

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th Street, Ste. 103
Boise, Idaho 83702-5956

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. L-95-S-5002A) **FINAL ORDER**
Gregg Larson)
)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A contested case hearing was held on August 9, 2007 at 1:00 pm PST at the Idaho Department of Lands office in Coeur d'Alene, Idaho. Eric Wilson served as Hearing Officer. The Hearing Coordinator issued his Recommendations on September 18, 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 August 9, 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 Officer.

III. CONCLUSIONS OF LAW

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

IV. FINAL ORDER

On the basis of the record, it is my order that the Mica Supervisory Area of IDL should approve Applicant's request for a navigational encroachment permit for a single-family dock.

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 20.03.04.025.08.

DATED this 20th day of September, 2007.

for 

GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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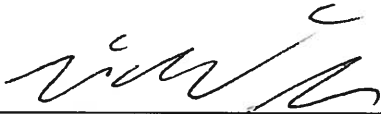
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GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

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

September 18, 2007

MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Contested Case Hearing – Single-Family Dock for Gregg Larson L-95-S-5002A

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a contested case hearing conducted by the Idaho Department of Lands (IDL). The contested case hearing was conducted in conjunction with the processing of an encroachment permit for a single-family dock on Fernan 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 June 13, 2007, Gregg Larson (Applicant) submitted to IDL an encroachment permit application (L-95-S-5002A) requesting approval to construct a single-family dock on Fernan Lake. The application was to add a "finger" to the existing permitted L-shaped

dock. This would create a complete slip. 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 § 58-1305) and the associated Rules (IDAPA 20.03.04.025). IDL sent the applicant's neighbors a notification of the application between June 19, 2007 and June 29, 2007. The Notices of Application are incorporated into this document by reference.

3. IDL received objections from seven neighbors of the applicant. All these letters and their attachments are incorporated into this document by reference.

a. Mr. Charles Tasca and Ms. Denice Tasca sent a letter dated July 9, 2007, expressing objection to the proposed single-family dock based on potential impacts to the water quality of Fernan Lake and impacts to the adjacent lots and hillsides. An attachment included with the letter is a copy of a newspaper article dated December 17, 2003. The article described new rules designed to protect water quality from hillside building around Fernan Lake.

b. Mr. Terry Peterson, Mr. Jorge and Ms. Judith Paniagua, Ms. Dorothy Simpson, and Mr. Randy Barber sent a letter received on July 6, 2007 objecting to the proposed single-family dock based on potential impacts to the water quality of Fernan Lake and impacts to the adjacent lots and hillsides.

c. Mr. T. Barry Tierney and Mary Ann Tierney sent a letter dated July 5, 2007 stating several objections to the proposed single-family dock based on potential impacts to the water quality of Fernan Lake. Exhibit A included with the letter was a

previous letter dated April 21, 2005 objecting to the original dock application because of concerns about water quality, fish habitat, recreation, aesthetics, and parking along Fernan Lake Road. Exhibit B is a copy of a newspaper article dated June 26, 2007 that describes an illegal road constructed by the applicant and the water quality problems with Fernan Lake. Exhibit C is a copy of the Draft Fernan Lake Watershed Management Plan dated November 5, 2003.

d. Mr. Patrick Kelly and Ms. Sheila Kelly sent a letter dated June 30, 2007 stating several objections to the proposed single-family dock based on potential impacts to the water quality of Fernan Lake and to wildlife.

4. Based on the objections received, and in accordance with IDAPA 20.03.04.025, IDL initiated a contested case hearing process for the proposed single-family dock. On July 25, 2007 the director issued orders appointing a hearing officer and notifying the applicant and objecting parties of the appointment and the hearing date. The contested case hearing was scheduled for August 9, 2007 at 1:00 pm at the IDL office in Coeur d'Alene. The orders are incorporated into this document by reference.

5. On July 25, 2007 the hearing officer notified the applicant and the objecting parties of a pre-hearing conference to be held on July 30, 2007 at 9 am PDT/10 am MDT. The conference was to be held by telephone. The notice is incorporated into this document by reference.

6. On July 30, 2007 the pre-hearing conference was held on the telephone. Patrick Kelly and Barry Tierney participated for the objectors, and Joel Hazel, legal counsel for the

applicant, also participated. Exhibits to be used at the hearing were scheduled to be turned in to the hearing coordinator by Monday, August 6th. A memo dated July 30, 2007 summarizing the conference was then drafted. The memo is incorporated into this document by reference.

7. Exhibits were received from the applicant and Mr. T. Barry Tierney and Ms. Mary Ann Tierney. The applicant's exhibit was a detailed drawing of the existing dock and proposed addition. The Tierney's exhibit was a copy of their previous letter and three exhibits, with an additional exhibit. The additional exhibit was a newspaper article dated July 25, 2007 that discussed an algae bloom at Fernan Lake. The exhibits are incorporated into this document by reference.

8. IDL held the contested case hearing at 1:00 pm in IDL's Coeur d'Alene office. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager, was the hearing officer. In attendance were Mr. Nick Krema, Deputy Attorney General assigned to the Idaho Department of Lands; Mr. Gregg Larson, the applicant; Mr. Joel Hazel, representing the applicant; and Mr. Barry Tierney, a neighbor. The 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. Joel Hazel and Mr. Gregg Larson provided an overview of the existing dock and the proposed finger addition. The existing L-shaped dock is approximately 531 square feet including the gangway. The proposed finger would add another 116 square feet. The purpose of the finger is to create a full slip that will enable the applicant to tie the boat and boat cover down on both sides of the

craft. The intent of the finger is not to park additional boats, but that would be possible. The lake bed under the finger is approximately four or five feet below the ordinary high water mark. The dock is normally used only in the summer.

b. Mr. Barry Tierney, a neighbor, stated that no other docks or encroachments are in that part of the lake which minimizes boat traffic and keeps it quiet and secluded. Encroachments will reduce aesthetics and the lake's water quality. They will also encourage more development, which will have additional impacts on the water quality. Fernan Lake is warm and shallow and very fragile. Most encroachments are on the west end in the City of Fernan.

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. Fernan 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 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 public trust values such as navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, water quality, etc. 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. Idaho Code § 58-1305(a) and IDAPA 20.03.04.025.01 establish that encroachment permits for single family docks should be processed with a minimum of procedural requirements and should not be denied except in the most unusual of circumstances.

7. IDAPA 20.03.04.015.01 limits the surface decking area of a single-family dock to seven hundred (700) square feet. The existing dock has approximately 531 square feet, and the proposed additional finger would add another 116 square feet, for a total of approximately 647 square feet. The square-foot size standard for a single-family dock

appears to have been met.

8. IDAPA 20.03.04.060.05 establishes a ten (10) foot setback from adjacent littoral property for single-family docks. The applicant's existing and proposed dock is 10 feet from the eastern property line and approximately 114 feet from the western property line, so this standard appears to have been met.

9. Water quality is a public trust value that the department should consider when evaluating proposed encroachments. Idaho law, however, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the establishment or enforcement of water quality standards, or upland road construction standards associated with recreation and development. Water quality standards are regulated by the United States Environmental Protection Agency and the Idaho Department of Environmental Quality. The City of Coeur d'Alene also enforces a hillside ordinance to help protect the water quality of Fernan Lake.

10. Applicant and IDL satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1305 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

The objections raised through written and oral testimony concern many issues outside the jurisdiction of IDL. Most of these objections are a result of the upland road building activity conducted by the applicant. Since this road construction did not fill the lake or otherwise

materially affect it, the Lake Protection Act does not authorize IDL to consider issues associated with the road building.

Other objections are related to the potential impact the additional finger dock would have on water quality. The applicant stated that he desired to add the finger in order to better secure and protect his existing boat, not to add another boat. While another boat could be tied on the shore line side of the proposed finger, boats could also be tied to the outside of the existing L-shaped dock and to the east side of the main approach. Even if the applicant did want to expand his dock in order to moor additional boats, no specific testimony was given regarding the capacity of Fernan Lake to support motorized recreation. In the absence of a credible witness or study that addresses a link between boat use and water quality, the department has no basis for considering the effects of increased boat use on water quality.

The department acknowledges that Fernan Lake has serious water quality issues, as evidenced by this summer's algae bloom, the draft lake management plan, the City of Coeur d'Alene hillside ordinances specific to Fernan Lake, and newspaper articles on Fernan Lake. The lake management plan did not identify docks or boat use on the lake as a contributor to water quality problems. Road building and related sediment delivery was identified as the primary source of phosphorus, the main pollutant of concern, to the lake.

Other objections to the dock mention aesthetics and the lack of other docks in this area. The single-family docks on the west end of Fernan Lake are approximately 650 feet west of the applicant's dock, and about five other single-family docks are located approximately

1,800 feet east of the applicant's dock. The applicant's dock is not the only dock on the north shore, and is not far from the numerous docks on the west shore. As a result, the dock does not seem to be out of place and should not affect lake recreation any more than the other docks on the lake.

Inherent in the rights of littoral ownership and Title 58, Chapter 12, Idaho Code, is the ability of a littoral owner to access navigable waters and the right to construct a navigational encroachment, subject to the permitting process and the physical limitations established by the Lake Protection Act (e.g. extraordinary circumstances, setbacks from adjacent riparian properties, and locations relative to the existing line of navigability).

Based upon the information provided to me as the hearing officer and based upon the fact that the encroachment permit application for the single-family 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 single-family dock.

DATED this 18th day of September, 2007.



ERIC WILSON
Hearing Officer