REPLY APPENDIX CONTENTS

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Court of Appeals Division I
State of Washington
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 80092-2-I

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et. al.,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et. al.,

Respondents,

MOTION TO PUBLISH OPINION

I. IDENTITY OF MOVING PARTY

This Motion is presented by Greg A. Rubstello and James Haney on behalf of the Respondent City of Bainbridge Island ("City"). Both Mr. Rubstello and Mr. Haney have served multiple decades as City Attorneys. Both are practitioners of land use law in Washington State, and practice in the area of administrative land use law under Chapters 36.70A, 36.70B and 36.70C RCW. The Unpublished Opinion (hereinafter, the "Decision") in the above-captioned

matter clarifies important legal principles for attorneys who practice before the Washington State Growth Management Hearings Board and in judicial LUPA proceedings.

II. RELIEF SOUGHT

Pursuant to Rule of Appellate Procedure ("RAP") 12.3(e), the City requests that this Court publish the Decision issued on December 9, 2019 in the above-captioned matter. A copy of the Decision is attached as Exhibit A.

The Decision clarifies two significant principles of Washington law regarding the significance of the making of the administrative record in local administrative proceedings appealable to the Growth Management Hearings Board ("Board"), particularly where constitutional issues may be argued in a subsequent appeal to the superior court. First, the Decision determines for the first time by an appellate court that judicial review of a decision of the Board is limited to the administrative record, even when constitutional issues may be raised by the appellant. The decisions states with certainty that a motion to supplement the administrative record with additional testimony is properly denied by the superior court. Second, the Decision clarifies the difference between an appeal of an administrative action under the APA (Chapter 34.05 RCW) and an appeal under LUPA (Chapter 36.70C RCW) with respect to supplementation of the record on appeal. The issues addressed in the Decision are of substantial public interest and will aid practitioners of local administrative land use proceedings, as well as litigants, practitioners and the judiciary in addressing

constitutional issues raised in the courts in APA cases.

III. FACTS RELEVANT TO THIS MOTION

Preserve Responsible Shoreline Management ("Petitioner") sought review of the superior court's decision denying its motion to supplement the administrative record made on appeal of the City's Shoreline Master Plan following an unsuccessful appeal to the Board. The background facts and arguments of the parties are detailed in the attached unpublished decision and will not be repeated here.

IV. GROUNDS FOR RELIEF AND ARGUMENT

The City moves to publish the Decision pursuant to RAP 12.3(e), which provides as follows:

> (e) *Motion To Publish*. A motion requesting the Court of Appeals to publish an opinion that had been ordered filed for public record should be served and filed within 20 days after the opinion has been filed. The motion must be supported by addressing the following criteria: (1) if not a party, the applicant's interest and the person or group applicant represents; (2) applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or

(6) whether the decision is in conflict with a prior opinion of the Court of Appeals.

A. Publication Is Necessary To Clarify That The Courts Will Not Allow An APA Administrative Record To Be Supplemented For Consideration Of Constitutional Claims.

The Decision's publication would assist all local government administrative law litigants, practicing land use attorneys. The Decision is the first Washington appellate court holding to explicitly and comprehensively answer the question of whether an administrative record first appealed to the Board can be supplemented on appeal to the superior court for consideration of constitutional issues not considered by the Board. Because the Board has exclusive jurisdiction of the initial appeal of local government land use actions on the basis of claims of violation of the Growth Management Act (Ch. 36. 70A RCW), the Decision, if published, would provide authoritative clarity for citizens, property owners, the land use bar and judiciary on the need to make a record in local government administrative proceedings necessary to later argue constitutional claims in the superior court. Specifically, the Decision, if published, will aid all LUPA litigants and their attorneys in knowing when to timely make the record necessary for argument of constitutional claims not heard or considered in APA appeals to the Board. The Petitioner in this case would have benefited from the earlier publication of an appellate court decision on this issue. For this reason, the Decision will add significant value to the

existing body of APA related authority in local land use proceedings.

The Decision also clarifies the distinction in the relevant statutes between LUPA proceedings and APA governed appeals to the Board, with respect to the ability of the courts to supplement an administrative record on appeal for consideration of constitutional claims not considered by the Board.

B. The Decision Is of General Public Interest and Importance.

If published, the Decision would provide strong and clear guidance to litigants, legal practitioners, and the judiciary regarding the raising and hearing of constitutional claims raised on appeal of local land use administrative decisions. Such matters are of broad and significant importance in the context of appealing the actions of local government in its administration of the GMA. The Decision clarifies existing law and shows the importance of developing a record at the local level that will allow consideration of all claims, including constitutional claims, that may be raised on appeal to the superior courts.

The issues addressed in the Decision are of broad and substantial public interest and are particularly important to attorneys and the judiciary in part because constitutional claims are frequently raised together with other claims of violation of the GMA and/or SEPA. Publication of the Decision will prevent the confusion experienced by Petitioner in this case. The Decision is worth adding to the established body of law in Washington State. As a document to guide future conduct of local land use law litigants and practitioners, the Decision merits publication.

C. The Decision Does Not Conflict with a Prior Court Opinion.

The Decision confirms for the first time, by applying well recognized principles of law, that a court must deny a motion to supplement the administrative record on appeal to the superior court of a decision of the Board. Thus, the Decision does not conflict with a prior opinion of this Court and provides helpful clarification not contained in previous reported decisions.

V. CONCLUSION

For the reasons above, the City respectfully ask the Court to publish the Decision dated December 9, 2019 in the above-captioned case.

DATED this 30th day of December, 2019.

OGDEN MURPHY
WALLACE, PLLC

s/ Greg Rubstello
* * * * *

Attorneys for City of
Bainbridge Island

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al., Petitioners, vs. CITY OF BAINBRIDGE ISLAND, et al., Respondents.	NO. 15-2-00904-6 WASHINGTON STATE DEPARTMENT OF ECOLOGY RESPONSE TO PETITIONERS MOTION TO SUPPLEMENT THE RECORD

* * * * *

II. ARGUMENT

The superior court acts in its appellate capacity when it hears a challenge to an administrative decision under the APA. *Farm Supply Distributors., Inc. v. Wash. Util. & Transp. Comm'n*, 83 Wn.2d 446, 448, 518 P.2d 1237 (1974). The bases for judicial review of the Board's Final Decision and Order are set out in RCW 34.05.570(3). Relevant to this motion, this Court may grant relief if the Board's order, or the statute on which the order is based, violates constitutional provisions on its face. RCW 34.04.570(3)(a).

A. Standard for Supplementation of the Record

PRSM now seeks to supplement the administrative record in this matter with testimony and documentary evidence. Petitioners' Motion to Authorize Supplementation of the Record (Pet. Mot.) at 10-13. However, in an APA appeal, courts apply the APA standards to the record that was before the Board. RCW 34.05.558. *Kittitas Cty. v. Eastern Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). "[T]he facts are established at the administrative hearing and the superior court acts as an appellate court." *US West Commc'ns, Inc. v. Wash. Util. and Transp. Comm'n*, 134 Wn.2d 48; 72, 949 P.2d 1321 (1997).

Under the APA, new evidence is generally not taken by a reviewing court. *See e.g. Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Herman v. Shorelines Hr'gs Bd.*, 149 Wn. App. 444, 455-56, 204 P.3d 928 (2009); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 64-65, 202 P.3d 334 (2009). The superior court does not take new evidence unless such evidence falls within the limited statutory exceptions of RCW 34.05.562. *US West*, 134 Wn.2d at 72.

New evidence is only taken if it relates to the validity of the agency action at the time it was taken, and is needed to decide disputed issues regarding improper composition of the decision making body, unlawfulness of procedure or decision making process, or if such evidence represents material facts not required to be determined on the agency record. RCW 34.05.562(1); *Motley*, 127 Wn. App. at 76. "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." *Motley*, 127 Wn. App. at 76.

Ecology agrees with PRSM that RCW 34.05.562(2), allowing remand to the Board for fact-finding, is not applicable in this case. Therefore one of the three exceptions that would allow supplementation of the record found in RCW 34.05.562(1) must apply in order for new evidence to be taken by this court:

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

RCW 34.05.562(1).[1] PRSM's proposed supplements to the record in this case do not meet these narrow exceptions. PRSM's motion should be denied.

* * * * *

Dated this 1st day of September, 2017.

s/ Phyllis J. Barney
* * * * *
Attorneys for Respondent
Department of Ecology

[1] PRSM does not claim that the Board was improperly constituted, nor that material facts were not determined on the agency record. RCW 34.05.562(1)(a), (c).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KITSAP COUNTY

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al., Plaintiffs, vs. CITY OF BAINBRIDGE ISLAND, et al., Defendants.	NO. 15-2-00904-6 CITY OF BAINBRIDGE ISLAND'S BRIEF IN OPPOSITION TO PETITIONERS' MOTION TO AUTHORIZE SUPPLEMENTATION OF THE RECORD

* * * * *

B. SUPPLEMENTATION OF THE ADMINISTRATIVE RECORD IS STRICTLY LIMITED UNDER RCW 34.05.562.

PRSM now seeks to supplement the record with testimony and documentary evidence. Such supplementation is strictly limited to specific circumstances that warrant making an exception to the general APA rule mandating that judicial review be limited to the agency record. RCW 34.05.566(1); *Motley-Motley, Inc. v. State,* 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n,* 110 Wn. App. 498,518, 41 P.3d 1212 (2002), *aff'd,* 149 Wn.2d 17, 65 P.3d 319 (2003).

The APA clearly prohibits the superior court from admitting new evidence unless such evidence falls within the statutory exceptions provided in RCW 34.05.562:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.
>
> (2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:
>
> (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to

> prepare or preserve an adequate record;
>
> (b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;
>
> (c) The agency improperly excluded or omitted evidence from the record; or
>
> (d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

As our courts have stated repeatedly, "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." *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Ault v. Wn. State Highway Comm'n*, 77 Wn.2d 376, 378, 462 P.2d 546 (1969) (quoting *Ins. Co. of N. Am. v. Kueckelhan*, 70 Wn. 2d 822, 835, 425 P.2d 669 (1967)).

Raising constitutional claims does not modify the superior court's mandate to limit its review to the agency record and admit new evidence only if it meets

the criteria of RCW 34.05.562. For example, in *Samson v. Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009), the court addressed constitutional and non-constitutional challenges to the Growth Board's approval of the City's SMP amendment. The Samson court denied the petitioners' motion to supplement the record because the proposed evidence did not meet the narrow categories provided in RCW 34.05.562. *Id*. at 65 (finding "there is no evidence that one or more of the parties did not know and was under no duty to discover the evidence until after the agency action" as required by RCW 34.05.562(2)). Likewise, in *Bayfield Resources Co. v. Western Washington Growth Management Hearings Board*, 158 Wn. App. 866, 244 P.3d 412 (2010), the court considered whether a critical areas zoning amendment violated substantive due process and whether the Growth Board's affirmation of the amendment was not supported by substantial evidence. Even though the petitioners were not able to raise their constitutional claims at the Growth Board (because constitutional claims are beyond the Growth Board's jurisdiction), the appellate court conducted its analysis on the basis of the Growth Board's administrative record. *Bayfield Res. Co.*, 158 Wn. App. at 880-81, 884.

C. PRSM'S NEW EVIDENCE DOES NOT MEET THE CRITERIA OF RCW 34.05.562.

PRSM concedes that it cannot demonstrate any of the permissible grounds for remanding supplementing the record identified in RCW 34.050.562(2). Petitioners' Motion to Authorize Supplementation of the Record ("PRSM Motion") at p. 4. Respondents agree that none of these circumstances were alleged by Petitioners, nor do they

apply to the instant case. Most noteworthy, as in *Samson*, none of the testimony PRSM identifies in its motion is "new evidence [that] has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action." RCW 34.05.562(2)(b)(l); *see also Motley*, 127 Wn. App. at 77 ("All of the new evidence that the trial court allowed Motley to submit concerning water use during the period from the late 1960s through the mid-1980s was available at the time of the PCHB hearing. This was not new evidence that Motley 'did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action.'").

Having no basis for supplementation under RCW 34.05.562(2)(b)(l), PRSM seeks to admit new evidence that was easily discoverable during the agency action under the auspices that the Board's procedure or decision-making was unconstitutional, and therefore "unlawful" under RCW 34.05.562(1)(b). PRSM Motion at 4-5. However, PRSM cites no authority for the proposition that RCW 34.05.562(1)(b)'s provision for supplementing the agency record when there has been "[u]nlawfulness of procedure or of decision-making process" allows substantive challenges to the Board's conclusions. Indeed, no such authority exists because the language of RCW 34.05.562(1)(b) plainly refers to the agency's process and procedure.

Accordingly, to demonstrate that new evidence should be admitted under RCW 34.05.562(1)(b), PRSM would have to show that the agency did not correctly follow its own procedure and that the

irregularity substantially prejudiced PRSM. *See, e.g.*, *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401,414, 216 P.3d 451 (2009). But PRSM does not allege that there were any procedural irregularities in the agency proceeding relating to the admission of evidence or any other matter. The agency record shows that PRSM was provided ample opportunity to develop a record during City's public hearings prior to adoption of the SMP, which was then incorporated into the record considered by the Board. Nothing prevented PRSM from submitting testimony and written comments related to its constitutional claims during public comment to the City. Therefore, PRSM' s argument that it meets the criteria of RCW 34.05.562(1)(b) fails.

* * * * *

A facial challenge "must be rejected if there are any circumstances where the statute can be constitutionally applied." *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 1220 (2010).

* * * * *

DATED this 1st day of September, 2017.

OGDEN MURPHY WALLACE, PLLC

By s/ James E. Haney

* * * * *

Attorneys for Defendant
City of Bainbridge Island.

Reply Appendix D-1

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No. 51109-6-II

COURT OF APPEALS,
DIVISION II, OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al.,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et al,

Respondents,

RESPONDENT BAINBRIDGE ISLAND'S RESPONSE TO MOTION TO MODIFY RULING

* * * * *

B. PRSM HAS NOT BEEN DENIED THE RIGHT TO PRESENT EVIDENCE IN SUPPORT OF ITS CONSTITUTIONAL CLAIMS. PRSM HAD AMPLE OPPORTUNITY TO PRESENT ITS EVIDENCE WHEN THE RECORD WAS CREATED BEFORE THE CITY OF

BAINBRIDGE ISLAND AND THE DEPARTMENT OF ECOLOGY.

PRSM's argues that the trial court deprived PRSM of its right to present evidence on its constitutional claims, but none of the cases cited by PRSM establish a statutory or constitutional right to present new evidence to a reviewing court under the APA. In fact, no such right exists and the APA contemplates that all evidence, including evidence supporting constitutional claims, must be presented during the administrative process that led to the decision under judicial review.

"[I]n administrative proceedings, the facts are established at the administrative hearing and the trial court acts as an appellate court." *US West Communications, Inc. v. Wash. Util. and Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). Judicial review of a Growth Management Hearings Board decision is limited by the APA to the local government record that was considered by the Board. RCW 34.05.558; *Kittitas Cty v. Eastern Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). New evidence is generally not taken by a reviewing court, and when such evidence is allowed, it must fall "squarely" within one of the statutory exceptions set forth in RCW 34.05.562. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Herman v. Shoreline Hr'gs Bd.*, 149 Wn. App. 444, 455-56, 204 P.3d 928 (2009); *Samson v. City of Bainbridge Island, supra*, 149 Wn. App. 33, 64-65. The APA thus requires that except in the limited circumstances described in RCW 34.05.562, a party must exercise its right to present evidence during the administrative proceedings that are the subject of

judicial review, and not during the judicial review process.

Washington courts have not had difficulty deciding constitutional issues under the evidentiary restrictions imposed by the APA. For example, in *Samson v. Bainbridge Island, supra*, this Court addressed constitutional and non-constitutional challenges to the Growth Board's approval of the City's SMP amendment. The *Samson* court denied the petitioners' motion to supplement the record because the proposed evidence did not fall into the narrow exceptions provided in RCW 34.05.562. *Id.* at 65 (finding "there is no evidence that one or more of the parties did not know and was under no duty to discover the evidence until after the agency action" as required by RCW 34.05.562(2)). Likewise, in *Bayfield Resources Co. v. Western Washington Growth Management Hearings Board*, 158 Wn. App. 866, 244 P.3d 412 (2010), the court considered whether a critical areas zoning amendment violated substantive due process and whether the Growth Board's affirmation of the amendment was not supported by substantial evidence. Even though the petitioners were not able to raise their constitutional claims at the Growth Board (because constitutional claims are beyond the Growth Board's jurisdiction), the appellate court conducted its analysis on the basis of the Growth Board's administrative record. *Bayfield Res. Co.*, 158 Wn. App. at 880-81, 884.

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Reply Appendix E-1

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No. 80092-2-I

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al.,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et al,

Respondents,

RESPONDENT CITY OF BAINBRIDGE ISLAND'S RESPONSE TO PETITIONERS' MOTION FOR RECONSIDERATION

* * * * *

A. Footnote 17 in the Washington Supreme Court case *Washington Trucking Ass'ns v. State Employment Security Department* supports the trial court's reliance on RCW 34.05.562(1) in deciding whether to supplement the record.

The first half of PRSM's motion provides several precedents PRSM argues were overlooked by this court in the original decision. None of the provided precedents contradict the court's decision or are dispositive on the issues in this case. Accordingly, the court should deny PRSM' s motion for reconsideration.

The first of PRSM' s cited precedents in support of reconsideration is the Washington Supreme Court decision *Washington Trucking Ass'ns v. State Employment Security Department*, 188 Wn.2d 198, 221 n.17, 393 P .3d 761, 773 (2017), specifically footnote 17. Footnote 17 states:

> WTA and the Carriers also assert that the remedy is not adequate because the ALJ in other administrative appeals excluded evidence regarding the auditing process, and there is therefore "very limited or no meaningful [opportunity] to create a record" to address the Department's violations of the Carriers' constitutional rights. Br. of Appellants at 41. Indeed, they contend that "an APA appeal is limited to the agency record." *Id*. at 22. They are mistaken. On judicial review, the court can consider evidence not contained in the agency record that "relates to the validity of the agency action." RCW 34.05.562). Our holding is therefore not affected by the fact that the ALJ excluded testimony regarding the auditing process in other administrative appeals, CP at 631-32, and the fact that the Department moved to exclude

> testimony in this case because the "issue is whether the assessment is correct, not how the agency made the assessment." *Id*. at 560. Even if these rulings were error, they do not render our state forum inadequate, since they do not limit the claims the Carriers can raise on appeal or the relief available if those claims succeed.

Petitioners read significantly more into this footnote than the text will bear. In its motion for reconsideration, PRSM asserts this footnote constitutes the court recognizing that:

> the statutory questions before an administrative agency are substantially different from constitutional questions properly raised to a court; thus, a limitation on the evidence on administrative review has no bearing on the admissibility of evidence to address constitutional issues raised on judicial review.

Pet'rs' Mot. for Recons. at 6. Undeniably, none of these sentiments were expressed in the footnote above. PRSM's extrapolation of the court's intent is baseless, unreasonable, and unfounded. A more reasonable interpretation of Footnote 17 is that the Court was simply responding to a litigant's assertion that an "APA appeal is limited to the agency record." *Wash. Trucking Ass'ns*, 188 Wn.2d at 221 n.17. As explained by the Court above, this statement is inaccurate if applied to all cases, even those not raising constitutional claims, because the reviewing judge has the discretion under RCW 34.05.562(1) to

"consider evidence not contained in the agency records that 'relates to the validity of the agency action.'" *Id*. (quoting RCW 34.05.562). The footnote in question does nothing more than clarify that existing law is contrary to the argument offered by a litigant in that case that additional evidence can never be allowed. At no point does the language in the cited footnote state that all proposed evidence in support of new constitutional claims must be admitted, or that new constitutional claims are exempt from RCW 34.05.562. Such an interpretation is inconsistent with the Supreme Court's specific reference to the possibility of admitting new evidence pursuant to RCW 34.05.562.

It is undisputed that constitutional claims can be addressed through judicial review under WAPA. Such claims are specifically included in RCW 34.05.570, which allows the court to grant relief from an agency action if it determines the "statute or rule on which the order is based[ ] is in violation of constitutional provisions on its face or as applied." The legislature clearly anticipated such claims arising from an administrative appeal when the WAPA was enacted. Yet the legislature chose not to carve out a blanket exception for such claims in drafting RCW 34.05.562. Had the legislature intended to make such an exception, it would have done so. Instead, the legislature considered the potential need for new evidence for constitutional claims and enacted RCW 34.05.562, which allows new evidence when the trial court determines that the evidence is necessary to

decide disputed issues. Such is the interpretation of the Washington Supreme Court in Footnote 17.[1]

Because Footnote 17 only reiterated the trial court's authority to admit new evidence pursuant to RCW 34.05.562(1), there is no basis to allege that this court overlooked binding precedent in reaching its decision.

PRSM argues that the "APA allows the trial court to consider evidence not contained in the agency record that is necessary to demonstrate whether the challenged government action violated the constitution." Pet'rs' Mot. for Recons. at 6. This assertion is true, but only when admission of that evidence is consistent with the requirements of RCW 34.05.562. Had the trial court and the panel held that it was proper to refuse to consider any new evidence at all, without regard to RCW 34.05.562, PRSM's claim would have merit. That is not the case here.

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[1] Even assuming the Washington Supreme Court intended to change state law within a footnote, it is well established that "courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Furthermore, the Court's statement in Footnote 17 was made in passing and is not directly related to the holding in the case. Such statements are dicta and are not binding on the courts. *Ass'n of Wash. Bus. v. Wash. Dep't of Revenue*, 155 Wn.2d 430,442 n.11, 120 P.3d 46, 51 (2005); *see also, e.g., State v. Potter*, 68 Wn. App. 134, 150 n.7, 842 P.2d 481 (1992). Footnote 17 was intended to supplement the overall finding that the state remedy available for challenging a tax assessment is adequate. The Court even specifically stated in Footnote 17 that it was not considering whether the trial court's decision to exclude evidence was in error because its holding was "not affected" by that exclusion.

The trial court in this case specifically considered whether the proffered evidence in support of the constitutional claims should be admitted under RCW 34.05.562 and determined the evidence was duplicative and unnecessary. The admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse of discretion. *State Dep't of Ecology*, 93 Wn. App. 329, 334, 969 P.2d 1072, 1075 (1998). PRSM has not provided any case law or statute that requires a separate or additional review other than RCW 34.05.562. Accordingly, the Court should deny PRSM's motion for reconsideration.

* * * * *

PRSM provides a number of cases in which federal courts have found, based on distinct facts, that the constitutional claims raised were not bound by the administrative review requirements. However, such cases are the exception, not the rule. *See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991) (holding statute in question was so limited as to not incorporate review of constitutional issues, noting Congress "could easily have used broader statutory language"); *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (holding statute that removed CIA Director's hiring decisions from judicial review did not restrict claims attacking the CIA's employment policies under Title VII of the Civil Rights Act of 1964). All other cases simply refer to the trial court's authority to allow additional evidence as necessary to supplement and address gaps in the record. None of these cases are dispositive here.

* * * * *

Reply Appendix F-1

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No. 51109-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Preserve Responsible Shoreline Management, et al.,

Appellants,

v.

City of Bainbridge Island, et al.,

Respondents,

CITY OF BAINBRIDGE ISLAND'S RESPONSE BRIEF

* * * * *

A. THE TRIAL COURT CORRECTLY DETERMINED THAT IT WAS ACTING IN ITS APPELLATE CAPACITY UNDER THE APA AND THAT ADDITIONAL EVIDENCE ON PRSM'S CONSITITUTIONAL CHALLENGES WAS ALLOWED ONLY IF THE REQUIREMENTS OF RCW 34.05.562(1) WERE MET.

1. The Trial Court's Decision was Correct under the Washington APA.

Under RCW 36.70A.300(5), decisions of the growth management hearings boards must be appealed to the superior court under the Administrative Procedure Act ("APA"), Chapter 34.05 RCW. Under APA review, "the facts are established at the administrative hearing and the superior court acts as an appellate court." *US. West Commc'n, Inc. v. Wash. Utils. And Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). A court reviewing an agency decision under the APA may overturn the action only if the challenger proves that the decision, or the statute or rule on which it is based (in this case the SMP), is invalid under at least one of the criteria set forth in RCW 34.05.570, including that the statute or rule is "in violation of constitutional provisions, on its face or as applied." RCW 34.05.570(3)(a). Where the administrative board below does not have jurisdiction to hear constitutional claims, those claims may be raised for the first time before the superior court as an additional issue in the judicial review. *Bayfield Resources Co. v. W. Wash. Growth Mgmt. Hrgs Bd.*, 158 Wn. App. 866, 881 n.8, 244 P.3d 412 (2010).

Regardless of the issues involved, "APA judicial review is limited to the record before the agency." *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 64, 202 P.3d 334 (2009) (citing RCW 34.05.566(1)). Accord, RCW 34.05.558 ("Judicial review of disputed issues of fact. . . must be confined to the agency record for judicial review as defined by this chapter"); *Kittitas County v. Eastern Wash. Growth Mgmt. Hrgs. Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). New evidence is generally not taken by a reviewing court,

and when such evidence is allowed, it must fall "squarely" within one of the statutory exceptions set forth in RCW 34.05.562. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005); *Herman v. Shoreline Hr'gs Bd.*, 149 Wn. App. 444, 455-56, 204 P.3d 928 (2009); *Samson v. City of Bainbridge Island*, *supra*, 149 Wn. App. 33, 64-65. The APA thus requires that except in the limited circumstances described in RCW 34.05.562, a party must exercise its right to present evidence during the administrative proceedings that are the subject of judicial review, and not during the judicial review process.

Given the statutes and case law cited above, the trial court correctly determined that it was acting in its appellate capacity in reviewing the Growth Board's decision under the APA and that it had authority under the APA to review PRSM's constitutional claims. The trial court was also correct that new evidence was allowed only if the requirements of RCW 34.05.562 for supplementation were met.

2. PRSM's Assertion of a Right to Supplement the Record Whenever Constitutional Claims are Raised is Not Supported by Washington or Federal Case Law.

Contrary to PRSM's assertions, Washington courts have not addressed whether a party raising constitutional challenges to agency action for the first time on appeal may supplement the record with evidence specific to its constitutional claims.

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Reply Appendix G-1

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No. 51109-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, et al.,

Petitioners,

v.

City of Bainbridge Island, et al.,

Respondents,

RESPONDENT CITY OF BAINBRIDGE ISLAND'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

* * * * *

3) <u>PRSM fails to carry its burden of showing that the lawfulness of procedure is in dispute.</u>

PRSM identifies only one potentially applicable exception to the APA's general rule against supplementation of an agency record-that provided in

RCW 34.05.562(1)(b). The cited statute allows the reviewing court to receive supplementary evidence if it "relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding: . . . (b) Unlawfulness of procedure or of decision-making process." RCW 34.05.562(1)(b).

On the plain statutory language, PRSM bore the burden of proving that the proffered evidence: (1) was "needed to decide disputed issues"; (2) regarding unlawfulness "of procedure or of decision-making process;" and (3) related "to the validity of the agency action at the time it was taken." RCW 34.05.562(1)(b). But nowhere in its request for discretionary review does PRSM claim that the lawfulness of the process and procedures giving rise to the Shoreline Master Program is even in dispute. PRSM argues only that the result of that process was an unconstitutional program. Its purported basis for supplementing the record is the fact that constitutional issues were not before the Growth Board.

PRSM's constitutional claims are not a challenge to the lawfulness of the Growth Board's procedures. An agency's procedures are lawful if they provide timely notice and a full and fair opportunity to be heard. *See Jow Sin Quan v. Washington State Liquor Control Bd.*, 69 Wn.2d 373, 379-80, 418 P.2d 424 (1966) (listing factors that establish lawfulness of agency procedures). The fact that the agency, on contested evidence, decides the matter contrary to an appellant's contentions does not render the procedure unlawful. *Id.* (citing *Deaconess Hospital v. Washington State Highway Comm'n*, 66 Wn.2d 378, 403 P.2d 54, 70 (1965)). Our Supreme Court recently held, albeit in a different context, that an agency's

procedures adequately protect constitutional rights if they allow a party to raise constitutional claims at some point in the process. *Washington Trucking Associations v. State Employment Sec. Dep't*, 188 Wn.2d 198, 213, 393 P.3d 761 (2017), *cert. denied sub nom. Washington Trucking Associations v. Washington Employment Sec. Dep't*, 17-145, 2017 WL 3324734 (U.S. Oct. 2, 2017). If the agency lacks authority to address constitutional issues, the procedures are still adequate if the constitutional issues can be raised before the superior court on review. *Id.* at 223.

As such, PRSM's contention—that its constitutional claims could not be raised before the Growth Board—simply does not amount to an argument that the Growth Board's processes and procedures were unlawful. PRSM admits that it "extensively participated" in the public process and "participated as petitioners" in the administrative appeal. It acknowledges that the Growth Board properly focused on non-constitutional issues because of its limited jurisdiction and that the trial court now has jurisdiction to hear PRSM's constitutional claims.

PRSM thus utterly fails to show a disputed issue regarding the lawfulness of the Growth Board's process and procedure. It was given notice and an opportunity to be heard, it participated extensively, and it does not claim that the process or procedure employed by the Growth Board was unlawful. On this basis alone, it fails to justify relief under RCW 34.05.562(1)(b).

* * * * *

(c) PRSM failed to justify admission of scientific evidence that was admissible in the administrative proceedings.

The last item of supplementary evidence identified in the Motion for Discretionary Review is the testimony of Kim Schaumburg, proffered as "a recognized expert familiar with the science underlying the SMP." Specifically, PRSM contends that Ms. Schaumburg would address a "gap" in the scientific record. This alleged "gap" relates to whether it is appropriate to rely on freshwater science in establishing saltwater regulations.

But filling a "gap" in the administrative record is not an appropriate basis for allowing supplementary evidence. "A superior court may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete." *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 455, 204 P.3d 928 (2009) (citing *Lewis County v. Pub. Employment Relations Comm'n*, 31 Wn. App. 853, 861, 644 P.2d 1231 (1982)). The trial court therefore properly denied PRSM's request.

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