



Statutory Exemption Appeal

Slow Streets Phase1

DATE: August 24, 2020
TO: Angela Calvillo, Clerk of the Board of Supervisors
FROM: Lisa Gibson, Environmental Review Officer, San Francisco Planning Department
RE: Planning Record No **2020-004631APL**
Appeal of Statutory Exemption for SFMTA Slow Streets Phase 1 Project
HEARING DATE: September 01, 2020
ATTACHMENT(S):

PROJECT SPONSOR: Shannon Hake, SFMTA
APPELLANT: Mary Miles, Coalition for Adequate Review

DEPARTMENT'S RECOMMENDATION: Uphold the statutory exemption and deny the appeal.

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 (CEQA determination) for the Slow Streets Phase 1 project (project) under the California Environmental Quality Act (CEQA, Public Resources Code Sections 21,000 et seq.), the CEQA Guidelines (California Code of Regulations Title 14, Sections 15,000 et seq.) and Chapter 31 of the City's Administrative Code.

The department, pursuant to CEQA and Article 18 of the CEQA Guidelines, issued a statutory exemption for the project on April 21, 2020 finding that the proposed project is exempt from the California Environmental Quality Act (CEQA), per CEQA Section 21080(b)(4) and the CEQA Guidelines Section 15269 (c), the Emergency Projects statutory exemption provision. 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 is located at various lower-traffic residential streets that connect neighborhoods to essential services in the absence of Muni service. Table 1 provides a complete list of streets within the scope of the project-boundaries.

Table 1. Slow Streets: Phase 1

Street	From	To
17 th Street	Noe	Valencia
20 th Avenue	Lincoln	Ortega
22 nd Street	Valencia	Chattanooga
41 st Avenue	Lincoln	Vicente
Ellis	Polk	Leavenworth
Holloway	Junipero Serra	Harold
Kirkham	Great Highway	7 th Avenue
Phelps	Oakdale	Evans
Ortega	Great Highway	14 th Avenue
Page	Stanyan	Octavia
Quesada	Lane	Fitch
Scott	Eddy	Page

PROJECT DESCRIPTION

On March 6, 2020, San Francisco Health Officer Tomas Aragon declared a health emergency due to the COVID-19 (coronavirus) pandemic (public health emergency) 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 city’s Public Health order C19-07 requires individuals to maintain six feet of social distance from individuals not in their household, among other requirements. In addition, as a result of the emergency, Muni service has also been reduced, requiring many San Francisco residents to find alternative travel modes to make essential trips, which has increased the number of pedestrians, bicyclists, and drivers traveling on city streets. To keep six feet social distance, many pedestrians choose to walk in the street and are at a higher risk of being struck by vehicles in the roadway. The Slow Streets Phase 1 project limits vehicular traffic on identified streets to mitigate the spread of COVID-19 by providing individuals walking or bicycling with additional space to safely maintain the necessary six feet of separation from others.

The SFMTA implemented the Slow Streets Phase 1 project to temporarily allow roadways to be used as a shared space for foot and bicycle traffic and to manage traffic speeds. Vehicle traffic is allowed on these streets but the overall purpose of the project is to encourage trips for local travel (e.g. access for residents, businesses, and visitors of residents or businesses), mail, delivery services, and emergency vehicle access.

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 August 6, 2020.

The Slow Streets Phase 1 project does not create any legal change in the designation of the public right-of-way. People walking or running in the street are allowed to be in the street as the California Vehicle Code currently permits, but would not have the right-of-way over motor vehicles. People walking or running in the roadway are required to yield to vehicular traffic.

Slow Streets Phase 1 project is a temporary project, requiring no major construction activities. Removable materials such as cones, A-frames with signage, plastic traffic diverters and delineators are placed in the roadways to slow and discourage vehicular through-traffic in order to enable people to safely walk, run, or bike while maintaining six feet social distancing. Once the emergency order is lifted, the designated streets would revert back to the pre-project condition.

BACKGROUND

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

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 April 17, 2020, the SFMTA Director of Transportation, in coordination with the city's Emergency Operations Center, approved the project.

On April 21, 2020, the Planning Department issued a Statutory Exemption for the Slow Streets Phase 1 project.

On April 22, 2020 the Planning Department posted a Statutory Exemption on the Planning Department's website. This posting marks the start of the appeal period for the exemption.

On May 21, 2020, an appeal of the Statutory Exemption determination was filed by Mary Miles on behalf of Coalition for Adequate Review (the appellant).

On August 21, 2020, a supplemental appeal letter was submitted by the appellant.

CEQA AND THE CEQA GUIDELINES – STATUTORY EXEMPTIONS

In accordance with Article 18 Statutory Exemptions, CEQA Guidelines sections 15260 through 15385 list exemptions from CEQA granted by the Legislature. These exemptions from CEQA apply in several forms. Some exemptions are complete exemptions from CEQA, while others apply only part of the requirement or only to the timing of the CEQA compliance.

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 letters are addressed in the responses below.

Response 1: The project meets the conditions outlined in CEQA Guidelines Section 15269(c) Emergency Projects, qualifying it as statutorily exempt from CEQA requirements. A statutory exemption is the appropriate level of environmental review for the project.

The project meets the definition of CEQA Guidelines section 15269(c) Emergency Projects statutory exemption.

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. In particular, 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.

On March 31, 2020, the Health Order No. C19-07 stated that to the extent individuals are using shared or outdoor spaces, they must at all times, as reasonably possible, maintain social distancing of at least six feet from any other person not in their household when they are outside their residence. The Slow Streets Phase 1 project provides additional space for pedestrians and bicyclists to navigate through the city, to perform essential trips, while also maintaining the required six feet of distance from other individuals. The six feet of social distancing, regulated by the San Francisco Health Officer, is to mitigate the COVID-19 Public Health Emergency; therefore, the project was properly analyzed in accordance of CEQA and qualifies as an Emergency Projects statutory exemption.

The appellant makes claims that the project would not fall within the (Pub. Res. Code §21060.3 [Emergency] definition of an emergency, stating that an emergency can only 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, including fire, flood, earthquake, or other soil or geological movements, as well as such occurrences as riot, accident, or sabotage. The appellant is implying that the COVID-19 Public Health Emergency does not meet the definition of an emergency under the definition in the Public Resources Code. However, if there was ever an occurrence that fits the definition of emergency under CEQA, it is the COVID-19 pandemic. COVID-19 is a sudden and unexpected occurrence; in the span of a few days the whole world, the United States, California, and the Bay Area in particular went from having a handful to many reported cases,² leading international, state

² San Francisco Department of Public Health. 2020. COVID-19 Cases and Deaths. Online at <https://data.sfgov.org/stories/s/dak2-gvuj>. Accessed August 13, 2020.

and local officials to declare a state of emergency. Moreover, COVID-19 involves a clear and imminent danger and can cause damage to life and health. Further, as stated above, the Public Health Emergency was declared by the city's public health officer on March 6, 2020. The subsequent public health orders include directives, such as the six feet of social distancing requirements, to mitigate the spread of COVID-19 and reduce health risks. The Slow Streets Phase 1 project was properly classified as a project mitigating an emergency and the statutory exemption determination is valid.

The appellant states that the "emergency exemption provided under CEQA is not meant to be used to justify the SFMTA's determination to close streets to cars, but for serious emergencies where peril to life and property is imminent and drastic." According to the Centers for Disease Control and Prevention, in the United States alone, as of August 20, 2020 approximately 5.5 million people have had confirmed COVID-19 cases and approximately 172,000 of the cases have resulted in death.³ The COVID-19 Public Health emergency qualifies as a "serious emergency."

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

CEQA Guidelines section 15269(c) states that the emergency project cannot include long term projects undertaken for the purpose of preventing or mitigation a situation that has a low probability of occurrence in the short term. This exclusion does not apply to the proposed project as the emergency is ongoing, and therefore the issue of "low probability of occurrence" that the emergency would happen is moot.

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. Therefore, the project is exempt from CEQA requirements and no analysis is required. The City's decision is that the project fits within the definition of statutory exemption 15269(c) Emergency Projects, and 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.

Response 2: The process by which the project was evaluated complies with applicable sections of CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code.

The appellant inaccurately claims that the project was not appropriately available to the public.

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

³ 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 August 20, 2020.

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 April 22, 2020. The website 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. The statutory exemption determination document was appropriately posted and digitally signed and dated.

In the appellant’s letter dated May 21, 2020, the appellant inaccurately states that the exemption determination was not publicly available or posted and was only made available after a Sunshine Ordinance/Public Records Act Request made by the appellant on May 11, 2020. As stated above, the exemption determination was made available on the planning department’s website on April 22, 2020. Due to the public health emergency and the rapid response made by the city to mitigate the emergency, the approval of the Slow Streets Phase 1 occurred prior to planning department’s documentation and issuance of a CEQA determination. This is not an error, as CEQA does not require public agencies 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 itself of, the opportunity to appeal the exemption determination to the City’s elected decision-making body, the board of supervisors.

The appellant claims that the approval action was not identified in the department’s post. That is incorrect. The exemption stated that the approval action was the Director of Transportation’s authorization. In accordance with Chapter 31 of the Administrative Code, the Planning Department properly issued a statutory exemption determination that followed all requirements stated above, including identification of the approval action for the project and the date of the CEQA determination, and posting. Per Section 31.16(e)(2)(B)(ii), since the project was not approved at a noticed public hearing, the appeal period for this exemption started on the date this exemption was posted to the planning department’s website. The exemption was posted on April 22, 2020, marking the start of the 30-day appeal period. Therefore, the department complied with CEQA and Chapter 31, and appellant was not harmed by the fact that the planning department posted the exemption determination a few days after the approval of the project.

The department met all above-noted city requirements in issuing the exemption determination for the project.

Response 3: The appellant lists other projects that are not included in the Slow Streets Phase 1 project.

The appellant lists other temporary projects such as the Panhandle Social Distancing project (2020-006678ENV) and other Slow Streets projects (Phase 2: 2020-005267ENV and Phase 3: 2020-006251ENV). The additional projects are not part of the scope of the Slow Streets Phase 1 project.

Those projects received a separate CEQA analysis and approval and are not relevant to this appeal. These distinct projects may be similar in nature in that they are all intended to reduce the risk of the spread of COVID-19 by providing additional space for people to maintain social distance of at least 6 feet when making essential trips walking or bicycling. However, these projects reflect different city actions taken at different times to respond to rapidly changing circumstances on the ground in various areas in the city. The projects all have independent utility in that they are not dependent upon one another for implementation and their own separate justifications. These are not all part of a single project that the City piecemealed in order to skirt environmental review.

CONCLUSION

The department has determined that the project is statutorily exempt from the requirements of CEQA on the basis that the project is mitigating a public health emergency. CEQA Section 21080(b)(4) and CEQA Guidelines section 15269(c) exempt projects that include necessary actions to prevent or mitigate an emergency from the requirements of CEQA. The use of a statutory exemption is applicable to the project. Statutory exemptions are projects specifically excluded from CEQA consideration as defined by the State Legislature (see Public Resources Code Section 21080 et seq and 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. The record includes substantial evidence supporting the City's determination. The appellant has failed to show why the City's factual determination is wrong, or why the project does not fit within the scope of the statutory exemption.

The health emergency is ongoing, and as it continues the city will continue to take actions that are intended to mitigate the emergency. To the extent that the SFMTA or any city agency is implementing projects to support compliance with guidelines and recommendations by local, state, and federal health experts that mitigate the emergency and assist in limiting the spread of the COVID-19 Coronavirus, these projects are appropriately statutorily exempt as emergency projects.

For the reasons stated above and in the April 22, 2020 CEQA statutory exemption determination, the City complied with the requirements of CEQA and the project is appropriately statutorily exempt from the requirements of CEQA. The department therefore respectfully recommends that the board uphold the CEQA statutory exemption determination and deny the appeal of the CEQA determination.