

GEORGE B. BACON  
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-5117 ) **FINAL ORDER**  
Twin Lakes Heights Owners Association, Inc. )  
)  
Applicant. )  
\_\_\_\_\_ )

**I. NATURE OF PROCEEDINGS/ISSUES**

A reconsideration hearing was held on May 30, 2007 at 6:00 pm PST at the Idaho Department of Lands office in Coeur d'Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on July 26, 2007.

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 May 30, 2007.
- 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-5117 be approved and the permit be issued by the Mica Supervisory Area to the Applicant.

This is a final order of the agency.

DATED this 7 day of ~~July~~ <sup>AUGUST</sup>, 2007.

  
\_\_\_\_\_  
GEORGE B. BACON  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7 day of ~~July~~ <sup>August</sup>, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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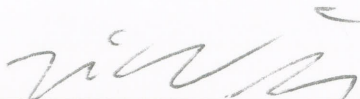
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EQUAL OPPORTUNITY EMPLOYER

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*Tom Luna, Sup't of Public Instruction*

July 26, 2007

**MEMORANDUM**

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters Program Manager 

SUBJECT: Reconsideration Hearing - Twin Lakes Heights Owners Association, Inc.  
Encroachment Permit L-95-S-5117

**I. INTRODUCTION**

The following document, which includes a recommendation for your consideration, was prepared following a reconsideration hearing conducted by the Idaho Department of Lands (IDL). This 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 July 6, 2006, Twin Lakes Heights Owners Association, Inc. (Applicant) submitted to IDL an encroachment permit application (L-95-S-5117) 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 encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). A public hearing for this application was held on January 17, 2007. The permit was then denied in a Final Order signed on February 16, 2007. As part of that order, IDL was to establish a line of navigability for this portion of Lower Twin Lake, and the applicant was advised to provide written documentation addressing the concerns expressed by the Kootenai County Building and Zoning Department in their letter dated November 16, 2006. The Final Order, and the related recommendation, is incorporated into this document by reference.

3. A request for reconsideration of the Final Order for Encroachment Application L-95-S-5117 was received from the applicant on March 8, 2007. The letter of request is incorporated into this document by reference.

4. Due to a related hearing regarding the line of navigability on Lower Twin Lake, the reconsideration hearing date for Encroachment Application L-95-S-5117 was postponed with consent of the department and the applicant.

5. In a letter dated April 27, 2007, IDL notified the following parties that a reconsideration hearing for Encroachment Application L-95-S-5117 would be held, and if they testified at the original hearing then they would also be able to testify at the reconsideration hearing:

- Mr. Marty Franz

- Mr. Ronald Halsted
- Mr. Robert E. Bjelland
- Mr. Jonathon Franz
- Mr. Eric A. Carlson
- Mr. Kevin Sharrai
- Mr. Michael E. Reagan
- Ms. Mary Moltke
- Mr. Stan Griswold
- The applicant

The letter is incorporated into this document by reference.

6. The line of navigability hearing was held on May 2, 2007. Department staff presented evidence that indicated the line of navigability was most likely 80 feet from the ordinary high water mark. The transcript from the hearing is incorporated into this document by reference.

7. The line of navigability was established by a Final Order signed on May 30, 2007. That order established a line of navigability 70 feet from the shoreline at low water. This order, the related recommendation, and the lakebed profiles that support the recommendation are incorporated into this document by reference.

8. The reconsideration hearing for Encroachment Application L-95-S-5117 was held at 6 pm on May 30, 2007 in IDL's Coeur d'Alene staff office. Eric Wilson, Navigable Waters Program Manager, was the hearing coordinator. In attendance were Mike Denney, IDL

Area Manager; Mr. Carl Washburn, IDL Navigable Waters Specialist; and several representatives from the applicant and the public. Testimony was given by the applicant and several other attendees. The transcript of the hearing is incorporated into this document by reference.

a. Mr. Marty Franz, representing Applicant, described the proposed encroachment, especially those features that differed from the original application. The proposed dock is in the same location but it is moved closer to shore, the slips closer to shore have been reduced in size, and less personal watercraft stations are proposed. These changes were made after receiving the water depth information obtained by IDL for the line of navigability determination. The overall dock length is proposed to be 80 feet from the ordinary high water mark. Mr. Franz also stated that the new dock would be 339 feet from the existing dock across the lake, which is wider than the narrow neck in the lake to the south. This would provide sufficient passing room for two boats under the current county rules. Placing the dock in the narrower area of the lake also keeps it out of lake areas where higher boat speeds and more boat activity occur. An underwater rock outcrop would also fall into the no-wake zone surrounding the proposed dock, and the rock outcrop is currently unmarked. He also pointed out that IDL recently approved another community dock across the lake from the Twin Lake Heights site. Mr. Franz gave IDL some diagrams and air photos of the proposed dock, which are incorporated into this document by reference.

b. Mr. Michael Reagan, representing applicant, presented a letter from Kootenai County Planning and Zoning. The letter stated that the applicant has 15 lots. This letter is



incorporated into this document by reference. Mr. Reagan also presented evidence that the homeowner's association will own or control 500 feet of littoral rights, which is in excess of the littoral rights needed to meet the community dock standards for the proposed docks. He also stated the proposed changes to the dock are not substantial enough to require a new application. Mr. Reagan pointed out that the non-association waterfront parcel with littoral rights within the development is mostly a steep cliff. Access to the water from this property is not possible. This owner has granted an easement to the association for the portion of the community dock that will be in front of the private property.

c. Mr. Eric A. Carlson testified that the newly proposed dock has been revised from the original application and should be treated as a new application. He also expressed concern that the line of navigability Final Order had been issued the same day as this hearing, and the order has not had the chance to go through the reconsideration process. Mr. Carlson also pointed out that the line of navigability hearing and the revised dock design referenced a line of navigability extending 80 feet out from the ordinary high water mark. The Final Order, however, determined that the line of navigability was 70 feet out from the low water mark. He estimated that the difference between the two different measuring methods could be five to ten feet.

d. Mr. Ralph Ward testified that the private parcel south of the docks is part of the development, but these lot owners would be able to build their own docks. He also stated that 38 boat slips seemed excessive for the 15 permitted lots. Mr. Ward pointed out that the newly permitted dock across the lake is shorter than some adjacent existing docks, so it does not affect the width of the navigable channel in this narrow part of the lake.

9. Due to the remaining uncertainties regarding the line of navigability, the record was kept open pending resolution of that issue. All the hearing participants agreed to this course of action.

10. IDL received a letter dated June 12, 2007 from Michael E. Reagan, representing the applicant. The letter stated that the Final Order regarding the line of navigability and the associated lake profiles measured by IDL would not substantively change upon reconsideration, if reconsideration for the line of navigability was requested. The applicant requested that IDL promptly prepare the decision on reconsideration for Twin Lakes Heights Owners Association, Inc.

11. IDL received a letter dated June 13, 2007 from Eric A. Carlson. The letter stated that while Mr. Carlson liked the modifications incorporated into the revised dock design for the Twin Lakes Heights Homeowners Association, Inc. application, the revised design should be treated as a new application and the original permit denial should be upheld.

12. IDL received a letter dated June 27, 2007 from Eric A. Carlson. The letter withdrew all previous correspondence and testimony regarding opposition to Encroachment Application L-95-S-5117, and the letter withdrew the request for reconsideration of the Final Order for the line of navigability on Lower Twin Lakes dated June 13, 2007. This letter effectively ended the administrative process for the line of navigability determination, and therefore closed the record for the reconsideration hearing on application L-95-S-5117.

### 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 public trust values 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 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 states that a community dock is presumed to have an

adverse effect upon the adjacent riparian property if the dock is within twenty-five (25) feet of the adjacent riparian property lines. Consent of the applicable adjacent riparian owner will rebut this presumption of adverse effects.

6. IDAPA 20.03.04.030.09 does not require that information presented at reconsideration hearings support the same application presented at the previous hearing.

7. The Lake Protection Act (Idaho Code § 58-1303 *et. seq.*) and IDAPA 20.03.04 does not address whether land dedicated to community docks must be contiguous.

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. Idaho law, including Idaho Code § 58-1301 (the Lake Protection Act), delegates no authority to IDL for the regulation of boats and water craft.

10. 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.

11. 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.

12. The line of navigability at the applicant's proposed dock site on Lower Twin Lake has been established by a Final Order dated May 30, 2007. This order established the line of navigability at 70 feet from the shoreline at low water.

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**

The applicant has presented a revised dock design that includes a smaller dock in the same location as that originally proposed. The revised application is for a 3,167 square foot dock, which is smaller than the 3,500 square feet allowed by the applicant's 500 feet of dedicated littoral area. An alternate dock location was evaluated by the applicant, but was rejected because of the potential impact to boat traffic and travel patterns. The revised design will allow sufficient room for boats to pass if they abide by the county no wake zone regulations.

The applicant's proposed dock does extend out in front of an adjacent riparian property, but an easement from the property owner has been secured. This easement effectively gives the consent of the property owner and rebuts any presumption of adverse effects upon his property. The property owner could make application in the future for their own

dock, but the steepness of the riparian area makes this unlikely. Any future application for single-family docks on private lots adjacent to the community owned lot would be processed according to IDAPA 20.03.04.25. This processing includes an opportunity for Twin Lakes Heights Owners Association, Inc. to object if the single-family dock infringed on their riparian rights or unduly interfered with use of the community dock.

IDAPA 20.03.04.030.09 does not mention whether the exact same application has to be presented at a reconsideration hearing. In this instance, the application was denied through a Final Order issued after a public hearing. One reason for denial was an unnecessary impact on navigation, and the extent of that impact could not be determined until the line of navigability was established. The applicant then requested reconsideration, as allowed by IDAPA 20.03.04.030.09. Given the new information obtained by IDL through investigating the line of navigability, the applicant modified the dock design to stay within 80 feet of the ordinary high water mark. The revised dock design resulted in a smaller structure in the same location. If this falls within the line of navigability, the dock would no longer pose an unnecessary impact to navigation. The second reason for denial of the original application was related to the concerns of the Kootenai County Building and Zoning Department. IDL needed some assurance that the proposed development was far enough along to support approval of the community dock application and that the applicant had dedicated sufficient riparian rights for the dock. Kootenai County and the applicant have adequately addressed these concerns. The county stated that 15 lots will be created in the development. The applicant provided evidence that 500 feet of riparian rights were to be dedicated to the proposed dock. Since the justifications for permit denial have been

addressed, no substantive reason exists to deny the revised application and require a new application.

A potentially significant question was raised by Mr. Carlson regarding the revised dock design and the line of navigability. The revised dock design anticipated a line of navigability 80 feet from the ordinary high water mark, but the Final Order stated the line of navigability was 70 feet from the shoreline at low water. Low water is the correct standard, as stated in IDAPA 20.03.04.060.03 and Idaho Code § 58-1302(g). The request for reconsideration of the line of navigability Final Order has been withdrawn, so the decision stands. The proposed dock is within 70 feet of the shoreline at low water, so it is not expected to unnecessarily impact navigation.

The requirement of applicants for community docks to dedicate specific amounts of riparian rights to the community dock is contained in IDAPA 20.03.04. IDAPA 20.03.04.010.06 states, in part, that "A community dock shall not have less than fifty (50) feet combined shoreline frontage." IDAPA 20.03.04.015.03.b states, in part, that "Moorage facilities will be limited in size as a function of the length of shoreline dedicated to the community dock."

Idaho Code § 58-13 does not address riparian ownership requirements for community docks. Although the 500 feet of riparian community property are not contiguous, the dedicated riparian rights meet the intent of IDAPA 20.03.04 to limit the size of private dock facilities.

Based upon the information provided to me as the hearing coordinator and based upon the fact that the revised 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 26th day of July, 2007.

---

ERIC WILSON  
Hearing Coordinator



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7<sup>th</sup> day of August, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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