

CIVIL No. **S237378**

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE WILLOW GLEN TRESTLE,

Plaintiff and Respondent,

v.

CITY OF SAN JOSÉ, *et al.*

Defendants and Appellants.

**REPLY IN SUPPORT OF
PETITION FOR REVIEW**

From a Published Decision of the Court of Appeal
6th District, H041563
Reversing the Judgment of the Santa Clara County Superior Court
Honorable Joseph Huber
Case No. CV260439

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REPLY IN SUPPORT OF PETITION FOR REVIEW

The City's convoluted Answer underscores the current statewide confusion in the application of CEQA's statutes and guidelines that affect California's historic and cultural resources, and thus illustrates the pressing need for review.

The question before the Court is:

Does the 'fair argument' standard of review apply to the threshold question of whether a threatened resource is historic for the purposes of CEQA review?

The answer must be *yes*. CEQA's unique 'fair argument' standard applies to the question of whether *any* discretionary project that is subject to CEQA (as is the demolition project in this case) requires review in an EIR or whether a negative declaration may suffice. (*E.g., No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 85 (*No Oil*)).) If the record presents evidence sufficient to support a 'fair argument' that a project may have a significant environmental impact, an EIR must be prepared. (*Ibid.*)

Agency actions are generally reviewed for substantial evidence. But when considering whether an EIR is required, the unique question is whether or not substantial evidence supports a finding *that no record evidence can support a fair argument of potentially-significant environmental impact*. As more commonly framed: if there is substantial record evidence supporting a fair argument, EIR review is required regardless of

contrary evidence. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.)

EIRs are especially helpful regarding projects that propose the demolition of historic and cultural resources, providing the public and decision makers with analysis of the feasibility of adaptive reuse of the resource. EIRs address a pivotal question: Can project objectives be met without demolishing the resource?



The Willow Glen Trestle in 1955

Architectural Heritage Association v. County of Monterey (2004) 122 Cal.App.4th 1095 got it right. CEQA's statutory definition of 'historic' sets a standard for significant environmental impact. Like all CEQA standards of significance, the question is whether the record provides a fair argument that the project in question may meet that threshold. That applies to expert opinions regarding wildlife and plant habitat, traffic (measured by traffic engineers), air quality (based on expert evidence of toxic air contamination projections), etc.

The definition of ‘mandatory’ historic resources relies on eligibility for the California Register of Historical Resources. (Petition for Review, *passim*.) Public Resources Code section 21084.1 set that standard of significance for projects that may substantially affect qualified resources.

The CEQA Guidelines consistently provide that “[g]enerally, a resource shall be considered by the lead agency to be ‘historically significant’ if it “*meets the criteria for listing in the California Register of Historical Resources*” codified in section 5124. (CEQA Guidelines, § 15064.5, subd.(a) (3), italics added; Slip Opinion at 14.) The Guideline, adopted almost 20 years ago and followed since, further provides that if a resource meets the California Register criteria, demolition qualifies as “a substantial adverse change” in historic significance, resulting in a significant impact that requires review in an EIR. (CEQA Guidelines, § 15064.5, subd.(b).)

The Slip Opinion and the Answer opine that a mandatory historic resource requires a ‘determination’ of eligibility by the California Historical Resources Commission. That is the proper measure of significance for a project *following EIR review*, but not for the initial question of whether an EIR process is triggered.

Again, as recognized by the CEQA Guidelines quoted above as well as all California case law with the exception of the Slip Opinion and the two Fifth District cases upon which it relies, *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340 and *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, and specifically inconsistent with *League for Protection v. City of*

Oakland (1997) 52 Cal.App.4th 896 and *Architectural Heritage Association v. County of Monterey, supra*, 122 Cal.App.4th 1095, the fair argument standard applies to the question of whether a project may have a significant environmental impacts. When historic resources are involved, the question is whether there is expert evidence supporting a fair argument that a project may be eligible for the State Register.

This Court's grant of review, or for grant and transfer for compliance with *Architectural Heritage Association* and *No Oil*, will resolve the conflict in the case law and enforce CEQA as required by statutory authority, to the great long-term benefit of California's cultural resources now at risk.¹

The brevity of this reply reflects the converse of the petition's importance. The straightforward issue presented is of statewide consequence warranting correction.

Counsel's Certificate of Word Count per Word:mac²⁰¹⁶:957

October 17, 2016

Respectfully submitted,



Susan Brandt-Hawley
Attorney for Respondent
Friends of the Willow Glen Trestle

¹ The City objects to the proof of service of the Petition for Review. But as shown by the evidence, the undersigned counsel served the petition as reflected in the sworn proof of service. After realizing the next morning that the petition was not in fact delivered electronically as intended, it was immediately corrected. A revised proof of service will be immediately filed if the Court so directs.

Friends of the Willow Glen Trestle v. City of San Jose, et al.
Supreme Court Number S237378

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 October 17, 2016, I served one true copy of:

Reply in Support of Petition for Review

By emailing to counsel as noted below.
 By electronic service via TrueFiling as listed below.

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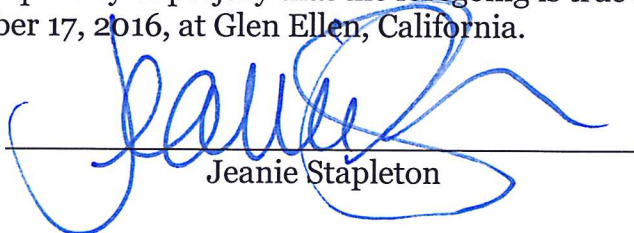
*Attorneys for Amicus Curiae
League of California Cities*

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.

Honorable Joseph Huber
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California Court of Appeal
Sixth Appellate District
Attention: Clerk of the Court
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San Jose, CA 95113

I declare under penalty of perjury that the foregoing is true and correct and is executed on October 17, 2016, at Glen Ellen, California.



Jeanie Stapleton