was present on Lot 19A when she first purchased her property in 1997. She stated that the dock later broke loose; 3) Exhibit D appears to show two vacant pilings in the water about 10-15 feet from the shoreline, between lots 19A and 20A. These pilings are also shown in Det. Lehman's photos in Exh. 47.07; 4) Mr. Maddux testified there were two boat docks on Lots 17 and 18 when he first leased the Premises in 1997. Yet by 1997 only one dock, associated with Lot 17A, was of record. This

suggests that the second dock may have been the dock Ms. McGowen and Ms. Deis testified about.

For the above reasons, it is more likely than not that one or more public docks were present within the 200-foot Right to Use area during the early years of the issuance of the License. With lack of maintenance, and the development of three new private residences, and three new private docks, it is likely that the ability to maintain the dock or docks eroded and that the public dock or docks floated away or otherwise disappeared.

Thus, a second special characteristic of a waterfront resort has materially changed. While there was likely one or more public docks within the Right to Use area at some time in the past, there are now none. There is no longer an ability of the public or patrons of Long Bridge to use public docks within the Right to Use area for vacationing, boating or fishing.

3. Access Easement

The only way the Premises can arguably meet the special characteristic of 200 feet of lakeshore frontage is if the public and Long Bridge owners and patrons can access the Lake via the Access Easement since the Premises are about 1900 feet from the Lake. Access directly from Highway 95 is not practical because of a steep slope. Access from the bike path is difficult because of a fence or guard rail and a slope. The waterfront resort liquor license has been granted to Long Bridge and its predecessors for many years based on the assumption that the Access Easement provides access to the Right to Use Lake frontage.

When Madduxes first leased the Premises in 1997, no structures were built on three of the Lots. As a practical matter, the public and Long Bridge patrons and the public could access the Lake from the Premises by traversing the Lots. However, as residences were built on the Lots,

together with fences and landscaping, the only way to access the 200 foot Right to Use Lake frontage was via the Access Easement.

Based on the evidence presented at the hearing, maintenance of the Access Easement has been inconsistent. The Access Easement had no maintenance in the winter and only occasional summer maintenance. On one occasion, Long Bridge obtained a permit/license from the Idaho Transportation Department to transport maintenance equipment from Highway 95 to the Access Easement. However, the Access Easement later became obstructed by rocks, vegetation, trees and landscaping such that by September 2019, when ABC investigators Lehman and Gripton viewed and travelled the Access Easement, the Access Easement was barely traversable by foot by a healthy person. This testimony was corroborated by Le Hardin, who owns Lot 20A adjacent to the Access Easement, and testified that the Access Easement was overgrown, wild, and brushy between 2013 and 2019 and inaccessible. At best, the Access Easement was an overgrown unimproved footpath. It was not traversable by a person in a wheel chair. By December 2019, after the Madduxes became aware of ABC's decision to reject the transfer application, the Madduxes video-taped the Access Easement. Tr. Vol I, pp. 229-232, 237. Exhibit C. By that time, some maintenance had been performed on the Access Easement area. But even then, the Access Easement was a footpath with some obstructions which interfered with its use.

The Madduxes testified about and introduced into evidence a picture of an annual swim event to argue that the public utilized the Access Easement and the Right to Use area. *See* Exh. D. The picture clearly shows numerous people at the lakeshore to commence the swim event. However, the event is only conducted once a year. It is unclear whether the people were there

with the permission of the Lot owners. It is unclear if the people in the picture utilized the Access Easement to access the Lake for the beginning the swim event.

The evidence suggests that the Access Easement was not regularly or consistently maintained by Long Bridge or the Madduxes. The License was granted on the basis of the legal and practical right to access the 200 foot of Lake front, since this is a special characteristic of a waterfront resort license. The public and Long Bridge patrons cannot now consistently access the Lake front via the Access Easement. Thus, this is a third material change in the special characteristics of a waterfront resort license.

Finally, there may be some question whether the Access Easement continues to exist. The Easement Agreement entered into between the Gickenhauses and Walter Fette in April 1995 may have resurrected the Access Easement from a prior chain of title problem. However, the Easement Agreement did not specify that the easement was assignable or reference heirs and assigns. Like the Right to Use, this cannot be resolved by the Hearing Officer in this proceeding. Rather, it can only be resolved by a court, through a quiet title action and/or declaratory judgment action. The lack of consistent maintenance, plus uncertainty about the continued viability of the Access Easement is a material change to the special characteristics of the License.

4. Parking

An additional special characteristic of a waterfront resort license is that there must be on-site parking for fifty automobiles on the operator's property. Idaho Code Section 23-948(2). ABC argued at the hearing, based on photographs, that there are only 35-40 parking spaces on the Premises. Ellen Maddux disputed this and asserted there is parking for 50 vehicles. Ellen Maddux also asserted there had been no change to the parking spaces at the Premises since 1997 when the Madduxes first leased the Premises. This latter contention was not effectively rebutted

by ABC. Even if ABC is correct that today the Premises is short of the 50 parking spaces needed to qualify for a waterfront resort license pursuant to Idaho Code Section 23-948(2), the more relevant question is whether there has been a change in the parking from ten years ago pursuant to Idaho Code Section 23-903. Since no evidence was produced that the number of parking spaces has changed from ten or more years ago, and since Ellen Madduxes' testimony of no change was not effectively rebutted, it can not be said that there has been a material change to the Premises with respect to the number of parking spaces. ABC argues what has changed is that in 1997 Lots 19A and 20A were vacant. Thus, as a practical matter, Long Bridge patrons could park on these vacant lots. ABC notes that this is a practical change since those lots are now occupied by residences, and therefore Long Bridge patrons can no longer park on the vacant lots. ABC has a point, since the statute counts, for purposes of the 50 spaces, "contiguous property upon which the docks" are located. This is a close call, but it cannot be said that ABC has proved changed circumstances with respect to the number of parking spaces at the Premises.

5. Estoppel

Long Bridge next argues that ABC is estopped from denying the application to transfer the License to AJ & AM. Long Bridge correctly notes that the License has been transferred and renewed numerous times with ABC's approval or acquiescence. Long Bridge credibly asserts it will suffer damage if the License transfer is not approved. Long Bridge has refunded \$75,000 of the purchase price for the Premises and the License to AJ and AM as a result of Long Bridge's inability to transfer the License. Long Bridge asserts in its post hearing memorandum that ABC "is estopped from denying the transfer of this License now, and in the future, as long as the characteristics of the property remain unchanged. It would simply be unconscionable to allow (ABC) to transfer a license and state it was valid, only to turn around and change its mind, when

the circumstances under which the license was transferred in the past have not changed.”

Petitioner’s Post-Hearing Memorandum, p. 25 (underlining in the original). As Long Bridge correctly notes, estoppel cannot be invoked if the circumstances under which the License was transferred in the past have changed. As noted above, the circumstances surrounding the issuance of License as a waterfront resort license have materially changed. Thus, based on Long Bridge’s own analysis, estoppel does not mandate that ABC’s decision to deny the transfer application be overruled.

Long Bridge correctly cites Idaho case law regarding equitable estoppel. For estoppel to be invoked in this case against ABC: (1) ABC must have made “a false representation of a material fact made with actual or constructive knowledge of the truth; (2)... (Long Bridge) did not and could not have discovered the truth; 3) (ABC intended) that the misrepresentation or concealment be relied upon; and (4) (Long Bridge) relied on the misrepresentation to (its) prejudice.” No evidence was presented that ABC made a false representation to Long Bridge regarding the license. There was no evidence that ABC had actual knowledge that the Right to Use area had become obstructed or lost through property transfers or otherwise. Nor was there evidence that ABC was made aware of lack of maintenance with respect to the Access Easement. *See Willing v. Department of Health & Welfare*, 127 Idaho 259, 261, 899, P.2d 9369, 971 (1995). If any misrepresentation was made, it was Long Bridge which represented to ABC during the annual License renewals that Long Bridge continued to meet the special characteristics required to retain a waterfront resort license. *See Idaho Code Section 23-905*. Likewise, it was Long Bridge, not ABC, who was regularly present at the Premises and able to determine whether the special characteristics to retain the License continued to exist. There was no evidence that ABC intended that Long Bridge or the Madduxes rely on any ABC misrepresentation or concealment.

Clearly, Long Bridge is prejudiced by its inability to have the License transferred to AJ & AM, but this prejudice is not the result of any misrepresentation or concealment by ABC. The elements to invoke equitable estoppel have not been met.

Next, Long Bridge argues that quasi-estoppel mandates that ABC's decision to deny the License transfer application from Long Bridge to AJ & AM be overruled. Long Bridge argues that with respect to quasi-estoppel, no concealment or misrepresentation is required. Rather, quasi-estoppel may be invoked when it would be "unconscionable to allow a party to assert a right which is inconsistent with a prior position." *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994).

While it is true that ABC approved numerous past transfers and renewals of the License, it is likewise true that there have been material changes in the special characteristics of the Premises since 1997 when Long Bridge and the Madduxes first leased the Premises and utilized the License. It cannot be said that it is unconscionable for ABC to perform its statutory duty to enforce the Idaho Liquor Act, where the Premises does not qualify for a waterfront resort liquor license, and the special characteristics for retention of such a license have materially changed since the Madduxes first leased the Premises.

Also, Long Bridge and the Madduxes are not entirely without fault in this matter. They did not consistently maintain and protect the Access Easement and the Right to Use area. By September 2019, the Access Easement was barely traversable on foot and was not useable by a person in a wheelchair. Likewise, there is no evidence that Long Bridge or the Madduxes took any legal action to protect rights they may have had to use the 200-foot lakefront, or to remove the obstructions which interfered with the Right to Use area. No quiet title or declaratory ruling

was initiated to clarify Long Bridge's legal rights under, or to prevent interference with, the Access Easement or the Right to Use the Lake frontage.

Even if ABC mistakenly issued the License to Long Bridge in 1997, such mistake does not result in Long Bridge or its successors having a permanent right to future transfers and/or renewals of the License. *See Henson v. Department of Law Enforcement*, 107 Idaho 19 684 Idaho P.2d 996 (1984). In *Henson*, a licensee was mistakenly issued a specialty liquor license by ABC. ABC was not precluded from revoking the license since the licensee was not in compliance with the law.

No vested property right is acquired as between ABC and licensees by virtue of ABC's grant of a license. If the statutory requirements for the license are not complied with, ABC has a duty to enforce compliance with the Idaho Liquor Act. *See case law cited at pp. 22-23.* Also, ABC did not deprive the Madduxes of all value associated with the Premises. Even though the Madduxes returned \$75,000 to AJ & AM based on the inability to transfer the License, the Madduxes still retained \$475,000 from the sale of the Premises. Tr. Vol. 1, p. 44 and 126; Vol 2, p. 4-7, and Exh. 48.43. It was not unconscionable for ABC to deny the transfer application.

Finally, Idaho courts have been reluctant to invoke estoppel against government agencies when acting in their governmental capacity. Estoppel "must be invoked with caution and only in exceptional cases...its application is the exception and not the rule." *Boise City v. Sinsel*, 72 Idaho 329, 338, 241, P.2d 173, 179 (1952). "The general rule is that administrative officers of the State cannot estop the state through mistaken statements of law." *Kelso v. Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 138 97 P.2d 591, 599 (2000). *See also Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 200-01, 207 P.3d 169, 176-77 (2009); *State ex-rel. Williams v. Adams*, 90 Idaho 195, 201, 409 P.2d 415, 419 (1965); *Buell v. Idaho Dep't of*

Transp., 151 Idaho 257, 265, 254 P.3d 1253, 1261, (Ct. App. 2011). “[E]stoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity.”

In conclusion, estoppel does not mandate that ABC’s decision to deny the License transfer from Long Bridge to AJ & AM be reversed. ABC had statutory authority to deny the transfer.

6. Attorney Fees and Costs

ABC requests an award of attorney fees and costs pursuant to Idaho C Section 12-117.

Idaho follows the “American Rule” that each party must bear its own attorney fees unless a specific statute or contract provides for such an award. *Ramell v. State*, 154 Idaho 669 (2012).

Idaho Code Section 12-117 provides:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney’s fees, witness fees and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law.

To be eligible for an award of attorney fees pursuant to Idaho Code Section 12-117: (1) the requesting party must be the prevailing party, and (2) the non-prevailing party must have acted without a reasonable basis in law or in fact.

ABC is the prevailing party. This decision supports ABC’s decision to deny the transfer application. The question becomes whether Long Bridge brought its Petition without a reasonable basis in law or in fact.

Long Bridge appropriately pointed to the 1994 and 1995 Director Declaratory Rulings wherein the agency stated that Long Bridge’s predecessors were entitled to a waterfront liquor

license, and that the relocation of the Access Easement and the Right to Use did not invalidate the License. The issues regarding the ongoing validity of the Right to Use and the Access Easement are subtle, complex, and factually intense. It was not unreasonable for Long Bridge to assert that it should be allowed to transfer a License that has been in effect for over 40 years, and has been in Long Bridge's possession or ownership for over 20 years. It cannot be said that Long Bridge has acted in this proceeding without a reasonable basis in law or in fact. Attorney fees and costs are not awarded in favor of ABC against Long Bridge.

7. Standard of Review

ABC argues that its decision to deny the transfer application should be entitled to deference pursuant to Idaho case law. It is correct that final agency action is entitled to such deference. However, ABC's decision to deny the transfer application is not a final agency action. Rather, ABC is a division within the Idaho State Police. This matter has been appealed to the agency head, the Director of Idaho State Police. The Director has appointed this Hearing Officer to conduct a contested case proceeding to consider the Petition and issue a preliminary decision. This preliminary decision will become the final agency decision unless appealed to the Director, and, if appealed, the Director's decision will become the final agency decision. Upon final agency action, the agency will be entitled to a presumption of correctness as set forth in ABC's Closing Argument.

CONCLUSIONS OF LAW

1. ABC has jurisdiction pursuant to the Idaho Liquor Act to regulate the sale of liquor in Idaho;

2. ABC has jurisdiction to permit or deny the renewal or transfer of a liquor license based on the criteria set forth in the Idaho Liquor Act;

3. ABC's decision to deny the application for transfer of the License from Long Bridge to AJ & AM was not improper pursuant to Idaho Code Section 23-948 for the reason that the Premises owned by the transferee does not meet the special characteristics to be eligible for a waterfront resort liquor license. *See* also Idaho Code Section 23-908(2);

4. ABC's decision to deny the application for transfer of the License from Long Bridge to AJ & AM was not improper pursuant to Idaho Code Sections 23-903 and 23-908(2) because the special characteristics of the Premises have materially changed;

5. ABC is not estopped from denying the application for transfer of the License from Long Bridge to AJ & AM;

6. ABC is the prevailing party, but the Petition was not brought by Long Bridge without a reasonable basis in law or fact. ABC is not entitled to an award of attorney fees and costs.

PRELIMINARY ORDER

IT IS ORDERED that the Petition is denied and that ABC's decision to deny the transfer application from Long Bridge to AJ & AM is affirmed.

COMPLIANCE WITH IDAPA 04.11.01.730

(a) This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within

fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

(b) Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency.

(c) If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on his own motion.

(d) If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

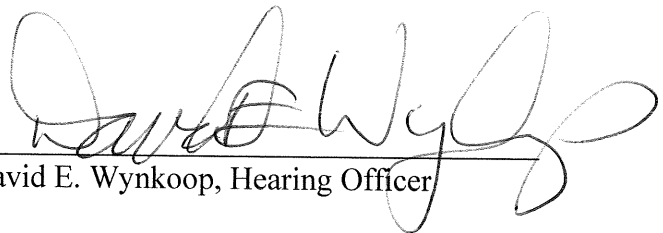
(e) Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held;
- ii. The final agency action was taken;
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho; or

iv. The real property or personal property that was the subject of the agency action is located.

(f) This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 16th day of March, 2020.



David E. Wynkoop, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of March, 2020, I served a true and correct copy of the foregoing upon the following, by the methods indicated below:

Cheryl Rambo
Deputy Attorney General
Alcohol Beverage Control
700 S. Stratford Drive
Meridian, Idaho 83642

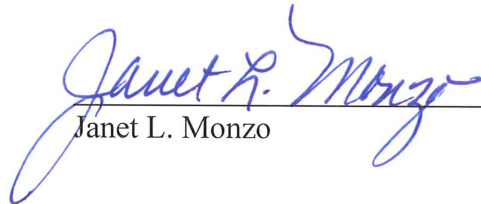
XX via email to cheryl.rambo@isp.idaho.gov
XX via U.S. mail, postage prepaid

James G. Reid
Jennifer Reid Mahoney
KAUFMAN REID, PLLC
1211 W. Myrtle St., Suite 350
Boise, Idaho 83702

XX via email to jreid@krlawboise.com
XX via email to jmahoney@krlawboise.com
XX via U.S. mail, postage prepaid

Robin Sabins
Legal Secretary
Alcohol Beverage Control
700 S. Stratford Drive
Meridian, Idaho 83642

XX via U.S. mail, postage prepaid



Janet L. Monzo