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

Calendar:

FILED
SUPERIOR COURT
THURSTON COUNTY, WA
2024 MAY 24 AM 9:28
Linda Myhre Enlow
Thurston County Clerk

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

SAVE THE DAVIS-MEEKER GARRY OAK,

Case No. 24-2-01895-34

Plaintiff,

vs.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF,
INCLUDING TEMPORARY
RESTRAINING ORDER

DEBBIE SULLIVAN, in her capacity of Mayor of
Tumwater

Defendant.

INTRODUCTION

1. Tumwater Mayor Debbie Sullivan has ordered, without a permit, the removal of a 400-year-old Oregon white oak (“Garry” oak) that is on the historic register. It is known as the Davis Meeker Garry Oak. It stands next to the Olympia Airport on Old Highway 99. Plaintiff, a citizen’s group called Save the Davis-Meeker Garry Oak (SDMGO), opposes removal for a variety of reasons. These include (1) the oak tree appears to have nesting birds in it; (2) the mayor is misapplying a municipal code meant to save historic structures in a way that destroys a historic structure without a permit; and (3) the mayor is relying on a flawed arborist’s tree hazard report. The mayor has indicated that she plans to have the tree removed during the Memorial Day weekend, meaning sometime between today (Friday) and midnight Monday. Decl. of Tanya Nozawa, para. 5.

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JURISDICTION

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2. This Court has jurisdiction over Plaintiff's claims because this is a civil action brought against agencies of the State of Washington and Plaintiff maintains its principal place of business in this county.

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PARTIES

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3. Plaintiff, Save the Davis-Meeker Garry Oak, is a local citizen action group dedicated to protecting the Davis-Meeker Garry Oak and the birds that need it today and tomorrow, using science, advocacy, education, and on-the-ground conservation. See <https://www.davis-meeker-oak.org/>. Founded in 2024, its Facebook group currently has 147 members.

4. The Mayor of Tumwater is the administrator of the city government of Tumwater. She is not a member of the council and has no vote on the council except in the event of a tie. She presides over council meetings, however. (The council is the city's legislative body and passes the laws that the mayor carries out).

BACKGROUND

5. On May 21, 2024, the City of Tumwater held its regularly scheduled council meeting. At that meeting, the city's attorney, Karen Kirkpatrick, explained to the council what legal authority the mayor was relying on to remove the tree (a registered historical landmark) without a permit. Decl. of Ronda Larson Kramer. Under Tumwater Municipal Code § 2.62.060, there is a requirement to get a permit to demolish a historic structure. Ms. Kirkpatrick claimed, incorrectly, that the mayor does not need a permit to demolish a historic structure if it falls within an exception. The exception the city is relying on is in subsection (B)(3) of that same code, which allows only emergency repairs, not demolition, of a historic structure without a

1 permit.

2 6. Subsection (B)(3) of TMC § 2.62.060 cross-references a definition in TMC
3 § 2.62.030(K), which defines “emergency repair” as “work necessary to prevent destruction or
4 dilapidation to real property or structural appurtenances thereto immediately threatened or
5 damaged by fire, flood, earthquake or other disaster.” When the city attorney claimed that this
6 code allowed destruction of the historic tree without a permit, she did not explain why the city
7 was not considering less drastic risk mitigation measures instead, since pruning and cabling
8 truly did constitute “repair work” that could be done without a permit, and arborists testified at
9 the council meeting that pruning and cabling would be more than sufficient.
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11 7. At the city council meeting, the public outcry was profound. Decl. of Ronda
12 Larson Kramer, at para. 5. Every person who gave comments was against the mayor’s plan.
13 Arborists also testified that the city’s arborist report was greatly flawed. *Id.*

14 8. Meanwhile, the tree apparently has nesting birds in it. Decl. of Tanya Nozawa,
15 at para. 6. The mayor has indicated an intention to cut down the tree this weekend. *Id.* At para.
16 5.

17 9. Prior to the city council meeting, on April 18, 2024., the Tumwater Historic
18 Commission voted unanimously not to de-list the tree from the historic register. See
19 [https://www.thejoltnews.com/stories/tumwater-commission-recommends-keeping-davis-
21 meeker-oak-on-historical-register,15380](https://www.thejoltnews.com/stories/tumwater-commission-recommends-keeping-davis-
20 meeker-oak-on-historical-register,15380).

22 10. The city was required to notify the tribes before cutting the tree. They apparently
23 were not notified. A third party notified them instead just recently, and they indicated they want
24 to have time to review this before providing feedback. Decl. of Ronda Larson Kramer, at para.
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ARGUMENT

11. During public comment both before and during the May 21, 2024, city council meeting, certified arborists pointed out that the tree is structurally sound, in contrast to the city arborist's report. Decl. of Tanya Nozawa, at para. 3. At least one of the non-city arborists pointed out that city arborist provided a low-budget assessment, which is wholly inappropriate given the historical importance of this tree. *Id.* Because the mayor disregarded all public comment, as well as the Tumwater Municipal Code, as discussed below, the decision to remove the tree is arbitrary and capricious.

12. Tumwater cannot remove the Davis-Meeker Oak because it would violate the Migratory Bird Treaty Act (MBTA). That act broadly applies, by its plain terms, to the killing of any migratory bird "at any time, by any means or in any manner." 16 U.S.C. § 703(a). MBTA Section 2(a) makes it unlawful to, among other things, "kill" or "take" a migratory bird (or its nest or eggs), acts that are punishable under Section 6(a) as misdemeanor crimes.¹ Courts have been faced with defining what constitutes a "taking" of migratory birds under the MBTA. Although the statute itself does not define the term "take," the MBTA regulations define the term "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect."² In general, the courts have looked at three different types of actions or omissions that result in the taking of migratory birds: 1. direct and intentional acts or omissions; 2. direct and unintentional acts or omissions; and 3. indirect and unintentional acts or omissions (incidental take).

13. Failure to comply with the MBTA may result in either felony or misdemeanor penalties, depending on the type of violation.³ Under MBTA Section 6(a), "any person,

¹ 16 U.S.C. §§ 703(a), 707(a). Knowingly taking a migratory bird to sell or with the intention of selling it is a felony crime under § 707(b).

² 50 C.F.R. § 10.12.

³ 16 U.S.C. § 707(a)-(b).

1 association, partnership, or corporation” who violates the Act or its regulations is guilty of a
2 misdemeanor and can be fined no more than \$15,000 and/or a maximum jail sentence of six
3 months.⁴

4 14. Unlike the Endangered Species Act, the MBTA does not include a citizen suit
5 provision that allows “any person” to enforce the MBTA provisions in court.⁵ However, citizen
6 suits are allowed under the Administrative Procedure Act’s (APA’s) prohibition against
7 unlawful agency action.⁶ Section 702 of the APA “entitle[s]” a “person” who is “adversely
8 affected or aggrieved by agency action” to have a court review the challenged action.⁷ The U.S.
9 Court of Appeals for the Ninth Circuit has allowed civil suits seeking to enjoin government
10 actions that take or have the potential to take birds protected to proceed under the APA.⁸

12 15. Because removal of the oak this weekend would result in the taking of migratory
13 birds, the MBTA prohibits the mayor from carrying out her plan to cut down the 400-year-old
14 oak tree.

15 16. Tumwater’s municipal code also prohibits the mayor from carrying out her plan
16 to cut down the tree without a permit. TMC § 2.62.060 and TMC § 2.62.030 plainly require a
17 permit to demolish a historic structure. There is no exception. The permit is waived to repair a
18 historic structure, assuming there is an emergency where a repair can prevent destruction of a
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21 ⁴ Id. § 707(a).

22 ⁵ Compare 16 U.S.C. § 706 (authorizing Department of the Interior (DOI) to enforce MBTA provisions), with 16
U.S.C. § 1540(g) (allowing “any person” to file a lawsuit to enforce the Endangered Species Act).

23 ⁶ See 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved
by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

24 ⁷ *Id.*

25 ⁸ See, e.g., *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1203, 1204 (9th Cir. 2004) (holding that “anyone who is
‘adversely affected or aggrieved’ by an agency action alleged to have violated the MBTA has standing to seek
judicial review of that action”); *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000) (citing 5
U.S.C. § 702 of the APA; *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); and *Noble v. Union
River Logging Co.*, 147 U.S. 165 (1893), as authority allowing for judicial review of government actions regarding
compliance with the MBTA).

1 nearby building. The tree is next to a building. It can be pruned to prevent destruction of the
2 building. The pruning can be done without a permit. But nowhere does the law allow the historic
3 tree to be removed without a permit.

4 5 **CLAIMS**

6 **Count One**

7 **The Proposed Action Violates the MBTA**

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9 31. The mayor's plan contravenes the plain language and conservation purpose of
10 the MBTA. Defendant also violated MBTA by failing to evaluate all reasonable alternatives,
11 such as delaying action until after nesting season and/or pruning and cabling.

12 **Count Two**

13 **Defendant Violated Tumwater Municipal Code** 14 **and Her Action is Arbitrary and Capricious**

15 32. Defendant violated TMC § 2.62.060 and TMC § 2.62.030, which require a
16 permit to demolish a historic structure. There is no exception. The only exception is when
17 the historic object is to be repaired. The mayor never suggested repair—i.e., pruning and
18 cabling. She failed to evaluate all reasonable alternatives. Moreover, she failed adequately
19 to respond to public comments, including comments urging her to consider obtaining a
20 neutral arborist's risk assessment using better technology than that used by the city arborist.
21 Additionally, the Tumwater Historic Commission voted unanimously not to de-list the tree
22 previously. All this the mayor disregarded arbitrarily.
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1 **REQUEST FOR RELIEF**

2 WHEREFORE, Plaintiff respectfully requests this Court:

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- 4 A. Declare that the decision to remove the tree violates the MBTA,
5 TMC § 2.62.060 and TMC § 2.62.030 and Administrative Procedure Act;
- 6 B. Grant an immediate Temporary Restraining Order restraining the Tumwater
7 mayor from removing the tree pending further order of this Court;
- 8 C. Grant a permanent injunction barring removal of the tree;
- 9 D. Award Plaintiff its costs of litigation; and
- 10 E. Grant Plaintiff such other relief as the Court deems just and proper.
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12 RESPECTFULLY SUBMITTED this 24th day of May, 2024.

13 LARSON LAW, PLLC

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15 _____
16 RONDA LARSON KRAMER, WSBA #31833
17 Attorney for SDMGO

1 **CERTIFICATE OF SERVICE**

2
3 I certify that I served a copy of the foregoing document on all parties or their counsel of
4 record as follows:

- 5 E-mail
6 United Parcel Service, Next Day Air
7 ABC/Legal Messenger
8 Hand delivered by Ronda Larson Kramer

9 TO:

10 KAREN KIRKPATRICK
11 City Attorney
12 City of Tumwater
13 555 Israel Rd SW
14 Tumwater, WA 98501-6515

15 MAYOR DEBBIE SULLIVAN
16 City of Tumwater
17 555 Israel Rd SW
18 Tumwater, WA 98501-6515

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

20 EXECUTED this 24th day of May, at Olympia, WA.

21 

22 _____
23 RONDA LARSON KRAMER
24 Attorney for SDMGO
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