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Judge Bassett
Oral Argument
September 20, 2021

BEFORE THE SUPERIOR COURT FOR THE COUNTY OF KITSAP
STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc., Petitioners and Plaintiffs, vs. 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 Defendants, and Kitsap County Association of Realtors®, Intervenor Below.	No. 15-2-00904-6 **PETITIONERS' OPENING BRIEF**

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255 South King Street, Suite 800
Seattle, WA 98104
(425) 576-0484

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INTRODUCTION

This Shoreline Management Act (SMA) case raises several important questions of statutory and constitutional law resulting from the City of Bainbridge Island's 2014 Shoreline Master Program (SMP) update. The questions all arise from a central set of facts that can be illustrated by a simple analogy: Imagine if a child was ordered permanently removed from her family based on a provisional report that had failed to consider statements from her family, stated that the report's findings were inconclusive, and insisted that further investigation is needed to determine the child's welfare. It would be easy to declare the unsupported removal order unconstitutional and invalid. Here, Bainbridge Island and the Washington State Department of Ecology enacted an update to the City's SMP that requires shoreline homeowners to dedicate large tracts of their land in perpetual conservation easements, as a mandatory condition on any new development, use, or "human activity" on private property—without any determination by the City that the proposed use will have any impact on the environment. In addition, the SMP demands that a landowner must allow City officials to enter the property, without notice or a warrant, for an undetermined period of years to monitor whether the property is being managed to the City's satisfaction. Administrative Record (AR) 104–05 (SMP § 4.1.2.8).[1] Failure to comply with any of these intrusive regulations carries civil penalties for noncompliance and *criminal* penalties if the City believes that an owner committed two or more violations within any 12-month period. AR 251–52 (SMP § 7.2.8).

Like the analogy above, the City and Ecology based its demands upon an overly precautionary reaction to a provisional scientific record that was riddled with data gaps and

[1] The administrative record on appeal consists of the record before the Growth Management Hearings Board, which is designated as AR 1–5907.

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contained numerous studies, insisting that the City must conduct additional site-specific analyses to identify the source of environmental impacts—such as those caused by neighboring property uses, public roads, ditches, and sewer outflow—in order to separate preexisting impacts that are not attributable to a proposed land use from those actual impacts of future residential development. *See, e.g.*, AR 4097. The City and Ecology, however, chose to forego the additional studies, choosing instead to invoke the so-called "precautionary principle" (when in doubt, take more land than necessary) to justify its numerous intrusions into the rights of shoreline homeowners. Statutory and constitutional law prohibit such a plainly unsupported deprivation of individual rights. *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The Petition assigns fault to the City and Ecology's actions in five key respects. First, during the SMP update process, the City failed to comply with the statutory requirements for encouraging continuing and meaningful public participation. RCW 90.58.130 and WAC 173-26-090. In particular, the City made several substantive, last-minute changes to the SMP, without providing an opportunity for public comment as required by *Citizens For Rational Shoreline Planning v. Whatcom County and Washington State Department of Ecology*, WWGMHB. Case No. 08-2-0031, 2009 WL 1420895, at *6 (Final Decision & Order, Apr. 20, 2009). And throughout the update process, the City failed to "consider" and "respon[d] to public comments" as specifically required by WAC 173-26-090, providing only "comment noted" to hundreds of substantive comments on critically important issues—a terse dismissal that

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1 deprived Bainbridge Island residents of their Due Process right to learn and respond to the
2 government's position on contested matters. *See Bowman Transp., Inc. v. Arkansas-Best*
3 *Freight Sys., Inc.*, 419 U.S. 281, 288 n.4, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974).

4 Second, as a consequence of its disregard for public input, the City failed to meet its
5 statutory duty to engage in a reasoned and objective analysis of the relative merits of all science
6 on the record. RCW 90.58.100(1); WAC 173-26-201(2); *Swinomish Indian Tribal Cmty. v. W.*
7 *Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 429, 166 P.3d 1198 (2007) (evidence
8 of a reasoned process must be included in the record). As discussed in detail below, the City's
9 scientific record was riddled by data gaps and contradictory/inconclusive determinations
10 regarding the source of and various methods to mitigate impacts to shoreline ecology.
11 Petitioners and other Bainbridge Island residents used the public comment process to submit
12 numerous scientific studies that had been developed to address those gaps and inconsistencies.
13 The City, however, opted to ignore those studies, providing no analysis of their relative merits
14 on the record. This failure resulted in an SMP that clearly cannot satisfy the SMA's "no net
15 loss" standard, which places a burden on the government to create a record showing that its
16 regulatory requirements are not "in excess of that necessary to assure that development will
17 result in no net loss of shoreline ecological functions and not have a significant adverse impact
18 on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A); *Ferry County v. Concerned*
19 *Friends of Ferry County*, 155 Wn.2d 824, 835, 123 P.3d 102 (2005) (a failure to memorialize
20 the reasoned process in the record is reversible error).

21 Third, the fact that the City's record cannot show that the SMP's mandatory
22 conservation easements are limited in size to mitigate only for the actual impacts caused by a
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1 proposed development results in a clear violation of the doctrine of unconstitutional conditions
2 as predicated on the Takings Clauses of the Washington State and United States Constitutions.
3 *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed.
4 2d 697 (2013). Under this doctrine, "theoretical harm" is not enough to justify a permit
5 condition demanding the dedication of a conservation easement—there must be "actual,
6 demonstrated harm." *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 687, 169 P.3d 14
7 (2007). Specifically, the Supreme Court of the United States places a heightened burden on the
8 government to show that a permit condition demanding a dedication of property bears an
9 "essential nexus" to an identified impact of the proposed development and is "roughly
10 proportional[]" to that impact. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 107
11 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), *and Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct.
12 2309, 129 L. Ed. 2d 304 (1994). The City plainly violated this doctrine when it enacted an SMP
13 demanding conservation easements that are "larger than the bare minimum needed for
14 protection." AR 4314 (Addendum to Summary of Science Report); *see also* AR 2400 (City
15 Environmental Technical Advisory Committee memorandum supporting precautionary buffers
16 that go "beyond the absolute minimum buffers to protect ecological functions"). The SMP's
17 mandatory conservation easement provisions, as written, are unconstitutional and invalid.
18 Fourth, the City violated the doctrine of unconstitutional conditions, as predicated on
19 the Takings and Search and Seizure Clauses, by enacting SMP provisions that authorize City
20 officials, as a mandatory condition of permit approval, to engage in continuous monitoring of
21 private property for years after an owner receives a permit. *See* AR 104–05 (SMP § 4.1.2.8(1));
22 AR 134 (SMP § 4.1.5.4(2)). As written, the SMP's monitoring provisions facially violate the
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Takings Clause by granting City officials a right to enter property that is superior to the owner's right to exclude. *Nollan*, 483 U.S. at 831–32 (invalidating a permit condition demanding an uncompensated access easement onto private property). The monitoring provision also violates the Search and Seizure Clauses by authorizing repeated intrusions upon private property without a warrant, judicial oversight, or any reasonable limitations on the subject and location of the searches. Wash. Const. art. 1, § 7; U.S. Const. amend. IV. The SMP's continuous monitoring provision is unconstitutional and must be invalidated.

Fifth, and finally, the City violated its statutory duty to draft provisions in "sufficient in scope and detail" (WAC 173-26-191(2)(a)(ii)(A)) and violated the Due Process prohibition against using terms that are too vague to properly inform citizens (and regulators) of their meaning by enacting provisions that require owners to secure City approval before engaging in any "human activity associated with the use of land or resources" "whether a permit is required or not." AR 48 (SMP § 1.3.5.2); AR 100–01 (SMP §§ 4.1.2.4.(2); 4.1.2.5(1)); AR 224 (SMP § 8, Definitions). Not only is the phrase "human activity" unlawfully and unconstitutionally vague, *State v. Bahl*, 164 Wn.2d 739, 745–46, 752, 193 P.3d 678 (2008), *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), but these provisions are subject to facial invalidation because the SMP holds individuals to civil and criminal liability regardless of the person's knowledge or intent. SMP § 7 (AR 250–53); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 114, 11 P.3d 726 (2000).

For these reasons, the Petitioners respectfully request the Court issue an order reversing the Growth Board's decision and invalidating the City's 2014 SMP update.

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IDENTITY OF PETITIONERS AND RELIEF REQUESTED

Petitioners Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. are Bainbridge Island shoreline homeowners and associations who joined with approximately 800 neighbors to form Preserve Responsible Shoreline Management (collectively, PRSM). PRSM's mission is to protect landowners' rights by advocating for a balanced and site-specific approach to land use laws. Its role in the community is primarily one of collaboration, education, outreach, and providing public comment on proposed land use and environmental regulations. PRSM, whose membership includes past City Council members, two prior mayors, and hundreds of homeowners, participated in the public process for development and approval of Bainbridge Island's SMP update and participated as petitioners in the administrative appeal before the Growth Management Hearings Board. Petitioners seek a decision reversing the Growth Board's Final Decision and Order[2]—in which the Board concluded that the SMP complied with the Shoreline Management Act (SMA), Ch. 90.58 RCW, and the Department of Ecology's 2011 SMA Guidelines, Ch. 173-26 WAC—and invalidating the City's SMP. PRSM is pursuing this appeal to ensure that the City, which is under a statutory mandate to revise and update its SMP every seven years, will do so in the collaborative and transparent manner intended by our Legislature, allowing all shoreline stakeholders to meaningfully participate in the update process.

[2] *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Cent. Puget Sound Growth Mgmt. Hr'ngs. Bd. No. 14-3-0012, 2015 WL 1911229 (Final Decision & Order, Apr. 6, 2015) (AR 5718–5838).

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ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

Petitioners assign error to the Growth Management Hearings Board's Final Decision and Order issued in *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Case No. 14-3-0012 (April 6, 2015).

1. Whether the Board erred in approving the City of Bainbridge Island's Shoreline Master Program (SMP), and Ecology's approval of the SMP, when
   a. the City failed to encourage continuous public participation as required by RCW 90.58.130 and WAC 173-26-090;
   b. the City failed to address scientific data and analysis properly, including failing to provide a reasoned, objective evaluation of shortcomings of the scientific information as required by RCW 90.58.100(1) and WAC 173-26-201;
   c. the City failed to justify in the record its decision to invoke the "precautionary principle" as required by RCW 90.58.100(1) and WAC 173-26-201(3)(g);
   d. the City failed to justify in the record its decision to depart from the "no net loss" standard required by WAC 173-26-201(2)(e)(ii)(A) in favor of a "net ecological gain" standard; and
   e. the City failed to draft certain provision of the SMP with "sufficient in scope and detail" to ensure implementation as required by WAC 173-26-191(2)(a)(ii)(A).

2. Whether the Board erred in approving the City's SMP and Ecology's approval of the SMP, because the SMP
   a. was adopted after a violation of procedural due process;
   b. unconstitutionally creates conservation easements in the property of homeowners;
   c. violates the doctrine of unconstitutional conditions;
   d. takes an access easement and authorizes warrantless searches of private property; and
   e. is unconstitutionally vague in its regulation of all "human activity."

STATEMENT OF THE CASE

Much of the dispute in this case arises from the fact that the City and Ecology chose to depart from the SMA's science-based "no net loss" standard, which places a burden on the

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government to create a record showing that the City engaged in a reasoned and objective analysis of all available science (WAC 173-26-201(2)(a)) to demonstrate its regulatory requirements are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A). Instead of following this carefully balanced mitigated development standard, the City chose to invoke the unscientific "precautionary principle" (AR 42 (SMP § 1.2.3)), requiring that individual shoreline homeowners go beyond mitigation by demanding that only the shoreline owners dedicate a conservation easement that is large enough to remedy all potential ecological impacts, including impacts caused by stormwater runoff from roads, drainage ditches, and sewers.[3] *See, e.g.*, AR 4311 (Conservation areas are designed to mitigate for "road runoff").

A. Legal Background: The Shoreline Management Act and "No Net Loss"

Washington's SMA directs each city and county to enact and periodically update its SMP, which constitutes the local development and use regulations for property adjacent to shorelines of the state. RCW 90.58.010–.920. In enacting the SMA, the Legislature readily acknowledged that basic societal needs—such as housing and public infrastructure—will inevitably result in alterations to the natural shoreline environment; thus, the Act directs local governments to develop regulations designed to "foster[]" priority shoreline uses, including the development of single-family homes on residentially zoned lots, while minimizing and/or

[3] SMP § 4.1.3.3(2) (conservation easements are designed to "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities"); SMP § 4.1.2.1 (the purpose of the easement requirement is to protect against "loss that may result from cumulative impacts of similar developments over time"); SMP § 4.1.2.2(4)(b) (in assessing an application for new development, use, and/or activities, the City will take into account "effects that may occur offsite").

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mitigating adverse impacts through appropriate planning. RCW 90.58.020 ("[C]oordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest.").

To carry out the Act's policy of balancing property rights and the environment, the SMA Guidelines (Ch. 173-26 WAC) require that SMP regulations "shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development." WAC 173-26-241(3)(j). Critically, the "no net loss" standard does not impose an environment-first requirement on shoreline regulations. Instead, concept of "no net loss," which originates in the field of environmental economics,[4] is the product of a carefully balanced compromise arising from years of negotiation with various stakeholders, including government, environmentalists, tribes, property owners, and builders. Thus, "no net loss" is based on the understanding that development and use of private property will occur and that any unavoidable impacts to ecological function can be offset by mitigation, thereby ensuring "no net loss" of overall environmental conditions. *See* WAC 173-26-201(2)(c) ("The concept of 'net' recognizes that any development has potential for actual, short-term or long-term impacts" and that mitigation can "assure that the end result will not diminish the shoreline resources and values as they currently exist."); AR 2127 ("For those projects that result in degradation of ecological functions, the required mitigation must at minimum return the resultant ecological function back to the baseline."); Department of Ecology, *Shoreline Master Programs Handbook*, at Ch. 4-2 (2010) ("[F]uture development will occur [and] is basic to the no net loss

[4] J.B. Ruhl & James Salzman, *Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State*, 64 Vand. L. Rev. 1, 29–35 (2011) (discussing the development of the no net loss standard).

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standard. The challenge is in maintaining shoreline ecological functions while allowing appropriate new development, ensuring adequate land for preferred shoreline uses and public access.").

The "no net loss" concept is focused on protecting existing conditions, whether pristine or developed, from identified impacts. AR 2127 ("No net loss" requires that of "those projects that result in degradation of ecological functions, the required mitigation must at minimum return the resultant ecological function back to the baseline."). To establish a baseline of actual ecological conditions, the Act requires (1) that the government create a record showing the local government engaged in a reasoned and objective analysis of "the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern" (WAC 173-26-201(2)), (2) that the scientific record demonstrate the conditions of area shorelines "as they currently exist" (WAC 173-26-201(2)(c)), and (3) that the record demonstrate that mitigation requirements are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A); WAC 173-26-186(8)(b)(i) (requiring that "regulations and mitigation standards" be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property"); AR 4282 ("The [SMA] defines the baseline for measuring no net loss to be 'existing shoreline conditions[.]'"). As part of this analysis, the Act requires the local government to identify the source of "adverse cumulative impacts" and "fairly allocate the burden of addressing cumulative impacts among development opportunities." WAC 173-26-186(8)(d); *see also* WAC 173-26-186(8)(b)(i) (requiring that "regulations and

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mitigation standards" be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property"); *Armstrong*, 364 U.S. at 49 (The Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The "no net loss" standard, therefore, is distinctly different from the more common type of environmental protection standard seen in statutes like the Endangered Species Act, which purports to ensure that ecological gains exceed any losses (a standard that is commonly termed either "net positive impact" or "net gain"). AR 2128 (Figure 1-2) (illustrating the limits on what impacts "no net loss" is designed to address); *Swinomish*, 161 Wn.2d at 435 (discussing the critical distinction between a "no new harm" standard and a "no harm" standard in the context of the Growth Management Act's critical area provisions). It is also distinct from a "precautionary principle" approach, which suggests that, in the absence of science, the government should demand mitigation that is greater than necessary to protect against any potential harm—no matter how speculative. AR 42 (SMP § 1.2.3), 2400, 4314. The distinction between the "no net loss," "net gain," and "precautionary" standards animates much of the parties' disputes.

B. Bainbridge Island's "Net Gain" and "Precautionary" SMP

The City of Bainbridge Island is a bedroom community located a short eight-mile ferry ride across Puget Sound from Seattle, Washington. The island is approximately twelve miles long and five miles wide, with a highly varied shoreline geography that runs approximately 53 miles. AR 4001. The City's waterfront is zoned primarily for single-family residential use and

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is historically almost entirely built out. Indeed, the City estimated that, when it began the process of updating the SMP, approximately 82 percent of the island's shoreline lots had been fully developed with single-family homes, housing roughly one-third of the island's residents. AR 4074. In addition to homes and apartment buildings, the prevalence of bulkheads, public roads, and other development adjacent to the shoreline has removed much of the native vegetation on the island, such that only a small percentage of waterfront property contains untouched shorelines warranting a "natural" designation. AR 4096 ("Only two areas [of the island] ... are relatively unmodified."); *see also* AR 4074 (approximately 4 percent of the City's shoreline falls within a "park" or "island conservancy" designation).

When the City started the process of updating its SMP in 2010, its existing scientific record was dated and incomplete. *See, e.g.*, AR 4097 ("available data regarding Bainbridge Island ... are dated and lack accuracy"). Because of this, the City's scientific consultants urged it to conduct "site-specific" studies "to fully understand and document the potential direct, indirect and cumulative impacts" of existing and future development. AR 4100. The consultants explained that additional studies were necessary to identify the baseline conditions on the shoreline from which "no net loss" must be measured, the source of existing environmental stressors (such as stormwater runoff from upland development and public roads), and the actual range of impacts that residential development may have on existing shoreline conditions. AR 4097–4100; AR 4299–4302; *see also* AR 4310 (warning that, on marine shorelines, site-specific information is "more important" for determining effectiveness of buffers).

Although these warnings should have spurred additional inquiry into questions that are readily available and easily addressed, the City chose not to do those additional studies. RCW

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90.58.100(1)(d) ("In preparing the master programs, … the department and local governments shall to the extent feasible: … Conduct or support such further research, studies, surveys, and interviews as are deemed necessary."). Instead, at the very outset of the four-year update process, the City announced its intention to rely on the "precautionary principle" in lieu of direct science (AR 1291 (City/Ecology emails); AR 42 (SMP § 1.2.3)) and to adopt aggressive measures designed to achieve "a net ecosystem improvement over time" rather than developing regulations designed to achieve the Act's more balanced "no net loss" standard. AR 50 (SMP § 1.5). This early decision by the City was extremely consequential. Without the necessary studies, the City's Addendum to Summary of Science Report ("the Addendum") explained that it could not arrive at any site-appropriate recommendations for the size of conservation easements. It further noted a lack of studies addressing the questionable effectiveness of buffers based on a variety of factors not addressed in the record. AR 4307–09. Nothing in the record, however, indicates that the additional studies were infeasible. AR 1291 (Ecology email noting that the Guidelines only allow a local government to invoke the "precautionary principle" when faced with "uncertainty" in the science.). The City simply chose not to do the additional work.

The City's decision to rely on the "precautionary principle" resulted in a decision to adopt conservation easements that its consultants and committee members acknowledged are "larger than the bare minimum needed for protection" in order to avoid a "worst case scenario" and "ensure success in the face of uncertainty about site-specific conditions." AR 4314 (Addendum to Summary of Science Report); *see also* AR 2400 (CETAC memorandum suggesting that government invoke the precautionary principle to go "beyond the absolute minimum buffers to protect ecological functions"). The early decision to invoke the

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"precautionary principle," in turn, allowed the City to circumvent the difficult, science-based requirement that it create a record demonstrating the conditions of area shorelines "as they currently exist" (WAC 173-26-201(2)(c)) and showing that its mitigation requirements are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions."[5] WAC 173-26-201(2)(e)(ii)(A). The City's reliance on the "precautionary principle" also led the City to base its default conservation easement demand upon the counter-factual assumptions that each shoreline property (1) is predominately covered with mature native vegetation, (2) provides all potential ecological functions, and (3) is functionally connected to the shoreline (*i.e.*, free of legally established bulkheads and other structures that nullify the effectiveness of conservation easements). AR 4307–08. Despite these obvious flaws, the City's revised SMP became effective when Ecology approved it in July 2014. Thereafter, the SMP became a state agency regulation. RCW 90.58.090(1).

C. The Conservation Easement Requirement

Central to this case is the City's enactment of provisions requiring shoreline property owners to dedicate a perpetual conservation easement as a mandatory condition on any approved activity on private property. Chapter 4 of the SMP requires that, as a mandatory condition on any new "development, use, or activities regardless of whether a permit is required" (AR 70 SMP § 4.1.2.4(2)), the owner must dedicate a conservation easement encompassing between 50–200 feet of private shoreline property. AR 96 (SMP Table 4-3). While conservation easements are a common tool for minimizing the impacts of development

[5] According to SMP § 4.1.2.6, the City considers everything from (1) taking no action to (2) taking affirmative steps to avoid or reduce impacts to (3) restoration and compensatory mitigation to fall under the term mitigation.

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by mandating a buffer between structures and environmentally sensitive areas,[6] it is well-settled that their effectiveness (and the appropriate size of buffers) will depend on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. *See*, *e.g.*, AR 4307–09 (discussing the range of site-specific conditions that can vary the need for and effectiveness of a buffer); AR 4310 (warning that, on marine shorelines, site specific information is even "more important" for determining the effectiveness of a proposed buffer). Thus, our Courts have consistently held that, for a conservation easement requirement to be lawful, there must be some provision requiring the government to show that the demand is both necessary and sufficiently scaled to the burdened project and site-specific conditions. *See Citizens' All. for Prop. Rts. v. Sims*, 145 Wn. App. 649, 668, 187 P.3d 786 (2008) (invalidating regulation requiring owners to set aside a forested buffer whether the demand was imposed automatically and was "unrelated to any evaluation of the demonstrated impact of proposed development"); *see also Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011) (critical area buffers must satisfy the nexus and proportionality tests); *Honesty in Envtl. Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (same).

Here, however, the City chose to forego the site-specific studies required by both science and law, adopting instead a default conservation area, the width of which is determined

[6] A.J. Castelle, et al., *Wetland and Stream Buffer Size Requirements – A Review*, 23 J. Envtl. Qual. 878, 878 (1994) (A buffer physically separates human activity from a sensitive area, leaving the area untouched, allowing it to mitigate for impacts, such as storm water runoff, caused by surrounding land uses.); *see also* Alan Desbonnet, et al., *Development of Coastal Vegetated Buffer Programs*, 23 Coastal Management 91, 93–95 (1995) (Based on a variety of site-specific factors, a fully vegetated buffer can provide a variety of ecological benefits, including impoundment of storm water runoff, filtration of sediment, nutrients, and pollutants, and creation of habitat corridors.).

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1 based on the land's general use designation, not on the property's existing development and
2 geographic conditions—let alone any identified impacts that the proposed development, use,
3 and/or activity might have on existing conditions of the property's shoreline. *Id.*; AR 112 (SMP
4 § 4.1.3.6(2)) ("The total area of the Shoreline Buffer shall be the equivalent of the length of the
5 property along the shoreline, multiplied by the required buffer depth as prescribed for the
6 specific shoreline designation in which the property is located."). The SMP directs the property
7 owner to either accept the City's default easement requirement (AR 101 (SMP § 4.1.2.4(4)) or,
8 if the owner wants to vary the configuration of the conservation area, he must, at his own
9 expense, prepare a "site-specific analysis of potential impacts and a mitigation plan." AR 101
10 (SMP § 4.1.2.4(3)). But even that variance-like provision does not ensure that the conservation
11 easement will be tailored to mitigate only for impacts caused by the proposed use because the
12 SMP requires that owners rely on the incomplete studies contained in the legislative record and
13 use only City-approved experts. AR 109 (SMP § 4.1.3.5(3)(c)); AR 306 (Appendix B-5(b)(4)
14 ("Such studies shall be prepared by experts in the area of concern, who shall be selected from
15 a list of approved consultants prepared by the Director.")). Thus, the SMP provides no
16 opportunity for independent expert analysis of a proposed development's actual impact on the
17 existing conditions of private shoreline property. Nor is there any provision allowing the owner
18 to "fairly allocate the burden" of addressing impacts caused by neighboring land uses, such as
19 stormwater runoff from public roads (WAC 173-26-186(8)(d)) or to address other non-
20 regulatory restoration projects that the City's consultants concluded "are likely to be offset" by
21 any unforeseen/incremental impacts of residential development. AR 2206.
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The dedication of a conservation easement has severe impacts on an owner's rights. The SMP divides the conservation area into two "zones." The more restrictive area—"Zone 1"—extends a minimum of 30 feet from the ordinary high water mark (OHWM) or to the limit of any existing native vegetation on the lot, whichever is greater. AR 112 (SMP § 4.1.3.6); AR 96 (Table 4-3). An expansion of Zone 1 is automatic and based solely on the presence of native vegetation, whether it is a stand of mature cedar trees, an ornamental Oregon grape, or a single sword fern (AR 388–401 (SMP Exhibit A (listing native species)))—there is no requirement that the City show that the plant is functionally connected to the shoreline or provides any measurable benefits to the shoreline ecology. "Zone 2" is the area landward of Zone 1 and extends to the outer limit of the prescribed conservation area as established by the property's use designation. AR 112 (SMP § 4.1.3.6(3)).

Within Zone 1, the owner has severely limited rights. Most notably, an owner of a residential zoned lot cannot build a house or any outbuildings, or even remodel existing structures, if they infringe on Zone 1. The SMP also impacts existing homeowners by requiring that an owner secure a permit before engaging in ordinary residential activities like yardwork or maintaining a footpath to one's shorefront.[7] Although the SMP states in one provision that its vegetation management standards do not pertain to existing landscaping (AR 109–10 (SMP 4.1.3.4(1))), that allowance is undone by another provision which states that "maintenance of existing residential landscaping is allowed subject to Sections 4.1.3.5(8) [requiring a clearing

[7] The SMP allows shoreline homeowners to maintain access to their private shorefront property without a permit only if the trail preexisted the regulatory update, the trail that is less than 4' wide, and if all work is done by hand. SMP § 4.1.3.8(1). If the trail does not meet these requirements, the owner is required to secure a shoreline development permit.

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1 permit for 'minor vegetation removal'] and 4.1.3.7(2) [requiring dedication of an easement if
2 vegetation within the conservation area is disturbed]." AR 116 (SMP § 4.1.3.8(1)).

3 Securing a clearing permit for yardwork has severe consequences: if, during the course
4 of ordinary maintenance, the owner removes any vegetation (whether native or not) in the
5 conservation area, the owner will be required to replant Zone 1 to achieve 65% vegetation
6 canopy coverage within 10 years—even if there was no vegetation there prior to development—
7 (AR 102 (SMP § 4.1.2.5(3)(b)), increase the canopy in Zone 2 to be contiguous with Zone 1
8 (AR 102 (SMP § 4.1.2.5(4)(b)), and even outside the conservation area the owner must "plant
9 in a manner that promotes a contiguous native vegetated corridor to the shoreline." AR 102
10 (SMP § 4.1.2.5(4)(d)); *see also* AR 116 (SMP § 4.1.3.5.8 (Even "[m]inor vegetation removal
11 outside the shoreline buffer" requires "replanting ... pursuant to Section 4.1.2.5.")); AR 117
12 (SMP § 4.1.3.8(4) (prohibiting any vegetation removal—including noxious weeds—that could
13 "reduce the vegetation canopy to less than 65%.")). Worse yet, the SMP requires City approval
14 for any "human activity associated with the use of land or resources" occurring within 200 feet
15 of the shoreline, "whether a permit is required or not." AR 48 (SMP § 1.3.5.2); AR 100–01
16 (SMP §§ 4.1.2.4.(2); 4.1.2.5(1)); AR 224 (SMP § 8, Definitions); *see also* AR 4300 (suggesting
17 that walking on one's own private property could be regulated because walking might result in
18 "trampling" of native vegetation).

19 While Zone 2 also places restrictions on ordinary residential uses, it primarily operates
20 as a presumptive restriction on development and the types of plants one can install in his or her
21 garden. Zone 2 is intended to be more malleable than Zone 1, allowing owners to reconfigure
22 Zone 2's boundaries if the owner can show that it is necessary to allow for residential
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development and use. But even that allowance comes with a hefty price: if an owner successfully varies the dimensions of the conservation area, he must execute a perpetual conservation easement expressly limiting all activities and uses allowed on his property. AR 303 (SMP App. B-3).

In addition to the numerous regulatory restrictions imposed on property within Zones 1 and 2, the SMP requires that shoreline property owners make the conservation area enforceable against current and future owners by demanding that, as a mandatory condition of any new permit or approval, the owner file a legal document binding the owner to perpetually maintain and manage the conservation area "in a predominantly natural, undisturbed and vegetated condition" in order to "protect," "enhance," and "restore" the marine shoreline. AR 105–06, 109 (SMP §§ 4.1.3.1, 4.1.3.2, 4.1.3.5(4)). The SMP further requires, as a condition of any permit approval requiring mitigation (including the mandatory conservation easements), that the landowner execute an agreement allowing the City to monitor the owner's use of his property for a period of at least five years, with no outer limit on how long the government can monitor the property. AR 104–05 (SMP § 4.1.5.4(2); SMP § 4.1.2).

D. PRSM Timely Challenged the SMP

1. Scientific, Statutory, and Constitutional Infirmities Raised in Public Comments

During the public comment process, PRSM members commented on various SMP proposals considered by the City and suggested ways to secure the rights of existing homeowners while also protecting the shoreline environment. *See, e.g.*, AR 742–44, 2510–11, 2539–40, 2567, 2767, 2821. These comments offered insight into the community's reaction to proposals, although due to the legislative nature of the SMP update process, the comments

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largely focused on addressing statutory standards and provided public comments that suggested ways to avoid potential constitutional conflicts. *Id*. Key to this line of commentary, PRSM and its members repeatedly objected to the City's early decision to invoke the "precautionary principle," the resulting incomplete and inconclusive scientific record, and the substitution of a "net gain" standard in place of the SMA's "no net loss" standard. *See, e.g.*, AR 876, 1638, 1790, 3574, 3623. The comments demanded that the City comply with the SMA and Guidelines and conduct the studies that its own scientists had concluded were needed to address the identified gaps in the record before demanding conservation easements from all shoreline residences. *Id*. Although these comments warned of *potential* constitutional infirmities arising from the proposal that any new development, use, or human activity should require the dedication of a mandatory conservation easement, based on an incomplete scientific record, they did not engage in a futile attempt to fully litigate such claims by producing facts relating to potential federal constitutional claims.[8] *Dolan*, 512 U.S. at 391 (burden of demonstrating nexus and proportionality on the government); *see also Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138, 449 P.3d 269 (2019) (same); *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 72 L. Ed. 842 (1928) (failure to include proof that a property restriction will advance the law's stated objective in the legislative record is "determinative" of a violation of due process).

[8] The City and Ecology offered no substantive response to the potential constitutional issues during the legislative process and are, therefore, bound by a record that is devoid of any factual rebuttal. *See, e.g.*, AR 5508–28 (Ecology response to selected public comments), 5594–99 (City response).

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2. Growth Board Review Was Limited to Questions of Statutory Compliance

Pursuant to the SMA, PRSM timely appealed the City's SMP to the Growth Board. *See* RCW 90.58.190(2)(a); RCW 34.05.510. After Ecology approved the City's revised SMP, PRSM followed the state-mandated exclusive procedure and filed a petition with the Growth Board that challenged the SMP as having been "adopted in a manner which directly violates state law and regulations." Petition for Review, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 2014 WL 5309151, at *1 (Oct. 7, 2014). The petition noted that the revised SMP "also violates numerous constitutional provisions," but acknowledged that such claims are "outside the scope of this Board's jurisdiction and will be addressed in another forum." *Id.*

In April 2015, the Growth Board issued a Final Decision approving the City's SMP. Final Decision & Order, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Case No. 14-3-0012, 2015 WL 1911229 (Apr. 6, 2015) (AR 5787–5905). The decision did not address any constitutional issues, noting that the Growth Board "has no jurisdiction to consider constitutional challenges." *Id.* at *73; *see also Aho Constr. I, Inc. v. City of Moxee*, 6 Wn. App. 2d 441, 462, 430 P.3d 1131 (2018) (The Growth Board "lack[s] jurisdiction to resolve constitutional challenges."); *see also Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196 n.21, 274 P.3d 1040 (2012) (same). Nor did the Board make factual determinations related to potential constitutional challenges. *See* Order on Motion to Supplement the Record, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 2015 WL 224867, at *5 (Jan. 5, 2015) (explaining that the Growth Board "does not

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conduct de novo hearings, examine witnesses, determine the authenticity of documents, *or otherwise engage in fact-finding*") (emphasis added, quotation omitted).

Review by the Board was instead limited to whether the SMP update complied with the SMA and Ecology's guidelines. *See Olympic Stewardship Found. v. Envtl. and Land Use Hr'gs Office*, 199 Wn. App. 668, 684–85, 399 P.3d 562 (2017); RCW 36.70A.290(4). Thus, PRSM's constitutional claims have never been adjudicated and are expressly preserved for de novo review by the trial court. RCW 34.05.570(3)(a), (b); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005).

3. PRSM's Statutory Claims Are on Appeal; PRSM's Constitutional Claims Are Properly Raised for the First Time to the First Adjudicative Body With Authority to Decide Such Claims

PRSM timely sought judicial review of the Growth Board decision and—as permitted for the first time—raised their constitutional claims by filing a combined complaint and petition for judicial review in this Court. The complaint names the City and Ecology as defendants and alleges violations of the search and seizure, due process, takings, and free expression clauses of the Washington and U.S. Constitutions, as well as violations of the federal doctrine of unconstitutional conditions. *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 393, 258 P.3d 36 (2011) ("[T]he State must take responsibility for any taking that occurs as a result of the regulations contained in the county's SMP."). Prior to a hearing on the merits, this Court granted Defendants' motion to dismiss the complaint portion of PRSM's filing, concluding that "judicial review under the [W]APA is the sole avenue of relief." PRSM accordingly amended its petition for judicial review to incorporate its state and federal constitutional claims. After a lengthy interlocutory appeal, the City finally conceded (Brief in

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Opposition (BIO) at 9) that defendants will not challenge the factual basis for establishing PRSM's standing, as required by *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), and *Guimont v. Clark*, 121 Wn.2d 586, 605, 854 P.2d 1 (1993) (proof of impact required in facial regulatory takings claim).[9] The City further conceded it will not challenge the factual bases for narrowing scope of facial constitutional review of PRSM's unconstitutional conditions claims, as established by *City of Los Angeles v. Patel*, 576 U.S. 409, 418, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888, 894, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The City made these critical concessions after admitting that—if Defendants did raise such factual contests—PRSM had both a statutory and federal constitutional right to present evidence for the first time before this Court.[10] *See, e.g.*, BIO at 12 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 24, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000)).

STANDARD OF REVIEW

On a petition for judicial review of a Growth Board decision, this Court reviews the Board's conclusions de novo and applies the standards of the Administrative Procedure Act (RCW 34.05, *et seq.*) directly to the record before the Board. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash. Growth Mgmt.*

[9] The City's BIO is available at https://www.supremecourt.gov/DocketPDF/20/20-787/165767/20210108171051427_OPPOSITION%20TO%20PETITION%20FOR%20WRIT%20OF%20CERTIORARI.pdf

[10] In its brief to the Supreme Court of the United States, the City disavowed the statutory argument it made to this Court in opposing PRSM's motion for additional evidence, insisting that under RCW 34.05.570(1)(c), "the record can be supplemented upon a showing that evidence is needed to resolve federal constitutional claims." BIO at i.

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Hearings Bd., 157 Wn.2d 488, 498, 139 P.3d 1096 (2006). Of the possible grounds for relief under the APA, five apply here:

> (a) 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;
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
>
> . . .
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [and]
> …
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3). Challenges under subsections (a) and (d) are reviewed de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Subsection (e) directs the Court to grant relief when the Board's order is not supported by substantial evidence. *Ferry County*, 155 Wn.2d at 833. The Court "may also grant relief from an agency order that is arbitrary and capricious, meaning that 'the decision is the result of willful and unreasoning disregard of the facts and circumstances.'" *King Cty. Pub. Hosp. Dist. No. 2 v. Washington State Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013). While the enactment of an ordinance under the SMA is generally presumed valid, this deference ends when it is shown that the government's actions are clearly erroneous. *See Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). As demonstrated below, the challenged provisions of Bainbridge Island's SMP update are clearly erroneous and unconstitutional, and, therefore, are due no deference or presumption of validity.

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A. This Court's Consideration of Constitutional Claims Is De Novo With No Regard to Growth Board Findings and Conclusions

PRSM's constitutional claims are raised for the first time to the first court with authority to consider them; thus, they must be reviewed de novo. RCW 34.05.570(3)(a). Indeed, as a matter of federal constitutional law, a plaintiff who raises facial constitutional claims on judicial review of an administrative decision is entitled to review independent of the record, even where the "constitutional claims were raised by way of a cause of action created by [the state's administrative review] law." *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997). And as a matter of state law, the Growth Board "lack[s] jurisdiction to resolve constitutional challenges." *Aho Constr. I*, 6 Wn. App. 2d at 462; *see also Olympic Stewardship Found.*, 166 Wn. App. at 196 n.21; *Twin Falls, Inc. v. Snohomish County*, CPSGMHB No. 93-3-0003, 1993 WL 839715, at *44 (refusing to consider evidence of a constitutional violation because the Board's "role is limited to reviewing the legislative decisions of cities and counties"). Accordingly the Board did not make any factual determinations related to potential constitutional challenges. *See* Order on Motion to Supplement the Record, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 2015 WL 224867, at *5 (Jan. 5, 2015) (explaining that the Growth Board "does not conduct de novo hearings, examine witnesses, determine the authenticity of documents, or otherwise engage in fact-finding") (quotation omitted).

B. The City's Consideration of Science Is Subject to "Critical Review"

The Washington Supreme Court has held that the government's consideration of science when developing critical area regulations is subject to a more intense, "critical review" application of the clearly erroneous standard. *Swinomish*, 161 Wn.2d at 435 n.8 (citing *Cougar*

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Mountain Assocs. v. King County, 111 Wn.2d 742, 749, 765 P.2d 264 (1988)). The Court has explained that meaningful scrutiny is required for several reasons. First, close review is necessary to ensure that the SMA's policy of balancing property rights and the environment are in fact incorporated into an SMP update. *Cougar Mountain*, 111 Wn.2d at 749 (citing Note, *A Standard for Judicial Review of Administrative Decisionmaking Under SEPA*—Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978)*, 54 Wash. L. Rev. 693, 699–700 (1979)). Second, "the major basis for judicial deference to administrative decisions—the expertise of the particular agency—does not apply when the agency is acting outside the area of that expertise," as is the case when a legislative body like the City Council is making decisions based on admittedly uncertain scientific reports. *Id*. Third, the nature of the rights involved "makes a more intense standard of review appropriate." *Id*. And fourth, because the Legislature made the SMA the State's policy in regard to shoreline development, critical review of local government decisions "is necessary to ensure that the statewide policy [including the protection of property rights] is not undermined by inappropriate political or economic pressures at the local level." *Id*.

ARGUMENT AND AUTHORITIES

I.

THE CITY'S FAILURE TO PROVIDE FOR MEANINGFUL PUBLIC PARTICIPATION VIOLATED THE SMA AND DEPRIVED RESIDENTS OF DUE PROCESS

The Growth Board committed obvious error when it concluded that the City had complied with the SMA's public participation requirements despite uncontested evidence that the City failed to meaningfully respond to hundreds of public comments, altered a key definition

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after the City Council had approved the final SMP, and added a substantive section to the SMP after the comment period was closed. AR 5799–5815. The Act places an unusually high value on public participation in the development of and amendment to SMPs. RCW 90.58.130 mandates that cities seek out and encourage public participation in all stages of an important set of decisions to be made in the SMP update process.

> To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a **full opportunity for involvement** in both their development and implementation, the department and local governments shall:
>
> (1) Make reasonable efforts to inform the people of the state about the shoreline management program of this chapter and in the performance of the responsibilities provided in this chapter, **shall not only invite but actively encourage participation** by all persons and private groups and entities showing an interest in shoreline management programs of this chapter.

RCW 90.58.130 (emphasis added). Similarly, the guidelines require the following:

> In developing master programs and amendments thereto, the department and local governments, pursuant to RCW 90.58.130 shall make all reasonable efforts to inform, fully involve and encourage participation of all interested persons and private entities, and agencies of the federal, state or local government having interests and responsibilities relating to shorelines of the state and the local master program.
>
> … Such procedures shall provide for **early and continuous public participation** through broad dissemination of informative materials, proposals and alternatives, opportunity for written comments, public meetings after **effective notice, provision for open discussion, and consideration of and response to public comments**.

WAC 173-26-090 (emphasis added).

The Growth Board in this case committed clear error when it chose to give no effect to bolded language above to find the City's actions in compliance with the public participation requirements. AR 5799–5805, 5810–11. Public participation, however, is not merely a box to

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1 be checked during the process, but rather a meaningful engagement with the public through "all reasonable efforts," "effective notice," and requiring "consideration and response to public comments." WAC 173-26-090. Thus, the Board has elsewhere concluded that RCW 90.58.130 requires that local government must "provide the public with 'a full opportunity for involvement in both [the] development and implementation' of master programs, and to 'not only invite but actively encourage participation." *Citizens For Rational Shoreline Planning v. Whatcom County and Washington State Department of Ecology*, W. Wash. Growth Management Hr'gs Bd. Case No. 08-2-0031, 2009 WL 1420895, at *6 (Final Decision & Order, April 20, 2009). This, according to Board precedent, requires an opportunity for "continuous public participation" in the update process. *Id*.

A. The City's Failure to Provide for Meaningful and Continuous Public Participation Violated the SMA

1. Section 7 of the SMP, Imposing New Criminal Penalties Beyond the Scope of the SMA, Was Enacted Entirely Without Public Input

The City clearly violated the Act's public participation requirement when it decided to add an entirely new substantive section to the SMP at the eleventh hour, without adequate notice or opportunity for public comment. The addition of the new section is not trivial. Section 7 of the SMP (Violations, Enforcement and Penalties) impacts the liberty rights of Island residents by creating new misdemeanors in SMP §§ 7.2.6 and 7.2.8 that are beyond the scope of penalties contemplated by the SMA. *See* RCW 90.58.220. Specifically, Section 7 subjects landowners to both civil and criminal liability for violating shoreline regulations, regardless of the person's knowledge or intent. AR 250–53 (SMP § 7). Section 7 also authorizes City officials to conduct searches for noncompliance with "any ordinance of the city" or "[f]or any other reason required

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by this code or any city ordinance," regardless of whether the subject of the search relates to the permit condition. BIMC § 1.16.010 (incorporated by SMP § 7 (AR 250–53)).

The first time Section 7 was made available to the public was its inclusion in the agenda packet for the City Council's March 13, 2013, Study Session—after the Planning Commission had completed review of the final SMP and just two days before the City submitted the SMP to Ecology for approval. AR 5810–11. However, it was never referenced on the agenda and was not addressed by the public or City Council at the March 13, 2013, meeting. AR 2445. At the April 10, 2013, Study Session, the Council supposedly approved Section 7 even though it was not referenced in the notice or agenda. AR 3696. In other words, Section 7 may have existed within City Hall, but was not publicly disclosed or vetted in accordance with the Act's public participation requirements. *See* AR 5811 (noting Ecology's admission that Section 7 was "inadvertently" omitted from the copy of the SMP used in the May 8, 2013, public hearing). Whether or not the City's omission of regulatory language imposing criminal penalties and authorizing warrantless searches of private property was inadvertent is irrelevant; the SMA's public participation requirements are mandatory and do not tolerate failure to publicly address an entire section of the SMP. The Growth Board's decision to the contrary constitutes clear error and must be reversed. *Citizens For Rational Shoreline Planning*, W. Wash. Growth Management Hr'gs Bd. Case No. 08-2-0031, 2009 WL 1420895, at *6.

2. The City Failed to Provide Meaningful Response to Public Comment

The City also violated the Act by not considering and responding to public comments in the record. WAC 173-26-090 (The City's public participation procedures "shall provide for … response to public comments."). This regulatory mandate is not a trivial requirement, as the

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1 Growth Board apparently concluded. AR 5804 (construing "[r]esponse to public comments" to
2 only require the City to "tak[e] them into consideration"). Indeed, it is well-recognized that
3 "[t]he opportunity under the APA to comment on proposed rules is 'meaningless unless the
4 agency responds to significant points raised by the public.'" *St. James Hosp. v. Heckler*, 760
5 F.2d 1460, 1470 (7th Cir. 1985) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36
6 (D.C. Cir. 1977)). The Washington State Supreme Court in *Mahoney v. Shinpoch* highlighted
7 the importance and necessity of receiving and considering public comment.

8 > Full consideration of public comment prior to agency action is both a statutory and constitutional imperative. … The opportunity for public comment is essential to
9 > agency rulemaking, not because public comment is invariably helpful in discerning legislative intent but because the agency's authority to act is premised on the
10 > functioning of such procedural safeguards.

11 107 Wn. 2d 679, 691, 732 P.2d 510 (1987) (citations omitted).

12 *Mahoney*'s point about public participation being necessary to protect procedural
13 safeguards is critical to this case. Indeed, the long interlocutory appeal over PRSM's motion
14 for additional evidence highlights the importance of a requirement mandating that government
15 provide a meaningful response to public comments. As this Court is well-aware, Washington's
16 APA limits judicial review to the record developed before the City. RCW 34.05.562. Such a
17 limitation on evidence, however, will only be upheld if it comports with due process, which
18 demands that an aggrieved person must be provided an adequate opportunity to learn and
19 respond to the government's position on contested matters. *See Bowman Transp.*, 419 U.S. at
20 288 n.4 ("[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses
21 an opportunity to offer a contrary presentation."); *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir.
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1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process.").

In order to construe RCW 90.58.130 and WAC 173-26-090 consistently with the Due Process Clause (as is required by RCW 34.05.020 ("Nothing in [the APA] may be held to diminish the constitutional rights of any person[.]")), the government's response must be adequately tailored to the comment evidencing actual consideration of the public's comments, as opposed to a mere notation of "comment noted," as the City Council tersely provided on 146 occasions and the Planning Commission responded 349 times. AR 2475–24. The City's failure to respond to comments in a meaningful fashion not only undermines the procedural safeguards written into the SMA, but it also has the obvious effect of discouraging and disparaging public input. No one will continue talking to a blank wall—particularly one that so tersely dismisses public input. The Growth Board's failure to give effect to the text of WAC 173-26-090, when combined with its characterization of the response requirement as a frustrating inconvenience for the City, demonstrated the same disregard for basic rights and warrants invalidation.

3. The City Staff Changed the Text of the SMP After the Public Hearing

The City violated the public participation provisions when it allowed staff to make substantive changes to the text of the SMP after the last public hearing and prior to sending it to DOE for its review. AR 5812–15. The last public hearing was on May 15, 2013. After that hearing, the City substantively altered the definition of "existing development" in the final version of the SMP, adopting a definition that was not subject to public review and was not voted upon by the City Council at the final City Council meeting. AR 267 (SMP § 8, at 237).

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This change was material and prejudicial because it created a seriously flawed and confusing provision in the SMP. *See* AR 151 (SMP § 4.2.1).

The minutes reveal a motion was made and approved to accept the following proposal: "Shoreline planner Ericson proposed to clean up the use of the term 'existing development' in place of 'nonconforming structure.'" AR 2471. This purported "clean up" replaces the narrow, legally defined term "nonconforming development" with a phrase so broad as to potentially encompass every existing structure, effectively (and consequentially) equating "existing development" to "nonconforming." AR 267 (SMP § 8, at 237). The Growth Board's conclusion that the amendment was only intended to delete the use of the offensive term "nonconforming" finds no factual support in the record, and the Board's decision fails to acknowledge the legal impact of the City's decision to expand the definition applicable to nonconforming structures to include all "existing development." AR 5815. This substitution of terms was done after public comments were closed, so we have no record of what staff's intention was. Nor does the motion reveal how this change would impact the "nonconforming development" provisions of the SMP, because the memo fails to acknowledge whether the new term adds, removes, or replaces text in any particular place. Obviously, there was no "effective notice" of this change. Without being subjected to any public scrutiny or even a vote by the City Council, there is simply no record to explain the change or its impact. The Board's conclusion that public participation was not required to address this change is contrary to its conclusion in *Citizens For Rational Shoreline Planning*, W. Wash. Growth Management Hr'gs Bd. Case No. 08-2-0031, 2009 WL 1420895, at *6, and must be reversed.

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This particular public participation challenge is not moot. While the present lawsuit has been underway, the City has since deleted the definition of "existing development," which strongly implied that everything that exists was a nonconforming use. However, this issue is not moot as it relates to the process employed by the City to make last second changes to the SMP. The City will be amending its SMP for decades to come and the parties need to know whether the SMA's public participation priorities allow a City, particularly staff only, to make substantive changes after the last public hearing before the SMP is submitted to Ecology for approval. PRSM contends that changes in language must not be made behind closed doors and that the procedure employed here is intolerable even without the high priority on public participation.

4. The City Failed to Provide Information in a Timely Manner

The Board committed clear error when it held that the City's decision to severely limit public comments on late-disclosed Appendices to the SMP. AR 5700–5815. The record establishes that the City made all of the SMP Appendices (in more or less final form) available for the first time in advance of the November 20, 2013 hearing—a half year after the City had closed the written comment period. AR 3699. The City, moreover, imposed severe limitations on oral comments at the November hearing. AR 5801–02. Petitioner Young attempted to speak at the public hearing regarding the August 31, 2011, Herrera report, newly disclosed as Appendix C to the SMP, which purports to settle scientific uncertainty and justify the mandatory conservation easements and had just been made available for public comment. AR 2835–39. The City Council refused to let her speak on either of these topics on the basis that testimony was being limited to changes made to the SMP after May 8, 2013. *Id*. Ms. Young

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pointed out that the City's designation of the report as Appendix C was not disclosed to the public until November 2013. AR 2829. Although the Herrera report had been in the record since 2011, it sat amongst hundreds (if not thousands) of pages of other scientific studies—many of which contained inconsistent and contradictory conclusions. *Id*. Nevertheless, the City refused to let her, or anyone, comment on any issue. *Id*. The City's refusal to allow public comment on these new provisions frustrated the public participation requirements for the development of SMPs.

These City actions are not merely a violation of Ms. Young's right to speak about provisions in the SMP at a public hearing. By gagging one person's opportunity to comment, the City has deprived the City Council of the right to receive public input, the right of citizens present to comment, and to hear the input of a fellow member of the public. Not to be forgotten is the stifling effect on participation by others who saw how Ms. Young was treated.

The Growth Board's conclusion that this failure by the City is a "no harm, no foul" matter fails to grasp the importance of public participation and the significance of the City's late disclosure. AR 5811–12. As discussed in detail in Argument Section II below, the City's scientific record was riddled by inconsistent and contradictory studies. Several scientists complained of significant gaps in the scientific record which required additional study. Given that context, the Board's supposition that Bainbridge Island residents should have suspected that the City would incorporate a single document as an Appendix to the SMP is baseless. Moreover, the City's selection of the Herrera report as Appendix C was significant for many reasons, including the statement by Herrera that the decisions as to the precise buffer sizes were to be made by the City on the basis of policy and that Herrera had simply found the science to

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justify the City's selections. AR 2845–63, 2867–95. Given the size of the record and the number of inconsistent scientific opinions about the appropriate size of buffers, it is inconceivable for the Board to conclude that Bainbridge residents should have known that a single letter, drafted well before much of the scientific record was developed, would provide the City's justification for its mandatory precautionary conservation easements and be included as an Appendix to the SMP. AR 5812.

If the public had timely access to the complete SMP, members of the public could have provided comment to the City Council which might have changed the final product that was delivered to the DOE for approval. One can easily imagine the public and Council debate that would have ensued if everyone knew the City's consultants had taken the position that "policy," rather than science (which had been the focus of years of public input), would drive the decision on the size of the mandatory conservation easements. The City's motive for not releasing Appendix C to the public is understandable, but the choice not to do so is inconsistent with the SMP's demands to encourage public participation.

The fact remains that there is nothing in the record prior to the City's submission of the SMP to Ecology for approval indicating that the City intended to append the Herrera report to its SMP. Nor is there any excuse for withholding this information until the eleventh hour. Indeed, the continuing nondisclosure of materials that would eventually comprise the SMP Appendices was brought to the City's attention several months. On July 22, 2013, several Petitioners protested submission of the June 10, 2013, draft to Ecology for approval because Appendices C, D, and E to the SMP had not been disclosed to the public prior to submission to Ecology. E-198. The Growth Board's decision constitutes obvious error and must be reversed.

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B. The City's Eleventh-Hour Amendments to the SMP Violated Residents' Due Process Rights

The City's failure to comply with the Act's public participation requirement also violated PRSM's procedural due process rights of notice and an opportunity to put evidence in the record showing the impact of the City's several eleventh-hour amendments to the SMP. *See* U.S. Const. amend. XIV, § 1 (No state shall "deprive any person of life, liberty, or property, without due process of law.").

As discussed above, Washington's APA mandates that aggrieved persons provide all evidence pertaining to challenges to an SMP during the public comment process. Due process, therefore, demands that, "in any proceeding which is to be accorded finality, an individual must be provided notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Harris v. Cty. of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"). In the context of administrative proceedings, this means that the individual must be provided an opportunity to an adequate opportunity to learn and respond to the government's position on contested matters before the record is closed. *Bowman Transp.*, 419 U.S. at 288 n.4. The City's failure to provide for public comments relating to late-disclosed additional and amendments to the SMP violated the procedural due process rights of Bainbridge Island residents. The SMP must be invalidated.

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II.

THE CITY'S CONSERVATION EASEMENT CONDITION IS UNLAWFUL AND CONTRARY TO PUBLIC POLICY

The SMA requires that a permit condition demanding a dedication of a conservation easement be no larger than necessary to mitigate for those identified impacts that are attributable to the proposed development or use.[11] As a critical corollary to this requirement, the SMA holds that a landowner cannot lawfully be forced to dedicate property to mitigate for impacts caused by preexisting neighboring property uses or public roads. These two requirements are expressly set out by the SMA Guidelines, which state that a conservation easement must be supported by a scientific record determining the conditions of regulated shorelines "as they currently exist" (WAC 173-26-201(2)(c)) and demonstrating that restrictions and mitigation requirements are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A). Compliance with these requirements is necessary, in turn, to ensure that "regulations and mitigation standards" are designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i). Because the City failed to create a record satisfying these fundamental requirements, the Growth Board's decision should be reversed and the SMP's conservation easement provisions invalidated.

[11] At the most basic level, the SMA directs local government to create a record showing that it based its decision to impose those regulations upon an analysis of "the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern." WAC 173-26-201(2); RCW 90.58.100.

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A. The City's Record Fails to Satisfy the Statutory Criteria for Demanding a Perpetual Conservation Easement

Although the Growth Board ultimately concluded that the City's conservation easements satisfied the SMA, its decision was premised on clear and reversible error. Specifically, the Board overlooked the significance of the City's decision to enact restrictions guided by the "precautionary principle" (AR 42 (SMP § 1.2.3)) and aimed at achieving a "net ecosystem improvement" standard. AR 50 (SMP § 1.5) (explaining that the Program's "master goal" is to ensure "a net ecosystem improvement over time"); AR 4285–86 (science acknowledging that "no net loss" is qualitatively different from "net gain"); AR 4362 (same). This failure by the Board is extremely consequential because it resulted in an erroneous decision to "disregard" arguments challenging the City's adoption of a precautionary, "net ecological gain" standard in lieu of the Act's more balanced "no net loss" requirement.[12] *See* AR 5793, 5764, 5769–71; *see also Swinomish*, 161 Wn.2d at 430 (recognizing that a statutory obligation

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[12] The Board's misunderstanding of this issue resulted in the erroneous conclusion that the "no net loss" vs. "net gain" argument presented by the parties did not fall within the issues set out by the Amended Petition for Review. That conclusion is clearly wrong. Paragraph 47 asks "Whether the City is not in compliance with RCW 90.58.020, RCW 90.58.030, RCW90.58.140 and WAC 173-26-221(5)(a) by imposing conservation easements in SMP 4.1.2.7 in regard to uses which are part of single family residential use. SMP 4.1.2.7." AR 576. And, more specifically, Paragraph 60 asks:

> Whether the City is not in compliance with RCW 90.58.100(1) and WAC 173-26-201 in failing to identify and assemble the most current, accurate, and complete scientific and technical information available, failing to consider the context, scope, magnitude, significance, and potential limitations of the scientific information, and make use of and incorporate all available scientific information. In particular, the City's failures in regard to technical and scientific information are evident in regard to:
>
> a. The need and effectiveness of buffers to Puget Sound for single family residential use;
> b. The contribution of pollution to the Puget Sound from Bainbridge Island from City streets and leaks from the City's sewer systems;
> c. The fact that the buffers selected were not driven by science-based information but City policy unrelated to science;
> d. Conflicting conclusions are drawn from the same scientific information to support policy-driven choices;
> e. The master program provisions are not based on a reasoned, objective evaluation of the relative merits of the conflicting scientific data.

AR 580–81 (emphasis added); *see also* AR 599–600 (incorporating the allegations in those paragraphs into the Growth Board's restated issues I-4 and III-1).

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to enact regulations designed to protect existing conditions from new harm is legally distinct from a requirement to enhance environmental conditions). As a result, the Board failed to hold the City and Ecology to the Act's mandatory prerequisite for enacting provisions that demand perpetual conservation easements from shoreline owners. *Id*.

At the most basic level, the City failed to comply with the SMA mandate to create a record showing that it based its decision to impose the regulations upon an analysis of "the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern." WAC 173-26-201(2)(a); RCW 90.58.100. To ensure that this requirement is satisfied, our courts have held that the decision to require a dedication of private property as a conservation easement must, at bare minimum, be supported by a legislative record showing that the government "considered the best available science **and** employed a reasoned process" when updating its SMP.[13] *KAPO*, 160 Wn. App. at 273 (emphasis added); *see also HEAL*, 96 Wn. App. at 533 ("[S]cience is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.").

Substantial evidence in the record is conclusive of the City's failure to comply with the Act. Indeed, its own consultants repeatedly cautioned that the record was incomplete in regard to three critical issues: (1) the actual environmental conditions on regulated shorelines, (2) what impacts may result from development, and (3) the effectiveness of conservation areas:

[13] The requirement that government place evidence of a reasoned process on the record is necessary to ensure that environmental regulations are not "needless" or "implemented haphazardly, on the basis of speculation or surmise" due to government "official[s] zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spears*, 520 U.S. 154, 176–77, 117 S. Ct. 1154, 137 L. Ed.2d 281 (1997) (reasoning adopted in *HEAL*, 96 Wn. App. at 531).

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- "In some cases information about existing conditions … was not available at a level that could be assessed qualitatively[.]" AR 2129 (Cumulative Impacts Analysis (CIA)).
- Calling for "[m]ore focused studies that apply to marine shorelines, and that are specific to the shoreline conditions and typical land uses found in the City of Bainbridge Island, would better inform the broad range of recommendations found in the literature for removing pollutants." AR 4308 (Addendum).
- Warning that "available data regarding Bainbridge Island ... are dated and lack accuracy." AR 4097 (Best Available Science Report (BAS)).
- Concluding that the City must perform "site-specific" studies "to fully understand and document the potential direct, indirect and cumulative impacts" of existing and future development. AR 4100 (BAS).
- Noting that "more research and analysis of buffer effects on marine functions is needed." AR 4310 (Addendum).
- Concluding that data regarding fish habitat "is incomplete" and that "several areas [of the island] have not been surveyed." AR 4312 (Addendum).
- Cautioning that "information on the application and effectiveness of marine buffers is more limited[.]" AR 4307 (Addendum).
- Noting that "uncertainty about specific site conditions" will result in "fixed-width" precautionary buffers that are "larger than the bare minimum needed for protection." AR 4314 (Addendum).

In this circumstance, the SMA states that the local government "shall to the extent feasible … [c]onduct or support such further research, studies, surveys, and interviews as are deemed necessary." RCW 90.58.100(1)(d). The City, however, chose not to conduct those additional necessary studies and included nothing in the record indicating that any of the recommended studies would be infeasible.[14] AR 4314 (noting that "the City could use available scientific guidance to develop variable buffers for the different site conditions and the resources to be protected").

The Growth Board committed an obvious error when it concluded that the City complied with the Act's science requirement (AR 5820–30) without addressing the City's

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[14] Where the party bearing the initial burden of proof asserts that the record lacks critical evidence, that burden is satisfied upon providing 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, 211, 562 P.2d 655 (1977).

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failure to create an adequate record showing a reasoned and objective analysis of all science, (WAC 173-26-201(2)), and its failure to "consider all ... studies" or "conduct ... further research," or "utilize all available information" as required by RCW 90.58.100(1). AR 3705–08, 3725–28. In its briefing below, PRSM argued that the City failed to discuss risks of residential use to shoreline functions as they currently exist and failed to explain how it arrived at its decision to base the size of its conservation easement requirement on policy grounds rather than direct science. AR 3706 (challenging City's goal decision to exact oversized conservation easements designed to "improve the ecological functions within the current residential development pattern"); *see also* AR 2114–15 (Intervenor's Prehearing Brief discussing the limitations inherent in the SMA's "no net loss" standard).

Neither respondent addressed these arguments. *See* AR 3848–50, 3852 (Ecology Brief); AR 3967–3970 (City Brief); *see also* AR 5676 (PRSM Reply Brief); AR 5764–66 (Intervenor Reply Brief). Instead, the City and Ecology set up a strawman defense by mischaracterizing PRSM's claim as challenging the validity of the (incomplete) studies contained in the record. Thus, Respondents provided only generalized and diversionary arguments that buffers may be beneficial to shoreline ecology without ever addressing the proverbial "elephant in the room:" that the record lacks any information showing that the SMP's default conservation easements are linked to the actual conditions on regulated properties and limited in size to mitigate only for those impacts caused by the proposed development or use. *Id*. Indeed, neither respondent even mentioned the precautionary principle or the City's stated goal that the SMP achieve "a net ecosystem improvement over time" in their pleadings. *Id*. As a result, the Growth Board's

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cursory decision discusses only the Respondents' strawman defense, leaving PRSM's policy challenge unaddressed. AR 5820–22.

1. The Growth Board Erroneously Interpreted or Applied the Law in Regard to the City's Duty to Objectively Consider All Science on the Record When Developing its SMP

RCW 34.05.570(3)(d) authorizes relief against an agency that erroneously interprets or applies the law in an adjudicatory proceeding. The Growth Board's proceeding below was an adjudicatory proceeding and it erroneously interpreted and applied the law regarding the SMA's procedures for considering scientific information in the development of SMPs. It is obviously important that government regulations "follow the science," but the only way to know whether that is happening is to create a record demonstrating how and where the City considered science and justifying its departures therefrom, which in its most basic form, is the traditional scientific method of gathering data and analyzing it in a transparent process to arrive at the most solid and supportable conclusions. This, the City did not do. The Growth Board committed obvious error when it approved the City's failures in regard to science. AR 5816–31.

The SMA requires cities to engage in an objective analysis of the science—even science that is contrary to the government's preferences—when adopting and revising SMPs. Specifically, RCW 90.58.100(1) mandates:

> In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:
>
> (a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;
>
> (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

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(c) **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;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) **Utilize all available information** regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

RCW 90.58.100(1) (emphasis added).

These basic requirements are fleshed out in the administrative code. Under the heading of "Basic Concepts," the governing regulations, WAC 173-26-201(2)(a), require cities to:

> First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science. …
>
> Second, base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available.
>
> Local governments should be prepared to identify the following:
>
> (i) Scientific information and management recommendations on which the master program provisions are based;
>
> (ii) **Assumptions made concerning, and data gaps in, the scientific information;** and
>
> (iii) Risks to ecological functions associated with master program provisions. Address potential risks as described in WAC 173-26-201 (3)(d).
>
> The requirement to use scientific and technical information in these guidelines does not limit a local jurisdiction's authority to solicit and incorporate

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> information, experience, and anecdotal evidence provided by interested parties as part of the master program amendment process. Such information should be solicited through the public participation process described in WAC 173-26-201 (3)(b). **Where information collected by or provided to local governments conflicts or is inconsistent, the local government shall base master program provisions on a reasoned, objective evaluation of the relative merits of the conflicting data.**

WAC 173-26-201(2) (emphasis added).

These provisions of the law essentially create three requirements: (1) Assemble, (2) Consider, and (3) Use. Critically, in regard to the use of scientific information, the Act recognizes that there will be assumptions, gaps in data, and in some situations, conflicts or inconsistencies in the scientific information. As a result, the Act and its governing regulations require that these anomalies are not to be ignored, but rather subjected to a "reasoned, objective evaluation of the relative merits." *Id.* The City failed to do this on the record.

As a prefatory consideration of this issue, it is important to realize the science is supposed to drive significant features of the SMP and not mere trifles. Science needs to be a significant consideration of the need and effectiveness of buffers that separate residential uses from the Puget Sound, which must also include consideration of other significant sources of pollution to the water, such as water runoff from City streets and leaks from the City's sewer systems. These are topics that were addressed by Dr. Don Flora in several memoranda highlighting errors, conflicts, and data gaps contained in the city's scientific record. *See, e.g.*, AR 2237–88, AR 2322–31, AR 2336–92, AR 2404–08, AR 2418, AR 2420–23, AR 3532–90, AR 3597–3639.

PRSM can and will describe the conflicting scientific data below, but, like the Growth Board, PRSM cannot provide any citation to where the City provided a reasoned, objective

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evaluation of it because it does not exist. The burden, therefore, is on the Respondents to identify where in the record this reasoned, objective evaluation occurred and PRSM is confident that it cannot do so. *Higgins v. Salewsky*, 17 Wn. App. 207, 211, 562 P.2d 655 (1977) (Where a party makes a sufficient showing "to render the existence of the negative probable," the court will reasonably presume that to be true unless the responding party can show the contrary.).

In the decision below, the Growth Board erroneously concluded that the City had, in fact, engaged in a "reasoned, objective evaluation of the relative merits of conflicting data." AR 5828–31. But the record materials the Board cites do not support its decision. The Board, for example, cites Exhibit 938 as evidence that the City evaluated gaps in its scientific record, but the exhibit is miscited. *See* AR 5818, 5821–22, 5826, 5828–29. In truth, Exhibit 938 is a letter from Dr. Flora to the City's Environmental Technical Advisory Committee (ETAC) identifying an error in a scientist's analysis of shoreline stressor data. AR 2404–08. Nor can reference to the actual ETAC memo that the Board assumedly intended to cite save its conclusion, because that memorandum merely acknowledges some of the data gaps identified by Dr. Flora, but fails to mention, let alone evaluate, all the problems with the science raised by Dr. Flora. *See* AR 2395–2403.

Ultimately, the Board's conclusion that the City satisfied its duty to engage in a reasoned and objective analysis of the science unduly relied on a statement that the City attorney made at the hearing on the merits, claiming that the City had objectively evaluated the merits of Dr. Flora's studies "off the record."

> At the hearing on the merits, counsel for the City explained the Herrera Addendum was the city's evaluation and response to the positions advanced by Dr. Flora. Similarly, ETAC's work addressed the Flora assertions about data gaps and uncertainties, though not naming him personally.

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AR 5829 (footnotes omitted). Argument of counsel, however, does not constitute evidence. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008); *Swinomish*, 161 Wn.2d at 435 n.8 (The court may not rely on "assurances" of government attorneys as a substitute for evidence.). Thus, the Board's conclusion is unsupported by substantial evidence.

Even so, the Board's conclusion that the Herrera Addendum was in response to the input by Dr. Flora is nonsensical and must be rejected. The input by Dr. Flora was submitted **after** the Herrera Addendum (AR 4233–4354) was issued on January 26, 2011. *See, e.g.*, AR 2237–88 (dated Mar. 13, 2011), AR 2322–31 (dated April 25, 2011), AR 2336–92 (dated August 4, 2011), AR 2404–08 (dated August 15, 2011), AR 2418 (dated September 5, 2011), AR 3532–63 (dated November 2013), AR 3597–3639 (dated October 26, 2013). Thus, not only did the Board erroneously interpret and apply the law requiring a reasoned, objective evaluation, its decision was not based on substantial evidence as required by RCW 34.05.570(3) and should be reversed.

The Growth Board also erred by failing to enforce the Act's requirement that the City create a record addressing the numerous science-based problems identified by Dr. Flora, including the following seven issues.

First, during the update process, the City received public comments objecting that several of the studies that the City consultants, Herrera, were relying upon for recommending mandatory conservation easements dealt with the effect of buffers between water bodies and commercial agricultural operations and feedlots for cattle. AR 821–32; AR 850; AR 876; AR 889; AR 908 n.20; AR 1634–35; AR 1644; AR 1660; AR 1686; AR 1718; AR 1726; AR 1734; AR 2349; AR 2416. These several memoranda from Dr. Flora demonstrated that Herrera's

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recommendation for a conservation easement was based, in part, on conclusions drawn from a feedlot study. AR 323 (SMP, Ex. 1).[15] Dr. Flora raised the obvious problem with drawing direct correlations between impacts on water bodies from cattle feedlots to impacts on water bodies from typical residential landscaped yards. AR 3532–63; AR 3580–90; AR 3607–14. Dr. Flora also pointed out that studies cited by the SMP had explained that nutrients from feedlots and farms is approximately 8 to 13 times more severe than what comes from single-family residences. AR 3580–90 (Dr. Flora, *Analyses Supporting Buffer Widths of 10 Feet or Less* (2013) (E-189)).Thus, as Dr. Flora's analysis explained, adjustments of the agricultural numbers to typical landscaped yards yields fully effective buffer widths of 5–10 feet. *Id.*

Again, Petitioners are not asking the Court to determine whether the City's use of the data which equates homes to be equivalent to cattle feedlots in terms of pollution was appropriate, whether the Herrera recommendations were best, or whether Dr. Flora's analysis of the misuse of data about cattle feedlot data was right or correct. Rather, the Court needs to determine whether the City complied with its obligation to provide a "reasoned, objective evaluation of the relative merits of the conflicting data." WAC 173-26-201(2). In no reasonable world is complete silence equivalent to a reasoned, objective evaluation of the fact that the data it relied on came from agricultural, not residential, settings. No such evaluation was ever done on the record.

Second, the science the City relied upon was also based on the impacts of use of fully forested upland property on relatively circumscribed and functionally intact freshwater bodies,

[15] The science used by Brennan and Herrera, two consulting firms which the City heavily relied upon, contain many faulty technical references, which were called to the City's attention. AR 3607–14; AR 2322–28. As was the pattern throughout this whole SMP update process, the City just ignored the fact numerous of the technical references were faulty.

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such as rivers and lakes, and not the impact of new development on already developed residential property located on saltwater bodies such as the Puget Sound which is directly connected to the entire Pacific Ocean and beyond. *See* AR 4307 (Addendum to Summary of Science Report, explaining that the conservation area recommendations "plot the relationship between the effectiveness of a mature forested buffer at providing an ecosystem function at various buffer widths"). As Dr. Flora pointed out, that science did not address existing conditions on Bainbridge Island or the impact of future development along tidally influenced expansive saltwater bodies is an inherent limitation on that data because that data was used to determine the nature of the buffers between residential properties and Puget Sound. The analysis the City chose to follow was also woefully out of date. AR 1739–73 (Dr. Flora, *A Review of Protection of Marine Riparian Functions In Puget Sound Washington* (2011)).

Again, the City simply ignored Dr. Flora's memorandum. Maybe the City thinks that it can show that Dr. Flora is wrong and the application of data from freshwater bodies to expansive saltwater bodies is not that big a deal as it instinctively appears to be. But maybe Dr. Flora is right. Whichever is true, to comply with the law, there must be something in the record that shows the City conducted a reasoned and objective evaluation of the undisputed fact that the science it relied on related to freshwater bodies—not saltwater—and the buffers being developed were for protecting a saltwater body and not rivers or lakes on the Island. The City cannot point to anything in the record showing its reasoned, objective evaluation of contrary, critical science because it did not do so.

Third, the SMP was intended to address pollution to water and yet the City ignored the science that the single most significant contributor to pollution to the water around Bainbridge

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Island is the runoff from City roads and leaks in the City's sewer system. AR 4311 (Hererra, concluding that most of the problems associated with runoff are "primarily associated with roads and other impervious surfaces"); AR 3594 (Flora: "Island buffers would be trivial sources relative to the two billion cubic feet of saltwater close to us and the billion-plus gallons of nutrient-laden sewer discharges piped into the Sound daily."). The City's SMP, however, was written as if homeowners along the waterfront are the sole or predominant cause of water pollution. If, in fact, 99% of the water pollution can be remedied by the City fixing its sewer system or filtering road runoff, then that scientific information should be considered when deciding what regulations should be imposed to prevent the remaining 1 percent that might come from waterfront houses. PRSM recognizes that the science which may conflict with what the City relied upon might not be perfect, but that is the whole point of providing a reasoned, objective evaluation made out in the open and reflected in the City's record. For whatever reason, it did not, but swept the source of the pollution issue under the rug, hoping no one would notice.

Fourth, the City relied on science suggesting that protection of shoreline trees over the water will promote the habitat for juvenile salmon without engaging in a reasoned objective analysis of science contesting the truth of that conclusion. "[A]dding shoreline trees will not make life better for juvenile salmon." AR 2391. Summarizing his peer-reviewed paper entitled *Evidence of Near-Zero Habitat Harm from Nearshore Development* (2009), Dr. Flora states "[a]nalyses show there is no significant relationship between anthropomorphic stressors and habitat." AR 1601. Where is the reasoned, objective evaluation of this science? Again, the City just ignored it and refused to engage in the proper evaluation.

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Fifth, the City assumed that bulkheads were bad for forage fish and herring habitats. Several recent studies demonstrated that is not true. AR 2421–23 (D. Flora, *Shore Protection and Nearshore Habitats: Recent Puget Sound Research* (2010)). Again, there is no reasoned, objective evaluation of this science. Perhaps in other contexts, cities can turn a blind eye to scientific analyses that are contrary to their preferences. But as addressed above, this is not allowed when developing an SMP. The law requires, in addition to obtaining as much scientific information as possible, a reasoned, object evaluation of any conflicts or gaps in the science and it is this law which the Court must enforce.

Sixth, the SMP is written as if non-native vegetation, such as lawn grass, is a negative feature for the shoreline environment. But again, Dr. Flora provided his assessment of this assumption: Replacing lawns with non-grass vegetation will not likely reduce alleged potential problems with excess nutrients nor pollutants. AR 1671–82. (D. Flora, *Lawns of Grass: An Assessment* (2010)). Evidence was submitted that criticized the scientific reports used by the City in that lawnless, native, 3-tiered vegetation runs against significant scientific literature. AR 1715–36 (D. Flora, *Some Notes On Vegetated Buffers for Bainbridge Commissioners and Council Members* (2011)).

Seventh studies in the record concluded that there were other viable options to control stormwater, sediment, pollutants, and wildlife that make extensive buffers unnecessary. AR 2376–83 (D. Flora, *Protecting Island Nearshores: Alternatives to Buffers* (2010)). The study further points out that Section 5.1.1 of the Herrera report dealing with bulkheads' linkage to loss or disruption of nearshore habitat is not supported by any of the eight citations given by

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Herrera. AR 2337–93; 2395–2403. Again, this is an example of conflicting scientific information and there is simply no reasoned, objective evaluation of it in the record.

The scientific gaps and potentially faulty assumptions are real. When criticism about the gaps in the science and/or potential misuse of scientific information surfaced, the City simply ignored it. This failure to provide a reasoned, objective evaluation of the conflicting science is directly contrary to RCW 90.58.100(1) and specifically contrary to WAC 173-26-201(2). PRSM does not ask the Court to evaluate the relative merits of scientific information, but does insist that the City follow the law that it engage in a reasoned, objective evaluation of the science, essentially an analysis for relying on one scientific analysis over another. The Board erroneously interpreted and applied the law in regard to these requirements when the City failed to evaluate all scientific information presented. PRSM is entitled to relief under RCW 34.05.570(3)(d).

2. The City's Reliance on the "Precautionary Principle" Violates the SMA's Science and Reasoned Process Requirements

The City undermined the Act's science-based approach by announcing its intention to rely on the unscientific precautionary principle in 2010—at the very outset of the four-year update process and well before the scientific record had been completed. AR 1285–92. Throughout the update process, PRSM members submitted public comments seeking clarification of how and why the City intended to employ the precautionary principle. AR 771–72, 1284–90, 2544, 3102. The City provided no substantive response, ignoring all but one comment to which it simply responded: "comment noted." AR 2544. Thus, beyond the broad statement that "[t]he 'precautionary principle' was employed as guidance in updating the policies and regulations of this SMP" (AR 42 (SMP 1.2.3)), there is absolutely no record

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indicating which policies it guided and, more critically, which regulations were in fact guided by the principle.

The precautionary principle cannot be invoked to cut short the requirement that the City engage in a reasoned process of developing and considering science and other relevant information. WAC 173-26-201(3)(g); *Taylor Shellfish Company, Inc. v. Pierce County and Ecology*, GMHB No. 18-3-0013c, 2019 WL 5088376, at *4 (Order on Reconsideration, Aug. 7, 2019) (concluding that the precautionary principle cannot "justify[]the enactment of burdensome regulations by citing environmental concerns not supported by scientific or technical information"); *see also Cougar Mountain*, 111 Wn.2d at 749 (evidence of a reasoned process "is necessary to ensure that the statewide policy is not undermined by inappropriate political … pressures at the local level"). Binding case law places strict limits on local government authority to invoke the precautionary principle when enacting land use regulations: the government must create a record showing that (1) the regulated activity poses a risk of irreversible harm to the environment, (2) there is an "absence of relevant scientific information" on the topic, and (3) the precautionary measures will only last "until the uncertainty is sufficiently resolved." *Yakima Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693, 279 P.3d 434 (2012); *see also Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd.*, 14 Wn. App. 2d 514, 531–32, 471 P.3d 960 (2020); *Ferry Cty.*, 184 Wn. App. at 742. The City and Ecology cannot meet these standards.

First, the City's record contains no indication that any new residential development, use, or activity on residential shoreline property will pose a risk of irreversible harm to the environment. There is no evidence in the record, for example, that removal of a native tree (AR

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389–90)—let alone a sword fern (AR 397)—poses a risk of *permanent* harm. *See, e.g.*, AR 4359 (concluding that any impacts caused by vegetation removal can be fully mitigated by replacing removed vegetation with species that provide similar functional benefits); AR 2178 (same). The same holds true for residential development and use. Instead, the science contained in the record is uniform in the conclusion that most development impacts can be minimized or avoided through such mitigation measures as properly locating a project (AR 4098), complying with setbacks (AR 2162), and employing low-impact development practices (AR 4299–4301; *see also* AR 2206) (concluding that "[p]otential incremental and/or unavoidable impacts are likely to be offset by ongoing and planned restoration actions over time"); AR 4302 (listing measures that could avoid and/or mitigate for impacts due to stormwater); AR 4314 (listing alternatives to conservation easements that may help avoid and/or mitigate development impacts).

Second, the City and Ecology have repeatedly insisted that the SMP's default conservation easements are supported by direct science and that all uncertainties and gaps in the record were resolved prior to its enactment. *See, e.g.*, Ecology Opposition to Petition for Review at 14–15 (representing that all gaps in the scientific record were addressed and the record is complete); City Answer to Motion for Reconsideration at 10–11 (claiming that "[t]he trial court in this case considered whether there were any 'gaps in the record' that needed to be filled in order to reach a decision and determined that no such gaps existed based on the thoroughness of the record below"). Although PRSM disputes that characterization of the scientific record, Respondents' position estops the City from claiming that the scientific record was sufficiently uncertain to justify invocation of the precautionary principle. AR 4314

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(Addendum to the Summary of Science concluding that sufficient information was available to develop site-appropriate buffers).

Third, the City's decision to make the conservation easements perpetual in duration is fatal to its invocation of the precautionary principle. The precautionary principle, by definition, suggests only a temporary strategy designed to protect against a perceived threat until such time as the science can ensure that its regulatory restrictions are properly keyed to actual development risks. David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 NOTRE DAME L. REV. 497, 560 (2004) (Misapplication of the "Precautionary Principle … risks advancing a model for scientific inference that lacks both objective measures and quantitative clarity."); Gary E. Marchant & Kenneth L. Mossman, *Arbitrary and Capricious: The Precautionary Principle in the European Union Courts* 1 (2005) (noting that precautionary measures are often viewed as being among "the most reckless, arbitrary, and ill-advised laws").

The City's failures to create a record of a reasoned process addressing the legal standards for invoking the precautionary principle, and to specifically identify which regulations were guided by the principle, violate the SMA. *Ferry Cty.*, 155 Wn.2d at 835. The Board's decision must be reversed and the SMP invalidated.

B. The Record Fails to Demonstrate That the City Engaged in a Reasoned Process Justifying Its Decision to Depart from the SMA's "No Net Loss" Standard and Adopt a Stricter "Net Ecosystem Improvement" Standard

The City similarly failed to create a record explaining why it departed from the SMA's "no net loss" standard to adopt a very different "net ecosystem improvement" standard. AR 50 (SMP § 1.5); *see also Swinomish*, 161 Wn.2d at 430 (recognizing legal distinction between the

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standards). While the SMA and its Guidelines afford substantial discretion to local governments to adopt SMPs that reflect local circumstances (WAC 173-26-171(3)(a)), an SMP update must comply with the Act's mandatory requirements. *Olympic Stewardship Found.*, 199 Wn. App. at 680, 684. This includes the requirement that an SMP adhere to the State's carefully constructed "no net loss" standard (*id*. at 572), which is essential both to the Act's science requirements and the Legislature's policy of promoting appropriate residential development and use of private shoreline property. RCW 90.58.020; *see also Futurewise v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion) (The Act "strik[es] a balance among private ownership, public access, and public protection of the State's shorelines."); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998) (The purpose of the SMA "is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning."); *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012) (noting that protecting private property is an express policy of the SMA).

Key to the "no net loss" strategy is the requirement that the City first establish a baseline from which development impacts can be measured and mitigated by identifying the ecological conditions of area shorelines "as they currently exist." WAC 173-26-201(2)(c). Without satisfying that initial step, a city cannot ensure that existing shoreline resources will be protected from new development impacts, and likewise cannot show that its mitigation demands will be limited to only that which is necessary to offset development impacts. WAC 173-26-201(2)(e)(ii)(A) (Government must show that mitigation requirements are not "in excess of that

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necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions."); Stacey E. Fawell, *Implementing No Net Loss for Washington State Shoreline Management* at 33, 44 (University of Wash. School of Maritime Affairs, 2004) ("No net loss" provides a meaningful standard for balancing "environmental protection and economic development."); *id*. at 33, 64–65, 69, 75 (government must develop an accurate baseline of existing conditions). Without first establishing a baseline of actual conditions, local governments cannot achieve "no net loss" without either violating the SMA's goal of avoiding shoreline ecological impacts (by setting mitigation standards too low) or violating property rights by demanding conservation easements in excess of what is actually required.

A "net gain" approach, by contrast, is unpredictable and ultimately arbitrary and standardless because the only requirement is that the owner provide environmental benefits in an amount that exceeds project impacts, with no limit on how much benefit may be required of a permit applicant. AR 2400 (City memorandum suggesting that government go "beyond the absolute minimum buffers to protect ecological functions"); AR 4314 (study concluding that precautionary buffers should be "larger than the bare minimum needed for protection" to avoid a "worst case scenario"). Thus, when applied to a demand for property, a "net gain" standard would allow the government to enact the type of oversized conservation easements that are expressly prohibited by the SMA and the State and Federal Constitutions, as discussed below.

Despite the differences between these two standards, the City's legislative record contains no reasoned justification for its decision to adopt a "net gain" standard. As a result, the SMP lacks any discussion regarding the Act's limits on how much mitigation can be imposed

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on a project, opting instead to adopt a policy of demanding more than necessary to mitigate the impacts of proposed development. SMP § 4.1.3.3(2) (conservation easements are designed to "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities"); *see also* AR 50 (SMP § 1.5) (explaining that the Program's "master goal" is to ensure "a net ecosystem improvement over time"); SMP § 4.1.2.1 (the purpose of the easement requirement is to protect against "loss that may result from cumulative impacts of similar developments over time"); SMP § 4.1.2.2(4)(b) (in assessing an application for new development, use, and/or activities, the City will take into account "effects that may occur offsite"). The City's departure from the "no net loss" standard is not justified in the record and violates the SMA.

III.

THE CITY'S CONSERVATION EASEMENT CONDITION VIOLATES THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS PREDICATED ON THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SEC. 16 TO THE WASHINGTON STATE CONSTITUTION

The Supreme Court of the United States established the doctrine of unconstitutional conditions to "vindicate[] the Constitution's enumerated rights by preventing the government from [using the permit process to] coerc[e] people into giving them up." *Koontz*, 570 U.S. at 604; *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593–94, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) (The state "may not impose conditions which require relinquishment of constitutional rights[,]" and "[i]t is inconceivable" that constitutional guarantees "may thus be manipulated out of existence."). Put simply, the doctrine holds that that government lacks lawful authority to demand that citizens waive a constitutionally protected right in exchange for

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a government benefit or permit. *See, e.g.*, *Lafayette Ins. Co v. French*, 59 U.S. 404, 407, 18 How. 404, 15 L. Ed. 451 (1855).

The unique nature of the land-use permitting context compelled the U.S. Supreme Court to devise a "special application of the 'doctrine of unconstitutional conditions,'"[16] designed to protect a landowner's rights in property while recognizing the government's authority to plan for appropriate community development.[17] *Koontz*, 570 U.S. at 605. Thus, the Court in *Nollan* and *Dolan* devised the two-part "essential nexus" and "rough proportionality" test to define the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: the government may require a landowner to dedicate property only where the dedication is sufficiently related in subject matter and in scope to mitigate the negative impacts of the proposed development.

Critically, the U.S. Supreme Court placed a heightened burden of establishing nexus and proportionality on the government. *Dolan*, 512 U.S. at 391; *see also Ralph v. Wenatchee*, 34 Wn.2d 638, 642–44, 209 P.2d 270 (1949) (proof of actual harm is necessary because any law that undertakes to limit the exercise of rights beyond what is necessary to provide for the public welfare, cannot be included in the police power of the government).

A. PRSM's Facial Unconstitutional Conditions Claim Is Justiciable

The PRSM Petitioners include shoreline residents of Bainbridge Island who are impacted by the City's SMP update and have standing to challenge its constitutionality. *Koontz*, 570 U.S. at 606–07 (landowners may challenge a permit condition before it is imposed). PRSM

[16] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).
[17] *See Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S. Ct. 447, 72 L. Ed. 842 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

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has exhausted its administrative remedies and the constitutional claim is ripe for judicial review. RCW 34.05.570; *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) (A facial constitutional claim ripens "the moment the challenged regulation or ordinance is passed."); *Orion Corp. v. State*, 109 Wn.2d 621, 633, 747 P.2d 1062 (1987) (facial constitutional challenge to mandatory provisions of an SMP update is ripe for judicial review immediately upon adoption). Washington courts, moreover, have repeatedly recognized the viability of facial unconstitutional conditions claims challenging the enactment of shoreline ordinances that require a dedication of land. *KAPO*, 160 Wn. App. at 273; *HEAL*, 96 Wn. App. at 533; *see also Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014), *rev'd on other grounds*, 576 U.S. 350, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) (holding that facial review is appropriate where a permit condition is predetermined and imposed evenly on a class of property owners). There are no procedural impediments to PRSM's facial unconstitutional conditions claim.

The fact that PRSM asserted facial claims does not alleviate the County of its constitutional burden under *Nollan* and *Dolan*. *See Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1086 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017); *HEAL*, 96 Wn. App. at 533–34. While is generally true that a "plaintiff who argues that a law is facially invalid is claiming that the law is not, and never can be, applied in a way that satisfies constitutional restrictions,"[18] challenges implicating the Takings Clause are subject to a different and unique standard. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993). "'In the takings context, the basis of a facial challenge is that the very

[18] Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 53 (2010).

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enactment of the statute has reduced the value of the [plaintiff's] property **or has effected a transfer of a property interest**.'" *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010) (en banc) (emphasis added, citation omitted). Thus, the question before the Court is whether the enactment of the SMP update conditions permit approval upon a demand that owners dedicate property in an amount that is not sufficiently related to an identified impact of proposed development. *Levin*, 71 F. Supp. 3d at 1086. If the City's legislative record indicates that the answer is yes, then the SMP facially violates the doctrine, and the ordinance must be invalidated. *Id*. at 1089.

B. As Written, the City's Conservation Easement Provisions Violate the Nexus and Proportionality Tests

The City's default conservation easement unquestionably constitutes an exaction because it conditions permit approval upon the transfer of well-recognized interests in property to the public.[19] Thus, the City and Ecology bear the burden of showing, in the record, that the dedication satisfies the nexus and proportionality tests.

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[19] *KAPO*, 160 Wn. App. at 273 (critical area buffers must satisfy the nexus and proportionality requirements of *Nollan* and *Dolan*); *see also Koontz*, 570 U.S. at 604 (holding that a fee imposed in lieu of a conservation easement is subject to the doctrine); *Dolan*, 512 U.S. at 393–94 (invalidating a government's demand that a landowner dedicate a stream buffer); *Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("[T]here is little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public purpose."); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. at 661 (a code provision requiring rural property owners to set aside vegetation retention areas as a condition of permit approval constituted a dedication); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 758–59, 49 P.3d 867 (2002) (a code provision requiring "reservation of open space" as a condition of permit approval is the equivalent of a dedication); *see also* RCW 64.04.130 ("A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect … or conserve for open space purposes … constitutes and is classified as real property."); RCW 58.17.020(3) (defining a dedication as "the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted"). Under both Washington state property law and federal constitutional law, a dedication of a property interest can be achieved via notice on a binding public document, such as a deed restriction. *See, e.g.*, *Richardson v. Cox*, 108 Wn. App. 881, 884, 890–91, 26 P.3d 970 (2001); *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 165, 684 P.2d 789 (1984); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

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Under the nexus test, the City and Ecology must begin by showing a sufficient connection between the imposed condition and identified development impacts. *Nollan*, 483 U.S. at 836–37. To make this showing, the government must first "identify a public problem or problems that the condition is designed to address." *Burton v. Clark Cty.*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998). Next, government must also show that the proposed development "will create or exacerbate" that problem. *Id*. at 521. Finally, the government must demonstrate that its "proposed condition or exaction ... tends to solve, or at least to alleviate, the identified public problem." *Id*. at 522.

Respondents cannot satisfy the nexus test because the SMP exacts a default, preset conservation easement keyed only to the land's use designation—the demand is not based on the intensity of the development (*see* AR 373–74 (requiring the same size easement for a 120-foot patio as a new home)) or the existing ecological conditions of the shoreline. The City's default conservation easement demand is therefore contrary to the scientific record; site-specific information is required to establish a nexus between a proposed development and an imposed easement. *See, e.g.*, AR 2185 (concluding that "the impacts of development will vary depending on the type of shoreline habitat"); AR 4306 ("One size does not necessarily fit all, especially when considering local (i.e., specific) historical and future land uses, property rights, and social values supported by marine riparian areas[.]"). The City's failure to include a provision requiring that it carry the initial burden of demonstrating a nexus by identifying the anticipated impacts of a proposed development on the actual ecological condition of the shoreline is fatal to its default conservation easement demand.

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But even if Respondents could show that a sufficient nexus exists, the government cannot "show that its proposed solution to the identified public problem is 'roughly proportional' to that part of the problem that is created or exacerbated by the landowner's development."[20] The City exacts a default conservation easement based solely on general (and counterfactual) assumptions about shoreline conditions. AR 2187 (Cumulative Impacts Analysis, explaining that the City's buffers were developed based on "the average existing conditions in each environmental designation"); AR 4307 (Addendum, explaining that the conservation area recommendations "plot the relationship between the effectiveness of a mature forested buffer at providing an ecosystem function at various buffer widths"). Critically, the proportionality test cannot be satisfied by "generalized statements" which are "too lax to adequately protect" constitutional rights. *Dolan*, 512 U.S. at 389. Instead, the government must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391; *see also* AR 4308 (Addendum, concluding that to develop appropriate and effective buffers based on the generalized buffer science, the City must conduct for "more focused studies … specific to shoreline conditions and typical land uses found in the City of Bainbridge Island[.]").

Respondents moreover cannot satisfy proportionality because, as written, the conservation easements are intended to go "beyond the absolute minimum buffers to protect ecological functions" (AR 2400) by mitigating preexisting impacts resulting from neighboring and upland property uses. SMP § 4.1.3.3(2) (conservation easements are designed to "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities");

[20] *Burton*, 91 Wn. App. at 523; *see also Dolan*, 512 U.S. at 391 (A condition must be "related both in nature and extent to the impact of the proposed development.").

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SMP § 4.1.2.1 (The purpose of the easement requirement is to protect against "loss that may result from cumulative impacts of similar developments over time."); SMP § 4.1.2.2(4)(b) (City will consider "effects that may occur offsite"); AR 50 (SMP § 1.5) (SMP is designed to ensure "a net ecosystem improvement over time."); *see also* AR 4311 (Conservation areas are designed to mitigate for "road runoff."). And the easement's vegetation standards force landowners to maintain their property in "a predominantly natural, undisturbed and vegetated condition" in order to "protect," "enhance," and "restore" the marine shoreline. AR 105–06, 109 (SMP §§ 4.1.3.1, 4.1.3.2, 4.1.3.5(4)). Consequently, the City cannot satisfy the proportionality requirement. The SMP's default conservation easement demand is unconstitutional and should be invalidated.

C. The SMP's Buffer Adjustment Procedure Does Not Cure the Constitutional Violation

The provision allowing owners to adjust the dimensions of the default conservation area via a "Site Specific Vegetation Management Plan" does not cure the SMP's constitutional violation for three reasons. AR 108–09 (SMP § 4.1.3.5(3)(a)). First, a violation of the doctrine occurs the moment the government conditions issuance of a permit upon an unconstitutional demand—the provision allowing an owner to vary the easement's default dimensions does not alter the fact that the demand was unconstitutional in the first instance.[21] *See Koontz*, 570 U.S. at 604–05 (government may not use an unconstitutional demand as a coercive bargaining chip).

[21] "[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 570 U.S. at 604–05 (citations omitted).

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Second, the City's site-specific alternative unlawfully shifts its burden of preparing an impact assessment onto individual property owners. *See Dolan*, 512 U.S. at 391. And third, the site-specific alternative provides no relief from the requirement to mitigate for "effects that may occur off-site" (AR 99 (SMP § 4.1.2.3(4)(c))) and for "cumulative impacts of similar developments over time." AR 100 (SMP § 4.1.2.4(1)(g)); AR 108 (SMP § 4.1.3.5(3)(a)(i)(B)). In addition, the site-specific alternative provides no opportunity for an independent assessment of development impacts because it requires the owner to employ a City-approved expert and use only the scientific and technical information compiled to support the default buffers. AR 108–09 (SMP § 4.1.3.5(3)(a)(i)(C)). It does not allow an owner to provide additional studies necessary to address the acknowledged gaps in the legislative record—gaps that directly pertain to nexus and proportionality. *Id.*

IV.

THE CITY'S MONITORING AND INSPECTION CONDITIONS AUTHORIZE GOVERNMENT TRESSPASSES AND GENERAL WARRANTLESS SEARCHES IN VIOLATION OF THE SEARCH AND SEIZURE CLAUSES OF THE U.S. AND WASHINGTON CONSTITUTIONS

The City's failure to complete the scientific record resulted in its adoption of yet another "precautionary" violation of the unconstitutional conditions doctrine. The SMP includes a mandatory monitoring provision that goes far beyond ordinary permit inspections by holding private property open to government trespass and ongoing searches for an indefinite period of at least five years after issuance of a permit—without requiring a warrant, judicial oversight, or any reasonable limitations on the subject and location of the searches:[22]

[22] The fact that the SMP's inspection and monitoring provisions implicate the search and seizure clauses of the State and U.S. Constitutions is beyond dispute. *Patel*, 576 U.S. at 415 (noting that "[f]acial challenges under the Fourth Amendment are not categorically barred or especially disfavored"). In *Florida v. Jardines*, 569 U.S. 1, 11,

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> When mitigation is required, a periodic monitoring program shall be included as a component of the required mitigation plan. To ensure the success of the required mitigation, monitoring shall occur for a minimum duration of five years from the date of the completed development. The monitoring plan may also require that periodic maintenance measures be included as recommended by a qualified professional. The duration of monitoring may be extended if the project performance standards set forth in the approved mitigation plan fail to be accomplished, or, due to project complexity, the approved mitigation plan requires a longer period of monitoring.

AR 104–05 (SMP § 4.1.2.8(1)); *see also* AR 134 (SMP § 4.1.5.4(2) ("Development, uses, and activities adjacent to critical areas … shall be monitored to assure that these areas are not being adversely impacted by approved development[.]")); AR 275 (SMP App. B (establishing that mitigation performance standards have been met may take "seven to ten years" of monitoring)).

Critically, like the conservation easement exaction, the monitoring requirement is imposed automatically as a mandatory condition of any new permit without any individualized determination of risk to the environment. The stated purpose of the SMP's monitoring provisions is to ensure that owners maintain the conservation easement to the City's satisfaction, and to facilitate enforcement actions where the City is unsatisfied. AR 104 (SMP § 4.1.2.6.4(d) ("The mitigation activity shall be monitored and maintained to ensure that it achieves its intended functions and values[.]")); AR 99 (SMP § 4.1.2.3(2) (The policy advanced by this provision is to "[e]nsure, through appropriate monitoring and enforcement measures[,]

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133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), and *Collins v. Virginia*, __U.S. __, 138 S. Ct. 1663, 1670, 201 L. Ed. 2d 9 (2018), the United States Supreme Court reiterated that the mere act of physically entering a home or its curtilage without consent constitutes a search for Fourth Amendment purposes. *Caniglia v. Strom*, No. 20-157, 593 U.S. __, slip op. at 3 (May 17, 2021) (quoting *Jardines*, 569 U.S. at 8) (affirming that where a warrant, consent, and exigent circumstances are absent, an agent of the state is limited to those actions that "'any private citizen might do' without fear of liability"). The protections of article I, section 7 of the Washington Constitution extend to administrative searches coextensively with those of the Fourth Amendment. *Centimark Corp. v. Dep't of Labor & Indus.*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005); *accord State v. Browning*, 67 Wn. App. 93, 95, 834 P.2d 84 (1992) (analyzing protections against unreasonable searches provided under both the federal and state constitutions).

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that all required conditions are met, and improvements are installed and properly maintained.”)); *see also* AR 103 (SMP § 4.1.2.6(1)(f) (All mitigation conditions must include a provision for “monitoring the impact … and taking appropriate corrective measures.”)); AR 309 (SMP Appendix B-6 (suggesting monitoring methods ranging from periodic physical inspection to installing cameras on one’s property)). The SMP, however, grants much broader search authority than simply monitoring the owner’s maintenance of the conservation area. It specifically authorizes City officials to conduct searches for noncompliance with “any ordinance of the city” or “[f]or any other reason required by this code or any city ordinance,” regardless of whether the subject of the search relates to the permit condition. BIMC § 1.16.010 (incorporated by SMP § 7 (AR 250–53)).

The SMP’s monitoring condition plainly violates both the Takings and Search and Seizure Clauses of the State and U.S. Constitutions.[23] The condition violates the unconstitutional conditions doctrine, as predicated on the Takings Clauses, by demanding an uncompensated access easement onto private property. *Nollan*, 483 U.S. at 831–32; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (Whenever “the government physically takes possession of an interest in property ... it has a categorical duty to compensate the former owner.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 180, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (A physical invasion amounts to a taking irrespective of economic impact, “even if the Government physically invades only an easement in property.”).

[23] A search is defined as any state action that (1) physically trespasses against a protected property interest (*United States v. Jones*, 565 U.S. 400, 411, 132 S. Ct. 945, 181 L. Ed.2d 911 (2012)), or (2) invades an objectively reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 576 (1967) (Harlan, J., concurring).

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The condition, moreover, violates the Search and Seizure Clauses because it authorizes the government to engage in continuous and warrantless monitoring of a homeowner's curtilage, which is presumed to be per se unreasonable and unconstitutional.[24] *State v. Tibbles*, 169 Wn.2d 364, 368–69, 236 P.3d 885 (2010); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). At "the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 6 (quotation omitted). "To give full practical effect to that right, the Court considers curtilage—'the area "immediately surrounding and associated with the home"—to be '"part of the home itself for Fourth Amendment purposes."'" *Collins v. Virginia*, 138 S. Ct. at 1670 (quoting *Jardines*, 569 U.S. at 6). Thus, when a government official "physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Collins*, 138 S. Ct. at 1670. And "[s]uch conduct thus is presumptively unreasonable absent a warrant." *Id*.

Even if judicial oversight were not required,[25] the City and Ecology still cannot satisfy the requirement that a search be sufficiently limited in scope so as to serve as an adequate substitute for a warrant. *Seymour v. Washington State Dep't of Health, Dental Quality Assur. Comm'n*, 152 Wn. App. 156, 167–68, 216 P.3d 1039 (2009); *New York v. Burger*, 482 U.S.

[24] The "conception defining the curtilage is ... familiar enough that it is easily understood from our daily experience." *Jardines*, 569 U.S. at 7 (quotation omitted). Just like the front porch, side garden, or area "outside the front window," the driveway also constitutes "an area adjacent to the home and 'to which the activity of home life extends,'" and so is also considered curtilage. *Id*.

[25] There are few "jealously and carefully drawn exceptions" to the warrant requirement, none of which applies here. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (internal quotation omitted); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 310, 178 P.3d 995 (2008) ("It is always the government's burden to show [that its search] fits within one of these narrow exceptions."). Indeed, neither Respondent asserted any exceptions to the search and seizure clauses in their answers to the petition/complaint and are, therefore, waived. Super. Ct. R. 8(c).

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691, 702, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (requiring warrantless administrative searches be necessary to a specific regulatory purpose and limited in time, scope, and manner to that end). Assuming, arguendo, that Respondents were to assert an exception to the warrant requirement, a valid administrative search must still satisfy three criteria: (1) there must be a substantial governmental interest that informs the regulatory scheme pursuant to which the inspection is made, (2) the government must show that a warrantless inspection is necessary to further the regulatory scheme, and (3) the regulation must provide "a constitutionally adequate substitute for a warrant, in terms of certainty and regularity of its application."[26] *Seymour*, 152 Wn. App. at 164–67 (citing *Burger*, 482 U.S. at 702). The SMP fails to satisfy these criteria.

The City's decision to impose a monitoring condition without any requirement that it first identify an actual ongoing risk of harm renders its purported public interest speculative at best. *Illinois v. Lidster*, 540 U.S. 419, 427, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004) (to satisfy the Fourth Amendment, the public interest must be sufficiently grave to justify the government's interference with individual liberty); *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) (holding that the government cannot conduct general searches of automobiles to confirm that drivers have a valid license; it must articulate some

[26] "Reining in the power of the executive branch in conducting administrative searches is a primary concern of courts reviewing such statutory schemes." *Seymour*, 152 Wn. App. at 167. At the most basic, a properly formulated regulatory inspection scheme must define the "discretion of Government officials to determine what facilities to search and what violations to search for;" it cannot "leav[e] the frequency and purpose of inspections to the unchecked discretion of Government officers." *Donovan v. Dewey*, 452 U.S. 594, 604–05, 101 S. Ct. 2534, 69 L. Ed. 2d (1981) (explaining that this requirement "establishes a predictable and guided ... regulatory presence"). The purpose of this basic regulatory requirement is to ensure that the person subject to the inspection "is not left to wonder about the purposes of the inspector or the limits of his task." *United States v. Biswell*, 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *see also Burger*, 482 U.S. at 703 (To comply with the Fourth Amendment, an inspection regulation "must perform the two basic functions of a warrant: it must advise the owner of the … premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.").

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basis amounting to reasonable suspicion supporting such a search). But even if the City could articulate a substantial interest in demanding continuous monitoring of an owner's activities on his private property, the City's record still lacks any explanation why those searches must be conducted without disclosed standards or limitations. Nor can it prove the necessity of circumventing the administrative warrant process provided for by *Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 531, 533, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). The City's administrative inspection and monitoring scheme is unconstitutional and must be invalidated. *See Ferguson v. City of Charleston*, 532 U.S. 67, 76, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (invalidating state hospital policy requiring that, as a condition of admission, pregnant women must agree to a drug urinalysis test without any articulable basis for suspecting the women of drug use and without any provision for independent oversight).

Finally, the SMP violates the search and seizure clauses in deeming that, by operation of law, "a property owner's application for any permit, license or approval with respect to an activity in or on a building or property" constitutes "consent for city officers, officials and employees to enter the building or property." AR 250 (SMP § 7.2.1) (incorporating BIMC § 1.16.020(C)); *see also id.* (incorporating BIMC § 1.16.020(E) (City officials do need "to obtain the property owner's consent … to enter property in which the city has a written easement for purposes authorized in the easement instrument.")). When the government "seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548–49, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); *see also State v. O'Neill*, 148 Wn.2d

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1 564, 589, 62 P.3d 489 (2003) ("'Consent' granted 'only in submission to a lawful claim of
2 authority' is not given voluntarily.") (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 233,
3 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). As the Ninth Circuit has recognized in the context of
4 Fourth Amendment waivers, "[t]he 'unconstitutional conditions' doctrine limits the
5 government's ability to exact waivers of rights as a condition of benefits, even when those
6 benefits are fully discretionary." *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006)
7 (internal citation omitted); *see also Chandler v. Miller*, 520 U.S. 305, 317, 117 S. Ct. 1295, 137
8 L. Ed. 2d 513 (1997) (the doctrine of unconstitutional conditions applies to the Fourth
9 Amendment). Thus, the SMP and Code provisions deeming submission of an application and/or
10 accepting a conditioned approval as consent for upwards of a decade of general, unwarranted
11 searches is unconstitutional and unenforceable.
12 As written, the SMP's monitoring condition poses a significant risk to owners' privacy,
13 property, and liberty rights. Like many regulatory laws, the SMP is enforced via both civil and
14 criminal processes. AR 250–53 (SMP § 7); *Camara*, 387 U.S. at 531 ("[B]road statutory
15 safeguards are no substitute for individualized review, particularly when … those safeguards
16 may only be invoked at the risk of a criminal penalty."). But the U.S. Supreme Court has held
17 that, absent an opportunity for independent oversight, an ordinance that authorizes such
18 unwarranted and criminally enforceable searches "creates an intolerable risk that searches
19 authorized by it will exceed statutory limits, or be used as a pretext to harass [owners]." *Patel*,
20 576 U.S. at 421. The SMP's inspection and monitoring condition should be stricken from the
21 SMP and City Code.
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V.

THE SMP'S REGULATION OF ALL "HUMAN ACTIVITY" IS UNCONSTITUTIONALLY VAGUE

4 The City's decision to require that shoreline property owners obtain the City's approval 5 before engaging in any "development, use, **or activities** located within shorelines of statewide 6 significance," "regardless of whether a permit is required," is so exceptionally vague as to 7 violate the Act's requirement that SMP provisions be "sufficient in scope and detail" to ensure 8 implementation (WAC 173-26-191(2)(a)(ii)(A)) and facially violate the Due Process Clauses 9 of the U.S. and Washington State Constitutions.[27] AR 97 (SMP § 4.1.1.2); AR 100 (SMP 10 § 4.1.2.4(2)). The SMP broadly defines "activity" as any "human activity associated with the 11 use of land or resources." AR 224 (SMP § 8). The limitless breadth of this provision demands 12 clarity—particularly where the SMP subjects landowners to both civil and criminal liability for 13 violating shoreline regulations, regardless of the person's knowledge or intent. AR 503–53 14 (SMP § 7). Like the SMA's "sufficient scope and detail" requirement,[28] Due Process demands 15 that laws be sufficiently clear to provide fair notice of proscribed conduct and to prevent 16 arbitrary or *ad hoc* enforcement of the laws. *State v. Bahl*, 164 Wn.2d at 745–46; *Vill. of* 17 *Hoffman Estates*, 455 U.S. at 494; *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S. Ct. 1209, 39

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[27] Washington's due process right affords the same protection provided by its federal counterpart, and caselaw interpreting the federal right applies to the state right. *See In re A.W.*, 182 Wn.2d 689, 703, 344 P.3d 1186 (2015). Both the Washington and U.S. Supreme Courts expressly allow facial constitutional challenges alleging that an ordinance is too vague to comport with due process. *Bahl*, 164 Wn.2d at 745-46, 752; *Vill. of Hoffman Estates*, 455 U.S. at 494; *Steffel v. Thompson*, 415 U.S. at 474.

[28] The Growth Board has interpreted WAC 173-26-191(2)(a)(ii)(A) to require that SMP provisions must be sufficiently "clear and detailed" to provide those administering the program with "sideboards" and "policy direction." *Pilchuck Audubon Society v. Snohomish County*, CPSGMHB Case No. 95-3-0047, 1995 WL 903206, at *29 (Final Decision & Order, Dec. 6, 1995).

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L. Ed. 2d 505 (1974); *see also* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 280–83 (2003).

In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the U.S. Supreme Court explained that the void for vagueness doctrine serves two principal functions:

> First because we assume man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Id. at 108–09. "[O]rdinary notions of fair play" prohibit government from enforcing any law written "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 2d 322 (1926); Orlando E. Delogu & Susan E. Spokes, *The Long-Standing Requirement That Delegations of Land Use Control Power Contain "Meaningful" Standards to Restrain and Guide Decision-Makers Should Not Be Weakened*, 48 ME. L. REV. 49, 55 (1996) ("[D]evelopers, within the concept of due process, are entitled to know with reasonable clarity what they must do to obtain under state or local land use control laws the permits or approvals they seek.").

In reviewing PRSM's statutory challenge to the definition of "human activity," the Growth Board agreed that the definition of "human activity" was poorly drafted, overbroad, and appeared on its face to include activities having no effect on shoreline ecological conditions. AR 5885–86. The Board, however, upheld the provision by concluding that the

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definition section of an SMP is not binding on the City's ad hoc interpretation and enforcement of regulatory terms. *Id*. Thus, the Board accepted the City's argument that it had intended the definition of "human activity" to be limited to activities resulting in a modification of land within the shoreline jurisdiction. *Id*.; *see also* City Br. at 25. Even if the City's explanation is to be credited, it did not include such limiting language in the SMP.[29] The Board's decision to leave those provisions unaltered constitutes an error of constitutional magnitude that must be reversed.

Moreover, a plain reading of the SMP refutes the City's explanation. First, the SMP separately defines "development" to include "land modification." AR 263. Second, the SMP repeatedly uses the disjunctive when stating that "development, use, **or activity**" is subject to regulation. *See, e.g.*, AR 97 (SMP § 4.1.1(2)). And third, the SMP does not include "land modification" in its definition of "activity," instead opting to broadly define the term to include any "human activity associated with the use of land or resources." AR 224 (SMP § 8). The Board's attempt to alter the plain language of the SMP constitutes clear error and, if allowed to stand, would only result in more confusion among Bainbridge Island residents by imposing legal standards contrary to the language of the published SMP.

The risk of arbitrary enforcement is manifest. The SMP grants the City authority to control all "human activity" occurring on private shoreline property "whether a permit is

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[29] The Board's decision to look past the SMP's written definition of "human activity" violates one of the most basic rules of statutory interpretation, under which "[a] definition which declares what a term 'means' ... excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 408 n.10, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (quoting 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978)); *see also Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (Legislative definitions in the statute control and are not subject to judicial construction.). Thus, when considering a facial vagueness challenge, courts will not accept an argument like that offered by the City and Ecology during the administrative proceedings below. *Colautti*, 439 U.S. at 392–93 (rejecting an alternative explanation for a term that was provided a clear statutory definition).

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required or not." AR 100 (SMP § 4.1.2.4(2)); AR 101 (SMP § 4.1.2.5(1)). Section 4.1.2 requires landowners to apply for a city approval before engaging in any "activity" that could result in disturbance of vegetation within 200 feet of the shoreline. AR 100 (SMP § 4.1.2.5(1)). Indeed, the entire "approval" scheme for "human activity" is left undefined by the SMP, giving the City *ad hoc* administration and enforcement authority. AR 101 (SMP § 4.1.2.5(1)) (citing BIMC 15.18) (stating that, before engaging in an activity, landowners must submit an "application" that contains substantially the same information required for a land clearing permit). As indicated above, the failure to comply with these requirements on "human activity" exposes property owners to civil and criminal penalties. AR 250–53 (SMP § 7).

Ultimately, if the City did intend that the phrase "human activity" would mean only "shoreline modification," then it admits that the definition section is vague and overbroad. And if that is true, then striking the offending definition and replacing it with limiting language should be no problem. The fact that it has chosen not to do so requires an order finding the challenged provisions of the SMP unconstitutionally vague and void.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue an order reversing the Growth Board's final decision and order and invalidating the SMP for violating the SMA's public participation and science requirements and declaring the SMP, as adopted, to violate the Search and Seizure, Due Process, and Takings Clauses of the United States and Washington State Constitutions.

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255 South King Street, Suite 800
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(425) 576-0484

1 RESPECTFULLY submitted this 18th day of June, 2021.

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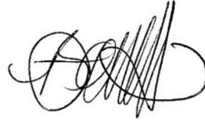

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5 By: ______________________________

Brian T. Hodges, WSBA #31976
6 Attorneys for Petitioner Preserve Responsible Shoreline Management

7

8

9 STEPHENS & KLINGE LLP

10

By: s/ Richard M. Stephens [with authorization]
11 Richard M. Stephens, WSBA #21776
Attorneys for Petitioners Preserve Responsible Shoreline
12 Management, Alice Tawresey, Robert Day, Bainbridge
Shoreline Homeowners, Dick Haugan, Linda Young,
13 John Rosling, Bainbridge Defense Fund, and Point Monroe
Lagoon Home Owners Association, Inc.

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Seattle, WA 98104
(425) 576-0484

DECLARATION OF SERVICE

I, BRIAN T. HODGES, declare as follows:

On June 18, 2021, true copies of this PETITIONERS' OPENING BRIEF were served via electronic mail, in accordance with the parties' agreement, upon:

James E. Haney
Ogden Murphy Wallace PLLC
901 Fifth Ave. Suite 3500
Seattle WA 98164-2008
jhaney@omwlaw.com

Phyllis. J. Barney, Assistant AG
Attorney General of Washington
Ecology Division
P.O. Box 40117
Olympia WA 98504-0117
(360) 586-6770
phyllisb@atg.wa.gov

Richard M. Stephens
Stephens & Klinge LLP
601 108th Avenue NE, Ste 1900
Bellevue WA 98004
Stephens@SKLegal.pro

Dionne Padilla-Huddleston, Assistant AG
Attorney General of Washington
Licensing & Administrative Law
P.O. Box 40110
Olympia WA 98504
(360) 586-6770
dionnep@atg.wa.gov

Lisa M. Petersen
Assistant Attorney General
Licensing & Administrative Law
800 Fifth Avenue, Suite 2000
Seattle WA 98104
(360) 753-6200
lisa.petersen@atg.wa.gov

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 18th day of June, 2021.

PACIFIC LEGAL FOUNDATION

By: ______________________________
Brian T. Hodges, WSBA #31976
Attorney for Petitioner Preserve Responsible Shoreline Management

PACIFIC LEGAL FOUNDATION
255 South King Street, Suite 800
Seattle, WA 98104
(425) 576-0484

Kiren Mathews

From: Brien P. Bartels
Sent: Friday, June 18, 2021 2:24 PM
To: exparte@co.kitsap.wa.us
Subject: Case No. 15-2-904-6: Petitioners' Opening Brief
Attachments: 15-2-904-6 Pet Opening Brief Bassett.pdf

Greetings:

In accordance with the filing procedures published at https://www.kitsapgov.com/sc/Documents/Document_Information_Sheet_08312020.pdf, attorneys for Petitioners submit for filing this Opening Brief.

A bench copy of the attached will also be emailed to the Superior Court.

Copies will also be emailed to all counsel of record as stated in this document's Declaration of Service.

Please contact me if there are any deficiencies with this filing or if you have any questions.

Best regards,

Brien Bartels | Legal Secretary
Pacific Legal Foundation
255 South King Street, Suite 800 | Seattle, WA 98104
425.576.0484

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