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Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

October 15, 2016

Re: Amicus Curiae Letter in Support of Friends of the Willow Glen Trestle Petition for Review or Request for Depublication

Friends of the Willow Glen Trestle v. City of San Jose, et al.
California Supreme Court Case No. S237378

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

We are writing today to express our concern that the fair argument standard be retained for all historical resources and that it be used as the standard for a new category of resources under the California Environmental Quality Act (CEQA): Tribal Cultural Resources (TCRs). AB 52 (Gatto, 2014), for the first time, put California Tribal Governments directly into the CEQA process, requiring consultation between lead agencies and tribes and recognizing TCRs as a category of resources separate from historical resources to be identified by tribes as experts in their cultures.[1]

The *Willow Glen Trestle* appellate court decision (*Willow Glen*) is gravely concerning because it undermines the application of the fair argument standard to presumptive and discretionary classes of historic resources. While we agree with the ruling's reasoning that *Berkeley Hillside Preservation* does not control the issue

[1] For AB 52 bill text, please see:
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52

(Decision, pages 18-19), we disagree with the appellate court's ultimate holding that the fair argument standard does not apply to discretionary classes of historic resources. The court, relying solely on its view of statutory construction, was unable to set out any principled basis for why historic resources should be treated differently than any other category of environmental resource under CEQA. Further, the legislative history for Public Resources Code section 21084.1 (AB 2881, Frazee (1992)) is devoid of evidence specifically addressing the fair argument issue or indicating that the legislature intended to remove the fair argument standard wholesale from certain resource categories. If there is ambiguity, CEQA is intended to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language (CEQA Guidelines section 15003(f)). Thus, CEQA's policy supports the commonly understood application of the fair argument standard, a cornerstone of all CEQA practice, when considering all historical resources.

We also take a different approach than that of Appellant Friends of the Willow Glen Trestle: Their petition for review appears to support application of the fair argument standard, but only for the class of *mandatory* historic resources and resources eligible for the California Register (Petition, page 14). Respectfully, this view appears based on the opinion of counsel, not on any objective factors. We believe the fair argument standard applies to all the classes of judicially-labeled historic resources: mandatory, presumptive and discretionary. First, there is no articulated reason for treating such resources differently than every other category of resources under CEQA such as air, biology, geology, etc., some of which also use a listing process (i.e., biology). Second, limiting its application to mandatory classes would greatly increase the paperwork associated with projects because the need to seek formal California Register eligibility would increase when presumptive and discretionary classes are involved.

Perhaps even more relevant to tribes, is that while *Willow Glen* involves a trestle bridge structure and not TCRs, the appellate court's approach could be used by misinformed parties to also direct the implementation of AB 52, by trying to analogize that a fair argument should not apply to the discretionary TCRs category, either. We have already encountered this issue relative to the AB 52 draft Technical Advisory.[2] We therefore agree with the Friends that the *Valley Advocates* and *Citizens for Restoration of L Street* and now *Willow Glen* cases appear to take different approaches than the *Architectural Heritage Association* and *League for Protection* cases when it comes to a fair argument and historic resources and that it is time for this issue to be resolved.

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[2] See, top of page 5, AB 52 draft Technical Advisory: https://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf

Further, the identification of TCRs must not be subject to unfettered lead agency deference because: 1) AB 52's legislative history recognizes the historic bias against incorporating tribal views into the CEQA process which AB 52 sought to rectify; 2) In AB 52, unlike the framework for historic resources, local registers are included in the mandatory not presumptive category; 3) There are historically fewer properties of significance to tribes on registers compared to historic buildings and structures as fewer have been brought forward for a variety of reasons unrelated to their value, and any effort to try and further restrict such listings or determinations of eligibility would run counter to AB 52's intent to better protect tribal resources; 4) AB 52's express bill language recognizes tribal expertise, emphasizes consultation, and recognizes that the substantial evidence standard applies (which includes the fair argument standard as set out in CEQA Guidelines section 15384); and 5) tribal religious and ceremonial practices, often related to TCRs and listed or eligible properties, unlike activities related to historic resources in general, are protected activities under the United States and California constitutions and cannot be impaired by the government without a compelling governmental interest. Each of these aspects of TCRs makes them very different from standard historic resources under CEQA and appropriate for the lower threshold fair argument standard.

Given these significant issues, we respectfully request the Court hear the issue of fair argument and its applicability to the classes of historic resources while recognizing the differences between such historic resources and TCRs. In the alternative, we respectfully request the case be depublished so that it will not further contribute to the apparent confusion among the courts about the appropriate standard of review for historic resources, and potentially, by extension TCRs - the preservation of which are vital to California tribal government self determination, sovereignty, and identity.

Very truly yours,

Courtney Ann Coyle
Attorney at Law

for:

United Auburn Indian Community
Hon. Gene Whitehouse
Chairman

Pechanga Band of Luiseño Indians
Hon. Mark Macarro
Chairman

PROOF OF SERVICE

CA Supreme Court Case No. S237378

I, Kelly A. McDonald, declare:

I am over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 7855 Fay Avenue, Suite 315, La Jolla, California 92037.

On October 17, 2016, I served the foregoing document described as follows:

Courtney Ann Coyle October 15, 2016 Amicus Curiae Letter in Support of Friends of the Willow Glen Trestle Petition for Review or Request for Depublication

on the parties in this action as follows:

(X) by placing a true copy thereof enclosed in a sealed envelope and addressed as shown below, and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th day of October 2016.

KELLY A. McDONALD