

NO. 49329-2-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

TAZMINA VERJEE-VAN and BRIAN VAN, Appellants

v.

PIERCE COUNTY, ET AL. , Respondents

BRIEF OF RESPONDENT PIERCE COUNTY

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A. INTRODUCTION

Appellants Tazmina Verjee-Van and Brian Van (“The Vans”) own a single family residence located at the apex of a cove on Lake Tapps in Pierce County. In 2014, the Vans applied for, and subsequently received, a shoreline exemption letter from Pierce County Planning and Land Services (PALS) to build a pier in Lake Tapps.¹ The exemption letter, issued on June 30, 2015, approved the project subject to two conditions: (1) that the pier shall maintain a minimum separation of 20 feet from an existing pier on the adjacent waterfront property and (2) that the pier not exceed 30 feet in length.² The Vans challenged these two conditions by submitting an administrative appeal to the Pierce County Hearing Examiner pursuant to Chapter 1.22 of the Pierce County Code. The Examiner upheld the conditions in the shoreline exemption letter. The Vans then appealed Examiner’s decision to Superior Court pursuant to the Land Use Petition Act, Chapter 36.70C RCW (“LUPA”).

The Honorable John R. Hickman, Pierce County Superior Court,

¹ A “dock” is defined in the Pierce County Code (PCC) as a structure which abuts the shoreline and floats upon the water and is used as a landing or moorage place for marine transport or for recreational purposes. PCC 20.56.010(A).

A “pier” is defined as a structure which abuts the shoreline and is built over the water on pilings and is used as a landing or moorage place. PCC 20.56.010(B). The terms “dock” and “pier” are used interchangeably in the record.

² The pier on the adjacent property is owned by Neil Borgert and is the subject of Court of Appeals case no. 48947-3-II

upheld the Examiner's decision, finding that the Vans did not meet their burden under RCW 36.70C.130(1). The Vans now seek review of the Superior Court decision to this Court.

B. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. Whether the Hearing Examiner committed error when he upheld lawful, reasonable, and appropriate conditions for the construction of the Vans' pier?
2. Whether the Hearing Examiner committed error when he concluded that the finality doctrine precluded review of the land use decisions pertaining to an adjacent pier installed approximately 19 years ago on a neighboring property?
3. Whether the Superior Court committed error when it denied the Vans' takings claim when there was no taking of the Appellant's property?

C. STATEMENT OF THE CASE

On May 23, 2014, the Vans submitted an application for a shoreline exemption letter to construct a pier 30 feet in length and 5 feet in

width in Lake Tapps.³ CP 249, CP 422.⁴ The proposed pier would be located on the lakebed on property owned by Cascade Water Alliance ("CWA"). CP 419. Cascade Water Alliance owns the entirety of the lakebed on Lake Tapps below the 545 elevation line. CP 410-412.

Waterfront property owners may obtain permits from Pierce County to build a pier on Cascade Water Alliance property with permission from Cascade Water Alliance. CP 410-412.

The petitioners' original proposal was denied by PALS on the basis that the proposed pier would be located closer to the side property lines than is allowed by Pierce County Shoreline Use Regulations ("SUR"). CP 249, 254. On September 18, 2014, the Vans appealed the denial via administrative appeal no. AA7-14. CP 249. The administrative appeal was heard by the Pierce County Hearings Examiner ("Examiner"). CP 254. On April 7, 2015, the Examiner issued a decision in favor of the Vans and determined that the PALS method of determining side property line setbacks was erroneous and that the proposed pier met the required setbacks from the extended side property lines. CP 254-264. However, the Examiner also determined that there was insufficient evidence presented to determine whether the Vans' pier met the criteria for an exemption as

³ A shoreline exemption letter is a document that exempts property owners from the requirement to obtain a shoreline substantial development permit. CP 249.

⁴ CP denotes Clerk's papers.

set forth in the Shoreline Management Act ("SMA") or other applicable shoreline regulations. CP 262, 263 (conclusions no. 4 and 6). The

Examiner held:

The correct method of extending property lines into the water is set forth by the Washington Supreme Court in *Spath v. Larsen*, supra, and in the surveying methods described in Exhibits 22-25. Based upon said authority, appellants' proposed pier satisfies all setback requirements. However, since PALS made no assessment as to whether the proposed structure satisfies other applicable requirements for piers and docks as set forth in the SUR, the record contains insufficient information to determine whether appellants' pier meets the criteria for an exemption. However, this appeal is limited to the issue of side yard setbacks.

CP 263.

The case was remanded back to PALS staff for further review and a determination as to whether the project complied with the goals and policies of the SMA and Shoreline Master Program (SMP). CP 218. On April 17, 2015, PALS staff sent an e-mail to Mr. Van requesting that he provide an updated site plan showing the proposed pier and other nearby structures, parcel boundaries, and the Lake Tapps shoreline. CP 249. Mr. Van refused. CP233, 249. Instead, the Vans went ahead and constructed a pier without written approval or a permit from Pierce County. CP 218,

249.⁵ A photo of the Van pier under construction is attached as Appendix A.⁶ CP 485. As can be seen in the photo, the end of the Van pier is located within a few feet of a neighboring pier owned by Neil Borgert. CP 485. Both the Van pier and the Borgert pier are located below the 545 elevation line, on property owned by Cascade Water Alliance. CP 90, 91.

On June 30, 2015 PALS Senior Planner Mike Erkinen issued a shoreline exemption letter that approved the Vans' request to construct a pier. CP 248- 250. The approval came with two conditions:

1. That pier length shall be shortened from the proposed 30 feet to a length that provides a minimum separation of 20 feet from piers associated with the adjacent waterfront properties, and
2. All portions of the recently constructed pier that are less than 20 feet from an adjacent pier or that are more than 30 feet in length shall be removed no later than 30 days from the date of this Exemption.

CP 250.

On July 13, 2015, the Vans submitted another administrative appeal to the Pierce County Hearing Examiner under case no. AA9-15. CP

⁵ There is a dispute in the record regarding the actual length of the Van pier. If the gangway is not included in the overall measurement, then the Van pier, as built, measures 26 feet. CP 93, 94. If the attached gangway is included in the overall length, the total length of the pier is approximately 34 feet. CP 237,240. The maximum length allowed for a pier under PCC 20.56.030.A.1.c.6 is 30 feet. The dispute was not resolved by the Examiner findings. The 20 foot separation requirement continues to be the key issue.

⁶ This is the second pier that the Vans have constructed without permits or approvals from Pierce County. The Vans constructed another unpermitted pier in 2007 which is discussed in more detail below.

243, 244. The Vans challenged the above-listed conditions and asserted that their unpermitted pier was lawfully installed. CP 246, 247. A second evidentiary hearing took place on November 18, 2015. CP 210. On December 14, 2015, the Examiner issued his opinion which upheld conditions 1 and 2 in the shoreline exemption letter, and found that the Van pier, as built, did not conform to the applicable goals and policies of the Pierce County Shoreline Master Program. CP 209-227. In conclusion no. 6, the Examiner stated:

Appellant's pier violates all of the above policies as it prohibits a reasonable use of the shoreline by both property owners. Appellant's pier creates a very narrow separation from an existing, legal pier, such that when one property owner moors a boat to their pier, the other property owner will have no access to their pier.

CP 224. On January 4, 2016, the Vans filed an appeal to Pierce County Superior Court under LUPA. CP 881-932. On July 26, 2016, the Honorable John R. Hickman denied the appeal, finding that the Vans did not meet their burden under RCW 36.70C.130(1). CP 861-866, 867-868. This timely appeal follows.

D. ARGUMENT

1. Standard of Review in LUPA Cases.

Under LUPA, the party seeking relief of an administrative decision bears the burden of proving error. RCW 36.70C.130(1), *N. Pac Union*

Conference Ass'n of Seventh Day Adventists v. Clark County, 118 Wn. App. 22, 28, 74 P.3d 140 (2003). On appeal of an administrative decision, the appellate court stands in the same position as the Superior Court and reviews the record made before the Hearing Examiner, including the Examiner's findings of fact and conclusions of law. *Id.*, *HJS Development, Inc. v. Pierce County*, 148 Wn. 2d 451,467, 61 P.3d 1141 (2003).

The Court may grant relief to the appellant only if the appellant carries the burden of establishing that one of the standards contained in RCW 36.70C.130 has been met. *Cingular Wireless, LLC v. Thurston Co.*, 131 Wn. App. 756, 767, 129 P.3d 300 (2006). For purposes of this appeal, the relevant standards in RCW 36.70C.130 are:

- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Interpretations of law are reviewed de novo.

Milestone Homes Inc., v. City of Bonney Lake, 145 Wn. App. 118, 126, 186 P.3d 357 (2008). Factual determinations are reviewed under the

substantial evidence standard. *Cingular Wireless, LLC v. Thurston Co.*, 131 Wn. App. at 768. Substantial evidence is evidence of a sufficient quantity to persuade a fair-minded person of the truth the statement asserted. *Id.* Courts view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Id.* Findings involving the application of law to facts are reviewed under the clearly erroneous standard. *Id.* Under that test, the decision may be reversed only if the Court is left with a definite and firm conviction that a mistake has been committed. *Id.*

2. The exemption conditions are reasonable and are consistent with the goals and policies of the applicable shoreline regulations.

Per RCW 90.58.140(1), "[a] development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program." Likewise, WAC 173-27-140 (1) states:

No authorization to undertake use or development on shorelines of the State shall be granted by the local government unless upon review the use or development is determine to be consistent with the policy and provisions of the Shoreline Management Act and the master program.

Additionally, WAC 173-27-040 (1)(b) states. . .

An exemption from the substantial development permit process is not an exemption from compliance with the act or

local master program, nor from any other regulatory requirement. To be authorized, all uses and development must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act.

WAC 173-27-040 (1)(b) (Emphasis added).

The burden of proof that a development or use is exempt from the permit process is on the applicant. WAC 173-27-040 (1)(c).

The Pierce County Shoreline Master Program (SMP) was adopted in two parts. On March 5, 1974, the Pierce County Commissioners adopted, via resolution 16990, the first part of the County's SMP which set forth the goals and policies of the master program.

On June 7, 1976, the County Commissioners adopted, via Resolution 18562-A, the shoreline regulations known as Shoreline Use Regulations ("SUR"). The current version of the SUR is codified in Title 20 of the Pierce County Code ("PCC").

Under the current shoreline regulations, a dock, pier, or float is typically allowed in the urban and rural residential environments if the structure meets the setbacks and design standards contained in PCC 20.56.030. Per PCC 20.56.030A.1.c.(4), "floats piers, and docks shall be located not closer than ten feet to a side property line except for docks intended for joint use."

As explained in the Examiner's decisions on cases AA7-14 and

AA9-15, the proposed pier meets the side property line setback requirement because the pier is located at least ten feet away from the adjoining neighbors' property lines. However, the proposed project must still be consistent the policies of the SMA and SMP per RCW 90.58.140(1), WAC 173-27-040, and WAC 173-27-140. The Examiner made this point very clear in his December 14, 2015, decision on AA9-15 when he stated:

Appellants either ignored or did not read Conclusions 4 and 6 and the Decision in AA7-14 that read as follows:

"Appellant's survey (Exhibit 7A) shows, pursuant to the Spath method, that appellant's proposed five foot wide, 30 foot long pier satisfies all side yard setback requirements. Therefore the proposed pier satisfies all bulk regulations for an exemption as set forth in PCC 20.56.030(a)(B). However, WAC 173-27-040 (1)(b) provides in part:

An exemption from the substantial development permit process is not an exemption from compliance with the act or the local master program, nor from any other regulatory requirements. To be authorized, all uses and development must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act..."

CP 217. Later in the decision, the Hearing Examiner emphasized the important of compliance with SMA and SMP when he stated:

It is abundantly clear that language in the Washington Administrative Code (WAC) and in a decision of the Washington Court of Appeals requires that an exemption from obtaining a shoreline substantial development permit requires an evaluation and determination of compliance with "the local master program, any other regulatory

requirements" and "policies and provisions of the applicable master program and the Shoreline Management Act".

CP 218.

In Finding no. 8, the Hearing Examiner explained that, although the side property line setback had been decided in the appellant's favor in AA7-14, the case was remanded back to PALS for further action: "In AA7-14 the Examiner reversed the Administrative Official's decision and remanded the matter for an action consistent therewith (determination of whether the exemption met all criteria set forth in the SMP, SUR, WAC, and SMA)" CP 218. The remand was required by PCC 1.22.090.H which states:

The Examiner may reverse or affirm, wholly or in part, or may modify the Administrative Official's order, requirement, decision or determination. If the Hearing Examiner reverses the Administrative Official's decision, the entire action shall be remanded to the Administrative Official for an action consistent with the Hearing Examiners decision.

PCC 1.22.090.H. The setback issue was not the only issue to be decided. Consistency with the goals and policies of the SMA and SMP was also required by law.

The Examiner cited several goals and policies of the SMA and SMP in his decision, including the following goals from the "piers" section of the SMP:

(b) Piers in conjunction with recreational development in appropriate areas should be allowed. Consideration should be given to size and intensity of uses in relation to adjacent shoreline uses.

(e) In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact on adjacent proximate land ownership should be considered.

CP 222,223.

The conditions proposed by PALS, and approved the Examiner, allow the Vans to build a pier and maintain consistency with the goals and policies of the SMA and SMP. As can be seen in the photos attached as Appendix B, the pier erected by the Vans creates a narrow opening and an unsafe condition between the Van pier and the Borgert pier. CP 487,489. At the hearing on November 18, 2015, PALS Planner Mike Erkinen explained why the standard ten foot setback was inadequate to meet the goals and policies of the SMP. At its closest point, the Van pier is 9 feet, 3 inches away from the Borgert pier. CP 249. A twenty foot separation between the piers would allow a standard sized boat to be moored at the Borgert pier and the Van pier at the same time. CP 249, 250. The Examiner reviewed the proposal and the applicable shoreline policies and concluded that the petitioner's pier was not consistent with those policies. CP 224, 225.

The Examiner performed his legal duty by considering the goals

and policies of the SMA and SMP. In addition to the state laws cited above, the Hearing Examiner Code, codified in Chapter 1.22 of the Pierce County Code, also requires conformance with the goals of the SMA and SMP. PCC 1.22.120.A states: “The findings of fact shall be supported by substantial evidence in the record and the conclusions of law shall be based upon the policies of the applicable Comprehensive Plan, Community Plan, Shoreline Master Program,...” (Emphasis added).

The Examiner is authorized to impose conditions to make the proposed project compatible with the goals and policies of the SMA and SMP. PCC 1.22.080.D states:

When acting upon any of the above specific application or appeals, the Examiner shall have the power to attach any reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shoreline Hearings Board decisions.

Likewise, WAC 173-27-040 (1)(e) states: “local government may attach conditions to the approval of exempted development and/or uses as necessary to assure consistency of the project with the act and the local master program.”

The Examiner’s decision, including the 20 foot separation requirement, should be upheld because the decision allows the petitioners

to build a pier that is consistent with the goals and policies of the SMA or SMP. The Examiner committed no error. The petitioners' arguments do not take into account the impacts on the neighbors and their pier, as constructed, is not consistent with the goals and policies of the SMA or SMP.

3. The land use decisions regarding the Borgert pier on the adjoining property are final and cannot be challenged.

Kelly Winne and Julie (Helmka) Winne were the prior owners of the Borgert property, which is adjacent to the Van property. CP 271. Sometime prior to April of 1998, the Winnes erected a pier without a shoreline exemption letter from Pierce County. CP 275, 276. On April 20, 1998, the Winnes' permitting agent, Beverly Helmka, applied for, and subsequently received, a shoreline exemption and building permit to allow the pier as built. CP 271-278.

On June 22, 1998, Pierce County Planning and Land Services (PALS) issued a building permit for the pier under permit no. 257403. CP 273, 274. On April 14, 1999, a shoreline exemption for the pier was approved by former PALS planner Lee Wyatt. CP 275. The shoreline exemption was listed as "approved" in the PALS+ permit tracking system on June 13, 2001. CP 271. PALS staff also conducted a SEPA environmental review and issued a determination of nonsignificance (DNS) on June 20, 2001. CP 276-278. No appeal was filed challenging

the decision to issue the DNS, the building permit, or approval of the shoreline exemption for the pier. CP 19,20,102,103. Neil Borgert purchased the Winne/Helmka property in 2003. CP 114. The existing pier has been maintained by Borgert since the time of purchase. CP 114.

Prior to the purchasing their current residence in May of 1999, the Vans viewed the Winne/Borgert pier and did not like it. CP 103,104, 471. The Vans submitted a complaint to PALS, but did not receive a response. CP 104, 471. Despite getting no response, the Vans bought the parcel anyway and have been living next to the Winne/Borgert pier for 18 years. CP 104, 471.

The Borgert pier was the subject of an earlier administrative appeal in 2007. On May 12, 2007, Brian Van constructed a pier without permits or approvals from Pierce County. CP 474. The Vans 2007 pier crossed over the top of the Borgert pier. CP 474. A photograph of the Vans' pier, while under construction in 2007, can be seen on CP 540. In his decision dated November 5, 2007, Deputy Hearing Examiner Terrence McCarthy found that the pier was built without County permits and he upheld the Notice and Order to Correct that was issued to the Vans. CP 477. Examiner McCarthy addressed the shoreline development history of the Van and Borgert parcels. CP 476. The prior owners of the Borgert property (the Winnes) applied for and received approval from the County

for a dock/pier. CP 476, 477. The prior owners of the Van property applied for and received approval from the County for a shoreline “cutout” to create an area where they could beach their jet skis. CP 476. Mr. Van did not appeal Examiner McCarthy’s 2007 findings regarding the permit history for the Borgert and Van parcels. CP 83, 84. Now, ten years later, the Vans are asking this court to reopen and review land use decisions pertaining to the Winne/Borgert pier that date back to June of 1998.

The Washington State Supreme Court has recognized the importance of finality in land use cases.

This court has also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that if there were no finality in land use decisions, no owner of land would ever be safe in proceeding with development of his property.... To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit.

Chelan County v. Nykreim, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002)

(quoting *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d

30, 49, 26 P. 3d 241 (2001). Later in the *Nykreim* opinion, the State

Supreme Court wrote:

To allow respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent,

predictable, and timely manner.

Nykreim, 146 Wn.2d at 933.

Following this policy of finality land use decisions, the State Supreme Court has consistently ruled that an erroneous land use decision becomes final and valid after the expiration of the applicable appeal deadline. In *Nykreim*, the Planning Director for Chelan County erroneously approved a boundary line adjustment after misinterpreting the county's ordinances. *Nykreim*, 146 Wn.2d at 911-914. The County did not file a timely appeal of the Planning Director's decision and instead filed a declaratory action 14 months later. *Id* at 914. The State Supreme Court refused to overturn the Planning Director's erroneous land use decision. *Id* at 939, 940.

In *Wenatchee Sportsmen Ass'n*, Chelan County rezoned property to allow residential subdivisions outside the urban growth area in violation of the Growth Management Act. *Wenatchee Sportsmen Ass'n v. Chelan Co*, 141 Wn.2d 169, 4 P.3d 123 (2000). The Wenatchee Sportsmen Association did not file a LUPA action within 21 days of the land use decision. *Wenatchee Sportsmen*, 141 Wn.2d at 180, 181. The State Supreme Court concluded that, although the rezone may have constituted an erroneous land use decision, the rezone became final and valid when the opportunity to challenge it passed. *Wenatchee Sportsmen*, 141 Wn.2d

at 181. In both cases, the erroneous land use decision became final after the opportunity to appeal had expired.

In 2005, the Washington State Supreme Court reaffirmed its adherence to the strict deadlines for challenging land use decisions under LUPA. In *Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 120 P.3d 56 (2005), Skagit County granted two permit extensions for a golf course without notice or a public hearing as required under the Skagit County Code. *Habitat Watch*, 155 Wn. 2d at 401, 402. When construction began five years later, Habitat Watch, a citizens group, learned that the County had granted the permit extensions without notice to the public in violation of the Skagit County Code. *Habitat Watch*, 155 Wn. 2d at 403-404. Habitat Watch moved for revocation of the permit. *Id.* The State Supreme Court held that the permit extensions could not be reviewed. *Habitat Watch*, 155 Wn. 2d at 406-407. The Court stated: “LUPA embodies the same idea expressed by this court in pre-LUPA decisions- that even illegal decisions must be challenged in a timely, appropriate manner.” *Id.* Absent a timely appeal, a land use decision becomes final and unreviewable. *Id.*

In 2014, the State Supreme Court held that doctrine of finality prevails over any lack of notice. In *Durland v. San Juan County*, the petitioners brought an untimely challenge to San Juan County's issuance of a garage addition building permit. *Durland v. San Juan County*, 182

Wn. 2d 55, 340 P.3d 191 (2014). The petitioners did not receive notice of the permit until after the administrative appeal period had expired.

Durland, 182 Wn.2d at 59. The Supreme Court rejected the petitioner's complaints and stated:

... [P]etitioners claim that our court's interpretation of the Land Use Petition Act (LUPA), chapter 36.70C RCW, required them to do the impossible: to appeal a decision without actual or constructive notice of it. While this result may seem harsh and unfair, to grant relief on these facts would be contrary to the statutory scheme enacted by the legislature as well as our prior holding. Indeed, we have acknowledged a strong public policy supporting administrative deadlines and have further explained that "leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable, and timely manner.

Durland, 182 Wn. 2d at 59.

Pursuant to PCC 1.22.090.1 a., any person aggrieved by a final land use decision may submit an administrative appeal at PALS within 14 days of the date of the decision. Administrative appeals are heard by the Pierce County Hearing Examiner. PCC 1.22.110. The Examiner's final decision may be appealed to Superior Court pursuant to RCW Chapter 36C.70 (LUPA). LUPA petitions are time barred and the court may not grant review unless the petition is filed in Superior Court within 21 days of the issuance of the Examiner's decision. RCW 36.70C.040(2)(3).

In this case, there was no appeal filed after PALS issued the

building permit, shoreline exemption letter, or DNS for the Winne/Borgert pier. CP 19, 20,102,103. Under Washington State law, those decisions are therefore final and valid. Had the Vans' complaints about the Borgert pier been raised in a timely appeal pursuant to PCC 1.22.090, there would have been a hearing before the Pierce County Examiner where their allegations would have been examined in detail and an evidentiary record would have been created.⁷ Any alleged defects involving the building permit, the shoreline exemption letter, or the Determination of Nonsignificance (DNS) could have been remedied, or the permits could have been revoked or modified. It is simply too late to reexamine those decisions now. Absent a timely appeal, land use decisions are final and valid and cannot be reopened and reexamined years later.

The Shoreline Hearings Board cases attached to the Vans' opening brief demonstrate the importance of filing a timely appeal. When a timely appeal is filed, a local hearing examiner may hold evidentiary hearings, examine land use decisions, and may reverse decisions where the issuing

⁷ The Vans allege on page 18 and 19 of their opening brief that the determination of nonsignificance (DNS) was never finalized. They do not believe the DNS was published. The County provided the Vans proof that the DNS was published. A copy of the affidavit of publication can be found on CP 417-425 in case no. 48947-3-II. It is unclear why the Vans continue to assert that the DNS was not published despite clear evidence to the contrary.

authority did not comply with state or local requirements. In cases where no timely appeal has been filed, the local shoreline permitting decisions are final and valid under established Washington law.

The Vans encourage this court to turn the finality doctrine on its head. According to the Vans, a land use decision is only final when it complies with all procedural and substantive land use regulations. They argue that until there is perfect compliance, land use permits, approvals, and decisions are never final and are subject to re-examination and reversal years or decades later. This argument is contrary to the purposes and policies underlying the doctrine of finality. As the State Supreme Court stated in *Durland*, "leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures..." *Durland*, 182 Wn. 2d at 59.

4. The approval of a pier does not constitute a government taking.

In their opening brief, the Vans claim that the exemption conditions constitute a government taking. The Vans rely solely on the case of *Isla Verde vs. City of Camas*, 99 Wn. App. 127, 990 P. 2d 429 (1999). The Vans' reliance is misplaced.

In *Isla Verde*, the City of Camas required the developer of a 51 lot subdivision to set aside 30% of their land as open space. *Isla Verde*, 99

Wn. App at 130. The open space designation was sought by the City to protect recreation and wildlife habitat and would have prohibited the building of homes in the open space area. *Isla Verde*, 99 Wn. App at 138-39. The court held that the 30% set aside requirement was a government "exaction". *Isla Verde*, 99 Wn. App at 139. The exaction was reversed because there was insufficient evidence that the set aside was roughly proportional to the loss of open space areas caused by the development. *Isla Verde*, 99 Wn. App at 141-42.

The *Isla Verde* decision does not apply to this case for several reasons. First, exaction cases are a specific type of takings case that deal with the forced relinquishment of one's own property interest. In exaction cases, the owner is being forced to give up part of his own property, usually through the dedication of land for an easement, right of way, or open space. For example, in *Dolan v. City of Tigard*, the city conditioned a permit approval for a store expansion and parking lot improvements upon the developer's dedication of property for storm drainage and for a pedestrian/bicycle pathway. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). In that case, the dedication or "exaction" had to meet the "rough proportionality test." *Dolan v. City of Tigard*, 512 U.S. at 391. Likewise in *Nollan v. California Coastal Comm'n*, the California Coastal Commission granted a permit to build a

large house on a beachfront lot on the condition that the owners grant an easement to the public to walk across their property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

The "exaction" line of cases has not been extended to normal building or shoreline setback requirements. Furthermore, the exaction cases deal with the forced dedication of one's own property. In this case, the lakebed where the pier is located is owned by Cascade Water Alliance, not the Vans. No part of the Vans' property has been taken by the government. Finally, the County's exemption letter approves the construction of a pier, just not to the dimensions that the Vans desire. The conditions imposed by the County would allow the Vans to have a pier on Cascade Water Alliance property and also allow the neighbor (Borgert) to use and enjoy his own pier. There has been no "exaction" of the Vans' property. The Vans have no recognized property "right" to build a pier on property owned by Cascade Water Alliance to whatever dimensions they desire.

5. The County is entitled to costs and reasonable attorneys fees.

If the Hearing Examiner's decision is upheld, the County is entitled to costs and reasonable attorney fees pursuant to RCW 4.84.370. Under applicable law, the County, as the prevailing party, would be entitled to an award of reasonable attorneys' fees and costs associated with

defending this appeal. *Bellevue Farm Owners Association v. State of Washington Shorelines Hearing Board*, 100 Wn. App. 341, 365-366, 997 P.2d 380 (2000).

E. CONCLUSION

The Vans have not met their burden of showing that the Examiner's decision was not based upon substantial evidence or was an erroneous interpretation or application of the law. The conditions attached to the exemption are reasonable and further the goals and policies of the SMA and SMP. The land use decisions regarding the Borgert pier are final and valid and cannot be reviewed at this late date. There was no government exaction under the exaction line of takings cases. Therefore, this appeal should be denied and the County awarded reasonable attorneys fees and costs.

DATED this 30th day of March, 2017.

MARK LINDQUIST
Prosecuting Attorney

By: 
CORT O'CONNOR WSBA #23439
Deputy Prosecuting Attorney
PH: (253)798-6201
Attorney for Pierce County

CERTIFICATE OF SERVICE

I, DAYNA WILLINGHAM, declare that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. As a legal assistant in the Office of the Pierce County Prosecuting Attorney, I sent a true and correct copy of the Brief of Respondent Pierce County today by delivering the same via electronic mail and via ABC Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

Attorney for Tazmina Verjee-Van and
Brian Van

Attorney for Neil Borgert and
Dan and Phyllis Abercrombie

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I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED at Tacoma, Washington, this 30th day of March, 2017.

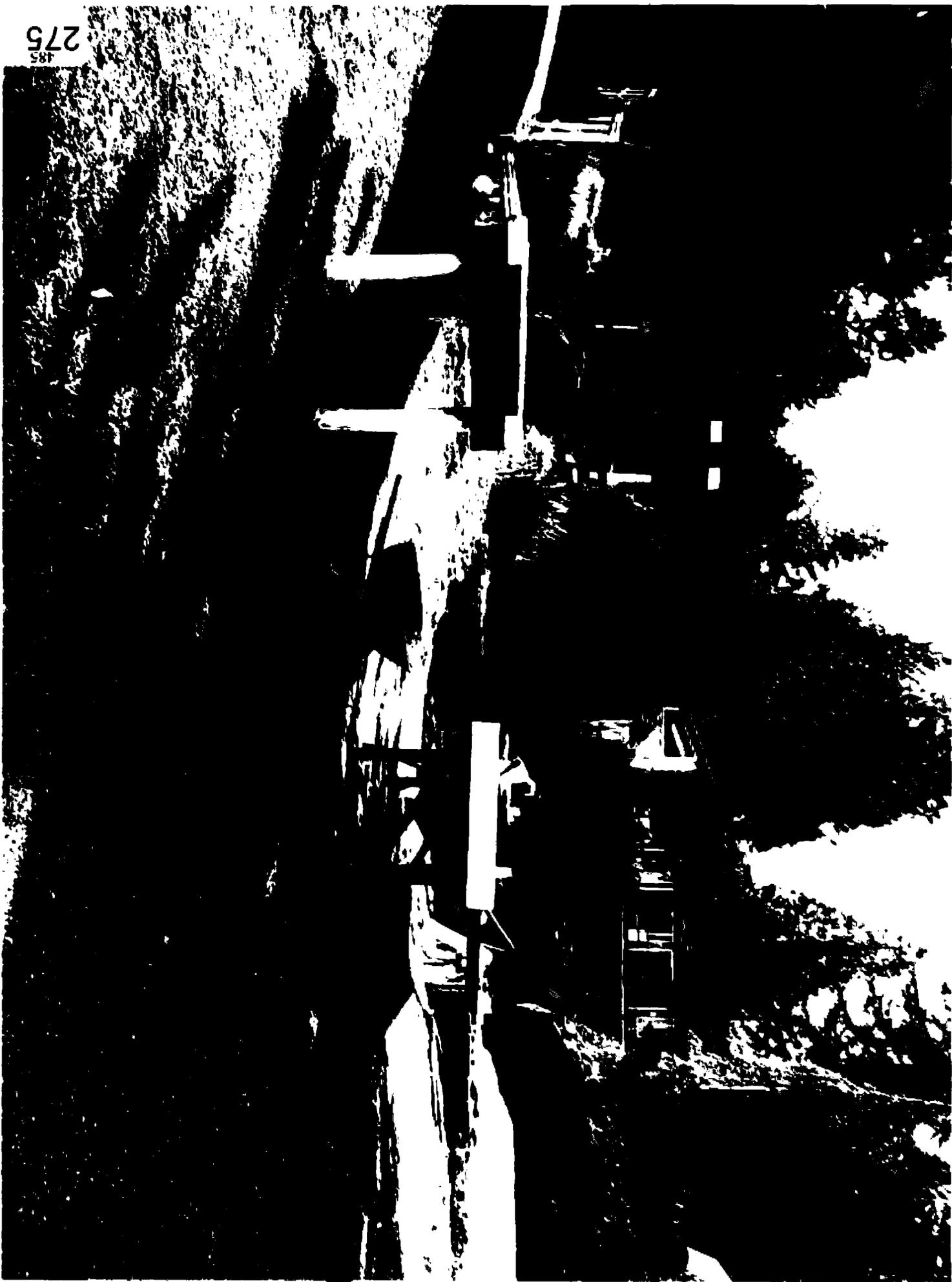

DAYNA WILLINGHAM

APPENDIX A

COPY OF CP 485

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APPENDIX B

COPY OF CP 487 AND 489





489
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PIERCE COUNTY PROSECUTOR
March 30, 2017 - 9:03 AM
Transmittal Letter

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Court of Appeals Case Number: 49329-2

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