

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

**PETITIONERS' APPENDIX
VOLUME I OF I
TABS 1-13
PAGES SJ0001-SJ0134**

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

RICHARD DOYLE, City Attorney (88625)
NORA FRIMANN, Assistant City Attorney (93249)
KATHRYN J. ZOGLIN, Sr. Deputy City Attorney (121187)
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Attorneys for Petitioners CITY OF SAN JOSE
and CITY COUNCIL OF THE CITY OF SAN JOSE

FRIENDS OF THE WILLOW GLEN TRESTLE vs. CITY OF SAN JOSE, et al.

Case No. 1-14-CV-260439

PETITIONER'S CHRONOLOGICAL APPENDIX

TAB NO.	DATE FILED	PARTY	DOCUMENT	BATES RANGE
1	02/11/14	Friends of the Willow Glen Trestle	Petition for Writ of Mandamus	SJ0001-SJ0010
2	04/24/14	City of San Jose	Answer to Petition for Writ of Mandamus	SJ0011-SJ0018
3	07/28/14	Superior Court	Order Re: Petition for Writ of Mandamus	SJ0019-SJ0034
4	08/20/14	Friends of the Willow Glen Trestle	Judgment Granting Petition for Writ of Mandamus	SJ0035-SJ0056
5	10/17/14	Superior Court	Peremptory Writ of Mandamus	SJ0057-SJ0058
6	10/17/14	City of San Jose	Notice of Appeal/Cross-Appeal	SJ0059-SJ0060
7	06/15/15	City of San Jose	Notice of Ex Parte Application by City Respondents	SJ0061-SJ0066
8	06/15/15	City of San Jose	Declaration of Marybeth Harasz in Support of the City's Ex Parte Application	SJ0067-SJ0068
9	06/15/15	City of San Jose	Declaration of Jan Palajac In Support of City Respondents' Ex Parte Application	SJ0069-SJ0071
10	06/15/15	City of San Jose	Declaration of Kathryn Zoglin In Support of City Respondents' Ex Parte Application	SJ0072-SJ0125
11	06/15/15	City of San Jose	Request for Judicial Notice in Support of City Respondents' Ex Parte Application	SJ0126-SJ0127
12	06/17/15	Friends of the Willow Glen Trestle	Petitioner's Opposition to Ex Parte Application for Demolition	SJ0128-SJ0132
13	06/22/15	Superior Court	Order	SJ0133-SJ0134

FRIENDS OF THE WILLOW GLEN TRESTLE vs. CITY OF SAN JOSE, et al.

Case No. 1-14-CV-260439

PETITIONER'S ALPHABETICAL APPENDIX

TAB NO.	DATE FILED	PARTY	DOCUMENT	BATES RANGE
2	04/24/14	City of San Jose	Answer to Petition for Writ of Mandamus	SJ0011-SJ0018
7	06/15/15	City of San Jose	Declaration of Marybeth Harasz in Support of the City's Ex Parte Application	SJ0061-SJ0066
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13	06/22/15	Superior Court	Order	SJ0133-SJ0134
3	07/28/14	Superior Court	Order Re: Petition for Writ of Mandamus	SJ0019-SJ0034
5	10/17/14	Superior Court	Peremptory Writ of Mandamus	SJ0057-SJ0058
1	02/11/14	Friends of the Willow Glen Trestle	Petition for Writ of Mandamus	SJ0001-SJ0010
12	06/17/15	Friends of the Willow Glen Trestle	Petitioner's Opposition to Ex Parte Application for Demolition	SJ0128-SJ0132
11	06/15/15	City of San Jose	Request for Judicial Notice in Support of City Respondents' Ex Parte Application	SJ0126-SJ0127

TAB 1

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2014 FEB 11 P 4: 31

David J. ...
County of Santa Clara
By: *T. ...*

1 Susan Brandt-Hawley/SBN 75907
2 BRANDT-HAWLEY LAW GROUP
3 P.O. Box 1659
4 Glen Ellen, CA 95442
5 707.938.3900, fax 707.938.3200
6 susanbh@preservationlawyers.com

7 Attorney for Petitioner

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 FOR THE COUNTY OF SANTA CLARA

11 Friends of the Willow Glen Trestle,
12 an unincorporated association;

Case No. 114 CV 260439

13 Petitioners,

Petition for
Writ of Mandamus

14 v.

BY FAX

15
16 City of San José and City Council
17 of the City of San José;

California Environmental Quality Act
[CEQA]

18 Respondents;

19 Does 1 to 10;

20 Real Parties in Interest.
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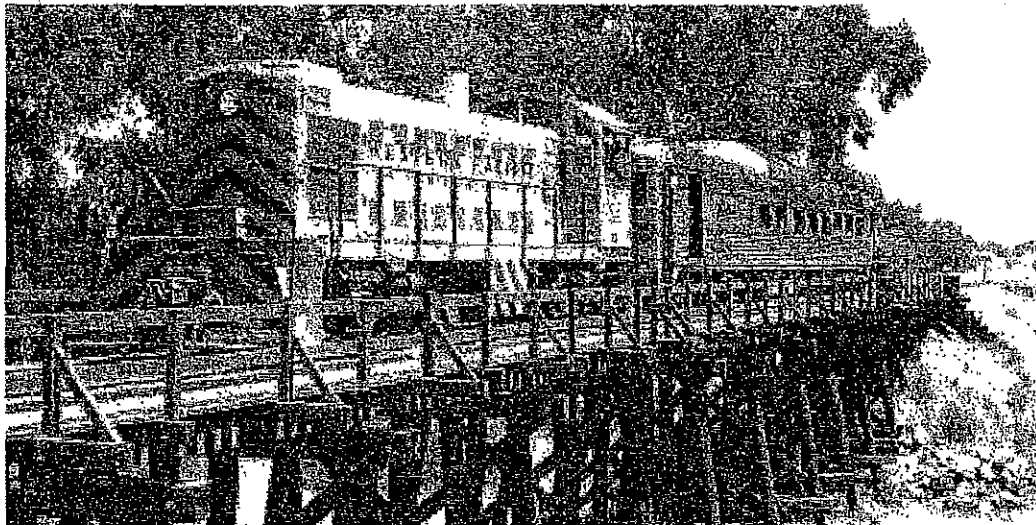
Petition for Writ of Mandamus

1 Petitioner alleges:
2

3 **Introduction**

4 1. The Friends of the Willow Glen Trestle bring this mandamus action in the
5 public interest. They challenge approval of the Three Creeks Trail Pedestrian Bridge Project
6 by a majority of the San José City Council. The Bridge Project would demolish rather than
7 rehabilitate the 1921 Willow Glen Trestle across Los Gatos Creek, causing significant
8 irrevocable environmental impacts. The City Council failed to prepare an environmental
9 impact report to inform its discretion, violating the fundamental mandate of the California
10 Environmental Quality Act to analyze project impacts and identify feasible alternatives.
11
12

13 Each public agency in California must prepare an EIR whenever citizens present a
14 fact-based "fair argument" that a proposed discretionary project *may* have significant
15 environmental impact, regardless of evidence to the contrary.
16



28 The Willow Glen Trestle in 1955

1 the Trestle, requested the preparation of an EIR, and exhausted administrative remedies.

2 4. Respondent City of San José, through its Respondent City Council, is the
3 governmental body that approved the Bridge Project on the basis of a Mitigated Negative
4 Declaration, and is the lead agency under CEQA.
5

6 5. Does 1 through 10 are named as Real Parties in Interest because there are no
7 private applicants who sought and received approval for the Bridge Project, and Does' true
8 names and capacities are currently unknown to petitioners. If true names and capacities become
9 known, petitioners will amend this petition to assert them.
10

11 6. The paragraphs below refer to and rely on information in documents relating to
12 this action, all of which will be filed with this Court as part of the record of proceedings and are
13 here incorporated by reference.
14

15 General Allegations

16 *Willow Glen Trestle*

17 7. The Willow Glen Trestle was built by Western Pacific Railroad when it was a
18 rival to the dominant Southern Pacific Railroad. Following World War I, when Western Pacific
19 was cash-strapped and looking for freight income it built the undersized Willow Glen Trestle
20 that forced trains to operate very slowly, under 10 miles an hour. Its design and construction in
21 1921 reflected the unique conditions of a time and place: the post-World War I materials'
22 shortage, Western Pacific's economic constraints, and the demand for quick service by new
23 canneries in Willow Glen and across San José.
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1 8. For decades, the Southern Pacific (SP) railroad tracks had followed 4th Street right
2 through the center of San José. When that railroad's franchise expired at the turn of the
3 twentieth century, the City began pressuring SP to relocate its tracks. The State Railroad
4 Commission recommended that SP loop around the City and share tracks with Western Pacific.
5 However, because of the undersized design of the Trestle, this was infeasible. SP built its own
6 crossing of Los Gatos Creek — the bridge near San Carlos Street that is still in use today.
7

8
9 9. The Willow Glen Trestle was strong enough only to carry freight for trains that ran
10 “dead slow.” This caused traffic congestion and led to the “grade separation” movement and the
11 eventual incorporation of the Town of Willow Glen.
12

13 10. It took some years for SP to build its tracks around San José, and in the meantime
14 Western Pacific served the area's many canneries. The route became Western Pacific's “cash
15 cow” and enabled the railroad to become profitable and expand its operations. By the 1930s,
16 Western Pacific had a network of lines traversing the Bay Area eastward across the Sierras,
17 providing an alternative to the SP monopoly.
18

19 11. If the Willow Glen Trestle had been just a “common trestle,” Western Pacific
20 would not have developed a lucrative cannery business, SP's dominance would likely have been
21 unchallenged, and the Bay Area might well have developed very differently.
22

23 *Three Creeks Trail Pedestrian Bridge Project*
24

25 12. For decades, the members of the Friends have been volunteering to benefit the Los
26 Gatos Creek Trail and Three Creeks Trail, and as part of that effort have worked with City
27 planners to incorporate the Willow Glen Trestle into the trail network. The Friends provided
28

1 information to planners and government officials about the Trestle and railroad rights-of way,
2 seeking grants so that the City could acquire them for the Three Creeks Trail and its connection
3 to the Los Gatos Creek Trail.
4

5 13. The City is continuing the process of developing the Los Gatos Creek Trail and
6 the Three Creeks Trail to improve its pedestrian and bicycle trail system. In 2004, the City
7 approved a project it called Los Gatos Creek Trail, Reach 4, based on a Mitigated Negative
8 Declaration. That project envisioned repair and continued use of the Willow Glen Trestle as part
9 of the trail system. cursory historic review of the Trestle, which was at that time not threatened
10 with demolition, indicated no known historic or archaeological resources.
11

12 14. In January 2014, the City published an Initial Study and proposed a Mitigated
13 Negative Declaration for a new Three Creeks Trail Pedestrian Bridge project, including
14 demolition of the City-owned Willow Glen Trestle and replacement with a prefabricated single-
15 span steel truss bridge on the same alignment, repurposing rehabilitation grant monies.
16

17 15. Relying on the cursory 2004 historic documents, the City's Initial Study concluded
18 that the Trestle design was based on "standard plans" and is "not unique" or qualified for the
19 California Register of Historical Resources although it is "locally important." The "Initial
20 Study" conceded, however, that "comments from local residents suggest additional local
21 historical interests, including the role of the railroad spur and the trestle in the incorporation of
22 Willow Glen and activism regarding roadway/railroad grade separations."
23

24 16. The administrative process for the 2014 project was concededly driven by
25 concerns about project funding deadlines. The San José Historic Landmarks Commission
26 declared that it would have designated the Willow Glen Trestle as an historic landmark if it had
27
28

1 been presented with that option in a timely fashion. Historic architect Marvin Bamberg AIA
2 provided an expert opinion that the Trestle currently meets objective qualifications for listing on
3 the California Register of Historical Resources.

4
5 17. The City Council approved the project on January 14, 2014, based on a Negative
6 Declaration, refusing the Friends' requests for preparation of an EIR based on substantial expert
7 evidence of the Trestle's historic status. The Council was advised by its counsel that it had
8 discretion to decline to treat the Trestle as historic despite credible evidence of its status, and a
9 majority of the Council did decline and then voted to approve the project. Two members of the
10 Council voted against the Mitigated Negative Declaration and against the project, expressing
11 grave concerns about the process followed to approve the demolition.

12
13
14 18. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of
15 law. Issuance of a peremptory writ is needed to avoid immediate, severe, and irreparable harm to
16 San José residents and City resources via the demolition of the Willow Glen Trestle. The City
17 has the capacity to correct its violations of law but refuses to do so.

18
19
20 **Violations of the California Environmental Quality Act**

21 19. Petitioner incorporates all previous paragraphs as if fully set forth.

22
23 20. The City abused its discretion and failed to act in the manner required by law in
24 approving the demolition of the Willow Glen Trestle on the basis of a Mitigated Negative
25 Declaration rather than preparing an EIR, because the administrative record contains substantial
26 evidence supporting a fair argument that the project may result in significant environmental
27 impacts. The Mitigated Negative Declaration and Initial Study also failed to adequately assess
28

1 the presence of historic and cultural resources within the project's environmental setting.

2
3 Wherefore, petitioner requests:

4 1. That the Court issue a peremptory writ of mandamus ordering respondents
5 City of San José, *et al.*, to set aside and void approvals of the Three Creek Trails Pedestrian
6 Bridge Project and demolition of the Willow Glen Trestle and to refrain from further
7 consideration until full compliance with CEQA is achieved, including preparation and
8 certification of an adequate EIR and adoption of feasible mitigations and alternatives based on
9 findings supported by substantial evidence;


10
11
12 2. That the Court issue a temporary restraining order and/or preliminary injunction
13 enjoining the City respondents and their agents and employees from any and all physical actions
14 in furtherance of the Three Creek Trails Pedestrian Bridge Project or that would physically alter
15 the site or the Willow Glen Trestle while this petition is pending, including but not limited to:
16 grading, demolition, pre-construction, or construction activities of any kind;

17
18 3. For petitioner's costs and attorney fees pursuant to CCP section 1021.5; and

19
20 4. For such other and further relief as the Court finds proper.

21 February 11, 2014

BRANDT-HAWLEY LAW GROUP

22
23 

24 Susan Brandt-Hawley
25 Attorney for Petitioner

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Verification

I, Susan Brandt-Hawley, am the attorney for petitioner Friends whose members are located outside of Sonoma County where I have my law offices, and so I verify this petition on their behalf. I have read the Petition for Writ of Mandamus and know its contents. The matters stated in it are true and correct based on my knowledge, except as to the matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the above is true and correct and is executed this 11th day of February, 2014, at Glen Ellen, California.



Susan Brandt-Hawley

Friends of the Willow Glen Trestle v. City of San Jose, et al.
Santa Clara County Superior Court Case No. _____

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma.
I am over the age of eighteen years and not a party to the within entitled action;
my business address is P.O. Box 1659, Glen Ellen, CA 95442.

On February 11, 2014, I served one true copy of:

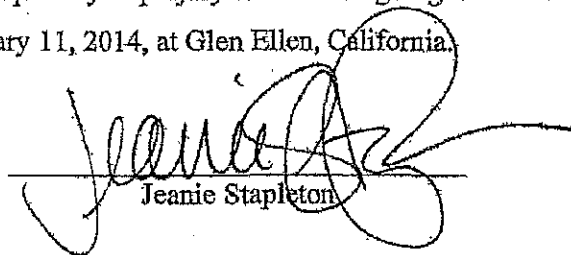
Petition For Writ Of Mandamus

by placing a true copy enclosed in a sealed envelope with prepaid postage in the
United States mail in Glen Ellen, California addressed as follows:

SALLY MAGNANANI, Deputy Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento CA 94244-2550

PURSUANT TO PUBLIC RESOURCES CODE § 21167

I declare under penalty of perjury that the foregoing is true and correct and
is executed on February 11, 2014, at Glen Ellen, California.



Jeanie Stapleton

TAB 2

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Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

ENDORSED

2014 APR 24 P 3:13

County of Santa Clara, California

By _____

J. CAO-NGUYEN

Attorneys for Respondents
CITY OF SAN JOSE and
CITY COUNCIL OF THE CITY OF SAN JOSE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION

FRIENDS OF THE WILLOW GLEN
TRESTLE, an unincorporated association,

Petitioners,

v.

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

Respondents.

Case Number: 1-14-CV-260439

ANSWER TO PETITION
FOR WRIT OF MANDAMUS

California Environmental Quality Act
[CEQA]

Does 1 to 10;

Real Parties in Interest.

Respondents City of San José and the San José City Council (hereinafter collectively "the City" or "Respondents"), in answer the Petition for Writ of Mandamus filed by Petitioner Friends of the Willow Glen Trestle, an unincorporated association (hereinafter "Petitioner"), that was verified by Petitioner's counsel, admit, deny, and allege:

1. Answering paragraph 1 of the Petition, Respondents admit based on information and belief that Petitioner challenged the City Council's approval of the Three Creeks Trail Pedestrian Bridge Project. Respondents deny each and every remaining

1 allegation contained in paragraph 1 of the Petition.

2 2. Answering paragraph 2 of the Petition, Respondents admit that Respondents
3 and the trestle across Los Gatos Creek are located in the County of Santa Clara.
4 Respondents deny and/or lack sufficient information or belief upon which to answer the
5 remaining allegations contained therein and on that basis deny each and every remaining
6 allegation.

7 3. Answering paragraph 3 of the Petition, Respondents admit that a group that
8 represents itself as the Friends of the Willow Glen Trestle object to the approval of the
9 Three Creeks Trail Pedestrian Bridge Project. Answering the remaining allegations in
10 paragraph 3 of the Petition, Respondents lack sufficient information or belief upon which
11 to answer the allegations contained therein and on that basis deny each and every
12 remaining allegation.

13 4. Answering paragraph 4 of the Petition, Respondents admit based on
14 information and belief the allegations contained therein.

15 5. Answering paragraph 5 of the Petition, Respondents lack sufficient
16 information or belief upon which to respond to the vague allegations and on that basis
17 deny each and every allegation contained therein.

18 6. Answering paragraph 6 of the Petition, Respondents lack sufficient
19 information or belief upon which to respond to the vague allegations and on that basis
20 deny each and every allegation contained therein.

21 7. Answering paragraph 7 of the Petition, Respondents lack sufficient
22 information or belief upon which to respond to the allegations and on that basis, deny
23 each and every allegation contained therein.

24 8. Answering paragraph 8 of the Petition, Respondents lack sufficient
25 information or belief upon which to respond to the allegations and on that basis deny each
26 and every allegation contained therein.

27 ///

28 ///

1 9. Answering paragraph 9 of the Petition, Respondents lack sufficient
2 information or belief upon which to respond to the vague allegations and on that basis
3 deny each and every allegation contained therein.

4 10. Answering paragraph 10 of the Petition, Respondents lack sufficient
5 information or belief upon which to respond to the allegations and on that basis deny each
6 and every allegation contained therein.

7 11. Answering paragraph 11 of the Petition, Respondents deny each and every
8 allegation contained in paragraph 11 of the Petition.

9 12. Answering paragraph 12 of the Petition, Respondents deny each and every
10 allegation contained therein based on information and belief.

11 13. Answering paragraph 13 of the Petition, Respondents admit the first two
12 sentences in paragraph 13. Respondents deny the third sentence, as phrased, based on
13 information and belief. Respondents deny each and every remaining allegation in
14 paragraph 13.

15 14. Answering paragraph 14 of the Petition, Respondents admit that a document
16 entitled "Initial Study" for the Three Creeks Trail Pedestrian Bridge Project, dated January
17 2014, indicates that it was recommended that a mitigated negative declaration be
18 prepared. According to that document, the project would replace the existing wood trestle
19 with a single-span steel truss bridge with a poured concrete deck and the new bridge
20 would be on the same alignment as the existing trestle. Respondents deny each and
21 every remaining allegation in paragraph 14.

22 15. Answering paragraph 15 of the Petition, Respondents admit that according
23 the Bridge Evaluation Short Form, the Los Gatos Creek Railroad Bridge "was originally
24 constructed in 1922, but the trestles and superstructure were likely replaced during the
25 last 30 or 40 years. The design is based on standard plans for wood trestle bridges." It
26 further states that "This bridge is a typical example of a common type and has no known
27 association with important events or persons in local history." According to the initial
28 report, "The trestle is not listed in, nor has it been determined eligible for listing in, the

1 California Register of Historical Resources, and is not listed in a local register of historical
2 resources." The Initial Report does indicate that "Comments from local residents suggest
3 additional local historical interests, including the role of the railroad spur and the trestle in
4 the incorporation of Willow Glen and activism regarding roadway/railroad grade
5 separations." Respondents deny each and every remaining allegation in paragraph 15.

6 16. Answering paragraph 16 of the Petition, Respondents lack sufficient
7 information on which to base a response and on that ground, deny each and every
8 allegation contained therein.

9 17. Answering paragraph 17 of the Petition, Respondents admit that on January
10 14, 2014, the City Council approved the Three Creeks Trail Pedestrian Bridge Project.
11 Respondents further admit that two members of the City Council voted against approval.
12 Respondents deny each and every remaining allegation contained in paragraph 17.

13 18. Answering paragraph 18 of the Petition, Respondents deny each and every
14 allegation contained therein.

15 19. Answering paragraph 19 of the Petition, Respondents deny each and every
16 allegation contained therein.

17 20. Answering paragraph 20 of the Petition, Respondents deny each and every
18 allegation contained therein.

19 **AFFIRMATIVE DEFENSES**

20 Respondents assert the following affirmative defenses, each of which is a separate
21 and distinct defense to each and every cause of action in the Petition:

22 **FIRST AFFIRMATIVE DEFENSE**

23 Petitioner's Petition for Writ of Mandate, and each cause of action purportedly
24 stated therein, fails to state facts sufficient to state a claim for relief against these
25 answering Respondents.

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SECOND AFFIRMATIVE DEFENSE

The Petition for Writ of Mandamus, if enforced, would compel an act contrary to public policy and would be harmful to the public interest.

THIRD AFFIRMATIVE DEFENSE

Petitioner has adequate remedies at law.

FOURTH AFFIRMATIVE DEFENSE

Petitioner is restricted to asserting in this action only those claims asserted in the administrative proceeding, and any claims not asserted in the administrative proceeding are barred as a matter of law.

FIFTH AFFIRMATIVE DEFENSE

Petitioner has failed to present to Respondents the alleged grounds for noncompliance with CEQA as required under California Public Resources Code section 21177.

SIXTH AFFIRMATIVE DEFENSE

To the extent the challenged acts are discretionary legislative acts, Respondent San José City Council properly exercised its discretion.

SEVENTH AFFIRMATIVE DEFENSE

The challenged acts are not expressly or impliedly required by law.

EIGHTH AFFIRMATIVE DEFENSE

Respondents allege all of the immunities and defenses afforded by Government Code sections 800-1000, inclusive.

NINTH AFFIRMATIVE DEFENSE

Petitioner has failed to exhaust its administrative remedies.

TENTH AFFIRMATIVE DEFENSE

With respect to all causes of action alleged in the Petition, Respondents proceeded in the manner required by law, did not act arbitrarily, capriciously, or wholly without evidentiary support, did not abuse their discretion, and made all required findings, which supported Respondents' actions.

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ELEVENTH AFFIRMATIVE DEFENSE

Respondents contend that they acted reasonably at all times and in all ways with respect to the subject matter of the Petition.

TWELFTH AFFIRMATIVE DEFENSE

Petitioner's claims are barred by the statute of limitations, including but not limited to those set forth in California Code of Civil Procedure section 1094.6 and California Public Resources Code section 21167.

THIRTEENTH AFFIRMATIVE DEFENSE

Petitioner's claims are barred in whole or in part by the doctrine of laches.

FOURTEENTH AFFIRMATIVE DEFENSE

Petitioner's claims are barred in whole or in part by the doctrine of equitable estoppel.

FIFTEENTH AFFIRMATIVE DEFENSE

Petitioner's claims are barred in whole or in part by the doctrine of unclean hands.

SIXTEENTH AFFIRMATIVE DEFENSE

Any and all acts or omissions if any of Respondents were the result of an exercise of discretion vested in them and, therefore, Respondents are not liable.

SEVENTEENTH AFFIRMATIVE DEFENSE

The acts and omissions alleged by Petitioner have in no manner caused special injuries to it.

EIGHTEENTH AFFIRMATIVE DEFENSE

Respondents have not violated any statutory provisions referred to in the Petition.

NINETEENTH AFFIRMATIVE DEFENSE

Petitioner has no clear, present and beneficial right to the relief it seeks.

TWENTIETH AFFIRMATIVE DEFENSE

Petitioner has waived the claims alleged in the Petition.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Petitioner has failed to exhaust its administrative remedies.

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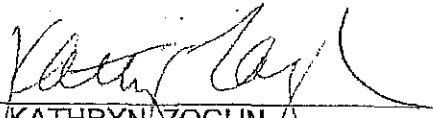
WHEREFORE, Respondents City of San José and San José City Council pray that:

1. Petitioner take nothing by the allegations in its Petition for Writ of Mandamus and the Petition be denied and dismissed;
2. The decisions of Respondents be affirmed;
3. Judgment be entered in favor of Respondents and against Petitioner; and
4. Respondents recover costs in this action, including all costs associated with preparation of the administrative record, and reasonable attorneys' fees as may be provided by law; and
5. For such other and further relief as this Court may deem just and proper

Respectfully submitted,

Dated: April 24, 2014

RICHARD DOYLE, City Attorney

By: 
KATHRYN ZOGLIN
Senior Deputy City Attorney

Attorneys for Respondents CITY OF
SAN JOSE and CITY COUNCIL OF THE
CITY OF SAN JOSE

PROOF OF SERVICE

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CASE NAME: FRIENDS OF THE WILLOW GLEN TRESTLE v. CSJ, et al.
CASE NO.: 1-14-CV-260439

ENDORSED
2014 APR 24 P 3:13

I, the undersigned declare as follows:

Deputy Sheriff, Dept of Sheriff-Corona
County of Santa Clara, California

I am over 18 years of age, employed in Santa Clara County, and reside at the within action. My business address is 200 East Santa Clara Street, San José, California 95113-1905, and is located in the county where the service described below occurred.

On April 24, 2014, I caused to be served the within:

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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
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*Attorneys for Petitioner,
Friends of the Willow Glen Trestle, an
unincorporated association*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 24, 2014**, at San José, California.


Katherine Walters

TAB 3

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(ENDORSED)
FILED

JUL 28 2014

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of Santa Clara County
by Willa Roman DEPUTY
Courtroom Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

FRIENDS OF THE WILLOW GLEN TRESTLE,
an unincorporated association,

Petitioner,

vs.

CITY OF SAN JOSE; CITY COUNCIL OF THE
CITY OF SAN JOSE,

Respondents.

Case No. 1-14-CV-260439

ORDER RE: PETITION FOR WRIT OF
MANDAMUS

The Petition for Writ of Mandamus by Petitioner Friends of the Willow Glen Trestle ("Petitioner") came on for hearing before the Honorable Joseph H. Huber on July 18, 2014, at 10:00 a.m. in Department 21. In advance of the hearing the Court carefully reviewed the administrative record and all briefs and pleadings. The matter having been submitted, the Court finds and orders as follows:

The request for judicial notice filed by Respondent City of San Jose ("City") with its Reply is DENIED. The material offered for judicial notice, portions of the San Jose Muni. Code

1 setting forth the procedure for designating landmarks, is not relevant to the Court's review of this
2 challenge to the City's Mitigated Negative Declaration ("MND"). A precondition to judicial
3 notice in either its permissive or mandatory form is that the matter to be noticed be relevant to
4 the material issue before the Court. *Silverado Modjeska Recreation and Park Dist. v. County of*
5 *Orange* (2011) 197 Cal App 4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal 4th
6 415, 422 fn. 2.

7
8 The Project challenged here is the City's proposed demolition of the existing wooden
9 trestle bridge in the Willow Glen area of San Jose, a structure which Petitioner claims may be a
10 historical resource. According to the City's Jan. 14, 2014 Notice of Determination ("NOD")
11 "[t]he proposed project includes a pre-fabricated, 210 foot-long, single span steel truss bridge
12 with a poured concrete deck. The new bridge would be on the same alignment as the existing
13 bridge, and small retaining walls would be installed adjacent to the new bridge abutments to
14 allow for the future Los Gatos Creek trail connection to the northeast and for a viewing area on
15 the south side of the new bridge." The Project was approved for CEQA purposes pursuant to the
16 City's MND, circulated from Nov. 19, 2013 to Dec. 19, 2013, and adopted on Jan. 14, 2014 in
17 City Council Resolution 76904 (certified administrative record, "CAR," at 0002).¹

18
19 A MND is "a negative declaration prepared for a project when the initial study has
20 identified potentially significant effects on the environment, but (1) revisions in the project plans
21 or proposals made by, or agreed to by, the applicant before the proposed negative declaration and
22 initial study are released for public review would avoid the effects or mitigate the effects to a
23 point where clearly no significant effect on the environment would occur, and (2) there is no
24 substantial evidence in light of the whole record before the public agency that the project, as
25

26
27 ¹ The Court notes that there has been some dispute between the parties as to the preparation and proper scope of the
28 administrative record. In analyzing this challenge to the MND, the Court has assumed that record certified by the
City (designated "CAR") is the correct record.

1 revised, may have a significant effect on the environment.” Pub. Res. Code § 21064.5. The
2 City’s 2013 MND claims in part that “[t]he project will not have a significant impact on cultural
3 resources, and therefore no mitigation is required.” The prior 2004 MND for a trail system that
4 proposed incorporating the existing trestle is the City’s main evidence for its conclusion that the
5 Trestle is not a historical resource. The evidence from 2004 is, at best, sparse and conclusory.
6 The 2004 Trail MND the City relies on did not propose any “substantial adverse change” to the
7 Trestle. It stated to the public that the Trestle would be incorporated into the trail system and
8 that “[s]ix to eight-foot high security fencing would be installed on both sides of the trail on top
9 of the trestle bridge, which will be covered with either wood or synthetic decking material.”
10 CAR 0023, part of the 2004 Project Description. There was no analysis of the potential impacts
11 of the Trestle’s demolition or consideration of alternatives to demolition in that document as
12 demolition was not proposed.

13
14 As Petitioner points out, Pub. Res Code §21084.1 states in pertinent part that: “A project
15 that may cause a substantial adverse change in the significance of an historical resource is a
16 project that may have a significant effect on the environment,” and therefore any project that
17 calls for the demolition of a potentially historical resource likely must be approved pursuant to
18 an EIR, not an MND, as demolition is clearly a “substantial adverse change.”

19
20 CEQA Guidelines §15064.5(a) states in pertinent part that “the term ‘historical resource’
21 shall include the following: (1) a resource listed in, or determined to be eligible by the State
22 Historic Resources Commission, for listing in the California Register of Historic Resources . . .
23 (2) A resource listed in a local register of historical resources [as defined in Pub Res. Code
24 §5020(k)] or identified as significant in an historic resource survey meeting the requirements of
25 [Pub. Res. Code §5024.1(g)] shall be presumed to be historically or culturally significant. Public
26 agencies must treat any such resource as significant unless the preponderance of evidence
27 demonstrates that it is not historically or culturally significant. (3) Any object, building,
28 structure, site, area, place, record, or manuscript which a lead agency determines to be

1 historically significant or significant in the architectural, engineering, scientific, economic,
2 agricultural, educational, social, political, military, or cultural annals of California may be
3 considered to be a historical resource, provided the lead agency's determination is supported by
4 substantial evidence in light of the whole record. Generally, a resource shall be considered by
5 the lead agency to be 'historically significant if the resource meets the criteria for listing on the
6 California Register of Historical Resources [Pub. Res. Code §5024.1] including the following:
7 (A) Is associated with events that have made a significant contribution to the broad patterns of
8 California's history and cultural heritage; (B) Is associated with the lives of persons important in
9 our past; (C) Embodies the distinctive characteristics of a type, period, region, or method of
10 construction, or represents the work of an important creative individual, or possesses high artistic
11 values; or (D) Has yielded or may be likely to yield, information important in prehistory or
12 history. (4) The fact that a resource is not listed in, or determined to be eligible for listing in the
13 California Register of Historical Resources, not included in a local register of historical
14 resources, or identified in an historical resources survey does not preclude a lead agency from
15 determining that the resource may be an historical resource as defined in [Pub. Res. Code
16 §§5020.1(j) or 5024.1]." Some internal citations omitted, brackets added.

17
18 CEQA Guidelines §15064.5(b) repeats Pub. Res. Code §21084.1's conclusion that a
19 project that may cause a substantial adverse impact to a historical resource is a project that may
20 have a significant impact on the environment, thus requiring an EIR. It goes to state in pertinent
21 part: "(1) Substantial adverse change in the significance of an historical resource means physical
22 demolition, destruction, relocation, or alteration of the resource or its immediate surroundings
23 such that the significance of an historical resource would be materially impaired. (2) the
24 significance of an historical resource is materially impaired when a project: (A) Demolishes or
25 materially alters in an adverse manner those physical characteristics of an historical resource that
26 convey its historical significance . . . (B) Demolishes or materially alters in an adverse manner
27 those physical characteristics that account for its inclusion in a local register . . . or its
28 identification in a historical resources survey . . . unless the public agency reviewing the effects

1 of the project establishes by a preponderance of evidence that the resource is not historically or
2 culturally significant; or (C) Demolishes or materially alters in an adverse manner those physical
3 characteristics . . . that convey its historical significance and that justify its eligibility for
4 inclusion in the California Register of Historical Resources as determined by a lead agency for
5 purposes of CEQA.”

6
7 The parties dispute what standard of review applies to the City’s determination that the
8 existing Trestle is not a historical resource. Petitioner argues that the “fair argument” standard
9 typically applied to challenges to MNDs applies here, citing decisions applying that standard to
10 challenges to projects potentially impacting historic resources such as *League for Protection v.*
11 *City of Oakland* (1997) 52 Cal App 4th 896 and *Architectural Heritage Assoc. v. County of*
12 *Monterrey* (2004) 122 Cal App 4th 1095. The City argues that the “fair argument” standard
13 simply does not apply, despite this being a challenge to a MND, and that it properly exercised its
14 discretion in determining (based on approximately two pages in the 2004 MND) that the trestle is
15 not historic. It contends that the trestle could only fall under the third/discretionary category of
16 historic resources (equivalent to the last sentence of Pub. Res. Code §21084.1). “Because the
17 trestle falls under the third category, the City is vested with the authority to exercise its discretion
18 when it concluded that that the trestle is not historic. . . . [T]he fair argument standard does not
19 apply when a resource falls under the third discretionary category, as explained in *Valley*
20 *Advocates v. City of Fresno* (2008) 160 Cal App 4th 1039.” Opposition Brief at 12:3-8. *Valley*
21 *Advocates* did not involve a MND, it was a challenge to a claimed categorical exemption from
22 CEQA for a project (an application for an addition to one existing building and the demolition of
23 another). *Id.* at 1046.

24
25 Having reviewed these decisions as well as other materials the Court determines that
26 Petitioner is correct that the fair argument standard applies to this challenge to the City’s MND.

1 In the six years since *Valley Advocates* was published, it has been cited in only two
2 published decisions, neither of which cited it for the proposition advanced by the City: that its
3 language interpreting the statutes dealing with historical resources has general application
4 outside of disputes over exemptions to CEQA and applies to challenges to MNDs. One of the
5 two published decisions citing it, *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal
6 App 4th 187, involved a challenge to a MND and was decided by the identical panel of the Fifth
7 District that decided *Valley Advocates*. That panel cited *Valley Advocates* in support of the
8 wholly unremarkable conclusion that: “When an agency certifies a negative declaration or a
9 mitigated negative declaration, the agency’s decision is subject to judicial review under the ‘fair
10 argument’ test. If the fair argument test is met, then the agency is required to prepare and certify
11 an EIR analyzing the project’s potential impacts on the environment. The fair argument standard
12 establishes a low threshold. . . . Whether the record contains sufficient evidence to support a
13 fair argument is a question of law. . . . Under this standard of independent review, when
14 appellate courts examine the sufficiency of the evidence to support a fair argument, no deference
15 is given [to] the agency’s determination.” *Id.* at 206-207, internal citations omitted.

16
17 The CEQA treatise by Kostka and Zischke, *Practice Under The Cal. Environmental*
18 *Quality Act* (2d Ed Cal CEB 2008, March 2014 Update) at §20.92 cites *Valley Advocates* simply
19 in support of the proposition that: “A categorical exemption cannot be invoked for certain
20 activities that affect historical resources. Under Pub. Res. Code §21084(e), categorical
21 exemptions cannot be used for any project that may cause a substantial adverse change in the
22 significance of a historical resource, as defined in Pub. Res. Code §21084.1. . . . The
23 determination of whether an object or building is a historical resource *for purposes of this*
24 *exception to the categorical exemptions is reviewed under the substantial evidence test.*”
25 Internal citations omitted, emphasis added. This makes sense when *Valley Advocates* is placed
26 in its proper context as a decision reviewing a claim of exemption from CEQA. Kostka and
27 Zischke state that an agency’s factual findings or determinations as to whether a statutory
28 exemption applies to a project or whether a project fits within a categorical exemption are

1 subject to review under the substantial evidence test. Those determinations must be affirmed as
2 along as they are supported by substantial evidence identified in the record. See §§5.125-126.
3 They also note: "It is unclear what standard applies to judicial review of questions of fact when it
4 is asserted that an activity that would otherwise be categorically exempt is subject to one of the
5 three general exceptions to the categorical exemptions. . . . One view is that the standard
6 substantial evidence test does not apply and that any substantial evidence in the record that
7 significant impacts *might* result triggers the significant effects exception to the categorical
8 exemptions even though there is substantial evidence to the contrary. This is the same standard
9 used to review adoption of a negative declaration in a case alleging that the project may have
10 significant effects on the environment." *Id.* at §5.127, internal citations omitted, emphasis in
11 original.

12
13 As noted, the fair argument standard is the standard of review typically applied by Courts
14 to challenges to a MND. Preparation of an EIR rather than a negative declaration or MND is
15 required if there is "substantial evidence" in the "whole record" of proceedings that supports a
16 "fair argument" that a project "may" have a significant impact on the environment. See Pub Res.
17 Code §§21082.2(a), 21100, 21151; CEQA Guidelines §15064(f)(1); *No Oil, Inc. v. City of Los*
18 *Angeles* (1974) 13 Cal 3d 68, 75; *Communities for a Better Environment v. California Resources*
19 *Agency* (2002) 103 Cal App 4th 98, 111-112. An approval for a timberland conversion permit for
20 a vineyard was set aside when a Negative Declaration was reviewed under the substantial
21 evidence standard rather than the fair argument standard. See *Sierra Club v. Cal. Dept. of*
22 *Forestry and Fire Protection* (2007) 150 Cal App 4th 370.

23
24 "May" in this context means a reasonable possibility. See *League of Protection v. City of*
25 *Oakland* (1997) 52 Cal App 4th 896, 904-905; *Sundstrom v. County of Mendocino* (1988) 202
26 Cal App 3d 296, 309. "Substantial Evidence" is defined as "facts, reasonable assumptions
27 predicated upon facts, and expert opinion supported by facts." Argument, speculation,
28 inaccurate information, unsubstantiated opinion, and social or economic impacts unrelated to

1 environmental impacts are not substantial evidence. See Pub. Res. Code §21080(e)(1) and (2).
2 The CEQA Guidelines repeat the statutory definition and add that substantial evidence includes
3 “enough relevant information and reasonable inferences from this information that a fair
4 arguments can be made to support a conclusion, *even though other conclusions might also be*
5 *reached*. Whether a fair argument can be made that the project might have a significant effect on
6 the environment is to be determined by examining the whole record before the lead agency. . . .
7 evidence of social or economic impacts that do not contribute to or are not caused by physical
8 impacts on the environment does not constitute substantial evidence.” CEQA Guidelines
9 §15384, emphasis added. See also *Stanislaus Audubon Society, Inc. v. County of Stanislaus*
10 (1995) 33 Cal App 4th 144, 152; *Lucas Valley Homeowners Assoc. v. County of Marin* (1991)
11 233 Cal App 3d 130, 142.

12
13 “Significant Effects” are defined as “substantial, or potentially substantial,” adverse
14 changes in physical conditions that exist within the area that will be affected by a proposed
15 project. See Pub Res. Code §§21068, 21100, 21151; *Quail Botanical Gardens v. City of*
16 *Encinitas* (1994) 29 Cal App 4th 1597, 1604; *Oro Fino Gold Mining Corp. v. County of El*
17 *Dorado* (1990) 225 Cal App 3d 872, 881. Physical Conditions include land, air, water, minerals,
18 flora, fauna, noise, historic and cultural sites, and aesthetics. See Pub Res. Code §20160.5. There
19 must be a causal link between the significant physical impacts and the activity in question. See
20 Pub. Res. Code §20160.5; CEQA Guidelines §15358(a); *Walmart Stores v. City of Turlock*
21 (2006) 138 Cal App 4th 273, 286, fn. 7, overruled on other grounds in *Hernandez v. City of*
22 *Hanford* (2007) 41 Cal 4th 279.

23
24 Courts have repeatedly affirmed that the fair argument standard is a “low threshold test.”
25 Evidence supporting a fair argument of any potentially significant environmental impact (and it
26 takes only one) triggers preparation of an EIR regardless of whether the record contains contrary
27 evidence. See *League for Protection, supra*; *Sundstrom v. County of Mendocino* (1988) 202 Cal
28 App 3d 296, 310. The *Stanislaus Audubon Society* court at 151 stressed the “low threshold” for

1 a fair argument, noting that the lead agency should not give an “unreasonable definition” to the
2 term substantial evidence, “equating it with overwhelming or overpowering evidence. CEQA
3 does not impose such a monumental burden” on those seeking to raise a fair argument. But see
4 *Citizens Committee to Save Our Village v. City of Claremont* (1995) 37 Cal App 4th 1157; *Jobe*
5 *v. City of Orange* (2001) 88 Cal App 4th 412.

6
7 Whether the administrative record contains “substantial evidence” in support of a “fair
8 argument” sufficient to trigger a mandatory EIR is a question of law, not a question of fact.
9 Therefore under the fair argument standard, “deference to the agency’s determination is not
10 appropriate and its decision not to require an EIR can be upheld only when there is no credible
11 evidence to the contrary.” *Sierra Club v. County of Sonoma* (1992) 6 Cal App 4th 1307, 1318.
12 See Also *Stanslaus Audubon Society, supra*; *Quail Botanical Gardens, supra* at 1597 (rejecting
13 an approval of a negative declaration prepared for a golf course holding that “[a]pplication of
14 [the fair argument] standard is a question of law and deference to the agency’s determination is
15 not appropriate.”) The Court in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131
16 Cal App 4th 1170 ruled that the need for an EIR for amendments to a beach plan could not be
17 evaluated on the basis of “net” environmental analysis; any potentially significant effect must
18 trigger an EIR even if the project provides a “net” or overall positive impact. See Pub Res. Code
19 §21080(c),(d). This would apply here as a rebuttal to any claim that the trail project of which the
20 2014 MND is a part is a “net” environmental or social positive such that an EIR should not be
21 required.

22
23 A conflict in expert opinion over the significance of an environmental impact normally
24 requires an EIR. See CEQA Guidelines §15064(g); *Sierra Club v. CDF* (2007) 150 Cal App 4th
25 370. See also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal App 4th 903, 928, citing
26 CEQA Guidelines §15064(g) (“If there is disagreement among expert opinion supported by facts
27 over the significance of an effect on the environment, the Lead Agency shall treat the effect as
28 significant and shall prepare an EIR.”); *Friends of the Old Trees v. Dept. of Forestry* (1997) 52

1 Cal App 4th 1383, 1399, n.10, cited by *Pocket Protectors* for the holding that expert opinion
2 offered under the Fair Argument standard need not meet the standards for expert witnesses
3 testifying at trial. “[T]o carry the proposition of the dissent to its logical extreme is to introduce
4 into the law a principle not heretofore recognized by any authority, i.e., that in order to raise a
5 fair argument, members of the public must bring forth impeccably credentialed experts who offer
6 scientifically irrefutable, site specific information foretelling certain environmental harm without
7 information supporting a contrary position. To the contrary . . . the evidence supporting a fair
8 argument should not be equated with ‘overwhelming or overpowering evidence.’ Nor does it
9 have to be uncontradicted.” *Id.* at 1402, internal citations omitted.

10
11 Having decided that the Fair Argument standard applies, the question becomes whether
12 Petitioner has shown that substantial evidence in the record supports a fair argument that the
13 demolition of the Trestle may have a significant effect on the environment because it may cause
14 a substantial adverse change in the significance of a historical resource. The Court finds that it
15 has shown that such substantial evidence exists in the record. Even limiting the record to only
16 that material accepted by the City and certified by it as the official administrative record, there
17 are several statements in the record from local citizens and at least two experts stating that the
18 trestle has historical value and/or referencing the material from the Willow Glen archives
19 uncovered after 2004 that may support a finding that the trestle is historic. These statements are
20 substantial evidence raising a fair argument that the trestle’s demolition may have a substantial
21 impact on the environment, triggering the requirement that an EIR be prepared.

22
23 The statements include, but are not necessarily limited to: the July 16, 2013 letter from
24 the California Trolley and Railroad Corporation (CTRC, a registered non-profit) at CAR 1392-
25 93 stating that “[t]he trestle is a classic 90 year-old structure, which once were common and are
26 almost now nonexistent”; the written comment letters from local citizens such as Larry Ames on
27 Dec. 19, 2013 (CAR 525-537 & 1495-1507) and Jan. 7, 2014 (CAR 1452-55), Martha Hendricks
28 on Nov. 19, 2013 (CAR 542-546 & 1512-1516); and a Dec. 18, 2013 letter from Jean Dresden

1 (CAR 518-524 & 1488-1507), the local historian partly responsible for the rediscovery of the
2 archive materials describing several sources of information that were not available in 2004 and
3 giving her opinion as to the historic value of the trestle. Her work regarding the archive material
4 is specifically referenced in Mr. Ames' letters and therefore indirectly referenced by others such
5 as architect Marvin Bamberg. Licensed Landscape Architect Susan Landry submitted a letter on
6 Dec. 16, 2013 (CAR 576) stating "Recently discovered reports and documents contain historic
7 information that was not taken into consideration and evaluated. The '3-Creeks RR Trestle
8 Bridge' was considered an historic feature over 50 years ago in Professional Reports that are part
9 of the discovered documents. The IS [Initial Study] states that there is 'No Impact' to the scenic
10 vista based on an outdated 2004 report for the CSJ's [City of San Jose's] Los Gatos Creek Trail
11 Project. The '3-Creeks RR Trestle Bridge' is the only remaining original 1920's Railroad Wood
12 Trestle Bridge along this historic rail line. . . . This historic RR line connected the Orchard in
13 south San Jose to the old Del Monte Cannery of Willow Glen." Brackets added.

14
15 Mr. Ames also made comments at the Jan. 14, 2014 City Council meeting stating that the
16 Willow Glen archive material "discovered in 2008" may make the Trestle "eligible for listing in
17 the State Historic Register under Categories 1, broad patterns of local or regional history, and
18 also possibly under Category 3, embodies the distinctive characteristics of a type of
19 construction," CAR at 799-801. This also qualifies as lay opinion supporting a fair argument. It
20 does not require technical expertise to opine that a 10-year old cursory evaluation of historical
21 significance could change if material discovered in the interim (and thus clearly not considered
22 in the prior evaluation) was also considered. Scott Lane (at CAR 803-804) and Richard Nisset
23 (CAR 804-805) also made comments at the Jan. 2014 hearing opposing demolition on the basis
24 that the trestle was historic and that a full EIR should be prepared.

25
26 Even if technical expertise is required to opine as to historical value, a separate and
27 additional basis for finding that a fair argument has been made exists in the record. The letters
28 dated Dec. 19, 2013 (CAR 1517 "With reference to Larry Ames' letter of this date") and Jan. 11

1 2014 (CAR 1464-1465) from Mr. Marvin Bamberg, a "CHRIS-listed historical architect,"
2 referencing the discovery of additional archive material discussed by Dr. Ames in his letters,
3 both included in the City's version of the AR, constitute "expert opinion supported by facts," and
4 are thus substantial evidence in support of a fair argument that (as Mr. Bamberg states) the
5 Trestle may qualify for listing in the California Register under criteria 1 (important events) and
6 criteria 3 (distinctive characteristics). Although the second, Jan. 11, 2014 letter by Bamberg
7 (specifically stating his belief that the Trestle "qualifies for listing in the California Register
8 under Criteria 1 and 3.") was not submitted until after the public comment period for the MND
9 had closed on Dec. 19, 2013, it was still submitted before the end of the City Council meeting at
10 which the MND was adopted and the NOD issued. Exhaustion of administrative remedies under
11 CEQA is satisfied if objections are made by any person "during the public comment period
12 provided by this division or *prior to the close of the public hearing on the project before the*
13 *issuance of the notice of determination.*" Pub. Res. Code §21177(a),(b), emphasis added.

14
15 The Dec. 16, 2013 letter from licensed landscape architect Susan Landry quoted above
16 was submitted during the public comment period and can also be considered "expert opinion
17 supported by facts" as she is presumably relying on her specialized training as an architect in
18 stating that the Trestle is historic and is the only remaining 1920's wood trestle on this rail line
19 closely linked to Willow Glen's history.

20
21 The City responds that even under the fair argument standard as the lead agency it is
22 vested with the authority to evaluate the credibility of evidence presented and determines if it
23 qualifies as substantial. But any questioning of credibility must be fact-based and addressed by
24 the lead agency during the administrative process. A determination that evidence is not credible
25 must be adequately supported by the record. In *County Sanitation Dist. No. 2 v. County of Kern*
26 (2005) 127 Cal App 4th 1544, 1597, the court emphasized that before an agency may reject
27 evidence as not credible, it must first identify that evidence with particularity to provide an
28 adequate basis for judicial review. Similarly, in *Pocket Protectors v. City of Sacramento* (2004)

1 124 Cal App 4th 903, 935, the court noted that, to find that the agency resolved disputed factual
2 allegations relating to credibility, the record must show that the decision-maker specifically
3 addressed the issue. There is no fact-based specific discussion of the evidence opposing the
4 City's conclusions in the record, let alone any fact-based evaluation of any specific person's
5 credibility. Most importantly, nowhere in the record does the City challenge the assertion that
6 Willow Glen archives were found in approximately 2008 and given to one of its public libraries
7 nor does it challenge anyone's credentials (such as those of Mr. Bamburg).

8
9 The evidence in the record relied on by Petitioner is similar to that found sufficient to
10 support a fair argument by the Sixth District in its *Architectural Heritage* decision. The Court
11 there stated "we disagree with the County's characterization of the speakers' testimony as
12 unsubstantiated opinion. For example, one of the speakers, Sales, is a certified historian; she
13 linked the jail with 'the perilous labor unrest in the Salinas Valley.' Another speaker, Munoz, is
14 an architect; he noted that the jail is 'a very rare style in Salinas and Monterrey County.' ...
15 These and other speakers' remarks represent fact-based observations by people apparently
16 qualified to speak to the question of the jail's historic status. That testimony constitutes
17 substantial evidence, because it consists of 'facts, reasonable assumptions predicated upon facts,
18 and expert opinion supported by facts.'" 122 Cal App 4th at 1117-1118.

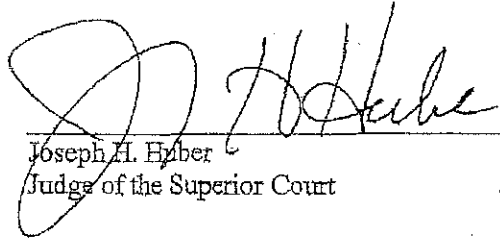
19
20 Petitioner here relies on two architects and an (amateur) historian, along with several
21 other citizens, attesting to the Trestle's possible historic value, based on material that was not
22 included in the 2004 review the City relies on for the determination that the trestle is not a
23 historic resource. None of their credentials or the key fact they base their opinions on (the
24 discovery of archive materials after 2004) was specifically challenged or evaluated anywhere in
25 the record. Neither City staff's disagreement with opposing opinions nor their stated opinion
26 that the archive material relates more to the railroad than the trestle constitutes a specific, fact-
27 based credibility determination.

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Having found that there is substantial evidence in the administrative record supporting a fair argument that the project as approved may have a significant effect on the environment, the Court orders that Respondents' approval of the Project based on the MND be withdrawn and an EIR prepared. Petitioner is directed to prepare and submit to Respondents for approval as to form 1) an appropriate form of Judgment granting the Writ of Mandamus and 2) a Writ of Mandamus, both consistent with this Order. Under Pub. Res. Code §21168.9(b), this Court will retain jurisdiction over Respondents' proceedings by way of a return on the peremptory writ until the Court has determined that Respondents have complied with CEQA. The parties are directed to meet and confer and communicate to the Court a proposed return date on the Writ.

Dated: 7-28-14



Joseph H. Eyber
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

(ENDORSED)
FILED
JUL 28 2014

TO: FILE COPY

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

Sylvia Roman
Courtroom Clerk

RE: Friends Of The Willow Glen Trestle vs City Of San Jose, et al
Case Nbr: 1-14-CV-260439

PROOF OF SERVICE

ORDER RE: PETITION FOR WRIT OF MANDAMUS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Kathryn J. Zoglin , City Attorney's Office - SJ
200 East Santa Clara St., 16th Floor Tower, San Jose, CA 95113-1905
Susan L. Brandt-Hawley , Brandt-Hawley Law Group
Post Office Box 1659, Glen Ellen, CA 95442

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 07/28/14. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Sylvia Roman, Deputy

SJ0033

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

TO: Kathryn J. Zoglin
City Attorney's Office - SJ
200 East Santa Clara St. 16th Floor Tower
San Jose, CA 95113-1905

RE: Friends Of The Willow Glen Trestle vs City Of San Jose, et al
Case Nbr: 1-14-CV-260439

PROOF OF SERVICE

ORDER RE: PETITION FOR WRIT OF MANDAMUS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Susan L. Brandt-Hawley , Brandt-Hawley Law Group
Post Office Box 1659, Glen Ellen, CA 95442

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

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SJ0034

TAB 4

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2 BRANDT-HAWLEY LAW GROUP
3 P.O. Box 1659
4 Glen Ellen, CA 95442
5 707.938.3900, fax 707.938.3200
6 susanbh@preservationlawyers.com

7 Attorney for Petitioner

(ENDORSED)
FILED
AUG 27 2014

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of DA County of Santa Clara
BY S. ROMAN DEPUTY

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA CLARA**

11
12
13 **Friends of the Willow**
14 **Glen Trestle,**
15 an unincorporated association;

16 Petitioner,

17 v.

18 **City of San José and City Council**
19 **of the City of San José;**

20 Respondents;

21 _____/
22 **Does 1 to 10;**

23 _____/
24 **Real Parties in Interest.**

Case No. 114CV260439

Proposed
Judgment Granting
Petition for Writ of Mandamus

Honorable Joseph Huber

1 The merits of the mandamus petition were heard on July 18, 2014, before the
2 Honorable Joseph Huber in Department 21. Attorney Susan Brandt-Hawley appeared
3 on behalf of petitioner Friends of the Willow Glen Trestle (Friends) and Kathryn Zoglin
4 appeared on behalf of respondents City of San José and City Council of the City of San
5 José (collectively, the City).
6

7 Upon considering the briefs and pleadings, the certified record of proceedings,
8 and the arguments of counsel, the Court issued the Order Re Petition for Writ of
9 Mandamus on July 28, 2014. It is attached and incorporated by reference as Exhibit A.
10

11
12 **WHEREFORE, GOOD CAUSE APPEARING:**
13

14 1. **The petition is GRANTED** for the reasons explained in Exhibit A.
15 Substantial evidence in the administrative record supports a fair argument that in
16 requiring the demolition of the Willow Glen Trestle the project may have a significant
17 effect on the environment. The project cannot be considered for approval unless and
18 until the City prepares and certifies an environmental impact report (EIR).
19

20 2. A peremptory writ of mandamus shall issue in the form attached as
21 Exhibit B. The City shall forthwith set aside its approvals of the Three Creeks Trail
22 Pedestrian Bridge Project, including Resolution Number 76904 adopting a mitigated
23 negative declaration. The City and its City Council shall refrain from further action to
24 approve the demolition of the Willow Glen Trestle pending preparation and
25 certification of an EIR and compliance with the requirements of the California
26 Environmental Quality Act.
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(ENDORSED)
FILED

JUL 28 2014

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of Santa Clara County
by Sylvia Roman DEPUTY
Courtroom Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

FRIENDS OF THE WILLOW GLEN TRESTLE,
an unincorporated association,

Petitioner,

vs.

CITY OF SAN JOSE; CITY COUNCIL OF THE
CITY OF SAN JOSE,

Respondents.

Case No. 1-14-CV-260439
ORDER RE: PETITION FOR WRIT OF
MANDAMUS

The Petition for Writ of Mandamus by Petitioner Friends of the Willow Glen Trestle ("Petitioner") came on for hearing before the Honorable Joseph H. Huber on July 18, 2014, at 10:00 a.m. in Department 21. In advance of the hearing the Court carefully reviewed the administrative record and all briefs and pleadings. The matter having been submitted, the Court finds and orders as follows:

The request for judicial notice filed by Respondent City of San Jose ("City") with its Reply is DENIED. The material offered for judicial notice, portions of the San Jose Muni. Code

EXHIBIT A

1 setting forth the procedure for designating landmarks, is not relevant to the Court's review of this
2 challenge to the City's Mitigated Negative Declaration ("MND"). A precondition to judicial
3 notice in either its permissive or mandatory form is that the matter to be noticed be relevant to
4 the material issue before the Court. *Silverado Modjeska Recreation and Park Dist. v. County of*
5 *Orange* (2011) 197 Cal App 4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal 4th
6 415, 422 fn. 2.

7
8 The Project challenged here is the City's proposed demolition of the existing wooden
9 trestle bridge in the Willow Glen area of San Jose, a structure which Petitioner claims may be a
10 historical resource. According to the City's Jan. 14, 2014 Notice of Determination ("NOD")
11 "[t]he proposed project includes a pre-fabricated, 210 foot-long, single span steel truss bridge
12 with a poured concrete deck. The new bridge would be on the same alignment as the existing
13 bridge, and small retaining walls would be installed adjacent to the new bridge abutments to
14 allow for the future Los Gatos Creek trail connection to the northeast and for a viewing area on
15 the south side of the new bridge." The Project was approved for CEQA purposes pursuant to the
16 City's MND, circulated from Nov. 19, 2013 to Dec. 19, 2013, and adopted on Jan. 14, 2014 in
17 City Council Resolution 76904 (certified administrative record, "CAR," at 0002).¹

18
19 A MND is "a negative declaration prepared for a project when the initial study has
20 identified potentially significant effects on the environment, but (1) revisions in the project plans
21 or proposals made by, or agreed to by, the applicant before the proposed negative declaration and
22 initial study are released for public review would avoid the effects or mitigate the effects to a
23 point where clearly no significant effect on the environment would occur, and (2) there is no
24 substantial evidence in light of the whole record before the public agency that the project, as
25

26
27 ¹ The Court notes that there has been some dispute between the parties as to the preparation and proper scope of the
28 administrative record. In analyzing this challenge to the MND, the Court has assumed that record certified by the
City (designated "CAR") is the correct record.

1 revised, may have a significant effect on the environment.” Pub. Res. Code § 21064.5. The
2 City’s 2013 MND claims in part that “[t]he project will not have a significant impact on cultural
3 resources, and therefore no mitigation is required.” The prior 2004 MND for a trail system that
4 proposed incorporating the existing trestle is the City’s main evidence for its conclusion that the
5 Trestle is not a historical resource. The evidence from 2004 is, at best, sparse and conclusory.
6 The 2004 Trail MND the City relies on did not propose any “substantial adverse change” to the
7 Trestle. It stated to the public that the Trestle would be incorporated into the trail system and
8 that “[s]ix to eight-foot high security fencing would be installed on both sides of the trail on top
9 of the trestle bridge, which will be covered with either wood or synthetic decking material.”
10 CAR 0023, part of the 2004 Project Description. There was no analysis of the potential impacts
11 of the Trestle’s demolition or consideration of alternatives to demolition in that document as
12 demolition was not proposed.

13
14 As Petitioner points out, Pub. Res Code §21084.1 states in pertinent part that: “A project
15 that may cause a substantial adverse change in the significance of an historical resource is a
16 project that may have a significant effect on the environment,” and therefore any project that
17 calls for the demolition of a potentially historical resource likely must be approved pursuant to
18 an EIR, not an MND, as demolition is clearly a “substantial adverse change.”

19
20 CEQA Guidelines §15064.5(a) states in pertinent part that “the term ‘historical resource’
21 shall include the following: (1) a resource listed in, or determined to be eligible by the State
22 Historic Resources Commission, for listing in the California Register of Historic Resources . . .
23 (2) A resource listed in a local register of historical resources [as defined in Pub Res. Code
24 §5020(k)] or identified as significant in an historic resource survey meeting the requirements of
25 [Pub. Res. Code §5024.1(g)] shall be presumed to be historically or culturally significant. Public
26 agencies must treat any such resource as significant unless the preponderance of evidence
27 demonstrates that it is not historically or culturally significant. (3) Any object, building,
28 structure, site, area, place, record, or manuscript which a lead agency determines to be

1 historically significant or significant in the architectural, engineering, scientific, economic,
2 agricultural, educational, social, political, military, or cultural annals of California may be
3 considered to be a historical resource, provided the lead agency's determination is supported by
4 substantial evidence in light of the whole record. Generally, a resource shall be considered by
5 the lead agency to be 'historically significant if the resource meets the criteria for listing on the
6 California Register of Historical Resources [Pub. Res. Code §5024.1] including the following:
7 (A) Is associated with events that have made a significant contribution to the broad patterns of
8 California's history and cultural heritage; (B) Is associated with the lives of persons important in
9 our past; (C) Embodies the distinctive characteristics of a type, period, region, or method of
10 construction, or represents the work of an important creative individual, or possesses high artistic
11 values; or (D) Has yielded or may be likely to yield, information important in prehistory or
12 history. (4) The fact that a resource is not listed in, or determined to be eligible for listing in the
13 California Register of Historical Resources, not included in a local register of historical
14 resources, or identified in an historical resources survey does not preclude a lead agency from
15 determining that the resource may be an historical resource as defined in [Pub. Res. Code
16 §§5020.1(j) or 5024.1]." Some internal citations omitted, brackets added.

17
18 CBQA Guidelines §15064.5(b) repeats Pub. Res. Code §21084.1's conclusion that a
19 project that may cause a substantial adverse impact to a historical resource is a project that may
20 have a significant impact on the environment, thus requiring an EIR. It goes to state in pertinent
21 part: "(1) Substantial adverse change in the significance of an historical resource means physical
22 demolition, destruction, relocation, or alteration of the resource or its immediate surroundings
23 such that the significance of an historical resource would be materially impaired. (2) the
24 significance of an historical resource is materially impaired when a project: (A) Demolishes or
25 materially alters in an adverse manner those physical characteristics of an historical resource that
26 convey its historical significance . . . (B) Demolishes or materially alters in an adverse manner
27 those physical characteristics that account for its inclusion in a local register . . . or its
28 identification in a historical resources survey . . . unless the public agency reviewing the effects

1 of the project establishes by a preponderance of evidence that the resource is not historically or
2 culturally significant; or (C) Demolishes or materially alters in an adverse manner those physical
3 characteristics . . . that convey its historical significance and that justify its eligibility for
4 inclusion in the California Register of Historical Resources as determined by a lead agency for
5 purposes of CEQA.”

6
7 The parties dispute what standard of review applies to the City’s determination that the
8 existing Trestle is not a historical resource. Petitioner argues that the “fair argument” standard
9 typically applied to challenges to MNDs applies here, citing decisions applying that standard to
10 challenges to projects potentially impacting historic resources such as *League for Protection v.*
11 *City of Oakland* (1997) 52 Cal App 4th 896 and *Architectural Heritage Assoc. v. County of*
12 *Monterrey* (2004) 122 Cal App 4th 1095. The City argues that the “fair argument” standard
13 simply does not apply, despite this being a challenge to a MND, and that it properly exercised its
14 discretion in determining (based on approximately two pages in the 2004 MND) that the trestle is
15 not historic. It contends that the trestle could only fall under the third/discretionary category of
16 historic resources (equivalent to the last sentence of Pub. Res. Code §21084.1). “Because the
17 trestle falls under the third category, the City is vested with the authority to exercise its discretion
18 when it concluded that that the trestle is not historic. . . . [T]he fair argument standard does not
19 apply when a resource falls under the third discretionary category, as explained in *Valley*
20 *Advocates v. City of Fresno* (2008) 160 Cal App 4th 1039.” Opposition Brief at 12:3-8. *Valley*
21 *Advocates* did not involve a MND, it was a challenge to a claimed categorical exemption from
22 CEQA for a project (an application for an addition to one existing building and the demolition of
23 another). *Id.* at 1046.

24
25 Having reviewed these decisions as well as other materials the Court determines that
26 Petitioner is correct that the fair argument standard applies to this challenge to the City’s MND.

1 In the six years since *Valley Advocates* was published, it has been cited in only two
2 published decisions, neither of which cited it for the proposition advanced by the City; that its
3 language interpreting the statutes dealing with historical resources has general application
4 outside of disputes over exemptions to CEQA and applies to challenges to MNDs. One of the
5 two published decisions citing it, *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal
6 App 4th 187, involved a challenge to a MND and was decided by the identical panel of the Fifth
7 District that decided *Valley Advocates*. That panel cited *Valley Advocates* in support of the
8 wholly unremarkable conclusion that: "When an agency certifies a negative declaration or a
9 mitigated negative declaration, the agency's decision is subject to judicial review under the 'fair
10 argument' test. If the fair argument test is met, then the agency is required to prepare and certify
11 an EIR analyzing the project's potential impacts on the environment. The fair argument standard
12 establishes a low threshold. . . . Whether the record contains sufficient evidence to support a
13 fair argument is a question of law. . . . Under this standard of independent review, when
14 appellate courts examine the sufficiency of the evidence to support a fair argument, no deference
15 is given [to] the agency's determination." *Id.* at 206-207, internal citations omitted.

16
17 The CEQA treatise by Kostka and Zischke, *Practice Under The Cal. Environmental*
18 *Quality Act* (2d Ed Cal CEB 2008, March 2014 Update) at §20.92 cites *Valley Advocates* simply
19 in support of the proposition that: "A categorical exemption cannot be invoked for certain
20 activities that affect historical resources. Under Pub. Res. Code §21084(e), categorical
21 exemptions cannot be used for any project that may cause a substantial adverse change in the
22 significance of a historical resource, as defined in Pub. Res. Code §21084.1. . . . The
23 determination of whether an object or building is a historical resource *for purposes of this*
24 *exception to the categorical exemptions is reviewed under the substantial evidence test.*"
25 Internal citations omitted, emphasis added. This makes sense when *Valley Advocates* is placed
26 in its proper context as a decision reviewing a claim of exemption from CEQA. Kostka and
27 Zischke state that an agency's factual findings or determinations as to whether a statutory
28 exemption applies to a project or whether a project fits within a categorical exemption are

1 subject to review under the substantial evidence test. Those determinations must be affirmed as
2 along as they are supported by substantial evidence identified in the record. See §§5.125-126.
3 They also note: "It is unclear what standard applies to judicial review of questions of fact when it
4 is asserted that an activity that would otherwise be categorically exempt is subject to one of the
5 three general exceptions to the categorical exemptions. . . . One view is that the standard
6 substantial evidence test does not apply and that any substantial evidence in the record that
7 significant impacts *might* result triggers the significant effects exception to the categorical
8 exemptions even though there is substantial evidence to the contrary. This is the same standard
9 used to review adoption of a negative declaration in a case alleging that the project may have
10 significant effects on the environment." *Id.* at §5.127, internal citations omitted, emphasis in
11 original.

12
13 As noted, the fair argument standard is the standard of review typically applied by Courts
14 to challenges to a MND. Preparation of an EIR rather than a negative declaration or MND is
15 required if there is "substantial evidence" in the "whole record" of proceedings that supports a
16 "fair argument" that a project "may" have a significant impact on the environment. See Pub Res.
17 Code §§21082.2(a), 21100, 21151; CEQA Guidelines §15064(f)(1); *No Oil, Inc. v. City of Los*
18 *Angeles* (1974) 13 Cal 3d 68, 75; *Communities for a Better Environment v. California Resources*
19 *Agency* (2002) 103 Cal App 4th 98, 111-112. An approval for a timberland conversion permit for
20 a vineyard was set aside when a Negative Declaration was reviewed under the substantial
21 evidence standard rather than the fair argument standard. See *Sierra Club v. Cal. Dept. of*
22 *Forestry and Fire Protection* (2007) 150 Cal App 4th 370.

23
24 "May" in this context means a reasonable possibility. See *League of Protection v. City of*
25 *Oakland* (1997) 52 Cal App 4th 896, 904-905; *Sundstrom v. County of Mendocino* (1988) 202
26 Cal App 3d 296, 309. "Substantial Evidence" is defined as "facts, reasonable assumptions
27 predicated upon facts, and expert opinion supported by facts." Argument, speculation,
28 inaccurate information, unsubstantiated opinion, and social or economic impacts unrelated to

1 environmental impacts are not substantial evidence. See Pub. Res. Code §21080(e)(1) and (2).
2 The CEQA Guidelines repeat the statutory definition and add that substantial evidence includes
3 “enough relevant information and reasonable inferences from this information that a fair
4 arguments can be made to support a conclusion, *even though other conclusions might also be*
5 *reached*. Whether a fair argument can be made that the project might have a significant effect on
6 the environment is to be determined by examining the whole record before the lead agency. . . .
7 evidence of social or economic impacts that do not contribute to or are not caused by physical
8 impacts on the environment does not constitute substantial evidence.” CEQA Guidelines
9 §15384, emphasis added. See also *Stanislaus Audubon Society, Inc. v. County of Stanislaus*
10 (1995) 33 Cal App 4th 144, 152; *Lucas Valley Homeowners Assoc. v. County of Marin* (1991)
11 233 Cal App 3d 130, 142.

12
13 “Significant Effects” are defined as “substantial, or potentially substantial,” adverse
14 changes in physical conditions that exist within the area that will be affected by a proposed
15 project. See Pub Res. Code §§21068, 21100, 21151; *Quail Botanical Gardens v. City of*
16 *Encinitas* (1994) 29 Cal App 4th 1597, 1604; *Oro Fino Gold Mining Corp. v. County of El*
17 *Dorado* (1990) 225 Cal App 3d 872, 881. Physical Conditions include land, air, water, minerals,
18 flora, fauna, noise, historic and cultural sites, and aesthetics. See Pub Res. Code §20160.5. There
19 must be a causal link between the significant physical impacts and the activity in question. See
20 Pub. Res. Code §20160.5; CEQA Guidelines §15358(a); *Walmart Stores v. City of Turlock*
21 (2006) 138 Cal App 4th 273, 286, fn. 7, overruled on other grounds in *Hernandez v. City of*
22 *Hanford* (2007) 41 Cal 4th 279.

23
24 Courts have repeatedly affirmed that the fair argument standard is a “low threshold test.”
25 Evidence supporting a fair argument of any potentially significant environmental impact (and it
26 takes only one) triggers preparation of an EIR regardless of whether the record contains contrary
27 evidence. See *League for Protection, supra*; *Sundstrom v. County of Mendocino* (1988) 202 Cal
28 App 3d 296, 310. The *Stanislaus Audubon Society* court at 151 stressed the “low threshold” for

1 a fair argument, noting that the lead agency should not give an "unreasonable definition" to the
2 term substantial evidence, "equating it with overwhelming or overpowering evidence. CEQA
3 does not impose such a monumental burden" on those seeking to raise a fair argument. But see
4 *Citizens Committee to Save Our Village v. City of Claremont* (1995) 37 Cal App 4th 1157; *Jobe*
5 *v. City of Orange* (2001) 88 Cal App 4th 412.

6
7 Whether the administrative record contains "substantial evidence" in support of a "fair
8 argument" sufficient to trigger a mandatory EIR is a question of law, not a question of fact.
9 Therefore under the fair argument standard, "deference to the agency's determination is not
10 appropriate and its decision not to require an EIR can be upheld only when there is no credible
11 evidence to the contrary." *Sierra Club v. County of Sonoma* (1992) 6 Cal App 4th 1307, 1318.
12 See Also *Stanislaus Audubon Society, supra*; *Quail Botanical Gardens, supra* at 1597 (rejecting
13 an approval of a negative declaration prepared for a golf course holding that "[a]pplication of
14 [the fair argument] standard is a question of law and deference to the agency's determination is
15 not appropriate.") The Court in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131
16 Cal App 4th 1170 ruled that the need for an EIR for amendments to a beach plan could not be
17 evaluated on the basis of "net" environmental analysis; any potentially significant effect must
18 trigger an EIR even if the project provides a "net" or overall positive impact. See Pub Res. Code
19 §21080(c),(d). This would apply here as a rebuttal to any claim that the trail project of which the
20 2014 MND is a part is a "net" environmental or social positive such that an EIR should not be
21 required.

22
23 A conflict in expert opinion over the significance of an environmental impact normally
24 requires an EIR. See CEQA Guidelines §15064(g); *Sierra Club v. CDF* (2007) 150 Cal App 4th
25 370. See also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal App 4th 903, 928, citing
26 CEQA Guidelines §15064(g) ("If there is disagreement among expert opinion supported by facts
27 over the significance of an effect on the environment, the Lead Agency shall treat the effect as
28 significant and shall prepare an EIR."); *Friends of the Old Trees v. Dept. of Forestry* (1997) 52

1 Cal App 4th 1383, 1399, n.10, cited by *Pocket Protectors* for the holding that expert opinion
2 offered under the Fair Argument standard need not meet the standards for expert witnesses
3 testifying at trial. “[T]o carry the proposition of the dissent to its logical extreme is to introduce
4 into the law a principle not heretofore recognized by any authority, i.e., that in order to raise a
5 fair argument, members of the public must bring forth impeccably credentialed experts who offer
6 scientifically irrefutable, site specific information foretelling certain environmental harm without
7 information supporting a contrary position. To the contrary . . . the evidence supporting a fair
8 argument should not be equated with ‘overwhelming or overpowering evidence.’ Nor does it
9 have to be uncontradicted.” *Id.* at 1402, internal citations omitted.

10
11 Having decided that the Fair Argument standard applies, the question becomes whether
12 Petitioner has shown that substantial evidence in the record supports a fair argument that the
13 demolition of the Trestle may have a significant effect on the environment because it may cause
14 a substantial adverse change in the significance of a historical resource. The Court finds that it
15 has shown that such substantial evidence exists in the record. Even limiting the record to only
16 that material accepted by the City and certified by it as the official administrative record, there
17 are several statements in the record from local citizens and at least two experts stating that the
18 trestle has historical value and/or referencing the material from the Willow Glen archives
19 uncovered after 2004 that may support a finding that the trestle is historic. These statements are
20 substantial evidence raising a fair argument that the trestle’s demolition may have a substantial
21 impact on the environment, triggering the requirement that an EIR be prepared.

22
23 The statements include, but are not necessarily limited to: the July 16, 2013 letter from
24 the California Trolley and Railroad Corporation (CTRC, a registered non-profit) at CAR 1392-
25 93 stating that “[t]he trestle is a classic 90 year-old structure, which once were common and are
26 almost now nonexistent”; the written comment letters from local citizens such as Larry Ames on
27 Dec. 19, 2013 (CAR 525-537 & 1495-1507) and Jan. 7, 2014 (CAR 1452-55), Martha Hendricks
28 on Nov. 19, 2013 (CAR 542-546 & 1512-1516); and a Dec. 18, 2013 letter from Jean Dresden

1 (CAR 518-524 & 1488-1507), the local historian partly responsible for the rediscovery of the
2 archive materials describing several sources of information that were not available in 2004 and
3 giving her opinion as to the historic value of the trestle. Her work regarding the archive material
4 is specifically referenced in Mr. Ames' letters and therefore indirectly referenced by others such
5 as architect Marvin Bamberg. Licensed Landscape Architect Susan Landry submitted a letter on
6 Dec. 16, 2013 (CAR 576) stating "Recently discovered reports and documents contain historic
7 information that was not taken into consideration and evaluated. The '3-Creeks RR Trestle
8 Bridge' was considered an historic feature over 50 years ago in Professional Reports that are part
9 of the discovered documents. The IS [Initial Study] states that there is 'No Impact' to the scenic
10 vista based on an outdated 2004 report for the CSJ's [City of San Jose's] Los Gatos Creek Trail
11 Project. The '3-Creeks RR Trestle Bridge' is the 'only remaining original 1920's Railroad Wood
12 Trestle Bridge along this historic rail line. . . . This historic RR line connected the Orchard in
13 south San Jose to the old Del Monte Cannery of Willow Glen." Brackets added.

14
15 Mr. Ames also made comments at the Jan. 14, 2014 City Council meeting stating that the
16 Willow Glen archive material "discovered in 2008" may make the Trestle "eligible for listing in
17 the State Historic Register under Categories 1, broad patterns of local or regional history, and
18 also possibly under Category 3, embodies the distinctive characteristics of a type of
19 construction," CAR at 799-801. This also qualifies as lay opinion supporting a fair argument. It
20 does not require technical expertise to opine that a 10-year old cursory evaluation of historical
21 significance could change if material discovered in the interim (and thus clearly not considered
22 in the prior evaluation) was also considered. Scott Lane (at CAR 803-804) and Richard Nisset
23 (CAR 804-805) also made comments at the Jan. 2014 hearing opposing demolition on the basis
24 that the trestle was historic and that a full EIR should be prepared.

25
26 Even if technical expertise is required to opine as to historical value, a separate and
27 additional basis for finding that a fair argument has been made exists in the record. The letters
28 dated Dec. 19, 2013 (CAR 1517 "With reference to Larry Ames' letter of this date") and Jan. 11

1 2014 (CAR 1464-1465) from Mr. Marvin Bamberg, a "CHRIS-listed historical architect,"
2 referencing the discovery of additional archive material discussed by Dr. Ames in his letters,
3 both included in the City's version of the AR, constitute "expert opinion supported by facts," and
4 are thus substantial evidence in support of a fair argument that (as Mr. Bamberg states) the
5 Trestle may qualify for listing in the California Register under criteria 1 (important events) and
6 criteria 3 (distinctive characteristics). Although the second, Jan. 11, 2014 letter by Bamberg
7 (specifically stating his belief that the Trestle "qualifies for listing in the California Register
8 under Criteria 1 and 3.") was not submitted until after the public comment period for the MND
9 had closed on Dec. 19, 2013, it was still submitted before the end of the City Council meeting at
10 which the MND was adopted and the NOD issued. Exhaustion of administrative remedies under
11 CEQA is satisfied if objections are made by any person "during the public comment period
12 provided by this division or *prior to the close of the public hearing on the project before the*
13 *issuance of the notice of determination.*" Pub. Res. Code §21177(a),(b), emphasis added.
14

15 The Dec. 16, 2013 letter from licensed landscape architect Susan Landry quoted above
16 was submitted during the public comment period and can also be considered "expert opinion
17 supported by facts" as she is presumably relying on her specialized training as an architect in
18 stating that the Trestle is historic and is the only remaining 1920's wood trestle on this rail line
19 closely linked to Willow Glen's history.
20

21 The City responds that even under the fair argument standard as the lead agency it is
22 vested with the authority to evaluate the credibility of evidence presented and determines if it
23 qualifies as substantial. But any questioning of credibility must be fact-based and addressed by
24 the lead agency during the administrative process. A determination that evidence is not credible
25 must be adequately supported by the record. In *County Sanitation Dist. No. 2 v. County of Kern*
26 (2005) 127 Cal App 4th 1544, 1597, the court emphasized that before an agency may reject
27 evidence as not credible, it must first identify that evidence with particularity to provide an
28 adequate basis for judicial review. Similarly, in *Pocket Protectors v. City of Sacramento* (2004)

1 124 Cal App 4th 903, 935, the court noted that, to find that the agency resolved disputed factual
2 allegations relating to credibility, the record must show that the decision-maker specifically
3 addressed the issue. There is no fact-based specific discussion of the evidence opposing the
4 City's conclusions in the record, let alone any fact-based evaluation of any specific person's
5 credibility. Most importantly, nowhere in the record does the City challenge the assertion that
6 Willow Glen archives were found in approximately 2008 and given to one of its public libraries
7 nor does it challenge anyone's credentials (such as those of Mr. Bamburg).

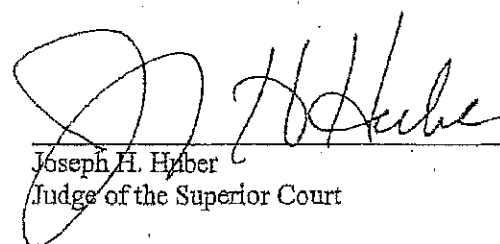
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9 The evidence in the record relied on by Petitioner is similar to that found sufficient to
10 support a fair argument by the Sixth District in its *Architectural Heritage* decision. The Court
11 there stated "we disagree with the County's characterization of the speakers' testimony as
12 unsubstantiated opinion. For example, one of the speakers, Sales, is a certified historian; she
13 linked the jail with 'the perilous labor unrest in the Salinas Valley.' Another speaker, Munoz, is
14 an architect; he noted that the jail is 'a very rare style in Salinas and Monterrey County.' ...
15 These and other speakers' remarks represent fact-based observations by people apparently
16 qualified to speak to the question of the jail's historic status. That testimony constitutes
17 substantial evidence, because it consists of 'facts, reasonable assumptions predicated upon facts,
18 and expert opinion supported by facts.'" 122 Cal App 4th at 1117-1118.

19
20 Petitioner here relies on two architects and an (amateur) historian, along with several
21 other citizens, attesting to the Trestle's possible historic value, based on material that was not
22 included in the 2004 review the City relies on for the determination that the trestle is not a
23 historic resource. None of their credentials or the key fact they base their opinions on (the
24 discovery of archive materials after 2004) was specifically challenged or evaluated anywhere in
25 the record. Neither City staff's disagreement with opposing opinions nor their stated opinion
26 that the archive material relates more to the railroad than the trestle constitutes a specific, fact-
27 based credibility determination.

28

1 Having found that there is substantial evidence in the administrative record supporting a
2 fair argument that the project as approved may have a significant effect on the environment, the
3 Court orders that Respondents' approval of the Project based on the MND be withdrawn and an
4 EIR prepared. Petitioner is directed to prepare and submit to Respondents for approval as to
5 form 1) an appropriate form of Judgment granting the Writ of Mandamus and 2) a Writ of
6 Mandamus, both consistent with this Order. Under Pub. Res. Code §21168.9(b), this Court will
7 retain jurisdiction over Respondents' proceedings by way of a return on the peremptory writ until
8 the Court has determined that Respondents have complied with CEQA. The parties are directed
9 to meet and confer and communicate to the Court a proposed return date on the Writ.

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13 Dated: 7-28-14



Joseph H. Hyber
Judge of the Superior Court

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

**Friends of the Willow
Glen Trestle,**
an unincorporated association;

Case No. 1-14-CV-260439

Petitioner;

Peremptory Writ of Mandamus

v.

**City of San José and City Council
of the City of San José;**

Respondents;

Does 1 to 10;

Real Parties in Interest.

EXHIBIT B

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TO the City of San José and its City Council:

Judgment having been entered in this action ordering that a Peremptory Writ of Mandamus issue from this Court:

YOU ARE HEREBY COMMANDED upon receipt of this Writ to forthwith set aside your approvals of the Three Creeks Trail Pedestrian Bridge Project, including Resolution Number 76904 adopting a mitigated negative declaration. The City and its City Council shall refrain from further action to approve the demolition of the Willow Glen Trestle pending preparation and certification of an EIR and compliance with the requirements of the California Environmental Quality Act.

Under Public Resources Code section 21168.9(b), this Court will retain jurisdiction over the proceedings by way of a return on the peremptory writ until the Court has determined that the City and its City Council have complied with CEQA.

YOU ARE FURTHER COMMANDED to make and file a return to this Court on or before November 6, 2015, upon taking final action to comply with this Writ, setting forth what you have done to comply.

Nothing in this Writ shall limit the discretion legally vested in the City.

_____, Clerk

by: _____, Deputy Clerk

Friends of the Willow Glen Trestle v. City of San Jose, et al.
Santa Clara County Superior Court Case No. 114CV260439

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, CA 95442.

On August 11, 2014, I served one true copy of:

Proposed
Judgment Granting Petition for Writ of Mandamus

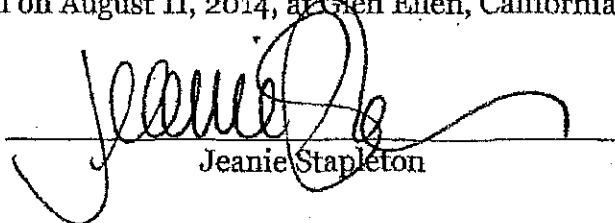
- By placing a true copy enclosed in a sealed envelope with prepaid postage in the United States mail in Glen Ellen, California addressed to the persons listed below.
- By emailing a copy to counsel as listed below.

Kathryn J. Zoglin
San Jose City Attorney's Office
200 E. Santa Clara Street
16th Floor
San Jose CA 95113

Attorney for Respondents

katie.zoglin@sanjoseca.gov

I declare under penalty of perjury that the foregoing is true and correct and is executed on August 11, 2014, at Glen Ellen, California.


Jeanie Stapleton

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

(ENDORSED)
FILED
AUG 20 2014

TO: FILE COPY

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
by Sylvia Roman
Courtroom Clerk

RE: Friends Of The Willow Glen Trestle vs City Of San Jose, et al
Case Nbr: 1-14-CV-260439

PROOF OF SERVICE

JUDGMENT GRANTING PETITION FOR WRIT OF MANDAMUS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Kathryn J. Zoglin , City Attorney's Office - SJ
200 East Santa Clara St., 16th Floor Tower, San Jose, CA 95113-1905
Susan L. Brandt-Hawley , Brandt-Hawley Law Group
Post Office Box 1659, Glen Ellen, CA 95442

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2590 or the Voice/TTY California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 08/20/14. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Sylvia Roman, Deputy.

SJ0055

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

TO: Susan L. Brandt-Hawley
Brandt-Hawley Law Group
Post Office Box 1659
Glen Ellen, CA 95442

RE: Friends Of The Willow Glen Trestle vs City Of San Jose, et al
Case Nbr: 1-14-CV-260439

PROOF OF SERVICE

JUDGMENT GRANTING PETITION FOR WRIT OF MANDAMUS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Kathryn J. Zoglin , City Attorney's Office - SJ
200 East Santa Clara St., 16th Floor Tower, San Jose, CA 95113-1905

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)725-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 08/20/14. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Sylvia Roman, Deputy

SJ0056

TAB 5

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

**Friends of the Willow
Glen Trestle,**
an unincorporated association;

Petitioner,

Case No. 1-14-CV-260439

Peremptory Writ of Mandamus

v.

**City of San José and City Council
of the City of San José;**

Respondents;

_____ /
Does 1 to 10;

Real Parties in Interest.
_____ /

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TO the City of San José and its City Council:

Judgment having been entered in this action ordering that a Peremptory Writ of Mandamus issue from this Court:

YOU ARE HEREBY COMMANDED upon receipt of this Writ to forthwith set aside your approvals of the Three Creeks Trail Pedestrian Bridge Project, including Resolution Number 76904 adopting a mitigated negative declaration. The City and its City Council shall refrain from further action to approve the demolition of the Willow Glen Trestle pending preparation and certification of an EIR and compliance with the requirements of the California Environmental Quality Act.

Under Public Resources Code section 21168.9(b), this Court will retain jurisdiction over the proceedings by way of a return on the peremptory writ until the Court has determined that the City and its City Council have complied with CEQA.

YOU ARE FURTHER COMMANDED to make and file a return to this Court on or before November 6, 2015, upon taking final action to comply with this Writ, setting forth what you have done to comply.

Nothing in this Writ shall limit the discretion legally vested in the City.



S. Smith
Clerk

OCT 17 2014



DAVID H. YAMASAKI
Chief Executive Officer/Clerk

by: _____, Deputy Clerk

TAB 6

(ENDORSED)
FILED
APP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): RICHARD DOYLE, City Attorney (88625) KATHRYN ZOGLIN, Senior Deputy City Attorney (121187) Office of the City Attorney 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113-1905 TELEPHONE NO.: (408)535-1900 FAX NO. (Optional): (408) 998-3131 E-MAIL ADDRESS (Optional): cao.main@sanjoseca.gov ATTORNEY FOR (Name): Respondents CITY OF SAN JOSE, et al.	FOR COURT USE ONLY OCT 17 2014 Filed by: <u>Reina Garza</u> County of Santa Clara, California CASE NUMBER: 1-14-CV-260439
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA STREET ADDRESS: 191 N. First Street MAILING ADDRESS: CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME: Downtown Superior Court	
PLAINTIFF/PETITIONER: Friends of the Willow Glen Trestle DEFENDANT/RESPONDENT: City of San Jose, et al.	
<input checked="" type="checkbox"/> NOTICE OF APPEAL <input type="checkbox"/> CROSS-APPEAL (UNLIMITED CIVIL CASE)	
Notice: Please read <i>Information on Appeal Procedures for Unlimited Civil Cases</i> (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.	

1. NOTICE IS HEREBY GIVEN that (name): **CITY OF SAN JOSE and CITY COUNCIL OF THE CITY OF SAN JOSE** appeals from the following judgment or order in this case, which was entered on (date): **August 20, 2014**
- Judgment after jury trial
 - Judgment after court trial
 - Default judgment
 - Judgment after an order granting a summary judgment motion
 - Judgment of dismissal under Code of Civil Procedure sections 581d, 583.250, 583.360, or 583.430
 - Judgment of dismissal after an order sustaining a demurrer
 - An order after judgment under Code of Civil Procedure section 904.1(a)(2).
 - An order or judgment under Code of Civil Procedure section 904.1(a)(3)-(13)
 - Other (describe and specify code section that authorizes this appeal):
2. For cross-appeals only:
- a. Date notice of appeal was filed in original appeal:
 - b. Date superior court clerk mailed notice of original appeal:
 - c. Court of Appeal case number (if known):

Date: October 7, 2014

Kathryn Zoglin, Senior Deputy City Attorney
(TYPE OR PRINT NAME)


(SIGNATURE OF PARTY OR ATTORNEY)

(ENCLOSED)
FILED

APP-002

CASE NAME: FRIENDS OF THE WILLOW GLEN TRESTLE v CITY OF SAN JOSE	CASE NUMBER: 1-14-CV-260439
---	--------------------------------

NOTICE TO PARTIES: A copy of this document must be mailed or personally delivered to the other party or parties to this appeal. A PARTY TO THE APPEAL MAY NOT PERFORM THE MAILING OR DELIVERY HIMSELF OR HERSELF. A person who is at least 18 years old and is not a party to this appeal must complete the information below and mail (by first-class mail, postage prepaid) or personally deliver the front and back of this document. When the front and back of this document have been completed and a copy mailed or personally delivered to the court, it may then be filed with the court.

PROOF OF SERVICE

Mail Personal Service

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My residence or business address is (specify):
Office of the City Attorney
200 East, Santa Clara Street, 16th Floor, San Jose, CA 95113
3. I mailed or personally delivered a copy of the *Notice of Appeal/Cross-Appeal (Unlimited Civil Case)* as follows (complete either a or b):

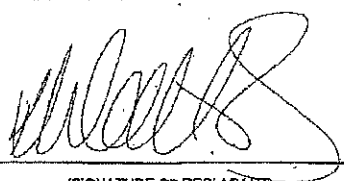
- a. **Mail.** I am a resident of or employed in the county where the mailing occurred.
 - (1) I enclosed a copy in an envelope and
 - (a) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (b) placed the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
 - (2) The envelope was addressed and mailed as follows:
 - (a) Name of person served: Susan Brandt-Hawley
 - (b) Address on envelope:
BRANDT-HAWLEY LAW GROUP
P.O. Box 1659, Glen Ellen, CA 95442
 - (c) Date of mailing: October 17, 2014
 - (d) Place of mailing (city and state): San Jose, CA

- b. **Personal delivery.** I personally delivered a copy as follows:
 - (1) Name of person served:
 - (2) Address where delivered:
 - (3) Date delivered:
 - (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: October 17, 2014

Katherine Walters
(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

TAB 7

ENDORSED
FILED

1 RICHARD DOYLE, City Attorney (88625)
2 NORA FRIMANN, Assistant City Attorney (93249)
3 KATHRYN J. ZOGLIN, Senior Deputy City Attorney (121187)
4 Office of the City Attorney
5 200 East Santa Clara Street, 16th Floor
6 San José, California 95113-1905
7 Telephone Number: (408) 535-1900
8 Facsimile Number: (408) 998-3131
9 E-Mail Address: cao.main@sanjoseca.gov

2015 JUN 15 A 8:30

Deborah H. Hines, Clerk of the Superior Court
County of Santa Clara, California

By _____

F. Tong-Miller

6 Attorneys for CITY OF SAN JOSE and CITY
7 COUNCIL OF THE CITY OF SAN JOSE

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 UNLIMITED JURISDICTION

13 FRIENDS OF THE WILLOW GLEN
14 TRESTLE, an unincorporated association,

15 Petitioner,

16 v.

17 CITY OF SAN JOSE and CITY COUNCIL
18 OF THE CITY OF SAN JOSE, and DOES
19 1-10, inclusive,

20 Respondents.

Case Number: 1-14-CV-260439

21 NOTICE OF AND EX PARTE
22 APPLICATION BY CITY
23 RESPONDENTS

24 Date: June 15, 2015

25 Time: 8:15 a.m.

26 Dept: 21

27 Judge: Hon. Joseph Huber

28 EX PARTE APPLICATION

29 Respondents City of San José and San José City Council ("City") bring this *ex parte*
30 application requesting the Superior Court to rescind its Order, Judgment, and Peremptory
31 Writ of Mandamus only to the extent that they prohibit the City from removing and
32 demolishing the Willow Glen trestle, which is also referred to as the Los Gatos Creek
33 trestle ("trestle"). (Rules of Court, Rules 3.1200, *et seq.*) In the alternative, the City asks

1 for an order shortening time for that matter to be heard. Good cause exists for this matter
2 to be heard on an *ex parte* basis and/or on shortened time, as set forth below.

3 The City has provided notice to opposing counsel Susan Brandt-Hawley in
4 accordance with Rule 3.1204 of the Rules of Court. (Declaration of Kathryn Zoglin ["Zoglin
5 Dec."] ¶2.) Counsel opposes the City's request. (*Id.* ¶3.)

6 BACKGROUND

7 A. Court Orders

8 On August 15, 2014, this Court ordered that a peremptory writ of mandamus should
9 issue that that the City of San José and the San José City Council should "refrain from
10 further action to approve the demolition of the trestle pending preparation and certification
11 of an EIR and compliance with the requirements of CEQA." (Judgment at p.1:24-28. *See*
12 *also* Peremptory Writ of Mandamus dated October 17, 2014, at p. 1:8-11.) On October
13 17, 2015, the City filed a notice of appeal. (Zoglin Dec. ¶4.)

14 B. The City Has Prepared an EIR

15 Since the Court's orders and judgment, the City prepared an Environmental Impact
16 Report ("EIR") under the California Environmental Quality Act ("CEQA") for the Three
17 Creeks Trail Pedestrian Bridge Project described in Planning Division File No. PP13-085
18 ("Project"). The EIR includes a detailed analysis of whether the Los Gatos Creek trestle is
19 a historic resource under CEQA. It concludes that the trestle "does not constitute a
20 historical resource." (Zoglin Dec. ¶5, Ex. A [Revised Historical Evaluation of the trestle];
21 Request for Judicial Notice, Ex. A.)

22 On May 19, 2015, the San José City Council adopted Resolution Number 77359,
23 certifying the Final EIR. (Zoglin Dec. ¶6, Ex. B [Resolution Number 77359, including the
24 MMRP]; Request for Judicial Notice, Ex. B.) The City Council considered public comment
25 and submissions regarding the historic nature of the trestle and concluded that "based on
26 and consistent with the analysis in the Final EIR, that the trestle is not a historic resource."
27 (*Id.*) The City Council upheld the Planning Commission's certification of the Final EIR for
28 the Project as completed in accordance with the requirements of CEQA. (*Id.*) The

1 Resolution attaches a copy of the Mitigation Monitoring and Reporting Program ("MMRP")
2 for the Project. (*Id.*) The City has refrained from removing the trestle bridge.

3 C. Time is of the Essence for the City to Complete the Project

4 Time is of the essence for the City to complete the Three Creeks Trail Pedestrian
5 Bridge Project, which includes removal of the trestle. Four permits are required to do any
6 work in the creek; removal of the trestle requires work in the creek. (Declaration of Jan
7 Palajac ["Palajac Dec."] ¶¶3-7.) The permitting agencies are: California Department of
8 Fish & Wildlife, Regional Water Quality Control Board, U.S. Army Corp, and National
9 Oceanic and Atmospheric Administration. The City has secured these permits; they allow
10 work to be done in the creek only during the period of June 15, 2015, through October 15,
11 2015.¹ (*Id.* ¶¶4-7.) According to the contractor's work schedule, the contractor would
12 need to start its work by July 15, 2015, in order to complete the project during the time
13 allowed under the permits. (*Id.* ¶8.) As a practical matter, the contractor needs notice in
14 advance of July 15, 2015, of when and whether the project can go forward, so that it can
15 ensure that it has the manpower available for the work and to ensure that it has time to
16 plan for the project.

17 The City was able to secure grant funds for the Three Creeks Pedestrian Bridge
18 Project with the support of my department and the City Council. The City secured grants
19 of: \$1,866,240 from the Roberti-Z'berg State Grant program to pay for the removal of the
20 existing trestle and to replace it with a steel and concrete bridge structure; and \$450,000
21 grant from the Santa Clara Valley Water District. (Declaration of Marybeth Harasz
22 ["Harasz Dec."] ¶3.) The State grant expires in June 2015. (*Id.* ¶4.) The City has already
23 received extensions on the grant from the State of California. (*Id.*) The City is currently
24 working with the State on an extension; if the extension is approved, the City anticipates it
25 would be final when the Governor signs the budget. (*Id.*) If the City is not able to obtain
26
27

28 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.

1 this extension, the City would not be able to use this grant funding for the project, as the
2 timeline for the grant would be expired. (*Id.*)

3 In order for the City to complete the project within the short window period allowed
4 by the permits and to have funding through the grant, it is important that the City be able to
5 remove the trestle as soon as possible. (Harasz Dec. ¶5.) The City thus will suffer
6 irreparable harm if the Court does not grant the City's request for *ex parte* relief and/or an
7 order shortening time for this matter to be heard.

8
9 D. The California Supreme Court and Court of Appeal Have Affirmed
the Ruling in *Valley Advocates* Since this Court Heard this Case

10 Since this Court issued its judgment in this case, the California Supreme Court in
11 *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, as modified, and
12 the Court of Appeal in *Citizens for the Restoration of L Street v. City of Fresno* (2014) 29
13 Cal.App.4th 340, have affirmed the ruling in *Valley Advocates v. City of Fresno* (2008) 160
14 Cal.App.4th 1039, that an agency has the authority to make the initial discretionary
15 determination of whether a resource is historic and the judicial standard of review is the
16 substantial evidence standard, not the fair argument standard. The City therefore believes
17 that it will likely prevail on appeal.

18 E. This Court Has Jurisdiction Over its Orders that Are Prohibitory

19 This Court has jurisdiction to rule on any of its orders that prohibit the City from
20 taking action to remove or to demolish the trestle. (See *Agricultural Labor Relations Board*
21 *v. Tex-Cal. Land Management, Inc.* (1987) 43 Cal.3d 696, 709 ["prohibitory portions of an
22 order are not automatically stayed pending appeal . . ."]; *Food and Grocery Bureau of*
23 *Southern California* (1941) 18 Cal.2d 174, 177 [if an "injunction is prohibitory, it is self-
24 executing and its operation is not stayed by the appeal]. See generally *Felton Water Co.*
25 *v. Superior Court* (1927) 82 Cal.App. 1, 4 [appeal of a prohibitive injunction does not
26 suspend authority of trial court].) In *Food and Grocery Bureau of Southern California*
27 (1941) 18 Cal.2d 174, the Supreme Court explained that if an "injunction is prohibitory, it is
28

1 self-executing and its operation is not stayed by the appeal." (*Id.* at 177.) It recognized
2 that sometimes a "decree may partake of a dual nature, in which even an appeal will stay
3 operation of the mandatory features but not of the prohibitory." (*Id.*, citations omitted.)

4 Here, this Court's order was dual in nature, with mandatory and prohibitory
5 features. The City limits its request to the prohibitory features of the Court's orders. The
6 City therefore requests that this Court rescind the prohibitory aspects of its orders to the
7 extent they prohibit the City from removing and demolishing the trestle.

8 In a letter brief by the Friends of the Willow Glen Trestle ("FWGT") to the Court
9 dated June 12, 2015, the FWGT cite two inapposite cases. Neither case involves a
10 prohibitory order. The first decision, *Eisea v. Saberi* (1992) 4 Cal.App.4th 625, concerned
11 the appeal of an order setting aside a default judgment as to an insurer in a personal
12 injury case. The question there was whether the trial court lacked jurisdiction to vacate or
13 to modify the judgment while the matter was on appeal. (*Id.* at 629.) The second case,
14 *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, addressed whether an
15 appeal of the denial of an anti-SLAPP motion under section 426.16 of the Code of Civil
16 Procedure automatically stayed further trial court proceedings. These two cases did not
17 involve prohibitory orders and consequently do not address the situation before this Court
18 nor do they undermine the City's request.

19 **CONCLUSION**

20 Based on the foregoing, the City respectfully requests that the Superior Court grant
21 this ex parte application and rescind any and all aspects of its Order, Judgment, and
22 Peremptory Writ of Mandamus only to the extent that they prohibit the City of San José

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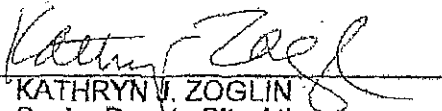
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1 from removing and demolishing the trestle. In the alternative, the City requests that a
2 hearing on this matter be set on shortened time.

3 Respectfully submitted,

4 Dated: June 15, 2015

RICHARD DOYLE, City Attorney

6 By: 
7 KATHRYN V. ZOGLIN
8 Senior Deputy City Attorney

9 Attorneys for Respondents City of San José
10 and San José City Council

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TAB 8

ENDORSED
FILED

1 RICHARD DOYLE, City Attorney (88625)
2 NORA FRIMANN, Assistant City Attorney (93249)
3 KATHRYN ZOGLIN, Senior Deputy City Attorney (125187) 15 A 8:31
4 Office of the City Attorney
5 200 East Santa Clara Street, 16th Floor
San José, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

David H. Harasz, Clerk of the Superior Court
County of Santa Clara, California

By: F. Tong-Miller
Deputy Clerk

6 Attorneys for Respondents
7 CITY OF SAN JOSE and CITY COUNCIL
8 OF THE CITY OF SAN JOSE

9
10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SANTA CLARA
12 UNLIMITED JURISDICTION

13 FRIENDS OF THE WILLOW GLEN
14 TRESTLE, an unincorporated association,

15 Petitioner,

16 v.

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

19 Respondents.

Case Number: 1-14-CV-260439

DECLARATION OF MARYBETH
HARASZ IN SUPPORT OF CITY'S EX
PARTE APPLICATION

Date: June 15, 2015
Time: 8:15 a.m.
Department: 21
Judge: Hon. Joseph Huber

20 Does 1 to 10;

California Environmental Quality Act
[CEQA]

21 Real Parties in Interest.
22

23
24 I, MARYBETH HARASZ, declare that I have personal knowledge of the following,
25 and if called, would testify:

26 1. Since January 2015, I have been the Interim Deputy Director of the Department
27 of Parks, Recreation, and Neighborhood Services for the City of San José. From January
28 2012 through January 2015, I was the Division Manager for the Administration Services

1 Division for Parks, Recreation, and Neighborhood Services Department. My
2 responsibilities in both positions have included but have not been limited to oversight of
3 the department's Capital Improvement Program ("CIP"). My responsibilities include the
4 oversight of budgets, grants, implementation of CIP for the department, including the
5 building and maintenance of the City's trail networks.

6 2. I am very familiar with the Three Creeks Trail Pedestrian Bridge Project. I know
7 that work in the creek may only take place during a short period of time due to permits
8 needed by various agencies.

9 3. The City was able to secure grant funds for the Three Creeks Trail Pedestrian
10 Bridge Project with the support of my department and the City Council. We secured
11 grants of: \$1,866,240 from the Roberti-Z'berg State Grant program to pay for the removal
12 of the existing trestle and to replace it with a steel and concrete bridge structure; and
13 \$450,000 grant from the Santa Clara Valley Water District.

14 4. The State grant expires in June 2015. The City has already received extensions
15 on the grant from the State of California. The City is currently working with the State on an
16 extension; if the extension is approved, the City anticipates it would be final when the
17 Governor signs the budget. If the City is not able to obtain this extension, it would not be
18 able to use this grant funding for this project, as the timeline would be expired.

19 5. In order for the City to complete the project within the short window period
20 allowed by the permits and to have funding through the grant, it is important that the City
21 be able to remove the trestle as soon as possible.

22 I certify and declare, under penalty of perjury under the laws of the State of
23 California that the foregoing is true and correct. Executed on June 12, 2015, in San José,
24 California.

25
26 
MARYBETH HARASZ

TAB 9

ENDORSED
FILED

1 RICHARD DOYLE, City Attorney (88625)
2 NORA FRIMANN, Assistant City Attorney (93249)
3 KATHRYN ZOGLIN, Senior Deputy City Attorney (124487) 5 A 8 31
4 Office of the City Attorney
5 200 East Santa Clara Street, 16th Floor
6 San José, California 95113-1905
7 Telephone Number: (408) 535-1900
8 Facsimile Number: (408) 998-3131
9 E-Mail Address: cao.main@sanjoseca.gov

David H. Veronicki, Clerk of the Superior Court
County of Santa Clara, California
By: F. Tong-Miller
Deputy Clerk

6 Attorneys for Respondents
7 CITY OF SAN JOSE and CITY COUNCIL OF THE
8 CITY OF SAN JOSE

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 UNLIMITED JURISDICTION

13 FRIENDS OF THE WILLOW GLEN
14 TRESTLE, an unincorporated association,

15 Petitioner,

16 v.

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

19 Respondents.

20 Does 1 to 10;

21 Real Parties in Interest.

Case Number: 1-14-CV-260439

DECLARATION OF JAN PALAJAC
IN SUPPORT OF CITY
RESPONDENTS' EX PARTE
APPLICATION

Date: June 15, 2015
Time: 8:15 a.m.
Department: 21
Judge: Hon. Joseph Huber

California Environmental Quality Act
[CEQA]

24 I, JAN PALAJAC, declare as follows:

25 1. I am a Senior Landscape Architect with the City of San Jose's Public Works
26 Department. I have been a registered Landscape Architect with the State of California
27 since May 1989. I have worked at the City since March 2000. I oversee a team that
28 delivers capital improvement projects for City-owned facilities. One primary area of focus

1 has been on the design and construction of trail projects, including but not limited to the
2 Three Creeks Trail Pedestrian Bridge Project. I also manage environmental and storm
3 water compliance programs for many of the City's public works projects within our division.

4 2. I have been responsible for overseeing the independent consultant's work on
5 the Feasibility Study, environmental clearance documents, preparation of regulatory
6 permit applications, and construction documents related to the trestle that crosses the Los
7 Gatos Creek.

8 3. In order to proceed with the construction of the project, the City is required to
9 secure the permits, opinions, and agreements set forth below. The permits are needed for
10 the City to remove the trestle, given that the trestle footings are in the creek and permits
11 are required for any work in the creek. I have been working with the consultant and these
12 state and federal agencies to secure permits for the project to remove and replace the
13 trestle.

14 4. On January 22, 2014, the California Department of Fish and Wildlife entered into
15 a Streambed Alteration Agreement with the City of San Jose to remove and to replace the
16 wood trestle. This permit allows work in the stream during the period of June 15 through
17 October 31. This permit is effective only through December 31, 2015.

18 5. On March 19, 2014, the National Oceanic and Atmospheric Administration
19 issued an Endangered Species Act section 7(a)(2) Biological Opinion that allows the City
20 to enter the stream bed, which is characterized as Central California Coast Steelhead
21 migration habitat and Pacific Salmon essential fish habitat, to remove and to replace the
22 trestle. This permit allows work in the stream during the period of June 15 through
23 October 15. Once this permit is activated, it is only valid for one season.

24 6. On April 10, 2014, the United States Department of Army, U.S. Army Corps of
25 Engineers, issued a Nationwide Permit 33 for the City to remove and replace the trestle.
26 This permit allows work in the stream during the period of June 15 through October 15.

27 7. On May 13, 2014, the Regional Water Quality Control Board issued a Water
28 Quality Certification permit that allows the City to enter the stream bed to remove and to

1 replace the trestle. This permit allows work in the stream during the period of June 15
2 through October 15.

3 8. Based on my review of the contractor's schedule, in order to complete the
4 project during the short window allowed by these permits, the contractor would need to
5 begin removal of the trestle on July 15, 2015.

6 I certify and declare, under penalty of perjury under the laws of the State of
7 California that the foregoing is true and correct. Executed on June 12, 2015, in San José,
8 California.

9
10 
11 _____
12 JAN PALAJAC
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27
28

TAB 10

1 RICHARD DOYLE, City Attorney (88625)
2 NORA FRIMANN, Assistant City Attorney (93249)
3 KATHRYN ZOGLIN, Senior Deputy City Attorney (121187)
4 Office of the City Attorney
5 200 East Santa Clara Street, 16th Floor
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7 Telephone Number: (408) 535-1900
8 Facsimile Number: (408) 998-3131
9 E-Mail Address: cao.main@sanjoseca.gov

10 Attorneys for Respondents
11 CITY OF SAN JOSE and CITY COUNCIL
12 OF THE CITY OF SAN JOSE

ENDORSED
FILED
2015 JUN 15 A 8:32
County of Santa Clara, California
F. Tong-Miller, Clerk

13 SUPERIOR COURT OF CALIFORNIA
14 COUNTY OF SANTA CLARA
15 UNLIMITED JURISDICTION

16 FRIENDS OF THE WILLOW GLEN
17 TRESTLE, an unincorporated association,
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19 Petitioner,
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21 v.
22 CITY OF SAN JOSE and CITY COUNCIL
23 OF THE CITY OF SAN JOSE,
24
25 Respondents.
26
27 Does 1 to 10;
28
Real Parties in Interest.

Case Number: 1-14-CV-260439

DECLARATION OF KATHRYN
ZOGLIN IN SUPPORT OF CITY'S EX
PARTE APPLICATION

Date: June 15, 2015
Time: 8:15 a.m.
Department: 21
Judge: Hon. Joseph Huber

California Environmental Quality Act
[CEQA]

24 I, KATHRYN ZOGLIN, declare that I have personal knowledge of the following, and
25 if called, would testify:

26 1. I am a Senior Deputy City Attorney for the City of San José. I have been
27 assigned to handle the above-entitled matter on behalf of the City of San José and San
28 José City Council.

EXHIBIT A

Revised Appendix F
Historical Evaluation

HISTORICAL EVALUATION OF THE
LOS GATOS CREEK TRESTLE
SAN JOSE, CALIFORNIA

Prepared for:

City of San Jose

Prepared by:

Stephen Mikesell
Mikesell Historical Consulting
1532 Eligio Lane
Davis, CA 95618

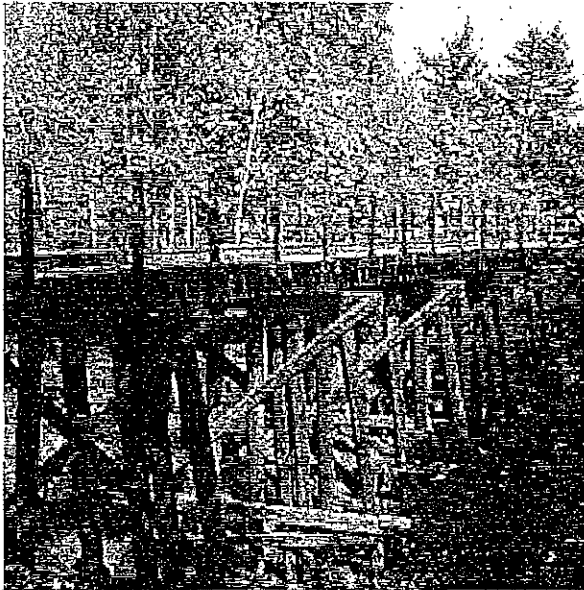
December 29, 2014, Revised April 1, 2015

A. INTRODUCTION

This historic evaluation report was prepared by Mikesell Historical Consulting Services (MHC) for the City of San Jose. The purpose of this study is to evaluate the potential eligibility of the Los Gatos Creek Trestle as an "historical resource," as that term is used in the California Environmental Quality Act, or CEQA. This report concludes that the trestle does not constitute a historical resource, for reasons outlined below.

B. DESCRIPTION OF THE RESOURCE

The Los Gatos Creek Trestle exists along the former right of way for the Western Pacific Railroad in the San Jose community of Willow Glen. The right of way is now maintained as the Los Gatos Creek Trail by the City of San Jose. The Los Gatos Creek Trestle crosses Los Gatos Creek between Coe and Lonus streets, very near the I-280 crossing of Lincoln Boulevard in the Willow Glen neighborhood.



Elevation view from southern approach, Los Gatos Creek Trestle; photograph by Larry Ames.



Deck view from southern approach, Los Gatos Creek Trestle

The Los Gatos Creek Trestle is an open-deck pile-supported trestle that has an overall span length of 210.5 feet and is approximately 25 feet high at its tallest point. The trestle was constructed by the Western Pacific Railroad in 1922 but the tracks have been removed from the structure which is now owned by the City of San Jose. The structure is supported by two timber pile abutments and thirteen timber pile bents. The bents range in size and geometry at each location, but the longitudinal spacing of the bents is constant at approximately 15 feet. The bents have a skew angle of 9.5 degrees. The structure construction is generally in conformance with past and current editions of the AREMA (American Railway Engineering and Maintenance of Way Association) Manual for Railway Engineering for pile bent trestles.

The deck of the superstructure is composed of three components. The first component, 4-inch by 8-inch by 18-foot long ties that are spaced at 5 feet on center, have a metal grate and hand rails attached. (In recent months, the City of San Jose has installed safety metal fencing across the entrances to the deck.) Between these ties are 8-inch by 8-inch by 10-foot long ties that are generally spaced at approximately 13.5 inches on center. The 18 foot long 4-inch by 8-inch ties are typically nailed to an 8-inch by 8-inch tie. Also, there is one 8-inch by 8-inch by 18-foot member at each abutment

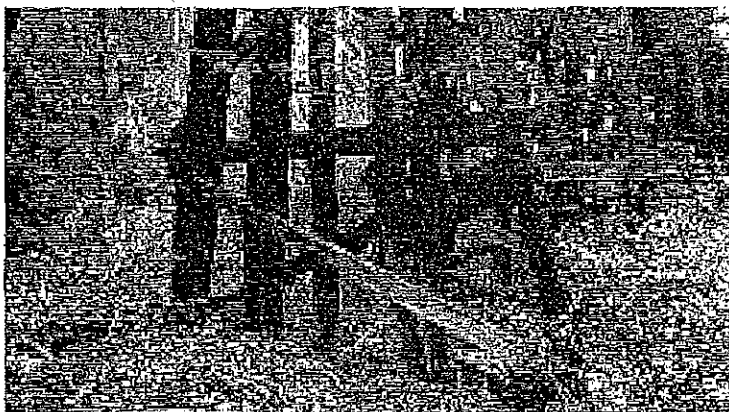
There are two longitudinal beams that are symmetric about the longitudinal centerline of the trestle. The beams are comprised of four 8-inch wide by 20-inch deep stringers that are bolted together. Each individual timber is about 30 feet in length and the splices are staggered 15 feet longitudinally. Typically, there are two stringers that are continuous at each bent cap location and two that are spliced over the cap. The bolt connection made at each pile cap is consistent with the AREMA Manual for Railway Engineering.

The various bents are made of timber piles in the substructure. A bent includes a series of piles, and is usually identified by the number of piles, e.g. a five-pile bent or a six-pile bent. This bridge is somewhat unusual in that there are different numbers of piles in different bents. In most of the bents, there are six piles. The number ranges, however, from five in two bents, seven in two bents, and eight in one bent.¹

¹ The technical data on the trestle is derived in large part from CH2M HILL, "Field Inspection Report, Three Creeks Trail Railroad Trestle at Los Gatos Creek," June 7, 2012.

In general, one could characterize the substructure as comprising six-pile bents, noting that the number of piles sometimes varies.

The manner in which the number of bents varies suggests strongly that the bridge was modified with the use of paired piles, or soldier piles, to take the stress from deteriorated piles. In every case in which there are more than six piles, the additional piles are paired with heavily deteriorated piles. This doubling of piles is illustrated below.



Pile bents showing doubled piles, from Los Gatos Creek bed.

The bents are vertical in the center and battered on the edges. In its bridge inspection manual, the AREMA describes the function of vertical and battered bents: "The center vertical posts used in each bent are known as 'plumb posts,' and take the vertical loads. The outside inclined posts, are known as 'batter posts,' the tops being tilted toward the center of the bent and serving the purpose of giving increased stability, are installed adjacent to the plumb posts. The batter of these outside posts may vary between 1-1/2 and 3 inches per foot. Sway bracing provides additional lateral stability by the use of planks extending diagonally across the bent, through bolted to the ends of the cap and sill and also to the posts or piles. A similar brace, but placed with the opposite direction in slope, is installed on the opposite side of the bent such that the two braces cross in the middle."²

C. REGULATORY CONTEXT

In general, this report is designed to establish whether the Los Gatos Creek Trestle constitutes a "historical resource" as that term is used in the guidelines to the CEQA. CEQA Guidelines define a historical resource at 15064.5:

For purposes of this section, the term "historical resources" shall include the following:

A resource listed in, or determined to be eligible by the State Historical Resources Commission, for listing in the California Register of Historical

² American Railway Engineering and Maintenance of Way Association, *Practical Guide to Railway Engineering*, 2003, 8-21.

Resources (Public Resource Code SS 5024.1, Title 14 CCR, Section 4850 et seq.).

A resource included in a local register of historical resources, as defined in section 5020.1(k) of the Public Resources Code or identified as significant in an historical resource survey meeting the requirements section 5024.1(g) of the Public Resources Code, shall be presumed to be historically or culturally significant. Public agencies must treat any such resource as significant unless the preponderance of evidence demonstrates that it is not historically or culturally significant.

Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be an historical resource, provided the lead agency's determination is supported by substantial evidence in light of the whole record. Generally, a resource shall be considered by the lead agency to be "historically significant" if the resource meets the criteria for listing on the California Register of Historical Resources (Pub. Res. Code SS5024.1, Title 14 CCR, Section 4852) including the following:

Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;

Is associated with the lives of persons important in our past;

Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or

Has yielded, or may be likely to yield, information important in prehistory or history.

The fact that a resource is not listed in, or determined to be eligible for listing in the California Register of Historical Resources, not included in a local register of historical resources (pursuant to section 5020.1(k) of the Public Resources Code), or identified in an historical resources survey (meeting the criteria in section 5024.1(g) of the Public Resources Code) does not preclude a lead agency from determining that the resource may be an historical resource as defined in Public Resources Code sections 5020.1(j) or 5024.1.

The Los Gatos Creek Trestle does not meet the mandatory sections of this definition.³ It is not listed in the California Register of Historical Resources (or the National Register of Historic Places, which

³ Court decisions have drawn a distinction between those findings which are mandatory, such as formal listing in the California Register, and discretionary findings, which can include a finding developed specifically for a specific project.

automatically results in a California Register listing); nor is it listed as a San Jose Designated Historic City Landmark.⁴ The CEQA guidelines clearly state, however, that: "The fact that a resource is not listed in, or determined to be eligible for listing in the California Register of Historical Resources, not included in a local register of historical resources (pursuant to section 5020.1(k) of the Public Resources Code), or identified in an historical resources survey (meeting the criteria in section 5024.1(g) of the Public Resources Code) does not preclude a lead agency from determining that the resource may be an historical resource as defined in Public Resources Code sections 5020.1(j) or 5024.1."

The purpose of this report is to determine whether the Los Gatos Creek Trestle is an "historical resource" as defined in the CEQA guidelines and PRC 5020.1 or 5024.5. Specifically, this report will determine whether the trestle meets the criteria for listing in the National Register of Historic Places or the California Register of Historical Resources.

National Register Eligibility Criteria

The eligibility criteria for the National Register are quoted in full below.

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- A. That are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. That are associated with the lives of significant persons in or past; or
- C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- D. That have yielded or may be likely to yield, information important in history or prehistory.

Criteria Considerations

Ordinarily cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties *will qualify* if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

- A. A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

⁴ A record search was conducted at the Northwest Information Center in October 2014.

- B. A building or structure removed from its original location but which is primarily significant for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
- C. A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building associated with his or her productive life; or
- D. A cemetery that derives its primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
- E. A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
- F. A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
- G. A property achieving significance within the past 50 years if it is of exceptional importance.

California Register of Historical Resources Eligibility Criteria

The criteria for the California Register of Historical Resources are quoted in full below:

- Associated with events that have made a significant contribution to the broad patterns of local or regional history or the cultural heritage of California or the United States (Criterion 1).
- Associated with the lives of persons important to local, California or national history (Criterion 2).
- Embodies the distinctive characteristics of a type, period, or method of construction or represents the work of a master or possesses high artistic values (Criterion 3).
- Has yielded, or has the potential to yield, information important to the prehistory or history of the local area, California or the nation (Criterion 4).

D. RESEARCH STRATEGY

The research strategy in evaluating this trestle is enriched by the fact that community members have made very useful suggestions, either through a court case that tested the adequacy of a previous evaluation or through the CEQA Scoping Process for the current Environmental Impact Report (EIR).⁵ The comments made before the court proceeding as well as the comments from the Scoping Meeting raised a wide array of issues. These may be summarized in five categories, summarized below and discussed and analyzed separately.

Rarity of the trestle

One issue raised during the court hearing was the rarity of the trestle. At various points during the legal proceedings leading to preparation of an EIR for this project, different parties have raised the possibility

⁵ Los Gatos Creek Trestle was the subject of a court case, Friends of the Willow Glen Trestle vs. City of San Jose, City Council of San Jose, decided in Superior Court, County of Santa Clara, on July 28, 2014. As a result of this decision, the City of San Jose initiated preparation of an Environmental Impact Report. A Scoping Meeting was held in the Willow Glen neighborhood on October 21, 2014.

that the Los Gatos Creek Trestle is a rare example of a bridge type. In a July 16, 2013 letter, the California Trolley and Railroad Corporation stated that "the trestle is a classic 90 year-old structure, which once were common and are now almost non-existent."⁶ In a letter of December 18, 2013, one commentator does not specifically state that the bridge is rare or unusual, but challenges the conclusion of the Ward Hill "Short Form" that it is a "typical" trestle. Among other questions, she asks: "How does his [Hill's] evaluation of 'typical' compare to accounts in railroad histories and Western Pacific Railroad documents?"⁷ Elsewhere, Susan Landry makes a more limited case for rarity for this bridge, contending it is the only timber trestle still in place on the Western Pacific Railway in Willow Glen.⁸ The question of rarity is best analyzed under National Register Criterion C or California Register Criterion 3.

Relationship to Canning Industry in San Jose

A second issue mentioned repeatedly was the relationship between the trestle and the canning industry in San Jose. This issue was raised in several comments from the Scoping Meeting. One comment read: "Please research the railroad history & the impact to the economy of Willow Glen and SJ. Also the impact of the Trestle to the canneries & their successful transport of fruit and vegetables." Another comment asked "How many canneries were served by this trestle? What portion of their business went over the trestle?" Another comment noted: "The products of the large Del Monte cannery, for decades, crossed the Los Gatos Creek on that very Trestle!" Still another commented on how the trestle "ties in with the agricultural/canning/marketing past of SJ." This type of analysis is most consistent with National Register Criterion A or California Register Criterion 1.

Grade Separation Movement

Still another issue that arose in the court case and in Scoping Comments is that of the grade separation movement. In the court proceeding but not in the Scoping Meeting, comments were made about the close association with a political movement to provide for safer interaction between automobiles and trucks, on the one hand, and railroad traffic on the other. The grade separation issue is best considered under National Register Criterion A and California Register Criterion 1.

History of the Community of Willow Glen

A fourth issue, raised in many comments, was the importance of the trestle to the history of the community of Willow Glen, with specific reference to the relationship between the Western Pacific Railroad line and the brief incorporation of Willow Glen as an independent city in the late 1920s and the 1930s. This issue is appropriately considered under National Register Criterion A and California Register Criterion 1.

History of the Western Pacific Railroad

A final research topic raised in some comments had to do with the importance of this trestle to the Western Pacific Railroad. This issue is appropriately considered under National Register Criterion A and California Register Criterion 1.

⁶ Writ, Friends of Willow Glen Trestle, 10.

⁷ Jean Dresden to City of San Jose, July 16, 2013.

⁸ Writ, Friends of Willow Glen Trestle, 12.

E. HISTORIC CONTEXT

The Los Gatos Creek Trestle was built by the Western Pacific Railway in 1922 as part of the San Jose Branch, which connected the City of San Jose and vicinity with the Western Pacific Railroad main line at Niles Canyon in Alameda County.

General History of Western Pacific Railroad

The Western Pacific Railroad⁹ has sometimes been called the railroad that was built too late.¹⁰ The chief backer of the line was George Gould, son of the legendary railroader Jay Gould, who felt his access to the California market was stymied by the Southern Pacific Railroad. Under the brief ownership of Edward Harriman in the early 20th century, the Southern Pacific Railroad had taken a much more aggressive stance toward Gould's holdings.¹¹ Gould was particularly concerned about ensuring access to the Port of Oakland, which the Harriman-owned Southern Pacific threatened to deny.

The Western Pacific Railroad was incorporated in 1903 and surveys of the line began almost immediately. The general alignment was to go from Salt Lake City to Oakland. The exact alignment, however, was fraught with difficulties, chiefly because the Southern Pacific already controlled the obvious railroad routes through Utah, Nevada, and California. The eastern end of the route – from Salt Lake City to Reno – was relatively easy to construct, although it was complicated by the need to cross the line of the Southern Pacific at various spots through the Humboldt River valley. The western end of the line, however, required heroic engineering and construction accomplishments. The line entered the Central Valley of California via the Feather River Canyon, a line that extended from Oroville in Butte County to a connection with an old Nevada-California-Oregon Railway (NCO) line, through what is commonly called the Beckwourth Pass. The Western Pacific line through the Feather River Canyon creates one of the most scenic railroad alignments in the United States and is the subject of many books.¹² The Feather River route also includes some of the most dramatic and significant railroad tunnels and bridges in the United States, which are commonly called out in national studies on railroad structures.¹³

In the San Francisco Bay Area, the Western Pacific Railroad found itself forced to wiggle around the lines of the Southern Pacific, which controlled all of the obvious passes and bridge sites. One key site was Niles Canyon, which connects the flatlands around the Bay in modern Fremont with the San Ramon

⁹ The line was called the Western Pacific Railway when it was incorporated. The line went into receivership in 1915 and emerged as the Western Pacific Railroad. The latter name will be used except in quotations from historic sources.

¹⁰ Spencer Crump, *Western Pacific: The Railroad that was Built Too Late*, Railway History Quarterly, Jan. 1963. It will be noted that there was an early San Francisco Bay Area railroad called the Western Pacific, which was absorbed into the Central Pacific in the 1870s. The early 20th century line of the same name has no corporate or operational relationship to that pioneer line.

¹¹ Richard Orsi, *Sunset Limited: The Southern Pacific Railroad and the Development of the American West, 1850-1930*, University of California Press, 2005; David F. Myrick, *Railroads of Nevada and Eastern California: The Northern Roads*; Donald L. Hofsmommer, *The Southern Pacific, 1901-1985*, Texas A&M Press, 1986.

¹² See, for example, Ken Rattenne, *The Feather River Route: A Geographical Tour, San Francisco to Kettle*, Two Volumes, 1980.

¹³ There are relatively few books on railroad bridges, relative to those on highway bridges. Two good examples that feature the Feather River bridges are: Brian Solomon, *North American Railroad Bridges*, Voyageur Press, 2008, and Robert J. Cook, *The Beauty of Railroad Bridges*, Golden West Books, 1987.

Valley. The Niles Canyon alignment was first used in the 1860s by a pioneer line, also called the Western Pacific, but which has no corporate relationship with the early 20th century line. The old Western Pacific built through the canyon in 1865 but went bankrupt and was purchased by the Central Pacific.¹⁴ The other difficult crossing the Western Pacific had to endure was the Altamont Pass, separating the Port of Stockton and the Central Valley from the San Ramon Valley and the Niles Canyon connector.

The old Niles Canyon route proved to be less useful than a more direct route between Oakland and Sacramento pioneered by the California Pacific Railroad, which extended from Oakland to Sacramento via a ferry crossing at Vallejo. The California Pacific alignment would prove to be the principal route for the Southern Pacific, relegating the Niles Canyon route to a secondary service. Nonetheless, the Southern Pacific still controlled and was using and upgrading the Niles Canyon alignment when the Western Pacific Railroad began to build its way through the Bay Area in 1909. The Western Pacific 1909 alignment proved to be superior to that of the older Western Pacific. The 1909 line of the Western Pacific is now used by Union Pacific freight trains as well as the busy Altamont Commuter Express passenger service.

The Western Pacific Railroad was never successful financially and the company went bankrupt in 1935. It was reorganized and continued in independent operation until it was purchased by the Union Pacific Railroad in the 1960s. When the Union Pacific purchased the Southern Pacific in the 1990s, Class 1 railroad service in Northern California was consolidated into a single carrier.

Western Pacific San Jose Branch Line

In the early 20th century, the Western Pacific Railroad purchased or built short lines or branches to increase its freight revenue. This issue was broached in a 1915 report of the California Railroad Commission, Rate Department, "Report on Western Pacific Railway," April 1, 1915.¹⁵ The author of the report notes that the newly-built line, if it were to succeed, would need to move into additional markets through the purchase of existing short lines or through construction of branches. The report analyzed various commodities that might add to the profitability of the line and discussed various planned or contemplated extensions from the main line from Oakland to the Feather River Canyon.

The Western Pacific did build many such lines. One extension was made using the old NCO tracks to connect with Reno, Nevada.¹⁶ Another acquisition was the Boca and Loyalton in the Sierra Valley.¹⁷ Another line, built in 1917, connected with the Toole Valley in Utah.¹⁸ Still another line extended from Stockton south to Turlock. In 1918, when the railroad was under federal control, it reported that it was operating 87 miles of branch lines in California, Nevada, and Utah.¹⁹

¹⁵ The 1915 Railroad Commission report discussed the possibility of a relatively short branch line from Niles Canyon to the San Jose area. "It goes without saying that the Western Pacific Railway should be

¹⁴ Henry Luna, *Niles Canyon Railways*, Arcadia Press, 2005.

¹⁵ California Railroad Commission, Rate Department, "Report on Western Pacific Railway," April 1, 1915

¹⁶ Myrick, 338.

¹⁷ Western Pacific Railroad, First Annual Report, 1916, 6.

¹⁸ Western Pacific Railroad, Second Annual Report, 1917, 6.

¹⁹ Western Pacific railroad, Third Annual Report, 1918, 6. The importance of "feeder" lines is discussed in detail by Crump, who argues that the absence of such feeder lines was ultimately the undoing of the late-arriving transcontinental line.

constructed south of Niles to San Jose at which point very large terminal facilities should be purchased so as to encourage construction of packing houses and industries on the rails of the new line."²⁰

In 1917, the Western Pacific Railroad was reorganized from receivership and its funding was more dependable. It began to contemplate some expansion, including the branch line to San Jose. American entry into World War I, however, put the line into federal control and delayed any such construction.²¹ The work began on the San Jose Branch in 1921 and was completed in 1922. The 1921 Annual Report for the railroad expressed optimism that the San Jose Branch would help increase freight traffic. "The outlook is for better freight traffic in 1922 than in 1921. The extension of the Western Pacific line into San Jose and the Santa Clara Valley and a number of minor extensions which together are of substantial importance have recently been completed and should contribute to 1922 revenue."²²

As discussed later, many commentators, including the staff of the California Railroad Commission, felt that it was most logical for the Western Pacific to use existing Southern Pacific tracks to get from Niles Canyon to downtown San Jose. At this point, however, the Southern Pacific and Western Pacific were unwilling to engage in any discussions about shared trackage or any other type of cooperation. Instead, the Western Pacific chose a great looping approach to San Jose in what many have called a huge fishhook, with a north-south shaft and a hook that turned to the west. It entered the city at the northeast, roughly paralleling Coyote Creek in a north-south direction. It passed near the modern San Jose Municipal Golf Course, crossing Santa Clara Street near where U.S. 101 now crosses Santa Clara. The line turned west near the corner of Senter and Phelan. It looped west into the community of Willow Glen, crossing the Guadalupe River and Los Gatos Creek, before heading due north into old San Jose. It terminated at stops at The Alameda and Sunol Street.

The Western Pacific built two major stations in San Jose: a passenger station near the Five Wounds Church at 27th and Santa Clara (in what was at the time an incorporated community of East San Jose), and a freight depot at The Alameda and Bush, near the current location of Diridon Station. Community leaders in San Jose supported the fact that the Western Pacific offered competition to the Southern Pacific Railroad. In a dedication to the freight depot at The Alameda in May 1922, leaders from the Chamber of Commerce, Lions Club, and other groups praised the entry of a new line into the industrial sector of the city.²³

The Western Pacific acquired the Sacramento Northern electric line in an attempt to broaden its market. In 1982, the Western Pacific was acquired by the Union Pacific Railroad. The Union Pacific continues to use most of the Western Pacific "fishhook" though San Jose. The hook through Willow Glen was

²⁰ California Railroad Commission, Rate Department, "Report on Western Pacific Railway," April 1, 1915, 16.

²¹ San Jose businessman T. S. Montgomery was a member of the board for the Western Pacific Railway and no doubt helped convince management of the need to build the San Jose Branch.

²² Western Pacific Railroad, Sixth Annual Report, 1921, 6. There was briefly an independent community of East San Jose, which included the passenger depot near Five Wounds Church.

²³ San Jose Mercury Herald, May 2, 1922. Special thanks to Gayle Frank for providing information on this celebration.

abandoned in recent years and the track removed in about 2010.²⁴ The Los Gatos Creek Trestle was left in place but all track removed on either side of it.²⁵

Packing Industry in San Jose

One of the main reasons the Western Pacific Railroad decided to build a line from Niles Canyon to San Jose was to take advantage of the fast growing fruit packing business there. Although fruit had been dried for decades before the coming of the Western Pacific Railroad, the Western Pacific did enter the city at a time in which the business was growing rapidly.

There was a bumper crop of fruit in the Santa Clara County region during the 1870s, leading local farmers and businessmen to search for ways to preserve the crop long enough to be shipped outside the local market. Fruit drying and canning would emerge as the preferred method. Santa Clara County entrepreneurs would make great innovations in the business of fruit packing.²⁶

These experiments led to the organization of the San Jose Fruit Packing Company in 1875, which would become a major part of the California Packing Company, or Calpak, which would in turn become the modern Del Monte Corporation. Experimentation included both fruit drying (especially useful for the huge apricot and plum crops) and fruit canning, favored for peaches. The innovations concerned the horticulture as well as industrial methods, especially as they pertained to automation in the drying and canning operations.

This industry was successful but still growing by the time the Western Pacific Railroad completed its branch to San Jose. The Calpak company was organized in 1916 and it first marketed its Del Monte brand in 1917. Calpak had small and large factories throughout the region by 1922. The Muirson Label company, which was responsible for many colorful fruit can and box labels, was also in operation prior to 1922.²⁷

This industry had grown around the railroad network of the Southern Pacific Railroad long before the Western Pacific Railroad built to San Jose in 1922.²⁸ The Southern Pacific controlled a tangle of freight lines through San Jose from lines it developed and especially the line it acquired when it took control of

²⁴ Holmes, 162 shows a map of the lines still in use and the parts through Willow Glen that were abandoned.

²⁵ Camp Dresser & McKee, "Removal Action Plan Workshop Willow Glen Right of Way Minnesota Avenue to Lotus Street, San Jose California, November 8, 2010.

²⁶ The history of fruit packing in the region, oriented toward extant resources, is told in two very interesting places. One is a website, "Cannery Life: Del Monte in the Santa Clara Valley."

<http://www.historysanjose.org/cannerylife/canned-topics/del-monte-brand.html> A second is a text for a tour of cannery sites in San Jose, prepared for the Society for Industrial Archaeology, May-June, 2008. See also: Robert James Claus, "Fruit and Vegetable Canning Industry in the Santa Clara Valley," MA Thesis, San Jose State, August 1966. Among the sites served by the Western Pacific was Del Monte No. 3 plant, a huge facility on Auzerais Avenue, not far from the Western Pacific freight terminal on The Alameda.

²⁷ SIA walking tour guide. See also another website history, "Label Legacy," dealing with the Muirson label, at http://www.historysanjose.org/labellegacy/places/rancho_el_potrero.html

²⁸ The most useful general history of railroad development in San Jose is: Norman W. Holmes, *Prune Country Railroading: Steel Trails to San Jose*, Huntington Beach, CA, 1985. Holmes maintains that one marketing device that helped the Western Pacific grow was to accept less than full car loads, which allowed shipments to move faster than the Southern Pacific, which insisted on full cars.

the South Pacific Coast Railroad. The Southern Pacific got control of the South Pacific Coast in 1887 and converted it to standard gauge through dual-tracking in 1904.²⁹

The 1932 Sanborn Fire Insurance Maps offer a glimpse of how canners and railroads interacted at the height of the canning industry.³⁰ Three facts are clear. First, packers are everywhere in the city. Second, there was a critical mass of packing and railroad resources at the huge Calpak Plant No. 3 at San Carlos and Los Gatos Creek, and at Plant No. 51 at Bush and San Fernando. Plant No. 3 was served directly only by the Southern Pacific but the Western Pacific tracks were nearby. Plant No. 51 was served only by the Southern Pacific Railroad. Third, while the Southern Pacific tracks appear to have offered more direct access, a packer could get a car to the Western Pacific through track linkages.

The Annual Reports of the Western Pacific Railroad suggest that the Western Pacific was an active but not dominant shipper of produce from the Santa Clara Valley. The report does not isolate tonnage by point of origin. It does, however, differentiate as to the type of tonnage. One category, particularly apropos for the San Jose area, was "dried fruit." In 1921, before the San Jose Branch was built, the Western Pacific shipped 7,626 tons of dried fruit. In 1922, when the San Jose branch was active, that figure jumped to 24,360, nearly a four-fold increase, almost certainly attributable to tapping the San Jose market. Between 1922 and 1930, that figure remained consistent: 20,560 in 1923, 23,602 in 1924, 34,321 in 1925, 37,220 in 1926, 44,781 in 1927, 36,157 in 1928, 28,875 in 1929, and 29,605 in 1930.³¹ Again, these figures are not specific to Santa Clara County and may have been influenced by shipping elsewhere, such as Butte County, where dried fruit was also important.

Was the Western Pacific dominant in shipping dried fruit? One way to measure this is to compare the Western Pacific tonnage figure with the amount shipped by the Southern Pacific. In 1921, the Southern Pacific shipped 515,584 tons of dried fruit, compared with 7,626 tons for Western Pacific.³² In 1922, the Southern Pacific figure was 568,501, compared with 24,360 for the Western Pacific. Similar figures were maintained throughout the 1920s: 517,431 in 1923 (20,560 for the Western Pacific); 634,261 in 1924 (23,602 for the Western Pacific); 649,339 in 1925 (34,321 for the Western Pacific); 651,729 in 1926 (37,220 for the Western Pacific); 699,002 in 1927 (44,781 for the Western Pacific); 629,711 in 1928 (36,157 for the Western Pacific); 387,107 in 1929 (28,875 for the Western Pacific); and 399,610 in 1930 (29,605 for the Western Pacific). Neither the Western Pacific nor the Southern Pacific Annual Reports break down shipping by point of origin. Dried fruit was selected as a good indicator of activity in San Jose because of the dominance of Santa Clara County in the production of dried apricots and prunes. In this key measure, the Southern Pacific between 1921 and 1930 shipped between 10 and 20 times as much dried fruit as the Western Pacific.

The Timber Trestle in Bridge Engineering

The timber trestle has been a mainstay of railroad bridge design since the earliest years of American railroad construction and operation, and remains so today. Simply stated, the timber trestle is by far the

²⁹ Bruce A. MacGregor and Richard Truesdale, *South Pacific Coast*, Pruett Publishing Company, 1982.

³⁰ The California Room at the Martin Luther King, Jr. Library in downtown San Jose has a wonderfully intact paper copy of the 1932 Sanborn maps for San Jose.

³¹ Annual Reports, Western Pacific railroad 1921-1930. Available online from the Western Pacific Railroad Museum.

³² Southern Pacific Company, Annual Reports, 1921-1930. On file at the California Railroad Museum Library.

most common railroad bridge type, particularly in reference to smaller branch lines, such as the San Jose Branch of the Western Pacific Railroad.

A sense of the place of the timber trestle in standard railroad operation is gained from a 1917 publication by Wilcott C. Foster, entitled *A Treatise on Wooden Trestle Bridges According to the Present Practice on American Railroads*.³³ This was written a few years before the Los Gatos Creek Trestle was constructed and is useful in assessing how and why this bridge type was selected for this crossing.

Foster begins his discussion by estimating how many timber trestles may have been in place at that time. He writes:

The amount of Timber Trestling in this country is very large, but few probably realizing its extent unless they have thoroughly studied the subject. At the present time there are about 2400 miles of single-track railway-trestle in the United States, of which we can consider about one quarter as only temporary, to be replaced by embankment. Of the remaining 1800 miles, at least 800 miles will be maintained in wood.³⁴

Foster approximates the number of timber trestles, calculated on the basis of an average distribution across the country, to be more than 700,000 nationwide. Foster goes on to express his opinion as to why the timber trestle was such a common part of the American railroad landscape. "The great extent to which timber trestling has been adopted in this country is one of the principal factors in the economy of construction and rapidity of completion which have been characteristic of American railroad construction."³⁵ The timber trestle, in short, allowed a line to be built quickly and inexpensively, with the hope that, as revenue increased for the new line, the wooden bridges could be replaced by steel bridges or embankments.

To a surprising degree, timber trestles appear to be nearly as common today as they were in 1917. The AREMA publishes a *Practical Guide to Railway Engineering*, an encyclopedic guide to all aspects of railroad engineering, which includes a chapter on timber structures. The author of this chapter comments on the common nature of timber trestles: "While the advent of economical steel construction has more or less eliminated timber from new mainline structures of any size, the lower initial cost and ease of construction still makes timber construction attractive for many light density lines. Additionally, because of the relative ease of repair, many significant older timber structures remain in service today. In all of North America, timber trestles are the preponderant type of structure still found on branch lines, short lines and at temporary crossings."³⁶ This analysis suggests two things. First, railroads keep older timber trestles in service "because of the relative ease of repair." Second, it suggests that for branch lines or short lines, the timber trestle is preferred, even for new construction.

The common presence of timber trestles was also noted in a recent study of railroad bridge safety prepared by the General Accounting Office, or GAO. In this 2007 report on railroad bridge safety, the GAO cited a 1999 survey by the Federal Railroad Administration that found there are 61,000 bridges on

³³ Wilcott C. Foster, *A Treatise on Wooden Trestle Bridges According to the Present Practice on American Railroads*, 1917 Edition.

³⁴ Foster, 1.

³⁵ Foster, 4.

³⁶ American Railway Engineering and Maintenance of Way Association, or AREMA, *Practical Guide to Railway Engineering*, 2007. Chapter 8-11.

Class I railroad lines.³⁷ Of these, 36 percent are made of timber, making wood the most common bridge material for railroad bridges; the other materials are steel (32 percent), masonry (20 percent) and unidentified materials for the remainder. If these figures are accurate, there are 19,520 timber bridges in use by Class I railroads in the United States. There are also 15,000 bridges owned by Class II and III lines, of which more than 5,000 are timber. Relying upon this large-scale data, it is reasonable to expect that there are more than 24,000 timber bridges in use by railroads today. That number would not include the Los Gatos Creek Bridge, which is not in current railroad use.

One of the key conclusions of the GAO report is that neither the federal government nor the states have systems in place for inspecting railroad bridges or even for knowing how many railroad bridges are in place. This is in stark contrast to the situation with highway bridges, where both the states and the federal government maintain very accurate lists of such bridges as well as the results of regular safety maintenance inspections. As a result, it is far more difficult to draw conclusions about the actual percentages associated with any one bridge type, including the timber trestle. The conclusions of the GAO and the AREMA, however, are that the trestle is the most common type of bridge, especially on branch lines or on Class II or III lines.

It is nearly impossible to test the conclusions of the GAO and AREMA commentators because there is no current public data on railroad bridge types. It is possible, however, to see how different bridge types were distributed in California as recently as 1970 by inspecting the records of the Southern Pacific Railroad in the library and archives of the California Railroad Museum. The Railroad Museum has a wonderful collection of bridge logs from the Southern Pacific, going back to the early years of the 20th century. For present purposes, however, the more recent data is most useful, as the more recent the data, the more likely it is to approximate circumstances today. The 1970 bridge log covers only the Southern Pacific Sacramento Division, which included Central California outside the Bay Area, as well as portions of Nevada. The table below shows the distribution of five bridge types on 753 miles of Southern Pacific Railroad. The ODT refers to open deck timber trestle, similar to the Los Gatos Creek Trestle. BDT refers to a ballasted deck trestle, similar to the Los Gatos Creek structure but with a closed box deck that held ballast. Concrete and steel bridges are self-explanatory. Culverts can be concrete or stone, although most appear to have been concrete. These figures indicate that as recently as 1970, timber trestles represented a huge part of the Southern Pacific bridge population. If one discounts the culverts, there were 755 true bridges on these 753 miles of track. Of these, 619 were timber trestles, either open or ballasted decks, or roughly 82 percent of all bridges in that part of the Southern Pacific system.

BRIDGES IN SOUTHERN PACIFIC SACRAMENTO BRANCH, 1970 INSPECTION REPORT

Name of Line	Miles	ODT	BDT	Concrete	Steel	Culvert
Woodland to Tehama	108	1	121	0	4	208
Roseville to Castle Rock	192	9	229	6	45	788
Sacramento to Rocklin	23	2	13	4	13	85
Rocklin to Colfax	31	2	14	1	13	99
Colfax to Norden	51	0	4	1	13	422
Norden to Eder	5	0	4	0	0	57
Eder to Reno	45	1	64	1	11	298

³⁷ General Accounting Office, "Railroad Bridges and Tunnels: Federal Role in Providing Safety Oversight and Freight Infrastructure Investment Could Be Better Targeted," GAO 07-770, 2007, 6.

Polk to Elvas	4	0	0	0	0	15
Citrus Heights	2	2	0	0	0	3
Woodland to Knights Landing	17	4	2	1	1	3
Mattheson Branch	10	0	1	1	1	97
Oroville	25	2	0	0	2	15
Placerville line	60	21	2	3	4	295
Stirling Branch	30	10	1	0	2	147
Walnut Grove Branch	33	15	2	0	4	55
Yuba City	44	4	0	1	0	26
Colusa Branch	73	80	9	0	4	127
TOTALS	753	153	466	19	117	2740

Another interesting point from the 1970 bridge inspection report is that timber trestles were not a product only of the early years of railroad construction. To get a sense of when these bridges were located, records were inspected for 79 timber trestles on about 80 miles of track on the Woodland to Tehama line. Of these, 18 (23 percent) were built between 1900 and 1909, 2 (3 percent) between 1911 and 1920; 24 (30 percent) between 1921 and 1930; 28 (35 percent) between 1931 and 1940; and 7 (9 percent) after 1940. These figures are consistent with the observations of the AREMA guidelines that timber trestles are still commonly used in branch lines; by 1970 the Woodland to Tehama Branch had diminished in utility and has since been largely taken over by a short line operator.³⁸

The Development of the Community of Willow Glen

Willow Glen has arguably a more complicated relationship with San Jose City Hall than any other neighborhood within San Jose. Willow Glen began life as a named but unincorporated community at the southern edge of San Jose. It became a separate incorporated city in 1927, in large part because of disagreement with the City of San Jose about where the Southern Pacific Railroad should built its north-south alignment. Nine years later, it allowed itself to be annexed to the City of San Jose but has held on to a spirit of independence, born of its brief life as a separate city.

The Willow Glen community is south and a little west of downtown San Jose. It was first settled in the 1860s as an agricultural community but was increasingly converted to suburban and urban uses in the early 20th century.³⁹ Community leaders attempted to incorporate in 1917 but that effort failed. They

³⁸ It is difficult to establish the number of existing timber trestles in San Jose and Santa Clara County because there are no available public records and because an onsite survey would require fouling the tracks, generally regarded as trespassing. San Jose historian Jean Dresden maintains that there are eight existing trestles in the county, four of which are on the old Western Pacific alignment. However, because she does not identify her sources, this estimate cannot be verified.

³⁹ There are numerous histories of this community. Darrell Alvin Hoff, "A Study of the Community of Willow Glen, San Jose, California," M.A. San Jose State University, 1995; John Rivizza, "Splendid Isolation: A Brief History of the City of Willow Glen, 1927-1936," 1994; Bob Garratana, *Old Willow Glen*, 1977;

tried again in 1927 and the effort was successful. In 1936, the people of the City of Willow Glen voted to be annexed into the City of San Jose and the community has been part of San Jose since that time.

The actions of the Southern Pacific and Western Pacific played a part in the decision to incorporate in 1927 and, in the view of some, to unincorporate in 1936. The problem with the Southern Pacific was also a source of disagreement between the people of Willow Glen and the city government of San Jose. The Southern Pacific had an active line that ran down 4th Street in downtown San Jose, which caused traffic congestion in the downtown area. The city council of San Jose sought to force the Southern Pacific to move the line west, which would have resulted in a bifurcation of the Willow Glen community.⁴⁰ The Southern Pacific had actually acquired a right of way through the area but construction was delayed by American entry into World War I and governmental takeover of the railroad system.

At the same time, the Western Pacific Railroad sought approval from the Railroad Commission to build into San Jose via a circuitous "fishhook" alignment discussed earlier. The people of Willow Glen complained mightily to the Commission. As discussed below under "Grade Separations," the engineer for the Railroad Commission observed that Willow Glen people were opposed to any entry of the Western Pacific Railroad into San Jose, especially into the Willow Glen neighborhood.

Likely in response to both railroad alignments (Southern Pacific and Western Pacific), local leaders petitioned the County Board of Supervisors to schedule an incorporation vote. The vote was taken in November 1917 but failed 273-155.⁴¹

The ire of the community was tested again in 1927. As one historian notes: "On July 22, 1927, the Southern Pacific, in conjunction with the San Jose City Council and City Manager, announced a plan for the removal of the 4th Street Railway station and tracks and the re-routing of a new railway. The new route would run from downtown San Jose along the Alameda, across Los Gatos Creek, around the Palm Haven district and across Willow Street through the Willow Glen district."⁴² Another election was held in November 1927 and this time the vote passed.

Willow Glen would remain an independent city for only nine years, annexing itself to San Jose in 1936. During those years, the Southern Pacific and City of San Jose managed to figure out how to get the trains off 4th Street without going through Willow Glen. The Southern Pacific moved its main depot to Cahill Street (the modern Diridon Station) and the north-south track that once went down 4th Street was moved to an alignment that just missed going through Willow Glen. That station and track realignment were completed in 1935. The next year, Willow Glen voted to annex itself to the city, giving it access to better sewers and other civic amenities.

Grade Separation as a Safety Issue in California and San Jose

Throughout the 20th century and into the 21st century, the State of California has wrestled with the question of how best to eliminate conflicts between automobile and truck traffic on the one hand and railroad traffic on the other. The origin of this conflict was clear: most train corridors were built before automobiles and trucks came into widespread use and, even among later-developed train lines such as

⁴⁰ Hoff, 88.

⁴¹ Rivizza, 5. Two prominent leaders of the Willow Glen incorporation effort were L.D. Bohnett and Paul Clark.

⁴² Rivizza, 5.

the Western Pacific Railroad, railroad traffic had priority when railroad and vehicular traffic met at grade.

The conflict over vehicular-railroad traffic was especially heated during the early decades of the 20th century, as car and truck usage accelerated in California, faster than in any other state of the union. In 1916, the California Railroad Commission produced a report, "General Program on Investigation of the Grade Crossing Problem in California to be Undertaken by the Commission."⁴³ The report analyzed the extent of the problem. "The grade crossing conditions in California are worse than in any other state in the Union." California at that time had two percent of the trackage in the country but five percent of accidents involving vehicles and railroads. And the problem was huge: in 1914, 4,900 Californians were killed or injured through a vehicle-train collision.⁴⁴ The Commission estimated the cost of providing grade separations and concluded it was so expensive that, "Plainly any movement to separate all grade crossings in the State is entirely out of the question." The Commission recommended a course of installing better signals, cutting down visual obstructions, and so forth, but pursuing grade separations "in extreme cases and only as a last resort."

The interface between vehicles and trains was both dangerous and annoying. Even where signals were installed, for example, vehicles might have to wait for long periods of time while a train or trains cleared the roadway. The grade separation movement reflected an attempt by the various communities within the state to convince the Railroad Commission that the situation in that community constituted an "extreme case" and deserved a "last resort" solution.

In some cases, the communities were successful. The problem in the City of Los Angeles, for example, was so dire that all parties, including the railroads, agreed that something needed to be done. The Railroad Commission was able to convince the railroads and the city to jointly sponsor a series of large bridges across the tracks, which ran along both sides of the Los Angeles River. This effort, financed equally by the city and the railroads, was one of the most ambitious grade separation programs anywhere in the United States. The joint railroad-city cooperative program also resulted in construction of Union Station in downtown Los Angeles.⁴⁵

Not surprisingly, the people of San Jose and the emerging community of Willow Glen tried to make a case for being an "extreme case" deserving grade separations when the Western Pacific Railroad proposed to build through the area.

In late 1917, the Engineering Department of the California Railroad Commission prepared a lengthy report on grade crossing issues raised by the proposal of the Western Pacific Railroad to build an extension from Niles Canyon to San Jose.⁴⁶ The author, H.G. Butler, was the Assistant Chief Engineer for the California Railroad Commission. He made it clear that the Commission was put in a difficult position by the attitudes of the leaders of the Western Pacific and the Southern Pacific Railroad. The City of San

⁴³ California Railroad Commission, "General Program on Investigation of the Grade Crossing Problem in California to be Undertaken by the Commission," January 1916.

⁴⁴ 1916 report, page 2.

⁴⁵ The Los Angeles situation is detailed in: Stephen D. Mikesell, "The Los Angeles River Bridges: A Study of the Bridge as a Civic Monument," *Southern California Quarterly*, Winter 1986, pp. 365-386.

⁴⁶ California Railroad Commission, Engineering Department, "Application 3139. Subject: Report on Proposed Crossings of Western Pacific Railroad, Niles to San Jose." H.G. Butler, Assistant Chief Engineer, September 26, 1917.

Jose had asked the Commission to compel the Western Pacific to use existing Southern Pacific tracks between Niles Canyon and San Jose, and to compel the Western Pacific and Southern Pacific to build a Union Station to serve passengers from both lines. At one point, he notes: "if joint trackage is possible and desirable, and there is no question that it is desirable, the logical place to make connection between the two roads would be at Niles."⁴⁷ But he lamented that it was virtually impossible to achieve joint usage because the Southern Pacific had refused to allow use of its tracks by a competitor and because Western Pacific leadership had insisted that it simply would not go into San Jose except on its own tracks. He concluded: "On the whole, the practical difficulties in the way of bringing about a joint use of tracks seem to be insurmountable, as far as orders of the Commission are concerned."

In the rest of the long report, Butler explores steps that can be taken to increase safety for the various places the Western Pacific would need to cross highways or other railroad lines, with a crossing-by-crossing analysis of the types of signals and sightlines improvements that would be required.

In his transmittal letter, Butler comments on objections raised by the residents of what was then the unincorporated community of Willow Glen, or Willow Glenn, as he spelled it. His conclusion was that there was nothing the Railroad Commission could do to mollify the residents of Willow Glen. "I have not commented on the protest of the people in the Willow Glenn district, as it appears that it is directed against the construction of any line rather than the manner in which this particular line is to be built. I do not believe that a separation of grades at all crossings in this district would remove the objections of these protestants, and a discussion of the matters seems to be outside the purpose of this report."⁴⁸ It seems clear that the residents were asking for construction of grade separation but Butler concluded that not even that would appease them.

The disagreement about the railroad traffic of the Western Pacific paled in comparison to a much more heated debate in 1925 over the proposal by the City of San Jose to move Southern Pacific Railroad tracks from 4th Street in San Jose to a route parallel to and near Lincoln Avenue, generally acknowledged as the "Main Street" of Willow Glen. It was the debate over the relocation of the Southern Pacific tracks to the Western Pacific alignment that convinced residents of the unincorporated community of Willow Glen to incorporate as a separate city.⁴⁹

F. APPLICATION OF THE CRITERIA FOR THE NATIONAL REGISTER AND CALIFORNIA REGISTER

The Criteria for the National Register and California Register are presented in Section C above. It will be observed that the criteria are nearly identical, with the four National Register criteria identified by letters A, B, C and D and the California Register criteria by numbers 1, 2, 3, and 4. In the analysis below, the National Register Criteria and California Register Criteria will be applied in groups of similar criteria (A and 1, B and 2, C and 3, D and 4).

⁴⁷ Page 4.

⁴⁸ Transmittal letter, 1917 report.

⁴⁹ Cecily Barnes, "Willow Glen residents think of their community, rather than their history, on Founders Day, 1998," reprinted on <http://www.willowglen.com/history/founders.html>

National Register Criterion A, California Register Criterion 1

The majority of the topics identified during the Scoping Meeting for this project and during legal proceedings leading to the current EIR are best considered under the "association with events" criteria A and 1. These include association with the Western Pacific Railroad, association with the Santa Clara County fruit packing industry, association with the development of the community of Willow Glen, and association with the grade separation movement. These will be discussed separately below.

- *Association with the Western Pacific Railroad*

This trestle does not appear to be significantly associated with the history of the Western Pacific Railroad. As discussed in the Historic Context, the Western Pacific Railroad represented an ill-fated attempt by the Gould family to break the Harriman family's stranglehold on the West Coast, particularly the Bay Area of California. It was a daring investment that defied the most consolidated railroad line in the world at the time. The Western Pacific extended throughout the Western United States and in specific communities played an extremely important role. In San Jose, however, the Western Pacific was a latecomer and its contribution never matched that of the long-established Southern Pacific.

The National Register of Historic Places has excellent guidance on how to apply National Register Criterion A. The Office of Historic Preservation, which has jurisdiction over the California Register, announces on its website that its California Register guidance is under review and not currently available.⁵⁰ Because the eligibility criterion 1 for the California Register is almost identical to that of National Register Criterion A, we can safely apply the National Register guidance as a guide to California Register eligibility as well.

National Register guidance in Bulletin 15 offers a three-step process for assessing significance under Criterion A:

- Determine the nature and origin of the property;
- Identify the historic context with which it is associated;
- Evaluate the property's history to determine whether it is associated with the historic context in any important way.⁵¹

As we have seen, the history of the Western Pacific was characterized by daring economic and engineering achievements because existing railroads, especially the Southern Pacific, had long before captured the easiest routes to various California markets. If one wished to point to the physical remains that best characterize the history of the Western Pacific, it would be the great pass through the Feather River Canyon, which still retains many aspects of its original 1906 design.

The Branch Line to San Jose reflects the history of the Western Pacific in that it followed a convoluted alignment to avoid or reduce interaction with existing Southern Pacific operations. The Western Pacific had just emerged from bankruptcy before it began construction into San Jose. While it had enough funds to expand, the Western Pacific was famous for economizing in construction. Norman

⁵⁰ www.ohp.parks.ca.gov states that: "Because Technical Assistance Bulletin 7, California Register, is now under review for updates and revisions, there are no manuals for nominating California Register properties."

⁵¹ National Register Bulletin 15, 12.

Holmes in his study of railroading in *Prune Country Railroading*, argues that the Western Pacific was unusually penurious in building the San Jose line, noting that "because of WP's financial condition, trackage was constructed as inexpensively as possible, using 75 lb. rail, untreated pine ties, no tie plates and little or no ballast."⁵² The San Jose Branch was one of the last "feeder" lines built by the Western Pacific; later expansion was achieved chiefly through acquisition of short lines.

The historic context for the Western Pacific, even the Western Pacific San Jose Branch, does not suggest that this timber trestle is associated with this development "in any important way." The trestle, like other trestles and bridges along the San Jose Branch, helped the branch to operate but only as part of a coordinated transportation network.

A railroad bridge may represent an important part of the history and operations of a railroad line. The Western Pacific Railroad is often highlighted in the history of railroad bridge design, recognizing the beauty and daring of its bridges in the Feather River Canyon.⁵³ Bridges associated with other railroad lines have been listed in the National Register of Historic Places, including the Southern Pacific's I Street Bridge in Sacramento and the Benicia-Martinez Bridge. The National Register eligibility for a bridge like the 1911 I Street Bridge in Sacramento emphasizes both its importance in engineering as well as its pivotal role in carrying the Southern Pacific main line over the Sacramento River.⁵⁴

In assessing the importance of a bridge to the history of a specific line, engineering and transportation considerations often coincide as the difficulty of the bridge design equates to the difficulty and importance of the crossing. The Feather River bridges of the Western Pacific are admired for their daring engineering as well as their role in bringing the line through the difficult Sierra Nevada crossing.

By contrast, simple timber trestles are rarely recognized for their engineering or transportation significance.⁵⁵ The Western Pacific San Jose Branch had to cross several small creeks between Niles Canyon and The Alameda in San Jose. These crossings were relatively simple; hence, timber trestles were used, the least cost solution to a simple crossing.

On balance, the Los Gatos Creek Trestle is best seen as a minor element on a small branch line of the Western Pacific. There is little reason to conclude that this structure's contribution to the Western Pacific Railroad is significant, as significance is measured under National Register Criterion A.

- *Association with the Santa Clara County Fruit Industry*

This trestle does not appear to be significantly associated with the Santa Clara County fruit packing industry. It is beyond dispute that the fruit packing industry was important to the economy and social network of Santa Clara County for more than half a century, between the late 1870s and American involvement in World War II. This trestle, however, is only tangentially related to that industry and does not meet the guidelines for how Criterion A of the National Register should be applied.

⁵² Norman W. Holmes, *Prune Country Railroading: Steel Trails to San Jose*, Huntington Beach, CA, 1985, 141. 75 lb. rails are not used today.

⁵³ The importance of the Feather River bridges is noted in many national surveys, including Richard Cook, *The Beauty of Railroad Bridges in North America, Then and Now*. Golden West Books, 1987 and Brian Solomon, *North American Railroad Bridges*, Voyageur Press, 2007.

⁵⁴ 1981 National Register nomination for I Street Bridge.

⁵⁵ The author of this report, who has worked with historic bridges for 30 years, is unaware of a single timber trestle to be listed in the National Register or California Register.

It will be recalled that the National Park Service calls for a three-step process in applying Criterion A to a specific property: to identify the nature of the property, to identify the historic context with which it is associated, and to evaluate whether that property "is associated with the historic context in any important way." Some who commented during the Scoping Session for the EIR concerning this trestle argued that the trestle is important for its association with the canning industry in San Jose and elsewhere in Santa Clara County, drawing attention to the indisputable importance of the packing industry to the region.

The National Register guidelines differentiate, however, between the importance of the historical development and the importance of the association between a historic property and that historical development. Few would dispute the notion that the packing industry was a key economic force in Santa Clara County from the 1870s through the 1950s. It is legitimate to ask, however, whether this trestle is associated with that development "in any important way."

Drying and canning fruit was an industry that required the involvement of a long chain of participants, from the growers who provided the produce to the wagons, trains, and trucks that carried the finished product to market. At the heart of the industry, however, were the physical plants where the canning and drying took place. Those plants were importantly associated with this industry.

The historical record indicates that there were dozens of such plants in the county, with the biggest collection being in San Jose. These sprawling industrial plants did not fare well once the industry faded in the 1960s. However, there are some physical remnants that were directly and importantly associated with this resource. In 2008, the Society for Industrial Archaeology (SIA) held its annual meeting in San Jose and presented several "walking tours," one of which was entitled "Cannery Life." The tour included several cannery sites for which almost nothing is left and several others where there are some physical remains. There is also a list of properties that have been designated Historic City Landmarks by the City of San Jose, some of which are mentioned in the SIA walking tour. These two sources do not offer a complete listing of properties that were directly related to this industry but they do suggest that at least a few such resources still exist. These include the CalPak District Manager's Office at 734 The Alameda (HL05-154); Pickle Factory Plant No. 39 at 621 N. Eighth Street (HL92-79); Bayside Canning Company at 1290 Hope Street (HL92-69); American Can Company Factory at 190 Martha Street (HL-92-94); and the Stevens Ranch Fruit Barn, moved to History Park in 1979. The SIA tour suggests that remnant pieces can still be found from Calpak No. 3, the biggest cannery in the area located on Auzeais Avenue, not far from the Western Pacific's freight depot on The Alameda, and of Calpak No. 51, also a very substantial operation.⁵⁶

It is important to note that even CalPak No. 3 was not exclusively dependent upon the Western Pacific Railroad for shipping its product. On its "Cannery Life" website, the San Jose History Home includes Sanborn Fire Insurance Maps for this plant, from 1901, 1917, 1929, and 1941.⁵⁷ The plant was already a large operation in 1901 and 1917, long before the Western Pacific Railroad built to San Jose in the 1920s. In 1901 and 1917, CalPak No. 3 was served directly by the Southern Pacific or one of its subsidiaries. Even in 1929 and 1941, the plant was served directly by tracks of the Southern Pacific, not the Western Pacific. CalPak No. 3 existed long before the Los Gatos Creek Trestle was built.

⁵⁶ This discussion does not ensure that all of the resources mentioned in the SIA tour or designated as a San Jose Landmark still exist and retain integrity.

⁵⁷ <http://www.historysanjose.org/cannerylife/>

On balance, it is difficult to conclude that the Los Gatos Creek Trestle is related to the Santa Clara County canning industry in any important way. The industry is represented by many types of resources that were directly linked to it, including packing plants and canneries. Even if the discussion is restricted to the transportation of canned and dried products, it is problematic to argue this timber trestle is significantly associated with this industry. The Western Pacific San Jose Branch is one piece of dozens of transportation networks that served that industry, and all indications are that the traffic of the Western Pacific was dwarfed by that of the Southern Pacific and its subsidiaries. In addition, the Los Gatos Creek Trestle is just one structural element of that branch line. The association of the trestle with that industry is so secondary that it does not appear to meet the National Register Criterion A guidelines.

- *Association with the early history of the Willow Glen community*

As discussed in the Historic Context, the community of Willow Glen was briefly an independent and incorporated city. The impetus for incorporation is generally interpreted as being a three-way struggle among the citizens of the Willow Glen neighborhood, the City Council of San Jose, and the Southern Pacific Railroad over the alignment of the Southern Pacific's major north-south track. The track passed down 4th Street in downtown San Jose, causing great traffic congestion among San Jose motorists. Under state law, the Southern Pacific had a franchise from San Jose to operate within city limits. That franchise expired in the early years of the 20th century and San Jose leaders sought to use the need for a new franchise as leverage to force the Southern Pacific to move its tracks to the west, and to consolidate its passenger service in the area now served by Diridon Station. In 1927, the Southern Pacific and city leaders in San Jose announced agreement on a western alignment that would have included a diagonal passage through Willow Glen. This agreement caused Willow Glen activists to ask for an incorporation vote. Historian Bob Garratana summarizes this situation: "But in 1927 residents rallied themselves for a common cause. The Southern Pacific Railroad, whose contract had expired years earlier, was planning to bisect this quiet community by rerouting its tracks from 4th Street down Willow through a portion of Willow Glen. The battle cry was 'Let's keep the railroad out of our bedrooms.'"⁵⁸

It is also true that there was an earlier unsuccessful attempt at incorporation that was spurred by Willow Glen residents' concern about the Southern Pacific realignment as well as the entry of the Western Pacific into the neighborhood. A previously cited report by an engineer for the California Railroad Commission makes clear that Willow Glen residents had objected to any form of the alignment passing through their neighborhood. He wrote: "I have not commented on the protest of the people in the Willow Glenn district, as it appears that it is directed against the construction of any line rather than the manner in which this particular line is to be built. I do not believe that a

⁵⁸ Bob Garratana, *Old Willow Glen*, 1977. 110. It will be observed that the City of San Jose and the Southern Pacific Railroad were simultaneously pursuing two alignments to avoid the 4th Street corridor, generally called the east and west alignments. According to Jean Dresden, San Jose historian, the east alignment was suggested by the planning firm of Harland Bartholomew & Associates and would have required joint Southern Pacific and Western Pacific use of the Western Pacific alignment through Willow Glen. The west alignment affected only a small corner of Willow Glen; a variation of it was actually built. These east and west alignments are discussed in an August 2, 1927, editorial in San Jose Evening News, provided to this author by Jean Dresden.

separation of grades at all crossings in this district would remove the objections of these protestants, and a discussion of the matter seems to be outside the purpose of this report."⁵⁹

In analyzing the relationship between the Los Gatos Creek Trestle and this chapter of Willow Glen history, there are two good reasons to conclude the two are not associated "in any important way." First, the historical record is clear that was it the proposed realignment of the Southern Pacific's 4th Street track, not the building of the Western Pacific line, which precipitated the incorporation of Willow Glen. To commemorate that relationship, one would better look to the 1935 alignment of the Southern Pacific Railroad, the physical manifestation of the long debate over where and how to realign that track. Diridon Station, for example, is a stately and important example of a resource that was built specifically for that purpose. There are also numerous grade separations around Diridon Station which grew out of the same agreement for realigning the track, reflecting the concern by the leaders of San Jose not simply to move gridlock from 4th Street to the new alignment near Cahill Street.

Second, the incorporation movement was not only about stopping the railroad; it resulted in the creation of a small city that was self-governing for nine years. A resource that is importantly associated with this early history of Willow Glen should take into account that the city actually governed the neighborhood for nine years: maintaining streets, arranging for police services, handling garbage, and so forth. It is likely there exists within the neighborhood a building that more closely reflects how the city functioned: a city hall, a fire department building, a police station, or something of the sort.

It is beyond the scope of the present study to inventory any and all buildings directly associated with the brief period of self-government. The point to be made is that a building directly associated with self-government would reflect that period of neighborhood history in a direct manner. The association of this 1922 timber trestle with the 1927-1936 period of self-government is distant at best.

- *Association with the grade separation movement*

As discussed in the Historic Context, there has been a persistent movement in California and throughout the United States to provide better separation of automobile and train traffic. This movement involves both safety and traffic flow issues. As noted in the Historic Context, a 1916 study by the California Railroad Commission found that there were 4,900 deaths or injuries in 1914 in California associated with railroad-auto interface.⁶⁰ Cities throughout the state scrambled to find a way to provide some type of relief, with grade separation being the most effective but also the most expensive option.

The long dispute between the residents of Willow Glen and the City of San Jose was precipitated by an effort in San Jose to eliminate its greatest auto-railroad choke point on 4th Street downtown. The preferred solution in 1927 involved moving the congestion point from downtown San Jose to streets in Willow Glen, something that was not well-received in Willow Glen. Ultimately, the railroad and the City

⁵⁹ California Railroad Commission, Engineering Department, "Application 3139. Subject: Report on Proposed Crossings of Western Pacific Railroad, Niles to San Jose." H.G. Butler, Assistant Chief Engineer, September 26, 1917. Transmittal letter.

⁶⁰ California Railroad Commission, "General Program on Investigation of the Grade Crossing Problem in California to be Undertaken by the Commission," January 1916.

of San Jose found an alignment that moved the trains off 4th Street but also bypassed Willow Glen, no doubt moving the point of congestion to points north and west of Willow Glen. The solution did, however, result in various grade separations near Diridon Station, at Julian, Alameda, Park, San Carlos, Bird, Delmas, Provost, and Willow. Many of those grade separations are still in use.⁶¹

The Los Gatos Creek Trestle is particularly unrepresentative of this problem in that it carried a railroad over a waterway and is not directly associated with either the problem or the solution. There are bridges that have been listed in the National Register of Historic Places on the basis of solving the grade crossing problem; the aforementioned Los Angeles River bridges, built in the 1920s and early 1930s, were listed for that reason as well as the architecture of the bridges. Another Northern California example is the Sierra Boulevard Overhead structure in Roseville over the Union Pacific tracks. It is worth noting that the solution to a grade crossing problem ordinarily involves a highway bridge or a highway underpass rather than a railroad bridge because it is usually more cost effective to raise or sink a highway than to raise or sink a railroad. The aforementioned railroad underpasses around the 1935 realigned Southern Pacific tracks are directly associated with the grade separation movement in San Jose and Santa Clara County. The Los Gatos Creek Trestle is not, and it does not qualify for listing in the National Register or California Register for a potential association with this historic theme.

National Register Criterion B, California Register Criterion 2

There is no indication that the Los Gatos Creek Trestle is associated with a person important to our history. Neither was there a suggestion made during the Scoping for the current EIR that such an association exists. It is concluded the trestle does not meet either National Register Criterion B or California Register Criterion 2.

National Register Criterion C, California Register Criterion 3

- Rarity or Importance as an example of a timber trestle bridge

National Register Criterion C includes four possible ways in which a property may qualify: embodies distinctive characteristics of a type, period, or method of construction; represents the work of a master; possesses high artistic value; or represents a significant and distinguishable entity whose components may lack individual distinction. Of these, only the first has been mentioned as a potential area of significance for the Los Gatos Creek Trestle. There has been no suggestion that the trestle was designed by a master bridge engineer.⁶² No one has suggested that the trestle is of "high artistic value." And the fourth category applies to historic districts and no one has suggested that this isolated trestle is part of a potential historic district. In applying National Register Criterion C to this trestle, the

⁶¹ California Department of Transportation, Bridge Inventory indicates that the San Carlos Grade separation (37c-195) was built in 1932 and is still in use, as is the facility at Julian (37c-207, 1935); at Taylor (37c-278, 1935); Delmas (37c-704, 1935) and Almaden (37c-264, 1935). The Southern Pacific Railroad had initially proposed to build a single grade separation rather than the five it ultimately constructed in the 1930s. It is likely this augmented effort at grade separation was in response to criticism coming from both the City of San Jose and the City of Willow Glen.

⁶² Unfortunately, despite repeated efforts, the author of this report was not able to locate original plans for this bridge. The City of San Jose was not given any such plans when it assumed ownership from the Union Pacific Railroad. The author inspected all citations to "Technical Drawings" in the vast Western Pacific Railroad holdings of the California State Railroad Museum library. While there are some bridge plans in that collection, there is no bridge plan for this trestle.

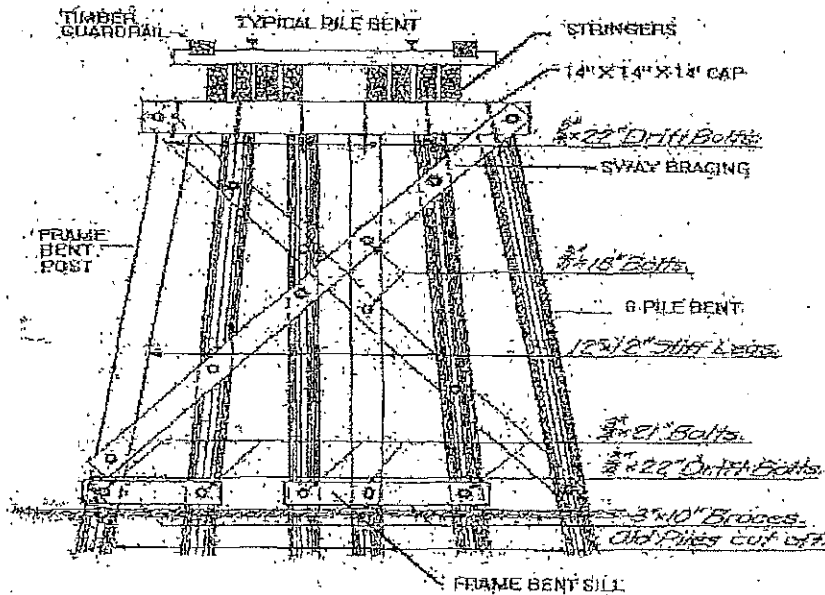
appropriate guidance from the National Register bulletin is that applying to "distinctive characteristics of a type, period, or method of construction."

In discussing the distinctive characteristics and the type, period or method of construction, Bulletin 15 offers the following guidance: "A structure is eligible as a specimen of its type or period of construction if it is an important example (within its context) of building practices of a particular time in history. For properties that represent the variation, evolution, or transition of construction types, it must be demonstrated that the variation, etc., was an important phase of the architectural development of the area or community in that it had an impact as evidenced by later buildings."⁶³ It will be observed that the language of this guidance is clearly directed toward architectural values and properties; the National Register guidance often must be interpreted to apply to engineering features.

Using this guidance, the type and period of construction are easily identified. The bridge type is an open deck, pile-supported timber trestle. The "open deck" part of the type description refers to a deck in which there is no ballast; the opposite is a "ballast deck." The "pile-supported" part of the type description refers to the use of bents made of timber piles in the substructure. As noted earlier, this bridge is somewhat unusual in that there are different numbers of piles in different bents, but in general, one could characterize the substructure as comprising six-pile bents, noting that the number of piles sometimes varies.

The AREMA Inspection manual includes an illustration of a typical 6-pile bent, braced in the manner of the Los Gatos Creek Trestle described earlier. This illustration fits the bents of the Los Gatos Creek Trestle very closely, except that in some instances there are more or fewer than six piles.

⁶³ Bulletin 15, 18.



From American Railway Engineering and Maintenance of Way Association, *Practical Guide to Railway Engineering*, 2003.

In assessing whether the Los Gatos Creek Trestle represents "an important example (within its context) of building practices of a particular time in history," the structure must be seen as both a typical and an atypical example of its type. It is typical in that it was originally constructed in a manner called forth in all historic as well as contemporary analyses of the timber trestle structural type. It is atypical in that it has been repaired and maintained in ways that have detracted from its ability to convey the typical appearance of such a structure.

One point that must be recalled is that a timber trestle is a very common resource type. The historic context documents that timber trestles are found in the thousands in California. Historic preservationists have long recognized the difficulty involved in evaluating resource types for which there are many examples. As noted earlier, it is difficult to document the number of remaining timber trestles in San Jose or anywhere else, owing to the absence of an official governmental register of railroad bridges and because field survey would require fouling the track, generally regarded as trespassing. San Jose historian Jean Dresden documents the existence of eight timber trestles in Santa Clara County, four of which are on the Western Pacific San Jose Branch. However, because she does not list her sources, that contention cannot be verified; there may be eight or even more of such bridges in the county.

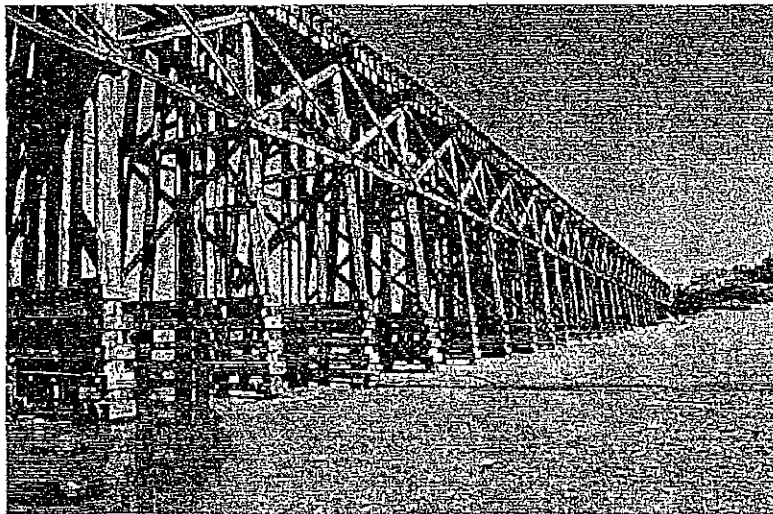
Fortunately, the National Register program at the National Park Service does offer some guidance for dealing with common resource types, in "Evaluating Common Resources for National Register of Historic

Places Eligibility: A National Register White Paper.”⁶⁴ This “White Paper” recognizes that certain resource types are “ubiquitous, and, therefore, difficult to evaluate.” In dealing with ubiquitous resources, this White Paper places special emphasis on recognizing types and sub-types of the common resources as a way of differentiating significant from insignificant examples. By identifying sub-types, it may be possible to “reduce the number of properties or groups of properties that constitute a basis for comparison.”

As discussed in an earlier section of this report, the only distinction made by bridge inspectors for the Southern Pacific Sacramento Department was between open deck and ballast deck timber trestles. This distinction concerns only the deck supports; the timber trestle types are otherwise nearly identical. In his thoughtful analysis of railroad bridge types, *The Beauty of Railroad Bridges*, Richard J. Cook suggests another sub-type in timber trestles: the framed trestle, which was built around four-legged frames, usually of squared timbers. The framed trestle form was used for very tall bridges and provided the most dramatic and daring crossings.

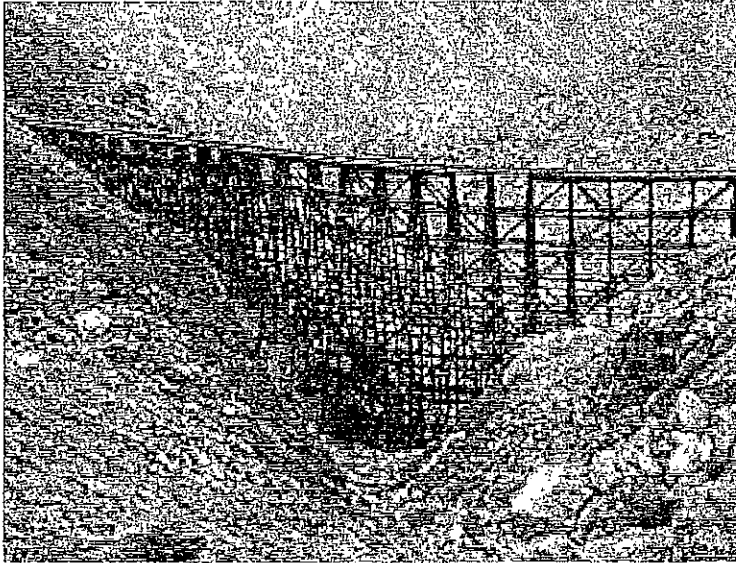
Cook includes photographs of only a few of the most dramatic examples of different bridge types (stone bridges, steel trusses, concrete arches, timber trestles, and so forth). Every timber trestle illustrated in his book is a framed trestle, most of them being very tall and dramatic. Well-known timber trestles in California are also dominated by framed trestles. Two very notable examples, both owned by California State Parks, are framed timber trestles. One is the Pudding Creek Trestle, near Ft. Bragg on the Mendocino Coast. Another is the Carrizo Gorge, or Goat Canyon, Trestle in Anza-Borrego State Park in the desert of San Diego County.

Pudding Creek Trestle



⁶⁴ Barbara Wyatt, “Evaluating Common Resources for National Register of Historic Places Eligibility: A National Register White Paper,” 4-9-09.

Goat Canyon Trestle



Following the logic of the White Paper on Common Resources, one may conclude that there are, in fact, specific sub-types of the timber trestle bridge type that can be seen as significant. The tall framed trestles, for example, achieved great engineering significance and incredible beauty. The far more common pile-bent trestles are so common as to make it unlikely that any one would be significant under National Register Criterion C on the basis of its design alone. A trestle might also be significant for historical associations, as with the Southern Pacific trestle on the coast in Orange County, California that gained great celebrity as the gateway to The Trestles, a surfing spot listed in the National Register for its role in the development of the California surf culture.⁶⁵ That type of significance, however, would better be judged under National Register Criterion A.

On balance, there is no evidence to suggest that the Los Gatos Creek Trestle achieved the kind of distinction needed to represent a significant example of a common property type. It does not appear to be significant under National Register Criterion C or California Register Criterion 3.⁶⁶

G. OVERALL CONCLUSIONS REGARDING POTENTIAL HISTORICAL SIGNIFICANCE OF THE LOS GATOS CREEK TRESTLE

This report applies the eligibility criteria for the National Register of Historic Places and the California Register of Historical Resources to the Los Gatos Creek Trestle, to determine whether it meets the definition of a "historical resource," as that term is used in CEQA guidelines. This report concludes that

⁶⁵ Lamentably, the trestle for which the site was named was recently replaced with a metal bridge.

⁶⁶ This evaluation under National Register Criterion C and California Register Criterion 3 has focused on significance rather than integrity because, in the absence of significance, integrity is not a sufficient consideration to warrant eligibility. The integrity of the trestle is generally good with two major exceptions: the removal of tracks, and the recent installation of protective fencing at the track level.

the trestle does not meet the National Register or California Register eligibility criteria and is not a historical resource.

H. SIGNIFICANCE UNDER CITY OF SAN JOSE LANDMARKS PROGRAM

The City of San Jose, like most medium- to large-sized California cities, has adopted a landmark ordinance that enables the City to designate properties as historic landmarks. The legal basis for this program is found at San Jose Municipal Code, Chapter 13.48, Historic Preservation.

As with most municipal historic preservation programs, the City of San Jose assigns primary responsibility for designating landmarks to a Historic Landmarks Commission. An applicant for landmark designation is asked to complete a landmarks nomination form, which applies the basis for landmark designation to a specific property. The landmark commission is responsible for making a finding that the property in question meets the city criteria for landmark designation. This process, including the criteria, are quoted below.

13.48.110 Designation

H. Prior to recommending approval or modified approval, the historic landmarks commission shall find that said proposed landmark has special historical, architectural, cultural, aesthetic, or engineering interest or value of an historical nature, and that its designation as a landmark conforms with the goals and policies of the general plan. In making such findings, the commission may consider the following factors, among other relevant factors, with respect to the proposed landmark:

1. Its character, interest or value as part of the local, regional, state or national history, heritage or culture;
2. Its location as a site of a significant historic event;
3. Its identification with a person or persons who significantly contributed to the local, regional, state or national culture and history;
4. Its exemplification of the cultural, economic, social or historic heritage of the city of San José;
5. Its portrayal of the environment of a group of people in an era of history characterized by a distinctive architectural style;
6. Its embodiment of distinguishing characteristics of an architectural type or specimen;
7. Its identification as the work of an architect or master builder whose individual work has influenced the development of the city of San José;
8. Its embodiment of elements of architectural or engineering design, detail, materials or craftsmanship which represents a significant architectural innovation or which is unique.

It will be noted that the San Jose ordinance uses the term factors to describe the criteria for designation, rather than the term, "criteria," which is used in state and federal designation processes. These factors

are repeated nearly verbatim in the City of San Jose application form for historic landmark designation, as follows:

BRIEF STATEMENT EXPLAINING WHY THE PROPOSED LANDMARK HAS SPECIAL HISTORICAL, ARCHITECTURAL, CULTURAL, AESTHETIC, OR ENGINEERING INTEREST OR VALUE OF AN HISTORICAL NATURE, AND HOW THE CHARACTERISTICS OF THE PROPOSED LANDMARK MEET WHICHEVER OF THE FOLLOWING THAT APPLY:

1. Its character, interest or value as part of the local, regional, state or national history, heritage or culture;
2. Its location as a site of a significant historic event;
3. Its identification with a person or persons who significantly contributed to local, regional, state or national culture and history;
4. Its exemplification of the cultural, economic, social or historic heritage of the City of San Jose;
5. Its portrayal of the environment of a group of people in an era of history characterized by a distinctive architectural style;
6. Its embodiment of distinguishing characteristics of an architectural type or specimen;
7. Its identification as the work of an architect or master builder whose individual work has influenced the development of the City of San Jose;
8. Its embodiment of elements of architectural or engineering design, detail, materials or craftsmanship which is either unique or represents a significant architectural innovation.

The landmark designation process in San Jose requires a positive recommendation and finding by the Historic Landmarks Commission and approval by the City Council. There is a slightly different process for designating historic districts but it too requires a finding by the Commission and approval by the City Council.

Two general conclusions may be drawn about the landmark designation process and the factors used to establish significance. First, the eight factors take into account many of the same values embodied in the National Register criteria. Second, the ordinance assigns responsibility for applying these factors to the Historic Landmarks Commission and the City Council. On balance, it must be observed that there is no legal basis for any party other than the Historic Landmarks Commission and the City Council to apply these "factors." The best that an outside party can propose is an opinion about how these factors appear to apply to any given property, such as the Los Gatos Creek Trestle.

Relationship between the San Jose Landmarks factors and National Register Eligibility Criteria

While there are obvious differences between the San Jose factors and National Register eligibility criteria, it is also clear that there are important similarities. It will be recalled that there are four National Register criteria, labeled A, B, C, and D. Criterion A pertains to association with important events. Criterion B pertains to association with important persons. Criterion C pertains to significance in

design, generally architecture or engineering, And Criterion D relates to "information important to our history," and is most commonly applied to archaeological sites.

The City of San Jose factors 1 and 2 are closely related to National Register Criterion A, association with important events.

1. Its character, interest or value as part of the local, regional, state or national history, heritage or culture;
2. Its location as a site of a significant historic event;

San Jose factor 4 also seems to relate to National Register Criterion A, which is often used to apply to the cultural history of groups, such as ethnic groups or religious groups.

4. Its exemplification of the cultural, economic, social or historic heritage of the city of San José;

San Jose factor 3 is very similar to National Register Criterion B, association with important people.

3. Its identification with a person or persons who significantly contributed to the local, regional, state or national culture and history;

San Jose factors 5, 6, 7, and 8 are similar to, although more expansive, than National Register Criterion C, which is geared toward significance in architecture or engineering.

5. Its portrayal of the environment of a group of people in an era of history characterized by a distinctive architectural style;
6. Its embodiment of distinguishing characteristics of an architectural type or specimen;
7. Its identification as the work of an architect or master builder whose individual work has influenced the development of the city of San José;
8. Its embodiment of elements of architectural or engineering design, detail, materials or craftsmanship which represents a significant architectural innovation or which is unique.

Does the Los Gatos Creek Trestle meet the factors in San Jose Landmarks ordinance?

As discussed earlier, the scoping session for the EIR for this project brought forth numerous questions that relate to National Register Criterion A. These included: association with the Western Pacific Railroad; association with the Western Pacific San Jose Branch; association with the canning industry of San Jose; and association with the history of the Willow Glen neighborhood.

These historical associations also align with San Jose landmark factors 1, 2, and 4. The history of the Western Pacific Railroad is best assessed under factor 1 and 2 as is the history of the canning industry. The development of the Willow Glen neighborhood might best be assessed under factor 4.

Across the board, the logic in applying National Register Criterion A applies to factors 1, 2, and 4. The importance of the trestle to the canning industry of San Jose is the same, whether analyzed under Criterion A or factors 1 or 2. The facts regarding the role of this trestle in servicing the canning industry do not change and the basis for ineligibility under National Register Criterion A is the same as that for

San Jose factors 1 and 2. The same may be said of the relationship between this trestle and the development of the Western Pacific Railroad. This trestle was a minor element of the Western Pacific whether evaluated under National Register criteria or San Jose factors.

Similarly, the role of this trestle in the history of Willow Glen does not change, whether it is considered under National Register Criterion A or San Jose factor 4. The brief incorporation of Willow Glen as a city was sparked in part by disagreements between and among the Southern Pacific Railroad, the Western Pacific Railroad, the City of San Jose, and community leaders in the Willow Glen neighborhood. The Los Gatos Creek Trestle is not significantly associated with this aspect or other aspects of the history of this neighborhood.

The four design-related factors, San Jose factors 5 through 8, are far more explicit than National Register Criterion C and deserve detailed analysis. Factor 5 relates to a property portraying the "environment of a group of people in an era of history characterized by a distinctive architectural style." The Los Gatos Creek Trestle does not portray the environment of a group of San Jose people in that the trestle was designed by a corporation headquartered in San Francisco.

Factor 6 is closest in language to National Register Criterion C, and speaks to the "embodiment of distinguishing characteristics of an architectural type or specimen." The foregoing analysis of the potential significance of the trestle under National Register Criterion C applies directly to potential significance under Factor 6. The trestle is not important under Factor 6 for the reasons given in the foregoing discussion of National Register Criterion C.

Factor 7 relates to a property being the work of a noted architect or master builder. The trestle is not the work of a noted architect or master builder.

Factor 8 relates to a property being an example of innovative design: "Its embodiment of elements of architectural or engineering design, detail, materials or craftsmanship which represents a significant architectural innovation or which is unique." As discussed in the foregoing analysis under National Register Criterion C, the Los Gatos Creek Trestle is a typical timber bent trestle, of a type built in the thousands throughout California. By the time it was built in the 1902s, trestles of this sort had already been built for at least half a century. Under this factor, the Los Gatos Creek Trestle is neither innovative nor unique.

General Conclusion Regarding Significance of the Los Gatos Creek Trestle under the Landmarks Program of the City of San Jose

As noted earlier, the Landmark designation process for the City of San Jose belongs to the City of San Jose and responsibility for its implementation is assigned to the Historic Landmarks Commission and the City Council.

It can be observed, however, that the factors to be considered for Landmark designation are fundamentally similar to the criteria for the National Register of Historic Places and California Register of Historical Resources. The logic that finds the Los Gatos Creek Trestle not eligible for the National Register or California Register strongly suggests that the trestle is also not eligible for designation under the Landmarks program of the City of San Jose.

EXHIBIT B

RESOLUTION NO. 77359

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE CERTIFYING THE ENVIRONMENTAL IMPACT REPORT, MAKING CERTAIN FINDINGS CONCERNING MITIGATION MEASURES, AND ADOPTING A MITIGATION MONITORING AND REPORTING PROGRAM, ALL IN ACCORDANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA), AS AMENDED, FOR THE THREE CREEKS TRAIL PEDESTRIAN BRIDGE PROJECT (SCH# 2013112050)

WHEREAS, the City of San José proposes to replace an existing wood railroad trestle with a pre-fabricated, 210-foot-long, single-span steel truss bridge with a poured concrete deck, on the same alignment as the existing bridge, with no permanent supports in the creek channel (although temporary supports might be needed during construction of the new bridge and small retaining walls installed adjacent to the new bridge abutments) to allow for the future Los Gatos Creek Trail connection to the northeast and for a viewing area on the south side of the new bridge, which crosses Los Gatos Creek south of Lotus Street in the City of San José ("City"); and

WHEREAS, the City is the lead agency for the project, and has prepared an Environmental Impact Report ("EIR") for the project pursuant to and in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et seq., "CEQA") and the Guidelines for Implementation of CEQA (Title 14, Cal. Code of Regs., Section 15000 et seq., the CEQA Guidelines); and

WHEREAS, CEQA requires that, in connection with the approval of a project for which an EIR has been prepared which identifies one or more significant environmental effects, the decision-making agency make certain findings regarding those effects. Pursuant to California Public Resources Code Section 21081 and the CEQA Guidelines Section 15091(a), the possible findings are:

- (1) Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR; or
- (2) Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been

adopted by such other agency or can and should be adopted by such other agency;
or

- (3) Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of San José at the meeting held on May 19, 2015, the following:

1. That the above recitals are true and correct; and
2. A mitigation monitoring and reporting program ("MMRP") has been prepared to meet the requirements of Public Resources Code Section 21081.6. This MMRP is designed to ensure compliance with project mitigation measures imposed to avoid or substantially lessen the significant effects identified in the EIR for the project; and
3. The City Council was presented with, and has independently reviewed and analyzed, the Final EIR and other information in the record and has considered the information contained therein prior to acting upon or approving the project, and finds that the Final EIR has been prepared and completed in compliance with CEQA and represents the independent judgment of the City of San José as lead agency under CEQA for the project; and
4. Having considered public comment and submissions related to the historic nature of the trestle, the City Council finds, based on and consistent with the analysis in the Final EIR, that the trestle is not a historic resource; and
5. The City Council finds and recognizes that the Final EIR contains additions, clarifications, modifications, and other information in its responses to comments on the Draft EIR and also incorporates information obtained by the City Council since the Draft EIR was issued and circulated for public review. The City Council does hereby find and determine that such changes and additional information are not significant new information, as that term is defined under the provisions of CEQA, from the information disclosed in the Draft EIR because such changes and additional information do not indicate that any new significant environmental impacts not already evaluated would result from the project and they do not reflect a substantial increase in severity of any environmental impact; and no feasible mitigation measures considerably different from those previously analyzed in the Draft EIR have been proposed that would lessen significant environmental impacts of the project. Accordingly, the City Council hereby finds and determines that recirculation of the Final EIR for further public review and comment is not warranted; and

6. The City Council does hereby make the following findings with respect to the significant effects of the environment of such the project, identified in the hereinbefore mentioned Final EIR, with the stipulations that all information in these findings is intended as a summary of the full administrative record supporting the Final EIR, which full administrative record should be consulted for the full details supporting these findings and which consists of, but is not limited to, the Draft EIR, the Mitigation Monitoring and Reporting Program, all testimony, documentary evidence and all correspondence submitted to the City in connection with the project, and other documents relied upon or prepared by City Staff or consultants related to the project and this Resolution.

**THREE CREEKS PEDESTRIAN BRIDGE PROJECT
SIGNIFICANT ENVIRONMENTAL IMPACTS**

The following findings, including impact statements, mitigation measures, findings and facts in support of findings, are based on the full administrative record, including, but not limited to, the Draft EIR, which contains a detailed discussion of each issue.

BIOLOGICAL RESOURCES / HAZARDOUS MATERIALS

Impacts: **BIO-1: Removal of creosote piles during construction could cause adverse effects on biological resources temporarily, including special status fish species. (Significant Impact)**

HAZ-1. Demolition of the existing bridge structure would generate a large amount of treated wood waste, primarily wood treated with creosote. (Significant Impact)

Mitigation: **MM BIO-1. To minimize impacts from removing creosote piles during bridge demolition, the following mitigation measures would be implemented:**

- Vibratory extraction shall be the preferred method of pile removal.
- The crane operator shall be trained to remove piles slowly. This would minimize sediment disturbance.
- The operator is to "wake up" the pile to break the bond between the pile and the soil by vibrating with sediment. Vibrating breaks the skin friction bond between pile and soil. Bond breaking avoids pulling out a large block of soil, possibly breaking off the pile in the process.
- A major creosote release to the environment may occur if equipment (bucket, steel cable, vibratory hammer) pinches the creosoted piling below the water line. Therefore, the extraction equipment shall be stored and the pile removal process implemented in dry conditions.
- Piling shall not be broken off intentionally by twisting, bending, or other deformation. This practice has the potential for releasing creosote to the water

column.

- Upon removal from substrate, the pile shall be moved expeditiously from the creek into the containment basin. The pile shall not be shaken, hosed off, stripped or scraped off, left hanging to drip, or any other action intended to clean or remove adhering material from the pile.
- Every attempt shall be made to completely remove the piling in its entirety before cutting. If the entire pile cannot be removed or it is accidentally broken off during removal, the piling shall be cut off at least 2 feet below the mudline. A chain shall be used, if practical, to attempt to entirely remove the broken pile; the chain would be attached at the top to a crane that would pull the piling directly upward, removing the piling from the sediment.
- Removed piles shall be placed in a containment basin. This shall be done immediately after the pile is initially removed. The containment basin may be made of hay bales and durable plastic sheeting to contain all sediment and creosote.
- Sediments spilled on work surfaces shall be contained and disposed of with the pile debris at a permitted upland disposal site to minimize transport of creosote in stormwater runoff to wetland environments. "Upland disposal sites" as used herein are sites located on higher ground, away from wetland and riparian habitat.

Finding: Implementation of MM BIO-1 would reduce impacts from the release of creosote as a result of timbers from bridge pilings being removed to a less than significant level.

Facts in Support of Finding: The required construction practices would minimize the disturbance of creosote on the piles to be removed.

CULTURAL RESOURCES

Impact: CUL-1. Previously unknown archaeological resources could be exposed during ground-disturbing operations. (Significant Impact)

Mitigation: MM CUL-1. To minimize potential impacts on unknown prehistoric and historic era archaeological sites and resources, the following measures would be implemented:

- The project proponent shall note on any plans that require ground-disturbing excavation that there is a potential for exposing buried cultural resources.
- The project proponent shall retain a professional archaeologist to provide a preconstruction briefing to supervisory personnel of any excavation contractor to alert them to the possibility of exposing significant prehistoric archaeological resources within the project area. The briefing shall discuss any archaeological objects that could be exposed, the need to stop excavation at the discovery, and the procedures to follow regarding discovery protection and notification of the

project proponent and archaeological team.

- The project proponent shall retain a professional archaeologist on an "on-call" basis during ground-disturbing construction for the project to review, identify, and evaluate cultural resources that may be inadvertently exposed during construction. Should previously unidentified cultural resources be discovered during construction of the proposed project, the project proponent shall cease work within 50 feet of the resources and notify the City of San José immediately. The archaeologist shall review and evaluate any discoveries to determine if they are historical resource(s) or unique archaeological resources under CEQA.
- If the professional archaeologist determines that any cultural resources exposed during construction constitute a historical resource or unique archaeological resource, he or she shall notify the project proponent and other appropriate parties of the evaluation and recommended mitigation measures to mitigate to a less than significant impact. Mitigation measures may include avoidance, preservation in place, recordation, additional archaeological testing, and data recovery, among other options. Treatment of any significant cultural resources shall be undertaken with the approval of the City of San José. The archaeologist shall document the resources using California Department of Parks and Recreation 523 forms and file those forms with the CHRIS/NWIC. The archaeologist shall be required to submit a report of the findings and method of curation or protection of the resources to the City of San José for review and approval. Further grading or site work within the area of discovery shall not be allowed until the preceding steps have been taken.

Finding: Implementation of MM CUL-1 would reduce potential impacts on unknown prehistoric and historic era archaeological sites and resources to a less than significant level.

Facts in Support of Finding: Monitoring by a professional archaeologist would minimize impacts from construction on undiscovered archaeological resources.

HYDROLOGY AND WATER QUALITY

Impact: HYDRO-1. Once the bridge is in use, pedestrian traffic could result in increased trash, litter and dumping, causing water quality impacts in Los Gatos Creek and downstream in the Guadalupe River. (Significant Impact)

Mitigation: MM HYDRO-1: To minimize potential impacts from increased trash and litter, trash receptacles shall be placed at either end of the proposed bridge. Additionally, signs deterring littering shall be conspicuously placed near the bridge.

Finding: Implementation of MM HYDRO-1 would reduce impacts to the creek from litter to less than significant levels.

Facts in Support of Finding: Trash receptacles provide a place for pedestrians to dispose of litter along the creek trail.

NOISE

Impacts: NOI-1: Although construction would only occur for approximately seven months, noise levels may exceed applicable noise standards due to pile driving. (Significant Impact)

NOI-2: Construction of the project, including pile driving, would temporarily increase noise levels in the immediate vicinity of the activity. (Significant Impact)

Mitigation: MM NOI-1: Prior to beginning pile-driving activities, the contractor shall notify residents within a 300-foot radius at least 1 week in advance. Additionally, sound curtains shall be used as necessary to help reduce construction noise levels at nearby residences.

Finding: Implementation of MM NOI-1 will reduce potential noise impacts to surrounding uses to a less than significant level.

Facts in Support of Finding: Implementation of MM NOI-1 will reduce the potential for potential noise impacts by providing neighborhood notification, and by requiring sound barriers to be erected during pile driving.

FINDINGS CONCERNING ALTERNATIVES

In order to comply with the purposes of CEQA, it is important to identify alternatives that reduce the significant impacts that are anticipated to occur if the Project is implemented and to try to meet as many of the Project's objectives as possible. The CEQA Guidelines emphasize a common sense approach -- the alternatives should be reasonable, should "foster informed decision making and public participation," and should focus on alternatives that avoid or substantially lessen the significant impacts. The Project would have no significant environmental impacts with implementation of adopted mitigation measures. The EIR analyzed two alternatives to the proposed Project:

- Retrofit Alternative
- No Project Alternative

1. Retrofit Alternative

The Retrofit Alternative consists of the reuse and repair of the existing Los Gatos Creek Trestle. This alternative would include replacing the existing deck with an 8-inch-thick concrete deck,

installing a new 54-inch-high galvanized metal bicycle-safe railing system, as well as making structural modifications to the existing bridge.

The Retrofit Alternative would be less environmentally beneficial than the proposed Project with respect to the impact categories of transportation and traffic, land use, hydrology and water quality, and biological resources. With respect to other impact categories, the Retrofit Alternative and proposed Project would be similar.

Both the proposed Project and the Retrofit Alternative would provide a bicycle and pedestrian crossing of Los Gatos Creek on the alignment designated in relevant plans and policies; therefore, both would meet this fundamental project objective. However, the Retrofit Alternative would not meet as well as the proposed Project the other fundamental project objective of creating this crossing with a structure that is cost effective in terms of both up-front capital costs and long-term operations and maintenance costs due to the long-term maintenance needs of the existing trestle. For this reason, the Retrofit Alternative would not be fully consistent with General Plan goals and policies regarding fiscally sustainable public infrastructure. In addition, the Retrofit Alternative would require short-term closures of the trail use during larger maintenance activities, to undertake future retrofit projects, and to repair fire damage. These occasional closures would require trail users to take alternate routes across Los Gatos Creek, or would otherwise discourage trail use. Thus, the Retrofit Alternative would be less consistent with the General Plan transportation and trail network goals and policies than the proposed Project. Because the trestle structure would remain in place under the Retrofit Alternative, the debris blockages that occur at the trestle would continue, as compared to the proposed Project which would improve the hydrological conditions.

On a long-term basis, the Retrofit Alternative would result in additional environmental impacts that would not occur under the proposed Project, primarily the following:

- The Retrofit Alternative includes a 25-foot clear space on either side of the bridge to help protect the timber structure from fire damage. As a result, the Retrofit Alternative would require more vegetation removal than would the proposed Project. The loss of riparian canopy as a result of the vegetation buffer would lead to reduction in the habitat value of the creek.
- The Retrofit Alternative would require periodic disturbance to the riparian forest as a result of maintenance activities, primarily from clearing debris from the piers following major storms. This would not be required under the proposed Project due to the clear-span bridge.
- Environmental benefits associated with pier removal would not occur under the Retrofit Alternative. The clear-span bridge that would be constructed under the proposed Project would allow more natural, unobstructed flow conditions with corresponding biological and hydrological benefits.

Because this alternative does not fully meet the project objectives and General Plan goals and policies and is not as environmentally beneficial as the proposed Project, the alternative is therefore rejected.

2. No Project Alternative

Under the No Project Alternative, the City would not replace the Los Gatos Creek Trestle. The existing trestle would remain fenced off from public access for safety reasons, and the planned trail projects would be rerouted.

The No Project Alternative would be less environmentally beneficial than the proposed Project with respect to the impact categories of transportation and traffic, land use, hydrology and water quality, and biological resources. With respect to other impact categories, the Retrofit Alternative and proposed Project would be similar and have no significant impacts.

The No Project Alternative would not meet either of the project objectives. The No Project Alternative would not provide a bicycle and pedestrian crossing of Los Gatos Creek along the former railroad alignment. Rerouting the trail to avoid the trestle would require acquisition of other right-of-way which may not be feasible and would be at additional cost. The maintenance costs to address further deterioration and vandalism of the trestle would be in addition to the costs of establishing a crossing at a different location.

The No Project Alternative would result in additional environmental impacts that would not occur under the proposed Project, primarily the following:

- The No Project Alternative would require periodic disturbance to the riparian forest as a result of maintenance activities, primarily from clearing debris from the piers following major storms. This would not be required under the proposed Project due to the clear-span bridge.
- Environmental benefits associated with pier removal would not occur under the No Project Alternative. The clear-span bridge that would be constructed under the proposed Project would allow more natural, unobstructed flow conditions with corresponding biological and hydrological benefits.

The No Project Alternative would be inconsistent with the Envision San José 2040 General Plan, specifically General Plan Policy FS-5.11, relating to Fiscally Sustainable Infrastructure, and General Plan Policy TN-2.3, which implements the Goal of Trails as Transportation that the creation of alternative transportation corridors in general and the Three Creeks Trail Master Plan, which specifically propose the railroad alignment for bicycle and pedestrian use. In addition, the No Project Alternative would not provide the biological and hydrologic benefits associated with the proposed Project, and would require periodic temporary disruptions for maintenance activities. The No Project Alternative is therefore rejected.

RD:SSL:JMD
5/6/2015

RES NO 77359

For the reasons discussed above, the proposed Project is environmentally superior to both the Retrofit Alternative and to the No Project Alternative.

Conclusion

Pursuant to California Public Resources Code Section 21081 and the CEQA Guidelines Section 15091(a)(1), the City Council adopts and makes the following findings with respect to the significant impacts identified in the Final EIR:

Changes or alterations have been required in, or incorporated into, the Project which avoid or substantially lessen the significant environmental effects as identified in the Final EIR.

MITIGATION MONITORING AND REPORTING PROGRAM

A Mitigation Monitoring and Reporting Program has been prepared for the Project as required under Section 21081.6 of the CEQA Statute and Section 15097(b) of the CEQA Guidelines, and is hereby adopted.

LOCATION AND CUSTODIAN OF RECORDS

The documents and other materials that constitute the record of proceedings on which the City Council based the foregoing findings and approval of the project are located at the Department of Planning, Building and Code Enforcement, City Hall, 200 East Santa Clara Street, 3rd Floor – Tower, San José, California.

RD:SSL:JMD
5/6/2015

RES NO 77359

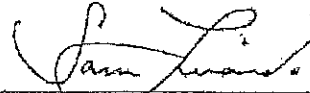
ADOPTED this 19th day of May, 2015, by the following vote:

AYES: CARRASCO, JONES, KHAMIS, MATTHEWS, NGUYEN,
OLIVERIO; LICCARDO.

NOES: PERALEZ, ROCHA.

ABSENT: HERRERA, KALRA.

DISQUALIFIED: NONE.



SAM LICCARDO
Mayor

ATTEST:



TONI J. TABER, CMC
City Clerk

MITIGATION MONITORING AND REPORTING PROGRAM

Three Creeks Trail Pedestrian Bridge Project

CITY OF SAN JOSE

May 2015

PDC013-085
SCH# 2013112050

79359

SJ0120

PREFACE

Section 21081 of the California Environmental Quality Act (CEQA) requires a Lead Agency to adopt a Mitigation Monitoring and Reporting Program (MMRP) whenever it approves a project for which measures have been required to mitigate or avoid significant effects on the environment. The purpose of the MMRP is to ensure compliance with the mitigation measures during project implementation.

The Project proposes to replace an existing wood railroad trestle with a pre-fabricated, 210-foot-long, single-span steel truss bridge with a poured concrete deck, on the same alignment as the existing bridge, with no permanent supports in the creek channel (although temporary supports might be needed during construction of the new bridge and small retaining walls installed adjacent to the new bridge abutments) to allow for the future Los Gatos Creek Trail connection to the northeast and for a viewing area on the south side of the new bridge, which crosses Los Gatos Creek south of Lonus Street in the City of San José. The Environmental Impact Report (EIR) concluded that the implementation of the project could result in significant impacts to the environment and therefore mitigation measures were incorporated into the proposed project and are required as a condition of project approval.

This MMRP addresses the mitigation measures in terms of how and when they shall be implemented. Proposed project oversight is the responsibility of the Environmental Review Division Manager of the City of San José Department of Planning, Building, and Code Enforcement, who shall receive a copy of all applicable studies, recommended mitigation measures and monitoring reports.

This document does *not* discuss those subjects for which the EIR concluded that the impacts from implementation of the project would be less than significant.



Environmental Impacts	Mitigation Measures	Responsibility for Implementation	Method of Compliance	Timing of Compliance
Biological Resources				
<p>BIO-1: Removal of creosote piles during construction could cause adverse effects on biological resources temporarily, including special status fish species.</p>	<p>MM BIO-1. To minimize impacts from removing creosote piles during bridge demolition, the following mitigation measures shall be implemented:</p> <ul style="list-style-type: none"> • Vibratory extraction shall be the preferred method of pile removal. • The crane operator shall be trained to remove pile slowly. This would minimize sediment disturbance. • The operator is to "wake up" the pile to break the bond between the pile and the soil by vibrating with sediment. Vibrating breaks the skin friction bond between pile and soil. Bond breaking avoids pulling out a large block of soil, possibly breaking off the pile in the process. • A major creosote release to the environment may occur if equipment (bucket, steel cable, vibratory hammer) pinches the creosoted piling below the water line. Therefore, the extraction equipment shall be stored and the pile removal process implemented in dry conditions. • Piling shall not be broken off intentionally by twisting, bending, or other deformation. This practice has the potential for releasing creosote to the water column. • Upon removal from substrate, the pile shall be moved expeditiously from the creek into the containment basin. The pile shall not be shaken, hosed off, stripped or scraped off, left hanging to drip, or any other action intended to clean or remove adhering material from the pile. • Every attempt shall be made to completely remove the piling in its entirety before cutting. If the entire pile cannot be removed or it is accidentally broken off during removal, the piling shall be cut off at least 2 feet below the mudline. A chain shall be used, if practical, to attempt to entirely remove the broken pile; the chain would be attached at the top to a crane that would pull the piling directly upward, removing the piling from the sediment. 	<p>Construction Contractor</p>	<p>The Public Works Division shall include these provisions in the construction specifications.</p> <p>The construction contractor shall provide evidence of compliance to the Public Works Division.</p>	<p>During demolition</p>

77359

Environmental Impacts	Mitigation Measures	Responsibility for Implementation	Method of Compliance	Timing of Compliance
	<ul style="list-style-type: none"> ▪ Removed piles shall be placed in a containment basin. This shall be done immediately after the pile is initially removed. The containment basin may be made of hay bales and durable plastic sheeting to contain all sediment and creosote. <p>Sediments spilled on work surfaces shall be contained and disposed of with the pile debris at a permitted upland disposal site to minimize transport of creosote in stormwater runoff to wetland environments. "Upland disposal sites" as used herein are sites located on higher ground, away from wetland and riparian habitat.</p>			
Cultural Resources				
<p>CUL-1. Previously unknown archaeological resources could be exposed during ground-disturbing operations.</p>	<p>MM CUL-1. To minimize potential impacts on unknown prehistoric and historic era archaeological sites and resources, the following measures shall be implemented:</p> <ul style="list-style-type: none"> ▪ The project proponent shall note on any plans that require ground-disturbing excavation that there is a potential for exposing buried cultural resources. ▪ The project proponent shall retain a professional archaeologist to provide a preconstruction briefing to supervisory personnel of any excavation contractor to alert them to the possibility of exposing significant prehistoric archaeological resources within the project area. The briefing shall discuss any archaeological objects that could be exposed, the need to stop excavation at the discovery, and the procedures to follow regarding discovery protection and notification of the project proponent and archaeological team. ▪ The project proponent shall retain a professional archaeologist on an "on-call" basis during ground-disturbing construction for the project to review, identify, and evaluate cultural resources that may be inadvertently exposed during construction. Should previously unidentified cultural resources be discovered during construction of the proposed project, the project proponent shall cease work within 50 feet of the resources and notify the City of San José immediately. The archaeologist shall review and evaluate any discoveries to determine if they are historical resource(s) or unique archaeological resources under CEQA. ▪ If the professional archaeologist determines that any cultural resources exposed during construction constitute a historical resource or unique archaeological resource, he or she shall notify the project proponent and other appropriate parties of the evaluation and recommended mitigation measures to mitigate to a less than significant impact. Mitigation measures may include avoidance, preservation in place, recordation, additional archaeological testing, and data recovery, among other options. Treatment of any significant cultural resources shall be undertaken with the approval of the City of San José. The archaeologist 	<p>Construction Contractor</p>	<p>The Public Works Division shall ensure that these provisions are included in the construction specifications.</p>	<p>During all phases of construction</p>

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Environmental Impacts	Mitigation Measures	Responsibility for Implementation	Method of Compliance	Timing of Compliance
	shall document the resources using California Department of Parks and Recreation 523 forms and file those forms with the CHRIS/NWIC. The archaeologist shall be required to submit a report of the findings and method of curation or protection of the resources to the City of San José for review and approval. Further grading or site work within the area of discovery shall not be allowed until the preceding steps have been taken.			
Hazardous and Explosive Materials				
HAZ-1. Demolition of the existing bridge structure would generate a large amount of treated wood waste, primarily wood treated with creosote.	See MM BIC-1 for mitigation measure.	Construction Contractor	The Public Works Division shall include these provisions in the construction specifications. The construction contractor shall provide evidence of compliance to the Public Works Division.	During demolition
Hydrology and Water Quality				
HYDRO-1. Once the bridge is in use, pedestrian traffic could result in increased trash, litter and dumping, causing water quality impacts in Los Gatos Creek and downstream in the Guadalupe River.	MM HYDRO-1: To minimize potential impacts from increased trash and litter, trash receptacles shall be placed at either end of the proposed bridge. Additionally, signs deterring littering shall be conspicuously placed near the bridge.	Project Applicant and Construction Contractor	The Public Works Division shall include standard details for trash receptacles and signage in construction plans and specifications.	Following completion of construction

Environmental Impacts	Mitigation Measures	Responsibility for Implementation	Method of Compliance	Timing of Compliance
<p>NOI-1: Although construction would only occur for approximately seven months, noise levels may exceed applicable noise standards due to pile driving.</p>	<p>MM NOI-1: Prior to beginning pile-driving activities, the contractor shall notify residents within a 300-foot radius at least 1 week in advance. Additionally, sound curtains shall be used as necessary to help reduce construction noise levels at nearby residences.</p>	<p>Construction Contractor</p>	<p>The Public Works Division shall include these provisions in the construction specifications.</p> <p>The construction contractor shall provide evidence of compliance to the Public Works Division.</p>	<p>Prior to and during pile installation</p>
<p>NOI-2: Construction of the project, including pile driving, would temporarily increase noise levels in the immediate vicinity of the activity.</p>	<p>See MM NOI-1 for mitigation measure.</p>	<p>Construction Contractor</p>	<p>The Public Works Division shall include these provisions in the construction specifications.</p> <p>The construction contractor shall provide evidence of compliance to the Public Works Division.</p>	<p>Prior to and during pile installation</p>

27359

TAB 11

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9 E-Mail Address: cao.main@sanjoseca.gov

10 Attorneys for CITY OF SAN JOSE and CITY
11 COUNCIL OF THE CITY OF SAN JOSE

ENDORSED
FILED
2015 JUN 15 A 8:32

David E. Thompson, Clerk of the Superior Court
County of Santa Clara, California
By: _____
Deputy Clerk

F. Tong-Miller

12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED JURISDICTION

15 FRIENDS OF THE WILLOW GLEN
16 TRESTLE, an unincorporated association,

17 Plaintiff(s),

18 v.

19 CITY OF SAN JOSE and CITY COUNCIL
20 OF THE CITY OF SAN JOSE, and DOES
21 1-10, inclusive,

22 Defendant(s)/Respondents.

23 Does 1 to 10;

24 Real Parties in Interest.

Case Number: 1-14-CV-260439

REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF RESPONDENT CITY'S
EX PARTE APPLICATION

Date: June 15, 2015
Time: 8:15 a.m.
Department: 21
Judge: Hon. Joseph Huber

California Environmental Quality Act
[CEQA]

25 Respondents City of San José and San Jose City Council (collectively "the City")
26 respectfully requests that the Court take judicial notice of the following documents in
27 support of the ex parte application by the City pursuant to Evidence Code sections 450, *et*
28 *seq.*

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1. Exhibit A: Attached as Exhibit A to the Declaration of Kathryn Zoglin is a true and correct copy of the Revised Historical Evaluation of the trestle from the Environmental Impact Report completed by the City of San Jose and certified by the San Jose City Council on May 19, 2015.

2. Exhibit B: Attached as Exhibit B to the Declaration of Kathryn Zoglin is a true and correct copy of the Resolution Number 77359, which the San Jose City Council adopted on May 19, 2015. By way of this Resolution, the City Council certified the Final EIR. The Resolution attaches a copy of the Mitigation Monitoring and Reporting Program ("MMRP") for the Project.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: June 12, 2015

By: 
KATHRYN J. ZOGLIN
Senior Deputy City Attorney

Attorneys for Respondents City of San Jose
and San Jose City Council

TAB 12

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6 susanbh@preservationlawyers.com

7 Attorney for Petitioner
8 Friends of the Willow Glen Trestle

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA CLARA**

11
12
13 **Friends of the Willow Glen Trestle,** Case No. CIV 114CV260439
14 an unincorporated association;

15 Petitioners,

**Petitioner's Opposition
to Ex Parte Application
for Demolition**

16 v.

17 **City of San José and City Council**
18 **of the City of San José;**

Honorable Joseph Huber

19 Respondents;
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Introduction

The City of San José's appeal to the Sixth District remains pending. In light of that appeal, this Court is currently without jurisdiction to consider the City's request to allow demolition of the Trestle and should decline to act on the *ex parte* application.

Even if the appeal were to be dismissed, the judgment requires that the City file a return to the writ after setting aside its approvals of the Three Creeks Trail Pedestrian Bridge Project. The writ also requires the City Council to refrain from further action to approve the demolition of the Willow Glen Trestle pending certification of an EIR and "compliance with the requirements of the California Environmental Quality Act."

(Peremptory Writ.) The City is required by the terms of the writ to file a return by November 2015. If the City contends that it has complied with the writ, the Friends of the Willow Glen Trestle will have the opportunity to file objections to the adequacy of the writ return. Only then would this Court adjudicate the adequacy of the return with the benefit of briefing and hearing in this important matter; *not ex parte*. And none of these things have even happened. The City's sole claim is that it has certified an EIR.

Thus, without addressing the disputed law and facts on the merits, there are two conclusive procedural problems with the City's novel *ex parte* application:

- (1) This Court has no jurisdiction to discharge the writ since an appeal is pending;
- (2) Even if there were no appeal, by order of this Court the City must file a writ return. That return would be accompanied by a complete supplemental record of proceedings, not just a few excerpts, and would be adjudicated upon notice if opposed by the Friends.

1 **Discussion**

2 The Friends will not here address the substantive arguments presented by the
3 City as to its claimed compliance with CEQA, because those require a supplemental
4 administrative record and a reasonable time for adequate briefing. Upon resolution of
5 the appeal, "the trial court shall retain jurisdiction over the public agency's proceedings
6 by way of a return to the peremptory writ until the court has determined that the public
7 agency has complied with this division." (Public Resources Code, § 21168.9, subd.(b).)
8 When the City files a return to the writ, the Friends can address its substance and the
9 applicable law applied to the facts; suffice it to say that the parties disagree.
10
11

12 The statutory authority controlling this *ex parte* application is Code of Civil
13 Procedure section 916, subdivision (a), which provides that an appeal stays proceedings
14 in the trial court. Thus, the *ex parte* application must be denied. Case law supports the
15 conclusion that a trial court's power to enforce, vacate or modify an appealed judgment
16 is suspended while the appeal is pending. (*Else v. Saberi* (1992) 4 Cal.App.4th 625, p.
17 6219; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, p. 189-90.)
18
19

20 The City cites to no CEQA cases to support its disagreement with section 916.
21 Its reliance on a distinction between mandatory and prohibitory injunction to support
22 its application to rescind the Court's protections of the Willow Glen Trestle is
23 unavailing. Without taking the time to distinguish the cases, they may be disregarded
24 because the peremptory writ includes an underlying mandatory order: that the City and
25 City Council "forthwith set aside your approvals of the Three Creeks Trail Pedestrian
26 Bridge Project ..." That order is the subject of the City's pending appeal. Even under the
27
28

1 City's interpretation of the case law, the Court is therefore now without jurisdiction to
2 rescind or amend the order. Without the City's approval of the demolition project, the
3 demolition may not proceed. None of the City's cited cases are relevant.
4

5 Since there is now no effective approval of the project, the City has no authority
6 to demolish the Willow Glen Trestle even if it certifies an EIR. The City's *ex parte*
7 application simply recites and requests notice of Resolution 77359 to the effect that it
8 certified an EIR and made findings; it did not set aside its prior approval based on the
9 Mitigated Negative Declaration or reapprove the Three Creeks Trail Pedestrian Bridge
10 Project after "compliance with the requirements of the California Environmental
11 Quality Act." (Peremptory Writ.) And it has no authority to do so absent (1) a successful
12 appeal or (2) dismissal of the appeal and completion of a successful writ return process.
13
14

15 Conclusion

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17 The Friends respectfully request that the Court decline to act on the City's
18 *ex parte* application in light of its lack of jurisdiction while the merits of this case are
19 pending on appeal. Even if the Court had jurisdiction, such an important matter as the
20 proposed demolition of the Willow Glen Trestle would require a noticed motion.
21

22 June 17, 2015

Respectfully submitted,

23 BRANDT-HAWLEY LAW GROUP

24
25
26 by



27 Susan Brandt-Hawley
28 Attorney for Petitioner

Friends of the Willow Glen Trestle v. City of San Jose

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, California 95442.

On June 17, 2015, I served one true copy of:

Petitioner's Opposition to Ex Parte Application for Demolition

x _____ By emailing to Kathryn Zoglin, Attorney for Respondents, at

Katie.zoglin@sanjoseca.gov

I declare under penalty of perjury that the foregoing is true and correct and is executed on June 17, 2015, at Glen Ellen, California.



Susan Brandt-Hawley

TAB 13

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(ENDORSED)

FILED

JUN 22 2015

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY S. Roman DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

FRIENDS OF THE WILLOW GLEN
TREESTLE, an unincorporated assn.,

Case No.: 1-14-CV-260439

Plaintiff,

ORDER

vs.

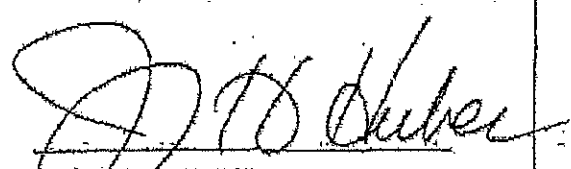
CITY OF SAN JOSE ET AL.,

Defendants

The City of San Jose, by ex parte application in the above entitled matter, requested this Court to rescind its Order, Judgment and Peremptory Writ of Mandamus to the extent it prohibited removal and demolition of the Willow Glen Trestle. The court requested and received a written response from Plaintiff. The court has read and considered all the papers and accepts the position outlined by Plaintiff. The City of San Jose's request is DENIED.

SO ORDERED.

Dated: June 22, 2015.


SANTA CLARA COUNTY SUPERIOR COURT
JOSEPH H. HUER
JUDGE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1000

(ENDORSED)

FILED

JUN 22 2015

TO: FILE COPY

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY: S. Roman DEPUTY

RE: Friends Of The Willow Glen Trestle vs City Of San Jose, et al
Case Nbr: 1-14-CV-260439

PROOF OF SERVICE

ORDER BY EX PARTE APPLICATION TO REBIND THE COURT'S ORDER, JUDGMENT AND
PEREMPTORY WRIT OF MANDAMUS

was delivered to the parties listed below in the above entitled case as set
forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Kathryn J. Zoglin, City Attorney's Office - SJ
200 East Santa Clara St., 16th Floor Tower, San Jose, CA 95113-1905
Susan L. Brandt-Hawley, Brandt-Hawley Law Group
Post Office Box 1659, Glen Ellen, CA 95442

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with
Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD Line, (408)882-2690 or
the voice/relay California Relay Service, (800)735-2929.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each
person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at
San Jose, CA on 06/22/15. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Sylvia Roman, Deputy

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:

**PETITIONERS' APPENDIX
VOLUME 1 OF 1
TABS 1-13
PAGES SJ0001-SJ0134**

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
Davis, California 95442
Phone Number: (707) 938-3908
Fax Number: (707) 576-0175

Attorneys for Real Party in
Interest FRIENDS OF THE
WILLOW GLEN TRESTLE
One (1) Copy

Superior Court of California
County of Santa Clara
191 North First Street
San Jose, California 95113

One (1) Copy

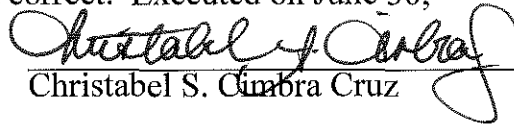
by PERSONAL DELIVERY, with a copy of this declaration, by causing to be personally delivered a true copy thereof to the person at the address set forth below.

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 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. Cumbra Cruz