

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application No. L-95-S-3057D,)	Case No. CC-2021-PUB-22-004
)	
Bryan E. Morganstern Trust,)	FINAL ORDER
)	
Applicant.)	
_____)	

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 October 7, 2021, IDL received an updated encroachment permit application filed by the Bryan E. Morganstern Trust. A hearing was held on December 16, 2021. Lincoln Strawhun served as duly appointed hearing officer. On January 14, 2022, the hearing officer issued his Preliminary Order, which contains an Issue, Findings of Fact, Discussion, and Conclusion 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 Issue and Findings of Fact as my Findings of Fact with the following amendments:

I delete paragraph 6 on page 3 of the Preliminary Order and insert the following new paragraph 6:

6. On November 1, 2021, IDL received a written objection from counsel representing the trustees of the August and Ida Vitolins Family Trust (Vitolins Trust). It explained that the Vitolins Trust was the Applicant's east neighbor and the Trust believed that the application was incompatible with its current, intended, and future uses of the Trust's property.

a. Part of the Vitolins Trust's objection was based on the distance between the proposed encroachment and the shared littoral line. However, Applicant's proposed dock would not be any closer to the littoral line shared with the Vitolins Trust than Applicant's current, existing, and permitted dock.

b. The Vitolins Trust property does not appear to have a permitted dock or other permitted encroachments. The Vitolins did not argue that the Applicant's dock placement would impede their navigation and access to the water.

c. There would be over 110 feet between the Applicant's proposed dock modification and the closest permitted dock upstream from the Vitolins

Trust, which leaves enough room for the Vitolins Trust to permit and build a larger dock to use as an aid to navigation if they choose to in the future.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Discussion and Conclusion of Law as my Conclusions of Law, except that I make the following amendments and additions to the Discussion section.

On page 4, I delete the first line and insert the following words in its place to complete the sentence that begins on page 3:

“the Vitolins without reason for the objection; that he is not extending the existing dock fingers and is just rotating the slip.”

On page 4, under the subheading “Objector's position” in the second full paragraph, I delete the word “Appellant's” on line 1 of that paragraph and replace it with the word “Applicant's.”

On page 4, under the subheading “Objector's position” in the second full paragraph, I delete the word “Applicant's” on line 5 of that paragraph and replace it with the word “Objector's.” I delete the word “permit” also on line 5 because the record appears to show that the Vitolins Trust property single-family dock is not currently permitted by IDL. With those amendments, the sentence altered now reads as follows with the new word inserted underlined:

“that Objector's current dock predates the Lake Protection Act and is small for the use of swimming, kayaks, and paddleboards (and other non-motorized watercraft);”

On page 5 under the heading “IDL's position” in the second paragraph, I delete the first two sentences and insert the following in its place:

That the Vitolins Trust does not currently appear to have a permitted dock or other permitted encroachment on their property; that Applicant's

dock would not impede access to the water from the Vitolins Trust property; that there would be over 110 feet between Applicant's proposed dock modification and the closest permitted dock upstream from the Vitolins Trust property; that the Vitolins could apply for a permit and build a larger dock to use as an aid to navigation if they choose to in the future;

On page 6, I delete the first sentence after the subheading "Analysis and reasoning supporting recommendation."

On page 6, I delete the last three lines on the bottom of page 6 and all the text on page 7 above the heading "Conclusions of Law." I add the following paragraphs in their place:

Per IDAPA 20.03.04.015.13.e, there is a presumptive adverse effect of a single-family dock that does not provide a 10-foot setback from adjacent littoral right lines on either side of the proposed encroachment. However, the presumption can be rebutted. IDAPA 20.03.04.015.13.e.

In this case, the presumption is rebutted by the evidence in the record. As IDL testified, the proposed dock would not be any closer to the littoral line shared with the Vitolins Trust than Applicant's current permitted dock. While the Vitolins argue that the dock interferes with their historical, current, and intended uses of the property, the Vitolins did not present evidence that established an actual inability to utilize their littoral rights, or any actual adverse impact resulting from the current dock's placement to their littoral rights to maintain adjacency to the lake and use their rights in building or using aids to navigation. They also did not articulate or submit evidence that established how the proposed dock configuration would actually and adversely impact their littoral rights.

Further, the proposed dock provides at least a ten-foot buffer from the littoral line shared with the Vitolins Trust at the end of the dock, where most motorized navigation is likely to occur. Given the 110 feet between the proposed dock and the closest known permitted dock, the Vitolins have room to extend their current dock or build a larger dock to aid navigation and in compliance with the Lake Protection Act if they so choose. Therefore, the evidence in the record rebuts any presumptive adverse effect.

Additionally, the Vitolins argue that the lake factors require that the Director deny this application. More specifically, they argue that all other lake factors outweigh the navigation factor because the Applicant's navigational needs are based purely on personal navigation and boat size.

The lake factors the Vitolins refer to are the lake values articulated in Idaho Code § 58-1301. That statute provides that the navigational and economic necessity, justification, or benefit derived from the encroachment must be weighed against the lake values of protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. *Id.*

I find that the navigational and economic justification for, and benefits of, the proposed encroachment are not outweighed by any proven impact to the lake values. Despite the Vitolins claim that the proposed encroachment would negatively impact the lake values, the evidence does not establish that the proposed encroachment would negatively impact any lake value. While the Vitolins submitted photographs of the view from their house and their view of Applicant's current dock, they do not articulate how

the placement of the proposed dock would be detrimental to aesthetic beauty beyond their individual opinions and desire for an unimproved lakeshore. “Notably, nothing in the LPA's definition of littoral rights confers the right to a particular view.” *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 243, 469 P.3d 23, 30 (2020).

The Vitolins also testified that they enjoy fish and wildlife, that they engage in non-motorized recreation, and that they think the Applicant’s reconfiguration of his dock will be detrimental to their future experiences. However, their evidence did not establish that these values would actually be, in any way, impacted by the proposed dock. To the contrary, the record shows that the proposed dock will result in more space between existing and permitted encroachments to Applicant’s west; thereby, improving the lake values of protection of property, navigation and recreation for the Gambles Trust property and the Applicant. Thus, after weighing the evidence in the record, I conclude that the factors in Idaho Code § 58-1301 support granting the permit.

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 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-95-S-3057D 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 31st day of January 2022.



DUSTIN T. MILLER

Director, Idaho Department of Lands

I hereby certify that on this 31st day of January 2022, 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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BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. CC-2021-PUB-22-004
ENCROACHMENT PERMIT APPLICATION)
No. L-95-S-3057D,)
) **PRELIMINARY ORDER**
Bryan E. Morganstern Trust,)
)
)
Applicant.)
_____)

After a hearing on this matter, held December 16, 2021, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to approve Encroachment Permit Application No. L-95-S-3057D (“application”) because denial would not serve the purpose of protecting adjacent littoral rights consistent with Idaho Code § 58-1302(f).

In summary, Applicant submitted an application for an encroachment permit for a private, single-family dock located on the Spokane River—which really was a modification to a current, permitted dock. An adjacent neighbor filed an objection. IDL scheduled a hearing.

On November 19, 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—the

Applicant, Objector (Vitolins Family Trust), and IDL. The parties submitted comments and exhibits before hearing, and provided testimony at hearing. All exhibits and testimony are accepted as evidence and part of the record in this matter. 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 the Lake Protection Act, Idaho Code § 58-13 and the *Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho*, IDAPA 20.03.04.

FINDINGS OF FACT

The hearing officer finds the following facts:

1. Applicant has an existing permit (L-95-S-3057C) for a 4'x20' pier, 3'x20' ramp, 6'x5' approach and 20'x27' single-slip dock (537 feet).
2. Applicant submitted an incomplete application on June 21, 2021, and after receiving an objection and corresponding with IDL, requested on August 26, 2021 to work with his dock builder on design, and to resubmit a new dock drawing.
3. On October 7, 2021, IDL received an updated application from Applicant for a single-family dock. The proposed dock will consist of a tapered 10'x20' approach, 3'x17' ramp and 20'x27' single-slip dock (537 square feet). The proposed dock modification rotates the slip portion of the existing dock to face the Spokane River and incoming waves to attempt to alleviate boating pressure on the downstream/west neighbor and make mooring a boat easier at Applicant's property.
 - a. The application includes an aerial image of the existing dock shape and dimensions overlaid with the proposed dock shape in which the slip fingers ("u" shape) will rotate from being parallel with the shoreline to face outwardly to the river.
4. On October 14, 2021, IDL sent adjacent littoral neighbors a letter because the proposed encroachment would not provide a 10-foot setback from adjacent littoral right lines on either side of the proposed encroachment. The proposed, reconfigured dock would

- provide at least a 10-foot buffer at the end of the dock at the outer slip portion.
5. The west neighbor (Gambles Revocable Trust) filed a written notice of no objection (received by IDL November 3, 2021) to Applicant's application. Applicant's proposed dock would improve navigability on the west property side.
 6. On October 26, 2021, IDL received notice from Applicant's east neighbor, Sarma Vitolins, acting for DMSV Rivercrest, LLC (DMSV)—who had objected to Applicant's June application. On November 1, 2021, IDL received a written objection from DMSV's counsel explaining that the DMSV property is now vested in the name of August and Ida Vitolins Family Trust (Vitolins Trust.)
 - a. Part of the Vitolins Trust objection was based on the distance between the proposed encroachment and the shared littoral line. However, Applicant's proposed dock would not be any closer to the littoral line shared with the Vitolins Trust than Applicant's current, existing and permitted dock.
 - b. The Vitolins Trust does not currently have a dock or other encroachment on their property. Applicant's dock would not impede their access to the water.
 - c. There would be over 110 feet between the proposed Applicant's dock modification and the closest dock upstream from the Vitolins Trust—enough room for the Vitolins Trust to build a dock if they choose to in the future.
 7. Applicant's drawings, submitted with the application, meet single-family dock standards as defined by IDAPA 20.03.04.015.01 (it's less than 700 square feet in size; it's within the line of navigability; no portion of the dock is wider than 10 feet). Applicant owns 25-feet of water frontage (which makes him eligible for an encroachment permit).
 8. As an exhibit for hearing, and in testimony at hearing, IDL recommended approval of application No. L-95-S-3057D based on the facts that the proposed, reconfigured dock provides at least a 10-foot buffer at the end of the dock; that there is an existing, permitted dock in the same location; that it is not clear that the proposed encroachment would interfere with the Vitolins Trust littoral rights.

DISCUSSION

Applicant's position. Applicant explained that he bought his home in March 2021; that he bought the property because it had a dock and he needed a dock for his boat; that his realtor contacted his neighbors and he received no objections; however, that he received an objection from

the Vitolins without reason for the objection; that he is just extending the existing dock fingers and rotating the slip.

Objectors' position. Legal counsel, and family members for the Vitolins Family Trust, explained that they have owned their property since the late '70's; that during the entirety of their ownership, they have used the land and water harmoniously so as not to detract from the aesthetic beauty of the area, disturb the native ecology, or negatively affect the water quality; that they have refrained from constructing large encroachments in the river or shoreline as part of their philosophy; that their father wanted to leave things as they were.

That Appellant's application is incompatible with their established and intended future use of their parcel; that if the application is approved, it will disrupt the use of their property; that the historical and present use of their property has been non-motorized boats; that these factors outweigh navigation needs; that Applicant has a bigger boat which is why he needs a bigger dock; that Applicant's current dock permit predates the Lake Protection Act and is small for the use of swimming, kayaks and paddleboards (and other non-motorized watercraft); that Applicant can move his dock further downstream; that the community dock pushed other docks upstream; that Applicant should move his dock west rather than east.

That Applicant's modified October application extends the littoral right lines at an angle from the shoreline in an effort to comply with the 10' buffer; that this has been done without reasoned explanation or justification and is at odds with that extended from the western property line; that the common boundary line dividing Applicant's and Objector's property extends at a right angle to the shoreline and river; that there is no basis to extend the littoral line at anything but a right angle across the shoreline to the line of navigability.

That Applicant's dock—existing and proposed—extends beyond the line of navigability; Applicant's boat slip extends past those presently existing on Lots 14 and 15 of the Shore Pines subdivision (both located downstream from Applicant's property) and Applicant does not explain why; that the existing and proposed permit do not conform to single-family dock requirements and so the application should be denied.

IDL's position. IDL's representative explained that Applicant has an existing permit; that the proposed dock modification rotates the slip portion of the existing dock to face the Spokane River and incoming waves to attempt to alleviate boating pressure on the downstream/west neighbor and make mooring a boat easier at Applicant's property; that the west neighbor (Gambles Revocable Trust) filed a written notice of no objection and Applicant's proposed dock would improve navigability on the west property side; that part of the Vitolins Trust objection was based on the distance between the proposed encroachment and the shared littoral line however, Applicant's proposed dock would not be any closer to the littoral line shared with the Vitolins Trust than Applicant's current dock.

That the Vitolins Trust does not currently have a dock or other encroachment on their property and Applicant's dock would not impede their access to the water; that there would be over 110 feet between the proposed Applicant's dock modification and the closest dock upstream from the Vitolins Trust—enough room for the Vitolins Trust to build a dock if they choose to in the future; that Applicant's drawings, submitted with the application, meet single-family dock standards as defined by IDAPA 20.03.04.015.01; that IDL recommends approval of application No. L-95-S-3057D based on the facts that the proposed, reconfigured dock provides at least a 10-foot buffer at the end of the dock; that there is an existing, permitted dock in the same location; and that it is not clear that the proposed encroachment would interfere with the Vitolins Trust

littoral rights and these factors rebut the presumption that the application should be denied (because the proposed encroachment does not provide a 10-foot setback from adjacent littoral right lines on either side of the proposed encroachment).

Analysis and reasoning supporting recommendation. The Objector's argument against the application lacks merit. The hearing officer agrees with IDL's recommendation for approval and finds no basis to deny the application.

Per IDAPA 20.03.04.010.33 and Idaho Code § 58-1302(f), Applicant is a littoral owner with littoral rights who may apply for encroachments. There is an existing, permitted dock on Applicant's property. The current application simply modifies the current dock by rotating the slip portion to face the Spokane River.

Applicant's proposed modification complies with the single-family dock standards of IDAPA 20.03.04.015.01 and the circumstances comply with Idaho Code § 58-1302(f).

Per the statute: "Riparian or littoral rights" means only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake. Applicant's proposed dock would not be any closer to the littoral line shared with the Vitolins Trust than Applicant's current dock. Applicant's reconfigured dock provides at least a 10-foot buffer at the end of the dock. The proposed encroachment would not interfere with the Vitolins Trust littoral rights.

Per IDAPA 20.03.04.015.13.e, there is a presumptive adverse effect of a single-family dock that does not provide a 10-foot setback from adjacent littoral right lines on either side of the proposed encroachment. To the hearing officer, this rule does not apply to this case given the fact

that there is already a permitted dock on Applicant's property that does not provide a 10-foot setback from adjacent littoral right lines. The rule would seem to only apply in circumstances when there is not a current encroachment already in place.

Even if the rule does apply, as mentioned, the proposed modified dock would not be any closer to the littoral line shared with the Vitolins Trust than Applicant's current dock, it provides at least a 10-foot buffer at the end of the dock, and would not interfere with the Vitolins Trust littoral rights. These factors rebut any presumptive adverse effect because there would be no change from the current effect of the current dock.

In conclusion, the hearing officer understands that the Objectors wants to keep things as they have been (without motorized boats moored and used near their property). However, Objector's argument lacks legal and practical merit in contrast to Applicant's modifications to an existing, permitted dock. The only remedy that would seem to satisfy Objectors would be for Applicant to promise to use a non-motorized boat or remove his current existing, permitted dock. Such potential remedies would be in contrast of Applicant's littoral rights consistent with Idaho Code § 58-1302(f).

CONCLUSION OF LAW

Applicant's Encroachment Permit Application for a single-family dock complies with the Lake Protection Act, Idaho Code § 58-13 and the *Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho*, IDAPA 20.03.04.

PRELIMINARY ORDER

The hearing officer recommends that the Director of the Idaho Department of Lands issue a Final Order approving Applicant's encroachment application No. L-95-S-3057D.

DATED: January 14, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: Lincoln Strawhun
LINCOLN STRAWHUN
Hearing Officer

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Idaho Code § 67-5245 and IDAPA 20.01.01.730.02 addressing petitions for review of preliminary orders are not applicable per the *Notice of Appointment of Hearing Officer and Hearing, December 16, 2021*, and Idaho Code § 58-1306, which requires a final order to be issued within 30 days of the hearing date.

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