

STATUTORY EXEMPTION APPEAL

Panhandle Social Distance and Safety Project

Date: **September 21, 2020**
To: **Angela Calvillo, Clerk of the Board of Supervisors**
From: **Lisa Gibson, Environmental Review Officer – (628) 652-7571**
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RE: **Planning Record No. 2020-006678ENV; Board of Supervisors File No. 200987**
Appeal of Statutory Exemption for the Panhandle Social Distance and Safety Project

Hearing Date: **September 22, 2020 (may be continued)**

Project Sponsor: **Elizabeth Chen – (415) 646-2328**
Appellant(s): **Mary Miles, Coalition for Adequate Review**

Planning Department’s Recommendation

Uphold the California Environmental Quality Act (CEQA) statutory exemption determination and deny the appeal of the CEQA determination.

Introduction

This memorandum is a response to the letters of appeal to the board of supervisors (the board) regarding the planning department’s (the department) issuance of a statutory exemption determination under CEQA for the proposed San Francisco Municipal Transportation Agency’s (SFMTA) Panhandle and Social Distance Safety project (the project).

The department, pursuant to Article 19 of the CEQA Guidelines, issued a statutory exemption for the project on July 16, 2020 finding that the proposed project is exempt from the California Environmental Quality Act (CEQA) per CEQA Section 21080(b)(4) and CEQA Guidelines Section 15269(c), the Emergency Projects statutory exemption provision. The SFMTA Department Operations Center, under the authority delegated by the City Traffic Engineer, approved the project on July 15, 2020. The decision before the board is whether to uphold the department’s decision to issue a statutory exemption and deny the appeal, or to overturn the department’s decision to issue a statutory exemption and return the project to the department staff for additional environmental review.

Site Description and Existing Use

The project site consists of a proposed project corridor, 7 blocks in length, on the south side of Fell Street between Baker Street and Shrader Street. There are currently 4 westbound mixed-flow travel lanes on Fell Street with one lane of vehicle parking on both sides of the street. To the south of the project site is a portion of Golden Gate Park, The Panhandle. The Panhandle includes multi-use pathways.

Project Description

On February 25, 2020, Mayor London Breed of San Francisco, issued a local health emergency under California Government Code sections 8550 et seq., San Francisco Charter Section 3.100(14), and Chapter 7 of the San Francisco Administrative Code to address the spread of coronavirus (COVID-19) pandemic (public health emergency) within the city. On March 6, 2020, San Francisco Health Officer Tomas Aragon declared a health emergency due to the COVID-19 pandemic and subsequently enacted Health Orders to protect the public health. Health Order No. C19-07 (Stay Safer at Home) was originally issued March 16, 2020 as Shelter in Place, and has been amended several times as conditions change and additional information and recommendations become available.¹ Health Orders are enforceable laws and are usually accompanied by one or more Directives which provide legally binding instructions for how to comply with the Health Order.

In response to the COVID-19 public health emergency, the SFMTA added² a parking-protected bikeway on Fell Street between Baker Street and Shrader Street “Panhandle Social Distancing and Safety Project” within The Panhandle.

The project installed a westbound parking-protected bike lane on the south side of Fell Street between Baker Street and Shrader Street. The project reduced the number of westbound mixed-flow travel lanes on Fell Street from 4 to 3 to accommodate the new bike lane. The parking-protected bike lane design is along the curb with a painted buffer between cyclists and parking. The SFMTA removed one travel lane and approximately 12 parking spaces along Fell Street between Baker and Shrader streets. The SFMTA removed no loading spaces. The SFMTA required paint and the installation of safe-hit posts and no excavation.

Background

On February 25, 2020, Mayor London Breed of San Francisco, issued a local health emergency under California Government Code sections 8550 et seq., San Francisco Charter Section 3.100(14), and Chapter 7 of the San Francisco Administrative Code to address the spread of COVID-19 within the city.

On March 6, 2020, San Francisco Health Officer Tomas Aragon declared a health emergency due to the COVID-19 pandemic.

¹ San Francisco Department of Public Health. 2020. Orders Issued by the San Francisco Health Officer Relevant to Coronavirus (COVID-19). Available online at <https://www.sfdph.org/dph/alerts/coronavirus-healthorders.asp>. Accessed September 9, 2020.

² As described further in the Background section, the SFMTA implemented the project, and thus the appeal response uses past tense language in describing reversible physical aspects implemented by the project.

On March 31, 2020, Public Health order C19-07 was issued, requiring individuals to maintain six feet of social (physical) distance from individuals not in their household.

On July 15, 2020, the SFMTA Department Operations Center, under the authority delegated by the City Traffic Engineer, approved the project.

On July 16, 2020, the department determined that the project was statutorily exempt under CEQA section 15269(c) and issued a determination that no further environmental review was required for the Panhandle Social Distance and Safety project. The department posted the CEQA determination on its website on July 17, 2020. The posting of the CEQA determination on the department website started the appeal period under Chapter 31.

On August 14, 2020, an appeal of the statutory exemption determination was filed by Mary Miles on behalf of the Coalition for Adequate Review (the appellant).

On September 10, 2020, a supplemental appeal letter requesting a continuance of the hearing was submitted by the appellant.

CEQA Guidelines

Statutory Exemptions

In accordance with Article 18 Statutory Exemptions, CEQA Guidelines sections 15260 through 15385 list exemptions from CEQA granted by the California State Legislature.

CEQA Guidelines section 15269(c) states that specific actions necessary to prevent or mitigate an emergency are exempt from the requirements of CEQA. This section reflects the mandate in CEQA Section 21080(b)(4), that CEQA “does not apply to (...) specific actions to prevent or mitigate an emergency.” An “emergency,” in turn, is “a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate attention to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.” (CEQA Section 21060.3; CEQA Guidelines Section 15359).

Planning Department Responses

The concerns raised in the appeal letter are addressed in the responses below:

Response 1: The project meets the definition of CEQA section 21080(b)(4) and CEQA Guidelines section 15269(c) Emergency Projects statutory exemption.

COVID-19 is an emergency pursuant to CEQA section 21080(b)(4) and CEQA Guidelines section 15269(c)

On February 25, 2020, Mayor London Breed of San Francisco, issued a local health emergency under California Government Code sections 8550 et seq., San Francisco Charter Section 3.100(14), and Chapter 7 of the San Francisco Administrative Code to address the spread of COVID-19 within the city. On March 4, 2020,

Gavin Newsom, Governor of California, issued the Proclamation of a State of Emergency under section 8625 of the California Government Code and the California Emergency Services Act, establishing the existence of a state of emergency throughout California due to COVID-19. As stated above, on March 6, 2020 San Francisco Health Officer Tomas Aragon declared a health emergency for the City and County of San Francisco. Health Orders were enacted to protect the public health and provide guidance and provisions to reduce the spread of COVID 19. Health Order No. C19-07 is the main order that states what activities are allowed and prohibited during the COVID-19 Emergency. It has been amended several times since it was first issued on March 16, 2020.

The appellant claims the proposed SFMTA Panhandle Social Distance and Safety project does not meet the definition of an emergency as defined in Public Resources Code section 21060.3 ["Emergency"]. This implies the COVID-19 public health emergency, which was the impetus for the SFMTA's decision to implement this project, does not meet the definition of an emergency under the definition in the Public Resources Code. While a pandemic is not explicitly listed in the Public Resources Code section, a sudden and unexpected event such as the COVID-19 pandemic falls within the category of events that would be considered an emergency under the code and meets the intent of that code.

COVID-19 is a sudden and unexpected occurrence. Within the span of a few days the whole world, the United States, California, and the Bay Area went from a handful of confirmed cases to many reported cases.³ As a result, leading international, state, and local officials to declare a state of emergency. COVID-19 involves a clear and imminent danger and can cause damage to life and health. According to the Centers for Disease Control and Prevention, in the United States alone, as of September 9, 2020 approximately 6.3 million people have had confirmed COVID-19 cases and approximately 189,000 of these cases have resulted in death.⁴ Thus, COVID-19 is an emergency pursuant to CEQA section 21080(b)(4) and CEQA Guidelines section 15269

The Panhandle Social Distance and Safety project is responding to the COVID-19 public health emergency

Before COVID-19, observations indicated the multi-use paths in the Panhandle were well used. Given the existing width of the multi-use paths (up to 12 feet wide), people cannot practically maintain the six feet of social distance required by the city's Public Health orders C19-07b. Providing a parking protected bikeway on Fell Street adjacent to the Panhandle provides people bicycling an alternative route to the Panhandle paths, thereby supporting social distancing between users within the Panhandle and mitigating a public health emergency.

None of the exclusions of CEQA Guidelines section 15269(c) apply

CEQA Guidelines section 15269(c) states that the statutory exemption for projects necessary to prevent or mitigate an emergency does not apply to "long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term." This exclusion does not

³ San Francisco Department of Public Health. 2020. COVID-19 Cases and Deaths. Available online at <https://data.sfgov.org/stories/s/dak2-gvuj>. Accessed September 9, 2020.

⁴ Centers for Disease Control and Prevention. 2020. Coronavirus Disease 2019 – Cases in the U.S. Available online at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. Accessed September 9, 2020.

apply to the SFMTA Panhandle Social Distance and Safety project, because the project directly addresses an ongoing public health emergency in which it is necessary to maintain 6 feet of social distancing in order to mitigate the emergency.

The emergency the project would respond to is ongoing. The February 25, 2020 proclamation of a local health emergency, March 4, 2020 Proclamation of a State of Emergency, and Health Order No. C19-07 (as amended) are still in effect. Furthermore, there is no anticipated date for the City to fully reopen and “remove all social distancing limits and other restrictions related to the COVID-19 response”.⁵ Therefore, the COVID-19 public health emergency has a high probability of occurring in the short-term.

Second, the project did not construct permanent infrastructure and the changes can be adjusted or removed quickly. The bikeway was implemented using paint and the installation of safe-hit posts. The project did not require excavation. This means the changes can facilitate quick removal. Furthermore, the changes would expire within 120 days of the repeal of the City’s February 25, 2020 proclamation of a local health emergency due to COVID-19. This is contrary to the appellant’s claim that the project is not temporary because there is “no end date”.

As shown above, the project meets the requirements of an emergency project statutory exemption and none of the above-noted exclusions stated in CEQA Guidelines section 15269(c) apply. The City’s decision that the project fits within the definition of statutory exemption 15269(c) emergency projects is supported by substantial evidence in the record. Statutory exemptions are projects specifically excluded from CEQA consideration as defined by the State Legislature. These exemptions are delineated in Public Resources Code Section 21080 et seq and discussed in CEQA Guidelines Sections 15260-15285. A statutory exemption applies to any given project that falls under its definition, regardless of the project’s potential impacts to the environment including emergency access.

For informational purposes, the San Francisco Fire Department provided written consent for the emergency project through an email sent on July 10, 2020, after the SFMTA made an evaluation and monitoring plan part of the project. The SFMTA describes this plan in their SFMTA’s appeal response memo.

Response 2: The department and SFMTA met procedural requirements for exemptions provided in the CEQA Guidelines and Chapter 31 of the Administrative Code

Chapter 31 of the Administrative Code requires the Environmental Review Officer to post on the department’s website the following: “(1) a project description in sufficient detail to convey the location, size, nature and other pertinent aspects of the scope of the proposed project as necessary to explain the applicability of the exemption; (2) the type or class of exemption determination applicable to the project; (3) other information, if any, supporting the exemption determination; (4) the Approval Action for the project, as defined in Section 31.04(h); and (5) the date of the exemption determination.” (section 31.08(e)(1)(A)).

The department posted the exemption determination for the project on the department’s website, <https://sanfrancisco.buildingeye.com/planningceqa/list/type/agencycatex>, on July 17, 2020. The website

⁵ City and County of San Francisco. Step by Step Reopening San Francisco. Available online at <https://sf.gov/step-by-step/reopening-san-francisco>. Accessed September 9, 2020.

includes a heading titled “Public Agency Exemptions,” with a table of exemptions for projects sponsored by public agencies to which the exemption determination for the project is linked. Chapter 31 of the Administrative Code does not require other City agencies to post exemption determinations on their websites or for approving bodies to include exemption determinations in their meeting materials. The exemption determination document was appropriately posted.

Due to the public health emergency and the rapid response made by the city to mitigate the emergency, the SFMTA Department Operations Center approved the Panhandle Social Distance and Safety project on July 15, 2020 prior to planning department’s issuance of the CEQA determination on July 16, 2020 and posting of the CEQA determination on July 17, 2020.

This is not an error, as CEQA does not require public agencies to follow any specific procedures in approving activities that are exempt. Because agencies are not required to make a written determination, a project approval cannot be challenged on the ground that the agency’s exemption determination was documented after the project was approved. (*Robinson v. City and County of San Francisco* (2012) 208 Cal.App. 4th 950, 961). What state law does require is that when a non-elected decision-making body determines that a project is exempt from CEQA, the decision is appealable to the agency’s elected decision-making body. (CEQA Section 21151(c)). Further, Chapter 31 imposes specific noticing and posting requirements, as described above. Here, the department complied with all those procedures, and appellant received, and availed themselves of, the opportunity to appeal the exemption determination to the City’s elected decision-making body, the board of supervisors.

Conclusion

The department has determined that the proposed project is statutorily exempt from environmental review under CEQA on the basis that: (1) the project meets the definition of an emergency project statutory exemption and (2) none of the exceptions specified in CEQA Guidelines section 15269 prohibiting the use of a statutory exemption are applicable to the project. The appellant has not demonstrated that the department’s determination is not supported by substantial evidence in the record.

For the reasons stated above and in the July 17, 2020 CEQA statutory exemption determination and accompanying memo from SFMTA, the CEQA determination for this project complies with the requirements of CEQA and the project is appropriately exempt from environmental review pursuant to the cited exemption. The department therefore respectfully requests that the board uphold the CEQA statutory exemption determination and deny the appeal of the CEQA determination.