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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

COALITION FOR FAIR, LEGAL AND ENVIRONMENTAL TRANSIT, et al.,

Petitioners and Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondents and Defendants,

APPLE, INC., et al.,

Intervenors.

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, et al.,

Real Parties in Interest and Defendants.

Case No.: CPF-14-513627

PETITIONERS' REPLY TO THE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF MANDATE

Dept: 608
Judge: Hon. Garret L. Wong

Filing Date of Action: May 1, 2014
First Amend. Compl. Filed: May 11, 2015
Trial Date: November 13, 2015

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. THE CITY ABUSED ITS DISCRETION BY EXEMPTING THE PROJECT FROM CEQA 2

A. There is no evidence to support the City's finding that the Shuttle Project is limited to activities covered by the Class 6 data collection exemption 2

1. Legal Standard 2

2. The Shuttle Project consists of a number of components that cannot be classified as data collection or experimental management, and therefore take the Project outside of the scope of the Class 6 exemption 3

i. The Shuttle Project changes the legality of commuter shuttles stopping in Muni zones under local law 4

ii. The Shuttle Project allows for unlimited growth 5

B. Defendants fail to refute the applicability of the unusual circumstances exemption 5

1. *Berkeley Hillside* created two alternative tests for establishing an unusual circumstances exception, and Petitioners presented evidence that meets either test 5

2. Substantial and unrebutted evidence demonstrates that the Shuttle Project *will have* a significant environmental impact, thereby establishing an unusual circumstance 6

i. The Shuttle Project *will have* a significant impact on traffic and bicyclist safety 6

ii. The Shuttle Project *will have* a significant noise impact 7

iii. The Shuttle Project *will have* a significant air quality impact 7

3. The City's determination that the Shuttle Project does not present an unusual circumstance is not supported by substantial evidence 8

i. The massive scale and unlimited growth allowed under the Shuttle Project is an unusual circumstance 8

ii. Data collection activities do not ordinarily authorize illegal activity 9

iii. The Shuttle Project presents an unusual circumstance because of its proximity to residences 9

iv. The Shuttle Project presents an unusual circumstance because it poses public safety risks 10

v. The City's findings are not supported by substantial evidence 11

4. There is a fair argument that the Shuttle Project will have significant environmental impacts 12

C. Defendants improperly include the Shuttle Project and its prior illegal activity in the baseline 12

D. A permit system and dedicated enforcement officers are mitigation measures, not project features 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster
(1997) 52 Cal.App.4th 1165 ..... 3, 15

Bankers Hill v. City of San Diego
(2006) 139 Cal.App.4th 249 14

Berkeley Hillside Preservation v. City of Berkeley
(2015) 60 Cal.4th 1086 ..... 3, 5, 7, 9

Bloom v. McGurk,
(1994) 26 Cal.App.4th 1307 10

Castaic Lake Water Agency v. City of Santa Clarita
(1995) 41 Cal.App.4th 1257 4

Citizens for East Shore Parks v. State Lands Commission
(2011) 202 Cal.App.4th 549 ..... 12, 13

Cmtys. for a Better Env't v. So. Coast Air Qual. Mgmnt. Dist.
(2010) 48 Cal.4th 310 13

County of Amador v. El Dorado County Water Agency
(1999) 76 Cal.App.4th 931 2

Dehne v. County of Santa Clara
(1981) 115 Cal.App.3d 827 2

Fat v. County of Sacramento
(2002) 97 Cal.App.4th 1270 13

Lewis v. 17th Dist. Ag. Assoc.
(1985) 165 Cal.App.3d 823 10

Lighthouse Field Beach Rescue v. City of Santa Cruz,
(2005) 131 Cal.App.4th 1170 13

Riverwatch v. County of San Diego
(1999) 76 Cal.App.4th 1428 13

Salmon Protection & Watershed Network v. County of Marin
(2004) 125 Cal.App.4th 1098 ..... 13, 15

San Francisco Beautiful v. City & Co. of San Francisco
(2014) 226 Cal.App.4th 1012 14

San Lorenzo Valley Comm. Advocates v. San Lorenzo Valley Unif. Sch. Dist.,
(2006) 139 Cal. App. 4th 1356 3

Save the Plastic Bag Coal. v. San Francisco
(2013) 222 Cal.App.4th 863 14

Voices for Rural Living v. El Dorado Irrig. Dist.
(2012) 209 Cal.App.4th 1096 9

Wolmer v. City of Berkeley
(2011) 193 Cal.App. 4th 1329 ..... 10, 14

Statutes

14 Cal. Code Regs.
§ 15300.2(c) 5
§ 15306 2

Cal. Pub. Res. Code
§ 21080(e)(1.) 12
§ 21083(b)(3) 10

Respondent City and County of San Francisco ("City") filed its Opposition Brief on October 8, 2015. Defendant-Intervenors ("Intervenors") filed a separate pretrial brief the same day. Intervenors joined in all argument made by the City, and the City joined in all arguments made by Intervenors. In an effort to reply to both briefs without unnecessary repetition, this brief replies to all arguments related to Petitioners' second and third causes of action, alleging that adoption of the Shuttle Project violated CEQA. Petitioners filed a separate brief concurrently herewith, in reply to the Intervenor's Opposition Brief, which addresses arguments related to Petitioners' first cause of action, alleging the Shuttle Project is preempted by the Vehicle Code. Petitioners fully incorporate herein the arguments made in their reply to the Intervenor's opposition brief.

INTRODUCTION

The City fails to address entirely the fact that while it prepared a full environmental impact report (EIR) for MUNI's own Transit Effectiveness Program (TEP), that involved mere rerouting of existing MUNI lines to improve service, it allowed the illegal private Commuter Shuttle Pilot Project ("Commuter Shuttle Project") to proceed with absolutely no CEQA review whatsoever. Certainly, a private transit program using high-polluting diesel buses carrying 35,000 riders each day and using over 200 stops throughout the City should require CEQA review to analyze the impacts of the Project and to propose alternatives and mitigation measures to reduce those impacts. CEQA review would require the City to impose mitigation measures to reduce conflicts with bikes lanes, Muni buses and traffic, to select alternative routes with less impacts, to use alternative fueled vehicles with lower emissions, and to analyze displacement impacts and propose mitigation, among other measures. But rather than conduct CEQA review, the City chose to conduct its own different "pilot program." While CEQA allows agencies to adopt "certified regulatory programs" in place of CEQA, the City has no such program, and must comply fully with CEQA. It has failed woefully.

ARGUMENT

I. THE CITY ABUSED ITS DISCRETION BY EXEMPTING THE PROJECT FROM CEQA.

A. There is no evidence to support the City's finding that the Shuttle Project is limited to activities covered by the Class 6 data collection exemption.

Defendants are unable to meet their burden of establishing that the Shuttle Project is limited to information collection activities covered by a Class 6 exemption. [1] Petitioners do not argue that the Project *includes* some data collection and even arguably experimental management. But the problem for the City is that the Project is not *limited* to those activities. Had the City merely decided to put GPS trackers on shuttles, or dedicated a few staff members to stand at stops and collect data on the frequency of stops, such a program may have fallen within the Class 6 exemption. But the Shuttle Project is not so limited. It does not just study the existing shuttles. It for the first time makes them legal under local law by adopting Section 914 of the City's Transportation code, creates a network of stops, sets rules and fees for a permit program, and then studies them. Since the Shuttle Project goes far beyond the limited terms of the exemption, the exemption is inapplicable.

1. Legal standard.

CEQA exemptions must be narrowly constructed, and the scope of an exemption should not be unreasonably expanded. *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 842. Strict construction is required in order to interpret categorical exemptions in a manner that affords the greatest environmental protection within the reasonable scope of their statutory language. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966. "Since a determination that a project falls within a categorical exemption excuses any further compliance with CEQA whatsoever, we must construe the exemptions narrowly in order to afford the fullest possible environmental protection." *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697. Exemptions "should not be so broadly interpreted so to include a class of [projects] that will not normally satisfy the statutory

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[1] The Class 6 exemption is limited to:

> [B]asic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource. These may be strictly for information gathering purposes, or as part of a study leading to an action which a public agency has not yet approved, adopted, or funded.

14 Cal. Code Regs. ["CCR"] § 15306.

requirements for a categorical exemption, even if the premises on which such [projects] are conducted might otherwise come within [the exemption]." *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192-1193.

The Court's determination as to the appropriate scope of a categorical exemption is a question of law subject to independent, or *de novo*, review. *San Lorenzo Valley Comty. Advocates v. San Lorenzo Valley Unif. Sch. Dist.* (2006) 139 Cal. App. 4th 1356, 1375 ("[Q]uestions of interpretation or application of the requirements of CEQA are matters of law.") Contrary to the City's argument, the *Berkeley Hillside* decision did not disturb this *de novo* legal standard at all since the scope of the exemption was not contested. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097.

The City abused its discretion in exempting the Shuttle Project from CEQA because it is not within the narrow scope of the Class 6 exemption.

2. The Shuttle Project consists of a number of components that cannot be classified as data collection or experimental management, and therefore take the Project outside of the scope of the Class 6 exemption.

At the most basic level, the Class 6 exemption does not apply to the Shuttle Project because the Project is not limited to just data collection[2] or experimental management. Instead, the Shuttle Project creates a permit program designed to regulate, legalize, and grow the use of commuter shuttles in San Francisco. Most significantly the City amended its Transportation code to make it legal for the first time for private shuttles to stop in Muni zones.

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[2] In fact, the City's recent Commuter Shuttle Pilot Program Evaluation Report says that 12 months into the project, the City still does not have real time data flowing from the shuttle operators. Declaration of Audrey W. Pearson in Opposition to Petitioners' Petition for Writ of Mandate ["Pearson Dec."], Ex. 1, p. 34. According to the Report, some shuttle operators have failed to provide data regularly and accurately, while others "have been slow to respond to inquiries from SFMTA staff and do not appear concerned about ensuring the proper delivery of data." *Id.* "SFMTA expected a more concerted effort by the shuttle providers to ensure the data was flowing properly." *Id.* at p. 35. Additionally, "[i]ssues with SFMTA's data vendor have complicated the process even further, such that, more than a year into the Pilot Program, the real-time vehicle data is still not flowing completely or accurately from all operators." *Id.* It is hard to justify a project's exemption from CEQA based on a data collection exemption, when more than a year into the program, data is still not being collected.

Defendants try to frame the project as merely a study of commuter shuttles that were already in operation. But the facts and the record demonstrate that the Shuttle Project is not so limited. In addition to data collection, the Shuttle Project also does the following, none of which can be reasonably classified as data collection or even experimental management:

- Creates a permit program allowing an unlimited number of commuter shuttles to load and unload passengers at Muni stops in San Francisco;
- Makes it legal under San Francisco law for permitted commuter shuttles to stop in Muni zones, when it was previously illegal to do so under San Francisco law.
- Determines the locations at which commuter shuttles will be allowed to stop, with no limit on the number of additional stops that may be approved.
- Establishes permit applications, conditions, and fees for permits allowing commuter shuttles to stop in designated Muni zones.
- Designates parking control officers to enforce permits.

AR59, AR130. These activities cannot be classified as data collection or experimental management. In particular, changing the legality of shuttles stopping in Muni zones and creating a permit program that allows for unlimited additional buses moves the Project outside of the limited scope of the Class 6 exemption.

In the case of *Castaic Lake Water Agency v. Santa Clarita* (1995) 41 Cal.App.4th 1257, 1268, the court held that CEQA's earthquake exemption did not apply to a city project involving earthquake retrofitting because the project also included other elements only loosely related to earthquakes. Similarly here, while the City's Project includes some data collection, it includes many other elements that go far beyond data collection. Thus, the exemption does not apply.

i. The Shuttle Project changes the legality of commuter shuttles stopping in Muni zones under local law.

The Shuttle Project does not just study and gather data on commuter shuttles. It changed the law to make it legal under local law for shuttles to stop in Muni zones, and then studied them. This distinction is not inconsequential. It is akin to the difference between an agency deciding to study existing illegal drug use, and an agency legalizing drugs and then studying drug use. Moreover, the record contains substantial evidence that making it legal for commuter shuttles to stop in Muni zones will increase the number of commuter shuttles, the length of time that those shuttles would idle in Muni zones, and increase traffic and Muni conflicts as a result. AR 1651. Changing the legal

status of an activity does not constitute "basic data collection, research, experimental management, and resource evaluation," and is outside of the scope of the Class 6 exemption.

ii. The Shuttle Project allows for unlimited growth.

The Shuttle Project creates a commuter shuttle permit program that allows – and expects – growth in the number of participating shuttles and stop locations.[3] The Project allows for an unlimited number of shuttles to make an unlimited number of stops, in an unlimited number of designated Muni zones. *See* AR7 (Director authorized to establish 200 initial stops, and unlimited number of additional stops following public hearing). This is not merely about collection of data on the existing level of shuttles; this program is designed to grow over time, and has done just that. Since the Shuttle Project began, there has been a 29 percent increase in daily stop events. Pearson Dec., Ex. 1, p. 6. Increasing the number of commuter shuttles and stops cannot be classified as data collection or experimental management, and is outside of the scope of the Class 6 exemption.

B. Defendants fail to refute the applicability of the unusual circumstances exemption.

Even if the Shuttle Project did fit within the scope of the Class 6 exemption, which it does not, the exemption would still be inapplicable because of the unusual circumstances exception. *See*, 14 CCR § 15300.2(c). The Shuttle Project does not present the same general risk of environmental impact as other projects falling under the Class 6 exemption, and therefore the Class 6 exemption is inapplicable.

1. *Berkeley Hillside* created two alternative tests for establishing an unusual circumstances exception, and Petitioners presented evidence that meets either test.

Berkeley Hillside establishes two ways a party may invoke the unusual circumstances exception. First, "a party may establish an unusual circumstance with evidence that the project *will* have a significant environmental effect. That evidence, if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.'" *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 (emph. added). Alternatively, "[a] party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has

[3] One of the findings of Sec. 914 of the San Francisco Transportation Code is that "[t]he use of Shuttle Buses for the purpose of providing Shuttle Service is a growing means of transportation in San Francisco and the greater Bay Area." AR05.

some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance." *Id.*

Here, Petitioners satisfy either alternative because they have established both unusual circumstances that distinguish the project from other Class 6 exemption projects, and they have presented evidence that the Project will and is having a significant effect on the environment.

2. Substantial and unrebutted evidence demonstrates that the Shuttle Project *will have* a significant environmental impact, thereby establishing an unusual circumstance.

Under *Berkeley Hillside*, evidence that a project *will* have a significant environmental effect "does tend to prove that some circumstance of the project is unusual." *Berkeley Hillside*, 60 Cal.4th at 1105. The record in this case contains substantial and unrebutted evidence that the Shuttle Project will – and is – having a significant environmental impact, thereby necessarily establishing an unusual circumstance.

i. The Shuttle Project *will have* a significant impact on traffic and bicyclist safety.

The City's "Transportation Impact Significance Criteria" provides that a project will have a significant effect on the environment "if it would create potentially hazardous conditions for bicyclists or otherwise substantially interfere with bicycle accessibility to the site and adjoining areas." Petitioners' Request for Judicial Notice in Support of Trial Brief ("RJN"), Ex. B, p. 2. The record contains substantial evidence that the Shuttle Project will have significant cumulative impacts on pedestrian and bicyclists in San Francisco, above the threshold level. AR1415-1421. The City provided no evidence to rebut this expert testimony. Thus, the only substantial evidence in the record indicates that the Shuttle Project will have significant impacts on pedestrian and bicyclist safety.

Indeed the City's evaluation has confirmed that the Shuttle Project is having significant impacts on bicyclist safety. "At five of the eight shuttle-only zones, blocked travel and bike lanes as a percentage of shuttle stop-events increased from pre-pilot to during-pilot, sometimes substantially." Pearson Dec., Ex. 1, p. 27. During the Shuttle Project, at four of the 20 zones studied by SFMTA, ***commuter shuttles blocked travel or bike lanes more than 90% of the times***

they stopped.[4] *Id*. at p. 26. Overall, the City says that, "Shuttles block travel and bike lanes about 35% of the time that they stop." *Id*. at p. 7.

This unrebutted evidence demonstrates that Shuttle Project will and is having a significant impact on bicyclist safety, which "prove[s] that some circumstance of the project is unusual." *Berkeley Hillside*, 60 Cal.4th at 1105.

ii. The Shuttle Project *will have* a significant noise impact.

As discussed in Petitioners' Trial Brief, there is also substantial unrebutted evidence in the record that the Shuttle Project's "shuttle noise emissions will contribute cumulatively to noise emissions in areas where existing noise levels are already well above levels protective to public health." AR1426; AR1423-1426. This unrebutted evidence that the Shuttle Project will have will have significant noise impacts "prove[s] that some circumstance of the project is unusual." *Berkeley Hillside*, 60 Cal.4th at 1105.

iii. The Shuttle Project *will have* a significant air quality impact.

Substantial and unrebutted evidence in the record also establishes that the Shuttle Project will have significant air quality impacts and resultant health consequences. AR1380-1390. Environmental Chemist, Dr. Paul Rosenfeld, Ph.D., submitted a detailed modeling analysis proving that the diesel engine exhaust from the shuttles will increase cancer risks to people living near shuttle stops above the Bay Area Air Quality Management District's ("BAAQMD") CEQA threshold of significance. *Id*. According to Dr. Rosenfeld, San Francisco residents near shuttle stops will experience an increased cancer risk of approximately 12 per million as a direct result of the Shuttle Project. AR1385. The record contains no evidence to rebut Dr. Rosenfeld's expert opinion.

This evidence that the Shuttle Project will have a significant environmental effect establishes an unusual circumstance, precluding the City's reliance on a CEQA exemption. The Court need go no further in its analysis.

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[4] The City's evaluation states that commuter shuttles blocked travel or bike lanes 105% of the time at Valencia & 24th, explaining that the "zone blocked travel in excess of 100% because two shuttles managed to block both the bike and travel lane at the same time." Pearson Dec., Ex. 1, p. 26, fn. 10.

3. The City's determination that the Shuttle Project does not present an unusual circumstance is not supported by substantial evidence.

Even if Petitioners had not presented evidence that the Shuttle Project *will* have significant environmental impacts, the unusual circumstances exception would still apply because four characteristics of the Shuttle Project distinguish it from other projects in the exempt class, and these characteristics create environmental risks not generally present for Class 6 projects. The Shuttle Project is unusual compared to other Class 6 projects because: 1) its scale is massive and allows for unlimited growth, 2) it authorizes illegal activity, 3) shuttles stop in close proximity to residences, and 4) it poses public health risks. Defendants have failed to point to substantial evidence demonstrating that these are not "unusual circumstances" compared to other projects exempt under the Class 6 exemption.

i. The massive scale and unlimited growth allowed under the Shuttle Project is an unusual circumstance.

The large scale and ability for unlimited growth allowed under the Shuttle Project are unusual circumstances that differ from other Class 6 projects. It is undisputed that the Shuttle Project does not limit the number of commuter shuttles that may apply for and receive permits to operate commuter shuttles in the City. It is also undisputed that there is no limit on the number of shuttle stops that the City may approve at Muni zones around the City. Since the Shuttle Project began, daily commuter shuttle stop-events have increase nearly 30 percent. Pearson Dec., Exh. 1, p. 6. Each new commuter shuttle and each new commuter stop creates new risks and health hazards, and increases the Project's environmental impacts.

The City claims that the size of the commuter shuttle fleet is irrelevant because the Shuttle Project is merely measuring existing commuter shuttles. City Opp. Br. at 23:5-6. What makes the Shuttle Project unusual though, is that it is not limited to the shuttles that existed when the project began, and instead allows for unlimited growth.

Other data collection projects are limited in scope and size, and are not ordinarily allowed to grow without limit. None of the Class 6 projects cited by the City provide for the size of the projects to grow, let alone to grow without limitation. For example, the City points to a project deemed exempt under Class 6 that removed a single traffic lane on Folsom Street between 4th and 11th streets. AR153. That project did not allow the City to close traffic lanes at an unlimited number of locations around the City, but rather was limited to the single discrete project. Another Class 6 project the City points to was a traffic diversion project that required right turns along

eastbound Market Street east of Van Ness Avenue. *Id*. Again, there was no room for the scope of the project to grow, and was limited to a discrete location. The project did not allow for the City to change the right turn lanes at an unlimited number of locations around the City. The same is true of the other projects the City points to that prohibit vehicles along a limited portion of a single street, or remove a single tow-away lane. AR 153.

The Shuttle Project is unusual because, rather than monitoring a discrete set of vehicles at discrete locations, the Shuttle Project allows for an unlimited number of additional shuttles and stops around the City. The ability for the Shuttle Project to increase in size indefinitely differentiates it from other Class 6 projects.

ii. Data collection activities do not ordinarily authorize illegal activity.

The Shuttle Project is unusual because data collection and experimental management activities do not normally authorize activity that is illegal under state law. Defendants' attempt to reject the Project's authorization of illegal activity as an unusual circumstance rests entirely on their argument that commuter shuttles stopping at Muni zones is not illegal. Neither of the Defendants argue that a data collection project that authorizes illegal activity is not unusual. Moreover, Defendants point to no other Class 6 project that authorizes illegal activity. Accordingly, if the court finds that it is illegal for shuttles to stop at Muni zones, it should also find that the Shuttle Project presents an unusual circumstance, precluding the use of the Class 6 exemption. Also, there is no dispute that before the City adopted Section 914 of the Transportation Code as part of the Shuttle Pilot Program it was illegal under the City's own Code for private shuttles to stop in MUNI zones. Thus, the Pilot Program is unusual because it attempted to render legal activity that was formerly illegal. The *Azusa* court held that the fact that a project violated state law was an unusual circumstance. *Azusa*, 52 Cal.App.4th at 1208-09 (violation of state water code was unusual circumstance). Contrary to Intervenor's assertion, *Berkeley Hillside* did not reverse *Azusa*.

iii. The Shuttle Project presents an unusual circumstance because of its proximity to residences.

The City argues that the shuttles' proximity to residences is not an unusual circumstance because it is not unusual for vehicles to travel or stop near residences. The question is not whether it is unusual for vehicles to drive and stop near residences, but whether it is unusual for data collection projects to be located close enough to residences that they cause human health impacts. *See Voices for Rural Living v. El Dorado Irrig. Dist.* (2012) 209 Cal.App.4th 1096, 1109 (large

amount of water needed for casino and hotel project was significantly different from the amount of water that would be supplied to a project covered by the exemption for construction of small structures used by agency); *Wolmer v. City of Berkeley* (2011) 193 Cal.App. 4th 1329, 1351 (court rejected claims that location of infill project at crowded intersection was unusual circumstance, noting that this type of circumstance was exactly what is expected in the infill development context, under which the project was exempt).

In support of its argument, the City cites *Bloom v. McGurk,* 26 Cal.App.4th 1307, 1315, for the proposition that the presence of comparable facilities in the immediate area is not an unusual circumstance, but this reliance is misplaced. *Bloom* is distinguishable because in that case there was nothing unusual about an industrial facility being located in an area zoned industrial, where the exemption was for an existing facility. Also, the court found that there were "no homes in the immediate vicinity" of the incinerator. *Id*. at 1316. Thus, the case supports Petitioners. The City contends that the case of *Lewis v. 17th Dist. Ag. Assoc*. (1985) 165 Cal.App.3d 823, 829, finding the proximity of residences to a race track to be unusual, was reversed by the Supreme Court in *Berkeley Hillside*, *supra*. However, *Berkeley Hillside* does not even mention *Lewis*. Thus, *Lewis* continues to be good authority supporting Petitioners' position.

iv. The Shuttle Project presents an unusual circumstance because it poses public safety risks.

The Shuttle Project also presents an unusual circumstance because basic data collection projects and experimental management projects do not ordinarily cause impacts to human health,[5] but the Shuttle Project does. The City does not deny that a project that causes public safety risks, including cancer risks and risks of injury to pedestrians and bicyclists is unusual.[6] Instead, the City argues that "Petitioners point to no evidence that permitting commuter shuttles and directing them to stop in a limited number of permitted locations in the City . . . creates any new public safety risks." City Opp. Br. at 23:17-19. This is incontinent with the facts.

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[5] Impacts to human health are significant under CEQA. CEQA § 21083(b)(3) provides that a project has significant impacts if it "will cause substantial adverse effects on human beings, either directly or indirectly."

[6] The City knows perfectly well that the shuttles pose an environmental threat to nearby residences. It has already begun a study of the shuttles' air quality impacts to prepare for its proposal of a permanent project.

The City has permitted and directed commuter shuttles to stop at locations where they were not previously stopping. People living near those new stops now have an increased cancer risk above the levels determined to be significant under CEQA. AR1175-1176. Moreover, the Shuttle Project allows for unlimited growth in the number of shuttles, stop locations, and stop-events. Expert evidence shows that the more shuttles and stops, the more public safety impacts that are created for bicyclists. AR1417.

v. The City's findings are not supported by substantial evidence.

Defendants have no evidence to prove that the size, location, and illegality and public health risks created by the Shuttle Project are not unusual circumstances compared to other Class 6 projects. The City claims that the Shuttle Project is not unusual because Class 6 exemptions are commonly used by the City for "gathering data about transportation strategies and whether those strategies improve the pedestrian, bicycle and transit environment in San Francisco. (AR 153.)" City Opp. Br. at 21:3-4. The City specifically points out that the Class 6 exemption was used for projects gathering data on traffic and traffic diversion on Market Street and in Golden Gate Park and on whether increased enforcement and traffic signal modifications could reduce pedestrian/vehicle conflicts on Market. AR153. These examples prove Petitioners' point, as none of them have the characteristics that the Shuttle Project does.

The City's internal guidance document is further evidence that the Shuttle Project presents an unusual circumstance. The City's interpretation of the exemption is that it ordinarily covers "mostly non-physical activities, test borings, soil sampling, water sampling, vegetation sample, and materials testing in facilities and structures." Pet. RJN, Ex. 1. Activities like test borings, soil and water sampling, and materials testing do not involve an illegal activity, do not allow for unlimited growth, and do not create public health risks due to proximity to residences. Most importantly, legalizing the Shuttle Program and allowing hundreds of buses to operate throughout the City is clearly not a "non-physical activity."

The record contains no evidence to support a finding by the City that the Project's illegality, size, location, and public health risks is not unusual. Accordingly, the City abused its discretion in finding that the Shuttle Project does not constitute an unusual circumstance.

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4. There is a fair argument that the Shuttle Project will have significant environmental impacts.

Once the Court determines that the Shuttle Project presents an unusual circumstance, Petitioners only need to present some substantial evidence that the Shuttle Project *may* have significant environmental impacts. As discussed above, the record is full of such evidence.

Intervenor's blank assertion that none of Petitioners' expert comments submitted to the City constitute substantial evidence is inaccurate, and contrary to CEQA. Intervenor claims that these experts' opinions could not be substantial evidence because the arguments are based on speculation about where the commuter shuttle stops would ultimately be located, since the locations were not decided when the Program was adopted. Interv. Br. at 25:14-16. This is nonsense. Just because the exact location of stops was not finalized, does not mean that experts were unable to opine on the impacts that will occur at those stops, once locations are chosen. The claim that these expert opinions do not constitute substantial evidence is even more dubious because the City's own evaluation of the Project confirm the impacts the experts predicted. Pearson Dec., Ex. 1.

Petitioners produced voluminous evidence from well-qualified experts that the Shuttle Project would have significant impacts on air pollution (AR1380-1390), traffic, (AR1650-1654), bicycle lanes (AR1205-1211), noise (AR1213-1216), displacement of low-income communities, and other impacts. This expert evidence constitutes "substantial evidence" within the meaning of CEQA. Pub. Res. Code § 21080(e)(1).

The unusual circumstances exception applies, and the City's exemption of the Shuttle Project from CEQA must be overturned.

C. Defendants improperly include the Shuttle Project and its prior illegal activity in the baseline.

Defendants contend that Petitioners' CEQA analysis is premised on the wrong baseline. Defendants are incorrect. It is not proper to include an activity that violates state and local law in the baseline. No case has ever held that an ***unlawful*** activity can be a baseline. While some cases have found that ***unpermitted*** activity can be part of the baseline, that is significantly different that ***illegal*** activity. Defendants point to no case law that says otherwise.

Defendants cite to *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, for example, but that case did not involve illegal activity. In that case, the issue was whether to include current operations at a marine oil terminal in addition to its physical structure when analyzing impacts of a lease renewal for the facility. *Citizens for East Shore Parks*,

202 Cal.App.4th at 557-558. While the oil terminal had never been analyzed under CEQA because it was built before CEQA was enacted, it was not illegal for it to operate. *Id.* at 555. The same is true for the other cases cited in *Citizens for East Shore Parks*. *See e.g.*, *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1280-1281(baseline included unauthorized expansion of airport, but expansion of airport not illegal); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428 (baseline properly included *unpermitted* mining operations, but mining not illegal activity).

Here, in contrast, the City included in the baseline activity that was illegal under state law and city ordinance.

Even if the Court finds that existing shuttles were part of the baseline, the City's analysis still violated CEQA because the Shuttle Project is not merely a continuation of an existing baseline. The City's analysis includes all growth in commuter shuttle buses, stop-events, and stop locations in the baseline. This is despite substantial evidence in the record that shuttle operation would increase under the Project. AR1651. According to the City's evaluation report, daily shuttle stop-events have increased 30 percent since the Project began. Pearson Dec., Ex. 1, p. 7. The City violated CEQA by including all of this growth in the baseline. *See Cmtys. for a Better Env't v. So. Coast Air Qual. Mgmnt. Dist.* (2010) 48 Cal.4th 310, 321 (agency must analyze impacts from increase in level of operations at oil refinery from historic levels). As in *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal.App.4th 1170, 1197 (2005), the City has increased the intensity of commuter shuttle activity by 30 percent by legalizing an activity that was previously illegal. CEQA review is required to analyze and mitigate the impacts of this increased level of operations.

D. A permit system and dedicated enforcement officers are mitigation measures, not project features.

As discussed in Petitioners' Trial Brief, an agency may not rely on mitigation measures as a basis for concluding that a project is categorically exempt from CEQA, or for determining that the unusual circumstances exception does not apply. *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108 ("*SPAWN*"). Defendants make the conclusory statement that the permits and enforcement officers are project features, not mitigation measures. Dedicating enforcement officers is clearly a mitigation measure and not a project feature. The enforcement officers serve no function related to collecting data or managing an experiment. They are there to reduce the impacts of the shuttles – not to collect data. This is consistent with the City's findings in other similar projects. For example, the City conducted an environmental review of its Transit

Effectiveness Project, and included "enforcement of parking violations" as a mitigation measure for many of the significant impacts created by the project. Davis Dec., Ex. 1. Requiring buses to pull fully into Muni stops is also a mitigation measure expressly designed to mitigate impacts to traffic.

The City relies on *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329. In *Wollmer*, the city of Berkley was considering upgrades to an intersection to improve traffic. *Wollmer*, 193 Cal.App.4th at 1353. As part of a development project located near the intersection that was undergoing CEQA review, a developer offered land to expand the intersection to make a new left turn lane as part of the development project. *Id.* The court found that the addition of the left turn lane was properly included in the city's categorical exemption finding because it was a project feature of the development and not a mitigation measure because it would improve the intersection and traffic in general, and was not meant to merely mitigate additional impacts from the Project. In *Bankers Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 275, the court held that planters placed in front of a building were design elements and not mitigation measures. In these cases, the courts held that physical structure such as planter boxes and a left turn lane were design elements. By contrast, in the Shuttle Project, the City relies on non-physical mitigation measures such as enforcement officers and requirements to pull fully into Muni zones that cannot be construed as physical "design elements." Unlike in *Wollmer*, the measures are intended to reduce the specific impacts caused by the Shuttle Project, not to reduce impacts of traffic generally in the area.

In *San Francisco Beautiful v. City & Co. of San Francisco* (2014) 226 Cal.App.4th 1012, 1032, the court held that reliance on generally applicable public works requirements that long pre-dated the project were not mitigation measures adopted for the project at issue, but rather long-standing rules of generally applicability to all projects in the City. Here, the City relies on mitigation measures expressly adopted for the Shuttle Project. In *Save the Plastic Bag Coal. v. San Francisco* (2013) 222 Cal.App.4th 863, 881, the court held that a 10 cent fee was not a mitigation measures. While this suggests that permit fee in the Shuttle Program may not be a mitigation measure, it says nothing about the other mitigations in the program.

Here, in contrast, additional enforcement officers will be dispatched specifically to monitor and enforce violations of the Shuttle Project. The requirement to commuter shuttles pull fully into Muni zones is designed to reduce this impacts of the Shuttle Project alone. They serve no purpose other than to mitigate the traffic and safety impacts created by the Project. They cannot be said to be merely part of the project design, are not measures of general applicability, and were therefore

improperly included as part of the CEQA exemption analysis. This case is much closer to the *SPAWN* case, 125 Cal.App.4th 1098, 1107, where conditions to prevent pollutants from entering a creek were held to be mitigation measures precluding exemption, or *Azusa*, 52 Cal.App.4th at 1199-1200, where measures to prevent release of pollution from a landfill were held to be mitigation measures precluding an exemption. In this case, as in SPAWN and Azusa, the City has developed non-physical measures to reduce the impacts of the Shuttle Project. These measures are mitigation measures, not design elements.

The City abused its discretion by relying on mitigation measures to grant a categorical exemption from CEQA.

CONCLUSION

For the reasons set forth herein, and in the separate brief filed in reply to the Intervenors' Opposition Brief, which Petitioners incorporate herein by reference, the Court should grant the Petition for Writ of Mandate.

Dated: October 22, 2015

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