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Case No: 80092-2-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc.,
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,

and
Kitsap County Association of Realtors®,
Intervenor Below.

On appeal of an order of the Kitsap County Superior Court, the Honorable Jeffrey P. Bassett, Case No. 15-2-00904-6

PETITION FOR REVIEW

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IDENTITY OF PETITIONERS

Petitioners are Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. (PRSM).

CITATION TO COURT OF APPEALS' DECISION

PRSM seeks review of the Court of Appeals' December 9, 2019, decision in *Preserve Responsible Shoreline Management, et al. v. City of Bainbridge Island, et al.*, Div. I, No. 80092-2-I, attached as App. A. The Court's March 5, 2020, Order Denying Reconsideration (App. B).

ISSUES PRESENTED FOR REVIEW

1. Whether a trial court exercises original jurisdiction over constitutional claims when they are properly filed for the first time in a petition for judicial review to the superior court.

2. Whether an individual has a right to present evidence necessary to prove a constitutional violation when that claim is filed before the first court with jurisdiction over the claims.

3. Whether the Court of Appeals erred by affirming the trial court's clearly erroneous decision denying PRSM's evidentiary motion.

INTRODUCTION

This case presents an opportunity to address a persistent and consequential conflict between three key provisions of Washington's Administrative Procedure Act (APA), Ch. 34.05 RCW, that bears directly on an individual's right to petition the courts for redress of harm.[1] On the one hand, the APA states that the superior court is the first adjudicative body with jurisdiction to hear a constitutional challenge to a local government's Shoreline Master Program (SMP) update. RCW 34.05.570. On the other hand, the decision below construed the APA's additional evidence provision, RCW 34.05.562(1)(b),[2] to restrict all testimony to public comments in the city's legislative record, without regard to a separate APA provision that prohibits courts from considering unsworn testimony. *See* RCW 34.05.452(3). The decision below creates an untenable conflict, effectively barring an individual from ever testifying in support of a constitutional claim. *St. Joseph Stock Yards Co. v. United States*,

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[1] The right of each person to petition the courts for redress of harm is one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967). As a corollary to that right, our courts hold that due process ensures that each litigant has a right to present evidence in support of his or her claims. *State ex rel. Puget Sound Navigation Co. v. Dep't of Trans.*, 33 Wn.2d 448, 495, 206 P.2d 456 (1949).

[2] "The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding: (b) Unlawfulness of procedure or of decision-making process."

298 U.S. 38, 77, 56 S. Ct. 720, 80 L. Ed. 1033 (1936) ("When dealing with constitutional rights . . . , there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it.").

This Court has confronted this conflict only indirectly, by ruling that a similar administrative review statute cannot impair a litigant's right to present evidence of a constitutional violation to the superior court, *James v. County of Kitsap*, 154 Wn.2d 574, 587-88, 115 P.3d 286 (2005), and by rejecting as "mistaken" the argument that the APA limits the superior court's authority to admit such evidence, *Washington Trucking Associations v. State Employment Sec. Dep't*, 188 Wn.2d 198, 221 n.17, 393 P.3d 761 (2017). But this Court has never squarely addressed this critical question.[3] The result is continued confusion, injustice, and inconsistency in the application of administrative laws and enforcement of the basic right to put on evidence.[4] The Court should grant the Petition to resolve these issues.

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[3] *See* City of Bainbridge Island, Motion to Publish, at 4-6 (Dec. 30, 2019) (arguing that settling the questions presented is critical to landowners, attorneys, government, and the public) (attached as App. C).

[4] Indeed, a recent decision from Division II allowed additional evidence on judicial review of an SMP update, concluding that "[b]ecause the Board did not have the authority to review constitutional challenges and because additional facts are relevant, OSF demonstrates that its request meets the requirements of RCW 34.05.562(1)." *Olympic Stewardship Foundation v. State of Washington Environmental Hearings Office*, Case 47641-0-II at 6-7 (Apr. 11, 2016) (attached as Ex. C).

STATEMENT OF THE CASE

This case involves a facial constitutional challenge to the City of Bainbridge Island's contentious 2014 SMP update, which imposes several novel and onerous demands on shoreline property owners. AR 26-366. The most controversial demands require that, as a mandatory condition of any new permit approval, shoreline landowners must: (1) consent to warrantless searches of their land (SMP § 7.2.1 (citing BIMC 1.16)); (2) secure City approval before engaging in any "human activity" on or near the shorelines (SMP § 4.1.1.2); (3) secure City approval before designing one's landscape or garden (SMP § 4.1.2); and (4) execute a conservation easement of sufficient size to "enhance" and "restore" the marine shoreline by "mitigat[ing] the . . . indirect, and/or cumulative impacts of shoreline development, uses and activities."[5] AR 104 (SMP 4.1.2.7); AR 115 (SMP 4.1.3.7(2)). AR 105-06, 109 (SMP §§ 4.1.3.1, 4.1.3.2, 4.1.3.5(4)); *see also* AR 50 (SMP § 1.5) (The Program's "master goal" is to ensure "a net ecosystem improvement over time.").

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[5] These mandatory conditions are unlike a typical critical area buffer in that they grant Bainbridge Island extensive physical control over the conservation easement, including a right to enter the property without notice or permission. The owner of the underlying estate may retain some passive use rights, such as the right to pass over the easement, but is barred from any additional use, or unapproved "human activity" without City approval. SMP § 4.1.3.7.

A. PRSM's Constitutional Challenge

PRSM faithfully followed the procedures set forth by the Shoreline Management Act (SMA) and the APA to ripen a constitutional challenge to the City's SMP. PRSM members extensively participated in the SMP update process, providing public comments that suggested ways to avoid potential constitutional conflicts. *See*, *e.g.*, AR 742-44, 2510-11, 2539-40, 2567, 2767, 2821. These comments were intended to provide input on the proposed SMP, not to provide evidence of a potential constitutional violation. *Id*. After the City of Bainbridge Island (City) and Department of Ecology (Ecology) approved the SMP, PRSM timely challenged the Program by filing a petition for review with the Growth Management Hearings Board (Growth Board), asserting only statutory claims and reserving all constitutional claims for later proceedings before the superior court. AR 2-25; RCW 90.58.190; RCW 34.05.570(3)(a). Thus, the administrative review was limited to whether the SMP complied with the SMA. AR 5787-5905. The Growth Board proceedings provided no opportunity to present any evidence—let alone evidence relevant to PRSM's constitutional claims.

After the Growth Board upheld the SMP,[6] PRSM filed a combined complaint and petition for judicial review in Kitsap County Superior Court, alleging violations of the free expression, search and seizure, due process, and takings clauses of the Washington and U.S. Constitutions, as well as violations of the doctrine of unconstitutional conditions. CP 326-43. The complaint invoked the trial court's original jurisdiction and sought declaratory relief as authorized by the APA. *Id.*; RCW 34.05.570(3)(a).

B. Motion for Additional Evidence

In advance of the hearing on the merits, PRSM moved for leave to submit evidence on four topics related to its constitutional claims: (1) expert testimony addressing acknowledged gaps in the City's scientific record; (2) testimony demonstrating how the SMP impacts development rights and property values; (3) testimony demonstrating how the SMP impairs the expressive nature of landscape design and gardening; and (4) expert testimony and documentary evidence showing how substantial confusion among City staff and land use professionals impacts individual rights. CP 253-67.

PRSM argued that the proposed evidence could be submitted on two grounds. First, the APA authorizes the court to "receive evidence in addition

[6] *See* AR at 5787-5905. The Growth Board's findings and conclusions are currently pending on the merits of PRSM's administrative appeal below.

to that contained in the agency record" if the evidence "relates to the validity of the agency action . . . and it is needed to decide disputed issues regarding the [u]nlawfulness of . . . [the] decision-making process." CP 255-57 (citing RCW 34.05.562(1)(b)). Second, PRSM argued that the constitutional claims were properly filed for the first time to the superior court and were subject to the trial court's original jurisdiction, which includes the right to put on evidence. CP 257-58; CP 292-93; CP 299-301.

The trial court denied PRSM's motion by concluding that it was acting in its "appellate" capacity in considering PRSM's constitutional claims. CP 348-49. The court, therefore, did not address PRSM's arguments regarding the court's original jurisdiction and a litigant's right to put on evidence. *Id*. Instead, the court concluded that the APA forbids additional evidence unless the moving party can show that it is necessary and not duplicative. CP 349. The court then simply adopted the governments' claim that "that the Board below heard much of the proffered testimony" (a factual claim that PRSM disputed), despite admitting that "[t]his Court has yet to review the record below."[7] CP 350. Based on that untenable conclusion, the

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[7] *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007) (On APA review, the court has a duty to independently review the record; it cannot rely on the "assurances" of government attorneys.); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (The trial court has a duty to independently review the record to ensure that its decision is supported.).

court held "that supplementary testimony is not 'needed' in order to decide the disputed issues in this case." CP 350.

Division II of the Court of Appeals, which had previously held that the APA allows additional evidence of constitutional violations, *supra*. n.3, granted discretionary review. But due to workload issues, the court transferred the case to Division I which affirmed the trial court, concluding that PRSM's claims are "appellate" in nature and construing the APA to bar litigants from presenting additional evidence of a constitutional violation "on appeal" to the superior court. Decision at 8-9. Based on these rulings, the court did not address the trial court's reasoning and did not address the merits of PRSM's evidentiary arguments. Decision at 8-15. PRSM timely filed this petition for review.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER THE APA ABROGATES AN INDIVIDUAL'S RIGHT TO PRESENT EVIDENCE OF A CONSTITUTIONAL VIOLATION TO THE FIRST COURT WITH JURISDICTION

Division I's conclusion that the APA bars an individual from presenting evidence necessary to address disputed elements of a constitutional claim raises a critical issue of law. Unlike a typical constitutional plaintiff, individuals who must first exhaust administrative

remedies under the APA cannot seek direct relief in the superior court. Instead, they must raise all constitutional claims in a petition for judicial review (RCW 34.05.570(3)(a))—even where the agency "lacks the jurisdictional authority to decide claims alleging a violation of [constitutional] rights." *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196 n.21, 274 P.3d 1040 (2012). If the lower court is correct that a single APA provision trumps an individual's right to present evidence in support of his/her claims before the first court with jurisdiction, then the government (which curates the contents of its legislative record) can potentially enact unconstitutional laws without consequence. This is particularly true here, where the City included a provision that requires all permit applicants to use only the City's incomplete science—thereby shielding itself from a later, as-applied constitutional challenge. The Court should grant the Petition to address this unresolved clash, and to ensure that our citizens have a meaningful opportunity to petition the courts for redress of constitutional injuries.

A. The Lower Court's Interpretation of the APA Conflicts with Decisions Allowing Evidence When a Petition Raises Constitutional Claims

Division I's rigid interpretation of the APA conflicts with decisions of this Court and the U.S. Supreme Court interpreting similar administrative appeal statutes to allow a trial court to consider additional evidence when a

petition for judicial review raises constitutional questions. *See*, *e.g.*, *Responsible Urban Growth Grp. v. City of Kent*, 123 Wn.2d 376, 384, 868 P.2d 861 (1994) (allowing evidence on judicial review of an agency decision upholding a zoning ordinance); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991) (allowing evidence pertaining to constitutional violations not subject to agency authority where Immigration Naturalization Act limits judicial review to administrative record); *Webster v. Doe*, 486 U.S. 592, 604, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (holding that discovery is available on constitutional claims raised to the trial court under the federal APA).

Indeed, this Court's opinion in *Washington Trucking* concluded that Division I's interpretation of RCW 34.05.562(1) is "mistaken." 188 Wn.2d at 221 n.17. There, an industry association argued that it should be allowed to file a lawsuit directly in court raising tort and constitutional claims that are outside the administrative court's jurisdiction. *Id*. at 202. The association claimed that the APA's additional evidence provision rendered administrative review futile by barring it from later introducing evidence of a constitutional violation when the claims are properly raised on judicial review. *Id*. at 219-220, 221 n.17. This Court disagreed, holding—contrary to the decision below—that the association was "mistaken" when it argued

that an "APA appeal is limited to the agency record." *Washington Trucking*, 188 Wn.2d at 221 n.17. This direct conflict warrants review.

The decision below also conflicts with a large body of federal case law confirming that litigants may introduce evidence of a constitutional violation when a statute requires them to raise those claims for the first time on judicial review.[8] *See*, *e.g.*, *Quaker Action Group v. Morton*, 460 F.2d 854, 861 (D.C. Cir. 1971) (a person may not be denied the right to put on evidence of a constitutional violation where the administrative court did not provide such an opportunity); *United States v. District of Columbia*, 897 F.2d 1152, 1158 (D.C. Cir. 1990) (Review of constitutional claims under the APA "mirror[s] review under the Constitution" itself); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (allowing plaintiffs to submit two affidavits not in the record); *Nat'l Medical Enterprises, Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993) (allowing affidavits). Division I's failure to address this body of law also warrants review.

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[8] The APA expressly states the Legislature's intent that "courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of . . . the federal government." RCW 34.05.001; *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161,179, 979 P.2d 374 (1999) ("Where there is no Washington case law construing provisions of the Washington APA, federal precedent may serve as persuasive authority.").

B. The Lower Court's Interpretation of the APA Deprives the Superior Court of its Original Jurisdiction Over Constitutional Claims

Central to Division I's opinion is the mistaken conclusion that the trial court acts in its "appellate capacity" when considering a constitutional claim that is filed for the first time before the first court with jurisdiction over such claims. Decision at 7-8. This error warrants review because it blurs the concepts of exhaustion and jurisdiction, *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 647, 310 P.3d 804 (2013) (cautioning against "intertwining procedural requirements with jurisdictional principles"), and frustrates the correct application of the law. Sarah H. Ludington, *Simplifying the Standard of Review in North Carolina Administrative Appeals*, 33 J. Nat'l Ass'n Admin. L. Judiciary 585, 591 (2013) ("It is critical for the superior court to understand whether the case invokes its original or appellate jurisdiction, as the different types of jurisdiction result in different scopes of review.").

Division I's mistake is obvious: appellate jurisdiction, by definition, invokes the court's power to review decisions of a lower tribunal. *Marbury v. Madison*, 5 U.S. 137, 147, 2 L. Ed. 60 (1803). Thus, a necessary prerequisite to appellate jurisdiction is that the lower tribunal actually

decide the contested issues in an adjudicative proceeding.[9] "Original jurisdiction," by contrast, means the power to entertain and resolve disputed cases in the first instance. *Burks v. Walker*, 25 Okla. 353, 109 P. 544, 545 (1909); *see also Spatz v. City of Conway*, 362 Ark. 588, 589, 210 S.W.3d 69, 70 (2005) ("Original jurisdiction means the power 'to hear and decide a matter before any other court can review the matter.'") (quoting *Black's Law Dictionary* at 856 (7th ed. 1999)). Importantly, original jurisdiction includes the court's right "to make its own determination of the issues from the evidence as submitted directly by the witnesses; or of the law as presented, uninfluenced or unconcerned or limited by any prior determination, or the action of any other court juridically determining the same controversy." *State v. Johnson*, 100 Utah 316, 114 P.2d 1034, 1037 (1941), *disagreed with on other grounds by Boyer v. Larson*, 20 Utah 2d 121, 433 P.2d 1015 (1967); *see also Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005) (recognizing that a court of original jurisdiction has the right to admit new evidence).

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[9] *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994); *see also* Black's Law Dictionary at 94 (7th Ed. 1999) (Appellate jurisdiction requires "the submission of a lower court's or agency's decision to a higher court for review and possible reversal."). Here, the Growth Board did not decide any constitutional questions. Without a decision, the trial court has nothing to review and no appellate authority over those claims. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 633-34, 733 P.2d 182 (1987), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

The superior court has original jurisdiction "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." *Cost Mgmt. Servs., Inc.*, 178 Wn.2d at 647; *see also* Wash. Const. art. IV, § 6. Thus, this Court has elsewhere held that an administrative review statute cannot "divest the power of the superior court to exercise its original jurisdiction under article IV, section 6." *James v. County of Kitsap*, 154 Wn.2d 574, 587-88, 115 P.3d 286 (2005). Based on this fundamental principle, *James* held that a similar administrative appeal statute, the Land Use Petition Act (LUPA), imposes a "procedural requirement[]" that a petitioner administratively litigate all claims subject to the agency authority "before a superior court will exercise its original jurisdiction" over constitutional claims. 154 Wn.2d at 588-89; *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (concluding that facial constitutional claims are independent of the administrative record even where "the federal constitutional claims were raised by way of a cause of action created by [the state's administrative appeal] law."); *id*. at 167 (confirming that the plaintiff "in fact raised claims not bound by the administrative record (its facial constitutional claims)"). Review is necessary to correct the Court of Appeals' plain and harmful error.

II

WHETHER THE LEGISLATIVE PUBLIC COMMENT PROCESS SATISFIES DUE PROCESS RAISES A QUESTION OF BROAD PUBLIC IMPORTANCE

Review is also necessary because the Court of Appeals' decision creates a legal impossibility that can only be resolved by this Court. Having construed the APA to bar additional evidence, the decision below concluded that PRSM must rely solely on public comments in the record as substantive evidence of a constitutional violation. Yet the APA expressly prohibits courts from considering unsworn testimony. *See* RCW 34.05.452(3) (requiring that all testimony be made under oath); *see also W. Washington Operating Engineers Apprenticeship Comm. v. Washington State Apprenticeship & Training Council*, 144 Wn. App. 145, 161, 190 P.3d 506 (2008). The decision below places citizens in a Catch-22 whereby faithful compliance with the APA will bar any opportunity to put on evidence of a violation. This is not what the Legislature intended. RCW 34.05.020 ("Nothing in [the APA] may be held to diminish the constitutional rights of any person[.]").

Moreover, the lower court's conclusion that PRSM's evidence should be limited to public comments misunderstood the purpose of the SMA's public comment procedure, which does not provide a forum in which conflicting allegations of fact and law are adjudicated as part of a

fact-finding procedure. Instead, the purpose of public comments is to provide the legislature with insight into the communities' support or opposition to a proposal, which is why the public comment process allows hearsay, speculation, and conclusory argument. RCW 90.58.120(1).

Based on this oversight, the Court of Appeals failed to address the fact that the City's public comment process bore none of the hallmarks of due process, such as a neutral decision maker, sworn testimony, an opportunity to address all issues, and a verbatim report.[10] Such an informal procedure cannot fix the facts for all future litigation. *See*, *e.g. Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982); *see also Ralpho v. Bell,* 569 F.2d 607, 628 (D.C. Cir. 1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process.").

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[10] The City did not preserve most of the public comments in the record. Instead, the record consists primarily of a spreadsheet containing City staff's own incomplete and often defensive summaries of public testimony. See, *e.g.*, AR 5801-03. The City also limited comments on later versions of the SMP by topics and restricted all comments to a maximum of 2 minutes. AR 5801-02.

III

THE DECISION CONFLICTS WITH PRECEDENTS ESTABLISHING CIRCUMSTANCES WHEN FACTS ARE NECESSARY TO DETERMINE DISPUTED ASPECTS OF A FACIAL CONSTITUTIONAL CLAIM

The Court of Appeals' decision to affirm the trial court's ruling warrants review because it overlooked the legal and factual bases supporting PRSM's motion for additional evidence. Decision at 10-15. Throughout the proceedings, the government has argued for the broadest possible scope of review, claiming that PRSM must prove that the SMP will violate the constitution in all of its potential applications. CP 273-77, 284-87. That assertion creates a contested question of fact upon which there is no evidence in the record. Indeed, the U.S. Supreme Court has explained that the phrase "in all of its applications" is actually much more limited in scope than it would appear. *City of Los Angeles. v. Patel*, 135 S. Ct. 2443, 2449-51, 192 L. Ed. 2d 435 (2015). When considering a facial constitutional claim, a court must consider only those applications of the statute "in which it actually authorizes or prohibits conduct." *Id*. That determination often requires facts and expert testimony. *Patel*, 135 S. Ct. at 2451; *ACORN v. City of Tulsa, Okla.*, 835 F.2d 735, 741 (10th Cir. 1987) (relying on testimony to distinguish those situations in which a permit would be necessary from situations in which it would not to establish proper scope of

review in a facial unconstitutional conditions claim). The Court of Appeals' failure to acknowledge the legal standard for adjudicating facial claims resulted in a decision that overlooked the existence of a factual dispute and failed to address the stated need for PRSM's proffered evidence. *See*, *e.g.*, AR 5815, n.52 (concluding that the City's record contained no data speaking to impacts to property), *id*. at *67 n.158 (record contains no evidence of impacts to free expression rights), *id*. at *64, n.150 (record contains no information considering how the SMP's "imprecise" language impacts protected rights); *see also* Opening Br. at 39-42, CP 264, 308 (testimony is necessary to demonstrate how and when the SMP will impact free expression rights); CP 263-64, 302-06 (offering expert and documentary evidence demonstrating the SMP's "poorly written" and "infelicitously" worded provisions (AR 5837) impair constitutional rights).

The decision below also overlooked the fact that questions of statutory compliance differ from constitutional questions. *Washington Trucking*, 188 Wn.2d at 221 n.17. Thus, the Growth Board's conclusion that the record was sufficient to satisfy the SMA cannot compel the same conclusion in regard to constitutional requirements. Decision at 12-15. For example, the City specifically curated its record to answer the statutory question *how much property* is needed to "mitigate the . . . indirect, and/or cumulative impacts of shoreline development, uses and activities." AR 104.

The unconstitutional conditions doctrine, however, asks *how little property* is needed to mitigate for only the direct impacts of the proposed development—that essential information is absent from the record.[11] *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138, 449 P.3d 269 (2019) (holding that the government has a duty to include evidence of nexus and proportionality in its record); *United States v. Raines*, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (A regulation must be evaluated on its facts and effects, not on fortuitous circumstances.).

The Court of Appeals also overlooked the fact that the City adopted the SMP over warnings from its own scientists that the record contained critical gaps and required additional study to determine the necessity and effectiveness of the conservation easement requirement.[12] CP 261-63; CP 310-12. Typically, an admission by the government that the record is incomplete will establish the need for additional evidence. *San Francisco Bay Conservation & Dev. Comm'n v. United States Army Corps of Engineers*, No. 16-CV-05420-RS(JCS), 2018 WL 3846002, at *3 (N.D. Cal. Aug. 13, 2018); *see also Lands Council v. Powell*, 395 F.3d 1019, 1026

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[11] *See Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[12] *See*, *e.g.*, AR 4097 (The "available data regarding Bainbridge Island nearshore resources are dated and lack accuracy across all elements. . . . Further data evaluation or additional studies will be required to address known data gaps."); *see also id.* ("Relatively little controlled research has been directed at documenting and understanding the functional impacts of shoreline modifications to biological resources.").

(9th Cir. 2005); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973). This missing information cannot be deemed "unnecessary" where the SMP requires that all future permit applicants use only the incomplete studies in the legislative record when determining how much land must be dedicated in a conservation easement. AR 109, 306. The Court of Appeals misapprehended the legal and factual basis for supplementation.

Finally, the Court of Appeals committed plain error when it refused to consider on the merits whether PRSM had shown that additional evidence of vagueness was admissible.[13] Indeed, the decision below simply adopted the governments' assertion that PRSM's facial vagueness claim was "likely not ripe" because it did not assert impairment of a free expression right, without confirming the assertion in the record. Decision at 15. PRSM's petition for judicial review does, in fact, allege that the SMP's vague vegetation standards impair free expression rights.[14] CP 339-40. PRSM is entitled, therefore, to have its argument for additional evidence considered

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[13] *See Asarco, Inc. v. U.S. Envtl. Protection Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) (allowing additional evidence on confusing and complex matters); *see also Colautti v. Franklin*, 439 U.S. 379, 384, 391-92, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (relying on testimony from numerous experts to determine the scope of a vagueness challenge).

[14] This claim is additionally cognizable in its facial capacity because the SMP imposes criminal liability for behavior that would not normally be considered criminal without a state of mind requirement. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 114, 11 P.3d 726 (2000) (citing *Jones v. City of Lubbock,* 727 F.2d 364, 373 (5th Cir. 1984)).

on its merits. *See* Trevor P. Williams, *Quality of the Bainbridge Island Shoreline Master Program: A Multi-Criteria Perspective*, at 34, 36 (University of Washington 2017) (concluding that the SMP is "difficult" to "extremely difficult" to understand because it contains numerous "vague" and "ambiguous" provisions, is riddled with incorrect citations, and uses terms of art in an inconsistent manner).

CONCLUSION

For the foregoing reasons, PRSM respectfully requests that this Court grant review.

DATED: April 6, 2020. Respectfully submitted,

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APPENDIX A

FILED
12/9/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, And Point Monroe Lagoon Home Owners Association, Inc.,	No. 80092-2-I
Appellants,	DIVISION ONE
v.	UNPUBLISHED OPINION
CITY OF BAINBRIDGE ISLAND, Washington State Department of Ecology, Environmental Land Use Hearing Office and Growth Management Hearings Board Central Puget Sound Region,	
Respondents.	FILED: December 9, 2019

MANN, A.C.J. — Preserve Responsible Shoreline Management (PRSM) seeks review of the superior court's decision denying its motion to supplement the administrative record in its appeal of the City of Bainbridge Island Shoreline Master Program. PRSM unsuccessfully appealed the Shoreline Master Program to the Growth Management Hearings Board (Board). PRSM then appealed the Board's final decision

to the superior court under the Administrative Procedure Act (APA), Ch. 34.05 RCW, adding facial constitutional challenges. PRSM then unsuccessfully moved to amend the administrative record with new testimony purportedly supporting its constitutional claims. We granted discretionary review and now affirm.

I.

In July 2014, the City of Bainbridge (City) adopted a new Shoreline Master Program (SMP) with approval of the State of Washington Department of Ecology (DOE). On October 7, 2014, PRSM filed a petition for review with the Board asserting that the SMP violated provisions of the Shoreline Management Act (SMA), ch. 90.58 RCW, and the Shoreline Master Program Guidelines, WAC 173-26-171. The petition asserted that the SMP also raised constitutional issues but because the Board did not have jurisdiction "those issues are not being raised in this petition." Consistent with this statement, the petition for review did not include PRSM's constitutional theories. On April 6, 2015, the Board issued its Final Decision and Order concluding that the petitioners failed to demonstrate that the actions of the City and the DOE violated the SMP or guidelines, and dismissing the appeal.

On May 6, 2015, PRSM filed a petition for judicial review of the Board's final decision in the Kitsap County Superior Court. The petition raised a number of constitutional issues under the APA and Uniform Declaratory Judgment Act (UDJA), ch. 7.24 RCW. The superior court dismissed the UDJA causes of action, concluding that RCW 34.05.510 dictates that judicial review under the APA provided the only avenue for relief and that RCW 7.24.146 instructs that the UDJA does not apply to state agency actions reviewable under the APA.

PRSM then moved for authorization to supplement the administrative record under RCW 34.05.562(1)(b). To support its motion, PRSM contended

> that there are many provisions in the SMP's 400 page plus new regulatory which are unduly oppressive, such as the provision that regulates every "human activity" in the shoreline (up to 200 feet inland from the ordinary high water mark). The SMP requires permits for any change to vegetation in one's yard. The SMP claims it is not retroactive (Section 1.3.5.2), but the fact that it regulates every human activity makes the non-retroactivity provision practically meaningless. The SMP includes contradictory language about what is permitted in terms of human activities, but then provides that the most restrictive regulation applies to wipe out provisions which appear to allow people to make reasonable use of their homes and yards.

PRSM sought to supplement the record with testimony from Kim Schaumburg, Barbara Phillips, and Barbara Robbins on matters relevant to its takings theories. Schaumburg, an environmental consultant would testify that "the science upon which the City relied relates to the impact of certain land uses on freshwater bodies" and "that such science should not be applied to salt water bodies." Further, Schaumburg would 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." Phillips, "a person with a scientific background," would testify to "the flaw in using conceptual scientific data to support conclusions that form the basis for the extensive increase in regulation in the SMP." And Robbins, a landowner on Bainbridge Island, would provide testimony about the loss of value to her property. Specifically, Robbins

> whose property she has owned for decades has plummeted in value because of the SMP's restriction on vegetation removal. She has paid high taxes for decades on the reasonable expectation that the property would have views of the water and the Olympics only to find that the SMP has significantly reduced the value of her property. At the heart of the

> protection from uncompensated taking and damaging of property in Article I, Section 16 of the Washington Constitution is the harm to the property owner. Ms. Robbins' testimony will demonstrate the reality of that harm.

PRSM also sought permission to offer testimony from Peter Brochvogel and Robbyn Meyers, to support its void for vagueness theory. Specifically, PRSM wanted to show that the SMP is "not decipherable by the average citizen." Brochvogel, a longtime architect on Bainbridge Island, and Meyer, a land-use consultant, would "explain why citizen's [sic] cannot determine the regulatory requirements of the SMP simply [by] reading its wording. Because of the sheer volume and complexity of the SMP, expert testimony will be of substantial assistance to the Court."

Finally, to support its First Amendment theory, PRSM offered testimony from Linda Young, "a citizen and petitioner herein, to testify as to how the SMP's provision giving City administrative staff control over vegetation and landscaping decisions interferes with freedom of expression."

The City and DOE opposed PRSM's motion to supplement, arguing that PRSM failed to show that any of the proffered supplementary evidence met the conditions for supplementation under RCW 34.05.562, the record contained ample evidence of the science used in SMP development, and supplementation was not needed to resolve the disputed facial challenges.

After oral argument, the superior court denied PRSM's request to supplement the record. The court found that the supplementary evidence was not needed to decide the disputed issues in this case.

This court granted PRSM's motion for discretionary review.

II.

This appeal is limited to PRSM's appeal of the superior court's decision denying PRSM's motion to supplement the administrative record with additional testimony.[1] "The admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse of discretion." Lund v. State Dep't of Ecology, 93 Wn. App. 329, 334, 969 P.3d 1072 (1998) (affirming the superior court's discretionary decision denying a request to supplement the record to present evidence and argument on constitutional issues not raised before the administrative tribunal). A trial court's decision is manifestly unreasonable if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

A.

Decisions of the growth management hearings boards must be appealed to the superior court under the APA. RCW 36.70A.300(5); Olympic Stewardship Foundation (OSF) v. State Envtl. & Land Use Hrgs. Office, 199 Wn. App. 668, 685, 399 P.3d 562 (2017), rev. denied, 189 Wn.2d 1040 (2018). In contrast to non-administrative proceedings where the trial court is the finder of fact, 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. Utils. & Transp. Comm'n, 134

[1] This is an interlocutory appeal of the trial court's decision denying PRSM's motion to supplement the record. Consequently, our decision does not address the merits of PRSM's constitutional claims. This opinion solely addresses whether the superior court abused its discretion by denying PRSM's motion to supplement the administrative record.

Wn.2d 48, 72, 949 P.2d 1321 (1997); Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

A court reviewing an agency order under the APA may overturn the action only if the challenger demonstrates that the order is invalid under at least one of the criteria set forth in RCW 34.05.570, including whether "the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied." RCW 34.05.570(3)(a). Where the administrative board below does not have jurisdiction to hear constitutional claims, those claims may be raised for the first time before the superior court as an issue in the judicial review. Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hrgs. Bd., 158 Wn. App. 866, 881 n.8, 244 P.3d 412 (2010).

Regardless of the issues raised in the APA appeal, "APA judicial review is limited to the record before the agency." Samson v. City of Bainbridge Island, 149 Wn. App. 33, 64, 202 P.3d 334 (2009) (citing RCW 34.05.566(1)). Accord, RCW 34.05.558 ("Judicial review of disputed issues of fact . . . must be confined to the agency record for judicial review as defined by this chapter"); Kittitas County v. Eastern Wash. Growth Mgmt. Hrgs. Bd., 172 Wn.2d 144, 155, 256 P.3d 1193 (2011); Lund v. State Dep't of Ecology, 93 Wn. App. 329, 333-34, 969 P.3d 1072 (1998) (review of constitutional challenges to shoreline regulation under the APA is limited to the Board's record and decision). While the APA allows the superior court to supplement the agency record, new evidence is admissible only under "highly limited circumstances" and must fit "squarely" within one of the statutory exceptions set forth in RCW 34.05.562. Motley-Motley v. Pollution Control Hrgs. Bd., 127 Wn. App. 62, 76, 110 P.3d 812 (2005);

Herman v. Shoreline Hrgs. Bd., 149 Wn. App. 444, 455-56, 204 P.3d 928 (2009); Samson, 149 Wn. App. at 64-65.

B.

PRSM first contends that the trial court erred in concluding that its constitutional claims were appellate in nature and thus bound by the APA. PRSM argues instead that the trial court should have exercised its original jurisdiction and accepted testimony and evidence outside of the APA's restriction to the record. We disagree.

PRSM cites little Washington precedence in support of its theory that the APA's strict limitation on new evidence is not applicable when the superior court is reviewing constitutional claims. PRSM quotes James v. Kitsap County, 154 Wn.2d 574, 588-89, 115 P.3d 286 (2005), for the proposition the "APA imposes only a 'procedural requirement[]' that PRSM litigate all claims subject to the Growth Board's authority to that agency 'before a superior court will exercise its original jurisdiction' over its constitutional claims." PRSM fails first, however, to recognize that James was a Land Use Petition Act (LUPA) case—not an APA case—and did not address supplementation of the administrative record under the APA. Second, what the James court held was "a LUPA action may invoke the original appellate jurisdiction of the superior court, but congruent with the explicit objectives of the legislature in enacting LUPA, parties must substantially comply with procedural requirements before a superior court will exercise its original jurisdiction." James, 154 Wn.2d 588-89. Here, 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.

Contrary to PRSM's argument, the superior court did not err in concluding that it was acting as an appellate court in reviewing PRSM's claims—including its constitutional claims—under the APA. U.S. West, 134 Wn.2d at 72; Waste Management, 123 Wn.2d at 633; Lund, 93 Wn. App. at 333-34; OES, 199 Wn. App. at 705, 710-11.

C.

PRSM argues that supplementation of the administrative record is appropriate under RCW 34.05.562(1)(b). We disagree.

Under the APA, the superior court has discretionary authority to supplement the agency record in three narrow circumstances, as defined in RCW 34.05.562:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material fact in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

PRSM argues that supplementation of the administrative record is appropriate under RCW 34.05.562(1)(b). RCW 34.05.562(1)(b) provides the superior court discretion to supplement the record, only if the evidence relates to the "validity of the agency action at the time it was taken" and is needed to decide disputed issues regarding the "unlawfulness of procedure or of decision-making process." Thus, RCW

34.05.562(1)(b) allows the superior court to supplement evidence when a petitioner claims that the agency violated procedure during its decision-making process.

For example, in Batchelder v. City of Seattle, 77 Wn. App. 154, 159, 890 P.2d 25 (1995), the court analyzed whether the Shoreline Hearings Board erred when it allowed "segmentation" of the permitting process for a waterfront development project. Improper segmentation is an unlawful procedure or decision-making process under the SMA. Batchelder, 77 Wn. App. at 159. Specifically, "a single project may not be divided into segments for purposes of avoiding compliance with the SMA." Batchelder, 77 Wn. App. at 160 (citing Merkel v. Port of Brownsville, 8 Wn. App. 844, 509 P.2d 390 (1973)). Where an agency engages in some unlawful procedure, such as segmenting a project's permits, subsection (b) grants discretionary authority to the superior court to supplement the administrative record to decide those disputed issues. RCW 34.05.562(1)(b).

Here, PRSM offered evidence to support disputed issues of the constitutionality of the SMP. PRSM did not claim, however, that the evidence is necessary to decide whether the procedure used or the decision-making process of the Board violated due process, the APA, or another statute or regulation governing the Board's procedure. Because PRSM failed to present an argument of how the supplemental evidence was necessary to show that the Board's decision-making process or procedure was unlawful, the superior court did not abuse its discretion when it denied PRSM's request under RCW 34.05.562(1)(b).

D.

While PRSM does not specifically assert that the additional evidence should be admitted under RCW 34.05.562(1)(c), PRSM's argument asserts that the superior court abused its discretion by refusing its request to supplement the record because it needed to develop the factual record to support its constitutional claims.

RCW 34.05.562(1)(c) provides the superior court with discretion to supplement the record with "material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record." It is also within the superior court's discretion to find that the facts proffered are not necessary to decide the disputed issues. The superior court did not err when it concluded that it did not need additional facts to decide PRSM's facial constitutional claims because its facial constitutional challenges can be decided without reference to additional facts. We address each of PRSM's claims.

1.

PRSM contends that the superior court abused its discretion by refusing to supplement the record with evidence demonstrating that gardening is expressive conduct and protected by the First Amendment.

"Facts are not essential for consideration of a facial challenge to a statute or ordinance based on First Amendment grounds." City of Seattle v. Webster, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990). When a petitioner makes a facial constitutional challenge based on First Amendment grounds, the "constitutional analysis is made upon the language of the ordinance or statute itself." Webster, 115 Wn.2d at 640.

PRSM contends "the City's vegetation provisions constitute an overbroad and unnecessary restrain on expressive conduct." PRSM agrees that "much of this argument could be decided as a matter of law because, if a regulation burdens expression, then the government bears the burden of showing that the restriction is justified," but, because "the City and Ecology have indicated that they plan to challenge whether gardening and landscape design constitute expressive conduct—a mixed question of law and fact," additional evidence is necessary. PRSM sought to supplement the record with testimony from Young about "the personal choices that go into different gardening styles or themes and to explain how those decisions constitute expression."

PRSM fails to explain how this supplemental evidence meets the requirements of RCW 34.05.562(1)(c). PRSM contends that its First Amendment claims are mixed questions of law and fact, because no court has found that gardening is protected expressive conduct under the First Amendment. Young's opinion on the expressive nature of gardening, however, is in the administrative record below.[2] Young, an

[2] Young's comment in the record states
The First Amendment right of free expression means not only do people have the right to capture their personalities in their garden choices, but also a government cannot mandate – as the Soviet Union did for years, and the Bainbridge SMP is doing here – what kind of expression is aesthetically pleasing. . . .

The SMP takes the private property owner's right to engage in what a majority of people would consider free expression. Gardens can be an expression of peoples' personalities, their basic 'essence.' For many, gardening is a passion, a joy, a source of fresh fruits and vegetables for the table, as well as a source of an abundance of beautiful flowers for the house. Frequent trips to the nursery are adventures – looking to see what new plants they have. Countless hours are spent dreaming about how to landscape and make one's natural surroundings as beautiful as possible: flowers and plants bring such emotional comfort and joy to mankind! And, what constitutes a beautiful garden is, as they say, in the eye of the beholder. Even if they are 'non-indigenous,' people in the Pacific Northwest love their Japanese maple trees, their tulips and their rhododendrons (brought from China in the 19th century)! Now, with the SMP, these are all things of the past.

attorney, sent the City and DOE a 99-page legal analysis, which included a discussion of the First Amendment. PRSM has not explained why this evidence is insufficient for it to argue that gardening is expressive in nature and protected conduct under the First Amendment. PRSM contends that public comments are insufficient to lay the groundwork of a constitutional challenge, but fails to cite legal authority supporting this contention.

The superior court did not abuse its discretion in determining that PRSM's proffered evidence was not necessary to decide whether the SMP infringes First Amendment rights.

2.

PRSM contends that the superior court abused its discretion by refusing to allow PRSM to supplement the administrative record with material facts supporting its claim that the mandatory buffer is an unconstitutional exaction.

In a recent opinion, the Washington Supreme Court clarified that, for purposes of the Washington State Constitution's takings clause, Washington jurisprudence follows the United States Supreme Court definition of "regulatory takings" and any other authority to the contrary is overruled. Yim v. City of Seattle, No. 95813-1 (Wash. Nov. 14, 2019). There are two per se categorical takings for Fifth Amendment purposes: one, "where government requires an owner to suffer a permanent physical invasion of her property" and two, where regulations "completely deprive an owner of 'all economically beneficial uses' of her property." Yim, No. 95813-1, slip op. at 22. "If an alleged regulatory taking does not fit into either category, it must be considered on a

case-by-case basis in accordance with the Penn Central factors." Yim, No. 95813-1, slip op. at 22.

Both Nollan and Dolan were as-applied challenges and cited Penn Central for their underpinnings. Nollan v. Cal. Coastal Comm'n, 483 U.S 825, 852, n.6, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); Dolan v. City of Tigard, 512 U.S. 374, 403-04, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The nature of the Nollan/Dolan analysis is fact specific, and therefore, must be evaluated on a case-by-case basis and is not easily susceptible to a facial challenge.

The nexus rule from Nollan "permits only those regulations that are necessary to mitigate a specific adverse impact of a development proposal." Kitsap Alliance of Property Owners (KAPO) v. Central Puget Sound Growth Mgmt. Hrgs. Bd., 160 Wn. App. 250, 272, 255 P.3d 696 (2011). The concept of rough proportionality from Dolan "limits the extent of the mitigation measures to those that are roughly proportional to the impact they are designed to mitigate." KAPO, 160 Wn. App. at 272-73.

PRSM contends that the City failed to use the best available science and therefore the mandatory buffer is an unconstitutional exaction. PRSM cites Honesty in Envtl. Analysis and Leg. (HEAL) v. Central Puget Sound Growth Mgmt. Hrgs Bd., 96 Wn. App. 522, 527, 979 P.2d 864 (1999) for the proposition that critical area buffers must satisfy the Nollan/Dolan tests. In HEAL, the court held that "policies and regulations adopted under [the Growth Management Act (GMA)] must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on government authority to impose conditions on development applications." HEAL, 96 Wn. App. at 527. If the best available science is not used to support the agency's

decision to designate critical area buffers, then "that decision will violate either the nexus or rough proportionality rules or both." HEAL, 96 Wn. App. at 537, 979 P.2d 864 (1999).

Here, PRSM contends that the testimony of Schaumburg, Phillips, and Robbins is necessary for the court to "determine whether the SMP's mandatory buffers are, in fact, limited to only that land necessary to mitigate for the impacts attributable to the burdened property."

PRSM fails to explain, however, why this testimony is not in the administrative record, since it contested the science before the Board. In its prehearing brief before the Board, PRSM argued, "The City is not in compliance with RCW 90.58.100(1) and WAC 173-26-201 by failing to identify and assemble the most current, accurate, and complete scientific and technical information available, by failing to consider the context, scope, magnitude, significance, and potential limitations of the scientific information, and by failing to make use of and incorporate all available science." In particular, PRSM claimed, "the science was also based on the impacts of use of upland property on freshwater bodies, such as rivers and lakes, and not on the salt water of the Puget Sound." The Board found that "Petitioners have failed to establish that the buffer widths proposed for the Bainbridge SMP were based on farm and feedlot data or were inappropriately based on freshwater rather than marine data" and that "they have not met their burden to establish a failure 'to assemble and appropriately consider technical and scientific information' in regard to buffer widths." PRSM has not explained why it needs further testimony from Schaumburg, Phillips, and Robbins to decide a disputed

issue that it briefed before the Board or how the testimony is different from the exhibits in the administrative record.

The superior court did not abuse its discretion when it determined that PRSM's proffered evidence was not necessary to decide whether the SMP is an unconstitutional taking or exaction.

3.

PRSM contends that the superior court abused its discretion by refusing to supplement the record to support its claim that the SMP contains vague and contradictory provisions rendering it indecipherable to the average citizen.

"When a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness." Weden v. San Juan County, 135 Wn.2d 678, 708, 958 P.2d 273 (1998) abrogated by Yim v. City of Seattle, No. 96817-9 (Wash. Nov. 14, 2019). In Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the court held that "vagueness challenges to statutes not threatening First Amendment interests are examined in the light of the facts of the case at hand; the statute is judged on an as-applied basis." Thus, PRSM's facial constitutional vagueness challenge is likely not ripe because PRSM is not challenging the ordinance on an as-applied basis.

The superior court did not abuse its discretion when it determined that PRSM's proffered evidence was not necessary to decide whether the SMP is unconstitutionally vague.

We affirm.

Mann, ACJ

WE CONCUR:

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 80092-2-I
Preserve Responsible Shoreline, et al, Petitioners v City of Bainbridge Island, Respondent
Kitsap County, Cause No. 15-2-00904-6

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

Enclosure

c: The Honorable Jeffrey P. Bassett

APPENDIX B

FILED
3/5/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc.,	No. 80092-2-I
Appellants,	DIVISION ONE
v.	
CITY OF BAINBRIDGE ISLAND, Washington State Department of Ecology, Environmental Land Use Hearing Office and Growth Management Hearings Board Central Puget Sound Region,	ORDER DENYING MOTION FOR RECONSIDERATION
Respondents.	

Appellants Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc., filed a motion to reconsider the court’s opinion filed on December 9, 2019. Respondents City of Bainbridge and Washington State Department

of Ecology have filed responses. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, A.C.J.

APPENDIX C

FILED
Court of Appeals
Division I
State of Washington
12/30/2019 2:38 PM

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

NO. 80092-2-I

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et. al.,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et. al.,

Respondents,

MOTION TO PUBLISH OPINION

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I. IDENTITY OF MOVING PARTY

This Motion is presented by Greg A. Rubstello and James Haney on behalf of the Respondent City of Bainbridge Island ("City"). Both Mr. Rubstello and Mr. Haney have served multiple decades as City Attorneys. Both are practitioners of land use law in Washington State, and practice in the area of administrative land use law under Chapters 36.70A, 36.70B and 36.70C RCW. The Unpublished Opinion (hereinafter, the "Decision") in the above-captioned matter clarifies important legal principles for attorneys who practice before the Washington State Growth Management Hearings Board and in judicial LUPA proceedings.

II. RELIEF SOUGHT

Pursuant to Rule of Appellate Procedure ("RAP") 12.3(e), the City requests that this Court publish the Decision issued on December 9, 2019 in the above-captioned matter. A copy of the Decision is attached as Exhibit A.

The Decision clarifies two significant principles of Washington law regarding the significance of the making of the administrative record in local administrative proceedings appealable to the Growth Management Hearings Board ("Board"), particularly where constitutional issues may be argued in a subsequent appeal to the superior court. First, the Decision determines for the first time by an appellate court that judicial review of a decision of the Board is limited to the administrative record, even when

constitutional issues may be raised by the appellant. The decisions states with certainty that a motion to supplement the administrative record with additional testimony is properly denied by the superior court. Second, the Decision clarifies the difference between an appeal of an administrative action under the APA (Chapter 34.05 RCW) and an appeal under LUPA (Chapter 36.70C RCW) with respect to supplementation of the record on appeal. The issues addressed in the Decision are of substantial public interest and will aid practitioners of local administrative land use proceedings, as well as litigants, practitioners and the judiciary in addressing constitutional issues raised in the courts in APA cases.

III. FACTS RELEVANT TO THIS MOTION

Preserve Responsible Shoreline Management ("Petitioner") sought review of the superior court's decision denying its motion to supplement the administrative record made on appeal of the City's Shoreline Master Plan following an unsuccessful appeal to the Board. The background facts and arguments of the parties are detailed in the attached unpublished decision and will not be repeated here.

IV. GROUNDS FOR RELIEF AND ARGUMENT

The City moves to publish the Decision pursuant to RAP 12.3(e), which provides as follows:

> (e) *Motion To Publish.* A motion requesting the Court of Appeals to publish an opinion that had been ordered filed for public record should be served and filed within 20 days after the opinion has been filed. The motion must be supported by addressing the following criteria: (1) if not a

> party, the applicant's interest and the person or group applicant represents; (2) applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or (6) whether the decision is in conflict with a prior opinion of the Court of Appeals.

A. Publication Is Necessary To Clarify That The Courts Will Not Allow An APA Administrative Record To Be Supplemented For Consideration Of Constitutional Claims.

The Decision's publication would assist all local government administrative law litigants, practicing land use attorneys. The Decision is the first Washington appellate court holding to explicitly and comprehensively answer the question of whether an administrative record first appealed to the Board can be supplemented on appeal to the superior court for consideration of constitutional issues not considered by the Board. Because the Board has exclusive jurisdiction of the initial appeal of local government land use actions on the basis of claims of violation of the Growth Management Act (Ch. 36.70A RCW), the Decision, if published, would provide authoritative clarity for citizens, property owners, the land use bar and judiciary on the need to make a record in local government administrative proceedings necessary to later argue constitutional claims in the superior court. Specifically, the Decision, if published, will aid all LUPA litigants and their attorneys in knowing when to timely make the record necessary for argument of constitutional claims

not heard or considered in APA appeals to the Board. The Petitioner in this case would have benefited from the earlier publication of an appellate court decision on this issue. For this reason, the Decision will add significant value to the existing body of APA related authority in local land use proceedings.

The Decision also clarifies the distinction in the relevant statutes between LUPA proceedings and APA governed appeals to the Board, with respect to the ability of the courts to supplement an administrative record on appeal for consideration of constitutional claims not considered by the Board.

B. The Decision Is of General Public Interest and Importance.

If published, the Decision would provide strong and clear guidance to litigants, legal practitioners, and the judiciary regarding the raising and hearing of constitutional claims raised on appeal of local land use administrative decisions. Such matters are of broad and significant importance in the context of appealing the actions of local government in its administration of the GMA. The Decision clarifies existing law and shows the importance of developing a record at the local level that will allow consideration of all claims, including constitutional claims, that may be raised on appeal to the superior courts.

The issues addressed in the Decision are of broad and substantial public interest and are particularly important to attorneys and the judiciary in part because constitutional claims are frequently raised together with other claims of violation of the GMA and/or SEPA. Publication of the

Decision will prevent the confusion experienced by Petitioner in this case. The Decision is worth adding to the established body of law in Washington State. As a document to guide future conduct of local land use law litigants and practitioners, the Decision merits publication.

C. The Decision Does Not Conflict with a Prior Court Opinion.

The Decision confirms for the first time, by applying well recognized principles of law, that a court must deny a motion to supplement the administrative record on appeal to the superior court of a decision of the Board. Thus, the Decision does not conflict with a prior opinion of this Court and provides helpful clarification not contained in previous reported decisions.

V. CONCLUSION

For the reasons above, the City respectfully ask the Court to publish the Decision dated December 9, 2019 in the above-captioned case.

DATED this 30th day of December, 2019.

OGDEN MURPHY WALLCE, P.L.L.C.

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PACIFIC LEGAL FOUNDATION - WASHINGTON

April 06, 2020 - 9:45 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Preserve Responsible Shoreline, et al, Petitioners v City of Bainbridge Island, Respondent (800922)

The following documents have been uploaded:

- PRV_Petition_for_Review_20200406094207SC607346_7904.pdf
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- jhaney@omwlaw.com
- stephens@sklegal.pro

Comments:

Appendix attached to petition. Service will be accomplished via portal

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Filing on Behalf of: Brian Trevor Hodges - Email: bth@pacificlegal.org (Alternate Email:)

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