IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 58881-1-II

SAVE THE DAVIS-MEEKER GARRY OAK,

Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Ordinances

Other Authorities

INTRODUCTION

The mayor claims that a 2023 risk assessment done by the city arborist shows that the Davis Meeker oak is hazardous. (The city arborist performed a risk assessment after the tree dropped a branch almost a year and a half ago.) What the mayor does not mention is that on June 4, 2024, she publicly said she would hold off removing the tree until she gets a second opinion. She is currently in the process of obtaining that second opinion. Regardless, whether the tree is a hazard is irrelevant. The mayor cannot cut it down anyway because she has not obtained permission from the Tumwater Historic Preservation Commission and a permit from the Department of Archaeology and Historic Preservation ("DAHP"). In the end, that is all that matters.

The mayor also asserts that the city's tree code at Chapter 16.08 of the Tumwater Municipal Code ("TMC") supersedes or otherwise eliminates the requirement to obtain the approval of the Tumwater Historic Preservation Commission. But the tree

code states unambiguously that the Commission's approval is required. Additionally, DAHP has told her *three times now* that the Davis Meeker oak is protected by Washington's Archaeological Sites and Resources Law at chapter 27.53 RCW.

REPLY TO STATEMENT OF THE CASE

A. The mayor's claim that the tree is dying is false.

The mayor states that the Davis Meeker oak is "coming to the end of its life." Resp. at 1. This is a false claim. Although the health of the tree is irrelevant to this Court's decision, the false claim is prejudicial. As such, it needs to be addressed.

In the risk assessment that recommended removal, the city arborist contradicted his own conclusion by writing, "the Meeker Oak appears to be in very good health. The crown density, leaf color, leaf size and internode growth all indicate a vigorous tree." CP 41. Similarly, before he issued his final report, the city arborist wrote in an undisclosed internal email that the tree was not high risk. *See* Decl. Beowulf Brower in Support of Motion

for Injunctive Relief Pursuant to RAP 8.3 (filed July 2, 2024), Ex. R.

Later, an independent arborist unaffiliated with the city or with Appellant Save the Davis-Meeker Garry Oak ("SDMGO") performed a risk assessment in June 2024. He found the tree risk level to be moderate and concluded that the risk level could be reduced to low with cabling and pruning. Brower Decl., Ex. S at 7.

Also, that independent arborist noted, "[t]he tree genera Quercus are among the species known to drop branches unexpectedly in calm conditions and high temperatures. This is called sudden branch drop (SBD) and is not well understood." *Id*. at 5. In fact, the very conditions for SBD were present when the branch dropped from the Davis Meeker oak. Brower Decl., ¶ 9. In other words, oak trees by nature drop branches occasionally, whether the tree is healthy or unhealthy, and this may be what happened in this case.

Moreover, Garry oaks have very strong compartmentalizing tendencies, meaning when they have an injury, wood grows around the injury and this new wood is physically stronger and chemically more resistant to decay than the old wood that had been there before. Brower Decl., ¶ 37. The new wood has thickened cells that are fully capable of preventing the spread of decay and of keeping the tree standing indefinitely. *Id*. The city's arborist noted this in his internal email as well: "Considering the species of tree which can be structurally sound or not prone to failure if the main stem is compromised (somewhat) the existence of a decay column or cavity within the base up through the main stem may not be a total reason to condemn the tree." Brower Decl., Ex. R. Notably, he omitted this information from his final report.

The mayor's response also makes the false claim that "a team" of arborists recommended removal. Resp. at 2. As SDMGO explained in its opening brief, this could not be further from the truth. Only the city arborist recommended removal, and

his risk assessment was so flawed that the owner of the same company he had contracted with to help on that risk assessment called his final report "an embarrassment to any knowledgeable arborist." Supp. Decl. of Ronda Larson Kramer in Support of Mot. for Injunctive Relief Pursuant to RAP 8.3 (filed July 18, 2024; herein, "Supp. Larson Decl."), Ex. B at 2.

The mayor's response also claims that the insurance carrier told her personally that the amount of liability could easily exceed $10 million if someone was injured or killed by a falling branch. Resp. at 3. But she provides no documentation to support this highly suspect claim. CP 34.

The mayor claims that none of the tribes she contacted "expressed concern at the decision to remove the tree." Resp. at 4. This is false. The Nisqually Tribe wrote the mayor a letter on June 4, 2024, asking her to delay removal so that the tribe could have time to consider it. Declaration of Ronda Larson Kramer in Support of Motion for Injunctive Relief Pursuant to RAP 8.3 (filed July 2, 2024; herein, "Larson Decl."), Ex. F. The tribe

wrote that it needed additional time to "complete consultation with the State Historic preservation officer and the Tribal Historic Preservation Officer." *Id*.

B. The mayor paints a false picture regarding events surrounding the issuance of the TRO.

The mayor paints an inaccurate picture surrounding the issuance of the temporary restraining order on May 24, 2024, making it sound as if she did not receive timely notice of the TRO. Resp. at 5-6. In reality, she received notice before the TRO was entered. Moreover, it was she who hid from the public the fact that she was going to have the tree cut down immediately, without further deliberation. This is what necessitated a TRO on the ex parte calendar in the first place. Had she not hidden her timeline from the public, SDMGO would have been able to set a regular hearing. One cannot hide one's actions and then complain that someone else was in the wrong for having had to use the ex parte calendar.

On Thursday, May 23, 2024, at approximately 9:00 p.m. at night, counsel for SDMGO received a tip that the mayor had directed the Davis Meeker oak to be removed that weekend (Memorial Day weekend) "when nobody was around." Supp. Larson Decl., ¶ 2. Under local court rules, there was only a short window the next morning (*i.e.,* Friday before a holiday weekend) to obtain a TRO during the ex parte calendar. *Id*., ¶ 3. The court's ex parte calendar is limited to 8:30 a.m. and 9:00 a.m. every court day. *See* https://www.thurstoncountywa.gov/departments/superior-court/ex-parte/ex-parte-main-campus. There is no procedure that allows a party to bring an ex parte matter at any other time in Thurston County.

After spending the entire night working on a request for a TRO, counsel for SDMGO called the city attorney at 8:00 a.m. Friday morning. Larson Decl., ¶ 5. Counsel called the attorney's direct number listed on the WSBA directory and got her voicemail. Counsel left a message stating that counsel was filing a motion for TRO "today" for the Davis Meeker oak. *Id*.

At 10:30 a.m. that same morning, after obtaining the TRO, counsel arrived at city hall and informed the person sitting at the front counter that counsel would like to serve legal papers on the mayor. *Id*., ¶ 7. Counsel asked how that could be done. The staff person stated she would find out and she left and did not return for several minutes. Then the city attorney's paralegal emerged from the back and came out into the lobby to greet counsel. *Id*. Counsel told the paralegal that counsel had papers to serve on the mayor. The paralegal indicated that she would take them on behalf of the mayor. The paralegal then looked through the stack of papers briefly before leaving counsel. *Id*.

After the superior court dissolved the TRO on May 31, 2024, the mayor stated at the city council meeting on June 4, 2024, that she would hold off removing the tree until she got a second opinion to evaluate the condition of the tree. *See* "Tumwater mayor pauses plan to cut down Davis-Meeker Oak, agrees to a new risk assessment," Jerome Tuaño, *The JOLT News*, June 5, 2024 7:45 pm (available at

https://www.thejoltnews.com/stories/tumwater-to-hire-another-arborist-to-give-new-risk-assessment-for-davis-meeker-oak,15887). The mayor's attorney later submitted a declaration to the superior court on August 28, 2024, stating that this second opinion—not the original arborist opinion cited in the Mayor's Response Brief—"will be used to evaluate next steps concerning the Davis Meeker Garry Oak." App. F at 3:7–13. The mayor is still in the process of obtaining that second opinion.

RELY TO ARGUMENT

A. The tree code expressly states that any removal of a tree on the historic register must be approved by the Tumwater Historic Preservation Commission.

The mayor claims that even though the Davis Meeker oak is on the city's Register of Historic Places, the city's Historic Preservation Ordinance does not apply. She claims the tree is exclusively regulated under the city's tree code instead. But the tree code—codified at chapter 16.08 of the Tumwater Municipal Code and attached as Appendix B hereto—says the exact opposite. TMC 16.08.070(S) provides that "the cutting or

clearing of historic trees requires the issuance of a certificate of appropriateness in accordance with" the Tumwater Historic Preservation Ordinance.

As discussed in Appellant's Opening Brief, the city's Historic Preservation Ordinance provides that no person may "alter, restore, remodel, repair, move, or demolish any existing property on the Tumwater register of historic places" without first obtaining the approval of the Tumwater Historic Preservation Commission, either through the issuance of a so-called "certificate of appropriateness," or by the Commission waiving the certificate requirement. TMC 2.62.060(A). The Davis Meeker oak is one such property listed on the city's register of historic places.

In addition to the Tumwater Historic Preservation Ordinance, the Davis Meeker oak also falls under the ambit of the city's tree code, TMC chapter 16.08. That chapter of the Tumwater Municipal Code generally requires a "land clearing permit" from the city's Community Development Department

prior to removing or clearing trees. *See* TMC 16.08.050(A). A "tree removal permit" also is required under that code for the removal of any "heritage tree," a designation that may be made based on a tree's historical significance, uniqueness as a specimen, rarity, or significance as a grove. TMC 16.08.075.

In this case, the Davis Meeker oak is a "heritage tree" within the meaning of the city's tree ordinance. But it is also a "historic tree," a defined term denoting "any tree designated as an historic object in accordance with the provisions of TMC Chapter 2.62," which is the city's Historic Preservation Ordinance. TMC 16.08.030(N).

In her Response Brief, the mayor argues that the Historic Preservation Ordinance does not apply—and is completely superseded by the tree code—because of various interpretative rules for resolving statutory ambiguity and conflicts. She cites rules saying that a more specific statutory provision generally controls over a more general one, and that a newer statutory provision generally controls over an older one. Resp. at 19–20.

But here, there is no ambiguity or conflict between the Historic Preservation Ordinance and the tree code. Indeed, the tree code itself makes clear that cutting the Davis Meeker oak down requires the approval of the Tumwater Historic Preservation Commission in accordance with the Historic Preservation Ordinance. This is stated at TMC 16.08.070, which establishes various standards under which trees can and cannot be cut down (for example, prohibiting cutting in "greenbelts" and other open space areas). The last such standard states that historic trees cannot be cut down without permission of the Historic Preservation Commission:

> In addition to the provisions of this chapter, the cutting or clearing of historic trees requires the issuance of a certificate of appropriateness in accordance with TMC Chapter 2.62.

TMC 16.08.070(S).

This provision could not be clearer. In order to cut down a historic tree—one that has been listed on the city's register of historic places—a person must comply not only with the tree code, but with the Historic Preservation Ordinance, and therefore

must obtain a "certificate of appropriateness." Such a certificate can be issued only by the Tumwater Historic Preservation Commission. TMC 2.62.060(A). The mayor does not mention this provision. Yet it is dispositive.

Moreover, the permit exemptions in the tree code for hazardous trees do not eliminate the need to obtain approval from the Tumwater Historic Preservation Commission. As the mayor observes, that section of the tree code generally allows hazardous trees to be cut down without a so-called "tree removal permit." Resp. at 19 (citing TMC 16.08.075(D)(3)). However, a "tree removal permit" is not the same as a "certificate of appropriateness." A tree removal permit is a specific type of permit required by the tree code. A certificate of appropriateness is a specific type of permission required by the Historic Preservation Ordinance.

Also, nothing in the Tumwater Municipal Code says that the exemptions in TMC 16.08.075 trump the requirement in TMC 16.08.070(S) that "the cutting or clearing of historic trees

requires the issuance of a certificate of appropriateness in accordance with TMC Chapter 2.62." In short, the exemptions in the tree code are exemptions from the tree code, not exemptions from the historic code. All of this is clear from the plain, unambiguous text of the code itself.

The cutting of a historic tree—one listed on the city's register of historic places—requires a certificate of appropriateness from the Tumwater Historic Preservation Commission under the city's own Historic Preservation Ordinance. The Court should enjoin the city from cutting down the tree otherwise.

B. Whether the Davis Meeker oak is a structure is irrelevant, and there is no emergency exception to the requirement for permission from the historic commission.

The mayor offers various interpretations of the historic code to support her arguments that the Davis Meeker oak is not a "structure," that the historic code applies only to structures, and that it therefore does not apply to the Davis Meeker oak. Resp. at

17–18. Whether the tree is a "structure," a "property," or a "site," it is clear from the plain language of both the tree code and the Historic Preservation Ordinance that the latter applies to the tree. TMC 16.08.070(S).

The mayor also argues that the Davis Meeker oak is not a historic "property" or "site," despite that the tree itself is clearly and indisputably listed on the city's register of historic places. Resp. at 17–18, 22–25. It is unclear if the mayor disputes that the tree itself (as opposed to the ground it stands on) is listed on the city's historic register. The mayor says that SDMGO "rel[ies] on Ms. Nozawa's declaration" to show that the tree is protected. Resp. at 19. She seems to imply that Ms. Nozawa (a member of the Tumwater Tree Board) might be wrong or that Ms. Nozawa's testimony might not be credible. If there is any doubt, this Court should take judicial notice that the tree is, indeed, listed on the city's register of historic places. *See* https://www.ci.tumwater.wa.us/Home/Components/FacilityDirectory/FacilityDirectory/48/3381 (Tumwater historic register website, including the "Davis

Meeker Garry Oak Tree" as a protected listing on the city's historic register).

The mayor is similarly wrong in claiming that the Historic Preservation Ordinance itself allows an historic tree to be destroyed in a so-called "emergency." Resp. at 25–27. First, there is no "emergency." The mayor herself has essentially admitted this by stating (via her attorney's August 28, 2024 declaration to the superior court) that she is still in the process of obtaining a second opinion the tree's condition, and that she will be using that second forthcoming assessment to guide her decision-making. App. F at 3:7–13. There can be no "emergency" before the mayor has obtained the study she says she will use to evaluate the tree's condition and to make decisions about how to manage the tree in the future.

Second, the Historic Preservation Ordinance does not contain a blanket allowance to destroy any historic property in the event of a so-called "emergency." Rather, the code allows for "[e]mergency measures *defined in TMC 2.62.030*." TMC

2.62.060(B) (emphasis added). The mayor argues that the word "measures" here should be read broadly, to encompass virtually any action that the mayor deems necessary in an emergency. Resp. at 26-27. In doing so, she ignores the words "*defined in TMC 2.62.030*." In that section of the code, emergency measures are only for "emergency repair." Cutting the tree down is not a "repair."

For all of the above reasons, the mayor's position that the historic code does not apply is pure fiction. The Court should grant an injunction preventing the mayor from having the tree cut down without first obtaining the permission of the Tumwater Historic Preservation Commission.

C. Historic sites, which can include historic trees, are precisely what the cultural resource laws were created to protect.

The mayor claims that natural objects are not "archaeological" resources and that chapter 27.53 RCW—Washington's Archeological Sites and Resources Law—protects only man-made artifacts. Resp. at 31–38. But she ignores the

broader subject matter that chapter 27.53 RCW governs: cultural resources. The Washington State Inventory of Cultural Resources "encompasses all the resources that are potentially eligible for listing in the National Register of Historic Places, that being: sites, buildings, structures, districts, and objects." *See* Washington State Standards for Cultural Resources Reporting (updated April 19, 2023) at 3-4 (*available at* https://dahp.wa.gov/sites/default/files/CR%20Update%20April2023.pdf). "[S]ignificant archaeological sites and traditional *cultural places* dating prior to contact are considered to be 'historic properties'" *Id*. at 4.

Chapter 27.53 RCW concerns cultural and historical resources, not just things that fit within an overly technical definition of archaeological resources: "All sites, . . . and locations of prehistorical . . . interest, . . . including, *but not limited to*, those pertaining to prehistoric and historic American Indian or aboriginal burials, campsites, dwellings, and habitation sites, including rock shelters and caves, . . . located in, on, or

under the surface of any lands or waters . . . are hereby declared to be archaeological resources." RCW 27.53.040 (emphasis added).

The mayor makes an odd statement when she claims, "The tree preexists its use as a trail marker." Resp. at 36. The Cowlitz Trail is thousands of years old. The tree is 400 years old. It is not clear if the mayor is trying to imply that the tree is older than the Cowlitz Trail, or instead if she is claiming that the tree was not capable of being a trail marker when it was a mere seedling, and therefore, it cannot be an archaeological resource. Whether the tree was planted by humans or grew there on its own does not matter. Whether it was a trail maker for its entire life or only 99 percent of its life does not matter. It is a cultural resource all the same.

The mayor relies on the mayor's attorney's own amateur opinion of what constitutes "archeology." This contravenes the expert opinion of DAHP. On this issue, this Court should defer to DAHP and grant an injunction to SDMGO.

D. DAHP has told the mayor three times that the tree is protected by chapter 27.53 RCW.

The mayor argues that "[n]o deference is owed to a letter addressed by agency staff to 'whom it may concern.'" Resp. at 31. She refers to the letter from DAHP that was filed with the superior court a day before the hearing and that lays out why the Davis Meeker oak is protected under chapter 27.53 RCW. CP 140.

It is unclear how the salutation would matter in this case. The mayor and her private attorney have been notified no less than *three times* that the Davis Meeker oak is protected by Washington's Archaeological Sites and Resources Law and that the tree may not be cut down without a permit from DAHP. The first such letter dated May 30, 2024 is quoted in SDMGO's Opening Brief and may be found at CP 140. The second, dated June 4, 2024, may be found at Exhibit D to the Declaration of Ronda Larson Kramer in Support of Motion for Injunctive Relief Pursuant to RAP 8.3 (filed July 2, 2024). The third was a letter

dated July 11, 2024, from the Washington Attorney General's Office to the mayor's private attorney notifying him in no uncertain terms that the tree is a protected archeological resource and may not be cut down without a permit. A copy of the July 11, 2024 letter is attached hereto as Appendix C.[1]

Among other things, this last letter by the Attorney General's Office identified the Davis Meeker oak by its "Smithsonian Trinomial" number (45 TN 548), a unique identifier for archeological sites across the country. App. C at 1.

The Attorney General's Office explained that classification of the Davis Meeker oak as a protected archeological resource under state law is consistent with DAHP's longstanding interpretation of the law (including its own regulations). *Id*. at 2 ("DAHP has correctly interpreted its statutes and rules to mean that trees that have archaeological or historical significance are archaeological objects or

[1] SDMGO previously filed the July 11, 2024 letter with the Thurston County Superior Court in support of SDMGO's August 12, 2024 motion to set the amount of a supersedeas bond pursuant to RAP 8.1(b)(2).

archaeological resources within archaeological sites subject to DAHP permitting requirements, and has done so publically [sic] for years.").

Finally, in its letter of July 11, 2024, the Attorney General's Office informed the mayor's private attorney that if the mayor persists in her plan to cut the tree down without a state-issued permit, then (a) she will be committing a crime, and (b) "DAHP will issue penalties against the City to the maximum extent allowed by RCW 27.53.095 for failure to obtain a Permit from DAHP for damaging or removing the tree." *Id*. at 3.

These letters confirm that DAHP's determination that the tree is an archeological resource protected by state law is not a "self-serving letter" obtained by SDMGO from "agency staff." (Resp. at 31.) Rather, it represents DAHP's expert determination on the very law it is charged with administering. *See* RCW 27.53.020 (designating DAHP as the expert state agency in charge of "[t]he discovery, identification, excavation, and study

of the state's archeological resources," amongst other responsibilities).

The mayor also contends that "the trial court properly concluded that claims under RCW 27.53 were not properly before the Court." Resp. at 27. However, the superior court did not rule that the claim was not properly before the court. Rather, it ruled on the merits of the claim. It held that Washington's Archaeological Sites and Resources Law "addresses archaeological resources, not trees, and therefore is not applicable and it does not provide this court a basis for a finding of clear legal or equitable right." CP 155. That is the very holding that SDMGO is challenging in this appeal.

It is also clear that the Davis Meeker oak constitutes the "physical evidence of an indigenous . . . culture" within the meaning of RCW 27.53.030(2), as it is itself a physical remnant of the ancient indigenous practice of burning the prairies to allow the oaks to survive. Resp. at 27–30. Nor does the mayor offer any legal justification for her exceedingly narrow interpretation of

the word "monument," asserting (without legal authority) that that word only denotes commemorative statutes. This narrow interpretation runs directly counter to that of DAHP, which has concluded that the Davis Meeker oak is, indeed, a "monument." App. C at 11 ("Based on the information available to DAHP, including but not limited to the Tree's relationship to the Oregon Trail and the Tree's significance to local Tribes, the Tree is a monument that comprises physical evidence of indigenous and subsequent cultures and is of archaeological interest.").

Finally, the mayor argues that Washington's Archaeological Sites and Resources Law does not contain a private "cause of action," and that citizens are therefore completely barred from enjoining violations of that law. Resp. at 28–30. The mayor discusses the "*Bennett*" factors in this regard. But these factors are irrelevant because SDMGO's complaint requested declaratory relief, not money damages. CP 5, 11. Under Washington's Uniform Declaratory Judgment's Act, courts are specifically empowered to declare rights and

obligations arising under "statute, ordinance, contract or franchise." RCW 7.24.020.

Further, under the Washington constitution itself, courts have "inherent power . . . to review administrative decisions for illegal or manifestly arbitrary acts." *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998) (citing *Kreidler v. Elkenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989) and *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983)).

Here, it was both illegal and manifestly arbitrary for the mayor to attempt to cut down the Davis Meeker oak without a permit issued by DAHP under Washington's Archaeological Sites and Resources law at chapter 27.53 RCW, as DAHP itself has repeatedly stated. The Court should enjoin the mayor from bypassing the permit requirement.

E. There was no procedural irregularity in the granting of the initial TRO and even if there were, it is moot.

Last, the mayor argues that the initial TRO issued by Judge Amamilo on May 24, 2024 was procedurally improper. She also argues that enjoining the mayor from destroying the Davis Meeker oak without the prior approval of the Tumwater Historic Preservation Commission and DAHP would interfere with the city's duty to protect the public from a "known hazardous tree." Resp. at 10–16, 38–42.

But any procedural irregularities became moot when Judge Egeler heard the mayor's motion to dissolve the initial TRO on May 31, 2024. At that hearing, the court also addressed SDMGO's cross-motion to extend the TRO. The purpose of that hearing was to hear from all parties on whether the mayor should be enjoined from destroying the tree. The mayor had more than sufficient notice to participate fully at that hearing and to contest SDMGO's request for a TRO.

Should this Court choose instead to focus on the circumstances surrounding Judge Amamilo's initial granting of the TRO, it should consider the declaration of Tanya Nozawa. Ms. Nozawa explains that it was only on Thursday, May 23, 2024 that SDMGO learned of the mayor's plan to have the tree cut down that very weekend, over the Memorial Day holiday. CP 17. As discussed previously, counsel for SDMGO did not learn of this until late that night and was forced to move quickly to obtain a TRO the very next morning. Based on the threat of the tree being cut down that very weekend, this was a true emergency. Obtaining an emergency TRO *ex parte* on short notice was the only feasible option to save the tree. This was fully consistent with Washington law. RCW 7.40.050 (allowing court to grant a temporary restraining order without notice in "cases of emergency").

The mayor claims that the initial TRO did not contain a bond. Resp. at 7. That issue is now moot due to SDMGO's posting of a $10,000.00 supersedeas bond to stay the superior

court's order. A copy of Appellant's Notice of Cash Supersedeas is attached as Appendix D hereto. A copy of Judge Egeler's September 6, 2024 order setting the amount of this bond is attached as Appendix E. The bond was set pursuant to Commissioner Bearse's ruling that obtaining such a bond is the proper initial procedure for enjoining the mayor from destroying the Davis Meeker oak during the pendency of this appeal. *See* Ruling Denying Stay Under RAP 8.3 Without Prejudice to Obtaining a Stay under RAP 8.1(b)(2), Determining Appealability, and Accelerating Appeal (July 23, 2024).

The mayor also argues that the TRO did not include factual findings and did not state the basis for its issuance. "Procedural due process is contextual. Here, context is crucial." *In re Estates of Smaldino*, 151 Wn. App. 356, 372 ¶ 43, 212 P.3d 579 (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 claims that enjoining her from destroying the historic Davis Meeker oak would interfere with "*the City's* legal duties to remove known hazardous trees." Resp. at 10 (emphasis added). There is no such interference. The mayor has not shown that the tree is a "known hazardous tree." And she is, at this very time, seeking a second opinion on the tree's condition.

Furthermore, the mayor has fundamentally failed to show that she is the person within "the City" with the sole legal authority to determine when and under what circumstances the tree should be removed. As discussed above, it is the Tumwater Historic Preservation Commission which has ultimate authority over the tree. If the tree must be removed, it is for the Commission to decide under the plain language of the city's

Historic Preservation Ordinance and tree code. That "the city" may have a duty of care does not imply that the mayor herself has unfettered authority to determine unilaterally how that duty will be exercised.

F. The mayor's own public statement that she needs a second opinion contradicts her present claim that the tree is a "known hazard.

The mayor repeatedly asserts that the Davis Meeker oak is a "known hazardous tree," that the tree has been "identified" or "determined to be hazardous," and that "[t]he decision to remove the tree is important to safeguard the public using the adjacent street." Resp. at 1, 3, 9, 10, 40. Yet, not only have multiple third parties (including arborists) called into serious question the city arborist's report that is the basis for such claims, but the mayor herself is no longer relying on that report. Her attorney stated that the mayor is getting a second opinion that "will be used to evaluate next steps concerning the Davis Meeker Garry Oak." App. F at 3:7-13. The mayor cannot claim the tree is a hazard based on a report and simultaneously abandon that same report.

In any case, it is irrelevant to this case whether the tree is hazardous or not. The mayor cannot have it cut down either way because she has not obtained a permit from DAHP and permission from the Tumwater Historic Preservation Commission.

CONCLUSION

For the foregoing reasons, this Court should enjoin the mayor from cutting down the historic Davis Meeker oak until she obtains permission from the historic commission and a permit from DAHP.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 5,206 words, in compliance with RAP 18.17(b)

Respectfully submitted this 23rd day of September, 2024.

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APPENDIX B

Tumwater Municipal Code, Chapter 16.08—Protection of Trees and Vegetation

From the City's online municipal code website at:
https://www.codepublishing.com/WA/Tumwater/#!/Tumwater16/Tumwater1608.html#16.08

Sections:

16.08.010 Short title.

This chapter shall be known and may be cited as the "tree and vegetation protection ordinance" of the city.

(Ord. O2002-012, Amended, 07/16/2002; Ord. O94-029,

Amended, 09/20/1994; Ord. 1190, Added, 05/16/1989)

16.08.020 Purposes.
The regulations are adopted for the following purposes:

A. To promote public health, safety and general welfare of the citizens of Tumwater, and to retain as many existing mature trees as possible, without preventing the reasonable development and maintenance of land;

B. To preserve and enhance the city's physical and aesthetic character by preventing indiscriminate removal or destruction of trees and ground cover, and by encouraging development that incorporates existing trees and ground cover into site development practices;

C. To retain trees and vegetation for their positive environmental effects including, but not limited to, the protection of wildlife habitat;

D. To promote identification and protection of trees that have historical significance; are unusual due to their size, species, or age; are unusual for their aesthetic quality; or have other values or characteristics that make them worthy of protection;

E. To prevent erosion and reducing the risk of landslides;

F. To protect environmentally sensitive areas;

G. To minimize surface water runoff and diversion. To reduce siltation and other pollution entering city storm sewer systems, other utility improvements, and the city's rivers, streams, and lakes;

H. To retain trees and ground cover to assist in abatement of noise, to provide wind breaks, and for improvement of air

quality;

I. To promote building and site planning practices that are consistent with the city's natural topographical, soil, and vegetation features and to reduce landscaping costs for new development by utilizing existing trees and ground cover to help fulfill landscaping requirements;

J. To ensure prompt development, restoration and replanting, and effective erosion control of property after land clearing;

K. To promote conservation of energy;

L. To educate the public regarding urban forestry;

M. To implement objectives of the State Environmental Policy Act and Growth Management Act; and

N. To implement and further the city's comprehensive plan and other related ordinances.

(Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O2000-012, Amended, 08/01/2000; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Amended, 09/29/1994; Ord. 1190, Added, 05/16/1989)

16.08.030 Definitions.

A. "Buildable area" is that portion of a parcel of land wherein a building, parking and other improvements may be located and where construction activity may take place. Buildable area shall not include streams, flood hazard areas, geological hazard areas or wetlands and their buffers as defined in TMC Chapter 18.04. For the purpose of calculating required tree protection open space area, existing and newly dedicated city rights-of-way shall not be included.

B. “City” means the city of Tumwater, Washington.

C. “Code administrator” means the director of the community development department or the director’s designated representative.

D. “Conversion option harvest plan (COHP)” means a voluntary plan developed by the landowner and approved by the Washington State Department of Natural Resources and the city of Tumwater, indicating the limits and types of harvest areas, road locations, and open space. This approved plan, when submitted to the Department of Natural Resources as part of the forest practice application and followed by the landowner, maintains the landowner’s option to convert to a use other than commercial forest product production (releases the landowner from the six-year moratorium on future development).

E. Critical Root Zone or CRZ. Unless determined otherwise by the tree protection professional, the root protection zone for trees means an area contained inside an area on the ground having a radius of one foot for every inch of tree diameter, measured from four and one-half feet above ground level, but in no event shall the root protection zone be less than a six-foot radius.

F. “Drip line” of a tree means an imaginary line on the ground created by the vertical projections of the foliage at its circumference.

G. “Environmentally sensitive area” means any lands with the following characteristics:

1. “Geologically hazardous areas” as defined in TMC Chapter 16.20;

2. Lakes, ponds, stream corridors, and creeks as defined in

TMC Chapter 16.32;

3. Identified habitats with which endangered, threatened, or sensitive species have a primary association as defined in TMC Chapter 16.32;

4. Wetlands as defined in TMC Chapter 16.28.

H. "Grading" means excavation, filling, or any combination thereof. Excavation and grading is governed by the International Building Code (IBC).

I. "Greenbelt" means certain designated areas of a project or development that are intended to remain in a natural condition, and/or private permanent open space, or serve as a buffer between properties or developments.

J. "Greenbelt zone" means any area so designated on the official zoning map of the city and subject to the provisions of TMC Chapter 18.30.

K. "Ground cover" means vegetation that is naturally terrestrial excluding noxious or poisonous plants and shall include trees that are less than six inches in diameter measured at four and one-half feet above ground level.

L. "Hazardous tree" means any tree that, due to its health or structural defect, presents a risk to people or property.

M. "Heritage tree(s)" means tree(s) designated by the city and their owners as historical, specimen, rare, or a significant grove of trees.

N. "Historic tree" means any tree designated as an historic object in accordance with the provisions of TMC Chapter 2.62.

O. “Land clearing” or “clearing” means any activity which removes or substantially alters by topping or other methods the vegetative ground cover and/or trees.

P. “Open space” means unoccupied land that is open to the sky and which may or may not contain vegetation and landscaping features, subject to the provisions in TMC 17.04.325 and 17.12.210.

Q. “Parcel” means a tract or plot of land of any size which may or may not be subdivided or improved.

R. “Qualified professional forester” is a professional with academic and field experience that makes them an expert in urban forestry. This may include arborists certified by the International Society of Arboriculture, foresters with a degree in forestry from a Society of American Foresters accredited forestry school, foresters certified by SAF, or urban foresters with a degree in urban forestry. A qualified professional forester must possess the ability to evaluate the health and hazard potential of existing trees, and the ability to prescribe appropriate measures necessary for the preservation of trees during land development. Additionally, the qualified professional forester shall have the necessary training and experience to use and apply the International Society of Arboriculture’s Guide for Plant Appraisal and to successfully provide the necessary expertise relating to management of trees specified in this chapter.

S. “Topping” is the removal of the upper crown of the tree with no consideration of proper cuts as per the current ANSI A300 Standard. Cuts created by topping create unsightly stubs that promote decay within the parent branch and can cause premature mortality of a tree. Topping a tree is considered to be a removal, and may require a tree removal permit.

T. “Tree” means any healthy living woody plant characterized by one or more main stems or trunks and many branches, and having a diameter of six inches or more measured four and one-half feet above ground level. Healthy in the context of this definition shall mean a tree that is rated by a professional with expertise in the field of forestry or arbor culture as fair or better using recognized forestry or arbor cultural practices. If a tree exhibits multiple stems and the split(s) or separation(s) between stems is above grade, then that is considered a single tree. If a tree exhibits multiple stems emerging from grade and there is visible soil separating the stems, then each soil-separated stem is considered an individual tree. Appropriate tree species under six inches may be considered with approval of the city tree protection professional.

U. “Tree plan” is a plan that contains specific information pertaining to the protection, preservation, and planting of trees pursuant to this chapter.

V. “Tree protection open space” is a separate dedicated area of land, specifically set aside for the protection and planting of trees.

W. “Tree protection professional” is a certified professional with academic and field experience that makes him or her a recognized expert in urban tree preservation and management. The tree protection professional shall be either a member of the International Society of Arboriculture or the Society of American Foresters or the Association of Consulting Foresters, and shall have specific experience with urban tree management in the Pacific Northwest. Additionally, the tree protection professional shall have the necessary training and experience to use and apply the International Society of Arboriculture’s Guide for Plant Appraisal and to successfully provide the necessary expertise relating to management of trees specified in

this chapter.

(Ord. O2013-017, Amended, 08/19/2014; Ord. O2013-025, Amended, 01/07/2014; Ord. O2011-002, Amended, 03/01/2011; Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Amended, 09/20/1994; Ord. 1311, Amended, 04/07/1992; Ord. 1190, Added, 05/16/1989)

16.08.035 City tree protection professional.
In the city's interest of achieving professional assistance in the city's tree protection efforts and achieving consistency in tree protection decisions; the city shall contract with a "city tree protection professional" that qualifies as a tree protection professional under the definition of this chapter. The tree protection professional shall be responsible for providing the information and services required of a tree protection professional described herein.

Individual applicants will be responsible for payment of costs of the tree protection professional for projects necessitating work to be performed by the tree protection professional with the exception that the code administrator may waive payment by the applicant for minor work of the tree protection professional in determining an exempt project; provided however, that the city shall be responsible for billing and collecting costs charged to the applicant and transferring payment to the tree protection professional unless the city has opted for some other mechanism of providing for the costs, such as inclusion of costs in application fees.

(Ord. O2002-012, Amended, 07/16/2002; Ord. O97-029, Added, 03/17/1998)

16.08.038 Forest practice applications.
Pursuant to RCW 76.09.240, requiring local jurisdictions to set

standards for and to process class IV forest practice applications, such permits shall be processed as a land clearing permit, and shall meet the requirements of this chapter.

A. The application of this chapter to forest practice activities regulated by the Washington State Forest Practices Act (Chapter 76.09 RCW) shall be limited to:

1. General forest practices.

B. This chapter is intended to allow the city of Tumwater to assume jurisdiction for approval of general forest practices, approvals occurring in the city of Tumwater, as authorized under the Washington State Forest Practices Act, Chapter 76.09 RCW. Until such time as jurisdiction for these permits is transferred to the city by the State Department of Natural Resources, the city will act as the State Environmental Policy Act (SEPA) lead agency for all general forest practice approvals occurring within the city limits. This chapter shall rely upon existing definitions contained within the Washington State Forest Practices Act (Chapter 76.09 RCW), Rules for the Washington State Forest Practices Act (Chapter 222-16 WAC), and the Tumwater Municipal Code.

(Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Added, 07/16/2002)

16.08.040 Tree account.

There is hereby established within the city a "tree account" for the purposes of acquiring, maintaining and preserving wooded areas, and for planting and maintaining trees within the city.

A. Collections and Deposits. All fines collected for violations of this chapter shall be deposited into the tree account. All donations and mitigation fees collected related to the preservation of trees or the enhancement of wooded buffer

areas shall also be deposited into the tree account.

B. Maintenance of Account. The tree account shall be maintained by the finance director as a separate, interest-bearing account.

C. Use of Funds. Funds in the tree account shall be used only upon appropriation by the city council. Funds may be withdrawn from the tree account with the approval of the code administrator, and may be used for any purpose consistent with the intent of this chapter. Funds used to plant trees may be used only on city-owned property, or on property upon which the city has been granted an easement for the purpose of establishing or maintaining trees or other vegetation.

(Ord. O2002-012, Amended, 07/16/2002; Ord. O94-029, Added, 09/20/1994)

16.08.050 Permit required – Applications – Requirements – Processing – Conditions of issuance.

A. No person, corporation, or other legal entity not exempt under TMC 16.08.080 shall engage in land clearing or tree removal in the city without having received a land clearing permit.

B. Requirement Established. The application for land clearing permit shall be submitted with any project permit as defined in TMC 14.02.020(O), including single-family and duplex structures unless a land clearing permit was previously reviewed as part of prior project permit. A tree protection plan is required to obtain a land clearing permit and is also required for any land development not exempt under TMC 16.08.080. The tree protection plan shall be developed by a qualified professional forester and be submitted in conjunction with other environmental submittals and site plan development permits. For single-family homes on lots created prior to November

1994, the applicant has the option of using the city tree protection professional to prepare the permit application. This service will be provided at the same hourly rates charged to the city under its contractual arrangement with the tree protection professional.

C. An application for a land clearing permit shall be submitted on a form provided by the city. Accompanying such form shall be a report which includes the following information:

1. General vicinity map;

2. Date, north arrow and scale;

3. Property boundaries, the extent and location of proposed clearing and major physical features of the property (streams, ravines, etc.);

4. Tree Inventory. Drawn to scale on the preliminary or conceptual site plan: a map delineating vegetation types. Each type should include the following information:

a. Average trees and basal area per acre, by species and six-inch diameter class. For nonforested areas, a general description of the vegetation present.

b. Narrative description of the potential for tree preservation for each vegetation type. This should include soils, wind throw potential, insect and disease problems, and approximate distance to existing and proposed targets.

c. Description of any off-site tree or trees, which could be adversely affected by the proposed activity;

5. Tree Protection Plan. Drawn to scale on the site plan,

grading and erosion control and landscape plans. It should include the following information:

a. Surveyed locations of perimeters of groves of trees and individual trees to be preserved, adjacent to the proposed limits of the construction. General locations of trees proposed for removal. The critical root zones of trees to be preserved shall be shown on the plans.

b. Limits of construction and existing and proposed grade changes on site.

c. Narrative description, buildable area of the site, and graphic detail of tree protection, and tree maintenance measures required for the preservation of existing trees identified to be preserved.

d. Timeline for clearing, grading and installation of tree protection measures.

e. Final tree protection plan will be drawn to scale on the above described plans and submitted with the final application packet;

6. Tree Replacement Plan. Drawn to scale on the site and landscape plans. The tree replacement plan shall be developed by a licensed Washington landscape architect, Washington certified nursery professional, ISA certified arborist, board certified horticulturist, qualified professional forester or Washington certified landscaper. It should include the following information:

a. Location, size, species and numbers of trees to be planted.

b. Narrative description and detail showing any site

preparation, installation and maintenance measure necessary for the long-term survival and health of the trees.

c. Narrative description and detail showing proposed locations of required tree planting, site preparation, installation and maintenance within critical root zones of preserved groups or individual trees.

d. Cost estimate for the purchase, installation and three years' maintenance of trees;

7. A timeline for implementation and monitoring of the tree protection, and/or replacement plan;

8. A plan indicating how the site will be revegetated and landscaped;

9. A proposed time schedule for land clearing, land restoration, revegetation, landscaping, implementation of erosion controls, and any construction of improvements;

10. Information indicating the method to be followed in erosion control and restoration of land during and immediately following land clearing;

11. A note indicating that the city will have the right of entry upon the subject property for the purpose of performing inspections consistent with the provisions of this chapter;

12. The approved tree protection plan map will be included in contractor's packet of approved plans used for construction on the project; and

13. Other information as deemed appropriate to this

chapter and necessary by the code administrator or city tree protection professional.

D. In addition to the requirements noted in subsection C of this section, on timbered property greater in size than one acre or commercial property with more than fifteen trees, or other sites the city deems necessary because of special circumstances or complexity, the code administrator may require review of the site and proposed plan and submittal of a report by the city's tree protection professional for compliance with the requirements of this chapter.

Further provided, that the code administrator may modify the submittal requirements of subsections C and D of this section, on individual applications where the information is not needed or is unavailable.

E. Each application shall be submitted with a fee established by resolution of the city council, to help defray the cost of handling the application, no part of which fee is refundable.

F. The code administrator shall notify the applicant whether the application is complete within twenty-eight calendar days of receipt of the application. If incomplete, the code administrator shall indicate in the notice the information required to make the application complete. The code administrator shall approve, approve with conditions or deny the permit within thirty calendar days of receipt of the complete application, or within thirty calendar days of completion of any environmental review, whichever is later. For applications such as site development proposals where there is more than a land clearing permit pending, the code administrator shall, whenever feasible, coordinate reviews, notices and hearings, and act upon the land clearing permit concurrently with other pending permits.

G. Any permit granted under this chapter shall expire eighteen

months from the date of issuance, unless said permit is associated with another development permit. If it is associated with another development permit, the restrictions and deadlines of that approval will apply. Upon a written request, a permit not associated with another development permit may be extended by the code administrator for one six-month period. Approved plans shall not be amended without being resubmitted to the city. Minor changes consistent with the original permit intent will not require a new permit fee or full application standards to be followed. The permit may be suspended or revoked by the city because of incorrect information supplied or any violation of the provisions of this chapter.

H. Once issued, the permit shall be posted by the applicant on the site, in a manner so that the permit is visible to the general public.

(Ord. O2017-022, Amended, 12/05/2017; Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Amended, 09/20/1994; Ord. 1190, Added, 05/16/1989)

16.08.060 Performance and maintenance bond may be required.

A. The code administrator may require bonds and bond agreements in such form and amounts as may be deemed necessary to assure that the work shall be completed in accordance with the permit. Bonds, if required, shall be furnished by the applicant or property owner. A bond agreement shall provide assurance that the applicant has sufficient right, title and interest in the property to grant the city all rights set forth in the agreement.

B. In lieu of a bond, the applicant may file assigned funds or an instrument of credit with the city in an amount equal to that which would be required in a bond.

C. The amount of bonds or other assurance instrument shall not exceed the estimated cost of the total restoration, revegetation, planting or landscaping work planned, as determined by the code administrator.

D. The duration of any bond or other required surety shall be not less than three years from the date that said restoration, revegetation, planting or landscaping has been accepted by the code administrator.

(Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O94-029, Amended, 09/20/1994; Ord. 1190, Added, 05/16/1989)

16.08.070 Standards.

All land clearing not exempt under TMC 16.08.080 shall conform to the approved plan and the following standards and provisions unless alternate procedures that are equal to or superior in achieving the purposes of this chapter are authorized in writing by the code administrator:

A. No land clearing and/or ground surface level changes shall occur in a greenbelt zone as delineated on the official zoning map except as required for uses permitted in that zone. In addition, such land clearing and/or ground surface changes shall be subject to all other applicable standards and regulations;

B. Land clearing in designated greenbelt, open space, tree tract or buffer areas of approved and recorded subdivisions or approved projects which would substantially alter the character or purpose of said greenbelt or buffer areas is prohibited, except in cases involving land clearing plans approved by the code administrator for removal of hazard trees, invasive or noxious plant species and replanting with native plant and tree species;

C. Erosion control measures shall be provided by the

applicant's professional engineer, in conformance with the Drainage Design Erosion Control Manual for the Thurston Region, Washington, as currently written and subsequently amended. The erosion control measures shall be reviewed and subject to approval by the code administrator. The requirement for a professional engineer may be waived by the code administrator on a case-by-case basis;

D. Land clearing shall be accomplished in a manner that will not create or contribute to landslides, accelerated soil creep, settlement and subsidence on the subject property and/or adjoining properties;

E. When land clearing occurs that does not include development, the proposal shall contain provisions for the protection of natural land and water features, vegetation, drainage, retention of native ground cover, and other indigenous features of the site;

F. Land clearing shall be accomplished in a manner that will not create or contribute to flooding, erosion, or increased turbidity, siltation, or other form of pollution in a watercourse;

G. Land clearing in wetlands, and fish and wildlife habitat areas shall be in accordance with the provisions of TMC Chapter 16.28, Wetland Protection Standards, and TMC Chapter 16.32, Fish and Wildlife Habitat Protection;

H. During the months of November, December, and January, no land clearing shall be performed in areas with average slopes of fifteen percent or greater, or any slopes of forty percent or greater;

I. During the months of November, December, and January, no land clearing shall be performed in areas with fine-grained soils and a slope greater than five percent. For the purposes of this

section, fine-grained soils shall include any soil associations which are classified in hydrologic soil groups C or D, as mapped in the Thurston County Soil Survey, or as determined by a qualified soil scientist;

J. Land clearing shall be undertaken in such a manner as to preserve and enhance the city's aesthetic character. The site shall be revegetated and landscaped as soon as practicable, in accordance with the approved revegetation plan. Where the construction schedule does not provide for revegetation of the site prior to October 15 of any year, all disturbed areas shall be hydro seeded or otherwise revegetated on an interim basis. The revegetation plan shall include plantings along public streets and adjoining property boundaries, especially between areas of differing intensities of development. For land clearing permits that are part of a specific development proposal, land use development shall be initiated or a vegetative screen or buffer established within six months of the date of initiation of land clearing activities;

K. Land clearing shall be conducted so as to expose the smallest practical area of soil to erosion for the least possible time, consistent with the construction schedule. Provisions shall be made for interim erosion control measures;

L. Land clearing activities shall be limited to the hours of 7:00 a.m. to 8:00 p.m. on weekdays and 9:00 a.m. to 8:00 p.m. on Saturdays in accordance with TMC Chapter 8.08;

M. Open burning of land clearing debris is prohibited. Slash shall be properly disposed of off site or chipped and applied to the site within six months of the completion of the land clearing. Chipped material deposited on the site shall be spread out or other means used to prevent fire hazard;

N. Any trees to be retained shall be flagged or otherwise

marked to make it clear which tree or groups of trees are to be retained;

O. Any trees or groups of trees to be retained shall have temporary fencing installed around the critical root zone. Temporary fencing must be adequate to protect the critical root zone of trees designated for retention. On construction sites where circumstances warrant, the code administrator may require more substantial tree protection fencing, as necessary, to protect intrusion of construction activity into the CRZ areas. Machinery and storage of construction materials shall be kept outside of the CRZ of trees designated for retention. The code administrator may require fencing beyond the CRZ if, in the code administrator's determination, such additional protection is needed to protect the tree from damage. Trees designated for retention shall not be damaged by scoring, ground surface level changes, compaction of soil, attaching objects to trees, altering drainage or any other activities that may cause damage of roots, trunks, or surrounding ground cover;

P. Any trees designated for retention shall be field verified by the city tree protection professional before land clearing begins;

Q. Not more than thirty percent of the trees on any parcel of land shall be removed within any ten-year period, unless the clearing is accomplished as part of an approved development plan. Such clearing shall be done in such a way as to leave healthy dominant and codominant trees well distributed throughout the site (taking into account the interdependency of the trees) unless, according to the determination of the city tree protection professional, this requirement would conflict with other standards of this section. For every tree removed at least one replacement tree shall be planted. Replacement trees shall consist of seedlings of the same or similar species to those trees removed, which shall be at least two years old. In lieu of this

planting of replacement trees, the applicant may contribute a cash payment to the city's tree account in an amount equal to one hundred twenty-five percent of the retail value replacement cost. The time schedule for the planting of replacement trees shall be specified in the approved plan. If a land clearing permit is applied for as part of a development plan within ten years of clearing under this subsection, all trees removed under this standard will be counted towards required tree retention/replacement when a land clearing permit is issued;

R. When land clearing is performed in conjunction with a specific development proposal not less than twenty percent of the trees, or not less than twelve trees per acre (whichever is greater), shall be retained.

Provided, however, where it can be demonstrated that the trees on a site were planted as part of a commercial Christmas tree farm, then no less than seventeen percent or twelve trees per acre, whichever is less, shall be retained. Commercial tree farm status must be verified by the city tree protection professional.

1. Size, Type and Condition of Retained Trees.

    a. For the purpose of calculating tree retention standards, trees twenty-four inches or greater in diameter measured four and one-half feet above ground level shall count as two trees.

    b. Species such as willow, cottonwood, poplar and other species, the roots of which are likely to obstruct or injure site improvements, sanitary sewers or other underground utilities, shall not be considered trees for the purpose of calculating tree retention standards if located within the buildable portion of the lot.

    c. A tree must meet the following standards in order

to be counted for the purpose of meeting tree retention standards:

i. Must have a post-development life expectancy of greater than ten years;

ii. Must have a relatively sound and solid trunk with no extensive decay or significant trunk damage;

iii. Must have no major insect or pathological problems;

iv. Must have no significant crown damage;

v. Should be fully branched and generally proportional in height and breadth for the tree age;

vi. Must be windfirm in their post-development state.

2. These standards may be waived or modified by the code administrator if the applicant provides substantial evidence demonstrating that strict compliance would make reasonable use of the property impracticable for three or more of the following reasons:

a. Removal of the tree or trees is needed to enable use of a solar system. A waiver for this reason must be accompanied by a bond assuring completion of the solar system within the timeframe associated with the underlying building permit issued for the project.

b. The tree retention standard cannot be achieved because of the necessity of complying with applicable zoning and development requirements including, but

not limited to, residential densities, open space requirements for active recreation, floor area ratios (FAR), parking requirements, stormwater requirements, street construction requirements, etc.

c. The tree retention standard cannot be achieved because the tree or trees do not have a reasonable chance of survival once the site is developed or modified and may pose a threat to life or property if retained.

d. The applicant has made reasonable efforts to reconfigure or reduce the building footprint(s), site access, on-site utility systems and parking area(s) to avoid impacts to trees on the property.

e. For commercial and industrial land uses, the project pro forma demonstrates that economically viable use of the property cannot be achieved while meeting the tree retention standards in this chapter. This standard is presumed to be met without a pro forma if the area disturbed by development of the property would be less than eighty-five percent of the land.

f. The granting of the waiver or modification will not result in increasing the risk of slope failure, significant erosion or significant increases in surface water flows that cannot be controlled using best management practices.

3. Where the standard is waived or modified, the applicant shall plant not less than three trees for each tree cleared in excess of the standard.

a. These replacement trees shall be at least two inches in diameter measured at a height of six inches above

the root collar.

b. Replacement trees shall be planted on the same parcel as the proposed development, unless the code administrator approves of an alternate location.

c. Replacement trees must first be planted in a "tree protection open space." The tree protection open space shall be comprised of a minimum of five percent of the buildable area for the purpose of retaining existing trees and/or for the planting of replacement trees. Replacement trees in the tree protection open space shall be a mix of native coniferous and deciduous trees. The tree protection open space shall be a contiguous area. The tree protection open space is required to be eighty percent covered by tree canopy after fifteen years utilizing retained and/or replacement trees. Approved trees and their CRZ area within a critical area buffer may count for up to fifty percent of the required tree protection open space. Stormwater facilities can be considered as part of the tree protection open space if trees can be retained and/or planted successfully and not disable the operating functions of the facility.

d. If more replacement trees are required than necessary to meet the canopy requirement in the tree protection open space, then these trees (either native and/or nonnative species) can be planted elsewhere on the parcel(s).

e. If the city tree protection professional determines that more replacement trees are required than can be planted in the tree protection open space and the rest of the parcel, then the applicant shall contribute a cash payment to the city's tree account in an amount

determined by the current city fee resolution.

4. In situations where a parcel of land to be developed does not meet the retention standards above in an undeveloped state, the applicant shall be required to reforest the site to meet the applicable standard outlined above at a 1:1 ratio as a condition of project approval.

5. In determining which trees shall be given the highest priority for retention, the following criteria shall be used:

a. Heritage or historic trees;

b. Trees which are unusual due to their size, age or rarity;

c. Trees in environmentally sensitive areas;

d. Trees that act as a buffer to separate incompatible land uses;

e. Trees which shelter other trees from strong winds that could otherwise cause them to blow down;

f. Trees within greenbelts, open space, tree protection open space or buffers;

g. Trees with significant habitat value as identified by a qualified wildlife biologist or by the city tree protection professional; and

h. Trees which are part of a continuous canopy or which are mutually dependent, as identified by a qualified professional forester or the city tree protection professional;

S. In addition to the provisions of this chapter, the cutting or clearing of historic trees requires the issuance of a certificate of appropriateness in accordance with TMC Chapter 2.62.

(Ord. O2013-017, Amended, 08/19/2014; Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Added, 09/20/1994)

16.08.072 Maintenance requirements.

A. Maintenance Requirement. Trees are to be maintained in a vigorous and healthy condition, free from diseases, pests and weeds. Trees which become diseased, severely damaged or which die shall be removed by the owner as soon as possible but no later than sixty days after notification by the city. As it pertains to this section, all replacement trees that die shall be replaced with healthy trees of the same size and species as required by the approved tree protection plan for the property. If retained trees die due to construction damage or negligence on the part of the applicant, the city tree protection professional shall determine the appraised landscape value of the dead trees, and the applicant shall plant the equivalent value of trees back onto the site. In the event that space is not available for the required replacement trees (as determined by the city tree protection professional), the equivalent value shall be paid into the tree fund.

B. For areas dedicated as tree protection open space areas, street trees and single-family residential land divisions, the maintenance requirement of this section shall be in effect for three years from the date the final plat is approved or the trees are planted. The tree plan shall be a condition of approval and identified on the face of the plat. The applicant shall also execute a covenant in a form agreeable to the city, which shall require the applicant and his successors to comply with the

maintenance requirement of this section. The covenant shall obligate both the property owner and the homeowner's association and shall be recorded with the county auditor. The recording fee shall be paid by the applicant.

C. For multifamily residential, commercial, and industrial developments, the maintenance requirement for all trees covered by the tree plan shall apply in perpetuity. The applicant shall execute a covenant in a form agreeable to the city, which shall require that the applicant and his successors comply with the maintenance requirement imposed by this section. The covenant shall be binding on successor property owners and owners' associations. The covenant shall be recorded with the county auditor and the recording fee shall be paid by the applicant.

D. Maintenance Agreement. Each development to which the maintenance requirement for this chapter applies and that contain a heritage tree(s) shall also be subject to a maintenance agreement. The code administrator shall require the applicant to execute a maintenance agreement with the city, in a form acceptable to the city attorney, which shall include the provisions of the maintenance requirement in this chapter, to ensure the survival and proper care of any heritage trees identified in the tree plan.

E. Failure to Maintain. Retained trees, replacement trees and street trees as per the requirements of this chapter and/or TMC Chapter 18.47, Landscaping, shall be maintained according to the American National Standards Institute, current edition of the American National Standards, ANSI A300. Failure to regularly maintain the trees as required in this section shall constitute a violation of this chapter and, if applicable, the plat covenant.

(Ord. O2006-014, Added, 04/17/2007)

16.08.075 Heritage trees designated.

A. Trees can be nominated for designation by citizens, the Tumwater tree board, or city staff.

1. Application for heritage tree designation must be submitted to the community development department. The application must include a short description of the trees, including address or location, and landowner's name and phone number. The application must be signed by both the landowner and nominator.

2. The tree board reviews the application and makes a recommendation to the city council.

3. All heritage trees will be added to city tree inventory and public works maps.

B. Trees that are designated as heritage trees shall be classified as follows:

1. Historical – A tree which by virtue of its age, its association with or contribution to a historical structure or district, or its association with a noted citizen or historical event.

2. Specimen – Age, size, health, and quality factors combine to qualify the tree as unique among the species in Tumwater and Washington State.

3. Rare – One or very few of a kind, or is unusual in some form of growth or species.

4. Significant Grove – Outstanding rows or groups of trees that impact the city's landscape.

C. The city will provide an evaluation and recommendation for

tree health and care and will provide up to one inspection annually upon request of the landowner. The city may, at its discretion, provide a plaque listing the owner's name and/or tree species/location.

D. Heritage Tree Removal.

1. A tree removal permit is required for removal of any heritage tree(s).

2. The city tree protection professional shall evaluate any heritage trees prior to a decision on the removal permit. Recommendations for care, other than removal, will be considered.

3. Dead or hazardous trees are exempt from a tree removal permit after verification by the city tree protection professional.

E. Heritage Tree Declassification. Any heritage tree may, at any time, be removed from heritage tree status at the request of the landowner after providing two weeks' written notice to the community development department. Unless an agreement can be reached to preserve the tree, the tree will be removed from the heritage tree inventory list and the plaque, if any, will be removed.

(Amended during 2011 reformat; O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O2000-012, Added, 07/18/2000)

16.08.080 Exemptions.

The following shall be exempt from the provisions of this chapter; provided however, the code administrator may require reasonable documentation verifying circumstances associated with any proposal to remove trees under any of the following

exemptions:

A. Land clearing in emergency situations involving immediate danger to life or property. For every tree cleared under this exemption, at least one replacement tree shall be planted. Except for the number of trees, replacement trees shall conform to the standard for replacement trees described in TMC 16.08.070(R);

B. Land clearing associated with routine maintenance by utility companies such as the power company and telephone company. Utility companies shall notify the community development department at least two weeks prior to the start of work and shall follow appropriate vegetation management practices;

C. Land clearing performed within any public right-of-way or any public easement, when such work is performed by a public agency and the work relates to the installation of utilities and transportation facilities (such as streets, sidewalks and bike paths). To the greatest extent possible, all such work shall conform to the standards set forth in this chapter;

D. Land clearing within ten feet (when required for construction) of the perimeter of the single-family or duplex dwellings and associated driveways or septic systems must be indicated on the plot plan submitted to the building official with an application for a building permit. This exemption does not apply to land clearing located within environmentally sensitive areas, or to areas subject to the provisions of the shoreline master program;

E. Clearing of dead, diseased, or hazardous trees, after verification by the city tree protection professional. For every tree cleared under this exemption, at least one replacement tree shall be planted. Except for the number of trees, replacement trees shall conform to the standard for replacement trees

described in TMC 16.08.070(R);

F. Clearing of trees that act as obstructions at intersections in accordance with the municipal code;

G. The removal of not more than six trees from any parcel of land in three consecutive calendar years. This exemption does not apply to heritage or historic trees, or to trees located in a greenbelt or greenbelt zone, or in wetlands or critical areas and their buffers or to tree topping. A letter of "waiver" for the exempt removals must be obtained from the community development department prior to tree removal;

H. Land clearing associated with tree farming operations specifically preempted by Chapter 76.09 RCW, Washington Forest Practices Act; provided, that a harvesting and reforestation plan is submitted to the code administrator prior to any land clearing;

I. Clearing of noxious ground cover for the purposes of utility maintenance, landscaping, or gardening. This exemption applies solely to ground cover, for protected trees clearing must conform to subsection G of this section;

J. Clearing of trees that obstruct or impede the operation of air traffic or air operations at the Olympia Airport. The tree replacement standards of this chapter must be met. Trees should be replanted outside the air operations area;

K. Clearing of not more than six trees every three consecutive calendar years on developed properties, when such clearing is necessary to allow for the proper functioning of a solar-powered energy system. Such clearing may be done only after verification of the need to clear the trees, issuance of a waiver letter, and the issuance of a building permit for such a system by the code administrator.

(Amended during 2011 reformat; O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Amended, 09/20/1994; Ord. 1311, Amended, 04/07/1992; Ord. 1190, Added, 05/16/1989)

16.08.090 Alternative plans.

Required tree mitigation must conform to the standards contained in this chapter unless alternate plans that are equal to or superior in achieving the purposes of this chapter are authorized in writing by the code administrator. The code administrator may modify or waive the requirements of this chapter only after consideration of a written request for any of the following reasons:

A. Special circumstances relating to the size, shape, topography or physical conditions, location, or surroundings of the subject property, or to provide it with use rights and privileges permitted to other properties in the vicinity and zone in which it is located;

B. Improvement as required without modification or waiver would not function properly or safely or would not be advantageous or harmonious to the neighborhood or city as a whole;

C. The proposed modification would result in an increased retention of mature trees and/or naturally occurring vegetation on the site;

D. The proposed modification represents a superior result than that which could be achieved by strictly following the requirements of this chapter, the proposed modification complies with the stated purpose of TMC 16.08.020 and the proposed modification will not violate any city of Tumwater codes or ordinances.

Any modifications under this chapter shall be as limited as possible to achieve the aim of relating required mitigation for tree protection to the impacts caused by the individual development.

(Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. 1190, Added, 05/16/1989)

16.08.100 Appeal procedure.

Any person aggrieved by a decision or an action of the code administrator in the enforcement or implementation of this chapter may, within fourteen calendar days of such decision or action, file a written appeal to the hearing examiner. Any decision of the hearing examiner may be appealed to the Thurston County superior court in accordance with the provisions of TMC Chapter 2.58.

(Ord. O2017-022, Amended, 12/05/2017; Ord. O2006-014, Amended, 04/17/2007; Ord. O2002-012, Amended, 07/16/2002; Ord. O94-029, Amended, 09/20/1994; Ord. 1259, Amended, 11/06/1990; Ord. 1190, Added, 05/16/1989)

16.08.110 Violation – Criminal penalties.

A. Any person who violates the provisions of this chapter or fails to comply with any of the requirements shall be guilty of a misdemeanor and subject to the penalties set forth in TMC 1.12.010. In keeping with the city's concern regarding protection of the environment, the court should consider the imposition of minimum fines of no less than $1,000 per occurrence. Each day such violation continues shall be considered a separate, distinct offense. In cases involving land clearing in violation of this chapter, the clearing of any area up to the first acre shall be considered one offense, and the clearing of each additional acre and of any additional fractional portion that does not equal one more acre shall each be considered a separate and distinct offense.

B. Any person who commits, participates in, assists or maintains such violation may be found guilty of a separate offense and suffer the penalties as set forth in subsection A of this section.

C. In addition to the penalties set forth in subsections A and B of this section, any violation of the provisions of this chapter is declared to be a public nuisance and may be abated through proceedings for injunctive or similar relief in superior court or other court of competent jurisdiction.

D. Upon determination that a violation of the provisions of this chapter has occurred, the building official shall withhold issuance of building permits for the affected property until corrective action is taken by the responsible party. However, if mitigating circumstances exist and reasonable commitments for corrective action are made, the building official may issue building permits. Such corrective action may include:

1. Restoration and replanting of surface vegetation with plant material similar in character and extent as existed prior to the unauthorized clearing;

2. Implementation of drainage and erosion control measures;

3. Replanting of trees equal in value to those lost through unauthorized clearing. The value of the trees removed shall be determined by the city's tree protection professional using landscape tree appraisal methodology published in the current edition of the International Society of Arboriculture's Guide for Plant Appraisal.

(Ord. O2002-012, Amended, 07/16/2002; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Amended, 09/20/1994; Ord. 1311, Amended, 04/07/1992; Ord. 1190, Added,

05/16/1989)

16.08.120 Violation – Civil penalties – Presumption – Other remedies.

A. As a supplement or alternative to the remedies set forth in TMC 16.08.110, the code administrator shall have the authority to seek civil penalties for violation of the provisions of this chapter.

Any person, corporation, partnership or other entity being the owner of real property or holder of timber rights upon such property who violates the provision of this chapter or fails to comply with any of its requirements shall upon a proper showing be deemed to have committed a class 1 civil infraction as defined by TMC 1.10.120(D)(1). Civil liability shall also attach to others who violate the provisions of this chapter, whether or not such violation occurs at the direction of the owners or holder of timber rights.

As provided by law, the Tumwater municipal court is hereby vested with jurisdiction to hear civil infraction cases under this chapter. Said cases shall be heard by the court without jury and upon a finding that the infraction has been committed by a preponderance of the evidence.

The code administrator shall have the authority to charge as a separate violation each such tree removed or destroyed.

B. Presumption. For purposes of administration and prosecution of alleged violations of this chapter, there is hereby created a rebuttable presumption that the person whose name appears on tax records of the Thurston County assessor, with respect to the real property in question, has responsibility for ensuring that violations of provisions of this chapter do not occur on the property in question.

C. In addition to the penalties set forth in this chapter, any violation of the provisions of this chapter is declared to be a public nuisance and may be abated through proceedings for injunctive or similar relief in superior court or other court of competent jurisdiction.

D. Upon determination that a violation of the provisions of this chapter has occurred, the building official shall withhold issuance of building permits for their affected property until corrective action is taken by the responsible party. However, if mitigating circumstances exist and reasonable commitments for corrective action are made, the building official may issue building permits. Such corrective action may include:

1. Restoration of surface vegetation with plant material similar in character and extent as existed prior to the unauthorized clearing;

2. Implementation of drainage and erosion control measures;

3. Replanting of trees equal in value to those lost through unauthorized clearing. The value of the trees removed shall be determined by the city's tree protection professional using landscape tree appraisal methodology published in the current edition of the International Society of Arboriculture's Guide for Plant Appraisal.

(Amended during 2011 reformat; O2002-012, Amended, 07/16/2002; Ord. O97-029, Amended, 03/17/1998; Ord. O94-029, Added, 09/20/1994)

APPENDIX C

Letter from Christopher P. Wright, Assistant Attorney General,
to Jeffrey S. Myers re: Davis-Meeker Garry Oak (45 TN 548),
dated July 11, 2024.

[on following page]

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Agriculture & Health Division
PO Box 40109 ● Olympia, WA 98504-0109 ● 360-586-6500

July 11, 2024

Jeffery S. Meyers
Attorney at Law
Law, Lyman, Daniel, Kamerrer & Bogdonovitch, P.S.
2674 RW Johnson Blvd SW
Tumwater, WA 98512

RE: **Davis-Meeker Garry Oak Tree (45 TN 548)**

Dear Jeffery Myers:

I am an Assistant Attorney General and represent the Washington State Department of Archaeology and Historic Preservation (DAHP). It is in that capacity that I send this letter.

The Davis-Meeker Garry Oak Tree (the Tree) is a recorded archaeological site, known by its Smithsonian Trinomial 45 TN 548. Chapter 27.53 RCW and WAC Chapter 25-48 require the City of Tumwater (City) to obtain an Archaeological Excavation and Removal Permit (Permit) from DAHP before the Tree is removed, altered, dug into, excavated, damaged, defaced, or destroyed. Should the City fail to obtain a permit as required by law, 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. Such penalties may include, but are not limited to, reasonable investigative costs incurred by a mutually agreed upon independent professional archaeologist investigating the alleged violation, reasonable site restoration costs, and civil penalties in an amount of not more than five thousand dollars per violation. Each day of continued violation constitutes a distinct violation of RCW 27.53.060 subject to the maximum penalties available by law.

The Tree constitutes an archaeological object and/or an archaeological resource contained within an archaeological site, placing it well within DAHP's regulatory authority and subjecting the City to the permitting requirements of Chapter 27.53 RCW and WAC Chapter 25-48. Chapter 27.53 protects archaeological sites from, amongst other things, destruction or alteration.[1] Such disturbance or alteration to archaeological sites subjects the violator to penalties under RCW 27.53.095.

[1] RCW 27.53.060.

Archaeological sites are locations that contain archaeological objects.[2] Archaeological objects include any item 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."[3] Trees can comprise physical evidence of indigenous and subsequent cultures.

DAHP's rules support this interpretation. The rules use the same definitions for archaeological site[4] and archaeological object[5] as the statute, and provide for the same enforcement and penalties.[6] WAC 25-48-041 also protects archaeological resources from alteration, excavation, or removal absent a permit.[7] Archaeological resources include "any material remains of human life or activities which are of archaeological interest, including all sites, objects, structures, artifacts, implements, and locations of prehistorical or archaeological interest, whether previously recorded or still unrecognized."[8] Material remains of human life are of archaeological interest when they are "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation, and explanation."[9] Trees can be material remains of human life and of archaeological interest, based on a plain reading of the DAHP rules.

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 for years. For example, DAHP's website[10] and the *Field Guide to Washington Archaeology*, produced in 2003, both reference permitting requirements for trees.[11] In fact, a search of DAHP's WISAARD (Washington Information System for Architectural and Archeological Records Data) system indicates that at least 458 recorded archaeological sites are trees. DAHP's interpretation of Chapter 27.53 RCW and WAC Chapter 25-48 is consistent with the plain meaning of the statute.

Based on the information available to DAHP, including but not limited to the Tree's relationship to the Oregon Trail and the Tree's significance to local Tribes, the Tree is a monument that comprises physical evidence of indigenous and subsequent cultures and is of archaeological

[2] RCW 27.53.030
[3] RCW 27.53.030
[4] WAC 25-48-020(9)
[5] WAC 25-48-020(8)
[6] WAC 25-48-041
[7] WAC 25-48-041(1)(a)
[8] WAC 25-48-020(10)
[9] WAC 25-48-020(12)
[10] Available at https://dahp.wa.gov/archaeology
[11] Available at https://dahp.wa.gov/sites/default/files/Field%20Guide%20to%20WA%20Arch_0.pdf

interest. As such, the Tree has been recorded as an archaeological site in Washington and is subject to the protections contained in Chapter 27.53 RCW and Chapter 25-48 WAC.

With respect to the City's assertions related to the dispositive nature of Judge Anne Egeler's statements on the record, Judge Egeler expressly called out that the issue had not been briefed prior to the hearing, and that her Honor's consideration of Chapter 27.53 was "brief." Judge Egeler's apparent consideration of DAHP's statutory authority was limited to a short statement from the bench.

As DAHP understands it, the issue before the Judge Anne Egeler on the Temporary Restraining Order was whether Save the Davis-Meeker Garry Oak (SDMGO) had established a clear legal or equitable right to relief. Judge Egeler ruled that SDMGO had not established such a right. SDMGO clearly has no right to vindicate DAHP's interest in archaeological permitting related to the Tree. DAHP is the sole authority within Washington authorized to issue Archaeological Excavation and Removal Permits allowing for disturbance of archaeological sites. As you know, DAHP was not a party to the case before Judge Egeler, and DAHP was not asked to provide input as an *Amici*. As such, Judge Egeler's Ruling is, at most, limited to the parties and is not binding on DAHP. DAHP further understands that on July 3, 2024 the Commissioner of the Court of Appeals, Division II granted a short-term stay of the dissolution of the Temporary Restraining Order. Such a stay does not prohibit the City from working to obtain a DAHP permit related to the Tree.

DAHP is aware of the City's concerns with respect to potential liability related to the Tree. However, it is also aware that the City has agreed following its June 4, 2024 Tumwater City Council meeting to obtain the service of another arborist to make additional determinations with respect to the health of the Tree. If the city is concerned about timeframes with respect to the Tree, emergency permitting from DAHP is available for circumstances where a Permit may need to be obtained on an expedited basis. WAC 25-48-095 outlines the process for the issuance of an emergency Permit, which require a shorter application process and are valid for 30-60 days, depending on the circumstance.

DAHP has now notified the City on three separate occasions that work on the Tree, including but not limited to removing or damaging the Tree, requires a Permit. This notice first occurred by email from Assistant State Archaeologist James Macrae dated May 30, 2024, second by letter from Assistant State Archaeologist James Macrae dated June 4, 2024, and finally by this letter.

The City is under clear notice of its legal obligation to obtain a Permit under state law prior to commencing work which removes, alters, digs into, excavates, damages, defaces, or destroys the Tree. Again, DAHP will issue penalties against the City to the maximum extent allowed by RCW 27.53.095 for failure to obtain a Permit from DAHP for damaging or removing the tree.

Please have the City contact my client at its earliest convenience to discuss obtaining an Permit if it still wishes to remove, alter or damage the Tree, including for the purpose of obtaining an arborist evaluation if that evaluation requires defacing or damaging the tree in any way. DAHP greatly appreciates the City's future compliance with Washington State laws and rules governing cultural resources.

Sincerely,

Christopher P. Wright
Assistant Attorney General
Attorney for DAHP

cc: James Macrae, Assistant State Archaeologist

CPW:MW

APPENDIX D

Plaintiff's Notice of Cash Supsersedeas (Sept. 12, 2024)

[on following page]

EXPEDITE
■ No Hearing Set
Hearing is set
Date:
Time:
Judge:

Calendar: Civil

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.	Case No. 24-2-01895-34 NOTICE OF CASH SUPERSEDEAS

Submitted with this notice is a cashier's check totaling $10,000 made payable to the Thurston County Superior Court Clerk. The clerk is directed to hold the funds as a bond to supersede the judgment previously entered in this case on May 31, 2024 against Save the Davis-Meeker Garry Oak plus interest likely to accrue during the pendency of the appeal and any costs that may be awarded to Debbie Sullivan on appeal.

The funds shall be held pending return of the mandate in Court of Appeals Cause No. 58881-1-II and thereafter until disbursed pursuant to further order of court or by agreement of the parties.

DATED this 12th day of September, 2024, at Olympia, Washington.

Ronda Larson Kramer
RONDA LARSON KRAMER

LARSON LAW, PLLC
P.O. Box 7337
Olympia WA 98507-7337
360-768-0775

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record **via email:**

Jeffrey S. Myers
Jakub L. Kocztorz
LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
P.O. BOX 11880
OLYMPIA, WA 98508-1880
jmyers@lldkb.com
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tam@lldkb.com

Bryan Telegin
Telegin Law, PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
Bryan@teleginlaw.com

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 12th day of September, at Olympia, WA.

Ronda Larson Kramer

RONDA LARSON KRAMER
Attorney for SDMGO

LARSON LAW, PLLC
P.O. BOX 7337
OLYMPIA WA 98507-7337
360-768-0775

APPENDIX E

Order Setting Amount of Supersedeas Bond Pursuant to RAP 8.1 (Sept. 6, 2024)

[on following page]

J

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** **ORDER SETTING AMOUNT OF SUPERSEDEAS BOND PURSUANT TO RAP 8.1**

THIS MATTER came on for the Court's consideration pursuant to Plaintiff's Motion to Set Amount of Supersedeas Bond. The Court, having reviewed the following pleadings and heard oral argument of counsel, if any:

1. Plaintiff's Motion to Set Amount of Supersedeas Bond (Aug. 12, 2024);
2. Declaration of Bryan Telegin in Support of Plaintiff's Motion to Set Amount of Supersedeas Bond (Aug. 12, 2024);
3. Supplemental Declaration of Bryan Telegin in Support of Motion for Supersedeas Bond;
4. Defendant's Response to Motion to Set Amount of Supersedeas Bond;
5. Declaration of Jeffrey S. Myers re Amount of Supersedeas Bond;
6. Plaintiff's Reply in Support of Motion to Set Amount of Supersedeas Bond;
7. Declaration of Ray Gleason;

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8. Declaration of Ronda Larson Kramer in Support of Plaintiff's Motion to Set Bond;

It is hereby ORDERED:

1. Plaintiff's Motion to Set Amount of Supersedeas Bond is GRANTED;

2. Based on the factors set forth at Rule 8.1 of the Washington Rules of Appellate Procedure, the amount of the bond shall be $ 10,000.

DATED this 6th day of September, 2024.

Hon. Anne Egeler
Thurston County Superior Court Judge

Presented by:

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

Jeffrey S. Myers, WSBA No. 16390
Jakub L. Kocztorz, WSBA No. 61393
Attorneys for Defendant

Approved as to form:

TELEGIN LAW PLLC

Bryan Telegin, WSBA No. 46686
Attorneys for Plaintiff

LARSON LAW, PLLC

Ronda Larson Kramer, WSBA No. 31833
Attorneys for Plaintiff

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APPENDIX F

Declaration of Jeffrey S. Myers in Support of Motion for Attorney's Fees (Aug. 28, 2024)

[on following page]

❑ **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

DECLARATION OF JEFFREY S. MYERS IN SUPPORT OF MOTION FOR ATTORNEY'S FEES

I, Jeffrey S. Myers, hereby states and declares as follows:

1. I am the attorney for Defendant Mayor Debbie Sullivan, who has been sued in her official capacity and the City of Tumwater in the above entitled matter. I am over the age of 18, am competent to testify herein, and make this declaration based upon personal knowledge.

2. In response to a temporary restraining order ("TRO") which was issued *ex parte* and provided to the City of Tumwater on May 24, 2024, I was retained to oppose the plaintiff's request for an injunction and to seek dissolution of the TRO. The City immediately filed an emergency motion to dissolve the TRO which failed to comply with the notice requirements of CR 65 and RCW 7.40.050 and motions to shorten time. The TRO failed to contain any factual findings whatsoever or describe the basis for imposition of the TRO. It failed to contain any requirements for a hearing to allow the city of

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Tumwater to oppose the injunction or to convert the TRO into a preliminary injunction as set forth in CR 65. The TRO further failed to include any financial security or bond to protect the City of Tumwater against the consequences if the TRO was determined to be wrongfully issued, despite the requirements of CR 65 and RCW 7.40.080.

3. The court shortened time and set the motion to dissolve the TRO for May 31, 2024. The parties filed additional briefing and oral argument was heard. The Court granted the motion to dissolve the TRO but stayed the effective date of its order until June 5, 2024 to allow the plaintiff an opportunity to seek emergency relief in the court of appeals.

4. On May 31, 2024, the plaintiff filed an "emergency notice of appeal" to the court of appeals. . However, the plaintiff did not file an emergency motion to stay the dissolution order or otherwise seek emergency relief under RAP 17.4(b). In response, on June 3, 2024, the Court of Appeals issued a ruling informing the plaintiff that it could not grant any such relief unless such an emergency motion for a stay was filed. A copy of the Court of Appeals' June 3, 2024 ruling is attached as **Exhibit 1.** As a result of their failure to file such a motion, the TRO was dissolved and this Court's May 31 order became effective on June 5, 2024. Plaintiff delayed for another month, waiting until July 2, 2024 to file a motion with the appellate court seeking a stay of this court's May 31, 2024 ruling. In that motion, the plaintiff contended that the order dissolving the TRO was an appealable final order. The Court of Appeals agreed in its July 23, 2024 ruling that the superior court effectively determined the City's right to remove the tree, and because it appears no other issues remain pending in the superior court, allowing the appeal to proceed under RAP 2.2(a)(3). See Telegin Decl., Exhibit B.

5. Instead of filing an emergency motion with the court of appeals, as noted by the July 3 ruling and allowed by this Court's May 31 order, the plaintiff instead sought to remove this matter to

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federal court. A notice of removal was filed by plaintiff on June 4, 2024, even though the plaintiff had originally chosen this court as a proper venue in which to bring its action. In response, the defendant immediately filed an objection pointing out that under federal law, only a defendant may remove a case to federal court. Consequently, the federal court immediately remanded this case back to Thurston County Superior Court.

6. In the meantime, the City of Tumwater and Mayor Sullivan agreed to obtain a second opinion concerning the condition of the tree. At the June 4, 2024 City Council meeting, Mayor Sullivan agreed to obtain a second opinion from an independent arborist to evaluate the condition of the tree. The City issued a Request for Qualifications and obtained responses through July 18, 2024. 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.

7. The City of Tumwater reasonably incurred attorney's fees to oppose the wrongfully obtained TRO as well as the aborted attempt to relitigate this issue through removal to federal court. Defendant was forced to move quickly to hire outside counsel to immediately bring the multiple flaws in the TRO to the court's attention. The Mayor and the City were represented by myself and Jakub Kocztorz, a first year associate with our firm. As the principal attorney on this matter, I directed the preparation of pleadings to obtain the dissolution of the TRO. I am a partner at Law, Lyman, Daniel, Kamerrer & Bogdanovich where my practice focuses on municipal law, land use and defense of claims against municipalities. I was admitted to the bar in 1986 after graduating from the University of Washington School of Law. I was an Assistant Attorney General in the Ecology Division for five and a half years until 1992. After three years in private practice in Seattle with Short, Cressman and Burgess, I was a deputy prosecuting attorney for Thurston County in the civil division from 1995 until 1986 when I joined

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Law, Lyman, Daniel Kamerrer & Bogdanovich. My regular billing rate is $290 per hour, but I billed the City of Tumwater a discounted hourly rate of $280 per hour in this matter.

8. Mr. Kocztorz is 2023 graduate from Seattle University Law School. His legal studies focused on municipal law, including an emphasis in land use issues. In Spring 2022, he received the CALI Excellence For The Future Award for achievement in American Legal History. In 2020, Mr. Kocztorz graduated from the University of Washington, with a bachelor's degree in history and minor in Classical Studies. Mr. Kocztorz has billed his time in this matter at his regular hourly rate of $190 per hour.

9. An itemization of the attorney's fees incurred by the Defendant is attached as **Exhibit 2.** We reasonably incurred 51.1 hours and $13,003.00 in attorney's fees in this matter as set forth in **Exhibit 2**.. The table included as **Exhibit 2** was compiled from our billing program and contemporaneous time records kept for this matter. The time set forth is reasonable and I have excluded time which in the exercise of billing judgment would have been excessive and included only the time reasonably necessary to defend this matter. This time includes only the time incurred while the matter was pending in Superior Court and does not include time responding to the plaintiff's filings on appeal.

10. In addition to the reasonable attorney's fees incurred in dissolving the wrongfully issued TRO, the City is continuing to incur attorney's fees to respond to issues raised by the plaintiff on appeal. The amount of reasonable attorney's fees incurred in July and August 2024 are an additional $18,353.88 to respond to the motions in the court of appeals and defend the right of the city to prevent hazards in its right of way. These amounts would reasonably be awarded to the City if it prevails on appeal. The total amount of reasonable attorney's fees spent by the City of Tumwater in responding to plaintiff's litigation is currently in excess of $31,356.88 . This amount does not include time spent responding to the motion to determine the amounts of a supersedeas bond or to bring Defendant's motion for attorney's fees.

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Dated this 28th day of August 2024 at Tumwater, Washington.

Jeffrey S. Myers, WSBA #16390

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