



STATUTORY EXEMPTION APPEAL

**SFMTA - COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes –
August 22nd, 2020 and Fall 2020**

Date: **October 26, 2020**
To: **Angela Calvillo, Clerk of the Board of Supervisors**
From: **Lisa Gibson, Environmental Review Officer**
Jenny Delumo, jenny.delumo@sfgov.org

RE: **Planning Record No. 2020-007183APL; Board of Supervisors File No. 201116**
Appeal of the Statutory Exemption for the SFMTA – COVID-19 Muni Rail Service
Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall
2020 Project

Hearing Date: **November 3, 2020 (may be continued to November 10, 2020)**

Project Sponsor: **Michael Rhodes, SFMTA, Michael.Rhodes@sfmta.com**
Appellant(s): **Justin Zucker, Rueben, Junius & Rose, LLP, on behalf of Safeway, Inc.**
David Pilpel

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) COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall 2020 project (the project).

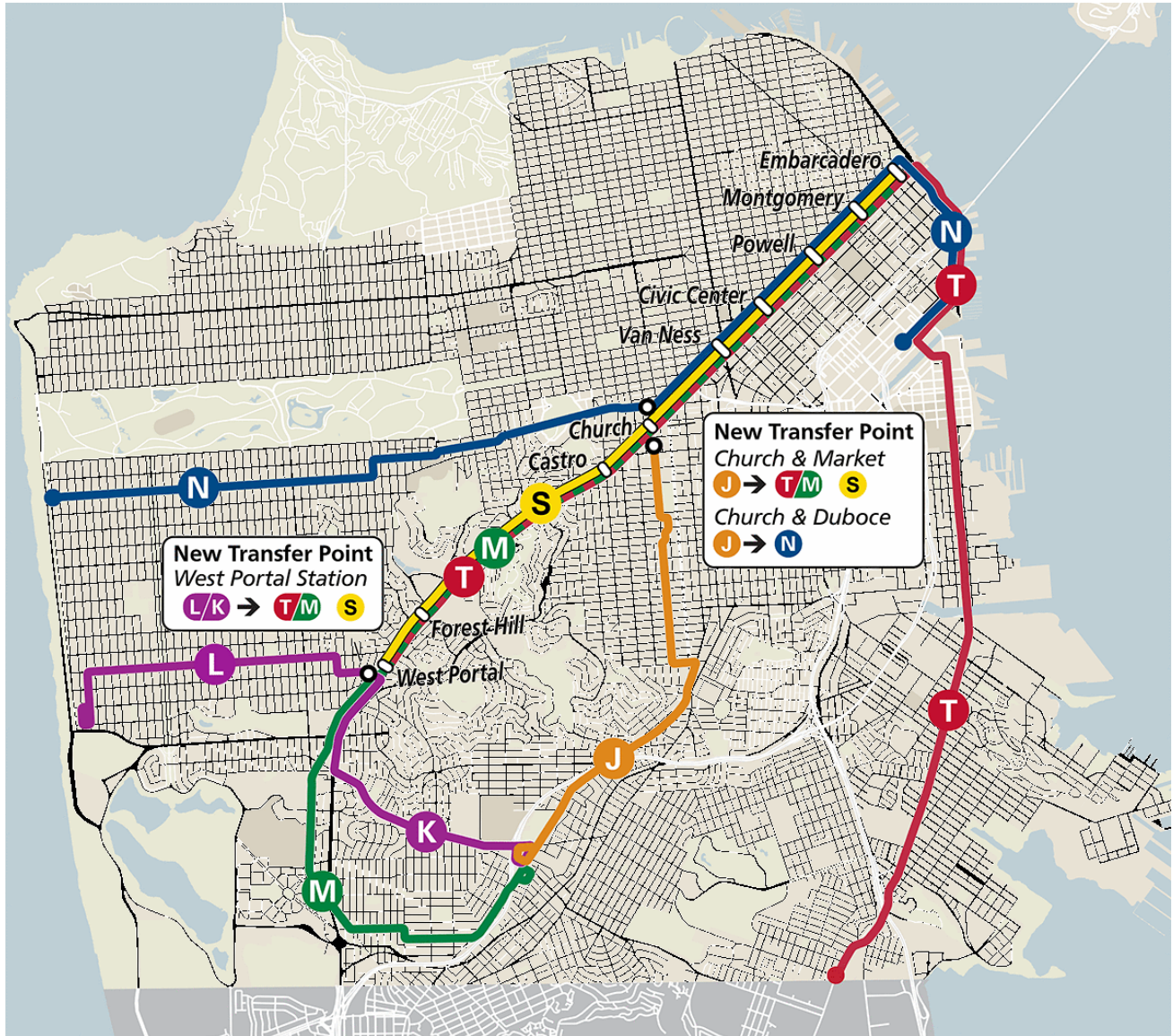
The department, pursuant to Article 19 of the CEQA Guidelines, issued a statutory exemption for the project on August 12, 2020 finding that the proposed project is exempt from CEQA as a statutory exemption per CEQA section 21080(b)(4) and CEQA Guidelines sections 15269(c) and 15275.

The decision before the board is whether to uphold the department's decision that the project is exempt from environmental review under the statutory exemption for emergency projects and the statutory exemption for specified mass transit projects and deny the appeal, or to overturn the department's decision that the project is statutorily exempt from environmental review, and return the project to the department staff for additional environmental review.

Site Description and Existing Use

The project site consists of SFMTA Muni rail lines and streets adjacent to those rail lines throughout San Francisco. Figure 1, Proposed COVID-19 Modified Muni Rail Service Changes shows the locations of these transit lines.

Figure 1: Proposed COVID-19 Modified Muni Rail Service Changes



Project Description

On February 25, 2020, San Francisco Mayor London Breed 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 (coronavirus) 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 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 SFMTA implemented the COVID-19 Muni Core Service Plan. The COVID-19 Muni Core Service Plan is also designed to respond to changes in ridership due to the COVID-19 public health emergency while enabling the public to safely make essential trips by transit. The SFMTA proposed to modify the COVID-19 Muni Core Service Plan by implementing surface rail service for Muni lines that typically operated in the subway pre COVID-19. This would allow SFMTA to operate longer train cars (up to three-car trains as opposed to two-car trains) thereby enabling adequate social distancing on train cars. Table 1, Proposed COVID-19 Modified Muni Rail Service Changes, provides a complete list of the Muni routes that would be altered and the proposed modified frequencies. Any Muni buses currently operating as substitutes for these Muni rail lines would be suspended. These bus lines include the N Judah bus, L Taraval bus, M Ocean View bus, and T Third bus.

Table 1: Proposed COVID-19 Modified Muni Rail Service Changes

Muni Line	Rail Changes	Modified Frequencies ¹	
		Weekday	Weekend
N Judah	Return to service as surface-subway rail service (no changes to pre-COVID alignment).	7 minutes	10 minutes
TM Ocean View	Return to service as a combined T Third and M Ocean View (TM) surface-subway rail service between Balboa Park Station and Bayshore/Sunnydale Station.	10 minutes	10 minutes
LK Taraval-Ingleside	Return to service as a combined L Taraval and K Ingleside (LK) surface-only rail service between Balboa Park Station and SF Zoo (rail service to 32nd Avenue/Sunset Boulevard and bus service to the zoo).	7 minutes	7 minutes
L Taraval	Provide express bus service between Sunset Boulevard (westbound)/32nd Avenue (eastbound) and West Portal Station (no stops in between) and would operate primarily along Santiago Street eastbound and along Taraval Street westbound.	No change proposed	No change proposed

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 October 14, 2020.

Muni Line	Rail Changes	Modified Frequencies ¹	
		Weekday	Weekend
J Church	Return to operation as surface-only rail service between Balboa Park Station and Church and Market streets in August. In the Fall 2020, the service would be extended one block north to terminate on Church Street at Duboce Avenue.	7 minutes	7 minutes
S Shuttle	Return to operation as subway-only rail service between West Portal and Embarcadero stations. Initially, this would operate as 2-car trains and may be 3-car trains later in the year.	7 minutes	7 minutes

Notes: ¹ Weekday frequencies: from approximately 5am to 10pm; Weekend frequency: from approximately 5am to 10pm for the J Church and LK Taraval-Ingleside and 8am to 10pm for the other lines.

Implementation of the project would require temporary changes to Muni transit stops, on-street vehicle parking and loading spaces, and traffic restrictions as listed in Table 2, Proposed Associated Stop, Street, and Parking Changes. These changes would facilitate the Muni service changes listed in Table 1 and enable adequate social distancing at transit stops by providing more space for riders to wait for, board, and disembark the service routes.

Table 2: Proposed Associated Stop, Street, and Parking Changes

Location/Muni Line	Associated Changes
West Portal Station Area	As shown on Figure 2, Proposed West Portal Station Area Changes, the project would: <ul style="list-style-type: none"> Install temporary signage and street signs. On Ulloa Street, between West Portal Avenue and Wawona Street, install two accessible boarding ramps; relocate two bus stops; remove two on-street parking spaces; remove one part-time passenger loading zone; and install one new terminal spaces. Near the intersection of Ulloa Street and Lenox Way, relocate the L-Owl bus stop; install a new L Construction Shuttle stop; remove two vehicle parking spaces; relocate one passenger loading zone; implement left-turn restrictions; and install painted safety zones.
J Church Termination Area	As shown on Figure 3, Proposed J Church Termination Area Changes, Phases 1& 2, the project would implement the following temporary changes under two phases: Phase 1 <ul style="list-style-type: none"> Terminate J Church at the intersection of Market Street and Church Street. On Church Street, between Market Street and 15th Street, all travel lanes would be restricted to Muni, paratransit, taxis, commercial vehicles, and bicycles; local access would be maintained for residents, customers and delivery services for local businesses, and emergency vehicles. Turn restrictions would be implemented at the intersections of Church Street and

Location/Muni Line	Associated Changes
	<p>Market Street and Church Street and 15th Street to limit private vehicle traffic on this block of Church Street.</p> <ul style="list-style-type: none"> ▪ Install traffic barriers; remove on-street parking spaces on the west side of Church Street; and convert existing on-street metered parking spaces to eight new 30-minute commercial loading zones and three 15-minute short-term parking spaces. <p>Phase 2</p> <ul style="list-style-type: none"> ▪ Further modify the block of Church Street between Market Street and 15th Street to install a transit passenger loading zone and accessible boarding ramp; and a new outbound transit stop and temporary accessible boarding island. ▪ On Church Street, between Market Street and Duboce Avenue, install a new inbound boarding island; install a wheelchair-accessible ramp on the existing boarding island; shorten or relocate an existing commercial loading zone on the west side of Church Street; and potentially restrict access to the northern Safeway parking lot driveway and providing more access to the southern Safeway parking lot driveway. This would limit access to the Safeway loading docks to Market Street. ▪ All Phase 1 changes would remain except SFMTA may decide to reopen the block to northbound traffic and relocate the outbound 22 Fillmore bus stop at the intersection of Market Street and 14th Street to the northside of Market Street to create a temporary shared stop with the J Church.

Figure 2: Proposed West Portal Station Area Changes

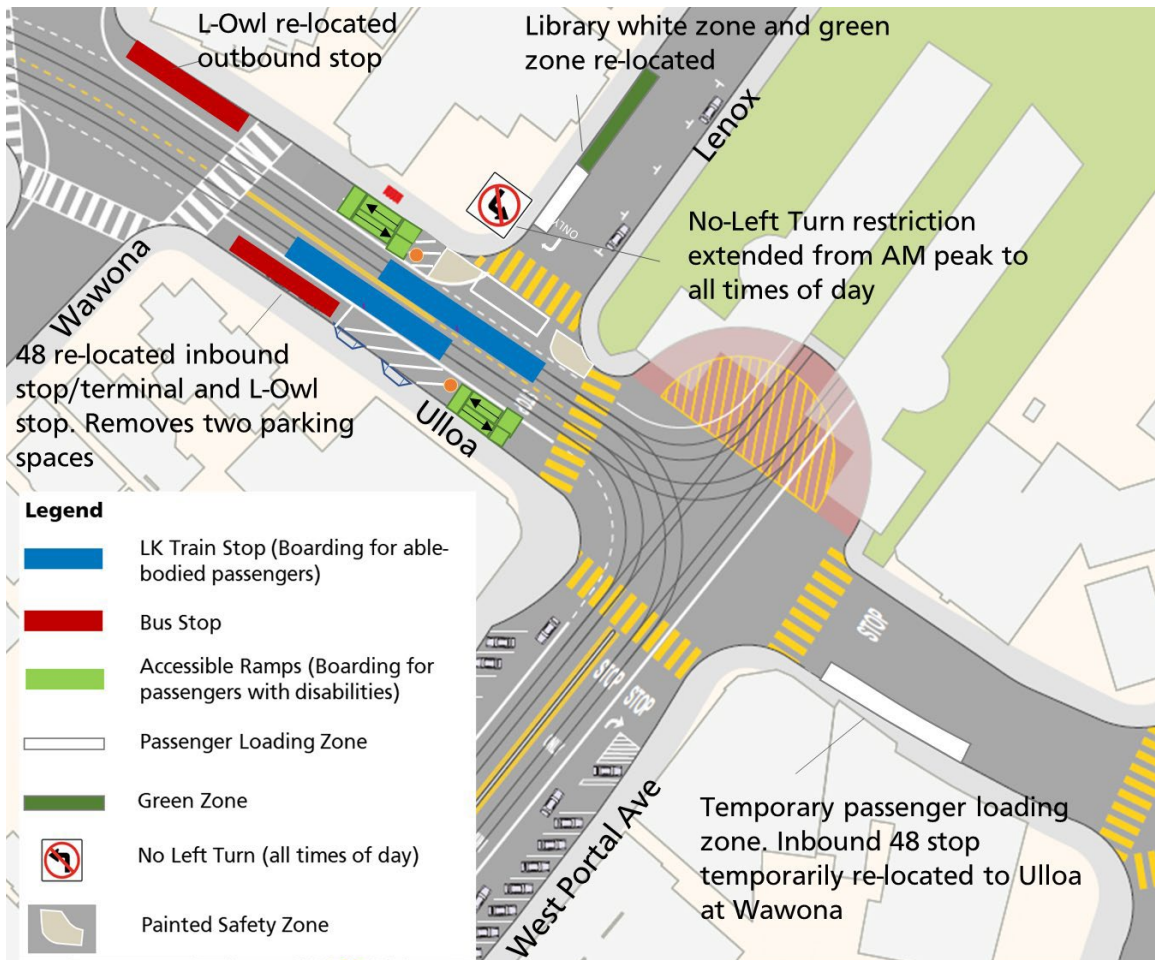
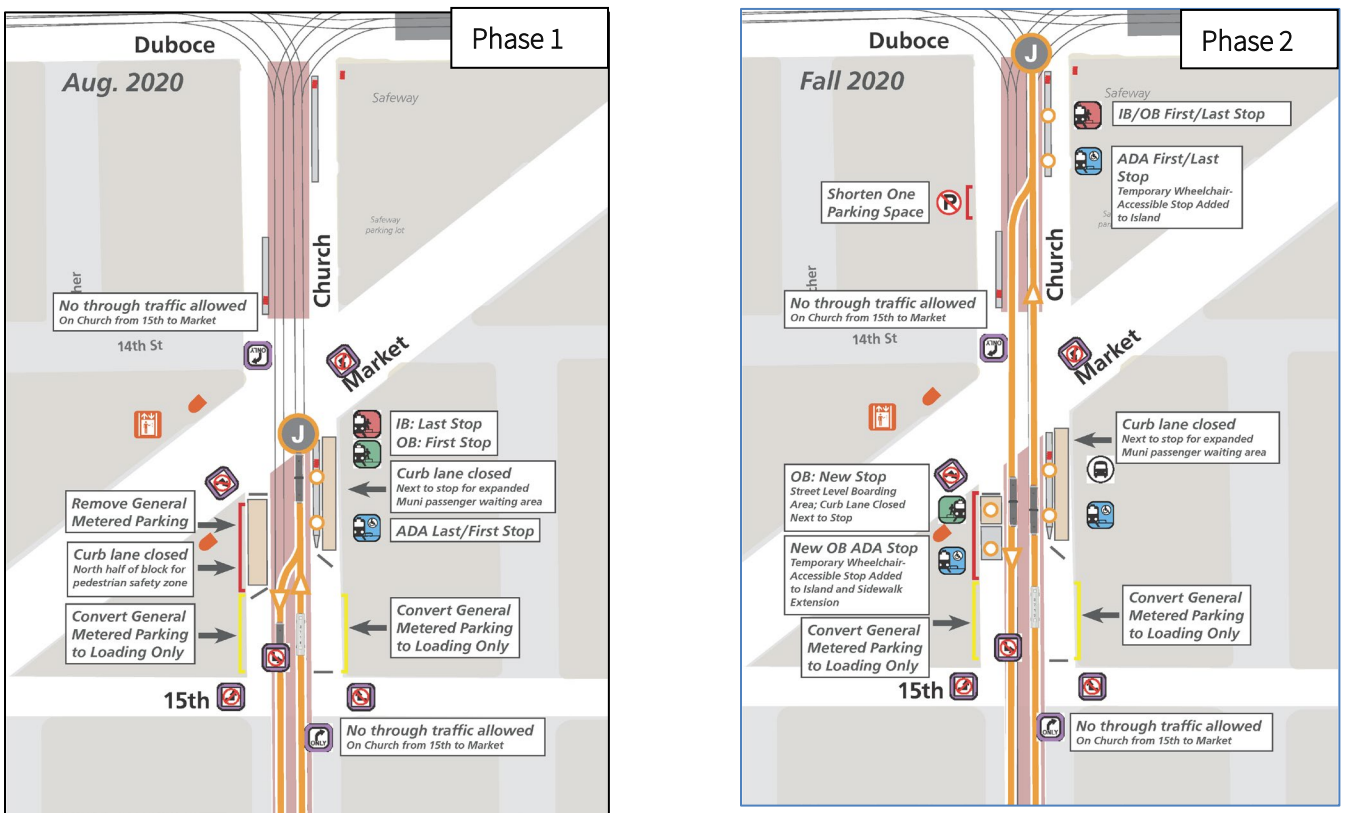


Figure 3: Proposed J Church Termination Area Changes, Phases 1 & 2



Construction of the project would entail temporary striping, signage on existing poles or moveable signage, installation of safe-hit posts or other moveable barriers on the ground, and the placement of wooden Americans with Disabilities Act (ADA) platforms on the ground. No excavation would be required. All changes would expire within 120 days of the repeal of the City’s proclamation of the COVID-19 local public health emergency.

Background

On February 25, 2020, San Francisco Mayor London Breed issued a local health emergency for San Francisco 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 (coronavirus) pandemic.

On March 16, 2020, Public Health order C19-07 was issued, requiring residents to Shelter-in-Place except for essential work or trips.

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 August 12, 2020, the department determined that the project was statutorily exempt under two distinct statutory exemptions under CEQA: 1) CEQA section 21080(b)(4) and CEQA Guidelines section 15269(c), for projects that prevent or mitigate an emergency; and 2) CEQA Guidelines section 15275, as a mass transit project that would institute or increase “passenger or commuter service on rail lines”. The department then issued a determination that no further environmental review was required for the project.

On August 12, 2020, the SFMTA City Traffic Engineer approved, as needed, the associated stop, street, and parking changes for the project.

On August 19, 2020, the SFMTA Director of Transit approved the Rail service adjustments. This approval marked the approval of the whole of the project.

On August 20, 2020, the Planning Department posted the date of the approval by the SFMTA Director of Transit for the Muni Rail Service Adjustments. This posting of the approval marked the start of the appeal period for the statutory exemption.

On September 14, 2020, an appeal of the statutory exemption determination was filed by Justin A. Zucker of Rueben, Junius & Rose, LLP on behalf of Safeway, Inc. (an appellant).

On September 21, 2020 an appeal of the statutory exemption determination was filed by David Pilpel (an appellant).

CEQA Guidelines

Statutory Exemptions

In accordance with Article 18 Statutory Exemptions, CEQA Guidelines sections 15260 through 15285 list statutory 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).

CEQA Guidelines section 15275 states that CEQA does not apply to mass transit projects that would institute or increase passenger or commuter service on rail lines already in use.

Planning Department Responses

Two appeals of the statutory exemption determination for the project were timely filed. The concerns raised in each appeal letter are addressed below as they relate to the department's determination that the project is statutorily exempt from CEQA. Where both appellants raise a similar concern, the responses below refer to those concerns in the plural (e.g., "appellants"). The responses below refer to the appellant in the case when one appellant raises a concern that the other appellant(s) did not (e.g., "appellant").

Response 1: The project meets the definition of CEQA section 21080(b)(4) and CEQA Guidelines section 15269(c) Emergency Projects statutory exemption and the definition of CEQA Guidelines section 15275 Specified Mass Transit 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 issued a local health emergency for San Francisco 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.

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.² 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 October 14, 2020 approximately 7.8 million people have had confirmed COVID-19 cases and approximately 215,000 of these cases have resulted in death.³ Thus, COVID-19 is an emergency pursuant to CEQA section 21080(b)(4) and CEQA Guidelines section 15269.

² San Francisco Department of Public Health. 2020. COVID-19 Cases and Deaths. Available online at <https://data.sfgov.org/stories/s/dak2-gvuj>. Accessed October 14, 2020.

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 October 14, 2020.

The SFMTA – COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall 2020 project is responding to the COVID-19 public health emergency

Since April 8, 2020, the SFMTA has operated a COVID-19 Muni Core Service Plan. The purpose of the COVID-19 Muni Core Service Plan is to enable the public to safely make essential trips by transit. Public Health Order No. C19-07 requires individuals to maintain social distancing of at least six feet from any other person not in their household when they are outside their residence, including while waiting for and riding on transit vehicles. The project would implement rail service modifications and associated streetscape and traffic changes that would allow for more rail cars to operate under the COVID-19 Muni Core Service Plan. Having additional train cars in operation, and the space they provide, would facilitate adequate social distancing on trains. The associated street and parking changes would provide for adequate social distancing for passengers waiting for or disembarking train cars. The project would also improve rail functionality and reduce delays which would reduce the amount of time riders spend on a train, thereby reducing the potential for exposure to COVID-19.

Even if the SFMTA – COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall 2020 project would address transit reliability issues that existed prior to COVID-19, appellant Safeway argues, that is not germane to the question of whether the project is eligible for an emergency projects statutory exemption under CEQA. What matters is whether the proposed project meets the definition of an emergency project under CEQA and would mitigate the COVID-19 public health emergency and help prevent it from further spreading. As described above, COVID-19 is an emergency and the project would prevent or mitigate it in two ways. First, by providing more rail cars so that riders can spread out and more easily distance themselves from others while making essential trips. Second by increasing transit reliability to decrease the amount of time riders must spend on transit vehicles. Furthermore, the whole of the proposed project would be temporary, contrary to appellant Safeway’s claim. The project does not include construction of permanent infrastructure and the proposed changes can be adjusted or removed quickly. Implementation of the project would include temporary striping, signage on existing poles or moveable signage, installation of safe-hit posts or other moveable barriers on the ground, and the placement of wooden ADA accessible platforms on the ground. No excavation would be required. The changes would expire within 120 days of the City rescinding the local public health emergency order. For these reasons, the project is responding to the COVID-19 public health emergency and qualifies for an emergency projects statutory exemption under CEQA. Thus, the project was properly exempted from CEQA.

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 apply to the proposed SFMTA – COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall 2020 project, as elaborated below.

The emergency that 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. The SFMTA is responding to the ongoing nature of the emergency by modifying

the COVID-19 Muni Core Service Plan to allow for additional transit vehicles for social distancing as transit ridership has grown since late March. 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.”⁴ The COVID-19 public health emergency is ongoing. Therefore, the exclusion to statutory exemptions under CEQA Guidelines section 15269(c), that it 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”, does not apply to the proposed project.

Appellant Pilpel raised concerns about potential health impacts due to related to rail transfers that would occur due to the proposed changes near the J Church line termination area. Appellant Safeway raised general concerns about potential traffic and pedestrian safety impacts, cumulative impacts, and unusual circumstances that would preclude an exemption determination. However, unlike a categorical exemption, a statutory exemption applies to any given project that fits within its definition, regardless of the project’s potential impacts to the environment. The department did not issue a categorical exemption for the project. Because the consideration of cumulative impacts and unusual circumstances only applies to projects evaluated for a categorical exemption, and not to projects evaluated for a statutory exemption under CEQA, the department did not address these. Overall, evaluation of environmental effects is not relevant for a project that qualifies for a statutory exemption under CEQA.

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.

The SFMTA – COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall 2020 project is a specified mass transit project pursuant to CEQA Guidelines section 15275

CEQA Guidelines section 15275 states than CEQA does not apply to mass transit projects that would institute or increase “passenger or commuter service on rail lines already in use, including the modernization of existing stations and parking facilities”. As discussed above, the SFMTA – COVID-19 Muni Rail Service Adjustments and Associated Street and Parking Changes – August 22nd, 2020, and Fall 2020 Project would increase passenger service on the N Judah, TM Third-Ocean View, LK Taraval-Ingleside, J Church, and S Shuttle rail lines compared to existing ridership on these lines. The project is also proposing street and traffic changes near the West Portal Station area and the J Church line termination area to support the reinstatement of the N Judah, TM Third-Ocean View, LK Taraval-Ingleside, J Church, and S Shuttle rail lines. For these reasons, the project meets the definition of a specific mass transit project statutory exemption and was properly exempted from CEQA.

⁴ 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 October 14, 2020.

Conclusion

The department has determined that the 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 in Guidelines section 15269, (2) none of the exclusions specified in CEQA Guidelines section 15269 prohibiting the use of an emergency project statutory exemption are applicable to the project, and (3) the project meets the definition of an specified mass transit project statutory exemption in CEQA Guidelines section 15275. The appellants have not demonstrated that the department's determination is not supported by substantial evidence in the record.

For the reasons stated above and in the August 12, 2020 CEQA statutory exemption determination, 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 exemptions. The department therefore respectfully requests that the board uphold the CEQA statutory exemption determination and deny the appeal of the CEQA determination.