

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application No.) Case No. CC-2022-NAV-10-001
L-97-S-1212,)
) **FINAL ORDER**
Kristen Lee Ellingson,)
)
 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 March 1, 2022, IDL received an encroachment permit application filed by Kristen Ellingson. A hearing was held on April 29, 2022. Lincoln Strawhun served as duly appointed hearing officer. On May 25, 2022, the hearing officer issued his Preliminary Order, which contains Issue, Findings of Fact, Discussion, and Conclusion of Law sections.

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.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Discussion and Conclusion of Law as my Conclusions of Law, except that I add the following paragraphs on page 7 below the paragraph ending in "from Objector's property line" and above the paragraph beginning with "In conclusion":

Additionally, Idaho Code § 58-1301 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. Objectors' written submission noted their concerns that the proposed encroachment may impact aesthetic beauty, fish and wildlife, and the safety of their grandchildren recreating on the water.

However, the evidence does not establish that the proposed encroachment would negatively impact lake values. Objectors do not articulate how the placement of the proposed dock would be detrimental to aesthetic beauty beyond their individual opinions on their view. "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). Objectors also did not provide any specific allegations of harm or unsafe boat use beyond general concerns that the proposed dock may cause congestion and negatively impact safety when used by unsafe boat operators. However, the proposed dock is at least ten feet from the littoral lines,

within the line of navigation, and boats can already navigate in the area. Further, no evidence in the record indicated the dock would negatively impact fish and wildlife. Finally, the proposed dock will be an aid to navigation and an exercise of Applicant's littoral rights. Therefore, I find that the navigational and economic justification for, and benefits of, the proposed encroachment are not outweighed by the lake values.

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-97-S-1212 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 9th day of June 2022.

A handwritten signature in blue 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 9th day of June 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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Kourtney Romine
Workflow Coordinator

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BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. CC-2022-NAV-10-001
ENCROACHMENT PERMIT APPLICATION)
No. L-97-S-1212,)
) **PRELIMINARY ORDER**
Kristen Lee Ellingson,)
)
)
Applicant.)
_____)

After holding a hearing on this matter April 29, 2022, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to approve Encroachment Permit Application No. L-97-S-1212 (“application”) because it complies with the Lake Protection Act, Idaho Code § 58-13 (“LPA”) and the *Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho*, IDAPA 20.03.04.

In summary, Applicant applied for an encroachment permit for a private, single-family dock located on Priest Lake in Nordman, Idaho. An adjacent neighbor filed an objection. IDL scheduled a hearing.

On April 6, 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. Applicant is a littoral owner with littoral rights.
2. On March 1, 2022, IDL received a complete application from Applicant for a single-family dock adjacent to a parcel (Parcel RP004450000050A, Lot 5 of Stevens Granite Creek Subdivision) on the western shore of Priest Lake. The proposed dock will consist of a 4'x26' pier, 4'x5' ramp, 8'x40' dock with a boat lift (comprising 444 square feet).
 - a. There is not an existing permit for Applicant's property.
 - b. There is an existing dock on Applicant's southern property line permitted as L-97-S-68B owned by adjacent neighbor, Laura Lindvall.
3. On March 3, 2022, IDL sent notice of the application to Applicant's adjacent neighbors.
4. On March 14, 2022, IDL received an objection from an adjacent neighbor, the Holling Family Trust ("Objector").

5. Applicant's proposed dock is not a commercial dock and meets single-family dock standards as defined by IDAPA 20.03.04.015 (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; the dock provides a 10' buffer to the north and a 20' buffer to the south adjacent littoral right lines). Applicant owns approximately 50-feet of water frontage (which complies with IDAPA 20.03.04.010.36 requirement of a single-family dock applicant to own at least 25-feet of waterfront footage).
6. As an exhibit for hearing, and in testimony at hearing, IDL recommended approval of application No. L-97-S-1212 because the proposed dock meets the legal requirements for single-family docks.
7. In hearing testimony, Objectors acknowledged that Applicant's proposed dock is not a commercial dock and did not refute that Applicant's proposed single-family dock meets legal requirements.

DISCUSSION

Applicant's position. Applicant asserted that the proposed dock is within standards; that his dock will be 71 feet long, not 74 feet; that he understands Objector's concerns about the safety for their grandchildren; that risk cannot be eliminated because safety depends on who is driving the boat; that he is complying with the law; that with 50 foot lots, there is only so much you can do; that the Objector wants him to move his dock and the Lindvall dock; that the Objector may build a dock in the future; that there is no way he will ask the Lindvalls to move their dock, which has been there for 30 years; that he has a great relationship with the Lindvalls but does not have a legal agreement with them.

That he bought his property as a second residence with the intention of one day making it his primary residence—not for a commercial enterprise; that he only rented his cabin four weeks out of the 52 weeks last year; that upcoming is less than three weeks this year.

That he chose the property location based on the lake dropping three feet in the winter; that it is safer to have the dock further out; that he cannot put the dock on the south side of his property because of the Lindvall dock.

Objector's position. Objector's representatives expressed concern that Applicant bought his property as investment property, not a single-family home; that he has rented his property and advertised on VRBO as a rental; that renters may behave badly or unsafely; that anyone can come there and when you have different people coming in, you have no idea how they will behave and that causes a risk; that Applicant's dock would increase boat congestion and cause safety issues; that the boundary for a commercial dock is 25 feet, not 10 feet; that the dock is 74 feet long, not 71 feet; that if Applicant's dock is considered a commercial dock, then Applicant is out of compliance; but Objectors acknowledge that just because Applicant rents his property on VRBO does not convert the dock to a commercial dock; that the proposed dock length affects the aesthetic beauty of the area and boats from the dock would affect the local habitat.

That there is no way of telling in the future if Applicant or his renters would use jet skis in addition to boats; that they want him to move the proposed dock south to give them more space; that it seems like it would not be a problem to move Applicant's proposed dock; that Objectors are on two family lots; that if they separate the lots, they could build two docks; that they question if there would be enough space or would IDL make Applicant move his dock; that the shoreline is curved between the properties and Objectors want IDL to assess any potential infringement.

That Objectors do not refute that Applicant's proposed dock meets legal requirements but there must be common sense; that Applicant's dock would lead to increased boat congestion and increased risk; that the Lindvall dock is illegal because it is right on the property line; that it should have to be moved; that the solution is to move the Lindvall dock so Applicant can move down his proposed dock.

IDL's position. IDL's representative explained that matters of boating safety are a matter for local law enforcement, not something that IDL can regulate; that the dock drawings submitted

by Applicant all appear to meet the single-family dock standards that are listed under IDAPA 20.03.04.015.01; and that the proposed dock appears to provide at least a 10 foot buffer on both sides of the dock per IDAPA 20.03.04.015.13.e; that the proposed dock would extend outward into the lake 71 feet, which is approximately the same length as adjacent docks in the area and would be within the line of navigability due to the contours of the shoreline; that the proposed dock includes a boat lift and boat lifts do not count toward the dock's square footage; that since the proposed dock meets the legal requirements, IDL recommends approval.

That IDL recognizes that there is a single-family dock on Applicant's southern property line shared with adjacent owner Lindvall (permitted as L-97-S-68B); and that the dock may have been used by both Lindvall and the Applicant at some point in the past; that IDL cannot force Lindvall to move their existing dock or force Applicant to move his proposed dock further south to provide more room for the Objector; that the Objectors could build their own dock in the future as long as it complied with the 10 foot setback buffer requirement.

That IDL also acknowledges Objector's concern that Applicant rents out his property as a vacation rental; that the LPA and LPA rules do not address the status of vacation rentals; that there are likely numerous waterfront properties in North Idaho rented out as vacation rentals; however, that renting out a waterfront property (including a dock) does not violate the existing LPA and LPA rules or convert a single-family dock into a commercial dock.

That the mere fact that upland property is being rented does not necessarily mean that renters are using a boat or the dock; that some renters may just want to enjoy the upland property and the shoreline for swimming; that not all renters may use the dock for moorage; that they may just want to use the dock for sitting, swimming and/or lounging.

Analysis and reasoning supporting recommendation. While the Objectors expressed understandable concerns, they acknowledged that Appellant's proposed dock is not a commercial dock and that it meets single-family dock requirements. Objectors did not identify any rule or legal basis to support denial of the application. Accordingly, the hearing officer agrees with IDL's recommendation for approving the application because Applicant's proposed dock meets LPA standards and LPA rules.

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. Applicant's proposed dock will consist of a 4'x26' pier, 4'x5' ramp, 8'x40' dock with a boat lift (comprising 444 square feet). Applicant's proposed dock meets single-family dock standards as defined by IDAPA 20.03.04.015 (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; the dock provides at least a 10' buffer to the north and south adjacent littoral right lines). Applicant owns approximately 50-feet of water frontage (which complies with IDAPA 20.03.04.010.36 requirement of a single-family dock applicant to own at least 25-feet of waterfront footage).

IDAPA 20.03.04.015.13.e of the LPA rules discusses presumed adverse effects with navigational encroachments such as docks. However, per the rule, the presumed adverse effect only applies if the dock is located closer than 10' feet to an adjacent neighbor's littoral right lines. As mentioned, the proposed dock provides at least a 10' buffer on both sides of the dock so there is no presumed adverse effect with the application.

Regarding Objectors' concerns that Applicant may rent his upland property, and that the renters may use Applicant's dock, there is no presumed adverse effect expressed in IDAPA 20.03.04.015.13.e or any other LPA rule regarding a waterfront owner who occasionally rents his

property. There is also nothing in the rules that would support IDL making the Lindvall dock owner move her dock further from Applicant's property line to then make Applicant move his proposed dock further from Objector's property line.

In conclusion, Appellant's proposed dock meets all legal standards. There is no legal basis to deny the application.

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-97-S-1212.

DATED: May 25, 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, April 6, 2022*, and Idaho Code § 58-1305, which requires a final order to be issued within 45 days of the hearing date.

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