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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' REPLY BRIEF

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I. REPLY INTRODUCTION

The decision of the Shoreline Hearings Board (“SHB” or “Board”)¹ to deny a proposed dock and water-dependent accessory boathouse is unsupportable. In each of the Respondent Briefs, opponents of Craig and Kelley Turner’s (the “Turners”) proposal merely repeat the erroneous conclusions of the SHB and ask this Court to defer and affirm. But one of the most important roles of the Court is to protect citizens of the state from actions of governmental agencies that – as here – go beyond application of the law to the facts and attempt to create new shoreline public policy inconsistent with the terms and purpose of the Shoreline Management Act (“SMA”) and local code. *See* RCW 34.05.570(3).

There is no dispute that the proposed dock meets all design standards and is available to be shared by another property owner if adequate arrangement is made. Nor is there any dispute that the Point Fosdick area where the Turners and Respondents Taylor, Baldwin and Simon live is highly developed with residences and bulkheads; it is not “pristine,” and untouched.² While the Turners were forced to file an application for a single-use dock because the neighbors refused a joint-use

¹ CP 565-98.

² Regardless of whether there are any other docks in the area, the proposal does not “radically alter” the shoreline as suggested by Respondent Taylor at p. 3 of their brief.

proposal,³ the Board effectively granted the neighbors the right 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 application reads the concept of joint-use out of the process, thus failing to implement the very policy the Board was required to consider and apply.⁴

While Respondents argue the decision is supported by substantial evidence, they ignore that the SHB incorrectly applied the law to the facts as found.⁵ The Turners do not merely “disagree” with the Board; they object to the SHB’s creation of new policy and its application of standards that were not adopted by the legislative authority. This constitutes an usurpation by a quasi-judicial agency of legislative authority.⁶ There is

³ Respondent Taylor claims that the Turners believe “socializing” and “entertaining” elevate their proposal to one of joint-use. Taylor Br. at p. 19. This ignores the offer, which remains standing, for any neighbor to share in use of the dock.

⁴ This is not the circumstance where joint-use docks exist and are available, and the Turners have decided they would rather have a single-use dock. The Turners have argued their dock is available for joint use and that they have made efforts to include neighbors in the proposal. The refusal of the offer to jointly use the dock should not be treated the same as the situation in which an applicant desires a dock for their own, solitary use.

⁵ The Turners do not concede that any of the Board’s findings of fact to which they assigned error are correct.

⁶ The test of what is a legislative vs. administrative is whether the proposition is one to make new law or to execute law already in existence. 2 E. McQuillin, Municipal Corporations § 10.06 (3d rev.ed.1979). Power is legislative if it prescribes a new policy or plan. It is administrative if it merely pursues a plan already adopted by the legislative body itself. *See Durocher v. King Cy.*, 80 Wn..2d 139, 152-53, 492 P.2d 547 (1972).

neither a ban on “first docks” nor a requirement of “no impact” that applies to docks. *See* PCC 20.56.030(D).⁷

The Pierce County Shoreline Master Program must comply with the Shoreline Management Act (“SMA”) and can only be construed in a manner that advances the policies and purposes of the Act. *See Olympic Stewardship Found. v. Environmental & Land Use Hearings Office*, 199 Wn. App. 668, 715, 399 P.3d 562 (2017). Finally, the Board’s exercise of “discretion” constitutes arbitrary and capricious decision-making based primarily – if not solely – on neighborhood opposition, contrary to well-established case law. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995); *Parkridge v. Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978); *Maranatha Mining, Inc. v. Pierce Cy.*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990); *Kenart & Assocs. v. Skagit Cy. Com'rs*, 37 Wn. App. 295, 303, 680 P.2d 439, *rev. denied*, 101 Wn.2d 1021 (1984). This arbitrary action further deprives the Turners of constitutionally protected due process rights. RCW 34.05.570(3)(a).

For all of these reasons, the decision of the SHB must be reversed and remanded with directions to issue the requested permits.

⁷ As noted in *Anderson v. City of Issaquah*, 70 Wn.App. 64, 79-80, 851 P.2d 744 (1993), an administrative agency acting in the absence of clear legislative guidelines may not arbitrarily impose vague, unarticulated and unpublished standards upon the public.

II. ARGUMENT

A. A Deferential Standard of Review Does Not Require the Court to Affirm the SHB's Decision on Appeal.

Respondents argue that deference is due to the SHB and that the Court cannot “re-weigh” evidence. First, a deferential standard of review does not require the Court to affirm the SHB’s decision, where deference is not due. *See, e.g., Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589, 870 P.2d 987, *rev. denied*, 124 Wn.2d 1029, 883 P.2d 326 (1994).⁸ *Samson v. Bainbridge Island*, 149 Wn. App. 33, 43, 202 P.2d 334 (2009), holds that deference is not due where “the agency’s regulatory interpretation conflicts with the legislature’s intent or exceeds agency’s authority.” This is the case here.

Second, the Turners do not request the Court to “reweigh” the evidence or substitute its judgment for that of the Board. The SHB made no direct findings that any witness was, or was not, credible. There is no “contradictory” evidence on which the Board relied in reversing the County Hearing Examiner. *C.f. Rios v. Washington Dep’t of Labor and Indus.*, 145 Wn.2d 483, 504, 309 P.3d 961 (2002). Respondents fail to note that, for mixed questions of law and fact, the court interprets the law

⁸ It is irrelevant for purposes of this Court’s review that the SHB conducted a two-plus day hearing and heard from a number of witnesses; that the SHB’s decision was unanimous does not grant it any more weight under the law. Respondents cite no authority to support any of these propositions.

de novo and then applies the law to the facts as found by the agency. *Puget Sound Water Quality Defense v. Municipality of Metropolitan Seattle*, 59 Wn. App. 613, 617, 800 P.2d 987 (1994) (citing *Henson v. Employment Security Dept.*, 113 Wn.2d 374, 377, 779 P.2d 715 (1989)).

This case boils down to the SHB's interpretation of the law and its application to the facts, not disputed facts *per se*. The Court considers the same, undisputed evidence and substitute its judgment for that of the Board, which it is permitted to do in a *de novo* review. *Water Quality Defense Fund, supra*, 59 Wn. App. at 617. The uncontested facts on which the parties agree can only support a conclusion that the proposal meets all required standards and that the SHB's decision to the contrary is error.

B. The SHB Did Not Recognize Shoreline Management Act Preference for Water-Dependent Access Facilities by Treating a Dock as a Disfavored Use.

The Turners seek no special treatment, nor claim exemption from permitting requirements. They seek to build a dock, which is a common structure embraced by the SMA. Respondents cannot refute the fact that that docks allow and encourage use and enjoyment of the beaches and the waters of the State.⁹ The SHB's prejudice against docks runs counter to

⁹ The Turners claim that docks are only appropriate shoreline structures for access to watercraft, citing WAC 173-26-231(3)(b). Turner Br. at p. 31. This appears to be an indirect challenge to an unappealed finding of the Board, that the proposed dock (and contemplated uses) is water-dependent, which must be disregarded by the Court. There is

one of the primary purposes of the Act recognized by the Washington Supreme Court: “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 Wn.2d 683, 169 P.3d 14 (2007); WAC 173-26-231(3)(b); *see also* PCC 20.56.040(A)(6) (“The use or uses of any proposed dock, pier or flat requires, by common and accepted practice, a shoreline location to function”).¹⁰

The Act requires a balance between shoreline protection and use. *Buechel v. State Department of Ecology*, 115 Wn.2d 196, 203, 884 P.2d 910 (1994). Docks are “reasonable uses” because they are water-dependent and promote recreation and access to the waters of the State. PCC 20.56.040(A)(6); WAC 173-26-020(39); WAC 173-26-201(d). Ecology’s witness testified there are no local or state regulations prohibiting docks. TR 228:2-9 (CP 1153). The SMA is controlling, *e.g.* *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 392, 258 P.3d 36 (2011).

nothing in the Code that requires a dock to be restricted to use for moorage; to suggest otherwise is absurd.

¹⁰ Respondents do not address the fact that facilitating family recreation is of substantial public importance, as established in RCW 79.105.430 (an abutting residential owner on state-owned shorelands may install and maintain a dock if used exclusively for private recreational purposes, subject to regulations governing location, design, construction, size and length of the dock); *see also* *Caminiti v. Boyle*, 107 Wn.2d 662, 673-74, 732 P.2d 689 (1987).

Respondents claim that docks are not entitled to any particular preference as a shoreline use, citing *Samson v. City of Bainbridge Island*, 149 Wn.App. 33, 202 P.3d 334 (2009). The case does not stand for that proposition, which runs contrary to the plain language of RCW 90.58.020, according water-dependent uses preference under state law, “[t]o 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 shoreland **shall be allowed** ... [for] Permitted Uses.” (emphasis added). The Taylors claim that the SHB is required to give consideration to both the private property owner and the public (Taylor Br. at p. 19); this is correct, but the Board ignored the **Turners’** rights, believing them to be claiming a special privilege, while elevating the concerns of the neighbors, tipping the “balance” in a manner contrary to law. *Buechel, supra*, 125 Wn.2d at 205.

It was error for the Board to view the Turners’ proposal as “disfavored” in the shoreline environment. Respondents, like the Board, view the application as though it sought a special privilege - rather than a permissible use. This approach ignores the underpinnings of the SMA and undermines the fairness and predictability that is required of land use permitting processes in the Growth Management Act, RCW 36.70A.020(7), and the Project Review Act, RCW Chapter 36.70B.

C. The Shoreline Master Program and County Code Do Not Require “No Impacts” or Prohibit Docks in a Dock-Free Area and Do Not Mandate Use of Buoys.

The SHB created new law by imposing a “no impact” standard, a prohibition of docks in “dock-free” areas, and requiring use of a buoy as a “reasonable alternative.” Respondents argue that use of a dock is either “imprudent” during winter or somehow precluded during summer because it will go “dry.” *E.g.*, Taylor Br. at 8. None of these bases for denial are required as standards. The SHB’s decision is not supported by any reasonable interpretation of Code requirements. Master Programs can only be construed to implement SMA policies – not change those policies and/or effectively prohibit uses encouraged by the Act. The Turners are not challenging the SMP, only the SHB’s interpretation in a manner that is inconsistent with state law.¹¹

The general pier policies are implemented through the use regulations, which permit a dock subject to certain criteria, which control. *See City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 391, 93 P.3d 176 (2004). Respondents admit that SMPs must implement the SMA. Here, use of terms such as “encourage” or “discourage” guide the adoption of

¹¹ The Turners have noted the Board’s findings that the proposed use will not unduly impair views, obstruct important navigational routes, or impair the public’s use of surface waters below ordinary high water, but they have not asserted that compliance with these factors in PCC 20.56.040(A) are a basis to ignore other approval criteria.

the criteria set forth in PCC 20.56.040(A)(1)-(7), and do not direct any specific outcome. Even if Respondents' arguments are accepted as true – that the pier policies have regulatory effect (e.g. Turner Br. at p. 22), those policies merely state considerations, using the terms “encourage” and “discourage,” qualified by “should,” rather than “shall.” CP 537-39

1. Obstruction or Impairment of Marine-Oriented Recreational Areas Is Not a “No Impact” Standard.

Like any project, the dock has an impact, but it is mitigated and insubstantial. The standard is not one that requires “no impact,” as Respondents would have it; the Board erred in so construing PCC 20.56.040(A)(1). The SMA requires mitigation only to the “extent practical” for a water dependent use. RCW 90.58.020. If the SHB’s interpretation is upheld, such that *any* impact on marine-oriented recreation is grounds for denial, no dock in Pierce County could ever be approved. This interpretation cannot be sustained under the law.

The debate over the term “important” as it relates to marine-oriented recreational areas, is not determinative. The Board’s conclusion is contradicted by its conclusion that there would be no undue restriction or impairment of use and enjoyment of the water or beach, and on ingress

and egress.¹² Respondents do not address the Turners' examination of the dictionary definitions of the terms "obstruct" or "impair." Respondents do not deny that any specific use currently available at the site would not be outright *barred* or *impossible* if the dock is constructed.

Respondent Taylor argues that the Turners did not present persuasive "evidence" of boating laws to the Board to show that the dock will not obstruct or impair boating. PCC 8.88.151 (Speed Limits in Salt Water); TR 410:9-25, 411:1-5, 370:16-21; CP 1335, 1336, 1295. But, like the Board, they invite the Court to similarly disregard applicable law. They also take issue with the Turners' citation that the Board presumes citizens will follow the law. *Jennings v. San Juan County*, SHB Nos. 97-31, 32, 33, 34, and 40, (1998). Neither of the Respondents' briefs address the Turners' points that: (a) no boaters (other than the neighbors) and no boating association expressed any concern; (b) the design of the structure allows easy passage through the piers (TR 306:1-4; CP 1231), and (c) the site distance between the proposed dock location and a boater coming around the point is over 1000 feet. TR 319-320; CP 1244.

¹² While the SHB determined the requirement, "[i]mportant navigational routes or marine oriented recreation areas will not be obstructed or impaired" was not met (CP 588), it found in a conflicting conclusion that the proposed dock meets PCC 20.56.040(A)(3), which requires, "Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired." These contradictory rulings cannot be explained, nor sustained, and Respondents do not even attempt to do so.

Respondents challenge the Turner's citation to *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 755, 765 P.2d 264 (1988) as not relating to the SMA. The Turners cite this case by analogy because there is not a single reported case or Board decision concerning the SMA which has held – as the Board did here – that a proposed dock can only be approved if there are zero impacts. None exists.

No one disputes the fact that a “no impact” standard for any proposed land use is impossible to meet. Development, by its very nature, changes the environment and thus creates some impact. The proper interpretation and application of the standard is whether any impact of a proposed development rises to a threshold, definable level, such that it should be denied. The Board's ruling is error of law and creates a new, impossible-to-meet standard that was not enacted by the Pierce County Council and is contrary to the SMA's policies and purposes.

2. There is no Reasonable Alternative for the Turners' Proposed Use.

The Board's application of a subjective test in analyzing compliance with PCC 20.56.040(A)(5), concerning “reasonable alternatives” is error. Respondents mischaracterize the Turners' objectives, dismissing the proposal as a means to save them inconvenience associated with off-site boat moorage. The Turners desire to use the dock

for more than just moorage, including fishing, swimming and a gathering and recreational place for overall water enjoyment. Buoys and commercial marinas cannot be reasonable alternatives because the desired multiple, year-round uses that extend beyond boat moorage cannot be accommodated. Consideration of the Turners' contemplated, year-round use, the type of boat they intend to use, and the unavailability of moorage at an alternative location were not considered by the SHB.

Next, Respondents assert that year-round use is not "reasonable," and thus should not be accommodated.¹³ But there is no restriction to limit uses to seasonal, and dock criteria do not require any showing that contemplated use is "feasible." They also argue that only boating and swimming are uses of state waters for which access is encouraged and protected by the SMA, the Code and SMP, and that use of a dock or boat for socializing is improper. Respondents are wrong, as set forth above.

Finally, the Turners are not required to own a boat in order to make application for a dock. Respondents' arguments that imply such a standard are entirely without merit. The SHB does not get to tell an applicant how to use a boat, when and where to store it, when they must obtain a boat (or

¹³ There is no legal basis for Respondents' contention that the Turner's must prove a dock is reasonable year-round, and no authority is cited in this regard. The Code's "permitting use" standard has no qualifiers, such as "mere convenience."

even that a boat is required to apply for a dock). The SHB does not get to decide that year-round use is or is not reasonable.

The Board's ruling establishes the dangers associated with an arbitrary determination of "reasonable alternatives." It runs afoul of land use permitting and due process principles that demand clarity of standards against which applications will be judged. *Anderson, supra*, 70 Wn. App. at 75 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 273, 501 P.2d 290 (1972); *Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law. *Burien Bark Supply*, 106 Wn.2d at 871.

A property owner cannot determine at the time of application whether a marina 15 miles away, or one that is 45 miles away will be considered "reasonable alternatives," because there is no standard established to guide decision-making. Respondents take the Turners to task for not "disclosing" their company property to the Hearing Examiner, which merely underscores the vagueness and invitation for arbitrary

application of the standard. The only way that principles of fundamental fairness can be squared with a criterion like this one is to have it defined by the *purpose of the proposal* set out in the application. Any person desiring use of a dock year-round would immediately know that a buoy and moorage at a different location (notwithstanding no slips are available) are not “reasonable alternatives” to be analyzed.

a. **A Buoy is Not a Reasonable Alternative.**

Respondents cannot get around the SHB holding in *Walker/Seidl, supra*, SHB 09-12 (“[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”). The case is on point and is not distinguishable based on the allegedly “protective” features the dock in that case offered. Respondents do not disagree that a buoy is not feasible for year-round moorage here, either.¹⁴ Instead, they challenge the Turners’ intent to use the dock year-round as, in and of itself, unreasonable. The SHB has no authority to determine for itself the “reasonableness” of the intended uses of the dock; that is not a standard.

¹⁴ Baldwin/Simon alleges that the argument a mooring buoy is not a reasonable alternative is contrary to the SMP. As discussed above, the SMP is a guidance document, implemented and controlled by the specific standards in the Code. Even if it was a standard, however, it does not say “deny” a dock proposal in favor of a buoy, but uses the term “encourage the use of mooring buoys.”

The exclusion of mooring buoys from the definition of “reasonable alternative” in PCC 20.56.040(A)(5) is clear, since the County allows both a mooring buoy and a dock. In *Robertson v. May*, 153 Wn.App. 57, 84, 218 P.3d 211 (2009), the use of two boat launches and a buoy was not considered a sufficient alternative to a dock. A buoy cannot meet the recreational needs of the family which embrace a variety of extended “boating season” uses requiring a large boat. TR 311:23-25, 312:1-23, 304:8-25, 305:1-9; CP 1236, 1237, 1229, 1230. It is irrelevant whether other people use a buoy in the area because what is a “reasonable alternative” for those persons’ uses does not foreclose the Turners from pursuing a dock that will meet their more frequent, year-round uses for their unique situation. Respondents do not dispute that a buoy cannot be used other than during summer months. Thus, a buoy is not a “reasonable alternative” for the Turners’ proposed use.

b. Public Moorage is Not Available.

Respondents do not dispute that space is not available for a 30-foot boat at a public marina. TR 356: 12-14. Since the alternative is not even available, it cannot be reasonable. The SMP does not provide that commercial marinas are *per se* a reasonable alternative to a private dock. If that was the intent, the legislative body would not have included the term “reasonable” in the Code. Without notice as to the standards by

which an alternative is deemed “reasonable,” (e.g., marinas within 5 miles with available slips to accommodate the applicant’s vessel are “reasonable alternatives”), arbitrary application is invited, as the SHB did here.

c. Moorage at Harbor Point is Not a “Reasonable Alternative.”

With respect to the Harbor Point LLC, Respondents contend the SHB made no directive to use this private facility, but its “reasonable alternative” ruling shows otherwise. CP 587. Respondents do not address that PCC 20.56.040(A)(5) only requires consideration of “commercial or public” moorage facilities. There is no dispute that Harbor Point’s property, including its pier, is private; it is not a “commercial or public moorage facility.” No one disputes that there are no available slots for mooring a boat there, either.

Respondent Taylor argues that the Turners have a “choice” and merely chose not to terminate existing leases at the LLC’s private facility, such that they somehow invited the SHB ruling in this regard. Respondent Baldwin/Simon also glibly assert that the Turners can and presumably should terminate existing leases, or alternatively, expand the facility, so that they have “alternative moorage” available. In even considering these options as an “alternative,” the Board did not need to “require” the Turners to take such action because it punished them for failing to do so.

Baldwin/Simon argue that RCW 25.15.061, disregarding corporate veil, is not applicable because “use of the company dock” will not “render[] them personally liable for the company’s debts.” Yet, they do not explain how it is reasonable that the Turners should be treated as one and the same as Harbor Point Holdings, LLC, forced to take action that impacts the company for an unrelated personal use associated with their private property. The SHB decision would require the Turners, as members of the LLC, to appropriate an asset of the LLC for their personal use, which is a classic example of behavior that would result in piercing the LLC’s veil. *See, e.g., McCombs Constr., Inc. v. Barnes*, 32 Wn. App. 70, 645 P.2d 1131 (1982) (piercing veil where shareholder commingled personal affairs with those of corporation). This is clear error.

3. The Proposed Use is Not Unduly Intense Such That it is Incompatible.

The Board ruled that a dock in an area currently devoid of other docks is *per se* incompatible, creating a new standard. CP 590. This interpretation leads to the absurd result that a *permissible use is banned* if it is the first proposed, a result contrary to rules of statutory construction.¹⁵ It is an impermissible de facto ban on docks. *Olympic Stewardship Found,*

¹⁵ *See e.g., Ski Acres, Inc. v. Kittitas County*, 118 Wn.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”).

supra, 199 Wn. App. at 716 n.22 (a "de facto prohibition" occurs when a land use is not expressly prohibited but is prohibited in fact because restrictions render such use impractical, citing 83 Am.Jur.2d Zoning and Planning §132 (2013))

It was error for the SHB deny the proposed use on standards that do not exist and to create a barrier to docks in "dock-free" areas. *E.g.*, *May v. Robertson* 153 Wn.App. 57, 87, 218 P.3d 211 (2009); *Innskeep v. San Juan County*, SHB No 98-033 (1999). The fact that *May* concerned a joint-use dock proposal is immaterial to the court's ruling that denial on the basis of "first dock" is in error.

The County did not adopt regulations to preserve "pristine" shorelines, which this stretch of beach most certainly is not. *See Olympic Stewardship, supra*, 199 Wn. App. at 747 (natural county shoreline designations include "minimal shoreline modification," "other high quality/pristine habitat characteristics," or "important feeder bluffs or otherwise unsuitable for development"). The record shows very active boating use by the community, undermining a conclusion that the Turner's use of a boat at a dock would materially impact the intensity of the use. Rather, PCC 20.56.040(A)(7) requires consideration of compatibility in light of the intensity of the proposed use, as compared to other public uses. This is not a "structure" question, either. It requires comparison of the

Turners' contemplated recreational uses, vis-à-vis other public recreational uses. The Board improperly focused on the wrong aspect (the existence of a dock) and then concluded that structure would be "intense," without considering the relatively low intensity of proposed uses of the structure.

In its ruling, the SHB did not "consider" pier density, but created a blanket prohibition where the absence of any docks in the area results in an automatic, and summary denial, without any consideration. The SHB's decision is contrary to law and an improper application of law to the facts. It is a classic example of arbitrary and capricious action. *Maranatha Mining, supra*, 59 Wn. App. at 804. While Respondents extol the virtues of the SHB's alleged "specialized knowledge and expertise" in determining compatibility, the Board's subjective determination, not guided by clear standards, is arbitrary decision-making, are entitled to no deference. *Jefferson County, supra*, 73 Wn. App. at 589.

Respondents do not persuasively distinguish case law on "first docks" in the Turners' Opening Brief. The Board in *Innskeep v. San Juan County*, SHB No. 98-033 (1999) did not rule that "first docks" were only permissible if they are joint-use docks and/or where reasonable moorage alternatives are not available, and/or where a proposed first dock has a low profile. It rejected the very assertion made by Respondents, accepted by the SHB, that a "first dock" is *per se* "intense," and/or *per se*

“incompatible.” The *Viafro* and *Gennotti* cases cited by Respondents are not on point because there, undue view impacts were found. Here, the Board ruled to the contrary, that there is no undue view impairment.

4. The Board Erred in Denying the Application Based on Cumulative Impacts.

With respect to cumulative impacts, Respondent Baldwin/Simon¹⁶ allege: (1) evidence of additional permitting activities is not critical; (2) the Board did not speculate in this regard; (3) speculate that (as the Board) approval could lead to additional applications, and (4) the County’s DNS issued for the proposed dock is not relevant. None of these assertions provide grounds to sustain the Board’s decision. The Board merely speculated that there could be additional applications, without any competent evidence and ignored evidence in the record supporting a lack of cumulative impacts for this specific application.

While Baldwin/Simon argue that the SHB made no decision based on speculation, they proceed to argue that the floodgates could be opened if the Turners’ dock is approved, notwithstanding the fact that *Garrison v. Pierce County (De Tienne)*, SHB 13-016c at 53, 2014 WL 309283 (January 22, 2014), *aff’d*, *De Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248, 391 P.3d 458 (2016) ruled that a cumulative impacts analysis

¹⁶ Only Respondent Baldwin and Simon address cumulative impacts in their brief.

must be based on “foreseeability” of additional applications for similar activities in the area. Without such evidence, one is left with the same straws at which Baldwin/Simon grasp – mere speculation that something may come to pass, which is not competent evidence. *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 209, 143 P.3d 876 (2006) (mere theory or speculation is not adequate proof). This general principal of law need not be in the context of a shoreline application for it to guide the Court’s analysis here.

Baldwin/Simon do not address the clear ruling in *Seidl v. San Juan County*, SHB No. 09-012 (2010), *supra*, which ruled that a shoreline substantial development approval is not precedent-setting because each dock application is analyzed on its own merits and is required to meet stringent local criteria (“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”).

Finally, Respondents attempt to minimize the importance of the fact that the County’s SEPA review determined there were no cumulative impacts associated with dock approval. CP 708 (Ex. RT/4).¹⁷ The Turners are not stating that the DNS “usurps” local decision-making or dictates a

¹⁷ 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).

particular substantive result. *C.f. Save Our Rural Env't v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983). Rather, the Turners point out the clear evidentiary gap and “disconnect” in the SHB’s decision which finds cumulative impacts where the County has already determined a lack of evidence of “cumulative impacts” in its SEPA analysis.

D. The Turners’ Constitutional Arguments Were Raised and Argued.

The Turners have not asserted they have a “fundamental right to do what they wish on their property without being troubled by reasonable regulation.” Baldwin/Simon Br. at p. 39. They do not contend they have a “constitutional right” to build a dock, either. Taylor Br. at p. 20. Rather, the Turners’ arguments are based on fundamental fairness and the denial of due process by the SHB’s failure to make a decision based on lawfully-promulgated criteria, its failure to interpret local regulations so as to accord with general laws of the State and the impact on the Turners’ right to ordered liberty that was denied because the Board erroneously characterized the proposal as disfavored and elevated general policies over specific criteria.

The Turners presented these arguments before the SHB and the Superior Court below, regardless of whether the term “constitutional” was directly appended to each individual argument or directly stated in the

Superior Court's ruling. Because Respondents did not respond to the Turners' arguments on these issues, the Turners stand on the arguments in their Opening Brief, with the following additional points of emphasis.

First, Respondents admit that a property owner has a privilege to build a dock when that person meets the criteria of the SMA and the local shoreline regulations and obtains a permit. Baldwin/Simon at p. 38. The Turners have done so.

Second, 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. Respondents do not claim otherwise. 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.

Finally, the Turners have repeatedly argued that denial of their proposal on the basis of generalized neighbor complaints and non-articulated standards is arbitrary and capricious. This 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 Wn.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 Wn. App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 1011 (1997).

E. The Turners Did Not Abandon Arguments Concerning the SHB’s Denial of a Conditional Use Permit.

Respondent Taylor asserts that the Turners abandoned their arguments concerning denial of a conditional use permit. A review of the Petition for Judicial Review and Opening Brief shows that Respondents are wrong. Petition for Review (CP 1) at 10.25, 10.26, 10.38 through 10.41, assigning error to Findings 40, 41 and Conclusions 32, 35-37); See Opening Brief at pages 7 and 10 (Assignments of Error and Issues Related to Assignments) and detailed argument on pages 41-43 on this issue.

In response to Baldwin/Simon’s arguments, the Turners wish to point out that there is no basis for “second-guessing” the water-dependent nature of the proposed structure, as Respondents concede the building is designed for use to store kayaks, life-jackets and fishing equipment. E.g. Taylor Br. at p. 11. There is no requirement for a showing of “necessity” or “other alternatives” for such storage. The Turners stand on their Opening Brief, including arguments regarding alleged “view impacts.”

F. Attorneys Fees Under the Equal Access to Justice Act.

Respondents allege that the Turners’ request for attorneys’ fees based on the Equal Access to Justice Act, RCW 4.84.340 and RCW 4.84.350, is foreclosed by *Duwamish Valley Neighborhood Pres. Coal. v.*

Central Puget Sound Growth Management Hearings Board, 97 Wn. App. 98, 100, 982 P.2d 668 (1999). Unlike *Duwamish Valley*, Pierce County is *not* the Turners’ adversary. *Id.* at 101. Pierce County approved the dock application and the SHB reversed that approval. Moreover, *Duwamish Valley* stated that the Growth Board’s decision was not made with “policymaking authority,” such that it was inappropriate to award fees. But the SHB’s attempt to make and enforce new policy against the Turners is foundational to this appeal. The Turners should be entitled to an award of attorneys’ fees under the Equal Access to Justice Act.

III. CONCLUSION

For all the foregoing reasons, and as set forth in Appellants’ Opening Brief, the Court should grant the Turners’ requested relief.

RESPECTFULLY SUBMITTED this 20th day of September, 2019.

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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 Tennessee, that I am now, and have at all times material hereto been, a resident of the State of Tennessee, 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 Bennu Law LLC, attorneys for Appellants. 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.

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DATED this 19th day of September, 2019.

____s/Amanda La Bell____
Amanda La Bell
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