

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th St. Ste. 103
PO Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of)
)
Encroachment Permits No. ERL-95-S-0675G) **FINAL ORDER**
)
Duane B. Hagadone, Applicant.)
)
)
)
)
)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on February 26, 2008 at 6:00 pm PST at the Idaho Department of Lands office in Coeur d'Alene, Idaho. Mike Murphy served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on March 24, 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 February 26, 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

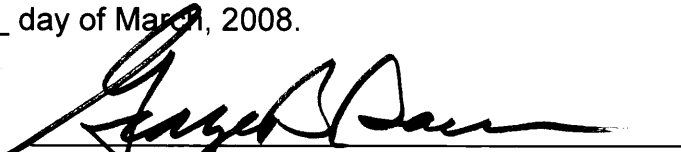
I concur with the Conclusions of Law presented by the Hearing Coordinator.

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit ERL-95-S-0675G be approved and the permit be issued to the Applicant by the Mica Supervisory Area.

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 27th day of March, 2008.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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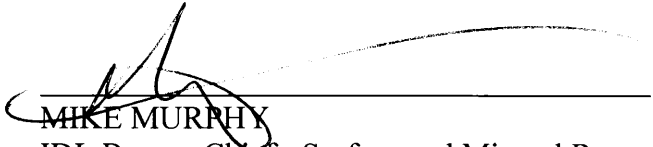
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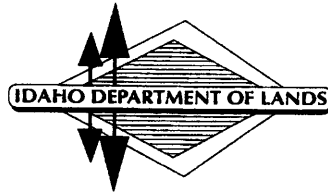
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MIKE MURPHY
IDL Bureau Chief - Surface and Mineral Resources

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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

March 24, 2008

MEMORANDUM

TO: George B. Bacon, Director

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

SUBJECT: Public Hearing – Encroachment ERL-95-S-0675G - Duane B. Hagadone

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 application for a commercial navigational encroachment (ERL-95-S-0675G) 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. Mr. John Barlow, agent of Mr. Duane B. Hagadone (Applicant), submitted to IDL an encroachment permit application (signed January 21, 2008 by Applicant), requesting approval to construct a commercial navigational encroachment on Lake Coeur d'Alene. The application also included a request for the scheduling of a public hearing. The application is incorporated into this document by reference.

2. Application ERL-95-S-0675G proposes to move the existing permitted 177-foot dock from the north end of the Hagadone residential property to the south end of the property. This dock includes a 30-foot square platform for mooring the Hagadone family's sailboat, a 3-slip boat garage measuring 37 by 47 feet, a single-slip measuring 30 by 58 feet, and a covered finger dock measuring 8 by 30 feet. The application also proposes constructing a new 177-foot dock with two 30-foot slips on the north end of the Hagadone residential property at the same location as the existing dock. The purpose of this dock is to moor two large cruise boats.

3. IDL initiated the processing of ERL-95-S-0675G as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On February 13, 2008 and February 20, 2008, IDL published a Notice of Application/Notice of Public Hearing in the Coeur d'Alene Press for the encroachment permit application submitted by Applicant. The Notice of Application/Notice of Hearing is incorporated into this document by reference.

4. In a letter dated February 7, 2008, IDL notified several agencies and organizations of the encroachment permit applications submitted by Applicant and requested the parties provide comments to IDL. The letter is incorporated into this document by reference. Some of those notified included:

- 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;
- Kootenai Environmental Alliance; and
- Lakes Commission.

5. Based on the request by Applicant, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed commercial navigational encroachment. The public hearing was held on February 26, 2008 at 6:00 pm in IDL's Coeur d'Alene office. Mike Murphy, IDL Bureau Chief, served as hearing coordinator. In attendance were Mike Denney, IDL Area Manager; Arvilla Allen, IDL Staff; John Barlow, representing Applicant; Janet Robnett, representing Applicant; Duane B. Hagadone, Applicant; and 23 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. John Barlow, representing Applicant, provided an overview of the project. Mr. Barlow indicated the encroachments will be used for commercial purposes in association with the Coeur d'Alene Resort. The upland facilities, including the gardens, allow Applicant to hold large fundraising events and provide a boating experience to the attendees. Mr. Barlow explained that the existing 177-foot encroachment located adjacent to the northern portion of the property is proposed to be moved to the southern portion of the lot and a new 177-foot encroachment would be built in the same location as the existing 177-foot encroachment. Mr. Barlow indicated that such a configuration would have no impact on navigability based on the existing encroachments, including the adjacent Murphy operation which extends 290 waterward of the shoreline.

b. Mr. Fred Murphy, adjacent neighbor to the south, and several members of the public provided testimony in support of the proposed encroachment based on its benefits to the community. IDL received many letters of support for the project from the public and local businesses.

c. Ms. Janet Robnett, representing Applicant, provided testimony which justified the existing and permitting of commercial encroachments other than commercial marinas. Ms. Robnett also identified the benefits of the proposed use of the property, its compliance with existing law and the lack environmental impacts.

d. Opposition to the proposed encroachment came in the form of letters and e-mails submitted to IDL and testimony provided at the public hearing. The objections can be summarized as follows:

- Upland zoning inconsistent with a commercial operation;
- Commercial use excludes public use. Over-commercialization exists;
- Commercial encroachments that are not marina are not permissible;
- Navigation will be impacted;
- Restroom facilities could be made available;
- Access should be made available from the uplands; and
- Future upland owners could continue or expand commercial use.

e. Mr. Duane Hagadone closed the public hearing with a description of his vision for the use of the uplands and the proposed encroachments.

6. IDL sent a letter to all public hearing attendees, dated February 27, 2008, indicating that the public comment period would be open until March 14, 2008. Previous announcements had indicated otherwise. IDL also published a notice of the correct closing date for the comment period in the Coeur d'Alene press on March 5, 2008 and March 12, 2008. The letter and the newspaper notice are incorporated into this document by reference.

7. IDL has previously issued encroachment permits for commercial navigational encroachments which are not commercial marinas. As an example, IDL issued an encroachment permit to the City of Coeur d'Alene on December 9, 2004 (#L-95-S-2391C) for a commercial navigational encroachment to moor tour boats. The encroachment is not a commercial marina. This encroachment permit is incorporated into this document by reference.

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. 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 20.03.04.060.05 establishes a presumption that a commercial encroachment located closer than twenty-five (25) feet from the adjacent littoral property

will have an adverse impact.

7. IDAPA 20.03.04.010.05 defines a commercial navigational encroachment as a navigational encroachment for the use of which patrons pay a fee. The proposed moorage facility is not a commercial marina which provides moorage for a fee; however, the proposed encroachments are associated with an activity that involves charity events where patrons are contributing money, offsetting the fees that normally would be collected by a “for-profit” commercial operation. The patrons, albeit indirectly, are paying a fee.

8. IDAPA 20.03.04.060.03 limits the length of docks to the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director.

9. 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.

10. Applicant 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

Applicant has submitted an application for a commercial navigational encroachment. The application meets the corresponding requirements set forth in the Lake Protection Act and is not in conflict with Public Trust Doctrine.

The follow reviews the objections identified during the public hearing process and includes a response to those objections:

Objection: Upland zoning inconsistent with a commercial operation.

Response: It is the responsibility of city and county governments to establish zoning ordinances (Idaho Code § 67-650 *et. seq.*). IDL has no authority related to upland zoning. Kootenai County is the appropriate entity to resolve any incompatibility with zoning. IDL received no adverse comments from Kootenai County related to zoning issues and the proposed encroachment/commercial operation.

Objection: Commercial use excludes public use. Over-commercialization exists.

Response: Public use has always included commercial use, as established by the Public Trust doctrine. Within Idaho, the public use of waterways has always assumed that commercial use was included within public use. The federal test for navigability, which determines whether states are granted ownership of the beds of lakes and rivers, is partly based on whether commercial use of those waters existed at the time of statehood.

IDL's role, as identified in Idaho law, is to permit encroachments over the beds of navigable lakes. Included in that same Idaho law are procedures which allow the permitting of commercial navigational encroachments. The proposed encroachments meet those requirements. Idaho law, however, does not give IDL the authority to decide how many encroachments are appropriate for a water body (excepting a theoretical maximum established by the minimum front footage required by encroachments and the available front feet on a lake). If the threat of over-commercialization exists, Kootenai County zoning has legal authority and the most effective tools, including comprehensive planning, to address and control this issue. IDL has no authority to address the commercialization of adjacent uplands.

Objection: Commercial encroachments that are not marinas are not permissible.

Response: Objectors stated that they felt that the proposed facility is not permissible because it is not a “commercial navigational encroachment” and such a facility is not expressly addressed in the Code or the Rules. This objection has no merit. Pursuant to Idaho Code §58-1303, the Land Board (and IDL) shall regulate, control and may permit encroachments in aid of navigation (or navigational encroachments). The subject facility is an “encroachment in aid of navigation” as defined by Idaho Code §58-1302(i), and is thus permissible. In accordance with Idaho Code §58-1303, IDL has previously permitted “commercial” activities on the lake, such as the City of Coeur d’Alene tour boat facility. This facility meets the definition of “commercial navigational encroachment,” but is not a commercial marina. Under these broad authorities, specific uses do not need to be delineated in the Rules in order to be authorized. The proposed use is reasonable and consistent with traditional uses of the lake and is in accord with the Public Trust Doctrine.

Objection: Navigation will be impacted.

Response: Applicant has demonstrated that the proposed encroachments will not impact navigation within Casco Bay. Both proposed docks are located within the currently established line of navigability. Of the two docks, one is a replacement of an existing dock and will extend no further waterward (177 feet) and the second is well within the line of navigability established by the Murphy facility to the south which extends 290 waterward of the shoreline.

Several comments related to navigation also implied that the proposed commercial operation will have an impact on the navigation beyond Casco Bay, asserting that perhaps too many boats already utilize the lake. IDL does not regulate boat traffic and an attempt by IDL to address boating density by denying this application would be arbitrary, capricious and without basis in law. If the public wishes to curtail boating activities, additional Idaho law or specific action taken by authorized local land use

planning commissions will be required.

Objection: Restroom facilities could be made available.

Response: Applicant has proposed that the large passenger boats, which will be moored in the northern encroachment, be allowed to remain in place after dropping off patrons. The boats would then be available to provide bathroom facilities for visitors. Although one alternative would be to provide upland restroom facilities, IDL has no authority to require such facilities be installed. The use of the boats is a reasonable request, with no obvious adverse impacts to the lake. Additionally this concept was met with no opposition by the adjacent neighbors.

Objection: Access should be made available from the uplands.

Response: Although parking (implied upland access) is a requirement of IDAPA 20.03.04.060.06 for commercial navigational encroachments, the parking described is clearly related to commercial navigation encroachments which provide moorage to the public. A one parking space per two watercraft moorage ratio is required, but allows city and county ordinances for "marinas" to be enacted.

Applicant has requested approval for a commercial navigational encroachment that provides a water-oriented service that is not a marina. Under these circumstances requiring upland access would provide no benefit to the public. As stated by Applicant, the use of the uplands in the proposed manner provides patrons with the added benefit of a boating experience.

Objection: Future upland owners could continue or expand commercial use.

Response: Any valid encroachment permit holder and any future assignee of that

encroachment permit is allowed to continue with use of the encroachment as long as the use remains the same. Upon change of use, permit holders are required to apply for a new encroachment permit. In this case, if the encroachment permit is approved, Applicant will be allowed to continue to use the encroachments in the manner requested. If Applicant were to sell the uplands, Applicant would have the opportunity to assign the encroachment permit to the new landowner. If the new landowner continued with the same use, the encroachment permit would remain valid. Any changes or expansion would require a new encroachment permit application, regardless of potential ownership changes, and would provide IDL to opportunity to assess the proposed changes or expansion for compliance with the Lake Protect Act.

Based upon the information provided to me as the hearing coordinator, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should **approve** the encroachment permit application submitted by Applicant.

DATED this 24th day of March, 2008.


MIKE MURPHY
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile:
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Craig Brosenic
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George B. Bacon
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300 N. 6th St. Ste. 103
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- Hand Delivery
- Federal Express
- Facsimile:
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