



JAMES E. RISCH
Governor

GAVIN M. GEE
Director

August 30, 2006

Re:

Dear M

This is in response to your August 14, 2006 letter requesting this Department take a "no-enforcement" position if membership interests in the Inc. are offered and sold in this state without being registered under applicable provisions of the Idaho Uniform Securities Act (2004) ("Act").

We particularly note the following facts presented in your letter dated August 14, 2006:

1. is a non-profit corporation formed for the sole purpose of acquiring and owning a marina and related property for the use and benefit of its members;
2. No payment of income, dividends or other distribution of profit will be made to the owners of membership interests unless an event of dissolution occurs pursuant to Articles of Incorporation;
3. Membership interests are not freely transferable or assignable; members will be allowed to sell, transfer or otherwise dispose of the membership only to and then only if board of directors accepts a new member as a designated replacement;
4. All capital improvements are in place and no additional capital improvements are anticipated in the near future; and

SECURITIES BUREAU

Bureau Chief - Marilyn T. Chastain

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5. membership interests are being offered on the basis that they entitle the owner/member to use the recreational marina facilities, and no representations or inducements to purchase memberships on the potential profitability of financial appreciation of the membership units will be made. Furthermore, all potential purchasers will be informed of the substantial limitations upon the transferability of the membership interests.

Based on these facts, we will recommend to the Director that no enforcement action be taken if _____ offers its membership interests in this state without benefit of registration. Please be advised that this letter only expresses the Bureau's position on the enforcement action and does not purport to express any legal conclusion as to whether the memberships offered are "securities" under the Act. This "no-action" is based solely on your representation of the facts and different facts may require a different conclusion.

If you have questions or comments regarding this matter, please contact Nancy C. Ax or me at 208-332-8004.

Sincerely,


Marilyn T. Chastain
Securities Bureau Chief

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STATE OF IDAHO
DEPT OF FINANCE

August 14, 2006

Idaho Department of Finance
Securities Bureau
P.O. Box 83720
Boise, ID 83720-0031

Re: Marina Cooperative, Inc.

Dear Ladies and Gentlemen:

The purpose of this letter is to request that the Idaho Department of Finance provide advice that it will not recommend any enforcement action if (" ") offers for sale and sells memberships in the manner and under the circumstances described below without registration under the Idaho Uniform Securities Act (2004) ("Act"). Enclosed is a check in the amount of \$50 in payment of the fee required by Rule 3.

The Cooperative and an Idaho limited liability company ("Seller"), have provided to us the information set forth below and have authorized us to provide such information to you on their behalf.

Formation

The Cooperative was formed as an Idaho non-profit corporation for the sole purpose of acquiring and owning a marina and related property for the use and benefit of its members (the "Members"). The Cooperative intends to offer and sell Memberships in order to raise the funds necessary to acquire the marina and related common area (" Property") from the Seller.

The marina will contain 100 boat slips, covered and uncovered ("Boat Slips"). The property also contains a dock, parking rights, water and drainage system, and private road easements (the "Common Area Facilities"). The Property is free and clear of all liens.

The Seller and Cooperative will enter into a Conditional Purchase and Sale Agreement (the "Purchase Agreement") pursuant to which the Cooperative will purchase the Property from the Seller subject to certain terms and conditions described below. As a condition to the purchase of the Property by the Cooperative, all Boat Slips and Common Area Facilities will be fully developed and ready for occupancy.

The Cooperative has not been formed to operate, nor will it be operated, for pecuniary gain or profit. The Cooperative's Articles of Incorporation ("Articles") provide that there will be no payment of income, dividends or other distributions of profit to any of the Cooperative's members, trustees or officers, and as such they will have no interest in or title to any of the

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profits or assets of the Cooperative. The Articles provide that, in the event of dissolution of the Cooperative, all of the property and assets of the Cooperative (if any) remaining after payment of debts and liabilities and any expenses of liquidation, will be distributed among the Members of the Cooperative as determined by the Cooperative's Board of Directors taking into account such factors as the relative value of the Boat Slip to which the Membership relates.

Membership

The Cooperative will offer 100 Memberships. Each Membership corresponds to a Proprietary Lease ("Lease") to be executed by the Member which specifies which Boat Slip the Member will have for their exclusive use and enjoyment. Persons will receive a numbered membership certificate for each Membership purchased by them. Members are entitled to one vote for each membership certificate.

The Cooperative will offer and sell the Memberships on its own account for an amount that it deems appropriate from time to time. Initially, offering price for the Memberships will range from \$30,000 to \$65,000, with the price depending upon the location of the leased Boat Slip and whether the Boat Slip is covered or not covered. The Cooperative intends to offer financing to Members which will require a down payment and the balance paid over a period of up to twenty years. The solicitation of Members will be on the basis of the recreational nature of the Boat Slip and no representations or inducements to purchase Memberships will be made on the basis of potential profitability or financial appreciation of the Memberships. All Members will be informed of the substantial limitations upon the transferability of the Memberships (as described below).

As noted above, at the time a person purchases a Membership, he/she will also enter into a Lease with the Cooperative, which lease relates to a specific Boat Slip. The Lease will have an initial term of ten years, but will automatically renew for so long underlying lease is obtained from the Idaho Department of Lands.

Each Member is also entitled to the use and enjoyment of the Common Area Facilities. Members will be subject to the Cooperative's Declaration of Covenants, Conditions and Restrictions ("CC&Rs"), Articles, Bylaws and such rules and regulations which may be adopted by the Board of Directors of the Cooperative (the "Board") from time to time. Persons will be provided with copies of these documents with ample time for review prior to making a decision whether to purchase a Membership.

Members will be required to pay assessments levied by the Cooperative as a condition of their Memberships and Leases.

Purchase Agreement

The Seller will enter into the Purchase Agreement with the Cooperative pursuant to which the Cooperative can purchase the Property from the Seller, all subject to certain terms and conditions described below.

The Property is fully developed and ready for occupancy. The closing of the Purchase Agreement is subject to some conditions, the most significant of which are that the Cooperative must sell 51 Memberships and that all 100 Boat Slips and the Common Area Facilities must be fully developed. When the conditions are met, the Cooperative will purchase the Property for consideration consisting of all down payments received by the Cooperative from Members, an assignment of the financing contracts, and the transfer to the Seller of the remaining Membership interests. The Cooperative will receive the Property free and clear of all liens.

In the event that the Cooperative has not sold 51 Memberships on or before October 1, 2007, or if any of the other conditions in the Purchase Agreement are not met by that date, the Purchase Agreement terminates. All monies deposited with the Cooperative by prospective Members will be returned in full, without interest.

The Memberships transferred to the Seller will be sold by the Seller. The Purchase Agreement contains the following restrictions/conditions on the Membership sales made by the Seller:

- The purchase price for such Memberships shall be established by the Seller and approved by the Cooperative.
- Any purchaser of the Membership must be approved by the Board of Directors of the Cooperative. Such approval cannot be unreasonably withheld. However, the Seller must provide adequate assurances to the Board that the proposed transferee will be able to financially perform its obligations as a member.
- The solicitation by Sellers of purchasers for the Memberships must be on the basis of the recreational nature of the Boat Slips and Seller has agreed that it will make no representations or inducements to purchase Memberships on the potential profitability or financial appreciation of the Membership Units. All potential purchasers will be informed of the substantial limitations upon the transferability of the Membership Units.

Also, until the Seller has sold all the Memberships transferred to it as a part of the purchase price for the Property, every fourth Membership transfer must be offered to the Seller so that the Seller has the first option to sell a Membership to the new purchaser.

Expansion

The Cooperative does not anticipate the need for further capital improvements in the near future. The Cooperative will have the option to add additional classes of memberships which may related to future expansion and may offer payment terms on a schedule different from the initial schedule offered by the Cooperative. The offering of any additional Memberships will either be registered or the Cooperative will obtain another no-action letter from the Department.

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Management of Property

Until the closing of the Purchase Agreement, the Seller will hold title to, manage and operate the Property. Once the Cooperative purchases the Property, management will be performed by the Board of Directors of the Cooperative. The Bylaws provide for a period of two years after closing, the three initial Board of Directors named in the Articles of Incorporation shall constitute the Board. the principal owner of the Seller, will not serve as an initial director. Thereafter, the Board expands to nine and the members are elected on a three year staggered basis by the Members. The Board has broad powers under the Bylaws and CC&Rs. The Bylaws provide for annual assessments which can be increased by the Board (but by no more than 10% each year). Any additional assessments require the approval of the Members.

A Member may only rent his/her recreational site upon the approval of the Board of Directors. The Cooperative will not offer rental pool arrangements for its Members,

Transfer of Membership

The recreational nature of the Memberships is emphasized by the fact that the Memberships will not be freely transferable. Members will be required to pledge their Memberships to the Cooperative to secure the payment of the balance of their membership purchase and assessments. No other pledges will be allowed. Members will be allowed to sell, transfer or otherwise dispose of the Membership only to the Cooperative and then only if the Board accepts a new member as a designated replacement. (Also, as noted above, the Bylaws of the Cooperative provide that until Seller has sold all its Memberships, every fourth designated replacement is referred to Seller.) In no event will the Cooperative be required to purchase a Membership unless it has a new purchaser for the Membership. The possibility that a Member may receive an amount greater than that originally paid by the Member will not be emphasized in any offering materials or presentations. All prospective purchasers will be informed that the Membership should not be viewed or acquired as an investment and that the purchaser should not expect to realize an economic profit from the Memberships. The Cooperative may also charge a transfer fee.

Discussion

For the reasons set forth below, I submit that the Memberships in the Cooperative, if offered and sold by the Cooperative in the manner described above, would not be "securities" as that term is defined in Section 30-14-102(28) of the Act and, therefore, would not be required to be registered in compliance with Section 30-14-301.

Although membership interests in private recreational cooperatives are not literally set forth in the definition of "securities," I have nevertheless considered whether the Memberships may be regarded as the equivalent of "stock" or another form of "securities" in this instance, because the Memberships carry certain voting rights and no other voting instruments will be issued by the Cooperative.

I believe that the Memberships to be offered and sold by the Cooperative clearly should not be treated as the equivalent of “stock” for the purpose of applying Section 30-14-102(28) of the Act. In *Tcherepnin v. Knight*, 389 U.S. 332, 339 (1967), the Court identified the right to receive “dividends contingent upon an apportionment of profits” as the most common feature of stock, and in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), the Court set forth several other characteristics traditionally associated with stock: (i) negotiability, (ii) the ability to be pledged or hypothecated, (iii) voting rights in proportion to the number of shares owned, and (iv) the ability to appreciate in value. 471 U.S. at 686 (citing *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 851.)

The Memberships bear little or no resemblance to stock as characterized by the *Tcherepnin* and *Landreth* Courts. The Memberships do not have dividend or distribution of income rights and may not be pledged or hypothecated (except to secure the initial Membership purchase obligation and assessments). The Memberships may only be transferred if the Board determines that the proposed transferee is financially capable of performing his/her obligations as a Member. Although a Membership conceivably could increase in value, it will not be part of the Cooperative’s solicitation effort and cannot reasonably form the basis of a profit motive to acquire a Membership.

Since the Memberships do not fall plainly within the usual concept or definition of “stock” as set forth in Section 30-14-102(28), we have considered whether the Memberships would otherwise be deemed “securities” by reason of being “investment contracts” or “instruments commonly known as securities” for purposes of Section 2(a)(1) of the Act. In *Landreth, supra*, 471 U.S. at 689, the Court suggested that the proper test for determining whether a particular instrument which is not clearly within the definition of “stock” as set forth in Section 2(a)(1), or which is otherwise of an unusual nature, is an “investment contract” or an “instrument commonly known as a security”, is the “economic realities” test set forth in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). In evaluating the economic realities of a transaction, the test is whether “the scheme involves an investment of money with profits to come solely from the efforts of others”, *Howey*, 328 U.S. at 301. The *Howey* test, as explained by the Court in *Forman*, 421, U.S. at 852, “embodies the essential attributes that run through all of the Court’s decisions defining a security”.

Applying the *Howey* test to the characteristics of the Memberships to be offered and sold by the Cooperative, it is clear that such a Membership would not be an “investment contract” as that term is used in Section 30-14-102(28) of the Act. While the persons who acquire Memberships will do so in exchange for money, and the common enterprise requirement arguably may be deemed to be met either through the horizontal commonality existing in the dependent relationship among the members or the vertical commonality represented by the dependency of such Members upon the actions of the Seller, the persons to whom such Memberships will be offered will be informed not to expect, and will not have any reasonable expectation of deriving, “profits” from the ownership of an Membership.

In *Forman, supra*, the United States Supreme Court elaborated on the “profits” aspect of the *Howey* test:

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By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in *Joiner, supra* (sale of oil leases conditioned on promoters' agreement to drill exploratory wells), or a participation in earnings resulting from the use of investors' funds, as in *Tcherepnin v. Knight, supra* (dividends on the investment based on savings and loan association's profits). In such cases the investor is "attracted solely by the prospects of a return" on his investment. *Howey, supra*, at 300. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased -- "to occupy the land or to develop it themselves," as the *Howey* Court put it, *ibid.* -- the securities laws do not apply. *See also Joiner, supra*, 421 U.S. at 852.

In the present situation, Members of the Cooperative will not be entitled to share in any income generated by the operation of the Cooperative, nor will the Cooperative pay to its members any dividends or make any distributions of any kind, except upon liquidation. The Cooperative itself will be operated as a not-for-profit corporation under Idaho law. Some possibility for realization of capital appreciation does exist, but we believe that it is, as were the opportunities for income from the leasing of commercial facilities in *Forman*, "far too speculative and insubstantial" to create in the mind of any reasonable purchaser an "expectation of profit in the sense found necessary in *Howey*." *Forman, supra*, 421 U.S. at 856.

As described above, Members may transfer their Memberships only to the Cooperative. However, the Cooperative is only required to purchase the Membership only if a successor Member is first found and approved by the Cooperative. Also, until the Seller resells the Memberships transferred to it as part of the purchase price for the property, every fourth Membership being transferred must be offered to the Seller. I believe another factor to consider in this respect is that the term of the Lease for the Boat Slip continues only for so long as Idaho Department of Lands approves the continued use of the marina. Although the Seller and the Cooperative do not anticipate the Department of Lands will discontinue their approval, this could be a factor in a Member's ability to transfer his/her Membership.

All Members will be informed of these substantial limitations upon both the transferability of the Memberships and the opportunity to profit therefrom and will be informed of the unsuitability of such Memberships as investments. Accordingly, purchasers of Memberships will not be promised, and reasonable purchasers should not expect, any "profits" from such Memberships. *See Forman, supra.*

Finally, to the extent that the risk capital test for determining the existence of a security may influence the Department's evaluation of this request, as such test was first articulated in *Silver Hills Country Cooperative v. Sobieski*, 55 Cal.2d 811, 361 P.2d 906 (Cal. 1961), I believe that the Memberships would not be deemed to be securities under such test. In the *Silver Hills* case, no facilities were in place or even under construction and the developer planned to use the proceeds from the sale of memberships as the start-up financing in connection with the construction of the facilities.

The situation is clearly distinguishable from *Silver Hills*, in that the Seller is not dependent upon the proceeds from the sale of any Membership to fund the any construction of

the facilities nor maintain operations prior to the Closing. The Boat Slips and Common Area Facilities will all be in place and ready for occupancy at the time the property is acquired by the Cooperative. As such, the Cooperative is not soliciting risk capital with which to develop a business for profit, and therefore the *Silver Hills* decision is inapposite.

The following no-action letters involved the offer and sale of memberships and in all of these letters the Department took a no-action position: No Action Letter, Idaho Securities Bureau, March 20, 1995, CCH Blue Sky Law Reporter ¶ 21,674; Lake Haven Owners Association, September 10, 1997 and Outlet Bay Owners Association, 1995. The Securities & Exchange Commission has also issued numerous no-action letters involving the sale of memberships in nonprofit corporations¹.

Conclusion

In view of the foregoing, we respectfully request your confirmation that the Department will not recommend enforcement action if the Memberships in the Cooperative are offered and sold in the manner described herein without registration under the Act.

If for any reason you conclude that you cannot respond affirmatively to our request, we would appreciate the opportunity to discuss the matter with you prior to the preparation of your response and ask that you contact me at the phone number above.

Sincerely yours,

¹ See, Liberty National Golf Club (March 29, 2004); Las Sendas Golf Club, Inc. (March 2, 2004); Hayfield Country Club (June 25, 1998); Big Island Country Club, L.P. (March 30, 1998); The Mar-a-Lago Club, Inc. (November 23, 1993).