NO. 98365-8

SUPREME COURT OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, ALICE TAWRESEY, ROBERT DAY, BAINBRIDGE SHORELINE HOMEOWNERS, DICK HAUGAN, LINDA YOUNG, JOHN ROSLING, BAINBRIDGE DEFENSE FUND, POINT MONROE LAGOON HOME OWNERS ASSOCIATION, INC., and KITSAP COUNTY ASSOCIATION OF REALTORS,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, WASHINGTON STATE DEPARTMENT OF ECOLOGY, ENVIRONMENTAL LAND USE HEARING OFFICE, and GROWTH MANAGEMENT HEARINGS BOARD CENTRAL PUGET SOUND REGION,

Respondents.

WASHINGTON STATE DEPARTMENT OF ECOLOGY'S ANSWER IN OPPOSITION TO PETITIONERS' PETITION FOR REVIEW

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I. INTRODUCTION

On review in superior court of a decision of the Growth Management Hearings Board, Petitioners (PRSM) sought to supplement the administrative record with additional evidence. The superior court denied PRSM's motion, holding that the evidence was not needed to decide the issues raised. The Court of Appeals affirmed in an unpublished opinion. PRSM now seeks discretionary review of the Court of Appeals' opinion.

Review should be denied. The Court of Appeals properly interpreted the standard for supplementation of the record under the Administrative Procedure Act (APA), and properly applied that standard to the facts of this case. As a result, there is no basis for review by this Court.

II. RESTATEMENT OF THE ISSUE

Did the Court of Appeals err when it affirmed the superior court's order denying supplementation of the administrative record, when the Court of Appeals properly interpreted and applied the standard for supplementation under the APA and the superior court properly exercised its discretion in denying the motion to supplement?

III. RESTATEMENT OF THE CASE

A. PRSM Sought APA Review of an Administrative Decision

After a full administrative hearing held on the legislative record, the Central Puget Sound Region Growth Management Hearings Board (Board) upheld the City of Bainbridge Island's Shoreline Master Program (SMP). CP 143–44[1]. PRSM sought review of the Board's decision in Kitsap County Superior Court under the APA. CP 7–24. PRSM also raised a number of constitutional challenges it claimed warranted relief under the Uniform Declaratory Judgments Act (UDJA), RCW 7.24. CP 19–24. Recognizing that the APA is the sole avenue of review of a SMP, the superior court dismissed PRSM's UDJA cause of action. CP 247. PRSM subsequently amended its petition to include its constitutional claims under its APA cause of action. CP 344–46.

B. PRSM's Motion to Supplement the Administrative Record

After its UDJA cause of action was dismissed, PRSM filed a Motion to Authorize Supplementation of the Record. CP 290–312. PRSM claimed "that live witnesses, many who have expertise in related fields, can make the determination of the constitutional issues a more straight-forward task."

[1] CP refers to Clerks Papers filed by the Kitsap County Superior Court. AR refers to the Administrative Record before the Board.

CP 255. PRSM offered testimony of six individuals, and documentary evidence it hoped to obtain from a public records request as follows:

1. Proposed Testimony of Kim Schaumburg

PRSM sought to provide testimony of Kim Schaumburg, an environmental consultant. PRSM alleged that the "science upon which the City relied relates to the impact of certain land uses on freshwater bodies . . ." CP 262. PRSM stated that "Ms. Schaumberg will testify that such science should not be applied to salt water bodies." CP 262. Ms. Schaumberg also proposed to "testify that the science which the City uses to justify restrictions on land use, such as increased buffers from the water, arises from studies involving fresh water bodies and does not apply to salt water bodies." CP 263.

2. Proposed Testimony of Barbara Phillips

PRSM stated that Barbara Phillips, "a person with a scientific background," would "speak to the flaw in using conceptual scientific data to support conclusions that form the basis for the extensive increase in regulation in the SMP." CP 263.

3. Proposed Testimony of Barbara Robbins

Barbara Robbins is a City landowner whose property, PRSM claims, has lost value due to restrictions on vegetation removal found in the SMP. CP 263. PRSM asserted that Ms. Robbins testimony would demonstrate the

master program causes an uncompensated taking and damaging of her property under Article I Section 16 of the Washington Constitution. CP 263.

4. Proposed Documentary Evidence and Testimony of Peter Brochvogel and Robbyn Myers

PRSM stated that Petitioner Gary Tripp had filed a request under the Public Records Act for City records "which may demonstrate the difficulty in interpreting the SMP." CP 264. PRSM identified no specific documents that it sought to admit.

PRSM also sought testimony from "Peter Brochvogel, a longtime architect on Bainbridge Island and Robbyn Myers, a land use consultant who can explain why citizen's [sic] cannot determine the regulatory requirements of the SMP simply be [sic] reading its wording." CP 264. To support the admission of this testimony, PRSM stated that the "sheer volume and complexity of the SMP" is the reason this evidence was required. CP 264.

5. Proposed Testimony of Linda Young

Finally, PRSM proposed that Linda Young would testify that the updated master program interferes with freedom of expression, by giving administrative staff control over vegetation and landscaping decisions. CP 264–65.

C. The Superior Court Denied Supplementation

After briefing and argument on PRSM's motion, the superior court issued its order denying PRSM's motion to supplement the record. CP 347–51. The superior court recognized that the APA allowed for supplementation of the administrative record with additional evidence, but denied the evidence PRSM proposed because it found the evidence unnecessary to resolve the facial challenges to the SMP. CP 348–49. The court stated "facial challenges such as those proposed by the Petitioners in this particular case go to questions of law, not of fact." CP 350. The Court of Appeals affirmed stating: "The superior court did not err when it concluded that it did not need additional facts to decide PRSM's facial constitutional claims . . ." *Pres. Responsible Shoreline Mgmt. v. City of Bainbridge Island*, 11 Wn. App. 2d 1040 (2019) (COA Decision) at 10.[2] PRSM now seeks review of the Court of Appeals' unpublished decision.

IV. STANDARD OF REVIEW

A petition for discretionary review of a Court of Appeals decision terminating review is governed by RAP 13.4. This Court will accept review if either (1) the decision conflicts with decisions of this Court, (2) the decision conflicts with a published decision of the Court of Appeals, (3) the

[2] Cites to the COA Decision are to the Slip Opinion attached to the Petition for Review as Appendix A

decision presents a significant question of constitutional law, or (4) it involves an issue of substantial public interest. RAP 13.4(b). None of these factors are present here.

The APA is the exclusive means of judicial review of a decision of the Growth Management Hearings Board. RCW 34.05.510; RCW 36.70A.300(5); *Olympic Stewardship Found. v. State Envtl. and Land Use Hearings Office*, 199 Wn. App. 668, 685, 399 P.3d 562 (2017). Although the Board does not have jurisdiction to hear constitutional issues, under the APA judicial review includes review of whether an order, or the statute or rule underlying the order, violates constitutional provisions on its face or as applied. RCW 34.05.570(3)(a); *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196, 274 P.3d 1040 (2012).

"In administrative proceedings the facts are established at the administrative hearing and the superior court acts as an appellate court." *U.S. West Commc'ns, Inc. v. Wash. Utilities and Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). On judicial review of an administrative decision under the APA, review is limited to the agency record. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 64, 202 P.3d 334 (2009); *Motley-Motley, Inc. v. Pollution Control Hearings. Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). Admission of new evidence at the

superior court level must be highly limited because otherwise "the purpose behind the administrative hearing would be squandered." *Motley-Motley*, 127 Wn. App. at 76. An appellant is obligated to present its case to the administrative tribunal, not to the superior court. *Id.* at 77.

Additional evidence is admissible, however, if it falls within statutory exceptions found in RCW 34.05.562. RCW 34.05.558. New evidence may be received by a reviewing court if it relates to the validity of the agency action, and if needed to decide disputed issues. RCW 34.05.562(1); *Wash. Trucking Ass'n v. Emp't Sec. Dep't*, 188 Wn.2d 198, 221 n.17, 393 P.3d 761 (2017).

It is well settled that the superior court's decision to admit or exclude evidence lies within its sound discretion. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004). This discretionary decision will not be reversed on appeal absent a showing of a manifest abuse of discretion. *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 334, 969 P.2d 1072 (1998). A court abuses its discretion when "its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

V. DISCRETIONARY REVIEW SHOULD BE DENIED

The Court of Appeals' decision upholding the superior court's denial of supplementation does not sweep as broadly or categorically as PRSM claims. The superior court had found that PRSM failed to demonstrate that the evidence it proposed in this case was needed to decide the issues before the court, and the Court of Appeals simply affirmed. COA Decision at 10–15. These decisions are plainly correct, do not conflict with applicable law, and do not present issues of substantial public importance.

A. The Court of Appeals' Decision Does Not Conflict with *Washington Trucking*, nor Other Applicable Case Law

PRSM claims that the Court of Appeals' decision conflicts with this Court's opinion in *Washington Trucking.* Petition for Review at 10–11. It does not.

"RCW 34.05.562(1) sets the parameters for superior court consideration of additional evidence." *Herman v. State of Wash. Shoreline Hearings Bd.*, 149 Wn. App. 444, 454, 204 P.3d 928 (2009). This is the standard set out in *Washington Trucking.* This Court in *Washington Trucking* said "[o]n judicial review, the court can consider evidence not contained in the agency record that 'relates to the validity of the agency action'" and cited RCW 34.05.562(1). *Wash. Trucking Ass'ns*, 188 Wn.2d at 221 n.17. *Washington Trucking* does not require a court to supplement

the record, it simply states that a court ***can*** consider other evidence under the standard set out in RCW 34.05.562.

The Court of Appeals' decision says exactly this. COA Decision at 8–10. The court recognized that the superior court had the discretion to supplement the record. *Id.* Importantly, the Court of Appeals did not "create[] an untenable conflict, effectively barring an individual from ever testifying in support of a constitutional claim" as PRSM claims. Petition for Review at 2. The court simply affirmed that the superior court has the discretion to supplement the record if it finds additional facts are necessary. COA Decision at 10. The court concluded, as had the superior court, that PRSM had failed to demonstrate that its proffered evidence was necessary to decide the issues.

The Court of Appeals' decision is also consistent with other Washington case law addressing APA appeals. While new evidence is generally inadmissible, it may be appropriate when no administrative hearing was held, or when the agency record consisted of no evidence or just a single letter. *Motley-Motley,* 127 Wn. App. at 76. But that is not the case here, where an extensive record exists from both the City and Ecology. That record already includes evidence very similar to the evidence PRSM sought to add to the record. COA Decision at 14–15.

In a similar vein, the federal cases on which PRSM relies do not set out a requirement that supplementation must always be allowed. They state that additional evidence *may* supplement an administrative record, but do not go so far as to mandate supplementation. For instance, the reviewing court in *Rydeen* considered affidavits not before the administrative agency, but did not set a mandatory rule. The court used the permissive "may" when discussing supplementation. *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990). In another example, the court in *A Quaker Action Group v. Morton* explicitly stated that it was not suggesting that there is always a right to a *de novo* record on constitutional issues. *A Quaker Action Group v. Morton*, 460 F.2d 854, 861 (D.C. Cir. 1971). The Court of Appeals decision here is entirely consistent with these cases.

B. The Court of Appeals' decision does not deprive the Superior Court of Jurisdiction to Decide Facial Constitutional Claims

There is no significant question of constitutional law for this Court to resolve. PRSM seeks to convince this Court that pleading a constitutional question in an APA appeal results in a petitioner's ability to ignore the requirements of RCW 34.05.562. This is inconsistent with this Court's precedents, inconsistent with the APA, and would squander the purpose behind an administrative hearing and the procedural steps for review instituted by the Legislature. *Motley-Motley,* 127 Wn. App. at 76.

The Court of Appeals correctly considered the applicable standards for review of facial constitutional challenges. COA Decision at 10–15. Facial constitutionality of a statute is a question of law. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623, 957 P.2d 691 (1998). In a facial challenge, no facts are in dispute. *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347, 353, 13 P.3d 183 (2000). The superior court reviews PRSM's constitutional claims as part of the APA appeal of the Board's decision. RCW 34.05.570(3)(a); c*f. Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 881 n.8, 244 P.3d 412 (2010); *Samson*, 149 Wn. App. at 60–64. New evidence, even in an appeal including review of constitutional issues, is governed by RCW 34.05.562. RCW 34.05.558; *Samson*, 149 Wn. App. at 64–66. Here, since PRSM challenged the SMP on facial grounds, the evidence it proffered in the motion to supplement was not necessary – the superior court correctly concluded it could decide the facial constitutionality of the SMP without that evidence.

PRSM cites *James v. County of Kitsap* as authority for its argument that it must have an unfettered right to supplement the administrative record because its appeal includes constitutional questions. Petition for Review at 3. *James* was an appeal of a decision under the Land Use Petition Act, not the APA. Nevertheless, *James* recognizes that "while a superior

court may be granted power to hear a case under article IV, section 6, that grant does not obviate procedural requirements established by the legislature." *James v. Cty. of Kitsap*, 154 Wn.2d 574, 588–89, 115 P.3d 286 (2005). As the Court of Appeals in this case stated, "while the superior court may have original appellate jurisdiction to consider PRSM's constitutional claims, the procedural requirements of the APA limit evidence to that introduced before the administrative agency, or allowed by the superior court consistent with the narrow exceptions in RCW 34.05.562." COA Decision at 7–8.

PRSM claims that the SMP is impermissibly vague. Petition for Review at 20–21. It is well settled that outside of the First Amendment context, this Court is unable to consider a facial challenge based on vagueness. *Weden v. San Juan Cty.*, 135 Wn.2d 678, 958 P.2d 273 (1998) (denying a facial challenge where respondents had not been cited for violating the ordinance at issue). "[W]hen a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness." *Id.* at 708 (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 182–83, 795 P.2d 693 (1990)). If a facial vagueness claim is reached, the allegation is essentially that "the terms of the ordinance 'are so loose and obscure that they cannot be clearly applied in any context.'" *Douglass*, 115 Wn.2d at 182 n.7. In Washington, the test for vagueness is

the common intelligence test. *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 805, 557 P.2d 307 (1976). "Vagueness in the constitutional sense means that persons of ordinary intelligence are obliged to guess as to what conduct the ordinance proscribes." *Douglass*, 115 Wn.2d at 179. The court may stand in the shoes of the person of ordinary intelligence and make its determination absent a reference to facts, which are only relevant to an as-applied challenge. *See e.g., Burien Bark Supply v. King Cty.*, 106 Wn.2d 868, 725 P.2d 994 (1986).

PRSM also claims that the SMP violates freedom of expression. Petition for Review at 18. "Facts are not essential for consideration of a facial challenge to a statute or ordinance on First Amendment grounds." *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990). Facial freedom of expression challenges may be brought against statutes that by their terms regulate words or patently expressive or communicative conduct. *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (citations omitted). "Constitutional analysis is made of the language of the ordinance or statute itself." *Webster*, 115 Wn.2d at 640.

The facial constitutional claims PRSM asserts can be evaluated on the language of the SMP itself. The Court of Appeals properly affirmed the superior court's denial of supplementation of the record with facts not needed for the court to resolve the issues before it.

C. PRSM's Proposed Supplementation Duplicates Information Already in the Administrative Record

Lastly PRSM claims that the Court of Appeals "concluded that PRSM must rely solely on public comments in the record as substantive evidence of a constitutional violation." Petition for Review at 15. The Court made no such categorical conclusion, it simply affirmed the superior court's discretion to make the decision to not supplement the record in this case.

PRSM's argument that public comment is insufficient to rely on fails. Public comment is a designated component of the administrative record, and thus available to the reviewing court. WAC 242-03-510(1). PRSM was seeking to supplement the administrative record, but failed to demonstrate to the superior court that such supplementation was necessary.

The Board's decision noted the significant amount of scientific information regarding buffers and shoreland habitat submitted into the record, much of which PRSM relied on in its briefing to the Board. CP 60, 60 n.61, 68; AR 3685–86 (PRSM's Prehearing Brief, listing, among other evidence it relied on, extensive submittals from Don Flora on these topics, which were analyzed and reviewed by the Board). CP 69.

PRSM states that the record requires supplementation to address purported gaps identified by staff. Petition for Review at 19. In so doing,

PRSM references the 2003 Bainbridge Island Nearshore Assessment document. AR 3995–4148 at 4097. While an allegation of an incomplete record is, by itself, insufficient reason to allow new evidence, in this case the allegation is not even correct. *Herman*, 149 Wn. App. 455 (citing *Lewis Cty. v. Pub. Emp't Relations Comm'n*, 31 Wn. App. 853, 861, 644 P.2d 1231 (1982)). In making its assertion that there is still a gap in the record, PRSM ignores the 2011 update to the original Assessment, and the additional science that Ecology identified in the record, all of which the Board discussed at some length in its decision. CP 61–62; AR 4356–72; 5530–48. As the Court of Appeals found, PRSM did not explain why it needed further scientific testimony, particularly where so much already existed in the record. COA Decision at 14–15.

Additionally, as the court stated, PRSM's proposed evidence addressing its free expression claims is also in the record. COA Decision at 11–12. The proposed testimony of Linda Young duplicates what is already in the record, as she submitted comments during the legislative process that include her opinion on gardening as an aspect of artistic expression. AR 742–44. Again, PRSM failed to convince the superior court that testimony was required to supplement her remarks already reviewable in the existing record.

VI. CONCLUSION

PRSM's Petition for Review raises no issue of substantial public interest that must be determined by this Court. The Court of Appeals properly interpreted state law, and applied it to the case before it. The unpublished Court of Appeals' decision does not set precedent prohibiting supplementation in any other case. The court merely upheld the superior court's discretion to deny supplementation in this particular case, where PRSM failed to show its proffered evidence met the standard set in RCW 34.05.562. For these reasons, this Court should deny PRSM's Petition for Review.

RESPECTFULLY SUBMITTED this 6th day of May 2020.

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CERTIFICATE OF SERVICE

I certify that on May 6, 2020, I caused to be served the foregoing document in the above-captioned matter upon the parties herein via U.S. mail and using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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

DATED this 6th day of May 2020, in Olympia, Washington.

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May 06, 2020 - 8:36 AM

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Appellate Court Case Title:	Preserve Responsible Shoreline, et al. v City of Bainbridge Island, et al.
Superior Court Case Number:	15-2-00904-6

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