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**Subject: Appeal of CEQA Categorical Exemption for the  
Outside Lands Festival Use Permit – Response to  
Supplemental Letter from Another Planet Entertainment  
and Supplemental 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 31, 2019 letter from counsel for Another Planet Entertainment (“APE”), and to the March 29, 2019 supplemental Staff Report concerning our appeal of the CEQA Categorical Exemption

issued 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.

## 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 limit for the Outside Lands Festival that is simply “too loud.”

**SHARON MEADOW NOISE POLICY:** The appellants propose that the City 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. Even if the City determines that these levels are not appropriate for Outside Lands, some numerical decibel limit should be required.

## II. RESPONSE TO MARCH 31 APE LETTER AND MARCH 29, 2019 SUPPLEMENTAL STAFF REPORT

### A. Outside Lands May Not be Categorically Exempted from CEQA Review Because it will have Significant Impacts.

APE’s main argument in its March 31, 2019 letter is that “because categorical exemptions apply, there are no significant environmental impacts as a matter of law.” This position fundamentally misstates black letter CEQA law. The Supreme Court has held that a CEQA categorical exemption may not be used for a project that may have significant adverse environmental impacts due to unusual circumstances. The project opponent may “establish an unusual circumstance with evidence that the project will have a significant environmental effect.” *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal. 4th 1086, 1105 (2015). Since the Outside Lands Festival has significant impacts on noise, traffic, historic resources, the coastal zone and public services such as MUNI, it may not be exempted from CEQA.

APE’s counsel appears to be conflating categorical exemptions with statutory exemptions. Statutory exemptions are created by the legislature. Projects that are subject to a statutory exemption are exempt from CEQA regardless of the presence of significant impacts. By contrast, categorical exemptions are created by the Resources Secretary and may be overcome with evidence of significant impacts. *Berkeley Hillside, supra*. Since there is no statutory exemption for Outside Lands, and the City invokes only categorical exemptions, APE’s argument is simply wrong.

## **B. Temporary Noise, Traffic and Coastal Zone Impacts Preclude a Temporary CEQA Exemption.**

The March 29, 2019 Staff Report argues that the Festival will not have significant impacts because any impact will be “temporary.” This is a classic example of a “circular argument.” The City invokes subsection “e” of the Class 4 exemption that allegedly applies to temporary events. Then the City contends that any noise, traffic and other impacts cannot be significant because they are “temporary.” Under the City’s reading, the temporary CEQA exemption could never be overcome by significant impacts because those impacts will necessarily be temporary. This flies in the face of well-established CEQA law that categorical exemptions are not absolute and can be overcome with evidence of significant impacts. Furthermore, for the same reason, the City’s admission that the Project will involve construction in the Coastal Zone, precludes application of the Class 4 exemption – regardless of the fact that the construction is “temporary.”

## **C. Appellant’s Experts are Properly Qualified.**

The City and APE argue that Appellants experts are not properly qualified to issue opinions on the Festival’s traffic and noise impacts on historic resources in Golden Gate Park. Wilson Ihrig is one of the preeminent acoustical consulting firms in the nation, and Derek Watry is one of their principals, with over twenty-five years of acoustical engineering experience. Mr. Watry has a Master’s degree in mechanical engineering from the University of California at Berkeley, and is a member of the National Council of Acoustical Consultants. Mr. Watry is clearly qualified to issue an opinion on the significant noise impacts of the Outside Lands Festival, as well as its noise impacts on the historic resources of Golden Gate Park and the Coastal Zone. (Exhibit A).

Daniel T. Smith, PE, of Smith Engineering and Management is a Professional Engineer certified in traffic engineering with over forty years of traffic engineering experience. He holds a Bachelor of Science in Engineering from Yale University and Master of Science in Transportation Planning from the University of California at Berkeley. He is clearly qualified to issue an opinion on the Festival’s significant traffic impacts, including its impacts on historic resources and the Coastal Zone. (Exhibit B).<sup>1</sup>

## **D. CEQA does not allow mitigated categorical exemptions.**

APE and the City contend that the Outside Lands Permit does not constitute a prohibited “mitigated categorical exemption.” As we have discussed, a project that requires mitigation measures cannot be exempted from CEQA. *Salmon Pro. &*

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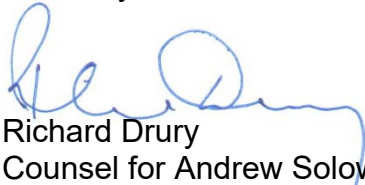
<sup>1</sup> The City argues that it has passed an ordinance declaring that traffic impacts are never significant in San Francisco. Under CEQA, it is well-established that traffic impacts are significant impacts. Therefore, any interpretation of the City’s ordinances that declares traffic impacts to be categorically insignificant is preempted by State law.

*Watershed Network v. County of Marin* (2004) 125 Cal.App4th 1098, 1102. The City's argument ignores the fact that the permit imposes dozens of mitigation measures to address the Festivals noise, traffic, litter, and other impacts. Yet none of these measures have ever been analyzed under CEQA to determine their adequacy or effectiveness.

**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



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**DEREK L. WATRY**  
Principal & CEO

**Experience**

**Wilson, Ihrig & Associates, Inc.** (1992 to Present)

Mr. Watry is experienced in all aspects of acoustics, including environmental noise, building acoustics, and mechanical system noise. He has measured and analyzed both noise and vibration for hundreds of projects. Examples of community noise issue experience includes construction noise and vibration, highway and rapid transit noise, sports facility noise, and low-frequency music noise. He has both created and critiqued dozens of environmental assessment documents over his 22 year career. Mr. Watry has helped resolve complex community noise issues, interpreted local Noise Ordinances, established acceptability criteria, and analyzed sound transmission both in the outdoor environment and in buildings. Mr. Watry has served as an expert witness at trial and mediation sessions related to noise disputes and accidents.

**University of California, Berkeley** (1988 - 1992)

Graduate Teaching Assistant (Fundamentals of Acoustics)

**Legal Case Experience**

Trial Testimony: Anderson v Carneiro, Calif. State Sup. Ct., Solano County

(Case No. N/A)

*Noise complaint in multifamily building regarding replacement of carpet with oak floor.*

*Testified for plaintiff. Result of bench trial unknown.*

Trial and Deposition Testimony: Frost v Sweeney, Calif. State Sup. Ct., Alameda County

(Case No. VG05218793)

*Noise complaint regarding new, backyard basketball court. Testified for plaintiff.*

*Plaintiff prevailed at jury trial.*

Trial Documents: Scott v Mex Rico, Calif. State Sup. Ct., San Francisco County

(Case No. CGC08-471804)

*Resident Scott sued landlord Mex Rico over noise from upstairs neighbor. Prepared defense documents for defendant. Case dropped by plaintiff.*

Trial and Deposition Testimony: Weisbrot v Lewin, Calif. State Sup. Ct., San Francisco Co.

(Case No. CGC-09-488562)

*Tenant Weisbrot sued landlord for relief from noisy neighbor. Testified for plaintiff.*

*Plaintiff prevailed at jury trial.*

Binding Arbitration Testimony: Pham v Robson Homes, Judicial Arbitration and Mediation Service, San Jose, Calif. (JAMS Ref. No. 1110013181)

*Homeowners filed for rescission of homes purchase contracts on grounds that developer and real estate agents failed to disclose excessive train vibration. Testified for claimants. Matter settled.*

Trial and Deposition Testimony: Dhillon v Tersini, Calif. State Sup. Ct., Santa Clara County (Case No. 109CV137134)

*Condominium owner Dhillon sued for rescission of home purchase contracts on grounds that developer and real estate agents failed to disclose noise issues. Expert witness for plaintiff. Bench rulings in favor of plaintiff.*

Expert Consultant: Shaughnessy v Raintree HOA, Alameda Co. Sup. Ct., Calif. (Case No. VG10534464)

*Downstairs condo owner Shaughnessy sued both HOA and upstairs owner to compel replacement of hardwood flooring with carpet. Expert witness for defense (both upstairs owner and HOA jointly). Claim dropped at mediation session.*

Trial and Deposition Testimony: Brady v Snapp, Calif. State Sup. Ct., Kern County (Case No. S-1500-CV-271675-SPC)

*Motorist Brady was struck by in-service ambulance at 60 mph at intersection. Acoustical opinion of whether Brady could have reasonably heard siren with time to react. Expert witness for plaintiff. Plaintiff prevailed at jury trial.*

Expert Witness: Cobb v TEC, Calif. State Sup. Ct., San Mateo County (Case No. CIV 505670)

*Plaintiff Cobb making various damage claims stemming from noise emission from Tyco Electronics facility. Expert witness for defendant. Matter settled; settlement details not disclosed.*

Expert Consultant: Tjandra v Kang, Calif. State Sup. Ct., San Francisco County (Case No. CGC-13-528647)

*Downstairs condo owner Tjandra suing upstairs owners Kang, et al over increased noise exposure resulting from the replacement of wood floor with marble floor. Expert consultant for defense. Matter settled.*

Trial and Deposition Testimony: Garbar v CHT HOA, Calif. State Sup. Ct., San Francisco Co. (Case No. CGC-04-432069)

*Plaintiff claiming excessive heat and noise from penthouse mechanical room above 24<sup>th</sup> floor condominium. Cross-complaint claims effects due to plaintiff altering ceiling, encroaching on condo common space. Expert for defense. Bench rulings pending.*

Expert Consultant: Keating v Omran, Calif. State Sup. Ct., San Francisco Co. (Case No. CGC-13-531010)

*Upstairs tenant Keating complaint about construction (remodel) noise and music noise from downstairs owner/defendant unit. Expert for defense. Matter settled.*

Expert Consultant: Train Grade Crossing Accident, Iowa

*Freight train struck automobile at a grade crossing with complex visual, aural, and situational environment. Assessed ability of automobile driver to hear train horn. Expert for defense. Matter settled before formal claim was filed.*

**Professional Associations**

*Member, Acoustical Society of America*

*Member, National Council of Acoustical Consultants*

**Education**

M.B.A. (2000), Saint Mary's College of California, Moraga, California

*Dean's Award Recipient*

M.S. (1991) in Mechanical Engineering, University of California at Berkeley

*National Science Foundation Fellowship Recipient*

B.S. (1988) in Mechanical Engineering, University of California at San Diego

*Summa Cum Laude*



**DANIEL T. SMITH, Jr.**  
**President**

**EDUCATION**

Bachelor of Science, Engineering and Applied Science, Yale University, 1967  
Master of Science, Transportation Planning, University of California, Berkeley, 1968

**PROFESSIONAL REGISTRATION**

California No. 21913 (Civil)                      Nevada No. 7969 (Civil)    Washington No. 29337 (Civil)  
California No. 938 (Traffic)                      Arizona No. 22131 (Civil)

**PROFESSIONAL EXPERIENCE**

Smith Engineering & Management, 1993 to present. President.  
DKS Associates, 1979 to 1993. Founder, Vice President, Principal Transportation Engineer.  
De Leuw, Cather & Company, 1968 to 1979. Senior Transportation Planner.  
Personal specialties and project experience include:

**Litigation Consulting.** Provides consultation, investigations and expert witness testimony in highway design, transit design and traffic engineering matters including condemnations involving transportation access issues; traffic accidents involving highway design or traffic engineering factors; land use and development matters involving access and transportation impacts; parking and other traffic and transportation matters.

**Urban Corridor Studies/Alternatives Analysis.** Principal-in-charge for State Route (SR) 102 Feasibility Study, a 35-mile freeway alignment study north of Sacramento. Consultant on I-280 Interstate Transfer Concept Program, San Francisco, an AA/EIS for completion of I-280, demolition of Embarcadero freeway, substitute light rail and commuter rail projects. Principal-in-charge, SR 238 corridor freeway/expressway design/environmental study, Hayward (Calif.) Project manager, Sacramento Northeast Area multi-modal transportation corridor study. Transportation planner for I-80N West Terminal Study, and Harbor Drive Traffic Study, Portland, Oregon. Project manager for design of surface segment of Woodward Corridor LRT, Detroit, Michigan. Directed staff on I-80 National Strategic Corridor Study (Sacramento-San Francisco), US 101-Sonoma freeway operations study, SR 92 freeway operations study, I-880 freeway operations study, SR 152 alignment studies, Sacramento RTD light rail systems study, Tasman Corridor LRT AA/EIS, Fremont-Warm Springs BART extension plan/EIR, SRs 70/99 freeway alternatives study, and Richmond Parkway (SR 93) design study.

**Area Transportation Plans.** Principal-in charge for transportation element of City of Los Angeles General Plan Framework, shaping nations largest city two decades into 21st century. Project manager for the transportation element of 300-acre Mission Bay development in downtown San Francisco. Mission Bay involves 7 million gsf office/commercial space, 8,500 dwelling units, and community facilities. Transportation features include relocation of commuter rail station; extension of MUNI-Metro LRT; a multi-modal terminal for LRT, commuter rail and local bus; removal of a quarter mile elevated freeway; replacement by new ramps and a boulevard; an internal roadway network overcoming constraints imposed by an internal tidal basin; freeway structures and rail facilities; and concept plans for 20,000 structured parking spaces. Principal-in-charge for circulation plan to accommodate 9 million gsf of office/commercial growth in downtown Bellevue (Wash.). Principal-in-charge for 64 acre, 2 million gsf multi-use complex for FMC adjacent to San Jose International Airport. Project manager for transportation element of Sacramento Capitol Area Plan for the state governmental complex, and for Downtown Sacramento Redevelopment Plan. Project manager for Napa (Calif.) General Plan Circulation Element and Downtown Riverfront Redevelopment Plan, on parking program for downtown Walnut Creek, on downtown transportation plan for San Mateo and redevelopment plan for downtown Mountain View (Calif.), for traffic circulation and safety plans for California cities of Davis, Pleasant Hill and Hayward, and for Salem, Oregon.



**Transportation Centers.** Project manager for Daly City Intermodal Study which developed a \$7 million surface bus terminal, traffic access, parking and pedestrian circulation improvements at the Daly City BART station plus development of functional plans for a new BART station at Colma. Project manager for design of multi-modal terminal (commuter rail, light rail, bus) at Mission Bay, San Francisco. In Santa Clarita Long Range Transit Development Program, responsible for plan to relocate system's existing timed-transfer hub and development of three satellite transfer hubs. Performed airport ground transportation system evaluations for San Francisco International, Oakland International, Sea-Tac International, Oakland International, Los Angeles International, and San Diego Lindberg.

**Campus Transportation.** Campus transportation planning assignments for UC Davis, UC Berkeley, UC Santa Cruz and UC San Francisco Medical Center campuses; San Francisco State University; University of San Francisco; and the University of Alaska and others. Also developed master plans for institutional campuses including medical centers, headquarters complexes and research & development facilities.

**Special Event Facilities.** Evaluations and design studies for football/baseball stadiums, indoor sports arenas, horse and motor racing facilities, theme parks, fairgrounds and convention centers, ski complexes and destination resorts throughout western United States.

**Parking.** Parking programs and facilities for large area plans and individual sites including downtowns, special event facilities, university and institutional campuses and other large site developments; numerous parking feasibility and operations studies for parking structures and surface facilities; also, resident preferential parking .

**Transportation System Management & Traffic Restraint.** Project manager on FHWA program to develop techniques and guidelines for neighborhood street traffic limitation. Project manager for Berkeley, (Calif.), Neighborhood Traffic Study, pioneered application of traffic restraint techniques in the U.S. Developed residential traffic plans for Menlo Park, Santa Monica, Santa Cruz, Mill Valley, Oakland, Palo Alto, Piedmont, San Mateo County, Pasadena, Santa Ana and others. Participated in development of photo/radar speed enforcement device and experimented with speed humps. Co-author of Institute of Transportation Engineers reference publication on neighborhood traffic control.

**Bicycle Facilities.** Project manager to develop an FHWA manual for bicycle facility design and planning, on bikeway plans for Del Mar, (Calif.), the UC Davis and the City of Davis. Consultant to bikeway plans for Eugene, Oregon, Washington, D.C., Buffalo, New York, and Skokie, Illinois. Consultant to U.S. Bureau of Reclamation for development of hydraulically efficient, bicycle safe drainage inlets. Consultant on FHWA research on effective retrofits of undercrossing and overcrossing structures for bicyclists, pedestrians, and handicapped.

## MEMBERSHIPS

Institute of Transportation Engineers      Transportation Research Board

## PUBLICATIONS AND AWARDS

*Residential Street Design and Traffic Control*, with W. Homburger *et al.* Prentice Hall, 1989.

Co-recipient, Progressive Architecture Citation, *Mission Bay Master Plan*, with I.M. Pei WRT Associated, 1984.

*Residential Traffic Management, State of the Art Report*, U.S. Department of Transportation, 1979.

*Improving The Residential Street Environment*, with Donald Appleyard *et al.*, U.S. Department of Transportation, 1979.

*Strategic Concepts in Residential Neighborhood Traffic Control*, International Symposium on Traffic Control Systems, Berkeley, California, 1979.

*Planning and Design of Bicycle Facilities: Pitfalls and New Directions*, Transportation Research Board, Research Record 570, 1976.

Co-recipient, Progressive Architecture Award, *Livable Urban Streets, San Francisco Bay Area and London*, with Donald Appleyard, 1979.