

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

KEVIN WAITE and CAROL HANSEN

APPLICANTS,

v.

CHARLES TANG

OBJECTOR.

Agency Case No. CC-2023-NAV-22-004

OAH Case No. 23-320-10

FINAL ORDER

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, 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 August 4, 2023, IDL received an encroachment permit application for a two-family dock on Hayden Lake in Kootenai County. A hearing was held on October 10, 2023. Stephen L. Adams served as duly appointed hearing officer. On November 6, 2023, the hearing officer issued his Recommended Order, which contains the following sections: Background,

Findings of Fact, Conclusions of Law, Recommendation, and Applicant's Motion to Dismiss Objection.

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 officer's Recommended Order in light of the entire available record in this matter.

II. FINDINGS OF FACT

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

III. CONCLUSIONS OF LAW

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

IV. ORDER

I conclude that the hearing officer's Recommended Order is based on substantial evidence in the record, and I adopt the Recommended Order's Findings of Fact and Conclusion of Law as my decision in this matter. I hereby incorporate by reference the Recommended Order's Background, Findings of Fact, Conclusions of Law, and ruling on Applicant's Motion to Dismiss Objection into this Final Order. I have enclosed and served the Recommended Order along with this Final Order.

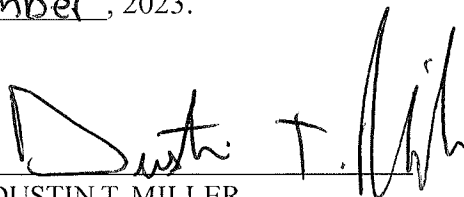
The hearing officer's Recommended Order stated that "[p]ursuant to Idaho Code section 67-5244, the parties may file an exception to this recommended order with the agency head." Objector filed an exception to the hearing officer's Recommended Order on November 7, 2023. Applicants filed a Response to Exception on November 10, 2023. Notwithstanding language to the contrary in the Recommended Order, these proceedings are governed by the process set forth in Idaho Code § 58-1306, which does not provide any right to file an exception. Nonetheless, I have considered Objector's Exception to the Recommended Order and Applicants' Response. Objector's Exception

merely restates arguments that were already raised before the hearing officer and addressed in the Recommended Order adopted by this Final Order. Accordingly, Objector's request is DENIED.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that the Encroachment Permit Application ERL95S1720D is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c) and IDAPA 20.03.04.025.08, 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 20.03.04.025.08, 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 21st day of November, 2023.


DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of November 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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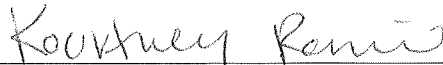
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BEFORE THE IDAHO DEPARTMENT OF LANDS

STATE OF IDAHO

KEVIN WAITE AND CAROL HANSEN

Applicants,

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CHARLES TANG,

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AGENCY Case No. CC-2023-NAV-22-004

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**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND RECOMMENDED ORDER**

BACKGROUND

This contested matter arises out of an application made jointly by Kevin Waite and Carol Hansen and Lot 24 LLC (“Applicants”) to replace and modify their existing dock on Hayden Lake in Kootenai County, Idaho. An objection by Charles Tang, on behalf of the LC Family Trust (the “Trust”), was submitted to the Idaho Department of Lands (“IDL”). The objection was dated August 21, 2023, and was file stamped as received on September 5, 2023.

This matter was assigned to the Hearing Officer pursuant to the Amended Notice Appointment of Hearing Officer [sic], dated September 28, 2023. A prehearing conference was held remotely via Zoom video conferencing on October 4, 2023, pursuant to written Notice. It was attended by Kevin Waite on behalf of the Applicants, Charles Tang on behalf of the Trust, J. J. Winters on behalf of IDL, and Leslie Hayes as monitor on behalf of the Office of Administrative Hearings.¹ The prehearing conference was recorded. At the hearing,

¹ Ms. Hayes did not participate in the proceedings. Her attendance was limited to the Office’s statutory charge to monitor proceedings. Idaho Code § 67-5282(1)(h).

the parties discussed scheduling for the hearing, remote attendance at the hearing, pre-hearing submission of exhibits, and other procedural matters related to this case.

The hearing was held remotely via Zoom video conferencing at 2:00 p.m. Mountain Time on October 10, 2023. The hearing was recorded. Kevin Waite attended on behalf of the Applicants, Charles Tang on behalf of the Trust, J. J. Winters on behalf of IDL, and Leslie Hayes as monitor on behalf of the Office of Administrative Proceedings.² Also present were Alison Olsen, Rachel King, and Marde Mensinger. Prior to taking testimony, each party stipulated to the admission of exhibits submitted by the other parties. Therefore, all exhibits were admitted into evidence and were considered by the Hearing Officer. 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 20.01.01.600. Witness testimony and statements were provided by Andrew Smyth, Jake Terpstra, Steven Buchan, Andy Kemp, Kevin Waite, and Charles Tang. All witnesses were sworn and testified under oath.

All parties agreed to submit written closing statements no later than October 13, 2023. Written closing statements from Charles Tang and IDL were received by the Hearing Officer on October 13, 2023. A written closing statement plus additional exhibits were received from Kevin Waite on October 13, 2023. The opportunity to present further evidence or argument closed on October 13, 2023. This matter is now ripe for resolution.

FINDINGS OF FACT

1. A “Joint Application for Permits” was filed with IDL on August 4, 2023, Application No. ERL95S1720D. (Waite/Hansen 001). The name of the applicants was Kevin J. Waite, Carol L. Hansen, and Lot 24 LLC (jointly referred to as “Applicants”). (Id.). Waite

² See Footnote 1.

and Hansen are identified as the owners of one parcel on Hayden Lake in Kootenai County, and Lot 24 LLC is identified as the owner of an adjoining parcel, also on Hayden Lake. (Id.) Applicants are, therefore, owners of littoral property and have littoral rights appurtenant to the property.

2. Prior to the submission of the Joint Application, the Applicants shared a dock that extended into Hayden Lake (the “existing dock”). (Waite/Hansen 001, 003 – 007).

3. Directly adjacent to the parcels owned by Applicants is a parcel owned by the Trust and a parcel owned by Steven C. Buchan. (Waite/Hansen 001, 018). Both of these adjacent parcels have docks that extend into Hayden Lake. (Waite/Hansen 001). The Trust is, therefore, an owner of littoral property, as is Steven Buchan, and both have littoral rights in the property they own.

4. The Joint Application requests permission to modify the dock shared by Applicants. (Hansen/Waite 001). The proposed modified dock would extend eight feet further into Hayden Lake than the existing dock. Further, the modified dock would have a total square footage of 1044 ft². (Id.).

5. The two parcels owned by Applicants have a total of 201 feet of frontage on Hayden Lake. (Hansen/Waite 001).

6. The existing dock extends further into Hayden Lake than other docks on either side of the two parcels owned by Applicants. (Hansen/Waite 009; Lands 002; Tang exhibits, p. 3).³ Therefore, the proposed dock would also extend further into Hayden Lake than other docks on either side of the parcels owned by Applicants.

7. The purported need for the modifications to the existing dock is because “The

³ Charles Tang submitted 5 pages of documentary evidence at the Hearing, but did not specifically identify exhibits by exhibit number. Therefore, any references to the documents submitted by Charles Tang will be referred to “Tang exhibits, p. __.”

Pier has been damaged by ice and when the water goes down the dock rests on the sandy bottom with quite a list (not level).” (Hansen/Waite 001).

8. Additionally, a sand bar or berm⁴ exists or has built up under where the existing dock is located, which appears to be larger than any sand bar or berm near or under other nearby docks. (Hansen/Waite 001; Lands 002; Tang exhibits, p. 3). This sand bar causes visibly shallow water under the existing dock and, depending on the lake levels may require any water vehicles to be moored on the outside of the dock instead of in the dock slip. (Hansen/Waite 003 – 007, 011 – 017).

9. During the inspection by IDL Resource Supervisor Mike Ahmer on October 6, 2023, “the inner finger for the single-slip floating dock was resting on the sandbar.” (Lands 002).

10. The proposed dock will be within the line of navigability. (Testimony of Andrew Smyth; IDL Closing Statement, p. 2).

11. The Joint Application provided contact information for neighboring parcel owners, which included Steven Buchan and the Trust. (Waite/Hansen 001). The Trust received notice of the application. (Waite/Hansen 018).

12. Steven Buchan consented to the replacement of any proposed changes to the existing dock. (Testimony of Steven Buchan). Charles Tang, on behalf of the Trust, submitted a letter of concern regarding the Joint Application. (Waite/Hansen 018). This letter of concern was dated August 21, 2023, and was stamped as received by IDL on September 5, 2023. (Id.).

CONCLUSIONS OF LAW

13. Applicants own littoral property on Hayden Lake in Kootenai County. *See Newton v. MJK/BJK, LLC*, 167 Idaho 236, 239, 469 P.3d 23, 26 (2020) (“littoral property”

⁴ This sand bar is referred to as “an underwater shelf” in Lands 002.

means lakeside property).

14. The Idaho Supreme Court has stated that lakeside property owners “possess certain littoral rights. These include the right of access to the water, and, subject to state regulation, the right to build wharves and piers in aid of navigation.” *West v. Smith*, 95 Idaho 550, 554, 511 P.2d 1326, 1330 (1973) (cleaned up). To resolve this matter, we must look to state statutes and regulations on this topic, including Idaho Code Title 58, chp. 13. “The Idaho Legislature enacted Chapter 13 of Title 58 in 1974 as part of the Lake Protection Act (Act). Chapter 13 concerns ‘Navigational Encroachments.’ After enactment of Chapter 13, any encroachment placed on navigable waters requires approval in a manner consistent with the Act.” *Lovitt v. Robideaux*, 139 Idaho 322, 326, 78 P.3d 389, 393 (2003). “Under the Act, owners of property next to a navigable lake . . . can apply for a permit in order to construct a dock so they can reach navigable waters.” *Id.*

15. Idaho statutes set forth the application process. Under this statute,

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.

Idaho Code § 58-1305(a). Applicants’ proposed dock is a navigational encroachment, *see* Idaho Code § 58-1302(h), and therefore, must comply with this statute and any applicable administrative regulations issued by IDL. That being said, “Generally, the board should approve a permit application unless the proposed encroachment infringes, or may infringe, upon the littoral rights of an adjacent property owner.” *Lovitt* at 326, 78 P.3d at 393.

16. The objection from the Trust is that the Applicant’s proposed dock will be out of character with the other docks in the neighborhood, will extend into the lake further than

any other docks in the area, and will violate the Trust's littoral rights. (Waite/Hansen 018). In addition, the Trust contends that the dock is not a "two-family dock" because collectively, the Applicants are the same people (i.e., Kevin Waite and Carol Hansen are the owners or members of Lot 24 LLC), and the parcel owned by Lot 24 LLC is empty and not buildable. (Tang exhibits, p. 2, 4 – 5). A final objection is that the proposed dock will create safety hazards for skiers and boats. (Waite/Hansen 018).

17. With regard to the contention that the dock is out of character with the other docks in the neighborhood and will extend further into Hayden Lake than other docks in the area, the facts support the conclusion that the dock will be further out into the lake than other nearby docks. However, nothing particular about the proposed dock is going to be out of character with the other surrounding docks. The Joint Application shows the design of the proposed dock. (Waite/Hansen 001). The only noticeable difference between the proposed dock and the existing dock is the length. Otherwise, the dock appears to be similar in shape and character to the existing dock and the other docks in the surrounding area.

18. With regard to the concern that the proposed dock will be too long, the administrative rules applicable to this process state, "Applications for single-family and two-family navigational encroachments not extending beyond the line of navigability will be processed with a minimum of procedural requirements and shall not be denied except in the most unusual of circumstances." IDAPA § 20.03.04.025.01. Similarly, "No portion of the docking facility may extend beyond the line of navigability. Shorter docks are encouraged whenever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability." IDAPA § 20.03.04.015.01(c). The only facts presented at the hearing show that the dock does not extend beyond the line of navigability. While shorter docks are clearly preferred by the administrative rules, as a matter of law, the proposed dock does not extend too far into Hayden Lake. Thus, even though the proposed

dock will be longer than other docks in the area, such a fact is not per se violative of any rule. Considering the circumstances that create the need for the added length (i.e., the sandbar, which makes the area around the dock too shallow for mooring water vehicles), the proposed dock is not unwieldy.

19. To the extent that the Trust has contended that such additional length “represents a safety hazard for other boaters and water skiers” (Waite/Hansen 018), no evidence was presented at the hearing that this is true. From a review of photographs of the shoreline, a reasonable presumption could be made that the opposite is true: the sand bar sticks quite far out into Hayden Lake at the point where the proposed dock is to be located, and it is not easily viewable from the water level. The dock may actually prevent boaters and skiers from approaching too close to the shoreline and being caught by this potentially hidden danger. Regardless, as the proposed dock does not extend beyond the line of navigability, and the additional eight feet of length does not constitute a “most unusual circumstance,” these objections are insufficient to justify the denial of the Joint Application.

20. To the extent that the Trust contends that the proposed dock is not a “two-family dock” because the Applicants do not constitute two families or that “the property under discussion is only a single family lot” (Tang, Closing Statement), such argument also does not justify denial of the application. This argument appears to be in the nature of a statutory construction argument. The administrative rules define a “two-family dock” as “A structure providing noncommercial moorage that serves two (2) adjacent waterfront owners having a combined waterfront footage of no less than fifty (50) feet. Usually, the structure is located on the common littoral property line.” IDAPA 20.03.04.010.39. The other relevant administrative rule states

Total surface decking area waterward of the natural or ordinary or artificial high water mark may not exceed seven hundred (700) square feet, including approach ramp and walkway for a

single-family dock and may not exceed one thousand one hundred (1,100) square feet, including approach ramp and walkway for a two-family dock.

IDAPA 20.03.04.015.01(b).

21. The first rule of statutory interpretation is that the intent of the drafters is to be gleaned from the plain, normal meaning of the words used. *See Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). “Statutory interpretation begins with the statute’s plain language.” *State v. Keeton*, 165 Idaho 663, 665, 450 P.3d 311, 313 (2019). “The language of the statute is to be given its plain, obvious and rational meaning.” *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). “Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction.” *In re Est. of Wiggins*, 155 Idaho 116, 119, 306 P.3d 201, 204 (2013). “Unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Ada Cnty.*, 123 Idaho 410, 415, 849 P.2d 83, 88 (1993) (cleaned up).

22. In reviewing the definition of a “two-family dock,” the language is clear and unambiguous. The Applicants’ proposed dock is “a structure providing noncommercial moorage.” IDAPA 20.03.04.010.39. The proposed dock serves “two (2) adjacent waterfront owners.” *Id.* At 201 feet, the Applicants’ “combined waterfront footage [is] no less than fifty (50) feet.” *Id.* Therefore, the Applicants have met each requirement of the regulatory definition. The definition also states that “usually the structure is located on the common littoral property line.” *Id.* This is not a mandatory requirement, and the diagrams showing the location of the proposed dock indicate that it will be further away from the Trust’s dock than if the proposed dock were actually on the property line between the Applicants’ adjoining property line.

23. The final regulatory requirement is that the proposed dock “may not exceed one thousand one hundred (1,100) square feet, including approach ramp and walkway for a two-family dock.” IDAPA 20.03.04.015.01(b). This requirement is also plain and unambiguous. The facts show that the proposed dock will be only 1044 ft². Therefore, the proposed dock will satisfy this regulation.

24. The confusion seems to come from the title, “two-family dock.” However, a rule of statutory construction is that “Although the title is part of the act, it may not be used as a means of creating an ambiguity when the body of the act itself is clear.” *State v. Peterson*, 141 Idaho 473, 476, 111 P.3d 158, 161 (Ct. App. 2004). Stated another way, the fact that the proposed dock is a “two-family dock” does not mean that two families must own and share the dock. The plain language of the definition and other regulatory requirements impose no such restriction. Instead, the relevant restriction is that there be “two adjacent waterfront owners.” IDAPA 20.03.04.010.39. In this case, there are two adjacent parcels and two separate owners: Kevin Waite and Carol Hansen own one parcel, and Lot 24 LLC owns the second parcel.

25. Idaho law is clear that: “A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.” Idaho Code § 30-25-109. Such entities are “distinct from its member or members.” Idaho Code § 30-25-108(a). As a result, an LLC that owns property owns it separately and distinctly from its owners. The record makes it clear that Lot 24, LLC has a deed to the parcel over which it claims ownership. (Waite/Hansen 001).

26. Ultimately, while the name “two-family dock” could potentially cause confusion as to what is required, the regulatory definitions clearly and unambiguously state what is required to constitute a “two-family dock.” There is no requirement that two families be involved, nor is there any requirement that both parcels be buildable. In issuing the

regulations, IDL could have identified the two dock types as “Type A” and “Type B” or “Type 1” and “Type 2.” It could have gone far afield and used more exotic designations. Whatever the designation, as long as the definition is clear, then the name of the dock type is immaterial. To the extent that the Trust requests that “the regulations should be strictly adhered to” (Tang, Closing Statement), the reasonable conclusion is that the proposed dock does adhere to the relevant regulations.

27. The final issue raised by the Trust is that the proposed dock “would be exceeding long and impedes the neighbor’s access to ingress and egress to their own docks.” (Hansen/Waite 018). Such argument suggests an impact on the Trust’s “right of access to the water, and . . . the right to build wharves and piers in aid of navigation.” *West*, 95 Idaho at 554, 511 P.2d at 1330. However, at the hearing, Mr. Tang testified that he believes he’ll still be able to access his dock from the lake. Therefore, there is no evidence to support the conclusion that the Trust’s littoral rights will be impeded by the proposed dock.

RECOMMENDATION

Based on the law and facts set forth above, it is recommended that the Joint Application be granted.

APPLICANTS’ MOTION TO DISMISS OBJECTION

Prior to the Hearing, Applicants filed a Motion to Dismiss the Objection raised by the Trust on timeliness grounds. As the recommendation herein is to grant the Joint Application, the relief sought by Applicants’ Motion is moot, as no different outcome will result from granting or denying this motion. *See Boe v. Boe*, 163 Idaho 922, 927, 422 P.3d 1128, 1133 (2018) (“An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief.”). Therefore, pursuant to IDAPA 20.01.01.565, the hearing officer determines it is appropriate to resolve this matter without a hearing or additional briefing. Applicants’ Motion to Dismiss is denied as it is moot.

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 close of evidence, which was October 10, 2023, when the closing statements were filed. *See* Idaho Code § 58-1305(c). The agency head's final order, in this case, must be issued **no later than November 27, 2023.**

Pursuant to Idaho Code 67-5244, the parties may file an exception to this recommended order with the agency head. Any such exception must be filed within three (3) business 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 an 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 set forth in Idaho Code § 58-1306(c) and (d) and IDAPA 20.03.04.025.08.

IT IS SO ORDERED

Dated this 6th day of November, 2023.

 /s/ Stephen L. Adams
Stephen L. Adams, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2023, I caused a true and correct copy of the foregoing document to be served upon the following parties by the designated means:

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Charles Tang 14354 N. Samhill Trail Hayden, ID 83835 <i>Objector</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail: charlestang3@gmail.com
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 /s/ Stephen L. Adams
 Stephen L. Adams