

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
8 Attorney for Petitioners

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

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

16 Petitioners,

17 v.

18 City of San José; City of San José
19 Department of Public Works;
20 California Department of Fish and
21 Wildlife; and Does 1 to 10;

22 Respondents;
23 _____/

Case No. 18CIV335801

**Supplemental Memorandum
of Points and Authorities
in support of
Preliminary Injunction**

Honorable Thomas E. Kuhnle

1 **Supplemental Memorandum of Points and Authorities**

2 The Conservancy appreciates the opportunity to research and discuss the application
3 of Code of Civil Procedure section 1008 following denial of a motion for preliminary
4 injunction brought under Civil Code section 527.

5 **A. No Published Cases.** After looking high and low, the Conservancy is so far unable
6 to provide citations to *any* reported case addressing the application of section 1008 to a
7 *motion for preliminary injunction*.

8
9 **B. Application of Section 1008 to Injunctive Relief.** When a trial court in *Farber*
10 *v. Bay View Terrace Homeowners Assn* (2006) 141 Cal.App.4th 1007 denied a motion for
11 attorney’s fees without prejudice, section 1008 was held inapplicable. “*Denial of a motion*
12 *without prejudice* impliedly invites the moving party to renew the motion at a later date, when
13 he can correct the deficiency that led to the denial.” (*Id.* at 1015, italics added.)

14 Denials of TROs and preliminary injunctions are also inherently without prejudice.
15 Under CCP section 527, “a preliminary injunction *may be granted at any time before*
16 *judgment [when] sufficient grounds exist therefor.*” (Italics added.) “Sufficient grounds” may
17 manifest over time. Unlike other renewed motions, involving strict procedures and deadlines
18 such as a notice of appeal or motion for summary judgment or summary adjudication, or for
19 excusable neglect, as reflected in cases such as *Le Francois v. Goel* (2005) 35 Cal.4th 1094 and
20 *Even Zohar Construction and Remodeling v. Bellaire Townhouses* 2015) 61 Cal.4th 830, an
21 application for injunctive relief seeks simply to maintain the status quo pending trial. The
22 weighing of relevant equitable factors including hardship and irreparable harm are critical to
23 judicial analysis and decisionmaking and can evolve during the course of a case leading up to
24 trial. Section 1008 thus should not apply following a denied motion for preliminary injunction.

25 The point of section 1008 is to discourage repeated motions on the same facts, law, and
26 circumstances, burdening courts and litigants. As held in *Darling, Hall & Rae v. Kritt* (1999)
27 75 Cal.App.4th 1148, 1156-57: “Section 1008 is designed to conserve the court's resources by
28 constraining litigants who would attempt to bring the same motion over and over.” That is
unlikely to occur for equitable motions for injunctive relief.

1 This Court pointed out to the City unequivocally that circumstances have indeed
2 changed since October 2018. The Conservancy has filed a new motion for preliminary
3 injunction, not reconsideration of the October 2018 motion. Upon the Court’s invitation in
4 open court yesterday, the City was unable to describe *any harm* from the 10-day delay sought
5 by the Conservancy between June 17 when the City prefers to begin work and June 27 when
6 this important case is set to be heard on the merits. Surely “sufficient grounds exist therefor.”

7 **C. Jurisdictional Requirements of Section 1008 Refer to Substance.** In 1992,
8 the Legislature amended section 1008 to add subdivision (e), making the statute jurisdictional.
9 (Stats. 1992, ch. 460, § 4, p. 1833.) The legislative findings specify that the intent is “to clarify
10 that no renewal of a previous motion, whether the order deciding the previous motion is
11 interim or final, may be heard unless the motion is based on new or different facts,
12 circumstances, or law.” (Stats. 1992, ch. 460, § 1(c), p. 1831.) The Legislature did not provide
13 that other procedural requirements, such as an affidavit, are jurisdictional. The language of the
14 statute suggests that the affidavit is simply the means of conveying the required jurisdictional
15 facts. In cases construing section 1008 after the 1992 amendment, courts have held that the
16 requirement of “new or different facts, circumstances, or law” is jurisdictional. (*See Gilberd v.*
17 *AC Transit* (1995) 32 Cal.App.4th 1494, 1500; cf. *Morite of California v. Superior Court* (1993)
18 19 Cal.App.4th 485, 492.) By contrast, the lack of an affidavit has not been held jurisdictional.

18 The Conservancy’s motion contains all elements required in an affidavit under section
19 1008 (b), as it references the earlier motion, the basis for the denial, and new circumstances
20 justifying injunction. The Conservancy’s counsel also filed a sworn declaration. And even if
21 every fact is not in an affidavit (a declaration under penalty of perjury is equivalent to an
22 affidavit, Code Civ. Proc., § 2015.5) that would not deprive the Court of jurisdiction as it may
23 consider all facts in the pleadings. (Cf. *Jurado v. Toys “R” Us, Inc.* (1993) 12 Cal.App.4th 1615,
24 1617-1618 [affidavit requirement relating to motion to postpone trial is not jurisdictional and
25 may even be excused by oral representations].) Any procedural error here was harmless. In
26 certain circumstances, a 1008 affidavit serves a critical purpose, as when a moving party must
27 establish that it could not have presented newly offered facts and legal arguments earlier. No
28 such consideration arose here. If section 1008 applies, its terms are met.

1 **D. The Court May Reconsider its Ruling on its Own Motion.** “Section 1008 is
2 designed to conserve the court's resources by constraining litigants who would attempt to bring
3 the same motion over and over. On the other hand, these same judicial resources would be
4 wasted if the court could not, on its own motion, review and change its interim rulings.”
5 (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156–1157.) The “trial court retains
6 the inherent authority to change its decision at any time prior to the entry of judgment” and to
7 “reconsider interim rulings on its own motion.” (*Le Francois v. Goel, supra*, 35 Cal.4th 1094,
8 1100, 1107.) This is an alternative approach that this Court may choose in light of the equities.

9 The changed circumstances in the new motion include clarification of the facts
10 underlying the arguments on the merits. For example, the parties now agree that the Trestle is
11 a mandatory historic resource because it is now listed in the California Register.

12 The primary issue on the merits has narrowed to whether the City’s approval of the 2018
13 Streambed Alteration Agreement was discretionary under CEQA’s rubric. The City’s upcoming
14 brief on the merits of the mandamus petition and the Conservancy’s reply brief will focus on
15 that issue and delve deeply into the case law to find parallels. The Court has shared with
16 counsel its appreciation of the importance of the issues as well as their complexity.

17 The Conservancy again requests that the Court allow this case to be heard and decided
18 on its merits — coming right up in less than three weeks. Substantial public policy as
19 repeatedly recognized by the Court of Appeal lies in trial courts taking actions that “will permit,
20 rather than prevent, the adjudication of legal controversies on their merits.” (*Comunidad en
21 Accion v. Los Angeles City Council* (2013) 219 Cal. App.4th 1116, 1132.)

22 The Conservancy respectfully requests that the preliminary injunction issue.

23
24
25
26
27
28
June 11, 2019

Respectfully submitted,


Susan Brandt-Hawley
Attorney for Petitioners

3 **PROOF OF SERVICE**

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

7
8 On June 11, 2019, I served one true copy of:

9 **Supplemental Memorandum of Points and Authorities**
10 **in support of Preliminary Injunction**

11 _____ By placing a true copy enclosed in a sealed envelope with prepaid postage,
12 in the United States mail in Petaluma, California, as listed below:

13
14 By emailing a copy to counsel as listed below:

15 Margo Laskowska margo.laskowska@sanjoseca.gov

16 Elisa Tolentino elisa.tolentino@sanjoseca.gov

17 Sara Van Loh sara.vanloh@doj.ca.gov

18 Connie Sung connie.sung@doj.ca.gov

19
20
21 I declare under penalty of perjury that the foregoing is true and is executed on
22 June 11, 2019, at San Francisco, California.

23
24
25 _____
26 Susan Brandt-Hawley