No. H047068

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

WILLOW GLEN CONSERVANCY, an unincorporated association; and FRIENDS OF THE WILLOW GLEN TRESTLE, an unincorporated association, Petitioners and Appellants, v. CITY OF SAN JOSE, et al., Respondents .	No. H047068 Superior Court of California, County of Santa Clara Case No.: 18CV335801

. CITY OF SAN JOSE'S OPPOSITION TO WRIT OF SUPERSEDEAS

Appeal from the Order Denying Petition for Writ of Mandate in the Superior Court of California, County of Santa Clara
Honorable Thomas E. Kuhnle

RICHARD DOYLE, City Attorney (88625)
NORA FRIMANN, Assistant City Attorney (93249)
KATHRYN J. ZOGLIN, Senior Deputy City Attorney (121187)
MARGO LASKOWSKA, Senior Deputy City Attorney (187252)
ELISA TOLENTINO, Senior Deputy City Attorney (245962)
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San Jose, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov
Attorneys for CITY OF SAN JOSE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

I. INTRODUCTION

The writ of supersedeas and request for stay should be denied because Appellants Willow Glen Conservancy and Friends of the Willow Glen Trestle have failed to meet their burden of showing that special circumstances exist or identifying an error by the lower court that warrants the extraordinary remedy of writ of supersedeas. Indeed, Appellants' arguments, both in the trial court and in their Petition for Writ of Supersedeas, lack merit.

The issue before this Court is whether the City's application for a streambed alteration pennit ("State Pennit"), which is issued by the California Department of Fish and Wildlife, constitutes a discretionary approval of the project at issue. It does not. Appellants incorrectly try to convert the City's application for a State Permit into a "discretionary action" that triggers CEQA review. (Petition for Writ of Supersedeas at p.16.) However, that is an incorrect characterizati on of the law and the facts. A discretionary **approval** of a project is required, not simply any discretionary act. (Pub. Res. Code § 21080(a); Guidelines §§ 15162(c), 15357.)

As a factual matter, the City made no discretionary approval of the Project by applying for and acquiring the State Pennit. The City is merely a permit applicant. The City made a discretionary approval of the Project when it adopted a Mitigated Negative Declaration ("MND") in 2014, three years before the trestle was listed on the State Register of Historical Resources The City made no discretionary approval of the Project at any time after the trestle's listing. Accordingly, CEQA does not apply and the City is not required to conduct an environmental analysis that considers the trestle's historicity.

In 2014, the City of San Jose adopted an MND and approved the Three Creeks Pedestrian Trail project ("Project"). The Project involves the removal and replacement of the Willow Glen trestle, a 97-year old structure spanning the Los Gatos Creek ("Creek") in the Willow Glen neighborhood of San Jose. The trestle is dilapidated, serves no public use, and discharges creosote into the Creek. (See

AA 138-141; Respondent City of San Jose's Appendix in Opposition to Petition for Writ of Supersedeas ["RA"] 139.) The Project would remove the trestle and replace it with a steel truss pedestrian bridge, which would connect the Los Gatos Trail with the Guadalupe River Trail for pedestrians, cyclists, and other recreational uses.

Appellant Friends of the Willow Glen Trestle ("Friends") filed a CEQA lawsuit in 2014, challenging the MND, asserting that it improperly failed to analyze the trestle as a historic resource based on the fair argument standard of review. The trial court ruled in Friends' favor and granted that writ petition. The City appealed, and this Court reversed, finding that the trial court had applied the wrong standard in reviewing the City's determination that the trestle was not historic. *(Friends of Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 473-474.) In October 2017, on remand, the trial court denied the writ petition. Friends did not appeal.

While the matter was pending in the trial court on remand, Friends nominated the trestle for listing on the State Register of Historic Resources (AA 330-331) and advocated for its listing (AA 323). The trestle was listed in May 2017, over the City's objections.

In October 2018, Friends and the Willow Glen Conservancy (collectively, "Appellants") filed the instant lawsuit. At that time, the City was awaiting approval of a streambed alteration permit ("State Permit" or "SAA") from the California Department of Fish and Wildlife ("CDFW" or "State"), a permit required for the City to perfonn in-stream work in the Creek. In this action, Appellants assert that the City must perfonn a new EIR to analyze the trestle as an historic resource in light of the listing of the trestle on the State Register.

The trial court (Hon. Thomas E. Kuhnle) denied Appellants' writ petition, finding that the City's application for a State Pennit did not constitute a discretionary approval of the Project and that CEQA did not apply.

As the trial court held, the City's application for and acquisition of the State Permit does not constitute a discretionary approval of the Project. CEQA does not apply because the City did not make a .discretionary approval of the Project after the trestle's listing on the State Register of Historical Resources. Further, the historical status of the trestle is irrelevant to that permit. In determining whether to grant or deny the City's permit application, CDFW is concerned only with potential impacts to biological resources in the Creek. The historical status of any man-made structures in the Creek area is outside of CDFW's purview. And, Appellants dismissed CDFW from this action.

Not only does this appeal lack merit, but a stay is not warranted. In *People ex Rel San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533 *("Town of Emeryville"),* a case cited by Appellants, the Supreme Court noted that a court's power to grant supersedeas to preserve jurisdiction "should be **sparingly employed".** *(Id.* at 537, emphasis added.) This Court should decline to exercise that power here, given this appeal's lack of merit. The City requests that the Court deny Appellants' stay request.

II. BACKGROUND

A. In Approving the Project, the City Council Contemplated and Approved the City's Application for the State Permit

The City Council approved the Project in 2014 based on a mitigated negative declaration ("MND"). (RA 83-91.)[1] The Project consists of removal of a dilapidated wooden railroad trestle bridge and replacing it with a new, steel truss pedestrian bridge to service the City's trail system. (RA 83.)

Because Project implementation requires entering the Los Gatos Creek, four permits are required, including a streambed alteration permit from the . California Department of Fish and Wildlife ("CDFW" or "State"). The MND contemplated this permitting requirement, stating: "The City will apply for a

[1] The San Jose City Council reapproved the Project in 2015, including acquiring the State Permit, when it certified an Environmental Impact Repmt ("EIR"). (RA 94, 113-114.)

Streambed Alteration Agreement from CDFW and will be responsible for the implementation of all its conditions." (RA 85.) As such, the City's approval of the Project included the requirement to apply for this Permit, acquire a valid Permit, and abide by its terms.

The State initially issued the Pennit in 2014, but the Permit expired. *(See* AA 1164.) On March 19, 2018, the City submitted an application to CDWF for the Permit. (RA 123-132.) On April 18, 2018, CDFW issued an Incomplete Notification, which advised the City that its March 19 application was incomplete and invited the City to revise and resubmit its application. (AA.349-350; AA 132.) On May 8, 2019, the City responded to the Incomplete Notification by submitting additional infonnation. (AA 347-348.) On October 4, 2018, CDFW issued the Permit, subject to terms and conditions. (AA 275-318.) The City did not negotiate the terms and conditions of the Permit with CDFW. (AA 133; RA 5.) Although the Pennit is titled "Streambed Alteration Agreement", it is not a bilateral agreement; the CDFW set the terms of the Permit. *(Id.)*

B. Permit Conditions Provide a Limited Work Period for In-Stream Work from June 15 to October 15

Upon receipt of the Permit on October 4, 2018, the City had secured all the required 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 begin work on the Project. (AA 133.) The permits allow work to be done in the Creek only during the dry season, from June 15 to October 15. *(See* AA 279.) The entire pennit period is needed to implement the Project because it consists not only of removal of the trestle but also of construction of the new bridge. (AA 134-136.)

To the extent Appellants suggest that additional approvals are required (Petition for Writ of Supersedeas ["Petition"], at p. 16), they are wrong. The City secured all required pennits and no further approvals of the Project are required.

C. Litigation Has Delayed Project Implementa tion For Five Years

Appellants note in several instances in their Petition that the trestle "still stands" and there is no hann in a "slight delay." (See, e.g., Petition at pp. 6, 16, 25.) The reality is that the City has diligently pursued Project implementation but the Friends' lawsuits have already delayed it for five years. As noted above, Appellant Friends challenged the City's approval of the Project by an MND. Friends prevailed, and the City prevailed on appeal. This Court issued its decision in 2016 and remanded to the trial court for further proceedings. In 2017, the trial court upheld the City's approval of the Project.

While the matter was pending on remand, Friends nominated the trestle for listing on the State Register of Historical Resources and advocated for its listing. Thus, Appellants created the circumstance they now claim requires supplemental CEQA review.

The filing of this action prevented the City from completing the Project after it had obtained all required pennits in October 2018. By the time the City obtained the last required pennit – the streambed alteration permit – on October 4, only 11 days remained in the work period. This may have been sufficient time to make some progress beginning the Project. However, despite knowing since at least June 2018 that the City applied for the State Permit in March 2018 (AA 366-369), on October 4, 2018, Appellants filed this action and requested a temporary restraining order ("TRO").

Appellants' request for a temporary restraining order was granted on October 4, 2018, and remained in effect for one week until October 11, 2018, when the trial court denied Appellants' motion for preliminary injunction. (AA 15-16, 28-35.) The trial court denied Appellants' request for an injunction after detennining there was a low likelihood of their success on the merits. (AA 34.)

The City requested permitting agencies to extend the work period beyond October 15, 2018, butthe Anny Corps of Engineers denied the City's request. (AA 134.) Because four days was insufficient for the City to mobilize its crews, no

Project work was done in October 2018. *(Id.)*

The permitted work period again opened on June 15, 2019. The City intended to begin in-stream work on June 17, and as of June 6, had mobilized its contractors and instructed its consultants to begin pre-construction work. *(Id.)* Upon Appellants' renewed motion, the trial court issued a limited preliminary injunction on June 12, prohibiting the City from removing the trestle but allowing all other Project work to proceed, such as tree trimming and removal of built-up creek debris, pending a decision on the merits. (AA 201.) The trial court held a hearing on the merits on June 27, 2019. The following day, the trial court issued an order in favor of the City, denying the writ petition, but staying that order until 9:00 a.m. on July 8, 2019, at which time the injunction will be dissolved. (AA 473.)

II. ARGUMENT

A. The Writ of Supersedeas Should Be Denied Because Appellants Failed to Meet Their Burden

The \Vrit of supersedeas, an extraordinary remedy intended to protect appellate jurisdiction, "should be sparingly employed and reserved for the exceptional situation." *(Town of Emeryville, supra,* 69 Cal.2d at 537; *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 376 *["Sun-Maid"]* [supersedeas requires "clear and compelling proof of extraordinary circumstances"].)

The burden is on Appellants to demonstrate that supersedeas is warranted in this case. *(Deepwell Homeowners' Protective Ass 'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 67-68 *["Deepwell"].)* They must show that (i) substantial questions of law will be raised on appeal, (ii) the City would not be irreparably harmed if a stay is granted, and (iii) absent a stay, they would be irreparably harmed because they would lose the benefits of the appeal were they to prevail. *(Town of Enieryville , supra,* 69 Cal.2d at 537; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.) Appellants fail to make any of these required

showings.

Supersedeas may not be granted unless Appellants show that "substantial" and "difficult questions oflaw" will be raised on appeal. *(Town of Emeryville, supra,* 69 Cal.2d at 537; *Deepwell , supra,* 239 Cal.App.2d at 67.) Appellants are required to demonstrate "that some special reason exists, differing from the ordinary case[,]" that justifies suspension of the lower court's judgment and issuance of an injunctive stay. *(West Coast Home Improvement Co. v. Contractors' State License Bd. of the Dept. of Prof and Vocational Standards* (1945) 68 Cal.App.2d 1, 6.) This is a high burden of proof because "it is not the province of [an appellate court] on a petition for writ of supersedeas to pass upon the merits of the appeal." *(Deepwell, supra,* 239 Cal.App.2d at 67.) Additionally, "the presumption is in favor of the lower court's decision." *(Nuckolls v. Bank of Cal.* (1936) 7 Cal.2d 574, 578.)

Thus, Appellants must show that the trial court committed "probable error" such that "a miscarriage of justice will occur in the absence of an issuance of the writ of supersedeas." *(Id.; Sun-Maid, supra,* 229 Cal.App.2d at 376-77.) As discussed below in Section B, Appellants do not describe a special circumstance or identify an error made by the trial court that warrants the extraordinary remedy of writ of supersedeas.

Appellants,must also show that an injunctive stay "will not cause the respondent disproportionate injury[:]" *(Mills, supra,* 98 Cal.App.3d at 861.) It is this Court's duty to "weigh the relative hardships on the parties" *(Town of Emeryville, supra,* 69 Cal.2d at 537), but "[i]f a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction." *(Nuckolls, supra ,* 7 Cal.2d at 578.) As discussed below in Section C, if a stay is granted in this case, the City and the public will be actually banned and deprived their rights to implement a properly approved public project, as discussed below in Section C.

Finally, as Appellants note, they must show that "the fruits of a reversal would be irrevocably lost unless the status quo is maintained." *(Town of Emeryville, supra,* 69 Cal.2d at 537.) This requires Appellants to demonstrate that a stay "... is necessary to protect [them] from the irreparable injury that they will necessarily sustain in the event their appeal is deemed meritorious." *(Mills, supra,* 98 Cal.App.3d at 861.) Appellants' failure to make this showing, discussed below in Section D, requires denial of the writ of supersedeas.

R AppeHants Fail to Raise Any Substantial or Difficult Questions of Law, and They Fail to Overcome the Presumption That the Trial Court's Decision Will Be Upheld on Appeal

Supersedeas may not be granted unless Appellants show that "substantial" and "difficult questions of law" will be raised and "that some special reason exists, differing from the ordinary case" that justifies suspension of the lower court's judgment and issuance of an injunctive stay. *(Town of Emeryville, supra,* 69 Cal.2d at 537; *Deepwell, supra ,* 239 Cal.App.2d at 67.)

Appellants fail to meet this standard and cannot meet their high burden of overcoming the presumption that the trial court will likely be upheld on appeal. *(Nuckolls, supra,* 7 Cal.2d at 578; *Sun-Maid, supra,* 229 Cal.App.2d at 376-377.) Instead, Appellants make the same fact-based arguments they made before the trial court. Even though CEQA requires a discretionary **approval of a project,** Appellants continue to argue that the City generally exercised discretion in applying for a State Permit. After reviewing the administrative record and authorities cited by the parties, the trial court rejected those arguments. Appellants fail to identify any error made by the trial court, and this Court should also reject Appellants' claims.

1. The City's discretionary approval of the Project occurred in 2014 and included approval to apply for a streambed alteration permit

The trial court properly detenriined that the City's 2014 approval of the Project encompassed application for a State Pennit. (AA 467-468.) As the trial court

acknowledged, CEQA defines the term "project" broadly. *(Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1056.) 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.,* emphasis added [citation omitted].) 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." *(Id.)* The Guidelines define the term "project" as "the whole of an action." (Guidelines §15378.) They explain: "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by govern ment agencies. The term 'project' does not mean each separate govern mental approval. . . . ." *(Id.,* emphasis added.)

The Project consists of removing a trestle spanning the Los Gatos Creek and replacing it with a steel truss pedestrian bridge. (AA 258; RA 83.) It requires a number of permits to be issued by various government agencies, which are responsible agencies under CEQA. (RA 16, 85.)

As the trial court detennined, securing the pennits required to implement the Project was part of the City's Project approval. It explained: "The SAA is subsumed within the Three Creeks Project and therefore does not, by itself, require a separate and distinct CEQA review." (AA 34, 196.)

Indeed, Appellants agree with the trial court determination that approval of the pennits is part of the Project. (AA 59 ["The current SAA approval is a component of the Three Creeks Trail Pedestrian Bridge project..."].) The Project includes everything necessary to accomplish removal of the trestle and installation of a steel truss pedestrian bridge. To do so entails work in the Creek. The State requires a streambed alteration permit for this work. Accordingly, the City's applying for – and securing – a streambed alteration permit is part of the Project and no subsequent discretionary approval by the City Council is required to obtain the

State Pennit.

When the City Council approved the Project in 2014, it knew that the City needed the State Permit. The MND states, "The City will apply for a streambed Alteration Agreement from CDFW and will be responsibl e for the implementation of all its conditions." (RA 85.) In assessing whether to issue this Permit, CDFW considers adverse effects to fish and wildlife resources from a given project. (Fish & G. Code §1602(a)(4).) The Fish and Game Code requires CDFW either to detennine 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 this State Permit was required to implement the Project, the City Council analyzed the Project's potential environmental impacts on the biological resources in the Creek when it approved the Project in 2014 (RA 30-37, 84-86.) Thus, the City's 2018 application to CDFW for a Streambed Alteration Agreement was not a new discretionary approval of the Project; rather, it **implemented** the City Council's 2014 and 2015 discretionary approvals of the Project.

2. *Appellants concede that CEQA is triggered only when a public agency makes a discretionary approval of a project. Here that public agency is CDFW*

As Appellants concede (AA 45), CEQA applies only to discretionary projects. (Pub. Res. Code § 21080(a); Guidelines §§ 15162(c), 15357.) It does not apply to ministerial decisions. (Guidelines §§ 15002(i)(l), 15268.) Consequently, "[o]nee a project has been approved, the lead agency's role in project approval is completed **unless further discretionary approval** on that project is required. Infonnation appearing after an approval does not require re-opening of that approval." (Guidelines § 15162(c), emphasis added.) Guidelines § 15162 and Public Resources Code section 21166 are intended to limit, not expand, the circumstances under which a public entity is required to perform a subsequent enviromnental review.

For example, in *Friends of the College of San Mateo Gardens* v. *San Mateo County Community College District* (2016) 1 Cal.5th 937, the Supreme Court noted that "restart[ing] the CEQA project every time plans or circumstances change, or whenever new information comes to light would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *(Id.* at 956.) For this reason, "[o]nce a project has received all necessary discretionary approvals, the CEQA process ends. No further environmental review can be required, even though circumstances may change significantly or important new information becomes available. (2 Kostka & Zischke, Practice Under the Environmental Quality Act, §19.22 (March 2019).)

It is undisputed that the City Council approved the Project in 2014. However, Appellants argue that the City must conduct additional CEQA review because the City exercised discretion in applying for and obtaining the State Permit. They rely on *Friends of Westwood* v. *City of Los Angeles* (1987) 191 Cal.App.3d 259 to argue that issuance of a permit could constitute a discretionary action. Their argument is without merit and *Friends of Westwood* is inapposite. In *Friends of Westwood,* the respondent city was the permitting agency. In contrast, here, the City is simply an applicant for a State Permit.

Moreover, the issue is not whether the City exercised discretion when it submitted an application for a Permit. The issue is whether the City issued a new discretionary **approval** of a project, such that CEQA would be triggered. (Pub. Res. Code § 21080(a); Guidelines §§ 15162(c), 15357.) It did not.

Appellants also incorrectly argue that there is, or should be, a difference between private and public projects. (Petition for Writ of Supersedeas at 20-22.) No so. CEQA does not distinguish between private and public projects. The question is who has discretionary approval over the State Permit. The answer is, the CDFW. Even if the City prepared the EIR Appellants seek, and submitted it to CDFW, that EIR would not assist CDFW in approving the State Permit because

CDFW does not consider historical resources.

The State Permit is required under the Fish and Game Code before any work can occur in the Creek. (Fish & G. Code § 1602(a).) The California Department of Fish and Wildlife is the regulatory agency and decisionmaker concerning the Permit. There is nothing the City Council or anyone in the City can do to require CDFW to issue the State Permit. As the State acknowledged at oral argument on June 10, 2019, CDFW is the entity with the ultimate approval on the Permit. (See AA 198.) Thus, it is CDFW, not the City, that has discretionary approval over this State Permit.

The City was required to comply with the permitting procedure in the Fish and Game Code. More specifically, Fish and Game Code section 1602 requires that CDFW be notified and provided with substantial information about any action that affects a streambed. (Fish & G. Code § 1602(a)(l).) CDFW then evaluates whether the activity may substantially adversely affect an existing fish and wildlife resource. Ifit determines that there may be a substantial adverse effect on fish and wildlife resources, CDFW issues a draft Pennit that includes reasonable measures necessary to protect the resource. (Fish & G. Code § 1603(a).) As the Court accurately observed, "CDFW is thus in charge." (AA 198.)

As an applicant for the Permit, the City can only identify aspects of the draft Permit that it sees as unacceptable. (Fish & G. Code § 1603(a).) The City's only recourse as a permit applicant is to invoke the administrative procedure in the Fish and Game Code. (Fish & G. Code §1603(b).) It is the CDFW, as the permitting agency, that determines the terms of the State Permit as a matter oflaw. The City, as the permit appJicant, has no discretionary approval for the State Permit.[2] In any case, Appellants have dismissed the CDFW from this action.

Accordingly, to the extent the State Permit might require CEQA clearance,

---

[2] Appellants previously took this same position. In a June 13, 2018 letter to CDFW, Appellants stated: 'There are no further discretionary approvals required by the City prior to demolition, but CDFW's discretionary 1602 process triggers revision to the project EIR and full CEQA compliance." (AA 1165.)

it is triggered by CDFW's discretionary approval of the Permit. And CDFW has already determined the trestle's listing as a historical resource does not require further CEQA analysis in order to issue th e Pennit. (AA 313-316.)

While the Fish and Game Code refers to the resulting Permit document as an "agreement," there is no arm's-length negotiation of its terms. *(See* Fish & G. Code § 1602(a).) As the trial court properly determined, the City exercised no discretionary approval that triggers CEQA. (AA 468-472.) The City did not engage in negotiation of this Agreement. (AA 133.) CDFW set its terms and conditions. *(Id.)* As the trial court noted, none of the pages in the record cited by Appellants evinces a negotiation of the permit's tenns. (AA 471.) The Pennit simply sets forth the tenns and conditions with which the City must comply in order to work in the Creek (AA 275-318.) The City's signature on the State Permit does not reflect a contractual arms-length negotiation, but rather, the City's pledge to abide by its terms.

3. The streambed alteration permit did not involve a discretionary approval by the City.

Discretionary approvals that trigger CEQA "require[] the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity .... The key question is whether the public agency can use its subjective judgment to decide whether or how to carry out or approve a project." (Guidelines § 15357.) As this Court stated, the test for determining if a public agency performs a discretionary or ministerial function is "whether the agency has power to shape the project in ways that are responsive to environmental concerns." *(Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 302.)

As discussed above, the City is required to obtain the Permit to perform the work necessary for Project implementation. (RA 85.) The permit application process does not provide an applicant, such as the City, with a means to shape the project in response to enviromnental concerns. Rather, CDFW – and only CDFW

– determines whether project implementation will adversely affect a fish and wildlife resource. If so, CDFW determines whether protective measures are necessary. (Fish & G. Code § 1603(a).) In contrast, the applicant's power is limited to objecting to permit conditions and seeking administrative review of conditions. (Fish & G. Code § 1603.) Far from Appellants' claim that the City's "exercise of discretion is well proven" (Petition for Writ of Supersedeas, at p. 17), the City's application for and acquisition of a State Permit do not involve any discretionary act, much less a discretionary approval of a project, as required to trigger CEQA. (Pub. Res. Code § 21080(a); Guidelines §§ 15162(c), 15357.) Accordingly, the trial court correctly concluded that CEQA does not apply. (AA 472-473.)

4. Because the State's jurisdiction is limited to biological resources in the Creek, the historical status of structures in the Creek area is irrelevant.

It is the CDFW, not the City, that detennines appropriate CEQA clearance for the Permit. The State is no longer a party to this action. Regardless, CDFW's evaluation of the City's Permit application considers only biological impacts on the Creek, over which the trestle spans.

As explained in *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459 *("EPIC"),* the purpose of streambed alteration agreements mandated by the Fish and Game Code sections 1600, *et seq.,* is "to protect fish and wildlife that may be adversely affected by streambed alteration." *(Id.* at 519.) The *EPIC* Court also explained that "an activity or project that necessitates a Streambed Alteration Agreement may require environmental review under CEQA." *(Id.* at 521.) Under certain circumstances, CEQA requires findings. (Pub. Res. Code § 21081.) Those findings, if needed, would be made by the Department of Fish and Wildlife. *(See EPIC,* 44 Cal.4th at 521-22.)

CDFW's evaluation is limited to effects on biological resources in the Creek. *(EPIC, supra,* 44 Cal.4th at 519; Fish & G. Code § 1602.) The historical

status of structures in the Creek is irrelevant. The CDFW does not have the authority to consider or address the historical status of structures in the Creek in its evaluation of whether to issue a permit. (Fish & G. Code §§ 1602(a)(4), 1603(a) [CDFW may describe fish and wildlife resources that may be adversely affected and may include measures to protect those resources].)

Further, CDFW, as the agency responsible for determining appropriate CEQA clearance for the Permit, determined that there has been sufficient CEQA compliance to work in the Creek. (AA 313-317.) Thus, the City's Permit application and the listing of the trestle have nothing to do with one another.

> As the trial court observed:
>
> What is confusing is that Petitioners are *not* arguing that CDFW's issuance of the SAA constituted a discretionary approval. The reason they are not making this argument is because CDFW is precluded by law from making any assessment of historic resources. So even if Petitioners can show CDFW made a discretionary approval, CDFW could not consider the May 2017 listing of the Trestle. Consequently, Petitioners are left with arguing that the actions taken by the *City* to obtain the SAA constituted a discretionary approval.

(AA 469 [emphasis in original].) The trial court properly determined that the trestle's listing on the State Register does not require any further CEQA analysis. (AA 472-473.)

C. The City Will Suffer Harm If It Is Further Prohibited From Implementing The Project Now.

Appellants inaccurately represent that "all parties agree that [the trestle's] demolition would have a significant environmental impact and would result in irreparable harm." (Petition for Writ of Supersedeas, at p. 15.) The City disagrees. It will suffer harm if it is prohibited from implementing the full Project now. As discussed, this appeal is meritless.

The City of San Jose bought the trestle and the railroad right of way in 2011. (AA 108.) The City bought the right of way to include it in the Three Creeks Trail, a unique trail system with multi-trail connectivity. *(Id.)* The City has been working on the Project since about 2003. *(Id.)* The trestle was in a degraded state even when the City acquired it in 2011. *(Id.)* In 2014 it had rotted timbers and parts of it were burned. (AA 108-129.)

It has further deteriorated. 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 stringers (i.e. wooden beams running the length of the trestle that constitute the main structural support for its deck). (AA 138-157.) 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. (AA 139-140, 142-143.) 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. (AA 140.)

The Willow Glen Neighborhood Association supports this Project and is in favor of removing the wooden trestle and installing a steel pedestrian bridge. (AA 109, 127-128.)

Under permit conditions, the Project work in the Creek may only proceed between June 15 and October 15. (RA 137.) Last year, the delay caused by the present litigation, including Appellants' first motion for preliminary injunction, prevented the City from working on the Project in October 2018. (AA 134.) After the State issued the Streambed Alteration Agreement on October 4, 2018, the City had all permits required for the Project construction work. (AA 133.) The work

period in all permits expired on October 15, 2018. (AA 134; RA 137.) Although the City was not permitted to perfonn 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. (AA 134.) The City's consultant had completed the Preconstruction Work phase (biological studies), and the City's contractor was scheduled to begin the Mobilization/Site preparation phase on October 8, 2018. *(Id.)* This work was halted when the trial court issued a TRO on October 4, 2018.

When the October 11, 2018, order denying preliminary injunction issued, only four days remained until the expiration of the allowed work-period. *(Id.)* That was insufficient time for the City's contractor to mobilize crews to begin work. (Id.) The City applied for extensions of its pennits, but the United States Corps of Almy 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 had to wait to start work until June 17, 2019. Mobilization and site preparation was scheduled to start on June 17, 2019 and be completed within one week. (AA 134-135.) Demolition of the trestle was scheduled to start on June 24, 2019, and to complete within one week. (AA 135.) Installation of the new bridge was scheduled to start on July 1, 2019, and be completed in fourteen weeks. *(Id.)* Work on the Project is expected to continue until October 15, 2019, or shortly before then. (AA 135-136.)

Contrary to Appellants' representation that the requested delay would be "slight" (Petition for Writ of Supersedeas, at p. 25), delaying Project implementation until this matter is decided on the merits would almost certainly result in the expiration of the permitted work period. Appellants would, as they did in October 2018, succeed in thwarting the Project by pursuing a meritless CEQA action. Friends of the Willow Glen Trestle have succeeded in delaying the Project for five years through CEQA litigation.

It is apparent that Appellants are usmg CEQA to stall Project implementation. While they argue that the City's application for a State Permit required the City to prepare an EIR, they did not file suit when they became aware of the City's March 2018 Permit application; rather, they waited until October 2018. (See AA 366-369 [June 13, 2018 letter from Appellants' counsel to CDFW, indicating that as of at least that date, Appellants were aware that the City had applied for a Permit].) Additionally, Appellants admit that they abandoned their prior appeal (case no. H046311) because the permitted work period expired on October 15, 2018 and "thus provided a de facto injunction until June 15, 2019'." (Petition for Writ of Supersedeas, at pp. 12-13.) It therefore appears that Appellants' primary interest is not in requiring the City to prepare an EIR, but in stalling the Project.

Although CEQA seeks to promote thorough analyses of projects' environmental impacts, that goal must be balanced against the public's interests in finality and efficiency. *(Friends of College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 949 [Section 21166 and Guidelines § 15162 "are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with interests in finality and efficiency."].) CEQA is not intended to delay projects. (See, e.g., *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 50-51 [short statute of limittiOns for certain CEQA actions is intended to avoid delay and achieve prompt resolution of CEQA claims]; *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 371 ["we do not believe the Legislature intended CEQA to be applied in a way that maximizes the expense and delay incurred before a final decision is reached..."].)

The significant delay of the Project has cost hundreds of thousands of dollars of public funds. (AA 134.) The City, and ultimately the City's taxpayers, have incurred 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 pennit 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. (AA 133.)

Additionally, because Project work could not be perfonned in 2018, the City incurred over $269,000 in unnecessary 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. (AA 134.)

Inthe 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. (AA 110.) 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. (AA 108, 110.) 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. Appellants should not be allowed to continue stalling the Project by this unmeritorious lawsuit and appeal.

D. Appellants Will Not Suffer Irreparable Harm Absent A Stay

Appellants seek a stay in part based on the argument that the City should conduct an EIR. While that argument is without merit, this Court would still have the authority to order that even if their request for a stay is denied. In *Citizens/or the Restoration of L Street v. City of Fresno ("L Street")* (2014) 229 Cal.App.4th 340, the Court of Appeal for the Fifth District held that the appeal was not moot, even though the historical buildings at issue had been demolished. *(Id.* at 362-363.) There, the plaintiff-appellant challenged the city's preparation of an MND, asserting that an EIR was required because there was a fair argument that the project may have significant impacts on historical resources. *(Id* . at 352.) Although

the structures at issue had already been demolished, the *L Street* court detennined that it could grant practical, effective relief because if the appellant's argument is accepted, the court would direct the trial court to issue a writ requiring the city to prepare and certify an EIR before approving the project. *(Id.* at 362-363 ["The preparation of an EIR constitutes effective relief for purposes of California's mootness doctrine because it might lead to changes in the Project, the adoption of further mitigation measures, or possibly the removal of the Project."].)

Similarly, in this case, the Court can grant Appellants the relief they seek, which is a writ requiring the City to prepare an EIR. (See AA 11-12.) As in the *L Street* case, this relief can be granted even if the Project proceeds and the trestle is removed.

A court's power to grant supersedeas to preserve jurisdiction "should be **sparingly employed".** *(People ex Rel San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533, 573.) This is in part because a trial court, being more familiar with the circumstances of a case is normally "the appropriate forum to weigh the relative hardships on the parties, including the likelihood that substantial questions will be raised on appeal." *(Id.,* emphasis added.) In this case, the trial court determined on three occasions that Appellants' legal arguments lacked merit. (AA 34, 195 [finding low likelihood of success on the merits]; AA 460-473 [denying on the merits Appellant's petition for writ of mandate].) Granting Appellants' request for an emergency stay would serve only to further delay the Project.

IV. CONCLUSION

Appellants fail to make the showing required for a writ of supersedeas to issue. They have not demonstrated any way in which the trial court erred, nor have they identified a substantial and difficult question of law or any other reason that justifies reversing the trial court's decision. The City and the public would be irreparably harmed if Project implementation is delayed yet again, and this Court could provide App,ellants with the relief they seek, even if the Project goes

forward. The City respectfully requests that the Court therefore deny their petition for writ of supersedeas.

Respectfully submitted,·

Dated: July 5, 2019

RICHARD DOYLE, City Attorney

By: _____

ELISA TOLENTINO
Sr. Deputy City Attorney

Attorneys for CITY OF SAN JOSE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, the undersigned counsel of record for Respondent City of San Jose certifies that Respondent knows of no person or entity that a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves. (Cal. Rules of Court, Rule 8.208(e)(2).)

Respectfully submitted,

Dated: July 5, 2019

RICHARD DOYLE, City Attorney

By: :211!V\rw>=

ELISA TOLENTINO
Sr. Deputy City Attorney

Attorneys for CITY OF SAN JOSE

CERTIFICATE REGARDING **WORD** COUNT

I, Elisa Tolentino, counsel for City of San Jose, hereby certify, pursuant to California Rules of Court, Rule 8.204 (c)(l), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this City of San Jose's Opposition to Writ of Supersedeas, exclusive of tables, cover sheet, and proof of service, according to my computer program is 7000 words.

Respectfully submitted,

Dated: July 5, 2019

RICHARD DOYLE, City Attorney

By: _____
ELISA TOLENTINO
Sr. Deputy City Attorney

Attorneys for CITY OF SAN JOSE

Willow Glen Trestle Conservancy, et al. v. City of San Jose, et al.
Santa Clara County Superior Court Case No. 18CV335801
Sixth District Court of Appeal No. H047068

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113.

On July 5, 2019, I served one true copy of:

1. Respondent's Opposition to Petition for Writ of Supersedeas Respondent's;

2. Respond ent's Appendix in Opposition to Petition for Writ of Supersedeas Vol. I

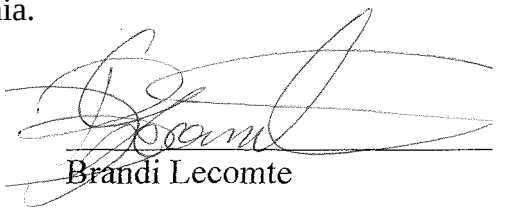
By placing a true copy enclosed in a sealed envelope with prepaid postage, in the United States mail in San Jose, CA, California, as listed below:

Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113

By emailing a copy to counsel as listed below:

Susan Brandt-Hawley: susanbh@preservationlawyers.com; susanbh@me.com
Jeanie Stapleton: jstapleton@preservationlawyers.com

I declare under penalty of perjury that the foregoing is true and is executed on July 5, 2019, at San Jose, California.



Brandi Lecomte