

GEORGE BACON
Interim Director
Idaho Department of Lands
954 W. Jefferson 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-5133) **FINAL ORDER**
Lakeview at Twin Lakes)
Condominium Association)
)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on November 21, 2006 at 6:00 pm PST at the Idaho Department of Lands office in Coeur d'Alene, Idaho. Michael J. Murphy served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on December 11, 2006.

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 November 21, 2006.
- 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 Chapter 13, Title 58, 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-5133 be approved and the permit be issued by the Mica Supervisory Area to 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 19th day of December, 2006.



GEORGE BACON
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2006, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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GEORGE BACON, INTERIM DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
James E. Risch, Governor
Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Keith L. Johnson, State Controller
Marilyn Howard, Sup't of Public Instruction

December 15, 2006

MEMORANDUM

TO: George Bacon, Interim Director

FROM: Mike Murphy, Bureau Chief

SUBJECT: Public Hearing - Lakeview at Twin Lakes Condominium Association
L-95-S-5133

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 Lower Twin Lake, 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 August 21, 2006, Lakeview at Twin Lakes Condominium Association (Applicant) submitted to IDL an encroachment permit application (L-95-S-5133) requesting the approval to construct a community dock on Lower Twin Lake. The application is incorporated into this document by reference.

2. IDL initiated the processing of the encroachment permit application as a navigational encroachments pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On September 15, 2006 and September 22, 2006, 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. Prior to the publication of the Notice of Application described in Section 2, above, IDL received three letters from nearby landowners objecting to the proposed community dock.

a. A letter to IDL, dated August 1, 2006, from Mr. Lyle Abbott and Ms. Iris Dawn Abbott, waterfront landowners south of Applicant's property, expresses objection to the proposed community dock citing concerns with increased boat traffic, shoreline erosion, and safety. The letter also references a swim dock; however, Applicant did not include that option in the final application submitted to IDL on August 21, 2006. This letter is included in this document by reference.

b. A letter to IDL, dated August 22, 2006, from Ms. Judy Cooper, Ms. Angie Cooper and Mr. Tim Cooper, a nearby landowner, expresses objection to the proposed community dock citing concerns with increased boat traffic, shoreline erosion, and safety. The letter also references a swim float; however, Applicant did not include that option in the final application submitted to IDL on August 21, 2006.

This letter is included in this document by reference.

c. A letter to IDL, dated August 31, 2006, from Ms. Karin Overbeck, trustee of the Bronson Special Trust, expresses objection to the proposed community dock citing concerns with increased traffic, air pollution, noise pollution, shoreline erosion and decreased swimmer safety, boater safety and recreational value. The Bronson Special Trust owns the property directly south of Applicant's property. This letter is included in this document by reference.

2. In a memo dated September 13, 2006, 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
- Army Corps of Engineers
- Idaho Department of Water Resources
- Kootenai County Parks, Recreation and Waterways
- Kootenai County Marine Division
- Kootenai County Building and Planning and Zoning
- Panhandle Health District 1 (PHD)
- Kootenai Environmental Alliance
- Ms. Mary Moltke, adjacent landowner
- Twin Lakes Property Owners, adjacent landowner organization.

The memo is incorporated into this document by reference. PHD and Ms. Mary Moltke

were the only two parties which responded.

- a. Subsequent to the receipt of the September 13, 2006 memo, PHD exchanged correspondence with Applicant and IDL regarding the potential permitting of the community dock. An e-mail message to Mr. Carl Washburn of IDL, dated October 2, 2006, from Mr. Jesse Anglesey of PHD and a letter to Applicant, dated November 29, 2006, from Mr. Anglesey, conclude that Applicant has satisfied the requirements of PHD and that PDH has no further comments on the matter. The letter and the e-mail message are incorporated into this document by reference.
 - b. A letter to IDL, dated October 13, 2006, from Ms. Mary Moltke, trustee of the Bronson Special Trust, expresses objection to the proposed community dock and requests that a public hearing be held. The trust is concerned with public safety and increased boat traffic given the narrow portion of the lake at Applicant's property. The letter also expresses concern that boat traffic will continue to be a problem given expected land development in the area, suggesting that a "no-wake" zone or other measures may be necessary to address the issue. This letter is included in this document by reference.
4. Based on Ms. Mary Moltke's request and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed community dock. On October 30, 2006 and November 6, 2006, IDL published the required Notice of Hearing in the Coeur d'Alene Press. The public hearing was scheduled for November 21, 2006 at 6:00 pm at the IDL office in Coeur d'Alene. The Notice of Hearing is incorporated into this document

by reference.

5. On November 21, 2006 IDL held a public hearing at 6:00 pm at the IDL office in Coeur d'Alene. Mr. Michael Murphy, IDL Bureau Chief, coordinated the public hearing. In attendance were Mr. Mike Denney, IDL Area Manager; Mr. Carl Washburn, IDL Navigable Waters Specialist; Mr. Ralph Ward, representing Applicant; Mr. James Bayley representing Applicant; and five 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.

a. Mr. Bayley, representing Applicant, provided an overview of the project, including the presentation of a drawing depicting the location of the proposed community dock. A digital photograph of the drawing is incorporated into this document by reference. Mr. Bayley stated the proposed encroachment is located within the line of navigability and meets the setback requirements. Mr. Bayley also testified that the proposed encroachment is actually smaller than what is allowed by Idaho law (approximately 1,100 square feet compared to the allowed approximately 1,800 square feet). Mr. Bayley indicated that the typical users of the community dock will be retired condominium association members that have small fishing boats.

b. Ms. Mary Moltke, representing the Bronson Special Trust, and Ms. Deborah Long provided testimony objecting to the proposed community dock based on concerns with increased boat traffic, shoreline erosion and swimmer safety. Ms.

Long suggested that a “no-wake” zone may be a solution. Ms. Moltke testified that Applicant Village had previously committed to not building encroachment on Lower Twin Lake, but could provide no documentation of this commitment.

c. Mr. Ralph Ward, representing Applicant, testified that most of the users of the proposed community dock already have boats on the lake and the project will not actually result in an increase in traffic. Mr. Ward also provided an aerial photograph of the project area showing that the proposed encroachment does not extend beyond the existing dock line and is well outside the 100’ “no-wake” zone established for Lower Twin Lake by the Kootenai County.

d. In conjunction with the public hearing, IDL received a letter dated November 16, 2006 from Mr. Roger Nilles, a nearby property owner, expressing objection to the proposed encroachment. Mr. Nilles indicates that the property owners in the area did not object to the original development of the Twin Lakes Village based on assurances that no docks would be built on Lower Twin Lake and that the lake would be accessed by a boat launch only. Mr. Nilles stated that although this promise was kept for many years, docks have since been constructed and more are planned. Mr. Nilles also stated that he is concerned with increased congestion on the lake and its impact on safety and the quality of life. This letter is included in this document by reference.

e. In conjunction with the public hearing, IDL received a copy of an e-mail message dated November 21, 2006 from Mr. Tim Cooper expressing objection to

the proposed encroachment, citing concerns with increased boat traffic and its impact on swimming and boating safety. Mr. Cooper suggested that an impact study might be appropriate to assess the impact of increased traffic and that a “no-wake” zone might alleviate some of the concerns.

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, Idaho Code § 58-119.

2. Lower Twin Lake 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 Lower Twin 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 and 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 by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) and

subsequent cases and Idaho Code §§ 58-1201 through 1203.

5. IDAPA 20.03.04.060.05 establishes a twenty-five (25) foot setback from adjacent riparian property for community docks.

6. Idaho Code § 58-1302(g) defines the "line of navigability" as a line located at a distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the Land Board when a line has not already been established for the body of water in question.

7. 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. Watercraft are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation and Local County Sheriff's Departments.

8. Idaho Code § 58-1201 *et. seq.*, the Public Trust Doctrine, 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.

9. 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 Lower Twin Lake.

10. 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

The objections raised by adjacent and nearby landowners to the proposed community dock relate almost entirely to concerns associated with increased boat traffic. The Lake Protection Act, however, does not regulate boat traffic and does not authorize IDL to consider overall encroachment density when approving navigational encroachments. In line with the Public Trust Doctrine, each riparian owner has the right to construct a navigational encroachment permit, subject to the permitting process and the physical limitations established by the Lake Protection Act (e.g. setbacks from adjacent riparian properties and locations relative to the existing line of navigability). Upland zoning, regulated by Idaho counties, appears to be the only mechanism by which encroachment density is currently controlled.

Testimony and information provided in a letter indicate that the Twin Lakes Village previously committed to not installing docks on Lower Twin Lake. IDL was provided with no written documentation supporting that claim.

At least two members of the public suggested that a “no-wake” zone be established on Lower Twin Lake in the vicinity of the proposed encroachment. The authority to implement

such restrictions lies with Kootenai County; I recommend that the concerned parties pursue that issue accordingly.

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application for the community dock meets 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 of IDL should **approve** Applicant's request for a navigational encroachment permit for a community dock.

DATED this 15th day of December, 2006.

A handwritten signature in black ink, appearing to read "Michael J. Murphy". The signature is stylized and cursive, with a horizontal line drawn through the middle of the name.

MICHAEL J. MURPHY
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2006, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

- | | |
|--|---|
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