

COPY

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE and CITY
COUNCIL OF THE CITY OF SAN JOSE,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA,

Respondent.

FRIENDS OF THE WILLOW GLEN
TRESTLE, an unincorporated association,

Real Party in Interest.

NO.

(Superior Court of California,
County of Santa Clara
Case No.: 1-14-CV-260439)

IMMEDIATE RELIEF REQUESTED

Court of Appeal, Sixth Appellate District
FILED

JUN 30 2015

DANIEL P. POTTER, Clerk

By _____
DEPUTY

**CITY OF SAN JOSE'S PETITION FOR WRIT OF MANDATE
OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION,
AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Petition for Review of Order of the Superior
Court of California, County of Santa Clara
Honorable Joseph H. Huber, Judge

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and CITY COUYNCIL OF THE CITY OF SAN JOSE

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Attorneys for Petitioners CITY OF SAN JOSE
and CITY COUYNCIL OF THE CITY OF SAN JOSE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, the undersigned counsel of record for Petitioners City of San José and City Council of the City of San José certifies that Respondent knows of no person or entity that a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves. (Cal. Rules of Court, Rule 8.208(e)(2).)

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I. PETITION FOR WRIT OF MANDATE OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

TO THE SIXTH DISTRICT COURT OF APPEAL:

The City of San Jose and City Council of the City of San Jose (City) petition this Court for a writ of mandamus, or in the alternative, writ of prohibition, to the Superior Court of California, County of Santa Clara, directing it to vacate its June 22, 2015 Order, and to consider the City's Environmental Impact Report (EIR) and Resolution certifying the EIR, in order to determine the EIR's compliance with the California Environmental Quality Act, and to determine whether the City may proceed with removing and demolishing the Willow Glen trestle that is the subject of the EIR. The City petitions this Court to direct the Superior Court to enter a new and different order that pending appeal the Superior Court has jurisdiction to consider the City's application regarding the prohibitory aspect of the Court's judgment. Immediate relief is requested because the City will lose State grant money for removal of the existing trestle and installation of a new bridge if work is not commenced by July 15, 2015.

II. INTRODUCTION

Petitioner City seeks a writ of mandate, or in the alternative, a writ of prohibition, directing Respondent Superior Court of the State of California, County of Santa Clara, to vacate its June 22, 2015 Order, and to consider the City's Environmental Impact Report (EIR) and Resolution certifying the EIR, in order to determine the EIR's compliance with the California Environmental Quality Act, and to determine whether the City may proceed with removing and demolishing the Willow Glen trestle that is the subject of the EIR. The City petitions this Court to direct the Superior Court to enter a new and different order that pending appeal the Superior Court has jurisdiction to consider the City's application regarding the prohibitory

aspect of the Court's judgment. Immediate relief is requested because the City will lose State grant money for removal of the existing trestle and installation of a new bridge if work is not commenced by July 15, 2015.

Such a writ is necessary because an order denying the City's ex parte application is not an appealable order and is reviewable only by a petition for writ of mandamus. (*See* Code of Civ. Proc. sec. 901.1)

III. PETITION

Petitioner specifically alleges as follows:

1. On February 11, 2014, Friends of the Willow Glen Trestle petitioned the Superior Court for a writ of mandamus, to set aside the City's approvals for the Three Creeks Trail Pedestrian Bridge Project, and the demolition of the Willow Glen Trestle, based on alleged non-compliance with CEQA. (Petitioner's Appendix (PA) SJ0001-10.)
2. After briefing and argument, on August 15, 2014, the Court ordered that a peremptory writ of mandamus should issue that that the City of San José and the San José City Council should "refrain from further action to approve the demolition of the trestle pending preparation and certification of an EIR and compliance with the requirements of CEQA." (PA SJ0036 (Judgment at 1:24-28), and PA SJ0058 (Peremptory Writ of Mandamus dated October 17, 2014 at 1:8-11).)
3. On October 17, 2015, the City filed a notice of appeal in this Court. (PA SJ0059 (Notice of Appeal) & PA SJ0073 (Zoglin Dec. ¶4).) The appeal is now fully briefed as case number H041563.
4. After the Trial Court issued judgment in this case, the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, *as modified*, and the Fifth District Court of Appeal in *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, have affirmed the decision of *Valley*

Advocates v. City of Fresno (2008) 160 Cal.App.4th 1039, that an agency has the authority to make the initial discretionary determination of whether a resource is historic and the judicial standard of review is the substantial evidence standard, rather than the fair argument standard. The City therefore believes that it will likely prevail on appeal.

5. After the Superior Court issued its judgment and writ of mandamus, the City prepared an EIR under CEQA for the Project. The EIR includes a detailed analysis of whether the Los Gatos Creek trestle is a historic resource under CEQA. It concludes that the trestle “does not constitute a historical resource.” (PA SJ0073 & SJ0077 (Zoglin Dec. ¶5 & Exhibit A thereto (Revised Historical Evaluation of the trestle); PA SJ0127 (Request for Judicial Notice ¶1).)
6. On May 19, 2015, the San José City Council adopted Resolution Number 77359, certifying the Final EIR. (PA SJ0073 & PA SJ0110-25 (Zoglin Dec. ¶6 & Exhibit B thereto (Resolution Number 77359); PA SJ0127 (Request for Judicial Notice ¶2).) The City Council considered public comment and submissions regarding the historic nature of the trestle and concluded that “based on and consistent with the analysis in the Final EIR, that the trestle is not a historic resource.” (PA SJ0111.) The City Council upheld the Planning Commission’s certification of the Final EIR for the Project as completed in accordance with the requirements of CEQA. (*Id.*) The Resolution attaches a copy of the Mitigation Monitoring and Reporting Program for the Project. (PA SJ0120-25.) To date, the City has refrained from removing the trestle bridge.
7. On June 15, 2015, the City applied to the Superior Court *ex parte* for an order rescinding “any and all aspects of its Order, Judgment, and

Peremptory Writ of Mandamus only to the extent that they prohibit the City of San Jose from removing and demolishing the trestle;” alternatively, the City requested an order shortening time to bring a motion. (PA SJ061-66.) Friends of the Willow Glen Trestle opposed the City’s application. (PA SJ0128-32.) The Superior Court issued an order denying the City’s application and “accept[ing] the position outlined by Plaintiff” Friends. (PA SJ0133.)

8. If the City is unable to start removing the trestle by July 15, 2015, it could lose the benefit of a reversal of the Superior Court’s judgment on appeal that is pending in this Court. Removal of the trestle is part of the City’s Three Creeks Trail Pedestrian Bridge Project.
9. Time is of the essence to proceed with that Project because the City is permitted to do the work only during a limited time period. Removal of the trestle requires work in the creek. (PA SJ0070 (Declaration of Jan Palajac (Palajac Dec.) ¶3.) In order to do any work in the creek, four permits are required from other government agencies. (PA SJ0070-71 (Palajac Dec. ¶¶3-7).) The City already obtained the necessary permits: from California Department of Fish & Wildlife, Regional Water Quality Control Board, U.S. Army Corp, and National Oceanic and Atmospheric Administration. But the permits allow work in the creek only in a short window of time: between June 15, 2015, and October 15, 2015.¹ (*Id.* (Palajac Dec. ¶¶4-7).) Therefore, in order to complete the project during the allotted time, the City’s contractor must start work by July 15, 2015. (PA SJ0071 (Palajac Decl. ¶8).) To ensure the necessary manpower

¹ The California Department of Fish & Wildlife permit allows work in the creek bed through October 31, 2015, but the other permits only allow work through October 15, 2015.

and time to plan for the project, the City must notify the contractor before July 15, 2015 whether the project may proceed. (*Id.*)

10. Time is of the essence also for financial reasons. The City's Department of Parks, Recreation, and Neighborhood Services and the City Council secured the following grants: \$1,866,240 from the Roberti-Z'berg State Grant program to pay for the removal of the existing trestle and to replace it with a steel and concrete bridge structure; and \$450,000 grant from the Santa Clara Valley Water District. (PA SJ0067-68 (Declaration of Marybeth Harasz (Harasz Dec.) ¶3).) The State grant expires in June 2015. (*Id.* (Harasz Dec. ¶4).) The City has already received extensions on the grant from the State of California. (*Id.*) The City is currently working with the State on an extension; if the extension is approved, the City anticipates it would be final when the Governor signs the budget. (*Id.*) If the City is not able to obtain this extension, the City would not be able to use this grant funding for the project, as the timeline for the grant would be expired. (*Id.*) The City will be unable to proceed with the Project without the grants.
11. In order for the City to complete the project within the short window period allowed by the permits and to have funding through the grant, it is important that the City be able to remove the trestle as soon as possible. (PA SJ0068 (Harasz Dec. ¶5).)
12. The Superior Court erred as a matter of law in denying the City's application. The City has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that the Superior Court's order is not appealable. The order is reviewable only by a petition for writ of mandamus. Review of this order together with the issues raised in the City's appeal from

the judgment will be inadequate due to prejudice from delay, as time is of the essence. A writ petition is, therefore, the City's only avenue of redress.

IV. PRAYER

Wherefore, the City of San Jose and City Council of the City of San Jose pray that this Court:

1. Issue a writ of mandamus, or in the alternative, writ of prohibition, to the Superior Court of California, County of Santa Clara, directing it to:
 - a. Vacate its June 22, 2015 Order, and to consider the City's EIR and Resolution certifying the EIR, in order to determine the EIR's compliance with the California Environmental Quality Act, and to determine whether the City may proceed with removing and demolishing the Willow Glen trestle that is the subject of the EIR.
 - b. Enter a new and different order that pending appeal the Superior Court has jurisdiction to consider the City's application regarding the prohibitory aspect of the Court's judgment.

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2. Grant immediate relief because the City will lose State grant money for removal of the existing trestle and installation of a new bridge if work is not commenced by July 15, 2015.
3. Grant such other relief as may be just and proper.

Respectfully submitted,

Dated: June 30, 2015

RICHARD DOYLE, City Attorney

By: *Margo Laskowska*
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Petitioners CITY OF SAN
JOSE and SAN JOSE CITY COUNCIL

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V. VERIFICATION

1. I am an attorney licensed to practice law before all the courts of the State of California. I am a Senior Deputy City Attorney in the San Jose City Attorney's Office. The San Jose City Attorney's Office has been counsel of record for Petitioners City of San Jose and San Jose City Council at all times pertinent to this action.
2. I am familiar with the proceedings which have occurred in this case, *Friends of the Willow Glen Trestle v. City of San Jose et al.*, Superior Court of California for the County of Santa Clara case number 1-14-CV-260439, and have read the foregoing Petition for Writ of Mandate or, in the Alternative, Writ of Prohibition.
3. I declare that the matters stated therein are true and correct except as to those alleged on information and belief; as to those matters, I am informed and believe that the statements made are true and on that ground allege them to be true. I make this declaration on behalf of petitioners City of San Jose and San Jose City Council.
4. The exhibits accompanying this petition, filed under a separate cover, are true and correct copies of original documents filed with the Trial Court.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on June 30, 2015, at San Jose, California.



Margo Laskowska

VI. MEMORANDUM OF POINTS AND AUTHORITIES

A. While the Appeal Is Pending, the Trial Court Retains Jurisdiction Over the Prohibitory Aspects of Its Decision.

On June 15, 2015, the City requested that the Superior Court grant its ex parte application to rescind any and all aspects of its Order, Judgment, and Peremptory Writ of Mandamus only to the extent that they prohibit the City of San José from removing and demolishing the trestle. In the alternative, the City requested that a hearing on this matter be set on shortened time. After briefing, on June 22, 2015, the Trial Court issued an order denying the City's request, and stating in part that "[t]he court has read and considered all the papers and accepts the position outlined by Plaintiff." (PA SJ0133.)

The Trial Court should have granted the City's request because even during pendency of an appeal, the Trial Court retained jurisdiction to rule on any of its orders that prohibit the City from taking action to remove or to demolish the trestle. In *Agricultural Labor Relations Board v. Tex-Cal. Land Management, Inc.* (1987) 43 Cal.3d 696, 709, the Supreme Court stated that "prohibitory portions of an order are not automatically stayed pending appeal." In *Food and Grocery Bureau of Southern California v. Garfield* (1941) 18 Cal.2d 174, 177, the Supreme Court stated that if an "injunction is prohibitory, it is self-executing and its operation is not stayed by the appeal." (See generally, *Felton Water Co. v. Superior Court* (1927) 82 Cal.App. 1, 4 (appeal of a prohibitive injunction does not suspend authority of trial court).)

In *Food and Grocery Bureau*, the Supreme Court explained that if an "injunction is prohibitory, it is self-executing and its operation is not stayed by the appeal." (*Id.* at 177.) The Court recognized that sometimes a "decree may partake of a dual nature, in which even an appeal will stay

operation of the mandatory features but not of the prohibitory.” (*Id.*) (citations omitted) In the present case, the Trial Court’s order on the petition was of such dual nature, having both mandatory and prohibitory elements. The City requested the Trial Court to rescind the prohibitory aspects of its order to the extent they prohibit the City from removing and demolishing the trestle. The City thus limited its request to the prohibitory features of the Trial Court’s order, which were not stayed on appeal.

B. The Trial Court Incorrectly Decided that It Lacked Jurisdiction to Consider the City’s Application.

In their June 17, 2015 opposition brief, the Friends relied on cases that did not involve prohibitory orders and thus are irrelevant. The Trial Court’s order thus should not have accepted the Friends’ position. The Friends’ first case, *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, concerned an appeal of an order setting aside a default judgment as to an insurer in a personal injury case. The question there was whether the trial court lacked jurisdiction to vacate or to modify the judgment while the matter was on appeal. (*Id.* at 629.) The second case, *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, addressed whether an appeal of the denial of an anti-SLAPP motion under section 426.16 of the Code of Civil Procedure automatically stayed further trial court proceedings. Neither of these cases involved prohibitory orders. Consequently, neither of them was relevant. Because the Friends’ authorities failed to address the situation before the Trial Court, the Trial Court should not have accepted the Friends’ position, and should have granted the City’s request.

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VII. CONCLUSION

The City requested the Trial Court to rescind its Order, Judgment, and Peremptory Writ of Mandamus only to the extent that they prohibit the City from removing and demolishing the trestle. In the alternative, the City asked for an order shortening time for that matter to be heard. The Trial Court has jurisdiction to entertain and grant the City's request, therefore, the Trial Court's decision to accept the Friends' position on the issue was in error.

Respectfully submitted,

Dated: June 30, 2015

RICHARD DOYLE, City Attorney

By: *Margo Laskowska*
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Petitioners CITY OF SAN JOSE
and SAN JOSE CITY COUNCIL

VIII. CERTIFICATE REGARDING WORD COUNT

I, Margo Laskowska, counsel for Petitioners City of San Jose AND San Jose City Council, hereby certify, pursuant to California Rules of Court, Rule 8.204 (c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this City of San Jose's Petition for Writ of Mandate or, in the Alternative, Writ of Prohibition, and Memorandum of Points and Authorities in Support Thereof, exclusive of tables, cover sheet, and proof of service, according to my computer program is 2,714 words.

Respectfully submitted,

Dated: June 30, 2015

RICHARD DOYLE, City Attorney

By: 
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for CITY OF SAN JOSE and
SAN JOSE CITY COUNCIL

PROOF OF SERVICE

CASE NAME: CITY OF SAN JOSE, et al. v. SUPERIOR COURT

COURT OF APPEALS CASE NO.: TBD

(Superior Court, County of Santa Clara Case No.: 1-14-CV-260439)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On June 30, 2015, I caused to be served the within:

**CITY OF SAN JOSE’S PETITION FOR WRIT OF MANDATE
OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION,
AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business’ practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

Addressed as follows:

Susan Brandt-Hawley, Esq.
Brandt-Hawley Law Group
P. O. Box 1659
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Phone Number: (707) 938-3908
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Attorneys for Real Party in
Interest FRIENDS OF THE
WILLOW GLEN TRESTLE
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Superior Court of California
County of Santa Clara
191 North First Street
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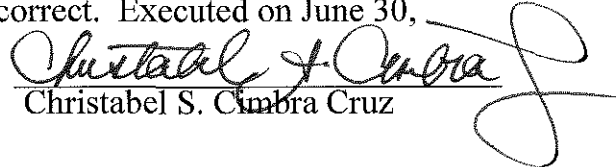
by PERSONAL DELIVERY, with a copy of this declaration, by causing to be personally delivered a true copy thereof to the person at the address set forth below.

Addressed as follows:

Clerk of the Court of Appeal
Sixth District Court of Appeal
333 West Santa Clara Street, Suite 1060
San Jose, California 95113

Original and Two (2) Copies
with eSubmission to satisfy
service upon Supreme Court
under rule 8.212(c)(2)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 30, 2015, at San Jose, California.


Christabel S. Cimbra Cruz