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October 14, 2016

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Support for Petition for Review of *Friends of the Willow Glen Trestle v. City of San Jose,* Supreme Court Case No. S237378

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Amici curiae California Preservation Foundation, West Adams Heritage Association, Glendale Historical Society and Citizens to Save College Avenue support review of this case that profoundly affects jurisprudence interpreting and applying the California Environmental Quality Act.

For decades since the landmark decision of *No Oil v. City of Los Angeles* (1974) 13 Cal.3d 376 established the "fair argument" standard in California jurisprudence regarding the California Environmental Quality Act, courts, public agencies, and the public have been able to rely upon a predictable standard of review where a public agency has used a negative declaration to conclude environmental impacts of a proposed project would not be significant. The Court of Appeal's decision in *Friends of Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457 runs contrary to this overwhelming weight of caselaw.

Compelling legal grounds for granting the petition for review are presented in the Petition. The hundreds of members of the *amici* public interest groups join interested residents statewide in asking the Court to grant review of this matter and respectfully request consideration of the following point:

1) The Fair Argument Standard Applies to Projects Impacting Historic Resources, Including the Determination of Their Historic Value

Of particular concern to *amici*, whose missions focus on preservation and adaptive reuse of California's unique cultural and historic resources, is the Court of Appeal's

discussion of CEQA vis-à-vis historic resource impacts, referencing the Fifth District's opinion in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 and a second Fifth District case, *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340. (*Friends of Willow Glen Trestle, supra*, 2 Cal.App.5th 457, 471-472.) These cases conflict with all prior case law in applying the substantial evidence standard (rather than the fair argument standard) to the question of whether a proposed project may significantly impact an historic building.

Ever since *No Oil v. City of Los Angeles* (1974) 13 Cal.3d 376, California courts have consistently and solely applied the fair argument standard to the question of whether, for a non-exempt project, a negative declaration is sufficient or whether an environmental impact report (EIR) must be prepared. An EIR is required for any project that may have a significant impact on the environment.

Valley Advocates, Citizens for Restoration of L Street, and now *Friends of Willow Glen Trestle* imply that two differing standards of review may somehow apply to historic resources, conflicting with *all* other negative declaration cases. These cases include *Architectural Heritage Associates v. County of Monterey* (2004) 122 Cal.App.4th 1095, which properly applied the fair argument standard to all three questions in a negative declaration challenge: first, to the question of whether the resource at stake was historic; second, whether demolition would have a significant environmental impact; and, finally, whether feasible mitigation measures would reduce project impacts to a level of insignificance. (*Id.*, p. 1109.)

Courts following and applying the fair argument standard repeated in *Architectural Heritage Associates* include the Sixth District in *Keep Our Mountains Quiet v. Cty. of Santa Clara* (2015), 236 Cal. App. 4th 714, 730, the First District in *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal. App. 4th 768, 777, and the Fourth District in *Citizens for Responsible & Open Gov't v. City of Grand Terrace*, (2008) 160 Cal. App. 4th 1323, 1332.

Architectural Heritage was well-rooted in the reasoning of prior cases including those dealing with historic resources as it cited *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 905, 60 Cal.Rptr.2d 821 (*City of Oakland*). (*Architectural Heritage Ass'n v. Cty. of Monterey* (2004) 122 Cal. App. 4th 1095, 1102.)

Nonetheless, *Valley Advocates* implicitly criticized the reasoning of *Architectural Heritage* that the fair argument standard applies at each stage of evaluation of impacts to historic resources by stating "the fair argument standard is not applicable to the determination whether the Flats qualify as historical resources at this stage of the CEQA

review process." (*Valley Advocates v. City of Fresno* (2008) 160 Cal. App. 4th 1039, 1068.)

Similarly, the court in *Friends of Willow Glen Trestle* attacks the validity of *Architectural Heritage's* reasoning by stating "We conclude that our decision in *Monterey [Architectural Heritage]* did not accurately state the appropriate standard of judicial review that applies in this case." (*Friends of the Willow Glen Trestle v. City of San Jose, supra,* 2 Cal.App.5th 457, 460.)

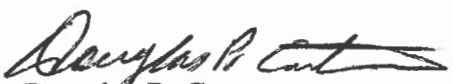
Friends of Willow Glen Trestle relied upon a misinterpretation of Public Resources Code section 21084.1 to conclude that as to historic resources, the substantial evidence test should apply to a public agency's initial determination of the historicity of a resource, i.e., whether it qualifies as a historical resource. (*Id.*, 466-467.) Public Resources Code Section 21084.1 should be interpreted as the Legislature's attempt to provide more specific protections to historic resources, not reduce those protections by setting them apart for application of the substantial evidence test rather than the fair argument test to the initial determination of historic value. CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896–897.)

Architectural Heritage Ass'n v. Cty. of Monterey (2004) 122 Cal. App. 4th 1095 remains good law and should be reaffirmed. To the extent *Valley Advocates, Citizens for Restoration of L Street,* and now *Friends of Willow Glen Trestle* state that the fair argument standard does not apply to the determination of the potential historicity of a resource, they should be disapproved.

Because this case presents an important question of law, one that has given rise to conflicting decisions among the various districts of the Court of Appeal, review of this case should be granted.

Thank you very much for your consideration of granting the petition for review.

Respectfully submitted,



Douglas P. Carstens
Amy Minteer

PROOF OF SERVICE

I am employed by Chatten-Brown & Carstens LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2200 Pacific Coast Highway, Ste. 318, Hermosa Beach, CA . On October 14, 2016, I served the within documents:

LETTER IN SUPPORT FOR PETITION FOR REVIEW OF FRIENDS OF THE WILLOW GLEN TRESTLE V. CITY OF SAN JOSE

☑ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. 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. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

☐ **VIA MESSENGER SERVICE.** I served the above-referenced document(s) by placing them in an envelope or package addressed to the person(s) at the address(es) listed below and provided them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)

☐ **VIA FACSIMILE TRANSMISSION.** Based on an agreement of the parties to accept service by fax transmission, I faxed the above-referenced document(s) to the persons at the fax number(s) listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

☐ **VIA ELECTRONIC SERVICE.** I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 14, 2016, at Hermosa Beach, California.

Cynthia Kellman

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