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President Norman Yee and Members
Board of Supervisors
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September 29, 2020

Re: MTA Emergency Temporary Transit Lanes and Bikeways Project and
MTA DOC COVID-19 Emergency Temporary Street Changes Program
California Environmental Quality Act (CEQA) Appeals, BOS File 200903 and BOS File 201000

Dear President Yee and Members,

I write to provide this brief in support of my two appeals now scheduled to be heard today, Tuesday September 29, 2020, under a 3 p.m. Special Order, Items 60 to 63 (BOS File 200903) and 68 to 71 (BOS File 201000). I have a number of points to make, as follows:

1. TONE OF THIS DOCUMENT

Although I have been angry and completely worn out by the process recently, I have toned down those thoughts and my considerable displeasure at how I am being treated here, instead using a neutral tone in this document and at today's hearing. I was reminded during Yom Kippur yesterday of several things: that we are all here for some purpose, even if that purpose is not obvious to us at this time; that we are charged with repairing the world ("tikkun olam") in large and small ways; and that none of us are perfect, thus requiring the annual request for atonement. I am using the process here and not abusing it. San Francisco supports people having rights to protest and seek redress from the government.

2. RENEWED CONTINUANCE REQUEST

I remind you of my continuance requests, filed September 11, 2020 and September 18, 2020, to continue the hearings on my two appeals. As I have previously stated, I have had insufficient time to brief and prepare for my appeals due to a number of circumstances and hardships previously explained on the record, in writing and in oral testimony before the Board. In particular, the timing of the Yom Kippur holiday, scheduled several thousand years ago, prevented adequate preparation for today. I again request a continuance for at least one week, to no earlier than **October 6, 2020**, on my two appeals today. I was told last week that MTA could live with a one-week continuance, but not more, that MTA would not make such a request, but that MTA would also not oppose it if asked by the Board. I again urge you to grant the continuance requests. Planning and MTA can speak to this at the hearing today.

3. APPLICABLE LAW, GUIDELINES, RULES, AND PROCEDURES

The principal laws, guidelines, rules, and procedures at issue here are the California Environmental Quality Act (CEQA), California Public Resources Code Section 21000 *et seq*., the CEQA Guidelines, California Code of Regulations Section 15000 *et seq*., San Francisco Administrative Code Chapter 31, and the Board of Supervisors Rules of Order. In addition, the City Attorney's Good

Government Guide discusses due process requirements several times. Although I have no property interest in the outcome of my citywide public interest appeals, I am nevertheless entitled to due process and procedures that ensure a fair hearing, including the opportunity to brief each appeal and be heard directly by the decisionmakers, i.e. the eleven members of the Board, prior to a decision being made.

4. PROCEDURAL OBJECTIONS

Please note that I have filed only two appeals here on seemingly unrelated MTA projects and that another party filed a separate appeal on one of those projects and two other appeals. I want to make it clear here, on the record: I have not filed any appeals regarding the Pandhandle Project, Shared Spaces, Slow Streets, or anything other than the two appeals that I filed myself. I want no association with any appeals that I have not filed, and I object specifically and strenuously to merging these appeals or consolidating them for purpose of hearing or any other reason. Administrative Code Section 31.16 (b) (4) states: "If more than one person submits a letter of appeal, the Board President may consolidate such appeals so that they are heard simultaneously." That section only provides authority for combining the two appeals into Board File 200903, and yet I have seen nothing in the record to show that the Board President has exercised that power by a Presidential Action Memorandum or other document. Further, since Chapter 31 includes this language, I believe that there is no power to consolidate other appeals (as is proposed here), which Chapter 31 could have provided for. I'm fairly sure courts have interpreted similar statutes and concluded that where specific legal authority is conferred, that is the only authority granted and that the absence of other provisions is presumed intentional.

I truly feel that I am being denied basic due process here due to combining unrelated appeals, denying reasonable continuance requests where good cause has been shown, and providing disparate treatment of appellants. There are no requests on the record, and no questions were raised, for continuances granted to Richard Drury, Sue Hestor, and several other appellants in recent months. Only I was singled out, by Supervisor Peskin during the September 22, 2020 Board meeting, to inquire whether I had a job and how I occupy my time. Board of Supervisors Rules of Order, Rule 4.19, states in part: "Supervisors shall not enter into debate or discussion with speakers during public comment." While I responded to the inquiry, Supervisor Peskin appears to have violated the Board rule to begin with and should have been reminded of the Rule by other Board members, the Board President, the Clerk of the Board, or the Deputy City Attorney. At a minimum, Supervisor Peskin should apologize to me publicly, today, and should consider being recused on my appeals if he cannot avoid bias or the appearance thereof, a basic tenet of due process, in hearing my appeals.

For a fair hearing here, we need to disregard other public policy agreements and disagreements and consider the appeals with the record before the Board. I do not wish to dwell further on procedural objections at this time. In my opinion, the Board should grant the continuance I have requested, so the parties can continue to meet and confer (see discussion below), and hear each appeal separately.

5. ABOUT ME AND MY APPEALS

For anyone unfamiliar with me, I have long been involved in San Francisco City government. I have served on the Sunshine Ordinance Task Force, MTA Citizens' Advisory Council, Public Utilities Commission Citizens Advisory Committee, Redistricting Task Force, and other bodies. I have attended hundreds, perhaps thousands, of City policy body meetings in a variety of subject areas, and participated in several refuse collection (garbage) and water and sewer rate-setting processes. I am well-versed in the City Charter, the Municipal Codes, many of the legal principles underlying those laws, associated rules, regulations, and procedures, the City budget, public meeting and public records laws, and related

matters. I have a deep commitment to and a long record in favor of government transparency, effective use of resources, and accountability, despite what some have said or are now saying to discredit me. I have been interested in all aspects of the Municipal Railway (Muni) since I was a young person, from planning, public information, and schedules to operations, maintenance, engineering, finance, and administration. As relates to my two appeals scheduled today, I reiterate that the CEQA appeals I have filed are brought in good faith about controversial projects where the language of the statutes and guidelines can be interpreted differently. I have not appealed every single action taken by MTA in response to the COVID-19 virus emergency nor do I intend to. I have nothing to apologize for here.

6. MUNICIPAL TRANSPORTATION AGENCY CONTEXT, PROJECTS, AND STATUS

The Municipal Transportation Agency (MTA) is governed primarily by San Francisco Charter Article VIIIA, largely as a result of Proposition E (11/2/1999) and Proposition A (11/6/2007). An attempt was initiated this year (BOS File 200512) to amend the Charter and adjust MTA's powers and duties, but that was abandoned following an agreement not to increase transit fares for two years. In the mean time, the COVID-19 virus emergency began, nearly eliminating most MTA revenues and transit ridership, among other effects. MTA has responded in various ways, including proposing two projects that I have appealed here, the MTA Emergency Temporary Transit Lanes and Bikeways Project (BOS File 200903) and the MTA DOC COVID-19 Emergency Temporary Street Changes Program (BOS File 201000). Some aspects of the projects are explained in MTA's September 21, 2020 submittal to this Board, but it is still difficult to understand exactly what each program or project is and how MTA's responses to COVID-19 relate to each other. In fact, at the September 15, 2020 MTA Board meeting, MTA Director Steve Heminger requested a list of the programs and projects to better understand them.

My primary concern with the Emergency Temporary Transit Lanes and Bikeways Project is that reconfiguring Muni Metro rail service in a way that forces passengers to transfer at Church and Market and at West Portal Station would expose them to the possibility of contacting or transmitting the COVID-19 virus, and that how MTA assesses the health risks of proposed operating changes or projects has not been discussed publicly. In addition, the closure of Church Street between 15th and Market Streets, and the boarding platforms now built on Ulloa Street at Lenox Way, outside West Portal Station, restrict emergency vehicle access and could reduce emergency response times. Finally, the expansive delegation of authority to the City Traffic Engineer to approve additional transit lanes is an unnecessary overreach and lacks sufficient control, further environmental review, or any meaningful public process.

As to the DOC COVID-19 Emergency Temporary Street Changes Program, my primary concern again here is the scope of authority that would be granted to the City Traffic Engineer without sufficient control, further environmental review, or any meaningful public process. In addition, the exemption document refers to the MTA Department Operations Center (DOC), the City's COVID Command Center (CCC) (previously known as the Emergency Operations Center), CCC Neighborhood Assessments, and the COVID Transportation Advisory Staff Committee (COVID-TASC) or TASC, without explaining at all what these entities or terms mean, who comprises, conducts, or serves on them, what they do, or most importantly, how the public can access them. For example, I was not aware of a COVID-TASC and I do not believe that meetings of such a committee are open and public. Neither it nor the other entities or terms mentioned are explained on the website of the Planning Department, MTA, or elsewhere. The September 21, 2020 MTA submittal only starts to explain these publicly.

I have not seen a clear and complete description of each proposed project, the locations that have been approved or are planned under each project, and the status (implemented, on hold, etc.) for each

location. An accurate and comprehensive status list from MTA would help clarify the scope and potential impacts of these two projects. I plan to discuss these issues further at the appeal hearing.

7. PLANNING DEPARTMENT CONTEXT AND ENVIRONMENTAL REVIEW

According to the Planning Department (Planning) website, its offices are closed to the public and most of its staff are working from home. The public has no access to case files, including environmental case files, other than the few documents posted on the Planning website. Navigating through Accela, Buildingeye, or whatever the new Permit Tracking System is now called is difficult at best and not at all intuitive. It is truly like trying to find a needle in a haystack.

Meanwhile, Planning continues to review and approve CEQA exemption determinations made by MTA pursuant to a Memorandum of Understanding that delegates certain approval authority to MTA that no other City department has. Since there is no current public access to case files, it is unclear whether Planning consulted with other City departments, including Emergency Management, the Fire Department, Police Department, or the Department of Public Health to review the aspects of the projects discussed above in the context of the environmental review process under CEQA. Planning is required to independently review and consider the projects under CEQA, not merely accept MTA's assertions.

8. ARGUMENTS AGAINST THE EXEMPTIONS

The main argument here is that a public health emergency under other statutes is not necessarily an emergency under CEQA. As I understand it, statutory construction rules require that the plain language of a statute be read first, without omitting any words, and then only if that plain language is ambiguous or unclear are other aids employed, including legislative history and intent, efforts to harmonize apparently disparate schemes, or use more recent or specific enactments over older or more general ones. In this case, the plain language is clear.

CEQA Guidelines Section 15269 states: "The following emergency projects are exempt from the requirements of CEQA. … (c) Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term, but this exclusion does not apply (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility." CEQA Guidelines Section 15269 states: "'Emergency' means 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."

The CEQA Guidelines interpret the law. Public Resources Code Section 21080 (b) states: "This division does not apply to any of the following activities: … (4) Specific actions necessary to prevent or mitigate an emergency." Public Resources Code Section 21060.3 states: "'Emergency' means 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."

I understand that statutory exemptions are construed narrowly, so a project must fit within the statutory language in order to qualify. In this case, I do not believe that a local health emergency is also an emergency under CEQA. Now, more than seven months since the Mayor's February 25, 2020 Proclamation Declaring the Existence of a Local Emergency, I believe the current circumstances are not a "sudden, unexpected occurrence" but instead a "new normal" of ongoing, albeit extremely difficult, existing conditions. Further, the proposed actions are not an "immediate" response in any real sense. The language cited above includes the word "necessary." In my view, the proposed actions are not "necessary" but merely convenient.

Further, even if all the other tests are met, MTA has still made no showing as to how, exactly, the proposed actions would "prevent or mitigate an emergency," nor is it clear whether the burden is on MTA, Planning, the County Health Officer, the Department of Public Health, the Department of Emergency Management, some other department, officer, or combination thereof, to validate or verify that the proposed actions are indeed "necessary to prevent or mitigate an emergency."

In any event, both MTA and Planning have the burden of showing, with substantial evidence in the record before an exemption is issued (not after), that the project fits the statutory exemption claimed, and I believe that they have failed to meet their burden. Finally, it seems illogical to me that a project would be exempt from CEQA both due to an emergency (Guidelines Section 15269 (c), "sudden, unexpected occurrence") and by a minor alteration to existing facilities (Guidelines Section 15301, "involving negligible or no expansion of existing or former use"). Statutory and categorical exemptions are fundamentally different, and I do not believe that they coexist. It may be one or the other, but not both. If you agree, then you may reverse Planning as to BOS File 200903 on that basis alone.

CEQA is a comprehensive law that already contemplates an emergency and defines it narrowly. Importantly, I am not aware of any recent order by Governor Gavin Newsom to suspend any substantive portion of CEQA. Thus, the law stands as is and is subject to interpretation as such. Finally, courts have interpreted the relevant sections here, including *Western Mun. Water Dist. v. San Bernardino County Superior Ct.* (12-11-86) 187 Cal.App.3d 1104, *Castaic Lake Water Agency v. City of Santa Clarita* (12-21-95) 41 Cal.App.4th 1257, and *CalBeach Advocates v. City of Solana Beach* (10-9-02) 103 Cal.App.4th 529, which I intend to discuss further at the appeal hearings.

9. NEXT STEPS

As I have said numerous times, I am always open to resolving my underlying concerns and withdrawing this appeal if an acceptable solution can be reached with Planning and MTA. Meeting and conferring in good faith takes time. I have made efforts to proactively reach out to Sean Kennedy and Sarah Jones of MTA, but I have been unable to reach anyone at Planning, since none of their phones seem to forward to a live person. Anyway, a modest one-week continuance would allow further meaningful discussion of unresolved issues and may result in me withdrawing either or both appeals. Discussions on related and unrelated issues, including SB 288 (Wiener) and changes to Chapter 31, are best left to another day or another venue. Others should weigh in there as well, and my appeals here should not be used as an excuse to weaken CEQA substantive requirements or public appeal rights.

In addition to concerns stated here and elsewhere, I have been unable to discuss leapfrogging exemptions, the considerable media and procedural distractions that have sucked up my time, my status as a non-lawyer and the resulting limited access to legal resources (a law library, for example), family, personal, technical, technological, and other constraints.

The Board of Supervisors can, and should, hold separate hearings on MTA's fiscal outlook, operations, and policy choices being made in the wake of the COVID-19 virus emergency. Without elaborating, it would be simply unconscionable if MTA spends down all of its reserves, hopes for further bailouts from Sacramento or Washington, fails to get them, and proceeds to declare a fiscal emergency under Public Resources Code Section 21080.32, allowing permanent abandonment of transit service without any environmental review. I filed an appeal of that exemption determination with this Board, which upheld Planning on a narrow 6-5 vote on April 13, 2010 (BOS Files 100288 to 100291).

Please bear in mind that I'm doing this all by myself. These are incredibly complicated issues that need time to sort through and untangle. I have had to skip certain issues here that merited discussion due to unfair time and other resource constraints. For example, I believe that the Twin Peaks Boulevard closure controversy came to light in part due to my efforts, although that issue also remains unresolved at this time. The best conclusion is that a good public process results in better public policy.

Sincerely,

/s/
David Pilpel