Case No: 51109-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents,

and

Kitsap County Association of Realtors®,

Intervenor Below.

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

MOTION TO MODIFY RULING

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IDENTITY OF MOVING PARTIES

The moving parties are Petitioners Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc. (PRSM).

I. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 17.7, PRSM asks this Court to modify Commissioner Schmidt's March 20, 2018, ruling denying discretionary review by granting the motion for discretionary review.

II. INTRODUCTION

This motion to modify asks whether a citizen has a right to put on evidence necessary to prove the elements of a constitutional claim where a statute requires that constitutional claims be raised for the first time alongside an administrative appeal. The answer is yes for three reasons:

First, binding precedent from the U.S. Supreme Court requires that PRSM put on proof of certain elements of its facial constitutional claims.[1]

[1] *See*, *e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (requiring landowner to provide proof that an ordinance impacts property to sustain a facial takings challenge); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (requiring evidence of a land use ordinance's effect on speech in facial free expression case); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)

Second, due process guarantees a right to present evidence necessary to seek redress of harm.[2] And third, the Legislature cannot limit the superior court's jurisdiction over constitutional claims, which includes the right to hear evidence.[3] Thus, the Administrative Procedure Act's (APA) limitation on the admission of "additional evidence" (RCW 34.05.562) 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); *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 in administrative appeal). The trial court's interpretation of the APA to bar PRSM from submitting evidence warrants discretionary review. RAP 2.3(b)(1), (3). The commissioner's decision should be modified accordingly.

III. FACTS RELEVANT TO MOTION

This case involves a challenge to the City of Bainbridge Island's 2014 Shoreline Master Program (SMP) update, which imposes several

(requiring proof that the challenged regulation impacts constitutionally protected conduct to sustain a facial vagueness claim).

[2] *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, 18–19, 58 S. Ct. 773, 82 L. Ed. 1129 (1938) (the right to present evidence extends to civil matters).

[3] *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012).

onerous demands on property owners. For example, the SMP requires that shoreline landowners: (1) consent to warrantless searches of their land as a mandatory condition of any new permit approval (SMP § 7.2.1 (citing BIMC 1.16)); (2) submit a request for approval before engaging in any "human activity" near the shorelines (SMP § 4.1.1.2); (3) seek City approval before designing one's garden (SMP § 4.1.2); and (4) dedicate conservation buffers designed to mitigate for impacts caused by public roads and upland neighbors (SMP, Table 4.3).

In accordance with the procedures set forth by the Shoreline Management Act (SMA), PRSM filed 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. RCW 90.58.190. The Growth Board's authority was limited to determining whether the City and Department of Ecology complied with statutory requirements when updating the SMP. *Id*. Thus, the Board's review was limited to the City's legislative record—PRSM had no opportunity to present evidence relevant to its constitutional claims during the administrative proceeding. *See Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196 n.21, 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.).

After the Growth Board upheld the SMP on statutory grounds,[4] 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. 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. As originally filed, the petition alleged only statutory grounds for reversing the Growth Board's decision under the APA.

PRSM notified the City and Ecology of its intent to submit evidence relevant to its constitutional claims, as is allowed in a declaratory judgment case. In response, the government—which wanted to restrict review to its record—successfully moved the trial court to dismiss the declaratory judgment claims, arguing that the APA provides the exclusive means for judicial review of an SMP update.[5] App. C (relying on RCW 34.05.510).

PRSM then moved the court for leave to submit evidence necessary to prove certain elements of three of its constitutional claims. In addition to

[4] *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Growth Mgmt. Hrngs. Bd. No. 14-3-0012, 2015 WL 1911229 (Apr. 6, 2015).
[5] After the court dismissed PRSM's declaratory judgment claims, the court granted leave for PRSM to amend the petition to reallege its constitutional claims under the APA.

addressing the APA's additional evidence provision, the motion argued that the court had original jurisdiction over constitutional claims.[6] App. F at 5–6. Thus, PRSM argued that the APA cannot limit a litigant's right to present evidence needed to show a constitutional violation. App. F at 4. The City and Ecology did not contest the relevance of the proffered evidence. Instead, they argued that the APA should be narrowly construed to forbid the additional evidence. App. G at 2–4; App. H at 2–4, 8–9. Alternatively, the government argued that the proffered evidence was duplicative because it is related to topics touched upon by public comments in the record. App. G at 6–10; App. H at 5.

The trial court denied PRSM's motion without addressing the arguments regarding original jurisdiction and a litigant's right to put on evidence. App. A. Instead, the court accepted the government's argument that the APA limits the admission of evidence to exceptionally limited circumstances. *Id*. at 3. The court then adopted the governments' argument that the proffered evidence was duplicative, without actually reviewing the record itself to verify that argument:

[6] PRSM argued that RCW 34.05.562(1) authorized 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." RCW 34.05.562(1); 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 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.

Id. at 4; *but see* App. I at 7–8, 20–22 (PRSM reply brief contesting respondents' argument that the Growth Board had heard much of the proffered evidence.).

PRSM moved for reconsideration, arguing that, because the trial court had not reviewed the record, the ruling does not address the substance of the proffered evidence, how it relates to the elements of the constitutional claims, or where it is supposedly duplicated in the record. App. J. Nor did the trial court provide any explanation of what it meant by "much" of the proffered evidence, leaving the parties and reviewing courts with no way to know what portion of the proffered evidence *is or is not* in the record. *Id*.

After the trial court denied the motion for reconsideration, PRSM moved this Court for discretionary review of the trial court's untenable evidentiary ruling under RAP 2.3(b)(1) and (3).[7] Like the trial court,

[7] *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); *see also*, *e.g.*, *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).

however, the Commissioner's ruling adopted the government's argument that the APA's limitation on evidence applies to constitutional issues raised for the first time to the trial court, without acknowledging PRSM's arguments and authorities. App. L at 2, 5. The Commissioner then denied review under RAP 2.3(b)(1), viewing the trial court's ruling as an ordinary exercise of discretion. *Id*. at 7. The Commissioner also denied review under RAP 2.3(b)(3), erroneously concluding that PRSM had offered no argument demonstrating how an evidentiary ruling can depart from accepted judicial norms. *Id*. at 8; *but see Young*, 63 Wn. App. at 431. This motion follows.

IV. GROUNDS FOR THE RELIEF SOUGHT

Discretionary review is necessary to correct the trial court's obvious error interpreting the APA to bar all evidence relevant to issues properly raised for the first time to the court. The ruling rendered all further proceedings useless by depriving PRSM of its right to present evidence necessary to prove its constitutional claims. *Morgan*, 304 U.S. at 18 (holding that due process guarantees "the right to present evidence"); *see also 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."). Review is further warranted to correct the trial court's untenable departure from accepted judicial norms when it ruled that the Growth Board had "heard much of the

proffered testimony" despite admitting that "[t]he Court has yet to review the record below." App. A at 4. That ruling represents an abdication of the judge's role as the arbiter of facts and warrants immediate review.

A. The Trial Court Deprived PRSM of Its Right to Present Evidence in Support of Its Constitutional Claims

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). This right guarantees that decision-makers, like judges, will be sufficiently informed to carry out their function 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[.]"). Accordingly, our courts hold that a litigant has a constitutionally protected right to present evidence in support of his claims, or to rebut contrary evidence. *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 33 Wn.2d 448, 495, 206 P.2d 456 (1949); *Robles v. Dep't of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987). A decision that denies a litigant of this right will cause irreparable harm and will render

further proceedings useless. *Palmigiano v. Travisono*, 317 F. Supp. 776, 787 (D.R.I. 1970).

Despite PRSM's briefing on this issue, neither the trial court nor the Commissioner acknowledged this constitutionally guaranteed right. Thus, their interpretation of the APA's "additional evidence" provision failed to follow the rule that courts must interpret statutes consistent with the Constitution, where possible. *ZDI Gaming*, 173 Wn.2d at 619; *see also* RCW 34.05.020 ("Nothing in [the APA] may be held to diminish the constitutional rights of any person[.]"). The trial court's decision also conflicts with the understanding that an administrative proceeding cannot fix the facts for all future proceedings where a party was not given an opportunity to present evidence and argument on the issue. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480–81, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982). Thus, the APA provision that limits appellate review of an agency decision to the record is predicated on the assumption that the limitation on evidence applies only to claims that were (1) subjected to administrative consideration and (2) have 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).

Discretionary review is particularly warranted here because the City and Ecology have indicated that they plan to assert *factual defenses* to PRSM's constitutional claims, even though the trial court barred PRSM from putting on basic facts necessary to prove their claims. This plainly violates due process and renders further proceedings useless. *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").

B. The Trial Court Committed Obvious Error When It Rejected Proffered Testimony As Duplicative Without Reviewing the Record

Discretionary review is also warranted because the trial court committed obvious error when it concluded that the Growth Board had "heard much of the proffered testimony," despite admitting that the court "has yet to review the record below."[8] App. A at 4. That conclusion is untenable for two reasons. First, the Growth Board heard no testimony.

[8] The court's decision relied solely on the government respondents' argument to reach that conclusion, which is obvious error. App. A at 4; *but see 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, 433 n.7, 166 P.3d 1198 (2007) (The court may not rely on "assurances" of government attorneys as a substitute for evidence.).

Second, the court cannot rule that evidence is duplicative of a record it has not read. Thus, the trial court's conclusion that the proffered evidence is not "needed" to prove certain elements of PRSM's constitutional claims is wholly unsupported. *Id*. Indeed, the court did not even address the elements specified in PRSM's motion, so it could not conclude that the proffered evidence is unnecessary. *Id*. Likewise, the trial court's conclusion that all of the proffered evidence is not "needed" because the Growth Board had "heard much of the proffered testimony" is untenable. Inherent in the conclusion that "much" of the evidence is duplicative of evidence in the record is the conclusion that "some" of it is not.

If the court had reviewed the record to verify the government's claims (which is its duty as a fact-finder), it would have seen that the record is designed to address the SMA's procedural requirements. It does not provide a forum to present facts necessary to establish a constitutional violation. Thus, while the record does contain public comments questioning the constitutionality of the various SMP proposals, those comments are extremely general and/or conclusory. They do not address the specific elements of PRSM's constitutional claims, nor do they address the final, adopted version of the SMP. Indeed, due to the general nature of the comments, the Growth Board concluded that it would be "impractical" and "unrealistic" for the City to address the comments in the record. *PRSM*,

2015 WL 1911229 at *28. Thus, the record is also devoid of the government's response to any of the constitutional concerns raised during the legislative process. To allow the City and Ecology, in this circumstance, to assert factual defenses to the constitutional claims for the first time on appeal, while holding that PRSM is bound to an inadequate record, is arbitrary and unjust. PRSM is entitled to meaningful consideration of the proffered evidence (*i.e.*, the "some") that is not duplicative of evidence in the record and is necessary to prove certain elements of its constitutional claims.

C. The Trial Court Plainly Misunderstood the Unique Factual Questions Raised by PRSM's Constitutional Claims

Finally, the trial court committed obvious error when it concluded, without reasoned explanation, that PRSM's proffered testimony was not "needed" to prove its constitutional claims.

1. Evidence Relevant to Property Rights 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 the burdened property owners, which is a threshold element in a facial regulatory takings claim.[9] *See Guimont v. Clark*, 121 Wn.2d 586, 605, 854

[9] A Commissioner from this Court ruled on this very issue in *Olympic Stewardship Foundation v. State of Washington Environmental Hearings Office*, Case No. 47641-0-II.

P.2d 1 (1993); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807–08 (9th Cir. 1998) (holding that facial takings plaintiffs have the burden of "introducing evidence of the economic impact of the enactment . . . on their property"). Nor does the record contain any studies showing the actual ecological/development conditions on individual properties. This evidence is necessary to show whether the government limited the size of the buffer to only that which is necessary to mitigate for the pollution caused by new development on the burdened property, as required by the doctrine of unconstitutional conditions.[10] *See Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

PRSM sought leave to submit testimony from Kim Schaumburg, a recognized expert familiar with the science underlying the SMP.[11] PRSM

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 . . ." App. D. at 6 (citing *Guimont*, 121 Wn.2d at 606). 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)." *Id*. at 6–7.

[10] Enactment of a critical area buffer "must satisfy the requirements of nexus and rough proportionality established in [*Dolan*] and [*Nollan*]." *Kitsap Alliance of Property Owners v. Cent. 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.").

[11] *Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 695, 399 P.3d 562 (2017).

intended that Shaumburg testify to constitutional questions that are not addressed by the record. Additional evidence regarding site-specific impacts is necessary for two reasons. First, the preamble to the SMP states that the City relied on "the precautionary principle" in lieu of direct science when developing the regulations, meaning that the City based its SMP on presumptions rather than facts.[12] And second, the Growth Board concluded that the government may demand a dedication of property based on science that is only "conceptually applicable"—a standard does not appear anywhere in scientific literature.[13] Schaumburg's testimony is necessary to demonstrate that the City's precautionary assumptions resulted in demands for more land than necessary, and would speak directly to the SMP's arbitrary and unnecessary impact on property rights.

Consider, for example, the City's demand that every shoreline property owner dedicate a conservation buffer to filter pollutants from storm water runoff.[14] On this issue, the City adopted buffers based on the precautionary assumption that every stretch of shoreline property would have identical runoff rates and pollutant loads. Because the SMA does not

[12] 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).
[13] *PRSM*, at *23. 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).
[14] *PRSM*, at *22.

require government to base regulations on actual conditions, the record does not identify the presence or source of any pollutants—let alone the rate and volume of storm water flow. Nor does the record contain any studies identifying and isolating the impacts of new development from preexisting public problems. That information, however, is necessary to decide PRSM's substantive due process, takings, and unconstitutional conditions claims. The trial court's failure to allow any of Schaumburg's proposed testimony in light of the insufficient record and the elements of PRSM's constitutional claims renders its decision arbitrary and unreasoned.

2. Evidence Relevant to Freedom of Expression Claims

As to its freedom of expression claim, PRSM argued that additional testimony was necessary to establish the communicative nature of landscaping and gardening.[15] There is nothing in the record speaking to this element of a free expression claim—the government's claims to the contrary are misleading. The record contains three public comments generally asserting a right to express oneself through landscaping. AR 742–44, 2511, 2821. The City responded to the first two comments without

[15] 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. 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). 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.

addressing the constitutional question. AR 2821 (stating 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. Thus, there is nothing in the record addressing the communicative nature of landscaping, which is a question of first impression under the State and Federal Constitutions. *See* Jaime Bouvier, *The Symbolic Garden: An Intersection of the Food Movement and the First Amendment*, 65 Me. L. Rev. 425, 439 (2013).

PRSM's motion argued that, insofar as the City and Ecology plan to challenge the expressive nature of landscaping, additional facts are necessary to determine the issue. Specifically, PRSM proposed that Ms. Young testify to the personal choices that go into different landscaping styles or themes, and to explain how those decisions constitute expression.[16]

[16] *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (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).

Ms. Young would also testify that landscaping can also be "a statement of social and political identity."[17] *See* Bouvier, 65 Me. L. Rev. at 439; *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 trial court's failure to meaningfully consider this proposed testimony, where the government has indicated that it plans to challenge this essential element of the free expression claim for the first time on appeal, constitutes an obvious and prejudicial error.

3. Evidence Relevant to Vagueness Claims

Finally, in regard to its vagueness challenge,[18] PRSM proposed to supplement the record with documentary evidence and expert testimony showing that the SMP contains several vague and contradictory provisions that render it indecipherable by the average citizen. *See PRSM*, at *75

[17] 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).

[18] 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 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).

(noting that "several SMP provisions are poorly written"). For example, one of the most objectionable provision demands that shoreline property owners obtain the City's approval before engaging in any "development, use, **or activities** located within shorelines of statewide significance" whether or not the activity requires a permit. SMP § 4.1.1.2 (AR 97) (emphasis added). The SMP then defines "activity" as any "human activity associated with the use of land or resources." SMP § 8 (AR 97, 224). The limitless breadth of this provision demands clarity—particularly where the SMP subjects landowners to both civil and criminal liability for violating shoreline regulations, regardless of the person's knowledge or intent. SMP § 7 (AR 250–53). And yet, the Growth Board decision only compounded the public's confusion by concluding—contrary to settled case law[19]—that the SMP's definition section is not binding on the City's interpretation and enforcement of regulatory terms. *PRSM*, at *64. PRSM sought leave to submit documentary evidence showing that City officials, addressing this and other provisions, have stated 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

[19] *Colautti v. Franklin*, 439 U.S. 379, 393 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.).

you is the flexibility to achieve it as you like, if you will." App. J, Ex. 2 at 42.

PRSM's proffered evidence is necessary to show how the vague provisions impact shoreline property owner's constitutionally protected conduct. *Kolender*, 461 U.S. at 358 n.8. It is also needed because the government lawyers were taking a contradictory position in this lawsuit from the City's Planning Commission and staff. *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 435 n.7 (The APA's clearly erroneous standard does not allow courts to rely on the "assurances" of government lawyers as evidence.). 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." App. J, Ex. 2 at 15. Another Commissioner stated: "this 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, "you can't figure it out." *Id.*, Ex. 2 at 45. Planning department staff also commented that the SMP is "not clear and people don't . . . understand" certain provisions. *Id.*, Ex. 2 at 62.

Given the size of the 400-page SMP, PRSM also sought for leave to submit testimony from a land-use professional to review several provisions of the SMP and explain why a citizen cannot determine the law by reading the SMP, thereby impacting the right to use one's property. 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 required and/or regularly allowed in support of vagueness claims. *See*, *e.g.*, *Kolender*, 461 U.S. at 358 n.8 (requiring proof of impacts); *Colautti*, 439 U.S. at 384 (relying on testimony from numerous experts to determine vagueness challenge). The trial court's failure to meaningfully consider this proffered evidence constitutes plain error and warrants discretionary review.

CONCLUSION

PRSM respectfully requests that this Court modify the Commissioner's ruling by granting discretionary review of the trial court's order denying PRSM's motion for leave to provide additional evidence relevant to the constitutional claims.

DATED: April 19, 2018.

Respectfully submitted,

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