FILED
Court of Appeals
Division II
State of Washington
11/9/2018 2:44 PM

Case No: 51109-6-II

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.,

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.

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

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I.

INTRODUCTION

The City of Bainbridge Island and the Department Ecology abandon the argument that the Administrative Procedure Act (APA) should be narrowly construed to bar courts from considering additional evidence of a constitutional violation. Indeed, they must concede this point. The Supreme Court of Washington has held that RCW 34.05.562(1) allows a petitioner to submit evidence of constitutional violations for the first time to the trial court where the administrative court does not have authority to rule on constitutional issues.[1] *Washington Trucking Associations v. State Employment Sec. Dep't*, 188 Wn.2d 198, 221 n.17, 393 P.3d 761 (2017). Thus, Respondents' attempt to portray Preserve Responsible Shoreline Management's (PRSM) request as extraordinary is baseless. In truth, state and federal courts routinely permit petitioners to submit evidence that was

[1] Case law interpreting similar administrative appeal statutes also holds that a trial court may 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 additional evidence on judicial review of an agency decision upholding a zoning ordinance); *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); *see also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991) (allowing additional evidence pertaining to constitutional violations not subject to agency authority where Immigration Naturalization Act limits judicial review to administrative record); *St. Joseph Stock Yards Co. v. United States*, 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.").

not part of the record where necessary to prove a constitutional violation.[2] And even outside the context of constitutional claims, courts allow for supplementation to address gaps in the record, questions not considered by agency, and to define complex and technical terms.[3]

Neither respondent seriously disputes that the trial court committed manifest error when the court denied PRSM's motion based on a record that the court had not read. CP 348-50. That basis, alone, warrants reversal because courts have a duty to independently review the record to determine contested questions of fact—particularly where constitutional rights are at issue. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) ("[W]here constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be

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[2] *See, e.g.*, *Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 226-27, 328 P.3d 1008 (2014) (allowing additional evidence on appeal from a decision issued by the board of county commissioners); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (allowing plaintiffs to submit two additional affidavits not in the record); *National Medical Enterprises, Inc. v. Shalala,* 826 F. Supp. 558, 565 n.11 (D.D.C. 1993) (allowing affidavits); *A 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 an opportunity to put on the evidence); s*ee also 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). This large body of persuasive case law shows that each request raised in PRSM's motion for additional evidence is reasonable and supported by law. *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.").

[3] *See, e.g.*, *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified*, 867 F.2d 1244 (9th Cir. 1989).

applied to the actual facts of the case."). That error is plainly prejudicial: it denied PRSM the right to submit evidence that is necessary to address contested constitutional issues. *Robles v. Dep't of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987).

The City and Ecology's attempts to rehabilitate the trial court order are baseless. Decisions of the state and federal courts confirm that each of the facial constitutional claims at issue is viable. Case law also confirms that evidence is necessary to establish certain threshold questions in facial claims and to address significant gaps in the record. *See* Opening Br. at 29-32; *see also infra* at 15-18. Both criteria are unquestionably satisfied here. *See* AR 4097 ("[A]vailable data regarding Bainbridge Island nearshore resources are dated and lack accuracy across all elements."); *see also id.* ("Further data evaluation or additional studies will be required to address known data gaps . . . filling of data gaps is critical to the City for long-range planning purposes, and has not been performed."). Respondents' remaining arguments rely on conjecture and mischaracterizations of the proffered testimony, the applicable constitutional doctrines, and the record to try to make the additional evidence appear duplicative of an admittedly incomplete record. For these reasons, PRSM respectfully requests that this Court reverse the trial court's order denying leave to submit additional evidence.

II.

ARGUMENT

Washington's Supreme Court has interpreted the APA's supplemental evidence provision to allow petitioners to submit evidence of a constitutional violation to the trial court where the administrative court lacks authority to consider such issues. *Washington Trucking Associations*, 188 Wn.2d at 221 n.17 (citing RCW 34.05.562(1)). The City and Ecology abandon the contrary claims advanced below (CP 271-72, 282-83), and now concede the legal basis for PRSM's motion for additional evidence.

A. The Trial Court's Decision Is Untenable

Respondents do not seriously contest that the trial court committed clear error when it concluded that it was acting in its appellate capacity in considering whether to allow evidence in support of PRSM's constitutional claims. CP 348-49; *Porter v. Califano*, 592 F.2d 770, 771 (5th Cir. 1979) (The trial court has independent authority over constitutional claims asserted in an APA petition.). Ecology does not address this error. The City's attempt to do so ignores the definition of an appeal, ignores the Growth Board's limited jurisdiction, and ignores on-point case law. City Br. at 13-15; *but see* Opening Br. at 17-20 (citing cases). It is black letter law that a trial court exercises its original jurisdiction when it considers a petition alleging constitutional questions that were not subject to agency

authority. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). Because the Board lacked authority to consider PRSM's constitutional claims, the trial court's conclusion regarding appellate jurisdiction constituted clear and prejudicial error.

The City and Ecology split on the question whether the trial court committed obvious error when it found "that Petitioners did not take issue with Respondents' assertion that the Board below heard much of the proffered testimony," despite admitting that the court "has yet to review the record below." CP 350. Ecology opts to not address this portion of the decision, likely because there is no defense for this clear error. PRSM did, in fact, contest the governments' assertion that all of the proffered testimony is duplicative of the record. CP 309-11 (PRSM reply); RP 18-19 (PRSM argument). Thus, the trial court had a duty to independently review the record to ensure that its decision to bar PRSM from submitting evidence relevant to its constitutional claims is supported by fact. *In re Third Lake Washington Bridge by City of Seattle*, 82 Wn.2d 280, 288, 510 P.2d 216 (1973).

The City, nonetheless, claims that PRSM's rebuttal (which insisted that the proffered testimony covered topics that are offered for the first time and is directly relevant to the constitutional claims) was not detailed enough to trigger the trial court's duty to review the record. City Br. at 19. This

argument fails for two reasons. First, the City did not raise this claim below; instead, it argued that PRSM's summary of the testimony was sufficiently detailed to allow the trial court to determine whether the evidence was necessary to decide the disputed constitutional claims. CP 273-77. And second, even if PRSM had not objected to the City's characterization of the evidence and record, the trial court would still be under a duty to independently verify Respondents' assertions regarding the contents of the record. *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 433 n.7, 166 P.3d 1198 (2007).

The City's argument in this regard highlights the very real prejudice resulting from the trial court decision. When ruling on a motion for additional evidence relating to a constitutional violation, the trial court must examine the record *in light of the actual claims raised*. *Porter*, 592 F.2d at 780 (When a court is reviewing the constitutional validity of government action pursuant to the APA, it must make "an independent assessment of a citizens' claim of constitutional right.") (citing *Pickering*, 391 U.S. at 578 n.2); *see also Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008) (The determination whether additional evidence is necessary to address constitutional claims raised on APA review turns on the standard of review applicable to each constitutional claim.). The City, however, has consistently advanced a straw man argument designed to stray the court's

attention away from *the actual claim raised*. Specifically, the City argues that the PRSM has failed to show that the proffered testimony is necessary to prove that the SMP denies shoreline property owners all economically viable use of their land (City Br. at 22-30)—*a claim that is not alleged in the petition*.[4] CP 326-43. PRSM's petition alleges a violation of the doctrine of unconstitutional conditions, which asks for a substantively different analysis based on qualitatively different evidence.[5] CP 340-41; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) ("[T]he plaintiff is the master of the complaint."). Thus, insofar as the trial court adopted the City's assertion that additional evidence is not necessary to decide whether the SMP denies owners all economically viable use of their land (CP 350), the decision is based on the wrong constitutional standard.

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[4] The distinction between "facial" and "as-applied" challenges is a notoriously confusing area of law—particularly in Washington where the terms "facial" and "as applied" are used to describe both the procedural posture of the case (at issue here) and certain legal tests under which a court may adjudicate the merits of a takings claim (not at issue here). *See Guimont v. Clarke*, 121 Wn.2d 586, 606, 854 P.2d 1 (1993) (using the term "facial" where the U.S. Supreme Court uses the term "categorical," and using "as applied" instead of the proper term "partial") (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

[5] *Compare Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office through W. Washington Growth Mgmt. Hearings Bd. (OSF)*, 199 Wn. App. 668, 747, 399 P.3d 562 (2017) (unpublished) (A facial plaintiff must demonstrate that "the 'mere enactment' of a restriction . . . violate[s] these standards of nexus and proportionality."), *with Guimont*, 121 Wn.2d at 595 ("Under a facial [total takings] challenge to a statute regulating the uses that can be made of property, the landowner must show that the mere enactment of the statute denies the owner of all economically viable use of his or her land.").

As explained in PRSM's trial court pleadings, the testimony of Ms. Schaumburg, Ms. Phillips, and Ms. Robbins is not intended to challenge the City's science, but is intended to address "critical gaps" in the record and address questions that are not addressed by the record. CP 262-63, 310-12. Specifically, PRSM argued that the testimony is necessary to show that the City and Ecology failed to engage in the type of analysis required by the "essential nexus" and "rough proportionality" tests before adopting a law that exacts property as a mandatory condition on any new use of shoreline property. CP 260-61, 309-11 (citing *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)). Additional evidence is necessary in this circumstance because, to prove that the analysis did not occur, PRSM has the burden of putting on proof "sufficient to render the existence of the negative probable, or to create a fair and reasonable presumption of the negative until the contrary is shown." *Higgins v. Salewsky*, 17 Wn. App. 207, 210-11, 562 P.2d 655 (1977). The proposed testimony will do precisely this by identifying the types of studies necessary to show nexus and proportionality and by demonstrating that this information is absent from the legislative record. CP 311. PRSM's motion clearly disputed "Respondents' assertion that the Board below heard much of the proffered testimony." CP 350. The trial court's failure to

independently verify whether or not the evidence is, in fact, duplicative of the record and necessary to litigate the actual claims raised was untenable.

Allowing this evidence in a facial challenge is all the more necessary because the SMP contains a "silver bullet," making it mandatory for permit applicants to rely only on the studies contained in the legislative record ("critical gaps" and all) and use City-approved experts when determining how much land must be set aside in a conservation easement. AR 109, 306. A landowner, therefore, cannot use independent science and experts in an as-applied challenge without violating the SMP, thereby providing the City with an alternative basis for denying the permit that will not trigger heightened scrutiny under the doctrine of unconstitutional conditions. The proffered testimony is additionally necessary because, to date, neither the City nor Ecology has claimed that the record contains a nexus and proportionality analysis, which is a significant gap in the record.

B. Public Comment Process Cannot Satisfy Due Process

The bare opportunity to submit public comments during the SMP update process cannot deprive an individual of his or her right to put on evidence of a constitutional violation. *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985) ("The opportunity under the APA to comment on proposed rules is 'meaningless unless the agency responds to significant points raised by the public.'") (quoting *Home Box Office, Inc. v. FCC*, 567

F.2d 9, 35-36 (D.C. Cir. 1977)). Without a reciprocal requirement that the City and/or Ecology substantively respond to the public comments, the process cannot put the public on notice of the government's position vis-à-vis the issues (such as the government's intent to challenge the expressive nature of gardening and landscape design) and therefore cannot hold preclusive effect. *Id*. Here, it is undisputed that neither the City nor Ecology responded to the substance of comments regarding the SMP's impact on free expression, property, and due process rights. *See* Opening Br. at 40-41. Such a process cannot bar PRSM from putting on evidence before the first court with jurisdiction to hear constitutional claims.

C. PRSM's Facial Claims Are Viable

Ecology claims that the trial court's decision is ultimately not prejudicial because PRSM's vagueness and unconstitutional conditions claims are per se barred in their facial posture.[6] Ecology Br. at 13-14, 19-20. Wrong—there is no per se bar to facial claims. *City of Los Angeles. v.*

[6] Ecology's argument in this regard is predicated on the oft-repeated myth that facial constitutional claims are rarely successful and should be disfavored by the courts. Not true. *Patel*, 135 S. Ct. at 2449-51. In practice, the distinction between facial and as-applied claims "is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15, 132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012). Indeed, an overview of three decades of U.S. Supreme Court cases found that facial claims are more frequent and more successful than their as-applied counterparts. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 918 (2011) (favorably cited by *Patel*, 135 S. Ct. at 2449).

Patel, 135 S. Ct. 2443, 2449-51, 192 L. Ed. 2d 435 (2015) (rejecting argument that facial claims are categorically precluded upon recognition that the Court has allowed facial claims under a "diverse array of constitutional provisions").

Ecology also incorrectly claims that facial vagueness claims will not be considered unless the challenged law affects a right protected by the Free Expression Clauses.[7] The U.S. Supreme Court rejected this argument in *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). There, the Court held that a "law that does not reach constitutionally protected conduct . . . may nevertheless be challenged on its face as unduly vague, in violation of due process." *Id*. And, directly on point, Washington's Supreme Court allows facial vagueness claims against laws that impose criminal liability for behavior that would not normally be considered criminal without a state of mind requirement.[8] *See Postema v. Pollution Control Hearings Bd.*, 142

[7] Ecology overlooks the fact that PRSM sought leave to submit testimony to demonstrate that gardening and landscape design constitute protected expressions, bringing the claims within the scope of facial claims Ecology itself endorses.

[8] It is true, of course, that when a plaintiff raises both facial and as-applied vagueness claims challenging a land use ordinance, Washington courts will resolve the case on the narrower, as-applied claim. *E.g.*, *Burien Bark Supply v. King Cty.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986); *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 618-19, 987 P.2d 103 (1999). But none of the cases cited by Ecology involved ordinances that impose criminal liability where a landowner unknowingly uses his or her land in a manner proscribed by regulations. Ecology's attempt to misrepresent the nature of PRSM's claim must be rejected. *Caterpillar*, 482 U.S at 398-99.

Wn.2d 68, 114, 11 P.3d 726 (2000) (citing *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984)); *see also State v. Worrell*, 111 Wn.2d 537, 547, 761 P.2d 56 (1988) (Utter, J., concurring) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (facial challenge to law imposing criminal liability for behavior that would not normally be considered criminal with no state of mind requirement); *Colautti v. Franklin*, 439 U.S. 379, 384, 391-92, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (facial challenge to law affecting right to privacy)). Respondents are well-aware that PRSM's vagueness challenge hinges on an SMP provision that holds landowners criminally liable (with penalties of up to three months in county jail and a thousand dollar fine) if they are found to have committed two violations of the SMP within any 12-month period. AR 251-52 (SMP 7.2.8). Importantly, the SMP's criminal enforcement provision contains no prior knowledge or mens rea requirement. *Id*. PRSM's petition clearly states a viable facial vagueness challenge.

Ecology's argument in regard to the unconstitutional conditions claim is also without merit. The U.S. Supreme Court has long recognized the viability of facial unconstitutional conditions challenges in general. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). And both Washington and Federal Courts have, in fact, adjudicated

facial exactions claims under *Nollan* and *Dolan*.[9] *See Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office through W. Washington Growth Mgmt. Hearings Bd. (OSF)*, 199 Wn. App. ¶ 208 (unpublished) (A facial plaintiff must demonstrate that "the 'mere enactment' of a restriction . . . violate[s] these standards of nexus and proportionality."); *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 272-74, 255 P.3d 696 (2011) (enactment of a critical area buffer "must satisfy the requirements of nexus and rough proportionality established in [*Dolan*] and [*Nollan*]"); *Trimen Dev. Co. v. King Cty.*, 124 Wn.2d 261, 274, 877 P.2d 187 (1994) (facially applying *Dolan*, as incorporated into impact fee statute, to a park fee ordinance); *see also, e.g.*, *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1141-44 (9th Cir. 2014) (applying *Nollan* and *Dolan* to the terms of a Marketing Order); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating facial *Nollan* claim against an ordinance requiring developers to provide affordable housing).

Ecology's citation to *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), is inapposite. *Garneau* is a plurality decision with only one judge

[9] Respondents provide no explanation why a court cannot assess nexus and proportionality on the face of a statute, where courts ordinarily engage in such analyses. *See, e.g.*, *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999) (determining whether a statute satisfied a "congruence" and "proportionality" test on its face under the Fourteenth Amendment).

opining on the viability of a facial *Nollan/Dolan* claim.[10] 147 F.3d at 811; *see Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012) (the opinion of one judge in a plurality is not binding because it does not draw a majority). Even so, the lead opinion in *Garneau* disallowed a *Dolan* facial claim only because the particular claim required consideration of the exact amount of a monetary exaction to determine if it met the *Dolan* "rough proportionality" test. 147 F.3d at 811; *see also OSF*, 199 Wn. App. ¶ 208 (noting that the factual nature of the nexus and proportionality test would make it "unusual," but not impossible, for a plaintiff to prevail on a facial *Nollan/Dolan* challenge). PRSM's claim does not depend on this type of analysis. Instead, it argues (1) that the SMP, on its face, mandates that owners dedicate several protected interests as a condition of permit approval (including a conservation easement, a five-year access easement, a waiver of the right to privacy, a waiver of the right to select one's plants, etc.) and (2) the SMP contains no method by which to determine whether those demands satisfy the nexus and proportionality requirements. *See, e.g.*, *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1079, 1084 n.4 (N.D. Cal. 2014) (holding a facial claim justiciable where the terms of an

[10] Judge Williams concurred in the judgment but wrote a separate opinion explaining that he did not believe that monetary exactions could be challenged as a taking or under *Nollan* and *Dolan*—a view that was overruled by *Koontz*. 147 F.3d at 819-20. Judge O'Scannlain dissented from the judgment and would have applied *Nollan* and *Dolan* to the legislation at issue. *Id.* at 813-15.

exaction are readily ascertainable on the face of the ordinance). Thus, for the purpose of the motion for additional evidence, PRSM's petition stated a viable unconstitutional conditions claim.

D. Facts Are Often Necessary to Establish Certain Threshold Questions in Facial Constitutional Challenges

The City and Ecology also insist that courts never consider any facts when reviewing a facial constitutional challenge, simply because the ultimate question whether a law violates the constitution constitutes a question of law. This is a gross oversimplification of constitutional procedure. Facts are often necessary where the parties dispute the particular constitutional doctrine and/or degree of scrutiny applicable.[11] *See, e.g.*, *California v. LaRue*, 409 U.S. 109, 111, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) (considering facts to determine whether nude dancing constituted protected expression in facial challenge to regulations prohibiting live adult entertainment); *Vill. of Hoffman Estates*, 455 U.S. at 494 ("In a facial challenge to the . . . vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 92, 96

[11] To establish standing, for further example, facial plaintiffs must show concrete injury that is fairly traceable to the defendant's action and is likely to be redressed by a favorable decision. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 215-16, 45 P.3d 186 (2002); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (considering facts to determine the scope of a statute's proscription in a facial challenge); *Torres v. Puerto Rico,* 442 U.S. 465, 466, 471, 99 S. Ct. 2425, 61 L. Ed. 2d 1 (1979); *see also* Fallon, 99 Cal. L. Rev. at 925 (discussing the U.S. Supreme Court's varying reliance on facts in facial and as-applied cases); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1370 (2000) (Facts are necessary to determine the applicable constitutional doctrine and standard of review.).

Facts and expert testimony are also necessary to set up the question whether "a law is unconstitutional in all of its applications." *Patel*, 135 S. Ct. at 2451. That is because the use of the phrase "in all of its applications" is considerably more limited in scope. *Id*. In considering a facial challenge, the reviewing court is instructed to consider "only applications of the statute in which it actually authorizes or prohibits conduct." *Id*. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court's analysis of a spousal-notification law did not include "the group for whom the law is irrelevant"—*i.e.*, women who would have voluntarily notified their husbands. 505 U.S. 833, 894, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (holding a law that required a newspaper to print a candidate's reply to an unfavorable editorial

invalid on its face, despite the fact that most newspapers would adopt the policy absent the law). Likewise, *Patel*'s review of a law authorizing police to search hotel guest registries without a warrant excluded consideration of those hoteliers who would have consented to the inspections, as well as warrantless searches justified by exigency. *Patel*, 135 S. Ct. at 2451. Such circumstances are "irrelevant" and cannot "prevent facial relief." *Id*.

The City and Ecology have made this type of narrowing evidence necessary by (1) challenging the applicability of certain constitutional tests and (2) arguing that the SMP will not implicate constitutional rights in every conceivable circumstance. CP 273-77, 284-87. In response to those arguments, Ms. Young's proposed testimony is intended to show the circumstances in which gardening and landscape design rise to the level of protected expression. Opening Br. at 39-42; *Planned Parenthood of Se. Pennsylvania*, 505 U.S. at 894 (considering evidence that 99 percent of women were either not subject to the statute's notification requirement or would voluntarily notify their spouse in order to narrow the scope of inquiry to the remaining one percent who are actually affected); *see also United Youth Careers, Inc. v. City of Ames, Iowa*, 412 F. Supp. 2d 994, 1001 (S.D. Iowa 2006) (considering government's rebuttal testimony regarding the ordinance's scope on facial First Amendment challenge). And testimony from Ms. Schaumburg, Ms. Phillips, and Ms. Robbins is necessary to rebut

the City and Ecology's argument that the SMP has no adverse impact on property owners (AR 5815 n.52) by identifying circumstances where rights are actually impaired. Opening Br. at 36. This evidence is clearly appropriate and necessary to rebut the Government Respondents' claim and to establish the scope of facial review. *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). This testimony is also needed to establish that the SMP triggers application of the doctrine of unconstitutional conditions as set out by *Nollan* and *Dolan*. Opening Br. at 33-39. The City and Ecology's claim that this type of evidence is never admissible in support of a facial constitutional claim is baseless.

E. PRSM's Motion Provided Good Cause for Admission of Evidence That Is Relevant to the Constitutional Claims

The City and Ecology devote the remainder of their responses to the argument that, had the trial court actually reviewed the record, it would have found the proffered evidence (that they have not read) duplicative of the administrative record (which the court did not read). *See* City Br. at 20-33; Ecology Br. at 11-23. This argument, however, relies on conjecture.[12] It is

[12] Respondents' argument relies on a self-serving and speculative characterization of the testimony. City Br. at 8-13; Ecology Br. at 3-5; *but see In re Terra Int'l, Inc.*, 134 F.3d

also fatally incongruous: the City and Ecology claim, on one hand, that the record is sufficient to address each element of PRSM's constitutional claims, but then, on the other hand, they insist that the claims will fail because they are unsupported by the record. *See, e.g.*, Ecology Br. at 14-15, 18; City Br. at 23-28. They cannot have it both ways. The record either resolves the disputed claims or it does not, in which case the relevant testimony is necessary and should be allowed.

1. Evidence Is Relevant to Constitutional Claims

In regard to constitutional claims, additional evidence will ordinarily be allowed where the applicable constitutional doctrine requires the court to consider substantively different questions than those that were at issue before the agency. *Washington Trucking Associations*, 188 Wn.2d at 221 n.17; *Puerto Rico Pub. Housing Admin. v. U.S. Dep't of Hous. and Urban Dev.*, 59 F. Supp. 2d 310, 327-28 (D. P.R. 1999); *Rydeen v. Quigg*, 748 F. Supp. at 906. Courts will not allow additional evidence, however, where the standard of review is identical to the standard applicable to the associated administrative appeal. *Chiayu Chang v. United States Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017)

302, 306 (5th Cir. 1998) (the party seeking to broadly bar evidence supporting constitutional claims must show the necessity of such an order through particular and specific facts, not conclusory statements); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (a party seeking to bar evidence must show a particular and specific need for the order, as opposed to making conclusory statements).

(motion for "fairly broad discovery" denied because equal protection claim alleged that "the agency's decision was 'irrational and arbitrary' and failed to consider evidence submitted by plaintiffs" which was subject only to rational basis scrutiny and "fundamentally overlap[ped]" the administrative claim that the agency decision was arbitrary and capricious).

Each of the claims on which PRSM sought leave to submit additional evidence demands much closer scrutiny than the standards for administrative review. PRSM's free expression claim is subject to intermediate scrutiny. *Voters Educ. Comm. v. Pub. Disclosure Comm'n,* 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) ("[T]he State usually 'bears the burden of justifying a restriction on speech.'") (quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, *amended by* 943 P.2d 1358 (1997)). The unconstitutional conditions claim is subject to heightened scrutiny. *Dolan*, 512 U.S. at 391; *KAPO*, 160 Wn. App. at 272-74; *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 622, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (Kagan, J., dissenting) (characterizing the *Nollan/Dolan* as establishing a "heightened scrutiny" test). And the void for vagueness claim calls for exacting scrutiny because the SMP imposes criminal sanctions on behavior that would not normally be considered a crime. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212, 200 L. Ed. 2d 549 (2018).

2. Evidence Is Necessary to Address Gaps in the Record

The federal courts also allow evidence outside the record where the movant shows that the evidence is necessary to address a significant inadequacy in the record. *See, e.g.*, *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2004); *Locher v. UNUM Life Ins. Co. of Am.*, 389 F.3d 288, 299 (2d Cir. 2004) (additional evidence will be allowed upon a showing of "good cause"); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-20, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971) (Courts have a duty to engage in "a thorough, probing, in-depth review" of an administrative decision, which may require it to consider evidence outside the record.). This exception to the administrative record rule applies where a party claims that a government body failed to adequately evaluate a question required by law, or otherwise swept "stubborn problems or serious criticism . . . under the rug." *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973). Such an allegation raises an issue that is "sufficiently important to permit the introduction of new evidence in the [trial] court, including expert testimony with respect to technical matters[.]" *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977); *see Asarco, Inc. v. U.S. Envtl. Protection Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("It will often be impossible . . . for the court to determine whether the agency took into

consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.”).

PRSM’s motion satisfied this standard as well. For example, in regard to Ms. Schaumburg’s testimony, PRSM argued that additional evidence was needed to address the City’s admission that there are “critical” gaps in the science. AR 4097; *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) (an admission by the government that the record is incomplete will establish the need for additional evidence). PRSM also argued that the testimony of Ms. Schaumburg and Ms. Phillips was necessary to show that the City’s acceptance of “conceptually applicable” science to justify the government access and conservation easement requirements relied on a fictional standard. AR 42, 5822; *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 811 (9th Cir. 1980); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 n.22 (9th Cir. 1992) (expert analysis appropriate to question the accuracy and credibility of the analysis upon on which the agency relied); *see also Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1336 (4th Cir. 1995) (It is the duty of an agency “to establish the . . . validity of the evidence before it prior to reaching conclusions based on that evidence.”).

The evidence pertaining to PRSM's free expression claim, too, falls within the recognized exceptions to the presumption that judicial review be limited to the agency record. Throughout the update process, Bainbridge Island residents objected that the proposed vegetation rules would interfere with their right to express themselves through their gardens and landscape design. *See, e.g.*, AR 742-44. The City, however, "swe[pt] [that] serious criticism . . . under the rug," allowing the SMP to advance without responding to the constitutional objections in the record. *County of Suffolk*, 562 F.2d at 1384-85. Now, the City and Ecology want to take advantage of an incomplete record to argue that the record does not contain adequate facts to establish that gardening and landscape design constitute expressive conduct. CP 276. This is precisely the circumstance that warrants admission of additional evidence.

Federal courts also allow expert testimony in order to explain technical terms or complex subject matter. *Asarco*, 616 F.2d at 1160; *see also Colautti*, 439 U.S. at 384 (considering expert testimony in facial vagueness challenges). It is no secret that "several SMP provisions are poorly written" or "infelicitously" worded. AR 5837. Indeed, a recent University of Washington study into the SMP's readability and effectiveness (initiated by City request) confirms that multiple SMP provisions are "vague" and "ambiguous," and the entire document is

"difficult" to "extremely difficult" to understand. Trevor P. Williams, *Quality of the Bainbridge Island Shoreline Master Program: A Multi-Criteria Perspective*, at 34, 36 (University of Washington School of Marine and Environmental Affairs 2017) (attached as Appendix A). "Should a citizen be interested in understanding the policies or regulations pertaining to their area of interest, they will be faced with a difficulty level of college or higher." *Id*. at 37. The SMP is additionally confusing because it does not use a "common language or vocabulary . . . throughout the text." *Id*. at 40. And because the SMP includes numerous inconsistent references to past code provisions, it is also difficult for the average person to determine "what is accurate or still relevant." *Id*. at 38. The study also found that the SMP lacked any benchmarks for achieving its goals. *Id*. at 36. Thus, as written, the SMP is "incomplete and incapable of actively being reviewed and refined." *Id*. at 38. Until the ambiguity and confusion is cured, "the SMP remains a large body of text that lacks the appropriate contents or prose to accomplish the goals it has set before it." *Id*. at 40. This study, when considered alongside the Growth Board's criticism and public testimony from City officials and planners, shows that PRSM's motion provided ample cause to warrant additional testimony.

Public policy weighs heavily in favor of PRSM's request. The University of Washington study concluded that, as currently written, "the

realistic potential of fulfilling the defined purposes of the document is unlikely," and there is nothing in the SMP "to ensure that that the general goals of environmental health and smart growth have been met." Williams, *supra*, at 38. And yet, the 400+ pages of the SMP holds each shoreline property owner subject to civil and criminal penalties for their failure to understand a law that has been deemed "poorly written," "infelicitously worded," "vague," and "ambiguous" by neutral reviewers. Frankly, the City and Ecology, in the exercise of sound policy, should invite the opportunity to excise confusing and imprecise language from the SMP.

III.

CONCLUSION

PRSM respectfully requests that this Court reverse the trial court's order denying PRSM's motion for leave to provide additional evidence relevant to the constitutional claims and remand the matter with instruction to allow PRSM to introduce all evidence that otherwise satisfies the rules of evidence and is necessary to prove claims that are filed for the first time before the court with original jurisdiction.

DATED: November 9, 2018. Respectfully submitted,

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I, BRIAN T. HODGES, certify that on November 9, 2018, I caused true copies of APPELLANTS' REPLY BRIEF to be served by the methods indicated below on the following counsel:

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APPENDIX A

Quality of the Bainbridge Island Shoreline Master Program: A Multi-Criteria Perspective

Trevor P. Williams

A thesis
submitted in partial fulfillment of the requirements for the degree of

Master of Marine Affairs

University of Washington
2017

Committee
Dr. Nives Dolšak
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Program authorized to offer degree:
School of Marine and Environmental Affairs

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Abstract

Quality of the Bainbridge Island Shoreline Master Program: A Multi-Criteria Perspective

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ABSTRACT: The Washington Shoreline Management Act was passed by the State Legislature in 1971, and was adopted by voters in 1972. The Act's purpose is to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines". To achieve this, the Shoreline Master Program (SMP), developed by each local government to comply with the Act, is granted the freedom of flexibility in determining what key elements shall be incorporated into the local plan to accommodate varying conditions. This research paper is an examination of the content within the Bainbridge Island Shoreline Master Program. A set of criteria was created and applied to review Bainbridge Island's SMP. In addition, a readability analysis was conducted on the individual sections of the document. The results of the study reflect a necessity to focus on the fact base, implementation, and monitoring, as these sections are the ones that consistently lack detail within the SMP. Incorporating this study into the current literature will improve communication between both the planners, and the public.

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Introduction

The coastal zone is a highly dynamic ecosystem, where anthropogenic influences can have a decisive impact on the balance of a habitat's health. Local governments, through the development of their land-use regulations, infrastructure policies, and shoreline master programs, play an integral role in shaping landscape through policies (Norton, 2008). Numerous laws and regulations have been enacted to balance environmental protection and the right to manage and protect private property. Bainbridge Island, Washington is one of the many communities that has complied with the 1972 Shoreline Management.

In recognizing the importance of meeting the challenges of growth within the coastal zone, the U.S. Congress passed the Coastal Zone Management Act (CZMA) in 1972. This act, overseen by NOAA, allows for the management of the nation's coastal resources. The stated goal of the act is to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone" (Office for Coastal Management). The CZMA itself provides the framework for three national programs: the National Estuarine Research Reserve System, the Coastal and Estuarine Land Conservation Program (CELCP), and the National Coastal Zone Management Program (CZMP). The NCZMP is designed to focus on the balance of competing land and water disputes through local state management programs. Through this program, the Shoreline Management Act (SMA) is promoted within the state of Washington, and supported through local government shoreline master programs.

The Act, which was passed in 1972, pertains to all 39 counties and over 200 different cities and towns that are designated as "shorelines of the state" (RCW 90.58.030). The shorelines are characterized as being all marine waters, rivers and streams, lakes that exceeded 20 acres, as

well as shore-lands and wetlands. The Act also requires that "the interests of all the people shall be paramount in the management of shorelines of statewide significance" (WSDOE, 2017). Significant shores that were under specific scrutiny were those that touched the Pacific Coast, Hood Canal, and all waters of Puget Sound and the Strait of Juan de Fuca. The document also considers lakes or reservoirs, along with larger rivers, to be of statewide significance. To comply with the 1972 Act, all towns and cities that contain "shorelines of the state" must develop a Shoreline Master Program (SMP).

The SMP is guided by a set of state laws and rules and entails three basic policy areas: shoreline use, environmental protection, and public access. These regulations are to be tailored to the "specific geographic, economic and environmental needs of the community" (WSDOE, 2017). The SMP is established through a balance of authority and partnership between state and local governments[1]. The Department of Ecology provides technical assistance and grants, and is required to review conditional use and variance permits, as well as review the local shoreline master programs for compliance. Local government, such as the City of Bainbridge Island, acts as the primary enforcement and regulators (WSDOE, 2017). Local governments that have established SMPs may modify or amend them to meet the demands of changing local circumstances that would prevent the efficient execution of the program (WAC 173-26-171; WSDOE, 2017). The two types of amendments are limited and comprehensive, and all changes that are made to the master programs require a public notice. The SMPs and any amendments made to them are only effective once the DOE has approved them.

[1] The Constitution of the state, and the U.S. Constitution, provide both the **authority** for conducting the activities necessary to carry out the Shoreline Management Act and significant **limitations** on that authority (WSDOE).

This study addresses the major components of a land use plan necessary for an SMP, and provides transparency on what areas of the document (Bainbridge Island SMP) are missing or require clarity. Sections such as public participation, fact base, purpose, implementation and monitoring, and consistency are all major categories that contain indicators utilized to review the SMP. At the request of the City of Bainbridge Island, included within the analysis of the SMP, a readability study is applied to the individual sections within the SMP. Utilizing the Flesch Reading Ease formula, the document's readability is presented in terms that can easily be grasped and addressed. As an outcome of the plan review process, the document will be viewed by the effected public entities as more transparent and evolving through time.

Significance

Bainbridge Island, which consists of over 50 miles of linear coastline, is one of the many cities which has complied with the Shoreline Management Act and developed a Shoreline Master Program. The island saw rapid development of its waterfront early on, as it was once known as having the largest, highest-producing sawmills in the world. The island population has grown in the past 27 years from 16,000 in 1990, to current day levels of approximately 24,404 (U.S. Census Bureau, 2017). Characteristic of the Pacific Northwest forests, the dense undergrowth was so challenging to travel through or build towns within that the new settlers chose to inhabit the shores of rivers and bays of the island. Travel was then primarily by water, requiring the shore to be stabilized in order to construct housing and transportation (Bainbridge Island Chamber of Commerce, 2017). Following the entire island's annexation in March of 1991 by the City of Winslow, the first SMP plan was adopted in 1996.

Critical Habitat

The nearshore ecosystem is a critical habitat for a large diversity of organisms. A variety of these creatures live predominantly on land or water, while a few can be found only in the intertidal zone between the two (Center for Coastal Resources Management, 2011). Natural riparian buffers, meant to support estuarine food webs, provide vital filtration capability for pollutants and nutrients carried in groundwater and runoff. Features such as beaches, dunes, and wetlands maintain a natural erosion resilience and are highly adaptable to both flooding and coastal storms.

A key issue with the nearshore ecosystem, commonly brought about by nearshore development, is the "loss of natural backshore riparian vegetation landward of the armoring" (Dethier, 2011). Important nearshore ecosystems such as marshes, seagrass meadows, and mangrove forests are predominantly valued for their very high productivity, which in turn provide a great abundance and variety of fish as well as crabs, oysters, shrimp, and invertebrates. Due to the vast quantity of shellfish and juvenile fish the habitats contain, nearshore ecosystems are largely considered nurseries (Toft, 2010). Much of the nearshore vegetation provides nesting for birds, forage and refuge, as well as structures for small aquatic species to utilize when they have fallen. These features can also act as a nutrient sink and uptake from tidal water, runoff and groundwater, sediment trapping and soil stabilization, as well as a carbon sink (Center for Coastal Resources Management, 2011). The loss of riparian vegetation such as trees and shrubs, could lead to an increase in ambient light levels, resulting in a loss of shade that is naturally distributed in the near shore zone. The absence of proper shade also leads to a lack of temperature reduction and "desiccation stress to insects, marine invertebrates, and fish eggs laid by intertidal spawning fish species" (Quinn, 2012). The increase in unnatural lighting that is

associated with shoreline development, in general, can be defined as having negative impacts on "salmon behavior and predator avoidance" (Quinn, 2012).

Development or degradation of the nearshore can also effect sand delivered to shores and beaches on a "regional basis" (Griggs, 2009). Development increases the difficulty for sediment to travel from a bank "onto the beach and into the shoreline drift cell" (Shipman, 2009). The obstruction of transfer would greatly threaten the sediment renewal of the beach, which could cause encroachment or loss of property. A major issue that follows encroachment is the passive erosion that follows any structure constructed along a shore. In response to a lack of sediment immediately in front of the structure, "the shoreline will eventually migrate landward on either side of the armoring" (Griggs, 2009). This erosion then places another section, belonging to another property owner, at risk and prompts legal action to protect their estate.

Coastal Value

The U.S. coastal zone comprises nearly 10% of the nation's land area, and holds approximately 39% of the population. Future population trends reveal an increase of an added 11 people per square mile by the year 2020 (NOAA, 2012). In 2012, coastal counties contributed nearly $7.1 trillion to the GDP, and roughly 67 million jobs (Kildow et al., 2014). For the City of Bainbridge Island, the nearshore is comprised mainly of single-family residence homes. Residents that live on the waterfront, most likely have the greatest interest in the health and aesthetics of the nearshore..

As noted by Kildow, many studies link air quality with property values, but the research addressing the linkage of water quality is limited (Kildow et al., 2014). This is circumnavigated by using alternative studies that estimated premium values for properties and homes that were located on the waterfront and possessed ocean views. A study conducted by Seiler (2001) studied

the influence a waterfront view had on property values along Lake Erie. Half the sampled homes that had a water view, on average, had an increased home value of $115,000, or 56%. The preservation of the coast has also been shown to influence property values, regardless of whether it constrains development to protect natural features. Several studies have shown that housing prices/value, on average, are anywhere from 7% to 21% higher within 4.5 miles from the coast, compared to those inland (Kniesel, 1979; French and Lafferty, 1984). Buffers played a large role within the value of homes as well. Studies produced in the early 2000s (Benson, Hansen and Schwartz, 2013; Major and Lusht, 2004) determined that buffers between a waterfront property created significant drops in value due to the "distance" or the sensation of such, from the ocean. This barrier was thought to also impact the view of the property itself as well. A comprehensive SMP will take into consideration nearshore ecological values, as well as economic considerations of waterfront property, when developing the plan.

Literature Review

Plan success relies not only on the execution of the document itself, but the understanding of the approach taken to construct it. With an understanding of the techniques on which this study is based, legitimacy towards the study is ensured while providing information for further analysis and research into the literature.

Content Analysis

Content analysis has had a long history of practice in journalism, business, psychology, sociology, and communication. Many of the methods applied throughout the study of content analyses were taken from cryptography, biblical concordances, the subject classification utilized for library books, and standard legal guides (Rogers, 1994; Neuendorf, 2016). A review of current trends shows an increase in the frequency that researchers have been engaging in the

practice of content analysis within a number of different fields. A study conducted in 1997 by Riffe and Freitag shows an increase in content analyses articles from 6.3% (of all articles) to 34.8%[2]. This trend continued to increase, because by the mid 1980s, 84% of master's-level research methods courses in journalism covered the practice of content analysis (Fowler, 1986; Neuendorf, 2016).

Content analysis can be described as a "set of methods for analyzing the symbolic content of any communication." (Norton, 2008; Singleton and Straits, 1999). Conventionally used to analyze newspaper, novels, and other various forms of media, content analysis aims to evaluate the message that is being conveyed within the communication. When properly executed, content analysis can be utilized to evaluate the content of a plan or code, both of which contain some sort of meaning or message to an audience.

Most approaches to content analysis come in a form similar to developing a series or list of close ended questions for a survey and then administering them. Following an evaluation protocol by defining categories for review, they then have one or more coders use this protocol to evaluate the text or communication to score it. The unit of analysis can be measured in multiple ways, such as format or spacing of a document or the frequency/intensity of a phrase, or appearance of an item (yes/no) within the text. Most commonly used by researchers is frequency and intensity, but this varies depending on its relevancy to the study being conducted (Norton, 2008).

Through different studies, researchers have come to develop different evaluation protocols to measure the multiple characteristics of plans and codes for the presence, frequency, or strength of specified topics or items (Norton, 2005, 2008; Burby and May, 1997). An example of such is an evaluation for a given policy or instruction manual, in which the document would

[2] Within the *Journalism and Mass Communication Quarterly*

be scored on a scale of 0 to 2; “0” lacking presence, “1” should the unit of analysis or indicator be mentioned only briefly or suggested, or “2” if it is discussed in detail or mandated by the plan itself. Multiple indicators are usually utilized in order to assess a given category in order to best measure the concept.

General Plan Evaluation

“*How would you know a good plan if you saw one*?” (Baer, 1997). The planner’s answer, according to Baer, is dangerously simplistic in that it is reminiscent of the “apocryphal" response towards the inquiry as to what constitutes good art: “I don’t know much about art [plans], but I know what I like” (Baer, 1997). Planners are easily able to differentiate between high and low quality plans, but struggle to outline key characteristics of plan quality. The profession has managed to avoid the subject and, alternatively, focus on the process and methods of plan crafting (Berke & French, 1994). Evaluation and analysis are critical to ensuring current plans are of value to the community (Tang, 2008). In engaging in critical evaluation of shoreline master programs, decision making is improved while legitimizing the document itself (Guyadeen and Seasons, 2015).

General plan evaluation, as incorporated into a land use guide, first appeared in the 1950s. The Shoreline Master Program, in its essence, is a shoreline-specific comprehensive plan, zoning ordinance, and development permit system (Department of Ecology, 2017). At a local scale, plans like the master program are critical in ensuring the significance of strategic environmental actions or development practices (Knox, 2017). Land-use planning, such as the SMP, can help facilitate consensus building, coordinate community agendas, articulate land-use policy through a published document, and achieve better development patterns (Berke & Godshalk, 2009; Kaiser & Godshalk, 1995; Knox, 2017)

Margoluis and Salafsky address the shortcomings in much of the planning literature, and provide a project cycle in which one can utilize the various steps to institute a successful development project, or for practical general plan evaluation. In the publication, a cycle is proposed that defines the process into 7 phases: Start: Clarify group missions, A: Design conceptual model based on local site conditions, B: Develop Management Plan: Goals, Objectives, Activities, C: Develop Monitoring Plan, D: Implement Management and Monitoring Plans, E: Analyze data and communicate results, and Iterate: Use results to adapt and learn. The listed key steps are critical components in adaptive management, and correspond with other studies produced by Baer (1997), Burby (2003), Knox (2017), Norton (2005, 2008), and Singleton & Straits (1999). From Start to Section C, the initial planning phase and the groundwork for such is presented. The Start of The Project Cycle clarifies the long-term outcome. Through the clear analysis of the groups involved, and the interests presented, the understanding of what missions or outcomes are desired by all parties is essential. The conceptual model phase is the point in which clarity on the relationships between certain factors that are thought to impact or lead to a targeted condition are laid out. The third phase, or B of the cycle, consists of developing a management plan. What are the goals, objectives, and activities designed to achieve such? This step is integral within any prominent plan, as it addresses how threats to success are dealt with. Goals that are set forth within a plan are broad statements of the desired outcome. Section C, development of a monitoring plan, is essentially the final phase of planning prior to implementation (according to Margoluis & Salafsky), and should be included within an effective plan. The assessment of the success or shortcomings of a project or plan is necessary to continue the cycle and build upon itself. A similar approach to this

cycle, that critically evaluates plans for their content and approach, is provided in Baer (1997), with a detailed outline of the required components of each analysis.

Plans serve many functions, and one of their greatest may be to act as a focal point to provide a vision for the community (Norton 2008). Baer (1997), in his original synthesis of the plan evaluation literature two decades ago, initially surveyed the different ways in which local master plans have been viewed over time. Through this synthesis, Baer generated a framework centered around categories such as scope, validity, format, communication, rationality, approach, implementation, and adequacy (Knox 2017). Baer (1997) developed a set of 60 criteria that fall into 8 categories: adequacy of context, rationality, procedural validity, guidance for implementation, scope, approach, quality of communication, and plan format. Below are the 8 categories and the descriptions of relevant information and indicators that must be addressed for each.

Adequacy of Context

In developing a plan, the context and setting must be addressed within the document in order to make it relevant and understood to the public. An overview of the purpose must be prevalent within the plan, as well as a background to frame the approach and necessity of this document. In this, it should be understood what the political and legal context of the plan is. If there isn't clarity on whether the plan is a priority issue or a consideration, there will be little interest in its support and execution. The public is an essential component of the process within Adequacy of Context. This connection to the public must materialize in the form of open communication, which is why the type of plan that is to be presented must be made clear early on. The reader should be alerted to whether the plan is highly quantitative and analytical, far ranging, narrow, or even technical.

Rationality

The application of rationality within the planning literature is meant to convey basic planning considerations grounded on core theory and its criteria. The authors of the plan must provide clear and well-defined information about what they are doing, in order for the reader to understand. Goals and objectives must be explicitly identified, along with the problems that they will potentially encounter. The tone of the plan itself must be made obvious. Is it commensurate with the approach that was recommended in achieving the goals? A comprehensive plan should relate substantively to a larger whole (horizontal consistency). When engaging in any form of planning, the current capacity or adequacy of existing infrastructure must be described. Should the plan fail or need alterations due to a foreseen or unforeseen issue in capacity, the potential for variations or the allowance of such must be addressed.

Procedural Validity

Validity is establishing the who and how of the plan-making, informing the reader of the process itself and what was done. Who, based on their expertise, was involved in the formulation and how were they chosen? Descriptions of how these individuals or advisory groups were involved in the process is central to building validity within a plan, and ensure its support or success. Preliminary drafts of the document should be circulated (and recorded) for those that are reviewing the plan on criteria such as interdisciplinary approach or support. Topics such as financial and legal issues must be addressed in order to insure effective execution of utilized resources. The scope of a document looks at the broader implications of the execution and final product that the plan produces.

Guidance for Implementation

Guidance for implementation can come in the form of ordinances, regulations, budgets, and schedules. Priorities are an aspect within plans that can cause restraint or extended timelines due to unresolvable immediate or long-term issues. Baer (1997) suggests a long-term schedule in order to address potential budget deficiencies or failure of the assigned agency or individual in completing the goal. In this, the identification of roles is pertinent in securing an order and approach to reach an end point. Should the plan in question be a vision plan, this section would not be relevant. A "next steps" or timeline to improve the current conditions would be expected however.

Scope

Similar to context, scope provides understanding towards the plan's connection on a larger scale. It should be clear as to how the plan potentially influences pertinent issues such as social, economic, physical, or cultural aspects of the world around it. The potential for issues such as relocation or displacement due to land use decisions, or equity and predictability must be included within the plan to identify larger long term issues.

Approach, Data, Methodology

The technical basis of the plan must be clarified. Including the source of the data and how it has been utilized within the study can provide others with the ability to check the plan's approach and thought process using the same resources. Utilizing an interdisciplinary approach that permits for the incorporation of a wider spectrum of data, as well as flexibility within the plan, allows both planners and the public to adapt to various scenarios.

Quality of Communication

Clarity of communication is an essential plan component. The client and the structure of the plan must be easily identifiable. Plans, ideas, and rationales must be presented in a way that best suits the specific audience. Communication and the clarity of it, is vital to a plan, as it allows for a fair hearing from others.

Plan Format

Similar to the accessibility of communication quality, other methods of communication can be found in the format of the plan itself. The format of the plan communicates the competence and professionalism of the groups or group that produces it. Plans should consider if the size and format of the document is appropriate for those that are receiving or using it. Oversize plans are a burden and can prevent easy or constant reference and day to day use. Details such as a table of contents, graphics, and authors all are necessary to establishing a competency in the product. The format, in reference to how it is laid out, also is necessary to the success of a document. Easily understood and utilized, a plan can be built upon or easily reviewed. Should the document be difficult to manage or referenced for concerns, it can be overlooked or determined ineffective.

As Baer (1997) once said "If planning is to have any credibility as a discipline or profession, evaluation criteria must enable a real judgement of planning effectiveness: good planning must be distinguishable from bad". The Bainbridge Shoreline Master Program must undergo scrutiny and constant revisions in order to successfully achieve the broad goals and specific objectives set forth by both the City of Bainbridge Island and the State of Washington. Systematically studying the SMPs can legitimize the practice through the assessment of current content in comparison to best practices (Knox, 2017).

Methodology

Analytical Framework

To assess the Bainbridge Island Shoreline Master Program, a set of five indicators composed of criteria have been derived from various research. These five indicators were chosen because of both their predominance in previous studies of plan evaluation and content analysis, and their relevance in regards to the SMA's guidelines.

Goals, Objectives, and Purpose

The Goals, objectives, and purpose category was derived from multiple literature sources. Chapter 173-26 WAC (Master Program Guidelines and Amendment Procedures) explicitly requires that the category contain the listed indicators. Baer (1997) suggested a general criterion that required one to review the "Adequacy of Context". Within this, Baer identified indicators such as purpose of the plan, planning process identification, and an executive summary of the document. These suggestions, along with Norton's (2008) criteria (articulation of goals, purpose, and policies proposed) to analyze land use policy provided the indicators that comprise "Goals, Objectives, and Purpose". Berke et al. (2006) and Marsh (2005) both suggest that a focus on land suitability or land use is a central component to the review process. This classification of land use was also found within the Chapter 173-26 WAC, as well as Norton (2008).

Fact Base

The decision to incorporate fact base is grounded on its prevalence within the primary literature. The listed indicators below come from a combination of both the Revised Code of Washington (RCW) 90.58.100, Norton (2008), Knox (2017), and S.D. Brody (2003). Brody most notably mentions that within the plan evaluation literature (Godschalk, Kaiser, and Berke 1998; Berke et al. 1994; Godschalk et al. 1999), plan quality was conceptualized as having consisted of

three regularly weighted components: “a strong factual basis, clearly articulated goals, and appropriately directed policies” (Brody, 2003). The indicators below were compiled from the literature above and compared with both the suggestions and requirements of RCW 90.58.100.

Elements of Plan Consistency

A plan must maintain consistency throughout its development and implementation. The concept of consistency has been recognized for quite some time, and has been incorporated into the Standard Zoning Enabling Act (Norton, 2008). According to the WAC 173-26-176, SMP’s must “consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state”. Burby & May (1997), as well as Weitz (1999), both emphasize the importance of consistency within the planning profession. This practice is furthered by Norton (2008) and Knox (2017), whom utilize the idea of vertical and horizontal consistency in their research. Vertical coordination assess the degree to how engaged and detailed the SMP is in coordinating with higher units of governance. The Horizontal coordination category draws upon Knox’s (2017) approach, and focuses on the extent to which the SMP cooperates with neighboring jurisdictions.

Public Participation

Meaningful opportunities for public participation has uniformly been called upon by advocates for issues such as smart and sustainable growth and development, as well as those who advocate for improved planning on a broader scale (American Planning Association, 2000; Burby, 2003; Corburn, 2003). Generally, enhanced public participation is encouraged as a way to improve the legitimacy of the plan-making process. This legitimacy is attained through making the process more representative and relevant to the local populations. Public participation is also supported as a path to improve the quality of the analyses conducted during the plan making

process. Public participation can also serve as a mean to equally enhance the "social-learning" characteristics of planning (Norton, 2008).

WAC 173-26-191 says: "…the preparation and amending of master programs shall involve active public participation". This, along with the key components of Baer's (1997) section on procedural validity and the importance of the integration of the public's involvement, demonstrate the necessity of this category. The indicators provided below are the fundamental components of recommendations from Baer (1997), Knox (2017), and Norton (2008),

Implementation

Implementation of management and monitoring is one of the single most important components within a plan (Margoluis & Salafsky, 1998; Baer, 1997). The Washington Administrative Code (WAC) mandates that "…local government shall also identify a process periodically evaluating the cumulative effects of authorized development on shoreline conditions" (WAC 173-26-191). Monitoring is essential in assessing the impact of a plan's interventions, and ascertain as to whether it has achieved the goals and objectives. Baer suggests approaching implementation through 9 steps aimed at evaluating the method. In order to expand the scope of this section, Norton's (2008) classification of implementation and monitoring criteria have been compared to Knox (2017) and Brody's (2003) criteria.

Data Collection

Data was generated through the assessment of the Bainbridge Shoreline Master Program. Using the quality indicators summarized below, two waves of coding are conducted on the SMP in order to produce a series of values representing the contents of the plan. This study utilizes a series of indicators that each contain several quality indicators (criteria). The indicators and subsequent criteria are derived from Norton (2008), Knox (2017), Baer (1997), Margoluis &

Salafsky (1998), as well as Chapter 173-26 Washington Administrative Code (Master Program Guidelines and Amendment Procedures. The categories and quality indicators below have been chosen to provide transparency on the quality of the Bainbridge Island SMP's current content, as well as report on the categories that lack the substance to appropriately address the provided criteria.

Weighting System

All review criteria are not weighted within this study. This was a conscious decision due to the complications that would arise through a weighting system. Shoreline Master Programs are flexible in nature, and have the freedom to be designed to the criteria of the city or town they represent. While the quality indicators are broad enough to function as intended, integrating a weighted system (without an in-depth analysis of which indicators are vastly more important to Bainbridge Island) would skew the data and misinform which aspects of the SMP were accounted for, and which were not.

Analysis Methods

A content analysis was conducted to assess the current quality of the Bainbridge Island SMP. A content analysis is a "set of methods for analyzing the symbolic content of any [written] communication. The basic idea is to reduce the total content of a communication to a set of categories that represent some characteristic of research interest'' (Singleton and Straits, 1999; Putt and Springer, 1989). Researchers have established assessment practices to grade plans and policies for the strength and frequency of identified terms or items (Burby & May, 1997; Norton, 2005). With the adaption of similar approaches, the content analysis can provide an appropriate research methodology (Norton, 2008).

A readability analysis was conducted on all of the individual sections within the SMP. A readability analysis is the assessment of the ease at which the reader can understand a written body of text. Within natural language, the readability of a body of text is contingent upon its content and the way in which it is presented (Tinker, 1963). The speed and reading effort exerted are also considered in a readability analysis. Documents which exceed the reading comprehension level of its audience will fail to convey key concepts and messages.

The Bainbridge Island Shoreline Master Plan was evaluated based on the list provided below. The quality indicators were sourced from previous studies and content analysis of Cumulative Land Use Plans (CLUPs) that involved coastal management and land-use policy. The Shoreline Management Act was also a source of information in devising the indicators that were incorporated into this study, and aided in outlining the appropriate elements to the plan.

Unless noted otherwise, indicators were scored using a three-point coding mechanism that ranged from 0 to 2[3]. Indicators were given a score of "0" if it was not present or completely missing within the plan (not mentioned whatsoever). A score of "1" indicated that the plan suggested or presented with a lack of explanation of the indicator. A vague description using terminology that is nondescript such as "should or "may" also qualified for a score of "1". Earning a score of "2" suggested that there was full identification, clear and measurable objectives, and/or language in the imperative voice ("shall", "must", "are required", and "mandate"). The vocabulary of an indicator earning a score of 1 reflects a vague and suggestive tone within the text. Indicators that often were scored at a 2 were found to have a vocabulary that was affirmative and commanding, not allowing for the potential reader to accept it as a suggestion. Many of these terms can be found within Chapter 173-26 WAC as key aspects in drafting a Shoreline Master Program.

[3] Norton, 2008; Knox, 2017

Shoreline Master Program Quality Indicators	
Adequacy of Context	Importance
Is the purpose of the plan explained?	The purpose of the document was specifically identified as one of the key indicators necessary. Identified within Baer's (1997) list of partial criteria for general plan evaluation, the identification of a clear purpose will describe the intent of the document (i.e., a framework for decisions, conveyance of information, actions to be taken).
Is there an explanation of the planning process provided?	Evidence of a planning process is required in order to assure that the public and higher units of governance that all the possible alternatives were evaluated in developing the document. This, sometimes reiterative process, allows for replication or refinement of the document to address the specified goals and objectives (Norton, 2008).
Are the goals and objectives present?	Margoluis & Salafsky (1998) describe the importance of a goal as something that provides a visionary picture of what the project or document is hoping to accomplish. A goal is general in nature, but measurable. "Defined so that changes in the target condition upon which the goal is based can be accurately assessed" (Margoluis & Salafsky, 1998). The objectives are specific statements detailing desired accomplishments of a project. Together, these two major aspects (goals and objectives) of a plan are necessary to move forward.
Is land classification designation present?	With the discussion of what types of classifications exist within a jurisdiction, and what applies to certain locations within Bainbridge Island, this information provides clarity for the public and future plan contributors as to where and why certain regulations apply within a designated area (Norton, 2008).
Are types of land-use classifications discussed?	

Fact Base	
Is there evidence of an interdisciplinary approach provided?	According to the Revised Code of Washington (RCW) 90.58.100, the plan (when feasible) should "utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts". Baer (1997), further reiterates the importance of incorporating a wide spectrum of data in plan development.
Does the plan reference the consultation or comments of a federal, state, regional, or local agency having special expertise in environmental impact?	The Revised Code of Washington (RCW) 90.58.100 states that the planners should "consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact". Baer (1997), further reiterates the importance of incorporating a wide spectrum of data in plan development.
Is there evidence of consideration or incorporation of alternative plans, studies, surveys, inventories, and systems of classification?	Based on the Revised Code of Washington (RCW) 90.58.100, the incorporation of this criteria within the quality indicators proposed is due to Margoluis & Salafsky's (1998) emphasis on flexibility when approaching general plan or development project evaluation/construction.
Was there employment of appropriate modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered?	Based on the Revised Code of Washington (RCW) 90.58.100, the incorporation of this criteria should be utilized to determine the extent and variety of research techniques used in drafting the plan. This criterion provides evidence of techniques used, and supports the conclusions and regulations or amendments placed within the document.
Is an assessment of past plan implementation effectiveness present?	As noted in Baer (1998), Brody (2003), Margoluis & Salafsky (1998), and Norton (2008), assessment of past plan implementation is used to modify approaches, and alter benchmarks based on a more realistic or informed planning method.

Is there a summary of data collection and analysis present?	One of the key criteria that was included in a similar content analysis performed by Norton (2008) was an inquiry about data collection and analysis. With the flexibility to determine the most efficient and effective approach to meeting the CZMA and SMA's overarching goals, building and/or amending regulations on current data is critical.
Is there any reference of an existing land use plan?	The purpose of this criteria, is to identify if previous land use plans were considered when establishing the SMP, and whether a comprehensive plan or piecemeal approach was conducted (Revised Code of Washington (RCW 90.58.100). This will demonstrate whether the Shoreline Management Plan is making acceptable progress.
Elements of Plan Consistency	
Vertical Coordination: To what extent does the plan discusses consultation and/or coordination between the locality and ‘‘higher’’ units of government	The Washington Administrative Code (WAC) 173-26-176, states that SMPs must “consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state”. Burby and May (1997) also emphasize the importance of consistency within planning throughout jurisdictions. Both Vertical and Horizontal Coordination criteria are incorporated into the study because of the WAC, Burby and May (1997), as well as Knox (2017) who emphasizes "Interorganizational Consistency" within their content analysis. Consistency is important in ascertaining whether the program has support at higher levels of governance, as well as neighboring jurisdictions.
Horizontal Coordination: To what extent is the locality consulting and/or coordinating with neighboring jurisdictions or other "horizontal" units of government?	

Public Participation	
Is there a description of the participation process used?	The American Planning Association (2000) addresses the importance of incorporating meaningful opportunities for public participation within the planning process. Enhanced public participation within planning and review is considered a legitimizing practice of the plan-making process (Burby, 2003; Knox, 2017). The incorporation of the participation utilized provides evidence to future amendments, policy planners, and the public, that input was sought in crafting the current plan.
To what extent is stakeholder involvement (throughout the process) noted within the SMP?	One of the most important groups in a plan or project are the local stakeholders (Margoluis & Salafsky, 1998). Engagement of local stakeholders within the process gives them control over how project activities or decisions affect their lives. Their presence provides support for the project as it fosters a sense of ownership to the plan itself, and less pushback during implementation.
Is there evidence of public education and information?	Through involving the public within the planning process, and actively engaging in educational opportunities builds their capacity for conservations and execution of proper management (Margoluis & Salafsky, 1998). Criteria in the evaluation process that promotes this as a requirement, improves the plans potential success.
Does the document provide evidence of community sessions?	The American Planning Association (2000) addresses the importance of incorporating meaningful opportunities for public participation within the planning process. Feedback from the public, outside of the stakeholder involvement, allows for an understanding of the broader audience and their position as to whether the stakeholders are accurately representing their values.

Is there the presence of a planning committee?	Presence of a planning committee provides direction to the early stages of the project, and organizes the stakeholders and public. This organized body will help to manage a "public participation program identifying procedures whereby proposed amendments of the comprehensive plan and development regulations relating to shorelines of the state will be considered by the local governing body" (RCW Chapter 36.70A).
Is there a record of public opinion surveys conducted prior to plan finalization?	Evidence of public opinion surveys prior to finalization of the plan provides documentation that the general populous that is involved or impacted by the plan or program has understood what is being proposed. A project with support prior to being published is more successful and sustainable within the community (Norton, 2008).
Is there information provided on the circulation of drafts for public comment?	
Is there evidence of alternative mechanisms used to address the variability within the public?	Alternative mechanisms present within the planning process reflect an attempt to involve the public through methods that best address the various situations present (Washington Administrative Code 173-26-191). It improves the potential for success and addresses the different situations each community faces in trying to enact an effective SMP.
Implementation	
Is the agency or person responsible for implementation identified?	Identification of roles and the individuals or groups assigned to address them is crucial in determining the most efficient approach. Management within an effective plan should have delegated the proper roles of those who are going to execute and oversee them (Margoluis & Salafsky, 1998).

Is there a time span for plan implementation?	As plans are intended to "do" something and serve a purpose, a time span provides a clear pathway to achieving this. The value of a time span within a plan is the ability to ascertain the costs of implementation, and convey to stakeholders the length of impact they can expect from execution of it (Baer, 1997)
Are there plans for cooperation with neighboring jurisdictions?	Consistency is important in ascertaining whether the program has support at higher levels of governance, as well as neighboring jurisdictions (Burby & May, 1997). Incorporation of an outlined approach to address horizontal consistency is necessary to effectively assign roles and cooperate.
Are there quantifiable benchmarks assigned?	Benchmarks provide a document with valuable information on the success or failure of current approaches. Baer (1997) identifies the importance of benchmarks as markers for achievements of high importance to the success of a document, and lists it within suggested general criteria for the assessment of plan success.
Are the provisions for a monitoring and evaluation process in place?	Monitoring and Evaluation is a criterion within most plan evaluations, as it is established within the implementation efforts of a project or document. Monitoring begins either during or after a project is engaged, and generates data on the impact to the community (Baer, 1997; Margoluis & Salafsky, 1998).
Are there mechanisms for implementation?	Mechanisms for implementations directly address the efforts underwent in order to achieve objectives. Just as the individual or group that engages in executing the plan, the mechanisms to that will be used should be clearly outlined in order to efficiently (and successfully) achieve them (Baer, 1997).
Is there a process to amend or alter the document following evaluation?	Initiating reform, following the implementation and review of the plan, is critical for growth and successfully attaining the objectives set forth. Clarity on the process to achieve reform is necessary. Timing of alterations, as well as who is responsible to judge how the document should be amended are necessary components (Margoluis & Salafsky, 1998).

Readability

As requested by the City of Bainbridge Island, a readability analysis was included within the study. Utilizing the Flesch Reading Ease approach, the SMP was reviewed by individual sections, and as a whole, to test for potential deficiencies according to the readability test. The Flesch Reading Ease formula analyzes a document by sentence length (in comparison by the average number of words per sentence), as well as the word length (as judged by the average number of syllables in a word). The formula for this approach is as follows: RE = 206.835 – (1.015 x ASL[4]) – (84.6 x ASW[5]). To examine the impact of WA code references on the readability assessment, the test was repeated with all code references deleted. Results of both assessment (with and without WA code reference) are reported in the results section.

Limitations and Problems

While researching this topic, there are certain restrictions and complications that can arise. The content analysis is based on a set of categories that the researcher has defined as integral to the SMP through research and review. If replicated, more subcategories and clear indicators may be created in order to broaden the impact of the research itself. As Putt and Springer (1989) assert, the "heart of any content analysis resides in the categories used to code data from available sources". Current categories, based on the coding that was assigned may be interpreted differently and, with the addition of new quality indicators, could influence the overall presumed quality of the plan. To address this concern, the text was coded twice and compared to each other.

[4] Average sentence length (total words/total sentences)
[5] Average number of syllables (total syllables/total words)

A second limitation to the study, is that it bases a majority of its indicators from studies and regulations that apply outside of the state or city itself. With the SMP being flexible in nature, a set of indicators to predict its quality becomes difficult to assess, and must remain broad enough to act as a core framework for future studies. In doing this, some of what the plan excelled or lacked in may have been missed within the criteria. In order to address this potential weakness, an inquiry with the planning office was made. This exposed specific aspects of the plan they are currently interested in being evaluated. The City of Bainbridge requested for a readability and consistency analysis of the SMP itself. A readability analysis was conducted using the Flesch Reading Ease formula, as explained within the methods section of this document.

In regards to the readability analysis, there were several limitations of the analysis. When reviewing all available methods, the most versatile and easily applied was the Flesch Reading Ease system. Adapted for multiple uses, the formula is basic in nature. As there is a multitude of other factors that can determine readability, the study was limited to utilizing one in which a computer could review the 400-page document and provide a summarization of its difficulty. Should the document be analyzed for readability alone, another method would be recommended to accurately grasp issues outside of sentence length and word complexity.

Results

The Bainbridge Island Shoreline Master Program was coded twice, with both results of the coding waves provided below. Following the comprehensive review and dissection of the seven major sections that comprise Bainbridge Island's Shoreline Master Program, the values assigned varied slightly between the two readings. The first evaluation of the plan accurately captures an initial assessment of what the SMP contains, and more closely aligns with what a citizen or

planner might interpret when presented with the material. In the second evaluation and coding of the SMP, certain aspects of the plan were more readily identified and measured, leading to several alterations of the original assessment. While most sections remained unchanged, both Fact Base and Elements of Plan Consistency saw minor alterations. Evidence of consideration or incorporation of alternative plans was modified, as the first wave of coding saw limited evidence that alternative sources/plans were provided within the process of drafting the SMP. Existing land use plan, was however reduced due to the wording of the indicator being too broadly interpreted through the first wave, and ignoring the necessity of affirmative language in order to assign a value of 2. The final discrepancy within the second wave of coding was vertical coordination. In reviewing the indicators that comprise vertical coordination, and the detailed presence within the first introductory pages of the plan, the score was increased to 2. Containing a clear timeline and description that was pertinent to the horizontal coordination indicator, it was determined that a higher score was a more accurate representation of the plan. A second review of the SMP was conducted to assess the "readability" of the text itself, section by section, while also assuring that scores were accurate in representing what the plan did or did not contain.

Adequacy of Context	Evaluation	
	R1	R2
Plan's purpose defined	2	2
Explanation/Planning process provided	1	1
Policy goals and objectives clearly stated	2	2
Land classification designation	2	2
Types of land-use classifications	2	2
Fact Base		
Interdisciplinary Approach	1	1
Consultation of any federal, state, regional, or local agency	2	2
Evidence of consideration or incorporation of alternative plans	0	1
Employment of appropriate modern scientific data processing and computer techniques	1	1
Existing land use plan	2	1
Assessment of past plan implementation effectiveness	0	0
Data collection and analysis summary	0	0
Elements of Plan Consistency		
Vertical Coordination	1	2
Horizontal	0	0
Public Participation		
Description of participation process used	2	2
Stakeholder involvement throughout process	1	1
Public education and information	2	2
Community sessions	2	2
Planning committee present	2	2
Survey of public opinion	2	2
Drafts circulated for public comment	2	2
Other participation mechanisms	1	1
Implementation		
Delegation of responsibility	0	0
Defined timetable for implementation	0	0
Horizontal incorporation discussed	1	1
Benchmarks assigned	0	0
Monitoring and evaluation process	1	1
Mechanisms for implementation	1	1
Amendment procedures	2	2

Table 1: Quality Indicators for SMP

Adequacy of Context

The indicators for this section were identified through classical content analysis reviews. The Bainbridge SMP, within the first twenty pages, clearly outlines the purpose and intent of the plan. The goals that are outlined by the state have been incorporated into the document, with a description of the requirements and the island itself. The planning process is described in different chapters, clearly identifying a public and procedural aspect, but lacks defined deadlines or time periods. There is a prominent absence of a timeline or assigned tasks needed in order to undergo "Restoration Planning". With this lack of detail, it becomes difficult to ascertain the process necessary to achieve these goals, or the actions needed to promote them. Clearly identified with a purpose and criteria, is the Shoreline Designation Policies. The criteria for Shoreline Designation is appropriately presented within the SMP so that homeowners may quickly understand the designation of their property . Overall, the indicators that comprise the Goals, Objectives, and Purpose were met, but lacked defined deadlines for the goals or the steps required to attain them.

Fact Base

Evidence in which fact base decision making was included, was somewhat lacking throughout the SMP. References towards incorporating the newest information and techniques, along with expertise from multiple different fields were made but not immediately found within the document. Handouts for homeowner mitigation and adjustments were included within the digital version of the document, and had material references as to the importance of mitigation techniques. There was also evidence of incorporating discussion materials from an outside consultant within the plan itself, citing multiple studies on the effectiveness or legitimacy of

certain restorative or protective practices. There was, however, no discussion on data collection or previous plan effectiveness. The initial review of the SMP, as discussed in the earlier Methodology section, differed from the second round of coding. The indicator for Fact Base, on average, received a quality indicator score of 1. This easily represents the vague, and somewhat ambiguous nature that the section suffers from. In review of this section, it is does not appear theoretically possible to achieve a value of 2 based on the criteria assigned. Imperative language does not fit the requirements of the section, and many of the indicators are practices that are enforced by the state of Washington. Values of 1 within this section should be further investigated outside of the Bainbridge Island SMP, to understand which efforts are still required by the City of Bainbridge Island (in order to achieve the goal of engaging in utilizing the newest research techniques).

Elements of Plan Consistency

Vertical Coordination as described as being the effectiveness and extent to which the plan was efficiently evaluated, managed, and redrafted at the local, federal, and state level, is prevalent within the document. The described drafting process discusses the required input from the state, and the necessity to make changes. Through an initial wave of coding, the vertical coordination was assigned a value of 1 as it had very little information of how the state proceeded to review and provide additional support. Prior research outside of the SMP had suggested greater involvement following the submission of the initial draft. With a lack of this information within the SMP, a preemptive assignment of a lower value (1) was given to the vertical coordination indicator. Following the second wave of coding, there was an alteration to this value. When reviewing the system of values and the descriptions assigned with them, it was

concluded that the SMP did, in fact, have enough specified evidence of vertical coordination to warrant a value of 2.

Horizontal Coordination, however, was not evident within the document. There was discussion of the SMP's overlay to other City policies, but no mention of how it would impact other neighboring jurisdictions. There was a lack of evidence of consultation with "horizontal" units of government within both reviews of the SMP. Discussions of the plan's compatibility with the policies and spatial characteristics of neighboring jurisdictions or the extent to which the locality is consulting and/or coordinating with them were not clearly addressed within any of the chapters, and therefore earned the section a 0 for the average score.

Public Participation

The steps taken to engage the public within the planning process can be immediately ascertained within the first few pages of the document. Dates of consultation and draft circulation were provided, along with a description of the comment time periods and revision dates. There were a few references to clearly identified stakeholders, and the implementation of a citizen planning committee that reviewed the draft and had input. The committee was comprised of multiple local organizations (whom self-selected representatives), in order to better represent of the community (Bainbridge Shoreline Property Owners, Bainbridge Concerned Citizens, Association for Bainbridge Communities, and Bainbridge Island People for Puget Sound). Five educational events were held in order to inform the public on the processes of the nearshore, rights and regulations, and the state's role in the development and management of the nearshore. This section received high marks due to the identifiable steps taken within defined time periods to inform the public, as well as incorporate and adjust the plan to a multitude of different inputs.

Implementation and Monitoring

Implementation was not defined, as stated earlier, by any clear timetable and therefore could not obtain the highest coding value because of this. Evidence of planning and discussion in regards towards the cohesion between the SMP and other local land policy was present within the document. Unfortunately, the degree of detail was lacking and did not merit the assigned maximum value. Amendment procedures were available within this document, and can be found throughout the different regulations. This section was the one found to be most lacking, as it had no mention of monitoring. There was also an absence of a defined timetable, along with assigned responsibility. With the lack of assigned benchmarks, no defined timeline, and a lack of delegated responsibility, monitoring rests solely on the homeowners. This is the impression gathered from both reviews of the document; monitoring and implementation are vaguely referenced with no clear evidence that it has been completed or initiated (on a scale) that would suggest the goals or objectives were met.

Readability

Following the analysis of the 7 different chapters, a score was generated using the Flesch Reading Ease formula. The different section's scores were then reviewed using the key provided within the appendix to assess the average grade level required to understand the literature. Nearly all chapters were considered college level, while some exceeded college level and qualified as college graduate. Chapters 2, 3, and 6 were especially difficult according to the system. It was upon further inspection that section 2 consisted primarily of excessive definitions and explanations, even when the section itself was shorter than all the others. Chapters 2, 3 and 6 were identified as outliers among the others, and it was evident that these chapters would need to

be reviewed and adjusted to assure that numbers or codes for regulations were not influencing the results. A removal of all code and Washington regulatory legal references produced only a slight variation of approximately .2 within the text. Following the analysis of individual chapters, the document was then tested as a whole. Results from the scan showed that the document, in its entirety, was more readable than the individual chapters that comprise it. The entire document averaged a readability level of late high school, which is approximately at what the general public should be able to read. The score itself may be skewed by bullet points and short lists that interfere with the structure of the readability formula. The chapters are long; the entire document is 414 pages and only consists of 8 separate sections. Should a citizen be interested in understanding the policies or regulations pertaining to their area of interest, they will be faced with a difficulty level of college or higher.

Chapter	Section Titles	Flesch Reading Ease	School Level
1	Introduction	46.2	College
2	Shoreline Inventory and Characterization	16.1	College Graduate
3	Shoreline Designation Policies and Regulations	34.1	College
4	General (Island-wide) Policies and Regulations	46.1	College
5	Specific Shoreline Use and Development Policies and Regulations	42.4	College
6	Shoreline Modifications Policies and Regulations	35.3	College
7	Violations, Enforcement, and Penalties	45.5	College
ALL	Cumulative SMP	51.8	10th to 12th Grade

Conclusion

Discussion

The Bainbridge Island Shoreline Master Program is an extensive document with over 400 pages of content in the form of implementing guidelines and regulations. While the document clearly outlines the objectives and goals of the program itself, there is a lack of a defined timetable within the plan. With this key component (timetable) missing, the realistic potential of fulfilling the defined purpose of the document is unlikely; as a lack of such prevents measurable success. As broad objectives, with no means of ensuring they are met or pursued, the Implementation section of the analysis suffers. While many of the regulations presented within the SMP contain some form of monitoring individually, nothing as of present has been established to ensure that the general goals of environmental health or smart growth have been met. This, along with the lack of assigned roles, leaves the SMP incomplete and incapable of actively being reviewed and refined through techniques such as Margoluis & Salafsky's (1998) project cycle.

Fact Base was another section that should be studied on for future analysis and implementation. While there is reference towards the previous plan, the focus on reviewing what had been changed is not prevalent within the document, reducing the ability to examine how earlier plans were implemented. Notice of amendments is made towards the end of the plan, but what is accurate or still relevant is not immediately understood. The Appendix which houses several helpful maps and homeowner mitigation manuals, contains multiple sections where strikethroughs and highlights are common. The lack of clarity, as to whether this was a previous document or plan, causes confusion. Evidence of consideration or incorporation of alternative plans, studies, surveys, inventories, and systems of classification, which may sit within the

appendix, is not readily understood or found. The purpose of building a stronger Fact Base is to incrementally reform previous regulations or land use in order to achieve objectives. With a lack of strong data gathered throughout the Implementation and Monitoring process, the City of Bainbridge is vulnerable to skepticism from the public and other third parties who may contest the decisions made.

Consistency of the plan varies regarding the extent to which it discusses the consultation or coordination between neighboring jurisdictions and higher units of governance. Vertical coordination was immediately addressed within the first 50 pages of the document, and was reported within the Public Participation section. Horizontal consistency was not as prevalent, and fell short of expectations. A multitude of groups and people participated in the review process, but units of government at the same level were not found within the document. Discussion of the plan's compatibility with the policies and spatial characteristics of neighboring jurisdictions, and the extent to which the locality is consulting and/or coordinating with neighboring jurisdictions or other ''horizontal'' units of government, was recognized as a key component to a successful plan (Norton, 2008). Horizontal consistency offers uniform planning and shared data of neighboring jurisdictions, providing a bolstered fact base while making measurably larger impacts within a similar stretch of nearshore through cooperation (and preventing the inadvertent clash of policies that may hinder one another).

Readability of the document varies based on the approach to the analysis that is taken. On a section by section analysis, the program maintains a reading level that borders graduate level. When reviewing as one singular document, the difficulty drops, potentially indicating that there is a conversion to the mean due to the increased content that is provided. As the program sums and averages all of the SMP, it comes closer to the actual valuation of the entire document, and

not a fraction of it. Individual sections can inaccurately skew the readability level, if they do not represent the common language or vocabulary used throughout the text.

The emphasis on the importance of readability is grounded in who the audience is, and what level of difficulty is appropriate. If the only ones to read the SMP were the city planners, then a difficulty of 30-50 would be acceptable (as most would presume college educated individuals were required to engage in land-use planning). Criticisms towards the SMP's readability is based entirely upon the argument that the document itself should be accessible to a broader range of the public[6]. The readability scores are, in part, a reflection of the failure to appropriately and succinctly convey policy and science to the broader public. With the requirement of public review and open access to the SMP, a simplified method to increase the comprehension of the plan's contents is essential. Until then, the SMP remains a large body of text that lacks the appropriate contents or prose to accomplish the goals it has set before it.

Conclusion

This study created a series of quality indicators, based on the research of Richard K. Norton, W.C. Baer, and Claire C. Knox, to analyze the content of Bainbridge Island's Shoreline Master Program. In addition, a readability analysis was conducted on the separate sections of the documents in response to interest expressed by the City of Bainbridge to better understand the SMP. This study was motivated by a lack of consistent plan evaluation for the Shoreline Management Act.

While many policies meet the minimum federal standards, content analysis of current programs and plans allows local governments or jurisdictions the ability to assess plan quality in regards to current plan evaluation literature. Evaluation allows for clarity on where and how plans could be more focused and specific to allow for increased transparency and accountability,

[6] As was brought to light in an earlier discussion with professors at the University of Washington.

as well as for higher public involvement with increased readability. Content analysis of local master programs may offer potential for realizing targets set forth by the city or government, providing clear results, and a history of success should it be engaged. However, funding and time tend to be limiting factors and are commonly cited as roadblocks towards such actions. Analysis or review must be built into the program itself, in order to understand which goals and indicators are necessary within the plan.

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