

Exhibit "B"

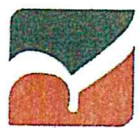
Hirschi Zone Change Application

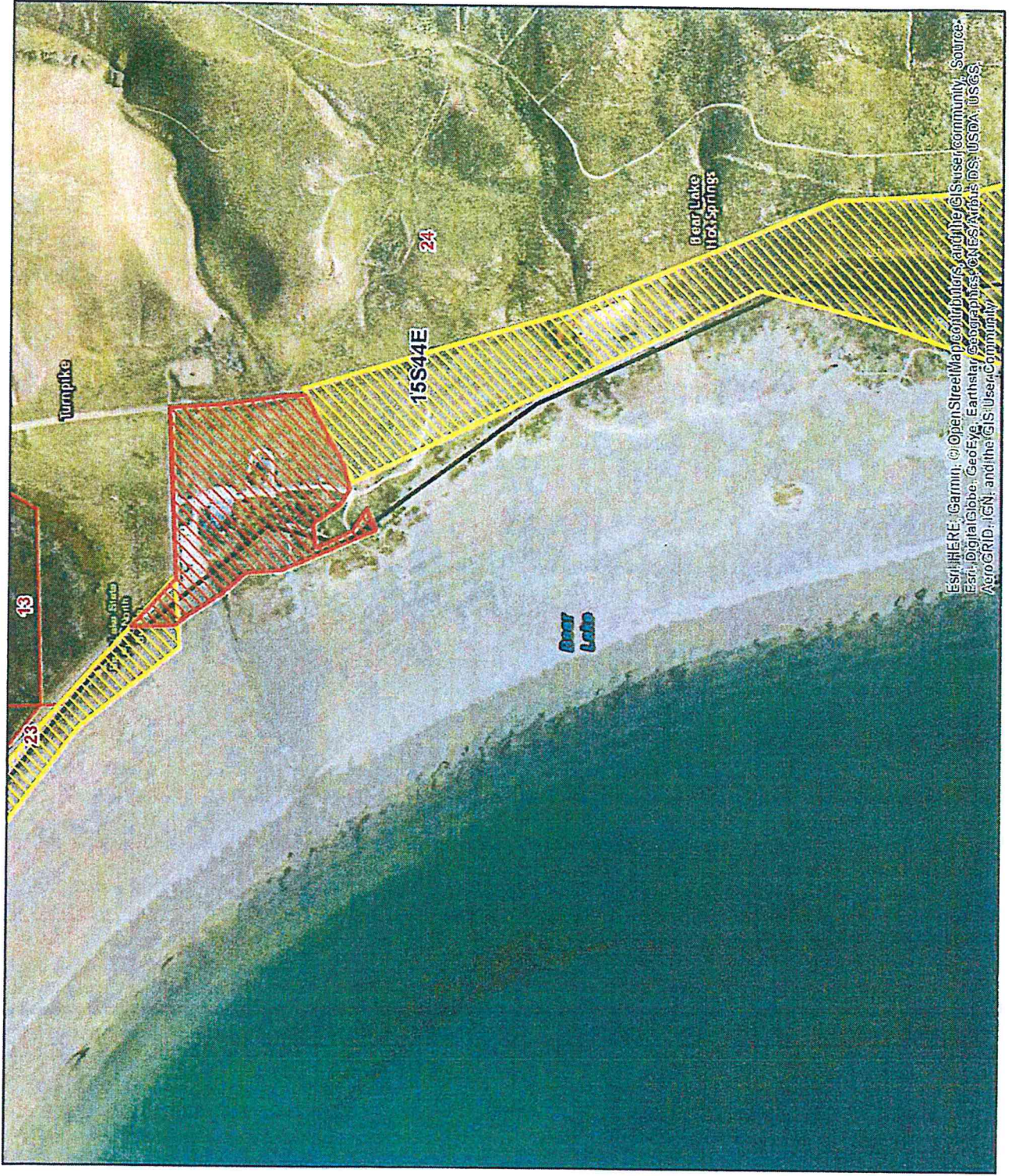
- Hogan
- Hogan
- Jones
- Jones
- Hirschi



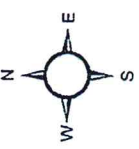
Google Earth

RACINE OLSON
ATTORNEYS | PROBLEM SOLVED

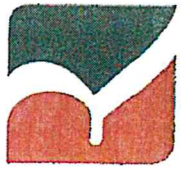




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| Legend | |
|--------|---------------|
| | Commercial |
| | Lakeshore |
| | TR Lines |
| | Section Lines |



51038

Type two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner. This latter type of spot zoning is invalid.

Evans v. Teton Cty., 139 Idaho 71, 77 (2003)

Littoral Rights

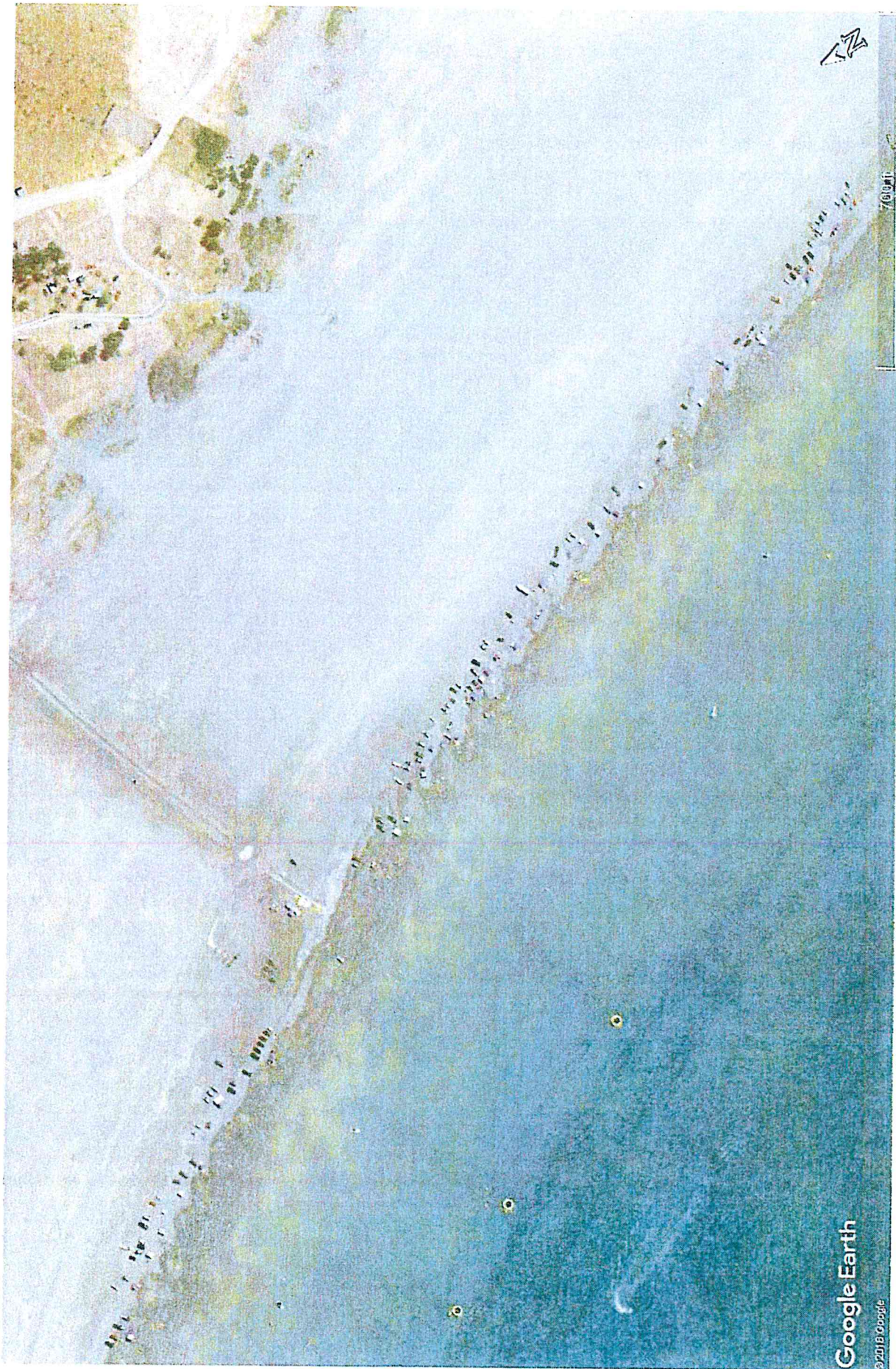
littoral

[lit-er-uh l]

1. of or relating to the shore of a lake, sea, or ocean.

Appurtenant to his ownership of lake front property, the littoral land owner normally possesses certain littoral rights. These include the right of access to the water . . . the right of access has been said to be a valuable right and, in many instances the controlling aspect of the value of “littoral” lands.

West v. Smith, 96 Idaho 554 (1974)



7. Use of beach area below the ordinary high water mark by Owner and patrons is limited to 192' of lake frontage associated with the property. The perimeter of this area must be marked by non-hazardous methods approved by the Idaho Department of Lands so that patrons know the boundary of the area they are permitted to utilize.

16. Motorized access to beach area below the ordinary high water mark by patrons is limited to shuttling persons and equipment to the 192' of lake frontage associated with the property. Maximum time allowed to park on the beach for the purpose of transferring occupants/contents to watercraft is 30 minutes. Access can be provided to those willing to walk.

Conditions for Brian Hirshi Rezone 6/21/2019

1. Approval for the use of property will be limited to watercraft rental facility only.
2. Owner must maintain the parking area in a dust free condition.
3. Owner/operator must provide adequate restroom facilities for employees and patrons.
4. All patron/employee parking must be on the one acre parcel zoned commercial above the ordinary high water mark.
5. Access to property must be on the south side of property and must be sufficiently wide for ingress and egress constructed of a hardened surface 25'-40' with 30'-40' radii and a maximum of 8% grade.
6. Must provide a 20' wide fire lane with surface to support a 50,000 lb fire truck. Lane is to run the length of the property. Fire lane can also be used as fire break and access can be combined with patron access. Fire lane must be posted.
7. Use of beach area below the ordinary high water mark by Owner and patrons is limited to 192' of lake frontage associated with the property. The perimeter of this area must be marked by non-hazardous methods approved by the Idaho Department of Lands so that patrons know the boundary of the area they are permitted to utilize.
8. Must provide one handicapped parking space.
9. Must provide a screened hedge or privacy fence. The privacy fence must be more than 6' but less than 8'. The screened hedge must have a source of water and be maintained in a healthy condition. Fencing must be constructed within three months of application approval.
10. Maintain reasonable hours of operation (sun up to sun down).
11. Comply with U.S. Army Corps of Engineers requirements for wetlands and areas below the ordinary high-water mark.
12. Meet requirements of Idaho Department of Lands by submitting and receiving necessary approvals.
13. Obtain access permit from Bear Lake County Road and Bridge.
14. Blocking any neighbors driveway prohibited.
15. Include site plan detailing the number of parking stalls and adequate circulation. Signage, to be approved by the County, identifying the parking lot is full must be placed at entrance when no additional parking spaces are available. Site plan to be reviewed by county staff (architect, administrator, sheriff, fire marshall).
16. Motorized access to beach area below the ordinary high water mark by patrons is limited to shuttling persons and equipment to the 192' of lake frontage associated with the property. Maximum time allowed to park on the beach for the purpose of transferring occupants/contents to watercraft is 30 minutes. Access can be provided to those willing to walk.

17. Failure to comply with these conditions may result in revocation of the commercial zone approval. Bear Lake County will provide written notice to the Owner of any alleged violation of these conditions. Such notices will state a reasonable time, as determined by Bear Lake County in its sole discretion, to cure the violation. If the Owner fails to cure the violation within the time allowed by Bear Lake County, Bear Lake County may revoke the rezone approval upon written notice to the Owner, in which case the commercial use of property for watercraft rental must immediately cease.

18. Rezone is subject to and conditioned upon a development agreement entered into between the applicant and Bear Lake County.

Exhibit "C"



Exhibit "D"



Legal Argument

Exhibit E

Cindy Garner

From: J. Brett Chambers <jbc@utahlawfirm.com>
Sent: Friday, June 21, 2019 04:49 PM
To: cgarner@bearlakecounty.id.gov
Cc: Joe Chambers; Adam McKenzie; tj@racineolson.com
Subject: Hirschi Rezone Application - Hoggan Comments
Attachments: Signed Letter to Comissioners 6.21.19 (Hirschi Rezone App).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hello,

Attached is a letter regarding the Hirschi Rezone Application, scheduled for June 24, 2019. If you have any questions, please don't hesitate to let me know.

I've cc'ed Mr. McKenzie as well.

Thanks,
Brett

--
J. Brett Chambers
Harris, Preston & Chambers, LLP
31 Federal Avenue
Logan, UT 84321
P: 435-752-3551
F: 435-752-3556
www.utahlawfirm.com

NOTICE: This e-mail is confidential and/or privileged, and intended to be reviewed by only the individual or organization named above. If you received this e-mail in error, please notify the sender by return e-mail and delete this e-mail from your system.

Exhibit

The Law Firm of

HARRIS, PRESTON & CHAMBERS

A LIMITED LIABILITY PARTNERSHIP

31 FEDERAL AVENUE
LOGAN, UT 84321

(435) 752-3551
FAX (435) 752-3556



GEORGE W. PRESTON
MAYBELL ROMERO
Of Counsel

JOSEPH M. CHAMBERS+
JOSH CHAMBERS*
J. BRETT CHAMBERS

+Licensed in Utah and
Idaho

*Licensed in Utah and
New York

June 21, 2019

SENT VIA ELECTRONIC MAIL

Comm. Bradley D. Jensen
Comm. Rex Payne
Comm. Vaughn Rasmussen
BEAR LAKE COUNTY
7 E Center St
Paris, ID 83261

RE: Brian Hirschi Rezone Application Request

Dear Commissioners:

My name is Brett Chambers and our firm represents Mr. Jeffrey Hoggan. Mr. Hoggan is a neighbor to the applicant and will be directly affected by the rezoning request. I'm writing to respectfully request you deny Mr. Hirschi's zoning request for four independent reasons. First, Mr. Hirschi's rezoning request is *prima facie*, prohibited spot zoning. Second, the alleged conditions fail to protect neighboring land owners. Third, the rezoning will constitute an unconstitutional regulatory taking. Fourth, Mr. Hirschi is currently scheduled for trial on felony attempted strangulation and aggravated battery, and yet the proposed development agreement is with him in his personal capacity. If Mr. Hirschi is imprisoned, how can he even comply? More importantly, how can the county reasonably expect compliance? As explained below, denial is necessary and appropriate.

At the outset, I do not intend the tone of this letter to come across as confrontational or adversarial. I have found that open and honest communication is best for all parties, and accordingly have tried to be transparent. We appreciate your careful and thoughtful consideration.

Spot Rezoning. Mr. Hirschi's rezoning request is *prima facie*, prohibited spot zoning. "Spot zoning is the reclassification of one or more lots for a use prohibited by the original zoning ordinance." *Price v. Payette Cty. Bd. of Cty. Com'rs*, 131 Idaho 426, 432 (Idaho 1998); *see also Dawson Enter., Inc. v. Blaine County*, 98 Idaho 506, 514, 567 P.2d 1257, 1265 (1977). Spot zoning falls under one of two categories. Type one is "rezoning of property for a use prohibited by the original zoning classification. The test for whether such a zone reclassification is valid is whether the zone change is in accord with the comprehensive plan." *Neighbors for*

*the Pres. of the Big & Little Creek C/
Payette Cnty., 358 P.3d 67, 74 (Idah
parcel of land for use inconsistent with
benefit of an individual property owner.*

BLH Apartments
LLC

*v. Bd. of Cnty. Comm'rs of
change that singles out a
the zoning district for the*

Mr. Hirshi's rezone request unequivocally falls under the second category. It is a zone change singling out his particular parcel "for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner." The Idaho Supreme Court is crystal clear: "This latter type of spot zoning is invalid." *Neighbors*, 358 P.3d at 74. Converting Mr. Hirshi's single parcel from Lakeshore to Commercial is plainly spot zoning and prohibited.

Even assuming it did not fall under the second category, it would also violate the first type. Here, the Bear Lake Comprehensive Plan 2025 ("Comprehensive Plan") does not anticipate or allow commercial property uses in the Lakeshore zone. To be frank, at the time the plan was created, Lakeshore zoning did not even exist. Accordingly, one would be hardpressed to credibly claim that converting Lakeshore property to Commercial property was anticipated or in accord. What information does exist regarding potential future commercial use in the area indicates that such was to occur north of the homeowner lots, not south. See *Bear Lake Comprehensive Plan 2025*, pg. 66 (identifying "Future Land Use – Bear Lake Hot Springs" north as potential commercial and business lands, not south of the residential plots). The Comprehensive Plan does not anticipate nor allow commercial property development south of the hot springs.

Respectfully, converting Mr. Hirschi's single parcel of property is spot zoning. It is inconsistent with the surrounding Lakeshore permitted uses and is plainly for the benefit of an "individual property owner." Likewise, the use is not in accord with the Comprehensive Plan. The rezone is illegal and prohibited.

Proposed Conditions. The proposed conditions do not adequately clearly delineate Mr. Hirschi's obligations. For example, without intending any disrespect, only conditions ##2-3 actually specify that it is "Owner" or Owner/operator" that must perform the conditions of numbers two and three. We assume the County intends the property owner to meet the listed conditions, but the agreement does not state that. It only states that the conditions must be met – but by whom? Applying statutory rules of interpretation, particularly *expressio unius est exclusio alterius*, a court could reasonably assume that because the owner was only specifically required to meet conditions ##2-3, the county and owner are jointly obligated to ensure the other conditions were met; we assume this isn't what you intend.

Further, the other conditions do not adequately protect the surrounding property owners. For example, condition #14 only indicates that "blocking any neighbors['] driveway is prohibited." However, who cannot block a neighbors' driveway, only the owner? How about guests, invitees, employees, and customers of Mr. Hirschi's? The agreement does not specify who cannot block the driveway and whether Mr. Hirschi owes an obligation to ensure his customers do not. Likewise, is the blocking only limited to driveways? If an invitee, guest, or customer of Mr. Hirschi encroaches on a neighbor's property, who is responsible?

Condition #7 is similarly vague. The closing sentence indicates that "Access can be provided to those willing to walk." Access to be provided to who, only patrons of the business?

The auxiliary verb "can" is permissive and not mandatory. We are assuming access "must" be provided to those willing to walk, not just permissively so.

Condition #16 specifies that failure to comply "may" result in revocation, not "shall." If the conditions are not met, the consequence should not be discretionary. Otherwise, it is subject to constitutional enforcement issues (laws and state power cannot be selectively enforced).

Condition #1 specifies the property is to be used solely for "watercraft rental." What qualifies as watercraft? If individuals renting small items, such as paddle boards, are given access to the beach, there will be significant overcrowding.

Additional conditions should also be added. Any and all rights under the development agreement should be nontransferable and nonassignable. Otherwise, what is to prevent Mr. Hirschi from getting the rezone and then selling them to someone else. The County could be stuck with a partner it did not bargain with. A bond in a reasonable amount should be required to cover the cost of improvements, to be released upon their completion. A noise requirement should be put in place to ensure the business does not unreasonably interfere with the established character of the area (another reason spot zoning is prohibited). And lastly, an access requirement ensuring business usage does not overwhelm the non-spot-zoned properties.

The above issues are non-exhaustive and beyond the scope of this letter. If the County intends to proceed, we respectfully request an opportunity to have interested property owners' counsel, Mr. Hirschi's counsel, and the county's counsel, exchange proposed conditions. Otherwise, significant and unnecessary resources will inevitably be spent in legal fees over future interpretation, enforcement, and/or non-enforcement of the conditions.

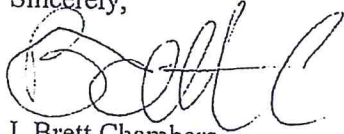
Regulatory Taking. Pursuant to IC § 67-6511, the County's selective rezoning of Mr. Hirschi's parcel may constitute a regulatory taking subject to IC § 67-8003. In the event the rezone occurs, we intend to request a taking analysis and enforce our rights thereunder. The rezone will unquestionably change the nature and character of the properties, impinge property owners' rights in the area, and decrease property values.

Compliance with Development Agreement – Mr. Hirschi's Trial. The proposed Development Agreement is with Mr. Hirschi, in his individual capacity, and yet there is a high likelihood Mr. Hirschi will be unable to comply due to his potential future imprisonment and/or terms of probation. It is my understanding, Mr. Hirschi currently faces two charges of attempted strangulation and aggravated battery, both felonies carrying respective terms of 15 years in prison.

At a minimum, the County should delay its decision until resolution of those matters. In the event those matters resolve favorably for Mr. Hirschi (which we would be happy to hear), the application can be resolved at that time. In the event it does not, the County can enter a decision at that time. If the County enters into a development agreement with Mr. Hirschi and he is imprisoned, pursuant to IC § 67-6511, the agreement may be unrevocable for four years even if he has not complied with the conditions (state law is generally preemptive).

With these in mind, we respectfully request the application be denied.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Brett Chambers". The signature is stylized and cursive, with a large initial "J" and "C".

J. Brett Chambers
Joseph Chambers (10181)
Attorneys at Law

cc: *Jeffrey Hoggan*

Legal Argument

Exhibit F

Cindy Garner

From: TJ Budge <tj@racineolson.com>
Sent: Friday, June 21, 2019 04:42 PM
To: cgarner@bearlakecounty.id.gov
Cc: Ted Jones; Tod Jones
Subject: Hirschi rezone application
Attachments: 20190621 Budge ltr to Bear Lake Board of County Commissioners.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Cindy,

The attached letter is being submitted for the ^{*June*} ~~May~~ 24, 2019, public hearing on the Hirschi Rezone Application.

Thank you,

T.J. Budge
RACINE OLSON
201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204
W: (208) 232-6101 | C: (208) 705-0826 | F: (208) 232-6109
www.racineolson.com

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June 21, 2019

Bear Lake County Board of Commissioners
Bradley D. Jensen
Rex Payne
Vaughn Rasmussen

Sent via email to Cindy Garner, County Clerk (cgarner@bearlakecounty.id.gov)

Re: Brian Hirschi Rezone Application

Dear Commissioners Jensen, Payne and Rasmussen:

I am writing on behalf of Ted Jones and Tod Jones in regard to the Hirschi rezone application that is scheduled for a public hearing before you on June 24, 2019. As you know, the Planning & Zoning Commission recommended that the County approve the rezone with certain conditions to protect the littoral rights of neighboring property owners. I understand that your Board held a study session earlier this month where a question was raised as to whether it is appropriate for the County to impose conditions on the use of the lake bed by Mr. Hirschi's customers. The purpose of this letter is to assure you that the County can indeed impose such conditions.

You are probably be aware that the Planning & Zoning Commission spent hours debating whether to recommend approval of Mr. Hirschi's rezone application. The Commission nearly voted to deny the rezone due to concern over concerns about the County's ability to regulate use of the lake bed. In fact, one member of the Commission voted to deny the rezone. The other members of the Commission recommended approval only after conditions were developed to protect the littoral rights of neighboring property owners, and only after Mr. Hirschi assured the Commission that he would ensure that his customers comply with such conditions.

Under Idaho law, ownership of lakefront property (known as "littoral land") includes a right to access the lake. The Idaho Supreme Court has stated: "Appurtenant to his ownership of lake front property, the littoral owner normally possesses certain littoral rights. These include the right of access to the water . . . the right of access has been said to be a valuable right and, in many instances the controlling aspect of the value of 'littoral' lands." *West v. Smith*, 96 Idaho 554 (1974). To protect the littoral rights of property owners neighboring Mr. Hirschi, the Planning & Zoning Commission recommended that the County impose the following conditions:

- *Use of beach by Owner and patrons is limited to the 192' of lake frontage associated with the commercial property. The perimeter of this area must be marked by non-hazardous methods approved by the Idaho Department of Lands so that patrons know the boundary of the area they are permitted to utilize.*

- *Motorized beach access by patrons is limited to shuttling persons and equipment to the 192' of lake frontage associated with the commercial property.*
- *Maximum time allowed to park on the beach for the purpose of transferring occupants/contents to watercraft is 30 minutes.*

The public notice for the June 24 hearing includes draft conditions but the conditions set forth above are not included. I understand the Board of Commissioners removed these conditions due to concern over the County's authority to regulate use of the lake bed. I can appreciate this concern. Since the land below the Ordinary High Water Mark is owned by the State of Idaho and regulated by the Idaho Department of Lands, the County may not be able to control use of the lake bed by the general public. However, the County absolutely can, as a condition of allowing Mr. Hirschi to operate a commercial rental business, insist that he control how his patrons use the lake bed. Keep in mind that the County is not obligated to approve the rezone application—it is a discretionary decision. If the County is willing to allow the rezone only if Mr. Hirschi's customers respect the littoral rights of neighboring property owners, the County certainly can impose conditions to that effect. Doing so does not step on the toes of the Idaho Department of Lands; it simply ensures that Mr. Hirschi's property is used in a way that protects neighboring property rights. If the Board does not think it can impose such conditions then the appropriate action is to deny the rezone.

Accordingly, I kindly urge the Board of Commissioners to either deny the rezone application or approve the rezone with the conditions enclosed herewith, which include conditions necessary to protect the littoral rights of neighboring property owners (see condition nos. 7 and 16).

Thank you very much for your consideration of this matter.

Sincerely,



T. J. BUDGE

cc: Ted Jones
Tod Jones
Adam Mackenzie

Conditions for Brian Hirshi Rezone 6/21/2019

1. Approval for the use of property will be limited to watercraft rental facility only.
2. Owner must maintain the parking area in a dust free condition.
3. Owner/operator must provide adequate restroom facilities for employees and patrons.
4. All patron/employee parking must be on the one acre parcel zoned commercial above the ordinary high water mark.
5. Access to property must be on the south side of property and must be sufficiently wide for ingress and egress constructed of a hardened surface 25'-40' with 30'-40' radii and a maximum of 8% grade.
6. Must provide a 20' wide fire lane with surface to support a 50,000 lb fire truck. Lane is to run the length of the property. Fire lane can also be used as fire break and access can be combined with patron access. Fire lane must be posted.
7. Use of beach area below the ordinary high water mark by Owner and patrons is limited to 192' of lake frontage associated with the property. The perimeter of this area must be marked by non-hazardous methods approved by the Idaho Department of Lands so that patrons know the boundary of the area they are permitted to utilize.
8. Must provide one handicapped parking space.
9. Must provide a screened hedge or privacy fence. The privacy fence must be more than 6' but less than 8'. The screened hedge must have a source of water and be maintained in a healthy condition. Fencing must be constructed within three months of application approval.
10. Maintain reasonable hours of operation (sun up to sun down).
11. Comply with U.S. Army Corps of Engineers requirements for wetlands and areas below the ordinary high-water mark.
12. Meet requirements of Idaho Department of Lands by submitting and receiving necessary approvals.
13. Obtain access permit from Bear Lake County Road and Bridge.
14. Blocking any neighbors driveway prohibited.
15. Include site plan detailing the number of parking stalls and adequate circulation. Signage, to be approved by the County, identifying the parking lot is full must be placed at entrance when no additional parking spaces are available. Site plan to be reviewed by county staff (architect, administrator, sheriff, fire marshal).
16. Motorized access to beach area below the ordinary high water mark by patrons is limited to shuttling persons and equipment to the 192' of lake frontage associated with the property. Maximum time allowed to park on the beach for the purpose of transferring occupants/contents to watercraft is 30 minutes. Access can be provided to those willing to walk.

17. Failure to comply with these conditions may result in revocation of the commercial zone approval. Bear Lake County will provide written notice to the Owner of any alleged violation of these conditions. Such notices will state a reasonable time, as determined by Bear Lake County in its sole discretion, to cure the violation. If the Owner fails to cure the violation within the time allowed by Bear Lake County, Bear Lake County may revoke the rezone approval upon written notice to the Owner, in which case the commercial use of property for watercraft rental must immediately cease.

18. Rezone is subject to and conditioned upon a development agreement entered into between the applicant and Bear Lake County.

Exhibit "G" of

Permit No. _____

Date: 4/2/19

BEAR LAKE COUNTY ENCROACHMENT PERMIT

Name: Brian Hirschi Phone number: 435-757-4399
Address: 1217 S. Bear Lake Blvd.
Garden City, UT 84028

Application of right-of-way encroachment is hereby granted, subject to the Regulations for the Control and Protection of County Road of Way Legally required and other general safety requirements, the approval plan and any special limitations set forth herein. Permission is requested for the purpose of

25' wide driveway road to gain access to my lot from East Shore Road
across the county road right of way, from edge of asphalt to my property.

In the following location 535 East Shore Road, Saint Charles, Idaho

The work shall commence 4/3/19

In the event work is commenced under this permit, the applicant agrees to prosecute the same to completion by the date herein above specified. In the event the applicant fails or refuses to complete the work, the County Road Department may, at its election, fill in or otherwise correct any existing impediments and the applicant agrees to forfeit his \$_____ deposit in compensation therefore.

The applicant shall be required to deposit \$_____ with the County at the time of application. This deposit will be retained by the County until the applicant completely restores the County right-of-way, disturbed by the applicant, to its original condition. If the right-of-way is not restored to its original condition by the applicant, the County may do so with its own forces and the \$_____ will be retained by the County as compensation for the restoration work. If it costs more than \$_____ to restore the right-of-way, the applicant agrees to pay the balance within 30 days of billing.

An inspection fee of \$ 50.00 will be required to accompany this application. *The inspection fee will not be refunded*

Before work permitted herewith is commenced, the applicant must notify Greg Skinner @ 208-847-1061, and commencement of said work of understood to indicate that the applicant will comply with all instructions and regulations of Bear Lake County with respect to performance of said work and that he will properly safeguard said work to prevent accident and shall indemnify and hold harmless Bear Lake County from all damages arising out of any and all operations performed under this permit.

Permittee shall not perform any work on County road-of-way beyond those areas or operation stipulated on the permit. If because of the future construction or other causes, the County wishes the encroachment removed or relocated, the permitte will do so after 30 days notice at his expense.

If applicant fails to comply with County regulations, specifications, or instructions pertinent to this permit, the County Road Supervisor or his duly authorized representative may by verbal order, suspend the work until the violation (s) is corrected. If the applicant fails or refuses to comply promptly, the County Road Supervisor or his duly authorized representative may issue a written order stopping all or part of the work. When satisfactory corrective action is taken, an order permitting resumption of work any be issued.

In the event the applicant fails to perform any of the conditions of this permit and it is necessary to resort to any legal actions, the applicant agrees to pay reasonable attorney fees and court costs incurred in said action.

This permit is binding upon the heirs, successors, and assigns of the applicant

Brian Hindi

Signature of Applicant:

Greg Skinner 6/20/19
Bear Lake County Corporations
By County Road Supervisor-Permit Officer

Note: The \$15.00 inspection fee and the \$_____ deposit will be waived for the driveways that do not encroach upon the traveled way of the County road

OFFICAL USE ONLY

Refund clearance for _____ is herby given _____
Date _____

Exhibit "H" c9



DYLAN B. LAWRENCE
DYLANLAWRENCE@VARINWARDWELL.COM

242 N. 8TH STREET, SUITE 220
P.O. BOX 1676
BOISE, IDAHO 83701
P: 208.345.6021
F: 1.866.717.1758
VARINWARDWELL.COM

June 20, 2019

VIA EMAIL

Bear Lake County Board of Commissioners
c/o Cindy Garner, County Clerk
7 E. Center St.
Paris, Idaho 83261
cgarner@bearlakecounty.id.gov

Re: Brian Hirschi Re-Zone Application

Dear County Commissioners:

I represent Brian Hirschi and hereby submit these written comments on his behalf. These written comments relate to Mr. Hirschi's pending application to re-zone one acre of vacant land along Bear Lake from "lakeshore - beach development" to "commercial." To be clear, Mr. Hirschi will be submitting the majority of his comments on his own separately from this letter. The purpose of this comment letter is to supplement Mr. Hirschi's comments with some specific legal authorities.

Thank you for the opportunity to provide these comments and for your consideration of them. This letter discusses two particular conditions of approval in sequence (Conditions 7 and 12), as follows:

Condition 7

The proposed Condition 7 reads as follows:

Motorized beach access for watercraft rental patrons is limited to patrons shuttling their equipment to the area where they board watercraft and is limited to the 192' of frontage of the rezoned property above the ordinary high water mark. Access can be provided to those willing to walk.

As we understand it, this Condition is stating that Mr. Hirschi is only authorized to utilize motorized vehicles to access the water below the ordinary high water mark (OHWM) in order to transport the watercraft to the water, but not the customers themselves, who must access the water only by walking from Mr. Hirschi's property to the water. If we are correctly reading Condition 7, then for the reasons explained below, the Board should eliminate this Condition from the re-zone approval. If we are not reading Condition 7 correctly, then the Board should revise it to be clearer.

The County Cannot Impose Conditions on Neighboring Lands Owned by the State

The following passage from an Idaho Supreme Court opinion expresses two related but separate reasons Condition 7 should be eliminated from the re-zone approval:

Under [the public trust] doctrine, "*the state holds the title* to the beds of navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people." *Callahan v. Price*, 26 Idaho 745, 754, 146 P. 732, 735 (1915). "This trust preserves the *public's right of use* in such land." *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987). Although initially limited to uses incident to navigation, "the public trust doctrine has been expanded to include uses other than those strictly incident to navigation. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983) (public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty and water quality)." *Id.*

In re Sanders Beach, 143 Idaho 443, 453 (2006) (emphasis added).

One important observation here is that Condition 7 is purporting to regulate conduct and activities taking place on property *other than* on Mr. Hirschi's one-acre parcel that is the subject of the pending application. As a general matter, this does not make sense, and I suspect imposing conditions on neighboring properties that are not otherwise the subject of a pending land use application would violate the Due Process rights of the owners of those neighboring properties, regardless of whether they are public or private landowners. *See generally Evans v. Board of Com'rs of Cassia County Idaho*, 137 Idaho 428, 433 (2002) (Due Process protections apply to land use proceedings).

More specifically in this case, the property below the OHWM that is the focus of Condition 7 is owned by the State of Idaho and is subject to the public trust doctrine referenced in the *Sanders*

Bear Lake County Board of Commissioners
June 20, 2019
Page 3

Beach opinion quoted above. The State's ownership of the lands below the OHWM is important, because the Idaho Supreme Court has previously rejected attempts by counties to regulate the conduct of third parties on state-owned lands. *See State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348 (Idaho 2003).

Condition 7 Violates Mr. Hirschi's Littoral Rights and the Public Trust Doctrine

As an owner of property along Bear Lake, Mr. Hirschi has the "right to have access to the waters of such lake at the low water mark." *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 283 (2010). The Idaho Supreme Court has described such "littoral rights" as "valuable" rights that are "in many instances...the controlling aspect of the value of such lands." *Id.* The State of Idaho itself as the owner of lands below the OHWM is specifically prohibited by law from interfering with the littoral rights of landowners along bodies of water. IDAHO CODE § 58-104(9)(a). The same prohibition must necessarily apply to a county.

And, regardless of whether the scope of Mr. Hirschi's littoral rights include the right to engage in activities that Condition 7 would otherwise prohibit, the fact remains that under *Sanders Beach* and the public trust doctrine, his customers are members of the public that are entitled to utilize the land below the OHWM. I am not aware of any legal authorities establishing that the public trust doctrine does not include the right of vehicular access to the water, and importantly, I understand that this practice is widespread at Bear Lake due to a lack of adequate docks and piers and the fact that the water's edge is regularly several hundreds of feet below the OHWM. Condition 7 violates the public trust doctrine and should be eliminated on that basis.

Condition 7 Violates the Americans With Disabilities Act

The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* (the "ADA"), applies to counties and other local governmental entities, as well as to private businesses. *See* 42 U.S.C. §§ 12131(1)(A), 12181(6). Generally speaking, the ADA prohibits public entities and private businesses from discriminating against people with disabilities by excluding them from participation or denying them benefits or services by reason of such disability. *Id.* at §§ 12132, 12182(a), (b)(1)(A)(i). Discrimination includes the failure to make "reasonable modifications" to accommodate individuals with disabilities. *Id.* at § 12182(b)(2)(A)(ii).

The fact that vehicular access to the water is legal and commonplace at Bear Lake indicates that transporting customers with disabilities to the water by vehicle is required by the ADA. However, Condition 7 would prohibit this. Condition 7 should be eliminated from the re-zone approval because it violates the ADA.

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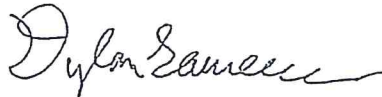
Condition 12

As Mr. Hirschi states in his separate comment letter, I transmitted the enclosed letter to the Deputy Attorney General for the Idaho Department of Lands (IDL) on May 20, 2019. In short, that letter explains that IDL's lease and encroachment permitting programs under the Lake Protection Act only apply to the construction of encroachments of a permanent nature, such as docks and piers. As of the date of this letter, I have received no response to that letter other than an acknowledgment of its receipt. Therefore, it is possible that Mr. Hirschi is not required to apply for or obtain any approvals from IDL for his planned operations. That is why Condition 12 should be revised to be more flexible and to at least contemplate the possibility that approvals from IDL may not be required.

Again, thank you for your time and consideration of these written comments. I intend to be present for the Board's June 24 meeting in order to address any further questions on these matters.

Sincerely,

VARIN WARDWELL, LLC



Dylan B. Lawrence

Enclosure



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May 20, 2019

VIA EMAIL AND U.S. MAIL

Angela Kaufmann
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Re: North Beach Rentals – Bear Lake County

Dear Angela:

It has been a while since we last spoke. I hope you have been well.

I have been recently retained by Brian Hirschi and his closely-held entity BLH Enterprises Inc. d/b/a North Beach Rentals. As you will recall, you were copied on an April 23 letter from Gary Billman to Mr. Hirschi that raised issues regarding Mr. Hirschi's activities along Bear Lake, which I have enclosed here for your convenience. I am writing in response to that letter.

Current Operations

To begin, I think it will be helpful to briefly summarize Mr. Hirschi's current operations and some of the history of communication between him and the Idaho Department of Lands.

Mr. Hirschi has operated a boat rental business at Bear Lake since the summer of 2001. For that entire time, Mr. Hirschi operated the business out of the Bear Lake Hot Springs facility pursuant to a private lease. However, that lease ended in 2018. Thereafter, Mr. Hirschi purchased the lakefront property at 535 Eastshore Road. An application to authorize Mr. Hirschi to operate the business from that location is pending before Bear Lake County.

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At present, Mr. Hirschi's planned operations at this location for the summer of 2019 include water craft rental (kayaks, paddleboards, Sea-Doos, boats, *etc.*) and associated supporting activities (parking lot, administrative office). As you probably know, the water level in Bear Lake can fluctuate widely over the course of the summer, and the edge of the water can sometimes be up to 2,000 feet below the ordinary high water mark (OHWM). At these times, there are few if any convenient places to launch watercraft into the water directly. Therefore, as is common for Bear Lake, Mr. Hirschi's operations also include tractors to transport watercraft to the water's edge. Mr. Hirschi also owns an offsite dedicated repair shop where repair and maintenance are performed on the watercraft and supporting vehicles. In addition to himself, Mr. Hirschi will be employing 9-10 individuals at this location, in addition to 3-4 offsite mechanics.

Prior Correspondences

There have been several correspondences between the Department and Mr. Hirschi over the past few years regarding his activities and whether they comply with Idaho law or require approvals from the Department. While I do not think it is necessary to recount each such communication individually, I have enclosed here three additional correspondences that I believe provide helpful background.

First, I have enclosed an email exchange between Mr. Billman and Mr. Hirschi from 2017-2018. As you will see, there had been communications between the parties in 2017 regarding Mr. Hirschi's activities, so in January 2018, Mr. Hirschi proactively reached out to Mr. Billman to confirm his understanding of permitting requirements in advance of the summer 2018 boating season. Mr. Billman responded, stating: "Yes, you are correct in stating that 'if items are not stored or anchored on sovereign (public trust) lands overnight'; you would not need a permit." While I am not sure that is an accurate characterization of the applicable standards, in response to the letter, Mr. Hirschi modified his activities to eliminate any overnight storage or anchorage of his vehicles and equipment below the OHWM.

On June 19, 2018, the Department sent Mr. Hirschi a letter raising three issues Department employees observed during a prior patrol of the lake: (1) the launching of boats "somewhat far out in the water;" (2) two anchored buoys, and (3) the fueling of a boat below the OHWM. The letter concluded by informing Mr. Hirschi he was required to remove the two buoys, to store watercraft and the tractor above the OHWM when not in use, and to cease fueling watercraft below the OHWM at any time. Importantly, the letter refers generally to the Idaho Lake Protection Act, but does not otherwise cite any particular statutory or regulatory provisions purporting to establish the alleged violations.

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Mr. Hirschi's response to the June 19 letter included a request for the Department to identify the specific legal authorities it was relying upon. To be clear, Mr. Hirschi acknowledges that the tone of his response letter was not ideal and that, in retrospect, he would have sent a different letter. However, it is also important to recall that this business provides a living to Mr. Hirschi, and he employs others as previously discussed. Therefore, he was understandably distressed.

And, while Mr. Hirschi's response letter could have been more cordial, its underlying message is legitimate: If an agency is going to impose consequences on someone, it needs to explain the specific factual and legal bases for doing so, and this must include identification of the specific legal provisions being enforced. *See* IDAHO CODE § 67-5248(1)(a) (requiring agencies to provide a "reasoned statement" in support of administrative decisions); *see also Jasso v. Camas County*, 151 Idaho 790, 796 (2011) (emphasizing need for agencies to "clearly and precisely" explain the basis for their decisions).

Mr. Hirschi never received any further correspondence from the Department, and so reasonably assumed his response had resolved the matter. The next written correspondence from the Department on any of these issues was Mr. Billman's recent letter of April 23, 2019.

Response to the Department's April 23, 2019 Letter

Before responding to the April 23 letter in detail, I should note that I have had the pleasure of working with Mr. Billman on mining-related matters in the past, and I have always found him to be knowledgeable and helpful. With that said, I do disagree with some aspects of his letter in this particular instance.

The April 23 letter raises the following issues: (1) it notes that Department staff observed two tractors parked on the "uplands;" (2) it notes that Department staff observed disk marks, tire marks, and other "disturbance" below the OHWM; and (3) it asserts Mr. Hirschi must obtain both an encroachment permit and a submerged land lease before engaging in "commercial activities" below the OHWM. While the letter references the Lake Protection Act generally and related sets of IDAPA rules, again, it does not identify the particular statutory or regulatory provisions the Department believes Mr. Hirschi is violating or that require him to obtain an approval from the Department. Without having the benefit of the Department's analysis, I have reviewed the general authorities cited in the April 23 letter, and as explained further below, I disagree with the Department's assertion that Mr. Hirschi is in violation of those authorities or that he must obtain the referenced approvals.

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Discussion of Common Law Access Rights

Before discussing the particular terms of the Lake Protection Act and its implementing rules, it is helpful to recall the legal status of the land below the OHWM.

Under [the public trust] doctrine, "the state holds the title to the beds of navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people." *Callahan v. Price*, 26 Idaho 745, 754, 146 P. 732, 735 (1915). "This trust preserves the public's right of use in such land." *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987). Although initially limited to uses incident to navigation, "the public trust doctrine has been expanded to include uses other than those strictly incident to navigation. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983) (public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty and water quality)." *Id.*

In re Sanders Beach, 143 Idaho 443, 453 (2006).

Notably, *Sanders Beach* was decided in 2006, after the enactment of the statutes in Title 58, Chapter 12 of the Idaho Code in 1996. It is also important to recall that Mr. Hirschi owns property along Bear Lake. "[O]ne of the basic [littoral] rights enjoyed by owners of properties upon a navigable lake is the right to have access to the waters of such lake at the low water mark; this right is valuable and in many instances it is the controlling aspect of the value of such lands." *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 283 (2010) (quoting *Driesbach v. Lynch*, 71 Idaho 501, 508 (1951)).

Such littoral rights are specifically preserved in the statutes governing the State Land Board:

The state board of land commissioners shall have power:...[t]o regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial, navigational, recreational or other public use; *provided, that the board shall take no action in derogation of or seeking to interfere with the riparian or littoral rights of the owners of upland property abutting or adjoining such lands....*

IDAHO CODE § 58-104(9)(a) (emphasis added).

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The activities described in the Department's April 23 letter (tire tracks, *etc.*)—which I understand are very common in the Bear Lake area¹—are simply a necessary and expected result of the exercise of the access rights that have been recognized by both the Idaho Supreme Court and the Idaho Legislature. The April 23 letter does not provide any information or analysis to conclude otherwise.

Discussion of Lake Protection Act and Related Rules

The April 23 letter suggests any “commercial activities” below the OHWM require both an encroachment permit and submerged land lease. However, that is not the legal standard that triggers the requirements of the Lake Protection Act.

While it is true the Lake Protection Act distinguishes between commercial and non-commercial encroachments, *see* IDAHO CODE §§ 55-1305, 55-1306, the Act only regulates “encroachments” specifically—not “commercial activities” generally. IDAHO CODE §§58-1303, 58-1306(a). The Act does not define the term “encroachment” in isolation, but it does define the phrases “encroachments in aid of navigation” and “encroachments not in aid of navigation.” IDAHO CODE § 58-1302(h), (i).

Based upon the items enumerated in those definitions (docks, piers, *etc.*) and their reference to “*structures not constructed* primarily for use in aid of...navigability,” *id.* (emphasis added), it is clear the Act only applies to the construction of physical “encroachments” that are of a permanent nature. “Where a statute contains specific terms followed by a general term, the latter will typically be regarded as referring to things of a *like class* to those particularly described in order to determine legislative intent.” *State ex rel. Wasden v. Daicel Chemical Industries, Ltd.*, 141 Idaho 102, 108 (2005) (emphasis added) (*citing Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875 (1979)). Mr. Hirschi's activities are not of a “like class” as the items enumerated in these definitions.

The State's “Rules Governing Leases on State-Owned Submerged Lands and Formerly Submerged Lands,” IDAPA 20.03.17 (the “Lease Rules”), are similarly limited in their application to structures of a permanent nature. As with the Lake Protection Act, the Lease Rules apply to “encroachments” that are divided into “encroachments in aid of navigation” and “encroachments not in aid of navigation.” *See* Lease Rules 001(b), 010.009, 010.10, 030.02.

¹ An agency errs if it applies disparate treatment to those who are “similarly situated.” *See Muiwēkema Ohlone Tribe v. Kempthorne*, 452 F.upp.2d 105, 115 (2006).

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Again, those phrases are defined to collectively include “structures” such as docks, piers, bridges, utility lines, *etc.* Under the *Wasden* case cited above, Mr. Hirschi’s activities are not in a “like class” as these items.

Discussion of Administrative Law

Finally, it is also important to briefly note that as an administrative agency, the Department “is a creature of statute, limited to the power and authority granted it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers.” *Welch v. Del Monte Corp.*, 128 Idaho 513, 514 (1996). And again, the Department is required to provide a “reasoned statement” for its decisions. *See* IDAHO CODE § 67-5248(1)(a).

If the Department’s position is that Mr. Hirschi is required to apply for an encroachment permit and submerged land lease, it needs to provide him with an adequate explanation of the basis for that position, in light of the authorities discussed in this letter. Until he receives that explanation from the Department, Mr. Hirschi has a reasonable basis to conclude that no such approval is required.

If it would be helpful to discuss this matter further, please do not hesitate to contact me. Otherwise, thank you for your time and consideration.

Sincerely,

VARIN WARDWELL, LLC



Dylan B. Lawrence

Enclosures (4)