

ENDORSED

FILED  
JUN 21 2017

Clerk of the Court  
Superior Court of CA County of Santa Clara  
BY *[Signature]* DEPUTY  
Shantel Hernandez

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 FOR SUPPLEMENTAL  
LETTER BRIEFS

The court is very close to a decision on this remanded petition for writ of mandate but, out of fairness, would like the parties to weigh in by letter brief on a specific, fundamental, and potentially dispositive topic that does not appear to have been sufficiently developed in prior briefing or argument.

It is clear that the Court of Appeal in its published opinion, which constitutes the law of the case here, directed this court on remand to “(1) vacate its judgment granting the petition and issuing a preemptory writ of mandate, and (2) determine whether the City’s adoption of the MND is supported by substantial evidence that the Trestle is not a ‘historical resource’ under CEQA.” (*Friends of the Willow Glen Trestle* (2016) 2 Cal.App.5th 457, 473-474 (*Willow Glen Trestle*)). This court is now engaged in that substantial evidence analysis, the Court of Appeal

1 having held that the standard of judicial review to be applied to the City’s determination that the  
2 Trestle is not a discretionary historical resource under CEQA is not the fair argument standard  
3 but the substantial evidence test. And the parties, as well as this court, agree that the Court of  
4 Appeal’s opinion focused the inquiry on the last sentence of Public Resources Code section  
5 21084.1, which provides: “The fact that a resource is not listed in, or determined to be eligible  
6 for listing in, the California Register of Historical Resources, not included in a local register of  
7 historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of  
8 Section 5024.1 shall not preclude a lead agency from determining whether the resource may be  
9 an historical resource for purposes of this section.”

10 This last sentence of Public Resources Code section 21084.1 does not provide, define, or  
11 reference an affirmative duty or a set of criteria to frame what the Court of Appeal in its  
12 construction of this section characterized as a discretionary decision by a lead agency—whether  
13 a resource that is not mandated or presumed by section 21084.1 to be historical may nonetheless  
14 be found to be so. The Court of Appeal’s decision in *Willow Glen Trestle* noted this absence of  
15 governing criteria, observing that “the statutory language does not affirmatively identify the  
16 standard that the lead agency is to utilize in making this determination” (*Willow Glen Trestle*,  
17 *supra*, at p. 467) and that this final sentence of section 21084.1 “imposes no presumption and  
18 sets no standard for the lead agency’s decision” (*id.* at p. 468). But the opinion acknowledged  
19 that in this discretionary realm, the “Legislature intended for the lead agency to have more, not  
20 less, discretion under the final sentence” than in the preceding sentences of Public Resources  
21 Code section 21084.1, which identify defined criteria for what is a mandated or presumed  
22 historical resource. As the Court of Appeal noted, a “lead agency may find even a *presumptively*  
23 historical resource *not* to be a historical resource if ‘the preponderance of the evidence’ supports  
24 the lead agency’s finding ... .” (*Ibid.*, italics original.)

25 *Willow Glen Trestle* followed *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th  
26 1039 (*Valley Advocates*) in its conclusion, derived from *League for Protection of Oakland’s etc.*  
27 *Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 906-907, that section  
28 “21084.1 and its implementing Guidelines establish three analytical categories for use in

1 determining whether an object is an historical resource for purposes of CEQA. [Citation.]”  
2 (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1051.) These are (1) mandatory historical  
3 resources, (2) presumptively historical resources, and (3) discretionary historical resources.  
4 (*Ibid.*) As noted, based on the record here, the Court of Appeal focused the Trestle inquiry on the  
5 discretionary realm only. As for discretionary historical resources, the court in *Valley Advocates*  
6 noted that the “last sentence of section 21084.1 is phrased in terms of what a lead agency is not  
7 precluded from doing. This phrasing, as well as the lack of reference to the lead agency in the  
8 second sentence of section 21084.1, creates ambiguity as to (1) what, if anything, a lead agency  
9 is required to do (i.e., its affirmative obligations) [fn. omitted] and (2) the extent of its  
10 discretionary authority. The provisions of CEQA do not address these ambiguities either in  
11 section 21084.1 or elsewhere.” (*Valley Advocates, supra*, at p. 1058; see also *id.* at p. 1060 [the  
12 “exact scope of that discretion is not clear”].) This quoted language acknowledging ambiguity on  
13 the question of an affirmative duty and its scope includes a footnote, above shown as omitted.  
14 This footnote provides that when “an agency does not fulfill an affirmative obligation, it fails to  
15 lawfully exercise its discretion. In other words, ‘the agency has not proceeded in a manner  
16 required by law.’ ([Public Resources Code] § 21168.5.)” (*Valley Advocates, supra*, at p. 1058, fn.  
17 12.) Thus, the ultimate issue to be decided by this court is whether the City abused its discretion  
18 by not proceeding in a manner required by law in its determination that the Trestle is not a  
19 discretionary historical resource, if the determination is found to be without substantial evidence  
20 support.

21 Yet neither *Valley Advocates* nor *Willow Glen Trestle* defined the scope of a lead  
22 agency’s discretion when operating in the discretionary-historical-resource realm under Public  
23 Resources Code section 21084.1, or authoritatively decided what standards or criteria apply to  
24 set the parameters for the exercise of that discretion. *Valley Advocates* cited the Guidelines,  
25 section 15064.5, subdivision (a)(4), noting some immaterial differences with Public Resources  
26 Code section 21084.1. But the court simply concluded, for purposes of that opinion, that it was  
27 “enough to note that these provisions are consistent with the conclusion that a lead agency has  
28 some discretionary authority when determining whether a building is an historical resource.”

1 (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1059.) *Valley Advocates* went on to interpret  
2 Guidelines section 15064.5 as confirming the discretionary character of a lead agency’s  
3 determination of the existence or identification of a historical resource and limiting that  
4 discretion “to situations where substantial evidence supports the lead agency’s determination of  
5 historical significance.” (*Valley Advocates, supra*, at p. 1059, fn. omitted.) But the court included  
6 a footnote at the end of this quoted language, which says, “In contrast to this explicit limitation,  
7 the Guidelines do not address the level of evidence, if any, that must support the opposite  
8 conclusion—namely, that the object or building is *not* historically significant,” which is the  
9 context of the case here. (*Ibid*, fn. 15.)

10 On this subject, *Valley Advocates* importantly noted that Public Resources section  
11 21084.1 and Guidelines section 15064.5 could be “*interpreted to mean a lead agency has a legal*  
12 *duty to (1) consider the question of a building’s historicity for purposes of CEQA and (2) apply*  
13 *the criteria in Guidelines section 15064.1, subdivisions (a)(3)(A) through (D) when making its*  
14 *determination (see 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act,*  
15 *[(Cont.Ed.Bar 2006)], § 20.109, p. 1063). Under this interpretation, so long as these two duties*  
16 *are fulfilled, the ultimate determination is committed to the lead agency’s discretion.”* (*Valley*  
17 *Advocates, supra*, 160 Cal.App.4th at p. 1060, italics added.) *Valley Advocates* concluded that in  
18 that case, discretion was abused by the lead agency’s failure to have exercised its discretion  
19 because it labored under a misunderstanding about the fact and scope of that discretion. (*Id.* at p.  
20 1061.) It was thus unnecessary in the case to identify a set of operative legal criteria or to define  
21 the scope of a lead agency’s discretion when dealing with the discretionary-historical-resource  
22 category.

23 The Court of Appeal’s opinion in *Willow Glen Trestle* followed *Valley Advocates* in its  
24 holding about the standard of judicial review to be applied to a lead agency’s determination  
25 about a discretionary historical resource under the final sentence of Public Resources Code  
26 section 21084.1—the substantial evidence test. (*Willow Glen Trestle, supra*, 2 Cal.App.5th at p.  
27 473.) While the *Willow Glen Trestle* decision noted the “ambiguity” about the extent and scope  
28 of discretion in this determination afforded to a lead agency, as acknowledged by the Court of

1 Appeal in *Valley Advocates (Willow Glen Trestle, supra, at p. 471)*, it did not go beyond that. It  
2 offered no guidance as to the extent of an affirmative duty or the criteria or parameters to be  
3 applied to the discretionary determination by a lead agency whether an object, not historical by  
4 mandatory or presumptive standards, nonetheless is, or is not, a historical resource under CEQA.  
5 (*Willow Glen Trestle, supra, 2 Cal.App.5th at p. 468* [Public Resources Code § 21084.1 “sets no  
6 standard” for this determination].)

7 But the legal exercise of discretion by a designated arbiter is not a function that takes  
8 place in a vacuum. As noted, under CEQA, a lead agency abuses discretion if its decision is not  
9 supported by substantial evidence. (Pub. Res. Code, § 21168.5; *Vineyard Area Citizens for*  
10 *Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426; *Western States*  
11 *Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 (*Western States*); *Laurel Heights*  
12 *Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5  
13 (*Laurel Heights*)). Substantial evidence includes facts, reasonable assumptions based on facts,  
14 and expert opinion supported by facts. It does not include argument, speculation, unsubstantiated  
15 opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence that is not  
16 credible. (Pub. Res. Code, §§ 21080, subd. (e) & 21082.2, subd. (c); Guidelines, §§ 15064, subd.  
17 (f)(5)-(6) & 15384.) Under the substantial evidence test, a reviewing court may not reweigh the  
18 evidence in the administrative record and is limited to determining whether the record contains  
19 *relevant information* that a reasonable mind might accept as sufficient to support the conclusion  
20 reached. (*Western States, supra, 9 Cal.4th at p. 572*; *Laurel Heights, supra, 47 Cal.3d at p. 392,*  
21 *fn. 5.*)

22 Still, recognizing the substantial evidence test for what it is does not resolve the proper  
23 scope and extent of discretion to be exercised, or identify the criteria or standard against which  
24 the relevancy of the evidence relied on is to be measured. What is the legal yardstick for  
25 measuring substantial evidence here? What defines the range of the proper exercise of discretion  
26 by the City? What are the applicable legal criteria outside of which a decision by the City as a  
27 lead agency as to the existence of a discretionary historical resource would be arbitrary and  
28 capricious, and thus constitute an abuse of discretion? The scope of discretion always resides in

1 the particular law being applied, here the last sentence of Public Resources Code section  
2 21084.1. Action that transgresses the confines of applicable principles and criteria or that applies  
3 a mistaken view or misunderstanding about the scope of discretion or applicable law constitutes  
4 an abuse of discretion. While the City's discretion here may be wide, and it may encompass a  
5 permissible range of options rooted in policy, there must still be a governing set of criteria or  
6 standards that frame its proper exercise. This set of criteria or standards is simply not well or  
7 authoritatively established or identified. This presents a challenge to a reviewing court in  
8 assessing, in the first instance, whether the record contains substantial evidence supporting the  
9 City's conclusion that the Trestle is not a discretionary historical resource, and, in turn, whether  
10 the City abused its discretion. One must ask: substantial evidence of what?

11 *Valley Advocates* offers the most specific teaching as to this question, in the italicized  
12 language quoted above, though it is dicta as the court expressly said it was not addressing in that  
13 case the scope of discretion granted to lead agencies under the last sentence of Public Resources  
14 Code section 21084.1. (*Valley Advocates, supra*, 160 Cal. App.4th at p. 1060.) But, as noted, the  
15 *Valley Advocates* court suggested that in this context, this statute and Guidelines section 15064.5,  
16 could be "*interpreted to mean that a lead agency has a legal duty to (1) consider the question of*  
17 *a building's historicity for purposes of CEQA and (2) apply the criteria in Guidelines section*  
18 *15064.5, subdivision (a)(3)(A) through (D) when making its determination.*" (*Valley Advocates,*  
19 *at p. 1060.*) Unlike in *Valley Advocates*, this court perceives that it is necessary here to decide the  
20 scope of discretion granted to a lead agency in the last sentence of Public Resources Code  
21 section 21084.1, and to identify the relevant criteria framing that discretion in order to conduct  
22 the substantial-evidence analysis on remand as directed by the Court of Appeal in *Willow Glen*  
23 *Trestle*. This analysis cannot be untethered from operative and identified legal criteria or  
24 standards, whatever those are.

25 Accordingly, the parties are to address (in letter briefing not to exceed five pages) the  
26 following questions:

- 27 1) Should this court utilize the criteria enumerated and referenced in Public  
28 Resources Code section 21084.1 and Guidelines section 15064.5, subdivision

1 (a)(3)(A) though (D), which apply to mandatory and presumptive historical  
2 resources, in the analysis as to whether substantial evidence supports the City's  
3 determination that the Trestle is not a discretionary historical resource? In other  
4 words, was the City affirmatively obliged to apply these criteria in some way in  
5 the exercise of its discretion?

6 2) If so, how should that enumerated set of criteria be analytically applied to a  
7 discretionary-historical-resource determination as opposed to a mandatory or  
8 presumptive one? Would the set of criteria simply be applied to the factual  
9 record before the lead agency without any presumption such as that identified  
10 in the third sentence of Public Resources Code section 21084.1? Would  
11 applying this set of criteria to a discretionary-historical-resource determination  
12 mean that the lead agency must, in effect, determine potential "eligibility" of  
13 the object to be treated as a historical resource? Must the agency's negative  
14 finding on a discretionary historical resource be supported by substantial  
15 evidence with respect to *each* of the alternatively enumerated and referenced  
16 criteria?

17 3) If the answer to question number 1) is no, as the City contended in oral argument,  
18 what legal criteria or standards was the City bound to apply, if any, in the  
19 exercise of its discretion as to the identification of a discretionary historical  
20 resource? While the City acknowledged it could not act arbitrarily in the  
21 exercise of its discretion, it has not offered any legal criteria or standards that  
22 set and defined the scope of its discretion, and against which its action could be  
23 assessed.

24 4) The criteria identified in Public Resources Code section 21084.1 and Guidelines  
25 section 15064.5, subdivision (a)(3)(A) through (D) include reference to Public  
26 Resources Code sections 5020.1, subdivision (k) and 5024.1, subdivision (g),  
27 and the California Code of Regulations, title 14, section 4852 (section 4852). If  
28 the answer to question number 1) is yes, was the City also bound to apply each

1 of these alternative provisions to the negative historicity determination in the  
2 exercise of its discretion and should the court’s substantial-evidence analysis  
3 reach each of these alternative provisions as well? In other words, must there  
4 be substantial evidence to support the City’s negative historicity determination  
5 on each of these listed alternative criteria? Or would the absence of substantial  
6 evidence on a single one mean the City’s ultimate determination is not  
7 supported by substantial evidence on the whole record?

8 5) Section 4852, subdivision (b) references historical significance “at the *local*,  
9 state, or national level” and (b)(1) further references “broad patterns of *local* or  
10 regional history, or the cultural heritage of California or the United States.”  
11 (Italics added.) This standard of historical significance is arguably more  
12 inclusive but not inconsistent with Public Resources Code section 5024.1,  
13 subdivision (b) and (c)(1), the latter of which references only “broad patterns of  
14 California’s history and cultural heritage” in assessing historical significance.  
15 If, as *Valley Advocates* suggested, a lead agency may be bound to apply the  
16 criteria referenced in Public Resources Code section 21084.1 and Guidelines  
17 section 15064.1, subdivision (a)(3)(A) through (D) in the exercise of its  
18 discretion as to the existence of a discretionary historical resource, is it to apply  
19 the broader set of criteria in section 4852 that includes *local* historical  
20 considerations? And if so, what is the meaning to be applied to “local”? San  
21 Jose? Willow Glen?

22  
23 The court understands the need to rule on the petition expeditiously. But these identified  
24 preliminary questions that are necessary to the analysis were not well focused in briefing to date.  
25 And they undergird the ultimate question the court must reach—whether the City’s  
26 determination that the Trestle is not a discretionary historical resource is supported by substantial  
27 evidence on the whole record. For this reason, the court perceives it only fair to provide the  
28

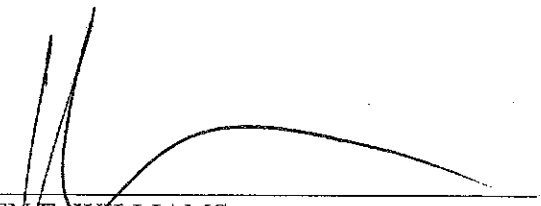


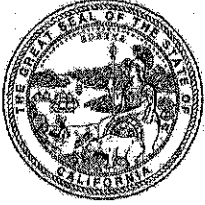
1 parties the opportunity to address these specific and focused questions and to consider the  
2 parties' positions on them in the court's ultimate disposition.

3 The simultaneous, supplemental letter briefs are due to be filed on or before July 7, 2017,  
4 with courtesy copies to chambers. Please confine the content to direct answers to the listed  
5 questions, supported by authority. Courtesy copies may be emailed to the courtroom clerk at  
6 lArmenta@scscourt.org. Submission is vacated for good cause shown and the matter will be  
7 resubmitted on July 7, 2017.

8  
9 IT IS SO ORDERED.

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13 Dated: June 21, 2017

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16 HELEN E. WILLIAMS  
17 Judge of the Superior Court  
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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA  
DOWNTOWN COURTHOUSE  
191 NORTH FIRST STREET  
SAN JOSE, CALIFORNIA 95113  
CIVIL DIVISION**

**ENDORSED  
FILED  
JUN 21 2017**

June 21, 2017

**Kathryn J. Zoglin  
200 E Santa Clara St 16th Fl  
San Jose CA 95113**

**Clerk of the Court  
Superior Court of CA County of Santa Clara  
BY Shantel Hernandez DEPUTY**

RE: **Friends Of The Willow Glen Trestle vs City Of San Jose, et al**  
Case Number: **2014-1-CV-260439**

**PROOF OF SERVICE**

**Order for Supplemental Letter Briefs** was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

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If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

**DECLARATION OF SERVICE BY MAIL:** I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on June 21, 2017. CLERK OF THE COURT, by Shantel Hernandez, Deputy.

**cc:** Susan L Brandt-Hawley Post Office Box 1659 Glen Ellen CA 95442



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA  
DOWNTOWN COURTHOUSE  
191 NORTH FIRST STREET  
SAN JOSE, CALIFORNIA 95113  
CIVIL DIVISION**

**FILED**  
JUN 21 2017

**Clerk of the Court**  
Superior Court of CA County of Santa Clara  
BY **Shantel Hernandez** DEPUTY

June 21, 2017

**Susan L. Brandt-Hawley**  
Post Office Box 1659  
Glen Ellen CA 95442

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Case Number: **2014-1-CV-260439**

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cc: Kathryn J Zoglin 200 E Santa Clara St 16th Fl San Jose CA 95113