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

NO. 58881-1-II

SAVE THE DAVIS-MEEKR GARRY OAK,

Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,

Respondent.

RESPONSE OF APPELLANT TO AMICUS BRIEF OF DAHP

Bryan Telegin, WSBA 46686
TELEGIN LAW PLLC
175 Parfitt Ave. SW, Ste. N270
Bainbridge Island, WA 98110
(206) 453-2884
bryan@teleginlaw.com

Ronda Larson Kramer,
WSBA # 31833
LARSON LAW PLLC
P.O. Box 7337
Olympia, WA 98507
(360) 768-0775
ronda@larsonlawpllc.com

Attorneys for Appellant Save the Davis-Meeker Garry Oak

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Ordinances

INTRODUCTION

One day before the superior court hearing that is at the center of this appeal, the Department of Archaeology and Historic Preservation (DAHP) wrote to Defendant Debbie Sullivan and informed her that under the state's archaeology laws, chapter 27.53 RCW, she would need a permit from DAHP to remove the Davis Meeker oak. That same day, Save the Davis Meeker Garry Oak (SDMGO) filed a copy of that letter with the court. At the hearing the next day, counsel for SDMGO raised that argument orally, and the court expressly rejected the argument on the merits.

DAHP now claims that nobody except DAHP is allowed to rely on the argument that the mayor would need a permit from DAHP to remove the Davis Meeker oak. Simultaneously, DAHP admits that it has no enforcement power to save a tree and that all it can do is impose a small fine after the tree has already been destroyed.

DAHP has unintentionally provided the Court with the starkest example for why private parties are needed in these cases. DAHP can do nothing proactively to save this tree other than write a letter. Even if DAHP were authorized to take legal action proactively, the agency cannot be everywhere all the time. But private parties, in most cases, can. Private parties with standing are authorized to rely on the state's archaeology laws proactively in court to save cultural resources.

DAHP further claims, without citation, that the issue of whether the state's archaeology laws apply to the Davis Meeker oak is not ripe. It reasons that since no permit application has been filed with DAHP, there is nothing to trigger applicability of the archaeology laws. But the fact the tree is an archaeological resource is enough to trigger protection of such laws. Even DAHP admits that the tree is protected by these laws and cannot be cut down without a permit. It told the mayor so in its May 30 letter. It also is a live controversy. The parties disagree on whether the mayor can act unilaterally or whether she needs a

permit from DAHP to remove the tree. Therefore, the dispute is not hypothetical or speculative. It is ripe.

ARGUMENT

A. Washington citizens are allowed to enjoin violations of Washington's Archaeological Sites and Resources Law.

In Section V.A of its amicus brief, DAHP argues that SDMGO "correctly identifies the [Davis Meeker oak] as an archaeological site" protected by Washington's Archaeological Sites and Resources Law. Amicus Br. at 16. At the same time, however, DAHP argues that SDMGO had no legal right to request a temporary restraining order from the superior court to enjoin the mayor from having the tree cut down without a permit under RCW 27.53.060. That statute expressly prohibits the alteration of any archaeological resource without such a permit. *Id*. DAHP cites no legal authority for its assertion that third parties like SDMGO cannot seek a TRO to enjoin violations of Washington's Archaeological Sites and Resources Law. Instead, the sole basis of DAHP's argument is its assertion that "*the*

Department is the only entity within Washington State empowered to permit archaeological site disturbance under RCW 27.53." *Id*. (emphasis in original).

SDMGO agrees with that DAHP is "the only entity within Washington State empowered to permit archaeological site disturbance under RCW 27.53." But this case is not about DAHP's issuance of a permit. Nor is this case about that agency's denial of a permit application (to our knowledge, the mayor has never applied to DAHP for a permit to remove the tree). Instead, the question presented by DAHP's amicus brief is whether members of the public may use the Washington court system to enjoin the unlawful destruction of archaeological resources, when the illegal destruction of those resources would cause them concrete and irreparable harm. The answer to that question should be a resounding "yes."

From a strictly legal perspective, DAHP's position that members of the public may not seek to enjoin prospective violations of Washington's Archaeological Sites and Resources

Law is in direct conflict with the Washington Constitution. Specifically, Article IV, § 6 of the Washington Constitution recognizes the inherent power of every court "to review administrative decisions for illegal or manifestly arbitrary acts." *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998) (citing *Kreidler v. Elkenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989)).

This constitutional power of review "extends to administrative action which is contrary to law as well as that which is arbitrary and capricious." *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983) (citing *Williams v. Seattle School Dist. No. 1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982)). "An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental." *Id*. (citing *Leonard v. Civil Serv. Comm'n*, 25 Wn. App. 699, 701–02, 611 P.2d 1290

(1980), *Wilson v. Nord*, 23 Wn. App. 366, 373, 597 P.2d 914 (1979), and *Tacoma v. Civil Serv. Bd*., 10 Wn. App. 249, 250–51, 518 P.2d 249 (1973)). "The courts thus have inherent power to review agency action to assure its compliance with applicable rules." *Id*.

Here, one of the rules that governs the mayor's authority to cut down the Davis Meeker oak is RCW 27.53.060, which specifies, *inter alia*, that before any archaeological resource may be altered or destroyed, a permit from DAHP must be obtained. The mayor failed to comply with that requirement. She neither sought nor obtained such a permit (and indeed, continues to contest her obligation to obtain a permit). It was therefore entirely appropriate for SDMGO to file an action with the superior court to enjoin the mayor from destroying the tree on that basis.

Similar to the right of review guaranteed by Article IV, § 6 of the Washington Constitution, Washington's Uniform Declaratory Judgment's Act at chapter 7.24 RCW also empowers

the courts of this state to declare rights and obligations arising under any "statute, ordinance, contract, or franchise." RCW 7.24.020. The Uniform Declaratory Judgments Act not only allows a person to seek a declaration of rights and obligations under a statute. It also a declaration of the statute's applicability to specific actions undertaken by government officials. *See, e.g., Protect the Peninsula's Future v. Clallam County*, 66 Wn.2d 671, 675–76, 833 P.2d 406 (1992) (holding that consideration by county commissioners of a shoreline permit application was subject to Washington's Open Public Meetings Act). Consistent with this authority, SDMGO was well within its rights to (1) seek a ruling by the superior court that the mayor's plan to cut down the Davis Meeker oak is subject to the permit requirements of Washington's Archaeological Sites and Resources Law and (2) to ask the court to enjoin the mayor from violating that law by destroying the tree without a permit.

In sum, DAHP may be the only entity in Washington with authority to issue a permit under Washington's Archaeological

Sites and Resources Law. But it is not the only entity with authority to file an action in court to enjoin violations of that law.

From a practical perspective, DAHP's theory that members of the public may not enjoin violations of Washington's Archaeological Sites and Resources law would leave the citizens of this state defenseless to violations of that law. This case is a prime example.

As discussed in the Declaration of Tanya Nozawa, SDMGO did not learn of the mayor's plan to have the tree cut down over the Memorial Day weekend until the Thursday before that weekend. CP 17. SDMGO was then forced to obtain an emergency TRO the very next morning to prevent the tree from being destroyed. CP 15. DAHP sent a letter to the mayor informing her of the requirement to obtain a permit on May 30, 2024 (*after* the tree was originally scheduled to be cut down). CP 140. Sending that letter was obviously a good thing to do. But even after the mayor received that letter, her attorney still informed the superior court that the mayor was remobilizing to

have the tree cut down the very next Monday. *See* Verbatim Rpt. of Proceedings at 7. To this day, DAHP has never instituted a legal action to enjoin the mayor from cutting down the Davis Meeker oak. It was only through the actions of SDMGO that the tree is still standing today.

DAHP observes that "*the City* has mechanisms under the Administrative Procedure Act, RCW 34.05, to challenge or seek clarification from the Department on the application of RCW 27.53 to the City and the Tree." Amicus Br. at 16 (emphasis added). That is true. But those mechanisms do nothing to stop a person (like the mayor of Tumwater) from unlawfully destroying a protected archaeological resource without a permit. Only a court action can do that. In this case, the only entity that stepped up to file such an action to save the Davis Meeker oak was SDMGO (not DAHP).

Finally, DAHP opines that this Court would benefit from a "full and robust record" of a hypothetical administrative hearing on "the application of RCW 27.53 to the City and the

Tree." Amicus Br. at 15. Again, that may be true, but it fails to address the practical reality of this case. The City did not initiate such an administrative proceeding. Nor did DAHP. Instead, the mayor attempted to have the tree cut down surreptitiously over the Memorial Day weekend. The only entity willing and ready to stop her was SDMGO by filing a lawsuit in the superior court. Had SDMGO not done so, the very thing this case is about—the Davis Meeker oak—would have been destroyed and there would have been nothing to hold an administrative hearing about.

In sum, DAHP cites no legal authority for its novel argument that the citizens of this state may not invoke the power of the courts to enjoin the unlawful destruction of protected archaeological resources that are important to them. *See, e.g.,* CP 77 (testimony by SDMGO member Stewart Hartman that "[t]he loss of the Old Oak tree at Olympia Airport to me personally would be like losing an old friend that I have known all my life"). DAHP cites no administrative procedures that could reliably take the place of swift judicial action to enjoin immediate threats to

protected archaeological resources.

DAHP has, however, clearly determined that the Davis Meeker oak is such a protected archaeological resource. This determination is in furtherance of its statutory mandate to identify and protect such resources under Washington's Archaeological Sites and Resources Law. *See* RCW 27.53.030. This Court should defer to DAHP on that issue. It should reverse the superior court's ruling that Washington's Archaeological Sites and Resources Law does not apply to trees. This Court should enjoin the mayor from cutting down the Davis Meeker oak unless and until the mayor obtains a permit from DAHP.

B. The case is ripe for review because the fact that the tree is an archaeological object triggers the protection of the state's archaeology laws.

DAHP claims without citation that the issue of whether the state's archaeology laws apply to the Davis Meeker oak is not ripe. Amicus Br. 14-15. It reasons that since no permit application has been filed with DAHP, there is nothing to trigger applicability of the archaeology laws.

But just because no permit application has been filed does not mean the mayor's unilateral removal of the tree without a permit would be legal. That would be an absurd interpretation that would flip the law on its head. The entire purpose of the permit requirement is to stop people from destroying a cultural resource without permission. The tree is protected by the archaeology laws whether someone has applied for a permit or not. *See, e.g.,* RCW 27.53.060 (providing that "it shall be unlawful for any person . . . to knowingly remove, alter, dig into, or excavate . . . or to damage, deface, or destroy any historic or prehistoric archaeological resource or site. . . without having obtained a written permit from [DAHP] for such activities").

Moreover, the main dispute in this case is not hypothetical or speculative. The parties disagree on whether the mayor can act unilaterally in removing the tree or whether she needs a permit from DAHP. That dispute is a ripe controversy. Indeed, the case could not be riper, with the mayor having already attempted to have the tree removed and having only been stopped through the

proactive action of SDMGO. And even if this case were not ripe regarding the archaeology laws, it is certainly ripe regarding the city's historic code.

"Deciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *First Covenant Church v. City of Seattle,* 114 Wn.2d 392, 399, 787 P.2d 1352 (1990), *vacated on other grounds and remanded,* 499 U.S. 901, 111 S. Ct. 1097, 113 L. Ed. 2d 208 (1991), *judgment reinstated,* 120 Wn.2d 203, 224, 840 P.2d 174 (1992) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967)). "'A claim is fit for [judicial] decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *Id*. (alteration in original) (quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989)).

In *First Covenant*, the City of Seattle designated a church as a landmark under a statute that was similar to Tumwater's historic preservation code. Under that statute, the church was not allowed to make changes to its façade without permission of the Landmarks Preservation Board. 114 Wn.2d at 395-96. The city had argued that since the church had not yet submitted a proposal for alteration of the façade, the church's lawsuit challenging the statute was speculative and premature. *Id*., at 398-99.

The Washington Supreme Court in *First Covenant* rejected the city's argument and held that the church's cause of action was ripe. 114 Wn.2d at 400. The Court reasoned that the record contained "the factual background surrounding the designation of First Covenant Church and no additional facts need be developed to determine the constitutionality of that designation." The Court also noted that the decision that was the subject of the appeal was a final action. "The Church has

exhausted its administrative remedies and the only forum now available for appeal is the judicial system." *Id*.

In this case, DAHP argues that for the claim to be ripe, the mayor has to have applied for a permit from DAHP. But just like the church in *First Covenant*, the statute applies regardless of whether the protected cultural resource is subject to a permit or not. DAHP admits that the tree is protected by these laws. It told the mayor so in its May 30, 2024, letter. All that is needed to trigger the protection of the archaeology laws is for an object to constitute a cultural resource.

Also, no additional facts need be developed to decide the question at issue, which is whether the mayor may cut down the Davis Meeker oak without a permit from DAHP. The facts establish that DAHP has designated the tree as a cultural resource.

Holding that this case is not ripe would create a significant hardship on SDMGO. If the mayor knew the case was thrown out, she would likely start up her illegal actions again at her

earliest opportunity. It is likely that SDMGO would not be so lucky the next time around compared to when it got a leak in May 2024 from someone who stated the mayor was going to cut down the tree over the Memorial Day weekend.

Finally, the superior court ruled on the merits of the archaeological object issue. That was sufficient for the decision to be final. The Court should reject DAHP's claim that this issue is not ripe.

CONCLUSION

For the foregoing reasons, the Court should reverse the superior court and declare that the mayor's decision to remove the Davis Meeker oak without obtaining prior approval by the city's historic preservation commission or a permit from DAHP violates the city's own Historic Preservation Ordinance (TMC 2.62.060) and Washington's Archaeological Sites and Resources law at chapter 27.53 RCW. This Court should enjoin the mayor from cutting down the tree until such approvals are obtained.

CERTIFICATE OF COMPLIANCE

We certify that this brief contains 2,773 words, in compliance with RAP 18.17(b)

Respectfully submitted this 28th day of October, 2024.

TELGIN LAW, PLLC

Bryan Telegin
WSBA No. 46686

LARSON LAW, PLLC

Ronda Larson Kramer
WSBA No. 31833
Attorneys for Appellant

TELEGIN LAW PLLC

October 28, 2024 - 3:29 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_20241028150948D2505486_0005.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 2024 10 24 Response of SDMGO to Amicus Brief.pdf

A copy of the uploaded files will be sent to:

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

Comments:

Sender Name: Jamie Telegin - Email: jamie@teleginlaw.com
Filing on Behalf of: Bryan James Telegin - Email: bryan@teleginlaw.com (Alternate Email: bryan@teleginlaw.com)

Address:
175 Parfitt Way SW
Ste. N270
Bainbridge Island, WA, 98110
Phone: (206) 453-2884 EXT 102

Note: The Filing Id is 20241028150948D2505486