

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 matter.

II. FINDINGS OF FACT

I adopt the Preliminary Order's Issue and Findings of Fact as my Findings of Fact, except that I make the following amendments:

- In the Findings of Fact 6, I delete the citation to "IDAPA 20.03.04.010.07.15" and replace it with "IDAPA 20.03.04.010.15."

III. DISCUSSION

I adopt the Preliminary Order's Discussion as my Discussion, except for the following amendments:

- On page 3, I delete the citation to "IDAPA 20.03.04.010.07.15" and replace it with "IDAPA 20.03.04.010.15."
- On page 5, I delete the first two full paragraphs beginning with "Since the encroachment" and ending with "would have on his neighbors." I substitute the following three paragraphs in its place:

IDAPA 20.03.04.015.13.e provides that "[i]t will be presumed, subject to rebuttal, that single-family . . . navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines." An adjacent littoral owner's consent "will automatically rebut the presumption." IDAPA 20.03.04.015.13.e. Boat lifts are subject to this presumption. *Id.*

Here, the boat lift is located closer than ten feet from adjacent littoral right lines and Applicant received objections from adjacent landowners. The Applicant's proposed boat lift is proposed as an "overhead boat lift

adjacent to [the] permitted dock.” While the Applicant testified that the lift is well on his property and within littoral rights, IDL’s testimony indicated that because of the Applicant’s twenty-five feet of shoreline and his five-foot wide dock, the boat lift will be located within the ten foot adjacent littoral owner setback. The Application also indicates that the proposed encroachment will be located zero feet from the littoral lines with the neighbors. Given the distance and the lack of consent, IDAPA 20.03.04.015.13.e. establishes a presumed adverse effect upon adjacent littoral rights, and the Applicant bears the burden of rebutting this presumption.

It is understood that Applicant wants a safe and practical boating use on the lake and does not believe a boat in a lift is a hazard to swimmers. However, Applicant did not prove his proposed boat lift would comply with setbacks and did not present any convincing evidence or testimony to rebut the presumption of adverse effect upon adjacent littoral rights.

IV. CONCLUSIONS OF LAW

I adopt the Preliminary Order’s Conclusion of Law as my Conclusion of Law.

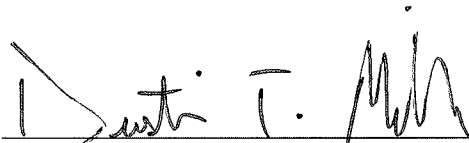
V. ORDER

I conclude that the hearing officer’s Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order’s Issue, Findings of Fact, Discussion, and Conclusion of Law with the amendments set forth herein as my decision in this matter. I hereby incorporate by reference the Preliminary Order’s Issue, Findings of Fact, Discussion, and Conclusion 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 Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-96-S-2571B is DENIED.

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 has 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. 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 30th day of June 2021.

A handwritten signature in black ink, appearing to read "Dustin T. Miller", is written over a horizontal line.

DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of July 2021, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ron Shaffer
1470 E. Mineral Pl.
Centennial, CO 80122

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: rvshff@cs.com

William Felton
5480 Bottle Bay Rd.
Sagle, ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Email:

Lissa Wentner
17 Portofino Rd
San Rafael, CA 94901

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: lissawent@yahoo.com

Sean Hood on behalf of John & Maria Siele
2394 East Camelback Rd, Suite 600
Phoenix, AZ 85016-3429

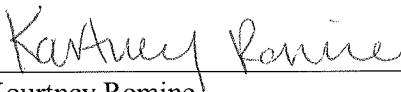
- U.S. Mail, postage prepaid
- Hand Delivery
- Email: shood@fennemorelaw.com

Angela Schaer Kaufmann
P.O. Box 83720
Boise, ID 83720-0010

- Statehouse Mail
- Hand Delivery
- Email: angela.kaufmann@ag.idaho.gov

Kourtney Romine *on behalf of*
Lincoln Strawhun, Hearing Officer

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: kromine@idl.idaho.gov



Kourtney Romine
Workflow Coordinator

LAWRENCE G. WASDEN
ATTORNEY GENERAL

ANDREW J. SNOOK
CHIEF OF CONTRACTS AND ADMINISTRATIVE LAW

LINCOLN STRAWHUN, ISB #8925
REBECCA OPHUS, ISB #7697
KAREN SHEEHAN, ISB #7279
Deputy Attorney General
Fair Hearings Unit
Contracts and Administrative Law
Office of the Attorney General
954 W. Jefferson, 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4555
Fax: (208) 854-8070
Hearing.officer@ag.idaho.gov

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)	
)	Case No. CC-2021-PUB-20-001
ENCROACHMENT PERMIT APPLICATION)	
No. L-96-S-2571B,)	
)	PRELIMINARY ORDER
Ron Shaffer,)	
)	
Applicant.)	
_____)	

After a hearing on this matter, held May 21, 2021, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to deny Encroachment Permit Application No. L-96-S-2571B (“application”).

In summary, Applicant submitted an application for a boat lift to be installed on the west side of an existing and permitted dock on Lake Pend Oreille. Several neighbors filed objections. IDL reviewed the application and concluded that the application does not meet the required 10 foot adjacent littoral owner setback.

On May 10, 2021, IDL sent *Notice of Appointment of Hearing Officer and Hearing* to schedule a public hearing in accordance with Idaho Code § 58-1306(c) to the interested parties—IDL, the Applicant and Objectors. The parties submitted comments and exhibits before hearing, and provided testimony at hearing. The hearing was held via Zoom videoconference.

After considering the written and testimonial evidence, this Preliminary Order is issued per Idaho Code § 67-5245 and IDAPA 20.01.01.730.02, and is organized by the following sections: *Issue, Findings of Fact, Discussion, Conclusion of Law and Preliminary Order.*

ISSUE

Whether Applicant's Encroachment Permit Application complies with Idaho Code § 58-1301 and IDAPA 20.03.04.015.13.e.

FINDINGS OF FACT

The hearing officer finds the following facts:

1. On April 1, 2021, Applicant submitted an encroachment permit application for a boat lift.
2. On April 7, 2021, IDL sent a copy of the application to adjacent neighbors.
3. On April 16, 2021, IDL received objection letters on behalf of the John and Maria Siele Trust and Lissa Wentner.
4. IDL's resource specialist visited the site for Public Trust Program Inspection Report. The report, dated May 8, 2021, concluded: "*The footprint of the proposed encroachments does not appear to provide a 10' setback from the west shared littoral line.*"
5. After its review of the application, and receiving objections, IDL recommended to deny the application because it violated minimum setback requirements.
6. Applicant's proposed boat lift is a navigational encroachment within the meaning of IDAPA 20.03.04.010.07.15 and Idaho Code § 58-1302(h).

DISCUSSION

IDL's position. That Applicant's proposed boat lift is a navigational encroachment within the meaning of IDAPA 20.03.04.010.07.15 and Idaho Code § 58-1302(h); that Idaho Code § 58-1301 and IDAPA 20.03.04.012.01 declare that the public health, interest, safety and welfare requires all encroachments (upon, in or above the beds or waters of navigable lakes of the state) be regulated so 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; and that no encroachment can be made without prior approval.

That IDL's resource specialist visited the site for Public Trust Program Inspection Report and concluded that the footprint of the proposed encroachments does not appear to provide a 10 foot setback from the west shared littoral line; that after its review of the application, and receiving objections, IDL recommended to deny the application because it violated minimum setback requirements.

That under IDAPA 20.03.04.015.13.e, there is a presumed adverse effect on adjacent littoral rights when the encroachment is a navigational encroachment less than 10 feet from adjacent littoral right lines; that the only way Applicant can overcome this presumed adverse effect is by consent by adjacent property owners.

Applicant's position. Applicant asserted that he secured a dock permit, is currently constructing the dock, and wants a safe and practical use in boating on Lake Pend Oreille; that the proposed boat lift would be safe, reasonable, and without undue impact on neighboring properties.

That Applicant has had bad experiences of trying to secure a boat when not in use; that the two options are to remove the boat from the water by loading it on a trailer—which the nearest boat ramp is seven miles away—or by a stationary lift; that leaving the boat tied to the dock is not an option.

That the proposed lift is well on the property and within the littoral rights; that the lift would benefit his neighbors because should the lake wreck a boat, and possible the dock it is tied to, it is unlikely that the remaining 10 feet of frontage dock would contain all the damage and debris.

That an unattended boat in a lift does not present a hazard to swimmers as a boat tied to the dock might; that the boat lift would be constructed by a skilled craftsman with 40 years of experience.

Objectors' position. Objectors asserted that this application is similar to the denied one from a year ago; that the prior application was denied for violating setback requirements; that the present application violates setback requirements; that Appellant's application has a presumed adverse effect on adjacent landowner property rights.

That Applicant has not proven that the boat lift would be within the setback requirements or not harm adjacent landowners property rights and values; that is not appropriate for Applicant to argue that the boat lift would be safe and beneficial for all; that Applicant was aware of setback requirements when building his dock and requesting a boat lift; that it is not right for Applicant just to expect his neighbors to give consent when he knows he is violating setback requirements.

Analysis and reasoning supporting recommendation. Applicant's proposed boat lift is a navigational encroachment within the meaning of IDAPA 20.03.04.010.07.15 and Idaho Code §

58-1302(h). (Hearing Record; IDL-1). Applicant's proposed boat lift does not provide a 10 foot setback from the west shared littoral line. (IDL-2).

Since the encroachment is a navigational encroachment less than 10 feet from adjacent littoral right lines, there is a presumed adverse effect on adjacent littoral rights. IDAPA 20.03.04.015.13.e. Practically, the only way Applicant can overcome this presumed adverse effect is by consent by adjacent property owners. (Hearing Record). However, in this case, Applicant did not receive consent by adjacent landowners. (Hearing Record). He received objections by both adjacent landowners. (Hearing Record).

The hearing officer recognizes that Applicant wants a safe and practical boating use the lake. However, Applicant did not prove his proposed boat lift would comply with setback requirements and he did not overcome the presumed adverse effect the boat lift would have on his neighbors. (Hearing Record; Exhibits A – F).

The state must regulate encroachments and give consideration to the encroachment's effect on the environment as described in Idaho Code § 58-1301 and the effect on neighbor's littoral property rights as described in IDAPA 20.03.04.015.13.e. Here, IDL gave Applicant's application fair consideration, conducted a site inspection, applied the rules, and correctly determined that the application should be denied because it did not comply with setback requirements and did not have consent by his adjacent landowners to overcome the presumed adverse effect. (Hearing Record; IDL-1 and 2).

CONCLUSION OF LAW

Applicant's encroachment application No. L-96-S-2571B does not comply with Idaho Code § 58-1301 and IDAPA 20.03.04.015.13.e.

PRELIMINARY ORDER

The hearing officer recommends that the Director of the Idaho Department of Lands issue a Final Order denying Applicant's encroachment application No. L-96-S-2571B.

DATE: June 14, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Lincoln Strawhun
LINCOLN STRAWHUN
Hearing Officer

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