

EXPEDITE  
 Hearing is set:  
Date: \_\_\_\_\_  
Time: \_\_\_\_\_  
Judge/Calendar: \_\_\_\_\_

**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 EMERGENCY  
MOTION TO DISSOLVE  
TEMPORARY RESTRAINING  
ORDER**

**I. INTRODUCTION / MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER**

Defendant Mayor of Tumwater, Debbie Sullivan, by and through her undersigned attorney moves to dissolve the Temporary Restraining Order preventing the City of Tumwater from removing the Davis Meeker Oak. The Temporary Restraining Order suffers from numerous procedural deficiencies which entitle the Defendant to its dissolution.

**II. FACTS**

The Davis Meeker Garry Oak tree in this case is located immediately adjacent to Old Highway 99, one of Tumwater's busiest streets, near the Olympia Airport. In February 2024, a large limb fell from the tree, suggesting that it might present a hazard to the traveling public. The City commissioned a study by the City's contracted tree professional, Kevin McFarland of Sound Urban Forestry. They investigated and concluded that there was substantial rot and decay in the main stems of the tree and recommended its

1 removal. It found that the tree was in poor condition and posed a high risk to the public. A copy of their  
2 report is attached to Mayor Sullivan’s Declaration as **Exhibit 1**.

3 In response to this report, the City conferred with Olympia’s arborist to get another opinion and  
4 assurance that it was following the proper methodology. The City received an email from Jasen Johns  
5 (ISA Board Certified Master Arborist, Municipal Specialist, TRAQ #SO-5648BM) who is Olympia’s  
6 Urban Forestry Program Manager. His April 24, 2024 email is attached as **Exhibit 2** to Mayor Sullivan’s  
7 declaration. Johns acknowledged the condition of the tree found by the City of Tumwater’s assessment  
8 and affirmed that the City’s arborist exceeded the standard of care in performing its assessment.  
9

10 The removal of this tree is important to safeguard the public using the adjacent street, Old Highway  
11 99 and other members of the public at the airport. There is a public event scheduled at the Airport in mid  
12 June and large crowds will be threatened if the tree remains in place. Expansion of the airport in the future  
13 is irrelevant and this tree has no impact on any such plans. The City’s decision was made to protect the  
14 public and the City from potential liability. Our insurance carrier, WCIA, informs me that the amount of  
15 liability could easily exceed \$10 million if people are injured or killed by falling limbs or collapse of the  
16 tree itself.  
17

18 The City bid the removal to a qualified firm who is scheduled to remove the tree on Tuesday May  
19 28, 2024. The wrongful injunction will only increase the cost of removal and will prolong the threat and  
20 risks to public safety.  
21

### 22 **III. ARGUMENT**

23 The Temporary Restraining Order (“TRO”) granted on May 24, 2024, is deficient in three key  
24 regards: (1) no notice was given; (2) no bond was required; & (3) it provides no end date. It failed to  
25 address the requirements for a TRO under Washington law. As explained below, it should be vacated.  
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1           **A. THE EX PARTE ISSUANCE OF THE TRO WITHOUT NOTICE WAS IMPROPER.**

2           The Defendant was not given notice of the TRO hearing in violations of RCW 7.40.050. Further,  
3 Plaintiff has failed to show the existence of an emergency that would justify failing to give notice. “No  
4 injunction shall be granted until it shall appear to the court or judge granting it, that some one or more of  
5 the opposite party concerned, has had reasonable notice of the time and place of making application,  
6 except that in cases of emergency to be shown in the complaint, the court may grant a restraining order  
7 until notice can be given and hearing had thereon.” RCW 7.40.050.  
8

9           The ex parte issuance also violates CR 65(b), which requires:

10           A temporary restraining order may be granted without written or oral notice to the adverse  
11 party or the adverse party’s attorney only if (1) it clearly appears from specific facts shown  
12 by affidavit or by the verified complaint that immediate and irreparable injury, loss, or  
13 damage will result to the applicant before the adverse party her or his attorney can be heard  
14 in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if  
any, which have been made to give the notice and the reasons supporting the applicant’s  
claim that notice should not be required.

15           Here, the plaintiff did not provide any advance notice or make any efforts to allow the City to be  
16 present or respond, all in violation of their responsibilities under CR 65(b). The City did not receive any  
17 pleadings until Ms. Kramer delivered them to the City after the TRO was already signed.

18           **B. PLAINTIFF IS NOT ENTITLED TO A TRO UNDER WASHINGTON LAW.**

19           The TRO fails to address any of the salient legal standards for a temporary restraining order. It  
20 does not address the requirements of Tyler Pipe . A party is only entitled to injunctive relief, including a  
21 TRO, if that party is able to “show (1) that he has a clear legal or equitable right, (2) that he has a well-  
22 grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting  
23 in or will result in actual and substantial injury to him.” *Tyler Pipe Indus., Inc. v. State, Dep’t of Revenue*,  
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1 96 Wash. 2d 785, 792, 638 P.2d 1213, 1217 (1982) (quoting *Port of Seattle v. International*  
2 *Longshoremen's & Warehousemen's Union*, 52 Wash.2d 317, 324 P.2d 1099 (1958)).

3 The Plaintiff does not have a clear legal or equitable right, because they do not even have standing  
4 to bring this suit. A duty owed to all is a duty owed to no one. Neither Plaintiff “Save the Davis-Meeker  
5 Garry Oak” nor its constituent members have any personal stake in the outcome of this dispute discernible  
6 from the public as a whole. An organizational mission cannot confer standing without a particularized  
7 harm or injury.” *Freedom Found. v. Bethel Sch. Dist.*, 14 Wash. App. 2d 75, 88, 469 P.3d 364, 371 (2020)  
8 (Quoting *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)). To meet  
9 the injury-in-fact test, “a person must allege facts demonstrating that he or she is ‘specifically and  
10 perceptibly harmed’ by the agency decision .... When a person alleges a threatened injury, as opposed to  
11 an existing injury, the person must demonstrate an ‘immediate, concrete, and specific injury to him or  
12 herself.’ ” *Id.*, quoting *Patterson v. Segale*, 171 Wash. App. 251, 259, 289 P.3d 657 (2012). No such  
13 harm is identified here. Thus, without a right there also can be no invasion. Finally, they have not pleaded  
14 how they would suffer harm in any way discernible other than the loss to the whole community, whenever  
15 a venerable tree succumbs to inevitable decay and must be removed. Therefore, the Plaintiff has failed to  
16 make a showing of entitlement to a TRO and that combined with the evident procedural deficiencies  
17 necessitates the TRO’s dissolution.

18 The plaintiff has not demonstrated a clear legal or equitable right or justifiable fear of immediate  
19 invasion of such a right. They state that there is a birds nest in a tree. This ubiquitous phenomenon would  
20 justify enjoining all cutting of trees and is simply not a legal basis for an injunction.

21 Plaintiffs also argue that the tree is on the historic register. They cite TMC 2.62.060 which requires  
22 a permit to demolish a historic structure. This is not a structure, it is a tree. TMC 2.62.060 does not apply.  
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1 Even if it did, the emergent threat posed by the tree allows its removal. Ms Nozawa's declaration, at 2:6,  
2 refers to heritage trees. Under the City's code, hazardous heritage trees are exempt from a tree removal  
3 permit after verification by the city tree protection professional. Thus, the tree here may be removed  
4 without a permit if the city's tree protection professional confirms it is hazardous. Here, the report issued  
5 by the City's professional did exactly that, finding that the tree . Sullivan Declaration Exhibit 1.  
6

7 The Plaintiff relied exclusively on hearsay and inadmissible declarations. The Declaration of  
8 Tanya Nozawa relies on hearsay relayed from anonymous sources and internet postings. She is not an  
9 expert and fails to provide any competent testimony to support the conclusion that the tree is "structurally  
10 sound". This conclusion is contradicted by two professional arborists opinions. Dec. of Sullivan Exhibits  
11 1, 2. The city's tree professional opines that:

12 there are structural concerns associated with the significant decay found in the stem base,  
13 lower main stem, east facing co-dominant stem and large scaffold branches. Probable  
14 future failures include large diameter scaffold branches from the east facing co-dominant  
15 stem and the entire west facing co-dominant stem at the union. The associated inclusions  
16 and stress loads will contribute to future failures. Structural support systems in conjunction  
17 with pruning were considered but the extent of decay in the main stem and upper east side  
18 of the canopy removes that as a mitigation option in my opinion.

19 The TRO also failed to consider the public interest in protecting public safety against the hazards  
20 presented by this decaying hazardous tree. It is adjacent to a major right-of-way and has already  
21 experienced a large limb falling into the street. Fortunately, it did not hit anyone. The next time we may  
22 not be so lucky. The arborists' forecast that it will have future failures including "large diameter" branches  
23 and "co-dominant" stems may fail could severely injure or kill members of the public who pass by. This  
24 is a known hazard in the right of way that the City has a clear duty to remedy. *Albin v. National Bank of*  
25 *Commerce of Seattle*, 60 Wash.2d 745, 748, 375 P.2d 487, 489 (1962).  
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1 Because of the clear threat to public safety created by the tree's decaying condition, the lack of  
2 harm to plaintiff's personal interests, the lack of any probable success on the merits, the Court should  
3 dissolve the erroneously issued TRO.

4 **C. CR 65 REQUIRES SUBSTANTIAL BOND TO PROTECT AGAINST THE CITY'S**  
5 **LIABILITY RESULTING FROM BEING UNABLE TO PROVIDE A SAFE RIGHT**  
6 **OF WAY.**

7 The Defendant is exposed to massive liability by the TRO. If harm were to result to a passing  
8 motorist from a tree failure, the city would be liable for failing to maintain the road in a reasonably safe  
9 condition for ordinary travel. The failure to require bond when the City is exposed to such liability is in  
10 violation of RCW 7.40.080. "No injunction or restraining order shall be granted until the party asking it  
11 shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, with surety  
12 to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to  
13 pay all damages and costs which may accrue by reason of the injunction or restraining order. The sureties  
14 shall, if required by the clerk, justify as provided by law, and until they so justify, the clerk shall be  
15 responsible for their sufficiency. The court in its sound discretion may waive the required bond in  
16 situations in which a person's health or life would be jeopardized." RCW 7.40.080.

17 **D. THE TRO FAILS TO PROVIDE A HEARING FOR A PRELIMINARY**  
18 **INJUNCTION IN VIOLATION OF CR 65.**

19 The TRO has provided no end date, rather it lasts in perpetuity until the Court reconsiders. Under  
20 CR 65, a TRO's usually last up to 14 days. Thus, what was granted is not a temporary restraining order.

21 The lack of notice, bond, and end date are serious deficiencies in the TRO. These deficiencies  
22 combined with the substantial risk posed to public safety from the rotting within the Davis Meeker Garry  
23 Oak tree. These safety risks and the enormous corresponding liability risk to the City require the TRO's  
24 dissolution.  
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**III. CONCLUSION**

Defendant Mayor of Tumwater, Debbie Sullivan, respectfully requests that the Court dissolve the Temporary Restraining Order preventing the removal of the Davis Meeker Oak.

Dated this 24<sup>th</sup> day of May 2024.

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

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

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