

Bicycle Advisory Committee Public Comment re: Fell/Masonic-----

This is public comment from District 5, given to District Supervisor Ross Mirkarimi and the San Francisco Bicycle Advisory Committee. It is not legal advice. It was not written by an attorney.¹



Substantial evidence supports the emergency exemption

The Supervisors' unanimous resolution is substantial evidence of the emergency situation at Fell and Masonic. Substantial evidence "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 be reached." (*Cal Beach Advocates v. City of Solana Beach* (2002) 103 Cal. App. 4th 529, 536-537.) ("*Cal Beach*") "Emergency means a sudden, unexpected occurrence, involving, a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health property or other essential services. (Pub. Resources Code §21080, subd. (b)(4).) "Emergency includes such occurrences as fire, flood, earthquake or other soil or geologic movements as well as such occurrences as riot, accident or sabotage." (Pub. Resources Code §21060.3.)

In *Cal Beach*, a sandstone cliff was likely to collapse because El Nino waves had eroded its base. Such a collapse could injure persons on the beach below and damage homes on the bluff above. Nearby sections of the coastal bluff had already collapsed and the notch at the base of the cliff had deepened to about 12 feet. The City of Solana Beach ("Solana") filed an emergency exemption to California Environmental Quality Act ("CEQA") review for the project to stabilize the cliff's base. Cal Beach Advocates, a local non-profit corporation, petitioned to set aside the exemption and sought an injunction to require an Environmental Impact Report ("EIR") for Solana's shoreline and coastal bluff protection ordinance. In response, Solana successfully moved for summary judgment. On appeal, Cal Beach Advocates argued that no emergency existed because no sudden, unexpected occurrence required immediate action. (*Id.* at pp. 535-536.)

Disagreeing, the appellate court found that, "[c]ertainly the collapse of the Torrey sandstone base of the bluff, like an earthquake or forest fire, is an occurrence: it is something that happens. Moreover, it is sudden in that it happens all at once" (*Id.* at p. 538.) In *Webster's Dictionary*, "'Sudden' can be defined as 'changing character or angle all at once'" (*Ibid.*) Further, the court found that if all emergencies had to be unexpected, then projects can never be designed to prevent emergencies. (*Ibid.*) [Public Resources Code] Section 21080, subdivision (b)

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(4) exempts not only projects that mitigate the effects of an emergency but also projects that prevent emergencies. (*Id.* at p. 537.)

Two engineers had determined the cliff would soon collapse, providing substantial evidence that the condition of the bluff required immediate action. (*Id.* at p. 538.) Finally, the court found that the exemption did not require a public hearing, and determined that even if a public hearing had been required, the exempted project, the cliff stabilization, had already been approved by the Solana City Council in a public meeting, as required by the local Municipal Code. (*Id.* at p. 541.)

In contrast, in *Western Municipal Water District of Riverside County v. The Superior Court of San Bernardino County* (1986) 187 Cal App. 3d. 1104 (“*Western*”) an emergency exemption was set aside because it was not supported with substantial evidence. The San Bernardino Water District (“San Bernardino”) filed an emergency exemption for a project to lower the water level in an aquifer beneath the City of San Bernardino to mitigate the “imminent” danger of liquefaction. Liquefaction occurs when an earthquake forces groundwater through sandy soil to the surface, where it creates a top-layer of virtual quicksand into which overlying structures may topple. (*Id.* at p.1109.) The risk of liquefaction increases when the area’s groundwater is high. The trial court affirmed the exemption, but referred to it as “extremely sketchy.”(*Ibid.*)

Western Municipal Water District (“Western”) appealed, arguing that San Bernardino did not consider alternatives to the two wells and ignored its own consultant’s warning that the wells may have potentially significant environmental effects. Further, Western pointed to evidence showing that contaminated plumes of groundwater might be drawn into the domestic water supplies if the dewatering wells were drilled and operated. (*Ibid.*) Western claimed that San Bernardino simply decided to proceed under the emergency exemption, thereby avoiding the CEQA requirement of an EIR. (*Ibid.*)

The court found that at a minimum, the administrative record must disclose substantial evidence of every element of the contested exemption as defined in section 21060.3. (*Id.* at p. 1114). San Bernardino’s only pertinent data regarding imminence were agency and magazine, articles, a consultant’s report and a paper of the U.S. Geological Survey. The consultant report’s statistics, for example, were “[m]athematically equivalent to an annual earthquake likelihood of 1.4%.” (*Id.* at p. 1115.) “Our review discloses no substantial evidence that liquefaction is an imminent danger, or that it demands immediate action.” (*Id.* at p. 1114.)

Here, at Fell/Masonic, the Supervisors resolved that the intersection has become dangerous under changed physical conditions, finding that design changes made to the intersection in 2005, “improved the safety of the intersection, but have not fully solved the safety problem.” (Fell Masonic res. no. __ p.1:22-23, July 10, 2007.) The resolution identifies the danger, finding that the “fast moving left-hand lane on Fell Street turn[s] directly into bicyclists and pedestrians’ right of way.” (p. 1:15-16.) And it clearly specifies the anticipated individual emergencies that result from the danger, “Collisions and near collisions between bicyclists, pedestrians and motorists occur almost regularly” (p.1:19-20.) Finally, it requests “a dedicated traffic signal phase crossing Masonic for bicyclists and pedestrians using the panhandle pathway...” (p. 2:4-7.)

An imminent crash, or accident, is an emergency just like an imminent cliff collapse. Both events are sudden, unexpected occurrences, involving, a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health and

property. The term “accident” is even specifically listed in the statutory definition of emergency. (Pub. Resources Code §21060.3.)

A crash, “is an occurrence: it is something that happens”. A crash is also “sudden”, because it, “changes character or angle all at once” A person’s body, for example, changes character, suddenly, when it is impacted and injured. The body is healthy and intact before the crash. After the crash, the body’s character has often physically changed. The body’s bones for example: when bones break, they are “broken”²

Further, the emergency at Fell/Masonic is very different from the “emergency” in *Western*. In *Western*, the agency’s decision was not supported by substantial evidence. Nothing in the record indicated the imminence of an earthquake. Intense controversy existed concerning the potential pollution of other nearby aquifers. And, the San Bernardino Water District had no discretionary authority over the movement of tectonic plates, or the occurrence of earthquakes. Consequently, it could not make findings of fact concerning the imminence of an earthquake or of the likelihood of a liquefaction event.

The San Francisco Board of Supervisors on the other hand, does have discretionary authority to provide for public safety. At Fell/Masonic, the resolution acts as substantial evidence to support the emergency exemption because it is within the local legislature’s discretionary power to keep its people safe. The Fell/Masonic resolution identifies the dangerous condition, specifically indicates how physical conditions have changed, and requests that the design be changed in order to mitigate the danger. The resolution passed unanimously. There is no articulable reason to ignore the resolution. And to do so would be fundamentally unreasonable.

Finally, if the City ignores its own findings of danger and emergency the City will be exposed to liability. The intersection has lost design immunity under changed physical conditions and notice. “Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.” (*Baldwin v. State* (1972) 6 Cal.3d 424, 434.) “The City is under an ongoing obligation to review the operation of its public works.” (*Id.* at p. 439.) (Cal. Const. Art. 1 §9.) “We find no insuperable burden to be created by extending this duty to cases of personal injury.” (*Ibid.*) The rationale behind design immunity is that juries should not be allowed to second-guess discretionary, legislative, street design decisions. (*Id.* at p. 432.) Here at Fell/Masonic, the Supervisors found the intersection to be dangerous and requested that its design be changed. The resolution passed unanimously. There is no higher authority. There is no need for further “analysis.” Even the MTA’s own “data” indicates a problem on multiple levels³ and a change in physical conditions⁴. The City can’t ignore its own notice, or disregard its own findings.

Substantial evidence supports the emergency exemption.

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²“Recovering from a fractured hip, a broken nose and abrasions from head to toe, [injured cyclist] is now healthy enough to ride his bike, but the scars remind him of the terror of crossing the “notorious” intersection.” “S.F. bike group seeks new lights at Fell, Masonic”, *The San Francisco Examiner*, June 27, 2007.

³ “A majority of pathway users felt that the crossing is not sufficiently safe (56% question 6) and were supportive of the concept of a separate pedestrian phase (88%)” *DPT Fell/Masonic Intersection Survey Report*, October 2005.

⁴ Recent city-wide bike counts also show a 12% increase in bike traffic on the Panhandle Bikeway.