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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents,

and

Kitsap County Association of Realtors®,

Intervenor Below.

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

APPELLANTS' OPENING BRIEF

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I.

INTRODUCTION

This interlocutory appeal asks whether a citizen has a right to put on evidence necessary to prove a constitutional claim where a statute requires that constitutional claims be raised to the superior court for the first time alongside an administrative appeal. The answer is yes. The right of each person to petition the courts for redress of harm is one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967). As a corollary to that right, our courts hold that each litigant has a constitutionally protected right to present evidence in support of his or her claims. *State ex rel. Puget Sound Navigation Co. v. Dept. of Trans.,* 33 Wn.2d 448, 495, 206 P.2d 456 (1949); *Robles v. Dept. of Labor & Indus.,* 48 Wn. App. 490, 494, 739 P.2d 727 (1987). Together, those basic rights guarantee that judges will be sufficiently informed to serve as arbiters and fact-finders. *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 556-57 (D. Del. 1980) (citing *Thomas v. Collins*, 323 U.S. 516, 530, 65 S. Ct. 315, 89 L. Ed. 430 (1945) ("It is . . . in our tradition to allow the widest room for discussion, the narrowest range for its restriction[.]")).

The fact that the Administrative Procedure Act (APA) limits the trial court's review of claims that are on appeal to the evidence considered by the adjudicative agency below does not alter these basic rights. RCW 34.05.562. The APA's limitation on "additional evidence" applies only when the court is acting in its appellate capacity, reviewing issues actually adjudicated to an agency. *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994). The APA does not limit evidence for a claim that is properly filed for the first time subject to the superior court's original jurisdiction. *In re Third Lake Washington Bridge by City of Seattle*, 82 Wn.2d 280, 288, 510 P.2d 216 (1973) (trial court authorized to take evidence on issues properly raised for the first time); *see also ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012) (The Legislature cannot limit the superior court's original jurisdiction over constitutional claims.).

The trial court erroneously concluded that PRSM's constitutional claims are appellate in nature, despite acknowledging that the Growth Board lacked jurisdiction to adjudicate the claims. CP 348-49. The court further erred when it applied the APA's standard for additional evidence on appeal to the evidence offered in support of constitutional claims raised for the first time to the court with original and exclusive jurisdiction. CP 349-50. Additionally, the trial court abused its discretion when it found that the

Growth Board had "heard much of [PRSM's] proffered testimony" despite admitting that "[t]he Court has yet to review the record below" and despite the fact that the record is devoid of evidence necessary to establish PRSM's constitutional claims. CP 350. For these reasons, appellants 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. (PRSM) respectfully request that this Court reverse the trial court's evidentiary ruling and remand the matter with direction to allow PRSM to submit all evidence necessary to prove the elements of its constitutional claims, which are properly raised for the first time before the court below.

II.

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

PRSM assigns error to the Kitsap County Superior Court's October 13, 2017, order denying PRSM's motion to supplement the record (CP 347-52), and the Court's October 25, 2017, order denying reconsideration. CP 459-61. The following issues pertain to those orders:

1. Whether the trial court committed obvious error when it concluded that it was acting in its appellate capacity in considering

constitutional claims properly filed for the first time before the superior court and subject to the court's original jurisdiction. CP 348-49.

2. Whether the trial court committed obvious error when it concluded that the APA (RCW 34.05.562) limits a litigant's right to present evidence on matters properly raised for the first time to the court with original jurisdiction and where binding precedent holds that the APA's limit on "additional evidence" applies only when the court is acting in its appellate capacity. CP 349-50.

3. Whether the trial court manifestly abused its discretion when it denied PRSM's motion based on its finding that the Growth Board had "heard much of the proffered testimony" despite admitting that "[t]he Court has yet to review the [administrative] record below." CP 350.

4. Whether the trial court manifestly abused its discretion when it found "that Petitioners did not take issue with Respondents' assertion that the Board below heard much of the proffered testimony" (CP 350) where PRSM's reply brief did in fact contest the government's claim that the proposed expert testimony is duplicative and where the government respondents never offered a citation to the record showing where its studies (or public comments) addressed the facts necessary to satisfy the elements of the alleged constitutional claims.

5. Whether the trial court committed clear error when it concluded that evidence supporting PRSM's constitutional clams is not "needed" to "decide disputed issues" (CP 350) where binding case law holds that a plaintiff must submit evidence to satisfy certain threshold elements of the constitutional claims alleged by the petition for review.

6. Whether the trial court committed an error of constitutional magnitude when it denied PRSM its right to put on evidence necessary to prove the elements of a constitutional claim when that claim is properly raised for the first time.

III.

STATEMENT OF THE CASE

A. Background

This case involves a constitutional challenge to the City of Bainbridge Island's highly contentious 2014 Shoreline Master Program (SMP) update, which imposes several onerous demands on shoreline property owners. AR 26-366. Among the most contentious are regulations requiring that shoreline landowners: (1) consent to warrantless searches of their land as a mandatory condition of any new permit approval (AR 250, SMP § 7.2.1 (citing BIMC 1.16)); (2) submit a request for approval before engaging in any "human activity" on or near the shorelines (AR 97, SMP § 4.1.1.2); (3) seek City approval before designing one's landscape or garden

(AR 101, SMP § 4.1.2.5); and (4) dedicate conservation buffers designed to mitigate for impacts caused by public roads and upland neighbors (AR 96, SMP, Table 4.3).

These demands all arise from the City's mandatory buffer requirement, which goes much further than the typical setback-type restriction, requiring that shoreline property owners convey a conservation easement or record a deed restriction on the property title that (1) designates and separates the buffer area from the rest of the lot and (2) binds the present and all future owners of the land to maintain the buffer as a conservation area in perpetuity.[1] AR 104 (SMP 4.1.2.7); AR 115 (SMP 4.1.3.7(2)). In addition to the dedication of land, the SMP demands that homeowners file a legal document binding the owner to perpetually maintain and manage the buffer 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)).

According to the SMP, once the conservation easement or notice to title is recorded, Bainbridge Island gains control over the buffer zone, including a right to enter the property to assure that the buffer area's use is

[1] To be clear, the SMP states that such a deed restriction is a "conservation easement," which is "[a] legal agreement that the property owner enters into to restrict uses of the land for purposes of natural resources conservation. The easement is recorded on a property deed, runs with the land, and is legally binding on all present and future owners of the property." AR 261.

in harmony with ecological values and a right to control the types of plants that may be planted.[2] The owner of the underlying estate may retain some passive use rights, such as the right to pass over the buffer, but is proscribed from any additional development, use, or "human activity" in the buffer without first securing a permit approval.[3] The purpose behind the designation of a buffer zone is to provide a mechanism that will *permanently* protect the targeted land from development and dedicate the land for purposes that go further than mitigation of on-site development impacts. Indeed, the stated purpose of the SMP is to ensure that shoreline property owners "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities." SMP § 4.1.3.3(2); *see also* AR 50 (SMP § 1.5) (The Program's "master goal" is to ensure "a net ecosystem improvement over time.").

The City enacted the SMP without meaningfully responding to PRSM's objections that the SMP shifted general public burdens onto individual landowners in violation of several provisions of the Washington and U.S. Constitutions.[4] In accordance with the procedures set forth by the

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[2] *See*, *e.g.*, City of Bainbridge Island Shoreline Master Program § 7.2.1 (citing Bainbridge Island Municipal Code § 1.16) (*available at* http://www.bainbridgewa.gov/DocumentCenter/View/5072).

[3] *Id*. § 4.1.3.7.

[4] *See*, *e.g.*, *Orion Corp. v. State*, 109 Wn.2d 621, 659, 747 P.2d 1062 (1987) (A shoreline property owner has a right "to make a profitable use of its land;" thus, development restrictions adopted under the SMA must comply with the Washington and U.S. Constitutions).

Shoreline Management Act (SMA), PRSM timely challenged the SMP by filing a petition for review with the Growth Management Hearings Board, asserting only statutory claims and reserving all constitutional claims for later proceedings before the superior court. AR 2-23; RCW 90.58.190; RCW 34.05.570(3)(a). The Growth Board's authority is limited by statute to determining whether the City and Department of Ecology complied with statutory requirements of the SMA and its regulatory guidelines when updating the SMP. *Id*. Thus, the administrative review was limited to the City's legislative record—the rules applicable to Growth Board proceedings provided no opportunity for any of the parties to present testimony or evidence relevant to PRSM's constitutional claims during the administrative proceeding.[5]

After the Growth Board upheld the SMP on statutory grounds,[6] PRSM filed a combined complaint and petition for judicial review in Kitsap County Superior Court, alleging violations of free expression, due process, and the Takings Clauses of the Washington and U.S. Constitutions, as well as violations of the doctrine of unconstitutional conditions. CP 1-165; 326-

[5] *See Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196, 274 P.3d 1040 (2012) ("[T]he Board lacks the jurisdictional authority to decide claims alleging a violation of [constitutional] rights" and cannot "determine what [] rights exist under Washington law.").

[6] *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Growth Mgmt. Hearings Bd. No. 14-3-0012 (Apr. 6, 2015) (AR at 5787-5905). The Board's findings and conclusions are currently pending on the merits of PRSM's administrative appeal below.

43. The complaint invoked the trial court's original jurisdiction and sought declaratory relief as authorized by the Uniform Declaratory Judgments Act, RCW 7.24.020. CP 13-18. As originally filed, the petition alleged only statutory grounds for reversing the Growth Board's decision under the APA. CP 5-13.

From the outset, PRSM notified the government respondents that additional evidence will be necessary to address its constitutional claims. Thus, shortly after the petition was filed, the City and Ecology submitted conditional witness lists, naming several expert witnesses who may testify to the impact of the SMP on development rights and property values and offer testimony interpreting challenged SMP provisions and opining on their effect. CP 182-85, CP 186-88. The City and Ecology thereafter moved the trial court to dismiss the declaratory judgment claims (under which PRSM would unquestionably have a right to present evidence in support of its constitutional claims), arguing that the APA provides the exclusive means for judicial review of an SMP update. CP 207-214 (relying on RCW 34.05.510). Indeed, the government acknowledged the evidentiary issue in their joint reply, stating that "[i]f evidence [of constitutional violations] is warranted, such evidence may be entered by order of the Court, pursuant to APA standards." CP 237. The trial court granted the motion (CP 246-48)

and later allowed PRSM to amend its petition to reallege its constitutional claims as authorized by the APA, RCW 34.05.570(3)(a). CP 344-46.

B. Motion for Additional Evidence

After the trial court dismissed the declaratory judgment claim, PRSM moved the court for leave to submit evidence necessary to prove certain elements of three of its constitutional claims. CP 253-67. The motion sought leave to submit evidence on four discrete topics: (1) expert testimony showing that the buffers and other demands are larger than necessary to mitigate for impacts caused by the owner's use of his or her land; (2) expert testimony explaining the SMP's impact to development rights and property values; (3) testimony pertaining to the expressive nature of landscape design and gardening; and (4) expert testimony and documentary evidence showing confusion among City staff, lawmakers, and land use professionals interpreting and applying the challenged SMP update. CP 253-67.

PRSM argued that proposed evidence was allowed on two grounds. First, the APA authorizes the court to "receive evidence in addition to that contained in the agency record" if the evidence "relates to the validity of the agency action . . . and it is needed to decide disputed issues regarding the [u]nlawfulness of . . . [the] decision-making process." CP 255-57 (citing RCW 34.05.562(1)(b); RCW 34.05.570(4)(b) ("The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by

the petition and answer.")). This provision authorizes additional evidence on PRSM constitutional claims because the APA authorizes the court to reverse an administrative decision if 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." CP 257 (citing RCW 34.05.570(3)(a)).

Second, PRSM argued that the constitutional claims were properly filed for the first time to the superior court and were subject to the trial court's original jurisdiction, which includes the right to put on evidence. CP 257-58; CP 292-93; CP 299-301. Thus, PRSM argued that the APA cannot be interpreted to limit PRSM's right to present evidence needed to show a constitutional violation. CP 256; CP 292-93.

The briefs filed by the City and Ecology only responded to the argument regarding the APA's supplemental evidence provision. CP 268-79; CP 280-89. On that issue, the City and Ecology argued that RCW 34.05.562(2) should be narrowly interpreted to allow additional evidence only if it is intended to prove that the Growth Board itself engaged in an unlawful practice or procedure—it does not authorize evidence addressing the substance of the challenged SMP, regardless of whether the claim was adjudicated by the Board or falls within the exclusive jurisdiction of the superior court. CP 271; CP 282.

Neither respondent addressed PRSM's argument that the constitutional claims are properly raised for the first time to the trial court and subject to its original jurisdiction. Instead, the City and Ecology simply asserted that PRSM's constitutional claims were appellate in nature, without any argument or analysis of the issue. CP 269, 270-71 ("If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered.") (quoting *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005)); CP 281 ("The superior court acts in its appellate capacity when it hears a challenge to an administrative decision under the APA."); *see also* RP 16 (A reason "why the APA limits the court to the record" is because the court is "acting as an appellate body. . . . And allowing additional evidence to come in means you're not acting in an appellate capacity; you're acting as an original fact finder.").

And in regard to the substance of PRSM's proposed evidence, the City and Ecology primarily argued that courts must consider facial constitutional claims on the face of the challenged ordinance and without regard to any evidence. CP 273-77; CP 283-87. Because of the categorical nature of that argument, the government chose not to address the specific

elements of the constitutional doctrines and chose not to argue how the proposed evidence relates to those elements. *Id*.

Importantly, the governments' response briefs challenged only two discrete aspects of PRSM's proposed evidence. But those arguments were based on the governments' self-serving and speculative characterization of the proffered evidence. For example, the City objected that Barbara Robbins' proposed testimony regarding impacts to property values would be irrelevant to the facial due process and regulatory takings claims, if it was limited to the impacts to her property. CP 275. Ecology added that Ms. Robbins' testimony was not probative of a total regulatory takings claim (a claim that is not alleged in the petition). CP 285. The government respondents then characterized a portion of the proposed testimony of Kim Schaumburg and Barbara Phillips as "apparently . . . purporting to dispute the science used by the City in the development of the SMP" and therefore the government argued that it may be duplicative of the record. CP 275, 285. The City and Ecology, however, provided no citations indicating where the proposed testimony is duplicated. The governments' briefs did not challenge any of the remaining evidence as being duplicative.

PRSM's reply brief refuted the governments' speculation in regard to Ms. Schaumburg, Ms. Phillips, and Ms. Robbins, clarifying that their testimony is aimed at questions that are not addressed by studies in the

legislative record. CP 311. The reply also refuted the government respondents' misrepresentation regarding the substantive constitutional doctrines alleged by the petition (CP 309-11), and provided binding authority refuting the governments' claim that evidence is never admissible in support of facial constitutional claims. CP 302-11.

At oral argument, the City and Ecology changed its argument to broadly claim that the record contained "a great deal of information" upon which the court could decide all the constitutional claims alleged by PRSM's petition. RP 11 (Ecology argument). The City went even further, asserting that the Growth Board's record contained "hundreds, if not thousands of pages, devoted to each of the issues we're talking about here." RP 13. Neither respondent, however, provided citations in support of their new assertions.

PRSM, in reply, reasserted that the proposed evidence was being offered for the first time. RP 18-19. PRSM further reminded the court that the constitutional claims were not appellate in nature. *Id*. They are asserted to the first court with jurisdiction to hear the constitutional claims. *Id*. The court took the motion under advisement, stating "I'm not going to make a decision without reading everything[.]" RP 20.

On October 13, 2017, the trial court issued a decision denying PRSM's motion. CP 347-52. The court opened its analysis by concluding

that it was acting in its appellate capacity in considering PRSM's constitutional claims. CP 348-49. The court did not address PRSM's arguments regarding claims subject to the court's original jurisdiction and a litigant's right to put on evidence. *Id*. Instead, the court concluded that the APA forbids additional evidence unless the moving party can show that it is necessary and not duplicative. CP 349. The court then adopted the governments' argument that the proffered evidence was duplicative of the record, without actually reviewing the proposed evidence and the record to verify that claim:

> This Court has yet to review the record below, but notes that Petitioners did not take issue with Respondents' assertion that the Board below heard much of the proffered testimony. This Court, having reviewed the Petitioner's pleadings and the potential witnesses to be presented, finds that supplementary testimony is not "needed" in order to decide the disputed issues in this case.

CP 350.

PRSM moved for reconsideration, arguing that the decision was not supported by law or fact because the trial court had not (1) reviewed the record, (2) the ruling does not address the difference between original and appellate jurisdiction, (3) the ruling does not address the substance of the proffered evidence, (4) the ruling does not address how the evidence relates to the elements of the constitutional claims, and (5) the ruling does not indicate where the proposed evidence is duplicated in the record. CP 353-

63. PRSM further objected to the court's conclusion that "much" of the proffered evidence was duplicative of the record, without identifying what portion of the proffered evidence *is or is not* in the record. *Id*. After the trial court denied the motion for reconsideration (CP 459-61), PRSM moved this Court for discretionary review of the trial court's evidentiary ruling under RAP 2.3(b)(1) and (3).[7] This appeal follows.

IV.

ARGUMENT

A. Standard of Review

The trial court's evidentiary ruling is subject to the abuse of discretion standard. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334 (2009). "A trial court abuses its discretion when a decision is . . . exercised on untenable grounds, or for untenable reasons." *State v. Howland*, 180 Wn. App. 196, 204, 321 P.3d 303 (2014) (citations omitted). A discretionary decision rests on "untenable grounds" if the trial court relies

[7] Evidentiary rulings are frequently subject to discretionary review. *See City of Seattle v. Personeus*, 63 Wn. App. 461, 464, 819 P.2d 821 (1991) (reversing trial court order excluding expert witness testimony on discretionary review); s*ee also*, *e.g.*, *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010) (explaining that discretionary review may be available where trial court's evidentiary ruling is untenable); *In re Estate of Bowers*, 132 Wn. App. 334, 339, 131 P.3d 916 (2006) (affirming trial court's evidentiary ruling on discretionary review); *Young v. Key Pharm., Inc.*, 63 Wn. App. 427, 431, 819 P.2d 814 (1991) (reversing erroneous evidentiary ruling on discretionary review); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991) (granting discretionary review to consider whether the trial court erred in entering a finding of fact that was unsupported by evidence); *Lurus v. Bristol Labs., Inc.*, 89 Wash. 2d 632, 634, 574 P.2d 391 (1978) (modifying ruling pertaining to discovery on discretionary review).

on unsupported facts or applies the wrong legal standard. *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citations omitted). The trial court's interpretation of the APA is reviewed de novo. *State v. Ervin,* 169 Wn.2d 815, 820, 239 P.3d 354 (2010). PRSM's claim that the trial court deprived it of due process is also reviewed de novo. *State v. Blair*, 3 Wn. App. 2d 343, 349, 415 P.3d 1232 (2018).

B. The Trial Court Committed Obvious Error When It Concluded That PRSM's Constitutional Claims Were Appellate In Nature

The trial court committed obvious error when it concluded that it was acting in its appellate capacity in considering PRSM's constitutional claims. CP 348-49. This is an error of constitutional magnitude because, based on that false premise, the court applied the APA's supplemental evidence provision to bar PRSM from introducing evidence necessary to establish its constitutional claims, depriving PRSM of its due process right to present evidence necessary to seek redress of harm. *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992); *see also Morgan v. United States*, 304 U.S. 1, 19, 58 S. Ct. 773, 82 L. Ed. 1129 (1938) (the right to present evidence extends to civil matters); *Ralpho v. Bell,* 569 F.2d 607, 628 (D.C. Cir. 1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of

due process."); *see also Saunders v. Shaw*, 244 U.S. 317, 319, 37 S. Ct. 638, 61 L. Ed. 1163 (1917) (finding a violation of due process where the trial court deprived a party of "a chance to put [its] evidence in").

PRSM's constitutional claims are not on appeal. By definition, an appeal requires that a lower tribunal actually decide the issues. *See* Black's Law Dictionary at 94 (7th Ed. 1999) ("A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal."). Here, as all parties agree, there was no adjudicative proceeding on the constitutional claims. Nor could there be. *See* CP 348 (finding that "[t]he Board below was not empowered or authorized to make determinations regarding questions of constitutionality"); *see also Olympic Stewardship Found. V. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. at 196 n.21 ("[T]he Board lacks the jurisdictional authority to decide claims alleging a violation of [constitutional] rights."). PRSM's constitutional claims are properly filed for the first time before the superior court, which is the first tribunal with jurisdiction to hear the claims. RCW 34.05.570(3)(a); *Bayfield Resources Co. v. W. Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 881 n.8, 244 P.3d 412 (2010).

The trial court has original and exclusive jurisdiction over PRSM's constitutional claims, the invocation of which obligates the court to hear and determine the facts in the first instance. According to Washington courts, the APA imposes only a "procedural requirement[]" that PRSM litigate all claims subject to the Growth Board's authority to that agency "before a superior court will exercise its original jurisdiction" over its constitutional claims. *James v. Cty. of Kitsap*, 154 Wn.2d 574, 588-89, 115 P.3d 286 (2005) (construing LUPA's administrative procedure requirement); *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 360, 271 P.3d 268, 278 (2012) (construing the APA).

The fact that the trial court retains original and exclusive jurisdiction over PRSM's constitutional claims is significant. The "term 'original jurisdiction' means the power to entertain cases in the first instance as distinguished from appellate jurisdiction." *Burks v. Walker*, 25 Okla. 353, 109 P. 544, 545 (1909); *see also Spatz v. City of Conway*, 362 Ark. 588, 589, 210 S.W.3d 69 (2005) ("Original jurisdiction means the power 'to hear and decide a matter before any other court can review the matter.'") (quoting *Black's Law Dictionary* 856 (7th ed. 1999)). Importantly, original jurisdiction includes the court's right "to make its own determination of the issues from the evidence as submitted directly by the witnesses; or of the law as presented, uninfluenced or unconcerned or limited by any prior

determination, or the action of any other court juridically determining the same controversy." *State v. Johnson*, 100 Utah 316, 114 P.2d 1034, 1037 (1941), *disagreed with on other grounds by Boyer v. Larson*, 20 Utah 2d 121, 433 P.2d 1015 (1967).

C. The Trial Court Plainly Misapplied The APA When It Applied the Limitation on Additional Evidence to Claims That Are Not on Appeal

The APA sets out the procedures for juridical review of claims on administrative appeal. Ch. 34.05 RCW. The APA's limitation on supplemental evidence applies only when the court is acting in its appellate capacity by reviewing issues previously adjudicated by an agency. *James*, 154 Wn.2d at 588-89. For this provision to apply, therefore, the claim must have been (1) subjected to administrative consideration and (2) resulted in the creation of an adequate record. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991); *see also Waste Mgmt. of Seattle*, 123 Wn.2d at 633-34; *Third Lake Washington Bridge*, 82 Wn.2d at 288; *cf. Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO*, 125 Haw. 317, 260 P.3d 1135, 1146 (Haw. Ct. App. 2011). Without an opportunity to present evidence and argument on the contested issues, an administrative proceeding cannot fix the facts for all future proceedings. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

Moreover, under the rules of statutory interpretation, the APA cannot be construed to limit the court's duty to determine the facts in the first instance when considering claims that are exclusively subject to its original jurisdiction. *ZDI Gaming Inc.*, 173 Wn.2d at 619 (the legislature cannot limit the superior court's original jurisdiction); *In re Third Lake Washington Bridge*, 82 Wn.2d at 288 (trial court authorized to take evidence on issues properly raised for the first time in administrative appeal). Nor can the APA be construed to deprive individuals of their due process right to petition the courts for redress of constitutional harms and to put on evidence of such claims. RCW 34.05.020; *see also ZDI Gaming*, 173 Wn.2d at 619 (Courts must interpret statutes consistent with the constitution, where possible.).

The prejudice of the trial court's ruling is manifest. Not only does the trial court's ruling deprive PRSM of basic due process, it capriciously tips the scales of justice in favor of the City and Ecology—both of whom have indicated that they plan to assert *factual defenses* to PRSM's constitutional claims (arguing, for example, that gardening and landscaping are not expressive conduct, the buffers have no effect on property rights, etc.). The rule applied below plainly violates due process and must be rejected.

D. The Trial Court's Findings of Fact and Conclusions of Law Regarding the Contents of the Record Are Untenable

The trial court committed obvious error when it found "that Petitioners did not take issue with Respondents' assertion that the Board below heard much of the proffered testimony," despite admitting that the court "has yet to review the record below." CP 350. This conclusion is untenable.

It is black-letter law that argument is not evidence. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (argument is not evidence); *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007) (The court may not rely on "assurances" of government attorneys as a substitute for evidence.). Thus, the trial court has a duty to independently review the record to ensure that its decision is supported. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984); *see also, e.g., Third Lake Washington Bridge*, 82 Wn.2d at 288 (a reviewing court must "study" the record before it); *State v. Leeloo*, 94 Wn. App. 403, 406, 972 P.2d 122 (1999) (the court has a duty to independently review the record). The court's failure in this regard constituted a clear departure from judicially accepted norms and should be reversed. *New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (basic

notions of "effective judicial administration" require the court to independently review the record).

In addition, the court's finding that PRSM "did not take issue with Respondents' assertion that the Board below heard much of the proffered testimony" is unfounded. As recounted in the statement of facts above, the briefs filed by the government respondents argued only that a portion of Ms. Schaumburg's proposed testimony was duplicative of studies and public comment letters in the record (providing no citations to the record). CP 273-74, 284. PRSM disputed this claim in its reply brief and at oral argument. *See* CP 296-97 (arguing that comment letters are insufficient to satisfy PRSM's burden of proof), *id*. at 310-12 (arguing that there is no evidence in the record establishing nexus and proportionality, which is the central topic of Ms. Schaumburg's proposed testimony); RP 18-19 (reasserted that all of the evidence is being offered for the first time in support of claims properly pleaded for the first time to the trial court).

Indeed, contrary to the trial court's decision, it is PRSM's position on the proffered testimony that remains unrebutted. Despite filing six briefs on this issue, the government respondents never offered a single citation to the record showing where its studies (or public comments) address the facts necessary to determine the impacts to property and free expression rights, let alone evidence that the SMP's mandatory permit conditions satisfy the

nexus and proportionality requirements. The fact that the record contains no evidence on those issues is confirmed by the Growth Board's decision. AR 5815, n.52 (finding no data in the record showing an adverse impact to property values), AR 5890, n.158 (finding no evidence of impact to an individual's choice of plants), AR 5886, n.150 (finding no evidence that the SMP's "imprecise" language affected any property rights).

There is simply nothing in the record supporting the finding that "the Board below heard much of the proffered testimony." The trial court's finding is untenable.

E. Neither the SMA nor the APA Require Citizens To Litigate All Potential Constitutional Claims to a Local Legislature Via the Public Comment Process

The trial court's conclusion that PRSM's proffered evidence is not needed was premised on the City's and Ecology's claim that the SMA and APA require citizens to testify to all potentially relevant facts relating to any potential future constitutional challenge through the local legislature's public comment process. *See* CP 272-75, 283-84. That argument is baseless. There is nothing in the SMA or the APA requiring citizens to present all factual evidence in support of all potential legal claims to the local government during the legislative development phase of an SMP. Indeed, the proposition that an individual must argue his or her case to a political body that lacks the authority (let alone, neutrality) to adjudicate the facts is

refuted by case law requiring actual adjudication before an agency proceeding can be deemed to fix the facts in future proceedings. *See*, *e.g. Kremer*, 456 U.S. at 480-81.

The trial court's decision offered no analysis of the issue and no explanation how or why the legislative record should be deemed to fix the facts in PRSM's constitutional lawsuit. CP 349-50. Nonetheless, the absence of a statutory provision requiring all testimony to occur through the public comment process is determinative against the governments' argument because, "[i]t is fundamental that a constitutional right will not be denied or abridged by implications arising out of some statute." *State v. Clausen*, 94 Wash. 166, 179, 162 P. 1 (1917); *see also* RCW 34.05.020 ("Nothing in [the APA] may be held to diminish the constitutional rights of any person[.]").

Moreover, reading such a requirement into the SMA would impose an unworkable and absurd restriction on an aggrieved citizen's right to seek redress from a constitutional harm because the Act's public comment provision does not provide meaningful notice and opportunity to comport with the most basic requirements of due process. *Olympic Forest Prod., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973). Indeed, the Act does not even provide an opportunity to comment on the final, adopted

version of the SMP.[8] Thus, the Growth Board in this case held that the City had complied with the public comment requirement when it closed the public comment period in August 2013—after which time the City adopted several substantive changes to the draft legislation before enacting the final SMP in June 2014. AR 5799-5800; *PRSM*, 2015 WL 1911229, at *7. In addition, the Act allowed the City to limit all oral comments to a maximum of 2 minutes—and those statements were not transcribed into the record. AR 5801-02; *id*. at *10, 12. Instead, the only record that exists of a majority of the public comments is found in a matrix where the City (the party opponent) rephrased and summarized the contents of public comments. AR 5802-04. Comments, not under oath, not subject to cross examination and not before an impartial decisionmaker, cannot be the sole proof of constitutional claims. Nothing in this process comports with due process and cannot, therefore, fix the facts for all future litigation.

Even so, the government respondents never explained in their pleadings below how the informal, abbreviated public comment process would give the judge a meaningful basis upon which to decide disputed questions of fact, some of which may depend upon credibility or bases for

[8] *See* RCW 90.58.060; *Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 744, 399 P.3d 562 (2017) (*OSF*) (holding that the government is authorized to modify a SMP without public comment once the initial comment period has passed—even where the changes directly impact property interests).

expressions to the city council. Indeed, the purpose of the public comment period is to gauge the communities' support and/or opposition to a proposal. It is not intended to provide a forum in which conflicting allegations of fact and law are adjudicated as part of a fact-finding procedure.[9]

Consider, for example, the government respondents' argument in regard to PRSM's free expression claims. The record contains three public comments generally asserting a right to express oneself through gardening. AR 742-44, 2511, 2821. The City responded to the first two comments without addressing the constitutional question. AR 2821 (responding only that "State guidelines require vegetation management in the shoreline jurisdiction to be regulated by the SMP"); AR 2510 (stating that revegetation with native species may be required to meet "no net loss of ecological functions and processes" for a specific project"). The third comment—a letter from Linda Young generally asserting a right to express oneself—was not logged in the public comment spreadsheet and received no response from the City. AR 742-44. More importantly, the letter does not contain testimony sufficient to satisfy the expressive conduct test. *Id*. The government respondents never challenged the assertion that gardening

[9] Indeed, due to the general nature and purpose of the comments, the Growth Board concluded that it would be "impractical" and unrealistic for the City to substantively address the comments during the legislative proceeding. AR 5830. Thus, the record is also devoid of the government's response to any of the constitutional concerns raised during the legislative process.

and landscaping constitute expressive conduct during the legislative process (as they do now).[10] Thus, the record contains only Ms. Young's bare assertion in that regard.

Surely, the City and Ecology are not suggesting that public comments must be taken as true (it has offered no other suggestion for evaluating the veracity of statements in the record, let alone deciding between conflicting statements). If so, then multiple public comments that received no response below would fix the facts against the City, without any opportunity for the government respondents to muster a meaningful defense. That sauce is good for neither goose nor gander.

[10] As a matter of fact, the SMA expressly protects the government from having to disclose its determinations regarding constitutional issues during the planning process, rendering any requirement to testify to constitutional facts and conclusions one-sided. *See* WAC 173-26-186(5) (local governments are exempt from disclosing legal arguments during the update process) (citing RCW 36.70A.370(4)). To require the public to "show their cards" while holding the government exempt would allow the government to game the court system by demanding full access to its opponents' playbook while, at the same time, hiding all of its factual and legal defenses until a time when citizens are barred from developing any rebuttal to the governments' undisclosed arguments. That is not justice. It is arbitrary and capricious.

F. The Trial Court Committed Obvious Error When It Rejected PRSM's Proffered Testimony Unnecessary To Prove the Constitutional Claims

The trial court committed obvious error when it concluded that PRSM's proposed evidence was not "needed" to prove its constitutional claims.[11] CP 350.

There is nothing in the nature of a facial challenge that bars courts from considering relevant evidence. *See City of Redmond v. Moore*, 151 Wn.2d 664, 672, 91 P.3d 875 (2004) (considering illustrative evidence of impacts in a facial due process challenge). A facial challenge differs from an as-applied challenge in that the former alleges that the law is inherently unconstitutional, whereas an as-applied claim alleges that an otherwise lawful law violates the constitution in its particular application. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). This distinction, however, "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional

[11] Although the government respondents argued below that the APA should be construed in a manner that would bar admission of evidence needed to prove a claim, it did not cross-appeal the trial court's decision.

challenge."). Thus, the need for evidence will change depending on the elements of each constitutional doctrine. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) ("a facial challenge involves an examination of the terms of the statute itself 'measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications[.]'") (quoting Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement,* 48 Am. U. L. Rev. 359, 387 (1998)).

It is elementary that a plaintiff alleging a constitutional violation must, as a threshold matter, show that the government's action impairs a protected right. Thus, binding case law holds that a plaintiff alleging facial Takings and Due Process claims must show that the ordinance impacts property uses and/or values in order to sustain a claim.[12] *See Guimont v. Clark*, 121 Wn.2d 586, 605, 854 P.2d 1 (1993) (proof of impact required in facial regulatory takings claim); *Garneau v. City of Seattle,* 147 F.3d 802, 807-08 (9th Cir. 1998) (holding that facial takings plaintiffs have the burden

[12] A Commissioner from this Court ruled on this very issue in *Olympic Stewardship Foundation v. State of Washington Environmental Hearings Office*, Case 47641-0-II. There, Commissioner Bearse granted an identical motion, concluding that additional evidence was both necessary and warranted: **"**Despite the largely legal nature of a facial challenge, it appears that in a land use context, facts going to the impact of the challenged legislative enactment has on the economically viable property uses and other potential negative effects are relevant. . . ." CP 320 (citing *Guimont*, 121 Wn.2d at 605). The Commissioner explained that "[b]ecause the Board did not have the authority to review constitutional challenges and because additional facts are relevant, OSF demonstrates that its request meets the requirements of RCW 34.05.562(1)." CP 320-21.

of "introducing evidence of the economic impact of the enactment . . . on their property"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (landowner must provide proof that an ordinance impacts property in a facial takings challenge); *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (the plaintiff must show that a state actor deprived it of a constitutionally protected life, liberty, or property interest as a threshold matter in a facial due process challenge).

Similarly, to sustain a claim alleging that a land use ordinance facially violates the Free Expression Clause, the plaintiff must put on evidence demonstrating that the land use ordinance affects speech. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). Because PRSM's claim is based on expressive conduct, it must also provide evidence that the regulated conduct (landscaping and gardening) is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974); *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 832, 389 P.3d 543 (2017). Moreover, because PRSM's free expression claims are predicated on the SMP's imprecise language, PRSM must also offer proof that the SMP actually chills speech. *City of Seattle v. Webster*,

115 Wn.2d 635, 640 n.2, 802 P.2d 1333 (1990); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

Finally, a person alleging that a land use ordinance is unconstitutionally vague must put on proof that the challenged regulation impacts constitutionally protected conduct to sustain a facial claim. *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). The trial court's conclusion that PRSM's evidence is not needed to satisfy those constitutional claims directly conflicts with binding precedent from the Washington and U.S. Supreme Courts and is untenable.

1. Evidence Relevant to Property Rights Claims

The trial court did not address the substance of the proffered evidence or how it related to the elements of the constitutional doctrines in its ruling. CP 349-50. Nor did the government respondents discuss this question in their opposition briefs. CP 268-79, CP 280-89. Thus, there is no basis in the record for the City and Ecology to challenge the relevance of the proffered evidence on appeal. Nonetheless, the proffered evidence is directly relevant to certain elements of PRSM's constitutional claims.

In regard to its property rights claims, PRSM argued that the City's legislative record does not contain any evidence showing the impact that the mandatory buffer dedication (and other SMP requirements) has on shoreline property owners (CP 261-63; CP 311), which is a threshold element in a

facial regulatory takings or due process claim. *See Guimont*, 121 Wn.2d at 605. The City and Ecology cannot contest the need for this type of evidence where the Growth Board determined that the record contains no evidence showing an adverse impact to property values. AR 5815, n.52.

The trial court's decision also failed to address the facts relevant to the doctrine of unconstitutional conditions predicated on the Takings Clause as set forth by *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).[13] Together *Nollan* and *Dolan* limit the government's authority to condition approval of a land-use permit on a requirement that the owner dedicate private property to the public to only those circumstances where the dedication is necessary to mitigate impacts caused by the proposed development. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-06, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). Thus, this Court has held that enactment of a critical area buffer

[13] The U.S. Supreme Court has developed several tests to identify regulatory takings, focusing on "the severity of the burden that government imposes upon private property rights"—an inquiry that often implicates questions about the extent of economic-use impact and the amount of compensation owed. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *see*, *e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 12 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (regulation depriving property owner of all "economically beneficial use" of land effects taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (regulation subjecting property owner to physical invasion of land effects a taking). But, in *Nollan* and *Dolan*, the Court developed a unique Takings Clause doctrine to prevent government from imposing an extortionate, and therefore unconstitutional, condition on a property owner's right to use or build on his property. *Lingle*, at 546-47.

"must satisfy the requirements of nexus and rough proportionality established in [*Dolan*] and [*Nollan*]." *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 272-74, 255 P.3d 696 (2011); *Honesty in Envtl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (Critical area buffers "must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.").

PRSM's motion explained that the legislative record was insufficient to determine this constitutional issue because the City's studies focused on the question of how to protect shoreline ecological functions from the cumulative effects of area-wide use and development. CP 261-63; CP 311. The Takings Clause, however, holds that individual landowners may not be singled out to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960). Thus, the evidence needed to satisfy PRSM's unconstitutional conditions claim must address the actual source of the impacts (*e.g.*, storm water runoff, pollutant loading, etc.) that the City's buffers are designed to mitigate. *See Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. That is a qualitatively different inquiry.

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

PRSM's motion further argued that the record did not contain evidence necessary to determine whether the SMP's mandatory buffers are, in fact, limited to only that land necessary to mitigate for the impacts attributable to the burdened property.[14] CP 261-63; 311. To address this constitutional question, PRSM sought leave to submit testimony from Ms. Schaumburg (a recognized expert familiar with the science underlying the SMP[15]), Ms. Phillips, and Ms. Robbins. *Id*. Specifically, PRSM intended that Ms. Shaumburg testify regarding site-specific conditions and development impacts. CP 262-63; CP 311. Relatedly, PRSM sought leave to submit testimony from Ms. Phillips regarding the Growth Board's adoption of a "conceptual applicability" standard[16] is contrary to the most basic understanding of what qualifies as a reliable scientific conclusion when determining whether a buffer condition satisfies the nexus and

[14] The City and Ecology did not respond to this argument and did not challenge the necessity of Ms. Schaumburg's testimony in relation to the unconstitutional conditions challenge. Instead, the government set up a straw man argument by re-characterizing PRSM's claim as alleging a per se total regulatory taking, which is not alleged and is not unsupportable by the facts of the case. CP 273-74, 285.
[15] *OSF*, 199 Wn. App. at 695.
[16] AR 5822. A determination of "conceptual applicability" is not a scientific standard because it is often based upon the popularity of the particular bias, rather than objective observation of data. *See* Karl R. Popper, *The Logic of Scientific Discovery* (1959).

proportionality requirements of *Nollan* and *Dolan* (CP 263)—particularly where the SMP admits that the City relied on the so-called "precautionary principle," in lieu of direct evidence of environmental impacts, in developing its regulatory program.[17] AR 42. PRSM also intended that the testimony directly address two issues on which the Board relied on assurances from government attorneys—rather than science in the record—to support the City's decision to impose buffers. CP 311; AR 5827, 5829; *see also Swinomish Indian Tribal Cmty*, 161 Wn.2d at 435 n.8 (The "critical review" standard does not allow courts to rely solely on government "assurances" as evidence.). This evidence is necessary to understand how the SMP affects an individual's interest in his or her property. It is also necessary to determine whether the City's buffer requirements demand more land than is necessary to mitigate for on-site development impacts.[18] This testimony is essential to an unconstitutional conditions claim which requires that the government establish nexus and proportionality before demanding a buffer dedication. *Dolan*, 512 U.S. at 391 (the government

[17] According to the City, the "precautionary principle" states that, "as a general rule, the less known about existing resources, the more protective shoreline master programs should be to avoid unanticipated impacts to shoreline resources." SMP § 1.2.3 (AR 42).

[18] Per the City's own report, it considered off-site impacts, including the cumulative impacts of neighboring and upland development, when developing buffers. AR 99-100, 106. On this issue, the Addendum concluded that most of the problems associated with runoff are "primarily associated with roads and other impervious surfaces." AR 4311.

cannot satisfy this burden reference to general area studies and cannot shift the burden onto landowners).

The City and Ecology's conclusory assertion that this testimony is duplicative of the record is without merit and was not supported by any citations to the record in their trial court pleadings. CP 268-79, CP 280-89. That is because the City's own reports confirm that that the record does not contain this information. The City's Nearshore Analysis, for example, states that the "available data regarding Bainbridge Island nearshore resources are dated and lack accuracy across all elements." AR 4097. The Analysis concludes that "[f]urther data evaluation or additional studies will be required to address known data gaps. . . . [F]illing of data gaps is critical to the City for long-range planning purposes, and has not been performed." AR 4097; *see also id.* ("Relatively little controlled research has been directed at documenting and understanding the functional impacts of shoreline modifications to biological resources.").

Similarly, the City's Addendum to the Summary of Best Available Science Report warned that preset buffers are not supported by the science. AR 4306 ("One size does not necessarily fit all."). Instead, the Addendum concludes that "[m]any factors influence the effectiveness of a buffer, which would depend on site-specific factors." AR 4306. And more specific to Bainbridge Island, the Addendum concludes that "[f]or marine shorelines,

site specific factors . . . are more important than in freshwater riparian areas because of the high variability of habitat types in marine areas." AR 4310; *see also* AR 4098 ("The design and location of shoreline structures can significantly affect relative impacts to nearshore biological resources."). Regardless of the science (and despite the fact that 82 percent of the Island's shorelines are fully developed), the City based its prescriptive buffers on a series of "curve" graphs that estimate the effectiveness of a buffer based on two broad assumptions: (1) that the property is fully forested with mature vegetation and (2) that the marine shoreline is fully intact, providing all potential ecological functions. AR 4307-08. Direct evidence of site-specific variation is necessary to refute those assumptions.

Ms. Schaumburg's testimony is critical in this proceeding because the City and Ecology plan to argue that the SMP contains a variance-like procedure that allows a landowner to reduce the size of the preset buffer based on a site-specific study. That procedure, however, requires the landowner to use experts selected by the City (AR 306) and based all findings and conclusions on the studies selected by the City (the very studies that warned of inadequate data). AR 109. Notably, in creating the list of acceptable science, the City excluded all science that was critical of its preferred reports, including scientific analysis yet to be finalized or conducted. AR 109-10. Thus, the government, through the legislative

process, cleansed the record of critical science in all future, as-applied challenges.

2. Evidence Relevant to Freedom of Expression Claims

PRSM's free expression claim alleges that the City's vegetation provisions constitute an overbroad and unnecessary restraint on expressive conduct.[19] PRSM agrees that much of this argument could be decided as a matter of law because, if a regulation burdens expression, then the government bears the burden of showing that the restriction is justified and sufficiently tailored. *Collier v. City of Tacoma,* 121 Wn.2d 737, 753, 854 P.2d 1046 (1993); *Spokane Arcades, Inc. v. Brockett,* 631 F.2d 135, 138 (9th Cir. 1980), *aff'd,* 454 U.S. 1022, 102 S. Ct. 557, 70 L. Ed. 2d 468 (1981). But, as stated above, the City and Ecology have indicated that they plan to challenge whether gardening and landscape design constitute expressive conduct—a mixed question of law and fact that is asserted for the first time to the trial court. To respond to this defense, PRSM proposed that Ms. Young testify to the personal choices that go into different gardening styles or themes and to explain how those decisions constitute

[19] Both Article I, Section 5, and the First Amendment forbid the abridgment of conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. at 409; *State v. Arlene's Flowers, Inc.*, 187 Wn.2d at 832. Conduct will constitute protected speech if two conditions are met: "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410-11; *Arlene's Flowers*, 187 Wn.2d at 832.

expression.[20] Ms. Young would also testify that gardening can also be "a statement of social and political identity."[21] *See* Jaime Bouvier, *The Symbolic Garden: An Intersection of the Food Movement and the First Amendment*, 65 Me. L. Rev. 425, 439 (2013); *see also* Jules Janick, "Horticulture and Art," in G. R. Dixon, D. E. Aldous (eds.), *Horticulture: Plants for People and Places, Volume 3*, 1197 (Springer Science & Business Media Dordrecht 2014) (A garden expresses an individual's view of nature, culture, religion, politics, and more, providing viewpoints and critiques on culture.).

The City's claim that the trial court can decide this important constitutional question of first impression based on a few public comments is absurd. RP 15. Admittedly, several Bainbridge Island residents complained that the City's proposed vegetation rules would interfere with their right to express themselves through their gardens and landscape design, repeatedly asking the City to justify the ban on non-native species.

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[20] *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 921-24 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); *Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 614 (D. Md. 2011) ("Artistic expression lies within First Amendment protection."), *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (same).

[21] One of the first major protests against the Stamp Act (which led to the American Revolution), involved planting and decorating Liberty Trees. *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 Geo. L.J. 1057, 1060 (Apr. 2009).

See, *e.g.*, AR 742-44. The City, however, failed to meaningfully respond to these comments, stating either "comment noted" or that "native species *may be required* to meet 'no net loss of ecological functions and processes' for a specific project. . . ." *See* AR 2510 (emphasis added), The City did not challenge the assertion that gardening and landscape design qualified as expressive conduct. And Ecology remained silent on this issue. Thus, there is nothing in record establishing the facts necessary for a court to determine whether or not gardening and landscape design qualifies as expressive conduct. *Spence*, 418 U.S. at 410-11 (Conduct will constitute protected speech if two conditions are met: "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."); *Arlene's Flowers, Inc.*, 187 Wn.2d at 832 (same).

This evidence is essential to PRSM's constitutional claim because the City's legislative record failed to justify its decision to impose a blanket restriction on gardening and landscaping decisions, where its studies indicated that native vegetation may be required based on site- and project-specific bases. AR 2510. Instead of limiting its restriction to those circumstances, the City opted to ban all homeowners from planting species of their own choice within the buffer area. Making matters worse, the City shifted its constitutional burden to justify the restriction onto affected

homeowners, who may only secure permission to plant a non-preapproved species if they can provide, via a costly and time-consuming variance-like proceeding which involves hiring City-approved experts who can only rely on City-approved science, sufficient proof that their desired plant will provide the same functions as a native plant. *Collier,* 121 Wn.2d at 753. By requiring property owners to follow this procedure, the City cleansed all contrary facts in future, as-applied challenges.

3. Evidence Relevant to Vagueness Claims

Finally, in regard to its due process vagueness challenge,[22] PRSM proposed to submit documentary evidence and expert testimony showing that the SMP contains several vague and contradictory provisions that render it indecipherable by the average citizen. CP 263-64; CP 302-06; AR 5885-86; *see also* AR 5837 (Growth Board decision, noting that "several SMP provisions are poorly written" or "infelicitously" worded). The most objectionable SMP provision requires that property owners obtain the City's approval through an undefined and informal approval process[23]

[22] Courts allow facial constitutional challenges alleging that an ordinance is too vague to comport with the due process requirement that citizens receive fair notice of proscribed conduct. *State v. Bahl*, 164 Wash. 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).

[23] The "approval" scheme for "human activity" approvals is left undefined by the SMP, giving the City ad hoc administration and enforcement authority. 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). Furthermore, the SMP does not indicate what an "approval of activity" document

before engaging in any "human activity associated with the use of land or resources." AR 97, 224 (SMP §§ 4.1.1.2, 8). The limitless breadth of this provision—and the associated risk of arbitrary enforcement—demands meaningful review.[24] This is particularly so here, where the SMP 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).

Given the size of the 400-page SMP (and numerous cross-references throughout), PRSM sought for leave to submit testimony from a land-use professional to review the challenged provisions and explain why a citizen cannot determine the law by reading the SMP. For example, the SMP contains several contradictory provisions concerning whether the new buffer requirements are retroactive. Several provisions state that the buffer standards do not apply retroactively to lawfully established structures and uses. AR 151, 107-8, 254-92 (SMP § 4.2.1.1, SMP § 4.1.3.4, SMP § 8.0).

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would be called, or whether it is appealable—it does, however, contemplate the issuance of a legally binding document that imposes conditions on the property owner. SMP §§ 4.1.2.5(1)-(5).

[24] The Growth Board decision only compounded the public's confusion by concluding—contrary to settled case law—that the SMP's definition section is not binding on the City's interpretation and enforcement of regulatory terms. AR 5886; *but see Colautti v. Franklin*, 439 U.S. 379, 392 n.10, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) ("[A] definition which declares what a term 'means' . . . excludes any meaning that is not stated."); *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.).

But elsewhere the SMP states that the buffer requirements apply to lawfully established residential structures. AR 151, SMP § 4.2.1.1. And yet another provision states that the new buffer requirements are only triggered if "changes or alterations are proposed" (AR 98, SMP § 4.1.2.1), which, of course, includes any "human activity." This is just one example of the SMP's many confusing provisions. PRSM argued that expert testimony on this issue will be of substantial assistance to the court and parties, and will narrow and focus this argument. This type of expert testimony is regularly allowed in support of facial vagueness claims. *See*, *e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 384, 391-92, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (relying on testimony from numerous experts to determine vagueness challenge). Indeed, the City and Ecology proposed expert testimony on this very topic in their conditional witness lists. CP 182-88.

PRSM additionally sought leave to submit public testimony from the City's Planning Commission and staff showing widespread confusion regarding interpretation and application of certain SMP provisions. CP 263-64; 302-06; 361-63. As an offer of proof, PRSM provided the trial court with excerpts from a Planning Commission meeting in which the Chair stated: "And so if you can't make the whole document so it's something that one person could read and understand, then I don't think we're anywhere. . . . And I've gone through this so many times. I can't understand

this document." CP 388, Ex. B at 15. Another Commissioner stated: "[T]his is the hardest document that I've ever had to use for any project that I've been on. And it's simply, it's vague in places. It's complicated." *Id*. Yet another Commissioner commented, "[Y]ou can't figure it out." CP 418, Ex. B at 45. Planning department staff also commented that the SMP is "not clear and people don't . . . understand" certain provisions. CP 435, Ex. B at 62. Another City official explains that the SMP's broad and imprecise language "opens up for interpretation among different planning staff, which I don't think the general public likes. But I think that what no net loss gives you is the flexibility to achieve it as you like, if you will." CP 415, Ex. B at 42. While flexibility *sounds* innocuous, it is precisely this sort of ad hoc, changeable interpretation by people administering the program that the void-for-vagueness doctrine prohibits. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."). The fact that different branches of the City government are taking contradictory positions in regard to vagueness further demands that that the court's decision is made on evidence, rather than attorney argument. *Swinomish Indian Tribal Cmty.*,

161 Wn.2d at 435 n.8 (Courts may not rely on the "assurances" of government lawyers as a substitute for evidence.).

V.

CONCLUSION

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

DATED: September 14, 2018. Respectfully submitted,

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