❑ **EXPEDITE**
■ **Hearing is set:**
Date: December 26,2025
Time: 9:00 a.m.
Judge/Calendar: Hon. Anne Egeler / Dispositive Motions

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

SAVE THE DAVIS-MEEKER GARRY OAK,

Plaintiff,

vs.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,

Defendant.

NO. 24-2-01895-34

RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This court should enter a declaratory judgment confirming the law as articulated by the Court of Appeals decision. That decision, which the Defendant did not appeal, is the law of this case and fully resolves this matter. The Court of Appeals held that under the city's current Historic Preservation Ordinance, the City may not remove the Davis Meeker Garry Oak without approval by the Tumwater Historic Preservation Commission.

The Court should not enter an injunction at this time because, as Plaintiff has known for over a year, the City reversed its prior decision to remove the Davis Meeker Garry Oak and instead has been pursuing maintenance of the tree in accordance with a second arborist's opinion and treatment plan. As such, there is no threat of an imminent invasion of any rights to not have the tree removed without a permit. Absent such a threat injunctive relief is inappropriate under the court's standards for granting

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

injunctive relief. The City's decision to seek retrenchment pruning and possible cabling of the tree, which were recommended and supported by Plaintiff in its prior pleadings, makes this matter moot.

II. STATEMENT OF FACTS

Plaintiff has elected not to fully inform the Court regarding the status of the City's decisions concerning the Davis Meeker Garry Oak. They present information that predates the City Council meeting of June 3, 2024, at which the Mayor decided to seek a second arborist's opinion and not to immediately remove the Davis Meeker Garry Oak. None of the declarations presented by the plaintiff in support of their motion are dated earlier than July 18, 2024. As such, they do not tell the whole story.

This court issued an order on May 31, 2024 dissolving a TRO entered *ex parte* and without notice on May 24, 2024. That order dissolving the TRO took effect on Wednesday, June 5, 2024. However, at the request of citizens, including members of the Plaintiff's organization, at the City Council meeting on June 4, 2024, the Mayor agreed to seek additional information about the health and threat posed by the tree and consider mitigation alternatives before seeking its removal. Myers Decl., Exhibit 5 (Sullivan Dec. I, at ¶2). The TRO was allowed to dissolve and no stay or other order prevented cutting of the tree for a month. After allowing a month to elapse, Plaintiff finally filed a motion for injunction under RAP 8.3 on July 2, 2024. On July 3, 2024 a stay was entered by the Court of Appeals to allow consideration of Plaintiff's motion for injunction under RAP 8.3. The City could have cut down the tree without violating any court order for a month. It did not do so. The City instead followed through on the Mayor's agreement to seek additional opinions concerning the tree.

On July 3, 2024, the City issued a Request for Proposals and Statement of Qualifications to select an independent arborist to conduct the second opinion. Sullivan Dec. I, at ¶3. Todd Prager & Associates (Prager) was selected and prepared a scope of work in August 2024. Myers Dec., Exhibit 6 (Sullivan Dec. II at ¶4). On August 22, 2024, the City wrote to the Department of Archeology and Historic Preservation

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

(DAHP) to request emergency permits for the investigation, if such permits were considered necessary. *Id.* 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. *Id.* The City commissioned Prager to proceed with non-invasive investigations while it applied for DAHP permits for the remaining activities. *Id.*. at ¶5. An archeologist was retained and an application was submitted to DAHP on October 24, 2024. *Id.* On December 2, 2024, DAHP granted the permits for the remaining work needed to complete the investigation. *Id.;* Dec. of Jones Wood, Exhibit 6.

Prager completed its investigation and on February 7, 2025 issued a report recommending mitigation and maintenance instead of removal. Sullivan Dec. II, at ¶6; Dec. of Jones Wood, Exhibit 2. 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. Sullivan Dec. II at ¶7. After careful consideration of the second opinion, the Mayor chose to follow the recommendation of Prager to retain the tree, pursuing a strategy of mitigation and maintenance instead of removal. *Id.* This is the current position of the City in how the tree should be managed to retain it in a safe condition.

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. Sullivan Dec. II at ¶8. 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 the Mayor is

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

"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." Decl. of Jones Wood, Exhibit 1, Res. 2025-009, Sec. 2 (emphasis added). 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.

The City notified plaintiff's counsel of these developments in early 2025 and moved for dismissal of the case as moot. Myers Dec. at ¶5. Plaintiff argued that voluntary cessation would allow recurrence of the issue, so the Court of Appeals should decide whether Historic Preservation Commission approval is required before the Mayor may remove a tree on the historic register. *Id.*, ¶6. The Court of Appeals issued their opinion in this matter on July 15, 2025, holding that such approval is required under Ch. 2.62 of the Tumwater Municipal Code. The City did not appeal this ruling. *Id.* Thus, the holdings of the Court requiring the City to secure approval of the Historic Preservation Commission prior to removal of the Davis Meeker Garry Oak became the law of the case. The City was already proceeding with plans to maintain the tree, not remove it.

Since the issuance of the Court of Appeals opinion in July 2025, the arborist hired by the city (who plaintiff recommended) has developed plans to implement mitigation measures, beginning a multi-year mitigation and treatment program with root zone management of soil surrounding the tree in year one, followed by reduction pruning, if necessary, in years two and three. Decl. of Jones Wood, Exhibit 5. Possible supplemental support or cabling to add support for the tree is also possible, depending on the results of the other mitigation measures. *Id.*

The City has no plans to remove the tree. This is evidenced by the actions of Mayor Sullivan who hired Prager to provide a second opinion and who obtained DAHP permits needed to evaluate mitigation options for retention of the tree. It is evidenced by selection of the maintenance option recommended by

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

the Prager & Associates February 2025 report. It is evidenced by the passage of Resolution 2025-009 and funding for the mitigation plans for the tree. It is evidenced by the development of the November 12, 2025 Treatment Plan.

Mayor Sullivan's term expires on December 31, 2025. Her successor, Mayor-elect Leatta Dahlhoff, confirms that there are no plans to remove the tree and that the City will implement the mitigation recommendations and treatment plan authored by Todd Prager & Associates. Dec. of Dahlhoff. ¶3-4. The City acknowledges that the Court of Appeals decision requires the city to obtain approval from the Historic Preservation Commission prior to removal of trees on the historic register, specifically the Davis Meeker Garry Oak.

III. ARGUMENT

A. THE COURT OF APPEALS DECISION THAT HISTORIC PRESERVATION COMMMISSION APPROVAL IS REQUIRED BEFORE REMOVAL OF THE DAVIS MEEKER GARRY OAK IS THE LAW OF THE CASE AND BINDING ON THE CITY.

The Court of Appeals decision is binding and final in this case concerning the central legal dispute between the parties. The City did not appeal this decision and acknowledges that it is the law of this case. This principle applies to promote finality and efficiency in the judicial process and prevents the re-litigation of settled issues. *State v. Stein*, 140 Wn.App. 43 (2007))

The plaintiff is entitled to a declaration confirming that the Davis Meeker Garry Oak, as a tree and site listed on the historic register, cannot be removed without approval of the Historic Preservation Commission under Ch. 2.62.060 and 2.62.030. This is the relief sought by the Complaint which seeks a declaration that "the decision to remove" the tree as being unlawful. Complaint at 7.

The declaratory relief now sought by the plaintiff goes beyond what was sought in the complaint and the ruling of the Court of Appeals. This case was brought to stop the "removal" of the tree. In the

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

Complaint, the Plaintiff specifically averred that measures aimed at repair or maintenance of the tree do not require such approval. Plaintiff's Complaint specifically states:

> 16. Tumwater's municipal code also prohibits the mayor from carrying out her plan to cut down the tree without a permit. TMC § 2.62.060 and TMC § 2.62.030 plainly require a permit to demolish a historic structure. There is no exception. The permit is waived to repair a historic structure, assuming there is an emergency where a repair can prevent destruction or dilapidation. The tree is next to a building. It can be pruned to prevent destruction of the building. **The pruning can be done without a permit.** But nowhere does the law allow the historic tree to be removed without a permit.

Complaint at ¶16, at 5:15 – 6:3. (Emphasis added).

Later in the Complaint, the plaintiff acknowledges that there is an exception to the permit requirements of TMC 2.62.060 and .030 where a historic property is being "repaired". Complaint, ¶32 [sic] at 6:16-17. The Complaint alleges:

> 32. Defendant violated TMC § 2.62.060 and TMC § 2.62.030, which require a permit to demolish a historic structure. There is no exception. The only exception is when the historic object is to be repaired. The mayor never suggested repair-i.e., pruning and cabling.

Complaint at 6. (Emphasis added).

Thus, this case has been about whether a permit from the Historic Preservation Commission is required for "removal" of the tree. The Complaint seeks to stop the City from "removing" or prohibit the "removal" of the tree without Historic Preservation Commission approval. That has been definitively accomplished and is reflected in the Court of Appeals holding. The Complaint does not seek relief concerning maintenance or repairs or mitigation measures designed to prolong the life of the tree, including the recommendations set forth by the February 2025 Prager & Associates Report or the November 12, 2025 Treatment Plan. The court should grant only the declaratory relief sought in the Complaint as determined by the Court of Appeals.

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

B. THE PLAINTIFF HAS FAILED TO SHOW ENTITLEMENT TO INJUNCTIVE RELIEF BECAUSE THERE IS NO THREAT OF AN IMMINENT INVASION OF ANY RIGHTS UNDER THE CITY'S HISTORIC PRESERVATION ORDINANCE

An injunction is distinctly an equitable remedy and is "frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in but should be used sparingly and only in a clear and plain case." *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000). Under the familiar test for injunctive relief, plaintiff must meet the three part test articulated in *Tyler Pipe Indus., Inc. v. Department of Revenue*, which stated:

> "[O]ne who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has 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 to him."
> ....
> [S]ince injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public.

Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wash.2d 785, 792, 638 P.2d 1213 (1982) (quoting *Port of Seattle v. International Longshoremen's & Warehousemen's Union,* 52 Wash.2d 317, 319, 324 P.2d 1099 (1958)

It is a bedrock principle of equity that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In considering the relief, the court must balance the equities and other equitable factors. These factors include the character of the interest to be protected, the adequacy of an injunction compared to other remedies, any delay in bringing the suit, misconduct by the plaintiff, the relative hardship to the defendant if the injunction is granted versus the hardship to the plaintiff if denied, the interests of third parties and the public, and the practicability of enforcing the injunction. *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn.App. 70, 75, 587 P.2d 1087 (1978). Plaintiff ignores these equitable considerations and thus fail to meet their burden of proof that an injunction should issue.

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

Courts are required to ensure that injunctions are not more comprehensive than necessary to remedy the proven abuses. If appropriate, less drastic remedies should be considered to achieve the desired relief without imposing undue hardship on the defendant. *Whatcom County v. Kane*, 31 Wn.App. 250, 253, 640 P.2d 1075 (1981). Here, such a remedy is a declaration requiring approval by the City's Historic Preservation Commission under Ch. 2.62 of the Tumwater Municipal Code prior to removal of the Davis Meeker Garry Oak, which the Court of Appeals opinion has already accomplished.

The plaintiff fails to show that there is a present threat of invasion of their claimed rights not to have the Davis Meeker Garry Oak removed without Historic Preservation Commission approval. This is because the City has been working with arborists for over a year to identify and implement mitigation measures that will preserve the tree, not remove it. Plaintiff thus largely succeeded by appealing to the Mayor to exercise her discretion to seek additional information, which was done immediately after this court ruled to dissolve the *ex parte* TRO issued without notice. If the Mayor had wanted to, she could have removed the tree between June 4, 2024 when the TRO was lifted through July 3, 2024 when the Court of Appeals entered a stay of the dissolution of the TRO to allow consideration of a motion for injunction pending appeal. During this month-long period, the City was not prevented by any court order from cutting down the Davis Meeker Garry Oak. Yet it did not do so because Mayor Sullivan was true to her word and promise to seek additional information before cutting down the tree.

Mayor Sullivan is leaving office at the conclusion of 2025 and will be succeeded by Mayor-Elect Leatta Dahlhoff. Mayor-Elect Dahlhoff likewise has no intention of removing the Davis Meeker Garry Oak and was part of the unanimous City Council that voted to pass Resolution 2025-009 to fund and implement measures to mitigate risks while retaining the Davis Meeker Garry Oak.

Given these developments, and in light of the Court of Appeals ruling that the City did not appeal, there is no reasonable likelihood that the City will remove the Davis Meeker Garry Oak without first

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

seeking approval from the Historic Preservation Commission, as its current Historic Preservation Ordinance requires. Without a well-grounded fear of immediate invasion of that alleged right, Plaintiff fails to establish the second prong of the *Tyler Pipe* test.

C. PLAINTIFF CONCEDED THAT NO PERMIT IS REQUIRED FOR THE PRUNING AND MITIGATION MEASURES WHICH SEEK TO REPAIR THE HEALTH OF THE DAVIS MEEKER GARRY OAK.

Plaintiff affirmatively pleaded in their complaint that no permit is required from the Historic Preservation Commission to pursue the pruning and soil management measures now underway to restore the health of the Davis Meeker Garry Oak. They cannot now seek to alter their position by expanding the language of their proposed relief to cover repair measures that they previously claimed did not require Commission approval. Such a change in position is barred by the doctrine of judicial estoppel.

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in *a court proceeding* and later seeking an advantage by taking a clearly inconsistent position.' " *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (emphasis added) (quoting *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 98, 138 P.3d 1103 (2006)); *Boyd v. City of Olympia*, 1 Wn. App. 2d 17, 36, 403 P.3d 956, 966 (2017).

The position taken by the plaintiff in this court proceeding is that no permit was required for pruning or repairs of the Davis Meeker Garry Oak. They cannot now seek an injunction that would apply to such pruning or other maintenance designed to restore the health of the tree by broadening the language of the relief they seek beyond determining whether a permit is required for removal of the tree.

D. GIVEN THE COURT OF APPEALS RESOLUTION OF THE PERMIT ISSUE AND THE CITY'S EFFORTS TO MITIGATE AND RETAIN THE TREE, THE REMAINDER OF THIS CASE IS MOOT.

A case is considered moot when a court can no longer provide effective relief to the parties involved. Where an issue has become "purely academic" such that the court cannot provide effective

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

relief, it is moot. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 258, 138 P.3d 943 (2006) (internal quotation marks omitted) (quoting *State v. Turner,* 98 Wn.2d 731, 733, 658 P.2d 658 (1983); *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 985, 474 P.3d 1107 (2020)

Upon resolution of the Historic Preservation Commission issue, the remaining issues raised in the Complaint are now academic and there is no ongoing need for judicial proceedings. Even if the plaintiff had a private right of action for their Migratory Bird Treaty act claim, which they do not, there is no need to adjudicate speculative matters as the tree is not being removed. Even if the plaintiff had a private right under the MBTA, such a claim would also be dependent on the kestrels returning to the tree. The Court of Appeals ruling and decisions by the City to pursue maintenance and pruning (as recommended by the current arborist and supported by the plaintiff) preclude the need for any further judicial intervention at this time.

IV. CONCLUSION

The Court should enter an order confirming that the Court of Appeals holding that the City may not remove the Davis Meeker Garry Oak under TMC 2.62.030 and .060 without Historic Preservation Commission approval is the law of the case and is binding on the City. The court should further find that the remaining issues herein are moot and the Court should dismiss this matter.

Dated this 12th day of December 2025.

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

Jeffrey S. Myers, WSBA No. 16390
Attorneys for Defendant
P.O. Box 11880, Olympia, WA 98508-1880
Telephone: 360-754-3480 Fax: 360-754-3511
Email: jmyers@lldkb.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I caused to be electronically filed the foregoing document, and this Certificate of Filing & Service, and have mailed a copy of this filing to the following parties via email per service agreement:

Plaintiff's Attorneys:
Ronda Larson Kramer
LARSON LAW, PLLC
P.O. Box 7337
Olympia, WA 98507-7337
ronda@larsonlawpllc.com

Bryan J. Telegin
Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
bryan@teleginlaw.com

DATED this 12th day of December 2025, at Tumwater, WA.

/s/ Tam Truong
Tam Truong, Legal Assistant

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511