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BOS FILE 200987

Attached is Appellant's brief in support of the Appeal on MTA's "Panhandle Social Distancing and Safety Project" BOS File 200987.

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TO:
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APPELLANT'S BRIEF IN SUPPORT OF APPEAL ON MTA "PANHANDLE SOCIAL DISTANCING AND SAFETY PROJECT" BOS FILE 200987

INTRODUCTION

This Appeal is of the San Francisco Planning Department's environmental determination that the San Francisco Municipal Transportation Agency's ("MTA's") claim that its "Panhandle Social Distancing and Safety Project," aka "D5 Slow Streets and Safety Project" ("Project") is exempt from the requirements of the California Environmental Quality Act ("CEQA") (Pub. Res. Code §§ 21000 *et seq.*) under an "emergency" exemption claimed under 14 Cal. Code Regs. (CEQA "Guidelines"), section 15269(c).

This Brief is necessarily incomplete due to the Board of Supervisors' refusal to allow reasonable scheduling and to consider Appellant's three continuance requests to allow adequate time for briefing, submitting documents supporting this Appeal, and precluding public notice and meaningful comment. Appellant has also not been allowed adequate time to read and respond to the September 21, 2020 "responses" to the Notice of Appeal by City's Planning Department and MTA.

The Project is not exempt from CEQA. The implementation of the Project by MTA with no public process violates CEQA's fundamental requirement that the public should be informed and meaningfully participate in the decisionmaking process on projects that may affect the environment. Under CEQA, the environment belongs to everyone, not just special interests.

The Project does not qualify for an emergency exemption under CEQA, because COVID-19 is not an emergency under CEQA, and because removing traffic lanes and parking spaces to create a recreational bicycle lane is not necessary to preclude or mitigate any emergency. (Pub. Res. Code §§21080(b)(4), 21060.3.)

There is no evidence that removing traffic lanes and parking to create bicycle lanes does anything to "prevent or mitigate" COVID-19 or that the new bicycles-only lane is necessary for essential trips.

City Hall directives declaring a *health* emergency due to COVID-19 are not an "emergency" under CEQA, and the California Health and Safety Code does not suspend CEQA's requirements.

While a health hazard from COVID-19 does exist, it has been ongoing for at least seven months and may go on for years. That ongoing condition does not justify MTA's assertion of unaccountable authority to change city streets without complying with CEQA's requirements of environmental review and public proceedings. There is no "sudden, unexpected occurrence" as required for an emergency exemption under CEQA. (Pub.Res.Code ["PRC"], §21060.3.) There is no evidence that MTA's actions are *necessary* to prevent or mitigate Covid-19. (PRC §21080(b)(4); 14 Cal. Code Regs. (CEQA "Guidelines"), §15269(c).)

By implementing the Project without environmental review MTA violated CEQA's fundamental mandate of allowing the public to participate meaningfully in environmental determinations *before* Project approval. (*Laurel Heights Improvement Assn. v. Regents of the University of California* [*"Laurel Heights I"*] (1988) 47 Cal. 3d 376, 394.)

MTA's failure to accurately describe the duration and scope of the Project violates CEQA, misleads the public, and does not support the asserted "emergency" exemption. As MTA's documents show, the Project is permanent. In fact with this and MTA's many other "emergency bicycle" projects, MTA asserts unprecedented power to change *any* street in the City without complying with CEQA's requirements of environmental review and mitigation of impacts. On May 7, 2020, MTA's Traffic Engineer Ricardo Olea stated that the Project "will never come out" and is permanent in agreement with Mr. Sallaberry. (E-mail from Ricardo Olea to Mike Sallaberry, May 7, 2020.)

The "Panhandle Social Distancing and Safety Project" does not meet CEQA's definition of an emergency, which must be "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services," and "such occurrences as fire, flood, earthquake, or other soil or geologic movements, . . . riot, accident, or sabotage." (Pub. Res. Code §21060.3 ["Emergency"].)

Since it does not meet the requirements for the claimed exemption, this Board must reverse the Planning Department's exemption and MTA's implementation of the Project, eliminate the "parking protected" bicycle lane on Fell Street, and restore Fell Street to its previous condition before this illegally implemented Project, including restoring the traffic lane and all parking spaces.

The Board should therefore grant this appeal and require MTA and Planning to comply with CEQA's requirement of environmental review.

FACTS

MTA implemented its "Panhandle Social Distancing and Safety Project," with no public process and then claimed it was "approved" under "authority delegated by the City Traffic Engineer" on July 15, 2020. (8/14/20 Notice of Appeal, Exh. A.)

The Project has a long history, going back more than a decade when it was first proposed by the San Francisco Bicycle Coalition ("SFBC"), a private lobbying corporation, after which it was made a "long-term project" in the City's 2004-05 Bicycle Plan Project. (See, *e.g.*, December 3, 2012 Planning Department Memorandum from Bill Wycko to David Chiu, on Appeal of

Categorical Exemption for the MTA's "Fell & Oak Streets Bikeways Project," BOS File No. 121118.) The entire Bicycle Plan Project was enjoined by the San Francisco Superior Court in 2006, including the Fell Street part of that Project.

On February 25, 2020, San Francisco Mayor London Breed issued a proclamation "Declaring the Existence of a Local Emergency" under California Government Code Section 8550 due to "the ongoing spread of a novel coronavirus" discovered in Wuhan, China in December 2019 known as "COVID-19." (https://sfmayor.org/sites/default/files/Proclamation%20of%20Local %20 Emergency%20re.%20COVID-19%202.25.2020.pdf)

On March 6, 2020, San Francisco's Health Officer declared a local health emergency under California Health and Safety Code ("H&S Code") Section 101080 after announcing that "two individuals in San Francisco had contracted COVID-19 without any known avenue of transmission, suggesting the contagion was community-acquired…and that the virus is circulating in the Bay Area." (https://www.sfdph.org/dph/alerts/files/HealthOfficerLocal EmergencyDeclaration-03062020.pdf)

Since Section 101080 provides that the Declaration "may remain in effect for up to seven days, but it can continue … if it has been ratified by the Board of Supervisors," the Health Officer asked the Board to continue the local health emergency "beyond March 13, 2020 … until the Board of Supervisors proclaims the local health emergency has terminated." (*Id.*)

On March 10, 2020, the Board of Supervisors ratified the local health emergency declared by the Department of Public Health by passing its Motion No. M20-38, which stated that "the Local Health Emergency shall continue beyond March 13, 2020, until, in consultation with the Health Officer, the Board of Supervisors proclaims the Local Health Emergency is terminated." (Motion M20-38, March 10, 2020, BOS File No. 200265.)

Thereafter, the Mayor issued 26 supplements to her February 25, 2020 proclamation, and the Health Officer has issued numerous amendments to his March 6, 2020 declaration. (https://sfmayor.org/mayoral-declarations-regarding-covid-19; https://www.sfdph.org/dph/alerts /coronavirus-health-directives.asp)

Since March, 2020, MTA has claimed that "emergency" exemptions from CEQA confer unlimited power on that agency to implement projects closing and altering San Francisco streets with no public process or environmental review. MTA has implemented and approved closing at least 50 streets to through travel by cars under its "Slow Streets" project, eliminating traffic lanes and parking spaces throughout the City, and removing access to public parks, viewpoints, and scenic public streets by travelers in cars, with all projects claiming emergency exemptions from CEQA that were issued *post facto* by the Planning Department. As with its many other changes to public streets, MTA claims this Project is "temporary," but MTA's own statements show that this Project **is permanent**.

In fact, on May 7, 2020, MTA's City Traffic Engineer Ricardo Olea stated this Project would be permanent if Mr. Sallaberry,[1] MTA's engineer designing the Project, agreed. (E-mail from Ricardo Olea to Mike Sallaberry, May 7, 2020.) MTA and Planning nevertheless continue to

[1] Mr. Sallaberry was a founder of SFBC's critical mass demonstrations who is now a "senior engineer" at MTA. (https://sf.streetsblog.org/2020/01/31/critical-mass-and-car-free-market-street/)

falsely claim the Project is "temporary," even though it was approved "under authority delegated by the City Traffic Engineer" on July 15, 2020. (8/14/20 Notice of Appeal, Exh. A.)

According to MTA's designs and Planning's exemption document, the Project as designed eliminates the left traffic and parking lanes on Fell Street to create a new "parking protected" bicycle lane, eliminating at least 12 parking spaces. (August 14, 2020 Notice of Appeal, Exh. A.) Fell Street is a major westbound traffic corridor that has carried more than 30,000 vehicles per day through the Project area to the west side of San Francisco. (SFMTA Traffic Count Data 1993-2015.)[2]

On May 13, 2020, District 5 Supervisors Dean Preston held a "Zoom meeting" that was not noticed to the public where Mr. Preston and MTA staff introduced and promoted the Project as an "innovative, safe streets effort[]" to members of the San Francisco Bicycle Coalition and other Project proponents, claiming "The reduction in traffic coupled with the need for social distancing for those outside has provided us with some opportunities to pilot projects…" (Public Records Act Request, MTA, 5/14/20.)

After several Public Records requests, *no* records were provided of minutes of the May 13, 2020 event or the identity of those who attended.

Mr. Preston's and MTA staff aggressively advocated for the Project before, during and after the May 13, 2020 event to implement the Project with no public process or CEQA review.

On May 20, 2020, the San Francisco Fire Department stated in a letter to MTA and other City agencies: "The SFFD has reviewed the plans for the Emergency parking Protected bikeway on Fell St between Baker and Shrader and does ***not*** approve of them." (August 14, 2020 Notice of Appeal, **EXHIBIT B** [emphasis in Fire Dept. letter]**.)** [3]

On July 15, 2020 Mr. Preston announced on Twitter that the Project was approved: "Dean Preston @ DeanPreston It's official: the Fell bike lane will move forward as planned! …thanks @sfbike & all advocates for your support…Should open 1st week of August! 7:35 PM July 15, 2020 Twitter for iPhone."

On July 16, 2020, the Planning Department created a statutory exemption under Guidelines §15269(c) ["Emergency Project"] and posted it on July 17, 2020. (8/14/20 Notice of Appeal, Exh. A, p. 2 [starting the "appeal period"].) CEQA requires that an environmental determination must be made before a project is approved. MTA's July 15, 2020 implementation of the Project

[2] In an anonymous Memorandum dated July 1, 2020, MTA claims the Pre-COVID traffic volumes during "Peak-Hour" were 2,210. (MTA's September 21, 2020 submission to the Clerk of the Board of Supervisors, "Attachment C.") The same Memo claims that peak-hour traffic volumes in June 2020 after it installed the Project's "emergency" bicycle lane were 1,260, stating that MTA "acknowledges the impossibility of accurately predicting future conditions given current uncertainty."

[3] Ignoring that the Traffic Engineer has already made the Project permanent, in a memorandum dated September 21, 2020, MTA's Director of Transportation now states that "if" MTA intends to make the Project permanent, "staff would need to conduct additional outeach and environmental review" and present "findings from project evaluation and outreach" to the MTA Board.

violates the fundamental requirements of CEQA to first provide public notice and the opportunity for meaningful public participation.

The exemption document falsely claims these changes "are temporary and will expire 120 days after the retraction of the City's proclamation of the COVID-19 local emergency (dated February 25, 2020)," when they are in fact permanent. (8/14/20 Notice of Appeal, Exh. A, p. 1; E-mail from Ricardo Olea to Mike Sallaberry, May 7, 2020.) During the six months since the February proclamation, the mayor has issued 26 (twenty-six) "supplements" to that fiat. Like other Slow Streets projects, no end date is provided for the Project. MTA now indicates it intends to make this Project permanent after the alleged "emergency need" expires.

As noted, on May 7, 2020, MTA's City Traffic Engineer Ricardo Olea stated the Project is permanent. (E-mail from Ricardo Olea to Mike Sallaberry, May 7, 2020.)

Before MTA implemented the Project, it received NO public approval process by any City agency, and MTA and Planning gave no official notice or opportunity for input from the public. Public Records requests to MTA and Planning were stonewalled with MTA ultimately producing thousands of pages of unresponsive paper, while failing to disclose the requested Project approval records.

On around July 15, 2020, MTA implemented the Project with *no* public notice, removing the left traffic lane and at least 12 parking spaces on this major one-way westbound street in San Francisco to install a "parking protected" bicycle lane.

This Appeal was filed on August 14, 2020.

PROCEDURAL OBJECTIONS

Please also note Appellant's Objections to Procedural Violations filed September 28, 2020.

Appellant objects to the Board of Supervisors ("BOS") refusal to consider or grant Appellant's requests for a continuance. No reasons were given for that refusal, and the Board treated Appellant with disrespect for merely requesting a continuance, while liberally granting continuances in other CEQA appeals. The shortened time for hearing on this case did not comply with the City's Administrative Code, which requires Appellant to submit a notice list for interested members of the public 20 days before the hearing and to submit a brief 11 days before the hearing. No time was allowed for Appellant to comply with those requirements.

Appellant objects to the Board of Supervisors ("BOS") procedures requiring Appellant to comment eleven days in advance of the Board's hearing that is contrary to CEQA, which allows public comment up to and including the date of the hearing or final disposition by the Board. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1202; Guidelines, §15202(b); PRC §21177(a).)

The right to public comment is undermined by the Board's improper time constraints, which deprive Appellant and the public of the right to more fully set forth their position and be heard. Further, Appellant is not subject to "exhaustion" requirements in future proceedings where the lead agency does not conduct public proceedings before its environmental determination. (*Ibid.*; see also, *e.g., Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* [*"Azusa"*] (1997) 52 Cal.App.4th 1165, 1209-1210.)

Here, the Board of Supervisors provided only 14 days' notice of the hearing and scheduled nine appeals on the same September 22, 2020 date, which made it impossible to submit an interested persons address list 20 days before the hearing as required by the San Francisco Administrative Code. The Board's short notice limited Appellant and the public to only three days to submit briefs or public comment under the Board's 11-day requirement.

Claiming that the Board "may" continue those hearings, the September 8, 2020 notice announced that the Board would *only* hear continuance requests at the September 22, 2020 hearing. Appellant's September 10, 2020 Request for Continuance was unanswered with no indication that it was even distributed to Board members. The Board did not acknowledge or address Appellant's continuance requests, and instead after 5:00 p.m. on September 22, 2020 continued this appeal and four others to September 29, 2020 without allowing Appellant and the public to speak to the continuance request on this appeal.

Appellant objects to the Board's shortened 14-day notice, to scheduling multiple appeals on one day, making it impossible to submit briefs and an address list for public notice and thereby curtailing meaningful participation by Appellant and public comment.

Supervisor Preston should be recused from participation in proceedings on this Project due to his aggressive advocacy for the Project before, during, and after its non-public "approval." (*Petrovich Development Co. LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, 974-976 [City council's denial of conditional use permit voided due to councilmember's bias].)

On September 24, 2020, at 5:55 p.m. the Board Clerk sent e-mail stating the Board was merging five separate appeals by two different parties, on separate Planning Exemptions on different MTA Projects, conflating the issues, and reducing the time for Appellant and the public to speak to the appeals to a fraction of the time allowed by San Francisco Administrative Code, Chapter 31, by Board Rules, and by established precedent. Appellant objects to the merging of different Appeals into one on September 29, 2020, and has separately filed Objections to that action.

ARGUMENT

I. THE PROJECT DOES NOT QUALIFY FOR A STATUTORY EMERGENCY EXEMPTION UNDER CEQA

The July 16, 2020 exemption document claims the "Panhandle Social Distancing and Safety Project is to facilitate members of the public maintaining six feet social distance while bicycling or walking in the Panhandle in order to prevent and mitigate a public health emergency." (8/14/20 Notice of Appeal, Exh. A, p. 1.) That is not an emergency under CEQA, and recreational bicycling is not essential.

A. There Is No Emergency Under CEQA's Strict Definition

An emergency under CEQA is strictly defined as: "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage." (PRC §21060.3.)

CEQA's definition of emergency is "explicit and detailed." (*Western Mun. Water Dist. v. Superior Court* [*"Western Municipal"*] (1986) 187 Cal.App.3d 1104, 1111.) "We particularly note that the definition limits an emergency to an '*occurrence*,' not a condition, and that the

occurrence must involve a '*clear and imminent danger, demanding immediate action.*'" (*Id.* [emphasis in original.])

In *Western Municipal*, the Water District claimed an emergency exemption under CEQA to pump water from an aquifer to "'prevent or mitigate earthquakes.'" (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1111.) The court denied that claim, noting that no earthquake was suddenly occurring, and that such a generalized claim of a possible emergency was not sufficient for an exemption from CEQA: "Such a construction completely ignores the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature" and that the agency's failure to "give meaning to *each word of the statute*" was erroneous. (*Id.* [emphasis added].)

As in *Western Municipal*, COVID-19 is not a "*sudden, unexpected occurrence*." Since it has been with us for at least seven months, there is no "*imminent* danger."

City's claim that Covid-19 is an "emergency" is factually and legally mistaken. Although the Mayor and Health Officer declared a "local emergency" under the Health and Safety Code and called for measures such as "social distancing" to deal with the pandemic, that does not allow a city agency it to declare a project exempt under CEQA's emergency exemption. (*Los Osos Valley Associates v. City of San Luis Obispo* [*"Los Osos*"] (1994) 30 Cal.App.4th 1670, 1682 [city council's declaration was neither conclusive nor sufficient].) "Emergency is not synonymous with expediency, convenience, or best interests… and it imports 'more…than merely a general public need.'" (*Id.* at p. 1681.) That CEQA exemption does not apply to an ongoing citywide condition such as the COVID-19 pandemic.

In fact, MTA Director of Transportation, Jeffrey Tumlin, has stated that private automobiles are the safest form of transportation during the COVID pandemic. (*San Francisco Chronicle*, April 14, 2020, https://www.sfchronicle. com/bayarea/article/Could-cars-emerge-with-a-better-image-when-SF 15198197.php) Obstructing and delaying the safest transportation mode is contrary to preventing and mitigating an emergency.

The only question considered by courts is whether the agency has provided substantial evidence to support a finding of an emergency under CEQA. To do so, "the record must disclose substantial evidence of *every element* of the contended exemption as defined in section 21060.3." (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1113 [emphasis added].) Here, Planning simply checked a box on a form and claimed a statutory exemption under Guidelines section 15269(c). (Notice of Appeal, Exh. B, p. 1.) No evidence is provided either by the Exemption document or the MTA's 6/10/20 Memo supporting an emergency exemption under CEQA. The burden of proof is entirely on city agencies when claiming an emergency exemption under CEQA. (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1113.)

There is no evidence that Covid-19 is a "sudden occurrence." Instead, after seven months, it is an ongoing condition. Indeed, it is now often called the "new normal." There is no "imminent danger," since the danger of COVID-19 has been known for at least seven months.

In *Western Municipal*, the court noted that approving an agency's generalized claim of "emergency" would "create a hole in CEQA of fathomless depth and spectacular breadth," since any large public works project could claim to mitigate any condition that might result from a natural disaster. (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1112.)

Here, as in *Western Municipal*, MTA has improperly used the "emergency exemption" claim without evidence that its Project would prevent or mitigate an actual emergency as a pretext to avoid complying with CEQA and to implement far-reaching changes with no public process.

B. The Project is Not *Necessary* To Prevent Or Mitigate An Emergency

Projects exempt under CEQA's emergency exemption are limited to "*specific* actions *'necessary* to prevent or mitigate an emergency." (PRC §21080(b)(4) [emphasis added]; Guidelines, §15269(c); *Castaic Lake Water Agency v. City of Santa Clarita* ["*Castaic*"] (1995) 41 Cal.App.4th 1257, 1267.)

The agency must support the *necessity* of the *specific* action with substantial evidence. (*Castaic*, *supra*, 41 Cal.App.4th at p. 1267.) Moreover, the Project's elimination of a traffic lane and changing it to an "emergency bikeway" is not *necessary* to mitigate an emergency. (PRC §21080(b)(4); Guidelines, §15269(c); *Castaic*, *supra*, 41 Cal.App.4th at p. 1267.)

In *Castaic*, the court rejected the agency's claim of an emergency exemption for a recovery plan from the Northridge Earthquake, because its plan did not meet CEQA's narrow requirement, since it included not just repairing the damage, but creating new "infrastructure improvements," including bikeways that did not exist before the earthquake. (*Castaic*, *supra*, 41 Cal.4th at p. 1267.)

The July 16, 2020 exemption document claims the "Panhandle Social Distancing and Safety Project is to facilitate members of the public maintaining six feet social distance while bicycling or walking in the Panhandle in order to prevent and mitigate a public health emergency." (8/14/20 Notice of Appeal, Exh. A, p. 1.) That is not an emergency under CEQA, and recreational bicycling is not essential.

MTA provides no evidence that removing traffic lanes and parking on any specific street to create bicycle and/or bus lanes will "support essential trips in San Francisco."

The Mayor's 26 proclamations and the Health Director's numerous directives since February, 2020 do not establish an emergency. Such directives are allowed under Gov. Code §8550, but they are not substantial evidence of an emergency under CEQA. (*e.g.*, *Los Osos*, *supra*, 30 Cal.App.4th at p. 1682.) Further, the City's proclamations do not mandate any departure from the requirements of CEQA.

CEQA requires MTA and Planning to provide substantial evidence to satisfy every element of Pub. Res. Code §21060.3. (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1111; *Castaic*, *supra*, 41 Cal.App.4th at p. 1267.)

No evidence supports that removing traffic lanes and parking is necessary to anyone on a particular bicycle actually making an essential trip, or that removing traffic lanes and parking will result in "better physical distancing," or that anyone on a bicycle is making an allegedly essential trip.

MTA provides no substantial evidence that removing traffic and parking lanes to create "temporary transit lanes…and temporary bikeways" is *necessary*.

Instead, MTA uses Covid-19 as a pretext for declaring the Project exempt from environmental review under CEQA. As in *Castaic*, the proposed Project here is not a "*specific* action *necessary* to prevent or mitigate an emergency." (PRC §21080(b)(4) [emphasis added]; Guidelines, §15269(c).) "Rather, it appears that this is an attempt to use limited exemptions contained in

CEQA as a means to subvert rules regulating the protection of the environment." (*Castaic*, *supra*, 41 Cal.App.4th at p. 1268.)

II. THIS BOARD'S AND MTA'S FAILURE TO CONDUCT PUBLIC PROCEEDINGS ON THE PROJECT VIOLATES CEQA'S REQUIREMENT OF INFORMED PUBLIC PARTICIPATION IN AN OBJECTIVE DECISIONMAKING PROCESS

The Exemption was not publicly available before MTA implemented the Project. Finding that document required complicated linking to documents not readily available to the general public

MTA's actions here are **a** fundamental violation of CEQA's requirement to inform the public and allow public participation.

Implementing the Project with no public process or the opportunity for the public to participate in its environmental review and approval violates CEQA's most basic mandate to give the public a meaningful voice in the decisionmaking process. (*e.g.*, *Laurel Heights I, supra*, 47 Cal. 3d at p.394.) City's claim that it need not comply with CEQA's fundamental requirements, citing *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, 961 is false and irrelevant, since unlike in that case, City here claims an "emergency" exemption. Unlike in that case where a categorical exemption was issued before project approval, here City issued an "emergency" exemption *after* its non-public "approval" of this Project by the Traffic Engineer.

CONCLUSION

The Project is not exempt under CEQA's statutory emergency exemption as claimed. This Board should grant this Appeal, reverse the Planning Department's Exemption and order MTA to immediately remove all physical changes already implemented and to conduct environmental review in compliance with CEQA.

DATED: September 28, 2020

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/s/ Mary Miles