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No. 52658-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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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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BRIEF OF RESPONDENTS REETZ

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**I.**  
**INTRODUCTION**

Petitioners Eric and Kendra Niesz commenced this Administrative Procedure Act (“APA”) appeal to challenge the Shoreline Hearings Board’s decision denying their request to construct a 154-foot pier-ramp-float on public tidelands located on the southwest side of Fox Island. This low bank beach is currently dock-free for miles and highly utilized by the local residents and the public. After considering the testimony of eight witnesses and substantial documentary evidence, the three-member Board unanimously concluded that Niesz failed to sustain their evidentiary burden to demonstrate their dock application met all of Pierce County’s permit criteria. More specifically, the Board found that **Niesz failed to satisfy four of the County’s seven permit criteria**, which the Board applied in light of applicable policies stated in Pierce County’s Shoreline Master Program. The Board’s decision is in accord with the prior review of the proposed dock. Following independent review of the Niesz’ application against the relevant permit criteria and policies

- The Pierce County Planning and Land Service Staff recommended that the dock application be denied (CP 1135, 1142-1147);<sup>1</sup>

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<sup>1</sup> The Certified Administrative Record of the Shoreline Hearings Board is at Clerk’s Papers (“CP”) 100 through 1442. The verbatim transcript of the Board proceeding is at CP 106-425. The remainder of administrative record is comprised of the pleadings filed with the Board and the Exhibits that the Board admitted as evidence.

- The Gig Harbor Peninsula Advisory Commission recommended the dock application be denied (CP 1079-1081); and
- The Pierce County Hearing Examiner, after a public hearing, found that the dock application did not satisfy the County permit criteria and denied the dock application (CP 1156, 1170-1193).

Despite that the multi-layered review and evaluation of the Niesz dock application consistently led to the same conclusion, petitioners Niesz attempt to characterize the Board's decision as off the rails to a level of some undefined, unexplained constitutional import. Niesz asserts that the Board (and apparently the County Planning Staff, the Gig Harbor Peninsula Advisory Commission and the County Examiner) did not evaluate the application against the stated criteria and policies, but "freelance[d] by reading limitations into the statutory and regulatory scheme that do not exist." (Niesz Brief at p. 4.) Niesz asserts that the Board in this case (and apparently the Examiner before it) so misapplied the Pierce County Code to the Niesz dock application that they violated petitioners' fundamental constitutionally protected rights.<sup>2</sup> (Niesz Brief at pp. 41-45.)

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<sup>2</sup> The constitutional challenges are new to this appeal. At page 4 of their opening brief below (CP 1452), petitioners indicate that they present a constitutional challenge to the Board's decision. At paragraph K, they identified the following issue for consideration:

Did the SHB's decision erroneously violate the Niesz's fundamental constitutional rights to reasonable use and develop their water front property and/or have a decision accord with the general laws of the state?

Petitioners mischaracterize the Board's decision. In reality, this appeal is comprised of little more than disagreement with the fact-finder's assessment of the witnesses and evidence. But to prevail on this APA appeal, Niesz must demonstrate that the Board erred with regard to each and every independent basis upon which it found the dock did not qualify for a shoreline permit. The questions presented were largely fact intensive. To make their factual findings, the Board necessarily assessed credibility of multiple witnesses and weighed both the testimony and documentary evidence.

Petitioners Niesz disagree with several of the Board's findings and conclusions drawn from the evidence. But disagreement is not enough to prevail on this APA appeal in which the Court is directed to conduct a deferential review of the Board's factual findings and interpretation of applicable shoreline regulations. Niesz may point to isolated testimony that contradicts certain Board findings (made after considering and

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But petitioners presented no argument or authority on the issue to the superior court. Citing an eminent domain case and a mortgage foreclosure case at page 11 of their brief (CP 1459), Niesz stated the undisputed general principal that property rights have constitutional protections. But they have presented no argument or authority that the Pierce County permit criteria and SMP policies, either on their face or as applied to the Niesz dock application, contravene the constitution. Of course, land use ordinances are generally constitutional in principle as a valid exercise of police power. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 26 (1978); *Lutz v. City of Longview*, 83 Wn.2d 566, 574 (1974). Regardless, an issue not briefed is deemed waived. *Currier v. Northland Services, Inc.*, 182 Wn. App. 733, 182 (2014). Thus the superior court below was not asked to and provided no ruling on any constitutional issues.(See CP 1574-75.)

weighing competing evidence), but they cannot demonstrate the findings are not supported by the substantial evidence in the record. Petitioners Niesz likewise cannot demonstrate that the Board misapplied applicable shoreline regulations to the specific facts of this case. The Court should affirm the Shoreline Hearings Board's decision that, in turn, affirmed the Pierce County Hearing Examiner's decision to deny the requested dock permit.

## **II. FACTS**

### **A. The Southwest Fox Island Shoreline And The Niesz Dock Proposal**

Petitioners Niesz seek a shoreline substantial development permit to construct a 154-foot (150 feet over water) pier, ramp and float on their shoreline property located at 695 Kamus Drive on Fox Island, Washington. (CP 1135, 301-303.) Respondents Erin and William Reetz own the property located at 683 Kamus Drive that is immediately north of the Niesz property. (CP433-434.) The proposed dock location is near the common boundary line between the Reetz and Niesz properties. (*See CP 983, 1139-1140.*) Respondents John and Christine West own and reside on the property immediately south of the Niesz property. (CP 407.) Photographs (CP 1220, 1222) depicting their respective properties and the approximate location of the proposed dock are attached at Appendix A.

The Niesz property is located on the southwesterly side of Fox Island and abuts the eastern shoreline of Carr Inlet. (CP 1140; 302-303.) This is low bank/no bank waterfront property – the concrete bulkhead that fronts the Niesz property is only 2 feet, 8 inches high. (CP 1256; 146, 306-308.) The beach fronting the Niesz property, as well as the beach along most of the west side of the island is a pebble beach with a graduated slope. (CP 1240-1248, 1273-1283.) It is thus easily traversable by beach walkers and also allows easy access to dinghies or rafts, which are routinely used on this side of the island to shuttle passengers to buoy moored boats. (CP 186, 351, 358-363, 413-415; 1261-1262, 1285, 1345.)

As with most of the tidelands in this area, the tidelands abutting petitioners' property are not privately owned, but publicly owned through the Department of Natural Resources ("DNR"). (CP 308; 1066-1072.) Many members of the public access these public tidelands through the Kamus Drive / West Wall public access approximately 200-300 feet away from the Niesz property. (CP 358-359; 1220, 1259.) The shoreline is well-used by both the people living in the community and the public for beach walking, swimming, kayaking, paddle boarding, fishing and boating. (CP 351, 358-363, 413-415, 441-452; 1340-1343.)

Significantly, with the exception of the U.S. Navy pier located 1.25 miles north of the Niesz property, no docks exist from the sand spit at the

northern tip of the island to the Peninsula Metropolitan Park District public fishing pier located on the southeasterly shoreline of Fox Island, approximately 3.1 miles from the Niesz property. (CP 305-306; 1224.) The public thus presently enjoys a four-mile stretch of shoreline void of impediments or structures between the Park District and the Navy Pier. (*Id.*) The proposed dock, if approved, would create the only obstacle to unimpeded enjoyment of the shoreline.

As noted earlier, the Niesz property is improved with a concrete bulkhead that is 2 feet, 8 inches high. The pier and dock, if approved, will extend perpendicular from the bulkhead 150 feet. (CP 1254-1257.) Because this is a low bank / no bank waterfront, the piers and railings of the proposed dock will vertically extend 19 feet above the beach and, thus, impede views enjoyed by members of the public and the neighbors. (*Id.*) The dock will also create an impediment or barrier to beach walking depending on the tide level. (CP 356-357; 1297-1298; 1345.)

Significantly, petitioners Niesz are not currently without access to the water. The Niesz property is already served by a 96' x 12.5' boat ramp. The existing concrete boat ramp extends 38 feet landward from the 2'8" bulkhead and 58 feet waterward of the bulkhead. (CP 286; 1246-1248, 1256, 1287-1289.) Like most the properties along this shoreline, the Niesz property is also served by a buoy. (CP 404; 1226-1234, 1349-1350.)

Unlike most properties, the Niesz property is also served by a float or boatlift. (CP 404-405; 1352-1354.)<sup>3</sup> As the other waterfront property owners along the southwesterly side of Fox Island routinely do, the Niesz family has historically safely accessed a dinghy or raft on the gentle sloped, pebble beach to transport to their buoy moored boat. (CP 186, 345-346, 370.)

**B. The Applicable Shoreline Policies and Regulations**

The Niesz property and all parcels for miles in both directions along the shoreline are located within the Conservancy Shoreline Environment of the Pierce County Shoreline Master Program (“SMP”). (CP 304; 1224.) The SMP states that the Conservancy Environment “is designed to protect, conserve and manage existing natural resources and valuable cultural areas in order to ensure a continuous flow of recreational benefits to the public and achieve sustained resource utilization.” Pierce County Code (“PCC”) 20.14.010. The general regulations and policies applied to all shorelines classified as in a Conservancy Environment include that (1) areas should maintain their existing character and (2) substantial and non-substantial development which do not lead to

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<sup>3</sup> At the time of the hearing, the float was not authorized a permit. (CP 179, 307.) Petitioners could, however, apply for a conditional use permit to authorize the float. Notably, the floats situated on the side of the boatlift effectively function as a dock would function for purpose of accessing the boat. (CP 349.)

significant alterations of the existing natural character of an area should be encouraged. PCC 20.14.020. Preferred uses in the Conservancy Environment are limited to outdoor recreation, timber harvesting and passive agricultural uses. PCC 20.14.030.

In addition to the policies for Conservancy designated shorelines, the SMP also sets forth general Pier Policies. The SMP Pier policies encourage piers in conjunction with marina development in appropriate areas (Pier Policy a), but discourages piers associated with single family residences (Pier Policy d). The SMP Pier Policies also encourage the use of mooring buoys as an alternative to space consume piers (Pier Policy f). Finally, the SMP Pier Policies provide: “In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact to proximate land owner should be considered” (Pier Policy e). (CP 1132-1133.)

It is in the context of the above SMP polices that the substantial development permit criteria, as set forth in PCC 20.56.040(A), must be applied to a single family dock<sup>4</sup> application:

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<sup>4</sup> Though the word dock, for brevity’s sake, is commonly used to describe structures like that proposed here, the structure does not meet the definition of a dock under the Pierce County Code. The project is more accurately described as an over-the water pier, with a float, thus the Pier Policies in the SMP are applicable. For the Board’s reference, the Code defines “pier” as “a structure which abuts the shoreline and is built over the water on pilings and is used as a landing or moorage place for marine transport or for recreational purposes.” PCC 20.56.010(B). A “float” is defined as “a number of logs,

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; and
7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

The above are subjective criteria require the exercise of judgment and discretion and are separate from and in addition to the Code's dimensional restrictions. Because the above Code provisions (as well as

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boards, barrels, etc., fastened together into a platform capable of floating on water, use as a landing or moorage structure for marine transport or for swimming purposes." A "dock," on the other hand, is "a structure which abuts the shoreline and floats upon the water and is used as a landing or moorage place for marine transport or for recreational purposes, but does not include recreational decks, storage facilities, or other appurtenances." PCC 20.56.010(A). Only piers and docks that are less than 50 feet in length and cost less than \$2,500 are exempt from the shoreline substantial development permit requirement. PCC 20.56.030(D).

WAC 173-27-150(c)) expressly conditions permit approval upon demonstration by the applicant that their proposal is consistent with SMP policies, the SMP policies have regulatory effect.

**C. The Pierce County Hearing Examiner's Decision**

The Pierce County Hearing Examiner conducted a public hearing on the Niesz dock application in which 18 people testified (CP 1158-1164) and the recommendations of Pierce County Planning and the Gig Harbor Peninsula Advisory Commission were presented.<sup>5</sup> The Examiner issued his decision on October 24, 2016. (CP 1155-1175.)

After applying the criteria and the applicable SMP policies, the Examiner concluded that the Niesz' dock application did not satisfy five of the seven criteria and, thus, did not qualify for a shoreline substantial development permit. Specifically, the Examiner found, based on the evidence presented, that the proposed dock:

- would impair marine oriented recreation areas;
- would unduly impair views from surrounding properties
- would unduly impair ingress-egress, as well as use and enjoyment of the water or beach on adjoining properties;

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<sup>5</sup> Prior to the Examiner's Decision, the Pierce County Peninsula Advisory Commission ("PAC") unanimously recommended denial of the dock, based upon the publicly owned shorelines in the area, impeding access to the public, and that the existing boat ramp and buoy provide a reasonable alternative. (CP 1079-1081.) The Pierce County Planning and Land Services ("PALS") Staff also recommended denial because, in Staff's opinion, the proposed dock does not meet either the intent of the applicable Conservancy Environment nor the criteria for a dock as set forth in the Pierce County Shoreline Management Regulations. (CP 1135, 1143-1147.)

- is unnecessary because reasonable alternatives to the proposed dock, such as a buoy or commercial mooring, exist; and
- in consideration of the comparative intensity of its use and applicable policies, is incompatible with the surrounding environment and land and water uses.

(CP 1170-1172.)

**D. The Shoreline Hearings Board Decision**

Niesz appealed the Examiner’s decision to the Shoreline Hearings Board and the Board conducted a *de novo* review of the Niesz’ dock application. After conducting a site visit, hearing the testimony and considering the documentary evidence, the Board independently applied the permit criteria and SMP policies to the Niesz’ proposal to construct a dock on this unique beach and concluded that the proposed dock could not satisfy four of the seven permit criteria. Specifically, the Board found:

- would impair marine oriented recreation areas;
- would unduly impair ingress-egress, as well as use and enjoyment of the water or beach on adjoining properties;
- is unnecessary because reasonable alternatives to the proposed dock, such as a buoy or commercial mooring, exist; and
- in light of applicable policies regarding intensity of use, is incompatible with the surrounding environment and land and water uses.

(CP 951-960.) The Board also considered the cumulative impacts to this currently unobstructed beach and the public that so often uses the beach.

The Board found:

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 [shoreline substantial development permit] for the proposed dock in this location would likely have cumulative impacts that would be inconsistent with the policies and regulations of the SMP.

(CP 961-962.)

Petitioners Niesz timely appealed the Board's context-driven factual findings and legal conclusions to the superior court. (CP 1-95.) The Honorable Frank Cuthbertson found that Niesz did not meet their burden on appeal. The superior court thus denied the appeal and affirmed the decision of the Board. (CP 1574-76.) Niesz thereafter appealed to this Court. (CP 1579-84.)

### **III. STANDARD OF REVIEW**

The Administrative Procedure Act, Chapter 34.05 RCW, governs and limits the judicial review of this matter. RCW 90.58.180(3) This Court reviews the Board's decision directly and review is confined to the record established before the Board. *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 201-02, 884 P. 2d 901 (1994). The reviewing court may only overturn the Board's decision under the APA for the reasons set forth in

RCW 34.05.570(3). *Buechel v. State Dept. of Ecology*, 125 Wn.2d at 202. As the party challenging the Examiner's ruling, Niesz had the burden of proof before the Board. RCW 90.58.140(7). They likewise carry the burden of demonstrating the invalidity of the Board's actions on this appeal. *May v. Robertson*, 153 Wn. App. 57, 73, 218 P. 3d 211 (2009). Here, Petitioners Niesz challenge the Board's decision primarily on the grounds that it erroneously interprets or applies the law, is not supported by substantial evidence, or is arbitrary and capricious.

While the court reviews the Board's pure decisions of law *de novo*, the court must afford "substantial deference" to the Board's legal interpretations given its specialized knowledge and expertise. *Puget Sound Water Quality Defense v. Municipality of Metropolitan Seattle*, 59 Wn. App. 613, 617, 800 P.2d 387 (1990); *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589, 870 P.2d 987 (1994); *see Cornelius v. Washington Dept. of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015) (stating agency decision of law is entitled to "great weight"). Reviewing courts "give due deference to the Board's specialized knowledge and expertise, unless there is a compelling indication that the agency's regulatory interpretation conflicts with the legislature's intent or exceeds

agency's authority.”<sup>6</sup> *Samson v. Bainbridge Island*, 149 Wn. App. 33, 43, 202 P.3d 334 (2009).

Determinations of fact are reviewed under the substantial evidence standard, which is “highly deferential” to the agency fact finder. *Nations Capital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wn. App. 723, 738, 137 P.3d 78 (2006). Factual review under the substantial evidence test requires the Court

to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.

*State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). *See also, Dep't of Corrections v. City of Kennewick*, 86 Wn. App. 521, 529, 937 P.2d 1119 (1997). Of course here, the Shoreline Hearings Board was the highest forum to exercise fact-finding authority; the Court reviews the Board decision. *Buechel, supra*, 125 Wn.2d at 202. A finding is supported by substantial evidence when “it would convince an unprejudiced, thinking mind of the truth of the

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<sup>6</sup> It is noteworthy that the Board's interpretation of the applicable Pierce County shoreline regulations and policies is in accord and consistent with the Pierce County Hearing Examiner's interpretation. The Examiner, of course, is the official to whom the County has charged with responsibility to interpret and apply its code to shoreline substantial development permit applications. *See* PCC 1.22.080(B)(1)(f); PCC 20.76.030.

declared premise.” *Jefferson County v. Seattle Yacht Club*, 73. Wash. App. 576, 587, 870 P.2d 987 (1994). The court should not weigh the “credibility of witnesses or substitute [its] judgment” for the agency’s regarding a finding of fact. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d at 568, 588, 90 P.3d 657 (2004). The Board’s factual findings should only be overturned if they are clearly erroneous in light of the entire record; in other words if the court is “definitely and firmly convinced that a mistake has been made.” *Port of Seattle*, 151 Wn.2d at 588; *Buechel*, 125 Wn.2d at 202.

Last, the Board’s decision may be overturned if it is “arbitrary or capricious.” A decision is arbitrary and capricious if it constitutes “willful and unreasoning action in disregard of facts and circumstances.” *Port of Seattle*, 151 Wn.2d at 589. Even if a different conclusion may have been reached, a decision will not be considered arbitrary and capricious if there is “room for two opinions” and the action taken upon honest and due consideration. *Buechel*, 125 Wn.2d at 202.

#### IV. ARGUMENT<sup>7</sup>

##### **A.     **Though A Dock Is Conditionally Allowed Under The Pierce County Code And SMA, Petitioners Niesz Do Not Have An****

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<sup>7</sup> Reetz joins and incorporates by reference the arguments presented by respondents West, including their argument in support of the Board’s findings and conclusions that the Niesz’ proposed dock would have unacceptable cumulative impacts on this shoreline.

**Unfettered Or Even A Preferred Right To Construct A Private Single-Use Dock, Much Less A Constitutional Right.**

The Shoreline Management Act (“SMA”) is founded upon a recognition that shorelines are fragile and there is an increasing pressure from additional uses that necessitates increased coordination in their management and development. *Buechel, supra*, 125 Wn.2d at 203. The SMA does not prohibit development of the state’s shorelines, and respondents Reetz have acknowledged throughout all of the proceedings that, in appropriate circumstances, private single-family docks may be a reasonable use of shoreline property. They also acknowledge that the SMA contemplates balanced consideration of both public and private use of tidelands and the public waters. But private residential docks are not a right as petitioners Niesz argue, nor do they hold the status of a preferred use as compared to public access to and use of shorelines.

Washington courts have clarified that private single-family docks are not afforded any special priority under the SMA. RCW 90.58.020 provides that, in instances where alterations to the natural shoreline are authorized, priority shall be given to

single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on

or use of the shorelines of the state and other developments that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

The SMA does not, however, make specific reference in this provision to private residential docks or piers as preferred uses. Piers are listed as a preferred use, but they are so listed for improvements that facilitate public access to the state's shorelines. In *Samson v. Bainbridge Island, supra*, the Washington Supreme Court found this distinction meaningful, noting:

The Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would limit public access in, rather than promote public access to the waters of the state.

149 Wn. App. at 51.

The SMA “does not permit unmonitored and uncontrolled expansion and multiplication of private docks on public aquatic lands and waters.” *Caminiti v. Boyle*, 107 Wn. 2d 662, 671, 732 P.2d 989 (1987). “[T]o the contrary, any such construction is subject to substantial regulation and control.” *Id.* Ultimately, the Board (as the Examiner before it) was required to and did apply the SMA, the County’s SMP and applicable local regulations to determine if the Niesz dock application qualifies for a substantial development permit. The SMP and County regulations applicable in this case do authorize single-family docks, but

only if the applicable criteria, which include compliance with SMP policies, are satisfied.

Those policies and standards do not confer special status or preference to private docks or private property owners, nor is the requisite permit for a dock of this nature ministerial. Rather, as contemplated by the SMA, the standards and policies balance and consider both the rights of the private property owner and the impacts of the private proposal on the public and the neighboring property owners. The standards and policies require the fact-finder, in this case the Board, to exercise discretion, after considering all of the applicable circumstances and evidence.

Petitioners Niesz attempt to elevate their status by unilaterally asserting that they are constructing a joint use dock. They attempt to support this argument by referencing WAC 332-30-144(2)(b), which addresses DNR permission to use public tidelands. This state regulations bears no relationship to Pierce County's local shoreline regulations, much less have application to interpreting the County's regulations.

More importantly, the Pierce County Shoreline regulations belie the petitioners' argument The County's shoreline regulations define these terms at PCC 20.56.010 at subsections I and J:

**I. Single Use Pier or Dock.** "Single Use Pier or Dock" shall mean a dock or pier including a gangway

and/or float which is intended for the private noncommercial use of one individual or family.

**J. Joint Use Pier or Dock.** "Joint Use Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for the private, noncommercial use of not more than four waterfront building lot owners, at least one boundary of whose building lots lies within 1,000 feet of the boundary of the lot on which the joint use pier or dock is to be constructed.

Notably, consistent with the above definitions, both the Pierce County reviewing staff (both in the SEPA DNS and the Staff Report) and the Pierce County Hearing Examiner characterized petitioners' application to propose a "single-use" dock. (CP 1031, 1135, 1156.) Petitioners Niesz did not protest the County's characterization of their application while the County processed and reviewed their application. Their argument that their proposal holds the status of a joint dock is new to the judicial appeals and a misguided attempt to gain the benefit of the County policies favoring joint docks and to avoid the Examiner and Board's well-reasoned decision distinguishing *May v. Robertson, supra*, from this case. (See subsection 4 below.)

Finally, that their neighbors rightfully declined to join the Niesz' to construct this dock as a joint use dock means only that a joint use dock is not available as an alternative. It does not, however, convert the dock to anything other than a single-use dock. The proposed dock is for use by a

single family – the Niesz family. Under the County’s code, the dock remains a single-use dock.

Likewise, the Niesz’ have no constitutional right to construct a dock and Niesz cites no law to indicate they have such a constitutional right. They seem to argue that because the local code and SMA affords discretion in the permit decision-making, but they offer no analysis that the discretion afforded renders the SMA or the County’s shoreline master plan and regulations somehow unconstitutionally vague.

Finally, petitioners Niesz attempts to devalue Reetz’ (and their neighbors’) challenges as nothing more than generalized complaints of disgruntled neighbors. Respondents Reetz have never argued that they have unfettered veto power, or that a “first dock” on a shoreline is *per se* prohibited or that docks are prohibited, whether designated with the Conservancy Environment or otherwise. Rather, respondents Reetz have consistently based their challenge on the SMP policies and the permit criteria and both the County Examiner and the Board independently concluded that multiple permit criteria were, in fact, not satisfied. Attempts by Niesz to elevate their own status in this appeal are not supported by the law.

**B. The Board Correctly Concluded That The Proposed Dock Does Not Satisfy The Relevant Permit Criteria In Light of Applicable SMP Policies And, Thus, Does Not Qualify For A Shoreline Substantial Development Permit.**

**1. The Board correctly concluded that the proposed dock would obstruct or impair marine oriented recreation (PCC 20.56.040(A)(1)).**

Unlike other permit criteria, PCC 20.56.040(A)(1) does not require a showing of “undue” impairment.<sup>8</sup> Rather, it provides that, to qualify for a permit, the applicant must demonstrate that “marine oriented recreation areas will not be obstructed or impaired.” The Board did, applying the separate criterion 3, conclude that the dock would unduly impair adjoining properties ingress, egress as well as use and enjoyment of the beach (CP 956, Conclusion 17), such proof is not, however, required for the first permit criterion.

Here, the 150-foot dock proposed on this highly used, unencumbered, low bank four-mile stretch of shoreline will most certainly obstruct or impair marine oriented recreation. Again, this particular shoreline along southwest side of Fox Island is unique, not just because of the current absence of impeding structures, but it is public shoreline that is often utilized for beach walking, kayaking, paddle boarding, swimming,

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<sup>8</sup> Of course, it is a well-accepted principal of statutory construction that, when a legislative body invokes specific language in one provision and omits it in another provision, the law will presume the omission was intentional. *Seeber v. Public Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).

fishing and boating. To avoid the dock, paddle boarders and kayakers will be forced to paddle further into the open waters and at many tides, the dock will deny beach walkers access to extensive portions of the shoreline. Thus, after considering all the testimony and documentary evidence, the Board found:

16. ...the beach adjacent to the Site is a publicly owned beach. Although the proposed dock does not require a lease from DNR, the regulations that govern the construction of docks over state-owned tidelands require that docks be located in a manner that provides “a safe, convenient, and clearly available means of pedestrian access over, and around, or under the dock at all tide levels.” Mr. Ramos [Erik and Kendra Niesz’ son-in-law] acknowledged that the Project, as presented to the Hearing Examiner, does not meet the DNR requirement for pedestrian access over, around or under the dock at all tide levels. Mr. Ramos stated, however, that the Nieszes intend to comply with the DNR requirement concerning pedestrian access, and that the Project will be modified as necessary to ensure compliance.

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

first piling which is 43 feet waterward of the bulkhead.<sup>9</sup> Two photographs showing a six-foot tall man standing on the beach in the area where the pier would be placed provide some support for Mr. Stroud's rough calculations. Based on the evidence presented, the Board determines that at many tide levels, people will not be able to walk unimpeded under the pier. (Citations to testimony and evidence omitted.)

(CP 941-942, Findings 16, 17.) Ultimately, the Board held the first criterion was not met:

...the Board concludes that the marine oriented recreation areas will be obstructed and impaired by the proposed dock. The use of the beach to access the water will be obstructed and impaired. Due to the fact that the bulkhead is only 2 feet 8 inches high and the pier will be attached on the top of the bulkhead and extend out over a gradually sloping beach from the height, the distance between the bottom of the pier and the beach will prohibit the public from walking along the beach at many tides. The use of the near shore water for marine recreation will also be obstructed and impaired as swimmers and people on small watercraft will be required to go around the proposed dock at many tide levels. (Citations to testimony and evidence omitted.)

(CP 955, Conclusion 15.)

While petitioners may have presented some competing testimony, the Board weighed the totality of the evidence to find that this dock will

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<sup>9</sup> Remarkably, petitioners request the Court to ignore Stroud's testimony, even though he was petitioners' witness and his firm designed and is the contractor for their proposed dock. (CP 210-212.) Regardless, petitioners held the burden of proof to demonstrate that their proposed dock would not impair marine recreation. Not only did petitioners fail to meet their burden, but the substantial evidence supported a contrary conclusion.

obstruct or impair marine oriented recreation in light of the characteristics of this particular shoreline and the uses of this shoreline. Under the APA standards of review, the Court must decline petitioners' invitation to independently weigh the evidence. That is especially true here, since it was petitioners that held, and failed to meet, the burden of proof.

Petitioners Niesz next complain that the Board should have considered undefined project modifications that would be necessary to comply with DNR regulation mandated pedestrian access and, further, assumed that Niesz would have complied. Notably, petitioners were informed of the DNR's regulatory pedestrian access requirements well before the Examiner's September 28, 2016 hearing (*see* CP 1066-1070), but Niesz nonetheless failed to provide for the requisite pedestrian access in their proposal. Instead, Niesz assert they would have accepted a condition requiring compliance had the project been approved and asked the Board to simply assume compliance with the hypothetical condition.

But regardless of Niesz' belated offer, the Board had a duty to review the specific permit application and decision before it, and that duty could not be altered by belated offers to comply with the DNR regulatory requirement. *Hayes v. Yount*, 87 Wn.2d 280, 291, 552 P.2d 1038 (1976). The Board's Conclusions 14 (CP 954-955), 15 (CP 955) and 17 (CP 956) are both wholly consistent with this articulated duty. Moreover,

petitioners' argument does not address that the Board also found that the proposed dock will impair nearshore marine recreation in the form of kayaking, paddle boarding, swimming and boating. (CP 955, Finding 15.) Belated acceptance of a hypothetical pedestrian access condition does not negate this separate finding that supports the Board's conclusion that marine recreation would be impaired.

The substantial evidence and the County shoreline regulations support the Board's findings and conclusion that the proposed dock would impair marine oriented recreation.

**2. The Board correctly concluded that the proposed dock would unduly impair adjoining properties ingress, egress as well as use and enjoyment of the beach (PCC 20.56.040(A)(2)).**

The Board not only concluded that the proposed dock would impair marine recreation, in violation of permit criterion 1 (CP 955, Conclusion 15), if also concluded that the dock's obstruction to pedestrian access during certain tide levels will unduly impair adjoining properties ingress, egress as well as use and enjoyment of the beach in violation of permit criterion 3 (CP 956, Conclusion 17). Petitioners Niesz respond with the same arguments as presented above, which require the Court to impermissibly weigh the evidence to reach a different conclusion and review a revised proposal that was not presented to the Examiner. For the

same reasons presented in the preceding section, petitioners failed to meet their burden on appeal. The Board's decision is supported by the substantial evidence and the law and should be affirmed.

**3. The Board correctly concluded that petitioners Niesz have a reasonable alternative to the proposed dock (PCC 20.56.040(A)(5)).**

PCC 20.56.040(A)(5) provides that a dock permit may only be approved if “[a] reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future.” (Emphasis added.) The Board found that petitioners Niesz do have a reasonable alternative to a single family dock:

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 Nieszes, along the southwest side of Fox Island for many years.

(CP 944, Finding 23.)

Petitioners first argue that a buoy cannot be a reasonable alternative to a dock because a buoy is not a listed alternative in the Code. But PCC 20.56.040(A)(5) does not purport to provide an exhaustive list of alternatives. But the County Code uses the phrase “such as” as a precursor to the alternatives listed. Moreover, the SMP Pier Policies, which must be considered when applying the permit criterion, expressly identify buoys as

a preferred alternative. Recall that SMP Policy (d) discourages use of piers associated with single-family residences, while policy (f) encourages the use of mooring buoys as an alternative to piers in front of single-family residences. Any interpretation that PCC 20.56.040(A)(5) does not include a buoy as a potential reasonable mooring alternative to a dock for a single-family whom would contravene the SMP policies the regulation is supposed to implement.

Petitioners Niesz next argue that they wish to extend the boating season and moor their boat at the dock year round. They argue that a mooring buoy cannot, therefore, be deemed a reasonable alternative if it will not provide moorage in the winter months. Niesz' reliance on *Walker/Seidl v. San Juan County*, SHB 09-12 (Final Decision, August 27, 2010) for this proposition is misplaced. *Walker/Seidl* does not require that a buoy, to be a reasonable alternative, be viable for any proposed or intended use. Rather, it only need be viable for a "reasonable intended use." *Id.* at Conclusion 13.

Unlike the northeast side of Fox Island, the southwest side is exposed and often subject to sever weather and significant wave action in the winter months. During winter months it is not uncommon to have winds of 50 to 60 mph and waives in excess of seven feet. With the storms, extremely large driftwood and other debris moves up and down

the shoreline and washes onto the beach. (CP 180, 363-365, 371-373; 1291-1323, 1329-1332, 1335, 1338.) Though Niesz presented expert testimony (Stroud) that the dock itself could be constructed to withstand such storms, substantial testimony was presented that one could not reasonably expect to safely moor and utilize a boat in the turbulent winter months. (CP 402, 468-470.) The Board weighed the evidence and found:

[A]lthough the dock may be designed to withstand the types of storms expected at the Site, the Nieszses have not established that the addition of the dock will significantly increase the boating season or increase access to the water in the winter months. The Nieszses 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 of their boat during the winter months.

(CP 945, Finding 27.)

Petitioners argue that a buoy is not convenient. But the Board has previously held that an applicant must demonstrate a dock is actually needed for moorage, not simply more convenient. *Walker/Seidl v. San Juan County*, SHB 09-12 (Final Decision, August 27, 2010) at Conclusion 8. It has also unequivocally held that feasibility of available alternatives should be evaluated without regard to individual age or physical limitations. *Id.* at Conclusion 8.

Finally, Niesz state that they desire this dock for more than mooring and boat access. They wish to use it as a viewing, fishing,

picnicking and gathering. They argue that a buoy will not accommodate this desire. But piers and docks only gain their status as appropriate shoreline structures because they can provide access to water craft. *See* WAC 173-26-201(2)(d) (“the act establishes policy that preference be given to uses that are unique to or dependent upon a shoreline location.”); WAC 173-26-231(3)(b) (“New piers and docks shall be allowed only for water dependent uses or public access. As used here, a dock associated with a single-family residence is a water-dependent use **provided that** it is designed and intended as a facility for access to watercraft...”). Moreover, fishing, picnicking, viewing and gathering can occur without a pier or dock – any time of year, provided of course any one would actually want to partake in such activities when the weather is cold and turbulent.

Because the beach is a pebble beach with a gentle slope, it is easy to access a dinghy or raft from the beach to transport passengers to a buoy moored boat. This has successfully been done by the Niesz family in the past many years, and is routinely done by property owners along this shoreline. (CP 186, 346-347, 368-370, 411; 1261-1262, 1226-1234, 1349-1350.) In light of this available reasonable alternative, the Board correctly concluded that the proposed Niesz dock does not qualify for a shoreline substantial development permit.

**4. The Board correctly concluded that the intensity of the use or uses of the proposed dock, pier and float is not compatible with the surrounding environment and land and water use (PCC 20.56.040(A)(7)).**

Again, SMP Policy (d) discourages use of piers associated with single-family residences. Pier Policy (e) provide: “In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact to proximate land owner should be considered.” (Emphasis added.) The Board considered these SMP policies when it applied PCC 20.56.040(A)(7) to the Niesz proposal to construct a 154-foot pier, ramp, float on this otherwise dock-free, low bank shoreline and concluded that the permit criterion was not satisfied.

Here, the existing pier density is zero – there are no existing piers or docks within miles. Insertion of the proposed pier and dock will be wholly out of character for the area. It could also pave the way for more single use docks, taking this shoreline in the opposite direction of all the noted Pier Policies. This long dock extending from a 2-foot 8-inch bulkhead over public tidelands will also interfere with the many public uses of this shoreline.

Respondents Niesz argue that their dock application must be judged on the adopted criteria for approval, without any regard to the

status of the project as the first dock application on this more than four-mile stretch of shoreline. But their argument necessarily invites the Court to, improperly, disregard Pier Policy (e), which requires consideration of pier density and PCC 20.56.040(A) and WAC 173-27-150(1)(c), which both direct that consistency with the SMP as a prerequisite to permit approval. The argument also improperly invites the Court to ignore the PCC 20.56.040(A)(7) permit, which requires consideration of compatibility in light of the intensity of the proposed use as compared to other public uses.

Moreover, the context of the surrounding area is critical to evaluation of this or any other dock application to determine consistency with stated SMP policies and subjective permit criteria that require the exercise of discretion. While the status of first dock, by itself and in a vacuum, may not be determinative, the applicable SMP policies and regulations must nonetheless be applied with consideration of **all** the facts, including that this would be the first pier on an expansive stretch of shoreline that is regularly used by the public. *See Gennotti v. Mason County*, SHB No. 99-011 (Final Decision, October 29, 1999); *Viafore v. Mason County*, SHB No. 00-03 (Final Decision September 24, 2000).

Petitioners Niesz rely on *Inskeep v. San Juan County*, SHB No. 98-033, (Final Decision, April 16, 1999), which held that the status of first

dock is not, by itself, determinative; “more important is the extent to which it will constitute a visual presence on the environment and the significance of the man-made alteration,” as well as the extent it will impair access and use. But *Inskeep* was context driven and does not instruct that the status of first in time cannot be considered in evaluating a dock proposal. There, unlike here, mooring buoys were impracticable and other reasonable alternatives to the proposed joint dock were not available. Also unlike here, the dock was proposed on high bank property. Based on the topography, the Board found that the joint use dock would be “low profile,” not be an “undue intrusion on the shoreline,” and would “not interfere with the aesthetic use and enjoyment of the shoreline.” (Finding X, Conclusion VI.)

Petitioners also rely on *May v. Robertson*, 153 Wn. App. 57, 218 P.2d 211 (2010). But *May* does not support their dock application. Again, the ultimate decision considered the applicable policies and permit criteria in the context of all relevant facts in the particular case. In *May* the applicants proposed a joint use dock and review of the decision reveals that this fact was central to the court’s conclusions. The court relied heavily on Pierce County policies that strongly encourage joint use facilities. The court also noted the existence of other overwater structures (several 50-foot piers and one 150-foot dock) and a heavily developed

upland, 153 Wn. App at 87, whereas in the present case no overwater structures exist for more than a mile in one direction and over three miles in the other. The court then determined, in context, that the proposed joint use pier would not conflict the area's existing land and water uses. Such is not the case for the single use dock proposed here, which unlike in *May*, is inconsistent with the SMP Pier Policies and the surrounding characteristics of the shoreline. The *May* case does not support the present dock.

Notably, Stephen Causseaux, the Pierce County Hearing Examiner that reviewed the Niesz application was also the Examiner that reviewed and approved the Robertson joint dock application in *May* decision. This Examiner correctly distinguished the circumstances in *May* from the circumstances here:

In Robertson the applicants proposed a joint use dock in a Rural Residential Environment, the second most intense in the SMP. A review of the decision shows that the court relied heavily on Pierce County policies that strongly encourage joint use facilities, and that the parcels were located in the Rural Residential Environment. In the present case the applicants propose a single use facility in a Conservancy Environment, the second most restrictive behind the Natural Environment, The court also noted the existence of other overwater structures and a heavily developed, upland shoreline, whereas in the present case no overwater structures exist for more than a mile in either direct. The Robertson, supra, case does

not support the present dock. In fact, the court describes Robertson's shoreline as follows.

...The parties' exhibit photographs show that the surrounding beach area contains significant residential development including existing piers, waterfront structures, seawalls, bulkheads, and moorage devises. 153 Wn. App at 87.

The court then determined that the proposed joint use pier "would not conflict with the area Rural Residential Environment" or the areas existing land and water uses.

Rather, the joint-use pier is consistent with and advances this shoreline environment's planned uses.

(CP 1142-1143, ¶ 18.) The Board similarly considered and distinguished *May* on its facts. (CP 959-960, Conclusions 25, 26.) *May* does not support petitioners Niesz' appeal.

## V.

### **RAP 18.1 REQUEST FOR ATTORNEYS' FEES**

RCW 4.84.370 provides that if a party prevails or substantially prevail on appeal to the Court of Appeals, and also prevails before the Shoreline Hearings Board and before the Superior Court below, that party is entitled to recover reasonable attorneys' fees and costs incurred on appeal. *See also, de Tienne v. Shoreline Hearings Board*, 197 Wn. App. 248, 291, 391 P.3d 458 (2016). Respondents Reetz prevailed before the Hearing Examiner, the Board and the Superior Court below and, if they

prevail on this appeal, are entitled to recover their attorneys' fees and costs.

Without analysis or argument that the statute applies on this appeal of a shoreline decision or that petitioners Niesz would qualify, the petitioners assert they should be awarded attorneys' fees pursuant to RCW 4.84.340 and 4.84.350 known as the Equal Access to Justice Act. The Act authorizes a fee award to a "Qualified Party" for certain successful challenges to an agency action. The Act has no application, however, where the challenged decision is made by a purely adjudicatory body in the course of an adjudicatory proceeding. *Duwamish Valley Neighborhood Pres. Coal. v. Central Puget Sound Growth Management Hearings Board*, 97 Wn. App. 98, 100, 982 P.2d 668 (1999).

## VI. CONCLUSION

That the Niesz dock would be the first dock in the area does not, by itself, disqualify it for a shoreline substantial development permit. But its status as the potential first dock was nonetheless appropriately considered by the Board (and the Examiner) in the context of the surrounding circumstances.

In this case, those surrounding circumstances include that the dock is proposed on a 4-mile stretch of low bank/no bank pebble beach that is

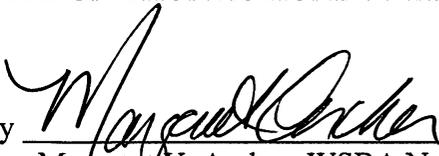
presently void of impediments or structures and frequently used by the public. If allowed, the dock would radically and permanently alter the shoreline character, impair marine recreation and unduly impair adjoining properties use and enjoyment of this unique shoreline. Moreover, these impacts would be unnecessarily sustained, since the Niesz property already has adequate access to the water for recreational use with the existing 96-foot boat ramp and buoy.

The Board's decision that the Niesz dock application does not qualify for a shoreline substantial development permit is well-supported by the substantial evidence in the record and the applicable shoreline regulations and policies. Like the superior court below, this Court should affirm the Board's decision and dismiss petitioners Niesz' appeal.

Dated this 30<sup>th</sup> day of April, 2019.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By   
Margaret Y. Archer, WSBA No. 21224  
Attorneys for Respondents Reetz

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on April 30, 2019 I served via email a true and correct copy of the foregoing by addressing and directing for delivery to the following:

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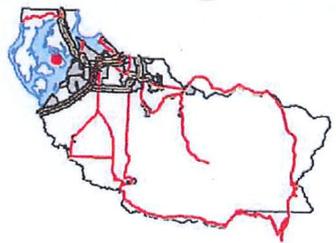
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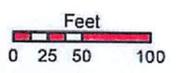
# **APPENDIX A**



**SD29 - 15  
NIESZ**

-  Base Parcel
-  Condominium
-  Other

Ortho Photos - 2014



Department of Planning and Land Services  
Plot Date: January 12, 2017

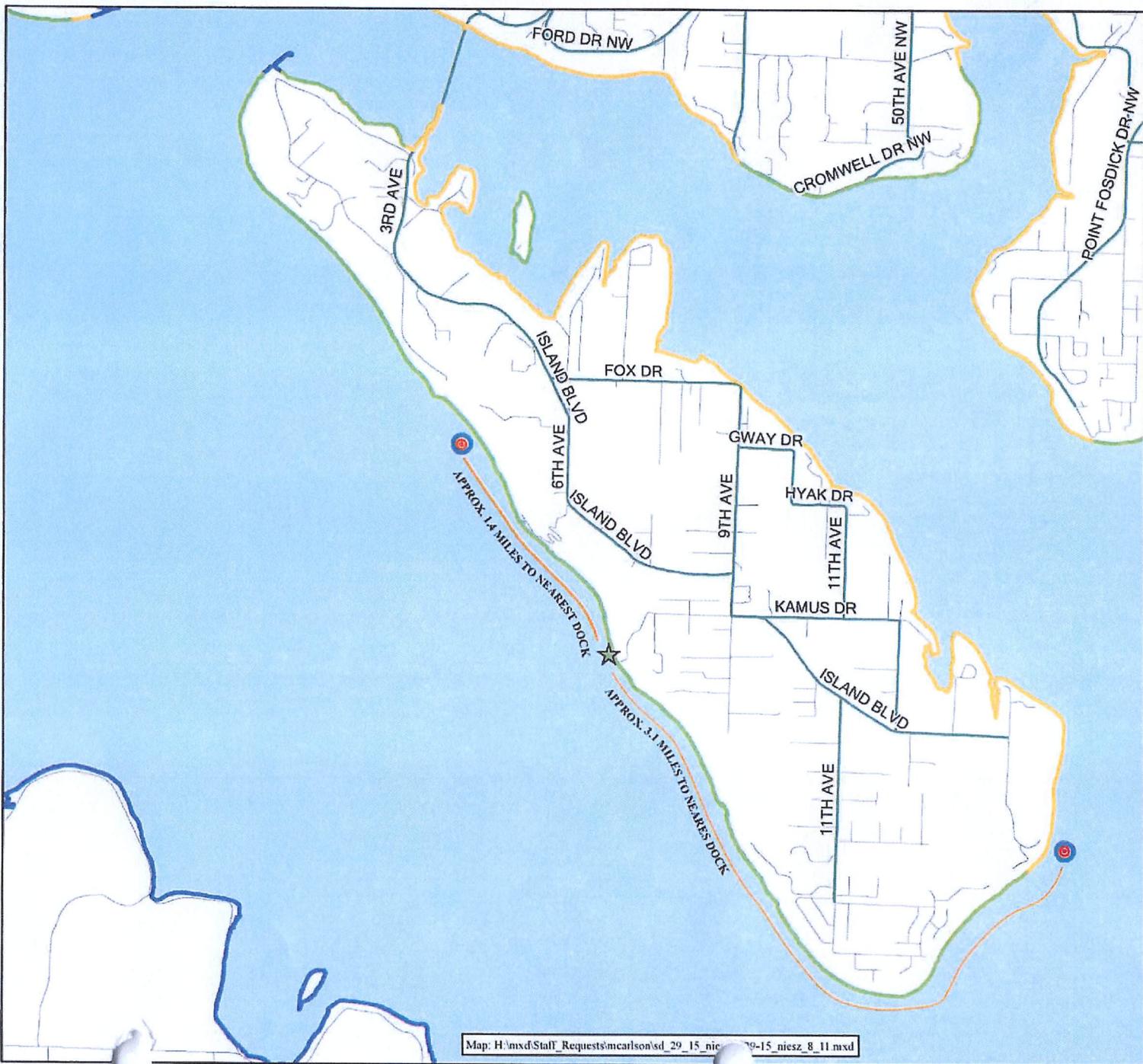
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0120111018**

2/2/17



690

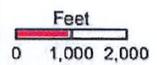
107



**SD29 - 15  
NIESZ**

**Shoreline Environments**

- Urban
- Rural /Residential
- Rural
- Natural
- Conservancy



**Pierce County**  
Planning and Land Services

Department of Planning and Land Services  
Plot Date: January 12, 2017

**Parcel Number  
0120111018**

**GORDON THOMAS HONEYWELL LLP**

**April 30, 2019 - 4:33 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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