

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application No.)	Case No. CC-2021-PUB-22-002
L-95-S-2924A,)	
)	FINAL ORDER
Pamela J. Novell,)	
)	
Applicants.)	
_____)	

I. NATURE OF PROCEEDINGS

The Idaho Department of Lands (“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 or around May 25, 2021, IDL received an encroachment permit application filed by Pamela J. Novell. A public hearing was held on August 3, 2021. Karen Sheehan served as duly appointed hearing officer. On September 2, 2021, the hearing officer issued her Preliminary Order, which contains a Background, Findings of Fact, and Analysis and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1305 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 matter.

II. FINDINGS OF FACT

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

- In Findings of Fact paragraph 1 on page 2, I delete the first sentence and replace it with the following amended sentence: "Applicant owns property identified as Parcel No. 0-4900-004-008-B on W. Canoe Loop, Coeur d'Alene, Idaho."
- In Findings of Fact paragraph 9 on page 3, I delete the word "Appellant" and insert the word "Applicant" in its place.
- In Findings of Fact paragraph 13 on page 4, I delete the citation of "IDAPA 20.03.04.0151.01" and insert "IDAPA 20.03.04.015.01 and IDAPA 20.03.04.015.013.e."

III. ANALYSIS AND CONCLUSIONS OF LAW

I adopt the Preliminary Order's Analysis and Conclusions of Law as my Analysis and Conclusions of Law. I also add the following paragraph as Analysis and Conclusion of Law paragraph 31a:

Ms. Ullrich testified to general concerns about the proposed dock's orientation and its potential impact upon the safety of those swimming near her dock, but did not provide any specific allegations of harm. The proposed dock is more than ten feet from the littoral line on either side, within the line of navigation, and boats can already navigate in the area. Ms. Novell testified that she will also have children swimming and wants the area to be safe. The proposed dock will be an aid to navigation and exercise of Ms. Novell's littoral rights, and there is no evidence that the proposed dock will negatively impact safety or recreation.

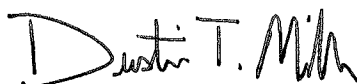
IV. ORDER

I conclude that the hearing officer's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's Background, Findings of Fact, and Analysis 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 Background, Findings of Fact, and Analysis 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 Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-95-S-2924A is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, 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. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, 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 17th day of September 2021.



DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of September 2021, 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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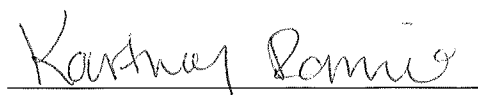
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BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of the Encroachment Permit)	
Application of:)	Case No. CC-2021-PUB-22-002
)	
PAMELA J. NOVELL,)	
Application No. L-95-S-2924A,)	PRELIMINARY ORDER
)	
Applicant.)	
_____)	

After a hearing on this matter, held August 3, 2021, the Hearing Officer recommends to the Director of the Idaho Department of Lands (“IDL”) that he approve Encroachment Permit Application No. L-95-S-2924A (“Application”).

I. BACKGROUND

Applicant seeks authorization to install a used single-family dock on Lake Coeur d’Alene. Applicant’s adjacent neighbors have objected asserting the used dock was dropped off at Appellant’s shoreline before she filed the Application and that the used dock is in poor condition.

The neighbors have requested the dock be removed, any modifications be completed elsewhere, and that civil penalties be assessed.

Pursuant to Idaho Code § 58-1305(c), IDL ordered a hearing. On July 12, 2021, IDL's Director, Dustin T. Miller, issued a *Notice of Appointment of Hearing Officer* appointing Karen Sheehan as the Hearing Officer to conduct the hearing and issue a preliminary order.

On August 3, 2021, the Hearing Officer conducted a hearing via Zoom teleconference. Applicant and her daughter, Caylin Novell, appeared and testified. Attorney Brian Bean represented Dana and Kelly Woudenberg and the Meredith K. Sunde Revocable Trust; he also testified on their behalf. Dana and Kelly Woudenberg appeared. Dana Woudenberg testified; Kelly Woudenberg did not testify. Julie Ullrich and David Sunde appeared on behalf of the Meredith K. Sunde Revocable Trust. Julie Ullrich testified; David Sunde did not testify. Deputy Attorney General Angela Kaufmann represented IDL.¹ Michael Ahmer testified for IDL. Jennifer Barker and Amidy Fuson also appeared for IDL, but did not testify. IDL employees, Amy Johnson and Renee Jacobson, were present to provide technical assistance. (Hearing Recording.)

The Agency Record, including documents numbered 1 through 7 (this also includes as part of document #7, Objector's Exhibits B1 through B9), were admitted into the record at the beginning of the hearing. B10 and B11 were submitted at the beginning of the hearing and also admitted into the record.

II. FINDINGS OF FACT

1. Applicant owns property located at 8212 W. Canoe Loop, Coeur d'Alene, Idaho, Parcel No. 0-4900-004-008-B. This property is adjacent to Lake Coeur d'Alene and more specifically, Rockford Bay. Applicant is a littoral owner since the lot has a frontage of

¹ Deputy Attorney General Joy Vega also appeared, but only to listen in.

approximately 60 lineal feet. As a littoral owner, Applicant has littoral rights and is eligible to make an application for an encroachment permit. (Hearing Recording; Agency Record 3, 6.)

2. Dana and Kelly Woudenberg own property located at 8240 W. Canoe Loop, Coeur d'Alene, Idaho. The property is adjacent to Applicant's property. (Hearing Recording; Agency Record 7.)

3. The Meredith K. Sunde Revocable Trust ("Sunde Trust") owns property located at 8212 W. Canoe Loop, Coeur d'Alene, Idaho. The property is adjacent to Applicant's property. Julie Ullrich is a beneficiary of the trust. (Hearing Recording; Agency Record 7.)

4. On May 25, 2021, IDL received a call from neighbors adjacent to Applicant complaining that a used dock was towed and deposited at Applicant's shoreline without a permit. On that same day, IDL received an encroachment permit application from Applicant seeking authorization to install a used dock on her property. (Hearing Recording; Agency Record 6.)

5. On May 26, 2021, IDL performed an inspection and confirmed a dock was placed on Applicant's shoreline without IDL having issued an encroachment permit. (Agency Record 6.)

6. On June 3, 2021, IDL sent notices of Applicant's Application to Applicant's neighbors, including to the Woudenbergs and the Sunde Trust. (Agency Record 4, 6.)

7. On June 7, 2021 and June 21, 2021, IDL received objections to Applicant's Application from the Woudenbergs and the Sunde Trust. (Agency Record 1, 2, 6.)

8. On June 24, 2021, IDL received a revised application from Applicant. (Agency Record 3, 6.)

9. On June 28, 2021, IDL mailed a Notice of Non-Compliance to Appellant regarding having a dock installed on the shoreline without a permit. On that same date, IDL mailed a second notice to Applicant's adjacent neighbors. (Agency Record 4, 6.)

10. Michael Ahmer, Lands Resource Supervisor for the Mica Supervisory Area Office of IDL, performed an assessment and completed an investigation report. Mr. Ahmer testified that Applicant's dock was placed on the shoreline of her property without first obtaining an encroachment permit. He also testified that the dock placed on the shoreline did not meet Idaho Administrative Rules ("IDAPA") standards for a single-family dock based on its size (being over the maximum allowed 700 square feet), and based on it being over 10-feet wide. (Hearing Recording; Agency Record 6.)

11. Mr. Ahmer testified that when IDL is alerted of a non-compliant encroachment, it follows a process to bring the encroachment into compliance. IDL typically offers several solutions, including allowing the applicant to submit an application within 30 days for a single-family dock that meets IDAPA standards, and then granting the applicant 1 year to correct/install the compliant dock.

12. Mr. Ahmer testified that, in this case, Applicant filed the Application on the same day IDL performed the site inspection. Under IDL's process, as outlined above, since the issue of non-compliance was being resolved, IDL did not demand that the dock be removed. IDL issued the Notice of Non-Compliance to Applicant so it could track and ensure the non-compliance issue(s) was resolved within one year.

13. Mr. Ahmer further testified that the drawings submitted by Applicant met the standards outlined in IDAPA 20.03.04.0151.01:

- Applicant owns more than 25 feet of water frontage.
- The proposed dock is less than 700 square feet in size. Applicant's proposed encroachment is a 638-square-foot dock.
- The proposed dock is within the line of navigability since the proposed dock would extend outward into the lake 58 feet. Adjacent docks in the area extend outward from 63 feet to 80 feet.

- No portion of the dock is wider than 10 feet.
- There is at least a 10-foot buffer between the dock and adjacent littoral lines.

III. ANALYSIS AND CONCLUSIONS OF LAW

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

15. The Board exercises its authority through the instrumentality of IDL. *See* Idaho Code §§ 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).

16. Under the Lake Protection Act, title 58, chapter 13, Idaho Code (“LPA”), IDL has the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the LPA. Idaho Code § 58-1304. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* (“Rules”).

17. In enacting the LPA, the Legislature expressed 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.

Idaho Code § 58-1301.

18. Under the LPA and Rules, “navigable lake” is defined as:

Any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

Idaho Code § 58-1302(a); IDAPA 20.03.04.010.024. Lake Coeur d'Alene is a navigable lake under the LPA.

19. For purposes of the LPA, the “beds of navigable lakes” are defined as “the lands lying under or below the natural or ordinary high water mark of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.” Idaho Code § 58-1302(b); IDAPA 20.03.04.010.04. According to the Application, the proposed single-family dock would lie partially or fully on or above the bed of a navigable lake. (Agency Record 3.) Since the proposed navigational encroachment lies on and/or above the bed of a navigable lake, IDL has jurisdiction to regulate the proposed encroachment.

20. As an owner of land adjacent to navigable waters of a lake, Applicant is a littoral owner, as defined in IDAPA 20.03.04.010.033, and is qualified to make an application for an encroachment permit for a single-family dock, pursuant to IDAPA 20.03.04.010.36 and .020.02.

21. IDAPA 20.03.04.015.01 sets the following parameters governing the size and dimensions of single-family docks:

- No part of the structure waterward of the natural or ordinary high water mark or artificial high water mark may exceed 10 feet in width, excluding the slip cut out.
- Total surface decking area waterward of the natural or ordinary or artificial high water mark may not exceed 700 square feet, including approach ramp and walkway for a single-family dock and may not exceed 1,100 square feet, including approach ramp and walkway for a two-family dock.

- No portion of the docking facility may 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.
- A variance to the standards in this Subsection 015.01 may be approved by IDL when justified by site specific considerations, such as the distance to the established line of navigability.

22. IDAPA 20.03.04.015.13.e provides that:

It 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 feet from adjacent littoral right lines.... Written consent of the adjacent littoral owners will automatically rebut the presumption. All boat lifts and other structures attached to the encroachments shall be subject to the above presumptions of adverse affects [sic].

23. Finally, IDAPA 20.03.04.025.01 provides:

Applications for single-family and two-family navigational encroachments not extending beyond the line of navigability will be processed with a minimum of procedural requirements and **shall not be denied except in the most unusual of circumstances**. No newspaper publication, formal appearance by the applicant, or hearing is contemplated.

(Emphasis added.)

24. There is no dispute that Frey Dock and Barge Inc. (“Frey”) towed a used dock to Applicant’s property and deposited it prior to an application being filed. According to Applicant’s (and her daughter, Caylin Novell’s) testimony, they were relying on Frey to file an application; they were unaware that the dock had been dropped off at Applicant’s property prior to filing the Application. Both Applicant and her daughter testified that they had not meant to circumvent IDAPA rules and were apologetic during the hearing. Applicant is requesting the Application be approved. (Hearing Recording.)

25. There is also no dispute that Applicant filed the Application as soon as she was notified that the dock had been dropped off before an application was filed. (Hearing Recording; Agency Record 3.)

26. Mr. Ahmer testified that the dock placed on the shoreline did not meet IDAPA standards for a single-family dock. However, he further testified that IDL has a process it follows when it receives notice of a non-compliant encroachment—IDL allows the applicant to submit an application within 30 days for a single-family dock that meets IDAPA standards, and then grants the applicant 1 year to correct/install the compliant dock.

27. Mr. Ahmer testified that, in this case, Applicant submitted revised drawings with the Application that met IDAPA standards. Consequently, IDL recommends approval of the Application. Mr. Ahmer testified that IDL is tracking the Application and will give Applicant one year to bring the non-complaint dock into compliance.

28. Mr. Woudenberg testified that the current dock that was deposited on Applicant's shoreline will require a major overhaul to meet the specifications set out in the drawings in the Application. He believes the dock should be moved and the renovations be done offsite. He testified the current dock is also causing erosion because it is tied up to a tree. The Woudenbergs and Sunde Trust want the erosion to stop and would like to be reimbursed for any expenses they incur in stopping the erosion. (Hearing Recording; Agency Record 7, B10, B11.)

29. Ms. Ullrich testified the dock was in sad shape when it was dropped off and its condition has gotten worse. In addition, there is foam from the dock floating around the area and the dock is causing erosion. In her opinion, the depiction of the dock does not represent the actual dock sitting on the shoreline. She also testified that the new dock will create safety issues. (Hearing Recording; Agency Record 7, B10, B11.)

30. Mr. Bean also testified that the current dock is trespassing on the Sunde Trust property. (Hearing Recording.)

31. The crux of this case is whether the Application (specifically the revised

application) meets the IDAPA requirements as set out above. No one disputed that the Application meets the IDAPA requirements. Instead, the Woudenbergs' and the Sunde Trust's objections are to the current dock that is along the shoreline and how it will be modified to fit the design in the Application. They also testified to peripheral issues. (Hearing Recording.)

32. The Hearing Officer is empathetic to the Woudenbergs' and the Sunde Trust's issue with Frey depositing the dock on Applicant's property prior to a permit being issued. However, IDL has a reasonable process for bringing non-complaint docks into compliance with IDAPA requirements. And in this case, the record includes sufficient evidence to show, by a preponderance of the evidence, that Applicant's Application meets Idaho's requirements for construction of the proposed single-family dock. Based on the evidence in the record, the Hearing Officer recommends that Applicant's Application be approved.

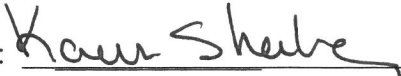
33. The Woudenbergs and the Sunde Trust have requested that the Hearing Officer assess civil penalties against Applicant. However, this is not an enforcement action and such an assessment is outside the jurisdiction of the Hearing Officer pursuant to the July 12, 2021 *Notice of Appointment of Hearing Officer*.

IV. PRELIMINARY ORDER

Based on the foregoing analysis, the Hearing Officer recommends that the Director of the Idaho Department of Lands issue a Final Order approving Applicant's Encroachment Permit Application No. L-95-S-2924A.

DATED: September 2, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: 
KAREN SHEEHAN
Hearing Officer

* * * * *

Idaho Code § 67-5245 and IDAPA 20.01.01.730.02, addressing petitions for review of preliminary orders, and Idaho Code § 58-1306, requiring a final order to be issued within 30 days of the hearing date, are not applicable per the *Notice of Appointment of Hearing Officer and Hearing* dated July 12, 2021.

* * * * *