

(ENDORSED)
FILED
JUN 28 2019

Clerk of the Court
Superior Court of CA County of Santa Clara
BY Jessica Crabtree DEPUTY

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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SANTA CLARA
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14 WILLOW GLEN TRESTLE CONSERVANCY,
15 an unincorporated association; and FRIENDS OF
16 THE WILLOW GLEN TRESTLE, an
unincorporated association,

17 Petitioners,

18 vs.

19 CITY OF SAN JOSE; CITY OF SAN JOSE
20 DEPARTMENT OF PUBLIC WORKS;
21 CALIFORNIA DEPARTMENT OF FISH AND
22 WILDLIFE; and DOES 1 to 10,
23

Respondents.

Case No. 18CV335801

**ORDER RE: PETITION FOR WRIT OF
MANDAMUS**

24 The above-entitled matter came on for hearing on Thursday, June 27, 2019, at 9:00 a.m.
25 in Department 5, the Honorable Thomas E. Kuhnle presiding. Having reviewed and considered
26 the written submissions filed by the parties, and having listened carefully to arguments of
27 counsel, the Court rules as follows:
28

1 **I. INTRODUCTION**

2 Willow Glen Trestle Conservancy and Friends of the Willow Glen Trestle (together,
3 “Petitioners”) filed a Petition for Writ of Mandamus (“Petition”) on October 4, 2018. Petitioners
4 are represented by Susan Brandt-Hawley, Esq. Respondents are the City of San Jose (the “City”)
5 and the California Department of Fish and Wildlife (“CDFW”). The City is represented by
6 Margo Laskowska, Esq. and Elisa T. Tolentino, Esq. CDFW is represented by Sara D. Von Loh,
7 Esq. and Connie P. Sung, Esq. Petitioners dismissed CDFW with prejudice on June 14, 2019.

8 At issue is the City’s Three Creeks Trail Pedestrian Bridge Project (the “Three Creeks
9 Project”). As part of the Three Creeks Project, the City proposes to demolish the Willow Glen
10 Trestle (“Trestle”). The Trestle is an open-deck pile-supported trestle that crosses Los Gatos
11 Creek in San Jose. (Administrative Record (“AR”) 469.) It is 210.5 feet long and is
12 approximately 25 feet high at its tallest point. (*Id.*) The Trestle was constructed in 1922. (*Id.*)
13 While not in the administrative record, a declaration filed in this action captures Petitioners’
14 interest in preserving the Trestle: “the destruction of the Willow Glen Trestle would result in
15 significant, needless loss to the cultural and historic environment of Willow [Glen] and would
16 cause irreparable environmental harm. The trestle is an important part of our community’s
17 history and culture.” (Declaration of Lawrence Ames, Ph.D. in Support of Motion for
18 Preliminary Injunction, ¶ 13.)

19 Petitioners argue the May 2017 listing of the Trestle on the California Register of
20 Historical Resources constitutes new information that must be considered in a supplemental
21 Environmental Impact Statement (“EIR”) before the Trestle is demolished. The City argues that
22 California Environmental Quality Act (“CEQA”) does not require any further consideration
23 before the Trestle is demolished because no discretionary approval has taken place after the
24 Trestle was listed, and even if a discretionary approval has been made, the City has already
25 evaluated the Trestle’s historical significance.

26 **II. PROCEDURAL BACKGROUND**

27 In January 2014, the San Jose City Council adopted a mitigated negative declaration
28 (“MND”), which concluded the Trestle was not a historic resource and that the Three Creeks

1 Project would have no significant impact on the environment after taking into account mitigation
2 and avoidance measures. In February 2014, Friends of the Willow Glen Trestle (“Friends”) filed
3 a writ of mandamus challenging the City’s approval of the Three Creeks Project and the adoption
4 of the MND. Friends argued there was substantial evidence to support a fair argument that the
5 Trestle was a historic resource and therefore CEQA required the City to prepare an EIR. In July
6 2014, the trial court issued a ruling consistent with the position taken by Friends. Judgment was
7 entered in August 2014 and the City appealed.

8 The Court of Appeal reversed the trial court’s judgment in a published opinion. (See
9 *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457.) The Court of
10 Appeal concluded that “the deferential substantial evidence standard of judicial review is the
11 correct standard to apply to the City’s finding that the Trestle is not a historical resource.”
12 (*Id.* at 473.) The Court of Appeal remanded the case and directed the trial court to vacate its
13 judgment and determine whether the City’s adoption of the MND was supported by substantial
14 evidence that the Trestle is not a historical resource. In its Order on Remand on Petition for Writ
15 of Mandamus, which was filed on October 5, 2017, the trial court concluded that the City’s
16 finding that the Trestle was not a historic resource was supported by substantial evidence.
17 Judgment was entered on November 21, 2017. It was not appealed.

18 While the matter was on appeal, the City prepared an EIR for the Three Creeks Project.
19 The EIR included an analysis of the historicity of the Trestle. (AR 466-99.) The City Council
20 certified the final EIR, and approved a mitigation monitoring and reporting program, on May 19,
21 2015. (AR 1-16; 638-39.)

22 Petitioners commenced this action on October 4, 2018. In addition to filing the Petition,
23 Petitioners filed an application for a temporary restraining order and preliminary injunction.
24 Petitioners stated that demolition of the Trestle was imminent. They argued the May 2017 listing
25 of the Trestle in the California Register of Historical Resources must be considered before the
26 Three Creeks Project can proceed. In particular, Petitioners argued the City must prepare an EIR
27 in order to consider this new information, and that the City’s obligation was triggered by its
28 discretionary approval of a streambed alteration agreement (“SAA”) on October 4, 2018. The

1 Court issued a temporary restraining order on October 4, 2018 and set a preliminary injunction
2 hearing on October 10, 2018. On October 11, 2018, the Court issued its Order Denying
3 Preliminary Injunction.

4 Petitioners filed a Renewed Motion for Preliminary Injunction on May 31, 2019. The
5 matter was heard on June 10, 2019, and after supplemental briefs were reviewed and considered,
6 the Court issued an Order Re: Renewed Motion for Preliminary Injunction which enjoined the
7 City from demolishing the Trestle before the June 27, 2019 hearing on the merits.

8 **III. FACTUAL BACKGROUND**

9 The City's Initial Study preceded approval of the MND. (AR 1035-98.) The Initial
10 Study evaluated biological resources. (AR 1052-59.) It recognized the need for an SAA, and
11 stated the City's commitment to implement all of the conditions in an SAA. (AR 1057.) The
12 Initial Study also evaluated cultural resources and concluded the Trestle was not a historical
13 resource, and consequently, the Three Creeks Project would not affect historical resources.
14 (AR 1059-60; see also AR 1093-98.)

15 The MND for the Three Creeks Project was approved by the San Jose City Council on
16 January 14, 2014. (AR 1107.) The MND includes a long list of mitigation and avoidance
17 measures for protecting biological resources. (AR 1101-03.) Consistent with the Initial Study,
18 the MND states: "The City will apply for a Streambed Alteration Agreement from CDFW and
19 will be responsible for the implementation of all its conditions." (AR 1102.) With respect to
20 cultural resources, the MND states: "The project will not have a significant impact on cultural
21 resources, and therefore no mitigation is required." (AR 1103.)

22 On May 10, 2017 – before the work on the Three Creeks Project had begun – the
23 California State Historical Resources Commission approved the nomination of the Trestle to be
24 listed in the California Register of Historical Resources. (AR 653-54; 1119.)

25 On March 19, 2018, the City notified CDFW of the streambed alteration described in the
26 MND. (AR 781-992 (notification and various attachments).) The SAA was issued on October 4,
27 2018. (AR 1349-69.) The SAA states the City "agrees to complete the project in accordance
28 with the [SAA]." (AR 1349.) At the end of the SAA, after all of the requirements are set forth,

1 Michael O’Connell, the City’s representative, signed under the statement: “The undersigned
2 accepts and agrees to comply with all provisions contained herein.” (AR 1367.)

3 The SAA identifies fish and wildlife resources the Project could substantially adversely
4 affect (AR 1350) and then lists, for thirteen pages, “Measures to Protect Fish and Wildlife
5 Resources.” (AR 1351-63.) The measures include: limitations on demolition work in order to
6 protect biological resources, revegetation requirements, habitat assessments, buffering of bird
7 nests, protection of bat habitat, erosion control, water quality protection measures, and many
8 other requirements for protecting fish and wildlife resources. (*Id.*) The SAA also requires the
9 City to implement measures in the Santa Clara Valley Habitat Plan. (AR 1356, 1362.)

10 In connection with its preparation of the SAA, CDFW prepared a document titled
11 “Consideration for Purposes of the California Environmental Quality Act of the Mitigated
12 Negative Declaration Previously Adopted by the Lead Agency City of San Jose for the Three
13 Creeks Trail Pedestrian Bridge Project,” which is dated October 4, 2018 (“CDFW Review”).
14 (AR 1379-91.) It states: “CDFW’s authority over the Project as a CEQA responsible agency is
15 limited to issuance of a streambed alteration agreement.” (AR 1380.) Among its conclusions,
16 the CDFW Review states: “CDFW lacks authority over historical resources and cannot deny or
17 condition the streambed alteration agreement to respond to any impacts arising from the trestle’s
18 status as an historical resource or to require retrofitting the trestle.” (AR 1390.) It further states:
19 “[T]he 2014 MND, along with CDFW’s consideration of the Project’s environmental effects, is
20 sufficient for CDFW’s approval of the draft streambed alteration agreement and subsequent or
21 supplemental environmental review for this Project is not required.” (*Id.*)

22 **IV. REQUESTS FOR JUDICIAL NOTICE**

23 With its opposition papers the City filed a request for judicial notice of certain documents
24 in the court file. With its reply papers Petitioners filed a request for judicial notice of the
25 Judgment Denying Petition for Writ of Mandate filed by the City in a separate action in which
26 the City challenged the listing of the Trestle in the California Register of Historical Resources.
27 That Judgment was filed on June 13, 2019. Both requests for judicial notice are DENIED. The
28 scope of this Court’s review is confined to relevant evidence found within the administrative

1 record. (*Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157
2 Cal.App.4th 885, 897; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114
3 Cal.App.4th 689, 706-07.)

4 **V. DISCUSSION**

5 The central issue before the Court is whether issuance of the SAA constituted a
6 discretionary approval by the City that triggers preparation of a supplemental EIR that would
7 re-evaluate the historicity of the Trestle. Petitioners argue the City exercised its discretion in
8 connection with the issuance of the SAA. The City argues it did not exercise discretion, and in
9 all events the Trestle’s historicity was considered in the 2014 MND and the 2015 EIR.

10 **A. Standard of Review**

11 The standard of review for determining if an action is discretionary or ministerial is
12 spelled out in *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11. It states: “We
13 generally review an agency’s determination that an activity falls under the ministerial exemption
14 for a prejudicial abuse of discretion.” (*Id.* at 23 (internal quotes omitted).) For support, *Sierra*
15 *Club* cites to Public Resources Code section 21168.5, which states in part: “In any action or
16 proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside,
17 void or annul a determination, finding, or decision of a public agency on the grounds of
18 noncompliance with this division, the inquiry shall extend only to whether there was a
19 prejudicial abuse of discretion. Abuse of discretion is established if the agency has not
20 proceeded in a manner required by law or if the determination or decision is not supported by
21 substantial evidence.”

22 *Sierra Club* further holds: “To the extent an agency’s determination that an activity is
23 exempt involves factual determinations, we review those determinations for substantial evidence.
24 And to the extent the agency’s determination that an activity is exempt involves pure questions
25 of law, we review those questions de novo. (*Sierra Club v. County of Sonoma, supra*, 11
26 Cal.App.5th at 24 (citations omitted).) This Court concludes these standards of review apply to
27 the disputed issue of whether issuance of the SAA constituted a discretionary approval or a
28 ministerial decision.

1 **B. Further CEQA Review Requires a Discretionary Approval**

2 The Petition argues the listing of the Trestle is “new information” that triggers additional
3 analysis under CEQA. (Petition at 2-3.) Public Resource Code section 21166 states: “When an
4 environmental impact report has been prepared for a project pursuant to this division, no
5 subsequent or supplemental environmental impact report shall be required by the lead agency or
6 by any responsible agency” unless “new information” becomes available. (Pub. Res. Code
7 § 21166, subd. (c).)

8 New information, however, does not by itself trigger additional analysis under CEQA.
9 CEQA applies only to discretionary projects. (Pub. Res. Code § 21080, subd. (a).) It does not
10 apply to ministerial decisions. (Guidelines §§ 15002, subd. (i)(1), & 15268.)¹ Consequently,
11 “Once a project has been approved, the lead agency’s role in project approval is completed
12 unless further *discretionary approval* on that project is required. Information appearing after an
13 approval does not require re-opening of that approval.” (Guidelines § 15162, subd. (c)
14 (emphasis added).) A leading CEQA treatise confirms that “[o]nce a project has received all
15 necessary discretionary approvals, the CEQA process ends. No further environmental review
16 can be required, even though circumstances change significantly or important new information
17 becomes available.” (2 Kostka & Zischke, *Practice Under the California Environmental Quality*
18 *Act*, § 19.22 (March 2019).)

19 What this means is that if issuance of the SAA constituted a discretionary approval or
20 action by the City, the City might be compelled to prepare a supplemental EIR to take into the
21 “new information,” which in this case is the listing of the Trestle. If issuance of the SAA
22 constituted a ministerial decision, no CEQA obligation would fall on the City.

23 A discretionary project requires judgment or deliberation by the public agency or body in
24 approving or disapproving it. (See Guidelines, § 15357.) A decision is ministerial if the public
25 agency has to determine merely whether the activity conforms to the applicable statutes,
26 regulations, or ordinances and the agency does not exercise judgment over whether, or how the
27 activity should be carried out. (*Id.* § 15369.)

28 _____
¹ References to the “Guidelines” is shorthand for sections of Cal. Code Regs. tit. 14, div. 6, ch. 3.

1 There are a handful of cases that provide guidance on how to distinguish between
2 discretionary projects and ministerial decisions. For example, *Friends of Juana Briones House*
3 *v. City of Palo Alto, supra*, 190 Cal.App.4th at 302 states:

4 [T]he pertinent judicial decisions have developed a “functional” test for
5 distinguishing ministerial from discretionary decisions. (*Friends of Westwood,*
6 *Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272.) That test examines
7 whether the agency has the power to shape the project in ways that are responsive
8 to environmental concerns. (*Id.* at 267; *Mountain Lion Foundation v. Fish &*
9 *Game Com.* (1997) 16 Cal.4th 105, 117.) Under this functional test, a project
10 qualifies as ministerial “when a private party can legally compel approval without
11 any changes in the design of its project which might alleviate adverse
12 environmental consequences.” *Friends of Westwood, supra*, 191 Cal.App.3d at
13 267, 235; accord, *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118,
14 1141-1142.) “Conversely, where the agency possesses enough authority (that is,
15 discretion) to deny or modify the proposed project on the basis of environment
16 consequences the EIR might conceivably uncover, the permit process is
17 ‘discretionary’ within the meaning of CEQA.” (*Friends of Westwood, supra*, 191
18 Cal.App.3d at 272.)

19 (form of citations modified.)

20 **C. Approval of the MND Encompassed the SAA**

21 In CEQA parlance, agencies approve “projects.” “Project” is defined in section 21065 of
22 the Public Resources Code and section 15378 of the Guidelines. “Project means the whole of an
23 action, which has a potential for resulting in either a direct physical change in the environment,
24 or a reasonably foreseeable indirect physical change in the environment. . . .” (Guidelines,
25 § 15378, subd. (a).) In addition, “the term ‘project’ refers to the activity which is being approved
26 and which may be subject to several discretionary approvals by government agencies. The term
27 ‘project’ does not mean each separate government approval.” (*Id.* § 15378, subd. (c).)

28 The MND defined the “project” here as “the demolition of an existing wood railroad
trestle and the construction of a new pedestrian bridge over Los Gatos Creek.” (AR 1100.)
Consequently, by approving the 2014 MND, the City approved all of the Three Creeks Project,
including demolition of the Trestle and construction of the steel truss bridge. Importantly, the
MND identified and approved the SAA as part of the project. The MND states, “The City will

1 apply for a Streambed Alteration Agreement from CDFW and will be responsible for the
2 implementation of all its conditions.” (AR 1102.)

3 Approvals for subsequent elements of a project, such as the MND’s approval of the SAA,
4 are allowed under CEQA. As noted above, the term “project” refers to the activity which is
5 being approved and which may be subject to several discretionary approvals by government
6 agencies. The term ‘project’ does not mean each separate government approval.” (Guidelines,
7 § 15378, subd. (c).) Thus, Petitioners’ statement that it was “the City’s decision to apply for and
8 approve a new SAA in 2018” is incorrect. (Petitioners’ Reply Brief on the Merits, at 8.) The
9 City’s approval of applying for a SAA was made in the 2014 MND. By calling out the SAA,
10 and stating the City would be responsible for the implementation of all its conditions, the MND
11 constituted a final approval of the SAA by the City even if there remained “several discretionary
12 approvals by government agencies.”

13 **D. The SAA Did Not Involve Approval By the City**

14 As called for and approved in the MND, the City notified CDFW of the alteration of the
15 streambed of Los Gatos Creek, and CDFW prepared a draft SAA. Under the Fish and Game
16 Code, CDFW must approve the SAA. Applicants cannot. Thus, as explained below, the City’s
17 notification to CDFW that an SAA would be needed, and the City’s subsequent pledge to comply
18 with the terms of the SAA drafted by CDFW, constituted ministerial decisions by the City that
19 do not trigger further environmental review. Whether *CDFW’s* issuance of the SAA was
20 discretionary or ministerial is not at issue; Petitioners dismissed CDFW.

21 **1. CDFW Is Responsible For Issuing SAAs**

22 CDFW regulates work that will substantially affect resources associated with rivers,
23 streams, and lakes in California, pursuant to Fish and Game Code sections 1600-1607. Any
24 action that substantially diverts or obstructs the natural flow or changes the bed, channel, or bank
25 of any river, stream, or lake, or uses material from a streambed, must be authorized by CDFW in
26 a Lake or Streambed Alteration Agreement.

27 Sections 1602 and 1603 of the Fish and Game Code set forth the procedures for issuance
28 of an SAA. First, an applicant must notify CDFW of any activity that will affect a streambed.

1 (Fish & Game Code § 1602, subd. (a)(1).) The notification must be accompanied by a
2 substantial amount of information. (*Id.*) CDFW then “shall determine whether the activity may
3 substantially adversely affect an existing fish and wildlife resource.” (*Id.* § 1603, subd. (a).) If
4 CDFW “determines that the activity may substantially adversely affect an existing fish or
5 wildlife resource,” it “shall provide a draft agreement to the entity within 60 days after the
6 notification is complete” (*id.*) and then issue “a final agreement to the entity that includes
7 reasonable measures necessary to protect the resource. . . .” (*Id.* § 1602, subd. (a)(4)(B).)

8 As noted, the applicant has a limited role in the preparation of an SAA. The applicant
9 provides CDFW with the initial notification. CDFW prepares the draft SAA. After reviewing
10 the draft SAA, the applicant “shall notify the department whether the measures to protect fish
11 and wildlife resources in that draft agreement are acceptable” and whether any measures are
12 unacceptable. (Fish & Game Code § 1603, subd. (a).) If there is a dispute about the content of
13 the SAA, then CDFW and the entity must seek out a mutual agreement on reasonable measures
14 necessary to protect the resource. (*Id.*) If the parties cannot reach agreement, “the entity may
15 request, in writing, the appointment of a panel of arbitrators to resolve the disagreement.”
16 (*Id.* § 1603, subd. (b).)

17 2. The SAA Did Not Require Discretionary Approval by the City

18 What is confusing is that Petitioners are *not* arguing that CDFW’s issuance of the SAA
19 constituted a discretionary approval. The reason they are not making this argument is because
20 CDFW is precluded by law from making any assessment of historic resources. So even if
21 Petitioners can show CDFW made a discretionary approval, CDFW could not consider the May
22 2017 listing of the Trestle. Consequently, Petitioners are left with arguing that the actions taken
23 by the *City* to obtain the SAA constituted a discretionary approval. While the Court addresses
24 Petitioners’ arguments below, it must be emphasized that all of the actions cited by Petitioners
25 fall under the umbrella of the “project” set forth in the MND that the City approved in 2014. The
26 MND expressly authorized applying for, and abiding by, the SAA. The actions cited by
27 Petitioners do not fall outside of that approval, and thus submitting the notification and signing
28 the SAA prepared by CDFW are ministerial decisions, not discretionary approvals.

1 In all events, Petitioners cite four overlapping reasons why the City’s approval of the
2 SAA was discretionary. First, Petitioners argue the SAA is an “agreement” that requires
3 mutuality; that both sides had to consider, and agree to, the terms in the SAA; that both sides had
4 to exercise discretion. The Court disagrees. The Fish and Game Code requires CDFW to issue
5 “a final agreement to the entity that includes reasonable measures necessary to protect the
6 resource.” Once again, the statutes charge CDFW with preparing and approving the final
7 agreement. This is consistent with the language in the SAA, which states the City “agrees to
8 complete the project in accordance with the [SAA].” (AR 1349.) The City accepted and agreed
9 to comply with the SAA’s provisions. (AR 1367.) There is no evidence that the City notified
10 CDFW of any unacceptable measures in the draft (or final) SAA and consequently, there was no
11 effort to “seek out a mutual agreement” with CDFW under Fish and Game Code section 1603,
12 and no impasse required resolution by a panel of arbitrators. The City’s signature on the
13 Agreement does not reflect any contractual arms-length negotiation, but rather, merely the City’s
14 pledge to abide by its terms.

15 Petitioners’ second, and related, argument is that the City’s “choice to enter into a
16 Streambed Alteration Agreement” in 2018 was a “new discretionary action.” (Opening Brief,
17 at 3.) This “choice” argument is without merit because in approving the MND in 2014, the City
18 agreed it “will apply for a Streambed Alteration Agreement from CDFW and will be responsible
19 for the implementation of all its conditions.” (AR 1102.) The “choice” to enter into the SAA
20 was made in 2014 and *not* in March 2018 when the City notified CDFW of the streambed
21 alterations, and *not* in August 2018 when the City agreed to all of the conditions set forth in the
22 SAA.

23 Third, Petitioners argue that “both agencies exercised discretion when entering into the
24 SAA. . . .” (Opening Brief, at 5.) Petitioners argue this included the City’s submission of
25 information to CDFW, consideration of a Habitat Plan, and correspondence in which CDFW
26 asked the City whether measures in the SAA were acceptable. (*Id.* at 9.) In addition, at the
27 hearing Petitioners directed the Court to pages 781-992 and 996-999 of the Administrative
28 Record. Those pages include the City’s March 9, 2018 notification to CDFW that it would alter

1 the streambed, CDFW's "Incomplete Notification" dated April 18, 2018, and an electronic mail
2 exchange in which the City responded to the "Incomplete Notification."

3 The Court has carefully reviewed all of the pages in the administrative record cited by
4 Petitioners. The Court cannot find evidence that the City negotiated with CDFW or that they
5 worked collaboratively to arrive at the terms set forth in the SAA. Instead, the City notified
6 CDFW of the alteration; CDFW asked for additional information; CDFW issued a draft SAA;
7 and the City agreed to its terms. These actions were expressly approved in the 2014 MND, and
8 they did not put the City in the position of providing a discretionary approval to the SAA. (See
9 *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1142-44 (the
10 submission and evaluation of a design plan application did not constitute a discretionary
11 approval by the joint powers authority).)

12 Other documents cited in Petitioners' Opening Brief and Reply Brief on the Merits fair
13 no better. None suggest, as Petitioners assert, that the City negotiated the terms of the SAA and
14 therefore took a discretionary action. In one document cited by Petitioners titled "Los Gatos
15 Creek Diversion Plan," CDFW (not the City) suggested changes in order to minimize fish and
16 wildlife impacts as prescribed in the draft SAA. (AR 1285-1305.) Another document references
17 the fact that on August 1, 2018, the City reviewed the Santa Clara Habitat Plan and found "the
18 proposed project is consistent with the applicable terms and conditions established under the
19 Habitat Plan." (AR 1222.) None of these documents show "negotiations."

20 As noted above, the determination of whether an agency performs a discretionary
21 approval or makes a ministerial decision must take into account "whether the agency has power
22 to shape the project in ways that are responsive to environmental concerns." (*Friends of Juana*
23 *Briones House, supra*, 190 Cal.App.4th at 302.) Where the approval process does not allow an
24 agency to apply conditions to respond to environmental concerns, its decision is ministerial.
25 (Pub. Res. Code § 21080, subd. (b)(1); Guidelines §§ 15268 & 15369.) Voluntarily agreeing to
26 requests by an agency does not mean the responding party took a discretionary action. (*Sierra*
27 *Club v. County of Sonoma, supra*, 11 Cal.App.5th at 31 ("[T]he simple fact that an agency asks
28 for more information does not establish that the applicant must provide that information before

1 the applicant can compel issuance of the permit.”.) Further, if discretion is possible, but not
2 exercised, a decision is ministerial. (*Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th
3 85, 97 (“The fact that discretion could conceivably be exercised in projects arising under the
4 State Historical Building Code does not mean that respondents’ project was discretionary.”).)

5 An approval is not discretionary even if some discretion is exercised. Instead, “even
6 assuming some discretion, petitioners do not demonstrate that it allowed the [agency] to mitigate
7 potential environmental impacts to any meaningful degree.” (*Sierra Club v. County of Sonoma*,
8 *supra*, 11 Cal.App.5th at 31.) Here, the Fish and Game Code provides no authority for the City
9 to respond to environmental concerns or apply conditions. All the City can do is object if it
10 concludes that certain measures are unacceptable. There is no evidence the City objected to any
11 measures set forth in the SAA. Indeed, the final SAA was signed by the City on August 7, 2018
12 – just one day after CDFW sent it the draft SAA. (Compare AR 1225 with AR 1367.)

13 Finally, at the hearing Petitioners distinguished projects by government entities versus
14 private entities. Petitioners argued that since government administrators and elected officials can
15 change their minds and halt projects, all project-related actions are per se discretionary actions.
16 This would mean that whenever new information comes to light, government agencies would
17 need to supplement their EIRs since moving the project forward would be, under Petitioners’
18 theory, a per se discretionary action.

19 The Court does not find this argument persuasive. First, the 2014 MND in fact charted a
20 course for obtaining permits, so the City’s decision to obtain the SAA was made; following
21 through on that approved action does not make subsequent approvals discretionary. Second,
22 section 21001.1 of the Public Resources Code expressly states that both private and public
23 projects are “subject to the same level of review and consideration. . . .” The fact that the City is
24 in charge of the Three Creeks Project instead of a private entity does not change the analysis of
25 whether an approval is discretionary or ministerial.

26 **E. Conclusion**

27 CEQA does not require the City to prepare a supplemental EIR to address the
28 2017 listing of the Trestle in the California Register of Historical Resources. The City approved

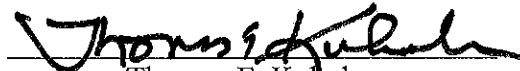
1 the MND in 2014. That approval expressly stated the City would seek issuance, and abide by the
2 terms, of an SAA. The MND was upheld in court and was not appealed. The SAA did not
3 require subsequent approval by the City, and even if it did, the issuance of the SAA was a
4 ministerial decision that did not trigger new CEQA requirements.² The Court thus finds that
5 substantial evidence supports the City's position that it was not required to commence further
6 environmental review because (1) the notification to CDFW of the streambed alteration, (2) the
7 provision of required information, and (3) the agreement to abide by the terms of the SAA, were
8 ministerial decisions and not a discretionary action or approval, and even if discretion were
9 exercised, approval was set forth the 2014 MND which cannot now be challenged.

10 **VI. DISPOSITION**

11 For the reasons set forth above, and good cause appearing therefore, the Petition for Writ
12 of Mandamus, which was filed on October 4, 2018, is hereby DENIED. However, issuance of
13 this Order shall be stayed until July 8, 2019, at 9:00 a.m., and the injunction issued on June 12,
14 2019 will remain on place until July 8, 2019, at 9:00 a.m. After that date and time, the injunction
15 will be DISSOLVED in its entirety.

16 The City shall prepare a form of judgment, seek approval from Petitioners, and then
17 submit it to the Court.

18
19 Dated: June 28, 2019


Thomas E. Kuhnle
Judge of the Superior Court

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27
28 ² The City argues that even if the SAA constituted a discretionary approval, it has already carefully studied and
evaluated the historicity of the Trestle in its 2015 EIR. Because the Court finds there was no discretionary approval,
the Court does not reach that argument.

IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

(ENDORSED)
FILED
JUN 28 2019

Willow Glen Trestle Conservancy, et al.

vs.

City of San Jose, et al.

Clerk of the Court
Superior Court of CA County of Santa Clara
BY Jessica Crabtree DEPUTY

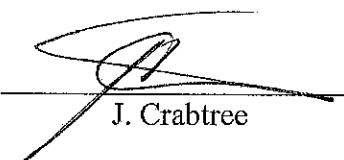
PROOF OF SERVICE OF:
ORDER ON SUBMITTED MATTER - ORDER RE: PETITION
FOR WRIT OF MANDAMUS

Case Number: 18CV335801

CLERK'S CERTIFICATE OF SERVICE: I am employed by the Santa Clara County Superior Court, San Jose, California. I certify that I am not a party to this case and that a true copy of this document was distributed to each party listed below by way of that stated.

Clerk of the Court,
Superior Court of CA County of Santa Clara

6/28/19

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