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

TO:
Brent Jalipa, Legislative Clerk
Angela Calvillo, Clerk, and
San Francisco Board of Supervisors
Room 244 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

DATE: November 27, 2017

RE: BOS File No. 171147

APPELLANT'S REBUTTAL BRIEF IN SUPPORT OF APPEAL TO BOARD OF SUPERVISORS OF CEQA DETERMINATION ON "HAIRBALL INTERSECTION IMPROVEMENT PROJECT"

Appellant submits this Rebuttal to the November 20, 2017 "Planning Department Response to the Appeal of Categorical Exemption for the SFMTA-Hairball Improvement Project (Segments M, N, O.)" ("Response"). The Planning Department's Response does not respond to Appellant's Opening Brief, timely submitted to this Board on November 17, 2017. (San Francisco Admin. Code §31.16(b)(6).) On November 27, 2017 at 2:00 p.m., Planning generated a "Supplemental Response," which is untimely and must be disregarded entirely by this Board. (San Francisco Administrative Code, §31.16(b)(5).) Other reasons for disregarding Planning's Response and granting this appeal also follow.

I. PLANNING'S RESPONSE FAILS TO ADDRESS APPELLANT'S OPENING BRIEF

The Planning Department's ["Planning's"] Response fails to respond to Appellant's Brief in Support of this Appeal timely submitted to this Board on November 17, 2017, eleven days before the hearing. Instead, the Response claims it is only addressing Appellant's Public Comment submitted to the MTA Board on September 19, 2017. (Response, p. 3.) The MTA Board had already received that Comment, and that Board and Planning already had a chance to respond before and during the MTA Board's September 19, 2017 hearing. This Board should disregard Planning's inadequate and disingenuous Response.

The matter before this Board now is Appellant's appeal, which was triggered by MTA's September 19, 2017 Resolution approving of the Hairball Intersection Improvement Project.

Appellant submitted a 102-page Opening Brief with exhibits in Support of this Appeal, which is in the BOS Packet at pp. 2491-2505 (brief), 2506-2592 (exhibits). (See also, Letter dated November 17, 2017, Packet, pp. 2593-2594.)

To comply with CEQA and the San Francisco Administrative Code, this Board must consider *all* briefs and materials submitted in support Appellant's appeal, regardless of Planning's failure to do so, including Appellant's Opening Brief and attachments, submitted November 17, 2017, and this Reply submitted November 27, 2017. (San Francisco Admin. Code §31.16(b)(6).)

The following are more reasons why the Board should disregard Planning's Response. The Board should grant Appellant's Appeal, and remand the CEQA determination to Planning with instructions to conduct further environmental review of the Hairball Project, beginning with an initial study.

II. PLANNING'S "RESPONSE" IS FALSE, EVASIVE, AND MISLEADING

Planning admits that this Project was reviewed in City's 2009 Environmental Impact Report ("EIR"), but it ignores that the EIR identified 27 significant impacts in the Hairball Project area, which City has failed to mitigate. (Response, p. 5.)

Planning falsely states that Appellant has not produced "substantial evidence" that the Project will have impacts. (Response, p. 5.) City's EIR *is* substantial evidence.

Planning falsely states that the Hairball Project area was not part of the 2009 Bicycle Plan Project. (Response, p.7.) Planning then contradicts that claim, admitting that three Bicycle Plan projects included in the 2009 EIR and Addenda are "within the project vicinity." Evading addressing the impacts identified in the EIR, Planning slips and slides around that fact by claiming that segments of the Hairball Project have "independent utility." (Response, p.8.) For the reasons already explained, City may not legally piecemeal environmental review to avoid reviewing the *whole* Hairball Project, and it does not show with substantial evidence that those segments have "independent utility." (See Appellant's Opening Brief, pp.6-13 [Packet, pp. 2496-2503].)

III. PLANNING'S RESPONSE FAILS TO ADDRESS CITY'S ILLEGAL PIECEMEALING

Planning's Response fails to address City's illegal piecemealing of the Project, simply repeating the mistaken notion that City can somehow renew the illegal strategy that resulted in a permanent Injunction against the City. City does not address or respond to Appellant's facts and arguments on piecemealing. City's repetition of the "independent utility" fiction does not apply here, as already discussed. (Appellant's Opening Brief, pp. 10-12 [Packet, pp. 2500-2502].) City *admits* through its own documents and illustrations that the Hairball Project consists of at least 15 parts, including "Segments M, N, and O." (See Appellant's Opening Brief, pp. 6-13 [Packet, pp. 2496-2503].)

IV. PLANNING FAILS TO CORRECTLY ADDRESS THE PROJECT'S CUMULATIVE IMPACTS AND FALSELY CLAIMS THAT ANALYSIS IS UNNECESSARY

Planning falsely states that it need not address cumulative impacts. City failed to identify the Project's cumulative impacts, which, as already discussed, had to be addressed *before* claiming the Project was categorically exempt. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 171; *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 285; *Orinda Ass'n. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171; 14 Cal. Code Regs. ["Guidelines"] §§15060(c)(2), 15065, 15131(a)(1),

15355(b); see also Appellant's Opening Brief, pp. 8-13 [Packet, pp. 2498-2503].) City instead claims with no supporting evidence that the Project's cumulative impacts on traffic, parking, air quality, GHG, energy consumption, and displacing homeless people do not exist. Those impacts clearly do exist, and City needs to deal with them to comply with CEQA. (*Ibid.*)

V. THE PROJECT IS NOT CATEGORICALLY EXEMPT

A. The Project Does Not Fit Within The Section 15301 Categorical Exemption

City's interpretation of what may fit within a categorical exemption is so overbroad as to be frivolous. (Response, p. 4.) City claims that because streets and sidewalks are "typically used" for "a variety of purposes," that anywhere a street exists would be an "existing condition." City is plainly wrong, since categorical exemptions are construed narrowly and may not be expanded beyond their terms or CEQA's statutory purpose. (*County of Amador v. El Dorado County Water Agency ["County of Amador"]* (1999) 76 Cal.App.4th 931, 966; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* [*"Azusa"*] (1997) 52 Cal.App.4th 1165, 1192.) City's citation to its "Transit First" policy is irrelevant to the factual determinations that must underlie a categorical exemption. (*Id.*)

The Hairball Project does not fit the categorical exemption in Guidelines §15301, which narrowly applies to minor alterations to existing conditions. The *existing* public street space does *not* contain exclusive or "protected" bicycle lanes. Therefore, Planning fails to meet its burden to show ***existing*** conditions.[1]

Further, Planning's Response ignores MTA's Staff Memo that states the Project's segment changes are only "near-term" and that MTA staff are working on "the detailed design of a long-term project that will propose similar changes...but *will be designed and constructed with concrete*," and that the concrete structures may or may not "require SFMTA Board approval." (Appellant's Opening Brief, Exhibit C,, p. 3 [Packet, p. 2493], emphasis added.) That is not a "minor alteration."

Further, the Project proposes a change of *use*, which removes the Project from the scope of the "existing facilities" exemption. (*E.g., County of Amador, supra,* 76 Cal.App.4th at p. 967 [existing facilities exemption does not apply to a project that changed use of an existing hydroelectric facility from non-consumptive to consumptive use]; *Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* (2006) 141 Cal.App.4th 677, 698 [rejecting Class 2 exemption where city failed to show that a proposed "replacement structure...will have substantially the same purpose and capacity as the replaced structure"].) The Project here proposes a change of use of public streets from use by all travelers, to a use that excludes all travelers who are not among the tiny minority of bicyclists. It is therefore not categorically exempt.

Similarly, the Project's proposed parking changes are not changes to existing conditions, which allow overnight parking. Instead, the Project proposes entirely new parking prohibitions that did not previously exist and therefore do not fit within any "existing conditions" categorical exemption.

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[1] For the same reasons, Planning's Response at fn. 2 claiming that Guidelines §15304(h) applies here for minor alterations to land is also mistaken. The land here does not contain bicycle lanes, concrete barriers, or restrictions on night parking.

B. The Project Is Not Categorically Exempt, Because Substantial Evidence Shows That It Will Have Significant Impacts

Planning's Response ignores that City's 2009 EIR on the Project area identified 27 significant impacts that have not been mitigated. An EIR *is* substantial evidence for the facts it states. City therefore may not claim that this Project is exempt from CEQA. (*Azusa, supra,* 52 Cal.App.4th at p. 1199.)

Planning's Response falsely states that "appellant has not provided substantial evidence to support the claim that there exists a reasonable possibility of any significant impacts." (Response, p. 5.) In fact, Appellant provided extensive citations to City's own EIR on the Project, which identified 27 significant impacts on traffic, transit and loading from the Hairball Project before its current renaming by MTA, impacts that are still under appeal because City has failed to mitigate them. (See Appellant's Opening Brief, p. 4, fn. 2 [Packet p. 2494].)

A project cannot be categorically exempt where, as here, City's own EIR identifies significant impacts.

C. Planning Cannot Meet Its Burden To Show The Project Is Categorically Exempt

Planning fails to support its claimed categorical exemption with substantial evidence. An agency's claim of categorical exemption will not be upheld without substantial evidence in the agency's record supporting that determination. (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 705.) The burden is on the *agency*, not Appellant, to support its exemption. (*Id.*)

D. Planning's "Checklist" Is Invalid And Irrelevant

Planning falsely claims that its invalid "Checklist: CEQA Section 21099-Modernization of Transportation" somehow supports its section 15301 categorical exemption, and that Planning "identified screening criteria to identify types, characteristics, or locations of projects and a list of transportation project types that would not result in significant transportation impacts under the VMT metric," and that its "screening criteria are consistent with CEQA Section 21099." (Response, p. 9.)

As already noted, City's "Checklist" is invalid and unauthorized, since Public Resources Code §21099 authorizes only the state Office of Planning and Research to develop future CEQA Guidelines, *not the City or its Planning Department.* City has *no* authority to create its own version of CEQA Guidelines. (Appellant's Opening Brief, p. 13 [Packet, p. 2503].)

Moreover, checklists do not support or provide a foundation for City's environmental determination. (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 784.)

VI. CITY'S SELECTIVE MEETINGS WITH "STAKEHOLDERS" IS NEITHER "PUBLIC" NOTICE NOR "OUTREACH"

Planning admits that it conducted "outreach" *only* to the San Francisco Bicycle Coalition and other Project proponents and *not* to the general public. (Response, p. 5.) The MTA has refused to produce records of "stakeholder" contacts, even though they were requested with an immediate disclosure request under the Sunshine Ordinance. (See Exhibit A, attached.) Neither agency has complied with CEQA, which requires public notice of public projects, including the

Hairball Project, which is a *public* Project that is paid for by the public and affects the public's environment.

Notably, City's "stakeholders" (Response, p.10) did not include travelers other than bicyclists, a demographic that is only two percent of travelers in San Francisco. (See Fehr & Peers: 2013-2017 Travel Decision Survey Data Analysis and Comparison Report, July 2017, p. 15, showing decline in bicycle mode share in San Francisco from 3% in 2014 to 2% in 2017].)

City's "stakeholders" also did *not* include those who will be displaced by the Hairball Project. (See, *e.g.*, Appellant's Opening Brief, Exhibits H and I [Packet, pp. 2591-2592].)

CONCLUSION

The proposed Hairball Intersection Improvement Project is not categorically exempt from CEQA. The Board of Supervisors should grant this Appeal, set aside the Planning Department's Categorical Exemption, and return the Project to the Planning Department for further environmental review to comply with CEQA, beginning with an initial study of the whole Project.

DATED: November 27, 2017

Mary Miles

EXHIBIT A

Mary Miles

From: Mary Miles <page364@earthlink.net>
Sent: Monday, November 13, 2017 8:55 AM
To: Edward Reiskin (ed.reiskin@sfmta.com); Caroline Celaya (caroline.celaya@sfmta.com); 'SFMTA Sunshine Requests'
Subject: IMMEDIATE DISCLOSURE REQUEST

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

TO:
Edward Reiskin, Director
Caroline Celaya, Records Custodian
San Francisco Municipal Transportation Agency
#1 S. Van Ness Ave., 7th Floor
San Francisco, CA 94103

DATE: November 13, 2017

IMMEDIATE DISCLOSURE REQUEST PURSUANT TO THE SAN FRANCISCO SUNSHINE ORDINANCE AND THE CALIFORNIA PUBLIC RECORDS ACT

This is an IMMEDIATE DISCLOSURE REQUEST pursuant to the San Francisco Sunshine Ordinance on the proposed "Hairball Project" approved by the MTA Board on September 19, 2017, and the Staff Report on that Project dated September 11, 2017. Please provide the follow records showing:

1. Studies (if any) of parking and parking occupancy on Jerrold Avenue, Barneveld Avenue, and the entire Project area.

2. Studies, correspondence, including emails, notes, and any other records showing that workers often cannot find parking due to vehicles parked overnight on nearby streets.

3. Studies, correspondence, including emails, notes, and any other records showing that there are oversized recreational vehicles that use the area of Barneveld Avenue where the parking restrictions are proposed.

4. SF Park's current Parking Supply Map specifically showing that the proposed parking restriction affects a small percentage of unregulated parking spaces in the area.

5. Map and/or description with street addresses or segments showing the specific location(s) where other unregulated parking spaces in the area are located.

6. Correspondence, including emails, notes, and any other records showing businesses contacted regarding the proposed removal of two loading zones on Barneveld Avenue.

7. Copy of the Cesar Chavez East Community Design Plan.

8. Full names of all stakeholders contacted for feedback, and copies of all correspondence, including emails, notes, and any other records showing communications with each of those stakeholders by name.

9. Full names and titles of MTA staff who met with the merchants along Jerrold Avenue, and the full names and addresses of those merchants.

10. Full names and titles of all staff from District 9, and all communications including email between MTA staff and staff from District 9.

11. Full names and titles of all staff from District 10, and all communications including email between MTA staff and staff from District 10.

12. Records of all feedback and input from stakeholders and merchants to develop a "balanced solution."

13. Full names of the members of the public who had objections to the parking restrictions, and all notes and communications including email, stating their objections.

14. Full names and positions of MTA staff who heard comments and stated the need to balance traffic safety with parking needs, and all notes and communications including email, responding to the comments.

In your response to this Request, please provide the full name and contact information of any person responding to this Request. In all responses to this Request, including on any disc provided, please refer to the specific Item numbers above. If information is provided on a disc, please place it in a folder on the disc corresponding to the above Item numbers. If you do not refer to the specific Item numbers in this Request in your response, I will deem that a denial of this Request. If the above records are available electronically, please provide them on a disc. Please do not send internet links or sites as a response to this Request, since I will deem that a denial of this Request. Please advise me in advance if the cost of copies of these records will exceed $10. If any of the above records will not be immediately provided, please state what records will and will not be immediately provided, referring to the above Item numbers, provide the **exact date** when you will provide any records not immediately provided, and do not delay providing the records that are immediately available, referring in all responses to the Item numbers above. If I have not received a response to this Request by 5:00 p.m. on November 14, 2017, I shall deem this Request denied.

Thank you for your attention to this IMMEDIATE DISCLOSURE REQUEST.

Sincerely,
Mary Miles