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December 8, 2016

Via E-mail and Regular Mail

Marc Zeppetello
Chief Counsel
San Francisco Bay Conservation and
Development Commission
455 Golden Gate Avenue, Ste. 10600
San Francisco, CA 94102

Re: BCDC Permit Nos. 1985.019.09B and 1985.019.020

Dear Marc:

As you know, this office represents Scott's Jack London Seafood, Inc. ("Scott's"), a co-permittee along with the Port of Oakland ("Port") under Permit No. 1985.019.09B ("Permit"), with respect to the Pavilion located at Jack London Square, Oakland. As promised, we provide below our client's proposal for resolution of the claimed violations of the Permit.

We have been in consultation with the Port relating to this matter. Mr. Sinkoff and Mr. Wan of the Port reviewed this proposal this morning and advised that the Port does not object to Scott's submission of this proposal as a good faith effort to make progress in this matter; provided that the Port reserves its right to respond in the next couple of days after it has had time to review the proposal in more detail.

This proposal shall not be considered a waiver or limitation of any rights or legal positions that Scott's or the Port could or will assert if agreement is not reached. Nor should this letter be construed as an admission by Scott's of the accuracy of statements contained in Attachment A—Additional Findings to the previous proposed Stipulated Order No. CCD 2016.03 or Recommendations submitted in association therewith.

We also continue our request that this matter be added to the January 19, 2017 docket of the Enforcement Committee for hearing as ordered by the full Commission.

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BACKGROUND

I won't belabor with you the history and background of this dispute. However, in light of comments made by certain Commissioners at the November 3, 2016 hearing, it is important to highlight some exceedingly important relevant facts.

First, the public interest is significantly advanced by the parties reaching agreement as opposed to BCDC proceeding with issuance of an Enforcement Order, as Scott's has agreed to install and pay upwards of $200,000 for a public access plan around the Pavilion as conceptualized with staff on August 28, 2015and to pay $300,000 to BCDC's Bay Fill Clean-Up and Abatement Fund. Neither the Permit nor the Port's Permit require this public access improvement and thus could not be the subject of an Enforcement Order, nor is it at all clear that a Court would uphold such a significant civil penalty.

Second, BCDC was well aware of the Pavilion improvements installed by Scott's when first proposed years ago, and delayed enforcement over a lengthy period of time despite staff's earlier knowledge that existing permit requirements were allegedly being violated. As staff's October 21, 2016 Recommendation supporting adoption of Stipulated Order No. CCD 2016.03 admits (par. 4), this provides Permittees with equitable arguments for substantially reducing the amount of penalties in a contested proceeding.

Third, Scott's is willing to include self-actuating stipulated penalties (with some adjustments and clarifications) in the event it violates certain terms of a revised Stipulated Cease and Desist Order. Hopefully, this will minimize the chances of future disputes. Of course, an Enforcement Order cannot assign stipulated penalties for non-compliance.

Fourth, despite suggestions to the contrary, Scott's has not made significant net profit from overuse of private, non-charitable events at the Pavilion over the last ten years. Apparently, some Commission members confused gross revenue of $800,000 or more with actual net profit, and confused "private use" under the Permit with charitable, public use; perhaps in part based on earlier misleading submissions. Regardless, as shown on Exhibit "A" attached, Scott's has ***not once*** used the Pavilion more than 73 days annually for private, non-charitable events over the last 5+ years, and for the five years before then averaged less than 72 days of private, non-charitable use. And as for profitability, Scott's has earned a grand total of only $4,150 in net profit by using the Pavilion for more than 73 days for private, non-charitable events—and that was 5 to 10 years ago.

Fifth, Scott's and BCDC both want the same thing: to promote and enhance the use of Jack London Square and to enhance the public's access to and enjoyment of the waterfront. Indeed, that is why the BCDC issued the Permit to allow construction of the Pavilion in the first place, in furtherance of the legislative intent of Cal. Govt. Code Section 66605.1. Scott's paid all costs for construction and upgrades to the Pavilion, and pays all costs for Pavilion maintenance,

utilities, taxes, etc. If Scott's doesn't pay for this, no one else will. The public interest is promoted if Scott's and BCDC work cooperatively together; not by litigating with one another. And the public is certainly not benefitted if Scott's simply ceases using and paying for the Pavilion as a result of excessive costs, penalties, and burdens imposed by issuance of an Enforcement Order or ongoing disagreements with BCDC.

PROPOSAL

Scott's is willing to agree to the terms contained on pages 5-13 of the proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.03 ("Order") rejected by the Commission, but with the following modifications and/or clarifications. Reference to these items is by paragraph number in the proposed Order signed by Scott's and the Port on September 28, 2016. If no reference is made to a particular paragraph, then no modification and/or clarification is proposed.

Par. II.D

Scott's has already made application with the City of Oakland for issuance of a final building permit approving plans for installation of new entrance/exit doors integrated into the existing retractable wall panel as previously proposed. We expect final approval next week. The Planning Department has already approved these plans with a CEQA exemption (attached as Exhibit "B"). Scott's can submit these same plans to BCDC for review immediately. Scott's needs to have BCDC approval for an amended permit before it incurs the costs of removal and replacement of the existing metal framing and door structure, and before payment of any civil penalty as part of an overall settlement. Though we do not believe BCDC approval is formally required to remove the metal door frame and permanent doors, if BCDC believes otherwise than of course that approval will be needed as part of the settlement.

Par. II.F

Scott's will immediately apply for an amendment to the Permit to allow more than the currently allotted 73 days per year of for-profit private events. Issuance of the Permit should occur as part of the global resolution of this dispute. The amended permit should allow a maximum of 88 days per year of Pavilion use for private, for-profit events and a maximum of 15 days per year for community based charitable events (less than the 104 days and 20 days stated in the Order).

Par. II.G.1

Scott's has already submitted plans to, and expects to have final building permits next week from, the City of Oakland for the already installed retractable wall system, stage, storage area, and roof connection at the Pavilion. Design Review Approval is attached as Exhibit "B".

This includes the new entrance/exit door system integrated into the retractable wall panels. Those plans (and hopefully City of Oakland final building permits) can be submitted to BCDC staff immediately. It is my understanding that staff already has Scott's application for an amended permit, though if further revisions are needed to the application, please advise. Scott's needs to have BCDC approval of an amended permit before it incurs the costs of removal and replacement of the existing metal framing and door structure, and before payment of any civil penalty as part of an overall settlement. Though we do not believe BCDC approval is formally required to remove the metal door frame and permanent doors, if BCDC believes otherwise than of course that approval will be needed as part of the settlement.

Par. G.3

See comments to above to Par. II.F and below to Par. V.A.1 below.

Par II.I

The Port controls this issue, so Scott's cannot commit to this. I appreciate that the BCDC is not making a distinction between Scott's and the Port as both are co-permittees, but presumably the Port agrees to this provision as it signed the Order. I will confirm with the Port.

Par. II.J

Clarification is requested as to whether past quarterly event schedules are necessary and useful at this stage, or only quarterly event schedules going forward from the Effective Date. If past schedules are requested, then we would like clarification as to why those are needed and for how long back BCDC wants these schedules.

Par. III Civil Penalty Order

Scott's is reluctantly willing to increase its payment to $300,000 (paid entirely by Scott's on behalf of both Permittees) in order to achieve a settlement, but does so purely because it wants to enhance the chances of any agreement being adopted by the full Commission. Scott's does not believe that its alleged violations warrant such a significant civil penalty, and reserves its right to contest the authority for and amount of any civil penalty imposed in the event a revised Stipulation cannot be achieved.

In that light, it is important to note that under California law, the amount of any civil penalty must not be arbitrary or capricious. The factors to be considered in determining the amount of any such penalty are spelled out in *Cal. Govt. Code Section 66641.9(a).* As best we can tell, the BCDC has never issued a civil penalty for a non-environmental permit violation over the last several years for more than $30,000. Virtually every civil penalty BCDC has issued relates to placement of fill or some significant activity that substantially and negatively impacted the bay or waterfront.

Scott's alleged permit violations do not impact the bay or reduce public access to the waterfront, nor do they substantially expand the use or footprint of the Pavilion. At most, Scott's use violations based on Exhibit "A" occurred only four times in the last 10+ years, and resulted in total overuse of a measly 14 days. (Note the term "private use" is nowhere defined in the Permit by BCDC; we have defined it in Exhibit "A" as for-profit event days but not charitable event days in which the public attends and Scott's makes no profit. One would think BCDC would want to encourage Scott's to use the Pavilion for charitable events; not issue a civil penalty for having done so.)

In essence, the Permit violations cited in the Order (and BCDC's May 16, 2013 Enforcement Letter) against Scott's involve three rather modest transgressions: (1) unpermitted construction of improvements to the Pavilion that BCDC staff had prior notice of and hearings on, and which improved public safety by making it easier for guests to escape in case of emergency; (2) overuse of the Pavilion for "private events", and failing to report all such events to BCDC staff, even though Scott's did not exceed its 73 day annual allotment for non-charitable for-profit events for the last 5+ years; and (3) storing equipment and placing planters in the Pavilion area without BCDC approval.

These do not warrant a substantial civil penalty being imposed under *Cal. Govt. Code Section 66641.9(a)* or in comparison to penalties historically issued by BCDC for far worse violations. If you contend differently, please provide an analysis of all civil penalties issued within the last five years for violations similar to those being asserted against Permittees. This analysis should be made part of the record if Scott's proposal for pay a $300,000 civil penalty is not accepted.

Moreover, as the Enforcement Committee and staff have already admitted, BCDC staff delayed enforcement action over the lengthy period of alleged non-compliance prior to issuance of the May 2013 Enforcement letter "despite staff's earlier knowledge that the existing permit requirements were likely being violated. This gives Permittees equitable arguments for substantially reducing the amount of civil penalties in a contested proceeding." We agree.

Finally, payment of the civil penalty should occur as part of a global resolution of all issues, and thus as part of the issuance of any amended permit(s) and/or approvals by BCDC for any past or future work or activities included in the Order.

Par. IV. Stipulated Penalties

It is not clear that these provisions are needed in light of our proposal, but Scott's has no objection so long as specific, achievable, and reasonable deadlines to accomplish these various tasks are clearly stated and failure to meet any deadline is caused solely by Scott's negligence.

As to subpar. 5, Scott's has no control over the Port's recordation of a legal instrument guaranteeing public access, so defers to the Port on this issue. Presumably, the Port agrees to meet this deadline as it signed the Order. I will confirm with the Port.

As to subpar. 6, clarification is needed as to why past due quarterly event schedules are necessary as part of any agreement but if so, for how far back and in what form BCDC wishes to have these. Also need a clear deadline for producing these.

Par. IV.D

Assuming agreement is reached on changes to and clarifications of the referenced subparagraphs of Par. II as proposed above, this is agreeable.

Par. V.A

Issuance of an amended Permit to authorize and clarify Pavilion usage should be part of the settlement and not deferred.

As to subpar. 1, Scott's is willing to reduce its request for private, for-profit use of the Pavilion from a maximum of 104 days during a calendar year to a maximum of 88 days during a calendar year, and to reduce its request for community based charitable events from a maximum of 20 days during a calendar year to 15 days during a calendar year. Note Scott's proposal references the number of days use per year, and not the number of events, in order to minimize any confusion over what constitutes an "event" if there are more than one event on any given day. This is consistent with language in the Permit.

Par. V.B

Again, issuance of an amended permit should be part of the overall settlement.

As to subpar. 1, in light of Scott's agreement to reduce its requested usage of the Pavilion per above, subpar. 1(a) should replace "104 for-profit events" with "88 days for for-profit events" and in subpar.1(b) replace "20 community based charitable events" with "15 days for community based charitable events".

As noted, the Permit references the number of days per year that the Pavilion can be used; not the number of events. To minimize any future disputes, the amended permit should state the number of days annually the Pavilion can be used for community based and for-profit private events, just like the existing Permit does. This issue effects all of the subparagraphs.

As to subpar. 1(c), Scott's agrees to install a monitoring camera on a 24/7 basis, but an automatic penalty of $10,000 per violation is inordinately harsh if any violation is caused by a mechanical or other problem with the camera or its recording system that prevents Scott's from

complying. There should be an exception to imposition of any penalty if Scott's is unable to comply through no fault of its own.

LEGAL ISSUE

As stated above, it is in both the parties' and the public's interests that this matter be resolved through agreement. However, as you have suggested that an Enforcement Order will be sought in the absence of agreement, you should be alerted to a very clear legal issue that Scott's will raise; namely, whether BCDC even has jurisdiction to require an amended permit for Pavilion improvements recently installed and to impose an Enforcement Order and a civil penalty for having done so. Moreover, as you know, the scope of any Enforcement Order, and the amount of the civil penalty, must not be arbitrary or capricious, or an abuse of the Commission's discretion, in order to withstand legal attack in Court.

The McAteer-Petris Act only empowers the BCDC Commission to require permits for structural upgrades if the improvements cause a "substantial change in use of any . . . structure", see *Cal. Govt. Code Section 66632(a).* This has been interpreted to mean ". . . a change in the general category of use of a structure, i.e., . . .residential, . . . recreational . . . (Cal. Code Regs., tit. 14, Sect. 10125, subd.(b)(2); *San Mateo County Harbor Dist. v. People ex rel. San Francisco Bay Conservation etc. Com.* (1994) 25 Cal.App.4th 1789, 1793-1794). In *Citizens v. Alcatraz Cruises,* 2006 CA. Sup.Ct. Lexis 197217, the Plaintiff seeking to reduce what it anticipated would be a twenty-fold increase in foot traffic and related use at the waterfront in the particular location in question cited BCDC's own regulation which defines a "substantial change in use" as an activity that "involves a substantial change in the intensity of use" (14 CCR Sect. 1125(b)(3)).

Here, the improvements made to the Pavilion by Scott's (primarily replacement of canvas tent siding with retractable doors, including a metal frame doorway for public safety purposes, and extending the roof to prevent rain intrusion and connect fire sprinklers) did not change the use of the pavilion one iota—it was, and always has been, used only for private and charitable public banquets and events. Nor did these improvements change the footprint of the structure or detrimentally impact the quality or area provided for public access from that which BCDC permitted back in 1997. On the contrary, providing a more comfortable and safe experience for Pavilion guests has *enhanced* attendance and thus access to the Plaza and waterfront by the public.

However, even if a Court were to conclude that there has been a change in use with respect to some of the alleged violations, they are certainly not "***substantial*** changes in use" that would warrant a significant civil penalty. As stated earlier, the alleged Permit violations are all relatively modest, do not negatively impact the Bay or waterfront, and are all easily remedied (which Scott's is willing to do in this Proposal).

I suspect that BCDC won't readily agree with my analysis of the scope of its jurisdiction or discretion in issuing a civil penalty, but I certainly don't see how it is in BCDC's interests to test these issues before the Alameda County Superior Court. But if no agreement is reached and an Enforcement Order is issued by the Commission, that will necessarily happen.

CONCLUSION

We hope and trust that this proposal will be favorably considered by staff, as it guarantees Scott's compliance with BCDC regulations as a condition of the settlement being finalized, while also promoting cooperation and clarity going forward by establishing rigorous and objective criteria to insure future compliance. And as mitigation for alleged past violations, Scott's not only will pay $300,000 to BCDC's Bay Fill Clean-Up and Abatement Fund, but also incur upwards of $200,000 in costs to construct public access improvements as conceptualized with staff on August 28, 2015. This is vastly preferable to an adversarial, contested proceeding that could never achieve all of these public benefits.

I look forward to your response.

Very truly yours,

Michael P. Verna

cc: R. Zachary Wasserman (Chairman, BCDC)
Greg Scharff (Chairman, Enforcement Cte.)
Richard Sinkoff (Port of Oakland)
Danny Wan (Port of Oakland)
Lawrence J. Goldzband (Exec. Dir., BCDC)

EXHIBIT A

Public Pavilion at Scott's Restaurant

Pavilion Usage

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015*	2016 to Nov 30	Total
Private Use	76	74	80	49	78	67	69	73	73	53	55	747
Charitable Use	22	25	12	17	14	13	13	20	13	16	21	186
Days Used	98	99	92	66	92	80	82	93	86	69	76	933
% Over Use	4.10%	1.40%	9.50%	0.00%	6.80%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

Pavilion Revenue through November 2016

Jan	2,650	35,302	56,692	45,362	35,629	18,952	16,614	33,208	19,940	49,794	71,747	314,143
Feb	9,670	40,687	23,338	25,369	31,714	8,604	40,100	26,489	13,675	8,791	60,915	228,437
Mar	32,873	64,658	35,462	32,060	44,643	45,946	46,809	36,496	47,296	89,174	84,228	475,417
Apr	36,716	37,846	41,307	34,609	56,935	33,530	34,971	27,347	51,855	32,974	144,026	388,090
May	28,730	57,882	55,503	28,641	86,412	62,655	43,243	95,895	70,851	72,908	85,498	602,720
Jun	24,111	53,005	69,122	23,264	13,889	60,118	18,755	59,923	60,901	36,057	66,544	419,145
Jul	14,176	54,849	31,520	25,547	24,372	47,823	21,349	21,749	0	39,510	102,167	280,895
Aug	29,535	16,717	110,155	22,287	29,178	39,347	33,208	30,960	51,570	38,574	60,150	401,531
Sep	24,472	58,500	54,956	41,961	35,086	30,205	63,680	27,702	42,680	33,313	53,000	412,555
Oct	88,416	91,353	62,543	94,406	138,145	74,863	72,013	100,003	80,515	85,504	125,369	887,761
Nov	55,728	69,446	42,246	40,529	27,455	32,781	51,088	69,926	59,802	33,509	92,855	482,510
Dec	201,687	232,791	104,550	60,624	72,293	76,605	133,620	133,620	120,018	197,799		1,333,607
Total	548,764	813,036	687,394	474,659	595,751	531,429	575,450	619,103	619,103	717,907	946,499	7,129,095
% Net Profit	3.00%	3.00%	2.10%	0.36%	4.35%	2.11%	6.62%	5.93%	8.48%	3.32%	2.44%	3.93%
Net Profit	$16,463	$24,391	$14,435	$1,709	$25,915	$11,213	$38,095	$36,713	$52,500	$23,835	$23,095	$245,268
% Over Usage	4.10%	1.40%	9.50%	0.00%	6.80%	0.00%	0.00%	0.00%	0.00%	0.00%		0.00%
Overage Profit	$675	$341	$1,371	$0	$1,762	$0	$0	$0	$0	$0	$0	$4,150

EXHIBIT A

EXHIBIT B

Community and Economic Development Agency

CITY OF OAKLAND
SMALL PROJECT DESIGN REVIEW
APPROVAL

DATE: 12/05/16
PROJECT ADDRESS: 2 Broadway
APN: 018 -0415-005-00
CASE FILE NO.: DS160577
APPLICANT NAME: Scott's Jack London Square, c/o Liz Gallagher

MAILING ADDRESS: 2 Broadway
Oakland, CA 94607
GENERAL PLAN: EPP Retail Dinning Entertainment 1
ZONING: C-45

Dear Applicant:

Your application to replace canvas vinyl material with movable sliding panel walls to enclsose the Public Pavilion at Jack London Sqaure for special events pursuant to B.C.D.C. Permit No. 1985.019.021A & B.C.D.C. Permit No. 1985.019.011B. Pavilion will remain open at all times with the exception of designated times allowed by B.C.D.C. use permits referenecd above. Movable panel walls conforms to the Small Project Design Review Criteria Checklist and to all applicable zoning regulations, and is therefore **APPROVED. This approval is subject to the Conditions of Approval stated in the following section of this letter.**

This design review approval becomes effective immediately and shall expire **two calendar years** from the date of this letter, unless all necessary permits for construction or alteration have been issued within such period. Upon written request and payment of appropriate fees submitted no later than the expiration date of this permit, such period of time may be extended by the Director of City Planning or designee, with additional extensions subject to approval by the approving body. Expiration of any necessary building permit for this project may invalidate this Approval if the said extension period has also expired.

NOTICE TO ALL PARTIES: The time within which judicial review must be sought of disposition of the Director of City Planning is governed by Section 1094.6 of the Code of Civil Procedure of the State of California. With certain exceptions, the time is ninety (90) days from date of the decision.

Please note that any desired modifications to the approved plans must be submitted for review by the Planning Department prior to the changes taking place.

EXHIBIT B

To apply for a building permit you must complete an application form and submit additional sets of plans to the Building Services Division. For more information about building permit requirements, please contact the Building Services Division at (510) 238-3443.

If you have any questions regarding this approval, please contact the Planning and Zoning Division at (510) 238-3911.

Signed,

-for-
SCOTT MILLER
Zoning Manager
Planning and Zoning Division

Record ID: DS160577

Menu **Reports** **Help**

File Date: 12/05/2016

Application Status: Approved

Application Detail: Detail

Application Type: Small Project DR

Address: 2 Broadway

Owner Name: CITY OF OAKLAND

Owner Address: 505 14TH ST, 609, OAKLAND, CA 946121406

Application Name: Jack London Pavilion Improvements

Parcel No: 018 041500500

Description of Work: Scope of work will allow the semi-permanent moveable sliding panel walls to enclose the Jack Lo

Contact Info:

Name	Organization Name	Contact Type	Rel
Scott's Jack London Sq...		Applicant	

Job Value: $0.00

Total Fee Assessed: $914.56

Total Fee Invoiced: $914.56

Balance: $914.56

Workflow Status:

Task	Assigned To	Status	Status D
Application Intake		Approved	12/05/20
Assignment			
Zoning Review		Approved	12/05/20

Condition Status:

Name	Short Comments	Status	Ap
PARCEL COMMENT	consistent with Mast...	Complied	01/

Custom Fields:

FEE CALCULATION INFORMATION

Track Level	Violation Fee
Track I	

GENERAL INFORMATION

Checklist Type

Non-Residential

IMPACT AFFORDABLE HOUSING

Affordable Housing Impact Fee

No

IMPACT CAPITAL IMPROVEMENTS

Capital Improvements Impact Fee

No

IMPACT TRANSPORTATION
Transportation Impact Fee
No

IMPACT JOB
Job Impact Fee
No

SUPPLEMENTAL FORMS

Impervious Surface Area
3-None of the Above

Tree Preservation Ordinance
1-No Protected Trees on Site

Hazardous Waste Statement
Listed-Statement Completed

Green Building Ordinance
1-Project Type Not Applicable

ENVIRONMENTAL EXEMPTIONS

CEQA Exemption Primary
15301-Existing Facilities

CEQA Exemption Secondary
15183-Projects Consistent with

PROPERTY INFORMATION

Historic Area of Primary Importance
–

Zoning
C-45

Historic Designated District
–

Service District
3

Council District
Metro

Heritage Property
–

Historic Status
–

OCHS Rating
*3

General Plan Designation
EPP Retail Dining Entertainment 1

S-7
No

S-20
No

Impact Zone
1

IMPACT AFFORDABLE HOUSING

Category **Calculation for Fee** (Number) **Reason** **Impact Zone** (Number) **Unit - Net Added** (I

IMPACT CAPITAL IMPROVEMENTS

Category **Calculation for Fee** (Number) **Reason** **Impact Zone** (Number) **Unit - Net Added** (I

IMPACT TRANSPORTATION

Category **Calculation for Fee** (Number) **Reason** **Impact Zone** (Number) **Unit - Net Added** (I

IMPACT JOB

Category **Calculation for Fee** (Number) **Reason** **Impact Zone** (Number) **Unit - Net Added** (I

SUPPLEMENTAL INFORMATION

Area Calculations **Existing** (Number) **New** (Number) **Total** (Number) **Percent Change** (Num

Initiated by Product: AV360