❑ **EXPEDITE**
❑ **Hearing is set:**
Date: 5/31/2024
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

REPLY IN SUPPORT OF MOTION TO DISSOLVE EX PARTE TEMPORARY RESTRAINING ORDER

I. A TRO ISSUED WITHOUT NOTICE IN VIOLATION OF CR 65 IS VOID

When a party obtains a temporary restraining order, the moving party must provide notice or, if it is sought ex parte, must certify to the court the efforts made to notify the adverse party and certify the reasons why such notice should not be required. CR 65(b). As early as 1900, the Washington Supreme Court held in *In re Groen*, 22 Wash. 53, 56, 60 P. 123 (1900), that these prerequisites exist to ensure that parties are afforded minimum due process protections.

The United States Supreme Court said much the same in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County,* 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974), stating the "stringent restrictions imposed [by Federal Rules of Civil Procedure Rule 65(b)] on the availability of ex parte temporary restraining orders reflect the fact

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *In re Estates of Smaldino*, 151 Wn. App. 356, 368, 212 P.3d 579, 585 (2009). Because CR 65(b) was modeled on the federal rule, Washington courts look to federal decisions for guidance in construing it. *See Bryant v. Joseph Tree, Inc.,* 119 Wash.2d 210, 218–19, 829 P.2d 1099 (1992).

Plaintiff here disregarded the minimum dictates of due process and obtained a temporary restraining order without notice to the City, and without certifying the reasons why such notice should not be required. In these circumstances, the TRO is void. *In re Estates of Smaldino*, 151 Wn. App. 356, 367–68, 212 P.3d 579, 584–85 (2009); *Dep't of Labor & Indus. v. Fowler*, 23 Wn. App. 2d 509, 532, 516 P.3d 831, 844 (2022), *review denied,* 200 Wn.2d 1027, 523 P.3d 1184 (2023).

The plaintiff's paltry efforts here to provide notice were not described in her declaration. Indeed, there was no motion for a TRO to inform the ex parte judge as to the legal requirements of CR 65 or RCW 7.40.050. Her phone message stated only the fact that she would be seeking a TRO about the Meeker tree. It failed to provide "reasonable notice of the time and place of making application", as required by RCW 7.40.050. Her declaration contains a single conclusory paragraph stating that she left a voicemail that she was filing a lawsuit and motion for TRO. No such motion was actually filed. Her declaration did not certify "the reasons supporting the applicant's claim that notice should not be required" as it is required to do under CR 65(b).

The failures to address the requirements of CR 65(b-d) here is comparable to In *Renner v. Williams,* 140 Colo. 432, 344 P.2d 966 (1959) where the Colorado Supreme Court set aside a contempt order, holding that the underlying ex parte restraining order was "completely devoid of virtually all of the requirements of [Colorado Rule of Civil Procedure] 65(b), (c), and (d)." The order did not set a time

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
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for its expiration or a date for hearing, did not define the injury or state why it was irreparable, did not give the reason for issuance without notice, and did not require any security. The court stated, without elaboration, citation or analysis, that "[a]ny one of the deficiencies noted was sufficient to render the order a nullity." *Id*. at 967. The only discussion in the opinion, however, related to case authority that failure to require the giving of security renders an ex parte order void. This case was cited with approval by the Washington Court of Appeals in *In re Estates of Smaldino*, 151 Wn.App.at 368-369.

Likewise, in 39 *American Can Co. v. Mansukhani,* 742 F.2d 314 (7th Cir.1984), the Seventh Circuit came to a similar conclusion. There, a TRO was improperly issued ex parte (there was no proof that notice could not be given or that notice would have rendered fruitless the further prosecution of the action). Like the TRO issued in this case, the order in *American Can* failed to define why the order was granted without notice. *Id.* at 322-23. The court explained the significance of these requirements, stating:

> The specific requirements of Rule 65(b) are not mere technical legal niceties. They are strongly worded, mandatory provisions which should be respected. They are not meaningless words. A temporary injunction can be an extremely powerful weapon, and when such an order is issued ex parte, the dangers of abuse are great. Because our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute, the procedural hurdles of Rule 65 are intended to force both the movant and the court to act with great care in seeking and issuing an ex parte restraining order. This court has said that Rule 65(d) with its companion requirements is no mere extract from a manual of procedural practice. It is a page from the book of liberty. The same is true for the Rule 65(b) requirements for ex parte temporary restraining orders where the dangers of abuse are especially great.

Id. at 324–25.

The *ex parte* TRO secured by Plaintiffs in this case violates the same precepts that the *In re Smaldino* Court relied upon. As observed in *In re Smaldino:*

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
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> An ex parte restraining order is indeed a powerful weapon, to be issued rarely and with great caution. Such orders are in tension with a first principle of our jurisprudence: that court action should follow, not precede, notice and opportunity to be heard.

151 Wn.App. at 371.

Likewise, this court should vacate the improperly obtained TRO which failed to comport with CR 65 in violation of the due process protections it provides against ex parte restraining orders.

II. THE TRO FAILED TO PROVIDE SECURITY REQUIRED BY CR 65.

Furthermore, the TRO failed to provide mandatory security for the protection of the enjoined party if the injunction is wrongful. CR 65 requires that unless otherwise provided by statute, 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. Here, the City faces enormous liability in being unable to remove a known dangerous tree from the City's right of way, as mandated by its duties to keep streets safe for the public. 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, 489 (1962).

Anyone who is injured because the City is so enjoined could recover millions. The TRO is required to address security for that contingent liability and failed to do so. Plaintiffs dismiss these concerns and do not cite any law in support of their position. They claim that the tree is not an imminent threat and therefore no bond is warranted. They falsely allege that the City has claimed it is an "emergency" and that the city may lose insurance coverage. Response at 5:18. The City's motion does not make these assertions, but instead, the City provided Mayor Sullivan's Declaration stating that its insurer has informed the City that the amount of such liability could exceed $10 million. Sullivan Decl.,

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
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at 2:19. This evidence was not rebutted by Plaintiff's response. The issue in requiring a bond is to protect against liability or damages that could occur if the TRO is wrongful. This includes the liability for injuries that the City cannot now prevent because of the wrongful TRO, which are reasonably estimated to be multiple millions of dollars.

If someone is hurt or killed by falling limbs, the City will be liable. The bond is the City's protection and only recourse against the plaintiff, in the event that the City's arborist is correct in his observations and tests showing the tree to be hazardous, and plaintiff's experts prove wrong. *Fisher v. Parkview Properties, Inc.*, 71 Wn. App. 468, 478, 859 P.2d 77, 83 (1993).

If the Court does not dissolve or void the TRO as improperly issued without notice, the Court must establish security to safeguard against the liability it threatens to impose upon the City if there is a recurrence of the previous failures of the Davis-Meeker Garry Oak. At a minimum, the court should require a $10 million bond to protect the City against potential liability for being unable to remove a known hazard from the right of way.

III. PLAINTIFFS HAVE FAILED TO SHOW ENTITLEMENT TO A TRO

A. PLAINTIFFS CONCEDE THAT THERE IS NO RIGHT OF ACTION UNDER THE MIGRATORY BIRD TREATY ACT.

Plaintiffs use the Migratory Bird Treaty Act as a basis for the TRO. Their complaint concedes that the statute provides only criminal enforcement remedies, not a private right of action. They seek to overcome this by bootstrapping a claim under the Administrative Procedures Act. This does not provide a right to relief against the City of Tumwater. The City is not a federal agency subject to the Administrative Procedures Act. Thus the cases cited in the complaint are not applicable and are distinguishable. See Complaint at 5, n.8.

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
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2674 R.W. JOHNSON RD. TUMWATER, WA 98512
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One of these cases, *City of Sausalito v. O'Neill,* 386 F.3d 1186 (9th Cir. 2004) undercuts their position because it held that cutting down a tree was not prohibited by the MBTA. The Court held:

> The Migratory Bird Treaty Act ("MBTA") provides that without authorization from the Secretary of the Interior it is unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory bird or "any part, nest, or egg of any such bird...." 16 U.S.C. § 703. Sausalito asserts that implementation of the Fort Baker Plan will violate the MBTA because migratory birds' nesting trees will be cut down, thereby disturbing both birds and their nests. The FEIS makes clear that the Park Service has not sought, and does not intend to seek, authorization from the Secretary.
>
> In *Seattle Audubon Society v. Evans,* we explained that the definition of an unlawful "taking" under the MBTA "describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." 952 F.2d at 302. There we held that unlike under the ESA, an unlawful "taking" under the MBTA did not occur through "habitat destruction," even that which "le[d] indirectly to bird deaths." *Id.* at 303. Because Sausalito alleges only that migratory birds and their nests will be disturbed through habitat modification, we hold that the Park Service does not need to seek authorization from the Secretary.

City of Sausalito v. O'Neill, 386 F.3d 1186, 1225 (9th Cir. 2004)

Thus, there is no violation of the MBTA from cutting down a tree, even if there is a nest as alleged here. See also, *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997). Since this case seeks to apply the MBTA to the same facts as in *O'Neill, Evans* and *Newton Cnty. Wildlife Ass'n*, the court should follow these precedents in rejecting the same claim advanced by plaintiff here.

B. PLAINTIFFS FAILED TO PLEAD AN INJURY IN FACT SUFFICIENT TO CONFER STANDING.

Finally, the Plaintiffs are not legally injured and will not suffer irreparable harm entitling them to a TRO. Plaintiff " must demonstrate that '(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative,

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
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2674 R.W. JOHNSON RD. TUMWATER, WA 98512
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(360) 754-3480 FAX: (360) 357-3511

that the injury will be redressed by a favorable decision.'" *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004)(quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

Plaintiffs failed to present declarations meeting this test. As such, their application for a TRO should have been rejected for failure to show an injury sufficient for standing or irreparable harm required for a TRO. The Court should find the TRO void and grant the motion to dissolve it.

Dated this 29th day of May 2024.

LAW, LYMAN, DANIEL, KAMERRER
& BOGDANOVICH, P.S.

/s/ Jeffrey S. Myers
/s/ Jakub L. Kocztorz

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Jeffrey S. Myers, WSBA No. 16390
Jakub L. Kocztorz, WSBA No. 61393
Attorneys for Defendant
P.O. Box 11880, Olympia, WA 98508-1880
Telephone: 360-754-3480 Fax: 360-754-3511
Email: jmyers@lldkb.com
jkocztorz@lldkb.com

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, the Declarations of Kevin McFarland, Sharleen Johansen and the Second Declaration of Debbie Sullivan and this Certificate of Filing & Service, and have served a copy of these documents to the following parties via email:

Plaintiff's Attorney:

Ronda Larson Kramer
LARSON LAW, PLLC
P.O. Box 7337
Olympia, WA 98507-7337
ronda@larsonlawpllc.com

DATED this 29th day of May 2024, at Tumwater, WA.

/s/ Tam Truong
Tam Truong, Legal Assistant

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511