

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	
)	Case No. CC-2019-PUB-10-001
Encroachment Permit Application)	
No. L-97-S-1171A)	PRELIMINARY ORDER
)	
STEPHAN L. BYRD, ERIKA MULLINS,)	
Applicants.)	
)	
)	
)	
)	

I. BACKGROUND

On March 4, 2019 The Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) from Stephan L. Byrd and Erika Mullins (“Applicants”). In the Application, Applicants seek authorization to construct two (2) boat lifts and replace two (2) mooring buoys in Priest Lake. Agency Record (A.R.”) pp. 1-6 IDL assigned number L-97S-1171A to the Application.

On March 8, 2019, IDL provided notice of the Application to neighbors Steve Coffey and the Gene Larson Trust. (AR., p. 22-23).

On March 15, 2019, IDL received comments in opposition to the Application from Applicants’ neighbor, Steven Coffey. (A.R., pp. 24-49.) and Cal Larson (A.R., pp. 50-52).

Mr. Coffey asserts Applicants are not littoral owners on Priest Lake and the existing dock permit should never have been issued. (AR., p 24)

Mr. Larson asserts Applicants are not lake front owners and that their lots are a vast distance from the edge of the water. (AR., p 50)

Pursuant to Idaho Code 58-1305(c), IDL ordered a hearing. On March 22, 2019, IDL's Director, Dustin T Miller, issued a Notice of Appointment of Hearing Officer appointing Mick Thomas as the hearing officer assigned to conduct the hearing and issue a preliminary order. (A.R., pp 28-29.)

On May 24, 2019, the Hearing Officer conducted a hearing. John Magnuson, Stephan Byrd, Bob McCray and Jacob Mullins appeared on behalf of Applicants. Steven, Susan, Ryan and Valene Coffey appeared, as did Cal Larson. Angela Schaer Kaufmann, Mike Ahmer and Trevor Anderson appeared for IDL. John Magnuson, Stephan Byrd, Steven Coffey, Valene Coffey, Ryan Coffey, Bob McCray, Jacob Mullins, Cal Larson and Trevor Anderson provided testimony.

II. FINDINGS OF FACT

1. Applicants own two (2) adjoining parcels of land near Priest Lake. On August 19, 2015, Charlotte Ushio and Patricia E. Tanner, conveyed to Amy and Stephan Byrd by warranty deed the following property, leally described as: (AR., p. 101)

In the State of Idaho, County of Bonner,
Tract No. 3 – A portion of Government Lot 6, Section 27, Township 60 North of Range 4 West of the Boise Meridian, Bonner County, Idaho, more specifically described as follows:
Beginning at the South Quarter corner of Section 27, Township 60 North of Range 4 West of the Boise Meridian, Bonner County, Idaho;
Then North 1°14' East along the centerline of said Section 27, 660.0 feet; Thence North 89°48' West on a line parallel to the South line of said Section 27, 1099. 16 feet to an iron pin;
Thence South 25°56' East, 102.72 feet to an iron pin which is the true point of beginning for this description;
Thence North 89°48' West, 252.98 feet to an iron pin on the shore of Priest Lake;
Thence South 15°18' East, along the shore of Priest Lake, 50.0 feet to an iron pin;
Thence South 89°48' East, 263.24 feet to an iron pin;
Thence North 25°56' West, 53.61 feet to the true point of beginning.

The Warranty Deed was recorded on August 2, 2016, and conveyed the property to the Byrds in fee simple “free from all encumbrances Except: Current Year Taxes, conditions, covenants, restrictions, reservations, easements, rights and rights of way, apparent or of record.”

2. On March 4, 2019, IDL received an application for permits from Applicants seeking to construct two (2) boatlifts and replace two (2) pre-existing mooring buoys. The boat lifts would lie on the lake bed and the mooring buoys would lie in the lake tethered to pre-existing anchors. (AR., pp. 1-7)
3. On March 8, 2019, IDL sent a Notice of Application to Applicants’ neighbors, Steven Coffey and Cal Larson. (AR., pp. 22-23)
4. On March 15, 2019 Steven Coffey and Cal Larson each filed an objection letter to Applicants’ Application. (A.R., pp. 24-49.) and Cal Larson (A.R., pp. 50-52)
5. Mr. Coffey asserts Applicants are not littoral owners on Priest Lake and the existing dock permit should never have been issued. (AR., p. 24)
6. Mr. Larson asserts Applicants are not lake front owners and that their lots are a vast distance from the edge of the water. (AR., p. 50)
7. On March 16, 2019, IDL received an email from Stephan Byrd waiving the right to a 60 day hearing within 60 days. (AR., pp. 53-54)

III. ANALYSIS AND CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over Payette Lake

1. On March 4 2019, IDL received an Application from Applicants seeking to construct two (2) boatlifts on the bed of Priest Lake and replace two (2) pre-existing mooring buoys in Priest Lake near their property. The mooring buoys would lie in the lake and be tethered to existing anchors. (A.R., pp 1-7.)

2. The State of Idaho Board of Land Commissioners (“Board” or “Land Board”) is authorized to regulate, control and permit encroachments in, on or above the beds of navigable lakes in the state of Idaho. Idaho Code § 58-104(9) and -1303.
3. The Board exercises its authority through the instrumentality of IDL. See Idaho Code § 58-101 and -119. As a result, “the duty of administering the Lake Protection Act falls upon the IDL.” *Kaseburg v. State, Board of Land Commissioners* 154 Idaho 570, 578, 300 P. 3d 1058, 1066 (2013).
4. Under the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”), IDL has the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the LPA. Idaho Code § 58-1304. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Water and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 et. Seq. (“Rules”).
5. In enacting the LPA, the Legislature expressed its intent that:
 - a. [T]he public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act. Idaho code § 58-1301.

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

Any permanent body of relatively still, or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency. Idaho Code § 58-1302(a); IDAPA 20.03.04.010.024. Priest Lake is a navigable lake under the LPA.

7. For purposes of the LPA, the “beds of navigable lakes” are defined as “the lands lying under or below the natural or ordinary high water mark of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.” Idaho Code § 58-1302(b); IDAPA 20.03.04.010.04. According to the Application, both proposed boat lifts would lie on the bed of Priest Lake. The mooring buoys lie in Priest Lake and are attached at anchors that are in place. (A.R., p. 4.) Since the proposed navigational encroachments lie in and/or on the beds of a navigable lake, IDL has jurisdiction to regulate the proposed encroachments.

8. Steven Coffey owns land adjacent to Applicants. In accordance with Idaho Code § 58-1305(c), Mr. Coffey filed written objections to Applicants’ Application. Mr. Coffey has no objection to the replacement of the mooring buoys. Rather, he objects to Applicants’ construction of the two (2) boat lifts. In addition to other points, he argues Applicants do not own the waterfront property abutting Priest Lake and therefore, Applicants are not littoral/riparian owners. (AR., pp. 24 & 26)

B. The Burden of Proof Is With the Applicant.

1. 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).

2. 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).

3. The threshold issue is whether Applicants are littoral owners, with associated littoral rights. The right to build encroachments on a navigable lake rests with riparian or littoral owners. Riparian or littoral owners are the fee owners of land immediately adjacent to a navigable lake, his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease or other grant. IDAPA 20.03.04.010.33. These owners have riparian or littoral rights which allow them to build or use aids in navigation. IDAPA 20.03.04.011.32. If Applicants fail to show they have the rights to build aids in navigation-i.e. the boat lifts or buoys-the analysis need go no further.

4. Ordinarily, the owner of uplands extending to the high-water mark is presumed to possess riparian rights, including the right to wharf out. *Walz v. Bennett*, 95 Conn. 537, 542, 111

A. 834 (1920). However, littoral rights can be conveyed expressly by deed separate from ownership of upland lands. *Lake CDA Investments v. Idaho Dept. of Lands*, 2008 WL 2227623, 6 (2008) citing *Barri v. Schwarz Bros. Co.*, 93 Conn. 501, 506, 107 A. 3 (1919); *Simons v. French*, 25 Conn. 346, 353 (1856). There is nothing in this record that expressly conveys littoral rights to Applicants. Therefore, it must be determined whether they have littoral rights due to their land abutting Priest Lake.

5. Under Idaho law, “a riparian owner (on a navigable river or stream) or a littoral owner (on a navigable lake) takes title down to the natural high water mark.” The State owns the land below the ordinary high water mark. In *re Sanders Beach*, 143 Idaho 443, 453, 147 P. 3d 75, 85 (2006), citing *West v. Smith* 95 Idaho 550, 554, 511 P. 2d 1326, 1330 (1973) and *Erickson v. State*, 132 Idaho 208, 210, 970 P. 2d 1, 3 (1998). The natural high water mark is defined as “the high water elevation in a lake over a period of years, uninfluenced by man-made dams or works, at which elevation the water impresses a line on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.” IDAPA 20.03.04.010.23.

6. The Applicants own two pieces of adjoining property near Priest Lake. One is owned by the Byrds, the other is owned by the McCray Trust. The actual deed conveying the property to the McCray Trust is not in the record. The legal description in the Warranty Deed conveying the property owned by the Byrds is. (AR., pp 100-101)

7. On September 6, 2018, a survey was conducted of both the Byrds’ and McCray Trust properties. The purpose was to determine the littoral right lines with the Coffeys’ property. The survey shows iron pins demark the west property line of both Applicants properties.

8. Based on the Byrds' Warranty deed and the September 6, 2018 survey, Applicants' west property line extends to the iron pins along the shoreline.

9. To establish littoral ownership, Applicants must show that the ordinary high water mark extends to their property, or the iron pins on the shoreline.

10. The party with the burden of proving a claim to land up to the ordinary high water mark must present evidence that will support the finding of an ordinary high water mark at a particular elevation. Idaho Code § 58-104, Idaho Forest Industries, Inc. v. Hayden Lake Watershed Imp. Dist., 135 Idaho 316, 17 P.3d 260 (2000). Therefore, Applicants bear the burden of showing the pins are at the ordinary high water mark.

11. The only evidence of the high water mark in this case is on the September 2018 survey, which states, "The high water mark is westerly of the existing edge of water per Mr. Jim Brady, Idaho Department of Lands Resource Supervisor. (AR., p. 49)

12. The survey shows that the edge of Applicants' property line, as designated by the iron pins, does not extend to the high water mark as of August 3, 2018. In other words, there is land between the edge of Applicants' property line on the shoreline and the high water mark as found on August 3, 2018. Further, the high water mark as described by Mr. Brady indicates the ordinary high water mark is farther west than it was on August 3, 2018; meaning the ordinary high water mark is farther from the westerly edge of Applicants' properties than shown on the survey. (AR., p. 49) Accordingly, there is insufficient evidence that Applicants' property extends to the high water mark.

13. The right to build encroachments on a navigable lake rests with riparian or littoral owners. Riparian or littoral owners are the fee owners of land immediately adjacent to a navigable lake, his lessee, or the owner of riparian or littoral rights that have been segregated

from the fee specifically by deed, lease or other grant. IDAPA 20.03.04.010.33. These owners have riparian or littoral rights which allow them to build or use aids in navigation. IDAPA 20.03.04.010.32.

14. The applicant states “There is established legal precedent as to how these particular deeds were written” . . . “and you have a de facto determination by the department of lands issued previously by the department of lands previously in the context of these two properties that they are littoral because they department of lands would not have issued a two family dock without a determination that they are littoral.” . . . “So to answer your question, is there a deed that says I hear by convey the Byrd property to Stephan Byrd and all littoral rights associated there with? No, there is a description that goes to the water line and the water line is consistent with the ordinary high water mark”. (Hearing Recording, minutes 35-37) The description presented does not plainly confer littoral ownership by deed, lease or other grant as described in IDAPA 20.03.04.010.33.

15. The Applicants may own the property that abuts Priest Lake. However, it is their burden to show that they are littoral owners. The record lacks sufficient evidence to show, by a preponderance of the evidence, that such is the case. Accordingly, they have not sufficiently shown they are littoral owners or subsequently, that they have littoral rights. Without littoral rights, they cannot build encroachments in or on Priest Lake. Based on the evidence in the record, their Application must be denied in its entirety.

PRELIMINARY ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-1171A is DENIED, subject to any conditions imposed by the Director of the Idaho Department of Lands. The record does not

show by a preponderance of the evidence that the Applicants are littoral owners with littoral rights sufficient to qualify for constructing and/or replacing encroachments in Priest Lake.

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 24, 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 21st day of June, 2019.



Richard "Mick" Thomas
Hearing Officer