Richard T. Drury (CBN 163559)
Michael R. Lozeau (CBN 142893)
Rebecca L. Davis (CBN 271662)
LOZEAU | DRURY LLP
410 12th Street, Suite 250
Oakland, CA 94607
Ph: 510-836-4200
Fax: 510-836-4205
Email: richard@lozeaudrury.com
rebecca@lozeaudrury.com

Attorneys for Petitioners and Plaintiffs

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-14513627

PETITIONERS' TRIAL BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY 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

TABLE OF AUTHORITIES

CASES

STATUTES

California Code of Civil Procedure

California Public Resources Code

California Public Utilities Code

California Vehicle Code

REGULATIONS

California Code of Regulations, Title 14

Constitutional Provisions

I. INTRODUCTION

The City and County of San Francisco ("City") has authorized a private shuttle bus project ("Shuttle Project"), involving over 35,000 boardings each day (Administrative Record page 228 ("AR228")), with absolutely no environmental review under the California Environmental Quality Act ("CEQA"). Pub. Res. Code ("PRC") Sect. 21000, et seq. The Shuttle Project is similar in size to the entire CalTrain system or an entire medium-sized transit agency. AR2205.

The Shuttle Project is preempted by State law. The State Vehicle Code makes it unlawful for private vehicles to stop in red bus zones, which are reserved solely for "common carriers." Vehicle Code § 22500(e)(i). The City's ordinance expressly allows the private shuttles to stop in red bus zones. San Francisco Transportation Code § 914 (AR197-212). This constitutes a direct conflict between State law and local ordinances. The local ordinance must yield to State law.

Undisputed expert evidence in the record indicates that the Shuttle Project will have unmitigated environmental impacts, including, but not limited to the following:

- air pollution and related cancer risks above CEQA significance thresholds due to the fact that virtually all of the buses operate on diesel fuel rather than clean fuels (AR1385);
- interference with the flow of San Francisco Municipal Transportation Authority ("MUNI" or "SFMTA") buses, since the private shuttles use MUNI "red zones" in violation of state law (AR82, 126);
- pedestrian safety impacts since the shuttles block MUNI zones, forcing MUNI buses to load and unload in traffic lanes (AR67, 82, 1415);
- interference with bicycle lanes, which are often blocked by the shuttles (AR82, 1415);
- noise impacts in quiet residential areas above relevant CEQA thresholds (AR1423); and
- displacement of low-income communities by higher-paid workers who commute on the private shuttles (AR1408-1413; 1499-1518).

These impacts have been documented not only by independent experts, but also by the City's own Budget and Legislative Analyst ("BLA"). AR1672-1707. Despite these impacts, the City refused to conduct any review of the Shuttle Project under CEQA. Instead, the City exempted the Project entirely from all CEQA review, pursuant to the Class 6 exemption for "Information Collection." 14 Cal.Code Regs. ("CCR") 15306; AR2. As discussed below, the Class 6 exemption does not apply on its face because the Shuttle Project goes far beyond mere information collection.

The Class 6 exemption is also improper because there is a "fair argument" based on expert evidence that the Project will have significant adverse environmental impacts due to unusual circumstances.

Dozens of well-respected individuals and organizations commented at public hearings on the Project and requesting CEQA review, including former City Supervisors (AR3217, 3221), the Harvey Milk LGBT Democratic Club (AR3186), the San Francisco Tenants Union (AR3216), Senior and Disability Action (AR3221), the Service Employees International Union ("SEIU") Local 1021 (AR3181), the AIDS Housing Alliance director (AR3189), as well as many long-time residents of San Francisco. AR3150-3222. The Petitioner Coalition represents hundreds of San Francisco residents who are facing the direct impacts of the Shuttle Project, including air pollution, traffic congestion, MUNI delays, bicycle lane blockage and displacement. The Coalition wants the City to conduct CEQA review of the Shuttle Project so that the City will be legally mandated to impose all feasible mitigation measures.

CEQA review would provide an orderly process to review the Project's environmental impacts, and to require the City to impose all feasible mitigation measures and alternatives to reduce those impacts. *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs*. (2001) 91 Cal. App. 4th 1344, 1354; 14 CCR §15002(a); Pub.Res.Code ("PRC") § 21081. Instead, the City has embarked on its own informal analysis, unfettered by any of the legal requirements of CEQA. While the City intends to analyze the impacts of the program, in the absence of CEQA, there is no legal requirement for the City to impose any mitigation measures or alternatives. CEQA does not allow such a "CEQA-light" procedure. *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 110 (agency may not replace formal requirements of CEQA with alternative environmental review procedure under Endangered Species Act).

At the same time that the City has exempted the Shuttle Project from all CEQA review, it is conducting full CEQA review of MUNI's own Transit Effectiveness Project (AR3151), which involves rerouting certain MUNI lines to improve efficiency. See, www.sfmta.com/news/project-updates/final-tep-eir-documents-now-available. Certainly, private shuttle operators should be held to the same environmental standards as the City's own transit provider, MUNI.

II. FACTS

A. Commuter shuttle history in San Francisco

For nearly 30 years, private shuttles have been providing intra-city transportation services for hospitals, schools, service organizations, and private employers. AR222. Starting in 2004,

private employers began offering regional commuter shuttle services to their employees who live in San Francisco and work in locations outside of San Francisco, particularly in Silicon Valley. AR222. The number of private commuter shuttles operating in San Francisco has grown dramatically in recent years, and the City expects that this rapid growth will continue. AR33.

To pick up and drop off passengers, commuter shuttles typically use red-curbed bus zones used by MUNI buses and trolleys and some white-curbed passenger loading zones. AR223. The California Vehicle Code § 22500(e)(i) prohibits the use of red-curbed zones by private vehicles such as the shuttles. Prior to adoption of the Project, it also violated the San Francisco Charter for shuttles to stop in MUNI zones. AR1682-1684. Despite the fact that the shuttles were illegally stopping at red-zones, the practice has been allowed for years, with only a handful[1] of citations issued by SFMTA and the Police Department. AR224. ***According to Asst. City Attorney David Greenburg, "all use of City bus zones by private shuttles to date has been in violation of the California Vehicle Code."*** AR233 (emphasis added).

Currently the City estimates that on an average weekday, these commuter shuttles have more than 35,000 boardings on more than 350 shuttles at 200 MUNI bus zones throughout San Francisco. AR 228. This is similar in size to CalTrain or a medium-sized transit agency. AR 2205. At peak locations, private commuter shuttles outnumbered MUNI operations 1.5 to 1. AR 3033. As the number of shuttles increased, so did the number of impacts created by the shuttles, including MUNI delays, traffic congestion, and pedestrian and bicycle safety risks, among others. AR223.

B. The Shuttle Project

The Shuttle Project is an 18-month pilot permit program that allows permitted private commuter shuttle buses to stop in approximately 200 designated MUNI bus stops throughout San Francisco to load and unload passengers. AR57, 59. The Project contains no limits on the number of shuttles that can register for a permit under the Project. See, AR59, 137-139.

There are significant differences between private commuter shuttles and MUNI vehicles. For instance, the large motor coach carriers used as shuttles are much larger than typical MUNI buses. AR962. Shuttles used for regional commuting are typically larger than those used for intra-city transit, and usually seat 52 to 81 people. AR99. Larger shuttles, such as those used in inter-

[1] Between January 1, 2011 and February 25, 2014, only an estimated 45 or 0.3% of the 13,385 citations issued for illegally stopping in a bus zone were issued to shuttle bus providers or companies that owned their own shuttle fleet. (AR 233.)

city transit, tend to have longer idling times than MUNI vehicles because it takes longer for passengers to board and alight because of the size of the bus, their high floor configuration, and use of a single door. AR239. Additionally, MUNI prioritizes low-emission vehicles such as battery-electric vehicles or diesel with advanced exhaust treatment, with a goal of moving towards zero emissions by 2020. AR970. There is no such goal or policy for the private shuttles, and almost all use conventional diesel engines. Moreover, while MUNI does not allow its own vehicles to idle for more than three minutes, private shuttles are allowed to idle for up to five minutes.[2] AR970.

As part of the Project, the city solicited input from the shuttle service providers and the public about which stops to include in the Project. SFMTA then selected approximately 200 Muni stops for shared use. AR32. While the initial Muni stops have now been chosen, the Shuttle Project contains no limit on the number of stops or the number of shuttles that may be permitted. Requests for additional shared MUNI stops can be submitted for consideration by the SFMTA on a rolling basis. AR2827. The City has made clear that the intent is for the Shuttle Project to grow over time. AR1064.

III. STANDARD OF REVIEW

A. Preemption

The determination of whether the San Francisco Transportation Code §914 is preempted by state law is a pure question of law, and it is therefore determined *de novo* by the Court, without deference to the agency. *M & B Constr. v. Yuba County Water Agency* (1999) 68 Cal. App. 4th 1353, 1359 ("The interpretation and application of a statutory scheme to an undisputed set of facts is a question of law . . . which is subject to de novo review on appeal."). The Court reviews questions of law *de novo* because "the ultimate resolution of . . . legal questions rests with the courts," not with agencies. *Yamaha Corp. v. State Bd. of Equal.* (1998) 19 Cal.4th 1, 13.

B. CEQA

The standard of review in an action challenging a CEQA exemption is whether there has been a prejudicial abuse of discretion. *See* PRC § 21168.5; *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist*. (1992) 9 Cal. App. 4th 644, 656. "[R]eversal of the City's action here is appropriate only if (a) the City, in finding the proposed project categorically exempt, did not proceed in the manner required by law, or (b) substantial evidence fails to support that finding."

[2] One resident reported to the SFMTA that an Apple shuttle bus idles its engine on Funston Avenue for almost two hours every day. AR2899.

Berkeley Hillside Preservation v. City of Berkeley (2015)("*Berkeley Hillside*") 60 Cal.4th 1086, 1109-1110. The Coalition contends that the City "failed to proceed in a manner required by law" because it failed to conduct any CEQA review for the Shuttle Project.

The question of "whether the Commission's activity fell within the express terms of a categorical exemption," is a question of law subject to independent, or *de novo* review. *Berkeley Hillside*, 60 Cal. 4th at 1109; *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. [Citations.] Thus, for example, interpreting the scope of a CEQA exemption presents 'a question of law, subject to de novo review by this court.' [Citations].") Erroneous reliance by the City on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) ("*Azusa*") 52 Cal. App. 4th 1165, 1192.

If the Project falls within the scope of the exemption, then the exemption can still be overcome if there is a "fair argument" that the Project may have significant impacts due to "unusual circumstances." 14 CCR. §15300.2(c). "The determination as to whether there are 'unusual circumstances' … is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on the environment' … is reviewed to determine whether the agency, in applying the fair argument standard, 'proceeded in [the] manner required by law.'" *Berkeley Hillside*, 60 Cal. 4th at 1114.

IV. ARGUMENT

A. The Shuttle Project is preempted by the California Vehicle Code and its adoption violates the California Constitution.

The Shuttle Project enacts local legislation in conflict with and preempted by state law, and is therefore invalid. A charter city, such as San Francisco, may not enact an ordinance in conflict with state law over matters that are of statewide concern. *Bishop v. San Jose* (1969) 1 Cal.3d 56, 61-2; *Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 659 ("legislation in an area of statewide concern preempts conflicting regulation by a charter city"). A charter city is authorized by the State Constitution to "make and enforce all ordinances and regulations in respect to municipal affairs." Cal. Const., Art. XI, § 5, subd. (a). "Under this provision, ordinances enacted in a charter city relating to matters which are purely municipal affairs prevail over state laws covering the same subject… 'As to matters which are of statewide concern, however, home rule charter cities remain

subject to and controlled by applicable general state laws regardless of the provisions of their charters…'" *Comm. of Seven Thousand v. Sup. Ct. (City of Irvine)* (1988) 45 Cal.3d 491, 505.

The threshold inquiry is whether a conflict actually exists between a city ordinance and a state law. *Johnson v. Bradley* (1991) 4 Cal.4th 389, 400. If a conflict exists, and the subject matter of the law is of statewide concern, then the state law preempts the city law. *Id.* at 399. "Any doubt as to whether a matter is of concern to both municipalities and the state must be resolved in favor of the legislative authority of the state." *Baggett v. Gates* (1982) 32 Cal.3d 128, 140.

1. A conflict exists between San Francisco Transportation Code §914 and California Vehicle Code § 22500(e)(i).

An actual conflict exists between the San Francisco Transportation Code §914 ("Sec. 914") and State law. California Vehicle Code § 22500(e) provides that:

> No person shall stop, park, or leave standing any vehicle whether attended or unattended, except when necessary to avoid conflict with other traffic or in compliance with the directions of a peace officer or official traffic control device, in any of the following places:
>
> . . .
>
> (i) Except as provided under Section 22500.5,[3] alongside curb space authorized for the loading and unloading of passengers of a bus engaged as a common carrier[4] in local transportation when indicated by a sign or red paint on the curb erected or painted by local authorities pursuant to an ordinance.

In direct conflict with the State Vehicle Code's prohibition against private buses stopping in public "red-curb" bus stops, the Sec. 914 expressly ***allows*** the same action. AR197-212, 203. Sec. 914 provides that a shuttle bus bearing a valid permit placard is allowed to stop at any stop designated under the program, including designated red curbs. Sec. 914(f)(2); AR203.

Moreover, California Vehicle Code § 42001.5 imposes a minimum $250.00 fine on any person convicted of violating Vehicle Code § 22500. Vehicle Code § 42001.5(b) provides that the fine cannot be suspended, except that the court can waive anything above $100.00, meaning the minimum fine allowed under state law is $100.00. In contrast, the Shuttle Project allows private shuttle operators to stop in public bus stops if they make a payment of one dollar ($1.00)[5], an action that is in direct conflict with State law. Sec. 914(h)(2); AR206.

---

[3] Vehicle Code § 22500.5 refers to school buses owned by or operated for a public school district.

[4] Section 211 of the Cal. Public Utilities Code defines "common carriers" as entities that provide transportation to the public for compensation, and the City acknowledges that this does not include the private commuter shuttle buses at issue in this action. AR272.

[5] The payment has since been increased to $3.55, but it still far below the statutory minimum.

a. A conflict exists and the statutory exceptions in Vehicle Code section 22500 do not apply because signs posted at commuter shuttle stops in MUNI zones are not "official traffic control devices," and the shuttles are not stopping because it is "necessary to avoid conflict with other traffic."

Vehicle Code section 22500 generally prohibits stopping in each place listed in section 22500, including curb space designated for bus stops. A statutory exception to this general rule exists, allowing vehicles to stop at each place listed in section 22500 if done "when necessary to avoid conflict with other traffic or in compliance with the direction of a peace officer or official traffic control device."[6] Vehicle Code § 22500. None of these exceptions apply here.

i. The signs posted at commuter shuttle stops in MUNI zones are not "official traffic control devices."

The City has argued in its demurrer that no conflict between Vehicle Code § 22500 and Sec. 914 exists because signs posted at shuttle stops in MUNI zones exempt the shuttles from having to comply with section 22500. The City's argument fails because not every sign or traffic control device excuses a violation of 22500, only an **official traffic control device** does. The City's signs are not "official traffic control devices" under the Vehicle Code.

The City has placed signs on at least some MUNI stops that state, "Commuter Shuttle Pilot, Permitted Users Only." (Declaration of Carli Paine in Support of City and County of San Francisco's Demurrer to Petition for Writ of Mandate (Feb. 17, 2015)). The problem with the City's argument is that not all signs are "official traffic control devices." The term "official traffic control device" is a term of art, defined in section 440 of the Vehicle Code:

> An "official traffic control device" is any sign, signal, marking, or device, ***consistent with Section 21400***, placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic, but does not include islands, curbs, traffic barriers, speed humps, speed bumps, or other roadway design features.

Vehicle Code § 440 (emphasis added).

The commuter shuttle signs are not "official traffic control devices because they are not "consistent with Section 21400." Section 21400 of the Vehicle Code, entitled in part, "[u]niform standards and specifications" provides:

[6] There is no evidence in the record that demonstrates that shuttle buses are, or have ever, stopped, parked, or idled in a MUNI zone at the direction of a peace officer.

> (a)(1) **The Department of Transportation shall**, after consultation with local agencies and public hearings, **adopt rules and regulations prescribing uniform standards and specifications for all official traffic control devices placed pursuant to this code**, including, but not limited to, stop signs, yield right-of-way signs, speed restriction signs, railroad warning approach signs, street name signs, lines and markings on the roadway, and stock crossing signs placed pursuant to Section 21364.

Vehicle Code § 21400. The rules and regulations adopted by the Department of Transportation are found in the California Manual on Uniform Traffic Control Devices (California MUTCD), which was most recently updated on November 7, 2014. (RJN Ex. C.) The California MUTCD contains the uniform standards and specifications for all official traffic control devices in California. (RJN Ex. C, p. 43.) According to the California MUTCD, "[t]raffic control devices should be placed and operated in a uniform and consistent manner," and "uniformity of the meaning of traffic control devices is vital to their effectiveness." (*Id*. at p. 54.)

None of the commuter shuttle signs are contained in the California MUTCD, and therefore they are not official traffic control devices. The MUTCD contains specific signs with specific language, symbols and shapes. The City's signs are nowhere to be found in the MUTCD. There are no signs in the MUTCD that state "Commuter Shuttle Pilot, Permitted Users Only," and nowhere does the MUTCD authorize the use of any sign related to commuter shuttles. (RJN Ex. C.) Therefore, this sign is not an "official traffic control device" within the meaning of Vehicle Code §21400.

Rather than addressing whether the shuttle signs are consistent with section 21400, the City simply assumes that any signs posted are sufficient to allow the City to avoid compliance with the Vehicle Code. This cannot be the law. Otherwise, any city could completely disregard the Vehicle Code simply by putting up any sign. Instead, section 21400 allows the state DOT to authorize very specific and limited signs. These do not include the signs at issue in this case. Moreover, under the City's reading, the phrase "official traffic control device" in section 22500 is meaningless, and the uniformity requirements of 21400 are undermined. Since the shuttle signs are not "official traffic control devices," the shuttle buses are not excused from complying with Vehicle Code section 22500. The City's adoption of the Shuttle Project is preempted by state law.[7]

[7] The City's argument that the shuttles are legally allowed to stop in MUNI zones is further undermined by the legislative history of Assembly Bill 61. AB 61 was introduced on December 12, 2014 as "[a]n act to amend Section 22500.5 of the Vehicle code, relating to shuttle services." Assem. Bill No. 61 (2015-2016 Reg. Sess.). According to the Legislative Counsel's Digest:

ii. The commuter shuttles are not stopping at MUNI zones because it is necessary to avoid conflict with other traffic.

The exemption from Section 22500 for vehicles stopping, parking, or idling in a red MUNI zone "when ***necessary*** to avoid conflict with other traffic" is equally inapplicable. In fact, the evidence in the record demonstrates that by stopping, parking, and idling in MUNI zones, the shuttles are actually *creating* traffic, not *avoiding* it.

The Vehicle Code defines "traffic" as including "pedestrians, ridden animals, vehicles, street cars, and other conveyances either singly or together, while using any highway for purposes of travel." Vehicle Code Section 620. There is no evidence that shuttle buses that stop, park, and idle in bus zones are doing so because it is ***necessary*** to avoid conflict with other traffic. The shuttles are stopping, parking, and idling at MUNI stops in order to pick up passengers.

Rather than avoiding traffic, the record contains abundant evidence that the shuttle buses are causing and contributing to conflicts with other traffic by stopping in bus zones. Studies conducted by the City's consultant, Nelson/Nygaard Consulting Associates, Inc., and Human Impact Partners, both report observations of shuttle activities contributing to localized traffic congestions (AR238-240), and impeding traffic and visibility (AR1208). The SFMTA itself has "conducted field data collection and confirmed that shuttle operations create conflicts with MUNI and other users of the transportation system." AR60. The field data collected by the SFMTA confirmed that shuttle impacts include: "Delays to MUNI service, Forcing Muni buses to must[sic] stop in the traffic lane

---

> Under existing law, a person may not stop, park, or leave a vehicle standing alongside a curb space authorized for the loading or unloading of passengers of a bus engaged as a common carrier in local transportation when indicated by a sign or red paint on the curb, except that existing law allows local authorities to permit schoolbuses to stop alongside these curb spaces upon agreement between a transit system operating buses as common carriers in local transportation and a public school district or private school.
>
> This bill would also allow local authorities to permit shuttle service vehicles, as defined, to stop for the loading or unloading of passengers alongside these curb spaces upon agreement between a transit system operating buses engaged as common carriers in local transportation and a shuttle service provider, as defined. The bill would state that it is the intent of the Legislature to not replace public transit services.

Id. AB 61 was withdrawn by the author. Therefore, the law remains in its current state, and it is unlawful for private shuttles to stop in red-curb zones. See, *CD Investment Co. v. California Ins. Guarantee Assn*. (2000) 84 Cal. App.4th 1410, 1426 (enrolled bill reports may be relied upon in interpreting a statute).

rather than at the curb, Localized traffic congestion[, and] Diversion of bicyclists out of bike lanes and into traffic lanes." AR60. The City's Budget and Legislative Analyst also found that shuttles contribute to localized traffic congestion, and create dangerous conditions for pedestrians, bicyclists, and passengers with disabilities. AR240. The record is full of additional evidence of the shuttles impacts on traffic. See AR43, 126, 222-223, 238-240, 1053, 1205, 1208, 1210, 1327-1330, 1765, 1769, 1790, 2119, 3173, 3197.

Since there is no evidence that every time a shuttle pulls into a MUNI zone, it is doing so because it is **necessary** to avoid conflict with traffic, the shuttle buses are not excused from complying with Vehicle Code section 22500, and the City's adoption of the Shuttle Project is preempted by state law.

2. The Shuttle Project is preempted because it involves a matter of statewide concern.

The Shuttle Project is preempted because the conflict between local and state law involves a matter of statewide concern. The phrase "municipal affair" is a term of art, and a matter is not a "municipal affair" unless it is of ***strictly*** local interest. *Trans World Airlines, Inc. v. San Francisco*, 228 F.2d 473, 475 (9th Cir. 1995), cert. denied, (1956) 351 U.S. 919. A matter is of statewide concern rather than only a municipal affair when its impact is primarily regional, even if its impacts are not truly statewide. *Comm. of Seven Thousand*, 45 Cal.3d at 505.

Transportation, particularly transportation that crosses county lines, is a quintessential matter of statewide concern. Public Utilities Code § 99220(b) states, "[t]he fostering, continuance, and development of public transportation systems are a matter of state concern." Inter-city transit is precisely the subject matter of the Shuttle Project and is therefore a matter of statewide concern. Unless expressly provided by the legislature, a city has no authority over vehicular traffic control. *Rumford v. City of Berkeley* (1982) 31 Cal.3d 545, 550 (city may not place traffic barriers on local streets because they could interfere with inter-city traffic which is a matter of statewide concern). As the Supreme Court stated in *Rumford*, "A city's police powers do not extend to control of vehicular traffic on its streets; that field has been preempted (Vehicle Code sec. 21)." *Id*. at 553.

The California Supreme Court has held that cities (including charter cities) may not enact ordinances that conflict with the State Vehicle Code, because the Vehicle Code expressly preempts local regulation. *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1074. The Supreme Court noted that Vehicle Code § 21 provides:

> Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein.

The court held that a city ordinance requiring forfeiture of cars used in prostitution was preempted by the State Vehicle code: "the City's ordinance is expressly preempted by state law." *Id*. at 1074. Since the Shuttle Program allows private buses to park in red-curb zones reserved by the State Vehicle Code for only public buses, the Program is expressly preempted by state law.

Vehicle Code § 22500(i) deals with matters of statewide concern. Public transportation is not strictly a municipal affair, but rather is a matter of statewide concern. Section 22500(i) was designed to allow public transportation to move efficiently throughout the state, by ensuring that vehicles other than "common carriers" do not block bus stops and cause delays to public transportation systems. The bus stops in San Francisco serve regional public transit agencies, including SamTrans,[8] Golden Gate Transit,[9] CalTrain, and AC Transit.[10] AR232. By allowing private commuter shuttles to use public bus stops, the regional public transportation system is affected. Its effects are not purely local. The Shuttle Project impacts persons outside of San Francisco, and therefore is a matter to which the state is empowered to, and has, regulated.

The Public Utilities Code provides:

> Public transportation is an essential component of the balanced transportation system which must be maintained and developed so as to permit the efficient and orderly movement of people and goods in the urban areas of the state. Because public transportation systems provide an essential public service, it is desirable that such systems be designed and operated in such a manner as to encourage maximum utilization of the efficiencies of the service for the benefit of ***the total transportation system of the state and all the people of the state***, including the elderly, disabled, the youth, and the citizens of limited means.

Pub. Util. Code § 99220(a) (emphasis added).

By allowing private commuter shuttles to use public bus stops, the Shuttle Project impacts public transportation. Since Vehicle Code § 22500(i) deals with matters of statewide concern, and the Shuttle Project conflicts with it, the Shuttle Project is preempted and San Francisco Transportation Code Sec. 914 is null and void.

---

[8] SamTrans provides bus service in between San Francisco and San Mateo County.
[9] Golden Gate Transit buses run from San Francisco to Marin and Sonoma Counties.
[10] AC Transit operates bus service between San Francisco and the East Bay.

B. The City abused its discretion and violated CEQA by exempting the Shuttle Project from CEQA review despite substantial evidence in the record of significant environmental impacts.

1. Legal Background

CEQA mandates that "the long-term protection of the environment . . . shall be the guiding criterion in public decisions" throughout California. PRC § 21001(d). The foremost principle under CEQA is that it is to be "interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Citizens of Goleta Valley v. Bd. of Sups.* (1990) 52 Cal.3d 553, 563-64. An agency's action violates CEQA if it "thwarts the statutory goals" of "informed decisionmaking" and "informed public participation." *Kings Co. Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. 14 CCR § 15002(k); *Comm. to Save Hollywoodland v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185-86. First, if a project falls into an exempt category, no further agency evaluation is required. *Id*. Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform a threshold initial study. *Id*.; 14 CCR § 15063(a). If the study indicates that there is no substantial evidence that the project may cause a significant effect on the environment the agency may issue a negative declaration. *Id*., 14 CCR §§ 15063(b)(2), 15070. Finally, if the project will have a significant effect on the environment, an environmental impact report ("EIR") is required. *Id*. Here, since the City exempted the Project from CEQA, we are at the first step of the CEQA process, where the standard is extremely low.

a. Categorical exemptions

CEQA identifies certain classes of projects that are exempt from the provisions of CEQA. These are called categorical exemptions. PRC § 21084(a); 14 CCR §§ 15300, 15354. Categorical exemptions are certain classes of activities that generally do not have a significant effect on the environment. *Id*. Public agencies utilizing such exemptions must support their determination with substantial evidence. PRC § 21168.5. CEQA exemptions are narrowly construed and "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language." *Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 125; *McQueen v. Bd. of Dirs*. (1988) 202 Cal. App. 3d 1136, 1148. Erroneous reliance by an agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA. *Azusa*, 52 Cal. App. 4th at 1192. "[I]f the court perceives there was substantial evidence that the project might

have an adverse impact, but the agency failed to secure preparation of an EIR, the agency's action must be set aside because the agency abused its discretion by failing to follow the law." *Dunn-Edwards*, 9 Cal. App. 4th at 656.

The City exempted the Project from CEQA review by relying on the Class 6 categorical exemption for "Information Collection" ("Class 6 Exemption" or "Information Collection Exemption"). This narrow exemption states that:

> Class 6 consists of basic 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 fathering purposes, or as part of a study leading to an action which a public agency has not yet approved, adopted, or funded.

14 CCR §15306. Failure to comply with the terms of the exemption renders the exemption inapplicable. The question of "whether the Commission's activity fell within the express terms of a categorical exemption," is a question of law subject to independent, or *de novo* review. *Berkeley Hillside*, 60 Cal. 4th at 1109; *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. [Citations.] Thus, for example, interpreting the scope of a CEQA exemption presents 'a question of law, subject to de novo review by this court.'")

b. Exceptions to categorical exemptions

CEQA contains several exceptions to categorical exemptions. 14 CCR § 15300.2. If an exception applies, the exemption cannot be used, and the agency must instead prepare an initial study and CEQA document. *McQueen*, 202 Cal. App. 3d at 1149; *Hollywoodland*, 161 Cal. App. 4th at 1187. "Even if a project falls within the description of one of the exempt classes, it may nonetheless have a significant effect on the environment based on factors such as location, cumulative impact, or unusual circumstances." *Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* (2006) 141 Cal. App. 4th 677, 689. The "significant effects" exception provides that a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to "unusual circumstances." 14 CCR §15300.2(c).

"The determination as to whether there are 'unusual circumstances' … is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on

the environment' … is reviewed to determine whether the agency, in applying the fair argument standard, 'proceeded in [the] manner required by law.'" *Berkeley Hillside*, 60 Cal. 4th at 1114.

The Court's review of the exceptions to the categorical exemptions is also governed by the fair argument standard. "[A]n agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances." *Banker's Hill, Hillcrest, Park West Cmty. Preservation Group v. City of San Diego* (2006) 139 Cal. App. 4th 249, 264; *Dunn-Edwards*, 9 Cal. App. 4th at 654-655. Accordingly, a reviewing court must "independently review the agency's determination under Guidelines section 15300.2(c) to determine whether the record contains evidence of a fair argument of a significant effect on the environment." *Id*.

Under the fair argument standard, if an agency is presented with a fair argument, supported by substantial evidence, that the project may have a significant effect on the environment, it cannot use a categorical exemption even where it is presented with other substantial evidence[11] indicating that the project will have no significant effect. *Azusa*, 52 Cal. App. 4th at 1201-2. The fair argument standard creates a "low threshold" for further environmental review and "reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." *Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1316-1317. Under this standard, the court does not weigh evidence, but only determines whether there is any substantial evidence of a possibility of environmental harm. *Dunn-Edwards*, 9 Cal. App. 4th at 647. Likewise, "deference to the agency's determination is not appropriate." *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal. App. 4th 144, 151.

2. The Class 6 "Information Collection" Categorical Exemption Does not Apply to the Shuttle Project as a Matter of Law.

The Court's initial determination as to whether the exemption applies on its face is a question of law subject to independent, or *de novo*, review. *San Lorenzo Valley*, 139 Cal. App. 4th at 1375. The City's attempt to avoid CEQA review by exempting the Project as a Class 6 Information Collection activity is improper. Class 6 is a very limited exemption for information collection. It is limited to "basic data collection, research, experimental management, and resource

[11] "Substantial evidence" under this standard means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. . . ." (14 CCR § 15384(a).)

evaluation activities which do not result in a serious or major disturbance to an environmental resource." 14 CCR § 15306. Categorical exemptions, such as the Class 6 exemption, are narrowly construed, and are limited to their terms. *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal. App. 4th 1257, 1268. "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. The Shuttle Project does not fit within the terms of the Class 6 Information Collection exemption because it goes far beyond basic "information collection," and because the Project will result in a "serious or major disturbance to an environmental resource."

The City contends that the Project is exempt from CEQA review because the SFMTA will collect data about the Project during the 18-month pilot period. The City is attempting to make the Class 6 exemption applicable for anything it deems a "pilot project." AR3238 (City Environmental Review Officer referred to the Class 6 exemption as the "pilot exemption"). According to the City, the fact that data will be collected as part of the Project, makes the Project exempt from CEQA review as a Class 6 "information collection activity." AR3224. The City's Environmental Review Officer testified that the decision to find the Project exempt was based on the following: "the proposed pilot program will include data collection, experimental management, and study that will help formulate a long term regulatory program. So that fits under class six." AR3224.

The City's argument proves too much. Under the City's reasoning, any activity that also includes data collection would be subject to the Class 6 exemption, regardless of the nature of the underlying activities. Under the City's argument, an oil refinery could be built and operated, and as long as data was collected about refinery emissions during a "pilot period," the refinery project would be exempt from CEQA review. This is clearly contrary to CEQA. *See, Castaic Lake,* 41 Cal. App. 4th at 1268 (CEQA earthquake exemption did not apply to rebuilding of City center because rebuilding project included elements beyond mere earthquake repairs and reconstruction).

The mere fact that data is also being collected does not mean that the Project is an information collection activity. Regardless of the City's desire to test policy options, the Class 6 exemption is not a "pilot project" exemption. It is for a much more narrow set of activities. This exemption is for gathering data – it is not for launching a transportation system that rivals the size

of CalTrain. The Class 6 exemption is inapplicable to the Shuttle Project because, like the refinery example, the Project goes far beyond the scope of mere information collection.

Indeed the City's own descriptions of the Project demonstrate that data collection is only a small portion of the Project; it is not the Project itself. The City describes the Project as a "permit program to allow shuttle service providers to use designated MUNI stops for passenger loading and unloading, and establishing permit conditions and a permit fee." AR59. The Shuttle Project allows more than 350 buses to engage in more than 35,000 boardings per day, and includes: (1) the development of a network of 200 shared Muni and shuttle stops, (2) a permit application and fee program, (3) adoption and implementation of shuttle operating guidelines, (4) parking control officers to enforce the permits, and (5) data provided from the shuttle operators to the SFMTA. AR 130. There is no reasonable interpretation of the Shuttle Project as mere "information collection."

The City's own CEQA guidance document undermines the City's litigation position. The City's CEQA guidance document provides that the Class 6 exemption, "is for the most part non-physical, but it also includes such activities as test borings; soil, water, and vegetation sampling; and materials testing in facilities and structures." RJN Ex. A, p. 13. The City's longstanding interpretation of the Class 6 exemption embodied in its published guidance is entitled to deference. *Fujitsu IT Holdings v. Franchise Tax Bd*. (2004) 120 Cal.App.4th 459, 462. When, as here, the agency takes a litigation position that is inconsistent with its published guidance document or a regulation, the litigation position is entitled to no deference. See, *Environmental Law Foundation v. Beech-Nut Nutrition Corp*. (2015) 235 Cal.App.4th 307, 329; *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 748. In each example listed in the City's guidance document, the project itself is the information collection activity. For example, the exempt project is the sampling of water, or the drilling of a test well. If the City were merely taking air samples near the shuttle stops or were placing GPS devices on shuttles, those may constitute information collection activities – but not the authorization of a private transit system with 35,000 boardings each day.

This Project is not just about collecting data. The Project allows an unlimited number of shuttle buses to pick people up at stops, transport them to work, and then take them back and drop them off at 200 stops around San Francisco. The Shuttle Project creates and legalizes a private shuttle transportation system "whose ridership is equivalent to that of a small transit system." AR2.

Rather than the data collection being the project itself, data is being collected to "measure the effectiveness of managing and regulating commuter shuttle loading activities."[12] AR127.

Furthermore, the Class 6 exemption does not apply if the activity will "result in a serious or major disturbance to an environmental resource." 14 CCR §15306. As discussed below, expert analysis demonstrates that the commuter Shuttle Project has significant impacts on air quality, pedestrian and bicycle safety, public transportation, traffic, and displacement. In contrast, the city has provided no evidence to support the Notice of Exemption's ("NOE") bare conclusion that the Shuttle Project would not result in a disturbance to an environmental resource. As such, the Class 6 exemption does not apply by its own terms. The City's certification of the NOE "is an attempt to use limited exemptions contained in CEQA as a means to subvert rules regulating the protection of the environment." *Castaic Lake*, 41 Cal. App. 4th 1257, 1268.

3. The Shuttle Project cannot be exempt from CEQA because it will have significant environmental impacts due to unusual circumstances.

Even assuming *arguendo* that the Project constitutes an information collection activity as defined by CEQA, the City still abused its discretion by issuing a notice of exemption because the Project falls under the "significant effect" exception to categorical exemptions. 14 CCR § 15300.2(c). A categorical exemption is inapplicable "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." *Id*.

a. Unusual Circumstances Exist Precluding the Exemption.

What is "unusual" is "judged relative to the *typical* circumstances related to an otherwise typical exempt project." *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal. App. 4th 786, 801 (emphasis added). An unusual circumstance is "some feature of the project that distinguishes it from others in the exempt class." *San Lorenzo Valley,* 139 Cal. App. 4th at 1381. The *Azusa* Court held that the unusual circumstances test would be satisfied where the

[12] The administrative record contains dozens of examples of "data collection" being discussed as a means of analyzing the effectiveness of the Project, not as the Project itself. For example, in describing the benefits of the Project, the city provides that "[t]he Pilot program will allow the SFMTA to build on knowledge that exists and test out an approach and gather additional data about the performance of this approach that can inform longer term solutions." AR 129 [emphasis added]); *see also* AR 133 ("The Pilot program has been carefully designed to test a solution to the issues raised by the expanded use of commuter shuttles in San Francisco, and provide SFMT A with data to accurately assess the Pilot"); AR1067 ("The SFMTA proposes to collect data during the course of the pilot program that will directly support the implementation of the pilot").

circumstances of a particular project: (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects. *Azusa,* 52 Cal. App. 4th at 1207; *Hollywoodland*, 161 Cal. App. 4th at 1187 (construction of new fence atop historic granite wall posed environmental risk that did not exist for "general class of exempt projects" under the Class 5 exemption due to differing historic nature of wall); *Fairbank v. City of Mill Valley* (1999) 75 Cal. App. 4th 1243, 1260-1261 (court looked for "some feature of the project that distinguishes it from any other small, run-of-the-mill commercial building or use" covered by claimed exemption).

Even if the Shuttle Project fell within the Class 6 Exemption (which is does not), it is certainly "unusual," since it is not a "typical," *Santa Monica Chamber of Commerce*, 101 Cal.App.4th at 801, or "run of the mill," *Fairbank*, 75 Cal.App.4th at 1261, information collection exercise. Perhaps the most notable "unusual circumstance" is the fact that the Shuttle Project violates state law by allowing private buses to stop in red-curb zones reserved for public transit vehicles. As a result of that violation of law, as discussed below, the Project creates significant impacts on public transit, traffic congestion, pedestrian safety and bicycle lanes. 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).

Another unusual circumstance is that the Shuttle Project involves stops in close proximity to residences – involving stops as close a five feet from residences. AR1384. As a result of the close proximity, as discussed below, the Shuttles create a significant cancer risk (AR1386), and noise impacts on nearby residents (AR1423). In *Lewis v. 17th Dist. Ag. Ass'n* (1985) 165 Cal. App. 3d 823, 829, the court held that proximity of residences to a proposed stock car race track was an "unusual circumstance" since it resulted in noise and air pollution impacts not typical for the category of projects subject to the exemption. Similarly, in the instant case, typical information collection projects do not involve exposing thousands of nearby residents to air pollution and noise above CEQA significance thresholds. *See also Bloom v. McGurk* (1994) 26 Cal. App. 4th 1307,1316 ("no homes in the immediate vicinity" of the incinerator); *Meridian Ocean Sys. v. State Lands Comm'n* (1990) 222 Cal. App. 3d 153, 164-165 (reasonable possibility of adverse noise effects on marine life from geophysical testing was unusual circumstances precluding exemption).

CEQA lists as examples of the types of projects to which the Class 6 exemption would apply, "basic data collection, research, experimental management, and resources evaluation

activities which do not result in a serious or major disturbance to an environmental resource." 14 CCR § 15306. Similarly, the City's CEQA guidance documents lists, as examples of the types of projects to which the information collection exemption would apply, "mostly non-physical activities, test borings, soil sampling, water sampling, vegetation sample, and materials testing in facilities and structures." RJN, Exh. A, p. 13. An example of a typical Class 6 activity is the Olivenhain Municipal Water District's San Elijo Valley Groundwater Project, which was a research project that used a single pilot well to determine the quantity and quality of a deep water aquifer beneath a lagoon and to obtain a better understanding of the geology around the lagoon. AR1433. Also found to be exempt as a Class 6 activity, the Update to the San Diego Bay Integrated Natural Resources Management Plant involved the review, evaluation, and determination of accuracy of existing data regarding natural resources of the San Diego Bay. AR1428.

The Shuttle Project presents an unusual circumstance because, unlike the mostly non-physical, basic data collection, experimental management and resource evaluations exempt under Class 6, the Shuttle Project involves the physical movement of more than 17,000 people on 350 buses every day. Typical information collection activities are dwarfed in scale compared to the size of the Shuttle Project. Data collection activities do not usually involve the operation of a transit system similar in size to a medium-sized transit agency. AR2205. Additionally, the public safety risks posed by the Shuttle Project is an unusual circumstance precluding CEQA exemption. Most information collection activities do not cause public safety risks, including cancer risks and risks of injury to pedestrians and bicyclists.

The unusual circumstances resulting from the massive scale and impact of the Shuttle Project, combined with substantial evidence in the record of significant environmental impacts, precludes the use of an exemption for the Shuttle Project.

b. There is a Fair Argument that the Shuttle Project May Have Significant Adverse Impacts Due to Unusual Circumstances.

When considering a CEQA exemption, an impact is considered significant if there is a "fair argument" demonstrating a "reasonable possibility" that the project may have a significant environmental impact. *Berkeley Hillside*, 60 Cal.4th at 1114; *Dunn-Edwards*, 9 Cal.App.4th at 656. Under the fair argument standard, an effect is considered significant even if there is contrary evidence, so long as there is some substantial evidence in the record indicating a significant impact. *Azusa*, 41 Cal.App.4th at 1202. Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption based upon fact, or expert opinion supported by fact." PRC

§ 21080(e)(1.) As discussed below, expert opinion supports a fair argument that the Project may have significant impacts on human health, traffic, public transportation, and displacement of low-income residents.

i. Increased cancer risk from diesel emissions.

The Shuttle Project will result in significant cancer impacts, above CEQA significance thresholds, as a result of the Project's diesel emissions. AR1380-1390; *see also Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th at 1219-20 (CEQA document must analyze "health consequences that necessarily result from the identified adverse air quality impacts."); PRC § 21083(b)(3). Environmental Chemist, Dr. Paul Rosenfeld, Ph.D.[13] 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. AR1380-1390. According to Dr. Rosenfeld, San Francisco residents near shuttle stops would experience an increased cancer risk of approximately 12 per million as a direct result of the Shuttle Project. AR1385. This exceeds the BAAQMD CEQA significance threshold[14] for airborne cancer risk of 10 per million. AR1571-2. When an air quality impact exceeds CEQA thresholds adopted by the local air district, it must be disclosed as significant in a CEQA document. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960; *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327.

Certified traffic engineer Tom Brohard, PE, concluded that, by legalizing private shuttle stops in red-zones (an activity that is currently illegal), the Shuttle Project is likely to increase idle times, which would in turn produce greater emissions of diesel exhaust.[15] AR1651.

The City provided no evidence at all to rebut this expert testimony. Thus, even under the substantial evidence standard, the only substantial evidence in the record indicates that the Shuttle Program will have significant cancer impacts, above the CEQA significance threshold.

---

[13] As a matter of law, expert opinion constitutes substantial evidence establishing a fair argument of significant environmental impacts. *Azusa*, 52 Cal. App. 4th at 1195.

[14] CEQA encourages agencies to adopt quantitative thresholds for significance, and impacts which exceed those threshold "will normally be determined to be significant." 14 CCR § 15064.7.

[15] According to certified traffic engineer Tom Brohard, PE without the Shuttle Project, shuttle operators often attempted to clear MUNI red zones quickly to avoid substantial tickets. Since the Shuttle Project purports to make it legal for private shuttles to block public bus stops, the shuttles are likely to stop and idle at the bus stops for longer periods of time. AR1651.

If the City conducted CEQA review, it would be required to analyze these impacts and implement all feasible mitigation measures. Feasible mitigation measures could include such measures as requiring shuttle buses to use clean-fuel such as biodiesel or natural gas, or hybrid electric power, as used by MUNI. AR1376, 1542. Since the City avoided CEQA, it considered no such mitigations.

ii. Impacts on pedestrian and bicycle safety.

In addition to increased cancer risks, the record contains substantial evidence of impacts on pedestrian and bicyclist safety. AR1415-1421. Expert evidence by Human Impact Partners ("HIP"), a non-profit public policy research organization, concludes that the Shuttle Project will contribute cumulatively to pedestrian and bicyclist safety risk in San Francisco. AR1415. According to HIP, "The presence and intensity of transit service is an established spatial risk factor for pedestrian injuries." AR1417. According to the City's own Budget and Legislative Analyst, the Project may have potential negative environmental impacts on bicyclist and pedestrian safety.[16] AR240, 253. For example, an expert consultant retained by the City reported that at a MUNI stop at Fourth and Townsend, during an evening shuttle observation, 23% of all shuttle observations blocked the bicycle lane leading up to the intersection. AR1769-70. A January 2014 report from the SFMTA found that commuter shuttles result in diversion of bicyclists out of bike lanes and into traffic lanes. AR2822. The San Francisco County Transportation Authority published a study concluding that the private shuttles cause frequent conflicts with cars, MUNI and bicycles. AR1540. The record also contains substantial evidence by citizens, including San Francisco Supervisor John Avalos,[17] who have observed these impacts directly. AR3172-3; 3197-8, 3202-3. 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 safety.

---

[16] The BLA even makes suggestions – which were not included in the Project – for addressing these negative impacts, including establishing shuttle size limitations and requiring certain safety features on shuttles, and requiring a cap on the number of shuttles. AR253.

[17] Supervisor Avalos explained his observations at the April 1, 2014 Board of Supervisors meeting: "[W]hen I actually ride my bike on Valencia Street or if I am with my kids on 24th Street in Noe Valley where they have music lessons and I see a shuttle bus go by, if I am on my bike I have to go swerve way out of the way and get deeply into traffic, that worries me. Am I going to get hit and get blind-sided on the side down on 24th Street? I am seeing that same issue happening where cars are actually backed up for blocks trying to get around a bus that's there, and also people edging around buses that are blocking their pathway, make it very, very dangerous." AR3173.

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." RJN, Exh. B, p. 2. Similarly, a project will "have a significant effect on the environment if it would . . . create potentially hazardous conditions for pedestrians, or otherwise interfere with pedestrian accessibility to the site and adjoining areas." *Id*. A City must apply its own published CEQA significance thresholds. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 796. The courts have held that lay testimony is sufficient to create a fair argument of traffic impacts, as here. *Mejia v. City of Los Angeles* (2005) 130 Cal. App. 4th 322, 341. There is expert and lay evidence sufficient to create a fair argument that the Shuttle Project may have significant impacts under the City's significance criteria.

If the City had conducted CEQA review, it would be legally required to implement all feasible mitigation measures and alternatives to reduce these impacts.

iii. Significant noise impacts.

HIP conduced an analysis of the noise impacts from the Shuttle Project and concluded that the Shuttle Project will have noise impacts well above the applicable significance thresholds. AR1423-1426. HIP's analysis concluded that "private employer shuttle bus operations contribute cumulatively to noise exposure and adverse health impacts among San Francisco residents living near bus stops and along major transit routes." AR1423. Importantly, the Shuttle Project "will concentrate these noise impacts in proximity to a limited number of MUNI Stops, including within traffic corridors with existing health adverse exposures to traffic noise." AR1423. "Because private shuttle buses are operating on existing transit routes, 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. According to HIP, "Chronic exposure to road traffic has several well-established impacts on health, including noise annoyance, decreased cognitive functioning and school performance among children, sleep impairment, and excessive alertness." AR 1423. The San Francisco Transportation Authority study also indicated serious noise concerns among residents. AR1539. Noise impacts are significant environmental impacts under CEQA. *Lewis*, 165 Cal. App. 3d at 829; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 882. 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 adverse noise impacts. CEQA review would require the City to analyze and mitigate these impacts.

iv. Substantial evidence in the record demonstrates that the Shuttle Project will have a significant impact on traffic and public transportation.

The City further abused its discretion by ignoring substantial evidence in the record demonstrating that the Shuttle Project will have significant impacts on traffic and on the operation of MUNI. AR1540. The City's CEQA guidance document provides: "A project would have a significant effect on the environment if it would result in a loading demand during the peak hour of loading activities that could not be accommodated within proposed on-site loading facilities or within convenient on-street loading zones, and created potentially hazardous conditions or significant delays affecting traffic, transit, bicycles or pedestrians." RJN, Exh. B, p. 2. Expert evidence in the record demonstrates that the Shuttle Project may exceed this threshold of significance. When an impact exceeds a threshold of significance, it must be deemed significant and analyzed in a CEQA document. *Cmtys. for a Better Env't. v. Cal. Res. Agency* (2002) 103 Cal. App. 4th 98, 111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant").

A January 2014 report from the SFMTA found that commuter shuttles result in delays to MUNI, cause MUNI buses to stop in the traffic lanes rather than at the curb, cause localized traffic congestion, and divert bicyclists out of bike lanes and into traffic lanes. AR2822. The San Francisco Transportation Authority report concluded:

> "The large majority (approximately 90%) of shuttle stops occur at Muni bus zones; some stops and layovers also occur at non-Muni stop red-curb zones. SFMTA planning staff report this has been a general problem at several locations. This concern was echoed by both SFMTA field supervision staff and in resident outreach surveys and meetings. SFMTA staff noted that shuttle dwell times can be lengthy, even compared with Muni dwell times, due to the large size of motor coaches, their high floor configuration, and use of a single door for boarding and alighting." AR1540.

The City's documents show that at peak locations, shuttles outnumbered MUNI operations 1.5 to 1, AR3033, and that shuttles frequently block the travel lane, up to six times per hour. AR3033. Impacts to MUNI noted by the City's consultant following field data collection include delays to MUNI service, forcing MUNI buses to stop in traffic lanes rather than at the curb, localized traffic congestion, and diversion of bicyclists out of bike lanes and into traffic lanes. AR60, 2213. Indeed, even the SFMTA admits that "there are effects that these shuttles are having that are not supportive of our policy goals, such as delays they might be creating on MUNI, just to

name one significant one for us." AR3268. The Budget and Legislative Analyst concluded that the private shuttles have significant adverse impacts on traffic and MUNI operations. AR1688-90. Many members of the public testified that the private shuttles are causing significant delays in MUNI service. AR3172-3, 3197-8, 3202-3. This substantial evidence creates a "fair argument" that the Shuttle Project may have significant adverse impacts to transit service.

v. Substantial evidence in the record demonstrates that the Shuttle Project may result in displacement of large numbers of people.

A project has significant impacts requiring CEQA review if it will "displace substantial numbers of people, necessitating the construction of replacement housing." CEQA Guidelines Appendix G, Section XII. The Shuttle Project is likely to displace numerous residents and commuters who currently live, work, commute, and recreate in the areas near shuttle stops, and replace them with workers from private companies sponsoring the shuttles, who are wealthier and less likely to come from communities of color. These displacement impacts must be studied and mitigated in an EIR.

The record includes several studies documenting the displacement impacts of the Shuttle Project. A study by Alexandra Goldman, MCP, of University of California Berkeley, found that rents rise much faster near private shuttle stops than elsewhere in the City. AR1408-1413, 1467. Goldman's "report suggests that the Google Shuttles are driving up rental prices within a walking distance (half mile) of five of the shuttle stops." AR1443. Goldman concludes, "rental prices are rising, and landlords, seeking to capitalize on the boom, are evicting larger numbers of their lower--income tenants." AR1457.

A study by Dai and Weinzimmer of University of California Berkeley planning department similarly concludes that the private shuttles have exacerbated San Francisco's "jobs-housing imbalance," has pushed housing prices up in San Francisco, and have contributed to displacement of low-income communities. AR1499-1514. The study found that almost one-half of shuttle commuters would live closer to their suburban workplaces if the shuttles were discontinued. AR1512. Thus, the shuttles increase pressure on the limited housing stock in the City. *See* AR1553-64.

The Budget and Legislative Analyst's report agrees that the commuter shuttles appear to be contributing to displacement impacts. The shuttles are bringing higher income people into the city, displacing lower and moderate income people. The BLA report recognizes that the shuttle buses are one factor that is contributing to gentrification and displacement in the City of San Francisco.

AR1693-1697. The BLA report concludes that the commuter shuttle buses are having an impact on displacement and causing rents to rise. AR1697.

These published research studies constitute substantial evidence that the Shuttle Project may have significant adverse environmental impacts.

4. The City relied on an improper baseline, unsupported by substantial evidence, in determining that the Shuttle Project will have no environmental impacts.

The City argued that no CEQA review is required because the "baseline" is the existing environment, which includes the illegal shuttle operations. The City contends that the Shuttle Project merely continues the existing illegal operations, and so there is no change from the existing environment, and therefore no CEQA review is required. AR159. The City is mistaken because the Shuttle Project will change the existing environment.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Cmtys. for a Better Env't v. So Coast Air Qual. Mgmnt. Dist*. (2010) 48 Cal.4th 310, 321. The baseline is "…the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced . . . This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." 14 CCR §15125(a). If the proposed project does not change the baseline conditions, then there is no impact to analyze under CEQA. *Save Our Peninsula Comm. v. County of Monterey* (2001) 87 Cal. App. 4th 99, 124-125.

First, the Shuttle Project will change the existing environment. The City admits that the Shuttle Project will involve relocating shuttle stops to new locations. AR129-130, 138, 144. SFMTA Director Ed Reiskin testified that many of the 200 shuttle stops would be relocated under the Project. AR3227. These locations may or may not be the same as existing stops. Therefore, the Shuttle Project is not merely a continuation of existing conditions. Of course, an agency must analyze a project that involves a change to the existing environment. *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal. App. 4th 429, 436 (increase in height of building from 75 to 90 feet required CEQA review).

Second, the City will be changing the legal status of the pirate shuttles. The City is amending the Transportation Code to authorize the private buses to use public bus stops. By amending the City Transportation Code to render this illegal activity authorized under local ordinance, the City is taking action to change the status quo.

Traffic engineer Tom Brohard, PE, has concluded that by authorizing currently illegal activity, the Shuttle Project will increase the number of shuttles operating in the City, thereby resulting in significant impacts. AR1736-1738. He concludes that even though some companies are currently operating illegal "pirate shuttles," there are many companies that are unwilling to violate the law or risk penalties. The Shuttle Project will authorize activity that was previously illegal. It is almost certain that additional companies will enter the shuttle market once it is legal. AR1737.

Traffic Engineer Brohard also concludes that the Shuttle Project is likely to increase idle times. Currently, shuttle operators often attempt to clear MUNI red zones quickly to avoid substantial tickets. Since the Shuttle Project will make it legal for private shuttles to block public bus stops, the shuttles are likely to stop and idle at the bus stops for longer periods of time. AR1737. This, of course will exacerbate the impacts documented above, including air pollution, blockage of MUNI, pedestrian safety, etc. *Id.*

By authorizing activity that is currently illegal, the Shuttle Project will increase adverse impacts above the level of current illegal pirate shuttle operations. This situation is very similar to the case of *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, 1197. In that case the City of Santa Cruz proposed to legalize off-leash dog use at a local beach. The City argued that although off-leash dog use was currently illegal, such use was common. Therefore the City argued that the legalization of off-leash dog use would have no significant impact compared to the baseline of illegal dog use. The Court of Appeal rejected this argument and held that by legalizing off-leash dog use, the City's action was likely to increase the "intensity or rate of use" of the beaches by off-leash dog walkers. The City's Shuttle Project is no different. By legalizing what was previously illegal, the City's Project is likely to increase the "intensity or rate of use" of commuter shuttles in the City. CEQA review is necessary to analyze this impact and to propose feasible mitigation measures.

5. The City improperly relied on mitigation measures in concluding the Shuttle Project is categorically exempt.

An agency must decide whether a project is eligible for a categorical exemption as part of its preliminary review of the project, not in the second phase when mitigation measures are evaluated. *Azusa*, 52 Cal.App.4th at 1198-1200. Only those projects that have no possibility of a significant impact on the environment are categorically exempt from CEQA review. *Id.*; *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108 ("*SPAWN*"). "Reliance upon mitigation measures (whether included in the application or later adopted) involves an

evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIR's or negative declarations." *SPAWN,* 125 Cal.App.4th at 1108. In determining whether the significant effect exception to a categorical exemption exists, "it is the possibility of a significant effect . . . which is at issue, not a determination of the actual effect, which would be the subject of a negative declaration or EIR." *Azuza,* 52 Cal.App.4th at 1200. If a project may have a significant effect on the environment, CEQA review must occur, and only then are mitigation measures relevant. *SPAWN,* 125 Cal.App.4th at 1107.

The City erred in relying on mitigation measures (the permit program and dedicated enforcement officers) to grant a categorical exemption from CEQA. The possibility of environmental impacts, such as those acknowledged by the City (AR1107, 1205-1211), necessitates review under CEQA, at which time mitigation measures, such as the permit system and dedicated enforcement officers, and others, may be considered in evaluating the actual environmental impact of the Shuttle Project. Instead, the City improperly included the untested permit program as part of the project, without disclosing the environmental impacts the permits are designed to mitigate, and without allowing the public to propose alternative or additional mitigation measures. Making matters worse, the City admits that the permit mitigation may not be effective:

> If the pilot does not demonstrate that sharing designated Muni zones with commuter shuttles successfully reduces conflicts and supports commuter shuttle operations, the SFMTA may consider whether any refinements in the approach would address remaining problems, and may consider a second pilot term to test these. If the conclusion is that commuter shuttles and Muni are not compatible at any shared stops, the SFMTA may then consider requiring that commuter shuttles pursue creation of white zones for shuttle stops.

AR94-5. Clearly, since the City does not even know if the Project will mitigate the impacts the City admits the project will have, a legitimate question exists about whether the project may have a significant impact, and therefore the agency cannot exempt the project. *See Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117.

By including unvetted mitigation measures as part of the Shuttle Project, the City has attempted to conduct "an 'end run' around the governing standards." *Azuza,* 52 Cal.App.4th at 1201. This shortcutting of CEQA requirements subverts the purposes of CEQA by omitting material necessary to informed decisionmaking and informed public participation. It precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences. The City cannot use a

notice of exemption for a project which includes mitigation measures to substitute for an EIR or mitigated negative declaration.

V. CONCLUSION

The Shuttle Project is preempted by State law. Even if it were not, the City may not authorize a transit system comparable to CalTrain with absolutely no CEQA review. Due to the failure of the City to conduct CEQA review, it has avoided its legal duty to impose mitigation measures to reduce the Shuttle Project's significant impacts on air pollution, traffic, pedestrian and bicycle safety, MUNI flow, displacement of low-income communities and other impacts. We respectfully request that the Court hold that San Francisco Transportation Code § 914 is null and void, and set aside the City's CEQA exemption and require the City to prepare a CEQA document to analyze and mitigate the Shuttle Project's impacts.

Respectfully submitted,

DATED: September 8, 2015

LOZEAU | DRURY LLP

Richard T. Drury
Rebecca L. Davis
Attorneys for Petitioners and Plaintiffs