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No. 52470-8-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

CRAIG and KELLY 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

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Turners appeal from a decision of the Washington Shorelines Hearings Board (the “Board”) denying their application for a shoreline substantial development permit to construct a dock, and conditional use permits to install a boat lift and construct a boat house on their waterfront property at Point Fosdick, at the southern tip of the Gig Harbor peninsula. The Board conducted a hearing for two and a half days and personally viewed the site. The Board heard evidence from multiple witnesses that the proposed dock would be the only dock on an otherwise unimpeded seven-mile stretch of beach heavily used by kayakers, boaters, and for beach walking by residents and the public. The Board heard testimony from multiple witnesses that there are reasonable alternatives to a private dock on the Turners’ property that have been used by other neighbors and the prior owner of the Turners’ property, such as mooring buoys and nearby commercial marinas. The Board heard testimony from the Turners themselves that their company owns waterfront property with a dock in nearby Gig Harbor.

After carefully weighing each of the factors in the Pierce County Shoreline Master Program and regulations, the Board concluded that the Turners’ proposed dock would obstruct and impair marine oriented recreation areas, that it would not be compatible with surrounding land and

water uses, and that they had reasonable alternatives to their single-use dock. Under the Pierce County Shoreline Master Program, any one of these conclusions was sufficient to deny the dock application. The Board denied the permit for the boatlift because it was not feasible without a dock, and denied the permit for the boathouse because the proposed structure was not a water dependent use as required by the Shoreline Master Program. The Board exercised its considerable expertise in this area in denying the Turners' permit applications, and its decision should be upheld.

II. STATEMENT OF THE CASE

The Turners' property is low bank waterfront located at the southern tip of the Gig Harbor peninsula is an area known as Point Fosdick. Their property is about half an acre in size with about one hundred feet of waterfront. [TR 299:15-18] ¹ They applied for a shoreline substantial development permit for construction of a 150-foot pier, ramp, and float,² and conditional use permits for the addition of a boatlift at the end of the dock and for the construction of a boathouse within the shoreline setback.

¹ TR refers to the transcript of the hearing before the Board commencing at CP 924.

² As defined in the Pierce County shoreline regulations, a pier is a structure which abuts the shoreline and is built over the water on pilings. A float is a platform capable of floating on water, used as a landing or moorage structure for marine transport or for swimming purposes, and either attached to a pier or are anchored to the bedlands so as to allow free movement up or down with the rising or falling water levels. A ramp or gangway is a sloping structure which provides access from a pier to a float. PCC 20.56.010. Throughout the record, the Board and parties commonly referred to the proposed pier, ramp and float as a dock. A drawing of the proposed structure is in the record as Ex. R/T-23, CP 779.

[Ex. R/T 3, CP 668] The Turners estimate that they will spend \$50,000-\$100,000 to build the dock. [TR 357:8–358:11]

There are no other docks in the vicinity of the Turner property. The closest dock to the east is over six miles away, and there are no docks to the west for over a mile. [TR 30:9-11; TR139:6-140:2, TR252:11-16; Ex. PBS-07, CP 849] Due to the exposure south down Puget Sound, the area is subject to severe weather, currents, and waves. [TR 82:22-83:14, TR 102:6-103:13, TR 155:1-7, TR 177:15-20] Boats and kayaks commonly hug the shoreline going around the point, even in good weather. [TR 39:9-16, TR 40:23-42:12, TR 42:21-43:24, TR 84:5-86:12, TR 99:13-100:1, TR160:14-163:8; Exs. P/T 9, 10, 18, CP 892-5, 896, 913] Nobody swims in the area because the water is too cold and the currents are too strong. [TR 36:24-37:11, TR 122:11-124:1]

The beach in the area around the Turners' property is a gradual slope heavily used by beach walkers. [TR 31:19-35:5, TR 34:20-35:5] There are several public access points in the area allowing access to the general public. [TR 33:24-34:3, TR 71:4-16] The Turners propose to construct their dock on top of their 3.5-foot bulkhead. [TR 209:21-25] At all but the lowest tides, the dock will significantly impede pedestrian access along the beach. [TR 53:4-21]

The prior owner of the Turners' property used a mooring buoy to moor his boat on his property. [TR 73:22-74:11, TR 153:15-24, TR 157:6-20, TR 158:21-159:15, TR 168:2-20] Other properties in the area do the same. [TR 213:13-22] The prior owner and other property owners also used nearby marinas in Gig Harbor and Day Island to moor their boats. [TR 80:11-22, TR 90:12-14, TR 174:6-12, TR 80:13-22, TR 99:4-12] Day Island Marina is about ten minutes away. [TR 99:10-12]

In October, 2016, the Turners purchased waterfront property in Gig Harbor with an established private dock that has historically provided moorage for large boats. [TR179:4-21, Ex. PBS-01] The property is next to the Tides Tavern, close to the entrance to Gig Harbor. [TR 185:23-186:13] They purchased the property under Harbor Point Holdings, LLC, a limited liability company that they own, rather than their own names. *Id.* The purchase included the assignment of a DNR lease for adjacent tidelands. [TR 182:4-12, TR 183:20-184:11, Ex. PBS-02, PBS-03, CP 791-835] The leased area includes a private dock. [Ex. PBS-05, CP 844]

The Turners did not disclose this alternative moorage to Pierce County or the Hearing Examiner prior to the Hearing Examiner's decision in November, 2016. [TR 186:14-20] The Pierce County Hearing Examiner initially approved the shoreline substantial development permit for the dock

and the conditional use permit for the boatlift, and denied the conditional use permit for the boathouse. [Ex. R/T 1, CP 604]

Gordon Baldwin lives on the property immediately west of the Turner property, which is the house where he grew up. [TR 208:9-20] Norman and Barbara Simon live on the property immediately west of the Baldwin residence. [TR 173:12-16] Mr. Baldwin and the Simons appealed the approval of the dock permit to the Board. [CP 248] Mark and Sarah Taylor live on the property immediately east of the Turner property. [TR 28:10-19] They separately appealed the approval of the dock permit, and also intervened in the Turner's appeal from the denial of a conditional use permit to construct the boathouse. [CP 281, 455]

The Board conducted a hearing for two and a half days and personally viewed the site. [CP 566] The Board heard testimony from fourteen witnesses and admitted 42 exhibits. [TR 4-5, 204-5; CP 599-600, 781, 853, 916] The Board issued its unanimous decision on September 1, 2017. [SHB No. 17-005c, CP 565] The Board denied the shoreline substantial use permit for the dock because the proposed dock would obstruct and impair marine oriented recreation areas, that it would not be compatible with surrounding land and water uses, and that they had reasonable alternatives to their single-use dock. Because the boatlift was only feasible if attached to a dock, the Board denied the conditional use

permit for the boatlift. The Board also denied the conditional use permit for the boathouse because it is not a water-dependent use and would impair views.

The Turners appealed the Board's decision to the Pierce County Superior Court, which denied their appeal and affirmed the Board. [CP 1593] The Turners then filed the instant appeal. [CP 1596]

III. STANDARD OF REVIEW

The administrative procedure act (RCW 34.05) governs judicial review of the Board's decision in this case. RCW 90.58.180(3); *Buechel v. State Department of Ecology*, 125 Wn.2d 196, 201, 884 P.2d 910 (1994). Appellate review is of the Board's decision, not the decision of the local government or the superior court, and judicial review of the Board's decision is based on the record made before the Board. *Buechel, supra.* at 202. In the course of judicial review, due deference will be given to the specialized knowledge and expertise of the Board. *Buechel, supra.* at 202–03; *Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 516, 137 P.3d 31 (2006), *rev. den.*, 162 Wn.2d 1008 (2008). Generally, an issue not raised in a contested case before the Board may not be raised for the first time on review of the Board's decision. *Buechel, supra.* at 201.

The Court can reverse the Board's decision only if it determines that the Board has erroneously interpreted or applied the law, the decision is not

supported by evidence that is substantial when viewed in light of the whole record before the court, or the decision is arbitrary and capricious. RCW 34.05.570 (3)(d), (e), (h). The burden is on the appellant to show that the Board's decision was invalid. RCW 34.05.570(1)(a).

Interpretation of the Shoreline Management Act and the local shoreline master program involves questions of law, which the Court reviews for errors of law. *Bellevue Farm Owners Association v. State of Washington Shorelines Hearings Bd.*, 100 Wn. App. 341, 362, 997 P.2d 380 (Div. 2, 2000), *review denied*, 142 Wn.2d 1014 (2000). The Court gives substantial weight to an agency's interpretation of law within its area of expertise. *Id.*

The Court reviews the Board's findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e); *Stericycle of Washington Inc. v. Washington Utilities & Transp. Comm'n*, 190 Wn. App. 74, 89, 359 P.3d 894 (Div. 2, 2015). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of its truth. *Id.* The substantial evidence standard of review is highly deferential to the agency's action, and on appeal the court will not invalidate an agency's discretionary decision without a clear showing of abuse. *Id.* Evidence will be viewed in the light most favorable to the party who prevailed in the highest forum that exercised factfinding authority, a process that necessarily entails acceptance

of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Department of Labor & Indus. of State v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 529, 347 P.3d 464 (Div 2, 2015), *affirmed*, 185 Wn.2d 721, 374 P.3d 1097 (2016). The Court does not reweigh evidence or substitute its judgment for the Board's determination of witness credibility. *Stericycle, supra*.

A board's decision is arbitrary or capricious if it is “willful and unreasoning action in disregard of facts and circumstances.” *Buechel, supra*, at 202. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached. *Id.* Neither the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious. *Rios v. Washington Dep't of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961, 972 (2002). The scope of review under the arbitrary and capricious standard is very narrow and the party asserting it carries a heavy burden. *Stericycle, supra*, at 93.

Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Olympic Stewardship Foundation v. State Env'tl. & Land Use Hearings Office through W.*

Washington Growth Mgmt. Hearings Bd., 199 Wn. App. 668, 687, 399 P.3d 562 (2017), *review denied*, 189 Wn.2d 1040, 409 P.3d 1066 (2018), and *cert. denied sub nom. Olympic Stewardship Found. v. State of Washington Env'tl. & Land Use Hearings Office*, 139 S. Ct. 81, 202 L. Ed. 2d 25 (2018). The Court will not consider claims unsupported by legal authority, citation to the record, or argument. *Id.*

IV. ARGUMENT³

A. The Board correctly concluded that the Turner proposal does not satisfy the criteria for approval of a pier, ramp and float in the Pierce County Master Shoreline Program.

Piers and docks are an outright permitted use in the Residential Shoreline Environment only if they are less than fifty feet in length and cost no more than \$2,500. PCC 20.56.030(D). Piers and docks that exceed those limits, like the Turner proposal, must meet the criteria for approval of a shoreline substantial development permit. *Id.*

A permit for a substantial development shall only be granted when the development is consistent with the applicable shoreline master program⁴

³ Baldwin and Simons join and incorporate by reference the arguments presented by respondents Taylors.

⁴ A Shoreline Master Program is a combination of planning policies and development regulations adopted by each county that addresses shoreline uses and development allowed under the Shoreline Management Act. *Olympic Stewardship Foundation v. Environmental & Land Use Hearings Office*, *supra*, at 680.

and the provisions of the Shoreline Management Act. *Buechel, supra*, at 204. Applicants for permits have the burden of proving that a proposed substantial development is consistent with the criteria that must be met before a permit is granted. *Id.*, at 205. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.180(1) and (2), the person requesting the review has the burden of proof. *Id.*

The granting of a Shoreline Substantial Development Permit for a pier or dock is governed by PCC 20.56.040(A), which states:

Criteria. The granting of a Substantial Development Permit is dependent upon the County reviewing authority's determination that the proposed project is consistent with the policies of the Master Program and with the following criteria:

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;
5. 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;
6. The use or uses of any proposed dock, pier or float requires, by common and acceptable practice, a Shoreline location in order to function;
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.

Thus the proposed project must be consistent with both the policies of the Pierce County Shoreline Master Program and with all of the seven listed criteria.

The Pierce County Shoreline Master Program contains Use Activity Policies. At page 21 of the Master Program, it states that each project that falls within the jurisdiction of the Shoreline Management Act will be evaluated to determine its conformance with the policies and regulations of the appropriate use activity. [CP 537] At page 37 of the Master Program it lists Use Activity Policies related to piers. [CP 538] Those policies include:

- d) Piers associated with single-family residences should be discouraged.
- e) In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact on adjacent proximate land ownership should be considered.
- f) Encourage the use of mooring buoys as an alternative to space consuming piers such as those in front of single-family residences.

The Board concluded that the Turners' proposed pier, ramp and float are not consistent with the above policies in the Master Program and with three of the criteria listed in PCC 20.56.040(A). [Conclusion 26, CP 592] The Board found that reasonable moorage alternatives exist for the Turners, so PCC 20.56.040(A)(5) is not met. [Conclusions 14, 15, CP 587] The Board found that marine oriented recreation areas will be obstructed and

impaired, so PCC 20.56.040(A)(1) is not met. [Conclusion 17, CP 588-9] The Board found that the intensity of the Turners' proposed use is not compatible with surrounding land and water uses, so PCC 20.56.040(A)(7) is not met. [Conclusion 21, CP 590] Because the Turners' proposed pier, dock and float is not consistent with the policies of the Master Program and all listed criteria in PCC 20.56.040(A), the Board denied the shoreline substantial development permit for that project.

The Turners assert that because the Board found the proposed dock would not unduly impair views, thus satisfying PCC 20.56.040(A)(2), would not obstruct important navigational routes, satisfying a portion of PCC 20.56.040(A)(2), and would not unduly impair the public's use of the surface waters below ordinary high water, satisfying PCC 20.56.040(A)(4), then "These findings and conclusions should have compelled the Board to approve the proposal."⁵ Apparently, the Turners believe the Board must ignore the other criteria set forth in PCC 20.56.040(A). The Turners cite no authority in support of that argument, because there is no such authority for the Board to ignore the approval criteria set forth in the local shoreline regulation. PCC 20.56.040(A) specifically states that a shoreline substantial development permit can only be issued if all of the listed criteria are met.

⁵ Appellants' Opening Brief, page 2.

B. The Board correctly found that the Turners have multiple alternatives to their proposed single-use dock.

The Board concluded that the Turners have reasonable alternatives to the proposed dock. [Conclusions 14, 15, CP 587] The Board found that the Turners could moor their boat at the Gig Harbor waterfront pier owned by their wholly-owned limited liability company. The Board found that the Turners could moor their boat at a nearby marina as their neighbors do. The Board found that the Turners could moor their boat at a mooring buoy as their predecessor owner and neighbors have done. The Board's findings to support these conclusions are at Findings 12, 13, 15, 22-27. [CP 570-576].

The Turners argue that a mooring buoy cannot be a reasonable alternative to a dock because mooring buoys are not listed in PCC 20.56.040(A)(5) along with "joint use, commercial or public moorage facilities." The Turners' argument ignores the preceding language "such as", which clearly indicates that the listed alternatives are not exclusive. Their position is directly contrary to the Pierce County Shoreline Master Program, which under pier policies states, "Encourage the use of mooring buoys as an alternative to space consuming piers such as those in front of single-family residences."

The Turners argue that a mooring buoy is not a reasonable alternative to a dock because it does not provide for year-round use. The

Turners' property is at Point Fosdick on the southern tip of the Gig Harbor peninsula, where is it exposed to strong winds and currents that make boating impracticable during winter months. There was substantial evidence to show that a mooring buoy provided reasonable access to a boat during the normal boating season. Dr. Baerg, the prior owner of the Turners' property for ten years, testified that he had used a mooring buoy for large and small boats. [TR153:15-24, TR157:6-20, TR158:21-159:15, TR168:2-20] Gordon Baldwin, the Turners' immediate neighbor to the west, testified that his family had used a mooring buoy. [TR213:13-22] Mark Taylor testified that after September most boats are removed from buoys and docks in the area. [TR 119:4-8, TR 128:12-24]

The only person who testified that year-round use of a dock was feasible was Mr. Turner. [TR 312:10-23] The Turners do not now and have never owned a boat. [TR 288:21-289:9, TR 421:3-7] They could not provide any credible testimony about the practicalities of mooring a boat on their property or the feasibility of mooring a boat to a dock at this location during winter months. They presented no other witnesses to establish that year-round use of a dock was feasible. Thus, there was no substantial evidence that year-round boating is a reasonable intended use at this location, and even if there was, the Board was entitled to find more credible the evidence that year-round boating is not feasible.

The Turners argue that the Board's conclusion that a mooring buoy is a reasonable alternative to the proposed dock is inconsistent with its prior decision in *Walker and Seidl v. San Juan County*, SHB No. 09-012, where the Board held that a mooring buoy did not provide for year-round access.

In Conclusion 13 of that case, the Board stated:

If a mooring buoy is adequate to provide for the reasonable intended uses of the applicant, a mooring buoy should be required pursuant to San Juan County's expressed preference for buoys. On the other hand, if a mooring buoy cannot accomplish the reasonable intended uses an applicant has identified, the preference for mooring buoys should not be interpreted as an unstated prohibition on docks.

In *Seidl*, The Board concluded that year-round use was a reasonable intended use. The applicants' properties were in Post Office Bay, and the testimony established that the dock's design and orientation will provide protection from prevailing winds. *Id.*, at findings 2-5.

In the case at bar, there is heavy weather, high winds, and strong currents at Point Fosdick in the winter. [TR102:6-102:13, TR155:1-7, TR177:15-20] The typical boating season is from late April through September. [TR 117:15-24] After September there are few boats on either mooring buoys or docks. [TR 119:4-8, TR128:11-24] There is no credible testimony in the case at bar that the dock's design and orientation will provide protection from prevailing winds or that year-round boating is a reasonable intended use at Point Fosdick.

The Turners falsely claim that in *May v. Robertson*, 153 Wn. App. 57, 218 P.3d 211 (2009), “the use of two boat launches and a buoy was not considered sufficient alternatives to a dock.”⁶ As discussed in more detail below, in *May* the applicants proposed a joint-use dock. The Court reasoned that since the Pierce County Code expressly lists joint use docks as a reasonable alternative to single use docks, it is not necessary to consider the availability of other alternatives. Thus the Court made no determination as to whether two boat launches and a buoy would be a reasonable alternative to a single use dock.

The Turners also argue that nearby commercial marinas do not provide a reasonable alternative. However, commercial or public moorage facilities are specifically listed in the regulation as reasonable alternatives to a dock. The evidence showed that there are numerous commercial marinas in nearby Gig Harbor. [TR 90:12-14] The Simons moored their large boat at a marina in Gig Harbor that provided easy access. [TR174:6-12] There are also moorage facilities at Day Island, only ten minutes away. [TR80:13-22, TR99:4-12]

As noted above, the Turners have never owned a boat. The testimony of Mrs. Turner strongly indicated that a significant motivation for

⁶ Appellants’ Opening Brief, p. 33.

them to install a dock was to use it as a view platform and a place to socialize. [TR282:21-283:16, TR291:2-8] They like to have parties with up to fifty people, and the dock will give them more waterfront property to host those parties. [TR288:6-14] That is not a use allowed by the Shoreline Master Program. PCC 20.56.030(A)(1)(c)(1)(“dock, pier or float shall be designed for swimming and/or mooring pleasure craft only”)

The Turners also argue that commercial marinas are not as convenient as having a dock in their backyard. Mr. Turner testified that a commercial marina in Gig Harbor was not “suitable” because he would have to pay monthly moorage fees and because it would take an hour or two to go to the boat, load it up, take it to their property, and then return it after use. [TR 354:18-24] A dock cannot be permitted just because it would be more convenient than using the Turners’ alternative moorage in Gig Harbor.

In *Siedl, supra*, at conclusion 10, the Board said:

The County and Friends stress that given San Juan County's clear policy against the proliferation of docks, the Walker/Seidl structure cannot be approved simply because it would make water access more “convenient.” The Board has recognized that the added convenience of a private dock does not obviate the requirement to use other available facilities in the area. *Shorett v. San Juan County*, SHB No.06-038 (2007)(23 minute drive to marina); *Stanford v. San Juan County*, SHB No. 06-004 (2006)(two marinas within 2 ½ miles from property); *Close v. San Juan County*, SHB No. 99-021 (2000)(marina 1 mile from property).

A private dock will always be more convenient than driving even a few minutes to a nearby marina. But the Pierce County Shorelines Regulations say that commercial marinas provide a reasonable alternative to a private dock.

The Turners also argue that the private dock located on tidelands owned and leased by Harbor Point Holdings, LLC in nearby Gig Harbor does not provide a reasonable alternative. Harbor Point Holdings, LLC is a limited liability company owned by the Turners. [TR 179:4-9] That company owns waterfront property next to the Tides Tavern in Gig Harbor that has a dock on it. [TR179:16-21, TR185:23-186:1] The property is a fifteen-minute drive from the Turners' residence. [TR194:18-23] The company's lease from DNR allows moorage of commercial or recreational vessels. [TR194:5-11] The company currently leases moorage at that location to a commercial fisherman and a recreational boater. [TR187:20-TR188:16] Those leases can be terminated on 90-days notice. [TR193:3-4] The Board noted that since the Turners own this company and therefore control its property, they could choose to moor their boat at that location, either by removing one of their current tenants or by increasing the moorage space. [CP 587, Conclusion 14] The Turners' desire to avoid the cost of expansion or termination of a lease does not mean that their private moorage is a not a reasonable alternative. Even if commercial moorage was fully

booked and unavailable in perpetuity, the Turners own a private marina only fifteen minutes from their house.

The Turners also argue that the private moorage owned by their limited liability company is not included in the examples of reasonable alternatives listed in PCC 20.56.040(A)(5). As discussed above, the Turners' argument ignores the preceding language "such as", which clearly indicates that the listed alternatives are examples and not exclusive. If commercial moorage in Gig Harbor is a reasonable alternative, then the dock owned by the Turners' company is also.

The Turners make the spurious assertion that using the company's dock for their personal boat puts them at risk by forcing them to disregard the corporate veil, citing to RCW 25.15.061. That statute states that members of a limited liability company are personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances, and the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil. The Turners submit no argument or authority to demonstrate how using space on the company's dock to moor their private boat would render them personally liable for the company's debts. If they think some

consideration is necessary, the company can lease the dock to the Turners, and they can transfer the money from one pocket to the other.

The proponent of a joint use dock does not have to show that reasonable alternatives are not available, because the code states that a joint use dock is itself a reasonable alternative. The Turners argue that their “proposal is properly characterized as one for joint-use.”⁷ They base this assertion on their offers of joint use that they extended to their neighbors, which were rejected by those neighbors. They also claim that they will make the dock available to another shoreline owner “if adequate arrangements are made”, that they are social people and lots of people locally will come to use their dock, and they have family in the neighborhood that will use the dock. None of these assertions, even if true, make their proposed dock a joint use dock.

The Pierce County shoreline regulations define a "Joint Use Pier or Dock" as “a pier or dock including a gangway and/or float which is intended for the private, noncommercial use of not more than four waterfront building lot owners, at least one boundary of whose building lots lies within 1,000 feet of the boundary of the lot on which the joint use pier or dock is to be constructed.” PCC 20.56.010(J). The Code defines a "Single Use Pier

⁷ Appellants’ Opening Brief, p. 22.

or Dock" to mean "a dock or pier including a gangway and/or float which is intended for the private noncommercial use of one individual or family." PCC 20.56.010(I). The Turners have never identified another waterfront building lot owner, at least one boundary of whose building lot lies within 1,000 feet of the boundary of the Turners property, which will share use of the dock. The Turners proposed dock meets the definition of a single use dock under the shoreline regulations, and it is not a joint use dock under the shoreline regulations.

The Board correctly found that the evidence established three reasonable alternatives to a private dock at the Turners' residence. Only one alternative is required. For this reason alone, the dock application must be denied.

C. The Board correctly found that marine oriented recreation areas will be obstructed or impaired by the Turners' proposed single-use dock.

The Board also found that the criterium in PCC 20.56.040(A)(1) is not satisfied because marine oriented recreation areas will be obstructed and impaired by the Turners' proposed dock.⁸ [Conclusion 17, CP 588] The

⁸ Appellants' misquote the language of PCC 20.56.040(A)(1) at page 38 of their Opening Brief. They quote the language as "[i]mportant marine oriented recreation areas will not be obstructed or impaired." What the code section actually says is, "Important navigational routes or marine oriented recreation areas will not be obstructed or impaired."

Board described the impact of a dock at this location on swimmers, paddleboarders, kayakers, and boaters. There was testimony from several witnesses and photographs regarding boats, kayakers and paddleboards that supports this conclusion. [TR 29:20-25, TR 40:23-42:12, TR 42:21-43:24, TR 81:17-86:12, TR 99:13-100:1, TR 108:17-114:16, TR 160:14-163:8, TR 212:23-213:11, CP 892-4, 896, 913]. There was no substantial testimony to the contrary.

The Turners assert that the Board treated their property as an “important” marine-oriented recreation area, and that the use of the beach for walking or boating is not important.⁹ The Board applied the qualifier “important” to navigational routes, not marine-oriented recreation. [Conclusion 17, CP 588] That is the context in which the word appears in PCC 20.56.040(A)(1). The Board held that “the pier will obstruct or impair marine oriented recreation.” Even if the marine oriented recreation areas had to be important, there is ample evidence that the subject beach is an important marine oriented recreation area. The beach is heavily used by beach walkers, boaters and kayakers.

The Turners ask this Court to insert the qualifiers “significant” or “undue” to describe the impairment of marine oriented recreation necessary

⁹ Appellants’ Opening Brief, p. 39.

to disallow a dock under PCC 20.56.040(A)(1).¹⁰ Those qualifiers do not appear in the code, and their absence is apparently intentional. PCC 20.56.040(A)(2) says that the views of neighboring properties cannot be “unduly impaired”, and the Board held that even though there was some view impairment, it was not undue. [Conclusion 18, CP 589] PCC 20.56.040(A)(3) says that the proposed dock cannot unduly restrict or impair use or enjoyment of the beach by adjoining properties, and the Board held that though the dock would cause some restriction or impairment it “would not be undue.” [Conclusion 19, CP 589] However, PCC 20.56.040(A)(1) requires that marine oriented recreation areas will not be obstructed or impaired, with no use of the qualifier “undue” or “unduly”. The code does not allow a dock that will impair or obstruct a marine oriented recreation area, with no higher standard of undue or significant impairment.

The Turners seem to argue that PCC 20.56.040(A)(1)’s prohibition of a dock in where it would impair or obstruct a marine oriented recreation area is inconsistent with the “standard” in the SMA that impacts be minimized “so far as practicable,” citing RCW 90.58.020, and that this “statewide qualified standard” is controlling.¹¹ This argument distorts that

¹⁰ Appellants’ Opening Brief, p. 40.

¹¹ Appellants’ Opening Brief, p. 40.

statute and the regulatory system under the SMA. RCW 90.58.020 sets forth the policy behind the SMA. That policy is implemented through local shoreline master programs that are reviewed and approved by the state Department of Ecology. The Pierce County shoreline master program at issue in this case was reviewed and approved by DOE as required by the SMA. If the Turners are challenging the contents of the Pierce County shoreline master program adopted in 1974, they are far too late. Nor is the Pierce County shoreline master program inconsistent with the language in RCW 90.58.020 cited by the Turners. What that statute actually states is “Permitted uses in the shorelines of the state shall be 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.” Use of the shoreline for a dock is only a “permitted use” if the Turners obtain a shoreline substantial development permit. Under the Pierce County shoreline master program, they are not allowed to get that permit if the dock would impair a marine oriented recreation area.

The sole case cited by the Turners on this point is wholly irrelevant. *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 755, 765 P.2d 264 (1988), dealt with an appeal from the denial of a subdivision application and the application of SEPA. Dealing with property located on

a plateau above the Snoqualmie River Valley, the case had nothing to do with the Shorelines Management Act. SEPA requires the agency to address significant adverse impacts, which was the standard being reviewed the court in that case. The Court reversed the County's decision because it failed to identify the significant adverse impacts that would result from the proposal. The Court never said that a "no impact" standard is impossible to meet and is not required. Nor does the Court's analysis of "significant adverse impacts" under SEPA have anything to do with obstruction or impairment under the Pierce County shorelines regulations.

The Board's conclusion that the criterium in PCC 20.56.040(A)(1) is not satisfied because marine oriented recreation areas will be obstructed and impaired by the Turners' proposed dock is clearly supported by substantial evidence. For this reason alone, the dock application must be denied.

D. The Board correctly found that the Turners' proposed single-use dock is not compatible with surrounding land and water uses.

The Board also found that the criterium in PCC 20.56.040(A)(7) is not satisfied because the intensity of the Turners' proposed use is not compatible with surrounding land and water uses. The Board found that this beach is regularly used by the public for walking. [Conclusion 21, CP 590] The Board found that there is currently a seven mile stretch of beach that is

unimpaired with piers. *Id.* The undisputed testimony is that there are no docks from the entrance of Wollochet Bay to the west to the town of Gig Harbor. [TR139:6-140:2, CP 849] This is a distance of over six miles. [TR252:11-16] The Board found that this unobstructed beach 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. [Conclusion 21, CP 590] This conclusion was based on extensive witness testimony described in Findings 8, 12, 13, and 18. As discussed above, the Board found that the near shore water in this area is heavily used for boating, kayaking, and paddleboarding. [Conclusion 21, CP 590] The Board concluded that proposed pier would present an impediment to all of these public uses. [Conclusion 21, CP 590]

The Board also interpreted PCC 20.56.040(A)(7) as addressing existing pier density based on the pier policy in the Master Program which requires that, “In considering any pier, considerations such as ... existing pier density... should be considered.” [Conclusion 22, CP 590] The proposed pier is incompatible with surrounding land and water use where there are no existing piers for miles in either direction.

The Turners assert that the reference to existing pier density in the pier policy has been interpreted by Pierce County as referring to what is already built, citing to testimony from the Turners’ private consultant, Carl

Halsan, at TR 397, 398.¹² What Mr. Halsan actually testified is that presumably Pierce County considers pier density in its regulations, and that he would presume that the reference to existing pier density looks at the density of docks that are already built. Mr. Halsan did not testify as to how Pierce County interprets the existing pier density policy, only how he would interpret it. His interpretation is not probative of anything. Furthermore, Mr. Halsan's presumption, that existing pier density looks at the density of docks that are already built, is not inconsistent with the Board's conclusion that the existing pier density policy takes into account that fact that no docks have previously been built in the area.

The Turners argue that the fact that their proposed dock would be the first dock for miles in either direction is not a valid basis for denial, citing to the Board's decision in *Inskip v. San Juan County*, SHB No. 98-033 (1999).¹³ However, *Inskip* does not stand for the proposition that the status of first in time cannot be considered in evaluating a dock proposal.

In *Inskip*, the applicant proposed a joint dock that would serve 10 lots and 2,200 lineal feet of shoreline.¹⁴ Unlike in this case, reasonable alternatives were not available. Commercial moorage was generally

¹² Appellants' Opening Brief, p. 26.

¹³ Appellants' Opening Brief, p. 19, footnote 16.

¹⁴ Decision available at

<http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1129>

unavailable and mooring buoys were impractical in the conditions of that shoreline. Finally, with respect to view impacts, unlike here, the dock was proposed to be constructed on a high bank shoreline. Thus, the Board found:

The proposed joint-use dock would not be an undue intrusion on the shoreline. The high banks behind the proposed location and on either end of Horseshoe Bay will allow the facility to blend into the environment. The applicants have further assured this by the proposed use of non-glare and natural material for construction of the dock. As proposed, the facility will not interfere with the aesthetic use and enjoyment of this shoreline.

Id. at Finding X. In context, the Board concluded that, though it would be the first dock, the *Inskoop* dock would have a low profile and be compatible with the surrounding environment. *Id.* at Conclusion VI.

The Board has considered other “first dock” proposals in the context of different surrounding conditions and, considering the totality of the facts and circumstances, concluded that the docks do not qualify for approval. For example, in *Viafore v. Mason County*, SHB No. 99-03 (2000),¹⁵ the Board denied a shoreline substantial development permit for a dock on the eastern shore of Pickering Passage across from Harstene Island. The Board stated at Conclusion VI:

The proposed dock is not consistent with the cited policies and use regulation from the SMP. The Bauer dock would be the first dock approved under the SMA in an area with only

¹⁵ Decision available at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1046>

one other existing dock structure that predates the SMA. In this context the proposed dock is not compatible with the shoreline. The proposed dock will also unduly impact the views on an extensive shoreline with almost no dock development. In terms of both compatibility and view impacts, considerable weight must be given to the possibility that similar docks will be sought by property owners on Pickering Passage if the permit here is allowed to stand. The cumulative effect of such development would be inconsistent with the cited policies and regulations. It would allow for the substantial degradation and corresponding reduction in public rights resulting from multiple docks on what is now a relatively pristine shoreline environment. In a case such as this it is critical to consider the cumulative impacts of a proposed development.

In *Gennotti v. Mason County*, SHB No. 99-011 (1999),¹⁶ the Board rejected a single-family dock proposed for construction on the North Shore of Hood Canal where the area was well developed with single family homes on lots of less than 100 feet in width. *Id.* at Finding VI. With regard to the presence of other docks in the area, the Board noted:

Piers and docks are common along various stretches of Hood Canal. However, they are not common on the North Shore near this proposed project. There are occasional concrete boat ramps along the shoreline and some floats in the water. Otherwise there are no protruding structures beyond the bulkhead. Several docks and piers existed in the area in the 1970s but these have long since disappeared. There are no existing piers or docks for miles in either direction of the [applicant's] property.

¹⁶ Decision available at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1150>

Id. at Finding VII. After considering all the facts, circumstances and applicable policies and criteria in that case, the Board concluded:

The proposal would obstruct views and cause conflicts with recreational uses. It is a single-use dock in tidal waters where cooperative uses of docks and piers are particularly favored. We note that the [applicant] did attempt to interest at least one neighboring property owner to join in their project, but a joint-use facility did not result. Finally, we conclude the project is not consistent with the policy that it be designed and located in a manner compatible with the shoreline area where it would be located. This pier-dock-float would be the only structure for several miles in either direction. We recognize that that the cove and gentle beach at issue are not pristine or unaltered to the residential development on the shoreline. Nevertheless, the area is currently devoid of any large structures protruding into the water. If allowed, the proposed pier dock float would not be compatible with the shoreline area where it would be located.

Id. at Conclusion VI. The first dock status was not determinative, but it was a factor appropriately considered in the context of all the surrounding circumstances.

That the Turner dock would be the first dock in the area, under the circumstances of this case, disqualifies it for a shoreline substantial development permit. Those circumstances include that the dock is proposed on a 7-mile stretch of beach that is presently void of impediments or structures and frequently used by the public. If allowed, the dock would radically and permanently alter the shoreline character and unduly impair

use and enjoyment and views of this unique shoreline. Moreover, these impacts are unnecessary, since the Turners already have adequate access to the water for recreational use with their existing private moorage only a few minutes away.

The Turners speculate that the Board was swayed by a witness's comment that the dock would divide the community by erecting a barrier across the beach, and a petition opposing the dock signed by nearly every neighbor.¹⁷ However, neither fact was mentioned by the Board in its decision. There is no basis to conclude that either fact contributed to the Board's decision. There is no indication that the Board based its decision on the "desires of the community,"¹⁸ that its analysis began and ended with the proposition that docks are disfavored uses and should be allowed only if they pass the Board's comfort level,¹⁹ or based its decision on aesthetic sensibilities.²⁰ Rather, the Board set forth a carefully reasoned decision based solely on the criteria required by the Pierce County shorelines regulations.

The Turners incorrectly assert that the Court in *May v. Robertson*, 153 Wn. App. 57, 87, 218 P.3d 211, 226 (2009), ruled that the fact that a

¹⁷ Appellants' Opening Brief, p. 20.

¹⁸ Appellants' Opening Brief, p. 20.

¹⁹ Appellants' Opening Brief, p. 26-27.

²⁰ Appellants' Opening Brief, p. 27.

private dock is the first proposed in the general vicinity is not a factor.²¹ The proposed project in *May* was a 100-foot joint use pier, where another 150-foot pier was only 1,500 feet away. The Court noted that the Pierce County Shoreline Master Program encourages joint use piers as an alternative to single use piers. *Id.*, at 86. The Court reasoned that since the Pierce County Code expressly lists joint use piers as a reasonable alternative to single use piers, it is not necessary to consider the availability of other alternatives. Since there were several other 50-foot piers and one 150-foot pier in close proximity, the Court concluded that the Board's focus on other alternatives to the joint use dock and incompatibility with surrounding land uses was not supported by the evidence.

The Turner proposal is different for obvious reasons. They are proposing a single use pier, not a joint use pier. Thus, they must show that there are no reasonable alternatives available. Their proposed dock is not within a few hundred feet of multiple other docks. Nothing in the *May* decision prevents consideration of the changes to the shoreline from the proposed Turner pier.

The Board's decision in this case is entirely consistent with its previous determinations in the *Viafore* and *Gennotti* discussed above. As

²¹ Appellants' Opening Brief, p. 2-3.

in those cases, the Board found that the proposed dock is not compatible with the surrounding land uses, because it would degrade the public's rights on a beach that is now unimpeded by any large structure for miles in both directions. The Board applied its "specialized knowledge and expertise" in determining compatibility, and its decision is entitled to deference. The Board's was correct in concluding that the criterium in PCC 20.56.040(A)(7) is not satisfied because the Turners' proposed dock, pier and float are not compatible with the surrounding environment and land and water uses. Again, for this reason alone, the dock application must be denied.

E. The cumulative impacts resulting from an approval of Turners' proposed pier and dock require denial of their application.

The Board has held in past cases that it may consider cumulative impacts resulting from the approval of a shoreline substantial development permit (SSDP) pursuant to the Shoreline Management Act (SMA) and local SMP, separate from SEPA. As stated by the Board in *Garrison v. Pierce County (De Tienne)*, SHB No. 13-016²², affirmed, *de Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248 (2016), at pp. 53-54:

While the SMA contains no mandate for a cumulative impacts analysis on review of an SSDP, the Board has held it is not precluded from considering cumulative effects

²² Decision available at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1608>.

where appropriate. *May v. Pierce County*, SHB No. 06-031 (2007); *see also Fladseth v. Mason County*, SHB No. 05-026 (2007) at COL 13, pp. 21-22.; *Lockhart*, SHB No. 13-006c at COL 21-27, pp. 37-42. This is particularly true for “cases where there is a clear risk of harmful impacts to high value habitat, loss of community uses, impacts to views or the loss of extraordinary aesthetic values. *See May*, SHB No. 06-031 at COL 18, p. 30. The Washington Supreme Court has confirmed that the Board's statutory duties encompass concern over the ultimate cumulative impact of piecemeal development on state shorelines. *Fladseth*, SHB No. 05-026 at COL 13, p. 21, *citing Hayes v. Yount*, 87 Wn.2d 280, 288, 552 P.2d 1038 (1976). The Supreme Court has, in fact, recognized that approval of one project can set a precedent for others to follow, and that it is proper for the Board to consider cumulative impacts that might occur from the granting a substantial development permit. *Id.*, *citing Skagit County v. Department of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 121 (1980).

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

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

In the case at bar, the Board held that a) Turners’ proposed single use pier-ramp-float is a disfavored use under the SMP; b) the 150 foot pier-ramp-float would be the first of its kind in this seven mile stretch of beach;

c) allowing the first pier would set a precedent for allowing other similarly large piers in this area; d) the cumulative impacts of this pier, and future piers, would degrade aesthetic values; e) there would be a loss of community uses; f) beach-walkers would be obstructed and marine recreation would be affected; g) kayakers, paddleboarders, and small fishing boats would be forced to go further off shore into the turbulent waters of Hale Passage; h) and the views of the public walking on the beach or using the water in this area, and the views of all of the neighbors including those up the hill above the project would be impacted. Since most of the relevant factors were met in this case, the Board concluded that approval of this permit application for a single use pier-ramp-float in this location would likely have cumulative impacts. [Conclusion 30, CP 593]

The Turners assert that there is no indication of additional permitting activities in the area, which is a “critical foreseeability showing.” They cite to *Garrison v. Pierce County (De Tienne)*, *supra*, but there is nothing in that decision indicating that any particular factor is “critical” or favored over other factors. The Turners then assert “speculation cannot sustain a finding in this regard”, but they already acknowledged that the Board made no finding in this regard. They do not explain what speculation they are referring to. They then cite to *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 209, 143 P.3d 876 (2006), a case which had nothing

to do with the Shorelines Management Act or cumulative impacts, but which merely said, “A verdict cannot be founded on mere theory or speculation.”

The Turners assert that because there is no evidence that other dock applications have been made, there is no risk that approval of this dock will lead to additional applications. As noted above, in *Garrison* the Board stated, “The Supreme Court has, in fact, recognized that approval of one project can set a precedent for others to follow, and that it is proper for the Board to consider cumulative impacts that might occur from the granting a substantial development permit.” The Turners own consultant testified that “once there is a dock that’s put in and ownerships change, it could pave the way for more docks in the area.” [TR 393:15-18]

The Turners stated that the County found no cumulative impacts, citing solely to the determination of nonsignificance (DNS) issued in its SEPA review.²³ This has no bearing on the Board’s determination of cumulative impacts. In *Bellevue Farm Owners Association v. State of Washington Shorelines Hearings Board, supra*, at 355, the Court held that the only function of a DNS is to avoid the preparation of an environmental impact statement. The Court stated:

²³ Appellants’ Opening Brief, p. 28.

Washington's legislature, courts, and state agencies recognize that, with the exception of avoiding an EIS, a DNS does not bind subsequent agencies that independently assess shoreline development applications. Accordingly, the County's DNS did not otherwise constrain the Board in its review of the Project.

To support that conclusion, the Court cited the Supreme Court's language in *Save Our Rural Env't v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983):

SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decisionmakers. It was not designed to usurp local decisionmaking or to dictate a particular substantive result.

Id., at 354. The Court also noted that “when San Juan County issued the DNS under SEPA, it was aware that the permit had to meet San Juan County's Shoreline Master Program, which adequately addressed environmental impacts.” *Id.*, at 355, n. 29. Therefore, Pierce County's issuance of a DNS does not limit the issues or otherwise bind the Board in assessing Turners' shoreline substantial development permit application.

Finally, it is interesting to note that the Turners argue that their dock will not have cumulative impacts because the location, currents, heavy weather, community opposition, and cost would deter others from building a dock. In other words, no one else would be so foolish to try to build a dock in this area.

F. The appellants do not have a constitutional right to build a dock.

Turners argue that they have a right, not a privilege, to build a dock, because one's right to use private property is protected by the state and federal constitutions. That is simply incorrect as applied to tidelands.

The sovereignty and dominion over this state's tidelands and shorelands, as distinguished from title, always remains in the state, and the state holds such dominion in trust for the public. *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987). The requirements of the "public trust doctrine" are fully met by the legislatively drawn controls imposed by the Shoreline Management Act. *Id.*, at 670. The construction of private recreational docks is regulated by the SMA which requires that a dock be constructed in a manner that is consistent with the policy of the Act and the local guidelines, regulations or master programs promulgated under the Act. *Id.*, at 673. Thus, it is clear that a property owner has a privilege to build a dock only when that person meets the criteria of the SMA and the local shoreline regulations and obtains a permit.

The Turners assert that the key issue is how far government can go in dictating private prerogatives. They raise the rhetorical question whether the government can tell a family they cannot build a tennis court on their property when there are private or public courts nearby, when a private court

on their property is a permitted use.²⁴ The analogy is misplaced for two reasons.

First, a dock over 150 feet long costing \$50,000-100,000 is only a permitted use if the applicant satisfies all criteria for a shoreline substantial development permit. A dock of this size and cost is not permitted outright. There are no such permitting requirements for a tennis court.

Second, building a tennis court on upland property does not implicate the public trust doctrine which, as noted above, means that the state retains sovereignty and dominion over this state's tidelands and shorelands, even privately-owned tidelands, in trust for the public. The Shoreline Management Act requires balancing private and public uses. Requiring use of readily available alternatives to a private dock allows reasonable access to the water while protecting public access and use of the tidelands. None of those factors are in play with an upland tennis court.

This Court rejected a similar argument in *Olympic Stewardship Foundation, supra*, at 720, where it stated,

More to the point, we are aware of no case law holding that property owners have a fundamental right to do what they wish on their property without being troubled by reasonable regulation. Such a rule would contradict the broad and ample scope of the police power long recognized under state and federal law. [citations omitted]

²⁴ Appellants' Opening Brief, p. 36.

This Court has repeatedly rejected the argument presented by Turner’s counsel in other cases, stating that, “We held that, contrary to the appellant's claims that RCW 90.58.020 states a policy of protecting private property rights, that the private property rights are “secondary to the SMA's primary purpose, which is ‘to protect the state shorelines as fully as possible.’ ” *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009); *Olympic Stewardship Foundation, supra*, at 690.

G. The Turners have abandoned any claim of error in the denial of the conditional use permit for a boatlift.

The Board denied the Turners’ application for a conditional use permit for a boatlift at the end of the dock. The Board concluded that the boatlift was not feasible in the absence of a dock. [Conclusion 27, CP 592] This conclusion is supported by the testimony of Rick Mraz, wetlands and shorelines specialist for the Department of Ecology, that a free-standing boatlift would not be feasible at this location. [TR 224:2-6] That testimony was undisputed.

The Turners’ Petition for Judicial Review did not assign error to Conclusion 27. [CP 1] It merely asked for remand to issue the requested shoreline substantial development permit for the dock and the conditional permits for the boathouse and boatlift. The Turners’ Opening Brief also did not assign error to that conclusion by the Board. Neither the Turners’

Petition for Judicial Review nor their Opening Brief contains any argument that the denial of the conditional use permit for the boatlift was erroneous. As noted above, passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Olympic Stewardship Foundation v. Environmental & Land Use Hearings Office, supra*, at 687. The Court will not consider claims unsupported by legal authority, citation to the record, or argument. *Id.*

H. Baldwin and Simons are entitled to an award of attorney fees on appeal.

Baldwin and Simons were the prevailing parties before the Board and in review before the Superior Court. RCW 4.84.370 states that reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals of a decision by a county, city, or town to issue, condition, or deny a shoreline permit if the prevailing party on appeal was the prevailing party or substantially prevailing party before the Board and in all prior judicial proceedings. *See de Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248, 291, 391 P.3d 458, 481 (2016) (where the Coalition was the substantially prevailing party before both the SHB and the superior court, the Coalition is entitled to reasonable attorney fees and costs). Because Baldwin and Simons were the substantially prevailing party before both the SHB and the

superior court, Baldwin and Simons are likewise entitled to an award of reasonable attorney fees and costs on this appeal.

The Turners assert in their Conclusion that they are entitled to an award of attorney fees against the Board under the Equal Access to Justice Act, RCW 4.84.340 and 350. Well-established case law is to the contrary. In *Duwamish Valley Neighborhood Pres. Coal. v. Central Puget Sound Growth Mgmt. Hearings Board*, 97 Wn. App. 98, 100, 982 P.2d 668, 669 (1999), the Court held that RCW 4.84.350 does not apply to a decision of a purely adjudicatory body rendered in the course of an adjudicatory proceeding. The Court noted that the Board was acting as an adjudicative body and is but a nominal party in the judicial proceedings. It reasoned that to award fees against the Board would be akin to awarding fees against the trial court when an appellate court reverses its decision, and would be inappropriate. *See also, Spokane County v. Eastern Washington Growth Mgmt. Hearings Board*, 176 Wn. App. 555, 584, 309 P.3d 673, 687 (2013). Even if the statute applied to the Board's action, the Turners make no attempt to demonstrate that they are a "Qualified Party" under RCW 4.84.340(5). Considering the nature of the Turners' 100 feet of waterfront property on which this dock was proposed, and the substantial waterfront property in Gig Harbor owned by their limited liability company, it is highly unlikely that their net worth does not exceed one million dollars.

III. CONCLUSION

Single-family piers are discouraged under the Pierce County SMP. No piers or docks have been permitted on the entire south end of the Gig Harbor peninsula, preserving an unimpeded beach and marine environment enjoyed by beach walkers and kayakers alike. The Turners' proposed pier would seriously impair marine recreation and pedestrian access to the beach. The Turners have a reasonable alternative to the pier in the form of their own private moorage a short distance away, as well as nearby commercial marinas or a mooring buoy. The only reason the Turners seek to install a pier, effectively destroying the existing character of the beach for everyone else, is to make their boat access slightly more convenient. The Court should affirm the Board's carefully reasoned decision following the clear mandate of the SMP and Pierce County Code and deny the Turners' appeal. The Court should award reasonable attorney fees to Baldwin and Simon.

DATED this 22nd day of April, 2019.

s/James V. Handmacher
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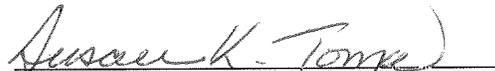
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Dated this 22nd day of April 2019 at Tacoma, Washington.


Susan K. Toma

MORTON MCGOLDRICK

April 22, 2019 - 3:17 PM

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