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San Francisco Police Commission

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Re: December 14 Traffic Enforcement Order 9.01

This letter supplements my previous submissions on the May 6 draft order.¹ I am a 30 year resident of the city and a retired lawyer.

The revised December 14 order is a significant improvement from the May 6 draft and, accordingly, less detrimental to pedestrians, public safety generally, and the reputation and habitability of the City. But serious issues remain:

I. The Commission's Self-Designed Public Input Process Delivers Pre-Determined Results

Commissioners continue to congratulate themselves as here on December 2: "...The Commission has undertaken the most exhaustive public outreach effort in its history."² But this is a bit like the host of the grand holiday dinner congratulating herself on how the invited relatives all got along rather well, conveniently forgetting that she failed to invite the more irascible members of the larger extended family.

The questions are: Outreach to who? Outreach for what purpose?

The Commission began this process by assuming it would restrict pretext stops — all, some, or most. It was transparent in this. Apparently to the Commissioners, it was merely a question of detail. The evidence for this is the May 6 draft itself: assume we

¹ September 8, September 19, October 31, November 11, and November 18, 2022.

² Cover Letter of Transmittal re Department General Order 9.01 from Commissioners Elias, Carter-Oberstone, and Benedicto dated December 2, 2022.

must ban all or some such stops, draft order to do so, devise a “public outreach” effort, amend order, adopt. The question was never: assuming African Americans are disproportionately stopped, how can we reduce or eliminate this practice and in a manner that does not adversely affect public safety. That should have been the sort of “first principles” analysis that the problem required. Instead, you assumed the remedy — ban pretext stops — so you drafted a general order to eliminate such stops.

Once the draft order was issued, the Commission embarked upon a “public outreach” process that was outcome determinative: It formed a “working group” composed of the most interested parties who met to edit the May 6 draft, and it deputized the Human Rights Commission to hold “listening sessions” to hear of the public’s “encounters with the police.” Let’s take these one by one.

What of the Working Group? Certainly it was laudable that there even was a working group but (a) as noted above it *presupposed* that there would be an order banning 14 stops because the Commission had already decided upon the remedy, (b) not surprisingly, the group was composed of passionate advocates rather than community groups or the public at large, and (c) presumably to reach consensus, the December 14 revised draft in parts is a dog’s breakfast of words that might be difficult for a patrol car officer to digest in real time.

And then there is the Human Rights Commission — an agency devoid of any authority over SFPD or responsibility for public safety — that held “listening sessions” on “encounters with the police” and “interactions” with the police; as in “complaints about the police.” Indeed, the HRC held 19 such community listening sessions, with one or more Commissioners always in attendance. This might be “public outreach” but of a rather crabbed sort; it is certainly not broad based civic engagement regardless of how many community meetings were held.

Too harsh a judgment? Let’s consider a counterfactual: The Commission itself, or a worthy proxy and with one or more Commissioners in attendance, holds “listening sessions” on the public’s “*encounters with cars*,” “*encounters with motor bikes*,” or “*encounters with [to use a charming word from revised section 9.01.04(A)9] devices*,” or *public and pedestrian safety generally*, and then writes up those comments and conclusions on Powerpoint displays for the education of the other Commissioners and public. Imagine if 19 such meetings were held. There was not even one.

The Commission and the HRC boast of all the “Feedback from the Community on Traffic Stops.” Where is the *feedback from the community on motor vehicle safety, or traffic enforcement, or “interactions” between bicycles and pedestrians, or interactions with dangerous drivers*? The May 6 order largely barred SFPD from stopping in connection with 14 traffic infractions yet apparently that did not warrant “public outreach” on the potential effect on pedestrian or public safety generally. You designed a “public outreach” process that condemned these voices to silence. Interactions with the police: we listen. Interactions with vehicles or bikes on matters of public safety implicated by the order: we hear nothing.

From this, the traffic order's advocates now see what they want to see — because that is all there is to see. The Commission's process, not the counterfactual one I pose above, was bound to produce a general order of some sort. The result was predetermined, if not the precise contours. To that extent, the advocates got what they wanted. The public, alas, got neither a fair nor objective process, and now we see the consequences. As is often the case in the law, procedure can be outcome determinative.

But it is worse than that. One would have thought that the Police Commission would bear a particularly heavy burden of justifying an order to patrol officers that they, with exceptions and with the option in some cases of issuing citations, ignore state law: The heavy burden of demonstrating that the pros vastly outweigh the cons. Instead, the Commission's outcome determinative process has had the collateral and insidious effect *of appearing to shift the burden to the opponents of the order*; the burden of proving adverse effects on pedestrians, to public safety generally, to the safety and habitability of the city, to the police department, and who knows what.

It is all too clever, too outcome determinative, too unfair. And it is a dreadful way to make public policy.

Turning to substance:³

II. Two Provisions that Bar Stops for “Low Level” Offenses Continue to be Detrimental to Public Safety and Therefore Should be Deleted or Amended.

With all due respect to the Commissioner-signatories of the December 3 cover letter that transmitted the December 14 draft, it is hard to take seriously the following sentence at the bottom of page 2 thereof: “Each one of these nine offenses has been carefully vetted *to ensure there are no public safety implications associated with them.*” (emphasis added.)

A. Banning Stops For Failure To Signal While Turning or Changing Lanes Would Surely Be Detrimental to Public Safety. 9.01.04(A)7

Can one honestly reconcile the Commissioners' sentence quoted above with prohibiting stops for failure to signal while turning or changing lanes? The voters and taxpayers await disclosure of the probative evidence that supports the claim of “no public safety implications” from abandoning California turn signal law 22108. Such evidence, if it exists, apparently is unique to San Francisco because even a casual internet search reveals that, among other sources, the Society of Automotive Engineers has determined that the failure to signal causes 2 million accidents per year; and that

³ I assume that as a consequence of the minimum 10 day requirement set forth in the City Charter, Sec. 4.104(a)1, that the order will not be put to a Commission vote until no earlier than December 14.

the National Highway Traffic Safety Administration estimates the number to be even higher, causing two percent of police-reported crashes. Surely there must have been some safety-related reason for the legislature to pass the law in 1959 and to continue it for more than 60 years; and even casual observation by sentient San Franciscans reveals frequent disregard of such a basic rule of the road, all to the detriment of pedestrians, cyclists, and motorists.

One need not recount, again, our utter failure to even approach the goal of zero traffic deaths by 2024; the disproportionately high pedestrian death rates experienced by African Americans, the elderly, and the homeless;⁴ the increasingly reckless driving in the City; and the already casual traffic enforcement. To reassure us, without evidence, that there is nothing to see here so please just move along, is as astonishing as it is insulting. While reasonable minds might differ on the wisdom of some elements of the prior order and even some in the latest draft, it beggars belief that one can conclude that there are “no safety implications” from largely abandoning a 60-plus year old turn signal law.

As some are reluctant to admit, this sort of proposal is simply out of step with the voters and the public; indeed, it is contemptuous of them. In June the voters essentially declared they want more law enforcement, not less; they did the same the first week of November; and poll after poll show that the public is unhappy, uneasy, and feels unsafe.⁵ For the Police Commission to condone law breaking, indeed to order it, in the form articulated in 9.01.04(A)7 is unacceptable, bereft of any evidence, and a stain on the Commission itself.

Section 9.01.04(A)7 should be deleted.

B. Of Pedestrians and Bicycles and a “Device.” 9.01.01(A)(9)

The previous “Banned Pedestrian and Bicycle Stops” provision has enjoyed a remarkable metamorphosis that appears to reflect the sausage making of the Working Group and, in particular, the influence of certain persuasive advocates.

Please: strike the entirety of this subsection in order to return some semblance of pedestrian safety to our sidewalks, alleys, and streets.

But if you cannot see fit to do that, at least make this amendment as underscored in the last line:

⁴ Vision Zero Traffic Fatalities 2021 End of Year Report, May 2022. <https://www.visionzerosf.org/wp-content/uploads/2022/06/Vision-Zero-2021-End-of-Year-Traffic-Fatality-Report-FINAL-PUBLIC-1.pdf> at p. 6.

⁵ The San Francisco Chronicle poll is here: <https://www.sfchronicle.com/sf/article/sfnext-poll-sentiment-17435794.php> Note: Behind a paywall. The San Francisco Standard poll is here: <https://sfstandard.com/politics/san-francisco-standard-voter-poll-fall-2022/>

Any stop of a pedestrian or bicycle for an infraction in violation of the California Vehicle Code or San Francisco Transportation Code unless there is an immediate danger that the pedestrian or bicyclist will crash with a moving vehicle, scooter, bicycle, or other device moving exclusively by human power, or that the bicyclist will crash with a pedestrian.

Can we not have the decency, the sense of community, to respect humans while ambling or using walkers or on crutches or in wheel chairs?

III. The Commission as Law Maker.

A. A Question of Authority.

I have previously asked verbally and in writing whether the Commission in fact has the legal authority to issue the traffic order, and I continue to pose this question even with respect to the current draft. It is fair to observe that there is a substantial question whether the Commission in fact has the legal authority to issue the order. Sec. 4.127 of the City Charter declares that the Police Department “...shall preserve the public peace, prevent and detect crime, and protect the rights of persons and property by enforcing the laws of the United States, the State of California, and the City and County.”⁶ (emphasis added) Furthermore, Sec. 4.102(1) requires boards and commissions to “...Formulate, evaluate and approve goals, objectives, plans, and programs and set policies consistent with the overall objectives of the City and County, as established by the Mayor and Board of Supervisors through the adoption of City legislation...”

The Police Commission should not hide behind principles of attorney-client privilege; rather, it should advise whether it believes it has this authority and the source thereof.

B. A Question of Safety, Public Policy, and Who Decides

Safety is now called-out in the first sentence of the revised general order, a welcome amendment. While some advocates of the traffic order previously promoted it as one that would make us all safer — an assertion I suspect was accepted by only the most credulous — the aforementioned December 2 transmission letter is more nuanced, declaring that “Expending less time and money on these stops will free up substantial resources that the Department can use on more effective public safety strategies.” (p.1) To this, several points can be made.

First, where is the evidence of that? I have previously urged the Commission to draft and publish a memorandum that sets forth the reasons for these orders, the

⁶ How will the Commission address the dilemma in which it puts the Department and sworn officers as they face apparently conflicting obligations set forth in the City Charter and the general order?

alternatives considered, the reasonably foreseeable consequences pro and con, and citations to record evidence. To that plea we are met with a two and half page letter of transmission. The advocates of the rule congratulate themselves on the exceptional public outreach efforts over the last few months but the *opinions* of organizations or individuals are not, in the main, *evidence* at least insofar as claims of enhanced safety are concerned. There is copious material on the Commission's website on the traffic order writ large but none on how this particular general order will increase pedestrian and public safety in San Francisco. The Planning Department publishes a report — with evidence — for every application for a conditional use authorization and zoning variance. This traffic order has far greater consequences than most CUAs. A substantive, detailed, footnoted report is called for.

Second, if the Commission really wants to make us safer, and to feel that we are, it should aggressively advocate for SFPD and the City to train and hire the 500+ officers that the City is short.

Third, this is a terrible way to make public policy. The traffic order is not akin to a “use of force” order. Nor is it like “prosecutorial discretion.” To the contrary, this is an order that transcends the officer-citizen interaction because it has potentially broad implications for pedestrian safety, public safety generally, and the appeal and habitability of the city. It also risks knock-on effects if other laws are flouted because San Francisco develops a reputation of a city where all law enforcement is casual.

Given the broad public policy implications of this order, it is fair to ask: Is the Police Commission the right body to decide? Does it have the institutional competence, the legal remit, the moral authority to issue a “traffic” order that affects so many aspects of City life? One would have thought that was the purview of elected officials — or even the voters directly. The proposed traffic order is certainly more consequential than whether JFK drive is open to automobiles, something upon which we recently voted.

Respectfully, the Commission is close to getting it right but it is not there yet.

Sincerely,
Paul Allen