

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. L-96-S-2420)	Case No. CC-2017-PUB-20-001
)	
Dale Cleveland,)	PRELIMINARY ORDER
)	
Applicant.)	
)	
)	
)	

I. BACKGROUND

On June 15, 2017, the Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) from Dale Cleveland (“Applicant”). Agency Record (“AR”), p. Cleveland0001 – 46.¹ IDL assigned number L-96-S-2420 to the Application. In the Application, the Applicant seeks authorization to construct a single-family dock that would extend 90 feet beyond the Artificial High Water Mark (“AHWM”) of Lake Pend Oreille and total 700 square feet of surface decking area. *Id.*

IDL processed this application for a single-family dock pursuant to I.C. § 58-1305 and IDAPA 20.03.04.025. On July 10, 2017, IDL received an objection to the Application and a request for hearing from the Applicant’s neighbor, Mr. Irv Jenkins. AR, p. 12-17.² On August 9, 2017, the Applicant agreed to waive the 60-day deadline for a hearing set forth in Idaho Code § 58-1305(c). AR, p. 18.

Pursuant to Idaho Code § 58-1305(c), IDL ordered a hearing and on August 25, 2017, Thomas M. Schultz, Jr., IDL Director, appointed Andrew Smyth to be the hearing officer for the hearing. AR,

¹ All references to the record are hereinafter designated by using the page numbers only, not the preceding “Cleveland.”
² Although the record does not contain copies of any notices provided by IDL, Objectors’ email references a “courtesy notification” that they had received from IDL regarding the Application.

p. 22-23. On September 12, 2017, the undersigned Hearing Officer held a telephonic pre-hearing conference in which the Applicants, the Jenkins, and IDL participated. As a result of this meeting, a Notice of Hearing establishing the date, time, and location of the hearing was issued on September 14, 2017. AR, p. 24-26.

Pursuant to Idaho Code § 58-1305(c), a contested case hearing regarding the Application was held on October 25, 2017. At the hearing, the Applicant presented testimony in support of the Application. Ms. Carol Jenkins provided testimony in opposition to the Application. Ms. Amidy Fuson, IDL Resource Specialist, Senior, provided testimony on behalf of IDL. *See generally* Hearing Recording.³ The Cleveland's Exhibits A through B, Ms. Jenkins Exhibit 1, and IDL's Exhibit IDL1 were admitted into the record without objection.

II. FINDINGS OF FACT

1. Mr. and Mrs. Dale and Shirley Cleveland own property adjacent to Lake Pend Oreille on Elliot Bay. AR, p. 1, 7.
2. The Cleveland's property includes approximately 165 feet of shoreline frontage. AR, p. 5.
3. As set forth in the Application, the proposed single-family dock would extend 90 feet beyond the AHWM of Lake Pend Oreille and have 700 square feet of surface decking area. AR, p. 1-10.
4. As further set forth in the Application, the proposed structure will include 4-6 cubic yards of concrete fill for piling footings. AR, p. 2.

³ The hearing in this matter 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 pertinent minute(s) and second(s) location. Ex: Hearing, mm:ss.

5. The dock will not be located closer than ten (10) feet from adjacent littoral right lines.

AR, p. 5.

6. IDL received written comments from Mr. Irving Jenkins, which included copies of comments received by IDL in 2005, regarding an encroachment permit application submitted by the Jenkins. AR, pp. 11-17. Mr. Jenkins' concerns can be summarized as follows:

- a. Boats motoring around a 90' dock would be a safety concern.
- b. The Jenkins' application to construct an 85' dock submitted in 2005 was denied because neighbors objected to its length.
- c. The Clevelands may rent moorage creating additional boat traffic around their dock and the Jenkins' property; devaluing their property and safety.

7. During the hearing, Mrs. Carol Jenkins provided testimony in opposition to the dock.

Hearing, 11:31. The concerns can be summarized as follows:

- a. Boats motoring around a 90' dock would be a safety concern.
- b. The Clevelands may rent moorage.
- c. The proposed dock would impact the Jenkins' view from their property.
- d. An existing easement on the Clevelands' property may be a concern.

III. ANALYSIS AND CONCLUSIONS OF LAW

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. 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.). 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); IDAPA 20.03.04.010.024. Lake Pend Oreille 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. The proposed single-family dock would lie partially or fully on or above the bed of a navigable lake. IDL therefore, has jurisdiction to regulate the proposed encroachment.

7. As owners of land adjacent to navigable waters of a lake, the Clevelandlands are littoral owners, as defined in IDAPA 20.03.04.010.033 and are qualified to make application for an encroachment permit for a single-family dock pursuant to IDAPA 20.03.04.010.36 and 020.02.

8. IDAPA 20.03.04.015.01.a provides that “[n]o part of the [single family dock] 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.” (Bracketed material added). The drawing of the proposed encroachment accompanying the Application shows that the widest portion of the dock will not exceed ten feet.

9. IDAPA 20.03.04.015.01.b provides that:

[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 and shall not exceed one thousand one hundred (1,100) square feet, including approach ramp and walkway for a two-family dock.

The drawing of the proposed encroachment accompanying the application shows the total surface decking area will total 700 square feet.

10. IDAPA 20.03.04.015.01.c provides that “[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.”

11. IDAPA 20.03.04.010.20 defines the “Line of Navigability” (“LON”) 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.

The testimony of Ms. Amidy Fuson, IDL Resource Specialist Senior, was that the proposed dock would not extend beyond the line of navigability. Hearing, 29:25. No evidence was presented to contradict that testimony.

12. The existing permitted docks located on either side of the Cleavelands’ proposed dock measure 40 feet and 65 feet in length from the AHW. Hearing, 33:12.

13. At the hearing, IDL Resource Specialist Senior Amidy Fuson testified that IDL typically allows docks to extend out far enough to reach a water depth of three feet. Hearing, 31:17.

14. There are other relevant criteria specific to the location of the proposed dock that justify a line of navigability located further waterward (when measured from the AHWL) than the adjacent properties. The proposed dock would be located “in a nook of a bay. . . It’s [] kind of setback in so it’s not encroaching out into the line of navigation.” Hearing, 30:23.

15. Ms. Fuson identified the Line of Navigability at this location to be a line between the two docks adjacent that generally follows the curve of the shoreline. Hearing, 33:45. She testified that the proposed 90-foot dock would not extend beyond the line of navigability. Hearing, 29:25. There was no evidence or testimony to contradict Ms. Fuson’s testimony.

16. The proposed dock is located in an area of the lake with a gradual slope. Hearing, 6:10. At the location of the proposed dock during full pool, there is 7.5 feet of water, 90 feet from the shoreline. Hearing, 6:22. Mr. Cleveland testified that the slope of the lakebed at the proposed location is less than the slope of the rest of the bay, where at full pool there is 15 feet of water just 50 feet from the shoreline. Hearing, 6:13.

17. The gradual slope combined with the dock’s specific location in a nook, demonstrates that the dock’s length would not interfere with the line of navigability.

18. The proposed single-family dock meets the requirements of IDAPA 20.03.04.015.01.

19. 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 (10) feet from adjacent littoral right lines . . . Written consent of the adjacent littoral owner or owners will automatically rebut the presumption . . .

The drawing of the proposed dock accompanying the application shows that the dock would be located 15 feet from the shared property line with the Cleveland's other property and 150 feet from the shared property line with the Jenkins. AR, p. 5. Ms. Fuson testified that the shared littoral right line with the Jenkins extended at a 90-degree angle from the shoreline. (Hearing, 37:20) and the dock would be located approximately 150 feet from the littoral right line. Hearing, 37:50. There was no evidence or testimony to contradict the drawing in the record or Ms. Fuson's testimony.

20. There are no presumed adverse effects to the adjacent littoral right owners associated with the Cleavelands' proposed single-family dock.

21. The Jenkins cited their concern that if the proposed dock is allowed, there will be a safety issue due to boats navigating in the water lying between their property and the proposed dock. AR, Doc. 3 and hearing, 12:41. However, even if the proposed dock is not constructed, the public, including the Applicants and Objectors, have the right to navigate on Lake Pend Oreille near the Jenkins' property.

22. The Jenkins also cited their concern regarding the ability to rent dock space, given the size of the dock. AR, Doc 2 and Hearing, 13:00. The application is for a single-family dock. *Id.* IDAPA 20.03.04.010.36 defines a 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.” (Emphasis added). Any navigational encroachment used for commercial purposes is considered a commercial navigational encroachment and would require a different permitting process than the one followed with the subject application. I.C. § 58-1306(a) and IDAPA 20.03.04.010.10.

23. Mrs. Jenkins voiced her concern that the proposed dock would significantly change the view from her property. Hearing, 13:33. While a new dock would change the Jenkins' view,
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there are other docks in the bay, including the Jenkins' dock. While objectors of a dock may not deem it to be aesthetically pleasing, the proponents of the dock would view it favorably. I find this factor to be neutral.

24. Mrs. Jenkins also raised a question about an easement that exists on the Jenkins' property. Hearing, 14:01. The Applicant clarified that the dock is not on the property with the easement. Hearing, 16:12. Furthermore, no information regarding the exact nature of the easement was provided. Even if the dock were to be located on the property with the easement, IDAPA 20.03.04.020.02 states in applicable part, "Except for waterlines or utility lines, the possession of an easement to the shoreline does not qualify a person to be eligible for an encroachment permit." Only the Jenkins, or the owners/lessees of the littoral rights would be eligible to make application for an encroachment permit, and not the holder of an easement.

III. PRELIMINARY ORDER

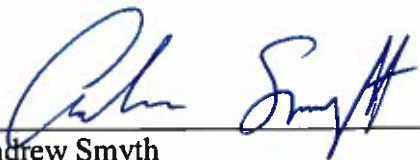
Based upon foregoing findings of fact and conclusions of law, Encroachment Permit Application No. L-96-S-2420 is approved, with the condition that the permit is for a single-family dock only, and that the Clevelands may not lease moorage at their dock to others without obtaining a permit under Idaho Code § 58-1306.

As stated in the Notice of Appointment of Hear Officer issued on August 25, 2017, the IDL Director has delegated all decision-making authority to the hearing officer, pursuant to Idaho Code § 67-5245. This preliminary order will become final 45 days after the hearing without further review by the director.

Pursuant to Idaho Code § 58-1305(c) and -1306(c), any 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 this decision. Because this decision is for approval of the permit, any party appealing this 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.

DATED this 6th day of December, 2017.



Andrew Smyth
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2017, I caused to be served a true and correct copy of the foregoing, by the method indicated below:

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Margaret Major
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