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Exempt from Filing Fees by Gov. Code §6103

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

WILLOW GLEN TRESTLE CONSERVANCY, an unincorporated association; FRIENDS OF THE WILLOW GLEN TRESTLE, an unincorporated association,

Petitioners,

v.

CITY OF SAN JOSE; CITY OF SAN JOSE DEPARTMENT OF PUBLIC WORKS; CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE; and DOES 1 to 10;

Respondents.

Does 1 to 10;

Real Parties in Interest.

Case Number: 18CV335801

CITY OF SAN JOSE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RENEWED MOTION FOR PRELIMINARY INJUNCTION

Date: June 10, 2019
Time: 2:00 p.m.
Dept: 5
Judge: Hon. Thomas E. Kuhnle

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I. INTRODUCTION

This case concerns a CEQA challenge to a Streambed Alteration Agreement, a permit issued to the City of San Jose as part of its Project, a component of the City's Three Creeks Trail system. Petitioners' renewed motion for a preliminary injunction should be denied because they failed to comply with statutory requirements for renewed motions. Petitioners also cannot satisfy the standard for preliminary injunctions because they are unlikely to prevail on the merits.

Petitioners renew their motion for preliminary injunction without complying with the requirements of Code of Civil Procedure section 1008(b) for motion renewals. Under that section, this Court lacks jurisdiction to consider the renewed motion. Even if Petitioners had complied with section 1008, they fail to state any new or different facts, circumstances or law from what this Court already considered and analyzed in October 2018. That alone is a ground for denial of this motion.

Petitioners attempt to bootstrap the issuance of this permit into an additional environmental review regarding the historical nature of the trestle, but they are unlikely to prevail on the merits of their case because, contrary to their argument, the City did not take any subsequent discretionary approval requiring any additional environmental analysis under CEQA. The administrative process of entering into the Streambed Alteration Agreement in 2018 is to simply implement a Project that was already approved by San Jose City Council in 2014. All required CEQA analysis and clearance was completed in 2014 as part of the Project approval and the sufficiency of the 2014 environmental clearance has been fully litigated. Even if the Court determines that the City did take subsequent discretionary approval requiring additional environmental analysis under CEQA, none of the circumstances set forth in Public Resources Code section 21166 apply to the facts of this case. The issue of whether the trestle is a "historic structure" has been fully analyzed, studied, and reported upon for over ten yearsin various reports and environmental documents, including the City Council approved Mitigated Negative Declaration in 2014 and Environmental Impact Report in 2015 for this Project.

The facts, circumstances, and law are the same now as they were in October 2018 when this Court denied Petitioners' previous motion for a preliminary injunction. The Streambed Alteration

Agreement is unchanged and the law is unchanged. The trestle was listed in the State Register of Historic Resources then and so it is now. There is no reason for a different decision.

The City respectfully requests the Court to deny Petitioners' motion.

II. BACKGROUND

1. The Project and attempts at its implementation

The City approved the Three Creeks Trail Pedestrian Bridge project ("Project") in 2014 based on a Mitigated Negative Declaration (Second Request for Judicial Notice filed on October 5, 2018 ("Second RFJN") Exhs. F & G), and then again in 2015 based on an environmental impact report. (*Id.* at Exhs. I, K & M.) The Project consists of removal of a wooden railroad trestle bridge and replacing it with a new, steel truss pedestrian bridge to service the City's trail system. (Request for Judicial Notice filed on October 5, 2018 ("First RFJN"), Exhibit A.) The Project was awarded to Gordon N. Ball, Inc. (Declaration of Katherine Brown in Opposition to Renewed Motion for Preliminary Injunction ("Second Brown Decl.") at ¶4.)

Because the work requires entering the Los Gatos Creek, four permits were required, including a streambed alteration agreement ("Agreement" or "Permit") from the California Department of Fish and Wildlife ("State" or "Department").

After receiving the Permit from the State on October 4, 2018, the City had all the needed permits (i.e. from the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, and National Oceanic and Atmospheric Administration) and was ready to commence working on the Project. (Declaration of Katherine Brown in Support of City of San Jose's Opposition to Plaintiffs' Application for TRO and Preliminary Injunction, filed on October 5, 2018 ("First Brown Decl.") at ¶3.) The permits allowed work only during the dry season, from June 15 to October 15. (*See* Declaration of Michael O'Connell in Support of Oppositon to TRO and Preliminary Injunction filed on October 5, 2018, at ¶4.)

When this Court issued its Order Denying Preliminary Injunction on October 11, 2018, only four days remained until the expiration of the allowed work period. That was insufficient time to mobilize crews to begin work. (Second Brown Decl. at ¶17.) The City therefore applied to the pemitting agencies for extensions to work after October 15. (*Id.*) One of the permitting agencies, the

Unites States Army Corps of Engineers, did not agree to an extension and the City could not commence work in 2018. (*Id.*) Due to the delay caused by Petitioners' litigation of their first motion for a preliminary injunction the City was unable to proceed with the Project before the permit window closed on October 15, 2018. (*Id.*) The work windows in all permits expired on October 15, 2018. (Second Brown Decl. at ¶15.)

The City currently has all the required permits for work in the Creek and the dry season when work in the creek is allowed starting June 15, 2019 and ending October 15, 2019. (*Id.* at 22.) Work in the Creek is anticipated to end or or shortly before October 15, 2019. (*Id.* at ¶¶24-29.)

2. Friends' previous unsuccessful CEQA lawsuit to halt the Project

In 2016, the Sixth District Court of Appeal vacated the trial court's judgment and remanded the case to "determine whether the City's adoption of the MND is supported by substantial evidence that the Trestle is not a 'historical resource' under CEQA." (*Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 473-74.) On remand, in 2017, the trial court issued a judgment in favor of the City, denying Friends' petition and finding that the records contained substantial evidence to support the City's decision that the trestle is not a historical resource. (First RFJN, Exhibit A at 31.) That judgment is final.

3. Neither Petitioner nor anyone else challenged the 2015 EIR that specifically analyzed whether the trestle was a historic resource.

While the case was pending in trial court, the City prepared an EIR for this Project (in an abundance of caution and to avoid further delay if the trial court sided with the challengers), including a detailed analysis whether the trestle is a historic resource under CEQA. (First RFJN Exhibit B at ¶¶5-6 & accompanying exhibits.) The City Council certified the final EIR and adopted it in May 2015. (*Id.*) That EIR was unchallenged, by Petitioners or anyone else. At the same time, the City reapproved the Project by affirming the construction contract with Gordon N. Ball, Inc., for the Project. (First RFJN Exhibit C (agenda item 4.5(b).)

4. This Court's order on Petitioners' first motion for a preliminary injunction

In early October 2018, Petitioners applied for a preliminary injunction in this case. After briefing and a hearing on the motion, this Court denied Petitioners' motion on October 11, 2018,

finding that while "the balancing of the relative interim harm to the parties from issuance or nonissuance of the injunction weighs in favor of Petitioners" (Order Denying Preliminary Injunction filed October 11, 2018 ("Order") at 4:9-11), and while on the issue "whether the Listing presents 'new information' or 'substantial changes with respect to the circumstances under which the project is being undertaken'" "Petitioners' position may have merit, but it is not strong" (*id.* at 5:7-8 & 5:23), ultimately the Court denied Petitioners' motion because "the finalization of the SAA [Streambed Alteration Agreement] was not a 'further discretionary approval on that project.'" (*Id.* at 6:27-28.) The Court found that "the finalization of the SAA did not change the activity to be undertaken" because the mitigated negative declaration the City adopted in 2014 and upheld by the Superior Court on remand "agreed the City would abide by conditions imposed on it in the SAA," "the City agreed in January 2014 that it would be bound by an SAA, and that decision was final." (Order at 7:11-12 & 4-6.)

III. ARGUMENT

A. Petitioners have failed to follow the requirements for a renewed motion.

Code of Civil Procedure section 1008(b) requires parties wishing to renew a previously denied motion to follow specific procedure. (Code Civ. Proc. §1008(b).) Otherwise, the court lacks jurisdiction to consider a renewed motion. (Code Civ. Proc. §1008(e).) Petitioners' renewed motion may not be heard because they failed to follow this mandatory procedure.

Section 1008 states that "[t]his section specifies the court's jurisdiction with regard to . . . renewals of previous motions." (Code Civ. Proc. §1008(e).) It provides: "No application . . . for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (*Id.*) The Code specifies the requirements for renewals of motions:

> A party who originally made an application for an order which was refused in whole or in part, or granted conditionally or on terms, may make a subsequent application for the same order **upon new or different facts, circumstances or law**, in which case it shall be shown **by affidavit** what application was made before, when and to what judge, what order or decisions were made, and **what new or different facts, circumstances, or law are claimed to be shown.** For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.

(Code Civ. Proc. §1008(b).) (emphasis added)

Here, Petitioners fail to provide any affidavit in support of their motion, much less an affidavit that identifies what purportedly new or different facts, circumstances or law exist since their previous motion for a preliminary injunction was heard.

In their previous motion for a preliminary injunction, Petitioners argued, like in this renewed motion, that it was the "listing" of the trestle in the State Register that allegedly triggered subsequent CEQA review. (*See* Petitioners' Supplemental Memorandum of Points and Authorities in support of Injunctive Relief filed on October 5, 2018, at 3:16-25.) This Court has already made a decision based on that fact and circumstance. (*See, e.g.* Order Denying Preliminary Injunction filed October 11, 2019, at 3:25-4:1.) There has been no change in the law, and Petitioners do not suggest any such change by affidavit or in their motion.

Even if Petitioners had complied with section 1008 of the Code of Civil Procedure, and this Court had jurisdiction to consider their renewed motion, it should be summarily denied. The circumstances, material facts and the law are unchanged since October 2018 when they brought their previous motion. And no new or different facts, circumstances, or law are asserted in this renewed motion.

B. Standards of review

1. Standard of review on a motion for a preliminary injunction favors public entities.

In *Tahoe Keys Property Owners' Association v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, the court articulated the standard for issuing injunctive relief as follows:

> In determining whether or not to issue a preliminary injunction, a trial court must evaluate two interrelated factors. The first is the **likelihood that the plaintiff will prevail on the merits at trial**. The second is the **interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted**.

Id. at 1470-71 (citation omitted) (emphasis added). (*See also San Francisco Newspaper Printing Co., Inc. v. Superior Court (Miller)* (1985) 170 Cal.App.3d 438, 442.) (A preliminary injunction must not issue unless it is "reasonably probable that the moving party will prevail on the merits.")

A plaintiff who seeks an injunction against a public entity bears a heavier burden than a plaintiff under other circumstances:

> Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. **There is a general rule against enjoining public officers or agencies from performing their duties.** This rule would not preclude a court from enjoining unconstitutional or void acts, but **to support a request for such relief the plaintiff must make a significant showing of irreparable injury**.

(*Tahoe Keys Property Owners' Assoc.*, 23 Cal.App.4th at 1471) (citations omitted) (emphasis added).

2. The merits are reviewed under the substantial evidence test.

Petitioners advocate the wrong standard of review under Public Resources Code section 21166. (*See* Petitioners' Renewed Motion for Preliminary Injunction ("Renewed Motion") at 6-8.) Because the City approved the Project on the basis of an EIR, the standard of review used in those circumstances applies. (City's Request for Judicial Notice filed on October 5, 2018 (First RFJN), Exhibit C at p. 19 (Agenda Item 4.5(b).) After acknowledging that the Project is the "whole of the action" and not just the Streambed Alteration Agreement, Petitioners may not change tack and claim that only the mitigated negative declaration ("MND") applies because the State allegedly reviewed only the MND during its process. (*See* Renewed Motion at 9-10.)

An initial EIR on a project must be challenged within 30 days after the notice of determination and cannot be challenged later under the guise that subsequent or supplemental EIR is required. (*A Local & Regional Monitor (ALARM) v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1794.) Here, this Project was reapproved based on the 2015 EIR. No-one challenged that environmental review, including Petitioners. The present lawsuit effectively and impermissibly attempts to do so now.

When the environmental document is an EIR, the agency's subsequent review determination is reviewed under a highly deferential test. (*Citizens Against Airport Pollution v. City of San Jose* (2014) 277 Cal.App.4th 788, 797 & 804.) The agency's determination that further EIR is not required will be upheld if supported by substantial evidence. (*Id.* at 804.) The challenger must show that the agency's determination is not supported by substantial evidence. (*Id.* at 798.) (*See also*

Stephen L. Kostka et al., *Practice Under the California Environmental Quality Act* ("Kostka") (CEB, 2nd ed. 2019) §19.55.) That standard applies here.

Benton v. Board of Supervisors (1991) 226 Cal.App.3d 1467, is a correct statement of the law "insofar as it recognizes that negative declarations, like EIRs, are entitled to a presumption of finality." (*Friends of College of San Mateo Gardens*, 1 Cal.5th at 958 n.6.) The High Court cautioned that "'a court should tread with extraordinary care' before reversing an agency determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decisionmaking process." (*Id.* at 953.)

C. The Streambed Alteration Agreement did not involve a discretionary approval in 2018.

The California Supreme Court cautioned that "'a court should tread with extraordinary care' before reversing an agency determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decisionmaking process." (*Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 953.) It is evident under any standard of review that in 2014 the Mitigated Negative Declaration "expressly agreed the City would abide by conditions imposed on it in SAA, and that decision was final." (Order at 7:5-6.) Similarly, the City's readoption of the Project in 2015 under an EIR, with the same approval of terms of the Streambed Alteration Agreement, was final. (First RFJN Exh. C; Second RFJN Exh. I at p. 2-2; & *id.* at Exh. M.) Because there was no more discretionary approval required from the City for applying for and entering into the Agreement, there was no occasion to reopen environmental analysis at any point after that to implement the Project—already approved by the City Council in 2014 and 2015.

1. Executing the Streambed Alteration Agreement in 2018 is not a subsequent discretionary approval requiring additional CEQA analysis because the terms were already approved in 2014.

The Petition for Writ of Mandamus alleges that "CDFW and the City abused their discretion and failed to act in the manner required by law in entering into the discretionary Streambed Alteration Agreement . . . ." (Petition at ¶25.) While unclear, Petitioners appear to argue in their

motion that the City allegedly violated CEQA when it applied for the Agreement, without first conducting an EIR. (*See* Renewed Motion at 8:24-26.) Petitioners' argument is without merit.

CEQA applies only to discretionary approvals. (Pub. Res. Code §21080(a).) "If, under the applicable substantive law, an agency's approval is ministerial rather than discretionary, evaluation of environmental impact is unnecessary and CEQA does not apply." (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 299.) (quotation marks omitted)

CEQA defines the term "project" broadly. (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1056.) "Under CEQA, a project is 'the whole of an action' that has the potential to affect the environment; it is defined based on the activity undertaken and not on actions by governmental entities concerning its approval." (*Id.*) A new government action does not convert an existing project into a new one: "[I]t is clear that **new government action taken with respect to the same activity** for which approval is sought does not convert that activity into a new project for purposes of CEQA review." (*Moss*, 162 Cal.App.4th at 1056.) (emphasis added) The Guidelines define the term "project" as "the whole of an action," and explain: "The term 'project' refers to the activity which is being approved and which may be subject to **several discretionary approvals by government agencies**. The term 'project' **does not mean each separate governmental approval**. . . ." (Guidelines §15378.) (emphasis added) In light of the above, the City Council's 2014 approval to enter into a Streambed Alteration Agreement and abide by its terms was part of the 2014 approval of the Project.

The Project consists of demolition of a trestle spanning the Los Gatos Creek and replacing it with a steel truss pedestrian bridge. (*See* Order at 6:28-7:2.) (*See also* Second RFJN, Exhibit I at p. 2-1.) This requires a number of permits to be issued by various government agencies. (Second RFJN Exhibit I at at p. 2-2; First Brown Decl. at ¶3.) As this Court determined on Petitioners' previous motion for a preliminary injuction, the City's securing the permits required for implementation of the Project was part of the City's Project approval. (Order at 7:2-11.)

When the City approved the Project in 2014, it knew it needed a Streambed Alteration Agreement to implement the Project, as required by Fish and Game Code section 1602. When determining whether to grant or deny this Agreement, the California Department of Fish and

Wildlife considers adverse effects to fish and wildlife resources from a given project. (Fish & G. Code §1602(a)(4).) The Code requires the Department to either determine that the proposed activity will not substantially adversely affect an existing fish or wildlife resource, or to issue an agreement with reasonable measures to protect the resource. (*Id.*)

Recognizing that such an Agreement was required for Project implementation, the City analyzed the Project's potential environmental impacts on the biological resoures in Los Gatos Creek when it approved the Project in 2014 (Second RFJN, Exhs. E through G) and when it reapproved it in 2015. (Second RFJN, Exh. I at pp. 3-12 through 3-28; & Exh. J.) Thus, the City's 2018 application to the State for a Streambed Alteration Agreement did not trigger CEQA because it was an administrative process implementing the City Council's approval of the Project in 2014 and 2015.

The City's discretionary approvals took place in 2014 when the City prepared the Mitigated Negative Declaration and approved the Project. (Order at 7:2-13.) (*See also* Second RFJN Exhibits F & G.) The City subsequently took discretionary action again in 2015, when it approved the EIR and reapproved the Project. (First RFJN Exh. C; & Second RFJN Exhs. I through M.) The City Council committed the City to the Project when it approved the construction contract in 2014 and 2015. These were the discretionary approvals requiring CEQA analysis by the City. As part of the environmental analysis for the MND and EIR, the City analyzed the considerations for a streambed alteration permit as a necessary part of the Project, and there has been no subsequent City approval requiring the City to re-analyze the same issues. (Second RFJN, Exhs. E through G; Exh. I at pp. 3-12 through 3-28; & Exh. J.)

Contrary to Petitioners' argument, the City made no discretionary approvals in connection with the Streambed Alteration Agreement in 2018 that would trigger supplemental CEQA analysis.

2. The terms of the Streambed Alternation Agreement were not negotiated.

To the extent that Petioners contend that the City's email correspondence with the California Department of Fish and Wildlife regarding the SAA constitutes discretionary action under CEQA, they are wrong.

While the Fish and Game Code refers to the resulting document as an "agreement," there is no arm's-length negotiation of its terms. (*See* Fish & G. Code § 1602(a).) It is the State that determines whether project implementation will adversely affect a fish and wildlife resource, and if so, the State determines if protective measures during construction are necessary. (Fish & G. Code §1603(a).) Under section 1603, the applicant's power during that process is limited to simply objecting to protective measures. (Fish & G. Code §1603.) The CDWF ultimately determines the terms and conditions of the permit. The applicant's only right is to be heard by the State in objection to those terms and to arbitrate the duration of the "agreement." (*Id.*)

This is nothing more than a permitting process. The applicant is prohibited from proceeding with a project without the required permit. (*See* Fish & G. Code § 1602(a).) While the State has discretion to deny the permit or impose conditions on its issuance, the Fish and Game Code governing that permit process only allows applicants to object to terms proposed by the State and seek their review through an administrative appeal. (*See* Fish & G. Code §1603.)

There was no negotiation of this Agreement, and its terms and conditions were set by the State. (First Brown Decl. at ¶¶ 4-8; Second Brown Decl. at ¶¶7-13.) The Agreement simply sets forth the terms and conditions with which the City must comply as conditions of being allowed to work in the Creek. (*See* Second RFJN Exhibit N.) The City's signature on the Agreement does not reflect any contractual arms-length negotiation, but rather, the City's pledge to abide by its terms.

Even if the Agreement had been negotiated as Petitioner claims, its terms were approved by the City Council in 2014 and 2015, as explained in Part III.C.1 above, and no further discretionary approval was required in 2018.

3. The issue of the trestle's historic status was extensively analyzed in the 2015 EIR and remained unchallenged so it was not new information or substantial change circumstances of the Project in 2018.

Petitioners argue that if there is an additional discretionary act and there is new information or circumstances that were not previously studied, additional environmental review is required under Public Resources Code section 21166. (Renewed Motion at 5.) Neither of these circumstances exist here. As explained above, the City did not make any discretionary approval in 2018 that would

trigger additional CEQA review. As a result, section 21166 is not implicated. Even if it were, the City studied whether the trestle is historic both in the MND and the EIR, and the public had ample opportunity to provide input regarding that issue.

The previous CEQA lawsuit of Petitioner Friends, filed in 2014, made the trestle's historic status its central issue when it challenged the City's determination that the trestle was not historic. That determination was eventually upheld. (*See* Part II.2 *supra*.) The City's 2015 EIR analyzed the trestle's potential historic status in detail. (First RFJN, Exh. B at ¶5 & accompanying exhibit A; Second RFJN, Exhibit I at pp. 3-28 through 3-32.) The 2015 EIR remains unchallenged and the time to do so has long passed. (Public Res. Code §21167(c).) (CEQA's 30-day period of limitations for challenging an EIR)

D. The balance of harms weighs against a preliminary injunction.

1. Petitioners' burden to show irreparable injury is heavier when injunctive relief is sought against a public entity.

A plaintiff who seeks an injunction against a public entity bears a heavier burden than a plaintiff under other circumstances:

> Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, **public policy considerations** also come into play. There is a **general rule against enjoining public officers or agencies** from performing their duties. This rule would not preclude a court from enjoining **unconstitutional or void acts**, but to support a request for such relief the plaintiff must make **a significant showing of irreparable injury**.

(*Tahoe Keys Property Owners' Assoc.*, 23 Cal.App.4th at 1471) (citations omitted) (emphasis added).

The City Council approved the Project and the means of its implementation, including the Streambed Alteration Agreement. (*See* Part III.C.1 *supra*.)

The City of San Jose has owned the trestle since 2011. (Second RFJN, Exh. K at p.2.) The City bought the right of way to include it in the Three Creeks Trail, a unique trail system with multi-trail connectivity. (*Id.* at ¶6.) The City has been working on that Project since about 2003. (*Id.*) The trestle was in a degraded state even when the City acquired it in 2011. (City of San Jose's Request for Judicial Notice in Opposition to Renewed Motion for Preliminary Injunction ("Third RFJN),

Exh. O at ¶¶7-9.) In 2014 it had rotted timbers and parts of it were burned. (*Id.* at ¶¶10-12 & exhibits E through G thereto.)

City consultant Jacobs Engineering visited the trestle site in February 2019, and as recently as June 5, 2019, and noted significant deterioration of the trestle, including deterioration of ties (i.e. pieces of timber spanning the width of the trestle parallel to the creek banks); missing ties; fire damage; bent and damaged railing posts along both edges of the trestle; warped metal grating at the edge of the trestle's deck, likely from fire and vandalism; significant damage to timbers supporting the metal grating; and deterioration of the trestle's stringes (i.e. wooden beams running the length of the trestle that constitute the main structural support for its deck). (Declaration of Dave von Rueden at ¶¶3-17 & Exhs. A through H thereto.) Jacobs Engineering also noted that the trestle acts as a dam on the Creek because it collects debris upstream, and has collected several large trees since the winter of 2016-2017. (*Id.* at ¶¶4 & 7, & Exh. A thereto.) Such stream flow conditions likely cause erosion and scour at the existing timber piles; piles are also subjected to battering from large debris and hydraulic forces due to debris loading. (*Id.* at ¶7.)

The Willow Glen Neighborhood Association supports this Project and is in favor of removing the wooden trestle and installing a steel pedestrian bridge. (Third RFJN, Exh. O at ¶14 & exhibit H thereto.)

2. The City would suffer irreparable harm if it is unable to complete the Project at this time.

The City Council awarded a contract to construct the Project to Gordon N. Ball, Inc. (Second Brown Decl. at ¶4.) Under permit conditions, the Project work in the Creek may only proceed between June 15 and October 15. (*Id.* at ¶20.) Last year, the delay caused by the present ligitation, including Petitioners' previous motion for preliminary injuction, prevented the City from working on the Project in October 2018. (*Id.* at ¶¶15-17.) After the State issued the Streambed Alteration Agreement on October 4, 2018, the City had all permits required for the Project construction work. (*Id.* at ¶15.) The work window in all permits expired on October 15, 2018. (Second Brown Decl. at ¶15.) Although the City was not permitted to perform construction work until October 4, 2018, the City intended to complete as much work as possible within the eleven days remaining to October

15, 2018. (*Id.* at ¶16.) The City's consultant had completed the Preconstruction Work phase (biological studies), and Gordon N. Ball, Inc. was scheduled to begin the Mobilization/Site preparation phase on October 8, 2018. (*Id.*)

When the October 11, 2018, order denying preliminary injunction issued, only four days remained until the expiration of the allowed work-period. (Second Brown Decl. at ¶17.) That was insufficient time for the City's contractor to mobilize crews to begin work. (*Id.*) The City applied for extensions of its permits. (*Id.*) The United States Corps of Army Engineers did not allow the City's contractor to work past the permit October 15, 2018 deadline. (*Id.*) The City's contractor was thus unable to begin work on the Project in 2018. (*Id.*)

The City now has to wait to start work until June 17, 2019. Mobilization and site preparation is scheduled to start on June 17, 2019 and to complete within one week. (Second Brown Decl. at ¶21.) Demolition of the trestle is scheduled to start on June 24, 2019, and to complete within one week. (*Id.*) Installation of the new bridge is scheduled to start on July 1, 2019, and to complete in fourteen weeks. (*Id.*) Work on the Project is expected to continue until October 15, 2019, or shortly before then. (*Id.* at ¶¶22-26.)

The City, and ultimately the City's taxpayers, incurred the following significant costs related to the Project to date: EIR (consultant and City staff costs from 2014 to 2016) of over $561,000; consultant fees paid to date for administrative support, construction management support, and permit extensions of over $117,000; and construction contract amount paid to date of over $400,000, in addition to staff time spent from 2014 to the present. (Second Brown Decl. at ¶14.)

Additionally, because Project work could not be performed in 2018, the City incurred over $269,000 in innecessary costs: payment for contractor's mobilization and demobilization of $50,000; contractor's delay costs of $75,000; consultant's delay costs of $119,000; and additional staff time of over $25,000. (Second Brown Decl. at ¶18.)

In the meantime, the public has been deprived for years of the ability to enjoy a complete and safe Three Creeks Trail for recreation. Moreover, according to a City trail count, 53% of the users of the Guadalupe River trail have done so to commute. (Third RFJN, Exh. O at ¶22.) the replacement of the trestle will significantly increase the connectivity of the trails, improve access to

Willow Glen's popular Lincoln Avenue, and reduce time spent on public roadways to travel by bike and foot. (*Id.* at ¶22 & ¶¶6-7.) As a result, delays in the Project mean that there are more people in cars and thus more air pollution than there would be otherwise.

IV. CONCLUSION

The City respectfully requests the Court not to countenance Petitioners' attempt to reargue the same motion this Court already denied in October 2018. The facts, circumstances, and the law remain unchanged since that time, and warrant the same result.

The City requests the Court to deny Petitioners' request for a preliminary injunction.

Respectfully submitted,

Dated: June 6, 2019

RICHARD DOYLE, City Attorney

By: Margo Laskowska
MARGO LASKOWSKA
Senior Deputy City Attorney

Attorneys for Respondents: CITY OF SAN JOSE and CITY OF SAN JOSE DEPARTMENT OF PUBLIC WORKS

PROOF OF SERVICE

CASE NAME: Willow Glen Trestle Conservancy, et al v. City of San Jose, et al.

CASE NO.: 18CV335801

I, the undersigned declare as follows:

I am over 18 years of age and not a party to this action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On June 6, 2019, I caused to be served the within:

CITY OF SAN JOSE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RENEWED MOTION FOR PRELIMINARY INJUNCTION

☒ by ELECTRONIC SERVICE listed below, transmitted using the One Legal Process Service electronic filing system. The document(s) listed above was/were electronically served to the electronic address(s) below

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 6, 2019, at San Jose, California.

Courtney Mohammadi

Courtney Mohammadi