

EXPEDITE
 Hearing is set:
Date: September 6, 2024
Time: 9:00 a.m.
Judge/Calendar: Hon. Anne Egeler

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

SAVE THE DAVIS-MEEKER GARRY OAK,

Plaintiff,

vs.

DEBBIE SULLIVAN, in her capacity of Mayor
of Tumwater,

Defendant.

NO. 24-2-01895-34

**DECLARATION OF JEFFREY S.
MYERS IN SUPPORT OF MOTION FOR
ATTORNEY’S FEES**

I, Jeffrey S. Myers, hereby states and declares as follows:

1. I am the attorney for Defendant Mayor Debbie Sullivan, who has been sued in her official capacity and the City of Tumwater in the above entitled matter. I am over the age of 18, am competent to testify herein, and make this declaration based upon personal knowledge.

2. In response to a temporary restraining order (“TRO”) which was issued *ex parte* and provided to the City of Tumwater on May 24, 2024, I was retained to oppose the plaintiff’s request for an injunction and to seek dissolution of the TRO. The City immediately filed an emergency motion to dissolve the TRO which failed to comply with the notice requirements of CR 65 and RCW 7.40.050 and motions to shorten time. The TRO failed to contain any factual findings whatsoever or describe the basis for imposition of the TRO. It failed to contain any requirements for a hearing to allow the city of

1 Tumwater to oppose the injunction or to convert the TRO into a preliminary injunction as set forth in CR
2 65. The TRO further failed to include any financial security or bond to protect the City of Tumwater
3 against the consequences if the TRO was determined to be wrongfully issued, despite the requirements of
4 CR 65 and RCW 7.40.080.

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6 3. The court shortened time and set the motion to dissolve the TRO for May 31, 2024. The
7 parties filed additional briefing and oral argument was heard. The Court granted the motion to dissolve
8 the TRO but stayed the effective date of its order until June 5, 2024 to allow the plaintiff an opportunity
9 to seek emergency relief in the court of appeals.

10 4. On May 31, 2024, the plaintiff filed an “emergency notice of appeal” to the court of
11 appeals. . However, the plaintiff did not file an emergency motion to stay the dissolution order or
12 otherwise seek emergency relief under RAP 17.4(b). In response, on June 3, 2024, the Court of Appeals
13 issued a ruling informing the plaintiff that it could not grant any such relief unless such an emergency
14 motion for a stay was filed. A copy of the Court of Appeals’ June 3, 2024 ruling is attached as **Exhibit**
15 **1**. As a result of their failure to file such a motion, the TRO was dissolved and this Court’s May 31 order
16 became effective on June 5, 2024. Plaintiff delayed for another month, waiting until July 2, 2024 to file a
17 motion with the appellate court seeking a stay of this court’s May 31, 2024 ruling. In that motion, the
18 plaintiff contended that the order dissolving the TRO was an appealable final order. The Court of Appeals
19 agreed in its July 23, 2024 ruling that the superior court effectively determined the City’s right to remove
20 the tree, and because it appears no other issues remain pending in the superior court, allowing the appeal
21 to proceed under RAP 2.2(a)(3). See Telegin Decl., Exhibit B.

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24 5. Instead of filing an emergency motion with the court of appeals, as noted by the July 3
25 ruling and allowed by this Court’s May 31 order, the plaintiff instead sought to remove this matter to
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1 federal court. A notice of removal was filed by plaintiff on June 4, 2024, even though the plaintiff had
2 originally chosen this court as a proper venue in which to bring its action. In response, the defendant
3 immediately filed an objection pointing out that under federal law, only a defendant may remove a case
4 to federal court. Consequently, the federal court immediately remanded this case back to Thurston County
5 Superior Court.

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

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14 7. The City of Tumwater reasonably incurred attorney's fees to oppose the wrongfully
15 obtained TRO as well as the aborted attempt to relitigate this issue through removal to federal court.
16 Defendant was forced to move quickly to hire outside counsel to immediately bring the multiple flaws in
17 the TRO to the court's attention. The Mayor and the City were represented by myself and Jakub Kocztorz,
18 a first year associate with our firm. As the principal attorney on this matter, I directed the preparation of
19 pleadings to obtain the dissolution of the TRO. I am a partner at Law, Lyman, Daniel, Kamerrer &
20 Bogdanovich where my practice focuses on municipal law, land use and defense of claims against
21 municipalities. I was admitted to the bar in 1986 after graduating from the University of Washington
22 School of Law. I was an Assistant Attorney General in the Ecology Division for five and a half years
23 until 1992. After three years in private practice in Seattle with Short, Cressman and Burgess, I was a
24 deputy prosecuting attorney for Thurston County in the civil division from 1995 until 1986 when I joined
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1 Law, Lyman, Daniel Kamerrer & Bogdanovich. My regular billing rate is \$290 per hour, but I billed the
2 City of Tumwater a discounted hourly rate of \$280 per hour in this matter.

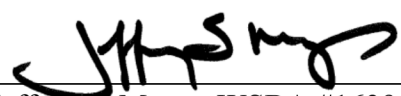
3 8. Mr. Kocztorz is 2023 graduate from Seattle University Law School. His legal studies
4 focused on municipal law, including an emphasis in land use issues. In Spring 2022, he received the CALI
5 Excellence For The Future Award for achievement in American Legal History. In 2020, Mr. Kocztorz
6 graduated from the University of Washington, with a bachelor's degree in history and minor in Classical
7 Studies. Mr. Kocztorz has billed his time in this matter at his regular hourly rate of \$190 per hour.

8 9. An itemization of the attorney's fees incurred by the Defendant is attached as **Exhibit 2**.
9 We reasonably incurred 51.1 hours and \$13,003.00 in attorney's fees in this matter as set forth in **Exhibit**
10 **2..** The table included as **Exhibit 2** was compiled from our billing program and contemporaneous time
11 records kept for this matter. The time set forth is reasonable and I have excluded time which in the exercise
12 of billing judgment would have been excessive and included only the time reasonably necessary to defend
13 this matter. This time includes only the time incurred while the matter was pending in Superior Court and
14 does not include time responding to the plaintiff's filings on appeal.

15 10. In addition to the reasonable attorney's fees incurred in dissolving the wrongfully issued
16 TRO, the City is continuing to incur attorney's fees to respond to issues raised by the plaintiff on appeal.
17 The amount of reasonable attorney's fees incurred in July and August 2024 are an additional \$18,353.88
18 to respond to the motions in the court of appeals and defend the right of the city to prevent hazards in its
19 right of way. These amounts would reasonably be awarded to the City if it prevails on appeal. The total
20 amount of reasonable attorney's fees spent by the City of Tumwater in responding to plaintiff's litigation
21 is currently in excess of \$31,356.88 . This amount does not include time spent responding to the motion
22 to determine the amounts of a supersedeas bond or to bring Defendant's motion for attorney's fees.
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Dated this 28th day of August 2024 at Tumwater, Washington.



Jeffrey S. Myers, WSBA #16390

Exhibit 1



Washington State Court of Appeals

Division Two

909 A Street, Suite 200, Tacoma, Washington 98402

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

June 3, 2024

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CASE #: 58881-1-II Save the Davis Meeker Garry Oak v. Debbie Sullivan
Case Manager: Jodie

Counsel:

On the above date, this Court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

The Save the Davis Meeker Garry Oak citizen group files a document captioned an "emergency appeal." It requests this Court to reverse the superior court's decision to dissolve a temporary restraining order (TRO), which allows for the removal of an historical oak tree located in Tumwater, Washington.

But this Court cannot decide an appeal before the record on appeal is submitted and before full merits briefing, even if it determines to accelerate review under RAP 18.12. See generally RAPs 9 & 10. In addition, the expedited emergency motion procedure in RAP 17.4(b) only covers motions, not appeals, and no motion appears to have been included in the "emergency appeal" filing. As a result, the "emergency appeal" will be placed in the appellate court file with no action.

The superior court temporarily stayed its decision to dissolve the TRO until Wednesday, June 5, at 5pm. Although the last page of the "emergency appeal" appears to reference one usual requirement for obtaining an extended appellate stay of the oak's removal-the posting of a bond-this Court can grant no timely relief absent an emergency motion requesting this

Court to stay the superior court's decision to dissolve the TRO while the group pursues its appeal. See generally RAP 8.1(b)(2) (stay as of right); RAP 8.3 (discretionary stay).

Sincerely,

A handwritten signature in black ink, appearing to be 'Derek M. Byrne', with a long horizontal line extending to the right.

Derek M. Byrne
Court Clerk

:jlt

EXHIBIT 2

Date	Timekeeper	Rate	Hours	Amount	Work Performed
05/24/2024	JSM	280.00	7.20	2,016.00	Telephone conference with Kirkpatrick re injunction action; Review and analyze information on tree issues and arborist reports; Receipt of and review pleadings from plaintiff re TRO; Receipt of and review TRO signed by court; analysis of procedural steps and Prepare emergency motion to dissolve TRO and declaration of Sullivan; Office conference with Mayor Sullivan; emails and phone conference with Judicial Assistant; Telephone Plaintiff's counsel; email pleadings to plaintiff's counsel; court appearance and conference with Maine re need for ex parte presentation; Telephone conference with Kirkpatrick.
05/24/2024	JK	190.00	6.3	1,197.00	Analyzed settlements for tree death cases. Prepared motion to shorten time and motion to dissolve TRO.
05/28/2024	JSM	280.00	7.5	2,100.00	Court call for ex parte motions to shorten time and dissolve TRO; Telephone conference with Parks; Telephone conferences with Kirkpatrick; Telephone conference with McFarland; Telephone conference with plaintiff's counsel; Prepare second declaration for Sullivan; Legal research re failure to comply with notice requirements as basis to void TRO; begin outlining reply memo.
05/28/2024	JK	190.00	3.20	608.00	Analyzed precedent in regard to MBTA and APA arguments. Reviewed and analyzed Plaintiff's filings.
05/29/2024	JSM	280.00	5.00	1,400.00	Draft reply to Plaintiff's response; draft declaration of McFarland; draft Declaration of Johansen; file with court; email with plaintiff's counsel re e-service; Receipt of and review motion to shorten time; emails with clients; Legal research re whether tree is structure.
05/30/2024	JSM	280.00	3.80	1,064.00	Prepare for court argument; review applicable TRO cases and outline oral arguments; Review and analyze declarations; Telephone conference with Kirkpatrick re risks and plans for possible outcomes from court hearing.
05/30/2024	JK	190.00	0.20	38.00	Completed research on APA and MBTA arguments.

Date	Timekeeper	Rate	Hours	Amount	Work Performed
05/31/2024	JSM	280.00	3.60	1,008.00	Court appearance and argument to dissolve TRO; Receipt of and review articles in media and statements from plaintiffs; Receipt of and review transcript of argument and order from Judge Egeler;
05/31/2024	JK	190.00	1.70	323.00	Analyzed rules of appellate procedure to determine likely counters to opponent's expected emergency appeal.
05/31/2024	JSM	280.00	1.60	448.00	Receipt of and review emergency motion for appeal and notice of appeal from Plaintiff; Receipt of and review memo from Koczor re expedited appeal procedures; email to Kirkpatrick; site visit to inspect tree and extent of threat to travel lanes on highway.
06/04/2024	JSM	280.00	7.80	2,184.00	Work on memo to Mayor re applicability of Migratory Bird Treaty and Archeological statute to DMGO; multiple Telephone conference with Kirkpatrick and emails re tree preservation demands; Receipt of and review multiple pleadings attempting to file for federal injunction Receipt of and review attempt to file new action in federal court; Receipt of and review notice of removal of state court action and file objection to improper removal by plaintiff; Receipt of and review order remanding to state court; Receipt of and review motion for TRO in new action in federal court; Receipt of and review order denying TRO emails with Kirkpatrick .
06/04/2024	JK	190.00	3.10	589.00	Analyzed supposed changes to MBTA to confirm non-applicability. Prepared Memo to JSM.
06/17/2024	JSM	280.00	0.10	28.00	Receipt of and review acknowledgement of receipt of remand from federal court;
Totals			51.1	13,003.00	