Order Issued
on Submitted Matter

FILED

JUL 28 2014

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
Sylvia Roman
Courtroom Clerk

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 RE: PETITION FOR WRIT OF MANDAMUS

The Petition for Writ of Mandamus by Petitioner Friends of the Willow Glen Trestle ("Petitioner") came on for hearing before the Honorable Joseph H. Huber on July 18, 2014, at 10:00 a.m. in Department 21. In advance of the hearing the Court carefully reviewed the administrative record and all briefs and pleadings. The matter having been submitted, the Court finds and orders as follows:

The request for judicial notice filed by Respondent City of San Jose ("City") with its Reply is DENIED. The material offered for judicial notice, portions of the San Jose Muni. Code

setting forth the procedure for designating landmarks, is not relevant to the Court's review of this challenge to the City's Mitigated Negative Declaration ("MND"). A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue 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.

The Project challenged here is the City's proposed demolition of the existing wooden trestle bridge in the Willow Glen area of San Jose, a structure which Petitioner claims may be a historical resource. According to the City's Jan. 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." The Project was approved for CEQA purposes pursuant to the City's MND, circulated from Nov. 19, 2013 to Dec. 19, 2013, and adopted on Jan. 14, 2014 in City Council Resolution 76904 (certified administrative record, "CAR," at 0002).[1]

A 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

[1] The Court notes that there has been some dispute between the parties as to the preparation and proper scope of the administrative record. In analyzing this challenge to the MND, the Court has assumed that record certified by the City (designated "CAR") is the correct record.

revised, may have a significant effect on the environment." Pub. Res. Code § 21064.5. The City's 2013 MND claims in part that "[t]he project will not have a significant impact on cultural resources, and therefore no mitigation is required." The prior 2004 MND for a trail system that proposed incorporating the existing trestle is the City's main evidence for its conclusion that the Trestle is not a historical resource. The evidence from 2004 is, at best, sparse and conclusory. The 2004 Trail MND the City relies on did not propose any "substantial adverse change" to the Trestle. It stated to the public that the Trestle would be incorporated into the trail system and that "[s]ix to eight-foot high security fencing would be installed on both sides of the trail on top of the trestle bridge, which will be covered with either wood or synthetic decking material." CAR 0023, part of the 2004 Project Description. There was no analysis of the potential impacts of the Trestle's demolition or consideration of alternatives to demolition in that document as demolition was not proposed.

As Petitioner points out, Pub. Res Code §21084.1 states in pertinent part that: "A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment," and therefore any project that calls for the demolition of a potentially historical resource likely must be approved pursuant to an EIR, not an MND, as demolition is clearly a "substantial adverse change."

CEQA Guidelines §15064.5(a) states in pertinent part that "the term 'historical resource' shall include the following: (1) a resource listed in, or determined to be eligible by the State Historic Resources Commission, for listing in the California Register of Historic Resources . . . (2) A resource listed in a local register of historical resources [as defined in Pub Res. Code §5020(k)] or identified as significant in an historic resource survey meeting the requirements of [Pub. Res. Code §5024.1(g)] shall be presumed to be historically or culturally significant. Public agencies must treat any such resource as significant unless the preponderance of evidence demonstrates that it is not historically or culturally significant. (3) Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be

historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be a historical resource, provided the lead agency's determination is supported by substantial evidence in light of the whole record. Generally, 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] including the following: (A) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage; (B) Is associated with the lives of persons important in our past; (C) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or (D) Has yielded or may be likely to yield, information important in prehistory or history. (4) 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 identified in an historical resources survey does not preclude a lead agency from determining that the resource may be an historical resource as defined in [Pub. Res. Code §§5020.1(j) or 5024.1]." Some internal citations omitted, brackets added.

CEQA Guidelines §15064.5(b) repeats Pub. Res. Code §21084.1's conclusion that a project that may cause a substantial adverse impact to a historical resource is a project that may have a significant impact on the environment, thus requiring an EIR. It goes to state in pertinent part: "(1) Substantial adverse change in the significance of an historical resource means physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired. (2) the significance of an historical resource is materially impaired when a project: (A) Demolishes or materially alters in an adverse manner those physical characteristics of an historical resource that convey its historical significance . . . (B) Demolishes or materially alters in an adverse manner those physical characteristics that account for its inclusion in a local register . . . or its identification in a historical resources survey . . . unless the public agency reviewing the effects

of the project establishes by a preponderance of evidence that the resource is not historically or culturally significant; or (C) Demolishes or materially alters in an adverse manner those physical characteristics . . . that convey its historical significance and that justify its eligibility for inclusion in the California Register of Historical Resources as determined by a lead agency for purposes of CEQA."

The parties dispute what standard of review applies to the City's determination that the existing Trestle is not a historical resource. Petitioner argues that the "fair argument" standard typically applied to challenges to MNDs applies here, citing decisions applying that standard to challenges to projects potentially impacting historic resources such as *League for Protection v. City of Oakland* (1997) 52 Cal App 4th 896 and *Architectural Heritage Assoc. v. County of Monterrey* (2004) 122 Cal App 4th 1095. The City argues that the "fair argument" standard simply does not apply, despite this being a challenge to a MND, and that it properly exercised its discretion in determining (based on approximately two pages in the 2004 MND) that the trestle is not historic. It contends that the trestle could only fall under the third/discretionary category of historic resources (equivalent to the last sentence of Pub. Res. Code §21084.1). "Because the trestle falls under the third category, the City is vested with the authority to exercise its discretion when it concluded that that the trestle is not historic. . . . . [T]he fair argument standard does not apply when a resource falls under the third discretionary category, as explained in *Valley Advocates v. City of Fresno* (2008) 160 Cal App 4th 1039." Opposition Brief at 12:3-8. *Valley Advocates* did not involve a MND, it was a challenge to a claimed categorical exemption from CEQA for a project (an application for an addition to one existing building and the demolition of another). *Id.* at 1046.

Having reviewed these decisions as well as other materials the Court determines that Petitioner is correct that the fair argument standard applies to this challenge to the City's MND.

In the six years since *Valley Advocates* was published, it has been cited in only two published decisions, neither of which cited it for the proposition advanced by the City: that its language interpreting the statutes dealing with historical resources has general application outside of disputes over exemptions to CEQA and applies to challenges to MNDs. One of the two published decisions citing it, *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal App 4th 187, involved a challenge to a MND and was decided by the identical panel of the Fifth District that decided *Valley Advocates*. That panel cited *Valley Advocates* in support of the wholly unremarkable conclusion that: "When an agency certifies a negative declaration or a mitigated negative declaration, the agency's decision is subject to judicial review under the 'fair argument' test. If the fair argument test is met, then the agency is required to prepare and certify an EIR analyzing the project's potential impacts on the environment. The fair argument standard establishes a low threshold. . . . Whether the record contains sufficient evidence to support a fair argument is a question of law. . . . Under this standard of independent review, when appellate courts examine the sufficiency of the evidence to support a fair argument, no deference is given [to] the agency's determination." *Id.* at 206-207, internal citations omitted.

The CEQA treatise by Kostka and Zischke, *Practice Under The Cal. Environmental Quality Act* (2d Ed Cal CEB 2008, March 2014 Update) at §20.92 cites *Valley Advocates* simply in support of the proposition that: "A categorical exemption cannot be invoked for certain activities that affect historical resources. Under Pub. Res. Code §21084(e), categorical exemptions cannot be used for any project that may cause a substantial adverse change in the significance of a historical resource, as defined in Pub. Res. Code §21084.1. . . . The determination of whether an object or building is a historical resource *for purposes of this exception to the categorical exemptions is reviewed under the substantial evidence test.*" Internal citations omitted, emphasis added. This makes sense when *Valley Advocates* is placed in its proper context as a decision reviewing a claim of exemption from CEQA. Kostka and Zischke state that an agency's factual findings or determinations as to whether a statutory exemption applies to a project or whether a project fits within a categorical exemption are

subject to review under the substantial evidence test. Those determinations must be affirmed as along as they are supported by substantial evidence identified in the record. See §§5.125-126. They also note: "It is unclear what standard applies to judicial review of questions of fact when it is asserted that an activity that would otherwise be categorically exempt is subject to one of the three general exceptions to the categorical exemptions. . . . One view is that the standard substantial evidence test does not apply and that any substantial evidence in the record that significant impacts *might* result triggers the significant effects exception to the categorical exemptions even though there is substantial evidence to the contrary. This is the same standard used to review adoption of a negative declaration in a case alleging that the project may have significant effects on the environment." *Id.* at §5.127, internal citations omitted, emphasis in original.

As noted, the fair argument standard is the standard of review typically applied by Courts to challenges to a MND. Preparation of an EIR rather than a negative declaration or MND is required if there is "substantial evidence" in the "whole record" of proceedings that supports a "fair argument" that a project "may" have a significant impact on the environment. See Pub Res. Code §§21082.2(a), 21100, 21151; CEQA Guidelines §15064(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. An approval for a timberland conversion permit for a vineyard was set aside when a Negative Declaration was reviewed under the substantial evidence standard rather than the fair argument standard. See *Sierra Club v. Cal. Dept. of Forestry and Fire Protection* (2007) 150 Cal App 4th 370.

"May" in this context means a reasonable possibility. See *League of Protection v. City of Oakland* (1997) 52 Cal App 4th 896, 904-905; *Sundstrom v. County of Mendocino* (1988) 202 Cal App 3d 296, 309. "Substantial Evidence" is defined as "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." Argument, speculation, inaccurate information, unsubstantiated opinion, and social or economic impacts unrelated to

environmental impacts are not substantial evidence. See Pub. Res. Code §21080(e)(1) and (2). The CEQA Guidelines repeat the statutory definition and add that substantial evidence includes "enough relevant information and reasonable inferences from this information that a fair arguments can be made to support a conclusion, *even though other conclusions might also be reached.* Whether a fair argument can be made that the project might have a significant effect on the environment is to be determined by examining the whole record before the lead agency. . . . . evidence of social or economic impacts that do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." CEQA Guidelines §15384, emphasis added. See also *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal App 4th 144, 152; *Lucas Valley Homeowners Assoc. v. County of Marin* (1991) 233 Cal App 3d 130, 142.

"Significant Effects" are defined as "substantial, or potentially substantial," adverse changes in physical conditions that exist within the area that will be affected by a proposed project. See Pub Res. Code §§21068, 21100, 21151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal App 4th 1597, 1604; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal App 3d 872, 881. Physical Conditions include land, air, water, minerals, flora, fauns, noise, historic and cultural sites, and aesthetics. See Pub Res. Code §20160.5. There must be a causal link between the significant physical impacts and the activity in question. See Pub. Res. Code §20160.5; CEQA Guidelines §15358(a); *Walmart Stores v. City of Turlock* (2006) 138 Cal App 4th 273, 286, fn. 7, overruled on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal 4th 279.

Courts have repeatedly affirmed that the fair argument standard is a "low threshold test." Evidence supporting a fair argument of any potentially significant environmental impact (and it takes only one) triggers preparation of an EIR regardless of whether the record contains contrary evidence. See *League for Protection, supra*; *Sundstrom v. County of Mendocino* (1988) 202 Cal App 3d 296, 310. The *Stanislaus Audubon Society* court at 151 stressed the "low threshold" for

a fair argument, noting that the lead agency should not give an "unreasonable definition" to the term substantial evidence, "equating it with overwhelming or overpowering evidence. CEQA does not impose such a monumental burden" on those seeking to raise a fair argument. But see *Citizens Committee to Save Our Village v. City of Claremont* (1995) 37 Cal App 4th 1157; *Jobe v. City of Orange* (2001) 88 Cal App 4th 412.

Whether the administrative record contains "substantial evidence" in support of a "fair argument" sufficient the trigger a mandatory EIR is a question of law, not a question of fact. Therefore under the fair argument standard, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." *Sierra Club v. County of Sonoma* (1992) 6 Cal App 4th 1307, 1318. See Also *Stanislaus Audubon Society, supra*; *Quail Botanical Gardens, supra* at 1597 (rejecting an approval of a negative declaration prepared for a golf course holding that "[a]pplication of [the fair argument] standard is a question of law and deference to the agency's determination is not appropriate.") The Court in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal App 4th 1170 ruled that the need for an EIR for amendments to a beach plan could not be evaluated on the basis of "net" environmental analysis; any potentially significant effect must trigger an EIR even if the project provides a "net" or overall positive impact. See Pub Res. Code §21080(c),(d). This would apply here as a rebuttal to any claim that the trail project of which the 2014 MND is a part is a "net" environmental or social positive such that an EIR should not be required.

A conflict in expert opinion over the significance of an environmental impact normally requires an EIR. See CEQA Guidelines §15064(g); *Sierra Club v. CDF* (2007) 150 Cal App 4th 370. See also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal App 4th 903, 928, citing CEQA Guidelines §15064(g) ("If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR."); *Friends of the Old Trees v. Dept. of Forestry* (1997) 52

Cal App 4th 1383, 1399, n.10, cited by *Pocket Protectors* for the holding that expert opinion offered under the Fair Argument standard need not meet the standards for expert witnesses testifying at trial. "[T]o carry the proposition of the dissent to its logical extreme is to introduce into the law a principle not heretofore recognized by any authority, i.e., that in order to raise a fair argument, members of the public must bring forth impeccably credentialed experts who offer scientifically irrefutable, site specific information foretelling certain environmental harm without information supporting a contrary position. To the contrary . . . the evidence supporting a fair argument should not be equated with 'overwhelming or overpowering evidence.' Nor does it have to be uncontradicted." *Id.* at 1402, internal citations omitted.

Having decided that the Fair Argument standard applies, the question becomes whether Petitioner has shown that substantial evidence in the record supports a fair argument that the demolition of the Trestle may have a significant effect on the environment because it may cause a substantial adverse change in the significance of a historical resource. The Court finds that it has shown that such substantial evidence exists in the record. Even limiting the record to only that material accepted by the City and certified by it as the official administrative record, there are several statements in the record from local citizens and at least two experts stating that the trestle has historical value and/or referencing the material from the Willow Glen archives uncovered after 2004 that may support a finding that the trestle is historic. These statements are substantial evidence raising a fair argument that the trestle's demolition may have a substantial impact on the environment, triggering the requirement that an EIR be prepared.

The statements include, but are not necessarily limited to: the July 16, 2013 letter from the California Trolley and Railroad Corporation (CTRC, a registered non-profit) at CAR 1392-93 stating that "[t]he trestle is a classic 90 year-old structure, which once were common and are almost now nonexistent"; the written comment letters from local citizens such as Larry Ames on Dec. 19, 2013 (CAR 525-537 & 1495-1507) and Jan. 7, 2014 (CAR 1452-55), Martha Hendricks on Nov. 19, 2013 (CAR 542-546 & 1512-1516); and a Dec. 18, 2013 letter from Jean Dresden

(CAR 518-524 & 1488-1507), the local historian partly responsible for the rediscovery of the archive materials describing several sources of information that were not available in 2004 and giving her opinion as to the historic value of the trestle. Her work regarding the archive material is specifically referenced in Mr. Ames' letters and therefore indirectly referenced by others such as architect Marvin Bamburg. Licensed Landscape Architect Susan Landry submitted a letter on Dec. 16, 2013 (CAR 576) stating "Recently discovered reports and documents contain historic information that was not taken into consideration and evaluated. The '3-Creeks RR Trestle Bridge' was considered an historic feature over 50 years ago in Professional Reports that are part of the discovered documents. The IS [Initial Study] states that there is 'No Impact' to the scenic vista based on an outdated 2004 report for the CSJ's [City of San Jose's] Los Gatos Creek Trail Project. The '3-Creeks RR Trestle Bridge' is the only remaining original 1920's Railroad Wood Trestle Bridge along this historic rail line. . . . This historic RR line connected the Orchard in south San Jose to the old Del Monte Cannery of Willow Glen." Brackets added.

Mr. Ames also made comments at the Jan. 14, 2014 City Council meeting stating that the Willow Glen archive material "discovered in 2008" may make the Trestle "eligible for listing in the State Historic Register under Categories 1, broad patterns of local or regional history, and also possibly under Category 3, embodies the distinctive characteristics of a type of construction," CAR at 799-801. This also qualifies as lay opinion supporting a fair argument. It does not require technical expertise to opine that a 10-year old cursory evaluation of historical significance could change if material discovered in the interim (and thus clearly not considered in the prior evaluation) was also considered. Scott Lane (at CAR 803-804) and Richard Nisset (CAR 804-805) also made comments at the Jan. 2014 hearing opposing demolition on the basis that the trestle was historic and that a full EIR should be prepared.

Even if technical expertise is required to opine as to historical value, a separate and additional basis for finding that a fair argument has been made exists in the record. The letters dated Dec. 19, 2013 (CAR 1517 "With reference to Larry Ames' letter of this date") and Jan. 11

2014 (CAR 1464-1465) from Mr. Marvin Bamburg, a "CHRIS-listed historical architect," referencing the discovery of additional archive material discussed by Dr. Ames in his letters, both included in the City's version of the AR, constitute "expert opinion supported by facts," and are thus substantial evidence in support of a fair argument that (as Mr. Bamburg states) the Trestle may qualify for listing in the California Register under criteria 1 (important events) and criteria 3 (distinctive characteristics). Although the second, Jan. 11, 2014 letter by Bamberg (specifically stating his belief that the Trestle "qualifies for listing in the California Register under Criteria 1 and 3.") was not submitted until after the public comment period for the MND had closed on Dec. 19, 2013, it was still submitted before the end of the City Council meeting at which the MND was adopted and the NOD issued. Exhaustion of administrative remedies under CEQA is satisfied if objections are made by any person "during the public comment period provided by this division or *prior to the close of the public hearing on the project before the issuance of the notice of determination.*" Pub. Res. Code §21177(a),(b), emphasis added.

The Dec. 16, 2013 letter from licensed landscape architect Susan Landry quoted above was submitted during the public comment period and can also be considered "expert opinion supported by facts" as she is presumably relying on her specialized training as an architect in stating that the Trestle is historic and is the only remaining 1920's wood trestle on this rail line closely linked to Willow Glen's history.

The City responds that even under the fair argument standard as the lead agency it is vested with the authority to evaluate the credibility of evidence presented and determines if it qualifies as substantial. But any questioning of credibility must be fact-based and addressed by the lead agency during the administrative process. A determination that evidence is not credible must be adequately supported by the record. In *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal App 4th 1544, 1597, the court emphasized that before an agency may reject evidence as not credible, it must first identify that evidence with particularity to provide an adequate basis for judicial review. Similarly, in *Pocket Protectors v. City of Sacramento* (2004)

124 Cal App 4th 903, 935, the court noted that, to find that the agency resolved disputed factual allegations relating to credibility, the record must show that the decision-maker specifically addressed the issue. There is no fact-based specific discussion of the evidence opposing the City's conclusions in the record, let alone any fact-based evaluation of any specific person's credibility. Most importantly, nowhere in the record does the City challenge the assertion that Willow Glen archives were found in approximately 2008 and given to one of its public libraries nor does it challenge anyone's credentials (such as those of Mr. Bamburg).

The evidence in the record relied on by Petitioner is similar to that found sufficient to support a fair argument by the Sixth District in its *Architectural Heritage* decision. The Court there stated "we disagree with the County's characterization of the speakers' testimony as unsubstantiated opinion. For example, one of the speakers, Sales, is a certified historian; she linked the jail with 'the perilous labor unrest in the Salinas Valley.' Another speaker, Munoz, is an architect; he noted that the jail is 'a very rare style in Salinas and Monterrey County.' . . . These and other speakers' remarks represent fact-based observations by people apparently qualified to speak to the question of the jail's historic status. That testimony constitutes substantial evidence, because it consists of 'facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.'" 122 Cal App 4th at 1117-1118.

Petitioner here relies on two architects and an (amateur) historian, along with several other citizens, attesting to the Trestle's possible historic value, based on material that was not included in the 2004 review the City relies on for the determination that the trestle is not a historic resource. None of their credentials or the key fact they base their opinions on (the discovery of archive materials after 2004) was specifically challenged or evaluated anywhere in the record. Neither City staff's disagreement with opposing opinions nor their stated opinion that the archive material relates more to the railroad than the trestle constitutes a specific, fact-based credibility determination.

Having found that there is substantial evidence in the administrative record supporting a fair argument that the project as approved may have a significant effect on the environment, the Court orders that Respondents' approval of the Project based on the MND be withdrawn and an EIR prepared. Petitioner is directed to prepare and submit to Respondents for approval as to form 1) an appropriate form of Judgment granting the Writ of Mandamus and 2) a Writ of Mandamus, both consistent with this Order. Under Pub. Res. Code §21168.9(b), this Court will retain jurisdiction over Respondents' proceedings by way of a return on the peremptory writ until the Court has determined that Respondents have complied with CEQA. The parties are directed to meet and confer and communicate to the Court a proposed return date on the Writ.

Dated: 7-28-14

Joseph H. Huber
Judge of the Superior Court