

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

IN THE MATTER OF:)
) Case No. 2014-PUB-20-004
ENCROACHMENT PERMIT APPLICATION)
NO. ERL-96-S-219D) **PRELIMINARY ORDER**
)
PETER KASEBURG,)
Applicant.)
_____)

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BOISE, IDAHO

This is a preliminary order that will become final without further review by the Director.

INTRODUCTION

This case involves an application by Peter Kaseburg (“Applicant”) to Idaho Department of Lands (“IDL”) for a noncommercial navigational encroachment on Lake Pend Oreille, filed on September 30, 2014. IDL provided notice of the application to the adjacent littoral owners. One of the adjacent owners is Sequoia Glen South, a family partnership. George Congleton, as Manager for Sequoia Glen South (“Objector”), objected to the application. Accordingly, IDL conducted a two day hearing on the application pursuant to IDAPA 20.03.04.25.06, on December 11, 2014 and January 14, 2015. Applicant and Objector both appeared and presented evidence through their respective counsel. Applicant was represented by John A. Finney, and Objector was represented by Janet D. Robnett. James Brady, Resource Supervisor at IDL, was also present as a witness. IDL was represented by Deputy Attorney General Steven J. Schuster. Applicant, Objector, and IDL each submitted written post-hearing arguments.

PROCEDURAL BACKGROUND

This proceeding is related to administrative and judicial applications by Applicant for encroachment permits on Glengary Bay of Lake Pend Oreille. Much of the procedural history is set forth in *Kaseburg v. State*, 154 Idaho 570, 300 P.3d 1058 (2013). Subsequent to that case, IDL issued its *Director’s Finding on Line of Navigability* on April 14, 2014, finding that the line of navigability in

Glengary Cove is 2049.6 ft msl. The instant case arose after the finding of the line of navigability, when Applicant submitted Application No. ERL-96-S-219D.

IDL'S MOTION IN LIMINE

In its *Prehearing Brief*, Applicant asserted that IDL unnecessarily sent notice of the application to adjacent littoral owners because such notice is only required if IDL first concludes that the proposed encroachment will or may infringe upon the riparian or littoral rights of an adjacent property owner. Idaho Code Section 58-1305(a) and (b). In such case, the applicant must obtain written consent of the adjacent landowner. I.C. §58-1305(b). Thus, Applicant asserted that the statute does not require that IDL, or an applicant, notify any adjoining property owners of an application. Applicant also asserted that IDL failed to act within sixty (60) days of receipt of the application, resulting in automatic approval of the application.

In response to these arguments, IDL filed a *Motion in Limine* asking the Hearing Officer to reject these arguments. At the close of the hearing, Applicant withdrew its arguments and any objection to IDL's *Motion in Limine*. Accordingly, I need not rule on Applicant's pre-hearing arguments.

APPLICABLE LAW

The Board of Land Commissioners (the "Land Board"), acting through IDL, regulates encroachments on, in, or above the beds or waters of navigable lakes, pursuant to the Lake Protection Act. I.C. §58-1301, *et. seq.* It is uncontested that Lake Pend Oreille is a navigable lake for purposes of the Lake Protection Act. I.C. § 58-1302(a). Persons seeking to construct encroachments in navigable lakes must obtain permits from IDL. I.C. §58-1301.

Idaho Code Section 58-1301 requires that lake encroachments must be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic 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.

If a proposed encroachment extends beyond the line of navigability, the application must be processed under Idaho Code Section 58-1306, which requires, among other things, public notice and opportunity to comment on and object to the application.

In the instant case, Applicant applied for a permit to construct a noncommercial navigational encroachment not extending beyond the line of navigability, nor intended for commercial or community use. *Application*. Such applications are governed by Idaho Code Section 58-1305, which provides that such permits shall not be denied “except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.”

The “most unusual of circumstances” exists when a condition is so out of the ordinary or different to make it inadvisable to issue the permit. *DuPont v. Idaho State Board of Land Com'rs*, 134 Idaho 618, 623. This determination is fact-specific and varies from case to case. *Id.* IDL may consider the proposed use of the encroachment in determining whether the most unusual of circumstances exist. *Id.* at 625. Encroachments and building materials shall be designed and installed to withstand normal weather conditions in the area, and be adequately secured to prevent displacement due to ice, wind, and waves. IDAPA 20.03.04.015.13.f.

Additionally, plans accompanying encroachment permit applications must include, among other things, “proof of current ownership or control of littoral property or littoral rights.” IDAPA 20.03.04.20.07.iii.

IDAPA 20.03.04.010.32 defines “Riparian or Littoral Rights” as: “The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.” IDL must determine the littoral rights of adjoining riparian landowners when there is a dispute regarding placement of an encroachment and possible infringement in littoral rights. *Brett v. Eleventh Street Dockowners Ass'n*, 141

Idaho 517(2005). IDL must determine the location of littoral right lines in an equitable manner. *Id.* at 522 (citing *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951)).

ISSUES PRESENTED AND SUMMARY ANSWER

The potential issues presented in this case are:

1. Has Applicant established ownership or control of the littoral property where the dock will sit or travel over?
2. Does the proposed encroachment or its intended use present the most unusual of circumstances?
3. Does the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality outweigh the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment?
4. Does the proposed encroachment extend beyond the line of navigability?
5. Does the proposed encroachment infringe upon the riparian or littoral rights of Objector?
6. Does it appear that the proposed dock may infringe upon the riparian or littoral rights of Objector?

Because I conclude that the application presents the most unusual of circumstances, I find that the permit cannot be issued. First, it is not clear that Applicant owns or has authority to use the entire area needed for the operation of the proposed dock. Second, I conclude that the application lacks important details, making it impossible for IDL to know precisely what would be permitted. In the absence of such specificity, IDL would be unable to adequately regulate the proposed dock. Consequently, I do not reach the remaining questions presented.

FINDINGS OF FACT

The water levels fluctuate on Lake Pend Oreille as a result of the Albeni Falls Dam. Tr. p. 32:10-18. Unlike lakes that do not have a dam, Lake Pend Oreille has an ordinary high water mark that has a lower elevation than the artificial high water mark. *Id.* Historically, docks on Lake Pend Oreille have typically been limited to fifty-five (55) feet in length. Tr. p. 26:25-28:2. When the lake is at the ordinary high water mark – also known as low pool – the water does not reach a traditional fifty-five (55) foot

fixed pier dock. Applicant's ultimate goal is to have a dock that would provide him with year-round access to the water from the dock, regardless of the elevation of the lake. Tr. p. 197-198.

The proposed encroachment is a "movable dock system." *Application*; Tr. p. 19:12-13. According to the application, the total length of the encroachment would be ninety-five (95) feet: the first fifteen (15) feet would be a stationary ramp, and the remaining eighty (80) feet would be floating dock. The application shows that the outer limit of the dock's flotation at low pool would be 2049.6 ft msl, which is the line of navigability. *Application*.

During the course of the hearing, Applicant added several details or proposals that were not part of the written application. These additional details did not clarify the application, and in some cases, only created more uncertainty.

The moveable dock system would have a bull wheel on the shore with an electric or hand crank mechanism. Tr. p. 216:3-216; Exhibit P. The dock would be anchored to the uplands with a cable. Tr. p. 216:21-217:1. The ramp portion of the dock would have wheels that allow the ramp to move with fluctuations in water levels. Tr. p. 217:22-218:5. The dock would be moved using a one-inch cable. Tr. 205. The cable would allow the dock to travel out to the water when the water is low. Tr. p. 218:12-22. The dock would also have an anchor at the waterward end that would be set at the line of navigability. Tr. p. 220:20-221:3. The ramp might be connected to the landward end of the dock with some kind of pivot system. Tr. p. 218:6-11.

Applicant testified that "there's all kinds of options" regarding how to construct the dock so that it would stay afloat in low water, including placing a cross member underneath, using a hinge, and putting jack stands on the end. Tr. 162. None of those details are contained in the application; the application only describes the outside footprint of the encroachment. Tr. p. 162:25-163:15.

Applicant is not at the property year-round. He lives in Ridgefield, Washington, about seven hours away. Tr. p. 170:4-7. Applicant testified that he is considering "a couple different options" for moving the dock when he is away from the property. Tr. p. 169:8-15. One option is remote control of the dock via internet. Tr. p. 168:17-25. Using a camera mounted to the dock, Applicant testified that he

could check the dock via his cell phone. Tr. p. 186:1-19. If the power were to go out, making remote control impossible, Applicant testified that, “The worst can happen is it goes high and dry, and I can’t move it until next spring.” Tr. p. 185:10-186:19. Applicant testified that he could call his contractor to come out and “take a look.” Tr. p. 185:6-9. According to Applicant, the dock would only move an inch or two, and “it’s probably not a big deal.” Tr. p. 186:15-19. Applicant also referred to the possibility of a chain drive that measures water depth and uses a motor to move the chain in and out. But, Applicant stated, he “didn’t think [the chain drive] was satisfactory.” Tr. p. 184:13-185:2.

Applicant stated that he designed the dock system to be able to withstand wind loads when Applicant is not physically at the property. Tr. p. 160:12-15. The dock is not designed to permanently moor a vessel. Tr. p. 158:15-159:10. Applicant testified that if the weather is not suitable for mooring his boat to the dock, he might anchor his boat or take it to a marina. Tr. p. 177:2-19.

The parties presented conflicting evidence concerning whether the proposed dock will sit on Objector’s private submerged land at low water, and whether the cables that connect the proposed dock to Applicant’s property might cross Objector’s property. Tr. p. 210:6-21. The parties do not agree as to where the Southern boundary of Objector’s property is located. Applicant asserts that the property line is the meander line. Tr. p. 210:12-14; Exhibit 13. Applicant’s Exhibit 6 is a 2008 record of survey that Applicant argues depicts the southern property line as the meander line. Tr. p. 223:7-224:8. Objector asserts that the property line is the ordinary high water mark. Tr. p. 310:20-24. Objector’s Exhibit T purports to show the dock crossing a twenty-five (25) foot long area of Objector’s private submerged lands if the property line is the ordinary high water mark.

ANALYSIS

The Most Unusual Of Circumstances Exist to Justify Denying the Permit

Idaho Code Section 58-1305, provides that noncommercial navigational permits shall not be denied “except in the most unusual of circumstances.” The facts in this case present the most unusual of circumstances sufficient to warrant denying the permit. Foremost among these unusual circumstances is that the evidence does not support Applicant’s assertion of ownership of the submerged land needed for

construction or operation of the dock. Thus, it is not clear whether Applicant owns the area where the dock would sit or travel across.

Plans accompanying encroachment permit applications must include “proof of current ownership or control of littoral property or littoral rights.” IDAPA 20.03.04.20.07.iii. The parties presented conflicting evidence concerning whether the proposed dock will sit on Objector’s private submerged land at low water, and whether the cables that connect the proposed dock to Applicant’s property might cross Objector’s property. Tr. p. 210:6-21. Whether the proposed dock would trespass on Objector’s property depends upon the location of the southern, or waterward, property lines. The parties do not agree as to where the Southern boundary of Objector’s property is located. Applicant asserts that the property line is the meander line. Tr. p. 210:12-14; Exhibit 13. Applicant’s Exhibit 6 is a 2008 record of survey that Applicant argues depicts the southern property line as the meander line. Tr. p. 223:7-224:8.

In direct contradiction, Objector asserts that the property line is the ordinary high water mark. Tr. p. 310:20-24. Objector’s Exhibit T purports to show the dock crossing a twenty-five (25) foot long area of Objector’s private submerged lands if the property line is the ordinary high water mark.

Applicant’s deed is attached to his application. Objector’s deed was submitted as Exhibit X. Both deeds state that the boundary is the ordinary high water mark. Furthermore, under Idaho law, littoral owners on navigable lakes take title down to the ordinary high water mark as it existed in 1890. *Lake CDA Investments v. Dept of lands*, 149 Idaho 274, 278 (2010). Thus, neither the deeds, nor the applicable case law support Applicant’s assertion that the meander line is the property line.

Applicant’s Exhibit 13 purports to show that if the property line is the meander line, the area of the trespass would be significantly smaller than if the property line were the ordinary high water mark. Applicant apparently drew a line on Exhibit 13 in what he believed to be the approximate location of the meander line. Tr. p. 427-429. Even if I were to find that Exhibit 13 is an accurate depiction of the approximate location of the meander line, Exhibit 13 shows that, even if the property line were the meander line, the dock would still sit on or travel over Objector’s property.

The parties all agree that it is beyond the purview of the Land Board to conclusively adjudicate private property disputes. The parties disagree, however, as to the effect of this limitation. Applicant argues that IDL cannot consider the fact that Applicant has not established ownership or control over the necessary area and urges me to make a determination regarding the issuance of the permit based only on an analysis of the littoral lines. Applicant argues that the law does not authorize IDL to consider whether an encroachment will trespass. Tr. p. 92-93:23. Applicant argues further that the issuance of a permit does not preclude Objector from pursuing a trespass claim in court, or a court from finding that a trespass exists. *Id.*

I disagree with Applicant's line of reasoning. First, the applicable administrative rules require proof of ownership. IDAPA 20.03.04.20.07.iii. Second, where Applicant's evidence does not support his claim of ownership of the submerged land on which the dock would sit or travel, it would be "entirely inappropriate" to issue the encroachment permit. *Beckish v. Manafort*, 399 A.2d 1274, 1279-80 (Conn. 1978) (applicant for building permit did not establish legal title to land).

In *Dupont v. Idaho State Board of Land Commissioners*, 134 Idaho 618 (2000), the Supreme Court stated that it "makes little sense" for IDL to issue a permit when the proposed use would violate local and state laws. Similarly, it makes little sense in the instant case for IDL to issue a permit to construct on an area whose ownership is in dispute. It would be a pointless exercise to issue a permit to an applicant who might ultimately lack authority to obtain the permit and build the proposed encroachment. *See also, MacDonald v. Board of Adjustment*, 558 A.2d 1083, 1089 (Del. 1989) (party seeking permit has burden to prove ownership); *Dmitri v. Zoning Board of Review*, 200 A. 963, 965 (RI 1938) (party appealing board decision must prove ownership of lot in question).

To be clear, I do not make any finding regarding the location of the Southern boundary of Objector's property. Rather, I find that this application presents the most unusual of circumstances. Applicant's evidence does not support his claim that he owns all of the property needed for the construction and operation of his proposed floating dock. Although Applicant proffered some evidence to

show that Objector's property line is the meander line, that evidence is contradicted by both the case law and the deeds.

In addition, this application presents the most unusual of circumstances because the proposed dock has not been designed to a sufficient degree to allow IDL to determine precisely what it would be permitting. Applicant testified that "there's all kinds of options" regarding how to construct the dock. The application does not set forth construction details. Nor did Applicant's testimony provide sufficient detail or clarify important issues.

For instance, encroachments must be designed and installed to withstand normal weather conditions in the area, and be adequately secured to prevent displacement due to ice, wind, and waves. IDAPA 20.03.04.015.13.f. Neither the application nor the testimony elucidates how Applicant will control the dock during severe weather. Applicant testified that the wind could cause the dock to swing three or four feet. Tr. p. 208:18-209:8. Applicant testified that he could manually move the dock in if necessary, using a hand crank. Alternatively, he could use a tractor. Tr. p. 232:7-21. If the dock were in the dry, however, he would not be able to reel it in. Tr. p. 210:22-211:17.

Regarding how he would control the dock if he were out of state, Applicant proposed several potential options, including: remote control of the dock via internet, using his cell phone to check a camera mounted to the dock; calling his contractor to come out and "take a look," and using a chain drive that measures water depth and uses a motor to move the chain in and out. Applicant did not commit to any of these methods.

Because Lake Pend Oreille has a dam, it is subject to unpredictable changes in water levels. The proposed dock would need to be moved in and out not just for weather events, but also so that it does not become a hazard to navigation as a result of the change in water elevation. For instance, the proposed dock could become a hazard by being partially submerged. Although Applicant denies that this could occur, there was credible testimony that it could occur. Tr. p. 388:16-398:16. Further, the proposed dock would also be unable to move while in the dry. Tr. p. 211:8-17.

It is also unclear whether the proposed dock would extend beyond the line of navigability, due to its use of an anchor that would be set on or near the line of navigability. The line of navigability for Glengary Cove is 2049.6 ft msl. *Director's Finding on Line of Navigability*. When processing permit applications for single-family encroachments, such as the one at issue here, IDL considers the location of the proposed encroachment in relation to the line of navigability. Tr. p. 24:2-19. The application shows that the waterward end of the dock system would sit directly at the line of navigability. *Application*. According to Applicant, the dock could move an inch or two. Tr. p. 186:15-19. Applicant testified that it is his "intention" that the anchor would not go beyond the line of navigability. Tr. p. 143:11-16. In correspondence with IDL, Applicant stated that "the anchor will not extend any further out into the lake bottom than necessary to do its job." Tr. p. 172:10-25. Applicant later stated, "I will not extend the line of navigability." Tr. p. 172:7. On the other hand, Applicant also testified that *if* the anchor *does* exceed the line of navigability, his neighbor will tell him, IDL will tell him to move it, and he will pick it up and reset it. Tr. p. 172:8; 173:5-7. Despite Applicant's assurances, the application lacks sufficient detail and certainty. Waiting for his neighbor or IDL to object to the location of the dock does not provide the specificity required for issuance of a permit. Applicant must provide the basic construction and expected operation of the dock so that IDL can adequately regulate the dock.

Moreover, the proposed dock does not meet applicant's proposed purpose. Applicant's specific reason for wanting a moveable dock system is to be able to "get to the line of navigability at low water." Tr. p. 133:5-8. Further, Applicant desires to have year-round access to the water. Tr. p. 162:22-24. He acknowledged at the hearing, however, that this might not be possible due to the potential lowering of the water elevation. Tr. p. 142:10-25. Applicant's stated goal is to have a 7 ½ foot draft at the end of the dock. *Application*. The application, however, acknowledges that the winter level at the end of the dock will be 1 ½ feet. *Application*.

Other factors also contribute to the finding that this proposed dock creates a most unusual circumstance. Mr. Brady testified that the fact that the proposed dock would be eighty (80) feet makes it unusual. Tr. p. 26:25. Mr. Brady testified that the proposed dock is unusual because, "the dock at the

lake's lowest level of 2051 will be approximately 165 feet waterward of the artificial high water mark or the summer pool." Tr. p. 29:1-4. Lastly, Mr. Brady testified the proposed dock is unusual because it appears that it would trespass and infringe on the adjacent private property. Tr. p. 107:14-20.

In sum, the lack of evidence demonstrating ownership of the required land, and the uncertainty regarding the design and operation of the proposed dock create a most unusual circumstance.

CONCLUSIONS OF LAW

The application presents the most unusual of circumstances. I.C. §58-1305. There is conflicting evidence regarding whether Applicant owns or has authority to use all of the land needed in order to operate the dock. The Application and the evidence presented at the hearing provide insufficient detail about the design, engineering, and operation of the dock. Based upon the record it is not possible to determine how it will operate in a lake with an artificial high water mark, or in severe weather, or if there is no electricity. IDL cannot permit an encroachment where it cannot define the scope of the encroachment. Further, the record shows that the proposed dock would not meet Applicant's stated purposes.

ORDER

Based upon the foregoing, Applicant's application is **DENIED**.

Any applicant or any other aggrieved party appearing at the hearing shall have the right to have this decision reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the board's decision.

DATED this 27th day of March, 2015.



BRANDON LAMB
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2015 I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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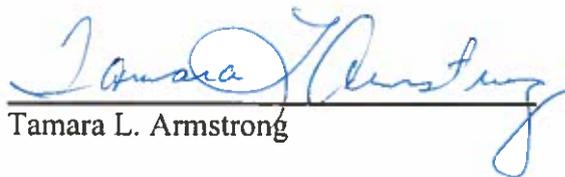
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