SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FRIENDS OF THE WILLOW GLEN TRESTLE, an unincorporated association, Petitioner, vs. CITY OF SAN JOSE; CITY COUNCIL OF THE CITY OF SAN JOSE, Respondents.	Case No. 1-14-CV-260439 ORDER ON REMAND ON PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

The Friends of the Willow Glen Trestle petitioned for relief in mandate under the California Environmental Quality Act (CEQA) in 2014, after the City of San Jose that year approved a project that included demolishing a wooden railroad trestle bridge (Trestle) and replacing it with a new, steel truss pedestrian bridge to service the City's trail system.[1] The City

[1] CEQA is found at Public Resources Code section 21000, et seq. Further unspecified statutory references are to the Public Resources Code. CEQA is also interpreted according to the guidelines in the California Code of Regulations, title 14, division 6, chapter 3. Further references to the "Guidelines" are to this chapter. "In interpreting CEQA, we accord the [CEQA] Guidelines great weight except where they are clearly unauthorized or erroneous." (*Vineyard*

found, as a discretionary matter, that the Trestle was not a "historical resource" under the last sentence of section 21084.1, and therefore the project would not have a significant effect on the environment. It adopted a mitigated negative declaration (MND) under CEQA, consistently with that determination. The Friends challenged the City's decision that an environmental impact report (EIR) was not required, contending there was substantial evidence in support of a fair argument that the Trestle was a historical resource under CEQA, and that there was no substantial evidence in the administrative record to support the City's contrary determination. This court, the Honorable Joseph Huber, issued a peremptory writ of mandate invalidating the City's approval of the project, concluding that the adoption of the MND was invalid because there was substantial evidence of a fair argument shown that the Trestle was a historical resource. The court accordingly ordered the City to prepare and certify an EIR in compliance with CEQA.

The City appealed, contending the court had applied the wrong standard of judicial review—the fair argument test—to the City's discretionary finding under the last sentence of section 21084.1 that the Trestle was not a historical resource, and that the finding was supported by substantial evidence, the correct and more deferential standard to be applied. The City relied on *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 (*Valley Advocates*) and *Citizens for Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340 (*L Street*) concerning the applicable standard of judicial review. The Sixth District Court of Appeal reversed this court's judgment in a published opinion, agreeing with *Valley Advocates* and *L Street* that the standard of judicial review applicable to a discretionary finding by a lead agency about historicity under the final sentence of section 21084.1 is the substantial evidence test as applied in CEQA. (*Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457 (*Willow Glen Trestle*).)

The Court of Appeal specifically concluded that "the statutory scheme and the legislative history of section 21084.1 require application of a deferential substantial evidence standard of

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Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 428, fn. 5 (*Vineyard*).)

judicial review, rather than a fair argument standard of review, to a lead agency's decision that a resource is not a discretionary historical resource under the final sentence of section 21084.1." (*Willow Glen Trestle, supra*, 2 Cal.5th at p. 473.) Consistently with this holding, the reviewing court remanded the matter to this court with directions to vacate its prior judgment granting the petition and issuing a peremptory writ of mandate, and 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." (*Id.* at pp. 473-474.) The prior order was previously vacated per these directions.

The court on remand has again reviewed the record, received and reviewed extensive post-remand briefing from both sides, and held oral argument on the petition on February 3, 2017, and April 7, 2017. Based on this review, and with the law of the case framing its analysis and conclusions, the court now determines that the City's discretionary finding under the final sentence of section 21084.1 that the Trestle is not a historical resource is supported by substantial evidence, slim as it may be and even though there is also substantial evidence on the other side.

The court further concludes that, on this record, this outcome is dictated by the language of the pertinent portion of section 21084.1, which does not appear to confer an affirmative duty on a lead agency to undertake a historicity determination of what could only be a discretionary historical resource, that is one that is not either mandated or presumptively found to be of historical significance based on specifically enumerated criteria in section 21084.1. These criteria include further criteria enumerated in section 5024.1, subdivision (g), and Guidelines section 15064.5, subdivision (a)(3)(A) through (D), including section 4852 of title 14 of the California Code of Regulations. Nor does section 21084.1 appear to command the application of these or any other particular criteria by a lead agency when it voluntarily undertakes a discretionary historicity determination, though these criteria would be a logical starting point around what is otherwise an analytical vaccuum. The final sentence of section 21084.1 provides only that with respect to a resource that is not afforded mandatory or presumptively historical significance, i.e., one that "not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not

deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1," this fact "*shall not preclude* a lead agency from determining whether the resource may be an historical resource." (Italics added.) Likewise, Guidelines section 15064.5, subdivision (a)(4) provides that the fact that a resource is not listed in a state or local historical registry, and has not been determined to be so eligible, "*does not preclude* a lead agency from determining that the resource may be an historical resource as defined in" sections 5020.1, subdivision (j) or 5024.1." (Italics added.) This emphasized language does not compel the application of any specified criteria to what is a voluntary historicity determination by a lead agency about a discretionary historical resource. Per *Valley Advocates* and *Willow Glen Trestle*, all that is required is that the agency's voluntary decision, whatever it is, is supported by substantial evidence, as that term is generally applied in CEQA.

What this textual conclusion practically means here, framed by the reviewing court's opinion in *Willow Glen Trestle* on the governing standard of judicial review, is that the City's discretionary and voluntary finding that the Trestle is not a historical resource must be afforded substantial deference and must be upheld if it is supported by substantial evidence, with all factual conflicts resolved in favor of the City's determination, which is presumed correct.

The court understands the broad environmental protection that CEQA is intended to afford, its goal of providing a transparent and informed decision-making process, and the practical challenges inherent in achieving mandatory or presumptively historical status of an identified resource *before* an agency's approval of a project affecting that resource. But given the legal landscape—specifically the holdings in *Valley Advocates*, *L Street*, and *Willow Glen Trestle* as to the applicability of a deferential standard of judicial review to discretionary historicity determinations by a lead agency—and the plain language of the final sentence of section 21084.1 and Guidelines section 15064.5, subdivision (a)(4), the court is compelled on this record to deny the petition.

While this court so concludes, it also perceives an analytical gap when it comes to affording CEQA protection and transparency to agency decisions on a discretionary historical

resource, particularly when, as here, the determination is that the resource lacks historical significance. But this is a gap that is not a court's job to fill.

STATEMENT OF THE CASE

I. *Factual Background*[2]

"The Trestle is a wooden railroad bridge that was built in 1922 as part of a 'spur line' to provide 'rail freight access' to 'canning districts' near downtown San Jose. In 2004, the City obtained a one-page 'BRIDGE EVALUATION SHORT FORM' from 'Consulting Architectural Historian' Ward Hill regarding the Trestle in connection with a proposed City trail project that did not threaten the Trestle's existence. Hill opined that '[t]he [Trestle's] design is based on standard plans for wood trestle bridges,' and 'the trestles and superstructure were likely replaced during the last 30 to 40 years.' He concluded that the Trestle 'is a typical example of a common type and has no known association with important events or persons in local history.' The City also obtained a one-page letter from a State Historic Preservation Officer stating that the City's proposed 2004 project would not affect any 'historic properties.' "[3] (*Willow Glen Trestle, supra,* 2 Cal.App.5th at pp. 460-461.)

"The City acquired ownership of the Trestle in 2011. In 2013, the City proposed a project to demolish the Trestle and replace it with a new steel truss pedestrian bridge as a component of the City's Three Creeks Trail system. The City determined that it would cost about the same amount to replace the Trestle as to restore it and retrofit it. A new steel bridge would present less of a fire hazard and have lower maintenance costs." (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p. 461.)

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[2] The court takes the background facts largely from the *Willow Glen Trestle* opinion, as the administrative record under review is the same, except as noted (see rulings below on the scope of the record).

[3] It is worth mention that the 2004 project, unlike the later one, did not involve destruction and removal of the Trestle, but, rather, leaving it in place, rehabilitated, and incorporating it into the trail line. The City contends that this point doesn't matter to the threshold and discrete question whether the Trestle itself is a historical resource, and maybe that's true. But this pitch does remove the context of the "project" from the equation and that may have implications on the historicity determination.

"In March 2013, the City approved the project after concluding that it was not a project and therefore did not require CEQA review. Eight months later, in November 2013, the City published a notice of intent to adopt an MND supported by an initial study. The initial study relied on the two 2004 documents to support its finding that there would be no impact on historical resources because 'the bridge is an example of a common type of trestle, and was not associated with important events or persons in local history.' The initial study emphasized that the Trestle was not distinctive or unique. The initial study took note of 'the role of the railroad spur and the trestle in the incorporation of Willow Glen and activism regarding roadway-railroad grade separations.' It 'acknowledge[d] the history of the trestle and the former Western Pacific Railroad alignment through Willow Glen' and the fact that the Trestle was 'locally important,' but it concluded that this history did not make the Trestle a historical resource." (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p. 461, fn. omitted.)

"The City received numerous comments on the proposed MND. Jean Dresden, a local historian, submitted extensive comments describing the uniqueness and historic importance of the Trestle. Marvin Bamburg, a 'CHRIST-listed' historical architect, agreed with Dresden that the Trestle 'is an important historical icon of the past' and 'that it qualifies for listing in the California Register under Criteria 1 and 3.' Susan M. Landry, an environmental architect, agreed, and she noted that the 2004 documents relied on by the City were 'outdated' and that 'reports and documents' had been uncovered after 2004 demonstrating that the Trestle had long been considered historic."[4] (*Willow Glen Trestle, supra*, 2 Cal.App.5th at pp. 461-462, fns. omitted.)

"In January 2014, the city council adopted the MND based on the initial study. The city council found that 'the existing wood railroad trestle bridge is not a historic resource' because 'the design is based on standard plans for wood trestle bridges and has no known association

[4] There has apparently been significant activity bearing on the status of the Trestle as a historical resource since the City's adoption of the MND in 2014. But this activity is beyond the scope of the record and the court's consideration. And as noted in the *Willow Glen Trestle* opinion, the City has already certified an environmental impact report (EIR) for this project, which occurred after this court previously granted the Friends' petition. But the City has not vacated its approval of the project and reconsidered it in light of the EIR, electing instead to play out this litigation. (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p. 463.)

with important persons; the bridge materials were likely replace[d] during the last 30 or 40 years; the trestle is not unique and is unlikely to yield new, historically important information; and the trestle did not contribute to broad patterns of California's history and cultural heritage.' The city council therefore concluded that the project would have no significant impact on the environment." (*Willow Glen Trestle, supra*, 2 Cal.5th at p. 462.)

II. *Procedural Background*

"In February 2014, Friends filed a writ petition challenging the City's approval of the project and adoption of the MND. Friends asserted that there was substantial evidence to support a fair argument that the Trestle was a historical resource and therefore an EIR was required. Friends also argued that 'there is not substantial evidence that the Trestle is not historic.' " (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p. 462, fn. omitted.) In July 2014, the trial court found that the fair argument standard applied and that substantial evidence supported a fair argument that the Trestle was a historical resource.[5] In August 2014, the court entered judgment granting Friends' petition and issuing a peremptory writ of mandate directing the City to set aside its approval of the project and its adoption of the MND." (*Id.* at pp. 462-463, fn. omitted.)

The City appealed the decision, and the Court of Appeal reversed, holding that the "deferential substantial evidence standard of judicial review, rather than a fair argument standard of judicial review" applies "to a lead agency's decision that a resource is not a discretionary historical resource under the final sentence of section 21084.1." (*Willow Glen Trestle, supra*, 2 CalApp.5th at p. 473.) The reviewing court remanded the matter to this court to exercise judicial review "under the correct standard" in the first instance. (*Ibid.*)

[5] The court did not previously reach the question whether the City's determination that the Trestle was not a historical resource was supported by substantial evidence, having resolved the case on the fair argument standard.

III. *Requests For Judicial Notice and to Augment the Administrative Record*

The parties have a running dispute over the scope of the administrative record that has resulted on remand in dueling requests for judicial notice of extra-record material, an informal request by the Friends to augment the record, and the City's unauthorized motion to strike. As part of post-hearing briefing and argument, the Friends narrowed what they sought to add to the record by augmentation. But ferreting out what was withdrawn and what remains necessitates more labor by the court than just ruling on the initial request. The court will address the requests in turn before proceeding to the substance of its ruling on the petition, and this requires a tedious detour, but one that is necessary for the court to provide rulings on all pending issues.

A. Requests for Judicial Notice

Both sides have submitted requests for judicial notice. A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issues before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal 4th 415, 422 fn. 2.) In a CEQA case, the only relevant material generally is the contents of the certified administrative record. (See *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 897 (*Porterville*) [improper for trial court to take judicial notice of extra-record documents as "extra-record evidence is not admissible when considering a challenge to the substantiality of evidence supporting a quasi-legislative determination under CEQA"].)

1) Friend's Request

With its reply briefing on remand, the Friends submitted a request for judicial notice of minutes of the State Historical Resources Commission dated April 18, 2016, and July 29, 2016 (attached as exhibits A & B to the request). The Friends claim the minutes are "relevant to clarify the actions of the Commission in light of the City's recent reference in its brief. (City's Opposition at 19, n.4.) The Commission minutes document the official California determination that the Willow Glen Trestle meets the criteria for listing in the National Register for Historic Places." (RJN at 1:23-28.) This 2016 material is irrelevant to judicial review of the January 2014

project approval (and specifically the determination that the Trestle was not historic). The request is accordingly denied.

2) City's Request

With its opposition brief, the City submitted a request for judicial notice of portions of its Municipal Code pertaining to the procedures for designating a landmark. It states that its request is "in support of the City's objections to Petitioner's proposed supplemental administrative record." The City apparently seeks to have this material judicially noticed (1) to counter any argument by the Friends that any post-project-approval actions by state or local historic commissions have any impact on the question whether the City's 2014 determination that the Trestle is not historic is supported by substantial evidence, or (2) to show that the City Historic Landmarks Commission as a sub-body of the municipality took no action, including at its November 6, 2013 meeting, that could be attributed to the City as a lead agency with respect to this "project." Because any post-approval actions by any bodies are irrelevant to judicial review of the project approval in 2014, evidence offered to counter such actions is also irrelevant. The court further concludes that the matter sought to judicially noticed is not necessary for the court make a determination about point (2) stated above. The request is accordingly denied.

B. Friends' Request to Augment the Administrative Record

At the outset, the court notes that the Friends never formally moved to augment the record before the previous July 2014 hearing on its petition, and has not done so even now. As reflected in the court file, before the July 2014 hearing but after their opening brief was filed, the Friends lodged a "proposed supplemental administrative record" on June 16, 2014, which the City objected to on several grounds (including that no motion to augment had been made). In ruling on the writ petition, Judge Huber relied only on the documents in the certified administrative record (designated CAR). As the Court of Appeal noted in its opinion, the Friends effectively conceded that the record was that certified by the City at the July 14, 2014 hearing. "There was a dispute between the parties in the trial court regarding a supplemental administrative record prepared by Friends. However, at the hearing on the petition, counsel for Friends stated: '[T]o just be clear that the record is, I think we all agree, the certified

administrative record that the City … has provided. … We do have supplemental documents that we'd ask to be part of the record as well.' The trial court's order stated that it 'assumed that [the] record certified by the City (designated "CAR") is the correct record.' The administrative record lodged in this court is the one 'designated "CAR" ' that the trial court considered, and we therefore consider it to be the appropriate one for us to consider in reviewing the trial court's decision." (*Willow Glen Trestle*, *supra*, 2 Cal.App.5th at p. 462, fn. 7.)

The Friends still have not made a formal motion to augment the record. They simply include in their opening brief on remand the following statement: "The Friends now move to augment the record with the supplemental record, and will continue to cite to the CAR and SuppAR rather than lodging one complete record." (Friends Opening Brief at 5:14-15.) Rule 3.2225(c) of the California Rules of Court provides in pertinent part that: "Unless otherwise ordered by the Court: (1) Any request to augment the administrative record must be made by motion served and filed no later than the filing of that party's initial brief." The Friends' request to augment the record to include their "supplemental record" could be denied in total on the basis that the Friends did not timely file a separate motion as required. The court acknowledges that this Rule of Court only went into effect on July 1, 2014, after the parties' papers relating to the initial hearing before Judge Huber had been filed. But the rule would apply here to the briefing ordered on remand, which included an "initial" opening brief by the Friends.

Even if the Friends' request to augment the record were considered on its merits, the court would still substantially deny it. The seminal case on the scope of the reviewable record is *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 (*Western States*). There, the California Supreme Court held that in determining whether a quasi-legislative decision, as this one, is supported by substantial evidence, the court should generally consider only the evidence in the record of the proceedings. (*Id.* at pp. 570-574.) The only evidence that is relevant to the question whether substantial evidence exists to support an agency's quasi-legislative decision under section 21168.5 is that which was *before the agency at the time it made its decision*. (*Id.* at p. 573, italics added.) A court is likewise confined to the record of proceedings when determining whether an agency acting in a quasi-legislative capacity is alleged to have

failed to proceed in the manner required by law. (*Id.* at pp. 574-576.) Accordingly, the evidence that may be considered in a substantial-evidence analysis is effectively the same as in a failure-to-proceed-in-the-manner-required-by-law analysis, and is limited to that which as before the decision-making body when it acted.

There are some recognized exceptions to this general principle. The first is that extra-record evidence in traditional mandamus actions challenging ministerial or informal actions is permitted if the facts are in dispute. (*Western States, supra,* 9 Cal.4th at p. 576.) This exception is not applicable here, where a quasi-legislative decision is at issue. The second exception is by analogy to mandamus proceedings brought under Code of Civil Procedure section 1094.5. *Western States* held that extra-record evidence would be admissible if it could not have been produced at the administrative level in the exercise of reasonable diligence. (*Western States, supra,* 9 Cal.4th at p. 578.) This exception is to be "very narrowly construed" such that previously unavailable evidence would only be admissible in those rare cases in which (a) the evidence in question existed before the agency made its decision, and (b) it was not possible in the exercise of reasonable diligence to have presented the evidence before the decision was made. The *Western States* court declined to consider whether other exceptions to the general rule against the admission of extra-record evidence might be warranted, but did not foreclose the possibility that other circumstances might justify further departure. (*Id.* at pp. 575, fn. 5, 578.) No such circumstances are presented here.

Section 21167.6, subdivision (e) is comprehensive in defining the proper scope of the CEQA administrative record. It provides in pertinent part that the administrative record shall include, but is not limited to: 1) all project application materials; 2) all staff reports and related documents prepared by the public agency "with respect to its compliance" with CEQA; 3) all staff reports, related documents, written testimony or documents submitted by any person "relevant to any findings or statement of overriding considerations" adopted by the agency pursuant to CEQA; 4) any transcripts or minutes of proceedings where the agency heard testimony on or considered any environmental documents on the project; 5) "[a]ll notices issued by the respondent public agency to comply with this division or any other law governing the

processing and approval of the project;" 6) all written comments received "in response to, or in connection with environmental documents prepared for the project;" 7) all written evidence or correspondence submitted to the agency "with respect to compliance with this division or with respect to the project;" 8) any proposed decisions or findings submitted to the decision-making body of the agency by its staff, project proponents, project opponents, or other persons; 9) the documentation of the final agency decision, including any EIR, statement of overriding considerations, etc. and all documents cited or relied on in any findings "adopted pursuant to this division;" 10) "[a]ny other written materials relevant to the respondent public agency's compliance with this division or to its decisions on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division;" 11) the full written record before any inferior decision making body (such as a planning commission) whose decision was appealed to a superior body prior to the start of litigation.

The required contents of the administrative record in a CEQA action should be construed broadly to include all environmental analysis *prepared on behalf of the agency* even if the agency did not certify the documents. (*County of Orange v. Sup. Ct.* (2003) 113 Cal.App.4th 1, 9-10.) A petitioner's efforts "to place extra-record documents before the trial court is strictly controlled by [*Western States*]." (*El Morro Community Assn. v. Cal. Dept. of Parks & Rec.* (2004) 122 Cal.App.4th 1341, 1359 [affirming trial court order denying motion to "augment" record]; see also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 367 [holding that extra-record evidence may be considered in quasi-judicial administrative mandamus only if the evidence was unavailable at the time of the hearing in the exercise of reasonable diligence or if improperly excluded from the record, citing *Western*

States]; *Porterville, supra,* 157 Cal.App.4th at p. 898 [improper for trial court to take judicial notice of extra-record documents].)

The largest portion of the Friends' proposed "supplemental" record (162 of 286 pages) consists of copies of two City staff reports relating to an entirely different project (the BART extension), and a third staff report (with several attachments) plus a staff memo (SuppAR 168-169), both of which are irrelevant to the analysis of the City's project approval as they were prepared for a different agency (the County of Santa Clara) that had nothing to do with the subject project. The remainder of the supplemental documents consists of a map of the project area apparently created by one of the Friends' members (Larry Ames), some newspaper opinion pieces and editorials, and several emails by members of the public, including Larry Ames.[6] Most of the supplemental documents do not clearly fit within any of the 11 categories encompassed by section 21167.6, subdivision (e). An exception appears to be three emails (at SuppAR 170-171, 180, & 272-273) that date from 2013 or early 2014 and that appear to have been sent or "cc'd" to City Councilmembers. These could be considered to fall under section 21167.6, subdivision (e)(6) (written comments received "in response to, or in connection with environmental documents prepared for the project").

In its opposition brief, the City argues against the Friends' request that the court consider any part of the proposed supplemental administrative record. The City asks that all references to the supplemental record be "disregarded and/or stricken, as set forth in the City's Objections to the Proposed Supplemental Record." (Opposition at 8:10-12.) This is a reference to a separate document the City filed with its opposition brief titled "Objections to Proposed Supplemental Administrative Record; Motion to Strike References to Proposed Supplemental Administrative Record." That document does not actually include any formal, discrete objections, nor is it a proper motion to strike, as Code of Civil Procedure sections 435 and 436 do not provide for striking what amount to citations from an opponent's brief. The "objections" argue that most of

[6] There are also some documents included in the proposed "supplemental" record that are already in the certified record, as the Friends acknowledge, such as a letter from the California Trolley and Railroad Corp. (already in the record at CAR 1392-1393) and an email to a City Planner (already in the record at CAR 0513).

the documents in the "supplemental" record are not cited in the Friends' briefing and note that almost all of the supplemental materials either have nothing to do with the project under review (such as the documents relating to the BART extension or those generated by the County of Santa Clara) or are not properly part of the administrative record (news articles, Larry Ames' project map).

About the emails copied to City Councilmembers, the City claims "[t]here is no evidence that these e-mails were opened by the City Councilmembers, much less read or considered. The City is not aware of case law indicating that, by copying many people including a city councilmember on a group email or an unanswered citizen's e-mail to a councilmember, the document automatically becomes part of an administrative record when there is no evidence that the message was opened, read, discussed, in City staff files, attached to staff reports to the City Council, or considered in any way. In any case, [the Friends] do not cite [the emails] in their brief." ("Opposition/Motion" at 7:22-28.) Though this latter point may be true and goes to relevance, the City's other argument here is not well taken. If a document falls within one of the section 21167.6, subdivision (e) categories, it should be included in the record, whether or not it was shown to have been read by persons within a lead agency. The public is not required to prove actual receipt and review. The better objections are that the Friends never properly moved to augment the record and that this material has questionable relevance under the substantial evidence standard of review in any event.

The Friends' short "Opposition," to the City's "motion to strike," filed with the Friends' reply on remand, does not make a case to include any specific documents, but instead simply argues that section 21167.6, subdivision (e) is "construed broadly to include all documents submitted to any agency that relate to a project, as long as submitted before project approval." ("Opposition" at 1:14-15.) But this statement is not exactly right. Section 21167.6, subdivision (e) speaks of documents submitted to "the respondent public agency," meaning the lead agency for a project (here the City, acting through its Council). Documents sent to the County of Santa Clara or the City Landmarks Commission, a sub-body that did not report on the matter to the

City as a respondent lead agency on the subject project, are not automatically part of the record under section 21167.6, subdivision (e), at least as far as this court can tell.

With the exception of the emails that appear at SuppAR 170-171, 180, & 272-273, which, as noted, could be considered to fall within section 21167.6, subdivision (e)(6), the court finds no substantive basis, whether under section 21167.6, subdivision (e) or *Western States* or any other authority, to augment the record by adding the proposed "supplemental" record documents. Despite the lack of a timely and formal motion to augment, the court will consider the administrative record augmented, based on the Friends' request, to include the emails (at SuppAR 170-171, 180, & 272-273). The court notes that even if all of the "supplemental" documents were included in the certified record, this would not necessarily affect the analysis the court must perform on remand, as there is no weighing of competing evidence under the substantial evidence standard of review under CEQA. The amount and purported quality of the Friends' evidence is not relevant to the question whether the City's factual determination of the Trestle's lack of historical significance is supported by substantial evidence in the certified record, except to the extent that the question of substantial evidence is viewed in light of the whole record.

The City's motion to strike is denied.

DISCUSSION

I. *Statutory Interpretation of Section 21084.1 and Guidelines Section 15064.5 as Applied to a Discretionary Historical Resource*

In its published opinion, which constitutes the law of the case here, the Court of Appeal directed this court on remand 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." (*Willow Glen Trestle, supra,* 2 Cal.App.5th at pp. 473-474.) The parties, as well as this court, agree that the Court of Appeal's opinion focused the inquiry on the last sentence of section 21084.1, which provides: "The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of

Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section."

This last sentence of section 21084.1 does not provide, define, or reference an affirmative duty or a set of criteria to frame what the Court of Appeal in its construction of this section characterized as a discretionary decision by a lead agency—whether a resource that is not mandated or presumed by section 21084.1 to be historical *may* nonetheless be found to be so. The Court's decision in *Willow Glen Trestle* noted this absence of governing criteria, observing that "the statutory language does not affirmatively identify the standard that the lead agency is to utilize in making this determination" (*Willow Glen Trestle, supra*, at p. 467) and that this final sentence of section 21084.1 "imposes no presumption and sets no standard for the lead agency's decision" (*id.* at p. 468). But the opinion acknowledged that in this discretionary realm, the "Legislature intended for the lead agency to have *more, not less*, discretion under the final sentence" than in the preceding sentences of section 21084.1, which identify defined criteria for what is a mandated or presumed historical resource. And as the Court of Appeal noted, a "lead agency may find even a *presumptively* historical resource *not* to be a historical resource if 'the preponderance of the evidence' supports the lead agency's finding … ." (*Ibid*, first italics added.)

Willow Glen Trestle followed *Valley Advocates* in its conclusion, derived from *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 906-907, that section "21084.1 and its implementing Guidelines establish three analytical categories for use in determining whether an object is an historical resource for purposes of CEQA. [Citation.]" (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1051.) These are (1) mandatory historical resources, (2) presumptively historical resources, and (3) discretionary historical resources. (*Ibid.*) As noted, based on the record here, the Court of Appeal focused the Trestle inquiry on the discretionary realm only.

As for discretionary historical resources, the court in *Valley Advocates* noted that the "last sentence of section 21084.1 is phrased in terms of what a lead agency is not precluded from doing. This phrasing, as well as the lack of reference to the lead agency in the second sentence of section 21084.1, creates ambiguity as to (1) what, if anything, a lead agency is required to do

(i.e., its affirmative obligations) [fn. omitted] and (2) the extent of its discretionary authority. The provisions of CEQA do not address these ambiguities either in section 21084.1 or elsewhere." (*Valley Advocates, supra*, at p. 1058; see also *id.* at p. 1060 [the "exact scope of that discretion is not clear"].)

While acknowledging this ambiguity, *Valley Advocates* did not step into the breach, as the case did not necessitate that leap. The *Valley Advocates* opinion did not decide whether section 21084.1 imposes an affirmative duty on a lead agency when dealing with a discretionary historical resource. Nor did it define the scope of a lead agency's discretion when operating in the discretionary historical-resource realm under section 21084.1, or decide what standards or criteria, if any, apply to set the parameters of the exercise of that discretion. *Valley Advocates* did cite the Guidelines, section 15064.5, subdivision (a)(4), noting some immaterial differences with section 21084.1. But the Court simply concluded, for purposes of that opinion, that it was "enough to note that these provisions are consistent with the conclusion that a lead agency has some discretionary authority when determining whether a building is an historical resource." (*Valley Advocates*, *supra*, 160 Cal.App.4th at p. 1059.) *Valley Advocates* went on to interpret Guidelines section 15064.5 as confirming the discretionary character of a lead agency's determination of the existence or identification of a historical resource and limiting that discretion "to situations where substantial evidence supports the lead agency's determination of historical significance." (*Valley Advocates, supra*, at p. 1059, fn. omitted.) But the court included a footnote at the end of this quoted language, which says, "In contrast to this explicit limitation, the Guidelines do not address the level of evidence, if any, that must support the opposite conclusion—namely, that the object or building is *not* historically significant," which is the context of the case here. (*Ibid*, fn. 15.)

On this subject, *Valley Advocates* importantly noted that section 21084.1 and Guidelines section 15064.5 could be *"interpreted to mean a lead agency has a legal duty to (1) consider the question of a building's historicity for purposes of CEQA and (2) apply the criteria in Guidelines section 15064.1, subdivisions (a)(3)(A) through (D) when making its determination (see 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, [(Cont.Ed.Bar 2006)], § 20.109,*

p. 1063). Under this interpretation, so long as these two duties are fulfilled, the ultimate determination is committed to the lead agency's discretion." (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1060, italics added.[7]) The lead agency in *Valley Advocates* had contended it could, under section 21084.1, "elect, in the exercise of discretion, to either consider the question of a building's [discretionary] historicity for purposes of CEQA or avoid the question entirely." (*Ibid.*) The Court of Appeal concluded that in the circumstances of that case, discretion was abused by the lead agency's failure to have exercised its discretion in that it had labored under a misunderstanding about the fact and scope of that discretion. (*Id.* at p. 1061.) It was thus unnecessary in the case for the Court to decide whether a lead agency has an affirmative duty to consider the question of a discretionary historical resource's historicity, and if so, to identify a set of operative legal criteria, or to define the scope of a lead agency's discretion when dealing with the discretionary-historical-resource category.

As noted, the Court of Appeal's opinion in *Willow Glen Trestle* followed *Valley Advocates* in its holding about the standard of judicial review to be applied to a lead agency's determination about a discretionary historical resource under the final sentence of section 21084.1—the substantial evidence test. (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p. 473.) While the *Willow Glen Trestle* decision also noted the "ambiguity" about the extent and scope of discretion in this determination afforded to a lead agency, as first acknowledged in *Valley*

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[7] The court here quotes *Valley Advocates*, which cited the then current 2006 version of 2 Kostka & Zischke, Practice Under the California Environmental Quality Act, as it did in its prior order for supplemental briefing. In response to this court's order for supplemental briefing, the City contended that the court's order had itself "cited" the 2006 version of the Kostka & Zischke treatise by this *Valley Advocates* quote, as if relying on and in ignorance of updating amendments to the treatise. Not so. But to quote an authoritative published opinion means quoting it exactly, not altering the internal citations to reflect updated materials. Updates not withstanding, what is key here is that the *Valley Advocates* quotation, as written, citations and all, remains accurate with no intervening and controlling authorities clarifying the ambiguous state of the existence and scope of an affirmative duty on the part of a lead agency when dealing with what could only be a discretionary historical resource under the final sentence of section 21084.1. While, as noted by the City, it is true that Kostka & Zischke have since 2006 updated their treatise, the authoritative *law* on this question, as reflected in CEQA, the Guidelines, and published decisions by courts, remains an open question, just as the *Valley Advocates* court perceived it to be when it raised, but did not answer, that question.

Advocates (*Willow Glen Trestle, supra,* at p. 471), it did not go beyond that. The Court did not opine as to the existence or extent of an affirmative duty or the criteria or parameters to be applied, if any, to the discretionary determination by a lead agency whether an object, not historical by mandatory or presumptive standards, nonetheless is, or is not, a historical resource under CEQA. (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p. 468 [§ 21084.1 "sets no standard" for this determination].)

But it is clear that whether or not there was an affirmative duty on the part of the City to consider whether the Trestle, not qualifying as a mandatory or presumptive historical resource at the time the challenged determination was made, could nonetheless be determined to be a discretionary historical resource, the City did consider this question, and answered it in the negative. As this court understands the direction of the Court of Appeal in its opinion, if that determination by the City is supported by substantial evidence, regardless of the presence of conflicting evidence in the record, it must be upheld.

Under CEQA, a lead agency abuses discretion if its decision is not supported by substantial evidence. (Pub. Res. Code, § 21168.5; *Vineyard, supra,* 40 Cal.4th at p. 426; *Western States, supra,* 9 Cal.4th at p. 573; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5 (*Laurel Heights*); *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 514 (*Panoche Valley*).) Substantial evidence for purposes of CEQA includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. It does not include argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence that is not credible on its face. (§§ 21080, subd. (e) & 21082.2, subd. (c); Guidelines, §§ 15064, subd. (f)(5)-(6) & 15384.) Under the CEQA substantial evidence test, a reviewing court may not reweigh the evidence in the administrative record and is limited to determining whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached. (*Western States, supra*, 9 Cal.4th at p. 572; *Laurel Heights, supra*, 47 Cal.3d at p. 392, fn. 5.) The agency is the finder of fact, and a reviewing court must indulge all reasonable inferences supporting the agency's determinations and resolve all evidentiary conflicts in favor of its

decision. (*Western States, supra*, 9 Cal.4th at p. 571; *Panoche Valley, supra*, 217 Cal.App.4th at p. 514.)

Still, recognizing the substantial evidence test for what it is does not identify criteria or a standard against which the relevancy of the evidence relied on is to be measured in a given context. One must ask: substantial evidence of what? *Valley Advocates* offers the most specific suggestion on this question with regard to a discretionary historical resource, in the italicized language quoted above that references Guidelines section 15064.5, subdivision (a)(3)(A) through (D). But this reference is dicta as the Court expressly said it was not deciding in that case the scope of discretion granted to lead agencies under the last sentence of section 21084.1. (*Valley Advocates, supra*, 160 Cal. App.4th at p. 1060.) And, as noted, the *Valley Advocates* court suggested that in this context, this statute and Guidelines section 15064.5, could be "interpreted to mean that a lead agency has a legal duty to (1) consider the question of a building's historicity for purposes of CEQA and (2) *apply the criteria in Guidelines section 15064.5, subdivision (a)(3)(A) through (D) when making its determination.*" (*Valley Advocates*, at p. 1060.) The Court of Appeal in *Willow Glen Trestle* offered no guidance on this threshold legal issue.

In supplemental briefing, the parties responded to this court's inquiry about whether the specific criteria referenced in section 21084.1 (including § 5024.1, subd. (g) referenced there), and Guidelines section 15064.5, subdivision (a)(3)(A) through (D) (including section 5024.1 & Cal. Code Regs., tit. 14, § 4852, referenced there) must be applied even to a lead agency's determination of discretionary historical significance. In other words, must a lead agency making a discretionary historical resource determination effectively decide whether the resource is "eligible" for listing by applying all of these specified criteria? The Friends contended that, yes, all of these listed criteria must be applied to such a determination, and that the absence of evidence of non-historicity on a single listed criterion, in the face of other evidence of historical significance, would mean that an ultimate determination of non-historicity is not supported by substantial evidence. In other words, according to the Friends, to support its decision, the City had to rule out, with evidence, every listed criterion reflecting historical significance.

The premise of this contention is that Guidelines section 15064.5, subdivision (a)(3) includes mandatory language that "[g]enerally, a resource shall be considered by the lead agency to be 'historically significant' if the resource meets the criteria for listing on the California Register of Historical Resources (Pub. Res. Code, § 5024.1, Title 14 CCR, Section 4852) including" those features listed in subdivision (a)(3)(A) though (D). The Friends cite *Willow Glen Trestle*'s invocation of this mandatory language (2 Cal.App. 5th at p. 468) as a call for the necessary application of the same criteria in the determination whether a resource that does not have mandatory or presumptive historical significance may nonetheless be historically significant. But as the court sees it, *Willow Glen Trestle*'s reference to this language was not in connection with the question whether a lead agency must consider specific criteria when making a discretionary historicity decision. It was, rather, to show that the applicable Guideline, section 15064.5, is consistent with the Court's conclusion that an agency's determination of historical significance is subjected to the substantial evidence standard of judicial review and not the fair argument test. (See *Palmer v. GTE California Inc.* (2003) 30 Cal.4th 1265, 1278 [language in court opinion is to be understood in light of facts and issue then before the court; opinion is not authority for propositions not considered therein].) Moreover, to the extent Guidelines section 15064.5, subdivision (a)(3) is inconsistent with the language of the applicable statute—the final sentence of section 21084.1—the Guideline must give way. (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 380, fn. 2 [Guidelines given great weight in interpreting CEQA except where unauthorized or clearly erroneous]; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128, fn. 7 [same].) In other words, the administrative regulations implementing CEQA cannot contravene the governing statute by imposing mandatory criteria where none exist.

The City, for its part, contended in response to the court's inquiry that the plain language of the last sentence of section 21084.1 and Guidelines section 15064.5, subdivision (a)(4) impose no affirmative requirements on a lead agency, including the application of specific criteria, in the context of a determination about a discretionary historical resource, and that the applicable statutory and Guideline text simply *allow* a lead agency to determine, using whatever non-

arbitrary criteria, that a resource is historic, notwithstanding that it is *not* listed, or already determined to be eligible for listing, in a state or local historic registry, or "deemed significant pursuant to criteria set forth" in section 5024.1, subdivision (g). (See also 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, (2d ed. 2008) § 20.98, p. 20-136 (3/17 update) ["Although lead agencies necessarily have authority under [section 21084.1] to apply the criteria for listing on the California Register of Historical Resources when determining whether a resource should be treated as historically significant, the statute does not require that they do so. The provision in [Guidelines] section 15064.5(a)(3) that purports to require that lead agencies apply those criteria when determining whether a resource should be considered historically significant is a departure from the statute"].) As to this mandatory language of Guidelines section 15064.5, subdivision (a)(3) relied on by the Friends even as to a discretionary historical resource, the City contends that this text corresponds not to a discretionary-historical-resource analysis, as to which subdivision (a)(4) more logically relates, but, rather, only to mandatory and presumptively historical resources, addressed in the second and third sentences of section 21084.1. The City further emphasizes that the criteria specified in Guidelines section 15064.5, subdivision (a)(3) mirrors that referenced in subdivisions (a)(1) and (a)(2) applicable to mandatory and presumptively historical resources, underscoring that subdivision (a)(3) does not concern what could only be a discretionary historical resource.

The City, convincingly, places great emphasis on section 21083.1 to support its position on this issue. Section 21083.1 requires courts to interpret CEQA statutes and Guidelines in such a way as to impose no "procedural or substantive requirements beyond those explicitly stated." "According to the legislative history, the purpose of [section 21083.1] was to 'limit judicial expansion of CEQA requirements' and to ' "reduce the uncertainty and litigation risks facing local governments and project applicants by providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law." ' [Citation.]" (*Berkeley Hillside Preservation v. City of Berkeley, supra,* 60 Cal.4th 1086 at p. 1077.) The City also relies on the evidentiary presumption of the regular performance of an official duty embodied at Evidence Code section 664, applicable when there is an absence of evidence to the contrary.

(See, e.g., *Panoche Valley, supra*, 217 Cal.App.4th at p. 515 [discussing presumption in context of whether adverse effects have been, or could be better, mitigated].)

But in this court's view, the most apt legal principle compelling the conclusion that the City's position wins the day here is that to the extent Guidelines section 15064.5, subdivision (a)(3) is viewed as requiring a lead agency to apply by elimination all the listed criteria, including those listed at California Code of Regulations, title 14, section 4852, to what could only be a discretionary historical resource—i.e., one that does not fall under a mandatory or presumptive category by virtue of having been listed in, or determined to be eligible for listing in, a state or local historical registry—the Guideline is inconsistent with, and more burdensome than, the last sentence of section 21084.1. The statute itself imposes no such requirement. To read one in would require virtually the same treatment of a discretionary historical resource as is required when a resource is mandated or presumed to have historical significance, and would effectively require the agency to make a full registry eligibility determination in every discretionary historical resource determination. This would impose a significant burden that would recognize exactly the same extent and scope of discretion when dealing with a discretionary historical resource as is required with one that is mandated or presumptively so. Indeed, section 21084.1 falls well short of such a requirement by going only so far as to *allow,* but not require, an agency to make a determination that a resource not so listed, or determined to be eligible for listing, in a registry, is nonetheless historically significant with no referenced criteria that must be applied in that determination. Moreover, interpreting Guidelines section 15064.5, subdivision (a)(4) to be applicable to discretionary historical resources rather than subdivision (a)(3) is consistent with this reading, which harmonizes the Guideline with the text of section 21084.1.

In sum, while recognizing that its textual interpretation of the final sentence of section 21084.1 and Guidelines section 15064.5, subdivisions (a)(3) and (a)(4) offers limited CEQA protection to a resource that could only be characterized as historical as matter of discretion, the court must still apply governing legal principles of statutory construction, which also apply to the Guidelines. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097.)

Doing so mandates the textual construction the court has reached, which means that, as directed by *Willow Glen Trestle*, the court will proceed to analyze whether the City's factual and discretionary determination that the Trestle lacks historical significance, and thus its approval of the MND, is supported by substantial evidence. In doing so, the court will not require the City to have exhaustively examined, and ruled out, of all the criteria for historical significance listed and referenced in Guidelines section 15064.5, subdivision (a)(3), which include not only those in section 5024.1 but also those in section 4852 of title 14 of the California Code of Regulations, and to have reached a negative determination on every one in order to have complied with CEQA.

II. *The City's Determination That the Trestle is Not a Discretionary Historical Resource is Supported by Substantial Evidence*

As noted, the Friends challenge the City's proposed demolition of the existing wooden trestle bridge, a structure the Friends claim is a historical resource. According to the City's January 14, 2014 Notice of Determination (NOD) "[t]he proposed project includes a pre-fabricated, 210 foot-long, single span steel truss bridge with a poured concrete deck. The new bridge would be on the same alignment as the existing bridge, and small retaining walls would be installed adjacent to the new bridge abutments to allow for the future Los Gatos Creek trail connection to the northeast and for a viewing are on the south side of the new bridge." As noted, the project was approved for CEQA purposes under the City's MND, circulated from November 19, 2013, to December 19, 2013, and adopted on January 14, 2014, in City Council Resolution 76904 (CAR at 0002).

The proposed MND followed the 2013 Initial Study, which had "updated" the Initial Study from the earlier 2004 project and reflected a survey of historical resources establishing that the Trestle was not listed in a historical registry such that its status as a historical resource was mandated or presumptive.[8] Although not required, the 2013 Initial Study did reference and

[8] Per the City's argument, and as supported by the record, the 2004 Initial Study "conducted a comprehensive review of over sixty sources that are identified in an extensive bibliography. (CAR0179-80, CAR0183-91.) These sources included state and national registers of historic places and landmarks. (CAR0179-81, CAR0185, CAR0190.) The study reviewed

discuss the four express criteria listed in section 5024.1, subdivision (c), concluding, with some reasoning given, that none of them applied. Public comments were then received, acknowledged, and included in the staff supplemental report (dated January 10, 2014, at CAR 499-506), which also referenced and ruled out the four criteria listed in section 5024.1, subdivision (c) (at CAR 501). The comments were also the subject of discussion at the City Council meeting at which the resolution approving the MND was adopted. Included in the analysis in the staff supplemental report was the conclusion that "[i]nformation suggests that the Western Pacific Railroad line in Willow Glen, including the trestle, was *locally important*, but did not contribute to *broad patterns of California's history and cultural heritage*. The Western Pacific Railroad completed the spur line through Willow Glen in 1922, providing rail freight access to the canning districts

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dozens of publications on California's railroads, the connection between the railroads and agriculture … historic civil engineering landmarks in Northern California, and other historic data. (CAR179-80, CAR0185.) It reviewed records with the State Office of Historic Preservation, County records, and City historic records. (CAR0185-91, CAR0204.) The Archaeological Survey reviewed evaluations from state and national authorities, including by Ward Hill, a Consulting Architectural Historian for the State of California. … According to Hills' Bridge Evaluation, the trestle 'was originally constructed in 1922, but the trestle and superstructure were likely replaced during the last 30 or 40 years.' (CAR0444, CAR0859.) Hill explained: 'The design is based on standard plans for wood trestle bridges.' (*Id.*) His evaluation concluded: 'This bridge is a typical example of a common-type and has no known association with important events or persons in local history.' (*Id.*) … In addition, Milford Wayne Donaldson, FAIA, State Historic Preservation Office with the Office of Historic Preservation of the Parks Department of the State of California … [at CAR0448] explained: 'An archeological resources record conducted at the Northwest Information Center at Sonoma State University and field inventory study conducted by [a] qualified archeologist revealed no known prehistoric or historic archeological resources within or adjacent to the project APE [area of potential effect].' According to the survey: 'No architectural resources were located within the project APE.' (*Id.*) The State Historic Preservation Officer confirmed Caltrans' finding of 'No Historic Properties Affected' for this Project. (*Id.*, CAR0871.) The trestle was also evaluated pursuant to the National Environmental Policy Act ('NEPA'), including a consultation with the State Historic Preservation Officer ('SHPO') pursuant to the National Historic Preservation Act ('NHPA'). (CAR0872-74, CAR1024, CAR1030-32.) This NEPA evaluation resulted in the adoption of a Categorical Exclusion by the Federal Highway Administration, given that the project did not have a significant impact on the environment. (CAR0874, CAR1032.) The Archeological Survey concluded: 'No National Register of Historic Places or California Register of Historic Resources listed, determined eligible, or pending properties were identified in or adjacent to the APE as a result of the records search, literature review, and field surveys.' (CAR0181.)" (Opposition at 3:4-4:4, some brackets added.)

on the west and south sides of downtown San Jose. Comments from local residents suggest additional *local historical interest*, including the role of the railroad spur and the trestle in the incorporation of Willow Glen and activism regarding roadway-railroad grade separations."[9] (See, e.g., CAR 501, italics added.) The supplemental staff report "acknowledges the history of the trestle and the former Western Pacific Railroad alignment through Willow Glen," but it concludes that "from a CEQA perspective, the trestle is not considered to be historically significant."[10] (CAR 500.)

As noted, the NOD and Council Resolution also include the City's findings and determination "that the existing wood trestle bridge is not a historic resource for the reasons stated in the Initial Study/Mitigated Negative Declaration and in the City staff report, including that: the evaluation of the bridge's historic merit concluded that the design is based on standard plans for wood trestle bridges and has no known association with important persons; the bridge materials were likely replace[d]during the last 30 or 40 years; the trestle is not unique and is unlikely to yield new, historically important information; and the trestle did not contribute to

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[9] Here's a principle rub of this case. Section 5024.1, subdivision (c)(1) references "broad patterns of California's history and cultural heritage" while section 4852, subdivision (b) of title 14 of the California Code of Regulations also references historical significance at the "*local*" level (italics added). The City's finding about the lack of the Trestle's contribution to "broad patterns of California's history and cultural heritage" would likely not be supported by substantial evidence if the "local" implications were required to be considered.

[10] The relevant CEQA documents also all reference the three other specified criteria listed in section 5024.1, subdivision (c), ruling them out based on the single page, short form evaluation from the earlier project. As quoted from the supplemental staff report, these are in order (with criteria italicized): "• *The resource is associated with the lives of persons important in our past.* The bridge evaluation concluded that the design is based on standard plans for wood trestle bridges, and has no known association with important persons. [¶] • *The resource embodies the distinctive characteristics of a type, period, region, or method of construction, represents the work of an important creative individual, or possesses high artistic values.* The bridge evaluation concluded that the design is based on standard plans for wood trestle bridges, and bridge materials were likely replaced during the last 30 or 40 years. [¶] • *Has yielded, or may be likely to yield, information important in prehistory or history.* Based on the bridge evaluation report, the trestle is not unique; therefore, it is unlikely to yield new, historically important information." (CAR 501.)

broad patterns of California's history and cultural heritage." (CAR at 0003; see also Initial Study at CAR 0405.)

An MND is "a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (§ 21064.5.)

CEQA generally favors the preparation of EIRs (which are presumed adequate as a matter of law, see § 21167.3, subd. (a)). Under the fair argument standard of review, an EIR rather than an MND is required if there is substantial evidence in the whole record of proceedings that support a fair argument that a project may have a significant impact on the environment. (See Guidelines §15064, subd. (f)(l); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112.) Courts have repeatedly held that the fair argument standard is a low threshold and that in applying it, an agency's determinations are not entitled to any deference from the reviewing court.

But applying the substantial evidence standard of review is a dramatically different prism through which a court reviews a lead agency's determination, and here, that difference is outcome determinative. As noted, substantial evidence for CEQA purposes is defined as "fact, a reasonable assumption predicated upon a fact, or expert opinion supported by fact," and specifically does not include "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, the physical impacts of the environment." (§ 21080, subd. (e).) Guidelines section 15384 adds that "substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. … Substantial

evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." The substantial evidence standard of review under CEQA applies in situations in which the lead agency has discretion to resolve questions of fact and to make policy decisions. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984.)

"Under the substantial evidence test, a reviewing court may not reweigh the evidence and is limited to determining whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached. All reasonable doubts must be resolved in favor of the agency's determination, and the court may not set aside the agency's decision even if the opposite conclusion is more reasonable." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (2d. ed.) § 23.34, p. 23-42, citing, among others, *Western States, supra*, 9 Cal.4th at p. 572; *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1267; see also *Young v. City of Coronado* (2017) 10 Cal.App.5th 408, 427 (*Young*).) Under this standard, substantial deference is shown to a lead agency's determinations, which are presumed correct, with the challenger bearing the burden of showing the contrary. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 723; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497; *Young, supra*, at p. 427.)

Under this lenient and deferential standard even the sparse evidence from the City's 2004 Initial Study that the updated Initial Study and then the MND primarily relied upon (the one-page Bridge Evaluation Short Form at CAR0444, and one-page letter from a State Historic Preservation Officer at CAR0448) is enough to support the City's determination that the Trestle is not a historic resource. This evidence, thin as it is, constitutes relevant information that a reasonable mind might accept as sufficient to support the conclusion reached. That the Friends can point to other contrary and more recent evidence in the record (the same evidence that was previously found to support a fair argument) is irrelevant under the substantial evidence standard as the court may not set aside an agency determination that is based on substantial evidence even

if the opposite conclusion is more reasonable. (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 957, 952-953 [court's task is not to weigh conflicting evidence and determine who has the better argument].)

The Friends' substantial evidence challenge is essentially that the City's determination lacks substantial evidence support because the record is conclusory, lacks depth of analysis, and fails to reflect sufficient consideration of the evidence and commentary supporting the opposite conclusion. But broad discussion, great specificity, and detailed analysis are not required, as long as the agency findings, which are liberally construed, apprise interested parties and the court of the basis of the administrative action and there is disclosure of " 'the analytic route the … agency traveled from evidence to action.' " (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1056, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516, see also at p. 514; *Young, supra*, 10 Cal.App.5th at pp. 420-421.) Beyond reaching a mere conclusion, a CEQA record must disclose the data or evidence on which an agency's conclusions rely. (*Young*, at pp. 420-421.) The record does that here, even though the raw data—primarily the two single page documents from 2004—is far from comprehensive or extensive. It still presents more than a mere checklist. And where comments disclose new or conflicting data, these cannot be ignored, though they may be rejected for reasons given. Here, as to historicity, analysis by staff concluded after reviewing all the contrary evidence and commentary, that much of it was about local rather than broad patterns of California's history and that it focused on the historic aspects of the rail line or corridor, not the actual structure of the Trestle itself, thus not tending to establish historical significance. (See staff supp. memo CAR 0499-503; staff presentation and hearing discussion City Council meeting 1/14/14 CAR 0793-0834.)

The Friends further contend that the evidence on which the City relies does not qualify as significant (despite that it only needs to be relevant information that a reasonable mind might accept as sufficient to support the conclusion reached to qualify as such) because the City's findings that the Trestle is not historic and that its materials were likely replaced over time (see CAR at 3) "do not track relevant criteria for California Register eligibility for association with

California's history and cultural heritage or embodying the distinctive characteristics of a type, period, region or method of construction." (Friends Brief at 16:8-17:20, internal citations and quotations omitted.) But the court has already concluded as a matter of statutory interpretation that the final sentence of section 21084.1 does not require a lead agency to apply and rule out specific criteria when making a discretionary historicity determination. Nonetheless, the City addressed the criteria listed in section 5024.1, subdivision (c) in the analysis it did provide, such that the mode by which it reached its conclusions can be seen. Whether its conclusions in this regard have merit is not for the court to decide, as long as they find substantial evidence support in the record, and even if contrary conclusions are more reasonable. The court's "review is not designed to rectify an imprudent decision by an administrative agency," only to ensure that its discretion is not abused. (*Young, supra,* 10 Cal.App.5th at p. 419.) As the City contends, the evidence from 2004 it relied upon and later updated qualifies as "substantial" in that a reasonable mind might accept it as sufficient to support the conclusion reached.

The Friends also contend that historicity determinations involve a matter of necessary expert opinion such that staff was not competent to reach the conclusions they did. But here, the raw data staff relied on—the two single page documents from 2004—constituted competent expert opinion that supports the City's ultimate determination. The Friends have not challenged the qualifications of the authors of these documents. Moreover, an agency may rely on the expertise of its planning staff in determining whether a project will not have a significant effect on the environment. [Citation.]" (*Porterville, supra,* 157 Cal.App.4th at p. 901; see also Young, supra, 10 Cal.App.5 th at pp. 426-428 [discussing staff analysis of historical significance as substantial evidence].)

Even when approving an EIR, an agency need not correctly resolve a dispute among experts about the accuracy of the EIR's environmental forecasts. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357 [city could accept expert's findings on noise impacts despite disagreement over methodology used]; *California Oak Found. v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1243 [city could rely in its water management plan rather than contrary evidence]; *Cadiz Land Co. v. Rail Cycle* (2000) 83

Cal.App.4th 74, 102 [county appropriately relied on expert opinions that further geologic trenching was not necessary].) Given the Court of Appeal's holding here that the substantial evidence standard of review applies to discretionary agency determinations about historicity made under section 21084.1, it is irrelevant that the Friends can point to statements by historians or architects that the Trestle qualifies as a historic resource, as the court may not set aside the agency's decision even if the opposite conclusion is more reasonable. The MND on this issue is effectively treated like an EIR based on the assigned standard of judicial review.

Even if it is assumed for purposes of argument that the Friends' evidence of the Trestle's historical significance is substantive and persuasive, the only question is whether the administrative record contains substantial evidence, meaning relevant information that a reasonable mind might accept as sufficient to support the conclusion, that supports the City's January 2014 factual determination under section 21084.1 that the Trestle is not a historical resource. It does.

CONCLUSION

The Friends petition for writ of mandate is denied. The City is directed to prepare and submit to the Friends for approval as to form an appropriate form of judgment.

Dated: October 5, 2017

Helen E. Williams
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

RE: **Friends Of The Willow Glen Trestle vs City Of San Jose, et al**
Case Number: **2014-1-CV-260439**

PROOF OF SERVICE

ORDER ON REMAND ON PETITION FOR WRIT OF MANDAMUS was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

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) 882-2690 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 below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on October 06, 2017. CLERK OF THE COURT, by Ismael Armenta, Deputy.

cc: Kathryn J Zoglin 200 E Santa Clara St 16th Fl San Jose CA 95113
Susan L Brandt-Hawley Post Office Box 1659 Glen Ellen CA 95442