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8 CITY OF SAN JOSE and CITY OF SAN JOSE
9 DEPARTMENT OF PUBLIC WORKS

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SANTA CLARA

12 UNLIMITED JURISDICTION

13 WILLOW GLEN TRESTLE
14 CONSERVANCY, an unincorporated
15 association; FRIENDS OF THE WILLOW
16 GLEN TRESTLE, an unincorporated
17 association,

18 Petitioners,

19 v.

20 CITY OF SAN JOSE; CITY OF SAN JOSE
21 DEPARTMENT OF PUBLIC WORKS;
22 CALIFORNIA DEPARTMENT OF FISH
23 AND WILDLIFE; and DOES 1 to 10;

24 Respondents.

25 Does 1 to 10;

26 Real Parties in Interest.

Case Number: 18CV335801

**DECLARATION OF KATHERINE
BROWN IN OPPOSITION TO
RENEWED MOTION FOR
PRELIMINARY INJUNCTION**

Date: June 10, 2019

Time: 2:00 p.m.

Dept: 5

Judge: Hon. Thomas E. Kuhnle

27 I, Katherine Brown, declare as follows:

28 1. I am a Principal Engineer at the City of San Jose's Public Works Department. I have
been so employed since March 13, 2016. My duties include planning, organizing, coordinating, and
directing the activities for the implementation of an assigned major engineering, architectural,

1 construction, or other related technical project or program, and acting as a high-level technical
2 advisor, as well as supervising professional and sub-professional engineering staff. I have personal
3 knowledge of the matters stated in this declaration.

4 2. I have reviewed the declaration I signed on October 5, 2018, which was filed in this
5 action on that day. The factual statements contained in that declaration continue to be true and
6 accurate.

7 3. I have been a licensed professional engineer since 2015. Before working for the City
8 of San Jose (“City”), I worked for Granite Construction Company, a large general contractor, for
9 eight years. For six years while with Granite, I was involved with the estimating, planning, and
10 oversight of multiple projects. Over these six years, my day to day duties ranged from plan and
11 specification review for project specific quantity needs, maintenance of files and working
12 documents, preparation of construction documents (i.e. change orders, requests for information, pay
13 letters) budget tracking, management and oversight of subcontractors and field crews to ensure
14 adherence to master schedule, and general site inspections. For two years, I oversaw the
15 environmental compliance program for the construction and material production facilities of the
16 Northern California area, which required me to obtain and maintain permits from multiple
17 regulatory agencies, oversee, manage, and maintain an environmental training program and
18 compliance database. I have worked on about 20 projects over the course of my career.

19 4. I am familiar with the Public Works file for the Three Creeks Trail Pedestrian Bridge
20 Project, which consists of a contract between the City and Gordon N. Ball, Inc. for the removal of
21 the wooden railroad trestle bridge and its replacement with a new steel truss pedestrian bridge over
22 the Los Gatos Creek to serve the City’s trail system (“Project”). The Public Works file for the
23 Project is maintained by the Public Works project manager in the regular course of business. It
24 documents acts, conditions, and events at or near the time they occurred. Items contained in the
25 Public Works file for the Project include correspondence and copies of official public documents,
26 such as contracts entered into by the City and permits obtained by the City from other public
27 agencies.

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1 5. I am responsible for overseeing the implementation of the Project, including the
2 removal and replacement of the trestle bridge. It is my responsibility to ensure that the Project is
3 completed in a timely manner and in compliance with all permits issued to the City.

4 6. It is also my responsibility to ensure that the City has obtained all required state and
5 federal permits necessary for Project implementation, in particular, permits from the Regional Water
6 Quality Control Board and the U.S. Army Corps of Engineers, and a biological opinion from the
7 National Oceanic and Atmospheric Administration, as well as a Streambed Alteration Permit from
8 the California Department of Fish and Wildlife (“DFW”).

9 7. As described in my October 5, 2018 declaration, the City submitted an application
10 for a streambed alteration permit on March 19, 2018.

11 8. On April 18, 2018, the City received an Incomplete Notification from DFW, which
12 advised the City that its March 19, 2018 application was incomplete. In my 13 years of experience
13 managing projects and obtaining necessary permits, government agencies’ responses to project
14 applications take one of four forms: (1) approval; (2) approval with modifications; (3) invitation to
15 revise and resubmit; or (4) rejection. The April 2018 Incomplete Notification was not a rejection of
16 the City’s application; rather, its contents are consistent with an invitation to revise and resubmit

17 9. On May 8, 2018, I responded to the Incomplete Notification by email to Robin
18 Rogers of DFW. This email is contained in the administrative record for this matter and is bates-
19 numbered AR 996-997.

20 10. Public Works staff and the City’s consultant representatives (CH2MHILL Engineers,
21 Inc.) attended a Project site visit with Kristin Garrison of DFW. The purpose of the site visit was to
22 review the understory vegetation and enable DFW to conduct an in-person observation of the
23 Project site. This was done to clarify the supplemental information necessary to address the
24 deficiencies identified in the Incomplete Notification. Other than this site visit, there have been no
25 in-person interactions between the City and DFW related to the City’s 2018 streambed alteration
26 permit application.

27 11. Written communications between the City and DFW related to the City’s 2018
28 streambed alteration permit application are contained in the Administrative Record in this action,

1 which I have reviewed. All other communications between the City and DFW related to the City's
2 2018 permit application consisted of DFW's requests for information, the City's responses to those
3 requests, the City's requests for clarification of application requirements, the City's inquiries about
4 the status of its application, and the City's submittal of required documentation necessary to proceed
5 with the Project per the permit conditions. Communications were never related to specific
6 conditions and always pertained to general requirements.

7 12. On October 4, 2018, DFW issued a streambed alteration permit to the City. Although
8 the permit is titled "Streambed Alteration Agreement," the permit is not a bilateral agreement. The
9 terms of the Streambed Alteration Agreement ("Agreement") were set by DFW. By signing the
10 Agreement, the City represents that it understands the permit conditions and conveys its promise to
11 abide by those conditions.

12 13. The City and DFW did not negotiate the terms of the agreement, whether in person,
13 in writing, or over the phone. The City is bound by the conditions DFW imposes. DFW never
14 requested the City's input on permit conditions. I understand DFW's permit conditions to represent
15 DFW's interpretation of its own guidelines. The City is required to obtain a streambed alteration
16 permit to proceed with Project implementation, and in order to obtain the permit, the City must
17 submit an application to DFW. The City has no discretion to decide whether or not to apply for this
18 permit. Given these circumstances, a permit applicant, like the City, is in no position to request that
19 conditions be withdrawn, modified, or substituted. If the City objected to a condition required by
20 DFW, the City's only recourse was an administrative appeal to the state.

21 14. The City has incurred the following costs related to the project: (1) EIR (consultant
22 and City staff costs from 2014 to 2016) of over \$561,000; (2) consultant fees paid to date for
23 administrative support, construction management support, and permit extensions of over \$117,000,
24 and (3) construction contract amount paid to date of over \$400,000, in addition to staff time spent
25 from 2014 to the present.

26 15. After the DFW issued the streambed alteration agreement on October 4, 2018, the
27 City had all permits required for Project construction work. All permits required that work to be
28 completed within the streambed was to be completed on October 15, 2018.

1 16. Although the City was not permitted to perform Project construction work until
2 October 4, 2018, eleven days before the end of the work period, the City intended to complete as
3 much work as possible in this time. The City's consultant had completed the Preconstruction Work
4 phase (biological studies), and Gordon N. Ball, Inc. was scheduled to begin the Mobilization/Site
5 Preparation phase on October 8, 2018.

6 17. At the time the Court denied Petitioners' motion for preliminary injunction on
7 October 11, 2018, only four days remained until the expiration of the allowed work period. This was
8 insufficient time to mobilize crews to begin work. The City applied for extensions of its permits on
9 October 12, but the Army Corps of Engineers denied a permit extension. The City was therefore
10 unable to begin work on the Project in 2018.

11 18. Because Project work could not be performed in 2018, the City incurred over
12 \$269,000 in unnecessary costs. These costs consist of: (1) payment for contractor's mobilization and
13 demobilization of \$50,000; (2) contractor's delay costs of \$75,000; (3) consultant's delay costs of
14 \$119,000; and (4) additional City staff time of over \$25,000.

15 19. The City currently has all required permits for Project work in the creek between
16 June 15 and October 15.

17 20. Gordon N. Ball, Inc. is the contractor handling the construction of the Project for the
18 City. I have been coordinating this project with Lance Concepcion, a project manager at Gordon N.
19 Ball, Inc.; and Hal Stober, the president of Gordon N. Ball, Inc. Based on my discussions with Mr.
20 Concepcion and Mr. Stober, they have been aware, since at least 2014, that the streambed alteration
21 permit provided a fixed window of time for work: June 15 to October 15. I asked Mr. Concepcion
22 and Mr. Stober to prepare a schedule for the project given this work period. They provided me with
23 a schedule for project completion and advised me that Gordon N. Ball, Inc. is coordinating and
24 mobilizing its staff and resources to complete Project work as set forth in this schedule.

25 21. Project completion will proceed in the following phases:

26 a. Preconstruction Work: 1 week, beginning the week of June 10. This work
27 will be completed by CH2MHILL Engineers, Inc., a consultant for the City.
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1 Preconstruction work includes the necessary pre-construction surveys to be
2 completed by certified and approved biologists.

3 b. Mobilization/Site Preparation: 1 week, beginning on June 17. This work will
4 be completed by Gordon N. Ball, Inc. and includes tree trimming, removal of built-
5 up creek debris, installation of access pad, and creek diversion.

6 c. Demolition of Trestle: 1 week, beginning on June 24. This work will be
7 completed by Gordon N. Ball, Inc.

8 d. Installation of New Bridge: 14 weeks, beginning July 1. This work will be
9 completed by Gordon N. Ball, Inc. and includes structural excavation, pile driving,
10 pouring structural concrete, installation of prefabricated steel bridge, installation of
11 fencing and railings, removal of creek diversion, final cleanup and demobilization.

12 22. I reviewed the work schedule and, based on my experience, I believe that the time
13 frames for completion of each phase are reasonable.

14 23. Except for the Preconstruction Work phase, all of the work detailed above is
15 considered "in-stream work" that must be completed in the June 15 to October 15 work period set
16 forth in the October 4, 2018 Streambed Alteration Agreement. "In-stream work" is scheduled to
17 begin on June 17, 2019 and complete on October 4, 2019, eleven days before the work period
18 concludes.

19 24. Each of the work phases identified above must be completed sequentially, i.e. each
20 phase must be completed before the next phase begins.

21 25. The work schedule described above does not account for any unexpected delays in
22 demolition or construction. Based on my training and experience, projects such as this one often
23 take longer than the time frame reflected in an initial work plan, given that unforeseen or other
24 circumstances sometimes arise.

25 26. The work schedule prepared by Gordon Ball assumes work will be performed on
26 Saturdays. However, Project work may not and will not be performed on Saturdays because the
27 Project site is within 500 feet of residential properties. San Jose Municipal Code section 20.100.450
28 prohibits construction work from occurring on weekends in such locations. Under Section

1 20.100.450, construction work in these locations must occur between 7:00 a.m. and 7:00 p.m. on
2 weekdays. I therefore anticipate that Project work will continue past October 4, 2019, and I believe
3 work will end on, or shortly before, October 15.

4 I declare under the penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct, and that this declaration was signed on June 6, 2019.

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8 KATHERINE BROWN

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1 **PROOF OF SERVICE**

2 CASE NAME: Willow Glen Trestle Conservancy, et al v. City of San Jose, et al.

3 CASE NO.: 18CV335801

4 I, the undersigned declare as follows:

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

7 On June 6, 2019, I caused to be served the within:

8 **DECLARATION OF KATHERINE BROWN IN OPPOSITION TO**
9 **RENEWED MOTION FOR PRELIMINARY INJUNCTION**

10 by ELECTRONIC SERVICE listed below, transmitted using the One Legal Process Service
11 electronic filing system. The document(s) listed above was/were electronically served to the
12 electronic address(s) below

13 Addressed as follows:

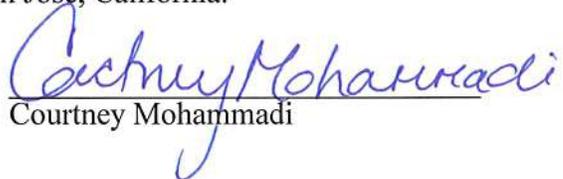
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Attorneys for Respondent, California Department
of Fish & Wildlife

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23 I declare under penalty of perjury under the laws of the State of California that the foregoing
24 is true and correct. Executed on June 6, 2019, at San Jose, California.

25 
26 Courtney Mohammadi