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

NO. 58881-1-II

SAVE THE DAVIS-MEEKER GARRY OAK,

Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,

Respondent.

APPELLANT'S RESPONSE TO RESPONDENT DEBBIE SULLIVAN'S MOTION TO STRIKE

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INTRODUCTION

On September 25, 2024, Defendant Debbie Sullivan—the mayor of the City of Tumwater—filed a motion to strike the entirety of the reply brief of Appellant Save the Davis-Meeker Garry Oak ("SDMGO"). Alternatively, she asks this Court to strike "all parts of the reply brief relying on material which is not part of the record designated in this case."

There is no basis for striking the entirety of SDMGO's reply brief. The outcome of this case is based purely on legal arguments. The mayor's motion to strike targets the parts of the reply brief that cite to extra-record documents, but provides no basis for striking SDMGO's legal arguments. Many of the extra-record materials cited in SDMGO's reply brief are within the scope of the mandatory judicial notice rule, while others are within the scope of the discretionary judicial notice rule. Still others are restatements of documents that are already in the record. Finally, several of the extra-record materials are necessary to correct the mayor's falsehoods but do not affect

the legal issues that are dispositive of this case. Rule 3.3 of the Washington Rules of Professional Conduct prohibit a lawyer from making knowingly false statements of fact or law to a court. The mayor's response brief repeatedly violates this rule.

ARGUMENT

A. There is no basis for striking SDMGO's reply brief in its entirety.

The mayor requests that the Court strike the entirety of SDMGO's reply brief because of the extra-record items cited therein. But those items do not impact the core issue, which is whether the mayor is prohibited from cutting down the Davis Meeker oak—a historic tree formally listed on the City of Tumwater's Register of Historic Places—under the city's Historic Preservation Code, TMC chapter 2.62. As discussed in SDMGO's opening brief, the Historic Preservation Ordinance prohibits any person from damaging or destroying "any existing property on the Tumwater register of historic places" without first obtaining a "certificate of appropriateness" from the

Historic Preservation Commission, or, in the case of demolition, a "waiver" of the certificate requirement. This is plainly stated at TMC 2.62.060(A):

> No person shall . . . alter, restore, remodel, repair, move, or demolish ***any existing property on the Tumwater register of historic places*** . . . without review by the commission and without receipt of a certificate of appropriateness, or in the case of demolition, a waiver, as a result of the review.

TMC 2.62.060(A) (emphasis added).

In front of the trial court, the mayor's attorney affirmatively misrepresented the scope the city's Historic Preservation Ordinance. He asserted that it only protects "structures," and that a tree is not a "structure." CP 13 (asserting, without citation to authority, that "[t]he City's ordinance does not apply because a tree is not a structure."). However, there is no provision of the Tumwater Historic Preservation Ordinance that limits the scope of that law to "structures." Instead, the plain language of TMC 2.62.060(A) (quoted above) makes clear that the Ordinance applies to "any

existing *property* on the Tumwater register of historic places," among which is the historic Davis Meeker oak.

In her response brief, the mayor attempts avoid the plain language of the law by arguing that the Davis Meeker oak is not actually protected by the Historic Preservation Ordinance but rather falls under the exclusive ambit of the city's tree code at TMC chapter 16.08. Resp. at 18. But that, too, is a misrepresentation of the law. Under the tree code, the Davis Meeker oak is classified as an "historic tree," a defined term denoting "any tree designated as an historic object in accordance with the provisions of TMC Chapter 2.62."

In turn, the plain language of the tree code provides:

> In 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.***

TMC 16.08.070(S) (emphasis added). This provision of the tree code clearly requires a "certificate of appropriateness" before any historic tree may be cut down. Thus, the very code cited by the mayor in her defense confirms that the historic Davis

Meeker oak may not be cut down without the prior approval of the Tumwater Historic Preservation Commission—the sole agency within the City of Tumwater with authority to grant a certificate of appropriateness under TMC chapter 2.62.

The sections of SDMGO's reply brief in which this argument is presented do not rely upon any evidence outside the record. The mayor may wish to ignore that her own defense is based on a misrepresentation of the law (or, at best, an obvious oversight). But there is no basis for striking SDMGO's reply brief in its entirety. The Court should deny the mayor's motion.

B. Some of the extra-record materials are restatements of documents that are already in the record.

Several of the materials that the mayor is asking the Court to strike are restatements of documents in the record and therefore should not be stricken, or in the least, the Court should substitute the other documents for them.

Page four of SDMGO's reply discusses how oak trees grow new wood around decay cavities that is structurally much

stronger than the wood it replaced. It discusses how this wood is capable of keeping the tree standing indefinitely. This information is in the record. CP 82–83. The same is true of the paragraph at the bottom of page four regarding the mayor and her staff making false claims that "a team" of arborists recommended removal of the tree. CP 81.

As an aside, the second paragraph of page five discusses the mayor's highly suspect claim that the insurance carrier "personally" told her that if someone were injured or killed by a branch, the liability could exceed $10 million. This is implicitly debunked by the record, i.e., Beowulf Brower's declaration in the trial court. CP 85-86 ("I looked at the meeting minutes and watched the video of that meeting by the insurance representative to the city council. . . . When he did talk about rising insurance costs for Tumwater, he never mentioned the tree as a factor having anything to do with insurance costs.").

The last paragraph of page two, all of page three, and the first paragraph of page five (regarding the city's risk assessment

being “an embarrassment to any knowledgeable arborist”) do not track documents in the record, but they nevertheless deal with the same overall issues as documents already in the record: the highly flawed risk assessment and the health of the tree. CP 16–17, 79–85.

The last paragraph of page five of the reply discusses the mayor’s claim that none of the tribes she contacted expressed concern at the decision to remove the tree. The record contradicts this because it indicates that she failed to give the tribes adequate time to respond. CP 14, 71.

The first paragraph of page seven discusses how counsel found out no sooner than 9:00 p.m. at night on Thursday before Memorial Day weekend that the mayor was going to cut down the tree that weekend. This exact time is not in the record, but the record does demonstrate that on Thursday, SDMGO discovered the mayor’s plans to have the tree cut down that weekend. CP 17.

Paragraph two on page seven and paragraph one on page eight counter inaccurate and misleading statements in the declaration of the city attorney's paralegal, in which she makes it seem as if the mayor did not get advance notice of the temporary restraining order (Note: advance notice is not required under CR 65(b) in an emergency). CP 113-115. The record debunks the paralegal's misleading lens. CP 15. Also, as discussed below, the Court should take judicial notice that because of a local rule, counsel for SDMGO would have been unable to seek a temporary restraining order at any time other than Friday morning, and as such, the time (and day) of the hearing should have been obvious to the city attorney.

Pages 20 through 24 discuss the three times that DAHP and DAHP's Assistant Attorney General told the mayor that the tree is an archaeological resource and that cutting the tree down without a permit from DAHP would violate the law. The fact that she received notice of DAHP's determination three times is not in the record, but it is in the record that she received such

notice in the first instance (May 30), including proof of service showing that the mayor's attorney was served such notice by email. CP 137-140.

C. The extra-record material should be accepted based on the judicial notice rules.

If the Court deems any of the extra-record material to be helpful in determining the proper outcome in the case, the Court should take judicial notice of it to the extent it is generally known in Thurston County or is easily verifiable as accurate. "Washington judges are permitted to take judicial notice of ';adjudicative facts.'" *State v. N.B.*, 7 Wn. App. 2d 831, 835, 436 P.3d 358 (2019) (quoting ER 201(a)). Such a fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). The court may take judicial notice on

its own and at any stage of proceedings. ER 201(c), (f); *N.B.*, 7 Wn. App. 2d at 835.

"A court shall take judicial notice if requested by a party and supplied with the necessary information." ER 201(d). "A court may take judicial notice, whether requested or not." ER 201(c).

Paragraph one of page seven of SDMGO's reply brief discusses how local court rules allow parties to obtain *ex parte* temporary restraining orders only between from 8:30 a.m. and 9:00 a.m. each court day and how there is no procedure that allows a party to bring an *ex parte* matter at any other time in Thurston County unless it is an existing case with an assigned judge. This is relevant because it makes clear that the mayor was on constructive notice that SDMGO had no way to stop her from removing the tree over the holiday weekend other than by using the *ex parte* procedure Friday morning, May 24.

The Court should take judicial notice of the local court rules in this regard. They are capable of accurate and ready

determination by resort to sources whose accuracy cannot reasonably be questioned, *i.e.*, the local court's own website: https://www.thurstoncountywa.gov/departments/superior-court/ex-parte/ex-parte-main-campus.

The top half of page nine and paragraph two on page 30 discuss the fact that the mayor has abandoned the flawed risk assessment she had originally relied on. The brief explains how she plans to rely on a new risk assessment. The paragraphs cite Appendix F, which is her attorney's declaration in the superior court for the bond hearing. This Court should take judicial notice of Appendix F because it is easily verifiable. It is an admission of a party opponent (ER 801) and it is available to the Court on Odyssey on the superior court docket with the click of a button.

Finally, paragraph two of page 27 discusses how SDMGO paid a $10,000 bond, and this mooted the mayor's claim that the TRO was flawed on account of there being no bond. The Court should take judicial notice of Appendices D

and E, which are also available to the Court on Odyssey on the superior court docket. Appendix E is the trial court's order and is thus verifiable. Appendix D is the notice of bond. It is verifiable because the clerk will not process that notice without receiving the amount of cash listed on the notice and without verifying that it matches the amount of cash listed in the court order.

D. The mayor's many knowing falsehoods and misrepresentations in her response brief necessitated the extra-record materials included in SDMGO's reply brief.

There is another reason the Court should reject the mayor's request to strike. This Court should consider Rule 3.3 of the Washington Rules of Professional Conduct ("RPC"): "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." RPC 3.3(a)(1).

This duty of candor and honesty to the court "continue[s] to the conclusion of the proceeding," defined as "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." RPC 3.3(b) & cmt. 13. Thus, not only is a lawyer forbidden from making a knowingly false statement of fact or law at the superior court level; a lawyer also may not do so on appeal. *See, e.g., In re Welfare of R.H.*, 176 Wn. App. 419, 429–430, 309 P.2d 620 (2013) (lawyer sanctioned for misrepresenting record in response brief and at oral argument).

In this case, the submission of extra-record material was necessary due to repeated misrepresentations by the mayor's attorney in her response brief. For example, the response brief repeatedly asserts that the Davis Meeker oak is a "known hazardous tree," that the tree has been "identified" or "determined to be hazardous," and that "[t]he decision to remove the tree is important to safeguard the public using the adjacent street." (*See, e.g.,* Resp. at 1, 3, 9, 10, 40.) The mayor

claims that she must "proceed with emergency tree removal to make [the city's] streets safe for the traveling public." *Id*. at 43.

Yet the city arborist's report been called into serious question by multiple third parties (including arborists, as discussed in SDMGO's Reply brief). Additionally, the mayor herself is currently pursuing a "second opinion concerning the condition of the tree"—a key fact omitted from her Response. The mayor has further stated that this future "second opinion"—which she has yet to obtain—"will be used to evaluate next steps concerning the Davis Meeker Garry Oak." In other words, the mayor has openly stated that this second opinion is what she will rely to evaluate future management options. Those options may entail measures other than total removal of the tree.

These statements are made in the declaration of Jeffrey S. Myers—the mayor's attorney—dated August 28, 2024 and attached as Appendix F to SDMGO's Reply brief. As Mr. Myer's states in that recent declaration to the superior court:

> In the meantime, the City of Tumwater and Mayor Sullivan agreed to obtain ***a second opinion concerning the condition of the tree***. At the June 4, 2024 City Council meeting, Mayor Sullivan agreed to obtain a second opinion from an independent arborist to evaluate the condition of the tree. The City issued a Request for Qualifications and obtained responses through July 18, 2024. The City has contracted with an independent arborist, Todd Prager & Associates, to make the assessment, ***which will be used to evaluate next steps concerning the Davis Meeker Garry Oak***.

Reply Br., App. F at 3:7–13 (emphasis add).

This demonstrates that there is no "emergency." The tree is not a "known hazard." The mayor cannot truthfully say that she needs to cut it down to "make [the city's] streets safe for the traveling public" when she is simultaneously representing to the superior court that she needs a second opinion "concerning the tree's condition," and that she will use this second opinion to "evaluate next steps concerning the Davis Meeker Garry Oak."

Another example of the mayor's misrepresentations concerns SDMGO's claim that the mayor may not cut down the historic Davis Meeker oak without the prior permission of

DAHP" under Washington's Archeological Sites and Resources Law at chapter 27.53 RCW. In support of this claim, SDMGO's Opening Brief relies upon a letter from DAHP to the mayor dated May 30, 2024 and found in the record at CP 140.

Attempting to disparage that letter, the mayor repeatedly brings up the letter's salutation ("To Whom it may concern"), implying that the letter was not actually addressed or delivered to the mayor. Resp. at 8, 31 (arguing, *inter alia*, that "[n]o deference is owed to a letter addressed by agency staff to 'whom it may concern.'"). The mayor also describes the letter as a "self-serving letter" obtained by SDMGO from "agency staff." *Id*. at 31.

These claims and insinuations are false. The mayor cannot honestly feign ignorance as to whom the letter was actually addressed. As discussed in SDMGO's reply, the mayor and her attorney have been informed *three times* by DAHP and the Washington Attorney General's Office (on behalf of DAHP) that the Davis Meeker oak is protected under

Washington's Archeological Sites and Resources Law, that cutting it down would be a crime, and that if the mayor persists in doing so, "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." These statements are made in the July 11, 2024 letter from the Attorney General's Office to Jeffrey S. Myers attached to SDMGO's Reply brief as Appendix C.

The July 11, 2024 letter from the Attorney General's Office also confirms that the May 30, 2024 DAHP letter cited in SDMGO's Opening Brief was, in fact, addressed and delivered to the mayor, contrary to her insinuations to the contrary. *See* Reply Br., App. C at 3 ("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.") (emphasis added).

The extensive legal analysis in the July 11, 2024 letter from the Attorney General's Office also confirms that DAHP's determination that the Davis Meeker oak is a protected archeological resource is not the product of a "self-serving letter" obtained by SDMGO from "agency staff." Rather, it is the reasoned and sustained legal conclusion of the expert state agency charged with administering Washington's Archeological Sites and Resources Law. *See* RCW 27.53.020 (designating DAHP as the agency in charge of "[t]he discovery, identification, excavation, and study of the state's archeological resources," amongst other responsibilities).

In *In re Welfare of R.H.*, this Court imposed monetary sanctions against an attorney under RPC 3.3 for "repeatedly assert[ing] in her reply brief and during oral argument that there was no evidence in the record that the children felt unsafe with their father"; and when confronted with such testimony in the

record, for "maintain[ing] that the statements were simply the attorneys' arguments and, as such, not evidence." 176 Wn. App. at 430.

In this case, the mayor's repeated statements and insinuations that the May 30, 2024 DAHP letter is merely a "self-serving letter" obtained by SDMGO from "agency staff," and that it was addressed to no one in particular, represents a similarly dishonest presentation of the facts. The mayor knows that the May 30, 2024 DAHP letter was the product of detailed agency deliberation, and that she was the intended recipient. She knows this because she received all three letters that DAHP and the Attorney General's Office sent to her and her attorney—all of which make the exact same point, that the historic Davis Meeker oak is a protected archeological resource under state law.

Yet another example of the mayor's knowing misrepresentations is her assertion that before she decided to cut down the Davis Meeker oak, she "proceeded to inform the

public and tribal officials," and that "[n]one of the tribes expressed concern at the decision to remove the tree." Resp. at 4. As discussed in SDMGO's Reply brief, one tribe did object—the Nisqually Tribe wrote a letter to the Tumwater City Council (which includes the mayor as the presiding officer) on June 4, 2024, asking the city to delay removal so that the Tribe could "complete consultation with the State Historic preservation officer and the Tribal Historic Preservation Officer." This letter may be found at Exhibit F to the Declaration of Ronda Larson Kramer in Support of Motion for Injunctive Relief Pursuant to RAP 8.3 (filed July 2, 2024) and is quoted at pages five to six of SDMGO's Reply brief. The mayor knows the Nisqually Tribe objected but stated otherwise in her response brief.

Disingenuously, the mayor argues that the superior court's dissolution of the temporary restraining order at issue in this case should be affirmed on the basis that no bond was required. Resp. at 7. She ignores that the superior court recently

approved a supersedeas bond of $10,000.00, which SDMGO promptly paid, completely mooting this issue. SDMGO's Notice of Cash Supersedeas is attached to the Reply brief as Appendix D. Judge Egeler's order approving the bond is attached as Appendix E. No court rule prohibits SDMGO from submitting extra-record documents post-dating the superior court's order to show that an issue has become moot. Indeed, that is the very nature of mootness—it can arise at any time.

Finally, there are the mayor's allegations that she had no notice of SDMGO's intent to seek a TRO to prevent her from illegally destroying the Davis Meeker oak, and that counsel for SDMGO somehow acted improperly by moving quickly to obtain the initial TRO on the morning of May 24, 2024. *See, e.g.,* Resp. at 12 (alleging that "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 response to these allegations, SDMGO's Reply brief cites the declarations of Ronda Larson Kramer filed in Support of SDMGO's Motion for Injunctive Relief Pursuant to RAP 8.3 to show (a) that the mayor did have notice, and (b) that the only opportunity to obtain a TRO that would save the tree was to use the superior court's *ex parte* procedures early that Friday morning. *See* Reply Br. at 6–8. The mayor cannot allege procedural irregularity knowing full well that SDMGO had no choice but to move quickly to save the tree, lest the tree be destroyed over the weekend and the entire controversy be mooted for all time.

E. This Court stands in the same position as the trial court because the record on appeal is wholly written.

The mayor claims that SDMGO is asking this Court to "usurp the role of the trial court by issuing an injunction." Mot. at 1. This is not correct. Appellate courts have the authority to grant appropriate relief, including injunctive relief. *See* RAP 12.2 (An appellate court "may reverse, affirm, or modify the

decision of the trial court, *or it may direct the entry of a specific judgment*." (emphasis added)).

Moreover, when there is no live testimony, "the reviewing court is not bound by the trial court's findings on disputed factual issues." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (citing *Smith v. Skagit County*, 75 Wn.2d at 718-19, 453 P.2d 832 (1969)).

In *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989), our Supreme Court noted that the appellate court stands in the same position as the trial court if the record consists only of affidavits, memoranda of law, and other documentary evidence. 112 Wn.2d at 35-36. Where the record both at trial and on appeal consists entirely of written and graphic material (documents, reports, maps, charts, official data and the like) and the trial court has not seen or heard testimony, a reviewing court stands in the same position

as the trial court in looking at the facts of the case and should review the record de novo. *Progressive*, 125 Wn.2d at 252.

Furthermore, even when there is more than written evidence, appellate courts are not limited solely to remanding cases to the trial court. For example, in *Boeing Co. v. Sierracin Corp*., 108 Wn.2d 38, 738 P.2d 665 (1987), after a two-month trial, the reviewing court reversed a jury verdict for lack of substantial evidence. *Id*. at 61. Similarly, in the criminal setting, appellate courts can acquit defendants instead of directing the trial court to do so. *See, e.g., State v. Hescock*, 98 Wn. App. 600, 989 P.2d 1251, 1257 (1999) ("We, therefore, reverse and dismiss Hescock's adjudication of guilt."); *see also* Charles A. Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 Ind. L. Rev. 497 (1975). This Court reviews this case under a de novo standard of review, and it is empowered to grant injunctive relief based upon that review.

CONCLUSION

For the above reasons, the Court should deny the motion to strike. If the Court sees fit to grant the motion in part, the Court should substitute the record cited above for the stricken record.

CERTIFICATE OF COMPLIANCE

I certify that this motion contains 4,166 words, in compliance with RAP 18.17(c).

RESPECTFULLY SUBMITTED this 2nd day of October, 2024.

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