FROM:
Mary Miles (SB #230395)
Attorney at Law
for Coalition for Adequate Review
364 Page St., #36
San Francisco, CA 94102
(415) 863-2310

TO:
President Norman Yee and Members
San Francisco Board of Supervisors
City Hall, Room 244
San Francisco, CA 94102

BY E-MAIL TO: bos.legislation@sfgov.org

DATE: September 28, 2020

PROCEDURAL OBJECTIONS

BOS FILE 200903 "Temporary Emergency Transit Lanes"
BOS FILE 200987 "Panhandle Social Distancing and Safety Project"
BOS FILE 201024 "Slow Streets - Phase 3"

Dear President Yee and Members of the Board:

I represent only Appellant Coalition for Adequate Review ("Appellant") in only the appeals noted above. The Board of Supervisors has improperly merged those appeals and two other appeals by a different party into one hearing, conflating the issues, and shortening the time allowed for both Appellants and the public to speak.

Appellant hereby OBJECTS to the Board's procedural violations that undermine and infringe Appellants' right to review. The merging of unrelated appeals also improperly conflates the issues of those appeals, effectively denying administrative review of each appeal as required by CEQA. The Board has also deprived Appellants of their rights by prejudicial scheduling and refusing to allow adequate time to brief and speak on these appeals.

Two different parties have filed five different appeals on different environmental determinations on four different Projects proposed by the San Francisco Municipal Transportation Agency ("MTA"), all of which have different dates, different exemption documents and different issues:

--File No. 200903 is about two appeals filed by Coalition for Adequate Review and David Pilpel on the Planning Department Exemption No. 2020-005472ENV on MTA's "Temporary Emergency Transit Lanes" project.

--File No. 200987 is the appeal filed by Coalition for Adequate Review of the Planning Department Exemption No. 2020-006678ENV on MTA's "Panhandle Social Distancing and Safety" project.

--File No. 201000 is an appeal filed by David Pilpel on the Planning Department Exemption No. 2020-006458ENV on MTA's "DOC COVID-19 Emergency Temporary Street Changes" project.

--File No. 201024 is an appeal filed by Coalition for Adequate Review of the Planning Department Exemption No. 2020-006251ENV on MTA's "Slow Streets-Phase 3" project.

MTA has stated that each of these Projects is independent of all the others. By creating different exemptions, the Planning Department triggered the time for filing the separate appeals and raised the different issues in its environmental determinations that require that these appeals be separately heard.

With its September 24, 2020 e-mail and its Agenda for the September 29, 2020 meeting (posted online on September 25, 2020), the Board of Supervisors effectively denies Appellants the right to be heard on these appeals as required by CEQA, the San Francisco Administrative Code, the Brown Act, and the due process requirements of the California and United States Constitutions.

The appeals were first scheduled for hearing on September 22, 2020, giving only 14 days notice of hearing for all of the appeals. The parties filed continuance requests for each appeal, none of which were acknowledged or heard. Instead, on September 22, 2020 after 5:00 p.m., the Board of Supervisors refused to hear the separate continuance requests, refused to allow Appellants to speak on their separate continuance requests, refused public comment on the separate continuance requests, and instead continued all of these appeals on the Board's own motion to September 29, 2020 at 3:00 p.m., allowing less than a 7-day continuance on all of these appeals, after allowing up to 90 days of multiple continuances on other CEQA appeals.

On September 24, 2020, Appellant again requested reasonable continuances of each of the appeals, with those requests still unacknowledged by the Board.

On September 24, 2020 at 5:55 p.m., the Board of Supervisors Clerk sent an e-mail with the "Subject": "HEARING TIME LIMITS: APPEALS OF CEQA DETERMINATIONS - File Nos. 200903, 200987, 200100, 201024 - September 29, 2020," which states:

"The President is expected to call all four appeal hearings together and may propose the following time allotments:

"Appellant(s): 10 minutes each appellant
"Public comment in support of appellant: 2 minutes each
"Department (Planning Department): 20 minutes
"Project Sponsor (MTA): 20 minutes
"Public comment in opposition to the appeal: 2 minutes each
"Rebuttal by Appellant(s): 3 minutes each appellants."

On September 25, 2020, the Board of Supervisors' Clerk posted the Agenda for the September 29, 2020 meeting, which at page 27 states: "The President is anticipated to request the following appeal hearings and associated Motions (File Nos. 200903-200906 (MTA Emergency Transit Lanes CEQA Appeal); 201000-201003 (MTA DOC Program CEQA Appeal); and 201024-201027 (MTA Slow Streets CEQA Appeal)) be **called together** and public comment taken for these appeal matters during the **consolidated hearing**." (emphasis added.)

Appellant objects to the Board's merging these different appeals into one, conflating the different issues in the different appeals, implying the different parties are one, and unfairly limiting both Appellants' and the public's right to address the different issues in the separate appeals.

1. CEQA Requires This Board To Hear And Decide Each Appeal

CEQA requires an appeal to the elected decisionnmaking body of an exemption determination by a nonelected decisionmaking body. The statutory wording is clear and unequivocally refers to a *single decision, not several*: "If a nonelected decisionmaking body. . . determines that **a project** is not subject to [CEQA]. . . **that** . . . **determination** may be appealed to the agency's elected decisionmaking body." (Pub. Res. Code §21151(c) [emphasis added].) "The decisionmaking body to which **an appeal** has been made shall consider **the environmental document**. . ." (CEQA Guidelines, §15185(b).) The Board's attempt to merge appeals of several environmental determinations into one clearly violates the plain language of the law.

CEQA's mandate is violated by the Board's predisposition and merging of separate appeals into one and by using that scheduling manipulation to curtail the time and undermine the opportunity for the Appellants and the public to meaningfully participate in the decisionmaking process. (*Laurel Heights Improvement Assn. v. Regents of the University of California* [*"Laurel Heights I"*] (1988) 47 Cal. 3d 376, 394, 405.)

2. The City's Administrative Code Also Requires A Separate Hearing And Decision On Each Appeal

The City's Administrative Code, Chapter 31, also clearly speaks in the singular when addressing a CEQA exemption, referring to "**each exemption determination**" (San Francisco ["SF"] Admin. Code, §§31.08(e)(1)(A) [emphasis added].) The Code requires that when any City department provides a "notice of a public hearing on the Approval Action for a project that it has determined to be exempt from CEQA, the notice shall: (A) Inform the public of the exemption determination and how the public may obtain a copy. . . (B) Inform the public of its appeal rights to the Board of Supervisors with respect to **the CEQA exemption determination following the Approval Action**. . . (SF Admin. Code §31.08(f)(1)(A)-(B) [emphasis added]..) The procedures require that an appellant must submit a letter of appeal that "shall state the specific grounds for appeal and "submit with **the appeal** a copy of the CEQA decision being appealed." (*Id.*, §31.16(b)(1) [emphasis added].) The Clerk of the Board "shall schedule a hearing on **the appeal** . . ." and shall "provide notice of **the appeal."** (*Id.* at §31.16(b)(4) [emphasis

added].) "The Board shall conduct its own independent review of whether **the CEQA decision** adequately complies with the requirements of CEQA. The Board shall consider anew all facts, evidence, and issues related to the adequacy, accuracy and objectiveness of **the CEQA decision**, including, but not limited to, the sufficiency of **the CEQA decision** and correctness of its conclusions." (*Id*., §31.16(b)(6) [emphasis added]; see also §31.16(e).)

Therefore, the Board's merging of several different CEQA exemption determinations does not conform or comply with the language and obvious intent of the Administrative Code.

The fact that the Planning Department issued different exemptions indicates that it found it infeasible to combine them. (SF Admin. Code §31.05(g).) In fact, as noted MTA has insisted that the exemptions at issue were on different projects.

3. The Board President Has NO Authority To Consolidate Different Appeals By Different Parties On Different Environmental Determination. There Is No Precedent For Doing So, And He Abuses His Authority By Doing So

The only time the Board President has consolidated appeals in the past is when two appeals were filed of the *same* agency determination.

Here, there is no document in the record indicating that the Board President has "consolidated" the two appeals on the Environmental Determination in Board File No. 200903.

Now, via a notation on the Agenda that was not publicly available until September 25, 2020, Appellants in five appeals are told that "The President is anticipated to request" that all five appeals "be called together and public comment taken for these appeal matters during the consolidated hearing." (Board of Supervisors Agenda for September 29, 2020, page 27.)

Since no statute, rule or procedure allows the Board President to make such a "request," and since the President has not made that request to Appellants, the Board should reject the request.

Neither the President nor the Board has the authority to dispense with Appellants' rights to appeal an environmental determination.

No Board President has in the past attempted to consolidate appeals of *different* environmental determinations. For the reasons stated above, doing so violates CEQA, and infringes on the right of appeal itself.

Other than in File No. 200903, none of the other appeals have the same environmental determinations, facts, approval dates, or issues.

Thus the "anticipated" action denies Appellants the right of review of a particular agency determination, improperly conflates facts and issues in different agency determinations,

and denies Appellants the informed decisionmaking and public participation required by CEQA.

4. The Shortened Time For Briefing and Merging The Arguments On Five Different Appeals Of Different Environmental Determinations Into One Prejudices Appellants

Facilitating the Board's blanket *denial* of all five appeals in the above four cases is clearly the goal of this manipulation, since Appellants are denied adequate time to submit briefs and make arguments before the Board.

This clearly prejudices Appellants who cannot possibly match the massive resources of MTA with 7,000 employees, and 300 City attorneys at its disposal. Even with that huge disproportion, the Board Clerk gives Appellants only a fraction of the time given MTA and Planning to argue at the hearing.

The unacceptable result of merging the appeals means Appellants are allowed only *two minutes* to speak to the different facts and legal issues in each appeal, and 36 seconds of rebuttal for each appeal. Each member of the public is allowed only *30 seconds* for each of four appeals!

5. The Board Is Required To Objectively Review *Each* Appeal To Comply With CEQA

This Board is required to assume a neutral role on any CEQA appeal and to consider that appeal with objectivity. (SF Admin. Code § 31.16(b)(6); *e.g., Citizens for Ceres v. Superior Court* (2013) Cal.App.4th 889, 917-918; *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 132-134.) The Board's disparate treatment of Appellants in refusing reasonable continuance requests to allow Appellants adequate time to submit briefs and argue each of the different appeals, and then by merging different appeals into one appeal a few days before the short-scheduled hearing, instead shows its intent to deprive Appellants of a fair hearing and the opportunity to contribute to informed decisionmaking on each of the appeals. A city violates CEQA when its elected decisionmakers display a predisposition against the appeal. (*Id.*)

6. The Board's Actions Also Violate The Brown Act And Materially Mislead The Public

By manipulating the September 29, 2020 Agenda with its notation at page 27 merging sixteen Agenda items, the Board violates the basic requirement to post an agenda containing a description of "*each* item of business to be transacted." (Cal. Gov. Code §54954.2.)

The Agenda notation here instead merges all of the appeals in Agenda Items 60 through 75 into one item that is not on the Agenda. Those sixteen Agenda Items are effectively transformed from separate items on different appeals into a single item "to be transacted or discussed at the meeting," an item that is not on the Agenda. (Gov. Code §54924.2.)

By listing the appeals separately on the Agenda, the public is misled to believe they will have a voice in the Board's consideration of *each* appeal, when in fact the page 27 notation transforms those sixteen Agenda items into *one* Agenda item that is "anticipated" to be discussed and decided at the same time, with public comment and Appellant's argument actually allowed on only *one* item that is not listed, instead of on each listed Agenda item. Misleading the public with an inaccurate agenda violates the Brown Act. (See, *e.g.*, *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 208; *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1176 [holding violation of Brown Act where MND was "plainly a distinct item of business, and not a mere component of project approval" and "concerned discrete, significant issues of CEQA compliance"].)

The Board's manipulation violates both the Agenda requirement and the Declaration of Public Policy in the Brown Act:

"[T]he Legislature finds and declares that . . . boards and councils and the other public agencies in this State exist to *aid in the conduct of the people's business*. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. ¶The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (Cal. Gov. Code §54950 [emphasis added].)

CONCLUSION

For the foregoing reasons, the Board should not as proposed merge five different appeals of four different agency environmental determinations into one appeal hearing. The Board should instead continue each of the appeals to provide fair hearings and publish accurate agendas on each appeal in compliance with the law.

Mary Miles
Attorney for Appellant Coalition for Adequate Review