

Civil No. H041563

STAY REQUESTED
BY AUGUST 4, 2015

IN THE COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FRIENDS OF THE WILLOW GLEN
TRESTLE, an unincorporated
association;

Civil No. H041563

Related Case No. H042505

Plaintiff and Respondent,

v.

Santa Clara County Superior Court
Case Number 1-14-CV-260439

CITY OF SAN JOSE and CITY COUNCIL
OF THE CITY OF SAN JOSE;

Defendants and Appellants,

On appeal from the Superior Court of Santa Clara County
Honorable Joseph Huber, Department 21
(408) 882-2330

**Application for Stay, Order to Show Cause for Contempt of
Court, Sanctions, and other appropriate relief;
Declaration of Susan Brandt-Hawley;
Request for Judicial Notice**

Susan Brandt-Hawley, SBN 75907
Brandt-Hawley Law Group
P.O. Box 1659
Glen Ellen, CA 95442
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Attorney for Respondent
Friends of the Willow Glen Trestle

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To the Honorable Justices of the Court of Appeal, Sixth District:

Respondent Friends of the Willow Glen Trestle (Friends) petitions for an immediate stay, an order to show cause for contempt of court and sanctions, and other appropriate order or writ of prohibition *to maintain the status quo while this appeal is pending and the current Superior Court writ is outstanding*. The appellant City is inexplicably pursuing demolition of the Willow Glen Trestle, prohibited by the Superior Court's peremptory writ, without awaiting the resolution of this appeal or subsequent discharge of the writ.

Immediate relief is warranted under Civil Code section 923 to preserve the status quo and this Court's jurisdiction. Normally, as in *People ex rel. San Francisco Bay v. Town of Emeryville* (1968) 69 Cal.2d 533, a stay is sought at the request of an appellant due to imminent actions of a respondent, because "fruits of a reversal would be irrevocably lost unless the status quo is maintained." (*Id.*, p. 537.) Here the *appellant* City of San Jose is flaunting judicial orders and threatening demolition of the Willow Glen Trestle without any legal right to take such an action. The danger is that fruits of an *affirmance* of respondent Friends' judgment will be irrevocably lost unless the status quo is protected.

Friends urgently request that this Court ensure the protection of the historic Trestle in the public interest, via an emergency stay by August 4 (the date upon which the San Jose City Council will consider imminent demolition in

closed session upon the request of the City Attorney, as explained below), to preserve this Court’s jurisdiction and Friends’ judgment.

Via the peremptory writ and in accord with established law, the City is *already* legally prohibited from demolishing the Trestle, and Friends therefore move for an order to show cause for contempt and sanctions, and any other order or writ this Court deems appropriate to preserve the status quo.



The Willow Glen Trestle in 1955

Statement of Facts

The Friends of the Willow Glen Trestle champion the adaptive reuse of the 1921 Willow Glen railroad trestle (“the Trestle”) to serve as a pedestrian bridge for the Three Creeks Trail in San Jose. (Joint Appendix (JA) 1.) Although it is undisputed that the reuse of the Trestle is feasible, safe, and less costly than a

new steel bridge, the City instead approved the demolition based on a mitigated negative declaration, refusing to prepare the environmental impact report (EIR) urged by Friends' members to consider feasible alternatives to demolition.

(Respondent's Brief, *passim*.)

Friends then filed the underlying mandamus action. (JA 1.) The Santa Clara Superior Court applied long-established precedent to require preparation of an EIR due to overwhelming evidence in the record that the demolition of the Trestle would result in significant environmental impact. The Honorable Joseph Huber first granted the Friends' motion for preliminary injunction and then granted the mandamus petition following preparation of the administrative record, full briefing, and an expedited hearing on the merits in July 2014. (JA 49-485, 648.) Judgment was entered for Friends and a peremptory writ issued. (JA 664-710.) The City then filed this appeal. It is fully briefed except for Friends' answer to an amicus brief due on August 10. The merits of the City's appeal are not before the Court in this application.

While its appeal is pending, the City filed an *ex parte* application in the Superior Court on June 15, 2015, requesting rescission of the judgment to the extent that prohibits demolition of the Trestle. The City contended that its certification of an EIR cured any violation of CEQA connected to its approval of the demolition a year ago, and that it should be allowed to demolish the Trestle

forthwith without further legal process while the appeal remains pending and the peremptory writ is still outstanding. Friends opposed the frivolous application and Judge Huber denied it on June 22. (Request for Judicial Notice.) The City then petitioned this Court for a writ of mandate or other relief. (Related Petition, Ho42505.) This Court summarily denied the City's petition on June 30.

Three weeks went by. On July 21 Deputy City Attorney Kathryn Zoglin gave notice to Friends' [undersigned] counsel that unless Friends obtains a new court order by July 31, the City intends to proceed with demolition of the Willow Glen Trestle because it has certified an EIR and "thus approved the project." (Declaration of Susan Brandt-Hawley, p. 13.) Friends' counsel urgently responded that demolition would be unlawful because this appeal remains pending and the peremptory writ prohibiting demolition is still in place. (*Id.*, p.15.) Friends' counsel pointed out that, among other problems with the City's proposed action, the City Council had certified an EIR but its adequacy has not yet been adjudicated via a writ return, and the City has not taken any action to approve the demolition of the Trestle. While the appeal is pending, the trial court, as it has already ruled, has no jurisdiction to consider a writ return. (*Ibid.*)

A day later, the deputy city attorney withdrew the 10-day notice. She then provided further notice that the San Jose City Council will consider "this matter" in closed session on August 4. (Declaration of Brandt-Hawley, p. 17.) Despite

Friends' further objections, the City declined to provide any assurance that the City will not precipitously demolish the Trestle on or after August 4th. (*Id.*, pp. 19, 21.) Friends' counsel made it clear that she needed to seek a stay and would seek sanctions absent further assurance:

I need your confirmation that the City will not proceed with demolition ... Otherwise I will seek judicial relief. Your letter did not provide that confirmation. I have no idea what the City Council will direct after the scheduled closed session. ... Will you confirm as I have requested — see bolded statement above! —?

(*Id.*, p. 20.) Attorney Zoglin replied on July 28:

... [T]he City does not plan on removing the trestle absent some kind of judicial action. *That being said, I will advise you if City Council provides other direction.*

(*Id.*, p.21.) The City thus declined to provide the assurance needed by Friends.

By all accounts, in closed session on August 4 the City Council will consider recommendations to demolish the Trestle immediately or on short notice, despite the pendency of this appeal and the peremptory writ that remains in force. This would cause irreparable harm and defeat the jurisdiction of this Court.

Discussion

Code of Civil Procedure section 1094.5 subdivision (g) provides in relevant part that when a writ issues by a trial court and there is an appeal, “the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order.” (CCP § 1094.5 subd.(g).) As noted above, this Court declined to “otherwise order” in its review of the City’s mandamus petition in Case FO66941. The stay of demolition is in effect despite appellant’s express, premature efforts to effect a discharge of the writ.

Even upon resolution of the appeal, if the judgment is affirmed a “trial court shall retain jurisdiction over the public agency’s proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.” (Public Resources Code, § 21168.9, subd.(b).) If the judgment is affirmed and the City files a return to the writ, Friends can address its substance and the applicable law applied to the facts; suffice it to say that the parties disagree, particularly about the import of dicta in two categorical exemption cases, *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 and *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. This Court’s ruling in *Architectural Heritage Association v. County of Monterey* (2004) 122 Cal.App.4th 1095 aligns with decades of negative declaration case law and remains controlling. (Respondent’s Brief, *passim*.)

The peremptory writ includes an underlying mandatory order: that the City and City Council “forthwith set aside your approvals of the Three Creeks Trail Pedestrian Bridge Project ...” (JA 709-710.) That order is the subject of the City’s pending appeal. Since there is now no effective approval of the project, the City has no authority to demolish the Willow Glen Trestle even if it certifies an EIR, and even if that EIR were to be found adequate by the trial court upon a writ return process after preparation of a supplemental administrative record.

Even if an EIR was certified and the City made CEQA findings, not only has the adequacy of that action not been determined upon a writ return, but the City did not set aside its prior approval that was based on the mitigated negative declaration or reapprove the Three Creeks Trail Pedestrian Bridge Project after “compliance with the requirements of the California Environmental Quality Act,” as ordered by the trial court. (JA 710.) An EIR process cannot be a *post-hoc* rationalization of a decision already made; the City must reconsider the Three Creeks Trail project with the benefit of the EIR analysis. It has no authority to demolish the Trestle absent (1) a successful appeal or (2) dismissal of the appeal and completion of a successful writ return process.

The adequacy of the EIR is at issue and has not been adjudicated. The City has not complied with the writ since it has neither set aside the 2014 demolition approval nor reconsidered approval after preparing the EIR.

Friends have no way of knowing what action the City Council may take on Tuesday, August 4, nor how quickly demolition might occur based on the deputy city attorney's repeated assertions that the City is somehow entitled to demolish the Trestle *now* without further judicial process. It could happen quickly and without sufficient time for Friends to seek judicial relief.

The Code of Civil Procedure grants broad discretion to this Court to “make any order appropriate to preserve the status quo.” (CCP, § 923.) There is also “both statutory and constitutional authority granting to this court the contempt power, where necessary, to protect the appellate power.” (*Smith v. Smith* (1954) 120 Cal.App.3d 474, p. 479.)

Section 187 of the Code of Civil Procedure provides:

When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.

(CCP, § 187.) The *Smith v. Smith* Court held a party on appeal in contempt for violating an order of the trial court, noting that the Court of Appeal has jurisdiction to protect the subject matter of an appeal including orders of a trial court that — just as in this case — has lost jurisdiction and “which of course

would include a contempt proceeding where appropriate.” (*Smith v. Smith*, *supra*, 120 Cal.App.3d 474, pp. 478-479.) The Court cited both custody and criminal case precedent but did not limit its holding. (*Ibid.*)

Conclusion

The City is the appellant, not a prevailing party. It has no legal right to demolish the Trestle. This Court’s equitable authority extends to the unfathomable conduct of appellant and its counsel.

Friends thus request an emergency stay of demolition of the Willow Glen Trestle and an order to show cause for contempt, reasonable sanctions to reimburse Friends’ attorneys fees and the expenses of this Court, and any other order or writ that the Court deems appropriate in these circumstances.

Counsel’s Certificate of Word Count per Word:mac²⁰¹¹: 2979

July 30, 2015

Respectfully submitted,

BRANDT-HAWLEY LAW GROUP



Susan Brandt-Hawley
Attorney for Respondent
Friends of the Willow Glen Trestle

Declaration of Susan Brandt-Hawley

1. I am counsel for respondent Friends of the Willow Glen Trestle, whom I also represented in the trial court.

2. As foundation for my credibility in this declaration, my statewide public interest law practice has focused on the California Environmental Quality Act and particularly cases involving the protection of historic resources for over 25 years. I have practiced law in California since 1977, the year that I received my JD degree from UC Davis and was admitted to the California bar. I am a member of the California Academy of Appellate Lawyers and currently am the elected Secretary-Treasurer. Since 1999, I have served annually as co-faculty in multi-day CEQA programs for appellate justices, superior court judges, and research attorneys through the Center for Judicial Education and Research and the California Judicial Studies Program. I am next scheduled to co-present a CEQA seminar in November 2015 at the Appellate Justices Institute. I also speak at CEQA seminars, *pro bono*, many times yearly.

3. I have been counsel of record in many published CEQA cases in all six Districts of the Court of Appeal and in the California Supreme Court.

4. Copies of the email correspondence between Deputy City Attorney Kathryn Zoglin and me sent between July 21 and July 28 are attached and numbered.

5. On July 21 Deputy City Attorney Kathryn Zoglin gave notice via email that unless Friends obtain a new court order by July 31, the City intends to proceed with demolition of the Willow Glen Trestle because it has certified an EIR and “thus approved the project.” (Attached, p.14.)

6. I responded that demolition would be unlawful because this appeal remains pending and the peremptory writ prohibiting demolition is still in place. (Attached, pp. 16-17.) I pointed out that, among other problems with the City’s proposed action, the City Council has certified an EIR but its adequacy has not yet been adjudicated via a writ return, and the City has not taken any action to approve the demolition of the Trestle. While the appeal is pending, the trial court, as it had already ruled, has no jurisdiction to consider a writ return. (*Ibid.*)

7. I contacted my clients to inform them of the City’s email, conducted legal research, sought an extension on the *amicus* reply brief I was working on, and began to prepare this application. The next day, I received another email from Ms. Zoglin withdrawing the 10-day notice. (Attached, p. 18.) She provided further notice that the San Jose City Council will consider “this matter” in closed session on August 4. Despite my further objections (attached, p. 19) the City declined to provide any assurance that the City will not precipitously demolish the Trestle on or after August 4th. I made it clear to Ms. Zoglin that Friends needed to seek a stay and that I would seek sanctions absent further assurance:

I need your confirmation that the City will not proceed with demolition ... Otherwise I will seek judicial relief. Your letter did not provide that confirmation. I have no idea what the City Council will direct after the scheduled closed session. ... Will you confirm as I have requested — see bolded statement above! —?

(Attached, p. 21.) Attorney Zoglin replied on July 28:

... [T]he City does not plan on removing the trestle absent some kind of judicial action. *That being said, I will advise you if City Council provides other direction.*

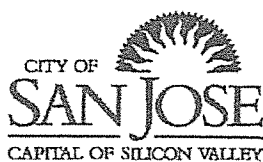
(Attached, p. 22.)

8. In my view the City has failed to provide the reasonable assurance needed by Friends. It is my understanding from the email correspondence that in closed session on August 4 the City Council will consider the deputy city attorney's recommendations to demolish the Trestle immediately or on short notice, despite the pendency of this appeal and the writ that remains in force. I am concerned that if the Council accepts its attorney's incorrect view of the law, demolition could occur without time for me to seek and obtain judicial relief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration is executed on July 30, 2015, at Glen Ellen, California.



Susan Brandt-Hawley



Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

KATIE J. ZOGLIN
Senior Deputy City Attorney
Direct Line: (408) 535-1991

July 21, 2015

SENT VIA EMAIL ONLY

Ms. Susan Brandt-Hawley
Brandt-Hawley Law Group
P.O. Box 1659
Glen Ellen, CA 95442

Re: Three Creeks Trail Pedestrian Bridge Project

Dear Ms. Brandt-Hawley:

As you are aware, on May 19, 2015, the San José City Council adopted Resolution Number 77359 in which it certified the EIR for the Three Creeks Trail Pedestrian Bridge Project. The Council concluded that "based on and consistent with the analysis in the Final EIR, that the trestle is not a historic resource." It certified the Final EIR for the project in accordance with the requirements of CEQA. The City Council thus approved the project, which includes the removal and replacement of the trestle. On May 20, 2015, the City filed and posted a notice of determination (NOD).

To date, neither the Friends of the Willow Glen Trestle nor any other party has filed a challenge to the EIR certifying the Three Creeks Trail Pedestrian Project. Any challenge at this point would be untimely under Public Resources Code § 21167, since more than 30 days have passed since the NOD was filed and posted. Given that no party has challenged the certification of the EIR and the approval of the project, the City is allowed to proceed with the project, including removing the trestle.

The City has acted, and continues to act, in accordance with the trial court's Judgment and Peremptory Writ of Mandamus, even though the trial court recently ruled that it does not have jurisdiction over this matter and the Court of Appeal declined to grant the City's writ. The trial court's Judgment and Peremptory Writ of Mandamus provide that "the project cannot be considered for approval unless and until the City prepares and certifies an environmental impact report (EIR)." The City prepared an EIR. On May 19, 2015, the City certified that EIR and approved the project. The City's approval of the project thus complied with the Court's order. Next, the trial court's

Judgment and Peremptory Writ of Mandamus provide that the City "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." As noted above, the City prepared and certified an EIR in accordance with CEQA. No party challenged the EIR; the time has run for a challenge to it.

As noted in the City's letter to you dated October 10, 2014, the City was compelled to prepare the EIR so as to avoid losing the much needed grant funds and given the short window that permitting agencies allow work in the stream bed. Moreover, by proceeding with the EIR, the City did not waive its right to appeal the judgment issued by Judge Huber. The City sees its appeal and moving forward with the project pursuant to the EIR as separate and distinct.

The City recognizes that the Friends of the Willow Glen Trestle may disagree with the City's position. As a result, the City will refrain from proceeding with the project for 10 days, to allow you the opportunity to seek court intervention, if you believe that to be appropriate. Absent any court order to the contrary by July 31, 2015, the City reserves the right to proceed with the project, including removing and demolishing the trestle.

Do not hesitate to contact me if you have any questions.

Very truly yours,

RICHARD DOYLE, City Attorney

By: 
KATIE J. ZOGLIN
Senior Deputy City Attorney

KJZ/kjz

From: **Susan Brandt-Hawley** susanbh@preservationlawyers.com
Subject: **trestle**
Date: **July 21, 2015 at 4:58 PM**
To: **Katie Zoglin** katie.zoglin@sanjoseca.gov, **Margo Laskowska** Margo.Laskowska@sanjoseca.gov



Hi Katie and Margo. I just Katie's emailed letter, which I presume Margo has seen. I attach it just in case not.

Before the Friends respond to the letter via further court action, I ask that you show me how the City took action to approve the demolition of the trestle? Via the current resolution you provided to Judge Huber and the Court of Appeal, the City certified an EIR but did not approve any project based on consideration of that EIR.

Case law makes clear that Friends have the option to contest any new action by the City relating to compliance with the writ by objecting to the writ return rather than filing a new action. We have waived no objections to the EIR. And there is no new project approval to contest, as far as I know.

Since the NOD is not based on any project approval based on the new EIR, as noted above, it could in any event not trigger any statute of limitations. An NOD must be based on a project approval, not just on the certification of an EIR.

Again, to be clear, I request your response to the question posed above: is there a resolution by which the City considered the EIR and then approved demolition of the trestle? If so it is not reflected in the resolution you provided to the courts in your recent efforts to overturn the protections of the peremptory writ.

Proceeding with demolition without discharging the peremptory writ would place the City in contempt of court.

Susan

Susan Brandt-Hawley
Brandt-Hawley Law Group
707.938.3900
preservationlawyers.com

From: Susan Brandt-Hawley susanbh@preservationlawyers.com
Subject: Fwd: trestle
Date: July 21, 2015 at 5:50 PM
To: Katie Zoglin katie.zoglin@sanjoseca.gov, Margo Laskowska Margo.Laskowska@sanjoseca.gov



sorry, forgot to attach the letter for Margo. Also I obviously left off the word 'read' in the second sentence. I look forward to hearing from you re any resolution approving demolition after certification of the EIR. Thanks.



zoglin 10 day notice July
2015.pdf

Begin forwarded message:

From: Susan Brandt-Hawley <susanbh@preservationlawyers.com>
Subject: trestle
Date: July 21, 2015 at 4:58:54 PM PDT
To: Katie Zoglin <katie.zoglin@sanjoseca.gov>, Margo Laskowska <Margo.Laskowska@sanjoseca.gov>

Hi Katie and Margo. I just Katie's emailed letter, which I presume Margo has seen. I attach it just in case not.

Before the Friends respond to the letter via further court action, I ask that you show me how the City took action to approve the demolition of the trestle? Via the current resolution you provided to Judge Huber and the Court of Appeal, the City certified an EIR but did not approve any project based on consideration of that EIR.

Case law makes clear that Friends have the option to contest any new action by the City relating to compliance with the writ by objecting to the writ return rather than filing a new action. We have waived no objections to the EIR. And there is no new project approval to contest, as far as I know.

Since the NOD is not based on any project approval based on the new EIR, as noted above, it could in any event not trigger any statute of limitations. An NOD must be based on a project approval, not just on the certification of an EIR.

Again, to be clear, I request your response to the question posed above: is there a resolution by which the City considered the EIR and then approved demolition of the trestle? If so it is not reflected in the resolution you provided to the courts in your recent efforts to overturn the protections of the peremptory writ.

Proceeding with demolition without discharging the peremptory writ would place the City in contempt of court.

Susan

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Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

KATIE J. ZOGLIN
Senior Deputy City Attorney
Direct Line: (408) 535-1991

July 22, 2015

BY E-MAIL ONLY

Ms. Susan Brandt-Hawley
Brandt-Hawley Law Group
P.O. Box 1659
Glen Ellen, CA 95442

Re: Friends of the Willow Glen Trestle v. City of San Jose, et al.

Dear Ms. Brandt-Hawley:

I am writing to advise you that the City is withdrawing the July 31, 2015 deadline set forth in my letter dated July 21, 2015. This matter will be brought to City Council's attention at its next closed session, which will be held on August 4, 2015.

As a result, there is no need for you to seek an order from the Court at this time. I will advise you if there is any change in this status after closed session.

Very truly yours,

RICHARD DOYLE, City Attorney

By:

KATIE J. ZOGLIN
Senior Deputy City Attorney

KJZ/kjz

From: **Susan Brandt-Hawley** susanbh@preservationlawyers.com
Subject: **status of proposed demolition**
Date: **July 23, 2015 at 4:50 PM**
To: **Attorney Katie Zoglin** katie.zoglin@sanjoseca.gov
Cc: **Margo Laskowska** Margo.Laskowska@sanjoseca.gov



Katie,

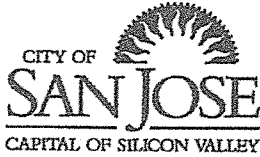
I received your emailed letter yesterday stating that the City is withdrawing its July 31 deadline for Friends to obtain a court order prohibiting demolition of the trestle.

The Friends already have just such an order prohibiting demolition: the peremptory writ. Your recent attempts to circumvent that writ — without filing a writ return and supplemental record and litigating the writ return if contested by the Friends -- have been denied by two courts.

I therefore am preparing pleadings to seek judicial relief and sanctions as I indicated yesterday. While I understand that the timing may have shifted while you seek direction from the Council (I am inferring that your July 31 notice was in fact without Council approval?), unless I have formal assurance that the City will not seek to demolish the trestle absent its receipt of court authorization to do so, I will not await another unknown arbitrary deadline from you.

Susan

Susan Brandt-Hawley
Brandt-Hawley Law Group
707.938.3900
preservationlawyers.com



Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

KATIE J. ZOGLIN
Senior Deputy City Attorney
Direct Line: (408) 535-1991

July 24, 2015

VIA EMAIL AND U.S. MAIL

Ms. Susan Brandt-Hawley
Brandt-Hawley Law Group
P.O. Box 1659
Glen Ellen, CA 95442

Re: Friends of the Willow Glen Trestle v. City of San Jose, et al.

Dear Ms. Brandt-Hawley:

As I stated in my letter dated July 22, 2015, the City is not planning to go forward with the removal of the trestle at this time. While you are free to file whatever papers you believe to be necessary, there is no need to do so. We would object to any request for attorney's fees for the preparation of such unnecessary work.

We of course will inform you immediately if our position changes. We disagree with your reference to an "arbitrary deadline." We are always available to work with you on dates.

Very truly yours,

RICHARD DOYLE, City Attorney

By:

KATIE J. ZOGLIN
Senior Deputy City Attorney

KJZ/kjz

200 East Santa Clara Street, 16th Floor Tower, San José, CA 95113-1905 tel (408) 535-1900 fax (408) 998-3131

1227913

From: Susan Brandt-Hawley susanbh@preservationlawyers.com
Subject: prospective demolition
Date: July 24, 2015 at 4:18 PM
To: Attorney Katie Zoglin katie.zoglin@sanjoseca.gov
Cc: Margo Laskowska Margo.Laskowska@sanjoseca.gov



In response to your latest letter:

I tried to be clear in my last email: **I need your confirmation that the City will not proceed with demolition absent a court order permitting such action.** Otherwise I will seek judicial relief. Your letter did not provide that confirmation. I have no idea what the City Council will direct after the scheduled closed session.

I am informed via a local resident that according to City staff your office instructed the Council not to reapprove the demolition because that would moot the appeal. That is your choice. Absent a resolution of the appeal no demolition can legally occur.

Will you confirm as I have requested — see bolded statement above! —?

Susan

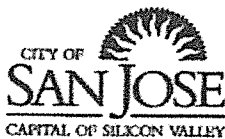
Begin forwarded message:

From: "Larcher, Maggie" <Maggie.Larcher@sanjoseca.gov>
To: "susanbh@preservationlawyers.com" <susanbh@preservationlawyers.com>
Cc: "jstapleton@preservationlawyers.com" <jstapleton@preservationlawyers.com>, "Zoglin, Katie" <Katie.Zoglin@sanjoseca.gov>
Subject: Friends of the Willow Glen Trestle v. City of San Jose
Date: July 24, 2015 at 3:55:10 PM PDT

Please see Ms. Zoglin's letter attached hereto.

Maggie S. Larcher
Legal Administrative Assistant
Office of the City Attorney | City of San Jose
200 E. Santa Clara Street, 16th Floor | San Jose, CA | 95113
Tel: (408) 535-1967 | Fax: (408) 998-3131
maggie.larcher@sanjoseca.gov

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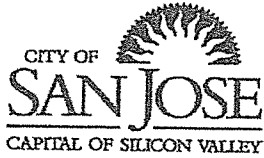


Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

KATIE J. ZOGLIN
Senior Deputy City Attorney
Direct Line: (408) 535-1991

July 24, 2015

21



Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

KATIE J. ZOGLIN
Senior Deputy City Attorney
Direct Line: (408) 535-1991

July 28, 2015

SENT VIA EMAIL & U.S. MAIL

Ms. Susan Brandt-Hawley
Brandt-Hawley Law Group
P.O. Box 1659
Glen Ellen, CA 95442

Re: Friends of the Willow Glen Trestle v. City of San Jose, et al.

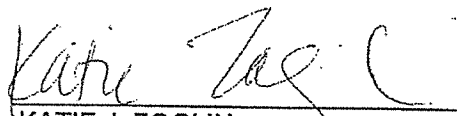
Dear Susan:

In response to your email of July 24, the City does not plan on removing the trestle absent some kind of judicial action. That being said, I will advise you if City Council provides other direction.

Thank you for your attention to this matter.

Very truly yours,

RICHARD DOYLE, City Attorney

By: 
KATIE J. ZOGLIN
Senior Deputy City Attorney

KJZ/kjz

Request for Judicial Notice

Friends request judicial notice pursuant to Evidence Code section 452 of filed Superior Court pleadings in this case that are relevant to this requested stay and that post-date the Joint Appendix in this appeal. Both of these May 2015 pleadings were also filed with this Court in the City's appendix in Related Case No. H042505. The pleadings are Friends' Opposition to the City's Ex Parte Application for Demolition and Judge Huber's ruling denying the Application.

July 30, 2015

Respectfully submitted,



Susan Brandt-Hawley
Attorney for Respondent

(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
TRESTLE, an unincorporated assn.,

Case No.: 1-14-CV-260439

Plaintiff,

ORDER

vs.

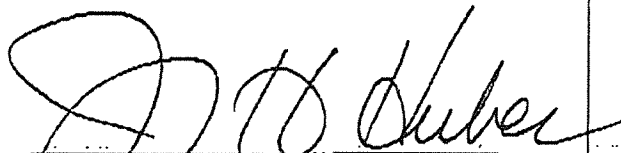
CITY OF SAN JOSE ET AL.,

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. HUBER
JUDGE

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

(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 EXPARTE APPLICATION TO RECIND 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)982-2690 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 06/22/15. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Sylvia Roman, Deputy

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 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,**
14 **an unincorporated association;**

15 **Petitioners,**

16 **v.**

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

19 **Respondents;**
20 _____/

Case No. CIV 114CV260439

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

Honorable Joseph Huber

1 **Introduction**

2 The City of San José’s appeal to the Sixth District remains pending. In light of
3 that appeal, this Court is currently without jurisdiction to consider the City’s request to
4 allow demolition of the Trestle and should decline to act on the *ex parte* application.
5

6 *Even if the appeal were to be dismissed*, the judgment requires that the City file
7 *a return to the writ* after setting aside its approvals of the Three Creeks Trail Pedestrian
8 Bridge Project. The writ also requires the City Council to refrain from further action to
9 approve the demolition of the Willow Glen Trestle pending certification of an EIR and
10 “*compliance with the requirements of the California Environmental Quality Act.*”
11

12 (Peremptory Writ.) The City is required by the terms of the writ to file a return by
13 November 2015. If the City contends that it has complied with the writ, the Friends of
14 the Willow Glen Trestle will have the opportunity to file objections to the adequacy of
15 the writ return. Only then would this Court adjudicate the adequacy of the return with
16 the benefit of briefing and hearing in this important matter; *not ex parte*. And none of
17 these things have even happened. The City’s sole claim is that it has certified an EIR.
18

19 Thus, without addressing the disputed law and facts on the merits, there are two
20 conclusive procedural problems with the City’s novel *ex parte* application:
21

- 22 (1) This Court has no jurisdiction to discharge the writ since an appeal is pending;
23
24 (2) Even if there were no appeal, by order of this Court the City must file a writ return.
25 That return would be accompanied by a complete supplemental record of proceedings,
26 not just a few excerpts, and would be adjudicated upon notice if opposed by the Friends.
27
28

Discussion

1
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
9 When the City files a return to the writ, the Friends can address its substance and the
10 applicable law applied to the facts; suffice it to say that the parties disagree.
11
12

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

16
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

Friends of the Willow Glen Trestle v. City of San Jose, et al.
Civil No. HO41563

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 July 30, 2015, I served one true copy of:

Application for Stay, Order to Show Cause for Contempt of Court, Sanctions, and other appropriate relief; Declaration of Susan Brandt-Hawley; Request for Judicial Notice

 x By emailing a copy to counsel as listed below.

Kathryn J. Zoglin
katie.zoglin@sanjoseca.gov

Attorneys for Respondents

Margo Laskowska
Margo.laskowska@sanjoseca.gov

Tim Taylor
tmtaylor@stoel.com

Attorney for Amicus Curiae

I declare under penalty of perjury that the foregoing is true and correct and is executed on July 30, 2015, at Glen Ellen, California.



Susan Brandt-Hawley