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March 27, 2019

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**Subject: Appeal of CEQA Categorical Exemption for the
Outside Lands Festival Use Permit – Response to Staff
Report**
SF PIng Case #: 2019-000684PRJ
SF BOS File #: 190117

Board President Yee and Honorable Members of the Board of Supervisors:

On behalf of San Francisco residents Andrew Solow and Stephen Somerstein (“Appellants”), I hereby submit this letter to respond to the March 25, 2019 Staff Report concerning our appeal of the CEQA Categorical Exemption issued on or about January 17, 2019 for the 10-year use permit for the Outside Lands Festival. (Planning Dept. Case No. 2019-000684PRJ; Board of Supervisors File # 190117). We incorporate our

prior comments in full by reference. We also attach a recent article by George Wooding, President of the Coalition for San Francisco Neighborhoods.

I. INTRODUCTION

“AS REQUIRED” IS NOT A NOISE LIMIT: The subject 10-year Use Permit Extension does not contain any quantitative noise standards. The Permit simply requires Another Planet Entertainment (“APE”) to monitor noise levels and adjust **“as required.”** (Outside Lands Permit ¶47). “As required” is not defined, and is an unenforceable permit condition. In short, there is no numerical decibel level that is simply “too darn loud.”

SHARON MEADOW NOISE POLICY: The appellants propose that the City simply adopt the reasonable Sharon Meadow noise policy and apply it to Outside Lands. The Sharon Meadow Policy requires, among other provisions, that the maximum levels at the mixing board shall not exceed a 5-minute average sound level of 96 dBA or instantaneous maximum sound level of 102 dBA.

II. RESPONSE TO STAFF REPORT

On March 25, 2019, the Environmental Review Officer (“ERO”) filed a staff report (“Staff Report”) responding to our appeal. The staff report reaches several erroneous conclusions.

Expert Evidence: The Staff Report states that Appellants have provided no substantial evidence that the Outside Lands Festival will have any significant impacts. (Staff Rpt. p. 5, 7, 10, 11, 12). The Staff Report ignores that fact that Appellants have submitted two expert reports from acoustical engineering firm, Wilson Ihrig concluding that the Festival has significant noise impacts (including impacts on the Coastal Zone and historic buildings), and a report from traffic engineering firm, Smith Engineering, concluding that the Festival has significant traffic impacts. The Staff Report ignores the traffic engineer’s report entirely. Under CEQA, “substantial evidence,” is defined to include, “expert opinion supported by facts.” (14 CCR §15064(f)(5)). Appellants clearly meet this legal standard.

There is No Such Thing as a “Temporary” CEQA Exemption: The Staff Report repeatedly refers to a Class 4 “Temporary” CEQA exemption. There is simply no such thing. The Class 4 CEQA exemption is for “minor alterations to land.” Outside Lands is not a minor alteration to land. The City may be referring to subsection “e” of the Class 4 exemption, which includes, “minor temporary use of land having negligible or no permanent effects on the environment, including carnivals, sales of Christmas trees, etc.” However, Outside Lands, which involves almost a quarter-million fans and weeks of set-up and break down, cannot reasonably be deemed, a “minor temporary use of land.” In short, Outside Lands, is a far cry from a Christmas tree lot.

Class 23 Exemption Does Not Apply: Despite conducting a public review and comment process pursuant to the Class 4 CEQA exemption, the Staff Report for the first time invokes the Class 23 exemption. If the City wants to change course at this point, it must start the CEQA process anew, rather than raise an entirely new CEQA argument a week before the final hearing. Furthermore, the Class 23 exemption does not apply since the Festival will have significant impacts on noise, traffic and historic resources.

Impacts to Coastal Zone: The Staff Report admits that the Class 4 exemption does not apply if a project has impacts to the Coastal Zone. The Staff Report also admits that the Festival involves installation of fencing, waste-sorting facilities, parking lot, mounted security and artist check-in, all within the Coastal Zone. (Staff Report, p.5). Since there is no dispute that the Festival involves facilities within the Coastal Zone, the Class 4 exemption does not apply. The Staff Report reaches the opposite conclusion, arguing that these facilities are “temporary.” But this is a circular argument. The Coastal Zone exception makes the temporary exemption inapplicable. It cannot be excluded from the exception based on the allegation that the intrusion is temporary. Furthermore, the Staff Report ignores expert evidence that the Festival has noise and traffic impacts on the Coastal Zone.

Impacts to Historic Resources: The Staff Report ignores entirely CEQA section 21084.1 which provides that a project may not be exempted from CEQA if it “may cause a substantial adverse change in the significance of an historical resource.” The Staff Report does not even mention this section of the CEQA statute, which does not require “unusual circumstances,” and which operates under the “fair argument” standard. Wilson Ihrig concludes that the Festival will have significant noise impacts on several historic resources within the park, and Smith Engineering concludes that the Festival will have significant traffic impacts on historic resources. Therefore the Festival may not be exempted from CEQA review.

Noise is a Significant Impact Under CEQA: The Staff Report makes the untenable assertion that “even though amplified sound from the annual three-day Outside Lands concert could be considered an annoyance to surrounding residents, the resulting noise would not represent a significant impact to the physical environment.” (Staff Rpt. p. 6). The Staff Report continues, “These noise levels, while a potential annoyance to nearby residents throughout the three-day annual event, are not within the range that would cause hearing loss.” (Staff Rpt. p. 11). This statement ignores the fact that CEQA expressly defines “significant effect on the environment” to include, “ambient noise.” Guidelines section 15382. The Staff Report also ignores the numerous cases finding noise to be a significant impact under CEQA. *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Assn.*, 42 Cal. 3d 929, 934 (1986); *Lewis v. Seventeenth Dist. Agric. Assn.*, 165 Cal. App. 3d 823 (1985). By admitting that noise from Outside Lands is an “annoyance to surrounding residents,” Staff essentially admits that noise is a significant impact.

Staff contends that noise impacts are not significant because they are temporary and also because the police code noise thresholds arguably do not apply in the park. These arguments make no sense. First, temporary impacts, such as construction impacts, are routinely considered significant under CEQA.¹ Under the City's rationale, even extreme levels of noise could be "insignificant" so long as the noise were temporary. There is no support for the Staff's assertion that noise is only significant if it may cause "hearing loss." (Staff Rpt. p. 11). Second, even if the police code does not apply in the park (which we dispute), this does not render the noise levels insignificant. In the case of *Keep Our Mountains Quiet v. Cty. of Santa Clara*, 236 Cal. App. 4th 714, 722 (2015), noise from 150-person weddings held occasionally at a private home was held to be significant under CEQA, even though the noise levels did not exceed the County's noise threshold. In the absence of numerical thresholds, significance is analyzed under a "fair argument" standard. *Id.*² Since duly qualified experts have concluded the Outside Lands has significant noise impacts, Appellants have established the requisite "fair argument" of a significant impact.

"As Required" is not a "Limit." The Staff Report contends that the Police Code noise thresholds do not apply in the Park. Police Code Section 2902 states that Police Code noise limits do not apply if RPD "has imposed different limits." However, the Outside Lands permit contains no noise limits at all. It merely requires the operator to make adjustments "as required." "As required" is nowhere defined in the permit, and is certainly not a "limit." Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. 14 CCR § 15126.4(a)(2). See *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 730 (project proponent's agreement to mitigate is insufficient; mitigation measures must be enforceable). Since the City has failed to impose any enforceable "limit," the Police Code applies.

CEQA does not allow mitigated categorical exemptions. A project that requires mitigation measures cannot be exempted from CEQA. *Salmon Pro. & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102. The City has dozens of mitigation measures on the Project, such as requiring noise monitors, adjustments to noise levels, delay speakers, additional MUNI service, Uber zones, and many other measures. The Staff Reports contends that these measures are not mitigation measures, but are "underlying conditions of the project itself." (Staff Rpt. p. 9). This makes no sense. The "project itself" is a festival with musicians playing loud music to hundreds of thousands of fans. The measures to reduce sound, traffic and other impacts are measures to mitigate the impacts of the Festival. Calling them part of the "project itself" does not alter the reality that they are mitigation measures.

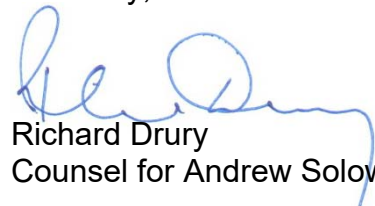
¹ See, e.g., Bay Area Air Quality Management District CEQA significance thresholds for construction emissions. http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en

² "A threshold of significance is not conclusive, however, and does not relieve a public agency of the duty to consider the evidence under the fair argument standard." (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342)

In consideration of the foregoing, we request that:

- **The City withdraw its deficient CEQA Categorical Exemption.**
- **The City promulgate quantitative noise standards that are appropriate for the Outside Lands Festival and other music performance events in Golden Gate Park, similar to the Policy already adopted for Sharon Meadow.**
- **The City conduct a CEQA process leading to Quantitative Noise Limits and other feasible noise mitigation measures.**

Sincerely,



Richard Drury
Counsel for Andrew Solow and Stephen Somerstein

Outside Lands' Excessive Noise

by George Wooding March 27, 2019

Thunderous noise for three days. People cannot hear in their own homes. Windows rattle. Children and seniors covering their ears in pain. Welcome to the San Francisco Outside Lands Festival Concert (OL).

The August 2018 OL festival generated 249 noise complaints by 190 different residents over approximately 12 square miles of western San Francisco. Some of the complaints came from residents who live as far as three miles from Golden Gate Park. And some residents whose noise complaints have been ignored for years simply abandon their homes during the three-day festival.

According to the City's own data, noise complaints in 2018 more than tripled over the average of prior years. Therefore, it appears OL complaints aren't a mere continuation of pre-existing activities, they represent a significant increase.

Currently, California Environmental Quality Act (CEQA) noise standards don't apply to San Francisco Recreation and Park Department (RPD) land. By cleverly utilizing CEQA categories incorrectly, the RPD was able to declare that OL automatically receive a *categorical exemption* in Golden Gate Park.

The RPD needs to use a CEQA Mitigated Negative Declaration (MND). A MND is prepared for a project when an initial study identifies potentially significant effects on the environment, but the effects no longer pose a significant environmental impact after a project is revised. MND's require an Environmental Impact Report (EIR). The report can cost millions of dollars and take up to two years to complete. Public safety should always come first.

"Categorical Exemptions" are descriptions of types of projects which the Secretary of the California Resources Agency has determined don't usually have a significant effect on the environment. They are the lowest CEQA environmental standard. The RPD has now rid itself of bothersome CEQA environmental reports and restrictions on noise.

Plaintiffs Andrew Solow and Stephen Somerstein are suing the City for OL noise reduction and changing the CEQA Categorical Exemption to a CEQA negative declaration.

No Police Jurisdiction: RPD's first step was to remove the noise jurisdiction from San Francisco's Police Code, Article 29 Regulation of Noise, *Guidelines for Noise Control Ordinance Monitoring and Enforcement*. The Police Code supersedes all previous San Francisco noise guidelines. RPD no longer has to comply with City noise guidelines.

RPD now operates under a new noise standard it calls "As Required." This new standard is a mystery. Nobody knows what decibel level the standard uses, not even the RPD.

Further, the proposed use permit doesn't include acoustical standards or testing protocols RPD and Outside Lands use to determine if outdoor noise levels from OL are acceptable, because the City never adopted outdoor noise standards. And, the use permit doesn't even mention the possibility of retaining an acoustical engineering firm to design the sound system for each festival.

The last slap in the face for neighbors involves OL complaint reporting. Neighbors over three miles away have made noise complaints. Complaint phone numbers are difficult to find. OL is self-monitoring and it receives the complaint calls rather than RPD receiving the calls. This is the classic "fox guarding the hen house."

Fewer noise complaints will be received and probably many complaints will go unreported. RPD has no way of knowing how many neighborhood complaints were received. Additionally, OL is a private company and cannot be

Sunshined for information and records. The police simply say that they have no jurisdiction, and won't even take noise complaint calls.

Tiffany Lin-Wilson, an RPD secretary answerable to RPD director, Phil Ginsburg; Dana Ketchum, Director of Permits and Property Management; and RPD Commissioner Mark Buell responded to one Sunshine records request stating:

"The documents I sent last week, were all that I was given. I was also informed of the following: Park Rangers don't conduct sound measurements in Golden Gate Park during Outside Lands Concerts. We are reactive to the calls from citizens who are complaining and concerns over loud music coming from the concert venue. There is no requirement as stated to monitor sound during the event. I cannot speak for the promoter 'Another Planet Entertainment' who hires a private company to monitor sound. I do not know their criteria."

"The festival has drawn 2 million visitors to San Francisco and is estimated to generate \$66 million annually in economic benefits, according to Ketchum.

RPD essentially admitted it has no idea how many noise complaints there are, what the decibel levels were per complaint, or even whether sound meters used the same calibration to produce uniform results. It's a clear example of RPD being inept and placing profits before public safety.

According to page three of the Wilson Ihrig *Noise, Vibration and Acoustics* report: "It is not clear who gathered the data, though most appear to have been collected by Treeline Security, the security company retained by the concert promoters, Another Planet Entertainment, LLC (promoters of OL.) These data are not provided in a formal technical report, so there is no indication of equipment used (San Francisco requires Type 1 sound level meters), calibration traceability, or even meter settings. Additional readings appear to have been made by San Francisco Park Rangers. Again, no information was provided about the equipment, calibration, or meter settings for these readings."

Plaintiff Solow states: "The RPD has now rid its agency of environmental reports and restrictions on noise. After spending six months trying to convince the SF Recreation and Parks Dept. to adopt objective standards for noise levels from the Outside Lands Festival, on Jan. 17, the SF Recreation and Park Commission (SFRPC) ignored complaints from more than 240 San Francisco residents and approved a 10-year extension of the Festival Use Permit with no noise limits. If the permit is adopted by the SF Board of Supervisors (BOS) on April 2nd, this permit would make it impossible to make a meaningful objection to noise from Outside Lands, no matter how loud it is, until 2031."

Citizens don't want to stop or harm the OL festival. We should want the following:

- A better run, more honest RPD.
- San Francisco's RPD and the Planning Department must withdraw their deficient CEQA Categorical Exemption Determination.
- The City must promulgate quantitative noise standards that are appropriate for the OL Festival and other music performance events in Golden Gate Park.
- The City must develop a CEQA process incorporating Quantitative Noise Limits and other feasible noise mitigation measures.

After all, excessive decibel levels can damage everybody's hearing.

George Wooding, President of the Coalition For San Francisco Neighborhoods