

12/8/09

5B-1

RESOLUTION NO. _____

**A RESOLUTION OF THE CITY OF SANTA CLARA,
CALIFORNIA, CERTIFYING AN ENVIRONMENTAL
IMPACT REPORT FOR THE PROPOSED 49ERS SANTA
CLARA STADIUM PROJECT AT 4900 CENTENNIAL
BOULEVARD (INCLUDING PROPERTIES ON
CENTENNIAL BOULEVARD, AND ON THE NORTH AND
SOUTH SIDE OF TASMAN DRIVE), SANTA CLARA**

SCH# 2008082084
CEQ2008-01060

BE IT RESOLVED BY THE CITY OF SANTA CLARA AS FOLLOWS:

WHEREAS, on March 12, 2008, 49ers Stadium, LLC (“Applicant”) filed an application for the development of an approximately 40-acre site located at 4900 Centennial Boulevard (including properties on Centennial Boulevard, and on the north and south of Tasman Drive) (“Project Site”); and

WHEREAS, the application proposes to allow the construction of an approximately 68,500 seat open-air stadium, with possible expansion for up to 75,000 seats for special events, for use by up to two National Football League (NFL) teams and other non-NFL events that are compatible with the type of venue proposed. Such other uses could include concerts and non-football sporting events; and

WHEREAS, in order to proceed with this proposal, five specific development components would be involved: (1) the Stadium, (2) relocation of an existing electrical substation, (3) a new six-story parking garage, (4) the use of surrounding properties for off-site parking, and (5) a transportation management plan. There are also fourteen implementing actions that the City would potentially take to facilitate these development components: (1) a General Plan Text Amendment, (2) Amendment of the Bayshore North Redevelopment Plan, (3) a rezoning of a

portion of the Project Site to Planned Development (PD) zoning, (4) vacation and abandonment of an existing roadway; (5) approval of a tentative map; (6) approval of a disposition and development agreement and related conveyance documents; (7) creation of a parking overlay zone; (8) creation of a joint powers authority public agency (“Stadium Authority”) that will develop and own the Stadium; (9) approval of a parking Variance, (10) approval of a parking arrangement or master plan that utilizes existing off-site parking facilities; (11) funding the construction of a new six-story parking garage to serve the Project, the convention center, and Great America theme park; (12) funding the abandonment, removal and relocation of portions of the transmission lines and electrical substation equipment located on the Tasman Substation Site; (13) creation of a Mello-Roos community facilities district or other financing district for hotels in the Stadium area if approved by a vote of the affected hotels; and (14) approval of a ballot measure to authorize the City to carry out the Stadium portion. These five project components and fourteen implementing actions are collectively referred to as the “Project”; and

WHEREAS, on February 23, 2009, the City of Santa Clara (“City”) posted and distributed a Notice of Preparation of a Draft Environmental Impact Report (“DEIR”), soliciting guidance on the scope and content of the environmental information to be included in the DEIR; and

WHEREAS, based on responses to the Notice of Preparation, the City prepared the DEIR, dated July 30, 2009 (SCH No. 2008082084), which reflected the independent judgment of the City as to the potential environmental impacts of the Project; and

WHEREAS, the City circulated copies of the DEIR to the public agencies that have jurisdiction by law with respect to the Project, as well as to other interested persons and agencies, and the City sought the comments of such persons and agencies for a minimum forty-five (45) day

review period, beginning on July 30, 2009 and concluding on September 14, 2009 (“Comment Period”); and

WHEREAS, the City subsequently extended the public review and comment period for the DEIR by two weeks and concluded on September 28, 2009, for a total public review and comment period of 61 days (“Extended Comment Period”); and

WHEREAS, the City received comment letters from state and local agencies and from the public during the Extended Comment Period. The City prepared written responses to these comments, which responses provide the City’s good faith, reasoned analysis of the environmental issues raised by the comments, and included these responses in a Final Environmental Impact Report (“FEIR”). The FEIR consists of the DEIR; a list of agencies, organizations, businesses and individuals to whom the DEIR was sent; a list of the comment letters received on the DEIR; revisions to the text of the DEIR; responses to comments received on the DEIR; and copies of the comment letters; and

WHEREAS, a Planning Commission Staff Report, dated November 18, 2009, and incorporated herein by this reference, described and analyzed the FEIR and the Project for the Planning Commission; and

WHEREAS, the Planning Commission reviewed the FEIR prepared for the Project, the Planning Commission Staff Report pertaining to the FEIR and all evidence received at a public meeting on November 18, 2009, at which time all interested parties had the opportunity to be heard. Following the consideration of the public comments and based on the record before it, the Planning Commission recommended that the City Council certify the EIR; and

WHEREAS, no significant new issues or information were raised at the November 18, 2009 Planning Commission meeting;

WHEREAS, at the November 18, 2009 meeting, City staff provided verbal responses to the testimony received at that meeting. City staff also prepared a Summary for consideration by the City Council on December 8, 2009, incorporated herein by this reference, identifying these comments and responses from the November 18, 2009 meeting and providing additional responses, and this Summary has been presented to the City Council and shall be attached to the FEIR;

WHEREAS, a City Council Staff Report, dated December 3, 2009, and incorporated herein by this reference, described and analyzed the FEIR and the Project for the City Council; and

WHEREAS, the City Council reviewed the FEIR prepared for the Project, the City Council Staff Report pertaining to the FEIR and all evidence received at a public meeting on December 8, 2009, at which time all interested parties had the opportunity to be heard; and

WHEREAS, the FEIR reflects the City's independent judgment and analysis on the potential for environmental impacts and constitutes the Environmental Impact Report for the Project; and

WHEREAS, the FEIR is a separately bound document, incorporated herein by this reference, and is available for review during normal business hours in the City Planning Division, file PLN2008-06947.

NOW THEREFORE, BE IT FURTHER RESOLVED BY THE CITY OF SANTA CLARA AS FOLLOWS:

1. That the City Council hereby finds that the above Recitals are true and correct and by this reference makes them a part hereof.
2. That the FEIR has been completed in compliance with CEQA, the State CEQA Guidelines, and the City of Santa Clara Local Environmental Review Procedures.

3. That the FEIR was presented to the City Council, which reviewed and considered the information and analysis contained therein before certifying the FEIR.

4. That the FEIR reflects the City's independent judgment and analysis on the potential for environmental effects of the Project.

5. Constitutionality, severability. If any section, subsection, sentence, clause, phrase, or word of this resolution is for any reason held by a court of competent jurisdiction to be unconstitutional or invalid for any reason, such decision shall not affect the validity of the remaining portions of the resolution. The City of Santa Clara hereby declares that it would have passed this resolution and each section, subsection, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more section(s), subsection(s), sentence(s), clause(s), phrase(s), or word(s) be declared invalid.

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE COPY OF A RESOLUTION PASSED AND ADOPTED BY THE CITY OF SANTA CLARA, CALIFORNIA, AT A REGULAR MEETING THEREOF HELD ON THE ___ DAY OF _____, 200__, BY THE FOLLOWING VOTE:

AYES: COUNCILORS:

NOES: COUNCILORS:

ABSENT: COUNCILORS:

ABSTAINED: COUNCILORS:

ATTEST: _____
ROD DIRIDON, JR.
CITY CLERK
CITY OF SANTA CLARA

Attachments Incorporated by Reference: None

S:\CityClerk\RESOLUTIONS\COUNCIL FULL TEXT STARTING 2009 WITH NO. 09-7583\12-08-09 Certifying Environmental Impact Report for the Proposed San Francisco 49ers Stadium 4900 Centennial Boulevard.doc

12/18/09



Interoffice Memorandum

Date: December 7, 2009

To: City Manager

From: Director of Planning and Inspection *Noted J. Jaramila 12/18/09*

Subject: 49ers Stadium EIR: Responses to CEQA Written Comments Received since the Planning Commission Meeting of November 18, 2009

The City has received several written comments since the Planning Commission reviewed the Final Environmental Impact Report (EIR) at their regular meeting of November 18, 2009.

Insofar as the City Council will consider certification of the EIR at their regular meeting of December 8, 2009, staff has prepared written responses to those recent comment letters (including e-mails) that address environmental issues or process. These written materials will become an addendum to the comprehensive EIR for the stadium project and a part of the administrative record.

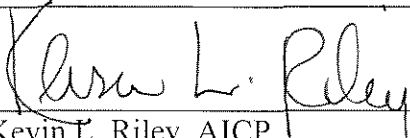
Commenter / Issue /Response	Dated
<p>Hoge, Fenton, Jones & Appel (representing Cedar Fair) <i>This is a letter that was referred to by Mr. John Hickey in his presentation to the Planning Commission on November 18, 2009. The item was received by the City on December 7, 2009. The letter addresses adequacy of time to provide comments on the FEIR, consistency of the project with the General Plan and financial, traffic, and parking implications of approving the stadium; the letter asks the Commission to continue their consideration of the EIR on November 18.</i></p> <p>The State CEQA Guidelines require a public review and comment process, but do not require public hearings at any stage of the environmental review process, including the certification of an EIR. In compliance with CEQA, the City circulated the EIR for the required 45-day review period from July 30, 2009 to September 14, 2009. The City subsequently extended the public review and comment period by two weeks and concluded on September 28, 2009, for a total public review and comment period of 61 days. The Final EIR was brought before the Planning Commission at a regular meeting on November 18, 2009 to give the public an additional opportunity to make comments as the Commission considered making a recommendation to the City Council regarding certifying the EIR. Comments on the EIR may also be presented directly to the City Council.</p> <p>The options for projects and facilities that create financial resources for the City within the Bayshore North Area are undefined and not limited; it assumes a combination of complementary and competing activities and land uses could meet the objectives of the General Plan policy. Determinations as to the measure of benefit in generating revenues to the City are not environmental considerations.</p>	<p>November 18</p>

<p>The stadium project proposal identifies a limited number of potential days of conflict between the Theme Park and Football seasons. The discussion of potential conflicts is provided on page 83 of the Final EIR, including the consideration of scheduling non-NFL events around Theme Park days of operation. It is assumed that the operations of the Theme Park would not be affected on all days when the stadium is not in use or in limited use with small events. Theme Park overflow parking can be accommodated to replace parking currently located on the proposed stadium site.</p> <p>Severe traffic congestion identified in the EIR for peak hour use before and after large stadium events would affect access to the Theme Park during those periods when both facilities are operating at a high level. The TMOP mitigation measure described in Master Response B of the FEIR (p.7) would address traffic control in this situation.</p>	
<p>Patrick Grant <i>This letter provides clarification and supplemental information related to the letter submitted by the commenter on August 14, 2009 on the Draft EIR.</i></p> <p>The comment regarding the quality of electronic images created from Mr. Grant's letter of August 14, 2009 is acknowledged. The images in the printed copy of the Final EIR appear legible. A URL link to the letter and images is provided by the commenter.</p> <p>Additional comments regarding pedestrian bridge considerations are acknowledged. This comment was addressed in the Final EIR; there are no proposed changes to the response provided in the Final EIR (p. 113).</p> <p>The comment regarding broader considerations in approving the project are acknowledged but are not related to the EIR.</p>	November 18
<p>Patrick Grant <i>This letter provides further clarification and supplemental information for the letter submitted on by the commenter August 14, 2009 on the Draft EIR.</i></p> <p>The comment reiterates the identification of the Hetch-Hetchy bicycle trail in the County-wide planning process. The comment is acknowledged; the Final EIR response (p. 113) notes that the stadium project does not interfere with the Hetch-Hetchy right-of-way and that there is no nexus for the stadium to complete this section of the trail.</p>	November 19
<p>Deborah Bress <i>This letter asks that the Planning Commission reconsider its recommendation to the Council for certification of the EIR.</i></p> <p>Point #1 asserts that the Planning Commission's considerations on November 18, 2009 were in regards to the stadium project, rather than just the EIR. The EIR describes the stadium project and addresses the potential environmental effects of the project, but it is only an informational document for use by decision makers when they consider the merits of the project. The recommendation for certification of the EIR is not an action on the project itself.</p> <p>In Point #2 the commenter opines that the EIR and project should be considered together and that the traffic analysis is not adequate. The Draft Transportation</p>	November 23 (et seq)

<p>Management Plan (TMP) is incorporated into the Draft EIR, establishing transit objectives among other things, and is a component of the project. The TMOP is a mitigation measure that will be required in the approval of the project to address traffic and transit movement and access to parking. Where it is not practical to define all of the specific details of a mitigation measure when an EIR is prepared, the CEQA Guidelines authorize a lead agency to defer formulation of the specifics if the mitigation measure describes the options that will be considered and identifies performance standards. Prior to the design and entitlement stages, there is insufficient information to prepare detailed circulation plans or set up transit services, but the options to be considered and performance standards of the TMOP are described in detail in Master Response B on pages 7-11 of the FEIR.</p> <p>Point #3 asserts that mitigation measures in general are not adequate. CEQA requires that mitigation measures be identified that can minimize a project's significant environmental effects. Some impacts described in the DEIR cannot be mitigated to a less than significant level. The City shall consider these impacts, both mitigated and unmitigated, at the time that it weighs approval of any component or implementing action of the project.</p> <p>The DEIR Appendices referred to in Point #4 have been available on line and at City Hall for the public since the circulation of the Draft EIR in July 2009. The Draft and Final EIRs were available at the public meeting of the Planning Commission on November 18, 2009.</p> <p>Regarding Point #5, the EIR describes an array of potential uses of the stadium, in addition to football games, that could be scheduled at any given time. The intent was to provide a range of uses representing a reasonable expectation of events over time.</p>	
<p>County of Santa Clara Roads and Airport Department <i>This letter acknowledges receipt of the Final EIR by the agency and redirects two points that were made by the agency and addressed in the Draft EIR.</i></p> <p>The contribution of fair share fees would be applied to the project approval for programmed improvements at four intersections that affect County expressways, as stated on page 23 of the FEIR. For intersections with no programmed improvements, there is no metric for imposing a fair share contribution, and the City lacks the authority to require a developer to fund improvements that would be speculative.</p> <p>It is anticipated that the County roads department will be included in the TMOP group, as noted on page 23 of the FEIR, and the means to address planning and operations of facilities in the vicinity of the stadium will be an integral part of the TMOP responsibility. Funding for public safety joint powers is already addressed in the Term Sheet.</p>	November 25
<p>Michael J. Antonini, D.D.S. <i>The letter follows upon comments provided on September 25 and September 28 regarding the DEIR.</i></p> <p>The Caltrain stations are identified in the EIR and options for access to the stadium are described in the EIR, including the direct connection between Caltrain and the VTA</p>	November 27

<p>Light Rail in Mountain View, as well as options for public or private charter bus connections, as stated on page 139 of the FEIR. The City and VTA staff have been reviewing options and these are to be an integral part of the TMOP, as noted in Master Response B on page 7 of the FEIR.</p> <p>Certain street closures and controlled access are mitigation measures intended to minimize impacts on pedestrian safety and on neighborhood parking and tranquility, depending upon location. Although persons accustomed to traveling on those roads would be inconvenienced on game days, the current level of traffic on those streets is relatively low, and closure of these routes would not create a new significant environmental impact.</p> <p>The comment regarding refurbishment of Candlestick Park is acknowledged; the Hunters Point EIR was released subsequent to the preparation of the Final EIR for the Santa Clara stadium.</p> <p>The concept of shared parking on surrounding private commercial/industrial properties is a component of the project, and relies upon City entitlements for and contracts with participating owners, which will ensure the availability of parking spaces on those lots at designated times. Master Response B in the FEIR (p. 7) addresses the stadium parking program requirements and process.</p> <p>The Draft EIR and TMP present projections of greater transit ridership at the Santa Clara site than currently occurs at Candlestick Park, given the proximity of multiple transit services. Although the comments recognize the availability of Caltrain, they overlook the Capitol Corridor & ACE train stop at the nearby Great America station on Lafayette Street. In addition, the Santa Clara site is essentially surrounded by a network of two State freeways (101 and 237) and two expressways (Lawrence and Montague) that serve the site, all within a 1.5 mile radius of the site.</p> <p>The comment regarding the appearance of errors and omissions in the FEIR provides no specific details, other than those addressed above.</p> <p>The commenter's opinion that the proposed site is too small is acknowledged.</p>	
<p>Kevin Brown <i>The letter expresses concern about presenting comments on the Final EIR and about the stadium plan associated with the EIR.</i></p> <p>The State CEQA Guidelines require a public review and comment process, but do not require public hearings at any stage of the environmental process, including the certification of an EIR. In compliance with CEQA, the City circulated the EIR for the required 45-day review period from July 30, 2009 to September 14, 2009. The City subsequently extended the public review and comment period by two weeks and concluded on September 28, 2009, for a total public review and comment period of 61 days. The Final EIR was brought before the Planning Commission at a regular meeting on November 18, 2009 to give the public an additional opportunity to make comments as the Commission considered making a recommendation to the City Council regarding certifying the EIR. Comments on the EIR may also be presented directly to the City</p>	<p>December 3</p>

<p>Council.</p> <p>The “plan” referred to by the commenter is the project description presented in Section 2 of the DEIR. Confusion regarding the absence of a “plan” before the Commission on November 18 relates to the fact that the Commission had no specific project approval in front of them at that time, only the recommendation on certification of the EIR. The City Council is considering the EIR for certification on December 8 because the CEQA Guidelines require that the lead agency certify the EIR “upon the earliest commitment” to go forward with a project. If the Council takes action to place a ballot measure before the voters, that will constitute “the earliest commitment,” even though the project may ultimately be approved or disapproved by either the voters or the Council. The Commission and Council will need to rely upon the EIR for later approvals if it is certified and the project moves ahead. If for any reason the project as described in the EIR changes, the City will need to evaluate whether further environmental analysis is required.</p>	
<p>Nancy Lang <i>The letter questions the actions to be taken by the City Council on December 8, 2009.</i></p> <p>The Council agenda of December 8, 2009 includes an action to certify the EIR for the stadium project. The ballot measure will not be prepared for Council action that evening, but it is anticipated that Council will give direction to the City Manager regarding the ballot measure. No other items identified in the letter will be action items on December 8.</p>	<p>December 3</p>
<p>City of Sunnyvale <i>The letter acknowledges the regional benefits that will be derived from the stadium project and addresses elements of the TMOP.</i></p> <p>The commenter is correct that the City of Sunnyvale will be a participant in the TMOP process and that the five points identified in the letter will be addressed in the ongoing TMOP process.</p>	<p>December 7</p>



 Kevin L. Riley, AICP
 Director of Planning and Inspection

cc: Assistant City Manager Ron Garratt
 Acting City Attorney Elizabeth Silver
 RDA Counsel Karen Tiedemann

Meeting Date: 12/8/09

Santa Clara



AGENDA REPORT

City of Santa Clara, California

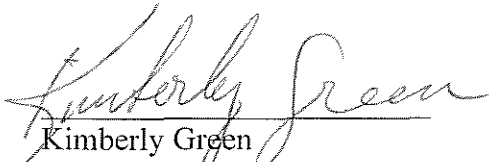
Agenda Item # 5B-1



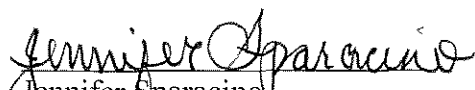
DATE: December 8, 2009
TO: City Council for Information
FROM: Executive Assistant to the Mayor and City Council
SUBJECT: Correspondence Received Regarding Proposed 49ers Stadium EIR Certification

Attached are communications received in the Mayor & Council Offices from Saturday, December 5, 2009 through Tuesday afternoon, December 8, 2009, regarding the proposed 49ers Stadium EIR Certification.

There are a total of 11 items attached herewith.


Kimberly Green
Executive Assistant
Mayor and Council Offices

APPROVED:


Jennifer Sparacino
City Manager

Documents Related to this Report:
1) Communications received

Kimberly Green

From: Hickey, John A. [JAH@hogefenton.com]
Sent: Tuesday, December 08, 2009 4:56 PM
To: Kimberly Green
Subject: Cedar Fair Comments on Final EIR for 49ers Stadium Project
Attachments: Letter to Santa Clara CC re Final EIR (12-8-09).pdf

Mayor and Council Members,

Attached please find Cedar Fair's comments on the Final EIR for the 49ers Santa Clara Stadium Project.

John A. Hickey | Attorney
jah@hogefenton.com 408.947.2414 direct

Hoge Fenton Jones & Appel | Silicon Valley Office
60 South Market Street • Suite 1400 • San Jose • CA • 95113
www.hogefenton.com

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December 8, 2009

VIA ELECTRONIC DELIVERY

Mayor Mahan and Members of the City Council
City of Santa Clara
1500 Warburton Avenue
Santa Clara, California 95050

Re: Final EIR for the 49ers Santa Clara Stadium Project

Dear Mayor and Council Members:

Cedar Fair L.P., the owner and operator of the Great America theme park in Santa Clara, submits the following comments on the environmental impact report (EIR) prepared by the City of Santa Clara for the 49ers Santa Clara stadium project.

Cedar Fair and Great America

Cedar Fair owns and operates the Great America theme park pursuant to a ground lease with the City. Cedar Fair pays a minimum of \$5,300,000 in rent each year for the right to operate the theme park, for substantial control over adjacent parcels, and for protection from interfering uses on those adjacent parcels. The City signed the ground lease for the theme park in 1989 and has, over the last 20 years, collected rent approaching a total of \$100,000,000. The theme park was one of the first major redevelopment projects in the City's North Bayshore Redevelopment Area, and it has served as a major anchor for the subsequent development of the area. In addition to the rent that the City receives each year under the ground lease, the City receives substantial benefit from the increased property taxes and sales taxes every year as a result of Great America. Cedar Fair enjoys providing important cultural and economic benefits to the residents and businesses of Santa Clara and contributing to the health of the community.

Comments on the Draft EIR

Cedar Fair submitted comments on the Draft EIR for the stadium project on September 25, 2009. The City provided responses to Cedar Fair's comments in the Final EIR. However, many of those responses were dismissive and not supported by substantial evidence in the record. Cedar Fair therefore renews its September 25, 2009, comments on the EIR.

Comments on the Final EIR

With regard to the Final EIR, Cedar Fair highlights the following concerns:

Failure to Impose Mitigation Measures

Section 21081 of the Public Resources Code prohibits the City from setting an election to consider the Term Sheet without first adopting all feasible mitigation measures that would substantially lessen or avoid the project's significant environmental impacts. However, it appears that the City intends to violate section 21081.

The agenda report for the City Council's December 8, 2009, meeting recommends that the City Council certify the EIR without adopting any findings pursuant to sections 15091 or 15093 of the California Environmental Quality Act (CEQA) Guidelines, nor any mitigation monitoring or reporting program (MMRP) pursuant to section 15097. Instead, the City proposes to adopt the findings and the MMRP at a subsequent meeting when the City Council sets an election to consider the Term Sheet. However, neither the CEQA findings, nor the MMRP, nor the Term Sheet impose any of the mitigation measures identified and recommended in the EIR. The CEQA findings are merely that: findings; and the MMRP simply monitors or reports. Neither document imposes the mitigation measures as conditions of approval. Thus, in effect, the City proposes to certify the EIR and set an election to consider the Term Sheet without requiring that the project be subject to any mitigation measures.

Failure to Consider Economic and Social Impacts Related to Physical Impacts

The Final EIR incorrectly dismisses Cedar Fair's comments regarding the profits and losses that Cedar Fair expects could occur as a result of the project as speculative and not related to environmental impacts. (Final EIR at 81–84.) Contrary to the assertion in the Final EIR, the information provided by Cedar Fair is based on a comparable prior situation in Houston. Moreover, while CEQA does not require an analysis of purely economic or social impacts, CEQA does require analysis of economic, social, and other non-physical impacts where those impacts could either lead to indirect physical impacts or indicate the significance of a physical impact. Unfortunately, the EIR fails throughout to consider such impacts.

Failure to Consider Great America in the Transportation Management Plan

Despite the fact that the draft Transportation Management Plan (TMP) attached to the EIR as Exhibit I has gone through multiple iterations, the TMP fails to identify the Great America theme park as one of the local facilities that could be affected by vehicles entering and exiting the stadium during game days. The TMP mentions a church, a movie theater, a mobile home park, a country club, and local hotels, but does not include Great America. The failure to include Great America in the TMP demonstrates how poorly the TMP is designed, and how little

assurance it provides that the City and the 49ers will take steps to control the severe traffic that will clog up the area during stadium events.

Improper Deferral of Mitigation

The EIR improperly defers mitigation of transportation impacts by relying on an undeveloped and undefined Transportation Management and Operations Plan (TMOP). The EIR recommends that the City, the 49ers, and other agencies prepare the TMOP as a mitigation measure to address the project's significant impacts on traffic and transportation. The EIR concludes that the TMOP would substantially lessen or avoid some of the project's significant impacts.

However, there is no basis for the EIR to conclude that the TMOP would lessen or avoid any impacts of the project, because the TMOP has not yet been adopted and the EIR does not identify any performance standards for the TMOP. In the absence of performance standards, the TMOP is just a name and a process, not mitigation.

Failure to Establish Presumed Project Limitations as Mitigation Measures

The Final EIR asserts that non-NFL events "would be scheduled by the Stadium Authority in cooperation with the Theme Park to minimize access and parking conflicts." (Final EIR at 83.) However, that assertion is not reflected in any mitigation measure or other enforceable condition of the project. Without some sort of requirement, there is no assurance that non-NFL events would be scheduled by the Stadium Authority in cooperation with Great America. Therefore, the EIR must consider the full extent of the impact.

Failure to Consider the MTC Transportation 2035 Plan

CEQA requires the EIR to discuss any inconsistencies between the proposed project and applicable regional plans. On April 22, 2009, three months before the City released the Draft EIR, the Metropolitan Transportation Commission (MTC) adopted the Transportation 2035 Plan for the San Francisco Bay Area, which specifies how some \$218 billion in anticipated federal, state and local transportation funds will be spent in the nine-county Bay Area during the next 25 years. However, the EIR does not discuss the Transportation 2035 Plan at all, despite the fact that the EIR identifies impacts to freeway segments that the Transportation 2035 Plan does not anticipate. (See Final EIR at 80.)

Failure to Adopt Feasible Mitigation for Impacts to Santa Clara Roadways

EIR acknowledges that impacts on eight intersections in Santa Clara would be significant. EIR also acknowledges that the physical improvements identified in section 4.8.5 would lessen the significant impacts. But the EIR, without explanation, does not recommend that any of the improvements be constructed as a condition of the project. Based on the information provided in the EIR, the physical improvements appear to be feasible, and therefore CEQA requires that

they be included as mitigation measures for the project. While fair share contributions may be an acceptable form of mitigation for the cumulative impacts of a project, fair share contribution does not adequately mitigate the project's direct impacts.

Failure to Adopt Feasible Mitigation for Impacts to Roadways Outside Santa Clara

The EIR identifies numerous impacts to intersections and roadway segments outside of the City that are not within the City's sole or concurrent jurisdiction. The EIR also identifies potential mitigation that would lessen the impacts to those intersections, but the EIR fails to recommend that the city in which the intersections are located implement the mitigation measures or that the City or the 49ers contribute to the mitigation. CEQA allows a lead agency to decline to implement a mitigation measure if it finds that the measure is not within the lead agency's jurisdiction, but that exception is limited. Where, as here, the City has jurisdiction to require the 49ers to work apply to the other City to implement the improvement and to make a fair share contribution to the improvement, if and when the other jurisdiction decides to implement the improvement, then the City must impose that requirement as mitigation.

On page 208 of the Final EIR, the EIR declines to implement a proposed mitigation measure on the grounds that the measure "may" not be feasible. CEQA does not allow the City to decline to implement a mitigation measure based on speculation. If the City finds that the mitigation measure *is* infeasible, based on substantial evidence in the record, the City may decline to impose the measure; otherwise, the City must include the mitigation measure as a condition of approval of the project.

Failure to Consider the Mandatory Findings of Significance under Guidelines § 15065

The Final EIR relies on thresholds of significance identified in the EIR, even though those thresholds have not been adopted pursuant to 15064.7(b) of the CEQA Guidelines. While the City may use thresholds identified in the EIR as a guide to whether an effect would *normally* be considered significant, the EIR must separately consider whether the impacts of the project fall within the criteria of section 15065(a) of the CEQA Guidelines. For example, if the environmental effects of a project would cause substantial adverse effects on human beings, either directly or indirectly, those effects must be identified as significant.

As Cedar Fair pointed out in comments on the Draft EIR, the project would severely increase traffic near the Great America theme park on event days at the stadium. As indicated in the EIR, traffic would increase not merely at those segments and intersections where the EIR concludes that the level of service would fall below the thresholds of significance, but at most of the intersections and roadway segments in the area. The increase in traffic at all of these intersections and roadway segments would cause potential visitors to the theme park to avoid the area and severely decrease attendance at the park on event days, which in turn would cause a substantial adverse effect on the employees of the theme park who rely on their jobs at the park for their livelihood.

Failure to Acknowledge Significant Impacts on Solid Waste Facilities

EIR acknowledges that project would generate 1.6 million pounds (800 tons) of waste per year that would need to go in a landfill. The EIR states that the stadium operators will be required to implement a Waste Reduction & Recycling Plan that targets 100 percent diversion of solid waste from stadium events. However, a “target” does not provide any assurance that the amount of waste generated will actually be less than the amount projected.

The EIR states that there is “no limit on the amount of waste materials the City can dispose of” at the Newby Island Landfill. Contrary to that assertion, at current disposal rates, the Newby Island Landfill is expected to be full by 2024, while the stadium is project to operate for at least another 15 years thereafter. The EIR does not identify any alternative disposal facility for the project waste for the remaining 15 years or more that the stadium is projected to operate. Therefore, the waste from the project will exceed the existing permitted capacity of the City’s landfill space, which is a significant environmental impact. The City must identify this impact as significant and recirculate the EIR to allow comment and proposed mitigation.

Post Hoc Rationalization

CEQA requires the City, as lead agency for the stadium project, to prepare and certify an EIR before approving the project. When the City approved the Term Sheet in June 2009, the City violated CEQA, because the City approved the project without first certifying an EIR.

In approving the Term Sheet, the City increased the political stakes by publicly defending the stadium project over objections, put the City’s official weight behind the project, committed to devoting substantial public resources to the project, and announced a detailed agreement with the 49ers to go forward with the project, creating a circumstance whereby the City will not be easily deterred from taking whatever steps remain toward the project’s final approval.

Consequently, although the City has subsequently prepared an EIR for the stadium project, that EIR still fails to meet the City’s obligations under CEQA. As the California Supreme Court has recognized, when a city reaches a binding, detailed agreement with a private developer and publicly commits resources and governmental prestige to that project, the city’s reservation of CEQA review until a later, final approval stage is unlikely to convince public observers that the agency fully considered the project’s environmental consequences. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116.

Notwithstanding the fact that the Term Sheet included language about future environmental review and compliance with CEQA, the City effectively precluded meaningful consideration of the project, its environmental impacts, and alternatives to the project. Statements made by members of the City Council and officers and representatives of the City on and after June 2, 2009, show that the City, by adopting the Term Sheet, (i) effectively circumscribed and limited their discretion with respect to environmental review and (ii) devoted

significant public resources to shaping the project and encouraged bureaucratic and financial momentum to build irresistibly behind it.

Public statements by Santa Clara City Council members, Santa Clara City Manager Jennifer Sparacino, attorneys for the City, and other City staff members, as recorded on video and included in the official records of the City Council, demonstrate that the City regards the Term Sheet as a binding agreement committing the City to the project.

The City's responses to comments on the Draft EIR further demonstrate that the City views the Term Sheet as binding and will not allow the scope and terms of the project to deviate from the Term Sheet. In response to the Draft EIR prepared by the City, Cedar Fair, the City of Cupertino, the City of Sunnyvale, the State Department of Transportation, the County of Santa Clara, the Santa Clara Valley Transportation Authority, and others identified feasible mitigation measures or alternatives to the project that would lessen or avoid the project's significant environmental impacts. Some of these mitigation measures and project alternatives would conflict with the Term Sheet but are otherwise feasible. However, the Final EIR prepared by the City does not adopt or recommend any mitigation measures or project alternatives that would conflict with the Term Sheet.

Comments by Others

In addition to the comments outlined above, Cedar Fair supports the comments made by the California Department of Transportation, the Valley Transportation Authority, the County of Santa Clara, the Bay Area Air Quality Management District, the Santa Clara Valley Water District, the Regional Water Quality Control Board, the City of Cupertino, the City of Sunnyvale, the City of San Jose, the City of Milpitas, Prudential Insurance, and others that identify additional impacts, potential impacts, and mitigation measures that should be considered in the EIR.

November 18, 2009, Letter to the Planning Commission

The summary of the Planning Commission's November 18, 2009, meeting which is attached to the December 3, 2009, agenda report for Item 5B-1 on the City Council's December 8, 2009, agenda states that the City did not receive the November 18, 2009, letter from Cedar Fair to the Planning Commission. The letter was sent electronically to the Planning Commission and the City Clerk, and we received no notification that the letter was not delivered. However, for your convenience, we are attaching another copy of the November 18, 2009, letter.

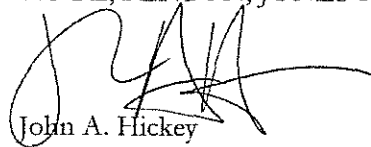
Mayor and Council Members
City of Santa Clara
December 8, 2009
Page 7

Conclusion

Cedar Fair appreciates your consideration of its comments.

Very truly yours,

HOGE, FENTON, JONES & APPEL, INC.



John A. Hickey

JAH: mjb

cc:	Duffield Milkie	General Counsel	Cedar Fair L.P.
	Peter J. Crage	CFO	Cedar Fair L.P.
	Jennifer Sparacino	City Manager	City of Santa Clara
	Ron Garratt	Deputy City Manager	City of Santa Clara
	Kevin L. Riley	Planning Director	City of Santa Clara
	Rod Diridon Jr.	City Clerk	City of Santa Clara
	Karen Tiedemann	Outside counsel	Goldfarb & Lipman
	Harry O'Brien	Coblentz, Patch, et al	Counsel to SF 49ers



HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

John A. Hickey
408.947.2414
jah@hogefenton.com

November 18, 2009

VIA ELECTRONIC DELIVERY (PlanningCommission@santaclaraca.gov)

Planning Commission
City of Santa Clara
1500 Warburton Avenue
Santa Clara, California 95050

Re: Final EIR for the 49ers Santa Clara Stadium Project

Dear Chairperson O'Neill and Members of the Planning Commission:

Cedar Fair, the owner and operator of the Great America theme park in Santa Clara, submits the following preliminary comments on the final environmental impact report (Final EIR) prepared by the City of Santa Clara for the 49ers Santa Clara stadium project.

Cedar Fair is deeply disappointed that the City has given Cedar Fair and the public only a few days to review and comment on the Final EIR before the Planning Commission's November 18, 2009, hearing. For a project of this magnitude, Cedar Fair and the public deserve more time to review the Final EIR and the City's responses to public comments on the Draft EIR. In addition, the Planning Commission should not be pressured to render a recommendation on such short notice.

Cedar Fair has had minimal opportunity to review the Final EIR. However, even after only a preliminary review, Cedar Fair has discovered that the Final EIR fails to respond adequately to the comments that Cedar Fair submitted on the Draft EIR.

For example, in its comments on the Draft EIR, Cedar Fair explained that the project is inconsistent with Land Use Policy 19 of the General Plan, which requires the City to "[d]evelop the Bayshore North area as a long term financial resource for the City." In response, the Final EIR insists that the stadium project is consistent with Policy 19, because "The City would benefit from the revenue generated by both NFL and non-NFL events at the stadium." However, the Final EIR jumps to this conclusion without supporting evidence. As Cedar Fair explained in its comments on the Draft EIR, the proposed stadium is projected to produce annual income to the City of \$1.6 million, but the stadium would jeopardize rent from Great American in the amount of \$5.3 million annually. Interference with attendance at Great America could result in reduced property tax revenue, reduced sales tax revenue, reduced lease payments, and liability of the City for Cedar Fair's financial damages.

81495:513325

San Jose Office | 60 South Market Street, Suite 1400, San Jose, California 95113-2396
phone 408.287.9501 fax 408.287.2583 www.hogefenton.com

The Final EIR does not dispute that the City could face a substantial loss in revenue from the impact of the stadium on Great America. Instead, the Final EIR simply dismisses this potential huge financial hit to the City as "not [an] environmental consequence of the proposed project."

However, contrary to the assertion in the Final EIR, the potential impact is environmental, not just financial. While the financial consequences may show how significant the potential impact is, the underlying impact itself--increased traffic and time spent driving around searching for parking--is environmental. The law is clear that economic or social impacts are relevant when determining whether a physical impact is a significant. As the Final EIR itself acknowledges, "The scheduling of any of the 40 events that may conflict with the Theme Park operations could reduce Theme Park revenues somewhat if patrons are discouraged from attending the Theme Park because of concerns about parking and traffic." Impacts on parking and traffic are physical impacts on the environment that must be considered in the EIR, and the potential economic consequences of those parking and traffic impacts make the impacts significant.

Cedar Fair will continue to review the Final EIR and submit comments. Cedar Fair would prefer to allow the City time to respond to Cedar Fair's comments. However, if the City rushes forward without giving the Planning Commission, Cedar Fair, or the public adequate time to review and comment on the Final EIR, Cedar Fair may be forced to submit the bulk of its comments at the City's final hearing on the EIR.

We request that the Planning Commission continue tonight's public hearing to the next meeting, and possibly the meeting after that, in order to provide the public and the Commission with adequate opportunity to review, comment on, and consider the Final EIR.

Very truly yours,

HOGE, FENTON, JONES & APPEL, INC.



John A. Hickey

JAH: mjb

cc: Rod Diridon, Jr.
Duffield E. Milkie

City Clerk
Cedar Fair

Kimberly Green

From: Etnire, Geoffrey C. [GCE@hogefenton.com]
Sent: Tuesday, December 08, 2009 4:53 PM
To: Kimberly Green
Subject: FW: 49ers stadium
Attachments: Cedar Fair Pleadings.pdf

For your information

From: Etnire, Geoffrey C.
Sent: Tuesday, December 08, 2009 2:25 PM
To: 'Jennifer Sparacino'; Ron Garratt; 'Karen M. Tiedemann'
Cc: 'Milkie, Duffield'
Subject: 49ers stadium

Jennifer, Ron and Karen,

Enclosed is a copy of the petition for writ of mandate. We regret that we were forced to file this petition at this time, but we had a legal filing deadline of Monday, December 7.

Having preserved Cedar Fair's legal rights, we hope that we will now be able to put this lawsuit on a back burner. We hope and expect that the City and Cedar Fair will continue to negotiate in good faith and that all issues can be resolved within a few weeks. Upon reaching an agreement, Cedar Fair will be in a position to dismiss this petition.

The lawsuit has a single cause of action -- under a recent California Supreme Court case (Save Tara v City of West Hollywood), the City should have completed the proper environmental analysis prior to adopting the Term Sheet in June. The central purpose of CEQA is to assure that decision-makers have an appropriate environmental analysis in front of them when making a significant decision on a course for development. In Save Tara, the City's early development decisions were made subject to subsequent CEQA review, but the Supreme Court reversed the city's approvals, stating:

"When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval."

We are looking forward to working closely with you in the coming weeks.

Geoff

Geoffrey C. Etnire | Co-Chair, Real Estate Group | gce@hogefenton.com
408.947.2490 direct • 925.460.3390 direct • 877.947.2490 toll free
(all calls roll to cell phone after two rings)

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12/8/2009

1 SEAN A. COTTLE – SBN 146229
2 JOHN A. HICKEY – SBN 219471
3 HOGE, FENTON, JONES & APPEL, INC.
4 Sixty South Market Street, Suite 1400
5 San Jose, California 95113-2396
6 Phone: (408) 287-9501
7 Fax: (408) 287-2583

8 Attorneys for Petitioner
9 Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2:58

David H. Yonemoto, Clerk of the Superior Court
County of Santa Clara, California

By: J. S. Nguyen

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 CEDAR FAIR L.P.,
13 Petitioner,
14 vs.
15 CITY OF SANTA CLARA;
16 REDEVELOPMENT AGENCY OF
17 THE CITY OF SANTA CLARA; AND
18 DOES 1 THROUGH 25,
19 Respondents,
20 and
21 FORTY NINERS STADIUM, LLC,
22 AND DOES 26 THROUGH 50,
23 Real Parties in Interest,

No. 109CV158836

VERIFIED PETITION FOR WRIT OF
MANDATE

(California Environmental Quality Act, Pub.
Res. Code § 21000 et seq.; Code of Civ.
Proc. §§ 1085 and 1094.5)

24 Petitioner, CEDAR FAIR L.P., alleges as follows:

25 **PREFATORY STATEMENT**

26 1. By this petition, Petitioner, CEDAR FAIR L.P. ("Cedar Fair"), seeks a
27 peremptory writ of mandate vacating approval by the City of Santa Clara ("City") and the
28 Redevelopment Agency of the City of Santa Clara ("Agency") of a Term Sheet ("Term
Sheet") by and among the City, the Agency, and Forty Niners Stadium, LLC ("49ers"), an
affiliate of the San Francisco 49ers NFL franchise. The Term Sheet sets forth the basic

1 terms of a transaction to develop a stadium in Santa Clara that would be the home field of
2 the San Francisco 49ers.

3 2. The California Environmental Quality Act ("CEQA") requires the City, as lead
4 agency for the stadium project, to prepare and certify an environmental impact report
5 ("EIR") before approving the project. When the City and the Agency approved the Term
6 Sheet in June 2009, the City and the Agency violated CEQA, because the City and the
7 Agency approved the Project without first certifying an EIR.

8 3. In approving the Term Sheet, the City and Agency increased the political
9 stakes by publicly defending the stadium project over objections, put the City's and the
10 Agency's official weight behind the project, committed to devoting substantial public
11 resources to the project, and announced a detailed agreement with the 49ers to go forward
12 with the project, creating a circumstance whereby the City and the Agency will not be
13 easily deterred from taking whatever steps remain toward the project's final approval.

14 4. Consequently, although the City has subsequently prepared an EIR for the
15 stadium project, that EIR still fails to meet the City's obligations under CEQA. As the
16 California Supreme Court has recognized, when a city reaches a binding, detailed
17 agreement with a private developer and publicly commits resources and governmental
18 prestige to that project, the city's reservation of CEQA review until a later, final approval
19 stage is unlikely to convince public observers that the agency fully considered the project's
20 environmental consequences.

21 THE PARTIES

22 5. Petitioner, CEDAR FAIR L.P., is a master limited partnership organized under
23 the laws of the State of Delaware, headquartered in Sandusky, Ohio. Cedar Fair is the
24 owner and operator of the California Great America amusement park ("Great America")
25 located in Santa Clara, California.

26 6. Respondent, CITY OF SANTA CLARA, is a local governmental entity duly
27 constituted under the constitution and laws of the State of California. The City approved
28

1 the Term Sheet through its City Council acting in the capacity as the legislative body of the
2 City.

3 7. Respondent, REDEVELOPMENT AGENCY OF THE CITY OF SANTA
4 CLARA, is a governmental entity duly constituted under the constitution and laws of the
5 State of California. The Agency approved the Term Sheet through the City Council acting
6 in the capacity as the legislative body of the Agency.

7 8. Cedar Fair is informed and believes that Real Party in Interest, FORTY
8 NINERS STADIUM, LLC, is a limited liability company organized under the laws of the
9 State of Delaware, with its principal place of business in California. 49ers is a party to the
10 Term Sheet and is the applicant for land use approvals for the development of a National
11 Football League stadium ("Project").

12 9. Cedar Fair does not know the true names or capacities of those Respondents
13 and Real Parties in Interest sued herein as DOES 1 through 50. Cedar Fair is informed
14 and believes and thereon alleges that said Respondents and Real Parties in Interest are in
15 some manner responsible for the adoption of, imposition of, or administration of those
16 laws, ordinances, and regulations of which Petitioner complains herein. Cedar Fair will
17 amend this Petition to set forth the true names and capacities of the fictitiously named
18 Respondents and Real Parties in Interest when such information has been ascertained.

19 STATEMENT OF FACTS

20 **A. The Project**

21 10. The National Football League ("NFL") granted the San Francisco 49ers a
22 franchise in 1950 and the team's home stadium has been Candlestick Park Stadium in San
23 Francisco since 1971. The 49ers decided to pursue the development of a new stadium at
24 the Project site near the team's existing training facility in the City of Santa Clara.

25 11. The Project would be located on multiple legal parcels that are not directly
26 contiguous, but that are located in the area bounded by U.S. Highway 101, State Route
27 237, Lawrence Expressway, and the Guadalupe River in the City of Santa Clara. The
28 Project site comprises at least four separate legal parcels, including a proposed parking

1 garage site, an existing electrical substation, a proposed stadium site, and a proposed site
2 for the relocation of the electrical substation. In addition, numerous public and privately
3 owned properties have been identified for possible use as existing parking lots.

4 12. The proposed stadium has a footprint of approximately 14 acres and the
5 49ers propose to locate the stadium on a 17-acre parcel that is subject to a long-term lease
6 between the Agency (as landlord) and Cedar Fair (as tenant). Cedar Fair has three 10-
7 year options remaining on the lease and currently uses this parcel site to provide parking
8 for visitors to Great America and for special events.

9 **B. Project Approval—Approval of the Term Sheet**

10 13. According to a May 29, 2009, Santa Clara City Council agenda report, the
11 49ers presented a proposal to the City of Santa Clara in April 2007 to locate an NFL
12 stadium in the City's Bayshore North Redevelopment Area, in proximity to Great America.
13 From April 2007 through June 2009, City staff and the 49ers engaged in intensive
14 negotiations on the approval of the Project.

15 14. According to the May 29, 2009, City Council agenda report, the stadium
16 would be developed and owned by a separate public agency to be formed by the City of
17 Santa Clara and the City's Redevelopment Agency. The stadium would be leased to the
18 49ers for playing their home games during the NFL pre-season, regular season and post-
19 season, and for possible sub-leasing to a second NFL team. In addition to NFL games, the
20 stadium would be used for other events and purposes, including uses in support of
21 adjacent Santa Clara Convention Center activities and major activities such as concerts
22 and other sporting events.

23 15. According to the May 29, 2009, City Council agenda report, the proposed
24 stadium would have permanent seating capacity for up to 68,500 seats and would be
25 designed to expand to approximately 75,000 seats for special events, such as a Super
26 Bowl game. The stadium structure would have a height of 175 feet, reaching a maximum
27 height of 200 feet at the top of the light standards. In order to accommodate the stadium
28

1 as proposed, Centennial Boulevard south of Tasman Drive would be abandoned and the
2 roadway removed except for a restricted travel lane.

3 16. According to the May 29, 2009, City Council agenda report, from December
4 2007 through May 2009, City staff and representatives of the 49ers negotiated the Term
5 Sheet, which serves as "an outline of the stadium deal structure, addressing major issues
6 of this proposed public/private partnership, including the governance structure, financing
7 plan, construction cost responsibilities, budget development for stadium operations, ground
8 rent payments, treatment of stadium revenue, and a number of other key issues that
9 comprise the core of the proposed Project."

10 17. According to the May 29, 2009, City Council agenda report: "The intent of the
11 Term Sheet is to document respective *commitments and obligations* of the involved
12 parties: the City of Santa Clara, its Redevelopment Agency, and the San Francisco 49ers.
13 Terms negotiated in this document serve as the basis to inform the Santa Clara community
14 in preparation for a City-wide ballot measure. Additionally, the Term Sheet serves as an
15 outline in continuing negotiations between the 49ers and the City in *defining and*
16 *documenting all aspects of a proposed long-term lease agreement.*" (Emphasis added.)

17 18. On June 2, 2009, the City held a City Council and Redevelopment Agency
18 "Committee of the Whole" special meeting to consider the Term Sheet.

19 19. On June 2, 2009, The City Council, acting in its capacity as the legislative
20 body of the City, voted to approve the Term Sheet. The City's approval of the Term Sheet
21 became final when the City Council declined to reconsider the action at its next regular
22 meeting on June 9, 2009.

23 20. On June 2, 2009, the City Council, acting in its capacity as the legislative
24 body of the Agency, voted to approve the Term Sheet. The Agency's approval of the Term
25 Sheet became final when the City Council declined to reconsider the action at its next
26 regular meeting on June 9, 2009.

27 21. Neither the City nor the Agency took any action to certify an environmental
28 impact report, adopt a negative declaration, or make other findings pursuant to Public

1 Resources Code §§ 21080 or 21081 before the City and the Agency approved the Term
2 Sheet.

3 22. No Notice of Determination or Notice of Exemption was filed for the Project
4 by the City or by the Agency pursuant to Public Resources Code §§ 21108 or 21152.

5 23. Following the approval of the Term Sheet on June 9, 2009, City staff and the
6 49ers continued to negotiate and develop the various documents that will eventually define
7 all aspects of the Project, the end result of which will be a Disposition and Development
8 Agreement (“DDA”), along with a Ground Lease and Stadium Lease.

9 **C. Respondents Have Foreclosed Meaningful Consideration of the Project,**
10 **Its Significant Environmental Impacts, and Alternatives to the Project**

11 24. Notwithstanding the fact that the Term Sheet included language about future
12 environmental review and compliance with CEQA, the City and the Agency effectively
13 precluded meaningful consideration of the Project, its environmental impacts, and
14 alternatives to the Project.

15 25. Statements made by members of the City Council and officers and
16 representatives of the City and the Agency on and after June 2, 2009, show that the City
17 and the Agency, by adopting the Term Sheet, (a) effectively circumscribed and limited their
18 discretion with respect to environmental review and (b) devoted significant public resources
19 to shaping the Project and encouraged bureaucratic and financial momentum to build
20 irresistibly behind it.

21 26. Public statements by Santa Clara City Council members, Santa Clara City
22 Manager Jennifer Sparacino, attorneys for the City, and other City staff members, as
23 recorded on video and included in the official records of the City Council, demonstrate that
24 the City and the Agency regard the Term Sheet as a binding agreement committing the
25 City and the Agency to the Project.

26 27. The City’s responses to comments on the Draft EIR further demonstrate that
27 the City views the Term Sheet as binding and will not allow the scope and terms of the
28 Project to deviate from the Term Sheet. In response to the Draft EIR prepared by the City,

1 Cedar Fair, the City of Cupertino, the City of Sunnyvale, the State Department of
2 Transportation, the County of Santa Clara, the Santa Clara Valley Transportation Authority,
3 and others identified feasible mitigation measures or alternatives to the Project that would
4 lessen or avoid the Project's significant environmental impacts. Some of these mitigation
5 measures and project alternatives would conflict with the Term Sheet but are otherwise
6 feasible. However, the Final EIR prepared by the City does not adopt or recommend any
7 mitigation measures or project alternatives that would conflict with the Term Sheet.

8 **STANDING AND INADEQUATE REMEDIES AT LAW**

9 28. The City of Santa Clara is lead agency responsible under the CEQA for
10 evaluating the environmental impacts of the Project.

11 29. The City issued a Notice of Preparation for the Project on August 15, 2008,
12 and a revised Notice of Preparation on February 23, 2009, acknowledging that the Project
13 could have a significant impact on the environment.

14 30. Cedar Fair, other agencies, interested groups, and individuals made oral and
15 written comments on the Draft EIR and raised each of the legal deficiencies asserted in
16 this petition.

17 31. Cedar Fair performed all conditions precedent to filing this action by
18 complying with the requirements of Public Resources Code § 21167.5 by serving a written
19 notice of commencement of this action on Respondents and by filing a proof of service of
20 the written notice of commencement of this action concurrently with this petition.

21 32. Cedar Fair complied with Public Resources Code § 21167.6 by concurrently
22 filing a notice that Petitioner elects to prepare the record of proceedings, subject to
23 certification of its accuracy by Respondents.

24 33. Cedar Fair will have complied with Public Resources Code § 21167.7 by
25 timely serving an endorsed filed copy of this petition on the Attorney General of the State of
26 California.

27 34. Respondents' actions in approving the Term Sheet without having certified
28 an EIR or adopting findings required by Public Resources Code § 21081 constitute a

1 prejudicial abuse of discretion in that Respondents failed to proceed in the manner
2 required by law and their decision is not supported by substantial evidence.

3 35. Respondents failed to prepare, circulate for public comment, or certify an EIR
4 for the Project prior to approving the Term Sheet.

5 36. Respondents foreclosed meaningful evaluation of the Project, its significant
6 environmental impacts, and alternatives to the Project by approving the Term Sheet before
7 preparing, circulating for public comment, or certifying an EIR for the Project.

8 37. Cedar Fair has no plain, speedy, or adequate remedy in the ordinary course
9 of law unless the Court grants the requested writ of mandate to require Respondents to set
10 aside their approval of the Term Sheet and the actions of the City in preparing and
11 considering for certification an EIR for the Project. In the absence of such relief,
12 Respondent's approvals will remain in effect in violation of State law.

13 38. Cedar Fair has a substantial beneficial interest in ensuring that the City
14 discharges its public duties in compliance with State law. Cedar Fair has standing to
15 assert the claims raised in this Petition because their aesthetic and environmental interests
16 are uniquely, directly, and adversely affected by the City's approval of the Project.

17 FIRST CAUSE OF ACTION

18 **(Violation of CEQA—Failure to Certify EIR before Project Approval)**

19 39. Petitioner incorporates by reference the allegations of paragraphs 1 through
20 38 of this pleading as though set forth fully in this paragraph.

21 40. Section 21100, subdivision (a), of CEQA states: "All lead agencies shall
22 prepare, or cause to be prepared by contract, and certify the completion of, an
23 environmental impact report on any project which they propose to carry out or approve that
24 may have a significant effect on the environment." Similarly, section 21151(a) of CEQA
25 states that "local agencies shall prepare, or cause to be prepared by contract, and certify
26 the completion of, an environmental impact report on any project that they intend to carry
27 out or approve which may have a significant effect on the environment."
28

1 41. Before conducting CEQA review, agencies must not take any action that
2 significantly furthers a project "in a manner that forecloses alternatives or mitigation
3 measures that would ordinarily be part of CEQA review of that public project." Cal. Code
4 Regs., tit. 14, § 15004, subd. (b)(2)(B).

5 42. The CEQA Guidelines define "approval" as "the decision by a public agency
6 which commits the agency to a definite course of action in regard to a project." (Cal. Code
7 Regs., tit. 14, § 15352, subd. (a).) *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th
8 116, 130.

9 43. Section 15352, subdivision (b) of the CEQA Guidelines (Cal. Code Regs., tit.
10 14, § 15352, subd. (b)) further defines approval of a private project as follows: "With
11 private projects, approval occurs upon the earliest commitment to issue or the issuance by
12 the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial
13 assistance, lease, permit, license, certificate, or other entitlement for use of the project."

14 44. To determine when an agency's favoring of and assistance to a project ripens
15 into a commitment, the line must be drawn neither so early that the burden of
16 environmental review impedes the exploration and formulation of potentially meritorious
17 projects, nor so late that such review loses its power to influence key public decisions
18 about those projects. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 130-31.

19 45. The California Supreme Court has recognized that postponing environmental
20 analysis can permit bureaucratic and financial momentum to build irresistibly behind a
21 proposed project, thus providing a strong incentive to ignore environmental concerns.
22 *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 135.

23 46. The California Supreme Court has further recognized that a public entity, by
24 executing a detailed and definite agreement with the private developer and by lending its
25 political and financial assistance to the project, may have as a practical matter committed
26 itself to the project, notwithstanding words that reserve rights to reject the proposed project
27 or acknowledge that the project is subject to subsequent review under CEQA. When an
28 agency has not only expressed its inclination to favor a project, but has increased the

1 political stakes by publicly defending it over objections, putting its official weight behind it,
2 devoting substantial public resources to it, and announcing a detailed agreement to go
3 forward with the project, the agency will not be easily deterred from taking whatever steps
4 remain toward the project's final approval. *Save Tara v. City of West Hollywood* (2008) 45
5 Cal. 4th 116, 135.

6 47. Besides informing the agency decision makers themselves, an EIR is
7 intended "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed
8 and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles*
9 (1974) 13 Cal.3d 68, 86.) When an agency reaches a binding, detailed agreement with a
10 private developer and publicly commits resources and governmental prestige to that
11 project, the agency's reservation of CEQA review until a later, final approval stage is
12 unlikely to convince public observers that before committing itself to the project the agency
13 fully considered the project's environmental consequences. Rather than being a
14 "document of accountability", the EIR may appear, under these circumstances, a document
15 of *post hoc rationalization*. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th
16 116,136.

17 48. To determine whether an agency has approved a project by entering into an
18 agreement with a private developer, courts should look not only to the terms of the
19 agreement but to the surrounding circumstances to determine whether, as a practical
20 matter, the agency has committed itself to the project as a whole or to any particular
21 features, so as to effectively preclude any alternatives or mitigation measures that CEQA
22 would otherwise require to be considered, including the alternative of not going forward
23 with the project. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 139.

24 49. The analysis should consider whether, in taking the challenged action, the
25 agency indicated that it would perform environmental review before it makes any further
26 commitment to the project, and if so, whether the agency *has nevertheless effectively*
27 *circumscribed or limited its discretion with respect to that environmental review*. Second,
28 the analysis should consider the extent to which the record shows that the agency or its

1 staff have committed significant resources to shaping the project. If, as a practical matter,
2 the agency has foreclosed any meaningful options to going forward with the project, then
3 for purposes of CEQA the agency has 'approved' the project. *Save Tara v. City of West*
4 *Hollywood* (2008) 45 Cal. 4th 116, 139.

5 50. By voting to approve the Term Sheet on June 9, 2009, and as demonstrated
6 by actions and statements since June 9, 2009, Respondents committed themselves to a
7 definite course of action with respect to the Project. Notwithstanding Respondents'
8 subsequent attempts to provide an ad hoc rationalization for the Project by preparing an
9 EIR, Respondents have effectively precluded any alternatives or mitigation measures to
10 the Project that CEQA would otherwise require to be considered— including the alternative
11 of not going forward with the Project—and have effectively circumscribed or limited their
12 discretion with respect to the environmental review.

13 **PRAYER**

14 WHEREFORE, Petitioner requests judgment as follows:

- 15 1. For a peremptory writ of mandate ordering:
- 16 (a) Respondent to vacate and set aside its approval of the Term Sheet.
- 17 (b) Respondent and Real Party in Interest to suspend all activity under the
- 18 approval of the Term Sheet that could result in any change or alteration in the
- 19 physical environment.
- 20 (c) Respondent to suspend all consideration and certification of the EIR
- 21 that Respondent or its consultants have prepared for the Project.
- 22 (d) Respondent to prepare, circulate, and consider a new and legally
- 23 adequate EIR and otherwise to comply with CEQA in any subsequent action
- 24 taken to approve the Project.
- 25 2. For its costs of suit.
- 26 3. For an award of attorney fees.

27 ///

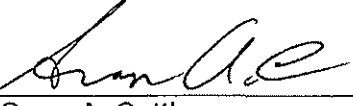
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4. For other equitable or legal relief that the Court considers just and proper.

DATED: December 7, 2009

HOGUE, FENTON, JONES & APPEL, INC.

By 
Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.

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VERIFICATION

I, Duffield E. Milkie, on behalf of Cedar Fair, L.P., under penalty of perjury under the laws of the State of California, declare as follows:

1. That I am the Vice-President and General Counsel of Cedar Fair, L.P.
2. That Cedar Fair, L.P., is the Petitioner in the above-entitled action;
3. That I have read the foregoing Verified Petition for Writ of Mandate and know the contents thereof; and that I am informed and believe and thereon declare that the matters stated therein are true.

Executed on the 7th day of December, 2009, at Sandusky, Ohio.


Duffield E. Milkie


1 SEAN A. COTTLE – SBN 146229
JOHN A. HICKEY – SBN 219471
2 HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
3 San Jose, California 95113-2396
Phone: (408) 287-9501
4 Fax: (408) 287-2583

5 Attorneys for Petitioner
Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2: 58

David H. Vinningski, Clerk of the Superior Court
County of Santa Clara, California

By: 

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SANTA CLARA

10 CEDAR FAIR L.P.,

11 Petitioner,

12 vs.

13 CITY OF SANTA CLARA;
REDEVELOPMENT AGENCY OF THE
14 CITY OF SANTA CLARA; AND DOES
1 THROUGH 25,

15 Respondents,

16 and

17 FORTY NINERS STADIUM, LLC, AND
18 DOES 26 THROUGH 50,

19 Real Parties in Interest,
20

No. 109CV158836

PROOF OF SERVICE OF NOTICE OF
INTENT TO COMMENCE ACTION AGAINST
THE REDEVELOPMENT AGENCY OF THE
CITY OF SANTA CLARA

21 **PROOF OF SERVICE BY MAIL**

22 I, the undersigned, say:


23 I am now and at all times herein mentioned have been over the age of 18 years,
24 employed in Santa Clara County, California, and not a party to the within action or
25 cause; that my business address is 60 South Market Street, San Jose, California
26 95113-2396. I am readily familiar with the firm's business practice for collection and
27 processing of correspondence for mailing with the United States Postal Service. I
28

1 served copies of the attached **NOTICE OF INTENT TO COMMENCE AN ACTION BY**
2 **FILING A CEQA PETITION FOR WRIT OF MANDATE** by placing said copies in
3 envelopes addressed to:

4 Ron Diridon, Jr.
5 Secretary for the Redevelopment Agency
6 Redevelopment Agency of the City of Santa Clara
7 1500 Warburton Ave.
8 Santa Clara, CA 95050

9 which envelopes were then sealed and, with postage fully prepaid thereon, were on
10 12/7/2009 deposited with the United States Postal Service at San Jose, California on
11 the above-referenced date in the ordinary course of business; and there is delivery
12 service by United States mail at the place so addressed.

13 I declare under penalty of perjury under the laws of the State of California that
14 the foregoing is true and correct and that this Declaration was executed on 12/7/2009,
15 at San Jose, California.

16 
17 M'Liss Jarvis Bounds

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HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

Sean A. Cottle
408.947.2404
sac@hogefenton.com

December 7, 2009

By U.S. Mail

Ron Diridon, Jr.
Secretary for the Redevelopment Agency
Redevelopment Agency of the City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Notice of Intent to Commence an Action by Filing a CEQA Petition for Writ of Mandate

Dear Mr. Diridon and the members of the Redevelopment Agency of the City of Santa Clara:

PLEASE TAKE NOTICE that pursuant to Public Resource Code Section 21167.5, Cedar Fair L.P. intends to commence an action by filing a Petition for Writ of Mandate under the provisions of the California Environmental Quality Act against the City of Santa Clara and the Redevelopment Agency of the City of Santa Clara challenging the failure to certify an environmental impact report or adopt a negative declaration and to make associated findings prior to the approval of the Term Sheet by and among the City of Santa Clara, the Redevelopment Agency of the City of Santa Clara, and Forty Niners Stadium, LLC on June 9, 2009.

Thank you for your anticipated cooperation in this matter.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.

JAH: jah

1 SEAN A. COTTLE – SBN 146229
2 JOHN A. HICKEY – SBN 219471
3 HOGE, FENTON, JONES & APPEL, INC.
4 Sixty South Market Street, Suite 1400
5 San Jose, California 95113-2396
6 Phone: (408) 287-9501
7 Fax: (408) 287-2583
8 Attorneys for Petitioner
9 Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2: 58

David H. Yamashita, Clerk of the Superior Court
County of Santa Clara, California

By: _____
County Clerk
J. Cabanera

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 CEDAR FAIR L.P.,
11 Petitioner,
12 vs.

No. 109CV158836

PROOF OF SERVICE OF NOTICE OF
INTENT TO COMMENCE ACTION AGAINST
THE CITY OF SANTA CLARA

13 CITY OF SANTA CLARA;
14 REDEVELOPMENT AGENCY OF THE
15 CITY OF SANTA CLARA; AND DOES
16 1 THROUGH 25,
17 Respondents,
18 and
19 FORTY NINERS STADIUM, LLC, AND
20 DOES 26 THROUGH 50,
21 Real Parties in Interest,

22 PROOF OF SERVICE BY MAIL

23 I, the undersigned, say:

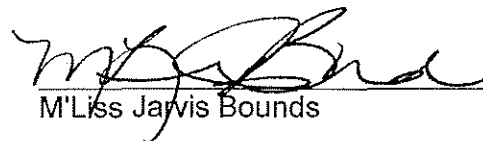
24 I am now and at all times herein mentioned have been over the age of 18 years,
25 employed in Santa Clara County, California, and not a party to the within action or
26 cause; that my business address is 60 South Market Street, San Jose, California
27 95113-2396. I am readily familiar with the firm's business practice for collection and
28 processing of correspondence for mailing with the United States Postal Service. I

1 served copies of the attached **NOTICE OF INTENT TO COMMENCE AN ACTION BY**
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4 Rod Diridon, Jr.
5 City Clerk
6 City of Santa Clara
7 1500 Warburton Avenue
8 Santa Clara, CA 95050

9 which envelopes were then sealed and, with postage fully prepaid thereon, were on
10 12/7/2009 deposited with the United States Postal Service at San Jose, California on
11 the above-referenced date in the ordinary course of business; and there is delivery
12 service by United States mail at the place so addressed.

13 I declare under penalty of perjury under the laws of the State of California that
14 the foregoing is true and correct and that this Declaration was executed on 12/7/2009,
15 at San Jose, California.

16 
17 M'Liss Jarvis Bounds

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HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

Sean A. Cottle
408.947.2404
sac@hogefenton.com

December 7, 2009

By U.S. Mail

Rod Diridon, Jr.
City Clerk
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Notice of Intent to Commence an Action by Filing a CEQA Petition for Writ of Mandate

Dear Mr. Diridon and the City of Santa Clara:

PLEASE TAKE NOTICE that pursuant to Public Resource Code section 21167.5, Cedar Fair L.P. (Petitioner) intends to commence an action by filing a Petition for Writ of Mandate under the provisions of the California Environmental Quality Act against the City of Santa Clara and the Redevelopment Agency of the City of Santa Clara challenging the failure to certify an environmental impact report or adopt a negative declaration and to make associated findings prior to the approval of the Term Sheet by and among the City of Santa Clara, the Redevelopment Agency of the City of Santa Clara, and Forty Niners Stadium, LLC on June 9, 2009.

Thank you for your anticipated cooperation in this matter.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.

JAH: jah

1 SEAN A. COTTLE – SBN 146229
2 JOHN A. HICKEY – SBN 219471
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4 Sixty South Market Street, Suite 1400
5 San Jose, California 95113-2396
6 Phone: (408) 287-9501
7 Fax: (408) 287-2583

8 Attorneys for Petitioner
9 Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2:58

David H. Yamasaki, Clerk of the Superior Court
County of Santa Clara, California

By: Sean A. Cottle
Deputy Clerk

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 CEDAR FAIR L.P.,

13 Petitioner,

14 vs.

15 CITY OF SANTA CLARA;
16 REDEVELOPMENT AGENCY OF THE
17 CITY OF SANTA CLARA; AND DOES
18 1 THROUGH 25,

19 Respondents,

20 and

21 FORTY NINERS STADIUM, LLC, AND
22 DOES 26 THROUGH 50,

23 Real Parties in Interest,

No. 109CV158836

PETITIONER'S NOTICE OF ELECTION TO
PREPARE ADMINISTRATIVE RECORD

24 Petitioner hereby gives notice of its election to prepare the record of proceedings
25 herein in accordance with Public Resources Code section 21167.6(b)(2).

26 DATED: December 7, 2009

HOGE, FENTON, JONES & APPEL, INC.

27 By: Sean A. Cottle

28 Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.



HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

RECEIVED

DEC 08 2009

City of Santa Clara
City of Santa Clara

John A. Hickey
408.947.2414
jah@hogefenton.com

December 8, 2009

VIA HAND DELIVERY

Jennifer Sparacino
City Manager, City of Santa Clara
1500 Warburton Avenue
Santa Clara, California 95050

Re: EIR for the 49ers Santa Clara Stadium Project

Dear Ms. Sparacino:

On page 86 of the final environmental impact report for the 49ers Santa Clara Stadium Project, in response to a comment from Cedar Fair, the EIR states that "no video was ever received from this letter writer." Based on that statement, it appears that our attempts to send the videos to the City electronically were unsuccessful. Accordingly, enclosed please find a DVD disc containing the videos referenced in Cedar Fair's September 25, 2009, letter to the City regarding the 49ers Santa Clara Stadium Project. The videos are in .mov format and may be viewed using Quicktime software.

Please contact me if you have any questions.

Very truly yours,

HOGE, FENTON, JONES & APPEL, INC.

John A. Hickey

JAH: mjb

cc: Ron Garratt (w/o enclosure)
Rod Diridon Jr. (w/o enclosure)
Jeff Schwilk (w/o enclosure)

Kimberly Green

From: Etnire, Geoffrey C. [GCE@hogefenton.com]
Sent: Tuesday, December 08, 2009 3:29 PM
To: Kimberly Green
Subject: Stadium proposal December 8 City Council meeting
Attachments: HFJA letter dated 120809.pdf

Please see the attached correspondence.

Geoffrey C. Etnire | Co-Chair, Real Estate Group | gce@hogefenton.com
408.947.2490 direct • 925.460.3390 direct • 877.947.2490 toll free
(all calls roll to cell phone after two rings)

Hoge Fenton Jones & Appel | Silicon Valley Office
60 South Market Street • Suite 1400 • San Jose • CA • 95113
www.hogefenton.com www.dirtlawyer.com

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HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

December 8, 2009

Hon. Patricia M. Mahan, Mayor
Members of the City Council
City of Santa Clara
1500 Warburton Avenue
Santa Clara, California 95050

Re: Comments on stadium agenda items
City Council meeting on December 8, 2009

Dear Mayor Mahan and Members of the City Council:

I am submitting these comments on behalf of Cedar Fair, LP, the owner and operator of the Great America theme park

In a letter dated December 3, 2009 and included in your December 8 agenda package, Cedar Fair requested that the City Council postpone the scheduled hearing on the stadium proposal for a minimum of thirty (30) days to allow City Staff to complete negotiations with Cedar Fair and to properly document the outcome of those negotiations. We ask that the City Council addresses the five procedural requests in that letter.

Cedar Fair can support the stadium proposal only if the City takes the steps necessary to assure that the legal rights and business interests of Cedar Fair are properly protected. Resolution of these challenges is possible if the City Council postpones this hearing to allow time for the completion of good faith negotiations.

The City has a schedule and certain deadlines to meet under CEQA and in the application process. Similarly, Cedar Fair has deadlines for getting comments into the record and deadlines for filing certain types of litigation. While schedules and deadlines must be honored, we recommend that good faith negotiations continue on a parallel path. It is our sincere hope the negotiations will be successful and all issues will be resolved within a few weeks.

City's Guiding Principle #7

The City adopted certain "Guiding Principles" on January 9, 2007 and Guiding Principle #7 states that:

"Cedar Fair must agree to and cooperate with any stadium proposal on their leasehold property."

City Staff and Cedar Fair are currently in negotiations and these negotiations is very important to the outcome of the stadium proposal and to the citizens of the City of Santa Clara. The report from City Clerk Rod Diridon makes clear that there is time to allow these negotiations to continue (the City has until March 9, 2010 to call a June election).

The fact that Cedar Fair is at the table and negotiating in good faith gives the City Council an opportunity to move the stadium proposal forward. Refusing to complete the negotiations with Cedar Fair exposes the City and the taxpayers to the risks described in this letter and in previous letters from Cedar Fair.

Given that the City Council has sufficient time to allow these negotiations to reach fruition, choosing not to complete the process would give the impression of an undue haste.

City's Guiding Principle #8

Guiding Principle #8 states that:

“The stadium should cause no financial loss from existing Cedar Fair lease payments.”

There is a possibility that attendance at Great America could be adversely affected by an NFL stadium and a drop in attendance could cause a financial loss to the City. In an agenda report in January 2, 2007, City Staff recognized this possible loss of rent and potential liability:

“It would be prudent for the City and the Agency to ensure that the Theme Park owner does not later assert liability, among other things, from the possibility of interference with on-going business concerns”

The 49ers speculate that this loss will not happen --- but speculation cannot be the basis for action by the City Council. The City Council has to act responsibly and attempt to negotiate an agreement with Cedar Fair that will eliminate this possibility.

Cedar Fair pays the City a minimum of \$5,300,000 per year in rent. In the 24 years that this lease has been in effect, the theme park operator has paid approximately 100 Million Dollars to the City. The financial projections by Keyser Marston state that the City may realize 1 Million Dollars for its General Fund per year from the stadium.

A negotiated agreement with Cedar Fair prior to City approval of the stadium would mean that the City could avoid risking \$5,300,000 in hand for \$1,000,000 in the bush.

Disclosures re financial impact in election materials

Whether an election is initiated by the Council or by citizens, the City has an obligation to provide full-disclosure to the electorate of the possible impacts of ballot measures. These disclosures must include full disclosure of the financial impacts to the City. Lack of full disclosure of possible financial impacts could invalidate the election.

The Keyser Marston economic projections may be reasonable, but these projections do not specifically address the Ground Lease for Great America and the possibility that the City could suffer a reduction of rent or even liability for breach of lease.

Financial projections necessarily involve assumptions about probable future events. If loss of rent revenues is deemed possible, but not probable, that possibility still must be noted in the financial projections and disclosed to voters.

Agreement with Cedar Fair would eliminate these potential problems and simplify the required financial disclosures.

Workshop on local financial impacts

The financial projections completed for the City are focused on the City's budget and the impact on the City of Santa Clara as a whole. The financial impacts of the stadium (and the traffic that the stadium generates) on neighboring residents and businesses have not yet been fully explored.

As Planning Director Riley often points out, the Environmental Impact Report does not address economic impacts of the project. However, the EIR may consider these impacts indirectly --- financial impacts may be one measurement or indicator of the degree of significance of environmental impacts (such as increased traffic) of a project.

Given the fact that neither the EIR nor the City's financial projections directly address the financial impacts on neighboring residents and business, it would be appropriate for the City Council to ask that a public workshop be held to address these impacts very directly.

Interference with Great America

It is common sense that a landlord cannot rent out property for a particular use and then interfere with that use --- and that also is the law in California. In fact, the City, in order to attract an operator for the theme park, offered a Ground Lease in 1985 that promised the operator that the City would not interfere with the theme park. The

Ground lease expressly grants the operator a degree of control over surrounding uses, particularly on those areas used as parking areas.

The Ground Lease states that the City and Cedar Fair will work together to find accommodating uses for the surrounding parcels -- clearly, the Ground Lease requires that the City not seek uses that may interfere with the theme park.

If City interferes with Great America operations, whether by bring in a non-accommodating use or in any other way, then the City would be liable for breach of the Ground Lease. This problem is detailed more thoroughly in my letter dated September 3, 2009 to City Manager Sparacino. Copies of this letter were provided concurrently to the members of the City Council and I will have additional copies available at the City Council meeting on December 8, 2009.

If the stadium does interfere with Great America, the economic damages and the City's liability for those losses may not occur until several years after the approval of the stadium, a public vote, and construction. That is a very significant unknown that would hang over the City for long period of time. That unknown can be eliminated if the City and Cedar Fair enter into an agreement prior to City Council approval of the stadium.

Violation of Ground Lease

Construction and operation of an NFL stadium on the Overflow Parking Area violate the terms of the Ground Lease. I have detailed these violations to City Staff and to the 49ers and I will summarize only three of the violations in this letter.

First, the interference with use described in the preceding section is a violation of the express terms of the lease and the implied covenant of quiet possession that is part of every lease in California.

Second, the Ground Lease expressly provides that the City "shall not otherwise construct or permit construction of, structures on the Parking Areas without Lessee's reasonable written approval." The Ground Lease states that:

"withholding of approval by Lessee shall be reasonable if the proposed construction would materially interfere with:

- (i) ongoing Park operations (including interference due to construction traffic or construction noise),
- (ii) access to the Parking Areas from public roads and/or the Premises,
- (iii) Lessee's rights under this Section 501 (including the location of permanent and overflow parking and the existence of a view corridor) or

(iv) the quiet enjoyment of the Premises."

Note that Cedar Fair has a right to object to proposed construction on a parking area -- and the stadium proposal is, right now, proposed construction on a parking area. Note also that the proposed stadium could materially interfere with all four of the examples given as valid grounds for objection.

Third, any proposed "replacement" parking area must meet clear contiguity requirements and a garage on the other side of Tasman meets neither the letter nor the spirit of these very specific requirements.

The City should not attempt to stretch the plain meaning of the Ground Lease in an attempt to avoid the letter and the spirit of the agreement. The 49ers have presented a very technical legal argument that twists the letter and spirit of the Ground Lease and the City Council should not accept that interpretation. The 49ers interpretation of the Ground Lease would result in lease litigation and, while the 49ers and Cedar Fair have both expressed confidence that they would prevail in such litigation, two things should be clear. First, the City would have to prevail on every single lease issue to prevail in the litigation; Cedar Fair would have to prevail only on any single issue. Second, -- the outcome of litigation is rarely predictable and anybody telling the City Council that the Council can rely on winning this litigation has an agenda.

The City has no need to endure the wild card of a lease dispute. A negotiated agreement with Cedar Fair during the next 30 days would resolve this uncertainty.

City as signatory

The City is the landlord and would be the signatory on any modification of the Ground Lease. The new Stadium Authority would be the signatory on any operating agreement with Cedar Fair. The pending agreements with Cedar Fair are the responsibility of the City, not the 49ers. The City must take charge and pursue a resolution of these issues.

The 49ers appear to have very little motivation to assist the City in resolving the issues relating to Great America. The 49ers appear to feel that they can obtain City Council approval for the stadium, City Council certification of the EIR, and public ratification of the project, all without having to deal with the issues relating to Great America.

The City has an opportunity to resolve the remaining issues and move the stadium proposal forward, but, to do that, the City must take control of this application and the resolution of these issues.

Hon. Patricia M. Mahan, Mayor
December 8, 2009
Page 6

Conclusion

The stadium proposal is an exciting possibility for the City of Santa Clara and presents substantial challenges. These challenges can best be addressed at the negotiating table and the City Council should not foreclose that possibility.

Sincerely



Geoffrey C. Etnire

GCE/mjb

cc:

Duffield Milkie
Peter J. Crage
Jennifer Sparacino
Ron Garratt
Kevin L. Riley
Rod Diridon
Karen Tiedeman
Harry O'Brien

General Counsel
CFO
City Manager
Deputy City Manager
Planning Director
City Clerk
Outside counsel
Coblentz, Patch, et al

Cedar Fair LP
Cedar Fair LP
City of Santa Clara
City of Santa Clara
City of Santa Clara
City of Santa Clara
Goldfarb & Lipman
Counsel to SF 49ers

Kimberly Green

From: Jerry Marsalli [jerrymarsalli@yahoo.com]
Sent: Tuesday, December 08, 2009 1:26 AM
To: Mayor and Council
Subject: City Council Meeting Tuesday December 4, 2009 Re: 49er Stadium Issue

City of Santa Clara
Mayor Mahan and Distinguished Council Members,

Hello,

I wish to convey my strong support of the City Staff's recommendation to the City Council to adopt the resolution of findings for the certification of the Environmental Impact Report for the Forty Niner Stadium proposal at tonight's City Council meeting.

I also want to encourage you to also support City Staff's recommendation to create the ballot measure language and all the other necessary reports to consolidate the Stadium Ballot Measure with the June 8th, 2010 primary election. The voters of Santa Clara should have the opportunity to decide and make the final decision on the stadium.

With regards to the letter sent to the City on behalf of Cedar Fair/Great America from the law firm of Hope,Fenton,Jones & Appel, I suggest the appropriate action would be to "note and file" the document and allow the City Manager and City Staff continue with their "on going" discussions with all the involved parties in this project.

I wish to thank you for your diligence, integrity, and tenacity these past two years while this project has proceeded through all the negotiations and review process. Your hard work will bring a tremendous opportunity to the City of Santa Clara and a strong economic future for our residents.

Thank you.

Happy Holidays!

Best Wishes,

Jerry Marsalli
281 Fontana Drive
Santa Clara, CA. 95051

Marsalli and Associates
P.O. Box 2844
Santa Clara, California 95055-2844
408-464-9037
jerrymarsalli@yahoo.com or jerrymarsalli@comcast.net

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12/8/2009

have received this message in error, please notify the sender by reply and delete the message/attachments immediately. (Electronic Communication Privacy Act Title 18, USC 2510-2521). Thank you.

Kimberly Green

From: Richard A. Worner [worner@sbcglobal.net]

Sent: Friday, December 04, 2009 3:50 PM

To: Mayor and Council

Subject: Flawed EIR

Mayor and Council:

A review of the EIR shows many flaws.

Please do not build a stadium with inadequate parking and public transportation.

R

COMMERCIAL MORTGAGE CAPITAL

Richard A. Worner

129 Palm Ave.

San Francisco, CA. 94118

Phone: 415-314-5833

FAX: 415-221-1501

Email: worner@sbcglobal.net or richard@cmcsf.com

WEB: www.cmcsf.com

This email and any files transmitted with it are solely intended for the use of the addressee(s) and may contain information that is confidential and privileged. If you receive this email in error, please advise us by return email immediately.

Kimberly Green

From: Zoraya Garay
Sent: Tuesday, December 08, 2009 3:09 PM
To: 'Joe Kornder'
Cc: Kimberly Green
Subject: Manial Avila

Hi Joe,

Mr. Avila called regarding elements of tonight's council meeting. He does not want the EIR accepted and he would like the 49ers stadium to be placed on the ballot. He is also concerned the IDA does not have sufficient money.

His contact number is (408) 984-5637.

Please note, this message will be part of the public record.

Zoraya Garay
Office Specialist to the City Council
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050
(408) 615-2253

Kimberly Green

From: Wordweaver21@aol.com
Sent: Saturday, December 05, 2009 9:40 AM
To: Kimberly Green
Subject: CORRESPONDENCE CONCERNING SANTA CLARA STADIUM FEIR
Attachments: RESPONSE TO KEVIN RILEY LETTER.doc

Dear Mayor Mahan and Members of the Santa Clara City Council:

Attached please find correspondence I sent to Santa Clara Planning Director, Kevin Riley, on Tuesday, December 1 2009 that expressed my concerns with responses in the Santa Clara Stadium FEIR to comments I had made in September 2009 that addressed issues in the DEIR for the stadium project. I trust that Mr. Riley has already forwarded my correspondence to you. Should questions exist, please feel free to contact me at (415) 533-2829 or by e-mail.

Sincerely,
Michael J. Antonini

2827 Franklin Street
San Francisco, CA. 94123
November 27, 2009

Kevin L. Riley, AICP
Director of Planning and Inspection
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA. 95050

Dear Mr. Riley:

Thank you for forwarding responses from the Santa Clara Stadium Final Environmental Impact Report (FEIR) to my comments relating to parts of the Santa Clara Stadium Draft Environmental Impact Report (DEIR). Despite these responses, serious concerns still exist. These concerns are noted in the text of this letter. I would ask you to forward this letter to members of the Santa Clara City Council for their consideration. Because of inaccuracies that still exist in the FEIR, I would urge city council members to delay certification of the FEIR until corrections can be made to that document.

RESPONSE FF-1: The proposed stadium site in Santa Clara is not served directly by Cal Train. The nearest ACE train station is a close one half mile from the stadium site, but the nearest Cal Train station at Lawrence is over 3 miles from the stadium site and the next nearest station at Santa Clara University is over 5 miles from the stadium site. By contrast, Candlestick Park is served by a nearby Cal Train station. Candlestick Park is less than one mile from both the Bayshore Cal Train station and from the Gilman and the Arletta Muni Metro stations of the Third Street T" line. Further, Candlestick is less than 5 miles from the Balboa Park BART station. The nearest BART station at Fremont is close to 13 miles from the Santa Clara stadium site. A Cal Train rail line already runs within a few hundred yards of a potential Hunters Point Stadium site.

While the DEIR may assume that only 19% of game day fans would arrive by public transit, it assumes that another 7% of game day fans would arrive by charter bus. This assumption is unrealistic based upon the historically low utilization of public transit or charter buses for current events in the South Bay. Even if these assumptions are allowed, it is questionable that the Santa Clara Valley Transit Authority (VTA) will ever have the capacity to transport even 19% of the projected 69,000 game day fans by bus and light rail. They have been silent on this issue, I understand.

RESPONSE OO-2: The closure of Tasman Drive, Agnew Road, and Mission College Blvd. on game days are huge impacts. Mitigation methods should be proposed.

RESPONSE OO-1: The distinction between a new or retrofitted stadium at Candlestick Point should be spelled out in the FEIR. By mentioning the need of voter approval of a new stadium but not mentioning that no changes to San Francisco Prop G are needed for a Candlestick retrofit is confusing to the reader. In fact, The Candlestick Point, Hunters Point Shipyard DEIR, released on November 12, 2009, clearly lists the retention of Candlestick Park as an alternative to the preferred option of a new 69,000 seat stadium on Hunters Point.

While no responses were made to parking concerns, it is important to note that the proposed Santa Clara stadium will occupy 14 acres of the 17 acre site. At best about 1,700 vehicles can be parked in a proposed parking structure north of Tasman Drive. The plan to lease the remaining needed 20,000 game day parking spots from nearby businesses is problematic. It should be mentioned in the FEIR that the leased parking plan, even if possible, will preclude any NFL football games on weekdays- hence no Monday or Thursday night football. This year at, Candlestick, the Forty Niners are hosting both a Monday and a Thursday night game.

Freeway access is also an issue that needs further comment. Candlestick Park is less ½ mile from US HWY 101 and one mile from IS 280. The closest freeways to the Santa Clara stadium site are CA. 237- one mile; US 101- 1.3 miles; IS 880 -3.4 miles .Additionally, the Santa Clara site lies to the southern edge of a population base of 10 million persons in which most of the San Francisco Forty Niner fans reside. One would expect significant new travel impacts, particularly in the Peninsula and parts of the East Bay as a greater percentage of fans travel further, often by car, than is currently the case with a mid bay San Francisco stadium. This concern should be addressed.

RESPONSE FF-4: There appear to be some errors and omissions in the FEIR. Corrections should be made before certification.

The San Francisco Forty Niners need a completely retrofit Candlestick or a new state of the art stadium to improve fan experience and to bring their stadium revenues in line with those of most other NFL teams. The proposed Santa Clara site is too small and too challenged environmentally, as outlined above. I don't believe many of these challenges can be mitigated. While I have served for the last 8 years as a planning commissioner on the San Francisco Planning Commission, my comments are those of a life time Bay Area resident , San Francisco Forty Niner fan and long time season ticket holder and do not represent the official position of any governmental entity.

Michael J. Antonini
Member Planning Commission
City and County of San Francisco
(415) 776-1900
(415) 533-2829

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ARNOLD SCHWARZENEGGER, Governor

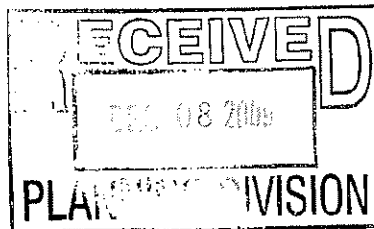
DEPARTMENT OF TRANSPORTATION

111 GRAND AVENUE
P. O. BOX 23660
OAKLAND, CA 94623-0660
PHONE (510) 622-5491
FAX (510) 286-5559
TTY 711



*Flex your power!
Be energy efficient!*

December 8, 2009



SCL237177
SCL-237-R5.83
SCH#2008082084

Mr. Jeff Schwilk
Planning Division
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Dear Mr. Schwilk:

49ers Santa Clara Stadium Project – Final Environmental Impact Report

Thank you for continuing to include the California Department of Transportation (Department) in the environmental review process for the 49ers Santa Clara Stadium Project. The following comments are based on the Final Environmental Impact Report (FEIR).

Forecasting

Response B-3 - On page 133 of the Draft Environmental Impact Report (DEIR), traffic volume for cumulative conditions were estimated by adding traffic volumes from pending developments to background plus project traffic volumes for each study period. The Department believes the "Traffic Volume for Cumulative Conditions" or the "Cumulative Growth Traffic Volumes" in the DEIR should be considered as Background plus Project Traffic Volumes. Background traffic is equal to existing traffic plus generated traffic derived from pending and approved projects under general plans or other planning documents. Background Conditions usually reflect near-term, so the 2030 regional traffic forecasting model is not used for background traffic. Typical California Environmental Quality Act (CEQA) documents in the Bay Area address cumulative traffic impacts for the long term horizon: such as year 2030, or 2035, or 20 years after construction completion, instead of short-term impacts. Since the 49ers Santa Clara Stadium will be a major traffic generator we recommend that the FEIR identify and mitigate year 2030 or 2035 traffic impacts, particularly on the near-by ramps and freeway segments of US 101 and State Route (SR) 237.

Response B-4 - The DEIR should provide turning traffic diagrams and intersection traffic analysis for the planned parking locations. If final parking locations are significantly different from the planned locations, the Transportation Management and Operations Plan (TMOP) should provide supplemental information in conjunction with the updated turning traffic at study intersections.

Mr. Jeff Schwilk /City of Santa Clara
December 8, 2009
Page 2

Highway Operations

Response B-5 - It appears that the entrance to the Golf and Tennis Club can only be accessed from Stars and Stripes Drive. On game days when eastbound Tasman Drive is closed, the only access to the Golf and Tennis Club is from westbound Tasman Drive. This is not practical for vehicles coming from west of the Golf and Tennis Club.

Response B-6 - How will the closure time of eastbound Tasman Drive be determined so as not to substantially impede the office park employees from going home?

Response B-8 - Table 19 in the DEIR should also show how many vehicles are arriving from the west and these vehicles should be included in your traffic operational analysis for the Great America Parkway/Tasman Drive and Centennial Boulevard/Tasman Drive intersections.

Response B-9 - How will the TMOP monitor the off-ramps queuing back onto the freeway? Directing vehicles to other ramps may cause these other ramps to also queue back onto the freeway. The impact to the freeway system is not adequately addressed.

Response B-10 - The CEQA requires that significant impacts be identified and mitigated where feasible. Therefore, this development should mitigate this impact or provide fair share fees towards mitigation for this impact, regardless of whether the improvement is programmed or not.

Response B-11 - If the identified mitigation is not feasible, alternative mitigation should be proposed to address this issue.

Response B-12, First bullet - Although the relevant jurisdictions have not addressed weekend conditions in adopted policy, it is crucial that the weekend traffic impacts be addressed and mitigated.

Response B-12, Second bullet - Mitigation does not always need to be capacity increasing. If adding capacity is not feasible, the City should evaluate alternatives to reduce vehicular volumes.

Response B-12, Third bullet - The traffic analysis does not show that the congestion can be adequately managed. In addition, officers at the intersections will not be able to see the impacts on the freeway.

Response B-13 - Mitigation does not always need to be capacity increasing. If the City determines that adding capacity will induce growth the City should evaluate alternatives to reduce vehicular volumes to mitigate this impact.

Response B-14 - The City may need to consider reducing parking or other additional Traffic Demand Management measures to reduce project impacts.

Response B-15 - Please explain how the traffic control center at the stadium will monitor the referenced ramps. Also, vehicles that queue back onto the freeway from these off-ramps could cause safety concerns between these queued vehicles and the fast moving freeway mainline vehicles. This safety concern validates the need to mitigate this impact.

Mr. Jeff Schwilk /City of Santa Clara
December 8, 2009
Page 3

cause safety concerns between these queued vehicles and the fast moving freeway mainline vehicles. This safety concern validates the need to mitigate this impact.

Response B-17 - This response still does not address the impacts. It just states that the impacts will only occur on two weekday nights and weekends.

Response B-18 - The Lawrence Expressway ramps (northbound and southbound) at El Camino Real are two intersections on a state facility. These intersections need to be analyzed as separate intersections per State requirements. Due to the close proximity of these two intersections, it is especially important to analyze them separately to determine if one intersection causes any impacts to the other intersection.

Should you have any questions regarding this letter, please call Yatman Kwan of my staff at (510) 622-1670.

Sincerely,



LISA CARBONI
District Branch Chief
Local Development - Intergovernmental Review

c: State Clearinghouse

Kimberly Green

From: Dominic Caserta [dominic@dominicforcalifornia.com]
Sent: Monday, December 07, 2009 11:53 AM
To: Kimberly Green
Subject: Re: call received

Kim:

Will do.

Cheers,
Dom

On Mon, Dec 7, 2009 at 11:32 AM, Kimberly Green <KGreen@santaclaraca.gov> wrote:

I received a call this morning from a person request a to speak to you. He said he was a friend and he would like to speak to you regarding the vote on the stadium and personal.

contact:
Casey Beyer
310-944-1503

...Kim

The information contained in this email may be privileged, confidential and exempt from disclosure under applicable law. The information is intended only for the use of the individual or entity to which it is addressed. If you are not the intended recipient or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, or are not the named recipient(s), please notify the sender immediately by reply email and delete this message from your computer. Thank you.

CITY OF SUNNYVALE

456 WEST OLIVE AVENUE • SUNNYVALE, CALIFORNIA 94086 • (408) 730-7480

Office of the City Manager

December 7, 2009

Jennifer Sparacino
City Manager
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

RECEIVED

DEC - 7 2009

OFFICE OF THE MAYOR
CITY OF SANTA CLARA

SUBJECT: 49ers Stadium Project
Final Environmental Impact Report

Dear Ms. Sparacino:

I would like to thank you for the opportunity to participate in the environmental review process for the proposed 49ers stadium project in the City of Santa Clara. We recognize that bringing a signature sporting and entertainment facility to the Santa Clara County will result in substantial economic benefits not only to the City of Santa Clara, but to the entire South Bay region. To ensure that the positive aspects of the project can be fully appreciated by neighboring cities, we know you share our interest in addressing and mitigating environmental and operational impacts.

To that end, the City of Santa Clara has created a collaborative working committee consisting of the mayors and city managers of Santa Clara and Sunnyvale to address the various environmental impacts of the project that are identified in the Draft Environmental Impact Report (DEIR) and any other substantive intercity issues that develop as the project moves forward. The City of Sunnyvale provided comments on the DEIR, and the Final Environmental Impact Report (FEIR) states that many of our concerns will be addressed as the project is more fully developed, including preparation of a Traffic Management and Operations Plan (TMOP). We believe that a comprehensive and effective TMOP is essential for a project of this magnitude because of its regional impacts and appreciate that a primary goal of the working committee will be to work cooperatively on preparing this plan. We expect that the TMOP will adequately address Sunnyvale's concerns related to traffic impacts on our local street system, possible overflow of parking into Sunnyvale neighborhoods, and staff and support costs for public safety and other municipal services. We also expect that the TMOP will identify sufficient funds or a source of financing to cover the necessary capital and operational expenses.

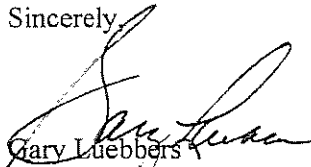
After reviewing the FEIR and the responses to our submitted comments on the DEIR, we would like to highlight several issues that need to be more fully discussed and adequately mitigated through the TMOP process:

1. The effect of traffic congestion on emergency response times to adjacent neighborhoods.

2. The FEIR states that through the TMOP and the formation of a Stadium Authority a joint powers agreement or equivalent will be enacted to identify and provide logistics and resources for management of stadium traffic and operations. We trust that the TMOP will identify the level of resources that are available from each affected jurisdiction, and develop a mechanism whereby resources will be provided to ensure public safety and safe traffic operations.
3. The intrusion of stadium parking into neighborhoods and commercial/industrial areas along the Tasman light rail line in Sunnyvale.
4. Economic and access impacts to commercial businesses on Wildwood Avenue.
5. Traffic safety impacts of controlling traffic access from Lawrence Expressway to Wildwood Avenue, Sandia Avenue, and Palamos Drive and the resulting queues from traffic backing up into high speed expressway traffic.

In conclusion, Sunnyvale understands the unique cultural and economic opportunities presented by hosting a National Football League franchise and constructing a major sports and entertainment venue. A stadium would be a cornerstone attraction for all communities in the South Bay area. We appreciate that the operational impacts on affected government agencies have been acknowledged and that the working committee will develop solutions to stage successful events with a dedicated funding source. We appreciate your commitment to address our concerns as this stadium project proceeds and look forward to participating on the working committee to resolve the many outstanding issues surrounding this project.

Sincerely,



Gary Luebbers
City Manager

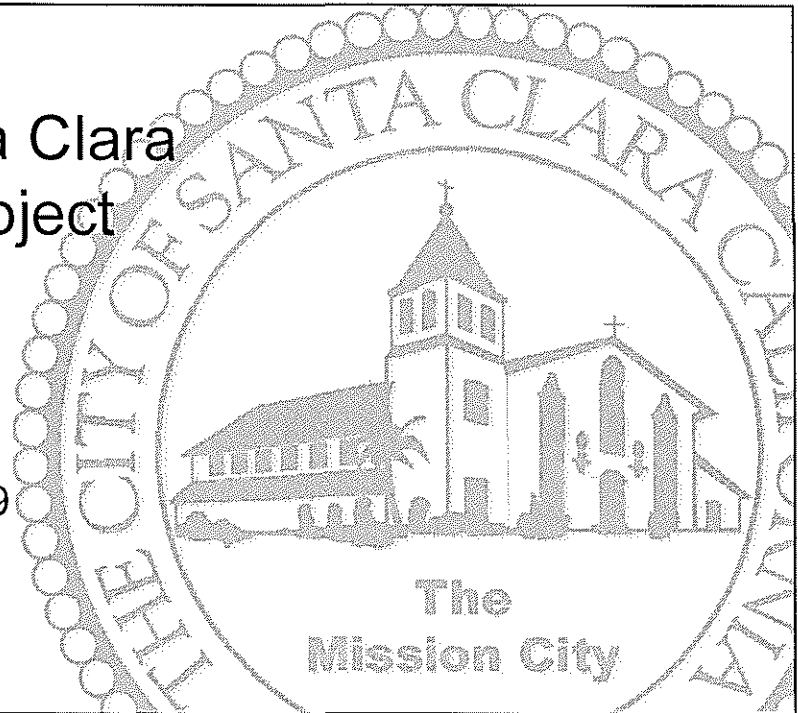
Cc: Sunnyvale City Council
Santa Clara City Council
Hanson Hom, Director of Community Development
Marvin Rose, Director of Public Works
Don Johnson, Director of Public Safety
David Kahn, City Attorney

12/8/09

5B-1

49ers Santa Clara Stadium Project EIR

City Council
December 8, 2009



California Environmental Quality Act

- ❖ **EIR Purpose:** An EIR is an informational document that:
 - Informs the agency of significant environmental effects
 - Identifies possible ways to minimize or avoid those effects
 - Describes reasonable alternatives to the project
 - Represents one category of information that decision makers will use

California Environmental Quality Act

❖ **EIR Standards:** An EIR must be found to be adequate:

- Enables decision makers to intelligently consider environmental consequences when they make project decisions
- Need not be an exhaustive evaluation, but sufficient in light of what is reasonably feasible
- Disagreement among experts does not mean an EIR is not adequate
- Objective is not perfection, but adequacy, completeness and good faith effort at disclosure

The
Mission City

California Environmental Quality Act

❖ **CEQA Process:** EIR preparation and certification is a public process:

- Presents a description of the proposed project
- Requires early consultation and notification: Scoping and NOP
- Seeks expertise and input: agencies and the general public
- Requires minimum circulation and availability for comment: minimum 45/10 day reviews
- EIR must be deemed adequate and certified prior to any action on the project

California Environmental Quality Act

❖ **Stadium EIR:** Conforms to procedural requirements of CEQA:

- Draft EIR circulated on July 30; extended to August 28, for 61-day review (min. 45)
- Public review generated 42 responses, including 13 State, regional and local agencies
- Staff met with staff from other agencies
- City has responded to comments in Final EIR and amended text of document, as necessary
- Public meetings not required, but typical of City process
- Planning Commission and City Council provided notice for public meetings to consider EIR

Project Evaluated by EIR

❖ **5 Key Components:** The EIR defines the following components:

- Design and construction of a 68,500 seat stadium
- Relocation of an existing substation
- Construction of a new shared parking structure
- Off-site parking program
- Transportation Management Plan

Project Evaluated by EIR

❖ **Implementing Actions:** The following actions rely upon the certified EIR:

(1) General Plan Amendment (2) Amendment of the Bayshore North Redevelopment Plan (3) PD rezoning of Stadium/Training Facility (4) vacation/abandonment of existing road (5) approval of tentative map (6) approval of DDA and related conveyance documents (7) creation of parking overlay zone; (8) creation of joint powers Stadium Authority (9) Parking Variance (10) Off-site parking program (11) construction of 6-story parking garage (12) relocation of electrical substation (13) creation of financing district for hotels (14) approval of binding ballot measure

Project EIR Analysis

❖ **Significant Unavoidable Impacts:** Effects not fully mitigated:

- Hazardous Materials Exposure - worst case analysis
- Transportation – Intersections during large event Peak hour
- Air Quality – Vehicle emissions during large event Peak hour
- Noise – Residential receptors during large events

Project EIR Analysis

❖ **Less Than Significant with Mitigation:** Effects reduced by mitigation:

- Water Quality - Non-point Source Runoff / Construction Runoff
- Vegetation and Wildlife - Nesting raptors
- Air Quality – Construction and Tailgating (BBQ)
- Noise – Construction
- Energy – Facilities construction and operation / transportation

Project EIR Analysis

❖ Mitigation calls for development of a **Transportation Management and Operations Plan (TMOP)** that will include other jurisdictions working with the City, the Stadium Authority and the Team in coordinating transportation activity related to significant stadium events. The TMOP contemplates coordination via three associated components:

- Policy Level Committee
- Staff Level Working Group
- JPA for Public Safety Coordination

Council Action – December 8, 2009

- ❖ Courts have determined that in order for the Council to place a binding measure on the ballot, the EIR must be completed and certified
- ❖ **Certification of the EIR:** (per Section 15090 of CEQA Guidelines)
In order to find the EIR is adequate, the Council must find, per the prepared Resolution:
 - That the FEIR has been completed in compliance with CEQA, the State CEQA Guidelines, and the City of Santa Clara Local Environmental Review Procedures
 - That the FEIR was presented to the City Council, which reviewed and considered the information and analysis contained therein before certifying the FEIR, and
 - That the FEIR reflects the City's independent judgment and analysis on the potential for environmental effects of the Project.

Council Action – December 15, 2009, and beyond

- ❖ **In order to carry out or approve a project** (per Section 15091 of CEQA Guidelines), and if the EIR has been certified, the Council must make written findings that address:
 - That changes have been made in the project or mitigation required to lessen significant impacts (e.g., conditions of approval)
 - That certain mitigations may not be within the jurisdiction of the lead agency
 - That specific economic, legal, social, technological or other overriding considerations make certain mitigations or alternatives infeasible
 - That these findings are supported by substantial evidence in the record, and
 - That the agency shall adopt a Mitigation Monitoring or Reporting Program (MMRP) to track implementation of mitigation measures

12/8/09

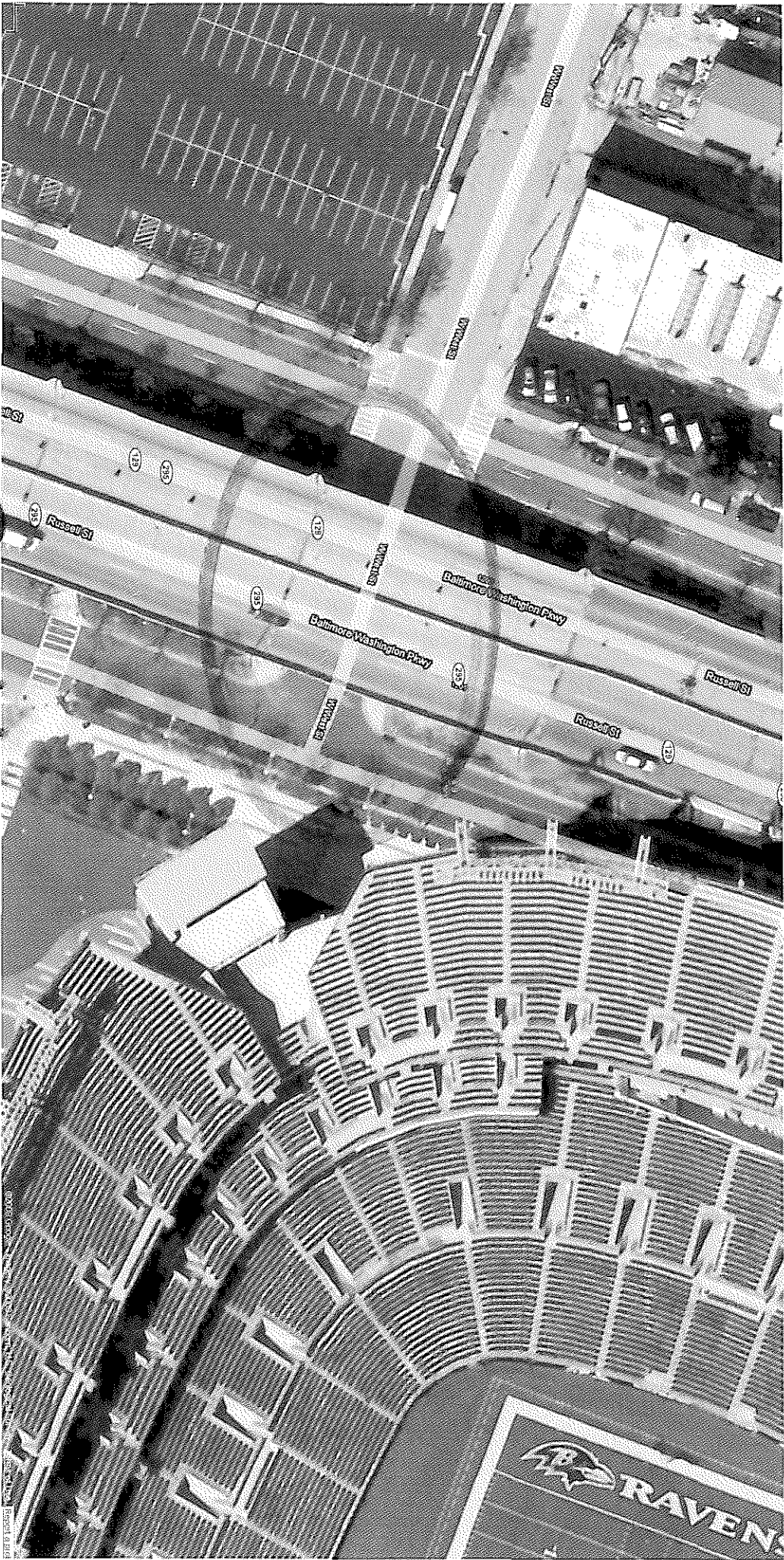
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Oakland



Baltimore



Super Dome



Houston

Reliant Stadium

Westridge

Westridge

Alamo Energy
Industrials

Accredo
Therapeutics

Hobby Rd

Concentra

0831

Westridge

Kirby Dr

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Shupe

Vascular
Access Center

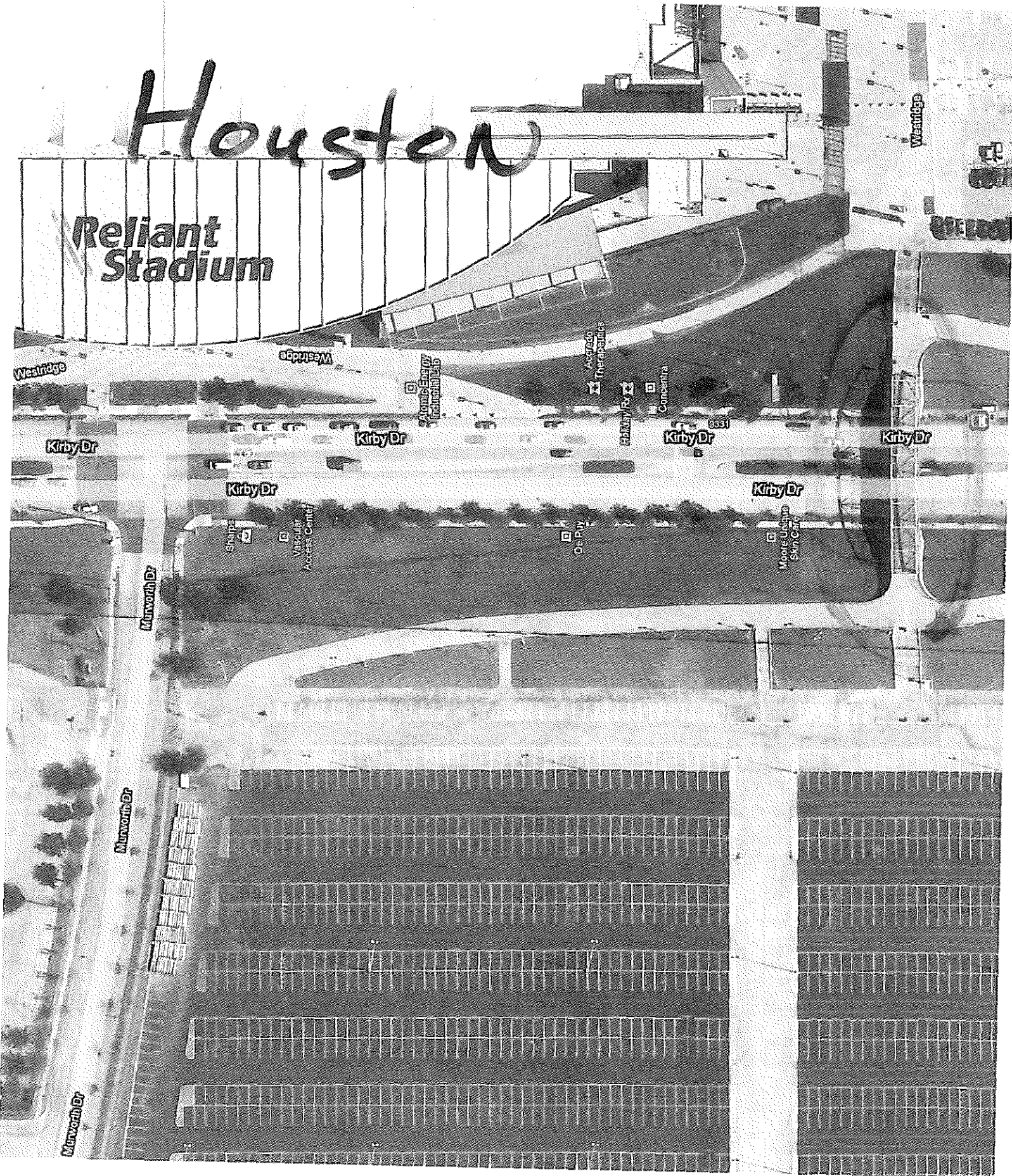
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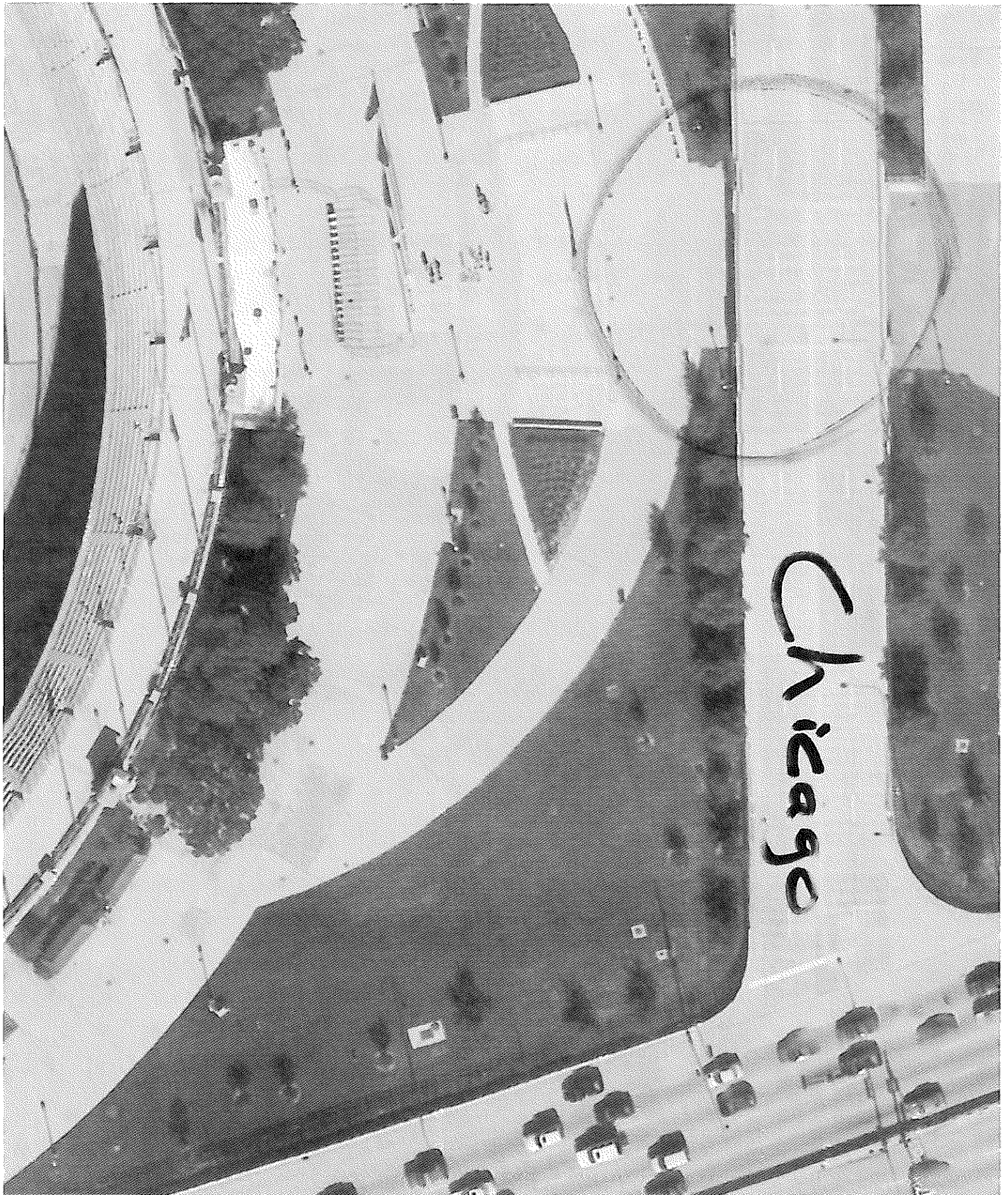
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Skin Care

Murdoch Dr

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Chicago

Cinn. Stadium



Great America

Stadium

Pedestrian
Bridge

Hetch-Hetchy
Trail

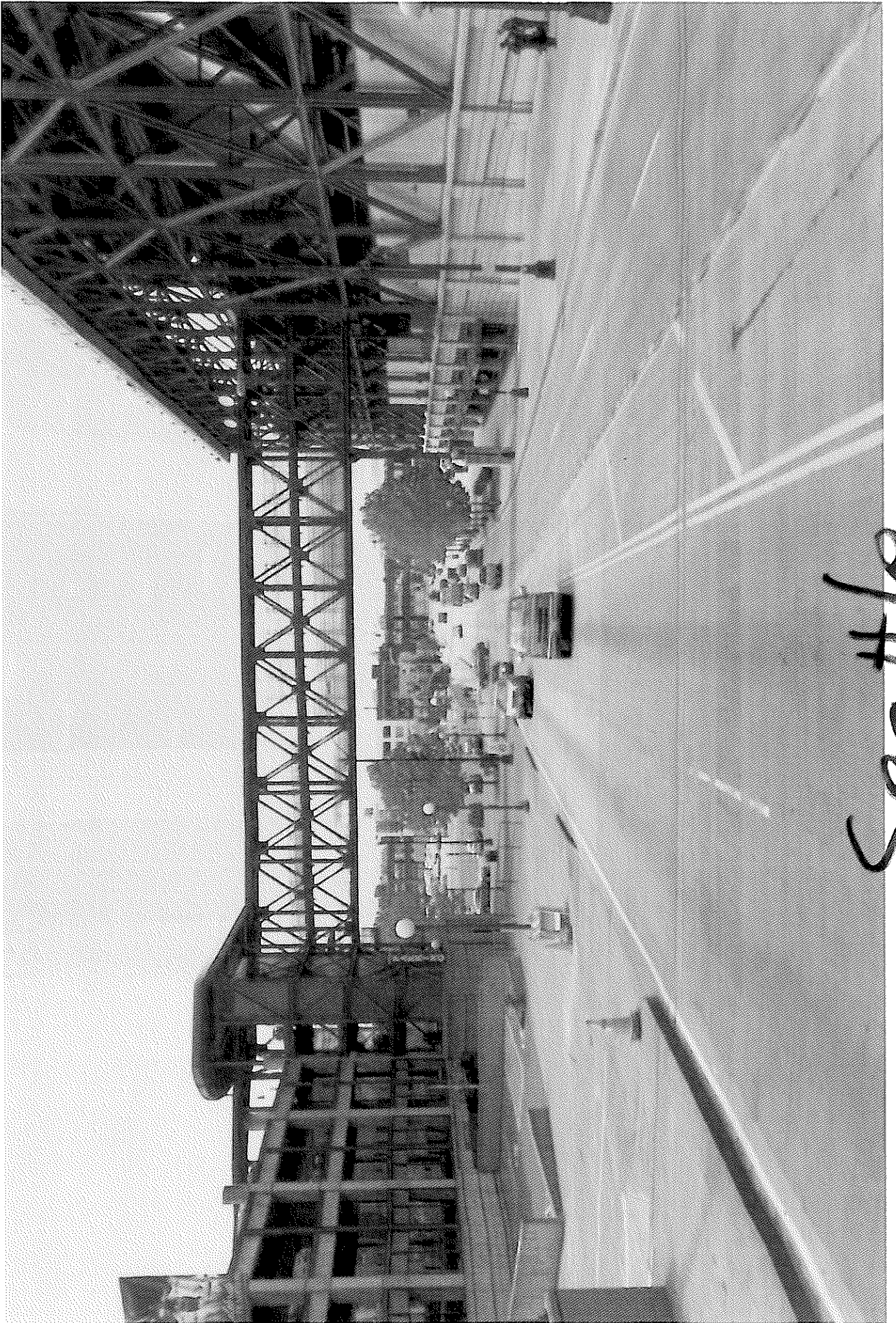
Tasman



© 2005 Google

Location wrong for stadium here, as in original mercenary news release label.

Seattle



12/8/09

5B-1

The EIR is Inconclusive

- Mary Emerson
- 20 year Santa Clara resident
- 8 December 2009

Santa Clara commissioners review final report on environmental impact of 49ers stadium proposal

By Howard
hmintz@me
Posted: 11/1
Updated: 11/1

Negative impacts

The staff report identified several unavoidable impacts in a "worst case scenario " such as a

The report does leave a number of questions unanswered, notably in the public transportation and parking areas, ***which city officials concede will remain speculative*** until the true measure of an NFL game on the Silicon Valley city can be evaluated in the future.

Meeting Date: 06/02/09

AGENDA REPORT

Agenda Item # 3A

Santa Clara



City of Santa Clara, California



Date: May 29, 2009

To: City Manager/Executive Director for City Council/Redevelopment Agency Action

From: Assistant City Manager/Assistant Executive Director

Subject: Joint Council and Redevelopment Agency "Committee of the Whole" Special Meeting to Consider a Proposed Term Sheet Between the City of Santa Clara/Redevelopment Agency and the San Francisco 49ers for the Construction and Operation of an NFL Stadium

Public safety costs attributable to NFL games, including an amortization charge for capital equipment dedicated to the stadium, will be included in reimbursable expenses to the City *up to a maximum annual amount*

Economics

City General Fund Considerations

\$NPVs 2008-09

	One Team	Two Teams
MAX. General Fund Potential – No Stadium		
Cooperation Agreement repayment from TI	\$67 M	\$67 M
General Fund Property tax – if no SB 211	\$8 M	\$8 M
City land for stadium site	\$23 M	\$23 M
Total	\$98 M	\$98 M
General Fund Return After Investment with Stadium	\$31 M	\$67 M
Net Loss to the General Fund	\$67 M	

Conclusions

- What we don't know:
 - Unknown impact from traffic and associated risks to safety & quality of life
- What we do know:
 - SF 49ers will impose a limit on spending for public safety – without knowing extent of risks
 - Net loss of \$67 Million to General Fund

Vote NO!!

12/8/09

5B-1

Santa Clara Plays Fair

www.SantaClaraPlaysFair.org

P.O Box 6244 Santa Clara, CA 95056-6244

Madame Mayor, Santa Clara City Councilmembers and City Staff, thank you & good evening. I'm Bill Bailey and I have lived in Santa Clara for 20 years. I'm the Treasurer of Santa Clara Plays Fair<dot>org. All of us are volunteers.

Candlestick Point:	82 acres.
County Fairgrounds:	152 acres.
Hunters Point:	493 acres.
<u>Santa Clara:</u>	<u>17 acres.</u>

Putting a 14-acre stadium on a 17-acre site is exactly why this Environmental Impact Report is uncertifiable. It's 4,400 pages state explicitly that **the San Francisco 49ers will NOT be mitigating any of the damage done by their publicly-subsidized stadium.**

First, gridlocked traffic. NFL and other events will reduce 17 intersections north of U.S. 101 to a near standstill. The 49ers' "solution"? **Drop 160 police officers in the middle of that mess.** And pray.

Second, road closures. The very idea of closing Tasman Drive and Agnew Road - *for a football game* - proves that the stadium site is not viable. **No roads are closed at Candlestick today, and none will be closed at Hunters Point.** Road closures here should not be tolerated by residents and businesses north of U.S. 101.

Third, inflated mass-transit figures. It defies common sense to claim a 26% figure here, while **Candlestick today achieves only 18%.**

Fourth, pushing 19,000 cars onto private lands. This EIR actually calls for businesses in a parking district to clear their own parking lots at 3:00 pm on workdays just for 49ers fans. **It's simply wrong to victimize businesses that contribute far more to our city than the 49ers will.**

Paying \$114,000,000 in public subsidies for a project this flawed is bad business for Santa Clarans. Please: Do not certify this highly faulty EIR.

Thank You.

“First...” :

“The project does not, therefore, propose to implement any of the **physical improvements** described below.”

[Emphasis mine.]

-- FINAL EIR, Page 168

-- Draft EIR, Page 204

“...Santa Clara Police Chief Stephen Lodge says his department's force of 147 officers won't be adequate on game days, with more than 68,000 people descending on a city of 114,000.

Lodge estimates he'll need at least 160 officers on game days and has proposed creating a pool of available officers from nearby agencies that he can draw from...”

-- <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/05/19/MNC917A01A.DTL>

-- **The 160-officer count was clearly and publicly stated in City Council Session.**

“Second...” :

Closure of Tasman Drive and Agnew Road, plus police checkpoint/entry control points along Lafayette Street, Agnew, Lawrence, Great America and North First Street:

-- Draft EIR, Page 186, Figure 61

“Third...” :

ALL mass transit utilization percentages INCLUDE Charter Buses. This is an “apples-to-apples” comparison.

“Fourth...” :

“Although the Traffic Management Plan assumes that the office parking lots to be used by the stadium **will be vacated prior to 3:00pm on a weekday game day, ...**”

[Emphasis mine.]

-- Draft EIR, Page 178

12/8/09

5B-1

12/8/09

Mayor and City Council

Comments on Certification of 49er FEIR

If this graphic that appeared in the SJ Mercury on Monday, December 7, 2009, is correct when it shows "July 2010: City Council considers approval of key elements of stadium project, including zoning, parking and public safety issues," then the FEIR cannot be certified tonight.

Let me speak to the consequences of not requiring all EIR elements being finalized before the FEIR is certified. If all elements are not finalized before the FEIR is certified, the City of Santa Clara could and probably would end up with a disastrous, long term problem as it has with the replacement Kaiser Hospital project at Homestead and Lawrence.

The FEIR in March 1995 stated that 4 entrance/exits were required. As recently as June of this year, 2009, the City of Sunnyvale and Kaiser Hospital have been "negotiating " over allowing a left turn out of the Kaiser campus onto westbound Homestead. As of now they have agreed to a two year "trial" of allowing left turns at this signaled intersection.

You may ask why is she talking about Kaiser's problems, well, it is because all problems involving the Kaiser project are the responsibility of the City of Santa Clara-the Lead Agency.

Also, at the Kaiser site, Forge Dr. has continued to be considered a viable entrance/exit option; it is not. On 4/2/09, in preparation for a City of Sunnyvale public outreach meeting considering allowing left turns from Kaiser onto westbound Homestead Rd. I made two inquiries as to the status of Forge Dr., located in Cupertino, CA.

I first contacted:

Assessor's Office - Mapping & Title Identification [408]299-5550

I spoke with Pauline Coleman and was told that as of 1/1/09 [the Assessor's Office last data update] Forge Dr. was not a dedicated street. Ms. Coleman suggested that I check with City of Cupertino [where Forge Dr. is located] to see if the status has changed since 1/1/09.

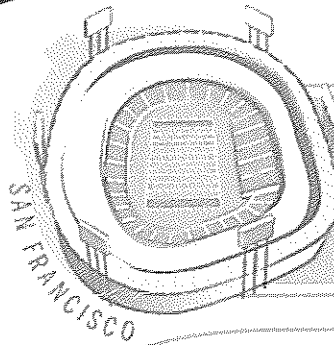
My second contact on 4/2/09:

City of Cupertino - Public Works

I spoke with Heather Phillips from Planning who relayed a message from David Stillman that Cupertino currently does not want to make Forge Dr. a public street because of the costs involved.

Problems that cannot be solved now will continue to be problems in the future that cannot be solved and will have disastrous results.

Nancy Lang



THE GAME SO FAR

Passing go
November 2006: 49ers break off negotiations with San Francisco for a new stadium at Candlestick Point and announce plans to build a stadium near Great America theme park in Santa Clara.

Advancing the ball
January 2007: Santa Clara City Council agrees to conduct a six-month feasibility study on a stadium.

An extra yard
May 2007: 49ers officials assure the city that the team will cover any operating losses from a stadium.

First trip to the red zone
January 2008: City Council votes to enter into formal negotiations with the 49ers on a proposed stadium deal.

Penalty flag
October 2007: First signs of stress between 49ers and Cedar Fair Entertainment, owners of Great America, as park owners indicate a willingness to entertain offers to sell the park to the team.

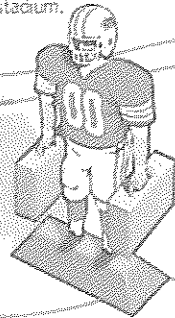
First down
June 2007: Santa Clara consultant releases a report finding that the stadium project could be a success for the Great America parking lot site, although it contains many caveats.

Punt
May 2008: 49ers chat with Brisbane as a fallback option for a stadium if Santa Clara deal collapses.

Checking the waiver wire
June 2008: San Francisco voters approve a massive Hunters Point development project that envisions a football stadium.

Back in the red zone
May 2009: Santa Clara and 49ers reach terms of deal that call for the city to provide a package of \$114 million in public money, including a tax on city hotel guests, in exchange for team assurances it will be responsible for any shortfalls in operating budgets and construction overruns on the \$937 million stadium.

Upon further review
July 2009: City releases draft environmental impact report (EIR) on proposed stadium that includes worries about parking, traffic and other factors on game days, but city officials say no "deal breakers" are in the report.



First down
November 2009: City Planning Commission approves EIR, moving it to City Council for a vote and the chance to put the stadium issue on the ballot.

Sack -- first lawsuit alert
September 2009: Cedar Fair starts banging the drum louder, threatening legal action if its concerns aren't addressed.

PLAYBOOK TO MOVE FORWARD

Crucial play
Tuesday: City Council votes on EIR and whether to put stadium on the ballot in June.

End run
January 2010: City Council votes on establishing special district to tax guests in the city's eight hotels for stadium project.

Fighting for yardage
February-March 2010: Planning Commission and City Council hold hearings on proposed changes to the city general plan to allow various elements of the project to proceed.

Fourth and one
June 2010: Likely date of city-wide election on stadium ballot measure.

Wild cards

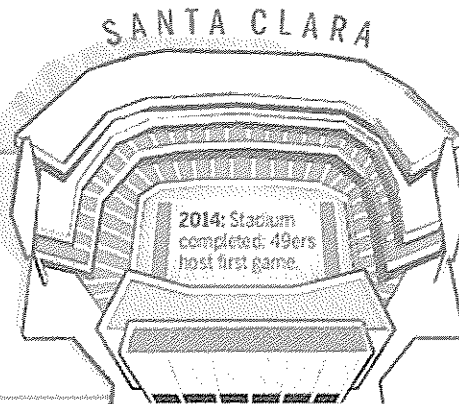
- ▣ Lawsuits from Cedar Fair, owners of Great America.
- ▣ Lawsuits from stadium opposition groups and local residents.
- ▣ The Oakland Raiders agreeing to play in the new stadium as well.

GAME OVER
 If voters reject ballot measure
 If voters approve measure
PLAYOFFS

Fourth quarter
June 2010: City Council moves to establish Stadium Authority to run stadium.

Tough yardage
July 2010: City Council considers approval of key elements of stadium project, including zoning, parking and public safety issues.

2012: Break ground



12/8/09

5B-1

Saturday, December 05, 2009

RE: comments on final EIR and future public vote; per the agenda of the Tues. Dec. 8 meeting of City Council

To members of City Council, Santa Clara, Ca.

I am a homeowner living near Tasman and Lafayette, and own a small business on Lafayette.

These comments were originally sent via email to Jeff Schwilk, but I did not receive any confirmation they were received or that these comments would be communicated to the council. My comments were sent via email because I received notification of the Dec. 8 meeting via email at 2:15 PM on Thursday, Dec. 3, leaving insufficient time to write up comments, mail them via regular mail and have the planning office receive them by the end of the week, as required by the notification. I feel strongly that the city should notify citizens early enough to provide adequate time in advance for them to submit comments properly. Additionally, there was no email address to respond to in the notification. I had to call the office and be transferred to several different people to get an address to send to. It circumvents public comment to a degree by giving inadequate notification like this, particularly for concerned citizens who cannot attend the meeting in person. I strongly urge city offices to give citizens adequate notice in the future.

At the planning commission meeting where the commission recommended approval of the EIR, the commission noted that there was no plan associated with the EIR, and that it was highly unusual for the commission to consider an EIR without a plan.

Because of the conspicuous absence of any plan, I am very concerned about several things:

1. Just what is the actual stadium plan, in detail, that this EIR is supposed to apply to?
2. Do the assumptions in the EIR adequately reflect that plan?
3. If the actual plan deviates significantly from the assumptions in the EIR, will the EIR be declared invalid and/or will the EIR be properly revisited and revised with real data, this time based on assumptions from the actual plan?
4. Will the public be allowed to review and comment on a revised EIR, the same as the initial EIR?

If the answers to #2 through #4 are "No", then I think there are notable public-deception problems afoot with this project, particularly if the EIR that underwent such public scrutiny is not the one that correctly applies to the final project plan. It seems like the 49ers are pulling some kind of stunt by not submitting documents in an orderly manner. I think the public, particularly living in the shadow of the site, has a right to know exactly what the actual stadium plan is before any EIR or other approvals. How was it even possible for a legitimate and accurate EIR to have been created without a specific detailed plan to follow in the first place? Because of this, already there is an appearance of impropriety in the stadium project.

Additionally, because of the lack of a formal, comprehensive plan, I am very concerned about what it is the public will be voting on. It would be impossible for an informed public to properly determine whether to vote in support or otherwise without a detailed project plan stating exactly what they are voting for. In the "term sheet" under section 1.3 "Effect of Term Sheet" it says, "This Term Sheet is intended to provide a general framework for the subsequent negotiation of definitive agreements . . . and is not intended to create any binding contractual obligations on any Party or to commit any Party to a particular course of action." So basically the term sheet is merely a basis for negotiation and has no binding legal value with regards to any project. It does not adequately address every aspect of the project in sufficient detail for the public to make an informed decision on a project of this scale, and has no binding legal effect even if it did. Spending hundreds of thousands of dollars to have the public vote on a non-binding "term sheet" instead of an actual project plan, would be a nonsensical waste of money, resources and everyone's time, to say the least. The public should be voting on the actual, comprehensive, detailed plan for the stadium, and nothing less.

The more irregularities like this are observed during the process, the more reasons there are to not support the stadium, and the more reason to be suspicious of proponents and those involved in the stadium project. As such, I would urge the council and planning commission in the strongest possible terms to insist on a formal, comprehensive, detailed plan as soon as possible, and disseminate the complete plan to the citizens of Santa Clara before any public vote or further council approvals related to the proposed 49er stadium project.

I would like my comments to be considered at the council meeting of Dec. 8 and to be part of public record. Please let me know if there is anything more I need to do to accomplish this.

I look forward to hearing your responses.

Thank you,

Kevin Brown
2216 Calle De Primavera,
Santa Clara, CA 95054

12/8/09



HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

To City Clerk

SB-1

Could you provide
copies to Council
for tonight's meeting?
Thank you

Sean A. Cottle
408.947.2404
sac@hogefenton.com

Jennifer
12/8/09

December 7, 2009

By U.S. Mail

Ron Diridon, Jr.
Secretary for the Redevelopment Agency
Redevelopment Agency of the City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Notice of Intent to Commence an Action by Filing a CEQA Petition for Writ of Mandate

Dear Mr. Diridon and the members of the Redevelopment Agency of the City of Santa Clara:

PLEASE TAKE NOTICE that pursuant to Public Resource Code Section 21167.5, Cedar Fair L.P. intends to commence an action by filing a Petition for Writ of Mandate under the provisions of the California Environmental Quality Act against the City of Santa Clara and the Redevelopment Agency of the City of Santa Clara challenging the failure to certify an environmental impact report or adopt a negative declaration and to make associated findings prior to the approval of the Term Sheet by and among the City of Santa Clara, the Redevelopment Agency of the City of Santa Clara, and Forty Niners Stadium, LLC on June 9, 2009.

Thank you for your anticipated cooperation in this matter.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.

JAH: jah

1 SEAN A. COTTLE – SBN 146229
2 JOHN A. HICKEY – SBN 219471
3 HOGE, FENTON, JONES & APPEL, INC.
4 Sixty South Market Street, Suite 1400
5 San Jose, California 95113-2396
6 Phone: (408) 287-9501
7 Fax: (408) 287-2583
8 Attorneys for Petitioner
9 Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2:58

David H. Yamamoto, Clerk of the Superior Court
County of Santa Clara, California

By: J. Cao-Nguyen
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 CEDAR FAIR L.P.,
11 Petitioner,
12 vs.
13 CITY OF SANTA CLARA;
14 REDEVELOPMENT AGENCY OF
15 THE CITY OF SANTA CLARA; AND
16 DOES 1 THROUGH 25,
17 Respondents,
18 and
19 FORTY NINERS STADIUM, LLC,
20 AND DOES 26 THROUGH 50,
21 Real Parties in Interest,

No. 109CV158836
VERIFIED PETITION FOR WRIT OF
MANDATE
(California Environmental Quality Act, Pub.
Res. Code § 21000 et seq.; Code of Civ.
Proc. §§ 1085 and 1094.5)

22 Petitioner, CEDAR FAIR L.P., alleges as follows:

23 **PREFATORY STATEMENT**

24 1. By this petition, Petitioner, CEDAR FAIR L.P. ("Cedar Fair"), seeks a
25 peremptory writ of mandate vacating approval by the City of Santa Clara ("City") and the
26 Redevelopment Agency of the City of Santa Clara ("Agency") of a Term Sheet ("Term
27 Sheet") by and among the City, the Agency, and Forty Niners Stadium, LLC ("49ers"), an
28 affiliate of the San Francisco 49ers NFL franchise. The Term Sheet sets forth the basic

1 terms of a transaction to develop a stadium in Santa Clara that would be the home field of
2 the San Francisco 49ers.

3 2. The California Environmental Quality Act ("CEQA") requires the City, as lead
4 agency for the stadium project, to prepare and certify an environmental impact report
5 ("EIR") before approving the project. When the City and the Agency approved the Term
6 Sheet in June 2009, the City and the Agency violated CEQA, because the City and the
7 Agency approved the Project without first certifying an EIR.

8 3. In approving the Term Sheet, the City and Agency increased the political
9 stakes by publicly defending the stadium project over objections, put the City's and the
10 Agency's official weight behind the project, committed to devoting substantial public
11 resources to the project, and announced a detailed agreement with the 49ers to go forward
12 with the project, creating a circumstance whereby the City and the Agency will not be
13 easily deterred from taking whatever steps remain toward the project's final approval.

14 4. Consequently, although the City has subsequently prepared an EIR for the
15 stadium project, that EIR still fails to meet the City's obligations under CEQA. As the
16 California Supreme Court has recognized, when a city reaches a binding, detailed
17 agreement with a private developer and publicly commits resources and governmental
18 prestige to that project, the city's reservation of CEQA review until a later, final approval
19 stage is unlikely to convince public observers that the agency fully considered the project's
20 environmental consequences.

21 THE PARTIES

22 5. Petitioner, CEDAR FAIR L.P., is a master limited partnership organized under
23 the laws of the State of Delaware, headquartered in Sandusky, Ohio. Cedar Fair is the
24 owner and operator of the California Great America amusement park ("Great America")
25 located in Santa Clara, California.

26 6. Respondent, CITY OF SANTA CLARA, is a local governmental entity duly
27 constituted under the constitution and laws of the State of California. The City approved
28

1 the Term Sheet through its City Council acting in the capacity as the legislative body of the
2 City.

3 7. Respondent, REDEVELOPMENT AGENCY OF THE CITY OF SANTA
4 CLARA, is a governmental entity duly constituted under the constitution and laws of the
5 State of California. The Agency approved the Term Sheet through the City Council acting
6 in the capacity as the legislative body of the Agency.

7 8. Cedar Fair is informed and believes that Real Party in Interest, FORTY
8 NINERS STADIUM, LLC, is a limited liability company organized under the laws of the
9 State of Delaware, with its principal place of business in California. 49ers is a party to the
10 Term Sheet and is the applicant for land use approvals for the development of a National
11 Football League stadium ("Project").

12 9. Cedar Fair does not know the true names or capacities of those Respondents
13 and Real Parties in Interest sued herein as DOES 1 through 50. Cedar Fair is informed
14 and believes and thereon alleges that said Respondents and Real Parties in Interest are in
15 some manner responsible for the adoption of, imposition of, or administration of those
16 laws, ordinances, and regulations of which Petitioner complains herein. Cedar Fair will
17 amend this Petition to set forth the true names and capacities of the fictitiously named
18 Respondents and Real Parties in Interest when such information has been ascertained.

19 STATEMENT OF FACTS

20 **A. The Project**

21 10. The National Football League ("NFL") granted the San Francisco 49ers a
22 franchise in 1950 and the team's home stadium has been Candlestick Park Stadium in San
23 Francisco since 1971. The 49ers decided to pursue the development of a new stadium at
24 the Project site near the team's existing training facility in the City of Santa Clara.

25 11. The Project would be located on multiple legal parcels that are not directly
26 contiguous, but that are located in the area bounded by U.S. Highway 101, State Route
27 237, Lawrence Expressway, and the Guadalupe River in the City of Santa Clara. The
28 Project site comprises at least four separate legal parcels, including a proposed parking

1 garage site, an existing electrical substation, a proposed stadium site, and a proposed site
2 for the relocation of the electrical substation. In addition, numerous public and privately
3 owned properties have been identified for possible use as existing parking lots.

4 12. The proposed stadium has a footprint of approximately 14 acres and the
5 49ers propose to locate the stadium on a 17-acre parcel that is subject to a long-term lease
6 between the Agency (as landlord) and Cedar Fair (as tenant). Cedar Fair has three 10-
7 year options remaining on the lease and currently uses this parcel site to provide parking
8 for visitors to Great America and for special events.

9 **B. Project Approval—Approval of the Term Sheet**

10 13. According to a May 29, 2009, Santa Clara City Council agenda report, the
11 49ers presented a proposal to the City of Santa Clara in April 2007 to locate an NFL
12 stadium in the City's Bayshore North Redevelopment Area, in proximity to Great America.
13 From April 2007 through June 2009, City staff and the 49ers engaged in intensive
14 negotiations on the approval of the Project.

15 14. According to the May 29, 2009, City Council agenda report, the stadium
16 would be developed and owned by a separate public agency to be formed by the City of
17 Santa Clara and the City's Redevelopment Agency. The stadium would be leased to the
18 49ers for playing their home games during the NFL pre-season, regular season and post-
19 season, and for possible sub-leasing to a second NFL team. In addition to NFL games, the
20 stadium would be used for other events and purposes, including uses in support of
21 adjacent Santa Clara Convention Center activities and major activities such as concerts
22 and other sporting events.

23 15. According to the May 29, 2009, City Council agenda report, the proposed
24 stadium would have permanent seating capacity for up to 68,500 seats and would be
25 designed to expand to approximately 75,000 seats for special events, such as a Super
26 Bowl game. The stadium structure would have a height of 175 feet, reaching a maximum
27 height of 200 feet at the top of the light standards. In order to accommodate the stadium
28

1 as proposed, Centennial Boulevard south of Tasman Drive would be abandoned and the
2 roadway removed except for a restricted travel lane.

3 16. According to the May 29, 2009, City Council agenda report, from December
4 2007 through May 2009, City staff and representatives of the 49ers negotiated the Term
5 Sheet, which serves as "an outline of the stadium deal structure, addressing major issues
6 of this proposed public/private partnership, including the governance structure, financing
7 plan, construction cost responsibilities, budget development for stadium operations, ground
8 rent payments, treatment of stadium revenue, and a number of other key issues that
9 comprise the core of the proposed Project."

10 17. According to the May 29, 2009, City Council agenda report: "The intent of the
11 Term Sheet is to document respective *commitments and obligations* of the involved
12 parties: the City of Santa Clara, its Redevelopment Agency, and the San Francisco 49ers.
13 Terms negotiated in this document serve as the basis to inform the Santa Clara community
14 in preparation for a City-wide ballot measure. Additionally, the Term Sheet serves as an
15 outline in continuing negotiations between the 49ers and the City in *defining and*
16 *documenting all aspects of a proposed long-term lease agreement.*" (Emphasis added.)

17 18. On June 2, 2009, the City held a City Council and Redevelopment Agency
18 "Committee of the Whole" special meeting to consider the Term Sheet.

19 19. On June 2, 2009, The City Council, acting in its capacity as the legislative
20 body of the City, voted to approve the Term Sheet. The City's approval of the Term Sheet
21 became final when the City Council declined to reconsider the action at its next regular
22 meeting on June 9, 2009.

23 20. On June 2, 2009, the City Council, acting in its capacity as the legislative
24 body of the Agency, voted to approve the Term Sheet. The Agency's approval of the Term
25 Sheet became final when the City Council declined to reconsider the action at its next
26 regular meeting on June 9, 2009.

27 21. Neither the City nor the Agency took any action to certify an environmental
28 impact report, adopt a negative declaration, or make other findings pursuant to Public

1 Resources Code §§ 21080 or 21081 before the City and the Agency approved the Term
2 Sheet.

3 22. No Notice of Determination or Notice of Exemption was filed for the Project
4 by the City or by the Agency pursuant to Public Resources Code §§ 21108 or 21152.

5 23. Following the approval of the Term Sheet on June 9, 2009, City staff and the
6 49ers continued to negotiate and develop the various documents that will eventually define
7 all aspects of the Project, the end result of which will be a Disposition and Development
8 Agreement ("DDA"), along with a Ground Lease and Stadium Lease.

9 **C. Respondents Have Foreclosed Meaningful Consideration of the Project,**
10 **Its Significant Environmental Impacts, and Alternatives to the Project**

11 24. Notwithstanding the fact that the Term Sheet included language about future
12 environmental review and compliance with CEQA, the City and the Agency effectively
13 precluded meaningful consideration of the Project, its environmental impacts, and
14 alternatives to the Project.

15 25. Statements made by members of the City Council and officers and
16 representatives of the City and the Agency on and after June 2, 2009, show that the City
17 and the Agency, by adopting the Term Sheet, (a) effectively circumscribed and limited their
18 discretion with respect to environmental review and (b) devoted significant public resources
19 to shaping the Project and encouraged bureaucratic and financial momentum to build
20 irresistibly behind it.

21 26. Public statements by Santa Clara City Council members, Santa Clara City
22 Manager Jennifer Sparacino, attorneys for the City, and other City staff members, as
23 recorded on video and included in the official records of the City Council, demonstrate that
24 the City and the Agency regard the Term Sheet as a binding agreement committing the
25 City and the Agency to the Project.

26 27. The City's responses to comments on the Draft EIR further demonstrate that
27 the City views the Term Sheet as binding and will not allow the scope and terms of the
28 Project to deviate from the Term Sheet. In response to the Draft EIR prepared by the City,

1 Cedar Fair, the City of Cupertino, the City of Sunnyvale, the State Department of
2 Transportation, the County of Santa Clara, the Santa Clara Valley Transportation Authority,
3 and others identified feasible mitigation measures or alternatives to the Project that would
4 lessen or avoid the Project's significant environmental impacts. Some of these mitigation
5 measures and project alternatives would conflict with the Term Sheet but are otherwise
6 feasible. However, the Final EIR prepared by the City does not adopt or recommend any
7 mitigation measures or project alternatives that would conflict with the Term Sheet.

8 **STANDING AND INADEQUATE REMEDIES AT LAW**

9 28. The City of Santa Clara is lead agency responsible under the CEQA for
10 evaluating the environmental impacts of the Project.

11 29. The City issued a Notice of Preparation for the Project on August 15, 2008,
12 and a revised Notice of Preparation on February 23, 2009, acknowledging that the Project
13 could have a significant impact on the environment.

14 30. Cedar Fair, other agencies, interested groups, and individuals made oral and
15 written comments on the Draft EIR and raised each of the legal deficiencies asserted in
16 this petition.

17 31. Cedar Fair performed all conditions precedent to filing this action by
18 complying with the requirements of Public Resources Code § 21167.5 by serving a written
19 notice of commencement of this action on Respondents and by filing a proof of service of
20 the written notice of commencement of this action concurrently with this petition.

21 32. Cedar Fair complied with Public Resources Code § 21167.6 by concurrently
22 filing a notice that Petitioner elects to prepare the record of proceedings, subject to
23 certification of its accuracy by Respondents.

24 33. Cedar Fair will have complied with Public Resources Code § 21167.7 by
25 timely serving an endorsed filed copy of this petition on the Attorney General of the State of
26 California.

27 34. Respondents' actions in approving the Term Sheet without having certified
28 an EIR or adopting findings required by Public Resources Code § 21081 constitute a

1 prejudicial abuse of discretion in that Respondents failed to proceed in the manner
2 required by law and their decision is not supported by substantial evidence.

3 35. Respondents failed to prepare, circulate for public comment, or certify an EIR
4 for the Project prior to approving the Term Sheet.

5 36. Respondents foreclosed meaningful evaluation of the Project, its significant
6 environmental impacts, and alternatives to the Project by approving the Term Sheet before
7 preparing, circulating for public comment, or certifying an EIR for the Project.

8 37. Cedar Fair has no plain, speedy, or adequate remedy in the ordinary course
9 of law unless the Court grants the requested writ of mandate to require Respondents to set
10 aside their approval of the Term Sheet and the actions of the City in preparing and
11 considering for certification an EIR for the Project. In the absence of such relief,
12 Respondent's approvals will remain in effect in violation of State law.

13 38. Cedar Fair has a substantial beneficial interest in ensuring that the City
14 discharges its public duties in compliance with State law. Cedar Fair has standing to
15 assert the claims raised in this Petition because their aesthetic and environmental interests
16 are uniquely, directly, and adversely affected by the City's approval of the Project.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of CEQA—Failure to Certify EIR before Project Approval)**

19 39. Petitioner incorporates by reference the allegations of paragraphs 1 through
20 38 of this pleading as though set forth fully in this paragraph.

21 40. Section 21100, subdivision (a), of CEQA states: "All lead agencies shall
22 prepare, or cause to be prepared by contract, and certify the completion of, an
23 environmental impact report on any project which they propose to carry out or approve that
24 may have a significant effect on the environment." Similarly, section 21151(a) of CEQA
25 states that "local agencies shall prepare, or cause to be prepared by contract, and certify
26 the completion of, an environmental impact report on any project that they intend to carry
27 out or approve which may have a significant effect on the environment."
28

1 41. Before conducting CEQA review, agencies must not take any action that
2 significantly furthers a project "in a manner that forecloses alternatives or mitigation
3 measures that would ordinarily be part of CEQA review of that public project." Cal. Code
4 Regs., tit. 14, § 15004, subd. (b)(2)(B).

5 42. The CEQA Guidelines define "approval" as "the decision by a public agency
6 which commits the agency to a definite course of action in regard to a project." (Cal. Code
7 Regs., tit. 14, § 15352, subd. (a).) *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th
8 116, 130.

9 43. Section 15352, subdivision (b) of the CEQA Guidelines (Cal. Code Regs., tit.
10 14, § 15352, subd. (b)) further defines approval of a private project as follows: "With
11 private projects, approval occurs upon the earliest commitment to issue or the issuance by
12 the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial
13 assistance, lease, permit, license, certificate, or other entitlement for use of the project."

14 44. To determine when an agency's favoring of and assistance to a project ripens
15 into a commitment, the line must be drawn neither so early that the burden of
16 environmental review impedes the exploration and formulation of potentially meritorious
17 projects, nor so late that such review loses its power to influence key public decisions
18 about those projects. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116,130-31.

19 45. The California Supreme Court has recognized that postponing environmental
20 analysis can permit bureaucratic and financial momentum to build irresistibly behind a
21 proposed project, thus providing a strong incentive to ignore environmental concerns.
22 *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 135.

23 46. The California Supreme Court has further recognized that a public entity, by
24 executing a detailed and definite agreement with the private developer and by lending its
25 political and financial assistance to the project, may have as a practical matter committed
26 itself to the project, notwithstanding words that reserve rights to reject the proposed project
27 or acknowledge that the project is subject to subsequent review under CEQA. When an
28 agency has not only expressed its inclination to favor a project, but has increased the

1 political stakes by publicly defending it over objections, putting its official weight behind it,
2 devoting substantial public resources to it, and announcing a detailed agreement to go
3 forward with the project, the agency will not be easily deterred from taking whatever steps
4 remain toward the project's final approval. *Save Tara v. City of West Hollywood* (2008) 45
5 Cal. 4th 116, 135.

6 47. Besides informing the agency decision makers themselves, an EIR is
7 intended "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed
8 and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles*
9 (1974) 13 Cal.3d 68, 86.) When an agency reaches a binding, detailed agreement with a
10 private developer and publicly commits resources and governmental prestige to that
11 project, the agency's reservation of CEQA review until a later, final approval stage is
12 unlikely to convince public observers that before committing itself to the project the agency
13 fully considered the project's environmental consequences. Rather than being a
14 "document of accountability", the EIR may appear, under these circumstances, a document
15 of *post hoc rationalization*. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th
16 116, 136.

17 48. To determine whether an agency has approved a project by entering into an
18 agreement with a private developer, courts should look not only to the terms of the
19 agreement but to the surrounding circumstances to determine whether, as a practical
20 matter, the agency has committed itself to the project as a whole or to any particular
21 features, so as to effectively preclude any alternatives or mitigation measures that CEQA
22 would otherwise require to be considered, including the alternative of not going forward
23 with the project. *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 139.

24 49. The analysis should consider whether, in taking the challenged action, the
25 agency indicated that it would perform environmental review before it makes any further
26 commitment to the project, and if so, whether the agency *has nevertheless effectively*
27 *circumscribed or limited its discretion with respect to that environmental review*. Second,
28 the analysis should consider the extent to which the record shows that the agency or its

1 staff have committed significant resources to shaping the project. If, as a practical matter,
2 the agency has foreclosed any meaningful options to going forward with the project, then
3 for purposes of CEQA the agency has 'approved' the project. *Save Tara v. City of West*
4 *Hollywood* (2008) 45 Cal. 4th 116, 139.

5 50. By voting to approve the Term Sheet on June 9, 2009, and as demonstrated
6 by actions and statements since June 9, 2009, Respondents committed themselves to a
7 definite course of action with respect to the Project. Notwithstanding Respondents'
8 subsequent attempts to provide an ad hoc rationalization for the Project by preparing an
9 EIR, Respondents have effectively precluded any alternatives or mitigation measures to
10 the Project that CEQA would otherwise require to be considered— including the alternative
11 of not going forward with the Project—and have effectively circumscribed or limited their
12 discretion with respect to the environmental review.

13 **PRAYER**

14 WHEREFORE, Petitioner requests judgment as follows:

15 1. For a peremptory writ of mandate ordering:

- 16 (a) Respondent to vacate and set aside its approval of the Term Sheet.
17 (b) Respondent and Real Party in Interest to suspend all activity under the
18 approval of the Term Sheet that could result in any change or alteration in the
19 physical environment.
20 (c) Respondent to suspend all consideration and certification of the EIR
21 that Respondent or its consultants have prepared for the Project.
22 (d) Respondent to prepare, circulate, and consider a new and legally
23 adequate EIR and otherwise to comply with CEQA in any subsequent action
24 taken to approve the Project.

25 2. For its costs of suit.

26 3. For an award of attorney fees.

27 ///

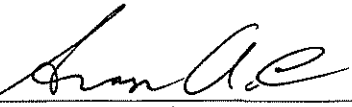
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4. For other equitable or legal relief that the Court considers just and proper.

DATED: December 7, 2009

HOGUE, FENTON, JONES & APPEL, INC.

By 

Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.

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VERIFICATION

I, Duffield E. Milkie, on behalf of Cedar Fair, L.P., under penalty of perjury under the laws of the State of California, declare as follows:

1. That I am the Vice-President and General Counsel of Cedar Fair, L.P.
2. That Cedar Fair, L.P., is the Petitioner in the above-entitled action;
3. That I have read the foregoing Verified Petition for Writ of Mandate and know

the contents thereof; and that I am informed and believe and thereon declare that the matters stated therein are true.

Executed on the 7th day of December, 2009, at Sandusky, Ohio.


Duffield E. Milkie

1 SEAN A. COTTLE – SBN 146229
2 JOHN A. HICKEY – SBN 219471
3 HOGE, FENTON, JONES & APPEL, INC.
4 Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583

5 Attorneys for Petitioner
6 Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2:58

David H. Yamamoto, Clerk of the Superior Court
County of Santa Clara, California

By: _____
David H. Yamamoto

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 CEDAR FAIR L.P.,
11 Petitioner,
12 vs.
13 CITY OF SANTA CLARA;
14 REDEVELOPMENT AGENCY OF THE
CITY OF SANTA CLARA; AND DOES
1 THROUGH 25,
15 Respondents,
16 and
17 FORTY NINERS STADIUM, LLC, AND
18 DOES 26 THROUGH 50,
19 Real Parties in Interest,
20

No. 109CV158836

PROOF OF SERVICE OF NOTICE OF
INTENT TO COMMENCE ACTION AGAINST
THE REDEVELOPMENT AGENCY OF THE
CITY OF SANTA CLARA

21 **PROOF OF SERVICE BY MAIL**

22 I, the undersigned, say:


23 I am now and at all times herein mentioned have been over the age of 18 years,
24 employed in Santa Clara County, California, and not a party to the within action or
25 cause; that my business address is 60 South Market Street, San Jose, California
26 95113-2396. I am readily familiar with the firm's business practice for collection and
27 processing of correspondence for mailing with the United States Postal Service. I
28

1 served copies of the attached **NOTICE OF INTENT TO COMMENCE AN ACTION BY**
2 **FILING A CEQA PETITION FOR WRIT OF MANDATE** by placing said copies in
3 envelopes addressed to:

4 Ron Diridon, Jr.
5 Secretary for the Redevelopment Agency
6 Redevelopment Agency of the City of Santa Clara
7 1500 Warburton Ave.
8 Santa Clara, CA 95050

9 which envelopes were then sealed and, with postage fully prepaid thereon, were on
10 12/7/2009 deposited with the United States Postal Service at San Jose, California on
11 the above-referenced date in the ordinary course of business; and there is delivery
12 service by United States mail at the place so addressed.

13 I declare under penalty of perjury under the laws of the State of California that
14 the foregoing is true and correct and that this Declaration was executed on 12/7/2009,
15 at San Jose, California.

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17 M'Liss Jarvis Bounds

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1 SEAN A. COTTLE – SBN 146229
2 JOHN A. HICKEY – SBN 219471
3 HOGE, FENTON, JONES & APPEL, INC.
4 Sixty South Market Street, Suite 1400
5 San Jose, California 95113-2396
6 Phone: (408) 287-9501
7 Fax: (408) 287-2583

8 Attorneys for Petitioner
9 Cedar Fair L.P.

ENDORSED
FILED

2009 DEC -7 P 2: 58

David H. Yamazaki, Clerk of the Superior Court
County of Santa Clara, California

By: _____
Deputy Clerk

Geo-Notary

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 CEDAR FAIR L.P.,

13 Petitioner,

14 vs.

15 CITY OF SANTA CLARA;
16 REDEVELOPMENT AGENCY OF THE
17 CITY OF SANTA CLARA; AND DOES
18 1 THROUGH 25,

19 Respondents,

20 and

21 FORTY NINERS STADIUM, LLC, AND
22 DOES 26 THROUGH 50,

23 Real Parties in Interest,

No. 109CV158836

PETITIONER'S NOTICE OF ELECTION TO
PREPARE ADMINISTRATIVE RECORD

24 Petitioner hereby gives notice of its election to prepare the record of proceedings
25 herein in accordance with Public Resources Code section 21167.6(b)(2).

26 DATED: December 7, 2009

HOGE, FENTON, JONES & APPEL, INC.

27 By: 

28 Sean A. Cottle
John A. Hickey
Attorneys for Cedar Fair L.P.

12/8/09

5B-1

----- Forwarded Message -----

From: djbre@comcast.net

To: planningcommission@santaclaraca.gov

Sent: Tuesday, November 24, 2009 5:01:52 PM GMT -08:00 US/Canada Pacific

Subject: Fwd: CORRECTION: Please reconsider Stadium Decision of 18 November

Correction: This decision was made on Wednesday, 18 November.

----- Forwarded Message -----

From: djbre@comcast.net

To: PlanningCommission@santaclaraca.gov

Sent: Monday, November 23, 2009 11:37:17 PM GMT -08:00 US/Canada Pacific

Subject: Please reconsider Stadium Decision of 16 November

Dear Planning Commissioners:

I respectfully request that you set aside (rescind) your approval of the FEIR for the 49er Santa Clara Stadium Project and re-open the public hearings and more fully evaluate the FEIR. Below is a brief list of some of the reasons to substantiate my request:

1. All of the Planning Commission's discussions revolved around that you were approving the FEIR and not a project.
 1. According to both the DEIR and FEIR ... there is NO indication that the above is true.
 2. Every indication is that this is indeed a "project" as outlined in DEIR beginning on Page 1
2. Because of #1 above. The entire project AND the FEIR need to be re-examined for completeness and compliance.
 1. A detailed Transportation Plan needs to be included ... as this FEIR relies on a document that does not yet exist
 - a. Traffic is a significant issue and "the TMOP will be completed for the opening of the stadium" is an unacceptable and inadequate response for a FEIR.
 - b. All issues relative to mitigating this issue must be included in this FEIR.
 2. Significant and effected travel routes and interchanges are missing
 3. Parking plan not included, FEIR relies on a document that does not yet exist
 - a. Parking is a significant issue and having it completed "prior to opening day of the stadium for the first year" is an unacceptable and an inadequate response.

- b. All issues relative to mitigating this issue must be included.
3. Mitigations are not impartial and information provided is incomplete, inaccurate, contradicting and unsubstantiated.
4. Appendices not available for public review at hearing
5. Potential stadium usage not adequately evaluated through DEIR or FEIR.

Please rescind your "approval" of this FEIR ... Everyone on the Commission said several times, this FEIR has too many shortcomings and should not be given a recommendation of "approve" to the City Council. Given all the details that you requested to be included with your approval ... the net-net is that this FEIR is NOT ready to pass to the Council for consideration with your stamp of approval, it is woefully incomplete and you should not have certified its completeness.

If you need any additional information or have any questions, please feel free to contact me anytime. Please advise if I need to attend the next meeting of the Planning Commission or if this document is sufficient to request this reconsideration.

Thank you in advance.

Sincerely,
Deborah Bress