No. 37911-2-II

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

RONALD ROBERTSON and KATHRYN ROBERTSON; JON KVINSLAND and MARU KVINSLAND; SHORELINE HEARINGS BOARD; WASHINGTON STATE DEPPARTMENT OF ECOLOGY; PIERCE COUNTY,

Respondents,

v.

GREGG MAY and MARGO MAY; JOHN CHRISTIANSEN; ERNIE HELLING; LARRY JOHNSON and KRISTIN JOHNSON; JIM LUZZI; STEVE SAXON and PAULA SMITH; and WILLIAM WEAVER and MARY LOU WEAVER,

Appellants.

BRIEF OF RESPONDENTS ROBERTSON AND KVINSLAND

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ASSIGNMENTS OF ERROR

Appellants assign error to the trial court's Order (CP 52-59) reversing of the subject Shoreline Hearings Board decision. While this Court reviews the Board decision (CP 16-51) directly, the scope of this Court's review is established by the issues stated and briefed in appellants' opening brief. Respondents accept the issues stated by appellants and the briefing herein is intended to respond to the stated issues. With regard to the stated issues, respondents assign error to Board Findings 6, 9, 11, 12, 14, 15, 16, 17, 18, 19, 28 and Conclusions 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, and 24. The following statements of error are presented per RAP 10.3(h). (*See also,* assignments of error in petition for review at CP 9-14.)

1. The Board erroneously applied the Pierce County Code ("PCC"), the Pierce County Shoreline Master Program ("SMP") and Shoreline Management Act ("SMA") when it determined that the dock will create undue restrictions and impairment of views and public enjoyment, and related findings are not supported by the substantial evidence. The Board improperly ignored development contemplated by the zoning and weighed utility for moorage against aesthetic values.

2. The Board erroneously applied the PCC when it determined that petitioners' applications will result in four moorage spaces.

3. The Board erroneously applied the PCC when it determined that the joint dock application did not satisfy the criteria regarding the availability of reasonable alternatives.

4. The Board erroneously applied the PCC, SMP and SMA when it determined that the dock will not be compatible with the surrounding area in light of existing development, and the related findings are not supported by the substantial evidence. The Board improperly The Board improperly ignored development contemplated by the zoning and weighed utility for moorage when assessing compatibility.

5. The Board erroneously applied the SMA when it concluded that Hales Passage is a Shoreline of Statewide Significance and further erred when it directly applied the SMA prioritized preferences to respondents' application.

6. The Board erroneously applied the PCC and SMA when it determined that the project area is fragile, in a state of recovery and important to habitat was a basis for permit denial, and related findings are not supported by the substantial evidence in the record.

7. The Board erroneously applied the PCC and SMA when it deemed it appropriate to consider cumulative impacts with regard to respondents' shoreline substantial development permit application, and related findings are not supported by the substantial evidence.

Notably, the Board applied PCC 20.56.040(B)(2) to respondents' project. (*See* Conclusions 7, 10 and 15 at CP 37-43.) Respondents assigned error to these conclusions (CP 9-11 at ¶¶ 19, 23) and briefed the issue before the trial court. The trial court thereafter concluded that the Board's application of PCC 20.56.040(B)(2) was error. (CP 68-69.) Because appellants did not include application of PCC 20.56.040(B)(2) in their issues and briefing, appellants have abandoned or waived this issue as a basis to reverse the trial court's decision and sustain the Board's decision. *Holder v. City of Vancouver,* 136 Wn. App. 104, 107, 147 P.3d 641 (2006). As a precaution, respondents assign error to Board Conclusions 7, 10 and 15, and reserve the right to file a sur-reply if appellants later brief the issue.

STATEMENT OF THE CASE

A. Respondents' Property And The Surrounding Area.

Respondents Robertson and Kvinsland are next door neighbors and collectively own 1.72 acres of waterfront property abutting Hales Passage in unincorporated Pierce County. (CP 19.) Robertson's shoreline frontage extends 145 linear feet and Kvinsland's frontage extends 100 feet. (*Id.*)

The shoreline that is the subject of this appeal is not in its natural state. The immediate neighborhood is fully developed with residential development. Respondents' and the neighboring properties are developed with single-family homes and bulkheads. (AR Ex. 83 at Findings 9 and

10.) Most of the lots in the area also have accessory structures and are landscaped landward of the properties' respective bulkheads. (*Id.* *See also* photographs at AR Ex. 2, slides 42, 36, 40, AR Ex. 88, attached hereto as Appendix A.) Appellants Elam live in close proximity and have constructed a 50-foot pier ramp float structure that is only 300 feet west of respondents' project site. (CP 20; *see* photographs at AR Ex. 2, slides 36, 40, AR Ex. 88 attached as Appendix A-2 and A-3.) Since a boat cannot be permanently moored at this dock, the Elams also have a buoy for mooring their boat. (Tr. At 106.) There is another 150-foot pier ramp float approximately 1,500 feet east of the project site. (CP 20; *see* photographs AR Ex. 2, slides 16 and 41 attached as Appendix A-4.)

There is substantial boating activity and other human activity both on the beach and in the bordering water. (*See* photographs at AR Ex. 2, slides 28, 31, AR Ex. 81, attached as Appendix A-5. *See also* Tr. At 47-48.) In fact Appellants' expert described the impact of the current development and activities on this shoreline as "an area that is typical of so much of the Puget Sound area that has been destroyed in terms of surf smelt, or we refer to them as forage fish habitat." (Tr. 228.)

Under the Pierce County Shoreline Master Program, all shoreline properties in Pierce County are placed in one of five shoreline environments: urban, rural residential, rural, conservancy, and natural.

(AR Ex. 100 at pp 14-19.)[1] Each designation allows for varying degrees of use and development. The site of respondents' project is within the Rural Residential Shoreline Environment. (CP 24, finding 13.) This is Pierce County's second most intensive shoreline environment. (Appendix B-1 at pp. 15-19; *See also* PCC 20.10 attached as Appendix B-3.) It is intended to accommodate medium-intensity uses and serve as a buffer between the high intensity urban environment and the low intensity rural environment. (Appendix B-3, PCC 20.10.010.) Preferred uses in the Rural Residential Shoreline Environment include single family residences. (*Id.*) It is the most common environment to find docks. (Tr. at 459).

B. Respondents' Proposed Joint Use Pier Ramp and Float.

Under the County Code, Respondents have the right to construct individual 50-foot docks without a shoreline substantial development permit. (Appendix B-3, PCC 20.56.030(1)(c); (Tr. at 467)). Instead of pursuing two docks, respondents opted for one joint-use dock because of the economics of constructing and maintaining docks, and to reduce any environmental impacts that two docks might have on the beach. (Tr. at 439). The dock will be located at the common property line between respondents' properties, so that there is at least 100 feet between the dock and the nearest neighbors' property line. (AR Ex. 61, 62.)

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[1] Excerpts from the SMP are attached as Appendix B-1 (AR Ex. 100). Gig Harbor Peninsula Community Plan excerpts are in Appendix B-2 (AR Ex. 108). Shoreline regulation excerpts are at Appendix B-3 (AR Ex. 100.)

Compared to other docks constructed in the County, respondents' proposal is small. (Tr. at 399-401). The dock consists of a 4' x 50' pier, a 4' x 32' foot aluminum ramp and an 8' x 24' foot float. The total length of the dock is 100 feet and its greatest width is 8 feet. The structure is supported by eight pilings—the minimum necessary—and designed to insure that the float does not "ground" during low tide. (Tr. at 399-401).

The dock is designed and located in a manner that minimizes environmental and view impacts. One of the central concerns with docks is the environmental impact caused by shading. The pier will be constructed with one foot of grating to facilitate the passage of light through the structure, the ramp will consist entirely of graded material and the float will consist of 50 percent grating. (Tr. at 400). Appellants' expert agrees that shading impacts will be minimal. (Tr. at 241). The dock is also designed to minimize view impacts. It utilizes thee-sixteenths stainless steel cables under the railings which disappear from sight at a distance of 100 feet. (Tr. at 401). The dock is constructed at the lowest possible height to accomplish its purpose and minimize view impacts. (Tr. at 401). Moreover, the decking is not colored with red or some other conspicuous color; it is colored in a neutral gray color to further minimize view impacts. (Tr. at 401).

Finally, respondents hired a professional biologist to evaluate the biological impacts of the proposed dock and to determine the most

suitable site for dock. The Biologist, Dr. Dan Cheney, consulted with both the Washington State Department of Fish & Wildlife ("WDFW") and the U.S. Army Corps to address any concerns they might have regarding potential impacts to habitat or the environment. (Tr. at 343). Additionally, Mr. Cheney conducted a site-specific survey to determine the presence of eel grass or other sensitive habitat that could be negatively impacted by the proposal. The survey extended 250 feet beyond where the dock would end. (Tr. at 346-347). Dr. Cheney compiled his conclusions in a Biological Evaluation. (AR Ex. 32). His survey revealed that eel grass was not present where the dock was proposed and, in fact, there was no eel grass within 350 feet of the of respondents' shorelines. (Tr. At 346-47; AR Ex. 32.) He further concluded that the proposed site for the dock could support sand lance spawning, but that the development conditions that would be required for the proposal would prevent the dock from significantly impacting their spawning. (Tr. at 351, 353). In fact, the pier would likely provide some value by shading the sand lance. (CP 23).

C. Procedural History – The Extensive Review Of Appellants' Proposed Dock.

Respondents' joint dock application has gone through multiple levels of environmental and design review on the, County, State and Federal levels. The following summarizes those reviews.

1. The State Environmental Policy Act review.

Under Washington's State Environmental Policy Act ("SEPA"), chapter 43.21C RCW, Pierce County, as the primary reviewing jurisdiction, was required to review the proposed dock and determine if the project will have a "probable significant, adverse environmental impact." RCW 43.21C.033, .031; WAC 197-11-310. Under SEPA, if the designated Environmental Official determines that there will be no probable significant adverse environmental impacts from the proposed project, then that Official is required to issue a Determination of Non-Significance ("DNS"). WAC 197-11-340.

Pursuant to PCC Title 18E and chapter 43.21C RCW, the County Environmental Official reviewed the project and issued a DNS on November 10, 2005 (AR Ex. 11). The County actively sought comments from WDFW, in addition to other state and federal agencies to identify potential impacts to natural resources. (Tr. at 496-497).

A Corrected DNS was issued on December 7, 2005 correcting the project description from 10 to 8 pilings and revising Finding No. 6 with regard to federal review (AR Ex. 12). A SEPA Addendum which modified the project to separate the boat lift from the dock was issued on May 31, 2006 (AR Ex. 13). No appeals were taken of the SEPA threshold determination and, accordingly, the DNS is final.

The designated Environmental Official concluded that the project "will have no significant adverse environmental impacts on fish and wildlife, water, noise, transportation, air quality, environmental health, public services and utilities, or land and shoreline uses." (AR Ex. 12) Noting the federal and State review processes established for the biological evaluation (Army Corps, USFWS [US Fish and Wildlife Services], WDFW, NMFS [National Marine Fisheries Services]), the DNS further provided that '[p]otential significant adverse impacts to fisheries habitat and marine life in the nearshore environment will be adequately mitigated through compliance with these agencies approval of the project specific biological evaluation." (*Id.*) The DNS for this project is final.

2. The United States Army Corps review.

On August 8, 2005, the Seattle District of the United States Army Corps of Engineers (the "Corps") issued an Informal Consultations and Request for Final Concurrence, together with a copy of the Biological Evaluation (AR Ex. 64)). On September 29, 2005, the Corps issued a Letter of Permission authorizing the project and concluding that it would not have significant individual or cumulative environmental impacts:

> The US Army Corps of Engineers' (Corps) regulatory program provides for the authorization of certain work that is minor in nature, would not have a significant individual or cumulative impacts on the environment, and should encounter no appreciable opposition by a type of permit known as a "Letter of Permission" (LOP). After reviewing

> your application for Department of the Army authorization to construct a pier, install a ramp and float and drive pilings, we have determined that the proposed work meets these requirements and is authorized by this LOP. (AR Ex. 65) (emphasis added).

3. The Washington State Fish & Wildlife review.

Wildlife, fish and shell fish are the property of the State. RCW 77.04.012, RCW 77.04.013. The Legislature thus created the WDFW and directed it to "preserve, protect, perpetuate, and manage the wildlife and food fish, game fish and shellfish in state waters and offshore waters." *Id.* WDFW is charged with project review of any "hydraulic project", or any construction or performance of work that will use, divert, obstruct or change the natural flow or bed of the salt or freshwater of the state. RCW 77.55.011(7); RCW 77.55.021(1). No person may undertake any hydraulic project without first obtaining Hydraulic Project Approval ("HPA") from the WDFW "in the form of a permit as to the adequacy of the means proposed for the protection of fish life." RCW 77.55.021(1). The WDFW has been accorded authority to deny or condition approval for the "protection of fish life." RCW 77.55.021(3)(a). Respondents' dock received the requisite HPA review from the WDFW.

The WDFW issued an HPA for the dock on April 17, 2006. Notably, appellant May appealed the HPA on May 10, 2006, alleging that the approval conflicts with current WDFW policy and alleging that the HPA was based upon incomplete and false information (AR Ex. 71).

WDFW denied May's appeal and affirmed the HPA on June 20, 2006 (AR Ex. 72), holding that "WDFW issued an HPA that was conditioned to provide for proper protection of fish life and it is in compliance with Chapter 77.55 RCW, Chapter 220-110 WAC and WDFW policies."

With respect to May's claims that the HPA conflicts with WDFW policy, the decision provided:

> Mr. May identified several WDFW policies, plans, and documents relating to forage fish and salmonids in Washington Sate. All of these documents stress the importance of forage fish in marine ecosystems and of protecting their habitat. Without offering proof or testimony from forage fish or other experts, Mr. May argued that because the project under appeal occurs on a beach with sand lance spawning, it will result in damage to that species in violation of WDFW policy.... Mr. Molenaar provided correspondence between himself and WDFW biologist Dan Pentilla, the agency's forage fish expert, that documents that the project is unlikely to damage sand lance or their habitat. The HPA was issued with conditions that were included specifically to protect sand lance (provisions 2, 8, and 9) and salmonids (provisions 1, 6, 7 and 12), with other provisions designed to protect habitat and fish in general. Because the HPA protects fish life from the effects of the project, it does not conflict with the SDFW policy, but rather complies with it. (AR Ex. 72 at p. 2).

The WDFW also rejected May's complaint that the site plan was revised in the permitting process and May's assertion that the HPA was based upon incomplete or false information and concluded:

> WDFW's expert on sand lance, biologist Dan Pentilla, indicated in a memo to Mr. Malenaar that the project, as proposed in the final design, would not impact sand lance or their habitat. (AR Ex. 72 at p. 3.)

May did not appeal the WDFW decision and the decision is now final.

4. The Pierce County Hearing Examiner review.

The Pierce County Planning and Land Services ("PALS") Staff recommended that respondent Robertson's request for a conditional use permit for the boat lift be approved. Staff recommended denial, however, of the shoreline substantial development permit for the proposed dock. Notably, the primary basis for Staff's recommendation was not that the proposed dock presented any unique impacts to the environment or shoreline use and views. Rather, Staff's recommendation was based upon his novel interpretation of the Code that, if the dock cannot be used for 24-hour moorage, Staff was authorized to weigh the limited utility for moorage when applying the applicable permit criteria. (*See* Staff Report, AR Ex. 1). There are, however, no such provisions in the County's code.

The permit applications were presented to the Pierce County Hearing Examiner, who is the County's highest authority on land use matters. The Examiner receives and examines available relevant information, including environmental documents, and issues final decisions for land use matters including shoreline substantial development permits. PCC 1.22.080(B)(1)(f). In this case, the Examiner was Stephen Causseax, Jr., who has been the County's Examiner for over 20 years and, thus, has repeatedly interpreted and applied the County's development regulations, including the County's SMP and shoreline regulations.

The Examiner disagreed with Staff's interpretation of the County's code and approved both the shoreline substantial development permit for the dock and the conditional use permit for the boat lift (AR Ex. 83, attached hereto as Appendix C-1). The Examiner, unlike Staff, appropriately applied the actual language in the SMP and related regulations. He likewise carefully examined the purposes and polices of the County SMP in addition to the Rural Residential shoreline designation. More specifically , the Examiner noted that the County SMP is intended to be applied based upon expected future development, not existing development. (*Id.* at p. 9, Finding 11.) The Examiner acknowledged that there are few local docks, but noted that the number of existing docks is not germane to the inquiry:

> Despite the pristine appearance of the beach, the SMP designates the entire crescent beach . . . as Rural Residential, second in intensity only to the Urban Shoreline Environment. The SMP defines the Rural Residential Environment as an area of medium intensity land uses . . . . [and] authorizes medium intensity residential, commercial, and agricultural development . . . . A joint use, eight foot wide, 100 foot long pier, ramp, and floating dock on 245 feet of waterfront falls well within the definition of medium intensity use and is consistent with the Rural Residential Shoreline Environment. (Appendix C, AR Ex. 83 at p 9, Finding 10.).

4. The Shoreline Hearings Board review.

The Examiner's decision was appealed to the Board for a *de novo* hearing. The Board reversed the County's decision to issue a substantial

development permit for the dock, but approved the County's decision to issue a conditional use permit for the float lift. (Appendix D, CP 16-51.)

Central to the Board's decision is the fact that, other than the Elam dock, there are dock in the immediate area. Contrary to the direction in the Pierce County SMP, the Board did not analyze the permit application in the context of future development authorized within the zoning designation. Rather, the Board sought to preserve the status quo. The PCC and SMP do not, however, call for preservation of the status quo. Thus, the Board improperly stepped out of its role as a quasi-judicial agency required to apply existing law, and instead assumed the role of policy-maker for Pierce County.

Respondents appealed the Board's denial of their dock permit. (CP 1-14) No appeal was taken, however of the Board's approval of the float. On appeal, the Honorable Beverly Grant reversed the Board's denial of the requested dock permit. (Appendix E, CP 52-59.)

ARGUMENT

The Board's decision reflects a clearly erroneous application of the PCC and SMP and, when compared to other Board decisions, is arbitrary. The Board failed to adhere to the stated SMP direction to evaluate development applications in the context of anticipated development authorized by the applicable zoning designation, not compatibility with only existing development. Further, to avoid application of the clear

instruction from the SMP and PCC, the Board erroneously classified the subject project site as within a Shoreline of Statewide Significance, and thereafter directly applied the preferences usually applied in ruling-making for such shorelines to this single, modest application. That the Board failed to apply Pierce County's SMP and regulations as written is evidenced by the fact that, only six months earlier, it applied the same SMP and PCC to another dock and reached a radically different result.

In *Roller v. Pierce County,* SHB 06-16 (Finding of Fact and Conclusions of Law, October 4, 2006), the Board reviewed a proposed single use dock that, while having a nearly identical design to the dock in this case, was greater in length. (*See*, Appendix F.) The dock approved in *Roller* will have a total length of 145.5 feet, consisting of a 4 foot wide by 90.5 foot long pier, a 4 foot wide by 40 foot long ramp, and an 8 foot wide by 24 foot wide long float. (Appendix F, Finding 7. Like here, the proposed dock was on shorelines assigned the Rural Residential Environment designation and was subject to the policies stated in the Gig Harbor Peninsula Community Plan. *Id.*, Finding 2.

In *Roller*, the Board thoroughly reviewed the Pierce County policies and regulations regarding the construction of docks, particularly with respect to proposed dock construction in the Rural Residential Environment shoreline designation. The Board also considered Pierce County's long-established interpretation of those policies and regulations.

Citing the Examiner's Decision under review here, the Board acknowledged and endorsed Pierce County's policy to evaluate docks based upon future development contemplated in shoreline environment designation, rather than upon the existing development. In *Roller,* the Board articulated a clear understanding that, in Pierce County

- "The Rural Residential Shoreline Environment is the second most intensive land use designation within the County's SMP [Shoreline Master Program] and is intended to serve as a buffer between the highly intensive development of the Urban Environment and the non-intensive development of the Rural Environment." (*Roller*, Conclusion 3.)
- "The [Rural Residential Shoreline Environment] designation reflects the County's intention for *future* development, rather than merely describing the status quo." (*Roller*, Conclusion 3.)
- "[T]he Gig Harbor Peninsula Community Plan which became effective December 1, 2002 . . . explicitly provides that 'Piers and docks should be permitted in the Urban, Rural Residential, and Rural Shoreline Environments.' Gig Harbor Peninsula Community Plan, Standard 15.2.4." (*Roller*, Conclusion 3.)
- "It is not uncommon to find 150 foot-long docks in the Rural Residential environment of Pierce County." (*Roller*, Conclusion 11.)
- "Water front property owners in Pierce County must expect to see docks along shorelines that have been designated Rural Residential." (*Roller*, Conclusion 7.)
- "Many of the docks in the Puget Sound go dry as a function of the length limits imposed by regulations and shallow waters." (*Roller*, Conclusion 11.)
- "Nothing in the Pierce County SMP requires, or favors, docks that will provide permanent moorage over those with more limited utility. Conversely, nothing in the SMP

prohibits or disfavors docks that go dry at certain water levels." (*Roller,* Conclusion 10.)

- "[T]he County SMP currently defines docks and piers as structures that are "used as a landing or moorage place for marine transport or for recreational purposes. PCC 20.56.010(A) and (B)." (*Roller*, Conclusion 10, underlining added.)
- "While the County may decide at some point in the future to prohibit (or limit the length of) recreational docks where they cannot achieve sufficient depth to provide moorage, the Board must apply the laws and regulations as they are currently written." (*Roller*, Conclusion 10.)
- "To the extent residents . . . may be generally concerned about the aesthetics of dock proliferation . . ., their concerns are more appropriately addressed to those in a position to recommend or enact policy changes at the County level." (*Roller*, Conclusion 9, ftnt. 2.)

Despite that the dock proposed here is of the same design (yet less intrusive because it is smaller and a joint use dock); and despite that the dock proposed here is similarly for recreational and landing purposes (since it cannot provide permanent moorage); and despite that the dock proposed here is subject to the exact same policy provisions and regulations, the Board refused to sustain the Examiner's decision to approve respondents' smaller joint use dock.

The Board's primary justification for the radically different result in this case is the fact that "this would be the first dock within this sandy crescent." (CP 39.) According to the Board, this opened the door to a wholly different analysis of view impacts and use impacts. In so doing,

the Board abandoned and ignored the County's long-standing policy that proposals should be evaluated based upon future use contemplated under the zoning designation. The Board also unilaterally asserted that this "distinction" opens the door for the Board to consider "cumulative impacts" as an integral part of its compatibility analysis. The Board applied a "cumulative impacts analysis" (based largely on speculation and conjecture) even though, as correctly noted by the Examiner, the PCC has "no guidelines or standards requiring consideration of cumulative impacts." (Appendix C, AR Ex. R-83 at Finding 16.)

Contrary to its action in *Roller,* the Board, in this case, assumed the role of rule-maker and adopted new rules for Pierce County when a dock is proposed on a currently "dock-free" beach, irrespective of the applicable shoreline zoning designation. Though there is no supporting Pierce County policy or regulation, the Board has unilaterally directed that docks should not be allowed in such cases because it will only lead to more docks. The Board is a quasi-judicial agency, however, and does not have authority to make public policy, to make rules or draw "bright lines" within the limited scope of its jurisdiction, either locally for Pierce County or statewide. *See,* RCW 90.58.170, .180. *See also, Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 323 (2005). The Board's decision is inconsistent with the applicable law and should be reversed.

A. Standards Of Review And Deference To The Board.

Appellants correctly state the standards of review applied under the Administrative Procedure Act and that this Court applies the APA standards directly to the Board's decision. Appellants also correctly state the general rule that courts will accord deference to an agency's factual determinations, as well as its interpretation of law where the agency has "specialized expertise" with the applicable statutes or regulations. Respondents disagree, however, with appellants' characterization of the Board's holdings and the appropriateness of according deference to the Board's application of the law in this case.

To begin, contrary to appellants' assertions, the challenges to the Board's decision are primarily legal, rather than factual in nature. Before this Court is whether the Board properly applied Pierce County's SMP and regulations to the facts in this case. "[T]he process of applying the law to the facts is a question of law subject to *de novo* review, meaning the Court must determine the correct law independent of the agency's decision and then apply the law to the established facts *de novo*." *Port of Seattle v. PCHB*, 151 Wn.2d 568, 588, 90 P.3d 569 (2004).

Additionally, this is not a case in which deference to the Board's legal analysis is appropriate. While the Board has specialized expertise with regard to the SMA, it does not have specialized expertise with regard to Pierce County's SMP and regulations. If anyone has special expertise

in this regard, it is the Hearing Examiner. While the Board was not required to accord any deference to the Examiner's decision in its *de novo* review; the Examiner's interpretation of the local provisions is nonetheless relevant and worthy of consideration. *See, id.* at 593-94. Regardless, this Court is not bound by the Board's interpretations and the review of legal determinations is *de novo*. *Id.* at 588.

Deference is particularly inappropriate here, since when the subject decision is considered in light of the *Roller* decision, it is apparent that the Board stepped beyond its quasi-judicial function and instead engaged in result-oriented policy-making. The Board's decision is inconsistent with the applicable law and deserves no deference.

B. The Relevant Regulatory Structure Under The SMA.

The SMA is a planning statute; it does not prohibit development, it plans for it. The SMA seeks to avoid the "piece-meal development of the state's shorelines" through "coordinated planning" while, at the same time "recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020. This includes planning for docks:

> [I]t is a practical recognition that one of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters.

Caminiti v. Boyle, 107 Wn.2d 662, 673-674, 732 P.2d 989 (1987).

The SMA places the onus of shoreline protection on local government. Local governments must develop regulations that plan for the reasonable use of the shorelines within its jurisdiction and administer a permitting program. RCW 90.58.050. Local regulations must be reviewed and ultimately approved by the Department of Ecology prior to implementation. RCW 90.58.090.

The SMA created the Shorelines Hearing Board to hear appeals of shoreline issues. RCW 90.58.170. The role of the Board is limited. With respect to substantial development permits, the Board's jurisdiction is limited to insuring that the proposal complies with the regulations of the local jurisdiction, this case Pierce County, and the policies in the SMA. The Board has no authority to impose its own policies or agenda on appeals that come before it. RCW 90.58.180.

The Pierce County implemented the mandates of the SMA through its Shoreline Master Program (Appendix B-1), the Gig Harbor Peninsula Community Plan (Appendix B-2) and its shoreline development regulations (Appendix B-3). The SMP places all of the County's shorelines within five shoreline environments: urban, rural residential, rural, conservancy, and natural. Each designation allows for varying degrees of use and development. On one end of the spectrum is the urban designation which allows for the most intense development. PCC 20.08. At the other end of the spectrum is the natural designation which is to be

protected in a natural state. PCC 20.06. The County's environmental designation for a specific shoreline area is based:

> [O]n the existing development pattern, the biophysical limitations and capabilities of the shoreline area, and the goals and aspirations of the citizens.

PCC 20.06.010. The designations "reflect intent for future uses rather than the status quo." (Appendix B-1, SMP at p. 8, emphasis added.)

As noted earlier, the respondents' property is located within the County's second most intensive shoreline environment, the Rural Residential Shoreline Environment. PCC 20.10. This Environment is intended to accommodate medium-intensity uses and serve as a buffer between the high intensity urban environment and the low intensity rural environment. PCC 20.10.010. Preferred uses in the Rural Residential Shoreline Environment include single family residences. It is the most common environment to find docks. (Tr. at 459).

C. Respondents Satisfied the Criteria for a SDP (PCC 20.56.040(A)) to Construct a Joint-Use Dock.

Uncovered, personal, single-family docks that do not exceed 50 feet in length are allowed outright in the rural-residential environment. PCC 20.56.030(B). Despite this authorization, Pierce County encourages the construction of joint-use docks so as to cut-down on the number of docks that might otherwise be allowed in an area. The Code provides:

> It is the intent of Pierce County to encourage the construction of joint use or community use docks and piers whenever feasible so as to lessen the number of structures projecting into the water. To this end, waterfront property owners are encouraged to explore the advantages of increased dock dimensions which are afforded by the construction of a joint or community use structure.

PCC 20.56.020. Joint use docks must obtain a shoreline substantial development permit ("SDP") from the County. PCC 20.56.030(2)(b). An SDP will be granted when the development proposed is consistent with the applicable local master program and the SMA. RCW 90.58.140.

In Pierce County, the granting of an SDP is dependent upon the County's determination that the proposal is consistent with policies of the SMP and seven permit criteria. PCC 20.56.040(A). Appellants agree that only criteria 2, 5 and 7 are at issue in this appeal (Appellants' Brief at p. 17). These SDP criteria require that

> 2. Views from surrounding properties will 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;
>
> 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.

1. Respondents' dock will not unduly impair views.

Initially, a key issue in this appeal is what constitutes "undue" impairment. The Board seemingly adopted the County Staff's analysis of

"undue" impairment even though the Hearing Examiner – the County's highest designated decision maker for land use decisions – expressly rejected it. (CP 36-37; PCC 1.22).

Moreover, the Board mischaracterized Staff's interpretation of undue impairments. The Board asserts that Staff utilized a balancing analysis mandated by PCC 20.56.040A to "weigh two basic classes of values set forth in PCC 20.56.040A." Staff's analysis was much more simplistic. First, Staff unilaterally determined that a dock's sole purpose and function is for permanent moorage. Thereafter, without authority, Staff evaluated the "undue impairment" criteria pitting his own subjective assessment of the functionality of the dock against perceived impacts:

> If you look at my executive summary in the staff report, throughout the criteria the word unduly impaired sort of repeats itself, and at a certain point when the dock is usable only part of the time, I felt the scale tips, yes; as a result, some of these criteria, therefore, then become too great an impairment.

(Tr. at 483). Staff did not weigh two competing values. He unilaterally tested whether views were "unduly" impaired by comparing the impacts with the functionality of the dock for 24 hour moorage. As the Examiner concluded, this is not the correct interpretation of the County Code.

The PCC does not limit docks for the purposes of moorage. Instead docks, piers, and floats are all defined as being used for moorage or landing or other "recreational purposes." PCC 20.56.010. Thus, while

docks may be used as moorage, their purpose or function is not limited to that use. *Id.* As noted by the Examiner, the PCC expressly allows 50-foot docks without a SDP. Yet, "[h]ardly any 50 foot dock on a Pierce County saltwater shoreline could provide a moorage." (Appendix C, AR Ex. 83 at 14, 17. *See also,* AR Ex. 73; Tr. at 406). Determining whether a dock unduly impairs views by weighing its functionality makes little sense as most approved docks in the County go dry. (Tr. at 405). There is no support for Staff and the Board's moorage functionality test.

The proper test for an undue impairment requires that the proposal be considered in the context the applicable designated shoreline environment. (Appendix C, AR Ex. 83 at 19, ¶23.B.). This is how the County has used the standard in the past. "Unduly" is undefined in the County Code and thus, this Court should revert to the dictionary meaning of the word. *See State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997) (using dictionary definition of an undefined statutory term). "Unduly" is defined as "improperly" or "excessively". The root word of unduly, undue, means "not appropriate; improper." Webster's New World Dictionary (2nd ed. 2002).

There is absolutely no evidence in the record that establishes that the views will be "unduly" or excessively impaired. Wendell Stroud has been designing and building docks in Pierce County for nineteen years and was involved designing respondents' dock. (Tr. at 398). He designed the

present dock to minimize view impacts in every aspect imaginable. Compared to other docks being approved in Pierce County, Respondents dock is small. (Tr. at 401). Piers can be 6 to 8 feet wide; the Respondents' is 4 feet wide. (Tr. at 400). The dock could extend out as much as 150 feet, but is designed to only go out to 100 feet. (Tr. at 401). Moreover, Mr. Stroud designed the dock to utilize a "minimum number of pilings." (Tr. at 400). Thus, on a dimensional scale, the dock is designed to minimize view impacts.

The other design components of the dock also minimize view impacts. For instance, the railings utilize three-sixteenths stainless steel cable that is invisible from a distance of 100 feet. (Tr. at 401). The Respondents could have used solid wood or aluminum which would have had a greater impact on views. Moreover, the dock is not colored red, yellow or some other color that stands out from the natural environment. The materials are neutrally colored. (Tr. 401-402).

While it is true that the dock will become part of the existing view that in and of itself is insufficient to deny a SDP. Instead the impairment must be "undue." The appellant May admitted that his views will not be blocked or unduly impaired, but rather his complaint was that his view will now include the dock. (Tr. at 115-116). Of course, the Board expressly rejected the above complaint as undue view impairment in *Roller*. There the Board held:

> The proposed dock will be clearly visible within the sweeping view corridors of adjacent properties. When applying the "view impairment" criteria, however, we agree with the analysis in a recent Pierce County Hearing Examiner Decision suggesting that it is important to do so in the context of the applicable designated environment. Waterfront property owners in Pierce County must expect to see docks along shorelines that have been designated Rural Residential. Impairment must be considered in light of the intensity of both existing and allowable uses within such designation. The mere introduction of a new dock into a surrounding property owner's historical view corridor, without more, does not constitute undue impairment in a rural residential setting.

(Appendix F, *Roller, supra*, at 13 (emphasis added). Remarkably, the Board decided to hold respondents to an entirely different standard unsupported by the historical application by County officials and prior Board decisions. In light of the *Roller* decision, it is difficult to receive the Decision provided in this case as anything other than arbitrary or an attempt by the Board to create its own policies and regulations for "dock-free" beaches. At a minimum, the Board erroneously applied the law.

To justify the Board's decision to ignore the stated Pierce County policy that view impacts are to be evaluated in the context of future development contemplated within a particular zoning designation, rather than the status quo, appellants point to court decisions that endorse consideration of aesthetics in SMA permitting decisions. Respondents do not disagree that the SMA contemplates that aesthetics may be considered in shoreline permitting decisions. Aesthetics, however, must be

considered in light of the policy statements articulated in the Pierce County's planning documents.

Appellants and the Board's reliance on *Bellevue Farm Owners Association v. Shoreline Hearings Board*, 100 Wn. App. 341 (2000), as justification to evaluate "first docks" differently is misplaced. In that case, the court evaluated an application for a 345-foot dock which included a 230-pier in San Juan County. Significantly, the proposed dock in *Bellevue Farms* was located in a Conservancy Shoreline Environment, which San Juan County defined as "areas which are largely free of intensive development." *Id.* at 356. San Juan County applied this designation to shorelines that "would most benefit the public if their existing character is maintained" and the designation is "used to protect areas of high scenic value." *Id.* at 356-57. The application for the *Bellevue Farm* dock, a dock that was 3 times the size of the joint dock proposed here, was evaluated under vastly different standards than those applied to the medium intensity Rural Residential Shoreline Environment in Pierce County.

Notably, the Examiner considered and, appropriately, distinguished the *Bellevue Farms* case (and the other cases cited by appellants) in its evaluation of respondents' joint dock. (Appendix C, AR Ex. R-83 at pp-12-13.) None of the cases cited justify the Board's decision to disregard the County's clear policy statements that have been consistently applied by the Examiner. If the appellants wish to prohibit

the construction of docks on "dock-free" or near dock-free beaches, they should do so through the local legislative process. In the absence of an amendment, however, the "Board must apply the laws and regulations as they are currently written." (Appendix C, *Roller*, Conclusion 10.)

2. The proposed joint dock satisfies the reasonable alternatives criteria.

PCC 20.56.040(A)(5) provides that the applicant must demonstrate that "a reasonable alternative such as a joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future. The Board concluded that the "evidence was insufficient to establish that existing launching facilities were generally insufficient.' (CP 39, Conclusion 8.) The Board misapplied the reasonable alternatives criteria.

The County code does not direct that dock applications be denied if public boat launches are available. Rather, the Code requires a finding that "a reasonable alternative such as joint use . . . does not exist or is not likely to exist in the near future." PCC 20.56.040(A)(5). Here the requirement is satisfied because respondents are using the alternative of joint use. Additionally, the dock will not be used for permanent moorage, but will be use for recreational purposes, such as for a boat landing, gatherings, swimming and fishing. (Tr. 432-36.)

Moreover, the Board improperly placed the burden of proof on the applicants. On the appeal to the Board, the burden to prove that the

application was not consistent with local regulations was on the appellants as the petitioners in that appeal. RCW 90.58.140(7); WAC 461-08-500(3). Nonetheless, the Board stated: "The evidence was insufficient to establish that existing launching facilities were generally insufficient." (CP 39.) In stark contrast, in a subsequent dock decision, the Board concluded that a public facility "across the bay" did not warrant denial of a Pierce County single use dock application. *McLean v, Pierce County*, SHB 07-014 (Findings and Conclusions, November 13, 2007). In *McLean*, the Board appropriately placed the burden of proof on the appellant challenging the project and concluded: "The McLeans have similarly failed to meet their burden to show the existing Parker float or public launching facilities across the bay are reasonable alternatives to Parker's intended purposes, which include swimming and fishing, as well as landing, loading and temporary moorage." *McLean*, Conclusion 7. (The *McLean* decision is attached as Appendix C-2.) Note that, in *Roller*, a public boat access was located only "a few parcels to the north" of the subject property. *Roller*, Finding 16. Nonetheless, the Board approved that application for a single use dock.

Since respondents' application is for a joint dock, they had no obligation to explore commercial or public moorage facilities as alternatives. Even though they were not required to do so, respondents

explained the inadequacy of the public facilities.[2] (Tr. 447-48.) The reasonable alternative criteria was satisfied.

3. Respondents' dock is compatible with the surrounding environment.

PCC 20.56.040(A)(7) requires a finding that "[t]he intensity of the use or uses of any proposed dock, pier and/or float is compatible with the surrounding environment and land and water uses." Note that the criteria does not focus the compatibility analysis on the introduction of a new dock, but rather focus's on whether the intensity of the use of the dock is compatible with the surrounding environment. Robertson testified as to both his and Kvinsland's plans to use the dock for recreational purposes and to provide more stable landing so that older family members and family members with illnesses could have better access to their boats. They also plan to use the dock for fishing, gatherings and swimming. (Tr. 432-36.) Respondents' intended use of the dock is clearly compatible with the existing and current uses of the beach, which include boating, water skiing, swimming, wake boarding and kayaking. (*See* photographs at AR Ex. 2, slides 28, 31, AR Ex. 81, attached as Appendix A-5. *See also* Tr. At 47-48.) Quite frankly, there is no evidence in the record that the

[2] Note, the standard calls for a reasonable alternative for moorage purposes. The Board concludes the existing "launching facilities" are sufficient. Again, the Board employs the wrong standard. Whether there are launching facilities is inconsequential to the determination. The proper inquiry would be where the closest moorage facilities are. In this case, the closest moorage facility is over twenty minutes away by boat, the Board fails to point out, however, that by car you have to go across the Tacoma Narrows Bridge into Gig Harbor. Regardless, respondents' proposed dock is not for permanent moorage.

intensity of the existing uses of the beach will increase with the construction of the proposed dock.

Furthermore, as with view impacts, this criteria must be applied in the context of the shoreline environment designation applied to the project site. Again, the applicable shoreline designation – the Rural Residential Shoreline Environment – authorizes development at the second highest intensity. This designation contemplates, allows and plans for medium intensity residential land uses, which includes docks. In fact, the designation expressly authorizes personal docks that do not exceed 50 feet outright regardless of whether there are other docks in the vicinity of the proposal. PCC 20.56.030(A)(1).

Instead of reviewing the application in the context of development authorized by the zoning designation, as directed by the SMP, the Board focused on the existing development (the small number of existing docks in the area) to reach its conclusion that the present proposal is incompatible with the surrounding environment:

> The evidence established that the site is located on a beach that has a wide expanse of sandy, gently sloping shoreline and is, to date, virtually undeveloped. . . . The fact that this would be the first dock within this sandy crescent is a significant factor in the compatibility analysis.

(CP 39.) The Board's conclusion, however, is directly contrary to the County's SMP, which provides that the shoreline environment designations "reflect intent for future uses rather than the status quo."

(Appendix B-1, SMP at p. 8.) The fact that this would be the first dock in the area, however, should have no bearing at all on the Board's analysis.

The Washington Supreme Court has taken a similar position when evaluating whether to allow a development that does not otherwise exist in a given area. In *SORE v. Snohomish County* the Court rejected the argument that a rezone should be denied because it was inconsistent with the use of the area:

> The action requested here is a rezone which would implement an adopted comprehensive plan of Snohomish County. If such implementation were not allowed to occur until physical or developmental circumstances in the area had changed, the new comprehensive plan might never be fulfilled: if an area is presently undeveloped and a newly amended comprehensive plan calls for industrial development, no industrial development may occur until at least one industrial rezone has been granted. If that rezone cannot itself occur because land development patterns have not changed in the area, then the industrial development will most likely never have the opportunity to occur.

99 Wn.2d 363, 369, 662 P.2d 816 (1983). The reasoning in *SORE* applies with equal force here. The County's SMP expressly allows docks and medium intensity uses in the Rural-Residential Environment. The Board's action to forbid docks when there are no or few other existing docks effectively imposes an unauthorized quasi-judicially created moratorium on all docks along undeveloped stretches of shoreline. Of course, such action is clearly beyond the scope of the Board's limited authority.

Appellants' next argue that the compatibility criteria cannot be satisfied because of claimed impacts to critical habitat or other environmental functions. Again, the focus of compatibility criteria in PCC 20.56.040(A)(7) is on the intensity of the use associated with the dock, rather than the dock itself. Moreover, the standard does not provide that, if any impacts are present, the application must be denied. Rather, the proposed development must be evaluated for compatibility in consideration of existing environmental values, existing development and uses, as well as the designated environment (e.g., Rural Residential, Conservancy). Under the Rural Residential designation, residential development (including accessory docks) is contemplated and compatibility must be assessed in this context.

There is already existing substantial development and substantial activities and uses of the beach that greatly impact the critical habitat in this area. The area is already developed with bulkheads and homes. There is substantial boating activity and other human activity both on the beach and in the bordering water. Appellants' expert testified that the impacts associated with the development and uses are typical for the area. (Tr. 228.) Existing boat activity will continue to disturb and negatively impact this critical habitat. (Tr. 240, 262-64.) There is no evidence that there will be an increase in boating or other recreational activity as a result

of the dock, much less an increase in impacts over an above existing impacts. Moreover, the evidence in the record establishes the following:

- A professionally prepared biological evaluation, which included an eel grass survey, revealed that there is no eel grass within 350 radius of the site. (AR Ex. 32 at p. 7; AR Ex. 33, 34.)

- The professionally prepared biological evaluation concluded that, despite the presence of sand lance in the adjacent areas, the proposed dock "may affect" but is "not likely to adversely affect" Puget Sound Chinook or critical habitat. (AR Ex. P-32 at p. 11.)

- The US Army Corps reviewed and approved the professionally prepared biological evaluation as adequately addressing potential impacts to critical area habitat. (AR Ex. 63.)

- The Washington State Department of Fish and Wildlife, likewise concluded that the proposed joint dock will not adversely affect critical habitat. (AR Ex. 70, 72.)

- The US Army Corps concluded that the proposed dock would not adversely affect Essential Fish Habitat. (AR Ex. 63 at p. 3.)

To combat the opinions formed by qualified professionals, the Board and appellants cite evidence on the general value of eel grass, forage fish and sand lance. They note that a 2-foot by 2-foot patch of eel grass was observed approximately 350 to 450 feet off shore. (Tr. 128.) Finally, the Board and appellants reference maps and anecdotal evidence that sand lance may be found in the areas adjacent to this site. Notably absent, however, is any evidence that this proposed joint dock will result

in any measurable adverse impacts to critical areas. There is speculation that, despite the substantial activity in this area, the eel grass will re-colonize or the sand lance will spawn more expansively. There is speculation that this dock might interfere with any possible revitalization. Respondents encourage the Court to read Mr. Delay's testimony in its entirety (Tr. 221-305) as well as the testimony of Mr. Cheney (Tr. 340-97.) We are confident that there is no evidence, much less substantial evidence in the record, that this proposed 100-foot dock, as designed to minimize impacts, will adversely impact critical habitat such that the dock is not compatible with the surrounding environment, either in its existing state, or as contemplated for future development.

D. Respondents Satisfied the County's Guidelines For A SDP (PCC 20.56.040(B)) to Construct a Joint-Use Dock.

The County Code also contains a set of development guidelines. PCC 20.56.040(B). [3] The County does not use these guidelines to approve or disapprove of a specific proposal; they are used to further guide the design of an approved proposal. (Tr. at 485-486).

Appellants argue that the proposed dock does not comply with the guideline in PCC 20.56.040(B)(7), which provides that "joint docks

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[3] The Board erroneously relied on PCC 20.56.040(B)(2). Staff testified that the guideline did not apply to this case because WDFW or DNR had not identified the area as having high environmental value. (Tr. at 487-488). The trial court reversed the Board's application of the provision and appellants did not brief the issue.

should have no more moorage spaces than one space per waterfront owner using the dock." Respondents' project does not run afoul of this guideline. Recall that a dock may be used for landing or moorage or recreational purposes. PCC 20.56.010 (A). Respondents' dock is not intended for moorage, but is intended for recreational purposes and use as a boat landing to board family members on their boats. The dock cannot and will not be used for moorage; it would need to extend 425 feet into the shoreline to be used for that purpose. Rather, there will only be two spaces for moorage, the buoy for the Kvinsland property and the floatlift for the Robertson property. (*Accord,* Appendix C-1, AR Ex. 83, Hearing Examiner's conclusions at p. 14, 16-17; Appendix C-2, AR Ex. 85.)

E. The Respondents Dock Is Consistent With The SMP Policies.

Appellants argue that respondents' proposed 100-foot joint use dock is not consistent with stated policies in the SMP. Appellants first quote an excerpt from PCC 20.02.010, which addresses the applicability of the shoreline regulations, and state that it "guides development to be conducted 'without degradation of the environmental quality, risk to health or safety, and insure where development takes place, that it is done in a manner which will promote and enhance the best interest of the general public.'" (Appellants' Brief at p. 34 quoting PCC 20.02.010. From there, the Board and appellants assert that the proposed dock is

inconsistent with this policy because the project "would likely be detrimental to the natural habitat currently existing and recovering at this location." (*Id.*, *quoting,* CP42-43.)

In invoking this excerpt without the context of the full provision, the Board and appellants misapply PCC 20.02.010, which provides:

> In order to implement the goals and policies of Phase I of the Shoreline Master Programs and to allow for all reasonable uses of Pierce County's Shorelines without degradation of environmental quality, risk to health or safety and to insure where development takes place, that it is done in a manner which will promote and enhance the best interest of the general public, this Title is designed to provide standards which will regulate and promote intensities and qualities of development consistent with the protection of the shoreline environment and its related resources and the policy of the Shoreline Management Act. (Emphasis added.)

Thus, PCC does not set forth a policy to be independently applied to individual permit applications. Rather, it is implicit that, if a proposal complies with the standards set forth in Title 20, including the permit criteria in PCC 20.56, the proposal is consistent with the general policy that led to the adoption of the standards. Neither the SMP nor the shoreline regulations provide that development cannot have any impacts. Development need only be consistent with the authorized intensity.

Appellants next isolate the "Conservation Element" of the SMP which strives to preserve the natural qualities of the shorelines. (Appendix B-1 at p. 12.) Appellants ignore, however, the competing elements in the

SMP, to include the Recreation Element and Shoreline Use Element, both of which are furthered by construction of a dock. (*Id.*) Likewise, appellants' argument again ignores the Rural Residential Environment designation applied to respondents' property, which expressly authorizes medium intensity development. The SMP contemplates and does not prohibit development where there are no existing structures.

Appellants next address the policies set forth in the Pier Element of the SMP. (Appendix B-1 at pp. 37-38.) Though the Board did not address each of the relevant pier policies in its decision, and appellants do not accompany cited policies with analysis, it is noteworthy that the Examiner methodically addressed the individual policies. (*See*, Appendix B-1 at pp. 17-18.) For example, appellants imply that the proposed dock is contrary to the SMP policy directing consideration of the impact on adjacent proximate land ownership. As noted by the Hearing Examiner, however, the dock will not create impacts on adjacent land ownership due to the minimum 100 foot separation from the nearest exterior property line. (Appendix C, AR Ex. 82 at p. 18.)

Finally, appellants rely on the policy stating that docks are "discouraged" or disfavored in Pierce County's residential areas. Appellants reliance on this policy, however, is misplaced. This single policy statement is set forth in the 1971 Pierce County SMP addressing

piers, which constitute only a portion of a pier, ramp float structure. Subsection (d) of the Use Activity Policies addressing piers states: "Piers associated with single family residences should be discouraged." (Appendix B-1, SMP at p. 37.) In the 1970's, floating docks were more typically seen in residential areas, rather than the pier, ramp float structures that are designed today. (*See* AR Ex. 54.) The Hearing Examiner explained the evolution of dock design:

> [T]he US Army Corps of Engineers (Corps) and the State Department of Fish and Wildlife (DFW) along with DOE have determined that piers have less impact on marine and pedestrian on fish habitat and beaches than do floating docks which rests on the beach for many hours of the day. Therefore, agencies now require piers and will not approve floating docks.

(AR Ex. R-83 at Finding 22(A).) Thus piers, though previously discouraged for residential purposes, are now favored, and even required by State and Federal agencies, to better protect the environment. (Tr. 267-70, AR Ex. 4 at p. 92.) The Board acknowledged the agency shift to favor piers over floating docks in the *Roller* decision. *Roller*, *supra,* Finding 10.

There is no statement in the SMP or the regulations that docks as a whole are disfavored in residential areas. As noted by the Board in *Roller*, the collective policies set forth in the SMP (Appendix B-1) and Gig Harbor Peninsula Community Plan (Appendix B-2) indicate that docks are

both expected and favored residential uses in the Rural Residential Shoreline Environment designation:

The [Rural Environment] designation reflects County's intention for *future* development, rather than merely describing the status quo. Although the SMP designations have not been updated since they were adopted in 1974, the Pierce County Council recently adopted the Gig Harbor Peninsula Community Plan which became effective December 1, 2002. That plan explicitly provides that "Piers and docks should be permitted in the Urban, Rural Residential, and Rural Shoreline Environments." Gig Harbor Peninsula Community Plan, Standard 15.2.4. The evidence presented to the Board demonstrated that recreational docks are a common accessory use for shoreline residential properties in the rural residential area surrounding the Unger property. The Board is persuaded that the proposed dock meets the definition of medium intensity use and is there fore consistent with the policies and intent of the Rural Residential Shoreline Environment. Respondents' proposed dock is consistent with the relevant shoreline policies.

F. Respondents' Proposed Dock Will Not Lie Within A Shoreline of Statewide Significance And The Board Erroneously Applied The SMA Preferences Reserved For Such Shorelines.

To justify its decision to abandon the stated Pierce County policies to independently interpret and apply statewide policies to this particular

beach, the Board asserted, without support, authority or analysis, that the subject shoreline is "part of a shoreline of statewide significance." (CP 41.) Most notably, the Board applied to this modest joint dock application the legislative declaration in the SMA that "the interest of all of the people shall be paramount in the management of shorelines of statewide significance. RCW 90.58.020." (CP 41.)

The Board's analysis reflects that it used the purported status of a "shoreline of statewide significance" to consistently review this dock application with an eye toward yielding to the neighbors' concerns. That the Board applied the prioritized general SMA policies (rather than the County's local policies) to afford preference to public sentiment is undeniable in light of the Board's own subsequent characterization of this decision. In *Fladseth v. Mason County*, SHP 05-026 (Findings and Conclusions, May 1, 2007), the Board stated at Conclusion 15:

> [A] community may place a high value on keeping a particular beach segment or area, such as a wide sandy beach, in a natural condition because it facilitates numerous recreational opportunities that would be compromised by the development. This is the situation the Board addressed in the *May* decision. The potential for one or more docks to cut across this large, open segment of beach compelled the Board to uphold the denial of the permit.

The Board and appellants' attempt to independently apply the prioritized policies of the SMA without regard to local policies is erroneous for two reasons. First, the SMA directs that the application of

the prioritized policies to shorelines of statewide significance is to be performed through the legislative and rule-making process of Ecology and the local jurisdictions. Second, the shoreline upon which respndents propose their dock is not a shoreline of statewide significance. RCW 90.58.020 provides in relevant part:

> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference... (Underlining added)

Thereafter, the Legislature lists in this provision, the prioritized policies also set forth in Conclusion 11 of the Board Decision. The statute is clear. The Legislature only mandates application of the prioritized policies and the "paramount" concern for the "interest of all the people" in the context of managing "shorelines of statewide significance." Even then, the mandate is to be carried out and implemented through rule-making by Ecology and the adoption of shoreline master programs by local jurisdictions. The SMA does not authorize the Board to independently apply these policies without regard to locally adopted shoreline policies, even if a shoreline of statewide significance is involved.

The SMA precisely sets forth which shorelines are designated "shorelines of statewide significance." RCW 90.58.030(e) specifically

lists certain passages, outside of the named passages, the SMA provides that shorelines of state wide significance means "[t]hose areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide... (emphasis added.) RCW 90.58.030(e)(iii), *see also,* PCC 20.04.570. "Extreme low tide" is the lowest line on the land reach by a receding tide. PCC 20.04.180.

Hales Passage is not one of the shorelines specifically identified in the statute. Accordingly, only the shorelines in the Puget Sound areas that lay "seaward from the line of extreme low tide" qualify as "shorelines of statewide significance. Notably, there is no dispute that the proposed dock does not extend seaward of extreme low tied. To the contrary, appellants utilize this fact to challenge the functionality of the dock for moorage, since the tide recedes beyond the reach of the dock and that the proposed dock would go dry twice most days.

Appellants attempt to defend the Board's characterization by asserting that, though the proposed dock will not be situated within a shoreline of statewide significance, the dock will result in impacts to the shoreline of statewide significance. Of course, the SMA does not authorize application of the prioritized preferences to projects situated outside shorelines of statewide significance where such projects impact

such shorelines. Even if it did, there is no evidence in the record that this 100-foot joint use dock will have impacts that extend to the shorelines of statewide significance. Appellants' argument is contrary to the clear language of the SMA and inappropriate attempts to convert an exception into a rule to be applied to all shorelines.

The Board's erroneous assumption that the proposed dock impacts a shoreline a statewide significance is central to its analysis: "In this case, the law requires this Board to balance the Respondents' rights to enjoyment of their property against got only the competing private property rights of their neighboring property owners, but also those priority rights of the public is a shoreline of statewide significance."[4] (CP 44.) The Board's erroneous assumption and approach not only fails to apply local policies and regulations as adopted, it improperly results in a decision that inappropriately yields to the wishes of the neighbors.

The Board effectively provided the neighbors with veto power over this land use application, and such veto power is in derivation of respondents' due process rights. *See Eubank v. City of Richmond*, 226 U.S. 137, 143-44, 33 S. Ct. 76, 57 L. Ed. 156 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210

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[4] The Board applied a similar analysis in cases Mason County addressing docks. *Fledseth, supra; McCauley v. Mason County*, SHB 07-033 (Findings of Fact and

(1928). The net result is that the Board's decision is largely a reaction to "community displeasure" rather than based upon the law. Washington courts have consistently rejected community displeasure as an appropriate basis to deny a project application. *See, Maranatha Mining, Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990).

G. The Shorelines Hearings Board Erred when it Considered Cumulative Impacts

The role of the Board is defined by statute. RCW 90.58.180. The SHB is limited to those powers expressly granted by statute or necessarily implied. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). The Board is not a policy setting body; setting policy is reserved exclusively for local jurisdictions and Ecology. The Board only has the authority entertain appeals of a local jurisdictions decision to either issue or deny a substantial development permit. RCW 90.58.180. It reviews the substantial development permit to assure that it is consistent with "the applicable master program" and the SMA. RCW 90.58.180; 140 (2)(b). As the Board readily admits none of the criteria in those policies require a cumulative effects analysis for a SDP. (CP 44-45); *Roller, supra.*

The Board's decision to utilize a cumulative impacts analysis is arbitrary and capricious. While the Washington Supreme Court has

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Conclusions of Law, June 8, 2007). Both cases addressed projects on Hood Canal, and thus, involved shorelines of statewide significance.

affirmed the Board's consideration of cumulative impacts in other situations in the past, the Board employs that standard without regard to the facts and circumstances. It is a moving target that the Board employs as it chooses with little regard for the facts and circumstances. This is made evident by the Board's recent decisions involving this issue.

For example, in *Roller*, the Board entertained an appeal of a substantial development permit to construct a dock in Pierce County. Like the present proposal, the property lay within an area designated as Rural Residential Shoreline Environment. The length of the proposed dock exceeded 100 feet and was secured by 14 steel pilings. In refusing to consider cumulative impact the Board reasoned:

> While it is true that cumulative impacts must be considered when reviewing shoreline *variances* and *conditional uses*, neither the Pierce County Code nor the SMA require consideration of cumulative impacts for *substantial development permit applications*. WAC 173-27-170 and 173-27-160. *Compare* WAC 173-27-150. Variances and conditional uses are exceptions that, by definition, do not conform to the authorized uses in a designated area. In grating permission fro such exceptions, is not only required by state regulation but entirely appropriate to consider the cumulative impact of additional requests for similar exceptions in the same area. *See Buechel v. Department of Ecology*, 125 Wn.2d 196, 210 (1994). These same important policy considerations, however, do not necessarily apply to requests for common accessory uses such as residential docks, particularly when, as in this case, they are anticipated uses in a designated area and pose no risk of environmental damage. (Emphasis in original.)

(Appendix F at Conclusion 9.) In reaching this decision, the Board distinguished an earlier decision, *Viafore v. Mason County*, SHB No. 99-022 (2000), that authorized a cumulative impact analysis for a SSDP in Mason County. The Board refused to follow *Viafore* in *Roller* because *Viafore* applied Mason County's Code, not Pierce County's.

Additionally, the Board's erroneous assumption that this case impacts a shoreline of statewide significance is relevant. In *Fledseth, supra,* the Board explained its application of a cumulative effects analysis:

> [The SMA] sets forth additional considerations for developments along shorelines of statewide significance in an order of preference. It is less likely, therefore, that cumulative effects will need to be considered for a substantial development on a shoreline that is not a shoreline of statewide significance. (Conclusion 15.)

The Board's utilization of cumulative impacts has no ascertainable standard. It is more appropriately left to the local jurisdiction or Ecology who can develop standards for when, if at all, cumulative impacts will be considered. To find otherwise leaves citizens to the ad hoc approach of the Board. As the Board itself acknowledged when refusing to consider cumulative impacts:

> To the extent residents . . . may be generally concerned about the aesthetics of dock proliferation . . ., their concerns are more appropriately addressed to those in a position to recommend or enact policy changes at the County level.

(Appendix F at Conclusion 9, fn 2.)

Even if the Court were to conclude that the Board may consider cumulative impacts, which it should not, there is no evidence to support a conclusion that the impact of the proposed joint-use dock or other docks will result in "clear risk of harmful impacts to high value habitat." (CP 46). Recognizing that there is no evidence, much less substantial evidence in the record to support a conclusion that the proposed 100-foot joint use dock will result in adverse environmental impacts that render it incompatible with the environment, the Board and appellants claim that this dock will necessarily lead to many more docks. Collectively, the un-quantified anticipated proliferation of docks will cumulatively cause adverse impacts to the environment. Once again, though there are many conclusory statements, there is little evidence, much less quantified evidence to support the May respondents' disaster fantasy.

The Board and appellants speculate that this dock, which, as a joint use dock already lessens the potential number of docks in the area from two to one, will necessarily lead to a proliferation of docks on this beach. No evidence is provided to support this speculation. The obvious anti-dock sentiment in this community would tend to prove the opposite. Thereafter, the Board speculates that, despite the substantial existing development (e.g. bulkheads, homes) and the substantial existing human activities (e.g. boating, skiing), the anticipated proliferation of docks will independently and quantifiably adversely impact the environment beyond

the current impacts. The speculative analysis (and absence of verifiable or quantifiable evidence) invoked by appellants and the Board should not be sufficient to overturn the Examiner's well-reasoned decision. More than the mere thought of cumulative impacts should be required.

The "cumulative impacts analysis" here is nothing more than camouflage for the Board's attempt to disregard Pierce County's stated policies and adopt policies of its own – policies that will prohibit the construction of docks on dock-free beaches, regardless of the applicable zoning designation. The Board's decision lacks support from the law and is not supported by the substantial evidence in the record.

CONCLUSION

Respondents request this Court to affirm that Order of the trial court reinstating the Hearing Examiner's approval of the requested SDP.

Dated this 12 day of November, 2008.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

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

APPENDIX A – PHOTOGRAPHS

A-1 Development in immediate area of proposed dock (Exhibit P-2, Slide 42)

A-2 Existing docks in vicinity of proposed projects (Exhibit P-2, Slide 36)

A-3 50-foot Fisher/Elam Dock (300 feet from project site) (Exhibit P-2, Slide 40, Exhibit R-88)

A-4 150-foot Kirschner Dock (1500 feet from project site) (Exhibit P-2, Slides 16 and 41)

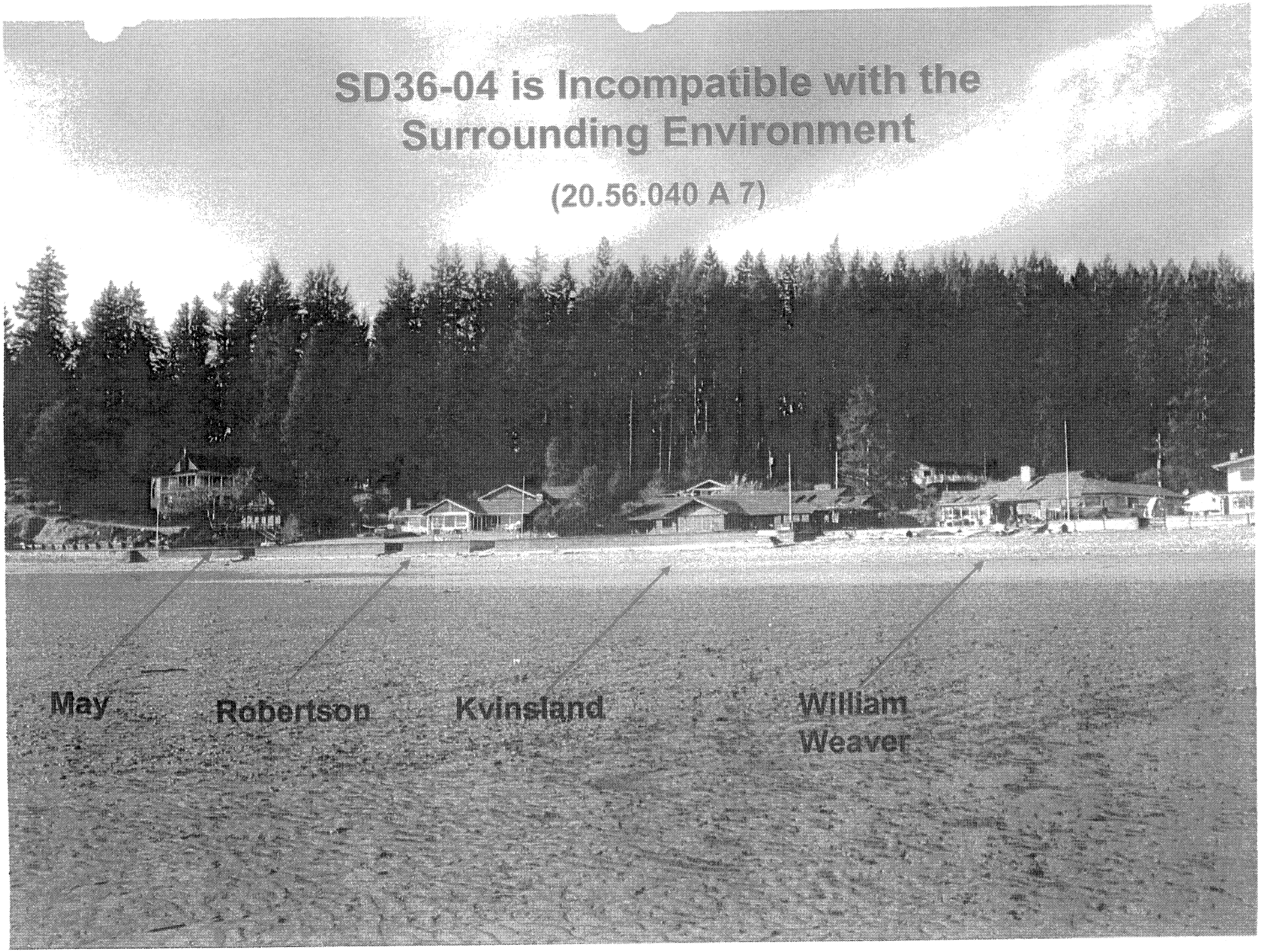
A-5 Current activities along shoreline of project site (Exhibit P-2, Slides 28, 31, Exhibit R-80)

APPENDIX A-1

Development in immediate area of proposed dock (Exhibit P-2, Slide 42)

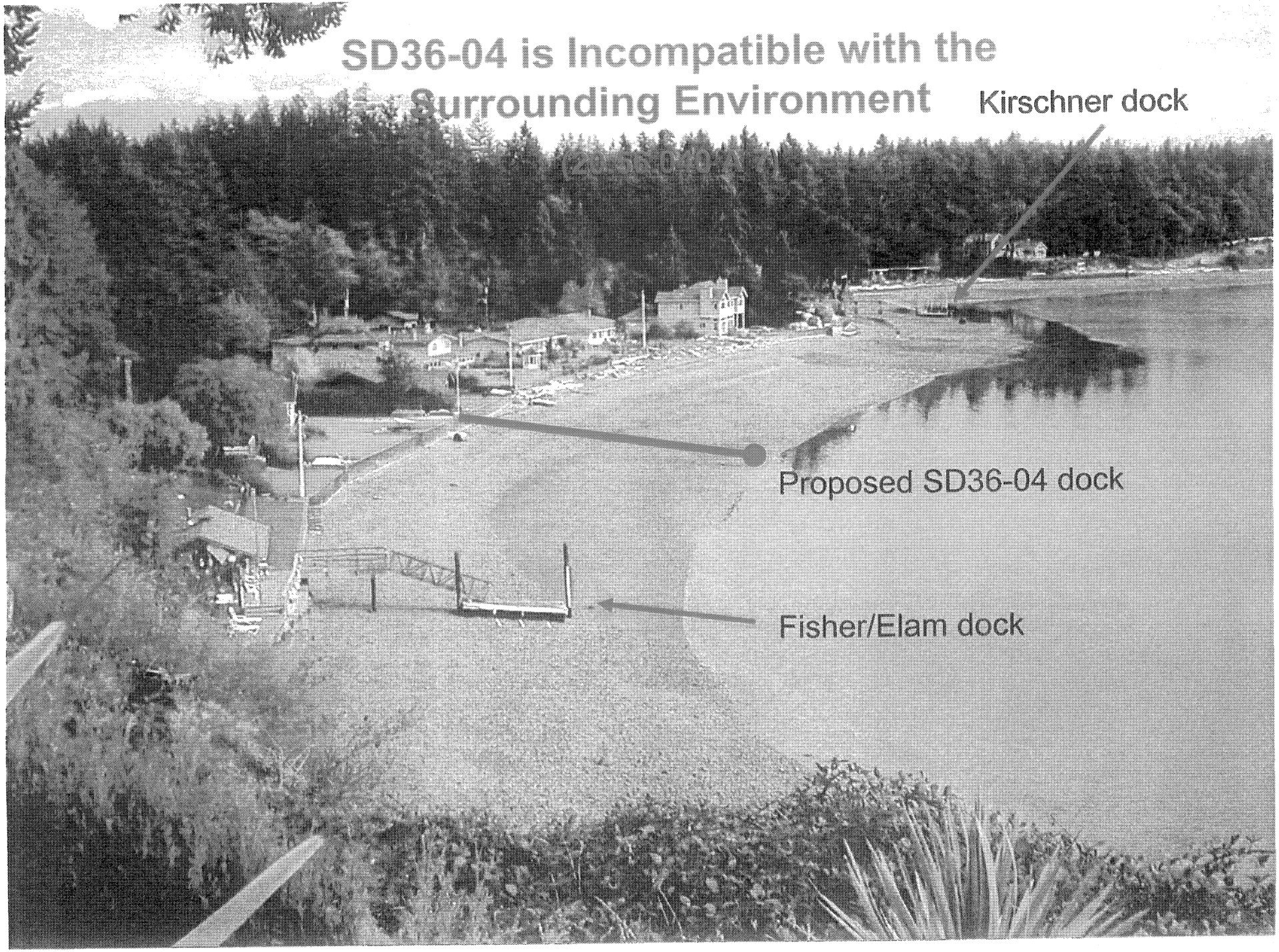
SD36-04 is Incompatible with the Surrounding Environment

(20.56.040 A 7)



APPENDIX A-2

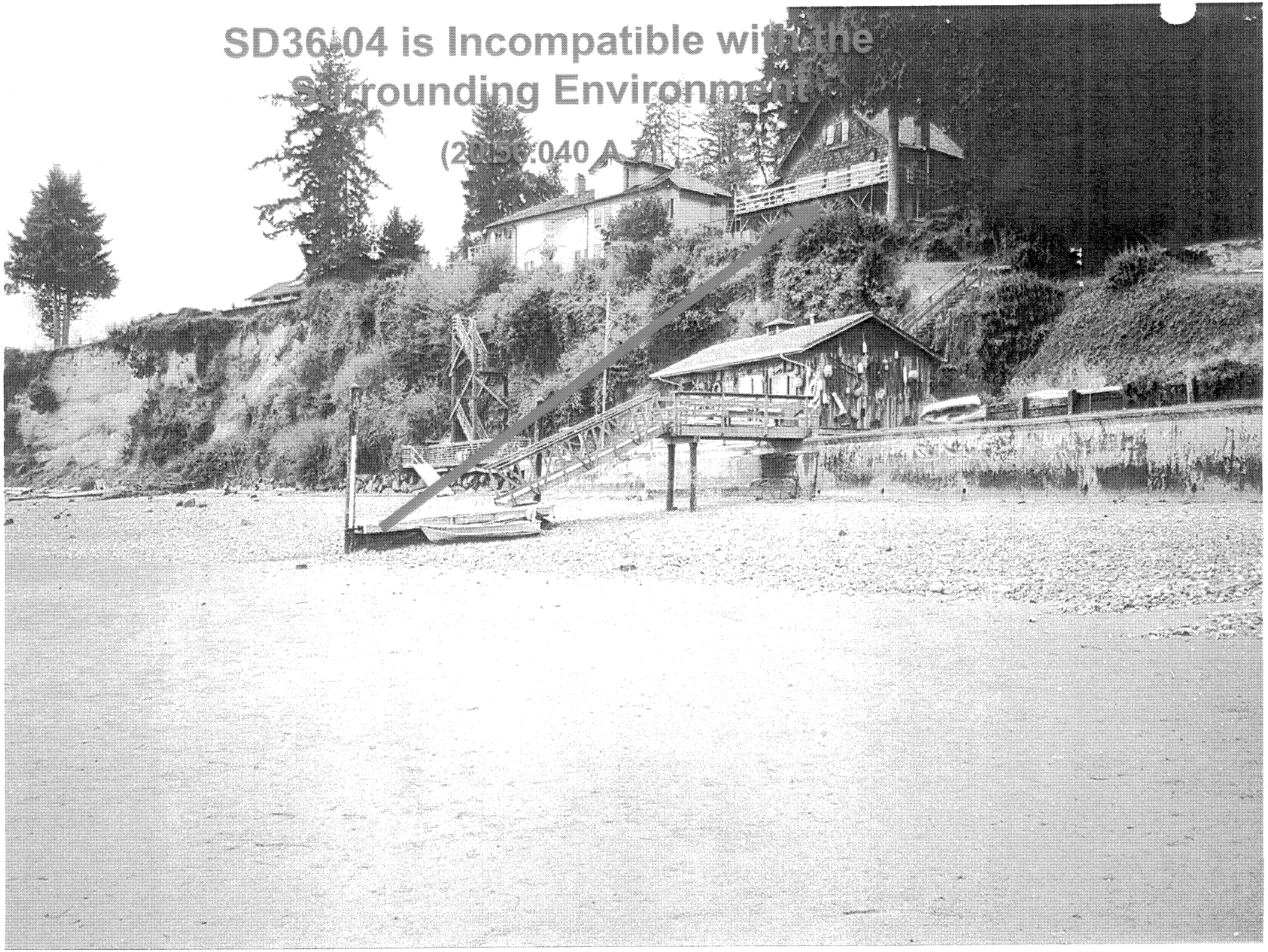
Existing docks in vicinity of proposed projects (Exhibit P-2, Slide 36)



34 (Exhibit P-2)

APPENDIX A-3

50-foot Fisher/Elam Dock (300 feet from project site)
(Exhibit P-2, Slide 40, Exhibit R-88)

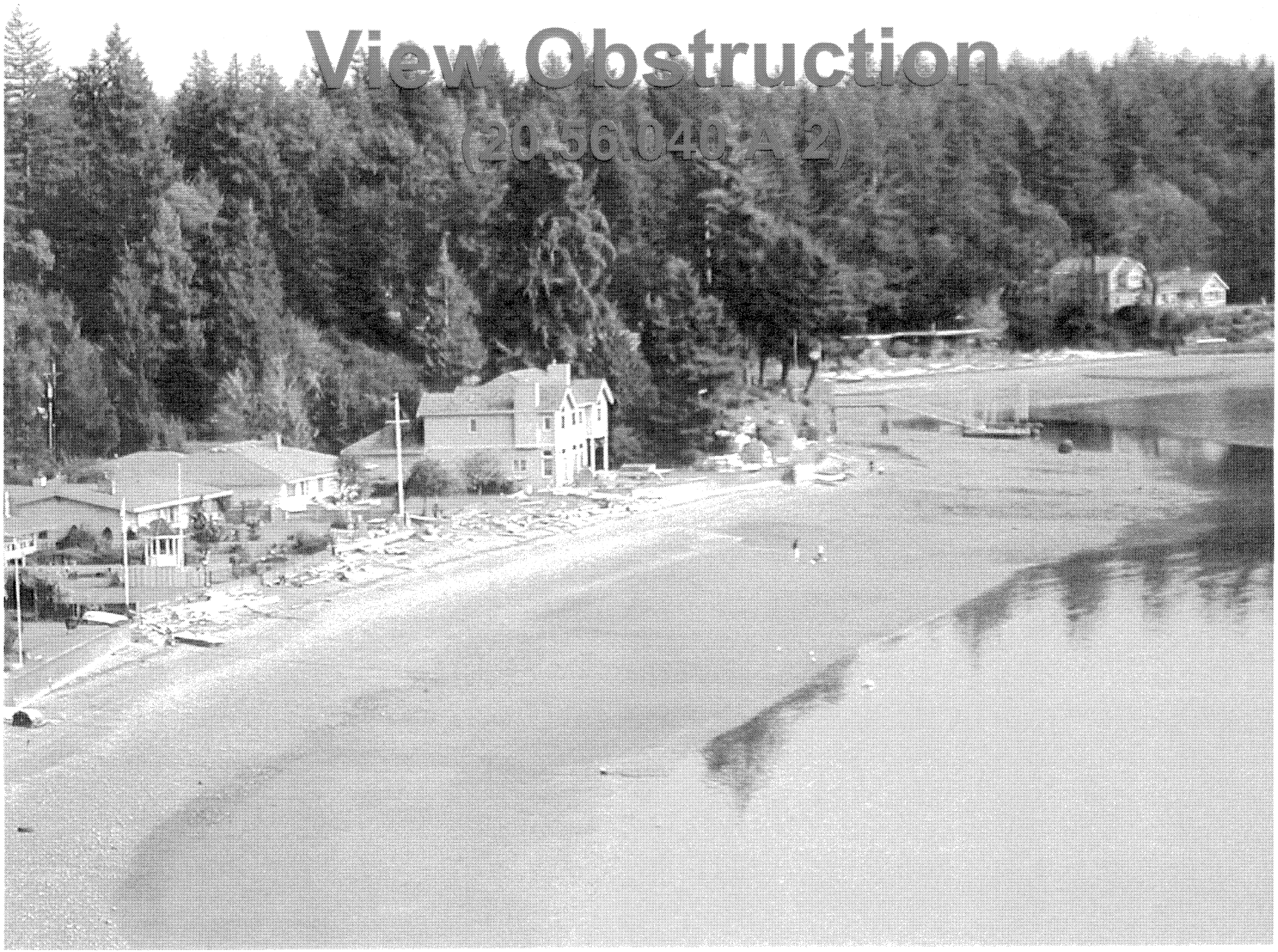

SD36-04 is Incompatible with the
Surrounding Environment
(20.56.040 A)

40 (Exhibit P-2)

Exhibit E-88

APPENDIX A-4

150-foot Kirschner Dock (1500 feet from project site)
(Exhibit P-2, Slides 16 and 41)

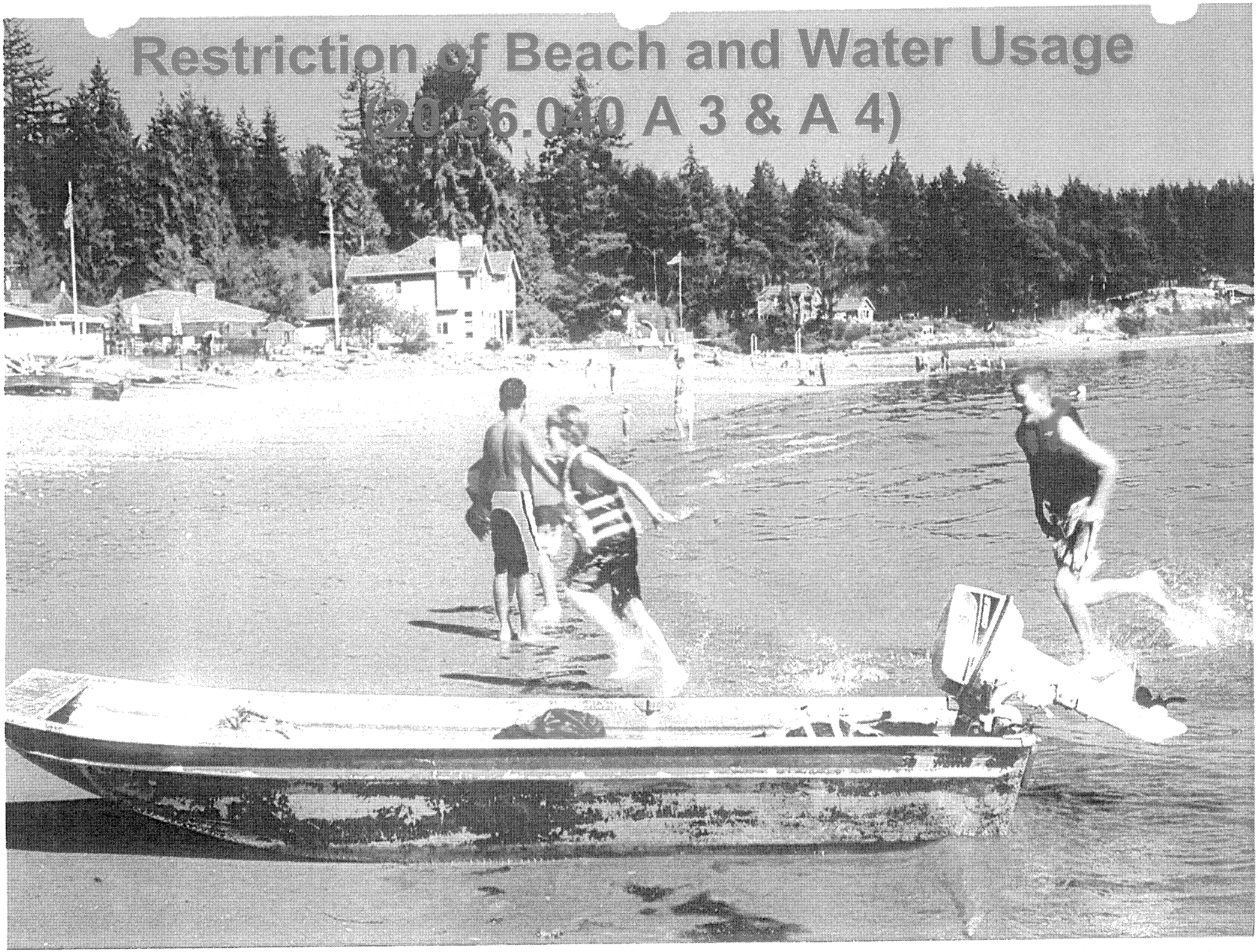


14 (Exhibit P-2)

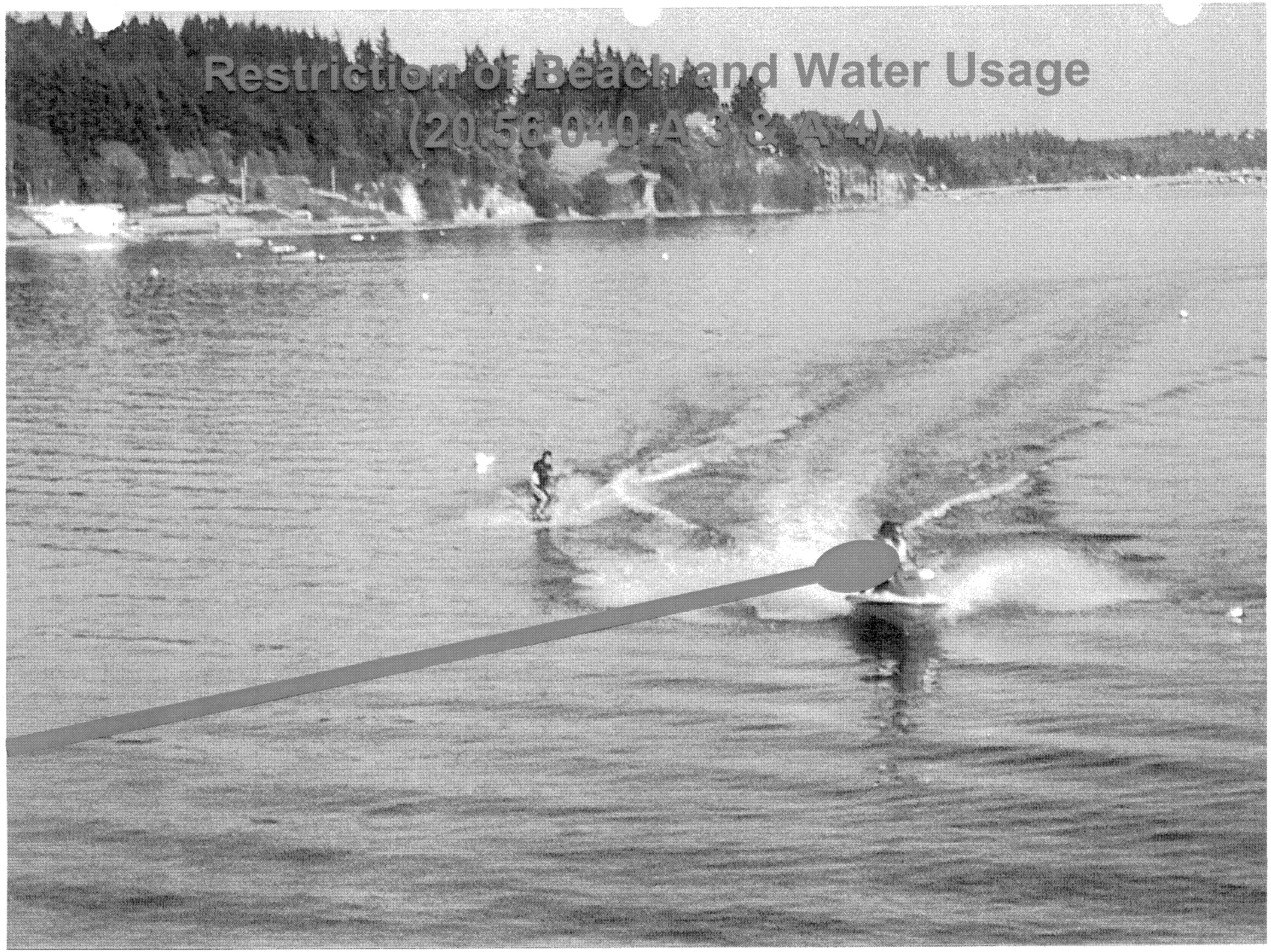
41 (Exhibit P-2)

APPENDIX A-5

Current activities along shoreline of project site
(Exhibit P-2, Slides 28, 31, Exhibit R-80)



28 (Exhibit P-2)



31 (Exhibit P-2)

exhibit P -30

APPENDIX B – LOCAL POLCIES AND REGULATIONS

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B-2 Excerpts, Gig Harbor Peninsula Community Plan (Exhibit R-108)

B-3 Excerpts, Pierce County Shoreline Management Use Regulations (Exhibit R-100)

APPENDIX B-1

Excerpts, Pierce County Shoreline Master Program (Exhibit R-100)

SHORELINE
MASTER PROGRAM
FOR PIERCE COUNTY

BOARD OF PIERCE COUNTY COMMISSIONERS
ADOPTED: MARCH 4, 1974

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DESCRIPTION OF PIERCE COUNTY SHORELINE MASTER PROGRAM

The Shoreline Management Act requires Pierce County to develop a Master Program for the future use of its shorelines. By its definition, a master program is general, comprehensive, and long-range in order to be applicable to the whole area for a reasonable length of time under changing conditions.

"General" means that the policies, proposals and guidelines are not directed towards any specific site.

"Comprehensive" means that the program is all inclusive toward land and water uses, their impact on the environment and logical estimates of future growth. It also means that the program should recognize plans and programs of other governmental units, adjacent jurisdictions and private developers.

"Long-range" means that the program is to be directed at least 20 to 30 years in the future, look beyond immediate issues, and follow creative objectives rather than a simple projection of current trends and conditions.

The policies of the Shoreline Management Act and all applicable goals, policies and use regulations of this Pierce County Master Program shall be considered in ruling upon applications for Substantial Development permits.

The Master Program consists of the following:

1.) Goal Statements
2.) Supporting Policies
3.) Environment Designations
4.) Use Regulations

Table number 2 which follows identifies these tasks more fully and groups them into phases.

TABLE 2 - SHORELINE MASTER PROGRAM - PHASES

Phase I

1. Develop area-wide goals which relate to the following plan elements: Economic development, public access, circulation, recreation, shoreline use, conservation, and history/culture. Goals represent the ideal state a community seeks to attain and are usually set higher than the expected achievement.

2. Develop policies to clarify and amplify the goals. Policies are action oriented directives selected to guide activities towards realization of the desired use of county shorelines.

Phase II

1. Study the shoreline Environments (Natural, Conservancy, Rural, Rural Residential and Urban) and apply them to all Pierce County shorelines. Placement will reflect intent for future uses rather than the status quo.

2. Develop regulations for specific land and water uses within the environments mentioned above. The Use Regulations will deal with location and design criteria for specific development activities, and are intended to be more precise than the policy statements.

Phase III

1. Conduct detailed studies concerning plan elements, their implementation, and integration with related federal, state, and Pierce County policies and plans. This is intended to be a continuous, ongoing procedure, with no time frame.

GOAL AND POLICY STATEMENTS

Introduction

The Master Program as defined by the Act is a program that includes planning and regulation. The function of the Master Program is to develop a set of general and basic goals then to formulate more specific policies and lastly to implement these planning efforts by developing regulations which are a direct reflection of the goals and policies.

The goals and policy statements include the following aspects of the Master Program:

1. Familiarization of the Citizens Advisory Committee to the various aspects of the Shoreline Management Act by virtue of their involvement in goal and policy formulation.

2. Determining the locations and boundaries of the five shoreline environments.

3. Determining use regulations for shoreline activities.

4. Decision making on applications for substantial developments, variances, and conditional uses.

5. Coordination with other planning management and regulatory efforts both private and public.

6. Determination of future courses of study and research.

7. Coordination with the State Planning effort and similar efforts by adjoining jurisdictions.

8. A framework for the Master Program and other shoreline related problems and issues.

The goals are written around eight general land and water use elements. Also included in this section is a Preamble which states the basic goal of the citizens of Pierce County.

The plan elements are:

A. Economic Development
B. Public Access
C. Circulation
D. Recreation
E. Shoreline Use
F. Conservation
G. Historical/Cultural

The policy statements are intended to be refinements of the goals. (As stated above). The policy statements have been grouped around "uses" or "activities" that occur on or near shorelines or in the waters themselves. Each group of policy statements reflects the goals that pertain to a particular use or activity.

"Pierce County shall consider the goals, policies and use regulations of this Shoreline Master Program in all land use management actions regarding the use or development of adjacent uplands and non-designated shorelines within its jurisdiction in order to achieve the consistency required by the Shoreline Management Act."

GOAL STATEMENTS FOR LAND AND WATER USE ELEMENTS

It shall be the general goal of Pierce County to preserve and enhance the environment by regulating the conservation, recreation, circulation, public access, historical/cultural and economic development elements on shorelines and related surrounding areas to the end that they shall return to the community, state, private property owners and public-at-large the greatest good compatible with the least possible disturbance.

Economic Development Element

For the location and design of industries, transportation facilities, port facilities, tourist facilities, commercial and other developments that are particularly dependent on shoreland locations.

Goal: Permit only that shoreline economic development which will enhance the quality of life with maximum preservation of the natural environment.

Public Access Elements

For assessing the need for providing public access to shoreline areas.

Goal: Assure diversified access for the public to the shorelines of the county, widely distributed to avoid concentration of user pressure and compatible with retention of natural features; discourage those intrusions that will endanger life, property, or have adverse effects on fragile environments. Preserve and enhance views of the shoreline and water from upland areas.

Circulation Element

For assessing the location and extent of existing and proposed major thoroughfares, transportation routes, terminals and other public facilities and correlating those facilities with the shoreline use elements.

Goal: Encourage circulation systems that will satisfy public and economic needs while protecting the rights of affected property owners and the natural environment, and exist in harmony with the land use and shoreline planning.

Recreational Element

For the preservation and expansion of recreational opportunities through programs of acquisition, development and various means of less-than-fee acquisition.

Goal: Assure diverse, convenient and adequate water related recreational opportunities along the shorelines of the county with maximum preservation of the natural environment; encourage acquisition of additional shoreline property for recreational use.

Shoreline Use Element

For considering: (1) The pattern of distribution and location requirements of land uses on shorelines and adjacent areas, including, but not limited to, housing, commerce, industry, transportation, public buildings and utilities, agriculture, education and natural resources. (2) The pattern of distribution and location requirements of water uses including, but not limited to, aquaculture, recreation and transportation.

Goal: To promote the best possible pattern of land and water uses, to assure that individual uses are placed on sites appropriate to such uses, to assure that lands and waters of specific natures are available to uses which need such special types of lands and waters, and to generally devise a pattern beneficial to the natural and human environments on designated shorelines and adjacent lands including shorelines upstream from designated shorelines.

Conservation Element

For the preservation of the natural shoreline resources, considering such characteristics as scenic vistas, parkways, estuarine areas for fish and wildlife protection, beaches and other valuable natural or aesthetic features.

Goal: To insure continuous sound management in the preservation of unique, fragile, and scenic elements, and of non-renewable natural resources; encourage the best management practices for the continued utilization of renewable resources of the shorelines.

Historical/Cultural Element

For protection and restoration of buildings, sites and areas having historic, cultural, educational or scientific values.

Goal: Encourage the identification, protection, preservation and restoration of shoreline sites or structures having historical, cultural, educational, or scientific value with maximum preservation of the natural environment.

PIERCE COUNTY SHORELINE ENVIRONMENT DESIGNATIONS

Intent

In order to more effectively plan and manage shoreline resources through the development of the Shoreline Master Program, a system of categorizing shoreline areas through a classification to be known as "Environments" has been utilized. This system is being used as a mechanism for applying appropriate land use policies and regulations to distinctively different shoreline areas.

The application of this system is not intended to be a substitute for but rather a supplement to local planning and land use regulations. These environments will hopefully guide the use of all County shoreline areas by planning for development and development patterns which enhance the desired character of the specific environments rather than overtly precluding the presence of certain uses in designated environments. The "Environment" system will attempt to insure that different shoreline uses or types of development are designed and located so as to minimize conflicts between the proposed use and stated policies of the pertinent environment classification. It is a system that encourages uses which enhance the character of the environment and at the same time place reasonable standards and restrictions on developments which might disrupt the character of the environment.

The placement of an environment designation on a specific area or site is based on the existing development pattern, the biophysical limitations and capabilities of the shoreline area being considered and the Goals and Aspirations of the Citizens.

The following pages include a detailed description of each environment. This includes the definition and purpose, general regulations and policies, and preferred uses appropriate for each environment. Following this description is a list of all legal boundaries for each environment designation for all shorelines within Pierce County that are under Shoreline Management jurisdiction. A map of the Pierce County Shoreline Designations has also been included.

THE URBAN ENVIRONMENT

A. Definition and Purpose

The Urban Environment is an area of high intensity land use including residential, commercial and industrial development. It is an environment designation that is particularly suitable for those areas which are presently subjected to intensive use pressure as well as those areas planned to accommodate urban expansion. The objective of assigning an area to an Urban Environment is to ensure optimum utilization of shorelines occurring within areas which are either presently urbanized or projected to be urbanized. This should be done by identifying areas physically suited to intensive use providing for intensive public use and by managing development so that it enhances and maintains the shorelines for a variety of urban uses.

B. General Regulations and Policies

The following general regulations and policies should apply to all shoreline areas classified as belonging in an Urban Environment:

1. Shorelines planned for future urban expansion should present few biophysical limitations for urban activities.

2. Because shorelines suitable for urban uses are a limited resource, emphasis should be given to development within already developed areas and particularly to water-dependent industrial and commercial uses requiring frontage on navigable waters.

3. Priority should be given to urban developments for public visual and physical access to water in the urban environment.

4. Planning for the acquisition of urban land for permanent public access to the water in the urban environment should be encouraged.

5. To enhance waterfront and ensure maximum public use, industrial and commercial facilities should be designed to permit pedestrian waterfront activities. When practical, access points should be linked to non-motorized transportation routes.

6. Designation for future urban expansion should include provisions for maintaining those features unique to urban shoreline areas.

RURAL-RESIDENTIAL ENVIRONMENT

A. Definition and Purpose

The Rural-Residential Environment is an area of medium intensity land use: that is, having use types and densities which do not imply large-scale alterations to the natural environment it is an area that will serve as a buffer between the highly intensive development of the urban environment and the non-intensive development of rural environment. It is an Environment Designation that will allow medium intensity residential, commercial and agriculture development. The purpose of assigning an area to a Rural-Residential Environment is to allow for a natural transitional area between the sometimes incompatible intensive land uses of urban areas and the agricultural uses, recreational uses, and open space found in the rural environment.

B. General Regulations and Policies

The following general regulations and policies should apply to all shoreline areas classified in a Rural-Residential Environment:

1. Existing land use patterns that reflect a suburban environment and also by virtue of existing development do not have the potential for supporting intensive agricultural or recreational activities should be designated as a Rural-Residential Environment if urban expansion is not anticipated.

2. Medium intensity residential uses should be encouraged in the Rural-Residential Environment in order to relieve pressure from urbanized areas and provide living area for those wishing to enjoy a less densely developed shoreline.

3. Preferred Uses

Single Family residence

Neighborhood commercial uses such as small service

THE RURAL ENVIRONMENT

A. Definition and Purpose

The Rural Environment is intended for those areas which are presently used for intensive agricultural and recreation purposes or for those areas having the potential of supporting intensive agricultural and recreational development. The Rural Environment is intended to protect agricultural land from urban expansion, restrict intensive development along undeveloped shorelines, and encourage the preservation of open spaces and opportunities for recreational uses compatible with agricultural activities.

B. General Regulations and Policies

The following general regulations and policies should apply to all shorelines classified in a Rural Environment:

1. Prime agricultural land should be maintained for present and future agricultural needs.

2. New developments in a Rural Environment should reflect the character of the surrounding area by limiting residential density, providing permanent open space and by maintaining adequate building setbacks from the water.

C. Preferred Uses

Intensive agricultural uses
Intensive recreational uses
Low density residential uses

THE CONSERVANCY ENVIRONMENT

A. Definition and Purpose

The Conservancy Environment is designed to protect, conserve and manage existing natural resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization. This environment should also include areas of steep slopes which present potential erosion and slide hazards, areas prone to flooding, and areas which cannot adequately deal with sewage disposal.

B. General Regulations and Policies

The following general regulations and policies should apply to all shorelines classified as in a Conservancy Environment:

1. Areas should maintain their existing character.
2. Developments which do not consume the natural physical resource base should be encouraged.
3. Substantial and nonsubstantial developments which do not lead to significant alterations of the existing natural character of an area should be encouraged.

C. Preferred Uses

Outdoor recreation activities
Commercial timber harvesting
Passive agricultural uses (pasture and range lands)

THE NATURAL ENVIRONMENT

A. Definition and Purpose

The Natural Environment classification is intended to preserve those dynamic natural systems in a manner relatively free of human influence and to discourage or prohibit those activities which might alter the natural characteristics which make these shoreline areas unique and valuable.

The designation of an area as a Natural Environment should be based on one or more of the following criteria:

1. There should be present some unique natural or cultural feature considered valuable in its natural or original condition.

2. The natural shoreline is relatively intolerant of intensive human use.

3. The shoreline is valuable as a historical, cultural, scientific or educational site by virtue of its natural unaltered original condition.

4. The site is unaltered and graphically depicts prevailing local physical systems such as feeder cliffs and spits.

5. The shoreline area, which by virtue of strongly expressed local and/or statewide need, should be preserved in its original condition.

B. General Regulations and Policies

The following general regulations and policies should apply in all shoreline areas classified as Natural Environments:

1. All developments which would potentially degrade or significantly alter the natural character should be regulated.

2. The main emphasis of regulation in these areas should be on the preservation of natural systems and resources which will not allow man to consider any type of development which will effect the natural condition of the area.

3. Physical alterations should only be considered when they serve to protect a significant, unique or highly valued feature which might otherwise be destroyed.

C. Natural Resource Systems to be considered

The following is a partial list of natural or cultural features which might be preserved through inclusion in a Natural Environment:

Spits
Bars
Lagoons
Typical river segments
High bank shorelines
Low bank shorelines
Sandy beaches
Wildlife habitats
Coves
Lakes
Marshlands
Swamps
Estuaries
Educational features
Scientific features
Historical features

USE ACTIVITY POLICIES

Shoreline use activities are specific classifications of the various types of activities which can be anticipated to occupy shoreline locations.

The Department of Ecology final guidelines for Master Program development established twenty-one use activities and set minimum guidelines for managing each activity. In addition to this the Citizens' Advisory Committee added four use activities which they felt were needed in order to effectively manage the shoreline areas of Pierce County.

Use activity policies are a means of guiding types, locations, designs, and densities of the future shoreline developments. These general policies are implemented by the use regulations which are included in Phase II of the Master Program.

The policies and regulations of each use activity have been developed on the premise that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline environment and adjoining properties.

Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the policies and regulations of the appropriate use activities.

(n) Efforts should be made to locate roads in such a manner that does not limit access to the shoreline.

(o) Prior to the site preparation or construction of new roads or railroads, near the shoreline, of any type, an environmental impact study should be made in accordance with Washington State Environmental Policy Act of 1971.

(p) New, efficient, pollution-free methods of transportation which have fewer environmental effects than present transportation methods should be encouraged.

Piers:

(a) Piers in conjunction with marina development in appropriate areas should be allowed.

(b) Piers in conjunction with recreational development in appropriate areas should be allowed. Consideration should be given to size and intensity of uses in relation to adjacent shoreline uses.

(c) Piers for commercial facilities should be discouraged unless they are an integral part of the commercial operation.

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

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

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

(g) Piers should not be built for the purpose of storing vehicles and/or boat trailers.

(h) Piers and floating docks should be encouraged to be built perpendicular to the shoreline rather than along it.

(i) Encourage pier construction to include larger spans on fewer pilings rather than smaller spans and more pilings. Piers in marine waters may provide habitat suitable for predatory fish with consequent detriment to young salmonids.

(j) When plastics or other non-degradable materials are used in pier construction precautions should be taken to insure their containment.

(k) Encourage the formulation and enforcement of pier maintenance regulations. Encourage regulations governing removal of piers and restoration of pier sites when no longer in use.

(l) The use of floating docks should be encouraged in those areas where scenic values are high and where conflicts with recreational boaters and fishermen will not be created.

(m) Open-pile piers should be encouraged where shore trolling is important, where there is significant littoral drift and where scenic values will not be impaired.

(n) Priority should be given to the use of community piers and docks in all new major waterfront subdivisions. In general, encouragement should be given to the cooperative use of piers and docks.

(o) Areas having a significant near shore fishery should not be used for floating docks.

Educational & Archeological Areas & Historic Sites:

(a) Archeological areas, ancient villages, military forts, old settlers homes, ghost towns, historic trails, kitchen middens, and historical cemeteries are nonrenewable resources and many are in danger of being lost through present day changes in land-use and urbanization. Because of their rarity and the educational link they provide to our past, these locations should be preserved.

(b) Professional archeologists should be consulted to identify and maintain an inventory of areas containing potentially valuable archeological data, and to establish procedures for salvaging the data.

(c) Where possible, sites should be permanently preserved for scientific study, education, and public observation. In areas known to contain archeological data, local governments should attach a special condition to a shoreline permit providing for a site inspection and evaluation by an archeologist to ensure that possible archeological data are properly salvaged. Such a condition might also require approval by local government before work can resume on the project following such an examination.

(d) Shoreline permits, in general, should contain special provisions which require developers to notify local governments if any possible archeological data are uncovered during excavations.

(e) Consideration should be given to the National Historic Preservation Act of 1966 and chapter 43.51 RCW provide for the protection, rehabilitation, restoration and reconstruction of districts, sites, buildings, structures and objects significant in American and Washington history, architecture, archeology or culture.

APPENDIX B-2

Excerpts, Gig Harbor Peninsula Community Plan (Exhibit R-108)

INTRODUCTION

THE GIG HARBOR PENINSULA

Overview of the Plan Area

The Gig Harbor Peninsula Community Plan area is located in northwest Pierce County, Washington. The Gig Harbor Peninsula and Fox Island encompass approximately 58 square miles of urban, suburban, and rural lands. The Gig Harbor Peninsula is the southeastern most extremity of the vastly larger Kitsap Peninsula. Puget Sound marine waters surround the Peninsula on three sides (Henderson Bay, Carr Inlet, Hale Passage, the Tacoma Narrows, and Colvos Passage). The plan area is abutting Kitsap County on the north, connected on the west to the Key Peninsula by the Purdy sand spit and bridge, and connected to the remainder of the mainland portion of Pierce County and the City of Tacoma via the Narrows Bridge. The 1996 estimated population of the plan area is 30,500 persons, including 6,350 persons within the Gig Harbor city limits. In addition to the City of Gig Harbor, several small-unincorporated communities exist throughout the plan area.

The Peninsula is essentially bisected from the southeast to the northwest by State Route 16 (SR-16). The highway is the major link between Tacoma, mainland Pierce County, and the rest of the Central Puget Sound region, Bremerton, Port Orchard, the remainder of the Kitsap Peninsula, the Olympic Peninsula, and Hood Canal. State Route 302 (SR-302) connects the plan area with the Key Peninsula area of Pierce County, the south end of the Kitsap Peninsula, Hood Canal, and the Olympic Peninsula.

The community plan provides a framework for consistent land use standards in the UGA for both Pierce County and the City of Gig Harbor. Directing new residential subdivisions as well as commercial and industrial development into areas that are served by urban services (such as sewers) provides efficient economies of scale which promote cost effective public facilities. These public facilities include sidewalks, parks, and open space that the community desires. This growth management planning concept also eliminates urban development patterns from sprawling into the rural area, allowing the rural area to retain the low density, pastoral, and forested characteristics that the community favors.

Urban Growth Area

City of Gig Harbor

The City of Gig Harbor is located in the east-central portion of the plan area adjacent to Gig Harbor Bay. The city is surrounded by its 3,417 acre Urban Growth Area (UGA). The City of Gig Harbor is the historic focus of civic and commercial activity in the plan area and is the location of moderate density residential neighborhoods. The City is oriented around Gig Harbor Bay and its commercial fishing and pleasure boat facilities.

Purdy
Purdy is located at the north end of Henderson Bay, adjacent to Burley Lagoon at the intersection of SR-16 and SR-302. Along with residential uses, several gas stations, retail businesses, Peninsula Light Company, and Peninsula High School are located in this area. The Purdy Bridge crosses the southern portion of Burley Lagoon and connects the Gig Harbor Peninsula with the Key Peninsula at the Purdy sand spit.

Canterwood
Canterwood is a planned residential, golf course community located immediately north of the city limits of Gig Harbor and east of SR-16. The Canterwood development is adjacent to the future planned development referred to as Gig Harbor North (Gig Harbor North is located entirely within the city of Gig Harbor). Canterwood is primarily developed with detached single-family residential homes with a few multi-family townhouses.

Swede Hill
Swede Hill refers to an area located west of SR-16 in the vicinity of Bujacich Drive NW. The neighborhood is dominated by moderate single-family residential neighborhoods with quite a number of single-family homes on lots that average from one to five acres in size. There are also a significant number of large vacant parcels that have historically been used for agriculture or forestry. Several commercial uses are located along Burnham Drive near SR-16. Fire District Number 5 headquarters and the Washington State Correction Center for women are located in the Swede Hill area.

Donkey Creek Corridor
Donkey Creek (also know as North Creek) flows into the northwest corner of Gig Harbor Bay in the vicinity of Harborview Drive and Burnham Drive. The Donkey Creek corridor follows Burnham Drive northwest towards SR-16 at the Swede Hill interchange. The city limits of Gig Harbor and the future development of Gig Harbor North are located northeast of the Donkey Creek corridor. Several business are located in the area, however because the corridor is dominated by the steep slopes and wetlands along the ravine formed by Donkey Creek, the land use pattern is dominated with single-family dwellings and large vacant parcels.

East Gig Harbor
The east shoreline of Gig Harbor Bay is referred to as East Gig Harbor. This residential neighborhood is dominated with large homes with views of the Harbor. Many of the parcels adjacent to the shoreline are one quarter acre or smaller while the upland areas contain several large lots that are undeveloped.

West Gig Harbor
The neighborhood located outside the city limits of Gig Harbor, west of SR-16 and south of Bujacich Drive is referred to as West Gig Harbor. This area of the UGA contains the vacant property that has been designated as an Employment Center.

Reid Drive Neighborhood
The Reid Drive neighborhood is located south and east of the city limits of Gig Harbor, between the marine bluffs of the Tacoma Narrows and SR-16. The neighborhood is predominantly

improved with moderate density, detached single-family neighborhoods, several of which contain the greatest density of homes in the plan area with densities near six dwelling units per net acre. The 62-unit Harbor Heights apartments are one of the few multi-family residential developments in the plan area.

Rural Area

The rural area of the Gig Harbor Peninsula includes all property located outside of the incorporated city limits of Gig Harbor and outside of the UGA surrounding the city. The rural area currently includes approximately 23,146 acres. The rural area is developed primarily with single-family dwellings at low densities with a number of moderate density, single-family subdivisions. There are also a limited number of civic, commercial, and industrial uses located throughout the rural area on the Peninsula. The Tacoma Narrows Airport is located in a rural area near Point Fosdick. A significant amount of vacant and undeveloped land, pasture lands, and forestland remain in the rural area.

Crescent Valley

Crescent Valley is mostly undeveloped; however, some small farms and residences are located adjacent to Crescent Valley Drive and along the shoreline of Crescent Lake. The Crescent Valley area contains the lowest residential densities in the plan area. The largest undeveloped parcels in the plan area are located directly east of Crescent Valley between Crescent Valley Drive and Hallstrom Drive.

Rosedale

A small rural business center with a store, church, and community park is located near the intersection of Rosedale Street and Ray Nash Drive. Large tracts of forest and pastureland dominate the Rosedale area. Several moderate density single-family neighborhoods are found in the area and the shorelines of Lay Inlet and Sylvia Lake are improved with fairly high density single-family dwellings that have mostly been converted from summer cabins to permanent year-round homes. Raft Island is located in Henderson Bay to the west of Rosedale and is developed as a moderate density single-family neighborhood.

Ray Nash Valley

Ray Nash Valley is a small rural valley south of Rosedale between the Artondale area and Henderson Bay. Land uses in the area generally include small farms and pasturelands as well as single-family homes on 5 to 10-acre lots. Kopachuck State Park is located directly to the west of Ray Nash Valley and extends to the shoreline of Henderson Bay.

Artondale

Artondale is generally considered the area northwest of Wollochet Bay, south of Rosedale and east of Arletta. There are several large undeveloped lots in the Artondale area ranging from 20 to approximately 100 acres. Some of these large parcels contain mature stands of timber. There are also a number of moderate density single-family neighborhoods, most notably in the vicinity of 40th Street and 70th Avenue. The Gig Harbor Golf and Country Club is located in Artondale.

Arletta

Arletta is located north of Hale Passage, directly east of Horsehead Bay. There is a community center and small grocery store at the intersection of 36th Street and Ray Nash Drive. Large lots, single-family homes, pastureland, and forestland characterize land uses at Arletta. Development along the shoreline of Horsehead Bay and Hale Passage consists of smaller lots with detached single-family homes. Similar to the development pattern in the Rosedale neighborhood, many of the waterfront cabins have been demolished or remodeled and are now used all year as permanent homes.

Cromwell and Warren

The Cromwell and Warren neighborhoods extend along Hale Passage from Wollochet Bay to Shaw Cove. Fairly steep marine bluffs characterize the shoreline of Cromwell, while the shoreline in the vicinity of Warren Drive is considered low to medium bank waterfront. Upland from the shoreline, both Cromwell and Warren have large forested tracts and pasturelands. Along Hale Passage, many of the original waterfront cabins have been replaced by permanent homes. The bridge that connects Fox Island to the Gig Harbor Peninsula is located in Warren.

Point Fosdick

The Point Fosdick area consists of the southern end of the Gig Harbor Peninsula between Wollochet Bay and the Tacoma Narrows. The shoreline in the Point Fosdick area is primarily high bank, marine bluffs with low bank properties extending toward Wollochet Bay. The largest landholder in the area is the City of Tacoma which owns and operates the Tacoma Narrows Airport. The Tacoma Narrows Airport is classified as a general aviation airport. Several businesses, including a convenience store and a gas station, are located near the intersection of Stone Drive and Point Fosdick Drive. The area has been developed with a number of moderate density single-family neighborhoods, most notably west of the Tacoma Narrows Airport and near the Tacoma Narrows Bridge. Pierce County owns a waterfront park along the shoreline of the Tacoma Narrows.

History of the Gig Harbor Peninsula and Fox Island

Native American Settlement

Native Americans settled in and utilized the Gig Harbor Peninsula and Fox Island for thousands of years before Europeans arrived. The tribal groups that inhabited the Gig Harbor Peninsula vicinity were mainly of Puyallup, Nisqually, and Steilacoom groups. Native Americans had permanent settlements in villages along waterways and had seasonal homes in places such as Fox Island for the purposes of fishing and food gathering. Known village sites exist at the north end of present-day Gig Harbor near Donkey or Crescent Creek, Wollochet Bay and Burley Lagoon. Some Native Americans continued to live in the area selling or trading fish and woven baskets to European settlers well into the 1900s. Native Americans continue to enjoy fishing and clamming rights in their usual and accustomed fishing grounds in waters surrounding the Peninsula and Fox Island.

NATURAL ENVIRONMENT AND OPEN SPACE ELEMENT

Introduction

The Natural Environment and Open Space Element addresses the protection, conservation, preservation, and restoration of the natural resources on the Gig Harbor Peninsula including shorelines, water resources, vegetation, fish and wildlife habitat, and other critical areas. Protection and preservation of these critical areas, environmentally sensitive areas, and sustainable natural resources are key components of the community's vision. A number of environmental protection strategies are identified within this element including: Establishing land use practices which protect critical areas, preserving the environment in its natural state to the greatest extent possible, maintaining or improving the water resources, encouraging forest management which promotes sustainable harvests, limiting pesticide use, and developing educational and community outreach programs which further the awareness of environmental issues.

Description of Current Conditions

In the past 50 years, the Gig Harbor Peninsula has experienced a high level of urban and suburban growth. With that growth has come a slow degradation of the natural environment and the fish and wildlife species that are supported by the native vegetation which constitutes habitat areas. Generally, there has been a decrease in the water quality of the streams, lakes, and wetlands in the plan area. The amount of native vegetation, open space, and populations and diversity in fish and wildlife species within the plan area has also decreased as development has occurred. However, several pockets of good quality habitat areas remain, many of which have been recently targeted for acquisition and restoration efforts. Understanding the condition of each component that makes up the natural environment is important to understanding the function of the whole ecosystem, and therefore, each particular resource warrants a more detailed discussion.

Shorelines

The Washington State Shoreline Management Act (SMA) provides for the management of water bodies identified as "shorelines of the state." In the Gig Harbor Peninsula area, these include Crescent Lake and all of the saltwater shorelines that surround the community plan area. Areas under jurisdiction of the SMA include these water bodies, all lands within 200 feet of their ordinary high water mark, and their associated wetlands and floodplains.

The Pierce County Shoreline Master Program (SMP), adopted by Pierce County under the SMA, includes five Shoreline Environments – Natural, Conservancy, Rural, Rural-Residential, and Urban. All shorelines are given a Shoreline Environment designation that reflects current conditions and identifies the type and intensity of allowed development.

The marine waters of Puget Sound that surround the Gig Harbor Peninsula and Fox Island, including Colvos Passage, the Tacoma Narrows, Hales Passage, Carr Inlet, Henderson Bay, and

the many other minor bays and inlets, are all regulated shorelines of the state. The majority of the saltwater shorelines surrounding the Gig Harbor Peninsula is either designated as a Rural Residential Shoreline Environment or a Conservancy Shoreline Environment. Low to medium bank shoreline areas are typically designated as Rural Residential. Conservancy areas are generally located along the marine bluffs adjacent to Colvos Passage, the Tacoma Narrows, and the south side of Fox Island. The east side of Burley Lagoon is designated as an Urban Shoreline Environment. The sand spits and estuaries within the plan area have been designated as Natural Shoreline Environments.

Crescent Lake, covering approximately 47 acres, is the largest lake on the Gig Harbor Peninsula. Most of the land surrounding the lake is zoned for residential use and approximately 50 percent of this land is currently developed. The lake is used for recreational purposes and features a public boat launch. Crescent Lake lies in the Rural Residential Environment, except for the outlet to Crescent Creek which is in the Conservancy Environment.

Streams within the plan area, including Crescent Creek, Artondale Creek, Wollochet Creek, Ray Nash Creek, and Purdy Creek, have not been identified as shorelines of the state as they have been determined to have a mean annual flow of less than 20 cubic feet per second. If it is demonstrated that their flows exceed this threshold, they could then be included as shorelines subject to the SMA.

Surface Water

Stormwater

The Gig Harbor Peninsula is located at the south end of Water Resource Inventory Area (WRIA) #15. The Pierce County Surface Water Management (SWM) Division is commencing a basin plan for this area. The plan will analyze the existing hydrologic and habitat systems and address the impacts of current and proposed land use development on surface water runoff, capital improvement projects, and habitat degradation. Information from this basin planning effort will provide some scientific analysis which can be used to help develop preferred land use designations.

As forested and native vegetative cover is replaced with development, surface water runoff (stormwater) tends to increase both in volume of runoff and rate in which the water drains off the land. Stormwater that has not been properly addressed can result in flooding, water quality and habitat degradation, negative impacts to fisheries, and erosion. Stormwater related issues can be correlated to the amount of impervious surface within a watershed or basin. Although total impervious surface area accompanying development is not the only factor in stormwater related issues, it is a readily measurable indicator that can be tracked and correlated to stormwater problems. Another indicator that is more difficult to measure, but can be correlated with more reliability, is effective impervious area. Effective impervious surfaces occur when impervious surfaces are directly connected to one another and the water flow is not interrupted by any pervious areas.

Historically, for the smaller storm events, runoff would stay on a site trapped in numerous small depressions and saturating the top several feet of soil. Flooding would occur only during larger

in the process of purchasing open space sites including Purdy B, Narrows Park, and the Homestead site.

Six Year Capital Facilities Plan for Regional Open Space

Currently the Countywide Level of Service (LOS) for Open Space (or Resource Conservancy Land) is 2.2 acres per 1,000 in population. The current LOS for Resource Conservancy land on the Gig Harbor Peninsula is 1.1 acres per 1,000 population. The estimated 2000 plan area population is 30,500. In the year 2017 the estimated plan area population will be approximately 52,000. If the 2017 population is used as a bench mark, 57.2 additional acres of Resource Conservancy land will be needed as compared to the Countywide LOS. (Note: these population projections are subject to change based upon annexation, new census data, etc.)

Description of Desired Conditions

The natural systems on the Gig Harbor Peninsula provide the citizens with the opportunity to live, work, and play in a healthy and scenic environment. The native vegetation and marine and fresh waters contribute to the livability of the area the residents treasure. Preserving the remaining fish and wildlife species and the native vegetation that provides the habitat for these species is important to the residents of the Gig Harbor Peninsula. Accommodating new growth while still maintaining the functions and values of the natural environment is a high priority. The following text describes the desired condition for each resource type in more detail.

Shorelines

The natural features and critical functions of the marine and freshwater shoreline areas should be preserved and protected for present and future generations. Implementation of shoreline regulations should promote long-term values and goals above short-term interests. It is important that the Shoreline Master Program (SMP) classify the Peninsula area shorelines based on the natural shoreline processes, natural features, habitat value, and the criteria identified for shorelines of the state. Development standards along shorelines should ensure the preservation of native vegetation and wildlife habitat and protect water quality and natural shoreline processes. Low impact development tools should be considered for implementation. Additional public access and recreational opportunities at shoreline locations is a community priority and should be provided whenever possible.

Surface Water

Surface water should not negatively impact properties located downstream from development. Uncontrolled surface water can damage property, negatively impact the natural environment, and disturb salmon spawning areas. To minimize impacts associated with uncontrolled surface water run off, including soil erosion, flooding, and stream scouring, it is imperative that new development be properly designed. Impervious surface should be limited to the greatest extent practical. Low impact development standards should be utilized, particularly on sites that contain critical areas, environmentally sensitive areas, and designated open space.

streams within the plan area should be removed and steams that provide quality fish habitat should be preserved. Current riparian area buffer standards should be reviewed against the best available science and increased where existing standards do not adequately protect the functions and value of the aquatic ecosystem. Wildlife corridors that facilitate wildlife movement within the plan area should be protected. Areas containing trees that provide snags, nesting, and roosting sites for state or federally listed threatened or endangered bird populations should be protected. A prioritization list of habitat improvement projects for the plan area should be developed. The Critical Area regulations should be amended to establish riparian area buffers based on the best available science. Habitat Management Plans (HMPs) should be required for development projects in all sensitive resource designations (open space corridors) and development projects within the shoreline jurisdiction. Implementation of low impact development techniques should be explored as a method to stop the degradation of fish and wildlife habitat areas. Acquisition of the remaining high quality priority habitats within the plan area is a priority.

Open Space

Protection and preservation of the ecological features of the riparian corridors and near-shore environment that help to provide a high quality of life for the citizens that live throughout the Gig Harbor Peninsula is a community priority. The County-wide open space/greenbelt map should be amended to reflect the existing and desired system of open space within the community for future generations. Open space areas that provide quality fish and wildlife habitat should be preserved and restored. Public and private acquisition, preservation, and restoration efforts within the designated open space areas should be pursued through cooperative agreements and public education and outreach efforts. Open space acquisition efforts should focus on land targeted by the community. These sites are described as high priority open space acquisition areas. Development within designated open space areas should be limited through established density and intensity levels, appropriate uses, and low impact development techniques. Open space dedications should continue to be a development incentive option that can be used to increase the density or intensity of a project site. Native buffer areas, vegetative screens, and greenbelts should be incorporated into the overall system of open space in order to soften impacts of development, provide opportunities for trails, create opportunities for pocket parks, and promote design that is consistent with community established standards as well as providing fish and wildlife habitat. See Open Space Corridors Map.

NATURAL ENVIRONMENT POLICIES

Goal: The various natural systems, critical areas, and resource lands on the Gig Harbor Peninsula provide residents the opportunity to live, work, and play in a healthy environment. The function and value of these features which contribute to the scenic beauty and livability of the area should be maintained, protected, and enhanced for the enjoyment and use of present and future generations.

Intent: Protect and conserve all elements of the natural environment on the Gig Harbor Peninsula, including but not limited to fish and wildlife habitat, native vegetation, aquifer recharge areas, lakes, streams, wetlands, steep slopes, and marine

shorelines by carefully controlling growth and limiting development in sensitive ecosystems.

Objective 15. **Shorelines.** Marine and freshwater shorelines have historically contributed to the economic, recreational, and cultural identity of the Gig Harbor Peninsula. Because of the high quality of life that is offered by living and working near the water, these shoreline areas have received some of the greatest development pressures within the community plan area. It is important that the natural features and critical functions of the marine and freshwater shoreline areas be preserved and protected for present and future generations. The natural character and ecology of the shoreline environment should be preserved. Land use policy should promote long-term values and goals above short-term interests.

Principle 1. Ensure that the Shoreline Master Program (SMP) accurately identifies and classifies all marine shorelines and freshwater lakes and streams in the Gig Harbor Peninsula plan area based on shoreline processes, natural features, habitat value, and the size and flow criteria for shorelines of the state.

Standards

15.1.1 Develop a detailed inventory of shoreline conditions within the plan area, including the number, type, and location of shoreline armoring projects, stairs, docks, and piers. The survey should also include public access points, marinas, stormwater discharge points, and potential septic system failures. Valuable habitat areas, such as eelgrass beds and baitfish spawning areas, should also be included. The shoreline inventory should be integrated into the County Geographic Information System (GIS).

15.1.2 Conduct stream flow testing and review other current information to determine if Crescent Creek, Purdy Creek, McCormick Creek, Goodnough Creek, Rosedale Creek, Lay (Nelyaly) Creek, Ray Nash Creek, Wollochet Creek, Artondale Creek, Sullivan Gulch Creek, or Donkey (North) Creek meet the minimum flow criteria for shorelines of the state.

15.1.3 The SMP should be revised to reflect shoreline environmental designations that accurately represent current conditions of the shorelines, the scientific understanding of shoreline processes, and the community's attitudes toward shoreline management.

15.1.3.1 The Urban and Rural-Residential designations should not generally be used outside of the Urban Growth Area (UGA).

15.1.3.2 The Rural-Residential designation may be appropriate outside the UGA only in locations that have historically been developed at higher densities.

15.1.3.3 Rural areas should generally receive a Rural designation.

15.1.3.4 Sites with environmental constraints, recreational land, and properties for which a land trust has an interest through ownership, easement, or other binding agreement should be designated as Conservancy.

15.1.3.5 Unique features such as sand spits, estuaries and marine feeder bluffs should receive a Natural designation.

Principle 2. Development standards along shorelines should ensure the preservation of native vegetation and wildlife habitat and protect water quality and natural shoreline processes.

Standards

15.2.1 Low impact development tools should be considered for implementation. These include reducing the amount of impervious surfaces on each site, minimizing soil disturbance and erosion, disconnecting constructed drainage courses, and utilizing micro-detention facilities on each lot, (provided such facilities would not contribute to landslide hazards or slope failures) where feasible, rather than one facility at the end of a conveyance system.

15.2.2 Require a tree canopy and native vegetation buffer plan for new development in all shoreline environments.

15.2.2.1 Discourage lawn areas that extend to the edge of slopes, bluffs, or beaches. Retaining native vegetation immediately adjacent to the water body in any required setback is encouraged.

15.2.2.2 Require protection for trees, including snags, located along the shoreline.

15.2.3 Allow new bulkheads and other hard armoring structures along shorelines only when it is demonstrated that beach nourishment or other bioengineering soft armoring techniques would likely be ineffective.

15.2.3.1 New and replacement bulkheads may be authorized only when accessory to an existing residential dwelling that is in imminent danger of damage caused by beach erosion and then, only after alternative techniques are determined to be unsuitable.

15.2.3.2 New and replacement bulkheads may be authorized for other non-water dependent uses only when an existing structure is in

imminent danger of damage caused by beach erosion, and alternative techniques have been ruled out.

15.2.3.3 Construction of non-water dependent structures (including single-family residences) along the shoreline shall be placed at a sufficient distance from the shoreline to ensure that bulkheads are not necessary for the lifetime of the structure.

15.2.3.4 New bulkheads shall be prohibited on vacant parcels and below feeder bluffs.

15.2.3.5 Establish a separate permit and permit-tracking system for bulkheads and other shoreline armoring projects that would allow the continued tracking of these structures while facilitating a more consistent review process.

15.2.4 Piers and docks should be permitted in the Urban, Rural-Residential, and Rural shoreline environments. Piers and docks should generally be prohibited in the Conservancy and Natural shoreline environments.

15.2.4.1 Encourage environmentally friendly dock design (e.g., grated dock surfaces that allow light to pass through instead of traditional dock construction methods).

15.2.4.2 Require the joint use of piers and docks whenever possible. Create a system of incentives that will encourage adjacent property owners to share docks. Afford greater flexibility in joint use facility design in cases that involve shallow water depths or other unusual circumstances.

15.2.4.3 Maximum intrusion into water for any pier or dock shall extend only far enough to obtain a depth of 8 feet of water as measured at mean lower low water (MLLW) on saltwater shorelines or as measured at the ordinary high water mark on freshwater shorelines. In circumstances when 8 feet of water depth cannot be attained because of a shallow bottom profile, the maximum intrusion into the water shall not exceed the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines and 40 feet on freshwater shorelines. In circumstances where these standards have been exceeded on abutting properties, it may be appropriate to average the length of the abutting docks if joint use cannot be obtained.

15.2.5 Allowable uses along the shoreline shall be based on the Comprehensive Plan land use designation and SMP and shall be permitted on a case by case basis.

15.2.5.1 Analyze the cumulative impacts of shoreline development when evaluating an individual project.

15.2.5.2 The Hearing Examiner may approve a specific land use through a site plan review process based on the unique characteristics of each site.

15.2.5.3 Detached single-family residential homes and associated accessory structures may be permitted outright or administratively when located outside of the defined shoreline setback.

15.2.5.4 Generally prohibit new construction or any expansion of an existing structure over the water (i.e., boathouses shall be located landward of the ordinary high water mark).

15.2.6 Residential densities on a particular site shall be based on the densities described in the Development Regulations-Zoning and the Shoreline Management Use Regulations in the Pierce County Code.

15.2.6.1 If the permitted density described in the Development Regulations-Zoning is inconsistent with the density described in the Shoreline Management Use Regulations, the more restrictive (i.e., less intensive) standards shall apply.

15.2.7 Consider the development of marine bluff standards in the next substantive update to the Pierce County Critical Area Ordinance. These standards should require an evaluation of stormwater management, vegetation removal, on-site septic requirements, and the placement of structures in these potentially hazardous shoreline locations.

15.2.8 Requests to obtain variances from development standards should be strictly controlled along the shoreline. These variances shall be granted only in extraordinary circumstances relating to the physical character or configuration of the building lot.

15.2.9 Vegetation and tree preservation is a priority in shoreline locations that are identified on the Open Space/Greenbelt Map.

15.2.9.1 Retaining native vegetation and trees immediately adjacent to the waterbody in any required setback is encouraged.

Principle 3. Promote education, awareness, and outreach programs that emphasize Best Management Practices (BMPs) and environmental stewardship for waterfront property owners.

Standards

15.3.1 Discourage the use of fertilizers and pesticides on lawns in shoreline areas. Offer educational information to residents on environmentally friendly, non-chemical alternatives.

15.3.2 To discourage erosion, encourage limbing or pruning trees for view enhancement instead of removing an entire tree. Tree stumps should never be removed.

15.3.3 Increase awareness and enforcement of SMP rules in order to prevent the loss of wildlife habitat.

15.3.4 To help control surface water runoff, discourage vegetation removal during construction and site development activity.

15.3.5 Encourage homeowners to reduce the amount of water entering the ground or running across the surface at high or medium bank locations. Drainage pipes along marine bluffs should be screened from view whenever possible.

15.3.6 Septic systems along shorelines should be maintained and pumped consistent with the Tacoma Pierce County Health Department's operation and maintenance program. Encourage the use of low-flow plumbing fixtures and appliances to reduce the possible exacerbation of slope failures by saturating on-site system drainfields.

15.3.7 Provide a list of bulkhead design options that encourage alternatives to traditional concrete, rock, or timber bulkheads. Examples include beach nourishment and soft armoring techniques, such as adding drift logs and bioengineering measures that include proper groundwater and vegetation management.

Principle 4. Encourage shoreline restoration activities that increase the function and value of the nearshore environment.

Standards

15.4.1 Require a habitat restoration plan for shorelines on those sites that have existing shoreline violations prior to any permit approval.

15.4.2 Establish an effective, incentive-based process to encourage the removal of bulkheads and other hard armoring along marine waters where it would improve fish habitat.

15.4.3 Promote the voluntary retention and replanting of native vegetation along lakes, streams, and marine waters.

Principle 5. Promote coordination between Pierce County and other agencies that have an interest in shoreline issues, such as the City of Gig Harbor, Army Corps of Engineers, and state agencies such as Ecology, Fish and Wildlife, and Natural Resources.

Standards

15.5.1 Coordinate with WSU's Cooperative Extension in a program that would offer technical assistance to waterfront property owners who are considering a shoreline armoring project or a shoreline habitat improvement project.

15.5.2 Coordinate with Pierce County's Water Programs Division on the next substantive update to the SMP.

15.5.2.1 Evaluate the action items in the KGI Watershed Plan for potential regulatory measures that should be considered in the next substantive update to the SMP.

15.5.3 Coordinate with other agencies in the development of an inventory of shoreline conditions within the plan area.

Principle 6. Provide additional County resources to monitor the health of the near-shore environment and to enforce shoreline violations.

Standards

15.6.1 Fund at least one additional staff person committed to shoreline management regulation and enforcement in the plan area.

15.6.2 Consider adding provisions for property liens on parcels that are in violation of the SMP.

15.6.3 Consider monitoring shoreline areas for environmental degradation and SMP violations.

Principle 7. Increase recreational opportunities at existing shoreline access points and promote additional public access to shoreline locations.

Standards

15.7.1 Encourage acquisition of shoreline access points that provide opportunities for boat launches, public docks or piers, beach walking, wildlife viewing and other shoreline-dependent uses. Public rights to access beaches,

shorelands, tidelands, and associated water bodies should be protected. (See Objective 43, Principle 3 for additional standards.)

15.7.2 Prohibit the vacation or trading of unopened public rights-of-way at shoreline locations except when the vacation or trade would enable a public authority to acquire the vacated property for public purposes.

15.7.3 Public access to marine and fresh waters should be actively pursued in order to provide non-waterfront neighborhoods and the general public permanent access to those waters.

15.7.4 Promote development of public and private pedestrian access to shorelands and tidelands. Property owners that provide public access to marine waters may be eligible for a property tax reduction pursuant to Chapter 2.114, Pierce County Code.

15.7.5 Access and use of public beaches and state-owned tidelands in front of private waterfront properties is permitted and encouraged. Mitigation of impacts to adjacent property owners at shoreline access points should be maintained (e.g., trash receptacles, buffering). Signs that describe shoreline-related hazards and proper use of the beaches shall be posted and enforced.

15.7.6 Public easements dedicating access to designated public waterfront areas should be included as part of private upland development projects prior to site development of the private development.

15.7.7 Encourage signs that provide the general public with directions to the various public shoreline access locations in the plan area.

Objective 16. **Surface Water.** Surface water runoff from land development can cause significant adverse impacts downstream. For example, increased volume of runoff can scour creeks, increase soil erosion, cause flooding, and disturb salmon spawning areas. To minimize these potential impacts, it is imperative that new development be properly designed. To reduce runoff within the plan area, impervious surface should be limited to the greatest extent practical on a site by site basis.

Principle 1. Maintain or improve the natural hydrologic conditions and functions within the plan area.

Standards

16.1.1 Adopt Low Impact Development (LID) guidelines and standards in the next substantive revision to the County's existing Site Development and Stormwater Management Regulations.

APPENDIX B-3

Excerpts, Pierce County Shoreline Management Use Regulations (Exhibit R-100)

Pierce County Code

SHORELINE MANAGEMENT USE REGULATIONS

Excerpts

Chapter 20.02

PURPOSE, TITLE, SCOPE, AND APPLICABILITY

Sections:

20.02.010 Purpose.
20.02.020 Title.
20.02.030 Scope.
20.02.040 Applicability.

20.02.010 Purpose.

In order to implement the goals and policies of Phase I of the Pierce County Shoreline Master Program, and to allow for all reasonable and appropriate uses of Pierce County's Shorelines without degradation of environmental quality, risk to health or safety, and to insure where development takes place, that it is done in a manner which will promote and enhance the best interest of the general public, this Title is designed to provide standards which will regulate and promote intensities and qualities of development consistent with the protection of the shoreline environment and its related resources and the policy of the Shoreline Management Act of 1971. (Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.02.010)

20.02.020 Title.

This Title shall be known as "Shoreline Use Regulations" for Pierce County. (Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.02.020)

20.02.030 Scope.

Hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits. (Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.02.030)

20.02.040 Applicability.

The provisions of this Title shall apply to all shoreline and associated wetland areas covered by the Shoreline Management Act of 1971 as follows:

A. All marine shorelines.
B. All rivers and streams and their associated wetlands downstream from a point where the mean annual flow is 20 cubic feet per second or greater.
C. All lakes and their associated wetlands which are 20 surface acres in size or larger.

(Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.02.040)

Chapter 20.06

INTRODUCTION TO ENVIRONMENTS

Section:

20.06.010 Environments.

20.06.010 Environments.

In order to more effectively plan and manage shoreline resources through the development of a Shoreline Master Program, a system of categorizing shoreline areas through a classification called "Environments" has been utilized. This system is being used as a mechanism for applying appropriate land and water use policies and regulations to distinctively different shoreline areas.

The application of this system is not intended to be a substitute for but rather a supplement to local planning and land use regulations. These environments will guide the use of all County shoreline areas by planning for development and development patterns which enhance the desired character of the specific environment rather than overtly precluding the presence of certain uses in designated environments. The environment system will attempt to insure that different shoreline uses or types of development are designed and located so as to minimize conflicts between the proposed use and stated policies of the pertinent environment classification. It is a system that encourages uses which enhance the character of the environment and at the same time places reasonable standards and restrictions on developments which might disrupt the character of the environment.

The placement of an environment designation on a specific area or site was based on the existing development pattern, the biophysical limitations and capabilities of the shoreline area, and the goals and aspirations of the citizens.

The following pages include a detailed description of each environment. This includes the definition and purpose, general regulations and policies and preferred uses appropriate for each environment.

(Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code Chapter 65.06)

Chapter 20.10

RURAL-RESIDENTIAL ENVIRONMENT

Sections:

20.10.010 Definition and Purpose.
20.10.020 General Regulations and Policies.
20.10.030 Preferred Uses.

20.10.010 Definition and Purpose.

The Rural-Residential Environment is an area of medium intensity land use, that is, having use types and densities which do not imply large-scale alterations to the natural environment. It is an area that will serve as a buffer between the highly intensive development of the urban environment and the non-intensive development of rural environment. It is an Environment Designation that will allow medium intensity residential, commercial and agriculture development. The purpose of assigning an area to a Rural-Residential Environment is to allow for a natural transitional area between the sometimes incompatible intensive land uses of urban areas and the agricultural uses, recreational uses, and open space found in the rural environment. (Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.10.010)

20.10.020 General Regulations and Policies.

The following general regulations and policies should apply to all shoreline areas classified in a Rural-Residential Environment:

A. Existing land use patterns that reflect a suburban environment and also by virtue of existing development do not have the potential for supporting intensive agricultural or recreational activities should be designated as a Rural-Residential Environment if urban expansion is not anticipated.

B. Medium intensity residential uses should be encouraged in the Rural-Residential Environment in order to relieve pressure from urbanized areas and provide living area for those wishing to enjoy a less densely developed shoreline.

(Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.10.020)

20.10.030 Preferred Uses.

A. Single family residence.

B. Neighborhood commercial uses such as small service establishments.

(Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.10.030)

Chapter 20.56

PIERS AND DOCKS

Sections:

20.56.010 Definitions.
20.56.020 Intent.
20.56.030 Environment Regulations - Uses Permitted.
20.56.040 General Criteria and Guidelines for Reviewing Substantial Development Permits.

20.56.010 Definitions.

A. **Dock.** A "Dock" shall mean 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.

B. **Pier.** A "Pier" shall mean 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.

C. **Float.** A "Float" shall mean a structure comprised of a number of logs, boards, barrels, etc., fastened together into a platform capable of floating on water, used as a landing or moorage structure for marine transport or for swimming purposes. Floats are 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.

D. **Gangway.** A "Gangway" shall mean a sloping structure which provides access from a pier to a float.

E. **Intrusion into the Water.** "Intrusion into the Water" shall mean the length of a dock or pier together with any attached structures such as a gangway and/or float measured along a perpendicular line from the ordinary high water line or lawfully established bulkhead to the most seaward projection of the structure.

F. **Length Parallel to Shore.** "Length Parallel to Shore" shall mean the width of a pier or dock at its widest point measured parallel to the shoreline or the combined width of a pier, dock, and any attached structures such as a float at the widest point.

G. **Fetch.** "Fetch" shall mean the horizontal distance across a body of water measured in a straight line from the most seaward point along the ordinary high water line or lawfully established bulkhead on a given stretch of shoreline to the closest point on the ordinary high water line or lawfully established bulkhead on the opposite shoreline.

H. **Opposite Shore.** "Opposite Shore" shall mean the area of shoreline across a body of water, from a given lot or tract of land that lies within an arc, the centerpoint of the arc being the mid-point of a base line which is a straight line drawn between the point of intersection of one lot sideline with the shoreline and the intersection of the opposite side lot line with the shoreline; the length of said radius being the distance between the mid-point of said line and the intersection of said radius line with the shoreline across the body of water measured perpendicular to the base line.

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.

K. **Community Pier or Dock.** "Community Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for use in common by lot owners or residents of a subdivision or residential planned development district.

L. **Public Recreational Pier or Dock.** "Public Recreational Pier or Dock" shall mean a pier or dock including a gangway and/or float either publicly or privately owned and maintained intended for use by the general public for recreational purposes, but not to include docks constructed as part of a marine development.

M. **Private Recreational Pier or Dock.** "Private Recreational Pier or Dock" shall mean a pier or dock including a gangway and/or float which is owned and maintained by a private group, club, association or other organization and is intended for use by its members.

N. **Commercial-Industrial Pier or Dock.** "Commercial-Industrial Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for any commercial or industrial use other than storage or moorage of boats used for recreational purposes.

O. **Constricted Body of Water.** "Constricted Body of Water" shall mean any tidal basin having a width at the entrance which is less than half of the inner distance, measured from the entrance to the innermost shoreline.

(Ord. 97-84 § 6 (part), 1997; Ord. 88-76S § 1 (part), 1988; Res. 19803 (part), 1977; Res. 19562-A § 1 (part), 1976; prior Code § 65.56.010)

20.56.020 Intent.

It is the intent of Pierce County to encourage the construction of joint use or community use docks and piers whenever feasible so as to lessen the number of structures projecting into the water. To this end, waterfront property owners are encouraged to explore the advantages of increased dock dimensions which are afforded by the construction of a joint or community use structure. (Ord. 88-76S § 1 (part), 1988; Res. 19803 (part), 1977; prior Code § 65.56.020)

20.56.030 Environment Regulations - Uses Permitted.

A. **Urban Environment.**

1. Uses permitted outright: (The issuance of a building permit may be required.)
   a. Floating type navigation aids such as channel markers.
   b. Anchor buoys limited to one per lot owner or one per 100 feet of shoreline frontage.
   c. One uncovered float, pier and float, or dock as an accessory use and located on, or in front of the same lot, tract or parcel of land as a single family dwelling.

FIGURE 1

ILLUSTRATIONS OF MEASUREMENTS

W = Length Parallel to Shore
L = Intrusion Into the Water

FIGURE 2

OPPOSITE SHORE

(1) The dock, pier or float shall be designed for swimming and/or mooring pleasure craft only, for the private noncommercial use of the owners, lessee or contract purchaser or the single family residence to which the float or dock is accessory provided the cost or fair market value, whichever is higher, does not exceed the dollar amounts outlined in Section 20.04.640 G.
(2) Floats shall be so anchored as to allow clear passage on all sides by small watercraft and shall extend at least eight inches above the water surface.
(3) Floats shall have an overall area not exceeding 100 square feet.
(4) Floats, piers, and docks shall be located not closer than ten feet to a side property line except for docks intended for joint use.
(5) Saltwater docks and piers shall have an intrusion into the water of not more than 50 feet or only so long as to obtain a depth of eight feet, whichever is less as measured at mean lower low water, except that the intrusion into water of any pier or dock on saltwater shall not exceed 15 percent of the fetch. Maximum length parallel to shore shall be eight feet.
(6) Fresh water docks and piers shall have an intrusion into the water of not more than 30 feet or only so long as to obtain a depth of eight feet, whichever is less as measured at ordinary high water, except that the intrusion into water of any dock or pier on fresh water shall not exceed 15 percent of the fetch. Maximum length parallel to shore shall be eight feet.

2. Uses permitted subject to the granting of a Substantial Development Permit upon a finding by the appropriate County reviewing authority, of consistency with the criteria and guidelines of Section 20.56.040; and subject also to the granting of a building permit.
   a. Uses permitted outright in subsection A.1., but which exceed the limitations set forth in subsection A.1.;
   b. Joint use pier or dock, uncovered;
   c. Community pier or dock, uncovered;
   d. Recreational pier or dock, uncovered;
   e. Commercial and industrial pier, covered or uncovered;
   f. Navigational aids, non-floating.

B. **Rural-Residential Environment.** Same as Urban Environment.
C. **Rural Environment.** Same as Urban Environment.
D. **Conservancy Environment.** Same as Urban Environment, except only water dependent and water related commercial and light industrial piers are allowed as a conditional use.
E. **Natural Environment.** Piers, docks and floats are prohibited.

(Ord. 97-84 § 6 (part), 1997; Ord. 88-76S § 1 (part), 1988; Res. 19803 (part), 1977; Res. 19562-§ 1 (part), 1976; prior Code § 65.56.030)

20.56.040 General Criteria and Guidelines for Reviewing Substantial Development Permits.

A. **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.

B. **Development Guidelines.** In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project application for Substantial Development Permit in arriving at a satisfactory degree of consistency with the policies and criteria set forth in this Chapter. To this end, the County may extend, restrict, or deny an application to achieve said purposes.

1. All subdivisions containing ten or more lots proposed after the effective date of this amended Chapter which abut the shorelines of any saltwater body or lake, should make provision for a community dock. Individual docks shall not be permitted.
2. In areas identified by the Department of Fisheries, Game or Natural Resources in accordance with a study in existence at the time of application as having a high environmental value for shellfish, fish life or wildlife, piers, docks and floats shall not be allowed unless functionally necessary to the propagation, harvesting, testing or experimentation of said marine or wildlife, unless it can be conclusively established that the dock, pier or float will not be detrimental to the natural habitat.
3. All piers and docks shall be constructed and maintained in a safe and sound condition.
4. Pilings employed in piers or any other structure shall have a minimum vertical clearance of one foot above extreme high tide.
5. When plastics or other nondegradable materials are used in pier construction, precautions shall be taken to ensure their containment.
6. Single use piers and docks.
   a. Maximum intrusion into water should be only so long as to obtain a depth of eight feet of water as measured at mean lower low water on saltwater shorelines or as measured at ordinary high water in freshwater shorelines, except that the intrusion into the water of any pier or dock should not exceed the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines and 40 feet on freshwater shorelines.
   b. Maximum length parallel to shore should not exceed eight feet.
   c. A minimum separation of ten feet should be maintained between the structure and the side property lines extended at a right angle to the shoreline.

7. Joint use piers and docks.
   a. Maximum intrusion into water should be only so long as to obtain a depth of eight feet of water as measured at mean lower low water on saltwater shorelines, or as measured at ordinary high water on freshwater shorelines, except that the intrusion into water of any pier or dock should not exceed the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines and 40 feet on freshwater shorelines.
   b. Maximum length parallel to shore shall be as determined by the appropriate reviewing authority.
   c. Minimum separation between the structure and the side property lines extended at a right angle to the shoreline of any property not sharing in the use of the structure shall be as required by the appropriate reviewing authority.
   d. Joint use piers and docks can be located on, or straddling the property line of adjacent waterfront property owners when mutually agreed to by the owners in a contract, a copy of which must be filed with the application for permit.
   e. Joint dock facilities should have no more moorage spaces than one space per waterfront owner using the dock.
8. Community and recreational piers and docks.
   a. Maximum intrusion into water should be only so long as to obtain a depth of eight feet of water as measured at mean lower low water on saltwater shorelines, or as measured at ordinary high water on freshwater shorelines, except that the intrusion into water of any pier or dock should not exceed 15 percent of the fetch or 150 feet whichever is less.
   b. Maximum length parallel to shore shall be as determined by the appropriate reviewing authority.
   c. Minimum separation between the structure and the side property lines extended at a right angle to the shoreline shall be as determined by the appropriate reviewing authority.
   d. Density of usage should not exceed the following:
      (1) Public recreational pier or dock. One moorage for each ten feet of waterfront up to 200 front feet plus one moorage for each additional five front feet (e.g., a 50 boat public recreational pier or dock would require 350 front feet). For piers associated with marinas, see Marinas Section.
      (2) Community pier or dock. One moorage for each 20 feet of waterfront up to 200 front feet plus one moorage for each additional ten front feet (e.g., a 20 boat community pier or dock would require 300 front feet).
      (3) Private recreational pier or dock - One moorage for each 30 feet of waterfront up to 210 front feet plus one moorage for each additional 15 front feet (e.g., a 20 boat club pier and dock would require 405 front feet).
   e. Applications for a community pier or dock, or a public or private recreational pier or dock should be approved in a constricted body of saltwater only if there is one surface acre of water within the constricted body, measured at mean low water, for each boat moorage (including buoys) within said constricted body.
   f. Developers of community or recreational piers and docks should provide some means of maintenance of the structure and the associated upland area to assure that the facility and associated ground will be adequately maintained.

g. Any parking area associated with a community or recreational pier or dock should provide parking spaces at a level which is consistent with the desired intensity of use of the pier or dock. Adequate separation and buffers should be maintained between said parking area and adjacent properties.

h. In addition, all recreational piers or docks which are intended for use by the general public should comply with the following regulations:

(1) An adequate number of approved sanitary waste containers should be located conveniently for boater utilization.

(2) The dock facilities should be equipped with adequate lifesaving equipment such as life rings, hook and ropes.

(3) Every facility should be in good repair and free from other safety hazards.

(4) All piers/docks with 25 or more moorage spaces should provide restrooms for the boaters' use. They should be kept clean, located within 200 feet from the dock or pier; there should be one toilet and handwashing facility for each sex per 25 moorage sites; signs should be posted such that the restrooms are readily identifiable.

(5) Boaters should not use their marine toilets while moored unless these toilets are self-contained or have an approved treatment device. Signs stating this should be posted where they are readily visible to all boaters.

(6) All community and recreational piers and docks may be required to provide facilities for dumping of holding tanks.

9. Commercial-Industrial pier or dock.

a. Piers/docks will be permitted to the outer harbor line or combined U.S. Pierhead/Bulkhead Line for water dependent or water related uses.

b. Piers/docks extending to the outer harbor or combined U.S. Pierhead/Bulkhead Line will be permitted for multi-use facilities if the majority use is water dependent and public access is provided (when public safety can be assured).

c. Joint or shared use of piers and other saltwater structures is preferred over single purpose use.

d. The maximum intrusion of the water should be no more than that required for the draft of the largest vessel expected to moor at the facility and in no case should intrusion extend beyond the outer harbor line.

e. Any parking area associated with a commercial or industrial pier or dock should maintain adequate separation and buffers between adjacent properties and uses.

10. Floats. The design and placement of floats exceeding the limits of 20.56.030 A.1. shall be as determined by the appropriate County reviewing authority. Compliance with the general criteria and guidelines for reviewing Substantial Development Permits (20.56.040) is required.

(Ord. 88-76S § 1 (part), 1988; Res. 19803 (part), 1977; Res. 19562-A § 1 (part), 1976; prior Code § 65.56.040)

20.72.030 Conditional Uses.

The objective of a Conditional Use provision is to provide more control and flexibility for implementing the regulations of the Master Program. With provisions to control undesirable effects, the scope of uses within each of the five environments can be expanded to include many uses.

Uses considered to be Conditional Uses are those which may be permitted provided all of the following criteria are met:

A. That there is some necessity for a shoreline site for the proposed use or that the particular site applied for is essential for this use.
B. The use will cause no unreasonably adverse effects on the environment or other uses.
C. That water, air, noise and other classes of pollution will not exceed the level customarily found in that particular environment.
D. Design of the site will be compatible with the Master Program.
E. The use will not interfere with public use or public shorelines.

(Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.72.030)

20.72.040 Unclassified Uses.

All proposed uses not classified under one or more of the Master Program use activities shall be considered a Conditional Use and will be permitted provided the Conditional Use criteria are met. (Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.72.040)

20.72.050 Expansion of a Nonconforming Use.

Any proposed expansion of a use determined by the Planning Department or the appropriate reviewing authority to be nonconforming shall be permitted provided all of the following criteria are met:

A. The proposed change will make the use more compatible with the environment in which it is located.
B. That water, air, noise and other classes of pollution will not exceed the level customarily found in that particular environment.
C. That the public health, safety and welfare will not be adversely affected.

(Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.72.050)

20.72.060 Discontinuance of Nonconforming Uses.

Should a nonconforming use be discontinued for a period of one year or more, the use of said property and structures shall thereafter conform to a use permitted in the environment designation in which it is located. If any structure or use thus becomes an illegal structure or use, the owner of the property in issue shall within two months of notification of such remove said illegal structure or use. (Ord. 88-76S § 1 (part), 1988; Res. 18562-A § 1 (part), 1976; prior Code § 65.72.060)

APPENDIX C – HEARING EXAMINER DECISIONS

C-1 Pierce County Hearing Examiner Report and Decision dated August 7, 2006 (Exhibit R-83)

C-2 Pierce County Hearing Examiner Decision on Reconsideration dated September 5, 2006 (Exhibit R-85)

APPENDIX C-1

Pierce County Hearing Examiner Report and Decision dated August 7, 2006
(Exhibit R-83)

Pierce County

Office of the Pierce County Hearing Examiner
902 South 10th Street
Tacoma, Washington 98405
(253) 272-2206

STEPHEN K. CAUSSEAUX, JR.
Pierce County Hearing Examiner

August 7, 2006

Ronald and Kathryn Robertson
10502 Powell Drive NW
Gig Harbor, WA 98335

Jon and Mari Kvinsland
10422 Powell Drive NW
Gig Harbor, WA 98335

RE: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT AND SHORELINE CONDITIONAL USE PERMIT: SD/CP36-04 (ROBERTSON/KVINSLAND)

Dear Applicants:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request in the above-entitled matter.

A copy of this action will be forwarded to the State Department of Ecology and the State Attorney General's Office for their review. The Department of Ecology will notify you of the expiration of the review period or of any further considerations.

The Shoreline Management Act requires that you may not begin development prior to the expiration of the Department of Ecology's review period.

Very truly yours,

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

SKC/ca
cc: Pierce County Planning
Pierce County Development Engineering
Pierce County Code Enforcement
Pierce County Utilities
Tacoma Pierce County Health Dept.
Fire Prevention Bureau
Pierce County Parks and Recreation
Pierce County Council
Department of Ecology
Attorney General's Office

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OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT AND SHORELINE CONDITIONAL USE PERMIT: SD/CP36-04 (ROBERTSON/KVINSLAND)

APPLICANTS:

Ronald and Kathryn Robertson
10502 Powell Drive NW
Gig Harbor, WA 98335

Jon and Mari Kvinsland
10422 Powell Drive NW
Gig Harbor, WA 98335

AGENTS:

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Terry Brink
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Tacoma, WA 98407

SUMMARY OF REQUEST:

Applicants request a Shoreline Substantial Development Permit (SD) to allow construction of a 4 foot by 50 foot pier (with a 1 foot grating along the center), a 4 foot by 32 foot aluminum ramp, an 8 foot by 24 foot float (with a 50% grating) for a total length of 100 feet and length parallel to shore (width) of 8 feet, with 8 associated pilings, as a joint-use dock accessory to two existing single-family residences. The project includes a Shoreline Conditional Use Permit (SDCP) to place a sediment screw anchor system and float lift located 250 feet waterward of the bulkhead. The project is located on the north shore of Hale Passage, within a Rural Residential Shoreline Environment, and a Rural 10 (R10) zone classification, at 10502 and 10422 Powell Drive NW, within the SE 1/4 of Sec. 21, T21N, R1E, W.M., in Council District #7.

SUMMARY OF DECISION:

Request granted, subject to conditions.

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on June 28, 2006, at 9:00 a.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1"	-	**Planning and Land Services Staff Report and Attachments**
EXHIBIT "2"	-	**Photoboard**
EXHIBIT "3"	-	**Letter Memorandum submitted by Terry Brink dated June 28, 2006**
EXHIBIT "4"	-	**Photo of boats in the water**
EXHIBIT "5"	-	**Letter from Paul Kirschner and Nancy Powell dated June 8, 2006**
EXHIBIT "6"	-	**Letter from Steven Brown dated June 27, 2006**
EXHIBIT "7"	-	**Presentation by Residents of Powell Road and Adjoining Shoreline Property Owners**
EXHIBIT "8"	-	**Neighborhood Petition**
EXHIBIT "9"	-	**Parcels of individuals signing petition**
EXHIBIT "10"	-	**Map showing docks**
EXHIBIT "11"	-	**Tidal chart**
EXHIBIT "12"	-	**Site Plan dated June 22, 2004**
EXHIBIT "13"	-	**Letter to Wendell Stroud from Patrick Prendergast dated September 16, 2004**
EXHIBIT "14"	-	**Letter to Patrick Prendergast from Gregg May dated September 21, 2004**
EXHIBIT "15"	-	**Letter to Patrick Prendergast from Gregg May dated January 13, 2005**
EXHIBIT "16"	-	**Letter to Pat Prendergast from Larry Johnson dated April 15, 2005**
EXHIBIT "17"	-	**An Analysis of the Biological Evaluation by William Weaver and Gregg May dated April 19, 2005**
EXHIBIT "18"	-	**Letter to Patrick Prendergast from Gregg May dated June 28, 2005**

EXHIBIT "19" - Letter dated March 15, 2006 from Windermere Real Estate, Barb Roe-Trochim
EXHIBIT "20" - List of Cases

TY BOOTH appeared, presented the Planning Division Staff Report, and testified that Patrick Prendergast prepared the staff report and visited the site. However, he worked on the case and has had seven to eight plus years experience in reviewing docks. The County recommends denial of the joint use dock at the length requested as it is not usable due to the slope of the beach and the depth of the water. Staff recommends approval of the boatlift as a single use, but not joint use facility. The environmental official issued a DNS on November 10, 2005, then a corrected DNS, and finally an addendum which separated the lift from the dock. No appeals were filed. The PAC heard the matter at its June 4, 2006, meeting and voted to recommend approval of the 100 foot long dock, but denial of the boatlift. The email subsequently sent to staff by Michael Murphy is not part of the PAC's official recommendation. A few docks presently exist in the area and upland parcels are improved with single family dwellings. Staff reviewed the project against the community plan, WAC criteria, the Pierce County Shoreline Regulations and Master Program. All documents allow docks and prefer joint use facilities. The Rural Residential Environment lists single family dwellings as a preferred use and a dock is considered a medium intensity use. However, the dock and detached lift considered together exceed the intent of the SMP. The applicant will need approval from DFW, the Corps of Engineers, possibly DNR, and possibly the Coast Guard. The beach is not significantly developed with docks. Staff considers the dock not usable for a mooring area and the structure impacts the neighbors. The regulations encourage mooring buoys. Because the dock is dry much of the day a lift is appropriate and it is not too different from a buoy. It would not impact views, is away from the shoreline and it appears as a moored boat. The dock length would not exceed the fetch and other dock guidelines.

WENDELL STROUD, Marine Floats, appeared on behalf of the request and testified that he agrees with the majority of the conditions and that they would install the dock perpendicular to the beach. He introduced Exhibit "2", a photoboard. The structure will consist of a four foot wide, 50 foot long pier and eight foot wide, 24 foot long float. The float will not ground and eight steel pilings will support the structure. The regulations allow a covered lift with a conditional use permit. These facilities are used extensively in other areas of the country as they keep boats out of the water. They propose a recreational dock for loading and unloading, not as a moorage. They have obtained DFW and Corps permits and agree with Condition No. 5. The concern expressed by staff that the length of the dock is not sufficient is a policy from nowhere. He has been building docks for 18 plus years and has never seen this condition before. The regulations allow 50 foot long docks along the beach outright. A 50 foot dock would serve as a loading and unloading facility at higher tides, and again, is allowed outright. He has constructed 138 docks in many areas of the County and some areas cannot support a moorage dock. Docks in Horsehead Bay provide an example. The County needs to base its length on some guideline and

cannot determine arbitrarily that the dock is too short for an appropriate use. We have here a long, flat beach and his policy is to use the slope to the maximum extent, but not beyond that. The dock presents no navigational issues if it is aground and no large boats can access the area. However, small boats can operate at high tide. They will light the buoy, but the Coast Guard has no requirement for such. Docks are used in many ways. Here, they cannot use the water if the dock aground 400 feet out. Docks can go to navigable water, but here a dock can provide a recreational use only. If we never have a first dock in an area, then we will never have a dock. The bulkhead measures five feet, four inches in height and they will build from the bulkhead out. In a few feet from the bulkhead people can walk under the pier. The pier will measure only 50 feet in length which is no longer than other docks. They cannot build all floating docks anymore. We do not have a large view issue as they will use one-quarter inch stainless steel cables for the handrails which will disappear at about 50 feet.

TERRY BRINK, attorney at law, appeared on behalf of the request and introduced Exhibit "3", his letter memorandum. They propose a joint use application for two parcels and Exhibit "D" sets forth the most recent site plan. Exhibit "F" shows the boatlift. They made application on August 4, 2004, and DFW has approved an HPA. An appeal was made of the HPA, but was denied. SEPA is final. The PAC referred to the project as one structure, 425 feet in length. According to staff's position, the government now decides when a dock is useful for a property owner. Condition No. 13 addresses the Murphy condition and email. He asked the Examiner to consider Mr. Murphy's comments as a private citizen, and not the weight of a PAC recommendation. Who determines whether a dock is useful, the applicant or the government? We have subjective decision-making taking place. The beach will measure between five feet, four inches and eight feet, six inches beneath the pier. Staff has advanced a strong conclusion about the impacts of docks along the shoreline. He referred to page 26, a history of the section. In addressing the lift, Mr. Booth said there would be no impact if it is two feet above the water. Exhibit "2" to Exhibit "3" sets forth the advantages of boatlifts, and the Corps has approved boatlifts. We have three first impression issues: 1. a boatlift; 2. a boatlift not attached to the dock; and 3. Staff making a subjective determination as to whether the length of a dock is useful or not useful. He then introduced Exhibits "4-6".

GREGG MAY appeared and presented a power point presentation which he introduced as Exhibit "7". He then introduced a number of additional exhibits ("8 – 19") with the presentation. He specifically referred to the number of property owners signing a petition in opposition and the difference in visual impacts of a dock on a level shoreline versus on a high bank shoreline. The appearance of the beach at low tide presents a compelling reason for denial. He has not seen the application for a float 425 feet offshore, but did see one for 250 feet. He finds no application to DNR for any type of use permit. He questions the safety of a lift at 450 feet. Public boat launches are located on Fox Island and Horsehead Bay. The Murphy letter corrects an inadvertent oversight of the PAC, and staff has known of that condition and the Hearing Examiner has supported such condition in the

past. He urged denial of the dock, but if the Examiner accepts the PAC recommendation, the common language requires removal of any floats and it should be included as a condition.

ANNE LUZZI appeared and recommended complete denial of the substantial development permit and conditional use permit.

LARRY JOHNSON appeared and testified that the beach appears located in sheltered water, but does not have protection. The fetch is several miles long and two to three foot high waves hit the beach. At one existing dock, the owner pulls the float from the pilings during the winter. They have to look at a 150 foot structure with a ramp extending from the pier in mid air. It is useless except to walk on for eight months of the year. The flat beach is dangerous in high winds as large waves hit structures in the area. In Horsehead Bay and Wollochet Bay the slopes allow access to navigable waters, but here it is very difficult. 80% of the time the dock would not reach the water and therefore would have no water use. Thus, the dock really has usability only 20% of the time. Many bays have clay and mud and are not conducive for walking, and docks located thereon do not impact pedestrians. Here, however, the beach has fine gravel and is appropriate for walking. This beach is a unique anomaly and docks are not allowed automatically anywhere.

MR. STROUD reappeared and testified that both parcels have a large width and that the Examiner needs to consider the view from the beach. The ramp is on one parcel and is not for use by the current owner. Joint use works better if it extends from the common property line. At other locations it makes sense to remove the float. The expanse in east Wollochet Bay and the Cromwell area is substantial and both of said areas have docks. However, the expanse is part of the reason why no docks exist on Fox Island opposite the site. He would challenge the 20% use estimate. The view of Mt. Rainier is not impacted and the railing will be as inconspicuous as possible. He also questions the height of the structure related to the bulkhead. Concerning the beach use, the applicants do not have to maintain their private beach for public use. Skiers can take off at a 45 degree angle, otherwise they can ski 200 feet off shore. The dock does not affect either use. The properties are so wide that the docks should not impact marine activities. Small boats can proceed under or around the dock at high water. The Fisher dock is a 50 foot long, exempt dock which the owner could not construct today due to environmental issues. Other property owners between the present location and the bridge have applied for docks. The next step will be processing a DNR permit. The Shorelines Hearings Board has found no real issues regarding property value reduction in dock cases.

MR. BRINK reappeared and noted two letters supportive of the dock, and that testimony presented at the PAC also supported the dock. The DFW upheld the challenge to the HPA on appeal. The Corps approved a permit and the PAC recommends approval of the dock. Only Pierce County recommends denial of the dock. Mr. Murphy's concerns are addressed in Conditions 12 and 13 in the staff report. The photographs of the beach do not show an

adjacent 50 foot long dock. It is typical to change site plans many times prior to getting a project to a hearing. The lift location is set at 425 feet from the bulkhead. Concerning the other lift, they were originally told they could install it and were then told to remove it and did. They will install a light on the lift. The Viafori case involved a different jurisdiction and a different set of code sections the "NIMBY" term applies all the time in all cases.

MR. MAY reappeared and reemphasized the beach is the view in the area. The site visit should occur during a lower tide.

MR. BOOTH reappeared and testified that staff does not have a written policy regarding dock length. Recommendations change when staff learns more.

MR. STROUD reappeared and testified that they tried to adjust the dimensions to please the County.

No one spoke further in this matter and the Examiner took the matter under advisement. The hearing was concluded at 12:15 p.m.

NOTE: A complete record of this hearing is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, viewed the property, heard testimony, and taken this matter under advisement.

2. Pursuant to the State Environmental Policy Act and the Pierce County Environmental Regulations, Title 18E, the Pierce County Environmental Official designate has reviewed this project and issued a Determination of Nonsignificance (DNS) on November 10, 2005, the comment period ended November 28, 2005. There was a comment letter received that mentioned inconsistencies and objected to conclusions drawn in the findings. A Corrected Determination of Nonsignificance was issued on December 7, 2005, correcting the project description from 10 to 8 pilings, and revising Finding Number 6 regarding federal review. A SEPA Addendum modified the project description to separate the float lift from the dock. No appeals were filed and the DNS is final.

3. Notice of this request was advertised in accordance with Section 20.76.150 of the Shoreline Use Regulations. Notice of the date and time of hearing was published two (2) weeks prior to hearing in the official County newspaper. Property owners

within 300 feet of the site were sent written notice. An Affidavit of Posting was received stating the site was posted with a public notice sign on August 29, 2004.

4. The PAC heard the request at its regularly scheduled meeting June 14, 2006. A motion was made by Mr. McHugh to approve the joint use dock and deny the float lift, which was seconded by Mr. Markos as the combination exceeds the limitations for dock dimensions in the code. The dock should be approved as joint use, regardless of the functionality. The PAC reiterated concerns with navigational impacts from the float lift. The motion passed 3-0.

5. Applicants Ronald and Kathryn Robertson have a possessory ownership interest in an irregularly shaped, 1.02 acre parcel of waterfront property abutting the south shore of Hale Passage in unincorporated Pierce County. The parcel extends from Powell Drive NW to the shoreline and along the shoreline for 145 feet. Improvements include an exclusive, single family residential dwelling located approximately 25 feet from the bulkhead, detached garage, boat ramp, and bulkhead.

6. Applicants Jon and Mari Kvinsland have a possessory ownership interest in a rectangular, .7 acre parcel of waterfront property abutting the east property line of the Robertson parcel. The Kvinsland parcel extends between Powell Drive NW and the shoreline of Hale Passage and abuts the shoreline for 100 linear feet. Improvements include an exclusive, single family residential dwelling, bulkhead, detached garage, and storage shed.

7. The applicants request a shoreline substantial development permit to allow construction of a 100 foot long, eight foot wide pier, ramp, and floating dock extending waterward from their common property line. The structure will consist of a four foot wide, 50 foot long pier with a one foot width of grating along the center; four foot wide, 32 foot long aluminum ramp with 100% grating; and eight foot wide, 24 foot long float with 50% grating. Eight steel pilings will support the structure. The applicants also request a shoreline conditional use permit to allow installation of a Sunstream float lift secured by a sediment screw anchor system 425 feet waterward of the bulkhead on the Robertson parcel, ten feet west of the joint property line.

8. A visit to the site, photographs of the beach and area, and a powerpoint presentation "Presented by Residents of Powell Road and Adjoining Shoreline Property Owners" narrated by Gregg May conclusively establish that the site is located on a crescent shaped stretch of beach consisting of small gravel adjacent to the bulkhead and changing to sand approximately 75 feet waterward of the bulkhead. The beach extends in an east/west direction from Green Point on the west, east to the approximate location of a 150 foot long dock which is not visible

from the crescent beach. The beach stretches approximately 1,500 feet from Green Point to the 150 foot dock and abutting parcels vary between medium/high bank and low/no bank. A 50 foot long, joint use pier, ramp, and float is located approximately 300 feet to the west of the proposed joint use facility. Said dock is located in an area of the shoreline which meets the definition of either medium or high bank. Shortly to the east of said dock the shoreline becomes either low or no bank waterfront which continues to the dock to the east. Thus, the applicants' parcels are located well within the area of no bank/low bank waterfront parcels. The Examiner visited the site near low tide and noted a flat, very wide beach.

9. Improvements along the shoreline likely predate the adoption of the State Shoreline Management Act (SMA) and the Shoreline Master Program for Pierce County (SMP) as most homes abutting the shoreline extend well within the required 50 foot wide, shoreline setback. All lots abutting the shoreline are improved with single family residential homes and many lots have accessory structures. Vegetation between the primary structure and bulkhead on most lots along the beach consists of grass and ornamental plantings.

10. Despite the pristine appearance of the beach, the SMP designates the entire crescent beach (with the exception of the sand spit at Point Green) as Rural Residential, second in intensity only to the Urban Shoreline Environment. The SMP defines the Rural Residential Environment as an area of medium intensity land uses which serve as a buffer between the highly intensive development of the Urban Environment and the non-intensive development of the Rural Environment. The SMP authorizes medium intensity residential, commercial, and agricultural development in said environment. Preferred uses include single family residential dwellings and neighborhood commercial uses such as small service businesses. A joint use, eight foot wide, 100 foot long pier, ramp, and floating dock on 245 feet of waterfront falls well within the definition of medium intensity use and is consistent with the Rural Residential Shoreline Environment.

11. Residents argue that with the exception of the existing 50 foot long structure located in a medium/high bank area and the 150 foot structure around a point, the beach remains undeveloped and pristine for approximately 1,500 linear feet. Residents argue that the applicants' dock will destroy the character of the area, adversely impact the use and aesthetics of the beach, and will set a precedent for future docks, thus eliminating the uniqueness of the area and significantly interfering with beach and marine recreation. The SMP provides in the "Description of Pierce County Shoreline Master Program" section as follows:

> Study the shoreline Environments (Natural, Conservancy, Rural, Rural Residential, and Urban) and apply them to all Pierce County shorelines. Placement will reflect intent for future uses rather than

the status quo.

Furthermore, under the section entitled "Pierce County Shoreline Environment Designations" the SMP provides:

> The placement of an environment designation on a specific area or site is based on the existing development pattern, the biophysical limitations and capabilities of the shoreline area being considered, and the Goals and Aspirations of the Citizens.
>
> The following pages include a detailed description of each environment. This includes the definition and purpose, general regulations and policies, and preferred uses appropriate for each environment...

Thus, drafters of the SMP considered this specific shoreline area, its existing development pattern, its biophysical limitations and capabilities, and its intent for future uses. The drafters did not determine that the area should maintain its status quo, but determined that development of the present shoreline should occur in accordance with the Rural Residential Environment. While the shoreline area below the ordinary high water mark resembles the Rural or Conservancy Environment, the upland area is improved consistent with the medium intensity land uses contemplated by the Rural Residential Environment. Title 20 of the Pierce County Code (PCC) sets forth the Pierce County Shoreline Management Use Regulations and Section 20.56.040(A) PCC sets forth the general criteria and guidelines for reviewing substantial development permits for docks. Subsection 7 provides that the "intensity of the use or uses of any proposed dock...shall be compatible with the surrounding environment and land and water uses". Thus, in determining compatibility of a dock, the PCC requires consideration of not only uses below the bulkhead, but uses above the bulkhead as well. The applicants' proposal is definitely compatible with the intensity of upland development along the entire shoreline.

12. While the SMP has an effective date of March 4, 1974, and has not been updated, the Pierce County Council recently adopted the Gig Harbor Peninsula Community Plan which became effective December 1, 2002. Said plan provides in pertinent part:

> Standard 15.2.4 Piers and docks should be permitted in the Urban, Rural Residential, and Rural Shoreline Environments. Piers and docks should generally be prohibited in the Conservancy and Natural Shoreline Environments.

Thus, the recently adopted Community Plan permits docks in the Rural Residential Environment, but not in the environmentally sensitive Conservancy and Natural Environments. Subsection 15.2.4.1 of the Community Plan encourages environmentally friendly dock designs such as grated dock surfaces that allow light to pass through instead of traditional dock construction methods. The applicant proposes 33% grating of the pier area, 100% grating of the ramp, and 50% grating of the float. The dock design will also includes stops on the pilings which will prevent the float from resting on the beach. Subsection 15.2.4.3 of the Community Plan provides:

> Maximum intrusion into water for any pier or dock shall extend only far enough to obtain a depth of eight feet of water as measured at mean lower low water (MLLW) on saltwater shorelines...In circumstances where eight feet of depth cannot be obtained because of a shallow bottom profile, the maximum intrusion into the water shall not exceed the lesser of 15% of the fetch or 150 feet on saltwater shorelines....

The Pierce County legislative body adopted dock guidelines during enactment of the SUR in the 1970s and 1980s and has made no changes since then. Upon adoption of the Community Plan in 2002, the legislative body once again adopted the same dock dimensions and also authorized docks in the Rural Residential Shoreline Environment. Since the 1970s the SMP and the SUR have authorized a joint use dock at the proposed site subject to meeting all guidelines for docks. The proposed length measures 33% less than the 150 foot guideline, substantially less than 15% of the fetch, will attain a depth substantially less than eight feet at MLLW, and meets the width criteria for a single use facility.

13. In SORE v. Snohomish County, 99 Wn. 2d 363 (1983), the Washington Court of Appeals addressed the implementation of a new comprehensive plan which changed agricultural land to industrial. A property owner desiring to rezone said property in accordance with the comprehensive plan was met with the objection that the area consisted of farms and residences on large lots and therefore the rezone should not be granted because it would change the character of the area. The Court of Appeals quoted favorably from the Snohomish County Hearing Examiner's decision as follows:

> The action requested herein is a rezone which would implement an adopted comprehensive plan of Snohomish County. If such implementation were not allowed to occur until physical or developmental circumstances in the area had changed, the new comprehensive plan might never be fulfilled: If an area is presently undeveloped and a newly amended comprehensive plan calls for

> industrial development, no industrial development may occur until at least one industrial rezone has been granted. If that rezone cannot itself occur because land development patterns have not changed in the area, then the industrial development will most likely never have the opportunity to occur. The Examiner does not believe that such a set of circumstances was desired or envisioned by the Supreme Court....99 Wn. 2d 363 at 370, 371.

In the present case, the applicant does not request a zone reclassification, but development in accordance with the Rural Residential Shoreline Environment and dock guidelines set forth in the PCC. As in SORE, supra, this shoreline may not develop in accordance with the SMP, SUR, and the Gig Harbor Peninsula Community Plan unless at least one dock is approved.

14. Residents assert that the dock, even if authorized by the Rural Residential Environment, cannot meet the guidelines for a dock set forth in Section 20.56.040(A) PCC, and specifically Subsection 2 which provides:

> Views from surrounding properties will not be unduly impaired.

Residents assert that the applicants cannot use the dock for moorage as it will attain a depth of plus six feet at MLLW (the applicants assert plus five feet). Such makes it essentially a "bridge to nowhere" as it will extend high over the beach and remain dry for many hours of the day. The Examiner has reviewed residents' positions in accordance with the decision of the Washington Court of Appeals in Bellevue Farm Owners Association v. Shorelines Hearings Board, 100 Wn. App 341 (2000). In that case the Court evaluated an application for a 345 foot long dock which included a 230 foot long pier and which would attain a depth of zero to one foot of water during minus tides. A residential subdivision sought the permit which would allow use of the structure by all lot owners. The Court upheld the denial of a substantial development permit for the dock by San Juan County. The Court recognized the goals of the SMA and the San Juan County Shoreline Master Program to protect scenic views, and noted that "Washington courts have upheld Shoreline Management Programs which describe preservation of scenic views in general terms". The Court then held that the Bellevue Farm dock created view interference. However, the cases relied upon by the Court [(Hunt v. Anderson, 30 Wn. App 437 (1981); and Hayes v. Yount, 87 Wn. 2d 280 (1976)] address interference of views by upland improvements as opposed to docks. The PCC has no ordinance criteria addressing view interference by upland improvements or by obstructions waterward of the bulkhead, and the Environment Official issued a DNS.

15. Furthermore, in Bellevue Farms, the proposed dock was located in a Conservancy Shoreline Environment which the SJC SMP defined as "areas which are largely free

of intensive development" and:

> ...It should be applied to those areas which would most benefit the public if their existing character is maintained, but which are also able to tolerate limited or carefully planned development or resource use...
>
> The Conservancy Environment may be used to protect areas of high scenic value when it is felt the Rural Environment would not provide the proper type or degree of protection. Areas to be designated Conservancy should meet one or more of the following criteria:
>
> . . .
>
> D. Areas possessing scenic or recreational qualities of considerable local, regional, or statewide significant which would be adversely affected by extensive modification or use...100 Wn. App 341 at 356, 357

By contrast, the present shoreline is located in the Rural Residential as opposed to the Conservancy Environment and is therefore evaluated by different standards. View impairments in the present case must be considered in accordance with the intensity of uses authorized in the Rural Residential Environment by the SMP. Applying such criteria, waterfront property owners must expect docks along a Rural Residential Environment shoreline. While constructing the dock will change views along the shoreline, it will not block such views.

16. Residents also assert that approval of the dock will establish a precedent for other docks, and that additional structures will create significant adverse impacts to views and the shoreline aesthetics. Title 173 of the Washington Administrative Code (WAC) sets forth the administrative regulations of the Department of Ecology (DOE) which includes the criteria for reviewing shoreline permits. The review criteria for shoreline variances set forth in WAC 173-127-170 requires consideration of "cumulative impact of additional requests for like actions in the area" for those developments waterward of the ordinary high water mark. WAC 173-27-160 sets forth the review criteria for shoreline conditional use permits and also requires consideration of cumulative impacts. However, WAC 173-27-150, which sets forth the review criteria for shoreline substantial development permits, does not require consideration of cumulative impacts. The PCC likewise has no guidelines or standards requiring consideration of cumulative impacts. Each shoreline project is reviewed separately and each parcel is different. However, shoreline development cannot cause a shoreline to become inconsistent with its designated shoreline environment.

17. Staff recommends denial of the dock based in part upon its not providing a moorage. However, the definitions of "dock" set forth in Chapter 20.56 PCC entitled "Piers and Docks" do not limit the use of a dock for moorage. Section 20.56.010 PCC sets forth the following definitions:

> A. Dock. A "dock" shall mean 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.
>
> B. Pier. A "pier" shall mean 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.
>
> C. Float. A "float" shall mean a structure comprised of a number of logs, boards, barrels, etc.,...capable of floating on water, used as a landing or moorage structure for marine transport or for swimming purposes. Floats are either attached to a pier or are anchored to the bedlands....

Thus, docks, piers, and floats are used for landing places, recreational purposes, and swimming as well as moorage. Furthermore, Section 20.56.030(A)(1) PCC sets forth uses permitted outright in various shoreline environments and provides in Subsection (c)(1):

> The dock, pier, or float shall be designed for swimming and/or mooring pleasure craft only, for the private non-commercial use of the owners....

Thus, while a dock may serve as a moorage (and virtually all docks approved to date do so), the PCC does not limit docks to structures providing moorage. To the contrary, Section 20.56.030(1)(c)(5) PCC authorizes 50 foot long docks on saltwater shorelines as an outright permitted use. Hardly any 50 foot dock on a Pierce County saltwater shoreline could provide a moorage.

18. The PAC recommends approval of the dock, but denial of the float based upon its interpretation of Section 20.56.030(A)(1)(c)(1) and (5) PCC as allowing construction of either the float or dock, but not both. Staff recommends approval of the float as it will provide moorage, but denial of the dock as it will not provide a moorage structure.

19. Section 20.56.030 PCC entitled "Environment Regulations – Uses Permitted" provides in part:

A. Urban Environment.

1. Uses Permitted Outright.: "The issuance of a building permit may be required".

a. Floating type navigation aids such as channel markers.

b. Anchor buoys limited to one per lot owner or one per 100 feet of shoreline frontage.

c. One uncovered float, pier and float, or dock as an accessory use and located on, or in front of the same lot, tract, or parcel of land as a single family dwelling.

(1) The dock, pier or float shall be designed for swimming and/or mooring pleasure craft only...

. . .

(5) Saltwater docks and piers shall have an intrusion into the water of not more than 50 feet...maximum length parallel to shore shall be eight feet.

2. Uses permitted subject to the granting of a substantial development permit...

(a) Uses permitted outright in Subsection A.1., but which exceed the limitations set forth in Subsection A.1.....

B. Rural-Residential Environment. Same as Urban Environment.

Since the applicants' parcels are located within the Rural Residential Environment,

the PCC authorizes the installation of navigation aids, one anchor buoy, and one uncovered, 50 foot long dock for a single family residential lot without the necessity of obtaining a shoreline substantial development permit.

20. Section 20.56.030 PCC sets forth separate exemptions for an anchor buoy and an uncovered dock. However, said section also requires that the dock not intrude into the water more than 50 feet, more than necessary to obtain a depth of eight feet at mean lower low water, or 15% of the fetch, whichever is less. The width of the dock may not exceed more than eight feet parallel to shore. Thus, Section 20.56.030(A) PCC authorizes one, 50 foot long, eight foot wide dock and one anchor buoy per lot owner as an outright permitted use. However, if a lot owner elects to request a substantial development permit to extend the length or width of a dock, to remain consistent with the policies of the SMP, the property owner could no longer install a buoy as an outright permitted use. However, said property owner could request a substantial development permit to allow the buoy. Such is consistent with previous interpretations by Pierce County Planning and Land Services which required removal of buoys as a condition of a longer dock. Said condition leaves no doubt that the substantial development permit is granted solely for the dock and does not include a float or mooring buoy.

21. Policy (f) of the Piers Element of the SMP reads:

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

Policy (f) refers to mooring buoys and piers as an alternative as opposed to a conjunction. While Policy (f) does not prohibit a dock and buoy on the same lot, it refers to them as a separate alternative and also seems to refer to docks longer than the outright permitted 50 foot length (space consuming pier) and which provide a moorage. However, the applicants propose a joint use facility which will not serve as a moorage, and Section 20.56.020 PCC provides:

> It is the intent of Pierce County to encourage the construction of joint use or community use docks and piers whenever feasible so as to lessen the number of structures projecting into the water. To this end, waterfront property owners are encouraged to explore the advantages of increased dock dimensions which are afforded by the construction of a joint or community use structure.

In the present case, the PCC would apparently allow each property owner to construct a 50 foot long pier and install a mooring buoy as outright permitted uses. The applicants have elected to propose a joint use facility as encouraged by the

PCC. A consistent interpretation of the PCC, especially considering the joint use preference, would authorize a longer, non-moorage, joint use dock with mooring buoys as a permitted use subject to a substantial development permit. Here, the applicants would need to construct a 425 foot long dock to provide a moorage due to the slope of the beach. In such an instance the PCC allows a combination dock/buoy subject to a substantial development permit.

22. The project complies with applicable policies of the Piers Element of the SMP as follows:

A. Policy (d) discourages piers associated with single family residential dwellings. However, the US Army Corps of Engineers (Corps) and the State Department of Fish and Wildlife (DFW) along with DOE have determined that piers have less impact on marine and pedestrian recreation and less impact on fish habitat and beaches than do floating docks which rests on the beach for many hours of the day. Therefore, said agencies now require piers and will not approve floating docks.

B. Policy (e) requires consideration of environmental impacts, navigational impacts, existing pier density, parking availability and impact on adjacent proximate land ownership. The Pierce County Environmental Official issued a DNS following review pursuant to the SEPA thus determining that construction of the dock will create no probable significant adverse environmental impacts. No appeals were filed and the threshold determination is now final. The applicant commissioned BioAquatics International, LLC, to perform a biological evaluation for the project. BioAquatics submitted the evaluation on March 21, 2005, and addendums dated April 21, 2006, and June 14, 2006. Residents contested the accuracy of the biological evaluation. Pierce County uses the information to augment permit application materials, but DFW utilizes the evaluation as part of the Hydraulics Project Approval (HPA) process. In the present case, DFW issued its HPA on April 17, 2006. Residents filed an appeal of the issuance on May 10, 2006, alleging that "the applicants and/or their representative submitted false and/or incomplete information in the application process and that the WDFW official responsible for issuing the HPA approval issued the approval utilizing false and/or incomplete information". DFW denied the appeal in a decision issued on June 20, 2006. In the decision denying the appeal WDFW found:

> The applicants routinely work with WDFW throughout the application process to change their projects so that WDFW's concerns about impacts to fish life can be addressed. Following a review of all materials submitted to

him, and after discussing changes he desired in the project with the applicants, Mr. Molenaar issued an HPA with conditions that protected fish life. There were no records or testimony offered by Mr. May that the final information Mr. Molenaar used in issuing the HPA was false or incomplete, or that its use resulted in the issuance of an HPA that did not fully protect fish life from the impacts of the project. To the contrary WDFW's expert on sand lance, biologist Dan Pentilla, indicated in a memo to Mr. Molenaar that the project, as proposed in the final design, would not impact sand lance or their habitat. (Exhibit "T" to Exhibit "3").

The US Army Corps of Engineers issued its Letter of Permission authorizing construction of the project on September 29, 2005.

C. No navigational routes exist in Hale Passage and the dock will therefore not interfere with navigation. The fetch between the beach and Fox Island is substantial and not an issue. The dock will not create impacts on adjacent proximate land ownership due to its minimum 100 foot separation from the nearest exterior property line. Pedestrians can walk beneath the structure which will vary in height above the beach between five feet, four inches at the bulkhead and eight feet, six and one-half inches at the end of the pier. During periods of high tides, kayakers and small boaters can pass beneath the structure. As previously found, while residents will see the dock it should not block views.

D. Policy (h) encourages the construction of piers and floating docks perpendicular as opposed to parallel to the shoreline and the proposal satisfies said policy.

E. Policy (i) encourages pier construction to include larger spans on fewer pilings and the applicant proposes eight such pilings, the minimum necessary to ensure the safety and integrity of the dock.

F. Conditions of approval address Policy (j) which requires containment of plastics and other non-degradable materials used in pier construction.

G. Policy (l) encourages the use of floating docks in areas where scenic values are high and where conflicts with recreational boaters and fisherman will not be created. As previously found, the Corps and DFW require piers, and the waterward portion of the project will consist of a floating dock.

H. Policy (n) encourages the cooperative use of piers and docks, and the

applicants have proposed a joint use facility.

23. Section 20.56.040 PCC sets forth the general criteria and guidelines for reviewing substantial development permits for docks. The applicant must show that the request satisfies the criteria set forth in Subsection A. Findings on each criteria are hereby made as follows:

A. As previously found, the dock will not obstruct or impair important navigational routes. The dock likewise will not obstruct or impair marine recreation areas as it is located 100 feet from the nearest exterior property line.

B. Views from surrounding properties will not be unduly impaired. While property owners will see the dock the structure will not unduly impair views of Mt. Rainier, Fox Island, or along the beach. Views must be evaluated in accordance with shoreline development contemplated by the Rural Residential Environment.

C. The dock will not unduly restrict or impair ingress and egress as well as the use and enjoyment of water or beach on adjoining parcels. The dock will exceed the minimum side yard setback of ten feet by 90 feet (ten times the minimum). The nearest dock measures 300 feet to the west.

D. Public use of surface waters below the ordinary high water mark will not be unduly impaired by the dock.

E. As previously found the applicants propose a joint use facility in compliance with this criteria.

F. The applicants propose the dock for marine oriented recreation and therefore need a shoreline location in order to function.

G. The intensity of the proposed dock will not exceed that of uses contemplated within the Rural Residential Environment as found above. The applicants' proposal is less than a medium intensity residential use.

24. The project satisfies all criteria set forth in Section 20.56.040(D) PCC as no evidence showed that the applicants' agent would not construct the dock in a safe and sound manner, or that the applicants would not maintain it in a safe and sound condition. The pilings will extend at least one foot above the extreme high tide and conditions of approval require containment of plastics and non-degradable materials. The joint use facility satisfies all criteria set forth in Section 20.56.040 PCC for joint use piers and docks.

25. The applicant requests a shoreline conditional use permit to allow installation of a Sunstream float lift 425 feet waterward of the bulkhead on the Robertson property as extended, ten feet from the joint property line. The float would have a depth of minus 4.5 feet at mean lower low water. The boatlift provides a boat moorage and raises the boat approximately two feet above the surface of the water. Solar energy will power the lift which utilizes water soluble, hydraulic fluid (Exhibit "3" to Exhibit "3"). The Corps in Regional General Permit (RGP) 1 has authorized watercraft lifts in "fresh and marine/estuarine waters within the State of Washington" effective February 14, 2005, (Exhibit "4" to Exhibit "3").

26. Prior to obtaining a shoreline conditional use permit the applicant must establish that the request satisfies the criteria set forth in Section 20.72.030 PCC. Findings on each criteria are hereby made as follows:

A. The lift must have a shoreline site to function as its purpose is to provide moorage for a boat.

B. The use will cause no unreasonably adverse impacts on the environment or other uses. The Corps has authorized boatlifts on Washington waters and the environmental official has issued a DNS finding no probable significant adverse environmental impacts associated therewith.

C. The water, air, noise, and other classes of pollution expected with the lift will not exceed the level customarily found in the Rural Residential Environment.

D. Design of the lift is compatible with the SMP.

E. The use will not interfere with public use or public shorelines.

27. Conditional use criteria for residential development are found in Section 20.62.050(D)(2) PCC. Piers, docks, buoys, and floats are listed by Section 20.62.040(A)(1)(c) as uses commonly accessory to single family residences, and therefore findings on each conditional use criteria are hereby made as follows:

A. Views from surrounding properties will not be unduly impaired. At a distance of 425 feet from the bulkhead, residents should hardly notice that the float will moor the boat two feet above the water level. A boat anchored to the float should appear little different from a boat moored to a buoy. Such will will not unduly impair views from surrounding properties.

B. The float will maintain adequate separation from adjacent properties and structures. The site plan shows the float ten feet from the joint property line

and 110 feet from the nearest exterior property line.

C. Criteria C refers to screening and vegetation to ensure blending with the surrounding environment and is not applicable in the present case.

D. The design and colors of the lift as shown on Exhibit "3" to Exhibit "3" will blend with the surrounding environment.

E. The applicant does not request a reduced setback.

28. Prior to obtaining a conditional use permit the applicant must also show that the request satisfies the criteria set forth in WAC 173-27-160. Findings on each criteria are hereby made as follows:

A. The proposed use is consistent with the policies of RCW 90.58.020, a portion of the SMA, and the SMP. Policies set forth in RCW 90.58.020 include the following:

> [U]ses shall be preferred which are consistent with the control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures...

The proposed lift will not pollute the water nor will it damage the beach/shoreline. Property owners altered the natural condition of the present shoreline prior to adoption of the SMA by constructing single family homes, and the applicant proposes a residential appurtenant structure.

B. The proposed float will not interfere with normal public of public use shorelines.

C. The proposed use and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and Shoreline Master Program. Buoys at approximately the same location as the proposed lift provide mooring for small boats, and the proposal is also consistent with the intensity of uses contemplated in the Rural Residential Environment of the SMP.

D. The proposed use will cause no significant adverse impacts to the shoreline environment as evidenced by the issuance of a DNS by the environmental

official.

E. The public interest will suffer no substantial detrimental effect.

F. In considering conditional use permits the Examiner must determine the cumulative impact of additional requests for like actions in the area. The Examiner must determine whether if similar conditional use permits were granted the total of such uses would not cause the area to become inconsistent with the policies of RCW 90.58.020 and would not produce adverse impacts to the shoreline environment. If existing buoys were replaced with floats similar to the applicants' proposal, such would have little impact on the shoreline and would not result in a shoreline of urban intensity. Therefore, additional applications will not affect the consistency of the area with the SMA.

29. While residents argue that the float lift will create a danger for navigation and for recreational and commercial water users due to its overall size and height, residents have produced no evidence substantiating such concerns and have not shown how a boat moored on the float lift would create any more of a hazard than a boat swinging on a buoy. Also, residents have not shown that the float lift would create any more of a danger to a vessel during the night as compared with a boat moored to a buoy. Such allegations are in the nature of generalized complaints. As held by the Washington Court of Appeals in Maranantha Mining v. Pierce County, 59 Wn. App 795 (1990):

> The only opposing evidence was generalized complaints from displeased citizens. Community displeasure cannot be the basis of a permit denial...
>
> We cannot escape the conclusion, in view of the evidence in support of Maranantha's application, that the Council based its decision on community displeasure and not on reasons backed by policies and standards as the law requires....59 Wn. App 795 at 804, 805.

30. Residents raised concerns regarding the ability of the applicant to obtain approval from the State Department of Natural Resources (DNR) and DFW for the float lift. The applicants' representative testified that they would apply for permits from appropriate State agencies following approval of the present permit.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented

by this request.

2. The applicant has established that the request for a shoreline substantial development permit is consistent with the policies of the SMA and with the Rural Residential Shoreline Environment and policies of the Piers Element of the SMP. The applicant has also established that the request satisfies all applicable criteria set forth in the PCC.

3. The applicant has established that the request for a conditional use permit for the float lift is consistent with all criteria set forth in the PCC and WAC and also satisfies policies of the SMA. Therefore, the substantial development permit and conditional use permit should issue subject to the following conditions:

1. A. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to, the letting of bids, making of contracts, and purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-27-090. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by construction and the pendency of litigation reasonably related thereto made it reasonable not to so pursue; provided further, that local government may, at its discretion, extend the two (2) year time period for a reasonable time based on factors, including the inability to expeditiously obtain other governmental permits which are required prior to the commencement of construction.

B. If a project for which a permit has been granted pursuant to the Act has not been completed within five (5) years after the approval of the permit by local government, the local government that granted the permit shall, at the expiration of the five (5) year period, review the permit, and upon a showing of good cause, do either of the following:

i. Extend the permit for one (1) year; or
ii. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

2. The applicants shall be required to obtain approvals from all agencies with jurisdictions including, but not limited to, U.S. Army Corps of Engineers and

the Washington State Departments of Ecology, Fish and Wildlife, and Natural Resources prior to construction. It shall be the applicants' responsibility to secure any required permits or leases

3. A Memorandum of Agreement shall be executed and recorded with the Pierce County Auditor prior to issuance of building permits.

4. Prior to issuance of building permits the applicant shall submit for approval, plans for containing plastics or other nondegradable materials which are used in pier construction, if such materials are utilized.

5. The applicants shall submit deed restriction, or joint-use agreement, which indicates that the use of the joint-use dock shall run with the land and not ownership. Once approved by Pierce County, the deed restrictions shall be recorded with the Pierce County Auditor's Office. Use of the joint use pier, ramp, and floating dock shall be limited to one moorage space per parcel.

6. The float lift should be located 425 feet waterward of the bulkhead as shown on the site plan.

7. Additional conditions may be imposed through the County building permit review process.

8. Pilings employed in piers or any other structure shall have a minimum vertical clearance of one foot above extreme high tide.

9. When plastics or other nondegradable materials are used in pier construction, precautions shall be taken to ensure their containment.

10. The dock, shall be constructed perpendicular to the shore at the shared property line of the applicants.

11. All existing buoys belonging to the applicants shall be removed.

12. Erosion control measures must be in place prior to any clearing, grading, or construction. These control measures must be effective to prevent soil from being carried into surface water by stormwater runoff. Sand, silt, and soil will damage aquatic habitat and are considered pollutants when discharged to waters of the state.

13. Any discharge of sediment laden runoff or other pollutants to waters of the state is in violation of Chapter 90.48, Water Pollution Control, and WAC 173-201A, Water Quality Standards for Surface Waters of the State of

Washington, and is subject to enforcement action.

14. During construction, all releases of oils, hydraulic fluids, fuels, other petroleum products, paints, solvents, and other deleterious materials must be contained and removed in a manner that will prevent their discharge to waters and soils of the state. The cleanup of spills should take precedence over other work on the site.

15. Proper disposal of construction debris must be on land in such a manner that debris cannot cause water quality degradation of state waters.

16. All trenches, depressions, or holes created in the intertidal area shall be backfilled prior to inundation by tidal waters.

17. The applicant should consider alternatives to treated wood or other chemically treated wood for in-water construction of wooden structures. Over time, treated wood may contaminate nearby sediment and cause toxicity for aquatic organisms.

18. The decision set forth herein is based upon representations made and exhibits, including plans and proposals submitted at the hearing conducted by the hearing examiner. Any substantial change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to the approval of the hearing examiner and may require further and additional hearings.

19. The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition precedent to the approvals granted and is a continuing requirement of such approvals. By accepting this/these approvals, the applicant represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the applicant agrees to promptly bring such development or activities into compliance.

DECISION:

The request for a conditional use permit and substantial development permit to allow a float lift is hereby approved subject to the conditions contained in the conclusions above.

The request for a shoreline substantial development permit to allow a 100 foot long, eight foot wide, joint use dock is hereby approved subject to conditions contained in the conclusions above.

ORDERED this 7th day of August, 2006.

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 7th day of August, 2006, to the following:

APPLICANTS:

Ronald and Kathryn Robertson
10502 Powell Drive NW
Gig Harbor, WA 98335

Jon and Mari Kvinsland
10422 Powell Drive NW
Gig Harbor, WA 98335

AGENTS:

Wendell Stroud
Marine Floats
1209 East "D" Street
Tacoma, WA 98421

Terry Brink
Attorney at Law
P.O. Box 1157
Tacoma, WA 98407

OTHERS:

Gregg May and Margo May
Kee May
10508 Powell Rd. NW

Kathy and Jerry Fisher
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Gig Harbor, WA 98335

Gig Harbor, WA 98335

Salli Rogers
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Jim and Anne Luzzi
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John and Eunice Christensen
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James D. DePew
10304 – 86th Avenue NW
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Michael B. Murphy
11030 – 56th St. NW
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474 – 3rd Avenue Fl
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PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

CASE NO. SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT AND SHORELINE CONDITIONAL USE PERMIT: SD/CP36-04 (ROBERTSON/KVINSLAND)

NOTICE

1. **RECONSIDERATION**: Any aggrieved party or person affected by the decision of the Examiner may file with the Planning and Land Services Department a written request for reconsideration and appropriate filing fees within seven (7) working days in accordance with the requirements set forth in Section 1.22.130 of the Pierce County Code.

2. **APPEAL OF EXAMINER'S DECISION**:

A. An appeal of a decision regarding shoreline matters under Title 20, Pierce County Code, may not be appealed to the Council and is addressed hereinafter.

B. An appeal of a decision of the Hearing Examiner regarding matters under Title 20 PCC (Shoreline Regulations) must be filed with the Washington State Shoreline Hearings Board or a court of competent jurisdiction, if applicable, within the required time limits specified by the Court and/or Board.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

APPENDIX C-2

Pierce County Hearing Examiner Decision on Reconsideration dated September 5, 2006
(Exhibit R-85) (Exhibit R-83)

Pierce County

Office of the Pierce County Hearing Examiner
902 South 10th Street
Tacoma, Washington 98405
(253) 272-2206

STEPHEN K. CAUSSEAUX, JR.
Pierce County Hearing Examiner

September 5, 2006

Ronald and Kathryn Robertson
10502 Powell Drive NW
Gig Harbor, WA 98335

Jon and Mari Kvinsland
10422 Powell Drive NW
Gig Harbor, WA 98335

RE: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT AND SHORELINE CONDITIONAL USE PERMIT: SD/CP36-04 (ROBERTSON/KVINSLAND)

Dear Applicants:

Transmitted herewith is the decision of the Pierce County Hearing Examiner regarding the reconsideration filed in above-entitled matter.

Very truly yours,

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

SKC/ca
cc: Parties of Record
PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY CODE ENFORCEMENT
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

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OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

DECISION ON RECONSIDERATION

CASE NO.: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT AND SHORELINE CONDITIONAL USE PERMIT: SD/CP36-04 (ROBERTSON/KVINSLAND)

APPLICANTS: Ronald and Kathryn Robertson
10502 Powell Drive NW
Gig Harbor, WA 98335

Jon and Mari Kvinsland
10422 Powell Drive NW
Gig Harbor, WA 98335

AGENT: Wendell Stroud
Marine Floats
1209 East "D" Street
Tacoma, WA 98421

Terry Brink
Attorney at Law
P.O. Box 1157
Tacoma, WA 98401

By Report and Decision dated August 7, 2006, the Examiner conditionally approved the applicants' request for a shoreline substantial development permit and shoreline conditional use permit authorizing construction of a 100 foot long, eight foot wide, joint use pier, ramp, and floating dock, as well as a float lift for the Robertson parcel located 425 feet waterward of the bulkhead. The Examiner found that the Pierce County Shoreline Management Use Regulations authorized a 50 foot long dock and buoy as outright permitted uses on a single family residential lot, and also allowed a longer dock/buoy subject to a substantial development permit.

The hearing focused on the Robertsons' request for the float lift and Condition 11 of the decision addressed the Robertson parcel in requiring removal of existing buoys as a

condition of approval of the dock/float lift. The condition was not meant to require removal of the Kvinsland buoy. Therefore, Condition No. 11 is hereby revised to read as follows:

> All buoys belonging to Ronald and Kathryn Robertson shall be removed upon installation of the float lift. All buoys in excess of one shall be removed from the Jon and Mari Kvinsland parcel.

DECISION:

The Request for Reconsideration is hereby granted as set forth above.

ORDERED this 5th day of September, 2006.

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 5th day of September, 2006, to the following:

APPLICANTS:

Ronald and Kathryn Robertson
10502 Powell Drive NW
Gig Harbor, WA 98335

Jon and Mari Kvinsland
10422 Powell Drive NW
Gig Harbor, WA 98335

AGENT:

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Marine Floats
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PIERCE COUNTY PLANNING DIVISION
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PIERCE COUNTY DEVELOPMENT ENGINEERING
PIERCE COUNTY UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL

CASE NO. SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT AND SHORELINE CONDITIONAL USE PERMIT: SD/CP36-04 (ROBERTSON/KVINSLAND)

NOTICE

1. **APPEAL OF EXAMINER'S DECISION**:

A. An appeal of a decision of the Hearing Examiner regarding matters under Title 20 PCC (Shoreline Regulations) must be filed with the Washington State Shoreline Hearings Board or a court of competent jurisdiction, if applicable, within the required time limits specified by the Court and/or Board.

APPENDIX D – SHORLINE HEARINGS BOARD FINDINGS AND CONCLUSIONS AND ORDER

(Clerk's Papers 16-51)

Pollution Control Hearings Board
Shorelines Hearings Board
Forest Practices Appeals Board
Hydraulic Appeals Board
Environmental and Land Use Hearings Board

Telephone: (360) 459-6327
FAX: (360) 438-7699
Email: eho@eho.wa.gov
Website:www.eho.wa.gov

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE
Mailing Address: PO Box 40903, Olympia, WA 98504-0903
Physical Address: 4224 - 6th Ave. SE, Bldg. 2, RoweSix, Lacey, WA 98504-0903

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GORDON, THOMAS, HONEYWELL
MALANCA, PETERSON & DAHEIM LLP

April 16, 2007

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RE: SHB NO. 06-031
GREGG MAY, et al v. RONALD & KATHRYN ROBERTSON, JON & MARI KVINSLAND, PIERCE COUNTY & ECOLOGY

Dear Parties:

Enclosed please find the Findings, Conclusions and Order of the Shorelines Hearings Board.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days, pursuant to WAC 461-08-570 and 575, and RCW 34.05.542(2) and (4).

The following notice is given per RCW 34.05.461(3): Any party may file a petition for reconsideration within 10 days and serve it on the other parties. The term "file" means receipt.

Sincerely yours,

Cassandra Noble
Administrative Appeals Judge, Presiding

CN/S 06-031
Enc.
Cc: Don Bales – Shorelands, Ecology
Dept of Planning

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED April 16, 2007 at Lacey, WA.

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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

GREGG MAY and MARGO MAY, JOHN CHRISTENSEN and EUNICE CHRISTENSEN, ERK ELAM and KAEN ELAM, ERNIE HELLING and LOIS HELLING, LARRY JOHNSON and KRISTIN JOHNSON, JIM LUZZI and ANNE LUZZI, STEVE SAXON and PAULA SMITH, and WILLIAM WEAVER and MARY LOU WEAVER,

Petitioners,

v.

RONALD ROBERTSON and KATHRYN ROBERTSON, JON KVINSLAND and MARI KVINSLAND, PIERCE COUNTY and WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

SHB NO. 06-031

FINDINGS AND CONCLUSIONS AND ORDER

Petitioners challenge Pierce County's approval of the Respondents' application for a Shoreline Substantial Development Permit (SSDP) and Shoreline Conditional Use Permit (SCUP) to build a pier, ramp, floating dock, and floating watercraft lift to serve their waterfront residences. Attorney David A. Bricklin appeared on behalf of the Petitioners. Attorney Margaret Y. Archer represented Respondents Robertson and Kvinsland. Deputy Prosecuting Attorney Jill Guernsey represented Pierce County. The Shorelines Hearings Board (Board) was comprised of William H. Lynch, Chair, and Andrea McNamara Doyle and Mary-Alyce Burleigh,

members[1]. Administrative Appeals Judge Cassandra Noble presided for the Board. Kim L. Otis of Gene Barker & Associates, Olympia, Washington, provided court reporting services. All the Board members conducted a site visit on February 12, 2007. Witnesses were sworn and heard, exhibits were introduced, and the parties presented arguments to the Board.

Sixteen issues were raised at the Pre-Hearing Conference. Two issues relating to standing were not argued, nor was evidence presented with regard to them. Therefore, the Board concludes they have been abandoned. The remaining issues in this case concern five broad subject areas. The issues raised include challenges to the proposed project's compliance with Pierce County's Shoreline Master Program (PCSMP) and the requirements of the Shoreline Management Act (SMA) with regard to each of its two components: the pier, ramp and float (PRF) and the floating watercraft lift (float lift). Other issues challenge the project's compatibility with the surrounding shoreline area and its uses, Pierce County's compliance with the requirements of the State Environmental Protection Act (SEPA), the Board's subject matter jurisdiction.

Based on the testimony from sworn witnesses, exhibits admitted, and arguments by the parties, the Board enters the following:

[1] Board Member Mary-Alyce Burleigh was unable to attend portions of the hearing, but listened to the recording from the portion of the hearing she missed, and she participated in the Board decision making.

FINDINGS OF FACT

[F1]

Respondents Robertson and Kvinsland applied together to Pierce County for an SSDP for a joint use pier, ramp, and float structure (PRF) and a shoreline conditional use permit for a floating watercraft lift (float lift) to be used by the two families. The Respondents want to achieve improved access to the water, particularly for older members of their families and for individuals in their families who have health issues that make it difficult to get on and off the families' boats. *Testimony of Robertson.*

[F2]

Respondents Robertson own a 1.02-acre parcel of waterfront property abutting Hale Passage in unincorporated Pierce County. The parcel extends from Powell Drive NW to the shoreline and along the shoreline for 145 lineal feet. Respondents Kvinsland own a 0.7 acre parcel of waterfront property abutting the east property line of the Robertson parcel. The Kvinsland parcel extends between Powell Drive NW and the shoreline of Hale Passage and abuts the shoreline for 100 linear feet. The Robertsons and the Kvinslands requested the permits so that they could construct the PRF extending waterward from their common property line. *Ex. R83.*

[F3]

The Petitioners are neighboring shoreline waterfront property owners on Powell Drive NW, except for one, who lives on nearby Horsehead Bay Drive NW, all in Gig Harbor, Washington.

[F4]

The PRF and float lift are proposed to be installed on the northwest shore of Puget Sound's Hale Passage, approximately 5 miles southwest of Gig Harbor, Washington. *Ex. R72, R79.* The Gig Harbor Peninsula is located in northwest Pierce County, where it and Fox Island encompass approximately 58 square miles of urban, suburban, and rural lands. Hale Passage is part of the Puget Sound marine waters that surround the Gig Harbor Peninsula on three sides. *Ex. R108.*

[F5]

The site for the proposed PRF is near the center of a 300-yard long crescent-shaped stretch of no-bank beach in an area of Pierce County called the "Arletta" area. The shoreline within the crescent is very gentle sloping beach with a 40 to 50 foot wide band of rock, gravel, and sand near the immediate shoreline, followed by fine grain sand that extends waterward nearly 400 feet at an extreme low tide. *Ex. P-5, P-20.* The beach adjacent to the bulkhead on the Robertson property consists of small gravel changing to sand approximately 75 feet waterward of the bulkhead. The beach extends in an east/west direction from Green Point on the west, approximately 1,500 feet east to the approximate location of a 150-foot long dock that is not visible from the crescent beach. A 50-foot long, joint use PRF is located approximately 300 feet to the west of the proposed PRF where the shoreline transitions to a medium to high bank area. This PRF is visible from the project site. No docks currently extend into the sandy beach area. *Testimony of May.*

[F6]

Due to its unusually long stretch of unobstructed sandy shoreline, this shoreline is considered "prime waterfront," whose "gentle sloping beach makes it perfect for shoreline recreational activities." *Ex. P2, P4, P5; Testimony of May, Johnson, & Christensen.* The crescent beach is considered by some to be "perhaps the most beautiful beach in Pierce County." *Ex. P2 (Roe-Trochim letter, March 15, 2006), Ex. P5.*

[F7]

The Respondents' proposed joint use PRF would serve two single family residences. It would extend approximately one hundred feet into the water. The PRF consists of a 6-foot by 50-foot pier, a 4-foot by 32-foot aluminum ramp with 1-foot width of grating along the center, and an 8-foot by 24-foot float (with 50% grating). In the aggregate, the PRF would constitute an area of 620 square feet. The structure would be secured by eight 10-inch galvanized steel pilings installed with a drop hammer pile driver. The structure will be attached to an existing bulkhead. *Ex. P109 (6/26/06 Site Plan), P8, R79, R 83.* The dock is considered to be small by Pierce County standards. *Testimony of Stroud.*

[F8]

The float lift proposed by the Respondents utilizes a solar electrically powered hydraulic system to lift and lower a boat between a float and the water. The frame supporting the boat is positioned above the structure, allowing the boat to rest upon floating pontoons. *Ex. R76, R86.* The proposed float lift would be 18 feet long by 12 feet wide, with an associated sediment screw anchor system. *Ex. R 86.* The impacts of a float lift are similar to those of a moored, floating

boat, which also sits on the water's surface. *Ex. R78.* The Respondents intend to install the float lift approximately 150 feet from the end of the dock, meaning it will be located approximately 425 feet waterward of the existing bulkhead at the Robertson residence.

[F9]

Shoreline residents have observed heavy wave action at all times of year, which causes some scouring of the tidelands. Some residents, including the Respondents, have installed bulkheads to protect from wave damage. *Testimony of Robertson.* Tides in the general vicinity have been measured and recorded from +14 feet to -4 feet from mean low tide (as recorded in Tacoma). The lowest tide recorded in recent records of the area where this project is proposed was measured at -3.1 in a May through September 153-day period. *Ex. P6.* As is somewhat common in the shallow beaches of the area, at low tides, the PRF could be expected to "ground" due to the lack of water, but because the PRF's design includes "stops" it would remain elevated above the tidelands. The float lift is not designed in the same way. At the lowest tides, the float lift could come within one foot of tidelands, but this would not be a common occurrence. *Ex. P6; Testimony of Lund, May.* A float lift is no more difficult to maneuver around than a mooring buoy. *Testimony of Robertson, Testimony of Lund.* Ecology found the float lift consistent with a medium intensive use. The location of the float lift is well below the sand lance spawning area. *Testimony of Lund.*

[F10]

A public launch is located less than one-half mile from the site, and is a ten-minute ride by boat. Another public launch is located on Fox Island, which is approximately one and one-

half miles from the site. Although no permanent moorage exists at these two launches, there is permanent moorage at Gig Harbor. Day Island, which is on the Tacoma side of the Narrows, also has permanent moorage and is approximately twenty minutes away by boat. *Testimony of May.*

[F11]

The shallow profile beach adjacent to the proposed PRF has traditionally been used freely by all neighbors and their families for group and individual water-associated activities such as beach walking, building sand castles, playing in the shallow water, and fishing from shore. No barriers presently exist to free access up and down the full length of this crescent beach, and no PRFs or other dock structures have ever been constructed along this stretch of shoreline. The neighborhood is characterized by families of long-time residence and individuals who have a deep historical recollection of the changes that have taken place over the years in the natural environment. *Testimony of Johnson, May, & Christensen.* Several of the Petitioners have lived on this beach for most of their lives and raised their children in their houses on the beach. The sandy crescent expanse has traditionally been the center for community activities and impromptu sports activities. Over time, these residents have enjoyed observing the come and go of the weather and wildlife that characterizes life on this beautiful beach. *Testimony of Christensen, May, Johnson.* The area off the beach is also used by kayakers, and sports fishers who troll for salmon. *Testimony of May.*

[F12]

The proposed PRF would be placed in the approximate center of the sandy crescent beach. It would be adjacent to no-bank single-family houses that sit at beach level and have expansive views of the beach, Mount Rainier, Fox Island, and a long, low bridge in the distance. From the location of the proposed PRF and surrounding houses, no other PRFs of comparable size are visible, including along the visible shore of Fox Island. Only one other PRF of comparable size is located nearby on the rocky edge beyond the sandy beach crescent. There are three other small structures of 50 feet or less, visible from the site. Local residents include the uninterrupted beach itself in their description of the beauty of the expansive view. *Ex. P36, Testimony of May, Christensen, Johnson, Robertson.*

[F13]

The proposed PRF and float lift project are located within an area of the Gig Harbor Peninsula that has been designated by Pierce County as a Rural Residential Shoreline Environment, and a Rural 10 (R10) zone classification. In Pierce County, the Rural Residential designation allows medium intensity land uses. *Ex. R 83.*

[F14]

All the shoreline areas in the vicinity of the project have been designated by the National Marine Fisheries Service as critical habitat for Puget Sound Chinook salmon. *Ex. P31,P52.* The beach on which the PRF is proposed is recognized as an important area of forage fish habitat. Forage fish species are important to larger fish such as Chinook salmon. *Ex. 17; Testimony of Daley.* The Washington Department of Fish and Wildlife has identified the beach as an

established area supporting Pacific sand lance spawning. Therefore it is classified as a saltwater habitat of special concern under WAC 220-110-250(1)(b). *Ex. P53, R94; Testimony of Daley.* Pacific sand lance (*Ammodytes hexapterus)* spawn at high tide in the upper intertidal area on sandy gravel beach material. Their ability to spawn at a given location is determined by the availability of sandy material. To have a place to spawn and carry on their life processes, fish need gravelly sand and an open beach area. The fine sandy beach material coats the eggs and likely serves to assist in moisture retention when the eggs are exposed during low tides. Sand also serves to conceal the eggs from predators. In Puget Sound, the spawning season is from November 1 through February 15, and larvae commonly are present between January and April in the Puget Sound area. Sand lance feed in open water in daylight and burrow into the bottom substrate at night to avoid predation. They are a significant dietary component of many economically important resources in Washington, such as juvenile salmon, whose diets consist of 35% Pacific sand lance. These forage fish are particularly important to Chinook salmon. *Exhibit P54.* Pacific sand lance comprises 60% of the juvenile Chinook diet. The sand lance habit of spawning in upper intertidal zones of protected sand and gravel beaches makes them particularly vulnerable to the direct and cumulative effects of shoreline development because loss of spawning habitat limits their numbers. *Ex. P54 (p. 27-38).* One long-time resident at the beach has, on different occasions over successive years, spotted the distinctive circular waves on the water in the winter months that signal the presence of spawning Pacific sand lance just off shore. He observed this activity in the vicinity of the proposed PRF. *Testimony of Christensen.* A pier can provide some value by shading sand lance and surf smelt eggs. *Testimony of Cheney.*

[F15]

The beach is also the site of various nearshore marine plants. These are very important to provide areas for juvenile salmon to feed on the spawning forage fish. The plants required for forage fish habitat include the larger plants (called "macroalgae") such as eelgrass, to the very small zooplankton, which provide places for fish to live and function. Another important function of nearshore marine plants is to provide a place for juvenile salmon to regulate their body processes and adjust from fresh to salt water in their migration. *Testimony of Daley.* Light is the single most important factor affecting plants because it drives the photosynthetic process, which controls plant growth and survival. Because overwater structures and associated activities reduce light in the water, they can impact the ecological functions of habitat and interfere with habitat processes (photosynthesis of benthic algae and eelgrass, for example) that support the key ecological functions of organisms' spawning, rearing, and refugia. *Ex. P54. Testimony of Daley.* Eelgrass is spread by the distribution of seeds, and shading can affect its propagation. *Testimony of Cheney.* Even with the best design, such as the use of open grating, overwater structures still diminish available light in the water, which adversely affects fish and plants. *Testimony of Daley.*

[F16]

Eelgrass is a grass-like marine flowering vascular plant (*Zostera spp.*) with dark green, long, narrow, ribbon-shaped leaves which are typically 8 to 20 inches in length. *Ex. R78.* Light is the primary factor limiting the survival and distribution of eelgrass. *Ex. P54.* Out-migrating

juvenile chum feed extensively upon organisms that live in eelgrass stands, where they occur in magnitudes four to five times higher than in sand habitat without eelgrass. *Ex. P54.* Because eelgrass stands provide such productive foraging habitat, loss of eelgrass poses the risk of reduced prey resources. Prey resource limitations likely impact migration patterns and the survival of many juvenile fish species, such as chum salmon. *Testimony of Daley.*

[F17]

The project site was once part of a large stand of eelgrass that supported migratory birds and aquatic species, but some years ago, a high bank on the nearby shore was disturbed as part of a development project, and a large quantity of soil and sediment was deposited into the bay. This event heavily impacted the eelgrass bed and diminished the abundance of wildlife that depended upon it. Years after, the local residents have recently observed small patches of eelgrass growing in the water and eel grass reestablishing itself along the beach and in the vicinity of the proposed float lift. *Ex. P104 (p.41-44); Testimony of Christensen, May.* In April of 2006, the Respondents hired a consultant to conduct a survey of the presence and distribution of eelgrass along the shoreline of the project area up to 350 feet waterward of the bulkhead, and none was noted. *Ex. P33.*

[F18]

The beach area also serves as a migration corridor for juvenile salmonids and supports various other marine species. *Ex. R72.* Long-time residents recall the availability of fish for

catching along the shoreline, and have observed the migration of salmonids, particularly chum, through the area. *Testimony of Christensen, May.* Changes to ambient underwater light environments pose a risk of altering fish migration behavior and increasing mortality risks. Studies have shown that light reduction from the existence of docks and other overwater structures changes fish behavior, driving the migration of juvenile fish into deeper waters, increasing the risk of predation. *Ex. P54; Testimony of Daley.* Prevailing winds affect the waves. A structure in the water can affect the wave action by causing greater disturbance of the bottom of the water body, which increases the turbidity. *Testimony of Daley.* Any such structure will produce some increased scouring. *Testimony of Cheney.*

[F19]

Where overwater structures cause adverse impacts on the marine environment, the extent of these impacts is magnified by increasing numbers of such structures. To the degree that each single dock structure alters the light, substrate, and wave energy regimes of nearshore habitat areas, they contribute to a cumulative effect on those areas. "[I]t is likely that each geographic subsystem has a threshold over which the nearshore habitat will no longer be able to support the biologic assemblages native to it." *Ex. P-54 (p.81).*

[F20]

To avoid or minimize impacts to the extent and quality of nearshore habitats, it is possible to place floating docks in deeper water. This can avoid disturbances and losses to habitat and predation. *Ex. P-54.* The Respondents' proposed float lift location was originally adjacent to the end of the PRF structure. It is currently proposed to be located 425 feet from the

Robinson bulkhead. This location has not yet been surveyed to determine whether eelgrass is present. Ex. P-10 (6/26/06 drawing); *Testimony of Robinson.*

Relevant Procedural History

[F21]

On September 21, 2004, Petitioner May wrote to the Pierce County Department of Planning and Land Services with a comment on the SEPA Environmental Checklist prepared for the Respondents' project. As the lead agency, Pierce County issued a Determination of Non-Significance (DNS) on November 10, 2005, that specified that the comment period would end on November 28, 2005, and that appeals must be filed within 14 days of the expiration of the comment deadline. *Ex. P-11.* A corrected DNS was issued on December 7, 2005 correcting the project description with regard to the number of pilings to be installed on the structure and revising a finding concerning federal review. The corrected DNS again stated that the comment deadline was November 28, 2005, and re-stated the 14-day deadline for appeals. *EX. P-12.* No appeals were filed, and the DNS became final on December 13, 2005. The Corrected DNS was subsequently revised to include the proposed boat lift and reissued on May 31, 2006. *Ex. P-11, P-, P-13.*

[F22]

Petitioner May timely received a copy of the SEPA DNS, and the corrected DNS with a cover letter dated December 7, 2005, indicating that appeal would be possible within 14 days of November 28, 2005. He did not appeal the DNS. On November 28, 2005, Petitioner May

delivered a letter to Pierce County Planning and Land Services that stated "...we are requesting that you reconsider the [DNS]." The letter listed six criticisms of the DNS in lengthy detail. It did not state, however, that it was an *appeal* of the DNS. *Ex. P-14; Testimony of May.* On December 13, 2005 (the day the DNS became final), Petitioner May visited Pierce County to inquire about appealing the DNS and was told that the appeal deadline had already passed. On March 21, 2006 (prior to the May 31, 2006 "Addendum to Existing Environmental Document"), Petitioner May stated that he "chose not to appeal but issue comments as appealing would have cost approx. $1500. Comments were free." *Ex. 98.* The Board finds that Petitioners knowingly chose not to appeal the DNS, opting instead to provide comments on the draft.

[F23]

On June 14, 2006, the Peninsula Advisory Commission (PAC) held a public hearing to consider the applications for the SSDP and the SCUP. The PAC decided to recommend to Pierce County approval of the PFR and denial of the SCUP for the floating watercraft lift.

[F24]

Pierce County Department of Planning and Land Services prepared a Staff Report on June 21, 2006, recommending that the Pierce County Hearing Examiner deny the SSDP for the dock and approval of the float lift and anchor buoy. The recommendation differed from the PAC recommendation, but agreed that the request was "of an intensity that is not compatible with the Rural Residential Shoreline environment." Staff based its recommendation, in part, on the fact that over water structures in the area were minimal, and the conclusion that the shallow profile of the beach is "not conducive to constructing docks that achieve a water depth for longer term

moorage," causing a boat moored at the proposed dock to be grounded "on a regular basis." Staff also concluded that the proposed dock would "unduly impact the views, the marine oriented recreation, and public use of the surface waters." *Ex. P-1.* The conclusion regarding the "undue" nature of the impacts was based on balancing the limited utility of the dock against the other values. *Testimony of Prendergast.*

[F25]

On August 7, 2006, the Pierce County Hearing Examiner issued a Report and Decision of Hearing Examiner approving the Respondents' request for an SCUP to allow the floating watercraft lift subject to conditions stated in the decision, and approved the request for an SSDP to allow a 100-foot long 8-foot wide joint use dock subject to conditions stated in the decision. *Exhibit R-84.*

[F26]

On August 16, 2006, Respondents Kvinsland filed a request for reconsideration of the Hearing Examiner's decision regarding the condition requiring removal of all existing buoys because they wished to retain a mooring buoy for continuous moorage for their boat. On September 5, 2006, the Hearing Examiner issued a decision on reconsideration that allowed the Kvinslands to retain their existing buoy. *Exhibit R- 85.*

[F27]

On September 28, 2006, the Department of Ecology (Ecology) received notice of Pierce County's approval of the SSDP and commenced its review of the SCUP for the float lift. On October 17, 2006, Ecology approved the SCUP, concurring that the proposal, as conditioned,

met the intent of the master program and the criteria set forth in WAC 173-27-160 for granting a Conditional Use Permit. *Exhibit R-87.*

[F28]

The Washington Department of Fish and Wildlife (WDFW) issued a Hydraulic Project Approval (HPA) for the Respondents' PRF on April 17, 2006, pursuant to Chapter 77.55 RCW. The Petitioner appealed that approval on May 10, 2006, and WDFW denied his appeal on June 20, 2006. WDFW's review of the proposed PRF did not include any analysis of fish and wildlife habitat impacts that might result if approval of this PRF lead to additional PRF's being built in this previously undeveloped stretch of shoreline. *Ex. R70; Testimony of Stewart.*

[F29]

Respondents applied to the U.S. Army Corps of Engineers (the Army Corps) for a permit for their proposed float lift. The Army Corps has issued a Regional General Permit with policies and conditions specifically addressing the installation of floating watercraft lifts. *Ex. R-78.* These policies include project impact reduction and conservation measures that include placement of float lift structures in deeper water to minimize impacts to the shallow water habitat. In response to these policies, Respondents amended their initial proposal for the float lift to provide that it would be placed 425 feet from the Robertson bulkhead. *Testimony of Stroud, Robertson.* The Army Corps' decision on the float lift permit float application is still pending.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, the Board enters the following:

CONCLUSIONS OF LAW

[C1]

The Board has jurisdiction over the parties and the subject matter of this case pursuant to RCW 90.58.180(1). Both the scope and standard of review for this matter is *de novo*. WAC 461-08-500(1). As the appealing parties, the Petitioners have the burden of proof. RCW 90.58.140(7). WAC 461-08-500(3). The appealing parties must establish that the permit approval is inconsistent with the requirements of the Shoreline Management Act (SMA) or Pierce County's Shoreline Master Program (PCSMP).

The issues identified in the Pre-Hearing Order remaining in dispute at the hearing were:

1. Whether the Shoreline Conditional Use Permit (SCUP) and the Shoreline Substantial Development Permit (SDP) are inconsistent with the requirements of the Shoreline Management Act and the Pierce County Shoreline Master Program.
2. Whether SDP 36-04 violates the Pierce County SMP's general criteria and guidelines for piers and docks in PCC 20.56.040.
3. Whether the SCUP can be issued for a project not located on land owned by the applicant where the owner of the underlying land has not consented to the application.
4. Whether SCUP 36-04 violates the criteria for conditional uses in PCC 20.72.030.
5. Whether the proposal conflicts with the SMP's General Regulations and Policies for the Rural-Residential Environment because the proposal is in excess of medium

intensity and would impair the public recreational use by including both a private dock and float lift.

6. Whether the dock is inconsistent with use policies for piers including, but not limited to, policies which discourage the use of piers for single-family residences and which policies provide that in considering any pier, considerations such as environmental impact, navigational impact, existing pier density, and impact on adjacent proximate land ownership should be considered.

7. Whether the project is inconsistent with the policy for piers which encourages the use of mooring buoys as an alternative to space-consuming piers such as those in front of single-family residences.

8. Whether the project is inconsistent with the use policy for piers which stipulates that floating docks should be encouraged in those areas where scenic values are high and where conflicts with recreational boaters and fishermen will not be created.

9. Whether the project conflicts with the general development guidelines for substantial development permits for piers and docks in PCC 20.56.040.B.

10. Whether Pierce County erred in not requiring preparation of an Environmental Impact Statement and failed to allow for the required time frame for an appeal of the DNS.

11. Whether the Shoreline Hearings Board has jurisdiction in this appeal to determine whether the proposed project has sufficient protections for forage fish as set forth in RCW 75.08.012, WAC 220-110-250 and.300.

12. Whether petitioners' claims that the proposed project has insufficient protections for forage fish, as set forth in RCW 75.08.012, WAC 220-110-250 and.300, are barred by the doctrines of res judicata and/or collateral estoppel, since these issues were fully adjudicated in petitioners' appeal of the Washington State Department of Fish and Wildlife Hydraulic Project Approval.

13. Whether petitioners failed to exhaust their administrative remedies and are therefore barred from seeking review of Pierce County's Determination of Nonsignificance.

14. Whether petitioners' claims regarding environmental impacts from the proposed project are barred by the doctrines of res judicata and/or collateral estoppel, since petitioners failed to appeal the Determination of Nonsignificance issued by Pierce County.

A. Shoreline Substantial Development Permit Requirements and Policies for Pier, Ramp, and Float Structures (PRF) (Issues 2, 6, and 7)

[C2]

In reviewing this appeal, the Board is guided by WAC 173-27-150, which provides that an SSDP may be granted only if the proposed development is consistent with both the policies and procedures of the SMA and its associated regulations, and the applicable local master program. WAC 173-27-150.

[C3]

Pierce County's Shoreline Use Regulations include goals and policies that allow for all reasonable and appropriate uses of Pierce County's shorelines "...without degradation of environmental quality, risk to health or safety, and to insure where development takes place, that it is done in a manner which will promote and enhance the best interest of the general public... ." PCC 20.02.010.

[C4]

Under the Pierce County Shoreline Master Program (PCSMP), docks are a permitted use in the Rural Residential Environment, provided they meet certain specifications. PCC 20.56.030 A (5), B. Joint use docks are encouraged in Pierce County "...so as to lessen the number of structures projecting into the water." PCC 20.56.020. The Respondents sought an SSDP to construct a joint-use dock totaling 100 feet waterward from the ordinary high water mark. This length was considered necessary to comply with the requirement that floating docks

must be at least one foot above bed bottom throughout the range of normal tidal conditions. PCC 20.56.040 B.4.

[C5]

To be eligible for an SSDP in Pierce County, a party bears the burden of showing that the proposed project is consistent with the policies of the Master Program and with the following criteria in PCC 20.56.040:

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

PCC 20.56.040 A.

The criteria at issue in this case are those that relate to views from surrounding properties, the use and enjoyment of the water or beach on adjoining property, the public's use of the waters, the availability of commercial or public moorage facilities, and the compatibility of the proposal with surrounding land and water uses.

[C6]

Pierce County Planner Prendergast recommended denial of Respondents' application for an SSDP after performing a balancing analysis addressing the PCSMP mandate in PCC

20.56.040A to weigh competing values. The planner's analysis focused on whether there were *undue* restrictions and impairments to views and public enjoyment of the beach including the particular environmental and biological impacts that would be involved at the beach and in the water. The PCSMP provides that only one moorage space is allowed per waterfront owner using a joint use dock. PCC 20.56.040 B.7.e. If the PRF and the float lift were approved without the removal of the existing moorage buoys, as is planned, there would be a total of four moorage spaces for two families. *Testimony of Prendergast.*

[C7]

In lieu of adopting specific standards relating to design, location, bulk, and use for substantial shoreline developments, Pierce County has also adopted development guidelines that the County's reviewing authority must apply to site-specific project applications to achieve a "satisfactory degree of consistency with the policies and criteria set forth in [the PCSMP Piers and Docks chapter]. Using these guidelines, the County may extend, restrict, or deny an application to achieve the purposes of the Piers and Docks chapter. The development guidelines include the following:

> 2. In areas identified by the Department of Fisheries, Game or Natural Resources in accordance with a study inexistence at the time of application as having a *high environmental value for shellfish, fish life or wildlife, piers, docks and floats shall not be allowed* unless functionally necessary to the propagation, harvesting, testing or experimentation of said marine or wildlife, *unless it can be conclusively established that the dock, pier or float will not be detrimental to the natural habitat.*

7. Joint use piers and docks.

a. Maximum intrusion into water[2] should be only so long as to obtain a depth of eight feet of water as measured at mean lower low water on saltwater shorelines, or as measured at ordinary high water on freshwater shorelines, except that the intrusion into water of any pier or dock should not exceed the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines . . . .

e. Joint dock facilities should have no more moorage spaces than one space per waterfront owner using the dock.

PCSMP 20.56.040 B. (Emphasis added).

Pierce County Planner Prendergast's recommendation to the Hearing Examiner that Respondents' application for a SSDP be denied was based on the PCSMP mandate to weigh two basic classes of values as set forth in PCC 20.56.040 A. One side concerns whether the proposal would cause *undue* restrictions or impairments of the views of the beach, the enjoyment of the water and beach on adjoining properties, and impairment of the public's use of surface waters below ordinary high water. To be weighed against those values is the question of whether reasonable alternatives exist for shoreline property owners, and whether the intensity of proposed uses is compatible with the surrounding environment and land and water uses. PCSMP 20.56.040 A. Prendergast concluded that, in this case, the balancing analysis required by the county SMP tipped the scale – that it was too much to expect in a rural residential environment to have a dock, a pier, a ramp, and a float lift where owners already had use of two boat launches and buoys.

[2] Intrusion into the water means the length of a dock or pier together with any attached structures such as a gangway and/or float measured along a perpendicular line from the ordinary high water line or lawfully established bulkhead to the most seaward projection of the structure. PCC 20.56.010 E.

[C8]

The Pierce County guidelines for reviewing SSDPs for piers and docks criteria require an analysis of whether a reasonable alternative such as joint use, commercial, or public moorage facilities exists and whether it is likely to exist in the near future. PCC 20.56.040 A.5. The Board uses an objective standard, rather than personal circumstances of a particular proponent to evaluate the need for a project. *Harman v. Bellevue, Order Denying Reconsideration,* SHB-94-75. The evidence was insufficient to establish that existing launching facilities were generally insufficient.

B. **Compatibility with Surrounding Environment and Uses (Issues 5, 8 & 9)**

[C9]

The evidence established that the site is located on a beach that has a wide expanse of sandy, gently sloping shoreline and is, to date, virtually undeveloped. The docks that do exist in the area are located on the rocky ends of the crescent and do not interrupt the long expanse of sandy beach in between. The fact that this would be the first dock within this sandy crescent is a significant factor in the compatibility analysis. The Board has addressed the issue of compatibility before. For example, in *Inskeep v. San Juan Co, SHB No. 98-033 (1999),* the Board granted an SCUP and variance for a dock that was the first such facility in a bay because it sufficiently minimized the impact by its location and design. In this case, the proposal is for a dock much longer than the nearest two older structures, and it is situated in the middle of a long, relatively undeveloped stretch of wide sandy beach where there are no other docks. Therefore,

compatibility is more of a concern to the Board. The fact that a dock is a permitted use in the Rural Residential zone does not eliminate the necessity for a compatibility analysis. The Court of Appeals has recognized that it is appropriate to consider compatibility, aesthetics, and the preservation of scenic views in the context of a substantial development permit. *Bellevue Farm Owners Ass'n v. Shorelines Hearings Board*, 100 Wn.App. 341, 355, 997 P.2d 380 (2000). Pierce County general criteria and guidelines for reviewing substantial development permits include compatibility issues such as the impairment of views from surrounding properties. PCC 20.56.040 A.2. For shoreline development proposals, compatibility has both upland and waterward aspects. Even where the shore is lined with structures on relatively narrow lots, the beach may still be in a relatively natural state. The Board has addressed compatibility and aesthetics in relation to the siting of docks, and recognized that property owners in dock cases are less concerned about their views being blocked than seeing man-made structures in a natural setting. *Citizens to Preserve the Upper Snohomish River Valley v. S-R Broadcasting*, SHB 06-022 (2006).

[C10]

The Pierce County General Criteria and Guidelines for Reviewing Substantial Development Permits Development Guidelines as found in PCC 20.56.040 B.2, require that, to approve a PRF structure in areas having a high environmental value, it must be *conclusively established* that a PRF will not be detrimental to the natural habitat.

[C11]

The site of this proposal is Hale Passage, which is part of a shoreline of statewide significance. For shorelines of state-wide significance, the first order of preference is to recognize and protect the state-wide interest over the local interest. The legislature has declared that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. RCW 90.58.020. The SMA provides an order of preference for uses on such shorelines in RCW 90.58.020, which is as follows:

(1) Recognize and protect the state-wide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protection of the resources and ecology of the shoreline;

(5) Increasing public access to publicly owned areas of shorelines;

(6) Increasing recreational opportunities for the public in the shoreline; and

(7) Providing for other elements defined in RCW 90.58.100 as necessary and appropriate.

[C12]

The SMA allows the development of reasonable and appropriate uses along the state's shores, but it is the policy of the state to provide for the management of the shorelines of the state by insuring development of the shorelines in a manner that will promote and enhance the public interest, contemplating protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights..." RCW 90.58.020. "The policy of the SMA was based upon the

recognition that shorelines are fragile and that the increasing pressure of additional uses being placed on them necessitated increased coordination in their management and development." *Beuchel*, 125 Wn.2d at 203, 884 P.2d 910. The evidence in this case demonstrated the fragile nature of this shoreline. The area involved in this application for a PRF is in a state of recovery following an event occurring prior to the enactment of the SMA that destroyed environmentally valuable eelgrass beds, which, in turn, impacted species, including endangered salmonid species, that depend on them. The beach is also an established area for sand lance spawning.

[C13]

The fact that the County issued a DNS in this case is not controlling, since a DNS is not binding on the Shorelines Hearings Board, nor does it preclude other environmental review. The SMA is to be broadly construed to protect the state shorelines as fully as possible. *Bellevue Farm Owners Assoc. v. SHB*, 100 Wn.App. at 352 (2000); RCW 90.58.170, 180(1). SEPA is essentially a procedural statute, not designed to usurp local decision making or to dictate a particular substantive result. *Save Our Rural Env't v. Shohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983).

[C14]

The project area is classified by the WDFW as a Nearshore Marine Area. It has been designated a critical habitat area for Hood Canal summer-run chum salmon, and Puget Sound Chinook Salmon, listed as Endangered under the Endangered Species Act. 50 C.F.R. Part 226, 70 F.R. 52705; 16 U.S.C. §§1531 to 1544. *Exhibit P-51, P-52.*

[C15]

Pierce County's development guidelines for shoreline uses include a requirement that, to approve a PRF structure in areas having a high environmental value, it must be *conclusively established* that a PRF will not be detrimental to the natural habitat. PCSMP 20.56.040 A. The Board concludes that the shoreline area involved in this proposal is one of high environmental value and that, in this case, the proposed structure would likely be detrimental to the natural habitat currently existing and recovering at this location.

[C16]

The evidence amply established fact that residents and visitors alike consider the beach and the views it affords to be beautiful and unique. Aesthetic values are inherent in the values to be protected under the SMA and Pierce County's Shoreline Master Program. Uses of shorelines of state-wide significance are prioritized. The Board concludes that inherent in all of these use preferences is protection of the aesthetics of the state's shorelines, particularly for relatively undeveloped stretches like the beach that is the subject of this case. The Board concludes that a 100-foot PRF constructed in the middle of the sandy crescent of this beach would have a jarring visual effect, and it would not further any of the priorities set forth in the SMA.

[C17]

The Board recognizes that private property rights, which are also protected by the SMA and at the same time is mindful of case law from our higher courts concluding that the protection of private property rights is secondary to the SMA's primary purpose which is "to protect the state shorelines as fully as possible." *Buechel v. Department of Ecology*, 125 Wn.2d 196, 203,

884 P.2d 910 (1994); *Lund v. Department of Ecology*, 93 Wn.App. 329,336, 969 P.2d 1072 (1998). In this case, the law requires this Board to balance the Respondents' rights to enjoyment of their property against not only the competing private property rights of their neighboring property owners, but also those priority rights of the public in a shoreline of statewide significance.

[C18]

Respondents argue that cumulative effects are not part of the criteria required to be considered in applications for substantial development permits, citing *Roller v. Unger*, SHB No. 06-016 (2006).[3] This is in contrast to shoreline conditional use permits and shoreline variances where cumulative impacts must be specifically considered. WAC 173-27-160, 170. Even though cumulative impacts are not listed, *per se*, as shoreline substantial development permit criteria, the Board is not precluded from considering them. The Supreme Court has held that, in light of its statutory duties, the Board was neither arbitrary nor capricious to be concerned over the ultimate cumulative impact of piecemeal development on the state's shorelines when it vacated and remanded an SSDP for filling wetlands. *Hayes v. Yount*, 87 Wn.2d 280, 288, 552 P.2d 1038 (1976).

In a case involving review of an SSDP issued by a local government, the Washington Supreme Court upheld the Board's remand of that permit based upon the potential cumulative impacts of other projects removing buffer protections along the shoreline. *Skagit County v.*

Department of Ecology, 93 Wn.2d 742, 750, 613 P.2d 121 (1980). Citing the *Hayes* decision, the *Skagit County* court approved the SHB's consideration of cumulative effects in the granting of a substantial development permit, recognizing that approval of one project can be adverse to the environment by setting a precedent for other similar projects. The Court said, "Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together." *Skagit County*, 93 Wn. 2d at 750 (quoting *Hayes* at page 287). The *Skagit County* court went on to conclude that "The SMA recognizes the necessity for controlling the cumulative detrimental impact of piecemeal development through coordinated planning of all development. RCW 90.58.020." *Skagit County*, 93 Wn.2d at 750 (1980).

This Board has also found that, under some circumstances, it is appropriate to consider SSDP applications for docks in the context of potential future development:

> We must also consider the present proposal in the context of potential future development of similar docks along Pickering Passage. The board noted in *Gennotti v. Mason County*, SHB No. 99-011 (1999), that listed salmon stocks on Hood Canal have been adversely impacted by extensive development. Even if the proposed dock alone would have no adverse impact, it should be considered in the cumulative adverse impact attendant on potential future dock development.

Viafore v.Mason County, SHB No. 99-033, p. 4 (2000).

The facts of this case are distinguishable from those in the *Roller* case in several important respects and more like those presented in *Viafore*. First, in *Roller*, it was significant

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[3] While it is true that, in *Roller*, the Board held that neither the SMA nor the Pierce County Code *requires* consideration of cumulative effects, it also acknowledged that they do not *preclude* such consideration where appropriate. *Roller v. Pierce County*, SHB 06-016 (2006).

that several existing piers were visible from the location of the proposed dock and there were a number of docks within a short distance of the proposal, whereas, in *Viafore,* the proposed dock would have been the first dock constructed after the SMA along that particular segment of beach where only one other pre-SMA dock structure existed. *Roller (2006) FOF No. 15; Viafore (2000) FOF III.* Additionally, unlike the present case, in *Roller*, the Board concluded that the anticipated use posed "no risk of environmental damage." *Roller (2006) COL 9.*

Consideration of potential cumulative effects and precedential effects is warranted in this case by the clear risk of harmful impacts to high value habitat, loss of community use, the impact to views and the extraordinary aesthetic values of the area. It is also appropriate to consider the fact that the Respondents in this case have available to them the means to enjoy their boating uses in the form of two boat launches, buoys, and nearby launching locations, and long-term moorage that is at a reasonable distance. In such a case, a balancing of the interests of the shoreline property owners and those of the public is necessary.

C. **Shoreline Conditional Use Permit for the Floating Watercraft Lift (Float Lift) (Issues 1 & 4)**

[C19]

In addition to the PRF, Respondents propose to build a float lift at a location 425 feet from the Robertson's bulkhead. Float lifts are not permitted outright in the PCSMP, but they may be installed if they meet the criteria for a conditional use permit.

[C20]

To be eligible for a CUP in Pierce County, a party bears the burden of showing that the all of the following criteria in PCC 20.72.030 have been met:

A. That there is some necessity for a shoreline site for the proposed use or that the particular site applied for is essential for this use.

B. The use will cause no unreasonably adverse effects on the environment or other uses.

C. That water, air, noise, and other classes of pollution will not exceed the level customarily found in that particular environment.

D. Design of the site will be compatible with the Master Program.

E. The use will not interfere with public use or public shorelines.

[C21]

Piers, pilings, docks, floats, rafts, ramps, etc., and associated mooring projects must incorporate mitigation measures as necessary to achieve no-net loss of productive capacity of fish and shellfish habitat. WAC 220-110-300. Floats and rafts "shall not ground on...Pacific sand lance..." WAC 220-110-300(1). Piers, docks, floats, rafts, ramps, boathouses, houseboats, and associated moorings shall be designed and located to avoid shading of eelgrass (Zostera spp). WAC 220-110-300(3).

[C22]

Although there was dispute regarding the presence of eelgrass in the precise project area, it was undisputed that the survey that was conducted did not extend to the likely location of the float lift. The Board has found that the evidence established the presence of at least one stand of

eelgrass and that eelgrass is re-establishing itself in the area. The evidence also established that the location of the float lift does not involve sand lance spawning because it is further waterward than the normal near-shore spawning habitat. The Army Corps general permit requires that no work on float lifts be performed over or within 50 feet of eelgrass and macroalgae beds. The Board concludes that the Army Corp's implementation of this separation between the proposed float lift and the eelgrass bed(s) would provide sufficient protection for the nascent re-establishment of eelgrass beds in the area, and meets the shoreline environmental protection requirements of RCW 90.58.020.

D. **Pierce County's Compliance with SEPA (Issues 10, 13 & 14)**

[C23]

Petitioner bases his appeal partly on SEPA. In this case, the evidence established that Petitioner was particularly active in the SEPA process. It also demonstrated that the County followed required SEPA procedures and provided proper notice of the appeal deadline to the general public, including actual notice to Petitioner. The DNS was issued on November 10, 2005, and it included a specific notice that the deadline for appeals was 14 days after the expiration of the comment deadline, which was also specifically stated as November 28, 2005. Petitioner May did not appeal. A corrected DNS was issued on December 7, 2005 and provided to Petitioner May, and although the appeal deadline was repeated on that document, Petitioner May still filed no appeal, although he did comment. However, he did not state that his comment was meant to be an appeal. In a later communication by e-mail to the County, Petitioner stated

that he had chosen not to appeal, but only to comment as it was free. Unless there has been a substantial change in a proposal between the time of the first governmental action and the subsequent governmental action that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed and proper notice provided, a corrected DNS does not require additional time for filing an appeal. RCW 43.21C.080(2)(b). The Board concludes that, although Petitioner May was actively involved throughout the SEPA process, he failed to timely appeal the County's SEPA determination and exhaust his administrative remedies. Therefore, the issues raised in this appeal pursuant to SEPA are not properly before this Board and they cannot be considered.

E. **Jurisdiction of the Shoreline Hearings Board (Issues 11, 14, and 12)**

[C24]

Respondents challenge the Board's jurisdiction to determine whether the proposed project has sufficient protections for forage fish. Chapter 77.55 RCW requires the WDFW to consider the welfare of fish. Protection of fish life is the only ground upon which approval of a [hydraulic] permit may be denied or conditioned. RCW 77.55.021(3)(a). The Board does not implement WDFW statutes. This Board is a quasi-judicial body with powers of *de novo* review authorized by Chapter 90.58 RCW to adjudicate or determine appeals from any person aggrieved by the granting, denying, or rescinding of a permit issued or penalties incurred pursuant to chapter 90.58 RCW (the SMA). RCW 90.58.180(2); WAC 461-08-315. The broad shoreline protection mandates of the SMA require the Board to balance the sometimes competing uses of

shorelines in light of the state mandate to protect the natural resources of the shorelines. "This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto." RCW 90.58.020. In order to do that, the Board must consider the environmental conditions that are necessary for the protection of the shoreline natural environment, including the fish and plant life. The Department of Fish and Wildlife (WFDW) does not consider the potential cumulative effects of a project when issuing a hydraulic project approval. *Testimony of Stewart.* Therefore, the fact that the WDFW has reviewed Respondents' proposal and issued a permit under the laws that govern hydraulics permitting does not preclude the Board from considering potential impacts to forage fish and other organisms in its evaluation of whether a proposal adequately achieves the SMA's goals of balancing uses and impacts. The Board concludes that it has jurisdiction under the SMA to hear and decide matters relating to the welfare of forage fish, and that the Board is not barred by the doctrines of *res judicata* and/or *collateral estoppel* from considering impacts to forage fish.

[C25]

Petitioners raised, but did not argue, an issue as to the ownership of the underlying tidelands, and whether an SSDP can be issued for a project not located on land owned by the Respondents. The Board rejects this issue because ownership of the underlying land is not necessary in an application for an SSDP first because the DNR has already issued a hydraulics permit for the PRF. With regard to the float lift, the Board has held that entitlement to an SSDP

is not dependent upon the applicant's property interest, but upon the nature of the SSDP itself under the SMA. *Friends of the Earth v. Westport*, SHB No. 84-63 (1985); *Casey v. City of Tacoma*, SHB No. 79-19 (1979).

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

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the following

ORDER

1. Pierce County's decision approving the Robertsons' and Kvinslands' Application for a Shoreline Substantial Development Permit for a PRF is REVERSED.
2. Pierce County's decision approving the Application for a Shoreline Conditional Use Permit for the floating watercraft lift is AFFIRMED, with the additional condition that a supplemental eel grass survey is conducted to allow placement of the float lift in a location that will not impact eelgrass.

SO ORDERED this 16th day of April 2007.

SHORELINES HEARINGS BOARD

WILLIAM H. LYNCH, Chair

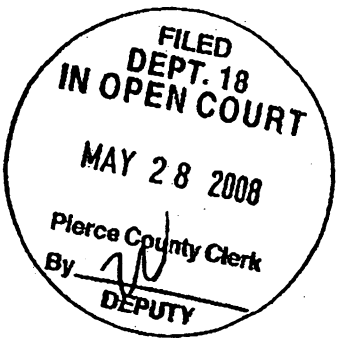
ANDREA McNAMARA DOYLE, Member

MARY-ALYCE BURLEIGH, Member

CASSANDRA NOBLE, Presiding
Administrative Appeals Judge

APPENDIX E
ORDER DATED MAY 28, 2008

(Clerk's Papers 52-61)



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

RONALD ROBERTSON AND KATHRYN ROBERTSON AND; Jon KVINSLAND and MARI KVINSLAND Petitioner(s) , vs. SHORELINE HEARINGS BOARD, et al. Respondent(s) .	Cause No: 07-2-08064-9 **ORDER**

This appeal comes on behalf of Petitioners Ronald and Kathryn Robertson and Jon and Mari Kvinsland who seek a reversal of the Shoreline Hearings Board's reversal of the Piece County's Hearing Examiner's decision approving the Petitioners' application for a shoreline substantial development permit (herein "SSDP"). The Court, having fully reviewed the Shoreline Hearings Board's order and the parties' briefs and exhibits hereby gives the following ruling.

STANDARD OF REVIEW

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that,

> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter. RCW 34.05.570(3).

Under the clearly erroneous test, the Board's decision is reviewed in view of the entire record and public policy of the Shoreline Management Act (SMA). *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201-202, 884 P.2d 910 (1994). Under this standard,

the Board's decision may only be reversed when the reviewing court is definitely and firmly convinced that a mistake has been made in light of the policies of the SMA and the reviewing court may not substitute its judgment for that of the Board. *Id.* at 202.

The Court also reviews the Board's decision to determine whether it is supported by substantial evidence or if the decision is arbitrary or capricious. Substantial evidence is evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 1294 (1995). A decision is arbitrary or capricious if it is a willful and unreasoning action in disregard of the facts and circumstances. *Buechel v. Dep't of Ecology*, 125 Wn.2d at 202,

FACTS

Petitioners Robertson and Kvinsland wish to build a joint dock that would be shared between their two families. Petitioners sought and obtained a shoreline substantial development permit (SSDP) from the Piece County Hearing Examiner in August of 2006. Respondents appealed the Examiner's decision to the Shoreline Hearings Board. On April 16, 2007, the Board reversed the Examiner's grant of the SSDP, but affirmed the Examiner's grant of a conditional use permit for the Petitioners to build a float lift 425 feet from the Robertson's bullhead. The Board's decision as to the conditional use permit was not appealed and was not reviewed by this Court.

ISSUE

Whether the Shoreline Hearings Board erred in reversing the Pierce County Hearing Examiner's decision and denying the Petitioners' application for an SSDP.

ANALYSIS

It is unfortunate this litigation has ensued to the present level of intensity. However this Court, being bound by the standard of review, finds there was little or no justification for the conclusion reached by the Board in denying Petitioners' application for an SSDP.

The Revised Code of Washington (RCW) provides that a permit shall be granted when the development proposed is consistent with the applicable Shoreline Master

Program and the RCW. RCW 90.58.140. To obtain an SSDP in Pierce County, the proposal must be consistent with the Pierce County Shoreline Master Program (SMP) and the following policies:

> ***
> 2. Views from the surrounding property will not be unduly impaired
> 3. Ingress-Egress as well as use and enjoyment of the water or beach on adjoining property is not unduly impaired
> 4. Public use of the surface waters before ordinary high water shall not be unduly impaired.
> 5. A reasonable alternative such as joint use, commercial or public moorage facilities does not exist
> ***
> 7. The intensity of the use shall be compatible with the surrounding environment, and land and water uses. PCC 20.56.040(A).

1) Did the Shoreline Hearings Board err when it determined that Petitioners' SSDP was inconsistent with the policies and criteria of the Shoreline Management Act and Shoreline Master Program?

COURT'S RULING: YES. The Board never makes an express finding on any of the actual criteria set forth under the Shoreline Management Act (SMA). Despite the Board's voluminous order, the Court finds little, if any, justification or evidence supporting the Board's decision that the Petitioners' proposed dock is inconsistent with the policies of the applicable statutes, given the environmental designation of Hale Passage. The Pierce County Shoreline Master Program, whose policy the Shoreline Management Act requires projects to be consistent with, states that its intent in providing shoreline environmental designations is to, "guide the use of all county shorelines *by planning for development*." SMP at 14 (emphasis added). Thus, the policy of the master program is to allow development when it is in line with the environmental designations. The shoreline at issue is designated as a Rural Residential Environment, providing for medium impact development. Under this

designation, Petitioners could each build their own dock, provided it was less than 50 feet long, on their separate properties without seeking a SSDP. PCC 20.56.030(B).

A. The Board fails to make or support a determination that views from the surrounding property will be unduly impaired.

Despite Hale Passage's environmental designation, the Board appears to base their reversal of the Hearing Examiner's decision in a large part on the fact the beach is currently undeveloped and, "pristine." The Board even goes so far as to say the affect of the proposed dock on the currently undeveloped beach would be, "jarring." *May* (2007) COL 16. What the Board does not find, or support with substantial evidence, however, is that the views from the surrounding property would be unduly impaired. Respondent admitted under questioning that the only view that will be affected if this dock is built is the view of the beach. (HT 115-116). Yet the Board's reversal of the Hearing Examiner's decision on this fact is misplaced in light of the policies of the SMP. Under the beach's environmental designation docks are allowed, some of them outright without a permit. Thus, the mere obstruction of beach views does not rise to the level of an undue impairment under the SMP, yet the Board provides no other evidence of view obstruction.

In an attempt to bolster its conclusion that the SSDP should be denied, without making an actual finding of undue impairment, the Board concludes that there is a preference for the protection of the aesthetics of relatively undeveloped beaches, like the one in this case, inherent in the priorities set for shorelines of state-wide significance. Reliance on this evidence, instead of the development priorities set by the SMP, is clearly erroneous, however, as Hale Passage has not been classified as being of "state-wide significance." RCW 90.58.030(e).

B. The Board fails to make or support a determination that the proposed dock would unduly impair the use and enjoyment of the water or beach on adjoining properties nor that the proposed dock would unduly impair public use.

Respondents concede that the Board never concluded that the proposed dock would unduly impair the use and enjoyment of the water or beach on adjoining property, nor did the Board find that the public use of the surface waters before ordinary high water would be unduly impaired. (Resp.'s Br. 33).

C. The Board fails to make or support a determination that the proposed joint dock does not meet the reasonable alternative criteria.

The Board also never expressly concludes, nor presents any evidence to justify the conclusion, that other reasonable alternatives such as joint use, commercial or public moorage facilities exist that undermine the value of the proposed dock. The Board completely fails to discuss that the Petitioners' dock is a joint dock, thus appearing to satisfy the criteria outright. The Board merely concludes that the evidence presented by the Roberstons and Kvinlands at the hearings was, "insufficient to establish that existing launching facilities were insufficient." *May* (2007) COL 8. Yet the criterion does not speak to launch facilities, but adequate moorage facilities. Thus, any conclusion based on the availability of alternative launch facilities is clearly is erroneous because it is not the standard set forth by the SMA.

D. The Board fails to make or support a determination that the proposed dock is incompatible with surrounding uses

The Board's apparent conclusion that the proposed dock is incompatible compatible with the surrounding environment, and land and water uses is not supported by sufficient evidence. The Board bases this conclusion on the fact that the proposed

dock would be the first in the area. *May* (2007) COL 9. Yet the Board's own findings of fact belie this conclusion. The Board states that 300 feet away from the petitioner's proposed dock is another dock. "The [dock] *is visible from the project site.*" *May* (2007) FOF 5 (emphasis added). Even if the definition of "surroundings" was limited to only the visual area around the proposed dock, the already existing dock would clearly meet this standard. In addition, the standard set by the criteria does require an application be denied if any impacts are present, only if they are incompatible with the existing environment and uses. There is already substantial development and human activity on and near the beach in question. In addition to the other dock, homes and bulkheads are built on the beach and there is already boating and swimming in the water. While a new dock will have an impact, the Board cites no evidence that the dock's impact would be any greater than, or incompatible with, pre-existing impacts from the other development.

E. The Board fails to make or support a determination that the proposed dock's cumulative impacts render the dock incompatible with the SMA or SMP.

Both parties argue at length about the propriety of the Board's consideration of the proposed dock's cumulative impacts in their determination. The Board's consideration of cumulative impacts would have been proper. The Supreme Court has approved the Shoreline Board's consideration of cumulative affects in past cases, "logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together." *Hayes v. Young*, 87 Wn.2d 280. 287, 552 P.2d 1038 (1976). This Court notes that the Shoreline Board refused to take cumulative impacts into account in a prior case, however this is not determinative because a state agency is not estopped from attempting to enforce

zoning laws because of a prior decision of the agency regarding other property. *Buechel v. Dep't of Ecology*, 125 Wn.2d at 211.

However, despite the propriety of the Board taking cumulative impacts into account, the Board cites to no evidence to sustain a conclusion that cumulative impacts of the proposed dock should foreclose the Petitioners' SSDP. The Board does not clearly state the way its consideration of the cumulative impacts affects its ultimate determination. Conclusion 18 describes, at length, the various precedents which allow the Board to consider cumulative affects. However, after determining the Board can consider the affects, the order simply concludes that, "such a balancing of interests of the shoreline property owners and those of the public is necessary." *May* (2007) COL 18. The Board then affirms the Petitioners' permit to build a float lift. Thus, the Board never affirmatively finds that the cumulative affects should cause the denial of the Petitioners' SSDP, nor is any conclusion based in this assumed finding supported by substantial evidence.

2) Did the Shoreline Hearings Board err when it applied the Development Guidelines in its decision to reverse the Hearing Examiner?

COURT'S RULING: YES. The SMA states that, "*in areas identified by the Department of Fisheries, Game or Natural Resources* in accordance *with a study in existence at the time of application* as having a high environmental value ...piers, docks and floats shall not be allowed...unless it can be conclusively established that the dock, pier or float will not be detrimental to the natural habitat." PCC 20.56.040(B)(2) (emphasis added). The Board's use of the Development Guidelines is clearly erroneous because, by plain terms, the requirement to conclusively establish a dock will not be detrimental to the natural habit of the area is only triggered when one of the enumerated agencies identifies the area as one with high environmental value. There is no such

determination by any enumerated agency in this case. "The Board concludes that the shoreline area involved...is one of high environmental value." *May* (2007) COL 15. However, the Board in not one of the listed agencies that can trigger the use of this standard. While the Respondents argue that it is unclear that the Board uses the guidelines in their ultimate decision, Conclusions of Law 10 & 15 would be rendered completely meaningless if the Board did not take the Development Guidelines into account.

3) Must the proposed dock plans be in conformity with the Shoreline Management Acts?

COURT'S RULING: YES. The SMA provides that, "Joint dock facilities should have no more moorage spaces than one space per waterfront owner using the dock." PCC 20.56.040(B)(7)(e). The Board finds that if, "the [dock] and the float lift were approved without the removal of existing moorage buoys, as planned, there would be a total of four moorage spaces for two families." *May* (2007) COL 6. There is no evidence that this conclusion is clearly erroneous, not supported by substantial evidence, or arbitrary. It is unclear, however, how many spaces that are available would be attributable to the joint dock facilities, and how many are attributable to the buoys. The record fails to address this matter. In granting the Petitioners' SSDP, however, the Hearing Examiner must ensure the proposed dock provides no more than one moorage space per owner.

CONCLUSION

For the reasons set forth above, the Court **reverses** the Shoreline Hearings Board's Order of April 16, 2007.

DATED this 28th day of May, 2008.

FILED
DEPT. 13
IN OPEN COURT
MAY 28 2008
Pierce County Clerk
By DEPUTY

JUDGE BEVERLY G. GRANT

APPENDIX F
ROLLER V. PIERCE COUNTY
SHB *(06-16)*

4 of 4 DOCUMENTS

JANET ROLLER; and G. JAMES KENNEY, M.D. & MARY KENNEY, Petitioners, v. PIERCE COUNTY and CHRISTOPHER & LARA UNGER, Respondents

SHB NO. 06-016

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

2006 WA ENV LEXIS 40

October 4, 2006

JUDGES: SHORELINES HEARINGS BOARD; Andrea Mcnamara Doyle, Presiding; Kathleen D. Mix, Member; Gordon Crandall, Member

OPINION:
[*1]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held in the above matter on September 5, 2006, in Gig Harbor, WA. The Shorelines Hearings Board was comprised of the following members: Andrea McNamara Doyle, presiding, Kathleen D. Mix, and Gordon Crandall. The Petitioners, Janet Roller and James & Mary Kenney, were represented by attorney Barnett Kalikow of Kalikow & Gusa PLLC. Pierce County was represented by Jill Guernsey, Deputy Prosecuting Attorney. Respondents Christopher and Lara Unger were represented by attorney Margaret Archer of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP. Kim Otis with Gene Barker and Associates of Olympia, WA, provided court reporting services.

The Board received sworn testimony of witnesses, exhibits, and argument on behalf of the parties. The Board also conducted a site visit on the morning of the hearing, which was attended by representatives of all parties. Having fully considered this record, the Board enters the following:

FINDINGS OF FACT

[1]

A Shoreline Substantial Development Permit (Shoreline SDP) to construct a dock at 7908 Olympic View Drive NW, Gig Harbor, WA was approved by Pierce County (County) on March 28, 2008. [*2] *(Exhibit PC-1)* The application was originally made by Eric and Marcee Russell, who subsequently sold the property to Christopher and Lara Unger (Respondents). Janet Roller and James and Mary Kenney (Petitioners) are neighboring property owners who oppose the construction of the proposed dock.

[2]

The site is located on the east shore of Carr Inlet in the Rosedale area of unincorporated Pierce County, immediately east of Raft Island. The property lies within an area that has been designated by the County in its Shoreline Master Program (SMP) as a "Rural Residential Shoreline Environment." The property includes 100 feet of no bank waterfront, consisting of a rock and gravel beach that is situated within a small indentation along the eastern shoreline of the inlet (referred to variously as a "cove" or "bight" by different witnesses).

[3]

Immediately to the north of the Unger's property is the Kenney residence, whose beach is also situated within the cove. The Kenney family has lived at their property for 33 years, during which time they have observed and participated in a wide range of water-related recreational activities from their beach, including swimming, boating, water skiing, [*3] skim and wake boarding, jet skiing, canoeing, kayaking, and sight-seeing. *(Testimony of James Kenney, Testimony of Mary Kenney)*

[4]

When making water ski runs, the Kenneys, and their neighbor Mr. Coy, who resides immediately to the north, like to take skiers to and from the cove directly in front of their homes. Their preferred drop-off route involves driving in a sweeping arc into the cove from the north and back out of the cove south past the Unger and Roller properties, at speeds high enough for skiers to land on the Kenney or Coy beach. The Kenneys and Mr. Coy are concerned that the proposed pier and dock will make water skiing more dangerous, by requiring sharper turns to drop off skiers, having to drop skiers out in deeper water, and by interfering with the ability of boat drivers to see downed skiers, swimmers, or paddlers, and vice versa. *(Testimony of James Kenney, Testimony of Mary Kenney, Testimony of Clifton Coy)*

[5]

Immediately to the south of the Unger property is the Roller property, which includes the Roller residence and dock. *(Exhibits PC-1, P 3)* The proposed dock will be approximately 10 feet from the Unger's southern property line and 61 feet north [*4] of the Roller dock. It will be situated at the end of an existing concrete walkway and next to a small platform currently in place along the Unger's southern property line. *(Exhibits R-1, R-2, R-3)*

[6]

The Roller dock is a professionally constructed, 3.5 to 4 foot wide floating wooden dock that was installed by the Rollers in 1991-92. It is anchored to the tidelands and has no pilings or railings. *(Testimony of Janet Roller)* Although the length of the Roller dock has been disputed at various points in this application and appeal process (between 103 and 130 feet), it is not disputed that the waterward end of the Roller dock extends to the same tidal level as the end of the proposed Unger dock. *(Exhibits P-1, P-3, P-4, R-2, Testimony of Jerry Broadus, Testimony of Michael Stead)*

[7]

The Unger dock will have a total length of 145.5 feet, consisting of a 4 foot wide by 90.5 foot long pier, a 4 foot wide by 40 foot long ramp, and an 8 foot wide by 24 foot long float. *(Exhibits PC-1, R-3(a) and (b), Testimony of Michael Stead)* The proposed dock will extend waterward to the same elevation contour in the channel as the Roller dock, meaning that it will go dry at the Mean Lower [*5] Low Water level (MLLW or zero tide) as the Roller dock does. *(Exhibits P-3, P-4, Testimony of Jerry Broadus, Testimony of Michael Stead)*

[8]

The structure will be secured by a total of 14 steel pilings, 10 for the pier and 4 for the float. Pilings constrain the movement of the structure, which will make it more stable than a floating or anchored dock that moves more with wind and wave action. The ramp will be grated aluminum, and the float will have 50 percent functional grating. The float will remain one foot off the beach, even when the dock goes dry. This will create less environmental impact than a solid dock that shades the water underneath and rests on the tidelands at lower tides. The pier will also have a protective railing constructed of stainless steel cables strung horizontally below a two inch by six inch handrail. From a distance of approximately 50 to 100 feet away, the cables will "disappear" from view, leaving only the handrail and base of the pier visible. *(Testimony of Michael Stead)*

[9]

Approximately nine feet of clearance will be available between the underside of the pier and the water's surface at average tidal levels (mean tide), and between approximately [*6] 3.3 to 4.2 feet at higher tides. *(Exhibit P-5, Testimony of Jerry Broadus)* There will be sufficient clearance to walk under the dock at low tide. *(Exhibit P-5, Testimony of Michael Stead)* No bulkhead or obstruction separates the beach from the landward end of the pier. *(Testimony of Christopher Unger)*

[10]

The dimensions and design features of the proposed pier-ramp-float structure are typical of those being professionally designed and installed in the Puget Sound area at this time. The elevated pier and grating were selected to meet current state and federal agency directives to protect aquatic habitat from damage. The length was modified to meet the County's length restrictions as calculated by the fetch limitations. The materials were selected to minimize both environmental and view impacts. *(Testimony of Michael Stead)*

[11]

Many docks in the Puget Sound area go dry as a function of the length limits imposed by regulations and shallow waters. The proposed structure is not unusually long, nor does it have an unusual amount of clearance. *(Testimony of Michael Stead)* It is not uncommon to find 150 foot-long docks in the Rural Residential environment of Pierce County. [*7] *(Testimony of Ty Booth)*

[12]

The Unger family has recently moved into the home at the site of the proposed dock, and they intend to make this their full-time residence. They were aware of this appeal of the Shoreline SDP at the time they purchased the property. The Ungers were also aware that the float will go dry at zero tides (making it unusable for permanent moorage), but they believe the dock will provide them many other recreational uses and safety benefits.

The Ungers have three young children and desire to make use of the proposed dock for a variety of water-related recreational activities similar to those enjoyed by the Kenneys, Rollers, and Coys. They also intend to use it for diving, snorkeling, kayaking, landing/loading boats, and as a gathering place from which to enjoy the views.

Mr. Unger is concerned about the speed of the ski boats in the area and believes that the proposed dock will have the desired effect of both slowing down boats in the cove as well as creating a protected swimming area. The location of the dock will be within the view corridor of the Unger house and deck, which Mr. Unger believes is a positive safety feature for monitoring children playing [*8] on the dock or in the water around the dock. The stability offered by the piling-secured float, the railings, and the ability to gate the landward and waterward ends of the pier, are also important safety features to the Ungers. *(Testimony of Christopher Unger)*

[13]

The Ungers are willing to honor the joint-use proposal offered by the previous owners (the Russells) to the Rollers as required in Condition 11 of the Shoreline SDP. *(Testimony of Christopher Unger, Exhibits PC-1, R-5, R-6)* Ms. Roller is not interested in spending additional money to remove her existing dock and share in the construction and permitting costs of the Ungers' proposed dock. Instead, she instructed her attorney to offer an easement to the Ungers for their use of her dock. *(Testimony of Janet Roller)* Mr. Unger has safety concerns about the Roller dock that would cause him to limit his children's use of it. *(Testimony of Christopher Unger)*

[14]

Views from all homes in the cove area are to the northwest toward the Olympic mountains and the west side of Carr Inlet. These homes also have views to the west toward Raft Island and to the southwest along the shoreline. *(Exhibit PC-22, P-1)* The Rollers [*9] have greater than 150 degrees of lateral water/beach view from their deck, and the Kenneys have 107 degrees from theirs. *(Testimony of Jerry Broadus)* Petitioners are concerned about the negative impact the proposed dock will have on their views and the surrounding aesthetics. *(Testimony of Mary Kenney, James Kenney, and Janet Roller)*

[15]

Several existing piers are visible from the properties in the cove area, including a large white pier directly across Carr Inlet (on the east side of Raft Island), one to the north, and several to the south. *(Exhibits P-6, P-7, P-8)* The proposed dock will be the first pier visible from the cove area along the east shore of Carr Inlet. *(Testimony of Mary Kenney)* Based on the length of the proposed Unger dock, and its angle relative to the neighboring properties, it will be visible in 36 percent of the lateral water view from the Kenneys' deck and in 33 percent of the lateral water view from the Rollers' deck. *(Testimony of Jerry Broadus)* However, the primary views of the mountains (northwest across the channel) will remain entirely unobstructed from both decks. This is due to the sloping nature of the properties which elevate the [*10] homes and their decks above the height of the pier. Substantial views of the water, Raft Island and the southern shorelines of the inlet will also remain visible from the homes, and through the wire railings of the pier from adjacent beaches. *(Exhibits P-7, P-8)*

[16]

The neighboring properties in this rural residential area are developed with single-family homes, and a number of docks are present along the eastern shore of Carr Inlet. The longest docks in the area consist of an approximately 150 foot long dock located six parcels to the south and an approximately 130 foot long dock located eight parcels to the north. Shorter docks are found between these two docks. *(Exhibits PC-9, R-4, Testimony of Ty Booth)* A public boat access is located a few parcels to the north of the Unger property, and a raised pier exists four parcels beyond that, along the same eastern shore of the inlet. *(Testimony of Clifton Coy)*

[17]

The County Hearing Examiner concluded in his March 28, 2006, Revised Report and Decision that the requested permit was consistent with the Rural Residential Shoreline Environment and all applicable policies of the County SMP, and that it satisfied all criteria [*11] and guidelines for docks in the county code. *(Exhibit PC-1)* Petitioners filed their appeal with this Board on May 1, 2006. Petitioners contested the issuance of the Shoreline SDP because they believe it is inconsistent with one or more of the County's general shoreline policies and Shoreline SDP review criteria, and that the cumulative impact and precedent of allowing this dock should have been considered by the County and this Board.

[18]

At the hearing, Petitioners challenged the Unger dock by arguing the proposed dock will obstruct and unduly impair recreational use and enjoyment of the water and beach by neighbors and the general public, and that it will unduly impair views from surrounding properties. Petitioners also argued that joint use has not been adequately explored as a reasonable alternative and that the proposed dock is incompatible with the surrounding environment. Finally, Petitioners alleged that mere convenience is not a sufficient basis for constructing a single-family dock in a shoreline of statewide significance.

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

CONCLUSIONS OF LAW

[1]

The Board has jurisdiction over this matter [*12] pursuant to RCW 90.58.180(1). Petitioners have the burden of proving, by a preponderance of the evidence, that the Shoreline SDP approving construction of the applicant's dock is inconsistent with the provisions of the County's SMP or the State's Shoreline Management Act (SMA). Both the scope and standard of review for this matter are *de novo*. WAC 461-08-500(1).

[2]

The proposed dock is a substantial development. RCW 90.58.030(3)(e). PCC 20.04.640. Approval of a Shoreline SDP in Pierce County is dependent upon a determination that the proposed project is consistent with the applicable policies of the County's SMP, and with the County's criteria and development guidelines for substantial development permits.

[3]

The County's SMP defines the Rural Residential Shoreline Environment as an area of medium intensity land uses and authorizes medium intensity residential, commercial, and agricultural development in this environment. PCC 20.10.010. The Rural Residential Shoreline Environment is the second most intensive land use designation within the County's [*13] SMP and is intended to serve as a buffer between highly intensive development of the Urban Environment and the non-intensive development of the Rural Environment. The designation reflects the County's intention for *future* development, rather than merely describing the status quo. Although the SMP designations have not been updated since they were adopted in 1974, the Pierce County Council recently adopted the Gig Harbor Peninsula Community Plan which became effective December 1, 2002. That plan explicitly provides that "Piers and docks should be permitted in the Urban, Rural Residential, and Rural Shoreline Environments. Piers and docks should generally be prohibited in the Conservancy and Natural Shoreline Environments." Gig Harbor Peninsula Community Plan, Standard 15.2.4. The evidence presented to the Board demonstrated that recreational docks are a common accessory use for shoreline residential properties in the rural residential area surrounding the Unger property. The Board is persuaded that the proposed dock meets the definition of medium intensity use and is therefore consistent with the policies and intent of the Rural Residential Shoreline Environment.

[4]

The County [*14] has identified additional general shorelines policies relevant to piers:

> (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. n1

n1 These were identified as policies (d) and (e) of the "Piers Element of the SMP" by the Hearing Examiner in *Exhibit PC-1, p. 7* and as relevant "policies from the SMP" in the Staff Report, *Exhibit PC-9, p. 8*. No citation or copy of this policy was provided to the Board, and a key word text search of the on-line version of the Pierce County SMP failed to produce a "Piers Element" or any text matching that quoted above in (d) or (e).

The County SMP also provides the following criteria for reviewing substantial development applications:

> (A) The granting of a Substantial Development Permit is dependent upon the County reviewing authority's determination [*15] 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 recreational areas will not be obstructed or impaired;

(2) Views from surrounding properties will not be unduly impaired;

(3) Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;

(4) Public use of the surface waters below ordinary high water shall not be unduly impaired;

(5) A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;

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

(7) The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses. PCC 20.56.040(A)

[5]

The main recreation activity allegedly interfered with is the dropping off and picking up of water skiers from the cove area in front of the Kenney property. However, no evidence was presented that water [*16] skiers will be deprived of the opportunity to ski, although ski boats may have to slightly modify the routes drivers and skiers have become accustomed to using. The Board is not persuaded that the proposed dock will make water skiing in the area inherently unsafe and concludes that any potential safety concerns can be easily addressed with the exercise of reasonable caution.

[6]

Secondary concerns were raised about the public's ability to navigate around the proposed dock, while either walking on the beach or boating in the near-shore waters. The Board concludes that the preponderance of the evidence presented demonstrates that access for walkers along the beach will not be unduly restricted or impaired. This is because people will be able to walk around the end or step over the top of the float at low tides, and walk under the pier at higher tides. At the highest tides (when beach walking is least likely), beach walkers can step up and around the landward end of the pier. As for paddlers, or others who prefer to remain in the shallow near-shore area, there will be sufficient clearance to pass under the pier at higher tides and ample room to pass around the end of the float at lower [*17] tides while still staying in shallow water.

[7]

The proposed dock will be clearly visible within the sweeping view corridors of the adjacent properties. When applying the "view impairment" criteria, however, we agree with the analysis in a recent Pierce County Hearing Examiner Decision suggesting that it is important to do so in the context of the applicable designated environment. *(Exhibit R-9, Robertson/Kvinsland SD/CP 36-04 Report and Decision,* August 7, 2006) Waterfront property owners in Pierce County must expect to see docks along shorelines that have been designated Rural Residential. Impairment must be considered in light of the intensity of both existing and allowable uses within such designation. The mere introduction of a new dock into a surrounding property owner's historical view corridor, without more, does not constitute undue impairment in a rural residential setting. In this case, the evidence offered by Petitioners themselves demonstrates that the proposed dock will not block any of their primary views of the Olympic Mountains, and will create only minimal obstruction of their expansive views of the beach and shorelines. Further, the Board notes that the applicants [*18] chose to employ a professional dock designer who specifically took potential view impacts into

account. The dock was designed to mitigate view impacts to the extent possible in light of the environmental necessity of using a pier-ramp-float structure. The Board concludes that while the Petitioners' views will be undeniably altered as a result of the proposed dock, they will not be unduly impaired.

[8]

Petitioners suggest that because Ms. Roller is now willing to grant an easement allowing the Ungers joint use of her existing dock that Respondents should not be allowed to build their own. We note first that Pierce County does not mandate joint-use docks. Rather, through the policies in its SMP, the County attempts to encourage construction of joint use docks and piers. PCC 20.56.020. Pierce County currently implements this policy by requiring parties to demonstrate that they have explored joint use alternatives, although the code does not specify what is needed to satisfy this requirement. County regulations explicitly allow single-family piers, outright in some areas and upon approval of a Shoreline SDP in the Rural Residential Shoreline Environment. PCC 20.56.030.

In this case, Ms. [*19] Roller has declined the Russell/Unger offer to share the expense of a new dock, and Mr. Unger has expressed safety concerns about having his children use the Roller's floating dock. In the absence of a local requirement for joint use, the Board declines to impose one under these circumstances. This Board has previously held that if the parties do not desire to enter into a joint-use agreement, the Board will not require them to do so. *Ackerson v. King County*, SHB No. 95-26 (Final Order, CL V-VI, March 19, 1996).

[9]

Petitioners identify no relevant authority that would require consideration of the cumulative impacts or the "precedent-setting nature" of the proposed dock. While it is true that cumulative impacts must be considered when reviewing shoreline *variances* and *conditional uses*, neither the Pierce County Code nor the SMA require consideration of cumulative impacts for *substantial development permit applications*. WAC 173-27-170 and 173-27-160. *Compare* WAC 173-27-150. Variances and conditional uses are exceptions that, by definition, [*20] do not conform to the authorized uses in a designated area. In granting permission for such exceptions, it is not only required by state regulation but entirely appropriate to consider the cumulative impact of additional requests for similar exceptions in the same area. *See Buechel v. Department of Ecology*, 125 Wn.2d 196, 210 (1994). These same important policy considerations, however, do not necessarily apply to requests for common accessory uses such as residential docks, particularly when, as in this case, they are anticipated uses in a designated area and pose no risk of environmental damage.

Petitioners cite to *Viafore v. Mason County*, SHB 99-033 (September 14, 2000), as support for requiring a cumulative impacts analysis of this substantial development permit application. We note several important differences between that case and this one. First, the *Viafore* decision was applying Mason County's SMP, not Pierce County's. Moreover, the Board did not hold that such an analysis is required for all substantial development applications (even in Mason County) but only "in a case such as this." In that case, the proposed dock would have been the [*21] first dock approved under the SMA in an area with only one other existing dock structure that pre-dated the SMA, and concerns were raised about potential impacts on the migration of listed salmon species. Finding no requirement to consider cumulative impacts absent such circumstances, we hold that approval is appropriate when the proposed dock is consistent with the designated shoreline environment, and the intensity of its use is compatible with the surrounding environment and land and water uses in the area. n2 As previously explained, the Unger dock is consistent with the allowed medium intensity use within the Rural Residential Shoreline Environment. The Board further concludes that the proposed length and anticipated uses of the dock are both comparable to and compatible with the surrounding environment and pier density, as well as the land and water uses in the area.

n2 To the extent residents in the Rosedale area may be generally concerned about the aesthetics of dock proliferation along Carr Inlet, their concerns are more appropriately addressed to those in a position to

recommend or enact policy changes at the County level.

[*22]

[10]

Finally, in considering Petitioner's contention that the proposed dock is a mere convenience and does not provide any needed utility, the Board rejects the suggestion that the Unger dock should be denied or shortened because it cannot be used to provide permanent moorage. Nothing in the Pierce County SMP requires, or favors, docks that will provide permanent moorage over those with more limited utility. Conversely, nothing in the SMP prohibits or disfavors docks that go dry at certain water levels. While the County may decide at some point in the future to prohibit (or limit the length of) recreational docks where they cannot achieve sufficient depth to provide moorage, the Board must apply the law and regulations as they are currently written. In doing so, the Board is mindful that the County SMP currently defines both docks and piers as structures that are "used as a landing or moorage place for marine transport or for recreational purposes." PCC 20.56.010(A) and (B) (emphasis added). The length of the proposed Unger dock, at 145.5 feet, is authorized by PCC 20.56.040.B (2)(b), and Respondents have amply demonstrated their intended recreational uses of the dock.

[11]

In [*23] conclusion, the Petitioners have failed to demonstrate that the proposed dock is inconsistent with the Rural Residential Shoreline Environment or the policies in the County SMP. The Board further concludes that the proposed dock also satisfies all criteria and development guidelines for docks in the Pierce County Code. Absent some showing of significant unresolved environmental harm, a proposed development that is consistent with specific shoreline use regulations is presumed to be consistent with the policies of the State's Shoreline Management Act. RCW 90.58.020. *Ackerson*, SHB No. 95-26 (CL VII)

Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

The Shoreline SDP to construct the Unger dock, as approved and conditioned by Pierce County, is AFFIRMED.

SO ORDERED this 4th day of October 2006.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater RightsNonconsumptive UsesWatercraftReal Property LawWater RightsNonconsumptive UsesWatersportsReal Property LawWater RightsNonconsumptive UsesWharfing

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COURT OF APPEALS, DIVISION II
OF STATE OF WASHINGTON

GREGG MAY AND MARGO MAY, et al.,

Appellants,

vs.

RONALD ROBERTSON and KATHRYN ROBERTSON, et al.,

Respondents.

NO. 37911-2-II

DECLARATION 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 an attorney in the offices of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, LLP, attorneys for the respondents in the above-entitled action; that on the 12th day of November, 2008, I served a true copy of the Brief of Respondents in the above-entitled Court, in the manner indicated below:

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Dated this 12th day of November, 2008.

Margaret Y. Archer