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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION

FRIENDS OF THE WILLOW GLEN
TRESTLE, an unincorporated association,

Petitioner,

v.

CITY OF SAN JOSE and CITY COUNCIL OF
THE CITY OF SAN JOSE, and DOES 1-10,
inclusive,

Respondents.

Case Number: 1-14-CV-260439

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF CITY
OF SAN JOSE'S OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

Date: February 3, 2017

Time: 9:30 a.m.

Dept.: Dept. 10

Judge: Hon. Helen Williams

California Environmental Quality Act
[CEQA]

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I. INTRODUCTION

Respondents City of San José and San José City Council ("the City") seek to remove and to replace a dilapidated and abandoned wooden trestle that they determined is not a "historic resource" as defined under the California Environmental Quality Act of 1970 (CEQA). The Friends of the Willow Glen Trestle ("Friends") filed a petition for writ of mandamus contending that the trestle is a historic resource under CEQA. However, the Friends failed to demonstrate that there is not substantial evidence in the record supporting the City's discretionary determination that the Willow Glen trestle is not a historic resource. The Friends' petition must be denied because they did not meet their burden.

Substantial evidence *supports* the San José City Council's discretionary determination that the trestle is *not* a historic resource under CEQA. The trestle is not listed on any federal, state, or local registry of historic structures. It does not meet any of the criterion of a historic resource under Public Resources Code §5024.1(g). Its design is based on standard plans for wooden trestle bridges, it has no known association with important persons, the materials were likely replaced, it is not unique, and it does not contribute to broad patterns of California's history and cultural heritage.

The Friends devote much of their brief to topics that are extraneous to those before this Court and they mischaracterize a number of matters. For example, they discuss the fair argument standard, which the Court of Appeal specifically held in *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 460, does not apply. The Friends also cite to documents that are not part of the certified administrative record and to an event that never occurred. The Friends' request that the Court consider documents in their supplemental record should be denied.

II. PROCEDURAL BACKGROUND

22 On February 11, 2014, the Friends a petition for writ of mandamus against the City pursuant to
23 Public Resources Code §21168.5 and §1085 of the Code of Civil Procedure. The Friends challenged
24 the approval of the Three Creeks Trail Pedestrian Bridge Project, asserting that the trestle is a historic
25 resource and the City therefore should have prepared an environmental impact report (EIR) rather than
26 a mitigated negative declaration (MND).

27 On May 23, 2014, the Honorable Joseph Huber granted the Friends' request for a preliminary
28 injunction to bar the City from removing the trestle until this Court ruled on the merits of the case. On

1 July 28, 2014, Judge Huber ruled that the fair argument standard applied to the Friends' challenge to
2 the City's MND. Based on that standard, the trial court granted the petition for writ of mandamus and
3 ordered the issuance of a peremptory writ of mandamus. The City appealed, arguing that the trial court
4 should have applied the substantial evidence rather than the fair argument standard of review.

5 In August 2016, the Court of Appeal reversed the trial court's determination that the fair
6 argument standard applied. (*Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2
7 Cal.App.5th 457, 460.) It agreed that the substantial evidence standard is the proper standard of
8 review. It held: "The statutory scheme created by the Legislature requires application of a deferential
9 substantial evidence standard of judicial review in this case." (*Id.*) It instructed the Superior Court to
10 vacate the judgment granting the petition for writ of mandamus and ordering issuance of a peremptory
11 writ of mandamus. (*Id. at 473.*) The Court of Appeal reversed and remanded "for the trial court to
12 conduct its judicial review of the administrative record under the correct standard." (*Id. at 460.*) It
13 directed this Court to "determine whether the City's adoption of the MND is supported by substantial
14 evidence that the Trestle is not a 'historical resource' under CEQA." (*Id.*)

15 Pursuant to the Court of Appeal decision, the Superior Court vacated the judgment entered on
16 August 20, 2014, which granted the petition for writ of mandamus and ordered issuance of a
17 peremptory writ of mandate.¹

18 III. STATEMENT OF FACTS

19 The City is developing the Los Gatos and Three Creeks trails as part of a trail network for
20 pedestrians and bicycles. (Certified Administrative Record ["CAR"] CAR0380.) An abandoned
21 railroad right of way and a trestle spans the Los Gatos Creek. That trestle, referred to as the Willow
22 Glen trestle, is the subject of this litigation.

23 A. THE 2004 INITIAL STUDY CONCLUDED THE TRESTLE IS NOT A HISTORIC 24 RESOURCE

25 In 2004, the City completed an environmental review of the proposed Los Gatos Creek Trail,
26 Reach 4, project, which proposed constructing a trail and making some changes to the Willow Glen

27
28 ¹ The Friends' assert that the judgment and writ were vacated pursuant to a stipulation by the parties. (Corrected
Opening Brief ["COB"] at 4:20-21.) That is inaccurate. The Court of Appeal ordered that the trial court do so; on
December 9, 2016, an order vacating the judgment and writ of mandamus was filed.

1 trestle. (CAR0018, CAR0023-24.) It proposed installing security fences on the trestle, adding new
2 decking, and removing the railroad tracks. (CAR0023, CAR0175.) The City prepared an Initial Study,
3 which carefully considered whether the trestle is a historic resource, based on significant research. It
4 conducted a comprehensive review of over sixty sources that are identified in an extensive
5 bibliography. (CAR0179-80, CAR0183-91.) These sources included state and national registers of
6 historic places and landmarks. (CAR0179-81, CAR0185, CAR0190.) The study reviewed dozens of
7 publications on California's railroads, the connection between the railroads and agriculture (one
8 publication is entitled "Prune Country Railroading: Steel Trails to San Jose"), historic civil
9 engineering landmarks in Northern California, and other historic data. (CAR179-80, CAR0185.) It
10 reviewed records with the State Office of Historic Preservation, County records, and City historic
11 records. (CAR0185-91, CAR0204.)

12 The Archaeological Survey reviewed evaluations from state and national authorities, including
13 by Ward Hill, a Consulting Architectural Historian for the State of California. (CAR0444-47,
14 CAR0859-62.) Hill described the bridge: "The superstructure of the single-track bridge is a timber
15 stringer trestle with an open deck." (CA0444.) He noted that "The stringers are aligned in rows
16 directly beneath the tracks" and "The substructure consists of timber pile bents with timber caps." (*Id.*)
17 He added that "Timber runners tie the rows of timber pilings together." (*Id.*) In addition, "The pilings
18 are driven directly into the ground with no footings." (*Id.*)

19 The bridge is on the Western Pacific Railroad line. (CAR0444.) According to Hills' Bridge
20 Evaluation, the trestle "was originally constructed in 1922, but the trestle and superstructure were
21 likely replaced during the last 30 or 40 years." (CAR0444, CAR0859.) Hill explained: "The design is
22 based on standard plans for wood trestle bridges." (*Id.*) His evaluation concluded: "This bridge is a
23 typical example of a common type and has no known association with important events or persons in
24 local history." (*Id.*) He attached a map and photos of the trestle. (CAR0445-47.)

25 In addition, Milford Wayne Donaldson, FAIA, State Historic Preservation Officer with the
26 Office of Historic Preservation of the Parks Department of the State of California, wrote to the Office
27 of Cultural Resource Studies in the California Department of Transportation about the Los Gatos
28 Creek Trail project. (CAR0448.) He explained: "An archaeological resources record conducted at the

1 Northwest Information Center at Sonoma State University and field inventory survey conducted by
2 qualified archeologist revealed no known prehistoric or historic archeological resources within or
3 adjacent to the project APE [area of potential effect]." (*Id.*) According to the survey: "No
4 architectural resources were located within the project APE." (*Id.*) The State Historic Preservation
5 Officer confirmed CalTrans' finding of "No Historic Properties Affected" for this project. (*Id.*,
6 CAR0871.)

7 The trestle also was evaluated pursuant to the National Environmental Policy Act ("NEPA"),
8 including a consultation with the State Historic Preservation Officer ("SHPO") pursuant to the
9 National Historic Preservation Act ("NHPA"). (CAR0872-74, CAR1024, CAR1030-32.) This NEPA
10 evaluation resulted in the adoption of a Categorical Exclusion by the Federal Highway Administration,
11 given that the project did not have a significant impact on the environment. (CAR0874, CAR1032.)

12 The Archaeological Survey concluded: "No National Register of Historic Places or California
13 Register of Historic Resources listed, determined eligible, or pending properties were identified in or
14 adjacent to the APE as a result of the records search, literature review, and field surveys." (CAR0181.)
15 In sum, "A field inventory of the APE did not note any indications of prehistoric and/or historic
16 resources." (CAR0179.)

17 On May 12, 2004, the City circulated the draft MND and Initial Study. (CAR0357-61.) The
18 City issued the MND and filed a notice of determination on December 2, 2004, after it after it was
19 approved. (CAR0357-80, CAR0382.)

20 **B. THE CITY UPDATED THE INITIAL STUDY BECAUSE THE PROJECT CHANGED**

21 As of 2013, the trestle was "in a state of disrepair that does not allow for bicycle and pedestrian
22 use." (CAR0382. See CAR0479.) The new proposed project to replace or to rehabilitate the trestle
23 required work in the Los Gatos Creek streambed.² (*Id.*, CAR0971-72.) The 2014 final Initial Study
24 draws upon and updates the analysis done in 2004 for the Los Gatos Creek Trail Reach 4 project,
25 including the evaluations of the trestle as a historic resource under CEQA, because the nature of the
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28 ² The Friends mischaracterize an underlying engineering report by CH2M Hill, which has no relevance to the issue of whether the trestle is historic. (COB 15:25-28.) That report concluded that it would be more cost-effective in the long run to replace the trestle. (CAR883, 909.)

1 project concerning the trestle had changed relative to the 2004 project. (CAR0380-82, CAR0479,
2 CAR0405, CAR0500.)

3 On November 19, 2013, the City published a notice of intent to adopt the MND and circulated
4 the new draft initial study. (CA0362.) The MND identified a number of mitigation measures to be
5 implemented to address environmental impacts. (CAR0363-68, CAR0486-98.) The City accepted
6 comments through December 2013. (CAR0362-69.) The Planning Division reviewed and
7 summarized the comments from the public. (CAR0499-587.) Staff revised the 2013 Initial Study to
8 address the comments, the majority of which concerned the purported historic aspects of the trestle,
9 and to update the analysis. (CAR0500, CAR0798.)

10 **C. THE FINAL 2014 INITIAL STUDY CONCLUDED THE TRESTLE IS NOT**
11 **HISTORIC UNDER CEQA**

12 In January 2014, the City's Planning Division issued the final Initial Study.³ (CAR0374-448,
13 CAR0500.) It noted that a formal search of historical resources using the California Historical
14 Resources Information System had been conducted that indicated that there were no historic resources
15 in the project area. (CAR0404-05.) In addition, the State Historic Preservation Officer concluded that
16 "there would be no impacts on historic properties." (CAR0405.)

17 The Initial Study set forth the legal standard under Public Resources Code §5024.1(g) and
18 analyzed the information under each of its criterion. (CAR0405.) It explained that the trestle is not
19 listed in, nor has it been determined eligible for listing in, the California Register of Historical
20 Resources, and is not listed in a local register of historical resources." (*Id.*) It determined that the
21 Western Pacific Railroad line "did not contribute to broad patterns of California's history and cultural
22 heritage." (CAR0405.) The Study pointed out: "The bridge evaluation concluded that the design is
23 based on standard plans for wood trestle bridges, and has no known association with important
24 persons." (*Id.*) Moreover, the evaluation "concluded that the design is based on standard plans for
25 wood trestle bridges, and bridge materials were likely replaced during the last 30 or 40 years." (*Id.*)
26 Further, "the trestle is not unique; therefore, it is unlikely to yield new, historically important
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³ The updated language and analysis are underlined in the 2014 final Initial Study. (CAR0500.)

1 information.” (*Id.*) The final Initial Study concluded that the trestle is not a historic resource;
2 therefore, there would be no impact.” (CAR0404-05, CAR0442-44.)

3 The 2014 Initial Study/MND concluded that implementation of the project could result in a
4 number of significant effects on the environment and identified mitigation measures that would reduce
5 the significant effects to a less-than-significant level. (CAR0012-13.)

6 **D. STAFF PROVIDED ADDITIONAL INFORMATION TO CITY COUNCIL**

7 On January 10, 2014, the Planning Division provided supplemental information to the City
8 Council to address information received during the public comment period. This information and the
9 City's updated analysis were incorporated into the final Initial Study. (CAR0499-506, CAR0798.)
10 This staff report attached revised pages from the final Initial Study, including those regarding the
11 analysis of whether the trestle is historic. (CAR0578-87.) Staff carefully examined the possibility of
12 the trestle being historic resource. (CAR0798.) Staff explained: “Although the comment letters
13 provided additional historical context, the bridge does not meet any of the criteria for treatment as a
14 historical resource under CEQA, and the Administration recommends making those findings as a part
15 of adopting the CEQA resolution.” (CAR0499, CAR0506.) Planning Department staff concluded that
16 the comments from the public “did not raise significant environmental issues that were not already
17 adequately addressed in the Initial Study/Draft Mitigated Negative Declaration, and staff continues to
18 recommend adoption of the Mitigated Negative Declaration.” (CAR0499, CAR0799.)

19 **E. THE SAN JOSE CITY COUNCIL EVALUATED THE EVIDENCE AND
20 CONCLUDED THAT THE TRESTLE IS NOT A HISTORIC RESOURCE**

21 On January 14, 2014, the San José City Council held a public hearing, considered the 2014
22 final Initial Study/Mitigated Negative Declaration, public comment, the staff report, and other input
23 from City staff. (CAR0012-14, CAR0378-448, CAR0499-587, CAR0792-834.) The Council
24 discussed the Three Creeks Trail Pedestrian Bridge Project, including whether the trestle was historic.
25 (CAR0012-14, CAR0792-834.)

26 Mayor Reed observed: “Well, one of the ironies of this California Environmental Quality Act
27 is it’s full of ironies. So today we’re arguing that something that would be good for the environment,
28 getting the creosote soaked wood out of the creek, help the water flow, help the creek, help the

1 animals, that somehow shouldn't be allowed under CEQA because it's historic. First, I don't think it's
2 historic, a lot of it is not even old." (CAR0816.)

3 The City Council independently reviewed the Initial Study/MND and the other information
4 before it, including staff reports and the Initial Study. (CAR0002-03, CAR0012-13.) It recognized
5 that the trestle "is not listed in, nor has it been determined to be eligible for listing in the California
6 Register of Historic Places and is not listed in a local register of historical resources." (CAR0002,
7 CAR0012.) The City Council determined that the Initial Study/MND was prepared in compliance with
8 CEQA; this conclusion represented the independent judgment and analysis of the City as the lead
9 agency for the project. (*Id.*)

10 The Council made a number of factual findings. It concluded: "The existing wood railroad
11 trestle bridge is not a historic resource for the reasons stated in the Initial Study/Mitigated Negative
12 Declaration and in the City staff report . . ." (CAR003, CAR013.) These reasons included:

- 13 ● The evaluation of the bridge's historic merit concluded that the
- 14 design is based on standard plans for wood trestle bridges;
- 15 ● The evaluation of the bridge's historic merit concluded that the
- 16 trestle has no known association with important persons;
- 17 ● The bridge materials were likely replaced during the last 30 or
- 18 40 years;
- 19 ● The trestle is not unique and is unlikely to yield new, historically
- 20 important information; and
- 21 ● The trestle did not contribute to broad patterns of California's
- 22 history and cultural heritage.

23 (CAR0003, CAR0013.)

24 The City Council voted to adopt the MND and Mitigation Monitoring and Reporting Program.
25 (CAR0003-11.) It voted to approve the project, with nine voting in favor and two against. (CAR0012-
26 14, CAR0833-34, CAR0855.) On January 14, 2014, the City issued a notice of determination for the
27 MND. (CAR0001.)

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1 IV. LEGAL DISCUSSION

2 A. THE FRIENDS' CITATIONS TO SOURCES OUTSIDE OF THE CERTIFIED
3 ADMINISTRATIVE RECORD SHOULD NOT BE CONSIDERED BY THIS COURT

4 This Court should limit its review to the certified administrative record submitted by the City.
5 (Pub. Res. Code §21167.6. See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th
6 559, 571 [“the Legislature intended courts to generally consider only the administrative record in
7 determining whether a quasi-legislative administrative decision was supported by substantial
8 evidence.”].) The Friends have withdrawn their references to a record that was never certified; they
9 filed a corrected opening brief (“COB”), which cites to the certified administrative record.

10 This Court should deny the Friends’ request that it consider a supplemental administrative
11 record. All references to it should be disregarded and/or stricken, as set forth in the City’s Objections
12 to the Proposed Supplemental Record. These references are found at the following pages in the
13 corrected opening brief: 8:1-14; 8:25-28; 18:24-19:5; and 19:10-20:4.) All except a handful of
14 documents in the proposed supplemental record are not part of the certified administrative record. The
15 Friends do not even cite to most of the documents in the proposed supplemental record.

16 B. THE FRIENDS BEAR THE BURDEN OF DEMONSTRATING THAT THERE IS
17 NOT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE CITY’S
18 DETERMINATION THAT THE TRESTLE IS NOT HISTORIC

19 1. The Fair Argument Standard Does Not Apply

20 The Friends devote part of their brief to the fair argument standard, which is not at issue.
21 (COB 10:18-14:28.) The Court of Appeal held that this standard does not apply. (*Friends of the*
22 *Willow Glen Trestle, supra*, 2 Cal.App.5th at 473 [the "deferential substantial evidence standard of
23 judicial review, rather than a fair argument standard of judicial review, [applies] to a lead agency's
24 decision that a resource is not a discretionary historical resource . . ."].) The Court of Appeal
25 remanded to this Court to conduct “the requisite review” under “the correct standard.” (*Id.* at 473.)
26 Thus, this Court is to conduct its own review. Contrary to the Friends’ suggestion, this Court is not
27 bound by observations made under in the context of the incorrect standard of review.

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1 **2. The City’s Determination That the Trestle Is Not Historic Is to Be Granted Substantial**
2 **Deference**

3 The substantial evidence test is a low hurdle. The determinations made by the lead agency are
4 to be granted substantial deference and all reasonable doubts are to be resolved in its favor: “The
5 agency is the finder of fact and a court must indulge all reasonable inferences from the evidence that
6 would support the agency’s determinations and resolve all conflicts in the evidence in favor of the
7 agency’s decision.” (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 514,
8 citing *Western States Petroleum Assn v. Superior Court* (1995) 9 Cal.4th 559, 571. Accord *Laurel*
9 *Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 393
10 [“reviewing court must resolve reasonable doubts in favor of the administrative finding and
11 decision”]); *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984
12 [“That deferential review standard flows from the fact that ‘the agency has the discretion to resolve
13 factual issues and to make policy decisions.’”].) Substantial evidence is “enough relevant information
14 and reasonable inferences from this information that a fair argument can be made to support a
15 conclusion, even though other conclusions might also be reached.” (14 Cal. Code Regs §15384(a).
16 Accord *Laurel Heights Improvement Association, supra*, 47 Cal.3d at 393 [citing definition of
17 substantial evidence in Guidelines].)

18 A court cannot set the lead agency’s determinations aside, even if contrary result is more
19 reasonable; it is not to weigh the evidence to determine which party has a superior argument. (See
20 *Laurel Heights Improvement Association, supra*, 47 Cal.3d at 393 [an agency’s decision shall not be
21 set aside based on the notion that “an opposite conclusion would have been equally or more
22 reasonable”]; *Save Panoche Valley, supra*, 217 Cal.App.4th at 514.) Nor is technical perfection
23 required. (See generally *id.*)

24 A court independently reviews whether the lead agency committed legal error and review
25 whether the agency’s factual determinations are supported by substantial evidence. (Pub. Res. Code
26 §21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40
27 Cal.4th 412, 427, as modified [court determines whether administrative record contains substantial
28 evidence to support the agency’s factual determinations]; *Citizens for Restoration of L Street v. City of*
Fresno (2014) 229 Cal.App.4th 340, 353 [court reviews “claims that an agency committed factual

1 errors under the substantial evidence standard”). Here, the City properly exercised its discretion and
2 its findings are supported by substantial evidence. (See generally *Citizens for Restoration of L Street*,
3 *supra*, 229 Cal.App.4th at 371 [the state legislature “intended that final discretionary decisions about
4 whether a building was an historical resource be made during the early stages of environmental
5 review” rather than through an EIR, which “maximizes the expense and delay incurred before a final
6 decision is reached about a building’s historic significance and the propriety of demolition”]; *Valley*
7 *Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 [city properly exercised its discretion in
8 determining that a 90-year-old apartment building was not historic, where it was not listed in the local
9 register of historic resources].)

10 **3. The Friends Have the Burden of Showing That There Is Not Substantial Evidence in**
11 **the Record that Supports the City’s Determination**

12 The City’s determinations are to be granted substantial deference and are presumed to be
13 correct. The Friends bear the burden of making a showing to the contrary. (See generally *Citizens*
14 *Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 798 [“The burden is on the
15 appellant to show there is no substantial evidence to support the findings of the agency”]; *Save*
16 *Panoche Valley, supra*, 217 Cal.App.4th at 514-15 [project opponent bears the burden under the
17 substantial evidence standard].) The Friends have failed to meet their burden.

18 **4. The Replacement of the Trestle Would Improve and Protect the Environment**

19 The Friends cited several cases and CEQA Guideline §15003 to argue that CEQA should be
20 interpreted so as to protect the environment. (COB 15:16-22.) The removal of the trestle would
21 improve the environmental health of the creek and wildlife. It is the trestle that has a negative impact
22 on the environment. The trestle impedes the Los Gatos Creek and poses a fire hazard. Debris
23 accumulates around the piers and the piers are coated with creosote. (CAR0511-12, CAR1151-52,
24 CAR1672.)

25 As the Santa Clara Valley Open Space Authority explained, removing the trestle “would
26 enhance the habitat of the creek, including water flows, and reduce impacts to wildlife; and [] the
27 proposed bridge structure would reduce the potential for fire, vandalism, and ongoing maintenance,
28 while improving public safety. (CAR0511-12, CAR1481-82.) In addition, the permitting agencies –

1 the National Marine Fisheries Service and San Francisco Bay Regional Water Quality Control Board --
2 “have expressed support for a new bridge that spans the channel.” (CAR0504, CAR0748.)

3 **C. THE PETITION MUST BE DENIED BECAUSE THE FRIENDS FAILED TO MEET**
4 **THEIR BURDEN OF DEMONSTRATING THAT THERE IS NOT SUBSTANTIAL**
5 **EVIDENCE IN THE RECORD SUPPORTING THE CITY COUNCIL’S**
6 **CONCLUSION THAT THE TRESTLE IS NOT A HISTORIC RESOURCE**

7 The Friends have failed to meet their burden of demonstrating that there is not substantial
8 evidence in the record that the trestle is not historic. They ignore significant parts of the record in their
9 discussion, minimize some, and mischaracterize others. (COB 14:24-17:15.) The City Council’s
10 determination that the trestle is not a historic resource is supported by substantial evidence in the
11 record, as set forth in greater detail above in Section III.

12 The 2004 analysis was based on a comprehensive review of over sixty sources in the extensive
13 bibliography. (CAR0179-92.) The Archaeological Survey reviewed local, state, and national registers
14 of historic places and landmarks, publications on California’s railroads and the connection between the
15 railroads and agriculture, engineering publications, State and City historic records, and other sources.
16 (*Id.*) The trestle is not listed as a historic resource on any federal, state, or local registry.

17 The final Initial Study, which updated the analysis completed in 2004 for the Los Gatos Creek
18 Trail Reach 4 project and took into account public comment, concluded that the trestle is not a historic
19 resource under CEQA. (CAR0015-356; Section III.C, above.) While the potential impacts of that
20 2004 and 2014 projects differ, the analysis of whether the underlying resource meets CEQA’s
21 definition of a historic resource is the same.

22 The 2014 Initial Study shows that the trestle is not listed in or eligible for listing in the
23 California Register of Historical Resources and is not included in the local register of historical
24 resources. (CAR0405.) It includes the report by Ward Hill, Consulting Architectural Historian for the
25 State of California, which supports the City Council’s determination. (CAR0444-47. See CAR1026.)
26 Hill observed that the trestle “was originally constructed in 1922, but the trestles and superstructure
27 were likely replaced during the last 30 or 40 years.” (CAR0444.) He explained: “The design is based
28 on standard plans for wood trestle bridges.” (*Id.*) He concluded: “This bridge is a typical example of
a common type and has no known association with important events or persons in local history.” (*Id.*)

1 It also reviews information from Milford Wayne Donaldson, FAIA, State Historic Preservation
2 Officer with the Office of Historic Preservation of the Parks Department of the State of California. He
3 advised the City that the State determined that “No Historic Properties would be affected.”
4 (CAR0448, CAR1025.) The trestle was also evaluated pursuant to NEPA, and the record reflects a
5 consultation with the State Historic Preservation Officer (“SHPO”) pursuant to NHPA. (CAR0872-74,
6 CAR1024, CA1030-32.) The NEPA evaluation resulted in the adoption of a Categorical Exclusion by
7 the Federal Highway Administration. (CAR0872-74, CAR1030-32.) The trestle thus is not considered
8 to be a historic resource under NEPA.

9 The 2014 Initial Study also reviews the criteria for listing on the State register and evaluated
10 the evidence, including the “new” evidence reflected in public comment. It analyzes each of the
11 criteria under Public Resources Code §5024.1(g). It notes that the Western Pacific Railroad line “did
12 not contribute to broad patterns of California’s history and cultural heritage.” (CAR0405.) The Initial
13 Study and staff report conclude that the trestle is not associated with events that have made a
14 significant contribution to the broad patterns of California’s history and cultural heritage. The Initial
15 Study explains: “The bridge evaluation concluded that the design is based on standard plans for wood
16 trestle bridges, and has no known association with important persons.” (*Id.*) In addition, the
17 evaluation “concluded that the design is based on standard plans for wood trestle bridges, and bridge
18 materials were likely replaced during the last 30 or 40 years.” (*Id.*) Further, “the trestle is not unique;
19 therefore, it is unlikely to yield new, historically important information.” (*Id.*) Staff and the Initial
20 Study conclude: “Based on the evidence provided in the prior review and consultation processes, the
21 trestle is not a historical resource; therefore, there would be no impact.” (*Id.*, CAR0501.)

22 The City Council resolution adopted the findings in these documents, stating that the existing
23 trestle “is not a historic resource for the reasons stated in the Initial Study/Mitigated Negative
24 Declaration and in the City staff report” and the “Initial Study/Mitigated Negative Declaration
25 represents the independent judgment and analysis of the City as the lead agency for the project.”
26 (CAR0013.) The City Council considered the reports, public comment, and other information before
27 it. (CAR0012-13.) It independently reviewed and analyzed the information before it, including that in
28 the Initial Study/MND. (CAR0013.) The Council made a number of findings and concluded, based

1 on substantial evidence, that “the existing wood railroad trestle bridge is not a historic resource for the
2 reasons stated in the Initial Study/Mitigated Negative Declaration and in the City staff report.” (*Id.*)

3 The Friends would have this Court believe that the record fails to include substantial evidence
4 that the trestle is not historic based on the criteria set forth under Public Resources Code §5024.1(g)
5 and the City did not consider these criteria. (COB 16:8-12.) That is incorrect. The final Initial Study
6 and staff report dated January 20, 2014, specifically addresses the four criteria set forth in Public
7 Resources Code §5024.1(g). (CAR0405, CAR0501.) Further, Public Resources Code §5024.1(g)
8 provides that a resource may be listed in the California Registry if the resource “meets all of the []
9 criteria.” Here, substantial evidence supports the conclusion that the trestle fails to meet *any* of the
10 four criteria. (CAR0405, CAR0501.)

11 The Friends attempt to minimize the conclusions of the State Historic Preservation Officer and
12 State Architectural Historian that the trestle is not historic because they are short and claims they are
13 irrelevant. (COB 16:13-17:2.) These assertions are without merit. These two reports include critical
14 relevant facts and analysis, as discussed above. Moreover, it is often more challenging to prove a
15 negative, than to affirmatively explain something. The Friends appear to ask this Court to apply a
16 double-standard. They contend that Bamburg's five-sentence letter which includes no facts, not only
17 constitutes substantial evidence, but is so strong that it overcomes the presumption of correctness.
18 (COB 17:26-18:9.) These analyses by the State Historic Preservation Officer and Consulting
19 Architectural Historian for the State are more robust than that of Bamburg.

20 Furthermore, the Initial Study and the City's determination are supported by more than these
21 two analyses, as discussed above in Section III, including extensive research in state and local archives
22 and published materials. The Survey in the 2004 Initial Study carried out a comprehensive review of
23 over sixty sources that are identified in an extensive bibliography. (CAR0179-80, CAR0183-91.)
24 These sources included state and national registers of historic places and landmarks, publications on
25 California's railroads and the connection between the railroads and agriculture (one publication is
26 entitled “Prune Country Railroading: Steel Trails to San Jose”), records with the State Office of
27 Historic Preservation, County records, and City historic records. (CAR0185-91, CAR0204.) The
28 trestle also was evaluated pursuant to NEPA, including a consultation with the State Historic

1 Preservation Officer (“SHPO”) pursuant to NHPA. (CAR0872-74, CAR1024, CAR1030-32.) This
2 NEPA evaluation resulted in the adoption of a Categorical Exclusion by the Federal Highway
3 Administration. (CAR0874, CAR1032.)

4 Moreover, it is beyond dispute that the trestle is not listed in the federal, California state, or
5 local registries. As the Court of Appeal observed, the parties do not dispute that the trestle has not
6 been “determined to be eligible” for listing in the California Register or “deemed significant under
7 Public Resources Code section 5024.1(g). (*Friends of Willow Glen Trestle, supra*, 2 Cal.App.5th at
8 467.)

9 **D. THE “EVIDENCE” CITED BY THE FRIENDS IS INSUFFICIENT TO OVERCOME**
10 **THE STRONG PRESUMPTION OF CORRECTNESS OF THE CITY’S COUNCIL’S**
11 **DETERMINATION THAT THE TRESTLE IS NOT HISTORIC**

12 The petition should be denied because the City’s determination that the trestle is not historic as
13 defined under CEQA is supported by substantial evidence. The Friends have not met their burden
14 demonstrating that there is not substantial evidence that the trestle is not historic, much less overcome
15 the strong presumption that the City’s determination is correct. Their position that the trestle is historic
16 is without merit as a matter of law and fact. (COB 17-20.)

17 **1. The Petition Should be Denied Because the City Council’s Determination Is Supported**
18 **by Substantial Evidence**

19 The Friends argue that substantial evidence supports their position that the trestle is historic
20 and appear to argue that their evidence is somehow “better.” (*Id.*) However, that is not the legal
21 standard. (*Laurel Heights Improvement Association, supra*, 47 Cal.3d at 393 [an agency’s decision
22 shall not be set aside based on the notion that “an opposite conclusion would have been equally or
23 more reasonable”].) Under the substantial evidence standard, a court resolves all doubts in favor of the
24 lead agency’s determination and looks to see if there is sufficient information and reasonable
25 inferences based on that information that a fair argument can be made to support its conclusion, even
26 though other conclusions could also be reached and even if the opposite result is more reasonable than
27 that reached by the lead agency, as discussed above. The City Council’s conclusion must be upheld
28 because substantial evidence supports it.

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1 **2. Because The Friends’ “Evidence” Is Based on Unsubstantiated Opinion and Narrative,
It Is Not Substantial**

2 The Friends would have this Court consider narrative and unsubstantiated opinion as
3 “substantial corroborative evidence of historic status.” (COB 18.) But that “evidence” fails to
4 constitute substantial evidence as a matter of law. The Public Resources Code provides that
5 “substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion
6 supported by fact.” (Pub. Res. Code §21080(e)(1). See Pub. Res. Code §21082.2(c) [“Substantial
7 evidence shall include facts, reasonable assumptions predicated on facts, and expert opinion supported
8 by facts”]; Pub. Res. Code §21080(e)(2) [“Substantial evidence is not argument, speculation,
9 unsubstantiated opinion or narrative . . .”].) The Friends rely on evidence that fails to meet this
10 standard.

11 a. Lay Opinion Fails to Constitute Substantial Evidence

12 The Friends rely heavily upon letters, e-mails, and testimony offered by Larry Ames, a well-
13 meaning community member who has advocated for the preservation of the trestle, as their primary
14 evidence that the trestle is historic. In fact, the Friends’ statement of facts is based almost entirely an
15 e-mail Ames authored. (COB 3-4.) Ames is not a historian or does he have any expert qualifications.
16 Neither Ames’ correspondence nor testimony rises to the level of “substantial evidence.” (Pub. Res.
17 Code §21080(e)(1). See Pub. Res. Code §21082.2(c), §21080(e)(2); *Wollmer v. City of Berkeley*
18 (2011) 193 Cal.App.4th 1329, 1350 [“a lay opinion is not substantial evidence”]. See *Leonoff v.*
19 *Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1352 [“Unsubstantiated
20 opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the
21 level of substantial evidence supporting a fair argument of significant environmental effect”].) That
22 Ames repeatedly informed the City of his view does not convert it to substantial evidence as a legal
23 matter. The e-mails and letters by other community members cited by the Friends fail to constitute
24 substantial evidence for the same reasons.

25 The Friends refer to “other corroborating evidence” submitted by Ames, “including newly-
26 found historical data in the archives of Willow Glen documenting the historic importance of the
27 trestle.” (COB 19:1-5.) But the citations do not support these contentions or constitute substantial
28 evidence. Rather, most of the citations at page 19:3-5 of the Friends’ corrected opening brief (other

1 than CAR1452-44 and a couple of items in the proposed supplemental record) do not mention
2 purported historical information at all and instead focus on other issues.

3 The Friends contend that purportedly “new” information was discovered in 2008. But they
4 never explain what information was discovered or how it might impact the evaluation of the trestle for
5 the purpose of a CEQA analysis. Presumably the "new" information was provided during the public
6 comment period. The City updated the Initial Study to include that information (CAR0578-87),
7 analyzed it, and concluded that it did not change the ultimate conclusion. (CAR0499-87.) The
8 information concerned the railroad line generally but did not add any information as to the trestle itself
9 or change the analysis of whether the trestle is a historic resource. (CAR0499-500, CAR0506.)

10 The Friends also rely on a number of references in their proposed supplemental record, such as
11 editorials, which should be disregarded and/or stricken, as set forth in the City’s objections to the
12 proposed supplemental record. (COB 18:24-20:4.)

13 In sum, the “evidence” cited by Petitioner does not constitute “expert opinion supported by
14 fact” or qualify as substantial evidence. (Pub. Res. Code §21080(e).) Rather, it is “argument,
15 unsubstantiated opinion or narrative” and therefore fails to meet the test of substantial evidence under
16 the Public Resources Code. (*Id.*)

17 b. Bamburg’s Letter Fails to Constitute Substantial Evidence

18 The Friends contend that a five-sentence long letter by Bamburg -- which is devoid of any facts
19 or analysis – constitutes substantial evidence and is sufficient to carry the day. (COB 17:26-18:9.)
20 That is incorrect factually and as a matter of law.

21 That letter, which was sent to the Planning Division three days before the City Council meeting
22 on January 14, 2014, fails to constitute substantial evidence for several reasons. First, the Friends’
23 quotation regarding Bamburg’s credentials is misleading; the citation is to Bamburg’s resume, not to a
24 source that includes that quotation. Next, the citation to the record at CAR1466 does not concern
25 Bamburg at all. (COB 18:2-6.) Third, Bamburg offers only conclusions and the letter is devoid of
26 facts. (Pub. Res. Code §21080(e)(b), §21082.2(c).)

27 Bamburg states that he “truly believe[s] that the existing wooden trestle bridge is an important
28 historical icon of the past” and he thinks the trestle should remain because it “is important to the locale

1 and history of this unique area of San Jose.” (CAR1464.) He adds that his “opinion is that it qualifies
2 for listing in the California Register under Criteria 1 and 3.” (*Id.*) But he provides no facts to support
3 this conclusion. As a result, Bamburg’s letter fails to constitute substance evidence. (Pub. Res. Code
4 §21080(e)(b), §21082.2(c).

5 *Citizens’ Committee to Save our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, is
6 instructive. There, a citizen’s group challenged a City’s MND for a project to build on undeveloped
7 land. The Court concluded that a letter by an experienced and respected landscape architect regarding
8 the historic nature of a landscape plan did not constitute substantial evidence that the project would
9 have a significant adverse impact on historical resources. It explained: “The facts of this case present
10 a fundamentally local issue” and “[t]he City Council is uniquely situated to determine the existence or
11 nonexistence of an allegedly significant local historic resource.” (*Id.* at 1170-71.)

12 Even if the Court considers the Bamburg letter, it is insufficient to overcome the strong
13 presumption granted to findings by the lead agency. The question before this Court presents a
14 fundamentally local issue.

15 c. None of the Other “Evidence” Constitutes Substantial Evidence

16 The Friends point to selected excerpts from comments made by Councilmember Campos but
17 take some of his remarks out of context. (COB 18:12-22.) In the first part of the testimony quoted by
18 the Friends, Campos is asking the City Attorney if there might be a lawsuit in light of Bamburg’s
19 letter. (CAR0813.) The majority of Councilmembers concluded the trestle is not historic.

20 The self-serving letter from the Friends’ counsel submitted the date of the City Council hearing
21 is argument and narrative that fails to constitute substantial evidence. (COB 19:7-10.) Finally, the
22 citation to a letter from a Trolley and Railroad Corporation (COB 18:28-19:1) and one from Blake
23 (COB 19:22 - 20:4) should be disregarded and/or stricken, given that they are not properly before this
24 Court. (See City Objections to Proposed Supplemental Administrative Record.) No do they rise to the
25 level of substantial evidence, much less are they sufficient to overcome the deference due to the City’s
26 conclusion that it is not a historic resource.

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1 **E. THE FRIENDS ARE ESTOPPED FROM CHALLENGING**
2 **THE DETERMINATION THAT THE TRESTLE IS NOT A HISTORIC RESOURCE**

3 The Friends are estopped from challenging the conclusion reached in 2004 in the MND for the
4 Los Gatos Creek Trail Reach 4 project in 2004, that the trestle was not a historical resource. The 2004
5 Initial Report and MND considered whether the trestle was a historic resource and concluded that no
6 historic resource would be impacted. This determination was not challenged. The Friends are
7 estopped from challenging this conclusion now, a decade later. *Citizens for Responsible Development*
8 *in West Hollywood v. City of West Hollywood* (1995) 39 Cal.App.4th 490, supports this conclusion.
9 That case held that a party was estopped from challenging a City's determination regarding the historic
10 nature of buildings, in a situation very similar to that before this Court. The Friends should likewise be
11 precluded from doing so here.

12 In *Citizens for Responsible Development*, the City's Cultural Heritage Advisory Board
13 reviewed a nomination application to create a Craftsman district in that same part of town. The Board
14 concluded that a Craftsman district should include certain requested structures but not structures that
15 were behind the requested properties because the back structures did not represent finer examples of
16 the Craftsman style. (*Id.* at 494.) The City Council affirmed the recommendation of the Board. The
17 decision was not challenged. The following year, a new project that would build low income housing
18 in the Craftsman district was proposed. It would restore some buildings and demolish some rear
19 structures. A group challenged the project, asserting that the City should have proceeded with an EIR
20 rather than a MND to address the impacts.

21 The Court concluded that the City had already determined that the rear structures were not
22 historic; that earlier decision had not been challenged and therefore was final. (*Citizens for*
23 *Responsible Development, supra*, 39 Cal.App.4th at 505.) The Court explained: "California courts
24 have consistently held that an administrative decision which has not been overturned through
25 administrative mandamus is absolutely immune from collateral attack." (*Id.*) The City Council was
26 entitled to rely on its earlier decision and "Citizens may not seek a judicial examination of the same
27 issues resolved by that decision in order now to support a contention that an EIR is required for the
28 project." (*Id.* at 506.)

1 **F. THE COURT SHOULD NOT CONSIDER MATTERS THAT MAY HAVE**
2 **OCCURRED AFTER JANUARY 2014**

3 The Friends also discuss matters that are outside of the record, did not occur, and/or that
4 occurred after relevant time period. (COB 3:12-20, 5:19-26, 20:16-20.) At the same time, they
5 correctly recognize that any event that took place after the City Council's action in January 2014 is
6 irrelevant here. (COB 5:25-27.) It therefore is unclear why they mention matters that they recognize
7 are irrelevant. The City agrees they are irrelevant and should not be considered by this Court.⁴

8 **G. THE PRELIMINARY INJUNCTION AUTOMATICALLY DISSOLVES IF THE**
9 **CITY PREVAILS**

10 If this Court denies the petition for writ of mandamus, then the preliminary injunction filed
11 on May 27, 2014, automatically dissolves. (*City of Oakland v. Superior Court* (1982) 136
12 Cal.App.3d 565, 569 [“Thus, when a judgment is entered in favor of the defendant, the preliminary
13 injunction dissolves without the necessity of a formal motion to dissolve.”].)

14 **H. THE COURT SHOULD AWARD THE CITY FEES AND COSTS**

15 If the Court denies the petition, the City respectfully requests that that it be awarded attorney's
16 fees and costs. (*The Otay Ranch, LP v. County of San Diego* (2014) 230 Cal.App.4th 60 [attorney and
17 paralegal costs in preparing administrative record on behalf of county may be recovered as costs when
18 reasonably and necessarily incurred]; *Coalition for Adequate Review v. City and County of San*
19 *Francisco* (2014) 229 Cal.App.4th 1043.)

20 **V. CONCLUSION**

21 The Friends failed to meet their burden that there is not substantial evidence in the record
22 supporting the City's finding that the trestle is not historic as defined under CEQA. Substantial
23 evidence in the record supports the City's determination that the trestle is not historic. The City
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26 ⁴ Moreover, the Friends' assertion that the State Historic Commission unanimously determined that the trestle qualifies
27 for listing in the California Register is false. (COB 5:23-25.) The Commission has never made any findings as to
28 whether the trestle qualified for listing on the California register. In 2016, it recommended that the trestle be listed in
the National Register of Historic Places but the Keeper of the National Register did not agree with the recommendation.
The time has long passed for the Friends to challenge an EIR where the notice of determination was filed in May 2015.
(COB 3:12-18, 3:25-28. See Pub. Res. Code §21167(c) [actions challenging an EIR must be filed 30 days after the
notice of determination is filed].)


1 respectfully requests that this Court deny the Petition in its entirety and award the City costs and fees.
2 The preliminary injunction will automatically dissolve.

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Respectfully submitted,

Dated: January 9, 2017

RICHARD DOYLE, City Attorney

By: 
KATHRYN J. ZOGLIN
Senior Deputy City Attorney

Attorneys for Respondents CITY OF SAN JOSE
and CITY COUNCIL OF THE CITY OF SAN
JOSE

PROOF OF SERVICE

CASE NAME: FRIENDS OF THE WILLOW GLEN TRESTLE v. CSJ, et al.
SUPERIOR COURT CASE NO.: 1-14-CV-260439

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San José, California 95113-1905, and is located in the county where the service described below occurred.

On January 9, 2017, I caused to be served the within:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CITY OF SAN JOSE'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

by ELECTRONIC TRANSMISSION, with a copy of this declaration, to an electronic addresses listed below.

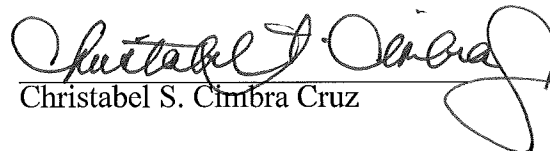
I further declare that the electronic transmission was sent on January 9, 2017, and that the City of San José, City Attorney's electronic address is cao.main@sanjoseca.gov.

Addressed as follows:

Susan Brandt-Hawley, Esq.
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Attorneys for Petitioner,
Friends of the Willow Glen Trestle, an
unincorporated association

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 9, 2017, at San José, California.


Christabel S. Cimbra Cruz