

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)	Case No. CC-2020-PUB-22-002
)	
Encroachment Permit Application No. L-95-S-5470D)	AMENDED FINAL ORDER
)	
Kirk Hughes,)	
)	
Applicant.)	
_____)	

On December 8, 2020, the Idaho Department of Lands (“IDL”) filed a *Motion to Reconsider and Motion to Correct Clerical Errors* (“*Motion*”). The *Motion* sought to correct certain errors in the Preliminary Order, which the Director had adopted and incorporated with certain exceptions into his November 24, 2020 Final Order. The *Motion* did not seek to change the ultimate outcome and approval of the encroachment permit application.

The Director hereby WITHDRAWS the November 24, 2020 Final Order and ISSUES an Amended Final Order. The Director has authority to amend an order by withdrawing and issuing a new amended final order and has the authority to act upon petitions for clarification. IDAPA 20.01.01.760 and 770. This Amended Final Order does not change the outcome of the November 24, 2020 Final Order.

I. NATURE OF PROCEEDINGS

The IDL, through the State Board of Land Commissioners, “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes” as provided in the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1303. The corresponding administrative rules promulgated by the State Board of Land Commissioners are IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On August 17, 2020, IDL received an encroachment permit application filed by Kirk Hughes to add one boat lift and two jet ski ports to his existing, permitted single-family dock. A hearing was held on October 15, 2020. Andrew Smyth served as duly appointed hearing officer. On November 2, 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 for the following:

- On page 7 in Paragraph III.4, I delete the words "and would extend seventeen-and-one-half (17.5) feet waterward from the sea wall" from the second sentence of Paragraph III.4's second paragraph. With that deletion, Paragraph 4's second paragraph now reads:

I do find that a permit is required for the jet ski ports since they would be located outside the edge of the Applicant's existing permitted dock. The proposed jet ski ports are each twelve-and-one-half (12.5) feet long. The waterward end of the jet ski ports will be shorter than the existing, permitted single family dock which extends thirty (30) feet waterward from the sea wall. I find that the proposed jet ski ports would be located within the line of navigability. As discussed in paragraphs II.13, *see also* III.8.a, the

jet ski ports would also be outside the ten (10) foot adjacent littoral owner setback.

- On page 8 in Paragraph III.5, I delete the word “line of navigability,” and replace it with the word “littoral right line” to reflect that the sentence is referring to the littoral right line. That amended sentence now reads:

Two measurements are needed in order to calculate the distance between the proposed jet ski ports and the littoral right line: the distance between the east edge of Applicant’s dock and the Objector’s property line, and the width of the two jet ski ports.

- I also make the following clerical corrections:
 - Page 9, second line from the bottom
 - I amend the phrase “but he had not measure them” to “but he had not measured them.”
 - Page 12, sixth line from the top
 - I amend the phrase “She stated due to the angel of the their sea wall” to “She stated due to the angle of their sea wall.”

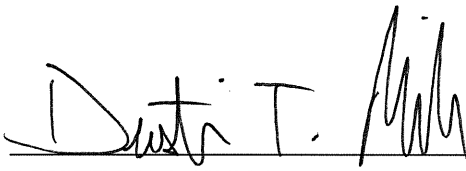
IV. ORDER

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 Amended Final Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Amended Final Order.

Based on the above adopted Procedural Background, Findings of Fact, and Analysis and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-95-S-5470D is APPROVED.

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 Amended 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 Amended 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 15th day of December, 2020.



DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of December 2020. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kirk Hughes
5931 W. Harbor Dr
Coeur d' Alene, ID 83814

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☒ Email: corkhughes@gmail.com

Bob & Cathyanne Nonini
5875 W. Harbor Dr
Coeur d' Alene, ID 83814

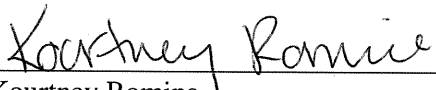
- ☒ U.S. Mail, postage prepaid
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Kourtney Romine on behalf of
Andrew Smyth, Hearing Officer
300 N 6th Street, Suite 103
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Kourtney Romine
Workflow Coordinator

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. L-95-S-5470D)	Case No. CC-2020-PUB-22-002
)	
Kirk Hughes,)	
Applicant.)	PRELIMINARY ORDER
)	
)	
)	

I. PROCEDURAL BACKGROUND

On or around August 17, 2020, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Kirk Hughes (“Mr. Hughes” or “Applicant”). Agency Record (“AR”) pp. Hughes 00001 – 00009.¹ IDL assigned application number L95S5470D to the Application. In the Application, the Applicant seeks authorization to add one boat lift and two jet ski ports to his existing, permitted single-family dock on the Spokane River, 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 August 18, 2020, IDL provided written notice of the Application to the adjacent littoral owners on each side of the Applicant’s property, Mr. Robert Nonini, and the Priest and Norman Trust. AR, pp. 10 – 13.
2. On August 26, 2020, IDL received an objection to the Application from Mr. and Mrs. Nonini; much of which focuses on upland issues, which are outside the scope of this contested case. AR, pp. 14 – 15. The points of objection that are relevant to this matter are discussed, below.

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

3. On September 28, 2020, 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 9:00 a.m. Pacific Time on Thursday, October 15, 2020, via video teleconference. AR, pp. 16 – 19.

4. On October 15, 2020, a hearing regarding the Application was held pursuant to Idaho Code § 58-1305(c). The participants appearing and offering evidence at the hearing were: Mr. Hughes, Applicant; Mr. Robert Nonini and Mrs. Cathyanne Nonini, Objectors; Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Kaufmann, Deputy Attorney General and legal counsel for IDL. Hearing Recording.²

5. Evidence admitted into the administrative record during the hearing consisted of witness testimony from Mr. Hughes, Mr. Nonini, Mrs. Nonini, and Mr. Ahmer on behalf of IDL, IDL's Exhibit 1 and Objectors Exhibit 1. AR, pp. 36 – 47.

II. FINDINGS OF FACT

1. The Applicant owns Kootenai County parcel AIN 113945. AR, pp. 1, 23 and 27.
2. The Applicant's property is located adjacent to the Spokane River. AR, pp. 10, 12 and 42.
3. The Applicant's property is located between littoral property owned by the Priest and Norman Trust, and Robert Nonini. AR, p. 4.
4. The Applicant currently holds encroachment permit L95S5470C, issued by IDL on March 24, 2020, which authorizes a bulkhead/seawall and a 700 square feet single-family dock. AR, pp. 23 – 35 and 39.

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.

5. The dimensions of the Applicant's existing single-family dock match the dimensions authorized by encroachment permit L95S5470C. AR, p. 43; Rec 1:01:03.

6. The Applicant's single-family dock extends thirty (30) feet waterward from the Applicant's seawall. AR, pp. 5, 6 and 32; Rec. 23:51.

7. The Applicant's single-family dock consists of two boat slips. AR, pp. 5, 6 and 32; Rec. 18:50 and 1:01:10.

8. The Applicant is seeking authorization to add a boat lift to the boat slip closest to the shore, and two side-by-side jet ski ports adjacent to, and parallel with, the east side of his dock. AR, pp. 2, 5 and 8; Rec. 12:39.

9. The jet ski ports are twelve (12) feet and six (6) inches long. Rec. 24:23.

10. The boat slip furthest from shore, is eleven (11) feet wide. AR, pp. 5, 6 and 32; Rec. 18:50 and 1:01:10.

11. During the 2020 summer, the Applicant placed the two jet ski ports, along with two approximately six (6) inch bumpers on the outer edge of each port, within the eleven-foot-wide boat slip that is furthest from shore. Rec. 19:11 and 21:35.

12. As the water level decreased, the Applicant pulled the two jet ski ports from the outer boat slip and placed them on top of his dock. AR, p. 51; Rec. 21:20.

13. The Application shows that the Applicant's dock is located twenty-five (25) feet from the property line shared with the Nonini's. AR, p. 5. However, the best evidence of record is that the distance is twenty-one (21) feet and ten (10) inches. AR, pp. 14, 42, 44 and 47; Rec. 13:55, 27:19, 42:26.

14. The distance between the western edge of the Nonini's dock and the property boundary line shared with Mr. Hughes is estimated to be between forty (40) and fifty-five (55) feet. AR, p. 43; Rec. 35:02, 38:08 43:19.

III. CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over the Beds and Banks of Spokane River.

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. 16; I.C. § 67-5245. The hearing in this matter began at approximately 9:11 a.m. Pacific Time and concluded at approximately 10:19 a.m. Pacific Time on October 15, 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 encroachment permits on navigable lakes – 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. The Spokane River 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. Hughes 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. Hughes, as the owner of property adjacent to the Spokane River, 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 Approved.

1. IDAPA 20.03.04.010.07 defines a boat lift as “[a] mechanism for mooring boats partially or entirely out of the water.”

2. IDAPA 20.03.04.010.19 defines a jet ski ramp, port, or lift as “[a] mechanism for mooring jet skis or other personal watercraft similar to a boat lift. The lifts may be free standing or attached to a dock or pier.”

3. IDAPA 20.03.04.015.13.b.i states: “Single-family docks are allowed a single boat lift and two (2) jet ski lifts, or two (2) boat lifts, without adding their footprint to the dock square footage. Additional lifts will require that fifty percent (50%) of the footprint of the largest lifts be included in the allowable square footage of the dock or pier as per Subsection 015.01.” IDAPA 20.03.04.015.01.b limits the total surface decking area of a single-family dock to 700 square feet. The Applicant’s single-family dock is authorized to be, and in fact is, 700 square feet. AR, pp. 23 – 35 and 39. The Application is for one boat lift and two jet ski ports. AR, pp. 2, 5, and 8; Rec. 12:39. I find that the size of the proposed boat lift and two jet ski ports does not affect the size of the dock, and is not factored when considering the size limit of the Applicant’s single-family dock.

4. IDAPA 20.03.04.015.13.b.iii states:

A boat lift or jet ski lift within lines drawn perpendicular from the shore to the outside dock edges will not require a separate permit if the lift is outside the ten (10) foot adjacent littoral owner setback, the lift does not extend beyond the line of navigability, and the lift does not count toward the square footage of the dock as outlined in Subparagraphs 015.13.b.i. and 015.13.b.ii. The permittee must send a revised permit drawing with the lift location as an application to the Department. If the lift meets the above conditions, the application will be approved as submitted. Future applications must include the lifts.

During an inspection conducted on October 9, 2020, IDL staff found that the dimensions of the Applicant's existing single-family dock match the dimensions authorized by encroachment permit L95S5470C. AR, p. 43; Rec 1:01:03. The proposed boat lift would be fully located within an existing slip and within the outside edges of the Applicant's permitted single-family dock. AR, pp. 2, 5, and 8; Rec. 12:39. Since the boat lift would be located fully within the existing permitted boat slip, I find that it would be located outside the ten (10) foot adjacent littoral owner setback and not extend beyond the line of navigability. As set forth in paragraph 4, above, the lift does not count toward the square footage of the dock as outlined in IDAPA 20.03.04.015.13.b.i. Therefore, I find that while a permit is not required for the boat lift, it is required to be include it in this, and any future, encroachment permit applications.

I do find that a permit is required for the jet ski ports since they would be located outside the edge of the Applicant's existing permitted dock. The proposed jet ski ports are each twelve-and-one-half (12.5) feet long, and would extend seventeen-and-one-half (17.5) feet waterward from the sea wall. The waterward end of the jet ski ports will be shorter than the existing, permitted single-family dock which extends thirty (30) feet waterward from the seawall. I find that the proposed jet ski ports would be located within the line of navigability. As discussed in paragraphs II.13 and

III.5.a, *see also* III.8.a, the jet ski ports would also be outside the ten (10) foot adjacent littoral owner setback.

5. IDAPA 20.03.04.015.13.e - Presumed Adverse Effect, states, in applicable part, that “[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 . . . All boat lifts and other structures attached to the encroachments are subject to the above presumptions of adverse affects.” 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. Two measurements are needed in order to calculate the distance between the proposed jet ski ports and the line of navigability: the distance between the east edge of Applicant’s dock and the Objector’s property line, and the width of the two jet ski ports.

a. Distance between the Applicant’s dock and the Objector’s property line

The Application shows that the Applicant’s dock is located twenty-five (25) feet from the property line. AR, p. 5. However, IDL measured the distance to be twenty-one (21) feet and ten (10) inches. Rec. 42:26. Mr. Hughes did not dispute that the distance could be at least twenty-one (21) feet, as measured by IDL; and Mr. Nonini agreed with IDL’s measurement. AR, pp. 14, 42, 44 and 47; Rec. 13:55 and 27:19. Mr. Ahmer testified, “Myself and Amidy were the ones who did the inspection that day. And, I found Amidy’s inspection notes and drawing, and on the drawing she shows the distance from the edge of the dock to the property line fence as being 21 feet 10 inches. That’s what she wrote down.” Rec. 43:00. In the absence of other evidence of an

actual measurement, I find that the distance between the Applicant's dock and the Objector's property line is twenty-one (21) feet and ten (10) inches.

b. Width of the two jet ski ports

The Application and Mr. Hughes' testimony, being the best evidence of record, show that the combined width of the two jet ski ports is ten (10) feet. AR, p. 5 and Rec. 15:41. The Applicant based this measurement on the fact that he put the jet ski ports in the outer slip of his dock with six inch bumpers on either side. Rec. 19:24 and 21:36. Mr. Hughes elaborated on this explanation by testifying:

I know that's an eleven (11) foot wide slip water area. And I know I had very large floats on each side and that I had it tied up with this fancy suspension sequence of . . . lines that would hold that jet ski port in the center and keep it from banging up. So, I know there was distance between and I know that it didn't go underneath. There is only about maybe six inches between the bottom of the dock and the water and those jet ski ports sit up out of the water considerably more than that. Our jet skis were heavy and caused the back end to go down and the front end to go up and so they actually sat in the water I'm going to say go up fourteen (14) inches in the front.

Rec. 59:10. The Applicant stated that as the water level went down, he pulled the jet ski ports "straight up and straight out of the water" onto his dock adjacent to the slip. Rec. 21:33.

IDL staff conducted an inspection of Mr. Hughes' property and found that Mr. Hughes' dock matches the permitted square footage and dimensions, and the outer boat slip is eleven (11) feet wide. AR, pp. 39 and 43; Rec. 47:53 and 1:01:03. During the inspection, IDL staff observed the jet ski ports on top of the Applicant's dock, but they did not measure the jet ski ports. Rec. 51:50, 52:23 and 1:01:39.

Mr. Nonini stated that the base of each jet ski port is more than five (5) feet wide, but he had not measure them. Rec. 26:07 and 32:17. When asked how he reached that conclusion, Mr. Nonini responded, "by looking at the picture . . . of Mr. Hughes' jet ski ports sitting on top of

his dock and the width of them as he said they fit inside the slip. Well the bases of them can actually go under the dock a little bit and if they were only five feet wide, together they would make ten feet obviously, but they would fall in the water I would assume right there because they are sitting on top of his dock.” AR, p. 46 (Nonini Exhibit, p. 3); Rec. 33:11. Mrs. Nonini added, “My comment is also regarding the ports sitting on the dock. When you put them in the water you have to put them from the west end and there’s room under the dock as you can see in the photo so I believe that they’re at least a total of twelve feet wide because as my husband said they’d fall in the water if they’re sitting on the dock.” Rec. 36:56. Referencing their photograph of the jet ski ports on top of the Applicant’s dock (AR, p. 46), the Noninis testified that because there is room under the Applicant’s dock and the jet ski ports are not currently falling into the water, they must be twelve (12) feet wide. Rec. 33:11, 36:56.

While the circumstances, as the Nonini’s testified, may be possible, looking at the evidence as a whole, it does not appear to be the case. This photograph neither shows the jet ski ports resting on the dock fingers on either side of the slip nor the jet ski ports completely suspended over the boat slip. The section of dock the jet ski ports are resting on is nine and a half (9.5) feet wide. AR, p. 5. The jet ski ports are twelve and a half (12.5) feet long. It is unclear how much space is between the jet ski port and the edge of the dock closest to the foreground of the photograph, but weighing all of the evidence in the record, including the Applicant’s testimony that the two jet ski ports fit inside the slip when the water level was higher with bumpers on either side, that he pulled them straight out of the water and onto his dock as the water level dropped, it seems more likely that the majority of the jet ski ports is resting on the dock leaving a small portion suspended over the slip and not on the adjacent dock fingers. I find that the jet ski ports, together, are ten (10) feet wide.

c. The Application shows that the jet ski ports will not be located closer than ten feet (10') to the adjacent littoral right lines. AR, p. 9 and Rec. 15:41.

The distance between the jet ski ports and the property line is the difference between the distance between the Applicant's dock and the property line minus the width of the jet ski ports. I find that the proposed jet ski ports will be located eleven (11) feet and ten (10) inches from the littoral right line (subtracting ten (10) feet from twenty-one (21) feet ten (10) inches) and find that there is no presumed adverse effect of the proposed dock to the adjacent owners in compliance with IDAPA 20.03.04.015.13.e.

6. 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.

7. 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 add a boat lift and two jet ski ports to his single-family dock.

8. 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 navigation.

The Noninis stated the proposed jet ski ports would not impact ingress to their dock, but would make it difficult to get their boats out of their dock. AR, pp. 14 and 47; Rec. 26:12, 28:32, 36:44, 38:34. Mr. Nonini stated they moor their twenty-one (21) foot electric boat in the slip closest to their sea wall. Rec. 28:35. Mrs. Nonini stated she is an excellent boat driver and she primarily operates this boat. Rec. 35:37 and 1:04:43. She stated due to the angle of the their sea wall and the slow responsiveness of their boat, the proposed jet ski ports would be in her way backing their boat out of their slip. Rec. 37:51 and 39:07.

Utilizing the measuring tool available on Kootenai County's website, Mr. Ahmer measured the Nonini's dock as being fifty-five (55) feet from Mr. Hughes' property line. AR, p. 43; Rec. 43:19. Mr. Nonini estimated that there is between forty (40) and forty-four (44) feet between the west end of his dock to Mr. Hughes' property line. Rec. 35:02. Mrs. Nonini stated it is closer to forty (40) feet. Rec. 38:08. However, neither Mr. nor Mrs. Nonini testified that they had an actual measurement of the distance. Based on the varying estimates, there would be between fifty-one (51) feet and sixty-six (66) feet between the Nonini's dock and Mr. Hughes' jet ski ports, which is roughly two to three times the length of the Nonini's electric boat.

The jet ski ports will impact navigation. They will aid in Mr. Hughes' navigation and while they would not prohibit the Nonini's navigation, they may require the Nonini's to alter egress from their dock. I find that the benefit to Mr. Hughes' navigation outweighs the potential inconvenience to the Nonini's navigation.

b. Protection of aesthetic beauty.

In their objection letter, the Nonini's stated, "[g]ranting this permit is not going to add to the aesthetics of beautiful Harbor Island, but rather detract and diminish property values."

AR, p. 15. Other than the Nonini's opinion, no evidence exists in the record that the proposed boat lift or jet ski ports have or would actually result in diminished property values. The Noninis claimed Mr. Hughes had "junk piled up on the dock." AR, p. 15. Mr. Ahmer stated, "littoral owners are not permitted to have items on docks that are unrelated to navigation and water activities." AR, p. 43. The comments about aesthetics appear to be about potential items, presumably other than a boat or personal water craft, that could be stored on the boat lift and jet ski ports. There is no claim or evidence in the record that that the boat lift or jet ski ports impact aesthetic beauty. I find that the proposed boat lift and jet ski ports do not negatively impact aesthetic beauty.

c. Protection of property, recreation, fish habitat, aquatic life, aesthetic beauty and water quality.

There is no claim and no evidence in the record that the proposed encroachments would negatively impact property, recreation, fish habitat, aquatic life, or water quality. I find that the proposed encroachments do not negatively impact property, recreation, fish habitat, aquatic life, and water quality.

9. I find that the navigational and economic justification for, and benefits of, the proposed encroachment are not outweighed by the Lake Values.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L95S5470D is 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 September 28, 2020, which states as follows:

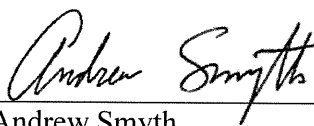
The Hearing Officer shall submit a preliminary order to the Director of the Idaho Department of Lands within thirty (30) days after the close of the hearing. After receiving the preliminary order the Director shall issue a Final Order no more than forty-five (45) days after the conclusion of the hearing, 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 2nd day of November, 2020.



Andrew Smyth
Hearing Officer