

1 Hearing Date: April 3, 2026
2 Hearing Time: 9:00 a.m.
3 Judge/Calendar: Hon. Anne Egeler
4
5
6

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

9 SAVE THE DAVIS-MEEKER GARRY
10 OAK,

No. 24-2-01895-34

11 Plaintiff,

**DECLARATION OF BRYAN
TELEGIN IN SUPPORT OF
PLAINTIFF’S MOTION TO
AMEND COMPLAINT**

12 v.

13 DEBBIE SULLIVAN, in her capacity of
14 Mayor of Tumwater

15 Defendant.
16

17 I, BRYAN TELEGIN, declare as follows:

18 1. I am one of the attorneys for Plaintiff Save the Davis-Meeker Garry Oak (“SDMGO”)
19 herein. I am over the age of 18 and make this declaration based upon my own personal knowledge.

20 2. Attached hereto as **Exhibit A** is a true and correct copy of a letter from the Washington
21 State Department of Archaeology and Historic Preservation (“DAHP”) stating that under RCW
22 27.53.060, the mayor cannot cut down the Davis Meeker oak tree without an Archeological
23 Excavation and Removal Permit from DAHP, dated May 30, 2024.

24 3. Attached hereto as **Exhibit B** is a true and correct copy of the declaration of Ronda
25 Larson Kramer submitted in support of Plaintiff’s supplemental response to the City’s Motion to
26 Dissolve the TRO, dated May 30, 2024.

1 4. Attached hereto as **Exhibit C** is a true and correct copy of a letter from James Macrae,
2 Assistant State Archaeologist with the Department of Archaeology & Historic Preservation, to
3 Tumwater Mayor Debbie Sullivan and the Tumwater City Attorney’s Office, dated June 4, 2024,
4 obtained via public records request.

5 5. Attached hereto as **Exhibit D** is a true and correct copy of a letter from the Assistant
6 Attorney General on behalf of the Washington State Department of Archaeology and Historic
7 Preservation (“DAHP”) to the mayor’s attorney, Jeffrey S. Myers, dated July 11, 2024, obtained via
8 public records request.

9 6. Attached hereto as **Exhibit E** is a true and correct copy of a letter from Mayor
10 Sullivan’s attorney, Jeffrey S. Meyers, to DAHP, dated June 28, 2024, arguing that “the Thurston
11 County Superior Court already determined that the archaeological statute did not prevent removal of
12 the tree,” obtained via public records request.

13 7. Attached hereto as **Exhibit F** is a true and correct copy of the brief of Respondent
14 Mayor Debbie Sullivan, filed in the Court of Appeals of the State of Washington Division II in Appeal
15 No. 58881-1-II, dated September 13, 2024.

16 8. Attached hereto as **Exhibit G** is a true and correct copy of the answer of Respondent
17 Mayor Debbie Sullivan to the amicus curiae brief of DAHP, filed in the Court of Appeals of the State
18 of Washington Division II in Appeal No. 58881-1-II, dated October 31, 2024.

19 9. Attached hereto as **Exhibit H** is a true and correct copy of the Court of Appeals’
20 unpublished opinion in Appeal No. 58881-1-II, dated July 15, 2025.

21 10. On May 1, 2025, Jeffrey S. Myers, counsel for Mayor Sullivan, emailed my co-counsel,
22 Ronda Larson Kramer, and me to ask if we would agree to the mayor’s then current motion to dismiss
23 our appeal on mootness grounds. A true and correct copy of Mr. Myers’ email to use is attached hereto
24
25
26

1 as **Exhibit I**. In his email, Mr. Myers states that the mayor elected to pursue a permit from DAHP for
2 alterations to the tree. However, he adds, “we do not believe that such permits are legally required.”

3 11. Attached hereto as **Exhibit J** is a true and correct copy of the Verbatim Report of the
4 Proceedings filed with Division II of the Washington Court of Appeals in Appeal No. 58881-1-II. The
5 Verbatim Report of Proceedings is a transcript of the oral argument before this Court on May 31,
6 2024, in the above-captioned matter. This transcript is also found as Exhibit A to the Declaration of
7 Bryan Telegin in Support of Plaintiff’s Motion to Set Amount of Supersedeas Bond.
8

9 I declare under penalty of perjury under the laws of the State of Washington that the foregoing
10 is true and correct.
11

12 Dated this 16th day of March, 2026, at Bremerton, Washington.
13

14 
15 _____
16 Bryan Telegin
17
18
19
20
21
22
23
24
25
26

EXHIBIT A



Allyson Brooks Ph.D., Director
State Historic Preservation Officer

May 30, 2024

RE: Davis-Meeker Oak: Archaeological Permit Requirements under RCW 27.53

To Whom it may concern,

Washington State Chapter 27.53 RCW and Chapter 25-48 WAC requires a permit, administered by the Department of Archaeology and Historic Preservation (DAHP), for the excavation, alteration, or removal of archaeological resources on public and private lands. This is a requirement for all pre-contact archaeological sites and any post-contact historic property that is eligible for the National Register of Historic Places.

The Davis Meeker Garry Oak Tree is a registered historic property on the City of Tumwater Historical Register, that based on published accounts is a historic feature associated with the Cowlitz Trail and subsequent Oregon Trail. Based on this association it is likely that this resource is eligible for the National Register of Historic Places. The address of the Davis-Meeker oak is 7525 Old Hwy 99, Tumwater, WA 98501.

Therefore, there are archaeological permit requirements, necessary prior to the removal or alteration of the Davis-Meeker Garry Oak Tree.

Specific information about Washington State Archaeological Excavation and Removal Permits can be found in RCW 27.53 and WAC 25-48. Knowing and willful failure to obtain this permit or comply with its requirements is a misdemeanor and may result in civil penalties of not more than five thousand dollars per violation, reasonable investigative costs, and site restoration costs.

Please let me know if you have any questions or concerns.

Sincerely,

James Macrae
Assistant State Archaeologist
James.macrae@dahp.wa.gov



EXHIBIT B

1 ■ EXPEDITE
□ No Hearing Set
2 ■ Hearing is set
Date: 5/31/2024
3 Time: 9:00 am
Judge: Egeler
4
5 Calendar: Civil

6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF THURSTON**

8 SAVE THE DAVIS-MEEKER GARRY OAK,

Case No. 24-2-01895-34

9 Plaintiff,

10 vs.

DECLARATION OF RONDA
LARSON KRAMER RE.
SUPPLEMENTAL RESPONSE TO
MOTION TO DISSOLVE TRO

11 DEBBIE SULLIVAN, in her capacity of Mayor of
12 Tumwater

13 Defendant.

14 I, RONDA LARSON KRAMER, make the following declaration:

15 1. I am the attorney of record for Save the Davis-Meeker Garry Oak (SDMGO). I
16 have knowledge of the facts stated herein and am competent to testify.

17 2. On May 30, 2024, I received via email a letter from the state archaeology
18 department indicating that under RCW 27.53.060, the mayor cannot cut down the Davis Meeker
19 oak tree without an Archeological Excavation and Removal Permit from the state archaeology
20 department. The mayor has not applied for the permit yet. Therefore, cutting down the tree would
21 violate ch. 27.53 RCW. Attached as **Exhibit A** is a true and correct copy of the letter.

22 //

23 //

24 //

25
DECLARATION OF
RONDA LARSON KRAMER - 1

LARSON LAW, PLLC
P.O. Box 7337
OLYMPIA WA 98507-7337
360-768-0775

1 I declare under the penalty of perjury of the laws of the State of Washington that
2 the foregoing is true and correct to the best of my knowledge.

3 EXECUTED this 30th day of May, 2024, at Olympia, Washington.
4

5 

6

RONDA LARSON KRAMER
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 **CERTIFICATE OF SERVICE**

2
3 I certify that I served a copy of the foregoing document on all parties or their counsel of
4 record as follows:

- 5 E-mail
- 6 U.S. Mail
- 7 ABC/Legal Messenger
- 8 Hand delivered by Ronda Larson Kramer

9 TO:

10 Jeffrey S. Myers, WSBA No. 16390
 11 Jakub L. Kocztorz, WSBA No. 61393
 12 LAW, LYMAN, DANIEL,
 13 KAMERRER & BOGDANOVICH, P.S.
 14 P.O. BOX 11880
 15 OLYMPIA, WA 98508-1880

16 I certify under penalty of perjury that the foregoing is true and correct.

17 EXECUTED this 30th day of May, at Olympia, WA.

18 

19 RONDA LARSON KRAMER
 20 Attorney for SDMGO



Allyson Brooks Ph.D., Director
State Historic Preservation Officer

May 30, 2024

RE: Davis-Meeker Oak: Archaeological Permit Requirements under RCW 27.53

To Whom it may concern,

Washington State Chapter 27.53 RCW and Chapter 25-48 WAC requires a permit, administered by the Department of Archaeology and Historic Preservation (DAHP), for the excavation, alteration, or removal of archaeological resources on public and private lands. This is a requirement for all pre-contact archaeological sites and any post-contact historic property that is eligible for the National Register of Historic Places.

The Davis Meeker Garry Oak Tree is a registered historic property on the City of Tumwater Historical Register, that based on published accounts is a historic feature associated with the Cowlitz Trail and subsequent Oregon Trail. Based on this association it is likely that this resource is eligible for the National Register of Historic Places. The address of the Davis-Meeker oak is 7525 Old Hwy 99, Tumwater, WA 98501.

Therefore, there are archaeological permit requirements, necessary prior to the removal or alteration of the Davis-Meeker Garry Oak Tree.

Specific information about Washington State Archaeological Excavation and Removal Permits can be found in RCW 27.53 and WAC 25-48. Knowing and willful failure to obtain this permit or comply with its requirements is a misdemeanor and may result in civil penalties of not more than five thousand dollars per violation, reasonable investigative costs, and site restoration costs.

Please let me know if you have any questions or concerns.

Sincerely,

James Macrae
Assistant State Archaeologist
James.macrae@dahp.wa.gov

EXHIBIT A



EXHIBIT C



June 4, 2024

RE: Davis-Meeker Oak: Archaeological Permit Requirements under Chapter 27.53 RCW

Honorable Debbie Sullivan
Mayor, City of Tumwater
555 Israel Road SW
Tumwater, WA 98501

City Attorney's Office
555 Israel Road SW
Tumwater, WA 98501

Mayor Sullivan and City Attorney's Office,

Chapter 27.53 RCW and Chapter 25-48 WAC require a permit, administered by the Department of Archaeology and Historic Preservation (DAHP), for the excavation, alteration, or removal of archaeological resources on public and private lands. This is a requirement for all pre-contact archaeological sites and any post-contact historic property that is eligible for the National Register of Historic Places.

DAHP understands that the City of Tumwater intends to remove a tree known as the Davies-Meeker Garry Oak Tree (the Tree). Based on the information DAHP currently has about the Tree and its historic and tribal association, the Tree is an archaeological site or object and therefore protected under state law. The Tree is a registered historic property on the City of Tumwater Historical Register that, based on published accounts, is an historic feature associated with the precontact Cowlitz Trail and historic Oregon Trail. The Tree is also likely eligible for inclusion on the National Register of Historic Places. Consequently, the City of Tumwater must obtain a Washington State Archaeological Excavation and Removal Permit issued by DAHP before the removal or alteration of the Tree. Failure of the City of Tumwater to obtain a permit prior to removal of the Tree is a violation of state law.

Under RCW 27.53.060, the Tree cannot be knowingly removed, altered, dug into, excavated, damaged, defaced, or destroyed without the City of Tumwater first obtaining a permit from DAHP to do so. Failure to obtain a permit from DAHP prior to removing, altering, digging into, excavating, damaging, defacing, or destroying the Tree will result in penalties from DAHP pursuant to RCW 27.53.095. Such penalties may include, but are not limited to, reasonable investigative costs incurred by a mutually agreed upon independent professional archaeologist investigating the alleged violation, reasonable site restoration costs, and civil penalties in an amount of not more than five thousand dollars per violation. Each day of continued violation shall constitute a distinct violation for the purpose of calculating penalties. A violation of Chapter 27.53 RCW is a misdemeanor.



Specific information about Archaeological Excavation and Removal Permits can be found in RCW 27.53 and WAC 25-48. Do not hesitate to contact me further if you have any questions or concerns, or wish to discuss the process of obtaining a permit from DAHP.

With respect,



James Macrae
Assistant State Archaeologist
1110 S. Capitol Way, Suite 30, Olympia WA, 98501
James.macrae@dahp.wa.gov



EXHIBIT D



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Agriculture & Health Division
PO Box 40109 • Olympia, WA 98504-0109 • 360-586-6500

July 11, 2024

Jeffery S. Meyers
Attorney at Law
Law, Lyman, Daniel, Kamerrer & Bogdonovitch, P.S.
2674 RW Johnson Blvd SW
Tumwater, WA 98512

RE: **Davis-Meeker Garry Oak Tree (45 TN 548)**

Dear Jeffery Myers:

I am an Assistant Attorney General and represent the Washington State Department of Archaeology and Historic Preservation (DAHP). It is in that capacity that I send this letter.

The Davis-Meeker Garry Oak Tree (the Tree) is a recorded archaeological site, known by its Smithsonian Trinomial 45 TN 548. Chapter 27.53 RCW and WAC Chapter 25-48 require the City of Tumwater (City) to obtain an Archaeological Excavation and Removal Permit (Permit) from DAHP before the Tree is removed, altered, dug into, excavated, damaged, defaced, or destroyed. Should the City fail to obtain a permit as required by law, DAHP will issue penalties against the City to the maximum extent allowed by law pursuant to RCW 27.53.095 and WAC 25-48-041. Such penalties may include, but are not limited to, reasonable investigative costs incurred by a mutually agreed upon independent professional archaeologist investigating the alleged violation, reasonable site restoration costs, and civil penalties in an amount of not more than five thousand dollars per violation. Each day of continued violation constitutes a distinct violation of RCW 27.53.060 subject to the maximum penalties available by law.

The Tree constitutes an archaeological object and/or an archaeological resource contained within an archaeological site, placing it well within DAHP's regulatory authority and subjecting the City to the permitting requirements of Chapter 27.53 RCW and WAC Chapter 25-48. Chapter 27.53 protects archaeological sites from, amongst other things, destruction or alteration.¹ Such disturbance or alteration to archaeological sites subjects the violator to penalties under RCW 27.53.095.

¹ RCW 27.53.060.

ATTORNEY GENERAL OF WASHINGTON

Jeffery S. Meyers
July 11, 2024
Page 2

Archaeological sites are locations that contain archaeological objects.² Archaeological objects include any item that “comprises the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products.”³ Trees can comprise physical evidence of indigenous and subsequent cultures.

DAHP’s rules support this interpretation. The rules use the same definitions for archaeological site⁴ and archaeological object⁵ as the statute, and provide for the same enforcement and penalties.⁶ WAC 25-48-041 also protects archaeological resources from alteration, excavation, or removal absent a permit.⁷ Archaeological resources include “any material remains of human life or activities which are of archaeological interest, including all sites, objects, structures, artifacts, implements, and locations of prehistorical or archaeological interest, whether previously recorded or still unrecognized.”⁸ Material remains of human life are of archaeological interest when they are “capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation, and explanation.”⁹ Trees can be material remains of human life and of archaeological interest, based on a plain reading of the DAHP rules.

DAHP has correctly interpreted its statutes and rules to mean that trees that have archaeological or historical significance are archaeological objects or archaeological resources within archaeological sites subject to DAHP permitting requirements, and has done so publically for years. For example, DAHP’s website¹⁰ and the *Field Guide to Washington Archaeology*, produced in 2003, both reference permitting requirements for trees.¹¹ In fact, a search of DAHP’s WISAARD (Washington Information System for Architectural and Archeological Records Data) system indicates that at least 458 recorded archaeological sites are trees. DAHP’s interpretation of Chapter 27.53 RCW and WAC Chapter 25-48 is consistent with the plain meaning of the statute.

Based on the information available to DAHP, including but not limited to the Tree’s relationship to the Oregon Trail and the Tree’s significance to local Tribes, the Tree is a monument that comprises physical evidence of indigenous and subsequent cultures and is of archaeological

² RCW 27.53.030

³ RCW 27.53.030

⁴ WAC 25-48-020(9)

⁵ WAC 25-48-020(8)

⁶ WAC 25-48-041

⁷ WAC 25-48-041(1)(a)

⁸ WAC 25-48-020(10)

⁹ WAC 25-48-020(12)

¹⁰ Available at <https://dahp.wa.gov/archaeology>

¹¹ Available at https://dahp.wa.gov/sites/default/files/Field%20Guide%20to%20WA%20Arch_0.pdf

ATTORNEY GENERAL OF WASHINGTON

Jeffery S. Meyers
July 11, 2024
Page 3

interest. As such, the Tree has been recorded as an archaeological site in Washington and is subject to the protections contained in Chapter 27.53 RCW and Chapter 25-48 WAC.

With respect to the City's assertions related to the dispositive nature of Judge Anne Egeler's statements on the record, Judge Egeler expressly called out that the issue had not been briefed prior to the hearing, and that her Honor's consideration of Chapter 27.53 was "brief." Judge Egeler's apparent consideration of DAHP's statutory authority was limited to a short statement from the bench.

As DAHP understands it, the issue before the Judge Anne Egeler on the Temporary Restraining Order was whether Save the Davis-Meeker Garry Oak (SDMGO) had established a clear legal or equitable right to relief. Judge Egeler ruled that SDMGO had not established such a right. SDMGO clearly has no right to vindicate DAHP's interest in archaeological permitting related to the Tree. DAHP is the sole authority within Washington authorized to issue Archaeological Excavation and Removal Permits allowing for disturbance of archaeological sites. As you know, DAHP was not a party to the case before Judge Egeler, and DAHP was not asked to provide input as an *Amici*. As such, Judge Egeler's Ruling is, at most, limited to the parties and is not binding on DAHP. DAHP further understands that on July 3, 2024 the Commissioner of the Court of Appeals, Division II granted a short-term stay of the dissolution of the Temporary Restraining Order. Such a stay does not prohibit the City from working to obtain a DAHP permit related to the Tree.

DAHP is aware of the City's concerns with respect to potential liability related to the Tree. However, it is also aware that the City has agreed following its June 4, 2024 Tumwater City Council meeting to obtain the service of another arborist to make additional determinations with respect to the health of the Tree. If the city is concerned about timeframes with respect to the Tree, emergency permitting from DAHP is available for circumstances where a Permit may need to be obtained on an expedited basis. WAC 25-48-095 outlines the process for the issuance of an emergency Permit, which require a shorter application process and are valid for 30-60 days, depending on the circumstance.

DAHP has now notified the City on three separate occasions that work on the Tree, including but not limited to removing or damaging the Tree, requires a Permit. This notice first occurred by email from Assistant State Archaeologist James Macrae dated May 30, 2024, second by letter from Assistant State Archaeologist James Macrae dated June 4, 2024, and finally by this letter.

The City is under clear notice of its legal obligation to obtain a Permit under state law prior to commencing work which removes, alters, digs into, excavates, damages, defaces, or destroys the Tree. Again, 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.

ATTORNEY GENERAL OF WASHINGTON

Jeffery S. Meyers
July 11, 2024
Page 4

Please have the City contact my client at its earliest convenience to discuss obtaining an Permit if it still wishes to remove, alter or damage the Tree, including for the purpose of obtaining an arborist evaluation if that evaluation requires defacing or damaging the tree in any way. DAHP greatly appreciates the City's future compliance with Washington State laws and rules governing cultural resources.

Sincerely,



Christopher P. Wright
Assistant Attorney General
Attorney for DAHP

cc: James Macrae, Assistant State Archaeologist

CPW:MW

EXHIBIT E

JOHN E. JUSTICE*
JAKUB KOCZTORZ
AMANDA BLEY KUEHN
ELIZABETH A. MCINTYRE*
JEFFREY S. MYERS
MATTHEW T. SONNEBY
MICHAEL J. THROGMORTON
*Admitted in WA & OR

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

ATTORNEYS AT LAW
(360) 754-3480 FAX (360) 357-3511

Mailing Address:
P.O. BOX 11880
OLYMPIA, WA 98508

Street Address:
2674 RW JOHNSON BLVD SW
TUMWATER, WA 98512

DONALD L. LAW, *retired*
DON G. DANIEL, *retired*
GUY BOGDANOVICH, *retired*
W. DALE KAMERRER, *retired*
JOCELYN LYMAN, 1951-2020

June 28, 2024

James Macrae
Assistant State Archaeologist
1110 S. Capitol Way, Suite 30,
Olympia WA, 98501

Re: Davis-Meeker Oak:

Dear Mr. Macrae,

We are in receipt of your letters of June 4, 2024 and May 30, 2024 in which you contend that the City of Tumwater is unable to fulfill its duty to provide safe streets by removing or even pruning a hazard tree from the right of way of Old Highway 99 without a permit because the tree is a "archeological object". We disagree.

The tree in question, known as the Davis Meeker Garry Oak tree, in this case is located immediately adjacent to Old Highway 99, one of Tumwater's busiest streets, near the Olympia Airport. In May 2023, a large limb fell from the tree, suggesting that it might present a hazard to the traveling public. The City commissioned a study by the City's contracted tree professional, Kevin McFarland of Sound Urban Forestry. The team of arborists investigated and concluded that there was substantial rot and decay in the main stems of the tree and recommended its removal. It found that the tree was in poor condition and posed a high risk to the public. A copy of their report is attached as **Exhibit 1**. The city's tree professional opines that:

there are structural concerns associated with the significant decay found in the stem base, lower main stem, east facing co-dominant stem and large scaffold branches. Probable future failures include large diameter scaffold branches from the east facing co-dominant stem and the entire west facing co-dominant stem at the union. The associated inclusions and stress loads will contribute to future failures. Structural support systems in conjunction with pruning were considered but the extent of decay in the main stem and upper east side of the canopy removes that as a mitigation option in my opinion.

James Macrae
June 28, 2024
Page 2

The removal of this tree is important to safeguard the public using the adjacent street, Old Highway 99, and other members of the public near the airport. The arborists forecast that the tree will have future failures including “large diameter” branches and “co-dominant” stems that may fail and could severely injure or kill members of the public who pass by. The City has a clear duty to remedy a known hazard in the right of way. *Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487, 489 (1962).

Your letter presumes that a tree can be an archeological object. That is contradicted by the definitions in the governing statute, RCW 27.53. As defined by the Act, “‘Archaeology’ means systematic, scientific study of humankind's past through material remains.” RCW 27.53.030(4). This is in accordance with the Merriam Webster Dictionary’s definition of archaeology as “the scientific study of material remains (such as tools, pottery, jewelry, stone walls, and monuments) of past human life and activities.” Thus, the Act’s application applies to “resources” or “objects” that are “archaeological” or relating to “archaeology.” This is consistently applied in the statute’s definitions: An “Archaeological object” means an object that comprises the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products.” The Davis Meeker Oak is not an archaeological site because it is not the remains of past human activity or culture, but rather a naturally occurring organism. Thus, definitionally the Davis Meeker Oak is beyond the scope of RCW 27.53.060 which applies only to “archaeological” resources.

We further disagree that the tree is eligible for listing as a historic place on the state or national registers. In 1998, it was renamed the Davis Meeker Garry Oak in honor of Jack Davis, who was instrumental in saving the tree from previous maladies. At that time, the chair of the Tree Board acknowledged that no connection to pioneer Ezra Meeker had been documented, despite research by local planner and historian Shanna Stevenson.

In 2001, the City adopted a heritage tree ordinance which more directly provides tree protection than a historic register, which typically protects human created structures and historic buildings. The purpose of this program, as stated in TMC 16.08.020(D), is “To promote identification and protection of trees that have historical significance; are unusual due to their size, species, or age; are unusual for their aesthetic quality; or have other values or characteristics that make them worthy of protection.” Thus, the applicable protection for the Davis Meeker Oak tree is under the heritage tree program. The City has taken significant measures to protect this tree designating it as one of the first heritage trees in 2001.

The heritage tree protections in Tumwater, like those of most other communities, recognize that the protection of trees must yield to protection of public safety where the

James Macrae
June 28, 2024
Page 3

City's tree professionals identify conditions rendering the tree a hazardous tree. The Tumwater City Code is clear that hazardous heritage trees may be removed without permit upon confirmation by the City's tree professional. TMC 16.08.075(D)(3).

The heritage tree provisions are specifically tailored to protect trees like the Davis Meeker Garry Oak. By contrast, historical preservation ordinances, like the DAHP's model ordinance protect the heritage of a community as represented by those "buildings, districts, objects, sites and structures" which reflect significant elements of its history. Model HPO at Section 1(A). Unlike the heritage tree ordinance, which is tailored for living things, historic preservation aims to protect the human created features that reflect historic values.

Finally, I note that the Thurston County Superior Court already determined that the archeological statute did not prevent removal of the tree. The plaintiffs in seeking an injunction argued that a permit was required because the tree is protected under RCW 27.53.060, the same argument set forth in your letters. Your May 30 letter was presented to the Court by the plaintiffs. However, on May 31, 2024, the court squarely rejected this argument, stating:

With respect to the newly raised argument regarding RCW 27.53.060, the defendant is correct that was not briefed previously. A quick look at that statute reveals that that chapter of the law addresses archaeological resources, not trees, and therefore that is not applicable and it does not provide this court a basis for a finding of clear legal or equitable right.

Order Dissolving TRO, incorporating Oral Ruling at 3-4. (Emphasis added, attached as **Exhibit 2**).

The Court determined that the tree is not a "structure", and that the archeological statutes you cite are not applicable to it. Thus, we disagree with the conclusion of your letter that it would violate these laws to remove the tree without a permit.

CURRENT ACTIONS AND NEXT STEPS

For these reasons, we continue to believe, as the Court has already ruled, that the archeological statute does not apply and the City is entitled to remove hazardous trees, including the Davis Meeker Garry Oak, from the right of way. The city is currently having a second evaluation of the tree performed. In the meantime, the City would welcome additional information about the scope of your agency's permitting process.

We have concerns that subjecting this tree to such permitting would unduly burden the City in any attempts to mitigate the conditions that are threatening public safety and may require constant permits for every instance where limbs are pruned or other efforts are

*LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW*

James Macrae
June 28, 2024
Page 4

taken to address the hazards. Thus, additional information about the permitting process, the decisionmakers, the duration and costs associated with such a permit, the applicable standards for such permits and whether any exemptions apply due to emergent circumstances and threats from hazardous conditions would apply would be helpful to understand.

We look forward to hearing more about your permitting process shortly.

Very truly yours,

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

A handwritten signature in black ink, appearing to read 'Jeffrey S. Myers', written in a cursive style.

Jeffrey S. Myers

Cc: Mayor Debbie Sullivan
City Administrator Lisa Parks
City Attorney Karen Kirkpatrick

EXHIBIT F

FILED
Court of Appeals
Division II
State of Washington
9/13/2024 4:04 PM
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.

BRIEF OF RESPONDENT MAYOR DEBBIE SULLIVAN

Jeffrey S. Myers, WSBA #16390
Jakub Kocztorz, WSBA # 61393
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508
T: (360) 754-3480
F: (360) 357-3511
Email: jmyers@lldkb.com

Attorneys For Respondent

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

A. THE CITY IDENTIFIES A HAZARDOUS TREE OVER A MAJOR HIGHWAY.1

B. APPELLANT SEEKS A TEMPORARY RESTRAINING ORDER EX PARTE WITHOUT NOTICE.....5

III. ISSUES PRESENTED.....9

IV. STANDARD OF REVIEW.....9

V. ARGUMENT.....9

A. THE EX PARTE ISSUANCE OF THE TRO WITHOUT MEETING THE REQUIREMENTS OF CR 65 AND RCW 7.40.050 RENDERS IT VOID.....10

B. THE CITY’S DECISION TO REMOVE THE TREE DOES NOT VIOLATE THE TUMWATER MUNICIPAL CODE.....16

1. The Trial Court properly rejected Plaintiff’s argument that the tree is a “structure” that cannot be demolished without a permit under the HPO.....17

2. The DMGO Is Properly Regulated As A Heritage Tree.18

3.	Appellant Erroneously Relies On Inapplicable Portions Of The City’s Code.	22
a.	The newly raised issue of whether the DMGO is a historic property or site should be rejected.	23
b.	The City’s HPO allows removal of hazards to public safety without a permit from the historic commission.....	25
C.	THE TRIAL COURT PROPERLY REFUSED TO ISSUE AN INJUNCTION UNDER RCW 27.53.	27
1.	The Trial Court properly concluded that claims under RCW 27.53 were not properly before the Court.	27
2.	Appellant lacks standing to sue under RCW 27.53.	28
3.	The DMGO is not an archeological object covered by RCW 27.53.	31
D.	APPELLANTS’ REQUEST FOR INJUNCTIVE RELIEF INTERFERES WITH THE CITY’S DUTY TO SAFEGUARD THE PUBLIC BY REMOVING HAZARD TREES FROM THE RIGHT OF WAY.	38
VI.	CONCLUSION.....	42

TABLE OF AUTHORITIES

Cases:

<i>Abel v. Diking & Drainage Improvement Dist. No. 4</i> , 19 Wn.2d 356, 142 P.2d 1017 (1943).....	21
<i>Albin v. National Bank of Commerce of Seattle</i> , 60 Wn.2d 745, 375 P.2d 487 (1962)	39
<i>American Can Co. v. Mansukhani</i> , 742 F.2d 314 (7th Cir.1984)	14
<i>ATU Legislative Council of Washington State v. State</i> , 145 Wn.2d 544, 40 P.3d 656 (2002)	21
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)	12
<i>Cannabis Action Coal. v. City of Kent</i> , 183 Wn. 2d 219, 351 P.3d 151, 155 (2015).....	41
<i>Cicchetti v. Tower Windsor Terrace, LLC</i> , 128 A.D.3d 1262, 9 N.Y.S.3d 727 (N.Y. App. Div. 2015).....	17
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn. 2d 801, 828 P.2d 549, 553 (1992).....	28, 32
<i>Dep't of Labor & Indus. v. Fowler</i> , 23 Wn. App. 2d 509, 516 P.3d 831 (2022), <i>review denied</i> , 200 Wn.2d 1027, 523 P.3d 1184 (2023)	12
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	24
<i>Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.</i> , 129 Wn.App. 35, 118 P.3d 354 (2005)	32

<i>In re Est. of Mower</i> , 193 Wn. App. 706, 374 P.3d 180 (2016).....	26
<i>In re Estates of Smaldino</i> , 151 Wn. App. 356, 212 P.3d 579 (2009).....	11, 12, 14, 15
<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County</i> , 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974).....	11
<i>In re Groen</i> , 22 Wash. 53, 60 P. 123 (1900)	11
<i>Holder v. City of Vancouver</i> , 136 Wn. App. 104, 147 P.3d 641 (2006).....	6
<i>Keodalah v. Allstate Ins. Co.</i> , 194 Wn. 2d 339, 449 P.3d 1040 (2019).....	29
<i>King Cnty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV</i> , 188 Wn. 2d 618, 398 P.3d 1093 (2017).....	41
<i>Lawson v. City of Pasco</i> , 168 Wn.2d 675, 230 P.3d 1038 (2010).....	42
<i>Lewis v. Krussel</i> , 101 Wn.App. 178, 2 P.3d 486 (2000)	40
<i>Local 2916, IAFF v. Pub. Employment Relations Comm'n</i> , 128 Wn.2d 375, 907 P.2d 1204 (1995), <i>amended</i> (Jan. 26, 1996).....	33
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 139 Wn. App. 334, 160 P.3d 1089 (2007), <i>aff'd</i> , 166 Wn. 2d 264, 208 P.3d 1092 (2009).....	28

<i>Meyers v. Ferndale Sch. Dist.</i> , 12 Wn. App. 2d 254, 457 P.3d 483 (2020).....	16
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008).....	16, 41
<i>Protect the Peninsula's Future v. City of Port Angeles</i> , 175 Wn. App. 201, 304 P.3d 914 (2013).....	29
<i>Renner v. Williams</i> , 140 Colo. 432, 344 P.2d 966 (1959).....	13
<i>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)</i> , 165 Wn.2d 275, 197 P.3d 1153 (2008).....	20
<i>Schroeder v. Excelsior Mgmt. Grp., LLC</i> , 177 Wn. 2d 94, 297 P.3d 677 (2013).....	9
<i>State v. Roggenkamp</i> , 153 Wn. 2d 614, 106 P.3d 196 (2005)	23
<i>View Ridge Estates Homeowners Ass'n v. Guetter</i> , 30 Wn. App. 2d 612, 546 P.3d 463 (2024).....	16
<i>Wark v. Wn. Nat'l Guard</i> , 87 Wn.2d 864, 557 P.2d 844 (1976).....	20
<i>Washington Rest. Ass'n v. Washington State Liquor & Cannabis Bd.</i> , 10 Wn. App. 2d 319, 448 P.3d 140 (2019)	32-33
<i>Washington State Republican Party v. Washington State Pub. Disclosure Comm'n</i> , 141 Wn.2d 245, 4 P.3d 808 (2000).....	38
<i>Wilson & Son Ranch, LLC v. Hintz</i> , 162 Wn. App. 297, 253 P.3d 470 (2011)	24

Statutes:

RCW 7.40.050.....7, 9, 10, 12
RCW 7.40.140.....42
RCW 27.53.....27, 28, 30, 31
RCW 27.53.030.....35
RCW 27.53.040.....37
RCW 27.53.060.....passim
RCW 27.53.090.....30
RCW 27.53.095.....30
RCW 43.334.....33

Ordinances:

TMC 2.62.030.....17, 24-26
TMC 2.62.050.....25
TMC 2.62.060.....passim
TMC 16.08.075.....18, 19, 21, 43

Other:

Black’s Law Dictionary (6th ed. 1990)25
Black’s Law Dictionary (12th ed. 2024)24
Merriam-Webster Dictionary.....33
Oxford Languages Dictionary.....34
14A Karl B. Tegland, Wash Prac. Civil Procedure § 25.4,
(2nd ed. 2009)28

I. INTRODUCTION

This case asks whether a trial court properly exercised its discretion to dissolve a TRO which was obtained without proper notice and failed to include required provisions under CR 65. This improvident order sought to prevent the City of Tumwater and its Mayor from removing a tree that was identified as a hazard from the right of way along one of the most traveled roads in the City. As such, the TRO endangered the safety of the public and threatened to impose liability on the City if the tree continued to decay and its limbs or the tree itself fell on adjacent passers-by.

II. STATEMENT OF THE CASE

A. THE CITY IDENTIFIES A HAZARDOUS TREE OVER A MAJOR HIGHWAY.

This case arises because an old oak tree is coming to the end of its life. That tree, known as the Davis Meeker Garry Oak (“DMGO”), is located along Old Highway 99 in Tumwater, and its canopy hangs over the highway. CP 33.

In May 2023, a large limb fell from the tree, suggesting that it might present a hazard to the traveling public. CP 116. The City commissioned a study led by the City's contracted tree professional, Kevin McFarland of Sound Urban Forestry. CP 34. A team of professional arborists investigated and concluded that there was substantial rot and decay in the main stems of the tree and recommended its removal. CP 34. The city's team of arborists found the tree was in poor condition and posed a high risk to the public. *Id.*

The arborist's opinion noted that despite outward appearances of health,

there are structural concerns associated with the significant decay found in the stem base, lower main stem, east facing co-dominant stem and large scaffold branches. Probable future failures include large diameter scaffold branches from the east facing co-dominant stem and the entire west facing co-dominant stem at the union. The associated inclusions and stress loads will contribute to future failures. Structural support systems in conjunction with pruning were considered but the extent of decay in the main stem and upper east side of the canopy removes that as a mitigation option in my opinion.

CP 41.

These concerns led the City's tree professional, who had treated the tree for 27 years, to recommend its removal. He considered, but rejected mitigating the risks through retrenchment pruning. He concluded that such drastic pruning would not reduce the risk, which would remain high and could be ineffective. *Id.*

The decision to remove the tree is important to safeguard the public using the adjacent street, Old Highway 99, and other members of the public at the airport. CP 34. The City's decision was made to protect the public from harm and the City from potential liability. *Id.* The City's insurance carrier estimated that the amount of liability could easily exceed \$10 million if people are injured or killed by falling limbs or collapse of the tree itself. *Id.*

Wanting to be certain that the report was reliable, the City conferred with the arborist for the nearby city of Olympia, who confirmed that the methodology used was "excellent" and went "above and beyond what is required in assessing the condition of

this tree”. CP 55-56. Olympia’s arborist pointed out that McFarland had cared for the DMGO for 27 years and “knows his patient well.” CP 55. Such intimate knowledge of the tree should be “weighed heavily” in considering his professional assessment along with the rigorous methodology used by the city’s team. *Id.* Of note, Olympia’s arborist noted that “the recently dropped stems from the tree are consistent with this pattern of fungal rot, as well as how fungal hyphae continue to spread throughout the tree.” CP 55.

The City proceeded to inform the public and tribal officials of the tree’s condition and the need to remove it, beginning in early March and continuing into May 2024. CP 84-86; CP 34. None of the tribes expressed concern at the decision to remove the tree. CP 34. The City explained its decision to the public at a City Council meeting on May 21, 2024, a meeting attended by Appellant’s attorney. CP 13.

B. APPELLANT SEEKS A TEMPORARY RESTRAINING ORDER EX PARTE WITHOUT NOTICE.

The City proceeded to contract with a tree professional to remove the hazardous tree, which was scheduled for Tuesday May 28, 2024. CP 35. On Friday, May 24, 2024, at 8:01 a.m., counsel for Appellant left a cryptic voicemail with the city attorney's legal assistant. CP 113-114. She stated that she "was hoping to speak to the city attorney to inform her that she was filing a motion for a temporary restraining order against the City today for the Meeker Oak." *Id.*

Counsel's message did not leave specifics, and just said she was filing a motion for temporary restraining order "today". CP 114. No time was given and certainly no indication that she was headed to the courthouse at that moment. Counsel did not state that she was going to "*ex parte*" to obtain the TRO or give any indication when such a motion would be served or brought before the court. *Id.* Appellant did not send any emails or provide the papers seeking a TRO to the City before going to court. *Id.*

Counsel did not even identify which court she would be seeking the TRO from. *Id.*

Despite the City's immediate efforts to contact Appellant's counsel, their return calls went unanswered. Counsel proceeded to present a TRO to the trial court which entered it *ex parte*. CP 114. At approximately 10:30 a.m., counsel delivered a complaint and a signed TRO to the City. CP 114-115.

Plaintiff's Complaint stated two claims as a basis for injunctive relief. CP 10. First, it alleged that migratory birds were presently nesting in the DMGO and that it would violate the federal Migratory Bird Treaty Act, 16 U.S.C. §703(a) to remove the tree. *Id.*¹ Second, the Complaint alleged that the DMGO is a "historic structure" which cannot be demolished

¹ Appellant's Opening Brief makes no mention of the Migratory Bird Treaty Act and abandons this claim as a basis for injunctive relief. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641, 643 (2006) (A party abandons an issue by failing to brief the issue on appeal).

without a permit from the City Historic Commission under TMC 2.62.060. CP 6, 9, 10.

The TRO was facially deficient in several regards: (1) no notice was given; (2) no bond was required; (3) it provided no end date (4) there were no findings entered by the court and (5) there were no provisions for a hearing to consider whether it should remain in place longer than 14 days. CP 26-27. The TRO did not contain any factual findings whatsoever and failed to show what irreparable harm would result or make findings why it was permissible to dispense with notice as required by CR 65 and RCW 7.40.050. *Id.* The City immediately moved to shorten time and to dissolve the improperly issued TRO. CP 61.

The Court set a hearing for May 31, 2024, and both parties filed briefs. CP 106. Appellant filed a response and motion to extend the TRO. CP 95. The City filed its reply in support of its motion to dissolve on May 29, two days prior to the hearing as required by LCR 10. CP 123. On May 30, 2024, the day prior to the hearing, Appellant filed an untimely declaration from its

counsel attaching a letter from the State Department of Archeology and Historic Preservation addressed “to whom it may concern”, which contended that a state permit was required under RCW 27.53.060 to remove the DMGO. CP 137.

The next day, on May 31, 2024, the Court heard argument and then dissolved the TRO, but provided that its ruling would not become effective for 5 days to allow Appellant an opportunity to immediately go to the court of appeals to seek emergency relief. CP 158.

On May 31, 2024, the Appellant filed an “emergency” notice of appeal of the order dissolving the TRO. CP 149. However, the Appellant did not file an immediate motion to stay the dissolution order. This allowed the TRO to be dissolved effective on June 5, 2024. Appellant delayed for another month, waiting until July 2, 2024 to file a motion to stay the dissolution of the TRO.

III. ISSUES PRESENTED

1. Whether the TRO was correctly dissolved because it was void due to the Appellants violations of CR 65 and RCW 7.40.050 in obtaining the TRO?
2. Whether the Court correctly dissolved the TRO because the decision to remove the tree does not violate the Historic Preservation Ordinance?
3. Whether the trial court properly refused to consider new issues raised by the Appellant in a reply brief alleging that the decision to cut down the tree violate Washington's Archaeological Sites and Resources Law?
4. Is the City of Tumwater under a legal imperative to remove a tree that has been determined to be hazardous?

IV. STANDARD OF REVIEW

Orders dissolving temporary restraining orders are reviewed on an abuse of discretion standard, while questions of law are reviewed de novo. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn. 2d 94, 103–04, 297 P.3d 677, 682 (2013).

V. ARGUMENT

The Appellant obtained the TRO in violation of basic due process requirements and without addressing the requirements of CR 65. As such, the TRO was void and correctly dissolved. The

Appellant has not addressed the City's legal duties to remove known hazardous trees under Washington Law, which further supports the trial court's dissolution of the TRO.

Appellant argues that the Superior Court's determinations with regard to the applicability of the City's Historic Preservation Ordinance and the Washington Archaeological Sites and Resources Law are erroneous. The Appellant is wrong. The Superior Court correctly determined that neither law is applicable to the facts at issue. Further, Appellant failed to properly raise any issue concerning the Washington Archaeological Sites and Resources Law, which were not set forth in the Complaint and were only raised in an untimely submitted reply declaration. Thus, such issues were not properly before the court and were raised too late to warrant consideration.

A. THE EX PARTE ISSUANCE OF THE TRO WITHOUT MEETING THE REQUIREMENTS OF CR 65 AND RCW 7.40.050 RENDERS IT VOID.

When a party obtains a temporary restraining order, the moving party must provide notice or, if it is sought *ex parte*, must

certify to the court the efforts made to notify the adverse party and certify the reasons why such notice should not be required. CR 65(b). As early as 1900, the Washington Supreme Court held in *In re Groen*, 22 Wash. 53, 56, 60 P. 123 (1900), that these prerequisites exist to ensure that parties are afforded minimum due process protections.

The United States Supreme Court said much the same in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974), stating the “stringent restrictions imposed [by Federal Rules of Civil Procedure Rule 65(b)] on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.” *In re Estates of Smaldino*, 151 Wn. App. 356, 368, 212 P.3d 579, 585 (2009). Because CR 65(b) was modeled on the federal rule, Washington courts look to federal decisions for guidance in

construing it. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218–19, 829 P.2d 1099 (1992).

Appellant here disregarded the minimum dictates of due process and obtained a temporary restraining order without notice to the City, and without certifying the reasons why such notice should not be required. In these circumstances, the TRO is void. *In re Estates of Smaldino*, 151 Wn. App. 356, 367–68, 212 P.3d 579, 584–85 (2009); *Dep't of Labor & Indus. v. Fowler*, 23 Wn. App. 2d 509, 532, 516 P.3d 831, 844 (2022), *review denied*, 200 Wn.2d 1027, 523 P.3d 1184 (2023).

The appellant's paltry efforts here to provide notice were not described in counsel's declaration. CP 15. Indeed, there was not even a motion filed seeking a TRO to inform the *ex parte* judge as to the legal requirements of CR 65 or RCW 7.40.050. Counsel's phone message stated only the fact that she would be seeking a TRO about the Meeker tree. *Id.* It thus failed to provide "reasonable notice of the time and place of making application", as required by RCW 7.40.050. Counsel's declaration contained

a single conclusory paragraph stating that she left a voicemail that she was filing a lawsuit and moving for a TRO. CP 15. No such motion was actually filed. Counsel's declaration did not certify, and the Court's subsequent TRO did not identify, "the reasons supporting the applicant's claim that notice should not be required" as it is required to do under CR 65(b). *Id.*

The failures to address the requirements of CR 65(b-d) here are comparable to those in *Renner v. Williams*, 140 Colo. 432, 344 P.2d 966 (1959) where the Colorado Supreme Court set aside a contempt order, holding that the underlying *ex parte* restraining order was "completely devoid of virtually all of the requirements of [Colorado Rule of Civil Procedure] 65(b), (c), and (d)." The order did not set a time for its expiration or a date for hearing, did not define the injury or state why it was irreparable, did not give the reason for issuance without notice, and did not require any security. The court stated, without elaboration, citation or analysis, that "[a]ny one of the deficiencies noted was sufficient to render the order a nullity."

Id. at 967. The only discussion in the opinion, however, related to case authority that failure to require the giving of security renders an *ex parte* order void. This case was cited with approval in *In re Estates of Smaldino*, 151 Wn.App.at 368-369.

Likewise, in *American Can Co. v. Mansukhani*, 742 F.2d 314 (7th Cir.1984), the Seventh Circuit came to a similar conclusion. There, a TRO was improperly issued *ex parte* without proof that notice could not be given or that notice would have rendered fruitless the further prosecution of the action. Like the TRO issued in this case, the order in *American Can* failed to define why the order was granted without notice. *Id.* at 322-23.

The court explained the significance of these requirements:

The specific requirements of [Rule 65\(b\)](#) are not mere technical legal niceties. They are strongly worded, mandatory provisions which should be respected. They are not meaningless words. A temporary injunction can be an extremely powerful weapon, and when such an order is issued *ex parte*, the dangers of abuse are great. Because our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute, the procedural hurdles of [Rule 65](#) are

intended to force both the movant and the court to act with great care in seeking and issuing an *ex parte* restraining order. This court has said that [Rule 65\(d\)](#) with its companion requirements is no mere extract from a manual of procedural practice. It is a page from the book of liberty. The same is true for the [Rule 65\(b\)](#) requirements for *ex parte* temporary restraining orders where the dangers of abuse are especially great.

Id. at 324–25.

The *ex parte* TRO secured by Plaintiffs in this case violates the same precepts that the *In re Smaldino* Court relied upon. As observed in *In re Smaldino*:

An *ex parte* restraining order is indeed a powerful weapon, to be issued rarely and with great caution. Such orders are in tension with a first principle of our jurisprudence: that court action should follow, not precede, notice and opportunity to be heard.

151 Wn.App. at 371.

Likewise, this court should affirm the dissolution of the improperly obtained TRO which failed to comply with CR 65 in violation of the due process protections it provides against *ex parte* restraining orders. Although the trial court did not rely on this theory, this court may affirm Judge Egeler’s ruling on any

basis supported by the record. *View Ridge Estates Homeowners Ass'n v. Guetter*, 30 Wn. App. 2d 612, 640, 546 P.3d 463 (2024); *Meyers v. Ferndale Sch. Dist.*, 12 Wn. App. 2d 254, 263-64, 457 P.3d 483 (2020); *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008).

B. THE CITY’S DECISION TO REMOVE THE TREE DOES NOT VIOLATE THE TUMWATER MUNICIPAL CODE

Appellant’s Complaint contended that the decision to remove the tree violates the City’s Historic Preservation Ordinance (HPO) contained in the Tumwater Municipal Code. The HPO does not forbid the removal of the hazardous tree because (1) TMC 2.62.060(A) is not applicable because the removal is addressed by more specific, newer provisions concerning heritage trees; and (2) as a heritage tree the tree is subject to permitless removal if found to be dead or hazardous and (3) in any event, TMC 2.62.060(B)(3) provides an emergency measures exception that permits removal of the tree as a threat to public safety.

1. The Trial Court properly rejected Plaintiff's argument that the tree is a "structure" that cannot be demolished without a permit under the HPO.

In their Complaint, Appellants contended that they were entitled to injunctive relief because the tree was a "structure" that required a permit to demolish under TMC 2.62.060 and 2.62.030. CP 6, 9, 10. Appellant now argues, without citation to authority, that the tree actually is a structure. That term is defined as "a work made up of interdependent and interrelated parts in a definite pattern of organization. Generally constructed by man, it is often an engineering project." TMC 2.62.030(W).

Courts considering this issue generally hold that a tree does not qualify as a building or "structure". *Cicchetti v. Tower Windsor Terrace, LLC*, 128 A.D.3d 1262, 1263, 9 N.Y.S.3d 727, 728 (N.Y. App. Div. 2015). Appellant cites no authority to support his contention that a tree which has been present for four centuries somehow falls within the definition of a "structure". As such, the court should reject this claim.

The ordinance states that structures are generally constructed by man because they are occasionally natural but so modified as to serve a particular purpose. For example, a tree hollowed out to serve as a dwelling or a cave covered in paintings. That is not the case with the tree in question. Appellant does not provide any evidence of modification of this tree or show that it consists of interdependent parts. The tree is a living organism, not a “structure.

2. The DMGO Is Properly Regulated As A Heritage Tree.

The Davis Meeker Garry Oak is a heritage tree. Heritage trees are nominated and designated for their historical importance, uniqueness as a specimen, rarity, or significance as a grove. TMC 16.08.075. The DMGO qualified for this designation because of its historical importance. Heritage Trees usually require permits to be removed. However, there is an exception to permitting for dead or hazardous trees. TMC 16.08.075(D)(3). As the City of Tumwater’s tree professional

determined the tree was hazardous the exception was triggered and thus removal is permitted without a permit.

Plaintiffs argued that the tree is protected by being on the City's historic register, relying on Ms. Nozawa's declaration, which referred to protections for Heritage trees. CP 16. Under the City's code, hazardous heritage trees are exempt from a tree removal permit after verification by the city tree protection professional. TMC 16.08.075(D)(3). Thus, the tree here may be removed without a permit if the city's tree protection professional confirms it is hazardous. Here, the report issued by the City's professional did exactly that, finding that the tree was a "high" risk and that the likelihood of failure was "probable". CP 37.

TMC 2.62.060 does not apply because the more specific ordinance, the heritage tree ordinance controls over the general historic preservation ordinance. This rule of statutory interpretation, known as the general-specific rule, dictates that if two statutes are concurrent, and cover the same conduct or

subject matter, the specific statute prevails unless it appears that the legislature intended to make the general act controlling. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 309, 197 P.3d 1153, 1170 (2008); *Wark v. Wn. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) (“It is the law in this jurisdiction, as elsewhere, that where concurrent general and special acts are in pari materia and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling.”)

Additionally, newer ordinances typically supersede older ones when they explicitly repeal the older ordinance, cover the same subject matter completely, and are intended to replace the older ordinance, or when they are irreconcilably inconsistent with the older ordinance. The subsequent legislation covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or ... [(2)] the two acts are so clearly inconsistent

with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect. *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002) quoting *Abel v. Diking & Drainage Improvement Dist. No. 4*, 19 Wn.2d 356, 363, 142 P.2d 1017 (1943).

Here, TMC 16.08.075 was enacted to establish the Heritage Tree program by Ord. O2000-012, on July 18, 2000, which was several years after the more general Historic Preservation Ordinance which was adopted by Ord. 1400, on October 19, 1993. The Court should thus give effect to the Heritage Tree Ordinance, TMC 16.08.075, as the more recent and specific ordinance applicable to the DMGO. However, even if the HPO applies, the emergent threat posed by the tree allows its removal. See discussion, *infra* at 25.

3. Appellant Erroneously Relies On Inapplicable Portions Of The City's Code.

The Appellant presumes that because the Davis Meeker Gerry Oak is on the local historic register as a Heritage Tree that TMC 2.62.060(A) applies. To render these sections applicable, the Appellant defines the tree as a historic property or alternatively a site or structure. However, nowhere does the Appellant explain why a provision clearly describing actions undertaken with regard to buildings should be applied to trees.

The relevant provision states “no person shall change the use, construct any new building or structure, or reconstruct, alter, restore, remodel, repair, move, or demolish any existing property on the Tumwater register of historic places ... without review by the commission.” TMC 2.62.060(A). The verbs used in TMC 2.62.060(A) when taken as a whole are utilized exclusively in relation to buildings and not for natural features. Even if an individual word may be so contorted as to permit its use in relation to a tree, the words must be read in the context of their

associated words per the doctrine of *noscitur a sociis*. “A principle consistent with this view is that of *noscitur a sociis*, which provides that a single word in a statute should not be read in isolation, and that ‘the meaning of words may be indicated or controlled by those with which they are associated.’” *State v. Roggenkamp*, 153 Wn. 2d 614, 623, 106 P.3d 196, 200 (2005). “In interpreting statutory terms, a court should ‘take into consideration the meaning naturally attaching to them from the context, and ... adopt the sense of the words which best harmonizes with the context.’” *Id.* The meaning naturally attached to words such as “alter, restore, remodel, repair, move, or demolish” a “property” is that it is in relation to buildings. Therefore, the provision does not apply to the DMGO.

a. The newly raised issue of whether the DMGO is a historic property or site should be rejected.

Appellant argues, for the first time on appeal, that the provision applies to the DMGO because it is a historic “property” or a historic “site”. This court should not consider this argument

because it is raised for the first time on appeal. *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 303, 253 P.3d 470, 473–74 (2011). Similarly, appellate courts do not consider theories not presented below. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

The term “property” is defined by TMC 2.62.030(L) as “real property together with improvements thereon, except property listed in a register primarily for objects buried below the ground[.]”. Appellant attempts to expand the application of the code and contends that “real property” should be defined as “[l]and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.” Property, Black’s Law Dictionary (12th ed. 2024).

The argument that anything that grows is part of the historic property, requiring approval from the historic commission for alteration, is patently absurd in its overbreadth.

Alternatively, Appellant argues that the provision applies because the DMGO is a historic “site”. Appellant merely notes

that sites are eligible for inclusion on the local historic register. TMC 2.62.050. No evidence has been provided that this is the case, only speculation. A site is defined as “a place where a significant event or pattern of events occurred,” and may be “the symbolic focus of a significant event or pattern of events.” TMC 2.62.030(T). “Place” can be defined as a term “applied to any locality, limited by boundaries, however large or however small.” Black’s Law Dictionary (6th ed. Rev. 1990). Therefore, a site would be a locality, limited by boundaries, where a significant event or pattern of events occurred. A tree is not a site but rather stands in the locality limited by boundaries. The City is not “demolishing” the “site” but is removing a hazardous tree.

b. The City’s HPO allows removal of hazards to public safety without a permit from the historic commission.

Even if TMC 2.62.060(A) was applicable, its permitting requirement has an exception for “emergency measures defined in TMC 2.62.030.” TMC 2.62.060(B)(3). However, TMC 2.62.030 provides authority for emergency repairs. “Emergency

repair’ means work necessary to prevent destruction or dilapidation to real property or structural appurtenances thereto immediately threatened or damaged by fire, flood, earthquake or other disaster.” TMC 2.62.030(K). Repair and measures are not synonyms nor are they usually used interchangeably. Therefore, to prevent the word measures from being rendered surplusage, it must be given a broader reading than the narrower category of repairs. “[T]he rule against surplusage ... requires this court to avoid interpretations of a statute that would render superfluous a provision of the statute.” *In re Est. of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180, 187 (2016). Thus, “work necessary to prevent” a structure that itself “immediately threatens” harm would be an emergency measure. This definition of measures would include measures taken to prevent a hazardous tree from causing harm.

If TMC 2.62.060(A) was applicable, then TMC 2.62.060(B)(3) provides an exception for emergency measures which if read as broadly as the reading necessary to apply TMC

2.62.060(A) to trees, would include permitless removal of hazardous trees.

C. THE TRIAL COURT PROPERLY REFUSED TO ISSUE AN INJUNCTION UNDER RCW 27.53.

Appellant's arguments concerning the Department of Archaeology and Historic Preservation ("DAHP") suffer from both procedural defects and fail on the merits. The procedural issues must be addressed as a threshold issue before the merits can be reached. On the merits, RCW 27.53.060 is not applicable to the DMGO, nor is the tree even within DAHP's purview.

1. The Trial Court properly concluded that claims under RCW 27.53 were not properly before the Court.

The Superior Court determined that the issue of the State Archeological Permit was not properly before the Court because it was not raised in the complaint and was first raised in an untimely reply declaration. Therefore, the issue was not properly briefed. "The court will ordinarily refuse to consider new issues raised by the moving party in its rebuttal to the response because

the nonmoving party has no opportunity to respond.” 14A Karl B. Tegland, Wash Prac. Civil Procedure § 25.4, at 105 (2nd ed. 2009). “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992). “[F]ailure to raise an issue before the trial court precludes a party from raising it on appeal.” *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089, 1091 (2007), *aff’d*, 166 Wn. 2d 264, 208 P.3d 1092 (2009). Therefore, as these arguments were not properly or timely raised in the trial court, they cannot be raised now in the Court of Appeals. The trial court did not abuse its discretion and should be affirmed.

2. Appellant lacks standing to sue under RCW 27.53.

Further, the Appellant has no standing to raise claims on behalf of the Department of Archaeology and Historic Preservation. The statute Appellant relies on, RCW 27.53.060, does not contain a private cause of action for its alleged violation. A cause of action should not be implied. The ‘Bennett’ factors

are considered when determining whether to imply a cause of action, they are: “(1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation.” *Keodalah v. Allstate Ins. Co.*, 194 Wn. 2d 339, 346, 449 P.3d 1040, 1045 (2019).

The first factor is not met because the statute was created to benefit the public, as a whole, through the preservation of Archaeological Sites, not a specific class of persons. “[I]f the statute serves the general public welfare instead of an identifiable class of persons, then there is no duty to any individual unless a specific exception applies.” *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 210, 304 P.3d 914 (2013).

The second factor is not met because not only is there no explicit cause of action, but no duty is imposed in relation to the public. Indeed, the statute expressly charges the State with

enforcement, requiring offenses to be reported to the appropriate law enforcement agency or to the director. RCW 27.53.090. In addition to criminal penalties, the Act provides the State with civil remedies, including penalties and the right to seize artifacts obtained in violation of the Act. RCW 27.53.095. Thus, nothing suggests legislative intent for a private cause of action.

The third factor fails as Ch. 27.53 RCW was intended to regulate archaeological resources and vest supervision and enforcement in the Department, therefore implying a private cause of action would be inconsistent with the purpose of centralizing and rationalizing archaeological resource management.

As the three ‘Bennett’ factors fail, no private cause of action can be implied. Therefore, as the Department of Archaeology and Historic Preservation is not a party, Appellant’s arguments based on RCW 27.53 should be rejected on that ground alone.

3. The DMGO is not an archeological object covered by RCW 27.53.

Appellant argues that the DMGO is a historic archeological resource because of a DAHP letter to that effect and because it is a historic feature or perhaps a monument associated with the Cowlitz tribe. Both arguments are erroneous because (1) the DAHP letter is not entitled to deference; and (2) the Appellant again posits overly broad definitions.

The letter sent by an official with the Department of Archaeology & Historic Preservation is not entitled to deference as Appellant contends. It is the role of the court to say what the law is. DAHP is not a party here. No deference is owed to a letter addressed by agency staff to “whom it may concern”. Allowing a party who obtains such a self-serving letter, thrusting it before the judge on the eve of a hearing, without proper briefing or any opportunity for a response would be a clear abuse of the judicial process. Indeed, the lack of a fair opportunity to develop a record and fully brief matters in the trial court is

precisely why courts of appeal do not allow parties to raise new issues on appeal, with only few exceptions.

Such a letter is not a rule adopted with notice and comment under the Administrative Procedure Act, nor is it a formal policy adopted by an agency. For an agency's interpretation to receive deference, it must be shown that the interpretation has been adopted as a matter of agency policy. *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.*, 129 Wn.App. 35, 47, 118 P.3d 354 (2005), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

Courts have the final authority to interpret statutes that define an agency's jurisdiction. This court has explicitly stated that courts are "ultimately responsible for determining the scope of an agency's authority and the validity of agency rules". Washington courts we do not “ ‘defer to an agency the power to determine the scope of its own authority’ ” under a statute. *Washington Rest. Ass'n v. Washington State Liquor & Cannabis*

Bd., 10 Wn. App. 2d 319, 331, 448 P.3d 140, 147 (2019). Similarly, the Supreme Court has held that determining the extent of an agency's authority is a question of law, which is a power ultimately vested in this court. *Local 2916, IAFF v. Pub. Employment Relations Comm'n*, 128 Wn.2d 375, 379, 907 P.2d 1204, 1207 (1995), *amended* (Jan. 26, 1996).

The Department of Archaeology and Historic Preservation is governed by RCW 43.334 which does not include a statement of its jurisdiction. However, Merriam-Webster defines archaeology as “the scientific study of material remains (such as tools, pottery, jewelry, stone walls, and monuments) of past human life and activities.” Archaeology, Merriam-Webster Dictionary.² Naturally, the purview of such a department would be the preservation of past human habitations or other residuum of human life while not extending to flora, no matter how venerable.

² <https://www.merriam-webster.com/dictionary/archaeology>. Accessed 9/11/2024.

However, Appellant does argue that the tree is an “archaeological object” because some Garry Oaks may have been “cultivated” by native peoples through planting of acorns and burning of prairies. Appellant’s Brief at 27-28. Alternatively, they argue that the DMGO is an “archaeological object” because it may have served as a trail marker, rendering it a “monument”. *Id.* at 28. However, it is not a monument, which is defined as “a building, column, statue, etc. built to remind people of a famous person or event”. Oxford Languages Dictionary.³

Neither is the letter presented by DAHP sufficient to show that the DMGO falls under the statutory definition of “archeological object”. “Archaeological object” is defined as “an object that comprises the physical evidence of an indigenous and subsequent culture, including material remains of past

³<https://www.oxfordlearnersdictionaries.com/us/definition/english/monument>. Accessed 9/12/2023

human life, including monuments, symbols, tools, facilities, and technological by-products.” RCW 27.53.030(2).

The notion that flora, which are the alleged byproduct of a centuries long subtle environmental manipulation by native peoples, are “archaeological objects” would necessarily extend to every Garry Oak. Indeed, it would extend to numerous natural phenomena which may have been influenced by the presence of humans. Further, the argument is predicated on a mere speculation as it cannot be demonstrated with any competent evidence whether any particular Garry Oak is the product of such manipulation. Therefore, although some of the population of Garry Oaks may have been planted by humans in the past, it cannot demonstrate that as to this individual tree. Moreover, even if trees were produced by humans planting acorns, this is not sufficient to render any of these trees to be “physical evidence of past human life” under the statutory definition. As Garry Oaks existed in the region prior to alleged human involvement, any individual tree evidences nothing about past human life.

The tree is not “archaeological” even if it could be shoehorned into a particularly broad notion of a “monument” because it does not evidence past human life. In conjecturing that the DMGO was erected or planted as a “monument”, Appellants fail to identify just who the tree is a monument to. It does not identify or honor any particular group or individual humans, so there is no demonstrated connection showing the tree is “physical evidence” of human life or culture.

Even if a tree was used as a trail marker, it does not render it evidence of past human life because nothing about the tree itself suggests such a use. There is nothing carved, painted or otherwise present on the tree to show its use as such a marker or as a monument to some unnamed human. Many natural objects including trees, water features, and even the North Star have guided people on their way. However, this does not render them evidence of human life. The tree preexists its use as a trail marker and its natural features, not human modification, rendered it sufficiently memorable to act as a signpost. Therefore, even its

long use as a trail marker does not render it evidence of past human life, because nothing about the tree itself suggests anything about past human life. Thus, as the tree is not archaeological object, RCW 27.53.060 does not apply.

The Archeological statute applies to things that are remains of human civilization, not living trees. This reading is confirmed by RCW 27.53.040 which enumerates the types of materials that are declared to be archeological objects. RCW 27.53.040 lists:

sites, objects, structures, artifacts, implements, and locations of prehistorical or archaeological interest, whether previously recorded or still unrecognized, including, but not limited to, those pertaining to prehistoric and historic American Indian or aboriginal burials, campsites, dwellings, and habitation sites, including rock shelters and caves, their artifacts and implements of culture such as projectile points, arrowheads, skeletal remains, grave goods, basketry, pestles, mauls and grinding stones, knives, scrapers, rock carvings and paintings, and other implements and artifacts of any material that are located in, on, or under the surface of any lands or waters

What the statute omits are natural objects, such as trees.

Each of the listed items is man-made or are actual human

remains. Classifying a tree as an archeological object is inconsistent with the plain meaning of the statute and the maxims of *ejusdem generis* and *expressio unius est exclusion alterius*. These common maxims of statutory construction, hold that where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000). If the legislature intended that the Archeological statute applied to natural objects, it would have listed at least one. It did not do so, indicating its intent to apply only to man-made artifacts and implements. Thus, Appellant's interpretation fails.

D. APPELLANTS' REQUEST FOR INJUNCTIVE RELIEF INTERFERES WITH THE CITY'S DUTY TO SAFEGUARD THE PUBLIC BY REMOVING HAZARD TREES FROM THE RIGHT OF WAY.

TMC 2.62.060(A) & RCW 27.53.060 should also be found inapplicable because they conflict with the City's state

common law duty to remove hazard trees. If found applicable, then when interpreting TMC 2.62.060(A) & RCW 27.53.060 the Court should bear in mind the imperative to remove hazard trees imposed by Washington Law. Statutes and local ordinances should be interpreted in a manner which does not conflict with duties imposed by state common law.

The government entity responsible for a road is obligated to maintain the road in a reasonably safe condition for ordinary travel. *Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962). Liability for harm is predicated on actual or constructive notice of the dangerous condition unless it was foreseeable. *Id.* Actual notice is simple and requires no elucidation, so cases typically turn on the existence of constructive notice. However, as the City's contract arborist has determined that the tree is a hazard, the city is on actual notice. The City has no defense to contest liability in the event of harm.

Similarly, the duty of a landowner regarding trees adjacent to a roadway depends on the location of the parcel. Specifically,

a greater duty is on those whose parcels are in proximity to denser populations and thus more likely to cause harm. “One whose land is located in or adjacent to an urban or residential area and who has actual or constructive knowledge of defects affecting his trees has a duty to take corrective action.” *Lewis v. Krussel*, 101 Wn.App. 178, 187, 2 P.3d 486, 491 (2000). The DMGO is located next to a busy thoroughfare near densely populated residential and commercial areas. Under this analysis the same conclusion is reached, the City has a duty to remove known hazardous trees.

The rival studies, meant to undermine the City’s contracted arborist’s determination, commissioned by the Appellant are irrelevant insofar as they do not take the city off actual notice of the risk.

If TMC 2.62.060(A) & RCW 27.53.060 are applied as argued by the appellant, they would prevent the City from fulfilling its duty. The fact that neither law contemplates the

longstanding duty to remove hazard trees further suggests they were not intended to apply to them.

If RCW 27.53.060 does apply, then the state common law duty is not explicitly abrogated or modified by it. “[W]e will not deviate from the common law ‘unless the language of a statute be clear and explicit for this purpose.’” *King Cnty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn. 2d 618, 627–28, 398 P.3d 1093, 1098 (2017) (quoting *Potter v. Wn. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008)). The statute should not be interpreted in a manner that preserves the duty while preventing the actions necessary to effectuate that duty.

Similarly, local ordinances should be interpreted in a manner which does not conflict with state law, which preempts them if they do conflict. “[A] state law preempts a local ordinance ‘when an ordinance permits what state law forbids or forbids what state law permits.’” *Cannabis Action Coal. v. City of Kent*, 183 Wn. 2d 219, 227, 351 P.3d 151, 155 (2015) (quoting

Lawson v. City of Pasco, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010). “We will find state law to preempt an ordinance only if the ordinance ‘directly and irreconcilably conflicts with the statute.’” *Id.* Therefore, TMC 2.62.060(A) should not be construed in a manner which prevents the City from fulfilling its duties under the state common law.

Neither TMC 2.62.060(A) nor RCW 27.53.060 contemplate the longstanding duty to remove hazard trees, suggesting they were not intended to apply to trees. If the Court finds TMC 2.62.060(A) & RCW 27.53.060 applicable, then they should be construed in such a way as not to prevent the effectuation of a state common law duty.

VI. CONCLUSION

The trial court did not err in dissolving the TRO that Appellants improperly obtained without notice and in derogation of the requirements of CR 65 and RCW 7.40.140. As such, the TRO was void ab initio.

Neither TMC 2.62.060(A) nor RCW 27.53.060 is applicable to the DMGO. A plain reading of TMC 2.62.060(A) shows that it applies to buildings not Heritage Trees which are governed by TMC 16.08.075. Under either provision, the City may proceed with emergency tree removal to make its streets safe for the traveling public. Arguments arising under RCW 27.53.060 are not properly before this Court as the Appellant did not raise these issues to the trial court in their Complaint and did not raise them in a timely fashion. The Appellant lacks standing to raise issues under the State Archeology statute. The DMGO is a tree and as such is not evidence of past human habitation and thus not an archaeological object meaning RCW 27.53.060. Finally, the City is under a legal duty to remove hazardous trees and should not be prevented from carrying out that duty. Therefore, the Court should not enjoin the Mayor from removing the hazardous tree.

I certify that this brief contains 7,447 words as determined by computer word count in conformity with RAP 18.17.

DATED this 13th day of September, 2024.

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



Jeffrey S. Myers, WSBA #16390
Jakub Kocztorz, WSBA # 61393
P.O. Box 11880
Olympia, WA 98508
(360) 754-3480
jmyers@lldkb.com

Attorneys for Respondent

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):

Appellant'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 13th day of September, 2024.

/s/ Lisa Gates

Lisa Gates, Legal Asst.

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

September 13, 2024 - 4:04 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 58881-1
Appellate Court Case Title: Save the Davis Meeker Garry Oak, Appellant v. Debbie Sullivan, Respondent
Superior Court Case Number: 24-2-01895-3

The following documents have been uploaded:

- 588811_Briefs_20240913160311D2921453_6380.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Appeal Response Brief final.pdf

A copy of the uploaded files will be sent to:

- bryan@teleginlaw.com
- jkocztorz@lldkb.com
- ronda@larsonlawpllc.com

Comments:

Sender Name: Lisa Gates - Email: lisa@lldkb.com

Filing on Behalf of: Jeffrey Scott Myers - Email: jmyers@lldkb.com (Alternate Email: lisa@lldkb.com)

Address:
P.O. Box 11880
OLYMPIA, WA, 98508
Phone: (360) 754-3480

Note: The Filing Id is 20240913160311D2921453

EXHIBIT G

FILED
Court of Appeals
Division II
State of Washington
10/31/2024 1:54 PM
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.

ANSWER OF RESPONDENT MAYOR DEBBIE SULLIVAN
TO AMICUS CURIAE BRIEF OF DEPARTMENT OF
ARCHEOLOGY AND HISTORIC PRESERVATION

Jeffrey S. Myers, WSBA #16390
Jakub Kocztorz, WSBA # 61393
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508
T: (360) 754-3480
F: (360) 357-3511
Email: jmyers@lldkb.com
jkocztorz@lldkb.com

Attorneys For Respondent

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTS RELEVANT TO MOTION	1
III.	ARGUMENT.....	1
A.	APPELLANTS FAILED TO PROPERLY RAISE THE ISSUE OF WHETHER AN ARCHAEOLOGICAL PERMIT IS REQUIRED TO REMOVE A TREE.	2
	1. The Complaint failed to raise claims under the State Archeology statute, Ch. 27.53 RCW.	2
	2. Amicus correctly observes that the Plaintiff lacks standing to assert claims under the State Archeology statute, Ch. 27.53 RCW.	4
A.	THE TREE IS NOT AN ARCHAEOLOGICAL OBJECT UNDER RCW 27.53.	7
	a. Amici’s claims that a tree is an archeological object are not supported by the master’s thesis relied upon.....	9
	b. A naturally occurring oak tree would not be considered an archeological object under federal law.....	17
	c. Foreign Law Is not Useful in Interpreting whether a tree is an archeological object under RCW 27.53	20

IV. CONCLUSION..... 22

TABLE OF AUTHORITIES

Cases:

<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	5
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn. 2d 801, 828 P.2d 549 (1992)	3
<i>In re Detention of Pettis</i> , 188 Wn. App. 198 (2015).....	11
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991)	4
<i>Fed. Home Loan Bank of Seattle v. Barclays Capital, Inc.</i> , 1 Wn. App. 2d 551, 406 P.3d 686 (2017)	21
<i>Franco v. U.S. Dep't of the Interior</i> , No. CIV S-09-1072 KJM, 2012 WL 3070269 (E.D. Cal. July 27, 2012)	18-20
<i>Frye v. United States</i> , 54 App. D.C. 46, 293 F. 1013 (1923) ..	11
<i>Jaramillo v. Morris</i> , 50 Wn. App. 822, 750 P.2d 1301 (1988)	16
<i>Keodalah v. Allstate Ins. Co.</i> , 194 Wn. 2d 339, 449 P.3d 1040 (2019)	5
<i>Local 2916, IAFF v. Pub. Employment Relations Comm'n</i> , 128 Wn.2d 375, 907 P.2d 1204 (1995), <i>amended</i> (Jan. 26, 1996) .	17
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 139 Wn. App. 334, 160 P.3d 1089 (2007)	3
<i>Protect the Peninsula's Future v. City of Port Angeles</i> , 175 Wn. App. 201, 304 P.3d 914 (2013)	5
<i>State v. Copeland</i> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	11
<i>Washington Rest. Ass'n v. Washington State Liquor & Cannabis Bd.</i> , 10 Wn. App. 2d 319, 448 P.3d 140 (2019).....	16

Wilson & Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 253 P.3d 470 (2011) 4

Statutes:

Ch. 27.53 RCW passim
RCW 27.53.030(2) 8, 14, 16, 19
RCW 27.53.030 12

Other Authorities:

43 C.F.R. § 7 .3(a)(3)(I) 18
Heritage Conservation Act, R.S.B.C. 1996, c. 187 (Can.)..... 21

I. INTRODUCTION

Respondent Debbie Sullivan, Mayor of the City of Tumwater, hereby responds to the brief submitted by the Amicus State of Washington on behalf of the Department of Archaeology and Historic Preservation.

II. FACTS RELEVANT TO MOTION

The State of Washington filed a Motion for Leave to File Brief as Amicus on October 3, 2024. That motion was granted by Commissioner Bears on October 7, 2024. Respondent relies on the facts set forth in her principal brief.

III. ARGUMENT

The Amicus in their brief has made arguments concerning two issues: (1) whether the issue of whether an archeological permit is required under Ch. 27.53 RCW was properly raised; (2) whether the tree at issue is an archaeological object. The Respondent agrees that the issue was not properly raised but denies that the statute applies to the tree at issue.

A. APPELLANTS FAILED TO PROPERLY RAISE THE ISSUE OF WHETHER AN ARCHAEOLOGICAL PERMIT IS REQUIRED TO REMOVE A TREE.

Respondent agrees with the Amicus that the issue of archaeological resources was not properly raised by the Appellants below. Though Respondent contests the applicability of RCW 27.53, she agrees that the statute does not contain a private cause of action and enforcement rests solely in the Department of Archeology & Historical Preservation (DAHP). Amicus Brief at 15. Because this issue was not properly raised in the trial court, it therefore cannot be raised on appeal.

1. The Complaint failed to raise claims under the State Archeology statute, Ch. 27.53 RCW.

The issue of whether the Davis Meeker Garry Oak is an archaeological object could arise in a variety of contexts both judicial and administrative, but the DAHP would necessarily be a party to any such case from the outset. The issue of archaeological resources was not properly raised and should not be considered.

The Superior Court determined that the issue of the State Archeological Permit was not properly before the Court, noting that the issue was not briefed. This is so because the issue was not mentioned in the complaint, CP 5, and was first raised in an untimely submitted declaration one day before the hearing of the motion to dissolve the TRO. CP 137. Any further statements of the Court on that issue are dicta and were not needed to reject this claim. Further, the issue cannot be resolved because it was not properly briefed below.

“The court will ordinarily refuse to consider new issues raised by the moving party in its rebuttal to the response because the nonmoving party has no opportunity to respond.” 14A Karl B. Tegland, Wash Prac. Civil Procedure § 25.4, at 105 (2nd ed. 2009). “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992). “[F]ailure to raise an issue before the trial court precludes a party from raising it on appeal.” *Lunsford v. Saberhagen*

Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007),
aff'd, 166 Wn. 2d 264, 208 P.3d 1092 (2009).

This court should not consider claims based on RCW 27.53 because they are raised for the first time on appeal. *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 303, 253 P.3d 470 (2011). Similarly, appellate courts do not consider theories not presented below. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Here, the trial court acknowledged that SDMGO did not brief or plead RCW 27.53. SDMGO did not seek any amendment of their Complaint to add such a claim. It was not the basis for the *ex parte* TRO issued by Judge Amamillo. CP 26. As such, the application of RCW 27.53 was not properly raised in the trial court and cannot now be raised in the Court of Appeals.

2. Amicus correctly observes that the Plaintiff lacks standing to assert claims under the State Archeology statute, Ch. 27.53 RCW.

Respondent agrees with DAHP that plaintiff lacks standing and cannot enforce the provisions of RCW 27.53. RCW

27.53 contains no private cause of action. A cause of action should not be implied, but is determined by a three part test derived from *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). The ‘Bennett’ factors are considered when determining whether to imply a cause of action, they are: “(1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation.” *Keodalah v. Allstate Ins. Co.*, 194 Wn. 2d 339, 346, 449 P.3d 1040 (2019).

The first factor is not met because the statute was created to benefit the public as a whole, not a specific class of persons. “[I]f the statute serves the general public welfare instead of an identifiable class of persons, then there is no duty to any individual unless a specific exception applies.” *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 210, 304 P.3d 914 (2013).

The second factor is not met because not only is there no explicit cause of action, but no duty is imposed in relation to the public. Also, ample alternative avenues of enforcement are provided in the statute, specifically through DAHP. Finally, the exhaustive permitting process outlined by the Amicus, which is clearly intended to centralize decision making, would not be served if private persons could utilize a cause of action to pursue their own archaeological agenda via private litigation. Amicus Brief at 8-11. Thus, nothing suggests legislative intent for a private cause of action.

The third factor fails as RCW Title 27.53 was intended to regulate archaeological resources and vest supervision and enforcement in the Department, therefore implying a private cause of action would be inconsistent with the purpose of centralizing and rationalizing archaeological resource management. As the three 'Bennett' factors fail, no private cause of action should be implied. Therefore, Appellant's claims should be dismissed for lack of standing as Amicus suggests.

B. THE TREE IS NOT AN ARCHAEOLOGICAL OBJECT UNDER RCW 27.53.

Respondent opposes Amicus' contention that RCW 27.53 applies to the Davis Meeker Garry Oak. Amicus argues that both the plain language of RCW 27.53 and the legislative intent behind the statute suggest that RCW 27.53 applies to trees. In both arguments Amicus relies on the unsubstantiated assumption that trees can be archaeological objects/resources. Thus, upon closer inspection both purportedly separate arguments collapse into one argument, i.e., that a tree can be an archaeological object.

It should be noted that the Respondent has not denied that a tree significantly modified by human activity can ever be an archaeological object. Instead, Respondent has argued that a mere tree, without more, cannot be an archaeological object and that the Davis Meeker Garry Oak is not an archaeological object. This was explained in detail in Respondent's Brief at 31-37.

In considering the definition of “archeological object,” the plain language of the statute does not even suggest the inclusion of trees. Amicus DAHP points to the language of the following definition from RCW 27.53.030(2) to demonstrate trees are included: an archaeological object “comprises the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products.” A mere tree, standing alone, no matter how venerable is not “evidence of an indigenous or subsequent culture” nor is it the “remains of past human life”. DAHP’s reading is not merely expansive but counterintuitive and thus does not represent the plain language meaning of the statute.

In fact, Amicus has not even met the burden of proving its more general premise—that a tree can be an archeological object. DAHP has cited to no state cases to support this premise as none exists. Beyond overwrought conclusory statements, the Amicus relies on three authorities to substantiate this key assumption: (a)

a master's thesis; (b) an unpublished district court opinion that mentions the subject in passing; and (c) foreign law. None of these purported authorities are sufficiently substantial to successfully carry this key assumption.

1. Amici's claims that a tree is an archeological object are not supported by the master's thesis relied upon.

Amicus claims that their assumption "is clear from the science of archaeology." Amicus Brief at 22. Amicus argues that, by consensus of the field, culturally modified trees (CMTs) are archaeological objects and that the Davis Meeker Garry Oak arguably belongs to that category. In support of this proposition, Amicus has mustered a single master's thesis. A master's thesis published in a University's own "graduate school collection" is not authoritative because it does not represent the consensus of the field and science of archaeology. Amicus Brief Appendix A.

The argument and its singular support suffer from four defects: (1) the thesis does not claim to represent the dominant view of archaeological science; (2) it is unclear from the thesis

whether CMTs are archaeological resources;(3) nothing in the thesis or in the record developed below suggests that the Davis Meeker Garry Oak is even arguably a CMT; & (4) the thesis's purpose is to advocate that existing archaeological principles be abandoned in favor a new, grander paradigm which is beyond the legal scope of archeology assigned to DAHP in RCW 27.53.

The thesis does not claim to represent the dominant view of archaeological science but rather the bleeding edge of the field. This thesis's purpose in its own words is to “deconstruct the dominant perspective of CMTs” through emphasizing “indigenous definitions ... and non-archaeological worldview approaches[.]” Amicus Brief Appendix A at 1, 2. The thesis attempts to “unlearn elements of Western archaeology” in favor of “community-centered heritage work[.]” Amicus Brief Appendix A at 7. As this thesis is from the Summer of 2023, it is implausible that the dominant view has been irreparably shaken and replaced by a master's thesis in a mere year.

The court should not be persuaded by a thesis which would be inadmissible under the *Frye* test, also known as the "general acceptance" test, used to determine the admissibility of expert scientific testimony. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). Under the *Frye* standard, scientific evidence is admissible only if the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community. *In re Detention of Pettis*, 188 Wn. App. 198 (2015); *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304, 1312 (1996). The thesis by its own words does not represent the generally accepted view of the relevant scientific community and therefore would not be admissible as scientific evidence. On that point alone the thesis fails to function as evidence supporting DAHP's position and its rogue conclusions lack persuasive value.

Further, within the thesis, CMTs are never defined as archaeological resources except when saying that view is one the field must "move away from." Amicus Brief Appendix A at 48.

Rather, CMTs are defined as “ethnographic resources.” Amicus Brief Appendix A at 10. In fact, the thesis acknowledges that: “CMTs are not typical ‘archaeological sites’ and should not be considered as such.” Amicus Brief Appendix A at 47.

The thesis seeks to expand the reach of legal protections to “ethnographic resources,” which are not mentioned by Washington law. “[E]thnographic resources can be defined as landscapes, culturally significant or sensitive plants, viewsheds, sites, and structures, that are significant or fulfill a sense of meaning, purpose, and way of existence.” Amicus Brief Appendix A at 10. (emphasis added). CMTs can also be conceptualized as “vivio-facts, eco-facts, and living artifacts.” *Id.* at 80.

“Ethnographic Resources” as a category are significantly broader than the definition of archaeological objects defined in RCW 27.53. See RCW 27.53.030. DAHP cannot unilaterally change the scope of its purview from archaeological resources to ethnographic resources. It is Legislature’s role to determine if

DAHP's purview should be expanded to consider these nonarchaeological factors and it has not done so. For this reason as well the thesis cannot serve as evidence of DAHP's conclusion.

Further, the thesis posits that the dominant view of CMTs is that they "are living trees from which materials are harvested (edible inner bark, pitch, resin, bark, branches) or modified through coppicing and pollarding."¹ Amicus Brief Appendix A at 13. According to the thesis, the dominant view is that only "easily identifiable bark-stripped Western red cedar trees" are CMTs. Amicus Brief Appendix A at 4. The Davis Meeker Garry Oak is not a bark-stripped red cedar identifiable as a CMT.

In the United States, CMTs require observable features to be eligible for the National Register of Historic Places (NHRP).

¹ "Coppicing" is a traditional woodland management technique that involves felling trees at their base where new shoots will grow. <https://www.nationaltrust.org.uk/discover/nature/trees-plants/what-is-coppicing>. "Pollarding" is a method of pruning that keeps trees and shrubs smaller than they would naturally grow. <https://www.rhs.org.uk/plants/types/trees/pollarding>.

Amicus Brief Appendix A at 54. The Davis Meeker Garry Oak does not have observably modified features. The dominant view is “influenced by neo-European ontology” with its undue emphasis “on observationally visible remnants of the past.” Amicus Brief Appendix A at 8.

As far as observationally visible remnants of the past (old things) can be equated with “physical evidence of culture,” then the thesis is actually criticizing RCW 27.53.030(2). The statute archaeological object as “the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products.” RCW 27.53.030(2). Amicus relies on this statutory definition to assert that the Davis Meeker Garry Oak as an archaeological object. Upon close reading, the thesis posits that, under the dominant view, the Davis Meeker Garry Oak is not a CMT, which is a prerequisite for classification as an archeological object. The thesis then proceeds to criticize this consensus view of archaeology that RCW 27.53 is predicated on.

This is unsurprising given that the thesis does not explore and explain CMTs' archaeological significance but rather makes a policy argument implicating archaeology, environmental protection, and native sovereignty. The author advocates for native sovereignty to play a greater role in environmental stewardship as part of a preservation program that transcends archaeology and includes land use decision making. The scope of the thesis's advocacy manifests in its opposition to "entirely visible 'sites' with discrete temporal/spatial boundaries" in favor of the broader conception of "culturally managed landscape." Amicus Brief Appendix A at 19, 20. Therefore, the thesis and its definitions burst the boundaries of archaeology into other fields in pursuit of a grander paradigm. If DAHP is adopting this thesis's view, it is unilaterally expanding its legal jurisdiction beyond what is defined by statute.

Allowing DAHP to adopt this thesis's definitions would greatly expand DAHP's jurisdiction, which is the legislature's role, not that of the agency. As a state agency, DAHP only has

the powers delegated to it by the Legislature. Administrative agencies are considered "creatures of statute" and can only exercise powers that are expressly granted to them by the legislature or necessarily implied from those grants. *Jaramillo v. Morris*, 50 Wn. App. 822, 750 P.2d 1301 (1988). These limitations would be contradicted if DAHP can unilaterally expand its authority over trees that have not been included in the definitions of archeological object in RCW 27.53.030(2). That role is up to the legislature.

Similarly, DAHP is not entitled to expand its purview and prerogatives by adopting the views of an academic article and then claiming their view is entitled to deference. See Amicus Curiae brief at 26. Courts have the final authority to interpret statutes that define an agency's jurisdiction. Washington courts do not “defer to an agency the power to determine the scope of its own authority” under a statute. *Washington Rest. Ass'n v. Washington State Liquor & Cannabis Bd.*, 10 Wn. App. 2d 319, 331, 448 P.3d 140 (2019). Similarly, the Supreme Court has held

that determining the extent of an agency's authority is a question of law, which is a power ultimately vested in this court. *Local 2916, IAFF v. Pub. Employment Relations Comm'n*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995), *amended* (Jan. 26, 1996).

This thesis relied upon by DAHP does not represent the view of archaeological science, does not argue that trees like the Davis Meeker Garry Oak are CMTs and does not argue that CMTs are archaeological resources. Instead, it argues for abandoning accepted narrow archaeology for a grander conception which is in excess of DAHP's role under the statute. For these reasons, the thesis does not demonstrate that RCW 27.53 applies to the Davis Meeker Garry Oak.

b. A naturally occurring oak tree would not be considered an archeological object under federal law.

The Amicus argues that federal law is similar to Washington State Law on this issue and therefore both should be interpreted similarly. Amicus Brief at 28. There is no need to argue the underlying premise when the sole representative of

federal law that could be mustered is an unpublished district court case.

Amicus relies on a purported determination of the District Court, which was merely a sentence in the Court's explication of existing law. *Franco v. U.S. Dep't of the Interior*, No. CIV S-09-1072 KJM, 2012 WL 3070269, (E.D. Cal. July 27, 2012). In fact, this dicta was not necessary to the remainder of the analysis. That dicta observed: “[o]therwise naturally occurring objects or organic matter may constitute an archaeological resource where they evince human involvement.” *Id.* at *10. The Court cited the following definition to support this:

“Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, middens)[.]” 43 C.F.R. § 7.3(a)(3)(I).

(Emphasis added).

The only organic matter described in *Franco* is “horticultural/agricultural gardens or fields” and no mention is made of isolated, naturally occurring trees. Such “gardens or fields” are inherently connected to human activity because they were by definition cultivated by humans, unlike an ancient tree growing near a trail. Further, the Court did not in a separate memorandum opinion for a motion for summary judgment find that “Grandfather Vines” constituted an archaeological resource. Instead, in a memorandum opinion granting a motion to dismiss on statute of limitations grounds, the Court mentioned, again that Grandfather Vines could be an archeological resource. This dicta was irrelevant to the issue before the court and is unpersuasive.

No comparable provision exists in the state definition in RCW 27.53.030(2). The state definition is limited to human activities, of which a naturally occurring tree does not fall under. Perhaps a garden or vineyard or agricultural cultivation could be “archeological” under the statute, but not an isolated, naturally occurring tree.

Further, the issue at stake in *Franco* concerned decisions of the Interior Board of Land Appeals regarding the Alaska Native Claims Settlement Act and a presidential proclamation establishing a national monument. Such decisions are irrelevant to the determination of whether a tree constitutes archaeological resources under Washington law.

Therefore, even if federal law is similar to Washington Law on this issue, Amicus has pointed to no evidence supporting its contention that under federal law a naturally occurring tree is an archaeological resource, absent human activity to set it apart.

c. Foreign Law Is not Useful in Interpreting whether a tree is an archeological object under RCW 27.53.

Amicus, lacking in local authorities, points to Canadian and Australian law to support the notion that trees are archaeological resources. However, Amicus' own article states that Canada has stronger protections for CMTs than in the United State, since the Haida Gwaii, "actively litigated legal protection for CMTs" and for "significant ethnographic resources [to be] considered in land use strategies." Amicus Brief Appendix A at

46. Further, the Canadian law cited by DAHP protects “heritage property” not archaeological objects, so the language employed is not the same. Heritage Conservation Act, R.S.B.C. 1996, c. 187, p.1.2. (Can.).

Amicus points to Australian law protects certain significant trees with ties to Aboriginal heritage. Amicus Brief at 32. The nature and scope of this Australian law is not elucidated, nor is explained how this law has any bearing on Washington law defining archaeological objects. Our courts have held that, when interpreting Washington statutes, the laws of other states is largely irrelevant to determining the intent of Washington's legislature. *Fed. Home Loan Bank of Seattle v. Barclays Capital, Inc.*, 1 Wn. App. 2d 551, 564, 406 P.3d 686 (2017), *rev'd on other grounds and remanded sub nom. Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 449 P.3d 1019 (2019). Thus, the determinations of foreign tribunals have no precedential authority and are at most persuasive.

Without similarity between the relevant statutes and jurisprudence on the subject, foreign law is not even persuasive.

IV. CONCLUSION

The issue concerning the applicability of RCW 27.53 to the Davis Meeker Garry Oak have not been properly raised, the record is inadequately developed and the issue should not be considered. The issue was not raised by the plaintiff's complaint and was only mentioned in an untimely declaration. The trial court's passing remarks on this improperly raised topic show it was not properly part of this case and should not be addressed.

Insofar as it is considered, RCW 27.53 does not apply because the Davis Meeker Garry Oak is not an archaeological object. The master's thesis; unpublished district court opinion; and foreign law relied upon by Amicus are insufficient to demonstrate that the Davis Meeker Garry Oak is an archaeological object. None of these authorities support the conclusion that the Davis Meeker Garry Oak is an "archeological" object.

I certify that this brief contains 3,689 words as determined by computer word count in conformity with RAP 18.17.

DATED this 31st day of October, 2024.

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

/s/ Jakub Kocztorz

Jeffrey S. Myers, WSBA #16390
Jakub L. Kocztorz WSBA #61393
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508
(360) 754-3480
jkocztorz@lldkb.com
jmyers@lldkb.com

Attorney for Respondent Debbie Sullivan

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):

Appellant'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, # N270
Bainbridge Island, WA 98110
bryan@teleginlaw.com

Attorney for Amicus Curiae:

Christopher P. Wright
Assistant Attorney General
Agriculture and Health Division
PO Box 40109
Olympia, Washington 98504
christopher.wright@atg.wa.gov

DATED this 31st day of October, 2024.

/s/ Lisa Gates

Lisa Gates, Legal Asst.

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

October 31, 2024 - 1:54 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 58881-1
Appellate Court Case Title: Save the Davis Meeker Garry Oak, Appellant v. Debbie Sullivan, Respondent
Superior Court Case Number: 24-2-01895-3

The following documents have been uploaded:

- 588811_Answer_Reply_to_Motion_20241031135421D2975514_7759.pdf
This File Contains:
Answer/Reply to Motion - Response
The Original File Name was ResponseToAmicus.pdf

A copy of the uploaded files will be sent to:

- bryan@teginlaw.com
- christopher.wright@atg.wa.gov
- jkocztorz@lldkb.com
- lisa@lldkb.com
- ronda@larsonlawpllc.com

Comments:

Sender Name: Lisa Gates - Email: lisa@lldkb.com

Filing on Behalf of: Jeffrey Scott Myers - Email: jmyers@lldkb.com (Alternate Email: lisa@lldkb.com)

Address:

P.O. Box 11880
OLYMPIA, WA, 98508
Phone: (360) 754-3480

Note: The Filing Id is 20241031135421D2975514

EXHIBIT H

July 15, 2025

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.

No. 58881-1-II

UNPUBLISHED OPINION

CRUSER, C.J.—At the center of this case is a 400-year-old Garry oak tree, known as the Davis Meeker Garry Oak Tree. The tree is located in Tumwater, Washington, and is listed on the city’s historical register as historic property. In 2023, a limb fell from the tree, causing concern and prompting Mayor Debbie Sullivan to commission a risk assessment and report on the health of the tree. Based on the findings of that report, the city decided to remove the tree in the interest of protecting the public. In May 2024, Save the Davis-Meeker Garry Oak, a local advocacy group (Group), filed a complaint for declaratory and injunctive relief and requested a temporary restraining order. The superior court granted the temporary restraining order request, and the city immediately moved to dissolve the temporary restraining order. After hearing arguments from the parties, the superior court granted the city’s motion to dissolve the temporary restraining order, finding that the mayor was not obligated to obtain a permit to remove the tree based on the court’s

reading of relevant municipal codes and state statutes.¹ Accordingly, the court found that the Group failed to establish a clear legal or equitable right, the first element a petitioner seeking a temporary restraining order is required to demonstrate. The Group appeals the order dissolving the temporary restraining order.

We hold that the superior court erred in concluding that the mayor was not required to obtain a permit prior to removing the tree under the Tumwater Municipal Code. We reverse and remand for reinstatement of the temporary restraining order and further proceedings consistent with this opinion.

FACTS

I. BACKGROUND

The Garry oak tree at the center of this case is listed on Tumwater’s historical register.² The tree is categorized on the register as historic property. According to the register, “[t]he tree is significant as a specimen tree of the Garry oak species, believed to be approximately 400 years old.” *Id.* The register explains that the tree provided resources for the Coastal Salish Indigenous people. Adding to the tree’s historical significance, it is rooted on the Cowlitz Trail, the northern branch of the Oregon Trail. *Id.*

In May 2023, according to Mayor Sullivan, “a substantial limb fell partially onto the southbound lanes of Old Highway 99.” Clerk’s Papers (CP) at 116. After the incident, the city

¹ The superior court judge who granted the temporary restraining order was a different judge than the one who granted the motion to dissolve the temporary restraining order.

² *Historical Register: Davis Meeker Garry Oak Tree*, CITY OF TUMWATER, <https://www.ci.tumwater.wa.us/Home/Components/FacilityDirectory/FacilityDirectory/48/3381> [<https://perma.cc/P4HM-4LNM>].

commissioned Sound Urban Forestry to assess the tree. The assessment was performed by a certified arborist and urban forester who is contracted with the city of Tumwater as a tree protection professional. The arborist assigned the tree a high-risk rating. The arborist provided the following comments and recommendation in his report:

With the exception of the recent large branch failures, the Meeker Oak appears to be in very good health. The crown density, leaf color, leaf size and internode growth all indicate a vigorous tree. However, there are structural concerns associated with the significant decay found in the stem base, lower main stem, east facing co-dominant stem and large scaffold branches. Probable future failures include large diameter scaffold branches from the east facing co-dominant stem and the entire west facing co-dominant stem at the union. The associated inclusions and stress loads will contribute to future failures. Structural support systems in conjunction with pruning were considered but the extent of decay in the main stem and upper east side of the canopy removes that as a mitigation option in my opinion.

The other mitigation options are retrenchment pruning and removal. A considerable amount of thought has been put into my final recommendation. The retrenchment option would be controversial to say the least along with the potential of its ineffectiveness. The targets^[3] around this veteran tree are many and high-use and the risk rating would remain high. If the City of Tumwater and the community opts for retrenchment pruning, there will be a need for the development of pruning specifications and a long-term management plan.

Based on my findings and information I have been provided, I am recommending removal.

Id. at 41.

The arborist's report included a memorandum from consulting arborists, whose services the arborist requested "to obtain additional information about the extent of decay at the base of the tree to provide the City of Tumwater with a more informed risk assessment and management recommendations." *Id.* at 48. In the memorandum, the consulting arborist stated:

³ "Targets" in the report refer to Highway 99, parking areas, power-lines, and the aircraft hangar near the tree. CP at 40.

The tomogram indicates there is slightly more sound wood than is required to support the tree. However, due to the extent of the decay and thin shell wall around measuring points 3, 4, and 18 it is my opinion that this tree should be managed as a veteran tree and have retrenchment pruning performed to reduce the tree height and spread by approximately 15 feet. Reducing the tree height and spread will result in lowered wind loads acting on the trunk and branch unions resulting in a lower likelihood of failure.

If this tree is retained, it should be reassessed with sonic tomography in five years to determine if the decay is continuing to spread and what the remaining shell wall is at that time. Additionally, 4 to 6 inches of wood chip mulch should be added within the dripline of the tree to improve soil conditions. The wood chip mulch should be kept 12 inches from the base of the tree.

Id.

Based on the consulting arborists' report, Mayor Sullivan made the decision to remove the tree in order "to protect the public and the City from potential liability." *Id.* at 34.

II. PROCEDURAL HISTORY

The Group, "is a local citizen action group dedicated to protecting the Davis-Meeker Garry Oak and the birds that need it today and tomorrow, using science, advocacy, education, and on-the-ground conservation." *Id.* at 166. On May 24, 2024, the Group filed a complaint for declaratory and injunctive relief in Thurston County Superior Court. The Group asked the superior court to grant a temporary restraining order (TRO) to prevent Sullivan from removing the tree pending further order from the court, and then to grant a permanent injunction barring removal. The Group also sought declaratory judgment that the decision to remove the tree violated the Migratory Bird

Treaty Act of 1918 (MBTA), 16 U.S.C. §§ 703-712, Tumwater Municipal Code (TMC) 2.62.060, TMC 2.62.030, and the Administrative Procedure Act, ch. 34.05 RCW.⁴

The superior court granted the requested TRO, ordering the mayor to “immediately cease and desist from all efforts to remove the Davis Meeker Garry Oak until further court order.” CP at 26. The same day, the mayor filed an emergency motion to dissolve the TRO. The mayor argued that the TRO was deficient because it was issued without notice, it failed to require a bond, and it failed to provide an end date.

On May 31, 2024, the court granted Sullivan’s motion to dissolve the TRO, but first extended the TRO until June 5, 2024, “to provide sufficient time to allow the plaintiffs to make an emergency motion on appeal.” *Id.* at 155. The court issued a short, written order, consisting of two sentences, to this effect. In its oral ruling, the court made the following statements:

THE COURT: . . . Under the law, a party requesting a temporary restraining order must show three things, a clear legal or equitable right, a well-grounded fear of immediate invasion of that right, and that the act complained of will result in actual and substantial injury to the moving party. All of these requirements have to be met, and the plaintiffs have not met the first criteria.

To establish a clear legal or equitable right, the moving party must show that it is likely to prevail on the merits. Here, plaintiffs make a number of claims, and I’ll begin with the claim that the legal right arises from the Tumwater Municipal Code. The mayor’s decision to proceed is compliant with the code. There was not an obligation to obtain a permit before removing a historic tree as opposed to a historic structure, and the code allows removal of a tree the city determines is posing a hazard.

With respect to the newly raised argument regarding RCW 27.53.060, the defendant is correct that was not briefed previously. A quick look at that statute reveals that that chapter of the law addresses archaeological resources, not trees,

⁴ In June 2024, the Group sought to remove its action to the federal court based on federal question jurisdiction. The federal district court ordered that the case be remanded to Thurston County Superior Court, finding that the Group’s “removal of the state court case under 28 U.S.C. §§ 1441 and 1446 is not effective, and it does not invoke this Court’s jurisdiction.” *Id.* at 337.

No. 58881-1-II

and therefore that is not applicable and it does not provide this court a basis for a finding of clear legal or equitable right.

Id. at 154-55.

The Group sought emergency review from this court. In the emergency appeal, the Group argued that the superior court “failed to consider RCW 27.53.060, under which the mayor cannot cut down the Davis Meeker oak tree without an Archeological Excavation and Removal Permit from the state archaeology department.” *Id.* at 165. The Group also argued that removing the tree without a permit would violate the Tumwater Municipal Code. In July 2024, this court granted an expedited appeal. Comm’r’s Ruling, *Save the Davis-Meeker Garry Oak v. Sullivan*, No. 58881-1-II, at 6 (Wash. Ct. App. July 23, 2024).

ANALYSIS

The Group argues that portions of the Tumwater Municipal Code, such as Tumwater’s historic preservation ordinance (ch. 2.62 TMC) and the city’s tree and vegetation protection ordinance (ch. 16.08 TMC), as well as chapter 27.53 RCW, apply to the Garry oak, and therefore the mayor’s decision to remove the tree without obtaining the necessary permits violated the code and the state statute. The mayor responds that chapter 2.62 TMC (the historic preservation ordinance) does not apply to the tree, but even if it does, the decision to remove the tree was not in violation of the code because an exemption found in TMC 2.62.060(B)(3) applied. The mayor also argues that a different chapter of the municipal code, ch. 16.08 TMC, applies to the tree, and although that chapter also requires a permit prior to tree removal, a similar exemption for hazardous trees applies (TMC 16.08.075(D)(3)), and thus, the decision to remove the tree did not violate either relevant chapter of the TMC. Finally, the mayor contends that chapter 27.53 RCW does not apply to the Garry oak, as the tree is not an archeological object.

We hold that the superior court erred in concluding that no permit was required to remove the tree under the TMC, based on the trial court’s belief that the code provision did not apply to historic trees and only applied to historic structures. Further, we hold that as it relates to historic trees, chapter 2.62 TMC supersedes the tree code found in chapter 16.08 TMC, because TMC 16.08.070(S) states that “[i]n addition to the provisions of this chapter, the cutting or clearing of historic trees requires the issuance of a certificate of appropriateness *in accordance with TMC Chapter 2.62.*” (Emphasis added.) As such, the superior court erred in finding that “the code allows removal of a tree the city determines is posing a hazard,”⁵ because the exemption for hazard trees found in chapter 16.08 TMC does not apply to the tree, and the “[e]mergency measures” outlined in chapter 2.62 TMC refer only to “[e]mergency repair[s]” and do not allow for the removal of the tree without a certificate of appropriateness.

I. STANDARD OF REVIEW

We review orders dissolving temporary restraining orders for abuse of discretion, and we review question of law involved in such orders de novo. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013).

II. TUMWATER MUNICIPAL CODE

The Group argues that because the tree is listed on Tumwater’s historical register, the mayor must obtain approval from the Tumwater Historic Preservation Commission before removing the tree, relying on ch. 2.62 TMC. According to the Group, the city’s historic preservation ordinance, ch. 2.62 TMC, applies to the tree because the statute applies to any “property” listed on Tumwater’s Register of Historic Places, which the code defines as real

⁵ VRP at 14-15.

No. 58881-1-II

property. The Group maintains that the tree constitutes both “real property” and a historic “site” within the meaning of the code. *See* TMC 2.62.030, 2.62.050, 2.62.060. The Group argues, moreover, that the exemptions listed in chapter 2.62 of the code do not apply to the Garry oak.

The mayor asserts that the city’s decision to remove the tree did not violate the municipal code. According to the mayor, the historic preservation ordinance applies only to structures, and thus does not forbid removal of the tree because the tree is not a structure. The mayor also argues that the Garry oak is properly regulated as a heritage tree, and therefore a more specific chapter of the code applies—chapter 16.08, which addresses the protection of trees and vegetation. Under chapter 16.08, the mayor contends, the city is allowed to remove the tree without a permit because TMC 16.08.075(D)(3) exempts dead or hazardous trees from the tree removal permit requirement. Regardless of which chapter of the code governs the tree, the mayor argues, an exemption to the permit requirement applies due to the hazard the tree presents.

In its reply brief, the Group argues that the exemptions to obtaining a tree removal permit under chapter 16.08 TMC do not apply in this case, as “the exemptions in the tree code are exemptions from the tree code, not exemptions from the historic code.” Reply Br. of Appellant at 14. The Group maintains that removal of a historic tree requires a “certificate of appropriateness from the Tumwater Historic Preservation Commission.” *Id.*

A. Chapter 2.62 TMC: The Historic Preservation Ordinance

The purpose of Tumwater’s historic preservation ordinance is “to provide for the identification, evaluation, and protection of historic resources within Tumwater and preserve and rehabilitate eligible historic properties.” TMC 2.62.010. This includes “[s]afeguard[ing] the heritage of Tumwater as represented by those buildings, districts, objects, sites and structures

which reflect significant elements of the city’s history.” TMC 2.62.010(A). Relevant definitions listed in the historic preservation ordinance include:

K. “Emergency repair” means work necessary to prevent destruction or dilapidation to real property or structural appurtenances thereto immediately threatened or damaged by fire, flood, earthquake or other disaster.

L. “Historic property” means real property together with improvements thereon, except property listed in a register primarily for objects buried below ground, which is listed in a local register of a certified local government or the National Register of Historic Places.

....

P. An “object” is a thing of functional, aesthetic, cultural, historical, or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.

....

T. A “site” is a place where a significant event or pattern of events occurred. It may be the location of prehistoric or historic occupation or activities that may be marked by physical remains, or it may be the symbolic focus of a significant event or pattern of events that may not have been actively occupied. A site may be the location of ruined or now nonexistent building or structure if the location itself possesses historic cultural or archaeological significance.

....

W. A “structure” is a work made up of interdependent and interrelated parts in a definite pattern of organization. Generally constructed by man, it is often an engineering project.

TMC 2.62.030.

Based on a plain reading of the code, we disagree with the Group’s contention that the Garry oak meets the definition of “structure.” However, we agree with the Group that the Garry oak does fall within the code’s definition of “[h]istoric property,” as the tree is “listed in a local register of a certified local government or the National Register of Historic Places.” TMC 2.62.030(L). Tumwater’s historical register dedicates a full webpage to the Davis Meeker Garry Oak Tree. *Historical Register: Davis Meeker Garry Oak Tree, supra*. The register states that the tree is “[l]isted on the Tumwater Register of Historic Places,” and categorizes the tree as “Historic

No. 58881-1-II

Propert[y].” *Id.* The webpage discusses the historical significance of the Davis Meeker Garry Oak Tree. Based on this description, we further agree with the Group that the Garry oak likely also falls within the definition of “site,” as defined in TMC 2.62.030(T), as the register outlines the tree’s “historic cultural [and] archaeological significance.” Accordingly, the tree falls within the purview of chapter 2.62 TMC.

Section 2.62.060 TMC governs “review of changes to Tumwater register of historic places properties.” (Boldface omitted.) Under this section, “[n]o person shall change the use, construct any new building or structure, or reconstruct, alter, restore, remodel, repair, move, or demolish any existing property on the Tumwater register of historic places or within a historic district on the Tumwater register of historic places without review by the commission and without receipt of a certificate of appropriateness.” TMC 2.62.060(A). A “waiver of a certificate of appropriateness,” means that “the commission has reviewed the proposed whole or partial demolition of a local register property or in a local register historic district and failing to find alternatives to demolition has issued a waiver of a certificate of appropriateness which allows the building official or director of community development to issue a permit for demolition.” TMC 2.62.030(Y). The review requirement applies to “all features of the property, interior and exterior, that contribute to its designation and are listed on the nomination form.” TMC 2.62.060(A). Therefore, unless an exemption applies—which we discuss below—anyone seeking to remove the Garry oak would need to obtain a certificate of appropriateness under chapter 2.62 TMC.

B. Chapter 16.08 TMC: Protection of Trees and Vegetation

Chapter 16.08 TMC addresses the protection of trees and vegetation. The purposes of this chapter include “retain[ing] trees and vegetation for their positive environmental effects including,

No. 58881-1-II

but not limited to, the protection of wildlife habitat,” and “promot[ing] identification and protection of trees that have historical significance; are unusual due to their size, species, or age; are unusual for their aesthetic quality; or have other values or characteristics that make them worthy of protection.” TMC 16.08.020(C)-(D). The code includes the following classifications of trees:

L. “Hazardous tree” means any tree that, due to its health or structural defect, presents a risk to people or property.

M. “Heritage tree(s)” means tree(s) designated by the city and their owners as historical, specimen, rare, or a significant grove of trees.

N. “Historic tree” means any tree designated as an historic object in accordance with the provisions of TMC Chapter 2.62.

TMC 16.08.030.

Again, the Davis Meeker Garry Oak Tree is listed on Tumwater’s Register of Historic Places, and is categorized as a historic property. *Historical Register: Davis Meeker Garry Oak Tree, supra*. Accordingly, the tree meets the definition of a “heritage tree” as the city has designated it to be historical. Because the tree also meets the definition of “historic object” as defined in TMC 2.62.030(P) (“An ‘object’ is a thing of functional, aesthetic, cultural, historical, or scientific value that may be, by nature or design, movable yet related to a specific setting or environment”), it also falls within the definition of a “[h]istoric tree” under TMC 16.08.030(N).

Because the tree is a heritage tree, “[a] tree removal permit is required for removal.” TMC 16.08.075(D)(1). According to the code, “[t]he city tree protection professional shall evaluate any heritage trees prior to a decision on the removal permit. Recommendations for care, other than removal, will be considered.” TMC 16.08.075(D)(2). As is true with the protections outlined in chapter 2.62, the protections in chapter 16.08 apply to the Garry oak, and the superior court erred

in concluding that “[t]here was not an obligation to obtain a permit before removing a historic tree as opposed to a historic structure.” Verbatim Rep. of Proc. (VRP) at 14.

C. Applicability of Exemptions Listed in the Municipal Code

We now turn to the question of whether an exemption from the certificate of appropriateness and the tree removal permit requirements applied in this case.

The trial court found that even if the Tumwater Municipal Code applied to the Davis Meeker Garry Oak Tree, exemptions within the Code allowed the mayor to remove the tree without seeking a certificate of appropriateness or tree removal permit. We disagree.

Under the historic preservation ordinance TMC 2.62.060(B)(3), neither a certificate of appropriateness nor review by the commission is required for any property listed on the register for “[e]mergency measures defined in TMC 2.62.030.” However, “emergency measures” refers to “[e]mergency repair[s],” which is defined as “work necessary to prevent destruction or dilapidation to real property or structural appurtenances thereto immediately threatened or damaged by fire, flood, earthquake or other disaster.” TMC 2.62.030(K). The “[e]mergency repair[s]” exemption found in TMC 2.62.030(K) does not allow for removal of the tree.

Although TMC 16.08.075(D)(3) purports to allow for the removal of a heritage tree without a tree removal permit after verification by the city tree professional, TMC 16.08.070(S) provides that “[i]n addition to the provisions of this chapter, the cutting or clearing of historic trees requires the issuance of a certificate of appropriateness *in accordance with TMC Chapter 2.62.*” (Emphasis added.) Thus, as it relates to historic trees, chapter 2.62 TMC supersedes the tree code found in

chapter 16.08 TMC. The seeming inconsistencies in the Tumwater Municipal Code are not for us to resolve.⁶

III. THE TRO

To obtain a TRO, the petitioner must establish “(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) conduct that has or will result in actual and substantial injury.” *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 553, 85 P.3d 959 (2004). In dissolving the TRO, the superior court determined that the Group had not satisfied the first element of establishing a clear legal or equitable right. Whether the Group established a clear legal or equitable right involves questions of both law and fact. With respect to the legal question, the superior court, as we note above, erroneously concluded that the tree did not fall within the purview of the Tumwater Municipal Code, and therefore, the city was not obligated to obtain a permit or approval prior to removing the tree. This erroneous determination of law led the superior court to conclude that the Group lacked a clear legal or equitable right.

CONCLUSION

The superior court took an erroneous view of the law in its application of the Tumwater Municipal Code. Because this erroneous view of the law caused the superior court to hold that the Group could not establish a clear legal or equitable right, the first element it needed to show to obtain a TRO, we remand for reinstatement of the TRO and further proceedings consistent with this opinion.

⁶ In light of our holding as it relates to the Tumwater Municipal Code, we need not address the application of chapter 27.53 RCW.


No. 58881-1-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




CRUSER, C.J.

We concur:



MAXA, J.



VELJACIC, J.

EXHIBIT I

Wednesday, May 14, 2025 at 09:53:00 Pacific Daylight Time

Subject: SDMGO v. City of Tumwater
Date: Thursday, May 1, 2025 at 6:15:18 PM Pacific Daylight Time
From: Jeff Myers
To: Bryan Telegin, ronda@larsonlawpllc.com
Attachments: R2025-005 Resolution Re Mitigation and Maintenance of DMGO.docx.pdf

By now I am sure that you are aware that the City of Tumwater has appropriated funds to provide for the mitigation of damage and future maintenance of the Davis Meeker Garry Oak. The Council passed Resolution 2025-009 which clearly states this intent. The City's decision, joined fully by the Council and Mayor, was made after the second opinion and arborist report was commissioned by Mayor Sullivan and performed by Prager & Associates. The City obtained permits from the DAHP for such review and, although we do not believe that such permits are legally required, the City intends to apply to DAHP for such permits to implement the recommendations of the second opinion. These matters were discussed at length with the City Council at their March 11 work session, preparatory to their April 15 meeting which passed Resolution 2025-009.

At this point, the City believes that the revised course makes the current litigation moot and intends to move for an order dismissing the appeal and/or remanding the matter back to Thurston County Superior Court. I am asking that the Appellants join in this request so that further resources, both yours and the City's, can be devoted to providing the needed maintenance of the tree, not in litigating this case further.

Please advise your position on an agreed motion to dismiss the pending appeal.

Jeffrey S. Myers

Law, Lyman, Daniel, Kamerrer
& Bogdanovich, P.S.
2674 R.W. Johnson Blvd. SW
Tumwater, WA 98512

Mailing Address
P.O. Box 11880
Olympia, WA 98508

(360) 764-7717 (direct line)
(360) 754-3480 (office)
(360) 791-1781 (cell)
(360) 357-3511 (FAX)
jmyers@lldkb.com

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

This e-mail message is protected by the Electronic Communications Privacy Act, 18 U.S.C. §2510-2521 and is legally privileged. Unauthorized review, use or distribution is prohibited. Interception of this e-mail is a violation of federal criminal law.

This office does not accept service of process via email or fax without prior authorization.

EXHIBIT J

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

SAVE THE DAVIS-MEEKER GARRY OAK,)
)
 Plaintiff,)
)
 vs.) SUPERIOR COURT
) NO. 24-2-01895-34
 DEBBIE SULLIVAN in her capacity)
 of Mayor of Tumwater,)
)
 Defendant.)

THE HONORABLE ANNE EGELER PRESIDING

Motion hearing report of proceedings
 May 31, 2024
 2000 Lakeridge Drive SW
 Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1606 12th Avenue SW
Olympia, Washington

A P P E A R A N C E S

For the Petitioner: Ronda Larson Kramer
Attorney at Law
PO Box 7337
Olympia, WA 98507

For the Respondent: Jeffrey Scott Myers
Law Lyman Daniel Kamerrer, et al
2674 RW Johnson Blvd SW
Olympia, WA 98508

THE COURT: All right. The next matter I want to take is the save the Davis-Meeker versus Sullivan case. Before we proceed, I have a disclosure to make. I was appointed by the governor and assumed my role in January of 2023. At that time I was required to file as a candidate to hold my seat after the appointment. I had many state and local judges and elected officials, including I believe the mayors of all of the Thurston County cities, endorse me. That includes Debbie Sullivan. For that reason I want to make sure that I, one, disclose it, and two, allow you an opportunity to request that I recuse. Does either party wish to make a motion?

MR. MYERS: Mayor Sullivan does not.

MS. LARSON KRAMER: No, Your Honor. Thank you.

THE COURT: All right. All right. We will proceed then. Let me explain how we got here procedurally. The motion was made on very short notice as an emergency motion last Friday for a tree removal that the court was informed was going to happen on the next business day in the morning before the court day. For that reason, given the emergency situation and the fact that removal of the tree would end any ability to litigate the case, the TRO was entered.

Having seen that when I was then assigned as the judge, I noted a hearing because a hearing needs to be noted to

consider the TRO to ensure that notice is provided and that the parties can be heard. So this was not in response to an *ex parte* request to shorten time of any sort; it was to make sure that we did get this into court properly. The TRO did not contain an end date which was another issue that needed to be addressed promptly.

That being the case, we are going to hear today the motion to dissolve as well as the motion to extend. So we will cover all of those matters today and make sure everyone --

MR. MYERS: Your Honor, I do object to the consideration of the motion to extend. And I'll address that at the end of my motion to dissolve. The --

THE COURT: Mr. Myers, I'm going to hear first the motion to dissolve. I will then rule on that. I will then proceed to hear, if necessary, the motion to extend. At that time you may make such argument if that time arises.

MR. MYERS: Thank you, Your Honor.

THE COURT: You may begin with respect to your motion to dissolve.

MR. MYERS: Your Honor, with respect to our motion, it is considering the motion to dissolve the *ex parte* TRO that was issued by this court on -- a week ago today. We believe that the TRO was issued improperly and that it is deficient in numerous respects with the contents of the TRO

that was presented to the court. First of all, it was improper because there was no notice given as required by RCW 7.40.050 and CR65. Both of those require the party who is seeking a TRO to attempt to notify the others or to demonstrate in their pleadings why notice could not be provided and describe the efforts. The materials that were provided along with the TRO, which were not served on the city until after the TRO had been issued, but the materials that were presented did not describe why a TRO could not be issued with -- without providing prior notice to the City of Tumwater and the city attorney and Mayor Debbie Sullivan.

The city maintains offices here. This dispute has been ongoing and discussed in numerous city council meetings for the better part of a month and a half. There is no reason to believe that parties seeking a restraining order could not have notified the city at least a day before a TRO was sought. Instead, what we got was a voicemail at 8:02 a.m. in which Ms. Larson Kramer stated that she wanted to contact the city attorney so that she could, quote, inform her that I am filing a motion for temporary restraining order today for the Meeker oak.

Well, that is a minimalistic type of notice. It fails to identify the time and place of the making of application, which is the statutory requirement of RCW 7.40.050. It fails to provide a motion. It fails to

provide the basis for a TRO. It failed to serve a complaint. It failed to identify what court the TRO was being sought in. So there was -- it was not adequate notice, any meaningful opportunity for the city to respond. And the failure to provide a notice and a meaningful opportunity to respond, as was held in the *In Re Estate of Smaldino* case, effectively denies due process and renders a TRO issued in that manner void.

The TRO also is drafted in such a way that there are absolutely no findings whatsoever. There is no finding of harm. There is no finding of what injury the plaintiffs would suffer. There is no finding as to why any such harm would be irreparable. There are no findings as to why notice could not be given to the city and why it had to be dispensed with. There are no factual findings at all. There is no end date. There is no provision for conversion of the temporary restraining order into a preliminary injunction in consideration of a proper motion for a preliminary injunction. All of that violates CR 65. There is -- was not even a motion upon which a TRO could properly be issued. There were no findings regarding the public interest, and the threat to public safety that is posed by the unfortunately dieing Davis-Meeker Garry oak, that threat to public safety we believe is a paramount consideration and is motivating why the City of Tumwater is

seeking to make its roadway safe as it has a duty to do for which it can be held liable.

THE COURT: Mr. Myers, should this TRO be dissolved, I have a question for you regarding what will occur after that. Has the city made plans to proceed with removal of the tree if the motion is dissolved, and if so, on what date?

MR. MYERS: The city has a contractor who was on standby for Tuesday afternoon. That was deferred until --

THE COURT: I understand. I'm asking you if I dissolve this TRO today, what will happen? What is the city's intention and is there a date --

MR. MYERS: The city's intention is to notify the contractor to remobilize and to remove the tree in as soon a fashion as time allows. My suspicion is that that would be a matter of a couple of days.

THE COURT: So possibly Monday morning.

MR. MYERS: Possibly.

THE COURT: All right. Thank you.

MR. MYERS: And then finally, as I mentioned, the duty to provide a safe street and a known hazard that has had limbs fall into the street creates a situation where the city has clear liability if it does not act. And by preventing the city from acting, the city would incur substantial liability if someone is injured. And there was

no security whatsoever provided for that. There was no security whatsoever provided for additional costs of the tree removal, and there was no security provided for the closure of the road which may have to result if in fact we are prevented from removing this known hazard in the street.

I want to also call the court's attention to the provisions of CR 65 and what are the consequences where these deficiencies exist and where the -- there is no provision for conversion to a preliminary injunction as was provided in this case. Under CR 65(b), if a TRO is granted without notice, "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time . . . and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and" -- this is important -- "if the party does not do so, the court shall dissolve the temporary restraining order."

The plaintiff in this case has made no provisions for a TRO to be converted to a preliminary injunction. The order that they drafted and presented to the court *ex parte* makes no end date and no provision for converting it to a motion for preliminary injunction. Indeed, by not even filing a motion, the court was prevented from considering the applicable law for a TRO, including possibility of success on the merits, possibility of irreparable harm and weighing

of the need to issue a temporary restraining order. The court was also prevented from considering the security that was necessary.

And in considering the security, I think the court needs to consider what type of damages might exist if that tree fell into the street and hit a passerby, what are the possible damages if it killed a child, what are the possible damages if it maimed a mother. That's the duty that the city is required to prevent and keep its streets in a safe condition for the traveling public.

THE COURT: You have two minutes remaining. Would you like to reserve time for reply?

MR. MYERS: I would just like to suggest in closing -- I'll reserve a minute for reply. The amount of damages should also consider the costs of removal and the cost of road closure. I'm thinking that that would cost \$10,000 a day in order to close Old 99, and this court should -- if it decides that a TRO should remain in place, it should absolutely require a minimum of \$140,000 for those costs and \$10 million to protect the city against the liability that it cannot prevent because of the injunction.

THE COURT: Thank you.

MS. LARSON KRAMER: May I speak from the podium?

THE COURT: You may.

MS. LARSON KRAMER: Thank you, Your Honor. At the

outset plaintiff would request that Your Honor construe plaintiff's motion as one to impose temporary injunction as opposed to one to extend the TRO.

The mayor says that she should be able to cut down this tree and kill the baby birds in it. Aside from the legality, the fact that she is willing to kill baby birds --

THE COURT: I'm going to ask you to slow down, please, so our court reporter can keep up with you.

MS. LARSON KRAMER: Sure. Aside from the legality, the fact that she is willing to kill baby birds is alarming on a personal level. And it is no different from her stance as to the tribes. She is seeking to cut down a tree cherished by tribes against their wishes and without giving them an opportunity for input.

THE COURT: Ms. Larson Kramer, I don't have any tribes appearing in this case. How does your client have standing to raise issues pertaining to the tribes?

MS. LARSON KRAMER: The tribes have expressed their wishes through the declarations, the tribal elder declarations that we have submitted. Suffice to show the standing as far as our group -- I am not -- we are not speaking for the tribes, yes. You're absolutely right. I want to make that clear. And nobody is intending to say we're speaking for the tribes.

THE COURT: And the tribes are not a party.

MS. LARSON KRAMER: You're right. The tribes are not a party. But the fact remains the declarations show that she has failed to do her duty to provide notice to the tribes. So, you know, there's no ambiguity there. So she has not provided them opportunity for input. That is the main point.

This court should put her plans on hold to give the baby birds time, to give the tribes time and to give the council time to exercise its authority and pass a city ordinance that is harder for her it to misconstrue.

Under the archaeological resource law, RCW --

THE COURT: Again, I'm going to ask that you slow down.

MS. LARSON KRAMER: Thank you.

THE COURT: We have a natural tendency to speed up, particularly when we're reading.

MS. LARSON KRAMER: Yes. Under the archaeological resource law, RCW 27.53.060, the mayor cannot cut this tree down without an archaeological excavation and removal permit. The mayor has not applied for the permit. She also cannot cut down the tree without a permit under Tumwater Municipal Code section 2.62.060. The only exception is to do emergency repairs. Removal of the tree is not a repair. Because the baby birds are in the tree,

the federal Migratory Bird Treaty Act does not allow removal of the tree at this time.

Additionally, the mayor's actions have been arbitrary and capricious. Anyone who drives down Henderson Boulevard at Watershed Park after a windstorm knows how many large and dangerous branches fall onto the roadway there. But the City of Olympia doesn't come in and remove all the trees. You don't jump to remove as your first option, even with a regular street tree. And with a culturally significant tree you should be bending over backwards to use mitigation techniques that are less drastic than removal, but the mayor didn't do any of that here.

I want to touch on the mayor's argument that plaintiff should post a bond because there is an imminent threat. The mayor contends someone is going to get killed and the city is going to go bankrupt because the insurer won't insure this tree. I want to point out the mayor's timeline here. Her arborist staff warrants report was in October. For the next seven months the mayor let this tree live. It has now been a year since the branch fell originally. If the mayor was truly worried about imminent threats, she would have gotten someone in there to do emergency pruning. There is no imminent threat. There is no loss of insurance coverage. This is a smoke screen. I would also like to point out that removing a tree of this magnitude is

extremely costly. Pruning is a fraction of the price. If the mayor were truly worried about money, she would have pruned it by now.

There are so many things wrong with the mayor's plan that it boggles the mind how the city council could let things get this bad. The council is the body that makes the laws. The mayor carries them out. She works for them, not the other way around, and yet they stand by and take no action. Voters should take notice. The plaintiff asks the court to issue a temporary injunction to at least July 30th. Thank you.

THE COURT: Thank you.

Mr. Myers, you have one minute remaining.

MR. MYERS: Yes, Your Honor. I'd like to address a couple of things. One, there is no pleading that raises archaeological resource laws for the state of Washington. It's not before the court. The city's ordinance does not apply because a tree is not a structure. And the definition of structure applies to man-made constructs, not trees. The Migratory Bird Treaty Act we cited to you in our reply brief, case law under the federal cases, including ones that are cited in the complaint by the plaintiffs that shows that it is not a violation of the migratory bird act to cut down a tree even where there is a nesting migratory bird. It is not the Endangered Species

Act. It's not applied to a habitat. It applies to hunters going out and shooting migratory birds or intentionally killing them. That is not the case here at all.

And then it's difficult to address the blatant political appeal that is being made here. I'd like the court to address the law, and we've shown you that the law does not allow a TRO in these circumstances.

7
8 THE COURT: Thank you. The court is prepared to
9 rule at this time. This court's ruling must be based
10 solely on the law and cannot consider the political
11 arguments regarding the wisdom of removing or saving the
12 tree. Under the law, a party requesting a temporary
13 restraining order must show three things, a clear legal or
14 equitable right, a well-grounded fear of immediate invasion
15 of that right, and that the act complained of will result
16 in actual and substantial injury to the moving party. All
17 of these requirements have to be met, and the plaintiffs
18 have not met the first criteria.

19 To establish a clear legal or equitable right, the
20 moving party must show that it is likely to prevail on the
21 merits. Here, plaintiffs make a number of claims, and I'll
22 begin with the claim that the legal right arises from the
23 Tumwater Municipal Code. The mayor's decision to proceed
24 is compliant with the code. There was not an obligation to
25 obtain a permit before removing a historic tree as opposed

1 to a historic structure, and the code allows removal of a
2 tree the city determines is posing a hazard.

3 With respect to the newly raised argument regarding RCW
4 27.53.060, the defendant is correct that was not briefed
5 previously. A quick look at that statute reveals that that
6 chapter of the law addresses archaeological resources, not
7 trees, and therefore that is not applicable and it does not
8 provide this court a basis for a finding of clear legal or
9 equitable right.

10 There are allegations of a federal law possibly
11 pertaining to endangered species or migratory birds. This
12 was not clearly established in the briefing. The
13 plaintiffs have not shown a clear legal or equitable right
14 under federal law.

15 They do not have standing to raise arguments on behalf
16 of the tribes regarding notice. That is something that the
17 tribes themselves can, of course, raise. They have not
18 joined in this action.

19 Therefore, the temporary restraining order will be
20 dissolved. However, when asked, the city's attorney stated
21 that the tree may be removed as early as Monday morning.
22 If that were to occur, that would destroy the plaintiffs'
23 ability to appeal this decision to the next court. I am
24 going to provide sufficient time to allow the plaintiffs to
25 make an emergency motion on appeal to the Court of Appeals.

1 Therefore, this temporary restraining order will expire on
2 Wednesday at five p.m.

3 Are there any questions?

4 MS. LARSON KRAMER: No, Your Honor. Thank you.

5 THE COURT: I will prepare an order that conforms
6 with the legal decision that I have entered. That will be
7 entered today.

8 MR. MYERS: Thank you, Your Honor.

9 THE COURT: All right. And that ends this matter
10 for today. Thank you.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

- 1. I reported the proceedings stenographically;
- 2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;
- 3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and
- 4. I have no financial interest in the litigation.

Dated this 31st day of May, 2024

RALPH H. BESWICK, CCR
 Official Court Reporter
 Certificate No. 2023
 1606 12th Avenue SW
 Olympia, WA 98502
 Fax: (360) 754-4060
 beswicr@co.thurston.wa.us