Case No: 80092-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

City of Bainbridge Island, Washington State Department of Ecology, Environmental Land Use Hearing Office, and Growth Management Hearings Board Central Puget Sound Region,

Respondents,

and

Kitsap County Association of Realtors®,

Intervenor Below.

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

MOTION FOR RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY OF PETITIONERS AND STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4, Petitioners Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc. (PRSM) respectfully move for reconsideration of the decision filed in this matter on December 9, 2019 (Decision) (attached as Appendix A).

ISSUES PRESENTED

1. Whether reconsideration is warranted where the Decision overlooked numerous precedential cases establishing that a citizen has a right to put on evidence necessary to prove a constitutional claim where a statute requires that constitutional claims be raised to the superior court for the first time alongside an administrative appeal.

2. Whether reconsideration is warranted where the Decision conflicts with binding case law holding that a trial court exercises original jurisdiction over constitutional claims when they are filed for the first time in a petition for judicial review.

3. Whether reconsideration is warranted where the Decision contains a critical error of fact. Specifically, the Decision concludes that

PRSM did not allege that vague SMP provisions impaired free expression rights where PRSM's petition for judicial review does in fact contain that allegation and its briefing asserts that claim.

4. Whether reconsideration is warranted where the Decision overlooked binding case law from the U.S. Supreme Court holding that facts are necessary to address certain aspects of a facial constitutional claim.

5. Whether reconsideration is warranted where the Decision overlooked key facts and arguments in the record and, as a result, failed to address the actual arguments raised on appeal.

INTRODUCTION

The Decision adopted legal conclusions that conflict with binding authority from the Washington Supreme Court and the U.S. Supreme Court. The Washington Supreme Court has interpreted the Administrative Procedure Act's (APA) additional evidence provision (RCW 34.05.562(1)) to allow a litigant to put on evidence necessary to show that the challenged government action violated the constitution when that claim is raised for the first time on administrative appeal. *Washington Trucking Associations v. State Employment Sec. Dep't*, 188 Wn.2d 198, 221 n.17, 393 P.3d 761 (2017). And the U.S. Supreme Court has broadly held that a facial constitutional claim is independent of, and not bound by, an administrative record. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 159, 118 S.

Ct. 523, 139 L. Ed. 2d 525 (1997). The Decision overlooked these direct authorities, holding instead that PRSM's constitutional claims are appellate in nature and therefore bound by the administrative record. Thus, the Decision concluded that PRSM has no right to introduce evidence in support of its constitutional claims despite the fact that the government respondents raised factual defenses for the first time in the Superior Court and despite recognizing that PRSM has "offered evidence to support disputed issues of the constitutionality of the [Shoreline Management Program (SMP)]." Decision at 9.

Reconsideration is also necessary because the Court's analysis of PRSM's evidentiary arguments overlooked key case law and rests on a misunderstanding of the facts. Although the Decision correctly observed that facial constitutional claims can often be decided on the language of the challenged ordinance, the Decision overlooked binding case law from the U.S. Supreme Court recognizing circumstances where facts are necessary to decide certain aspects of facial claims. The Decision also overlooked a large body of federal case law that PRSM cited in its trial court and appellate briefing to establish the necessity of proposed supplemental evidence. *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."). The Court's failure to acknowledge that body of case law led it to analyze PRSM's proposed evidence under the wrong legal standards and in the wrong factual context. Decision at 10-15. As a result, the Decision does not address the merits of PRSM's evidentiary arguments and warrants reconsideration.

ARGUMENT

I.

THE DECISION OVERLOOKED AUTHORITIES ESTABLISHING THAT FACIAL CONSTITUTIONAL CLAIMS INVOKE THE ORIGINAL JURISDICTION OF THE TRIAL COURT AND ARE INDEPENDENT OF THE ADMINISTRATIVE RECORD

A. Binding Case Law from the Washington State Supreme Court Holds That the APA Allows a Litigant To Introduce Evidence of a Constitutional Violation on Judicial Review

The Decision warrants reconsideration because it overlooked the fact that Washington's Supreme Court has interpreted RCW 34.05.562(1) to allow additional evidence showing the underlying government action (*i.e.*, enactment of the SMP) violated the constitution when such claims are raised for the first time in a petition for judicial review.[1] *Washington*

[1] At argument, the Court appeared to dismiss the holding of *Washington Trucking* as dicta. But when *Washington Trucking* is read in its entirety, it is clear that the Court's resolution of the evidentiary question was, in fact, necessary to resolve the case and cannot be disregarded. 188 Wn.2d at 221 n.17 (referring to its conclusion as a "holding"); *see also State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (defining dicta as an observation or aside that is not necessary to the resolution of the case at bar).

Trucking Associations, 188 Wn.2d at 221 n.17. That interpretation of the APA is binding on this Court. *State v. Dean,* 113 Wn. App. 691, 699, 54 P.3d 243 (2003) (the Supreme Court's interpretation of a statute operates as if it were originally written into it).

At issue in *Washington Trucking* was whether an industry association could forego the required administrative appeal of a tax assessment in order to file a lawsuit in a state court raising only tort and constitutional claims that are beyond the administrative law judge's statutory jurisdiction. 188 Wn.2d at 202. In an attempt to create a conflict between the APA and 42 U.S.C. § 1983 (and thereby render the APA's administrative exhaustion requirement unenforceable), the association argued that the APA's additional evidence provision (RCW 34.05.562(1)) should be narrowly construed to bar a litigant from introducing evidence of a constitutional violation on judicial review. *Id*. at 219-220, 221 n.17. The State argued that the APA's judicial review procedure was analogous to the procedures established by the federal Employment Security Act and Administrative Procedures Act, under which each litigant has a right to a "full hearing and judicial determination" at which they may present evidence and argument in support of their constitutional objections. *See* Washington State, Response Br., 2015 WL 12978682 at *29, *Washington*

Trucking, 188 Wn.2d 198 (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981)).

The Washington State Supreme Court agreed with the State, concluding that the trucking association was "mistaken" when it argued that an "APA appeal is limited to the agency record." *Washington Trucking*, 188 Wn.2d at 221 n.17. In reaching that conclusion, the Court recognized a critical point of law: the statutory questions before an administrative agency are substantially different from constitutional questions properly raised to a court; thus, a limitation on the evidence on administrative review has no bearing on the admissibility of evidence to address constitutional issues raised on judicial review. *Id*.; *see also* PRSM Opening Br. at 34-35; PRSM Reply Br. at 19-20.

Contrary to the Decision's conclusion that the APA only allows supplemental evidence pertaining to the constitutionality of the Growth Board's hearing procedures (Decision at 8-9), the Supreme Court determined that the APA "affords the [association] an opportunity to raise constitutional objections to the tax assessments"—*i.e.*, a substantive challenge to the underlying government decision. *Id*. at 221 n.17. Thus, the Court concluded that the APA allows the trial court to consider evidence not contained in the agency record that is necessary to demonstrate whether the challenged government action (here, the City's SMP) violated the

constitution. *Id*. (citing RCW 34.05.562(1)). This Court should reconsider its Decision to reflect the actual basis for PRSM's evidentiary motion and to acknowledge binding authority interpreting that provision.

B. Binding Case Law from the U.S. Supreme Court Holds That Facial Constitutional Claims Invoke a Trial Court's Original Jurisdiction and Are Independent of an Administrative Record

This Court's conclusion that PRSM's facial constitutional claims are appellate in nature and, therefore, bound by the administrative record also overlooks binding case law from the U.S. Supreme Court. Decision at 8. In *City of Chicago v. International College of Surgeons*, property owners filed lawsuits in a state trial court seeking judicial review of an adverse administrative decision pursuant to Illinois' version of the APA.[2] 522 U.S. at 159. The lawsuit alleged facial and as-applied violations of the U.S. Constitution, as well as state statutory claims. *Id*. at 160. Over the property owners' objection, the City removed the lawsuits to the federal district court on the basis that trial court had original jurisdiction over the constitutional claims. *Id*. at 161. The court thereafter granted summary judgment to the City. *Id*.

The Seventh Circuit reversed in part, concluding that because a petition for judicial review is limited to the administrative record and

[2] Cited by PRSM Statement of Suppl. Auth.

subject to a deferential standard of review, it invokes the trial court's appellate jurisdiction over the statutory and as-applied constitutional claims and is therefore "inconsistent with the character of a court of original jurisdiction" and cannot be removed. *Int'l Coll. of Surgeons v. City of Chicago, Ill.*, 91 F.3d 981, 990 (7th Cir. 1996). But, because facial claims "are not dependent on the factual record developed at the administrative hearing," the court concluded that they are independent claims that invoke the trial court's original jurisdiction—even where they are raised in a petition for judicial review. *Id*. at 992. Ultimately, however, the Seventh Circuit ruled (like this Court) that, because the state law claims involve deferential administrative review, the case was appellate in nature and remanded the case to state court. *Id.* at 994. The U.S. Supreme Court granted review and reversed. *Int'l Coll. of Surgeons*, 522 U.S. at 162.

Critically, the U.S. Supreme Court confirmed that property owners' constitutional claims raised issues that are subject to the trial court's *original jurisdiction*—even though "the federal constitutional claims were raised by way of a cause of action created by [the state's administrative appeal] law." *Id*. at 164. The Supreme Court, therefore, expressly rejected the property owner's argument that the facial constitutional claims are bound by the administrative record when those claims are raised in a petition for judicial review. *Id*. at 167 (Concluding that the property owner

"in fact raised claims not bound by the administrative record (its facial constitutional claims)."). Reconsideration is necessary to avoid a direct conflict with a binding decision from the U.S. Supreme Court.

C. The APA Cannot Be Construed To Deprive Litigants of the Right To Present Evidence to an Adjudicative Body

The Decision also overlooks the Legislature's plain command that the APA be construed in a manner consistent with due process. RCW 34.05.020 ("Nothing in this chapter may be held to diminish the constitutional rights of any person."). As a result, the Court's analysis of the APA overlooks case law establishing that each person has a basic due process right to present evidence to an adjudicative body in support of his or her claims. *See*, *e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77, 56 S. Ct. 720, 80 L. Ed. 1033 (1936); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992); *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.,* 33 Wn.2d 448, 495, 206 P.2d 456 (1949); *Robles v. Dep't of Labor & Indus.,* 48 Wn. App. 490, 494, 739 P.2d 727 (1987); *see also Morgan v. United States*, 304 U.S. 1, 19, 58 S. Ct. 773, 82 L. Ed. 1129 (1938) (the right to present evidence extends to civil matters); *Ralpho v. Bell,* 569 F.2d 607, 628 (D.C. Cir. 1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency

has long been regarded as a primary requisite of due process."); *see also Saunders v. Shaw*, 244 U.S. 317, 319, 37 S. Ct. 638, 61 L. Ed. 1163 (1917) (finding a violation of due process where the trial court deprived a party of "a chance to put [its] evidence in"). The Decision's failure to acknowledge RCW 34.05.020—and its failure to harmonize the APA's additional evidence provision with due process—creates a conflict within the APA and with binding case law. *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012) (The Legislature cannot enact laws that limit the superior court's original jurisdiction.).

D. Federal Case Law Confirms That the Federal APA Allows a Litigant To Introduce Evidence of a Constitutional Violation on Judicial Review

The Decision also overlooks the large body of federal case law confirming that litigants may introduce evidence of a constitutional violation when a statute requires them to raise those claims for the first time on judicial review.[3] *See*, *e.g.*, *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*

[3] The APA "expressly states the Legislature's intent that 'courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of . . . the federal government.'" *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581 (1996) (quoting RCW 34.05.001).

also McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 493, 111 S. Ct. 888, 896-97, 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); *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); *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). And even outside the context of constitutional claims, federal courts allow for supplementation to address gaps in the record, questions not considered by agency, and to define complex and technical terms—all of which were bases for PRSM's evidentiary motion. *See*, *e.g.*, *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified,* 867 F.2d 1244 (9th Cir. 1989). The Decision's failure to acknowledge this body of case law resulted in a mistaken analysis of PRSM's evidentiary motion.

II.

THE DECISION OVERLOOKED NUMEROUS PRECEDENTS ESTABLISHING THAT FACTS MAY BE NECESSARY TO DETERMINE DISPUTED ASPECTS OF A FACIAL CONSTITUTIONAL CLAIM

The Decision's analysis of PRSM's evidentiary arguments also warrants reconsideration because it is relies on an incomplete understanding of the law and, therefore, misunderstands the actual bases for supplementation argued below. Decision at 10-15. The Decision correctly cited the *general rule* that facial constitutional claims are often resolved on the language of the challenged ordinance, but then failed to acknowledge case law establishing circumstances where facts become necessary to resolve those claims. Decision at 10. Most notably, facts become necessary when a government respondent challenges the injury prong of standing, disputes the proper constitutional test to be applied, or argues for a broader scope of facial inquiry—all of which are disputed issues here.[4] The failure by the Decision to acknowledge this body of case law is particularly

[4] It is elementary that a plaintiff alleging a constitutional violation must, as a threshold matter, show that the government's action impairs a protected right. *See*, *e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (landowner must provide proof that an ordinance impacts property in a facial takings challenge); *Garneau v. City of Seattle,* 147 F.3d 802, 807-08 (9th Cir. 1998) (holding that facial takings plaintiffs have the burden of "introducing evidence of the economic impact of the enactment . . . on their property"); *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (the plaintiff must show that a state actor deprived it of a constitutionally protected life, liberty, or property interest as a threshold matter in a facial due process challenge).

prejudicial to this case because the City and Ecology did not dispute these issues during the legislative or administrative proceedings—instead it waited until the record was closed and the case was pending before the Superior Court to claim that the record does not contain facts sufficient to establish constitutional violations. This circumstance warrants closer review than provided by the Decision under the legal standards adopted by the federal courts.

A. The Decision Applied the Wrong Standard for Facial Review

The Decision's discussion of PRSM's evidentiary arguments relies on an incomplete understanding of the law and must, therefore, be reconsidered. Decision at 10-15. The Decision rests on the general proposition that a plaintiff asserting facial claims must prove that a law will violate the constitution in all of its applications. *Id*. Left unqualified, that understanding of the law is wrong. Indeed, binding precedent from the U.S. Supreme Court significantly narrows and focuses the scope of facial review in a manner that requires a much closer analysis of law and fact than provided by the Decision. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449-51, 192 L. Ed. 2d 435 (2015).

In *Patel*, the U.S. Supreme Court admonished that its use of the phrase "in all of its applications" in establishing the standard of review for facial constitutional claims is much more limited in scope than it appears.

Id. When 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*. Critically, the U.S. Supreme Court has recognized that facts and expert testimony are often necessary to establish the proper scope of facial review. *Patel*, 135 S. Ct. at 2451. 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 facts 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 Decision's failure to acknowledge this case law resulted in an erroneous understanding of PRSM's evidentiary arguments and warrants reconsideration.

B. PRSM's Vagueness Claim Alleges Impairment of Free Expression Rights

The Decision contains a clear error of fact that should be corrected. PRSM's petition for judicial review alleges that the SMP's vague vegetation standards directly impair free expression rights. Amended Pet. for Review at 14-15; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (the plaintiff is "master of the complaint"). Accordingly, PRSM has consistently argued that its free expression claims "are predicated on the SMP's imprecise language." PRSM Opening Br. at 31 (citing *City of Seattle v. Webster*, 115 Wn.2d 635, 640 n.2, 802 P.2d 1333 (1990); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)); PRSM Reply Br. at 11. The Decision, however, concluded that PRSM's vagueness claim "is likely not ripe" because it does not involve free expression rights and therefore declined to address its evidentiary argument. Decision at 15 (quoting *Weden v. San Juan County*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998) ("When a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness."). That is a misstatement of the record and is prejudicial to PRSM's claims.

Even so, the conclusion that courts will not consider facial vagueness claims outside the context of the Free Expression Clauses

overlooks binding authority to the contrary. Both the Washington and U.S. Supreme Courts specifically allow a facial vagueness claim against a law that imposes criminal liability for behavior that would not normally be considered criminal without a state of mind requirement. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 114, 11 P.3d 726 (2000) (citing *Jones v. City of Lubbock,* 727 F.2d 364, 373 (5th Cir. 1984)); *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)); *Colautti v. Franklin*, 439 U.S. 379, 384, 391-92, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979). As explained throughout this proceeding, 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 with no mens rea requirement. AR 251-52 (citing SMP 7.2.8); *see also* PRSM Opening Br. at 42-43; PRSM Reply Br. at 20, 25. PRSM's petition clearly states a viable facial vagueness challenge by alleging impacts to both liberty and free expression rights.

Because PRSM alleged cognizable facial vagueness claims, it is entitled to have its evidentiary arguments considered on their merits. The Growth Board concluded that "several SMP provisions are poorly written"

or "infelicitously" worded. AR 5837. And a recent University of Washington study confirmed that the 400+ page document contains numerous "vague" and "ambiguous" provisions, and the entire program is "difficult" to "extremely difficult" to understand, riddled with incorrect citations, and uses terms of art in an inconsistent manner.[5] In this circumstance, PRSM's motion, which sought leave to submit documentary evidence demonstrating confusion among City staff and expert testimony from a land-use professional showing precisely where the SMP contains vague and confusing standards, was unquestionably supported by law. *Asarco, Inc. v. U.S. Envtl. Protection Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980); *see also Colautti*, 439 U.S. at 384 (considering expert testimony in facial vagueness challenges). Reconsideration is necessary to address the merits of PRSM's evidentiary arguments.

C. Ms. Young's Testimony Is Necessary To Establish the Scope of the Facial Free Expression Analysis

The Decision's analysis of the proposed free expression testimony fails to acknowledge the inconsistent and contradictory nature of the government's objection. On the one hand, the City and Ecology insisted that supplementation is not necessary because facts in the record (*i.e.*, a

[5] 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).

paragraph from Ms. Young's letter reproduced at n.2 to the Decision) are sufficient to address each and every element of its free expression claim. Ecology Resp. Br. at 23-24; City Resp. Br. at 28-30. But then on the other hand, the government has asserted that, based on the record, PRSM cannot establish that gardening and landscape design can ever rise to the level of protected conduct (CP 276), which is a mixed question of law and fact. *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). It has to be one or the other—it cannot be both. If the statements in the record are insufficient to establish the circumstances when gardening and landscape design rise to the level of protected expression, then additional evidence is necessary. If they are sufficient, then the City and Ecology must be compelled to concede that Ms. Young's statement is the only evidence that can be considered on this disputed issue. The Decision should be reconsidered to address this inconsistency.

The Decision also warrants reconsideration because it misstates PRSM's evidentiary argument. The City and Ecology created a factual dispute regarding the scope of review by broadly arguing that PRSM must prove that the SMP will impact free expression rights in every conceivable circumstance. CP 273-77, 284-87. That argument is identical to the position taken by the government defendants in *Patel*, *Planned Parenthood*, and *Miami Herald Publishing*. As in those cases, PRSM responded by offering

evidence that will demonstrate the circumstances when the SMP will impact constitutional rights, thereby providing the foundation necessary for the trial court to establish the appropriate scope for facial review. *See 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 1 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 testimony regarding the ordinance's scope on facial First Amendment challenge). Thus, in regard to PRSM's free expression claim, Ms. Young's proposed testimony was offered to show the circumstances in which gardening and landscape design rise to the level of protected expression. Opening Br. at 39-42; CP 264 (offering testimony explaining "how" the SMP impairs expression rights); CP 308. Understanding how and when gardening and landscape design constitute expressive conduct is necessary to ensure that the trial court consider only those circumstances where the SMP will impact speech rights as required by *Parenthood of Se. Pennsylvania*, 505 U.S. at 894.

The motion also sought leave to respond to a mixed question of law and fact that the City and Ecology raised for the first time to the Superior Court. CP 308. The Decision overlooks case law establishing that this

situation provides grounds for admitting supplemental evidence. *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368, 1384-85 (2d Cir. 1977). Indeed, throughout the update process, Bainbridge Island residents generally asserted a free expression right in gardening and landscape design.[6] *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—let alone asserting that gardening and landscape design cannot rise to the level of protected expression. *County of Suffolk,* 562 F.2d at 1384-85. Instead, the City and Ecology waited until the administrative record was closed to argue that the record does not contain adequate facts to establish that gardening and landscape design constitute expressive conduct. CP 276. Although the SMA authorizes the City and Ecology to withhold its determinations regarding constitutional issues during the planning process, that legislative privilege cannot be transformed into a litigation advantage. *See* WAC 173-26-186(5) (local governments are exempt from disclosing legal arguments during the update process) (citing RCW 36.70A.370(4)). The law recognizes that litigants can supplement the record in this circumstance. Reconsideration is

[6] The letter that Ms. Young wrote to the City simply asserted a free expression right. It was not a declaration or a legal brief and did not purport to present any facts addressing the legal standards for both questions. AR 742-44. Nor does the legislative process create an opportunity for anyone to test assertions made by anyone in the legislative process that would be sufficient for proving or disproving constitutional claims.

warranted to address PRSM's evidentiary arguments under the legal standards asserted to the trial court and throughout the appellate the proceedings.

D. Expert Testimony Is Necessary To Address "Critical Gaps" in the Record Pertaining to the Constitutionality of the SMP's Mandatory Conservation Easement

The Decision also overlooks the legal and factual bases for PRSM's motion to supplement the record pertaining to its unconstitutional conditions claims.[7] PRSM did not allege that "the City failed to use the best available science" when developing its SMP. Decision at 13. Nor did PRSM offer testimony from Ms. Schaumburg, Ms. Phillips, and Ms. Robbins to contest the conclusions contained in the City's science. Decision at 14. Instead, as explained throughout this proceeding, PRSM offered that evidence to address what the City itself deemed to be "critical gaps" in its scientific record and address questions that are not addressed by the record. Opening Br. at 36-38; Reply Br. at 2-3, 8-9; CP 262-63, 310-12. This is a well-recognized basis for supplementing an agency record. *See*, *e.g.*, *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005); *Asarco*, 616 F.2d at 1160; *County of Suffolk,* 562 F.2d at 1385; *Silva v. Lynn*, 482 F.2d 1282,

[7] The Decision criticizes PRSM for not explaining why it did not offer the proposed testimony to the Growth Board. Decision at 14. PRSM did not do so because, as a matter of law, the Growth Board will not accept testimony when reviewing an SMP update—and it cannot take testimony pertaining to constitutional questions.

1285 (1st Cir. 1973); *see also 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). The Court's analysis of PRSM's evidentiary argument overlooked this argument and all supporting authority and should therefore be reconsidered.

The Decision also appears to rest on the erroneous conclusion that any evidence tending to show compliance with the SMA's science requirement would be sufficient to address the nexus and proportionality tests. Decision at 13-14. Not so. Questions of statutory compliance are substantially different from constitutional questions. *Washington Trucking*, 188 Wn.2d at 221 n.17. The SMA, for example, asks only how much property is necessary to mitigate for landscape-wide impacts to shoreline ecology. CP 261-63; CP 311. The constitution, by contrast, asks how little land is necessary to mitigate the identified impacts of the proposed development. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). That is a qualitatively different inquiry and relies on very different evidence. *United States v.*

Raines, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (A regulation must be evaluated on its facts and effects, not on fortuitous circumstances.).

The City's record speaks only to questions of statutory compliance. It does not speak to the constitutional questions (recall that the SMA directs the government to withhold from the record determinations relating to constitutional issues). Because of that, the City and Ecology have never cited any science in the record identifying that portion of the mandatory conservation easement that is necessary to mitigate for impacts originating on site. That critical gap in the record provides a well-recognized basis for the supplementing the records with the proposed testimony from Ms. Phillips, Ms. Robbins, and Ms. Shaumburg. CP 262-63; CP 311. The proposed testimony is necessary to understand how the SMP affects an individual's interest in his or her property (and thereby 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). It is also necessary to determine whether the City's buffer provisions contain any mechanism for determining whether the conservation easement demands more land than is necessary to mitigate for on-site development

impacts.[8] The Decision does not address the critical distinction between the statutory and constitutional questions and does not address the legal and factual bases for supplementation. Reconsideration is warranted.

CONCLUSION

For the foregoing reasons, PRSM respectfully requests that this Court reconsider its Decision.

DATED: December 19, 2019

Respectfully submitted,

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[8] As explained in the trial court briefing, PRSM's proposed testimony would address the gaps in the record 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. Allowing this evidence in a facial challenge necessary because the SMP requires that 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.

Appendix A

Pet’rs’ Mot. for Recons./Decision

Wash. Court of App. Case No. 80092-2-I

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, And Point Monroe Lagoon Home Owners Association, Inc.,	No. 80092-2-I DIVISION ONE UNPUBLISHED OPINION
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.	FILED: December 9, 2019

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

This court granted PRSM's motion for discretionary review.

II.

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

A.

Decisions of the growth management hearings boards must be appealed to the superior court under the APA. RCW 36.70A.300(5); Olympic Stewardship Foundation (OSF) v. State Envtl. & Land Use Hrgs. Office, 199 Wn. App. 668, 685, 399 P.3d 562 (2017), rev. denied, 189 Wn.2d 1040 (2018). In contrast to non-administrative proceedings where the trial court is the finder of fact, in administrative proceedings, "the facts are established at the administrative hearing and the superior court acts as an appellate court." U.S. West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n, 134

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

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

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

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

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

B.

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

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

administrative agency, or allowed by the superior court consistent with the narrow exceptions in RCW 34.05.562.

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

C.

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

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

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

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

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

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

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

D.

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

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

1.

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

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

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

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

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[2] Young's comment in the record states

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

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

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

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

2.

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

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

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

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

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

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

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

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

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

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

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

3.

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

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

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

We affirm.

Mann, ACJ

WE CONCUR:

RICHARD D. JOHNSON,
Court Administrator/Clerk

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December 9, 2019

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

Counsel:

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

"We affirm."

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

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

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

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

Enclosure

c: The Honorable Jeffrey P. Bassett

PACIFIC LEGAL FOUNDATION - WASHINGTON

December 19, 2019 - 1:43 PM

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

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