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

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES

I. INTRODUCTION

Plaintiff Save the Davis-Meeker Garry Oak ("SDMGO") opposes the Mayor of Tumwater's motion to recover more than $13,000.00 in attorney's fees incurred by her private attorney (herein, "Mot."). The fees were due to the mayor opposing a temporary restraining order ("TRO") that SDMGO obtained on Friday, May 24, 2024. The TRO was issued on an emergency basis to stop the mayor from having an historic, 400-year old oak tree known as the Davis Meeker oak surreptitiously cut down over the Memorial Day weekend—a plan which SDMGO's attorney found out about only twelve hours before the TRO was issued. The Davis Meeker oak is listed as an historic property on the City of Tumwater's Register of Historic Places and is of immeasurable

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

cultural value to the surrounding community and tribal members (several of whom are also members of SDMGO).

Although the mayor claims that this Court wrongfully granted the TRO, state law already prohibited the mayor from having the Davis Meeker oak cut down, as it is a protected archeological resource under Washington's Archeological Sites and Resources Law at chapter 27.53 RCW. As the Washington Attorney General's Office and Department of Archaeology and Historic Preservation ("DAHP") have now repeatedly informed the mayor, under state law, if the mayor alters or harms the tree in any way, then (a) she will be committing a crime, and (b) "DAHP will issue penalties against the City to the maximum extent allowed by law pursuant to RCW 27.53.095 and WAC 25-48-041." (Supp. Decl. Telegin, Ex. F & Ex. G at 1.) Because the mayor was already prohibited by state law from harming the tree, the TRO did nothing to alter the status quo. The mayor is not entitled to attorney fees for fighting a TRO that prevented her from doing precisely what she was already prohibited from doing under state law.

Additionally, the mayor's motion fails on the because the equitable rule that she relies upon for a fee award does not apply when a TRO is the only relief available to a plaintiff to preserve the fruits of a lawsuit. The TRO was not procedurally flawed. Moreover, the mayor's request for attorney fees seeks compensation for time that is not recoverable, and the motion is based on excessively block-billed time entries. For all of these reasons, this Court should deny the motion for fees.

II. EVIDENCE RELIED UPON

This motion relies on the pleadings and filings herein, including the following declarations:

- Declaration of Bryan Telegin in Support of Plaintiff's Motion to Set Amount of Supersedeas Bond (Aug. 12, 2024) ("Telegin Decl.");

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

- Supplemental Declaration of Bryan Telegin in Support of Plaintiff's Motion to Set Amount of Supersedeas Bond (Aug. 14, 2024) ("Supp. Telegin Decl.");
- Declaration of Ronda Larson Kramer in Response to Defendant's Motion for Attorney Fees (September 3, 2024) ("Larson Kramer Decl.");
- Declaration of Ronda Larson Kramer re. Supplemental Response to Motion to Dissolve TRO (May 30, 2024) ("Suppl. Larson Kramer Decl.");
- Declaration of Tanya Nozawa in Support of Petition for Temporary Restraining Order (May 24, 2024) ("Nozawa Decl.").

III. BACKGROUND

On May 16, 2023, the Davis Meeker oak dropped a branch. (Larson Kramer Decl., Ex. C (work order detail).) Later that year, the city's arborist, Kevin McFarland, asked Tree Solutions to help him perform a risk assessment on the tree. (Declaration of Debbie Sullivan, Ex. 1 at 12 (memo to Kevin McFarland from Tree Solutions) (May 24, 2024).) Tree Solutions concluded that the tree has "more sound wood" than is needed to support the tree structurally and that the tree can be managed as a veteran tree. *Id*.

However, McFarland's final report recommended removal of the tree. (*Id*., Ex. 1 at 5). The owner of Tree Solutions, board certified master arborist Scott Baker, disagreed so strongly with McFarland's recommendation that Baker wrote an email to the assistant city attorney to say that the final report was "an embarrassment to all knowledgeable arborists," that the tree "has a full and vigorous canopy," and inviting the city to "[p]lease give me a call if you are interested in learning more about tree risk assessment." (Larson Kramer Decl., Ex. E). Baker wrote his email soon after the mayor initially made public her plan to have the tree removed.

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

Notwithstanding the lack of credibility of the risk assessment performed by the city's arborist, a member of SDMGO learned on Thursday, May 23, 2024, that they mayor had directed the tree to be cut down "during the Memorial Day weekend when everyone was out of town." (Nozawa Decl., ¶ 6). Working quickly to stop the mayor from destroying the tree, on Friday morning, May 24, 2024, at 8:00 a.m., SDMGO's attorney called the direct line of the city attorney for the City of Tumwater and left a message that she was filing a motion for a TRO "today" to prevent the mayor from having the Davis Meeker oak cut down over the weekend. (Larson Kramer Decl., ¶ 2). SDMGO's attorney learned of the mayor's plan to have the tree surreptitiously cut down over the Memorial Day weekend only twelve hours before seeking a TRO. (Larson Kramer Decl., ¶ 5.)

After SDMGO notified the city attorney that it was going to seek a TRO, the Honorable Sharonda D. Amamilo granted an emergency *ex parte* TRO enjoining the mayor from cutting the tree down. (Order Granting Temporary Restraining Order (May 24, 2024)). Had the TRO not been granted that day—Friday, May 24, 2024—the tree would have been cut down that very weekend. The entire lawsuit would have been rendered moot.

Several hours after the TRO was granted, the mayor's attorney called SDMGO's attorney's receptionist around 3:07 p.m. and left a message that he would be filing a motion to dissolve the TRO. He did not give a date, time, or place for when he planned to do this. (Larson Kramer Decl., Ex. A (phone message).) Half an hour later, at 3:37 p.m., the mayor's attorney sent an email to SDMGO's attorney containing a motion to dissolve the TRO. (Larson Kramer Decl., Ex. B (e-mail from Jeff Myers).) That motion alleged numerous procedural irregularities in the granting of the emergency TRO by Judge Amamilo. The first page of that motion also stated falsely that the tree had dropped a branch in February 2024, creating an alleged safety hazard which required the tree

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

to be immediately removed. In reality, the branch had fallen a year earlier, on May 16, 2023. (Larson Kramer Decl., Ex. C (work order detail).) Thus, there was no emergency requiring the tree to be cut down immediately and secretly over the Memorial Day weekend.

The email from the mayor's attorney to SDMGO's attorney stated at the top that he was asking this Court for an emergency hearing to vacate the TRO. (Decl. Larson Kramer, Ex. B.) In a less noticeable part of his email, he wrote that he was requesting a hearing that same day at 4:00 p.m. This meant the hearing would have been 23 minutes after he sent that email. However, this Court's local rules do not allow *ex parte* hearings on demand. *See* LCR 7(b)(1)(B).

A few minutes later, the Court emailed the mayor's attorney to inform him—consistent with the local rules—that the Court would not be granting his request for a hearing that day, and that he should call the Court's *ex parte* phone line between 8:30 a.m. and 9:00 a.m. if he desired an emergency hearing. (Larson Kramer Decl., Ex. D (e-mail from Court).)

The next week, on Tuesday, May 28, 2024, although it had been over a year since the branch had dropped, this Court set the mayor's motion to dissolve the TRO for a hearing three court days later, on Friday, May 31, 2024. (*See* Defendant's Emergency Motion to Dissolve Temporary Restraining Order (May 24, 2024); Order Setting Hearing on Motion to Dissolve TRO (May 28, 2024).) At the conclusion of that hearing, the Court granted the mayor's motion but stayed the effective date of the TRO dissolution until June 5, 2024 "[t]o ensure a meaningful right of appeal." (Order Granting Mot. to Dissolve TRO (May 31, 2024).) The mayor's attorney did not object to this short extension of the TRO until June 5th.

Neither this Court's written order nor the attached transcript of this Court's oral ruling found any procedural irregularities in Judge Amamilo's emergency granting of the TRO.

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

Instead, this Court rejected SDMGO's argument that the mayor could not cut the tree down without permission from the Tumwater Historic Preservation Commission. On that issue, the mayor's attorney argued, without citation to authority, that the city's Historic Preservation Ordinance, chapter 2.62 of the Tumwater Municipal Code ("TMC"), "does not apply because a tree is not a structure. And the definition of structure applies to man-made constructs, not trees." (Decl. Telegin, Ex. A at 13.) This Court appears to have adopted that same reasoning in its order dissolving the TRO. (*Id*. at 14–15).

However, as discussed in SDMGO's pending Motion to Set Amount of Supersedeas Bond, the mayor's argument is false. The city's Historic Preservation Ordinance applies not just to "structures." Rather, the plain language of that ordinance protects all "properties" listed on the City's Register of Historic Places, as plainly stated at TMC 2.62.060:

> No person shall . . . alter, restore, remodel, repair, move, or demolish any existing ***property*** on the Tumwater register of historic places . . . without review by the commission and without receipt of a certificate of appropriateness, or in the case of demolition, a waiver, as a result of the review.

RMC 2.62.060 (emphasis added). The Davis Meeker oak is one such property listed on the register. It may not be cut down without the prior approval of the Tumwater Historic Preservation commission.

Nor does the definition of "structure" apply only to "man-made constructs," as the mayor's attorney asserted without citation to authority. Instead, the definition of that term in the city's Historic Preservation Ordinance provides that structures are "***[g]enerally*** constructed by man," not that they are *always* constructed by man. TMC 2.62.030.W (emphasis added). This allows even natural objects like trees to fall within the ambit of that term.

At the hearing to dissolve the TRO in May 2024, this Court also rejected SDMGO's argument that Washington's Archaeological Sites and Resources Law (chapter 27.53 RCW) prohibits the mayor

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

from harming the tree. However, this Court acknowledged that its ruling was based on a "quick look at that statute." (Decl. Telegin, Ex. A at 15.)

In contrast, the Washington Attorney General's Office and DAHP—the expert state agency charged with administering Washington's Archaeological Sites and Resources Law—have now had an opportunity to take a much deeper look at the tree's protection under state law. Both have now repeatedly informed the mayor that the Davis Meeker oak is, in fact, an archaeological resource protected by state law; if the mayor harms the tree, she will be committing a crime; and if she does harm the tree, then "DAHP will issue 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 & Ex. F at 1; Supp. Larson Kramer Decl., Ex. A.)

The Washington Attorney General's Office has also informed the mayor that "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." (Supp. Decl. Telegin, Ex. G at 2.) Under Washington law, DAHP's interpretation of Washington's Archaeological Sites & Resources Law, and of DAHP's own regulations implementing that law, are entitled to substantial deference. *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.,* 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.").

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

In summary, the TRO at issue in the mayor's fee motion was sought and granted on an emergency basis, only twelve hours after SDMGO's attorney learned of the mayor's plan to have the Davis Meeker oak cut down over the Memorial Day weekend. Had the mayor succeeded in having the tree cut down over the weekend, then she would have completely destroyed the very thing this lawsuit seeks to protect, rendering any further proceedings entirely fruitless. Had the mayor cut the tree down, she also would have committed a crime and would have subjected the City of Tumwater to substantial civil penalties and site restoration costs under Washington's Archaeological Sites and Resources Law.

III. ARGUMENT

A. The equitable rule that the mayor relies on does not apply when a TRO is necessary to preserve the very fruits of a lawsuit.

The mayor seeks $13,003.00 in fees for work performed by her private attorney dissolving the emergency TRO, citing the rule that "[o]n equitable grounds, a party may recover attorney's fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order." (Mot. at 4 (citing *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 247 (1981)).) The mayor notes that the purpose of this rule is to "deter plaintiffs from seeking relief prior to a trial on the merits." (*Id*. at 5:11–12 (citing *Ino Ino Inc. v. City of Bellevue*, 132 Wn.2d 103, 143 (1997).) But that is an incomplete statement of the law, and a contortion of the reason behind the rule.

While the purpose of the equitable fee-shifting rule cited by the mayor is, indeed, to "encourage plaintiffs to prove the merits of their cases before seeking relief," *Quinn Const. Co. LLC v. King Cnty. Fire Prot. Dist. No. 36*, 111 Wn. App. 19, 36 (2002), it is equally true under Washington law that this purpose is not served by punishing a plaintiff for seeking the only relief available to preserve the fruits of his or her lawsuit—namely, to prevent the very harm the lawsuit seeks to avoid.

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

In *Confederated Tribes of Chehalis Reservation v. Johnson*, the defendant had unsuccessfully sought a fee award after the court dissolved a TRO that the plaintiff obtained to prevent dissemination of public records. Although the plaintiff's TRO was dissolved, the Supreme Court held that it was appropriate to deny the defendant's fee request because seeking a TRO was the *only* way for the plaintiff to prevent the very harm that lawsuit sought to avoid. Had a TRO not been sought, the documents would have been disseminated, and the lawsuit "would have been fruitless." 135 Wn.2d 734, 758 (1998). Thus, the Court explained, the "purpose" of the fee-shifting rule "would *not* be served where injunctive relief prior to trial is *necessary* to preserve a party's rights pending resolution of the action." *Id*. (emphasis added).

Similarly, in *Quinn*, the Court of Appeals upheld the denial of a fee request where the injunction "was not only necessary to preserve any rights [the plaintiff] might have; it was the only relief available to [the plaintiff]." *Quinn*, 111 Wn. App. at 35. Echoing the Supreme Court's ruling in *Johnson*, the Court explained that while the purpose of the rule allowing fees for wrongful injunctions is to encourage plaintiffs to prove their cases before seeking relief, "***[t]hat purpose would not be served by deterring plaintiffs from seeking the only relief available to them under the law.*** *Id.* Thus, the fee request was appropriately denied; requesting a TRO was the only means available to the plaintiff to prevent the very harm the lawsuit sought to enjoin.

Like the injunctive relief at issue in *Johnson* and *Quinn*, the *only* way for SDMGO to preserve the fruits of this case was to seek an emergency TRO to prevent the mayor from cutting down the Davis Meeker oak. It was not until the Thursday before the Memorial Day weekend that SDMGO discovered that the mayor intended to have the tree cut down that very weekend. If the TRO had not been issued on an emergency basis, the tree would be gone and the entirety of this lawsuit would have been rendered moot; the very thing this lawsuit aimed to protect would have

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

been obliterated. As in *Johnson* and *Quinn*, the mayor's fee request should be denied, because the purpose underlying the equitable fee-shifting rule "would not be served by deterring [SDMGO] from seeking the only relief available to [it] under the law." *Quinn*, 111 Wn. App. at 35.

Just as in *Johnson* and *Quinn*, forcing SDMGO to bear the burden of the mayor's defense would serve no equitable purpose. The Court should deny the mayor's request for $13,003.00 in attorney's fees.

B. An award of attorney's fees would not be equitable because the mayor comes to this Court with unclean hands.

SDMGO also submits that it would be inequitable to grant the mayor's motion when the mayor herself has been put on repeated notice by the Washington Department of Archaeology and Historic Preservation, and by the Washington Attorney General's Office, that cutting down the Davis Meeker oak without a permit from DAHP would constitute a criminal violation of Washington's Archaeological Sites & Resources Law at chapter 27.53 RCW.

In its letter of May 30, 2024, DAHP first stated its determination that the tree is a protected archaeological resource under state law. SDMGO submitted that letter to this Court that same day and also and served it on the mayor's attorney that same day. (Larson Kramer Decl., ¶¶ 11-12; Supp. Larson Kramer Decl., Ex. A.) This was the day before the May 31, 2024 hearing on the TRO. DAHP wrote in that letter that cutting the tree down without a state permit "is a misdemeanor and may result in civil penalties of not more than five thousand dollars per violation, reasonable investigative costs, and site restoration costs." (Supp. Larson Kramer Decl., Ex. A at 1.)

On June 4, 2024, DAHP wrote directly to mayor, informing her that "[u]nder RCW 27.53.060, the Tree cannot be knowingly removed, altered, dug into, excavated, damaged, defaced, or destroyed without the City of Tumwater first obtaining a permit from DAHP to do so"; that "[f]ailure to obtain a permit from DAHP prior to removing, altering, digging into, excavating, damaging, defacing, or

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

destroying the Tree will result in penalties from DAHP pursuant to RCW 27.53.095"; and that "[a] violation of Chapter 27.53 RCW is a misdemeanor." (Supp. Telegin Decl., Ex. F at 1.)

On July 11, 2024, the Washington Attorney General's Office wrote directly to the mayor's private attorney. The Assistant Attorney General refuted the spurious arguments of the mayor's attorney who was contesting DAHP's determination. The AAG informed the mayor's attorney that DAHP has always interpreted Washington's Archaeological Sites and Resources Law (and its own regulations) as protecting historic trees. The AAG further informed the mayor's attorney that if the tree is cut down without a permit, "DAHP will issue penalties against the City to the *maximum extent allowed by law* pursuant to RCW 27.53.095 and WAC 25-48-041." (Supp. Decl. Telegin, Ex. G at 1 (emphasis added).)

"It is a well-known maxim that a person who comes into an equity court must come with clean hands." *Income Investors v. Shelton*, 3 Wn.2d 599, 602 (1940). Here, the mayor claims an "equitable" right to recoup $13,003.00 in attorney's fees for her private attorney, for work dissolving the emergency TRO. Yet, ever since May 30, 2024, the mayor has been on clear notice by DAHP—and now by the Washington Attorney General's Office—that she has no legal authority to cut the tree down without a permit under Washington's Archaeological Sites and Resources Law. She has been on notice that cutting the tree down is a crime. She has been on notice that doing so would subject the City of Tumwater itself to substantial civil penalties, imposed "to the maximum extent allowed by law." The mayor has not come to this Court with clean hands. Even having defeated the emergency TRO, she still has no legal authority to cut down the historic Davis Meeker oak. For this reason, too, the mayor's motion should be denied in its entirety.

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

C. The Mayor's Procedural Claims Lack Support and Are Without Merit.

The mayor claims the "highly irregularly [*sic*] TRO lacked proper notice." (Mot. at 5.) But she fails to explain this statement in either the motion or in her attorney's supporting declaration. As discussed above, city attorney received notice of the TRO in advance. It also is unclear what the mayor means when she states that the TRO was highly irregular. Her pleadings do not explain that allegation.

If the mayor means to say that the TRO was irregular in that it was obtained *ex parte* on short notice, there is nothing irregular about that. Indeed, RCW 7.40.050 authorizes the Court to grant a TRO, even with zero notice, in cases of emergency.[1] Here, the rushed timeline was of the mayor's own making as she was attempting to have the historic tree cut down secretly before anyone could stop her, over the Memorial Day weekend, constituting a true emergency. It was only because SDMGO learned of her plans at the last minute and obtained a TRO that the tree survived the weekend. One cannot hide one's actions from the public and then complain that someone else was in the wrong for having found out in the nick of time.

Next, the mayor claims that the TRO was deficient because no bond was required. (Mot. at 5.) CR 65(c) provides that "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." But the mayor would not incur any costs or damages for being wrongfully restrained because she was already restrained by the requirement to obtain a permit from DAHP. The TRO was not changing the status quo from a legal standpoint.

[1] RCW 7.4.050 provides: "No injunction shall be granted until it shall appear to the court or judge granting it, that some one or more of the opposite party concerned, has had reasonable notice of the time and place of making application, *except that in cases of emergency to be shown in the complaint*, the court may grant a restraining order until notice can be given and hearing had thereon" (emphasis added).

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

Moreover, the amount of a bond is discretionary with the Court. RCW 4.44.470; *Fischer v. Parkview Properties*, 71 Wn. App. 468, 480 (1993). Here, nothing would have prevented Judge Amamilo from setting the bond at a nominal amount—thus, the Mayor can hardly claim prejudice from the lack of a bond.

The mayor next claims the TRO provided no hearing date to consider a preliminary injunction. (Mot. at 5.) This issue is moot. It became irrelevant when this Court's order on May 31, 2024, dissolved the TRO one week after it was issued.

The mayor also argues that the TRO did not include factual findings and did not state the basis for its issuance. (Mot. at 5.) "Procedural due process is contextual. Here, context is crucial." *In re Estates of Smaldino*, 212 P.3d 579, 151 Wn. App. 356, 372 ¶ 43 (2009). Just as in *Smaldino*, "[o]n this record, there can be no question that both the nature of the alleged injury and the reason it was deemed irreparable were plainly apparent" to the mayor "and her attorney." *Id*., ¶ 45. The mayor was not "deprived of due process by the court's failure to spell out the obvious in its order." *Id*. It was obvious that the tree was going to be cut down if a TRO was not granted, and if the tree was cut down, that would remove all opportunities for SDMGO to receive relief in the future.

The mayor's procedural claims lack support and are without merit. For this reason, too, the Court should deny the mayor's fee motion.

D. The time records submitted by the mayor's private attorney are excessively block-billed and seek reimbursement for unrecoverable work that post-dates this Court's dissolution of the TRO.

Finally, should this Court entertain the mayor's motion despite the equitable problems discussed above, the time records submitted by the mayor's attorney are both excessive and excessively block-billed.

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

First, at a macro-level, the time records are nearly 100-percent block-billed, with numerous tasks grouped together into a single large time entry encompassing several hours or a whole day. This is true of virtually every time entry in Exhibit 2 to the Myers declaration, in which Mr. Myers consistently "blocks" up to ten discrete tasks into a single, multi-hour time-unit of up to seven or more hours. Of all the time entries in Exhibit 2 to the Myers declaration, only three are not block-billed—the final entry on June 17, 2024 for 0.1 hours of work; an entry on May 31, 2024 for 1.7 hours of work; and an entry on May 30, 2024 for 0.2 hours of work. The rest of the entries provide zero basis for the Court to judge the reasonableness of time spent on any particular task.

As the Washington Court of Appeals has held, the practice of block-billing deprives the reviewing court of its ability to assess the reasonableness of time spent on any one task. Block-billed entries should be, therefore, significantly reduced. *Berryman v. Metcalf*, 177 Wn. App. at 644, 663-64 (2013); *Welch v. Metropolitan Life Ins. Co.,* 480 F.3d 942, 948 (20% reduction of block-billed time entries appropriate). Here, the block-billed entries account for $12,614.00 of the $13,003.00 requested in the mayor's motion. Those entries should be reduced by at least 20 percent (to $10,091.20), reducing the total fee requested to $10,480.20. The mayor may be content to pay large sums for block-billed time entries. She should not be allowed to pass that loss on to SDMGO in the guise of equity.

In addition, the fee request includes time spent on tasks that clearly are not compensable under the equitable rule cited in the mayor's motion. The cases on which the mayor relies are abundantly clear that even when fees are awarded for dissolving a TRO, they are only available for work performed "up to the date on which a wrongfully issued restraining order is dissolved." *Ino Ino Inc., supra*, 132 Wn.2d at 144. More specifically, "[t]he point at which the wrongfully issued court order is dissolved *is the point at which attorney's fees cease to be recoverable*." *Ritchie v.*

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

Markley, 23 Wn. App. 569, 575 (1979) (emphasis added). *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).[2]

Under this rule, attorney's fees ceased to be recoverable once this Court issued its order dissolving the TRO on May 31, 2024. Yet, the time entries in Exhibit 2 to the Myers declaration encompass a total of 14.3 hours ($3,572.00) for work performed *after* that time on issues pending before the Washington Court of Appeals, and even the United States District Court for the District of Washington. Even the time entries for May 31, 2024 referencing work at the hearing appear also to include work performed *after* this Court issued its ruling (*e.g.,* for reviewing news articles and transcripts). Not only is this time not compensable under the equitable rule cited in the mayor's motion, the mayor cites no legal authority enabling this court to award fees for work performed in other judicial forums.

Even if this Court were inclined to entertain the mayor's fee request—despite the serious equitable problems discussed above, (a) all time post-dating the Court's order dissolving the TRO should be excluded (reducing the fee award from $13,003.00 to $8,927.00), and (b) the remaining time entries should be reduced by at least 20 percent to account for the mayor's private attorney's excessive block-billing, reducing the award further to no more than $7,141.60.

/ / /

/ / /

[2] Nor will fees be available on appeal in this case, contrary to what Mr. Myers asserts (without authority) in his declaration. *Compare* Myers Decl., ¶ 10 (asserting that an additional $18,353.88 would "reasonably be awarded to the City if it prevails on appeal") *with Ino Ino Inc., supra,* 132 Wn.2d at 144 (Court of Appeals "allow[s] recovery for attorneys' fees incurred at the appellate level only when . . . necessary to dissolve a currently effective temporary restraining order"). Here, where there is no "currently effective temporary restraining order," the mayor will not be entitled to collect any fees for her private attorney on appeal.

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

IV. CONCLUSION

The mayor's Motion for Attorney's Fees should be denied. The TRO was necessary to prevent the destruction of the very thing this lawsuit seeks to protect—the Davis Meeker oak—and the mayor comes to this Court with unclean hands, having been told repeatedly by the Washington Attorney General's Office and DAHP that the tree may not be cut down without a state permit. If the motion is entertained at all, the fee award should be no more than $7,544.80.

A proposed order is submitted herewith.

Dated this 3rd day of September, 2024.

TELEGIN LAW PLLC

By: _____
Bryan Telegin, WSBA No. 46686

LARSON LAW, PLLC

By: _____
Ronda Larson Kramer,
WSBA No. 31833

Attorneys for Plaintiff Save the Davis-Meeker Garry Oak

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2024, I caused to be served a true and correct copy of the foregoing Plaintiff's Response to Defendant's Motion for Attorney's Fees on each of the persons and in the manners listed below.

Jeffrey Scott Myers
Jakub Lukasz Kocztorz
Law Lyman Daniel Kamerrer et al
PO Box 11880
2674 R W Johnson Blvd SW
Olympia, WA 98508-1880
jmyers@lldkb.com
jmyers@lldkb.com
Attorneys for Defendant Debbie Sullivan
Via e-mail to jmyers@lldkb.com, jkocztorz@lldkb.com, lisa@lldkb.com, & tam@lldkb.com

Ronda Larson Kramer
Larson Law PLLC
Of Attorneys for Plaintiff Save the Davis-Meeker Garry Oak
Via email to ronda@larsonlawpllc.com

Dated: September 3, 2024

TELEGIN LAW PLLC

By: _____
Bryan Telegin, WSBA No. 46686
Counsel for Plaintiff Save the Davis-Meeker Garry Oak

Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Tel. (206) 453-2884