| | |
|---|---|
| **From:** | Mary Miles |
| **To:** | BOS Legislation, (BOS) |
| **Subject:** | Appellant"s Brief in Support of Appeal, BOS File No. 200903 |
| **Date:** | Monday, September 28, 2020 7:39:21 PM |
| **Attachments:** | 9-28-20 TETL BRIEF BOS FILE 200903.pdf |



FROM:

Mary Miles (SB #230395)

Attorney at Law

364 Page St., #36

San Francisco, CA 94102

TO:

Angela Calvillo, Clerk and Members of

San Francisco Board of Supervisors

Room 244, City Hall

1 Dr. Carlton B. Goodlett Place

San Francisco, CA  94102

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

DATE: September 28, 2020

**BOS FILE  200903**

Attached is Appellant's Brief in Support of Appeal of CEQA Exemption on MTA "Temporary Emergency Transit Lanes" ("TETL") Project.

Mary Miles

Attorney for Appellant

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

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

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

DATE: September 28, 2020

**APPELLANT'S BRIEF IN SUPPORT OF APPEAL OF CEQA EXEMPTION ON MTA "TEMPORARY EMERGENCY TRANSIT LANES" ("TETL") PROJECT**
**BOS FILE NO. 200903**

## INTRODUCTION

This Appeal is of the San Francisco Planning Department's environmental determination that the San Francisco Municipal Transportation Agency's ("MTA's") "Temporary Emergency Transit Lanes" ("TETL") Project ("Project") is exempt from the requirements of the California Environmental Quality Act ("CEQA") (Pub. Res. Code §§ 21000 *et seq.*)

The Project is not exempt from CEQA. The approval and implementation of the Project by MTA violate CEQA's fundamental requirement that the public should be informed and meaningfully participate in the decisionmaking process on projects that may affect the environment. Under CEQA, the environment belongs to everyone, not special interests.

The Project does not qualify for an emergency exemption under CEQA, because COVID-19 is not an emergency under CEQA, and because removing many traffic lanes and **837 parking spaces** throughout the City are not "specific actions necessary to prevent or mitigate an emergency" as defined in CEQA.

There is no evidence in the record that removing traffic lanes and parking to create "emergency bikeways" and bus-only lanes does anything to "prevent or mitigate" COVID-19.

Directives and orders declaring a health emergency due to COVID-19 are not an "emergency" under CEQA, and the California Health and Safety Code does not suspend CEQA's requirements. While a health hazard from COVID-19 does exist, it has been ongoing for at least seven months and may go on for years. That ongoing condition does not justify MTA's assertion of unaccountable authority to change City streets without environmental review and public proceedings. There is no "sudden, unexpected occurrence" as required for an emergency exemption under CEQA. (Pub.Res.Code ["PRC"], §21060.3.) There is no evidence in the record that MTA's specific actions are *necessary* to prevent or mitigate COVID-19. (PRC §21080(b)(4); 14 Cal. Code Regs. [CEQA "Guidelines"], §15269(c).)

Nor is the Project categorically exempt under Class 1, Existing Facilities (Guidelines §15301.), as claimed. The claimed categorical exemption for "minor alterations" and "existing conditions" under Section 15301 does not apply to the Project, because it is not a "minor alteration" of an existing facility.

There are no existing bicycle or transit lane "facilities" on any of the affected streets. Instead, the Project proposes major changes of use, by eliminating traffic lanes and parking to create "emergency bikeways" and bus-only lanes, on those streets, which include major transportation corridors such as Masonic Avenue, 19th Avenue, Mission Street, Ocean Avenue, Lincoln Way, California Street, and many others.

Since this citywide Project clearly may have significant direct, indirect, and cumulative impacts adversely affecting transportation, traffic congestion, air quality, GHG, public safety (including emergency vehicle access), parking, and energy consumption, it is not categorically exempt under CEQA.

By implementing the Project without environmental review, MTA violated CEQA's fundamental mandate of allowing the public to participate meaningfully in environmental determinations *before* Project approval. (*Laurel Heights Improvement Assn. v. Regents of the University of California* [*"Laurel Heights I"*] (1988) 47 Cal.3d 376, 394.)

MTA's failure to accurately describe the Project and its,duration, and scope violates CEQA, misleads the public, and does not support the asserted exemptions. As MTA's documents state, the Project is permanent on the streets already designated, it will have no other approval process, and it confers vast powers to the City Traffic Engineer to change *any* street in the City in the future.

The Board should therefore grant this appeal and require MTA and Planning to comply with CEQA's requirement of environmental review.

## FACTS

Facts stated in Appellant Coalition for Adequate Review's Notice of Appeal filed July 30, 2020, are not repeated here and are, with the Notice of Appeal, incorporated herein by reference along with citations to the record.

MTA's "initial phase" of its TETL Project removes an unstated number of traffic lanes, turning lanes, loading zones, and **837 parking spaces**, to install exclusive bus-only and "emergency bicycle lanes" on city streets. (6/10/20 MTA Memo, p. 3.)[1] The Project would convert travel and parking lanes to bus-only or "emergency bicycle" lanes. (6/10/20 MTA Memo, pp. 2-9.) The Project would also remove turning lanes, loading zones, and motorcycle and vehicle parking. (6/10/20 MTA Memo, p. 11.) The Project also changes boarding of MTA facilities. (*Id.*)

MTA claims that "The proposed changes . . . are to facilitate members of the public maintaining six feet social distance while making essential trips by bus or bicycle modes." (6/10/20 MTA Memo, p. 10.) No evidence is provided of *any* increase in *essential* trips by bicycle or bus.

[1] The "6/10/20 MTA Memo" refers to the MTA Memorandum from Ian Trout, SFMTA, to Laura Lynch, SF Planning Department, June 10, 2020, in Appellant Coalition for Adequate Review's July 30, 2020 Notice of Appeal at Exhibit B. References in this Brief are to the Planning Department's Exemption document, including a four-page "CEQA Categorical Exemption Determination" checklist, and the June 10, 2020 Memorandum, cited as "6/10/20 MTA Memo."

As MTA admits, transit ridership has declined by 90%, and travel by other motor vehicles is only 60% of pre-COVID-19 levels. (MTA Fiscal Year 2021-2022 Update, June 30, 2020, p. 12.)

A list of MTA's "initial phase" street changes is in Appellant's Notice of Appeal and in the Exemption document. (6/10/20 MTA Memo, pp. 3-14.) MTA's map of streets it will change is at Exhibit C of the Notice of Appeal. Those streets include major traffic corridors throughout San Francisco.[2]

On February 25, 2020, Mayor London Breed issued a proclamation "Declaring the Existence of a Local Emergency" under California Government Code Section 8550 due to "the ongoing spread of a novel coronavirus" discovered in Wuhan, China in December 2019 known as "COVID-19." (https://sfmayor.org/sites/default/files/Proclamation%20of%20Local%20Emergency%20re.%20COVID-19%202.25.2020.pdf )

On March 6, 2020, San Francisco's Health Officer declared a local health emergency under California Health and Safety Code ("H&S Code") Section 101080 after announcing that "two individuals in San Francisco had contracted COVID-19 without any known avenue of transmission, suggesting the contagion was community-acquired … and that the virus is circulating in the Bay Area." (https://www.sfdph.org/dph/alerts/files/HealthOfficerLocalEmergencyDeclaration-03062020.pdf) Since section 101080 provides that the Declaration "may remain in effect for up to seven days, but it can continue … if it has been ratified by the Board of Supervisors," the Health Officer asked the Board to continue the local health emergency "beyond March 13, 2020 … until the Board of Supervisors proclaims the local health emergency has terminated." (*Id.*)

On March 10, 2020, the Board of Supervisors ratified the local health emergency declared by the Department of Public Health by passing Motion No. M20-38, which states that "the Local Health Emergency shall continue beyond March 13, 2020, until, in consultation with the Health Officer, the Board of Supervisors proclaims the Local Health Emergency is terminated." (Motion M20-38, March 10, 2020, BOS File No. 200265.)

Since then, the Mayor has issued at least 26 supplements to the February 25, 2020 proclamation, and the Health Officer has issued numerous amendments to the March 6, 2020 declaration, along with other orders and directives. (https://sfmayor.org/mayoral-declarations-regarding-covid-19; https://www.sfdph.org/dph/alerts/coronavirus-health-directives.asp.)

Since March 2020, MTA has claimed that "emergency" exemptions from CEQA confer unlimited power on that agency to implement projects closing and altering San Francisco streets with no public process or environmental review. MTA has approved and implemented closing at least 50 streets to through travel by cars under its "Slow Streets" project, eliminating traffic lanes and parking spaces throughout the City, and removing access to public parks, viewpoints, and

[2] Potrero Avenue, Bayshore Blvd., Laguna Honda Blvd., Woodside Avenue, O'Shaugnessy Blvd., Bosworth St., Mission Street, Castro Street, Divisadero Street, California Street, Sacramento Street, Clay Street, 7th Street, 8th Street, Masonic Avenue, Presidio Avenue, Fulton Street, 4th Street, Geary Boulevard, Haight Street, Lincoln Way, Ulloa Street, West Portal Avenue, Church Street, Park Presidio Blvd./Crossover Drive, Post Street, Sutter Street, Ocean Avenue, Hyde Street, Eddy Street, Larkin Street, Geneva Avenue, 19th Avenue/Junipero Serra Blvd., Veterans Blvd./Presidio Parkway/Richardson Avenue/Lombard Street. (6/10/20 MTA Memo, pp. 4-8.)

scenic public streets by travelers in cars, with all projects claiming emergency exemptions from CEQA that were issued *post facto* by the Planning Department. MTA claims that all of those projects are temporary, but then states that it will make them permanent at will at some future time. (6/10/20 MTA Memo, pp. 14-15.)

With the TETL Project, MTA states that all of the streets in its "initial" phase are permanent, but that some form of "process" may take place when the Traffic Engineer approves future street changes. (6/10/20 MTA Memo, pp. 14-15.) By amending the Transportation Code, the Project would give the Traffic Engineer complete discretion to change any street in San Francisco. (*Id.*; 7/30/20 Notice of Appeal, Exh. A.)

MTA approved this Project on June 30, 2020. (7/30/20 Notice of Appeal, Exh. A [MTA Board Resolution 200630-062].) Planning issued a backdated document stating the Project was statutorily exempt under Guidelines section 15269(c), and categorically exempt under section 15301. (7/30/20 Notice of Appeal, Exh. B.)

Appellant filed a Notice of Appeal on July 30, 2020, and another party also appealed the Planning Department's environmental determination that day. The Board of Supervisors "consolidated" the two appeals for hearing on the same day under BOS File No. 200903, with nothing in the record to document that such action was taken under Administrative Code Section 31.16(b)(4).

MTA's July 21, 2020 Project Map (7/30/20 Notice of Appeal, Exh. C) shows its plans to implement the Project. On July 14, 2020 MTA announced on its website that it was implementing the Project on 7th and 8th Streets, Masonic Avenue, Laguna Honda, O'Shaugnessy, and Mission Street, claiming that it feared a return of pre-COVID-19 traffic congestion.[3] On September 9, 2020, MTA posted a similar announcement on its website that it would implement the Project on Geary Boulevard.

On August 22, 2020 with no public notice, MTA implemented the Project, closing a block of Church Street between 15th and Market Street. (https://hoodline.com/2020/09/half-block-church-street-closure-leads-to-merchant-complaints-muni-seeks-alternatives; https://sanfrancisco.cbslocal.com/2020/09/17/muni-closure-of-church-street-near-market-causing-hardship-for-businesses/; https://www.sfmta.com/projects/j-church-transfer-improvements). On September 15, 2020, the MTA Board considered another *post hoc* approval of its already-implemented Project changes at Church and Market, West Portal Station, and other locations using different piecemealed exemptions and approvals, even though this appeal was pending on the Project, including those changes. The MTA Board took no action on September 15, 2020.

MTA's actions to implement the Project violate CEQA and City's own codes, which provide for appeal of an exemption determination to this elected body before a project may be implemented. (see, *e.g.*, Pub. Res. Code §21151(c); SF Admin Code § 31.16(b)(3) [other departments "shall not carry out…the project "until the "CEQA decision is affirmed by the Board [of Supervisors];" §31.16(b)(5) [the public may submit materials to the Board of Supervisors prior to scheduled

[3] https://www.sfmta.com/projects/19-polk-7th-and-8th-streets-temporary-emergency-transit-lanes; https://www.sfmta.com/projects/43-masonic-and-44-oshaugnessy-temporary-emergency-transit-lanes; https://www.sfmta.com/sites/default/files/reports-and-documents/2020/09/masonic-lagunahonda_tetl_9.16.20_presentation.pdf; https://www.sfmta.com/projects/38-geary-temporary-emergency-transit-lanes.

hearing on an appeal]; and §31.16(e) ["The date the project shall be considered finally approved shall occur no earlier than either the expiration date of the appeal period if no appeal is filed, or the date the Board affirms the CEQA decision, if the CEQA decision is appealed."].)

## PROCEDURAL OBJECTIONS

Appellant objects to the Board of Supervisors ("BOS") procedures requiring an appellant to comment eleven days in advance of the Board's hearing as contrary to CEQA, which allows public comment up to and including the date of the hearing or final disposition by the Board. (PRC § 21177(a); Guidelines § 15202(b); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1202.)

The right to public comment is undermined by the Board's improper time constraints, which deprive Appellant and the public of the right to more fully set forth their position and be heard. Further, Appellant is not subject to "exhaustion" requirements in future proceedings where the lead agency does not conduct public proceedings before its environmental determination. (*Ibid.*; see also, *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* [*"Azusa"*] (1997) 52 Cal.App.4th 1165, 1209-1210.)

Here, the Board of Supervisors provided only 14 days' notice of the hearing and scheduled nine appeals on the same September 22, 2020 date, which made it impossible to submit an interested persons address list 20 days before the hearing as required. The Board's short notice limited Appellant and the public to only three days to submit briefs or public comment under the Board's 11-day requirement.

Claiming that the Board "may" continue those hearings, the September 8, 2020 "notice" indicated that the Board would *only* hear continuance requests at the September 22, 2020 hearing. Appellant's September 10, 2020 Request for Continuance was unanswered with no indication that it was even distributed to Board members.

Appellant objects to the Board's 14-day notice, to scheduling multiple appeals on one day, making it impossible to submit briefs and an address list for public notice and thereby curtailing meaningful participation by Appellant and public comment.

On September 24, 2020, at 5:55 p.m. the Board Clerk sent e-mail stting the Board was mergng five separate appeals by two different parties, on separate Planning Exemptions on different MTA projects, conflating the issues, and reducing the time for Appellant and the public to speak on the appeals to a fraction of the time allowed by San Francisco Administrative Code, Chapter 31, by Board Rules, and by established precedent.

Appellant has filed additional procedural objections prior to the September 29, 2020 hearing.

## ARGUMENT

### I. THE PROJECT DOES NOT QUALIFY FOR A STATUTORY EMERGENCY EXEMPTION UNDER CEQA

#### A. There Is No Emergency Under CEQA's Strict Definition

An emergency under CEQA is strictly defined as "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." (PRC §21060.3.)

CEQA's definition of emergency is "explicit and detailed." (*Western Mun. Water Dist. v. Superior Court* [*"Western Municipal"*] (1986) 187 Cal.App.3d 1104, 1111.) "We particularly note that the definition limits an emergency to an '*occurrence*,' not a condition, and that the occurrence must involve a '*clear and imminent danger, demanding immediate action.*'" (*Id.* [emphasis in original].)

In *Western Municipal*, the Water District claimed an emergency exemption under CEQA to pump water from an aquifer to "'prevent or mitigate earthquakes.'" (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1111.) The court denied that claim, noting that no earthquake was suddenly occurring, and that such a generalized claim of a possible emergency was not sufficient for an exemption from CEQA. "Such a construction completely ignores the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature" and that the agency's failure to "give meaning to *each word of the statute*" was erroneous. (*Id.* [emphasis added].)

As in *Western Municipal*, COVID-19 is not a "*sudden, unexpected occurrence*." Since it has been with us for at least seven months, there is no "*imminent* danger."

City's claim that COVID-19 is an "emergency" is factually and legally mistaken. Although the Mayor proclaimed a "local emergency" under the Government Code and the Health Officer declared a "local health emergency" under the Health and Safety Code and called for measures such as "social distancing" to deal with the pandemic, that does not allow a city agency to declare a project exempt under CEQA's emergency exemption. (*Los Osos Valley Associates v. City of San Luis Obispo* ["Los Osos"] (1994) 30 Cal.App.4th 1670, 1682 [city council's declaration was neither conclusive nor sufficient].) "Emergency is not synonymous with expediency, convenience, or best interests … and it imports 'more … than merely a general public need.'" (*Id.* at p. 1681.) That CEQA exemption does not apply to an ongoing citywide condition such as the COVID-19 pandemic.

MTA claims that it must remove traffic lanes and parking to create bus-only lanes so that that people on buses can "maintain six feet of social distancing." (6/10/20 MTA Memo, p. 2.) MTA's presumptive leap is completely unsupported, since there is no evidence that more people will use buses during the COVID-19 pandemic. Instead, MTA admits that its bus ridership has declined by 90% since COVID-19. (MTA Board, June 30, 2020 Agenda Packet, p. 3.) MTA ignores that it has already drastically reduced transit service below pre-COVID levels, and it provides no evidence that transit is only being used during the COVID-19 pandemic for essential trips.

In fact, MTA Director of Transportation Jeffrey Tumlin, has stated that private automobiles are the safest form of transportation during the COVID-19 pandemic. (*San Francisco Chronicle*, April 14, 2020, https://www.sfchronicle.com/bayarea/article/Could-cars-emerge-with-a-better-image-when-SF 15198197.php) Obstructing and delaying the safest transportation mode is not a "specific action necessary to prevent or mitigate an emergency."

The only question considered by courts here is whether the agency has provided substantial evidence to support a finding of an emergency under CEQA. To do so, "the record must disclose substantial evidence of *every element* of the contended exemption as defined in section 21060.3."

(*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1113 [emphasis added].) Here, Planning simply checked a box on a form and claimed a statutory exemption under Guidelines section 15269(c). (Notice of Appeal, Exh. B, p. 1.)[4] No evidence is provided either by the Exemption document or MTA's 6/10/20 Memo supporting an emergency exemption under CEQA. The burden of proof is entirely on city agencies when claiming an emergency exemption under CEQA. (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1113.)

There is no evidence that COVID-19 is a "sudden occurrence." Instead, after seven months, it is an ongoing condition. Indeed, it is now often called the "new normal." There is no "imminent danger," since the danger of COVID-19 has been known for at least seven months.

In *Western Municipal*, the court noted that approving an agency's generalized claim of "emergency" would "create a hole in CEQA of fathomless depth and spectacular breadth," since any large public works project could claim to mitigate any condition that might result from a natural disaster. (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1112.)

Here, as in *Western Municipal*, MTA has improperly used the "emergency exemption" claim without evidence that the Project would prevent or mitigate an emergency as a pretext to avoid complying with CEQA and to implement far-reaching changes with no public process.

**B. The Project is Not *Necessary* To Prevent Or Mitigate An Emergency**

Projects exempt under CEQA's emergency exemption are limited to "*specific* actions *'necessary* to prevent or mitigate an emergency." (PRC §21080(b)(4) [emphasis added]; Guidelines, §15269(c); *Castaic Lake Water Agency v. City of Santa Clarita* ["*Castaic*"] (1995) 41 Cal.App.4th 1257, 1267.)

The agency must support the *necessity* of the *specific* action with substantial evidence. (*Castaic*, *supra*, 41 Cal.App.4th at p. 1267.) Instead, the agencies' actions are generalized, *not specific*, since the Project proposes a general grant of authority to MTA to change *any* street in San Francisco, and an "initial phase" to permanently change at least 36 major traffic corridors with no review under CEQA and no public process. (6/10/20 MTA Memo, pp. 3-8; fn. 2, *ante.*)

Moreover, the Project's elimination of traffic lanes and 837 parking spaces, changing them to "emergency bikeways" and bus-only lanes, is not *necessary* to prevent or mitigate an emergency. (PRC §21080(b)(4); Guidelines, §15269(c); *Castaic*, *supra*, 41 Cal.App.4th at p. 1267.)

In *Castaic*, the court rejected the agency's claim of an emergency exemption for a recovery plan from the 1994 Northridge Earthquake, because its plan did not meet CEQA's narrow requirement, since it included not just repair of the damage, but creating new "infrastructure improvements," including bikeways that did not exist before the earthquake, and it generally encompassed much of the City, not just a specific affected area. (*Castaic*, *supra*, 41 Cal.4th at p. 1267.)

Here, MTA claims that "[a]s a result of the [COVID-19] public health emergency," it "proposes to create temporary transit lanes … and temporary bikeways in order to support essential trips in San Francisco, allow for better physical distancing, and maintain transit reliability for essential trips in light of increasing congestion." (6/10/20 MTA Memo, p. 1.)

[4] The Exemption document simply checks a box on a form for a categorical exemption. (*Id.*)

That is not a "specific action" but, as in *Castaic*, a citywide plan conceived by MTA to alter any street without environmental review under CEQA. MTA provides no evidence that removing traffic lanes and parking on any specific street to create bicycle and/or bus lanes will "support essential trips in San Francisco."

The Mayor's proclamation and 26 supplements and the Health Officer's numerous orders and amendments do not establish an emergency under CEQA. Such documents are allowed under the Government Code or the Health and Safety Code, but they are not substantial evidence of an emergency under CEQA. (*e.g.*, *Los Osos*, *supra*, 30 Cal.App.4th at p. 1682.)

Further, neither the City's nor the California Governor's numerous proclamations and executive orders indicate any departure from the substantive requirements of CEQA.

CEQA requires MTA and Planning to provide substantial evidence to satisfy every element of Public Resources Code section 21060.3. (*Western Municipal*, *supra*, 187 Cal.App.3d at p. 1111; *Castaic*, *supra*, 41 Cal.App.4th at p. 1267.)

No evidence supports that removing traffic lanes and parking is necessary to "maintain transit reliability for essential trips," that anyone on a particular bus or bicycle is actually making an essential trip, or that removing traffic lanes and parking on streets will result in "better physical distancing" on any specific bus or bicycle where anyone is making an allegedly essential trip.

MTA provides no evidence that removing traffic and parking lanes to create "temporary transit lanes … and temporary bikeways" is *necessary* at all.

Instead, MTA uses COVID-19 as a pretext for declaring controversial changes to major traffic corridors exempt from environmental review under CEQA. As in *Castaic*, the Project is not a "*specific* action *necessary* to prevent or mitigate an emergency." (PRC §21080(b)(4) [emphasis added]; Guidelines, §15269(c).) "Rather, it appears that this is an attempt to use limited exemptions contained in CEQA as a means to subvert rules regulating the protection of the environment." (*Castaic*, *supra*, 41 Cal.App.4th at p. 1268.)

## III. THE PROJECT IS NOT CATEGORICALLY EXEMPT FROM CEQA

With no evidence or authority Planning checks another box on a form claiming the Project is categorically exempt under "Class 1 – Existing Facilities." The claimed Class 1 "Existing Conditions" categorical exemption contradicts the claimed "Emergency" exemption.

Since the Exemption document also claims a statutory *emergency* exemption due to a "sudden, unexpected occurrence" (Pub. Res. Code §21060.3), a Class 1 categorical exemption claiming "existing" conditions exemption is mutually exclusive.

City's two exemption claims are contradictory on their face. An exemption cannot be rationally based on both a "sudden, unexpected occurrence" and on "minor alterations" of existing conditions.

For following additional reasons, the Project is not categorically exempt.

### A. The Planning Department And MTA Fail To Show With Substantial Evidence That The Project Fits Within The Claimed Categorical Exemption

The Exemption document claims in a checked box that the Project is "categorically exempt" under "Class 1 - Existing Facilities. Interior and exterior alterations; additions under 10,000 sq. ft." (Notice of Appeal, Exh. B, p. 1.)

Contrary to Planning's Exemption document, the accompanying MTA Memo states, "The project area spans *several neighborhoods throughout San Francisco*," and lists many "project corridors" in the "initial phase" that include major streets with heavy traffic, such as Masonic Avenue, Geary Boulevard, California Street, Potrero Avenue, Lincoln Way, Bayshore Boulevard, Sutter Street, and 19th Avenue. (See Fn. 2 *ante*; 6/10/20 MTA Memo, pp. 3-14; Exh. C [Map].)

A public agency must show with substantial evidence that a proposed project fits within a categorical exemption. (*Azusa*, *supra*, 52 Cal.App.4th at p.1192; *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 705.) 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, supra,* 52 Cal.App.4th at p. 1192.)

As with statutory exemptions, that strict construction allows CEQA to be interpreted in a manner affording the fullest possible environmental protection within the reasonable scope of statutory language. (*Ibid.*) Strict construction "'also comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a significant environmental effect.'" (*County of Amador, supra,* 76 Cal.App.4th at p. 966.)

City has failed to meet its burden to provide substantial evidence that a categorical exemption under Guidelines §15301 or any other exemption applies to this Project.

**1. The Section 15301 Categorical Exemption Does Not Apply To The Project**

The claimed Class 1 exemption does not apply because the Project does not propose "minor alterations" of "*existing* ... public "facilities," it proposes major changes of use of streets.

The Exemption document admits that there are *no* existing "emergency bicycle" or bus-only lanes on the many streets it proposes to change. (6/10/20 MTA Memo, pp. 1-16.) The claimed Guidelines §15301 exemption therefore is inapplicable on its face. (*Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* [*"Save Our Carmel River"*] (2006) 141 Cal.App.4th 677, 697.)

Guidelines section 15301 explicitly states that in determining the types of "existing facilities" subject to such an exemption, "The key consideration is whether the project involves negligible or no expansion of an existing use." Far from being negligible or no expansion, the Project proposes *changing existing roadways and street parking to implement a completely new use of those streets.*

By amending the City's Transportation Code, the Project also proposes an expansive grant of authority to the Traffic Engineer to change any City street, not just those already designated and implemented under this Project. (6/10/20 MTA Memo, pp. 14-15.)

MTA states there will be *no further opportunity for the public to contest these actions*, since the June 30, 2020 approval of this "initial phase" of the Project is the Approval Action under Administrative Code Chapter 31. (6/10/20 MTA Memo, pp. 14-15.) Thereafter, "the delegation of authority to approve emergency temporary transit lanes and tow-away lanes to the Office of the City Traffic Engineer for the *rest* of the project corridors" would occur "following holding a public hearing for the *subsequent* locations." (*Id.* at pp. 14-15 [emphasis added].) **In short, the**

**Project's "initial phase" before this Board is permanent, and no future public proceeding will take place.** (*Id.*)

Hence, MTA's Project description claiming the Project is "temporary" is false.

Importantly, the Project also proposes a major *change of use* of those streets from allowing all transportation modes to instead reduce capacity, delay, obstruct, and exclude the mode choice of the vast majority of city travelers, and it therefore does not qualify for an exemption under Guidelines section 15301. According to MTA's data, bicyclists constitute less than 2% of San Francisco travelers.[5] Since COVID-19, transit ridership has declined by 90%. (MTA Board, June 30, 2020 Agenda Packet, p. 3.)

Eliminating traffic lanes and parking on major corridors like Masonic Avenue, 19th Avenue, Mission Street, California Street, and Lincoln Way, and converting them to "emergency bikeways" and bus-only lanes is not only counterproductive to enabling essential travel, but it shows that the Project is not exempt under Guidelines section 15301. (*County of Amador, supra*, 76 Cal.App.4th at p. 967 [existing facilities exemption did not apply to project that changed use of an existing hydroelectric facility from non-consumptive to consumptive use]; *Save Our Carmel River*, *supra*, 141 Cal.App.4th at p. 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"].)

In addition to reducing street capacity and removing traffic lanes and parking, the Project also excludes the vast majority of users by creating new facilities that are inaccessible to anyone not using a bicycle or a bus. The Project thus changes the street's use from a *public* roadway for *all* users to one that serves only certain users. Such a change of use does not fall within the "existing facilities" categorical exemption. (*County of Amador*, *supra*, 76 Cal.App.4th at p. 967.)

Further, the Project does not propose "minor alterations," but proposes major changes affecting and significantly impacting transportation, air quality, parking, noise, and public safety both in the immediate and cumulative areas by reducing street capacity. (*e.g.*, *Azusa*, *supra*, 52 Cal.App.4th at p. 1194 [project proposing to dump tons of additional waste into an existing landfill was not a "*minor* alteration" to an "existing facility"].)

The Project therefore does not fit within the Class 1 (Guidelines section 15301) exemption.

**2. The Project May Have Significant Impacts, Negating Any Exemption**

The Project clearly may have significant direct, indirect, and cumulative impacts on the environment, including impacts on transportation, air quality, GHG, energy consumption, public safety, noise, and essential police, fire, and emergency services, and therefore is not categorically exempt. (See, *e.g.*, PRC §§21080(a), 21083.05, 21084(e); Guidelines, §§15064, 15065.)

[5] See, MTA 1-28-20 workshop MODE SHARE INCREASE SINCE 2017, p. 12, showing decline in bicycling mode share to 2%; see also, Fehr & Peers, 2013-2017 Travel Decision Survey Data Analysis and Comparison Report, prepared for MTA, July 2017, p. 15, showing decline in bicycle mode share in San Francisco from 3.4% in 2014 to 2% in 2017 (https://www.sfmta.com/sites/default/files/reports/2017/Travel_Decision_Survey_Comparison_Report_2017.pdf.)

Before declaring the Project exempt, City was required to do a preliminary analysis exploring the possibility of the Project's significant impacts on the environment. (Guidelines §15060(c), 15061.) There is no evidence that any preliminary analysis took place or any evidence that supports the exemption determination, only a checked box on a form.

The Project's potentially significant direct, indirect, and cumulative impacts on transportation, as well as impacts on air quality, GHG, energy consumption, public safety, emergency vehicle access, and noise should be identified, analyzed, and mitigated under CEQA. The Project is not exempt from those requirements.

**3. MTA And Planning Have Failed To Analyze The Project's Cumulative And Other Significant Impacts**

The cumulative impacts analysis occurs at the preliminary stage, *before* any determination that a project is categorically exempt. (PRC §21065; Guidelines §§15060(c), 15061, 15065(a)(3); *Orinda Ass'n v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171 [whole project must be analyzed at preliminary phase]; *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* ["*East* Peninsula"] (1989) 210 Cal.App.3d 155, 171.)

To comply with CEQA, a cumulative impacts analysis must set forth existing conditions and compare those conditions with anticipated future conditions. That analysis must also show *other* current and anticipated future projects in the cumulative area that will *also* affect traffic, air quality, GHG, energy consumption, public safety, and noise, and then must compare present conditions with conditions assuming those other projects. That analysis did not occur here.

There is no discussion or analysis of cumulative impacts in the Exemption document here. The Project has "possible environmental effects" that are "cumulatively considerable," meaning "that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (Guidelines §15065(a)(3).)

Instead, MTA issues false and contradictory statements about the "temporary" nature of the Project, and then admits that the "initial phase" will receive **no further review**. (6/10/20 MTA Memo, pp. 12, 15.)

City's failure to analyze cumulative impacts does not allow an improper conclusion of *no* impacts. (*Azusa, supra,* 52 Cal.App.4th at p. 1198; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) City's failure to analyze the Project's impacts, including its cumulative impacts, violates CEQA's informational requirements and results in improper piecemealed implementation of such projects, also prohibited by CEQA.

City's past, present, and planned future projects on City's roadways also impede and obstruct vehicle transportation and remove parking, including "Slow Streets," the "Panhandle Social Distancing and Safety Project," "Better Market Street," City's Bicycle Plan, "Sustainable Streets," "Vision Zero," BRT projects, and other projects that, when combined with this Project, clearly have significant cumulative impacts on transportation, air quality, parking, and public safety, which demonstrates why the Project requires cumulative impacts analysis and cannot be considered in a vacuum.

For example, the City closed Market Street to motor vehicles on January 29, 2020 under its "Better Market Street" Project, diverting hundreds of vehicles to Mission Street, which caused increased congestion throughout the area. The Project here now proposes to remove a traffic

lane on Mission Street, worsening the impacts of the "Better Market Street" Project. City's Masonic Avenue bicycle project eliminated traffic lanes and parking on that major north-south corridor causing traffic congestion and other impacts. The Project here would eliminate another traffic lane on Masonic, reducing that four-lane street to two lanes, causing more congestion. JFK Drive was closed to vehicles in March 2020, reducing access to Golden Gate Park. The Project here would remove all parking on one side of Lincoln Way, further reducing access to Golden Gate Park and the inner Sunset commercial area.

MTA admits that "[p]lanned projects in the area include the Geary Rapid project, 16th Street Improvement Project, 6th Street Improvement Project, Howard/Folsom Streetscape project, Better Market Street project, Central Subway project and the Hub Area Plan, as well as the Draft Public Realm Plan." (6/10/20 MTA Memo, pp. 12-13.) But MTA again falsely claims the Project is "temporary." (*Id.* at p. 12.) MTA then states that the "initial" Project is permanent and that there will be *no further public process*. (*Id.* at pp. 14-15.)

Those successive projects over time also eliminate traffic lanes, parking and turning, with cumulative impacts on transportation, air quality, GHG, energy consumption, noise, and public safety (including emergency vehicle access). Those cumulative impacts invalidate City's unsupported claim that the Project is exempt. Thus, the Project's potential direct, indirect, and cumulative impacts preclude any claimed categorical exemption.

**4. MTA Improperly Piecemeals The Project, Falsely Claiming That It Is "Temporary"**

The Project also signals City's improper return to a piecemealing strategy that has already been disapproved by courts and led to a permanent Injunction against City's Bicycle Plan Project.

Claiming different time frames and exemptions for segments of the Project also violates the law, because CEQA requires that any exemption must apply to the whole Project and not just a piece of it. (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 640; see also, *e.g.*, *POET, LLC v. State Air Resources Board* ["*Poet II*"] (2017) 12 Cal.App.5th 52, 79-81 [failure to include whole Project in baseline held an abuse of discretion]; *County of Amador, supra*, 76 Cal.App.4th at pp. 953-954.)

As noted, MTA falsely claims the Project is "temporary," but admits that all of the street changes approved by the MTA Board will be permanent with no further CEQA review or public process.

**5. Exceptions Under Guidelines §15300.2 Also Apply To This Project**

Even if the Project qualified for a Class 1 categorical exemption, which it does not, CEQA's exceptions to categorical exemptions under Guidelines section 15300.2 also apply to this Project. City fails to show that those exceptions do not apply.

Here, the Project is one of many City projects in the same area that over time remove traffic lanes and parking and hinder transportation by motor vehicles that also eliminate traffic lanes and street parking with cumulative impacts on transportation, air quality, GHG, energy consumption, noise, and public safety, including emergency vehicle access. Those successive projects over time Project's trigger the Guidelines section 15300.2 (b) exception, invalidating the claimed categorical exemption.

Further, MTA's claim that the Project is required by an "emergency" triggers the Guidelines section 15300.2 (c) exception, since an emergency is an "unusual circumstance."

**6. MTA's Claim That It Need Not Analyze Transportation Impacts Is False**

MTA claims that the Project falls under "'Active Transportation … and transit Projects' and 'Other Minor Transportation Projects'" under Public Resources Code Section 21099, and thus it may avoid analyzing transportation impacts.

Section 21099 is irrelevant to the asserted exemption and does not excuse City's failure to conduct environmental review under CEQA. Section 21099 provides that the California Office of Planning and Research shall prepare proposed revisions for determining the significance of transportation impacts that "may include, but are not limited to, vehicle miles traveled," which MTA claims will increase to greater than pre-COVID-19 levels. (6/30/20 MTA Board Packet Memo, p. 3, https://www.sfmta.com/sites/default/files/reports-and-documents/2020/06/6-30-20_item_10_traffic_modifications_and_transportation_code_amendment_-_temporary_transit-only_lan.pdf.)

Section 21099 also states that it "*does not relieve a public agency of the requirement to analyze a project's potentially significant transportation impacts* related to air quality, noise, safety, or any other impact associated with transportation," and "*shall not create a presumption that a project will not result in significant impacts*" (PRC § 21099 (b) [emphasis added].)

## IV. MTA'S FAILURE TO CONDUCT PUBLIC PROCEEDINGS ON THE PROJECT VIOLATES CEQA'S REQUIREMENT OF INFORMED PUBLIC PARTICIPATION IN THE DECISIONMAKING PROCESS

The Exemption was not publicly available before MTA's hearing on the Project. Finding that document required complicated linking to documents not readily available to the general public or easily found on the internet. (Guidelines § 15202 (b).)

MTA claims its "staff have had to rethink and develop a new way to engage with people." In fact, MTA has failed to "engage with people" at all on this Project, since it created the Project with no public participation and it amends the Transportation Code to allow the City Traffic Engineer to change any street in the City with no public process. (MTA Board Agenda Packet, 6/30/20, p. 8.) MTA claims that it has met with "various advocacy groups," "Supervisor offices," and members of unnamed "groups," and that it developed a "mailing list" that was "used to send email updates" to those selected individuals. (*Id.*)

That is *not* public notice or participation required by CEQA, and it is a fundamental violation of CEQA's purpose to inform the public and allow public participation.

Implementing the Project by City's MTA without allowing the public's right to appeal to an elected decisionmaking body violates CEQA's most basic mandate to give the public a meaningful voice in the decisionmaking process. (*e.g., Laurel Heights I, supra,* 47 Cal.3d at p. 394.)

## CONCLUSION

The proposed TETL Project is not exempt under CEQA's emergency statutory exemption or any categorical exemption. This Board should grant this Appeal, reverse the Planning Department's Exemption, and order further environmental review in compliance with CEQA.

/s/
Mary Miles
Attorney for Appellant Coalition for Adequate Review