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NO. 52470-8

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

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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,

Respondent.

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**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S  
RESPONSE BRIEF**

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## **I. INTRODUCTION**

In this case, Craig and Kelley Turner appeal a Shorelines Hearings Board's decision denying their application for permits under the Shoreline Management Act to construct a dock, boathouse, and boatlift on the shoreline of their single-family home on Hale Passage in Pierce County.

The Department of Ecology takes no position on whether this Court should affirm or reverse the Board's decision. Ecology submits the following response to correct some of the Turners' misrepresentations regarding the law applicable to their proposed boathouse. Specifically, Ecology will address what constitutes a water-dependent use and an accessory use under the Shoreline Management Act, RCW 90.58, and Pierce County's Shoreline Master Program.

## **II. COUNTER-STATEMENT OF ISSUE**

Ecology addresses only Issue 7 as identified in Appellants' Opening Brief, and restates that issue as follows:

1) Is the Turners' proposed boathouse a water dependent or accessory use under the Shoreline Management Act, RCW 90.58, or Pierce County's Shoreline Master Program?

## **III. STATEMENT OF THE CASE**

Craig and Kelly Turner own a single-family residence on Hale Passage in Gig Harbor, Washington. CP 627. In 2015, they applied for a

substantial development permit and a conditional use permit to complete the following work on their property: (1) construct a 150-foot long by 8-foot wide single-use dock, (2) place a 20-foot long by 10-foot wide boatlift at the south end of the proposed dock, (3) construct a 192-square foot boathouse landward of the existing bulkhead on the property, and (4) remove an existing hot tub and construct an integrated swimming pool and hot tub 50 feet from the bulkhead. CP 627. Under Pierce County's Shoreline Master Program (SMP), the Turners needed to obtain a substantial development permit for the dock, swimming pool, and hot tub, and a conditional use permit for the boatlift and boathouse. Pierce County Code (PCC) § 20.56.030; 20.72.030–.040.

Pierce County approved a substantial development permit for the Turners' proposed dock, swimming pool, and hot tub; approved a conditional use permit for a boatlift at the end of the dock; but denied a permit for the boathouse. CP 97. Ecology then reviewed, and approved, the conditional use permit for the boatlift. CP 918-919. In its decision, Ecology noted that Pierce County had denied a conditional use permit for the boathouse. *Id.* Because the County denied the permit for the boathouse, Ecology did not review it or approve it.

Neighbors Gordon Baldwin, Norman and Barbara Simon, and Mark and Sarah Taylor appealed the approved permits to the Shorelines

Hearings Board. CP 135–140, 142–147. The Turners cross-appealed the County’s denial of a conditional use permit for the boathouse. CP 319–325. The Board reversed the substantial development permit for the dock,<sup>1</sup> reversed the conditional use permit for the boatlift, and affirmed the County’s denial of a permit for the boathouse. CP 45–77. The superior court affirmed the Board. CP 1601. This appeal followed.

#### IV. ARGUMENT

##### A. Standard of Review

This Court reviews the Board’s decision under the Washington Administrative Procedure Act. *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*, 146 Wn.2d 778, 789–90, 51 P.3d 744 (2002); *see also* RCW 34.05.570(3). Judicial review is confined to the record before the Board. RCW 34.05.558. The Turners bear the burden of demonstrating the invalidity of the Board’s decision. RCW 34.05.570(1)(a).

The Court may grant relief if it determines that the Board has “erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). The Court reviews the Board’s conclusions of law, and its interpretation of the Shoreline Management Act and the County’s local shoreline regulations,

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<sup>1</sup> No party challenged the portion of the substantial development permit allowing the Turners to remove the existing hot tub on their property and install a swimming pool, so the Board did not reach that issue. *See* CP 45–77.

de novo. *De Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248, 277, 391 P.3d 458 (2016). The Board’s findings of fact are reviewed under the substantial evidence standard. *Jefferson Cty. v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994). “Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.” *Id.*

**B. The Shoreline Management Act and Pierce County’s Shoreline Master Program**

The Shoreline Management Act, RCW 90.58, establishes a comprehensive scheme of shoreline regulation and requires local governments to develop “shoreline master programs” to regulate shoreline development consistent with the goals and policies of the Act. *See Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 201, 884 P.2d 910 (1994). Any shoreline development in Washington must be consistent with the Act and the corresponding local shoreline master program (SMP).

RCW 90.58.140(1); *Overlake Fund v. Shorelines Hearings Bd.*, 90 Wn. App. 746, 753, 954 P.2d 304 (1998).

Local governments are responsible for developing the SMPs, which become effective upon Ecology’s review and approval.

RCW 90.58.050; *accord* WAC 173-26-010. Ecology approves a SMP only after it determines that it is consistent with the Act and the state SMP

guidelines, WAC 173-26. *See* RCW 90.58.090. Once approved by Ecology, the SMPs constitute use regulations for activities within shoreline jurisdiction and become part of the State Master Program, which is made up of all the local SMPs. RCW 90.58.030(3)(d); RCW 90.58.100(1). Ecology is also charged with reviewing deviations from a SMP that can only be authorized through the issuance of variance permits or conditional use permits. RCW 90.58.140(10).

For residential properties such as the Turners', Pierce County's SMP establishes a fifty-foot setback from a lawfully established bulkhead within which development may not occur. PCC § 20.62.050(C). However, the SMP does allow a property owner to construct a "water dependent accessory use" within the setback, so long as the property owner obtains a conditional use permit. PCC § 20.62.050(D)(2). An applicant seeking a conditional use permit for a water dependent accessory use within the setback must meet the statewide conditional use permit review criteria, WAC 173-27-160. Those criteria direct an applicant to demonstrate:

- (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
- (b) That the proposed use will not interfere with the normal public use of public shorelines;
- (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;

- (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
- (e) That the public interest suffers no substantial detrimental effect.

WAC 173-27-160(1). Pierce County's SMP requires an applicant for a conditional use permit to meet the following additional criteria:

- a. Views from surrounding properties will not be unduly impaired.
- b. Adequate separation will be maintained between the structure and 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 § 20.62.050(D)(2).

**C. The Turners' Proposed Boathouse Is Not a Water Dependent Accessory Use**

The Turners argue that the Board erred in applying the conditional use permit criteria to their proposed boathouse. According to the Turners, the boathouse is a water dependent "accessory" use, and therefore should have been approved. Appellants' Opening Brief (Opening Br.) at 41.

Although the Turners admit that "the boathouse will be used for storage," and not to moor a boat, they argue "[j]ust as the residence itself is a water-dependent use, so is its appurtenant storage building." *Id.* In making

this argument, however, the Turners misrepresent state and local regulations governing water dependent uses and conditional use permits.

First, the Turners mischaracterize their residence and boathouse as water dependent uses. “Water dependent uses” are “[a]ll uses which cannot exist in any other location and are dependent on the water by reason of the intrinsic nature of the operation.” PCC § 20.04.670. Neither Pierce County’s SMP nor the statewide SMP guidelines, WAC 173-26, designate residences as water dependent. The Turners’ single-family home, while “a priority use” under the state SMP guidelines, WAC 173-26-241(3)(j)(i), can certainly exist in a location other than within shoreline jurisdiction, and therefore it is not a water dependent use. Likewise, the proposed boathouse is not a water dependent use because it will be used for storage and not as “[a] covered or enclosed moorage space.” PCC § 20.04.030.<sup>2</sup> As the Board correctly found, “[b]ecause this structure is not planned to be used for boat moorage it does not need to be within the setback from the bulkhead or even in a shoreline location.” CP 76. The Turners have not shown any water dependent need for building their proposed boathouse within the setback, and therefore the proposed boathouse is not a water dependent use.

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<sup>2</sup> Pierce County’s SMP defines “boathouse” as “[a] covered or enclosed moorage space.” PCC § 20.04.030. The Turners appear to concede that their proposed boathouse does not meet the SMP’s definition of “boathouse.” Opening Br. at 41.

Second, the Turners' proposed boathouse is not an accessory use. The Turners rely on PCC § 20.62.040(A)(1)(c)(2) to argue that the boathouse should be considered an accessory to their residence like a shed or storage facility, and should therefore be permitted outright. *See* Opening Br. at 41. But that provision of the SMP provides that any sheds or storage facilities can only be constructed outside any applicable setback. PCC § 20.62.040(A)(1)(c). It is undisputed that the Turners propose to locate their boathouse within the setback; therefore, it cannot be permitted outright but instead it must comply with state and local conditional use permit review criteria. *See* PCC § 20.62.050(D)(2); WAC 173-27-160.

The Turners also appear to argue that the proposed "boathouse" is exempt from the requirements for a shoreline substantial development permit as a normal "appurtenance" to their residence. *See* Opening Br. At 41. As explained above, however, Pierce County's SMP explicitly requires a conditional use permit for any construction within the fifty-foot shoreline setback. PCC § 20.62.050(D)(2). Regulations regarding the exemptions from a substantial development permit therefore do not apply to the proposed boathouse. Regardless, a boathouse or storage shed are not considered "appurtenances" that would be exempt from a substantial

development permit. The statewide shoreline permit guidelines provide in relevant part:

An “appurtenance” is necessarily connected to the use and enjoyment of a single-family residence and is located landward of the ordinary high water mark and the perimeter of a wetland. On a statewide basis, normal appurtenances include a garage; deck; driveway; utilities; fences; installation of a septic tank and drainfield and grading which does not exceed two hundred fifty cubic yards and which does not involve placement of fill in any wetland or waterward of the ordinary high water mark. Local circumstances may dictate additional interpretations of normal appurtenances which shall be set forth and regulated within the applicable master program.

WAC 173-27-040(2)(g).<sup>3</sup> The Turners’ proposed boathouse is therefore not an “appurtenance” under either state or local shoreline regulations.

Both the County in the first instance, and the Board on review, thus correctly applied the conditional use permit criteria to the Turners’ application for the proposed boathouse.

## V. CONCLUSION

Ecology takes no position on whether the Board correctly denied the requested substantial development and conditional use permits. However, to aid in the Court’s review, Ecology notes that neither a single-family residence nor the proposed boathouse are water dependent uses, and the

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<sup>3</sup> The Turners cite to WAC 173-26-040(2)(g), which does not exist. Opening Br. at 41. Ecology believes the Turners intended to cite to WAC 173-27-040(2)(g), which explains what constitutes a normal appurtenance for shoreline permitting purposes.

Turners' proposed boathouse should not be permitted outright as an accessory use.

RESPECTFULLY SUBMITTED this 8th day of April 2019.

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**PROOF OF SERVICE**

I certify that I electronically filed the foregoing document with the Clerk of the Court of Appeals, Division II, using the CM/ECF system which will send notification of such filing to all parties of record.

DATED this 8th day of April 2019.

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MEAGHAN KOHLER  
Legal Assistant

**ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION**

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