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

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.,

Appellants,

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.

CITY OF BAINBRIDGE ISLAND'S RESPONSE BRIEF

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I. INTRODUCTION

This matter comes before the Court on discretionary review of the trial court's denial of a motion to supplement the record and a motion for reconsideration. Appellants, Preserve Responsible Shoreline Management, et al. (collectively "PRSM"), have filed a lawsuit in Kitsap County Superior Court seeking review of a decision by the Central Puget Sound Growth Management Hearings Board ("Board") upholding the Bainbridge Island Shoreline Master Program ("SMP"). PRSM seeks to overturn the trial court's denial of a motion to supplement the record considered by the Board with new evidence related to PRSM's constitutional claims. In exercising its discretion and denying the motion based on the plain language of RCW 34.05.562, the trial court correctly rejected PRSM's proffered evidence and did not violate the manifest abuse of discretion standard by which this Court must review a trial court's evidentiary rulings. PRSM's appeal must therefore be denied.

II. RESPONSE TO ASSIGNMENTS OF ERROR/ISSUES

The trial court committed no error in denying PRSM's motion to supplement the record and its motion for reconsideration of that denial. Specifically,

1. The trial court correctly held that PRSM's constitutional claims may be litigated within the appellate framework of the APA and that PRSM was not entitled to supplement the record without meeting the requirements of RCW 34.05.562(1) (Appellant's Assignment of Error/Issues No. 1 and 2);

2. The trial court correctly based its ruling on PRSM's failure to satisfy the requirements of RCW 34.05.562(1) for supplementation of the record and not on a record that the trial court had not reviewed (Appellant's Assignment of Error/Issue No. 3);

3. The trial court did not err in its statement that PRSM did take issue with the fact that much of the proffered evidence was in the record (Appellant's Assignment of Error/Issue No. 4);

4. The trial court did not manifestly abuse its discretion when it concluded that the evidence proffered by PRSM to prove its constitutional claims was "not needed" to "decide disputed factual issues" (Appellant's Assignment of Error/Issue No. 5); and

5. The trial court did not deprive PRSM of any constitutional due process right to present evidence when PRSM had every opportunity to make a record below (Appellant's Assignments of Error/Issues Nos. 1 and 6).

III. COUNTERSTATEMENT OF THE CASE

In July 2014, after more than four years of public process, the City of Bainbridge Island (City) adopted Ordinance No. 2014-04, the Bainbridge Island Shoreline Master Program (“SMP”). Prior to adopting the SMP, the City of Bainbridge Island held more than 100 meetings before various City boards and commissions at which public testimony or comment was taken, including one public hearing before the Bainbridge Island Planning Commission and three public hearings before the Bainbridge Island City Council. *Preserve Responsible Shoreline Management, et al. v. City of Bainbridge Island, et al.*, CPSGMHB Case No. 14-3-0012, Final Decision and Order (Apr. 6, 2015), 2015 WL 1911229 (“Growth Board Decision”) at 10-12 (AR 5796–AR 5798). The City also received and responded to more than 2000 written comments, at least 363 of which came from PRSM, its attorneys, or the named individual Appellants in this lawsuit. *Id.* at 15 (AR 5801). The Washington State Department of Ecology (Ecology) also conducted an extensive public process before approving the Bainbridge Island SMP. Ecology conducted one public hearing attended by 200 people and received and considered 112 oral or written comments, before deciding to approve the City’s SMP. *Id.* at 11 (AR 5797) and AR 475-491.

Because the process of adopting the SMP was legislative in nature, there was no limit on the evidence that PRSM and other members of the public could present and no limit on the City's and Ecology's ability to consider that evidence in deciding whether to adopt or approve the SMP. Most notably for purposes of this appeal, PRSM submitted at least seventeen "white papers" totaling more than 225 pages by one of its members, Dr. Don Flora (a former individual plaintiff in the lawsuit below), in which Dr. Flora wrote extensively on the science behind the City's shoreline buffers, including Dr. Flora's claim that the buffers were inappropriately based on freshwater science rather than marine science. *See, e.g.*, Board Exhibits 640, 871, 938, 949, 994, E-186 – E-193 and E-195 (AR 2237–2288, AR 002322-2331, AR 2336-2392, AR 2404-2408, AR 2418, AR 2420-2423, AR 003532 -003590, AR003597 – 003639). PRSM also submitted several multipage letters, emails, and papers from Linda Young (one of the appellants in this matter and whose testimony PRSM has asked to supplement the record with), including a 98-page letter in which Ms. Young argued, among other things, that the SMP was an unconstitutional taking of property on its face and violated her First Amendment right to express herself through gardening. AR 681-779. Numerous other people, including several of the named Appellants in this

litigation and PRSM's attorneys, also submitted comments to Ecology alleging that the SMP's shoreline buffers were an unconstitutional taking of property, and Ecology responded with citation to studies showing that riparian buffers do not devalue property. AR 5508-5509.

PRSM appealed the City's adoption of the SMP to the Central Puget Sound Growth Management Hearings Board ("the Board") under RCW 90.58.190 and RCW 36.70A.290. On April 6, 2015, the Board issued a 119-page decision upholding the SMP and dismissing PRSM's appeal. Growth Board Decision (AR 5787-5905). The Board addressed 52 legal issues and 39 sub-issues raised by PRSM, holding that PRSM had failed to meet its burden of proof on each and every issue. *Id.* Of specific relevance to this appeal, the Board engaged in an extensive, 16-page analysis of the applicable science in the record relating to the shoreline buffers adopted in the SMP, including the review of more than 25 scientific exhibits and studies and at least thirteen of the seventeen white papers authored by Dr. Flora and submitted by PRSM. *Id.* at 30-45 (AR 5816-5831). Based on this review of the scientific evidence, the Board concluded that PRSM had failed to prove that the buffer widths adopted by the City were inappropriately based on freshwater science, and that the science relied upon by the City to establish the buffers came "primarily from studies...

conducted in Puget Sound and the Salish Sea.” *Id.* at 35 (AR 5821). The Board also held that the City “gave reasoned consideration to Dr. Flora’s critique [of the science] by documenting the gaps and uncertainties in the applicable science, which is the Flora theme, while building its SMP provisions around the consensus science incorporated in the requirements of the [state’s SMP] guidelines.” *Id.* at 43 (AR 5829). In sum, the Board concluded that “the City assembled current science, indicated data gaps and uncertainties, and provided objective, reasonable consideration of opposing views” and thereby complied with the Shoreline Management Act in basing its shoreline buffers on appropriate scientific information. *Id.* at 45 (AR 5831).

Also relevant to this appeal, the Board rejected PRSM’s argument that the City’s regulation of “human activity” within the shoreline was “too broad or vague,” noting that for purposes of the regulatory portions of the SMP, such activities were specifically defined as meaning “shoreline modification activities,” which are in turn defined as “those actions that modify the physical qualities of the shoreline area, usually through the construction of a physical element such as a dike, breakwater, pier, weir, dredged basin, fill, bulkhead, or other shoreline structure.” *Id.* at 98 (AR 5884) (citing SMP §4.0 and SMP definitions at AR 5103 and AR 5324).

After losing on every argument made to the Board, PRSM sought review of the Board's decision by the Kitsap County Superior Court under RCW 36.70A.300(5) and RCW 34.05.514. PRSM originally sought review under both the Administrative Procedure Act, Chapter 34.05 RCW, and the Uniform Declaratory Judgment Act ("UDJA"), Chapter 7.24 RCW. CP 1-165. On October 5, 2016, the trial court granted the joint motion of the City and Ecology to dismiss the UDJA claims, correctly holding that the APA provides the exclusive means for review of the Board's actions under RCW 36.70A.300(5) and RCW 34.05.510, and that the UDJA does not apply to agency actions reviewable under the APA by the express terms of RCW 7.24.146. CP 247.

After the trial court's dismissal of the UDJA claim, the parties agreed to stay the proceedings in Kitsap County Superior Court pending this Court's decision in *Olympic Stewardship Foundation, et al. v. State Environmental and Land Use Hrgs Office*, 199 Wn. App. 668, 399 P.3d 562 (2017), a case with some issues that overlap with those in the case at bar. Shortly after this Court issued its opinion in *Olympic Stewardship Foundation*, PRSM filed the motion to supplement that is the basis for the instant discretionary review. CP 253-267. Specifically, PRSM's motion sought to supplement the record with the live testimony of seven witnesses:

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(1) Kim Schaumberg, an environmental consultant, whom PRSM said would testify that “the science upon which the City relied relates to the impact of land uses on freshwater bodies and... that such science should not be applied to saltwater bodies” in order to justify shoreline buffers; (2) Barbara Phillips, “a person with a scientific background,” whom PRSM said would testify that using freshwater science that was “conceptually applicable” to marine shorelines was scientifically flawed; (3) Barbara Robbins, a property owner who would testify that the value of her land has been reduced by the regulations; (4) Appellant Linda Young, who would testify as to how the SMP’s vegetation management provisions “interferes with freedom of expression” associated with gardening; (5) Appellant Gary Tripp, who would testify concerning unnamed public records “which may demonstrate the difficulty in interpreting the SMP” (Emphasis supplied); (6) Peter Brachvogel, a “land use professional,” who would “explain why citizen’s (sic) cannot determine the regulatory requirements of the SMP simply by reading its wording”; and (7) Robbyn Myers, “a land use consultant,” who would testify similarly to Mr. Brachvogel. CP 262–265. PRSM submitted no declarations or other materials in support of the motion beyond these bare conclusory statements and specifically did not submit any

of the transcripts and other public records that they now point to in this court as justifying their motion to supplement on their vagueness challenge.

The City and Ecology both opposed PRSM's motion to supplement. Ecology and the City pointed out that the Board had thoroughly analyzed the science in the record and had determined that the SMP buffers were not inappropriately based on freshwater science, as PRSM and Dr. Flora had argued before the Board and as the testimony of Ms. Schaumberg was being proffered to dispute. CP 274; CP 284. The City and Ecology also pointed out that the Board had determined, based on the scientific evidence in the record, that the City had properly considered the science it assembled and appropriately recognized the limits on the science it used, a determination that Ms. Phillips's testimony was being proffered to dispute. *Id.*

With respect to Ms. Robbins' testimony, both the City and Ecology pointed out that the takings challenge being made by PRSM was necessarily a facial challenge, since WAC 173-27-170 requires that a variance from shoreline regulations must be granted whenever a landowner shows that the regulations "preclude, or significantly interferes with, reasonable use of the property." CP 274 – 275; CP 284 - 285. For this reason, and because facial challenges require that a challenger show that the mere enactment of the regulation denies all economically viable use of any and all property to

which it is applied, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493, 107 S.Ct. 1232, 94 L.Ed.2d 427 (1987); the City and Ecology argued that Ms. Robbins' proffered testimony as to the reduction in value of her property alone would not aid the court in any way. CP 284 – 285.

With respect to Ms. Young's testimony, both the City and Ecology argued that Ms. Young's testimony was unnecessary because "[f]acts are not essential for consideration of a facial challenge to a statute or ordinance on First Amendment grounds" and "[c]onstitutional analysis is made on the language of the ordinance or statute itself," *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990). CP 276-77; CP 287.

Finally, with respect to the proffered testimony of Mr. Tripp, Mr. Brachvogel, and Ms. Myers, both Ecology and the City cited to the well-settled test for vagueness, which is that an ordinance is vague in the constitutional sense only if persons of ordinary intelligence are obligated to guess as to what conduct the ordinance prescribes. CP 285; RP at 14. The City and Ecology argued that the trial judge was certainly capable of applying the test to the language of the SMP and that the testimony of others was completely unnecessary for the court to apply that test. *Id.*

In reply, PRSM offered nothing further regarding the substance of the testimony it desired to present, nor did PRSM dispute that much evidence was already in the record on the scientific issues or that the trial court already had evidence in the form of the ordinance itself to decide the vagueness challenge, the takings challenge, and the First Amendment challenge. PRSM did not submit any of the public records it expected Mr. Tripp to testify to with its reply or provide any additional information as to how those records or the testimony of Mr. Brachvogel and Ms. Myers were needed by the trial court on the issue of vagueness. Simply put, PRSM's entire argument in its reply brief was that while there may be evidence in the record from which the trial court could decide these issues, that evidence is not the evidence PRSM wants to present and PRSM should therefore be allowed to supplement the record to provide what it wants.

On October 13, 2017, the trial court denied PRSM's motion to supplement the record, issuing a six-page order explaining the court's reasoning. CP 347-352. The trial court held that PRSM had not satisfied the requirements of RCW 34.05.562 for the admission of new evidence in a proceeding under the APA in that "[t]his Court, having reviewed the Petitioner's pleadings and the potential witnesses to be presented, finds that the supplementary testimony would (sic) is not 'needed' in order to decide

the disputed issues in this case.” CP 350. The court also stated, in passing, that “[t]his Court has yet to review the record below, but notes that Petitioners did not take issue with Respondents’ assertion that the Board below heard much of the proffered testimony.” a notation apparently based on the City’s and Ecology’s assertion that the substance of the proffered scientific testimony from Ms. Schaumberg and Ms. Phillips had been extensively reviewed by the Board based on evidence already in the record.

PRSM moved for reconsideration of the trial court’s order denying the motion to supplement on October 23, 2017. CP 353. PRSM’s motion provided no discussion of how the scientific testimony of Ms. Schaumberg and Ms. Phillips would add necessary information to the scientific testimony already in the record, asserting only that the testimony of those particular experts was not in the legislative record and had not been presented to the Board. CP 357. PRSM’s motion also offered nothing further on the substance of Ms. Young’s or Ms. Robbins’ proffered testimony. And with respect to the testimony of Mr. Tripp, Mr. Brachvogel, and Ms. Myers, PRSM offered for the first time, on reconsideration, a transcript of a Bainbridge Island Planning Commission meeting held more than three years after the SMP was adopted at which some commissioners purportedly expressed opinions regarding the vagueness of the SMP.

PRSM did not explain how this transcript was necessary for the court or made the testimony of Mr. Tripp, Mr. Brachvogel, or Ms. Myers necessary to resolve the vagueness challenge.

Per local court rule, KCLCR 59(e), the City and Ecology were not allowed to submit a response to PRSM's motion for reconsideration and the trial judge denied the motion without oral argument on October 25, 2017. CP 459-461. The trial court did not provide an extensive justification for denial, simply stating that "[t]he Court having concluded that the Motion states insufficient basis for reconsideration under CR 59... the Petitioner's Motion is denied." This appeal followed.

IV. ARGUMENT

A. THE TRIAL COURT CORRECTLY DETERMINED THAT IT WAS ACTING IN ITS APPELLATE CAPACITY UNDER THE APA AND THAT ADDITIONAL EVIDENCE ON PRSM'S CONSTITUTIONAL CHALLENGES WAS ALLOWED ONLY IF THE REQUIREMENTS OF RCW 34.05.562(1) WERE MET.

1. The Trial Court's Decision was Correct under the Washington APA.

Under RCW 36.70A.300(5), decisions of the growth management hearings boards must be appealed to the superior court under the Administrative Procedure Act ("APA"), Chapter 34.05 RCW. Under APA

review, “the facts are established at the administrative hearing and the superior court acts as an appellate court.” *U.S. West Commc’n, Inc. v. Wash. Utils. And Transp. Comm’n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). A court reviewing an agency decision under the APA may overturn the action only if the challenger proves that the decision, or the statute or rule on which it is based (in this case the SMP), is invalid under at least one of the criteria set forth in RCW 34.05.570, including that the statute or rule 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 additional issue in the judicial review. *Bayfield Resources Co. v. W. Wash. Growth Mgmt. Hrgs Bd.*, 158 Wn. App. 866, 881 n. 8, 244 P.3d 412 (2010).

Regardless of the issues involved, “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). New evidence is generally not taken

by a reviewing court, and when such evidence is allowed, it must fall “squarely” within one of the statutory exceptions set forth in RCW 34.05.562. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Herman v. Shoreline Hr’gs Bd.*, 149 Wn. App. 444, 455-56, 204 P.3d 928 (2009); *Samson v. City of Bainbridge Island, supra*, 149 Wn. App. 33, 64-65. The APA thus requires that except in the limited circumstances described in RCW 34.05.562, a party must exercise its right to present evidence during the *administrative proceedings* that are the subject of judicial review, and not during the judicial review process.

Given the statutes and case law cited above, the trial court correctly determined that it was acting in its appellate capacity in reviewing the Growth Board’s decision under the APA and that it had authority under the APA to review PRSM’s constitutional claims. The trial court was also correct that new evidence was allowed only if the requirements of RCW 34.05.562 for supplementation were met.

2. PRSM’s Assertion of a Right to Supplement the Record Whenever Constitutional Claims are Raised is Not Supported by Washington or Federal Case Law.

Contrary to PRSM's assertions, Washington courts have not addressed whether a party raising constitutional challenges to agency action for the first time on appeal may supplement the record with evidence

specific to its constitutional claims.¹ Federal courts have addressed this issue, however. Under the parallel provisions of the federal APA, "[t]he Court is strictly limited to a review of the administrative record." *McKenzie v. Calloway*, 456 F. Supp. 590, 593 (1978); *see also* 5 U.S.C. § 706. The only exceptions to this rule are that the court may obtain explanatory testimony from the agency "[w]hen the administrative record so fails to explain agency action that judicial review of that action is effectively frustrated"; when the agency itself relied on materials outside the record; or when "supplementation of the record is necessary to explain technical terms or complex subject matter involved in the agency action." *City & County of San Francisco v. United States*, 930 F. Supp. 1348, 1355-56 (N.D. Cal. 1996).

¹ PRSM cites *James v. County of Kitsap*, 154 Wn.2d 574, 588-89, 115 P.3d 286 (2005), for the proposition that "[t]he APA's limitation on supplemental evidence applies only when the court is acting in its appellate capacity by reviewing issues previously adjudicated by an agency." PRSM Br. at 20. This is not the case. *James* did not involve the APA, and it did not at any point discuss evidence or supplementation of the administrative record. To the contrary, *James* stands for the proposition that, even when a party's claim lies within the superior court's original jurisdiction, the party must still comply with statutorily imposed prerequisites to bringing a claim. *See James*, 154 Wn.2d 574 at ¶¶ 28-29. PRSM also cites *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994) for this same proposition. *See* PRSM Br. at 2. *Waste Management* says no such thing. To the contrary, *Waste Management* affirms that "[t]he superior court does not take evidence or hear new issues unless the matter falls within the statutory exceptions of RCW 34.05.554 and RCW 34.05.562." *Waste Mgmt. of Seattle*, 123 Wn.2d at 633.

This strict rule holds in the context of a constitutional challenge. Federal courts encountering attempts to supplement the administrative record with constitutional evidence have generally taken one of two approaches: they either strictly limit review to the administrative record below unless the appellant can satisfy one of the APA's statutory exceptions to the limited record rule, or they will admit evidence only if the constitutional claims do not "fundamentally overlap" with the administrative issues. *See Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d, 160, 161–62 (D.D.C. 2017) (consolidating cases). The former group of courts have refused to "allow fresh discovery, submission of new evidence and legal arguments" because this would "incentivize every unsuccessful party to agency action to allege... constitutional violations" in order to "trade in the APA's restrictive procedures for the more evenhanded ones of the Federal Rules of Civil Procedure." *See id.* (quoting *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237–38 (D.N.M. 2014)). The latter group rejects attempts to supplement the record where the constitutional claims require essentially the same types of proof as the administrative claims. *See id.* (citing *Alabama–Tombigbee Rivers Coal. v. Norton*, No. CV–01–S–0194–S., 2002 WL 227032, at 3–6 (N.D. Ala. Jan. 29, 2002)).

Here, under either standard, PRSM is not entitled to supplement the record. As explained in Section IV(C) of this brief, PRSM's proffered evidence on its constitutional claims does not fit within the exceptions in RCW 34.05.562, and was correctly rejected by the trial court as a basis for supplementing the record. And even under the more relaxed standard used by some federal courts, as also discussed in Section IV(C) of this brief, PRSM still cannot supplement the record, because its constitutional claims that are evidence-dependent require evidence that fundamentally overlaps with its proof on its administrative Shoreline Management Act claims.

B. THE TRIAL COURT'S RULING WAS BASED ON PRSM'S FAILURE TO PROVE THAT ITS PROFFERED TESTIMONY WAS NEEDED TO DECIDE THE CONSTITUTIONAL ISSUES AND NOT ON THE SUFFICIENCY OF A RECORD THAT THE TRIAL COURT HAD NOT REVIEWED.

Throughout this Court's proceedings, PRSM has repeatedly taken the trial court's statement regarding the record out of context, arguing that the trial court committed error when it found that much of the proffered testimony had been heard below without actually reviewing the record itself. But what the trial court actually said was, "This Court has yet to review the record below, *but notes that Petitioners did not take issue with Respondents' assertions that the Board below heard much of the proffered*

testimony.” (Emphasis added). CP 350. This was a completely true statement. While PRSM claims to have disputed the assertions of the City and Ecology regarding the evidence, all PRSM actually argued in its reply was that its proffered testimony should be allowed because it was “attempting to try its constitutional claims for the first time.” CP 296. PRSM made no specific references to any of the evidence that was actually in the record. PRSM also made no attempt to refute the City’s and Ecology’s assertions that the substance of the scientific evidence on which Ms. Schaumberg and Ms. Phillips were being offered to testify had been presented to and considered by the Board on the record below, including evidence specifically offered by PRSM disputing that science. The trial court’s statement that PRSM did not take issue with the City’s and Ecology’s assertions was clearly correct regarding the scientific evidence.

More importantly, however, when the entirety of the trial court’s decision is reviewed, the trial court clearly based its decision on PRSM’s failure to prove that the requirements for supplementation of the record under RCW 34.05.562(1) were met, i.e., PRSM’s failure to prove that the proffered testimony was “needed” in order to decide the disputed factual issues in the case, and not on the status of the record. *Id.* The trial court recognized and repeatedly emphasized that necessity was the standard

under RCW 34.05.562, and the trial court ultimately decided that the standard was not met in this case. CP 351. PRSM's attempt to distract this Court from the actual basis on which the trial court made its ruling by mischaracterizing the trial court's statement concerning the record is disingenuous and should be rejected by this Court.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT PRSM'S PROFFERED EVIDENCE WAS NOT NEEDED BY THE COURT TO DECIDE PRSM'S CONSTITUTIONAL CLAIMS.

1. The APA Authorizes Supplementation Only Where the Trial Court Determines that the New Evidence is Necessary to Decide Disputed Issues of Fact and the Trial Court's Determination may be Overturned Only for a Manifest Abuse of Discretion.

RCW 34.05.562(1) governs the taking of new evidence by a court reviewing an administrative decision under the APA:

(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 of fact* 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 facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(Emphasis added). Under this statute, new evidence is admissible only in “highly limited circumstances” that “fall squarely within the statutory exceptions.” *Motley-Motley v. State, supra*, 127 Wn. App. at 76.

Here, the trial court expressly found that the testimony proffered by PRSM did not fall within the statutory exceptions:

This Court, having reviewed the Petitioner’s pleadings and the potential witnesses to be presented, finds that supplementary testimony would [sic] is not “needed” to decide the disputed issues in this case... The interim ruling in *OSF 2015* does not set down a **requirement** that this Court take supplemental testimony to address the facial challenges propounded by the Petitioners. This Court still retains the discretion to determine whether the supplementation proffered by Petitioners is **needed** to decide disputed issues; it finds that it is not.

CP 350-351 (bold emphasis in original).

A trial court’s decision to grant or deny a motion to supplement under RCW 34.05.562(1) may be overturned only if “there was a manifest abuse of discretion.” *Samson v. City of Bainbridge Island, supra*, 149 Wn. App. at 64; *Okamoto v. Employment Sec. Dep’t.*, 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001). A court abuses its discretion when its discretion is exercised on untenable grounds or for untenable reasons. *Minehart v. Morning Star Boys Ranch, Inc., supra*, 156 Wn. App. at 463. A review of {JEH1800000.DOCX;1/13023.150007/ }

PRSM's claims and its proffered testimony demonstrates that no such abuse of discretion has occurred in this case and that PRSM has failed to meet its heavy burden of proof in this matter.

2. The Trial Court Did Not Abuse its Discretion in Holding that PRSM Failed to Prove that the Testimony of Ms. Schaumberg and Ms. Phillips was Necessary to Decide PRSM Takings Claim.

The shoreline variance process established by WAC 173-27-170 authorizes a variance from shoreline regulations whenever the regulation in question “precludes, or significantly interferes with, reasonable use of [a] property” located landward of the ordinary highwater mark. Because this variance process exists, PRSM's takings claim regarding the SMP must necessarily allege a facial taking and not a taking as applied. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 335, 787 P.2d 907 (1990), *cert. denied*, 498 U.S. 911, 111S.Ct. 284, 112 L.Ed.2d 238 (1991); *Hill v. Garda CL NW, Inc.*, 198 Wn. App. 326, 347-48, 394 P.3d 390 (2017), *review granted in part, denied in part*, 189 Wn.2d 1016, 403 P.2d 839 (2017).

Under a facial challenge based on a takings theory, the challenger must show that the mere enactment of the regulation denies all economically viable use of all property to which it applies. *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 493; *Guimont v. Clarke*, 121 Wn.2d 586, 605, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176 (1994); {JEH1800000.DOCX;1/13023.150007/ }

Orion Corp. v. State, 109 Wn.2d 621, 658, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). As such, a successful facial takings challenge should prove to be a relatively rare occurrence.” *Presbytery of Seattle v. King County*, *supra*, 114 Wn.2d at 335, *Guimont v. Clarke*, *supra*, 121 Wn.2d at 605.

In this case, PRSM sought to supplement the record with the testimony of two scientific witnesses which it claimed would somehow be necessary for the trial court to determine whether the SMP constitutes a facial taking of private property: Ms. Schaumberg, whom PRSM said would testify that the City’s SMP buffers were improperly based on freshwater science, and Ms. Phillips, whom PRSM said would testify concerning the danger of using “conceptually applicable” freshwater science to marine shoreline protection. The trial court correctly held that PRSM had failed to prove that this testimony was necessary for the court to decide factual disputes on the takings claim and the trial court therefore did not manifestly abuse its discretion.

The Board’s record clearly contains evidence of all of the science relied upon by the City in developing the SMP and its buffers, including evidence presented by PRSM’s expert witness during the City and Ecology legislative process, Dr. Don Flora. This evidence is discussed in great detail

in the Growth Board Decision at 30-45 (AR 5816-5831), where PRSM's "primary attack on the City's SMP buffer system" was

the argument that buffer widths were based (a) on pollution control effectiveness for buffers on feedlots and farms in the Midwest, not based on residential pollution sources, and (b) on habitat impacts of upland activities, primarily forestry, above freshwater lakes and streams, not marine shores. PRSM Brief at 20, citing Flora white papers, Ex. 186, 189, 192, and ETAC memo, Ex. 938. The actual width of the SMP buffers is not challenged here, just the source and appropriateness of the science on which the City's consultant and ETAC relied. In Legal Issue I-4 Petitioners allege the City failed "to assemble and appropriately consider technical and scientific information."

Id. at 34-35 (AR 5820-5821). Thus, in challenging the SMP before the Board, PRSM specifically argued that the City inappropriately relied on freshwater science that "conceptually applied" to marine shorelines, rather than on saltwater science, in establishing the shoreline buffer widths required by the SMP, and PRSM cited Dr. Flora's white papers as the expert evidence on which it relied. The Board rejected PRSM's arguments on the use of freshwater science, noting that the City relied on an Addendum to the Summary of the Science Report prepared by Herrera Environmental Consultants, which cited current, Pacific Northwest marine shoreline analysis derived from studies conducted in Puget Sound and the Salish Sea. *Id.* at 35-36 (AR 5821-5822). In addition, based on the numerous studies in the record, the Board found that "the City assembled current science, {JEH1800000.DOCX;1/13023.150007/ }

indicated data gaps and uncertainties, and provided objective, reasonable consideration of opposing views” such as Dr. Flora’s and PRSM’s. *Id.* at 45 (AR 5831).

Under these circumstances, the trial court clearly did not abuse its discretion in denying PRSM’s motion to supplement the record. PRSM simply made no showing as to why the testimony of Ms. Schaumberg and Ms. Phillips was “needed to decide disputed issues of fact” related to the science underlying the City’s shoreline buffers when all of the white papers on this issue by Dr. Flora and all of the studies referred to in the Board’s 16-page analysis of the buffer science were already in the record. Under the express language of RCW 34.05.562(1) and both the strict interpretation of the Washington APA adopted by Washington courts and the strict interpretation of the federal APA by the federal courts, PRSM’s motion to supplement was properly denied.

The motion would have also been properly denied under even the more relaxed standard for supplementation adopted by some federal courts. *See*, Section IV(A) of this brief. If Ms. Schaumberg’s and Ms. Phillips’ testimony is indeed necessary to prove PRSM’s constitutional claims, that evidence “fundamentally overlaps” with the evidence PRSM was required to present in order to prove its administrative claims before the Board.

PRSM's administrative claims were based on RCW 90.58.100(1), which requires that a city developing a shoreline master program "consider all plans, studies, surveys, inventories, and systems of classification... dealing with pertinent shorelines of the state," and WAC 173-26-201(2)(a), which requires that such cities "base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available," identify "assumptions made concerning, and data gaps in, the scientific information," and "base master plan provisions on a reasoned, objective evaluation of the relative merits of [any] conflicting data." Claims under these provisions necessarily require the exact same type of scientific evidence that PRSM wants to present from Ms. Schaumberg and Ms. Phillips on its constitutional claims. Because the required proof on the constitutional and administrative issues fundamentally overlaps, PRSM cannot supplement the record under even the more relaxed standard for supplementation adopted by some federal courts for use in the federal APA.

3. The Trial Court Did Not Abuse its Discretion in Holding that PRSM Failed to Prove that the Testimony of Ms. Robbins was Necessary to Decide PRSM's Takings Claim.

PRSM's proffered testimony of Ms. Robbins fares no better than its proffered testimony of Ms. Schaumberg and Ms. Phillips. As noted in the {JEH1800000.DOCX;1/13023.150007/ }

preceding section of this brief, PRSM's claim is a facial takings challenge, which requires proof that the mere enactment of the SMP denies all economically viable use of all property to which it applies. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, *supra*, 480 U.S. at 493; *Guimont v. Clarke*, *supra*, 121 Wn.2d at 605; *Orion Corp. v. State*, *supra*, 109 Wn.2d at 658, 747 P.2d 1062 (1987). According to PRSM's motion to supplement, Ms. Robbins was prepared to testify only that "the SMP has significantly reduced the value of her property." (Emphasis added) CP 264. While this testimony might be helpful to the court in deciding an as-applied challenge to the SMP,² PRSM made no showing as to how Ms. Robbins' testimony was needed by the trial court to decide disputed factual issues regarding PRSM's facial challenge to the SMP and specifically how that evidence would show that the SMP denies all economically viable use of all property to which it applies.

Moreover, the existing record already contains significant evidence relating to the facial takings claim. For example, the record contains a 98-page letter from Appellant Linda Young that devotes more than 90 pages to

² An as applied challenge cannot be brought by Ms. Robbins at this time since Ms. Robbins has not applied for a shoreline variance under WAC 173-27-170, which allows such variances when an SMP regulation "precludes, or significantly interferes with, reasonable use of the property" for which the variance is applied. *Presbytery of Seattle v. King County*, *supra*, 114 Wn.2d at 335

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arguments relating to facial takings. AR 681-779. The record also contains at least 47 public comments received and responded to by Ecology alleging that the SMP is a taking, including Ecology's responsive summary of studies showing that mandatory riparian buffers have no significant impact on riparian property values. AR 5508-5509. PRSM made no showing to the trial court that this evidence was insufficient for the trial court to decide any disputed factual issues regarding its facial takings claim and did not show that Ms. Robbins' testimony in this regard would be anything more than cumulative anecdotal evidence.

Given the nature of PRSM's claim as a facial takings challenge, and given the evidence already in the record, the trial court did not abuse its discretion in holding that PRSM's proffered testimony of Ms. Robbins met the standards for supplementation under RCW 34.05.562. The trial court's decisions denying the motion to supplement and the motion for reconsideration must be upheld.

4. The Trial Court Did Not Abuse its Discretion in Holding that PRSM Failed to Prove that the Testimony of Ms. Young was Necessary to Decide PRSM's First Amendment Claim.

The trial court correctly determined that PRSM failed in its burden of proving the necessity of the proffered testimony of Linda Young on the expressive nature of gardening and the effect of the SMP's native vegetation

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requirements on her First Amendment rights. “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, supra*, 115 Wn.2d at 640. Where such challenges are entertained, “[c]onstitutional analysis is made upon the language of the ordinance or statute itself.” *Id.* Because the language of the SMP is in the record before the trial court, AR 26 – 437, Ms. Young’s testimony is clearly not needed to decide PRSM’s First Amendment challenge.

Moreover, even if Ms. Young’s freedom of expression testimony could be considered, it is already in the Board record to be considered by the trial court. As noted above in the Counterstatement of Facts, Ms. Young commented on the SMP throughout the adoption process, and at least one of those communications, a 98-page letter dated August 19, 2013, contains Ms. Young’s statements regarding the expressive nature of gardening and its alleged protection under the First Amendment. AR 681-779. In that letter, Ms. Young laid out the factual basis for her First Amendment argument as follows:

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.

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Frequent trips to the nursery are adventures – looking to see what new plants they have. Countless hours are spent dreaming and planning 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. When the City takes control over a homeowner’s garden, it has deprived him of the very pleasure of life, and a valuable personal freedom protected by the First Amendment. It is ironic that in their zeal for the environment, the SMP drafters have created a dictatorship.

AR 0744. PRSM made no showing to the trial court, nor has it made any showing before this Court, as to why Ms. Young’s written statements in the record concerning the way in which the selection of plants and the creation of a garden allegedly constitutes artistic expression, are insufficient for the trial court to decide PRSM’s First Amendment claim or must be supplemented with live testimony from Ms. Young.

Under these circumstances, the trial court’s determination that PRSM failed to prove Ms. Young’s testimony was needed by the court to decide disputed factual issues on PRSM’s First Amendment claim was not a manifest abuse of discretion. The trial court rightly denied the motion to supplement and the motion for reconsideration as to Ms. Young’s testimony and that denial must be upheld.

5. The Trial Court Did Not Abuse its Discretion in Holding that PRSM Failed to Prove that the Testimony of Mr. Tripp, Mr. Brachvogel, and Ms. Myers was Necessary to Decide PRSM's Void for Vagueness Claim.

Finally, PRSM's argument that the trial court abused its discretion in not granting PRSM's motion to supplement the record with the live testimony of Mr. Tripp, Mr. Brachvogel, and Ms. Myers in support of its "void for vagueness" due process argument is also without merit. "In many cases, vagueness questions will be amenable to resolution as questions of law." *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The test for determining whether a statutory provision is unconstitutionally vague is whether a person of common and ordinary intelligence can understand what conduct is prohibited and what conduct is allowed. *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 805, 557 P.2d 307 (1976). Courts are perfectly capable of applying this vagueness test to statutory language without the need for additional testimony. PRSM offers no basis for concluding that the trial court would be unable to do so here or needs the testimony of others to "decide disputed facts" regarding PRSM's vagueness claim.

In addition, the only term PRSM argued to be unconstitutionally vague in its motion to supplement was the word "activity," which the SMP defines as "human activity associated with use of the land or resources."

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Growth Board Decision at 98 (AR 5884), citing SMP §8 (AR 97 and AR 224). But PRSM challenged this very term as vague in its argument before the Board, albeit under WAC 173-26-191(2)(a)(ii)(A), which requires SMPs to be “sufficient in scope and detail to ensure implementation of the Shoreline Management Act.” The Board rejected PRSM’s argument, holding that the terms “activity” and “human activity” must be read in the context in which they are used in the SMP and that when this is done the terms are sufficiently definite to satisfy vagueness concerns. Growth Board Decision at 97-100 (AR 5883-5886). Specifically, the Board relied on §4.0 of the SMP (AR 67), which defines “activities” as shoreline modification activities,” and the SMP’s definition of “shoreline modification activities” (AR 285) as “those actions that modify the physical configuration or qualities of the shoreline area, usually through the construction of a physical element such as a dike, breakwater, pier, weir, dredged basin, fill, bulkhead, or other shoreline structure,” in holding that PRSM had failed to meet its burden of showing that the SMP was too broad or vague. Growth Board Decision at 100 (AR 5886).

Under these circumstances, the trial court did not abuse its discretion in holding that PRSM failed to prove why the testimony of Mr. Tripp, Mr. Brachvogel, and Ms, Myers was necessary for the court to decide PRSM’s

vagueness claim and thus met the standard for supplementation required by RCW 34.04.562(1). Because the court could clearly apply the common intelligence standard used to decide vagueness claims and because PRSM's proffered evidence on the vagueness claim fundamentally overlaps with the evidence necessary to prove an SMP is not "sufficient in scope and detail," the trial court rightly denied the motion to supplement with testimony and documents regarding vagueness under both the strict interpretation of Washington and federal APA and the more relaxed standard for supplementation adopted by some federal courts for the federal APA. The trial court's denial of the motion to supplement and the motion for reconsideration must be upheld on the vagueness claim.

D. PRSM HAS NO DUE PROCESS RIGHT TO PRESENT ADDITIONAL EVIDENCE WHEN AMPLE OPPORTUNITY EXISTED DURING THE TIME THE RECORD WAS CREATED BEFORE THE CITY AND ECOLOGY.

PRSM has cited numerous cases emphasizing the existence and importance of the right to petition the court, and the right to present evidence. *See, e.g., State ex rel. Puget Sound Navigation Co. v. Dept. of Trans.*, 33 Wn.2d 448, 495, 206 P.2d 456 (1949) (acknowledging that parties to an administrative adjudication have a right to present evidence); *Robles v. Dep't of Labor & Indus.*, 48 Wn. App. 490, 495 (acknowledging

same); *Morgan v. United States*, 304 U.S. 1, 19, 58 S. Ct. 773, 82 L. Ed. 1129 (1938) ("The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.").

None of the due process cases cited by PRSM stand for the proposition that due process affords plaintiffs *two* opportunities to put evidence before a court. In this case, PRSM had ample opportunity to establish the facts it now claims it needs for its constitutional arguments during the extensive public process that led to the adoption of the Bainbridge Island SMP. Prior to adopting the SMP, the City of Bainbridge Island held more than 100 meetings before various City boards and commissions at which public testimony or comment was taken, including one public hearing before the Bainbridge Island Planning Commission and three public hearings before the Bainbridge Island City Council. Growth Board Decision at 10-12 (AR 5796-5798). The City also received and responded to more than 2000 written comments, at least 363 of which came from PRSM, its attorneys, or the named individual appellants in this lawsuit. *Id.* at 15 (AR 5801). The Washington State Department of Ecology (Ecology) also conducted an extensive public process before approving the Bainbridge Island SMP, holding one public hearing which 200 people

attended and receiving and considering 112 oral or written comments. *Id.* at 11 (AR 5797) and AR 475-491.

Because the process of adopting the SMP was legislative in nature, there was no limit on the evidence that PRSM could have presented and no limit on the City's and Ecology's ability to consider that evidence in deciding whether to adopt or approve the SMP. In fact, as detailed in Section IV(C) of this brief, PRSM presented extensive evidence during the making of the legislative record herein on many of the issues it now seeks to supplement the record on, including the alleged use of freshwater vs. marine science, the alleged violation of First Amendment rights, the alleged taking of property, and the alleged vagueness of SMP provisions. Under these circumstances, the trial court's denial of PRSM's motion to supplement was not a denial of the right to present evidence. PRSM could have presented the evidence for which it sought supplementation at any time during the making of the administrative record. Any failure to do so was an error of PRSM's own making and should not entitle it to supplement the record here.

V. CONCLUSION

For all of the reasons set forth above, this Court should uphold the decision of the trial court denying PRSM's motion to supplement and

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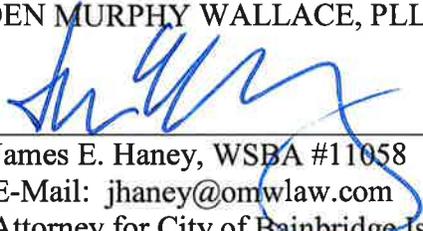
motion for reconsideration. The trial court correctly determined that it was acting in its appellate capacity under the APA and that PRSM was required to show that its proffered testimony met the requirements for supplementation under RCW 34.05.562(1). The trial court did not err when it found that much of PRSM's proffered scientific evidence was already in the record, but it did not base its decision on that finding and instead denied PRSM's motion to supplement and motion for reconsideration based on PRSM's failure to prove that its proffered evidence met the standard for supplementation under the APA. The trial court's decision that PRSM had not met that standard was not a manifest abuse of the trial court's discretion. Finally, PRSM's constitutional right to due process was not violated by the trial court's ruling, as PRSM had ample opportunity to make its record during the legislative process conducted by the City and Ecology on the SMP. For all of these reasons, PRSM's appeal of the trial court's denial of the motion to supplement and motion for reconsideration must be denied and the trial court's denial must be upheld.

RESPECTFULLY SUBMITTED this 15th day of October, 2018.

Respectfully submitted,

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By



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DECLARATION OF SERVICE

On the date below I e-filed a true and accurate copy of the Respondent City of Bainbridge’s Response to Motion to Modify Ruling in Court of Appeals, Division II, and e-served the following:

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

Dated this 15th day of October, at Seattle, Washington.

Charolette Mace
Legal Assistant

OGDEN MURPHY WALLACE, PLLC

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