

BEFORE THE IDAHO DEPARTMENT OF LANDS

In re: Application for Encroachment)
Permit by HUCKLEBERRY BAY)
COMPANY,)

Case No. L-97-S-971

Applicant,)

PRELIMINARY ORDER

SELKIRK-PRIEST BASIN, INC.,)
a non-profit corporation; C.R.)
and D.J. HANNON; RAY)
and MARYBEL DAVIS; JAMES and)
KAREN KIMBALL; FRANK and)
PEARL FREEMAN; and)
WILLIAM K. and SHIRLEY)
CARROLL,)

Protestants.)

I. INTRODUCTION

This matter has come before the undersigned hearing officer on Applicant Huckleberry Bay Company's (HBC) motion for reconsideration of the Idaho Department of Land's (IDL's) denial of a lake encroachment permit No. L-97-S-971. HBC's encroachment permit application was denied by correspondence dated May 30, 1996, from Will Pitman. IDL

administrator, Lake Protection Act. Mr. Pitman listed the following reasons to support the denial of HBC's encroachment permit application:

1. The insufficiency of HBC's riparian rights as an incorporated homeowners association;
2. HBC's contravention of the State's recreational easement at Huckleberry Bay;
3. A payment structure for moorage usage that more closely resembles a commercial facility than a community dock; and
4. Failure to demonstrate an actual need for the proposed moorage.

Subject to the modifications contained in this opinion, Mr. Pitman's decision contained in his May 30, 1996, correspondence to David Bell is affirmed.

II. FACTUAL BACKGROUND

HBC purchased approximately 1,565 acres from Diamond Land Corporation in 1988. From this property, HBC has developed two subdivisions, the Huckleberry Bay subdivision with fourteen (14) water-front lots on Huckleberry Bay and the Ridgeview Terrace subdivision with twenty-seven (27) second-tier lots. As property is developed by HBC, it is made subject to the plan of Huckleberry Bay. The plan designates HBC as administrator. One of the administrator's duties is the maintenance and development of common areas.

The land purchased by HBC from Diamond Lands Corporation was subject to a recreational easement. This recreational easement was conveyed to the State by Diamond as part of a land exchange between Diamond Lands and IDL.

Subsequent to the transfer from Diamond to HBC, HBC negotiated with IDL to modify the geographic limitations of the easement. The easement had originally extended at Huckleberry Bay for a 2,000 foot long strip. HBC negotiated with the Department of Lands to

extend the length of the easement from 2,000 feet to the entire 5,700 foot length of the bay but to compress the depth of the easement from 200 feet to 100 feet.¹ The sole limitation on the terms of this recreational easement was a prohibition of over-night use or use by motorized vehicles except for public service vehicles as necessary. In addition to the limitations on the use of the recreational easement, HBC also retained riparian rights to 700 feet of Huckleberry Bay for the development of a marina or multiple-slip moorage development. Finally, HBC agreed to operate and maintain three access points to the recreational easement.²

HBC applied for an encroachment permit for the construction of a 24-slip community dock on the 700 feet of lake frontage at Huckleberry Bay upon which HBC reserved riparian rights.

A public hearing was held on HBC's application on July 13, 1995. As a result of that hearing, IDL requested an additional submission regarding HBC's riparian rights to support a lake encroachment permit. As a result of IDL's request, HBC submitted a declaration that purported to dedicate the 700 foot riparian area into common ownership for the benefit of individuals who came into ownership of property associated with the plan of Huckleberry. The dedication to common ownership was contingent upon approval by IDL of the lake encroachment application. The dedication was not an unconditional gift of the property. Rather, the dedication established a lease arrangement by which payments were to be made to HBC in exchange for moorage privileges.

¹ The recreational easement also included a strip of land 200 feet wide and 1000 feet long at an area known as Canoe Point that is geographically removed from Huckleberry Bay.

² Although the easement was executed in August of 1991, HBC has done nothing to provide the public with access points to the recreational easements.

The declaration also attempted to impact the State's recreational easement in a number of respects. First, IDL has been unable to ascertain from the legal description contained in the declaration whether HBC is attempting to convey ownership and riparian rights to more than the 700 feet allowed for in the recreational easement. Second, it appears both from the declaration and from the testimony of HBC at the contested case hearing, that HBC believes that it can exclude the public from the 700 feet of lake frontage in which HBC has retained riparian rights. Finally, the declaration gives priority for slip leases to second-tier lot owners, except lake frontage lot owners that assign their "shoreline" in a manner which allows expansion of the community moorage facility. This provision of the declaration as well as testimony at the contested case hearing indicate that HBC is asserting riparian rights in other than the 700 feet of property on Huckleberry Bay in which riparian rights were reserved in the recreational easement. As previously noted, by correspondence dated May 30, 1996, IDL administrator Will Pitman denied HBC's application for a lake encroachment permit.

On June 13, 1996, HBC filed a Petition for Clarification and or Reconsideration. This pleading predominantly raised an objection to Mr. Pitman's reference to issues relating to the recreational easement in his decision. On June 19, 1996, HBC filed a Supplemental Petition for Reconsideration alleging additional error in Mr. Pitman's decision. Protestant, Selkirk-Priest Basin Association, Inc., (SPBA) filed a response to Petition for Clarification or Reconsideration on June 25, 1996. On July 3, 1996, SPBA filed a response to HBC's Supplemental Petition for Reconsideration. Issues raised in SPBA's response to HBC's Motion for Reconsideration were disposed of in a pre-trial hearing held on July 3, 1996.

On July 11, 1996, a hearing was held at the Coolin Community Center on HBC's Motion for Reconsideration. HBC presented the testimony of two witnesses. Mr. David Bell

testified regarding the background and history of the project. Mr. Bell also testified regarding the history of the encroachment application, the dedication filed by HBC and HBC's interpretation of the recreational easement. HBC then presented the testimony of Dean Fiedler, who testified regarding the benefit to the residents of the Huckleberry Bay Subdivision that would result from a moorage facility at Huckleberry Bay.

SPBA presented the testimony of Jules Gindraux and Dean Stevens. The testimony of these witnesses generally related to moorage facilities available on Priest Lake. In addition, the witnesses testified regarding their perception of the lack of benefits that would be occasioned by construction of a moorage facility at Huckleberry Bay.

III. ANALYSIS

1. **HBC's Oral and Written Statements Regarding the Recreational Easement Place a Cloud on the Title to This Property that Precludes Granting the Lake Encroachment Permit.**

Upon IDL's request for additional information, HBC submitted a declaration that purported to establish common riparian rights to the shoreline within the Huckleberry Bay subdivision. However, as a result of this declaration, HBC has raised issues that call into question HBC's and the public's riparian rights in the property subject to recreational easement. In their motion for reconsideration, HBC complained primarily of the inclusion of this issue in IDL's initial decision. It was HBC's action in introducing this declaration with language that calls the nature and extent of the recreational easement into question that necessitated resolving this issue in the lake encroachment application.

Originally, the State acquired a recreational easement in the riparian zone at Huckleberry Bay as a result of a land exchange between IDL and Diamond Lands. The terms

of the original recreational easement provided for the recreational use and enjoyment for the public of a strip of land 200 feet wide in the northern 2,000 feet of Section 35, Township 62 North, Range 4 West, Boise Meridian, Bonner County, Idaho. As with the easement later granted by HBC, the Diamond Lands recreational easement prohibited over-night use and use by motorized vehicles other than for public service purposes.

When HBC acquired the subject property, they sought to negotiate a change of the configuration of the recreational easement from 200 feet wide and 2,000 feet long to 100 feet wide and 5,700 feet long. In addition, HBC sought to change the terms of the original recreational easement to include the following language: “[T]hat the Grantor retain riparian rights for marina or multiple-slip moorage development on Huckleberry Bay for approximately 700 feet. Further, Grantor intends three points of access to the easement that the Grantor will operate and maintain.” The modifications to the recreational easement were approved by IDL after testimony was taken at a public hearing.

HBC has maintained through the terms of its declaration and the testimony of David Bell that it has retained riparian rights in the entire 5700 foot strip at Huckleberry Bay. HBC also maintains that the recreational easement does not extend to the 700 foot strip in which it retained riparian rights. There is evidence that indicates that HBC intended to divest itself of riparian rights in all but the 700 foot strip of retained land. It also appears that HBC did not intend to retain the right to exclude the public from this 700 foot strip.

When HBC sought to change the terms of the recreational easement, IDL held a public hearing on the issue. The hearing was held on October 27, 1988, and was attended by Don Barbieri, a principal in HBC. Mr. Barbieri provided the following testimony regarding HBC's intent with regard to development in Huckleberry Bay:

I think from a planner's perspective again is. you don't tend to get quality development or even quality public space if you end up with a proliferation of docks and a proliferation of shoreline improvements and maybe it would even lessen the quality of the shoreline here. And, from a developer's perspective, probably even lessen the quality of whatever future development would happen in the whole project. We, to some extent are feeling that perhaps this space should be trying to emulate what has been done in more quality type developments that have been done in Idaho where beaches are left in open space. A little more quality given to the esthetic appearance of the bay and developments set back away from the bay and you have gained perpetual recreational control over the use of the bay. So, what we have proposed to do is leave the bay in open space from this point to this point, which, again, is the state land's ownership which is at the southwest corner of the bay. . . . The 100 foot setback encompasses all of the beach areas and saves, sets back anything that would have to happen beyond the beach areas, well into tree cover, which we think is appropriate. From a users standpoint, we have not attempted to address the question of should there be no dock structures in the whole bay. What we have suggested is the easement request is that a site be picked in the bay and we have tentatively looked at a site in the bay that would eventually be developed for some moorage. You can look again at this aerial and see that some of these are really great swimming beaches and great sandy beaches. We would prefer not to have dock structures and not have boat activities in those areas and leave them into open space.

Transcript of October 27, 1988, public hearing, Huckleberry Bay easement, pp. 3 and 4.

Later in the hearing, Mr. Barbieri testified further regarding the intent of HBC in entering into the recreational easement:

We are basically giving a few million dollars of lake frontage to the public. We are not asking for anything in return from a building site standpoint. . . . We are really trying to give a couple million dollars worth of lake frontage away because we think the open space control of that whole bay is in the public's best interest and sets the quality tone for what we are trying to do in this whole area up there.

Id. at pp. 10-11.

The position taken by HBC at the hearing on the modification of the recreational easement and the position taken by Huckleberry Bay in this proceeding are inconsistent. This inconsistency calls into question the extent of HBC's riparian rights and the extent of rights

granted to the public as a result of the recreational easement retained by IDL. Initially, it was contemplated that this dispute could be held in abeyance while IDL ruled on HBC's application for a lake encroachment permit. However, HBC has squarely raised the issue of the extent of its rights relative to the public's right to use this lakefront property. As a result of the uncertainty raised regarding the riparian rights in this property, IDL is not in a position to proceed any further with HBC's encroachment permit application. As a threshold matter, the relative rights of all parties having proprietary interest in the shoreline must be resolved.

2. HBC has Failed to Establish an Existing Need for Moorage for the Huckleberry Bay Development.

In his initial decision, Mr. Pitman found that HBC had failed to establish riparian rights sufficient to justify approval of an encroachment permit for a community dock. This conclusion was based upon a number of factors. First, HBC did not represent a homeowners association with common riparian rights. Second, the declaration that attempted to establish these riparian rights was contingent upon approval of the encroachment permit. Finally, HBC failed to establish that the homeowners of developed lots at Huckleberry Bay had demonstrated an actual need for moorage.

These findings are all consistent with the fundamental directive to IDL in evaluating the issuance of lake encroachments. The Lake Protection Act, found at Idaho Code § 58-1301, *et seq.*, establishes the criteria upon which IDL evaluates whether an encroachment to navigable water is sustainable. The balancing that must be undertaken pursuant to Idaho Code § 58-1301 is that:

[T]he public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat.

aquatic life, recreation, esthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.

(Emphasis added.)

Applicants for an encroachment permit must establish that there is navigational or economic necessity and justification for the encroachment. All of Mr. Pitman's findings reflect that HBC has not established a navigational or economic necessity for the community moorage facility requested. HBC has not demonstrated a need for a 24-slip moorage facility for the HBC Huckleberry Bay development.

Testimony at the public hearing established that, of the available lots at Huckleberry Bay, there exists only one residence and one residence under construction. This fact, viewed in light of the contingent nature of HBC's attempt to convey riparian rights through the declaration to an undefined homeowners association with unknown membership, shows that HBC has not established economic or navigational necessity for a community facility.

In order to establish the type of economic or navigational necessity required, HBC must show an actual need by owners of property at the HBC Huckleberry Bay development for the 24-slip moorage facility requested. It is insufficient for HBC to show a contingent or speculative need for such moorage facility in the future. HBC has failed to establish a navigational or economic justification for an encroachment upon the bed of Priest Lake. This failure is an independent ground for IDL to deny HBC's encroachment permit.

IV. CONCLUSION

For the above stated reasons, the decision of Administrator Pitman is UPHELD and HBC's motion for reconsideration of the denial of their encroachment permit is DENIED.

Pursuant to Idaho Code § 67-5245, this Order shall become final without further notice after the expiration of fourteen (14) days from the date of its issuance, unless the Director of IDL has moved to review the findings contained herein. The Applicant may request administrative review of the Preliminary Order by the Director of IDL by filing a motion requesting review within fourteen (14) days from the issuance of this Order. Idaho Code § 67-5245. In the event that this Preliminary Order becomes final by the expiration of fourteen (14) days, the Applicant may seek judicial review pursuant to Idaho Code § 58-1306(c) and Idaho Code § 67-5270 within thirty (30) days from the date on which the Preliminary Order becomes final.

DATED this 12th day of September, 1996.



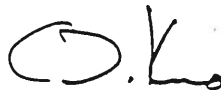
C. NICHOLAS KREMA
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 1996, I caused to be served a true and correct copy of the foregoing by facsimile to the addressees listed below:

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