

July 23, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SAVE THE DAVIS-MEEKER GARRY
OAK,

Petitioner,

v.

DEBBIE SULLIVAN, in her capacity of
Mayor of Tumwater,

Respondent.

No. 58881-1-II

RULING DENYING STAY
UNDER RAP 8.3 WITHOUT
PREJUDICE TO OBTAINING A
STAY UNDER RAP 8.1(B)(2),
DETERMINING
APPEALABILITY, AND
ACCELERATING APPEAL

This ruling addresses a stay motion filed by Citizen group Save the Davis Meeker Garry Oak (SDMGO), a cross-motion on appealability raised by the City of Tumwater (City) in its response to the stay motion, and a request by SDMGO to hear this appeal on an accelerated basis under RAP 18.12. The request for a stay from this court under RAP 8.3 is denied without prejudice to SDMGO's ability to seek as stay as of right from the superior court under RAP 8.1(b)(2). In addition, this court

determines that this matter may proceed as an appeal. Finally, it grants SDMGO's request to accelerate this appeal.

STAY MOTION

SDMGO moves to stay the City's removal of the Davis Meeker Garry Oak tree¹ while this appeal is pending, arguing that removal of the tree would destroy the fruits of this appeal.² RAP 8.3. In its stay motion, SDMGO explained that it was now moving because Respondent, Tumwater Mayor Debbie Sullivan, recently stated to the press that the tree would be removed.

Sullivan responded, clarifying that her statement was made in response to a question about what would happen only if a pending second round of tree safety evaluations required the tree to be taken down. She confirmed a second evaluation is underway and is being conducted by an independent arborist. This third party review is expected to continue through August 2024.

She also argues that an order dissolving the temporary restraining order (TRO) that temporarily prevented the City from removing the tree is not appealable. Sullivan clarifies that in any event, the TRO would have expired two days after it was

¹ This 400-year-old white oak tree is listed on the Tumwater Register of Historic Places.

² This court relies on facts set out in its previous rulings of July 3, 2024, and June 3, 2024.

dissolved, and SDMGO never requested the entry of a preliminary or permanent injunction to maintain the status quo beyond the TRO expiration date.³

But the City's response does not address this court's inquiry about whether SDMGO can obtain a stay as of right under RAP 8.1(b)(2). *See* Notation Ruling (Jul. 3, 2024) (requesting parties to address RAP 8.1(b)(2)). The reply addresses RAP 8.1(b) stays in general, but does not discuss the applicability of RAP 8.1(b)(2). Reply to Resp. at 13-14.

RAP 8.1(b)(2) provides:

Except where prohibited by statute, a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property, or of tangible personal property, or of intangible personal property, by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4). If the decision affects the rights to possession, ownership or use of a trademark, trade secret, patent, or other intellectual property, a party may obtain a stay in the trial court only if it is reasonably possible to quantify the loss that would be incurred by the prevailing party in the trial court as a result of the party's inability to enforce the decision during review.

If a superior court stay is available as of right, this court does not apply the discretionary stay rule of RAP 8.3. *See Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288,

³ In reply to this contention, SDMGO says that the superior court not only dissolved the TRO but functionally denied its then-pending cross-motion to extend the TRO. Reply to Resp. at 8; *see* Mot. for Disc. Rev., Appendix U at 4 (Report of Proceedings (RP) May 31, 2024 at 4) ("That being the case, we are going to hear today the motion to dissolve as well as the motion to extend.").

290, 716 P.2d 956 (1986) (reaching RAP 8.3 stay request after determining that the superior court's "decision is not among those supersedable of right under RAP 8.1").

Because the City contends it has full control over its property, which includes the oak tree, and because SDMGO contends that various laws limit the City's control over the oak tree so the City cannot destroy the tree, this court concludes that the superior court's decision affects the City's right to full "use" of its property, including even its ability to remove the tree from City land.⁴ RAP 8.1(b)(2); *see generally Ames v. Ames*, 184 Wn. App. 826, 340 P.3d 232 (2014) (discussing stay of right to harvest timber under CR 62). Under these circumstances, a discretionary stay from this court under RAP 8.3 is unwarranted. *See Boeing*, 43 Wn. App. at 290-91. Rather, SDMGO is entitled to a stay from the superior court by complying with RAP 8.1(b)(2), RAP 8.1(b)(4) or (c)(2), and RAP 8.1(d).⁵ Thus, SDMGO's RAP 8.3 motion is denied without

⁴ This court acknowledges that equitable trial court decisions often fall under RAP 8.1(b)(3) or RAP 8.3. *See* 2A WASHINGTON PRACTICE, RULES PRACTICE RAP 8.1 (9th ed. June 1994), Drafters' Comment, 1990 Amendments, section (2) (discussing stays of equitable decisions). But here, the equitable decision comes down to whether the City has the power to remove a tree on City property, so this court concludes RAP 8.1(b)(2) better applies.

SDMGO relies on *Shamley v. City of Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955), which addresses timber harvesting, to seek an injunction from the appellate court. But Shanley predated the governing stay RAPs, which were initially adopted in 1976. *See* 2A WASHINGTON PRACTICE, RULES PRACTICE RAP 8.1, "History of RAP 8.1."

⁵ This court notes the parties dispute any supersedeas bond amount. For example, the City argues it may suffer a significant loss if it cannot remove the tree and the tree falls and injures someone. SDMGO counters that the City let the tree stand without action for over a year after a branch fell, and seven months after the initial arborist

prejudice to its ability to seek a stay as of right under RAP 8.1(b)(2). The City assures this court that it has committed to a review by an independent arborist and that the evaluation process is “expected to continue through August 2024.” Resp. to Stay Mot. at 6. So this court extends the current administrative stay to August 30, 2024, to allow SDMGO to comply with RAP 8.1(b)(2) and related rules. RAP 7.3.

APPEALABILITY

This court will also address the appealability issue raised in the City’s response and addressed in SDMGO’s reply. The City maintains that the superior court’s TRO dissolution is not appealable as of right. Generally, temporary injunction decisions are not appealable. *See Sydow v. Douglass Prop. LLC*, No. 38888-3-III, 2023 WL 3317370, at *3 (May 9, 2023).

But RAP 2.2(a)(3) permits appellate review of a written decision that affects a substantial right in a civil case if the decision in effect determines and discontinues the action. Under this rule, when a superior court enters an order that determines a party’s right to injunctive relief and there are no other issues left to determine, an appeal may proceed. *Sheats v. City of E. Wenatchee*, 6 Wn. App. 2d 523, 431 P.3d 489 (2018).

evaluation. Reply to Resp. at 7-8, 10. But the superior court has the initial responsibility to consider bond adequacy or determine what qualifies as an alternate form of security. *See generally* RAP 8.1(e), (g).

SDMGO's position that the TRO dissolution essentially determined the full merits of the action, that is whether the City could remove the tree, is supported by the superior court's TRO dissolution order, which stayed the effect of the order to allow the group to appeal the superior court's decision. Court Spindle, Emerg. Notice of Appeal at 4 (June 3, 2024) (Order Granting Motion to Dissolve TRO (May 31, 2024)). Given 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, this court concludes this appeal may proceed under RAP 2.2(a)(3).

RAP 18.12 MOTION

Finally, in the stay motion, SDMGO requests an expedited appeal. For the reasons set out in in the motion, and because the City contends there is a risk to keeping the tree in place, the motion is granted. Accordingly, it is hereby

ORDERED that SDMGO's request for a stay under RAP 8.3 is denied without prejudice to its right to obtain a stay in the superior court under RAP 8.1(b)(2). This court extends its administrative stay to August 30, 2024, to allow SDMGO to comply with RAP 8.1(b)(2) and related rules. It is further

ORDERED that this matter may proceed as an appeal under RAP 2.2(a)(3). It is further

ORDERED that this appeal is accelerated. The parties have 10 days to submit a joint proposed accelerated perfection schedule to this court and an accelerated perfection notice will issue in due course.



Aurora R. Bearse
Court Commissioner

cc: Rhonda L. Kramer
Jeffrey S. Myers
Jakub L. Kocztorz
Hon. Anne Egeler