

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application No.) Case No. PH-2022-PUB-20-001
L-96-S-0691F)
Laurence Smith – Riser Creek Marina,) **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 December 6, 2021, IDL received a second encroachment permit application filed by Laurence Smith for an expansion of Riser Creek Marina. A public hearing was held on March 6, 2022. Lincoln Strawhun served as duly appointed hearing coordinator. On April 5, 2022, the hearing coordinator issued his Preliminary Order, which contains a brief procedural history, Findings of Fact, and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030 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 coordinator's Preliminary Order in light of the entire record in this matter.

II. FINDINGS OF FACT

I adopt the Preliminary Order's Findings of Fact as my Findings of Fact.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Conclusions of Law, except as follows:

- I amend the first sentence of the first paragraph under Conclusions of Law on page 6 to read as follows:
 - Applicant's Encroachment Permit Application for a commercial encroachment 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.

IV. ORDER

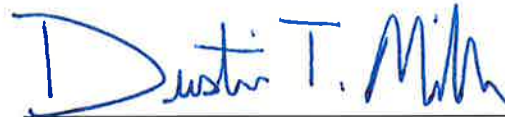
I conclude that the hearing coordinator's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's Findings of Fact and Conclusions of Law as my decision in this matter, except as specifically set forth herein. I hereby incorporate by reference the Preliminary Order's Findings of Fact and Conclusions of Law into this Final Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-96-S-0691F is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, the Applicant and any aggrieved party appearing at a hearing have a right to have

the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. Pursuant to Idaho Code § 58-1306(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 6th day of April, 2022.



DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of April 2022. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Laurence Smith – Riser Creek
Marina
PO Box 24
Hope, ID 83836
Applicant

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: risercreek@hotmail.com
risercreek2@hotmail.com

Rick Auletta – Hope Marina
47392 Idaho 200
Hope, ID 83836
Objector

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: rauletta@hopemarina.com
hopemarina@frontier.com

Toby McLaughlin
312 South First Avenue, Ste A,
Sandpoint, Id 83864
Attorney for Objector

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: Toby@sandpointlaw.com

Angela Schaer Kaufmann
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Counsel for IDL

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

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

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

Kourtney Romine
Kourtney Romine, Workflow Coordinator

Copy sent via email and/or regular U.S. Mail, postage prepaid to Those Who Have Provided Comments.

Stacy Simkins
Idaho Transportation Department
600 W. Prairie Ave.
Coeur d'Alene, ID 83815
Stacy.simkins@itd.idaho.gov

Charles E. Corsi
Idaho Department of Fish and Game
2885 West Kathleen Ave
Coeur d'Alene, ID 83815
Charles.corsi@idfg.idaho.gov

Tani and Toby Carlson
279 Shiras Drive
Sandpoint, Idaho 83864
tobinc@me.com

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

ANDREW J. SNOOK
Division Chief
State General Counsel & Fair Hearings Division

LINCOLN STRAWHUN, ISB #8925
REBECCA OPHUS, ISB #7697
KAREN SHEEHAN, ISB #7279
Deputy Attorney General
State General Counsel & Fair Hearings Division
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4555
Fax: (208) 854-8070
Email: Hearing.officer@ag.idaho.gov

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. PH-2022-PUB-20-001
ENCROACHMENT PERMIT APPLICATION)
No. L-96-S-0691F,)
) **PRELIMINARY ORDER**
Laurence Smith – Riser Creek Marina,)
)
Applicant.)
_____)

After a hearing on this matter, held March 7, 2022, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to approve Encroachment Permit Application No. L-96-S-0691F (“application”) because it meets all the applicable legal requirements of Idaho Code § 58-13 and IDAPA 20.03.04.

In summary, Applicant has an existing commercial marina dock and an existing encroachment permit (No. L-96-S-0691D). Applicant applied to add three slips with wave/wake attenuator on the north/south dock and to revise their existing commercial marina encroachment permit (adding kayak docks to No. L-96-S-0691D). An adjacent commercial marina (Hope Marina) filed an objection and asked for a hearing.

On January 21, 2022, 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, 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. On December 6, 2021, Applicant applied for three additional boat slips with wake/wave attenuator on the north/south dock for its commercial marina.
2. On December 6, 2021, IDL sent adjacent neighbor notices to the Idaho Transportation Department and Hope Marina (and copies to applicable federal, state, and local resource agencies and organizations).
3. On December 8, 2021, IDL received a parking plan from Applicant.
4. On January 10, 2022, IDL received an objection and request for hearing from Hope Marina.
5. Applicant’s drawings, submitted with the application, meet commercial marina dock standards as defined by IDAPA 20.03.04.015.
6. As an exhibit for hearing, and in testimony at hearing, IDL recommended approval of application No. L-96-S-0691F because the proposed additional dock slips appeared to meet the applicable legal requirements.

7. As to Objector's assertion that Applicant should have to meet all requirements that apply to a commercial marina, the hearing officer asked Objector's counsel which requirements were not being met under Idaho Code § 58-13 and Objector's counsel could not name any.
8. Applicant has an existing encroachment permit (No. L-96-S-0691D, issued on November 2, 2020, which authorizes a 4'x65' pier approach, 4'x25' ramp, 6'x50' floating dock, 4'x14' ramp and three 6'x50' float docks with piling for commercial charter boats; and the removal of creek rock at the mouth of Riser Creek just downstream of Highway 200).
9. On June 2, 2020, IDL received a revised drawing for the Applicant's marina showing that 8'x16' and 6'x20' kayak docks had been added to the north of the main dock system; that due to the angle of the existing dock system, the kayak docks fall within the footprint of the commercial marina facility and an encroachment permit was not needed for the addition per IDAPA 20.03.04.020.05.b

DISCUSSION

Applicant's position. Applicant's representative explained that the marina has tried to do everything right; that there was a public meeting in June 2021; that he has addressed all deficiencies regarding boat traffic; that the Objector has complained about Riser Creek customers parking in Hope Marina's parking lot; that Applicant has instructed its customers not to park in Hope Marina's parking lot; that seven parking spaces have been added to comply with IDAPA 20.03.04.015.03.c and county ordinance given Applicant's expansion over the last 10 years adding 13 slips (eight previously, five with current application); that IDL has said that non-water issues are non-issues; that Applicant is working with the county regarding Applicant's conditional use permit.

That Applicant would be adding five boats, not six; that that is five more people who can enjoy the lake; that the septic issue is being taken care of and he was unaware it was unpermitted.

Objector's position. Hope Marina's legal counsel asserted that additional slips will be navigational hazards; that there is heavy traffic because of Hope Marina and the floating restaurant;

that the floating restaurant already has an established docking path; that Applicant should have to meet all requirements that apply to a commercial marina; that the increase in car traffic is a safety hazard; that Applicant's additional slips would violate its conditional use permit with Bonner County of Applicant being a limited marina.

That Applicant's customers park in Hope Marina's parking lot; that IDL has not addressed the safety issue of six new boats on sight and Applicant's lack of infrastructure for the additions; that commercial marinas are supposed to have their own pumps; that Objector's complaint raises more concerns that IDL can deal with; that Applicant has past violations with septic and parking requirements; that the application should be conditional on taking care of other issues first.

That the Idaho Transportation Department commented that Applicant's approach is not permitted for more volume of use than is listed in its current permit and there are unresolved matters of unpermitted septic facilities; that for public safety, other issues should be taken care of first; that Objector recognizes that parking is not an IDL issue, but it is a problem; that Objector is not against development, but it must be done right.

IDL's position. IDL's representatives explained that Applicant applied to add three slips with wave/wake attenuator on the north/south dock and to revise their existing commercial marina encroachment permit; that Applicant has an existing encroachment permit (No. L-96-S-0691D, issued on November 2, 2020, which authorizes a 4'x65' pier approach, 4'x25' ramp, 6'x50' floating dock, 4'x14' ramp and three 6'x50' float docks with piling for commercial charter boats; and the removal of creek rock at the mouth of Riser Creek just downstream of Highway 200).

That on June 2, 2020, IDL received a revised drawing for the Applicant's marina showing that 8'x16' and 6'x20' kayak docks had been added to the north of the main dock system; that due to the angle of the existing dock system, the kayak docks fall within the footprint of the commercial

marina facility and an encroachment permit was not needed for the addition per IDAPA 20.03.04.020.05.b; that the kayak docks should have been called out in the existing permit No. L-96-S-0691D when the removal of creek rock was permitted, and IDL recommends that the kayak docks be added to the permit if the current application (No. L-96-S-0691F) is approved.

That Objector's concerns include a conditional use permit with the Bonner County Planning Department and upland parking locations; that IDL has no jurisdiction over these concerns; that Bonner County has an existing parking ordinance for commercial marinas similar to IDAPA 20.03.04.015.03.c; that IDL has no jurisdiction over issues above the ordinary or artificial high water mark; that IDL notified Bonner County of Applicant's application and did not receive any feedback or comments.

That IDAPA 20.03.04 does not have any specific requirements for shoreline length or square footage with commercial marinas; that Applicant's wave/wake attenuation information is consistent with what IDL has permitted in the past; that Applicant's proposed additional slips are more than 25' from adjacent littoral right lines and does not extend beyond the established line of navigability in compliance with IDAPA 20.03.04.015.13.e; that the application complies with the moorage requirements of IDAPA 20.03.04.015.03.a; that the application appears to meet the applicable legal requirements and IDL recommends approval.

Analysis and reasoning supporting recommendation. The Objector's argument against the application lacks merit as to issues within IDL's purview. As to Objector's assertion that Applicant should have to meet all requirements that apply to a commercial marina, in hearing testimony the hearing officer asked Objector's counsel which requirements were not being met under Idaho Code § 58-13 and Objector's counsel could not name any. The hearing officer agrees with IDL's recommendation for approval and finds no basis to deny the application.

Per IDAPA 20.03.04.010.09, Applicant is a commercial marina. Applicant's drawings, submitted with the application, meet commercial marina dock standards as defined by IDAPA 20.03.04.015.

IDAPA 20.03.04 does not have any specific requirements for shoreline length or square footage with commercial marinas. Applicant's wave/wake attenuation information is consistent with what IDL has permitted in the past. Applicant's proposed additional slips are more than 25' from adjacent littoral right lines and do not extend beyond the established line of navigability in compliance with IDAPA 20.03.04.015.13.e. The application complies with the moorage requirements of IDAPA 20.03.04.015.03.a.

In conclusion, the hearing officer understands that the Objectors have concerns however the concerns do not appear to be within IDL's jurisdiction. There is no basis to deny the application because the application appears to meet the applicable legal requirements of Idaho Code § 58-13 and IDAPA 20.03.04.

Regarding the kayak docks and the previous existing permit (No. L-96-S-0691D), the hearing officer agrees with IDL that the kayak docks should have been called out in the existing permit No. L-96-S-0691D when the removal of creek rock was permitted, and the hearing officer recommends that the kayak docks be added to the permit if the current application (No. L-96-S-0691F) is approved.

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-96-S-0691F.

DATED: April 5, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: Lincoln Strawhun
LINCOLN STRAWHUN
Hearing Officer

* * * * *

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, January 21, 2022*, and Idaho Code § 58-1306, which requires a final order to be issued within 30 days of the hearing date.

* * * * *