Civil No. H047068

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Willow Glen Trestle Conservancy and **Friends of the Willow Glen Trestle;**

Plaintiffs and Appellants,

v.

City of San José and **City of San José Department of Public Works;**

Defendants and Respondents.

Civil Number H047068

Santa Clara County Superior Court Case No. 18CV335801

On appeal from the Superior Court of Santa Clara County

Honorable Thomas E. Kuhnle

Reply Memorandum of Points and Authorities in support of

Petition for Writ of Supersedeas

BRANDT-HAWLEY LAW GROUP
Susan Brandt-Hawley (SBN 75907)
P.O. Box 1659
Glen Ellen, California 95442
707.938.3900 fax 707.938.3200
susanbh@preservationlawyers.com
Attorney for Appellants

Introduction

Appellants Willow Glen Trestle Conservancy and Friends of the Willow Glen Trestle (hereafter, the Conservancy) thank the Court for its stay of demolition of the historic Willow Glen Trestle. A writ of supersedeas is critical to protect the Court's *de novo* jurisdiction to enforce the California Environmental Quality Act (CEQA) and its mandates for supplemental environmental review.

CEQA is citizen-enforced and the Conservancy is acting solely in the public interest. The City of San José is intent on demolishing the Trestle and admits it has sought for years to avoid its formal recognition as historic. The logical — and discreditable — reason is that historic status triggers CEQA protections, including an EIR process. Not only will an EIR show that adaptive reuse of the Trestle for the Three Creeks Trail Pedestrian Bridge project is feasible, but demolition would violate CEQA because loss of an historic resource causes a significant impact to the built environment.

The City approved demolition in 2014. Local residents sued in mandamus to require an EIR process to study the evocative Trestle that was so important to the twentieth-century development of Willow Glen. Following issuance of a writ in 2014, reversal by this Court in 2016, and judgment for the City on remand, the City's 2014 approval of demolition of the Trestle was ruled legal since its

contention that the Trestle is not historic was supported by substantial evidence. Demolition of a *non*-historic railroad bridge has no significant impact, and does not trigger CEQA's preferred EIR process to consider feasible mitigation measures and alternatives.

Five years later, circumstances have changed, and CEQA accommodates just such evolution. Critical new information now triggers an EIR process to protect the environment, for two reasons. *First*, following nomination by Friends of the Willow Glen Trestle,[1] in 2017 the State Historical Resources Commission unanimously listed the Trestle in the California Register. That fact does not in itself trigger supplemental review for an already-approved project, but, *second*, the City made a new and final discretionary approval in 2018 — of a Streambed Alteration Agreement (SAA). The SAA is the last step the City must take prior to demolition of the Trestle's mighty supporting piles in Los Gatos Creek.

City experts in previous years determined that rehabilitation of the Trestle for use as a pedestrian trail would be programmatically

[1] Referencing the successful nomination of the Trestle to the California Register, the City protests that *"[a]ppellants created the circumstance they now claim requires supplemental CEQA review*." (Opposition at 9, italics added.) Yes. Appellants sought formal listing in the Register to obtain CEQA's protections for the Trestle when the City persisted in its refusal to acknowledge its historic status despite the ongoing urgings of archivists, residents, and historic experts including its own Historic Preservation Commission. (AA 50.)

and economically feasible. Again, absent historic status, in 2014 the City nonetheless had discretion to approve demolition as a matter of preference because there would be no significant impact. The Trestle's new historic status is consequential and triggers CEQA's supplemental review provisions for the discretionary SAA approval. Because as a matter of law demolition of an historic resource has a significant environmental impact (Pub. Resources Code, § 21084.1), the City Council must inform its discretion in an EIR process.

The City offers two primary, illogical defenses: *first*, that its 2018 approval of the SAA was somehow *ministerial* — something it was required to do despite now knowing that it would result in demolition of an historic resource with a resultant significant environmental impact — and *second*, that in approving the SAA it was restricted to fish and wildlife issues and would be without power to consider or mitigate any other significant environmental impact.

This appeal will explore why these defenses are unsupported by CEQA and its implementing case law. The California Supreme Court's interpretation of supplemental review provisions in Public Resources Code section 21166 and CEQA Guidelines [14 Cal.Code Regs.] section 15162 in *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, (*Friends of College of San Mateo Gardens*) is controlling. (AA 245.)

The fact that a lead agency has previously approved a project is *not a defense* to its refusal to conduct a supplemental CEQA process when it makes a further approval "on a project." (Guidelines, § 15162 (c).) *Supplemental* review comes after an *initial* project approval. An underlying environmental document relied upon for the initial approval is no longer adequate when there is a new significant impact that was not studied or mitigated as a basis for the new decision. As held by our Supreme Court, a lead agency is required to prepare an EIR when a project initially approved via a negative declaration "might have a significant environmental effect not previously considered in connection with the project as originally approved." (*Friends of the College of San Mateo Gardens*, *supra*, 1 Cal.5th at 959.) This case presents a textbook example of changed circumstances and new information triggering supplemental review.

The Trestle is now an *historic environmental resource* to which all of CEQA's mandates apply. Supersedeas is essential to allow this Court's full review and application of the protections of environmental law. The City's newly-proffered suggestion that demolition cannot moot the appeal is disingenuous. Absent supersedeas, the Trestle would be demolished and a steel bridge installed in place this year. Irreparable harm is manifest.

Finally, neither a project's touted merit nor the delay that might accompany environmental compliance can affect judicial enforcement. "CEQA's requirements ... [imposing] feasible mitigation measures, still need to be enforced." (*Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 240; cf. dis. opn. of Chin, J., 254.) This especially resonates when a beloved historic resource is at stake.

Clarification of Material Fact

The 2015 EIR is not Relevant. The Conservancy has explained why the City's 2015 EIR is not relevant to this appeal. It was prepared two years before the Trestle was listed in the California Register in 2017. It was never relied upon for the initial approval of the Trestle demolition, *or* for any subsequent approval of demolition, *or* for the Streambed Alteration Agreement (SAA). (*E.g.*, *Friends of the Willow Glen Trestle v. City of San José* (2016) 2 Cal.App.5th 457, 463 ["The City has not vacated its approval of the project and reconsidered [it] in light of the EIR as would be required by CEQA."]; Petition for Writ of Supersedeas (Petition) at 6, 7, 10, 12, 17; Appellants' Appendix (AA) 163-64, 243-44.)

The City's Opposition to Writ of Supersedeas (Opposition) inaccurately states that the City "reapproved the Project in 2015 ...

when it certified an EIR." (Opposition at 7, n.1.)

However, much of the 2015 EIR that describes the Three Creeks Trail Pedestrian Bridge project and the environmental setting can be expeditiously reused for a new draft EIR.

Discussion

The Conservancy will briefly reply to points raised by the City's Opposition without repeating arguments already made, and looks forward to the complete briefing of the merits on appeal.

At the outset, the City errs in failing to acknowledge that this Court's review of this CEQA case will be *de novo*, without deference to the trial court's ruling. (Opposition at 12.) CEQA mandamus actions present issues of law based on a certified administrative record, and the duties of trial and appellate courts are identical. (*Schaeffer Land Trust v. San José City Council* (1986) 188 Cal.App.3rd 612, 622, *Lighthouse Field Beach Rescue v. California Department of Parks and Recreation* (2005) 131 Cal.App.3d 1170.)

A. The SAA Involves Discretion

The City's position is that the City's approval of the SAA did not involve discretion, which it repeatedly asserts as fact but fails to explain how so. The Conservancy has already explained that the City *in pursuing its own project* has discretion at all times. Beyond that,

the City *chose to apply* for the SAA in 2018, as its last step before demolishing the Trestle — which at that point it knew to have a significant environmental impact although that was not known when it approved the initial SAA as part of the project in 2014. Those qualify as changed circumstances based on new information. (Pub. Resources Code, § 21166 (b) and (c); Petition at 19-21.)

The City argues that its approval of the project in 2014 "included *a requirement* to apply for [the SAA], acquire a valid [SAA], and abide by its terms." (Opposition at 8 [referencing the SAA as a "permit" rather than an "agreement"], italics added.)

Perhaps the City means that it approved its own actions to obtain all necessary permits to demolish the Willow Glen Trestle and install the already-purchased steel bridge, but it is not accurate to claim that the City "required" itself to do anything. Indeed, even when a lead agency approves permits for a private project applicant, it cannot "require" the applicant to proceed with the project. All the lead agency can do is provide approval for the permits that would be required to proceed with the project. Once it gives those approvals, entitlements ripen, and if the applicant proceeds with the project it must comply with project-related permits and mitigation.

The City concedes that after its 2014 SAA permit expired it "submitted an application" to the California Department of Fish and

Wildlife (CDFW) in March 2018. (Opposition at 8.) The application was approximately 200 pages long; it was not identical to the 2014 SAA. (Administrative Record (AR)[2] 781-992.) CDFW responded to the application with a request for substantial additional information and corrections. (Opposition at 8; AA 349.) CDFW did not "invite" the City to revise and resubmit the application. (*Ibid*.)

There were thereafter another couple of hundred pages of documents back and forth (AR 996-1106) before CDFW provided a draft agreement to the City in August 2018, which the City *accepted*. (AR 519.) CDFW then had 60 days to consider its CEQA compliance under supplemental environmental review provisions of Public Resources Code section 21166, and decided that the 2014 mitigated negative declaration was adequate for its actions since its purview as a responsible agency was limited to fish and wildlife. (AA 306-317.)

While the City oddly argues that this CEQA mandamus action should have been filed sooner, it was *not ripe* for filing until CDFW signed the SAA (AR 519) and filed the Notice of Determination on October 4, 2019 (AA 318), and was in fact filed that same day. (AA 1.)

Relying solely on a declaration from Principal Engineer Katherine Brown from its Public Works Department, the City

[2] Appellants requested that the administrative record be transmitted and lodged with this Court by the Superior Court.

pronounces that there was no negotiation of the terms of the SAA, at the same time acknowledging that CDFW and City personnel met at the Trestle site to discuss the SAA: "to clarify supplemental information necessary" to complete the agreement. (Opposition at 8; AA 132.) Correspondence between City staff and CDFW documents discretion, both in the application and responses noted above (AR 781-1106) including but not limited to the specific reference to discretion as co-permittee to the Habitat Plan. (AR 997, *see also* 1121-1122, 1221-1223.)

As discussed at the merits hearing, CDFW had the obligation to comply with requirements of the Fish and Game Code, and to obtain the SAA the City had the obligation to reach agreement with CDFW as to how to do so. (Reporter's Transcript at 27-42.)

Both agencies exercised discretion. The SAA states:

> WHEREAS, pursuant to Fish and Game Code (FGC) section 1602, *Permittee notified* CDFW on March 19, 2018 that *Permittee intends* to complete the project described herein.
>
> WHEREAS, pursuant to FGC section 1603, CDFW has determined that the project could substantially adversely affect existing fish or wildlife resources and has included measures in the Agreement necessary to protect those resources.

> WHEREAS, Permittee *has reviewed the Agreement and accepts its terms and conditions*, including the measures to protect fish and wildlife resources.
>
> NOW THEREFORE, *Permittee agrees* to complete the project in accordance with the Agreement.

(AR 501, italics added.)

"Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required." (Guidelines, § 15162 (c).) It is important to note the language referencing approval "on" a project and not approval "of" a project. The SAA is a "further discretionary approval" made by the City as the lead agency for the Three Creeks Trail Pedestrian Bridge project following new information and changed circumstances that trigger supplemental review and mitigation of impacts to the now-historic Trestle.

B. The City Can Address Historic Resource Impacts

This is not the place to deeply address the merits of this case. But the City assumes that its CEQA obligations in 2018, if any it had, solely related to fish and wildlife impacts of the SAA. To the contrary, when a lead agency makes a discretionary decision that is not exempt from CEQA, as here, it must consider a full range of any

potentially significant environmental impacts and possible mitigations and alternatives. The Guidelines' Appendix G identifies a full range potential environmental impacts.

Because the City's actions to apply for and agree to the SAA occurred with knowledge that it was approving the last remaining impediment to demolition of the now-historic Trestle, CEQA's supplemental review provisions were triggered to mitigate impacts. The point of CEQA is to study and mitigate or avoid significant project impacts when feasible. (Pub. Resources Code, § 21002.)

There is no question but that the City has authority to study and condition the Three Creeks Trail Pedestrian Bridge project. It has provided the Initial Study relied upon in 2014 that lists all environmental topics. (Respondents' Appendix, AR 560.)

The California Supreme Court continues to strictly enforce CEQA's mandates in cases such as *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945 and *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, in which public universities were required to address all impacts of proposed projects — even when outside their own mission of education. Consistently, in *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, CDFW was charged with broad CEQA obligations to

address historic and resources impacts and greenhouse gas issues beyond its normal mission to protect fish and wildlife.

The Willow Glen Trestle in 1955

Conclusion

The Conservancy's public-interest goal, sought now for so many years, is to enforce CEQA's supplemental review provisions that require the City to consider and impose any feasible adaptive reuse alternative for the historic Willow Glen Trestle. This case warrants protection of this Court's jurisdiction via supersedeas.

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July 12, 2019

Respectfully submitted,

Susan Brandt-Hawley
Attorney for Appellants

Willow Glen Trestle Conservancy, et al. v. City of San José, 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 P.O. Box 1659, Glen Ellen, California 95442.

On July 12, 2019, I served one true copy of:

Reply in Support of Petition for Writ of Supersedeas

_____By placing a true copy enclosed in a sealed envelope with prepaid postage, in the United States mail in Petaluma, 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:

Margo Laskowska Margo.Laskowska@sanjoseca.gov

Elisa Tolentino Elisa.Tolentino@sanjoseca.gov

I declare under penalty of perjury that the foregoing is true and is executed on July 12, 2019, at Glen Ellen, California.

Susan Brandt-Hawley