

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:) Case No. CC-2020-PUB-22-001
)
Encroachment Permit Application No. ERL-95-S-) **FINAL ORDER**
1106B)
)
David Peterson,)
)
Applicant.)

I. NATURE OF PROCEEDINGS

Encroachments, including single-family docks, placed in or on the beds of navigable lakes require a permit issued by the Idaho Department of Lands (“IDL”) pursuant to the requirements of the Lake Protection Act, title 58, chapter 13, Idaho Code; and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On or around March 10, 2020, IDL received a complete encroachment permit application filed by David A. Peterson. A hearing was held on June 4, 2020. Andrew Smyth served as duly appointed hearing officer. On July 1, 2020 the hearing officer 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 § 58-1305(c) and IDAPA 20.03.04.025 on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my personal expertise gained through education, training, and experience. I relied on the record for this matter, including

examining the hearing officer'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.

III. CONCLUSIONS OF LAW

I concur with the Preliminary Order's Conclusions of Law, except that in paragraph 10 on the 10th line I amend the citation "See Findings of Fact ¶ 23" to read "See Findings of Fact ¶ 15."

IV. ORDER

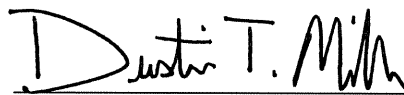
I conclude that the hearing officer's Procedural Background, Findings of Fact, and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt the Preliminary Order's Procedural Background, Findings of Fact, and Conclusions of Law with the amendments 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 ERL-95-S-1106B is CONDITIONALLY APPROVED. The Applicant shall acquire and maintain a submerged land lease from IDL pursuant to IDAPA 20.03.17.020.02 and maintain the concrete pier in a state of repair that eliminates concrete from being deposited into the waters, or onto the bed of, Lake Coeur d'Alene.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.025.09, 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 § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.09, 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 20th day of July, 2020.



DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING


I hereby certify that on this 20th day of July, 2020. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Kourtney Romine
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BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. ERL-95-S-1106B)	Case No. CC-2020-PUB-22-001
)	
David A. Peterson,)	PRELIMINARY ORDER
Applicant.)	
)	
)	
)	
)	

I. PROCEDURAL BACKGROUND

On or around March 10, 2020, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by David A. Peterson (“Mr. Peterson” or “Applicant”). Agency Record (“AR”) pp. Peterson 00015 – 00031.¹ IDL assigned application number ERL-95-S-1106B to the Application. In the Application, the Applicant seeks authorization to replace parts of his existing, permitted single-family dock on Lake Coeur d’Alene, in Kootenai County, Idaho.

IDL processed the Application pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025, which resulted in the following timeline of activities:

1. On or around February 12, 2020, IDL received Mr. Peterson’s initial encroachment permit application. AR, pp. 5 – 14.
2. On February 19, 2020, IDL provided notice to the Applicant that the initial application was incomplete. AR, pp. 1 – 14.
3. On March 10, 2020, IDL received additional information from the Applicant and deemed the Application complete. AR, pp. 15 – 31.

¹ All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Peterson 0000.”

4. On March 30, 2020, IDL provided written notice of the Application to the adjacent littoral owners on each side of the Applicant's property, Thomas Robinson and Rick White. AR, pp. 32 – 35. Neither adjacent littoral owner filed an objection to the Application with IDL.

5. At IDL's request, on April 24, 2020, a hearing on the Application was ordered pursuant to Idaho Code § 58-1305(c) due to the existence of unusual circumstances of the Application, including that granting it would require variance from the regulatory standards, and that IDL has previously granted similar variances to Mr. Peterson based on similar site specific considerations of this littoral property.

6. Mr. Dustin T. Miller, IDL Director, issued a Notice of Appointment of Hearing Officer and Hearing, in which he appointed Mr. Andrew Smyth as the Hearing Officer and scheduled the hearing to be at held at 1:00 p.m. Pacific Time on Tuesday, May 5, 2020, via video teleconference. AR, pp. 36 – 39.

7. On May 1, 2020, Mr. Peterson and IDL, through their respective legal counsel, jointly filed a Stipulation to Continue Hearing, which requested that the hearing be rescheduled no later than May 19, 2020. In addition, the Applicant waived the 60 day post-application hearing deadline set forth in Idaho Code § 58-1305(c) for the period of the continuance. AR, pp. 42 and 43.

8. On May 4, 2020, the Hearing Officer issued the Order Granting Stipulation to Continue Hearing. AR, pp. 46 – 47.

9. However, there was no unanimous availability for a hearing date by May 19. On May 20, 2020, following a telephonic scheduling conference the Hearing Officer issued the Amended Notice of Hearing, scheduling the hearing for Thursday, June 4, 2020 at 9:00 a.m. Pacific Time via video teleconference. AR, pp. 49 – 51.

10. Pursuant to Idaho Code § 58-1305(c), a hearing regarding the Application was held on June 4, 2020. The participants appearing and offering evidence at the hearing were: Mr. Peterson, Applicant; Mr. Douglas Marfice, legal counsel for the Applicant; Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Kaufmann, Deputy Attorney General and legal counsel for IDL. Hearing Recording.²

11. Evidence admitted into the administrative record during the hearing consisted of witness testimony from Mr. Peterson, witness testimony from Mr. Ahmer on behalf of IDL, Applicant's Exhibits A – J, and IDL's Exhibit 1. AR, pp. 54 – 151 and 156 - 160.

II. FINDINGS OF FACT

1. The Applicant owns Kootenai County parcel 07060001003A with AIN 139277. AR, pp. 18 and 25.

2. The Applicant's property has 93.06 feet of frontage on Lake Coeur d'Alene in Rockford Bay. AR pp. 131 and 159; Rec. 11:55.

3. The Applicant currently holds encroachment permit ERL-95-S-1106A, issued by IDL on May 18, 2000. AR, pp. 58 – 60; Rec. 18:19.

4. On or about January 3, 1975, approximately twenty-five years before IDL's issuance of ERL-95-S-1106A, IDL accepted the completed Notice of an Encroachment on a Navigable Lake or Navigable Stream ("Permit No. ERL-95-S-1106") from Elvin L. Lindsay, a predecessor littoral owner to the Applicant. AR, pp. 78 – 81.

5. The Notice of an Encroachment on a Navigable Lake or Navigable Stream was a form created by IDL following the Idaho Legislature's passage of the Lake Protection Act, Title 58,

² 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 recording number and the minute(s) and second(s) location on that recording. For example: Rec. #, mm:ss.

Chapter 13, Idaho Code (“LPA”), in 1974. *See* AR, p. 78. At the time Mr. Lindsay filed the notice, the LPA required littoral owners to do the following:

On or before December 31, 1974, every person owning or possessing an existing navigational or nonnavigational encroachment on, in or above the beds or waters of a navigable lake in this state shall file with the board notification thereof. Such notice shall be upon forms to be furnished by the board and contain such information concerning the encroachment as would be necessary on plans submitted with an original application under the provisions of this act.

I.C. § 58-153 (1974) (renumbered to I.C. § 58–1312 by 1990 Idaho Sess. Laws 986; amended to present text by 2006 Idaho Sess. Laws 135, H.B. 524).

6. Permit No. ERL-95-S-1106 acknowledged the following existing encroachments associated with the littoral property: 44’ x 32’ swimming pool and breakwater, 16’ x 36’ fixed dock, 14’ x 14’ hinged ramp, 22’ x 30’ floating boathouse (“Pre-LPA Encroachments”). AR, pp. 78 – 81. Mr. Lindsay indicated that the Pre-LPA Encroachments were originally installed before 1971. AR, p. 78.

7. The Pre-LPA Encroachments remained in Lake Coeur d’Alene until Mr. Peterson filed the application resulting in his current permit. AR, p. 66; Rec. 21:00. Considerations of both Mr. Peterson and IDL for the issuance of ERL-95-S-1106A appear to have been Mr. Peterson’s prior removal of the 44’ x 32’ swimming pool, breakwater, and a 6’ x 32’ dock next to the swimming pool; and the conditional removal of the 22’ x 30’ floating boathouse. AR, pp. 62 – 66 and 132; Rec. 21:00.

8. The Applicant’s current permit ERL-95-S-1106A authorizes a “24’ x 34’ single-slip floating dock; existing 16’ x 32’ pier & 14’ x 14’ ramp & removal of boat garage.” AR, pp. 58 – 60; Rec. 18:19.

9. In the present matter, the Applicant is seeking authorization to replace the existing, permitted single-slip floating dock measuring twenty-four feet wide and thirty-four feet long (24' x 34'), and totaling 581 square feet, with a two-slip dock measuring thirty-seven feet wide and thirty-five feet long (37' x 35'), and totaling 648 square feet. AR, pp. 69, 119, 123, and 132.

10. The Applicant is also seeking authorization to replace the existing (Pre-LPA Encroachment) ramp that is fourteen feet wide and fourteen feet long (14' x 14'), totaling 196 square feet, with a ramp³ that is seventeen feet long and three feet wide (17' x 3'), and totals 51 square feet. AR, pp. 69, 123, and 132.

11. The combined surface decking area of the existing ramp and floating dock is 777 square feet. AR, pp. 119 and 132; Rec. 21:31, 24:32, 49:55, and 57:25.

12. The combined surface decking area of the proposed ramp and floating dock is 699 square feet. AR, pp. 119, 123, and 132; Rec. 53:29.

13. The ramp and floating dock connect to the shore by the existing (Pre-LPA Encroachment), permitted concrete pier⁴ that measures sixteen feet wide and thirty-six feet long (16' x 36'). AR pp. 58, 68, 69, 126, 123, and 124; Rec. 13:12.

14. The concrete pier was constructed prior to 1975. AR, pp. 78 and 160; Rec. 13:20.

15. The Applicant is not seeking authorization to modify or replace the concrete pier; and the Applicant has no present intention to remove the concrete pier. Rec. 1:39:02 and 2:02:59. During conversations with IDL prior to submission of the Application, Mr. Peterson indicated that it would cost over \$60,000 to remove the concrete pier. Rec. 1:56:52.

³ The diagram provided in the Application calls this ramp a "gangway."

⁴ There was some discussion during the hearing whether to call this encroachment a quay or a pier. Rec. 1:13:29. It is currently described as a pier in the existing encroachment permit. AR, p. 58. It was referred to as a fixed dock in the application for the current permit. AR, p. 69. It was identified as a fixed dock in Mr. Lindsay's 1975 notice. AR, p. 78 and 160; Rec. 13:20. In the Application under review now, it is identified as a concrete pad. AR, p. 123. For the purpose of this order, it is referred to as a concrete pier.

16. While IDL has not conducted a site visit to inspect Mr. Peterson's permitted encroachments, the record indicates that at a minimum, on its northeast side, the concrete pier extends eight feet (8') beyond the ordinary high water mark ("OHWM"), and at most twenty feet (20') beyond the OHWM, on its southwest side.⁵ AR, pp. 69 and 124; Rec. 2:01:15.

17. As permitted, the most waterward extent of the existing dock extends sixty-eight feet (68') beyond the OHWM.⁶ AR, p. 69.

18. If approved, the most waterward extent of the proposed dock would extend up to seventy-two feet (72'), but more likely approximately sixty-eight feet (68') beyond the OHWM.⁷ AR, p. 124; Rec., 2:01:15.

19. IDL offered into evidence its undisputed determination that regardless of the actual total length, the proposed dock would not extend beyond the line of navigability. AR, pp. 128, 130, and 160.

20. The Applicant's property is located to the southwest of littoral property owned by Thomas Robinson, and to the northeast of littoral property owned by Rick White. AR, pp. 21 and 23; Rec. 25:02.

⁵ The record is not clear regarding how far the concrete pier extends. Contradictory evidence exists about how much of the concrete pier is located below the OHWM. The schematic incorporated into Mr. Peterson's current encroachment permit shows the concrete pier extending twenty feet (20') below the OHWM. AR, p. 69. The schematic provided with the Application shows that on one side it extends sixteen feet (16') below the OHWM and the other side extends eight feet (8'). AR, p. 124. Mr. Ahmer testified that while he has not been onsite to measure the distance the concrete pier extends below the OHWM, he used aerial imagery to estimate, and his findings are consistent with the schematic submitted as part of the Application. Rec. 2:01:15.

⁶ This is based on the maximum sum of the existing parts, as follows: The concrete pier extends twenty feet (20') below the OHWM, the ramp extends fourteen feet (14') below the OHWM, and the dock extends thirty-four feet (34') below the OHWM.

⁷ This is based on the maximum sum of the proposed parts, as follows: The concrete pier, along its furthest reach extends up to twenty feet (20') below the OHWM, the proposed ramp extends seventeen feet (17') below the OHWM, and at its longest point, the floating dock extends thirty-five feet (35') below the OHWM. It should be noted that while the concrete pier has not been modified since the Notice of an Encroachment on a Navigable Lake or Navigable Stream, the described distance it extends beyond the OHWM might have decreased by up to four feet (4'), possibly due to accumulation of sediment caused, in part, by the pier. The proposed encroachment, if approved, could be four feet (4') longer than the existing dock.

21. The proposed dock would be moved closer to, and be located thirty-eight feet (38') from the littoral right line shared with Mr. White; and would be moved away from, and be located fifteen feet (15') from the littoral right line shared with Mr. Robinson. AR, p. 128.

22. IDL offered into evidence its undisputed determination that the proposed dock would be at least 10-feet away from both littoral right lines. AR, p. 160.

23. Mr. Peterson offered evidence that his neighbors, the Robinsons, limit his use of the existing dock by placing floating toys next to Mr. Peterson's dock throughout the boating season, which prevent him from mooring watercraft off the eastern finger of his dock. AR, pp. 111 – 115, 134, and 143 – 147; Rec. 33:27. Mr. Peterson testified that it was only after he was unable to reach an agreement with the Robinsons, which would allow him to make full use of his dock, that Mr. Peterson began looking at reconfiguring the existing dock. Rec. 39:56. Mr. Peterson also testified that having moorage for his two boats would eliminate the need to moor a vessel off the eastern finger of his dock. Rec. 47:08.

24. IDL offered evidence, disputed by the Applicant, that the concrete pier, measuring sixteen feet wide and thirty-six feet long (16' x 36') should be treated as a component of the whole proposed single-family dock; which, would result in the proposed dock being larger than the 700 square feet maximum size for a single-family dock, and being outside of the limitation that no part of the structure waterward of the OHWM may exceed 10-feet in width. AR, pp. 156, 159, and 160; Rec. 1:55:56 and 2:07:05.

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 Officer is authorized by the Director to issue this Preliminary Order. AR, p. 36; I.C. § 67-5245. The hearing in this matter began at approximately 9:00 a.m. Pacific Time and concluded at approximately 11:22 a.m. Pacific Time on June 4, 2020. With all evidence submitted, the matter is fully before the Hearing Officer.

4. In accordance with Idaho Code § 67-5206 and the 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. Mr. Peterson is qualified to make application

IDAPA 20.03.04.020.02 states, in part, “[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” I find that Mr. Peterson, as the owner of property adjacent to Lake Coeur d’Alene, is a littoral owner, as defined in IDAPA 20.03.04.010.33, and is therefore 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 and Variance Granted to Specified Standards in Subsection 015.01.

1. Pursuant to the LPA, a permit is required for the Applicant to replace parts of the existing navigational encroachments for the following reasons: a) the existing encroachments do not meet the current requirements for new encroachments; b) the location of the replacement will change from the existing encroachments; and c) the replacement will not be the same shape as the existing encroachment. I.C. 58-1305(e)(2, 3 and 4). “While [littoral] owners have traditionally had a right to ‘wharf out,’ the right is clearly subject to state regulation as can be seen by the Lake Protection Act.” *Dupont v. ID State Bd. of Land Comm’rs*, 134 Idaho 618, 625, 7 P.3d 1095, 1102 (2000). As the agency authorized to regulate the Applicant’s navigational encroachments, IDL has the authority to grant variances to certain single-family dock standards when justified by site specific considerations. IDAPA 20.03.04.015.01.d.

2. IDAPA 20.03.04.010.36 defines 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.” Mr. Peterson testified that the purpose of the Application and the proposed dock is to have moorage for at least his two boats. Rec. 47:08. The Applicant’s property consists of approximately 93.06 feet of waterfront footage. AR, pp. 131 and 159. I find that the Application is for a single-family dock.

3. IDAPA 20.03.04.015.01.a, states, “[t]he following parameters govern the size and dimensions of single-family docks and two-family docks. No part of the structure waterward of the

natural or ordinary high water mark or artificial high water mark shall exceed ten (10) feet in width, excluding the slip cut out.” During the hearing, Mr. Ahmer recognized that the term ‘structure’ is not defined in IDAPA 20.03.04. Rec. 1:21:38. However, given the use of the term ‘structure’ in this section of the Rules setting minimum standards for single-family and two-family docks, it would be difficult to imagine that it refers to anything other than the dock.

There is no question whether the ramp and the floating dock are parts of the Applicant’s single-family dock. The proposed floating dock is a structure providing noncommercial moorage that serves the Applicant as the waterfront owner, and the ramp is essential for access above the water to the dock – both are components of a single-family dock. The proposed ramp would be three feet (3’) wide and the widest part of the floating dock would be eight feet (8’) wide. Neither of these parts of the proposed single-family dock would exceed ten feet (10’) in width.

4. The questions remain whether the concrete pier is a part of the single-family dock; and, if so, does any part of it exceed ten feet (10’) in width causing it to be outside of the minimum standards required under IDAPA 20.03.04.015.01.a.

a. Addressing the second question first, the evidence of record shows that the concrete pier is, today, and has always been, since before 1971, 16’ x 32’ or 576 square feet. AR, pp. 58, 62, 69, 79, 123, 124, 126, and 159; Rec. 13:12. The width of the concrete pier exceeds ten feet (10’). And, while not all of the concrete pier is below the OHWM of Lake Coeur d’Alene, some of it is. If the concrete pier is determined to be part of the single-family dock, the Application would not satisfy the encroachment standards of IDAPA 20.03.04.015.01.a or b.

b. The parties presented divergent opinions during the hearing regarding whether the concrete pier is a component of the single-family dock structure. The evidence I find to be more probably true than not is that presented by IDL, including the following:

Mr. Ahmer testified that, “IDL has determined that [Mr.] Peterson is seeking an encroachment permit for an aid to navigation, and that the concrete pier, ramp, and slip dock are all components of a single-family dock.” AR, p. 159. Mr. Ahmer described that the concrete pier is how the Applicant gets out to his dock. Rec. 1:39:04. Mr. Ahmer’s evaluation and testimony is consistent with the Application, which shows the ramp connecting the floating dock to the concrete pier rather than to the shore. AR, p. 123; Rec. 1:36:16. There is no evidence in the record to suggest that the Applicant does not use the concrete pier to access his boat moorages. The concrete pier, like the legs and walkway of the floating dock and the ramp, is used to access moored vessels. I find that the concrete pier is a part of the existing dock and would be part of the proposed single-family dock, and is wider than the width that is automatically allowed under IDAPA 20.03.04.015.01.a; however, as discussed below, site specific considerations justify a variance to this standard.

5. IDAPA 20.03.04.015.01.b, states, in applicable part, that the “[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.” The surface decking area waterward of the OHWM of the proposed ramp and floating dock is 699 square feet. AR, pp. 119, 123, and 132; Rec. 53:29. The exact surface decking area of the concrete pier waterward of the OHWM is unknown, but it is more than one square foot and likely between 180 and 256 square feet. Rec. 1:00:45. I find that the total surface decking area of the proposed single-family dock, including the concrete pier, ramp, and floating dock is over 700 square feet and the proposed dock is not a size that would automatically be allowed under IDAPA 20.03.04.015.01.b; however, as discussed below, site specific considerations justify a variance to this standard.

6. IDAPA 20.03.04.015.01.c, states, “[t]he following parameters govern the size and dimensions of single-family docks and two-family docks . . . No 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.” The line of navigability is defined 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.” I.C. § 58-1302; IDAPA 20.03.04.010.20. At its furthest extent, the concrete pier extends between sixteen feet (16’) to twenty feet (20’) from the OHWM. *See* Findings of Fact ¶ 16; AR, p. 124; Rec., 2:01:15. The proposed ramp is seventeen feet (17’) long. AR, p. 123. The proposed floating dock is thirty-five feet (35’) long. AR, p. 123. The combined total length of the proposed single-family dock beyond the OHWM is approximately sixty-eight feet (68’). The aerial overviews attached to the Application show that the proposed dock would not be longer than the adjacent docks and would be within the line of navigability. AR, pp. 128 and 130. This is consistent with Mr. Ahmer’s analysis of the Application as well. AR, p. 160. I find that the proposed dock would not extend beyond the line of navigability and would meet the standard set in IDAPA 20.03.04.015.01.c.

7. IDAPA 20.03.04.015.13.c.i - Angle from Shoreline states, “[w]here feasible, all docks, piers, or similar structures shall be constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights.” The proposed dock appears to be roughly perpendicular to the shoreline and parallel to the two adjacent docks. AR, p. 127. I find that the proposed dock would meet this standard.

8. IDAPA 20.03.04.015.13.e - Presumed Adverse Effect, states in applicable part, “[i]t will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines.” Littoral right lines are “[l]ines that extend waterward of the intersection between the artificial or ordinary high water mark and an upland ownership boundary to the line of navigation. Riparian or littoral right lines will generally be at right angles to the shoreline.” IDAPA 20.03.04.010.34. The Application shows that the dock will not be located closer than ten feet (10’) to the adjacent littoral right lines. AR, p. 132. One of the drawings accompanying the Application shows that the dock would be located thirty-eight feet (38’) from the littoral right line shared with the Whites and fifteen feet (15’) from the littoral right line shared with the Robinsons. AR, p. 128. Mr. Ahmer stated, “The proposed dock does appear to meet the requirement for not extending beyond the Line of Navigability as well as providing a 10-foot setback from the dock to mutual property lines.” AR, p. 160. I find that there is no presumed adverse effect of the proposed dock to either adjacent owner in compliance with IDAPA 20.03.04.015.13.e.

9. 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.

10. As to the navigational or economic necessity, justification for, or benefit derived from the proposed encroachment, the record shows that the Applicant is looking to exercise his littoral rights to modify his single-family dock in a manner that will, hopefully, eliminate his neighbor's interference with his use of the eastern area of the existing encroachment. Mr. Peterson testified that a two-slip dock would eliminate the need to moor one of his two boats outside of the dock's eastern finger. AR, pp. 111 – 115, 134, and 143 – 147; Rec. 33:27. Moving the ramp and floating dock further away from the littoral right line shared with the Robinsons will create more room between the neighboring uses of the waters of Lake Coeur d'Alene. Rec. 39:56. Additionally, the Applicant presently has no intention to remove the permitted concrete pier, in part, due to the significant cost of such demolition and removal. *See* Findings of Fact ¶ 23. Finally, if the Application was not granted with variance, the current permit ERL-95-S-1106A would remain in effect, and the authorized non-standard encroachments would remain in and over Lake Coeur d'Alene. AR, pp. 58 – 62.

11. The navigational and economic necessity, justification, or benefit derived must be weighed against the Lake Values of protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. I.C. § 58-1301.

a. Protection of property, navigation, and recreation.

The Applicant's existing, permitted single-family dock is located closer than ten feet (10') from the littoral right line shared with Mr. Robinson due to written consent provided by the owners prior to Mr. Robinson. AR, p. 71; Rec., 40:09; I.C. § 58-1305(b). Approval of the Application will allow Mr. Peterson to relocate his dock to a position more than ten feet from this littoral right line. AR, pp. 132, 128, and 160. The proposed dock location would provide both Mr.

Peterson and Mr. Robinson more room between their docks, promoting a mutual ability to recreate safely on the lake, while enabling Mr. Peterson's full use of his littoral rights to build and use an encroachment in aid of navigation. I find that the proposed encroachment would protect Mr. Peterson's property rights, promote Mr. Peterson's ability to navigate safely to and from his dock, and promote safe and respectful recreation in the waters of Lake Coeur d'Alene.

b. Protection of fish habitat, aquatic life, aesthetic beauty, and water quality.

There is no claim and no evidence in the record that the proposed encroachment would negatively impact any Lake Value. Common sense suggests that fish and wildlife habitat, aquatic life, aesthetic beauty, and water quality may be improved, and certainly not negatively impacted, by fewer and smaller encroachments in the lake. Here, the surface decking area of the proposed single-family dock would be seventy-eight (78) square feet less than the existing, permitted dock, lessening the impact of Mr. Peterson's encroachments on the lakebed. I find that the proposed encroachment does not negatively impact the Lake Values of fish and wildlife habitat, aquatic life, aesthetic beauty, or water quality.

12. While the proposed single-family dock does not comply with two sections of the Rules, I find that the navigational and economic justification for, and benefits of, the proposed encroachment are not outweighed by the Lake Values; and are, in fact, aligned to further promote the Lake Values. The site specific circumstances of the Applicant's littoral ownership justify a variance to the two Rules, which is authorized, as follows:

IDAPA 20.03.04.015.01.d states, "The following parameters govern the size and dimensions of single-family docks and two-family docks . . . A variance to the standards in this Subsection 015.01 may be approved by the Department when justified by site specific considerations, such as the distance to the established line of navigability."

Without a variance to the standards, the Applicant's proposed single-family dock would not be allowed based on the requirements of IDAPA 20.03.04.015.01.a or b. Following its review of the Application, IDL was willing to grant a variance for IDAPA 20.03.04.015.01.a – to allow the concrete pier to remain, which is part of the single-family dock and six feet (6') wider than the allowable ten-foot wide limit – but IDL would not recommend granting a variance for IDAPA 20.03.04.015.01.b to allow the single-family dock to exceed 700 square feet. AR, p. 160. Yet, IDL granted a variance for both of these requirements in 2000, when it issued Mr. Peterson's current single-family dock permit.⁸ AR, p. 58. Such variance promoted Mr. Peterson's voluntary stewardship of the Lake Values of Lake Coeur d'Alene.

Here, the record shows that Mr. Peterson is continuing his voluntary stewardship of the lake. Approval of the Application results in a net reduction in the surface decking area on the lake created by Mr. Peterson's single-family dock. The reduction in surface decking area is an end result even though the dock would provide two slips rather than one. In addition, the new location of Mr. Peterson's single-family dock would enable his littoral right of navigation and provide more room for recreation in the congested area surrounding the littoral right line shared with the Robinsons.

Given all of the site specific considerations discussed, above, I conclude that variances to the standards in Subsection 015.01 are appropriate; and with the grant of such variances, the Application is conditionally approved for a single-family dock as set forth in the Application, with the conditions that the Applicant acquire and maintain a submerged land lease from IDL pursuant

⁸ There are slight variances in the wording of between the current version of IDAPA 20.03.04.015.01 and 02 and the 2000 version when Mr. Peterson's existing encroachment was issued. Regardless of the differences, the standards are the same and IDL had the authority to grant a variance in 2000.

to IDAPA 20.03.17.020.02; and maintain the concrete pier in a state of repair that eliminates concrete from being deposited into the waters, or onto the bed of, Lake Coeur d'Alene.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that Encroachment Permit Application No. ERL-95-S-1106B is CONDITIONALLY APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

This order is a Preliminary Order, pursuant to Idaho Code §§ 58-1305(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Officer and Hearing issued on April 24, 2020, which states as follows:

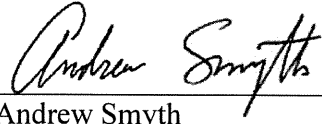
The Hearing Officer shall submit a preliminary order to the Director of the Idaho Department of Lands within thirty (30) days after the close of the hearing. After receiving the preliminary order the Director shall issue a Final Order no more than forty-five (45) days after the conclusion of the hearing, or allow the preliminary order to become final forty-five (45) 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 forty-five (45) 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 § 58-1305(c), the Applicant or other aggrieved party has the right to have this decision reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the final decision. Idaho Code § 58-1306(c).

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

DATED this 1st day of July, 2020.

A handwritten signature in cursive script that reads "Andrew Smyth". The signature is written in black ink and is positioned above a horizontal line.

Andrew Smyth
Hearing Officer