

Thomas M. Schultz, Jr.
Director
Idaho Department of Lands
300 N. 6th Street, Suite 103
P. O. Box 83720
Boise, ID 83720-5956

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Application for a Single)	
Family Dock, Encroachment Permit No.)	FINAL ORDER
L-96-S-2175A)	
)	
STACY R. BELL-POWELL)	
)	
Applicant)	
)	
)	
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)	

I. NATURE OF PROCEEDINGS/ISSUES

An administrative hearing was held October 1, 2012, at 10:30 a.m. PDT at the Panhandle Health District office in Sandpoint, Idaho. Mick Schanilec served as the Hearing Officer. The Hearing Officer issued his Recommendations on November 6, 2012.

My responsibility is to render a decision on the behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training and experience. In making this determination I have relied on the record provided. Specifically,

- I have read the transcript of the hearing conducted in Sandpoint, Idaho on October 1, 2012.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Officer's Recommendations in light of the entire record.

Encroachments, including docks, placed on the navigable waters, require a permit

issued by the Idaho Department of Lands pursuant to the requirements of Chapter 13, Title 58, Idaho Code and the Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04 as promulgated by the State Board of Land Commissioners.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Officer.

III. CONCLUSIONS OF LAW

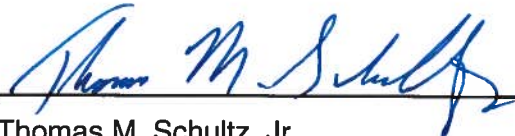
I concur with the Conclusions of Law presented by the Hearing Officer.

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Application L-97-S-2175A as revised on August 3, 2012 be approved with conditions as detailed in the Hearing Officer Recommendations dated November 6, 2012.

This is a final order of the agency. If the Applicant, or a party who appeared at the hearing, is aggrieved by the director's final decision, they shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed. A notice of appeal must be filed within thirty (30) days from the date of the final decision in accordance with IDAPA 20.03.04.025.09.

DATED this 16th day of November, 2012.



Thomas M. Schultz, Jr.

Director

PRIEST LAKE
SUPERVISORY AREA
4053 Cavanaugh Bay Rd
Coolin ID 83821
Phone (208) 443-2516
Fax (208) 443-2162




TOM SCHULTZ, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
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Lawrence G. Wasden, Attorney General
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Tom Luna, Sup't of Public Instruction

November 6, 2012

MEMORANDUM



To: Tom Schultz, Director
From: Mick Schanilec, Area Manager – Priest Lake Area
Subject: Administrative Hearing - Navigational Encroachment L-96-S-2175A,
Applicant – Stacy R. Bell-Powell

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following an administrative hearing conducted by the Idaho Department of Lands (IDL). The hearing was conducted on October 1, 2012, in conjunction with the processing of an encroachment application (L-96-S-2175A) on Pend Oreille River, a navigable waterway in Idaho. The applicant proposes to increase waterward extension of an existing permitted single family dock from 42 feet to 90 feet.

Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers the State Board of Land Commissioners to regulate, control and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho.

II. FINDINGS OF FACT

1. On July 5, 2012, IDL issued encroachment permit L-96-S-2175 for a 5 foot by 42 foot pier located adjacent to the property owned by Stacy R. Bell-Powell at Parcel RPS0490261BOA, Replat of Lots 5 & 6 of Well's 3rd Addition to Sandpoint, Block 21, Lot 1B, Section 22, Township 57 North, Range 2 West, Boise Meridian, Bonner County.
2. On or about July 12, 2012, Stacy R. Bell-Powell (applicant) submitted to IDL an encroachment application (L-95-S-2175A), requesting approval to extend their existing permitted dock from 42 feet to 90 feet, and to add an anchored mooring buoy. Said application was subsequently revised on or about August 3, 2012 to withdraw the request for the anchored mooring buoy.

3. Application L-96-S-2175A proposes a piling supported pier dock with straight sections of 5 feet by 63 feet and 10 feet by 27 feet for a total deck area of 585 square feet. Total waterward extension from the high water line would be 90 feet. The applicant's drawing indicates a minimum sideline setback of 14 feet to the adjacent property to the west (Lot 1A, Veblen Trust), and a minimum sideline setback of 30 feet to the adjacent property to the east (3rd Ave Public ROW – City of Sandpoint). The application drawing shows the specific proposed dimensions and dock location.
4. IDL initiated the processing of Application L-96-S-2175A as a single family navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1305) and the associated Rules (IDAPA 20.03.04.025).
5. On August 8, 2012, the IDL Pend Oreille office provided courtesy notice of Application L-96-S-2175A to the two adjacent property owners. On August 11, 2012, legal notice of the application was published in the Bonner County Daily Bee specifying that written objection to the application or requests for hearing be submitted by August 27, 2012.
6. On or about August 14, 2012, IDL received a letter from Joyce Hartley (concerned citizen) opposing Application L-96-S-2175A and expressing concerns about the: *“safety of children that swim down there [Third St. Pier].”*
7. On or about August 17, IDL received a letter from Jeremy Grimm (Planning and Community Development Director, City of Sandpoint) urging that IDL: *“deny this request for expansion (Application L-96-S-2175A)”*. His concerns involved the adjacent City of Sandpoint 3rd Street Pier beach and swimming area: *“Public use of the facility include a wide range of age groups, most notably many young children and toddlers enjoy the gradual sandy entrance to the water, and opportunity for snorkeling.”* He added: *“We note the approval of this permit is likely to substantially increase the potential for boat/swimmer interaction through the added capacity of moorage and subsequent boat traffic in proximity to the swimming area.”* He also shared information regarding the use of the applicant's property as a vacation rental and the associated concern: *“Due to the likely unfamiliarity guest would have with the area, unique water currents and ignorance of the adjacent swimming activity; we feel that any expansion to the existing structure would represent an unacceptable risk to the public in the form of boat/swimmer conflict.”*
8. On or about August 20, IDL received a letter from Utta Schnakenberg (part interest in adjacent property) opposing Application L-96-S-2175A: *“I oppose this extension because it will detract from my view and decrease the value of my home. Additionally, an extension of the dock represents a safety hazard for the swimmers who use the 3rd Ave Pier owned by the city of Sandpoint.”*

9. On or about August 23, 2012, IDL received a letter from Loise McCloskey (Trustee of Veblen Trust with part interest in adjacent property) stating that their family want to *"file a formal objection to the expansion of the pier by Stacy R. Bell-Powell (Application L-96-S-2175A)."* Expressed concerns included: *"...my family and I are very concerned that the proposed pier expansion would create an obstruction of the view from our condo looking out on Lake Pend Oreille."* And: *"In addition, we are deeply concerned that the proposed pier expansion would significantly reduce the value of our property."*-
10. In response to opposition letters, On September 19, 2012, IDL scheduled an administrative hearing on Application L-96-S-2175A to be held on October 1, 2012 in Sandpoint. Mick Schanilec (IDL Priest Lake Area Manager) was selected as hearing officer, and visited the site of the proposed encroachment on September 26, 2012, to view the locale and the existing dock configurations.
11. On October 1, 2012, at approximately 10:30 a.m., IDL held an administrative hearing at the Panhandle Health District office in Sandpoint, Idaho to review Application L-96-S-2175A. Mick Schanilec (IDL Priest Lake Area Manager) served as the hearing coordinator. Other IDL staff in attendance were Ed Robinson (Pend Oreille Area Manager), Jamie Brunner (Pend Oreille Lands Resource Specialist, Navigable Waters), and Jim Brady, (Mica Lands Resource Specialist Senior, Navigable Waters). Other attendees included William Berg (legal counsel representing the applicant Stacy R. Bell-Powell), Kim Woodruff (Parks and Recreation Director representing the City of Sandpoint), and Joyce Hartley (concerned citizen representing people in the neighborhood). The hearing was recorded on audio tape, and was subsequently transcribed on October 7, 2012
12. Stacy R. Bell-Powell, as applicant, was given first opportunity to testify at the hearing. William Berg from the law firm of Berg and McLaughlin spoke as her representative. Mr. Berg submitted Exhibits A-G on behalf of his client, and represented Stacy R. Bell-Powell's position as follows: The subject property with 55 feet of river frontage is vested with Ms. Powell, and has an existing 42 foot permitted dock. The current application as modified on August 8th requests a 48 foot extension to the existing dock so that it would be a total of 90 feet waterward, 63 feet would be 5 feet in width, and the last 27 feet would be 10 feet in width. The eastern edge of the proposed encroachment would be 31 feet from their eastern boundary. The total square footage would be less than 700 square feet. The current depth at the very end of the existing dock is 3 feet at summer pool. The depth at the end of the proposed dock is estimated at 7 feet. Current dock length and water depth creates problems with dinging props and accessibility. IDAPA 20.03.04.025.01 says applications for single family docks not extending beyond the line of navigability should be processed with a minimum of procedural requirements, and shall not be denied except in the most unusual circumstances. The dock itself does not extend beyond the line of

navigability as defined in Idaho Code 58-1302, and IDAPA regulations defines the line of navigability as a line that's located waterward of the low water mark. Low water is well south past the end of the proposed encroachment, so the line of navigability is not a factor. IDAPA 15.01C does permit the Department to limit the extension of docks beyond existing docks due to navigational hazard. However, this dock is not going to stick out beyond existing docks due to the 3rd Avenue Pier and the curvature of the bay. The only question is if a most unusual circumstance gives the Department a reason to deny the dock. The applicant acknowledges that there is a sandy swimming beach on the west side of the 3rd Avenue Pier that is used. However, a longer dock of 90 feet offers greater safety by keeping boats away from near shore areas. The applicant is also willing to only allow mooring on the west side of their dock and only the last 27 feet on the east side (nearest the swim area). Concerns from the City of Sandpoint about occasional rentals at the Bell-Powell property producing more boat traffic are not factually supported in the record. The City of Sandpoint has not designated or restricted the swim area. Mr. Berg concluded that there is no most unusual circumstance here, and the proposed encroachment is nothing more than just another private dock. Submitted Exhibits include the following:

Exhibit A: Aerial photo showing proposed dock location in red.

Exhibit B: Photo showing east beach of 3rd Ave Pier.

Exhibit C: Photo showing west beach of 3rd Ave Pier.

Exhibit D: Photo of Bell-Powell dwelling.

Exhibit E: Photo of existing Bell-Powell dock from 3rd Ave Pier.

Exhibit F: Photo of 3rd Ave Pier from Bell-Powell dock.

Exhibit G: Deed information for Bell-Powell property.

13. Kim Woodruff was given the second opportunity to testify representing the City of Sandpoint. Mr. Woodruff stated that the swim area may not be advertised, but it has been used for years and years by people in the immediate neighborhood. Use includes swimming, snorkeling and launching of paddle boards and kayaks. Use has traditionally been by younger kids and toddlers. The area on the west side of the pier is preferred due to sandy beach and shallow water. There is concern about renters pulling up to the applicants beach as well as to the city's beach with boats. If an extension in dock length is granted, would the applicant be willing to just moor on the west side? That would remove boats from the swim area. Safety is the real concern. The possibility of delineation with floats was also suggested. In response to questions from the hearing officer, Mr. Woodruff acknowledged that the swim area is not formally designated, and the city has not

considered buoy separation at the site. A larger city beach area is buoyed off with lifeguards elsewhere.

14. Joyce Hartley was given third opportunity to testify, and stated that she represented "*the people in our neighborhood.*" Ms. Hartley stated that there are many that come down to the area to swim from June until school starts. She indicated she is totally against putting more length on the dock. Her main concern is that lots of renters with big boats compromise the safety of the kids swimming and playing on the sand. She also mentioned that another individual expressed some question as to ownership of the area under the water.
15. Mr. Berg was next given opportunity for closing comments on behalf of the applicant. He indicated the property ownership under the water was resolved with a re-plat, and that a road that had formerly existed there was presumably vacated when the lake came up. He revisited the issue of rental properties, and suggested that many in the city are out of compliance with rental permit requirements. He indicated his clients are going to be in compliance with them. He questioned IDL's authority and jurisdiction over upland use. He said limiting moorage to the last 27 feet would be a part of rental agreements, and they will do their best to ensure compliance. He said the maneuverability issue is important, and keeping boats out of where they could go right now is more important. With respect to floats and buoys, he suggested that should be the responsibility of the city. His client may be willing to participate in having them installed, but it would not be fair for them to pay the cost. In response to a question from the hearing officer, he indicated his client may be willing to accept allowing only west side tie downs if that is IDL's best judgment for safety concerns.
16. Given the relatively small turnout, the hearing officer opened the floor for anyone with additional comments. Kim Woodruff and Joyce Hartley elected to jointly testify regarding the issue of swimmer safety. Mr. Woodruff suggested that extending the dock out further and limiting traffic to the west side would protect the bay better. Ms. Hartley reiterated that boats near the kids at the swim beach was the safety issue.
17. The application, letters, transcript, file, and other documents referenced herein and all associated documents are incorporated into this record by reference.

III. CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (Board) is designated in Idaho Code § 58-104(9) and § 58-1303 to regulate, control and permit encroachments on, in or above the beds of navigable waters in the state of Idaho. IDL is the administrative agency of the Board, Idaho Code § 58-119.

2. Pend Oreille Lake and Pend Oreille River are navigable waterways as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04., encroachments of any kind on, in or above the beds of these waterways require a permit prior to encroaching on the lake or river. The applicant has littoral rights as required by ADAPA 20.03.04.
3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality and 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.
4. The Lake Protection Act delegates no authority to IDL for the regulation of vessels. Vessels are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation, the local County Sheriff, and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act).
5. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code title 58, chapter 12, and as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The Supreme Court in KEA determined that public trust uses include those of commerce, navigation, fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance by IDL with its' legislative authority is not sufficient to determine if its actions comport with the requirements of the Public Trust Doctrine.
6. Idaho Code §58-1302 (h) defines navigational encroachments as docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and other facilities used to support water craft and moorage on, in, or above the beds of waters of a navigable lake.
7. Procedures, criteria and standards for single and two family docks are defined in Idaho Code § 58-1305 and IDAPA 20.03.04.
8. IDAPA 20.03.04.015.C specifies that no portion of the docking facility shall extend beyond the line of navigability. Shorter docks are encouraged wherever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability.
9. IDAPA 20.03.04.025.01 specifies that applications for single-family and two family navigational encroachments not extending beyond the line of navigability will be processed with a minimum of procedural requirements and shall not be denied except in the most unusual of circumstances.

10. The Applicant has satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1305 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Stacy Bell-Powell has submitted application L-96-S-2175A to extend the length of an existing single family navigational encroachment. The applicant claims the water depth accessed by the existing dock is not adequate, and there is some merit to this. The primary objection raised to this application by the City of Sandpoint (adjacent public beach property owner) and other concerned citizens is that the dock extension will increase boat traffic near the adjacent city beach, thereby compromising the safety of water-based public recreation. The Bell-Powell property occasionally rents to people from outside the area who are not familiar with the public swim beach, and this aggravates the safety concerns. Another adjacent property owner is also concerned that a dock extension may adversely affect their view.

Relevant background considerations include the following:

Line of Navigability

The line of navigability established by existing encroachments in this area shows docks with waterward extension ranging from 35 feet to 90 feet. A review of IDL aerial photos taken during low water conditions reveals the varied existing dock lengths are accessing a similar lakebed contour. That contour would intersect the proposed extension location at a length of approximately 80 feet.

Unusual Circumstance – Public Safety

The circumstance of this single family encroachment application is unique and unusual from its potential to impact recreation and public safety. Although the adjacent property belonging to the city of Sandpoint is not formally designated as a public swim area, there is consensus that it has functioned as one for many years. Young kids are attracted to the site due to the sandy beach and shallow lakebed profile. Renters utilizing the Bell-Powell dock may not be as familiar with or as sensitive to swimmer safety as they ought to be. A more formal designation of the public swim area and the installation of a buoy line to segregate the near shore area by the city of Sandpoint could help to address the situation. However, to date none of these measures have been taken. At least until the swim area is more effectively addressed by the city, it is appropriate to consider measures for a dock extension at the Bell-Powell property including limiting tie-downs to the west side of the proposed dock and restricting motorized moorage from the east side of the proposed dock. Precedent for IDL limiting the location of moorage exists with The Idaho Supreme Court in Eleventh Street Dock Owners Association, Inc. V. the Idaho Land Board, Idaho Department of Lands, 141 Idaho 517, 112 P. 3d 805 (2005). An extension of the existing dock would also move boat traffic further away from the near shore swim area. These measures would reduce the potential for boater and swimmer contact.

Aesthetics

The proposed extension would not have aesthetic impacts beyond those associated with other routinely permitted single family docks. The concern over aesthetics by adjacent property owner to the west is understandable. However, some aesthetic impact to a waterfront lot by docks from adjacent waterfront lots that possess littoral rights including the right to wharf out is common and to be expected. I saw nothing with the proposal or the site to suggest that aesthetic impact with this proposal would be excessive.

Other Public Trust Considerations

I did not identify any other unique public trust considerations with this proposal regarding fish and wildlife habitat, water quality or aquatic life.

Recommendation to Approve with Conditions

Based upon the information provided to me as the hearing coordinator, the findings of fact and the conclusions of law contained herein, I recommend that the Director of IDL issue a Final Order stating that the Pend Oreille Supervisory Area should **approve with conditions** encroachment application L-96-S-2175A as revised on August 3, 2012.

Conditions of Approval

1. A maximum waterward extension of the straight dock to 80 feet from the high water line.
2. A restriction of tie-downs to the west side of the dock
3. An acceptable plan (as approved by IDL) to prevent motorized moorage on the east side of the dock.

Dated this 6th day of November, 2012



Mick Schanilec
Hearing Coordinator