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BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. CC-2020-PUB-20-001
ENCROACHMENT PERMIT APPLICATION)
No. L-96-S-2571,)
) **PRELIMINARY ORDER**
RON SHAFFER,)
)
)
Applicant.)
_____)

I. BACKGROUND

On March 20, 2020, the Idaho Department of Lands (“IDL”) received an encroachment permit application from Ron Shaffer (“Applicant”) (Agency Record 1). IDL assigned number L-96-S-2571 to the Application (“Application”). In the Application, Applicant seeks authorization to construct a 6’ x 60’ single-family dock and boat lift on Lake Pend Oreille. IDL processed the Application pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025.

Pursuant to Idaho Code § 58-1305(c), IDL ordered a hearing. On April 20, 2020, IDL's Director, Dustin T. Miller, issued a *Notice of Appointment of Hearing Officer* appointing Karen Sheehan as the Hearing Officer assigned to conduct the hearing and issue a preliminary order.

On May 14, 2020, the Hearing Officer conducted a hearing. The hearing was conducted telephonically. Ron Shaffer and William Felten appeared and testified on behalf of the Applicant. Lissa Wentner testified for the Wentner Family LLC. Peter Gregory appeared for the Wentner Family LLC but did not testify. John Siele and Sean Hood testified on behalf of the Siele Trust. Nicolle Hood appeared for the Siele Trust but did not testify. Deputy Attorney General Angela Kaufmann represented IDL.¹ Justin Eshelman testified for IDL. Michael Ahmer also appeared for IDL but did not testify. (Hearing Recording.)

The following exhibits were identified at the hearing:

- Agency Record 1-12 (the exhibits were posted on IDL's website prior to the hearing).

Mr. Shafer and Ms. Wentner noted objections to the aerial photos. The Hearing Officer indicated the parties could ask questions regarding the photos during the testimony portion of the hearing. The Hearing Officer admitted all of the exhibits into the record.

II. FINDINGS OF FACT

1. Applicant, Ron Shaffer, owns property located at 5485 Bottle Bay Road. This property is adjacent to Lake Pend Oreille in Sagle, Idaho. Applicant is a littoral owner since the lot has a frontage of approximately 25 lineal feet. As a littoral owner he has littoral rights and is eligible to make an application for an encroachment permit. (Hearing Recording, Agency Record 1, 11-12.)

¹ Ms. Kaufmann also had an extern, Dakota Hamilton, on the line with her.

2. On March 20, 2020, IDL received an encroachment permit application from Applicant seeking authorization to construct a 6' x 60' single-family dock and boat lift at 5485 Bottle Bay Road. (Agency Record 1.)

3. The Wentner Family LLC owns the adjacent property northwest to Applicant's property. (Hearing Recording, Agency Record 2.)

4. The Siele Trust owns the adjacent property southeast to Applicant's property. (Hearing Recording, Agency Record 2.)

5. On March 23, 2020, IDL sent notices of Applicant's application to Applicant's neighbors, Lissa Wentner and the Siele Trust. (Hearing Recording, Agency Record 2.)

6. On March 31, 2020, IDL received objections to Applicant's Application from the Wentner Family LLC and the Siele Trust. (Agency Record 3 and 4.)

7. On April 2, 2020, IDL received a response to the objections from Applicant's agent William Felten of Felten Enterprises. The response includes the following statement:

I acknowledge the ten foot setbacks from property lines, but ask that in this case they be waived at least on one side. The purpose of the setbacks, as I understand them, is to minimize boat maneuvering, docking and other incursions in front of neighboring property.

(Agency Record 5.)

8. On May 8, 2020, Justin Eshelman, a Senior Resource Specialist with IDL, performed an assessment and completed an investigation report stating the following:

a. The proposed dock meets the encroachment standards for a single family dock as set forth in IDAPA 20.03.04.015.01 since the proposed encroachment does not exceed ten (10) feet in width, is 360 square feet, and does not extend beyond the line of navigability.

b. The proposed dock meets the encroachment standards set forth in IDAPA

- 20.03.04.015.13.a. and .b because this is a single family dock that is allowed to have a boat lift without increasing the square footage calculation.
- c. The proposed dock and boat lift do not meet the general encroachment standards set forth in IDAPA 20.03.04.015.13.e and there is a presumed adverse effect upon adjacent littoral rights because the encroachments are located closer than ten (10) feet from adjacent littoral right lines. (Hearing Recording, Agency Record 11-12.)
9. IDL concluded the Application should not be approved for the following reasons:
- a. The proposed dock meets the standards for a single-family dock including no portion exceeding 10' in width, total surface decking area not exceeding 700 square feet, and no portion of the docking facility extending past the line of navigability.
- b. The proposed encroachments do not meet the setback requirement on the west side but do meet the setback requirement on the east side.
- c. The Application does not meet all the applicable IDAPA rules, and that there will be a presumed adverse effect upon adjacent littoral rights if the encroachments are located closer than ten (10) feet from adjacent littoral right lines. (Hearing Recording, Agency Record 11- 12.)

III. ANALYSIS AND CONCLUSIONS OF LAW

1. On March 20, 2020, IDL received an Application from Applicant seeking authorization to construct a single-family dock and boat lift at 5485 Bottle Bay Road on Lake Pend Oreille. (Agency Record 1.)
2. The State of Idaho Board of Land Commissioners (“Board” or “Land Board”) is authorized to regulate, control, and permit encroachments in, on or above the beds of navigable lakes in the State of Idaho. Idaho Code §§ 58-104(9) and 58-1303.

3. The Board exercises its authority through the instrumentality of IDL. *See* Idaho Code §§ 58-101 and 58-119. As a result, "the duty of administering the Lake Protection Act falls upon the IDL." Kaseburg v. State, Bd. of Land Comm'rs, 154 Idaho 570, 578, 300 P.3d 1058, 1066 (2013).

4. Under the Lake Protection Act, Title 58, Chapter 13, Idaho Code ("LPA"), IDL has the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the LPA. Idaho Code § 58-1304. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* ("Rules").

5. In enacting the LPA, the Legislature expressed its intent that:

[T]he public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

Idaho Code § 58-1301.

6. Under the LPA and Rules, a navigable lake is defined as:

Any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

Idaho Code § 58-1302(a); IDAPA 20.03.04.010.024. Lake Pend Oreille is a navigable lake under the LPA.

7. For purposes of the LPA, the "beds of navigable lakes" are defined as "the lands lying under or below the natural or ordinary high water mark of a navigable lake and, for purposes

of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one." Idaho Code § 58-1302(b); IDAPA 20.03.04.010.04. According to the Application, the proposed single-family dock would lie partially or fully on or above the bed of a navigable lake. (Agency Record 1.) Since the proposed navigational encroachment lies on and/or above the bed of a navigable lake, IDL has jurisdiction to regulate the proposed encroachment.

8. As an owner of land adjacent to navigable waters of a lake, Applicant is a littoral owner, as defined in IDAPA 20.03.04.010.033 and is qualified to make an application for an encroachment permit for a single-family dock pursuant to IDAPA 20.03.04.010.36 and 20.03.04.020.02.

9. IDAPA 20.03.04.015.01 sets the following parameters governing the size and dimensions of single-family docks:

- a.** No part of the structure waterward of the natural or ordinary high water mark or artificial high water mark may exceed ten (10) feet in width, excluding the slip cut out.
- b.** Total surface decking area waterward of the natural or ordinary or artificial high water mark may not exceed seven hundred (700) square feet, including approach ramp and walkway for a single-family dock and may not exceed one thousand one hundred (1,100) square feet, including approach ramp and walkway for a two-family dock.
- c.** No portion of the docking facility may extend beyond the line of navigability. Shorter docks are encouraged whenever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability.
- d.** A variance to the standards in this Subsection 015.01 may be approved by the Department when justified by site specific considerations, such as the distance to the established line of navigability.

10. IDAPA 20.03.04.015.13 sets out general encroachment standards as follows:

- a.** Square footage. The square footage limitations in Subsections 015.01 and 015.02 include all structured beyond the ordinary or artificial high water mark such as the approach, ramp, pier, dock, . . . except for:

- i. Boat lifts as allowed pursuant to Paragraph 015.13.b.

...

b. Boat Lifts and Jet Ski Lifts.

- i. Single-family docks are allowed a single boat lift and two (2) jet ski lifts, or two (2) boat lifts, without adding their footprint to the dock square footage . . .

...

11. IDAPA 20.03.04.015.13.e provides that:

It will be presumed, subject to rebuttal, that single family... navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten feet from adjacent littoral right lines... Written consent of the adjacent littoral owners will automatically rebut the presumption. All boat lifts and other structures attached to the encroachments shall be subject to the above presumptions of adverse affects [sic].

12. Justin Eshelman, a Senior Resource Specialist with IDL, testified that he completed an assessment of the Application. He went to the property on May 8, 2020, and conducted an investigation. Mr. Eshelman testified that he concluded the proposed encroachments do not meet all of the applicable IDAPA rules. The proposed dock and boat lift did not meet the general encroachment standards set out in IDAPA 20.03.04.015.13.e. The proposed encroachments do not meet the setback requirement on the west side but do meet the setback requirement on the east side. (Hearing Recording, Agency Record 11-12.)

13. Mr. Eshelman further testified that according to IDAPA 20.03.04.015.13.e, there is a presumed adverse effect upon adjacent littoral rights if the encroachments are located closer than ten (10) feet from adjacent littoral right lines. Here there is a presumed adverse effect upon adjacent littoral rights since the encroachments are located closer than ten (10) feet from adjacent littoral right lines. (Hearing Recording, Agency Record 11-12.)

14. According to IDAPA 20.03.04.015.13.e, Applicant bears the burden of rebutting this presumption.

15. Mr. Felten testified Applicant is proposing to construct a modest dock and that Applicant should have access to the lake just as his neighbors do. The lot is small but still acceptable for a single-family dock and boat lift. In his opinion, there is a great bit of distance between the proposed dock and the neighboring docks. He does not see any reasonable objection to approving the Application. (Hearing Recording.)

16. Mr. Shaffer testified the requirements are met on one side but not on the other side. He is asking for a variance on the one setback. (Hearing Recording.)

17. Ms. Wentner testified that at a minimum the setback requirements should be met. She also testified regarding boater safety, congestion, and the overall impact the proposed dock and boat lift would have on the Wentner Family LLC property. (Hearing Recording.)

18. Mr. Siele and Mr. Hood testified the Application is an attempt to get around the real estate deal that was agreed upon when the Siele Trust purchased the property adjacent to Applicant's property. In their opinion, there are no grounds for a variance. (Hearing Recording.)

19. The crux of this case is the location of littoral lines. As set out above, according to IDAPA 20.03.04.015.13.e, it is presumed, subject to rebuttal, that single family... navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines.

20. No one disputed the method IDL used to determine the littoral lines. (Hearing Recording.)

21. Mr. Eshelman's assessment shows the proposed encroachments do not meet the setback requirement on the west side. Consequently, the Application does not meet the requirements set out in IDAPA 20.03.04.015.13.e. (Hearing Recording, Agency Record 1, 11-12.)

22. Mr. Shaffer and Mr. Feltoe did not set forth any convincing evidence or testimony to rebut the presumption of adverse effect upon adjacent littoral right lines. In fact, they both acknowledge that the setback on one side does not meet Idaho's requirements and are asking for a variance. (Hearing Recording, Agency Record 5.)

23. The Hearing Officer is empathetic to the Applicant's situation. However, the Applicant has not met his burden of proving by a preponderance of the evidence that his Application meets all of Idaho's requirements for construction of the proposed single-family dock and boat lift.

24. Based on the evidence in the record, Applicant's Application is denied.

IV. PRELIMINARY ORDER

Based on the foregoing analysis, Encroachment Permit Application No. L-96-S-2571 is DENIED. Applicant did not meet his burden of proof by a preponderance of the evidence that his Application for a single-family dock and boat lift on Lake Pend Oreille in Sagle, Idaho meets all of Idaho's requirements as set out above.

As stated in the April 20, 2020 Notice of Appointment of Hearing Officer, the IDL Director has delegated all decision-making authority to the Hearing Officer, pursuant to Idaho Code § 67-5245. The procedures found in Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable. Upon issuing this Preliminary Order to the Idaho Department of Lands Director, the Director will issue a Final Order no more than 45 days after the conclusion of the hearing or will allow the Preliminary Order to become final 45 days after the hearing.

Pursuant to Idaho Code §§ 58-1305(c) and 58-1306(c), any applicant or other aggrieved party has the right to have the decision 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 decision. Because the decision is for approval of the permit, any party appealing the decision shall file a bond on such appeal in an amount to be fixed by the court but not less than five hundred dollars (\$500). The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal

DATE: June 8, 2020.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Karen Sheehan
KAREN SHEEHAN
Hearing Officer

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2020, I caused to be served a true and correct copy of the foregoing by the following method to:

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/s/ Karen Sheehan

KAREN SHEEHAN
HEARING OFFICER