

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit) Case No. PH-2019-PUB-10-002
Application No. L-97-S-700B)
) **AMENDED FINAL ORDER**
Grandview Motorhome Resort, LLC,)
)
)
Applicant.)
)

The Director hereby WITHDRAWS the December 6, 2019 Final Order and ISSUES an Amended Final Order. The Director has authority to amend an order on his own motion by withdrawing and issuing a new amended final order. IDAPA 20.01.01.760.

I. NATURE OF PROCEEDINGS

Encroachments, including community 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 around August 28, 2019, IDL received an encroachment permit application filed by Grandview Estates.¹ A public hearing was held on November 6, 2019. Eric Wilson served as duly appointed hearing coordinator. On December 2, 2019, the hearing coordinator issued his Preliminary Order, which contains Findings of Fact and Conclusions of Law.

¹ Subsequently, the Applicant amended the application to substitute Grandview Motorhome Resort, LLC as the Applicant. AR Doc. 20. Rec 8:10; 34:45.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030 on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my personal expertise gained through education, training, and experience. I relied on the record for this matter, including examining the hearing coordinator's Preliminary Order in light of the entire record in this contested case.

II. FINDINGS OF FACT

I concur with the Preliminary Order's Background and Findings of Fact, except to delete the last sentence of the Background section on page 1 and substitute the following two sentences:

The ten double slips will be covered with fabric canopies. The application also includes Dock C, which would be 127'3" long by 5'9" wide and connect Dock A and B to each other and to the ramp that adjoins the pier.

III. ANALYSIS AND CONCLUSIONS OF LAW

I concur with the Preliminary Order's Analysis and Conclusions of Law, except to amend the following as described:

- On page 7, I amend paragraph 9 to replace the word riparian with littoral, so it reads:

IDAPA 20.03.04.020.02 provides that "Only persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits."

IV. ORDER

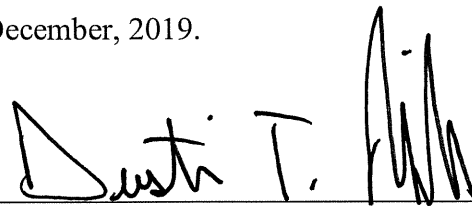
I conclude that the hearing coordinator's Findings of Fact and Analysis and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt those Findings of Fact and Conclusions of Law with the amendments set forth herein as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Background, Findings of Fact, and Analysis and Conclusions of Law into this Amended Final

Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Amended Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-97-S-700B is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.30.09, the Applicant or any aggrieved party who appeared at the hearing have a right to have the proceedings and Amended Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.30.09, an adjacent littoral owner or other aggrieved party shall be required to deposit an appeal bond with the court in an amount to be determined by the court but not less than five hundred dollars (\$500) insuring payment to the Applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the Amended Final Order. The Applicant does not need to post a bond with the district court for an appeal. The filing of the petition for review to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

Dated this 10th day of December, 2019.



DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2019. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Grandview Estates, LLC
c/o Travis Garske
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Dick and Kristen Winn

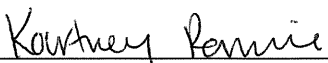
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Kourtney Romine, Administrative Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	Case No. PH-2019-PUB-10-002
)	
Encroachment Permit Application)	PRELIMINARY ORDER
No. L-97-S-700B)	
)	
Grandview Motorhome Resort LLC,)	
Applicant.)	
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I. BACKGROUND

On August 28, 2019, Grandview Estates, LLC, (Applicant) submitted to the Idaho Department of Lands (IDL) an encroachment permit application, identified as number L-97-S-700B (Application), requesting approval to construct a community dock on Priest Lake. The new construction would consist of a 6-foot by 28-foot pier, 5-foot by 8-foot ramp, 5-foot and 9-inch by 14-foot approach, and two docks (Dock A and Dock B) with five double slips each. Dock A is closest to shore and measures 128'9" long by 5'9" wide with five finger docks measuring approximately 3'9" by 25' that create the five double slips. Dock B is the outer, waterward dock and measures 128'9" long by 9'6" wide with five finger docks measuring approximately 3'9" by 25' that create the five double slips. The extra width on Dock B is due to the integrated wave attenuator built into the dock. This wave attenuator extends 30 feet east of the rest of the dock, but this portion of the wave attenuator is not decked. The ten double slips will be covered with fabric canopies and are separated by a 5-foot and 9-inch by 48-foot walkway (Dock C). Agency Record (AR) Document (Doc) 1.

IDL processed the Application pursuant to Idaho Code § 58-1306 as well as IDAPA 20.03.04.030.

1. In a letter dated August 28, 2019, IDL provided notice of the Application to several government agencies, non-governmental organizations, and the adjacent neighbors. AR Doc 4.
2. In a letter dated September 3, 2019, IDL provided notice of the Application to Debbie Butler, Warren and Lauren Byxbee, Robert and Jenny Martinsen, and Donald Howell. AR Docs 5 and 6.
3. IDL caused a Notice of Application to be published in the *Bonner County Daily Bee* on August 31 and September 7, 2019. AR Docs 7 and 11.
4. On or about September 20, 2019, IDL received a neighbor consent form signed by Felipe Cano, on behalf of adjacent neighbor U.S. Forest Service, representing it had no objection to the proposed encroachment described in the Application. AR Doc 8.
5. On September 25, 2019, IDL received written questions about the Application from Don Howell; which were forwarded to the Applicant for answering. AR Doc 12.

6. On September 27, 2019, IDL received objections to the Application from Robert Martinsen, and Warren and Lauren Byxbee. AR Docs 9 and 10. IDL also received an objection from Kristen and Dick Winn on September 28, 2019. AR Doc 13.
7. In accordance with Idaho Code § 58-1306(c) and IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed community dock. A Notice of Appointment of Hearing Coordinator and Hearing was sent on October 9, 2019, to the Applicant and the public witnesses who submitted written objections. AR Doc 14. The public hearing was scheduled for 1:00 pm on November 6, 2019, at the Idaho Department of Lands office located at 4053 Cavanaugh Bay Road, Coolin, Idaho.
8. IDL caused a Notice of Hearing to be published in the *Bonner County Daily Bee* on October 11 and 18, 2019, pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.05. AR Doc 15.
9. IDL staff inspected Applicant's property on October 10, 2019, due to a complaint regarding pilings being driven into the shoreline. The work was found to be occurring above the ordinary high water mark, so no further action was required. AR Doc 16.
10. On November 6, 2019, IDL held a public hearing at 1:00 pm in IDL's Priest Lake office. In attendance were Mr. Trevor Anderson, IDL Resource Specialist; Mr. Mike Ahmer, IDL Resource Supervisor; Mr. Andrew Smyth, IDL Program Manager; Ms. Angela Kauffman, Deputy Attorney General assisting IDL staff; Mr. Ken Hagman, with Copper Bay Construction and representing Applicant; Mr. Scott Poorman, attorney for Applicant; Ms. Kim Holman with Copper Bay Construction and representing Applicant; Mr. Bobby Martinsen; Mr. Warren Byxbee; Ms. Lauren Byxbee; Mr. Sam Holman; and Mr. Don Howell. AR Doc 17. The public hearing was digitally recorded.¹ Testimony concluded and the record was closed at 3:00 pm.

Evidence admitted into the administrative record during the hearing consisted of Applicant's testimony and exhibits A through G (AR Doc 18); IDL's testimony and a written statement prepared by IDL, including a corrected page 1 of the Application form, and a Grandview Lodge Site Map dated 2015 showing Applicant's littoral property (AR Doc 20); Byxbee's exhibits A and B (AR Doc 19); public witness's oral statements.

II. FINDINGS OF FACT

1. Grandview Motorhome Resort LLC is the owner of the subject littoral property, and is the Applicant. AR Docs 1 and 20; Rec 8:10, 34:45.
2. Applicant's property is adjacent to Priest Lake and has 574 feet of waterfront. AR Docs 1 and 20; Rec 40:15 and 49:00.

¹ The hearing was recorded pursuant to IDAPA 20.01.01.651. A hearing transcript has not been prepared. The agency or any party may have a transcript prepared at its own expense. All references to the hearing recording in this Preliminary Order will be described by reference to the hour(s), minute(s), and second(s) location on that recording. For example: Rec, hh:mm:ss.

3. The Application is for a community dock and integrated wave attenuator. The community dock has a total of 4001 square feet and extends 163 feet and 3 inches into Priest Lake. Dock A and Dock B both have five double slips and extend westward from Dock C, which is a north-south walkway dock that connects Dock A and Dock B to each other and the shore. The wave attenuator is built into Dock B, the outer dock, and also extends 30 feet east of Dock C. The eastward extension is not decked over. AR Docs 1 and 18.

4. The prior permitted encroachments related to Applicant's littoral property (Permit No. L-97-S-700A, assigned December 19, 2017), included a "230'x240' dock and piling including moorage slips and breakwater." AR Doc 9, p. 7.

5. The proposed dock would be located approximately 100 feet from the west littoral right line, and approximately 315 feet from the east littoral right line. AR Docs 1 and 12; Rec 48:45.

6. Written objections to the Application generally covered the following issues:

- a. Boats travelling from the proposed community dock to Elkins Resort will cut too close to the shore due to the dock entrance being placed on the west side. If the dock entrance were on the east side, boat traffic would stay toward the center of the bay and further from shore. The shoreline between the Grandview area and Elkins has a lot of non-motorized recreation, and the west entrance creates an unsafe situation for people in the water. AR Docs 9, 10, and 13.
- b. The proposed community dock should be moved eastward to reduce the proximity to recreation occurring southwest of the community dock. AR Docs 9 and 10.
- c. The covered slips will block views to the east and decrease property values. AR Docs 9 and 10.
- d. The new dock design now extends beyond the line of sight. AR Docs 9 and 10.
- e. The new dock design causes navigational issues for land owners to the west. AR Docs 9 and 10.
- f. Bonner County Ordinance 3-101 requires denial of the Application due to the impact on the health, safety, and welfare of the general public. AR Docs 9 and 10.
- g. Bonner County Ordinance 3-103 requires denial of the Application due to the proposed west entrance and impact on residents west of the proposed dock. AR Docs 9 and 10.
- h. Bonner County Ordinance 3-105 requires denial of the Application because boat operators will be required to violate the 200-foot no-wake zone by throttling their boats into the wind. AR Docs 9 and 10.
- i. The length of the proposed dock is excessive. AR Docs 9 and 10.
- j. Dock A and Dock B should share an entrance so the entire structure can be pulled in closer to shore. AR Docs 9 and 10.

7. The United States Forest Service (USFS) owns the roughly triangle shaped littoral parcel immediately west of the Applicant. AR Doc 1; Rec 32:55.

8. Lots southwest of the adjacent USFS triangle parcel are leased from the USFS. Rec 33:28.

9. Debbie Butler is a Recreation Specialist with the USFS, and she was mailed a notice of the Application. AR Doc 5; Rec 51:35.

10. Felipe Cano is employed by the USFS, and returned to IDL the neighbor consent form, dated September 20, 2019. AR Doc 8; Rec 52:05.

11. Don Howell owns the littoral parcel immediately east of the Applicant. Mr. Howell was mailed a notice of the Application. AR Docs 1 and 6; Rec 1:16:50.

12. The Applicant's testimony was provided from Ken Hagman and Kim Holman with Copper Bay Construction, and Scott Poorman, attorney for Applicant. Their testimony supporting the Application is as follows:

- a. The dock design was dictated by measured water depths, wind direction, and expected wave heights. They took a year and a half to study these factors before developing the proposed dock in this application. AR Doc 18; Rec 8:45, 27:25.
- b. The inner slips provide just enough room for boats to back out without hitting the prop on the bed of the lake. Rec 13:20.
- c. Water depth determined the location of the proposed dock. Aerial photographs show a gravel or sand bar where the former dock was located. Rec 9:30, 22:00. The proposed dock is just west of that shallow area. The IDL inspection report dated October 22, 2019 has a photo showing the gravelly substrate of the shoreline in this area, and that gravel is not expected to erode further. AR Doc 16; Rec 01:50:00. At the approach section on the east side of the proposed dock, a three-foot water depth is first reached 27 feet from shore. At the western side of the proposed dock, a three-foot water depth is first reached only 16.5 feet from shore. AR Doc 18; Rec 30:30. The water depth at the lakeward extent of the proposed dock is 60 feet. Rec 41:10.
- d. Changing the entrance to the east side would require the dock to be pushed further out into the lake. AR Doc 18; Rec 26:35.
- e. An east entrance could create boat congestion issues due to the presence of the Murray Acres community dock just to the east of Mr. Howell's property. Rec 26:55.
- f. The regional wind is mostly southerly. The normal southerly wind can shift approximately 10 degrees to come from the south-southwest direction. AR Doc 18; Rec 10:20. And, the southerly wind sometimes comes into the bay from the south-southeast by 10 to 15 degrees. AR Doc 18; Rec 14:45.
- g. A 30-foot extension to the wave attenuator is proposed on the east side. This will help protect the east side of the dock from waves that come from the direction of south 10 to 15 degrees east. AR Doc 18; Rec 14:45, 38:45.

- h. Both Dock A and Dock B are designed to have the bows of the boats in the slips facing outward and into the waves. This reduces the waves' impact on the parked boats and potential boat damage, as the wave attenuator will only eliminate about 70% of the wave action. AR Doc 1; Rec 12:45.
- i. The wind has about 7.5 miles of fetch south of the proposed dock. AR Doc 18; Rec 12:00. The wave attenuator is designed for wave heights of up to 4 feet measured trough to crest, with a 4.6 second duration. Rec 39:10. These are the most common wave sizes, but not the largest waves that occur. Rec 39:35.
- j. The wave attenuator consists of sections of 2-foot diameter, plastic corrugated pipe filled with foam. The pipe sections are arranged 4 pieces wide and 2 pieces tall, so the overall width of the attenuator is approximately 9 feet wide and 4.5 feet tall. The ends of the pipes are capped, and they are surrounded by a steel framework. Rec 36:45.
- k. The proposed wave attenuator is floating, while the nearby Murray Acres attenuator is fixed. The difference is due to the water depths. Rec 01:25:13. Most of the wave energy will be absorbed by and within the proposed attenuator, and it will be more efficient at the energy absorption than older designs. Rec 36:45, 01:46:40.
- l. Slip covers will be fabric and made of natural colors to blend in to the natural surroundings. AR Doc 1; Rec 29:30.
- m. No part of the proposed dock is wider than 10 feet. AR Doc 1; Rec 40:07.
- n. The docks and wave attenuator will be secured by piling and concrete anchors. Rec 41:00.
- o. A direct line of travel from the proposed dock to Elkins Resort is not possible due to the presence of two headlands. The shortest path of travel requires boat traffic to veer out into the lake. AR Doc 18; Rec 10:40.
- p. The western edge of the proposed community dock is more than 150 feet from the nearest dock to the west. AR Doc 1; Rec 20:55.
- q. The nearby property owners' safety concerns are common on the lake and not unique to this Application. Rec 24:50.
- r. The main criteria to consider in statute is avoiding unreasonable, adverse effects on adjacent landowners and undue interference with navigation. Rec 01:38:10.

13. Mike Ahmer and Trevor Anderson provided testimony on behalf of IDL. Between these IDL representatives, agency testimony included the following:

- a. The Application meets the community dock requirements of the administrative rules for Regulation of Beds, Waters, & Airspace Over Navigable Lakes in the State of Idaho (IDAPA 20.03.04), including specifications for littoral property length, dock

width, and total square footage (IDAPA 20.03.04.015.02); and dock length and setbacks (IDAPA 20.03.04.015.13). AR Doc 20.

- b. The proposed dock appears to be within the line of navigability because it is not further into the lake than the previous community dock at this location. AR Doc 20; Rec 49:17.
- c. Based on a review of aerial imagery, the previous community dock extended 164 feet into the lake. Rec 52:30.

14. Robert Martinsen, Warren Byxbee, Lauren Byxbee, and Don Howell offered oral statements as public witnesses at the hearing. Each public witness was opposed to the Application. The main issues driving the objections in their oral statements include those described in paragraph 6, above, as well as the following:

- a. The constant southerly winds and wave action will force vessels into the northwest corner of the bay toward the rocky shoreline and nearby private docks. Rec 57:50.
- b. Lots of boat traffic will exist between the community dock and Elkins resort to the southwest, endangering non-motorized users. Rec 01:08:25.
- c. Non-motorized usage is common at the nearby private docks and Ledgewood Beach. Rec 01:08:35.
- d. The winds may not come from the east, so an eastern entrance would be better. Rec 01:13:20.
- e. The prior dock did not have an issue with water depths, so it is unclear why the current proposal is using water depths to justify the dock design, length, and location. Rec 01:15:45.
- f. The shallow area at the former dock location was due to deposition behind the main resort dock and its breakwater fence. The shallow area is being eroded because that dock and breakwater are no longer present. The silt that accumulated behind the dock will dissipate over time. Rec 01:20:50.
- g. The adjacent Murray Acres community dock is in shallower water and has a similar tubular design. Rec 01:24:30. Based on experience with that system, the Applicant's proposed wave attenuator will reflect waves back into the lake and create issues for adjacent land landowners. Rec 01:26:50.
- h. The administrative rules require docks to be situated in the center of a littoral property. Rec 01:32:15.

15. The prior encroachments at Applicant's property were the main resort dock with approximately 16 slips, a boat ramp and small pier dock between the main resort dock and the shore, and two lone finger docks west of the main dock. AR Doc 19. One of these finger docks was closer to the nearby docks to the west than the current proposed dock. Rec 01:36:40.

16. The prior community dock extended approximately 180 feet out into the bay. Rec 01:36:20.

17. All prior encroachments have been removed from Applicant's property. AR Docs 1 and 18; Rec 01:40:20.

III. ANALYSIS AND CONCLUSIONS OF LAW

1. The State Board of Land Commissioners (Board) is authorized in Idaho Code § 58-104(9) and § 58-1303 to regulate, control, and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho.

2. The Board exercises its authority through the instrumentality of IDL. See I.C. §§ 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).

3. Priest Lake is a navigable lake as defined by Idaho Code § 58-1302(a). *State of Idaho v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

4. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property, and the lake values of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. These values must 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 evidence was submitted into the administrative record on the Application that the proposed encroachment would negatively impact the lake values of fish and wildlife habitat, aquatic life, or water quality.

5. No encroachment on, in, or above the waters of any navigable lake in Idaho shall be constructed until approval has been granted pursuant to the Lake Protection Act, title 58, chapter 13, Idaho Code (LPA).

6. Idaho Code § 58-1304 gives IDL authority to adopt such rules and regulations as are necessary to implement the LPA. 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").

7. "Littoral rights" are defined by IDAPA 20.03.04.010.32 as: "The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake."

8. A "community dock" is defined by IDAPA 20.03.04.010.11 as: "A structure that provides private moorage for more than two (2) adjacent littoral owners, or other littoral owners possessing a littoral common area with littoral rights including, but not limited to homeowner's associations. No public access is required for a community dock."

9. IDAPA 20.03.04.020.02 provides that, "Only persons who are riparian owners or lessees of a riparian owner shall be eligible to apply for encroachment permits."

10. IDAPA 20.03.04.015.02.c provides that, "A community dock shall not have less than fifty (50) feet combined shoreline frontage. Moorage facilities will be limited in size as a function of the length of shoreline dedicated to the community dock. The surface decking area of the community dock shall be limited to the product of the length of shoreline multiplied by seven (7) square feet per lineal feet or a minimum of seven hundred (700) square feet."

11. IDAPA 20.03.04.015.02.b requires that, "No 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 except breakwaters when justified by site specific conditions and approved by the department."

12. IDAPA 20.03.04.015.04.b provides that, "Slip covers should have colors that blend with the natural surroundings and are approved by the department."

13. IDAPA 20.03.04.015.13.e provides that "[i]t will be presumed, subject to rebuttal, that ... commercial navigational encroachments, community docks or nonnavigational encroachments will have [an] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. Written consent of the adjacent littoral owner or owners will automatically rebut the presumption."

14. IDL initiated processing of the Application pursuant to Idaho Code § 58-1306 and the related Rules.

15. The Application is for a community dock, as defined in IDAPA 20.03.04.010.11. The dock structure includes an integrated wave attenuator. AR Doc 1.

16. The size of the prior encroachments on Applicant's property are reported as either 230 feet by 240 feet (AR Doc 9), 164 feet long (Rec, 52:30), or 180 feet long (Rec, 1:36:20). Regardless, the proposed dock is no longer than the prior dock and may be shorter. AR Docs 1, 9, and 19.

17. Applicant's littoral property has 574 feet of littoral frontage. AR Doc 20; Rec 40:15 and 49:00. The proposed community dock is a component of a new development on Applicant's littoral property. AR Doc 1.

18. Applicant is eligible for a community dock of up to 4,018 square feet in size (574 feet x 7 feet = 4,018 square feet) under IDAPA 20.03.04.015.02.c. With a proposed dock size of 4,001 square feet, this standard is met in the Application. AR Docs 1 and 20.

19. The proposed dock would be located approximately 100 feet from the west littoral right line, and approximately 315 feet from the east littoral right line. This is at least four times the minimum distance generally required by IDAPA 20.03.04.015.13.e. In addition, the proposed dock is approximately 152 feet from the closest dock.

20. Oral statements were presented that alleged the proposed dock would impact the neighbors' visual aesthetics. As noted previously, the proposed dock is no longer than the prior dock and all the moorage is consolidated into one dock instead of three. This suggests the proposed dock will be no more visually intrusive than the prior dock, and perhaps less so overall. The proposed fabric canopies will be natural colors to blend in to the natural surroundings. No testimony was received suggesting that the proposed dock would impact the

visual aesthetic differently than other community docks and marinas around Priest Lake. While the neighbors' view will certainly be changed, the overall size and proposed slip covers meet the applicable standard in IDAPA 20.03.04.015.02 and 04. AR Docs 1 and 9.

21. Oral statements were presented that alleged the boat traffic from the proposed dock would impact the safety of nearby recreation on the lake due to the wakes from boats that leave the bay and travel southwest. AR Docs 9 and 13; Rec 1:08:25. The regulation of boat traffic is outside the authority of IDL. Any regulation of watercraft, their use, or consequences of their use is accomplished pursuant to Title 67, Chapter 70, Idaho Code, and through the adoption of local ordinances allowed by the Idaho Safe Boating Act. The Marine Sheriff had been notified of unsafe boating from the prior resort docks on the west side of the resort property, but no evidence of actual harm to other lake users due to boat traffic was entered into the record. AR Doc 9. Those prior resort docks were also closer to the nearby residents than the proposed community dock. Rec 01:36:40.

22. Oral statements were presented that alleged the administrative rules require a dock to be placed in the middle of a littoral ownership. No citation was provided, and no such administrative rule was found. To the contrary, IDAPA 20.03.04.015.13.e may be read to set a minimum setback of twenty-five (25) feet from either adjacent littoral right line.

23. Oral statements were presented that alleged the proposed wave attenuator would reflect energy back into the lake and create issues for adjacent landowners. Applicant's rebuttal testimony regarding the proposed wave attenuator explained that while other designs may have this effect, the newer design being proposed will not have this effect.

24. Evidence of record demonstrates that a boat on the eastern slip of Dock A would have to back out of the 25-foot long slip and then turn to the west to exit toward the lake. With a 28-foot pier, 8-foot ramp, and 14-foot approach (AR Doc 1), the back of the slip is 50 feet from the ordinary high water mark ($28+8+14=50$). A 25-foot long boat would then be approximately 25 feet from shore when it exits the slip. If the water depth is three feet at a distance of 27 feet from shore along the east side of the dock, this boat does not have much room to turn and exit toward the lake before hitting bottom. Applicant acknowledges that the proposed design provides just enough room for boats to exit Dock A and not bottom out. Rec 13:20.

25. The design of the proposed community dock appears to be the product of the Applicant balancing the use of their littoral rights with the site specific challenges, respect for the littoral rights of nearby littoral owners, and impact on the lake itself.

26. Moving the dock eastward, moving the entrance to the east side, pulling the dock in closer to shore, and other suggestions provided by objecting public witnesses would impact the ability of the moorage to be used safely and effectively. These suggestions could also require the dock to extend further out into the lake. All of these suggestions may therefore impact the Applicant's use of their littoral rights and actually increase the impact on the lake.

27. No evidence for adverse effects upon adjacent littoral rights was presented. The USFS is the adjacent littoral owner to the west, and they signed a Consent of Adjacent Riparian or Littoral Property Owner form. Mr. Howell is the adjacent littoral owner to the west, and he did not claim the proposed dock would impact his littoral rights. Mr. Martinsen, the Byxbees, and others had other concerns with the proposed dock, but they are not adjacent littoral owners and did not present testimony as to the impact on their littoral rights as defined in IDAPA 20.03.04.010.32.

28. I find that the community dock does meet the requirements of IDAPA 20.03.04. Given the limitations of the location, wind direction, and water depths, the Applicant's proposed dock design and location minimizes dock length and the impact on the lake as a whole.

IV. PRELIMINARY ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-0700B is APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

The order issued herein is a Preliminary Order, pursuant to Idaho Code §§ 58-1306(c) 67-5270 and 67-5272, and the Notice of Appointment of Hearing Coordinator issued on October 9, 2019. It can and will become final without further action of the agency if the Director does not issue a Final Order within thirty days of the close of the hearing.

If this Preliminary Order becomes final, or if the Director issues a Final Order, pursuant to Idaho Code § 58-1306(c) the Applicant or other aggrieved party has the right to have this decision 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 final decision. Idaho Code § 58-1306(c). Because the final decision would be for approval of an encroachment permit, any aggrieved party, other than the Applicant, appealing this final decision must file a bond with the district court in accordance with Idaho Code § 58-1306(c). The filing of an appeal to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 2nd day of December, 2019



ERIC WILSON

IDL Resource Protection and Assistance Bureau Chief

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