NO. 58881-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SAVE THE DAVIS MEEKER GARRY OAK, Appellant, v. DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater, Respondent.	REPLY IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF PURSUANT TO RAP 8.3

Appellant submits this reply to the mayor's response. On pages 4 and 13 to 17, the mayor argues that the temporary restraining order (TRO) was deficient for several reasons. First, the mayor claims that there was no notice. But she admitted that she received notice that the TRO would be obtained that day. Also, the rushed timeline was of the mayor's own making because she was trying to cut the tree down secretly before anyone could stop her. *See* Supp. Dec. Larson Kramer. Only because a good Samaritan leaked information to Appellant did the tree survive the weekend. One cannot hide one's actions

from the public and then complain that someone else was in the wrong for having taken so long to find out.

Next, the mayor claims that the TRO was deficient because no bond was required. 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." (Emphasis added). The city would not incur any costs or damages for being wrongfully restrained because it was already restrained by the requirement to obtain permits under both the Migratory Bird Treaty Act (MBTA) and the Department of Archaeology and Historic Preservation (DAHP). *See* Supp. Dec. Larson Kramer (filed herewith), at Ex. A; Dec. Larson Kramer, at Ex. G. The TRO was not changing the status quo from a legal standpoint.

The mayor next claims the TRO provided no end date. This issue is moot. Subsequent events made that irrelevant. The

mayor also argues that the TRO did not "define the injury and state why it is irreparable and why the order was granted without notice," per CR 65(b).

"Procedural due process is contextual. Here, context is crucial." *In re Estates of Smaldino*, 212 P.3d 579, 151 Wn. App. 356 ¶ 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*., at ¶ 45 The mayor was not "deprived of due process by the court's failure to spell out the obvious in its order." *Id*. The obvious was that the tree was going to be cut down if a TRO was not granted, removing all opportunities for the Appellant to receive relief in the future.

The mayor next claims, "they falsely alleged that the Mayor told the Olympian that the tree would ultimately not be there." Response at 6. The mayor further states that she "responded that the road would not be widened and the site would remain a historic place, even without the tree." *Id*.

(emphasis added). But the mayor actually said, "It's an historic place and will stay an historic place, it just won't have the tree standing there." (Emphasis added). *See* Dec. Larson Kramer, Ex. J.

Even if the mayor did not mean to sound as certain as she did, the city has consistently rejected pruning and has always gone straight to removal. And yet the city's own report condemning the tree includes an opinion of arborist (Tyler Bunton) with Tree Solutions who recommends pruning, not removal.

The city never mentions Mr. Bunton's actual opinion and instead consistently claims "a team of arborists" determined that the tree must be removed. Response at 2. In fact, Scott Baker, the owner of Tree Solutions, later wrote that the city arborist's report is an "embarrassment":

> The consultant report that you have is an embarrassment to any knowledgeable arborist. By the way...the tree is not dead! It has a full and vigorous canopy.

Supp. Dec. Larson Kramer, Ex. B. Mr. Baker is a Board Certified Master Arborist, meaning he is a professional arborist who has attained the highest level of arboriculture offered by the International Society of Arboriculture (ISA).

Also, the mayor recently ignored requests by city council members to allow a member of either the tree board or the historical commission to be on the interview team that will interview the arborists who have recently applied to do the follow-up assessment. *See* 1:01:00 to 1:05:25 at Tumwater City Council Meeting recording, July 17, 2024, available at https://www.youtube.com/watch?v=S--aD12WSJY&list=PLE_nN-qDbnQqYIEbBFpMH9GFJyyM3CfSw . The only people on the interview team will be the mayor, the city administrator, and the city attorney. If they were truly committed to an outcome driven by science, they would allow someone else in the room.

The mayor claims that dissolution of the Appellant's TRO does not determine the outcome of the action, and so it is

discretionary appeal, not an appeal as of right. *See* Response at 10. Even if this is not an appeal as of right, the criteria to allow a discretionary appeal have been met. RAP 2.3(b) provides that discretionary review may be accepted only in the following circumstances:

> (1) The superior court has committed an obvious error which would render further proceedings useless; (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo . . .; (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, . . . as to call for review by the appellate court; . . . .

RAP 2.3(b).

As to the first criteria, the errors of the superior court are obvious, and the errors have rendered further proceedings useless. The superior court ignored the evidence that the undersigned filed the day before stating that the city must obtain a permit from the state Department of Archaeology and Historic Preservation. The court then mistakenly deemed a tree to be incapable of being an archaeological site. The court also

mistakenly relied on an expired Trump-era interpretation of the Migratory Bird Treaty Act to hold that it does not violate any law to cut down a tree and knowingly kill migratory birds in it. And the court failed to account for the Tumwater Municipal Code's definition of historic property as including the real property and everything on it.

By dissolving the TRO, the superior court has opened the gates to cutting down the tree. If the tree is cut down, the entire case becomes moot. The appellant will lose all ability to obtain relief.

Even if the first criteria is not met, the second criteria is. The court has committed probable error, and as a result of its error, the gates opened to the tree being cut down, which would remove the appellant's ability to obtain any relief whatsoever. This was a significant alteration of the status quo.

The third criteria is also met because the superior court acted in such haste that it violated Appellant's due process rights. It had by that time been a year since the tree branch fell

and seven months since the city arborist issued a report condemning the tree to be removed. And yet the court rushed the process through so quickly that the court had only three court days to obtain briefing and review it before making a decision. This is why the court made so many mistakes. The court did not give itself time to make a reasoned decision. Nothing required the court to act with such haste.

Additionally, in reflection of this haste, the court did not follow up with its promise to address Appellant's cross-motion to extend the TRO. Dec. Larson Kramer, Ex. K, at 4 ("That being the case, we are going to hear today the motion to dissolve as well as the motion to extend.").

Thus, the case qualifies for a discretionary appeal. Moreover, if the Court deems this not to be an appeal as of right, RAP 8.3 allows the Court to issue an injunction pending appeal, whether it is before or after acceptance of review, to insure effective review.

The mayor next claims the issue of a permit requirement from DAHP is not part of the case below. Response at 17-19. But the undersigned emailed her attorney the letter from DAHP at 12:53 p.m. on Thursday the day before the hearing. Dec. Larson Kramer, para. 13 & Ex. L. The undersigned also made sure the lower court received a bench copy of that letter around 1:00 p.m. the day before the hearing. *Id*. Moreover, the undersigned raised this issue during oral argument, and the court addressed it on the merits, finding that a tree is not an archaeological object. Dec. Larson Kramer, Ex. K, at 15. The same is true of the claim that the mayor failed to give adequate notice to the tribes. CP 8 ("The city was required to notify the tribes before cutting the tree."); CP 14; Dec. Larson Kramer, Ex. K, at 10 & 15.

The mayor next claims that the Migratory Bird Treaty Act (MBTA) allows her the freedom to cut down the tree and kill the nesting kestrels without any restrictions. Response at 19-21. But the letter from FWS says otherwise. Supp. Dec.

Larson Kramer, Ex. A. Current law does not allow incidental takes without a permit. *See Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 734 (9th Cir. 2017).

The mayor next argues that the tree is a high danger. Response at 22-23. This is belied by her inaction in the past year. She could have had it pruned long before now. She also does not address the city arborist's own internal email stating that the tree is not high risk. As for the claimed $10 million liability estimate by the city's insurer, there is nothing in the record to support that. Even if there were, the figure arises from a faulty risk assessment. Faulty data creates faulty liability estimates.

The mayor claims that appellant does not have standing to assert a claim that the mayor violated the notice requirements of the Centennial Accord. Response at 23-26. But the mayor cites laws relating to treaty rights. The Centennial Accord is not a treaty. Moreover, the accord expressly states that it is intended to make the lives of individuals better: "While this Accord

addresses the relationship between the parties, its ultimate purpose is to improve the services delivered to people by the parties. . . . The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this Accord." Dec. Larson Kramer, Ex. E, at 2. The mayor must be accountable to act consistent with the Accord.

The mayor also claims, without evidence, that she is not governed by the Accord and that it applies only to state agencies. But the language of the Accord itself contradicts that claim:

> The parties recognize that the state of Washington is governed in part by independent state officials. Therefore, although, this Accord has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes."

Dec. Larson Kramer, Ex. E, at 1-2.

The mayor next claims the Appellant does not cite any particular provision of the Centennial Accord that is violated or describe in what circumstances "consultation" is required. The purpose of the Accord is to "improve[] communications between [the parties], and facilitate[] the resolution of issues." Dec. Larson Kramer, Ex. E, at 2. The city delayed telling the tribes about the plan to remove the tree for almost five months. If anything violates the Centennial Accord, this does. As soon as the city arborist's report stated in October 2023 that the tree should be removed, the mayor's team created a communications plan to control the message. Supp. Dec. Larson Kramer, Ex. C & Ex. D. It put a time frame of March 2024 for notifying the tribes. *Id*. at Ex. D, at 2 ("Week of March 4 . . . Email/Letter: Tribes, County, Individuals"). This five-month delay is not reasonable for a tree of such importance to the tribes.

The mayor next claims that the Appellant should furnish a bond. Response at 26-28. Appellant addressed the issue of bond in the original motion and will address it further below.

The Court requested that this reply address the discretionary stay standards under RAP 8.3. Under that rule, "the appellate court has authority to issue orders, before or after acceptance of review . . ., to insure effective and equitable review, including authority to grant injunctive or other relief to a party." Because effective and equitable review is impossible if the mayor cuts down the tree, it is necessary to issue a stay to insure such review. All fruits of the appeal will be lost if the mayor cuts down the tree.

The Court also asked that this reply address whether RAP 8.1(b)(2) applies instead, which would allow the group to obtain a stay as of right upon the posting of a supersedeas bond or alternate security. RAP 8.1(b) provides a supersedeas bond procedure. Assuming RAP 8.1(b) were to apply, the next step would be to calculate the bond under RA 8.1(c). Under that

section, the amount of the bond shall be "the amount of any money judgment, plus interest likely to accrue during the pendency of appeal and attorney fees, costs, and expenses likely to be awarded on appeal entered by the trial court 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. . . ." (Emphasis added).

As noted, there was not an award of attorney fees in the lower court. Hence, there was no "money judgment." The next question is what the attorney fees, costs, and expenses likely to be awarded on appeal would be and what the amount of loss would be that the mayor would incur as a result of her inability to cut the tree down pending appeal.

As for the loss, the mayor claims that 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 Appellant is wrong.

This is incorrect because legally, the city cannot cut down the tree even without an injunction.

Because it does not appear possible for the mayor to receive an attorney fee award, and because there is no other loss the mayor could incur as a result of a stay, there is no basis for a bond. Arguably, RAP 8.1(b) applies (i.e., for an automatic stay) and the bond calculation would be zero.

Respondent respectfully requests that the Court grant an injunction pending appeal and deny request for a bond.

CERTIFICATE OF COMPLIANCE

I certify that this reply brief contains 2497 words, in compliance with RAP 18.17(b)

RESPECTFULLY SUBMITTED this 18th day of July, 2024.

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