

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application)	Case No. CC-2022-NAV-22-001
No. L-95-S-6002,)	
)	FINAL ORDER
Justin Sternberg as trustee for Justin L. Sternberg)	
Living Trust,)	
)	
Applicant.)	

I. NATURE OF PROCEEDINGS

The Idaho Department of Lands (“IDL”), through the State Board of Land Commissioners, “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes” as provided in the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1303. The corresponding administrative rules promulgated by the State Board of Land Commissioners are IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On or around January 19, 2022, IDL received an updated encroachment permit application filed by Justin Sternberg as trustee for Justin L. Sternberg Living Trust. A hearing was held on March 10, 2022. Lincoln Strawhun served as duly appointed hearing officer. On April 8, 2022, the hearing officer issued his Preliminary Order, which contains Issue, Findings of Fact, Discussion, and Conclusion of Law sections.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025 on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my personal expertise gained

through education, training, and experience. I relied on the record for this matter, including examining the hearing officer's Preliminary Order in light of the entire record.

II. ISSUE

I do not adopt the Preliminary Order's Issue. I delete the sentence under the heading "Issue" and replace it with the following new sentence under that heading:

Whether Sternberg's encroachment permit application involves unusual circumstances and is consistent with Idaho law and local municipal ordinances.

III. FINDINGS OF FACT

I adopt the Preliminary Order's Findings of Fact as my Findings of Fact with the following amendments:

I amend paragraph 3 of the Findings of Fact to delete the number "1992" and replace it with "2008."

I delete paragraph 4 of the Findings of Fact on page 3 of the Preliminary Order, and replace it with the following new paragraph 4:

4. In *Dupont v. Idaho State Board of Land Commissioners*, 134 Idaho 618, 7 P.3d 1095 (2000), the Idaho Supreme Court affirmed the Land Board's revocation of an encroachment permit for a dock on Lakeshore Drive in Coeur d'Alene (the same street as Sternberg's property). The Court found that the presence of a long-standing designated swimming area was the type of "unusual circumstances" in Idaho Code § 58-1305(a) that would justify the denial of an application for an encroachment permit. *Dupont*, 134 Idaho at 625. The Court explained that unusual meant "out of the ordinary, different, etc." and the agency had the "right to deny the permit if, in its discretion, the Board determines the circumstances surrounding a particular encroachment are so out

of the ordinary as to make it inadvisable to issue the permit.” *Id.* at 623. The Court held that the agency could consider the dock’s proposed use in its decision, and ultimately reasoned: “It makes little sense for the Board to grant a permit for an encroachment when the intended use of the encroachment would violate applicable local and state laws.” *Id.* at 625.

I add the following new paragraphs 5 and 6 to the Findings of Fact.

5. The City has designated City Beach as a swimming area for decades. Many swimmers use the area, including triathlon competitors that compete and train in this part of Lake Coeur d’Alene.

6. The designated City Beach public swimming area extends in front of Sternberg’s property on Lakeshore Drive. No other encroachment permit or dock exists for any of the thirteen waterfront properties on Lakeshore Drive between North Idaho College and Fort Sherman Park.

IV. DISCUSSION

I adopt the Preliminary Order’s Discussion as my Discussion, except that I make the following amendments and additions:

I delete the last sentence in the second full paragraph on page 5 under the heading “Analysis and reasoning supporting recommendation” and replace it with the following sentence:

Permit #L-95-S-2809 C and D (2008) granted the City the right to place swim buoys 200’ waterward of the ordinary high water mark in front of Applicant’s property in order to provide swimmers with a safe place to swim.

Under the heading “Analysis and reasoning supporting recommendation,” I delete the final paragraph on page 5 and the first paragraph on page 6. I add the following paragraphs in their place:

Idaho Code § 58-1305(a) provides that applications for construction of single-family navigational encroachments:

shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required *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.

(Emphasis added). The Court in *Dupont* explained that Idaho Code § 58-1305 allows the agency to deny a permit “if, in its discretion, the [agency] determines the circumstances surrounding a particular encroachment are so out of the ordinary as to make it inadvisable to issue the permit.” *Dupont*, 134 Idaho at 623; See also *Almgren v. Idaho Dept. of Lands*, 136 Idaho 180, 184, 30 P.3d 958, 962 (2001) (“The Department had the discretion to determine whether ‘unusual circumstances’ existed...”). Such a determination is necessarily fact specific and may vary from case to case. *Dupont*, 134 Idaho at 623. Thus, IDL may, depending on the circumstances of the case, deny an application for single-family navigational encroachments when unusual circumstances apply to an application.

In *Dupont*, the Court found unusual circumstances existed when a designated swimming area was present in same area as the proposed encroachment permit because the existence of the designated swimming area triggered the related boating restrictions in city ordinance and the Idaho Safe Boating Act. *Id.* at 625. The Court also explained that “the existence of the designated swimming area in the location of the proposed encroachment is highly relevant to the question of whether the proposed encroachment presents ‘unusual circumstances,’” the agency could consider the proposed use of the dock in its decision, and it would make “little sense” to grant a navigational encroachment permit when boating in the area would violate local and state law. *Id.*

In this case, the City's current municipal code addresses public swimming areas in this location. In its code, the City designated the area of the lake in front of Sternberg's property as a "public swimming area." City Code § 4.20.030; Idaho Code § 67-7031(c). Under the code, "no person shall operate, navigate, cause to float, moor or anchor any motor driven watercraft or toy boat of any length or any sail powered vessel longer than twenty feet (20') within designated public swimming areas created by this chapter." *Id.* at §4.20.020.A.1. The City's code does not state that the swimming area is only limited to a certain time of year, but the IDL encroachment permit for the marking buoys allows their placement from May until October. Also, the Idaho Safe Boating Act provides in relevant part that "[i]t shall be unlawful for any person to operate a vessel on the water of this state in any area which has been clearly marked in accordance with, and as authorized by the laws of this state, by buoys or some other distinguishing device as a bathing, swimming or other restricted area." Idaho Code § 67-7026. Thus, I conclude the presence of a designated public swimming area used by many swimmers each year and the boating restrictions within this swimming area created by local ordinance and state law constitute unusual circumstances that warrant denial of Sternberg's application.

Sternberg argues that there are not unusual circumstances in this case. First, he argues that because buoys marking the area are not present from October to May, boats are permitted in the area during that time. Second, he argues that because sailboats less than twenty feet are allowed in the swimming area, that there is no blanket prohibition on boats in the area.

Neither argument is persuasive or demonstrates that unusual circumstances are not present here. The presence of buoys only during May to October does not change the City's code, which does not state anywhere that it applies only during certain months.

Even so, a designated swimming area during only part of the year does not preclude a finding of unusual circumstances, as the *Dupont* court similarly upheld the agency's determination of unusual circumstances for another owner on the same street based on the existence of a swimming area that prohibited boats from "at least April until September." *Dupont*, 134 Idaho at 624. Further, there is no evidence in the record that the purpose of Sternberg's dock is to moor a sailboat of less than twenty feet. Indeed, the only evidence in the record directly related to Sternberg's intended use is the first page of the application form where the box for "Private" was checked and the reason for the dock stated, "Install floating dock for Mr. Sternberg."¹ Nowhere in the application or at hearing did Sternberg assert his dock was intended to moor a sailboat. Thus, Sternberg's arguments do not change my determination that unusual circumstances exist.

Approval of Sternberg's application also would be inconsistent with the Lake Protection Act because the navigational and economic justification for, and benefits of, the proposed encroachment are outweighed by the lake values. Idaho Code § 58-1301 provides that the public health, interest, safety and welfare requires that all encroachments be regulated in order that the navigational and economic necessity, justification, or benefit derived from the encroachment are weighed against the lake values of protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality.

Here, Sternberg did not provide specific evidence of the navigational and economic benefits derived from the encroachment, although the ability to use the dock

¹ Even if Sternberg intended to use the dock for a sailboat less than twenty feet, his application proposes to use a tug boat to deliver the dock to the site. The tug boat would appear to be a motor driven watercraft of any length that the City's code restricts from operating in that area.

to moor watercraft would be a navigational benefit. However, the evidence establishes that the recreation lake value would be negatively impacted by the encroachment. The proposed encroachment is located within a designated swimming area that does not allow any motorized boats in order to allow for the safety of swimmers. The area has been designated in that way for years, and swimmers, including triathletes, use the area for swimming. No other single family docks are present at the other properties in the area, and a dock in the area would limit the area that swimmers could access, as well as decrease swimming safety by increasing boat traffic within the area. While the proposed dock could have a navigational benefit for Sternberg, it would negatively impact the public's interest in recreation in the area and health, safety, and welfare of having a safe area to swim that is unencumbered by boats and docks. Thus, after weighing the lake factors and the evidence in the record, I conclude that the Idaho Code § 58-1301 factors indicate the proposed encroachment would be inconsistent with the Lake Protection Act.

V. CONCLUSION OF LAW

I do not adopt the Preliminary Order's Conclusion of Law. Instead, in the Conclusion of Law section, I delete the paragraph and I add the following paragraph in its place:

The existence of a designated public swimming area established by local ordinance within and above the beds and banks of the lake in front of Applicant's property as well as the boating restrictions that exist under state and local law (City Municipal Code Chapter 4.20.30, .070, and Idaho Code §§ 67-7026 and 67-7031) are unusual circumstances that warrant denying Sternberg's encroachment permit. Further, as explained above, the permit application is inconsistent with the Lake Protection Act.

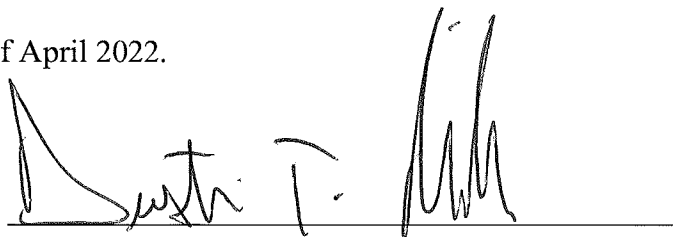
VI. ORDER

I conclude that the hearing officer's Preliminary Order as amended herein is based on substantial evidence in the record, and I adopt the Preliminary Order's Findings of Fact and Discussion with the amendments set forth herein as my decision in this matter. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the adopted Findings of Fact and Discussion with the amendments herein and the amended Issue and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-95-S-6002 is DENIED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, the Applicant or any aggrieved party who appeared at the hearing has a right to have the proceedings and Final Order 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 final decision. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, an adjacent littoral owner or other aggrieved party shall be required to deposit an appeal bond with the court in an amount to be determined by the court but not less than five hundred dollars (\$500) insuring payment to the Applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the Final Order. The Applicant does not need to post a bond with the district court for an appeal. The filing of the petition for review to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

Dated this 25th day of April 2022.

A handwritten signature in black ink, appearing to read "Dustin T. Miller", is written over a horizontal line.

DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of April 2022, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Justin Sternberg
Trustee, Justin L. Sternberg Living Trust
PO Box 895
Post Falls, ID 83877
Applicant

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: justinlsternberg@gmail.com

Colton Carlson
North Idaho Maritime
4020 N. Huetter Rd
Coeur d'Alene, ID 83814

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: colton@northidahomaritime.com

Jonathan Frantz
Attorney for Applicant

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: jonathon@postfallslaw.com

Linda K. Stroh
Trustee, Stroh Family Trust
707 West Lakeshore Dr.
Coeur d'Alene, ID 83814


- U.S. Mail, postage prepaid
- Hand Delivery
- Email: Lstroh@luc.edu

Angela Schaer Kaufmann
P.O. Box 83720
Boise, ID 83720-0010
Counsel for IDL

- Statehouse Mail
- Hand Delivery
- Email: angela.kaufmann@ag.idaho.gov

Kourtney Romine *on behalf of*
Lincoln Strawhun, Hearing Officer

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: kromine@idl.idaho.gov



Kourtney Romine
Workflow Coordinator

Copy sent via email and/or regular U.S. Mail, postage prepaid to Those Who Have Provided Comments.

Mike Gridley
Coeur d'Alene, City Attorney
mgridley@cdaid.org
bgreenwood@cdaid.org
radams@cdaid.org

Ken Copper
The Ken Ray Copper Living Trust
703 West Lakeshore Drive
Coeur d'Alene, Idaho 83814
k.copper@icloud.com

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

ANDREW J. SNOOK
Division Chief
State General Counsel & Fair Hearings Division

LINCOLN STRAWHUN, ISB #8925
REBECCA OPHUS, ISB #7697
KAREN SHEEHAN, ISB #7279
Deputy Attorney General
State General Counsel & Fair Hearings Division
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4555
Fax: (208) 854-8070
Email: Hearing.officer@ag.idaho.gov

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. CC-2022-NAV-22-001
ENCROACHMENT PERMIT APPLICATION)
No. L-95-S-6002,)
) **PRELIMINARY ORDER**
Justin Sternberg as trustee for Justin L Sternberg)
Living Trust,)
)
Applicant.)
_____)

After a hearing on this matter, held March 10, 2022, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to deny Encroachment Permit Application No. L-95-S-6002 (“Application”) because the proposed dock would be in a designated public swimming area.

In summary, Applicant is a littoral property owner with littoral rights. He applied to build a single-family dock on his waterfront property. The City of Coeur d’Alene (“City”) opposed the application because the beach in front of Applicant’s property is a designated public swimming area.

On February 17, 2022, IDL sent *Notice of Appointment of Hearing Officer and Hearing* to schedule a public hearing in accordance with Idaho Code § 58-1306(c) to the interested parties—the Applicant, Objector, and IDL. The parties submitted comments and exhibits before hearing and provided testimony at hearing. All exhibits and testimony are accepted as evidence and part of the record in this matter. The hearing was held via Zoom videoconference.

After considering the written and testimonial evidence, this Preliminary Order is issued per Idaho Code § 67-5245 and IDAPA 20.01.01.730.02, and is organized by the following sections: *Issue, Findings of Fact, Discussion, Conclusion of Law, and Preliminary Order.*

ISSUE

Whether Applicant’s Encroachment Permit Application violates applicable local and state laws.

FINDINGS OF FACT

The hearing officer finds the following facts:

1. Applicant is a littoral property owner with littoral rights. He does not have an existing encroachment permit for his property. On January 19, 2022, he applied to build a single-family dock on his waterfront property.
 - a. Applicant’s proposed dock complies with the encroachment standards of IDAPA 20.03.04.015 however, the beach in front of Applicant’s property is a designated public swimming area per the City’s Municipal Code (Chapter 4.20.030).
 - b. The beach in front of Applicant’s property has swim buoys at least six months out of the year.
 - c. On January 20, 2022 (and again on February 4, 2022), IDL sent notices of Applicant’s Application to Applicant’s adjacent neighbors.
 - d. On February 3, 2022, IDL corresponded via email with Applicant regarding the fact that the beach in front of his property has been designated as a public swimming area per the City’s Municipal Code.

2. On February 4, 2022, IDL informed Applicant it would ask for a contested case hearing. On February 14, 2022, IDL corresponded with the City via email regarding the application. On February 15, 2022, the City informed IDL that it would oppose the Application; and on March 3, 2022, submitted a 39-page Statement of Opposition.
3. IDL Permit #L-95-S-2809 C and D (1992) granted the City has the right to place swim buoys (labeled “Swim Area”) 200’ from the shoreline of Applicant’s beach to provide distance swimmers with a safe place to swim.
4. In *Dupont v. Idaho State Board of Land Commissioners*, 134 Idaho 618, 7 P.3d 1095 (2000), the Idaho Supreme Court affirmed IDL’s denial of a dock application for a dock on Lakeshore Drive in Coeur d’Alene (same street as Applicant) based on the “existence of unusual circumstances” along the waterfront of Lake Coeur d’Alene in the City. The court found that the presence of a long-standing marked swimming area equals “unusual circumstances” that would justify the denial of an application for an encroachment permit. The court said: “It makes little sense for the Board to grant a permit for an encroachment when the intended use of the encroachment would violate applicable local and state laws.” *Dupont* at 625, 7 P.3d at 1102.

DISCUSSION

Applicant’s position. Applicant’s counsel asserted that Applicant has lived on his waterfront property year-round for the last seven years; that there are no buoys there presently; that he was not aware the beach is a public swimming area; that part of the lake does not freeze over, and boats are frequently there October through May, including cruise boats and fishing boats.

That the *Dupont* case said that IDL may—not must—deny an application with unusual circumstances; that it is not unusual for Applicant to use his boat six months out of the year; that there is a difference between a “swim area” and “swim only area”; that the City has designated two types of swim areas; that the City’s permit by Applicant’s property is a “swim area” that allows boats 20’ or shorter; that the Safe Boating Act requires markings; that the markings on the buoys by Appellant’s beach property are unmarked and only there half of the year; that IDL should not deny the application based on other lot owners potentially applying for docks in the future.

Objector’s position. Objector asserted that boats on the lake are not close to the shoreline by Applicant’s property; that the ordinance says no boats (not just boats less than 20’); that kayaks

and paddle boards would be ok but no boats; that the proposed dock would interfere with and be detrimental; that the proposed doc would interfere with and be detrimental to the public's use of the City's long-standing designated public swimming areas; that the dock would be contrary to IDL permit #L-95-S2809 C and D (1992) granted to the City for the placement of swim buoys as well as the *Dupont* decision; that the designated swimming area includes the waterfront at City Park that is host to over 100,000 citizens from June through September each year; that each year over 2,600 ironman and triathlon competitors train and compete in the part of Lake Coeur d'Alene; that subjecting these athletes, children and other citizens to the risk of gruesome propeller injuries or boat related injuries would be contrary to the intent and purpose of the Lake Protection Act and the greater public good.

IDL's position. IDL's representatives explained that Idaho Code § 58-1305(c) and IDAPA 20.03.040.025.04 provide that IDL (acting on behalf of the Land Board) may set a hearing regarding a single-family dock application when it deems it advisable due to the existence of unusual circumstances; that the unusual circumstances with this application are the *Dupont* Idaho Supreme Court decision and the continued existence of a designated swimming area in front of Applicant's littoral property.

That per *Dupont*, it does not make sense for IDL to grant an application for a boat dock when per the Idaho Safe Boating Act, it would be unlawful for Applicant to use or moor a boat at the proposed dock; that the Idaho Safe Boating Act says that no person shall operate a boat in swimming areas; that IDL also notes that Applicant's property is one of 13 waterfront properties between North Idaho College and Fort Sherman Park in downtown Coeur d'Alene; that there are no private docks and no encroachment permits in this area; it is unusual to have such desirable water frontage in the heart of town and have no encroachment permits for docks.

That the buoys are not there year-round because buoys get damaged in the winter; that the city is looking to get more robust buoys to be there year-round; that the buoys placed there have diamond shaped stickers on them restricting the area from boats; that boaters know about the restrictions of buoy markings.

That IDL has determined that a dock that only serves one waterfront owner does not provide a major benefit to the general public of Idaho; that Applicant's proposed dock appears to meet the single-family dock standards of IDAPA 20.03.04.015.01. However, based on the *Dupont* Idaho Supreme Court decision, the City Code, and the Idaho Safe Boating Act, IDL recommends denial.

Analysis and reasoning supporting recommendation. It is understandable that Applicant wants a boat dock on his shoreline property. However, Applicant's argument that IDL should approve his application lacks merit.

The City Municipal Code Chapter 4.20.030 has designated the beach in front of Applicant's property as a public swimming beach. The beach in front of Applicant's property has swim buoys at least six months out of the year marked as swim areas and restricted from boats. Idaho Code §§ 67-7026 and 67-7031, as well as the City's Municipal Code Chapter 4.20.070 prohibits boats where buoys mark swim areas. Permit #L-95-S-2809 C and D (1992) granted the City the right to place swim buoys 200' from the shoreline of Applicant's beach to provide swimmers with a safe place to swim.

Per Idaho Code § 58-1305, IDL may deny an encroachment when an application has unusual circumstances. The *Dupont* court found that the presence of a long-standing swimming area equals "unusual circumstances" that would justify the denial of an application for an encroachment permit.

In conclusion, the hearing officer understands that Applicant would like a dock on his waterfront property, however there is no basis to approve the application because the beach in front of Applicant's property is a public swimming beach, boats are not allowed in public swimming areas, and there would be no point in granting a dock when it would be unlawful to moor or operate a boat from that dock.

CONCLUSION OF LAW

Applicant's Encroachment Permit Application for a single-family dock violates applicable local and state laws (City of Coeur d'Alene's Municipal Code Chapter 4.20.030, 070 and the Idaho Safe Boating Act, Idaho Code §§ 67-7026 and 67-7031).

PRELIMINARY ORDER

The hearing officer recommends that the Director of the Idaho Department of Lands issue a Final Order denying Applicant's encroachment application No. L-95-S-6002.

DATED: April 8, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: Lincoln Strawhun
LINCOLN STRAWHUN
Hearing Officer

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Idaho Code § 67-5245 and IDAPA 20.01.01.730.02 addressing petitions for review of preliminary orders are not applicable per the *Notice of Appointment of Hearing Officer and Hearing, February 17, 2022*, and Idaho Code § 58-1306, which requires a final order to be issued within 30 days of the hearing date.

* * * * *