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Division II
State of Washington
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No. 52470-8 II

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

CRAIG and KELLEY TURNER,

Appellants,

v.

GORDON BALDWIN; NORMAN SIMON; BARBARA SIMON;
MARK TAYLOR; SARAH TAYLOR; PIERCE COUNTY; and STATE
OF WASHINGTON SHORELINES HEARINGS BOARD,

Respondents,

and

WASHINGTON STATE DEPARTMENT OF ECOLOGY,
Agency With Jurisdiction/Other Party,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal involves the wrongful denial of a private dock which is a permitted use under Pierce County's Shoreline Use Regulations¹ and which the Pierce County Hearing Examiner approved because it met all criteria for approval.²

Appellants Craig and Kelley Turner (the "Turners"), their children, and their extended family wish to construct a dock and small accessory boathouse for storage of boating equipment. The dock would be used in months some do not consider boating "season." The proposed dock meets all design standards³ and is available to be shared by another shoreline property owner if adequate arrangement is made. No one suggests the proposed dock will have any measurable impact on the aquatic environment. The Turners seek no special treatment. They desire to build a dock that is expressly allowed as a permitted use under the applicable Code as conditioned by the Examiner in his ruling.

The Shoreline Hearings Board (the "Board") found that the public would be able to continue to use surface waters below the ordinary high-

¹ PCC § 20.56.030(D) specifically *allows* private docks in the Conservancy Environment, in the same manner as allowed in the Urban (and Rural-Residential and Rural) Environment. In 2018 Pierce County adopted new Shoreline Use Regulations, PCC Chapter 18 S, Ordinance No. 2018-575. The County Council continued to allow docks within the shoreline designation applicable to the Turner property.

² The Examiner's decision is in the record, AR 357-378(CP 605-626) *See also* SHB Decision at 13 (Finding No. 31, p.13).

³ *See* Note 7, *infra*.

water mark. (Decision at 25-26, Conclusions Nos. 19-20)⁴ and that beach walkers could capitalize on the proposed dock's clearance to continue to walk on the Turners' private beach without undue interference, a use the Turners allow even though they own their tidelands. (Decision, Findings Nos. 8-9, p. 21.) The Board determined that views from surrounding properties would not be unduly impaired by the dock. (Decision, Conclusion No. 18, p. 25.) The Board further ruled that the proposal did not obstruct or impede important navigational routes due to the almost 5,000-foot-long fetch at the site. (Decision, Conclusion No. 17, pp. 24-25.)

These findings and conclusions should have compelled the Board to approve the proposal. However, the Board reversed the Examiner and denied approval because the Turners' dock would be the first in the neighborhood. This "out-of-character" ruling was based upon the absence of docks within a six-mile stretch. The Board erroneously ruled that this was a disqualifying factor based upon "compatibility," since the existing dock density was zero.⁵

There is no law or regulation that grants the Board the power to deny an application on this basis. To the contrary, in *May v. Robertson*

⁴ The Board's Decision is attached as Appendix A-1. It is in the Administrative Record, 317-350 (CP 565-598). The entire Administrative Record is set out at CP 243-1445.

⁵ See Decision at 13-14, 26, 28 (Findings Nos. 32-33, Conclusions Nos. 21-22 and 26).

153 Wash.App. 57, 218 P.3d 211 (2009), this Court ruled (under the same County regulations construed by the Board in this matter) that the fact that a private dock is the first proposed in the general vicinity is not a factor:

The Board's focus on alternative facilities and "[t]he fact that this would be the first [pier] within this sandy crescent" are not the proper criteria for evaluating and denying this joint-use pier permit application.

153 Wash.App. at 87 (emphasis added).⁶

Facilitating family recreation is of substantial public importance, as the Legislature determined when it passed RCW 79.105.430, which states in part:

The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters . . . , may install and maintain without charge a dock on the areas if used exclusively for private recreational purposes This permission is subject to applicable local, state, and federal rules and regulations governing location, design, construction, size, and length of the dock.⁷

RCW 79.105.430(1).⁸

⁶As in *May*, the Turner proposal is one for joint use because the Code compels a joint-use offer be made. *See infra* at 22. Family members and friends can moor at the dock. In addition, the Turners will allow another waterfront owner in the neighborhood use of the facility if accommodations are made.

⁷The Turner proposal meets all of these criteria. Decision at 13 (Finding No. 31); Staff Report Ex. R/T-2, at 1. (AR 380-419) (CP 628)

⁸RCW 79.105.430(3) allows the Department of National Resources ("DNR") to revoke its permissive use based upon a finding of public necessity "to protect waterward access, ingress rights of other landowners, public health or safety, or public resources." Here, no "public necessity" determination was made and the DNR did not oppose the Turner project.

The Washington Supreme Court upheld the constitutionality of this statute, summarizing its benefits as follows:

[O]ne of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters.

Caminiti v. Boyle, 107 Wash.2d 662, 673-74, 732 P.2d 689 (1987).

The Washington State Supreme Court has ruled that a private dock is a common use allowed under the Shoreline Management Act, RCW 90.58 ("SMA"). "As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks." *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 169 P.3d 14 (2007).

The Board should not make policy by reading a limitation into the statutory and regulatory scheme that does not exist based upon community displeasure. Only Pierce County can enact a moratorium on shoreline use and development. RCW 90.58.590. If enacted, the statute would limit a moratorium to 18 months. Here, the Board's denial effectively creates a moratorium of much longer duration, as it will continue to apply until someone can find a way to secure an entitlement for a dock. The Turners challenge the opposition to explain how that can ever happen under the Board's holding that a change is "incompatible" because the current density is zero docks.

II. ASSIGNMENTS OF ERROR

The Board made 42 Findings of Fact and drew 38 Conclusions of Law. Mr. and Mrs. Turner assign error as follows:

A. Shoreline Hearings Board Errors

1. Entering its Findings of Fact, Conclusions of Law, and Order dated September 1, 2017 (the "Decision"), which holds:

The decision of the Pierce County Hearing Examiner on Shoreline Substantial Development Permit and Shoreline Conditional Use Permit SD/CP21-15 Application Numbers 813160, 813158, and 813162 is REVERSED in part and AFFIRMED in part. The SSDP for the pier-ramp-float is denied and the SCUP for the boatlift is denied. The SCUP for the boathouse is denied.

2. Holding that the dock proposal is not consistent with the Pierce County Shoreline Master Program policies and regulations and SMA policies, RCW 90.58.020. Decision at 28 (Conclusion No. 26).

3. Entering Conclusions Nos. 6-7 to the effect that the proposed water-dependent dock is not a preferred use under the Shoreline Management Act. Decision at 20.

4. Entering Conclusion No. 22 that PCC 20.56.040A.7's use of "existing pier density" as a criterion for approval means that the absence of a dock is a reason to deny a proposal. Decision at 26

5. Entering Conclusions Nos. 21-22, to the effect that the proposed dock is not compatible with the surrounding land and water uses and the proposed dock is inconsistent with existing pier density. Decision at 26.

6. Characterizing the proposed dock as a "single-use" facility for purposes of its analysis. Decision at 3, 20, 22-23, 27-30 (Findings Nos. 3, 7, 13, 15 and Conclusions Nos. 24, 25, 30).

7. Entering Conclusions Nos. 28-30 to the effect that the proposal would result in undue cumulative impacts. Decision at 28-30.

8. Entering Conclusion No. 26 that the proposal is inconsistent with local Shoreline Master Program Policies. Decision at 28.

9. Entering Findings Nos. 22-27 and Conclusion No. 13 to the effect that reasonable alternatives to the proposed dock are available. Decision at 10-11, 22.

10. Refusing to presume that boaters will obey a five-mph speed limit when closer than 200 feet to the shore when concluding that important navigational routes or marine-oriented recreation areas will be obstructed or impaired. Decision at 24-25 (Conclusion No. 17).

11. In the context of a cumulative impact ruling, entering its Conclusion No. 30 to the effect that the proposed dock would impair or

restrict beach walkers, after ruling that the impact was not “undue.”

Decision at 29-30.

12. Entering its Finding No. 19 as implemented by Conclusion No. 17, to the effect that the proposed dock will impair or obstruct nearshore marine recreation in the form of kayaking, paddle boarding, swimming, and boating. Decision at 9, 24-25.

13. Entering its Findings Nos. 22-23 and Conclusions Nos. 14-15 that (a) a fully-leased dock owned by a corporation in which the Turners have a financial interest, (b) commercial marinas 20-25 minutes away or (c) a mooring buoy are “reasonable alternatives” to the multiple purpose dock intended for extended season use. Decision at 10-11, 23.

14. Entering its Conclusions Nos. 31-32 and 35-37 denying a conditional use permit for the boathouse. Decision at 30,31-32.

15. Entering a ruling which, as applied, violates fundamental constitutionally-protected rights.

B. Superior Court

1. The Superior Court erred in entering the following Order on the Petitioners’ Administrative Procedure Act Petition for Review⁹:

⁹ CP 1-103.

ORDERED, ADJUDGED AND DECREED that the Board's decision in Case Number 17-005c is affirmed, and it is further

ORDERED, ADJUDGED AND DECREED that the Turners' petition for judicial review of the Board's decision in Case Number 17-005c is denied.

CP 1595.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the Board (and the Superior Court to the extent required on review) erroneously interpret the law and apply the law and/or act arbitrarily and capriciously without substantial evidence when (a) concluding that the dock proposal was a "single use facility," and (b) leaving out of its analysis state policies (RCW 90.58.020), which allow water-dependent uses such as private docks? (Assignments of Error Nos. A-1, B-1, A-2, A-3 A-6, A-8)

2. Did the Board (and the Superior Court to the extent required on review) erroneously interpret the law and apply the law and/or act arbitrarily and capriciously without substantial evidence when holding local policies discouraging docks in favor of mooring buoys justified denial of the dock/boat lift approved by the County's Hearing Examiner? (Assignments of Error Nos. A-1, B-1, A-2, A-8)

3. Did the Board (and the Superior Court to the extent required on review) erroneously interpret the law and apply the law to the

facts and/or act arbitrarily and capriciously when it denied the dock application because it would be the first dock “for miles around,” thereby being “out of character and incompatible” since the existing dock density was zero and compounded its error by placing into the approval criteria the terms “existing pier density,” a standard not adopted by the policy-makers? (Assignments of Error Nos. A-1, B-1, A-2, A-4, A-5, A-8)

4. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts, act without substantial evidence, and/or act arbitrarily and capriciously when it denied the dock permit on grounds that use of a mooring buoy, a dock leased for commercial purposes only, or a local marina are reasonable alternatives to a fixed dock without regard to the extended season and multiple purposes identified by the Turners in their application? (Assignments of Error Nos. A-1, B-1, A-2, A-6, A-9, A-13)

5. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts, act without substantial evidence, and/or act arbitrarily and capriciously when it based its denial of the Turner’s dock permit on a faulty cumulative impacts analysis that ignored the criteria the Board itself had previously established, and speculated without proof that an approval would result in

a proliferation of new docks? (Assignments of Error Nos. A-1, B-2, A-2, A-7, A-11)

6. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts, act without substantial evidence, and/or act arbitrarily and capriciously when it denied the dock permit on the grounds it would impair nearshore marine recreation without considering whether such alleged impacts would be “undue” or the dock easily passed by or through by recreational users? (Assignments of Error Nos. A-1, B-1, A-2, A-10, A-12)

7. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts, act without substantial evidence, and/or act arbitrarily and capriciously when it denied the boathouse application on the basis it is not a water-dependent use and would unduly impair views? (Assignments of Error A-1, B-1, A-2, A-14)

8. Did the Board’s decision (affirmed by the Superior Court) as applied violate the Turners’ fundamental constitutional property and due process rights when (1) that decision was not based upon lawfully-promulgated criteria; (2) it failed to interpret local regulations so as to accord with the general laws of the State; and/or (3) the Turners’ right to

ordered liberty was not protected because the decision-maker erroneously characterized the proposal as disfavored under local policies and elevated its perception of general policies over specific criteria permitting the use and/or the decision acts as a taking of property for private purposes?

(Assignments of Error Nos. A-1, B-1, A-2, A-15)

IV. STATEMENT OF THE CASE

A. The Site

The Turners own waterfront property on the northeast shore of Hale Passage, located on Point Fosdick Drive NW, in unincorporated Pierce County (the "Property"), including their tidelands. (CP 628) (Staff Report at 1, 3), TOP¹⁰ 279:25, 280:1 (CP 1204, 1205), Decision at 3 (Finding No 1). The Property is within the Rural Residential ("RR") Shoreline Environment and Rural 10 ("R-10") zoning district. TOP 231:24-25; 232:3-4 (CP 1156, 1157). The RR shoreline designation allows "medium intensity" uses. (TOP 374) (CP 1299). The property is developed with a home and other appurtenances, including a four-foot-high bulkhead. No view easements have been granted over the Property. Decision at 3 (Finding No. 1), TOP 281:18 (CP 1206).

¹⁰ "TOP" refers to the Transcript of Proceedings before the Board. The Transcript of Proceedings is set out in the Clerks Papers starting at page 925. For ease of this Court's review, the Turners cite to both the administrative record and the Clerks Papers.

The neighborhood is highly developed and compact, with densities commensurate with city urban growth areas, and includes a gated community. TOP 31:10-11, 70:18-25, 71:1 (CP 956, 995, 996). The Property experiences significant tides and winds that prohibit beaching a boat close to shore or use of buoys except for a few good weather months per year. TOP 374:24-25, 375:1-5 (CP 1299, 1300).

Site-specific studies do not show the presence of critical fish habitat or spawning at the project site. *See* (CP 714-753) (Ex. R/T 5 (Biological Evaluation)).

B. The Proposed Dock

Prior to submitting their shoreline permit applications for this project, the Turners sent letters to the neighboring property owners, the Taylors and Mr. Baldwin, inviting them to consider a joint use dock. Neither neighbor was interested. TOP 286:5-11 (CP 1211).

The Turners proposed to install a dock to serve their goal of extended boating usage, fishing, and swimming beyond just the summer months and to serve as a gathering and recreational place for their three children, friends, and family. TOP 284:15-19, 281:16-21, 282:21-25, 287:1, 278:20-25, 283:2-16 (CP 1209, 1206, 1207, 1212, 1203, 1208). For social events, up to 50 people could be on the property. TOP 288:6-14 (CP 1213).

The dock proposal meets all design, location, and setback requirements. TOP 249:3-12, 250:9-15, 252:24-25, 253:1-6 (CP 1174, 1175, 1177, 1178).

The proposed dock is a standard pier, ramp, and float design that is a combined 150-foot long with a narrow width. TOP 350:19-22 (CP 1275). The float is eight feet wide by 24 feet long. The proposed pier is six feet wide by 92 feet long, which will be reduced to a four-foot width to satisfy Army Corps of Engineers requirements. TOP 350:19-22 (CP 1275). The ramp is three feet wide by 40 feet long. The design is open and neighbors can see through, under, and over the proposed facility. TOP 313:5-6, 368:9-24, 370:1 (CP 1238, 1293, 1295). It includes at the south end a 20-foot long, 10-foot wide boatlift, which the County approved by issuance of a shoreline conditional use permit ("SCUP"). The State of Washington Department of Ecology ("Ecology") affirmed the SCUP. TOP 225:4-11 (CP 1150).

No public agency with jurisdiction opposed the dock. TOP 244:20-24 (CP 1149). The dock meets all "fish friendly" design standards and is not placed within critical aquatic habitat, such as a fish and wildlife conservation area. TOP 276:25, 277:1-2 (CP 1201, 1202).

The proposed pier and ramp would be aluminum. TOP 368:9-23 (CP 1293). Using aluminum for the pier and ramp allows for fewer

pilings. The piles are open with no cross bracing. There are only four piers or supports, spaced 40 feet apart. TOP 373:18-23 (CP 1298). The railing above the pier will be 42 inches high. TOP 405:7-8 (CP 1330). The proposed pier is perpendicular to the shoreline.

Clearance to walk below the pier was measured from the bulkhead with a level. Fifteen feet from the bulkhead, there will be five feet of clearance. At 20 feet, six inches from the bulkhead, there will be seven feet of clearance below the pier. TOP 280:7-23, 310:11-23, 311:1-5 (CP 1205, 1235, 1236). At eight feet from the bulkhead, there is four feet, six inches of clearance. TOP 311:6-10 (CP 1236). These elevations are surveyed. TOP 369:6-25, 370:1 (CP 1294, 1295).

C. The Proposed Boathouse

The Turners also desire to construct a small, 192 square-foot boathouse on the side of their front yard, 22 feet from the bulkhead, with a height of 12 feet. Decision at 3 (Finding No. 3). The boathouse is an accessory water-dependent use, according to Pierce County, with no toilet or sink. TOP 249:3-24, 293:16-23 (CP 1174, 1218).¹¹ Such facilities are “routinely approved” by Pierce County. TOP 381:14-25 (CP 1306). The boathouse location was adjusted to mitigate any possible undue view impacts. TOP 237:2-13, 237:18-23 (CP 1162). The boathouse will “be

¹¹ The Shoreline Guidelines provide that single-family shoreline homes and appurtenant structures are “priority uses.” See WAC 173-27-241(3)(j)(i).

used for storage of kayaks, lifejackets, fishing poles, etc.” Decision at 4 (Finding No. 5). (TOP 285, 293) (CP 1210, 1218)

D. Course of Proceedings

1. Pierce County Examiner

The Pierce County Hearing Examiner approved the proposed dock and boatlift with conditions but denied the boathouse. The Examiner appeared concerned that the boathouse would not be used for moorage, and therefore, did not meet the definition in the Code of a “boathouse.” Thus, according to the Examiner, the structure would not be water-dependent. *See* CP 612 (Ex. R/T 1 at 8(X)).¹²

2. Shoreline Hearings Board

Several neighbors opposed the Turner project: Gordon Baldwin, Norman and Barbara Simon, and Mark and Sarah Taylor. They separately appealed the dock and boatlift approvals to the Board. The Turners appealed the denial of the boathouse application. The Board conducted a hearing on June 26-28, 2017, on the Turner appeal.¹³ It considered the seven specific approval criteria. PCC 20.56.020A.

¹² As set out below, *infra* at 41, water dependency is not a CUP requirement.

¹³ Pierce County took no active role at the hearing to defend the Examiner’s decision. Legal counsel and/or staff assumed the role of decision-maker, subverting the Examiner. The Board noted the County staff position as changing. Decision at 11 (Finding No. 24).

The Board ruled that the Turner proposal did not meet three of the criteria – Nos. 1, 3, and 7, which read:¹⁴

1. Important navigational routes or marine oriented recreation areas will not be obstructed or impaired;
3. 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.

The Board also ruled that undue cumulative impacts would occur and thus, denied the application. Decision at 28-29 (Conclusions Nos. 28-30). The Board also denied the request for the boathouse:

The Board's ruling on the availability of "reasonable alternatives" included a commercial dock located in Gig Harbor rented out by Harbor Point Holdings, LLC (owned by the Turners) under an aquatic land lease with the State of Washington Department of National Resources.¹⁵ According to the Board, that commercial use dock qualified as an alternative without regard to consequences or obligations under existing leases.

¹⁴ As to Criteria Nos. 1 and 7, *see* Decision at 24-28, (Conclusions Nos. 17, 19, 21-22, and 25-26. For reasonable alternatives, *see* Decision at 10-12, 23 (Findings Nos. 22-27 and Conclusions Nos. 14-15).

¹⁵ The DNR Lease is at CP 803-836.

E. Superior Court

The Superior Court held that the Turners failed to meet their burden of proof under RCW 34.05.570(3). It denied their APA appeal and affirmed the Board's decision. CP 1594-1595. This timely appeal followed. CP 1596-1602.

V. STANDARDS OF REVIEW

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs review of Shorelines Hearings Board orders. RCW 34.05.570(1). This Court applies the APA to the administrative record. *See Postema v. Pollution Control Hr'gs Bd.*, 142 Wash.2d 68, 77, 11 P.3d 726 (2000). The Court reviews the Board's decision, not the decision of the local government. *Buechel v. Dep't of Ecology*, 125 Wash.2d 196, 202, 884 P.2d 910 (1994).

A party may challenge a decision of the Board on nine different bases. RCW 34.05.570(3). The core focus of this appeal is on the error of law standard, as interpreted and applied, and unlawful procedure or decision-making, RCW 34.05.570(3)(d) and (c), as set out below.

The party appealing a decision of the Board bears the burden of demonstrating the invalidity of the Board's actions. *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wash.App. 503, 515, 137 P.3d 31 (2006),

review denied, 162 Wash.2d 1008, 175 P.3d 1092 (2008); RCW 34.05.570(1)(a).

The interpretation of a statute or code is a question of law. *Jefferson County v. Seattle Yacht Club*, 73 Wash.App. 576, 589, 870 P.2d 987, *review denied*, 124 Wash.2d 1029, 883 P.2d 326 (1994). Questions of law and an agency's application of the law to the facts are reviewed *de novo*. In *de novo* review of the Board's legal determinations, this Court may substitute its judgment for that of the agency. *Id.*, 73 Wash.App. at 588.

"An agency's factual findings are reviewed under a substantial evidence standard." *Id.*, 73 Wash.App. at 588.

This appeal boils down almost exclusively to the interpretation of the law and its application to the facts, not disputed facts *per se*. Where facts are discussed, the Turner's contention is that those facts describe what the opposing neighbors believe is usable for their own needs or purposes or do not rise to "undue" impacts. The reasonable alternative standard is an objective one which must be measured against the dock application and its' purpose of multiple uses for an extended boating season. *See infra* p. 31.

VI. ARGUMENT

The SMA is a statewide law. The SMA and cases construing it allow and encourage use and enjoyment of the beaches and the waters of the State through a variety of facilities and methods of access, including private docks. The population in Puget Sound is growing and it is reasonable to presume that waterfront owners will desire docks in the future where none presently exist.¹⁶

This Court must protect its integrity from parochial interests. *See Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash.2d 384, 392, 258 P.3d 36 (2011).¹⁷ It should compel decision-makers to return to the SMA's basics and reject any non-statutory predisposition that private docks are not allowed if another dock is not present. This approach will encourage fairness and predictability in the

¹⁶ This is not a valid basis for denial, as demonstrated by the SHB's own prior decisions holding that the fact that there would now be a dock in a discrete area previously free of docks is not determinative. *See, among others, Innskeep v. San Juan County*, SHB No 98-033 (1999) ("Any dock will have a physical presence and alter the view of a particular shoreline. The proposed dock minimizes its impact by its location and design features. ***It is not determinative that the dock will be the first such facility in Horseshoe Bay.***") (Emphasis supplied.)

¹⁷ The Courts have ruled docks should be approved despite Board denial. *See e.g., May v. Robertson*, 153 Wash.App. 57, 218 P.3d 211 (2009) (affirming superior court's reversal of Shoreline Hearings Board's denial of permit to build joint-use pier); *Hughes v. Shorelines Hearings Bd.*, 159 Wash.App. 1045 (2011) (unpublished) (affirming trial court's reversal of Shoreline Hearings Board's denial of permit to build residential dock because the Board's decision was based on erroneous interpretation and application of the law and was not supported by substantial evidence).

permitting process as envisioned by the Growth Management Act, RCW 36.70A.020(7), and the Project Review Act, RCW 36.70B.

The Turners believe that the Board heard – and overreacted to – testimony that the proposed dock “goes to divide this community.” TOP 53:2-3 (CP 978) Over objection, it admitted a petition opposing the dock signed by neighbors. TOP 56 (CP 981).

As the Board has chosen to interpret Pierce County’s use standards, no first dock proposal can ever meet them if the neighbors object. The Board’s denial of the Turners’ proposal based upon the desires of the community is outside the law and facts. It is a classic example of arbitrary and capricious action. *Maranatha Mining, Inc. v. Pierce County*, 59 Wash.App. 795, 804, 801 P.2d 985 (1990) (“[T]he Council’s denial of the permit (based upon community opposition) presents a textbook example of arbitrary and capricious action: without consideration and in disregard of the facts.”).

A. The Proposed Dock Is a Favored Water-Dependent Joint Use Facility Within the Meaning of PCC 20.56.040(A)(5) (Addressing Issues Nos. 1, 6)

The proper characterization of the Turner proposal is important for at least three reasons: (1) it bears on how to interpret and apply local policies favoring joint use docks; (2) it controls the correct interpretation and application of the County’s “reasonable alternatives” criteria; and (3)

it informs how to interpret and apply SMA policies allowing reasonable use of the shorelines as this Court and others have done through the years.

The Turner dock is permitted. The term “permitted” means: (1) to consent to expressly or formally; (2) to give leave, authorize; or (3) to make possible.¹⁸ Ecology’s witness testified there are no local or state regulations prohibiting docks, TOP 228:2-9 (CP 1153).

Docks are “reasonable uses” because they are water-dependent and promote recreation and access to the waters of the State. *See* WAC 173-26-020(39) (definition of water dependent use). *See also* WAC 173-26-201(d) (preferred uses for shoreline areas include water dependent uses).

As to private docks, the State Guidelines provide:

(b) **Piers and docks.** As used here, a **dock associated with a single-family residence is a water-dependent use** because it is designed and intended as a facility for access to watercraft

(WAC 173-26-231(3)(b)).

The County’s own regulations (PCC 20.56.040.A.6) state that a dock is a “water-dependent use.”

A water-dependent use is accorded preference under state law. *See* RCW 90.58.020 (“To this end uses **shall be preferred** ... which are unique to or dependent upon use of the state’s shoreline.”). Under RCW 90.58.020, “alterations to the natural condition of the shorelines and

¹⁸ <https://www.merriam-webster.com/dictionary/permitted>.

shoreland *shall be allowed* ... [for] Permitted Uses.” (Emphasis added.)¹⁹

Impacts must be “minimized.”

Local policies favor joint-use. (Decision, Finding No. 30, p. 13). But here, that was not immediately feasible since the adjacent neighbors refused a “joint -use” offer. See Exhibit 2E, AR 445-446, (CP 693-694) (offers of joint use).

While not dispositive, the Turner proposal is properly characterized as one for joint-use based upon the offers made to the adjacent neighbors. In addition, Appellants will make the dock available to another shoreline owner if adequate arrangements are made. Mr. Turner testified: “We tend to be social people and I can imagine lots of people locally close by coming to use the dock.” (TOP 315: 9-11) (CP 1240). Some family live in the neighborhood and will use the dock. (TOP 296-297) (CP 1222-1223).

Envisioning joint use promotes effective use of aquatic land, cost-sharing, and efficient use of construction materials. Under the Board’s interpretation, opposing neighbors are allowed to say “no” to force a reasonable alternatives analysis, which here operated as a *de facto* veto. The Board’s insistence upon joint use at the time of permit approval

¹⁹ The Board’s focus on whether the proposed private dock is a priority use when compared to public docks, set out in Decision at p. 20 (Conclusions of Law Nos. 6-7), and is irrelevant. There is no public dock proposed in the area.

instead of when adequate arrangements are made by two users reads the concept of joint-use out of the approval process, thus failing to implement the very policy the Board was required to consider and apply.

B. The Board's Interpretation and Application of the SMA and Local Policies Is Erroneous. (Addressing Issues Nos. 1, 3)

The Board viewed single-use docks as highly disfavored and "discouraged" in favor of a mooring buoy. (Decision, Conclusion 12, p 22). In doing so, the Board misinterpreted and/or misapplied the SMA and local policies.

First, as to the SMA, the Board ignored the policies in RCW 90.58.020 favoring water-dependent uses and minimization of impacts, as set out above. *See supra* at 21.²⁰

Second, as noted, subject to project mitigation, the SMA allows private docks when a permitted use under local law.

The balance envisioned by the SMA anticipates that there will be *some* impact to shoreline areas by development. The SMA explicitly states "[a]lterations of the natural conditions of the shorelines and

²⁰ The SMA declares that it "is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." See RCW 90.58.020. The SMA strikes a balance between protection of the shoreline environment and reasonable and appropriate use of the waters of the State and their associated shoreline. See *Nisqually Delta Ass'n v. City of DuPont*, 103 Wash.2d 720, 727, 696 P.2d 1222 (1985).

shorelands *shall be recognized* by the department” for water dependent uses. RCW 90.58.020 (emphasis added).

The SMA policies control over the Board’s interpretation of the cited local policies discouraging docks. *See Citizens for Rational Shoreline Planning v. Whatcom County, infra*, p. 19.

Third, the County found compliance with all of its applicable policies, including the policies for the Rural Residential Shoreline Environment, the Zoning Code, the local Shoreline Master Program and the Gig Harbor Peninsula Community Plan. (Staff Report pp. 8- 9, pp 11-12) (AR 388-89, 390-91) (CP 636-37, 639-40).

The Board ignored the SMA policies, emphasizing just two policies of many, those found in the SMP piers policies: that docks associated with single family residences be discouraged; and buoys are favored over docks. (Decision, Conclusion No. 12, p. 12, addressing SMP Piers Policies (d) and (f)) This was legal error. The policies had to be construed together, not in isolation. For instance, the policies for the RR Shoreline Environment state “Require the joint use of piers and docks whenever possible.” (Staff Report, p. 9 (AR 389) (CP 637). Here, at the time of the SHB’s *de novo* hearing, a joint-use was not possible based upon the adjoining neighbors’ rejection of the Turners’ joint use offer.

The Turners' goal to extend the boating season does not allow reliance solely upon a mooring buoy, so the preference for a buoy is also inapplicable under the circumstances. Of note, the County Code does not prescribe seasonal limitations on dock usage.

The PCSMP's goals and policies are general and implemented through the use regulations which permit a dock subject to certain criteria, Decision at 24 (Conclusion No. 16). These specific regulations control over more general policies. *See City of Seattle v. Yes for Seattle*, 122 Wash.App. 382, 391, 93 P.3d 176 (2004) (development regulations are the controls placed on development or land use activities). This point was confirmed by Mr. Carl Halsan, an experienced planner who for years has applied the Pierce County shoreline policies and dock approval criteria in question in his capacity as an employee of the County, and later, as a private consultant. TOP 395 (CP 1320).

The Turners' position is in accord with the Board's ruling that the policies are implemented by specific approval criteria. Mr. Halsan confirmed that the "discourage" policy and the preference for buoys policy are met by making reasonable efforts to ask neighbors to participate in a joint -use dock. (TOP 371-372) (CP 1296-1297). The SMP buoy policy does not ask if a buoy is a "reasonable" alternative. The criteria do and

control. (TOP 387) (CP 1312). The Board should not have gone any further and treated the local policies as an independent basis for approval.

C. The Proposed Dock Does Not Violate the “Compatibility” Standard Set Out in PCC 20.56.040(A)(7) (Addressing Issues Nos. 1-3)

PCC 20.56.040(7) is the compatibility use standard this Court addressed in *May v. Robertson* 153 Wash.App. 57, 218 P.3d 211 (2009).

The Board used as a standard of compatibility what the opposing neighbors desired. This was error. The sense of the community is set out in the Gig Harbor Peninsula Community Plan which the Citizen Advisory Committee found the Turner proposal met.

The Board compounded its error by adding to the approval criteria the words “existing pier density” even though not found in the promulgated approval criteria. (Decision, Conclusion 22, p 26). This was error. The Board lacked authority to add non-promulgated approval criteria. *See infra*, p. 46-47.

Although not controlling because not part of the approval criteria, the County over the years has interpreted the “dock density” as referring to what is already built. (Halsan testimony, TOP, 398, 397-398) (CP 1323, 1322-1323)

The Board analysis erroneously began (and ended) with the proposition that docks are “disfavored uses” and should be allowed only if

they pass the Board's comfort level, the "first dock" or "change of character" test. But the approval criteria mention the "surrounding environment and land and water uses, not "character." The Board is tasked with applying the law. Its own sense of whether a dock in a given instance meets its aesthetic sensibilities is not the correct standard.

The Board's interpretation leads to the absurd result that a *permitted use is banned* if it is the first proposed, a result the rules of statutory construction prohibit.²¹

The Turner site is not unique for the medium intensity uses allowed, which include docks. Nor is it for the intensive boating use in the vicinity. The County did not adopt or employ regulations to preserve any "pristine" nature of the subject shoreline according to Mr. Halsan. (TOP 364-365) (CP 1289) Absent such a designation or adoption of criteria that would favor preservation of "pristine" shorelines, there is no basis to support the Board's denial on the basis that the shoreline – already highly developed with homes and bulkheads – must be kept "pristine" by denial of a dock proposal that meets all applicable criteria.

²¹ See e.g., *Ski Acres, Inc. v. Kittitas County*, 118 Wash.2d 852, 857-58, 827 P.2d 1000 (1992) ("statutes should be construed to effect their purpose, and unlikely, absurd or strained consequences should be avoided.").

D. No Facts or Law Support the Board's Cumulative Impacts Ruling. (Addressing Issues Nos. 1, 3, and 5)

The Turners did not have the burden of proof on this issue before the Board. The only proof offered was subjective personal opinions that change can be expected to bring more change. This is not substantial evidence. The opposition referred to no permit records, patterns of permit applications nor precedent from other judications.

The Board failed to consider that the very reason to mention "cumulative" impacts (the Turner proposal) answers the concern because the community is not interested in docks and opposes even the "first dock." See Halsan Testimony, citing the neighborhood petition against docks, and providing numerous other reasons why docks have not been built in the vicinity, concluding "for the same reasons," the Turner dock will not change people's minds, that the reasons to decline a dock "will continue to be the reasons" to do so. (TOP 378-379) (CP 1303-1304).

The County found no cumulative impacts. It issued a SEPA determination of "no significance." CP 708 (Ex. RT/4)²²

The factors the Board weighs in considering whether a cumulative impacts analysis is required include whether there is some indication of additional applications for similar activities in the area. *Garrison v.*

²² The DNS was based upon a SEPA Checklist which addresses cumulative impacts, showing none were expected. See WAC 197-11-186(d); WAC 197-11-060(4)(d).

Pierce County (De Tienne), SHB 13-016c at 53, 2014 WL 309283 (January 22, 2014), *aff'd*, *De Tienne v. Shorelines Hearings Bd.*, 197 Wash.App. 248, 391 P.3d 458 (2016).

The record is devoid of any “indication of additional applications,” which is the critical foreseeability showing. *Garrison, supra*. Mere speculation cannot sustain such a finding. *Johnston v. Aluminum Precision Prods., Inc.*, 135 Wash.App. 204, 208-9, 143 P.3d 876 (2006).

There is no evidence in the record that approval of the Turner application would set a precedent leading to a substantial influx of applications, resulting in cumulative impacts. The costs of construction and permitting and the time involved are very high and act as a deterrent, here, over \$200,000 to date for three year plus process which is continuing. (TOP 356, 358) (CP 1281, 1283).

As the Board itself held in *Seidl v. San Juan County*, SHB No. 09-012, 2010 WL 3432599 (Aug. 27, 2010), a shoreline substantial development approval is not precedent-setting:

Unlike a variance or conditional use, approval of this SSDP will not establish a special circumstance that would expand the basic standards governing dock approvals in the local master program. Future applicants for a SSDP to build a dock will have to meet the very stringent criteria in the SJCSMP which the Board has upheld and applied in this case. The Walker/Seidl dock approval simply will not have any bearing on whether future dock applications

will be approved by San Juan County or the Board.
[Emphasis added.]

Any dock proposal is considered on its own merits and impacts must be minimized. Apparently, the Board was worried about incremental impacts, but each dock must meet the “minimization” SMA standard. When it speculated as to possible future impacts, the Board failed to account for the “beneficial aspects” of the existing regulatory systems. *See* WAC 173-26-186(8)(d). More fundamentally, no expert was offered by the neighbors that incremental impacts as mitigated could arise to substantial if another dock or two was built in a six -mile stretch of beach.

E. Reasonable Alternatives Within the Meaning of the Applicable Criteria PCC 20.56.040A.5 Are Not Available. (Addressing Issues Nos. 1-2, 4)

Before the Board, the Turners did not have the burden of proof on this issue. Mr. Halsan testified that the County has not required applicants to investigate use of a marina located miles away. TOP 375, (CP 1300). Nor has the County considered a buoy a reasonable or feasible use for an applicant that desires multiple uses, such as fishing, crabbing etc.

Alternatives are defined by the purpose of proposed facilities: *Walker/Seidl v. San Juan County*, SHB No. 09-012, 2010 WL 3432599 at * 14.

The neighbors mischaracterized the Turners’ objectives as one of avoiding “inconvenience.” The Board accepted this mischaracterization

and dismissed the proposal. The record does not support this characterization. The Turners would lose at least two hours of time to go to a marina, load their boat, come back to their home waters, then return to the marina, unload and drive home. (TOP 354) (CP 1279). On week days especially that leaves very little time for water recreation.

The record demonstrates that the Turners want to enhance their waterfront property with a dock that will be used for boating, fishing, swimming, and a gathering and recreational place -- that is, water enjoyment, not just boat access or moorage. A marina or a buoy does not address the desired multiple uses that extend beyond only boat moorage or the summer boating season.

What is a "reasonable alternative" for the Turners is not answered by choices made by opposing neighbors for their boating activity. Decision at 23 (Conclusions Nos. 14-15) (referring to what the neighbors do regarding use of marina or buoy during the boating season). It is an objective standard.²³ "Reasonable" means what is not "extreme or

²³ Throughout the law, "reasonableness" is judged by an objective standard. For example, a tort-feasor is not allowed to limit liability by judging the reasonableness of his or her actions through a subjective lens. See WPI 10.01. In legal malpractice cases, the standard is one of objective reasonableness based upon all of the circumstances. See, e.g., *State v. Sherwood*, 71 Wash.App. 481, 860 P.2d 407 (ineffective assistance case). When an officer claims exigent circumstances in executing a warrantless search, the test again is whether the officer's perception was objectively reasonable. See, e.g., *State v. Goodin*, 67 Wash.App. 623, 838 P.2d 135 (1992). Here, the Board impermissibly allowed the subjective desires of the neighbors to control its decision.

excessive,” “moderate, fair,” “inexpensive,” providing “a reasonable chance.”²⁴ It is what a reasonable careful person would do under the same or similar circumstances. It must be judged against the proposal, not what the neighbors or the Board believe the Turners should do.

The line in this instance is defined by the purpose of the proposal set out in the application, not the oppositions’ subjective desires or their own choices.

(1) A Buoy

The Board ruled that the Turners could moor their boat at a mooring buoy, which it determined to be a reasonable moorage alternative. Decision at p. 23 (Conclusion No. 15, addressing PCC 20.56.040A.5.; *see also* Decision at p. 22 (Conclusion No. 13).

This ruling is flawed because (1) the standard does not require, let alone mention, a mooring buoy; (2) the conclusion fails to account for seasonal use, as a mooring buoy only works in calm waters; (3) the conclusion is not supported by substantial evidence; and (4) the opposing parties failed to meet their burden of proof on this issue. Decision at 18 (Conclusion No. 2).

PCC § 20.56.040A.5 does not identify mooring buoys as a reasonable alternative:

²⁴ <https://www.merriam-webster.com/dictionary/reasonable>.

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;

The exclusion of mooring buoys from the definition of “reasonable alternative” is obvious and intentional, since the County allows both a mooring buoy and a dock. In *Robertson v. May*, 153 Wash.App. 57, 218 P.3d 211 (2009), the use of two boat launches and a buoy was not considered a sufficient alternative to a dock. *Id.* at 84.

There is no substantial evidence the buoy is feasible for year-round use by a large boat. To the contrary, the record shows that a buoy cannot meet the recreational needs of the extended family which embrace a wide variety of extended “boating season” uses by many users requiring a large boat. TOP 311:23-25, 312:1-23, 304:8-25, 305:1-9 (CP 1236, 1237, 1229, 1230).

All testimony regarding whether a mooring buoy was a “reasonable alternative” related only to use during good weather months, or approximately April to Labor Day. TOP 117:11-24, 119:4-8 (CP 1042, 1044). The testimony showed that a buoy was not a safe or feasible option to extend the boating season. TOP 53:9-12 (the off-shore waters are “turbulent” and the currents “really strong”), 37:7-8, 42:4-14, 39:9-16 (“tend to get a lot of wave action”), 102:12-13, 353:18-25 (CP 978, 962, 967, 964, 1027, 1278). The question is safety – not convenience – and

buoys are unsafe at the site location. TOP 375:21-25, 376:1-5) (CP 1300, 1301).

The prior owner of the Turner's home testified that using a buoy concerned him greatly:

[So other boats] constantly cut the corner, which made me nervous, having my boat on the buoy, because I was always nervous someone was going to run into it. . . .

TOP 161:14-16 (CP 1086).

He had to replace his buoy because it was lost and the buoy was difficult to maintain. TOP 167:3-13 (CP 1092). The Turners have also lost a buoy. TOP 346:12-16 (CP 1271). For bigger boats, use of a buoy is "more problematic," according to the prior owner. TOP 168:7-20 (CP 1093). Here, the Turners need a large boat (at least 30 feet) to effectuate their purposes. TOP 311:23-25, 312:1-23 (CP 1239, 1240).

In another case, the Board reached exactly the opposite conclusion to the one here when comparing use of a dock to a mooring buoy, correctly focusing on the seasonal limits of a mooring buoy. *See Walker and Seidl*, SHB No. 09-012, 2010 WL 3432599, at *25-26. ("[W]hile the Walker mooring buoy may have worked marginally for summer recreational use, it is not a viable option for year-round use and moorage.").

(2) A Marina

The Board also erred when it relied on the presence of nearby marinas as a basis to deny the permits approved by the County and Ecology. The evidence showed that local marinas did not have slips available for a 30-foot boat, the desired length. TOP 356:12-14 (CP 1281). If the presence of a public marina in the vicinity were determinative, no private dock could ever be approved in the Gig Harbor area. TOP 306:17-24 (CP 1231). A marina is not a viable option for the Turners due to price, availability, reasonable travel time, the multiple uses they desire, or the larger boat needed to achieve the proposal's purposes as set out in the permit application. TOP 351:23-25, 352:1-11, 356:12-14 (CP 1276, 1277, 1281).

The neighbors submitted only the testimony of one household that had chosen to store a boat at a marina and accept the travel and expense that entails when they wish to use their boat, but no evidence that space is available in any nearby marina for the size of boat the Turners will use. Decision at 12, 23 (Finding No. 26; Conclusion No. 14.) This is not substantial evidence.

Driving distance is only one measure of the "reasonableness" of a marina as an alternative, as noted. Compare coming home from work and jumping in a waiting boat on a weekday to driving to a facility, parking,

loading, and cruising back to the home area, then doing it all over again, in reverse.

The Board's interpretation and application of the term "reasonable alternative" is exceptionally arbitrary.

The key issue with every "alternative," particularly the marina alternative, is how far government can go in dictating private prerogatives. Would any member of the panel be satisfied if told his or her family does not warrant a private tennis court on their residential property because they can join a private tennis club one-half hour away or use a public court 35 minutes from the family home, when the private court on their property is allowed as a permitted use?

(3) The Private Commercial Pier

The Board improperly considered a private moorage held by a commercial entity (Harbor Point Holdings, LLC) in which the Turners have a financial interest as a reasonable alternative.²⁵ (Decision at 10-11 (Findings of Fact Nos. 22-23). The commercial use pier is leased for profit. *Id.* There are no plans to cancel the leases. *Id.*

The Turners currently own property on the Gig Harbor waterfront that includes private moorage. The Turners contend this moorage is not a reasonable alternative because two berths at their pier are currently leased to others and expanding the facility would take time

²⁵ The Board had no authority over this non-party. *See* WAC 461-08-305.

and money. The Board is not persuaded by this argument. The Turners have not presented any persuasive reason why they could not choose to change **their leasing arrangements** and moor their own boat at **their Gig Harbor waterfront pier** if they chose to do so. Mr. Turner testified that the leases could be terminated upon 90 days' notice.

Decision at 22-23 (Conclusions Nos. 13-14).

Opponents may argue that the Board did not specifically direct use of a commercial property owned by a non-party (Harbor Point), but that is irrelevant. By holding that the Harbor Point facility (a commercial dock) was a "reasonable alternative," the Board effectively did just that.

Harbor Point's private moorage rights are not a proper consideration under the applicable code. PCC § 20.56.040.A.5. provides: "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 ...*" (Emphasis added.) There is no dispute that Harbor Point's property, including its pier, is private (not a "commercial or public moorage facility").

The opposition provided the DNR aquatic lands lease to the Board, but no proof that the commercial purpose allowed in that lease could be converted to personal moorage or that the lease will or should be extended.

The Turners provided a “persuasive reason” to the Board why the commercial lease and the attendant moorage did not qualify as a reasonable alternative. The SHB’s decision improperly forces on the Turners a classic “Hobson’s Choice,” as it ruled that the Turners must either disregard the Harbor Point entity and purpose and treat Harbor Point’s property as their own personal playground, or not have a dock for their family boat. The Board’s position would require the Turners, as members of the LLC, to appropriate an asset of the LLC for their personal use, a classic example of behavior that would result in piercing the LLC’s veil. *See* RCW 25.15.061 (LLC members subject to liability under “piercing corporate veil” cases); *see, e.g., McCombs Constr., Inc. v. Barnes*, 32 Wash.App. 70, 645 P.2d 1131 (1982) (piercing veil where shareholder commingled personal affairs with those of corporation).

F. Marine-Oriented Recreation Areas Are Not Impaired Within the Meaning the Applicable Criteria for Dock Approval, RCW 20.56.040 A.1 (Addressing Issues Nos. 1, 6)

The Board erroneously held that the criterion set forth in PCC 20.56.040.A.1 was not met. That Code provision provides, in part, that “[i]mportant *marine oriented recreation areas will not be obstructed or impaired.*” (Emphasis added.)

The Board held:

Swimmers, paddleboarders, and kayakers will be required to either go around or under the pier depending upon the

level of the tide. The currents in Hale Passage are stronger further from shore and can be frightening even for experienced kayakers. M. Taylor Testimony. Fishing and other boats currently come close into the shore as they round the point and they will have to avoid the pier. Ex. PT-9. After decades without any piers on this shoreline, it would be a safety hazard for boaters who are not expecting to find [a] pier 150 feet out from the shore. The Board notes that these criteria do not require that the impairment be undue; the question is simply whether marine oriented recreation areas will “be obstructed or impaired.” PCC § 20.56.040A.1.

Decision at 26 (Conclusion No. 21)²⁶

The Board treated the Turner property as an “important” marine-orientated recreational area. The word “important” means “marked by or indicative of significant worth or consequence.”²⁷ As applied by the Board, every rural beach on Puget Sound which the neighbors can walk or boat nearshore is important. That is an erroneous interpretation and application of the cited standard ignoring the qualifier “important.”

Although the Board found that there would be *some* interference with nearshore use, it also held that public use of the surface waters would not be *unduly* impaired “by the need to avoid the pier when swimming, paddle boarding, kayaking, or boating.” Decision at 26 (Conclusion No.

²⁶ See also Decision at p. 26 (Conclusion No. 21) (“Furthermore, the near shore water in this area is heavily used for boating, kayaking, and paddle boarding. The proposed pier would present an impediment to all of these uses.”); Decision at 27, 29-30 (Conclusions Nos. 25 and 30).

²⁷ <https://www.merriam-webster.com/dictionary/important> (last visited February 20, 2019).

20). Below, the opposition argued that the Board's ruling on mere "impairment" is sufficient to deny the Turners' application because Criterion No. 1's standard is only "impaired," with no qualification as to whether any obstruction is "significant" or "undue". The Superior Court accepted this forced justification for the Board's ruling. The SMA standard, however, requires only that impacts be minimized "so far as practicable." RCW 90.58.020. This statewide, qualified standard controls. *See Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash.2d 384, 392, 258 P.3d 36 (2011). To hold otherwise leads to an absurd result or no applicant can meet a standard of no impact whatsoever. *See, e.g., Cougar Mountain Associates v. King County*, 111 Wash.2d 742, 756 P.2d 264 (1988).

The Board erroneously failed or refused to acknowledge that there is a nearshore speed limit for recreation boats of five miles per hour, and boats must stay offshore at least 200 feet, if they exceed that speed which avoids docks (and the proposed dock in particular),²⁸ TOP 410:9-25, 411:1-5, 370:16-21) (CP 1335, 1336, 1295) The Board normally presumes citizens will follow the law. *See, e.g., Jennings v. San Juan County*, SHB Nos. 97-31, 32, 33, 34, and 40, (1998). As set out below, Mr. Turner testified there are over 1000 feet site distance from the Point to

²⁸ The local regulations (PCC 8.88.151) are attached, **Appendix 2**.

the Turner property. The Google map shows the shoreline is rounded, not sharp with a gradual bend. (Google Map AR 514; CP 762.)

G. The Conditional Use Permit For the Boathouse Should Have Been Approved. (Addressing Issue Nos 7 and 8)

The accessory boathouse permit must be judged as an accessory use and should have been approved. The Turner property, as noted, is zoned R-10. For that district, outright permitted uses include “sheds and storage facilities.” PCC 20.62.040(A)(C)(2). If a proposal meets CUP criteria, as does the boathouse, it is deemed compatible with SMP policies. (TOP 382) (CP 1307)

The record shows the boathouse will be used for storage. TOP 285:4-25 (CP 1210). It is a normal appurtenance to the Turners’ single-family residence and accessory use. *See* WAC 173-26-040(2)(g). The Turners are not bound by what the neighbors choose to use for storage (garages), although this was of impermissible importance to the Board. Decision at 30 (Conclusion No. 32). A boathouse for storage is as equally appurtenant to a residence as a garage. There is no explicit “water dependency” requirement. However, the Board’s holding Conclusion No. 35 (Decision at 30-31), that the storage shed is not a “water dependent” use is error. Just as the residence itself is a water-dependent use, so is its appurtenant storage building.

Similarly, Conclusion No. 37 (Decision at 32), that the storage shed within a shoreline site “is not necessary for kayak and paddleboard storage” is error. PCC 20.72. 030 requires “that there is some necessity for a shoreline site for the proposed use.” It is not difficult to envision owners of a waterfront home with a dock would want to store boating equipment on their property. But this obvious connection the Board erroneously missed. The County over the years has routinely approved boat houses if they store items to be used in the water. (TOP 380-381) (CP 1305-1306)

Essentially, the Board speculated that the Turners would not limit use of the boathouse to storage of boating equipment as promised. *See* Decision at p. 30 (Conclusion No. 32). The Board has in other cases presumed that an applicant will abide by other laws.

It is improper to assume that the applicant and the applicant’s customers will violate the law and permit conditions. It is equally improper to assume that the County will not enforce the terms of the permit. This board has long eschewed consideration of the potential for future violations in its review of permits.

Jennings v. Klein, SHB No. 97-31, 32, 33, 34 & 40, 1998 WL 377652 (April 21, 1998).

Turning to views, it is true that the Boat House will impact the Taylor’s view of the Olympic Mountains from one window in one direction located within their home. (Decision. Conclusion No 36, p 32).

However, their views of the Olympics are not impacted at all from all other points on their property.

There are many SHB cases holding that a minimal view impairment is insufficient to justify denying a permit. *See Alexander et al. v. City of Port Angeles et al.*, SHB No. 02-027 & 02-028 (2003) (concluding 5-10 percent view impairment does not equate to view obstruction and does not warrant denial of project permit); *Rossellini v. City of Bellingham and Port of Bellingham*, SHB No. 08-003 (2008) (finding view impairment of 10-15 percent of shoreline did not preclude permit approval under RCW 90.58.320); *Batchelder v. City of Seattle*, 77 Wn. App. 154, 164, 890 P.2d 25, 31 (1995) (affirming SHB determination that 18 degree view reduction did not constitute an obstruction); *Berwyn B. & Emma J. Thomas v. Mason County*, SHB No. 81-3 (1981) (deeming potential 20 degree view impairment out of 180 degree view unsubstantial).

The Board's rulings award the Taylor's a view easement they do not have in violation of the Washington Constitution, Article 1 Section 16 which states: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes."

H. The Substantial Evidence Standard is Not in Play as to Impacts but the Board’s Outcome Determinative Rulings are not Supportable Under the Facts (Addressing Issues Nos 1-2, 4-7)

This case does not require the Court to review disputed factual findings, but only to correctly apply the law to the facts. The Turners incorporate their argument, *infra* at pp. 30-38 regarding reasonable alternatives. Evidence of conduct of other people who did not seek a dock permit does not show that a dock permit is inconsistent with the Code

To “obstruct” means to “block or close up.”²⁹ “Impair” means “disabled or functionally defective.”³⁰ The evidence shows every dock structure impacts but does not block access. (TOP 363-366) (CP 1288-1291)

One neighbor (Mark Taylor) testified that the proposed dock will obstruct his use of a paddle board because the dock is too long to go around its end and far offshore use of a paddle board can be dangerous. Decision at 5-6, 9 (Findings Nos. 10, 19). The Turners do not challenge this testimony but ask this Court to recognize that this testimony does not demonstrate a material impact. After all, there are only four small piers in 92 feet of dock. (TOP 373) (CP 1298). No boating association expressed any concern. Kayaks easily pass through piers. TOP 306:1-4 (CP 1231).

²⁹ <https://www.merriam-webster.com/dictionary/obstruct>.

³⁰ <https://www.merriam-webster.com/dictionary/impair>.

Mr. Taylor can paddle miles in the other direction with no obstruction, or walk four feet around the dock, or paddle four feet under it, then continue for miles with no obstructions. This testimony typifies several marginal, isolated, and subjective complaints in the record that together fail to support the SHB's conclusion that the project does not meet the criteria in the Code to permit a dock.

Evidence that another neighbor used a nearby commercial marina to access a boat, or a prior owner used a moorage buoy for a boat in summer months, is not substantial evidence that these options are objectively reasonable alternatives to the Turners' proposed dock and its multiple uses for an extended boating season.

There is one factual dispute relating to the Board's concern that boaters will have a safety risk coming around the point and confronting a new dock. The opposition had the burden before the Board on this question and offered no expert opinion by a boater safety authority. The site distance between the proposed dock location and a boater coming around the point is over 1000- feet. TOP 319-320 (CP 1244.)

I. Fundamental Constitutionally-Protected Rights Preclude the Shoreline Hearings Board Rulings as Applied (Addressing Issues Nos. 1, 8)

The Turners do not challenge the constitutionality of the SMA or the County's shoreline use regulations on their face. They assert a limited

“as applied” challenge if the Board’s decision is not reversed. The Turners’ use of their shoreline property is properly understood not as a privilege, to be allowed solely as Pierce County sees fit, but rather is based on a fundamental right.

The right³¹ to own and use one’s private property is protected by the state and federal constitutions. *See* U.S. Const. Amend. V; Wash. Const. art. I, § 16; *Mfr’d. Housing Cmty. of Wash. v. State*, 142 Wash.2d 347, 368, 13 P.3d 183 (2000) (property rights consist of the fundamental rights of possession, use, and disposition); *Maytown Sand & Gravel, LLC, v. Thurston Cty.*, 191 Wash.2d 392, 423 P.3d 223 (2018), *as amended* (Oct. 1, 2018).

The Turner proposal does not have any discernable environmental impacts to the aquatic habitat or species that rely upon it and is deemed a water dependent preferred reasonable use. Within that context, governmental authority is limited by RCW 90.58.020 since alterations to the natural condition must be recognized and allowed if impacts are minimized.

³¹ The right to have a dock does not come from government. The right to develop and use land resides in the people. The state and federal constitutions restrain government; they do not provide the right, which is inherent. *See Dennis v. Moses*, 18 Wash. 537, 52 P. 333 (1898).

The Board's use of unarticulated criteria, such as need and affirmance of the opposing neighbors' subjective desires of what they consider adequate for boating and nearshore recreations, speculating as to impacts, adding "dock density" to the approval criteria, violates the fundamental right to be free of arbitrary government decision-making based upon promulgated policies. See *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 50, 720 P.2d 782, 785 (1986) (due process standards required city to apply and enforce its laws as written without adding new criteria on a case-by-case basis); *Peter Schroeder Architects v. City of Bellevue*, 83 Wash.App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 1011 (1997).

The Board's outcome-determinative approach violates ordered liberty, a fundamental right. A recent Washington Supreme Court case, *Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wash.2d 392, 423 P.3d 223 (2018), confirms that the right to develop land and the right to be free from arbitrary decision-making in the land use context are constitutionally protected right, e.g. imposition of a view easement for private purposes. In that case, the Court noted that under the Fourteenth Amendment, "property" encompasses more than just tangible physical property, and a permit applicant has a cognizable property interest "when there are articulable standards that constrain the decision-making process."

In other words, a permit applicant has a constitutionally protected property interest “if discretion [to deny the final issuance of the permit] is substantially limited.” The *Maytown* Court recognized that there is a constitutionally-protected right to develop land where the applicant has satisfied the necessary preconditions, as here.

The constitutional rights announced in *Maytown* are implicated here, where the Board denied a permit application that meets the objective criteria set forth in the controlling development regulations and SMA policies.

A decision cannot conflict with a general law of the State. Washington Constitution, Article XI, Section 1; *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 155 Wash.App. 937, 230 P.3d 1074 (2010), *aff’d*, 172 Wash.2d 384, 258 P.3d 36 (2011) (analyzing whether provisions of shoreline master program imposed indirect taxes, fees, or charges on development in violation of RCW 82.02.020).

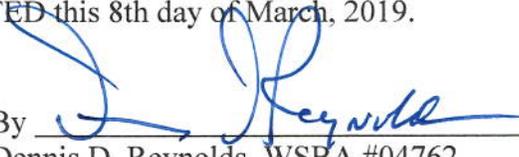
Here, the Board’s decision conflicts with RCW 90.58.020’s standards for a water-dependent use and allowance of a dock by a proposal “designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” It did so by precluding *any* dock if any impact occurs to nearshore recreational users

and failing to account for the statutory preference for a water dependent use.

VII. CONCLUSION

This appeal should be granted, the Board's ruling reversed and vacated, and this matter remanded to Pierce County with instructions to issue the requested shoreline permit with the conditions approved by the Examiner. Appellants should be granted their reasonable attorneys' fees and costs pursuant to RCW 4.84.340 and .350. The Board's decision is not justified in particular because of its mishandling of the nature of the proposal, its unsupported cumulative impacts ruling, and its use of non-promulgated standards as to what the neighbors would like to see, plus imposing a view easement across the Turners' property in favor of one neighbor as regards the boathouse without compensation for a private use. It is just to award attorney fees to the Turners. The proceedings in this matter have been protracted, including a hearing before a superior court judge whose decision has no weight, and this appeal carries the threat of a claim of fees from the opposition.

RESPECTFULLY SUBMITTED this 8th day of March, 2019.

By 

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CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

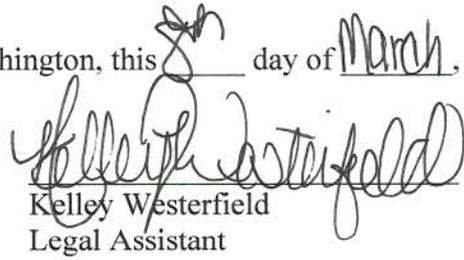
I am employed by the Dennis D. Reynolds Law Office, attorneys for Petitioners. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below.

<p>Lisa M. Petersen, WSBA #30372 Assistant Attorney General Licensing and Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 (206) 389-2127, tel. / (206) 389-2800, fax Lisapl@atg.wa.gov lalseaef@atg.wa.gov <i>Attorney for Shorelines Hearings Board</i></p>	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> UPS, Next Day Air <input checked="" type="checkbox"/> Email
<p>Cort O'Connor, WSBA #23439 Pierce County Prosecutor / Civil 955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160 (253) 798-6201, tel Mr. O'Connor Coconno@co.pierce.wa.us <i>Attorneys for Respondent Pierce County</i></p>	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> UPS, Next Day Air <input checked="" type="checkbox"/> Email
<p>Emily C. Nelson, AAG, WSBA #48440 Office of Washington State Attorney General – Ecology Div. P.O. Box 40117 Olympia, WA 98502 (360) 586-6770, tel general / (360) 586-4607, tel direct EmilyN1@atg.wa.gov; MeaghanK@atg.wa.gov; ecvolyef@atg.wa.gov <i>Attorneys for Respondent State Department of Ecology</i></p>	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> UPS, Next Day Air <input checked="" type="checkbox"/> Email
<p>James V. Handmacher, #8637 Morton McGoldrick, PS 820 "A" Street, #600 / P.O. Box 1533 Tacoma, WA 98401 (253) 627-8131, tel / (253) 272-4338, fax jvhandmacher@bvmm.com <i>Attorneys for Petitioners Gordon Baldwin and Norman and Barbara Simon</i></p>	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> UPS, Next Day Air <input checked="" type="checkbox"/> Email

<p>Margaret Y. Archer, WSBA #21224 Gordon Thomas Honeywell LLP 1201 Pacific Avenue, #2100 Tacoma, WA 98402 (253) 620-6500, tel / (253) 620-6565, fax marcher@gth-law.com; lblakeney@gth-law.com Attorneys for Petitioners/Intervenors Mark and Sarah Taylor</p>	<ul style="list-style-type: none"> <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> UPS, Next Day Air <input checked="" type="checkbox"/> Email
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Email and Mail per E-service Agreement

DATED at Bainbridge Island, Washington, this 8th day of March, 2019.


Kelley Westerfield
Legal Assistant

APPENDIX A-1

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 GORDON BALDWIN, NORMAN SIMON,
4 BARBARA SIMON, MARK TAYLOR, and
5 SARAH TAYLOR,

6 **Petitioners,**

7 v.

8 PIERCE COUNTY, CRAIG TURNER,
9 KELLEY TURNER, and STATE OF
10 WASHINGTON, DEPARTMENT OF
11 ECOLOGY,

12 **Respondents.**

13 **CRAIG AND KELLEY TURNER,**

14 **Petitioners,**

15 v.

16 PIERCE COUNTY and STATE OF
17 WASHINGTON, DEPARTMENT OF
18 ECOLOGY,

19 **Respondent.**

20 **MARK and SARAH TAYLOR,**

21 **Intervenors.**

SHB No. 17-005c

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

On December 27, 2016, the Pierce County Hearing Examiner (Hearing Examiner) granted a Shoreline Substantial Development Permit (SSDP) for construction of a pier-ramp-float, granted a Shoreline Conditional Use Permit (SCUP) for a boatlift, and denied an SCUP for a boathouse. The permit applicants are Craig and Kelley Turner.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**
SHB No. 17-005c

1 On March 6, 2017, Gordon Baldwin, Barbara Simon, and Norman Simon filed a petition
2 with the Shorelines Hearings Board (Board) for review of the SSDP and SCUP issued by the
3 Hearing Examiner. On March 7, 2017, Mark and Sarah Taylor filed a petition for review of the
4 approval of the SSDP for the pier-ramp-float and the SCUP for the boatlift. On March 7, 2017,
5 the Turners filed a petition for review of the decision of the Hearing Examiner denying the
6 SCUP to construct the boathouse. The three appeals were consolidated. On April 26, 2017, the
7 Taylors were allowed to intervene in the Turner's appeal of the denial of the SCUP for the
8 boathouse.

9 The Board conducted a hearing June 26, 2017, in Tacoma, Washington and June 27-28,
10 2017, in Tumwater, Washington. The Board considering the matter was comprised of Members
11 Kay M. Brown, Jennifer Gregerson, and Jamie Stephens. Administrative Appeals Judge Heather
12 C. Francks presided for the Board. Attorney James Handmacher represented Gordon Baldwin,
13 Barbara Simon, and Norman Simon. Attorney Margaret Archer represented Mark and Sarah
14 Taylor. Attorney Dennis Reynolds represented Craig and Kelley Turner. Pierce County Deputy
15 Prosecuting Attorney Cori O'Connor represented Pierce County. Assistant Attorney General
16 Emily Nelson represented State of Washington, Department of Ecology (Ecology). Kim Otis,
17 Olympia Court Reporters, provided court reporting services. The Board visited the site, received
18 the sworn testimony of witnesses, admitted exhibits, and heard arguments on behalf of the
19 parties. Having considered the record, the Board makes the following decision.

1 FINDINGS OF FACT

2 1.

3 The Proposal

4 The Turners own a waterfront home at 16 Point Fosdick Drive NW on the northeast shore
5 of Hale Passage in Pierce County. They purchased the property five years ago. K. Turner
6 Testimony. The property is .48 acres with 100 feet of shoreline frontage which includes a
7 bulkhead that is approximately four feet high. C. Turner Testimony; Ex. RT-2 at 1. The
8 property is at the very point of the Gig Harbor Peninsula. Ex. RT-5, Appendix A at A.1, A.2.

9 2.

10 The property is located in a Rural Residential Shoreline Environment, is zoned Rural 10
11 and is in the Gig Harbor Peninsula Community Plan (GHPCP) area. Ex. RT-4 at Ex. 3B. The
12 Turners own their private tidelands. K. Turner Testimony. No view easements have been
13 granted over the property. K. Turner Testimony. It is not a critical area under the local critical
14 areas ordinance. Halsan Testimony.

15 3.

16 The Turners, through their agent, Carl Halsan, submitted a proposal for an SSDP and
17 SCUP to Pierce County Planning and Land Services to 1) construct a 150 foot long, eight foot
18 wide single use pier-ramp-float; 2) place a 20 foot long, ten foot wide boatlift at the south end of
19 the proposed pier-ramp-float; 3) construct a 192 foot square boathouse landward of the bulkhead;
20 and 4) remove the existing hot tub and construct an integrated swimming pool and hot tub 50
21 feet from the bulkhead. Ex. RT-2 at 1. The cost of the pier project is \$50,000-\$100,000. C.
Turner Testimony.

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4.

The Turners plan to use the pier-ramp-float, boatlift, and boathouse to enjoy the water with their three children aged 8-13 and extended family. K. Turner Testimony. They have not yet purchased a boat but they expect it to be approximately 30 feet in order to be large enough to accommodate everyone. C. Turner Testimony. The Turners currently have a kayak and a paddleboard. K. Turner Testimony; C. Turner Testimony.

5.

The boathouse would be used for storage of kayaks, lifejackets, fishing poles, etc. K. Turner Testimony. The Turners also plan an outdoor shower outside the boathouse which is also next to the proposed pool and hot tub. K. Turner Testimony. The boathouse as currently proposed would be 22 feet landward of the bulkhead and 12 feet high. Halsan Testimony.

6.

The proposed pier and ramp would be aluminum and the float would be wood. Halsan Testimony. Using aluminum for the pier and ramp allows for fewer pilings. Halsan Testimony. The proposed pier pilings will be steel. Halsan Testimony. The proposed pier is perpendicular to the shoreline. Halsan Testimony. The railing above the pier will be 42 inches high. Halsan Testimony. The bottom of the pier will be one foot above the bulkhead and the railing is three and a half feet above the pier so the pier and railing together will be a total of four and a half feet above the bulkhead. Halsan Testimony.

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7.

The design for the pier-ramp-float includes a pier that is at least 50% grated, a ramp that is 100% grated, and a float that is also 50% grated. Halsan Testimony. Grating is designed to reduce shading to protect fish. Halsan Testimony. In order to avoid the float grounding on the beach, float stops must hold the float at least two feet above the substrate. Halsan Testimony.

8.

Although their tidelands are private, the Turners would continue to allow beach-walking under and around the pier-ramp-float. K. Turner Testimony. Although Ms. Turner testified that beach-walking is not common, a number of neighbors testified they walked the beach regularly. K. Turner Testimony; Baldwin Testimony; N. Simon Testimony. Based on the weight of the evidence, the Board finds that the beach is used regularly for walking.

9.

In order to assess the clearance to walk below the pier, Mr. Turner measured from the bulkhead with a level and determined that at 14 feet from the bulkhead there will be 5 feet of clearance; and at 19'6" from the bulkhead there will be 6 feet of clearance below the pier. C. Turner Testimony. There will be 40 feet between the four sets of supports that hold up the pier. C. Turner Testimony.

10.

The Site

The Turner property experiences significant weather impact. Baerg Testimony. Stormy winter weather tends to come from the south and hits the shore at Point Fosdick. M. Taylor

1 Testimony. At Point Fosdick in front of the Turner property there are turbulent water currents
2 which cause kayaks, paddleboards, and small boats to stay in close to shore. Exs. PT-7-10.
3 Boats also tend to come close to shore at Point Fosdick because there are no hazards like reefs
4 and shoals. T. George Testimony. There are no other docks for over six miles to the east and
5 one mile to the west of the project site. Ex. PBS-8.

6 11.

7 Kayak clubs in groups come by the Point Fosdick area regularly. S. Taylor Testimony;
8 Ex. PT-10. This area is also popular for fishing and boating. T. George Testimony. For
9 example, three dozen boats were out in the Point Fosdick area of Hale Passage when Mr. George
10 was out on the evening of Sunday, June 25, 2017. T. George Testimony. Fishing boats often
11 come in close to shore, even after dark. S. Taylor Testimony; Ex. PT-9. These boats are often
12 coming from the Narrows Bridge probably returning to Wollochet Bay. S. Taylor Testimony.

13 12.

14 **The prior owner and current neighbors**

15 Dr. Baerg owned the property which is now owned by the Turners. He owned the
16 property for 10 years from approximately 2002-2012, and lived there with his three children.
17 The Baerg family walked the beach from Narrows Bridge to Wollochet Bay. The family looked
18 for crabs in front of the Taylors' house in "Crab city." They fished off the bulkhead and off the
19 beach. Dr. Baerg snorkeled occasionally. His kids also went inner tubing, knee-boarding, and
20 kayaking. They had a 40 foot boat on a mooring buoy. Dr. Baerg put a solar navigation light on
21 his boat on the buoy to make sure other boaters could see it. They had a metal bottomed boat

1 that was easy to get kids in and out of off the beach. He also had a rowboat and created a pulley
2 system to bring the boat in to shore. In Dr. Baerg's opinion, a pier was not necessary to access
3 the water at the site. He does not believe that a pier necessarily makes water access safer. A pier
4 could make it dangerous for children falling from height due to the currents. Baerg Testimony.

5 13.

6 Petitioner Gordon Baldwin resides at 26 Point Fosdick Drive NW next door to the
7 Turners to the west. Mr. Baldwin grew up in the house and inherited it in May 2016 from his
8 parents who bought it in 1956. Mr. Baldwin walks the beach. A pier will cause him to turn
9 around or walk in the other direction. He also kayaks in Hale Passage. The pier will require him
10 to head out into the strong currents beyond the pier. Over the years, Mr. Baldwin's family has
11 had boats and launched them from the beach. Baldwin Testimony.

12 14.

13 The proposed pier will be visible from Mr. Baldwin's house. In order to estimate the
14 location of the pier-ramp-float, Mr. Baldwin purchased two ropes measuring a total of 150 feet
15 and extended them out from the Turner bulkhead when the tide was at a minus 1.5 foot tide.
16 Baldwin Testimony; Ex. PT-11. The photograph taken of Mr. Baldwin by Ms. Taylor was used
17 by a professional to do a computer assisted drawing of the project, which is in evidence at Ex.
18 PT-12. S. Taylor Testimony; Ex. PT-12. The professional also used a copy of the site plan that
19 was presented to the County to create the drawing. S. Taylor Testimony. Mr. Baldwin believes
20 that the pier is out of character with the area because it would be the first residential pier.
21 Baldwin Testimony.

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15.

Petitioners Norman and Barbara Simon reside at 30 Point Fosdick Drive NW, two doors to the west of the Turners. They have lived there since 1994. The Simons had a boat and moored it in Gig Harbor. They walk their dog on the beach twice a day sometimes as far as Wollochet Bay and the Narrows Bridge. Mr. Simon is concerned that the pier might trap driftwood debris or be damaged by floating logs or stumps. In the past, pier debris, tree stumps, and even a sailboat have washed up on the beach. N. Simon Testimony. At the site visit, the Board observed a large tree stump which had drifted onto the beach near the Turner property.

16.

Petitioners Mark and Sarah Taylor live at 14 Point Fosdick Drive NW, next door to the Turners to the east. S. Taylor Testimony. They have lived there since 2004. The Taylors own the house directly upland of their house and rent it to the Turners' in-laws, John and Shelly Turner. S. Turner Testimony.

17.

Looking west towards the Turners' property, the Taylors have a view of the Olympic mountain range over the Turner hedge. S. Taylor Testimony; Ex. PT-4. The Taylors have a boardwalk that runs parallel to their bulkhead and extends about 5'10" waterward from their bulkhead along their beachfront. S. Taylor Testimony; Exs. PT-7, 8. The Taylors have a flagstone patio next to their boardwalk where they can sit and enjoy the view. S. Taylor Testimony; Ex. PT-7. Ms. Taylor enjoys conversing with neighbors as they walk the beach past her property. S. Taylor Testimony.

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18.

The neighbors believe a pier will be a barrier for beach-walkers especially when the tide is in. S. Taylor Testimony; J. Bowen Testimony; M. Taylor Testimony. As a result, fewer neighbors may pass by. M. Taylor Testimony. The public can access this beach at several locations. There is public access to the beach from Narrows Park which is approximately ¼ mile from the Turner property. S. Taylor Testimony. The Wollochet Bay boat launch is approximately one mile to the west of the Turner property. S. Taylor Testimony. There is also a public access path between the houses approximately 8-10 houses to the west of the Turner house. S. Taylor Testimony. Local residents who live up the hill behind the beachfront houses especially use this path to access the beach. S. Taylor Testimony.

19.

Mr. Taylor kayaks and paddleboards from his beach. The views of Mt. Rainier and the Olympics are spectacular from the water when kayaking and paddleboarding. When kayaking and paddleboarding, Mr. Taylor normally heads west toward Wollochet Bay and hugs the shore because the currents out further are stronger. The currents start 40-50 feet from the bulkhead. One time he was paddling his kayak back from Fox Island and encountered frighteningly large waves in the middle of Hale Passage. He is concerned about the currents if there is a 150 foot pier in front of the Turner property that he will have to paddle around. At certain tidal levels he will not be able to kayak and paddleboard. M. Taylor Testimony.

1 20.

2 In response to Mr. Taylor's concerns, the Turners have stated that they would allow their
3 neighbors to carry paddleboards past their pier to launch them. K. Turner Testimony.

4 21.

5 Mr. Taylor believes that the proposed pier will be an obstruction to their view. M. Taylor
6 Testimony. If the pier is not visible to boaters, it will be a safety issue for boats especially at
7 night. S. Taylor Testimony; Baerg Testimony. If the pier is lit up for safety, it will be even more
8 visually intrusive. S. Taylor Testimony. Dr. Baerg believes there aren't any other piers in the
9 area because the strength of the currents would require a very stoutly built pier which would be
10 very expensive and would impact neighbors, boaters, and the entire community. Baerg
11 Testimony. The neighbors are concerned that after the first pier is built, other piers may follow.
12 M. Taylor Testimony.

13 22.

14 Alternative moorage options

15 In October 2016, the Turners, through Harbor Point Holdings LLC, purchased a piece of
16 property on the Gig Harbor waterfront. Ex. PBS-1. The location is about a fifteen minute drive
17 from the Turner house at Point Fosdick. C. Turner Testimony. The property includes a house, a
18 net shed, and a pier. C. Turner Testimony; Ex. PBS-6. The Turners purchased the property to
19 acquire local office space. The Turners intend to keep the historic net shed as is. C. Turner
20 Testimony.

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23.

The pier on the purchased property is subleased by two parties who moor their boats there. Ex. PBS-6. One is a commercial fisherman and the other owns a recreational boat located on the pier. The Turners intend to lease the pier space to the current lessees indefinitely although the leases can be terminated on ninety days' notice. C. Turner Testimony. The property also included an aquatic land lease from the Washington Department of Natural Resources which was assigned to Harbor Point Holdings LLC as part of the purchase of the property. C. Turner Testimony; Exs. PBS-2, 3.

24.

Neither the Pierce County Planner nor the County Hearing Examiner were aware of the Turners' Gig Harbor waterfront property purchase at the time of the hearing in November 2016. Carlson Testimony. The County Planner Mojgan Carlson testified to the Board that if she had known the Turners had purchased private moorage in Gig Harbor, she would not have approved a single use pier because their private moorage would be a reasonable alternative to a single use pier. Carlson Testimony.

25.

Before commencing this project, Mr. Turner looked for moorage alternatives in Gig Harbor but concluded that some locations were too far away, some were too expensive, and the time it takes to transport people and gear is inconvenient. C. Turner Testimony.

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26.

Mr. Bowen resides a few houses up the beach to the west of the Turner property. J. Bowen Testimony; Ex. PT-15. Mr. Bowen keeps a boat in Day Island Marina and estimated that it takes 10 minutes to get to Day Island Marina. J. Bowen Testimony. There are also public marinas in Gig Harbor. T. George Testimony. It would take about 25-30 minutes for a boat to travel from Point Fosdick to Gig Harbor. T. George Testimony.

27.

There was a mooring buoy in place when the Turners bought the property. Four years later the mooring buoy was lost in a storm. If a boat is moored out at the buoy each passenger will need to be ferried out to the boat one by one. The Turners rejected that alternative for their family. C. Turner Testimony.

28.

On January 15, 2016, the applicant's agent Carl Halsan sent letters to the neighboring property owners, the Taylors,¹ and Mr. Baldwin, regarding participating in a joint use dock. Ex. RT-3 at Ex. 2E. Neither neighbor was interested. S. Taylor Testimony; Baldwin Testimony.

29.

County's Review and Process

The County Planner reviewed the Turner application, visited the site several times, and then prepared the staff report for the Hearing Examiner. The purpose of the staff report is to set forth the facts of the project and analyze its compliance with the relevant zoning regulations

¹ The Taylors did not receive the letter but testified that they are not interested in a joint pier. S. Taylor Testimony.

1 (PCC Title 18), the GHPCP, Pierce County Shoreline Master Program (SMP), and the Shoreline
2 Management Use Regulations for Pierce County (PCC Title 20). Carlson Testimony; Ex. RT-2.

3 30.

4 The staff report included an analysis of compliance with the GHPCP. Ex. RT-2 at 9. The
5 GHPCP includes policies about how the community should be developed including land use,
6 housing economic development, environmental, and shoreline policies. The GHPCP states that
7 "piers and docks should be permitted in the Rural Residential Environment" and that "joint use
8 of piers and docks" should be required "whenever possible." *Id.*

9 31.

10 The County staff report prepared by Ms. Carlson contained the following
11 recommendation:

12 Staff has reviewed this proposal for compliance with all policies, codes
13 and regulations. The project, as proposed, is out of character with the
14 area; however, it meets all the criteria stated within these regulations. Staff
15 has reservations on construction of the proposed dock at this location since
16 there are no other docks for over 6 miles to the east and west of the project
17 site.

18 Ex. RT-2 at 1.

19 32.

20 Ms. Carlson prepared a map showing the distance to the nearest dock² in each direction.
21 Ex. PBS-8. She also prepared a map showing the properties of the neighbors who sent letters³ to
the County objecting to the proposal. Ex. PBS-7.

² The Point Fosdick vehicle ferry dock was located several lots to the east of the Turner residence and operated until the 1950s. The proposed pier will be the first pier in the area since that ferry dock was in use. C. Turner Testimony.

Ms. Carlson made the following observations in her report.

"[T]his shoreline area is free from docks. A dock structure with a boatlift could result in a permanent view obstruction to all neighboring properties. In addition, during the majority of daily low tides, moorage of a boat will not be feasible because it will ground out. With the aid of the proposed boatlift, vessels will remain in the tidelands and will create a view impact more consistent with storage than moorage. The intent of the code is to protect view aesthetics; therefore staff believes that construction of a permanent dock will change the nature of the shoreline character in this area and would damage the natural landscape of the shoreline." Ex. RT-2 at 10-11.

"[T]he proposed dock, if approved, will change the structure free character of the shoreline in this area. Ex. RT-2 at 12.

[T]he immediate surrounding properties are not considered high bank waterfront sites and as such if the dock is approved, it will be the only dock in the immediate vicinity of the site that will be highly visible to the neighboring properties. Therefore, staff believes that construction of a permanent dock will permanently create a view obstruction to adjacent residences as well as public view and enjoyment of a natural shoreline area." Ex. RT-2 at 12.

Ms. Carlson analyzed impacts on navigation. In order to determine if important navigation routes are affected by a proposal, the fetch⁴ is calculated. Carlson Testimony. The fetch in this area is 4,908 feet across to Fox Island. The proposed pier will be approximately 3% of the fetch. Carlson Testimony; Ex. RT-2 at 4. Although fetch is the main criteria used by staff

³ By the date of the hearing before the Hearing Examiner more than fifty members of the public had sent letters opposing the proposal. Carlson Testimony. All the letters were submitted to the Hearing Examiner. Carlson Testimony.

⁴ Fetch is the horizontal distance across a body of water measured in a straight line from the most seaward point along the ordinary high water line or lawfully established bulkhead on a given stretch of shoreline to the closest point on the ordinary high water line or lawfully established bulkhead on the opposite shoreline. PCC 20.56.010(G).

1 to determine whether navigation is affected, they also look at activity in the area. Carlson
2 Testimony.

3 35.

4 Ms. Carlson noted in her report the impacts to marine oriented recreation from the
5 proposed pier. She states:

6 "[M]arine oriented recreation will incur an impact as the approval of the
7 dock could result in rowers/kayakers and swimmers traveling further into
8 deeper open waters of Hale Passage to navigate around the extreme
9 waterward end of the float. In addition, if approved, it will create a
10 perception to a beach walker that beach access is limited in this area. Ex.
11 RT-2 at 12.

12 36.

13 Pierce County conducted a State Environmental Policy Act (SEPA) review for the
14 project. On August 29, 2016, Pierce County issued a Determination of Nonsignificance (DNS).
15 Carlson Testimony; Ex. RT-4 at Ex. 3B. The DNS was not appealed. Carlson Testimony; Ex.
16 RT-1 at 6X.

17 37.

18 The Gig Harbor Peninsula Advisory Council (PAC) considered the proposal at its
19 regularly scheduled meeting on November 18, 2015, and approved the proposal. Ex. RT-2 at 7.
20 The PAC advises Pierce County officials including the Hearing Examiner and the Pierce County
21 Planning and Land Services on land use matters within defined geographic areas. PCC 2.45.010.
The PAC recommended approval of the project, although it expressed concerns including
concerns about cumulative effects of the dock in this area. Ex. RT-2 at 7.

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2 The County's decision on the SSDP and SCUP was made by the Hearing Examiner
3 following a hearing on November 2, 2015. Ex. RT-1. The Hearing Examiner conditionally
4 approved the Turners' application for an SSDP to construct the dock, swimming pool, and hot
5 tub and partially approved their application for a SCUP. Ex. RT-1 at 16X-19X. The Hearing
6 Examiner approved the SCUP to build the boatlift at the end of the dock but denied the SCUP to
7 build the boathouse on the grounds that the boathouse did not meet the definition of boathouse
8 and was not a water dependent use. Ex. RT-1 at 8X.

9
10 Ecology's review

11 Ecology reviews shoreline conditional use permits granted by local governments. Mraz
12 Testimony. Ecology Wetlands and Shoreline Specialist Rick Mraz reviewed the SCUP for the
13 Turner boatlift and prepared a staff report to his supervisor, Perry Lund. Mraz Testimony; Ex.
14 E-3. Ecology reviews the county decision and determines whether it complies with the relevant
15 code provisions. Mraz Testimony. Because the boatlift is attached to the pier-ramp-float, the
16 review was limited to the effect of the boatlift on the pier's normal use which Ecology concluded
17 would be de minimus. Mraz Testimony; Ex. E-3. Ecology recommended the project be
18 approved subject to the conditions set forth by Pierce County. Ex. E-3. Ecology did not review
19 the SCUP for the boathouse because Pierce County had denied that permit. Mraz Testimony;
20 RCW 90.58.140(1). Ecology did not review the County's decision to grant the pier-ramp-float,
21 nor did it take a position on the County's decision. This portion of the project is subject to an

1 SSDP which is issued by the local government without Ecology review. Mraz Testimony; RCW
2 90.58.140(2).

3 40.

4 Applicants' proposed changes to the boathouse location

5 The original proposed location of the boathouse was five feet from the bulkhead. The
6 Turners revised the proposal to locate the boathouse 22 feet back from the bulkhead as an
7 attempt to address the Taylors' concerns about view impacts. Halsan Testimony. The proposal
8 before this Board was submitted after the County Planner had completed her review and after the
9 hearing before the Hearing Examiner. Carlson Testimony. Therefore, the county staff report did
10 not address the view impact of the proposal. Carlson Testimony. After participating in the site
11 visit with the Board, Ms. Carlson concluded the Taylors' view is impacted by the proposed
12 boathouse at 22 feet back from the bulkhead. Carlson Testimony.

13 41.

14 In order to demonstrate the effect of a boathouse on their view, the Taylors placed a 14
15 foot paddleboard 22 feet back from the bulkhead with a two foot paper at the top of the
16 paddleboard to estimate the 12 foot height proposal for the boathouse. Exs. PT-2-6. The
17 photograph of the view with the paddleboard illustrates how the Taylors' entire Olympic
18 mountain view would be lost if the Turners erected a boathouse in that location. Exs. PT-6; PT-
19 13.

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42.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based upon the foregoing Findings of Fact, the Board enters the following:

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the subject matter of this case pursuant to RCW 90.58.180(1). Both the scope and standard of review for this matter is *de novo*. WAC 461-08-500(1). The Board has jurisdiction to determine whether a permit issued by the Hearing Examiner complies with the Shoreline Management Act (SMA) and the SMP. WAC 461-08-335(1); WAC 461-08-505(1).

2.

The Baldwin/Simons and the Taylors have the burden to establish that the permit approval for the pier-ramp-float and boatlift is inconsistent with the requirements of the SMA or SMP. RCW 90.58.140(7); WAC 461-08-500(3).

3.

The Turners have the burden to establish that the boathouse permit that was denied is consistent with the requirements of the SMA or SMP. RCW 90.58.140(7); WAC 461-08-500(3).

4.

The following issues were identified by the parties in the Prehearing Order for resolution at hearing:

- 1. Whether the Turners' proposal for a single use, 150-foot pier-ramp-float complies with applicable provisions of the Shoreline Management Act, the

1 Pierce County Shoreline Master Program, and the permit criteria as set
2 forth in PCC 20.56.040(A) so as to qualify for a shoreline substantial
development permit?

- 3 2. Whether the Turners' proposal for a boatlift complies with applicable
4 provisions of the Shoreline Management Act, WAC 173-27-160, the
5 Pierce County Shoreline Master Program, and the applicable criteria in the
6 Pierce County Shoreline Management Use Regulations, including PCC
7 20.62.050(2) and PCC 20.72.030, so as to qualify for a shoreline
8 conditional use permit?
- 9 3. Whether the Turners' applications for a single use, 150-foot pier-ramp-
10 float and boatlift should be denied based upon cumulative impacts?
- 11 4. Whether the Turners' proposal for a 192-square foot boat house complies
12 with applicable provisions of the Shoreline Management Act, WAC 173-
13 27-160, the Pierce County Shoreline Master Program, and the applicable
14 criteria in the Pierce County Shoreline Management Use Regulations,
15 including PCC 20.62.050(2) and PCC 20.72.030, so as to qualify for a
16 shoreline conditional use permit?

17 5.

18 **Compliance with SMA and SMP for Pier-Ramp-Float (Issue 1)**

19 "The policy of the SMA was based upon the recognition that shorelines are fragile and
20 that the increasing pressure of additional uses being placed on them necessitated increased
21 coordination in their management and development." *Buechel v. State Dep't of Ecology*, 125
Wn.2d 196, 203, 884 P.2d 910, 915 (1994). "The SMA does not prohibit development of the
state's shorelines, but calls instead for 'coordinated planning ... recognizing and protecting
private property rights consistent with the public interest,' " (quoting RCW 90.58.020). *Samson*
v. City of Bainbridge Island, 149 Wn. App. 33, 46, 202 P.3d 334, 341 (2009)(citations deleted).

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6.

The Turners argue that their proposal involves a preferred use under the policies of the SMA. They base this argument on language in RCW 90.58.020 which provides that, in instances where alterations to the natural shoreline are authorized, priority shall be given to:

single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

RCW 90.58.020. This argument has already been rejected by the Washington Courts.

Samson v. City of Bainbridge Island, 149 Wn. App. at 50-1. In *Samson*, the Court noted that:

[T]he reference in RCW 90.58.020, to single-family residential uses and their appurtenant structures, does not specifically list docks or piers. Piers are listed however, as a preferred use, under improvements which facilitate public access to the state's shorelines. We conclude that the Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would limit public access in, rather than promote public access to the waters of the state.

Id. at 50, 51.

7.

The Board concludes that the Turners proposed private single use dock is not a preferred use of the shoreline under the SMA.

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8.

Pierce County, through its SMP, has explained that "It is the intent of Pierce County to encourage the construction of joint use or community use docks and piers whenever feasible so as to lessen the number of structures projecting into the water." PCC 20.56.020. Pierce County allows piers and docks of the size and cost of the Turners' proposed dock, only if they meet the requirements for an SSDP. PCC 20.56.030(B). In Pierce County, an SSDP may be granted only if the proposed development is consistent with the policies of the SMP and with the criteria set forth in PCC 20.56.040. PCC 20.56.040(A). Here the relevant SMP is the Pierce County SMP passed in 1974⁵.

9.

The SMP policies applicable to piers are set out in the SMP Phase I, Goals and Policies, § 5 T, subsections (a)-(o)(SMP Piers Policies). The Turners argue that the SMP Piers Policies do not have separate regulatory effect, and instead are implemented through the promulgated criteria. As support for this argument, they point to PCC 20.20.010, which states:

The use activity regulations are a means of implementing the more general policies of Phase I of the Master Program and the Shoreline Management Act.

PCC 20.20.010 goes on to state, however, that:

Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the use activity regulations *as well as the goals and policies of Phase I of the Master Program.* (emphasis added)

⁵ Pierce County has passed a new SMP but Ecology has not yet approved it.

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10.

This language, coupled with the clear statement in PCC 20.56.040A mandating consistency with the policies of the SMP, require that the Board give consideration to consistency with the policies as they have been implemented through the use activity regulations.

11.

The Petitioners argue that the SSDP at issue is inconsistent with SMP Piers Policies (d), (e), and (f). They also argue that the SSDP is inconsistent with regulations PCC 20.56.040.A.1 through A.5 and A.7.

12.

SMP Piers Policy (d) provides that “[p]iers associated with single family residences should be discouraged.” Policy (f) provides that the County will “[e]ncourage the use of mooring buoys as an alternative to space consuming piers such as those in front of single family residences.” These policies have been implemented through PCC 20.56.040A.5, which provides 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.”

13.

The Turners did make an attempt to enter into a joint use dock arrangement with both of their neighbors, which was rejected. The Board concludes that this attempt is sufficient to establish that a joint use dock is not an available option for the Turners at this time. However, even though a joint use dock is not an available option, the Board concludes that other reasonable moorage alternatives exist for the Turners.

1
2 The Turners currently own property on the Gig Harbor waterfront that includes private
3 moorage.⁶ The Turners contend this moorage is not a reasonable alternative because the two
4 berths at their pier are currently leased to others and expanding the facility would take time and
5 money. C. Turner Testimony. The Board is not persuaded by this argument. The Turners have
6 not presented any persuasive reason why they could not choose to change their leasing
7 arrangements and moor their own boat at their Gig Harbor waterfront pier if they chose to do so.
8 Mr. Turner testified that the leases could be terminated upon 90 days' notice. C. Turner
9 Testimony. When the Turners purchase a boat, if they wish to continue to allow their tenants to
10 use their Gig Harbor moorage, they can moor their boat at a nearby marina like some of their
11 other neighbors. Bowen Testimony; N. Simon Testimony. Alternatively, the Turners could
12 moor their boat at a mooring buoy like Dr. Baerg, the previous owner of the property. Baerg
13 Testimony. The Board concludes that a mooring buoy is a workable alternative for this shoreline
14 property. The previous owner of the Turner property testified that he was able to use a mooring
15 buoy for his boats in Hale Passage. Baerg Testimony.

17 Here, the Board concludes that a number of reasonable moorage alternatives to a single
18 use pier do exist even if the Turners find them less convenient. Therefore, the Turners' proposed
19 single use pier is inconsistent with PCC 20.56.040A.5.

20
21 ⁶ Pierce County Planner Carlson testified to the Board that had she been aware of the Turners' ownership of this property before she issued her staff report she would have concluded that a reasonable moorage alternative did exist. Carlson Testimony.

16.

Piers Policy (e) provides that "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." Policy (e) is related to implementing regulations PCC 20.56.040 A. 1, 2, 3, 4 and 7. These regulations provide that:

1. Important navigational routes or marine oriented recreation areas will not be obstructed or impaired;
2. Views from surrounding properties will not be unduly impaired;
3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
4. Public use of the surface waters below ordinary high water shall not be unduly impaired;
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.

17.

As to the first part of the first regulatory criteria, important navigational routes, the Board concludes that, due to the almost 5,000 foot long fetch at the site, these routes will not be obstructed or impaired. Ex. RT-2 at 12. However, the Board concludes that the second part of the first criteria, marine oriented recreation areas, will be obstructed and impaired by the proposed project. Swimmers, paddleboarders, and kayakers will be required to either go around or under the pier depending upon the level of the tide. The currents in Hale Passage are stronger further from shore and can be frightening even for experienced kayakers. M. Taylor Testimony. Fishing and other boats currently come close into the shore as they round the point and they will have to avoid the pier. Ex. PT-9. After decades without any piers on this shoreline, it would be

1 a safety hazard for boaters who are not expecting to find a pier 150 feet out from the shore. The
2 Board notes that this criteria does not require that the impairment be undue; the question is
3 simply whether marine oriented recreation areas will "be obstructed or impaired." PCC
4 20.56.040A.1. The Board concludes that the pier will obstruct or impair marine oriented
5 recreation.

6 18.

7 As to the second criteria, whether views from surrounding properties will be unduly
8 impaired, the Board concludes that views from the surrounding properties will be impaired but
9 not unduly. The pier-ramp-float would certainly be a structure in the otherwise structure free
10 views from nearby neighbors' properties and residences. However, the pier-ramp-float would
11 not completely block any views. If it is illuminated at night or somehow designed to be more
12 visible, it could increase the obstruction of the neighbors' views.

13 19.

14 As to the third criteria, undue impairment or restriction on ingress and egress, and use
15 and enjoyment of the water or beach by adjoining properties, the Board concludes there would be
16 restriction and impairment by the need to avoid the 150 foot pier but the restriction and
17 impairment would not be undue. Neighbors who enjoy beach walking would need to either duck
18 under or walk around the pier depending upon the water level. Neighbors who swim,
19 paddleboard, or kayak would need to go out into the strong current or pass under the pier to
20 access the water.

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20.

As to the fourth criteria, undue impairment of the public's use of waters below ordinary high water, the Board concludes that public use of the surface waters below ordinary high water would be impaired by the need to avoid the pier when swimming, paddleboarding, kayaking, or boating but the impairment would not be undue.

21.

As to the seventh criteria, whether the intensity of the use is compatible with the surrounding land and water uses, the Board has already found that this beach is regularly used by the public for walking. There is currently a seven mile stretch of beach that is unimpaired with piers and provides the public with an excellent place to enjoy a long walk on the beach with beautiful views of the water, the Olympics, and Mount Rainier. Furthermore, the near shore water in this area is heavily used for boating, kayaking, and paddleboarding. The proposed pier would present an impediment to all of these public uses.

22.

Based on Piers Policy (e), the Board also interprets PCC 20.56.040.A.7 as addressing existing pier density. Here, there are no piers on a seven mile stretch of shoreline that is used by the public.

23.

The Turners argue based on *May v. Robertson*, 153 Wn. App. 57, 218 P.3d. 211 (2009), that their proposed pier cannot be denied merely because it will be the first pier in the area and it will therefore change the visual effect of the shoreline. Turner Prehearing Brief, p. 7. The *May*

1 decision, however, does not support the Turners' application. One key distinction between the
2 pier at issue in *May* and the Turners' proposed pier, is that the pier in *May* was a joint use pier.
3 The *May* Court, in reaching its decision, relied heavily on this fact coupled with the Pierce
4 County policies that strongly encourage joint use facilities. 153 Wn. App at 80-87.
5 Furthermore, because it was a joint use dock, it was not necessary for the applicant to consider
6 reasonable alternatives.

7 24.

8 The dock at issue here, in contrast, is a single use facility. While the Turners attempted
9 unsuccessfully to engage their neighbors in a joint use dock, this does not excuse them from the
10 requirement to consider the availability of other alternatives. The Board has already concluded
11 that other reasonable alternatives to a single use pier are available.

12 25.

13 Another significant difference between this situation and the *May* case is that the
14 proposed pier will have more impact than just the visual one of being the only pier within a
15 seven mile stretch of beach.⁷ Due to its proposed location protruding 150 feet out on the very
16 point of the Peninsula, and the heavy use by fishing boats, kayakers, and paddleboards that hug
17 the shoreline to avoid the turbulent waters further out from the point, the Board has concluded
18 that this proposed pier will interfere with marine oriented near shore recreation. Furthermore,
19 the pier will interfere with the use of this seven mile stretch of pier free beach by walkers.
20 Unlike in *May*, where the Court observed that "the joint-use pier would not conflict with the

21 ⁷ In *May*, the Court noted that "[T]hree 50-foot piers and one 150-foot pier are visible on either side of this beach..."
153 Wn. App at 63.

1 area's Rural Residential Environment shoreline designation or the area's existing land and water
2 activities" this single use pier, given its location on the very point of the Peninsula, would create
3 such a conflict. *May*, 153 Wn. App at 87.

4 26.

5 In summary, the Board concludes that the pier-ramp-float is inconsistent with the SMP
6 policies on piers and fails to satisfy PCC 20.56.040A.1 and A.7. As a result, the Hearing
7 Examiner's decision should be reversed and the SSDP should be denied.

8 27.

9 **Boatlift (Issue 2)**

10 The Turner's proposal to the County included a 20 by 10 foot boatlift attached to a pier-
11 ramp-float. Because the Board is denying the SSDP for the pier-ramp-float, the boatlift as
12 applied for is no longer feasible. There was no evidence presented of a project with the boatlift
13 not attached to a pier-ramp-float and therefore the Board does not further analyze the boatlift
14 separately.

15 28.

16 **Cumulative Impacts (Issue 3)**

17 Petitioners Baldwin/Simon argue that the cumulative impacts of approval of the Turner
18 project require denial of the application. The Board has held in past cases that it may consider
19 cumulative impacts resulting from the approval of an SSDP pursuant to the SMA and local SMP,
20 separate from SEPA. *Garrison v. Pierce County (De Tienne)*, SHB 13-016c at 53 (January 22,

1 2014), affirmed, *De Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248 (2016). In the
2 *Garrison* decision, the Board stated:

3 The Supreme Court has, in fact, recognized that approval of one project can
4 set a precedent for others to follow, and that it is proper for the Board to
5 consider cumulative impacts that might occur from the granting a substantial
6 development permit. *Id.*, citing *Skagit County v. Department of Ecology*, 93
7 Wn.2d 742, 750, 613 P.2d 121 (1980).

8 *Garrison*, at 53-54.

9 29,

10 The factors the Board weighs in considering whether a cumulative impacts analysis is
11 required for an SSDP are listed below:

- 12 1. Whether a shoreline of statewide significance is involved;
- 13 2. Whether there is potential harm to habitat, loss of community use, or a
14 significant degradation of views and aesthetic values;
- 15 3. Whether a project would be a "first of its kind" in the area;
- 16 4. Whether there is some indication of additional applications for similar
17 activities in the area;
- 18 5. Whether the local SMP requires a cumulative impacts analysis be
19 completed prior to the approval of an SSDP;
- 20 6. The type of use being proposed, and whether it is a favored or disfavored
21 use.

22 *Garrison*, SHB 13-016 at 54-55.

30.

31 The Turners' proposed single use pier-ramp-float is a disfavored use under the SMP. The
32 150 foot pier-ramp-float would be the first of its kind in this seven mile stretch of beach.
33 Allowing the first pier would set a precedent for allowing other similarly large piers in this area.
34 The cumulative impacts of this pier, and future piers, would degrade aesthetic values. There
35 would be a loss of community uses. Beach-walkers would be obstructed and marine recreation

1 would be affected. Kayakers, paddleboarders, and small fishing boats would be forced to go
2 further off shore into the turbulent waters of Hale Passage. The views of the public walking on
3 the beach or using the water in this area, and the views of all of the neighbors including those up
4 the hill above the project would be impacted. The Board concludes that approval of this SSDP
5 for a single use pier-ramp-float in this location would likely have cumulative impacts.

6 31.

7 **Boathouse Compliance with SMA, SMP, and Regulations (Issue 4)**

8 The Turners argue that the boathouse SCUP was unreasonably denied. The SMP defines
9 "Boathouse" as "A covered or enclosed moorage space." PCC 20.04.030. As the Hearing
10 Examiner noted:

11 The proposed boathouse does not fit the definition of a boathouse because
12 moorage is not possible. Making it further unlikely that the boathouse will
13 ever be used for moorage is the fact that the applicant is asking for a 20 by
14 ten boatlift presumably for mooring a boat.

15 Ex. RT-1 at 8X.

16 32.

17 The Turners testified that they would use the boathouse to store their kayak,
18 paddleboard, fishing equipment, lifejackets, etc. A boathouse is not necessary in order to
19 have a kayak or paddleboard available for use. Neighbors store their kayaks and
20 paddleboards on their property or in the garage. S. Taylor Testimony. The proposed
21 boathouse is adjacent to the proposed pool and hot tub, suggesting that it will be as
equally used to store pool toys as it is used to store kayaks and paddleboards.⁸

⁸ The Turners' application stated that "the boathouse is for storing water toys and equipment." RT-3, §6b.

The criteria for a conditional use permit for an accessory use within the 50-foot setback is set forth in PCC 20.62.050D.2 which provides:

Any water dependent accessory use may be allowed within the 50 foot setback upon the issuance of a Conditional Use Permit. The issuance of a Conditional Use Permit shall be predicated upon a determination that the project will be consistent with the following Conditional Use criteria and the Conditional Use criteria in WAC 173-14-140⁹ and will cause no reasonable adverse effects on the environment and other uses.

Conditional Use Criteria:

- a. Views from surrounding properties will not be unduly impaired.
- b. Adequate separation will be maintained between the structure and the adjacent properties and structures.
- c. Screening and/or vegetation will be provided to the extent necessary to insure aesthetic quality.
- d. Design and construction materials shall be chosen so as to blend with the surrounding environment.
- e. No additional harm to the aquatic environment will result from the reduced setback.

PCC 20.72.030 adds additional requirements for conditional uses including "that there is some necessity for a shoreline site for the proposed use or that the particular site applied for is essential for this use."

The Board concludes that the Turners have failed to demonstrate that the boathouse is a water dependent use¹⁰. Water dependent uses are defined as "[a]ll uses

⁹ WAC 173-14-140 was repealed October 31, 1996.

¹⁰ The Turners argue that the boathouse need not be a water dependent use citing PCC 20.62.030A1-5. However, because the boathouse is proposed to be within the 50 foot setback from the ordinary high water

1 which cannot exist in any other location and are dependent on the water by reason of the
2 intrinsic nature of the operation.2" PCC 20.04.670. Because this structure is not planned
3 to be used for boat moorage it does not need to be within the setback from the bulkhead
4 or even in a shoreline location.

5 36.

6 The Turners also failed to demonstrate the boathouse would not unduly impair neighbors'
7 views. As demonstrated by the Taylors in a series of photographs, a 12 foot high boathouse 22
8 feet back from the bulkhead would completely eliminate their view of the Olympic Mountains
9 from inside their house. S. Taylor Testimony; Exs. PT 2-6, 13. The Board concludes this
10 impairment of the Taylors' view to be undue.¹¹

11 37.

12 The Board concludes that a location within the setback from the bulkhead or even a
13 shoreline site is not necessary for kayak and paddleboard storage. The Hearing Examiner
14 correctly denied the SCUP for the boathouse.

15 38.

16 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based
17 upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:
18
19
20

21 line, it can be permitted only through the issuance of an SCUP, and only if it is a water dependent
accessory use. PCC 20.62.050 D.1, D.2.

¹¹ The County Planner agrees with this conclusion. Carlson Testimony.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER
SHB No. 17-005c

32.

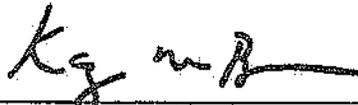
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ORDER

The decision of the Pierce County Hearing Examiner on Shoreline Substantial Development Permit and Shoreline Conditional Use Permit SD/CP21-15 Application Numbers 813160, 813158, and 813162 is REVERSED in part and AFFIRMED in part. The SSDP for the pier-ramp-float is denied and the SCUP for the boatlift is denied. The SCUP for the boathouse is denied.

SO ORDERED this 1st day of September, 2017.

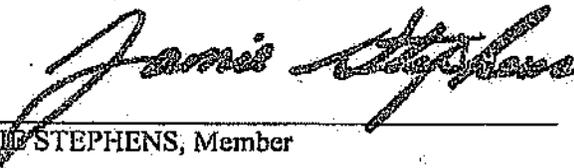
SHORELINES HEARINGS BOARD



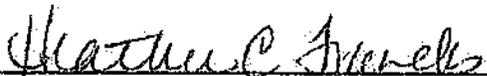
KAY M. BROWN, Member



JENNIFER GREGERSON, Member



JAMIE STEPHENS, Member



HEATHER C. FRANCKS, Presiding
Administrative Appeals Judge

APPENDIX A-2

8.88.151 Speed Limits – Salt Water.

It shall be unlawful to operate a vessel at a rate of speed greater than will permit the operator in the exercise of reasonable care to bring the vessel to a stop within the assured clear distance ahead; provided, however, it shall be unlawful to operate vessels in excess of five miles per hour, or at a speed which produces a damaging wake, within 200 feet of any shore, dock or public swim area, or within 100 feet of swimmers or of any vessel, or within 300 feet of any public boat launch.

A violation of this Section constitutes a Class 4 civil infraction under Chapter 1.16 PCC.

(Ord. 2001-68 § 1 (part), 2001; Ord. 96-89 § 3, 1997).

DENNIS REYNOLDS LAW OFFICE

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