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NEWS RELEASE

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Herrera Moves to Lift Bicycle Plan Injunction to Protect Public Safety

Completion of environmental review, growing accident rate justify dissolution of 3-year-old stay on bike lane improvements, City argues

SAN FRANCISCO (Aug. 28, 2009)—City Attorney Dennis Herrera today filed a motion to dissolve the three-year-old court ordered stay that has prohibited the City from implementing the improvements envisioned in the San Francisco Bicycle Plan until after potential environmental effects were fully evaluated in accordance with the California Environmental Quality Act, or CEQA. The motion filed with San Francisco Superior Court Judge Peter J. Busch this afternoon follows an exhaustive environmental review and approval process that culminated in a 2,200 page environmental impact report, or EIR, which was recently certified by the City’s Planning Commission, and affirmed by the Board of Supervisors on appeal. In addition, the Municipal Transportation Authority, the Board and Mayor Gavin Newsom approved accompanying plans, findings, and amendments to the City’s Planning Code and General Plan in accordance with CEQA to enable the bicycle safety improvements to proceed.

Herrera’s motion argues that the completion of the environmental review underlying the original injunction, together with the growing number of bicycle-related injury accidents in San Francisco, justify dissolving the injunction. The dissolution would allow the City to move forward with the implementation of 45 separate bicycle route improvements that are intended to enhance the safety and usability of City streets for the bicyclists, pedestrians and motorists who make use of them.

“After years of environmental review and public participation, the San Francisco Bicycle Plan reflects an unprecedented consensus to create a City that is safer, healthier and more environmentally responsible,” Herrera said. “Even amidst disagreements over the scope of the law’s requirements, Judge Busch has demonstrated sound judgment in recognizing our duty as City officials to protect public safety, and to fulfill our citizens’ vision for a better community. I am confident that the exhaustive process we’ve now completed will finally enable us to move forward, and I’m very grateful to the many dedicated public servants from the Municipal Transportation Agency, the Planning Department, the Board of Supervisors, and Mayor Gavin Newsom’s office for their hard work and commitment to improve health and safety for all San Franciscans.”

The 15-inch-thick filing—which includes thousands of pages of accompanying documentation, including the final EIR, legal pleadings, declarations, and approximately two dozen exhibits—marks an important milestone in a lengthy and procedurally complex process in which San Francisco has sought to enact improvements to its bicycle route network. The following is a timeline of significant events:

[MORE]

BIKE PLAN LITIGATION TIMELINE

Feb. 3, 2005: S.F. Planning Dept. reviews 2005 Bicycle Plan, adopts General Plan amendments, finding that the amendments would have no significant impact on the environment under CEQA.

June 21, 2005: S.F. Board of Supervisors amends the City's General Plan to incorporate the Department of Parking and Traffic's Bicycle Plan Policy Framework.

July 28, 2005: A legal challenge is initiated by two unincorporated associations opposed to bicycle-friendly policies—the "Coalition for Adequate Review," or CAR, and "Ninety-Nine Percent"—and local blogger and perennial political candidate Rob Anderson. Together, the petitioners argue that the City should have first prepared an environmental impact report evaluating the Bicycle Plan.

June 20, 2006: Judge James L. Warren grants petitioners' request for a preliminary injunction to prohibit the City from implementing projects contained in the Bicycle Plan, finding that they would likely prevail in their argument that the City was required to prepare an EIR for the plan.

August 2006: Municipal Transportation Authority (the successor agency to DPT) conducts a count of the number of bicyclists at 35 locations throughout the City, generally between 5:00 and 6:30 p.m.

Sept. 19, 2006: A hearing on the merits of *CAR v. CCSF* is held before Judge Peter J. Busch on the petitioners' Petition for Writ of Mandate to compel the City to conduct environmental review.

June 5, 2007: Planning Dept. issues a Notice of Preparation of an environmental impact report to analyze key components of the Bicycle Plan.

June 18, 2007: Judge Busch issues a Peremptory Writ of Mandate ordering the City to conduct environmental review on the Bicycle Plan, continuing in effect the June 2006 injunction pending completion of environmental review.

June 26, 2007: Planning Dept. holds a public meeting to solicit comments on what should be included in the scope of the Bicycle Plan EIR, accepting written comments on the scope through July 6, 2007.

August 2007: MTA conducts another count of bicyclists at the same 35 locations and times surveyed a year earlier. The counts demonstrate a 15 percent increase in bicycle traffic over August 2006.

March 15, 2008: Planning Dept. publishes an Initial Study (a preliminary analysis to identify significant environmental effects to be analyzed in an EIR). In this study, Planning Dept. narrows the range of impacts to be studied to those relating to traffic and circulation, traffic-related noise, and air quality.

March 28, 2008: City Attorney Herrera petitions Court for modification of the injunction to allow for safety improvements to the intersection of Fell Street and Masonic Avenue.

April 29, 2008: Judge Busch grants Herrera's motion to modify the injunction in part, allowing for safety improvements to intersection of Fell and Masonic.

August 2008: MTA conducts another count of bicyclists at the same 35 locations and times surveyed a year earlier. The counts demonstrate a 24 percent increase in bicycle traffic over August 2007.

Nov. 26, 2008: Planning Dept. publishes Draft EIR, mailing notice of its availability to more than 1,400 individuals and organizations.

Jan. 8, 2009: Planning Commission holds a public hearing on the Draft EIR to obtain oral comments. Only one person speaks at the hearing, in support of the draft.

Jan. 13, 2009: The official period for submission of written public comments on the Draft EIR concludes, allowing slightly longer than the statutorily required 45-day comment period.

June 11, 2009: Planning Dept. publishes its response to public comments on the Draft EIR, including those received after the official comment period had ended.

June 25, 2009: Planning Commission certifies the EIR as accurate, adequate and in compliance with CEQA; recommends that the Board of Supervisors approve ordinances amending the General Plan and Planning Code. The Commission also adopts a statement of overriding considerations that the plan's benefits outweigh unavoidable impacts to traffic, transit and loading.

June 26, 2009: MTA Board of Directors adopts 2009 Bicycle Plan, together with a resolution approving traffic changes necessary to implement 45 of 60 proposed near-term improvements. It also adopts a statement of overriding considerations.

July 15, 2009: Petitioners appeal the Planning Commission's certification of the EIR to the Board of Supervisors.

Aug. 4, 2009: Board of Supervisors hears Petitioners' appeal of Planning's certification of the EIR, and votes to deny the appeal.

Aug. 11, 2009: Board of Supervisors adopts ordinances rescinding approval of the 2005 Bicycle Plan and amending the Planning Code and the General Plan, and makes other findings required by CEQA, including a statement of overriding considerations.

Aug. 12, 2009: Mayor Newsom signs the ordinances.

Aug. 14, 2009: Planning issues a Notice of Determination, reflecting the completion of the CEQA process that supports the City's adoption of the Bicycle Plan.

Aug. 28, 2009: City Attorney Herrera files motion to dissolve injunction.

The case is: *Coalition for Adequate Review et al. v. City and County of San Francisco*, San Francisco Superior Court No. 505-509, filed July 28, 2005.

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10 COUNTY OF SAN FRANCISCO

11 UNLIMITED JURISDICTION

12 COALITION FOR ADEQUATE REVIEW;
13 NINETY-NINE PERCENT; and ROB
ANDERSON,

14 Petitioners,

15 vs.

16 CITY AND COUNTY OF SAN FRANCISCO
17 DOES 1 through 10, inclusive,

18 Respondents.

Case No. 505-509

**RESPONDENT CITY AND COUNTY
OF SAN FRANCISCO'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISSOLVE
INJUNCTION**

Hearing Date: September 24, 2009
Time: 9:30 a.m.
Department 301
Hon. Peter Busch

Date Action Filed: July 28, 2005

Accompanying Documents: Notice of Motion and
Motion, Request for Judicial Notice; Declaration of
Damon R. Curtis

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INTRODUCTION

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2 In June 2006, this Court entered a preliminary injunction (the "Injunction") prohibiting the City
3 and County of San Francisco (the "City") from implementing its 2005 Bicycle Plan on the ground that
4 the City's invocation of a "common sense exemption" or "general rule exclusion" to exempt the 2005
5 Bicycle Plan from further review under the California Environmental Quality Act ("CEQA"), Public
6 Resources Code § 21000 *et seq.*, violated that law. The Court later extended the Injunction in the June
7 2007 Writ of Mandate entered in this case. But in the three years since the Injunction issued, the City
8 conducted exhaustive environmental analysis of all aspects of the proposed Bicycle Plan in an open
9 and public process, culminating in a \$1.5 million, 2,200 page environmental impact report ("EIR") and
10 adoption of new, updated Bicycle Plan, "the 2009 Bicycle Plan." (See Final EIR, attached as Exhibit
11 A, and the 2009 Bicycle Plan, attached as Exhibit B, to City's Request for Judicial Notice ["RJN"],
12 filed herewith.)

13 The EIR reflects three years of environmental review, analysis of and responses to numerous
14 public comments, and many months of public participation. The EIR includes in-depth analyses of the
15 2009 Bicycle Plan's goals and policies, 60 individual bicycle route improvements, and many long-
16 term and minor improvements to the City's bicycle route network. On June 25, 2009, the City's
17 Planning Commission (the "Commission") certified an EIR supporting the revised, 2009 Bicycle Plan
18 – a decision affirmed by the San Francisco Board of Supervisors – and on June 26, the San Francisco
19 Municipal Transportation Agency ("MTA") Board of Directors adopted the 2009 Bicycle Plan, which
20 includes 45 of the 60 improvements studied in the EIR. The City is now ready to implement those 45
21 separate bicycle route improvements and increase the safety of the City's streets for bicyclists and
22 other members of the public.

23 The Court has two independent bases for dissolving the Injunction. Code of Civil Procedure
24 Section 533 allows dissolution or modification of an injunction if there has been a material change in
25 the facts upon which the injunction was granted or if dissolution would serve the ends of justice. (Cal.
26 Civ. Pro. Code § 533.) The City's completion of the comprehensive three-year environmental review
27 process and certification that its Bicycle Plan EIR is in compliance with CEQA is a material change of
28 facts – indeed it negates the factual basis on which the Injunction was based. This change alone is

1 sufficient grounds for dissolving the Injunction. But, there is a second and independent ground for
2 dissolving the Injunction. None of the grounds upon which Petitioners previously asserted irreparable
3 harm still exists. Moreover, as the City has previously informed this Court, bicycle ridership in the
4 City has increased substantially in the last three years, but bicycle accidents have increased at a
5 disproportionately higher rate. Many aspects of the Bicycle Plan are designed to address and improve
6 the safety of bicyclists (as well as the drivers and pedestrians with whom they share City streets). In
7 view of the increases in ridership and accidents, dissolution of the Injunction so that the City can
8 implement the Bicycle Plan would serve "the ends of justice" and provides a separate basis for
9 dissolving the Injunction.

10 STATEMENT OF FACTS

11 A. Background

12 In June 2005 the San Francisco Board of Supervisors (the "Board") amended the San Francisco
13 General Plan to, among other things, incorporate by reference the Department of Parking and Traffic's
14 ("DPT") 2005 Bicycle Plan "Policy Framework."¹ Before the Board adopted these amendments, the
15 City's Planning Department (the "Department") reviewed the 2005 Bicycle Plan under CEQA, finding
16 that the amendments would have no impact on the environment, and issued a "general rule exclusion"
17 ("GRE"), an exemption in CEQA for projects that have no potential to cause a significant impact on
18 the environment. (See Order Granting Petition for Peremptory Writ of Mandate ["Order"], filed
19 November 7, 2006, attached as Exhibit C to City's RJN]; CEQA Guidelines § 15061(b)(3).) In July
20 2005, Petitioners Coalition for Adequate Review, Ninety-nine Percent and Rob Anderson (collectively
21 "Petitioners") challenged the City's CEQA determination, arguing, among other things, that the Board
22 should have first prepared an environmental impact report evaluating the entire 2005 Bicycle Plan,
23 comprised of both the Policy Framework and the Network Improvement Document, which listed 18
24 priority improvements to the City's bicycle network, adopted in June 2005 by the San Francisco
25 Transportation Authority ("MTA"). (Order at p. 6.)

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27
28 ¹ The Policy Framework did not include specific bicycle route improvements; those were contained instead in the Network Improvement Document described below.

1 In June 2006 the Court granted Petitioners' request for a Preliminary Injunction to prohibit the
2 City from implementing projects contained in the 2005 Bicycle Plan because it found both that
3 Petitioners were likely to prevail on their claim that the City was required to prepare an EIR for the
4 2005 Bicycle Plan rather than issue a GRE, and the balance of hardships tipped in their favor. (See
5 Preliminary Injunction, filed June 20, 2006, attached as Exhibit D to RJN.)

6 After a September 2006 hearing on the merits, the Court granted the Petition for Writ of
7 Mandate. (Order at p. 2.) On June 18, 2007 the Court issued a Peremptory Writ of Mandate ordering
8 the City to conduct environmental review on the 2005 Bicycle Plan in compliance with CEQA, and
9 continuing in effect the Injunction pending completion of environmental review. (See Peremptory
10 Writ of Mandate issued June 18, 2007 ("Writ"), attached as Exhibit E to RJN.)

11 **B. Environmental Review**

12 Following the Court's issuance of the Injunction and Writ, the City undertook all the steps
13 CEQA requires to comply with its mandates that public agencies inform themselves about the
14 environmental effects of a proposed action, carefully consider all relevant information before acting,
15 give the public an opportunity to comment on environmental issues, and avoid or reduce significant
16 environmental impacts when it is feasible to do so. (Pub. Resources Code § 21002.1.) Thus, on June
17 5, 2007, the Department issued a Notice of Preparation ("NOP") of an EIR of the Bicycle Plan project
18 (the "Project"). (See NOP, Exhibit F to RJN.) As described in the NOP and as required by the Writ,
19 the Project to be analyzed in the EIR included four components: program level review of (1) the
20 goals, objectives and recommended actions contained in the Bicycle Plan; (2) proposed "long-term
21 improvements" to the City's existing bicycle route network, including anticipated but not-yet-designed
22 bicycle route improvements that the MTA (the successor department to DPT) may add later to the
23 City's bicycle network; (3) minor improvements to the bicycle route network, including treatments
24 such as sharrows; and project-level review of (4) 60 proposed "near-term" (within 5 years)
25 improvements to the existing bicycle route network. These near-term improvements include MTA
26 priority projects, individual bicycle route improvements that were already funded but not yet built, and
27 projects that had already been designed, including those that were designed and implemented after
28 approval of the 2005 Bicycle Plan but before the Court's issuance of the Injunction in June 2006.

1 (NOP at p. 1-2.) Most of the 60 individual improvement projects included two design options, each
2 analyzed in an equal level of detail.

3 The Department held a public meeting on June 26, 2007 to solicit comments on what should be
4 included in the scope of the analysis in the Bicycle Plan EIR and accepted written comments on the
5 scope through July 6, 2007. (NOP at p. 1; CEQA Guidelines § 15082.) Then, on March 15, 2008, the
6 City published an Initial Study – a preliminary analysis used to identify the significant environmental
7 effects to be analyzed in an EIR. (Notice of Availability of Initial Study, Exhibit G, to RJN; CEQA
8 Guidelines § 15365.) Through the Initial Study, the Department narrowed the range of impacts to be
9 studied in greater depth in the EIR to those relating to traffic and circulation, traffic-related noise, and
10 air quality. (Exhibit A, Appendix A at p. 60-64.)

11 On November 26, 2008, the Department published a Draft EIR, and mailed notice of the
12 availability of the Draft to over 1,400 individuals and organizations. (See Exhibits A and H to RJN.)
13 The City also provided notice in the San Francisco Chronicle and to the Department’s standing list of
14 those requesting Draft EIR notice.² (*Id.*)

15 The EIR includes analysis of transportation impacts to 60 intersections throughout San
16 Francisco, 12 transit corridors (each of which is several linear blocks), 10 transit “spot studies” (either
17 short street segments or intersections), and 13 parking and loading corridors. The transportation
18 analysis of these intersections and corridors included an evaluation of four scenarios: (1) existing
19 conditions; (2) existing conditions with each near-term improvement (including analysis of any
20 options for individual projects), and, if an intersection was common to more than one project, an
21 analysis of impacts to the intersection with implementation of all projects common to that intersection;
22 (3) cumulative conditions projected in year 2025 without the project; and (4) cumulative conditions
23 projected for year 2025 with each near-term improvement (including any alternative design options)
24 and any overlapping improvements. (EIR at p. V.A.3-1 to 3-13.)

25
26
27 ² In addition to the required legal announcement, the San Francisco Chronicle ran an article on
28 the publication of the draft EIR on the front page of its Bay Area section. See “S.F. Releases Draft
Study On City’s Bike Plan,” November 27, 2008, San Francisco Chronicle, p. B-1, found at
<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/27/BA3814D67R.DTL>.

1 The EIR also analyzes a reasonable range of alternatives: (1) the no project alternative; (2)
2 alternatives to the near term improvements in the form of design options; and (3) two grouped
3 alternatives Alternative A: all Option 2 designs (or Option 1 if there is only one option), and
4 Alternative B: all Option 1 designs. (CEQA Guidelines § 15126.6(a)[EIR must analyze reasonable
5 range of alternatives to project or project location].) In addition, the EIR analyzes two alternatives to
6 each of the minor improvements and long-term improvements. (EIR at §VII.)

7 The EIR also proposes and describes mitigation measures to minimize the significant
8 environmental impacts identified in the EIR, including measures such as adding or modifying traffic
9 signals at intersections (by lengthening green light time or adding a green arrow), or modifying
10 roadway striping (by changing shared lanes to exclusive turn lanes, narrowing travel lanes, or
11 eliminating or restricting on-street parking). (Pub. Resources Code §§ 21002.1(a); and 21100(b)(3);
12 CEQA Guidelines § 15126.4 [EIR shall describe feasible mitigation measures which could minimize
13 significant adverse impacts].)

14 The official period for submission of written public comments on the Draft EIR ran until
15 January 13, 2009, slightly longer than the statutorily required 45-day period. (Exhibit H at p. 2; Pub.
16 Resources Code § 21091(a).) The Commission held a public hearing on the Draft EIR on January 8,
17 2009 to obtain oral comments. Only one person commented at that hearing – a comment in support of
18 the Draft EIR. (See Transcript, Exhibit A, Appendix E to RJN.)

19 The City responded to all comments received on the Draft EIR, including those received after
20 the official comment period had ended, and on June 11, 2009, published its response to these
21 comments in what is known as a “comments and responses” document. (See Exhibit A, § VIII; CEQA
22 Guidelines § 15088(a) [agency “shall” respond to comments received in the comment period and
23 “may” respond to late comments]; § 15088(b) [written response to public agency’s comments required
24 at least 10 days before certification of the EIR].)

25 On June 25, 2009, at a regularly noticed meeting, the Commission certified the EIR as
26 accurate, adequate and in compliance with CEQA. (Exhibit I to RJN; CEQA Guidelines
27 § 15090(a)(1)-(3) [prior to approving project, agency shall certify that EIR complies with CEQA,
28 agency reviewed information in EIR, and EIR reflects agency’s independent judgment].) The

1 Commission also recommended for Board approval ordinances amending the General Plan and
2 Planning Code implementing several goals of the Bicycle Plan, and made findings required by CEQA
3 including a statement of overriding considerations. (Exhibit J [General Plan], K [Planning Code] and
4 L [CEQA Findings] to RJN.) Supporting documents, such as staff reports and proposed findings, were
5 publicly available a week before the Commission hearing.³ (See staff reports, attached as Exhibit U to
6 RJN.)

7 On June 26, 2009 – after almost three years of meetings and public hearings to review the
8 Bicycle Plan and the detailed drawings for the near-term improvements – the MTA Board of Directors
9 adopted the 2009 Bicycle Plan and adopted a resolution approving traffic changes necessary to
10 implement 45 of the 60 proposed near-term improvements. (Exhibit M [Plan approval] and N
11 [legislation] to RJN.) The MTA Board also made findings required by CEQA. (Exhibit M to RJN.)
12 Again, supporting documents, such as staff reports, were publicly available a week before the MTA
13 Board of Directors’ hearing. (See staff reports, attached as Exhibit V to RJN.)

14 On July 15, 2009 Petitioners appealed the Commission’s certification of the EIR to the Board.
15 (See Exhibit O to RJN.) The Board heard Petitioners’ appeal on August 4 – duly noticed in
16 compliance with the San Francisco Administrative Code – and denied the appeal. (Motion 09-136,
17 Exhibit Q to RJN; see also S.F. Admin. Code § 31.16(b) and (e) [appeal heard within 30 days of
18 receipt] and CEQA (Pub. Resources Code § 21151(c) [right to appeal CEQA determination to elected
19 decision-making body].)

20 On August 11, 2009, the Board adopted Ordinances 187-09 and 188-09, rescinding approval of
21 the 2005 Bicycle Plan, amending the Planning Code and the General Plan, and making findings
22 required by CEQA. (Exhibits R and S to RJN.) On August 12, 2009, the Mayor signed the
23 ordinances. (*Id.*)

24 In approving the Bicycle Plan, the Ordinances and 45 of the 60 individual projects, the
25 Commission, MTA Board of Directors and Board of Supervisors each adopted the feasible mitigation
26 measures identified and analyzed in the EIR as necessary to eliminate or reduce significant impacts.

27 _____
28 ³ Staff provided a supplemental memo to the Planning Commission on June 24, 2009, which
made minor revisions to the proposed findings. (Exhibit W to RJN.)

1 (Exhibit L, M and R; Pub. Resources Code § 21002.) But for some impacts, no feasible mitigation
2 measures were identified, and the impacts remain significant and unavoidable. (*Id.*) Because of this,
3 the decision-making bodies each adopted a statement of overriding considerations as part of the
4 findings required by CEQA, finding that the benefits of adopting the Bicycle Plan and providing
5 additional bicycle facilities throughout San Francisco overrode the burdens associated with the
6 remaining significant traffic, transit and loading impacts. (*Id.*) The decision makers found, among
7 other reasons, that the Project would help fulfill the City's Transit First Policy set forth in San
8 Francisco Charter section 8A.115, which requires the City to make bicycling an attractive alternative
9 to travel by private car; that the Project was consistent with the state, regional and Citywide plans and
10 policies to reduce greenhouse gas emissions by facilitating the increased use of bicycles and the
11 decreased use of private automobiles, a major source of greenhouse gas emissions; and that bicycling
12 has numerous health benefits. (See e.g. Exhibit M at p. 121-134.)

13 On August 14, 2009, the City issued its Notice of Determination, reflecting that the City had
14 completed the CEQA process supporting the City's adoption of the Bicycle Plan. (Exhibit T to RJN.)

15 **C. Bicycle Use and Bicycling Accidents Have Increased Since 2005, and So Has the**
16 **Need to Implement The Bicycle Plan.**

17 As explained in previous requests to modify the Injunction, both City and federal data show
18 that the number of bicyclists in San Francisco has steadily increased. (Declaration of Jack Fleck in
19 Support of Second Request for Order Modifying Preliminary Injunction and Peremptory Writ of
20 Mandate, filed on December 1, 2008, at ¶¶ 15-17.) For example, in August 2006, MTA staff conducted
21 a count of the number of bicyclists at 35 locations throughout the City, generally between 5:00 PM to
22 6:30 PM. (*Id.* at ¶ 16.) In August 2007, counts at the same intersections at the same times showed a
23 15% increase over the previous year. Final counts in August 2008 – again at the same intersections
24 and times – showed a 24% increase in bicycle traffic over 2007 totals. (*Id.*) The number of bicyclists
25 continues to rise: preliminary results from counts in August 2009 reveal another 13% increase from
26 2008 – in total, a 63% increase since 2006. (Declaration of Damon Curtis at ¶5, filed herewith.)

27 Similarly, the annual American Community Survey conducted by the United States Census
28 Bureau reported that the percent of San Francisco respondents stating that they use a bicycle as their

1 primary means of transportation to work increased from 2.3 in 2006 to 2.5 in 2007. (Fleck Declaration
2 at ¶ 17.) This increase means San Francisco has one of the highest percentages of bicycle commuters
3 of any major American city. (*Id.*) The MTA’s Draft *San Francisco’s State of Cycling Report*
4 concludes that 5.9% of all trips taken in San Francisco in 2008 are on a bicycle (as opposed to a motor
5 vehicle, transit or walking), with over 128,000 trips made by bicycle per day. (*Id.*)

6 But this increase in bicycling has been accompanied by a disproportionate increase in the
7 number of bicycle-involved injury collisions on San Francisco streets. For example, there were 451
8 bicycle collisions in San Francisco in 2007 (most involving automobiles), an increase of 31% over the
9 343 collisions in both 2005 and 2006. (*Id.* at ¶ 15.) As noted in the City’s previous requests to modify
10 the Injunction, the demand for safe bicycling facilities appears to be growing more quickly than the
11 City’s ability to supply them.

12 ARGUMENT

13 California Code of Civil Procedure section 533 grants the Court the express power to dissolve
14 a previously issued injunction “upon a showing that there has been a material change in the facts upon
15 which the injunction . . . was granted” or that or “that the ends of justice would be served by the . . .
16 dissolution.” (Cal. Civ. Pro. Code § 533.) Here, the Court should dissolve the Injunction because the
17 facts upon which the Court issued the Injunction have materially changed: Petitioners can no longer
18 show that the City failed to prepare an EIR. Indeed, the City has now completed CEQA’s highest
19 level of environmental review on the Bicycle Plan – namely, preparation and approval of an EIR that
20 even goes beyond the scope of environmental review contemplated in the Court’s order. Also, the
21 balance of hardships – and thus the interests of justice – now weigh in favor of dissolving the
22 Injunction. In the three years since the City has been prohibited from implementation of bicycle
23 projects, the City has seen not only an increase in bicycle use but also a disproportionate rise in the
24 number of bicycle accidents. Thus, improvements are needed to carry out the City’s strong public
25 policy of encouraging bicycle use, while improving public safety for bicycle riders and the pedestrians
26 and automobile drivers with whom they share the streets.

1 **I. THE COURT SHOULD DISSOLVE THE INJUNCTION BECAUSE THERE HAS**
2 **BEEN A MATERIAL CHANGE IN THE FACTS UPON WHICH THE INJUNCTION**
3 **WAS GRANTED IN THAT THE CITY HAS CERTIFIED AN EIR ON THE UPDATED**
4 **BICYCLE PLAN IN COMPLIANCE WITH CEQA.**

5 **A. The City's Preparation and Certification of the EIR for the Bicycle Plan Present**
6 **Changed Circumstances That Merit Dissolution of the Injunction.**

7 In issuing the Injunction, the Court determined that the City had not complied with CEQA
8 because it had relied on a GRE for the 2005 Bicycle Plan in lieu of conducting further environmental
9 review of the Bicycle Plan. (Order at p. 20.) A GRE, also known as the "common sense exemption"
10 to CEQA, is a finding by a public agency that "it can be seen with certainty that there is no possibility
11 that the activity in question may have a significant effect on the environment." (CEQA Guidelines
12 § 15061(b)(3).) At the time of the Court's decision, a public agency's use of the common sense
13 exemption could be successfully challenged in court by as little as a reasonable argument that the
14 project might have a significant impact on the environment, even if the argument that there would be
15 an impact was based on facts that were exaggerated or untrue. (*Myers v. Board of Supervisors* (1976)
16 58 Cal.App.3d 413, 427.)⁴ Thus, in opposing the Injunction under standards applicable in 2006, the
17 City faced the formidable burden of showing – *to a certainty* – that the 2005 Bicycle Plan would have
18 no impact on the environment. Applying this stringent standard to the City's GRE finding, the Court
19 concluded Petitioners had a substantial likelihood of prevailing on the merits of their claims and issued
20 the Injunction. (See Injunction at p. at 1.)

21 Today the situation is entirely different from that facing the Court in 2006. The City has now
22 prepared a comprehensive EIR analyzing the Bicycle Plan in compliance with CEQA, as outlined in
23 pages 3-7 above. The scope of the EIR is broad; and includes evaluation of the Bicycle Plan's policy
24 goals, as well as the proposed long-term, near-term and minor improvements to San Francisco's
25 bicycle network. In fact, this scope of review is even broader than that contemplated by the Writ,
26 which did not specify the type of environmental review to be performed (a Categorical Exemption,
27

28 ⁴ Since this Court's ruling, in *Muzzy Ranch Co. V. Solano County Airport Land Use Comm'n*
(2007) 41 Cal.4th 372, the California Supreme Court applied a somewhat different standard for
application of the common sense exemption, finding that use of the exemption should be upheld if
there is evidence in the record to support the agency's determination that the activity cannot have a
significant impact on the environment, even if reasonable contrary arguments can be made. (*Muzzy
Ranch* at p. 388; See Kostka and Zischke, Practice Under the California Environmental Quality Act, at
§ 5.111.)

1 Negative Declaration or an EIR) and required review of the Network Improvement Document, which
2 contained only 18 priority projects, not the 60 projects reviewed in the EIR. By certifying the EIR and
3 upholding certification on appeal, the Commission and Board, respectively, found that the EIR is
4 adequate and complies with CEQA, that the decision-makers reviewed and considered the information
5 contained in it, and that the EIR reflects their independent judgment and analysis, and must be
6 presumed correct if not timely - and successfully - challenged. (CEQA Guidelines § 15090(a) (1)-(3);
7 15231 [EIR presumed correct by lead and responsible agencies]; Pub. Resources Code § 21167.2 [EIR
8 conclusively presumed to comply with CEQA if no action within statute of limitations].)

9 The adequacy of the Bicycle Plan EIR could be challenged either by objection to the City's
10 Return on the Writ or through an independent action,⁵ as described further below, however, the
11 standard of review the Court would apply to such a challenge would be deferential to the City's
12 findings and conclusions—unlike the standard the Court was required to apply to the City's GRE
13 finding. (*City of Long Beach v. Los Angeles Unified School Dist.* (July 16, 2009) 2009 WL 2059913
14 ["Our task is to ensure that the public and responsible officials are adequately informed of the
15 environmental consequences of their decisions before they are made. Accordingly our task is
16 limited."][*internal citations and italics omitted*]).

17 **B. The City's Determination to Certify the Bicycle Plan EIR is Presumed Correct.**

18 In arguing that the Court should issue the Injunction based on the City's GRE for the 2005
19 Bicycle Plan, Petitioners noted the fact that the City carried the very heavy burden of showing, to a
20 certainty, that the Bicycle Plan would have no environmental impacts. (See Memorandum of Points

21 ⁵ The process for dissolving an injunction set forth in Civil Code Section 533 is distinct from
22 the process of filing a return to the writ. The purpose of the former is to allow a party to obtain relief
23 from an injunction when the grounds upon which it was issued have ceased to exist, which as
24 discussed in the text is the case here. The injunction is the portion of the Court's prior ruling that
25 prevented the City from implementing most of the Bicycle Plan. The purpose for the return to the
26 writ, by contrast is to facilitate the court's retention of jurisdiction over a public agency's proceedings
27 until it determines that the agency has complied with CEQA. (Pub. Res. Code 21168.9(b); Code of
28 Civ. Proc. §1097.) The City anticipates from their comments during the EIR process that Petitioners
will challenge the return to the writ and argue that the EIR is inadequate. But that inquiry – which as
discussed further below is subject to a very deferential standard of review – should not prevent the
Court from lifting the Injunction given the material change in facts that has eliminated the factual
bases for the grant of the Injunction. This motion does not seek to terminate the Court's jurisdiction
over the City's environmental review of the Bicycle Plan. Instead, the issue raised by this motion is
limited to whether the facts upon which the Injunction was granted have materially changed and/or the
interests of justice require dissolution of the Injunction. In short, the adequacy of the EIR is an issue
for another day, to be decided under an entirely different standard of review.

1 and Authorities in Support of Preliminary Injunction and Temporary Restraining Order (“MPA”), filed
2 May 11, 2006, at p. 8-9.) But now, with the City's certification of a comprehensive EIR, this legal
3 burden has shifted. Unlike when the City relied on the GRE for the 2005 Bicycle Plan, Petitioners
4 cannot successfully challenge the City's findings in an EIR merely by providing this court with *some*
5 *evidence* to support contrary findings. Instead, the court must uphold the EIR if there is *any*
6 *substantial evidence*, whether contradicted or uncontradicted, that supports the City's findings and
7 conclusions. (*Western States Petroleum Assoc. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Citizens*
8 *of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566; *Laurel Heights Improvement*
9 *Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392.) This highly
10 deferential standard applies not only to the City's “conclusions, findings and determinations” but also
11 to “challenges to the scope of an EIR’s analysis of a topic, the methodology used for studying an
12 impact, and the reliability or accuracy of the data upon which the EIR relied.” (*Bakersfield for Local*
13 *Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) In applying the substantial
14 evidence standard, the reviewing court must resolve any reasonable doubts in favor of the City’s
15 findings and decisions, and may not set aside an agency’s approval of an EIR on the ground that an
16 opposite conclusion would have been equally or more reasonable. (*Id.*)

17 Thus, the City’s certification of the EIR has materially changed the facts and the standards
18 under which the Court must view the City’s actions. Whereas the Petitioners previously argued they
19 were entitled to an injunction because the City would be unable to defend its determination not to
20 prepare an EIR under the common sense exemption, now, all doubts must be resolved in the City’s
21 favor as a matter of law. Because of this, Petitioners could not obtain a new injunction, and they
22 should not be permitted to extend the prohibitions of the current Injunction.

23 In sum, the Court issued the Injunction for the 2005 Bicycle Plan because it determined that
24 Petitioners were likely to show that the City should have conducted a more thorough environmental
25 review of the Bicycle Plan, rather than avoiding environmental review by issuance of a GRE. But now
26 the City has completed the highest level of environmental review recognized under CEQA, an effort
27 that spanned nearly three years, entailed months of public comment, resulted in over 2,200 pages of
28 analysis and cost the City and its taxpayers of over \$1.5 million, resulting in a certified Bicycle Plan
EIR. CEQA accords a high level of deference to a certified EIR, applying a presumption of adequacy,

1 and permits the courts to overturn an EIR only where it lacks any substantial evidentiary support. The
2 Court should dissolve the Injunction to reflect this material change in facts.

3 **II. THE COURT SHOULD DISSOLVE THE INJUNCTION BECAUSE THE BALANCE**
4 **OF HARDSHIPS NOW TIPS IN FAVOR OF THE CITY, AND THE INTERESTS OF**
5 **JUSTICE WOULD THEREFORE BE SERVED BY LIFTING THE INJUNCTION.**

6 The Court previously found the balance of hardships in this case tipped in favor of preserving
7 the status quo. (Injunction at p. 1.) But each of the facts Petitioners relied upon to show they would
8 be harmed unless an injunction was issued has also materially changed.

9 First, Petitioners argued that the Injunction should be granted because the City was
10 “piecemealing” implementation of individual bicycle projects, which would have required Petitioners
11 to bring multiple suits to challenge each projects’ environmental review. Thus, they argued, the
12 Injunction was necessary to prevent a “multiplicity of judicial proceedings.” (MPA at p. 12, citing
13 Code of Civ. Proc. § 526(a)(6).) Since then, the City has certified a comprehensive EIR analyzing the
14 environmental impacts of each of 60 proposed near-term improvements – projects that could be
15 completed within the next five years – including a cumulative analysis of multiple projects that are
16 located in geographic proximity to each other. (See EIR at p. V.A.3-4.) Thus, Petitioners can no
17 longer argue that the Injunction is necessary to prevent the City from conducting separate CEQA
18 review of components of the Bicycle Plan or the individual improvement projects within it.

19 Second, Petitioners argued the City should be enjoined because the Board had adopted bicycle
20 facility improvement projects despite vocal opposition to some of those projects. (MPA at p. 14.)
21 There is no legal support for the proposition that an injunction is warranted merely because a public
22 agency adopts legislation over the objections of a minority viewpoint. In any event, the Bicycle Plan
23 and the 45 projects adopted (of 60 proposed) by the MTA Board of Directors were the subject of
24 extensive public review and were supported by a multitude of speakers at each hearing regarding
25 project approval. (See e.g. Minutes, Exhibit X to RJN.)

26 Third, Petitioners argued that the City should be enjoined because the 2005 Bicycle Plan
27 contained an item recommending that the Department, in evaluating projects under CEQA, use a
28 standard for measuring transportation impacts other than the traditional automobile “level of service”
standard, which measures the amount of time it takes a vehicle to pass through a given intersection.

1 This new standard would measure transportation impacts based on the number of automobile trips
2 generated by a project. Generally, projects that cause a decrease in an intersection's level of service
3 require a more detailed review under CEQA, depending on the severity of the decrease. Without an
4 injunction, Petitioners argued, their Petition seeking an EIR on bicycle projects would be ineffectual,
5 because if the City were allowed to use an auto-trips-generated standard for determining the
6 appropriate level of environmental review, bicycle projects would never require an EIR, because
7 bicycle projects do not generate auto-trips. (MPA at p. 15.) In other words, Petitioners argued that
8 they would be harmed without an injunction because the City would be able to bypass CEQA review
9 of individual bicycle projects once the new transportation standard went into effect.

10 Even assuming that Petitioner's argument warranted injunctive relief when the Court originally
11 issued the Injunction, it no longer does. The EIR analyzes all intersections impacted by the proposed
12 60 near-term improvements using the traditional "level-of-service" methodology. (See EIR at V.A.3-
13 14.) The EIR analyzes impacts to 61 different intersections describing the level-of-service for existing
14 conditions, conditions with the near-term project (or projects), conditions projected for the year 2025
15 without bicycle improvements, and conditions projected for 2025 with the improvements. The EIR
16 also analyzes impacts, using level-of-service methodology, to 12 traffic corridors, providing an even
17 more comprehensive picture of transportation conditions with implementation of the Bicycle Plan and
18 all of its components. (EIR at V.A.3-17.) Thus, Petitioners' contention that individual bicycle projects
19 might never be analyzed for impacts using an LOS methodology is no longer true. Indeed, all 60
20 proposed near-term improvements -- including 15 not adopted by the MTA -- have now been analyzed
21 using Petitioners' preferred methodology. (EIR at V.A.3.)

22 Finally, Petitioners argued that the Court should impose an injunction because the City would
23 not be harmed by a continuance of the status quo. (MPA at 15.) But again, even if this were once
24 true, which the City disputes, this material fact has changed. The City has well documented the need
25 to improve the safety of its streets for bicyclists. (See Declaration of Jack Fleck in Support of Request
26 for Order Modifying Preliminary Injunction and Peremptory Writ of Mandate, filed March 28, 2008,
27 and Declaration of Jack Fleck in Support of Second Request for Order Modifying Preliminary
28 Injunction and Peremptory Writ of Mandate, filed December 1, 2008 ["Second Fleck Declaration"].)

1 As noted in previous requests to modify the Injunction, the number of bicyclists in San Francisco has
2 steadily increased, and continues to rise. (Second Fleck Declaration, at ¶¶ 15-17; Curtis Declaration at
3 ¶5.) At the same time, after almost a decade of declining annual collision numbers, for the first time in
4 2007 the number of bicycle injury collisions increased significantly over the previous year. (*Id.*)
5 Petitioners can no longer argue that the City and its residents would not be harmed by a continuance of
6 the status quo. To the contrary, continuance of the status quo may only increase this disturbing trend
7 in bicycle collisions. If the Court dissolves the Injunction, the City can implement bicycle projects
8 included in the Bicycle Plan to address this growing public safety concern.

9 In sum, all of the asserted facts Petitioners offered in support of the Court's issuance of the
10 Injunction have materially changed. The Court should dissolve the Injunction because: (1) the
11 material facts have changed since the City has completed the EIR process for the Bicycle Plan, and (2)
12 the balance of hardships weighs in favor of the City to protect the safety of bicyclists and those with
13 whom they share the road.

14 CONCLUSION

15 For the reasons set forth above, the City respectfully requests that the Court dissolve the
16 Injunction.

17 Dated: August 28, 2009

18 DENNIS J. HERRERA
19 City Attorney
20 KATE HERRMANN STACY
21 KRISTEN A. JENSEN
22 AUDREY WILLIAMS PEARSON
23 Deputy City Attorneys

24 By: 
25 KRISTEN A. JENSEN

26 Attorneys for Defendants
27 CITY AND COUNTY OF SAN FRANCISCO
28

1 **PROOF OF SERVICE**

2 I, CHARLOTTE COLOYAN, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall,
Room 234, One Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

5 On August 28, 2009, I served the following document(s):

6 **RESPONDENT CITY AND COUNTY OF SAN FRANCISCO'S MEMORANDUM**
7 **OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISSOLVE**
8 **INJUNCTION**

8 on the following persons at the locations specified:

9 Mary Miles, Esq.
10 364 Page Street, No. 36
San Francisco, CA 94102

11 in the manner indicated below:

12 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies
13 of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing
with the United States Postal Service. I am readily familiar with the practices of the San Francisco City
14 Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s)
that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that
15 same day.

16 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed
17 envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional
messenger service. A declaration from the messenger who made the delivery is attached or will
18 be filed separately with the court.

19 **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed
20 envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am
readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries.
21 In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a
courier the same day.

22 **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true
23 and correct copies of the above document(s) via a facsimile machine at telephone number Fax #' to the persons
and the fax numbers listed above. The fax transmission was reported as complete and without error. The
24 transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission
report is attached or will be filed separately with the court.

25 I declare under penalty of perjury pursuant to the laws of the State of California that the
26 foregoing is true and correct.

27 Executed On August 28, 2009, at San Francisco, California.

28 
CHARLOTTE COLOYAN