

1 Susan Brandt-Hawley/SBN 75907  
2 BRANDT-HAWLEY LAW GROUP  
3 P.O. Box 1659  
4 Glen Ellen, CA 95442  
5 707.938.3900, fax 707.938.3200  
6 susanbh@preservationlawyers.com

7 Attorney for Petitioner  
8 Friends of the Willow Glen Trestle  
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF SANTA CLARA**  
12

13 **Friends of the Willow Glen**  
14 **Trestle,**  
15 an unincorporated association;

16 Petitioners,

17 v.

18 **City of San José and City Council**  
19 **of the City of San José;**

20 Respondents;  
21 \_\_\_\_\_/

Case No. 2014-1-CV-260439

**Petitioner's Reply Brief**  
**on Remand in support of**  
**Petition for Writ of Mandamus**

Date: February 3, 2017  
Time: 9:30 am  
Dept: 29a

Honorable Helen Williams

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## Table of Contents

<b>Introduction</b> .....	1
<b>Discussion</b> .....	2
<i>2004 Initial Study</i> .....	2
<i>2004 Reports of Ward Hill and M. Wayne Donaldson</i> .....	3
<i>2014 City Analysis</i> .....	4
<b>Conclusion</b> .....	5

## Introduction

The Friends of the Willow Glen Trestle and the City of San José agree on the critical, straightforward issue now before the Court on remand from the Sixth District: does the administrative record contain substantial evidence that the Willow Glen Trestle does *not* qualify for listing in the California Register of Historical Resources?

*The answer is no.* The city’s opposition brief restates its primary evidence (from 2004) over and over, to no avail. In 2014 this Court fairly and fully reviewed that evidence and ruled that it was “*at best, sparse and conclusory.*” (2014 Order at 3.) Sparse and conclusory cannot equate to ‘substantial.’

As the identical facts and issue are again before the Court, principles of collateral estoppel arguably may apply, but the Friends are cognizant of the remand order issued by the Sixth District (while ordering the parties to bear their own costs on appeal). The trial court judgment adjudicated historic status under the ‘fair argument’ standard, and the remand order requires application of the substantial evidence standard to the question of whether the Trestle is not a ‘historical resource’ under CEQA.

The Willow Glen Trestle *meets the criteria* for listing in the California Register. Ironically, while the State Historical Resources Commission unanimously determined just that in April 2016, its action is not relevant to the city’s 2014 demolition approval now before the Court. The Friends nonetheless request that the Court take judicial notice of the minutes and transcript of the Commission’s April 2016 action for clarification of the status of the nomination, since the city’s description of the proceedings is misleading. (Opposition Brief (Opp.) at 19, n.4.)



1 had proposed to incorporate the trestle, with some rehabilitation as needed. (*E.g.*,  
2 Opening Brief (OB) at 16-17; Opp. at 2-3.) An Initial Study was prepared for that  
3 project, and the city now repeatedly refers the Court to the “comprehensive review of  
4 over sixty sources that are identified in an extensive bibliography.” (Opp. at 3, citing  
5 CAR 179-191 and 204, and again referenced at Opp. at 5-6, 11-13.) *All that the “review”*  
6 *confirmed is that the trestle was not yet listed in any historic register or inventory.*  
7 (*Ibid.*) That is not evidence of the lack of historic register eligibility, as implied by the  
8 city. Unless and until threatened with demolition, many historic resources are not  
9 proposed for listing in historic registers, as there is no reason to spend the months of  
10 time or substantial resources in terms of effort and money that are necessary for listing.  
11 Regardless, again, the lack of listing is not evidence.

12  
13  
14  
15  
16 **2004 Reports of Ward Hill and M. Wayne Donaldson.** The summary-style  
17 reports of Mr. Hill and State Historic Preservation Officer (SHPO) M. Wayne  
18 Donaldson were discussed in the opening brief, along with their consideration by the  
19 Honorable Joseph Huber. (OB at 16-17.) The Friends will not repeat their discussion,  
20 upon which they continue to rely, and the single-page reports were attached to the  
21 opening brief for the Court’s convenience. No harm or substantial change to the bridge  
22 was proposed in 2004, as noted by Judge Huber, and so the content of the reports is “at  
23 best, *sparse and conclusory*” as the Court found. (*Ibid.*, *Ante* at 1.)  
24  
25  
26  
27  
28

1 The city notes that SHPO Donaldson also confirmed that the trestle was not listed  
2 in any historic surveys or registers, as similarly established by Ward Hill. (Opp. at 4.)  
3 Again, this information is not evidence as to register eligibility.  
4

5 The 2004 reports did not opine on whether or not the trestle qualified for the  
6 California Register or the National Register of Historic Places, and so the Friends will  
7 not further address the city's argument that somehow lack of historicity was established  
8 at that time and cannot now be considered. This argument was also made during the  
9 litigation in 2014 and was not accepted by Judge Huber.  
10

11 The Friends also disagree with the city's characterization of the CH2M Hill  
12 engineering report, which is essentially irrelevant in terms of whether rehabilitation of  
13 the trestle would be economically feasible. Regardless, the report speaks for itself. (OB  
14 at 15, citing AR 883, 903.)  
15

16  
17 **2014 Initial Study.** The city for some reason again references the 2004  
18 documents, including the Ward and Donaldson documents and undisputed data stating  
19 that the trestle is not yet listed in any historic registers, without being clear that it is not  
20 referencing new documents. (Opp. at 5 - 6.) The city lists the Initial Study's conclusions,  
21 based upon facts listed in 2004 without analysis of the California or National Register  
22 criteria or any depth of analysis.  
23

24  
25 **2014 City Analysis.** City staff largely relied on the 2004 documents in its staff  
26 report, and while noting that it had received "additional historical context" since Willow  
27 Glen Archives had recently been discovered, staff did no substantive analysis of the  
28

1 archives' import before making conclusory statements that the trestle is not eligible for  
2 listing in the Register. (Opp. at 6; OB at 15-17.) The citations of findings by the City  
3 Council simply reiterate the information in the Initial Study and staff reports, which  
4 again recite statements from 2004. (Opp. at 7.)

5  
6 On this record, the trestle has not been determined to lack eligibility for historic  
7 status as defined by CEQA on the basis of substantial evidence, as the Friends look  
8 forward to discussing further at the merits hearing.  
9


### 10 **Conclusion**

11 As the Court can see from this brief, the Friends of the Willow Glen Trestle  
12 continue to rely on the opening brief. The Friends respectfully reiterate their request  
13 that this Court grant the petition and issue a peremptory writ ordering the city to set  
14 aside the mitigated negative declaration and approvals for the Three Creeks Trail  
15 project. Since the city has already prepared an EIR, it need only set aside its project  
16 approval, update the EIR with current information and recirculate as needed, and  
17 comply with CEQA if it chooses to reconsider demolition of the Willow Glen Trestle.  
18  
19

20 January 19, 2017

21 Respectfully submitted,

22 BRANDT HAWLEY LAW GROUP

23   
24 \_\_\_\_\_  
25 Susan Brandt-Hawley  
26 Attorney for Friends of the Willow Glen Trestle  
27  
28

*Friends of the Willow Glen Trestle v. City of San Jose, et al.*  
Santa Clara County Superior Court Case No. 114CV260439

**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, CA 95442.

On January 19, 2017, I served one true copy of:

**Petitioner's Reply Brief on Remand  
in support of the Petition for Writ of Mandamus**

\_\_\_\_\_ By placing a true copy enclosed in a sealed envelope with prepaid postage in the United States mail in Glen Ellen, California addressed to the persons listed below.

\_\_\_\_\_ By placing a true copy enclosed in a sealed envelope by overnight mail at Glen Ellen, California addressed to the persons listed below.

  x   By emailing a copy to counsel as listed below.

Kathryn J. Zoglin  
San Jose City Attorney's Office  
200 E. Santa Clara Street  
16<sup>th</sup> Floor  
San Jose CA 95113

*Attorney for Respondents*

katie.zoglin@sanjoseca.gov

I declare under penalty of perjury that the foregoing is true and correct and is executed on January 19, 2017, at San Francisco, California.



\_\_\_\_\_  
Susan Brandt-Hawley