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

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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.

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[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.

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I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the foregoing document all to be served to the below listed party by the Washington State Court of Appeals e-filing system as well as by electronic mail per service agreement upon the following person(s):

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