SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

WILLOW GLEN TRESTLE CONSERVANCY, an unincorporated association,

Petitioner,

vs.

CITY OF SAN JOSE, CITY OF SAN JOSE DEPARTMENT OF PUBLIC WORKS, and DOES 1 to 5,

Respondents.

COUNTY OF SANTA CLARA, SANTA CLARA VALLEY OPE SPACE AUTHORITY, and Does 6 to 10,

Real Parties in Interest.

Case No. 20CV367292

ORDER DENYING APPLICATION FOR TEMPORARY RESTRAINING ORDER

After two unsuccessful appeals, this is the third lawsuit in six years to stop the removal of the Willow Glen Trestle ("Trestle") as part of the development of the Three Creeks Trail ("Trail"). Petitioner Willow Glen Trestle Conservancy ("Petitioner") offers no viable legal basis for further delaying the development of the Trail for the use and enjoyment of all people, an effort seventeen years in the making. For the reasons stated here, Petitioner's application for a temporary restraining order is denied.

I. THE EFFORT TO DEVELOP THE THREE CREEKS TRAIL

The long history of the effort by Respondent City of San Jose ("City") to develop and complete the Trail is not disputed.[1] In 2003, the City began working to develop the Trail as part of its integrated trail system. In 2004, the City completed an environmental assessment (an initial study and a mitigated negative declaration ("MND")) that addressed the Trestle.

By 2011, the City had succeeded in arranging funding by Real Parties in Interest Santa Clara Valley Open Space Authority ("SCVOSA") and the County of Santa Clara ("County") for the acquisition of the real property on which the Trestle is situated. On March 22, 2011, SCVOSA entered into a "20% Program Funding Agreement" for this purpose. (Conservation Easement ("Easement")(Exhibit A to Declaration of Susan Brandt-Hawley), at page 1 and Certificate of Acceptance.) The County and the City "entered into an Amended and Restated Agreement for the Possible Acquisition of Property for the Three Creeks Trail dated September 27, 2011 to assist funding [the City's] acquisition of the Property for the establishment of the Three Creeks Trail…." (*Id.*, at page 1.) The participation by the County and SCVOSA was expressly "for the purpose of preserving, protecting and managing, for the use and enjoyment of all people, a well-balanced system of urban and non-urban areas of outstanding scenic, recreational and agricultural importance, and for the establishment of a network of trails that will facilitate public access to scenic, recreational areas…." (*Id.*, at page 2.)

In furtherance of this purpose, on December 9, 2011, the City, as "Grantor," granted to the County and SCVOSA a conservation easement pursuant to Civil Code section 815. (Easement, at page 2.) "[T]he purpose of this Easement is to ensure that the Property is dedicated and preserved as open space and parkland, and open to the public, in perpetuity, and that Grantor's responsibilities for continued maintenance and operation of the Property and its improvements as open space and parkland remain in effect in perpetuity…." (*Id.*) Section B.1.b. entitled "Permissible Uses" on page 2 specifies that "The Property shall be used and maintained

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[1] This summary is drawn from the record in this case and from the two published appellate opinions in the litigation's history, both cited herein.

for open space and recreation, specifically, for development of a trail, and be open to the public, in perpetuity."

The Easement was accepted by the County on December 20, 2011, and by SCVOSA on December 21. Then, on December 23, 2011, the Easement was recorded: that is, made a part of the publicly available record of the County Recorder.

With the acquisition was completed, the City's work continued. The City obtained four permits from the California Department of Fish and Wildlife ("CDFW") for the work in the Los Gatos Creek to remove and replace the Trestle. That work was allowed only during a narrow seasonal window, between June 15 and October 15. The Trestle had been deteriorating for many years, partially burned and timbers rotting. By 2014, the Trestle was fenced off from the public because it was unsafe.

In January 2014, the City adopted the MND based on the initial study. Then the litigation began.

II. SIX YEARS OF LITIGATION

In February 2014, the Friends of Willow Glen Trestle ("Friends"), represented by counsel who represents Petitioner here, filed Santa Clara Superior Court Case No. 14CV260439, seeking to enjoin the City from removing the Trestle to make way for a new bridge "to service the City's trail system." (*Friends of Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 459.) The challenge was based on the California Environmental Quality Act ("CEQA"), specifically disputing the City's determination that an environmental impact report ("EIR") was not necessary. The trial court issued a peremptory writ of mandate, invalidating the City's approval of the project based on the MND. In August 2016, that ruling was reversed by the Sixth District Court of Appeal in *Friends of Willow Glen Trestle, supra,* and remanded for further proceedings. While the matter was on appeal, the City certified a full EIR on May 19, 2015. On remand, on November 21, 2017 judgment was entered for the City. Friends did not appeal, but they sued again.

In March 2018, the judgment in its favor now final, the City applied to CDFW for a permit which issued on October 4, 2018, leaving the City only eleven days to move the project

forward before the 2018 seasonal deadline. On the same day the permit issued, Petitioner and Friends, represented by the same counsel appearing in this case, filed Santa Clara Superior Court Case No. 18CV335801, against the City and CDFW, again based on CEQA and again seeking to enjoin the removal of the Trestle. This time, Friends and Petitioner argued that the City's act of requesting from CDFW a Streambed Alteration Agreement was a "new discretionary approval" by the City and thereby triggered supplemental CEQA review. The Court issued a temporary restraining order but, on October 11, 2018, denied the preliminary injunction motion. Petitioner and Friends filed Appeal No. H046311 seeking review of that denial, but on December 14, 2018, abandoned that appeal.

Then, after six months of winter and spring, on June 3, 2019, twelve days before the opening of the 2019 seasonal window to begin work removing the Trestle, Petitioner and Friends made a renewed motion for preliminary injunction. The Court temporarily enjoined the City, but after an expedited hearing on the merits, denied relief on June 28, 2019. The Court stayed dissolution of the injunction until July 8, 2019. By that time, Petitioner and Friends had filed Appeal No. H047068 and obtained a writ of supersedeas staying removal of the Trestle. The 2019 season went by with no progress on the project.

On May 18, 2020, the Court of Appeal affirmed the denial of injunctive relief. (*Willow Glen Trestle Conservancy v. City of San Jose* (2020) 49 Cal.App.5th 127.) The opinion rejected Petitioner's "attempts to equate *any action in connection with a project* with an '*approval* on' or an '*approval* for' the project. (Italics added.) If every action had to be considered an 'approval,' each and every step that the City took toward *implementing* an approved project would necessarily constitute another 'approval on' the project, thereby endlessly reopening the City's long-final consideration of the project's environmental impacts."[2]

In disallowing Petitioner's effort at "endless reopening," the Court of Appeal recognized the need for finality in such projects: specifically, the need "to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with *interests in finality and efficiency.*' [Citation omitted.] 'In this context, "the interests of finality are

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[2] Page cites to the opinion are not yet available.

favored over the policy of encouraging public comment.'"[Citation omitted.]" (Emphasis in original.)

The City knew that the writ of supersedeas would dissolve when the opinion became final on June 17, 2020--just as the 2020 window for Three Trails work opened. On that day, Petitioner filed this application for a temporary restraining order.

III. CONTENTIONS AND ANALYSIS

Just as in the 2014 and 2018 cases, Petitioner in this case sought injunctive relief based on CEQA. On the morning of June 18, 2020, the Court conducted a lengthy hearing on Petitioner's application. Petitioner requested and was given the opportunity to file more papers, and the Court set a further hearing for Friday afternoon, June 19.

On Friday morning, Petitioner filed a First Amended Petition ("FAP"). Although it refers to CEQA throughout, the FAP makes no mention of CEQA in the prayer. At the June 19 hearing, Petitioner confirmed that it is no longer seeking relief based on CEQA because, as counsel explained, CEQA relief would be "premature" until the County, as Grantee under the Easement, approves removal of the Trestle. Instead, in the FAP Petitioner now seeks relief under Code of Civil Procedure section 1085 to compel the City "to perform a mandatory duty." At the June 19 hearing, Petitioner's counsel confirmed that the allegation of non-compliance by the City is that the City has not obtained the County's written approval for removal of the Trestle.[3]

At the June 18 hearing, Petitioner identified the following as the sections of the Easement critical to Petitioner's argument:

- In section B.1.d., the City agreed that it would provide to SCVOSA and the County "the opportunity to review and comment on any plan for significant improvements to the Property at appropriate stages in the planning process…. Grantees' comments shall be advisory only. Grantor shall make the final decision as to any plans or improvements for the Property as long as the decision is consistent with the terms and conditions of this Conservation Easement."

[3] Petitioner's counsel clarified the allegation by stating that it appears that SCVOSA may have given approval so Petitioner focused on the City's failure to obtain the County's approval.

- In section B.1.b., the Easement provides that "[n]o new structures or improvements shall be erected on the Property without written approval of the Grantees…."
- In section B.1.c., the Easement provides that "[n]o native plant, tree, or wildlife species shall be disturbed now or in the future on the Property except to abate disease, eliminate an imminent hazard to the health, safety, or welfare of the general public, or as approved by Grantor as part of a plan for public access, resource management, and restoration."

In considering whether to grant injunctive relief to prevent irreparable harm, "a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Ca1.4th 668, 677-678.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Id.*, at p. 678.)

In evaluating the record on this application, the Court grants the City's Request for Judicial Notice and overrules the City's objection to the Declaration of Lawrence Ames.

A. PETITIONER LACKS AUTHORITY TO ENFORCE THE EASEMENT

The City argues that Petitioner lacks authority to enforce the Easement because Civil Code section 815.7(b) provides that only a party to a conservation easement may sue to enforce it. That statute states, in its entirety:

> Actual or threatened injury to or impairment of a conservation easement or actual or threatened violation of its terms may be prohibited or restrained, or the interest intended for protection by such easement may be enforced, by injunctive relief granted by any court of competent jurisdiction *in a proceeding initiated by the grantor or by the owner of the easement*.

(Emphasis added.)

Petitioner contends that it is not precluded from seeking enforcement because the statute merely authorizes actions by the grantor or the easement owner but does not specifically preclude actions by others.

Neither party has presented, nor has the Court found, any cases construing section 815.7(b). Thus, the Court is called upon to apply general principles of statutory construction to determine the meaning of that statute. When construing statutes, the Court's "task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs….[Citation omitted.]" (*Friends of Willow Glen Trestle, supra*, 2 Cal.App.5th at 466.)

Given that the Legislature has specified that the grantor and the easement owner may enforce the easement, that statement precludes an enforcement action by another. As the Supreme Court noted: "*Expressio unius est exclusio alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (holding that when the Legislature has "specified exactly" the preclusive effect of a criminal proceeding on an administrative proceeding, the court may not add what the Legislature omitted).)

In support of its position on the meaning of section 815.7(b), Petitioner argues that broadening the scope of enforcement beyond what the Legislature specified is consistent with the policy favoring liberal enforcement of CEQA. However, this is, as Petitioner specifically redesigned it, *not* a case seeking CEQA relief. To the contrary, honoring the limitations on enforcement expressly stated by the Legislature is consistent with the statutory scheme creating conservation easements, which also limits entities or organizations that may acquire and hold such an easement. (Civil Code section 815.3.)

Accordingly, the Court concludes that Petitioner will not prevail in this action because it seeks to enforce a conservation easement when the Legislature has expressly restricted the right to such enforcement to grantors and easement owners.

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B. THE EASEMENT DOES NOT PRECLUDE REMOVAL OF THE TRESTLE.

The City further argues that, even if Petitioner's action were not precluded by section 815.7(b), in any event Petitioner will not prevail because the Easement does not require the City to obtain the County's approval to remove the Trestle.

At the hearing, in response to the FAP, the City pointed to the language in the first two pages of the Easement, which repeatedly states that the purpose of the Easement is the development of the Trail and preservation of open space and parkland. While Petitioner focuses on the Easement's reference to "historical…condition" in the second "Whereas" on page 2, that paragraph simply quotes the definition of "conservation easement" set forth in Civil Code section 815.1. There is no other reference to "history" anywhere in the Easement.

Considering the entire document and the context in which it was created, it is clear that the Easement is not about "historical condition." Rather, the purpose of acquiring the Property, the funding therefor, and the granting of the Easement is to develop the Trail and to ensure public access to open space. The fact that the language of the Easement focuses on public access to open space and trail development is significant, because the rights and obligations under a conservation easement are limited to those framed by its terms, per Civil Code section 815.2(d): "The characteristics of a conservation easement shall be those granted or specified in the instrument creating or transferring the easement."

Petitioner relies specifically on the restriction set forth in section B.1.b that "No new structures or improvements shall be erected on the Property without written approval of the Grantees…." However, as the City correctly points out, no provision in the Easement restricts the City's prerogative to *remove* structures.

Petitioner also argues that the removal of the Trestle will disturb plants in violation of the section B.1.c. That section of the Easement provides that "No native plant, tree, or wildlife species shall be disturbed now or in the future on the Property except to abate disease, eliminate an imminent hazard to the health, safety, or welfare of the general public, *or as approved by Grantor as part of a plan for public access, resource management, and restoration*." (Emphasis added.) This language explicitly gives the City the authority to "disturb plants" as part of the

plan to develop the Trail for public access, and therefore would not be violated by removal of the Trestle.

Accordingly, since removal of the Trestle is not contrary to any duty owed by the City under the Easement, Petitioner's action would not succeed even if Petitioner had authority to bring an action to enforce the Easement.

C. PETITIONER'S CLAIM IS BARRED BY RES JUDICATA.

Before the FAP was filed, when Petitioner asserted only one cause of action for violation of CEQA, the City argued that the claim was barred by res judicata because Petitioner improperly piecemealed its CEQA theory and could have put forward in 2014 or 2018 its theory that the City's action of seeking approval from SCVOSA or the County triggered CEQA obligations.

Petitioner responded by claiming that, despite being involved in years of litigation over the Trestle, it did not know until December 2019 about the Easement publicly recorded in 2011, and therefore could not have asserted its 2020 CEQA theory when the earlier lawsuits were filed.

However, the City brought forward persuasive evidence that Petitioner's chairman and counsel both knew about the Easement by 2014 or 2015. The City identified by Bates number a document produced during the 2014 litigation that refers to the Easement. (Exhibit B to the City's request for Judicial Notice.) Friends were led by that same chairman and represented by that same attorney in the 2014 litigation. Petitioner was itself a party in the 2018 litigation and again was represented by the same attorney.

In any event, even if Petitioner's chairman and counsel did not have actual knowledge of the Easement, the 2020 CEQA claim would be barred, because res judicata precludes claims that were *or could have been* adjudicated in a prior proceeding. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202 (affirming denial of writ of mandate against City).) Application of res judicata "promote[s] judicial economy by preventing repetitive litigation, and protect[s] against vexatious litigation." (*Id.*, at 1205.)

After amending its pleading, Petitioner argued that it should not be barred by res judicata because "enforcement of the conservation easement that requires approvals by the County and

Open Space Authority is *a separate issue* from the City's initial project approval." (Petitioner's Supplemental Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order ("Supplemental Memorandum"), at 6:1-2 (emphasis added).) However, the fact that a legal issue may be "separate" from another legal issue is not the correct analysis in applying the law of res judicata. As the case on which Petitioner relies makes clear, the law is concerned with whether or not serial actions "vindicate separate and distinct primary rights." (*Citizens Planning Assn. v. City of Santa Barbara* (2011) 191 Cal.App.4th 1541, 1549.) In that case, the Court of Appeal held that an action to enforce a requirement of voter approval was based on a separate primary right than an action to enforce CEQA.

However, the rationale of *Citizens* does not apply in the unique circumstances of this case. The primary right at issue in the prior litigation was Petitioner's claim to enforce CEQA. That was clearly the same right at issue in Petitioner's initial pleading in this case. Then Petitioner filed the FAP, explaining that its CEQA claim was "premature" until the County issues approval pursuant to the Easement. Petitioner's argument contradicts itself: on the one hand, Petitioner's action does not seek to enforce CEQA, and yet Petitioner argues that it should be able to enforce the Easement--despite Civil Code section 815.7(b)--because of the policy favoring CEQA enforcement.

If Petitioner's claim is not barred by section 815.7(b), then it must be barred by res judicata. The claim to enforce the Easement clearly could have been brought earlier, and allowing the current claim to be parsed and brought later, as a separate "bite" at the injunctive "apple," violates the principles of avoiding repetitive and vexatious litigation. In equity, the Court considers, as did the Court of Appeal, the need for finality.

IV. CONCLUSION

Petitioner has failed to establish any reasonable likelihood of prevailing on the merits of its claim. The current action—the third attempt to stop the City from removing the Trestle—is presumably the strongest case that an expert advocate could make in Petitioner's favor, but it is procedurally contrary to statute, substantively contrary to the language of the Easement on which the claim is based, and barred by the piecemeal litigation approach that has prolonged the delay

in completing the Trail access for all people. There is very little if any discernible merit in Petitioner's claim.

In evaluating a request for injunctive relief, the court must "balance[e] the respective equities of the parties [and] determine whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by it." (*Tahoe Keys Property Owners' Association v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471 (affirming denial of preliminary injunction against public entity).) In balancing the harms when a petitioner seeks to restrain a public entity respondent in the performance of its duties, public policy considerations come into play. (*Id.)* When public officers and agencies are prevented from or delayed in performing their legal duties, that circumstance may be a matter of significant public concern. (*Id*., at 1473.)

The City begins its opposition brief by recognizing the passion of the views held by Petitioner concerning the historical significance of the Trestle. (Respondent City of San Jose's Opposition to Temporary Restraining Order, at 1:20-23.) That subject is a matter on which views differ widely. But the role and duties of this Court are different from those of the California Historical Resources Commission. The equities that the Court must evaluate in this case include the fact that the development of the Trail has been delayed six years based on multiple legal theories, asserted serially, none of which has ever ultimately prevailed. The current legal challenge is utterly lacking in merit.

Balanced against this meritless claim is the cognizable harm in further depriving the public of a key component that will interconnect the City's trail system. The goal of the City's extensive efforts over seventeen years—including arranging funding, acquiring the property, granting the Easement—is not trivial, ephemeral, or unimportant: "for open space and recreation, specifically, for development of a trail, [to] be open to the public, in perpetuity." (Easement, at page 2, section B.1.b.) Further delay in implementing the public interest in this open-space access goal cannot be justified by the current legal challenge.

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Accordingly, Petitioner's application is denied.

Dated: June 22, 2020

Patricia M. Lucas
Judge of the Superior Court