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

Attorney for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

Willow Glen Trestle Conservancy, an unincorporated association, and Friends of the Willow Glen Trestle, an unincorporated association;

Petitioners,

v.

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

Respondents;

_____/

Case No. 18CIV335801

Renewed Motion for Preliminary Injunction; Memorandum of Points and Authorities

Honorable Thomas E. Kuhnle

Date June 10, 2019
Time 2:00 p.m.
Dept 5

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Introduction

The Willow Glen Trestle Conservancy and Friends of the Willow Glen Trestle (collectively, the Conservancy) respectfully renew their motion for preliminary injunction to prevent the imminent demolition of the Trestle. To protect the remedy prayed for in the Conservancy's mandamus petition— a peremptory writ to enforce CEQA's procedural and substantive protections of historic resources — the Trestle must remain standing. Demolition would moot the case and defeat the Court's jurisdiction.

In October 2018 the Court granted a TRO to stay demolition. It thereafter denied preliminary injunction based on the pleadings and documents available in the short time frame for review, finding the Conservancy unlikely to prevail on the merits. (Order Denying Preliminary Injunction (Order).) As it turned out, in addition to the Streambed Alteration Agreement (SAA) that is the subject of this action, the City had not disclosed that it also lacked a federal permit restricting demolition from October to June. The Conservancy did not pursue appeal after learning there was no need for injunction.

The Conservancy expected this case to settle or resolve on its merits by now, but that has not occurred despite best efforts. Absent injunction, the City has announced its intention to begin physical demolition activities at the Trestle site on June 17 and represents that it has all required permits and approvals. At the Conservancy's request and with the cooperation of all counsel, this Court issued a Scheduling Order and has set expedited hearing dates both for this motion and the merits. The record is lodged and the merits hearing is set for June 27. The Conservancy has filed its opening brief.

At the recent case management conference the Court shared with counsel that the denial of preliminary injunction in October 2018 had been a close and difficult decision based on its view of the merits. The Court's ruling stated in part that the subject SAA did not trigger supplemental CEQA review because it did not involve the exercise of discretion by the City. (Order at 6-7.)

In support of this renewed motion, with the full record finally available to clarify the SAA proceedings, the Conservancy can better document and demonstrate City discretion. The length of the requested injunction is now very short since the merits hearing is set 10 days after the City's earliest starting date of June 17. Last October, the City urgently requested that it be allowed to proceed with demolition, representing that it could demolish the Trestle within the less than two weeks of time available to work within Los Gatos Creek. The City also said it needed to proceed with demolition to retain a grant that would be expiring at year's end.

The Conservancy greatly appreciates the Court's accommodation of an expedited hearing on the merits, assuring no prejudice to the City. Even more so than last October, "the balancing of the relative interim harm to the parties from issuance or nonissuance of the injunction weighs in favor of the Petitioners." (Order at 2.)

The Conservancy renews its request for preliminary injunction to preserve the status quo and protect the Court's jurisdiction. The Trestle has stood for almost 100 years and the City has no legal right to proceed with demolition of an historic resource without compliance with state law. Injunction under the facts is manifestly equitable.

Statement of Facts

The facts as laid out in the mandamus petition, referenced in the Court's Order, and discussed in the opening brief are undisputed. The record and pleadings in the underlying cases 14CIV260439 and 508656 are incorporated by reference along with *Friends of the Willow Glen Trestle v. City of San José* (2017) 2 Cal.App.5th 457.

Three years after the City's approval of demolition, the Trestle was listed in the California Register. The SAA between the City and the California Department of Fish and Wildlife (CDFW) is the final discretionary approval impeding demolition.

Discussion

A. Irreparable Harm is Manifest

Absent injunction, the City intends to demolish the historic Willow Glen Trestle. Demolition would result in significant environmental impacts contrary to the goals of CEQA and would moot this case and defeat the jurisdiction of the Court. Imminent demolition of an historic resource presents one of the clearest equitable scenarios for injunction. Since the Court previously found that the balance of hardships favors the Conservancy, it will not further explore the *prima facie* harm here.

B. The Conservancy is Likely to Succeed on the Merits

From its inception in 1970, CEQA has protected the 'built' environment along with the natural environment. (Pub. Resources Code, § 21001 (b) ["… it is the policy of the state to take all action necessary to provide the people of this state with …enjoyment

of aesthetic, natural, scenic, and historic environmental qualities …"].) CEQA recognizes that the demolition of an historic resource listed in the California Register has a significant environmental impact as a matter of law.[1]

The CEQA Guidelines provide that "once a project has been approved, the lead agency's role in project approval is completed, *unless further discretionary approval on that project is required*." (CEQA Guidelines [14 Cal.Code Regs.], § 15162 (c), italics added.) In that circumstance, an agency conducts supplemental review to address new information or substantial changes in circumstances that were not previously studied. (Pub. Resources Code, §§ 21166 (b) and (c); Guidelines, § 15162, (a)(3)(A).)

Here, the City must conduct supplemental environmental review before approving the SAA, which is its final discretionary action before demolition may proceed. Because the Trestle is now listed in the California Register its historic status is undeniable at last. Demolition would cause a significant unstudied environmental

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[1] **Pub. Resources Code, § 21084.1**. A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment. For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, … or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1, are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. 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, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section.

impact. (Pub. Resources Code, § 21084.1.) This listing of the Trestle equates to new information and changed circumstances of great importance under section 21166.

Citing to the record the City certified a few days ago, the Conservancy will respond to the Court's preliminary concerns about the merits of the petition:[2]

1. ***Standard of Review***. In the 2018 injunction proceedings, the parties did not fully explore the applicable standard of review. However, while the appropriate level of CEQA review for demolition of a *potential historic resource* that is *not listed in any historic register* is complex, as discussed below, since this case now involves a *listed* resource the standard of review is straightforward. It is the fair argument standard.

The Supreme Court's ruling in *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (*Gardens 1*) (2016) 1 Cal.5th 937, 957-958 and the remand decision in *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (*Gardens 2*) (2017) 11 Cal.App.5th 596 are controlling. The *Gardens* cases interpret CEQA to require that under Public Resources Code section 21166, *supplemental CEQA review of a project initially approved with a negative declaration must be in the form of an EIR* if the record contains a '*fair argument*' that the project *may* have a significant environmental impact that was not addressed in the prior environmental document. (*Ibid.*; *see Gardens 2*, 11 Cal.App.5th

[2] All points on the merits are more fully explained in the opening brief.

at 607-608; Guidelines, §§ 15162, 15164.) The fair argument standard is *not* deferential to the City. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318.)

The substantial evidence standard relied upon in the Order does not apply under the facts of this case. (Order at 4, 5, 7.) The *Gardens* cases specifically disapprove the longstanding holding to the contrary in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 137. (*Gardens 1, supra*, 1 Cal.5th at 958, n.6 and *Gardens 2, supra*, 11 Cal.App.5th at 608, n.4)

Because the Trestle is now listed in the California Register, it is a "mandatory" historic resource under the definition in Public Resources Code section 21084.1 (*ante* at 5, n.2) and its demolition would unquestionably have a significant environmental impact. Preparation of an EIR is thus required to consider alternatives and mitigations. Before it was listed in the California Register, the Trestle was a "discretionary" resource described in the "final sentence" of section 21094.1 as addressed in *Friends of the Willow Glen Trestle v. City of San José, supra,* 2 Cal.App.5th at 18-23, 32.[3] The substantial evidence standard is applied to determine historicity of such "discretionary" historic resources. At the time of the City's 2014 demolition approval, which was the

[3] In *Friends*, *id.* at 24, the Sixth District Court of Appeal cited *League for Protection v. City of Oakland* (1997) 52 Cal.App.4th 896 with approval. The League case was the first to "group[] into three categories the resources referenced in section 21084.1. It identified those resources listed in … the California Register as 'mandatory' historical resources. Those listed in a local historical register or recognized by a local government by ordinance or resolution to be historically significant were called 'presumptive' historical resources. It referred to the remaining resources as those 'deemed historical resources at the discretion of the lead agency.' [Citation.]"

sole focus of the appellate ruling, the Trestle was not listed in the Register and so the complex judicial ruling focused on the "final sentence" of section 21084.1.

> The statutory scheme and the legislative history of section 21084.1 require application of a deferential substantial evidence standard of judicial review, rather than a fair argument standard of judicial review, to a lead agency's decision that a resource is not a *discretionary historical resource* under the final sentence of section 21084.1.

(*Id.* at 33, italics added.) Upon its California Register listing, the Trestle became a "mandatory" historic resource whose loss would be a significant impact that the City must now study in an EIR and mitigate before considering approval of demolition.

2. *The Historic Listing of the Trestle is New Information.* All parties agree that the Santa Clara Superior Court ruled on remand from the Sixth District that the City's reliance on a mitigated negative declaration in 2014 was supported by substantial evidence that the Willow Glen Trestle is not a discretionary historic resource. That ruling was final as to the City's 2014 demolition approval. However, the City misleads the Court in arguing that the remand ruling could in any way affect or undercut the import of the listing of the Trestle in the California Register in 2017. The remand order did not freeze the non-historic status of the Trestle for all time.

In preparing its application for the SAA in March 2018, the City staff should have prepared a supplemental EIR to inform the City's discretion before entering into the SAA, being well aware both that the SAA would be the City's final approval before

demolition of the Trestle and that the California Historical Resources Commission had formally listed the Trestle in the California Register and that its demolition would therefore result in a significant environmental impact requiring EIR review.

During last year's injunction proceedings, the City represented to the Court that it could rely on its 2015 EIR for the SAA even though the EIR did not treat the Trestle as historic (AR 539.) This representation confused the issues. We know from the record that the City considered but then deliberately did *not* rely on the 2015 EIR for its approvals of the Trestle demolition in order not to moot its then-pending appeal of the negative declaration case. We now know that the SAA states on its face both that it is subject to CEQA review and that it was prepared solely in reliance on the [now-inadequate] 2014 negative declaration. (*E.g.,* AR 2-9, 11, 533, 538, 543, 638, 639; *see* Opening Brief at 6.)

The City may also argue that its CEQA discretion under the SAA was limited to compliance with requirements of the Fish and Game Code and protection of riparian resources and Los Gatos Creek. That narrow reading of CEQA is unsupported.

When an agency action in furtherance of its core responsibilities may indirectly result in any significant environmental impacts, its CEQA review and mitigation responsibilities extend to all such impacts. While the SAA is directed at fish and wildlife habitat, the City *chose to pursue* the SAA *in order to demolish the Willow Glen Trestle*. That is the core action. When it approved demolition in 2014 and issued permits and entered into an SAA, the Trestle's historic status had not been established. Things have

changed. It cannot be disputed that the City — unlike CDFW — has authority over the entire Trestle project and can and now must conduct a supplemental CEQA process in the form of an EIR to identify and adopt feasible alternatives that may allow the historic Trestle to serve as a unique link in the Three Creeks Pedestrian Trail project.

Authority for an agency's CEQA compliance to extend beyond the scope of a particular project component is clearly established. The California Supreme Court has in recent years underscored CEQA's requirements that agencies must analyze and mitigate impacts of their actions even if they are not directly part of their decision. (*E.g., Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 [a city's EIR was required to address Environmental Sensitive Habitat Areas (ESHAs) under jurisdiction of the Coastal Commission], *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945 [University must seek funding for traffic problems caused by campus development, although such traffic problems would be off-campus and traffic issues are beyond its educational mission.].)

City of Marina v. Board of Trustees of the California State University (2006) 39 Cal.4th 341, 360-62 held that while education is the University's "core function," mitigating environmental effects is part of its CEQA duties, unrelated to education:

> This is the plain import of CEQA, in which the Legislature has commanded that '[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out ... whenever it is feasible to do so.' (Pub. Resources Code, § 21002.1, subd.(b), italics added; see also id., § 21001.)

3. The City Exercised Discretion in Approving the SAA

In March 2018 the City, as an "*applicant proposing project*," *chose* to request a new SAA to accommodate its proposed demolition project, knowing this was the final step before demolition. (AR 782, 783, italics added.) CDFW rejected the City's new proposed agreement as incomplete based on various biological issues. (AR 996, 998.) The City and CDFW corresponded for months about the content of the SAA. (*E.g.*, AR 997, 1111.) In one section, "... the city recognizes, as a Habitat Plan Co-Permittee, it is using some discretion in exempting this project from the Habitat Plan ..." (AR 997, *see also* 1121-1122, 1221-1223.) The CDFW and the City continued to alter the draft SAA through negotiation and review, including "whether the measures in the SAA "are acceptable" to the City. (AR 1198, 1200-1220, 1225, 1285-1305 and 1322 [substantial back-and-forth comments and amendments of the proposed creek diversion plan]) for seven months until the SAA agreement was signed by both agencies.

As noted above and in the opening brief, because the City had knowledge that the Trestle was historic and that the import of the SAA would be demolition causing a

significant environmental impact, Public Resources Code section 21166 triggered supplemental environmental review by the City as the lead agency.[4]

C. Balance of Hardships Favors the Conservancy

Without preliminary injunction, the Trestle will be demolished. It has stood for almost 100 years and is structurally intact. As the Court has recognized, the Trestle has been passionately championed by local residents for many years because it has been an important part of their history. (Order at 7.) The Court's jurisdiction should be protected. The City's claimed hardship is that the Three Creeks Trail Pedestrian Bridge project that proposes to demolish the Trestle and install a steel bridge will take four months and that its only allowed window of time is from June 17 to October 15.

The record demonstrates the contrary. On October 5, 2018, the City told the Court, supported by the declaration of Michael O'Connell, that it sought to demolish the Trestle over a time period of only a few weeks: "Under the permit conditions, the City may work in the creek only between June 15 and October 15. If the City is prevented

[4] The Conservancy notes the CDFW's primary position is that it has no responsibility as a responsible agency to assess historic resources impacts. Under the facts of this case, which are that the City is equally involved in the SAA approval and remains the lead agency, the Conservancy agrees. However, it does not agree with CDFW's analysis of the legal import of the Trestle's newly-acknowledged historic status. That changed circumstance is more that an identification, it means there is a new unstudied significant environmental impact. (AR 540-541.) The Conservancy agrees with CDFW's statement that "the retrofit [non-demolition] alternative is described as feasible in the 2015 EIR and may reduce significant effects to the Trestle as a historical resource" albeit not within CDFW's jurisdiction as a responsible agency. (AR 541.)

from working on the project in October 2018 it will be unable to start again until after June 2019." (City Opposition to Motion for Preliminary Injunction at 7.)

D. No Bond is Required

The financial damages claimed by the City in the 2018 injunction proceedings do not apply to the short time of injunction sought here.

Further, bonding in environmental cases is subject to Code of Civil Procedure section 529.1, which allows courts to impose a bond as a condition of injunction in a "construction project which has received all legally required licenses and permits" *only* when "there is no reasonable possibility" that the plaintiff will prevail on the merits and when "the plaintiff will not suffer undue economic hardship by filing the undertaking."

The Three Creeks Trail Pedestrian Bridge is a construction project. And while the litigants disagree about the merits of the petition, there is no question that all claims presented here are made in good faith by a non-profit preservation organization — supported by the City's own Preservation Commission. A bond would place the public-interest petitioner out of court. Imposition of a substantial bond requirement where an environmental plaintiff has successfully enjoined a project defeats the policy of citizen enforcement of CEQA. When faced with an analogous statutory scheme, the federal courts harmonized injunction requirements with federal policy acknowledging the importance of private enforcement of environmental laws.

The federal authority is based on a perception that where a court is inclined to issue a stay, as here, the public interest in preventing irreparable damage to the

environment pending a hearing on the merits is more significant than the wallet of a project applicant. (*People ex rel. Van De Kamp v. Tahoe Regional Planning Agency* (1985) 766 F.2d 1319, 1325-1326; *Natural Resources Defense Council, Inc. v. Morton* (D.C. D.C. 1971) 337 F.Supp. 167, 169; Henson and Gray, "Injunction Bonding in Environmental Litigation" (1979) 19 *Santa Clara Law Review* 541, at 569; https://digitalcommons.law.scu.edu/lawreview/vol19/iss3/3/ (Henson).)

Where a petitioner has established a probability of success on the merits and has persuaded a trial court to grant injunctive relief, any substantial bond could "effectively deny access to judicial review" or "close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing" to raise an environmental challenge. (*People ex rel. Van De Kamp v. Tahoe Regional Planning Agency, supr*a, 766 F.2d at 1325.) The federal courts have justified injunctions against multimillion-dollar projects on nominal bonds as low as $1. One commentary concludes that substantial bonds would discourage legitimate environmental actions brought by public interest groups and thus increase environmental degradation. (*Henson, supra*, at 562-565.)

Finally, addressing the mandatory bond language in Code of Civil Procedure section 529, the authors of the well-known treatise *Guide to the California Environmental Quality Ac*t offer that courts may waive bonds or impose nominal bonds "in meritorious environmental lawsuits" and that substantial bond requirements

> . ... should be understood to apply to more typical kinds of civil litigation in which self-interested parties fight over money, rather than to mandamus actions in which petitioners do not seek money damages but instead raise public policy issues relating to environmental protection or similar matters.

(Remy, Thomas, Moose, Manley, *Guide to the California Environmental Quality Act* (Solano Press (11th ed. 2007), Chapter 17, "Injunctive Relief," p. 893.)

The injunction should issue and the Court's discretion should be exercised to require no bond as an equitable matter, as is the practice statewide. A bond would place the Conservancy, whose counsel is working wholly pro bono, out of court prior to a hearing on the merits. The Court's discretion should be exercised to maintain the status quo and avoid such an outcome.

Conclusion

This case presents important issues. Loss of the Trestle would be of grave consequence. The public interest lies in its protection while this case proceeds expeditiously. The Conservancy requests a preliminary injunction without bond.

June 2, 2019

Respectfully submitted,

BRANDT-HAWLEY LAW GROUP

Susan Brandt-Hawley
Attorney for Petitioners

Willow Glen Trestle Conservancy, et al. v. City of San José, et al.
Santa Clara County Superior Court Case No. 18CV335801

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 3, 2019, I served one true copy of:

Motion for Preliminary Injunction; Memorandum of Points and Authorities in support of Renewed Motion for Preliminary Injunction

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

__✓__By emailing a copy to counsel as listed below:

Margo Laskowska	margo.laskowska@sanjoseca.gov
Elisa Tolentino	elisa.tolentino@sanjoseca.gov
Sara Van Loh	sara.vanloh@doj.ca.gov
Connie Sung	connie.sung@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and is executed on June 3, 2019, at Glen Ellen, California.

Susan Brandt-Hawley