



May 3, 2017

Via Email & Overnight Mail

City\_Council@CityofPasadena.net

The Honorable City Council  
City of Pasadena  
100 North Garfield Avenue, Room S228  
Pasadena, California 91109

Re: May 8, 2017 Appeal of Board of Zoning Appeals' CEQA Determination for Modification of Expressive Use Permit #3537 (490 East Union Street, Applicant Bob Oltman as Trustee for Pasadena Museum of California Art)

Honorable Members:

The Maryland Homeowners Association ("The Maryland") asks this Honorable Council to grant The Maryland's appeal and overturn the Board of Zoning Appeals' ("Board's") February 15, 2017 environmental determination associated with the Board's modification of Expressive Use Permit #3537. The Board modified the permit to allow the Pasadena Museum of California Art ("PMCA") to increase the number of commercial entertainment events from 8 to 55 events per year and total attendees from 320 to 6,010 per year. Only 5 of the events would be affiliated with PMCA. The rest would be weddings and other commercial rental-parties on PMCA's third floor, including its approximately 4,000 square foot terrace that faces The Maryland. The Board found that this 587% increase in the number of events and the 1,778% increase in the number of attendees to be exempt from environmental review because it supposedly involves "negligible or no expansion of an existing use."

No one contemplated PMCA's commercializing a third of its building into a rental-party venue when PMCA received its current permit. PMCA's current permit is subject to the following condition:

The commercial entertainment use approved under this use permit is for the display of artwork in a gallery/museum type atmosphere. *Any change to a different type of entertainment use would require a new expressive use permit.*

(February 5, 1999, Permit Decision Letter, Conditions of Approval No. 9, emphasis added.) By the City's own language in the current permit, the City should not modify

PMCA's permit as proposed. PMCA should apply for a *new* permit and conduct the required environmental study if it wishes to transform its building's terrace into a *de facto* commercial rental-party venue.

The remainder of this letter explains (1) why The Maryland is justifiably concerned about PMCA's proposed rental-parties, (2) why The Maryland's asking that PMCA be required to conduct a sound study is modest and reasonable request, (3) why the City *may not legally* modify PMCA's permit without conducting an initial environmental study as required by the California Environmental Quality Act ("CEQA"), and (4) how the City's own Environmental Administrative Procedures and Revised Noise Element show the acoustic impact of PMCA's rental-parties would be acoustically significant and call for a sound study.

The Maryland is Justifiably Concerned about PMCA's Proposed Rental Parties.

Maryland residents understand that we live in an urban area and accept normally loud and occasionally abnormally loud noises that are part of urban life. We are used to All Saints' programs, wedding receptions and quinceañeras in and around the City Hall courtyard, parties at Day One nonprofit, and trucks loading and unloading at the Plaza Las Fuentes dock on a daily basis. The fact that Maryland residents don't complain about those noises but appear before this Council to appeal PMCA's proposed permit modification should signal that PMCA's parties are not normal urban noises that Maryland residents should learn to tolerate.

Many of PMCA's prior party-rentals on its approximately 4,000 square foot third-floor terrace—which directs noise at The Maryland—have been unreasonably and disruptively loud. One of our residents (someone not prone to exaggeration) describes the noise from some of PMCA's parties as being as loud, with his windows closed, as playing his stereo inside his apartment at medium volume. A number of PMCA's rental parties were easily audible on the City Hall-side of The Maryland. PMCA's rental parties have unquestionably violated the City's sound ordinance.

Increasing the frequency and size of PMCA's events will logically exacerbate this problem. The proposed modification to PMCA's permit will effectively transform PMCA's third floor, including its terrace, into a *de facto* commercial rental-party space, especially when the weather makes the deck most valuable. From about April through October, two or more weddings or other large parties will likely occur every week, along with other smaller, 75-person parties. PMCA will have a terrace full of wedding attendees, a band, and alcohol-fueled guests on an amplified speaker within about 100 feet from and shooting sound down into Pacific Asia Museum's courtyard, across the street and into Fuller Theological Seminary's library and prayer garden, and at Fuller housing and at least two residential buildings, namely The Maryland and Barcelona.

It is Reasonable to Require PMCA to Conduct a Sound Study.

The Maryland wants to know the impact of the proposed permit modifications *before* the modifications are approved. The Maryland has been asking for a sound study

for nearly a year. PMCA could easily commission such a study at a cost less than the rental fee it will likely get from 2 or 3 of its 50 annual rental parties. The Maryland thinks the City's requiring such a study *before* deciding whether and how to modify PMCA's permit is a modest requirement.

To make The Maryland's position on this last point very clear: The Maryland is *not* saying the City should never modify PMCA's permit to increase the number or size of its rental events. To the contrary, The Maryland wants PMCA to thrive and suspects PMCA should probably be allowed to increase the number and size of its events, though probably to a lesser extent than is being contemplated. The word "probably" is necessary because, in the absence of a study of the effects of the proposed permit modification, the City cannot determine what's reasonable. A sound study will provide the data needed for the City to know, as opposed to speculate—which is all the City has done so far—about the appropriate increase in the number and size of PMCA's events.

The reasonableness of requiring PMCA to perform a sound study is also evidenced—as discussed in the last section of this letter—by the City's own Environmental Administrative Procedures and Revised Noise Element calling for one.

#### CEQA Requires an Environmental Analysis.

The Board erred for at least three reasons when it determined that modifying PMCA's permit is exempt from environmental review under CEQA. First, and most obviously, the exemption does not apply because the proposed expansion of use is patently greater than negligible. Second, the Board mitigated the proposed expansion to try to fit it (albeit unsuccessfully) into the CEQA exemption; that is not allowed. Third, even if the Board were correct (which it was not) that the proposed expansion of use is negligible, the CEQA exemption would still not apply because all of the evidence in the record indicates that the change would have a significant environmental impact, which precludes use of the exemption. It may also be worth noting at the outset that consistency with the City's General Plan does not mean the proposed permit modification is exempt from an initial study, as staffs' February 15 Board report suggested. See *East Sacramento P'ships for a Livable City v. City of Sacramento* (2016) 5 Cal. App. 5th 281, 302-03.

#### *The Proposed Increase Does Not Fall Within the Class 1 CEQA Exemption.*

Following City staffs' recommendation, the Board found that the proposed permit modifications were exempt from environmental study under the Class 1 CEQA exemption for "no or negligible expansion of use." Under its current permit, PMCA is allowed to have 8 parties per year with a maximum of 40 attendees per party. The modified permit would allow PMCA to have 55 parties per year, with up to 140 attendees at 29 of the parties and 75 attendees at the remaining 26 parties.<sup>1</sup> As stated by PMCA

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<sup>1</sup> In an apparent attempt to increase the CEQA baseline, the applicant represented to staff before the Board hearing that PMCA violated its current permit by exceeding its current permit levels since 2002. (See February 15, 2017 Staff Report to Board, at p. 5.) The Maryland makes two points in reply. First, PMCA has held virtually no events in the last year. Prior violations in years since 2002 do not, therefore, increase

(Mr. Oltman) at the Board hearing, only 5 of the parties would be museum-affiliated. The remaining 50 would be rental parties.

The proposed increase is far from negligible and cannot fall under within the CEQA exemption whose “key consideration is whether the project involves negligible or no expansion of an existing use.” 14 CCR § 15301.

Current # of permitted events per year	Proposed # of permitted events per year	Increase in # of permitted events per year	Percentage increase in # of permitted events per year
8	55	47	587 %

Current # of permitted attendees per year	Proposed # of permitted attendees per year	Increase in # of permitted attendees per year	Percentage increase in # of permitted attendees per year
320	6,010	5,690	1,778 %

The City cannot meet its burden to demonstrate with substantial evidence that PMCA’s project falls within the categorical exemption. *E.g., Cal. Farm Bureau Federation v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal. App. 4th 173, 185.

To the contrary, *all* of the evidence in the record—namely Maryland residents’ testimony—indicates that PMCA’s proposed rental parties will create a substantial acoustic environmental effect, which precludes the exemption. Even if PMCA’s project *prima facie* fell within the CEQA exemption (which it does not), The Maryland’s evidence would constitute an unusual circumstance exception to the exemption. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1105 [“a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect” and “[t]hat evidence, if convincing, necessarily also establishes ‘a

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the baseline now at the time of the City’s CEQA determination. Indeed, the number of events held in the last year appears to be lower than the permitted number. Therefore, the CEQA baseline has apparently decreased. See *Communities for a Better Env’t v. S. Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 321 [CEQA baseline is actual environmental conditions existing at the time of CEQA analysis, even if a plan or regulation allowed for greater than current development]. Second, even if the violative events increased the CEQA baseline as Staff incorrectly assumes, the proposed increase would still be more than negligible since the number of events would increase by 57% to 111% and the number of attendees by 86% to 180% per year. (See Maryland handout, made part of the administrative report at the Board hearing, for the calculations supporting these numbers.) The Class 1 CEQA exemption thus would still not apply even granting every assumption in favor of the applicant.

reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (quoting CEQA Guidelines § 15300.2 (c)).

City staff and the Board provided *nothing* but speculation for its conclusion that increasing PMCA’s permit limits will not have a significant environmental effect. See 14 CCR 15064(f)(f) [“Argument, speculation, unsubstantiated opinion...shall not constitute substantial evidence”]. The Hearing Officer in his September 26 addendum, attached to the last page of the Staffs’ February 15 report to the Board, stated that “[n]either staff nor I *felt* that a noise study was warranted for the proposed modification” (emphasis added) because The Maryland is in an urban area with traffic noise. The Board’s decision relied on the same affective-based speculation. Neither the Hearing Officer nor the Board addressed, let alone found non-credible, Maryland residents’ testimony that PMCA’s prior rental parties—most of which would increase in size by 250% if the permit were modified—were much louder than the ambient urban and traffic noises, unreasonably noisy, and patently in violation of the City’s sound ordinance. (The City Noise Ordinance permits only a 5 decibel increase over ambient sound, which is not far above the threshold of human hearing. Municipal Code § 9.36.050(B); Revised Noise Element fig. 2.)

*The City Mitigating the Impact of PMCA’s Increased Party Events Precludes Use of the CEQA Exemption.*

The applicant, Mr. Oltman as Trustee for PMCA, applied for 98 events per year. The Board agreed with Staff that that number of events would be “excessive” and reduced the number to 55. (Staff Report to Board at p. 7.) The Board also imposed a number of other mitigating conditions, including limiting the hours the party events may occur, limiting how many large events may occur within a specified span of days, and limiting where dancing may occur. These are all mitigation measures, designed to “limit the degree or magnitude of the action and its implementation.” 14 CCR § 15370(b).<sup>2</sup>

The City “should decide whether a project is eligible for a categorical exemption as part of its preliminary review of the project without reference to or reliance upon any proposed mitigation measures,” whether the applicant proposes the measures or the City imposes them. *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1106, 1108. Mitigation measures must be assessed and weighed against potential environmental impacts “under established CEQA standards and procedures for EIRs or negative declarations.” *Id.* at 1108.

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<sup>2</sup> Because noise from PMCA’s rental events would be generated by those very events, these are indeed mitigation measures and not responses to pre-existing conditions. *E.g., Citizens for Enviro. Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (2015), 242 Cal. App. 4th 555, 568 [manure management plan designed to address a pre-existing condition and not proposed for or necessitated by the permitted rodeo project is not a mitigation measure for the rodeo project]; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1352 [“cutting a deal” with developers to dedicate a right-of-way to improve traffic at a nearby intersection “was not a CEQA mitigation measure for project impacts, but a component of the project that assisted the City with an existing traffic issue”].

The City's Own Environmental Administrative Procedures and Revised Noise Element Indicate PMCA Should Conduct a Sound Study.

The City Environmental Administrative Procedures and Revised Noise Element of the General Plan provide guidance on what the City considers thresholds of acoustic significance. 14 CCR 15064 (d) [CEQA grants agencies discretion to develop their own thresholds of significance]. These City governing documents indicate that the acoustic impact of the proposed modification to PMCA's permit would be significant and necessitate a sound study.

The following sections of the City's Environmental Administrative Procedures-Thresholds for Study (p. 2-47) indicate a noise investigation should be conducted to determine the significance of the Project because the Project will:

*Section 1. "Expose people to noise levels that exceed established standards."*

PMCA's increased party rentals will exceed established noise standards. The "Normally Acceptable" noise exposure in the area of PMCA and The Maryland is 60 to 70 dBA. (Revised Noise Element, Fig. 1.) The current ambient noise around The Maryland is approximately 60 to 67.5 dBA. (See Revised Noise Plan fig. 8 "Existing Noise Contours" [existing dB level around PMCA and the Maryland, indicated in light yellow, is 60 dB]; *id.* Fig. 5 [nearest noise measurement location reads 67.5 dBA]; April 7, 2008 City Council Agenda Report p. 3 [60 dBA presumed ambient noise level for Noise District III].) PMCA's past party-rental events resulted in increased noise at The Maryland in excess of 10 dBA, which is quieter than the ambient noise of a bedroom at night. (Revised Noise Element, Fig. 2.) Under the proposed modified permit, most of PMCA's rental parties will increase in size by 250%. There is no doubt that amplified speeches, the speaking and shouting of 140 wedding guests, and a band on PMCA's terrace would increase ambient noise by more than 10 dBA.

*Section 3. "Substantially increase ambient noise above existing levels without the project...."*

Based on prior rental events, ambient noise will substantially increase. Most of PMCA's rental parties will increase in size by 250% if PMCA's permit is modified as proposed.

The City's Environmental Administrative Procedures (pp. 2-47 to 2-49) provide factors that indicate PMCA's proposed rental parties would expose people to significant noise levels exceeding established standards:

- *"Does the project have the potential to increase the ambient noise level in the project vicinity by more than five (5) decibels, as prohibited by the City's Noise Restrictions Ordinance (Section 9.36.[050])?"*

Yes. PMCA's past rental parties have certainly violated this ordinance. Increasing the size of these parties will only increase the magnitude of the violations. Therefore, "additional investigation is normally required." (Page 2-48).

- "Does the project have the potential to increase the ambient noise level in the project vicinity to a level that is considered "normally unacceptable" for the receiving land use as identified on Figure 1 of the Noise Element?"

Yes. The "Normally Unacceptable" noise exposure in the area of PMCA and The Maryland starts at 75 dBA. (Revised Noise Element, Fig. 1.) The noise from PMCA's past events has certainly increased the ambient noise above 75 dBA, which is the common outdoor noise level of a commercial area at night. (Revised Noise Element, Fig. 2.) Increasing the size of most of PMCA's parties by 250% will push the ambient noise further into the "normally unacceptable" range. Thus, the City's Environmental Administrative Procedures call for further investigation. (P. 2-48.)

- "Would the project periodically generate acute noises that would be audible to surrounding sensitive land uses, such as ...crowd noise..?"

Yes, 140 party-goers on the terrace will generate crowd noise. (P. 2-48.)

The City's Environmental Administrative Procedures (pp. 2-49 to 2-50) also indicates that PMCA's party rentals will significantly increase ambient noise above existing levels and call for a quantitative investigation—i.e., a noise study.

- "*Does the project have the potential to increase the ambient noise level in the project vicinity by more than five (5) decibels, as prohibited by the City's Noise Restrictions Ordinance (Section 9.36.[050])?*"

Yes, for the reasons stated above. The section continues: "If so, additional investigation is normally required. In such a case, further investigation should **quantify** the noise levels that will be experienced by surrounding land uses and, if necessary, identify attenuation methods to achieve acceptable noise levels." (P. 2-49, emphasis added.)

### Conclusion

The Maryland wants PMCA to flourish. And The Maryland certainly wants to maintain good relations with the City. But, given the noise generated by PMCA's prior rental-parties, The Maryland is also understandably concerned that its residents will be blasted by weddings and other parties and is adamant that PMCA's permit should not be modified unless a study is conducted so that the effects of the permit modification are known. PMCA has had its current permit for about 18 years. Given that The Maryland—

and Barcelona, Fuller, and the Pacific Asia Museum—will have to live with PMCA's modified permit for possibly decades, is it asking too much that PMCA be required to conduct a modest empirical investigation *before* the City modifies its permit?

If the City, despite everything in this letter, insists on denying The Maryland's appeal and affirms the decision of the Board of Zoning Appeals, The Maryland strongly encourages the City to condition the permit modification on PMCA's indemnifying the City for all legal costs and fees associated with any successful challenge to the City's action. The City should not take any risk associated with the modification of PMCA's permit on the current administrative record.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Stefan Fauble". The signature is written in black ink and is positioned below the word "Sincerely,".

Stefan Fauble, President, The Maryland Homeowners Association

cc: Tracie Grove, President, Barcelona of Pasadena