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

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NO. 58881-1-II

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SAVE THE DAVIS-MEEKER GARRY OAK,

Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,

Respondent.

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APPELLANT'S MOTION FOR EXTENSION OF TIME TO  
FILE AMENDED REPLY BRIEF

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Bryan Telegin, WSBA 46686  
TELEGIN LAW PLLC  
175 Parfitt Ave. SW, Ste. N270  
Bainbridge Island, WA 98110  
(206) 453-2884  
bryan@teginlaw.com

Ronda Larson Kramer,  
WSBA # 31833  
LARSON LAW PLLC  
P.O. Box 7337  
Olympia, WA 98507  
(360) 768-0775  
ronda@larsonlawpllc.com

*Attorneys for Appellant Save the  
Davis-Meeker Garry Oak*

## **I. IDENTITY OF MOVING PARTY**

Appellant Save the Davis Meeker Garry Oak (“SDMGO”) seeks the relief designated in Part II.

## **II. RELIEF REQUESTED**

SDMGO requests that this Court extend the deadline for SDMGO to file its amended reply brief. Pursuant to the Commissioner’s October 8, 2024 ruling granting Respondent Debbie Sullivan’s motion to strike, the current deadline for SDMGO’s amended reply brief is Thursday, October 17, 2024. However, pursuant to RAP 17.7(a), SDMGO intends to file a motion to modify the Commissioner’s ruling on Mayor Sullivan’s motion to strike. SDMGO therefore requests that the current deadline for its amended reply brief be stricken, and that the amended reply brief be due 10 days after this Court resolves SDMGO’s forthcoming motion to modify.

## **III. EVIDENCE RELIED UPON**

This motion relies on the pleadings and filings herein.

#### **IV. FACTS RELEVANT TO MOTION**

This appeal challenges the mayor of Tumwater’s decision in May of 2024 to cut down an historic, 400-year-old oak tree known as the Davis Meeker oak. On July 23, 2024, this Court granted SDMGO’s motion for accelerated review pursuant to RAP 18.12. SDMGO filed its opening brief on August 30, 2024. Mayor Sullivan filed her response brief on September 13, 2024. SDMGO filed its reply brief ten days later on September 23, 2024.

One of the issues underlying the present controversy is whether the Davis Meeker oak truly needs to be immediately cut down to protect public safety. In her response brief to this Court, Mayor Sullivan states, for example, that the Davis Meeker oak is a “known hazardous tree,” that the tree has been “identified” or “determined to be hazardous,” and that she must “proceed with emergency tree removal to make [the city’s] streets safe for the traveling public.” Resp. at 1, 3, 9, 10, 40, 43.

Even if the mayor at one time had a good faith basis for asserting to the superior court that the tree created an emergency, there is no good faith basis for the mayor to continue making these assertions to this Court. She openly stated in a recent declaration filed by her attorney with the Thurston County Superior Court that she is pursuing “a second opinion concerning the condition of the tree” and that she will use that future, second opinion “to evaluate next steps concerning the Davis Meeker Garry Oak.” SDMGO attached this declaration of the mayor’s attorney as Appendix F to its September 13, 2024 reply brief.

On September 25, 2024, Mayor Sullivan moved to strike SDMGO’s reference to her attorney’s declaration, as well as other extra-record materials cited in SDMGO’s reply brief, including materials submitted by SDMGO to show that at least one of her criticisms of the original TRO issued in this case is now moot.

On October 8, 2024, this Court granted Mayor Sullivan’s motion to strike, including to strike the evidence of mootness, and directed SDMGO to file an amended reply brief within 10 days of that order. *See* Notation Ruling by Commissioner Bearse (Oct. 8, 2024.) As such, the current deadline for SDMGO to file an amended reply brief is October 17, 2024.

## V. ARGUMENT

SDMGO should receive an extension of time because the mayor has herself been dilatory the past four months. For unknown reasons, she has yet to apply for the necessary permit to do a second risk assessment. She agreed four months ago to do a second risk assessment.

RAP 17.7(a) provides that “[a]n aggrieved person may object to a ruling of a commissioner or clerk . . . only by a motion to modify the ruling directed to the judges of the court served by the commissioner or clerk.” Such an objection and motion must be filed within 30 days of the entry of the challenging ruling.

Pursuant to this rule, SDMGO plans to file a motion to modify the Commissioner’s October 8, 2024 notation ruling granting Mayor Sullivan’s motion to strike. Among other things, SDMGO intends to challenge the exclusion of evidence showing that the mayor has now acknowledged (contrary to statements made repeatedly in her response brief) that the Davis Meeker oak need not be immediately cut down. SDMGO also intends to challenge the exclusion of evidence showing that one of her claims against the original TRO is now moot. SDMGO anticipates that it will be able to file its motion to modify by Friday, October 18, 2024—well in advance of the 30-day deadline imposed by RAP 17.7(a).

Because SDMGO plans to file a motion to modify, it respectfully requests that this Court extend the deadline for SDMGO to file an amended reply brief. SDMGO believes it is critical for the panel assigned to this case to review many of the extra-record materials cited in its reply brief, including statements by the mayor’s attorney concerning her need for a

second opinion. SDMGO also believes—as stated in its response to the mayor’s motion to strike—that the Court has authority to review such materials under RAP 1.2(a) and (c), as well as Rule 3.3 of the Rules of Professional Conduct. Therefore, SDMGO requests that the current deadline to file an amended reply brief be stricken, and that the amended reply brief be due 10 days after this Court’s resolution of SDMGO’s forthcoming motion to modify.

Such an extension will not prejudice Respondent Sullivan. As discussed above, Mayor Sullivan has openly stated to the trial court that she is in the process of obtaining a second opinion on the condition of the Davis Meeker oak and that completion of that second opinion is necessary to evaluate future management options for the tree. Mayor Sullivan has yet to obtain this second opinion, which may still be months away from completion (or from even starting). It may be months away because she must obtain a permit to conduct the second assessment. As of now, she has failed for unknown reasons to

apply for this permit. Before this second opinion is completed, the mayor has no basis for asserting that the tree must be destroyed immediately.

As discussed in the recent amicus brief filed by the Washington Department of Archeology and Historic Preservation (“DAHP”), under state law the mayor must obtain a permit under RCW chapter 27.53 before the tree may be altered or removed. Altering includes conducting a thorough risk assessment, because to be thorough, the risk assessment will invariably entail invasive methods like sonic tomography. This technology uses sound waves to detect decay in trees. It requires puncturing the bark to insert pins.

The mayor was informed of DAHP’s position that a permit is required on May 30, 2024, over four months ago. Yet, as DAHP reports in its amicus brief, “[t]he City has not as of the date of the filing of this brief applied for a Permit from the Department.” DAHP Amicus Br. at 6–7.



The failure to apply for any type of permit also means Mayor Sullivan has not otherwise attempted to expedite her plan to cut down the Davis Meeker oak, since a permit from DAHP is required for that, too. Nor in that time has Mayor Sullivan attempted to formally challenge DAHP's determination, despite having been informed by the Washington Attorney General's office that if the tree is cut down, "DAHP will issue penalties against the City to the maximum extent allowed by RCW 27.53.095 for failure to obtain a Permit from DAHP for damaging or removing the tree." Resp. Br., App. C at 3.

This appeal has proceeded on an accelerated basis, despite the fact that the mayor has delayed in obtaining the very second opinion she needs to evaluate the condition of the tree and to make decisions about future management options. The mayor has yet even to apply to DAHP for removal of the tree. It also is unknown when the second risk assessment will be completed or when the mayor will apply for a permit. On these

facts, Mayor Sullivan will not be prejudiced by a short delay to allow this Court to rule on SDMGO's forthcoming motion to modify before SDMGO is required to submit an amended reply brief.

## **VI. CONCLUSION**

For the reasons above, SDMGO respectfully requests that the current deadline of October 17, 2024 for SDMGO to file an amended reply brief be stricken. The amended reply brief should be due 10 days after this Court rules on SDMGO's forthcoming motion to modify under RAP 17.7(a).

## **VII. CERTIFICATE OF COMPLIANCE**

I certify that this motion contains 1,398 words, in compliance with RAP 18.17.

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RESPECTFULLY SUBMITTED this 9th day of  
October, 2024.

TELGIN LAW, PLLC

  
\_\_\_\_\_  
Bryan Telegin  
WSBA No. 46686

LARSON LAW, PLLC

  
\_\_\_\_\_  
Ronda Larson Kramer  
WSBA No. 31833  
Attorney for Plaintiff

**TELEGIN LAW PLLC**

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**Transmittal Information**

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