❑ **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

DEFENDANT'S RESPONSE TO MOTION TO SET AMOUNT OF SUPERSEDEAS BOND

I. INTRODUCTION

Plaintiff's motion to set the amount of supersedeas presents a single question: what amount of money is necessary to protect the interests of the Defendant Mayor Debbie Sullivan and the City of Tumwater if plaintiff supersedes this court's ruling that the temporary restraining order (TRO) obtained by the plaintiff was improper. Because the City has substantial interests in maintaining the right of way where the hazard tree in question is located, the Court should require a substantial supersedeas bond.

II. STATEMENT OF FACTS

This case arises from an appeal of this court's prior order entered on May 31, 2024. That order dissolved a TRO obtained *ex parte* without notice to the City as being improper. The TRO was obtained without filing any motion for its issuance, apparently solely on the basis of the Complaint. The Complaint raised two claims. First, it claimed that it would violate the City's Historic Preservation Ordinance

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because a permit is needed to "demolish a historic structure". Complaint at 5:17; 6:16. Secondly, the complaint alleged that the proposed action would violate the Migratory Bird Treaty Act, 16 U.S.C. 706 because there was a nest of birds in the tree. Complaint at 4:10; 6:9.

The TRO was granted without prior notice of the time and place of the hearing in violation of RCW 7.40.050. It did not contain any findings as to the basis for the TRO or why it was granted without notice despite the requirements of CR 65(b). It was issued without any bond, despite the requirements of CR 65(c) and RCW 7.40.080. Moreover, the TRO contained no expiration date even though CR 65(b) provides that it will expire no later than 14 days from its issuance. It did not contain any procedures to convert it to a preliminary injunction, despite the requirements of CR 65(b).

The City moved to dissolve the TRO, noting its noncompliance with these statutory requirements and court rules. See Motion to Dissolve at 3-6. The City argued that Plaintiff is not entitled to a TRO under Washington law on either ground cited in the Complaint and asked that the court allow it to address a clear hazard created by the tree's decaying condition. Motion to Dissolve at 3. The City supported its argument that a substantial bond should have been required by submitting the Declaration of Mayor Debbie Sullivan which estimated the potential liability for failing to remove a known hazard could easily exceed $10,000,000.00. Sullivan Decl. at 2:19.

In response, the plaintiff argued that the risk assessment performed by the City's arborist was flawed and there was no emergency threat justifying a bond. Response at 2:23 -3:4. Plaintiff argued that a permit was needed to demolish a "historic structure." *Id.* at 3:8. They argued that because kestrel hatchlings were present, the court should extend the TRO to the end of July to allow them to fledge. *Id.* at 3:15. Plaintiff then raised new issues, arguing that the City was required to consult with Tribes under RCW 70A.65.305 and that they had standing to raise such claims. *Id.* at 3:21.

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The City responded by pointing to case law holding that a TRO issued without proper notice in violation of the due process protections afforded by CR 65 is void. Reply Brief at 1 – 2. The City further rebutted the argument that the plaintiff was entitled to sue under the Migratory Bird Treaty Act, and demonstrated that under existing Ninth Circuit precedent, the Act does not apply to cutting of trees which might contain such birds. *Id.* at 5-6. Just prior to oral argument of the motions, the plaintiff submitted a new declaration arguing a completely new legal theory that the City was required to get a state permit under RCW 27.53.060.

After considering oral argument, the Court determined that the plaintiff's claims, as set forth in the Complaint, did not demonstrate any clear legal or equitable right necessary to support injunctive relief. The Court's order stated:

> Under the law, a party requesting a temporary restraining order must show three things, a clear legal or equitable right, a well-grounded fear of immediate invasion of that right, and that the act complained of will result in actual and substantial injury to the moving party. All of these requirements have to be met, and the plaintiffs have not met the first criteria.

Order, May 31, 2024 at 3.

The Court agreed with the City that the new issue regarding RCW 27.53.060 had not been properly raised and briefed. The Court further observed that a brief reading of the statute shows that it addresses archeological resources and is not applicable here, and did not provide a basis for finding of clear legal or equitable rights.

The Court granted the motion to dissolve the TRO but allowed plaintiff an opportunity until June 5, 2024 to seek an emergency appeal to the Court of Appeals, which the plaintiff did. However, the plaintiff did not file any motion for emergency relief in the court of appeals within the time period allowed by this court. The plaintiff did not do so even though the Court of Appeals specifically informed plaintiff's

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counsel of the need for such a motion under RAP 17.4(b) in a ruling issued on June 3, 2024. Myers Decl., Thus, the Court's order took effect and the TRO was dissolved effective June 5, 2024.

Instead of seeking emergency relief from the court of appeals under RAP 17.4(b), the plaintiff opted instead to file a notice of removal of this action to federal court. This frivolous attempt to remove their own action to a different forum was objected to by the Defendant and quickly denied by the US District Court.

In the meantime, at the June 4, 2024 City Council meeting, after hearing substantial public comments, Mayor Sullivan agreed to obtain a second opinion concerning the condition of the tree. Myers Decl. ¶ 6. The City issued a Request for Qualifications and obtained responses through July 18, 2024. Myers Decl. ¶ 6. The City has contracted with an independent arborist, Todd Prager & Associates, to make the assessment, which will be used to evaluate next steps concerning the Davis Meeker Garry Oak. Myers Decl. ¶ 6.

On July 2, 2024, nearly a month after the TRO had been dissolved, the plaintiff filed a motion for injunctive relief pursuant to RAP 8.3. The Court issued a ruling on July 23, 2024. Telegin Decl., Exhibit B. The Court of Appeals determined that the trial court's May 31, 2024 order was an appealable order because it had effectively determined the rights of the parties. The Court's ruling denied the motion for injunctive relief but extended an administrative stay to allow the plaintiff to file a motion to determine the amount of a supersedeas bond under RAP 8.1(b)(2). Plaintiff then filed this motion to set the amount of a supersedeas bond.

III. ARGUMENT

As an initial matter, Plaintiff seeks to reargue the merits of their TRO request when the only issue before the court is the amount of a bond to supersede the trial court's judgment. In arguing that the matter

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is now properly before the court of appeals, as its July 23 ruling established, the merits of the TRO request are not in front of the court in this motion and the Court should disregard the efforts to relitigate matters that the court has already decided. The Court's May 31, 2024 Order has already concluded that the TRO was wrongly issued and that the plaintiff has no legal or equitable right to support such relief.

A. THE PURPOSE OF A SUPERSEDEAS BOND IS TO PROTECT THE INTERESTS OF THE PARTY WHO OBTAINED JUDGMENT IN THE TRIAL COURT.

A supersedeas bond is a means of staying enforcement of a trial court judgment while on appeal. RAP 8.1. "A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment, or a decision affecting real, personal or intellectual property, pending review." RAP 8.1(b). Thus, when a supersedeas bond is filed, the judgment cannot be enforced. The supersedeas bond is intended to preserve the "status quo between the parties." *Murphree v. Rawlings*, 3 Wn.App. 880, 882, 479 P.2d 139 (1970). The supersedeas bond amount should be enough to secure any money judgment, plus the amount of loss which a party may be entitled to recover as a result of the inability of the party to enforce the judgment during review. RAP 8.1(c). *Guest v. Lange*, 195 Wn.App. 330, 338, 381 P.3d 130, (2016).

A supersedeas bond thus serves two purposes: it serves the interest of the judgment debtor (here the plaintiff) by delaying the execution of the judgment, but it also serves the interest of the judgment creditor (the Mayor/City) by ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired during the appeal process. *Lampson Universal Rigging, Inc. v. Washington Public Power Supply System,* 105 Wn.2d 376, 378, 715 P.2d 1131 (1986); *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 769, 27 P.3d 1233 (2001), *modified,* 33 P.3d 84 (2001).

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The amount of a supersedeas bond is not limited to the amount of a judgment, but also must factor in attorney's fees to which a party is entitled, both before the trial court and upon appeal. RAP 8.1(b)(2) concerns the amount of the supersedeas bond to be fixed in decisions affecting property. It provides,

> If the decision determines the disposition of property in controversy, or if the property is in the custody of the sheriff, or if the proceeds of the property or a bond for its value are in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure any money judgment *plus the amount of loss which a party may be entitled to recover as a result of the inability of the party to enforce the judgment during review.*

Norco Const., Inc. v. King Cnty., 106 Wn.2d 290, 295–96, 721 P.2d 511 (1986)(emphasis in original).

Plaintiff's Motion To Set Amount Of Supersedeas Bond seeks only a nominal bond of $200 which is plainly insufficient to cover the amount of loss that the City would incur by being wrongly enjoined. Plaintiff's argument is based solely on the first clause of RAP 8.1(c)(2), which requires the bond cover the amount of the judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs, and expenses likely to be awarded on appeal. Plaintiff does not allocate any funds towards the second clause, which requires an additional amount to address the loss that a party would be entitled to recover as a result of its inability to enforce the trial court's judgment.

Here, the City has been forced to expend substantial taxpayer funds to dissolve the wrongfully issued *ex parte* TRO obtained by plaintiff on May 24, 2024. See Defendant's Motion for Attorney's Fees; Declaration of Jeffrey S. Myers in Support of Motion for Attorney's Fees. To secure dissolution of the TRO, the City incurred $13,003 in attorney's fees to which the City is entitled to recover for having had to dissolve the TRO. *Alderwood Assocs. v. Washington Envtl. Council,* 96 Wn.2d 230, 247, 635 P.2d 108 (1981); *Cecil v. Dominy,* 69 Wn.2d 289, 291–92, 418 P.2d 233 (1966).

Since the dissolution, the City continues to incur fees to contest the appeal of this matter. If the Court of Appeals affirms the trial court, the City would be entitled to its fees on appeal under RAP 18.9.

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The trial court properly exercises its discretion when it accounts for the possibility of post-judgment and appellate attorney fees and costs. *IBEW Health & Welfare Tr. of Sw. Washington v. Rutherford*, 195 Wn. App. 863, 867, 381 P.3d 1221 (2016). In *IBEW Health*, IBEW estimated the amount of supersedeas bond necessary to be $96,874.39, which included the judgment of $57,141.69; post-judgment interest to the time of the trial court hearing of $11,854.16; an additional year of post-judgment interest until the appellate decision of $6,875.79; post-judgment attorney fees, costs and, expenses of $11,002.75; and attorney fees, costs, and expenses likely to accrue on appeal of $10,000.00. IBEW suggested that the trial court round up to $100,000, leaving the exact amount to the trial court's discretion. 195 Wn.App at 866-867. The court recognized that these amounts are subjective and rounded the supersedeas amount up to $100,000, which was upheld on appeal.

Here, the city has already incurred an additional $18,353.88 on appeal in June – August 2024 (not including work in progress not yet billed to the City). Myers Decl. at 1:26. It expects to incur an additional $25,000 in attorney's fees to contest this appeal, which is likely to go through the Washington Supreme Court. *Id.* at 2:4-8. These are conservative figures for carrying through the case to its ultimate conclusion.

Following the *IBEW Health* approach, the Court should set the supersedeas bond to include the following as amounts under the first clause of RAP 8.1(c)(2):

Attorney's fees to obtain dissolution of TRO in trial court:	$13,003.00
Attorney's fees to date (June-August) on appeal:	$18,353.88
Future Estimated Attorney's Fees on appeal:	$25,000.00
Post judgment interest (one year) on trial court fees:	$ 1,560.36
TOTAL ATTORNEY'S FEES AND INTEREST	**$ 57,917.24**

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Consistent with the approach used in the *IBEW Health* case and recognizing the subjective nature of the costs to be expected on appeal, the City requests that the Court require an amount of $58,000.00 to cover the amount of the judgment, attorney's fees and future expected fees on appeal, plus applicable interest. This is the first component of the supersedeas bond amount under RAP 8.1(c)(2).

B. THE COURT SHOULD INCLUDE A SUBSTANTIAL BOND TO PROTECT THE CITY AGAINST THE CONSEQUENCES OF BEING UNABLE TO SAFEGUARD ITS RIGHT OF WAY AGAINST A KNOWN HAZARD.

In addition to the figure needed to supersede judgments for attorney's fees RAP 8.1(c)(2) adds the amount of the loss that a party would be entitled to recover as a result of its inability to enforce the trial court's judgment. This amount is substantial as the tree in question has been identified as a known hazard that the City is obligated to protect the users of Old Highway 99 against. The plaintiffs sought to prevent the City from doing so by seeking an injunction without any bond or other financial security, even though the injunction statute and CR 65 required otherwise. This court should correct that error and protect the City from loss that it would incur if it cannot remove a known hazard from its right of way.

This case is not unique and many government agencies face liability claims when trees fall and injure members of the public traveling on the right of way that the agency is obligated to make safe. The City has a clear duty to remedy a known hazard in the right of way and would be clearly liable for anyone injured by falling limbs or trees that are not removed. *Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962). Plaintiff dismisses this substantial liability out of hand by seeking to relitigate the arguments that the Court has already rejected.

Plaintiff also points to factors outside this litigation that involve possible need for permits from DAHP for modifying an "archeological object". First, this claim is not what the plaintiffs relied upon to obtain the wrongfully issued TRO, as the Complaint did not make any claim concerning RCW 27.53.

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Second, it was not properly before the Court when it dissolved the TRO. Third, the plaintiff does not have standing to enforce any requirement to seek a permit from DAHP, who is not a party here. Fourth, plaintiff misstates the law, averring that DAHP has determined the tree may not be cut down. That is not what they said. They said it requires a permit to do so. Fifth, and most significantly, the Court has already rejected the argument that the statute is applicable here, because the tree is not an "archeological object".

The position that the tree is an archeological object is inconsistent with the definitions in DAHP's governing statute, RCW 27.53. As defined by the Act, "'Archaeology' means "systematic, scientific study of humankind's past through material remains." RCW 27.53.030(4). This is in accordance with the Merriam Webster Dictionary's definition of "archaeology" as "the scientific study of material remains (such as tools, pottery, jewelry, stone walls, and monuments) of past human life and activities." Thus, the Act's application applies to "resources" or "objects" that are "archaeological" or relating to "archaeology." An ""Archaeological object" is an object that comprises "the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products." The Davis Meeker Oak is not an archaeological site because it is not the "remains of past human activity or culture", but rather a naturally occurring organism. Thus, definitionally the Davis Meeker Oak is beyond the scope of RCW 27.53.060 which applies only to "archaeological" resources. [1]

Any supersedeas bond should necessarily account for the liability the city could incur if prevented from protecting the public in the adjacent right of way. Recent claims involving a tree falling on a passing motorist in Cowlitz County have been filed seeking over $11,000,000.00 in damages for a single fatality

[1] This was explained to DAHP by the City's June 28 letter, which plaintiff did not provide to the court. Myers Declaration, Exhibit A

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from a falling tree. Myers Declaration, Exhibit B. This is consistent with the estimates of possible liability provided by Mayor Sullivan's May 24, 2024 declaration.

The amount of the supersedeas bond should be the amount of the judgment, attorney's fees and applicable interest, "plus 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 judgment during review." RAP 8.1(c)(2). This amount should be $10,000,000.00 to protect the City from claims that would arise if it cannot address the hazards presented in its right of way.

IV. CONCLUSION

The Court should require a total supersedeas bond in the amount of $10,058,000.00 to cover the amount of the attorney's fees incurred to dissolve the TRO, applicable interest, fees on appeal and to safeguard the City's taxpayers against liability created by plaintiff's wrongfully seeking to enjoin the City from fulfilling its duty to protect the traveling public from a known hazard tree.

Dated this 3rd day of September, 2024.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I caused to be electronically filed the foregoing document, and this Certificate of Filing & Service, and have mailed a copy of this filing to the following parties via email per service agreement:

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DATED this 3rd day of September, 2024, at Tumwater, WA.

/s/ Tam Truong
Tam Truong, Legal Assistant

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