

David Pilpel
2151 27th Ave
San Francisco CA 94116-1730

President Norman Yee and Members
Board of Supervisors
1 Carlton B Goodlett Pl Ste 244
San Francisco CA 94102-4689

October 23, 2020

Re: MTA COVID-19 8-22-20 Muni Bus Service Adjustments and Associated Stop, Street, and
Parking Changes (BOS File 201112)
MTA COVID-19 8-22-20 and Fall 2020 Muni Rail Service Adjustments and Associated
Stop, Street, and Parking Changes (BOS File 201116)
California Environmental Quality Act (CEQA) Appeals

Dear President Yee and Members,

I write to provide this brief in support of the two subject appeals now scheduled to be heard Tuesday, November 3, 2020, under a 3 p.m. Special Order, which may be continued to Tuesday, November 10, 2020. I have a number of points to make, as follows:

1. APPLICABLE LAW, GUIDELINES, RULES, AND PROCEDURES

The principal laws, guidelines, rules, and procedures at issue here are the California Environmental Quality Act (CEQA), California Public Resources Code Section 21000 *et seq.*, the CEQA Guidelines, California Code of Regulations Section 15000 *et seq.*, San Francisco Administrative Code Chapter 31, and the Board of Supervisors Rules of Order. In addition, the City Attorney's Good Government Guide discusses due process requirements several times. Although I have no property interest in the outcome of these citywide public interest appeals, I am nevertheless entitled to due process and procedures that ensure a fair hearing, including the opportunity to brief each appeal and be heard directly by the decisionmakers, *i.e.* the eleven members of the Board, prior to a decision thereon. For a fair hearing here, we need to disregard other public policy agreements and disagreements and consider the appeals with the record before the Board. I have no procedural objections at this time.

2. ABOUT ME AND THESE TWO APPEALS

For anyone unfamiliar with me, I have long been involved in San Francisco City government. I have served on the Sunshine Ordinance Task Force, MTA Citizens' Advisory Council, Public Utilities Commission Citizens Advisory Committee, Redistricting Task Force, and other bodies. I have attended hundreds, perhaps thousands, of City policy body meetings in a variety of subject areas, and participated in several refuse collection (garbage) and water and sewer rate-setting processes. I am well-versed in the City Charter, the Municipal Codes, many of the legal principles underlying those laws, associated rules, regulations, and procedures, the City budget, public meeting and public records laws, and related matters. I have a deep commitment to and a long record in favor of government transparency, effective use of resources, and accountability. I have been interested in all aspects of the Municipal Railway (Muni) since I was a young person, from planning, public information, and schedules to operations, maintenance, engineering, finance, and administration. These two CEQA appeals are brought in good

faith about controversial projects where the language of the statutes and guidelines can be interpreted differently. I have only appealed certain MTA actions in response to the COVID-19 virus emergency.

3. MUNICIPAL TRANSPORTATION AGENCY CONTEXT, PROJECTS, AND STATUS

The Municipal Transportation Agency (MTA) is governed primarily by San Francisco Charter Article VIII A, largely as a result of Proposition E (11/2/1999) and Proposition A (11/6/2007). An attempt was initiated this year (BOS File 200512) to amend the Charter and adjust MTA's powers and duties, but that was abandoned following an agreement not to increase transit fares for two years. Since the COVID-19 virus emergency began, much of MTA's revenues and transit ridership have disappeared.

MTA has responded in various ways, including the two Projects that are appealed here, the MTA COVID-19 8-22-20 Muni Bus Service Adjustments and Associated Stop, Street, and Parking Changes Project (BOS File 201112) and the MTA COVID-19 8-22-20 and Fall 2020 Muni Rail Service Adjustments and Associated Stop, Street, and Parking Changes Project (BOS File 201116). Both Projects were supposedly approved by the Municipal Transportation Agency Director of Transit on August 19, 2020 and posted on the Planning Department website on August 20, 2020. The only document that I have found to evidence the supposed approval is a Memo to File dated August 20, 2020, posted on the Planning Department website.

Some aspects of the Projects were explained in MTA's September 21, 2020 submittal to this Board (BOS File 200903), but it is still unclear how MTA's responses to COVID-19 relate to each other and what each program or project is. In fact, at the September 15, 2020 MTA Board meeting, MTA Director Steve Heminger requested a list of the programs and projects to better understand them. An accurate and comprehensive description of the current status of each Project from MTA, including the locations that have been approved or are planned under each Project, when each element was approved, and by whom, would help clarify the scope and potential impacts of these two projects.

My primary concern with the transit service changes is that reconfiguring Muni Metro rail service in a way that forces passengers to transfer at Church and Market and at West Portal Station would expose them to the possibility of contacting or transmitting the COVID-19 virus, and that how MTA assesses the health risks of proposed operating changes or projects has not been discussed publicly. In addition, the closure of Church Street between 15th and Market Streets, and the boarding platforms now built on Ulloa Street at Lenox Way, outside West Portal Station, restrict emergency vehicle access and could reduce emergency response times.

4. PLANNING DEPARTMENT CONTEXT AND ENVIRONMENTAL REVIEW

According to the Planning Department (Planning) website, its offices are closed to the public and most of its staff are working from home. The public has no access to case files, including environmental case files, other than the few documents posted on the Planning website. Navigating through Accela, Buildingeye, or whatever the new Permit Tracking System is now called, is difficult at best and not at all intuitive. Meanwhile, Planning continues to review and approve CEQA exemption determinations made by MTA pursuant to a Memorandum of Understanding that delegates certain approval authority to MTA, unlike other City departments. Since there is no current public access to case files, it is unclear whether Planning consulted with other City departments, including Emergency Management, the Fire Department, Police Department, or the Department of Public Health, to review aspects of the projects discussed above in the context of the environmental review process under CEQA. Planning is required to independently review and consider the projects under CEQA, not merely accept MTA's assertions.

The bus exemption describes changes to Muni bus service effective August 22, 2020, and some associated stop, street, and parking changes. It is unclear which elements of the Project have been approved, by whom, and on what date or dates. The bus changes have been in effect since August 22, 2020. The bus exemption describes some of the relationship between the Project and other MTA projects, including the MTA Emergency Temporary Transit Lanes and Bikeways Project, which was previously appealed in BOS File 200903. The bus exemption also describes various bus route changes and restorations planned for August 22, 2020. Importantly, the project description does not mention the extension of the 30-Stockton route into the Presidio, using a route that did not have regular transit service beforehand. I believe that omission is relevant here, as it is a material element of the Project.

The rail exemption describes planned changes to Muni rail service effective August 22, 2020, and some associated stop, street, and parking changes. It is unclear which elements of the Project have been approved, by whom, and on what date or dates. The changes were only in effect for three days. The rail exemption clarifies and repeats elements of the MTA Emergency Temporary Transit Lanes and Bikeways Project, which was previously appealed in BOS File 200903. My particular concerns about rail service changes that force passengers to transfer at Church and Market and at West Portal Station are directed here, including concerns about the health impacts and risks to passengers having to transfer.

5. LEGAL ARGUMENTS AGAINST THE EXEMPTIONS

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

CEQA Guidelines Section 15269 states: "The following emergency projects are exempt from the requirements of CEQA. ... (c) Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term, but this exclusion does not apply (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility." CEQA Guidelines Section 15269 states: "'Emergency' means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services. Emergency includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage."

The CEQA Guidelines implement the law. Public Resources Code Section 21080 (b) states: "This division does not apply to any of the following activities: ... (4) Specific actions necessary to prevent or mitigate an emergency." Public Resources Code Section 21060.3 states: "'Emergency' means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage."

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

Further, even if all the other tests are met, MTA has still made no showing as to how, exactly, the proposed actions would "prevent or mitigate an emergency," nor is it clear whether the burden is on MTA, Planning, the County Health Officer, the Department of Public Health, the Department of Emergency Management, some other City department, officer, or combination thereof, to validate or verify that the proposed actions are indeed "necessary to prevent or mitigate an emergency." In any event, both MTA and Planning have the burden of showing, with substantial evidence in the record before an exemption is issued (not after), that the project fits the statutory exemption claimed, and I believe that they have failed to meet their burden.

CEQA is a comprehensive law that already contemplates an emergency and defines it narrowly. Importantly, I am not aware of any order by Governor Gavin Newsom this year to suspend any substantive portion of CEQA. Thus, the law stands as is and is subject to interpretation as such. Finally, courts have interpreted the relevant sections here, including *Western Municipal Water Dist. v. San Bernardino County Superior Ct.* (12-11-86) 187 Cal.App.3d 1104, *Los Osos Valley Associates v. City of San Luis Obispo* (12-20-94) 30 Cal.App.4th 1670, *Castaic Lake Water Agency v. City of Santa Clarita* (12-21-95) 41 Cal.App.4th 1257, *CalBeach Advocates v. City of Solana Beach* (10-9-02) 103 Cal.App.4th 529, and *Marshall v. Pasadena Unified School Dist.* (6-29-04) 119 Cal.App.4th 1241.

Western Municipal is the leading case on an emergency under CEQA. While disapproved for other reasons, it is still on point here. Under *Western Municipal*, an "occurrence" is not a "condition" and requires immediate action without environmental review. Alternatively, a changed condition happens over time and allows for environmental review. *Los Osos* found that an official declaration doesn't make something an emergency under CEQA. *Castaic* is also on point, still good, and is in accord with and quotes *Western Municipal*. It has more on the issue of actions necessary. *CalBeach* can be distinguished. It was about a retaining wall for a house on a bluff, an imminent danger, which is not the case here. *Marshall* found that a decision for a public agency's own convenience was not a "sudden, unexpected occurrence" and is consistent with other cases.

I invite the City Attorney's office to weigh in on the legal issues here, either through Planning and/or MTA, on their own, or through a public opinion. If the City Attorney's Land Use, Transportation, or Government Teams think that I'm misunderstanding the law or the CEQA Guidelines, we can all benefit from their expertise, which San Francisco taxpayers are paying for, after all.

6. OTHER ARGUMENTS AND CONCERNS ABOUT THE EXEMPTIONS

My concerns about the bus exemption include the project description, the relationship to other current and reasonable foreseeable projects (particularly MTA projects), whether the Project fits the specific exemptions claimed (Public Resources Code Section 21080 (b) (4) / CEQA Guidelines Section 15269 (c) and Public Resources Code Section 21080 (b) (10)), and whether either (or both) of the exceptions to an exemption (cumulative impacts or unusual circumstances) apply. My concerns about

the rail exemption include the health impacts and risks, and impacts to emergency vehicle access, that could result from these actions; whether the Project fits the specific exemptions claimed (CEQA Guidelines Section 15269 (c), Public Resources Code Section 21080 (b) (10), and CEQA Guidelines Section 15275); and whether either (or both) of the exceptions to an exemption (cumulative impacts or unusual circumstances) apply.

CEQA requires a clear, complete, finite, and stable project description. The baseline transit ridership and route information here is not clear. Is it using pre-virus routes and ridership or routes and ridership just prior to August 22, 2020? Further, the travel demand assumptions and projections are not disclosed or discussed in the exemptions, and are subject to different considerations and conclusions. Although Planning asserts an approval date of August 19, 2020 for changes that were effective August 22, 2020, there was considerable planning and a transit operator sign-up conducted earlier to implement the Projects. Thus, I believe that an earlier date should have been considered the Approval Action that triggered the exemption. I intend to research that issue further. Also, some of the street and parking changes related to the transit service changes were originally part of the MTA Emergency Temporary Transit Lanes and Bikeways Project, which was previously appealed in BOS File 200903. It is difficult to follow which exemption covers which project when the project scope shifts as it has here. Similarly, transit service changes related to the Taraval Street Improvement Project were the subject of several previous environmental determinations, including the Transit Effectiveness Project Environmental Impact Report, and it is difficult to track subsequent and supplemental amendments and changes there.

I also question if MTA consulted with affected employee organizations under meet and confer requirements, pursuant to applicable Memoranda of Understanding or otherwise, prior to considering and implementing the transit service changes here. I understand that the next transit operator sign-up is already being planned. The Projects here have already been implemented, so I do not think that these two appeals have delayed or impaired MTA's ability to make transit service changes or respond to the COVID-19 situation otherwise. Indeed, only three days after the rail service changes were in effect, MTA reported that overhead lines splices in the subway overhead wire were experiencing unacceptable failures and that one or more staff in the Transportation Management Center were COVID-19 positive, leading to another rail service shutdown and bus service substitution on rail routes, which continues.

Since then, the overhead lines splice issue has been discussed at the San Francisco County Transportation Authority Board and the MTA Board on September 15, 2020. No determination has been made at this time as to how to proceed on this issue or when the subway will reopen. Meanwhile, an issue regarding the ballast (rock used to drain water and hold rails in place) in the Twin Peaks Tunnel, likely caused by work performed by a contractor or subcontractor on the Twin Peaks Tunnel Project, was discussed at the MTA Board on October 20, 2020. Finally, this Board is considering approval of an agreement (BOS File 201135) with Thales Transport and Security for work related to the existing Automatic Train Control System (ATCS), which may be expedited if performed during a continuing subway shutdown. Separately, construction delays still plague the Central Subway and considerable testing is required before revenue (passenger) service can start. In summary, there is no timeframe for reopening the Muni Metro subway or Twin Peaks Tunnel, and several outstanding and overlapping problems require attention. Thus, there is sufficient time for MTA's Environmental Review Team, along with Planning, to conduct environmental review of the proposed rail service changes and the likely impacts therefrom. Finally, I believe that if more than one exemption is claimed and one fails, the entire exemption fails and should be reconsidered. Thus, if you find a defect in either exemption, for any reason, then you should reverse Planning and require additional environmental review in that case.

Once again, I am still not clear from MTA or Planning as to how they believe this is an emergency under CEQA, and if so, exactly how the specific actions prevent or mitigate an emergency under CEQA. If MTA and Planning believe that this is an occurrence and not an ongoing condition, when does it become an ongoing condition? From my perspective, this is a difference of opinion. I would prefer to spend my limited time working with MTA and Planning to improve transit operations and planning, environmental review, and public engagement rather than pursuing CEQA appeals.

7. NEXT STEPS

The Board of Supervisors can, and should, hold separate hearings on MTA's fiscal outlook, operations, and policy choices being made during the COVID-19 virus emergency. It would be simply unconscionable if MTA spends down all of its reserves, hopes for further bailouts from Sacramento or Washington, fails to get them, and proceeds to declare a fiscal emergency under Public Resources Code Section 21080.32, allowing permanent abandonment of transit service without any environmental review. I filed an appeal of that exemption determination with this Board, which upheld Planning on a narrow 6-5 vote on April 13, 2010 (BOS Files 100288 to 100291). Discussions on related and unrelated issues, including SB 288 (Wiener) and changes to Chapter 31, are best left to another day or another venue, and others should weigh in on those issues as well.

Thank you for considering this brief. I am always open to resolving my underlying concerns and withdrawing these appeals if an acceptable solution can be reached with Planning and MTA. Otherwise, I look forward to the hearing on these two appeals.

Sincerely,

/s/

David Pilpel