

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • Fax: (415) 352-3606 • www.bcdc.ca.gov

October 1, 2009

TO: All Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
Adrienne Klein, Chief of Enforcement (415/352-3609 adriennek@bcdc.ca.gov)
Tim Eichenberg, Chief Counsel (415/352-3655 time@bcdc.ca.gov)

SUBJECT: Recommended Enforcement Decision Regarding Proposed Stipulated Civil Penalty Order No. CCD 2-09, JMA Waterfront Properties, LLC
(For Commission consideration on October 15, 2009)

Summary and Recommendations

BCDC staff commenced an enforcement action against JMA Waterfront Properties (the respondent or JMA) on May 28, 2008, 15 weeks after the respondent was first notified of three violations of BCDC Permit No. 4-05 at the Epic Roasthouse and Waterbar Restaurants at 369 and 399 The Embarcadero, in the City and County of San Francisco. The violations included: (1) the failure to install certain public access improvements required by Special Condition II-B-5; (2) the failure to submit and receive staff approval of a legal instrument to guarantee public access prior to construction required by Special Condition II-B-2; and (3) the failure to submit a Notice of Completion and Compliance and obtain a Certificate of Occupancy and Use required by Special Condition II-D prior to occupancy and use. JMA accrued a total fine of \$16,800 under BCDC's standardized fine regulations for the failure to correct the three violations within the time period required. JMA subsequently appealed the fine to the Executive Director. On January 13, 2009, Executive Director Will Travis and Commission Chair Sean Randolph waived the fines for Violations One and Three, and assessed a fine of \$6,700 for Violation Two, the failure to submit and receive the staff approval of a legal instrument to guarantee public access prior to construction. On February 17, 2009, JMA declined to pay the standardized fine of \$6,700 and requested a formal enforcement hearing before the Enforcement Committee.

JMA is no longer eligible for a standardized fine under BCDC's regulations, and is now subject to additional civil penalties of \$10 - \$2,000 per day, up to \$30,000, for the failure to pay penalties under Section 66641.5(e) of the McAteer-Petris Act. Staff sent JMA a Violation Report and a Statement of Defense Form on May 15, 2009, notifying JMA that an administrative penalty of \$15,600 was being recommended to the Enforcement Committee for failure to pay the standardized fine. JMA responded to the Violation Report and submitted a Statement of Defense Form on July 31, 2009.



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BCDC staff initiated this Civil Penalty Order and recommended to the Enforcement Committee that an administrative penalty of \$13,200 be applied in lieu of the standardized fine under Section 66641.9(a) of the McAteer-Petris Act, which calls for additional penalties due to costs to the State in pursuing enforcement actions. The recommended fine was based upon the number of days (132 days) from the date that JMA was notified of the permit violation by an enforcement letter (May 28, 2008) until it was nearly resolved at an accrual rate of \$100 per day, to reflect the costs to the State to pursue this violation that would have been avoided had JMA paid its original and reduced standardized fine of \$6,700. The staff recommended that the fines for Violations One and Three be waived for the reasons stated in the January 2, 2009 staff recommendation to Mr. Travis and Mr. Randolph.

The Enforcement Committee voted to modify the staff recommendation and impose a civil penalty of \$15,000 to be disbursed as follows: (1) JMA spend approximately \$6,000 to purchase and install approximately four tables and 16 chairs for public use at the site and that these improvements must be installed within four months of Commission action on the order and consistent with the requirements of a forthcoming permit amendment; (2) JMA pay a civil penalty of \$9,000 over a period of five months beginning five months after Commission action on the order; and (3) \$2,000 of this penalty would be stayed for full compliance with the terms of the order. JMA has since stipulated to these terms.

Attached to this memorandum are the following documents: (1) the Committee's Recommended Enforcement Decision (Attachment One); (2) the proposed Stipulated Civil Penalty Order (Attachment Two); and (3) the signed Stipulation Form (Attachment Three).

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ATTACHMENT ONE – Enforcement Committee Recommendation

TO: All Commissioners and Alternates
FROM: BCDC Enforcement Committee)
SUBJECT: **Enforcement Decision Regarding Proposed Stipulated Civil Penalty Order No. CCD 2-09; JMA Waterfront Properties, LLC**
(For Commission consideration on October 15, 2009)

Enforcement Committee Recommendations

The Enforcement Committee recommends that the Commission adopt this enforcement decision and issue proposed stipulated Civil Penalty Order No. CCD 2-09 (the proposed order) to JMA Waterfront Properties, LLC (the respondent or JMA). The proposed order would require the respondent to pay a \$15,000 penalty for the failure to pay the standardized fine for a now resolved violation of a permit condition that requires the respondent to permanently guarantee the public access area by completing a legal instrument, also known as a CC&R document. Up to \$6,000 of this penalty may be used to purchase and install public access furniture at the site and \$2,000 may be stayed for compliance with the terms of the order.

Enforcement Decision

I. Background

On November 30, 2005, BCDC issued permit No. 4-05 to JMA and the Port of San Francisco (the Port) authorizing the construction of two, two-story restaurants, the installation of 3,400 square feet of private, outdoor dining and the installation of 3,490 square feet of public access.

On February 4, 2008, BCDC enforcement officer Nina Bacey reviewed the permit file for compliance and notified JMA Project Manager Cammy Willing that a public access guarantee (a CC&R document) had not been submitted prior to the commencement of grading or construction, as required by Special Condition II-B-2 of the permit. On February 8, 2008, BCDC staff (the staff) met with Ms. Willing and Joe Nootbaar, Principal with JMA, at the project site. The staff observed that both restaurants were open for business and that the public access pathways had been installed, but other required public access improvements were not installed. The staff informed Ms. Willing that certain public access improvements had to be installed prior to the use of either restaurant and that staff approval of plans for those improvements was required prior to installation. The staff also informed Ms. Willing that the permit required the public access area to be guaranteed with a CC&R document prior to the



commencement of any grading or construction and that a draft CC&R document had not yet been submitted.

On May 28, 2008, due to JMA's failure to yet correct the violations, Ms. Bacey sent an enforcement letter to Ms. Willing informing her of the outstanding permit violations, the process for resolving the violations, and the civil penalties that may accrue under BCDC's standardized fine regulation (14 CCR §11386(e)(3)). The enforcement letter allowed 35 days to resolve the violations without accruing a fine, noted the rate at which the fines would thereafter accrue, and noted the following three permit violations:

- a. Failure to install certain public access improvements prior to the use of either restaurant as required by Special Condition II-B-5.
- b. Failure to submit and receive staff approval of a CC&R to guarantee public access prior to commencement of grading or construction as required by Special Condition II-B-2.
- c. Failure to submit a Notice of Completion and Compliance and obtain a Certificate of Occupancy and Use prior to the use of either restaurant as required by Special Condition II-D.

The staff continued to work with Ms. Willing from May 28 until October 31, 2008, when the last permit violation was corrected. During this period, JMA accrued a total standardized fine of \$16,800 to resolve its three violations under BCDC regulations (14 CCR §11386(e)(3)). Mr. Nootbaar subsequently appealed the amount of the fine to the Executive Director and Commission Chair. On January 12, 2009, Ms. Bacey submitted to Executive Director Will Travis and Commission Chair Sean Randolph her recommendation that the staff waive the \$1,000 fine for Violation One (the failure to install the public access tables, chairs and signs), and the \$6,700 fine for Violation Three (the failure to submit the Notice of Completion and Declaration of Compliance within 30 days of Occupancy of either restaurant). However, she recommended that the staff assess a fine of \$6,700 for Violation Two (the failure to submit and receive the staff approval of a CC&R document to guarantee public access prior to the commencement of grading or construction). The staff recommended that the penalty clock be stopped on October 7, 2008, when the second and much improved draft CC&R document was submitted, 132 days after the respondent was notified of the violation in the enforcement letter, rather than October 31, 2008, when the CC&R document was finally approved, reducing the total fine from \$9,100 to \$6,700. On January 13, 2009, Mr. Travis and Mr. Randolph concurred with the staff recommendation and approved the reduced fine amount of \$6,700. On January 27, 2009, Ms. Bacey sent a letter to Mr. Nootbaar informing him of the reduction of the fine. On February 17, 2009, Mr. Nootbaar requested a formal enforcement hearing before the Enforcement Committee.

JMA has refused to pay the standardized fine of \$6,700 and, therefore, is no longer eligible to resolve the penalty portion of the violation using the standardized fines (14 CCR §11386(e)(3)). JMA is now subject to civil penalties of \$10 - \$2,000 per day up to \$30,000 per violation under Section 66641.5(e) of the McAteer-Petris Act.

Staff sent JMA a Violation Report and a Statement of Defense Form on May 15, 2009, notifying JMA that for failure to pay the standardized fine an administrative penalty of \$15,600 was being recommended to the Enforcement Committee. JMA responded to the Violation Report and submitted a Statement of Defense Form on July 31, 2009 stating that it believed the fine was too high and not reasonable given JMA's mitigating factors outlined in Sections IV and VI below.

During a meeting on September 8, 2009, initiated at Mr. Chapman's request, Mr. Chapman reiterated JMA's mitigating factors as outlined in its Statement of Defense and stated that JMA would be willing to install public access improvements onsite in lieu of a civil penalty. In

response, the staff stated that it preferred to resolve the matter and offered to reduce the penalty from \$15,600 - \$13,200.

The staff Bay Development and Design Analyst believed there was limited opportunity to install additional public furniture at the site and recommended the installation of four tables with chairs at grade and below the elevated patio where the existing public access furniture is currently available to provide additional public benefit at the site. He estimated that the cost to purchase this furniture would be about \$6,000.

At the public hearing on September 24, 2009, the staff recommended that the Enforcement Committee impose an administrative penalty of \$13,200 in lieu of the standardized fine for Violation Two (the failure to submit and receive the staff approval of a CC&R document to guarantee public access prior to the commencement of grading or construction). Section 66641.9(a) of the McAteer-Petris Act calls for additional penalties due to costs to the State in pursuing enforcement actions, among other factors. BCDC staff expended numerous hours to pursue resolution of this violation and based the recommended fine on the number of days between the time that JMA was notified of the permit violation in the May 28, 2008 enforcement letter until it was nearly resolved on October 7, 2008 (132 days), at an accrual rate of \$100 per day. The staff continued to recommend that the fines for Violation One and Three be waived for the reasons stated in the January 2, 2009 recommendation to Mr. Travis and Mr. Randolph.

The Enforcement Committee voted to modify the staff recommendation and impose a civil penalty of \$15,000 to be disbursed as follows: (1) JMA spend approximately \$6,000 to purchase and install approximately four tables and 16 chairs for public use at the site and that these improvements must be installed within four months of Commission action on the order and consistent with the requirements of a forthcoming permit amendment; (2) JMA pay a civil penalty of \$9,000 over a period of five months beginning five months after Commission action on the order; and (3) \$2,000 of this penalty would be stayed for full compliance with the terms of the order. JMA has since stipulated to these terms.

II. Essential Staff Allegations

A. Civil penalties are justified because JMA failed to fully resolve its violation by paying a standardized fine pursuant to BCDC's enforcement regulations for failing to complete a CC&R document to guarantee the public access area prior to the commencement of grading or construction as required by Special Condition II-B-2 of the permit.

B. JMA was first made aware of the BCDC permit violation on February 4, 2008, and was given numerous opportunities to correct the violations without accruing a civil penalty. However, it took JMA 156 days to complete the draft legal instrument during which time a standardized fine of \$9,100 accrued. This fine was subsequently reduced to \$6,700 and remains outstanding.

C. Special Condition II-B-2 of BCDC Permit No. 4-05, Public Access, Permanent Guarantee, states:

“Prior to the commencement of any grading or construction activity, the permittee(s) shall, by instrument or instruments acceptable to counsel for the Commission, dedicate to a public agency or otherwise permanently guarantee such rights for the public to the 3,490-square-foot public access areas(s) in a manner consistent with Special Condition II-B-1. The instrument(s) shall create rights in favor of the public that shall commence no later than after completion of construction of any public access improvements required by this authorization and prior to the use of the two structures authorized herein. Such instrument shall be in a form that meets recordation requirements of San Francisco County and shall include a legal description of the property being restricted and a map that clearly shows the

shoreline

(the

mean high tide line), the property being restricted for public access, *the legal description of the property and of the area being restricted for public access*, and other appropriate landmarks and topographic features of the site, such as the location and elevation of the top of bank of any levees, any significant elevation changes, and the location of the nearest public street and adjacent public access areas. Approval or disapproval of the instrument shall occur within 30 days after submittal for approval and shall be based on the following:

- (a) Sufficiency of the instrument to create legally enforceable rights and duties to provide the public access area required by this authorization;
- (b) Inclusion of an exhibit to the instrument that clearly shows the area to be reserved with a legally sufficient description of the boundaries of such area; and
- (c) Sufficiency of the instrument to create legal rights in favor of the public for public access that will run with the land and be binding on any subsequent purchasers, licensees, and users” (emphasis added).

D. Attached to the email that Ms. Bacey sent to Ms. Willing on February 4, 2008, were a draft CC&R document form and instructions for completing the form. Section 3 of the instructions states in most relevant part: “Attach to the agreement: (c) A legal description and corresponding map of the area that will be restricted for public access, open space, or view corridor use; label this Exhibit C. It is often necessary to retain a surveyor to prepare this legal description and map. You must provide the surveyor with a copy of your permit, including the permit exhibit that depicts the areas that are required to be restricted.”

E. Attached to the email that Ms. Willing sent to Ms. Bacey on June 27, 2008, was a copy of the first submittal of JMA’s draft CC&R document. As noted above, both the permit condition and the instructions for completing the form require Exhibit C to the CC&R to be a legal description and metes and bounds map of the area required to be dedicated as public access. However, on June 27, 2008, JMA instead provided a copy of Exhibit B of the permit, which is not a legal description of the area that is required to be dedicated as public access. The permit exhibit is meant to be used by the surveyor to conduct the survey to generate the legal description of the area required to be dedicated as public access and cannot suffice to fulfill the requirements of Special Condition II-B of the permit.

III. Facts or Allegations Admitted or Not Contested by the Respondent

The allegations admitted by JMA are as follows:

A. JMA admits to not paying the civil penalties that accrued for three violations to Special Conditions II-B-5, II-B-2, and II-D of BCDC Permit No. 4-05, listed in Section 2 of the Violation Report.

B. JMA also admits to items 6a, 6b, 6c, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 6q, 6r, 6s, 6t, 6w, 6x, 6y, 6z, 6aa, 6bb, 6cc, 6dd, 6ee, 6ff, and 6gg, as referenced in Section 6 of the Violation Report.

C. JMA admits to other facts and allegations in Sections 1, 3, 4, 7, and 9 of the Violation Report.

IV. Facts or Allegations Denied by the Respondent

The allegations denied by JMA are as follows:

A. JMA contends that their mailing address is not correct in section 1 and 4 of the Violation Report. **Staff Response:** BCDC has corrected this in the permit file.

B. JMA contends they complied in a timely manner with the requirements of BCDC Permit 4-05 listed in Section 2 of the Violation Report. **Staff Response:** BCDC contends that JMA did not gain staff approval of a CC&R document until October 31, 2008, at which point a fine of \$9,100 had accrued, pursuant to the provisions of BCDC's enforcement regulation as outlined in Ms. Bacey's letter to JMA dated May 28, 2008. Also see Essential Staff Allegations C, D and E above.

C. JMA contends that they initially requested an inspection of the site by BCDC staff and the preparation of a Notice of Completion form on December 17, 2007, not February 4, 2008 as stated in section 5 of the Violation Report. **Staff Response:** BCDC agrees that the initial request for an inspection was made on December 17, 2007, and the site was not inspected until February 8, 2008. However, the date of the initial request is not relevant to this enforcement action because it does not affect the time JMA took to correct the violations during which it incurred a fine. The staff did not initiate an enforcement action when it inspected the site on February 8, 2008. It was not until May 28, 2008, 15 weeks later, that an enforcement letter was issued, allowing JMA 35 more days to correct the violations prior to the commencement of a penalty clock.

D. JMA denies certain facts and allegations in section 6 of the Violation Report related to the purchase of chairs (6c); the placement of placards for the tabletops (6m); and the approval of signs (6n). **Staff Response:** Staff alleges that these facts and allegations are not relevant to this enforcement action, which concerns only the failure to secure approval of the CC&R guaranteeing public access required in Special Condition II-B-2.

E. JMA contends that, contrary to section 6u of the Violation Report, a legal description was included as Exhibit A, B and C with the initial draft of the CC&R submitted to BCDC staff, and that Ms. Willing was not informed in an email from Ms. Bacey that the staff could not approve the instrument without the required materials. **Staff Response:** BCDC contends that on June 27, 2008, JMA did not submit any legal description of the public access area nor a map that described the precise land measurements affected by the access restrictions as required by the permit and outlined in the instructions for completing the form, among other deficiencies in the submittal. The staff responded to Ms. Willing's submittal five days later in a letter, dated July 2, 2008, that outlined the insufficiencies of the draft CC&R document, most significantly that the proposed Exhibit C to the legal instrument was not sufficient and that it should be replaced with the required legal description and survey map of the public access area. At that time JMA had not yet contracted a surveyor to survey the public access area. BCDC also contends that Ms. Willing was informed on numerous occasions by staff that the final approval of the CC&R document could not be given without the required materials. Ms. Willing was informed of the permit requirement and provided with a copy of the CC&R template form and instructions for completing it by email on February 4, 2008, and in numerous subsequent emails and verbal communications.

F. JMA contends that the information included in the July 2, 2008 letter referred to in Section 6v of the Violation Report is different than what is written under Section 6v. **Staff Response:** BCDC contends that the July 2, 2008 letter clearly notifies JMA that it needs to submit a legal description and map that describes the precise land measurements affected by the permit's access restrictions. Specifically, Nick Dreher, Legal Intern, states in most relevant part "6. Please submit a legal description of the public access and visual access subject to the restrictions under 'Exhibit C.' The current map does not describe the precise land measurements affected by the access restrictions. The map must contain numerical measurements consistent with all provisions of Special Condition II-b, such as the 30-foot-wide visual access described in II-B-4 and the 20-foot walkway described in Special Condition II-B-5.

Additionally, the map should be surveyed with stamped, approval like the map in 'Exhibit A.' Lastly, for readability, please enlarge this map while staying within the 8.5 x 11 inch dimensions."

G. JMA contends that language noted in Section 7, Paragraph 4 of the Violation Report concerning the requirements of Special Condition II-B-2 of the permit appears to have differences in the wording than the Condition in the permit. They also contend that the individual with personal knowledge and direct experience with this matter, Mr. Nootbaar, is no longer with JMA. **Staff Response:** BCDC contends that the statement in Section 7 paragraph 4 is a correct description of Special Condition II-B-2. Although the wording had been summarized for the Violation Report, the summary has no affect on the requirements of Special Condition II-B cited above in Section C of the Essential Staff Allegations. It is also irrelevant that Mr. Nootbaar is no longer with JMA because Ms. Willing was made aware of the permit requirements on February 4, 2008, she was the contact at JMA who worked with BCDC staff to correct all of the violations, and she was given ample time to submit the documents prior to the commencement of a penalty clock.

H. JMA contends that in Section 7, Paragraph 5 of the Violation Report, all the public access area improvements were installed on June 30th, within 35 days of the violation notice, except for one double-sided custom chrome sign which was in place by July 3rd, one day past the 35-day violation notice period. **Staff Response:** This is a correct statement. Although the public access violation was not considered corrected until the last improvement (chrome sign) was installed, since the violation was corrected one day past the 35-day violation notice period, the fine for this violation was subsequently waived. Therefore, JMA and the staff are in agreement and this point is not relevant to this enforcement action.

I. JMA contends in response to Section 7, Paragraph 6 of the Violation Report, that they first requested a site visit related to the Notice of Completion and Compliance on December 17, 2007, and that it was JMA's intent to engage BCDC in these required actions prior to the occupancy or use of the restaurants. **Staff Response:** JMA is correct that they requested a site visit on December 17, 2007. BCDC contends that the initial request to conduct a site visit is not relevant to this enforcement action, which is based on the failure to secure approval of the CC&R document prior to the commencement of grading or construction. BCDC contends that the staff conducted a site inspection on February 8, 2008, and informed JMA at that time of permit requirements that still needed to be met. It then took JMA approximately eight months to meet those requirements.

J. JMA contends in response to Section 7, Paragraph 6 of the Violation Report, that when they submitted a copy of the draft CC&R to BCDC on June 27, 2008, they indicated that the Notice of Completion form was not submitted because they believed it could not be submitted until BCDC had reviewed/signed off on the CC&R document. **Staff Response:** BCDC staff contends that it informed JMA that the Notice of Completion form should be submitted once all the improvements had been installed. However, the fine for the failure to submit a Notice of Completion was subsequently waived and is, therefore, not relevant to this enforcement action.

K. JMA contends in response to Section 8 of the Violation Report, that it disagrees with the staff recommendation that an administrative penalty of \$15,600 be applied in lieu of the standardized fine as described in Section 66641.9(a). JMA states that it believes that the nature, circumstances, extent and gravity of the violation are minimal, and that they worked diligently to close out all requirements listed under Permit 4-05 and achieve the principal objective of providing an area of public benefit along the waterfront and adjacent to its restaurants. They also state that this objective was achieved and that the result has proven positive for the community. JMA contends that it was always their intent to complete any document revisions requested by BCDC in a timely manner and to submit all requested paperwork associated with the permit and, while there are other factors to be considered under Section 66641.9(a), any associated penalties should meet the gravity of the alleged fine. JMA does not believe there is a reasonable correlation between the proposed \$15,600 administratively civil penalty, nor the

earlier standardized fine of \$6,700, and the alleged civil liabilities. **Staff Response:** BCDC contends that JMA was made aware of the BCDC permit violations at the time of the initial site inspection in February 2008, and was given numerous opportunities to correct the violations prior to the initiation of the penalty clock. Therefore, pursuant to the provisions of BCDC's enforcement regulations, standardized fines did not begin to accrue until 35 days after BCDC sent its May 28, 2008 enforcement letter, and accrued at \$1,000 for days 36-65 from May 28th, and \$3,000 for days 66-95 from May 28th, plus \$100/day from the 96th day onward through resolution of the violation, with a maximum fine of \$30,000/violation. The fines were determined using current regulations fully described to JMA in the 35-day enforcement letter. JMA subsequently appealed the fine amount and it was significantly reduced. The fine of \$1,000 for Violation One (the failure to install the public access tables, chairs and signs prior to the use of either restaurant), and the fine of \$6,700 for Violation Three (the failure to submit the Notice of Completion and Declaration of Compliance prior to occupancy or use of either restaurant), were waived completely. JMA could have resolved its fine of \$6,700 for Violation Two (the failure to gain staff approval of the CC&R document prior to the commencement of grading or construction) under the standardized penalty provisions. However, JMA did not do so. The Violation Report sent to JMA on May 15, 2009, notified JMA that an administrative penalty of \$15,600 was being recommended to the Enforcement Committee. The penalty was calculated at a rate of \$100 per day from May 28, 2008, when JMA was notified of the violation, until it was completely resolved on October 31, 2008, when the CC&R document was finally approved. The staff now recommends that the penalty clock be stopped on October 7, 2008, when the second and much improved draft CC&R document was submitted. The current recommended fine for this violation is \$13,200 and is based on the fact that it took JMA 132 days to submit a nearly approvable legal instrument at the rate of \$100 per day. Section 66641(e) of the McAteer-Petris Act provides for civil penalties up to \$2,000 per day for a maximum of \$30,000 for a single violation for the expenditure of State resources in pursuing a violation. Staff has expended considerable time working with JMA to comply with its permit conditions and, therefore, believes that a fine of \$13,200 is extremely reasonable under the current circumstances.

V. Allegations of which Respondents have no Personal Knowledge

There are no allegations of which JMA has no personal knowledge.

VI. Respondent's Defenses and Mitigating Factors and Staff Rebuttals

A. JMA contends in Item 4(A) of its Statement of Defense that Mr. Nootbaar spoke with BCDC staff Brad McCrea on June 27, 2008, regarding the public access improvements and CC&R document and informed him that they were working diligently to complete them. Mr. Nootbaar states that Mr. McCrea asked him to submit the required documents still needed as soon as possible and then he would "review the case with staff." **Staff Response:** BCDC contends that there was never any indication to JMA from the staff that the enforcement case would be closed and fines waived once the draft legal instrument was submitted. Mr. McCrea is BCDC's Bay Development and Design Analyst and does not manage the resolution of enforcement cases nor does he review legal documents. Moreover, staff issued a 35-day enforcement letter to JMA on May 28, 2008 clearly detailing the requirements of JMA's permit and BCDC's enforcement regulations relating to standardized fines, and the requirement to submit and gain staff approval of a final CC&R document to stop the penalty clock (Special Conditions II-B-1 and II-B-2 of the permit). JMA did not submit the draft documents until the restaurants were open for business. Ms. Willing was informed both by email and in person in February, 2008 that a surveyor would be needed to complete the draft CC&R. A surveyor was not contracted by JMA until July 9, 2008, approximately six months after they were first informed that a survey would be needed to complete the CC&R.

B. JMA contends in Item 4(B) of its Statement of Defense that it was their belief that after they submitted the draft legal instrument on June 27, 2008, and completed the installation of all required public access improvements, the enforcement case and fines would stop and the case would be closed. **Staff Response:** BCDC contends that the permit is clear that the CC&R document must be reviewed and approved by the staff before it is deemed complete. The staff also informed JMA on numerous occasions, verbally and by email, that a draft CC&R document would need to be reviewed by BCDC counsel and would likely require revisions prior to final approval. The instructions to complete the CC&R document provided to JMA on February 4, 2008 clearly state that a surveyor should be retained to prepare the legal description and map. The form is also available on BCDC's website. At no time did staff waive any penalties or time periods for compliance with permit requirements, and in fact diligently encouraged JMA to comply with its permit conditions on time. However, JMA did not meet the time periods required for compliance with permit conditions. These facts notwithstanding, the staff reduced the fine from \$9,100 to \$6,700 in acknowledgement of JMA's efforts.

C. JMA contends in Item 4(C) of its Statement of Defense that throughout the time period they worked to complete the permit requirements, there was open communication and coordination between JMA and BCDC staff. **Staff Response:** BCDC staff agrees with this statement. However, it was only after Ms. Bacey's multiple and consistent outreach efforts to Ms. Willing for project updates, and Ms. Willing's slow response to complete the permit requirements (from February 4 through May 28, 2008 - 15 weeks after the initial site inspection), that the staff sent an enforcement letter. Penalties still did not begin to accrue until 35 days after the May 28th letter was sent.

D. JMA contends in Item 4(C)(i) of its Statement of Defense that the staff review and approval process, and its request to modify one public access sign, caused a longer than expected design, review and fabrication period. **Staff Response:** BCDC contends that the review, fabrication and installation of this one sign is not relevant to this enforcement action, which involves only the failure to secure approval of the public access agreement. The design and approval of the sign took no more than 36 days (Special Condition II-A-1 of the permit provides that the staff may take up to 45 days) and, had JMA initiated the plan review process in February 2008, after the initial site visit, it would have been completed before the enforcement letter was sent. However, the sign was installed one day past the 35th day from May 28th and the fine was subsequently waived.

E. JMA contends in Item 4(C)(ii) of its Statement of Defense that they did not engage a surveyor to survey the public access area until they received BCDC's July 2, 2008 letter providing comments on their initial draft CC&R and indicating the need to retain a surveyor. They also contend that the discrepancy between the square footage of the surveyed public access area and the permit condition created delays in creating a final instrument. **Staff Response:** BCDC contends that Ms. Willing was notified by email and in person during the initial site inspection in February 2008, that a CC&R document to guarantee public access was required and that a survey would be necessary to complete the draft instrument. However, a surveyor was not contracted by JMA until July 9, 2008, approximately six months after they were first informed that a survey would be needed to complete the CC&R document. A discrepancy in the public access area required by the permit and the legal description prepared by the surveyor is quite common and all the more reason why permittees such as JMA should commence their compliance requirements well in advance of deadlines outlined in the permit and employ the expertise of the BCDC staff.

F. JMA contends in Item 4(C)(iii) of its Statement of Defense that BCDC's review process should not affect the violation period (penalty time clock). **Staff Response:** BCDC contends that the time involved in reviewing documents submitted pursuant to permit requirements is a

necessary aspect of permit compliance and the burden of the permittee when the document is

being reviewed pursuant to an enforcement letter. That said, the standardized fine regulation does provide the permittee the opportunity to appeal the amount of the fine upon resolution of a violation and the staff does consider factors such as good faith and its review time when determining whether to reduce the fine amount. It was JMA's lack of sufficient progress to correct the permit violations that caused fines to accrue. BCDC's review process was never more than allowed by the permit and often much shorter and in no way impacted the accrual of fines. BCDC contends that had JMA initiated correction of all of the violations in February 2008, an enforcement letter would not have been sent and no fines would have accrued. Furthermore, when considering JMA's appeal, the staff waived two of three potential fines and reduced the remaining fine from \$9,100 to \$6,700, essentially resolving violation in 132 days rather than 156 days.

VII. Staff Rebuttals to the Allegations Denied by the Respondents

The staff has inserted its rebuttals immediately following each of JMA's points in Sections IV and VI above.

VIII. Summary and Analysis of Unresolved Issues

JMA does not believe it should pay a penalty to fully resolve the violation of Special Condition II-B of BCDC Permit No. 4-05.

Staff contends that JMA should have paid a standardized fine of \$6,700 by February 27, 2009 to fully resolve the violation of Special Condition II-B of BCDC Permit No. 4-05, and should now pay a larger penalty because JMA has caused the staff to invest more time in pursuing full resolution of this case rather than pursuing other important cases.

The staff could but it is not recommending that the Commission assess an administrative penalty of \$30,000 as the violation endured for a long time. It could also but is not recommending an administrative penalty of \$15,600, as the violation was not officially resolved until October 31, 2008.

Rather, the staff recommends that JMA pay an administrative penalty of \$13,200, which effectively considers that JMA resolved its on October 7, 2008, the date that it submitted a second draft legal instrument that was close to being approved by staff.

The staff recommendation was revised by the Enforcement Committee decision on September 24, 2009, to provide for a \$15,000 penalty that is allocated between improvements to the site costing approximately \$6,000 and a \$9,000 penalty, \$2,000 of which would be waived with compliance with the proposed order.

IX. Statement of Whether the Executive Director Has Issued a Cease and Desist Order

The Executive Director has not issued a cease and desist order.

X. Proposed Order

A copy of the proposed order is attached to, and included as part of, this enforcement decision.



Bay Conservation and Development Commission

ATTACHMENT TWO – Proposed Order

October 15, 2009

Todd A. Chapman, Principal
JMA Ventures, LLC
706 Mission Street, Suite 900
San Francisco, CA 94103-3169

SUBJECT: Proposed Stipulated Commission Civil Penalty
Order No. CCD 2-09, JMA Waterfront Properties, LLC
Effective Date: _____, 2009

Ladies and Gentlemen:

I. Civil Penalty Order

The San Francisco Bay Conservation and Development Commission (“the Commission” or BCDC”) has been investigating an enforcement action (“the action”) against JMA Waterfront Properties, LLC (JMA or the respondent), and seeks administrative civil penalties to resolve the penalty portion of matters raised by the action.

Therefore, pursuant to Sections 66641.6, 66641.5(e) and 66641.9(a) of the McAteer-Petris Act (California Government Code, Title 7.2), the Commission hereby orders the respondents to pay a \$15,000 civil penalty as follows:

A. Onsite public access improvements. No later than February 16, 2010, JMA shall install approximately \$6,000 of public access improvements at the site. Specifically and pursuant to the regulatory approval noted below, JMA shall install approximately four small tables and 16 chairs below and to the sides of the current location of the public outdoor dining tables. These public access improvements must be installed within four months of the effective date of this order pursuant to the requirements of an amendment to BCDC Permit No. 4-05 and BCDC staff plan approval. As these improvements would be located on property owned by the Port of San Francisco, its prior approval is also necessary.

B. Civil Penalty. JMA shall pay a civil penalty of \$9,000 in four payments of \$1,750 each and one final payment of \$2,000. Each of the five payments should be made in the form of a cashier’s check made out to the Bay Fill Clean-up and Abatement Fund and should be received no later than March 16, 2010, April 16, 2010, May 16, 2010, June 16, 2010, and July 16, 2010, respectively.

Proposed Commission Civil Penalty Order No. CCD 2-09

Todd A. Chapmen, Principal

JMA Ventures, LLC

October 15, 2009

Page 2

C. Stay of \$2,000 for Compliance. If JMA complies with Sections I-A and I-B or this order, JMA's final payment of \$2,000 on July 16, 2010, shall not be due. However, if JMA violates any provision above, the required public access improvements are not entirely installed as required by a permit amendment and staff approved plans or if any of the payments are late, JMA shall transmit the final payment of \$2,000.

D. Total Expenditure Not to Exceed \$15,000. As of the date of issuance of this order, JMA has estimated that the cost to install the required public access improvements outlined in Section I-A above to be approximately \$6,000. If the cost to purchase public access improvements is less than \$6,000, JMA shall remit a check in the amount of the difference to BCDC no later than June 16, 2010. If the cost to purchase the public access improvements is more than \$6,000, the amount of the payment due on June 16, 2010 shall be \$1,750 less the difference.

II. Findings

This order for civil penalties is based on the following findings supported by the permit and enforcement fines, which are herein incorporated by reference:

A. The respondent JMA owns property located at 369 and 399 The Embarcadero in the City and County of San Francisco.

B. JMA currently leases the property to the Epic Roasthouse and Waterbar Restaurants.

C. The Commission has shoreline band jurisdiction at the site pursuant to the McAteer-Petris Act, California Government Code sections 66610(a) and 66610(b).

D. On November 30, 2005, the Commission issued Permit No. 4-05 (the permit) to JMA and the Port of San Francisco (Port), which includes Special Conditions.

E. Special Condition II-A, Specific Plans and Plan Review, requires the permittee to submit and obtain staff approval of project plans prior to construction of each component of the project, including the required public access improvements.

F. Special Conditions II-B-1, II-B-2, and II-B-3, Public Access, require the permittee to permanently guarantee prior to any construction a public access area by recording an instrument on title upon receiving staff approval.

G. On December 17, 2007, by letter JMA requested that BCDC staff (the staff) to inspect the site.

H. On February 4, 2008, Cammy Willing, the project manager with JMA, requested by email that BCDC staff inspect the site. After reviewing the permit file for compliance with permit requirements, Nina Bacey of the staff notified Ms. Willing by email that a public access guarantee document (CC&R document), required by Special Condition II-B-2 of the permit had not yet been submitted for BCDC staff review and approval. Ms. Bacey included a CC&R template form and the instructions to complete the CC&R document in the email. Ms. Bacey also scheduled a date to inspect the site.

Proposed Commission Civil Penalty Order No. CCD 2-09

Todd A. Chapmen, Principal

JMA Ventures, LLC

October 15, 2009

Page 3

I. On February 8, 2008, Ms. Bacey and Adrienne Klein of the staff met with Ms. Willing and Joe Nootbaar, Principal with JMA, at the project site. The staff observed that both restaurants were open for business. The staff also observed that the public access pathways had been installed, but other required public access improvements had not been installed (e.g. public access tables, chairs and signs). The staff informed Ms. Willing and Mr. Nootbar that all improvements needed to be installed pursuant to plan approval and as soon as possible, and again reminded her that a CC&R document had not yet been submitted.

Proposed Commission Civil Penalty Order No. CCD 2-09

Todd A. Chapmen, Principal

JMA Ventures, LLC

October 15, 2009

Page 4

J. On March 21, 2008, by then six weeks after JMA was notified of its permit obligations, JMA had not yet submitted the draft CC&R document nor installed the public access tables, chairs and signs. Ms. Bacey contacted Ms. Willing by email to remind her of the permit requirements and to inquire of their status.

K. Ms. Bacey continued to work with Ms. Willing through May 28, 2008 to secure voluntary compliance with the outstanding permit conditions.

L. On May 28, 2008, 15 weeks after JMA was notified of its permit violations and due to insufficient progress to date, Ms. Bacey sent an enforcement letter to Ms. Willing informing her of the outstanding permit violations, the process for resolving the violations, and the civil penalties that may accrue under BCDC's standardized fine regulation (14 CCR §11386(e)(3)). The enforcement letter stated that if the violations were resolved within 35 days of the date of the letter, no fines would accrue. The letter also noted the rate at which the fines would thereafter accrue and the following three permit violations:

1. Failure to install certain public access improvements prior to the use of either restaurant as required by Special Condition II-B-5;
2. Failure to submit and receive staff approval of a CC&R document to guarantee the public access area prior to construction of the restaurants as required by Special Condition II-B-2; and
3. Failure to submit a Notice of Completion and Compliance and obtain a Certificate of Occupancy and Use prior to the use of either restaurant as required by Special Condition II-D.

M. Ms. Bacey and other staff continued to work with Ms. Willing to obtain staff plan approval of tables, chairs and signs to be installed, and legal staff approval of the CC&R document through October 31, 2008, the date the last violation was corrected.

N. On November 19, 2008, Ms. Bacey sent a letter to Ms. Willing informing her that a total fine of \$16,800 had accrued for each of the three permit violations and that the regulations provided the option to appeal the amount of the fine.

O. On December 19, 2008, Mr. Nootbaar submitted a letter of appeal of the fines to the staff.

P. On January 12, 2009, Ms. Bacey submitted to Executive Director Will Travis and Commission Chair Sean Randolph the staff recommendation that the total fine be reduced from \$16,800 to \$6,700, because the staff recommended waiving the fines for Violations One and Three and reducing the fine for Violation Two.

Q. On January 13, 2009, Mr. Travis and Mr. Randolph concurred with the staff recommendation and approved a reduction of the fine from \$16,800 to \$6,700.

R. On January 27, 2009, Ms. Bacey sent a letter to Mr. Nootbaar informing him of the reduction of the fine to \$6,700.

Proposed Commission Civil Penalty Order No. CCD 2-09

Todd A. Chapmen, Principal

JMA Ventures, LLC

October 15, 2009

Page 5

S. On February 17, 2009, Mr. Nootbaar informed Ms. Bacey that JMA did not believe the fine was equitable or that the staff's memo accurately described the facts. As such, JMA requested a meeting with staff and a formal enforcement hearing before the Enforcement Committee.

T. The staff initiated a formal enforcement proceeding.

U. The proposed penalties for the violation are based on the following facts:

1. Ms. Willing of JMA staff was notified by email and in person during the site inspection in February 2008 of all the permit violations that needed to be corrected in order to be in compliance with the permit;
2. The staff worked with JMA staff for 15 weeks to correct the permit violations but JMA's lack of progress to voluntarily correct the violations required the staff to send an enforcement letter to JMA on May 28, 2008;
3. The enforcement letter allowed an additional 35 days to correct the violations without accruing a penalty;
4. It took JMA an additional 156 days to correct all violations and, therefore, a standardized fine of \$16,800 accrued;
5. JMA appealed the amount of the fine to the Executive Director and Commission Chair;
6. The staff together with the Executive Director and Commission Chair agreed to waive the fines for Violations One and Three and reduce the fine for Violation Two from \$9,100 to \$6,700; and
7. JMA objected to the reduced fine and requested a formal enforcement hearing.

V. Thus, the Commission is pursuing a formal complaint for civil penalties consisting of the following proposed penalties: \$15,000 to be applied in lieu of the standardized fine for the failure to complete the legal instrument prior to the commencement of grading or construction under Section 66641.9(a) of the McAteer-Petris Act, which calls for additional penalties due to costs to the State in pursuing enforcement actions, among other factors. This amount is based on the number of days (132 days at \$100 per day) that it took JMA to submit a second draft legal instrument that then required only minor modifications to gain staff approval - rather than 156 days, which is the actual number of days it took JMA to gain staff approval of the legal instrument and fully resolve the violation. The Enforcement Committee and JMA together believe this penalty amount, a portion of which shall be used to purchase and install public access furniture at the site, the five-month-long payment schedule, and the stay of \$2,000 for compliance results in a reasonable and fair resolution of this matter.

W. JMA stipulated to the terms of this order on September 30, 2009.

III. Disclaimer of Effect of Order on Private Rights of Public Regulations

Proposed Commission Civil Penalty Order No. CCD 2-09

Todd A. Chapmen, Principal

JMA Ventures, LLC

October 15, 2009

Page 6

This order shall have no effect on any rights, duties, or obligations established by private agreement or by the laws and regulations of other public bodies.

IV. Disclaimer of Recognition of Property Rights

This order shall not constitute any recognition of property rights.

V. Respondent's Right to Seek Judicial Review of this Civil Penalty Order

Pursuant to the McAteer-Petris Act, section 66641.7(a), within 30 days after service of this order issued under Section 66641.6, the respondent may file with the superior court a petition for writ of mandate for review thereof pursuant to Section 1094.5 of the Code of Civil Procedure.

VI. Possible Court Action for Noncompliance

Strict compliance with this order is required. Pursuant to the McAteer-Petris Act, Section 66641.7(b), failure to comply strictly with any and all terms and conditions of this order can result in the Commission requesting the Attorney General to institute an action in the appropriate superior court to collect and recover any administrative civil penalties imposed pursuant to Section 66641.6.

**PROPOSED STIPULATED CEASE AND DESIST ORDER NO. 2-09
(ER 08-15), JMA Waterfront Properties, LLC**

STIPULATION FORM

1. I, Todd Chapman, hereby declare that I have read and understand the Proposed Enforcement Decision and Proposed Stipulated Cease and Desist Order No. 2-09 ("proposed order") and that I agree to the issuance of the proposed order, a copy of which has been provided to me and which is attached.
2. I understand that by stipulating to this proposed order, I waive all rights to contest the issuance of this order before the Commission and all rights to contest the order in court.
3. I also understand that by stipulating to this proposed order, I am agreeing to comply with all of its terms and conditions and that any failure to comply with the order could result in the Commission seeking court enforcement of the order, additional court imposed penalties, or both.
4. I understand and accept that my stipulation to this proposed order is an agreement with the Commission staff only, and that the Commission will exercise their own independent judgment when they review this proposed order and may accept it, disapprove it, or recommend alternative terms and conditions. If the Commission recommends alternative terms and conditions, I shall have the option of agreeing or disagreeing with that recommendation. However, unless the Commission issues an order in this case to which I have previously stipulated in writing, a public hearing on a contested enforcement action will be scheduled for the next available meeting.
5. If the party named in the proposed order is an entity other than an individual, I further stipulate that I have the authority to bind that entity.

Executed on _____, 2009, at San Francisco, California.

Todd Chapman, President
JMA Waterfront Properties, LLC
706 Mission St, 9th Floor
San Francisco, CA 94103
415-546-7766