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Dupont v. Idaho State Bd. of Land Comm'rs, 7 P.3d 1095 (Idaho 2000)

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inverse condemnation "taking by flooding" requirement of deprivation of all VLX's reasonable use of the property.

VLX appealed and the court of appeals reversed. The appellate court ruled the correct legal standard involved the question of whether a continuing physical invasion of the property existed. The court stated it was not the flooding that caused the taking, but the taking that caused the flooding. In considering the water flow a continuing physical invasion, the court concluded VLX proved the three elements needed to constitute inverse condemnation under the physical invasion standard. First, SSU entered upon private property with the water for more than a momentary period. Second, SSU entered under color of legal authority because SSU was a utility with eminent domain powers. Third, SSU devoted the property to public use by releasing the treated wastewater. Under the physical invasion standard, VLX need not show deprivation of all reasonable use of the property. Thus, VLX recovered in inverse condemnation, not because there was a taking by flooding, but because there was a taking by physical invasion.

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IDAHO

Dupont v. Idaho State Bd. of Land Comm'rs, 7 P.3d 1095 (Idaho 2000) (affirming state land board's decision revoking a dock permit granted in a designated swimming area).

Dupont filed an application with the Idaho Department of Lands ("Department") seeking permission to construct a private dock in the waters abutting his property. The Department communicated with the City of Coeur d'Alene ("City") several times regarding the application of city ordinances to Dupont's proposed dock. In 1992, the State Board of Land Commissioners ("Board") issued the dock permit when no timely objections were filed. Subsequently, the Department filed a notice of appeal regarding Dupont's permit. Likewise, the City notified the Department of its objection to the permit and requested the Board to reconsider. The Department scheduled an informal hearing and concluded the Board validly issued the permit. However, in 1993, after a hearing officer's recommendation from *de novo* contested case hearing, the Board issued a decision revoking Dupont's permit due to "unusual circumstances." The Board concluded the proposed dock violated City boating ordinances preventing the operation of a boat within a designated swimming area.

Dupont appealed to the district court. The district court concluded the Board's order revoking the permit was erroneous. The district court determined no procedure existed by which the Board

could order a *de novo* reconsideration of the decision to grant Dupont's permit. The district court held that a revocation hearing should have been conducted and that the hearing officer applied an incorrect standard of review. The City appealed and the Board cross-appealed the district court's order. The Supreme Court of Idaho affirmed the decision to revoke Dupont's dock permit.

The City first argued the Board incorrectly classified the hearing as a revocation proceeding rather than as a reconsideration of the original decision to issue Dupont's dock permit. The supreme court determined the City lacked standing to appeal the issue regarding the characterization of the contested case hearing because the City suffered no injury as a result of the Board's action.

Dupont also argued the Board incorrectly applied a *de novo* standard of review to the contested case hearing. Dupont argued the Board could only review the record to determine whether the Department's findings of facts supported its conclusions of law and the Board could not reweigh the evidence in determining the permit's initial issuance. The City and the Board argued the *de novo* standard was appropriate for revocation hearings, referencing the administrative rules governing lake encroachments. The Board reviewed the recommendation and, based on the evidence from the contested hearing, the Board made an independent determination as to whether the permit violated applicable laws. Thus, the supreme court declared the Board's decision valid. As long as the Board applied the correct standard of review in its decision, it did not matter that the hearing officer's recommendations were based on an incorrect standard of review.

Dupont then argued that even if the Board applied the correct standard of review, the relevant statutory law was unconstitutionally vague. Dupont argued the phrase "the most unusual of circumstances" could not be reasonably interpreted and thus was subjective. The City argued the statutory law is reasonably interpreted. The City noted that the supreme court had previously held a statute would not be void for vagueness when such terms could be interpreted as taking their ordinary, contemporary, or common meaning. The supreme court stated the Board, under ordinary circumstances, could grant a permit as long as such permit did not infringe on the littoral rights of adjacent owners. The statute additionally gave the Board the right to deny a permit if the circumstances regarding a particular encroachment were not ordinary. The supreme court concluded that such relevant law was not unconstitutionally vague. The supreme court held the phrase in the code "the most unusual of circumstances" could be reasonably interpreted based on the ordinary meaning of the words.

The supreme court found the existence of the designated swimming area in the location of the proposed encroachment highly relevant to the question of whether the proposed encroachment (the

dock) presented "unusual circumstances." Dupont argued the Board's decision was not based on substantial and competent evidence because the Board impermissibly considered the intended use of the proposed encroachment, instead of focusing only on the placement and existence of the dock. Dupont contended the Board had the right to regulate the existence of this encroachment, but could not regulate the use of it. The supreme court held the Board possessed the authority to consider the intended use of the proposed encroachment in making its determination to revoke the permit based on the existence of unusual circumstances.

Both the City and the Board argued substantial and competent evidence supported the Board's decision that the existence of unusual circumstances required the revocation of Dupont's permit. The City produced evidence that the area had been a designated swimming area for approximately forty years, and the City had an encroachment permit, granted for at least ten years, to place buoys around the area. Dupont argued the beach area in front of the swimming area was private property. While riparian owners have a traditional right to "wharf out," such right was clearly subject to state regulation. Thus, the supreme court held substantial and competent evidence supported the Board's finding of "unusual circumstances."

Finally, the City argued the Board erred in rejecting the hearing officer's conclusion that the City had been given inadequate notice. In contrast, the Board and Dupont contended the City's argument was moot because the City received actual notice of the proposed encroachment in a timely fashion. The supreme court determined that this question was moot, and asserted it could overturn an administrative agency's incorrect decision only if an appellant's substantial rights had been prejudiced. The supreme court held the City's rights had not been prejudiced because the City was allowed to intervene in the action, present its evidence and witnesses, and be heard at all stages of the revocation hearing.

Nicole Anderson

Sagewillow, Inc. v. Idaho Dep't of Water Res., 13 P.3d 855 (Idaho 2000) (finding that when a district court is assigned exclusive jurisdiction over a river adjudication, Idaho Department of Water Resources decisions involving that river cannot be reviewed by any other district court).

Sagewillow, Inc. ("Sagewillow") acquired water rights in the Snake River water system. Six water rights authorized irrigation of 2,383 acres. The Idaho Department of Water Resources ("IDWR") approved Sagewillow's first application for transfer of place of use and point of diversion in 1992. No protests were filed to the transfer. Four years later, after Sagewillow applied for seven additional place of use