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No. 52658-1-II

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

ERIC and KENDRA NIESZ,

Appellants,

v.

PIERCE COUNTY; JOHN WEST; CHRISTINE WEST; WILLIAM  
REETZ; ERIN REETZ; and STATE OF WASHINGTON SHORELINES  
HEARINGS BOARD,

Respondents.

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**APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

This appeal involves the wrongful denial of a private dock, which is a permitted use under Pierce County Shoreline Use Regulations.<sup>1</sup>

Appellants Eric and Kenda Niesz (the “Nieszes”) and their extended family wish to construct a dock. The proposed dock meets all design standards that by law they must share with another shoreline property owner if adequate arrangements are made.<sup>2</sup> No one suggests the proposed dock will have any measurable impact on the aquatic environment. The Shoreline Hearings Board<sup>3</sup> (the “Board”) found that the Nieszes’ proposal (1) does not unduly impair views; (2) important navigational routes would not be obstructed; and (3) the public’s use of the surface waters below ordinary high water would not be unduly impaired “by the need to go out around the proposed dock.”<sup>4</sup>

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<sup>1</sup> PCC § 20.56.030(D) specifically *allows* private docks in the Conservancy Environment, in the same manner as allowed in the Urban (and Rural-Residential and Rural) Environment. In 2018 Pierce County adopted new Shoreline Use Regulations, PCC Chapter 18 S, Ordinance No. 2018-575. The County Council continued to allow docks at the Niesz site.

<sup>2</sup> WAC 332-30-144(4)(d). A full copy of WAC is attached as Appendix A-1. See p. 16, *infra*.

<sup>3</sup> The Decision is attached as Appendix A-2. It is in the Administrative Record, at Index 40, AR 403-431. The Decision can also be found at CP 934-952. The entire Administrative Record is set out at CP 100-1442.

<sup>4</sup> Beach walking must be accommodated under state regulations allowing use of public tidelands, WAC 332.30.144(4)(d), which applies because the Nieszes do not own their beach.

These findings should have compelled the Board to approve the proposal.<sup>5</sup> However, the Board denied approval because the Nieszses' dock would be the first in the neighborhood. The Board erroneously ruled that this was a disqualifying factor based upon "compatibility," since the existing dock density was zero.<sup>6</sup>

There is no law or regulation that grants the Board the power to deny an application on this basis. To the contrary, in *May v. Robertson* 153 Wash.App. 57, 218 P.3d 211 (2009), this Court ruled (under the same County regulations construed by the Board in this matter) that the fact that a private dock is the first proposed in the general vicinity and will change the visual effect or character of the shoreline *cannot be used to deny an application* for an approval:

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

153 Wash.App. at 87 (emphasis added).<sup>7</sup>

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<sup>5</sup> See Decision at 21 (Conclusion No. 16) (Important Navigation Routes); 21-22 (Conclusion No. 16) (Views); 22 (Conclusion No. 18) (Public Use of Waters); 22 (Conclusion No. 17) (Go Around the Proposed Dock).

<sup>6</sup> Decision at 25-26 (Conclusions Nos. 25-27).

<sup>7</sup> As in *May*, the Nieszses' proposal is one for joint use. WAC 332-20-144(2)(b) permits use of public tidelands for a "single joint use dock." The joint facility must be for use of "abutting owners" of the waters of the State and front "one of the owners' property," which the Nieszses' proposal does.

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

The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters . . . , may install and maintain without charge a dock on the areas if used exclusively for private recreational purposes . . . . This permission is subject to applicable local, state, and federal rules and regulations governing location, design, construction, size, and length of the dock.<sup>8</sup>

RCW 79.105.430(1).

The Washington Supreme Court upheld the constitutionality of this statute and summarized its benefits as follows:

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

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

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

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<sup>8</sup> The Nieszes’ proposal meets all of these criteria. See n.15, *infra*.

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

The Board’s role is to interpret and apply the law, not to make the law, which in this case is a role reserved to the Pierce County Council and State Department of Ecology. Despite assertions as to its intent not to deny a “First Dock” proposal in all instances,<sup>9</sup> the Board’s decision results in a *de facto* ban on all docks when no other dock has been constructed along a beach because any new dock is a change invoking subjective perceptions of incompatibility and one is more than zero. No properly-adopted law or regulation supports this result.<sup>10</sup>

The Board should not “freelance” by reading a limitation into the statutory and regulatory scheme that does not exist. This Court should return decision-makers to the fundamental statutory premise that private docks are allowed if permitted under local law when designed to minimize undue impacts as far as reasonably practical. Reversing the Board and directing the Niesz shoreline application be approved simply reaffirms the

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<sup>9</sup> Decision at 25-26 (Conclusions Nos. 25-27).

<sup>10</sup> RCW 90.58.590 provides that only a local government is authorized to adopt a moratorium.

balance inherent in the SMA as held by this and other courts. It would encourage fairness and predictability in the permitting process as envisioned by the Growth Management Act, RCW 36.70A.020(7), and the Project Review Act, RCW 36.70B.

## II. ASSIGNMENTS OF ERROR

The Shoreline Hearings Board made 37 Findings of Fact and drew 34 Conclusions of Law.<sup>11</sup> The Superior Court entered a two-page order stating in part:

ORDERED, ADJUDGED AND DECREED that the Board's decision in Case Number 16-011 is affirmed, and it is further

ORDERED, ADJUDGED AND DECREED that the Niesz's petition for judicial review of the Board's decision in Case Number 16-011 is denied.<sup>12</sup>

Mr. and Mrs. Niesz assign error as follows:

### A. Shoreline Hearings Board Errors.

1. Entering its Findings of Fact, Conclusions of Law, and Order dated November 20, 2017 (the "Decision"), which hold: "The decision issued by Pierce County denying Petitioners' request for a Shoreline Substantial Development Permit to construct a single-use dock is AFFIRMED. Decision at 29.

2. Holding that the dock proposal is not consistent with the

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<sup>11</sup> CP 1-95.

<sup>12</sup> CP 1576.

Pierce County Shoreline Master Program policies and regulations and SMA policies, RCW 90.58.020. Decision at 16, 21-29 (Conclusions Nos. 2, 15-31, 33).

3. Entering its Conclusions Nos. 23 and 31, to the effect that “the proposed dock is not compatible with the surrounding land and water uses and the proposed dock is not consistent with existing pier density.” Decision at 24-25, 28.

4. Entering Conclusion No. 30, which reads in full:

The proposed single-use dock is discouraged under the SMP Piers Policies. The 150-foot proposed dock would be the first of its kind on the southwest side of Fox Island. Allowing the proposed dock would set a precedent for allowing other similar docks in this area. The cumulative impacts of this dock, and future similar docks, would degrade aesthetic values. There would be significant loss of community uses. Beach-walkers would be obstructed and marine recreation would be affected. The Board concludes that approval of an SSDP for the proposed dock in this location would likely have cumulative impacts that would be inconsistent with the policies and regulations of the SMP.

Decision at 27-28. The Board erred as well in entering Conclusions Nos. 28-31, ruling that the proposal would lead to more dock applications which would degrade the aesthetic quality of the beach. Decision at 26-28.

5. By deeming the proposed dock as a “single-use” facility for purposes of its analysis. Decision at 3, 16-17; 23 (Finding No. 4,

Conclusions Nos. 4, 19).

6. Elevating the policies of the local master program over the County's use regulations and giving the local policies dispositive weight over specific language which provides that a private dock is a permitted use. Decision at 18 (Conclusion No. 9).

7. Entering Conclusion Nos. 19-21 and No 26, that reasonable alternatives to the proposed dock are available. Decision at 20-21, 23-26.

8. Refusing to presume that the Nieszes will comply with applicable DNR standards (WAC 332-30-144(4)(d)), which mandate accommodation of beach walking; impermissibly shifting the burden of proof as to alleged cumulative impacts of the dock and its reasonable alternatives rulings; applying a subjective standard of what the opposing neighbors find suitable for themselves, rather than an objective standard, for identifying "reasonable alternatives" to a dock; and using as a factor for approval whether the proposal was safe to use "year round," then substituting a layman's opinion on safety for that of an expert. Decision at 7-11, 20, 23 (Finding Nos. 16, 18-25, 27; and Conclusions Nos. 14, 19, 21).

9. Entering its Conclusions Nos. 15, 17, and 23, and Finding No. 17, to the effect that the proposed dock would impair or restrict beach

walkers, further compounding its error by failing to consider state regulations that mandate that access be provided for walkers around the facility by use of a few steps up to, around, and down the low bulkhead which the dock ties into. Decision at 7-8, 21-22, 24-25.

10. Entering its Finding No. 15, to the effect that the proposed dock will impair nearshore marine recreation in the form of kayaking, paddle boarding, swimming, and boating. Decision, pp. 6-7.

11. Entering its Finding No. 22, to the extent it finds the Narrows Marina is a reasonable alternative; Finding No. 23, to the extent it finds a mooring buoy is a reasonable alternative; and Finding No. 24, that year-round use of the dock would be unsafe. Decision at 10.

12. Entering its Finding No. 24, that the dock would not significantly increase the boating season. Decision at 10.

13. Entering its cumulative impacts ruling that the proposal would lead to more dock applications which would degrade the aesthetic quality of the beach. Decision at 26-28 (Conclusions Nos. 28-31).

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

**B. Superior Court**

1. The Superior Court erred in holding that the Nieszes failed

to meet their burden of proof under RCW 34.05.570(3), denying their APA appeal, and affirming the Board's decision.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Did the Board (and the Superior Court to the extent required on review) erroneously interpret the law and apply the law and/or act arbitrarily and capriciously without substantial evidence when (a) concluding that the dock proposal was a "single use facility" and (b) leaving out of its analysis state policies (RCW 90.58.020), which allow water-dependent uses such as private docks, when it ruled that the proposal was "disfavored" under the SMA and Pierce County's shoreline use regulations? (Assignments of Error Nos. 1-2, 4, 6, 10, 12.)

2. Did the Board (and the Superior Court to the extent required on review) erroneously interpret the law and apply the law to the facts and/or act arbitrarily and capriciously when it denied the dock application because it would be the first dock "for miles around," thereby being "incompatible with the existing intensity of use" and "dock density"? (Assignments of Error Nos. 1-3.)

3. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts, act without substantial evidence, and/or act arbitrarily and capriciously

when it denied the dock permit on grounds that use of a mooring buoy or a local marina are reasonable alternatives to a fixed dock for the extended season and multiple purposes identified by the Nieszkes in their application? (Assignments of Error Nos. 1-2, 6-7, 10-11.)

4. Did the Board (and the Superior Court to the extent required on review) erroneously substitute its subjective judgment over the testimony of an expert who opined the proposed dock was "safe to construct and use" at the site location year-round and further compound its error by addressing safety, which is not one of the promulgated criteria for approval? (Assignment of Error Nos. 1-2, 7, 11.)

5. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts when it denied the dock permit on the basis that state requirements mandating accommodation of beach walkers (which the County made a condition of approval) could not be considered, leading the Board to conclude that the ability of the public to walk on the beach would be impacted by the proposed dock? (Assignments of Error Nos. 1-2 and 7-8.)

6. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts; act without substantial evidence, and/or act arbitrarily and capriciously

when it based its denial of the Nieszses' dock permit on a faulty cumulative impacts analysis that ignored the criteria the Board itself had previously established for such analyses, and when its conclusion that approval of the Nieszses' dock permit would result in a proliferation of new dock applications was based upon speculation rather than substantial evidence? (Assignments of Error Nos. 1-2, 4, and 7.)

7. Did the Board (and the Superior Court to the extent required on review) erroneously interpret and/or apply the law to the facts, act without substantial evidence, and/or act arbitrarily and capriciously when it denied the dock permit on the grounds it would impair nearshore marine recreation without consideration if such alleged impacts would be "undue"? (Assignments of Error Nos. 1-2, 9.)

8. Did the Board's decision (affirmed by the Superior Court) as applied violate the Nieszses' fundamental constitutional property and due process rights when (1) that decision was not based upon lawfully-promulgated criteria; (2) it failed to interpret local regulations so as to accord with the general laws of the State; and/or (3) that their right to ordered liberty was not protected because the decision-maker erroneously characterized the proposal as disfavored under local policies and elevated its general perception over specific criteria permitting the use?

(Assignments of Errors Nos. 1-2 and 12.)

#### IV. STATEMENT OF THE CASE

##### A. The Property

The Niesz property (the "Site") (TOP 35:15-20)<sup>13</sup> is one-half acre in size located on the southwest side of Fox Island at 695 Kamus Drive, Fox Island, Washington. *Id.*, TOP 36:24-25 (CP 142) The Nieszes have lived on the Site since 2004. TOP 37:1-7 (CP 143.) The Site is within the Conservancy Shoreline Environment and Rural 10 (R10) zone classification of Pierce County, in the NE ¼ of Section 11, T20N, R1E, W.M., Tax Parcel No. 0120111018. TOP 92:1-2; 17-19 (CP 198).

The Site faces east towards Carr Inlet with views of the water and the Olympic mountains. TOP 46:20-25, 197 (CP 152, 303).

The Site is improved with two single-family waterfront residences and carports, other appurtenances, and a concrete boat ramp and bulkhead. TOP 39:24-25, 40:1-5 (CP 145-146); CP 970-976 (Ex. P-2, Index No. 000439-000445 (Pictures of Site)).

The neighborhood has small urban-type lots developed with houses, appurtenant structures, one boat launch, and bulkheads for most properties. TOP 42:15-24, 43:8-16, 160:4-18 (CP 148-149, 254-259.)

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<sup>13</sup> "TOP" refers to the Transcript of Proceedings before the Board. The Transcript of Proceedings is set out in the Clerks Papers at CP 106-431.

There are no other residential docks within the near vicinity of the Site.

There is no critical fish habitat at the Site. TOP 98:7-15 (CP 204).

The fetch at the Site on Carr Inlet is over two miles wide and the proposed 150-foot long (over water) dock is approximately 1.2 percent of the fetch. TOP 97 (CP 203). This meets applicable length requirements.

John and Christine West own property adjacent to and south of the Site. TOP 40:22-25 (CP 146). William and Erin Reetz own property along the beach directly north of the Site. *Id.* The West property consists of several parcels. TOP 41:1-4 CP 147). The parcel immediately to the south of the Site is vacant and the Wests live in a house on the next parcel. TOP 41:19-25, 42:1 (CP 147-148.) The West property is also low-bank waterfront developed with a home and has a rock wall bulkhead. There is a house on the Reetz property that is used by them as a second home. TOP 42:14-25, 43:1-5 (CP 148-149).

Mr. and Ms. Niesz have an extended family. The property is in the nature of a "compound" used by relatives, guests, and friends for private recreation. The fetch can be stormy. TOP 39:4-17 (CP 145). The family has found that use of a mooring buoy/boat ramp as the exclusive method to access the waters of the state is dangerous and not always feasible, especially for small children and senior citizens. The Nieszes intend

multiple uses for the facility including swimming, fishing, crabbing, and gathering. TOP 38-39 (CP 144-149).

**B. The Proposal**

The pier of the dock would be attached to the top of the concrete bulkhead that runs along the east side of the Site. The bulkhead is two feet, eight inches high. Decision at 4 (Finding No. 7). The dock would consist of a 90-foot long by four-foot wide pier, a 46-foot long by three-foot wide ramp, and an eight-foot long by 24-foot wide float. CP 1253-1258 (Ex. R-20); TOP 96:1-17 (CP 202); TOP 109-110 (CP 215-216). The pier and ramp would be supported by four steel piles and the float would be supported by four steel piles, for a total of eight that would be 10 inches in diameter. *Id.* The existing mooring buoy would remain. CP 166-171.

The Nieszes' dock was designed to avoid undue view impacts. TOP 60:11-14, 21-25; 61:1-2 (CP 166-167).

The piles supporting the pier and ramp would be approximately 42, 44, and 40 feet apart and the piles that support the float would be 24 feet apart. The handrail on the pier and ramp would be three inches wide and three feet, six inches above the surface of the pier and ramp. *Id.*; *see also* Decision at 3 (Findings Nos. 5-6).

The proposal is to extend use beyond the four month “boating season” some find acceptable for their purposes. TOP 18:10-11, 18-19 (CP 139-140). The dock will be offered for use to extended family and neighbors, to another shoreline waterfront owner, and the Sheriff’s Office for emergency use.<sup>14</sup> TOP 33:15-18, 34:2-13 (CP 139-140.)

Public agencies have developed a standard “fish friendly” design for private docks. The Nieszes’ proposal meets the applicable criteria. TOP 107-108 (CP 213-218.)

No public agency opposed the application. There was, however, substantial neighborhood comment in opposition to the application.

The County issued a routine decision under the State Environmental Policy Act (“SEPA”), a Determination of Nonsignificance (“DNS”), dated July 11, 2016. Ex. P-12 (CP 1030-1033.)

The DNR advised the County that the Nieszes were allowed to use the waters of the State pursuant to state law. Ex. P-20 (CP 1064-1069); TOP 64:18-25, 65:1-23 (CP 171-172). It further advised that its regulations, WAC 332-30-144(4)(d), provide that “owners of docks located on state-owned tidelands or shorelines must provide a safe,

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<sup>14</sup> The Nieszes attempted to develop the proposed dock as a joint-use dock, but the adjacent property owners declined to participate. TOP 37:25, 38:1-2, 53:22-25, 54:1-11 (CP 143-146, 159-160); Ex P-14 (CP 1048). Neighbors John and Chris West initially offered a joint-use facility, but later withdrew the offer. TOP 37:8-25, 302 (CP 143, 408).

convenient, and clearly available means of pedestrian access over, around, or under the dock at all tide levels.” Compliance with this regulatory obligation was made a project condition if the County approved the proposal. The Nieszses did not object to the condition. CP 1146 (Staff Report at 9, Condition No. 2).

The Staff Report to the Pierce County Examiner stated that the dock proposal met all dimensional criteria for single-use piers and docks. CP 1148 (Report, Ex. P-27, at 11).<sup>15</sup>

The Staff Report found that public use of the surface waters below the ordinary high-water mark would not be unduly impaired. CP 1149 (Report at 12). It stated that “a structure extending 150 feet into the water at high tide will cause no more than an incidental impairment to small watercraft traveling parallel to shore and will have no impact on larger craft.”

**C. The Examiner’s Decision**

A public hearing on the proposal was held before the Pierce County Examiner on September 28, 2016. A substantial number of the public testified in opposition. The complaining citizens emphasized the uniqueness of the area because it does not have docks. The Hearing

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<sup>15</sup> The Board agreed that the Nieszses’ proposal meets all dimensional criteria in the County’s Shoreline Management Use Regulations. *See* Decision at 4 (Finding No. 8).

Examiner denied the dock request; the buoy was approved. TOP 197 (CP 303.)

**D. The Board's Decision**

The Board conducted a hearing on September 18-19, 2017, on the Nieszes' appeal. It considered the following specific approval criteria:

**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.

PCC 20.56.020A.

The Board ruled that the Nieszses' proposal did not meet four of the criteria – Nos. 1, 3, 5 and 7. The Board found there would be some interference with nearshore recreational use, Decision at 21 (Conclusion No. 15), even though nearshore recreational use *would not be unduly impaired*, Decision at 22 (Conclusion No. 17).

Erroneously ignoring the DNR regulations (WAC 332-30-144(4)(d)), the Board found that the ability of the public to walk on the beach would be impacted by the proposed dock and the facility would “impair” to some unspecified degree nearshore marine recreation in the form of kayaking, paddle boarding, swimming, and boating. Decision at 7 (Finding No. 17), 21 (Conclusion No. 15), 22 (Conclusion No. 17), 24-25 (Conclusion No. 23).

The Board found that there were two “reasonable alternatives” to the proposed dock: (a) a mooring buoy; and (b) a private marina. *See* Decision at 10 (Finding Nos. 22 and 23), 11 (Finding No. 27), 23-24 (Conclusions Nos. 20-22)

The Board perceived the proposal as one for year-round use, a label the Nieszses applied but in the context that the proposal increased use for the months a buoy cannot be safely used or times when a private boat launch at site cannot be used. That launch facility is not feasible to use except during only very high tides. TOP 12-25 (CP 118-125).

The Board ruled that the Neiszes could moor their boat at a mooring buoy, which it determined to be a reasonable moorage alternative in the context of the "boat season" it viewed as "commonly running" from later spring to early fall. Decision at 23-24 (Conclusion No. 21); *see also* Decision at 10 (Finding No. 23) ("accessing a boat secured to a buoy and bringing it to the beach for loading and unloading is a reasonable manageable activity."). That approach let the opposing neighbors decide what was reasonable based upon what they found manageable and sufficient for themselves.

The Board's decision viewed the proposal as a "single-use" dock, which it characterized as highly disfavored or "discouraged," Decision at 27-28 (Conclusion No. 30), despite the undisputed facts that the Nieszes had offered to build a joint-use facility and the DNR regulations mandate joint use. Decision at 23 (Conclusion No. 19).

The Board then assured the Nieszes' dock would not be built by issuing a cumulative impact ruling that permitting the Niesz dock would set a precedent, speculated that a proliferation of docks would result, and that these docks (real or imagined) "would degrade aesthetic values." Decision at 26-28 (Conclusions Nos. 28-30).

**E. Superior Court**

An appeal was filed under the Administrative Procedure Act. CP 1-95. The Superior Court denied the appeal and affirmed the SHB decision, stating:

1 The Board correctly concluded that the Niesz proposal does not satisfy the criteria for approval of shoreline substantial development permit for a pier and dock under the Pierce County Master Shoreline Program and use regulations.

2 The Board correctly found that reasonable moorage alternatives exist for the Niesz, so PCC 20.56.040(A)(5) is not met.

3 The Board correctly found that marine oriented recreation areas will be obstructed and impaired, so PCC 20.56.040(A)(11) is not met.

4 The Board correctly found that the use and enjoyment of the beach on adjoining property will be unduly restricted or impaired, so PCC 20.56.040(A)(3) is not met.

5 The Board correctly found that the intensity of the Niesz's proposed use is not compatible with surrounding land and water uses, so PCC 20.56.040(A)(7) is not met.

CP 1575-1576. This timely appeal followed. CP 1579-1584.

**V. STANDARD OF REVIEW**

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

the local government. *Buechel v. Dep't of Ecology*, 125 Wash.2d 196, 202, 884 P.2d 910 (1994).

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

The party appealing a decision of the Board bears the burden of demonstrating the invalidity of the Board's actions. *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wash.App. 503, 515, 137 P.3d 31 (2006), *review denied*, 162 Wash.2d 1008, 175 P.3d 1092 (2008); RCW 34.05.570(1)(a).

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

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

34.05.570(3)(e). “Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.” *Id.*

When reviewing the Board’s decision for arbitrary or capricious conduct, the Court asks whether the Board demonstrated “willful and unreasoning action in disregard of facts and circumstances.” *Buechel*, 125 Wash.2d at 202 (quoting *Skagit County v. Dep’t of Ecology*, 93 Wash.2d 742, 749, 613 P.2d 115 (1980)).

## VI. ARGUMENT

This appeal is not a contest over “disputed facts.” The Board, as noted, found no undue view impairment with the proposal, and that the dock can be easily gone around by nearshore users. Further, state regulations *require* accommodation of beach walkers. This appeal thus boils down to the interpretation of the law and its application to the facts.

The SMA is a statewide law. This Court must protect its integrity from parochial interests. *See Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash.2d 384, 392, 258 P.3d 36 (2011). This Court should compel decision-makers to return to the SMA’s basics and reject any non-statutory predisposition that private docks are never allowed if another dock is not present. The SMA and cases construing it allow and encourage use and enjoyment of the beaches and the waters of the State

through a variety of facilities and methods of access, including private docks.<sup>16</sup>

The Board improperly ignored or dismissed the fact that docks are permitted. Rather, 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. The Board is tasked with applying the law, not its own sense of whether a dock in a given instance is “good enough” to meet its aesthetic sensibilities.

The SMA itself does not bar development where none has yet occurred. In fact, it permits much water-dependent development (such as private docks) if impacts are appropriately minimized. RCW 90.58.020.

The Board’s claim that it is not denying a “first dock in every instance” must be judged against its ultimate conclusion that the Niesz dock “would not be compatible” with the community and the “proposed dock is not consistent with pier density.” *Compare* Decision at 25 (Conclusion No. 25) with Decision at 26, 28 (Conclusions Nos. 27, 32).

As the Board has chosen to interpret these standards, no first dock

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<sup>16</sup> See e.g., *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 697, 169 P.3d 14 (2007) (“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.”); *May v. Robertson*, 153 Wash.App. 57, 218 P.3d 211 (2009) (affirming superior court’s reversal of Shoreline Hearings Board’s denial of permit to build joint-use pier); *Hughes v. Shorelines Hearings Bd.*, 159 Wash.App. 1045 (2011) (unpublished) (affirming trial court’s reversal of Shoreline Hearings Board’s denial of permit to build residential dock because the Board’s decision was based on erroneous interpretation and application of the law and was not supported by substantial evidence).

proposal can ever meet them if the neighbors object. The Board's denial of the Nieszses' proposal based upon the desires of the community is outside the law and facts. This is a classic example of arbitrary and capricious action. *Maranatha Mining, Inc. v. Pierce County*, 59 Wash.App. 795, 804, 801 P.2d 985 (1990) (“[T]he Council’s denial of the permit (based upon community opposition) presents a textbook example of arbitrary and capricious action: without consideration and in disregard of the facts.”).

**A. The Proposed Dock Is a Favored Water-Dependent Joint Use Facility Within the Meaning of PCC 20.56.040(A)(5) (Addressing Issues Nos. 1, 8)**

The proper characterization of the Niesz proposal is important for at least three reasons: (1) it bears on how to interpret and apply local policies favoring joint use docks; (2) it controls the correct interpretation and application of the County’s “reasonable alternatives” criteria; and (3) it informs how to interpret and apply SMA polices allowing reasonable use of the shorelines as this Court and others have held through the years.

The Nieszses’ proposed dock is clearly a preferred, water-dependent use. The County’s own regulations (PCC 20.56.040.A.6.) state that a dock is a “water-dependent use.” A water-dependent use is accorded preference under state law. *See* RCW 90.58.020 (“To this end uses shall be preferred ... which are unique to or dependent upon use of the state's shoreline.”). Under RCW 90.58.020, “alterations to the natural

condition of the shorelines and shoreland *shall be allowed* ... [for] Permitted Uses.” (Emphasis added.)

The Nieszes’ proposal is also one for joint use. WAC 332-20-144(2)(b) permits use of public tidelands for a “single joint use dock.” The joint facility must be for use of “abutting owners” of the waters of the state and front “one of the owners’ property.” The dock also must be “the only dock used by the owners.” When another waterfront owner wishes to use the dock, the Nieszes must allow them to do so per the DNR regulation.

The Board viewed single-use docks as highly disfavored or “discouraged.” Decision at 27-28 (Conclusion No. 30). Whether or not this observation is correct is irrelevant because the Nieszes’ proposal by law is joint use. PCC 20.50.040(A)(5), which addresses “reasonable alternatives” analysis, states a joint use dock is such an alternative.

**B. The Board’s Interpretation and Application of the SMA and Local Policies Is Erroneous.**

The Board misinterpreted and/or misapplied the SMA and local policies.

First, as to the SMA, the Board ignored the policies in RCW 90.58.020 favoring water-dependent uses and minimization of impacts, as set out above. The SMA declares that it “is the policy of the state to

provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.” See RCW 90.58.020,

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

Third, the SMA strikes a balance between protection of the shoreline environment and reasonable and appropriate use of the waters of the State and their associated shoreline. See *Nisqually Delta Ass’n v. City of DuPont*, 103 Wash.2d 720, 727, 696 P.2d 1222 (1985). The balance envisioned by the SMA anticipates that there will be *some* impact to shoreline areas by development or continued use, repair, and maintenance of existing structures or developments. The SMA explicitly states “[a]lterations of the natural conditions of the shorelines and shorelands *shall be recognized* by the department” for water dependent uses. RCW 90.58.020 (emphasis added).

By Resolution No. 16990 dated March 4, 1974, the Pierce County Commissioners established the County’s “Shoreline Management Master Program Goals and Policies” (“PCSMP”). The PCSMP policies for piers state, in relevant part:

- (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.

PCSMP, Piers, pp.37-38.<sup>17</sup>

The facts show compliance with these policies by offering a joint use to neighbors as required by the specific use regulations governing applications for substantial development permits, which are set forth in PCC § 20.56.040.

The Nieszes' goal to extend the boating season does not allow reliance solely upon a mooring buoy, so the preference for a buoy is inapplicable under the circumstances. In regard, the Code does not prescribe seasonal limitations.

The PCSMP's goals and polices are general and implemented through the use regulations which permit a dock subject to certain criteria. TOP 151 (CP 257). These specific regulations control over more general policies. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 873, 947 P.2d 1208 (1997) (comprehensive plan policies serve as a "guide" or "blueprint"); *City of Seattle v. Yes for Seattle*, 122 Wash.App. 382, 391, 93 P.3d 176 (2004) (development regulations are the controls placed on development or land use activities); RCW 36.70A.030(7) (same).

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<sup>17</sup> Attached as Appendix A-3; (CP 1130-1133.)

**C. The Proposed Dock Does Not Violate the “Dock Intensity” and “Compatibility” Standards Set Out in PCC 20.56.040(A)(7) (Addressing Issues Nos. 1-2, 8)**

Appellants go forward from their argument, *infra*, at p. 2. PCC 20.56.040 (7) is the compatibility/intensity of use standard this Court addressed in *May v. Robertson* 153 Wash. App. 57, 218 P.3d 211 (2009). When judged against the existing condition of “no docks,” a new dock will always be “incompatible” in the eyes of neighbors who oppose change. The Board as noted claimed that its ruling is not a blanket denial of all “first docks,” but when the current density is zero, a new proposal can *never* be consistent with “existing pier density.” According to long-time Pierce County employee/planner Carl Halsan (now in private practice), the density requirement simply means “too crowded.” TOP 153 (CP 259). The Board’s interpretation leads to the absurd result that a *permitted use is banned* if it is the first proposed, a result the rules of statutory construction prohibit.<sup>18</sup>

**D. The Proposed Dock Does Not Unduly Impair or Restrict Ingress/ Egress or Use of the Beach and Water by Adjacent Property Owners Within the Meaning of PCC 20.56.020A. 3 and 1(Addressing Issues Nos. 1-2, 5, 7-8)**

The Board misconstrued certain approval criteria in an outcome-determinative fashion to support its core ruling that a first dock does not

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<sup>18</sup> See e.g., *Ski Acres, Inc. v. Kittitas County*, 118 Wash.2d 852, 857-58, 827 P.2d 1000 (1992) (“statutes should be construed to effect their purpose, and unlikely, absurd or strained consequences should be avoided.”).

meet Criterion No. 7 (intensity and compatibility standards). PCC 20.56A.020(7).

The first example of the Board's improper approach is shown by its construction and application of the ingress/egress and adjacent uses set out in PCC 25.56.020(3). Criterion No. 3 applies only to "the use and enjoyment of the water or beach *on adjoining property*." (Emphasis added.) No witness testified that the dock would prevent the opposing neighbors from using their own beaches or launching any watercraft from their properties.

Being blocked by the Code language, the Board impermissibly extended it to the Nieszes' property and the neighbors' complaints about the dock. PCC 25.56.020(3) is not ambiguous. The Board erred by finding language not set forth in the governing ordinance and misapplying it beyond immediately adjacent properties.<sup>19</sup>

Turning to Criterion No. 1 (PCC 25.56.020(1)), that "[i]mportant navigational routes or marine oriented recreation areas will not be obstructed or impaired," the Board treated the Niesz property as an "important" marine-orientated recreational area. The word "important"

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<sup>19</sup> RCW 34.05.570(3) provides, in relevant part: "The Court shall grant relief from any agency order in an adjudicative proceeding only if it determines that:...(d) The agency has erroneously interpreted or applied the law."

means “marked by or indicative of significant worth or consequence.”<sup>20</sup>

The record, however, is devoid of proof of any marine park designation or public boat launch at the Site or in the general vicinity. As applied by the Board, every rural beach on Puget Sound which the neighbors can walk is important. That is an erroneous over-interpretation and application of the cited standard ignoring the qualifier “important.”

Although the Board found that there would be some interference with nearshore recreational use (Conclusion No. 15, p. 21), it also found that nearshore recreational use would not be *unduly* impaired. (Index No. 000424, Conclusion No. 17, p. 22.) The Board found that the public’s use of the surface waters below ordinary high water would not be unduly impaired “by the need to go around the proposed dock.” (Index No. 000424, Conclusion No. 18, p. 22.)

Below, the opposition argued that the Board’s ruling on mere “impairment” is sufficient to deny the Nieszes’ application because Criterion No. 1’s standard is only “impaired,” with no qualification as to whether any obstruction is significant or undue. The Superior Court accepted this forced justification for the Board’s ruling. The SMA standard, however, requires only that impacts be minimized “so far as practicable.” RCW 90.58.020. This statewide, qualified standard

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

controls. See *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash.2d 384, 392, 258 P.3d 36 (2011). To hold otherwise leads to an absurd result; no applicant can meet a standard of no impact whatsoever. The courts certainly have not required applicants to prove “no impact.” See, e.g., *Cougar Mountain Associates v. King County*, 111 Wash.2d 742, 756 P.2d 264 (1988). The Board’s interpretation of the law, and application of the law to the facts, is clearly erroneous. Again, the Board explicitly found that any obstruction caused by the proposed dock could be easily avoided by simply going around it. That finding has not been challenged in this appeal.

The Board tap-danced around DNR regulations requiring accommodation of beach walkers. It entered Finding No. 17 to the effect that the project must be “modified” to meet the DNR requirement; consequently, the Board claimed that it could not consider the mitigation required by the DNR in its Determination of Non-Significance and recommended by County staff, only the application as submitted to Pierce County. But the DNR requirement was part of mitigation required on the record. It is part of the permit package, not somehow separate. Any other characterization would encourage applicants to contest, rather than agree to, mitigation of possible impacts.

The Board has in other cases presumed that an applicant will abide by other laws.

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

*Jennings v. Klein*, SHB No. 97-31, 32, 33, 34 & 40, 1998 WL 377652 (April 21, 1998). Further, the Board has gone so far as to impose its own mitigation requirements to achieve an approval. The board has the authority to modify a permit and its conditions. *San Juan Cnty. v. Dep't of Natural Res.*, 28 Wash.App. 796, 626 P.2d 995 (1981), *review denied*, 95 Wash.2d 1029 (1981); *King Cnty. Ch. Wash. Env'tl. Council v. City of Seattle*, SHB No. 11, 1973 WL 34206 (Findings of Fact, Conclusions of Law and Order) (Dec. 20, 1973).

The required mitigation to meet the DNR standard in WAC 332-30-144(4)(d) is a simple matter involving erection of a small four- or five-step set of stairs pursuant to a shoreline exemption since the work will not exceed the dollar threshold for a shoreline substantial development permit. See RCW 90.58.030(3)(e). If the lack of such mitigation in the original application (though imposed as a mitigation condition by the Determination of Non-Significance) was an issue, the Board should have

directed that the condition be imposed, rather than forcing the Nieszes to file an amended application.

**E. No Facts or the Law Support the Board's Cumulative Impacts Ruling. (Addressing Issues Nos. 1, 6, 8)**

The Board erred when it denied the Nieszes' permits based upon a faulty cumulative impacts analysis. Indeed, the County found no cumulative impacts. *See* Ex. P-12 (CP 1030-1033) (DNS).<sup>21</sup>

The factors the Board weighs in considering whether a cumulative impacts analysis is required include whether there is some indication of additional applications for similar activities in the area. *Garrison v. Pierce County (De Tienne)*, SHB 13-016c at 53, 2014 WL 309283 (January 22, 2014), *aff'd*, *De Tienne v. Shorelines Hearings Bd.*, 197 Wash.App. 248, 391 P.3d 458 (2016).

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

There is no evidence in the record that approval of the Nieszes' application would set a precedent, leading to a substantial influx of applications, resulting in cumulative impacts. Decision, (Conclusion No.

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<sup>21</sup> The SEPA Checklist, CP 983, evaluates cumulative impacts. *See* WAC 197-11-186(d); WAC 197-11-060(4)(d).

30). To the contrary, the evidence is that no dock permit applications have been made for the area at issue because the neighbors do not want docks. TOP 55-56, 82 (CP 161-167). Only eight docks have been approved since 1971 on Fox Island, almost all in one small area. None is on the Nieszes' side of the island. TOP 168, 274 (CP 273, 380). At certain areas within the Conservancy environment, currents and location are problematic for docks. TOP 133 (CP 249). The costs of construction and permitting are very high and act as a deterrent. TOP 63:7-25, 64:1-2 (CP 169-170). When it speculated as to possible future impacts, the Board failed to account for the "beneficial aspects" of the existing regulatory systems. *See* WAC 173-26-186(8)(d).

The Board did not consider the sense of the community or permitting/construction costs when evaluating whether the alleged cumulative impacts were likely to occur. These facts show it is not reasonably foreseeable that many new applications will be made. The application should not have been denied based on cumulative impacts. As the Board itself held in *Seidl v. San Juan County*, SHB No. 09-012, 2010 WL 3432599 (Aug. 27, 2010), a shoreline substantial development approval is not precedent-setting:

Even if the Board were to engage in cumulative impacts analysis for this project, the dock installation does not create a risk of increased dock approvals. ***Unlike a variance or conditional use,***

*approval of this SSDP will not establish a special circumstance that would expand the basic standards governing dock approvals in the local master program. Future applicants for a SSDP to build a dock will have to meet the very stringent criteria in the SJCSMP which the Board has upheld and applied in this case.* The Walker/Seidl dock approval simply will not have any bearing on whether future dock applications will be approved by San Juan County or the Board. [Emphasis added.]

Any dock proposal is considered on its own merits and impacts must be minimized. It is pure speculation to assume cumulative aesthetic impacts without even considering the beneficial aspects of the existing regulatory system. Upon review, this error should be corrected.

**F. The Substantial Evidence Standard is Not in Play but the Board's Outcome Determinative Rulings are not Supportable Under the Facts. (Addressing Issues Nos. 1, 3-6, 8)**

The Board entered several findings that allegedly support its conclusions. As noted, the "substantial evidence" standard of review typically applies to factual findings. However, the factual components of the Board's rulings are inexplicably related to its erroneous legal rulings. For example, whether reasonable alternatives are present is irrelevant because the Nieszes' application was for a joint use dock which is a "reasonable alternative" under PCC 20.56.020A(5). Any interference with beach walkers is resolved easily by recognizing the required DNR mitigation (required by DNR and recommended by County staff). The "impair nearshore recreation" finding is answered by the SMA minimization standard. Thus, Appellants address the Board's findings

with the caveat that the law prevented the Board from even reaching the facts it found. The Board's approach was impermissibly outcome-determinative.

1. Reasonable Alternatives

Assuming for the sake of argument that a "reasonable alternative" analysis is appropriate, the test under the Pierce County regulations is not "feasibility" or "adequacy," but whether there are "reasonable" alternatives. Application of the criteria must be based upon the purpose of the facility, in this case, to extend the short boating season.

There is no public launch in the vicinity, and the Narrows Marina is a drive of at least 20-25 minutes, more like 40 minutes for the Nieszses. The Board decided that the Marina was a reasonable alternative. Decision, (Finding No. 22, Conclusion No. 19). That might be so for the sporadic use the complaining neighbors desire, but for the purpose of the Niesz dock to extend the season or have use during the work week it is not.

It takes only a few minutes to load a boat, use the dock at the Site location during after work, then return. A drive to the Marina, parking, walking long floats to load and leave, then return, dock, and unload, then drive home requires substantially more time. If the Nieszses desire to boat

along their shoreline, then you also have to add the transit time to and from the Marina. There is also the question of security.

The Board accepted one opposing neighbor's contention that the dock was unsafe to be used "year round." This was error, as feasibility is not an articulated factor for approval and the extended use dock would not be used every day. The Board's Finding No. 27 (Decision at 11) to the effect that the Nieszes "did not establish that it is safe to leave their boat moored to a dock throughout the year or that there would be significant use" during the standard time winter months is not supported by substantial evidence. It is based solely on the subjective view of a non-expert neighbor who opposes the dock. *See* Decision, (Finding No. 24); (Tom Watkins Testimony).<sup>22</sup> This testimony was rebutted by testimony of an expert in dock construction, Wendell Stroud. Mr. Stroud testified that he had built more than 200 docks in Puget Sound and that in no case was year-round use dangerous or not feasible. TOP 105, 116 (CP 211, 222).

The Board should not have considered the neighbor's testimony, much less relied upon that testimony in entering its finding. To the expert's personal knowledge, there are many docks in Puget Sound built

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<sup>22</sup> The neighbor testified as to a purely hypothetical matter – whether the dock, if built, would be safe to use year-round. The dock will not be used "year-round" if that means moorage or use during storm events. Lay testimony concerning a purely hypothetical matter is particularly inappropriate under ER 701. KARL B. TEGLAND, 5B WASH. PRAC., EVIDENCE LAW AND PRACTICE § 701.19 (6th ed. 2018).

“where there is wave action.” TOP 132:21 (CP 238). On the south side of Fox Island, there are currently no docks, but also dramatically fewer people. TOP 133:1-8 (CP 239.) Pierce County Development Engineering approved the design. Ex. P-16 (CP 1054.)

No one in the vicinity uses a mooring buoy year-round because of currents and weather. The Board ruled that the Neiszes could moor their boat at a mooring buoy, which it determined to be a reasonable moorage alternative in the context of the “boat season” it viewed as “commonly running” from later spring to early fall. Decision at 23-24 (Conclusion No. 21); *see also* Decision at 10 (Finding No. 23) (“[A]ccessing a boat secured to a buoy and bringing it to the beach for loading and unloading is a reasonable manageable activity.”).

This ruling is flawed for four independent reasons: (1) the cited standard does not require, let alone mention, a mooring buoy; (2) the conclusion fails to account for times other than dead calm waters; (3) the conclusion is not supported by substantial evidence if meant to apply to use longer than the narrow “boating season” as the SHB perceived it; and (4) the Board imposed its subjective view that year-round use was impossible, setting up a straw man analysis for a purpose not sought by the Neiszes.

PCC § 20.56.040A.5, as noted, does not explicitly identify mooring buoys as a reasonable alternative. The exclusion of mooring buoys from the definition of “reasonable alternative” is obvious and intentional, since the County allows both a mooring buoy and a dock. In *Robertson v. May*, 153 Wash.App. 57, 218 P.3d 211 (2009), the use of two boat launches and a buoy was not considered sufficient alternatives to a dock. *Id.* at 84.

The Board’s ruling recognized a buoy is limited to only good weather months. This is consistent with the testimony that waves and weather make it impractical and dangerous in other months, thereby justifying the dock. Decision at 8-9 (Finding No. 19); TOP 35:4-5, 84:4-11 (CP 141), TOP 294 (CP 400). The Board’s Finding No. 23, Decision at 10, that the use of a buoy is a “reasonably manageable activity” is an erroneous application of the facts to the law because it refers only to seasonal use, which is not what is proposed or desired. The Boating Season is May to Labor Day, according to the neighbors. TOP 331:12-15 (CP 439, TOP 361-62 (CP 467-468). But the proposal is to extend that as much as possible. In this regard, neither the Board or the opposing neighbors have authority to change the application.

## 2. Beach Walking

The Nieszses will place a sign on their property welcoming beach walkers to use their land to walk around the dock. TOP 71:10-22 (CP 177).

The exhibits and other testimony clearly show the clearance at various locations from the bulkhead. *See, e.g.*, Ex. P-11 (CP 1022), Exhibit P-11 (1109) (CP 603).<sup>23</sup> At 16 feet six inches from the bulkhead the proposed dock is six feet above the beach. TOP 148:11-14) (CP 254), Ex. P-31 (CP 1187). At the first pile 44 feet from the bulkhead the height would be approximately eight to ten feet, above the beach. TOP 134:24-25; 135:1-11 (CP 240-241).

The Board's Finding No. 17, Decision at 7-8, "that at many tide levels, people will not be able to walk unimpeded under the pier" is not based upon substantial evidence when linked to tide lands in context the people can bow their heads and walk. At high tides, the beach cannot be walked. The only "interference" would occur when tides are approximately 15-20 feet down the beach from the bulkhead, and only if a walker does not want to lean over and cross under the dock or to step up over the bulkhead and walk about five feet on the Niesz lawn then step back down to the beach and continue.

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<sup>23</sup> *See* attached as Appendix A-4.

### 3. Nearshore Use

The Board held that the public's use of the surface waters below ordinary high water would not be unduly impaired "by the need to go around the proposed dock," Decision at 22 (Conclusion No. 18).

Although the Board found there would be some interference with nearshore recreational use, Decision at 21 (Conclusion No. 15), it also found that nearshore recreational use would not be unduly impaired. Decision at 22 (Conclusion No. 17).

*Any* structure, of course, is an impairment or obstruction. The question is one of degree. If a permit can be denied based solely upon the fact that a nearshore paddleboarder, kayaker, or swimmer must go under the four feet wide dock or walk four feet around it (assuming the person is not otherwise satisfied by using the miles of unfettered beach in each direction), then no dock will ever be built. On this element, the matter is not a question of substantial evidence, but rather one of reasonable interpretation and application of the facts to the law.

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

The Nieszes do not challenge the constitutionality of the SMA or the County's shoreline use regulations on their face. They assert a limited "as applied" challenge if the Board's decision is not reversed. The

Nieszes' use of their shoreline property is properly understood not as a privilege, to be allowed solely as Pierce County sees fit, but rather is based on a fundamental right. The Niesz proposal does not have any discernable environmental impacts to the aquatic habitat or species that rely upon it and is deemed a reasonable use. Within that context, governmental authority is limited, because the SMA is sensitive to private property rights.

The right<sup>24</sup> to own and use one's private property is protected by the state and federal constitutions. *See* U.S. Const. Amend. V; Wash. Const. art. I, § 16; *Mfr'd. Housing Cmty. of Wash. v. State*, 142 Wash.2d 347, 368 (2000) (pProperty rights consist of the fundamental rights of possession, use, and disposition); *Maytown Sand & Gravel, LLC, v. Thurston Cty.*, 191 Wash.2d 392, 423 P.3d 223 (2018), *as amended* (Oct. 1, 2018).

The SMA unequivocally states that coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state ***while, at the same time, recognizing and protecting private property rights*** consistent with the public interest. RCW

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<sup>24</sup> The right to have a dock does not come from government. The right to develop and use land resides in the people. The state and federal constitutions restrain government; they do not provide the right, which is inherent. *See Dennis v. Moses*, 18 Wash. 537, 52 P. 333 (1898).

90.58.020. The SMA also states that “the Legislature further finds that much of the shorelines of the state and the uplands adjacent thereto *are in private ownership* ....” RCW 90.58.020 (emphasis supplied).

The SHB’s use of unarticulated criteria, such as need and affirmance of the opposing neighbors’ subjective desires of what they consider adequate for boating, violates the fundamental right to be free of arbitrary government decision-making based upon promulgated policies. *See Norco Constr., Inc. v. King County*, 97 Wash.2d 680, 684-685(1982) (when attempting to impose new standards on a project applicant, “[d]ue process requires governments to treat citizens in a fundamentally fair manner”); *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 50, 720 P.2d 782, 785 (1986) (due process standards require the City to apply and enforce its laws as written without adding new criteria on a case-by-case basis); *Peter Schroeder Architects v. City of Bellevue*, 83 Wash.App, 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 1011 (1997).

The Board’s outcome-determinative approach violates ordered liberty, a fundamental right. A recent Washington Supreme Court case, *Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wash.2d 392, 423 P.3d 223 (2018), confirms that the right to develop land and the right to be free from arbitrary decision-making in the land use context are constitutionally protected rights. In that case, the Court noted that, under

the Fourteenth Amendment, “property” encompasses more than just tangible physical property, and a permit applicant has a cognizable property interest “when there are articulable standards that constrain the decision-making process.” In other words, a permit applicant has a constitutionally protected property interest “if discretion [to deny the final issuance of the permit] is substantially limited.” The *Maytown* Court recognized that there is a constitutionally-protected right to develop land where the applicant has satisfied the necessary preconditions.

The constitutional rights announced in *Maytown* are implicated here, where the Board denied a permit application that meets the objective criteria set forth in the controlling development regulations based largely on unarticulated criteria such as the applicants’ need and nearby land owners’ subjective opinions of whether the proposed land use is necessary.

A decision cannot conflict with a general law of the State, Washington Constitution, Article XI, Section 1; *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 155 Wash.App. 937, 230 P.3d 1074 (2010), *aff’d*, 172 Wash.2d 384, 258 P.3d 36 (2011) (analyzing whether provisions of shoreline master program imposed indirect taxes, fees, or charges on development in violation of RCW 82.02.020); *State, Dep’t of Ecology v. Wahkiakum Cty.*, 184 Wash.App. 372, 337 P.3d 364 (2014)

(county ordinance banning use of biosolids found unconstitutional because it prohibited what state law allowed); *Amalgamated Transit Union Local No. 1576 v. Snohomish Cty. Pub. Transp. Ben. Area*, 178 Wash.App. 566, 316 P.3d 1103 (2013) (provision of transit agency's bylaws prohibiting nonvoting transit agency board member from attending any executive session of board pertaining to personnel matters conflicted with state statute and was therefore void); *Employco Pers. Servs., Inc. v. City of Seattle*, 117 Wash.2d 606, 817 P.2d 1373 (1991), *as modified* (Nov. 19, 1991) (ordinance that rendered city immune from liability for damages for loss of electrical service occasioned by acts of negligence was void because it conflicted with state statutes authorizing suits against utilities and permitting recovery of damages for negligently caused losses).

Here, the Board's decision conflicts with RCW 90.58.020's standards for a water-dependent use and allowance of a dock by a proposal "designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." It did so by precluding *any* dock if any impact occurs to nearshore recreational users. *See infra*, pp. 25-26, 30-31.

The Board's decision also conflicts with RCW 79.105.430 because it takes away the permission to use public tidelands ostensibly to protect

the public. *See* p. 3 *infra*. The Legislature already weighed the public interest when enacting the cited law.

## VII. CONCLUSION

The appeal should be granted, the Board's ruling reversed and vacated, and this matter remanded to Pierce County with instructions to issue the requested shoreline permit with the conditions proposed by staff to the Examiner.

Appellants should be granted their reasonable attorneys' fees and costs pursuant to RCW 4.84.340 and .350. The Board's decision is not justified in particular because of its mishandling of the nature of the proposal, refusal to acknowledge required mitigation to accommodate beach walkers, and its use of non-promulgated standards. It is just to award attorney fees to the Nieszes. The proceedings in this matter have been protracted, including a hearing before a superior court judge whose decision has no weight, and this appeal carries the threat of a claim of fees from the opposition.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of February, 2019.

By 

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Counsel for Appellants

## CERTIFICATE OF SERVICE AND MAILING

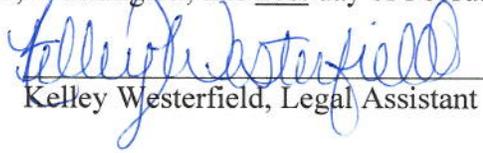
I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent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

I further certify that I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

<p>Todd A. Campbell, WSBA #21457  Court O'Connor, WSBA #23439  Pierce County Prosecutor / Civil  955 Tacoma Avenue South, Suite 301  Tacoma, WA 98402-2160  (253) 798-7837, tel Mr. Campbell  (253) 798-6201, tel Mr. O'Connor  Tcampbe@co.pierce.wa.us; Coconno@co.pierce.wa.us  Attorneys for Respondent Pierce County</p>	<p><input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Hand Delivered  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> Email</p>
<p>Margaret Y. Archer, WSBA #21224  Gordon Thomas Honeywell LLP  1201 Pacific Avenue, #2100  Tacoma, WA 98402  (253) 620-6500, tel / (253) 620-6565, fax  marcher@gth-law.com; lblakeney@gth-law.com  Attorneys for Reetz Intervenors</p>	<p><input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Hand Delivered  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> Email</p>
<p>James V. Handmacher, #8637  Morton McGoldrick, PS  P.O. Box 1533  Tacoma, WA 98401  (253) 627-8131, tel / (253) 272-4338, fax  jvhandmacher@bvmm.com  Attorneys for West Intervenors</p>	<p><input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Hand Delivered  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> Email</p>

<p>Lisa Petersen, #30372 Washington State Attorney General's Office 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 (206) 464-7676, tel / (206) 389-2800, fax lisap1@atg.wa.gov; lalseaef@atg.wa.gov <i>Attorney for Shoreline Hearings Board</i></p>	<ul style="list-style-type: none"><li><input type="checkbox"/> <i>Legal Messenger</i></li><li><input type="checkbox"/> <i>Hand Delivered</i></li><li><input type="checkbox"/> <i>Facsimile</i></li><li><input checked="" type="checkbox"/> <i>U.S. Mail</i></li><li><input checked="" type="checkbox"/> <i>Email</i></li></ul>
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DATED at Bainbridge Island, Washington, this 21st day of February, 2019.

  
\_\_\_\_\_  
Kelley Westerfield, Legal Assistant

# APPENDIX-1

## WAC 332-30-144

### Private recreational docks.

(1) **Applicability.** This section implements the permission created by RCW **79.105.430**, Private recreational docks, which allows abutting residential owners, under certain circumstances, to install private recreational docks without charge. The limitations set forth in this section apply only to use of state-owned aquatic lands for private recreational docks under RCW **79.105.430**. No restriction or regulation of other types of uses on aquatic lands is provided. This section shall not apply to port districts managing aquatic lands under a management agreement (WAC **332-30-114**).

(2) **Eligibility.** The permission shall apply only to the following:

(a) An "abutting residential owner," being the owner of record of property physically bordering on public aquatic land and either used for single family housing or for a multifamily residence not exceeding four units per lot.

(b) A "dock," being a securely anchored or fixed, open walkway structure visible to boaters and kept in good repair extending from the upland property, primarily used as an aid to boating by the abutting residential owner(s), and accommodating moorage by not more than four pleasure boats typical to the body of water on which the dock is located. Two or more abutting residential owners may install and maintain a single joint-use dock provided it meets all other design requirements of this section; is the only dock used by those owners; and that the dock fronts one of the owners' property.

(c) A "private recreational purpose," being a nonincome-producing, leisure-time, and discretionary use by the abutting residential owner(s).

(d) State-owned aquatic lands outside harbor areas designated by the harbor line commission.

(3) **Uses not qualifying.** Examples of situations not qualifying for the permission include:

- (a) Yacht and boat club facilities;
- (b) Floating houses, as defined in WAC **332-30-106**(23), and vessels used as a residence (as defined in WAC **332-30-106**(62));
- (c) Resorts;
- (d) Multifamily dwellings, including condominium ownerships, with more than four units;
- (e) Uses other than docks such as launches and railways not part of the dock, bulkheads, landfills, dredging, breakwaters, mooring buoys, swim floats, and swimming areas.

(4) **Limitations.**

(a) The permission does not apply to areas where the state has issued a reversionary use deed such as for shellfish culture, hunting and fishing, or park purposes; published an allocation of a special use and the dock is inconsistent with the allocation; or granted an authorization for use such as a lease, easement, or material purchase.

(b) Each dock owner using the permission is responsible for determining the availability of the public aquatic lands. Records of the department are open for public review. The department will research the availability of the public aquatic lands upon written request. A fee sufficient to cover costs shall be charged for this research.

(c) The permission is limited to docks that conform to adopted shoreline master programs and other local ordinances.

(d) The permission is not a grant of exclusive use of public aquatic lands to the dock owner. It does not prohibit public use of any aquatic lands around or under the dock. Owners of docks located on state-owned tidelands or shorelands must provide a safe, convenient, and clearly available means of pedestrian access over, around, or under the dock at all tide levels. However, dock owners are not required to allow public use of their docks or access across private lands to state-owned aquatic lands.

(e) The permission is not transferable or assignable to anyone other than a subsequent owner of the abutting upland property and is continuously dependent on the nature of ownership and use of the properties involved.

(f) Vessels used as a residence and floating houses are not permitted to be moored at a private recreational dock, except when such moorage is necessary because of an emergency that immediately threatens human life or property, for the duration of the emergency only.

(5) **Revocation.** The permission may be revoked or canceled if:

(a) The dock or abutting residential owner has not met the criteria listed in subsection (2) or (4) of this section; or

(b) The dock significantly interferes with navigation or with navigational access to and from other upland properties. This degree of interference shall be determined from the character of the shoreline and waterbody, the character of other in-water development in the vicinity, and the degree of navigational use by the public and adjacent property owners;

(c) The dock interferes with preferred water-dependent uses established by law; or

(d) The dock is a public health or safety hazard.

(6) **Appeal of revocation.** Upon receiving written notice of revocation or cancellation, the abutting residential owner shall have thirty days from the date of notice to file for an administrative hearing under the contested case proceedings of chapter 34.05 RCW. If the action to revoke the permission is upheld, the owner shall correct the cited conditions and shall be liable to the state for any compensation due to the state from the use of the aquatic lands from the date of notice until permission requirements are met or until such permission is no longer needed. If the abutting residential owner disclaims ownership of the dock, the department may take actions to have it removed.

(7) **Current leases.** Current lessees of docks meeting the criteria in this section will be notified of their option to cancel the lease. They will be provided a reasonable time to respond. Lack of response will result in cancellation of the lease by the department.

(8) **Property rights.** No property rights in, or boundaries of, public aquatic lands are established by this section.

(9) **Lines of navigability.** The department will not initiate establishment of lines of navigability on any shorelands unless requested to do so by the shoreland owners or their representatives.

(10) Nothing in this section is intended to address statutes relating to sales of second class shorelands.

[Statutory Authority: RCW 79.105.360. WSR 06-06-005 (Order 724), § 332-30-144, filed 2/16/06, effective 3/19/06. Statutory Authority: RCW 79.90.455, 79.90.460. WSR 02-21-076 (Order 710), § 332-30-144, filed 10/17/02, effective 11/17/02. Statutory Authority: RCW 79.90.105, 79.90.300, 79.90.455, 79.90.460, 79.90.470, 79.90.475, 79.90.520, 79.68.010, 79.68.68 [79.68.080], and chapter 79.93 RCW. WSR 85-22-066 (Resolution No. 500), § 332-30-144, filed 11/5/85.]

## AGENDA

**Bainbridge Island Metropolitan Park & Recreation District  
Regular Board Meeting 4:30 pm  
Thursday – February 21, 2019**

**Bainbridge Island Aquatic Center  
8521 Madison Avenue North  
Bainbridge Island, WA 98110  
206.842.2306**

**NOTE:** The February 21, 2019 board meeting will be held at the BI Aquatic Center and will begin at 4:30 pm to address matters pertaining to the board vacancy. Other agenda items will begin at 6:00 pm.

### 4:30 PM:

**10. CALL TO ORDER**

- 10.1 Roll Call
- 10.2 Adjustments to the Agenda

**20. UNFINISHED BUSINESS**

- 20.1 Board Vacancy Finalist Determination Kinney (90 min)  
Action: Possible motion to determine finalists.

**30. ADJOURN TO EXECUTIVE SESSION IF NEEDED (Evaluation of candidate qualifications)**

**40. EXECUTIVE SESSION**

**50. RECONVENE TO REGULAR SESSION**

### 6:00 PM:

**60. PUBLIC COMMENTS (Oral Communications from Audience)**

- 60.1 Public comments on topics not itemized elsewhere on the agenda  
Action: Information only.
- 60.2 Public comments on agenda topics (possibly during agenda item).  
Action: Information only.

**70. BOARD CONSENT**

- 70.1 Minutes: Regular Board Meeting of February 7, 2019
- 70.2 Financial: Approval of vouchers and payroll.

**8.0 UNFINISHED BUSINESS (continued)**

- 80.1 Follow-Up on Aquatic Center Feasibility Study Benishek (60 min)  
Action: Questions entertained and motion to accept study.

**90. GENERAL BUSINESS**

**100. DIRECTOR'S REPORT**

- 100.1 Director's Report

## 100.2 Upcoming Meetings/Work Sessions/Events

2/21/19	Regular Board Meeting	4:30 pm	BI Aquatic Center
2/28/19	Special Board Meeting	7 pm	Strawberry Hill Center
3/7/19	Regular Board Meeting	6 pm	Strawberry Hill Center
3/21/19	Regular Board Meeting	6 pm	Strawberry Hill Center

### 110. BOARD MEMBER ITEMS

- 110.1 Remarks from Board Members
- 110.2 Board Member Committee Reports as Needed

### 120. WRITTEN COMMUNICATIONS

### 130. ADJOURNMENT

### 140. ADJOURN TO EXECUTIVE SESSION IF NEEDED

### 150. EXECUTIVE SESSION

### 160. RECONVENE TO REGULAR SESSION

### 170. ADJOURNMENT

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#### Board Committees

Governance  
Capital Facilities  
Program  
Budget & Finance  
Personnel  
Sakai Park Planning

#### **2019 Board Representatives**

Kinney/Swolgaard  
DeWitt/Swolgaard  
Not filled in 2019  
DeWitt/Pollock  
Kinney/DeWitt  
DeWitt/Swolgaard

#### Board Liaisons

##### Park District Committees:

Parkland Advisory Committee  
Trails Advisory Committee  
Dog Advisory Committee

Swolgaard/Cross  
Swolgaard/Cross  
Kinney/Pollock

##### Community/Public Agencies:

BI Parks Foundation  
COBI Multi-Modal Transportation Advisory Cmte  
Intergovernmental Work Group (IGWG)  
Intergovernmental Policy Liaison to COBI

DeWitt/Pollock  
Kinney/DeWitt  
Cross/Swolgaard  
Pollock/Kinney

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#### ***Mission Statement***

*The mission of the Bainbridge Island Metropolitan Park & Recreation District is to build a healthy community through effective, sustainable stewardship of the District's parks and open space, and through the development and delivery of innovative cultural and recreation opportunities.*

# **APPENDIX-2**



1 The Board visited the site,<sup>2</sup> received sworn testimony of witnesses, admitted exhibits, and  
2 heard arguments on behalf of the parties. Having fully considered this record, the Board enters  
3 the following:

4 **FINDINGS OF FACT**

5 1.

6 Eric and Kendra Niesz own a waterfront home at 695 Kamus Drive on Fox Island in  
7 Pierce County (Site). Ramos Testimony; Carlson Testimony; Exs. R-1, P-13. The Site, parcel  
8 number 01201108, is along the southwest side of Fox Island facing east toward Carr Inlet.  
9 Carlson Testimony; Exs. R-2, R-5. The Nieszs have lived at the Site since 2004. From 1990 to  
10 2004 the parents of Eric Niesz lived at the Site. Ramos Testimony. There is a large garage  
11 behind the home. Ramos Testimony; Ex. R-3. The waterfront portion of the Site is  
12 approximately 128 feet long. Ramos Testimony.

13 2.

14 The Site is located in a Conservancy Shoreline Environment and is zoned Rural 10. The  
15 tidelands adjacent to the Site are public. The state-owned aquatic lands are regulated by the  
16 Department of Natural Resources (DNR). Ramos Testimony; Carlson Testimony; Ex. P-19.

17 3.

18 **The Proposal**

19 In September of 2015, the Nieszs submitted an application for an SSDP to construct a  
20 single-use dock and place a mooring buoy 245 feet off shore at the Site (Proposal). Ex. R-1.

21 \_\_\_\_\_  
<sup>2</sup> Mr. Beck was not at the site visit, but he did attend the entire hearing.

1 The proposed dock would be 154 feet long, with 150 feet of the dock over water. The buoy  
2 would be 245 feet off shore. Carlson Testimony.

3 4.

4 The Nieszs initially attempted to develop the proposed dock as a joint-use dock. They  
5 asked the owners of the properties directly north and south of the Site, the Wests and the Reetz,  
6 if there was interest in participating in a joint-use dock development. The Wests and the Reetz  
7 declined to participate. Ramos Testimony; Ex. P-14.

8 5.

9 The 154-foot dock would consist of a 90-foot long by four-foot wide pier, a 46-foot long  
10 by three-foot wide ramp, and an eight-foot long by 24-foot wide float.<sup>3</sup> The pier and ramp would  
11 be supported by four steel piles and the float would be supported by four steel piles, for a total of  
12 eight steel piles that would be 10 inches in diameter. Carlson Testimony; Stroud Testimony; Ex.  
13 R-20. The piles supporting the pier and ramp would be approximately 42, 44, and 40 feet apart  
14 and the piles that support the float would be 24 feet apart. Ex. R-20.

15 6.

16 The pier and ramp would be constructed with 100 % fiberglass decking and grating to  
17 achieve 69% open area. The float surface would be constructed with 50% fiberglass grating to  
18 achieve 69% open area. Stroud Testimony; Ex. P-13, p. 3. The handrail on the pier and ramp is  
19 three inches wide and is three feet six inches above the surface of the pier and ramp. The sides  
20

21 <sup>3</sup> Although the ramp would be 46 feet long, a portion of the ramp would extend out over the float, so the total length  
of the pier-ramp-float would be 154 feet with 150 feet over water. Ex. R-20. For ease of reference the pier-ramp-  
float is referred to as the proposed dock throughout this decision.

1 of the pier and ramp are made of aluminum in a diagonal pattern that resembles roof trusses.

2 Stroud Testimony; Ex. R-20.

3 7.

4 The pier of the dock would be attached to the top of a concrete bulkhead that runs along  
5 the east side of the Site. The bulkhead is two feet eight inches high. The dock would be located  
6 at the north end of the bulkhead, approximately 11 feet to the south of an existing concrete boat  
7 ramp. Carlson Testimony; Stroud Testimony; Exs. R-20(4), R-27(2).

8 8.

9 The proposed dock meets the dimensional criteria of the County Shoreline Management  
10 Use Regulations. Carlson Testimony. The criteria provide that a single-use dock may intrude  
11 into the water the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines so long as  
12 no more than a depth of eight feet of water is obtained. Carlson Testimony; PCC  
13 20.56.040(B)(6)(a). The maximum length parallel to the shore can be no more than eight feet  
14 and a minimum of 10 feet of separation must be maintained between the structure and the  
15 property line. PCC 20.56.040(B)(6)(b&c). The proposed dock meets all of these dimensional  
16 criteria. Carlson Testimony; Ex. P-26, p. 11.

17 9.

18 **The Site**

19 The beach in front of the Site and along a significant portion of the southwest side of Fox  
20 Island is a gravel beach with a gradual slope. Carlson Testimony; Reetz Testimony; West  
21 Testimony; Exs. R-6, R-7, R-12, R-13, R-25. The gradually sloping gravel beach in front of the

1 Site and to the north and south of the site is a good beach for walking along the shoreline. *Id.*

2 The Site faces to the east with views of the water and the Olympic Mountains. Ex. R-26(2).

3 10.

4 John and Christine West own property adjacent to and South of the Site. The West  
5 property consists of two parcels. The parcel immediately to the south of the Site is vacant, and  
6 the Wests live in a house on the next parcel. West Testimony; Ex. R-3. The West property is  
7 also low-bank waterfront, and it has a rock wall bulkhead. West Testimony; Exs. R-4, R-6.

8 11.

9 Directly to the south of the West's property is a public access point for the beach. West  
10 Testimony; Carlson Testimony; Exs. R-3, R-21. Although there are some parking restrictions,  
11 there are locations for the public to park and the public access is commonly used by people who  
12 do not live along the beach. West Testimony; Reetz Testimony; Heim Testimony.

13 12.

14 William and Erin Reetz own property along the beach directly to the north of the Site.  
15 Reetz Testimony; Ex. R-3. There is a house on the Reetz property that is used by the Reetz as a  
16 second home. Erin Reetz testified that their other home is nearby, and she spends approximately  
17 half of her time at the beach house. Reetz Testimony. The Reetz property is also low-bank.  
18 Their home is protected by a bulkhead that consists of rocks and driftwood. Reetz Testimony;  
19 Exs. R-23(4), R-41.

1 13.

2 Access to the beach north and south of the Site is possible, in part, due to the absence of  
3 docks. West Testimony; Reetz Testimony; Watkins Testimony; Heim Testimony. There are no  
4 private docks along the entire southwest side of Fox Island. Carlson Testimony; Ex. R-5. The  
5 nearest dock to the south of the Site is a County pier that is approximately 3.1 miles away. *Id.*  
6 The nearest dock to the north of the Site is a Navy pier that is approximately 1.4 miles away. *Id.*  
7 The nearest private dock is around the north end of Fox Island beyond the sand spit along Bella  
8 Bella Drive. Exs. R-5, R-18.

9 14.

10 The beach in the area near the Site is commonly used by people who live nearby and by  
11 the public in general. West Testimony; Reetz Testimony; Watkins Testimony; Heim Testimony.  
12 The use of the beach includes walking, accessing the water for diving and swimming, and  
13 accessing the water with water craft such as paddle boards, kayaks, and various types of small  
14 and larger boats. *Id.* People using small water craft such as paddle boards and kayaks tend to  
15 stay close to the shoreline in shallow water, both for enjoyment and due to safety concerns. *Id.*

16 15.

17 **Potential Impacts to Use of the Beach**

18 The neighbors who testified all stated that the proposed dock would prevent them from  
19 walking along the beach at many tides and would require people using small water craft to go out  
20 around the dock at many tides. *Id.* They also all stated that they believe the proposed dock is out  
21 of character with the area as there are no other private docks along the southwest side of Fox

1 Island. They stated that the lack of docks provides a unique environment for exploring and  
2 enjoying the shoreline for more than a mile both north and south of the Site. *Id.*

3 16.

4 As noted above, the beach adjacent to the Site is a publicly owned beach. Ramos  
5 Testimony; Carlson Testimony; Exs. P-19, P-20. Although the proposed dock does not require a  
6 lease from DNR, the regulations that govern the construction of docks over state-owned  
7 tidelands require that docks be located in a manner that provides "a safe, convenient, and clearly  
8 available means of pedestrian access over, around, or under the dock at all tide levels." WAC  
9 332-30-144(4)(d); Ex. P-20. Mr. Ramos acknowledge that the Project, as presented to the  
10 Hearing Examiner, does not meet the DNR requirement for pedestrian access over, around, or  
11 under the dock at all tide levels. Mr. Ramos stated, however, that the Nieszs intended to comply  
12 with the DNR requirement concerning pedestrian access, and that the Project would be modified  
13 as necessary to ensure compliance. Ramos Testimony.

14 17.

15 The Board determines that the beach adjacent to the Site and going north and south of the  
16 Site is commonly used by the neighbors and the public for walking. In addition, due to the  
17 gradual slope of the beach, the low height of the bulkhead and the placement of the proposed pier  
18 on top of the bulkhead, the ability to walk along the beach will be impacted by the proposed  
19 dock. The evidence concerning how far the tide would have to be out to allow people to walk  
20 under the dock was insufficient to support a specific finding as to which tide levels will be  
21 associated with public access issues. Wendell Stroud, the contractor for the dock, testified that to

1 get five feet of clearance under the pier, the tide would need to be approximately at the location  
2 of the first piling which is 42 feet waterward of the bulkhead. Stroud Testimony; Ex. R-20(1).  
3 Two photographs showing a six-foot tall man standing on the beach in the area where the pier  
4 would be placed provide some support for Mr. Stroud's rough calculation. Ex. R-29. Based on  
5 the evidence presented, the Board determines that at many tide levels, people will not be able to  
6 walk unimpeded under the pier.

7 18.

8 **Potential Alternatives to a Dock**

9 Because there are no private docks on the southwest side of Fox Island, it is common for  
10 waterfront property owners to secure a boat to a mooring buoy in front of their property during  
11 the boating season. *Id.* To access their boats, people use a small craft such as a dingy that can be  
12 stored on shore and transported over the beach and launched in shallow water. A boat secured to  
13 a buoy may be accessed with a small craft that is then secured to the buoy. The larger boat that  
14 was secured to the buoy is brought close to, or onto, the shore to allow additional individuals to  
15 board the boat. When the boating activity is complete, the process is reversed, and the larger  
16 boat is left secured to the buoy for the next use. *Id.*

17 19.

18 The boating season in the area near the Site runs from approximately late May to late  
19 September due to winter storms that occur along the southwest side of Fox Island. *Id.* The long  
20 open fetch across Carr Inlet from Fox Island is subject to significant storms in the winter months  
21

1 which create safety issues for storing a boat on a mooring buoy. Watkins Testimony; Heim  
2 Testimony; Exs. R-30(1)-R-30(16).

3 20.

4 The Nieszs have a boat which they access with a dingy. The dingy is stored along the  
5 north side of the Niesz bulkhead. Ramos Testimony; Ex. R-15. While in the water, the boat sits  
6 on a boat lift that is attached to a mooring buoy. Ramos Testimony; Exs. R-27(3), R-39. The  
7 boat lift can raise the boat out of the water, but it is not secure enough to withstand winter storms  
8 and thus is only used during the boating season. Ramos Testimony. The Nieszs also have a  
9 concrete boat ramp on the north end of the Site that is 12.5 feet wide and 96 feet long. The boat  
10 ramp extends 58 feet waterward of the property line onto the beach and is usable at many tide  
11 levels, but not all tide levels. Ramos Testimony; Halsan Testimony; Exs. R-16, R-17, R-20(3).

12 21.

13 The Nieszs are requesting the proposed dock to allow easier and safer access to their boat  
14 during the normal boating season and to extend the boating season by creating a safer mooring  
15 location for their boat in the winter. Ramos Testimony. They remove their boat and the boat lift  
16 from the water in the winter months. *Id.* Jordan Ramos, a son-in law of the Nieszs, stated that  
17 the Nieszs have an extended family that has owned and used the Site since 1990. He stated that  
18 the Site is used continuously by various family members and that some of them have difficulty  
19 accessing the boat from a dingy or the beach due to their age. He also stated that there are safety  
20 concerns with having children access the boat from a dingy or the beach. Ramos Testimony.

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22.

Mr. Ramos stated that there is no public moorage for the Niesz boat on Fox Island and that other available public moorage is not close enough to be a reasonable alternative to the proposed dock. Ramos Testimony. Matt Heim lives in the third house to the south of the Niesz property. He stated that he moors his boat on a buoy during boating season and at the Narrows Marina on the other side of Carr Inlet in the winter. He stated that the drive to Narrows Marina is approximately 20-25 minutes by car from his house. Heim Testimony.

23.

The Board determines that due to the composition of the beach materials and the gradual slope of the beach in the area around the Site, accessing a boat secured to a buoy and bringing it to the beach for loading and unloading is a reasonably manageable activity. This process has been used by home owners, including the Nieszs, along the southwest side of Fox Island for many years. West Testimony; Reetz Testimony; Watkins Testimony; Heim Testimony.

24.

Tom Watkins testified for the Reetz concerning the potential for using a dock to extend the boating season and moor a boat during the winter. Mr. Watkins stated that the dock would potentially sustain significant damage due to the strength of winter storms, and that a boat moored to a dock in this area would not be safe in the winter. He did not expect a dock to significantly extend the boating season as a boat should not be moored throughout the winter in this exposed area and winter boating is not common. Watkins Testimony.

1 25.

2 Ms. Reetz also testified that she is concerned that the proposed dock will change the  
3 manner in which driftwood moves up and down the beach which could have an impact on her  
4 property and on the public's ability to access the beach. Reetz Testimony.

5 26.

6 Mr. Stroud testified that the dock is designed to withstand the type of weather conditions  
7 experienced at the Site. He also stated that he did not expect the dock to impact the movement of  
8 driftwood up and down the beach because the distances between the support piles is at least 40  
9 feet, which should be sufficient to allow logs to move through or around the dock. Stroud  
10 Testimony.

11 27.

12 The Board determines that although the dock may be designed to withstand the types of  
13 storms expected at the Site, the Nieszs have not established that the addition of the dock will  
14 significantly increase the boating season or increase access to the water in the winter months.  
15 The Nieszs did not establish that it is safe to leave their boat moored to a dock throughout the  
16 year or that there would be significant use of their boat during the winter months.

17 28.

18 **Potential Impacts to Views**

19 Mr. West and Ms. Reetz both testified that they believe the dock will have an undue  
20 impact on the views from their properties. West Testimony; Reetz Testimony. They stated that  
21 because their homes are at the same level at which the dock will placed on the bulkhead, and

1 because the beach has a gradual slope, their view will be directly impacted by the pier, the ramp  
2 and the float in a significant manner. The neighbors also stated that part of what makes their  
3 views unique is the absence of any docks along this side of Fox Island. The addition of a dock in  
4 the current environment would change the character of the beach, which would negatively  
5 impact their views. *Id.* Ms. Reetz also stated that the proposed dock will unduly impact her  
6 view of the beach from the water when she is on the water in a boat or kayak. Reetz Testimony.

7 29.

8 Carl Halsan, a consultant for the Nieszys, and Mr. Stroud testified that the dock was  
9 designed to minimize view impacts with the use of certain materials and spacing. Halsan  
10 Testimony; Stroud Testimony. Mr. Halsan acknowledged that the dock will impact views, but  
11 he did not believe the impact will be undue in light of the potential to see through portions of the  
12 dock, the remaining views of the shoreline and horizon that will not be impacted and the fact that  
13 docks are common on shorelines. Halsan Testimony.

14 30.

15 The parties did not submit a view analysis demonstrating the expected view impacts of  
16 the proposed dock. The evidence concerning view impact included photographs of the existing  
17 beach with a dock structure superimposed in the photograph to demonstrate a conceptual impact  
18 on some of the views. Exs. R-24, R-31.

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31.

**County's Review and Process**

The Gig Harbor Peninsula Advisory Council (PAC) considered the Proposal on April 13, 2016. Ex. P-22. The PAC advises Pierce County officials including the Hearing Examiner and the Pierce County Planning and Land Services on land use matters within defined geographic areas. PCC 2.45.010. The PAC recommended denial of the proposed dock and approval of the buoy. Ex. P-23, p. 4.

32.

The County issued a Determination of Nonsignificance (DNS) for the Proposal on July 11, 2016. Ex. P-12. No comments or appeals were submitted on the DNS. Ex. P-27, p. 1.

33.

The County Hearing Examiner held a public hearing on the Proposal on September 28, 2016. Ex. P-28, p. 2X. The County Department of Planning and Land Services submitted a Staff Report which recommended that the Hearing Examiner deny the proposal for the dock and approve the proposal to place the mooring buoy. Ex. P-27, p. 13.

34.

The Hearing Examiner found that the proposed dock: does not comply with the "Definition and Purposes" of the Conservancy Environment, is not consistent with applicable policies of the Piers element of the SMP, and is not consistent with the General Criteria and Guidelines for Piers and Docks. Ex. P-28, pp. 11X-20X. The Hearing Examiner also found that due to the low-bank/no-bank waterfront, the proposed dock would have an undue impact on the

1 views from the surrounding parcels and also from the publically owned shoreline. Ex. P-28, p.  
2 17X.

3 35.

4 The Hearing Examiner denied the request for construction of the dock and approved the  
5 request to install a mooring buoy.

6 36.

7 The Nieszs timely appealed the denial of their request for an SSDP for the proposed  
8 dock. The decision to grant the request for a mooring buoy was not appealed by any party.

9 37.

10 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

#### 11 CONCLUSIONS OF LAW

12 1.

13 The Board has jurisdiction over this matter pursuant to RCW 90.58.180. The scope and  
14 standard of review for this matter is *de novo*. WAC 461-08-500(1). The Nieszs have the burden  
15 of proving that the proposed dock is consistent with the requirements of the Shoreline  
16 Management Act (SMA) and the County SMP. RCW 90.58.140(7).

17 2.

18 The following issues were identified for resolution in the Amended Prehearing Order:

- 19 1. Is the petitioner's proposal for a single use dock, approximately 154 feet  
20 long (150 feet over water) and eight foot wide, consistent with the  
21 applicable provisions of the Pierce County Shoreline Master Program, the  
Washington State Shoreline Management Act (90.58 RCW), Washington  
Administrative Code (Chapters 332-30, 461-08, 173-26, and 173-27), and  
any other applicable local regulations and plans?

- 1 2. Does the fact that the proposed dock is the first proposed in a defined  
2 Stretch of Puget Sound somehow disqualify it from approval when it is a  
permitted use?
- 3 3. Will the proposed dock unduly impair views taking into account that its  
4 design meets all dimensional criteria?
- 5 4. Considering Department of Natural Resources regulations and enabling  
6 statutes, WAC 332-30-144(4)(d) and RCW 79.105.430, does the fact that  
the Petitioners have not obtained a lease for use of state-owned tidelands  
7 disqualify the proposal from approval?
- 8 5. Can the dock proposal be mitigated to provide safe, convenient and clearly  
9 available pedestrian access over, around and under the dock at all tide  
10 levels?
- 11 6. Does the fact that neighbors were offered but refused a joint-use dock  
12 proposal disqualify the application for approval because it is still  
13 considered a "single-use" dock?
- 14 7. Under the facts and circumstances, is use of the Nieszes' existing mooring  
15 buoy and boat ramp unfeasible?
- 16 8. Where SMP policies are implemented by adopted use regulations, and  
17 those regulations permit private recreational single-use docks in the  
18 applicable shoreline designation, may those policies nevertheless be  
19 interpreted and applied such to disqualify the dock proposal from  
20 approval?
- 21 9. Can the Gig Harbor Community Plan be interpreted and applied to  
prohibit the dock proposal?
10. Does the failure to appeal the County's SEPA decision relating to the dock  
proposal foreclose contending that elements of the environment disclosed  
in the SEPA Checklist for the project are foreseeable, significant and/or  
incapable of being mitigated?
11. Under the facts and circumstances, are significant cumulative impacts  
reasonably foreseeable?
12. Whether the SSDP should be denied based on a cumulative impact  
analysis utilizing the factors set forth in *De Tienne*, SHB No. 13-016?

1 13. Whether the SEPA declaration of non-significance issued by Pierce  
2 County limits the Board's review of impacts from the Project?

3 3.

4 **A. Compliance with SMA and SMP (Issues 1-9)**

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

12 4.

13 The proposed single use dock is not a preferred use under the policies of the SMA.

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

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

1 *Id.* at 50, 51. Although the proposed dock is an allowed use, Pierce County encourages the  
2 construction of joint-use or community-use docks and piers “whenever feasible so as to lessen  
3 the number of structures projecting into the water.” PCC 20.56.020.

4 5.

5 The proposed dock must meet the requirements for an SSDP. PCC 20.56.030(B). In  
6 Pierce County, an SSDP may be granted only if the proposed development is consistent with the  
7 policies of the SMP and with the criteria set forth in PCC 20.56.040. PCC 20.56.040(A). Here  
8 the relevant SMP is the Pierce County SMP passed in 1974<sup>4</sup>.

9 6.

10 The Site is located in the Conservancy Environment which is “designed to protect,  
11 conserve and manage existing natural resources and valuable historic and cultural areas in order  
12 to ensure a continuous flow of recreational benefits to the public and to achieve sustained  
13 resource utilization.” PCC 20.14.010.

14 7.

15 The general regulations and policies for the Conservancy Environment also provide that  
16 areas in the Conservancy Environment “should maintain their existing character.” PCC  
17 20.14.202(A).

18 8.

19 In addition to the general policies and regulations for Conservancy Environments, the  
20 SMP contains policies applicable to piers that are set out in the SMP Phase I, Goals and Policies,

21 \_\_\_\_\_  
<sup>4</sup> Pierce County has passed a new SMP but Ecology has not yet approved it.

1 § 5 T, subsections (a)-(o)(SMP Piers Policies). The Nieszs argue that the specific regulations in  
2 the SMP control over the SMP Piers Policies.

3 9.

4 The Board declines to consider the regulations in the SMP separate from the applicable  
5 policies. The SMP provides that the Board must determine whether the proposed dock is in  
6 "conformance with the use activity regulations as well as the goals and policies of Phase I of the  
7 Master Program." PCC 20.20.010. Moreover, PCC 20.56.040A requires a determination of  
8 whether the proposed dock is consistent with the policies of the SMP in addition to the specific  
9 criteria set forth in the SMP.

10 10.

11 The SMP Piers Policies that are at issue in this matter are Piers Policies (d), (e), and (f)  
12 which provide:

13 (d) Piers associated with single family residences should be discouraged.

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

16 (f) Encourage the use of mooring buoys as an alternative to space-  
17 consuming piers such as those in front of single family residences.

18 SMP at pp. 37-38; Ex. P-26.  
19  
20  
21

11.

As discussed above, the proposed dock must comply with both the SMP Piers Policies and with applicable regulations in the SMP.<sup>5</sup> The SMP sets forth specific criteria that must be met to issue an SSDP for the proposed dock. The criteria are as follows:

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.

PCC 20.56.040(A).

12.

The Nieszys argue that the proposed dock will not interfere with the recreational benefits of the public or be inconsistent with the existing character of the surrounding area. They assert that the public will be able to walk under the pier at many tides and that water craft can either go

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<sup>5</sup> Although the Gig Harbor Peninsula Advisory Council recommended denial of the proposed dock, the Board's review of the decision to deny the dock is based on the County SMP not on the Gig Harbor Community Plan.

1 under the pier and ramp or go out and around the structure on the water. They also assert that  
2 because they are required by DNR regulations to provide access to the public over or around the  
3 dock at all tides, the Board should find that there will be no interference with any recreational  
4 benefits to the public. Finally, the Nieszs argue that the surrounding area is highly developed  
5 with waterfront homes and that a single dock will not be inconsistent with the character of that  
6 area.

7 13.

8 The Respondents argue that the dock will block public access to the beach at many tides  
9 and would interfere with a continuous flow of recreational benefits to the public, which is  
10 inconsistent with the definition and purpose of the Conservancy Environment. The Respondents  
11 also argue that the proposed dock does not comply with the general regulations and policies for  
12 the Conservancy Environment because it would not be consistent with the existing character of  
13 the shoreline which is free of protruding waterward structures. In addition, Respondents argue  
14 that the only Proposal that is before the Board is the Proposal that was submitted to the Hearing  
15 Examiner for review. Respondents assert that the Nieszs may not attempt to amend their  
16 Proposal by offering to make whatever changes are necessary to comply with the DNR  
17 pedestrian requirement.

18 14.

19 The Board agrees with Respondents that the Proposal that is before the Board in this  
20 matter is the proposed dock and mooring buoy as submitted to the Hearing Examiner. The offer  
21 by the Nieszs to make changes to the Proposal to ensure compliance with DNR's pedestrian

1 requirements and the County's public access provisions are not conditions that the Board may  
2 consider because the Board is limited to a review of the specific permit or permit application  
3 before it. *See Hayes v. Yount*, 87 Wn.2d 280, 291, 552 P.2d 1038 (1976).

4 15.

5 As to the initial part of the first regulatory criterion, important navigational routes, the  
6 Board concludes that there are no important navigational routes that would be obstructed or  
7 impaired by the proposed dock. However, the Board concludes that marine oriented recreation  
8 areas will be obstructed and impaired by the proposed dock. The use of the beach to access the  
9 water will be obstructed and impaired. Due to the fact that the bulkhead is only 2 feet 8 inches  
10 high and the pier will be attached on top of the bulkhead and extend out over a gradually sloping  
11 beach from that height, the distance between the bottom of the pier and the beach will prohibit  
12 the public from walking along the beach at many tides. Ex. R-29. The use of the near shore  
13 water for marine recreation will also be obstructed and impaired as swimmers and people on  
14 small watercraft will be required to go around the proposed dock at many tide levels. *Id.*<sup>6</sup>

15 16.

16 As to the second criterion, whether views from surrounding properties will be unduly  
17 impaired, the Board concludes that views from the surrounding properties will be impaired but  
18 not unduly. The evidence before the Board does not sufficiently demonstrate the degree to  
19 which the views from the West home or the Reetz home will be impacted by the proposed dock.

20  
21 <sup>6</sup> Although not necessary to the Board's analysis concerning whether the proposed dock is consistent with the SMA and the County SMP, the Board also determines that the proposed dock does not comply with WAC 332-30-144(4)(d).

1 The proposed dock will have a significant impact on the Wests' view looking north and the  
2 Reetz's view looking south due to the fact that the homes are on low-bank waterfront and the  
3 pier will be at the approximately the same level as the homes. However, the structure will not  
4 completely block any views and there are significant portions of the views from both homes that  
5 will not be impacted at all. Accordingly, the Board determines that, based on the information  
6 presented, the proposed dock will not unduly impair the views from surrounding properties.

7 17.

8 As to the third criterion, undue impairment or restriction on ingress and egress and use  
9 and enjoyment of the water or beach by adjoining properties, the Board concludes there would be  
10 undue restriction and impairment as to the use of the beach. As discussed above, the distance  
11 between the bottom of the pier and the beach will prevent the adjoining property owners from  
12 walking along the beach at many tides. Although the limited distance between the surface of the  
13 water and the bottom of the pier will require neighbors who swim, or use small watercraft to go  
14 out around the pier at certain tide levels, the Board determines that this would not result in an  
15 undue impairment or restriction.

16 18.

17 As to the fourth criterion, undue impairment of the public's use of waters below ordinary  
18 high water, the Board concludes, as discussed above, that the public's use of the surface waters  
19 below ordinary high water would not be unduly impaired by the need to go around the proposed  
20 dock at many tide levels when swimming, or using small water craft.

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19.

The fifth criterion requires the Nieszys to demonstrate that there is no reasonable alternative such as joint-use, commercial, or public moorage facilities and that such a reasonable alternative is not likely to exist in the near future. The fifth criterion advances the SMP Pier Policies which discourage piers associated with single-family residents and encourage the use of mooring buoys. The Nieszys have established that a joint-use dock is not an available option at this time as they attempted to enter into a joint-use dock arrangement with both of their neighbors. However, even though a joint-use dock is not an available option, the Board concludes that other reasonable moorage alternatives exist for the Nieszys.

20.

The Nieszys have lived at the Site since 2004, and Mr. Nieszys' family has lived at the Site back to 1990. The Nieszys, like all of the other residents along the beach on the southwest side of Fox Island currently access the water through the use of a mooring buoy. The nature of the beach at the site allows for the use of a small boat to access a larger boat stored on a buoy and it also allows for the larger boat to come close enough to the shore to load additional people. Unlike many other properties, the Nieszys also have a boat ramp on their property which allows them to launch their larger boat at many tides.

21.

The testimony from the neighbors established that a mooring buoy is a reasonable alternative to a dock at this location and that it has worked as a reasonable alternative along the beach at and near the Site for many waterfront residents. Moreover, in light of the weather

1 experienced in the open water fetch at the site, it is unlikely that a dock would allow the Nieszs  
2 to significantly increase their use of the water in the winter months. The boating season  
3 commonly runs from late spring to early fall due to the weather and winter storms. The  
4 unprotected nature of the beach makes it unlikely that the Nieszs would leave a boat moored to  
5 the dock throughout the winter. Although a dock may make it more convenient to use a boat in  
6 the summer months, a mooring buoy is a reasonable alternative to a dock at this location.

7 22.

8 The Nieszs' request for the dock is based in part on their desire to provide easier access  
9 to their boat for elderly family members who have difficulty accessing the boat from the beach  
10 and for younger children who need help accessing boat from the beach or the dingy. The Board  
11 has previously refused to consider the age and health of the applicant in evaluating whether  
12 approval for a dock SSDP should be granted. *Walker and Seidl v. San Juan County*, SHB No.  
13 09-012 COL 8 (August 27, 2010).

14 23.

15 As to the seventh criterion,<sup>7</sup> whether the intensity of the use is compatible with the  
16 surrounding land and water uses, the Board has already found that this beach is regularly used by  
17 the public for walking. There are no other private docks along the entire southwest side of Fox  
18 Island. More than a mile of beach north and south of the Site is unimpaired with structures.  
19 Moreover, the gradual slope and gravel structure of the beach provides the public with an  
20 excellent location for a long walk on the beach with beautiful views of the water and the

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<sup>7</sup>The sixth criterion is not in dispute.

1 Olympic Mountains. As proposed, the dock would present an impediment to the public's use of  
2 the beach.

3 24.

4 The seventh criterion relates to SMP Piers Policy (e), which addresses existing pier  
5 density. Here, there are no private docks on a multiple mile stretch of shoreline, and the Board  
6 has concluded that this proposed dock will interfere with marine-oriented near-shore recreation  
7 and will interfere with the public's use of this stretch of beach.

8 25.

9 The Nieszszs argue that their proposed dock cannot be denied merely because it will be the  
10 first dock in the area. They cite to *May v. Robertson*, 153 Wn. App. 57, 218 P.3d. 211 (2009) for  
11 the proposition that the absence of docks is not determinative of whether a dock should be  
12 allowed. Niesz Prehearing Brief, pp. 11-13. The Board agrees that the absence of docks is not  
13 determinative of the decision on whether the intensity of use is compatible or whether a dock  
14 would be inconsistent with existing pier density.

15 26.

16 Each application must be considered on its own merits. In *May*, the proposed pier was a  
17 joint-use pier which was encouraged by the County policies and which was not subject to the  
18 requirement that the applicant consider reasonable alternatives. *May*, 153 Wn. App at 84-85.  
19 The dock at issue here is a single-use facility. While the Nieszszs attempted unsuccessfully to  
20 engage their neighbors in a joint-use dock, this does not excuse them from the requirement to  
21 consider the availability of other alternatives. The Board has already concluded that other

1 reasonable alternatives to a single-use dock are available. Moreover, in *May* the proposed joint-  
2 use pier was determined to be consistent with the area's Rural Residential Environment shoreline  
3 designation and the area's existing land and water activities. *May*, 153 Wn. App at 87. The  
4 proposed dock in this matter would interfere with marine-oriented near-shore recreation and the  
5 use of the beach by walkers.

6 27.

7 In light of the specific impacts of the dock proposed by the Nieszys and the County's  
8 policy of discouraging single-use docks, the Board concludes that the intensity of use concerning  
9 the proposed dock is not compatible with the surrounding land and water uses and the proposed  
10 dock is not consistent with existing pier density. The Board is not ruling that all docks are  
11 prohibited along the southwest side of Fox Island. Although the proposed dock would not be  
12 compatible with the land and water uses in the area or the existing pier density, other docks may  
13 not have the impacts of the proposed dock or the reasonable alternative of the proposed dock.

14 28.

15 **C. Cumulative Impacts (Issues 11-12)**

16 The Board has held in past cases that it may consider cumulative impacts resulting from  
17 the approval of an SSDP pursuant to the SMA and local SMP, separate from SEPA. *Garrison v.*  
18 *Pierce County (De Tienne)* SHB 13-016c (January 22, 2014), affirmed, *De Tienne v. Shorelines*  
19 *Hearings Bd.*, 197 Wn. App. 248 (2016). In the *Garrison* decision, the Board stated:

20 The Supreme Court has, in fact, recognized that approval of one project  
21 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

1 substantial development permit. *Id.*, citing *Skagit County v. Department of*  
2 *Ecology*, 93 Wn.2d 742, 750, 613 P.2d 121 (1980).

3 *Garrison*, COL 21.

4 29.

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

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

17 *Garrison*, SHB 13-016 at 54-55. The parties do not dispute that a cumulative impact analysis is  
18 appropriate in this matter.

19 30.

20 The proposed single-use dock is discouraged under the SMP Piers Policies. The 150-foot  
21 proposed dock would be the first of its kind on the southwest side of Fox Island. Allowing the  
proposed dock would set a precedent for allowing other similar docks in this area. The  
cumulative impacts of this dock, and future similar docks, would degrade aesthetic values.

1 There would be a significant loss of community uses. Beach-walkers would be obstructed and  
2 marine recreation would be affected. The Board concludes that approval of an SSDP for the  
3 proposed dock in this location would likely have cumulative impacts that would be inconsistent  
4 with the policies and regulations of the SMP.

5 31.

6 As noted above, the Board is not ruling that all docks are prohibited along the southwest  
7 side of Fox Island. Although the proposed dock would not be compatible with the land and  
8 water uses in the area or the existing pier density, other docks may not have the impacts of the  
9 proposed dock or the reasonable alternative of the proposed dock. A dock with fewer impacts  
10 and no reasonable alternative may not lead to unacceptable cumulative impacts.

11 32.

12 **D. SEPA (Issues 10 and 13)**

13 The Nieszs did not present evidence or argument concerning Issues 10 and 13 and thus  
14 the Board determines that those issues have been abandoned. To the extent the Nieszs consider  
15 these issues to include arguments that the proposed dock is consistent with the SMA and County  
16 SMP due to its alleged limited impacts, the Board determined above that the Nieszs failed to  
17 demonstrate that the proposed dock is consistent with the SMA and the County SMP.

18 33.

19 In summary, the Board concludes that the Nieszs have failed to demonstrate that the  
20 proposed dock is consistent with the SMA and the County SMP. As a result, the Hearing  
21 Examiner's decision should be upheld and the SSDP for the proposed dock should be denied.

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34.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

Having so found and concluded, the Board enters the following order.

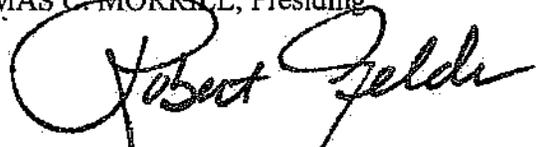
**ORDER**

The decision issued by Pierce County denying Petitioners' request for a Shoreline Substantial Development Permit to construct a single-use dock is AFFIRMED.

SO ORDERED this 20<sup>th</sup> day of November, 2017.

**SHORELINES HEARINGS BOARD**

  
\_\_\_\_\_  
THOMAS C. MORRILL, Presiding

  
\_\_\_\_\_  
ROBERT GELDER, Member

  
\_\_\_\_\_  
GRANT BECK, Member

# APPENDIX-3

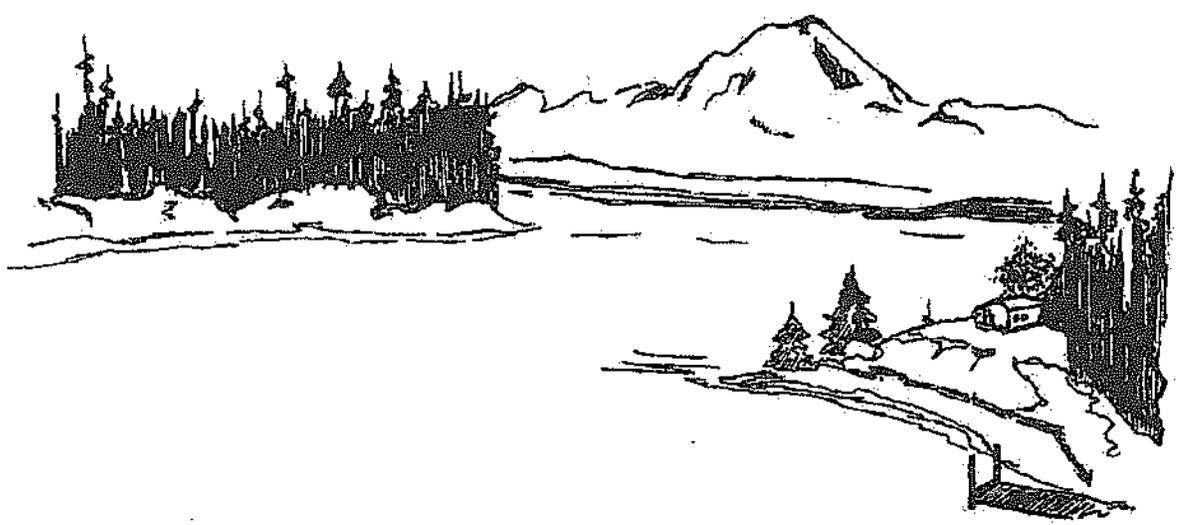
*Carl*

**SHORELINE  
MASTER PROGRAM  
FOR PIERCE COUNTY**

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5/19/8018



**BOARD OF PIERCE COUNTY COMMISSIONERS  
ADOPTED: MARCH 4, 1974**

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- (n) Efforts should be made to locate roads in such a manner that does not limit access to the shoreline.
- (o) Prior to the site preparation or construction of new roads or railroads, near the shoreline, of any type, an environmental impact study should be made in accordance with Washington State Environmental Policy Act of 1971.
- (p) New, efficient, pollution-free methods of transportation which have fewer environmental effects than present transportation methods should be encouraged.

Piers:

- (a) Piers in conjunction with marina development in appropriate areas should be allowed.
- (b) Piers in conjunction with recreational development in appropriate areas should be allowed. Consideration should be given to size and intensity of uses in relation to adjacent shoreline uses.
- (c) Piers for commercial facilities should be discouraged unless they are an integral part of the commercial operation.
- (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.
- (g) Piers should not be built for the purpose of storing vehicles and/or boat trailers.
- (h) Piers and floating docks should be encouraged to be built perpendicular to the shoreline rather than along it.
- (i) Encourage pier construction to include larger spans on fewer pilings rather than smaller spans and more pilings. Piers in marine waters may provide habitat suitable for predatory fish with consequent detriment to young salmonids.
- (j) When plastics or other non-degradable materials are used in pier construction precautions should be taken to insure their containment.
- (k) Encourage the formulation and enforcement of pier maintenance regulations. Encourage regulations governing removal of piers and restoration of pier sites when no longer in use.

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- (l) The use of floating docks should be encouraged in those areas where scenic values are high and where conflicts with recreational boaters and fishermen will not be created.
- (m) Open-pile piers should be encouraged where shore trolling is important, where there is significant littoral drift and where scenic values will not be impaired.
- (n) Priority should be given to the use of community piers and docks in all new major waterfront subdivisions. In general, encouragement should be given to the cooperative use of piers and docks.
- (o) Areas having a significant near shore fishery should not be used for floating docks.

Educational & Archeological Areas & Historic Sites:

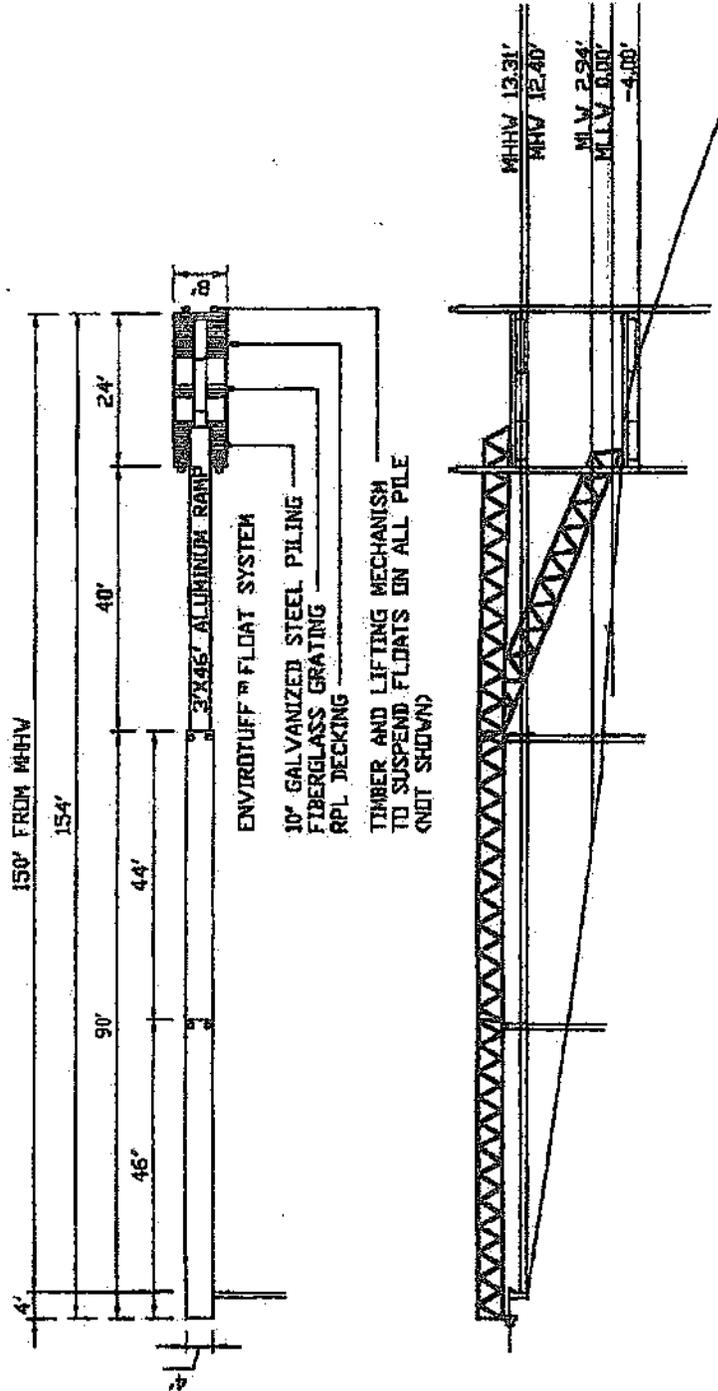
- (a) Archeological areas, ancient villages, military forts, old settlers homes, ghost towns, historic trails, kitchen middens, and historical cemeteries are nonrenewable resources and many are in danger of being lost through present day changes in land-use and urbanization. Because of their rarity and the educational link they provide to our past, these locations should be preserved.
- (b) Professional archeologists should be consulted to identify and maintain an inventory of areas containing potentially valuable archeological data, and to establish procedures for salvaging the data.
- (c) Where possible, sites should be permanently preserved for scientific study, education, and public observation. In areas known to contain archeological data, local governments should attach a special condition to a shoreline permit providing for a site inspection and evaluation by an archeologist to ensure that possible archeological data are properly salvaged. Such a condition might also require approval by local government before work can resume on the project following such an examination.
- (d) Shoreline permits, in general, should contain special provisions which require developers to notify local governments if any possible archeological data are uncovered during excavations.
- (e) Consideration should be given to the National Historic Preservation Act of 1966 and chapter 43.51 RCW provide for the protection, rehabilitation, restoration and reconstruction of districts, sites, buildings, structures and objects significant in American and Washington history, architecture, archeology or culture.

# APPENDIX-4

Figure 5. Proposed plan and section views

<b>Purpose</b> Private use recreational dock and Boat Moorage	<b>MAINE FLOATS</b> Tacoma, WA 98501 889-2740	<b>Proposed</b> Construct a single use dock consisting of a 4x20' pier, and a 3x18' ramp with 100% grained surface. An 8x24' float with 100% grained surface. Supported by (4) 8" galvanized steel pier piles and (4) 10" galvanized steel float pile.
<b>Drawn:</b> 0.0		
<b>Adjacent Property Owner:</b> (1) Glen Duggan 683 Kamas Dr. Fox Island, WA 98333	<b>Job Addr:</b> Erin Niesz 693 Kamas Dr. Fox Island, WA 98333 Mail Addr: Same	<b>Appl by:</b> Eric Niesz In: Curt Islet At: Piers Sound County: Pierce State: WA Date: 7/22/18 Page: 5 of 8
<b>Scale:</b> NTS	<b>Sec 11</b> T 20N R 01E	<b>Corps Reference:</b> Lan/Lang 47 240718 / -122.63232

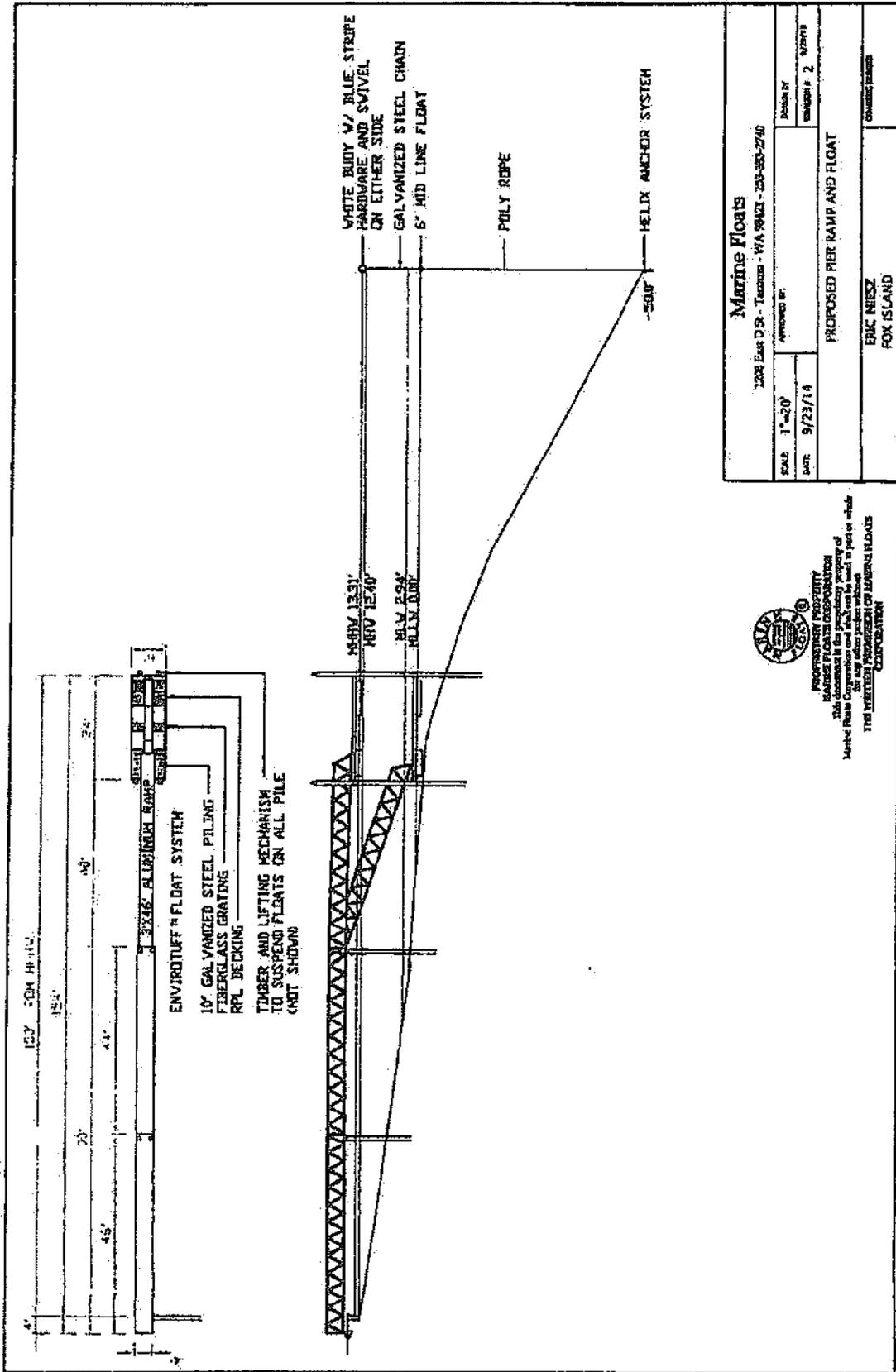
**PLAN AND SECTION**



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<b>Marine Floats</b>	
1208 East D St - Tacoma - WA 98403 - 253-855-2740	
Scale: 1"=20'	Drawn by: WSP/PT
Date: 9/23/14	Sheet # 2
PROPOSED PIER RAMP AND FLOAT	
ERIC NIEZ FOX ISLAND	



PROPRIETARY PROPERTY  
 MARINE FLOATS CORPORATION  
 This document is the property of  
 Marine Floats Corporation and is not to be  
 used for any other project without  
 THE TRESTLE CORPORATION

000072



MHV 13.31'

MHV 12.40'

MLV 2.94'

MLLV 0.00'

LET -4.00'

**DENNIS REYNOLDS LAW OFFICE**

**February 21, 2019 - 3:09 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52658-1  
**Appellate Court Case Title:** Eric Niesz and Kendra Niesz, Appellants v. Pierce County, Respondent  
**Superior Court Case Number:** 17-2-14146-7

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