

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application No.) Case No. PH-2019-PUB-22-005
L-95-S-3997F)
) **FINAL ORDER**
Discovery Coeur d’Alene Investors, LLC dba)
Arrow Point Marina,)
)
Applicant.)
)

I. NATURE OF PROCEEDINGS

Encroachments, including commercial marinas, 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 November 22, 2019,¹ IDL received an encroachment permit application filed by Discovery Coeur d’Alene Investors, LLC dba Arrow Point Marina. A public hearing was held on January 15, 2020. Andrew Smyth served as duly appointed hearing coordinator. On February 6, 2020, the hearing coordinator issued his Preliminary Order, which contains Procedural Background, Findings of Fact, and Conclusions of Law.

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

¹ The Application was received on or around October 17, 2019, but the last update to the Application was received on November 22, 2019.

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. PROCEDURAL BACKGROUND & FINDINGS OF FACT

I concur with the Preliminary Order's Procedural Background and Findings of Fact, except to change the citation of Idaho Code § 55-101 to Idaho Code § 52-101 in paragraph 14 on page 3. I changed this citation because while Ms. Bieze cited Idaho Code § 55-101 in her objection, the accompanying text she cited addressing nuisances is actually found in Idaho Code § 52-101.

III. CONCLUSIONS OF LAW

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

- On page 11 and 12, I amend paragraph 2(b) to remove the last three sentences of the paragraph and replace them with the following:

However, the portion of the swim area below the ordinary high water mark of Lake Coeur d' Alene remains public and may be accessed by the public via the day-use tie ups at the Arrow Point Marina or by non-motorized forms of navigation under one of the two gangways. This offers a protected swimming area within the Lake that is accessible to all members of the public for recreation, including swimming and non-motorized uses. It has been closed off to motorized boats with a deckway, but that deckway makes it safer for swimmers and other non-motorized vessels to use that specific defined area. Rec. 103:42. No evidence in the record suggests any other feasible alternative or an alternative that would provide the same level of safety. In addition, as is more fully discussed below, the design of the marina, with the entrance

located between the two docks, offers some benefit to the adjacent landowners. For these reasons, I find that the decked walkway and the swim area it creates provides major social benefits to the general public consistent with the public trust doctrine and meets the requirements of this rule.

IV. ORDER

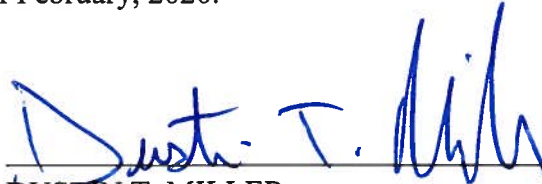
I conclude that the hearing coordinator's Procedural Background, Findings of Fact, and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt the Preliminary Order's Procedural Background, Findings of Fact, and Conclusions of Law with the amendments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

Based on the adopted Procedural Background, Findings of Fact, and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-95-S-3997F is **CONDITIONALLY APPROVED**. The Applicant must submit to IDL a complete and correct copy of a favorable decision from Kootenai County regarding the proposed parking plan.

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 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 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 14th day of February, 2020.



DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Matt Baine
Discovery Coeur d’Alene Investors, LLC
dba Arrow Point Marina
PO Box 3587
Coeur d’Alene, ID 83816

U.S. Mail, postage prepaid
 Hand Delivery
 Federal Express
 Email: mbaine@gozzerranchclub.com

Stephanie Blalack
Senior Planner – Verdis
601 East Front Street, Suite 205
PO Box 580
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 Hand Delivery
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 Email:

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Courtesy Copy via email only
Sandy Young – syoung@verdisnw.com
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Jason Garvey – jason@northidahomaritime.com



Renée Jacobsen, Management Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

| | | |
|--|---|-----------------------------|
| In the Matter of Encroachment Permit |) | |
| Application No. L-95-S-3997F |) | Case No. PH-2019-PUB-22-005 |
| |) | |
| Discovery Coeur d’Alene Investors, LLC dba |) | PRELIMINARY ORDER |
| Arrow Point Marina, |) | |
| |) | |
| Applicant. |) | |
| <hr/> | | |

I. PROCEDURAL BACKGROUND

On or around November 22, 2019¹, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Discovery Coeur d’Alene Investors, LLC dba Arrow Point Marina (“Applicant” or “APM”). Agency Record (“AR”) pp. Arrow Point Marina 00021 – 00041.² IDL assigned application number L-95-S-3997F to the Application. In the Application, the Applicant seeks authorization to enlarge a commercial marina on Lake Coeur d’Alene by extending the northern dock 602 feet beyond the ordinary high water mark (“OHWM”) and adding 36 boat moorages. The Applicant also seeks after-the-fact approval for a decked walkway connecting the north and south docks, which created a protected swimming area. AR, pp. 21 and 28.

IDL processed the Application pursuant to Idaho Code § 58-1306 and IDAPA 20.03.04.030, which resulted in the following timeline of activities:

1. On or around October 17, 2019, IDL received an application from APM. AR, pp. 22-37.

¹ The last update to the Application was received by IDL on November 22, 2019.

² All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Arrow Point Marina 0000.”

2. On October 22, 2019, IDL provided notice of the Application to various agencies. AR, p. 1.
3. On October 23, 2019, IDL provided notice of the Application to Wayne D Johnson Revocable Trust Agreement, Jody Bieze, and Patrick Stroud. AR, pp. 2 – 7.
4. On October 24, 2019, IDL received an email from Jay Loveland indicating Panhandle Health District had no objections with the Application. AR, pp. 8 – 10.
5. On October 25 and November 1, 2019, a notice of the Application was published in the Coeur d’Alene Press, which has general circulation in Kootenai County, Idaho. AR, p. 11.
6. On November 13 and 26, 2019, IDL received emails Laura Jones from Kootenai County indicating the Applicant’s proposed parking plan does not comply with the County’s current standards. AR, pp. 12 – 19 and 43 – 46.
7. On or around November 14, 2019, IDL received an objection to the Application and request for hearing from Jody Bieze along with the requisite \$75 fee to cover cost of publishing notice of hearing. AR, pp. 20 and 99. Ms. Bieze is concerned that the additional boat moorages will lead to increased boat traffic and increase the wakes damaging her shoreline, dock, and boat. AR, pp. 52 – 70; Rec, 35:30.
8. On or around November 22, 2019, IDL received updates to the Application from APM and deemed the Application to be complete. AR, pp. 21 and 38 – 43.
9. On or around December 5, 2019, IDL received notice from the Applicant authorizing Verdis to represent it in this matter. AR, p. 47.
10. Pursuant to Idaho Code § 58-1306(c), IDL ordered a hearing in this matter. On December 10, 2019, Mr. Dustin T. Miller, IDL Director, issued a Notice of Appointment of Hearing Coordinator and Hearing in which he appointed Mr. Andrew Smyth to be the Hearing

Coordinator and scheduled the hearing to be at held at 1:00 p.m. Pacific Time on Wednesday, January 15, 2020, at the IDL Office located in Coeur d'Alene, Idaho. AR, pp. 48 – 51.

11. On December 11 and 18, 2019, IDL published an advertisement for the public hearing in the Coeur d'Alene Press. AR, p. 99.

12. Pursuant to Idaho Code § 58-1306(c), a hearing regarding the Application was held on January 15, 2020. The participants appearing and offering comments at the hearing were: Ms. Sandy Young, Verdis; Mr. Matt Bain, APM; Mr. John Condon, North Idaho Maritime; Ms. Jody Bieze; Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Kaufmann, Deputy Attorney General, counsel for IDL. AR, p. 71; Hearing Recording.³

13. Evidence admitted into the administrative record during the hearing consisted of witness testimony on behalf of the parties, Ms. Young's presentation slides, Applicant's parking map, Encroachment Permit L-95-S-3997E, Mr. Ahmer's line of navigation map, Mr. Ahmer's written statement, plats, and Kootenai County Case No. MIN11-0004 Order. AR, pp. 72 – 113.

14. Questions and comments regarding the dock storage along the southern portion of the marina were made at various points in the record. AR, pp. 53, 63 and 102; Rec, 10:30, 37:40 and 52:18. Dock storage is not part of the Application, nor is it allowed under APM's current Encroachment Permit L-95-S-3997E, and is therefore outside the scope of this hearing and the jurisdiction of the Hearing Coordinator. In addition, Ms. Bieze raised questions regarding the Applicant's past application, future plans, and compliance with Idaho Code § 55-101. AR, pp. 54 and 67 – 70. These matters are also outside the scope of the Application and the jurisdiction of the

³ 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 minute(s) and second(s) location on that recording. For example: Rec, mm:ss.

Hearing Coordinator. While these matters will not be addressed in this order, Ms. Bieze is welcomed to reach out to the Applicant and IDL staff to discuss.

II. FINDINGS OF FACT

1. The Applicant owns Kootenai County parcels AIN 137430 and 191817. AR, p. 29; Rec, 32:38.⁴
2. The Applicant's property is located adjacent to Lake Coeur d'Alene. AR pp. 21, 73 and 75.
3. The Applicant currently holds IDL Encroachment Permit L-95-S-3997E, which authorizes a commercial marina extending 470 feet waterward from the OHWM with 146 boat slips, 28 jet ski slips, 300 feet of public day use boat tie ups, and 78 upland vehicle parking spaces. AR, pp. 79 – 97 and 99; Rec, 7:33, 10:15 and 28:56.
4. If approved, the Applicant would be authorized to have a commercial marina that would extend 602 feet from the OHWM and consist of 182 boat slips and 118 upland vehicle parking spaces as well as a decked walkway that creates an enclosed swim area. AR, pp. 21 and 28; Rec, 7:42, 25:20 and 30:14.
5. The marina is currently located 47 feet from the northern property line and approximately 150 feet from the shoreline to the south and southeast. These distances would remain unchanged with the proposed plan. AR, pp. 27 – 29, 63, 74 and 103; Rec, 8:15.
6. Ms. Bieze and her family have owned the second littoral property southeast from the Applicant's property for over 60 years. AR, pp. 52 and 57; Rec, 35:46.

⁴ The record contains conflicting information regarding the littoral property and littoral rights. AR, pp. 29, 38 – 41. The Applicant incorrectly indicated in the Application that its littoral rights are leased. AR, p. 35. While the Applicant leases the portion of the lakebed occupied by the marina, it owns the adjacent littoral property and the associated littoral rights. Rec, 22:55.

7. Ms. Bieze has observed an increase in damage to her property from natural waves and boat wake waves since 1982. Rec, 35:50.

III. CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over the Beds and Banks of Lake Coeur d'Alene.

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

2. The Land Board exercises its authority through the instrumentality of IDL. 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. The Hearing Coordinator is authorized by the Director to issue this Preliminary Order. AR, p. 48; I.C. § 67-5245. The hearing in this matter began at approximately 1:00 p.m. Pacific Time and concluded at approximately 2:13 p.m. Pacific Time on January 15, 2020. With all evidence submitted, the matter is fully before the Hearing Coordinator.

4. In accordance with Idaho Code § 67-5206 and the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”), IDL has promulgated rules for navigable waters encroachment permits – the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho (“Rules”). IDAPA 20.03.04.000 *et seq.*

5. In enacting the LPA, the Idaho Legislature declared its intent that:

[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.

I.C. § 58-1301. “IDL is required to balance the competing interests involved while determining whether to approve permits for navigational encroachments.” *Brett v. Eleventh St. Dockowner’s Ass’n Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 810 (2005); IDAPA 20.03.04.012.

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

[A]ny 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 Coeur d’Alene is a navigable lake under the LPA; and therefore, IDL has jurisdiction to regulate the proposed encroachments. *See State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

B. The Applicant is Qualified to Make Application.

IDAPA 20.03.04.020.02 states, in part, that: “Only persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” I find that the Applicant, as owner of property adjacent to Lake Coeur d’Alene, is a littoral owner, as defined in IDAPA 20.03.04.010.33, and is qualified to make application for an encroachment permit.

C. 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).

D. The Application is Conditionally Approved.

1. Commercial Marina

a. IDAPA 20.03.04.010.09 defines a commercial marina as “[a] commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public.” Ms. Young and Mr. Bain indicated that the general public may lease moorages for the season, or use the 300 feet of tie ups for day use. Rec, 10:02 and 26:52. I find that this Application is, in part, for a commercial marina.

b. IDAPA 20.03.04.015.03.a states:

Commercial marinas must have a minimum of fifty percent (50%) of their moorage available for use by the general public on either a first come, first served basis for free or rent, or a rent or lease agreement for a period of time up to one (1) year. Moorage contracts may be renewed annually, so long as a renewal term does not exceed one (1) year. Moorage for use by the general public may not include conditions that result in a transfer of ownership of moorage or real property, or require membership in a club or organization.

Ms. Young stated, “[t]his is a public marina, so all dock slips are offered to the public that opens in February of every year and this area of the dock has 300 feet of tie-ups that the general public can

use for day use or for even less than day use.” Rec, 10:02. Mr. Bain elaborated on the management of the leases, stating:

The slips, every February, are sent out on a first right of refusal to the existing lease holder. At that point in February, if somebody does not renew their slip for the following season, we then go do the wait list which is now established. Starting in 2019 was the first time that we ever reached full occupancy so now we have a wait list established so that if someone does resign their annual lease we have a waitlist that we will then defer to and start to fill the open spots.

Rec, 26:52. Mr. Bain also stated that leases have one-year terms with moorage available April 1 through October 31. Rec, 28:11. He also clarified that membership in a club or organization is not required to lease a slip. Rec, 28:30. These statements are consistent with IDL’s conclusions based on a meeting with the Applicant in December 2019. AR, p. 102. I find that the proposed expansion of the commercial marina would meet this standard as all moorages are available to the general public on a first come, first served basis with annual lease agreements and without requiring membership in a club or organization.

c. IDAPA 20.03.04.015.03.c states:

If local city or county ordinances governing parking requirements for marinas have not been adopted, commercial marinas must provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) public watercraft or float home moorages. If private moorage is tied to specific parking spaces or designated parking areas, then one (1) parking space per one (1) private watercraft or float home moorage shall be provided. In the event of conflict, the local ordinances shall prevail.

If the Application is approved, APM would increase the number of boat slips by 36, from 146 to 182, and the number of parking spaces by 40, from 78 to 118. AR, pp. 21 and 79; Rec, 7:42 and 30:14. Currently there are 78 parking spots on S. Arrow Point Drive. Rec, 28:56. While these parking spaces may also be used by people visiting the condominiums, restaurant or the lake club

located near the marina, these parking spaces are in addition to the County's requirements for parking used by owners of the condos. Rec, 17:03 and 33:04.

Kootenai County has ordinances governing parking requirements for marinas. AR, pp. 12 – 19 and 44 – 46. The Applicant has submitted plans to Kootenai County for a Site Disturbance Permit for the 40 new parking spaces designated for the marina. Rec, 16:50 and 18:55. At this time, because the County has not rendered its final decision on APM's submitted plans, I cannot determine if APM meets the requirements of IDAPA 20.03.04.015.03.c.

d. IDAPA 20.03.04.015.03.d states, “[i]f a commercial marina can be accessed from a road, marina customers must be allowed access via that road.” Ms. Young testified that customers access the marina from State Highway 97 via S. Arrow Point Drive. AR, p. 73; Rec, 19:48. I find that the commercial marina meets this requirement.

e. IDAPA 20.03.04.015.13.d states:

Docks, piers, or other works may extend to a length that will provide access to a water depth that will afford sufficient draft for water craft customarily in use on the particular body of water, except that no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director. If a normally accepted line of navigability has not been established through use, the director may from time to time as he deems necessary, designate a line of navigability for the purpose of effective administration of these rules.

Mr. Ahmer provided IDL's interpretation of the location of the line of navigability. AR, p. 98.

This shows the line of navigability roughly parallel to the general shoreline following the length of the docks and marinas shown on a Google Earth image. APM has existed since at least 2003, and has been allowed to extend 470 feet waterward from the OHWM since at least 2006. AR, pp. 79, 86, and 99; Rec, 8:02. If the Application is approved, the commercial marina would extend 602

feet beyond the OHWM. AR, pp. 25, 27, 29, 79 and 99; Rec, 7:50 and 25:20. I find that the expansion would be located beyond the line of navigability established through use.

Mr. Bain stated that in 2019, the marina reached full occupancy and they have a wait list of people wishing to lease a boat slip. Rec, 27:01. Mr. Condon stated, “This county is growing and there is a need for additional moorage on the lake so the people of this county can enjoy that waterway.” Rec, 1:00:23. I find that there are navigational and economic needs to expand the marina beyond the line of navigability.

f. IDAPA 20.03.04.015.13.e states, in applicable part that, “nonnavigational encroachments will have [an] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines.” While the record shows the dock is located 47 feet from the northern property boundary and 150 feet from the shoreline to the south, the record does not contain any information regarding the distances between the Applicant’s encroachments and the adjacent littoral owners’ littoral right lines. AR, pp. 27 – 29, 63, 74 and 103; Rec, 8:15. However, there are no objections from any adjacent owner asserting that the Applicant’s encroachments infringe, or would infringe, on another’s littoral rights. Ms. Young stated, “[s]etbacks to the adjacent property lines will remain the same. They’ve been 47 feet [to the North] and 150 feet to the South.” Rec, 8:17. Mr. Ahmer reached the same conclusion stating “the proposed commercial marina addition does not appear to affect or change the 25-foot setback required from each property/littoral boundary.” AR, p. 103. Ms. Bieze also calculated a similar distance from her shoreline to the marina. AR, p. 63. Given that IDL has already granted a permit for the marina in its existing location and given that the proposed addition is not located closer to neighboring littoral right lines, I find that there is no presumed adverse effect upon adjacent littoral rights.

2. Decked Walkway Enclosing the Swim Area

a. IDAPA 20.03.04.010.16 defines encroachments not in aid of navigation as follows:

Includes all other encroachments on, in, or above the beds or waters of a navigable lake, including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation. It shall also include float homes and boat garages. The term “encroachments not in aid of navigation” may be used interchangeably herein with the term “nonnavigational encroachments.”

Regarding the 610 foot-long walkway between docks that effectively created a swim area, Ms.

Young stated, “at one time this was open . . . but this area has been closed off to make it safer for

swimmers, kayakers, and paddle boarders who are able to go underneath this gangway and then exit

out this way.” Rec, 1:04:30. While a commercial marina, by definition, is a navigational

encroachment, *see* IDAPA 20.03.04.010.09, I find that the 610 feet of decked walkway that

connects the northern and southern docks and creates a protected swim area, does not meet the

definition of an encroachment in aid of navigation as it does not support watercraft or moorage.

b. IDAPA 20.03.04.030.02 states that:

Encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.

The uplands adjacent to the swim area which includes a beach, restaurant, and club house are

private property and may not be accessible to the public. AR, p. 102. However, the portion of the

swim area, below the ordinary high water mark of Lake Coeur d’Alene remains public and may be

accessed by the public via the day-use tie ups at the Arrow Point Marina or by non-motorized forms

of navigation under one of the two gangways, thereby offering a protected swimming area within

the Lake that is accessible to all members of the public. In addition, as is more fully discussed below, the design of the marina, with the entrance located between the two docks, offers some benefit to the adjacent littoral owners. For these two reasons, I find that the decked walkway and the swim area it creates provides social benefits to the general public and meets the requirements of this rule.

c. IDAPA 20.03.04.020.03 states, “Nothing in these rules shall excuse a person seeking to make an encroachment from obtaining any additional approvals lawfully required by federal, local or other state agencies.” One such approval that the Applicant should be cognizant of is based on Idaho Code § 67-7031 which authorizes local, political subdivisions of the state of Idaho to adopt ordinances which establish operational zones for personal watercraft within its territorial limits. Kootenai County Ordinance 6-2-6(A)(2) authorizes Kootenai County to designate “no watercraft zones” where motorized vessels are prohibited. There is no evidence in the record that APM has applied to Kootenai County for a designated “no watercraft zone” along the shoreline of the marina. However, based on Ms. Young’s statements, it is apparent that APM intended to create a boat-free area for safer swimming for which County approval may be required.

3. The littoral rights of an upland owner adjacent to navigable waters include the right “to maintain their adjacency to the lake and make use of their rights” as littoral owners by “building or using aids to navigation.” I.C. § 58-1302(f). However, the proposed encroachments must be weighed against the other Lake Values itemized in Idaho Code § 58-1301, as follows:

[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.

4. As to the economic necessity or justification for or benefit derived from the proposed encroachment, Mr. Bain and Mr. Condon demonstrated a public demand for additional moorage on Lake Coeur d'Alene as the marina is at full capacity with a wait list and the population of Kootenai County is increasing. Rec, 27:01 and 1:00:23.

5. 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

Ms. Bieze has observed an increase in damage to her property from natural waves and boat wake waves since 1982. Rec, 35:50. To protect her property Ms. Bieze stated:

I replaced my dock in 2013. The design of my new dock was purposely designed with oversized logs with the hope to mitigate the wave impact to boat and dock. Unfortunately, the size and the number of waves continue to roll over the dock and the energy impact to my dock is significant. That would be for the landowners, for the three of us, between the marina and the Panhandle Yacht Club.

Rec, 38:37. Ms. Bieze commented that the addition of new moorages would increase the concentrated traffic in and out of the marina, and increase negative impact to the shoreline and docks. AR, p. 65. Regarding boat traffic in general, Mr. Condon stated, "there truly is increased boat traffic and boat wakes that do, do damage to properties." Rec, 59:15.

APM offers only one entrance to the marina from the Lake. This limits boat traffic to one defined lane entering and exiting the marina. APM's entrance is located approximately 300 feet from Ms. Bieze's shoreline. AR, pp. 28, 63 and 98. This design limits APM customers from

boating near the adjacent shorelines. Other marina designs, such as the Panhandle Yacht Club, force customers to navigate near the shoreline to reach the marina. AR, p. 98.

Mr. Condon stated that the expansion of the marina will protect Ms. Bieze's and her neighbor's properties from natural waves. He stated, "This extension of the encroachment actually will protect these properties further from the naturally occurring waves because the prevailing winds typically come from the south to the north and it is somewhat protected by Arrow Point but it also has a tendency to come and reach around the [point] there and in fact by extending this out, will actually protect those properties further." Rec, 58:36.

Almost perpendicular to Ms. Bieze's property, and parallel to the eastern edge of APM, are three Kootenai County no-wake buoys paid for by APM. Mr. Bain stated that if the Application is approved, these buoys would be relocated waterward from the marina. Rec, 59:35 and 1:00:45.

The additional boat slips may increase boat traffic in this area. However, regardless of the approval of the Application, the public has the right to navigate on Lake Coeur d'Alene in front of Ms. Bieze's shoreline. Ultimately, boaters are responsible to boat responsibly and in compliance with local and state boating laws. Enforcement of the Safe Boating Act and local waterways ordinances are outside the jurisdiction of IDL and outside the scope of this proceeding. The design of the marina and the no-wake buoys paid for by the Applicant might help mitigate damage to Ms. Bieze's property by natural and boater-caused waves.

b. Protection of navigation

No specific evidence was presented regarding protection of navigation. If the application is approved, the marina would extend beyond the line of navigability and reduce the area available to the public to navigate. However, the additional moorages, as part of the commercial marina, by definition do aid navigation. As discussed above, these moorages fill a

local demand. Additionally, these moorages would likely alleviate some of the use of public ramps around the Lake. I find that the navigational benefits from the proposed encroachments mitigate the possible impacts to navigation.

c. There is no evidence that the proposed encroachments would negatively impact fish and wildlife habitat, aquatic life, aesthetic beauty, recreation, aesthetic beauty or water quality.

6. I find that the proposed expansion of the commercial marina and the decked walkway enclosing a swim area comply with Rules and that the economic justification for and benefits of the proposed encroachments are not outweighed by the Lake Values with one exception. The Applicant has not provided documentation demonstrating APM's compliance with Kootenai County's parking requirements for marinas.

I conclude that the Application is conditionally approved for enlargement of the commercial marina, including the extended walkway deck that results in a boat-free swim area as set forth below, with the conditions that the Applicant submits to IDL a complete and correct copy of a favorable decision from the County regarding the proposed parking plan.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L95S3997F is CONDITIONALLY APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

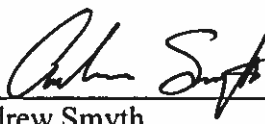
This order issued herein is a Preliminary Order, pursuant to Idaho Code §§ 58-1306(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Officer issued on December 10, 2019, which states as follows:

The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty (30) days after the conclusion of the hearing.

The Preliminary Order can and will become final without further action of the agency if the Director does not issue a Final Order within thirty (30) 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), 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 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 6th day of February, 2020.



Andrew Smyth
Hearing Officer