

San Francisco Bay Conservation and Development commission

File: ER2000.097
Permit: 1998.011.02

**Statement of Defense by Trux Airline Cargo Services Inc.,
ParkSFO, Inc. and Robert E. Simms DBA REST Investments**

Edward W. Suman
Attorney at Law
881 Sneath Lane, Suite 218
San Bruno, California 94066

Telephone: 650 – 583 – 5200
edsum@sbcglobal.net

If the staff violation report/complaint that accompanied this statement of defense form included a proposed civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed penalty along with a notation that you are choosing to pay the penalty rather than contesting it on an administrative permit listing. If no Commissioner objects to the amount of the penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the proposed payment of the penalty, the Commission shall determine by a majority of those present and voting whether to let the proposed penalty stand. If such a majority votes to let the proposed penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority does not let the proposed penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's action. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact as soon as possible Maggie Weber or Marc Zeppetello of the Commission Enforcement and Legal Staff at telephone number (415) 352-3600.

1. Facts or allegations contained in the violation report that you admit (with specific reference to paragraph number in the violation report):

Please see Attachment 1.

2. Facts or allegations contained in the violation report that you deny (with specific reference to paragraph number in violation report):

Please see Attachment 2,

3. Facts or allegations contained in the violation report of which you have no personal knowledge (with specific reference to paragraph number in violation report):

N/A

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify each by name, date, type, and any other identifying information and provide the original or a copy if you can):

Please see Attachment 4 .

5. Any other information, statement, etc., that you want to make:

Please see the declaration of Robert Simms and the points and authorities by Edward W. Suman.

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (please list in chronological order by date, author, and title and enclose a copy with this completed form):

Please see Attachment 6.

7. Name of any person whose declaration under penalty of perjury was listed in the violation report as being part of the staff's case who the respondent wants to cross-examine, all documents about which you want to cross-examine the person, area or areas of information about which the respondent wants to cross-examine the witness, information that the respondent hopes to elicit in cross-examination, and the reason(s) why some other method of proving this information is unsatisfactory:

Please see attachment 7.

Attachment 1 to Statement of Defense by ParkSFO, Inc.-Trux Transport, Inc.

Trux admits the following parts of allegations in the Violation Report/Complaint, section II., Brief description of the nature of the illegal activity:

A. Admit that not all public access areas were guaranteed as required by the permit, but deny that this constituted a violation by Trux.

B. Admit that the open space area for Wildlife habitat was not guaranteed as required by the permit, but deny that this constituted a violation by Trux.

F. Admit that landscaping was not placed on the east side of the building because it was a driveway for vehicles, including emergency vehicles and shuttle buses.

H. Admit that wildlife habitat reports were late, but deny that this constituted a violation by Trux.

J. Admit that the bike lanes were not instructed according to the permit, however, deny that this constituted a violation by Trux.

K. Admit construction of fence without prior authorization in the area north of the approved bollards, which is not in the public access area. It was required for maintenance to prevent homeless people from trespassing upon the driveway. Trux denies that this is a violation.

Attachment 2 to Statement of Defense by ParkSFO, Inc.-Trux ransport, Inc.

Trux generally denies that it committed any substantial violation ,specifically denies that it committed the following allegations, and denies the following facts contained in the Violation Report:

I.Trux denies that Robert Simms is responsible for illegal activity.

II.Trux denies that Robert Simms committed any of the illegal acts described in paragraph II, a through k on pages 2 and 3.

III. Trux denies that the violations occurred, but does not object to the description of and location of the property.

IV. Trux denies that it committed any illegal activity, however, admits that it and the City of South San Francisco, own or control the property where BCDC alleges the violations occurred.

V. Trux denies all of the alleged allegations.

VI. Trux denies Section B.as to sub-sections 3.,& 4.c.&d., 6. & 8.; Trux denies Sections F. through L.Trux denies Sections N. through P.; Trux denies Sections V. through FF. Trux denies Sections HH. through XX. Trux denies Sections ZZ. through DDD.Trux denies Sections FFF. through LLL. Trux denies Sections PPP. through QQQ.

VI> Trux denies the statement on page 7 under section J. that the administrative penalty clock for "standardized fines" had commenced then, or any other time prior to 35 days after service of the Notice of Violation on March 23 2016.

Attachment 4 to Statement of Defense by ParkSFO, Inc.-Trux Transport, Inc.

ParkSFO, Inc.-Trux Transport, Inc. (herein "Trux") submits the following facts in its statement of defense to the violations alleged in Sections II.A through II.J and II.K of the Violation Report/Complaint mailed March 23, 2016:

A. Public Access Area Guarantee. On July 26, 2002, Robert Simms submitted all of the requested documents with the requested revisions for the Public Access/Wild life enhancement guarantee to Ms. Ellen M. Sampson, Staff Counsel for BCDC. Those documents provided a public access and wildlife enhancement guarantee for the property owned and controlled by SFO. These documents were resubmitted on March 3, 2003.(BCDC Exhibit23*)

Robert T. Hahn P.E., the civil engineer for the city of South San Francisco (herein "City") submitted the final drawings for the North Access Road Public Access Project to BCDC on November 20, 2006.(Exhibit 25) On April 12, 2007, BCDC notified Mr. Hahn that his plans complied with the BCDC permit (Exhibit 26). Mr. Hahn subsequently submitted a Bay Trail survey for BCDC's staff to review. On May 14, 2015, Ms. Maggie Weber, Postal Program Analyst informed Mr. Hahn that his survey looks good but that the final draft should have the widths for the sidewalks and bike lanes, and that he should apply for an amendment to the permit so that the required public access would be consistent with what was already built on the site, otherwise a permanent guarantee could not be recorded.(Exhibit 29) Trux does not own the roadway for the bike lanes nor the sidewalks, and the engineering matters were handled by the City. Trux lacked the authority to complete the Public Access Area Guarantee because it included property which Trux does not own. The City in its letter of March 27, 2002, paragraph 8., stated to BCDC that the Public Access Guarantee for the "finger" park was under review by BCDC, and that a second draft had been sent to BCDC and that it would record it when it was accepted. (Exhibit 18)

B. Failure to permanently guarantee the open space area for wild life habitat.** The issue of the guarantee for wildlife habitat is essentially the same issue as the guarantee for public access alleged in violation A.(Exhibit 22) On July 26, 2002, Robert E. Simms submitted the documents with the requested revision for the Public Access/wildlife enhancement guarantee to Ms. Ellen Sampson, Staff Counsel for BCDC. These documents provided a public access and wildlife enhancement guarantee for the property owned and controlled by Trux. Trux lacks the authority or ability to submit a guarantee for wild life habitat that covers property which it does not own. Mr. Simms resubmitted its documents on March 3, 2003. (Exhibit 23) See Trux' Exhibit ("E"), the Agreement Imposing Open Space Restrictions On the Use of Real Property which was submitted, but not accepted. BCDC on August 29, 2002, stated that Trux had in general, provided clear plats with most of the necessary features. (Exhibit 22, p.2) BCDC made further requirements for the exhibits, which have been provided. On December 21, 2015, Maggie Weber stated that the permanent guarantee forms had been changed since the last submittal. (Exhibit 38)

*All exhibits cited herein, unless otherwise indicated, refer to the BCDC exhibits mailed to Trux on March 23, 2016, with the notice of violation, and are incorporated herein by reference.

** The record is silent as to when, if ever, Ms Bennett confirmed that Mr. Simms resolved the alleged public access and space violations. (Violation Report, p. 8, fn. 4)

Trux has to the best of its knowledge, provided all information in its possession or control so that the exhibits to the guarantees properly designate ownership of the respective properties.

C., D. & E. Failure to post signage. The allegations of signage violations should be one alleged violation. Signs designated for North Access Road were installed by the City, which owns North Access Road. Bay Trail signs consistent with the dimension and design requirements of BCDC were installed on North Access road in early 2000, pursuant to the plan approved in 1998. On October 15, 2001, Mr. Simms requested a modification of the sign program. (Exhibit 12) On January 29, 2002, Mr. Simms notified Mr. Bennett that the signs had been installed as approved. (Exhibit 15) The public shore and bay trail signs are new signs that were not in the original sign plan. The signage has been approved (Violation Report, page 16, paragraph 000 and Exhibit 43)

F. Failure to screen the parking structure. The land on the south side of the parking structure is owned by the San Francisco International Airport (SFIA), as is the title gate on the southeast side of the parking structure. A fuel pipeline owned by Shell Oil runs below the SFIA property on the south side of the structure. SFIA and Shell Oil have restricted the planting of shrubs or trees over the pipe lines. (Trux' Exhibits "A" & "C")

BCDC provided a conceptual sketch that required planting tall and low shrubs on the building perimeter, and low drought resistant plants on the south side of the trail. Pursuant to the required restrictions, the landscaping plan was approved by BCDC and the plants were installed accordingly. Ande Bennett inspected and approved the installation of the landscaping. The east side of the parking structure is cement, and planters have been placed on that surface.

Ivy on the side of the parking facility is not feasible because it would damage the surface. This information is confirmed by John Fugle, landscape architect. See his e-mail dated January 26, 2016, in which he states that live plant material attached to the face of the structural concrete columns and walls would lead to a long-term degradation of the concrete material. The vines would grow and expand in cracked areas, thereby widening the concrete cracks and exposing steel reinforcing bars within the concrete. Exposure to water would result in cause oxidization of the metal and structural deterioration of the garage. (Trux' Exhibit "G")

Tall shrubs are being planted on the south side and in planters on the east side of the building. Shrubs on the south side are replacements from plantings under the original plan, which were damaged by the drought and homeless people. The shrubs and planters on the east side were not required in the original plan.

G. Failure to maintain BCDC – required public access improvements and areas. This allegation includes other specific allegations in the Violation Report. The public access area of the park has been consistently maintained for over 14 years. Trux promptly retained a landscape professional, and a

gardener who cleans the park and trims the foliage regularly. Homeless drug addicts frequent the park at night leaving empty liquor bottles and syringes, etc. SFO's maintenance company has been instructed to clean the property twice a week. The plant maintenance is complicated by the ongoing drought, even though drought resistant vegetation has been planted. Because of the proximity to the water, the use of chemicals for weed control must be restricted to avoid ecological harm. The current landscape professional is Gratién Etchebehere was declaration is submitted as Trux' Exhibit "H." Prior to Mr. Etchebehere and beginning right after approval of the permit, Trux used a landscaper who similarly maintained the premises continuously. Also see response K. below.

Trux retained all contractors and professionals necessary to comply with the maintenance requirements. For example, see Trux' Exhibit "B" which shows that Engineering Resources was retained to design lighting that that maximized the light in the parking area while minimizing the light on surrounding areas.

H. Failure to submit past – due monitoring reports for the wild life habitat surrounding the "finger" parking areas. It appears that the substance of this allegation has been resolved by substantial compliance. (Violation Report, p. 11, fn.6) Also see the letter from Maggie Weber, dated September 29, 2015, showing that the violation would be resolved upon submittal and approval of two reports conforming to the Permits requirements.(Exhibit 35 p.5, par.1) On February 9, 2016, Mr. Simms, provided the wildlife Habitat Assessment to Maggie Weber. The face page of that report is submitted as Trux' Exhibit "F". The City has handled the Public Access guarantee for the "finger" park. (Exhibit 18, par. 8)

I. Failure to authorize by an amendment to Special Conditions of the permit, re – alignment of a section of the public access walkway and changes to the width and location of sidewalks and bike lanes. The sidewalks and bike lanes are owned by the City. The City provided the proposed final drawings for realignment of the public access sidewalks and bike paths on North Access Road on November 27, 2006. On April 12, 2007, Mr. McCrea conditionally approved the plans for realignment of the public access sidewalks and bike paths on North Access Road submitted by the City.(Violation Report, p.10, EE. &FF.) Trux lacks the authority to obtain an amendment concerning property that it does not own.

J. Construction of two 5 – foot wide bike lanes instead of 8 – foot wide bike lanes. This alleged violation is included in alleged violation I.Trux' response to section I.above is incorporated herein.

K. Construction of and unauthorized gate and fence. The fence is 89 feet long and 6 feet high. There are 2 gates. One is 20 feet long and 6 feet high. The other is 17 feet long and 6 feet high. The fence and gates are made of steel and located at the east end of the parking structure. They were placed there as part of the ongoing maintenance after the bridge was installed, to prevent trespassers from entering the driveway, and to eliminate safety and security hazards. This avoids safety conflicts between pedestrians and cars. On January 19, 2015, Maggie Weber stated that the unauthorized gate and fence could be

authorized by an amendment request letter (Exhibit 39,p.2., par.4). Accordingly, such a request letter was submitted.

Declaration of Robert E. Simms in Support of Statement of Defense

I, Robert E. Simms, have personal knowledge of the following facts and if called as a witness can testify to the truth thereof.

I am the CEO of ParkSFO, and Trux Transport, Inc. ("Trux").

Pursuant to the issuance of Permit No. 11-98 by BCDC on September 23, 1998, for the development of a parking structure, I have carried out the requirements of the Permit to the extent that I have been able to do so. I retained qualified engineers, architects and landscape contractors. The engineers and architects found that some of the plans provided for in the permit were not feasible. I obtained a report from engineers, Wilbur Smith Associates dated December 19, 2001, which found that the widths for travel lanes provide in the Permit were not feasible. I understood that the City of South San Francisco, ("City") assumed responsibility to bring these matters into compliance with BCDC's requirements. I retained and paid for landscape maintenance of the park and other landscaped areas since 2000. The park and landscape area was cleaned and trimmed two (2) time per week since 2000. I have kept a constant maintenance program since approximately when the Permit was issued, including the retention of maintenance personnel and landscapers.

Ande Bennet, Coastal Program Analyst for BCDC, on March 19, 2002, sent me a copy of a letter to the City in which she stated her understanding that the City would assume active responsibility for completing the public access and that BCDC and the City would negotiate a reasonable completion date to comply with all the requirements of the permit. I have not participated in matters being handled by the City and BCDC, such as the Public Access and Open Space Guarantees, except to the extent that I obtained reports and legal descriptions of the

properties. I have responded to all inquiries, and complied with all BCDC requests regarding tasks that were within the scope of my rights and ability. I have complied with the request of BCDC since the permit was issued in September 1998. A landscaping plan was submitted, and approved by BCDC for the park, and the trail. The plantings were approved by Ande Bennett. A plan for signs on North Access Road, and the park was submitted and approved. The signs were installed and approved by Ande Bennett. The signage and landscaping were installed from 1998 – 2002. I have responded to all inquiries from BCDC to the best of my knowledge. Attached hereto is Trux' Exhibit List for Statement of Defense which lists Exhibits "A" through Exhibit "K" each of which is a true copy of records I have received in the regular course of business and have maintained as business records, except for Exhibit "K" a declaration of the landscaper, which was obtained for the purpose of this defense.

The long delay in enforcing these alleged violations has substantially increased the difficulty in defending against the allegations. For instance, my surveyor no longer has certain records which BCDC requires, although I was able to provide those records to the surveyor. Further, beginning in 2015, BCDC suddenly resumed enforcement and has imposed new requirements which were not in the original plans, however, Trux is cooperating to comply with these new requirements. In response to Maggie's Weber's July 2015 enforcement demand we have completed the following improvements:

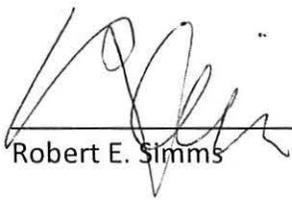
1. We have installed new signs on North Access Road, and in the parking area of the park. The signage was approved by BCDC.
2. We have completed and submitted a wildlife report that has been accepted and approved by BCDC.

3. We have completed a landscape renovation plan that was approved by BCDC. The landscape renovation was completed on May 13, 2016, except for the planters that will be installed by June 20, 2016. Attached are photographs of the renovation that was completed. The photos are true representations of the renovation and were taken on May 13, 2016.
4. We installed a security gate and fence at the exit of the garage. The fence and gate was located on the north side of the bollards which is outside of the public access area. Ms. Weber requested that the fence and gate be included in the amendment to the permit. The fence and gate were incorporated into the amendment submitted to BCDC by the City of South San Francisco.
5. On 3/29/2016, we sent the Open Space documents to Maggie Weber. These documents were originally submitted to Ellen Sampson in 2002. We have also retained Triad Holmes Surveyors to make modifications to the exhibits as requested by Marc Zepetello of BCDC. On 4/20/2016, Gary Posekian of Triad Holmes provided Marc Zepetello with five exhibits (E, A, E(1), F, and B). Using comments provided by Ellen Sampson in August 29, 2002, and comments from Marc Zepetello dated April 6, 2016, Gary organized the exhibits for discussions regarding modifications as requested by Zepetello. It is important to note that these exhibits were presented to Ellen Sampson in August of 2002, and that we have been providing the documents for the public access guarantee since that time. Regarding the public access guarantee, we have cooperated, and complied with BCDC's requests since 2002.

I believe that Trux has substantially complied with all provisions of the Permit that it has the power to comply with, and that any non-compliance with the Permit is with minor issues that were quickly resolved. These minor items include: planters, signs on North Access Road and a renovation plan, all of which were not in the original permit, but again, were quickly resolved to the extent that Trux had the ability to do so.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of California.

Dated: May 16, 2016



Robert E. Simms

Trux' Exhibit List For Statement of Defense

- Exhibit "A" Letter from Equilon Pipeline Company to Robert Simms dated February 7, 2001
- Exhibit "B" Letter from Engineering Resources to Robert Simms dated September 4, 2001
- Exhibit "C" Letter to Andrea Bennett of BCDC from SFIA dated February 8, 2002
- Exhibit "D" Face page, and exhibits re parking facility and lot line adjustment from triad/holm Associates, civil engineers showing transmittal of legal descriptions to Robert Simms dated July 22, 2002
- Exhibit "E" Property description of Parcel A upon recordation of lot line adjustment
- Exhibit "F" Drawings of parking facility and open space parcel 1
- Exhibit "G" Agreement Imposing Open Space Restrictions On the Use of Real Property provided to BCDC on or about March 3, 2003
- Exhibit "H" Fax Cover Sheet from Ande Bennett dated January 24, 2003 with sketch regarding vegetation
- Exhibit "I" Habitat Assessment dated January 26, 2016, obtained by Trux and provided to BCDC
- Exhibit "J" Email from architect, John Fugle of International Parking Design, Inc. advising against the placing of Ivy or creeping vine on the concrete wall of the South side of the parking structure dated January 26, 2016
- Exhibit "K" Declaration of landscaper, Gratien Etchebehere

Attachment 6 to Statement of Defense by ParkSFO, Inc-Trux Transport, Inc.

Trux requests that the following documents, exhibits and the declarations be made part of the administrative record for this enforcement proceeding:

1. The Declaration of Robert E. Simms and all exhibits referred to therein;
2. The following staff exhibits served on Robert E. Simms by BCDC on or about March 23, 2016, with the Violation Report/Complaint:

Exhibit 12 October 16, 2001 letter from Mr. Simms to Mr. McAdam

Exhibit 15 January 31, 2002 letter from Mr. Simms to Ms. Bennett

Exhibit 17 March 19, 2002 letter from Ms. Bennett to the City

Exhibit 18 March 27, 2002 letter from the City and Mr. Simms to Ms. Bennett

Exhibit 22 August 29, 2002 letter from Ms. Sampson to Mr. Simms

Exhibit 23 March 3, 2003 letter from Mr. Simms to Ms. Sampson

Exhibit 25 November 27, 2006 letter from the City to Mr. McCrea

Exhibit 26 April 12, 2007 letter from the City to Mr. McCrea

Exhibit 28 Landscaping plan submitted by Mr. Simms, received by the staff February 13, 2008

Exhibit 29 May 14 2015 email from Ms. Weber to the City

Exhibit 32 July 30, 2015 enforcement letter from Ms. Weber to the City and Mr. Simms

Exhibit 33 August 27, 2015 letter from Mr. Simms to Ms. Weber

Exhibit 35 September 30, 2015 enforcement letter from Ms. Weber to the City and Mr. Simms

Exhibit 38 December 21, 2015 email from Ms. Weber to Mr. Simms

Exhibit 39 January 19, 2016 email from Ms. Weber to Mr. Simms

Exhibit 43 Emails between Ms. Weber and Mr. Simms on February 10 and 11, 2016 with attached photographs

Exhibit 44 February 19, 2016 email from Ms. Weber to Mr. Simms

Attachment 7 to Statement of Defense by ParkSFO, Inc-Trux Transport, Inc.

Trux requests the opportunity to examine or cross – examine the following employees of BCDC, regardless of whether they made a declaration under penalty of perjury:

1. Ellen M. Sampson- Mr. Simms provided Ms. Sampson with numerous documents and had communications with her regarding the production of documents. This respondent anticipates that her testimony would show ongoing cooperation by Mr. Simms and the difficulties in obtaining the legal descriptions and related documents.
2. Ande Bennett- this respondent anticipates that Mr. Bennett would testify regarding communications with Mr. Simms about the production of documents, signage, and the planning.
3. Brad McRae- this respondent anticipates that Mr. McRae would testify that Mr. Simms was responsive to BCDC's requests.
4. Maggie Weber- this respondent wishes to examine Ms. Weber concerning Mr. Simms' compliance with her requests that exceeded the requirements of the permit, her observations of downed or inadequate signage, requests for planting beyond the requirements of the permit, and how the proposed penalties were determined.