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 REPLY IN SUPPORT OF MOTION TO MODIFY COMMISSIONER'S RULING OF OCTOBER 8, 2024

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I. INTRODUCTION

For the reasons below, this Court should grant the motion to modify (herein, "Mot.") of Save the Davis Meeker Garry Oak (SDMGO), which seeks to modify the Commissioner's October 8, 2024, notation ruling. Pursuant to RAP 1.2(a), (c), and RAP 9.11(a), this Court should allow SDMGO to cite and rely upon the extra-record materials attached as Appendices C through F of SDMGO's reply brief and the June 4, 2024, letter from the Nisqually Tribe.

Additionally, on October 15, 2024, Commissioner Bearse entered a notation ruling extending the deadline for SDMGO to file an amended reply brief until 10 days after this Court resolves the motion to modify. If the Court grants the motion to modify, SDMGO will file an amended reply brief limiting citation to extra-record materials to those contained in Appendices C through F of SDMGO's reply brief, plus the Nisqually Tribe letter.

II. ARGUMENT IN REPLY

A. The extra-record evidence meets the six criteria of RAP 9.11(a).

The mayor claims that SDMGO does not meet all six requirements of RAP 9.11(a) for allowing extra-record evidence. Resp. to Mot. to Modify, at 9. This is not correct.

As to the first factor—that additional proof of facts is needed to fairly resolve the issues on review—the August 8, 2024, declaration of the mayor's attorney (Appendix F to SDMGO's reply brief) refutes the mayor's claim that the Davis Meeker oak presents an immediate danger, because it shows the mayor is currently in the process of obtaining a second opinion about the condition of the tree. This moots the mayor's claim that the tree is so hazardous that it presents a public-safety emergency, empowering her to bypass her obligation to obtain the authorization of the Tumwater Historic Preservation Commission before she may legally cut down the tree. Thus, the extra-record evidence is necessary to fairly decide this issue.

The supersedeas bond materials (Appendices D and E to SDMGO's reply brief) rebut the mayor's claim that the lack of a bond caused the temporary restraining order ("TRO") to be procedurally flawed. That defense is moot because SDMGO has since paid a bond. Thus, the extra-record evidence is necessary to fairly decide that issue.

The July 11, 2024 letter from the Attorney General's Office (Appendix C to SDMGO's reply brief) is needed to fairly resolve this appeal because it refutes the mayor's claim that she did not receive the Department of Archaeology and Historic Preservation's ("DAHP") letter on May 30th (one day before the decision on review).

Finally, the June 4, 2024 letter from the Nisqually Tribe (cited at page 5 of SDMGO's reply brief) refutes the mayor's claim that no tribe objected to her immediate removal of the tree. Such a claim tries to conceal the viewpoint of a tribe and as such needs to be exposed for this case to be decided fairly.

The second factor of RAP 9.11(a) is that the additional evidence would probably change the decision being reviewed. This factor is also met. The trial court likely would not have ruled that the mayor could immediately cut down the historic Davis Meeker Oak if it knew the mayor would be pursuing a second opinion about the tree's condition. If the trial court had known that a few days later, the Nisqually Tribe would submit a letter asking the mayor to hold off removing the tree, the court probably would not have ruled as it did. The trial court appeared to be concerned about what tribes wanted, as the court specifically asked if a tribe was a party. *See* Verbatim Rpt. of Proceedings at 10–11. Similarly, the trial court would probably not have ruled as it did had it seen the subsequent letter from the Attorney General's Office that went into great detail about why the mayor may not legally cut the tree down without first obtaining a permit from DAHP. And finally, the trial court probably would have ruled differently if it had known that

ultimately SDMGO would post a bond, since lack of a bond was one of the mayor's arguments in the trial court.

The third requirement of RAP 9.11(a) is that it is equitable to excuse a party's failure to present the extra-record evidence to the trial court. This is clearly met, since SDMGO had no chance to submit evidence that did not yet exist. All of the evidence at issue in this motion post-dates the May 31st hearing. Moreover, the trial court was rushing the case so quickly that this evidence could not have gotten into the record. It is equitable to allow that extra-record evidence into the record now.

The fourth requirement of RAP 9.11(a) is that the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive. This factor is met here because there are no post-judgment motions left for SDMGO to pursue.

The fifth factor under RAP 9.11(a) is that the appellate court remedy of granting a new trial is inadequate or

unnecessarily expensive. This is met because SDMGO has no money as it is a citizen action group and is operating solely on loans. A new trial would essentially kill the case for SDMGO due to lack of funds. Moreover, the issues are legal issues. There is no need for credibility determinations, and thus a new trial would not be helpful

The sixth factor of RAP 9.11(a) is that it would be inequitable to decide the case solely on the evidence already taken in the trial court. This factor is met because the trial court set such a short timeline (*i.e.,* one week from start to finish) that it made it impossible for SDMGO to develop the record or for events to play out. This violated SDMGO's right to due process, with the trial court holding affirmatively that the tree may be cut down with virtually no time for SDMGO to gather necessary evidence.

Moreover, when there is no live testimony, as in this case, "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)). Where, as here, 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.

B. Mootness issues also require allowing in the extra-record evidence.

1. August 8, 2024 declaration of the mayor's attorney.

The mayor objects to allowing her attorney's August 8, 2024 declaration to come into the record. This is the declaration in which her attorney states that the mayor is now pursuing a "second opinion" on the condition of the tree. The mayor is simultaneously advancing contradictory theories of the facts

and of the law, and this declaration needs to be added to the record to expose that and to show mootness.

It is the very nature of mootness problems that they arise based on the current facts of the case, not on the facts as they were presented at an earlier stage of the case. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 948 (2006). Here, where the facts have changed, and where the mayor can no longer truthfully say that the tree is so dangerous that it must be immediately removed, SDMGO should be allowed to cite this evidence and to argue that her "emergency measures" defense is now moot.

This issue of mootness distinguishes this appeal from all of the cases cited by the mayor in her response to SDMGO's motion to modify, including *State v. Harvey*, 5 Wn. App. 719, 491 P.2d 660 (1971); *Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495 (2002); *Canal Station North Condominium Association v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 322 P.3d 1229 (2013); and *Public Hospital District No. 1 of King County v.*

University of Washington, 182 Wn. App. 34, 327 P.3d 1281 (2014). In each of those cases, the Court of Appeals rejected attempts to inject extra-record material intended to bolster one party's original position before the superior court. Here, in contrast, SDMGO offers the August 8, 2024 declaration of the mayor's attorney not to bolster its original position, but to show that circumstances have changed and that the mayor's "emergency measures" defense no longer applies.

The mayor also argues that under RAP 9.11, SDMGO should have filed a motion with this Court prior to attaching her attorney's declaration as an appendix to SDMGO's reply brief. Resp. at 5. But as discussed in SDMGO's motion to modify, on July 23, 2024, Commissioner Bearse set this appeal on an accelerated schedule based on the mayor's immediate threat to cut down the tree. Mot. to Modify at 10. Under that schedule, SDMGO had only 10 days after receipt of the mayor's response brief to draft and file its reply. *See* Amended Accelerated Perfection Notice (Aug. 1, 2024). The mayor raised her

"emergency measures" defense in her response brief dated September 13, 2024 (without informing this Court of her current plans to seek a second opinion). Under RAP 17.4—which establishes a 13-day briefing period on motions—there was not sufficient time for SDMGO to file a motion on this issue before the deadline to submit its reply brief 10 days later.

Ultimately, RAP 1.2(a) provides that "[t]he rules [of appellate procedure] will be liberally interpreted to promote justice." RAP 1.2(c) provides that "[t]he appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice." And RAP 9.11(a) allows additional proof of facts when "it would be inequitable to decide the case solely on the evidence already taken in the trial court."

2. Supersedeas bond evidence.

Regarding SDMGO's citation to the supersedeas bond, that, too, relates to an issue of mootness. In her response brief, the mayor argues that Judge Egeler's dissolution of the original TRO should be upheld because the original TRO did not impose

a bond. Resp. Br. at 7, 13. Lack of a bond was not cited by Judge Egeler as a basis for dissolving the TRO, and the issue is now moot because SDMGO has since paid a $10,000.00 bond. The mayor offers no valid basis for precluding SDMGO from offering evidence of the bond to show that her argument is now moot. Nor would it be equitable to preclude SDMGO from making this mootness argument on appeal.

C. The letter from the Attorney General's Office should be added to the record to demonstrate that the mayor received DAHP's May 30th letter.

Next, SDMGO should be allowed to cite and rely upon the July 11, 2024, letter from the Washington Attorney General's Office to the mayor's attorney attached as Appendix C to SDMGO's reply brief. As discussed in SDMGO's motion to modify, that letter was sent on behalf of DAHP and represents one of DAHP's multiple letters informing the mayor that the historic Davis Meeker oak may not be cut down without prior approval under Washington's Archeological Sites and Resources Law.

SDMGO did not cite this letter in its opening brief because it did not see the need at that time. On May 30, 2024, one day before the decision on review, DAHP had already informed the mayor that the tree could not be cut down without an archeological permit. CP 140. SDMGO relied on that May 30, 2024 letter because it is already part of the record.

However, in the mayor's Opening Brief, she repeatedly refers to the "To Whom it may concern" salutation of DAHP's May 30, 2024 letter to imply either that the letter was not actually sent to the mayor or that it does not represent DAHP's formal conclusion about the protected status of the tree. *See, e.g.,* Resp. Br. at 8, 31 (arguing, *inter alia*, that "[n]o deference is owed to a letter addressed by agency staff to 'whom it may concern.'").

But the mayor knows this is false. Notwithstanding the salutation, DAHP's May 30, 2024 letter was indeed sent to the mayor. We know this because the letter from the Attorney General's Office specifically says so. *See* Reply Br., App. C at

3. Had the mayor not attempted to imply falsely that DAHP's letter was not actually sent to her, there would have been no need for SDMGO to cite the more recent letter from the Attorney General's Office. SDMGO should be allowed to rebut the mayor's false implication with additional evidence added to the record.

D. SDMGO should be allowed to cite the June 4, 2024 letter from the Nisqually Tribe.

Finally, SDMGO should be allowed to cite to the June 4, 2024, letter from the Nisqually Tribe to show that at least one tribe did object to the mayor's plan to immediately cut down the historic Davis Meeker oak. The mayor states in her Opening Brief that no tribe objected to her plan to remove the tree. Resp. Br. at 4. In fairness, if the mayor is going to claim on appeal that no tribe objected to the tree's destruction, then SDMGO should be allowed to offer clear, incontrovertible evidence to the contrary.

III. CONCLUSION

This Court should reverse the Commissioner's October 8, 2024, notation ruling and hold that SDMGO may cite and rely upon the extra-record materials contained in Appendices C to F of its reply brief, as well as the Nisqually Tribe's letter cited at page 5 of that brief.

On October 15, 2024, Commissioner Bearse entered a notation ruling extending the deadline for SDMGO to file an amended reply brief until 10 days after this Court resolves SDMGO's pending motion to modify. If the Court grants the motion to modify, SDMGO will file an amended reply brief limiting citation to extra-record materials to those contained in Appendices C through F of SDMGO's reply brief, plus the Nisqually Tribe letter.

IV. CERTIFICATE OF COMPLIANCE

I certify that this motion contains 2,367 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 13th day of November, 2024.

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