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No. 52658-1-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON

ERIC and KENDRA NIESZ

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENTS

JOHN WEST AND CHRISTINE WEST

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I. INTRODUCTION

The Nieszs appeal from a decision of the Washington Shorelines Hearings Board (the “Board”) denying their application for a shoreline substantial development permit to construct a dock on public tidelands in front of their waterfront property on the southwest side of Fox Island. The Board conducted a two-day hearing and personally viewed the site. The Board heard evidence from multiple witnesses that the proposed dock would be the only dock on an otherwise unimpeded four-mile stretch of beach heavily used for kayaking, boating, and beach walking by residents and the public. The Board heard testimony from multiple witnesses that there are reasonable alternatives to a private dock on the Nieszs’ property that have been used by other neighbors and by the Nieszs themselves, such as boat ramps, mooring buoys and nearby commercial marinas. After carefully weighing each of the factors in the Pierce County Shoreline Master Program and regulations, the Board concluded that the Nieszs had failed to prove that the proposed dock would not obstruct and impair marine oriented recreation areas, that it would not unduly restrict or impair the use and enjoyment of the beach on adjoining property, that it would be compatible with surrounding land and water uses, and that they had no reasonable alternatives to a single-use dock. The Board exercised its considerable

expertise in this area in denying the Nieszs' application, and followed its established precedents, and its decision should be upheld.

II. STATEMENT OF THE CASE

Appellants Niesz' property is 128 feet of flat, no-bank to low-bank waterfront located on the west shore of Fox Island. [TR 40:19-21, 200:21-24]¹ Their parents owned the property before them. [TR 37:3-5] The tidelands in front of their property, where they propose to build their dock, are publicly owned. [TR 33:4, 35:7] Separating the upland property from the beach is a concrete bulkhead that is two feet eight inches high. [TR 201:5-6]

Respondents John and Christine West have two parcels including their residence to the south of the Niesz parcel, and Respondents William and Erin Reetz have a house to the north of the Niesz parcel. [TR 40:24-25] Immediately south of the West property is a public road providing public access to the beach. [TR 243:15-244:3, 306:2-14, Ex. R-21 at CP 1258]

The Nieszs currently access their boat using a private concrete boat ramp through their bulkhead, two mooring buoys, and a boat lift. One mooring buoy secures the boat lift, and one is available to tie up a boat. [TR

¹ TR refers to the transcript of the hearing before the Board commencing at CP 106.

297:21-298:2] They do not have a permit for their boat lift or buoys. [TR 73:12, 201:10-12] Their boat ramp is 12.5 feet wide and extends 58 feet waterward from their bulkhead. [TR 180:3-8] They use a tractor to raise and lower their boat trailer on the boat ramp, and float the boat on or off of the trailer. [TR 238:22-239:12] They use a small row boat to ferry people out to their boat when moored on the buoy or boat lift. [TR 80:15-24, 239:13-24] The Nieszs' boat lift is tied up off-shore, and can lift their boat completely out of the water. [TR 241:7-21, Ex. R-27, slide 3, at CP 1289] The floats on either side of the boat lift provide a landing area for getting into or out of a boat, functioning exactly like a dock. [TR 242:6-15] Testimony from their neighbors indicate that the Nieszs use their boat only three or four times over the course of a summer. [TR 238:11-21]

The Nieszs proposed to build a pier, ramp and float that would extend 150 feet from their bulkhead over the public tidelands.² [TR 125:1-3, 197:3-5] It would be placed a few inches above the existing bulkhead. [TR 127:8-10] It will cost the Nieszs about \$150,000 to construct. [TR 64:2] Because of its size and cost, they are required to obtain a shoreline

² As defined in the Pierce County shoreline regulations, a pier is a structure which abuts the shoreline and is built over the water on pilings. A float is a platform capable of floating on water, used as a landing or moorage structure for marine transport or for swimming purposes, and either attached to a pier or are anchored to the bedlands so as to allow free movement up or down with the rising or falling water levels. A ramp or gangway is a sloping structure which provides access from a pier to a float. PCC 20.56.010. Throughout the record, the Board and parties commonly referred to the proposed pier, ramp and float as a dock. A drawing of the proposed structure is in the record as Ex. R-20, CP 1253.

substantial development permit from Pierce County. Their property is located in the Conservancy Shoreline Environment. [TR 92:3, 198:10]

The Niesz property is exposed to the southwest, causing significant waves and winds during the winter months. [TR 74:2] It is not uncommon to have winds of 50-60 mph. [TR 264:8-12] Waves can exceed seven feet. [TR 266:10-16] Unlike a marina protected from wind and waves by a breakwater, there is no breakwater protecting the Niesz property. [TR 74:3-8] There are no private docks on the west side of Fox Island, but many docks on the east side of the island, the difference being that east side is not exposed to the waves and wind like the west side. [TR 74:11-21] The storms bring in a lot of driftwood, some of which can be logs over one hundred feet long and weighing over a thousand pounds. [TR 256:12-258:11, Ex. R-23 at CP 1263] It would not be feasible to moor a boat in the winter on a dock such as the one proposed by the Nieszs, because the winds and waves would damage the boat. [TR 295:2-20, 361:9-363:22]

The southwest side of Fox Island is about seven miles of easily-walkable gravel beach. [TR 234:24-25, 235:10-17] Photos admitted into evidence show that the project site is located on a pristine, unobstructed beach with a gentle slope. [Ex. R-25, CP 1272] Over a mile north of the project site is a Navy pier, and the nearest dock to the south is over three miles from the site. [TR 199:21-200:3] The beach is heavily used by the

public for beach walking, at all times of day and all times of the year. [TR 244:4-14 306:6-11]

All of the property owners along this beach use mooring buoys to secure their boats. [TR 234:18-23] Most people bring their boats in to the beach and board the boat from the beach. [TR 239:25-240:3, 261:1-263:4, 304:6-11, Ex. R-22 at CP 1260, 331:18-25, 358:16-360:3] The Nieszcs have been seen doing the same thing. [TR 263:5-8]

Exhibit R-28 [CP 1290] admitted at the hearing shows a similar size dock on the other side of Fox Island built on a similar size bulkhead as present on the Nieszcs property, demonstrating that the dock is an effective barrier to pedestrian or boat passage at higher tides. [TR 246:25-249:16] Exhibit R-29 [CP 1296] admitted at the hearing shows a six-foot person standing 45 feet waterward from the Nieszcs bulkhead could still not pass unimpeded under the proposed dock. [TR 249:19-250:25]

The public beach is heavily used for swimming, kayaking, boating, water skiing, and jet skiing. [TR 251:17-252:3] Children often drive small boats just 10-12 feet offshore. [TR 252:13-22] Kayakers also usually hug the shoreline, as shown in Exhibit R-35. [TR 253:5-256:10, 308:22-309:17; CP 1339]

After the Nieszcs applied for the shoreline substantial development permit to install a dock, the Pierce County planning staff recommended

denial. [Ex. P-27, CP 1135] The Gig Harbor Peninsula Advisory Commission voted to recommend denial of the permit. [Ex. P-23, CP 1078] The Pierce County Hearings Examiner denied the permit for the dock. [Ex. P-28, CP 1156] The Nieszys appealed to the Shoreline Hearings Board, which voted unanimously to deny the permit. [SHB No. 16-011, CP 935] The Nieszys appealed to the Pierce County Superior Court, which denied their appeal and affirmed the Board. [CP 1574] The Nieszys then filed the instant appeal. [CP 1579]

III. STANDARD OF REVIEW

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

The Court can reverse the Board's decision only if it determines that the Board has erroneously interpreted or applied the law, the decision is not supported by evidence that is substantial when viewed in light of the whole record before the court, or the decision is arbitrary and capricious. RCW 34.05.570 (3)(d), (e), (h). The burden is on the appellant to show that the Board's decision was invalid. RCW 34.05.570(1)(a).

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

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

exercised factfinding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453, 459 (2001); *Department of Labor & Indus. of State v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 529, 347 P.3d 464, 470 (Div 2, 2015), *affirmed*, 185 Wn.2d 721, 374 P.3d 1097 (2016). The Court does not reweigh evidence or substitute its judgment for the Board's determination of witness credibility. *Stericycle, supra*.

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

IV. ARGUMENT

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

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

A permit for a substantial development shall only be granted when the development is consistent with the applicable master program and the provisions of the Shoreline Management Act. *Buechel, supra*, at 204. Applicants for permits have the burden of proving that a proposed substantial development is consistent with the criteria that must be met before a permit is granted. *Id.*, at 205. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.180(1) and (2), the person requesting the review has the burden of proof. *Id.* Therefore, in this case, this burden of proof was on the Nieszs in the original application and also in the review of the denial by the Board and the courts. *Id.*

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

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

1. Important navigational routes or marine oriented recreation areas will not be obstructed or impaired;
2. Views from surrounding properties will not be unduly impaired;
3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
4. Public use of the surface waters below ordinary high water shall not be unduly impaired;
5. A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;
6. The use or uses of any proposed dock, pier or float requires, by common and acceptable practice, a Shoreline location in order to function;
7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

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

The Pierce County Shoreline Master Program (SMP) contains Use Activity Policies. At page 21 of the SMP, it states that each project that falls within the jurisdiction of the Shoreline Management Act will be

evaluated to determine its conformance with the policies and regulations of the appropriate use activity. [CP 811] At page 37, the SMP lists Use Activity Policies related to piers. [CP 812, 1132] Those policies include:

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

The Board concluded that the Nieszs' proposed pier, ramp and float is not consistent with the above policies in the SMP and with four of the seven criteria listed in PCC 20.56.040(A). [CP 935] The Board found that reasonable moorage alternatives exist for the Nieszs, so PCC 20.56.040(A)(5) is not met. [Conclusions 19-21, CP 957] The Board found that marine oriented recreation areas will be obstructed and impaired, so PCC 20.56.040(A)(1) is not met. [Conclusion 15, CP 955] The Board 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. [Conclusion 17, CP 956] The Board found that the intensity of the Nieszs' proposed use is not compatible with surrounding land and water uses, so PCC 20.56.040(A)(7) is not met. [Conclusion 23, CP 958] Because the Nieszs'

proposed pier, dock and float is not consistent with the policies of the SMP and all of the listed criteria in PCC 20.56.040(A), the Board denied the shoreline substantial development permit for that project. [Conclusion 33, CP 962]

The Nieszys assert that because the Board found the proposed dock would not unduly impair views, thus satisfying PCC 20.56.040(A)(2), would not obstruct important navigational routes, satisfying a portion of PCC 20.56.040(A)(2), and would not unduly impair the public's use of the surface waters below ordinary high water, satisfying PCC 20.56.040(A)(4), then "These findings should have compelled the Board to approve the proposal."³ Apparently, the Nieszys believe the Board must ignore the other criteria set forth in PCC 20.56.040(A). The Nieszys cite no authority in support of that argument, because there is no such authority for the Board to ignore the approval criteria set forth in the local shoreline regulation. PCC 20.56.040(A) specifically states that a shoreline substantial development permit can only be issued if all of the listed criteria are met.

³ Appellants' Opening Brief, page 2.

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

The Board concluded that the Nieszs have reasonable alternatives to a single use dock, so PCC 20.56.040(A)(5) is not met. The Board found that the Nieszs and their neighbors have moored their boats on buoys for a long time. The Board found that the Nieszs could also launch their boat from their own private boat ramp.⁴ The Board concluded that though a dock may be more convenient than a mooring buoy, a mooring buoy is a reasonable alternative to a dock at this location. [Conclusions 19-21, CP 957-8] The Board’s findings to support these conclusions are at Findings 18-27. [CP 942-5].

The Nieszs argue that a mooring buoy cannot be a reasonable alternative to a dock because mooring buoys are not listed in PCC 20.56.040(A)(5) along with “joint use, commercial or public moorage facilities.”⁵ The Nieszs’ argument ignores the preceding words, “such as”, which clearly indicates that the listed alternatives are not exclusive. Their position is also directly contrary to the Pierce County Shoreline Master Program, which under pier policies directs, “Encourage the use of mooring

⁴ Contrary to the Nieszs’ assertion, there is no evidence that the boat ramp can only be used during very high tides. The boat ramp extends 58 feet waterward from their bulkhead. [TR 180:3-8]

⁵ Appellants’ Opening Brief, p. 39.

buoys as an alternative to space consuming piers such as those in front of single-family residences.”

The Nieszszs argue that a mooring buoy is not a reasonable alternative to a dock because it does not provide for year-round use. There is heavy weather on the west side of Fox Island in the winter, with winds of 50-60 mph and waves that can exceed seven feet. The typical boating season is from spring through September. [TR 294:1-20, 324:22-25, 331:12-15, 362:4-7] There was substantial testimony that it is not safe to moor a boat to a dock during the winter months at this location. [TR 295:2-20, 361:9-363:22] There was no substantial evidence that year-round boating is a reasonable intended use at this location, and even if there was, the Board was entitled to find more credible the evidence that year-round boating is not feasible. The Board correctly found that the Nieszszs did not meet their burden of proving that the addition of a dock will significantly increase the boating season or increase access to the water in the winter months, that it would be safe to moor their boat on a dock throughout the year, or that there would be significant use during the winter months. [Finding 27, CP 945]

The Nieszszs argue that the testimony of numerous witnesses who said that mooring a boat to a dock during the winter months was not feasible at this location was rebutted by the testimony of Wendell Stroud, citing to his

testimony at TR 105, 116.⁶ What Mr. Stroud was actually discussing in that testimony is his opinion that the dock itself would withstand the force of wind and waves during the winter months. He did not opine on the feasibility of mooring a boat on the dock during the winter months. Furthermore, even if he had expressed such an opinion, the Board as the finder of fact can choose to find the testimony of other witnesses more credible on this issue, as they clearly did.

The Nieszs argue that the Board should not have considered the testimony of lay witnesses regarding the feasibility of mooring a boat to a dock during the winter months, arguing that such testimony is inappropriate under ER 701.⁷ First, the Board is not bound by the civil rules of evidence. *Nisqually Delta Association v. City of DuPont*, 103 Wn.2d 720, 733, 696 P.2d 1222 (1985). As stated in WAC 461-08-515(1):

Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. All relevant evidence is admissible which, in the opinion of the presiding officer, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing upon the admissibility of evidence, the presiding officer shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings in matters not involving trial by jury in the superior courts of the state of Washington.

⁶ Appellants' Opening Brief, p. 37

⁷ Appellants' Opening Brief, p. 37, footnote 22.

Second, the Nieszs never objected to the testimony at the hearing. Testimony admitted without objection may properly be considered by the court. *Payless Car Rental Sys., Inc. v. Draayer*, 43 Wn. App. 240, 243, 716 P.2d 929 (1986). Third, even if ER 701 was binding, the testimony would be permitted under the plain language of the rule, which says, “If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to ... the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.”

The Nieszs also argue that erred in holding that nearby commercial marinas can be a reasonable alternative to a dock.⁸ However, commercial or public moorage facilities are specifically listed in PCC 20.56.040(A)(5) as reasonable alternatives to a dock. The evidence showed that others living in the area use nearby commercial marinas for winter moorage, such as Narrows Marina that is 10-15 minutes away.⁹ [TR 358:4-12] And contrary to the Nieszs’ assertions, the Board did not rely on commercial marinas as a reasonable alternative to the proposed dock, but on the use of a mooring buoy. [Conclusions 19-21, CP 957-8]

⁸ Appellants’ Opening Brief, p. 36.

⁹ The Nieszs give no citation to the record to support their assertion at page 36 of their Opening Brief that it would take them 40 minutes to reach the same marina.

The Nieszszs assert that a commercial marina may be fine for their neighbors' sporadic use, but not for them.¹⁰ However, the testimony showed that the Nieszszs use their boat only three or four times over the course of a summer. [TR 238:11-21]

The Nieszszs make the odd assertion that there is no public boat launch in the vicinity.¹¹ They do not explain why that makes any difference, since they have a private boat launch on their own property. The Nieszszs also falsely claim that in *May v. Robertson*, 153 Wn. App. 57, 218 P.3d 211 (2009), "the use of two boat launches and a buoy was not considered sufficient alternatives to a dock."¹² As discussed in more detail below, in *May* the applicants proposed a joint-use dock, and the Court reasoned that since the Pierce County Code expressly lists joint use docks as a reasonable alternative to single use docks, it is not necessary to consider the availability of other alternatives. Thus the Court made no determination as to whether two boat launches and a buoy would be a reasonable alternative to a dock.

The Nieszszs try to get around the reasonable alternatives criteria by asserting that their proposal is a joint use dock, which is considered a reasonable alternative in the regulation. They do so by reference to WAC 332-30-144(2)(b), which relates to DNR permission to use public

¹⁰ Appellants' Opening Brief, p. 36.

¹¹ Appellants' Opening Brief, p. 36.

¹² Appellants' Opening Brief, p. 39.

tidelands.¹³ They grossly misrepresent the content of that regulation, which actually says:

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.

From that language, it is clear that a “single joint-use dock” for purposes of that DNR regulation is one installed by two or more abutting residential owners. The Niesz dock will be installed by only one abutting residential owner.¹⁴

They also ignore the definition of "Joint Use Pier or Dock" in the Pierce County shoreline regulations, which says the term “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.” PCC 20.56.010(J). The Code defines a "Single Use Pier or Dock" to mean “a dock or pier including a gangway and/or float which is intended for the private noncommercial use of one individual or family.” PCC 20.56.010(I).

¹³ Appellants' Opening Brief, page 2, footnote 7, and page 25. Both places contain an erroneous reference to WAC 332-20-144(2)(b).

¹⁴ The Niesz also assert that the DNR regulation requires them to allow another waterfront owner to use their proposed dock, but there is no such language in the regulation.

The Nieszs' proposed dock meets the definition of a single use dock under the shoreline regulations, and it is not a joint use dock under either the shoreline regulations or the DNR regulation.

The Nieszs' real reason for wanting a dock comes down to convenience. They assert that it is too much trouble to use a buoy, and it will take too long to drive to a marina, and neither is as convenient as having a dock in their backyard. A dock cannot be permitted just because it would be more convenient. In *Seidl v. San Juan County*, SHB No. 09-012 (August 27, 2010),¹⁵ at conclusion 10, the Board said:

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

A private dock will always be more convenient than a mooring buoy or driving even a few minutes to a nearby marina. But the Pierce County Shorelines Regulations say that a private dock cannot be permitted where a buoy and commercial marinas provide a reasonable alternative.

¹⁵ Available online at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=246>

C. The Board correctly found that marine oriented recreation areas will be obstructed or impaired, and that use of the beach by adjoining owners would be unduly restricted or impaired, by the Niesz's proposed single-use dock.

The Board found that the criterium in PCC 20.56.040(A)(1) is not satisfied because marine oriented recreation areas will be obstructed and impaired by the Niesz's proposed dock. In Conclusion 15, the Board described the impact of a dock at this location on beach walkers, swimmers, and small boaters. [CP 955] The conclusion is well-supported by the testimony cited in the Board's Findings 14 and 17 and described in the Facts section above.

It is not clear from PCC 20.56.040(A)(1) whether the marine oriented recreation areas must be "important" or whether that qualifier applies solely to navigational routes. Even if the marine oriented recreation areas have to be important, there is ample evidence that the subject beach is an important marine oriented recreation area. It is only two parcels away from a public beach access, and the beach is heavily used by beach walkers, boaters and kayakers.

The Board also found that the criterium in PCC 20.56.040(A)(3) is not satisfied because the use of the beach by adjoining properties would be unduly restricted or impaired. In Conclusion 17, the Board stated that the

low clearance of the dock over the beach would prevent the adjoining property owners from walking along the beach at many tide levels, and this constitutes an undue restriction or impairment on the use of the beach by those adjoining properties. [CP 956]¹⁶ This conclusion is well supported by the same facts described above.

It should be noted that PCC 20.56.040(A)(3) requires “undue” restriction or impairment of the use of the water and beach on adjoining property, but PCC 20.56.040(A)(1) does not require that the obstruction or impairment of marine oriented recreation areas be “undue.” This distinction gives greater protection to the rights of the public to enjoy marine oriented recreation areas.

The Nieszcs argue that it is unreasonable to impose an obligation on them to prove there is no impact.¹⁷ PCC 20.56.040(A)(1) does not use the term “no impact.” It says that can be no impairment or obstruction. That is a higher standard, and the Board properly found impairment and obstruction in this case.

The Nieszcs cite to *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 755, 765 P.2d 264 (1988), for the proposition that the courts have not required applicants to prove “no impact.” That case says no such

¹⁶ At the same time, the Board found that swimming and boating by adjoining property owners would not be unduly impaired or restricted.

¹⁷ Appellants’ Opening Brief, p. 31.

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

The Niesz argue that there will be no impact on beach walking because they will put up a sign welcoming people to use their upland property to walk around the dock. No such sign or the stairs necessary to climb up their bulkhead to go around the dock were part of their dock application. An applicant's offer before the Board to accept additional conditions on the permit does not alter the duty of the Board to rule on the specific permit before it which did not contain such conditions. *Hayes v. Yount*, 87 Wn.2d 280, 291, 552 P.2d 1038 (1976). In Conclusion 14, the Board followed that binding decision. [CP 954-5]

The Nieszszs argue that they will have to provide unrestricted pedestrian access under DNR regulations governing use of public tidelands, so the Board should have deemed the criteria in PCC 20.56.040(A)(1) and (3) satisfied. But the Board is tasked with determining whether the proposed project complies with the requirements of the Shoreline Management Act, the local SMP, and the local shoreline regulations, not DNR regulations. *Buechel, supra*, at 24. The permit application submitted by the Nieszszs said nothing about installing stairs and sign to allow beach walkers to go around the dock. Under the law as stated in *Hayes*, the Board could not consider changes proposed by the applicant not contained in the permit application submitted to the County. The project as proposed by the Nieszszs does not comply with the shoreline regulations because it impairs beach walking.

The Nieszszs argue the Board should have imposed a condition that they install a sign and stairs as a way around the impediment to beach walking created by their proposed dock, rather than forcing them to file a new application incorporating those features.¹⁸ The Supreme Court rejected that approach in *Hayes v. Yount, supra*. The applicant in that case argued that the Board erred in vacating the permit even though respondent offered

¹⁸ Appellants' Opening Brief, p. 32-3.

at the hearing to accept additional restrictions on the nature of the fill material to be imposed by the Board. The Court said, “We find no merit in this contention. Respondent may still make effective his offer to accept such restrictions by submitting to the county an application for a permit which is consistent with the Board's interpretation of [the regulation]. Respondent's offer before the Board to accept additional conditions on the permit did not alter the duty of the Board to rule on the specific permit before it which did not contain such conditions.” *Id.*, at 291. Similarly, the Nieszs can submit to Pierce County an application which meets the requirements of the shoreline regulations, but cannot ask the Board to consider conditions that were not part of the pending application.

Testimony from witnesses and Exhibit R-29 admitted at the hearing shows a six-foot person standing 45 feet waterward from the Niesz bulkhead could still not pass under the proposed dock. [TR 249:19-250:25; CP 1296] The Board also relied on testimony from the Nieszs own witness, Wendell Stroud, that the tide would need to be 42 feet out to get five feet of clearance under the dock. [Finding 17, CP 942; TR 117:12-16, 118:18-23, 125:14-22] The Nieszs argue that there is other evidence indicating that sufficient clearance to pass under the dock would be 16.5 feet from the bulkhead. The Board is the sole determiner of the credibility of testimony and is free to disregard testimony it does not deem credible. Sitting as an appellate court,

this Court cannot make its own judgment of credibility. Furthermore, even if the distance was 16.5 feet instead of 42-45 feet, there is still an obstruction or impairment of marine oriented recreation by the public and use of the beach by adjoining owners.

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

The Board also found that the criterium in PCC 20.56.040(A)(7) is not satisfied because the intensity of the Niesz's proposed use is not compatible with surrounding land and water uses. [Conclusion 23, CR 958] The Board found that this beach is regularly used by the public for walking, there are no other private docks on the southwest side of Fox Island, the beach is not impaired by structures for over a mile to the north and south of the site, and the gradual slope and gravel structure of the beach provide the public with an excellent location for a long walk on the beach with beautiful views of the water and the Olympic Mountains. The Board found that as proposed, the dock would present an impediment to the public's use of the public beach.

The Board also found that PCC 20.56.040(A)(7) relates to the pier policy in the SMP which requires that, "In considering any pier, considerations such as ... existing pier density... should be considered." [CP 959, Conclusion 24] The proposed pier is incompatible with

surrounding land and water use where there are no existing piers for miles in either direction.

The Nieszys assert that the Board cannot consider the adopted pier policies in the Pierce County Shoreline Master Program because the specific regulations of PCC 20.56.040 control over the general policies. They cite no authority for that assertion applying the Shoreline Management Act. Further, their argument is directly contrary to the plain language of PCC 20.56.040, which says that the proposed project must be consistent with both the policies of the Master Program and the criteria listed in that section.

The Board has considered other “first dock” proposals in the context of surrounding conditions and, considering the totality of the facts and circumstances, concluded that the docks do not qualify for approval. For example, in *Viafore v. Mason County*, SHB No. 99-03 (Final Decision September 14, 2000),¹⁹ the Board denied a shoreline substantial development permit for a dock on the eastern shore of Pickering Passage across from Harstene Island. The Board stated at Conclusion VI:

The proposed dock is not consistent with the cited policies and use regulation from the SMP. The Bauer dock would be the first dock approved under the SMA in an area with only one other existing dock structure that predates the SMA. In this context the proposed dock is not compatible with the shoreline. The proposed dock will also unduly impact the views on an extensive shoreline with almost no dock

¹⁹ Available online at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1046>

development. In terms of both compatibility and view impacts, considerable weight must be given to the possibility that similar docks will be sought by property owners on Pickering Passage if the permit here is allowed to stand. The cumulative effect of such development would be inconsistent with the cited policies and regulations. It would allow for the substantial degradation and corresponding reduction in public rights resulting from multiple docks on what is now a relatively pristine shoreline environment. In a case such as this it is critical to consider the cumulative impacts of a proposed development.

In *Gennotti v. Mason County*, SHB No. 99-011 (Final Decision, October 29, 1999),²⁰ the Board rejected a single-family dock proposed for construction on the North Shore of Hood Canal where the area was well developed with single family homes on lots of less than 100 feet in width. *Id.* at Finding VI. With regard to the presence of other docks in the area, the Board noted:

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

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

²⁰ Available online at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1150>

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

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

That the Niesz dock would be the first dock in the area, considered in the context of the circumstances of this case, disqualifies it for a shoreline substantial development permit. Those circumstances include that the dock is proposed on a 4-mile stretch of beach that is presently devoid of impediments or structures and is frequently used by the public. If allowed, the dock would radically and permanently alter the shoreline character and unduly impair use, enjoyment, and views of this unique shoreline. Moreover, these impacts are unnecessary, since the Niesz already have

adequate access to the water for recreational use with their existing private boat ramp, mooring buoys and boat lift.

The Nieszys incorrectly assert (in their Introduction) that the Court in *May v. Robertson, supra*, at 87, ruled that it was improper to deny a dock based on the fact that it will be the first dock in the area.²¹ The proposed project in *May* was a 100-foot joint-use pier, where another 150-foot pier was only 1,500 feet away, and three other smaller docks were visible from the site. The Court noted that the Pierce County Shoreline Master Program encourages joint use piers as an alternative to single use piers. *Id.*, at 86. The Court reasoned that since the Pierce County Code expressly lists joint use piers as a reasonable alternative to single use piers, it is not necessary to consider the availability of other alternatives. *Id.*, at 84. Thus, the applicants satisfied PCC 20.56.040A(5). Since there were three other 50-foot piers visible from the site and one 150-foot pier in close proximity, the Court concluded proposed dock, pier and/or float were compatible with the surrounding environment and land and water uses, satisfying PCC 20.56.040A(7). Because those two criteria were met, the Court said that the Board's focus on other alternatives to the joint use dock and incompatibility

²¹ Appellants' Opening Brief, p. 2.

with surrounding land uses was not supported by the evidence. The Court did not say that it is inherently improper to deny the first dock in an area.

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

The Board's decision in this case is entirely consistent with its previous determinations in the *Viafore* and *Gennotti* discussed above. As in those cases, the Board found that the proposed dock is not compatible with the surrounding land uses, because it would degrade the public's rights on a beach that is now unimpeded by any large structure for miles in both directions.²² [Conclusion 27, CP 960] The Board applied its "specialized knowledge and expertise" in determining compatibility, and its decision is entitled to deference. The Board's conclusion that the criterium in PCC 20.56.040(A)(7) is not satisfied because the Nieszs did not prove that the proposed dock, pier and float are compatible with the surrounding environment and land and water uses is correct.

²² The Board expressly recognized that mere absence of other docks is not determinative, and that docks at other locations of this beach on Fox Island may not have the same impacts or reasonable alternatives as the Niesz proposal. [Conclusions 25, 27; CP 959-960]

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

The Board has held in past cases that it may consider cumulative impacts resulting from a proposed shoreline substantial development permit pursuant to the Shoreline Management Act and local SMP, separate from SEPA. As stated by the Board in *Garrison v. Pierce County (De Tienne)*, SHB No. 13-016²³, affirmed, *de Tienne v. Shorelines Hearings Board*, 197 Wn. App. 248 (2016), at pp. 53-54:

While the SMA contains no mandate for a cumulative impacts analysis on review of an SSDP, the Board has held it is not precluded from considering cumulative effects where appropriate. *May v. Pierce County*, SHB No. 06-031 (2007); *see also Fladseth v. Mason County*, SHB No. 05-026 (2007) at COL 13, pp. 21-22.; *Lockhart*, SHB No. 13-006c at COL 21-27, pp. 37-42. This is particularly true for “cases where there is a clear risk of harmful impacts to high value habitat, loss of community uses, impacts to views or the loss of extraordinary aesthetic values. *See May*, SHB No. 06-031 at COL 18, p. 30. The Washington Supreme Court has confirmed that the Board's statutory duties encompass concern over the ultimate cumulative impact of piecemeal development on state shorelines. *Fladseth*, SHB No. 05-026 at COL 13, p. 21, *citing Hayes v. Yount*, 87 Wn.2d 280, 288, 552 P.2d 1038 (1976). The Supreme Court has, in fact, recognized that approval of one project can set a precedent for others to follow, and that it is proper for the Board to consider cumulative impacts that might occur from the granting a substantial development permit. *Id.*, *citing Skagit County v. Department of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 121 (1980).

²³²³ Available online at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1608>.

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

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

In the case at bar, the Board held that a) Niesz's proposed single use dock is a disfavored use under the SMP; b) the 150-foot dock would be the first of its kind in the southwest side of Fox Island; c) allowing the first dock would set a precedent for allowing other similar docks in this area; d) the cumulative impacts of this dock, and future docks, would degrade aesthetic values; e) there would be a significant loss of community uses; and f) beach-walkers would be obstructed and marine recreation would be affected. Since most of the relevant factors were met in this case, the Board concluded that approval of this permit application for the proposed dock in

this location would likely have cumulative impacts that would be inconsistent with the policies and regulations of the County's Shoreline Master Program.

The Nieszs assert that there is no indication of additional permitting activities in the area, which is a "critical foreseeability showing." They cite to *Garrison v. Pierce County (De Tienne)*, *supra*, but there is nothing in that decision indicating that any particular factor is "critical" or favored over other factors. The Nieszs then assert "mere speculation cannot sustain such a finding", but the Board made no finding regarding additional permitting activities. They do not explain what speculation they are referring to. They then cite to *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 209, 143 P.3d 876 (2006), a case which had nothing to do with the Shorelines Management Act or cumulative impacts, but which merely said, "A verdict cannot be founded on mere theory or speculation."

The Nieszs assert that because there is no evidence that other dock applications have been made, that means there is no risk that approval of this dock will lead to additional applications. However, as noted above, in *Garrison* the Board stated, "The Supreme Court has, in fact, recognized that approval of one project can set a precedent for others to follow, and that it is proper for the Board to consider cumulative impacts that might occur from the granting a substantial development permit."

The evidence before the Board supports its conclusion of cumulative impacts. The County planner testified that in her opinion, once someone builds a dock then everybody else wants to build one, because the first dock has taken away the beauty of an open beach. [TR 207:7-18] In her words, “Build and more will come.” [TR 207:23] She also testified that in an area where some docks have been built, the County hearing examiner had treated them as precedent to allow additional docks. [TR 216:4-6]

The Nieszs quote from *Seidl v. San Juan County, supra*, regarding how a cumulative impact analysis could be done under the facts of that case. What the Nieszs fail to mention is that the quoted language is mere dicta.

In the preceding paragraph, the Board stated:

Under the facts of this case, the Board is not persuaded that the triggering conditions for cumulative impact analysis are present. The unique facts at this site reveal that no significant harm to the shoreline environment, or eelgrass within that environment, will be caused by this project. The dock will not result in a loss of long-time community use of this shoreline. The only area impacted is a rocky outcropping accessible solely from the Walker property.

Clearly those unique facts are quite different from the case at bar. In this case, the Board found that the dock will have significant impacts on the long-time community use of this shoreline, impacting a lengthy, widely-used, unimpeded beach, not a solitary rocky outcropping accessible from only one property as in *Seidl*.

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

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

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

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

Id., at 354. The Court also noted that "when San Juan County issued the DNS under SEPA, it was aware that the permit had to meet San Juan County's Shoreline Master Program, which adequately addressed environmental impacts." *Id.*, at 355, n. 29. Therefore, Pierce County's

issuance of a DNS does not limit the issues or otherwise bind the the Board in assessing the Niesz shoreline substantial development permit application.

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

F. The Board's decision is consistent with its own precedent established in the recent case of *Baldwin v. Pierce County*.

On September 1, 2017, less than two months before the Board's decision in the case at bar, a different panel of the Board issued its decision in *Baldwin v. Pierce County*, SHB No. 17-005c. [CP 900] In that case, the Board denied the dock application by the Turners under facts remarkably similar to the Niesz proposal. As in this case, the Turner dock was a single use dock, was proposed on a beach with no docks for miles in either direction, was a substantial impediment to beach walking and kayaking, and mooring buoys had been successfully used by the preceding owner and neighbors for many years.

The outcome in the Niesz case is even more compelling. Where the Turners owned their tidelands, the tidelands in front of the Nieszs' property are publicly owned. Where there was limited public access to the Turner

dock, there is easy public access to the beach in front of the Niesz property that is heavily used. Where the Turner dock was located in the Rural Residential Shoreline Environment, the Niesz property is in the more protected Conservancy Shoreline Environment. Where the Turner bulkhead was taller, so their dock would be higher off the beach and less of an impediment, the Niesz dock rests on a bulkhead that is only two feet, eight inches above the beach. Where the Turner dock was approved by the County Hearings Examiner, so the neighbors bore the burden of proof to show that the dock should be denied, the Niesz dock was denied by the Hearings Examiner and the Niesz had the burden of proof.

The Board denied the permit for the Turner dock, saying that it was not consistent with the policies and criteria in the Pierce County Code, and would have detrimental cumulative impacts. The Turners appealed that Board decision to the Pierce County Superior Court under Civil Cause No. 17-2-11825-2. Judge Bryan Chushcoff denied that appeal and affirmed the Board's decision. That case is compelling precedent for the decision in this case.

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

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

on public property, not on the Nieszs' private property. Appellants have not cited to any constitutional right for private citizens to use public property.

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

Appellants also argue that the Board's decision denying their dock application conflicts with RCW 79.105.430, because it takes away the permission granted under that statute to place a dock on public tidelands. Their argument conveniently fails to mention that this statute expressly states in the first subsection, "This permission is subject to applicable local,

state, and federal rules and regulations governing location, design, construction, size, and length of the dock.” The statute only grants permission for a dock when it otherwise complies with the Shoreline Management Act and the local shoreline regulations.

In *Caminiti v. Boyle*, *supra*, the Court held that the permission to build a dock on public land granted by RCW 79.105.430 (formerly RCW 79.90.105) does not violate the public trust doctrine because such construction of a dock is subject to substantial regulation and control under the SMA. The Court stated at 672–73:

As further specifically expressed in the statute itself, the docks are subject to local regulation governing construction, size and length of the dock. The construction of private recreational docks is also regulated by the Shoreline Management Act of 1971 which requires that a dock be constructed in a manner that is consistent with the policy of the Act and the local guidelines, regulations or master programs promulgated under the Act and the Planning Enabling Act which authorizes local zoning controls. Although not expressly mentioned in the statute, state control also exists through the Hydraulics Act and state flood control laws. In Washington, abutting landowners have no riparian rights in state-owned tidelands and shorelands;

[citations omitted] Thus, RCW 79.105.430 only grants permission to place a dock on public tidelands after obtaining the shoreline substantial development permit required by the SMA. In exercising its statutory authority to approve or deny such permits, the Board was not acting in conflict with RCW 79.105.430.

H. The Wests are entitled to an award of attorney fees on appeal.

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

The Nieszs assert in their Conclusion that they are entitled to an award of attorney fees against the Board under the Equal Access to Justice Act, RCW 4.84.340 and 350. Well-established case law is to the contrary. In *Duwamish Valley Neighborhood Pres. Coal. v. Central Puget Sound Growth Mgmt. Hearings Board*, 97 Wn. App. 98, 100, 982 P.2d 668, 669 (1999), the Court held that RCW 4.84.350 does not apply to a decision of a

purely adjudicatory body rendered in the course of an adjudicatory proceeding. The Court noted that the Board was acting as an adjudicative body and is but a nominal party in the judicial proceedings. It reasoned that to award fees against the Board would be akin to awarding fees against the trial court when an appellate court reverses its decision, and would be inappropriate. *See also, Spokane County v. Eastern Washington Growth Mgmt. Hearings Board*, 176 Wn. App. 555, 584, 309 P.3d 673, 687 (2013). Even if the statute applied to the Board's action, the Nieszs make no attempt to demonstrate that they are a "Qualified Party" under RCW 4.84.340(5). Considering the nature of the Nieszs' waterfront property, it is highly unlikely that their net worth does not exceed one million dollars.

V. CONCLUSION

Single-family piers are discouraged under the Pierce County Shoreline Master Program. No piers or docks have been permitted by Pierce County on the entire southwest side of Fox Island, preserving an unimpeded beach and marine environment enjoyed by beach walkers, boaters, and kayakers alike. The Nieszs' proposed pier would seriously impair marine recreation and pedestrian access to the beach. The Nieszs have reasonable alternatives to the pier with their existing boat ramp, mooring buoys, and boat lift, as well as nearby commercial marinas. The only reason the Nieszs seek to install a pier, effectively destroying the existing character of the beach for

everyone else, is to make their boat access a little more convenient. The Court should affirm the Board's carefully reasoned decision following the clear mandate of the SMP and shoreline regulations, and deny the Nieszs' appeal. The Court should award reasonable attorney fees to the Wests.

DATED this 25th day of March, 2019.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of Morton McGoldrick, PLLC

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On March 25, 2019 I served in the manner noted the document(s) entitled: Brief of Respondents John and Christine West on the following person(s):

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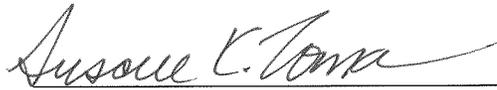
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