Appendix CC

City Authority to Impose Employee Trip Reduction Programs
The Stanford University Medical Center ("SUMC") has filed an application with the City of Palo Alto ("the City") to expand its hospital facilities located within the City. This proposed expansion is referred to herein as "the Project." In order to approve the Project, the City will need to amend its Comprehensive Plan and rezone the Project site to accommodate the increase in density. The Draft Environmental Impact Report ("DEIR") for the Project has concluded that it will result in a significant increase in traffic trips, thus resulting in significant impacts to various intersections both within and outside the City. The DEIR has also concluded that the increase in traffic will result in other significant environmental impact relating to air quality and climate change.

To help mitigate these impacts, the DEIR identifies a proposed mitigation measure (TR-2.3) which would require SUMC to enhance its Travel Demand Management ("TDM") Program, to reduce vehicle trips by SUMC employees. The TDM Program would include the provision of Caltrain Go Passes to all SUMC employees. The DEIR concludes that implementation of this mitigation measure will mitigate to a level of "less than significant" the Project's impacts at several intersections.

SUMC originally suggested the Go Pass measure, and continues to reaffirm its commitment to including such a measure, as part of a negotiated development agreement with the City. However, the question has nonetheless come up whether the City has the independent legal authority to impose this requirement, and other TDM measures, were SUMC not to otherwise agree to them.

This question has arisen in light of section 40717.9 of the Health and Safety Code (hereafter "Section 40717.9"), which purports to prohibit "any ... public agency" from "requir[ing] an employer to implement an employee trip reduction program unless the program is expressly
required by federal law . . . .” This memorandum analyzes that question and concludes that the City does have such authority, notwithstanding this apparent prohibition.

Before proceeding to the analysis, it should be noted that, even if the City did not have the authority to impose such TDM measures, it was nonetheless appropriate for the DEIR to identify them as potential mitigation measures. EIRs are required to identify all potentially feasible mitigation measures. In this case, TDM measures clearly are “potentially feasible” given SUMC’s expressed willingness to agree to them. Further, even if SUMC were not so willing, and even if Section 40717.9 prohibited the City from imposing them, these TDM measures nonetheless could be deemed to be “potentially feasible” given the very real possibility that the Legislature could amend or repeal Section 40717.9 sometime during the buildout of the Project. AB 32 and other recent legislative enactments suggest that Section 40717.9 is very much contrary to current legislative policy. Further, the DEIR certainly demonstrates that such TDM measures can be extremely effective in reducing traffic congestion.

Furthermore, it should also be noted that it is becoming increasingly common for other jurisdictions to impose TDM requirements on new development to mitigate traffic, air quality, and greenhouse gas related impacts. For example, the City/County Association of Governments of San Mateo County (C/CAG) requires that if the project generates 100 or more peak hour trips, “local jurisdictions must ensure that the developer and/or tenants will reduce the demand for all new peak hour trips (including the first 100 trips) projected to be generated by the development.” (Revised C/CAG Guidelines for the Implementation of the Land Use Component of the Congestion Management Program, September 21, 2004.)

**Question Presented**

Does the City have the legal authority to require SUMC to implement an employee trip reduction program and other TDM measures in order to mitigate the traffic, air quality, and climate change impacts of the Project prior to approving the Project?

**Short Answer**

As a charter city, the City has the power to require SUMC to implement an employee trip reduction program to mitigate traffic congestion, despite the apparent prohibition in Section 40717.9. Moreover, even if Section 40717.9 applied to the City, it would not prohibit the City from refusing to amend its Comprehensive Plan and zoning ordinances to accommodate the Project based upon its adverse traffic, air quality, and climate change impacts. Thus, the City could effectively and appropriately require SUMC to agree to such mitigation before granting SUMC the legislative approvals it needs for the Project to go forward.
Discussion

A. Because Palo Alto is a charter city, it is not barred by Section 40717.9 from requiring SUMC to implement an employee trip reduction program to mitigate the traffic congestion impact of the Medical Center's expansion.

On its face, Section 40717.9 appears to prohibit the City from requiring SUMC to adopt an employee trip reduction program. It states:

"Notwithstanding Section 40454, 40457, 40717, 40717.1, or 40717.5, or any other provision of law, a district, congestion management agency, as defined in subdivision (b) of Section 65088.1 of the Government Code, or any other public agency shall not require an employer to implement an employee trip reduction program unless the program is expressly required by federal law and the elimination of the program will result in the imposition of federal sanctions, including, but not limited to, the loss of federal funds for transportation purposes." The City is a "public agency," and it is not required by federal law to require employee trip reduction programs. Therefore Section 40717.9 appears to prohibit the City from requiring such programs.

The California Constitution grants all cities and counties the power (known as the local "police power") to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. 11, § 7.) In addition, the California Constitution actually allows charter cities legislative authority over purely "municipal affairs" even if the charter city's legislation is in conflict with general state laws. (See Baron v. City of Los Angeles (1970) 2 Cal.3d 535.) The City of Palo Alto is a charter city. Thus, the question is whether Section 40717.9 applies to charter cities such as the City of Palo Alto. We conclude that it does not.

For a state law to apply to a charter city such as Palo Alto, the state law must be "reasonably related to the identified statewide concern and narrowly tailored to avoid infringing legitimate municipal affairs." (City of Watsonville v. State Department of Health Services (2005) 133 Cal.App.4th 875, 888.) "The courts must be mindful that ‘the sweep of the state’s protective measures may be no broader than its interest.’" (Fielder v. City of Los Angeles (1993) 14 Cal.App.4th 137, 146 quoting California Federal Savings and Loan Association v. City of Los Angeles (1991) 54 Cal.3d 1, 25.) "[I]n articulating the test for preemption [of a charter city] the Supreme Court was concerned with ensuring that a state law does not infringe legitimate municipal interests other than that which the state law purports to regulate as a statewide interest." (City of Watsonville v. State Department of Health Services 133 Cal.App.4th . at p. 889.) We believe that Section 40717.9 fails this test because it impinges on two important municipal interests: traffic congestion and zoning. As a result, Section 40717.9 is not sufficiently narrowly tailored to apply to a charter city.
The mitigation of traffic congestion caused by development is a legitimate municipal concern. "[T]raffic congestion is a local problem that cities ordinarily are authorized to address." (O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, 1076.) "There would not seem to be much question but that regulation of land use, particularly in relation to ... vehicular congestion ... is of vital concern to a municipality." (Hirsch v. City of Mountain View (1976) 64 Cal.App.3d 425, 430 quoting Codding Enterprises v. City of Merced (1974) 42 Cal.App.3d 375, 378.)

It might be argued that traffic congestion is a matter of statewide concern and not a municipal affair, in light of court rulings that "the state has preempted the field of vehicular traffic regulation." (Rumford v. City of Berkeley (1982) 31 Cal.3d 545, 548). "The right of the state to exclusive control of vehicular traffic on public streets has been recognized for more than forty years. While local citizens quite naturally are especially interested in the traffic on the streets in their particular locality, the control of such traffic is now a matter of statewide concern." (Mervyne v. Acker (1961) 189 Cal.App.2d 558, 561.) However, we believe that only the "control of vehicular traffic" — the rules for how vehicles can be used on the public roads — is a matter of statewide concern. The reduction of traffic congestion is not part of this statewide concern. The cases addressing the "statewide concern" in traffic control are distinguishable from cases dealing with the local interest in the mitigation of traffic congestion. For example, Ex Parte Daniels, (1920) 183 Cal. 636, concerned speed limits; Barajas v. City of Anaheim, (1993) 15 Cal.App.4th 1808, concerned the regulation of sales from cars parked on public streets; Los Angeles Railway Corp. v. City of Los Angeles (1940) 16 Cal.2d 779, concerned the number of drivers required in a streetcar; and Brierton v. Department of Motor Vehicles, (2005) 130 Cal.App.4th 499, concerned the power of a university police department to enforce traffic laws. Although the State has preempted the specific rules of how vehicles can be operated and used on the public streets, it has not preempted how cities can address traffic congestion caused by development. Consequently, none of these cases contradict the cases that have held that traffic congestion is a legitimate municipal concern. (See, e.g., O'Connell v. City of Stockton, supra, 41 Cal.4th 1061, 1076; Hirsch v. City of Mountain View, supra, 64 Cal.App.3d 425, 430; Codding Enterprises v. City of Merced, supra, 42 Cal.App.3d 375, 378.)

Land use regulation, zoning in particular, has long been held to be a municipal affair. "Land use regulation in California historically has been a function of local government." (Big Creek Lumber v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1151.) The chapter of the Government Code that contains zoning regulations (Chapter 4 of Division 1 of Title 7) specifically provides that it does not apply to charter cities. (Gov. Code § 65803.)

Because Section 40717.9 impinges on two municipal concerns — traffic congestion and zoning — it is our opinion that it is not sufficiently narrowly tailored to further a matter of statewide concern, and therefore its prohibition of employee trip reduction programs does not apply to charter cities. Indeed, the fact that Section 40717.9 appears in a section of the Health and Safety Code containing
regulations applicable to air pollution control districts suggests that the Legislature was really not considering local concerns about traffic congestion or zoning.¹

Because traffic congestion is a particularly local problem that varies significantly across the state, from low density rural areas to high density urban areas, a court would be particularly hesitant to hold that Section 40717.9 preempts the City’s ability to use an employee trip reduction program to mitigate the traffic congestion caused by new development.

“We have been particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption. Thus, when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute.” (Big Creek Lumber v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1149.)

It should be noted that, while O'Connell v. City of Stockton, supra, 41 Cal.4th 1061, recognized that “traffic congestion is a local problem that cities ordinarily are authorized to address,” it held that “they may not do so by means of an ordinance that, by allowing forfeiture of a vehicle used to commit a specific state law violation, impinges on an area fully occupied or exclusively covered by state law.” (Id. at p. 1076.) The court, however, reached this conclusion with no analysis, and the Stockton ordinance directly impinged on an area of law that is fully covered by state law. In contrast, an employee trip reduction program imposed to mitigate traffic congestion would not impinge on the State’s regulation of vehicle emissions. It therefore remains that, as a charter city, Palo Alto should be able to require SUMC to implement an employee trip reduction program to mitigate the traffic congestion that would be caused by the expansion of its medical center.

B. Even if section 40717.9 applied to the City, the City could require SUMC to mitigate the traffic impacts of the medical center expansion, and an employee trip reduction program could be one of the mitigation methods.

Section 40717.9 prohibits a public agency from requiring an employer to implement an employee trip reduction program. However, it does not prevent a city from requiring that traffic congestion impacts of new development be mitigated, and it does not prevent an employee trip reduction program from being selected by a developer as a mitigation measure.

¹This is evident from both the legislative history and the fact that it is placed in Part 3 (“Air Pollution Control Districts”) of Division 26 (“Air Resources”) of the Health and Safety Code.
In a 1996 opinion, the Attorney General concluded that an air pollution control district is not prohibited by Section 40717.9 from offering a trip reduction program as one of several options that employers can choose from to reduce emissions. (79 Ops. Cal. Atty. Gen. 214 (1996).) The Attorney General explained that Section 40717.9 only prohibits an air district from requiring that an employer adopt a trip reduction program. It does not prohibit an employer from deciding to adopt one. Consequently, provided the employer is given multiple options, one of the options can be a trip reduction program.

The Attorney General’s reasoning would apply with even more force to the City. As noted earlier, Section 40717.9 is directed at pollution control districts. As discussed above, its application to a charter city that is trying to mitigate the traffic congestion impact of new development — not trying to mitigate vehicle emissions — is very questionable. Moreover, the zoning change SUMC needs is a quasi-legislative act. (Corona-Norco Unified School District v. City of Corona (1993) 17 Cal.App.4th 985, 992.) The City has more discretion over whether to grant or deny the request than it would have with a quasi-judicial decision. “[Z]oning decisions are afforded more deference than adjudicative decisions made by a governmental agency.” (William S. Hart Union High School District v. Regional Planning Commission of the County of Los Angeles (1991) 226 Cal.App.3d 1612, 1624; Mira Development Corporation of San Diego v. City of San Diego (1988) 205 Cal.App.3d 1201, 1218 (“Zoning decisions are afforded more deference than an agency’s adjudicative decisions.”)

As a result, the City could elect to deny the zoning change on the grounds that it would cause too much traffic congestion. However, the City could also decide that the traffic congestion impact would be sufficiently mitigated by an employee trip reduction program. In doing so, the City would not be requiring SUMC to adopt an employee trip reduction program. SUMC would be voluntarily agreeing to a trip reduction program as part of its voluntary application for a zoning change. Indeed, in this case, SUMC has stated that it is willing to “voluntarily” implement certain TDM measures, particularly the Go Pass measures.

Conclusion

Section 40717.9 does not apply to the City because it is a charter city. Furthermore, even if it did apply, it would not require the City to amend its Comprehensive Plan and zoning ordinances to accommodate the Project based upon the Project’s traffic, air quality, and climate change impacts, in the absence of an agreement by SUMC to the implementation of TDM measures to partially mitigate such impacts. Given this backdrop, the Council has broad discretion to determine whether the proposed TDM measures are feasible and whether they will effectively mitigate the identified impacts.