San Francisco Bay Conservation and Development Commission
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October 21, 2016

TO: Commissioners and Alternates

FROM: Enforcement Committee

SUBJECT: **Recommended Enforcement Decision Involving Proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.03; Scott's Jack London Seafood, Inc. and the Port of Oakland**
(For Commission consideration on November 3, 2016)

Recommendation

The Enforcement Committee recommends that the Commission adopt the Recommended Enforcement Decision on proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.03 ("Order") to Scott's Jack London Seafood, Inc. ("Scott's") and the Port of Oakland ("Port") (collectively "the Permittees"). This matter arises out of an enforcement action commenced by the BCDC staff on May 6, 2013.

The attached proposed Order accomplishes four major goals: (1) it requires removal of certain unauthorized construction at a pavilion owned by Scott's and a regulatory process to consider future permit amendments to authorize modifications to the pavilion and improved public access in Jack London Square's Franklin Street Plaza; (2) it requires the Permittees to pay a lump sum penalty of $250,000 for violations of the Scott's Permit; (3) it obviates a vigorously contested administrative enforcement proceeding, possibly followed by a court challenge to the Commission's action, which would neither ensure a result that benefits the public as much as this Order nor would include an agreement on the pavilion's future use that is far more enforceable than the current permit; and (4) it simplifies the future authorization of the pavilion for shared public and private use. Several other benefits of the proposed Order, such as a surveillance camera and a shared online calendar to monitor pavilion use, are described in the Order.

On October 20, 2016, the Enforcement Committee held a hearing on this matter and, after considering staff's presentation, as well as comments provided by Respondents and the public, determined that the recommended stipulated order was an appropriate resolution of the violations of the Permit and the McAteer-Petris Act.

Staff Report

Background. On March 6, 1986, the Commission issued BCDC Permit No. 1985.019, as amended through April 10, 2008 ("the Port's Permit"), to the Port of Oakland for development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets known as Jack London Square.

On February 13, 1996, the Commission issued BCDC Permit No. 1985.019.08B, as amended through October 7, 1997 ("the Scott's Permit"), to Scott's and the Port. The Scott's Permit authorized Scott's Seafood, LLC to construct, use, and maintain a 4,400-square-foot open air pavilion within the public space at Jack London Square for shared public and private use at a ratio of 80 percent public (during which the pavilion would be open to the air) to 20 percent private (during which temporary pavilion "walls" would be in place). The Scott's Permit also authorized the installation of public access site furnishings within the pavilion and the adjacent Franklin Street Plaza. During the past 20 years, BCDC has not changed the authorization for shared use of the pavilion.

In December 2011, Scott's representatives contacted the BCDC staff to propose modifications to the pavilion, including replacing its labor-intensive canvas wall system with a steel and plastic retractable wall panel system that would transform the open public space into an enclosed private space, and vice-versa, more quickly. Between December 2011 and November 2012, the BCDC staff and Scott's representatives discussed and evaluated the panel wall proposal without resolution.

Violations. In December 2012, BCDC staff learned that Scott's had commenced construction of a large fixed, metal-framed doorway, the proposed panel wall system surrounding the doorway, and other ancillary elements without obtaining BCDC approval. The unauthorized construction continued for approximately four months and was completed in March 2013.

On May 16, 2013, after a site visit by the Executive Director and pursuant to the Commission's regulations, BCDC issued an enforcement letter to the Permittees describing a number of alleged violations of the McAteer-Petris Act and/or the Scott's Permit, including:

1. Unauthorized construction of a metal-framed doorway, storage area, and stage, and unauthorized installation of multiple planters, in a public access area;
2. Failure to obtain BCDC staff approval of design and construction plans prior to replacing the former tent walls with a retractable wall panel system used to enclose the pavilion;
3. Failure to provide six years of reports of private events in the pavilion;
4. Failure to permanently guarantee all the public access improvements at the pavilion; and,
5. Failure to install and maintain all the public access improvements at the pavilion for at least 292 days per year (80 percent of the year).

The May 16, 2013 enforcement letter directed the Permittees to take specific actions that would preserve their opportunity to resolve the alleged violations with standardized fines. Unfortunately, the Permittees chose to not remove the unauthorized structures and improvements and, instead, Scott's continued to use the pavilion as a venue for private events for approximately two years. During this time, the Permittees engaged in discussions with BCDC staff regarding the possibility of obtaining after-the-fact approval of some or all of the unauthorized structures or improvements but Scott's declined to move forward with any substantive changes.

Upon learning of Scott's unauthorized construction activities in a dedicated public access area, BCDC staff activated its enforcement investigation. That investigation revealed numerous additional alleged violations, including Scott's extensive unauthorized use of the pavilion for private events during an approximately eleven-year period.

Negotiations and Settlement Agreement. After almost thirty months of fits and starts and reversals on Scott's part that did not lead to an agreement, the BCDC staff informed the Permittees in September 2015 that the Executive Director intended to initiate an enforcement proceeding regarding the numerous violations that would likely result in the Commission issuing a cease and desist and administrative civil penalty order against the Permittees. The Permittees requested an opportunity to seek to negotiate a proposed settlement with BCDC that would:

1. Resolve the violations, including directions how to comply with the Scott's Permit;
2. Provide for payment of an appropriate administrative civil penalty; and,
3. Specify the matters to be addressed by the Permittees in applications to amend the Scott's Permit and the Port's Permit, and a schedule for submitting those applications.

On July 19, 2016, the Port, Scott's, and the BCDC staff agreed in principle on a settlement framework, subject to review and approval of this proposed Order by the Commission's Enforcement Committee and by the Commission. If the Enforcement Committee recommends, or the Commission directs modification of, any of the terms of this Order as proposed by the Parties, the Permittees have the option of accepting those modifications or declining to enter into the Order. If the Permittees decline to agree to this Order as the result of any modification recommended by the Enforcement Committee or directed by the Commission, the proposed settlement agreement shall be the abandoned and the Executive Director shall initiate an enforcement proceeding against the Permittees regarding the alleged violations described herein.

Resolution through a Stipulated Cease and Desist and Civil Penalty Order. The proposed Order accomplishes four major goals: (1) it requires removal of certain unauthorized construction at the pavilion within 75 days of the approval date of this Order and commencement of a regulatory process to consider future permit amendments to authorize modifications to the pavilion and improved public access in Jack London Square's Franklin

Street Plaza; (2) it requires the Permittees to pay a lump sum penalty of $250,000 for violations committed of the Scott's Permit; (3) it obviates a vigorously contested administrative enforcement action, possibly followed by a court challenge to the Commission's action with an uncertain result; and, (4) it simplifies the future authorization of the pavilion for shared public and private use. Several other benefits of the proposed Order, such as a surveillance camera and a shared online calendar to monitor use, are described in the Order.

1. **Regulatory Process.** Should the Commission adopt the Order, the permittees are required within 75 days to remove the stationary metal entry door frame to which the wall panels attach that is perceived by the public to designate the area as private even when the wall panels are not in use, not store various materials at the pavilion, complete an appropriate public access improvements plan, and ensure that the pavilion space, when not in private use, is fully designated as, and attractive to use as, a public access area. The permittees are also required within eight weeks to propose two fully completed applications to amend their permits to make those, and other requirements, permanent.
2. **Penalties.** Should the Commission adopt the Order, the Permittees will pay $250,000 into the Bay Fill Clean-up and Abatement Fund. While that amount is smaller than the aggregate of all the potential penalties accrued by the Permittees, staff recognizes that any successful settlement process includes a compromise of disputed claims, believes that the fine's large size is appropriate in light of the settlement package as a whole, and is of sufficient size to deter future violations, especially when combined with future possible penalties for noncompliance.
3. **Potential Litigation.** One benefit of this settlement is that it would avoid a vigorously contested administrative enforcement proceeding that would likely be followed by litigation. It should be noted that only after Scott's commenced construction of the new wall panel structure without authorization did BCDC activate an enforcement action, despite staff's earlier knowledge that the existing permit requirements were likely being violated. This delay in enforcement over the lengthy period of noncompliance prior to May 2013 could give the Permittees equitable arguments for substantially reducing the amount of penalties imposed in a contested proceeding. Moreover, while BCDC could seek penalties and an order to compel compliance in a contested proceeding, the settlement embodied in the proposed Order addresses issues regarding requested permit amendments and future use of the pavilion that could not be included in a unilateral Commission (or court) order.
4. **Future Authorization.** A future permit amendment would strongly clarify rules regarding the pavilion's use. Scott's overused the pavilion by significant amounts during each year of the current permit (save for 2015). In addition, while the current permit allows the permittees to use the former structure for 73 events, they occur under a highly complex formula that limits when the structure can be used but does not define

an "event." The Scott's Permit is very difficult to enforce because BCDC and the Permittees do not agree on basic facts regarding the pavilion's use. Therefore, the framework upon which a future permit amendment would be requested includes provisions that:

a. Define an event as a specific number of hours during which the pavilion may be used within one day;

b. Allow Scott's to use the pavilion twice weekly for profit-making events and up to twenty additional times for charitable (at cost) events, but not during more than one day per weekend or during more than three events during any 7-day calendar week;

c. Impose a fixed and unappealable schedule of penalties that will be imposed upon the Permittees should noncompliance occur;

d. Require Scott's to host a publicly available scheduling calendar so that the public knows when the space is to be publicly available; and,

e. Install a continually operating camera to ensure that evidence exists that can determine Scott's compliance with the permit.

The Port of Oakland, Scott's Jack London Seafood, Inc., the BCDC staff and the Enforcement Committee all agree that settling this long-standing matter through a Stipulated Cease and Desist and Civil Penalty Order results in a fair, just, and efficient outcome. With the consent of the Permittees, the proposed Stipulated Order accomplishes several goals that may or may not have been achieved if BCDC had proceeded with the case in a contested manner. It should be noted, however, that all parties compromised in an effort to reach a final agreement. For example, as stated above, the Permittees requested that the settlement agreement include an allowance to use the public pavilion for more private events than currently authorized. The BCDC staff and the Enforcement Committee agreed with this request knowing that, in return, certain unauthorized constructed elements will be quickly removed, significant new public access improvements will be built within the Franklin Street Plaza, a $250,000 penalty will be paid by the Permittees, and new penalties will be clearly defined for any future violations that occur. In addition, the Permittees will improve permit compliance by providing a shared online calendar of private events and installing a surveillance camera for monitoring. Therefore, on balance, the proposed Cease and Desist and Civil Penalty Order provides continued public benefits in and around Jack London Square and supports BCDC's mandate, including that the proposal provides maximum feasible public access, consistent with the project.

Attachments to this recommendation include: (1) The Stipulated Order; (2) The Permit; (3) a Vicinity Map and two images of the site; and (4) Letters of Public Comment.