No. 983658

SUPREME COURT
OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al.,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et al.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Six years ago, respondent City of Bainbridge Island ("City") adopted its Shoreline Master Program ("SMP"). That action followed four years of public hearing and comment in which petitioner Preserve Responsible Shoreline Management ("PRSM") was heavily involved. PRSM's contributions included extensive analysis of the science underlying the City's shoreline buffers, as well as comments from its members about freedom of expression.

PRSM appealed the City's adoption of the SMP to the Central Puget Sound Growth Management Hearings Board ("Board"). The Board rejected all PRSM's challenges. Again, the underlying science was a central theme. The Board issued a lengthy discussion of the scientific principles behind the shoreline buffers, including the scientific analyses submitted by PRSM.

When PRSM appealed to the Kitsap County Superior Court, it attempted to continue adding new evidence. PRSM's appeal was subject to the Administrative Procedures Act ("APA"), Ch. 34.05 RCW, which limits judicial review to the administrative record and allows supplemental evidence only in narrow circumstances. *See* RCW 34.05.562. The trial court denied PRSM's motion to supplement the record, finding that PRSM

failed to meet the APA's standards for admission of new evidence. The Court of Appeals affirmed.

Although PRSM raises several issues, its arguments fit into two categories. First, PRSM argues that the APA's evidentiary rules should not apply to this action because it raises constitutional claims. That result would reject the Legislature's clear mandate that the APA governs appeals from the Board's decisions, including related constitutional issues. Second, PRSM asks this Court to revisit the trial court's evidentiary ruling—a discretionary decision that has now been upheld by a unanimous panel of the Court of Appeals. PRSM's arguments do not warrant review.[1]

B. STATEMENT OF THE CASE

The City adopted the SMP in 2014, after holding more than 100 meetings before various City boards and commissions at which public testimony or comment was taken, including one public hearing before the Bainbridge Island Planning Commission and three public hearings before the Bainbridge Island City Council. AR 5796-98. The City also received

[1] PRSM attached the City's motion to publish the Court of Appeals' decision, as Appendix C to its petition. PRSM claims that the City argued that "the questions presented" were "critical." The City's motion to publish, however, focused mainly on the analytical distinction the Court of Appeals drew between the APA and the Land Use Petition Act—an issue not raised in PRSM's petition—and did not even address most of the questions PRSM presents here. *See* Pet. at App. C. PRSM also omits that the Court of Appeals denied the City's motion.

and responded to more than 2000 written comments, at least 363 of which came from PRSM, its attorneys, or the named individual petitioners in this lawsuit. AR 5801. The Washington State Department of Ecology ("Ecology") also conducted an extensive public process before approving the SMP. Ecology conducted one public hearing attended by 200 people and received and considered 112 oral or written comments, before deciding to approve the City's SMP. AR 475-91, 5797.

PRSM submitted substantial evidence directed at the SMP's underlying science. Indeed, it offered at least seventeen "white papers" totaling more than 225 pages by one of its members, Dr. Don Flora, in which Dr. Flora wrote extensively on the science behind the City's shoreline buffers, including Dr. Flora's claim that the buffers were inappropriately based on freshwater science rather than marine science. *See*, *e.g.*, AR 2237-88, 2322-31, 2336-92, 2404-08, 2418, 2420-23, 3532-90, 3597-639. PRSM also submitted several multipage letters, emails, and papers from Linda Young, including a 98-page letter in which Ms. Young argued, among other things, that the SMP was an unconstitutional taking of property on its face and violated her First Amendment right to express herself through gardening. AR 681-779. Many other people, including several of the named petitioners in this litigation, also submitted comments to Ecology

alleging that the SMP's shoreline buffers were an unconstitutional taking of property, and Ecology responded with citation to studies showing that riparian buffers do not devalue property. AR 5508-09.

PRSM appealed the City's adoption of the SMP to the Board. On April 6, 2015, the Board issued a 119-page decision upholding the SMP and dismissing PRSM's appeal. AR 5787-905. The Board addressed 52 legal issues and 39 sub-issues raised by PRSM, holding that PRSM failed to meet its burden of proof on each. *Id.* The decision included a 16-page analysis of the applicable science in the record relating to shoreline buffers, including review of more than 25 scientific exhibits and studies and at least thirteen of the seventeen white papers authored by Dr. Flora and submitted by PRSM. AR 5816-31. The Board concluded that "the City assembled current science, indicated data gaps and uncertainties, and provided objective, reasonable consideration of opposing views" and thereby complied with the Shoreline Management Act in basing its shoreline buffers on appropriate scientific information. AR 5831.

PRSM sought review of the Board's decision by the Kitsap County Superior Court. PRSM originally sought review under both the APA and the Uniform Declaratory Judgment Act ("UDJA"), Chapter 7.24 RCW. CP 1-165. The trial court dismissed the UDJA claims, ruling that the APA

provides the exclusive means for review of the Board's actions under RCW 36.70A.300(5) and RCW 34.05.510. CP 247. PRSM did not appeal that decision.

In August 2017, PRSM moved to supplement the record. CP 253-67. The proffered evidence consisted of: (a) testimony, from people claiming to have scientific backgrounds, about the perils of applying freshwater science to marine shorelines; (b) testimony from landowners about the impact of the SMP on their property values and free expression; and (c) evidence that some people found portions of the SMP difficult to understand. Pet. at 6.

The City and Ecology opposed PRSM's motion to supplement. For each piece of proffered evidence, Ecology and the City explained why additional evidence was not "needed," under RCW 34.05.562(1). *See* CP 274-77, 284-87. They pointed out, for example, that the Board had thoroughly analyzed the science in the record and had determined that the SMP buffers were not inappropriately based on freshwater science, as PRSM was offering testimony to dispute. CP 274; CP 284. The trial court denied PRSM's motion. CP 347-52.

After an unsuccessful motion for reconsideration, PRSM moved the Court of Appeals for discretionary review. The Court of Appeals accepted

review, affirmed the trial court's ruling in its entirety, and denied PRSM's motion for reconsideration. This petition followed.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

A petition for discretionary review will be denied unless the petitioner shows that its case satisfies one of four exclusive conditions:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). PRSM fails to show that any of these conditions warrants review here.

1. PRSM fails to demonstrate a conflict of authority.

PRSM purports to identify two conflicts: (a) with authority holding that trial courts can take additional evidence relating to constitutional claims on judicial review of administrative decisions; and (b) with authority providing that trial courts have original jurisdiction over constitutional claims. Both alleged conflicts are illusory.

a. The Court of Appeals held that additional evidence may be admitted if needed for the disposition of a constitutional claim.

PRSM begins its first argument by alleging that the Court of Appeals concluded "that the APA bars an individual from presenting evidence necessary to address disputed elements of a constitutional claim…." Pet. at 8. PRSM then cites four cases from this Court and the U.S. Supreme Court for the proposition that a trial court can, under certain circumstances, take additional evidence to support constitutional claims raised on judicial review of an administrative decision. *Id*. at 10. PRSM's allegations of a conflict do not hold up to scrutiny.

The primary flaw in PRSM's argument is that the Court of Appeals simply did not say that the APA bans new evidence. To the contrary, the Court of Appeals specifically recognized that the APA allows new evidence, under RCW 34.05.562(1), if "needed" to decide certain types of disputed issues. Op. at 8. The Court then pointed to one subsection, RCW 34.05.562(1)(c), and acknowledged that it would allow new evidence that is needed to decide a constitutional claim. Op. at 10. The Court then analyzed each piece of proffered new evidence and affirmed the trial court's finding that it was not needed under RCW 34.05.562(1)(c). Op. at 10-15.

Of the cases posited by PRSM as supposedly conflicting with this portion of the Court of Appeals decision, the only one that involved the APA is *Washington Trucking Associations v. State Employment Sec. Dep't*, 188 Wn.2d 198, 393 P.3d 761 (2017). The respondents there were trucking carriers that had been assessed unemployment taxes. *Washington Trucking*, 188 Wn.2d at 204. While maintaining administrative appeals, they brought a separate lawsuit against the State for irregularities in the auditing process. *Id*. at 205. They argued that they lacked an adequate remedy under the APA because evidence about the auditing process had been excluded in the administrative proceedings, and judicial review was limited to the record. *Id*. at 221 n. 17. This Court explained in a footnote that this argument was mistaken because the trial court, in an APA appeal, could admit new evidence that meets the standards under RCW 34.05.562(1). *Id*. The Court of Appeals' holding here—that PRSM could submit new evidence if needed under RCW 34.05.562(1)—is entirely consistent with that holding.

b. There is no conflict in the Court of Appeals' holding that the trial court acts in its appellate capacity.

PRSM purports to identify a second conflict in the Court of Appeals' holding that a trial court applying APA judicial review acts in its appellate capacity. Pet. at 12-14. According to PRSM, that holding conflicts with

various authorities providing that the trial court has original jurisdiction over constitutional claims. Again, the conflict is imaginary.

The substantive challenge in PRSM's argument is to the use of RCW 34.05.562 in deciding whether to admit new evidence. In other words, in PRSM's view, if the trial court exercises its original jurisdiction, then the APA's procedural requirements do not apply and there are no evidentiary restrictions. PRSM then touts this Court's caution "against 'intertwining procedural requirements with jurisdictional principles.'" Pet. at 12 (quoting *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 647, 310 P.3d 804 (2013)).

But it is PRSM's argument—not the Court of Appeals' holding—that would blur the distinction which this Court clarified in *Cost Mgmt.* There, a taxpayer requested a tax refund from the city of Lakewood. When Lakewood failed to grant or deny the request, the taxpayer sued in superior court. *Cost Mgmt.*, 178 Wn.2d at 638. The Court of Appeals held that Lakewood's failure to respond to the request rendered its administrative remedy inadequate, thereby allowing the taxpayer to forgo the exhaustion requirement and invoke the courts' original jurisdiction. *Id*. at 645 (citing *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 170 Wn. App. 260, 274, 284 P.3d 785 (2012)). The Court of Appeals went on to say that because the

courts have "concurrent original jurisdiction" over tax-refund claims, the taxpayer could "refer its claim to either the hearing examiner or superior court." *Id*. at 645 (quoting *Cost Mgmt.*, 170 Wn. App. at 274).

On further review, this Court explained that the latter statement by the Court of Appeals was potentially confusing. *Id*. It took the opportunity to clarify that the courts' original jurisdiction does not give litigants free rein to forgo administrative procedures. *Id*. at 646. The taxpayer was exempt from the exhaustion requirement only because the administrative remedy was inadequate—*not* merely because the superior court had concurrent original jurisdiction. *Id*. at 645-46. This Court's message in *Cost Mgmt.* was thus that the courts' original jurisdiction over claims does not obviate the need to comply with legislatively mandated procedural requirements. It does, however, give the courts flexibility to hear claims if those procedures have rendered the administrative remedy inadequate.

Here, PRSM has not shown that the APA's evidentiary limitations leave it without an adequate remedy for alleged constitutional violations. Indeed, in a footnote cited by PRSM, this Court explicitly rejected that argument as "mistaken." *See Washington Trucking*, 188 Wn.2d at 221 n. 17. In short, PRSM's inherent assumption—that the trial court's original jurisdiction over constitutional claims means the APA's procedural

requirements do not apply—promotes the very intertwining of "procedural requirements with jurisdictional principles" that this Court cautioned against. *Cost Mgmt.*, 178 Wn.2d at 647.

The Legislature explicitly provided that a party can raise constitutional challenges on judicial review under the APA. *See* RCW 34.05.570 (3)(a). And this Court has already endorsed RCW 34.05.562(1)—the statute applied by the lower courts here—as the procedural mechanism for introducing additional evidence in support of such a claim. *Washington Trucking*, 188 Wn.2d at 221 n. 17. The Court of Appeals' analysis was thus correct, and PRSM's arguments do not warrant review.

2. Statutes and case law regarding adjudicative proceedings are inapposite.

PRSM next claims that the Court of Appeals created a "legal impossibility" that raises a question of broad public importance. Pet. At 15-16. But that impossibility, like the supposed conflicts with case law discussed above, is a fabrication.

PRSM's argument hinges on its claim that "the APA expressly prohibits courts from considering unsworn testimony." Pet. at 15 (citing RCW 34.05.452 (3)). PRSM then claims that the Court of Appeals "construed the APA to bar additional evidence," thereby confining the

evidence to unsworn public comments. *Id*. Thus, according to PRSM, a party that complies with the APA will be prohibited from presenting any evidence of a constitutional violation. *Id*. That is simply not true.

Again, as discussed above, the Court of Appeals did not hold that the APA bars additional evidence. It merely held, under the specific facts of this case, that PRSM did not satisfy the APA's requirements for supplementing the record under RCW 34.05.562.

PRSM's other fundamental premise—that RCW 34.05.452(3) expressly prohibits courts from considering unsworn testimony—is also wrong. The cited statute appears in Part IV of the APA, which encompasses sections .410 through .494 and governs agencies' internal adjudicative proceedings.

The cited statute does *not* appear in Part V (sections .510 through .598), which governs judicial review. It says nothing about what a court can or cannot consider on judicial review. Further RCW 34.05.452 expressly does not apply to the underlying procedure at issue here: agency rulemaking. *See* RCW 34.05.410(2). It is thus irrelevant to this proceeding.

PRSM does not cite a single case, from anywhere in the country, holding that a court cannot consider unsworn public comments when reviewing agency rulemaking or that such a procedure violates due process.

Rather, PRSM cites three cases that discussed the presentation of evidence in an agency's adjudicative proceeding. *See W. Washington Operating Engineers Apprenticeship Comm. v. Washington State Apprenticeship & Training Council*, 144 Wn. App. 145, 161, 190 P.3d 506 (2008) (in adjudicating a private organization's request for approval of an apprenticeship program, state agency violated RCW 34.05.452 (3) by asking factual questions of the representative's attorney without placing him under oath).[2] Indeed, this Court has recognized that the rulemaking record is the proper record for legal challenges under the APA. *See Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606, 616 (2003) ("agency must keep a rule-making file, which serves as the record for review"). PRSM thus fails to show that its due-process argument warrants this Court's review.[3]

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[2] *See also Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) (federal district court must give preclusive effect, in Title VII employment-discrimination claim, to a decision by a state agency affirmed on appeal by state courts, if basic requirements of due process are followed); *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) (in adjudicating an individual's claim for compensation under the Micronesian Claims Act, federal agency violated due process by relying on a valuation study that was not made available to the claimant before the hearing).

[3] In a footnote, PRSM claims that the "City did not preserve most of the public comments in the record." Pet. at 16 n. 10. That allegation is false. The City submitted all written comments to the Board as part of the record. *See*, *e.g.*, AR 681-779. The City also made audio recordings of all meetings in which public comments were given orally. As required by WAC 242-03-510(2), the City identified these recordings, which were available for transcription by any party that wished to have them transcribed, in the Index of Record. *See* AR 503, 1989, 2047.

3. PRSM's disagreement with the trial court's discretionary evidentiary rulings does not merit review.

Finally, PRSM raises four criticisms of the evidentiary ruling that PRSM did not meet the standards required to supplement the record under RCW 34.05.562. PRSM tries to shoehorn this discretionary ruling into a ground for review by claiming that the Court of Appeals' decision "conflicts with precedents." Pet. at 17. PRSM's disagreement with the Court of Appeals' analysis, however, does not merit this Court's review.

In its first challenge, PRSM argues that facial constitutional claims "often" require "facts and expert testimony." *Id*. PRSM cites only two cases for this point: *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015); and *ACORN v. City of Tulsa, Okl.*, 835 F.2d 735, 740-41 (10th Cir. 1987). Neither is a decision of this Court or a published decision of the Washington Court of Appeals. The argument thus does not meet the standard for review based on conflicting precedent in RAP 13.4 (b) (1) or (2). Moreover, neither case construed this state's APA or whether the evidence was "needed," as PRSM was required to show under RCW 34.05.562.

Further, the Court of Appeals here quoted this Court's precedent that facts "are not essential for consideration of a facial challenge to a statute or ordinance based on First Amendment grounds" and that a facial

constitutional challenge is analyzed "upon the language of the ordinance or statute itself." Op. at 10 (quoting *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990)). It is thus PRSM's position, not the lower court's decision, that conflicts with this Court's precedent.

PRSM's second challenge argues that the Court of Appeals' ruling results in a record devoid of evidence regarding "nexus and proportionality." Pet. at 18-19. PRSM cites this Court's decision in *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 449 P.3d 269 (2019), for the proposition that such evidence must be included in the record. Pet. at 19. What this Court held in *Church of Divine Earth* was that, in imposing a condition on development, the government must show that the proposed condition "will tend to solve or alleviate" a public problem and that "the condition is roughly proportional to the development's anticipated impact." *Church of Divine Earth*, 194 Wn.2d at 138.

There are multiple flaws in PRSM's claim that it needed new evidence to satisfy that standard. Initially, although it claims the City "curated" its record to answer a slightly different question, PRSM fails to identify any evidence offered in the public-comment phase that is not available in the record before the trial court. Further, PRSM fails to explain how the question that was supposedly the focus of the rulemaking record—

"*how much property* is needed to 'mitigate the … indirect, and/or cumulative impacts of shoreline development, uses and activities'" (Pet. at 18)—is in any way incompatible with the inquiry this Court mandated in *Church of Divine Earth*. Finally, as the Court of Appeals noted, PRSM fails to explain why its proffered new evidence is not already in the record, when it presented substantial scientific evidence in the public-comment phase and briefed this very issue before the Board. Op. at 14-15.

PRSM's third evidentiary challenge contends that the Court of Appeals overlooked alleged admissions by the City's scientists about gaps in the available data. Pet. at 19. PRSM claims that "an admission by the government that the record is incomplete will establish the need for additional evidence." *Id*. Again, PRSM does not cite any Washington authority for this proposition.

Further, none of these cases stand for the proposition that PRSM cites them for, i.e. that any imperfection in the available science entitles the challengers to a trial de novo. Rather, they espouse a more limited proposition that is consistent with the Court of Appeals' decision here. *See Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (rejecting the notion that all data relied upon by the agency must be immediate); *San Francisco Bay Conservation & Dev. Comm'n v. United States Army Corps*

of Engineers, 16-CV-05420-RS(JCS), 2018 WL 3846002, at *3 (N.D. Cal. Aug. 13, 2018) (allowing supplementation with evidence that the agency conceded should have been part of the record and was inadvertently omitted).[4] These cases do not support supplementation here.

PRSM's fourth and final evidentiary challenge claims that the Court of Appeals did not consider the merits of PRSM's vagueness evidence. Pet. at 20-21. The Court of Appeals cited cases from this Court and the U.S. Supreme Court holding that when "a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness." Op. at 15 (quoting *Weden v. San Juan County*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998)). The reason for allowing facial vagueness claims on First Amendment grounds is that free expression can be chilled by mere uncertainty as to whether a given expression is allowed. *Thornhill v. State of Alabama*, 310 U.S. 88, 98, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). That exception is not applicable here. Although PRSM claimed infringement of

[4] *See also Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977) (reversing the district court's finding that an environmental impact statement ("EIS") was inadequate and noting that an "EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible" (citations omitted); *Silva v. Lynn*, 482 F.2d 1282, 1288 (1st Cir. 1973) (remanding for the agency to provide more detailed reasons for its conclusions but stating that the appellate court did "not contemplate that the district court, in the absence of special circumstances which we cannot now foresee, would have the need to take more evidence").

free expression, that claim was based on regulation of gardeners' plant choices. CP 342 at ¶ 27. Its separate vagueness claim did not assert a lack of clarity as to what signage or vegetation is permitted. CP 339-40.

PRSM's proffer fails on its merits as well. The "evidence" highlighted by PRSM is an individual's opinion that the SMP is difficult to understand because it uses "vague" and "ambiguous" provisions, incorrect citations, and inconsistent terms of art. Pet. at 21. This Court holds that whether a statute is vague is normally a pure question of law. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). Although PRSM cites two cases for the proposition that testimony may be admissible to support a vagueness claim, neither case allowed a witness to give a direct opinion about vagueness. *See*, *e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 398–99, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (discussing physician testimony about professional practices in considering whether abortion regulation was impermissibly vague).[5] Therefore, even if "plain error" were a ground for this Court's review under RAP 13.4 (b) (it is not), PRSM fails to show any such error.

[5] PRSM also cites *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153 (9th Cir. 1980). That case did not involve a vagueness challenge. Notably, however, the Ninth Circuit held that "the district court went too far in its consideration of evidence outside the administrative record." *Id*. at 1160.

D. CONCLUSION

PRSM brought its evidentiary motion in August 2017. By the time this Court considers PRSM's petition for review, the parties will have spent roughly three years litigating a discretionary evidentiary ruling. This Court should deny PRSM's petition and remand the matter to the trial court, so that the parties can finally litigate the merits of the 2014 SMP.

RESPECTFULLY SUBMITTED this 6th day of May, 2020.

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PROOF OF SERVICE

I, Bonnie Rakes, hereby state and declare as follows:

1. That I am a citizen to the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 6th day of May 2020, I cause to be served a true and correct copy of the Answer to Petition for Review, as follows:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

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

Bonnie Rakes

OGDEN MURPHY WALLACE, P.L.L.C.

May 06, 2020 - 9:05 AM

Transmittal Information

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Superior Court Case Number:	15-2-00904-6

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