

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. PH-2022-NAV-10-001
Encroachment Permit Application)
No. L-97-S-1081C) **PRELIMINARY ORDER**
)
Gregory M. Wilson)
)
)
_____)

I. BACKGROUND

On June 16, 2021, Gregory Wilson (“Applicant”) submitted an encroachment permit application number L-97-S-1081C (“Application”) to the Idaho Department of Lands (“IDL”) seeking to permit an existing log structure on the southern boundary of his property at or below the ordinary high-water mark (“OHWM”) as a pre-LPA encroachment.¹ (AR, Doc. 1.)² On or about March 23, 2022, Applicant submitted two letters to IDL (one from Gary Fievez dated November 24, 2020, and one from Patrick Phillips dated February 22, 2022). (AR, Docs. 2 and 3.)

On July 8, 2022, IDL sent a letter to Applicant denying the Application stating the information provided by Applicant does not satisfy Idaho Code § 58-1312. (AR, Doc. 3.) On August 8, 2022, Applicant submitted a letter to IDL appealing the denial. (AR, Doc. 4.)

On October 4, 2022, IDL’s Director, Dustin T. Miller, issued a *Notice of Appointment of Hearing Coordinator and Scheduling Conference* (“Notice of Appointment”). The Notice of Appointment appointed Karen Sheehan as the Hearing Coordinator to conduct a public hearing

¹ LPA stands for Lake Protection Act, discussed in more detail below.

² The citation “AR” refers to the Agency Record. “Doc.” refers to the document number.

per Idaho Code § 58-1306(c) with a scope of authority delineated by IDAPA 20.01.01.413.01 and, as applicable, IDAPA 20.03.04.030. The Notice of Appointment also set a scheduling conference for October 17, 2022, at 9:00 a.m. pacific time. (AR, Doc. 5.)

A telephonic scheduling conference was held on October 17, 2022. In attendance were Gregory Wilson, William Faloon, along with his counsel, Mischelle Fulgham, Mike Ahmer, Deputy Attorney General Angela Kaufman, counsel for IDL staff.³ At the scheduling conference, the Hearing Coordinator agreed to the request that the Record from PH-2020-NAV-10-001 be made part of the record. A hearing date was set for December 19, 2022, at 9:00 a.m. Pacific Time.

The Hearing Coordinator issued a *Notice of Public Hearing* on October 25, 2022, scheduling a public hearing for December 19, 2022, at 9:00 a.m. Pacific Time, in-person or by video conference at the IDL office located at 3258 W. Industrial Loop, Coeur d'Alene, Idaho 83815. Exhibits and testimony was requested to be delivered to the Hearing Coordinator and IDL by December 12, 2022. (AR, Doc. 7.)

On November 8, 2022, Applicant submitted *Applicant's Objection and Protest*. (AR, Doc. 8.) On December 12, 2022, IDL submitted a *Notice of Filing and IDL's Exhibits* (which includes Mike Ahmer's written statement (AR, Doc. 9.) and Applicant submitted a *Declaration of Gregory M. Wilson, Applicant's Memorandum of Authorities Disputing IDL's Jurisdiction* and Exhibits A–N. (AR, Doc. 10.)⁴

On December 15, 2022, Mischelle Fulgham, Objector William Faloon's counsel, submitted *Objector's Legal Memorandum Supporting Denial of Wilson's Pre-LPA Encroachment Permit Application and Requiring Removal of the Unpermitted Encroachment*, Faloon's Objection, and a PowerPoint presentation. (AR, Doc. 12.)

³ The scheduling conference was supposed to be recorded. However, IDL's telephone system encountered a glitch. The Hearing Coordinator did not learn until after the scheduling conference had ended that it was not recorded.

⁴ AR, Doc. 11 is email correspondence dated December 14, 2022, confirming Applicant's submissions were correctly received by IDL.

On December 19, 2022, IDL held a public hearing starting at approximately 9:03 a.m. Pacific Time, at the IDL office located at 3258 W. Industrial Loop, Coeur d'Alene, Idaho 83815. In physical attendance and offering testimony or argument were Gregory Wilson, William Faloon, Mischelle Fulgham, as attorney for Mr. Wilson, Mike Ahmer, IDL Resource Supervisor, and Angela Kaufman, Deputy Attorney General assisting IDL staff. According to the sign-in sheet, other persons in physical attendance were Debra Wilson, Ali Seibly, Cassandra Wilson, Marde Mensinger, Eric Wilson, Crystal Butler, Vicki Richter, Amidy Fuson, and Jennifer Barker. Participating via Zoom were Tyler Wilson, Mick Thomas, Ryan Thomas, Ryan Zandhuisen and Dan (no last name). (AR, Doc. 14.) The Hearing Coordinator was also physically present at IDL's office in Coeur d'Alene. The hearing was recorded. (Hearing Recording.)

At the public hearing, Applicant submitted Exhibit O (AR, Doc. 13.) and Mr. Faloon submitted a fact sheet and map. (AR, Doc. 15.) The public hearing concluded at approximately 12:02 p.m. pacific time. (Hearing Recording.)

The Hearing Coordinator is authorized by the IDL Director to issue this Preliminary Order. (AR, Doc. 5.) With the public hearing concluded and all evidence submitted, this matter is fully before the Hearing Coordinator.

II. FINDINGS OF FACT

1. Gregory Wilson, Applicant, owns Parcel ID RP0008700017A0A, Lot 17A of the Diamond Park Replat subdivision on the north-eastern shoreline of Priest Lake. Applicant is a littoral owner, with littoral rights. (AR, Docs. 1 and 9.)

2. Applicant purchased the property in 2003. (Hearing Recording; AR, Doc. 6.)

3. According to the Application, when Applicant purchased the property, there was a log crib with cobble extending from the southern property line, below the OHWM, and into the lakebed. ("pre-existing log crib"), (AR, Doc. 6.)

4. On June 16, 2021, Applicant submitted encroachment permit application number L-97-S-1081C to IDL seeking to permit the pre-existing log crib as a pre-LPA encroachment. (AR, Doc. 1.)

5. On or about March 23, 2022, Applicant submitted two letters to IDL in support of the Application. The first letter, dated November 24, 2020, from Gary Fievez states that during the time his family owned Lot 17 (from June 1965–2002) “two cedar logs that were approximately 4-6 inches in diameter and 20 feet long were placed in the beach at the property line...” (AR, Doc. 2.) The second letter, dated February 22, 2022, from Patrick Phillips states in part “The logs’ configuration at their current location has not changed since the late 1960’s.” (AR, Doc. 2.)

6. On July 8, 2022, Mike Ahmer, IDL Resource Supervisor for IDL, sent a letter to Applicant denying the Application stating the information provided by Applicant “does not satisfy Idaho Code § 58-1312’s requirement of substantive documentation of the age of the encroachment and documentation that the encroachment has not been modified since 1974.” Applicant can either “remove the portions of the log structure that are below the OHWM” or request a hearing. The letter further states that “IDL does not have any jurisdiction over the lands above the OHWM.” (AR, Doc. 3.)

7. On August 8, 2022, Applicant submitted a letter to IDL appealing the denial. (AR, Doc. 4.)

8. According to Paragraph 7 of the *Declaration of Gregory M. Wilson*:

In April 2020, in response to the Order, applicant removed the “Riprap” stones from his lakefront lot but left the underlying Pre-Lake Protection Act (“LPA”) wooden crib structure in place. The Riprap stone structure was comprised of cobblestones placed over a log crib structure embedded in the lakebed. The Order had encouraged the Applicant to file an encroachment permit on the pre-existing log crib structure under the Pre-LPA statute I.C. 58-1312(1).

(AR, Doc. 10.)

9. The Affidavit of Patrick M. Phillips signed before a notary public on August 4, 2022, (“Affidavit”) states in part:

3. I have firsthand knowledge of the log crib being located on Lat 17 in 1966 and subsequent years....
4. I recall two cedar logs bound together with timbers and fashioned as a crib. It contained rocks. The logs were about 4-6 inches in diameter and about 20 feet long...
6. (sic) I inspected the log crib in the Summer of 2021. This weathered log crib is the same structure I recall in the 1960’s. The log and timber structure has not changed since my first recollection in 1966 and subsequent years with the exception of weathered aging. Greg Wilson informed me that his family had placed rocks alongside one of the timbers but has since removed them. The 1966 log structure shown in the Exhibit A and B photos has not been altered. The logs and timber are fixed together with timber spikes...

(AR, Doc. 10, Ex. M.)

10. Objector William Faloon owns land adjacent to Applicant’s property. He purchased the property in 2002. (Hearing Recording, AR, Docs. 12 and 15.)

11. Mike Ahmer, IDL Resource Supervisor for the Mica Supervisory Area Office of IDL, testified that the log structure does not show up on the aerial imagery that IDL has for that particular area due to the scale of the photo, the size of the existing log structure and lack of clarity. At the time IDL denied the Application, Mr. Wilson had only submitted two letters (i.e., no affidavit was submitted). Without any evidence that supported the size, building materials and construction of a pre-LPA encroachment, IDL did not grant a pre-LPA permit. (Hearing Recording, AR, Doc. 9.)

12. Mr. Ahmer also testified that based on photographs submitted by Dr. Faloon, IDL believed the log structure has been modified since 2005. The photographs show rocks were added to the lakebed and log structure sometime in 2006–2007. (Referring to AR, Doc. 6, pp 0124–0133.) Mr. Ahmer also noted that according to Mr. Fievez’s letter dated November 24, 2020, submitted by Applicant in support of the Application, Mr. Fievez only described logs on the beach, no rock

barrier or rock structure that extended from the beach to the lake. (Hearing Recording, AR, Doc. 9.)

13. Mr. Ahmer further testified that Applicant only provided two letters attesting to the age of the existing log structure. No historic aerial images or any personal photographs were provided that would show the extent and construction of the existing log structure. Based on all of this information, IDL determined Applicant had modified what remained of the log structure and that the existing log structure can no longer be permitted as a pre-LPA encroachment. Mr. Ahmer recommended upholding the decision to deny the Application and that the portion of the logs below the OHWM be removed prior to June 1, 2023. (Hearing Recording, AR, Doc. 9.)

14. Mr. Ahmer testified that IDL did not have a copy of the Affidavit when it reviewed and denied the Application. Mr. Ahmer reviewed the Affidavit during the hearing and testified IDL does not feel that this one document is sufficient as it does not include the age of the structure, the size of the structure or the purpose of the structure. In order to obtain a pre-LPA, permit a threshold must be met, this is a high threshold since the applicant needs to have substantial proof. (Hearing Recording.)

III. ANALYSIS AND CONCLUSIONS OF LAW

A. IDL has jurisdiction over the beds and banks of Priest Lake.

1. The Idaho legislature enacted the Lake Protection Act, Title 58, Chapter 13, Idaho Code, on or about January 1, 1975, stating:

The legislature of the state of Idaho hereby declares that the 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.

2. The State of Idaho Board of Land Commissioners (“Land Board” or “Board”) is authorized to regulate, control, and permit encroachments in the beds of navigable lakes, rivers, and streams in the state of Idaho. Idaho Code §§ 58-104(9), 58-1305 and 58-1306.

3. The Land Board exercises its authority through the instrumentality of IDL. *See* Idaho Code §§ 58-101 and 58-119.

4. In accordance with the LPA, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* (“LPA rules”).

5. Priest Lake is a navigable lake under the LPA, and therefore, IDL has jurisdiction to regulate the proposed encroachment. *See State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

6. Applicant, as an owner of property adjacent to Priest Lake, is a littoral owner, as defined in Idaho Code § 58-1302 and IDAPA 20.03.04.020.02 and therefore is qualified to submit the Application.

7. IDAPA 20.03.04.012.03.a. states that the LPA Rules apply to permitting existing encroachments pursuant to Idaho Code § 58-1312. This is the Idaho Code section applicable to this matter.

8. Applicant testified that IDL has acted untimely, denied him due process, and consequently, lacks jurisdiction and so the Application must be granted. (Hearing Recording, AR, Doc. 10.) The Hearing Coordinator holds that her authority is limited pursuant to the *Notice of Appointment*, specifically IDAPA 20.01.01.413. The Hearing Coordinator does not have the authority to determine due process and/or jurisdictional issues. To the extent Applicant’s claims are included in the Hearing Coordinator’s scope of authority, the Hearing Coordinator holds that there is no mechanism to automatically grant the Application. Idaho Code § 58-1312(1) requires that every person seeking a pre-LPA encroachment permit **shall** meet the two part-test as outlined in more detail below. Consequently, Applicant must show the Application meets the requirements

of Idaho Code § 58-1312(1) in order to be granted a pre-LPA encroachment permit.

B. Applicant has the burden of proof.

1. The Applicant bears the burden of proof in this matter. “The customary common law rule that the moving party has the burden of proof including not only the burden of going forward but also the burden of persuasion – is generally observed in administrative hearings.” *Intermountain Health Care, Inc. v. Bd. Of County Com’rs of Blaine County*, 109 Idaho 299, 707 P.2d 410 (Ct. App. 1985).

2. The burden of proof is a preponderance of the evidence. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 926 P.2d 213 (Ct. App. 1996). A preponderance of the evidence is “evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth.” *Harris v. Electrical Wholesale*, 141 Idaho 1, 105 P.3d 267 (2004). Stated another way, a preponderance of evidence is evidence that persuades you “the proposition is more probably true than not true.” Idaho Civil Jury Instruction (IDJI) 1.20.1.

C. Applicant does not meet the requirements of the two-part test.

1. Idaho Code § 58-1312 states the following:

PERMITTING OF EXISTING ENCROACHMENTS.

(1) Unless otherwise prohibited, every person seeking a permit for a navigational or nonnavigational encroachment constructed prior to January 1, 1975, shall provide the board with substantive documentation of the age of the encroachment and documentation that the encroachment has not been modified since 1974. Persons providing such documentation shall receive an encroachment permit and shall not be required to pay the application and publication fees established in this chapter. Such substantive documentation shall include dated aerial photographs, tax records, or other historical information deemed reliable by the board.

(2) Every person seeking a permit for a navigational or nonnavigational encroachment constructed, replaced or modified on or after January 1, 1975, shall submit a permit application and enter the same permitting process as required for new encroachments.

2. Based on Idaho Code § 58-1312, Applicant **shall** provide (a) substantive documentation of the age of the encroachment and (b) documentation that the encroachment has not been modified since 1974.

3. Idaho Code also sets out what is considered “substantive documentation”— dated aerial photographs, tax records, or other historical information deemed reliable by the Board. Idaho Code § 58-1312.

4. In order to meet statutory requirements, Applicant submitted two letters in March 2022 and then the Affidavit as an exhibit for this hearing. (AR, Docs. 2, 3, and 10, Ex. M.)

5. As to the first requirement, the question is whether any of these documents fit the definition of substantive documentation by being “other historical information deemed reliable by the board.” Idaho Code § 58-1312(1).

6. The Hearing Coordinator finds that the two letters (AR, Docs. 2 and 3.) by themselves do not fit the definition of “substantive documentation.” Mainly because they are not documents that would be deemed reliable by the Board.

7. The Hearing Coordinator finds that an affidavit is a reliable source of information as it is a sworn statement signed in front of a notary. And there is no indication in the record that the Affidavit in this case should be considered untrustworthy.

8. The question then becomes whether the Affidavit contains “historical information” that would be deemed reliable by the Board. The Hearing Coordinator notes that the only historical information the Affidavit needs to contain is information regarding the age of the pre-existing crib. *See* Idaho Code § 58-1312(1).

9. Mr. Ahmer, on behalf of IDL, was not provided a copy of the Affidavit when Applicant submitted his Application. Mr. Ahmer reviewed the Affidavit during the hearing and testified IDL does not feel that this one document is sufficient as it does not include the age of the structure, the size of the structure or the purpose of the structure. In order to obtain a pre-LPA

permit a threshold must be met, this is a high threshold since the applicant needs to have substantial proof. (Hearing Recording.)

10. The Hearing Coordinator respectfully disagrees with Mr. Ahmer to the extent he states that the Affidavit does not include the size and purpose of the structure, as Idaho law only requires substantive documentation of the age of the encroachment. However, the Hearing Coordinator agrees that the Affidavit, while a reliable source, does not include the age of the pre-existing log crib.

11. The Affidavit states in part:

3. I have firsthand knowledge of the log crib being located on Lot 17 in 1966 and subsequent years....
4. I recall two cedar logs bound together with timbers and fashioned as a crib. It contained rocks. The logs were about 4-6 inches in diameter and about 20 feet long...
- 6.(sic) I inspected the log crib in the Summer of 2021. This weathered log crib is the same structure I recall in the 1960's. The log and timber structure has not changed since my first recollection in 1966 and subsequent years with the exception of weathered aging. Greg Wilson informed me that his family had placed rocks alongside one of the timbers but has since removed them. The 1966 log structure shown in the Exhibit A and B photos has not been altered. The logs and timber are fixed together with timber spikes.

(AR, Doc. 10, Ex. M.)

12. In sum, the Affidavit states that Mr. Phillips recalls the log crib existing back in the 1960's; however, the Affidavit does not state when the log crib was first constructed. In other words, the Affidavit does not provide the age of the encroachment.

13. The Hearing Coordinator empathizes with Applicant's assertion that there are no records that show when the pre-existing log structure was constructed or first existed. However, the requirement is clear – in order to obtain a pre-LPA encroachment permit, the applicant shall provide substantive documentation of the age of the encroachment. *See* Idaho Code § 58-1312(1).

14. Since the Applicant failed to meet his burden as to the first requirement of the test, the Hearing Coordinator does not need to determine whether Applicant meets his burden as to the second part of the test. However, in order to provide a complete analysis, the second requirement is discussed below.

15. The second part of the test requires Applicant to prove by a preponderance of the evidence that the pre-existing log crib has not been modified since 1974. The Hearing Coordinator finds Applicant has failed to meet his burden.

16. There is ample evidence in the record that the log crib structure has been modified since the LPA was enacted. Applicant states in his own words that he removed stones and pieces of concrete that were around the pre-existing log crib. (Hearing Recording.)

17. More specifically, Applicant stated in Paragraph 7 of the *Declaration of Gregory M. Wilson*:

In April 2020, in response to the Order, applicant removed the “Riprap” stones from his lakefront lot but left the underlying Pre-Lake Protection Act (“LPA”) wooden crib structure in place. The Riprap stone structure was comprised of cobblestones placed over a log crib structure embedded in the lakebed. The Order had encouraged the Applicant to file an encroachment permit on the pre-existing log crib structure under the Pre-LPA statute I.C. 58-1312(1).

(AR, Doc. 10.)

18. In addition, Mr. Ahmer testified that based on photographs submitted by Dr. Faloon, IDL believed the log structure has been modified since 2005. The photographs show rocks were added to the lakebed and log structure sometime in 2006–2007. (Referring to AR, Doc. 6, pp 0124–0133.) (Hearing Recording, AR, Doc. 9.)

19. The Hearing Coordinator agrees that Objector’s photographs show rocks and sandbags placed on top of the log crib structure. (AR, Doc. 12, PowerPoint Slides).⁵

⁵The Hearing Coordinator notes Objector submitted many photographs that show rocks, sandbags, tarps on the beach between Applicant’s and Objector’s properties. These photographs are for areas outside of IDL’s jurisdiction and the Hearing Coordinator’s scope of authority.

20. Based on the entirety of the record, the Hearing Coordinator finds that there is more than sufficient evidence showing the log crib structure has been modified since 1974.

21. In conclusion, based on the evidence in the record, IDL properly denied the Application as not meeting the requirements of Idaho Code § 58-1312(1).

IV. PRELIMINARY ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-1081C be DENIED and that Applicant remove the portion of the logs below the OHWM prior to June 1, 2023. It is outside the Hearing Coordinator's scope of authority to order remediation, mitigation, injunctive relief or to order Applicant to pay any financial penalties as requested by Objector. *See Notice of Appointment.*

This Order is a Preliminary Order pursuant to Idaho Code §§ 58-1306(c), 67-5420 and 67-5245. Consistent with the *Notice of Appointment*, "[T]he Hearing Coordinator shall submit a preliminary order to the Director of IDL, who shall issue a Final Order no more than thirty (30) days after the conclusion of the hearing." The hearing in this matter was completed on December 19, 2022. This Preliminary Order is submitted fewer than thirty (30) days after conclusion of the hearing.

As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedures Act do not apply where the legislature has directed the use of alternative procedures. Because the legislature has enacted specific alternative procedures in Idaho Code § 58-1306 that require a final order to be issued within thirty (30) days of the hearing and leaves insufficient time to consider petitions for review of preliminary orders, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable. *See Notice of Appointment.*

DATE: January 13, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: *Karen Sheehan*
KAREN SHEEHAN
Hearing Coordinator