No. 58881-1-II

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

SAVE THE DAVIS-MEEKER GARRY OAK,
Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,
Respondent.

RESPONDENT MAYOR DEBBIE SULLIVAN'S MOTION TO DISMISS APPEAL

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I. INTRODUCTION / MOTION

Respondent Debbie Sullivan, Mayor of the City of Tumwater hereby moves to dismiss this appeal because it is now moot, as the City of Tumwater has obtained a second opinion from an arborist and determined not to remove the Davis Meeker Garry Oak in favor of taking recommended steps to mitigate the conditions threatening the tree.

II. FACTS RELEVANT TO MOTION

This case arises from the dissolution of a temporary restraining order (TRO) by the Thurston County Superior Court. Following dissolution of the TRO, the City of Tumwater had an opportunity to remove the tree, but did not do so. Instead, the Mayor commissioned a second arborist to conduct an examination and provide an independent second opinion as to the condition of the tree and present recommendations for its future.

The City's initial determination to remove the tree was based on the professional evaluation of its tree professional in

2023. In July 2024, the City issued a Request for Proposals and Statement of Qualifications to select an independent arborist to conduct the second opinion. Todd Prager & Associates was selected and prepared a scope of work in August 2024. On August 22, 2024, the City wrote to the Department of Archeology and Historic Preservation (DAHP) to request emergency permits for the investigation, if such permits were considered necessary. On August 23, 2024, DAHP responded that permits were needed for invasive investigations, but not for non-invasive evaluation such as sonic tomography or visual inspections.

The City had Todd Prager proceed with non-invasive investigations while it applied for DAHP permits for the remaining activities. An archeologist was retained and an application was submitted to DAHP on October 24, 2024. On December 2, 2024, DAHP granted the permits.

The City commissioned the second arborist to secure a second opinion which was underway when Appellants

previously filed briefs contending that the case no longer warranted expedited review because of the lack of imminent threat of removal. At the time, the City's second arborist opinion was incomplete and the analysis was ongoing. Without the completed second opinion, the City had not yet decided to retain the tree, nor embraced an alternative to removal. Thus, this court did not find it to be "absolutely clear" that this dispute was moot in its December 6, 2024 order.

Subsequently, Prager completed its investigation and on February 7, 2025 issued a report recommending mitigation and maintenance instead of removal. The report conducted additional tests not conducted by the prior arborist, including additional Specifically, the report recommended Option B which includes:

- Tree retention;
- Reduction pruning to reduce risk of branch failure;
- Installing supplemental support to further reduce risk of branch failure and reduce the likelihood of target impacts;
- Root zone management to improve soil and root zone conditions; and

- Ongoing monitoring on a five year or less interval to proactively address ongoing risks.

This recommendation was presented to the Mayor who convened a City Council Work Session to review the report and its recommendations. After careful consideration of the second opinion, the Mayor chose to follow the recommendation of Prager & Associates to retain the tree, pursuing a strategy of mitigation and maintenance instead of removal.

To implement the new recommendations, a cost estimate was prepared and presented to the City Council showing expected costs of $29,672.50 to $49,722.50. The Mayor requested an appropriation to financially support the ongoing costs of tree mitigation and maintenance. The Council then adopted Resolution 2025-009 which provided the necessary funding and under which she is "authorized to take any and all actions necessary and proper to carry out measures including mitigation and maintenance activities to retain the tree in a safe condition." Res. 2025-009, Sec. 2. The Mayor will be

periodically reporting to the Council on the tree's condition and make additional recommendations on the long-term funding, mitigation and maintenance of the Davis Meeker Garry Oak Tree. *Id.*, Sec. 3.

III. ARGUMENT

A. THIS CASE IS MOOT BECAUSE OF THE MAYOR'S DETERMINATION NOT TO REMOVE THE TREE.

In this case, Appellants sought a TRO or injunction to prevent the mayor from cutting down a tree as recommended by the initial report from the City's tree professional. Based on the second opinion, based on a more intensive and recent investigation, she no longer intends to do so and has selected a mitigation and maintenance option that will preserve the tree.

A preliminary injunction or TRO generally requires the party seeking it to demonstrate three elements: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury.

Tyler Pipe Indus., Inc. v Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn. 2d 317, 319, 324 P.2d 1099 (1958); *Bellevue Square, LLC v. Whole Foods Mkt. Pac. Nw., Inc.*, 6 Wn. App. 2d 709, 715, 432 P.3d 426 (2018) (emphasis added). This standard is consistent across multiple cases and statutes in Washington.

The requirement of a well-grounded threat of an "immediate invasion" of the asserted right indicates that there must be an imminent threat of harm. For instance, in *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000)., the court emphasized that a preliminary injunction requires a well-grounded fear of immediate invasion of the right. Similarly, in *Bellevue Square, LLC v. Whole Foods Market Pacific Northwest, Inc.*, Division One of this court reiterated that the party must show a well-grounded fear of "immediate invasion" of their right and failure to show any of the *Tyler Pipe* elements required denial of injunctive relief. *Bellevue Square, LLC v. Whole Foods*

Mkt. Pac. Nw., Inc., 6 Wn. App. 2d 709, 715, 432 P.3d 426 (2018), citing *Kucera*, 140 Wn.2d at 209-10, 995 P.2d 63.

The necessity of showing "actual and substantial injury" underscores the need for there to be an imminent threat causing irreparable harm. Our Supreme Court has held that failure to establish any of the *Tyler Pipe* criteria, including a well-grounded fear of immediate invasion, dictates that preliminary injunctive relief be denied. *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State,* 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

An appeal is moot if the matter becomes purely academic and the court cannot provide effective relief. *Department of Labor and Industries v. Fowler*, 23 Wn.App.2d 509, 533-534, 516 P.3d 831 (2022). In *Fowler*, a restaurant owner's challenge to a TRO enforcing Covid-19 restrictions from the Governor's emergency proclamation was rendered moot by the expiration of the TRO against indoor seating at the restaurant. Because there was no longer an imminent threat of invasion of the owner's

rights, the appeal became moot and the Court of Appeals declined to consider the moot issue.

Now that the Mayor has determined to retain the tree with necessary mitigation and maintenance, there is no longer any imminent threat of irreparable harm. The Mayor, with funding and authorization from the City Council, will implement a mitigation program designed to retain the tree. This is fully consistent with the requests of the Appellants to the Council and their stated goal for the tree. As such, they cannot establish either that their rights will be imminently invaded or that they will suffer irreparable harm, both elements being necessary for an injunction under *Tyler Pipe*, whether it is termed a TRO or a preliminary SDMGO cannot show an imminent threat of irreparable harm, SDMGO cannot prove an essential element of the *Tyler Pipe* elements necessary to show entitlement to injunctive relief. *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn.App. 98, 115, 168 P.3d 443 (2007). Therefore, this case is now moot.

B. THE MAYOR HAS NOW MADE A FINAL DECISION AND IT IS ABSOLUTELY CLEAR THAT THE TREE WILL NOT BE REMOVED.

Here, this court previously declined to dismiss the matter as moot based solely on concessions in SDMGO's briefings. See Ruling on Motion to Dismiss, Dec. 6, 2024. The court there found that because the Mayor had not made a decision on the fate of the tree while the second opinion was in process, it was "not 'absolutely clear' to this court that the threatened destruction will not reoccur during the pendency of this appeal. Ruling at 2.

There is now more than a "voluntary suspension pending the results of a second arborist report" as argued by SDMGO and agreed by the Court in its prior ruling. There is now a final decision to retain the tree and approval of necessary funds to implement the recommendations in the arborists completed report. Thus, the situation now is distinguishable from that contemplated in the Mayor's earlier motion.

Because the Mayor has accepted the recommendations of the second arborist's report and has now made a final decision

to retain the tree with implementation of mitigation, the issues presented in this case have materially changed. Absent such an imminent threat to remove the tree, there is no basis to continue to seek injunctive relief. Such a threat is an essential element of their claim that SDMGO is entitled to injunctive relief. In its absence the case is now moot and should be dismissed.

IV. CONCLUSION

The Court should therefore dismiss the appeal and remand the matter back to the trial court. Whether the trial court erred in its dissolution of the TRO is now a purely academic issue, as the Mayor has decided not to remove the tree. Any opinions would be purely advisory in nature. Absent an immediate threat of harm, SMDGO has no basis for injunctive relief.

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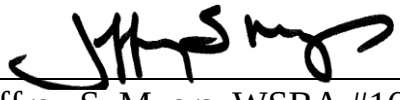
I certify that this brief contains 1,611 words as determined by computer word count in conformity with RAP 18.17.

DATED this 12th day of May, 2025.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.



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CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the foregoing document all to be served to the below listed party by the Washington State Court of Appeals e-filing system as well as by electronic mail per service agreement upon the following person(s):

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DATED this 12th day of May, 2025.

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