

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th Street
P.O. Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. L-95-S-5208) **FINAL ORDER**
Mica View Estates Homeowners Association, Inc)
)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on January 29, 2008 at 6:00 pm at the Idaho Department of Lands office in Coeur d’Alene, Idaho. Michael Murphy served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on February 27, 2008.

My responsibility is to render a decision on the behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I have relied on the record provided. Specifically,

- I have read the transcript of the public hearing conducted in Coeur d’Alene, Idaho on January 29, 2008.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator’s Recommendations in light of the entire record.

Encroachments, including docks, placed on the navigable waters, require a permit issued by the Department of Lands pursuant to the requirements of Title 58, Chapter 13, Idaho Code and the Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04 as promulgated by the State Board of Land Commissioners.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Coordinator.

III. CONCLUSIONS OF LAW

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

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-95-S-5208 be approved and the permit be issued by the Mica Supervisory Area to the Applicant.

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

DATED this 28th day of February, 2008.

GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of February, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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Idaho Department of Lands
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Boise, ID 83702-5956

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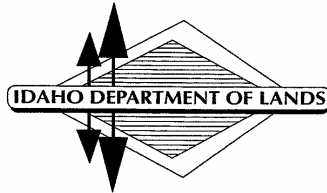
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EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
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Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

February 27, 2008

MEMORANDUM

TO: George B. Bacon, Director

FROM: Mike Murphy, Bureau Chief - Surface and Mineral Resources

SUBJECT: Public Hearing – Community Dock for Mica View Estates L-95-S-5208

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL). The public hearing was conducted in conjunction with the processing of an encroachment permit for a community dock on Lake Coeur d'Alene, a navigable lake in Idaho. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers the State Board of Land Commissioners to regulate, control, and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho.

II. FINDINGS OF FACT

1. On October 31, 2007, Mica View Estates Homeowners Association, Inc. (Applicant) submitted to IDL an encroachment permit application (L-95-S-5208)

requesting the approval to construct a community dock on Lake Coeur d'Alene. The application is incorporated into this document by reference.

2. IDL initiated the processing of the encroachment permit application as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On November 26, 2007 and December 3, 2007, IDL published the required Notice of Application in the Coeur d'Alene Press for the encroachment permit application submitted by Applicant. The Notice of Application is incorporated into this document by reference.

3. In a letter dated November 20, 2007, IDL notified the following parties of the encroachment permit application submitted by Applicant and requested that the parties provide comments to IDL:

- Idaho Department of Fish and Game;
- Idaho Department of Environmental Quality;
- Idaho Department of Water Resources;
- U.S. Army Corps of Engineers;
- Panhandle Health District;
- Kootenai County Parks, Recreation, and Waterways;
- Kootenai County Marine Division;
- Kootenai County Building, Planning, and Zoning;
- Lakes Commission;
- Kootenai Environmental Alliance;
- Mr. Jason Plummer, adjacent landowner; and
- Mr. Paul Huetter, Jr., adjacent landowner.

The letter is incorporated into this document by reference.

4. Jason and Collette Plummer submitted a letter to IDL dated December 11th, 2007 objecting to the proposed community dock and requesting a public hearing on the application. This letter is incorporated into this document by reference.

5. Based on the Jason and Collette Plummer letter and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed community dock. On December 20, 2007 and December 27, 2007 IDL published the required Notice of Hearing in the Coeur d'Alene Press. The public hearing was scheduled for January 29, 2008 at 6:00 pm at the IDL office in Coeur d'Alene, Idaho located at 3780 Industrial Avenue South. The Notice of Hearing is incorporated into this document by reference.

6. On January 29, 2007 IDL held a public hearing at 6:00 pm in IDL's Coeur d'Alene office. Mr. Michael Murphy, IDL Bureau Chief of Surface and Mineral Resources, coordinated the public hearing. In attendance were Mr. Michael Denney, IDL Area Manager; Ms. Ellen Mitchell, IDL staff; Mr. Jim Magnuson, representing Applicant; Mr. Mark Wagner representing Applicant; Mr. Denny Ryerson representing Applicant; and 15 members of the public. The public hearing was recorded on audio tape and was subsequently transcribed. The transcript of the public hearing is incorporated into this document by reference.

7. Mr. Jim Magnuson and Mr. Wagner, representing Applicant, provided an overview of the project, including the presentation of drawings and maps depicting the location and layout of the proposed community dock. All maps are incorporated into

this document by reference. Mr. Magnuson stated that the application requests a 12-slip community dock and that no state or local agencies have objected to the project. Mr. Magnuson and Mr. Wagner collectively stated that the proposed dock extends 96' feet waterward of the shoreline and has a surface area of 2,916 square feet. According to exhibits and their testimony approximately 417.75 feet of shoreline has been dedicated for the project, creating a maximum community dock size of 2,924 square feet. Mr. Wagner indicated that the proposed dock is 25 feet from the adjacent Ryerson property (319 feet from Plummer property) and 126 feet from the Gould's Landing property line, meeting the setback requirements. Mr. Wagner summarized by stating that the proposed application meets the requirements of Idaho law and should be approved.

8. The multiple letters, e-mails and testimonials at the public hearing which were entered into the record and were in opposition to the proposed community dock (including testimony submitted into the record for this hearing from an earlier September 2007 IDL hearing for a proposed community dock, which was later denied by IDL) can best be summarized by reviewing the collective verbal and written testimonies of Mr. Scott Reed and Ms. Jai Nelson. According to their testimony, the proposed community dock would adversely impact :

- Navigation, safety and activities associated with the Camp Lutherhaven and Camp Sweyolakan;
- The line of navigability;
- Recreation;
- Aesthetic beauty;
- Water quality; and

- Adjacent property owners.

In addition their testimony questioned the issuance of community docks to non-riparian owners, IDLs involvement in planning based on Idaho Code 67-6508, and the proposed dock square footage.

III. CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (Board) is designated in Idaho Code § 58-104(9) and § 58-1303 to regulate, control and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho. IDL is the administrative agency of the Board, as per Idaho Code § 58-119.

2. Lake Coeur d'Alene is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.011.02, encroachments of any kind on, in, or above the beds of a navigable lake require a permit prior to encroaching on the lake.

3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. These values must be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.

4. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through 1203. This statute

protects the property rights of private land owners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.

5. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The court in KEA stated that encroachment permits and submerged land leases remain subject to the public trust, and are not irretrievable commitments. The court in KEA also stated that mere compliance of IDL with its' legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine.

6. IDAPA 20.03.04.015.03b limits the surface decking area of a community dock to seven (7) square feet per lineal foot of shoreline owned by the applicant. Applicant owns and is dedicating 417.75 feet of littoral frontage, allowing a 2,924.25 square foot dock. The proposed dock has 2,916 square feet, which is in compliance with the cited rule.

7. IDAPA 20.03.04.060.05 establishes a twenty-five (25) foot setback from adjacent littoral property for community docks. Applicant's proposed dock will be 25 feet and 126 feet from the adjacent littoral right lines, satisfying this requirement.

8. IDAPA 20.03.04.010.06 allows homeowners' associations that are riparian owners, owning a riparian common area including riparian rights, to apply for and obtain a community dock, subject to approval of IDL. No portion of Idaho law, including Idaho

Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, requires that such homeowners' associations own residential lots that are waterfront lots or residential lots within a specific distance from the riparian common area.

9. This section of law also indicates that a community dock shall be considered a commercial navigational aid for the purposes of processing by IDL.

10. Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the regulation of boats and water craft. Water craft are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation and local County Sheriff's Departments.

11. Kootenai County Waterways Ordinance No. 279D, Section 6 - Limits for Certain Waterways establishes a 5 mph "no-wake" zone within 100' of shoreline, docks, and structures for Lake Coeur d'Alene.

12. Idaho Code § 67-650 *et. seq.* establishes the authority of city and county governments to establish and enforce local planning and zoning. IDL has no authority under this section of Idaho Code.

13. Applicant and IDL satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1306 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

According to the Lake Protection Act all navigational encroachments must be regulated in order to protect the public health, safety, and welfare (Idaho Code § 58-1301). In order to properly exercise that regulatory authority, IDL must weigh the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality against the navigational and economic necessity of the encroachment. In processing Applicant's request for a community dock encroachment permit, IDL has successfully considered and met the obligations set forth in the Lake Protection Act. This is further demonstrated by the following responses to the objections raised during the public hearing process:

- **Navigation, safety and impacts on Camp Lutherhaven and Camp Sweyolakan**

Objection: The presence of the community docks will increase boat traffic in Mica Bay and will impact use of the bay by the two camps. This will increase the burden of the marine patrol.

Response: IDL recognizes that anytime a new single-family, two-family, community or commercial dock is permitted, it will have some impact on navigation. This impact, however, has to be balanced by the public's right to use public waterways and the ability of littoral property owners to "wharf out" to extent allowed by the Lake Protection Act. Existing Idaho law, including the Lake Protection Act and the associated IDAPA Rules, does not provide IDL with the authority to limit the number of encroachments on a given navigable lake.

Absent changes to existing Idaho law, the public must rely on county zoning and comprehensive planning or perhaps other local, state or federal agencies to regulate development densities. Additionally IDL has no statutory authority to regulate boat traffic. IDL received no comments from Kootenai County related to this hearing or previous community dock applications requesting the approval of community docks be denied based on increased boater activity and their inability to regulate the increased activity.

Additionally, the traditional water activities of Camp Lutherhaven and Camp Sweyolakan are not sanctioned or otherwise designated by any local agency. These circumstances are not comparable to those associated with the *Dupont v. State Board of Land Commissioner*; *Almgren v. Idaho Department of Lands*; *Kootenai Environmental Alliance v. Panhandle Yacht Club*; or *Shokal v Dunn*.

- **Line of Navigability**

Objection: The proposed community dock is outside the established line of navigability.

Response: The proposed community dock extends 96 feet waterward of the shoreline (within the established line of navigability of 100 feet) based on the application and the testimony on behalf of Applicant.

- **Recreation**

Objection: The recreational use of the bay will be adversely impacted by the presence of the encroachment and the associated boats.

Response: IDL recognizes that anytime a new single-family, two-family,

community or commercial dock is permitted, it will have some impact on recreation. This impact, however, has to be balanced by the public's right to use public waterways and the ability of littoral property owners to "wharf out" to extent allowed by the Lake Protection Act. Existing Idaho law, including the Lake Protection Act and the associated IDAPA Rules, do not provide IDL with the authority to limit the number of encroachments on a given navigable lake.

- **Aesthetic Beauty**

Objection: The aesthetic beauty of the bay will be adversely impacted by the presence of the encroachment and the associated boats

Response: IDL recognizes that anytime a new single-family, two-family, community or commercial dock is permitted, it will have some impact on aesthetic beauty. This impact, however, has to be balanced by the public's right to use public waterways and the ability of littoral property owners to "wharf out" to extent allowed by the Lake Protection Act. No testimony was presented which indicated that the proposed community dock impacts the aesthetic beauty of the lake on a level greater than any typically approved community dock under the Lake Protection Act.

- **Water Quality**

Objection: The presence of the additional boats associated with the proposed community dock will adversely impact water quality.

Response: IDL recognizes that anytime a new single-family, two-family, community or commercial dock is permitted, it will have some impact on water quality. This impact, however, has to be balanced by the public's right to use

public waterways and the ability of littoral property owners to “wharf out” to extent allowed by the Lake Protection Act. IDL must rely on “sister” agencies such as the Idaho Department of Environmental Quality (DEQ) to provide technical insight into the impacts of encroachments and the use of public waterways on water quality. Neither DEQ nor any other agency provided testimony indicating that the installation of this community dock would result in water quality impacts significant enough to warrant permit denial.

- **Adjacent property owners**

Objection: The proposed community dock will adversely impact adjacent property owners.

Response: The proposed community dock meets the setback requirements outlined in IDAPA 20.03.04 and poses no unusual threat to adjacent property owners.

- **Non-riparian owners**

Objection: The lots associated with the proposed community dock are located a significant distance from the riparian common area.

Response: IDAPA 20.03.04.010.06 allows homeowners’ associations that are riparian owners, owning a riparian common area including riparian rights, to apply for and obtain a community dock, subject to approval of IDL. No portion of Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, requires that such homeowners’ associations own residential lots that are waterfront lots or residential lots within a specific distance from the riparian common area.

- **Planning under Idaho Code 67-6508**

Objection: IDL is obligated by Idaho Code 67-65008 to be involved in the planning process which would restrict size and number of encroachments.

Response: Idaho Code § 67-650 *et. seq.* establishes the authority of city and county governments to establish and enforce local planning and zoning. IDL has no authority under this section of Idaho Code.

- **Dock Size**

Objection: The size of the proposed community dock was not limited based on its impact on private property, fish habitat, aquatic life and aesthetic beauty.

Response: Applicant's property contains 417.75 feet of littoral frontage, which according to IDAPA 20.03.04.015.03.b, allows a maximum community dock of 2,924 square feet. The proposed community dock is 2,916 square feet. IDAPA 20.03.04.015.03.b does allow IDL to limit the ultimate size of a proposed community dock based on public trust values. In this case, however, those public trust values have been evaluated against the installation of the proposed community dock and IDL finds no compelling evidence or measurable benefit in reducing the proposed square footage of the community dock.

As the hearing coordinator, I believe that denial of the proposed encroachment based on the oppositional testimony provided, absent additional guidance from Idaho law or specific action taken by authorized local land use planning commissions to restrict the issuance of community dock permits, would arbitrary and capricious. Therefore, based upon the information provided to me as the hearing coordinator and based upon the

encroachment permit application's compliance with all the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area should **approve** Applicant's request for a navigational encroachment permit for a community dock.

DATED this 27th day of February, 2008.

MICHAEL J. MURPHY
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of February, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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