

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	
)	Case No. CC-2019-PUB-50-002
Encroachment Permit Application)	
No. L-65-S-0185A)	FINAL ORDER
)	
Michael D. Burdge on behalf of)	
the Burdge Family Trust,)	
)	
Applicant.)	
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I. PROCEDURAL BACKGROUND

Encroachments, including single-family docks, placed in or on the beds of navigable lakes require a permit issued by the Idaho Department of Lands (“IDL”) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code; and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.”

On or about March 12, 2019, Applicant Michael Burdge on behalf of the Burdge Family Trust applied for an encroachment permit to replace a single-family dock on Payette Lake. A contested case hearing was held on May 6, 2019. Mr. Andrew Smyth served as the duly appointed Hearing Officer. The Hearing Officer issued his Preliminary Order that contains Findings of Fact and Conclusions of Law on May 29, 2019.

My responsibility, as Director of IDL, is to render a decision pursuant to Idaho Code § 58-1305(c) and IDAPA 20.03.04.030.07 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. In making this determination I have relied on the record for this matter, including the following materials:

- I have examined the Hearing Officer's Preliminary Order in light of the entire record in this contested case.

II. FINDINGS OF FACT

I concur with the Procedural Background and Findings of Fact presented by the Hearing Officer in the Preliminary Order.

III. CONCLUSIONS OF LAW

I concur with the Conclusions of Law found by the Hearing Officer in the Preliminary Order.

IV. ORDER

I conclude that the Hearing Officer's recommendations in the Preliminary Order are based on substantial evidence in the record, and I adopt those recommendations as my decisions in this matter. The Preliminary Order is hereby incorporated, by reference, in its entirety into this Final Order, and is enclosed and served along with this Final Order.

The Applicant is qualified to make application for an encroachment permit for a single-family dock on Payette Lake. That application is in conformance with applicable rules and regulations. Based upon all of the foregoing, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-65-S-0185A is APPROVED by IDL.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c) and IDAPA 20.30.04.030.09, the Applicant, or any aggrieved party who appeared at the hearing, shall have the right to have the proceedings and this Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty

(30) days from the date of this Final Order. *See also* IRCP 84. Because this Final Order is for approval of an encroachment permit for one mooring buoy, any aggrieved party, other than the Applicant, appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c). 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 20 day of June, 2019.



Dustin T. Miller
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of June, 2019, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Eagle, ID 83616

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- Hand Delivery
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Brok Goul
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Renée Miller
Management Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	
)	Case No. CC-2019-PUB-50-002
Encroachment Permit Application)	
No. L-65-S-0185A)	PRELIMINARY ORDER
)	
Michael D. Burdge on behalf of the Burdge)	
Family Trust,)	
)	
Applicant.)	

I. BACKGROUND

On March 12, 2019, the Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) filed by Michael D. Burdge o.b.o. the Burdge Family Trust (“Applicant”). In this Application, the Applicant is seeking authorization to replace a single-family dock. Agency Record (“AR”), p. 2 and 4. IDL assigned number L-65-S-0185A to the Application.

On March 13, 2019, IDL provided notice of the Application to Edward G Elliott III and the Laby Family Trust, the Applicant’s two adjacent littoral owners. AR, p. 12 – 13.

On or around March 20, 2019, IDL received comments in opposition to the Application from Mr. Edward Elliott and Mrs. Sally Elliott. AR, p. 14- 15. In their letter, the Elliotts express their concern regarding the size of the proposed dock and the impact of the proposed dock on milfoil, the Elliott’s view, and recreation on the lake. *Id.*

In response to the Elliott’s letter, on April 25, 2019, IDL ordered that a contested case hearing be held pursuant to Idaho Code § 58-1305(c). AR, p. 16-19.

On May 6, 2019, IDL held that contested case hearing. At the hearing, Mr. Michael Burdge and Mr. Brok Goul, of Mountain Marine, LLC, the Applicant’s contractor on this project,

presented testimony in support of the Application. Mr. Elliott provided testimony in opposition to the Application. Mr. Jasen King, IDL Resource Specialist Senior, provided testimony on behalf of IDL.

II. FINDINGS OF FACT

1. The Applicant owns property adjacent to Payette Lake, with approximately 64.55 feet of waterfront footage. AR, p. 2 and 9.

2. Under the Application, the existing dock would be removed and replaced with a 658 square-foot single-family dock consisting of a 6' by 12' fixed pier, a 4' by 8' ramp, a 6' by 60' floating dock, 24' by 8' floating dock supported by a 2 square-foot triangle support. AR p. 2, 5, and 8; Hearing Recording ("Rec") 14:26 and 47:20.

3. The widest portion of the proposed dock would be the foot of the L-shaped dock, which would be 8 feet wide. AR p. 8.

4. The proposed dock would extend 88 feet beyond the ordinary high water mark ("OHWM"). AR p. 2, 8, and 24 and Rec 47:42.

5. The Laby Family Trust's dock extends 97 feet waterward from the OHWM and consist of approximately 768 square feet of surface decking area. AR p. 24 and 41 and Rec 48:13.

6. The Elliott's dock extends 67 feet waterward from the OHWM and consists of approximately 336 square feet. AR p. 14 and Rec 24:52.

7. Brett Troyer's dock, which is located just north of the Elliott's dock, is permitted to extend 92 feet from the OHWM and consist of approximately 672 square feet of surface decking area. AR, p. 24, 28, and 32 and Rec 48:10.

8. The dock would protrude at, or nearly at, a right angle to the shoreline. AR, p. 8 and 11.

9. The proposed dock would be located 10 feet from the Applicant's northern littoral right line shared with the Elliotts and 30.55 feet from the southern littoral right line shared with Laby Family Trust. AR, p. 8.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over Payette Lake

1. 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. I.C. §§ 58-104(9) and 1303.

2. The Board exercises its authority through the instrumentality of IDL. *See* I.C. §§ 58-101 and 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).

3. IDL's authority under the LPA includes the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the Lake Protection Act, Title 58, Chapter 13, Idaho Code ("LPA") I.C. § 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").

4. In enacting the LPA, the legislature expressed its intent that:

the 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.

I.C. § 58-1301.

5. 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.

I.C. § 58-1302(a); IDAPA20.03.04.010.024. Payette Lake is a navigable lake under the LPA.

6. 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.” I.C. § 58-1302(b); IDAPA 20.03.04.010.04.

7. The proposed single-family dock would lie in whole or in part over the bed of a navigable lake. IDL therefore has jurisdiction to regulate the proposed encroachment.

8. “Encroachments in aid of navigation” or “navigational encroachments” includes “docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and such other aids to the navigability of the lake” I.C. § 58-1302(h). The Applicant’s single-family dock is a navigational encroachment.

B. The Burden of Proof Is With the Applicant.

9. The Applicant generally bears the burden of proof in this matter. “The customary common law rule that the moving party has the burden of proof – including not only the burden of going forward but also the burden of persuasion – is generally observed in administrative hearings.” *Intermountain Health Care, Inc. v. Bd. of County Comm’rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev’d on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

10. Under Idaho law, “preponderance of the evidence” is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). “A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not.” *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003).

C. Compliance with Legal Requirements for Single-Family Docks.

11. IDAPA 20.03.04.010.36 defines single-family dock as “[a] structure providing noncommercial moorage that serves one (1) waterfront owner whose waterfront footage is no less than twenty-five (25) feet.” The Applicant identified the proposed encroachment as a single-family dock and that the Applicant owns 64.55 feet of waterfront footage. AR, p. 2 and 9. No contrary evidence to either factor exists in the record. I find that the Applicant meets this requirement.

12. IDAPA 20.03.04.015.01.a, states, “[n]o part of the structure waterward of the natural or ordinary high water mark or artificial high water mark shall exceed ten (10) feet in width, excluding the slip cut out.” The Application and testimony on behalf of the Applicant show that the widest portion of the dock would be 8 feet. AR, p. 8. I find that the proposed dock would meet this requirement.

13. IDAPA 20.03.04.015.01.b, states in applicable part, “[t]otal surface decking area waterward of the natural or ordinary or artificial high water mark shall not exceed seven hundred (700) square feet, including approach ramp and walkway for a single-family dock.” The Application and testimony on behalf of the Applicant show that the proposed dock would consist of 658 square feet of surface decking area. AR, p. 8; Rec 14:26 and 47:20. While there was

discussion during the contested case hearing regarding the calculation of total square feet, no contrary evidence exists in the record. I find that the proposed dock would meet this requirement.

14. IDAPA 20.03.04.015.01.c, states, “[n]o portion of the docking facility shall 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.” The line of navigability is defined as “[a] line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.” I.C. § 58-1302; IDAPA 20.03.04.010.20. The evidence of record shows that the proposed dock is shorter than two of the three existing legally permitted encroachments adjacent to the proposed dock. AR, Exs. C, D and F; Rec 47:43. I find that the proposed dock would meet this requirement.

15. IDAPA 20.03.04.015.13.c.i - Angle from Shoreline states, “[w]here feasible, all docks, piers, or similar structures shall be constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights.” The Application and testimony during the contested case hearing show that angle of the proposed dock is at a right angle from the general shoreline. AR, p. 8 and 11; Rec 48:36. I find that the proposed dock would meet this standard.

16. IDAPA 20.03.04.015.13.e - Presumed Adverse Effect, states in applicable part, “[i]t will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines.” Littoral right lines are “[l]ines that extend waterward

of the intersection between the artificial or ordinary high water mark and an upland ownership boundary to the line of navigation. Riparian or littoral right lines will generally be at right angles to the shoreline.” IDAPA 20.03.04.010.34. Since the dock will not be located closer than 10 feet from either adjacent littoral right lines, AR, p. 8 and Rec 50:30, I find that the proposed dock meets this standard.

17. The littoral rights of an upland owner adjacent to navigable waters include the right “to maintain their adjacency to the lake and make us of their rights” as littoral owners by “building or using aids to navigation,” such as a single-family dock. I.C § 58-1302(f). However, when an application for navigational encroachment is objected to, the proposed encroachment must be weighed against the other Lake Values itemized in Idaho Code § 58-1301:

[A]ll 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.

18. As to the economic necessity or justification for or benefit derived from the proposed encroachment, Mr. Burdge is building a house on the upland property that is adjacent to Payette Lake and vested with littoral rights. Rec. 7:52. In the application, he indicated his intent to replace an old log dock and locate the new dock towards the north side of his property. AR, p. 4 and 11. Mr. Burdge stated “[w]e specifically put the dock over here on the north side of the property to avoid these rocks.” Rec. 31:38. He went on to state, “[a]dditionally, you know, the beach was better on the south side of the property. We had more beach utilization we thought by moving the dock to the north side.” Rec. 32:27. I find that the Applicant has established the economic justification for or benefit derived from the proposed encroachment.

19. The economic necessity or justification or benefit derived must be weighed against the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality, i.e., the “Lake Values”.

a. Protection of property: Mr. Elliott testified, “It is simply unavoidable that by placing the dock that close to our property line that we would be adversely impacted by watercraft traffic and additional destruction our shoreline. And our shoreline has taken a huge hit for a number of reasons.” Rec, 26:00. Other than Mr. Elliott’s conclusory testimony, the record does not contain any evidence that the proposed single-family dock will, in fact, cause additional destruction to the shoreline adjacent to the Elliott’s property. Further, Idaho law provides that a littoral owner takes title down to the ordinary high water mark. *State v. Hudson*, 162 Idaho 888, 892, 407 P.3d 202, 206 (2017). The State of Idaho then owns in trust for the public, the lake bed and waters and air space above the navigable waters. *Id.* Therefore, the Elliott’s have no ownership in or control over watercraft traffic through the waters of Payette Lake.

b. Navigation: There is no evidence that the proposed dock would impede navigation on the lake.

c. Fish and wildlife habitat and aquatic life: In their letter, the Elliotts state, “We have a millfoil [sic] problem in our neighborhood and a dock the size of the proposed Burdge dock will significantly compound the problem.” AR, p. 14 and Rec 24:26. However, the record does not contain any evidence showing that the proposed boat dock could or will compound the alleged milfoil problem.

d. Recreation: The Elliotts enjoy non-motorized recreation including kayaking, stand-up paddle boarding, and fishing in the area. AR, p. 15 and Rec 27:10. While the proposed

location of the dock may impact these activities to a certain extent, the fact remains that the Burdges and the public have the right to navigate over the beds of navigable lakes below the OHWM. Boaters could potentially disrupt the above-listed activities, with or without the proposed dock in the proposed location.

e. Aesthetic beauty: The Elliott's strongest objection to the proposed dock arises from their presumption that they will be able to see it while looking at the lake from inside their home, which will diminish the aesthetic beauty of the lake. AR, p. 14 and 15 and Rec, 25:50. While the Elliotts may negatively view the aesthetic changes, the Burdges may view the changes in a more positive light. I find that this criteria to be neutral.

f. Water quality: There is no evidence that the proposed dock would negatively impact water quality.

20. I find that the economic justification for or benefit of the proposed dock is not outweighed by the Lake Values.

PRELIMINARY ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-65-S-0185A is APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER. Idaho Code § 58-1305(c); Idaho Code § 67-5240; Idaho Code § 67-5245; *Notice of Appointment of Hearing Coordinator and Hearing*. The hearing in this matter was completed on May 6, 2019. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, "The Hearing Officer shall submit a preliminary order to the Director of the Idaho Department of

Lands within thirty (30) days after the close of the hearing.” This Preliminary Order is submitted within thirty days after conclusion of the hearing.

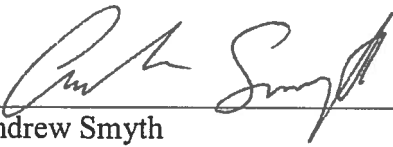
As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedure Act do not apply where the legislature has directed the use of alternative procedures. Because the Legislature has enacted specific alternative procedures in Idaho Code § 58-1305 that require a final order to be issued within forty-five (45) days of the hearing, and leave insufficient time to consider petitions for review of the preliminary order, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable to this contested case. *Notice of Appointment of Hearing Coordinator and Hearing.*

After receiving the preliminary order the Director shall issue a final order no more than forty-five (45) days after the conclusion of the hearing, or allow the preliminary order to become final if no final order is issued within forty-five (45) days after the conclusion of the hearing. I.C. § 58-1305(c); *Notice of Appointment of Hearing Coordinator and Hearing.* Upon issuance of a final order by the Director, or upon this preliminary order being allowed to become final, Idaho Code § 58-1306(c) provides:

Any applicant or other aggrieved party so appearing at a hearing shall have the right to have the proceedings and decision of the board reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the board’s decision. If the decision of the board be approval of a permit, the party or parties appealing shall file a bond on such appeal in an amount to be fixed 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’s fees, incurred on the appeal in the event the district court sustains the action of the board.

The filing of an appeal to the district court does not itself stay the effectiveness or enforcement of the order under appeal. I.C. § 67-5274.

DATED this 29th day of May, 2019.



Andrew Smyth
Hearing Officer