

1 EXPEDITE
2 No Hearing Set
3 Hearing is set
4 Date:
Time:
Judge:
Calendar:

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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF THURSTON**

8 SAVE THE DAVIS-MEEKER GARRY OAK,
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Plaintiff,
vs.
DEBBIE SULLIVAN, in her capacity of Mayor of
Tumwater
Respondent.

Case No. 24-2-01895-34

DECLARATION OF BEOWULF
BROWER

I, BEOWULF BROWER, make the following declaration:

1. I have knowledge of the facts stated herein and am competent to testify.
2. I am an International Society of Arboriculture (ISA) Certified Arborist and Qualified Tree Risk Assessor for Washington State Parks. All opinions expressed here are my own and do not reflect any official position of the WSPRC.
3. In my employment with State Parks, my co-workers and I manage more old-growth and heritage trees than any other state agency. Let me be clear--I love trees. That said, I have felled thousands of them that were untenable to keep around developed recreation sites.
4. The arborist's report produced for the City of Tumwater condemning this tree contains a litany of errors unbecoming of an ISA Certified Arborist. First, there was a failure

1 of duty of care/due diligence in the failure to recommend a biological survey of the tree to
2 protect wildlife critical habitat. As it turns out, the tree has a pair of nesting kestrels including
3 one that is leucistic (similar to an albino). If it weren't for the TRO, the mayor would have
4 violated the Migratory Bird Treaty Act and would have killed the kestrels' developing eggs by
5 now.

6 5. Second, the most obvious and impactful mistake is found in the Risk Rating
7 Matrices, a standardized rating scale used to categorize risk. The arborist repeats a mistake
8 three consecutive times, leading to an artificial inflation of the risk posed by the tree in the
9 report as submitted to the Washington Cities Insurance Authority (WCIA) & the City of
10 Tumwater. A proper application of the rating scale would result in a moderate risk, while the
11 city arborist's improper use of the scale resulted in a high risk.

12 6. The arborist's additional mistakes, which involve his assigning a "Likelihood
13 of Impact" to given targets, are incongruent with best management practices set forth by the
14 International Society of Arboriculture. When the oak branch fell in 2023, the tips on the limb
15 barely crossed the fog line on the west side of the road, according to arborist Ray Gleason.
16 This means the branch had fallen almost entirely on the side of the road. Yet, when city
17 manager Lisa Parks talked about this incident at the city council meeting on May 21, 2024,
18 she glossed over the fact that the tips on the limb had barely entered the road.

19 7. With risk assessment, that's what we look at most. What is the target. From
20 photos, I'm not seeing evidence that a large limb failure would fall into the road. Furthermore,
21 in his testimony on April 18, 2024, to the Tumwater Historical Commission, the city arborist
22 misrepresented both the nature and the required frequency of advanced assessments.

1 8. Because the city arborist’s report is so flawed, the city should hire another
2 company, a neutral third-party company, to do a more thorough analysis—essentially a second
3 opinion. A heritage tree as important as this one deserves this perhaps more than any tree out
4 there. I have asked around and have heard that the tree could be assessed for a total of
5 \$10,000, which would include the cost of bringing in a lift truck.

6 9. The mayor’s office has put out statements claiming that a “team of arborists”
7 has recommended removing this tree. This is false. The city arborist was the only one to
8 recommend removal. The city arborist utilized two outside arborists: Tree Solutions and
9 Waxwing Tree Specialists. Tree Solutions performed sonic tomography at the base of the
10 trunk and recommended saving the tree with retrenchment. Waxwing Tree Specialists did not
11 make any recommendations and simply assisted with logistics of the testing by climbing the
12 tree and hitting the tree with a mallet to produce sound for the city arborist to listen to from
13 the ground.

14 10. The other thing to know is that the city arborist was listening on the ground
15 next to a busy road, trying to hear slight variations in tone, which can be quite unreliable
16 especially when the environment is noisy. Regardless of a noisy environment, this type of
17 testing should never be used as a basis for tree removal. It should be used solely as a basis for
18 further testing. It simply is too prone to errors.

19 11. I reviewed an email from 2008 by long-time local arborist Neal Wolbert
20 discussing how this tree has had a fungal pathogen since at least the 1990s. *See* attached
21 **Exhibit 1**, attached hereto (Email dated February 3, 2008). According to Neal’s email to the
22 daughter of Jack Davis (i.e., the “Davis” in “Davis-Meeker”), the cause of the fungus was that
23 in response to Jack Davis’s heroic successful battle to save the tree, road maintenance workers
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1 buried the tree's root flare during the process of moving the road away from the tree.
2 Regardless of the existence of the fungus, Neal deemed the tree to be "quite healthy" and
3 wrote that "it has the moxie to heal well." See **Exhibit 1**.

4 12. Neal is one of the most innovative arborists I've come across. He and another
5 arborist named Rob Lloyd volunteered their time to mitigate this pathogen in the oak tree
6 using air excavation and soil amendments in the late 1990s. **Exhibit 1**. During that mitigation,
7 Rob got inside the cavity and stood up. That is how big the opening to the cavity was. In the
8 decades since then, the opening to the cavity has filled in and decreased in size to such a
9 dramatic extent that the opening at the base of the trunk is now only a few inches high. This
10 occurred as part of the oak tree's natural compartmentalizing of the decay.

11 13. A reliable source lists the treatments that Neal and Rob performed for
12 mitigation as "best practices." See *Research Laboratory Technical Report: Armillaria Root*
13 *Rot*, by The Bartlett Tree Research Laboratories, available at
14 <https://www.bartlett.com/resources/armillaria%20root%20rot.pdf>. By excavating the root
15 collar, replacing adjacent soil with river rock, and thoroughly removing decayed wood, Neal
16 and Rob mitigated much of the decay-causing potential of the fungal pathogen.

17 14. One thing to know is that Garry oaks, as a species, are quite remarkable. They
18 have very strong compartmentalizing tendencies. Trees don't heal wounds. They
19 compartmentalize them. There are four types of "walls" that the tree builds to
20 compartmentalize the wound. One wall entails the tree chemically plugging the straws in the
21 wood. Another wall entails the radial cells chemically altering themselves to block the radial
22 spread of decay. A third wall entails the internal growth rings altering so that they can limit
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1 decay going inwards. The fourth and final wall entails wood growing around the injury
2 afterword. That's the wound wood and the reaction wood. That is the strongest wall of all.

3 15. This new wood is physically stronger and chemically more resistant to decay.
4 Its thickened cells are fully capable of preventing the spread of decay and of keeping the tree
5 standing indefinitely.

6 16. In this case, sonic tomography conducted by Tree Solutions Inc for the city on
7 September 5, 2023, concluded that there was more than enough healthy wood to retain this
8 tree. Tree Solutions recommended a pruning regiment to lower leverage on branches over the
9 road corridor. They did not recommend tree removal, contrary to what the mayor's office has
10 been telling people when it states that a "team of arborists" recommended removal.

11 17. One reason there was more than enough healthy wood to retain this tree is that
12 oaks are known for being one of the strongest compartmentalizing trees. They handle their
13 injuries and branch breakouts really well. In this case, it will be critical to take a sample of the
14 decay to determine what decay fungi we're dealing with because some are aggressive and
15 some are benign. In fact, that sampling should have been the city arborist's recommendation
16 from day one. Also, doing an assessment at the base of the tree, as happened in this case, has
17 nothing to do with limb failure. Thus, it is not appropriate to rely on that type of assessment to
18 conclude that limb failure on the road is likely.

19 18. Also, as to the pathogen, in my professional experience and as detailed by third
20 parties, the most likely fungal pathogen (*Armillaria* spp.) in this case does not extend more
21 than a few feet above ground level, which would rule out decay in the stem having any
22 bearing on a limb failure.

1 19. I observed a city council work session on March 11, 2024, and heard the city's
2 arborist tell the city council (at 19:15 minutes into the recording here:
3 <https://youtu.be/F1Hbuoygoeg>) that the tree has an infection of Ganoderma spp. But this type
4 of infection is not consistent with the symptoms that I observed on the tree, namely the lack of
5 a fruiting body. A fruiting body will be present in cases of moderate to advanced decay.

6 20. As touched on above, trees self-optimize their structure to cope with decay and
7 changes to their environment. For example, cedars experience die-back of their highest
8 branches in dry weather, Douglas Fir ends up short and stout over the centuries, and all trees
9 drop branches. In a forest, this is inconsequential. On the road, however, the retention of
10 veteran trees calls for experienced arborists to help the tree optimize in a controlled manner to
11 prevent unplanned self-optimization.

12 21. The entirety of documented non-reactionary work done to this tree has been
13 donated for the past several decades and was consequently limited in scope. Veteran or
14 Heritage trees require specialized pruning regimes and techniques that are outside the scope of
15 work for the average tree on a city street. Pruning and training of growth happens over a
16 period of years to decades to allow the tree to respond and for arborists to base their next
17 moves on the tree's reaction.

18 22. It is my professional opinion that branches that overhang the road could be
19 cabled to mitigate impact to the roadway without disrupting the process of
20 thigmomorphogenesis that keeps the limbs robustly attached. Additionally, a prop could be
21 added on the side facing the building if necessary.

22 23. The city arborist's lack of consideration of any mitigation efforts other than full
23 removal constitutes a breach in the expected duty of care assigned to a historic tree.

1 24. There has been no documented tree care performed for decades by the City of
2 Tumwater on this tree. The tree care has been performed by volunteers. The most attention it
3 has had from the government during this time was the publication of an error-laden report
4 condemning it to be destroyed. By combining a scientifically-backed assessment,
5 well-informed pruning, and a simple cable system, any risk that exists can be mitigated to an
6 acceptable level, as determined by the relevant tree managers.

7 25. Not only did the city's arborist create a deeply flawed report, but also the city
8 attorney's office appears to have been acting improperly to push tree removal. Tumwater
9 Parks and Recreation Director Chuck Denney stated in a memo to the Historic Preservation
10 Board on March 23, 2024, that the Washington Cities Insurance Authority (WCIA) had
11 reviewed the city arborist's October 2023 report and that WCIA had recommended removal of
12 the tree. *See Exhibit 2*, attached hereto (Chuck Denny Memo). This did not seem plausible to
13 me, based on my experience with insurance bodies and tree risk assessments.

14 26. Therefore, on April 3, 2024, I called the main phone number of the Washington
15 Cities Insurance Authority (WCIA) at 206-575-6046 to confirm this. I spoke with a local
16 agent, and she categorically denied that WCIA ever makes recommendations to clients to
17 remove individual trees. She said that retention or removal is a decision left up to the client.
18 She explained that WCIA offers guidance and best practices for decision making but stressed
19 that they had not issued any statement to the city in this case telling them to remove the tree.
20 She said a public records request would confirm her statement.

21 27. As such, I filed a Public Records Request. The responsive emails and report
22 arrived, and I immediately noticed that there was nothing in the record mentioning insurance
23 rate raises, dropped coverage, or any consequences related to retaining or removing this Davis
24

1 Meeker Oak. Furthermore, there was nothing indicating that WCIA recommended removing
2 the tree.

3 28. Two emails in this disclosure were especially notable. The first was from
4 Assistant City Attorney Davis Abbott to the insurance company. *See Exhibit 3*, attached
5 hereto (Email dated March 12, 2024). In it, the city attorney started the conversation by
6 saying, “I am reaching out because we are getting some pushback to remove a historical, but
7 now very dead, oak tree in Tumwater.” (Emphasis added). This statement was shocking to me
8 because the tree is very much alive. Even worse, City Attorney Karen Kirkpatrick later asked
9 the insurance company to try to sway the city council to agree to the tree’s removal. **Exhibit**
10 **4**, attached hereto (Email dated March 27, 2024). Her comment was in reference to a
11 presentation that the insurance company representative was to give to the city council in
12 March 2024. Pushing the insurance company to try to sway the council into agreeing to tree
13 removal was an egregious breach of ethics by the city attorney in my opinion because this tree
14 is so important to tribes, community members, and the ecosystem that lives in its 400-year-old
15 branches. It should, of all trees, have every conceivable thing done for it to avoid having to
16 remove it. But the city attorney’s office seems to view it as just another tree that needs to be
17 dealt with and moved out of the way.

18 29. I looked at the meeting minutes and watched the video of that meeting by the
19 insurance representative to the city council. I saw that the representative did not try to sway
20 the council during his presentation like the city attorney has asked him to. When he did talk
21 about rising insurance costs for Tumwater, he never mentioned the tree as a factor having
22 anything to do with insurance costs.

1 I declare under the penalty of perjury of the laws of the State of Washington that the
2 foregoing is true and correct to the best of my knowledge.

3 EXECUTED this 28th day of May, 2024, at Tumwater, Washington.

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6 _____
BROWULF BROWER

From: Neal Wolbert <Neal@wolberts.com>

Sent: Sunday, February 3, 2008 3:35:23 PM

To: Dianna Moore <dlmoor2@coastaccess.com>

Cc: cascadetreexperts@hotmail.com <cascadetreexperts@hotmail.com>; bert@wolberts.com <bert@wolberts.com>

Subject: RE: Davis-Meeker Oak

Hi Dianna,

Yes, sadly, I discovered the damage last week. There were pieces of safety glass and plastic car parts on and around the tree so our suspicion is that a part fell off a junk hauler on the way to the scrap yard down the road. The wound is about 18" to 24" in diameter and the bark was completely sliced off. Our company is helping Ray Gleason, Cascade Tree Experts, Olympia, with a new post injury treatment. With the help of a government researcher, Ray is installing a wrap that will allow gas exchange, vital to callous formation, and protect the tree from the road spray contamination. It also will keep the wound dark in hopes of encouraging more callous formation on the wound itself. There have been promising results from some much smaller projects, so we hope this helps the old timer. The project will be completed Monday afternoon with a final covering of burlap (not paper) around the trunk. It will stay in place until July or August, if vandals leave it alone. John Dodge, who writes the "Soundings" column for The Olympian, will print an article this week which should satisfy the curious and possibly deter any would-be vandals. The tree is quite healthy as far as we know, so it should close the wound within a few years. A lower limb was removed many years ago (the hanging limb?) that left a much larger open wound that the tree completely closed, so it has the moxie to heal well.

In the late 90's I discovered Armillaria wood destroying fungus eating away at the roots and the trunk evidenced by mushrooms growing up the trunk on the road side. That's what caught my attention and lead to the pathogen identification and treatments. Our company and Rob Lloyd, Lloyd's Arboricultural Consulting, Vancouver, WA performed a root crown excavation with a tool called an air knife that safely blows soil off roots without damaging them. After your grandfather's intervention lead to bending the road to save the tree, the new road construction left nearly 3' of soil over the root crown of the tree. After the base of the tree was uncovered, a cavity was revealed that was plugged with soil and Armillaria mycelia (mold). The excavation process broke the contact with the soil and the fungus stopped progressing. Since then the roots have been regularly fertilized and treated with biological additives to stimulate new feeder root development. Medicine (fungicide) was added to stop any further invasion by other types of root rotting fungi. Sadly, Armillaria itself is untreatable but keeping the tree in good health and protecting it from other invaders will definitely prolong its life. We also eliminated the grass under the tree and spread washed dairy manure compost over most of the root zone which lead to a rapid increase in feeder roots. Compost has been re-applied periodically since then.

The area under the street could not be treated however, and the city has been unwilling to consider drilling holes or installing grates in the street so treatments can be administered. If you want to help that cause, a letter to the Tumwater City Council would be welcome. It's a huge deal to get approval for a project like that. Just dealing with re-routing the traffic is a major thing. Access to the roots under concrete and subsequent treatments would encourage new rooting on the weak side of the tree extending the life of the tree even more.

I'm so glad you wrote and many people would appreciate any info you could send along about this stately piece of history. We'd like to see this living historic monument thrive for a few hundred more years. We are committed to do whatever we can to help save this tree.

Cordially,

Neal Wolbert
360-239-3126

EXHIBIT 1

P.S.

Watch for John Dodge's article, it will have a photo or two.

From: Dianna Moore [mailto:dlmoor2@coastaccess.com]

Sent: Sunday, February 03, 2008 1:01 PM

To: info@wolberts.com

Subject: re: Davis-Meeker Oak

Hi...I understand you worked on the root fungus problem back in 1991 on the Davis-Meeker Oak. My father was Jack Davis...he fought to save that tree from being cut down to enlarge Hwy 99, and the tree was renamed to honor him. When he died in 1998 I moved to Ocean Shores to be closer to my mother, and I have kept in touch with local Tumwater residents. They have told me this tree is now undergoing some sort of work...a large piece of bark has been removed or has fallen off and the area is now covered by paper (?). Do you know anything about this?

Thanks in advance for information.

Dianna Moore

Ocean Shores, Wa.

dlmoor2@coastaccess.com

360-289-5048

TO: Historic Preservation Commission
FROM: Chuck Denney, Parks and Recreation Director
DATE: March 21, 2024
SUBJECT: Davis/Meeker Oak Tree

1) Recommended Action:

Staff requests that the Commission consider and approve a recommendation to the Tumwater City Council for de-listing the Davis/Meeker Oak from the City's Historic Register.

2) Background:

Located near the Olympia Regional Airport and adjacent to Highway 99, the Davis Meeker Oak Tree was placed on the City's Historic Register on January 16, 1996. In June of 2023, an 18-inch diameter branch failed about 50 feet up in the tree and fell to the ground. A visual inspection showed that there was rot where the failed branch connected to the main stem of the tree. The City contract Urban Forester was asked to conduct a detailed tree assessment which showed significant rot in the main stem and branches of the tree. That assessment deemed the tree to be a hazard and identified risks to adjacent property. It is the arborist's recommendation that the tree be removed. Washington Cities Insurance Authority (WCIA) has reviewed the report and recommends removal of the tree.

3) Alternatives:

- Approve the de-listing from the City's Historic Register.
 - Do not approve de-listing from the City's Historic Register
-

4) Attachments:

- A. Historic Register Listing
- B. Tree Assessment

EXHIBIT 2

From: "Farah Derosier"

To: "Davis Abbott" <DAbbott@ci.tumwater.wa.us>

Date: 3/12/2024 9:27:52 PM

Subject: Re: removing hazards & liability

Farah

Sent from my iPhone

On Mar 12, 2024, at 9:56 AM, Davis Abbott <DAbbott@ci.tumwater.wa.us> wrote:

Good Morning, Farah,

Hope you are doing well! I am reaching out because we are getting some pushback from city council on removing a historical, but now very dead, oak tree in Tumwater.

I am putting together a memo on tort liability and duty of care of property owners, I am wondering if you could provide me with a couple examples of cases where situations like this went wrong for cities?

Specifically high dollar amount verdicts finding the city/property owner liable when they were aware of a hazard but failed to correct it. I have some other cases explaining the way liability is determined, but it is hard to find ones with dollar amounts in damages to convey what this could potentially cost.

If you know of anything like that, I'd greatly appreciate any info you have or even just a point in a different direction.

Thanks,

Davis Abbott | Assistant City Attorney
Tumwater City Attorney's Office
555 Israel Road SW | Tumwater, WA 98501
Work Cell: (360)742-4830
Direct: (360)754-3926 | Legal: (360)754-4121
DAbbott@ci.tumwater.wa.us | www.ci.tumwater.wa.us

EXHIBIT 3

From: "Karen Kirkpatrick" <KKirkpatrick@ci.tumwater.wa.us>

To: "Rob Roscoe" <robr@wciapool.org>

"Melody Valiant" <MValiant@ci.tumwater.wa.us>

Date: 3/27/2024 8:24:46 PM

Subject: RE: Rescheduled Presentation for Tumwater - confidential communication

Hi Rob,

That was a great presentation last night. Thank you!

I just want to confirm that you are scheduled on the agenda at 5:00 pm Friday evening for the Dos and Don'ts presentation. 40 minutes has been allotted for the presentation. I hope that is sufficient.

I also wanted to quickly let you know that we are having an issue regarding a hazardous tree that needs to be removed. However, it is a beloved historic tree the council and historic commission are resisting delisting from our historic registry due to public outcry. Your presentation will be a good opportunity to remind the council not to substitute their judgement in place of expert opinion and any other don'ts that may apply to such a hypothetical situation.

This will be a timely presentation for the council. We're looking forward to it and seeing you again.

From: Rob Roscoe <robr@wciapool.org>

Sent: Tuesday, March 26, 2024 3:07 PM

To: Melody Valiant <MValiant@ci.tumwater.wa.us>

Cc: Karen Kirkpatrick <KKirkpatrick@ci.tumwater.wa.us>; Troy Niemeyer <TNiemeyer@ci.tumwater.wa.us>; Marnie McGrath <MMcGrath@ci.tumwater.wa.us>

Subject: RE: Rescheduled Presentation for Tumwater

Ha. Good point. That makes way more sense. Thanks again

Rob Roscoe

Deputy Director

Washington Cities Insurance Authority

PO Box 88030 Tukwila, WA 98138

General: 206.575.6046 Direct: 206.687.7892 Cell: 206.607.7838



From: Melody Valiant <MValiant@ci.tumwater.wa.us>

Sent: Tuesday, March 26, 2024 3:06 PM

To: Rob Roscoe <robr@wciapool.org>

Cc: Karen Kirkpatrick <KKirkpatrick@ci.tumwater.wa.us>; Troy Niemeyer <TNiemeyer@ci.tumwater.wa.us>; Marnie McGrath <MMcGrath@ci.tumwater.wa.us>

Subject: RE: Rescheduled Presentation for Tumwater

So there is no zoom link for Friday as that is in person – so that one was for this one 😊

Melody Valiant, MMC | City Clerk

City of Tumwater, Administrative Services Department

555 Israel Road SW | Tumwater, WA 98501

O (360) 252-5488

mvaliant@ci.tumwater.wa.us | www.ci.tumwater.wa.us

From: Rob Roscoe <robr@wciapool.org>

Sent: Tuesday, March 26, 2024 3:05 PM

To: Melody Valiant <MValiant@ci.tumwater.wa.us>

Cc: Karen Kirkpatrick <KKirkpatrick@ci.tumwater.wa.us>; Troy Niemeyer <TNiemeyer@ci.tumwater.wa.us>; Marnie McGrath <MMcGrath@ci.tumwater.wa.us>

EXHIBIT 4