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COURT OF APPEALS  
DIVISION II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY JW  
DEPUTY

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NO. 37911-2-II

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RONALD ROBERTSON and KATHRYN ROBERTSON; JON  
KVINSLAND and MARI KVINSLAND; SHORELINES HEARINGS  
BOARD; WASHINGTON DEPARTMENT OF ECOLOGY; PIERCE  
COUNTY,

Respondents,

v.

GREGG MAY AND MARGO MAY; JOHN CHRISTENSEN; ERNIE  
HELLING; LARRY JOHNSON AND KRISTIN JOHNSON; JIM LUZZI;  
STEVE SAXON AND PAULA SMITH; AND WILLIAM WEAVER  
AND MARY LOU WEAVER,

Appellants.

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OPENING BRIEF OF APPELLANTS

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## I. ASSIGNMENTS OF ERROR

The Superior Court erred in reversing the Shorelines Hearings Board's denial of the Applicant's Substantial Shoreline Development Permit to construct a pier/ramp/float/ ("PRF") structure in Pierce County.

### Issues Pertaining to Assignment of Error

1. Was the Board's decision that the proposed PRF would violate the criteria set forth in PCC 20.56.040.A supported by substantial evidence, clearly erroneous, or arbitrary and capricious?

2. Was the Board's decision that the proposed PRF would violate PCC 20.56.040.B(7), a development regulation prohibiting more than one moorage space per waterfront owner, supported by substantial evidence, clearly erroneous, or arbitrary and capricious?

3. Was the Board's decision that the proposed PRF would violate the policies of the Pierce County Shoreline Master Program supported by substantial evidence, clearly erroneous, or arbitrary and capricious?

4. Was the Board's decision that the proposed PRF would violate the Shoreline Management Act use criteria under RCW 90.58.030 supported by substantial evidence, clearly erroneous, or arbitrary and capricious?

5. Was the Board's decision that the proposed PRF would have adverse cumulative effects, warranting denial of the project supported by substantial evidence, clearly erroneous, or arbitrary and capricious?

## I. STATEMENT OF THE CASE

### A. Factual Overview

#### 1. The Applicants' proposed development

Respondents Ronald and Kathryn Robertson and Jon and Mari Kvinsland (herein Applicants) own residential property adjacent to one another on Puget Sound. Their properties are on the north shore of Hale Passage, approximately five miles southwest of Gig Harbor, Pierce County. They propose to construct and share the use of a 50 foot pier with a 32 foot aluminum ramp and an 8 by 24 foot float. CP 21 (Board FF 7). The proposed pier, ramp and floating dock ("PRF" or "dock") will constitute an area of 620 square feet and will be secured by 8 ten inch galvanized steel pilings. The dock will extend 100 feet into Hale Passage. *Id.* See also AR<sup>1</sup> Ex. 79 (permit application). The Applicants also propose to place a separate floatlift 425 feet waterward of an existing bulkhead in front of their homes.

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<sup>1</sup> References to the Shoreline Hearings Board's administrative record use the notation "AR" followed by the administrative record exhibit number.

AR Ex. 61. The PRF structure is designed for moorage of two watercraft and the floatlift will be able to moor one boat. AR Ex. 1 at 17.

The Robertsons have an existing concrete boat ramp that that they consistently use to launch their boat. Tr. 447. There also is a public boat ramp located approximately one-half mile from the Applicants' properties, in Horsehead Bay. CP 22 (Board FF 10). Another public launch is located on Fox Island, which is approximately one and one-half miles from the site. *Id.*

Moorage in nearby Gig Harbor is also available - seven miles away from the proposed development site. Tr. 176-77. The Robertsons currently moor their 68-foot yacht there. *Id.* Applicant Kvinsland also has a mooring buoy at their property. Tr. 37. The approved float-lift will provide on-site moorage at the Robertson residence.<sup>2</sup> *Id.* at 39.

Because the PRF is proposed in a "Rural Residential Environment" (PCC 20.56.030),<sup>3</sup> the Applicant must obtain a "shoreline substantial development permit" ("SDP") pursuant to the Shoreline Management Act

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<sup>2</sup> The Robertsons also currently have a mooring buoy at their property which will be moved when the floatlift is installed.

<sup>3</sup> A joint use dock is not permitted outright in a "Rural Residential Environment." PCC 20.56.030. The dock may be approved only if an applicant qualifies for "a Substantial Development Permit upon a finding . . . of consistency with the criteria and guidelines of Section 20.56.040." *Id.* This proposal's inconsistency with PCC 20.56.040 is discussed *infra* at 18-33.

("SMA"), ch. 90.58 RCW, and the Pierce County Code ("PCC") 20.56.030-.040. The floatlift requires a shoreline conditional use permit pursuant to the same statutes. In June of 2004, the Applicants filed applications for the requisite permits with Pierce County. AR Ex. 79.<sup>4</sup>

2. The shoreline environment at the proposed development site

The project site is located on the north shore of Hale Passage within a crescent beach referred to as the "Arletta" area. The crescent beach is considered by some to be "perhaps the most beautiful beach in Pierce County." CP 21 (Board FF 6). *See also* Tr. 35; AR Exs. 2, 5 (photos), 104. The existing development in the area is predominantly single-family homes. Local residents have wide, unmarred views of Mount Rainier from their shoreline homes. Tr. 14-15. AR Ex. 5. Residents in the area consider the sandy, crescent beach to be a "view" in and of itself. Tr. at 42; CP 24.

Unlike most Puget Sound beaches, this beach is sandy. "Due to its unusually long stretch of unobstructed sandy shoreline, this shoreline is

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<sup>4</sup> The Shoreline Conditional Use Permit for the floatlift was granted by the County and this permit has not been appealed. The approval of the floatlift is relevant, however, because the floatlift will provide the Applicants with full-time moorage and a reasonable alternative to dock construction. *See discussion infra* at 22-25.

considered ‘prime waterfront,’ whose ‘gentle sloping beach makes it perfect for shoreline recreational activities.’” CP 21 (Board FF 6); AR Ex. 2g. The area is heavily used for walking, beachcombing, fishing and boating. CR 7.

There are no significant over-water structures impinging on this beautiful shoreline. “[N]o other PRFs of comparable size are visible” from the location of the proposed PRF and surrounding houses. CP 24 (Board FF 12). There are three short docks up to 500 yards from the site. None currently extend into the sandy beach area, or impair the beach’s unique scenic and recreational qualities. Tr. 35, 41, 161, 189; CP 20, 24.

The proposed dock would be “placed in the approximate center of the sandy crescent beach.” CP 24 (Board FF 12). The dock location will directly impede recreation along the shoreline and greatly diminish scenic views and the aesthetic qualities of the area. Tr. 77; AR Ex. 1 at 3, 13-14, 16.

The shoreline in this area is also ecologically sensitive. The inter-tidal area at the location of the proposed PRF has been designated by the National Marine Fisheries Services (NMFS) as “essential fish habitat,” critical to salmon survival. CP 24 (Board FF 14); AR Ex. 1 at 5, 31; Tr. 233-

5. It provides critical habitat for small forage fish, specifically sand lance and herring, AR Exs. 31, 35, 94; Tr. 230, 233-34, which juvenile salmon (including threatened Chinook salmon) depend on for over 60% of their diet. AR Exs. 31, 38-39; Tr. 248-250. The area also has eelgrass beds which provide habitat for these forage fish. AR Exs. 14, 31; CP 26-27 (Board FF 15, 16). Damage to the forage fish habitat and eelgrass beds directly and adversely impacts salmon survival. *Id.*

The beach and bay in this area are quite shallow. Thus, the beach varies in size from no beach at an extreme high tide to an extension of over 400 feet at an extreme low tide. Because of the shallow shoreline, as the tide begins to recede, the dock quickly becomes a structure without a function.<sup>6</sup> There is no water (or not enough) for a boat beneath the dock during substantial parts of the tide cycle and a boat moored at the proposed dock will be grounded on a regular basis. Tr. 57-63; AR Exs. 1 at 10, 16; 61; 104.

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<sup>5</sup> The area also has been classified by the Washington Department of Fish and Wildlife (WDFW) as “essential fish habitat” and a “habitat of special concern” under WAC 220-110-250(1)(b) because it serves a critical function for salmon in supporting forage fish such as sand lance and herring. CP 24-25 (Board FF 14).

<sup>6</sup> Virtual photographs show that a dock extending 100 feet into the cove would reach only the 6.2 tidal elevation (not the 5.0 tidal elevation claimed by the Applicants). AR Exs. 5, 104; Tr. 59-66. Thus, the dock would be in the water even less of the time than as predicted utilizing the Applicant’s incorrect data.

This will cause repeated scouring of the beach and destruction of essential forage fish habitat. Tr. 251-252, 258, 289-290, 295; CP 26-28.

B. Procedural Background

In August of 2004, the Robertsons and the Kvinslands submitted an application to the County for a SDP for the dock. This initial application did not include the float lift structure.<sup>7</sup> The float lift structure was added to the application as a physical extension of the dock in July of 2005. In 2006, the Applicants amended their application twice, first to move the lift 250 feet, and eventually 425 feet off-shore, no longer attached to the dock.

On June 21, 2006, Pierce County issued a staff report recommending denial of the PRF, but approval of the floatlift based on the following assessment:

**This shoreline is yet to be encumbered with very many over water structures.** The suspected reason for this is that the shallow profile of the beach is not conducive to constructing docks that achieve a water depth for longer term moorage. ... **A boat moored at this dock will be grounded on a regular basis;** as such the applicants have also asked for an anchor buoy and floatlift, for longer term moorage, to be

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<sup>7</sup> In the spring of 2004, Applicants Ronald and Kathryn Robertson placed a floatlift (near the proposed location of the floatlift now before this Board) without any required County or State approvals. This unpermitted floatlift was used by the Robertsons for approximately two years before both the County and the State agencies requested the unpermitted structure to be removed in May of 2006.

removed in the winter months. **The request does not meet all the criteria or guidelines for piers and docks.**

**The proposed dock unduly impacts the views, the marine oriented recreation, and public use of the surface waters by being proposed in an area where a useful water depth for mooring cannot be achieved.** ... Not all sections of shoreline are appropriate for pier, ramp, and float docks, in the Rural Residential shoreline environment designation. This shallow shoreline profile is conducive to allowing for a floatlift beyond the tidal areas. The Master Program does not encourage multiple items with single-family residences and encourages mooring buoys instead of “space-consuming piers.” The request includes two separate mooring structures where typically a property owner would receive one. Staff normally recommends removal of mooring buoys and floats when a dock is requested. **The floatlift was characterized by the applicants as an appurtenance to the dock, but it can function on its own and in this case it does so better than a dock.**

Staff is recommending denial of the dock and approval of the floatlift and anchor buoy, ... **The request for two mooring structures exceeds Staff’s normal interpretation of Chapter 20.56, Piers and Docks, as the minimum necessary to achieve the mooring of a boat, appropriate to the criteria, guidelines, and shoreline environment. The [existing] Robertson boat ramps and proposed floatlift, would provide reasonable access to the water. ... [T]he request is of an intensity that is not compatible with the Rural Residential Shoreline environment.**

Ex. 1 (emphasis supplied). *See also* CP 30 (Board FF 24).

The staff determined that the PRF violated the provisions of the Gig Harbor Peninsula Community Plan, the Pierce County Shoreline Master

Program (“SMP”), the Pierce County shoreline regulations, and the Department of Ecology criteria for issuing SDPs. AR Ex. 1 at pp. 9-18.<sup>8</sup>

On August 7, 2006, the Pierce County Hearing Examiner issued his decision rejecting the staff recommendation and approving the substantial development permit for the dock and the conditional use permit for the separate floatlift. AR Ex. 83.

On October 18, 2006, Gregg and Margo May and several of their neighbors filed an appeal of the Hearing Examiner’s decision with the Washington Shorelines Hearings Board.<sup>9</sup> The Board conducted a *de novo* hearing. RCW 90.58.180.

The Board members conducted a site visit on February 12, 2007 (CP 18) and, thereafter, conducted an evidentiary hearing -- considering sworn testimony and cross-examination from 11 witnesses over three days.

On April 16, 2007, the Board issued a decision denying the dock application. CP 17-51. The Board determined that, at this particular

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<sup>8</sup> Comment letters raising issues with the impacts of the Applicants’ proposal also were received by Pierce County from the Department of Natural Resources, the Department of Ecology, and the Squaxin Island Tribe. AR Exs. 38-41.

<sup>9</sup> Neighbors joining in the appeal were John and Eunice Christensen, Erik and Karen Elam, Ernie and Lois Helling, Larry and Kristen Johnson, Jim and Anne Luzzi, Steve Saxon and Paula Smith, and William and Mary Lou Weaver. Lois Helling passed away last year and the Elams have been dismissed from this appeal.

location, the Applicants had not met their burden to prove that the proposed dock would be consistent with requirements of the SMA, Pierce County's Shoreline Master Program or the County's shoreline regulations.

The Board started its analysis by acknowledging that "an [SDP] may be granted only if the proposed development is consistent with both the policies and procedures of the SMA and its associated regulations, and the applicable local master program." CP 35. The Board then rejected the application for a number of reasons. The full scope of grounds for the Board's decision are discussed in detail, *infra*. A brief summary of the Board's analysis is provided here to focus this Court's review.

The Board concluded that the visual impact of the dock would be "jarring," and that the aesthetic impacts alone warranted denial of the permit. PCC 20.56.040.A(2); CP 37, 43. The decision also highlighted the environmental value of the project site and likelihood of environmental harm. CP 43. The Board also concluded that there were ample "reasonable alternatives" to the dock, including the float lift that was approved for the same location. PCC 20.56.040.A(5); CP 36-37, 39.

These factors formed the basis for the Board's conclusion that the PRF was incompatible with the surrounding environment, in violation of

PCC 20.56.040.A(7). The Board also took into account the limited dock utility because of the shallow beach profile and evidence showing that tides would render the dock functionless at medium and low tides. CP 20, 22.

The Board also concluded that the dock was improper because it would result in more than one moorage site per waterfront owner, in conflict with PCC 20.56.040.B. *Id.* The Board also based its decision on the “cumulative” and “precedential” effects of the proposed project, recognizing that allowing this first dock would, in all likelihood, lead to other docks on this beach resulting in more harm to environmental and aesthetic resources. CP 44.

The Applicants appealed the Board’s denial of the dock permit to the Superior Court. The Superior Court reversed the Board’s decision. This appeal timely followed.

## II. ARGUMENT

### A. Standard of Review

Although the Appellants are seeking to have the Superior Court’s decision overturned, it is the Board’s decision that this Court reviews. *See Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515,

137 P.3d 31 (2006). The Administrative Procedure Act (APA), RCW 34.05, governs judicial review of the Board's decision.

Under the RCW 34.05.570(3), the court shall grant relief from a state agency order in an adjudicative proceeding only if it determines that:

... (d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court; . . .

(i) The order is arbitrary or capricious.

“Interpretation of the SMA and local government shoreline regulations involves questions of law, which this court reviews de novo.” *Preserve Our Islands*, 133 Wn. App. at 515. In reviewing questions of law, this Court accords ‘deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues.’” *Id. citing Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

In this case, the Shoreline Hearings Board is the agency with “special knowledge and experience as the entity charged with administering and enforcing the [SMA].” *Id. quoting Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 736, 592 P.2d 1108 (1979). The “expertise” of an agency like the Shorelines Hearings Board “is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the Legislature sought to achieve by its enactment.” *Hama Hama Company v. Shorelines Hearings Board*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975).

“The burden of demonstrating the Board erroneously interpreted or applied the law rests with the party asserting the error.” *Preserve Our Islands*, 133 Wn. App. at 515. The Applicants have asserted error with the Board’s decision and, therefore, they retain the burden of proof even though they prevailed before the superior court. *Id. See also Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 133-34, 159 P.3d 1 (2007) (party asserting error in LUPA action bears burden “even if that party prevailed on its LUPA claim at the superior court”).

This Court reviews the Board’s decision under the clearly erroneous test “in view of the entire record and the public policy contained in the Shoreline Management Act . . . .” *Buechel v. Dep’t. of Ecology*, 125 Wn.2d

196, 201-02, 884 P.2d 910 (1994). Under the clearly erroneous test, “the reviewing court may not substitute its judgment for that of the Board.” *Id.* at 202. The Board’s decision “may only be reversed when the reviewing Court is definitely and firmly convinced that a mistake has been made in light of the policies of the SMA.” *Id.*

The Board’s decision is also reviewed using the arbitrary and capricious standard. The Board’s decision is arbitrary and capricious only “if it is ‘willful and unreasoning action in disregard of facts and circumstances.’” *Id.* As with the clearly erroneous test, the arbitrary and capricious test does not give the reviewing Court license to second guess the decision of the Board. “Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached.” *Id.*

Factual determinations are reviewed under the substantial evidence test. RCW 34.05.570(3)(e). The substantial evidence standard is “deferential” and requires the reviewing court to review “the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder’s views regarding the

credibility of witnesses and the weight to be given reasonable but competing inferences.” *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993). Here, the highest fact-finding forum was the Board which had a site visit, three days of live testimony, and over 100 exhibits presented during the hearing. Its factual determinations are entitled to substantial deference.

B. Overview of Shoreline Management Act’s Legal Framework and Requirements

The SMA was enacted by a vote of the people in 1971 as Initiative 43B. The Act declares that “the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.” RCW 90.58.020. In adopting the legislation, the people recognized that “ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state.” *Id.* Further, it was determined that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” *Id.*

In reviewing a proposed shoreline development project for consistency with the Act, the Act must be “broadly construed in order to

protect the state shorelines as fully as possible.” *Buechel*, 125 Wn.2d at 203.

This Supreme Court directive echoes the directive in the legislation itself:

This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.

RCW 90.58.900.

The Act incorporates both state and local requirements to ensure shoreline protection. This requires that a project be consistent with the policies and requirements of the SMA and the local shoreline “master program.” WAC 173-37-150. The Pierce County shoreline program includes both policies and regulations. Compliance with both is required. PCC 20.56.030.

When determining whether a SDP was properly granted or denied, the Board considers the proposed project’s compliance with all of these requirements. *Id.* The Board needs only to have accurately concluded that any one of these criteria were not met to justify its permit denial.

C. The Board Correctly Concluded that the Proposal is Inconsistent with the County’s Shoreline Master Program

Pursuant to the SMA, ch. 20.56 PCC sets forth three groups of standards that must be satisfied before a shoreline permit can be granted for a

dock. The proposed project must be consistent with (1) the criteria set forth in PCC 20.56.040.A, (2) the guidelines in PCC 20.56.040.B, and (3) the policies and standards of the Master Program. The Board's decision to deny the permit on each of these grounds is discussed below.

1. The project is inconsistent with Shoreline Master Program criteria under PCC 20.56.040.A

The County's Shoreline Master Program requires a site-specific analysis to determine whether a SDP is appropriate for a particular project. Several criteria, enumerated in PCC 20.56.040.A, must be met for a project to be approved. The criteria relevant to this project specify the following requirements:

\* \* \*

2. Views from surrounding properties will not be unduly impaired;

\* \* \*

5. A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;

\* \* \*

7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

PCC 20.56.040.A.

Applicants must comply with all of these criteria. Thus, if the Board correctly concluded that any of these criteria were not met, its decision should be upheld. The Board's decision correctly reflects that all three of these criteria were not met by the Applicants.

a) Undue impairment of views

There can be no serious dispute of a legal error regarding the Board's consideration of view impairment as a basis for denial. RCW 90.58.020 expressly seeks to protect the aesthetic qualities of the shorelines: "aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interests of the state and the people generally." This directive is reflected in the County's Shoreline Master Program's requirement that "[v]iews from surrounding properties will not be unduly impaired." PCC 20.56.040.A(2).

Denial of a development permit on aesthetic grounds is well accepted by the Board and this Court. *Hilltop Terrace Homeowners' Assoc. v. Island County*, 126 Wn.2d 22, 35, 891 P.2d 29 (1995); *Cingular Wireless LCC v. Thurston County*, 131 Wn. App. 756, 129 P.3d 200 (2006); *Bellevue Farm Owners Assoc. v. Shorelines Hearings Board*, 100 Wn. App. 341, 997 P.2d 380 (2000); *Fladseth v. Mason County*, SHB No. 05-026 at 9 (May 1, 2007).

In *Bellevue Farm Owners*, Division II affirmed the Shorelines Hearings Board's denial of a SDP to build a dock on a scenic bay because of its aesthetic (and precedent-setting) impacts. The Court rejected arguments that the County's regulations protecting aesthetic qualities were too vague and affirmed the Board's determination that the proposed dock would violate those aesthetic standards. A "property owner's desire for a dock must be balanced against the natural limitations of the subject shoreline." *Id.* at 365.<sup>10</sup>

There was no error of law in the Board's statement that "[a]esthetic values are inherent in the values to be protected under the SMA and Pierce County's Shoreline Master Program." CP 43 (Board CL 16). The Board's ensuing conclusion that the dock proposed for "the middle of the sandy crescent of this beach would have a jarring visual effect" and would not be inconsistent with the SMP criteria under PCC 20.56.040.A(2) was supported by substantial evidence. CP 43.

The Board made multiple findings of fact establishing the beauty of the proposed dock site and the impact this proposal would have on the aesthetics along the shoreline. The Board found that "the crescent beach is

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<sup>10</sup> The Court of Appeals in *Bellevue* also took into account that the applicants had reasonable alternatives for accessing the water -- an issue present in this case, too. *Id.* at 359. *See infra*, at 22-25.

considered by some to be ‘perhaps the most beautiful beach in Pierce County.’” CP 21, *quoting* AR Ex. 2, Ex. 5. It found that the project site was an “unusually long stretch of unobstructed sandy shoreline” with “no docks [extending] into the sandy beach area” and very few over-water structures visible from the proposed project site. CP 20-1.

Turning to facts presented to the Board, the record swells with evidence of a substantial, undue aesthetic impact. Numerous area residents testified at the hearing or provided written comments on the unobstructed view of the sandy beach, Puget Sound, and Mount Rainier in the background. Tr. 41-42, 45, 115-17, 189-90; AR Exs. 2c, 4, 5, 104. These same individuals noted that it was the view of the beach itself, without obtrusive, over-water structures, that made the shoreline view so valuable. *Id.* And the Board specifically took this evidence into consideration, concluding that “[l]ocal residents include the uninterrupted beach itself in their description of the beauty of the expansive view.” CP 24.

The record was also replete with evidence that the proposed dock would significantly and adversely impair the existing view. Virtual photos were submitted showing what the dock would look like along the shoreline. Exs. 5, 104. Neighbors also testified that the view would be significantly impaired

by the dock. Tr. 41-2, 189-91. One neighbor compared the dock's visual impacts to "having a picture on a wall and if you had a stripe through the picture . . . it's the whole effect that's changed." Tr. 190.

The Board's factual findings were also supported by the evidence supplied by the County's planning department. The County Staff Report recommending denial of the dock, in part, because of aesthetic impacts. AR Ex. 1. It concluded that the proposed dock "unduly impairs views from surrounding properties by creating a visual impact." *Id.* at 13. Public comment letters received by the County reflected concerns that the project would "spoil the view of the beach and Hale Passage." *Id.* at 6.

In other SHB cases, the Board has addressed aesthetics in relation to the siting of docks, "and recognized that property owners in dock cases are less concerned about their views being blocked than seeing man-made structures in a natural setting." CP 39-48, CL 9 citing *Citizens to Preserve the Upper Snohomish River Valley v. S-R Broadcasting*, SHB No. 06-022 (Dec. 26, 2006). This was precisely the case here. The aesthetic impacts of the proposed PRF are made more pronounced because the proposed change would insert a 620 square foot steel and aluminum structure (which would frequently be functionless due to low tides) into the center of this picturesque

and currently unobstructed crescent beach. CP 21-22 (FF 7, 9). The Board correctly stated that “[t]he evidence amply established that residents and visitors alike consider the beach and the views it affords to be beautiful and unique.” CP 43 (Board CL 16).

Based on the strong directive within the SMA, the criteria adopted in PCC 20.56.040.A(2), and the facts of this case, the Board’s denial of the SDP based on view obstruction and aesthetic impacts was supported by substantial evidence, was not clearly erroneous, and was not arbitrary and capricious.

b) Availability of reasonable alternatives

The applicant had the burden of proving that the dock was necessary, e.g., that a “reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future.” PCC 20.56.040A.5 The Board concluded that in this case “[t]he evidence was insufficient to establish that existing launching facilities were generally insufficient.” CP 39 (Board CL 8).

The Board found that reasonable alternatives were available in the form of on-site and nearby moorage and launching facilities. CP 21-23, 46 (FF 8-10, CL 18). Substantial evidence supported the findings:

- Applicant Robertson has an existing boat launch ramp on his property. Tr. 477.
- A public boat launch is located less than one-half mile from the site. Tr. 175.
- A second public boat launch is located on Fox Island, approximately one and ½ miles from the site. Tr. 175-176.
- The Applicants currently have mooring buoys adjacent to their properties. Tr. 24, 39, 101.
- The County has approved a float lift that would provide moorage off the Applicants' properties which would be smaller, less visible, further away from the beach and sand-lance spawning areas, and would have more year-round utility than the proposed PRF. Ex. 83 at 26; Tr. 30, 64. *See also* Ex. 1 at 18.
- Permanent moorage is available at Gig Harbor, approximately 5 miles away. Tr. 176-77.
- Permanent moorage is available on Day Island, approximately 20 minutes by boat. Tr. 176-77.
- The proposed PRF would be functionless during low tides. AR Ex. 1 at 6, 10; Ex. 5-6; Tr. 40-42, 57-60.

The Board also reviewed and relied in part on the County staff's analysis of the project and recommendation that the PRF be denied. CP 22. The County staff recognized that the proposed floatlift could provide greater functionality with fewer adverse impacts than the PRF.

The Master Program does not encourage multiple items with single-family residences and encourages mooring buoys instead of "space-consuming piers." The request includes two separate mooring structures [the floatlift and the dock] where typically a property owner would receive one. Staff normally recommends removal of mooring buoys and floats when a dock is requested. The floatlift was characterized by the applicants as an appurtenance to the dock, but it can function on its own and, in this case, it does so better than a dock.

. . . The request for two mooring structures [the floatlift and the dock] exceeds Staff's normal interpretations of Chapter 20.56, Piers and Docks, . . . The [existing] Robertson boat ramps and proposed floatlift would provide reasonable access to the water.

AR Ex. 1. *See also* CP 22, 28, 36-37, 44 (Board FF 9, 20; CL 6, 7, 18).

The reasonable alternatives, readily available to the Applicants, become all the more significant when viewed in light of the nominal utility of the proposed PRF. Tide charts, testimony, and pictures were submitted to the Board establishing that a boat at the proposed PRF would be grounded every day during boating seasons. AR Ex. 1 (Pierce County Staff Report), 5 (pictures of tide and grounded boats), 6 (tide data for Hale Passage), 9, 104;

Tr. 46, 63. And, testimony was given that during the summer months it is typical for the tide to be out for six hours of the day. Tr. 168-69. This results in the PRF being wholly unsuitable for permanent moorage, and of very limited use for daily moorage during boating season. AR Ex. 1.

These facts substantiate the weight given by the Board to the available alternatives to the PRF and, specifically, to the existing mooring buoys at the Applicants' residences and the approved float lift. CP 21, 22, 44.

Moreover, all of this evidence must be viewed in light of the County policy discouraging docks when alternatives exist. Under the County's Shoreline Master Program, "piers associated with single family residences should be discouraged."<sup>11</sup> SMP at 37. In the same policy section, the County is directed to "encourage the use of mooring buoys as an alternative to space consuming piers such as those in front of single family residences." *Id.* The Applicants have mooring buoys and a float lift that provide reasonable alternatives to the disfavored PRF option.

The Board had ample basis for its conclusion that the existing mooring and launching facilities were adequate – particularly in light of the

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<sup>11</sup> Note this policy directive does not distinguish between single or joint use docks. It simply discourages use of piers located in front of single family residences, which is the case here.

lack of functionality of the PRF during low tide. CP 39. The Board's denial of the SDP based on PCC 20.56.040.A(5) was supported by substantial evidence, was not clearly erroneous, and was not arbitrary and capricious.

c) Incompatibility with the surrounding environment

PCC 20.56.040.A(7) requires that proposed PRF's be "compatible with the surrounding environment." There is no legal issue regarding the meaning of this requirement. The issue is whether there is substantial evidence in the record to support the Board's finding that the dock would not be compatible with the surrounding environment.

In a compatibility analysis, the Board looks at the proposed development in light of the existing development around the project site and the unique attributes of the area to assess whether the proposed project would be appropriate. See *Wolverton v. WA. Department of Ecology*, SHB No. 02-008 (Jan. 8, 2003), at 5 (proposed development incompatible because it was "substantially larger than any other in the area"); *Viafore v. Mason County*, SHB No. 99-033 (Sep. 14, 2000) (dock incompatible where it "would be the first dock approved under the SMA with only one other existing dock structure"); *Mukai & Parkshore v. City of Seattle*, No. SHB 00-029 (Apr. 19,

2001) (dock incompatible because it would interfere with navigation). In this case, the factors that are relevant to the Board's compatibility analysis are aesthetics and environmental impacts.

(1) The PRF is incompatible with the area aesthetics

As to the project's aesthetic compatibility, the Board found that the crescent beach is currently unobstructed and provides beautiful views of a natural beach setting. CP 20-24 (FF 5, 6, 12). The Board's findings focus on the fact that there are no existing docks on the cove's sandy beach. *Id.* As discussed in detail *supra* at 18-22, these findings are supported by ample record evidence. *See* Tr. 41-5, 115-17, 189-90; AR Ex. 1, 2c, 4, 5, 40, 104.

Based on this substantial evidence, the Board concludes that "[t]he fact that this would be the first dock within the sandy crescent is a significant factor in the compatibility analysis." CP 39 (Board CL 9). The Board states that because the shoreline is in a "natural state" and set apart from any other structures, aesthetic "compatibility is more of a concern to the Board." *Id.* Ultimately, the Board concludes that the PRF would have a "jarring visual effect" -- making it incompatible with the surrounding environment. CP 43.

Just as in *Viafore*, the Board justifiably concluded that because of the natural beauty of the shoreline environment and because the proposed dock would be the first on this stretch of beach, it was incompatible with the surrounding environment, and in particular, with the unobstructed views currently afforded. SHB No. 99-033. This conclusion is supported by substantial evidence, was not clearly erroneous, and was not arbitrary and capricious.

The applicant may cite to other evidence in the record that would support a contrary finding, e.g., evidence that other, shorter docks already impair the view. But under the APA, this Court does not re-weigh the evidence. *See Buechel*, 125 Wn.2d at 202; *Freeberg*, 71 Wn. App. at 371. Once the Court determines there is substantial evidence to support the Board's findings, its inquiry is at an end.

(2) The PRF is incompatible with the shoreline's ecological value

As to the project's ecological compatibility with this area, the Board found that the shoreline area at issue is one of "high environmental value" and would be adversely impacted by the dock. CP 43. There was abundant

evidence regarding the unique and valuable environment existing along the shoreline and the probable adverse impacts that would result from the dock.

The Board heard extensive testimony and reviewed a report from biologist Wayne Daley on the environmental value and vulnerability of the project site. AR Ex. 30 (Daley C.V.); Ex. 31; Tr. 220-306. Mr. Daley testified that the shorelines in the proposed project area have been designated by NMFS as “essential fish habitat” for threatened Chinook salmon. AR Ex. 31; TR 233. This designation includes the project site as critical shoreline habitat for forage fish (including herring and sand lance) which salmonids rely on as a primary food source. AR Ex. 1 at 5; Ex. 31; Ex. 94; Tr. 233. *See also* AR Ex. 35 (Pacific Watershed analysis identifying sand lance spawning area at the project site); Tr. 233-34 (herring holding habitat). Similarly, WDFW has recognized the area as a “habitat of special concern” under WAC 220-110-250(1)(b) because it supports sand lance spawning. Exs. 37, 73; Tr. 255. *See also* AR Ex. 38-39 (Squaxin Island Tribe letters to Pierce County).

Juvenile salmon (including threatened Chinook salmon) depend on these forage fish for their survival. AR 31, 38-39; Tr. 248-250. WDFW has recognized that the project area “serves as a migration corridor for juvenile salmonids.” Ex. 73; Tr. 255. The Applicants’ own biological evaluation

acknowledges that salmonids, including Chinook, occupy the project area.

Ex. 32. Sand lance alone make up 60% of the diet of juvenile Chinook salmon. Tr. 250.

Mr. Daley concluded that “permitting of the project will result in a violation of the regulations of ESA concerning impact to threatened Chinook salmon [essential fish habitat] and the indirect impact to Orca whales due to the reduced Chinook populations.” AR Ex. 31. The Squaxin Island Tribe also submitted comments, reviewed by the Board, stating that because the beach was used by forage fish for spawning “any further degradation to salmonid and forage fish habitat in this area” would thwart Tribal goals for salmon recovery, and would “have a deleterious impact on salmonid populations including endangered Chinook salmon.” AR Exs. 37, 38.

The area also has eelgrass beds which provide habitat for these forage fish. AR Exs. 14, 31; CP 26-27 (FF 15, 16). Evidence on existence of eel grass was submitted by numerous sources, including the Department of Ecology (AR Ex. 40), biologist Wayne Daley (AR Ex. 31), and neighbors who personally observed and provided pictures of the eelgrass at the project site (AR Ex. 43, 44; Tr. at 213). Because of its usefulness to forage fish (and

therefore salmon) Pierce County's environmental regulations include protection of eelgrass beds among their priorities. PCC 18E.40.020D.10.

Mr. Daley stated that "[b]ased on the impacts of boats being continually launched at this site and then tied to the float or the dock there will be continual damage to the shoreline and the eelgrass and macro algae beds." AR Ex. 31. These facts are also established by a biological evaluation for the project prepared by Pacific Watershed Associates. AR Ex. 14.

Moreover, because the beach in this area is shallow, there is no water (or not enough) for a boat beneath the dock during substantial parts of the tide cycle. Tr. 57-63; AR Ex. 1 at 10, 16; Ex. 61; Ex. 104. Because of the shallow shoreline, a boat moored at a dock in this area will be grounded on a regular basis. *Id.* This will cause scouring of the beach and destruction of habitat, including adverse impacts on sand lance habitat. Tr. 251-252, 258, 289-295; CP 26-28 (FF 15, 16, 18, 19). In fact, the Department of Ecology "recommended alternative methods" of moorage at this site "due to the shallow profile of the intertidal area of this shoreline." AR Ex. 1 at 5.

This evidence was reflected in the Board's findings. CP 24-28 (Board FF 14-18). Consistent with the evidence presented, the Board echoed the concerns of the County, the Department of Ecology, the Squaxin Indian

Tribe, Mr. Daley, and neighbors that this essential habitat would be degraded by the proposed dock.

As with other factual issues in this case, there was competing evidence submitted by the Applicants. But the Applicants do not meet their burden or appeal by citing that evidence. It was the job of the Board, not this Court, to weigh the evidence. The Board did that and ultimately concluded that the proposed project would be incompatible with the environment at the project site because the dock “would likely be detrimental to the natural habitat currently existing and recovering at this location.” CP 43 (CL 15). This conclusion was based on substantial evidence and should be affirmed.

2. The project is inconsistent with County development regulations under PCC 20.56.040.B

Pierce County’s shoreline regulations require that applicants meet the development requirements of PCC 20.56.040.B. One of those requirements prohibits “more moorage spaces than one space per waterfront owner using the dock.” PCC 20.56.040.B(7). This regulation is expressly not satisfied by the Applicants and forms an independent basis for the Board’s permit denial.

Under PCC 20.56.040.B(7), there is a clear directive that each waterfront owner not have more than one moorage space. The Board

concludes that the proponents' project does not comply with this regulation because "if the PRF and the float lift were approved without the removal of the existing moorage buoys, as is planned, there would be a total of four moorage spaces for two families." CP 37 (Board CL 6). Even if the moorage buoys were removed, the float lift and PRF would provide three moorage spaces, exceeding the requirement of PCC 20.56.040.B(7). *See* Ex. 1 at 17.

Evidence supported the Board's finding that the proposal is inconsistent with PCC 20.56.040.B(7). Evidence establishes the approval of the float lift and existence of additional on-site mooring buoys at the Applicants' residences. Tr. 24, 39, 101; AR Exs. 1, 83. The County Staff Report expressly states that if the new dock were approved, the Applicants' proposal would exceed the limitation in PCC 2056.040.B(7). Ex. 1 at 17. The Board justifiably based its conclusion, in part, on the County's interpretation of its own regulations. CP 37, 59.

This factor alone required denial of the application. The Board's decision to deny the SDP under PCC 20.56.040.B(7) was based on substantial evidence, was not clearly erroneous, and was not arbitrary and capricious.

3. The project is inconsistent with Pierce County's Shoreline Master Program policies and standards

The Applicants also were obligated to meet the County Master Program's policies and standards to proceed with their proposed shoreline development. RCW 90.58.140. Title 20 of the County Code contains "standards which will regulate and promote intensities and qualities of development consistent with the protection of the shoreline environment and its related resources and the policy of the [SMA]." PCC 20.02.010.

The Board cites PCC 20.02.010 in reaching its conclusion that the PRF was inconsistent with the Master Program. This subsections guides development to be conducted "without **degradation of environmental quality**, risk to health or safety, and to insure where development takes place, that it is done in a manner which will promote and enhance the **best interest of the general public....**" CP 34, *quoting* PCC 20.02.010.

The Board concluded that the project "would likely be detrimental to the natural habitat currently existing and recovering at this location." CP 42-43 (CL 12, 15). The Board also concluded that the dock was not in the best interest of the general public because of the value placed on the currently

unobstructed, “virtually undeveloped” shoreline which affords beautiful views and recreational opportunities to the community. CP 39, 43 (CL 9, 16).

These conclusions are amply supported by the Board’s factual findings, which establish the environmental risks of the proposed dock (CP 24-28 (FF 14-18)) and support the conclusion that the dock is not in the interest of the general public (CP 20-4 (FF 5-12)).

The Board’s factual findings are based on substantial record evidence. On the issue of environmental degradation, the same evidence relied on by the Board in its analysis of incompatibility under PCC 20.56.040.A(7) applies here. *See supra* at 26-32. On the issue of public interest, the Board heard extensive testimony about the views along the shoreline, the recreational use that currently takes place along the beach, and how the dock will impair these resources. Tr. 35-9, 46-8, 76-7, 160-61, 189-90. Moreover, the Board heard testimony regarding the limited dock utility during low tide rendering the dock unusable for up to six hours on some days during boating season. Tr. 57-63, 251-52, 289-95; AR Ex. 6. This weighs against compromising public interest for marginal (at best) private gain.

Mirroring the mandate of PCC 20.02.010, the Shoreline Master Program also contains a “Conservation Element” that sets forth policies and

goals for the Shoreline Master Program. The “Conservation Element” seeks preservation of natural shoreline resources, “considering such characteristics as scenic vistas, . . . estuarine areas for fish and wildlife protection, beaches, and other valuable natural or aesthetic features.” The Conservation Element goal is to “ensure continuous sound management in the preservation of unique, fragile, and scenic elements, and of non-renewable natural resources; [and] encourage the best management practices for the continued utilization of renewable resources of the shorelines.” AR Ex. 100 at 13.

The policies also provide that: “In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, . . . and impact on adjacent proximate landownership should be considered.” *Id.* at 37 (Pier Policy (e)). Further, the policies state: “Encourage the use of mooring buoys as an alternative to space-consuming piers such as those in front of single-family residences.” *Id.* (Pier Policy (f)).

As cited throughout this brief, the Board’s decision that the PRF was inconsistent with these County SMP policies was supported by substantial evidence. The Board heard evidence on and personally saw the scenic views afforded by the shoreline at Hale Passage. Tr. 41-2, 45, 115-17, 189-90. It also heard testimony on the impact the proposed project would have on

adjacent property owners. *Id.* See also Tr. 35-6, 39, 46-8, 76-7, 160-61. The Board considered evidence relating to environmental impacts as well. See *supra* at 29-33; AR Ex. 1, 14, 31, 37, 38, 61; Tr. 220-306. The Board also specifically considered the issue of alternatives - weighing testimony on the availability of other float lifts, mooring buoys, and private moorage with the aesthetic and environmental impacts of the proposed dock. See *supra* at 22-25; Tr. 24, 39, 40-2, 57-60, 101, 175-77, 477; AR Exs. 1, 5, 6, 83, 104.

Taking into account all of this evidence presented to and considered by the Board, the Board correctly concluded that this project was not in the public interest because of the myriad aesthetic and environmental impacts that would result from construction of the dock. CP 37, 39, 43-46 (CL 7, 9, 15, 16, 18). The inconsistencies between the proposed dock and the County's Shoreline Master Program policies provided an adequate basis for the Board to deny the SDP. This decision was based on substantial evidence, was not clearly erroneous and was not arbitrary or capricious.

D. The Board Correctly Concluded that the Proposal is Inconsistent with State Requirements for Shorelines of Statewide Significance

The SMA identifies certain shorelines as "shorelines of statewide significance." RCW 90.58.030 establishes a set of policies to provide an

extra level of protection for those shorelines. RCW 90.58.020. At the proposed project site, the shoreline of statewide significance designation starts at the low tide line and runs seaward from there. Although the proposed dock is not being constructed directly within the designated shoreline of statewide significance, the project will have direct adverse impacts on the shoreline of statewide significance.

The legal issue is whether the policies in RCW 90.58.020 protective of shoreline's of statewide significance are implicated where a project is located outside a shoreline of statewide significance, but will have impacts on the shoreline of statewide significance. To our knowledge, this issue has not previously been addressed in a reported appellate decision. In this case, the SHB decided that the policies in RCW 90.58.020 were relevant. We address that legal issue first. Then we address the factual issue—whether the Board's determination that the project was inconsistent with the policies in RCW 90.58.020 was supported by substantial evidence.

1. RCW 90.58.020 applies to all projects impacting shorelines of statewide significance

To determine whether the policies in RCW 90.58.020 are applicable to a project that impacts shorelines of statewide significance (though located

outside those shorelines), we focus on the language of the statute. RCW 90.58.140(2)(b) sets the basic standard for all shoreline projects. Without regard to whether the project is within or outside a shoreline of statewide significance, all projects in any shoreline must be consistent with the local master program **and** be consistent with the SMA itself:

A permit shall be granted . . . (b) . . . only when the development proposed is consistent with the applicable master program and this chapter.

RCW 90.58.140(2). “This chapter” refers to chapter 90.58 RCW—the SMA. The policies in RCW 90.58.020 protecting shorelines of statewide significance are a portion of “this chapter.” Thus, any project requiring a shoreline permit must be consistent with those policies, regardless whether the project itself is located within the shoreline of statewide significance.

Statutes should be construed to give effect to legislative intent. *Preserve Our Islands*, 133 Wn. App. at 519. Applying the policies in RCW 90.58.020 to protect shorelines of statewide significance from impacts caused by a shoreline project (whether the project is sited within the shoreline of statewide significance or not) is consistent with the clearly stated goals of the SMA. The statute was adopted to “prevent the inherent harm in an

uncoordinated and piecemeal development of the state's shorelines.” RCW 90.58.020. That section also protects against “adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life ...” *Id.* These policies apply to all shorelines, not just shorelines of statewide significance. The RCW 90.58.020 preferences apply to all shoreline developments impacting shorelines of statewide significance without regard to the precise location of the project.

RCW 90.58.020’s mandate to effectively coordinate development to protect shorelines of statewide significance is undermined if projects that will have adverse effects on shorelines of statewide significance are allowed to be set just outside of the designated “significant” area to avoid application of the policies in that section. For example, the shoreline in this case provides valuable habitat for threatened Chinook salmon, sand lance spawning, herring rearing and eelgrass. As discussed *supra*, the proposed project jeopardizes these environmental values not just at the dock site itself, but within the adjacent shoreline of statewide significance.

Statutes should not be read to reach absurd results. *Nelson v. Applemay Chevrolet, Inc.*, 129 Wn. App. 927, 942, 121 P.3d 95 (2005). Here it would be absurd to ignore the SMA mandate for protection of

shorelines of statewide significance and allow projects that will have adverse impacts on shorelines of statewide significance to avoid application of the RCW 90.58.020 use preferences.

2. The proposed project is inconsistent with the use preferences in RCW 90.58.020

The first use preference listed is to “recognize and protect the statewide interest over local interest.” RCW 90.58.020(1). The second use preference is to “preserve the natural character of the shoreline.” RCW 90.58.020(2). The third use preference is to “result in long-term over short-term benefit,” and the fourth is to “protect the resources and ecology of the shoreline.” RCW 90.58.020(3)-(4).

These use preferences overlap with the criteria, policies, and standards considered throughout this brief. Specifically, all four RCW 90.58.020 use preferences are reflected in the SMP policies to conduct development without environmental degradation and in the “best interest of the general public.” *See supra* at 34-37. PCC 20.56.040A’s shoreline development criteria regarding view preservation and compatibility with the surrounding environment are also parallel to the SMA use preferences. *See supra* at 17-

33. The theme of protecting the shoreline for the greater public benefit is pervasive in the relevant law and the Board's decision.

The Board concluded that the project "would not further any of the priorities set forth in the SMA." CP 43 (Board CL 16). In reaching this conclusion, the Board relied on its factual findings and record evidence relating to aesthetic and environmental impacts along the shoreline.

The Board first focused on the aesthetic and view impacts of the proposed project. It concluded that "aesthetic values are inherent in the values to be protected under the SMA"<sup>12</sup> and that these values are particularly in jeopardy with "undeveloped stretches like the beach that is the subject of this case." CP 43. The Board discussed the "unusually long stretch of unobstructed sandy shoreline" and "that residents and visitors alike consider the beach and the views it affords to be beautiful and unique." CP 21, 43. The Board then concluded, based on ample evidence and factual findings, that "a 100-foot PRF constructed in the middle of the sandy crescent of this

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<sup>12</sup> RCW 90.58.020 expressly seeks to protect the aesthetic qualities of the shorelines: "aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interests of the state and the people generally."

beach would have a jarring visual effect, and it would not further any of the priorities set forth in the SMA.” CP 43 (Board CL 16).

The substantial evidence supporting these factual findings is found throughout the record. Property owners and recreational beach users testified about the value of the natural, unobstructed shoreline. Tr. 41-2, 45, 115-17, 189-90. Exhibits reflected the visual effect that would result from the dock, and the public outcry against this artificial structure being placed in the center of the sandy cove. AR Exs. 1, 2c, 4, 5, 104. *See also supra* at 18-22.

Based on this evidence, the proposal would significantly detract from the “natural character” of the cove as the only dock on the sandy beach in this area. CP 20, 24. RCW 90.58.020(2). The dock also would favor local over statewide interest and short-term over long-term benefits, in conflict with the first and third use preferences. RCW 90.58.020(1), (3).

The Board’s denial is also supported by evidence showing probable environmental impacts of the dock, inconsistent with the use preference to “protect the resources and ecology of the shoreline.” RCW 90.58.020(4). The Board entered several factual findings and legal conclusions establishing the “critical” and “fragile” environmental characteristics of this shoreline that the dock could impact. CP 24-28, 42-4 (FF 14-18, CL 14-15). *See supra* at

28-32. The Board's factual findings and conclusions were supported by substantial testimony and documentary evidence considered by the Board. AR Exs. 1, 5, 14, 31, 104; Tr. 251-58, 289-95. *See supra* at 30-32.

Based on the evidence summarized above, the Board concluded "that the shoreline area involved in this proposal is one of high environmental value and that, in this case, the proposed structure would likely be detrimental to the natural habitat currently existing and recovering at this location." CP 27 (Board CL 15). Consequently, the Board concluded the dock was inconsistent with the "resources and ecology" protection use preference. *Id.* Under the SMA use preferences, the Board's denial was based on substantial evidence, was not clearly erroneous, and was not arbitrary and capricious.

E. Cumulative Impact Assessment

Another basis for the Board's denial of the SDP is the cumulative effects of the project. CP 44 (Board CL 18). We first consider whether the Board had discretion to consider cumulative effects and then assesses whether the Board correctly concluded that cumulative effects warranted denial of the permit.

1. The SHB may undertake a cumulative effects analysis in review of a substantial development permit

The Applicant argued below that the Board lacked authority to consider the project's cumulative effects. That argument is directly countered by two Supreme Court cases that have affirmed the Shoreline Hearings Board's consideration of cumulative effects when ruling on an application for substantial development permits. *Skagit County v. Department of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 115 (1980) (approving SHB's cumulative effects assessment for a substantial development permit); *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976) (upholding SHB permit denial because of the project's precedential effect and cumulative impacts).

The Applicant argued that the Board's cumulative effects analysis in this case was contrary to its decision in *Roller v. Pierce County*, SHB No. 06-016 (Oct. 4, 2006). Of course, the Supreme Court decision in *Skagit* and *Hayes* take precedence over any SHB case. But in any event, *Roller* is factually distinguishable. The Board did not employ a cumulative impacts analysis there, in part, because the proposal posed "no risk of environmental damage." *Roller*, CL 9. In contrast, the record in this case is replete with

examples of how “fragile” this shoreline area and the potential for environmental harm. Tr. 257-38; Ex. 31. *See also supra* at 28-32.

Moreover, the *Roller* decision acknowledged that several piers were already visible from the location of the proposed dock and there was a low risk for precedential impact. The opposite factual findings were made here. CP 21 (“unobstructed sandy shoreline”); CP 20 (no docks on sandy beach area); CP 24 (uninterrupted beach is prime view); Tr. 41-2, 115-17, 189-90.

The Board here also noted that although *Roller* held that while a cumulative effects analysis was not **required**, the Board has never been **precluded** from such considerations. CP 44-4 (Board CL 18). The Board has discretion to conduct a cumulative effects analysis if the facts warrant it.

Given the clear authority of *Skagit County* and *Hayes*, and under the facts of this case, a cumulative impacts analysis was appropriate for the Board to assess the project’s ability to meet the SMP and SMA criteria.

2. Under the facts of this case, the project’s cumulative effects warrant denial of the SDP

The Board was presented with evidence of three types of cumulative impacts: (1) the cumulative effect of various combined impacts generated by the dock on neighboring property; (2) the cumulative impact on the

environment; and (3) the cumulative effect resulting from the dock's precedential impact, spawning more dock development on this unobstructed beach.

a. Cumulative impacts to area residents

To this point, we have discussed the project's impacts individually. Views are adversely impacted. Beach and nearshore recreational activities are impeded. Salmon and other natural resources are harmed. But in addition to considering these impacts in isolation, the Board also considered their cumulative import. The neighbors' use and enjoyment of their properties is the sum of all these (and other) resource values in the shoreline zone. In assessing whether the project would be compatible with its surroundings, the Board correctly assessed the cumulative impact of all these adverse impacts. The same property owners who will be adversely affected by visual impacts also will be impacted by reduced recreational opportunities. Tr. 69, 124, 161, 206, 208. The loss of recreational opportunities will impact those who also treasure the environmental resources put at risk by the project. *See, e.g.*, Tr. 185-203. The Board correctly took account of the cumulative effect of these multiple impacts in concluding that the project was not compatible with its surroundings. CP 46.

b. Environmental cumulative effects

Just as the neighbors will suffer the cumulative consequence of multiple impacts, so, too, will the environment. The project will cause several types of environmental harm, each significant in its own right, but when combined, posing an even greater threat.

The dock would cause loss of critical forage fish habitat as a result of the new structure shading tideland areas where these forage fish feed and spawn. This includes loss of eelgrass, herring rearing areas, and spawning grounds for sand lance. CP 24-28. *See also supra* at 28-32. These impacts will be exacerbated by the continual grounding of boats at the dock because of daily low tides. Tr. 251-52, 289-95. The groundings destroy habitat, further reducing food supply for salmon. *Id.* The dock would also obstruct the shoreline migration corridor for salmon, forcing salmon into deeper water where they are more exposed to predation. Tr. 255-56. These environmental impacts, when considered together are significant and support the Board's conclusion that the dock's cumulative impacts would be "detrimental to the natural habitat" in the surrounding environment. CP 43. *See supra* at 32.

c. Precedence for future development

An important part of the cumulative effects from this dock is its precedent setting nature. The proposed dock would be the first on the cove's sandy beach and it would be located in the approximate center of the cove. FF 5, 6, 12; CL 16. *See supra* at 27-8. To date, the absence of docks on this beach has proved to be a powerful disincentive to any dock proposals. But once the beach is marred by one dock, that disincentive will be gone and other docks likely will follow. *Viafore*, SHB No. 99-033 (Sep. 14, 2000). Multiple docks will increase the aesthetic, recreational and environmental impacts many times over.

The Board's conclusions here were consistent with its cumulative effects analysis in its prior decision in *Viafore*. There, the Board considered a dock proposal that would have been the first dock on that particular stretch of beach. The Board concluded that:

[i]n terms of compatibility and view impacts, considerable weight must be given to the possibility that similar docks will be sought if the permit here is allowed to stand. The cumulative effects of such development would be inconsistent with the cited policies and regulations. In a case such as this, it is critical to consider cumulative impacts of a proposed development.

*Id.* Just as in *Viafore*, the visual impacts here would be significant and would reduce the overall scenic value of the site, making it more prone to future dock development. Also, just as in *Viafore*, this dock approval is likely to be the catalyst for additional docks (and thereby exacerbate aesthetic and environmental degradation), giving the Board a valid cumulative impacts basis to deny the permit. The Board's decision was based on substantial evidence, was not clearly erroneous, and was not arbitrary and capricious.

#### V. CONCLUSION

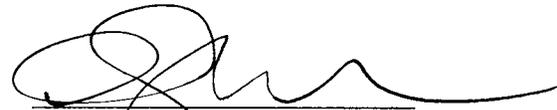
Based on the foregoing analysis, May respectfully requests that this court reverse the Superior Court and reinstate the Board's decision denying the Applicants' Shoreline Substantial Development Permit.

Dated this 8 day of September, 2008.

Respectfully submitted,

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DATED this 8<sup>th</sup> day of September, 2008, at Seattle,  
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