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 REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

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I. INTRODUCTION / MOTION

Respondent Debbie Sullivan, Mayor of the City of Tumwater moved to dismiss this appeal because the City of Tumwater has obtained a second opinion from an arborist and determined not to remove the Davis Meeker Garry Oak. Instead, the City has chosen to implement mitigation measures to retain the tree.

II. REPLY ARGUMENT

A. THE CASE IS MOOT BECAUSE THE ALLEGEDLY ILLEGAL CONDUCT IS NOT LIKELY TO RECUR OR CONTINUE.

Appellant argues that a case does not become moot due to voluntary cessation of allegedly illegal conduct, citing *State v. State v. City of Sunnyside*, 3 Wn. 3d 279, 313, 550 P.3d 31, 49 (2024). Appellants omit, however, the salient part of the court's opinion on which the matter turned. That case turned on whether the record demonstrated "a likelihood of the illegal conduct recurring." *Id., citing State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 82 Wash.2d 265, 272, 510 P.2d 233 (1973); *see*

Braam v. State, 150 Wash.2d 689, 709, 81 P.3d 851 (2003) (a plaintiff may pursue injunctive relief unless it is "absolutely clear that behavior will not reoccur"). In *Sunnyside*, both the record and the respondents' argument demonstrated that they would continue to enforce the CFRHP in the same manner if not for this litigation and that they intended to resume enforcement when this litigation was resolved." *Id.*, at 314 (citation to record omitted).

Here, by contrast, the Mayor has stated and the Council have adopted the very relief that Appellants originally sought, preservation of the tree through an alternate means. This conclusion was not forced upon the mayor by the litigation but was the product of newly developed facts and recommendations by new arborists. It is supported by a resolution of the City Council. Thus, unlike the City's stated intent to resume the unlawful CFRHP in *Sunnyside*, there is no intent or likelihood that the tree here will be unilaterally removed.

The city has thus met its burden to show that the case is moot, and further legal proceedings to determine if the trial court

properly dissolved a temporary restraining order are unnecessary and wasteful.

Appellants argue that there is no change in circumstances from the prior motion. Response at 20. They ignore the fact that the prior motion was prompted by their own concessions that:

> 1. Since [expedited review was sought], circumstances have changed. The mayor no longer is threatening to immediately cut down the historic tree. (Reply in Support of Motion for Extension at 2).
>
> 2. In short, the circumstances that led SDMGO to request expedited review no longer exist. The mayor no longer has imminent plans to remove the tree. She does not even possess the very study she now says she needs to evaluate the tree's condition and to determine how the tree should be managed in the future. (Reply in Support of Motion for Extension at 2-3).
>
> 3. As a result, not only does the mayor not have plans to immediately cut the tree down, and not only does she not possess the very study she now needs to evaluate the tree's condition and to make a decision, but she also is protected by a $10,000.00 bond.

See Motion to Dismiss, 10/14/24 at 1-2.

The Court denied that prior motion because the Mayor still believed the tree might be a hazard, pending completion of the second arborist report. December 6, 2024 Ruling at 2. At that time, the arborist had not issued a second opinion and it was unclear whether the tree could be retained. Subsequently, on February 7, 2025 issued a report recommending mitigation and maintenance.

The circumstances, as demonstrated by the Mayor's May 12, 2025 declaration have materially changed, due to the completion of that report. As a result, the Mayor requested funding to retain the tree and implement the measures that are needed to mitigate the tree's condition. These are not insubstantial or inexpensive remedies and the Mayor secured the funding to implement the preferred mitigation alternative presented in the report from Todd Prager & Associates.

Mr. Telegin's declaration cherry-picks portions of counsel's email asking them to agree that the tree should be retained and further public expense avoided, so that he can argue

that the issue of whether DAHP permits are required is not moot. He ignores the stated intention of the City to pursue such permits. Sullivan Decl., at 5. Thus, there is no evidence that alleged unlawful conduct will recur and there is evidence that the City will not remove the tree because of the new arborist report.

Additionally, whether this issue of obtaining state permits is even part of this appeal is disputed. The Complaint did not raise RCW 27.53 nor identify any need for a state permit. CP 10. The TRO was not based on compliance with state permitting requirements. contrary to what Mr. Telegin claims. CP 26-27. Instead, as DAHP's amicus notes, that issue is not properly raised in an APA action and was not adequately briefed below and only DAHP has the authority to enforce RCW 27.53, not the Appellants. Amicus Brief of DAHP at 17.

These issues are purely academic in light of the Mayor's decision to retain the tree and implement the mitigation remedy recommended by the arborist's second opinion. Remarkably, this is what Appellants asked for all along.

The case here has become moot because circumstances have changed materially by the issuance of the Prager report and the City's adoption of its recommendation. It is unlike the *Sunnyside* case relied upon by Appellants to continue pursuit of a moot issue.

B. APPELLANTS CLAIMS WOULD NOT BE BARRED BY RES JUDICATA IF THE CITY TRIED TO REMOVE THE TREE IN THE FUTURE.

Appellants also argue that their claims would be barred by *res judicata* if the issue returned to superior court. Response at 17. This fear is baseless. Res judicata requires a valid and final judgment on the merits in a previous suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004); *Penner v. Cent. Puget Sound Reg'l Transit Auth.*, 25 Wn. App. 2d 914, 924, 525 P.3d 1010, 1015 (2023), *review denied,* 534 P.3d 788 (2023). Here, there is no final judgment or adjudication of their claims in this case that would preclude them from raising such claims again if the City were to attempt to remove the tree. What they refuse to recognize is that the tree is not going to be

removed. If the City attempted to do so, which it does not intend, Appellants would be free to raise them again based on whatever facts were shown in the future.

C. THE PUBLIC INTEREST EXCEPTION DOES NOT APPLY AND WOULD RESULT IN WASTEFUL EXPENSE AND AN ADVISORY OPINION.

Appellants argue that the Court should retain authority to decide the issues under the public interest exception to the mootness doctrine. Response at 27. This results in unnecessary waste of public resources; undue expense and any opinion here would be purely advisory.

The record here is undeveloped and the issue is not of broad, far-reaching public interest. The court, applying the factors from *State v. Beaver,* 184 Wn.2d 321, 330, 358 P.3d 385 (2015) should not invoke the public interest exception. Under the first factor, the dispute here affects a single tree, not issues affecting the broader public or affecting state or regional interests. The issues of state permitting are not properly before the Court, as the State's amicus demonstrates. Secondly, it

would provide guidance to officials to do exactly what they have publicly committed to doing. Third, as shown above, there is no likelihood of future recurrence, and if there was, the issues could be raised again with a more fully developed record. Thus, it is not capable of repetition yet evading review, as Appellants contend.

III. CONCLUSION

The Court should dismiss the appeal as moot.

I certify that this brief contains 1,309 words as determined by computer word count in conformity with RAP 18.17.

DATED this 29th day of May, 2025.

LAW, LYMAN, DANIEL,
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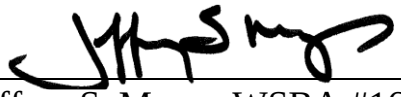

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CERTIFICATE OF SERVICE

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 29th day of May, 2025.

/s/ Tam Truong
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