

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

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

NO. 37911-2-II

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
AND ANNE LUZZI; STEVE SAXON AND PAULA SMITH; AND
WILLIAM WEAVER AND MARY LOU WEAVER,

Appellants.

REPLY BRIEF OF APPELLANTS

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I. STANDARD OF REVIEW AND DEFERENCE TO THE BOARD

On factual issues, the applicants consistently point to evidence that contradicts the evidence the Board relied on. But that does not meet the applicants' burden on appeal. Merely demonstrating an evidentiary conflict does not establish the *absence* of substantial evidence supporting the Board's findings. *Ongom v. Dept. of Health*, 124 Wn. App. 935, 949, 104 P.3d 29 (2005) (under substantial evidence test, reviewing court does not assess credibility of witnesses or the weight to be given conflicting evidence).

As to issues of law, the applicants assert that deference is not warranted because the Board does not have specialized expertise with regard to Pierce County's shoreline regulations.¹ Resp. Br. at 19-20. But this exact argument was rejected by this Court in *Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 515-16, 737 P.3d 81 (2006):

POI argues that if any deference is due, it should be accorded to the County rather than the Board because the County wrote the Master Program, and the SMA grants local governments primary responsibility for "administering the regulatory program consistent with the policy and provisions of [the SMA]." While this is true as far as it goes, our courts have long recognized that the Board "draws on its special knowledge and experience as the entity charged with

¹ There is no dispute that where questions of fact are at issue, this Court gives deference to the Board. *See* Op. Br. at 12.

administering and enforcing the [SMA].” The important distinction here is that the Board hears cases like this one de novo, and it does not accord deference to the local government's decision. ... **Because we review the Shorelines Hearings Board's decision, not that of the local government, to the extent we give deference, it is to the Board.**

Id. (emphasis added).

Giving deference to the state board, not the County Examiner, also is called for by the SMA's structure. “Under the SMA, the state has the primary authority to manage shoreline development.” *Biggers v. Bainbridge Island*, 162 Wn.2d 683, 687, 169 P.3d 14, 18 (2007). (This contrasts with the state's more limited role in other land use settings. *See, e.g.*, ch. 36.70A RCW (Growth Management Act); ch. 36.70 RCW (Zoning Enabling Act).)

Local rules for shoreline uses must be reviewed and approved by a state agency (the Department of Ecology), *see* RCW 90.58.300, and, if the local government disagrees with Ecology's evaluation, the dispute is resolved by another state agency, the Shorelines Hearings Board. Moreover, (and unlike the Growth Management Act), the SMA gives the State the duty to oversee local government decisions on individual permits. All other shoreline permits, if challenged, are reviewed by a state agency, the SHB. RCW 90.58.180. Shoreline conditional use permits require additional review

and approval by yet another state agency, the Department of Ecology. RCW 90.58.140(10).

Thus, the SMA creates a pervasive State role overseeing local government regulation of shoreline land use. In this “State-heavy” regulatory system, distinct from any other land use system in Washington, reviewing courts certainly should provide deference to the state board’s legal conclusions, even when they differ from those of the local government.

II. THE APPLICANTS REFER TO IRRELEVANT LAWS AND FICTIONAL SCENARIOS

In their response brief, the applicants dwell on issues that are irrelevant to the Court’s consideration of the assigned errors. The applicants’ first red herring is the fictional scenario of whether its project would have been allowed if the dock were only 50 feet in length. Resp. Br. at 5, 22, 32. It is irrelevant what would have happened if the proposed structure were only half the length proposed. The dock proposed here is 100 feet long and, regardless whether it is a single or joint use dock, any proposed dock over 50 feet requires a shoreline substantial development permit and must meet the conditions established for those docks.²

² The applicants also are wrong to suggest that a 50-foot dock would automatically avoid review. Only short docks below a specified cost threshold do not need a

It is also irrelevant what other agencies concluded as to whether the dock qualified for various other permits. Resp. Br. at 7-14. Although other agency decisions may rely on similar underlying facts, those permit requirements are different.³ Approval of other permits does not absolve the applicant from compliance with the legal requirements for obtaining a shoreline permit. *See* WAC 173-27-150 (shoreline permit applications reviewed for compliance with the requirements of the Shoreline Management Act and county's shoreline regulations). Those shoreline-specific laws and regulations were the appropriate focus of the Board.

III. THE ALLOWANCE OF NEW DOCKS IN THE RURAL
RESIDENTIAL ENVIRONMENT IS CONDITIONAL
AND REQUIRES COMPLIANCE WITH
NUMEROUS CRITERIA

The applicants focus heavily on the County's designation of the project site as within the "Rural Residential Shoreline Environment." Resp. Br. at 5, 21-22, 25. This designation allows new docks under certain

permit. PCC 20.56.030.A.1.c.1. There is no evidence the mythical dock conjured up in the applicants' brief would be below that threshold (or other applicable criteria, *see* Tr. 500).

³ For instance, the Department of Fish and Wildlife did not consider cumulative impacts. CP 32 (FF 28).

conditions. This designation does not eliminate the applicants' obligation to comply with the conditions established in the County Code or the State law.

The Board was aware of the Rural Residential designation and recognized that the authorization provided by that section was conditional: "The fact that a dock is a permitted use in the Rural Residential zone does not eliminate the necessity for a compatibility analysis," CP 40 (one of the conditions established in the Shoreline Master Program).

Given the qualified allowance of new docks in the Rural Residential environment, the Board had to consider the dock's compatibility with its surroundings and factors such as the SMP policy "discourag[ing]" "piers associated with single family residences," SMP Pier Policy (d); the shoreline designation as "critical habitat for Puget Sound Chinook salmon" by the National Marine Fisheries Service; and its designation as a shoreline "habitat of special concern" under WAC 220-110-250(1)(b). CP 24-25; 35, 40. The Board did not err by doing so.

The applicants point to PCC 20.56.020, which "encourages construction of joint-use docks." Resp. Br. at 22-23. All things are relative. Certainly one "dual use" 50-foot dock is better than two "solo use" 50-foot docks. But that SMP preference is not the same as saying that a joint use

dock is preferred to no dock at all or that a 100-foot dock on this beach meets all Code requirements. The SMP does not automatically authorize any dock longer than 50 feet, whether it is a solo or dual use dock. Any dock longer than 50 feet, solo or joint use, must comply with the requirements and policies of the County Code and State law. *Id.* at 35-8. Rather than committing a legal error by considering these criteria and factors, the Board would have committed legal error if it had not.

IV. THE BOARD CORRECTLY APPLIED THE COMPATIBILITY FACTORS IN PCC 20.56.040

The County Code authorizes new docks in the Rural Residential environment only upon a showing by the applicant that the dock will not unduly impair views; that reasonable alternatives do not exist; that the use of the dock is compatible with its surroundings; and that no more than one moorage space per lot is provided. PCC 20.56.040.A(2), (5), and (7) and -.B. The Board addressed treated these criteria in a single section because they all relate to the project's compatibility.⁴ The parties have addressed these individually and we continue that format here. As to each, we demonstrate the Board committed no legal error and that there is substantial evidence in

the record to support its factual findings. While the applicants point to conflicting evidence, they cannot deny that substantial evidence exists supporting the Board's decision.

A. PCC 20.56.040.A(2) – View Impairment

The Board found that the sandy, crescent beach possesses “extraordinary aesthetic values” and that a 100 foot long dock jutting into the middle of this “virtually undeveloped” beach would be “jarring.” CP 39 (CL 9); CP 43 (CL 16); CP 46 (CL 18). These findings are amply supported by substantial evidence. *See* Op. Br. at 20-21 (citing evidence). *See also* AR Ex. 55. The applicants' reference to competing evidence in the record does not satisfy their burden under the substantial evidence test.

The applicants are incorrect in stating that May “admitted that his views will not be blocked or unduly impaired.” Resp. Br. at 26. Nothing in the record reflects that belief. On the contrary, May clearly stated: “the view, . . . which shoreline residents consider to be this unobstructed crescent-shaped sandy beach, will disappear forever with the approval of the Robertson-Kvinsland proposal.” Tr. 45.

⁴ *See* Conclusion 9 (CP 40) (compatibility issues include “impairment of views from surrounding properties”); Conclusion 18 (CP 46) (appropriate to consider alternative launching and moorage options available to the applicants).

The applicants attempt to downplay the view impairment evidence by noting that the upland lots are developed. But “[e]ven where the shore is lined with structures on relatively narrow lots, the beach may still be in a relatively natural state.” CP 40 (CL 9). Indeed it is, as the Board found. CP 39 (CL 9).

The only on-beach development the applicants reference are two docks 300 and 1,500 feet away from the proposal. But there is ample substantial evidence to support the Board’s findings that the “docks that do exist in the area are located on the ends of the crescent and do not interrupt the long expanse of sandy beach in between,” CL 9 (CP 39), notwithstanding contrary evidence cited by the applicants. Pictures submitted by May show that these existing docks do not have the same aesthetic impacts on this beach as would the proposed dock. AR Ex. 5. *See also* Op. Br. 18-22 (citing evidence). The dock 1,500 feet away is not even visible from the proposed dock location. CP 20. The other existing dock is only 50 feet long, and is not located on the crescent beach. *Id.*⁵ Moreover, both of these docks are constructed in front of high-bank lots. In contrast, the proposed dock is in

⁵ The applicants’ reliance on *Fladseth v. Mason County*, SHB 05-026 (Findings and Conclusions, May 1, 2007) only weakens their argument. Resp. Br. at 42. The portion of this case cited by the applicants shows the Board’s consistent recognition of the undue impacts of dividing large uninterrupted shoreline areas with docks.

front of low-bank lots where the visual impacts would be much greater. TR 36:6, 51:1.

The applicants charge that the Board committed a legal error by improperly considering the limited utility of the dock when assessing whether the dock would “unduly” impair views. Resp. Br. at 23-25. The Code uses the adverb “unduly” to make clear that some view impairments may be acceptable. As the applicants point out, the dictionary definition of “unduly” uses words like “excessively” and “not appropriate.” *Id.* Determining whether an impact is “excessive” or “inappropriate” logically includes consideration not just of the magnitude and nature of the adverse impact, but the benefits provided by the project, too. Impacts may not be “excessive” or “inappropriate” if the project is providing significant public and/or private benefits.

A bridge or sewer treatment plant, for example, may have significant adverse view impacts and may create noise, odor and other compatibility issues, but those impacts may not be “excessive,” “inappropriate” or “undue” when weighed against the benefits of the new facility. But that same degree of view impairment may well be “excessive,” “inappropriate” or “undue” if

the project were providing no public benefit and limited private benefit for only a few.

Had the proposal been for a dock that had greater utility (*e.g.*, usable during more of the tide cycle or provided public access) or if reasonable alternatives such as the on-site float lift and mooring buoys were not available, the Board (and County staff) may have felt that the utility of the dock outweighed the aesthetic and environmental concerns. But that was not the conclusion the Board reached based on its factual findings in this case. CP 39, 43. The Board's findings and conclusions on the mixed issues of law and fact are entitled to substantial deference.

Citing *Roller v. Pierce County*, SHB No. 06-016 (Oct. 4, 2006), the applicants argue that the Board should have given more weight to potential future uses. Resp. Br. at 27. *Roller* states that view impairment must be considered "in light of the intensity of both existing and allowable uses." *Roller*, at 13. The applicants interpret this language to require evaluation in the context of "future development" (which they apparently believe necessarily includes docks) "rather than the status quo." Resp. Br. at 27 (emphasis added).

The applicants are wrong that the Board need not consider the “status quo.” The Board’s decision in *Roller* explicitly requires consideration “of both existing and allowable uses.” (Emphasis supplied.)⁶

Finally, the applicants’ argument that the Board must consider future uses is circular. Neither the County Code nor *Roller* mandate or allow docks everywhere in the Rural Residential environment. Potential future uses are relevant only if there is a reasonable possibility that such uses will be developed in this shoreline. Otherwise, reference to all the future uses nominally authorized in a Rural Residential area would be an experience in raw speculation and unlikely outcomes. The applicants never attempted to prove that any of the “potential” uses had any realistic chance of being developed on this beach. The Board was correct not to let pure speculation about future uses unduly influence its compatibility analysis. *Roller* at 12.

⁶ If respondents are claiming that the facts in *Roller* are similar to this case, they are wrong. First, in *Roller*, existing docks already impacted the shoreline view. *Roller* at 7-8. Here, in contrast, no docks exist along the crescent beach and the proposed dock would be placed in the middle of the currently unmarred shoreline.

Second, in *Roller*, the proposed dock would create only “minimal obstruction of their expansive views of the beach and shorelines.” *Roller* at 14. Here, in contrast, there was substantial evidence that the view impairment would be “jarring.” AR Ex. 55, 104; Tr. 41-2, 189-91.

B. PCC 20.56.040.A(5) – Reasonable Alternatives

PCC 20.56.040.A(5) requires that the applicant to show that no reasonable alternative exists which would minimize or eliminate the need for a new dock. Factually, the applicants do not challenge the existence of alternatives. Resp. Br. at 29-30. Nor could they. *See* Op. Br. at 22-23; Tr. 24, 30, 39, 64, 101, 175-76, 477; CP 22, 28, 36-7, 44.

Instead, the applicants make two legal arguments that their dock should have been approved despite the existing alternatives. First, the applicants argue that PCC 20.56.040A(5) should be read to exempt joint use docks from the alternatives analysis, because a joint use dock is one of the listed alternatives that may avoid the need for a solo use dock. But nothing in PCC 20.56.040.A(5) expressly or impliedly excuses a joint use dock proposal from an alternatives assessment.

PCC 20.56.040A.5 requires an applicant, regardless of the type of dock structure proposed, to assess potential alternatives to new construction. A joint use dock may be one of the alternatives considered, but that does not

eliminate the need to consider other potentially more benign, alternatives, too.⁷

Second, the applicants assert that the Board applied the wrong burden of proof, requiring the applicants to show they have no reasonable alternatives. But PCC 20.56.040.A(5) does put the initial burden of showing an absence of reasonable alternatives on the applicant, as the applicants acknowledge. Resp. Br. at 30.

The applicants cite two cases to support their burden of proof argument, Resp. Br. at 30, but these cases do not match the present facts.⁸ In *Roller*, the Board does not discuss compliance with PCC 20.56.040.A(5), most likely because it was a weak argument where only a single public launch existed north of the parcel in question and no other mooring options existed. In *McLean v. Pierce County*, SHB 07-014 (Nov. 13, 2007), alternative

⁷ The applicant also takes issue with what it perceives to be County staff's focus on the proposed dock's inadequacy for "permanent moorage" instead of also considering its utility for "landing or other recreational purposes." Resp. Br. at 24-25. Applicants ignore the obvious conclusion that at the same time the dock is unavailable for mooring due to low tides, it would also be useless for landing and most other recreational purposes (e.g., fishing).

⁸ The applicants also note that the evidence in *Roller* and *McLean* caused the Board to find no reasonable alternatives existed. Resp. Br. at 30. But that goes to the factual issue which the applicants have not raised -- whether the evidence here supported the SHB's conclusion that alternatives exist. See CP 21-23, 39, 46. See also Op. Br. at 22-25. Whether the evidence in another case led the Board to a different result there relates to a fact-related

mooring options also were inadequate. In that case there was “no dock or mooring facility related to the McLean lot” and “[t]he closest public boat launch area is across the bay...[with] no parking, loading dock or moorage available.” *McLean* at 3, 6.

In stark contrast, here the alternatives include two on-site moorage options; one existing on-site boat launch; two nearby public boat launches; and two nearby permanent moorage options. There was no error in the Board’s consideration of all arguments related to viability of alternative mooring options and its conclusion that existing options were adequate.

C. PCC 20.56.040.A(7) – Compatibility with Surrounding Environment

PCC 20.56.040.A(7) requires that a proposed dock and, therefore, the uses to which the dock will be put, are compatible with the surrounding environment. As discussed in detail in the opening brief, substantial evidence established that, in addition to the precedent setting impacts, the proposed dock would be incompatible with area aesthetics and the natural shoreline environment. Op. Br. at 26-28 (citing evidence); CP 24-28. The Board based its incompatibility decision on these facts. While the applicants cite to some

inquiry irrelevant to the legal issues raised by the applicant here. *See also* Op. Br. at 48 (discussing factual difference between *Roller* and this case).

conflicting evidence, they have not refuted or invalidated any of the substantial evidence presented by the neighbors or relied on by the Board, *id.*; Resp. Br. at 31-36, and, therefore, have not met their burden on appeal.

The applicants also raise two legal issues regarding compatibility. First, they focus on whether the project will result in an increased intensity of use that is incompatible with the surrounding environment. Resp. Br. at 17, *citing* CP 39. But the applicants over-simplify the Board's considered analysis.

The shoreline surrounding the proposed dock is not currently used for boat moorage or dock landings. The intensity of shoreline use for these purposes will increase significantly with the introduction of a new dock. CP 39-43. This is particularly true for a joint use dock, which would be heavily used during the limited times when the tides would facilitate landing and moorage.

Moreover, although the water in Hale's Passage is currently used for boating, there is no evidence of impact on the tidelands beneath the water currently. The Board considered extensive evidence on the value of the tidelands for eelgrass restoration and spawning habitat. Those resources would be impacted by the dock that would facilitate boat mooring and

running aground during times of low tide. CP 41-43. This is a significant increase in intensity of use considering the currently undisturbed state and the environmental value of this particular shoreline. There was no error in the Board's assessment that the dock and its usage would be incompatible with the low intensity recreational use and environmental resources on this shoreline.

Second, applicants raise the same "future use" argument they raised with the issue of view impairment. *See supra* at 10-11. The argument suffers from the same deficiencies and circular reasoning here. The County Code does not require docks on this shoreline in the future. Whether other docks would be proposed or approved (absent approval of this one) is pure speculation on the applicants' part. It certainly is not supported by the history of this application which demonstrates the significant hurdles any proponent of a dock would have on this sandy crescent beach.

Nor does the Board's ruling create a "*de facto* moratorium" on dock construction along this shoreline. Resp. Br. at 33. If docks are precluded on the sandy crescent, that is due to the shoreline regulations adopted by the County and the terms of the State law. The Board was merely applying existing law.

In contrast, a moratorium is a land use tool to temporarily preclude new developments while new laws are being proposed. *See, e.g., Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 (2007). This case has nothing to do with a moratorium (*de facto or de jure*).

In like manner, the Board is not straying into a “rule-maker” role. Resp. Br. at 18. The Board was required to apply the current rules. If the applicants seek to install a dock that creates incompatibility or undue visual impairment, they should seek an amendment of the County’s regulations. Until and unless such an amendment is adopted, the Board was correct to apply the rules presently in effect.

The applicants cite *SORE v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983) to support their argument that the dock should not have been denied based on incompatibility. There, the Court held that a proponent of a rezone did not need to prove “changed circumstances” if the rezone is called for in the comprehensive plan. *Id.* at 370. That holding is inapplicable here. In contrast to *SORE*, the Pierce County regulation at issue here specifically requires the County and the Board to consider whether the proposed use is compatible with the existing environment and uses. *See Op. Br.* at 26-32.

The applicants acknowledge the Board was required to evaluate the proposal “for compatibility in consideration of existing environmental values, existing development, and uses, as well as the designated environment.” Resp. Br. at 34. That is exactly what the Board did. There was no legal error in the Board’s ultimate determination.

D. PCC 20.56.040.B -- Limit of One Moorage Space

PCC 20.56.040.B(7) restricts moorage spaces to one space per waterfront owner and provides, perhaps, the most straightforward ground for the Board’s denial of the application. It is undisputed that, if granted, the new dock would result in more than one moorage space for each applicant.

The applicants acknowledge that without the proposed dock they each have a moorage in front of their property: “the buoy for the Kvinsland property and the floatlift for the Robertson property.” Resp. Br. at 37. *See also* Tr. 506:12-507:19. Their only argument is a strained assertion that the proposed dock is not really for moorage, so it does not count for purposes of PCC 20.56.040.B(7).

This new assertion is in stark contrast to the applicants’ own, earlier characterization of the proposal which clearly states that “[t]he purpose of this dock is for continued recreational use and private boat moorage.” AR 8

(JARPA Application). *See also* AR 74 (Robertson-Kvinsland Agreement Regarding Joint Use Dock), ¶ 7 (“boats moored at the dock shall be kept seaworthy;” no live-aboards “while moored at the dock”).

The applicants confuse moorage with *permanent* moorage. To “moor,” although not defined in the County Code, is generally defined as “to secure (a ship, boat, dirigible, etc.) in a particular place, as by cables and anchors or by lines; 2. to fix firmly; secure.” Random House Unabridged Dictionary (2006). There is no temporal element to moorage. Regardless of whether a boat is secured to the dock permanently or temporarily, in either case the dock is being used for moorage.

The applicants have no valid argument that their proposal satisfies PCC 20.56.040.B(7). This alone provides a sufficient basis for the Board’s decision.

V. THE BOARD CORRECTLY CONSIDERED COUNTY SHORELINE POLICIES IN DENYING THE SHORELINE DEVELOPMENT PERMIT

We agree with the applicant that the intent section of the County’s shoreline program (PCC 20.02.010) does not create independent requirements for a shoreline permit. *See* Resp. Br. at 38. But that does not mean this section is irrelevant. The plain meaning of the operative sections of the Code

(e.g. PCC 20.56.040) is to be determined, in part, by considering codified legislative intent (i.e., PCC 20.02.010). See, e.g., *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 130, 186 P.3d 357, 363 (2008).

PCC 20.02.010 states that the Code was adopted to ensure that development is conducted without environmental degradation and in the best interest of the general public. The Board appropriately considered these factors in evaluating the degree of incompatibility acceptable under PCC 20.56.040.A(7). CP 20-28, 39, 43.

Contrary to the applicants' argument, the Master Program pier policies also are relevant. The Code, PCC 20.56.040.A, expressly requires consistency with "the policies of the Master Program."

Pier Policy (d) states that "piers associated with single family residences should be discouraged." The applicants assert this policy applies only to "piers" and, therefore, does not apply to its "pier, ramp and float" proposal. Resp. Br. at 39-40. They ignore that their "pier-ramp-dock" proposal includes a pier.

The applicants also argues that this policy is outmoded and should be ignored. Resp. Br. at 40. But that is an argument for the legislative body. Until and unless the County Council amends the Code to eliminate or revise

this policy, it must be applied. (The applicants' reference to *Roller* in this context is misplaced; *Roller* does not interpret this policy.)

VI. THE BOARD CORRECTLY CONSIDERED THE SMA'S PROTECTION OF SHORELINES OF STATEWIDE SIGNIFICANCE

The use preferences applicable to "shorelines of statewide significance" apply to any shoreline project which will impact those designated shorelines. *See* Op. Br. at 37-41. The applicants do not seriously challenge that analysis, providing only a single sentence refutation with no analysis or citation. *See* Resp. Br. at 44-45.

Instead, they claim the use preferences do not have independent vitality, but rather must be considered in conjunction with local shoreline programs. *Id.* at 43. The applicants are doubly wrong. One, the Board did not apply the statutory use policies independently. It analyzed those policies in conjunction with the County's compatibility policies. CP 39-46. Two, even if the Board had applied them independently, this would not have been error. The Supreme Court has conducted its review on that basis, too. *Hayes v. Yount*, 87 Wn.2d 280, 291, 582 P.2d 1038 (1976) ("The public policy set forth in the Shoreline Management Act of 1971 is part of the standard of judicial review of the actions of the Shorelines Hearings Board"). *See also*

WAC 173-27-150(i)(a) (substantial development permits must be consistent with policies of the Act).⁹

VII. THE BOARD APPROPRIATELY CONSIDERED CUMULATIVE IMPACTS

There was no error in the Board's consideration of cumulative impacts. The applicants acknowledge that the Supreme Court has upheld the Board's authority to consider cumulative effects of a shoreline project. Resp. Br. at 46-47. *See also Skagit County v. Department of Ecology*, 93 Wn.2d 742, 730, 613 P.2d 115 (1980); *Hayes v. Yount, supra*, 87 Wn.2d at 287 (“Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together”); AR Ex. 31, 37, 38; Op. Br. 28-32.

Instead, the applicants argue that the Board's analysis of cumulative effects in this case does not match its analysis in *Roller* and, therefore, is “arbitrary.” But the discussion in *Roller* exemplifies why such an analysis is critical under the present facts. In *Roller*, the Board acknowledged that a cumulative impacts analysis was justified in a case such as *Viafore*, where “the proposed dock would have been the first dock approved under the

⁹ See Op. Br. at 37-44 for argument regarding the project's impacts on the shoreline of statewide significance as validating the Board's use, if any, of RCW 90.58.020

SMA...and concerns were raised about potential impacts on the migration of listed salmon species.” *Roller*, at 16. Both of these “*Viafore*” factors are present here, and neither were present in *Roller*. See CP 39 (“[T]he fact that this would be the first dock within this sandy crescent is a significant factor.”); CP 24-28, 43; AR Ex. 73 (WDFW recognition that the project area “serves as a migration corridor for juvenile salmonids”).

Based on a cumulative impacts analysis, the facts of this case warrant permit denial in two different ways. First, even if undue visual impairment, the ecological and aesthetic incompatibility of the proposal with the current environment, the violation of the Code’s moorage limitations, the inconsistency with the County’s shoreline policies, the numerous moorage and launching alternatives, and the limited utility of the dock do not individually justify permit denial, cumulatively, they do. See Op. Br. at 46-50. The Board’s decision properly considered the project’s impacts *in toto*, not just in isolation.

Second, a cumulative impacts analysis is necessary in this case because, as the first dock in this area, it would open the flood gates for additional dock development that will result in much greater impacts than just

as a basis for permit denial.

the single dock now proposed. *Viafore, supra; Hayes v. Yount, supra.* The Board properly considered the impacts not just from this dock, but also from the other docks that would likely follow if the near-pristine beauty of this beach is destroyed by the proposed 100-foot long dock. There was substantial evidence that those cumulative impacts would occur, e.g. AR Ex. 31, 37, 38; Op. Br. 28-32, and the Board was legally justified in considering them, *Skagit Cy v. DOE, supra; Hayes v. Yount.*

VIII. CONCLUSION

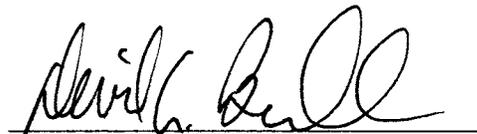
This Court should reverse the Superior Court and reinstate the Board's permit denial.

Dated this 12 day of January, 2009.

Respectfully submitted,

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