

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

PAULINE AND BOB YOUNG, and
CHRISTOPHER AND RANDALL LENIGER

Agency Case No. CC-2023-NAV-20-001

Petitioners,

OAH Case No. 23-320-01

vs.

FINAL ORDER

JAMES AND RUTH ROWE,

Respondents.

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, 2022, IDL received an encroachment permit application for a single-family dock filed by Pauline and Bob Young. A hearing was held on May 1, 2023. Leslie Hayes served as duly appointed hearing officer. On May 31, 2023, the hearing officer issued her Recommended Order, which contains the following sections: Background, Preliminary Evidentiary Ruling, Findings of Fact, 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 available record for this matter, including examining the hearing coordinator's Preliminary Order in light of the entire available record in this matter.

II. EVIDENTIARY RULINGS

I adopt the Preliminary Order's Evidentiary Rulings as my Evidentiary Rulings.

III. FINDINGS OF FACT

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

IV. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Conclusion of Law as my Conclusions of Law.

V. 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 Findings of Fact and Conclusion of Law as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Background, Preliminary Evidentiary Ruling, Findings of Fact, and Conclusions of Law into this Final Order. 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 the Encroachment Permit Application L-96-S-2778 is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(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) 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 15th day of June 2023.



DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of June 2023, 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

BEFORE THE IDAHO DEPARTMENT OF LANDS

PAULINE AND BOB YOUNG, and)	
CHRISTOPHER AND RANDALL)	AGENCY Case No. CC-2023-NAV-20-001
LENIGER,)	
)	OAH Case No. 23-320-01
Petitioners,)	
v.)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND RECOMMENDED
JAMES AND RUTH ROWE,)	ORDER
)	
Respondents.)	
)	

This matter was assigned to Hearing Officer Leslie Hayes on March 30, 2023. An in-person administrative hearing was set for May 1, 2023. A status conference was held on April 13, 2023, at the request of Respondents James and Ruth Rowe. This status conference was recorded and discussed general rules of procedures and the process of these proceedings. A prehearing status conference was held on April 26, 2023. This prehearing status conference was recorded and further discussed rules of procedure for this proceeding, stipulations/objections to any prehearing filings, remote attendance at the hearing, and the burden of proof pursuant to Idaho Code section 58-1305.

The hearing was held on May 1, 2023, at Winston Cashatt, located at 250 Northwest Blvd., Suite 206, Coeur d’Alene, Idaho, 83814. Present at the hearing were the Hearing Officer, Leslie Hayes; Petitioners, Pauline and Bob Young; Respondents, James, Ruth, and Paul Rowe, via Zoom, who were represented by their son, Randy Rowe; and Lead Deputy Attorney General Angela Schaer Kauffman representing the Idaho Department of Lands (IDL). Also present for IDL was Mike Ahmer and two non-testifying IDL employees: Amidy Fuson and Gwen Victorson. No

witnesses were excluded from the proceedings.¹ All parties stipulated to the admission of each participant's exhibits, reserving the right to object on the grounds of relevance at the hearing.

The Hearing Officer, having considered the matter herein, including documents contained in the Administrative Record, makes the following Findings of Fact and Conclusions of Law pursuant to Idaho Code section 58-1305.

PRELIMINARY EVIDENTIARY RULINGS

As a preliminary matter, both Petitioners and Respondents moved to admit expert testimony: Kirsten Leniger testifying on behalf of Petitioners, and Kira Kelly testifying on behalf of Respondents. The rules of evidence do not apply to these proceedings and all evidence is to be "admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." IDAPA 0411.01.600 ("IRAP 600").

While the Petitioners framed Ms. Leniger's testimony as expert, she is better described as a fact witness as an individual who uses the Young property, who helped choose the design for the proposed Young dock, and is the mother of the Young grandchildren whose safety was a factor in the design choices. The Hearing Officer finds that Ms. Leniger's testimony will be admitted, although there is little weight or relevance to the testimony provided.

As to Ms. Kelly's testimony, it was properly framed as expert testimony and will be admitted. However, the testimony provided as to the reduction in value of the Rowe property is not particularly relevant to the standard to be applied in these proceedings pursuant to Idaho Code section 58-1305. Therefore, while admitted, it carries very little weight, which will be discussed below.

FINDINGS OF FACT

¹ The two other witnesses present were Kirsten Leniger, Petitioners' proposed expert, and Kira Kelly, Respondents' proposed expert.

1. On October 7, 2022, Petitioners, Pauline and Bob Young and Christopher and Randall Leniger, submitted an Application for Encroachment Permit No. L-96-S-2778. This permit “proposed a single-family fixed pier [that] would consist of a 6’x48’ approach and 30’10’ L-shaped pier, comprising of 600.5 square feet.” (IDL Ex. 01).²

2. The proposed dock would be located at Parcel RP03210010040A, Lot 4, Block 1 of the Peaceful Haven subdivision, which has a physical address of 1339 Glengary Bay Road, Sagle, Idaho. (IDL Ex. 01).

3. The property is located adjacent to the eastern shore of Lake Pend Oreille. (IDL Ex. 01). No party disputed whether Lake Pend Oreille is a navigable lake.

4. Pursuant to Idaho Code section 58-1305(b), notice of Petitioners’ application was sent to adjacent property owners. (IDL Ex. 01). On November 5, 2022, Respondents, James and Ruth Rowe, objected to the application for a single-family dock. (IDL Ex. 01).

5. Between November 2022 and March 2023, there was communication between Petitioners and IDL, and Respondents and IDL on various matters, including modifying the original application. (IDL Ex. 01). Some of those communications related to incorrect or inconsistent distances between Petitioners’ proposed dock and neighboring docks. (IDL Ex. 01). Those distance discrepancies were corrected in later versions of the application and confirmed by IDL during an onsite inspection. (IDL Ex. 01).

6. On March 9, 2023, IDL received Petitioners’ completed application that is at issue for this hearing. IDL refers to it as Application for Encroachment Permit No. L-96-S-2778. (IDL Ex. 01; Rowe Ex. 1). The Hearing Officer will refer to it as Petitioners’ Application.

² References will be made to each party’s respective exhibits as they are marked in the Agency Record.

7. Petitioners' Application proposes a dock with a 6' x 48' approach and a 30' x 10' L-shaped pier, which IDL calculates as 600.5 square feet. (IDL Ex. 01; Rowe Ex. 1).

8. On March 28, 2023, IDL received Respondents' objection to Petitioners' Application and request for a contested case hearing. (Rowe Ex. 2). Respondents' property is adjacent to and north of Petitioners' property.

9. On April 14, 2023, IDL completed an on-site inspection of Petitioners' property and single-family dock proposal contained within the March 9, 2023, completed application. (IDL Ex. 2).

10. Based on its review of Petitioners' Application and its on-site inspection, IDL determined that:

- a. Petitioners' property is 63 feet wide at the artificial high-water mark;
- b. There is at least 56 feet of littoral space where the dock would be located;
- c. The dock would be at least 10 feet from the littoral line to the north, and 16 feet from the littoral line to the south; and
- d. There would be 42 feet of space between the proposed dock and Respondents' existing dock. (IDL Ex. 02).

11. IDL recommends approval of Petitioners' Application because the "proposed dock meets the legal requirements for single-family docks." According to IDL's analysis:

- a. Petitioners are littoral owners;
- b. Petitioners own sufficient water frontage for a single-family dock navigational encroachment under IDAPA 20.03.04.010.36;
- c. Petitioners' proposed dock complies with IDAPA 20.03.04.015.01.b.'s square footage limit (700 square feet), because it is no more than 600.5 square feet;
- d. Petitioners' proposed dock is within the line of navigability; and

- e. Petitioners' proposed dock is at least 10 feet from both littoral lines, so there is no presumption of adverse effects on adjacent littoral rights under IDAPA 20.03.04.015.13.e.

(IDL Ex. 01).

12. No party disputes IDL's analysis.

Respondents' Concerns with the Proposed Dock

13. Respondents have several concerns with Petitioners' proposed dock, which will be outlined in more detail below.³ Respondents' concerns include safety issues, the weather patterns on the lake, lack of consistency in measurements regarding the proposed dock, recreational use of Respondents' dock being compromised, and reduction in the value of Respondents' property. (Rowe Ex. 2, 6, 11). Respondents' preference would be for Petitioners to build a dock similar to a dock that existed 6-7 years ago. (*See generally*, Rowe Ex. 5).⁴

- a. Safety issues. Respondents contend that the proposed dock would not leave sufficient space between their dock and Petitioners' dock for safe boating and docking.
- b. Weather patterns. Respondents contend that local weather patterns, particularly storms from the northeast, exacerbate their safety concerns. Due to the weather patterns, Respondents dock their boat on the south side of their dock (the side closest to Petitioners' property). Respondents express concern that it may be difficult for them and other boaters to safely maneuver between the docks,

³ A summary of the concerns is contained in the Rowe prehearing statement filed on April 13, 2023 and titled "Rowe Dock objection pts 4-13-23", and Rowe Exhibit 2. Additional information was provided by way of testimony at the hearing.

⁴ At the hearing, testimony was provided that the circled dock in Rowe Exhibit 5 is the prior dock. Testimony further indicated that the new dock will be in the same general area, but with an L-shape extended to the north.

especially in rough weather. Petitioners do not contest the testimony related to the weather patterns on this portion of Lake Pend Oreille.

- c. Lack of consistency in measurements. Respondents note that some of Petitioners' Application materials have contained inaccurate or inconsistent measurements, which leads Respondents to question the reliability of final application.
- d. Recreation compromised. Respondents express concern that the distance between their dock and Petitioners' proposed dock would not leave sufficient space for safe recreational use of Respondents' dock for activities such as paddle boarding, floating on inflatables, kayaking, canoeing, diving/jumping off the dock, and swimming. Respondents own and use an 18-foot boat.
- e. Feared property value reduction. Respondents express concern that the distance between their dock and Petitioners' proposed dock could reduce the value of Respondents' property if they decided to sell their property and a potential buyer shared their concerns that the distance between the docks was inadequate. Respondents offered the testimony of real estate agency Kira Kelly, to support their concern. Ms. Kelly testified that the property value could be reduced by 10-20% depending on the number of boats and the size of the boats for adjacent property owners and potential buyers. Ms. Kelly also testified that the Petitioners' property value would increase based on the value/cost of the proposed dock. The Hearing Officer admitted Ms. Kelly's testimony but does not find that the testimony carries much weight given that it supports both the Petitioners' and Respondents' respective positions because it implicates the value of both properties.

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CONCLUSIONS OF LAW

1. The Idaho legislature enacted the Lake Protection Act (“LPA”), Title 58, Chapter 13, Idaho Code, in 1974 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 of 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 weighted 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.

I.C. § 58-1301.

2. The IDL, through the 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 of waters of navigable lakes[.]” I.C. § 58-1303; I.C. § 58-119(1); *see also Newton v. MJK/BJK, LLC*, 167 Idaho 236, 242 (2020).

3. Through its statutory authority, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho located at IDAPA 20.03.04.000 *et. seq.*

4. Lake Pend Oreille is a navigable lake and is within IDL’s authority to regulate encroachment permits. *See Kaseburg v. Bd. of Land Comm’rs*, 154 Idaho 570 (2013) (applying LPA to Lake Pend Oreille encroachment).

5. Petitioners are owners of property adjacent to Lake Pend Oreille. They are littoral owners as defined in Idaho Code section 58-1302 and IDAPA 20.03.04.020.02, qualified to submit Petitioners’ Application.

6. Idaho Code section 58-1305(a) provides:

Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

7. Petitioners' Application seeks approval for construction of a "navigational encroachmen[t] not extending beyond the line of navigability nor intended primarily for commercial or community use."

8. "Generally, the [B]oard should approve a permit application unless the proposed encroachment infringes, or may infringe, upon the littoral rights of an adjacent property owner." *Byrd v. Idaho State Board of Land Commissioners*, 169 Idaho 922, 929 (2022) (cleaned up) (citation omitted).

9. The burden of proof is on the applicant to demonstrate that IDL should grant the encroachment permit. *See generally* I.C. §§ 58-1303, -1305(a). The "standard of proof is akin to the preponderance of the evidence standard generally applied in administrative hearings." *Northern Frontiers, Inc. v. State*, 129 Idaho 437, 439 (Ct. App. 1996).

10. The Hearing Officer finds IDL's unchallenged site inspection results and analysis to be credible and persuasive.

11. Petitioners' Application complies with IDL's rules for single-family docks.

12. The Hearing Officer finds Respondents' concerns to be sincere, but Respondents have failed to establish that Petitioner's Application "infringe[s] upon the riparian or littoral rights" of Respondents as adjacent property owners.

- a. As to the safety concerns, IDL's site inspection found that there is 42 feet of distance between the proposed dock and the neighboring dock, which provides sufficient ability to navigate Respondents' 18-foot boat. There is a presumption

of adverse effect if the dock is closer than 10 feet to the littoral line; IDL's site inspection found that there is a "10-foot buffer to the north and a 16-foot buffer to the south." Therefore, no adverse presumption exists as to the spacing of the dock. *See* IDAPA 20.03.04.13.e.

- b. As to the concerns about weather patterns, there is nothing that prevents Respondents from docking the boat on the south of the dock. While Respondents expressed concerns about the distance between their dock and the proposed dock and preferences for how a boat is docked, there was no evidence presented that demonstrates they cannot dock the 18-foot boat with 42 feet of space between the proposed dock and the existing dock.
- c. As to the concerns about the consistency of measurements, these concerns are addressed by IDL's onsite visit and inspection. The measurements have been verified by IDL. Mr. Ahmer also testified at the hearing that it is not unusual for there to be inconsistency in historical records and that is why an onsite inspection is utilized to confirm measurements for encroachment permits.
- d. As to the concerns about reduction in recreational value, both Petitioners and Respondents shared similar concerns about a loss of recreational value both if the dock was built and if the dock was not built. For that reason, because the proposed dock complies with what IDL has determined is reasonable to respect the littoral rights of adjacent property owners, the Hearing Officer finds that there will not be a reduction in the recreational value of the property for Respondents.

e. As to the concerns about reduced property value, while Idaho Code section 58-1305 does not mention this as a factor (single-family dock encroachment permits “shall be processed by the board with a minimum of procedural requirements and shall not be denied now appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner[]”), the Hearing Officer will still consider this evidence. Since this evidence weighed towards both Petitioners’ and Respondents’ positions, it carries very little weight in this proceeding. For that reason, despite its questionable relevance, it does not weigh in favor of Respondents’ position that the encroachment permit should not be issued.

13. Based on the entirety of the record, this Hearing Officer finds that Petitioners’ carried their burden of demonstrating that the encroachment permit should be approved.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that Petitioners’ request for an encroachment permit be **GRANTED**.

RECOMMENDED ORDER NOTICE

This is a recommended order of the hearing officer. It will not become final without action of the agency head. By law, the agency head must issue a final order within forty-five (45) days of the hearing in this case, which was held May 1, 2023. *See* I.C. § 58-1305(c). The agency head’s final order in this case must be issued **no later than June 15, 2023**.

Pursuant to Idaho Code section 67-5244, the parties may file an exception to this recommended order with the agency head. Any such exception must be filed within five (5) days

after the service date of this recommended order. Written briefs in support of or taking exception to the recommended order shall be filed with the agency head. If time permits, the agency head may schedule oral argument in the matter before issuing a final order. Following the agency head's issuance of a final order, the parties' rights to seek reconsideration of or appeal that order are prescribed by Idaho Code section 58-1306(c), (d), and IDAPA 20.03.04.025.08.

IT IS SO ORDERED.

DATED this 31st day of May, 2023.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Leslie M. Hayes

Leslie M. Hayes
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

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/s/ Leslie M. Hayes
Leslie M. Hayes
Hearing Officer