Hearing Date: September 6, 2024

Hearing 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,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater

Defendant.

No. 24-2-01895-34

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO SET AMOUNT OF SUPERSEDEAS BOND

I. INTRODUCTION

On May 31, 2024, this Court dissolved the temporary restraining order ("TRO") obtained by Plaintiff Save the Davis-Meeker Garry Oak ("SDMGO"). On July 2, SDMGO moved the Court of Appeals for an injunction pending appeal, and that Court granted an administrative stay the very next day. (*See* Declaration of Ronda Larson Kramer in Support of Plaintiff's Motion to Set Bond (Sept. 3, 2024) (herein, "Larson Bond Decl."), Ex. E.)

The Court of Appeals later extended the stay through September 13 to give SDMGO the opportunity to ask this Court to set a supersedeas bond amount such that SDMGO could receive a stay as of right under RAP 8.1(b)(2). The bond amount "shall be the amount of the loss which the prevailing party in the trial court would incur ***as a result of the party's inability to enforce the***

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judgment during review." RAP 8.1(c)(2) (emphasis added). "Ordinarily, the amount of loss will be equal to the ***reasonable value of the use of the property*** during review." *Id*. Here, the mayor argues that if she is unable to enforce this Court's order dissolving the TRO pending the outcome of SDMGO's appeal, then the "result" will be that she cannot cut down the historic Davis Meeker oak. The mayor then attempts to place an exorbitant "value" on her alleged loss of that right, arguing without any evidence that the bond should be more than $10 million.

But the mayor cannot lose a right that she does not possess. Whether this Court's order dissolving the TRO is stayed or not, the mayor cannot legally remove the Davis Meeker oak, because removal would require both a permit from the Washington Department of Archeology and Historic Preservation ("DAHP") under Washington's Archeological Sites and Resources Law (chapter 27.53 RCW) *and* permission from the city's Historic Preservation Commission under the city's own Historic Preservation Ordinance, chapter 2.62 of the Tumwater Municipal Code ("TMC"). It appears the mayor is not planning to seek either. It also appears she did not exercise any due diligence—prior to her attempt to have the tree removed surreptitiously over Memorial Day weekend—to investigate the many laws that constrain her ability to remove the tree.

Instead of seeking proper authorization to have the tree removed, the mayor continues to defiantly assert that she has an absolute, unfettered right to remove the historic Davis Meeker oak, employing a private attorney at public expense to fight a citizen group that seeks nothing more than to have her comply with the law. The mayor identifies no valid basis for setting the bond at more than $10 million, inclusive of $58,000 in a private attorney's fees for which she identifies no legal basis for recovery. Moreover, her claims that the tree is dangerous are spurious. For all these reasons, there is no justification for setting the bond any higher than $200.00, as requested in SDMGO's original motion.

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II. ARGUMENT

A. Under the Tumwater Municipal Code, the mayor cannot enforce her judgment.

Because the historic Davis Meeker oak is listed as a property on the city's Register of Historic Places, it may not be cut down without the prior approval of the city's Historic Preservation Commission. TMC 2.62.060.A. Because such permission has not been granted, let alone sought, the mayor cannot have the tree cut down. The Tumwater Municipal Code prohibits it. As such, a stay has no effect on the mayor's pre-existing inability to have the tree removed.

As part of the order dissolving the TRO, this Court held that "[t]he Mayor's decision to proceed [with cutting the tree down] is compliant with the code," and that "[t]here was not an obligation to obtain a permit before removing a historic tree as opposed to a historic structure." (Order Granting Motion to Dissolve TRO (transcript of Court's oral ruling at 3:17–20).) In doing so, this Court appears to have adopted the argument put forward by the mayor's attorney, and advanced without citation to any authority whatsoever, that the city's Historic Preservation Ordinance "does not apply because a tree is not a structure" and that "the definition of structure applies to man-made constructs, not trees." (Telegin Decl., Ex. A at 13.)

That statement by the mayor's attorney constituted an absolute misstatement of the law, as discussed in SDMGO's Motion to Set Amount of Supersedeas Bond (herein, "Mot."). The city's Historic Preservation Ordinance is not limited to protecting "structures," but instead protects every "property" listed on the city's Register of Historic Places. TMC 2.62.060(A). Here, because the historic Davis Meeker oak is listed as a property on the city's register, it may not be cut down without the prior approval of the City of Tumwater's Historic Preservation Commission. *Id*. To date, the mayor has not obtained the Commission's permission to cut down or otherwise harm or alter the tree. The mayor does not contend otherwise.

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The mayor's attorney similarly misrepresented the law to this Court when he stated at the hearing on May 31st that the city's definition of the word "structure" applies only to "man-made constructs, not trees." (Telegin Decl., Ex. A at 13.) In actuality, the definition of that term in the city's Historic Preservation Ordinance states only that structures are *"[g]enerally* constructed by man," not that they are *always* constructed by man, thus enabling even natural objects like trees to fall under the ambit of that term. TMC 2.62.030(W) (emphasis added).

Tellingly, in his communications with the Washington Department of Archeology and Historic Preservation ("DAHP"), the mayor's attorney has acknowledged that the term "structure" only "typically" applies to manmade constructs, although he stated falsely to this Court that the term absolutely does not apply to natural objects like trees. (*See* Decl. of Jeffrey S. Myers re Amount of Supersedeas Bond (Aug. 28, 2024), Ex. A at 2 (acknowledging that the city's Historic Preservation Ordinance only "typically" applies to buildings and other man-made constructs, not that it *only* applies to those types of historic properties).)

Finally, as the mayor discusses in her response, the amount of a supersedeas bond is ultimately discretionary with the Court. Here, we respectfully submit that a relevant consideration in setting the amount of a bond is that the mayor's attorney affirmatively misrepresented the law to this Court at the May 31, 2024 hearing—asserting falsely and without citation to authority that the city's Historic Preservation Ordinance only applies to "structures," and further that the city's definition of "structure" applies only to "man-made constructs." Both of those statements are demonstrably false.

The city's Historic Preservation Ordinance protects every "property" listed on the city's Register of Historic Places, of which the Davis Meeker oak is one example. TMC 2.62.06(A). Nor does the definition of "structure" apply only to manmade constructs. TMC 2.62.030(W). Notably,

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the mayor's attorney does not even attempt to rebut SDMGO's allegations that he affirmatively misrepresented the law to this Court. Such failure is strong evidence that he is aware that that is what he did. Because the mayor already is barred from having the tree cut down without permission from the city's Historic Preservation Commission, a stay would have no effect. She cannot lose a right that she does not possess.

B. Under Washington's Archeological Sites and Resources Law, the mayor cannot enforce her judgment.

The mayor is also prohibited from enforcing this Court's order by Washington's Archeological Sites and Resources Law. She cannot alter, harm, or destroy the Davis Meeker oak without a permit from DAHP, the state agency charged with administering Washington's Archeological Sites and Resources Law, chapter 27.53 RCW. The Washington Attorney General's Office has informed the mayor's attorney that if the mayor destroys the tree (or even alters it) without a state-issued permit, then the mayor will be committing a crime and DAHP will levy civil penalties against the city "to the maximum extent allowed by law pursuant to RCW 27.53.095 and WAC 25-48-041." (Supp. Telegin Decl., Ex. G at 1.) The mayor does not contend that the city has obtained such a permit, and thus she is prohibited by state law from cutting the tree down. For this reason, a stay would have no effect on the mayor's pre-existing inability to have the tree removed. As above, the mayor cannot lose a right that she does not possess.

Additionally, the mayor fails entirely to rebut the expert determination by DAHP that the Davis Meeker oak is a protected archeological resource under state law. That determination—now communicated *three times* to the mayor by DAHP and the Attorney General's Office—is entitled to substantial deference by this Court. *See, e.g., Schofield v. Spokane Cnty.*, 96 Wn. App. 581, 587 (1999) ("[D]eference should be given to an agency's interpretation of the law where the agency has special expertise in dealing with such issues."); *Silverstreak, Inc. v. Dep't of Labor & Indus.,*

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159 Wn.2d 868, 885 (2007) (Washington courts give a "high level of deference to an agency's interpretation of its regulations because the agency has expertise and insight gained from administering the regulation that we, as the reviewing court, do not possess.").

Attempting to overcome the substantial deference that this Court owes to DAHP—the expert state agency charged with administering Washington's Archeological Sites and Resources Law—the mayor presents baseless arguments that the tree is not a protected archeological resource. (Resp. at 9:7–19). But these arguments have all been specifically rejected by DAHP and the Attorney General's Office. Indeed, in the Attorney General's Office's letter of July 11, 2024 to the mayor's attorney, the AAG noted specifically that not only do historically and archeologically significant trees fall within the "plain meaning of the statute," over the years DAHP has identified 458 trees protected by Washington's Archeological Sites and Resources Law:

> DAHP has correctly interpreted its statutes and rules to mean that trees that have archaeological or historical significance are archaeological objects or archaeological resources within archaeological sites subject to DAHP permitting requirements, and has done so publically [*sic*] for years. For example, DAHP's website and the Field Guide to Washington Archaeology, produced in 2003, both reference permitting requirements for trees. In fact, a search of DAHP's WISAARD (Washington Information System for Architectural and Archeological Records Data) system indicates that ***at least 458 recorded archaeological sites are trees***. ***DAHP's interpretation of Chapter 27.53 RCW and WAC Chapter 25-48 is consistent with the plain meaning of the statute.***

(Supp. Telegin Decl., Ex. G at 2 (footnotes omitted; emphasis added).)

It is also easy to rebut the mayor's spurious argument that the Davis Meeker oak does not qualify as a protected "archeological resource" under state law. As the Washington Attorney General's Office and DAHP have observed, the term "historic archeological resource" is defined as "any item that 'comprises the physical evidence of an indigenous and subsequent culture,

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including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products.'" (*Id*., quoting RCW 27.53.030.)

As discussed in the previously submitted Declaration of Bill Iyall—currently the chairman of the Cowlitz Tribe—the Davis Meeker oak represents a living remnant of cultural burning of prairies, an ancient practice of Indigenous peoples that "extended from Vancouver to Puget Sound." (Decl. of Bill Iyall, ¶3 (May 28, 2024).) The purpose of such burning was to limit the growth of competing species such as fir trees. The practice "allowed the survival of the oak." (*Id*.) It was because of this ancient Indigenous burning practice that trees like the Davis Meeker oak still remain to this day. (*Id*., ¶ (observing that the "Meeker oak is a remnant" of this ancient practice.)

In this way, the Davis Meeker oak constitutes the "physical evidence of an indigenous . . . culture." The same is true regarding the fact that the tree stood as a monument and trail maker on the ancient Cowlitz trail for hundreds of years, and later, on the Oregon Trail. (*See* Decl. of Cowlitz Tribe Elder Diane Riley, ¶¶ 5, 9 (May 27, 2024) (explaining that the "Meeker Oak tree has stood next to the Cowlitz trail for hundreds of years," and also "has a tragic period in its long life. It was known as the hanging tree.").) DAHP and the Attorney General's Office were correct in determining that the Davis Meeker oak is a protected archeological resource within the "plain meaning" of RCW 27.53.030.

It also is not relevant whether SDMGO has "standing to enforce any requirement to seek a permit from DAHP," as the mayor contends. (Resp. at 9:1–2.) Whether SDMGO has standing to "enforce" the permit requirement is not relevant in setting the bond amount. The purpose of a supersedeas bond is to compensate the prevailing party for losses incurred as a result of staying a court's final judgment on appeal. Here, the mayor speculates without evidence that the city may suffer up to $10,000,000.00 if it cannot enforce this Court's order of May 31, 2024 on appeal. But

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whether the city can enforce that order or not, it cannot enforce it against DAHP. DAHP was not a party to this Court's judgment and could not be bound.

The fact that the Davis Meeker oak is a protected archeological resource under state law means that the mayor has no right to remove it without a permit. If she does destroy it, she faces criminal prosecution and subjecting the city itself to substantial civil penalties issued by DAHP. (The mayor knows this, which is no doubt part of why she is endeavoring to get a new, credible tree risk assessment.) A stay will have no effect on her legally because she cannot lose a right she does not possess.[1]

C. Even if the mayor could enforce the judgment, her claims that the tree is dangerous are spurious.

The mayor has acknowledged that the original risk assessment that she relied upon in her attempt to surreptitiously cut down the Davis Meeker oak over Memorial Day weekend is not credible. As discussed in the Response to the mayor's Motion for Attorney Fees, the owner of the very company that helped with the original assessment disagreed so strongly with the final report that he called it "an embarrassment to any knowledgeable arborist." (Decl. of Ronda Larson Kramer in Resp. to Mot. for Attorney Fees (Sept. 3, 2024), Ex. E.)

As admitted in the mayor's Response to Motion to Set Amount of Supersedeas Bond ("Resp."), the mayor has now contracted with a *new* company, to perform a *new* tree risk assessment, "which will be used to evaluate next steps concerning the Davis Meeker Garry Oak." (Resp. at 4:11–12.) That new assessment has yet to be performed. Thus, not only is the mayor prohibited by law from cutting the tree down, she also has no basis for claiming that it must be cut down from a public safety

[1] Not only do state and local laws forbid the mayor from having the tree cut down without permits, but at the time the Court dissolved the TRO, federal law also forbade it. Because there were kestrels nesting in a cavity in the tree, the U.S. Fish & Wildlife sent the city a letter telling it that it would be subject to federal "criminal prosecution" under the Migratory Bird Treaty Act if it cut down the tree without obtaining an incidental take permit. (Larson Bond Decl., Ex. D).

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perspective. The mayor does not even possess the very study which she claims will be used to make decisions about the tree in the future.

In the absence of the mayor completing her new tree risk assessment, an independent tree risk assessment was completed by ISA Certified Arborist Paul. A. Dubois IV, who has 40 years of experience, many of those with oaks specifically. He personally evaluated the Davis Meeker oak and determined that the risk is moderate and can easily be made low with simple pruning and cabling. (Larson Bond Decl., Ex. A at 4.)

In turn, current research suggests that given the old age of the Davis Meeker oak, it may be especially resistant to perceived structural defects, and that "even strongly hollowed trees can be safer than young intact trees without any defects." Some of this research—performed by renowned tree physicist Frank Rinn—is reported in the accompanying declaration of Ray Gleason, an arborist who the city itself has recognized for his "dedicated service to the City of Tumwater" in his care for the Davis Meeker oak. (Decl. of Ray Gleason in Support of Mot. to Set Bond (Sept. 3, 2024) (herein, "Gleason Decl."), Ex. B at 36.)

Oaks, in particular, have a special ability to remain stable even when they become hollow. (Gleason Decl., ¶ 6.) They should not be assessed for risk in the same way other trees are assessed for risk; doing so would be like "comparing apples to oranges." (*Id*., ¶ 7). When a Garry oak is in decline, gaps would become seen in the canopy, leaf size would become smaller, and the tone of the leaf would change. (*Id*., ¶ 11.) You would start seeing a higher percentage of fruit that is nonviable. (*Id*.) These are the signs of a tree that is failing. (*Id*.) The Davis Meeker oak displays none of these signs. (*Id*., ¶ 12.)

Ultimately, the mayor's claims that the tree is dangerous are based on a risk assessment that the mayor herself has now rejected; nor is the mayor in possession of the new tree risk assessment

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that she claims "will be used to evaluate next steps concerning the Davis Meeker Garry Oak." (Resp. at 4:11–12.) Reliable evidence and current research indicates that the tree is not a hazard. Even if the mayor could enforce her judgment, her claim that she needs a bond of over $10 million to protect the city from speculative damages is completely unsupported.

D. The mayor's claim for attorney fees is baseless.

Last, in Section III.A of her response, the mayor argues that the supersedeas bond should include $58,000.00 in attorney's fees, inclusive of $13,003.00 that she claims to have incurred in dissolving the TRO in this matter; $18,353.88 for attorney's fees incurred to date while this case has been pending before the Washington Court of Appeals; $25,000.00 for future fees on appeal; and $1,560.36 in post-judgment interest. (Resp. at 7.) Yet, the mayor cites no authority and presents no legal theory under which the vast majority of these claimed attorney's fees could ever be awarded.

"Washington has long followed the American rule on the award of attorney's fees." *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 514 (1996) (citing *Rorvig v. Douglas*, 123 Wn.2d 854, 861 (1994) and *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 102–03 (1941)). Under the American rule, a court may award fees "*only* if authorized by contract, statute, or recognized ground in equity." *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70 (1993) (emphasis added; quoting *Painting & Decorating Contractors, Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 815 (1982)). Absent such a contract, statute, or recognized ground in equity, "[t]he American rule requires each party to bear its own litigation costs and fees." *Maytown Sand and Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 436 (2018). As stated by the Washington Supreme Court in *Maytown*, the purpose of the American rule is to enable access to the courts:

> The primary justification for adopting the American rule is that it encourages aggrieved parties to air their grievances in court. "[S]ince litigation is at best uncertain[,] one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be

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> unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."

Id. (brackets and ellipsis in original; quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 18 L.Ed. 2d 475 (1967)).

Here, the mayor is correct that RAP 8.1(c)(1) provides that a supersedeas bond should include the amount of "attorney fees, costs, and expenses *likely to be awarded* on appeal." RAP 8.1(c)(1) (emphasis added). However, the mayor identifies no contract, statute, or recognized ground in equity that would allow her to recoup $58,000.00 in attorney's fees, in contravention of the standard American rule that she must bear her own litigation costs and fees.

The mayor has argued in her pending Motion for Attorney's Fees that the first sum listed above—$13,003.00 in attorney's fees for dissolving the TRO—are awardable based on the equitable rule that "[o]n equitable grounds, a party may recover attorney's fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order." (Def's Mot. for Attorney's Fees at 4.) However, as SDGMO discussed in its response to that motion, that equitable rule does not apply when obtaining a TRO or preliminary injunction is the *only* way for the plaintiff to preserve the fruits of their lawsuit—*i.e.,* to prevent the very harm the lawsuit seeks to enjoin. (*See* Resp. to Def's Mot. for Attorney's Fees at 8–10.) *Confederated Tribes of Chehalis Reservation v. Johnson,* 135 Wn.2d 734, 758 (1998) (holding that "purpose" of the fee-shifting rule cited by the mayor "would *not* be served where injunctive relief prior to trial is necessary to preserve a party's rights pending resolution of the action," and where without a TRO or preliminary injunction, the lawsuit would be rendered entirely "fruitless") (emphasis added); *Quinn Const. Co. LLC v. King Cnty. Fire Prot. Dist. No. 36*, 111 Wn. App. 19, 36 (2002) (holding that the purpose of that rule "would not be served by deterring plaintiffs from seeking the only relief available to them under the law").

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Here, the equitable rule that might otherwise allow the mayor to recoup past fees for dissolving the TRO does not apply because the emergency TRO was the only means available to SDMGO to prevent the tree from being destroyed over Memorial Day weekend. It was the only means available to SDMGO to preserve the fruits of this lawsuit.

As for the other fees the mayor seeks to have included in the bond, any fees incurred or to be incurred by the mayor *after* this Court dissolved the TRO—are not recoverable under the equitable rule cited by the City in its motion for attorney's fees. As discussed in our response to that motion, "[t]he point at which the wrongfully issued [TRO] is dissolved is the point at which attorney's fees cease to be recoverable." *Ritchie v. Markley*, 23 Wn. App. 569, 575 (1979). *See also Burt v. Washington State Dep't of Correction*s, 191 Wn. App. 194, 207 (2015) (attorney's fees "*cease to be recoverable* if a temporary restraining order is dissolved by agreement, by a motion and hearing, or where a preliminary injunction is dissolved by trial on the merits.") (emphasis added).

The TRO was dissolved through this Court's order of May 31, 2024. The equitable rule cited by the mayor provides no basis for an award of attorney's fees after the TRO was dissolved, including on appeal. *Ino Ino Inc. v. City of Bellevue*, 132 Wn.2d 103, 144 (1997) (denying fees on appeal and holding that the equitable rule cited by the mayor "allow[s] recovery for attorneys' fees incurred at the appellate level only when . . . necessary to dissolve a *currently effective* temporary restraining order") (emphasis added).

The mayor also does not cite any other statute, contract, or recognized ground in equity that would allow her to recoup any attorney's fees for any past or future work in this case on appeal. The American rule that Washington courts have followed for decades requires her to cite authority if she is to be awarded fees, which she has failed to do. As discussed in SDMGO's Motion to Set

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Amount of Supersedeas Bond, the only applicable fee-shifting statute is RCW 4.84.080, which would allow the mayor to recoup a grand total of $200.00 in attorney's fees if she prevails on appeal.

Because the mayor identifies no statute or recognized equitable rule that would allow her to recoup attorney's fees in this case, there is no basis for this Court to include $58,000.00 in bond amount as "attorney fees . . . *likely to be awarded* on appeal." RAP 8.1(c)(1) (emphasis added). The only amount likely to be awarded on appeal, if she wins, is $200.00.

III. CONCLUSION

Under the RAP 8.1(c)(2), the amount of a supersedeas bond should reflect the loss the mayor would incur as a result of her inability to enforce this Court's order dissolving the TRO. The mayor claims that "loss" is her loss of the right to remove the Davis Meeker oak. But that is a right which she does not possess, regardless of whether this Court's order is stayed or not. Under the city's own Historic Preservation Ordinance, the mayor has no legal right to remove the Davis Meeker Oak without the prior approval of the Tumwater Historic Preservation Commission. The mayor is similarly prohibited from removing the Davis Meeker Oak under state law.

Even under federal law, the city was prohibited from cutting the tree down at the time this Court dissolved the TRO. One week after this Court issued its order of May 31, 2024, a biologist from the U.S. Fish & Wildlife Service visited the tree and confirmed that "it is highly likely that a pair of American kestrels are currently either incubating or brooding young within a cavity of the Davis-Meeker Oak." (Larson Bond Decl., Ex. D.) On that basis, the U.S. Fish & Wildlife Service informed that city that if the tree was cut down before the kestrels left the nest, then the city would face "criminal prosecution" under the federal Migratory Bird Treaty Act, 16 U.S.C. § 703. (*Id.*)

In summary, the mayor claims an absolute right to remove the historic Davis Meeker oak. But that bald assertion is based on nothing more than her own failure to investigate the many laws that

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protect the tree independently of this Court's order dissolving the TRO. The mayor claims the tree is hazardous, but is not even in possession of the new tree risk assessment which, she claims, will be used to make decisions about the tree's future. Nor does the mayor identify a single contract, statute, or recognized ground in equity that would allow her to recoup her private attorney's fees on appeal. This Court should grant SDMGO's motion. The bond should be set at $200.00.

An updated order is submitted herewith.

Dated this 4th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2024, I caused to be served a true and correct copy of the foregoing Reply in Support of Plaintiff's Motion to Set Amount of Supersedeas Bond on each of the persons and in the manners listed below.

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