Port of Oakland's **Statement of Defense Form**

Enforcement Investigation ER2013.009

Scott's Jack London Seafood, Inc. and Port of Oakland

FAILURE (1) TO COMPLETE THIS FORM, (2) TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLAREATIONS UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF'S CASE AS IDENTIFIED IN THE VIOLATION REPORT THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FROM AND ALL INCLUDED MATERIALS TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF OR TO CONTACT **MARC ZEPPETELLO** OR **ADRIENNE KLEIN** OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF BY **JANUARY 23, 2017** MEANS THAT THE COMMISSION CAN REFUSE TO CONSIDER SUCH STATEMENTS AND EVIDENCE WHEN THE COMMISSION HEARS THIS MATTER.

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU, IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BY USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AND ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE SAN FRANCISCO BAY CONSERVATION AND DEVLOPMENT COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report. The violation report indicates that you may be responsible for or in some way involved in either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. This form also requires you to identify by name any person whom you may want to cross-examine prior to the enforcement hearing on this matter, the area of knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, i.e., no issuance of either a cease or desist order or a permit revocation order, this form allows you alternatively to pay the proposed fine without contesting the matter subject to ratification of the amount by the Commission.

IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE STAFF HAS RELIED IN THE VIOLATION REPORT, YOU MUST COMPLETE PARAGRAPH SEVEN TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, ()2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY YOU BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.

You should complete the form as fully and accurately as you can as quickly as you can and return it no later than 35 days after its having been mailed to you to the Commission's enforcement staff at the address:

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, California 94102

If you believe that you have good cause for not being able to complete this form within 35 days of its having been mailed, please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise complete the form as much as is currently possible will be grant an extension to complete the form.

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 **MARC ZEPPETELLO** or **ADRIENNE KLEIN** of the Commission Enforcement Staff at telephone number **415-352-3600**.

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

The Port of Oakland specifically admits all facts set forth in its Statement of Defense, dated January 23, 2017, submitted herewith, and in all correspondence sent from the Port to BCDC.

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

The Port of Oakland generally denies all facts not set forth in its Statement of Defense, dated January 23, 2017, submitted herewith. Specifically, the Port denies BCDC's unfair characterizations of its role (or lack thereof) in the investigation and reporting of Scott's violations.

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

The Port of Oakland only has "personal" knowledge of the facts set forth in its Statement of Defense, dated January 23, 2017, submitted herewith, and the facts contained in its correspondence to BCDC.

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 identity it by name, date, type, and any other identifying information and provide the original or a copy if you can):

Please see the Port of Oakland's Statement of Defense, dated January 23, 2017, submitted herewith.

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

Please see the Port of Oakland's Statement of Defense, dated January 23, 2017, submitted herewith.

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, title and enclose a copy with this completed form):

Those documents listed by chronological order in the Port's Statement of Defense (attached hereto) and the following attached documents: Scott's Lease, a Letter from the State Lands Commission of December 15, 2010, and Article VII of the City of Oakland's Charter.

These documents are arranged in 3 categories: 1. Correspondence by chronological order; 2. the Lease; and, 3. the Charter.

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:

It appears that BCDC is not relying on any declarations under penalty of perjury. It also appears that BCDC would not allow the Port to cross-examine any of its staff absent the use of such a declaration. If the Port is allowed to cross-examine BCDC staff, it would be interested in doing so, particularly as it relates to the absolutely vital and key factual issues in this matter. These include: BCDC's delay in taking enforcement actions; BCDC's characterization of the Port as a violator; and, BCDC's basis for bringing a complaint against the Port.

RUDDER LAW GROUP
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January 23, 2017

Lawrence J. Goldzband
Executive Director
SF BCDC
455 Golden Gate Avenue
Suite 10600
San Francisco, CA 94102

Statement of Defense of the Port of Oakland to
San Francisco Bay Conservation and Development Commission's Violation Report/Complaint for the Imposition of Administrative Civil Penalties,
Enforcement Investigation No. ER2013.009

Dear Mr. Goldzband:

Our firm has been retained by the City of Oakland, a municipal corporation, acting by and through its Board of Port Commissioners ("Port" or "Port of Oakland") in connection with its receipt of the San Francisco Bay Conservation and Development Commission's ("BCDC") Violation Report/Complaint for the Imposition of Administrative Civil Penalties, Enforcement Investigation No. ER2013.009 ("Complaint").

As you know well, the Complaint seeks in excess of $800,000 in penalties from Scott's Jack London Seafood, Inc. ("Scott's), a seafood restaurant, for certain unpermitted construction and uses performed by Scott's within BCDC's jurisdictional area in Jack London Square in Oakland, California. We were surprised and disappointed to find that the Complaint also names the Port as a respondent. Section I of the Complaint alleges that the Port is "jointly responsible for each and every violation" allegedly committed by Scott's and demands that the Port use in excess of $800,000 in California public trust funds to pay for Scott's alleged bad acts. The Complaint impermissibly conflates the self-interested acts of a private for-profit restaurant with the fiduciary duties of a public agency trustee of public trust funds. And, even worse, the Complaint willfully ignores the Port's key and pivotal role in investigating, documenting, and reporting Scott's violations to BCDC for enforcement action in the first place. Not only does the Port get no credit for its important enforcement role, it gets blamed for BCDC's 15 years of delay in taking appropriate action.

As discussed in further detail below, BCDC's Complaint against the Port is troubling on a number of other legal and public policy grounds. Chief among these is the deafening truth that the Port did not actually commit any of the violations alleged. Despite its 46 page-length (with 2 attachments), the Complaint never

actually articulates BCDC's theory for why the Port and the public funds it manages should be liable for Scott's alleged bad acts. The Port is forced to guess on BCDC's behalf. While the Port is a nominal "co-permittee" with Scott's on BCDC Permit No. 19-85(B) ("Permit"), which Scott's is alleged to have violated, the Permit does not establish any notion of joint and several liability. Further, the Port is in no way a joint-venturer with Scott's. The Port does not participate in Scott's activities and has less oversight authority over such activities than BCDC does. Further, and more insidiously, the Port is only a nominal co-permittee because BCDC insisted that the Port do so as part of BCDC's practice and policy of compelling landowners to co-sign with tenants.

While the Port does hold the land underlying Scott's in trust for the people of the State of California, it is not, for BCDC's enforcement purposes, a typical landlord. Scott's holds a 54-year, triple-net, ground lease from the Port that will not revert to the Port until 2041. The Port does not exert operational control of Scott's activities and, when it needs to exercise the police power against tenants such as Scott's, it turns to enforcement agencies such as BCDC, as it did here.

In certain limited circumstances, BCDC can and should pursue penalties against arms-length landowners, even public agency owners, for the bad acts of their tenants and users. In those unique cases, the violator is either unknown or financially insolvent and pursuing the public agency landowner is appropriate and necessary, as a last resort, to remedy the violation. Here, by dramatic contrast, the alleged violator is more than merely "known" to BCDC. BCDC has been actively and directly negotiating with the violator for nearly 4 years. The violator is a reputable business institution, not a midnight dumper. Seeking to compel the Port to indemnify a private, for-profit business for its violations is a policy of compelling prohibited gifts of public funds.

The Complaint's unfair and deceptive "Factual Background" conveniently glosses over a key fact. It was the Port that investigated and brought Scott's alleged violations to BCDC's attention. The Port called on BCDC to enforce its rules. Ironically, when, many years later, BCDC finally chose to take a formal enforcement action, it did so against the Port. Retaliating against whistleblowers is not only legally inappropriate, it is bad policy and the kind of misstep that will have a chilling effect on reporting to and cooperation with agencies such as BCDC in the future.

BCDC's Complaint against the Port also fatally suffers from what, in legal parlance, is known as "unclean hands" and laches. BCDC, not the Port, is the enforcement agency here. BCDC, and not the Port, chose to allow Scott's to maintain unpermitted improvements for years. BCDC, and not the Port, chose to allow Scott's to engage in unpermitted activities for years. And now, when BCDC finally decides to act, it assesses penalties against the Port which are measured in the "Duration in Days" of the alleged violations. Eight-hundred-forty-thousand-dollars-worth of days passed on BCDC's watch and now BCDC wants the Port to gift public funds to a private party to atone for its inactivity and foot-dragging. We object.

In addition to the substance of the Complaint, we also have concerns about BCDC's process. The Complaint is 46 pages long, not including 2 exhibits. The Port was given 35 days, starting December 19, 2016, and inclusive of the Christmas and New Year's holidays, to respond. During that time period, BCDC issued no less than 3 corrections to errors in the Complaint. The Port is expected to fully respond to the Complaint on a 7-question form of less than 2 pages. We object to this timing and process.

Notwithstanding the Port of Oakland's objections, the Port responds to the Complaint as set forth herein.

I. Statement of Facts

The State of California's sovereign tide and submerged lands within the City of Oakland were legislatively granted in trust to the City by the State under various statutes enacted in the 19th and 20th Centuries to be held in trust for the people of the State. By City Charter amendment, the Port of Oakland was established in 1927 as an independent department of the City. Created as an enterprise agency, the Port is charged with the management of the City's public trust lands. Funds derived from and generated by these lands are held, in trust, by the Port within a public trust fund pursuant to Public Resources Code section 6306. Under Article VII of the City Charter, the Port was given broad police powers to manage and enforce laws within the "Port Area" designated by the City Charter.

While the Port, including its seaport and airport, is the economic engine for the City of Oakland, it generally does not develop, own, or operate the many maritime commercial and other public trust-consistent uses within its commercial real estate area, centered in Jack London Square. As a public agency, the Port does not have the resources, staff, or expertise to develop and operate hotels and restaurants. In order to incentivize private enterprises, and the banks that finance them, to invest in the development of Port lands, the Port must typically provide for very long term ground leases, sufficient for private parties to recover their investment.[1] These ground leases are necessarily not akin to typical commercial leases and the landlord-tenant relationship between the Port and its tenants is similarly significantly more arm's length in nature than a typical landlord-tenant relationship. The Port's ground leases are "triple net," meaning that the long-term tenant, not the Port, is responsible for the ongoing expenses of the property, including real estate taxes, building insurance, and maintenance, in addition to paying the rent and utilities. The Port does not and simply cannot exercise the control and oversight that a typical landlord might wield over a typical tenant.

On or about April 9, 1987, the Port entered into such a ground lease for the premises at 2 Broadway with Scott's. As supplemented, the subject lease runs with a term of 54 years and expires in 2041. About ten years later, Scott's expressed an

[1] Such ground leases and other forms of alienation (e.g. easements), by City Charter and legislative grant, may not exceed 66 years.

interest in constructing a pavilion in an adjacent public plaza for private use from time-to-time for special functions ("Pavilion"). Scott's was directed to apply to BCDC by the Port. At that time, it is the Port's understanding that BCDC insisted that the Port sign on to Scott's permit application even though the proposed construction and subsequent use were entirely and solely a part of Scott's business operation. It is believed that this was pursuant to a policy and practice by BCDC to compel underlying landowners to co-sign such permit requests based on a working understanding by BCDC that landlords exercise significant operational control over their tenants and that tenancies are typically short term in nature. I.e., tenants come and go but the landlord owning and operating the premises will remain operationally involved. The Port complied with BCDC's request and co-signed Scott's permit application. On or about October 7, 1997, BCDC issued the Permit to Scott's to construct and use the pavilion.

On February 10, 1999, the Port adopted its Estuary Plan which included plans for the redevelopment of the Jack London Square area, including areas within the Port Area under Port police power jurisdiction and areas outside the Port Area under City police power jurisdiction. On June 8, 1999, the City of Oakland incorporated the Estuary Plan into the Oakland General Plan. The City and the Port subsequently determined that it made more logistical sense for the City to oversee the redevelopment contemplated by the Estuary Plan. In 2000, the City and the Port amended the City Charter's delineation of the Port Area to remove most of Jack London Square, including the subject premises at 2 Broadway to the Port Area. Importantly, this meant the transfer of the Port's police powers over the Scott's premises away from the Port and to the City. Subsequently, the Port has necessarily relied on enforcement agencies such as BCDC and the City of Oakland to enforce planning and land use laws within the area. Absent police powers, the Port's enforcement ability is restricted to those limited powers reserved to it under its long-term ground leases.

In 2012, Scott's approached both BCDC and Port staff to propose alterations to the Pavilion structure. These included a proposal to replace the tent fabric walls with retractable solid wall panels. After a number of meetings, it is the Port's understanding that BCDC staff was tentatively supportive of the idea. Port staff expressed conceptual support for the idea but, on November 26, 2012, the Port expressed some reservations regarding the design specifics, construction materials and finishes, and asked for assurances that Scott's was going to pursue all necessary permits from BCDC and other agencies. In a November, 27, 2012 letter, Scott's assured the Port that it would address the "permit issues" raised by the Port.

On December 27, 2012, Port staff received reports from Cushman and Wakefield, the private property management company retained by the Port and its master tenant to perform day-to-day oversight in Jack London Square, that Scott's had begun construction on the new Pavilion walls. On that same date, Pamela Kershaw of the Port's Commercial Real Estate Division sent an email to Scott's representatives, stating in pertinent part:

> I have just been informed that you have begun construction of the new Pavilion walls in the Common Area of Jack London Square. I presume that you have obtained all necessary regulatory permits and approvals for this work prior to commencement of construction. As such, please provide evidence of these permits and/or approvals to the Port and Cushman and Wakefield as soon as possible. Thank you in advance for your cooperation with this request, please let me know when you have delivered copies of the approvals and/or permits to the Port headquarters building or to Cushman and Wakefield's office via email notification.

That same day, Stephen E. Fagalde of Scott's replied in pertinent part:

> We have not begun any construction, HOWEVER today they have started some investigative work to see what is below the pavers where some post columns are planned to go ... by the end of day, everything will be back in place. Again, this was just investigative work. I did explain this to Monique when I saw her this afternoon.
>
> I believe next week some brackets will start to be installed up in the rafters ... this is in preparation for the soon to be permitted walls to be installed. We want to be fully ready and prepared as we expect the permit to be signed any day now.

Despite these assurances, Port staff continued to question Scott's representatives as to their permitting status. On January 2, 2013, Mr. Fagalde responded to the Port's queries with an email regarding the panel doors Port staff had asked about, stating in pertinent part:

> These doors ARE NOT being hung or installed until we have the appropriate permits, which we will furnish to you. I am expecting the BCDC sign off in the next day or two.

Toward the end of February of 2013, Port staff suspected that the subject panel doors had been formally installed. Julie Braun of the Port's Commercial Real Estate Division wrote Mr. Fagalde a letter on February 25, 2013, stating in pertinent part:

> This letter is provided as a follow-up to previous communications between the Port and Scott's regarding our request to obtain evidence of your obtainment of all necessary permits and approvals from the City of Oakland and the San Francisco Bay Conservation and Development Commission ("BCDC") for the modifications to the Public Pavilion.
>
> In your January 2, 2013 email to Pamela Kershaw you stated that the door panels would not be hung or installed until you had the appropriate permits and would furnish us with a copy. It appears that

> the panels have now been hung and installed for several days so we presume that you have obtained all of the required permits and regulatory agency approvals and can provide us with a copy. As the subject Pavilion is located on Port owned property outside of your leased premises, the Port must ensure that all improvements constructed on our property are in compliance with all applicable Building and Fire Codes of the City of Oakland for safety reasons, as well as in compliance with all our [sic] the BCDC permit regulations affecting this space.
>
> Thank you in advance for your cooperation with this request, please submit these permit approval documents to me for our records and for our insurance requirements within the next five business days. If we do not receive these documents within that timeframe we will need to pursue other actions to address this situation.

Despite Scott's assurances to the contrary, Port staff suspected that BCDC and the City of Oakland had not, in fact, permitted the Scott's improvement work. On March 8, 2013, Ms. Braun reported Scott's to BCDC by formal letter to Ellen Miramontes of BCDC. Ms. Braun wrote in pertinent part:

> As you are aware, Scott's Seafood Restaurant has been pursuing BCDC's approval for a modified wall system to replace the canvas curtain walls of the Public Pavilion in Jack London Square for the past couple of months. I am inquiring as to the status of BCDC's approval of this project since I have been unable to obtain a copy of this permit approval directly from Scott's. Since the Public Pavilion is a part of the Common Areas of Jack London Square, we must insure that it meets and complies with all applicable regulatory agency requirements, codes, and ordinances, and must have copies of approved permits for our risk management purposes.
>
> If BCDC has issued an approval or permit for the new wall system in the Public Pavilion I would greatly appreciate it if you could email a copy to me at jbraun@portoakland.com. or fax to (510) 893-2793. Please don't hesitate to contact me at (510) 627-1144 if you have any questions.

On the same day, Ms. Braun wrote a similar letter reporting Scott's improvement work to the City of Oakland. On March 13, 2013, the City of Oakland responded to Ms. Braun's report to say that a "stop work" order had been issued to Scott's because it had not yet applied for a permit.

On March 19, 2013, Ms. Braun wrote another formal letter to Mr. Fagalde at Scott's, forwarding the City's response, and stating in pertinent part:

> We are in receipt of the attached notice from the City of Oakland pertaining to construction performed without a building permit. This

> notice pertains to the construction and installation of the wall panels and other work occurring in the Public Pavilion.
>
> As you know, Section 3.2 of our lease requires that you comply with all laws, rules and regulations applicable thereto adopted by federal, state, local or other governmental bodies, or departments, or officers and applicable to the Premises. Further, Section 10 of our lease requires that you submit complete plans and specifications to the Port of Oakland for approval prior to making any alterations, additions, or betterments to the Premises, after first securing all necessary permits and approvals. As of today, the Port has not received evidence of your approvals or permits from BCDC or the City of Oakland.
>
> We ask that Scott's act promptly to obtain the necessary permits from the City of Oakland's Building department and forward a copy to the Port. I also wish to remind you that failure to comply with the terms and covenants of your lease constitutes a default if not cured within fifteen (15) days.

On April 24, 2013, Ms. Kershaw wrote to Mr. Fagalde by letter, stating in pertinent part:

> Pursuant to the terms of the Lease between the Port of Oakland ("Port") and Scott's Jack London Seafood, Inc. ("Scott's") dated April 9, 1987, as subsequently amended ("Lease"), the Port transmitted a written notice to Scott's on March 19, 2013 regarding Scott's violation of Section 3.2 and Section 10 of the Lease, with respect to Scott's commencement of construction of wall panels on the Public Pavilion prior to submitting complete plans and specifications for these improvements to the Port and prior to obtaining all necessary building and other permits from the Port, the City of Oakland and other appropriate governmental agencies, including the San Francisco Bay Conservation and Development Commission ("BCDC"). As you are aware, Section 21 of the Lease requires that the Scott's cure any condition which would entitle the Port to declare a default, including a violation of any term or condition of the Lease, within fifteen (15) days after notice from the Port, or if the default is of such a nature that it cannot be remedied within fifteen (15) days, Scott's shall have commenced the elimination of the violation and shall be continuously and diligently proceeding in good faith to cure the violation.
>
> It has now been more than fifteen (15) days since the Port provided written notice of these Lease violations to Scott's yet the Port has not received evidence from Scott's that you have commenced the elimination of these Lease violations. Please provide written evidence to the Port indicating how Scott's has commenced elimination of these Lease violations. At a minimum, such evidence must include permit

> applications submitted to the City of Oakland and BCDC, by Tuesday, April 30th at 4:00 p.m.
>
> As you are aware, Scott's failure to remedy a violation of the Lease in accordance with the language provided in Section 21 of the Lease entitles the Port to declare Scott's in default of the Lease. If the Port does not receive evidence from Scott's indicating how you have cured or commenced cure of these violations by Tuesday, April 30th at 4:00 p.m., the Port will pursue all actions necessary to address these Lease violations.

Finally, on May 16, 2013, in response, at least in part, to the Port's report of Scott's unpermitted work from two months prior, BCDC sent a letter alleging that Scott's unpermitted work was in violation of the McAteer-Petris Act and the Permit.[2] However, rather than take any formal enforcement action, this letter proposed that Scott's submit a proper permit application and seek permission for the improvements it desired. Confusingly, on the same day, BCDC sent a second letter indicating that the improvements Scott's desired to make could likely be accommodated through an amendment to the Permit.

On May 21, 2013, Ms. Braun sent another letter to Mr. Fagalde at Scott's, stating in pertinent part:

> The Port of Oakland is in receipt of a letter from Adrienne Klein, Chief of Enforcement for the San Francisco Bay Conservation and Development Commission ("BCDC") dated May 16, 2013, regarding alleged violations under BCDC Permit 1985.019A, Permit 1985.019B, and Enforcement File No. ER2013.008, related to the installation of various improvements at and adjacent to the Public Pavilion. Pursuant to the prior correspondence transmitted to you from the Port on March 19,2013 (attached, in which we requested proof of approvals and/or permits from the City of Oakland and BCDC) and April 24, 2013 (attached, notifying you that Scott's was in violation of their lease) these improvements were installed in violation of the terms of the Lease between the Port of Oakland ("Port") and Scott's Jack London Seafood, Inc. ("Lessee") dated April 9, 1987, as subsequently amended ("Lease").
>
> This letter serves to remind you again that Section 3.2 of the Lease, mandates that the Lessee shall at all times faithfully obey and comply with all laws, rules and regulations applicable thereto adopted by federal, state, local or other governmental bodies, departments, or officers and applicable to the Premises. Further, lease Section 3.2 states that the Lessee agrees to defend and indemnify the Port and Port officers, employees and agents from and against any penalties or

[2] Remarkably, this letter stated that the Port was also liable for Scott's violations.

> charges and administrative and/or judicial proceedings (including, without limitation, attorneys fees and legal expenses incurred by the Port in connection with such penalties or charges and proceedings) imposed on or involving the Port for any violation or alleged violation by Lessee or by Lessee's licensees, sublessees or invitees, of any and all laws, ordinances and regulations applicable to Lessee's use of the Premises. I also remind you that Section 43 of the Lease states that the Port shall also be entitled to have and recover from Lessee all other reasonable costs and expenses associated with the Port's enforcement of the provisions of the Lease. Please be advised that the Port Attorney's Office bills our assigned Deputy's time at $383.45 per hour.
>
> We ask that you immediately take all necessary action to comply with BCDC's requests as detailed in Ms. Klein's letter to resolve all violations, to submit all documentation as requested, and to pay for any fines, penalties, or fees incurred or assessed on the Port and/or the Lessee.

It is believed by the Port that throughout the early summer of 2013, Scott's met with BCDC staff on multiple occasions as part of a BCDC-sanctioned effort to formalize a BCDC permit application to allow retroactive approval of the Pavilion modifications already built. On July 12, 2013, Ms. Braun sent another letter to Mr. Fagalde, stating in pertinent part:

> In reference to our previous letters to you dated March 19th, April 24th and May 21st in which we request your compliance with all governing bodies relative to the various Public Pavilion improvements you have made, we ask that you provide us with a written update of your efforts to cure your default as defined under lease Section 3.2.
>
> Thus far the Port has received plans of the proposed Public Pavilion modifications and copies of permit applications for the City of Oakland and BCDC, however we have not received any confirmation by either agency that permits or approvals have been issued.

It is the Port's understanding that Scott's and BCDC continued to negotiate the terms and conditions of a revised permit throughout the summer of 2013. On September 6, 2013, BCDC sent another letter urging Scott's to finalize its submittals, including its plans for a retractable wall panel system. That letter stated in pertinent part:

> In the 35-day enforcement letter, dated May 16th, we informed you that if you did not resolve the violations as outlined therein by July 1st, the staff would commence a formal enforcement proceeding. Until now, we have deferred taking this action to allow you additional time to achieve compliance with your permit and the law. However, we are

> presently concerned by your lack of progress toward resolving this matter in a timely and thorough fashion. At any time, we may commence a formal enforcement proceeding.

Within days of receiving this letter from BCDC, on September 12, 2013, Ms. Braun again wrote a letter to Mr. Fagalde, stating in pertinent part:

> The Port of Oakland is in receipt of "Violations at Scott's Jack London Seafood Restaurant" from Adrienne Klein dated September 6, 2013, summarizing the seven outstanding violations and associated penalties as a result of Scott's unauthorized modifications in and adjacent to the Public Pavilion in Jack London Square. According to Ms. Klein's letter, accrued standardized fines total $41,600 as of the date of her letter, and will continue to accrue at the rate of $100 per day, per violation, until resolved.
>
> Once again I wish to remind you of Section 3.2 of the Lease which states that you agree to comply with all laws, rules and regulations applicable to your premises (including those prohibiting the unauthorized modifications described above) and to defend and indemnify the Port and Port officers from and against any penalties or charges and administrative and/or judicial proceedings, including attorneys' fees and legal expenses incurred by the Port in connection with such penalties or charges. Please refer to my May 21, 2013 letter attached, and the Lease for further details.
>
> We trust that Scott's will diligently take every necessary step to resolve all outstanding violations in a timely manner to avoid a formal enforcement proceeding and will pay the violation fees as determined by BCDC.

It is the Port's understanding that several meetings and iterative negotiations between Scott's representatives and BCDC staff ensued and that Scott's ultimately submitted an application that BCDC deemed complete. It is the Port's further understanding that BCDC staff continued meeting and negotiating with Scott's representatives to modify Scott's proposed plans. While Port staff was involved at each step of the way, specifically at the request of BCDC and Scott's, its role was to provide technical advice and design suggestions relating to the Pavilion and other improvements and to assure design consistency within Jack London Square.

It is the Port's understanding that Scott's permit application was subsequently reviewed by the BCDC Design Review Board on or about February 10, 2014, for a "First Pre-Application Review" and, again, for a "Second Pre-Application Review" on or about April 6, 2016. It is the Port's further understanding that during both hearings, additional revisions to Scott's permit application were requested by BCDC, including the removal of certain features and components of the improvements that had already been constructed by Scott's, as well as additional

public access improvements. It is also the Port's understanding that on multiple occasions members of the public spoke at BCDC hearings to express concerns that BCDC was allowing improvements built without permits to remain in public access areas for an unreasonable amount of time without any enforcement action.

BCDC's iterative negotiations with Scott's continued unabated for many months, punctuated from time to time with sudden threats by BCDC to initiate formal enforcement actions. On or about July 19, 2016, BCDC and Scott's agreed to the terms of a Stipulated Cease and Desist and Civil Penalty Order ("Stipulated Order") that would formally and finally resolve BCDC's claims stemming from Scott's violations. As the nominal co-permittee, the Port was a party to this agreement as well. It took BCDC staff another 3 months to schedule a hearing in front of BCDC's Enforcement Committee. On October 20, 2016, the Enforcement Committee held a noticed public hearing to consider the Stipulated Order and, at the conclusion of the hearing, the Committee formally recommended that BCDC's legislative body ("Commission") finally approve the Stipulated Order.

On November 3, 2016, the Commission considered the Stipulated Order, along with staff and the Enforcement Committee's recommendation to approve such order. In a vote of 12-2, the Commission voted against the Stipulated Order and the Complaint followed.

II. Affirmative Defenses

A. The Complaint Fails to State a Claim Against the Port

The Complaint names the Port as a respondent but completely fails to articulate a cognizable claim against the Port. For this reason alone, the Complaint against the Port should fail. The Port demurs as follows.

1. Each Category of Violation in the Complaint Fails to State a Claim

The Complaint against the Port sets forth 7 categories of violations, confusingly labelled E through K. Each category is fatally flawed and should be rejected.

a. Category E

The first category of violation consists of Scott's construction of unpermitted improvements in the Pavilion area. The Complaint does not allege that the Port was involved in any way in this construction, and BCDC presents no evidence to suggest otherwise. To the contrary, BCDC's evidence that Scott's was solely responsible for this violation significantly relies on the Port's documentation of the violation which it supplied to BCDC. BCDC cites as its authority for this claim Government Code section 66632(a). That section specifies that: "Any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall

secure a permit from the commission." BCDC makes no allegation and presents no evidence to suggest that the Port "wished," desired, intended, or wanted to make any of the unpermitted improvements alleged. BCDC is aware that, to the contrary, the Port has been diligently attempting to stop Scott's from making such improvements.

b. Category F

The second category of violation consists of Scott's non-permit compliant use of the Pavilion through excessive "private use" for restaurant events. The Complaint does not allege that the Port was involved in any way in these private restaurant uses, and BCDC presents no evidence to suggest otherwise. To the contrary, BCDC's evidence that Scott's was solely responsible for this violation significantly relies on the Port's documentation of the violation which it supplied to BCDC to assist in abating Scott's non-permit compliant uses.

c. Category G

The third category of violation consists of Scott's unpermitted use of the Franklin and Broadway Street plazas for displaying promotional materials and installing restaurant event equipment. The Complaint does not allege that the Port was involved in any way in these activities, and BCDC presents no evidence to suggest otherwise. To the contrary, BCDC's evidence that Scott's was solely responsible for this violation significantly relies on the Port's documentation of the violation which it supplied to BCDC to assist in abating Scott's unlawful activities. Here, again, BCDC cites as its authority for this claim Government Code section 66632(a). Again, BCDC makes no allegation and presents no evidence to suggest that the Port "wished," desired, intended, or wanted to engage in any of Scott's unlawful activities. BCDC is aware that, to the contrary, the Port has been diligently attempting to stop Scott's from engaging in such activities.

d. Category H

The fourth category of violation consists of Scott's holding of unscheduled restaurant events and failing to submit to the Port a quarterly calendar of events. It is undisputed that the Port is not responsible for these violations. But, the Complaint then insidiously adds a violation claim against the Port for failing "to submit to BCDC by March 1st of every year, a summary of the scheduled events for the previous year." The allegation is worded just deceptively enough that a trier of fact unfamiliar with the Permit might not understand what is being alleged. Put simply, BCDC is alleging that because Scott's failed to submit its event information to the Port, the Port necessarily failed to pass on that information to BCDC.[3] The Permit simply cannot be read to require that the Port engage in magic and pass on information

[3] The Complaint itself notes that it was Cushman and Wakefield, not the Port, who was responsible for passing on whatever event information Scott's gave to it, if and when Scott's chose to do so.

unavailable to it. This allegation is (at best) inaccurate and (at worst) made in bad faith.

e. Category I

The fifth category of violation consists of a "failure to dedicate the required public access area before commencement of construction of the Pavilion" in violation of Special Condition II.B.3 to the Permit. Here, again, deceptive language is inappropriately used (twice) to create the appearance that the Port violated the Permit.

First, the Permit requires that Scott's seek and receive approval from BCDC *prior* to commencing construction. The Permit contemplates that once BCDC approval is obtained, the dedication will be made by the Port as a condition precedent to construction. But, of course, the action at issue here is Scott's unpermitted construction *before* receiving approval from BCDC or concurrence from the Port. Hence, it would have been absolutely impossible for the Port to have made a dedication prior to Scott's unpermitted and unlawful construction which was initiated without the Port's knowledge or consent. Again, BCDC seeks to hold the Port liable for its inability to perform acts of magic.

Second, the Complaint intentionally omits the word "permanent" to avoid revealing that BCDC's proposed course of conduct violates State law. Special Condition II.B.3 is entitled "Permanent Guarantee" and requires that the Port "permanently guarantee" public access "to the extent permittees are legally able to do so." The Port was not and is not legally able to permanently dedicate land. BCDC knows this well.

On July 24, 2014, then-Deputy Port Attorney Joshua Safran sent a letter to John Bowers, Staff Counsel for BCDC, that stated in pertinent part:

> As you know the Port of Oakland and BCDC are currently negotiating the Port's dedication of a public access restriction on public trust lands, granted by the State and held in trust by the Port, in Oakland, California's Jack London Square.
>
> BCDC has asked that the term of the restriction be permanent. Based on recent discussions with the State Lands Commission [footnote omitted] and the Attorney General's Office, it is our understanding that the Port may not lawfully dedicate a permanent restriction encumbering such lands. However, it may dedicate a restriction for a term of up to 66 years.
>
> Beginning in 1852, through a series of legislative grants from the State, the City of Oakland acquired all of the right, title, and interest to certain tide and submerged lands located within its boundaries. Through the City's Charter, portions of these public trust lands are within the Port Area and are managed by the Port. These "granted

> lands" are subject to constitutional, statutory, and common law requirements that impose public trust restrictions on their use and upon the revenues derived from development of these lands. As you may be aware, the grantee of sovereign tide and submerged lands is charged with the duty to administer the trust solely in the interest of its beneficiaries, the people of California. As part of that duty, grantees like the Port are prohibited by their legislative grants and "shall not, at any time, grant, convey. give or alien said lands, or any part thereof, to any individual, firm or corporation for any purposes whatever." These same legislative grants, however, provide that the Port "may grant franchises thereon for limited periods" but in no event for terms "to exceed 66 years." The subject legislative grants may all be found here:
>
> http://www.slc.ca.gov/Granted_Lands/Alameda.html.
>
> For these reasons, the Port Attorney is proposing that the permanent public access restriction language proposed by BCDC be modified to include a term of years not to exceed 66 years.
>
> Thank you for your consideration of this important matter and do not hesitate to contact me further. I understand that Supervising Deputy Attorney General Chris Tiedemann and Deputy Attorney General Joseph C. Rusconi are interested in discussing this matter further. As appropriate, counsel for the State Lands Commission may also be available.

The Complaint awkwardly attempts to sidestep this legal reality by stating in pertinent part:

> Commission Staff Counsel John Bowers responded to this proposal by pointing out that that Port's proposal was based on a misconception as to the term of the dedication required by the Permit, which Mr. Safran had characterized as "permanent" or "perpetual." As Mr. Bowers advised Mr. Safran, the term of the dedication required by the Permit is not in fact "permanent," but rather, pursuant to section 10503(c) of the Commission's regulations, is limited to the duration of the permit and of the improvements that it authorizes.

This language in the Complaint is significantly problematic for a couple of reasons. First, the Port is not aware of Mr. Bower's alleged response and hereby requests documentation of such response. Second, reciting the exact language of the Permit, which requires a "permanent" dedication is not a "misconception." Third, the only misconception here is BCDC's willful blindness in reading the very regulation they cite. 14 CCR section 10503(c) specifies: "The terms and conditions of a permit shall normally remain effective so long as the permit remains effective, the uses authorized in the permit remain in effect, or the structures authorized in the permit remain standing, whichever is longer, *unless the condition specifies*

differently" (emphasis added). In this case, the Permit clearly does specify differently. It specifies a "permanent" guarantee.

The Complaint goes on to shoot its own argument in the foot. It further states in pertinent part:

> Mr. Bowers further advised Mr. Safran that any change in the terms of the Permit, such as a change in the term or duration of the public access dedication required by the Permit, could only occur by means of an amendment to the Permit, and that any limitation on the term of the Permit's dedication requirement would need to be accompanied by a corresponding change or reduction in the term of the Permit itself;

First the Complaint attempts to cast blame on the Port for "misconceiving" that the permit required a permanent dedication. Now, it goes on to say a less-than-permanent dedication would constitute a "change in the terms of the Permit," requiring a permit amendment. Whatever the case, the Port remains lawfully prohibited from granting a permanent easement. If BCDC, by whatever means it chooses to employ, can accept a 66-year (or shorter) easement, the Port remains ready to grant it.

f. Category J

The sixth category of violation consists of Scott's failure to install and maintain certain signage on the side of Scott's restaurant and Scott's failure to maintain certain tables and chairs in the Pavilion area. The Complaint does not allege that the Port was responsible in any way for these failures, and BCDC presents no evidence to suggest otherwise. To the contrary, BCDC's evidence that Scott's was solely responsible for this violation significantly relies on the Port's documentation of the violation which it supplied to BCDC to assist in abating Scott's violations of the Permit.

g. Category K

The seventh category of violation consists of Scott's failure to obtain written plan approval from BCDC in advance of installing certain tables and chairs in the Pavilion area. The Complaint does not allege that the Port was responsible in any way for these failures, and BCDC presents no evidence to suggest otherwise.

2. The Complaint Fails to Comply with Law

California Government Code section 66641.6(a) empowers BCDC to issue complaints for administrative civil penalties. However, such complaints "shall allege the act or failure to act that constitutes a violation of law." Because the Complaint fails to make such mandatory allegations against the Port, the Complaint against the Port should be dismissed as a matter of law. Further, 14 CCR section 11302 specifies that only certain specific actions may constitute grounds for the imposition of civil

penalties by BCDC. These are: (1) the undertaking of any activity that requires a BCDC permit without having obtained such a permit; or, (2) the violation of any term or condition of a BCDC permit. Because the Port did not undertake any activity that required a permit or violated a permit, and because the Complaint fails to cognizably allege as much, the Complaint against the Port should be dismissed as a matter of law.

B. The Complaint Fails to Allege Vicarious Liability

Despite its 46 page-length (with 2 attachments), the Complaint never actually articulates any theory for why the Port and the public funds it manages should be liable for Scott's alleged bad acts. To the extent BCDC is relying on such a theory, it had the burden of including it in the Complaint, and it failed to do so. As such the Complaint should be dismissed.

Although the burden is squarely on BCDC, the Port does the Commission the courtesy here of guessing, literally, why BCDC might justify its notion that public funds should be held vicariously liable for the acts of a private party.

1. The Port's "Co-Permittee" Status Is Immaterial

To the extent BCDC is seeking to argue that the Port should be held vicariously liable because it is nominally a "co-permittee" with Scott's on the Permit, it must be noted that the Port has never agreed to be held jointly and severally liable with Scott's. Further, the Permit does not expressly or implicitly indicate that any such vicarious liability is established under its terms.

The Port does not participate in Scott's activities and has less oversight authority over such activities than BCDC does. Further, and more insidiously, the Port is only a nominal co-permittee because of BCDC's position that the Port was obligated to co-sign the Permit. This was presumably part of BCDC's practice and policy of compelling landowners to co-sign permits with their tenants. While the Port does hold the land underlying Scott's in trust for the people of the State of California, it is not, for BCDC's enforcement purposes, a typical landlord. Scott's holds a 54-year, triple-net, ground lease from the Port that will not revert to the Port until 2041. The Port does not exert operational control of Scott's activities and, when it needs to exercise the police power against tenants such as Scott's, it turns to enforcement agencies such as BCDC, as it did here.

2. No Strict Liability Standard Applies

The Port recognizes that in certain limited circumstances, BCDC can and should pursue penalties against arms-length landowners, even public agency owners, for the acts of their tenants and users. In those unique cases, the violator is either unknown or financially insolvent and pursuing the public agency landowner is appropriate and necessary to remedy the violation as a matter of last resort. *See, e.g.*, *Leslie Salt Co. v. BCDC* 153 Cal.App.3d 605 (1984) (upholding a rare strict liability standard against a landowner where the violator (who dumped "several

hundred tons of earth, gravel, asphalt, broken concrete and other demolition materials, along with a barge-like structure" on wetlands and the adjacent shoreline) was totally "unknown" and limiting liability to the unknown "responsible person" would have frustrated the purpose of the McAteer-Petris Act). Here, by dramatic contrast, the alleged violator is more than merely "known" to BCDC. BCDC has been actively and directly negotiating with the violator for nearly 4 years. The violator is a reputable business institution, not a midnight dumper.

C. The Complaint Unlawfully Retaliates Against the Port

Reading the stilted language of the Complaint, a trier of fact might not be able to tell that the Port is, in fact, a public agency. And, he or she would be stunned to learn that the Port investigated, responded, and sought to abate Scott's violations of law faster and more diligently than BCDC. Yet, throughout the Complaint BCDC casually and inappropriately refers to the "permittees" when referring to Scott's, failing in numerous places to distinguish between a privately owned, for-profit restaurant that actually engaged in the subject violations and the public agency who brought Scott's violations to BCDC's attention.[4]

The Port's key role in identifying, investigating, and reporting Scott's violations to BCDC are minimized and distorted to such an extent in the Complaint that the Port's investigatory findings are painted more like a set of admissions against interest by a violator than the diligent work of a public agency seeking BCDC's help in enforcing the law. Not only is the Port given no credit for its diligence, it is now penalized for it.

The cavalcade of Port correspondence in 2012 and 2013, excerpted above in our Statement of Facts, clearly demonstrates that it was the Port, not BCDC, who initially identified, investigated, and reported Scott's violations. A careful read of the Complaint reveals that most of BCDC's substantial evidence in its case against Scott's comes directly from information reported to it by the Port and/or the Port's own property management and security staff.

Because the 2 Broadway premises are outside of the Port Area, the Port turned to BCDC to enforce its rules against Scott's. Ironically, when, many years later, BCDC finally chose to take a formal enforcement action, it did so against the Port. Retaliating against whistleblowers is not only legally inappropriate, it is bad public policy, the kind of public misstep that will have a chilling effect on reporting to and cooperation with agencies such as BCDC in the future.

D. The Complaint Is Barred by the Doctrine of Unclean Hands

The doctrine of "unclean hands" is a legal defense for respondents such as the Port where complainants such as BCDC have engaged in materially

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[4] BCDC staff's presentation to the Commission on November 3, 2016, as reflected in the minutes, are similarly replete with these same indifferent references to the "permittees" when referring to Scott's violations of law.

unreasonable conduct related to the subject matter of the complaint, particularly where such conduct prejudiced the respondent.

Here, BCDC has engaged in materially unreasonable conduct in two key respects, both of which have prejudiced the Port. First, as detailed above, BCDC insisted, and continues to insist that the Port be a co-permittee with Scott's on the Permit. This insistence is apparently based on BCDC's fundamental misunderstanding of the nature of the Port's role as a landlord for its long term triple-net commercial ground leases. Because of the Port's nominal inclusion as a co-permittee, unwillingly tethered to Scott's as it performs unpermitted bad acts, the Port has been forced to expend significant human and financial resources in responding to 4 years of BCDC's on-again, off-again negotiations with Scott's over improvements that the Port has no control over.[5]

Second, the Port is being used as the sacrificial lamb for BCDC's years of prevaricating and foot-dragging. As discussed above, the 2 Broadway premises are outside of the Port Area and, therefore, outside of the Port's police power jurisdiction. Outside of the Port Area, the Port is left with only its limited rights as a landlord under the triple-net ground lease with Scott's. Those rights were, however, sufficient for the Port to file suit in Alameda County Superior Court to compel Scott's to cure its violations of law. As is evidenced by the correspondence cited above, in 2013, the Port was preparing to do just that. And, then along came BCDC. Instead of taking decisive enforcement action, BCDC engaged in 4 years of talking with Scott's about an amendment to the Permit before taking any action. Unfortunately, the Port's ground lease with Scott's provides that the Port may not enforce a default so long as Scott's is "continuously and diligently proceeding in good faith to cure the violation." So, while Scott's and BCDC were engaged in their 4 years of good faith but ultimately fruitless negotiations, the Port has been estopped from taking its own swift and decisive enforcement action because BCDC has provided Scott's with a tortuously prolonged avenue to cure its violations.

After making the Port an unwilling participant in this debacle and robbing it of its only functional remedy, BCDC may not now seek to penalize the Port through the Complaint.

E. The Complaint Is Barred by the Doctrine of Laches

Complainants such as BCDC are estopped from making claims against respondents such as the Port under the legal doctrine of laches where the complainant has engaged in unreasonable delays that prejudiced the respondent. Here, BCDC's unreasonable delay is undisputed. According to the Complaint itself, BCDC took 15 years to act in some cases, 11 years in other cases, and nearly 4 years in others. Whether 15, 11, or 4 years, these are objectively unreasonable amounts of

[5] For these reasons, and to extract itself from the ongoing dispute between Scott's and BCDC, the Port hereby requests that it be removed as a permittee under the Permit. Given that BCDC has, at various times, threatened to revoke the Permit, the Port is curious to hear if and why BCDC would oppose this request.

time to bring an action such as the Complaint. Further, BCDC's own staff report to the Commission on November 3, 2016, at page 4, notes that:

> 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.

Similarly, in BCDC's staff presentation to the Commission on November 3, 2016, Chief of Enforcement Adrienne Klein explained that "no formal enforcement proceeding was commenced by staff" because of "a spirit of reaching settlement." At that same hearing, BCDC's Regulatory Program Director Brad McCrea further explained that BCDC "staff has been aware anecdotally of the alleged [violations]. For a number of years, through a change of leadership, we have lacked the leadership to enforce a number of projects including this one." Once, BCDC finally decided to "engage" with Scott's, Mr. McCrea explained that BCDC participated in a "soft back-and-forth; fits and starts."

Whether it was BCDC's "spirit" of settlement, its lack of "leadership," or its "soft" negotiation style, the pivotal fact remains that BCDC, not the Port, is the enforcement agency here. BCDC, and not the Port, chose to allow Scott's to maintain unpermitted improvements for years. BCDC, and not the Port, chose to allow Scott's to engage in unpermitted activities for years. And now, years later when BCDC finally decides to act, it assesses penalties against the Port which are measured in the "Duration in Days" of the alleged violations. Eight-hundred-forty-thousand-dollars-worth of days passed on BCDC's watch and now BCDC wants the Port to gift public funds to a private party to atone for its inactivity and foot-dragging. Any reasonable trier of fact would conclude that the Complaint is barred by BCDC's unreasonable delay.

F. The Complaint Improperly Demands a Gift of Public Funds

California public agencies such as the Port of Oakland are prohibited under Article 16, Section 6 of the California Constitution from gifting public funds "for the payment of the liabilities of any individual, association, municipal or other corporation whatever." Because the Port's funds are public trust funds held in trust for the people of the State of California, this restriction is further reinforced by the Port's obligations as a trustee and a fiduciary.

By naming the Port as a respondent to the Complaint and demanding that it pay in excess of $800,000 out of its public trust funds to assume liabilities assessed against Scott's for Scott's alleged bad acts, BCDC is demanding nothing less than a Constitutionally prohibited gift of public funds to Scott's. As such, the Port vigorously objects to its inclusion in the Complaint, and believes that no reasonable

trier of fact would uphold a requirement that a public agency offset the liabilities of a private, financially solvent, for-profit corporation.

G. The Complaint Fails to Comply with Government Code §66641.9

Government Code section 66641.9 mandates that in determining the amount of administrative civil liability to impose under the Complaint, BCDC must take into consideration the nature, circumstance, extent, and gravity of the violations alleged, whether the violations are susceptible to removal or resolution, the cost to BCDC in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on its ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

In the Complaint, it appears that BCDC diligently evaluated these criteria in order to comply with this section of the Government Code with respect to Scott's. It also appears that BCDC completely failed to evaluate *any* of these criteria with respect to the Port. Absent such a determination, BCDC may not seek administrative civil penalties from the Port. If it had embarked on this mandatory evaluation, the Port is confident that the amount of penalties assessed against the Port would be astronomically lower than the over $800,000 BCDC is currently seeking.

IV. Conclusion

For the reasons set forth above, the Port of Oakland respectfully requests that the Complaint against it be dismissed by BCDC.

Very truly yours,

Joshua Safran

Enclosures: Tab A – Statement of Defense form
Tab 1 – Correspondence in chronological order
Tab 2 – Scott's Lease
Tab 3 – City of Oakland Charter excerpt

cc: Marc A. Zeppetello, Chief Counsel, BCDC
Michael P. Verna, Esq., Bowles & Verna LLP
Danny Wan, Port Attorney
Richard Sinkoff, Director of Environmental Programs and Planning
Pamela Kershaw, Director of Commercial Real Estate

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December 15, 2010

David Alexander
Port Attorney
Port of Oakland
530 Water Street
Oakland, CA 94607

Subject: Status of Port of Oakland Funds

Dear Mr. Alexander:

The State Lands Commission (Commission) has the statutory responsibility to oversee the management of sovereign public trust lands and assets by legislative grantees who manage these lands in trust on behalf of the State of California. (Public Resources Code Section 6301 et. seq.; *State of California ex rel. State Lands Commission v. County of Orange* (1982) 134 Cal.App. 3d 20, 23.) The Commission and its staff exercise this responsibility and authority through various mechanisms including opinion letters such as this one discussing the status of a particular trust grant.

The State of California's sovereign tide and submerged lands within the city of Oakland (City) were legislatively granted in trust to the City by the State of California under various statutes enacted in the 19th and 20th Centuries and are held subject to the trust as subsequently amended by the Legislature. Through the City's Charter, portions of these public trust lands are within the Port of Oakland (Port) and are managed by the City acting by and through its Board of Port Commissioners. Port funds derived from and generated by these lands are held, in trust, by the Port within a public trust fund pursuant to Public Resources Code Section 6306.

The granting language utilized by the State Legislature has the effect of conveying the State's legal title to the described tide and submerged lands, subject to certain terms and conditions and subject to the statutory and common law public trusts. The grantee, here the City, is a trustee, both as to the lands themselves and as to the revenues derived therefrom. (*City of Long Beach v. Morse* (1947) 31 Cal. 2d 254, 257.) The trust is held for the benefit of the entire State. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209.) The effect of

the legislative grant is, therefore, to create a trust in which the grantee is trustee, and the State is the trustor, and the people of the State are the beneficiaries of the trust. The legal consequence of this relationship is that the proper use of public trust lands and public trust revenues is a statewide affair. (*Mallon* at 209.)

In connection with the proceeding before the Federal Maritime Commission you have asked the staff of the State Lands Commission for guidance regarding the legal status of the Port's trust funds. Please be advised that the Port's trust funds, like the trust lands themselves, are held in trust by the Port on behalf of the State of California and may not be allocated to any non-trust purposes. As a trustee for the State of California and as administrator and manager of trust lands and funds, the Port performs valuable governmental functions on behalf of the State and as such should be considered as acting as an arm of the State. Therefore, we conclude that the Port's public trust revenue funds, managed by the Port as trustee for the people of the State of California, should have no less immunity under the 11th Amendment to the United States Constitution than is otherwise applicable to like funds held by the State of California. This is true even though the subject Port trust funds are held in a separate public trust fund administered and managed by the Port of Oakland.

We hope that this information is helpful to you in clarifying the relationship of the Port of Oakland's trust funds in relation to the State of California.

Sincerely,

Jennifer Lucchesi

Jennifer Lucchesi
Chief Counsel

November 27, 2012

Sent VIA e-mail attachment only to addressees

Mr. Dorin Tuitin,
Ms. Julie Braun
Commercial Real Estate
Port of Oakland
530 Water Street
Oakland, CA 94607

Dear Dorin and Julie

Thank you very much for your time and consideration relative to our meeting on Monday, November 26, 2012 regarding Scott's plans to make much needed improvements to the Public Pavilion at the foot of Franklin Street.

I appreciate the Port's effort in working with Scott's to come up with a better and more attractive solution to providing a new enclosure for the Pavilion to accommodate private and public events. As I mentioned, Scott's has been working since early this year on a design that will meet the objectives of BCDC by maintaining the public views while the Pavilion remains in public use. I believe that we have come a long way in engineering an acceptable system that meets the needs of Scott's for private events while providing a workable and attractive solution for this building's dual roles.

Because it is critical to our marketing efforts for next year, we were imploring BCDC and now are imploring the Port to signal to BCDC the Port's concurrence with respect to the latest proposed plan for the sliding wall system - as we have described in the materials presented. We had convinced BCDC that we would address outstanding issues relative to the Pavilion in a formal amendment, but we believe that the sliding wall issue requires only staff level approval which will permit us to pursue any other required permits and begin ordering the materials and installing the system which we would like to do as soon as we can.

With respect to other issues with the operation of the Pavilion, we are strongly in favor of modifications to the existing BCDC permit so that both Scott's and the Jack London Square Operations people can maintain and manage the requirements in a way that makes it easier for all involved. At the same time, under one master permit amendment, we would like address other permit issues raised by BCDC associated with our storage room and then address the need for a permanent entry system/door as indicated. We believe this process may take some time to finalize for which we will diligently apply ourselves to addressing, but we believe this more complex process will delay our immediate objective of installing the new sliding wall system. Therefore, would like to bifurcate the formal permit amendment from the staff approval process for the wall installation.

With respect to the door, we believe that it is required, as a public assembly space, to meet all fire codes and standards necessary for doors in other similar space while in private use, therefore we wish to work with BCDC and other applicable agencies to come up with a solution that will address this health and safety need which we believe ultimately requires a ridged system that will withstand thousands of entries, exits and rough use as well as the weather elements throughout its life. We will agree to

mitigations if necessary. We want to combine this effort and other permit issues you raise and pursue those as soon as possible, but we don't want this to delay our wall system fabrication and installation and therefore ask the Port to support our efforts in this regard. We will simply use a temporary curtain or some other removable system until we can address the full permit amendment issue.

Please contact me or Steve Fagalde if you have further questions and concerns. As of now, I will review your recommended language for permitted use of the Pavilion as an amendment to BCDC's permit and will also make additional recommendations which will be in keeping with the objectives of the public space use.

Sincerely,

Steven E. Hanson
Consultant for Scott's, Jack London Square

cc: Steve Fagalde, President, Scott's

Kershaw

From: Steve Fagalde [stevef@scottscorp.com]
Sent: Thursday, December 27, 2012 4:48 PM
To: Pam Kershaw; hansonsteven@gmail.com
Cc: Dorin Tiutin; Julie Braun; Steve Fagalde
Subject: RE: Construction in Common Area on Pavilion

Hi Pam

We have not begun any construction, HOWEVER today they have started some investigative work to see what is below the pavers where some post columns are planned to go...by the end of day, everything will be back in place. Again, this was just investigative work. I did explain this to Monique when I saw her this afternoon.

I believe next week some brackets will start to be installed up in the rafters...this is in preparation for the soon to be permitted walls to be installed. We want to be fully ready and prepared as we expect the permit to be signed any day now.

Please let me know if you have any further questions.

Stephen E. Fagalde
Phone: (510) 302-0999

From: Pam Kershaw [mailto:pkershaw@portoakland.com]
Sent: Thursday, December 27, 2012 2:14 PM
To: Steve Fagalde; hansonsteven@gmail.com
Cc: Dorin Tiutin; Julie Braun
Subject: Construction in Common Area on Pavilion

Mr. Fagalde and Mr. Hanson:

I have just been informed that you have begun construction of the new Pavilion walls in the Common Area of Jack London Square. I presume that you have obtained all necessary regulatory permits and approvals for this work prior to commencement of construction. As such, please provide evidence of these permits and/or approvals to the Port and Cushman and Wakefield as soon as possible.

Thank you in advance for your cooperation with this request, please let me know when you have delivered copies of the approvals and/or permits to the Port headquarters building or to Cushman and Wakefield's office via email notification.

Thank you

Pamela Kershaw

Pam Kershaw

From: Pam Kershaw
Sent: Thursday, December 27, 2012 5:42 PM
To: Steve Fagalde
Cc: hansonsteven@gmail.com; Dorin Tiutin; Julie Braun; Steve Fagalde
Subject: Re: Construction in Common Area on Pavilion

Thanks Steve for the timely response, I really appreciate it.

Pamela

Sent from my iPhone

On Dec 27, 2012, at 4:48 PM, "Steve Fagalde" <stevef@scottscorp.com> wrote:

> Hi Pam
>
> We have not begun any construction, HOWEVER today they have started some investigative work to see what is below the pavers where some post columns are planned to go...by the end of day, everything will be back in place. Again, this was just investigative work. I did explain this to Monique when I saw her this afternoon.
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> I believe next week some brackets will start to be installed up in the rafters...this is in preparation for the soon to be permitted walls to be installed. We want to be fully ready and prepared as we expect the permit to be signed any day now.
>
> Please let me know if you have any further questions.
>
> Stephen E. Fagalde
> Phone: (510) 302-0999
>
> ---
>
> **From:** Pam Kershaw [mailto:pkershaw@portoakland.com]
> **Sent:** Thursday, December 27, 2012 2:14 PM
> **To:** Steve Fagalde; hansonsteven@gmail.com
> **Cc:** Dorin Tiutin; Julie Braun
> **Subject:** Construction in Common Area on Pavilion
>
> Mr. Fagalde and Mr. Hanson:
>
> I have just been informed that you have begun construction of the new Pavilion walls in the Common Area of Jack London Square. I presume that you have obtained all necessary regulatory permits and approvals for this work prior to commencement of construction. As such, please provide evidence of these permits and/or approvals to the Port and Cushman and Wakefield as soon as possible.
>
> Thank you in advance for your cooperation with this request, please let me know when you have delivered copies of the approvals and/or permits to the Port headquarters building or to Cushman and Wakefield's office via email notification.
>
> Thank you
>
> Pamela Kershaw

Pam Kershaw

From: Steve Fagalde [stevef@scottscorp.com]
Sent: Wednesday, January 02, 2013 4:18 PM
To: Pam Kershaw
Cc: Dorin Tiutin; Julie Braun; Steve Fagalde; Steven E. Hanson
Subject: Pavilion work

Pam/Dorin/Julie

I wanted to keep you up to date on the pavilion....As Mr. Gallagher had mentioned in our meeting with Deborah, the designer of the wall panel system flew out from Floriday. He is currently overseeing the "assembly" of the panel doors. The doors came in multiple pieces from multiple vendors (they are all custom designed and built).

For about the next 7 or 8 days, they will be assembling the doors. These doors ARE NOT being hung or installed until we have the appropriate permits, which we will furnish to you. I am expecting the BCDC sign off in the next day or two. Ellen was on vacation and comes back tomorrow

We are also measuring all the track needed. And assessing all of that work, because it is all so very technical, it is all being assessed on site.

If you have any questions, please let me know
I will be out of town tomorrow, however I will have my cell phone!

Stephen E. Fagalde
Phone: (510) 302-0999

PORT OF OAKLAND

FILE
2 Broadway
Scott's correspondence

February 25, 2013

Mr. Steve Fagalde
President
Scott's Seafood Restaurant
255 Third Street, Suite 102
Oakland, CA 94607

RE: Permits and Approvals
Public Pavilion Modifications

Dear Mr. Fagalde:

This letter is provided as a follow-up to previous communications between the Port and Scott's regarding our request to obtain evidence of your obtainment of all necessary permits and approvals from the City of Oakland and the San Francisco Bay Conservation and Development Commission ("BCDC") for the modifications to the Public Pavilion.

In your January 2, 2013 email to Pamela Kershaw you stated that the door panels would not be hung or installed until you had the appropriate permits and would furnish us with a copy. It appears that the panels have now been hung and installed for several days so we presume that you have obtained all of the required permits and regulatory agency approvals and can provide us with a copy. As the subject Pavilion is located on Port owned property outside of your leased premises, the Port must ensure that all improvements constructed on our property are in compliance with all applicable Building and Fire Codes of the City of Oakland for safety reasons, as well as in compliance with all our the BCDC permit regulations affecting this space..

Thank you in advance for your cooperation with this request, please submit these permit approval documents to me for our records and for our insurance requirements within the next five business days. If we do not receive these documents within that timeframe we will need to pursue other actions to address this situation.

Sincerely,

Julie Braun
Commercial Representative V

cc: Pamela Kershaw, Commercial Real Estate
Dorin Tiutin, Commercial Real Estate
Joshua Safran, Port Attorney's Office

530 Water Street ▪ Jack London Square ▪ P.O. Box 2064 ▪ Oakland, California 94604-2064
Telephone: (510) 627-1100 ▪ Facsimile: (510) 627-1826 ▪ Web Page: www.portofoakland.com

PORT OF OAKLAND

FILE
#2 Broadway
Scotts corresp

March 8, 2013

Mr. Tim Low
Engineer, Civil Principal
City of Oakland, Permit Center
250 Frank H. Ogawa Center, Room 2114
Oakland, CA 94612

RE: Public Pavilion
Jack London Square

Dear Mr. Low:

As you may be aware, one of our tenants in Jack London Square, Scott's Seafood Restaurant, has plans to construct a retractable wall system in the Public Pavilion located adjacent to their restaurant near the foot of Franklin Street. Since the Public Pavilion is located on property owned by the Port of Oakland I am inquiring as to the status of any building permits that have been applied for or issued for this structure, as I have been unable to obtain a copy directly from Scott's. Since the Public Pavilion is a part of the Common Areas of Jack London Square, and used by the public, the Port of Oakland must insure that this structure complies with all applicable regulatory agency requirements, codes, and ordinances, for our risk management purposes.

If the City has received any such building permit application or issued any such permits for this work I would greatly appreciate it if you could email a copy to me at jbraun@portoakland.com, or fax to (510) 893-2793. Thank you in advance for your prompt attention to this matter and please don't hesitate to contact me at (510) 627-1144 if you have any questions.

Sincerely,

Julie Braun
Commercial Representative V

cc: Steve Fagalde, Scott's Seafood Restaurant
Dorin Tiutin, Commercial Real Estate Division
Pamela Kershaw, Commercial Real Estate Division
Joshua Safran, Port Attorney's Office

FILE
#2 Broadway
Scott's correspond.

PORT OF OAKLAND

March 8, 2013

Ms. Ellen Miramontes
Bay Design Analyst
SF Bay Conservation and Development Commission
50 California Street, Suite 2600
San Francisco, CA 94111

RE: Public Pavilion
Jack London Square

Dear Ellen:

As you are aware, Scott's Seafood Restaurant has been pursuing BCDC's approval for a modified wall system to replace the canvas curtain walls of the Public Pavilion in Jack London Square for the past couple of months. I am inquiring as to the status of BCDC's approval of this project since I have been unable to obtain a copy of this permit approval directly from Scott's. Since the Public Pavilion is a part of the Common Areas of Jack London Square, we must insure that it meets and complies with all applicable regulatory agency requirements, codes, and ordinances, and must have copies of approved permits for our risk management purposes.

If BCDC has issued an approval or permit for the new wall system in the Public Pavilion I would greatly appreciate it if you could email a copy to me at jbraun@portoakland.com, or fax to (510) 893-2793. Please don't hesitate to contact me at (510) 627-1144 if you have any questions.

Sincerely,

Julie Braun

Julie Braun
Commercial Representative V

cc: Steve Fagalde, Scott's Seafood Restaurant
Dorin Tiutin, Commercial Real Estate Division
Pamela Kershaw, Commercial Real Estate Division
Joshua Safran, Port Attorney's Office

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PORT OF OAKLAND

March 19, 2013 Certified Mail

Mr. Steve Fagalde
Scott's Seafood Restaurant
255 Third Street, Suite 102
Oakland, CA 94607

RE: Public Pavilion Building Permit

Dear Steve:

We are in receipt of the attached notice from the City of Oakland pertaining to construction performed without a building permit. This notice pertains to the construction and installation of the wall panels and other work occurring in the Public Pavilion.

As you know, Section 3.2 of our lease requires that you comply with all laws, rules and regulations applicable thereto adopted by federal, state, local or other governmental bodies, or departments, or officers and applicable to the Premises. Further, Section 10 of our lease requires that you submit complete plans and specifications to the Port of Oakland for approval prior to making any alterations, additions, or betterments to the Premises, after first securing all necessary permits and approvals. As of today, the Port has not received evidence of your approvals or permits from BCDC or the City of Oakland.

We ask that Scott's act promptly to obtain the necessary permits from the City of Oakland's Building department and forward a copy to the Port. I also wish to remind you that failure to comply with the terms and covenants of your lease constitutes a default if not cured within fifteen (15) days.

Sincerely,

Julie Braun

Julie Braun
Commercial Representative V

Attachment

cc: Steve Fagalde, 2 Broadway, Oakland, CA 94607 (Certified Mail)
Steve Hanson
Pamela Kershaw
George King, Esq.
Joshua Safran, Esq.
Dorin Tiutin

530 Water Street ■ Jack London Square ■ P.O. Box 2064 ■ Oakland, California 94604-2064
Telephone: (510) 627-1100 ■ Facsimile: (510) 627-1826 ■ Web Page: www.portofoakland.com

Julie Braun

From: Low, Tim [TLow@oaklandnet.com]
Sent: Wednesday, March 13, 2013 1:45 PM
To: Julie Braun
Subject: Cmplnt# 1301154 at 2 BROADWAY

Stop work order has been issued.
Your tenant has yet to appy for permit!

```
Cmplnt# 1301154  Code ALL                    Cmplnt Disp: V  03/06/13
Address      2   BROADWAY                  Suite:        Parcel: 018 -0415-005-00
Existing Use

Descr:  CONSTRUCTION W/OUT PERMITS - CANOPY STRUCTURE ATTACHED TO REAR OF
        SCOTT'S SEAFOOD RESTAURANT (FRANKLIN STREET SIDE NEAR KINCAID'S)

Notice:

Station CE-INSP  Dist: 01C  Primary Insp          Total Insp Hours    :18
          Insp   A   Scheduled                 Performed   Start  End  Total Trvl
No Code   Date   P   Date    By  Division Dst By Vio* Rsl* Time  Time  Time Mlge
04 OBC  04/16/13 P 03/13/13 ME  CE-INSP  01C MF
    Reinsp requested from insp result 87 on 03/06/13
02 OBC  03/12/13 P 03/08/13 TEC CE-INSP  01C MF
    Reinsp requested from insp result 86 on 03/04/13
03 OBC  03/06/13   03/06/13 PTS CE-INSP  01C MF  41  87  11:30 11:38   :08  2.0
    STOP WORK ORDER                                                          +
```

Timothy Low P.E.
Inspection Manager
250 F H Ogawa Pz, #2334C
Oakland, CA 94612
Tel: 510-238-6315
Fax: 510-238-3586

Below is the link to our online Customer Service Survey form. Please complete the survey to help us to improve our serviice.
https://www.research.net/s/TXZ7YN8

CONFIDENTIALITY NOTICE: This e-mail message including attachments, if any, is intended only for the person(s) or entity(ies) to which it is addressed and may contain confidential and /or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

CUSHMAN & WAKEFIELD®

Cushman & Wakefield of California, Inc.
Jack London Square
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Oakland, CA 94607
(510) 645 9292 Tel
(510) 645 9363 Fax
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VIA EMAIL

April 12, 2013

Mr. Steve Fagalde
Scott's Seafood Restaurant
255 Third Street, Suite 102
Oakland, CA 94607

RE: Installation of Planters in Common Area

Dear Steve,

It has come to our attention that approximately sixteen planters are being installed at this time around the Public Pavilion in the common area at Jack London Square. Please provide evidence that this installation has received all applicable approvals including but not limited to BCDC, the Port and City of Oakland.

If you cannot provide evidence of approval immediately, we request you remove the planters within one week of this letter. If not, we will proceed with removal of the planters.

Thank you very much.

Sincerely,

Marjorie Turrel - License # 01903852
Interim General Manager
Cushman & Wakefield of California, Inc. – Lic. #00616335
as Managing Agent for
Jack London Square Ventures, LLC

Cc Julie Braun, Port of Oakland
Michael D. Meyer, C&W
Caroline Morris, Ellis Partners

PORT OF OAKLAND

April 24, 2013

Mr. Steve Fagalde
Scott's Seafood Restaurant
255 Third Street, Suite 102
Oakland, CA 94607

RE: Public Pavilion Permits and Approval(s)

Dear Mr. Fagalde:

Pursuant to the terms of the Lease between the Port of Oakland ("Port") and Scott's Jack London Seafood, Inc. ("Scott's") dated April 9, 1987, as subsequently amended ("Lease"), the Port transmitted a written notice to Scott's on March 19, 2013 regarding Scott's violation of Section 3.2 and Section 10 of the Lease, with respect to Scott's commencement of construction of wall panels on the Public Pavilion prior to submitting complete plans and specifications for these improvements to the Port and prior to obtaining all necessary building and other permits from the Port, the City of Oakland and other appropriate governmental agencies, including the San Francisco Bay Conservation and Development Commission ("BCDC"). As you are aware, Section 21 of the Lease requires that the Scott's cure any condition which would entitle the Port to declare a default, including a violation of any term or condition of the Lease, within fifteen (15) days after notice from the Port, or if the default is of such a nature that it cannot be remedied within fifteen (15) days, Scott's shall have commenced the elimination of the violation and shall be continuously and diligently proceeding in good faith to cure the violation.

It has now been more than fifteen (15) days since the Port provided written notice of these Lease violations to Scott's yet the Port has not received evidence from Scott's that you have commenced the elimination of these Lease violations. Please provide written evidence to the Port indicating how Scott's has commenced elimination of these Lease violations. At a minimum, such evidence must include permit applications submitted to the City of Oakland and BCDC, by Tuesday, April 30th at 4:00 p.m.

As you are aware, Scott's failure to remedy a violation of the Lease in accordance with the language provided in Section 21 of the Lease entitles the Port to declare Scott's in default of the Lease. If the Port does not receive evidence from Scott's indicating how

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Telephone: (510) 627-1100 ■ Facsimile: (510) 627-1826 ■ Web Page: www.portofoakland.com

you have cured or commenced cure of these violations by Tuesday, April 30th at 4:00 p.m., the Port will pursue all actions necessary to address these Lease violations.

As you know, Section 43 of the Lease provides for the Port's recovery of its reasonable costs and expenses (including attorneys' fees and costs) from Scott's should the Port be required to enforce provisions of the Lease.

Thank you in advance for your prompt attention to this matter.

Sincerely,

Pamela Kershaw
Director of Commercial Real Estate

Cc: Steve Fagalde
2 Broadway
Oakland, CA 94607

George King, Esq.
555 12th Street, Suite 1440
Oakland, CA 94607

Julie Braun, Commercial Real Estate Division
Dorin Tiutin, Commercial Real Estate Division
Joshua Safran, Port Attorney's Office

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Oakland, CA 94607
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(510) 645 9363 Fax
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VIA EMAIL and FEDERAL EXPRESS

April 25, 2013

Mr. Steve Fagalde
Scott's Seafood Restaurant
255 Third Street, Suite 102
Oakland, CA 94607

RE: Planters in Common Area

Dear Steve:

We have not received from you evidence of applicable approvals regarding the sixteen planters in the Common Area adjacent to the Public Pavilion as requested in my emailed letter of April 12.

We, therefore, as the Port's designated operator of the Common Area, require that Scott's Seafood remove all of these planters by 5:00 pm, Monday, April 29. Please know that in the event the planters remain after this date and time, then we shall arrange to have them removed from the Common Area and disposed of.

Thank you very much for your cooperation in this matter.

Sincerely,

Marjorie Turrel

Marjorie Turrel - License # 01903852
Interim General Manager
Cushman & Wakefield of California, Inc. – Lic. #00616335
as Managing Agent for
Jack London Square Ventures, LLC

Cc Dorin Tuitin, Port of Oakland
Julie Braun, Port of Oakland
Michael D. Meyer, C&W
Caroline Morris, Ellis Partners

PORT OF OAKLAND

May 21, 2013

Mr. Steve Fagalde
President
Scott's
255 Third Street, Suite 102
Oakland, CA 94607

RE: Lease Section 3.2
Compliance with Law and Indemnity to Port

Dear Steve:

The Port of Oakland is in receipt of a letter from Adrienne Klein, Chief of Enforcement for the San Francisco Bay Conservation and Development Commission ("BCDC") dated May 16, 2013, regarding alleged violations under BCDC Permit 1985.019A, Permit 1985.019B, and Enforcement File No. ER2013.008, related to the installation of various improvements at and adjacent to the Public Pavilion. Pursuant to the prior correspondence transmitted to you from the Port on March 19, 2013 (attached, in which we requested proof of approvals and/or permits from the City of Oakland and BCDC) and April 24, 2013 (attached, notifying you that Scott's was in violation of their lease) these improvements were installed in violation of the terms of the Lease between the Port of Oakland ("Port") and Scott's Jack London Seafood, Inc. ("Lessee") dated April 9, 1987, as subsequently amended ("Lease").

This letter serves to remind you again that Section 3.2 of the Lease, mandates that the Lessee shall at all times faithfully obey and comply with all laws, rules and regulations applicable thereto adopted by federal, state, local or other governmental bodies, departments, or officers and applicable to the Premises. Further, lease Section 3.2 states that the Lessee agrees to defend and indemnify the Port and Port officers, employees and agents from and against any penalties or charges and administrative and/or judicial proceedings (including, without limitation, attorneys fees and legal expenses incurred by the Port in connection with such penalties or charges and proceedings) imposed on or involving the Port for any violation or alleged violation by Lessee or by Lessee's licensees, sublessees or invitees, of any and all laws, ordinances and regulations applicable to Lessee's use of the Premises. I also remind you that Section 43 of the Lease states that the Port shall also be entitled to have and recover from Lessee all other reasonable costs and expenses associated with the Port's enforcement of the provisions of the Lease. Please be advised that the Port Attorney's Office bills our assigned Deputy's time at $383.45 per hour.

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We ask that you immediately take all necessary action to comply with BCDC's requests as detailed in Ms. Klein's letter to resolve all violations, to submit all documentation as requested, and to pay for any fines, penalties, or fees incurred or assessed on the Port and/or the Lessee.

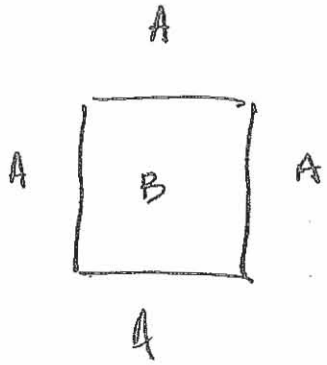
I thank you in advance for your immediate attention to this matter, if you have any questions, please don't hesitate to contact me at (510) 627-1144.

Sincerely,

Julie Braun
Commercial Representative V

cc: Steve Hansen
Pamela Kershaw
George King, Esq.
Joshua Safran, Deputy Port Attorney
Dorin Tiutin
Adrienne Klein, BCDC

PORT OF OAKLAND



July 12, 2013

Mr. Steve Fagalde
President
Scott's
255 Third Street, Suite 102
Oakland, CA 94607-4328

RE: Status of Permits and Approvals
With the City of Oakland and BCDC

Dear Steve:

In reference to our previous letters to you dated March 19th, April 24th and May 21st in which we request your compliance with all governing bodies relative to the various Public Pavilion improvements you have made, we ask that you provide us with a written update of your efforts to cure your default as defined under lease Section 3.2.

Thus far the Port has received plans of the proposed Public Pavilion modifications and copies of permit applications for the City of Oakland and BCDC, however we have not received any confirmation by either agency that permits or approvals have been issued.

We appreciate your anticipated cooperation regarding this matter. If you have any questions, please don't hesitate to contact me at (510) 627-1144.

Sincerely,

Julie Braun
Commercial Representative V

530 Water Street ■ Jack London Square ■ P.O. Box 2064 ■ Oakland, California 94604-2064
Telephone: (510) 627-1100 ■ Facsimile: (510) 627-1826 ■ Web Page: www.portofoakland.com

PORT OF OAKLAND

September 12, 2013

Mr. Steve Fagalde
Scott's Jack London Seafood Restaurant
255 Third Street
Oakland, CA 94607

RE: Further Notice of Lease Violations at Scott's Jack London Seafood Restaurant
BCDC Permit Nos. 1985.019A and 1985.019B

Dear Steve:

The Port of Oakland is in receipt of "Violations at Scott's Jack London Seafood Restaurant" from Adrienne Klein dated September 6, 2013, summarizing the seven outstanding violations and associated penalties as a result of Scott's unauthorized modifications in and adjacent to the Public Pavilion in Jack London Square. According to Ms. Klein's letter, accrued standardized fines total $41,600 as of the date of her letter, and will continue to accrue at the rate of $100 per day, per violation, until resolved.

Once again I wish to remind you of Section 3.2 of the Lease which states that you agree to comply with all laws, rules and regulations applicable to your premises (including those prohibiting the unauthorized modifications described above) and to defend and indemnify the Port and Port officers from and against any penalties or charges and administrative and/or judicial proceedings, including attorneys' fees and legal expenses incurred by the Port in connection with such penalties or charges. Please refer to my May 21, 2013 letter attached, and the Lease for further details.

We trust that Scott's will diligently take every necessary step to resolve all outstanding violations in a timely manner to avoid a formal enforcement proceeding and will pay the violation fees as determined by BCDC.

Sincerely,

Julie Braun
Commercial Representative V

Attachment

Cc: Brad McCrea, Adrienne Klein, Pamela Kershaw, John Briscoe, Esq., Joshua Safran, Esq., Scott's, #2 Broadway, Oakland, CA 94607

530 Water Street ■ Jack London Square ■ P.O. Box 2064 ■ Oakland, California 94604-2064
Telephone: (510) 627-1100 ■ Facsimile: (510) 627-1826 ■ Web Page: www.portofoakland.com

PORT OF OAKLAND

JOSHUA SAFRAN
Deputy Port Attorney
Tel. No.: (510) 627-1136
Fax No.: (510) 444-2093
E-Mail: jsafran@portoakland.com

Via E-Mail & U.S. Mail

July 24, 2014

John Bowers, Esq.
Staff Counsel
San Francisco Bay Conservation and Development Commission
50 California Street, Suite 2600
San Francisco, CA 94111

RE: Restrictions on Conveyance of Port Public Trust Property Interests for Access Restriction Agreement in Jack London Square in Oakland, California

Dear Mr. Bowers:

As you know the Port of Oakland and BCDC are currently negotiating the Port's dedication of a public access restriction on public trust lands, granted by the State and held in trust by the Port, in Oakland, California's Jack London Square.

BCDC has asked that the term of the restriction be permanent. Based on recent discussions with the State Lands Commission[1] and the Attorney General's Office, it is our understanding that the Port may not lawfully dedicate a permanent restriction encumbering such lands. However, it may dedicate a restriction for a term of up to 66 years.

Beginning in 1852, through a series of legislative grants from the State, the City of Oakland acquired all of the right, title, and interest to certain tide and submerged lands located within its boundaries. Through the City's Charter, portions of these public trust lands are within the Port Area and are managed by the Port. These "granted lands" are subject to constitutional, statutory, and common law requirements that impose public trust restrictions on their use and upon the revenues derived from development of these lands. As you may be aware, the grantee of sovereign tide and submerged lands is charged with the duty to administer the trust solely in the interest

[1] The Commission has the statutory responsibility to oversee the management of sovereign public trust lands and assets by legislative grantees, such as the Port, who manage these lands in trust on behalf of the State of California. (Public Resources Code Section 6301 et. seq.; *State of California ex rel. State Lands Commission v. County of Orange* (1982) 134 Cal.App. 3d 20, 23.)

of its beneficiaries, the people of California. As part of that duty, grantees like the Port are prohibited by their legislative grants and "shall not, at any time, grant, convey. give or alien said lands, or any part thereof, to any individual, firm or corporation for any purposes whatever." These same legislative grants, however, provide that the Port "may grant franchises thereon for limited periods" but in no event for terms "to exceed 66 years." The subject legislative grants may all be found here: http://www.slc.ca.gov/Granted Lands/Alameda.html .

For these reasons, the Port Attorney is proposing that the permanent public access restriction language proposed by BCDC be modified to include a term of years not to exceed 66 years.

Thank you for your consideration of this important matter and do not hesitate to contact me further. I understand that Supervising Deputy Attorney General Chris Tiedemann and Deputy Attorney General Joseph C. Rusconi are interested in discussing this matter further. As appropriate, counsel for the State Lands Commission may also be available.

Very truly yours,

Danny Wan
Port Attorney

By

JOSHUA SAFRAN
Deputy Port Attorney

cc: Eric B. Milstein, Senior Staff Counsel,
California State Lands Commission

Joseph C. Rusconi, Deputy Attorney General

PORT OF OAKLAND - RENTAL BILLING INSTRUCTIONS

RBI # 013308

Bill the following starting: August 1, 2000
ending: July 31, 2001

Lease # P12205
Tenant # 7504
Parcel # 12900A

Billing Address:
Scott's Jack London Square
1719 Bonanza Street
Walnut Creek, CA 94596

Approval: June 16, 1987

Resolution No:

Ordinance No: 2755

PBA1 RR24 F-106 21,045 s.f. $ 1.17

* 4.5 % of Gross Sales against Minimum Rent
(4th Supplemental Agreement)

Total: $ 24,522.82

Contact:	Michael Stagg	Ray Gallagher	Supersedes
Phone:	(510) 444-3456 Rest.	(510) 934-4800	RBI: 013265

Business Type:	REST	Agreement Date:	April 9, 1987
Agreement Type:	LEAS	Occupancy Date:	December 12, 1984
Next Action:	July 31, 2001	Effective Date:	July 16, 1987
Increase of minimum rent:		Ending Date:	August 31, 1941

Provides for an increase in the minimum rent under Section 4.1.2 of Lease. Total Minimum Rent plus Percentage Rent paid between August 1, 1999 and July 31, 2000 was $392,365.04; average = $32,697.09 X 75% = $24,522.82. This is more than previous Minimum Rent of $23,106.19; therefore, the new Minimum Rent will be $24,522.82.

Delinquent Penalty:	026	$50.00 + 18.25% DUE ON 1ST, DELQ ON 21ST
% Delinquent Penalty:	051	$50.00 + 8.25% DUE ON 15TH, DELQ ON 11TH
Utilities:	Tenant Pays Utility Company	
Performance Deposit:	$ 30,000.00	

MW

Prepared by:

Julie Braun

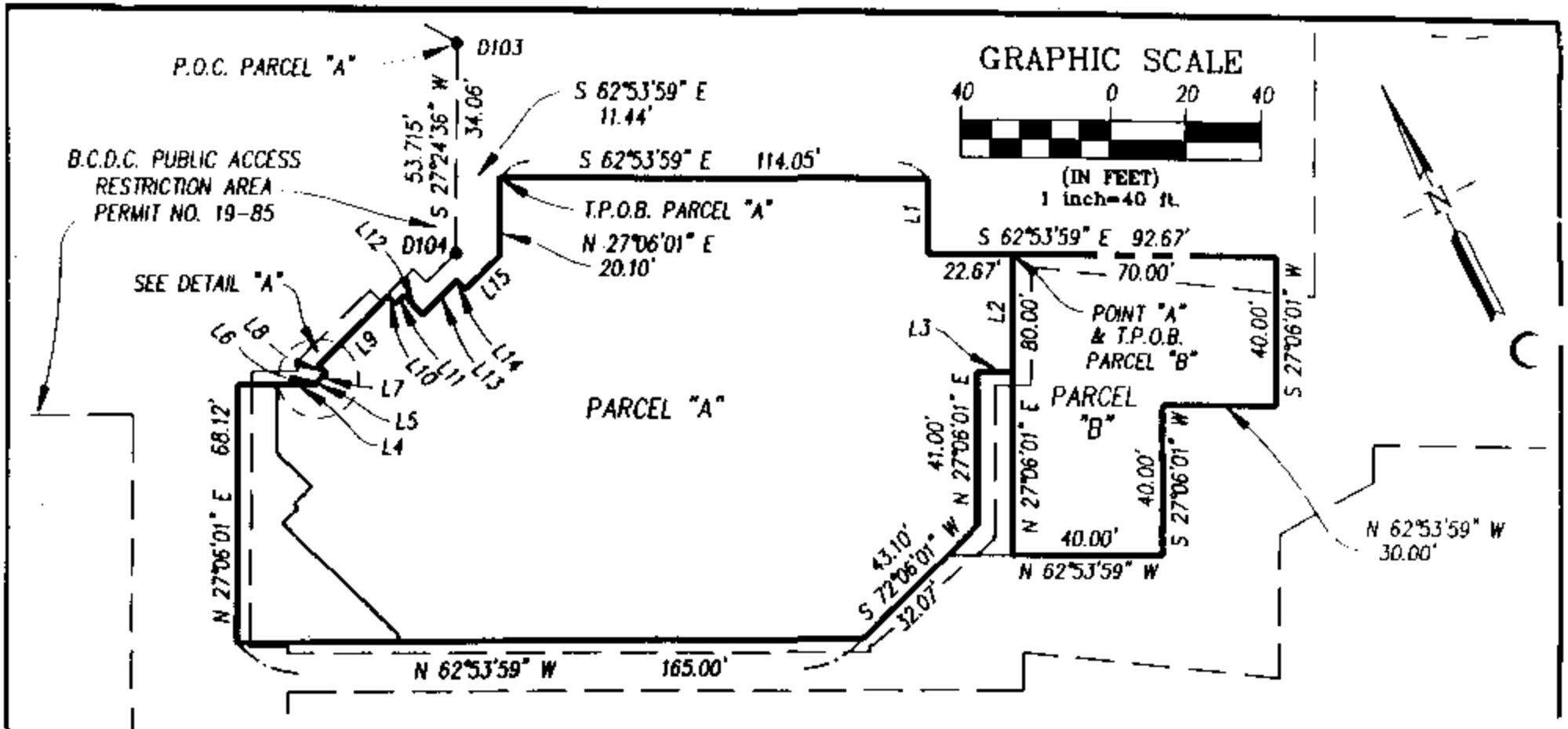
Approved:

Joyce B. Washington

Joyce Washington

Date prepared: September 5, 2000

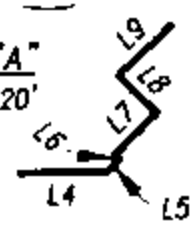
Dist: 2-Finance, 3-CRED, Office Services, EOE, Facilities, Eng. Utilities, Julie Braun



PARCEL AREAS:

PARCEL "A" 20,760± SQUARE FEET
PARCEL "B" 4,400± SQUARE FEET

DETAIL "A"
SCALE: 1"=20'



LINE DATA

LINE	DIRECTION	DIST.
L1	S 27°06'01" W	19.60'
L2	S 27°06'01" W	31.20'
L3	N 62°53'59" W	9.50'
L4	S 62°53'59" E	20.11'
L5	N 72°06'01" E	0.90'
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L7	N 72°06'01" E	3.10'

LINE DATA (CONT.)

L8	N 17°53'59" W	2.80'
L9	N 72°06'01" E	25.73'
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L11	N 72°06'01" E	3.10'
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Port of Oakland
530 Water Street
Oakland, California

PLAT TO ACCOMPANY LEGAL DESCRIPTION
SCOTT'S PUBLIC PAVILION
LEASE AREA
LOCATED IN THE PORT OF OAKLAND

SCALE: 1"=40'	DRAWN: SHP
DATE: 01/16/96	CHECKED: FAR
JOB NO.: N101681.42	
FILE NAME: SCOTT3.DWG	
SHEET 1 OF 1	

DUPLICATE ORIGINAL

SIXTH SUPPLEMENTAL AGREEMENT

(Lease of Real Property
Located in City of Oakland,
County of Alameda)

Between

PORT OF OAKLAND

And

SCOTT'S JACK LONDON SEAFOOD, INC.,
a Corporation

Dated

November 7, 1995

Scott's

SIXTH SUPPLEMENTAL AGREEMENT

THIS SIXTH SUPPLEMENTAL AGREEMENT, dated as of November 7, 1995 (the "Sixth Amended Lease"), by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, (hereinafter "Port"), and **SCOTT'S JACK LONDON SEAFOOD, INC.**, a corporation, (herein "Lessee").

W I T N E S S E T H:

WHEREAS, the Port, as Lessor, and **SCOTT'S JACK LONDON SEAFOOD, INC.**, as Lessee, are parties to that certain Lease dated the April 9, 1987, recorded on September 9, 1988, as Document Number 88-237370 of the Official Records of Alameda County (said Lease, as previously amended, is herein called "the Lease"); and

WHEREAS, the Port and Lessee wish to amend the Lease to provide for addition to the Premises covered by the Lease of 4,400 square feet of adjacent open area (referred to herein as "Parcel B"), to be used by Lessee for construction of a 4,400-square foot covered and open public access pavilion for use by Lessee and by the general public; and

WHEREAS, the Port and Lessee wish to correct the original incorrect description of Parcel A consisting of 21,044.987 with a correct description of Parcel A consisting of 20,760.49 square feet;

NOW, THEREFORE, the Port and Lessee agree as follows:

1. **Leased Premises**: Section 1 of the Lease is hereby amended by adding to the first paragraph thereof the following new second sentence:

> "The Property consists of 'Parcel A' and 'Parcel B' as shown on said Exhibit 'A' and Exhibit 'B'."

Exhibits "A" and "B" of the Lease are hereby replaced by Exhibits "A" and "B" attached to this Sixth Supplemental Agreement and by this reference incorporated herein.

2. **Use of Premises**: The Lease is hereby amended by adding thereto the following new Section 3.3:

> "3.3. **Use of Parcel B**: Notwithstanding any other provision of this Lease, Parcel B shall be used by Lessee only for the construction and installation thereon, in accordance with this Lease, of 4,400 square

feet of public access pavilion improvements and, thereafter, for operation and maintenance of Parcel B and said pavilion improvements in accordance with this Section 3.3 and the other applicable terms and conditions of this Lease. In the event of any conflict between this Section 3.3 and any other provisions of this Lease, Section 3.3 shall govern.

"Lessee agrees that Lessee's use of Parcel B shall be strictly in compliance with each and every applicable provision of that certain 'PERMIT NO. 19-85 (Issued on March 13, 1986, As Amended Through September 14, 1995) AMENDMENT NO. EIGHT (Exclusive of Amendments Nos. One, Two, and Three)", as said permit may be amended from time-to-time, including all exhibits thereto, issued by the San Francisco Bay Conservation and Development Commission ('BCDC') to the Port of Oakland, a copy of which is attached as Exhibit 'C-3' to the Sixth Supplemental Agreement to this Lease and which is hereinafter referred to as 'the BCDC Pavilion Permit.' Lessee acknowledges and agrees that Lessee shall take particular care to comply with the following provisions of the BCDC Pavilion Permit:

"(a) The pavilion shall be used and maintained for shared public and private use pursuant to Special Condition II-B of the BCDC Pavilion Permit.

"(b) Exclusive, private use of the pavilion shall be allowed only on a periodic basis and only in accordance with the BCDC Pavilion Permit, including Exhibit 'E' attached thereto (entitled 'Guidelines For Private Use of Public Pavilion'). Except to the extent that the BCDC Pavilion Permit expressly allows Parcel B to be used for exclusive, private use, Parcel B shall at all times be available without restriction to the public for unrestricted public access for walking, bicycling, sitting, viewing, fishing, picnicking and related purposes as more specifically described in paragraph II-B-2 of the BCDC Pavilion Permit; provided, however, that the Port shall have the complete and exclusive discretion regarding any and all publicly-oriented events on Parcel B, including but not limited to concerts, parades, fairs, festivals, farmers market and any event charging paid admission, and Lessee

shall have no right to schedule, allow or operate and such publicly-oriented events. All scheduling conflicts between Lessee's private events and public events shall be resolved at the sole discretion of the Port's Executive Director; provided, however, that Lessee shall have available the use of Parcel B for private events as provided for in the BCDC Pavilion Permit."

3. **Improvements**:

3.1. Prevailing Wages; Section 7.1: The last seven paragraphs of Section 7.1 of the Lease pertaining to prevailing wages, are hereby deleted.

3.2. Fixtures and Equipment: Section 7.3 of the Lease is hereby amended to read as follows:

"7.3. **Fixtures and Equipment**: "(a) Except as otherwise provided in paragraph (b) below, Lessee shall at its own cost and expense, provide and maintain all equipment, furnishings and trade fixtures upon the Premises required for the maintenance and operation of a first-class business of the type to be conducted and pursuant to Section 3 hereof.

"(b) The Port agrees to provide cafe tables, seating and public benches for public use beneath the pavilion on Parcel B. Lessee shall be responsible to remove and store said furnishings during private events by Lessee on Parcel B and promptly to replace said furnishings on Parcel B after the private event has ended."

3.3. Improvements to Parcel B: The Lease is hereby amended by adding thereto the following new Section 7.4:

"7.4. **Parcel B**:

"(a) Lessee shall commence by January 15, 1996, and diligently pursue to completion and shall complete in no event later than July 31, 1996, the pavilion improvements in Parcel B that are authorized by the BCDC Pavilion Permit. All of the provisions of Section 7.1 of this Lease shall apply to the pavilion improvements except for the first two paragraphs of Section 7.1.

"(b) The pavilion improvements shall generally conform to plans entitled "Public Pavilion," prepared by Arcus Architecture and Planning, dated June 19, 1995, as modified through July 3, 1995, and special Condition II-B-6-i and Exhibit F of the BCDC Pavilion Permit.

"(c) Lessee shall be solely responsible for preparing all plans for the pavilion improvements that are required by the BCDC Pavilion Permit, for conforming the improvements as built to all final approved plans, and for all costs and expenses therefor.

"(d) The pavilion improvements shall be designed and constructed so that they are consistent with the Findings and Declarations in paragraph III-C of the BCDC Pavilion Permit that pertain to the pavilion project."

3.4. **Binoculars**: The Lease is hereby amended by adding thereto the following new Section 7.5:

"7.5. **Binoculars**: Lessee agrees promptly, and in no event later than January 15, 1996, to purchase, install and maintain at Lessee's sole cost and expense two sets of permanent pedestal style binoculars for public use free of charge, all consistently with the BCDC Pavilion Permit. Installation shall be at locations off of but adjacent to the Premises as directed by the Port generally in the location shown on Exhibit 'F' of the BCDC Pavilion Permit."

3.5 **Directional Signs**: The Lease is hereby amended by adding thereto the following new section 7.6:

"7.6. **Directional Signs**: Lessee agrees promptly, and in no event later than January 15, 1996, to provide, at it sole cost and expense, at least four additional public access signs, two permanent and two temporary, to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of the restaurant building, consistently with the BCDC Pavilion Permit."

3.6. **Prevailing Wages; New Section 7.7**: The Lease is hereby amended by adding thereto the following new Section 7.7:

"7.7. **Prevailing Wage Requirements:** Lessee agrees that in the performance of work under this Lease, Lessee shall comply with:

"(a) The Public Work Prevailing Wage Requirements, which are the applicable prevailing wage requirements of California Labor Code Sections 1720 et seq. and Port Ordinance No. 1606, as amended, and which generally apply to construction, costing more than $1,000.00, which is made on or to Port property and the cost of which is paid for in whole or in part by the Port's advance or reimbursement to Lessee or by credit against rent or other sums due the Port; and

"(b) The Private Work Prevailing Wage Requirements of this Lease which generally apply to all construction, other than construction to which the Public Work Prevailing Wage requirements apply, which is made on or to Port property, costing more than $50,000.00 including, without limitation, construction of the pavilion improvements on Parcel B.

"'Construction' as used herein shall apply to construction, alteration, demolition or repair work, and the laying of carpet and maintenance work, provided, that Private Work Prevailing Wage Requirements shall not apply to maintenance work. 'Construction' includes all construction of building core and shell, tenant improvements and public works that are within the customary jurisdiction of the construction trades and crafts, whether performed on- or off-site. Off-site work, performed by Materialmen, as defined under California Law, is not included in the term 'Construction'.

"The Private Work Prevailing Wage Requirements shall not apply to tenant improvements costing less than $50,000.00, nor to tenant improvements for which the initial building permit for such work is issued more than one year after the certificate of occupancy is approved on the core and shell. The $50,000.00 cost shall be adjusted annually pursuant to the CPI.

"The following provisions of this subsection apply only if, and to the extent that, the prevailing wage requirements are applicable.

"The prevailing wage requirements shall apply to the employees of any employer including the Lessee, any tenant of Lessee, any general contractor or subcontractor or other contractor engaged in construction for the Improvements by the Lessee, including their successors and assignees, but shall not apply to supervisory or managerial personnel or to persons employed in the rental, operation or (in the case of Private Work Prevailing Wage Requirements only) maintenance of the Premises.

"The Lessee shall cause the provisions of this subsection to be incorporated into each contract and subcontract, and lease agreement which would be subject to this subsection. In the event the provisions are not so incorporated, the Lessee shall be liable to the worker in any action or proceeding for the difference between the prevailing wage rate required to be paid and the amount actually paid to the worker, including costs and attorney fees, as if the Lessee were the actual employer.

"The prevailing wage requirements of this subsection will be monitored and enforced by the Port. In addition to any other rights provided by California law to recover compensation, a worker that has been paid less than the prevailing wage rates shall have a right to commence an action or proceeding against the employer of the worker for the difference between the prevailing wage rates and the amount paid to such worker for each calendar day or portion thereof for which the worker was paid less than the compensation required to be paid under the provisions of this subsection. No issue other than that of the liability of the employer for the amount of unpaid wages allegedly due shall be determined in such action or proceeding, and the burden shall be on the employer to establish that the amounts demanded are not due. A worker recovering any or all of the wages claimed to be due shall recover his costs and attorney fees in securing such recovery. Nothing in this section shall

preclude its enforcement by the California Division of Labor Standards Enforcement.

"Nothing in this lease shall prevent the employment of any number of properly registered apprentices, as defined in Chapter 4, Division 3 of the Labor Code. Every such apprentice shall be paid not less than the standard wage paid to apprentices under the regulations of the crafts or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is in training.

"Lessee agrees that, any action by Lessee or its assignee against the Port for the recovery of penalties or forfeitures shall be commenced, and written notice thereof shall be actually received by the Port, within the ninety-day period after the Port's Chief Engineer notifies Lessee in writing that the Chief Engineer has determined that the work is complete. Lessee agrees that such suit on the Lease for alleged breach thereof in not making an advance or reimbursement or in not permitting a credit to rent or other sums due the Port is the exclusive remedy of Lessee or the Lessee's assignee with reference to such penalties or forfeitures. Lessee or Lessee's assignee may bring such suit without permission of the Port, but the suit shall be limited to the recovery of the penalties or forfeitures without prejudice to Lessee or Lessee's assignee's rights in other matters affecting the Lease. Lessee agrees that no other issues shall be presented to the court in such case and the burden shall be on the plaintiff to establish plaintiff's right to the penalties or forfeitures withheld or to be withheld.

"Lessee agrees that to the extent that Lessee is required to comply with the prevailing wage requirements, Lessee shall assure that all workers are paid the prevailing rate of per diem wages, and travel and subsistence payments (defined in applicable collective bargaining agreements filed in accordance with Section 1773.8 of the California Labor Code), in effect on the date

of the Port's first approval of a building permit or other approval of the work. Copies of the applicable prevailing rate of per diem wages are on file at the Port's principal office and will be made available to any interested party on request. Lessee agrees to post a copy of the prevailing rate of per diem wages at each job site.

"Lessee, as a penalty to the Port, shall forfeit twenty-five dollars ($25) for each calendar day, or portion thereof (or such other sum as specified from time to time by Section 1775 of the California Labor Code), for each worker paid less than the applicable prevailing rates for such work or craft in which such worker is employed. The difference between such prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by Lessee.

"To the extent that there is insufficient money due Lessee as an advance, reimbursement or credit to cover all penalties forfeited and amounts due and in all cases where the Lease does not provide for a money payment by the Port to Lessee, and except in cases where enforcement authority is vested in the State pursuant to Section 1775 of the California Labor Code, the Port not later than ninety (90) days after the filing of a valid notice of completion in the office of the Alameda County Recorder or not later than ninety (90) days after the Port's acceptance of the work, whichever last occurs, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided for herein. Lessee agrees that no issue other than that of the liability of Lessee for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon Lessee to establish that the penalties and amounts demanded in such action are not due. Out of any money withheld or recovered or both there shall first be paid the amount due each worker and if insufficient funds are withheld or recovered or both to pay each worker in full the money shall be prorated among all such workers.

"Lessee agrees to keep or cause to be kept by each contractor and subcontractor an accurate payroll record for each worker employed on work covered by this Paragraph showing all of the information specified in subsection (a) of Section 1776 of the California Labor Code. All such payroll records shall be certified, available for inspection and filed in accordance with the procedures specified in subsections (b)-(e) inclusive of Section 1776 of the California Labor Code. In the event of noncompliance with the foregoing requirements concerning payroll records which continues for more than ten (10) days after the Port gives to Lessee written notice specifying in what respects Lessee must comply, Lessee shall forfeit as a penalty to the Port for each worker twenty-five dollars ($25) for each calendar day, or portion thereof, until strict compliance is effectuated.

"Lessee shall be responsible for complying with Section 1777.5 of the California Labor Code concerning apprenticeable occupations, with respect to all work covered by that section.

"Except where the context otherwise requires, the definitions of terms and phrases contained in the State prevailing wage law, Sections 1720 et seq. of the California Labor Code, and in the implementing administrative regulations, shall apply to the same terms and phrases which are used in the prevailing wage requirements of this subsection."

4. **Maintenance of Improvements**

4.1. Old Section 10.1: Section 10.1 of the Lease is hereby renumbered Section 10.2.

4.2. New Section 10.1: The Lease is hereby amended by adding thereto the following new Section 10.1:

"10.1. **Special Provisions for Pavilion and Binoculars**: "Lessee shall be responsible at Lessee's own cost and expense, to clean, maintain, repair and replace from time-to-time as necessary to keep them in first class condition (a) the binoculars Lessee is required to install pursuant to Section 7 hereof and (b) the cafe tables, seating and public benches provided initially by the Port

for Parcel B pursuant to Section 7 hereof; provided, however, that any required replacement of the cafe tables, seating and public benches shall be by and at the expense of the Port unless replacement is required due to damage or loss caused by negligence or other wrongful conduct of Lessee in which case Lessee shall replace said items at Lessee's sole cost and expense. In addition, Lessee, at Lessee's own cost and expense, shall clean up all debris, dirt and other refuse on, Parcel B on not less than a daily basis."

5. **Liability Insurance**: The provisions of Section 16.2 of the Lease reading as follows:

"the sum of One Million Dollars ($1,000,000.00)"

is hereby amended to read as follows:

"the sum of Five Million Dollars ($5,000,000.00)."

6. **Lease In Effect**: Except as provided in this Agreement, the Lease is hereby ratified, confirmed and approved.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
Executive Director

Alice A. Ferreira
Comm. 998810
NOTARY PUBLIC - CALIFORNIA
ALAMEDA COUNTY
Comm. Expires March 9, 1997

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation

By _____
(Signature)

Raymon J Gallagher
(Print or Type Name)

Attest _____
(Signature)

MICHAEL FLOERSCH
(Print or Type Name)

January 16, 1996
REV.(3)

LEGAL DESCRIPTIONS

Real property located in the City of Oakland, County of Alameda, State of California, being a portion of the Port of Oakland property which is shown on sheet 4 of 19 sheets of Parcel Map 5651 (unrecorded as of this date), on file in the Office of the Port Land Surveyor, Port of Oakland, comprised of two Parcels, more particularly described as follows:

PARCEL "A":

COMMENCING at Point D103 as it is shown on Sheet 13 of said Parcel Map; thence southerly along the line connecting points D103 and D104 as shown on said map, being on the B.C.D.C. Public Access Restriction Area, Permit No. 19-85, South 27°24'36" West, 34.06 feet; thence leaving said line South 62°53'59" East, 11.44 feet to the TRUE POINT OF BEGINNING of this description; thence along the southeasterly prolongation of said line South 62°53'59" East, 114.05 feet; thence South 27°06'01" West, 19.60 feet; thence South 62°53'59 East, 22.67 feet to a point hereafter referred to as Point "A"; thence along the following courses:

South 27°06'01 West, 31.20 feet;
North 62°53'59 West, 9.50 feet;
South 27°06'01 West, 41.00 feet;
South 72°06'01 West, 43.10 feet;
North 62°53'59 West, 165.00 feet;
North 27°06'01 East, 68.12 feet;
South 62°53'59 East, 20.11 feet;
North 72°06'01 East, 0.90 feet;
North 17°53'59 West, 0.33 feet;
North 72°06'01 East, 3.10 feet;
North 17°53'59 West, 2.80 feet;
North 72°06'01 East, 25.73 feet;
South 17°53'59 East, 2.80 feet;
North 72°06'01 East, 3.10 feet;
South 17°53'59 East, 7.00 feet;
North 72°06'01 East, 12.50 feet;
South 17°53'59 East, 3.30 feet;
North 72°06'01 East, 12.80 feet;

thence North 27°06'01" East, 20.10 feet to the TRUE POINT OF BEGINNING.

Containing 20,760.49 square feet, more or less.

PARCEL "B":

BEGINNING at Point "A" referred to in the description for Parcel "A" above; thence South 62°53'59" East, 70.00 feet; thence South 27°06'01" West, 40.00 feet; thence North 62°53'59" West, 30.00 feet; thence South 27°06'01" West, 40.00 feet; thence North 62°53'59" West, 40.00 feet; thence North 72°06'01" East along the easterly line of Parcel "A" and its southerly prolongation 80.00 feet to the POINT OF BEGINNING.

Containing 4,400.00 square feet, more or less.

END OF DESCRIPTIONS

SURVEYOR'S STATEMENT:

I hereby state that these legal descriptions and their accompanying plat were prepared by me or under my direction in January, 1996.

Dated: 1/17/96

Steven H. Pepper, P.L.S. 7110
License expires: 12/31/98

LICENSED LAND SURVEYOR
STEVEN H. PEPPER
Exp. 12/31/98
No. 7110
STATE OF CALIFORNIA

Exhibit "A"

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE PORT ATTORNEY.

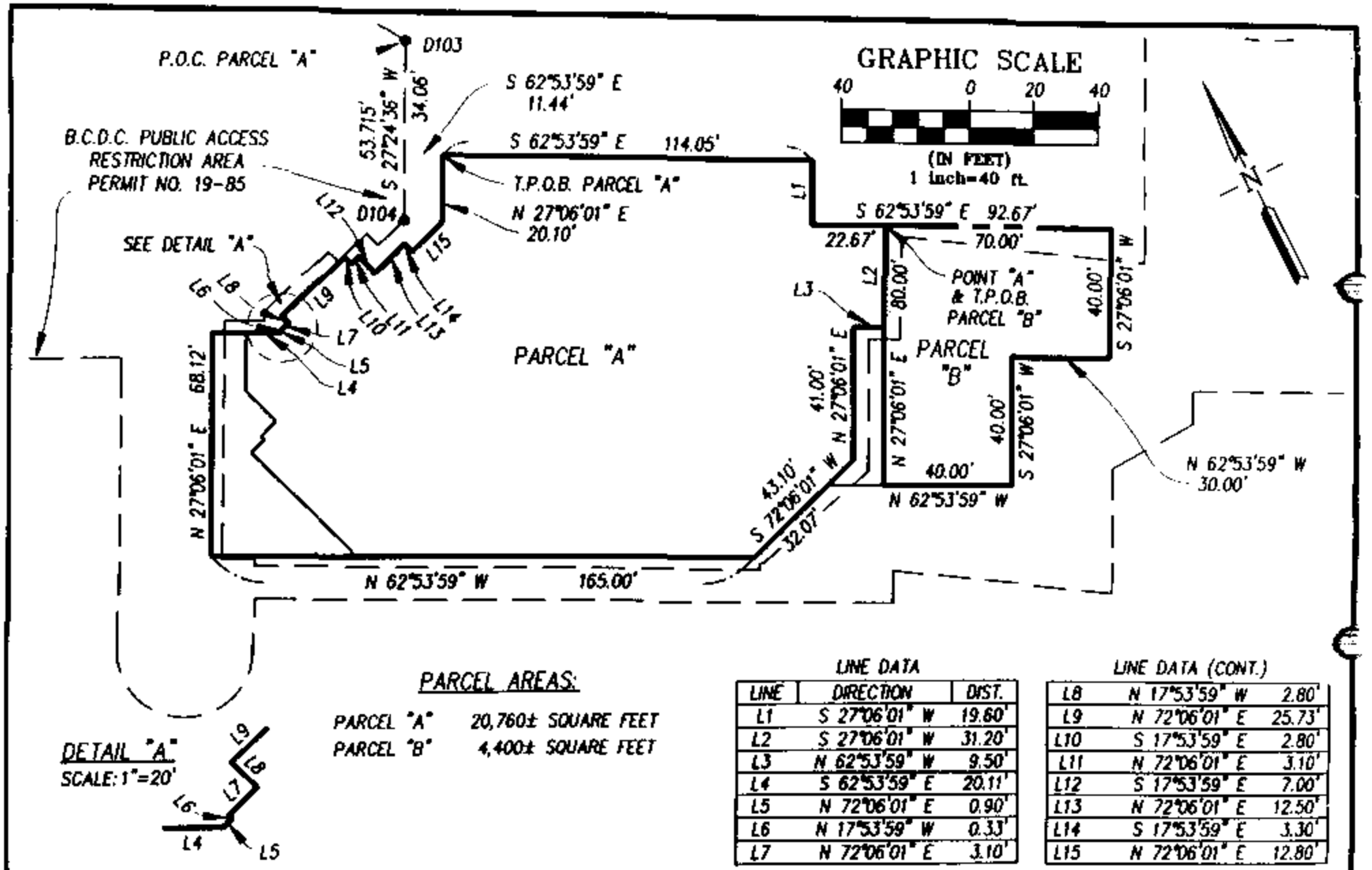
Approved as to form and legality this 16th day of February, 1996.

Thomas G. Clark

(Acting) Port Attorney

Port Ordinance No. 3297

P.A. # 96-47



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PARCEL "B" 4,400± SQUARE FEET

DETAIL "A"
SCALE: 1"=20'

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LINE DATA (CONT.)

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Port of Oakland
530 Water Street
Oakland, California

PLAT TO ACCOMPANY LEGAL DESCRIPTION
SCOTT'S PUBLIC PAVILION
LEASE AREA
LOCATED IN THE PORT OF OAKLAND

SCALE: 1"=40'	DRAWN: SHP
DATE: 01/16/96	CHECKED: FAR
JOB NO.: N101681.42	
FILE NAME: SCOTT3.DWG	
SHEET 1 OF 1	

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
THIRTY VAN NESS AVENUE, SUITE 2011
SAN FRANCISCO, CALIFORNIA 94102-6080
PHONE (415) 557-3686

Permittees' Copy

PERMIT NO. 19-85
(Issued on March 13, 1986, As
Amended Through September 14, 1995)
AMENDMENT NO. EIGHT
(Exclusive of Amendment Nos. One,
Two, and Three)

Port of Oakland
P.O. Box 2064
Oakland, California 94604-2064

ATTENTION: Fredrick R. Ferrin

Ladies and Gentlemen:

On March 6, 1986, the San Francisco Bay Conservation and Development Commission, by a vote of 16 affirmative, 1 negative, and 1 abstention, approved the resolution pursuant to which the original permit was issued. Moreover, on June 10, 1991, November 5, 1991, June 25, 1992, and June 23, 1994, the Executive Director, pursuant to Regulation Section 10822, approved Amendment No. Five, Four, Six, and Seven, respectively. On August 17, 1995, the San Francisco Bay Conservation and Development Commission, by a vote of 15 affirmative, 0 negative and 0 abstentions, approved the resolution pursuant to which this amended permit is hereby issued:

I. Authorization

A. Subject to the conditions stated below, the permittee is granted permission to do the following on a 19.6-acre site, 16.1 acres of land and 3.5 acres of water, along the Oakland Estuary, between Clay Street and the Franklin D. Roosevelt Pier on the west and Webster Street on the east, in the City of Oakland, Alameda County:

1. **In the Bay**

   a. Remove 9,300 square feet of fill used for public access walkways, boat berths, and guest berthing;

   b. Construct and use a 54-berth addition to the existing marina requiring 8,500 square feet of floating Bay fill;

   c. Place and use 300 square feet of fill for a restaurant within the Boatel expansion;

   d. Construct and use 6,700 square feet of pile-supported wooden public access walkways bayward of the Boatel and the new Boatel expansion;

   e. Place and use 6,263 square feet of new fill for public access at the foot of Broadway for tidal stairs, an observation platform, and wooden walkways;

f. Construct and use 20 new public guest berths, and a combination floating observation platform and pier for mooring large visiting vessels, both covering 5,500 square feet of Bay surface area;

g. Install a 10-foot by 126-foot pier, including 24 concrete pilings, for access to the ferry;

h. Install 6 public access benches and a glass windscreen on the westerly side of the ferry pier, and permanently dedicate the pier for public access;

i. Install a blue canvas awning with a 20-inch rise over the ferry pier;

j. Install a 54-foot-long, 6-foot-wide gangway to a 30-foot by 80-foot steel float, with 4, 20-inch steel piles;

k. Install a wooden platform and ramp for handicap access on the steel float;

l. Remove approximately 3,800 square feet of boat docks, including 7 pilings and install 2, 16-inch timber piles to anchor the remaining pier;

m. Relocate an existing dock to alongside Dock D, at the foot of 7th Avenue; and

n. Replace an existing dock, located between Franklin and Webster Streets, with a dock located at the foot of Clay Street;

o. Relocate and use an existing 1,600-square-foot barge approximately 20 feet closer to the shoreline as a small boat launching float, affixed to four, approximately four-square-foot steel piles; (Amendment No. Eight); and

p. Install and use a 175-square-foot, small boat launching head-float on the shoreline side of the relocated barge (Amendment No. Eight).

2. Within the 100-foot shoreline band, construct and use the following:

a. A 20,300-square-foot portion of a 42,500-square-foot hotel;

b. A 8,400-square-foot portion of a 14,250-square-foot expansion of the Boatel;

c. A 700-square-foot portion of two small retail structures, covering a total of 18,400 square feet of area;

d. A 3,700-square-foot portion of a 5,600-square-foot expansion to Scott's Seafood Grill and Bar;

e. A 64,500-square-foot area, paved and landscaped for public access purposes; and

f. Make modifications to structures which do not change the footprint of the buildings nor detrimentally affect the quality or area provided for public access.

g. Plant an approximately 6,000-square-foot area north-west of the Boatel with grass to minimize erosion and dust until the hotel is built;

h. improve approximately 900 square feet of an existing public plaza area for outdoor dining, bayward of the Old Spaghetti Factory Restaurant;

i. use dedicated public access areas for regularly scheduled, publicly-oriented events including but not limited to a farmer's market, parades, festivals, fairs, and a limited number of events charging paid admission, not including restaurant-sponsored private banquets, as limited by Special Condition II-B-2-a;

j. Use up to 500 square feet of dedicated public access area for small retail kiosks or carts for vending food or merchandise, as shown in Exhibit BB and as limited by Special Condition II-B-2-b; and

k. Construct a 472-square-foot ground level building addition, a 230-square-foot entry canopy and landscaping at Kincaid's Restaurant.

l. Use a dedicated public access plaza for the periodic, temporary installation and use of a 4,500-square-foot banquet tent as part of Scott's Restaurant through January 15, 1996, pursuant to Special Condition II-B-2 (Amendment No. Eight);

m. Construct, use and maintain a 4,400-square-foot, 19 to 40-foot-tall pavilion for shared public and private use, pursuant to Special Condition II-B-2 (Amendment No. Eight);

n. Install cafe seating, benches, lighting, two sets of binoculars and other site furnishings within an existing 20,000-square-foot plaza (Amendment No. Eight); and

o. Install and maintain three permanent and two temporary public access directional signs as part of the pavilion project. (Amendment No. Eight)

B. This amended authority is generally pursuant to and limited by your application of December 18, 1985, your letter dated December 16, 1987, requesting Amendment No. One which was reclassified as Amendment No. Five to BCDC Permit No. M84-94, your letter dated July 20, 1989 requesting Amendment No. Two, which was subsequently abandoned; your letter dated April 4, 1990 requesting Amendment No. Three which was incorporated into Amendment No. Seven; and your letters dated March 22, 1991, March 26, 1991, April 16, 1992, and your application dated April 20, 1993, requesting Amendment Nos. Four, Five, Six and Seven, and your application dated March 30, 1995 for Material Amendment No. Eight, respectively, including all accompanying and subsequent amendments, exhibits, and correspondence thereto, but subject to the modifications required by the conditions herein. The applications for Amendment Nos. One and Two were withdrawn.

C. The work authorized herein must commence no later than July 1, 1987, or this amended permit will lapse and become null and void. The work authorized herein must also be diligently prosecuted to completion and must be completed by July 1, ~~1995~~ 1998 (for hotel in I-A-2-a only) (Amendment No. Eight). The work authorized by Amendment No. Four must be diligently prosecuted to completion and must be completed by November 1, 1995. The work authorized by Amendment No. Five must be diligently prosecuted to completion and must be completed by June 1, 1993. The work authorized by Amendment No. Six must be diligently prosecuted to completion and must be completed by June 1, 1994. The work authorized by Amendment No. Seven must be diligently pursued to completion and must be completed by December 1, 1994. Authorizations I-A-2-h, i, and j and shall lapse seven years from the issuance of Amendment No. Seven. The work

authorized by Material Amendment No. Eight must commence by January 15, 1996 and must be diligently pursued to completion and must be completed by March 31, 1997. Reasonable extensions of time may be granted by further amendment of the permit where application is made prior to the completion date.

D. This project will result in a total of 31,247 square feet of fill. Of this fill, 8,500 square feet will be placed for marina berthing, 2,724 square feet for a ferry barge and gangway, 5,500 square feet for public guest berthing, and a pier for visiting vessels, and 14,523 square feet will be placed to improve public access and the appearance of the shoreline. The latter fill will consist of 6,700 square feet of pile-supported boardwalks, 300 square feet of solid fill for Boatel Expansion, 6,263 square feet of concrete fill for tidal stairs, observation platform, and wooden walkways and 1,260 square feet of pile-supported fill for a ferry pier. A total of approximately 102,168 square feet (2.30 acres) of improved public access plazas, walkways, and lookouts will be provided in the shoreline band and on fill in the Bay. Amendment No. Eight modifies the use of 4,400 square feet of this public access by allowing periodic, exclusive, private use of a 4,400-square-foot public access pavilion constructed pursuant to this amendment.

II. Special Conditions

The amended authorization made herein shall be subject to the following special conditions, in addition to the standard conditions in Part IV:

A. Specific Plans and Plan Review

1. **Final Plan Review.** No work whatsoever shall be commenced pursuant to this amended permit until final precise site, engineering, grading, riprapping, architectural, landscaping, and any other relevant criteria, specifications, and plan information for that portion of the work have been submitted to, reviewed, and approved in writing by or on behalf of the Commission. The pavilion authorized in Material Amendment No. Eight shall generally conform to plans entitled "Public Pavilion," prepared by Arcus Architecture and Planning, dated June 19, 1995, as modified through July 3, 1995. The specific drawings and information required will be determined by the staff.

   a. **Site, Architectural, and Landscaping Plans.** Site, architectural, and landscaping plans shall include and clearly label the 6.2-foot contour line above Mean Sea Level (the line of highest tidal action), the line 100 feet inland of the line of highest tidal action, property lines, the boundaries of all areas to be reserved for public access purposes and open space, grading, details showing the location, types, dimensions, and materials to be used for all structures, irrigation, landscaping, drainage, seating, parking, signs, lighting, fences, paths, trash containers, utilities, and other proposed improvements.

   b. **Engineering Plans.** Engineering plans shall include a complete set of contract drawings and specifications and design criteria for all portions of the project to be built on fill. Final plans shall be signed by the professionals of record and be accompanied by evidence that the design complies with all applicable codes.

Plans submitted shall be accompanied by a letter requesting plan approval, identifying the type of plans submitted, the portion of the project involved, and indicating whether the plans are final or preliminary. Approval or disapproval shall be based upon:

~~c.~~ a. Completeness and accuracy of the plans in showing the features required above, particularly the line of highest tidal action, property lines, and the line 100 feet inland of the line of highest tidal action, and any other criteria required by this amended permit;

~~d.~~ b. Consistency of the plans with the terms and conditions of this amended permit;

~~e.~~ c. The provision of the amount and quality of public access to and along the shoreline and in and through the project to the shoreline required by this amended permit;

~~f.~~ d. Consistency with legal instruments reserving public access and open space areas;

~~g.~~ e. Assuring that any fill in the Bay does not exceed this amended permit; and

~~h.~~ f. Consistency of the plans with the recommendations of the Design Review Board.

Plan review shall be completed by or on behalf of the Commission within 45 days after receipt of the plans to be reviewed.

2. **Conformity with Final Approved Plans.** All work, improvements, and uses shall conform to the final approved plans. Prior to any use of the facilities authorized herein, the appropriate design professional(s) of record shall certify in writing that, through personal knowledge, the work covered by the amended permit has been performed in accordance with the approved design criteria and in substantial conformance with the approved plans. No noticeable changes shall be made thereafter to any final plans or to the exterior of any constructed structure, outside fixture, lighting, landscaping, signage, landscaping, parking area, or shoreline protection work without first obtaining written approval of the change(s) by or on behalf of the Commission.

3. **Discrepancies between Approved Plans and Special Conditions.** In case of any discrepancy between final approved plans and Special Conditions of this amended permit or legal instruments approved pursuant to this amended permit, the Special Condition or the legal instrument shall prevail. The permittee is responsible for assuring that all plans accurately and fully reflect the Special Conditions of this amended permit and any legal instruments submitted pursuant to this amended permit.

4. **Conformity with Plans.** Work authorized by A.1.l. in this amended permit shall conform to plans dated October 17, 1991 entitled "Seabreeze Marina" and "Central Basin", prepared by N. Doolittle and incorporated by this reference herein. The glass windscreen authorized by A.1.h. in this amended permit shall conform to plans dated August 20, 1991, entitled "Canopy Sections and Details" and incorporated by this

reference herein. The location and size of the ferry docks shall conform to site plan dated August 15, 1991, entitled "Proposed Development," attached as Exhibit B and incorporated by this reference herein. The ferry dock canopy authorized by A.1.i. in this amended permit shall conform to plans entitled "Jack London Square Ferry, Canopy-Elevation and Section" prepared by the Port of Oakland, dated April 15, 1992 and attached as Exhibit C. The outdoor dining area at the Old Spaghetti Factory Restaurant authorized by I-A-2-n shall conform to plans entitled "Outdoor Dining Area, Plan and Details" reissued on May 19, 1993, prepared by Mel Kroker, architect. No material changes shall be made thereafter to these plans without first obtaining written approval of the change(s) by or on behalf of the Commission.

5. **As-Built Plans.** The permittee shall submit as-built plans of the existing public access improvements in the plaza adjacent to the El Torito and Old Spaghetti Factory restaurants which describe, in detail, existing public access improvements.

B. **Public Access**

1. **Area.** The approximately 2.33-acre (102,168-square-foot) area along the entire approximately 1,875-lineal-foot shoreline of the site including 82,445 square feet of the shoreline band and 18,960 square feet of fill in the Bay as generally shown on Exhibits "A" "B," and "D," "E" and "G" shall be made available to the public for unrestricted public access for walking, bicycling, sitting, viewing, fishing, picnicking, and related purposes as more specifically described in paragraphs II-B-2. If the permittee wishes to use the public access area for other than those purposes expressly delineated in paragraph II-B-2, the permittee must obtain prior written approval by or on behalf of the Commission.

2. **Permissible Uses.** The area required for public access shall be used and maintained for public purposes as outlined in Special Conditions II-B-1 and II-B-7 with only the following exceptions:

   a. The permittee may use the public access areas for regularly scheduled, publicly-oriented events, including but not limited to concerts, parades, fairs, festivals, a weekly farmers market, and a limited number of events charging paid admission, but not including restaurant sponsored private banquets. Each event must receive prior written approval by or on behalf of the Commission and should be generally open to the public, should maintain a continuous band of public access to and along the shoreline at all times, should not discourage any persons or groups from attending approved events, should take advantage of the unique Bay setting, and should not unduly impede public access to and along the shoreline. Any additional maintenance, clean up or other maintenance or improvements required as a result of approved events shall be performed immediately. Excessive soiling of the public access areas or inadequate maintenance of public access facilities, or failure to maintain continuous public access to and along the shoreline are grounds for discontinuing the activities authorized pursuant to sections I-A-2-h through j.

On or before December 15th of each year, the permittee shall submit the following for review and approval by or on behalf of the Commission:

(1) a list and proposed schedule of all proposed events for the next year;

(2) a site plan showing the location of each proposed event;

(3) at least 30 days prior to annual events listed in the schedule provided pursuant to this Special Condition, the permittee shall provide a brief written description of the proposed use of the public access areas, e.g. any erection of booths, tables or other temporary elements, the approximate amount of the public access area to be utilized, and the duration of each event, and a site plan showing the location of the event and all temporary structures. These plans shall be reviewed within 15 days of submittal pursuant to Special Condition II-A.

b. The permittee may locate and use, within the required public access areas, retail kiosks that shall total no more than 500 square feet as shown in Exhibit BB. Approval of individual kiosks shall be pursuant to Special Condition II-A, Specific Plan Review and consistent with descriptive materials provided in the application for Amendment No. Seven;

c. In addition to the events authorized pursuant to Special Condition II-B-2-a, the permittee may obtain authorization for a limited number of "last-minute" events. Request for authorization shall be submitted at least 10 days prior to the event. For each "last-minute" event, the permittee shall submit a plan depicting the location of the event pursuant to Special Condition II-B-2-a, prior to the staging of the event. The staff shall review the permittee's request for "last-minute" events within 3 days of submittal and may refuse authorizations for excessive last-minute event requests.

d. The uses of public access areas authorized by Special Condition II-B-2 shall terminate at the end of seven years from the date of Amendment No. Seven. The Commission will consider extensions of the non-public uses permitted by subsections II-B-2-a through II-B-2-c and may renew these uses only if the permittee can demonstrate to the satisfaction of the Executive Director that the permittee has complied with Special Condition II-B and all non-public use or uses authorized for the seven-year period have not adversely affected the public's use of the public access areas.

3. <u>Temporary Banquet Tent Use, Pavilion Use and Public Access Barge and Launching Float Use.</u>

a. <u>Temporary Banquet Tent Use.</u> <u>Scott's Restaurant shall be allowed to use an approximately 4,500-square-foot portion of the approximately 23,000-square-foot dedicated public access plaza located between Scott's and Kincaid's Restaurants in Jack London Square between August 31, 1995 and January 15, 1996 for erecting a tent to house private banquets and other private events only as specified herein. Scott's Restaurant shall submit to and obtain approval by</u>

the Port of Oakland of a schedule of private banquets and other private events to be held. The approved event schedule shall be consistent with the parameters for scheduling specified in Exhibit E to this amended permit. The tent shall be erected no sooner than 6 hours prior to an approved scheduled event and shall remain standing no longer than 12 hours following an approved scheduled event.

b. **Public Pavilion Use.** Scott's Restaurant shall be allowed to use the approximately 4,400-square-foot public pavilion located in the 23,000-square-foot, dedicated public access plaza lying between Scott's and Kincaid's Restaurants in Jack London Square for private events only as specified herein. Scott's Restaurant shall submit to and obtain approval by the Port of Oakland of a schedule of private events. Operation of the fabric panels enclosing the private events beneath the pavilion shall be consistent with the guidelines specified in Exhibit E to this amended permit. The public plaza site furnishings shall be restored immediately following each approved event, or if an approved event terminates after 10:00 PM, the site furniture shall be replaced by 9:00 AM of the following day. California Canoe and Kayak shall be allowed to occasionally use a small portion of the dedicated public access plaza for kayak rentals and classes. The racks for kayak display shall be maintained at the north end of the plaza consistent with the conceptual arrangement shown in Exhibit F to this amended permit.

c. **Event Schedule Reporting.** Scott's Restaurant shall provide the Port of Oakland with its first quarterly schedule for private events to be held in the pavilion at least 60 days prior to the first event. The events schedule shall not be approved by the Port of Oakland, unless it is consistent with the parameters for scheduling specified in Exhibit E to this amended permit. Subsequently, Scott's Restaurant's quarterly schedules shall be submitted to the Port of Oakland by January 1, April 1, July 1 and October 1 of each year. By March 1 of 1996 and March 1 of every year thereafter the Port of Oakland shall provide the Commission with a summary of the events scheduled for the previous year. The tent-covered event schedule shall be submitted to the Port of Oakland within 10 days of the issuance of Amendment No. Eight to the BCDC Permit and shall be updated every three months until January 15, 1996.

d. **Public Access Barge and Launching Float Use.** The 1,600-square-foot, relocated barge and 175-square-foot launching float shall be used primarily for public launching of small boats, swimming access and other public access uses. The permittee is also authorized to use these facilities for occasional kayak launching and boat removal and for transient tour boat and dining yacht tie-up. The commercial use of this public access facility shall not unduly limit the public's use and enjoyment of the small boat launching facilities.

e. **Violation.** The holding of a banquet or other private event within the pavilion or public access plaza not listed in the schedule of events, or the approval of a schedule of events that is inconsistent with the guidelines set forth in Exhibit E to this amended permit shall be considered an activity undertaken without Commission authorization and subject to the schedule of standardized civil

penalties described in Commission Regulation Sections 11302(2) and 11386(a)(3).

~~3.~~ 4. **Permanent Guarantee.** Prior to the commencement of construction of each phase of the project, the permittee 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 public access areas within that phase to the extent the permittee is legally able to do so. The instrument(s) shall create rights in favor of the public which shall commence no later than after completion of construction of any public access improvements required by this amended permit and prior to the use of any structures authorized herein. Such instrument shall be in a form that meets recordation requirements of Alameda County and shall include a legal description of the property being restricted and a map that clearly shows the line of highest tidal action, 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 amended permit;

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, lessees, licensees and users.

~~4.~~ 5. **Recordation of the Instrument.** Within 60 days after approval of the instrument, the permittee shall record the instrument and shall provide evidence of recording to the Commission. No changes shall be made to the instrument after approval without the express written consent by or on behalf of the Commission.

~~5.~~ 6. **Improvements Within the Public Access Area.** In accordance with the phased completion schedule described in Special Condition II-B-5, below, the permittee shall install the following improvements:

a. A 22,000-square-foot shoreline promenade and access area adjacent to the new hotel with a minimum width of 25 feet, including a public picnic area of approximately 4,500 square feet;

b. A 8,400-square-foot access area adjacent to the Bostel extending to the foot of Broadway including walkways a minimum of 13 feet wide, with larger seating areas up to 32 feet wide;

c. A 18,000-square-foot paved plaza on the shoreline at the foot of Broadway;

d. Five thousand five hundred (5,500) square feet of access on fill between the foot of Broadway and along Scott's including tidal stairs at the foot of Broadway, a 20-foot extension of the 10-foot-wide pile-supported walkway along Scott's, and a 30-foot by 115-foot fixed viewing platform near Scott's;

e. Five thousand five hundred (5,500) square feet of floating fill for access including 20 guest boat berths and 18-foot by 90-foot dock for large, visiting vessels;

f. A 22,800-square-foot portion of a 32,300-square-foot public pedestrian plaza between Scott's and the Grotto and around the Grotto to the existing pedestrian mall on Water Street; and

g. A 1,260-square-foot ferry pier, with 6 public access benches, west of the FDR Pier; and

h. A, 18,189-square-foot, existing improved plaza, bayward of the El Torito and Old Spaghetti Factory Restaurants, with 7 benches, 283 square feet of landscaping, Jack London's cabin, the most of the USS Oakland, concrete paving, 4 trash containers, 3 public shore signs, and lighting;

i. A 4,400-square-foot, L-shaped pavilion (see Exhibits F) with a translucent fiberglass roof material consistent with awnings in Jack London Square, three sets of four steel columns supporting a tubular steel truss roof-frame with light fixtures attached providing fifteen vertical-feet clear from the existing plaza, a revised paving pattern using pavers which match existing pavers and reflect the shape of the pavilion, tivoli lighting, grade-level up-lighting, fabric panels with transparent window panels located at the perimeter of the pavilion roof, and colorful flags and banners which do not include the names of any business or product. Signs on the pavilion towers shall be neon and shall read "Public Pavilion" only;

j. At least 15 tables and 35 chairs which are designed to match the existing cafe seating at the Barnes and Noble bookstore, to be in placed at all times, except when the pavilion is needed for approved private events or other approved public events;

k. Two sets of permanent, pedestal style binoculars for public use free of charge;

l. At least four additional public access signs, two permanent and two temporary to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott's Restaurant. The temporary signs shall be installed and removed when approved private events are held. One public access sign shall be installed at the entrance to the gangway leading to the kayak launch float that describes the rules and hours for public use of the kayak launch float; and

m. A 1,775-square-foot kayak launch, including a 1,600-square-foot floating barge and a 175-square-foot head float for use in kayak and other small boat launching, tour and dining yacht tie-up, swimming and other public access purposes;

Such improvements shall be consistent with the plans approved pursuant to Special Condition II-A of this amended permit and shall substantially conform to the plans entitled "Jack London Square Phase I Area; Master Plan," prepared by Amphion Environmental, and as shown on the attached Exhibits A, B, and D.

~~6.~~ 7. **Phasing of the Construction of the Public Access Improvements.** The public access improvements may be completed in segments in conjunction with the phased development of the project. The public access improvements shall be completed with each phase of the adjacent development and shall be completed prior to the use of the facilities constructed during that phase of the development.

~~7.~~ 8. **Maintenance.** All areas and improvements required by Special Condition II-B-4, including hardscape, landscaping, signs, and public paths shall be permanently maintained by, and at the expense of, the permittee, any assignee, lessee, sublessee, or other successor in interest to the project. Maintenance shall include, but not be limited to, repairs to all path and hardscape surfaces, replacement of any plant material that dies or becomes unkempt, repairs or replacement as needed of benches, trash containers, signage and irrigation devices, restoration of any shoreline or other area that becomes eroded or damaged by wave action, storm, or other deterioration, and assuring that public access signs remain in place and visible. Within 90 days after notification by staff of the Commission, the permittee or any successor or assignee shall correct any maintenance deficiency noted by the staff.

~~8.~~ 9. **Reasonable Rules on Use of Public Access Areas.** The permittee may impose reasonable rules on the use of the areas required to be provided for public access provided such rules are first approved by or on behalf of the Commission and do not significantly affect the public nature of the area nor unreasonably burden public use.

~~9.~~ 10. **Event Clean-Up Plan.** The permittee shall submit a plan for the clean-up of the public access areas used during public events. The plan should be based on the plan submitted in the permittee's application for Amendment No. Seven and shall be approved by or on behalf of the Commission.

~~10.~~ 11. **Vehicular Use of Public Access Areas**

a. **Parking.** No parking whatsoever shall be permitted within the public access areas required under this amended permit, except as specifically authorized herein.

b. **Vehicular Use.** Vehicular use of the public access areas authorized herein shall be restricted to service, delivery vehicles, and drop off purposes. Service and delivery access shall be limited to the hours prior to 11 a.m. Access for the infirm and handicapped shall be permitted but shall be managed according to a vehicular access plan as required below.

c. **Vehicular Access Plan.** Prior to June 1, 1986, the permittee shall prepare and submit for review and approval by or on behalf of the Commission pursuant to Special Condition II-A, a vehicular access plan which will describe which areas may be used for vehicular access, under what conditions, and specifically describing how the vehicular access plan will be enforced.

C. **Marina Conditions**

1. **Construction.** Construction standards for marina berths and associated facilities shall be at least equal to those established by the California Department of Boating and Waterways. All construction activity shall be performed to minimize turbidity and to prevent debris from drifting and presenting a pollution or navigation hazard.

2. **Waste Discharge.** The discharge of any solid or liquid wastes, including oily bilge water, waste oil, or sewage into the Bay within the marina basin shall be in accordance with federal and state regulations.

3. **Waste Facilities.** Prior to the use of any berth, the permittee shall assure there is available and convenient, suitable facilities for receiving and disposing of oily bilge water and waste oil, at least one facility for pumping out vessel holding tanks and receiving wastes from portable toilets in locations easily accessible by boats, and onshore toilet facilities for the marina tenants. Such facilities shall be constructed to all applicable codes and standards, shall be connected to onshore waste treatment facilities, and shall be maintained by the permittee in a safe and sanitary manner. Such facilities shall be available to boaters every day of the week and any fees for the use of the facilities shall be limited in amount to cover the cost of the installation, operation, and maintenance of the facilities.

4. **Enforcement Responsibility.** The permittee shall adequately enforce the requirements herein, and shall submit to the Commission the name, address, and telephone number of the person at the marina responsible for such enforcement.

5. **Houseboats and Live-Aboards.** No houseboat, floating structure, or vessel used for residential purposes shall be moored at the marina.

6. **Sales or Long-Term Rental of Berths.** No right to use an individual berth shall be granted or otherwise transferred that exceeds one year in duration.

D. **Covenant Not to Sue or Seek Indemnification for Damages**

1. By execution of this amended permit, the permittee releases from any present or future liability whatsoever and covenants on behalf of itself and its successors not to sue or otherwise seek legal redress against the San Francisco Bay Conservation and Development Commission and/or the permittee's and any other port authority's shipping and terminal tenants for damages to the marina facilities or for any other relief based either directly or indirectly on wave action or other actions which affect the marina facilities and that arise out of the use of the Oakland Estuary for navigation

or waterborne commerce, whether or not said action or actions constitute passive or active negligence, provided that this release and covenant shall not prohibit permittee from seeking such damages or other relief (a) from or against any person or entity whose intentional and wrongful act is the proximate cause of damages or losses to permittee, or (b) for any trespass on or wrongful physical invasion of the marina by tangible objects such as vessels, but excluding any trespass or invasion by means of noise, light, vibrations, smoke, air currents, water waves or turbulence, or electronic or other emissions resulting from the operation of vessels or marine terminals in the Oakland Estuary, so long as said operations comply with all laws, rules, and regulations that apply to the use of the Oakland Estuary for navigation or waterborne commerce. The legal actions covered by this release and covenant shall include, but not be limited to, damages for physical or emotional injuries, discomfort, inconvenience, property damage, death, interference with the use or enjoyment of property, nuisance, or inverse condemnation, for injunctive or other extraordinary or equitable relief from normal navigation, waterborne commercial, or port-related operations within the Oakland Estuary.

2. In any deed, lease, license agreement, or other instrument that conveys either an interest in or right to use a marina berth or berths, the permittee or its assignees or leasees shall include in the deed, lease, license agreement, or other transfer instrument a term or condition by which the purchaser, lessee, licensee, or transferee (herein after collectively referred to as "transferee") releases from any present or future liability whatsoever and covenants on behalf of himself and his successors not to sue the Commission and/or the permittee's and any other port authority's shipping and terminal tenants for damages to the transferee's property used in connection with or located at the marina, or any other relief based directly or indirectly on wave action or other actions which affect the transferee's said property or the transferee's use or enjoyment of the marina, or which result in any bodily or personal injury to the transferee as a result of the transferee's use of the marina (including access by way of the Oakland Estuary to or from the marina), and that arise out of the use of the Oakland Estuary for navigation or waterborne commerce, whether or not such action or actions constitute passive or active negligence, provided that this release and covenant shall not prohibit the transferee from seeking such damages or other relief (a) from or against any person or entity whose intentional and wrongful act is the proximate cause of damages, injuries, or losses to transferee, or (b) for any trespass on or wrongful physical invasion of the marina by tangible objects such as vessels, but excluding any trespass or invasion by means of noise, light, vibrations, smoke, air currents, water waves or turbulence, or electronic or other emissions resulting from the operation of vessels or marine terminals in the Oakland Estuary, so long as said operations comply with all laws, rules, and regulations that apply to the use of the Oakland Estuary for navigation or waterborne commerce. The release and covenant shall cover the same legal actions that the release and covenant required by Special Condition II-D-1 covers.

3. The permittee agrees to and shall defend, hold harmless, and indemnify the Commission, and/or the permittee's and any other port authority's shipping and terminal tenants from any and all liability, including without limitation, civil penalties.

fines, business losses, and additional expenses, that arise out of any act, event or occurrence which would come within permittee's or any transferee's release and covenant not to sue under Special Condition II-D-1 and Special Condition II-D-2. For purposes of Special Condition II-D-3, any person using the marina shall be deemed to be a transferee, and any property at or being used in connection with the marina shall be deemed to be the property of a transferee. The hold harmless and indemnification shall cover the same actions that the release and covenant required by Special Condition II-D-1 covers.

4. In any deed, lease, license agreement, or other transfer instrument covered under Special Condition II-D-2, the permittee shall include in the deed, lease, license agreement, or other transfer instrument a term or condition by which the transferee agrees to defend, hold harmless, and indemnify shipping and terminal tenants and shipping users from any and all liability, including without limitation, civil penalties, fines, business losses, and additional expenses that arise out of any act, event or occurrence which would come within any transferee's release and covenant not to sue under Special Condition II-D-2 and which involves the transferee. For purposes of Special Condition II-D-4, any person using the marina shall be deemed to be a transferee, and any property at or being used in connection with the marina shall be deemed to be the property of a transferee. This hold harmless and indemnification shall cover the same legal actions that the release and covenant required by Special Condition II-D-1 covers.

5. **Liability Insurance.** The permittee shall maintain in force at all times public liability and property damage insurance, including personal injury, broad form property damage, blanket contractual, completed operations and products, with such limits as may be reasonably requested by the Commission from time to time, but in no event for less than the sum of TEN MILLION DOLLARS ($10,000,000.00) combined single limit; and the permittee agrees that the Commission, and/or the permittee's and any other port authority's shipping and terminal tenants shall be named as additional insureds under such liability insurance policy or policies.

All such policies shall be endorsed with a severability of interest or cross-liability endorsement, reading generally as follows: "Cross-Liability – In the event of one of the assureds incurring liability to any other of the assureds, this policy shall cover the assured against whom claim is or may be made in the same manner as if separate policies had been issued to each assured. Nothing contained herein shall operate to increase underwriters' limit of liability."

A certificate or certificates, in a form provided by the Commission or reasonably satisfactory to the Commission, evidencing such insurance coverage shall be filed with the Commission prior to the commencement of any work under this amended permit, and said certificate(s) shall provide that such insurance coverage will not be canceled or reduced without at least 30 days prior written notice to the Commission. At the Commission's request from time to time, the permittee shall promptly provide to the Commission complete copies of liability insurance policies maintained pursuant to this amended permit. At least 15 days prior to the expiration of any such policy, a

certificate showing that such insurance coverage has been renewed or extended shall be filed with the Commission. If such coverage is canceled or reduced, the permittee shall, within 15 days after receipt of written notice from the Commission of such cancellation or reduction in coverage but in no event later than the effective date of cancellation or reduction, file with the Commission a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies.

E. **Debris Removal.** All construction debris shall be removed to a location outside the jurisdiction of the Commission. In the event that any such material is placed in any area within the Commission's jurisdiction, the permittee, its assigns or successors in interest, or the owner of the improvements, shall remove such material, at its expense, within ten days after it has been notified by the Executive Director of such placement.

F. **Notice to Berth Renters.** The permittee shall provide a copy of this amended permit to every berth renter calling his or her attention to Special Conditions II-C and II-D of this amended permit.

G. **Assignment.** The permittee may make a full or partial assignment to the rights and/or duties under this amended permit provided that the assignee is acceptable to the Commission. The assignment shall be made in writing and clearly indicate which portions are assigned and which portions remain unassigned. Any assignee shall sign a written statement to the effect that he or she has read and understands the conditions of this amended permit and agrees to be bound by all terms and conditions hereof.

H. **Permit Recording.** The permittee shall record this amended permit or a notice referring to this amended permit with the County of Alameda within 60 days after execution of this amended permit and shall provide evidence of recording to the Commission.

II. Findings and Declarations

A. Use

1. **Bay Plan.** San Francisco Bay Plan Map No. 4 does not designate the project site for any priority uses but a note on the map states: "JACK LONDON SQUARE. Expand commercial recreation facilities as needed. Provide continuous public access along Estuary to Lake Merritt Channel." The proposed use of the site as commercial recreation development which provides continuous shoreline access is consistent with the Bay Plan.

2. **Seaport Plan.** Areas to the east, the west, and across the Estuary are designated for marine terminal use in the Seaport Plan. The use of the Jack London Square area for a small craft recreational marina could be inconsistent with the Seaport Plan if it interferes with the existing use of the estuary for port purposes. The construction of a small boat marina expansion in the vicinity of a port operation raises liability issues for shippers. The wakes of passing ships and wash from turning ships can cause waves and surge in the marina that could result in wear and chaffing or swamping of

small boats in the marina. If shippers find that using the area would expose them to liability they may select other ports of call or additional fill in the Bay may be requested in areas where the conflict between shipping and recreational boating does not exist. In order to assure that the project does not result in additional fill and does not impair the efficient utilization of the adjacent port area, the Commission finds that Special Condition II-C must be imposed.

B. **Fill.** The permittee will place a total of 31,247 square feet of Bay fill, including fill for berths, public access, and to improve shoreline appearance.

1. **Fill for Marina.** The fill for the marina berths is for a water-oriented use and can be authorized so long as the fill is the minimum necessary. The expansion of the marina is modest and the berths are sized to fall within Department of Boating and Waterways guidelines for such facilities. Therefore, the Commission finds that the fill for the marina berths is the minimum necessary for the proposed use.

2. **Fill for Public Access.** The Commission's policies allow minor amounts of fill for providing new public access if there is inadequate public access in the area. The site includes three existing buildings located directly on the edge of the Bay (the Boatel, Scott's, and the Grotto). There are 7-foot-wide wooden walkways on fill bayward of the Boatel and Scott's. The proposed fill would replace these narrow walks with wider walkways, some seating and viewing areas, and observation decks. In addition, the permittee will provide public short-term boat docks for public access from the Bay to the shoreline. Placement of the new wooden walkways is the only way to provide continuous shoreline access around the Boatel and Scott's. Furthermore, the Design Review Board found the fill necessary to provide attractive useable public walkways bayward of these structures. The public boat docks will promote Bay-to-shore access and are the only public facilities of this type in the Jack London Square area. The fill for tidal stairs and observation platforms will provide design elements within the overall public access design, create opportunities for the public to get close to the water's surface, and enhance views from the public access areas to the surface waters of the narrow Estuary. The fill for the ferry docks, authorized in Amendment No. Four will provide access to public transportation, including handicap access, and will provide a place for the public to sit near the Bay. Therefore, the Commission finds the proposed fill is needed to provide public access and is the minimum amount necessary.

3. **Amendment No. Seven.** Several minor modifications to the fill quantities in the original permit are made by this amended permit to reflect minor modifications to the project's design and to correct errors and omissions from earlier amendments to the permit. In Section I-A-1-e, the authorized fill increases from 5,500 to 6,263 square feet to reflect the actual amount of solid and pile supported fill placed to improve public access and shoreline appearance at the foot of Broadway. The original 5,500-square-foot fill total was derived from imprecise conceptual design drawings.

Further, in Section I-D the total amount of fill is increased from 26,500 to 31,247 square feet to reflect: (1) the 763-square-foot increase in I-A-1-e; (2) the 2,724 square feet of fill for a ferry barge and gangway authorized in Amendment No. Four; and (3) the 1,260-square-foot public ferry pier authorized in Amendment No. Four.

4. Material Amendment No. Eight to this permit authorizes the relocation of an existing, 1,600-square-foot barge affixed to four, four-square-foot piles with a 175-square-foot launching float attached. The barge is being relocated to facilitate its use, in conjunction with the launching float, as primarily a small boat launching facility. The barge will also continue to be used periodically for tour and dining yacht berthing and for other transient boat tie-up as needed. The fill is water-oriented in nature and will serve primarily to facilitate the public's use and enjoyment of the Bay by providing a safe, convenient small-boat launch which also provides small boat access to the Bay for people with handicaps, consistent with the requirements of the Americans with Disabilities Act (ADA) and California Title 24.

4. 5. **Fill for Improving Shoreline Appearance.** The Commission's policies allow minor fill to improve shoreline appearance if the appearance of the shoreline adversely affects enjoyment of the shoreline. Adjacent to the Boatel is a small inlet which will be inland of the public access boardwalk. The permittee proposes to construct a 300-square-foot portion of a restaurant within the Boatel over this inlet. The public access walkway will be reconstructed and built as a link to the large public plaza at the foot of Broadway. The Design Review Board found the overall exterior of the facade of the Boatel expansion would be attractive. Therefore, the minor fill will improve the shoreline appearance, and be the minimum amount necessary. The awning authorized by Amendment No. Six will not adversely impact the appearance of the shoreline nor public access.

C. **Public Access.** The project will provide a total of 2.35 acres of public access along the entire 1,875-foot length of shoreline of the site, or approximately 42 percent of the shoreline band. The access will consist of a continuous shoreline walkway with larger plaza areas at the foot of Broadway and between Scott's Grill and the Grotto Restaurant and will include 2,830 square feet of public access already provided by Scott's in BCDC Permit No. M84-94. There will also be public access on the ferry pier.

The access provided is much less than the Commission has required in other urban, mixed use developments, even those with existing structures. For example, in 1980, the Commission authorized Alameda Marina Village directly across the Estuary. On the 206-acre site, the Commission required 286,000 square feet of shoreline band along the one-mile of shoreline, which is over 50 percent of the shoreline band. In addition, the Commission required 126,000 square feet of public access on fill.

The Design Review Board reviewed the project on three occasions and only one Board member found that the project would provide maximum feasible public access. However, when the area for public access on fill--boardwalks and piers--is added to the area provided in the shoreline band, a total of 102,430 square feet or 2.35 acres, the Commission finds that the minimum threshold for maximum feasible public access is met and provided by the overall project.

The design of the public access area is also of considerably less quality than other projects approved by the Commission. In this redevelopment project, the Port has the opportunity to create a major civic achievement on the level of other urban waterfront developments around the nation. The Design Review Board expressed its frustration that the Port is foregoing the opportunity to develop a public plaza where Broadway, Oakland's major city street, meets the Estuary. This site has considerable historic, cultural, and urban design significance. Yet the Port has chosen to largely ignore the public value of the area by allocating it to the expansion of the Boatel. As a result, one Design Board member concluded: "There's no square there," referring to the fact that Jack London Square (the plaza at the foot of Broadway around the bust of Jack London) will be little more than an extension of a vehicle turn-around area. The Board also noted that the focus of activities--the eating pavilion and retail shops--will be inland, and that no major civic spaces face directly onto the waterfront. The waterfront area is designed as a secondary space instead of as a focus for public assembly and a center of activity for members of the public who cannot or choose not to patronize the hotels, shops, and restaurants.

The Commission shares the conclusions of the Design Review Board that the design of the project is not the highest quality and that the project will not realize the full potential of this unique urban waterfront location. However, the Commission finds that the project will provide sufficient space for public access for the project to be approved.

Public Access Use Modifications (Amendment No. Seven)

Amendment No. Seven authorizes the permittee to: (1) use dedicated public access areas for regularly scheduled, publicly oriented events including fairs, festivals, concerts, a farmer's market and some events charging paid admission; (2) use up to 500 square feet of dedicated public access area for limited commercial activities, including small retail kiosks or carts for vending food or merchandise; and (3) improve approximately 900 square feet of an existing plaza for outdoor dining as part of the Old Spaghetti Factory Restaurant. The Port is dedicating 18,189 square feet of an existing public plaza for permanent public access to offset the public access impacts of the project.

The use of the dedicated public access areas for publicly-oriented events will enliven and increase the use of the underutilized public access in the Jack London Square area. The events proposed by the permittee do not charge admission, are of limited duration and would be consistent with the intended and anticipated uses of the public access spaces. The Bay Plan findings on recreation state in part, that, "a major supplement to parks, marinas, and other forms of water-oriented recreation are the several areas of water-oriented commercial recreation and public assembly that have been developed around the Bay, such as...Jack London Square in Oakland...Additional commercial recreation and public assembly are desirable uses of the shoreline if they permit large numbers of persons to have direct and enjoyable access to the Bay. These uses can often be provided by private development at little or no cost to the public support authorization of this project."

Special Condition II-B-2-a requires the permittee to submit a schedule of proposed events annually accompanied by a site plan describing each event's location for review and approval by, or on behalf of the Commission. This will enable the Commission staff to monitor the amount,

frequency, duration, size, and other aspects of events to ensure that the public's use of the dedicated public access areas is not compromised.

The limited commercial activities authorized by this amendment are small-scale carts and stands for vendors which will not singly nor collectively serve to constrain the public's use of the public access areas. The Bay Plan policies on recreation, in part, state that, "limited commercial recreation facilities...should be permitted within waterfront parks provided that they are clearly incidental to the park use, are in keeping with the basic character of the park and do not obstruct public access to and enjoyment of the Bay."

Special Conditions II-B-2-b and II-A require staff review and approval of individual kiosks for use, design and location. The review will ensure that all approved kiosks will compliment the public access areas and uses in the Jack London Square area and provide for the needs of the recreating public without impeding its use of the public access areas.

These limited, non-public uses of the public access areas may help to bring larger numbers of persons to the public access areas than otherwise might use them and, therefore, help publicize the areas public availability. The limited nature of the non-public use will not substantially interfere with the public nature of the area. Special Condition II-B-2-d provides that the uses of the public access areas authorized in Amendment No. Seven are authorized for the limited term of seven years to allow the Commission to reevaluate these uses and the related impacts, if any, on public access. This requirement provides an additional mechanism for ensuring the public access areas remain open and accessible to the public.

Amendment No. Three, which permitted the construction of a 472-square-foot restaurant addition, a 230-square-foot entry canopy and landscaping was incorporated into Amendment No. Seven since the Port failed to pursue the amendment request by submitting requested information in a timely manner, and the amendment request was not returned unfiled pursuant to Regulation Section 10351. The application lay dormant until its rediscovery arising from the request for Amendment No. Seven. The Port has already completed the work for which authorization was requested and modified the proposal project consistent with the comments of the staff and the Design Review Board. Therefore the Commission finds the work proposed in the application for Amendment No. Three will not have a detrimental affect on public access.

The project authorized in Amendment No. Eight modifies the design and use of the existing, dedicated public access plaza lying between Kincaid's and Scott's Restaurants in Jack London Square. This amendment authorizes the construction of a 4,400-square-foot pavilion in the plaza to be used for public access purposes eighty percent of each year (292 days) and for private events hosted by Scott's Restaurant twenty percent of each year (73 days). The periodic, private use of the public access space for private events will eliminate the public's access to a significant portion of the plaza for approximately 20 percent of each year. In addition, the covering of the public access space could reduce the public character of the plaza, thereby discouraging the public's use of the plaza.

The site for the public access pavilion is part of a large (32,300-square-foot), L-shaped, public space which receives relatively little public use, in part because its primary function is as a service vehicle access to the two restaurants and retail shops. The lack of activities fronting on the

plaza combined with the service vehicle activity significantly diminish the value of the plaza as a public space. The California Canoe and Kayak rental and sales business has significantly enlivened this plaza with its colorful kayaks and the activity generated by frequent classes and canoe and kayak rentals. However, the backs of buildings generate little life in plazas. Approximately 290 feet of the 330 feet of walls framing this plaza are the rear or service entry of the buildings, while only 40 feet are fronts.

The introduction of the pavilion could generate activities in the plaza which do not occur there now because of the existing building and use configuration. The private banquet events may bring people to Jack London Square who would not otherwise visit the shoreline and it may serve as a catalyst for future visits to the Square and will likely generate additional sales for other businesses in the Square. The pavilion will also be used by other, more public events which require cover or protection from inclement weather, including the Farmers' Market, art shows, product displays and boat show displays.

The existing barge on the southeast side of the plaza will be relocated closer to the shoreline to be shared by the existing kayak rental and sales business for launchings associated with classes it offers, by tour and dining yachts as a transient boat tie-up and for public access. Special Condition II-B-3 provides that the 1,600-square-foot barge and the 175-square-foot launching float be used for public access including small boat launching, tour and dining boat tie-up and swimming access to the Estuary. Relocating the float and programming its use as described should increase the activity in the plaza, while increasing the on-going commercial use of the plaza area. Increased human activity in the area is desirable since the plaza is relatively underutilized by the public. However, the relocated barge and head float will primarily provide more convenient access for customers of the California Canoe and Kayak shop for launching in the Oakland Estuary and will provide an additional berth for private dining and tour boats. Given the public access use and dedication requirements in this amended permit, the Commission finds that this limited commercial use on the floating fill is appropriate.

Amendment No. Eight authorizes the private use of the public pavilion for twenty percent of the time or up to seventy-three calendar days per year. Special Condition II-B-3 requires that this private use be scheduled consistent with the guidelines specified in Exhibit E to this amended permit. The scheduling guidelines define two types of use periods: (1) May through October will be the higher public use period; and (2) November through April will be the lower public use period. There are approximately one-hundred-and-six weekend days each year or approximately nine weekend days per month. During the higher public use period (May through October), the private events are limited to a maximum of three weekend days per month on-average, with six weekend days required for public use. There is a minimum requirement of three weekend days per month free of private events. This allows the permittee to exceed the three events per month limit, but requires that it meet the overall requirement by having fewer events in subsequent months during the higher use period. During the lower public use period (November through April), the permittee is allowed to schedule up to four private events per month on weekend days, on average, and will be required to reserve at least five weekend days on average for public use. The permittee is required to provide a minimum of three public-use weekend days per month, and must average the private use to conform with the four-day-per-month average allotment. The total event allotment for one year is seventy-three. The Commission finds that the private event use will not adversely

impact the public's use and enjoyment of the plaza, provided that the schedule of events approved by the Port adheres to the guidelines specified in Exhibit E to this amended permit.

The Commission's public access design guidelines state, in part, that: "public access should generally be open to the sky...be designed to be usable by the greatest number and diversity of people, including the physically handicapped." The project will provide a covered, open outdoor area for all users of the wharf. The towers will be visible above the adjacent buildings to attract passersby from a distance and signal users to explore the waterfront. The open-truss structural system allows for longer spans with less intermediate supports, thus preserving views of the Bay. The structure does not significantly impede existing shoreline access nor will it unduly interfere with the existing access to the wharf edge. The proposed pavilion will have a minimal impact on existing view corridors and sight lines of the Oakland Estuary. The feeling of openness achieved through the use of slender structural columns and the open truss system will minimize sight line obstructions. The project will modify the existing paving pattern to coordinate with the outline of the proposed structure. The Design Review Board noted that the existing paving pattern directs one's eye along the existing view corridor to the ships on the opposite shore. The revised paving pattern will preserve this feature to the greatest extent feasible.

The pavilion will be supported by columns similar in color and shape to pedestrian scale lighting in the square, will be outlined with neon signs atop the towers naming the structure "Public Pavilion" and the paving pattern in the plaza will be modified to reflect the overhead pavilion while utilizing paving materials consistent with the existing paving. However, the covering of the public access space could reduce the public character of the plaza, thereby discouraging the public's use of the plaza. The periodic, private use of the public access space for private events will eliminate the public's access to a significant portion of the plaza for approximately twenty percent of each year. The proposed pavilion will be situated to provide an unobstructed, 34-foot-wide view corridor from Water Street to the estuary approximately 80 percent of the time when the facility is open for public use. The existing view corridor width through this plaza is approximately 57 feet wide. The authorized pavilion design will maintain an 18-foot-wide view corridor through the plaza to the shoreline during private events. Special Condition II-B-6 requires the installation of binoculars for public use, benches, flags, lighting, and cafe seating to furnish the pavilion, enhancing its utility to the public for daily use.

The Commission finds that the public access improvements sufficiently offset the potential for the pavilion to privatize the existing plaza and that these enhancements will improve overall the public's use and enjoyment of the existing plaza so that the net effect of the project, given the periodic unavailability of the plaza, will result in an overall enhancement of the public access. The Commission finds that the design of the proposed pavilion will be sufficiently congruous with and complements the existing development in the area and will enhance the public's use of the existing dedicated public access areas. The Commission also finds the proposed view corridor adequately preserves views of the Estuary and Alameda shoreline. The Commission also finds that the private use is incidental to the public access use, is in keeping with the character of the area and will not unduly obstruct public access to and enjoyment of the Bay. The Commission finds therefore, that the authorized pavilion construction and private use of the public access area will contribute to the public's use and enjoyment of a public access area which is currently underutilized. Finally, the Commission finds that the public access required in this amended permit will provide the maximum

feasible public access, consistent with the original Jack London Square project as modified through Amendment No. Eight to this permit.

Amendment No. Eight authorizes, on a temporary basis, tent-covered banquet use of the dedicated public access plaza until January 15, 1996. At the time that the Port first proposed the tent use to the staff in April of 1993, the staff had concerns that approving the tent use on a permanent basis would be inconsistent with the requirements of amended BCDC Permit No. 19-85 and with the Commission's Bay Plan policies on public access. Moreover, after viewing the plaza with the tent in it, the staff determined that the tent effectively blocked the existing view corridor from Water Street out to the estuary and the Alameda shoreline. However, he Commission finds that authorizing the temporary continuation of the temporary, periodic tent use will not unreasonably detract from the public's current, limited use and enjoyment of the area, because the tent use is only temporary in nature and under the existing conditions, the public's use of the area is limited.

D. **Water Quality**. Discharges from the proposed marina could adversely affect Bay water quality if not properly controlled. Special Condition II-C requires that the proposed marina be equipped with suitable facilities to be made available to the boating public for receiving and disposing sewage and other wastes. Special Condition II-B-4-1 requires the installation of restrooms for public use. These conditions assure that the project as authorized will not adversely affect the quality of Bay waters.

E. **Public Trust**. The project area was granted to the City of Oakland by the State to be used for public trust purposes. Therefore, the lands have to be administered in accordance with the trust grant. The tidal area within the Commission's jurisdiction will be used for a marina, a water-oriented use, or for improving shoreline appearance and public access. Therefore, the Commission finds that the proposed project is consistent with public trust needs.

F. **Environmental Review**. The permittee, the lead agency for the proposed project, prepared an Environmental Impact Report for Jack London Square--Phase I Development Plan. The final Environmental Impact Report was certified by the permittee on March 1, 1983, and a supplemental final Environmental Impact Report certified by the permittee on December 4, 1984. The Commission finds that, as conditioned herein, the proposed project will not have a significant adverse environmental impact on the Bay.

On March 8, 1991, the Port of Oakland Commission certified the "Addendum to the Supplemental Final Environmental Impact Report--Central Area Project--Jack London Square" which assesses the environmental impacts of the ferry terminal project authorized by Amendment No. Four to this permit. On April 21, 1993, the Port of Oakland determined that the project authorized in Amendment No. Seven to this permit was exempt from the requirement to prepare an environmental report on the project, citing Sections 15303 (e) and 15304 (e) of the California Environmental Quality Act (CEQA), Classes 3 and 4. On March 22, 1995, the Port of Oakland determined that the project authorized in Amendment No. Eight to this permit was exempt from the requirement to prepare an environmental report on the project, citing Sections 15303 (e) and 15304 (e) of the California Environmental Quality Act (CEQA), Classes 3 and 4.

G. **Conclusion.** For all of the above reasons, the benefits of the proposed project clearly exceed the detriment of the loss of water areas and the project will provide maximum feasible public access to the Bay and its shoreline. Therefore, the project is consistent with the San Francisco Bay Plan, the McAteer-Petris Act, the Commission's Regulations, and the coastal management program for San Francisco Bay.

IV. Standard Conditions

A. All required permissions from governmental bodies must be obtained before the commencement of work; these bodies include, but are not limited to, the U. S. Army Corps of Engineers, the State Lands Commission, the Regional Water Quality Control Board, and the city and/or county in which the work is to be performed, whenever any of these may be required. This amended permit does not relieve the permittee of any obligations imposed by State or Federal law, either statutory or otherwise.

B. The attached Notice of Completion and Declaration of Compliance form shall be returned to the Commission within 30 days following completion of the work.

C. Work must be performed in the precise manner and at the precise locations indicated in your application and amendment requests, as such may have been modified by the terms of the amended permit and any plans approved in writing by or on behalf of the Commission.

D. Work must be performed in a manner so as to minimize muddying of waters, and if diking is involved, dikes shall be waterproof. If any seepage returns to the Bay, the permittee will be subject to the regulations of the Regional Water Quality Control Board in that region.

~~E. The rights derived from this amended permit are assignable as provided herein. An assignment shall not be effective until the assignee shall have executed and the Commission shall have received an acknowledgment that the assignee has read and understood the application and amendment requests for this amended permit and the amended permit itself and agrees to be bound by the terms and conditions of the amended permit, and the assignee is accepted by the Executive Director as being reasonably capable of complying with the terms of the amended permit.~~

E. The rights, duties, and obligations contained in this amended permit are assignable. When the permittee transfers any interest in any property either on which the authorized activity will occur or which is necessary to the full compliance of one or more conditions to this amended permit, the permittee/transferor and the transferee shall execute and submit to the Commission a permit assignment form acceptable to the Executive Director. An assignment shall not be effective until the assignee executes and the Executive Director receives an acknowledgment that the assignee has read and understands the amended permit and agrees to be bound by the terms and conditions of the amended permit, and the assignee is accepted by the Executive Director as being reasonably capable of complying with the terms and conditions of the amended permit.

F. Unless otherwise provided in this amended permit, all the terms and conditions of this amended permit shall remain effective for so long as the amended permit remains in effect or for so long as any use or construction authorized by this amended permit exists, whichever is longer.

G. Unless otherwise provided in this amended permit, the terms and conditions of this amended permit shall bind all future owners and future possessors of any legal interest in the land and shall run with the land.

H. Unless otherwise provided in this amended permit, any work authorized herein shall be completed within the time limits specified in this amended permit, or, if no time limits are specified in the amended permit, within three years. If the work is not completed by the date specified in the amended permit, or if no date is specified, within three years from the date of the amended permit, the amended permit shall become null and void. If this amended permit becomes null and void for a failure to comply with these time limitations, any fill placed in reliance on this amended permit shall be removed by the permittee or its assignee upon receiving written notification by or on behalf of the Commission to remove the fill.

I. Except as otherwise noted, violation of any of the terms of this amended permit shall be grounds for revocation. The Commission may revoke any amended permit for such violation after a public hearing held on reasonable notice to the permittee or its assignee if the amended permit has been effectively assigned. If the amended permit is revoked, the Commission may determine, if it deems appropriate, that all or part of any fill or structure placed pursuant to this amended permit shall be removed by the permittee or its assignee if the amended permit has been assigned.

J. This amended permit shall not take effect unless the permittee executes the original of this amended permit and returns it to the Commission within ten days after the date of the issuance of the amended permit. No work shall be done until the acknowledgment is duly executed and returned to the Commission.

K. Any area subject to the jurisdiction of the San Francisco Bay Conservation and Development Commission under either the McAteer-Petris Act or the Suisun Marsh Preservation Act at the time the permit is granted or thereafter shall remain subject to that jurisdiction notwithstanding the placement of any fill or the implementation of any substantial change in use authorized by this amended permit.

L. Any area not subject to the jurisdiction of the San Francisco Bay Conservation and Development Commission that becomes, as a result of any work or project authorized in this amended permit, subject to tidal action shall become subject to the Commission's "bay" jurisdiction ~~up to the line of highest tidal action~~.

M. Unless the Commission directs otherwise, this amended permit shall become null and void if any term, standard condition, or special condition of this amended permit shall be found illegal or unenforceable through the application of statute, administrative ruling, or court determination. If this amended permit becomes null and void, any fill or structures placed in reliance on this amended permit shall be subject to removal by the permittee or its assignee if the amended permit has been assigned to the extent that the Commission determines that such removal is appropriate. Any uses authorized shall be terminated to the extent that the Commission determines that such uses should be terminated.

Executed at San Francisco, California, on behalf of the San Francisco Bay Conservation and Development Commission on the date first above written.

WILL TRAVIS
Executive Director
San Francisco Bay Conservation and
Development Commission

By: Jeffry Blanchfield
JEFFRY S. BLANCHFIELD
Chief Planner

Enc.
JSB/JL/rr
cc: U. S. Army Corps of Engineers, Attn.: Regulatory Functions Branch
San Francisco Bay Regional Water Quality Control Board,
Attn.: Certification Section
Environmental Protection Agency, Attn.: Clyde Morris, W-7-2

* *

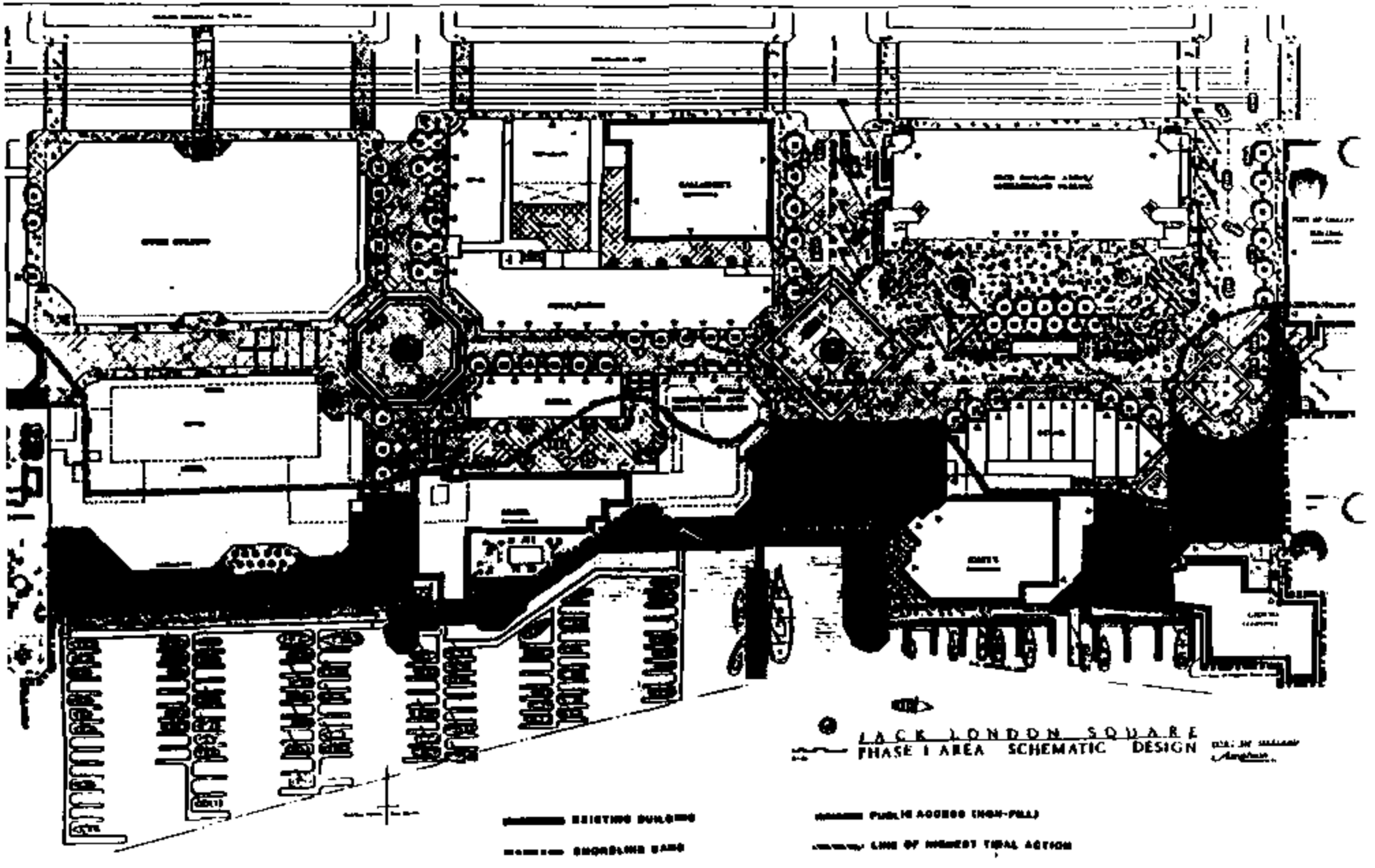
Receipt acknowledged, contents understood and agreed to:

Executed at Oakland, Ca

Applicant

On September 26, 1995 By: Andree F. Thomas
Notary Public
Title

ANDREE F. THOMAS
COMM. EXPIRES
STATE OF CALIFORNIA
COUNTY OF ALAMEDA
My Comm. Expires Jan. 12, 1996


JACK LONDON SQUARE
PHASE I AREA SCHEMATIC DESIGN
EXISTING BUILDING
SHORELINE BAND
PUBLIC ACCESS (NON-PILE)
LINE OF HIGHEST TIDAL ACTION

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PROPOSED DEVELOPMENT

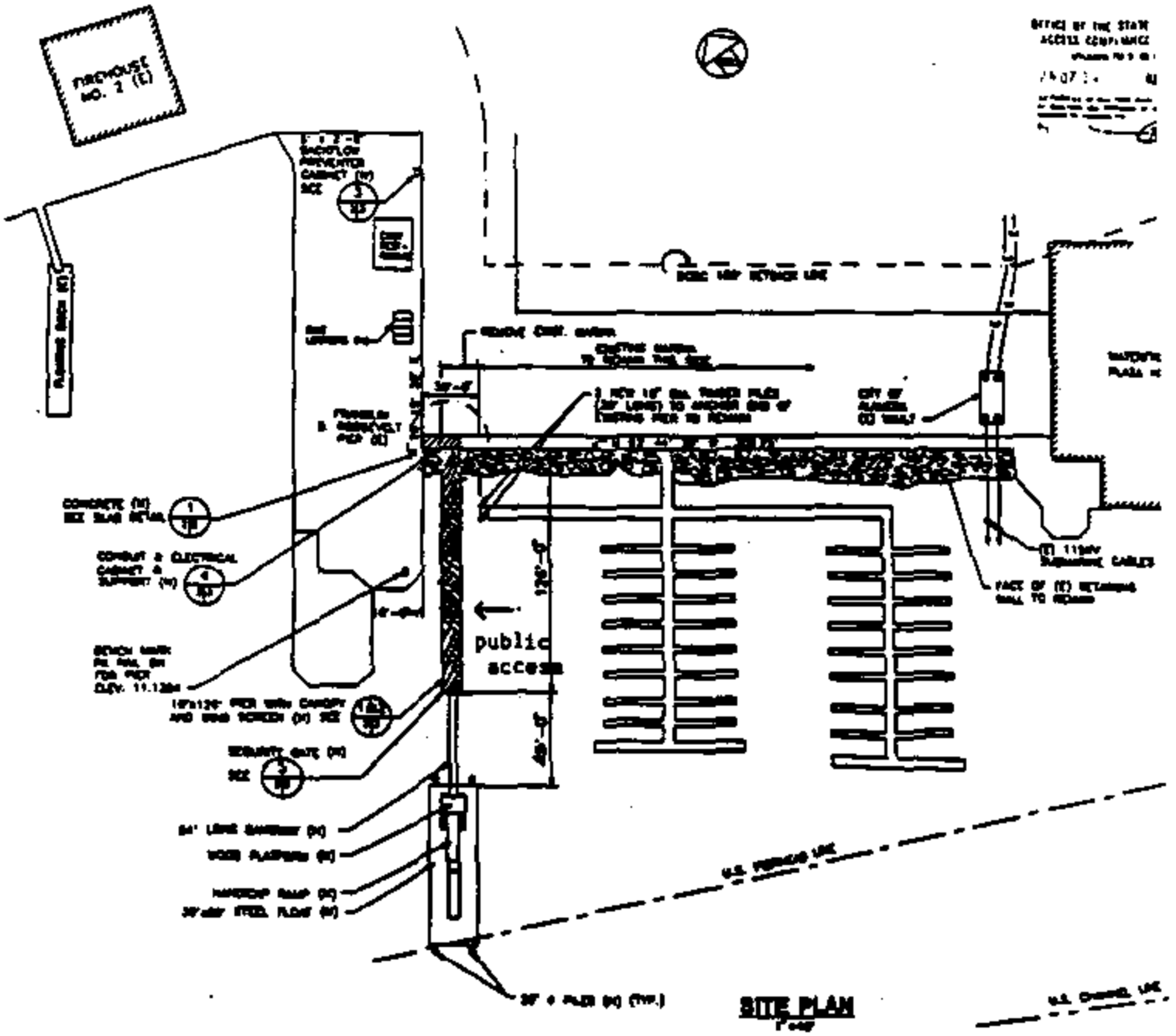


Exhibit B
Ferry dock Public Access

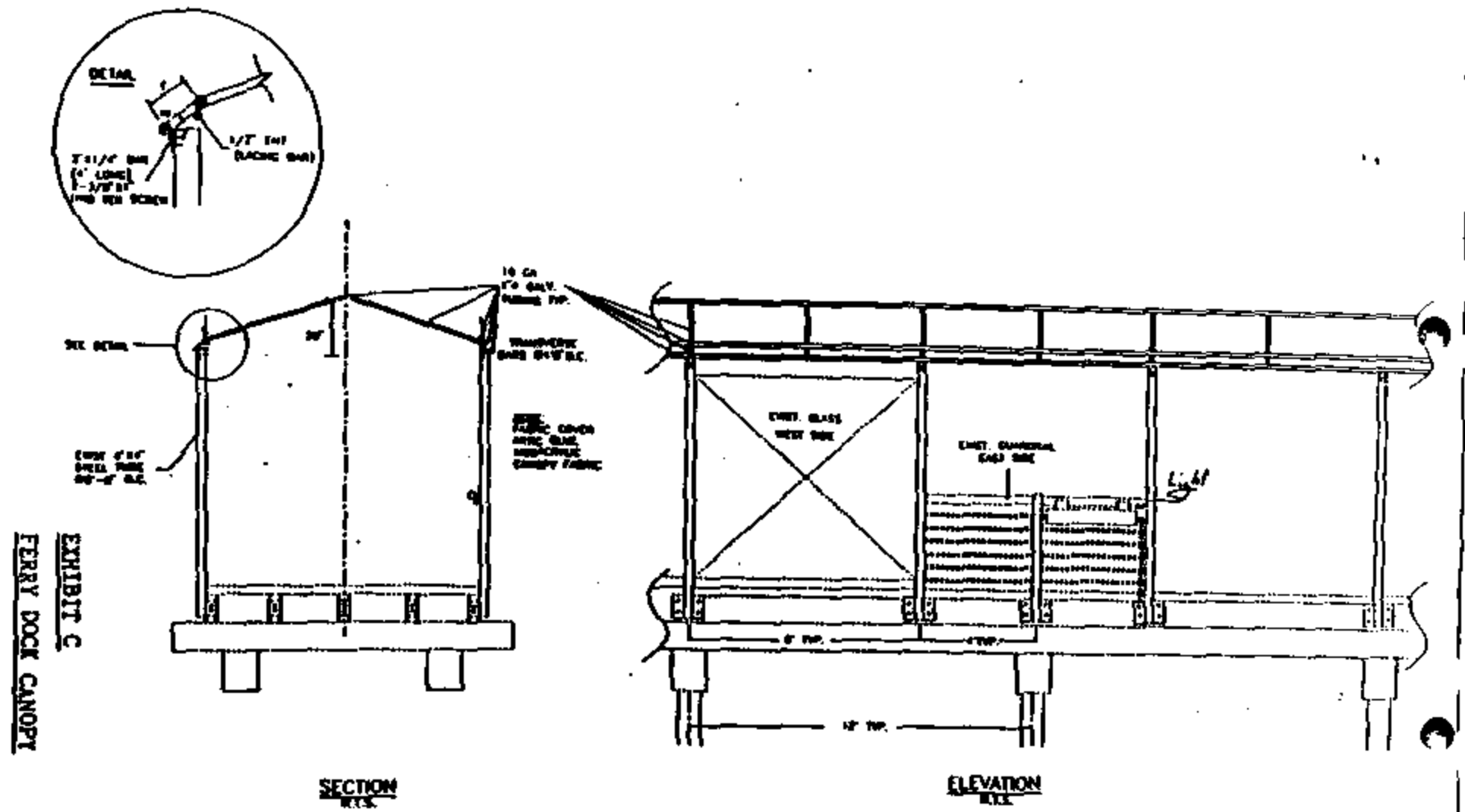


EXHIBIT C

FERRY DOCK CANOPY

PORT OF OAKLAND

92217

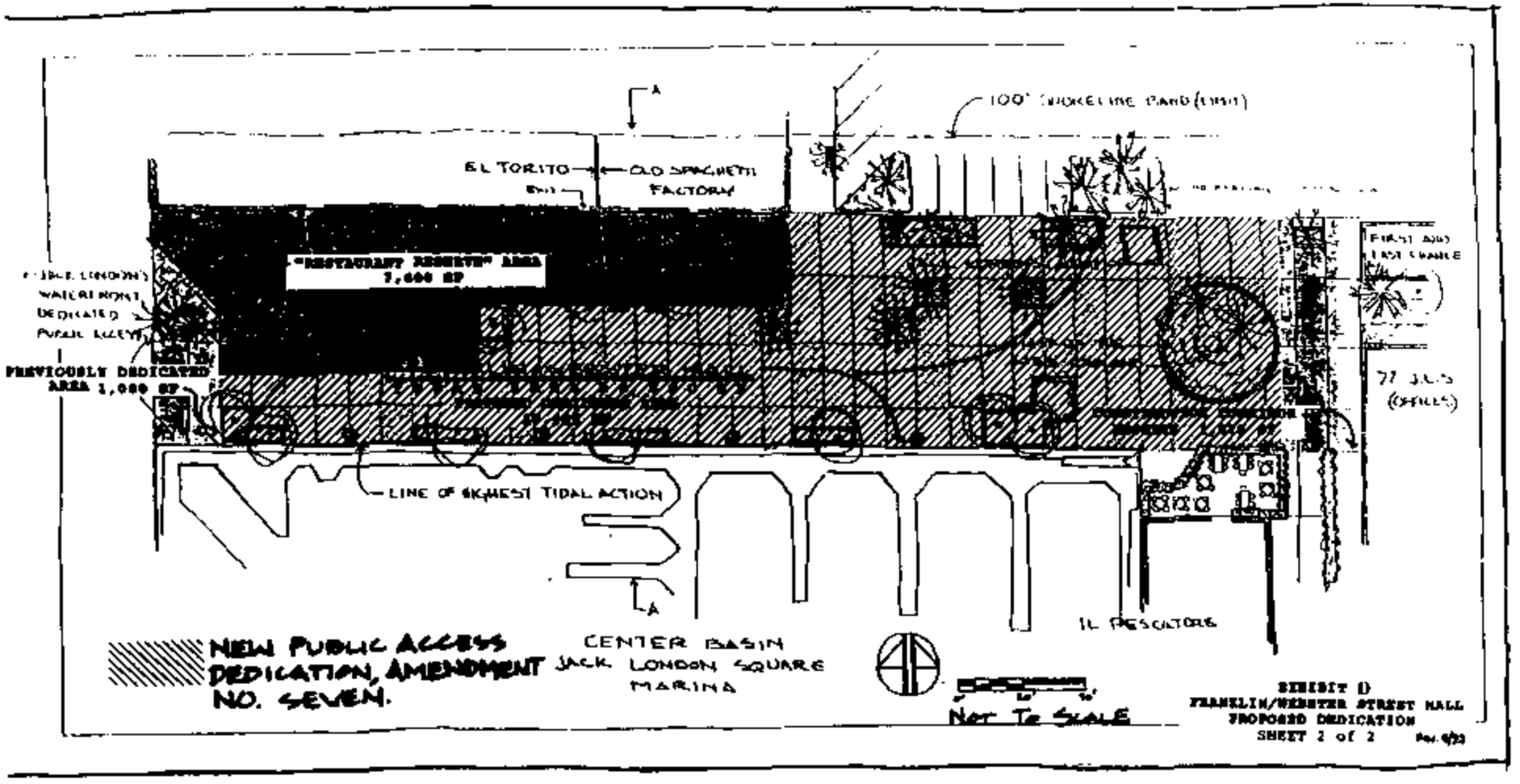


EXHIBIT D
FRANKLIN/WEBSTER STREET MALL
PROPOSED DEDICATION
SHEET 2 of 2 Rev. 6/93

	Public Use of the Pavilion	Private Use of the Pavilion	Percentage of Private Use of Pavilion during high use periods (weekend days/nights)
Percentage of use per year.	80%	20%	
Number of days available per year for use of the public pavilion.	292	73	
No. of weekend days/nights* to be made available for use of the Pavilion on average per month from May through October	6	3	33%
Minimum no. of weekend days/nights for Public Use in any month	3		
No. weekend days/nights* to be made available for use of the Pavilion on average per month from November through April	5	4	40%

*weekend nights = Friday and Saturday; weekend days = Saturday and Sunday

1. Scott's will submit a quarterly calendar of proposed private events for Port approval. The events calendar will include a time estimate of each individual event, including set-up and take-down times consistent with each event.
2. The Port will transmit a copy of the approved quarterly events calendar to BCDC staff for its information.
3. The Port will closely monitor the use of the pavilion for private events to ensure compliance with the 20-percent maximum private use limit.
4. The Port will not approve more than two consecutive private events at any time.
5. Scott's will coordinate with the Port's Marketing Director to eliminate conflicts between private events and any public events.
6. Scott's will not lower the fabric curtains prior to one (1) hour before a private event and will retract the curtains within one (1) hour after a private event.
7. Scott's will be responsible for the repair and maintenance of the pavilion structure, the outdoor tables and chairs and the binoculars.
8. Scott's will be responsible for the daily clean-up of the area beneath the pavilion structure.
9. The Port, Scott's and BCDC staff will review these guidelines within six (6) months of the first private event to determine if additional guidelines are necessary.

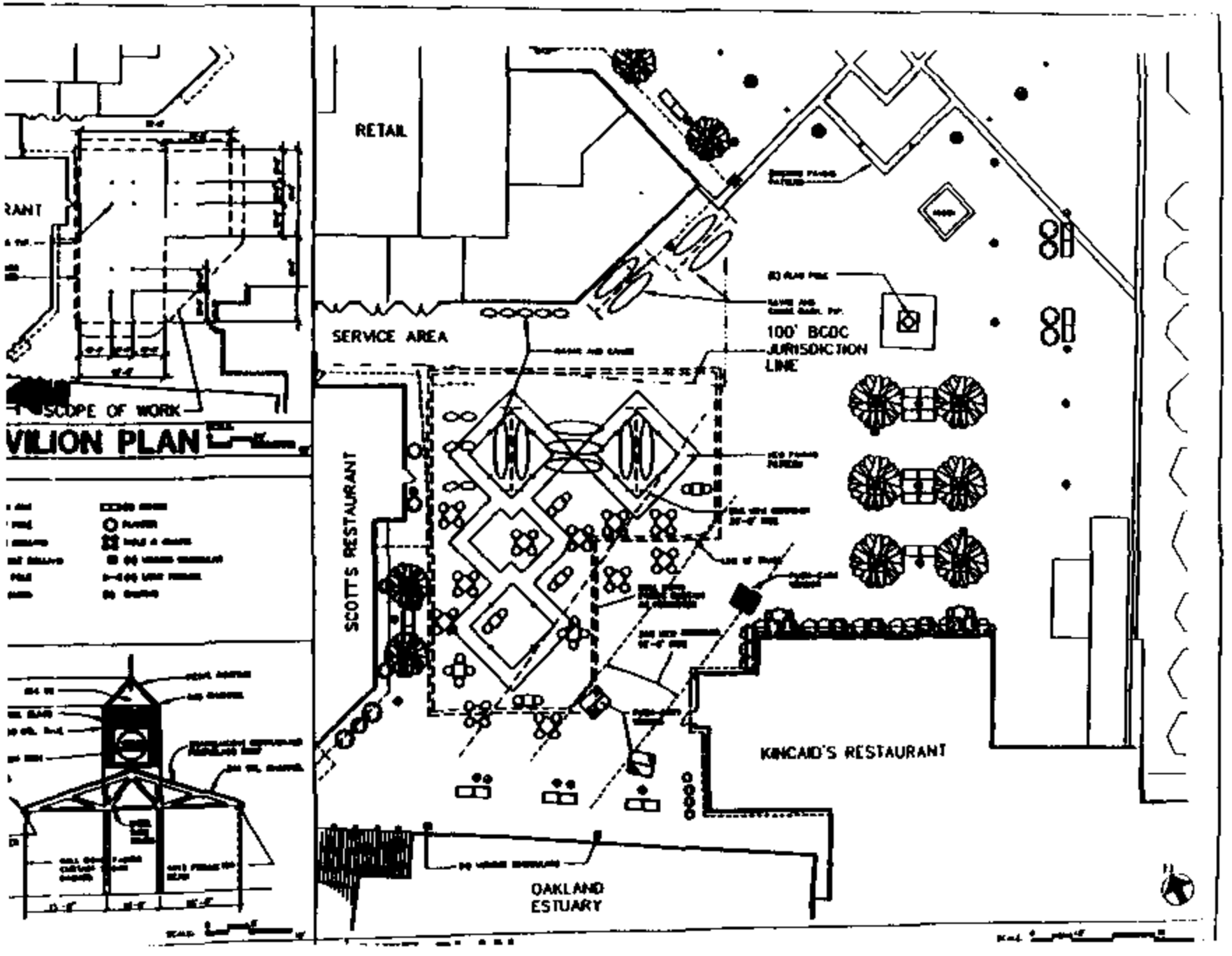
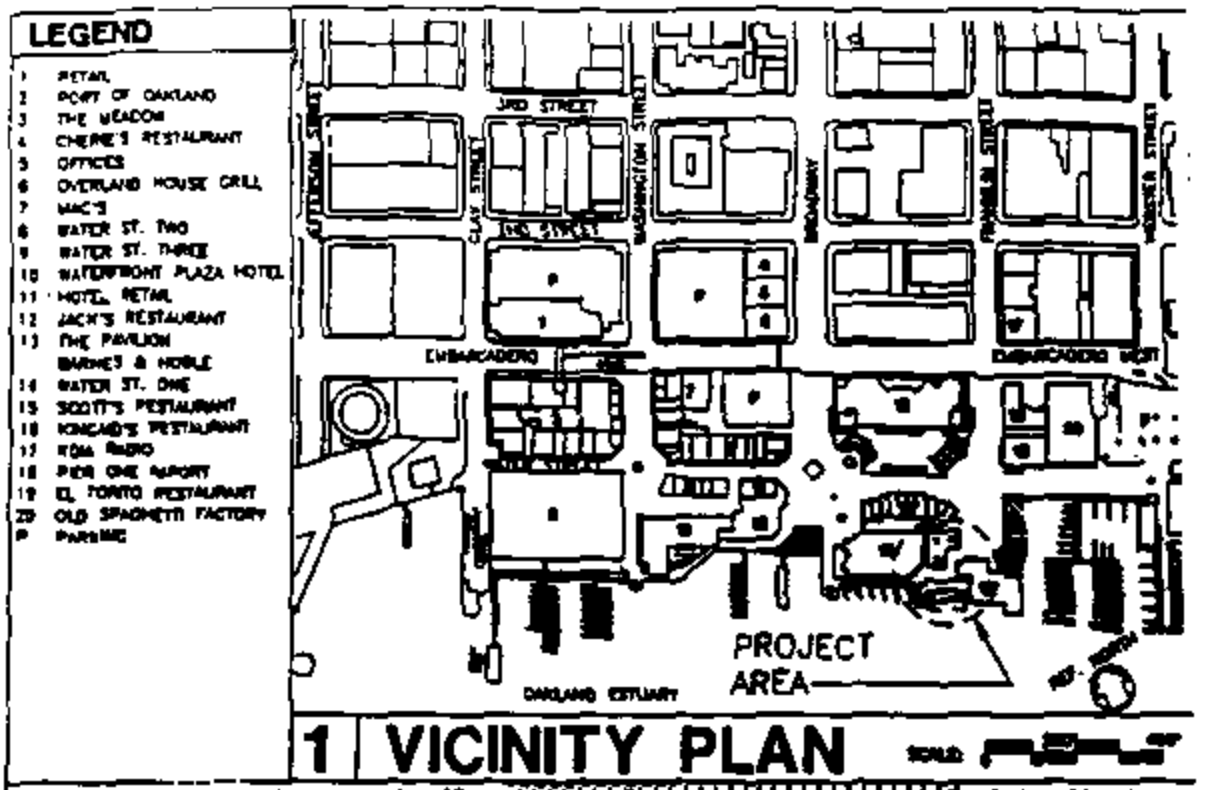
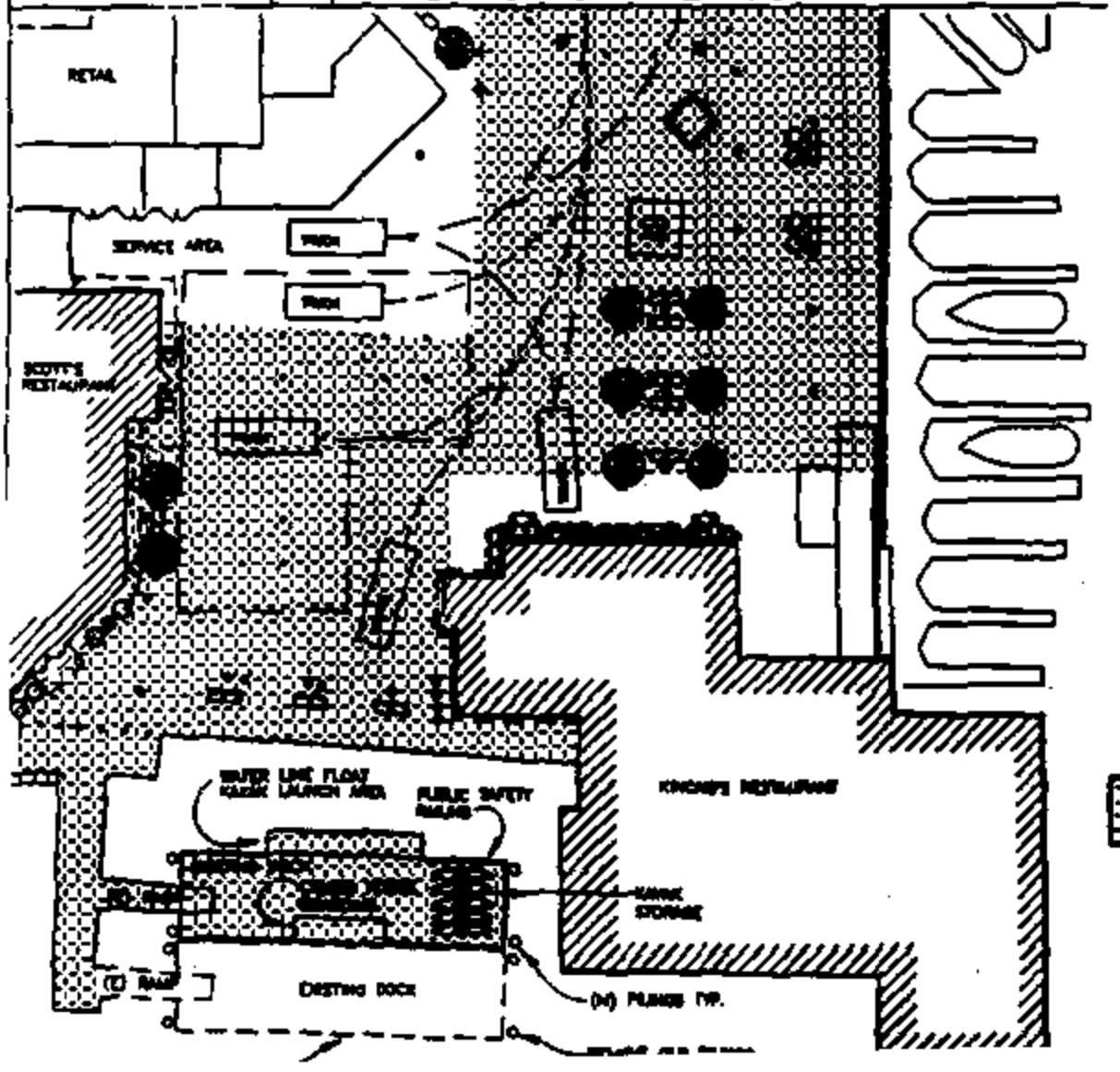

RETAIL
SERVICE AREA
100' BCDC JURISDICTION LINE
SCOTT'S RESTAURANT
KINCAID'S RESTAURANT
OAKLAND ESTUARY
SCOPE OF WORK
VILION PLAN
PUBLIC PAVILION
SITE PLAN
LOWER SECTION &
DIMENSION PLAN

EXHIBIT F



1 VICINITY PLAN

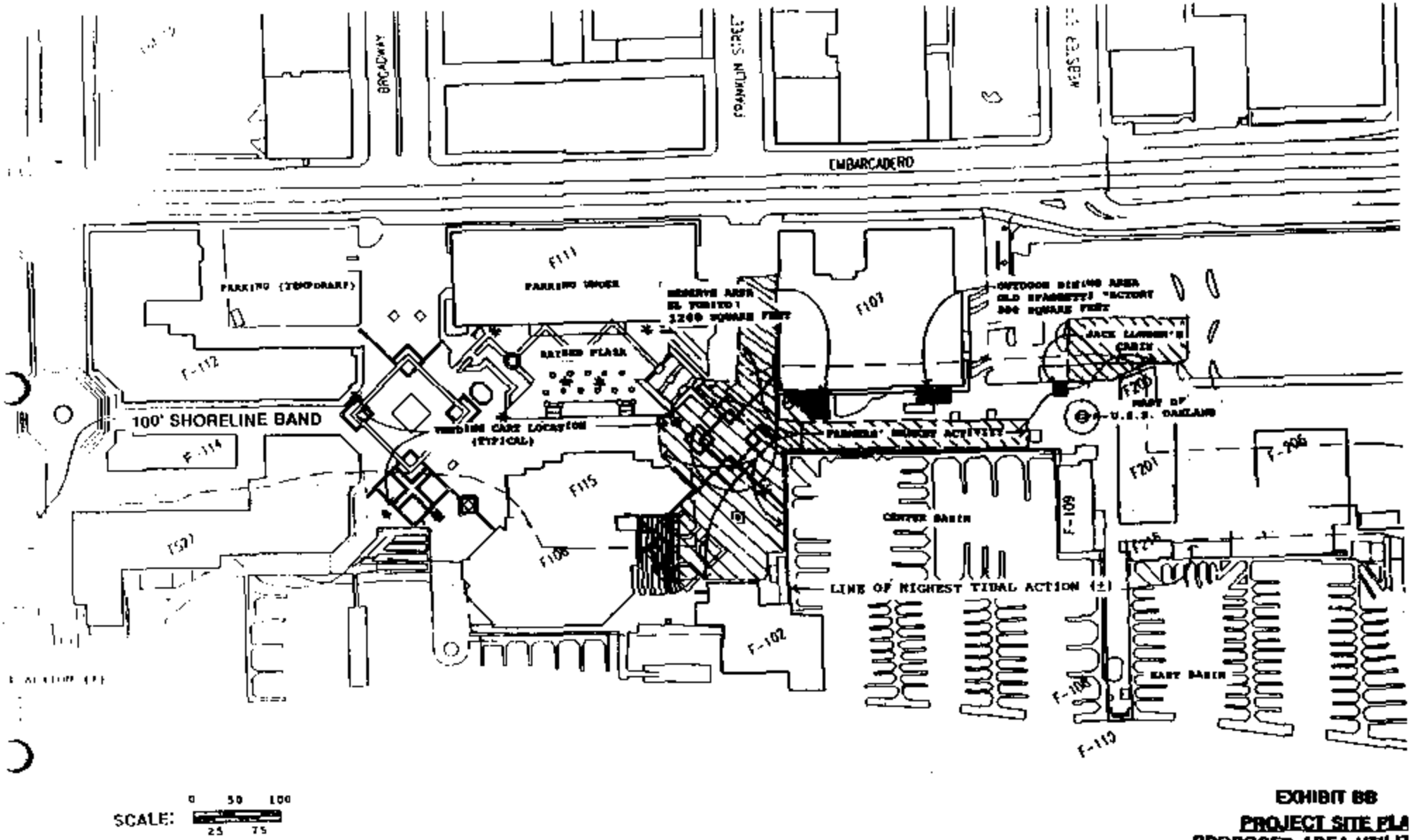


DEDICATED PUBLIC ACCE

	Public Use of the Pavilion	Private Use of the Pavilion	Percentage of Private Use of Pavilion during high use periods (weekend days/nights)
Percentage of use per year.	80%	20%	
Number of days available per year for use of the public pavilion.	292	73	
No. of weekend days/nights* to be made available for use of the Pavilion on average per month from May through October	6	3	33%
Minimum no. of weekend days/nights for Public Use in any month	3		
No. weekend days/nights* to be made available for use of the Pavilion on average per month from November through April	5	4	40%

*weekend nights = Friday and Saturday; weekend days = Saturday and Sunday

1. Scott's will submit a quarterly calendar of proposed private events for Port approval. The events calendar will include a time estimate of each individual event, including set-up and take-down times consistent with each event.
2. The Port will transmit a copy of the approved quarterly events calendar to BCDC staff for its information.
3. The Port will closely monitor the use of the pavilion for private events to ensure compliance with the 20-percent maximum private use limit.
4. The Port will not approve more than two consecutive private events at any time.
5. Scott's will coordinate with the Port's Marketing Director to eliminate conflicts between private events and any public events.
6. Scott's will not lower the fabric curtains prior to one (1) hour before a private event and will retract the curtains within one (1) hour after a private event.
7. Scott's will be responsible for the repair and maintenance of the pavilion structure, the outdoor tables and chairs and the binoculars.
8. Scott's will be responsible for the daily clean-up of the area beneath the pavilion structure.
9. The Port, Scott's and BCDC staff will review these guidelines within six (6) months of the first private event to determine if additional guidelines are necessary.



SCALE: 0 50 100 25 75

EXHIBIT 8B

PROJECT SITE PLA

PROPOSED AREA UTILIZ

PERMIT NO. 19-85
(Issued on March 13, 1986, As
Amended Through September 14, 1995)
AMENDMENT NO. EIGHT
(Exclusive of Amendment Nos. One,
Two, and Three)

PORT OF OAKLAND

NOTICE OF COMPLETION AND DECLARATION OF COMPLIANCE

San Francisco Bay Conservation
and Development Commission
Thirty Van Ness Avenue, Room 2011
San Francisco, CA 94102

Ladies and Gentlemen:

You are hereby informed that the work authorized by the above-referenced amended permit was completed on _____.

I have personally reviewed the terms and conditions of the amended permit, the final plans approved by or on behalf of the Commission, and the completed project and hereby certify that the project is in compliance with all terms and conditions of the amended permit and conforms to the plans previously reviewed and approved by or on behalf of the Commission. I further certify that all conditions of the amended permit, particularly with regard to plan review, public access areas and improvements, recordation, open space restrictions and other special conditions have been met.

I, _____, hereby declare under penalty of perjury that the foregoing is true and correct and that if called upon to testify to the contents of this notice, I would so testify.

Executed on this _____ day of _____, 19____,

at _____,

California.

_____
(Permittee)

_____
(Title)

FIFTH SUPPLEMENTAL AGREEMENT

THIS FIFTH SUPPLEMENTAL AGREEMENT, dated as of March 7, 1995 (the "Fifth Amended Lease"), by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, (hereinafter "Port"), and **SCOTT'S JACK LONDON SEAFOOD, INC.**, a corporation, (herein "Lessee").

W I T N E S S E T H:

WHEREAS, the Port, as Lessor, and **SCOTT'S JACK LONDON SEAFOOD, INC.**, as Lessee, are parties to that certain Lease dated the April 9, 1987, recorded on September 9, 1988, as Document Number 88-237370 of the Official Records of Alameda County (said Lease, as previously amended, is herein called "the Lease"); and

WHEREAS, the Port and Lessee wish to amend the Lease to provide for a rental credit to Lessee in exchange for Lessee installing an addition to the existing fire sprinkler system for the lease premises, which will also cover the adjacent public access walkway;

NOW, THEREFORE, the Port and Lessee agree as follows:

1. Rental Credit

Section 4.6 is hereby added to the Lease to read as follows:

> "4.6. Rental Credit For Addition to Sprinkler System: If the Board of Port Commissioners approves by resolution a building permit for an addition to Lessee's sprinkler system, which covers areas within the restaurant on the Premises (including the attic and underfloor) and underneath the restaurant building, the wharf facility on which the restaurant facility is located, and the Port's public access walkway adjacent to the Premises, and including installation of a new fire hose cabinet on the exterior of the restaurant building at the public access walkway, and in said resolution the Board expressly approves a rental credit as provided in this Section 4.6, then Lessee shall be entitled to a rent credit as follows:

(a) The total rent credit shall be $19,859.50;

(b) The rent credit shall be taken in three annual installments of $6,619.83 each on May 1, 1995, May 1, 1996 and May 1, 1997, or such later date as may be required by paragraph (d) below;

(c) The rent credit shall not begin until installation of the addition to Lessee's sprinkler system is complete and operational, as determined in writing by the Port's Director of Commercial Real Estate; and

(d) If at the time a rent credit is scheduled under paragraph (b) above, any default described in a notice of default from the Port to Lessee under this Lease is not cured, the rent credit shall be delayed and may be taken only when all defaults described in all notices of default from the Port to Lessee under this Lease have been cured.

"Lessee shall maintain and repair the addition to the sprinkler system, whether located within or outside the Premises, at no cost or expense to the Port, upon the same terms and conditions that Lessee is required to maintain and repair the Premises under this Lease."

2. **Lease In Effect**

Except as provided in this Agreement, the Lease, as previously amended, is hereby ratified, confirmed and approved.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
Executive Director

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation

By _____
(Signature)

Raymond J. Gallagher
(Print or Type Name)

Attest _____
(Signature)

JACINTA S. BENAVIDES
(Print or Type Name)

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE PORT ATTORNEY.

Approved as to form and legality this 10th day of May, 1995.

_____
Port Attorney

Port Resolution No. 95102

PORT OF OAKLAND - OFFICIAL BUSINESS
DOCUMENT REQUIRED TO BE RECORDED UNDER GOVERNMENT CODE SECTION 37393, AND ENTITLED TO FREE RECORDATION UNDER GOVERNMENT CODE SECTION 27383

RECORDED ON BEHALF OF AND WHEN RECORDED RETURN TO:

Stanley P. Hébert
Port Attorney
Port of Oakland
530 Water Street, 4th Floor
Oakland, California 94607

FIFTH SUPPLEMENTAL AGREEMENT

Between

PORT OF OAKLAND

And

SCOTT'S JACK LONDON SEAFOOD, INC.,
a Corporation

Dated

March 7, 1995

PORT OF OAKLAND - OFFICIAL BUSINESS
DOCUMENT REQUIRED TO BE RECORDED UNDER GOVERNMENT CODE SECTION 37393, AND ENTITLED TO FREE RECORDATION UNDER GOVERNMENT CODE SECTION 27383

RECORDED ON BEHALF OF AND WHEN RECORDED RETURN TO:

Stanley P. Hébert
Port Attorney
Port of Oakland
530 Water Street, 4th Floor
Oakland, California 94607

LGS 17042-01

RECORDED IN OFFICIAL RECORDS
ALAMEDA COUNTY, CA
PATRICK O'CONNELL CO. RECORDER

'93 AUG 31 PM 1:54

Commercial Heal Est.
Doolittle
Hanson
Wilson Jones
Harding
Joy
Jones
Kammermeier
Ogden
Sanchez
Sherrod
Szudy
Tash
Tse
Washington
White
Wong
Division File

DH

ORIGINAL

Scott's

FIFTH SUPPLEMENTAL AGREEMENT AND ESTOPPEL (SCOTT'S BLOCK LEASE)

THIS FIFTH SUPPLEMENTAL AGREEMENT AND ESTOPPEL (this "**Agreement**"), dated as of July 1, 1993 ("Effective Date"), is by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, hereinafter called the "**Port**" or "**Lessor**", and **OAKLAND PORTSIDE ASSOCIATES**, a California limited partnership, hereinafter called "**Lessee**" or "**OPA**".

R E C I T A L S

A. Lessor and Lessee are parties to that certain Lease (as such Lease has been, is hereby, or may hereafter be amended, modified or supplemented, the "Lease") dated July 21, 1987 and recorded August 5, 1987, in the Official Records of Alameda County, California (the "Official Records") as Instrument No. 87-219659, which lease has been supplemented and amended by that certain First Supplemental Agreement dated April 5, 1988 and recorded June 22, 1988 in the Official Records as Instrument No. 88-148838 (the "First Supplemental Agreement"), by that certain Second Supplemental Agreement dated November 1, 1988, and recorded January 3, 1989, in the Official Records as Instrument No. 89-000921 (the "Second Supplemental Agreement"), by that certain Third Supplemental Agreement and Estoppel (Scott's Block Lease) dated December 20, 1991, and recorded December 20, 1991, in the Official Records as Instrument No. 91-338211 (the "Third Supplemental Agreement") and by that certain Fourth Supplemental Agreement (Scott's Block Lease) dated March 24, 1992, and recorded May 13, 1992, in the Official Records as Instrument No 92-148908 (the "Fourth Supplemental Agreement"). All initially capitalized terms used in this Agreement and not specifically defined shall have the meanings given such terms in the Lease unless the context herein clearly requires otherwise.

B. As referenced in the First Supplemental Agreement, Bankers Trust Company, a New York banking corporation ("Bank") has made a term and construction loan to Lessee (the "Loan"), which Loan is secured by, among other things, (i) that certain Construction and Term Loan Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing dated as of June 21, 1988 (as amended to date and concurrently herewith, the "Deed of Trust")

(3) of this Section 18 hereinabove set forth, Lessee may encumber the said trade fixtures, equipment and other personal property with a security device securing an indebtedness not in excess of the amount which would be permitted under said Items (2) and (3) hereof.

19. Assignment and Subletting: Except as hereinafter expressly provided, Lessee shall not, either directly or indirectly, voluntarily or involuntarily, assign, hypothecate, encumber or transfer this Lease or any interest therein or sublet the whole or any part of the demised premises, or license the use of same, or suffer any other person or entity to occupy, use or manage (except management by Lessee's employees) the same, in whole or in part, without the prior written consent of Lessor evidenced by resolution of its Board of Port Commissioners. Neither this Lease nor any interest therein shall be assignable or transferable in proceedings in attachment, garnishment or execution against Lessee, or in voluntary or involuntary proceedings in bankruptcy or insolvency or receivership taken by or against Lessee or by any process of law (including, without limitation, the transfer of this Lease or any interest therein by testacy or intestacy), and possession of the whole or any part of the demised premises shall not be divested from Lessee in such proceedings or by any process of law, without the prior written consent of the Port evidenced by resolution of its Board of Port Commissioners. No occupancy or use of the demised premises by any prospective transferee, sublessee, or assignee shall occur before the Port's written consent to the transfer, sublease, or assignment. Any breach of the provisions of this Section shall constitute a default and shall cause this Lease to terminate immediately at the option of the Port without further notice to Lessee. Lessee shall not be deemed to be in default if Lessee causes an attachment or execution to be removed within ten (10) days of levy, or if Lessee causes an involuntary proceeding in bankruptcy to be dismissed or receiver to be removed within thirty (30) days of the date of commencement of said proceeding or appointment of said receiver.

Lessee may without further consent of the Port assign its interest in this Lease as Lessee to Bayside Hosts, Inc.

Notwithstanding the provisions of this Section 19 hereinabove set forth, the Port agrees that it will not unreasonably withhold its consent to assignment of this Lease by Lessee if the proposed assignee's operating entity has a similar net

worth to: Lessee's operating entity's net worth (adjusted for inflation) at the commencement of the term of this Lease or Lessee's operating entity's net worth at the time of proposed assignment, whichever is greater, and the proposed assignee has a substantially similar operational ability to Lessee's. It is understood and agreed that notwithstanding the Port's consent to any such assignment, the provisions of Sections 4.1.2 and 4.5 hereof relating to adjustment of the minimum rental and increase in the performance deposit shall apply to such assignment, other than an assignment to Bayside Hosts, Inc.

A prohibited assignment within the meaning of this Section 19 shall include, but is not limited to, the following:

(1) If Lessee is other than a corporation, the transfer of the Lease or any of Lessee's interests therein to a corporation that is not wholly owned by Lessee;

(2) If Lessee consists of more than one person or entity, or a combination of a person or persons and an entity or entities, a purported assignment, voluntary, involuntary, or by operation of law of any interest in the Lease from one or more such persons or entities, to any other person or persons or entity or entities whether or not such other person or persons or entity or entities are Lessees;

(3) If Lessee is a partnership, a withdrawal or change, voluntary, involuntary, or by operation of law, of any general partner, or the dissolution of the partnership;

(4) If Lessee is a corporation, any dissolution, merger, consolidation, or other reorganization of Lessee, or the sale or other transfer of a controlling percentage of the capital stock of Lessee, or the sale of more than fifty percent (50%) of the value of the assets of Lessee whether in one conveyance or cumulatively in the aggregate in more than one conveyance. The phrase "controlling percentage" means the ownership of, and the right to vote, stock possessing at least fifty percent (50%) of the total combined voting power of all classes of Lessee's capital stock issued, outstanding, and entitled to vote for the election of directors. This section (4) shall not apply to a corporation the stock of which is traded through an exchange or over the counter.

The Port's consent to or waiver of its option to terminate this Lease in the event of a default on account of, any assignment, transfer, occupation or use requiring prior written Port consent shall not be construed or deemed to be a waiver of the restrictions hereinabove contained or to be a consent to or waiver of objections to any subsequent assignment, transfer or occupation or use by another person.

Lessee and the Port acknowledge and agree that the rights retained by and granted to the Port pursuant to this section constitute a material part of the consideration for entering into this Lease and constitute a material and substantial inducement to the Port to enter into this Lease at the rental, for the terms, and upon the other covenants and conditions contained in this Lease, and that the acceptability of Lessee, and of any sublessee, assignee or other transferee of any right or interest in this Lease, involves the exercise of broad discretion by the Port in promoting commerce, navigation and shipping in the Port Area of the City of Oakland.

Lessee agrees that as a condition to the Port's consideration of any request by Lessee for each proposed sublease, assignment, or other transfer that Lessee shall deliver to the Port a nonrefundable processing fee of not less than One Hundred Dollars ($100.00). The Port's Director of Properties, or such other Port representative designated from time to time by the Port's Executive Director, may within ten (10) days of receipt of said fee give to Lessee notice that said fee shall be increased by a sum, not to exceed an additional Four Hundred Dollars ($400.00), that said Director or such other designated representative may in his discretion determine is necessary to cover the anticipated Port administrative costs and expenses, including labor, in processing and investigating Lessee's request. Lessee agrees that unless and until said fee, and any request for such additional fee, is delivered to the Port, Lessee shall be deemed to have made no request to the Port to assign or sublease. The minimum and maximum fees shall be adjusted upon the commencement of each successive year of this Lease, in the same percentage as the change in last Consumer Price Index published prior to the date of each succeeding one year period from the last such index published prior to the commencement of the term of this Lease; provided that in no event shall the adjusted fees be less than the theretofore existing fees.

In addition, the parties hereto each agree that Lessee's request for consent to any proposed sublease, assignment or other transfer shall not be deemed to have been submitted to the Port unless and until Lessee, except as and to the extent excused in writing by the Port's Director of Properties, shall have submitted to the Port, in writing, the following information and documents:

(1) The name of the proposed subtenant, assignee or other transferee;

(2) The nature of proposed subtenant's or assignee's business to be carried on in the premises;

(3) Each of the terms and provisions of the proposed sublease, assignment or transfer, including without limitation the full consideration for such sublease, assignment or transfer;

(4) A balance sheet of the proposed subtenant or assignee as of a date within at least ninety (90) days of the request for the Port's consent;

(5) Statements of income or profit and loss of the proposed subtenant or assignee for the two (2) year period preceding the request for the Port's consent;

(6) A statement in reasonable detail as to the business experience of the proposed subtenant or assignee during the five year period preceding the request for the Port's consent;

(7) Such other information and documents relating to the proposed sublessee's or assignee's business, experience, finances as the Port may request.

It is understood and agreed that the Port's consent to a requested sublease, assignment or other transfer, if said consent in the Port's sole discretion is granted, shall not be granted unless and until the Port receives each of the following:

(1) In the case of a proposed assignment, a full and complete executed copy of all documents to effectuate the assignment, together with a document in recordable form whereby the proposed assignee shall expressly assume all the covenants and conditions of this Lease;

(2) In the case of a proposed sublease, a full and complete copy of the executed sublease, which sublease shall contain a provision, satisfactory to the Port and to each leasehold mortgagee having an interest at the time the sublease is executed, requiring sublessee to attorn to the Port or, in the event of any proceeding to foreclose any leasehold mortgage, to the leasehold mortgagee, or any person designated in a notice from leasehold mortgagee, if Lessee defaults under this Lease and if the sublessee is notified of Lessee's default and instructed to make sublessee's rental payments to Lessor or leasehold mortgagee or designated person as in this section.

Lessee shall not accept, directly or indirectly, more than three (3) months' prepaid rent from any sublessee and said copy of the executed sublease shall recite this restriction and sublessee's acknowledgment of the same.

(3) In the case of any other proposed encumbrance or proposed transfer, a full and complete executed copy of all documents to effectuate the encumbrance or transfer, which documents shall incorporate directly or by reference all of the provisions of this Lease.

Unless otherwise provided by resolution adopted by the Board of Port Commissioners, no subletting or assignment, even with the Port's consent, shall relieve Lessee of its rental or other obligation to be performed by Lessee hereunder, and Lessee shall continue to be liable as a principal and not as a guarantor or surety, to the same extent as though no assignment or subletting had been made.

Lessee immediately and irrevocably assigns to the Port, as security for Lessee's obligations under this Lease, all rent from any subletting of all or a part of the premises as permitted by this Lease, and the Port, as assignee and as attorney-in-fact for Lessee, or a receiver for Lessee appointed on the Port's application, may collect such rent and apply it toward Lessee's obligations under this Lease; except that, until the occurrence of an act of default by Lessee, Lessee shall have the right to collect such rent.

Lessee agrees that it shall immediately notify the Port in writing of any cancellation or surrender of any sublease. No modification of any sublease, assignment or other transfer after the Port's initial consent shall be effective without the prior written approval of the Port as evidenced by resolution of its Board of Port Commissioners.

It is understood and agreed that Lessee may, with the prior written consent of the Port evidenced by resolution of its Board of Port Commissioners, assign, transfer, mortgage or encumber Lessee's interest in the demised premises under this Lease and leasehold estate hereby created, to a lender on the security of the leasehold estate, and Lessee may execute any and all instruments in connection therewith necessary or proper to complete any such loan and perfect the security therefor to be given such lender. Any such lender shall have the right at any time during the term hereof and while this Lease is in full force and effect: (a) To do any act or thing required of Lessee hereunder and all such acts or things done hereunder shall be as effective to prevent a forfeiture of Lessee's rights hereunder as if done by Lessee; and (b) to realize on the security of the leasehold estate and to acquire and succeed to the interest of the Lessee hereunder by foreclosure or by a deed or assignment given in lieu of foreclosure and thereafter at such lender's option to convey or assign the interest in or title to this leasehold estate to any other person subject to all the terms, conditions and covenants of this Lease. Upon receipt of written request, the Port shall confirm in writing to any such lender the rights of such lender granted under this section.

Two (2) copies of any and all security devices or instruments shall be filed with the Port prior to the effective date thereof, and the Lessee shall give to the Port prior written notice of any changes or amendments therein.

20. Hazardous Substances: No goods, merchandise or material shall be kept, stored or sold in or on said demised premises which are in any way explosive or hazardous; and no offensive or dangerous trade, business or occupation shall be carried on therein or thereon, and nothing shall be done on said premises other than as is provided for in Section 3 of this Lease which will increase the rate of or suspend the insurance upon said premises or other structures of the Port; and no machinery or apparatus shall be used or operated on said demised premises which will in any way injure said premises or adjacent buildings; provided, however, that nothing in this Section contained shall preclude Lessee from bringing, keeping or using on or about said premises such materials, supplies, equipment and machinery as are appropriate or customary in carrying on its said business, or from carrying on its business in all respects as is generally usual.

21. Forfeitures: It is mutually covenanted and agreed and this Lease is made upon the condition that if the rents or other sums which Lessee herein agrees to pay, or any part thereof, shall be unpaid on the date on which the same shall become due, or if default be made in any of the terms, agreements, conditions or covenants herein contained on the part of Lessee, or should Lessee abandon and cease to use the premises for a period of fifteen (15) days at any one time except when prevented by fire, earthquake, wars, strike or other calamity beyond its control, then and in any such event, at its option, the Port may declare this forfeited, whereupon all improvements of every kind and description shall, at the option of the Port, be forfeited to and become the property of the Port, and the Port may exercise all rights of entry and re-entry upon the demised premises.

Lessee shall not be considered to be in default until the expiration of three (3) days (in the case of a failure in the payment of rent or other sums herein provided to be made by Lessee) or fifteen (15) days (in all other instances) after written notice by the Port to Lessee (and to any mortgagee or other lienholder who may have a leasehold mortgage or other lien on the Lease and to any trustee to whom the leasehold created hereby may have been assigned under a trust indenture and who shall have requested, in writing, the Lessor for such notice specifying the address to which said notice shall be sent) and if, during such three (3) or fifteen (15) day period, as the case may be, such failure or condition in violation of the provisions of this Lease shall have been cured or obviated by Lessee or any such mortgagee or other lienholder or trustee (Lessor hereby agreeing that said mortgagee, lienholder or trustee shall have said right), then upon payment performance or satisfaction of such term, covenant or condition, any right of the Lessor to terminate this Lease or re-enter upon the demised premises by reason of such failure shall cease.

Lessor shall not declare if within such three (3) or fifteen (15) day period, as the case may be, the mortgagee or other lienholder or trustee commences an action to obtain possession of said premises, including the appointment of a receiver, or institutes foreclosure proceedings to sell the interest of Lessee at foreclosure sale, or acquires title to the interest of Lessee by deed or assignment in lieu of trustee's sale or foreclosure proceedings, and thereafter diligently proceeds in good faith to cure such failure or condition in violation of the provisions of this Lease; provided, however, that the rental

agreed to be paid under this Lease is paid and the other covenants of Lessee hereunder which are capable of being performed by such mortgagee, lienholder or trustee are being fully performed.

Any purchaser at a trustee's sale or foreclosure sale, or, in case a deed or assignment is executed in lieu of trustee's sale or foreclosure proceedings, the new owner shall have the same right to cure any default as is given to Lessee.

If any condition which would entitle the Port to declare a default is of such nature that it cannot be remedied within fifteen (15) days, such declaration of default, termination and right of re-entry, or other rights of Lessor, shall be postponed as long as the Lessee or any such mortgagee or other lienholder or trustee shall have commenced the elimination of such condition within said fifteen (15) days and shall then be continuously and diligently proceeding in good faith to cure the same.

22. Right of Entry as Agent: In any and all cases in which provision is made herein for the termination of this Lease, except by forfeiture, or for exercise by the Port of right of entry or re-entry upon said premises, or in case of abandonment or vacating of the premises by Lessee, and the Port may not elect to invoke a forfeiture of said Lease, Lessee hereby irrevocably appoints the Port the agent of Lessee to enter upon said premises and remove any and all persons and/or property whatsoever situated upon said premises, and place all or any portion of said property, except such property as may be forfeited to the Port, in storage for account of and at expense of Lessee; and in such case the Port may relet the premises upon such terms as to it may seem fit, and if a sufficient sum shall not thus be realized after paying expenses of such reletting and collecting to satisfy the rent and other sums herein agreed to be paid, Lessee agrees to satisfy and pay any deficiency, and to pay expenses of such reletting and collecting. Lessee hereby exempts and agrees to save harmless the Port from any cost, loss or damage arising out of or caused by any such entry or re-entry upon said premises and/or the removal of persons and/or property and storage of such property by the Port or its agents.

23. Surrender and Holding Over: Lessee covenants that at the expiration of the term of this Lease or upon its earlier termination it will quit and surrender said premises in good state and condition, reasonable wear and tear and damage by the

elements excepted. The Port shall have the right upon such termination to enter upon and take possession of all said premises. Should Lessee hold over the use of said premises after this Lease has been terminated in any manner, such holding over shall be deemed merely a tenancy from month to month and at a rental to be fixed by the Port, payable monthly in advance, but otherwise on the same terms and conditions as herein set forth.

It is understood and agreed that nothing contained in this Lease shall give Lessee any right to occupy the demised premises at any time after expiration of the term of this Lease or its earlier termination, and that this Lease shall not create any right in Lessee for relocation assistance or payment from the Port upon expiration of the term of this Lease or upon its earlier termination or upon the termination of any holdover tenancy pursuant to this section. Lessee acknowledges and agrees that upon such expiration or termination, it shall not be entitled to any relocation assistance or payment pursuant to the provisions of Title 1, Division 7, Chapter 16, of the Government Code of the State of California (Sections 7260 et seq.) with respect to any relocation of its business or activities upon the expiration of the term of this Lease or upon its earlier termination or upon the termination of any holdover tenancy pursuant to this section.

24. Duty to Guard Goods: Lessee shall assume the responsibility for the guarding and safekeeping of and risk of loss to all property, stock merchandise and equipment stored or located upon or used in connection with the said premises.

25. Waivers: No waiver by either party at any time of any of the terms, conditions or covenants or agreements of this Lease or of any forfeiture shall be deemed or taken as a waiver at any time thereafter of the same or of any other term, condition or covenant or agreement herein contained, nor of the strict and prompt performance thereof. No delay, failure or omission of the Port to re-enter the demised premises or to exercise any right, power or privilege, or option, arising from any default, nor any subsequent acceptance of rent then or thereafter accrued shall impair any such right, power, privilege or option or be construed a waiver of any such default or relinquishment thereof, or acquiescence therein, and no notice by the Port shall be required to restore or revive time as of the essence after waiver by the Port of default in no one or more instance. No option, right, power, remedy or privilege of the Port shall be construed as being exhausted by the exercise thereof in one or more instances. It is agreed that each and all of the rights, powers,

options or remedies given to the Port by this Lease are cumulative, and no one of them shall be exclusive of the other or exclusive of any remedies provided by law, and that exercise of one right, power, option or remedy by the Port shall not impair its rights to any other right, power, option or remedy.

26. Right to Inspect Premises: The Port or its duly authorized representatives, or agents and other persons for it, may enter upon said premises at any and all reasonable times during the term of this Lease for the purpose of determining whether or not Lessee is complying with the terms and conditions hereof or for any other purpose incidental to rights of the Port.

27. Agent for Service of Process: It is expressly agreed and understood that if Lessee is not a resident of this State, or is an association or partnership without a member or partner resident of this state, or is a foreign corporation, then in any such event Lessee shall file with the Port a designation of a natural person residing in the County of Alameda, State of California, giving his name, residence and business address as his or its agent for the purpose of service of process in any court action between him or it and the Port arising out of or based upon this Lease, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon such Lessee; and it is further expressly agreed, covenanted and stipulated that if for any reason service of such process upon such agent is not possible, then in such event Lessee may be personally served with such process out of this state, and that such service shall constitute valid service upon such Lessee; and it is further expressly agreed that Lessee is amenable to the process so served, submits to the jurisdiction of the court so acquired, and waives any and all objection and protest thereto.

28. Automobile Parking: Lessee shall have and is hereby granted a nonexclusive right or license to use, in common with others, automobile parking areas provided by the Port in the vicinity of the demised premises for the parking of automobiles of its patrons and customers, it being understood and agreed, however, that the Port may at any time, without notice, close any of the said automobile parking areas, assign a particular area for parking of Lessee's customers, make a charge for the privilege of parking therein, restrict or limit such parking or devote such parking areas to other uses.

Lessee shall participate in the Port's established and controlled parking validation program and shall purchase validation stickers or participate in such other comparable parking validation program as the Port may establish.

29. Trade Names: The name or names under which Lessee shall elect to operate the restaurant and cocktail lounge shall be subject to the prior written approval of the Port's Executive Director, which approval shall not be unreasonably withheld. Lessee agrees to operate the restaurant and cocktail lounge only under the name so approved; provided, that Lessee shall initially use the name "Scott's Seafood Grill and Bar" for said restaurant and cocktail lounge without further approval of the Port's Executive Director. Lessee shall not maintain, operate or authorize by franchise any similar facility in the City of Oakland or in the East Bay Area within 10 miles of the demised premises under any name or names the same or similar to the name under which the facility constructed hereunder is maintained and operated.

30. Disposal of Trash and Garbage: Lessee agrees to handle and dispose of its trash, garbage and refuse in a sanitary manner and not to pile any boxes, cartons, barrels, trash, debris or refuse in or about the demised premises. Lessee shall properly screen its refuse containers from public view.

31. Licenses and Permits: Lessee agrees to maintain, at its own expense, throughout the term of this Lease, any necessary liquor licenses or permits upon the demised premises and any other licenses or permits required for the conduct of Lessee's business activities on the demised premises.

32. Fumes and Odors: Lessee agrees to conduct its operations upon the demised premises and to use the most modern equipment available so as to reduce to the minimum that is reasonably practicable the emanation from the demised premises of fumes and odors.

33. Annoying or Injurious Conduct: Lessee shall not, without the advance written consent of the Port, install any exterior decorations or painting or install any radio or television antennae, loudspeakers, sound amplifiers, or any devices on the exterior walls of the demised premises. No loudspeakers, radios or other means of broadcasting to be heard outside the demised premises shall be used by Lessee. Lessee shall not use any false or misleading advertising, or engage in any unfair trade practices injurious to other tenants of the Port.

34. Waiver of Claims: The Lessee hereby waives any claim against the City of Oakland, and the Board of Port Commissioners, its officers, agents or employees, for damage or loss caused by any suit or proceedings directly or indirectly attacking the validity of this Lease, or any part thereof, or by any judgment or award in any suit or proceedings instituted by a party other than the Port directly or indirectly attacking the validity of this Lease, or any part thereof, or by any judgment or award in any suit or proceeding declaring this Lease null, void or voidable, or delaying the same, or any part thereof, from being carried out.

35. Extensions of Time: The Port shall have the right to grant reasonable extensions of time to Lessee for any purpose or for the performance of any obligation of Lessee hereunder.

36. Successors: Each and every of the provisions, agreements, terms, covenants and conditions herein contained to be performed, fulfilled, observed and kept shall be binding upon the successors and assigns of the parties hereto, and the rights hereunder, and all rights, privileges and benefits arising under this Lease and in favor of either party shall be available in favor of the successors and assigns thereof, respectively; provided no assignment by or through Lessee in violation of the provisions of this Lease shall vest any rights in such assignee or successor.

37. Board of Port Commissioners: The term "Board of Port Commissioners" as used in this Lease shall mean the department of the City of Oakland presently operating under such name and as presently constituted, or any successor thereof.

38. Time of Essence: Time is hereby expressly declared to be of the essence of this Lease.

39. Notices: Any notice required or permitted to be given Lessee may be given to it at 73 Jack London Square, Oakland, California 94607; provided, however, that if Lessee shall give notice in writing to the Port of any change in said address, then and in such event such notice shall be given to Lessee at the changed address specified in such notice. Any notice permitted or required to be served upon the Port may be served upon it at 66 Jack London Square, Oakland, California 94607; provided, however, that if the Port shall give notice in writing to Lessee of any change in said address, then and in such event such notice shall be given to the Port at such substituted address.

40. Equal Opportunity; Nondiscrimination:

A. Equal Opportunity and Nondiscrimination: In furtherance of the Port's long-standing policy to insure that equal employment opportunity is achieved and nondiscrimination is guaranteed in all Port-related activities, it is expressly understood and agreed with respect to Lessee's activities upon the premises:

(1) That Lessee shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, physical handicap, or veteran's status. Lessee shall take affirmative action to ensure that applicants and employees are treated fairly. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Port's Equal Opportunity Employment Officer setting forth the provisions of this section.

(2) That Lessee shall, in all solicitations or advertisements for employees placed by or on behalf of Lessee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, age, physical handicap, or veteran's status.

(3) That Lessee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Port's Equal Opportunity Employment Officer, advising the labor union or workers' representative of the Lessee's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) That Lessee shall not discriminate by segregation or otherwise against any person or persons because of race, color, religion, sex, age, national origin, physical handicap, or veteran's status in furnishing, or by refusing to furnish, to such person or persons the use of any public facility upon the Premises, including any and all services, privileges, accommodations, and activities provided thereby.

(5) That Lessee shall maintain work force records showing male, female and minority employees by job category and similar information with respect to new hires and shall permit the Port's Equal Employment Opportunity Officer to inspect such records at all reasonable times and not less than annually and shall submit a summary of such information annually on a form provided by the Port.

(6) That Lessee shall undertake the steps outlined in its affirmative action program attached hereto as Exhibit "C" and by this reference incorporated herein to promote effective utilization of minorities, women, handicapped persons, and veterans. Any change(s) in the Lessee's affirmative action program approved by an appropriate federal or state agency or required as a result of a court order shall be submitted to the Port within thirty (30) days after the approval or order, and shall be complied with by Lessee. Such affirmative action program and such changes thereto shall be accorded the same level of confidentiality as provided for by the state or federal regulations or court order under which it was originally submitted.

(7) That Lessee's noncompliance with the provision of this section shall constitute a material breach of this Lease. In the event of a breach of any of the above-stated nondiscrimination and affirmative action covenants, the Port shall have the right to consider but not be limited to the following:

(i) Terminate this Lease pursuant to Section 20 hereof and to re-enter and possess said land and the facilities thereon, and to hold the same as if this Lease had never been made without liability therefor; or

(ii) Seek judicial enforcement of said covenants.

(8) The Port shall assist Lessee in preparing the required affirmative action program to secure equal employment opportunities, whenever such assistance would be beneficial and shall be available to advise and counsel Lessee in the implementation of Lessee's Affirmative Action Program.

41. Employment Resources Development Program: It is further expressly understood and agreed with respect to Lessee's activities upon the demised premises:

(1) That Lessee shall cooperate in implementing the goals of the Port's Employment Resources Development Program, hereinafter called the "ERDP", as set forth in Port Resolution No. 26291, as amended. Lessee understands the Port's "ERDP" seeks to address the needs of Port tenants for a qualified work force and the needs of Oakland's chronically unemployed and underemployed for employment, by identifying employment opportunities, by providing employment training and counseling for persons seeking such opportunities and by facilitating the employment of those persons qualified to fill the jobs identified;

(2) That Lessee understands that cooperation in implementing the goals of the Port's ERDP involves considering Port ERDP referrals consistent with relevant state and federal anti-discrimination regulations seeking to insure equal employment opportunity;

(3) That Lessee shall provide copies of all solicitations or advertisements for employees placed by or on behalf of Lessee to the Port's Executive Director or his designee, so that the Port may assists in providing Lessee with the names of qualified unemployed and underemployed residents of Oakland and others, including minorities, women, physically handicapped persons, and veterans seeking such employment or training opportunities through the Port's ERDP efforts.

42. Quiet Possession: Lessee, upon performing its obligations hereunder, shall have the quiet and undisturbed possession of the demised premises throughout the term of this Lease.

43. Attorneys' Fees and Costs: If the Lessee or the Port commences any action or proceeding against the other arising out of or in connection with this Lease, the prevailing party shall be entitled to have and recover from the losing party reasonable attorneys' fees and costs of suit. The Port shall also be entitled, at the election of the Port, to have and recover from Lessee all other reasonable costs and expenses associated with the Port's enforcement of the provisions of this Lease.

44. Force Majeure: If either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure material, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, or other reason of a like nature not the fault of the

party delayed in performing work or doing acts required under this Lease, the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

45. Tidelands: This Lease and the Premises hereby demised shall at all times during the term of this Lease be subject to the limitations, conditions, restrictions and reservations contained in and prescribed by the act of the Legislature of the State of California entitled, "An act to transfer to the City of Oakland a surface easement over certain tide and submerged lands and to define the powers and duties of the City in relation thereto", approved June 13, 1941 (Statutes 1941, Chapter 720), and the Charter of the said City.

46. Termination of Prior Lease: Upon the date of commencement of the term of this Lease that certain Lease between the Port and Lessee, as successor to PORTOAK CORP., a corporation, dated the 1st day of March, 1966 and recorded that 12th day of April, 1966 in Reel 1747, Image 254, Official Records at Alameda County, California, shall terminate; provided that such termination shall not effect liabilities of the parties hereto which accrued prior to such termination.

47. Agreement in Quintuplicate: This agreement is executed in quintuplicate, each copy of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
President

Attest _____
Secretary

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation,

By _____
Pres. Raymond J. Gallagher
(Print Name and Title)

Attest _____ EXV.P.
MALCOLM STROUD EXV.P.
(Print Name and Title)

Approved as to form and legality this 28th day of July, 1987.

_____
Port Attorney

Port Ordinance No. 2755

DEFINITIONS

Except to the extent otherwise provided in this Lease, the following terms when used in this Lease with the initial letter(s) capitalized, whether in the singular or plural, shall have the following meaning:

"Property": The land leased by the Port to Lessee under this Lease. The Property is described and depicted respectively in attached Exhibits A and B.

"Airport": The Metropolitan Oakland International Airport.

"Improvements": Buildings, landscaping and other permanent improvements located from time to time on the Property.

"Premises": The Property together with the Improvements.

"Effective Date": The date this Lease become effective.

"City": The City of Oakland.

"Executive Director": The Port's Executive Director, any other person authorized by the Board to act for the Executive Director in case of the absence or disability of the Executive Director, or the Board.

"Port": The Port of Oakland, which consists of the Port Department of the City, under the exclusive control and management of the Board. In any case under this Lease that the Port may or shall take any action, the Executive Director is authorized to take such action unless this Lease provides for action by the Board or by resolution or ordinance, and except as otherwise provided by law, the Charter of the City of Oakland, or by resolution or ordinance of the Board.

"Board": The Board of Port Commissioners of the City of Oakland, acting for and on behalf of the City.

"Consumer Price Index": The Consumer Price Index for Urban Wage Earners and Clerical Workers, All Items, San Francisco-Oakland (1967 equal 100), of the Bureau of Labor Statistics of the United States Department of Labor, or the official successor of said Index. If said Index is changed so that the base year differs from the base year used in the last index published prior to the commencement of the term of this Lease, the former Index shall be converted to the new Index in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If said Index is discontinued or revised during the term of this Lease, such other government index or computation with which it is replaced, as determined by said Department or said Bureau, or, failing such determination, such other government index or computation which is most similar to said Index, shall be used in order to obtain substantially the same result as would be obtained if said Index had not been discontinued or revised; provided, that in the event the parties are unable to agree upon such other government index or computation, it shall be selected by arbitration pursuant to the rules of the American Arbitration Association.

"Leasehold Mortgage": Any mortgage, deed of trust or other security instrument (including, without limitation, an assignment of the rents, issues and profits generated on or by the Premises) and any obligation relating thereto, which secures Lessee's repayment of any loan to, and associated obligations of, Lessee, and in which all or any part of the security consists of an encumbrance on the leasehold estate created by this Lease, or the Improvements, or Lessee's trade fixtures on the Premises, or Lessee's equipment or other personal property used on or about the Premises.

"Lender": The party or parties who are beneficiaries of a Leasehold Mortgage.

2/27/87 JEN:mgj (D-164)
4/09/87 JEN:mgj

AFFIRMATIVE ACTION AGREEMENT

THIS AGREEMENT, made and entered into this 9th day of April, 1987, by and between the CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners, hereinafter called the "Port", and SCOTT'S JACK LONDON SEAFOOD, INC., a corporation, hereinafter called "Lessee",

W I T N E S S E T H:

WHEREAS, the Port and Lessee have negotiated the terms of a lease of even date herewith (hereinafter "the Lease") for Lessee's development of approximately .4851 acres of land near the Oakland Estuary in Jack London Square, in the Port Area of the City of Oakland; and

WHEREAS, the Port and Lessee have reached agreement in principle on the major terms of said Lease, which will provide for Lessee to construct certain improvements on and adjacent to the Lease Premises and after construction to carry on the uses specified in the Lease; and

WHEREAS, Lessee and the Port have reached agreement on the provisions of an Affirmative Action Agreement which shall be incorporated by reference into the Lease and which is the Affirmative Action Agreement that is referred to in Paragraph 40 of the Lease;

NOW, THEREFORE, Lessee and the Port hereby agree that the following covenants and conditions including Exhibits C-1, C-2 and C-3 attached hereto constitute the Affirmative Action Agreement of Lessee in connection with Paragraph 40 of the Lease and that such covenants and conditions are intended to assist Lessee in undertaking implementation of its obligations regarding nondiscrimination and affirmative action.

Exhibit "C"

1. Purpose; Effective Date and Term of Agreement:

1.1. Purpose: The purpose of this Agreement is to provide an agreed upon program and set of procedures to help redress the present effects of past discrimination against minorities and women which is evident in the disproportionate representation of minorities and women in employment and business opportunities that are created as a result of development and operation of projects on Port land. If during the term of the Lease the Port determines that the adverse effects of past discrimination appear to have been redressed and reasonably proportionate representation of minorities and women secured, the Port reserves the right, as may be appropriate, to suspend or terminate in whole or in part any future obligations of Lessee under this Agreement.

1.2. Effective Date and Term of Agreement: This Agreement shall become effective upon the effective date of the Lease. Subject to the terms and provisions hereinafter contained, the term of this Agreement shall run concurrently with the term of the Lease. This Agreement shall not obligate Lessee or the Port to enter into any Lease, or create any other legally binding commitment by either party unless and until the Lease becomes effective.

2. Definitions: For purposes of this Agreement, the following definitions shall apply:

2.1. "Project": The "Project" shall mean the improvements that Lessee is required to construct on and adjacent to the Premises pursuant to Section 7.1 of the Lease.

2.2. "Contractor": A "contractor" shall mean a person, firm, partnership, corporation or other entity who contracts to perform work for the Project. A contractor includes a prime contractor and a subcontractor in any tier. A "contractor" shall not include a person, firm, partnership, corporation or other entity in performing a Vendor Service Contract or Professional Contract for the Project.

2.3. "Subcontractor": A "subcontractor" is a contractor who contracts with a prime contractor or higher tier of subcontractor; provided, however, that for purposes of the minority subcontractor affirmative action plan, a "subcontractor" is only a contractor who contracts with the prime contractor.

2.4. "Minority": A "minority" includes the following: American Indian or Alaskan native; Black, not of Hispanic origin; Asians (Orientals); and Hispanic - a person of Mexican, Puerto Rican, Cuban, Central or South American or other Hispanic culture or origin, regardless of race. Individuals born in Spain or Portugal or their descendants shall not be included in the Hispanic category.

2.5. "Minority Subcontractor": A "minority subcontractor" is a business at least fifty-one percent (51%) of which is owned by minority persons.

2.6. "Minority or Women Business Enterprise" ("MBE/WBE"): A "minority business enterprise" ("MBE") and a "women business enterprise" ("WBE") shall mean a small business concern, as defined pursuant to Section 3 (15 U.S.C. 632(a)) of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities or women, as the case may be. For the purposes of this Agreement, owned and controlled means a business:

(a) Which is at least 51 per centum owned by one or more minorities or women, as the case may be, or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women, as the case may be; and

(b) Whose management and daily business operations are controlled by one or more such individuals.

Lessee may count toward its contractor, subtenant, Vendor Service Contract and Professional Contract MBE goals a portion of the total dollar value of a contract, or a portion of space occupied by a subtenant (as the case may be) when the contract or sublease is with a joint venture, equal to the percentage of the ownership and control of the MBE or WBE partner (as the case may be) in the joint venture. Women who are minorities may be considered as women or minorities at Lessee's option, but shall not be considered as both.

In determining whether a business enterprise qualifies as an MBE or WBE, the eligibility standards presently set forth in Title 49, Code of Federal Regulations, Part 23, (23.53 (a)(2) through (4) shall apply.

2.7. "Joint Venture": A "joint venture" shall mean an association of two or more businesses to carry out a single business enterprise for profit for which they combine their property, capital, efforts, skill and knowledge.

2.8. "Executive Director": The "Executive Director" shall mean the Port's Executive Director, or an assistant or Deputy Executive Director or the Chief Engineer to whom the Port's Executive Director from time to time may delegate the Executive Director's rights or obligations under this Agreement and any other person authorized by the Bylaws and

Administrative Rules of the Board of Port Commissioners to act for the Executive Director in case of the absence or disability of the Executive Director.

2.9. "Subtenant": A "subtenant" shall mean a sublessee, sublicensee, subconcessionaire, assignee, and any other person or entity to whom Lessee has delegated or assigned a portion (but not all) of the rights, privileges, or benefits granted to Lessee by the Port.

2.10. "Professional Contracts": "Professional contracts" include contracts let by Lessee or a contractor relating to the planning, design and testing for the initial construction of the Project and contracts for the operation of the completed Project let by Lessee during the first two (2) years after completion of construction of the major building or buildings to be constructed under the Lease (as completion is defined in Paragraph 4.1.2 of the Lease), such as contracts for the following types of services: architectural, surveying, soils testing and engineering, civil engineering, structural engineering, mechanical/electrical engineering, landscape architecture, graphics, leasing, project management and operation, accounting, public relations, advertising, space planning, and for Lessee only, and not Lessee's contractors, legal services.

2.11. "Vendor Service Contracts": "Vendor service contracts" include contracts covering such services as window washing, janitorial/building maintenance, elevator or HVAC maintenance (except for maintenance provided under warranty), security services, landscape maintenance and similar service contracts.

3. Minority and Women Participation in Lessee's Construction of Improvements: Lessee hereby commits itself to significant minority and women involvement in the construction of the Project. In this regard, Lessee shall comply with the Plans established by Paragraphs 5.1, 5.2 and 5.3.

3.1. Minority Contractor Affirmative Action Plan: Lessee agrees that it shall comply with, and undertake each of the steps set forth in, the Minority Contractor Affirmative Action Plan, attached hereto as Exhibit "C-2" and by this reference incorporated herein.

3.2. Minority Employment Affirmative Action Plan: Lessee agrees that it shall comply with, and undertake each of the steps set forth in, the Minority Employment Affirmative Action Plan that is attached hereto as Exhibit "C-3" and by this reference incorporated herein.

4. Minority and Women Business Enterprise Participation in Retail and Restaurant Subtenancies and in Vendor Service Contracts:

4.1. Goals: Lessee agrees that it shall exercise good faith efforts to seek the following percentages of qualified MBE's as subtenants and vendors:

(a) Subtenants: For MBE's, a goal of at least twenty percent (20%) of all of the retail and restaurant space in the Project; provided, however, that the space subleased to WBE's shall be credited toward the MBE goal up to a total not exceeding two percent (2%) of all of the retail and restaurant space in the Project.

(b) Vendors: For MBE's, a goal of at least twenty-six percent (26%) of the total contract price of all vendor service contracts for the Project; provided, however, that the amount of contracts awarded to WBE's shall be credited toward the MBE goal up to a total sum not exceeding two percent (2%) of the total contract price of all vendor service contracts.

"Good faith efforts" for purposes of this Paragraph 4.1 include but are not limited to the following affirmative action steps:

(1) Active solicitation of MBE's to be subtenants and vendors.

(2) Documented contacts with MBE's and minority professional associations, community business assistance organizations, and related entities.

(3) Provision of assistance (including forms) to MBE's in such matters as business proposal preparation, and provision of general advice to MBE's in such matters as obtaining bonds and insurance.

(4) Encouragement of MBE's to joint venture with other MBE's or non-MBE's in order to qualify for restaurant and retail subtenancies.

(5) Advertising for proposals from MBE's in local minority newspapers, and in other daily and weekly newspapers and area media.

(6) Utilizing MBE lists and other related information available from the Port, State of California, federal government or elsewhere.

(7) Active efforts to inform the Oakland real estate brokerage community of Lessee's goals and available restaurant and retail business opportunities in the Project.

Lessee agrees that in discussing sublease or contract terms with prospective restaurant and retail subtenants and service contract vendors for the Project, Lessee in good faith will encourage and assist, when requested, such prospective subtenants and service contract vendors, who have women and minority employee underutilization, in developing an employee affirmative action plan. Lessee also agrees that all subtenancy and vendor service contracts entered into by Lessee shall contain a provision substantially the same as Paragraph 3, excluding (except as provided in Section VI of attached Exhibit "A") subparagraph F thereof.

4.2. Documentation of Good Faith Efforts:

4.2.1. Subtenancies: In all cases where Lessee is required to make good faith efforts to seek an MBE subtenant, Lessee in good faith shall submit to the Executive Director all information relating to Lessee's good faith efforts to seek a qualified MBE as a subtenant. If Lessee believes that such documentation is not required, it shall either (1) in the case where the goal is being met, set forth in writing the names of all MBE and WBE subtenants, all subtenants who are not MBE's or WBE's, and the space occupied by each subtenant; or (2) in the case where Lessee believes that a proposed subtenant is an MBE or WBE when the goal is not being met, provide to the reasonable satisfaction of the Executive Director documentation of good faith efforts setting forth in reasonable detail the facts supporting such belief.

4.2.2. Vendor Service Contracts: In all cases where Lessee is required to make good faith efforts to seek an MBE vendor, Lessee in good faith shall submit to the Executive Director all information relating to Lessee's good faith efforts to seek a qualified MBE as a vendor. If Lessee believes that such good faith efforts documentation is not required, it shall either (1) in the case where the goal is being met, set forth in writing the names of all MBE and WBE vendors, and all vendors who are not MBE's or WBE's, and the contract price of each vendor

contract; or (2) in the case where Lessee believes that a proposed vendor is an MBE or WBE when the goal is not being met, provide to the reasonable satisfaction of the Executive Director documentation setting forth in reasonable detail the facts supporting such belief.

4.2.3. Review Procedures: The Executive Director, within seven (7) working days after a submittal by Lessee pursuant to Paragraph 4.2.1 or 4.2.2, shall make in writing one or more of the following determinations, as appropriate: (1) Whether Lessee has made a good faith effort to secure an MBE for the proposed subtenancy or vendor service contract; (2) Whether the proposed subtenant or vendor service contractor is an MBE or WBE; and (3) Whether, where Lessee has requested such a determination, Lessee is entitled to any credit toward a goal because of the claimed existence of an MBE or WBE joint venture partner. The Executive Director's determination shall be final and binding on the Executive Director (except where material information supplied by Lessee is incorrect).

If the Executive Director fails to so respond within such seven (7) working days, the information and Lessee's determination contained in Lessee's submittal shall be deemed to be correct, and Lessee may, if all other approval requirements of the Lease have been satisfied, enter into the proposed sublease or vendor service contract.

In the event that within such seven (7) working days the Executive Director notifies Lessee that the Executive Director in good faith does not believe that the representations or determinations made by Lessee in Lessee's submittal are correct, or that a good faith effort has been made by Lessee, (i) such notification shall set forth in detail the reasons for such determination, and (ii) Lessee shall not enter into the proposed sublease or vendor service contract unless and until all issues with respect to Lessee's compliance with this Agreement have been mutually resolved. In addition, Lessee shall not enter into any sublease unless and until it first has been approved in accordance with Paragraph 19 of the Lease.

5. Default: The Port and Lessee agree that the provisions of this Agreement shall by reference be incorporated into the Lease with all of the force and effect that the provisions would have if they were set forth in full in the Lease.

The Port and Lessee also agree, however, that the Port's remedies for Lessee's failure to comply with the provisions of this Agreement shall be governed solely by this Paragraph 7.

5.1. Default Concerning Lease Sections 40 and 41: In case of a default by Lessee concerning Section 40 ("Equal Opportunity and Nondiscrimination"), including Exhibit "C-1" ("Affirmative Action Plan for Lessee") or Section 41 ("Employment Resources Development Plan") of the Lease, the Port may resort (consistent with all provisions contained in the Lease relating to notice to Lessee of any default and an opportunity on the part of Lessee to cure such default) to any remedy provided in said respective paragraphs and Exhibits or provided in the Lease for default of other terms and conditions set forth in the Lease.

5.2. Default Concerning Paragraph 3:

5.2.1. Liquidated Damages: Lessee and the Port agree that if Lessee or any of Lessee's prime contractors enter into a contract with a contractor without complying substantially with the requirements of Paragraph 3.1 and attached Exhibit "C-3" ("Minority Contractor Affirmative Action Plan"), or if Lessee does not comply substantially with Lessee's obligations under Paragraph 3.2 and attached Exhibit "C-3" ("Minority Employment Affirmative Action Plan") the Port and the public shall suffer damages as a result thereof, which damages the Port and Lessee have determined are difficult or impracticable to determine as of the date of this Agreement. Therefore, the Port and Lessee agree that a reasonable estimate of the amount of such damages is as follows:

(a) For substantial noncompliance by Lessee, or by a prime contractor of Lessee, with Paragraph 3.1 and attached Exhibit "C-2" as to any applicable contract, a sum equal to ten percent (10%) of the amount of such contract; provided, however, that no liquidated damages shall be imposed if the applicable contract was never awarded, or if awarded, the contract was terminated before work commenced thereunder.

(b) For substantial noncompliance by Lessee with Paragraph 3.2 and attached Exhibit "C-3" with respect to any applicable contract, a sum equal to One Thousand Dollars ($1,000.00) for each working day of noncompliance, regardless of the number of separate acts of substantial noncompliance for the contract involved on a particular day. A working

day of noncompliance shall include only the day work commences under the contract and the day work is completed under the contract, and each working day between said two days.

Such liquidated damages shall be imposed in accordance with the conditions and procedures specified in this Paragraph 5.2.

All liquidated damages collected by the Port pursuant to this Paragraph 5.2 shall be separately accounted for and, to the maximum extent legally permissible, and after deducting the Port's share of any arbitration costs, shall be expended only for implementation of the Port's equal opportunity and affirmative action policies.

Lessee shall pay to the Port liquidated damages for any particular instance of noncompliance, as specified above, within ten (10) days after (a) the date any written agreement between the Executive Director and Lessee is signed by both which provides for imposition of liquidated damages, (b) the date that a determination of noncompliance by the Executive Director or a Notice of Damages becomes final and binding on Lessee in accordance with Paragraph 5.2.2, (c) the date that Lessee receives the Board's resolution containing the Board's determination of damages after a hearing, unless Lessee files a notice of arbitration as provided in Paragraph 5.2.2 or (d) the date that Lessee receives a determination of damages made by the Arbitration Board as provided in Paragraph 5.2.3.

Notwithstanding any provision in this Paragraph 5.2 to the contrary, no damages imposed for noncompliance with Paragraph 3.1 and attached Exhibit "C-2" shall be due or payable if Lessee satisfies the MBE goal set forth in Exhibit "C-2" and no damages imposed for Lessee's noncompliance with Paragraph 3.1 and Exhibit "C-2" shall be due and payable until ten (10) days after the date that Lessee or Lessee's contractor executes that contract which, based on the the total construction cost of the Project as specified in Exhibit "C-2", precludes Lessee from achieving the MBE goal specified in Exhibit "C-2".

5.2.2. <u>Hearings Before Board of Port Commissioners</u>: Hearings before the Board of Port Commissioners (hereafter "Board") concerning Lessee's compliance with Paragraph 5 shall be held as provided in this Paragraph 5.2.2.

A hearing may be requested by the Executive Director or Lessee, as evidenced by written notice by one to the other, if they are unable to resolve within a reasonable period of time to their mutual satisfaction, in accordance with this Paragraph 5.2.2, disputes concerning Lessee's compliance with Paragraph 3.

Any Board hearing requested by the Executive Director or the Lessee shall be held as soon as reasonably practicable.

5.2.2.1. Hearing on Contractors and Professional Contractors: If with respect to a contractor or proposed contractor, or a professional contractor or proposed professional contractor, the Executive Director has issued to Lessee a Disagreement Notice or a Rejection Notice as provided in attached Exhibit "C-2" or has notified Lessee in writing (hereafter "Contractor Noncompliance Notice") that in the Executive Director's reasonable, good faith determination Lessee has failed timely to provide a Notice of Selection or Intended Selection or a Request for Determination and should promptly provide the same, the Executive Director or the Lessee may request a Board hearing if they have been unable within seven (7) working days after Lessee's receipt of the Disagreement Notice, Rejection Notice or Contractor Noncompliance Notice to resolve the disputes involved to their mutual satisfaction. The Executive Director and Lessee shall make every reasonable good faith effort to resolve all disputes and avoid the necessity for a Board hearing. If within thirty (30) days of Lessee's receipt of the Disagreement Notice, Rejection Notice or Contractor Noncompliance Notice Lessee and the Executive Director do not in writing signed by each resolve their dispute, and neither the Executive Director nor Lessee has requested a Board hearing, the Executive Director's determinations in such notice shall be final and binding on Lessee. If the Executive Director or Lessee requests a Board hearing within such thirty (30) day period, Lessee shall be required to establish before the Board that Lessee is in compliance with the relevant requirements brought into issue by the Executive Director's Disagreement Notice, Rejection Notice or Contractor Noncompliance Notice.

5.2.2.2. Hearing On Construction Employment: If with respect to any contractor the Executive Director in writing (hereafter "Employment Noncompliance Notice") notifies Lessee that the Executive Director reasonably believes that Lessee or the contractor is not in compliance with the requirements of Paragraph 3.2 and attached Exhibit "C-3"

("Minority Employment Affirmative Action"), Lessee promptly upon receipt of such Employment Noncompliance Notice shall investigate and report back in writing to the Executive Director within five (5) working days after Lessee receives the Employment Noncompliance Notice. If the Executive Director's determinations in the Employment Noncompliance Notice become final and binding on Lessee as provided below, or if the Board after hearing determines that Lessee has not complied with Paragraph 3.2 and attached Exhibit "C-3" and the noncompliance is on-going, the Executive Director shall notify Lessee in writing ("Notice of Damages") promptly after the Executive Director has determined the total amount of liquidated damages due to the Port, what damages Lessee shall pay. The Executive Director and Lessee shall make every reasonable good faith effort to resolve all disputes and avoid the necessity for a Board hearing.

If the Executive Director and Lessee are unable within ten (10) working days after Lessee receives the Employment Noncompliance Notice or the Notice of Damages to resolve in writing signed by each all disputes involved to their mutual satisfaction, either of them may request a Board hearing, and if neither of them requests a Board Hearing within thirty (30) days after Lessee's receipt of the Employment Noncompliance Notice or within ten (10) days after Lessee's receipt of Notice of Damages, the Executive Director's determination in the Employment Noncompliance Notice or the Notice of Damages, as the case may be, shall be final and binding on Lessee. If the Executive Director or Lessee requests a Board hearing within such thirty (30) day or ten (10) day period, as the case may be, Lessee shall be required to establish before the Board that Lessee is in compliance with the relevant requirements brought into issue by the Employment Noncompliance Notice, or that the Notice of Damages improperly calculates total damages, as the case may be.

5.2.2.3. <u>Board's Decision</u>: After its hearing, the Board by resolution shall determine, as appropriate, whether Lessee has complied with the relevant requirements of Paragraph 3 and/or shall determine the amount of liquidated damages that are due and owing to the Port under Paragraph 5.2.1. In the case of on-going noncompliance under Paragraph 3.2 and attached Exhibit "C-3", the total days of noncompliance shall be determined by the Executive Director, subject to Lessee's right to appeal such determination to the Board by giving to the Executive Director written notice of a request for hearing within ten (10) days after Lessee receives a Notice of Damages.

Notwithstanding the foregoing, Lessee, but not the Port, may appeal the Board's determination to the Arbitration Board (as provided in Paragraph 5.2.3) if within thirty (30) days after receipt of a certified copy of the Board's resolution the Executive Director receives from Lessee a written notice of appeal ("Appeal Notice") to the Arbitration Board.

5.2.3. Arbitration Board:

5.2.3.1. Date of Establishment: The Arbitration Board shall not be established unless and until the Port receives from Lessee a timely written Appeal Notice. If the Arbitration Board has not already been established, it shall not be established as the result of the Port's receipt from Lessee of a notice of appeal from a determination of the Board of noncompliance with Paragraph 3.1 and attached Exhibit "C-2" unless and until Lessee or Lessee's contractor executes that contract which, based on the total construction cost of the Project as specified in Exhibit "C-2" precludes Lessee from achieving the MBE goal specified in Exhibit "C-2".

Once established, the Arbitration Board shall continue in existence (with such replacements of arbitrators as may be required due to death, disability, disqualification or other removal) for purposes of this Agreement until the Project is completed.

5.2.3.2. Composition and Procedures: The Arbitration Board shall conduct its proceedings in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules"), and judgment upon the award rendered by the Arbitration Board may be entered in any court having jurisdiction.

The Arbitration Board shall be composed of a panel of three (3) arbitrators with the following qualifications:

(1) At least two (2) of the arbitrators shall be minorities, as defined in this Agreement, but shall be from different minority groups.

(2) At least one (1) of the arbitrators shall have had extensive experience and direct involvement in affirmative action programs in Alameda County for at least five (5) years during the eight (8) years preceding that arbitrator's appointment as arbitrator.

(3) At least one (1) of the arbitrators shall be an attorney at law actively engaged in the practice primarily of business law for at least seven (7) years.

The arbitrators shall have no power to modify any of the provisions of this Agreement or the Lease and their jurisdiction is limited accordingly. Each party hereby consents to the entry of judgment by any court having jurisdiction in accordance with the decision of the Arbitration Board. No change in the Arbitration Rules which would deprive a party of the rights to be represented by counsel, to present evidence or to cross-examine witnesses presented by the other party shall be effective in any arbitration proceeding arising out of this Paragraph 5.2. Any arbitration provided for herein shall be conducted in Alameda County.

The Arbitration Board shall have no jurisdiction to modify any determination by the Executive Director or by the Board which has become final and binding on Lessee in accordance with Paragraph 5.2.2. Lessee shall have the burden of establishing before the Arbitration Board by a preponderance of the evidence that the Board's determination was not consistent with this Agreement, and the Arbitration Board shall have jurisdiction to modify any Board determination only to the extent that the Arbitration Board finds that Lessee has established by a preponderance of the evidence that the Board's determination was not consistent with this Agreement.

5.3. Default Concerning Paragraph 4: In case of a default by Lessee concerning Paragraph 4 ("Minority and Women Business Enterprise Participation in Retail and Restaurant Subtenancies and Vendor Service Contracts"), the Port may deny its consent to the subtenant or vendor that Lessee requests the Port to approve and with respect to which Lessee has failed to comply with the requirements of Paragraph 4. The Port's right to deny consent to such subtenant or vendor shall be the only remedy available to the Port for Lessee's breach of Paragraph 6; provided, however, that such limitation of the Port's remedy shall not preclude the Port from declaring a default, forfeiting the Lease, recovering damages, or seeking other legal or equitable remedies if as the direct or indirect result of the Port's denial or denials of consent Lessee breaches other provisions of the Lease including, without limitation, provisions requiring maintenance and operation of the Premises.

5.4. Inapplicability of Paragraph 4 Upon Foreclosure of Leasehold Mortgage: Upon foreclosure of any Leasehold Mortgage (as defined in the Lease), or any sale thereunder, whether by judicial proceedings or by virtue of any power contained in the Leasehold Mortgage, or any conveyance of the leasehold estate created hereby from Lessee to Lender (as defined in the Lease) through, or in lieu of, foreclosure or other appropriate proceedings in the nature thereof, Paragraph 4 shall become, and for the remainder of the term of the Lease shall remain, inapplicable. Except for Paragraph 4 in the specific and limited circumstances set forth in the immediately preceding sentence, all of the provisions of this Agreement shall be binding upon and inure to the benefit of all of the successors and assigns of the Port and Lessee in the same manner as all of the other provisions of the Lease.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
Executive Director

Attest _____
Secretary

SCOTT'S JACK LONDON SEAFOOD, INC.
a corporation,

By _____
Raymond J. Gallagher Pres.
(Print Name and Title)

Attest _____ Ex.V.P.
Malcolm Stroud Ex.V.P.
(Print Name and Title)

Approved as to form and legality this 28th day of July, 1987.

_____
Port Attorney

Port Ordinance No. 2755

AFFIRMATIVE ACTION PLAN FOR LESSEE

I. AFFIRMATIVE ACTION POLICY STATEMENT

The principals of Lessee, SCOTT'S JACK LONDON SEAFOOD, INC., have issued the following policy statement delineating the policy of Lessee regarding its commitment to equal employment opportunity, nondiscrimination and affirmative action, and such policy will be fully implemented to the extent practicable at the time of actual occupancy of the Project by Lessee.

Equal Employment Opportunity Statement

It is the policy of Lessee, personally subscribed to and supported by its principals, that there shall be no unlawful discrimination against an employee or applicant for employment, because of race, color, religious creed, national origin, ancestry, sex, marital status, physical handicap, non job-related medical condition, age or veteran status. This policy includes, but is not limited to, the following: hiring, upgrading, recruitment, recruitment advertising, selection, training, demotion, transfer, compensation, lay-off or termination, or any other term or condition of employment. To implement this policy, Lessee has an affirmative action program which is supported by all of Lessee's managers and supervisors, and which Lessee shall fully implement as appropriate during the Lease term. To assure that equal opportunity and affirmative action efforts are properly carried out, Lessee at all times shall have an Equal Opportunity Coordinator; provided, however, that the principals of Lessee shall be responsible for proper implementation of the Affirmative Action Plan. _____ has been appointed Equal Opportunity Coordinator for Lessee.

II. RESPONSIBILITIES AND DUTIES OF EEO COORDINATOR

In addition to the Equal Opportunity Coordinator's regular duties, it is the Coordinator's responsibility to: (1) develop equal opportunity and affirmative action procedures and communication techniques; (2) assist supervisors and managers in identifying and solving problems relating to equal opportunity; (3) maintain an open-door policy to all employment problems which may be raised by employees or applicants for employment; (4) design and implement a system of periodic monitoring and reporting Lessee's equal opportunity efforts, including monitoring of selection procedures and regular review and validation of any selection requirements and tests which are found to impact adversely on minorities or women; (5) keep informed, and keep senior management informed, on equal opportunity developments; (6) act as a liaison with equal opportunity enforcement agencies; (7) ensure that all managers and supervisors comply with this policy and implement Lessee's nondiscrimination and affirmative action program; (8) train employees, including supervisory and management personnel, to create a favorable climate for an effective equal opportunity program; (9) ensure that all of the Lessee's facilities are desegregated; (10) conduct a periodic audit to ensure notices are properly displayed; (11) review the qualifications of all employees to ensure that minority and female employees are given full opportunity for promotions or transfer; (12) encourage employees including minorities and females to participate in all company-sponsored social and recreational events, educational and training programs; (13) communicate to supervisors that their performance is being evaluated on their equal employment opportunity and affirmative action efforts and results as well as other criteria; (14) ensure that supervisors take action to prevent discriminatory harassment of employees. If the above named Equal Opportunity Coordinator, or any successor, is unable to continue as Equal Opportunity Coordinator, Lessee or its successor or assigns will appoint another such coordinator with at least equal ability to carry out the previously-described responsibilities.

III. COMMUNICATION OF POLICY

Lessee is desirous of ensuring that all employees and other persons are fully informed of its commitment to equal opportunity. Accordingly, Lessee will undertake the following steps to disseminate the policy both internally and externally:

Internal Dissemination

A. Lessee's Equal Employment Opportunity/Affirmative Action Policy shall be contained in Lessee's policy guide books or employee handbook, whichever may exist.

B. Lessee shall publicize at least once each year its EEO Policy in newsletters and/or magazines which are intended for the general reading of management and employees.

C. A policy statement and Federally-required Equal Employment Opportunity notice will be posted on Lessee's bulletin boards in areas where employees or applicants congregate.

D. Lessee shall communicate to all employees its EEO policy and program through regular meetings during which managers and supervisors will discuss Lessee's EEO policies and programs, individual responsibilities and review progress.

E. Applications for employment shall include a statement regarding non-discrimination.

External Dissemination

A. Recruiting services through which Lessee hires, and each labor union or workers' representative with which it has a collective bargaining agreement or other employment-related contract, shall be informed through meetings or by written notification of the Lessee's policies regarding equal opportunity. Lessee will encourage the above actively to recruit and refer minority and female applicants.

B. All advertisements for employment will state that Lessee is an equal opportunity employer.

C. When employees are featured in marketing campaigns, employee handbooks or similar publications under Lessee's control, both nonminorities and minorities will be pictured where practicable.

D. An Equal Opportunity clause will be inserted by Lessee in all future labor union agreements, purchase orders and all other contracts relative to this Lease.

IV. GOALS AND TIMETABLES

A. Identification of Underutilizations

For each of its EEO job categories, Lessee will identify any underutilizations of minorities and women by:

1. Identifying the number and percentage of minority and women employees by ethnic groups in division, office or department by job classification and by EEO-1 categories for which Lessee has employees.

2. Analyzing the availability of promotable minority and female employees and preparing a list of such persons, if any, by present job classification.

3. Comparing the data described above with the most recent relevant labor force availability data for persons in the particular job group or comparable occupational category(ies) for County of Alameda.

4. Identifying those job categories where minorities and/or women are present in Lessee's work force at levels below their availability to the relevant labor force for County of Alameda.

B. Identification of Goals & Timetables

For each of its EEO job categories where minorities and/or women are present in Lessee's work force at levels below their availability in the County of Alameda, Lessee will establish annual goals to correct such underutilizations. Goals will also be set to correct deficiencies in applicant flow, hiring, promotions, training, etc.

Lessee's timetable for reaching its goals will be based on realistic estimates of attrition and applicant availability. In addition, consideration will be given to the following:

1. The availability of promotable and transferable minorities and women within Lessee's work force;

2. The existence of training institutions capable of training Lessee's minority and women employees to acquire requisite skills to be qualified for promotions and/or transfers as they become available; and

3. The degree of training which Lessee is reasonably capable of providing for its minority and women employees.

Upon achievement of parity with the relevant labor force in Alameda County for each ethnic group, sex and EEO job category, Lessee shall take the steps described in item A above and this item B with respect to the long range goal described in item C below.

C. Long Range Goals

The long range goals are to achieve parity with the relevant labor force in the City of Oakland for each ethnic group, sex and EEO-1 job category.

D. Nature of Goals

The goals described in item A, B and C above are not inflexible quotas, but rather are objectives to be pursued by mobilization of available resources and by a good faith effort to fulfill the letter and spirit of Lessee's equal opportunity employment policy. The anticipated expansion, contraction, and turnover of and in the work force, along with the qualifications for respective jobs, will be considered in determining goals.

V. PLAN OF ACTION

Lessee will make a good faith effort to achieve the goals and timetable indicated above. These efforts will include, but are not necessarily limited to the following actions:

A. Lessee will make every good faith effort to ensure that all job descriptions and job specifications accurately reflect job functions.

B. Every good faith effort will be made to ensure that the qualifications do no constitute intentional or inadvertent discrimination against minorities or women.

C. Prompt notice of all Lessee's job openings will be made to Port's Employment Resources Development Program, employment agencies, clearing houses, and referral groups. The notice shall state, among other things, the nature of the job, general job qualifications, salary level when applicable, and that minorities, women and Oakland residents are encouraged to apply.

D. Lessee will actively encourage minority and female employees to refer applicants for its job openings.

E. Lessee will make every good faith effort to cooperate with local community programs designed to improve the employment of minorities and females.

F. Lessee will make every good faith effort to ensure that pre-employment screening and selection procedures are not discriminatory and that they do not have an adverse impact on the hiring of any minorities or women.

G. Lessee will maintain applicant flow data to ensure minorities and women are not being discriminated against.

H. Lessee will develop reports to monitor the progress of the affirmative action program on a semi-annual basis.

I. Due to Lessee's size, it may generally be unable to conduct internal job-related training and if so, then, as a result, Lessee will seek the most qualified applicant to fill each available position within its organization. However, Lessee in good faith will, as a part of its continuous monitoring system, consider the feasibility of internal job-related training.

Lessee's affirmative action and nondiscriminatory compliance plan will be updated and revised periodically (at least annually) in light of experience, revised laws and regulations and their interpretations, and better understanding of effective approaches which will assure truly equal opportunity for all. The initial set of goals and timetables established pursuant to this Plan shall be forwarded to the Executive Director within ninety (90) days after Lessee's

occupancy of the Premises for purposes of Lessee's conducting management, leasing or general administrative functions. Each updated plan, including each updated set of goals and timetables, will be forwarded to the Executive Director within thirty (30) days after their adoption. The initial set of goals and timetables, and each updated plan and updated set of goals and timetables, shall be consistent with the goals and objectives of this Plan.

Any questions relating to details of this Plan should be referred to Lessee's Equal Opportunity Coordinator.

VI. SUBTENANTS

Lessee shall cause to be inserted in the tenancy agreements of each subtenant of any tier an Equal Opportunity and Nondiscrimination provision substantially identical to Paragraph 40 of the Lease (except for subparagraph 6 of Paragraph 3).

In addition, Lessee shall cause to be inserted an Affirmative Action Plan agreement in the tenancy agreement of each of the following subtenants of any tier: (1) a subtenant who is an Affiliate of Lessee, who occupies any portion of the Premises and who proposes to have or does have fifteen (15) or more employees on the Premises; and (2) a subtenant who occupies any space other than office space in an Office Building and who proposes to have or does have fifteen (15) or more employees on the Premises. This Affirmative Action Plan agreement shall require that a subtenant who proposes to have fifteen (15) or more employees on the Premises within the first year of the term of the subtenancy, adopt and furnish to the Port an Affirmative Action Plan substantially equivalent in form and substance to the Plan of Lessee stated immediately above in this Exhibit "C-1". If the subtenant first proposes to employ or does employ fifteen (15) or more employees on the Premises after commencement of the term of the subtenancy, the subtenancy agreement shall require that the Affirmative Action Plan shall be adopted and furnished to the Port within ninety (90) days after reaching such number of employees.

All subtenancy agreements shall provide that the Affirmative Action Plan and Equal Opportunity and Nondiscrimination provisions are inserted at the express request and for the benefit of the Port and may be enforced by the Port.

Lessee agrees that it is a covenant and condition of the Lease that such plans be adopted and furnished to the Port and that subtenants comply with their respective plans and the Equal Opportunity and Nondiscrimination provisions in their subleases.

In the event of a subtenant's noncompliance with its Affirmative Action Plan requirements or Equal Opportunity and Nondiscrimination requirements, the subtenant shall be considered in substantial breach of its subtenancy agreement. In the case of such a breach, Lessee agrees promptly to take appropriate remedial and other actions against the involved subtenant that are reasonably calculated to result in ultimate compliance with its Affirmative Action Plan or Equal Opportunity and Nondiscrimination requirements. Such actions may include, among other things (1) imposition of liquidated damages and (2) termination of the involved subtenancy agreement. Appropriate actions shall be determined by Lessee in its good faith reasonable judgment. Lessee agrees that all subtenancy agreements shall provide for imposition of liquidated damages of One Thousand Dollars ($1,000.00) per day for each day of substantial noncompliance with the requirements imposed by the Affirmative Action Plan and Equal Opportunity and Nondiscrimination provisions of the subtenancy agreement. All liquidated damages shall be paid over to the Port and used for the purposes set forth in Paragraph 7.2 of the Agreement. Lessee and the Port each agree that it shall keep the other fully informed and shall fully consult with the other concerning all subtenancy agreement breaches involving Affirmative Action Plan and Equal Opportunity and Nondiscrimination requirements and proposed remedial and other actions.

MINORITY CONTRACTOR

AFFIRMATIVE ACTION PLAN

Lessee shall comply with the provisions of this Minority Contractor Affirmative Action Plan to achieve a goal of twenty-six percent (26%) MBE participation in the total construction cost of the Project.

For purposes of this Plan, the Port and Lessee agree that the total construction cost of the Project shall be deemed to be One Million Dollars ($1,000,000.00). This sum shall not be subject to adjustment to actual costs resulting from construction of the Project.

This Plan is based upon Lessee's construction plan which provides for expansion of existing improvements to provide an approximate five thousand (5,000) square foot expansion of the restaurant building and a banquet facility and related facilities.

For purposes of this Plan, the following special rules shall apply to contractors who are suppliers:

(1) The Lessee may credit toward its MBE goal its entire expenditure to an MBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale, or custom makes an item for the Project).

(2) The Lessee may credit toward its MBE goal only twenty percent (20%) of its expenditures to MBE suppliers that are not manufacturers, provided that the MBE supplier performs a commercially useful function in the supply process.

I.
LESSEE'S PLAN FOR ACHIEVING 26% GOAL

In order to achieve the twenty-six percent (26%) goal, Lessee agrees to implement in good faith the Plan set forth herein, which represents a realistic and reasonable Plan for accomplishing that goal. Lessee shall provide hereinafter in reasonable detail how it proposes to achieve the 26% goal--i.e., set forth a realistic program, based on Lessee's experience and knowledge of construction in the Bay Area, of how it reasonably expects to reach the 26% goal. The Program might include such things as: structuring portions of the work to be performed by subcontractors in order to increase the likelihood of award of a subcontract to a minority subcontractor; providing for special consideration for minority subcontractors bidding within a determined budget and within a specified range of non-minority subcontractors; selecting portions of the work for minority subcontractor participation.

II.

SPECIFIC AFFIRMATIVE ACTION STEPS IN SEEKING MINORITY CONTRACTOR

A. Good Faith Efforts

Efforts that are merely pro forma are not good faith efforts to meet the goal. Efforts to obtain MBE participation are not good faith efforts to meet the goal, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation consistent with reasonably available minority contractors.

The Port will determine whether Lessee's or the prime contractor's, as the case may be, efforts were those that, given all relevant circumstances, including orderliness, high standards and timeliness of construction management essential to efficient and successful fast-track construction, a Lessee or the prime contractor actively and aggressively seeking to meet the MBE goal would make.

Lessee shall take, or be responsible for Lessee's prime contractors taking, the following good faith effort affirmative action steps with respect to securing each prime contract and each prime contractor's subcontractors unless (1) the contract is awarded to an MBE, or (2) Lessee has already achieved the 26% MBE contractor goal:

(1) Contact by correspondence at least 10 of the minority contractors in each contract area intended to be utilized as such minority contractors are identified in the Port's Directory of Minority Contractors and Subcontractors, and other supplemental lists available from the Port. The correspondence should advise such minority contractors of all the matters described below. Lessee and its prime contractor are encouraged to utilize other minority lists or directories provided by MCA-NC, San Francisco Redevelopment agency or other known directories. Credit for use of firms not previously recognized by the Port as minority-owned will depend on the Port's verification of minority ownership. If the number of known minority firms in a contract area is less than ten (10), then Lessee and its prime contractor should contact all known minority contractors in such contract areas. Correspondence should be sent no later than twelve (12) full working days prior to the bid opening date. Communications should state that Lessee or its prime contractor, as the case may be, is interested in soliciting minority contractor participation in each of the contract areas anticipated to be utilized. An example of an acceptable written solicitation is attached. The following information should be contained therein:

(a) The Lessee's or prime contractor's, as the case may be, name, address, telephone number and the name of the estimator for the contract.

(b) The title of the contract.

(c) The bid opening date and the deadline for accepting bids, which should be reasonably related to standard practices of the subcontracting community.

(d) A brief description of the scope of work of the project and a brief description of the scope of work of the applicable subcontract area(s). The description of the scope of work for each subcontract area does not need to be more than the equivalent of a short paragraph in length.

(e) A statement that the plans and specifications are available for inspection at Lessee's or the prime contractor's, as the case may be, office and that Lessee or the prime contractor (as the case may be) will assist the

minority contractor in such matters as bid preparation, and obtaining bonds and insurance.

(f) A statement directed to both minority and non-minority contractors that Lessee or the prime contractor, as the case may be, encourages said contractors to utilize minority contractors and suppliers.

(2) Contact by telephone at least 75% of the minority contractors previously contacted by correspondence in each contract area intended to be utilized as identified in the Port Directory of Minority Contractors and Subcontractors, and other supplemental lists available from the Port. The communication should ascertain with certainty whether the minority contractors are interested in bidding on the contract work. If the number of minority contractors interested in bidding in a contract area is less than three (3), additional contacts should be made by telephone.

During such additional telephone communication(s), Lessee or the prime contractor, as the case may be, should ascertain the willingness of other minority contractors to bid on the identified contract work and should convey the information described in (1) above if such information has not been previously given to the minority contractor. The above described communication should be made no later than five (5) full working days prior to the bid opening date.

(3) Contact the following by correspondence, which should be mailed no later than twelve (12) full working days prior to the bid opening date.

(a) Minority Contractors Association
of Northern California
610 - 16th Street, Suite 214
Oakland, California 94612
(415) 763-2330

(b) Such other organizations as may be designated from time to time by the Port

Correspondence should include all information listed in (1) above and should also give a brief description of the scope of work for each of the contract areas.

(4) Advertise at least two (2) weeks prior to the bid opening date in the Daily Construction Service and Daily Pacific Builder that Lessee or the prime contractor, as the case may be, is seeking minority bids for the contract.

B. Documentation of Steps

Documentation of all efforts is essential to be credited with having made the efforts claimed by Lessee. All efforts will be independently verified by Port staff. Lessee shall keep or cause to be kept a telephone log of all telephone calls and a brief summary of the nature of each discussion. Copies of all correspondence shall be submitted with the responses to the "good faith efforts" questionnaire referred to below in item C.(3).

C. Pre-Award Procedures

(1) Lessee shall maintain or cause to be maintained a list of minority contractors contacted, indicating those selected or rejected and the reasons for such rejection.

(2) Lessee shall document Lessee's or the prime contractor's, as the case may be, good faith efforts to obtain minority subcontractors.

(3) When requested by the Executive Director, Lessee shall complete and return to the Port the Contractor's questionnaire, a sample of which is attached hereto. Failure to submit the completed questionnaire as required may result in a determination by the Executive Director that Lessee has not complied with the Affirmative Action Agreement.

(4) Before or promptly after a contract is awarded, Lessee shall do one or both of the following:

(a) If the contractor is one which Lessee believes is an MBE, or a joint venture with an MBE partner, Lessee shall so advise the Executive Director in writing ("Notice of Selection or Intended Selection"). The Notice of Selection or Intended Selection shall include the factual grounds upon which Lessee bases Lessee's belief. The Executive Director promptly shall consider the Notice of Selection or Intended Selection and notify Lessee in writing whether the Port concurs in Lessee's belief. The Executive Director within seven (7) working days

after receipt of the Notice of Selection or Intended Selection may give written notice to Lessee ("Disagreement Notice") that in the reasonable good faith belief of the Executive Director Lessee's belief is incorrect. If no such Disagreement Notice is given within said period, the contractor shall be deemed to have the status set forth in Lessee's Notice of Selection of Intended Selection. Each Disagreement Notice shall specifically respond to the factual grounds set forth in the Notice of Selection or Intended Selection, and shall set forth all of the grounds upon which the Executive Director believes that the contractor does not have the status claimed by Lessee. If a Disagreement Notice timely is submitted to Lessee, Lessee or the prime contractor, as the case may be, shall not enter into the proposed contract or shall terminate the contract entered into, or Lessee shall appeal the Rejection Notice as provided in Paragraph 5.2 of the Affirmative Action Agreement.

(b) Except when Lessee has met its goal under this Plan, Lessee shall in writing present a separate request (hereinafter "Request for Determination") to the Executive Director for each contract or proposed contract (at Lessee's option) to determine whether, with respect to such contract or proposed contract, Lessee and Lessee's prime contractor has complied with this Minority Contractor Affirmative Action Plan, accompanied by all documentation concerning MBE participation referred to in items (1), (2) and (3) immediately above. The Executive Director within seven (7) working days after receipt of the Request for Determination and all such documentation shall determine in writing ("Rejection Notice") on the basis of this Plan, such documentation and such other pertinent information that may be made available, either that Lessee and Lessee's prime contractor with respect to the contract or proposed contract has complied with this Plan, or that Lessee and Lessee's prime contractor has not so complied. The Executive Director's determination shall be reasonable and shall be made as promptly as is reasonably practicable. If the Executive Director issues no written determination within said seven (7) working day period, Lessee shall be deemed to have satisfied the Plan with respect to the contractor involved in the Request for Determination. If the Executive Director issues a written determination to Lessee within said seven (7) working day period that Lessee or Lessee's prime contractor has not complied with this Plan, Lessee or Lessee's prime contractor at Lessee's option shall (1) not enter into the proposed contract or shall terminate the contract entered into, or (2) if Lessee or Lessee's prime contractor decides to enter into the contract, or decides not to terminate the contract, Lessee shall appeal the Rejection Notice as provided in Paragraph 5.2 of the Affirmative Action Agreement.

If Lessee has awarded a contract before the Lease becomes effective, Lessee shall immediately upon the Lease becoming effective take one or both of the acts described in (a) and (b) of item (4) immediately above.

D. Post-Award Procedures

MBE's awarded a contract may be dismissed for cause by Lessee or Lessee's prime contractor, but in securing a replacement Lessee and Lessee's prime contractor shall comply with this Plan unless replacement is required on an emergency basis in which case Lessee and Lessee's prime contractor shall make those efforts under the circumstances that are reasonable to secure an MBE replacement. Lessee shall promptly notify the Executive Director in writing of all replacements of MBE's in the same manner as specified in subparagraphs C(4)(a) and C(4)(b) above. This Section D shall not apply to dismissal of an MBE who was not necessary for achieving Lessee's 26%.

SAMPLE FORM LETTER

Lessee's (or its Prime Contractor's)
Letterhead including
address & telephone number

Name & Address Date
Minority Firms
Subject: Bid for "_____"

Oakland, CA

SUBBIDS DUE: (date), (time)

BIDS OPENED: (date), (time)

Gentlemen:

We are prime contractors for the subject work. If your firm would be interested in submitting a quote to us as a subcontractor and/or material supplier, please advise.

The work available for subcontracting and/or furnishing miscellaneous supplies or materials are as follows:

* 1)	Underground	- Furnish and install 12" and 15" storm drain pipe, catch basins, manholes, etc.
* 2)	Pavement Markings	- Layout and painting pavement markings.
* 3)	Tiedown Loops	- Layout and install galvanized loops. - Installation of three (3) floodlight poles and eleven (11) - 1,000 watt high pressure sodium luminaires and lamps, and three (3) double obstruction lights, concrete pole foundations, wires underground and overhead conduits, pull boxes, panelboards, contractors transformers, switches, circuit breakers, etc.

*Type of description required. This description does not necessarily apply to the specific contract at hand.

Plans and specifications to be used for bidding on the above project, may be obtained at _____, and may also be examined at our office.

Name, (or I am) the estimator for this contract, is (and am) available to assist you in such matters as clarifying questions regarding the scope of work, bid preparation and obtaining bonds and insurance.

We encourage subcontractors to utilize minority subcontractors and suppliers.

Very truly yours,

By_____
(type name)

MINORITY EMPLOYMENT

AFFIRMATIVE ACTION PLAN

I. REQUIREMENTS - AFFIRMATIVE ACTION PLAN

Lessee is responsible for assuring that each contractor employed on the Project at or on the immediate vicinity of the Project site fully complies with the conditions set forth herein to each construction trade it intends to use on the Project.

Lessee shall appoint a company executive to assume the responsibility for implementation of the requirements, terms and conditions of the Minority Employment Affirmative Action Plan.

II. AFFIRMATIVE ACTION PLAN

A. Content of Affirmative Action Plan

1. Lessee's goal for the employment of minorities on the Project work force, on a craft-by-craft basis, for each contractor, is 50%.

2. The percentage of minority labor utilization is expressed in terms of labor-hours of employment as a proportion of the total labor-hours to be worked. The labor-hours for minority work must be substantially uniform throughout the length of the contract for each of the trades. The transfer of minority employees or trainees from employer to employer or from project to project for the sole purpose of meeting the contractor's goal shall be grounds for disqualifying the employee's hours from credit toward the 50% goal. Contractor may transfer employee from project to project or from employer to employer, providing such transfer is for the sole purpose of keeping the employee employed after his prior employer's work on the Project was completed or for the purpose of completing a full day's work.

3. Any worker performing any function or work on the Project who is not an employee of a contractor or subcontractor will be considered an employee of the contractor or subcontractor who retained said worker for affirmative action purposes. Such worker(s) will be included by the appropriate contractor or subcontractor in its affirmative action plan, and must be included in all reports submitted to the Port throughout the life of the Project.

4. The requirements for affirmative action will not apply to suppliers of materials to be used on the Project.

B. Specific Affirmative Action Steps

Lessee shall not be found to be in noncompliance with this Plan solely on account of a contractor's failure to meet its goals. Lessee and each contractor shall be given the opportunity to demonstrate that it has instituted the Specific Affirmative Action Steps specified and has made every "good faith" effort to make these steps work toward the attainment of its goals. Lessee hereby agrees to assure that each contractor is informed of its obligations under the terms and requirements of this Plan.

Lessee, to the maximum extent reasonably practicable, shall assure that each contractor's Specific Affirmative Action Steps shall be at least as extensive and as specific as the following and that such steps shall be undertaken:

1. Each contractor shall notify community organizations that they have employment opportunities available and shall maintain records of the organizations' responses.

2. Each contractor shall maintain a file of the names and addresses of each minority worker referred. The file shall indicate what action was taken with respect to each such referred worker, and if the worker was not employed, the reasons therefor. If such worker was not sent sent to a union hiring hall for referral or if such worker was not employed by the contractor, the contractor's file shall document this and the reasons therefor.

3. Each contractor promptly shall notify Lessee (who shall promptly notify the Port) (a) if it has reason to believe that it will not meet its 50% minority craft-by-craft employment goal, (b) when the union or unions with whom the contractor has a collective bargaining agreement has not referred to the contractor a minority worker as requested, or (c) when the contractor has

other information that the union referral process has impeded the contractor's efforts to meet its goal.

4. Each contractor shall participate in minority employment training programs in the area, especially those funded by the Department of Labor unless training is provided by Union Labor Agreement.

5. Each contractor shall disseminate their equal employment opportunity and affirmative action policy within its own organization by including it in any policy manual; by publicizing it in company newspapers or other company publications; by conducting staff, employee and union representative's meetings to explain and discuss the policy; by posting of the policy; and by specific review of the policy with minority employees.

6. Each contractor shall disseminate its equal employment opportunity and affirmative action policies externally by discussing them with all recruitment sources; by advertising in news media, specifically including minority news media; and by notifying and discussing them with all subcontractors.

7. Each contractor shall make written and oral recruitment efforts directed at all minority organizations, schools with minority students, minority recruitment organizations, and minority training organizations, within the contractor's recruitment area.

8. Each contractor shall make specific efforts to encourage present minority employees to recruit their friends and relatives.

9. Each contractor shall validate all personnel specifications, selection requirements and tests to insure they do not have a discriminatory effect.

10. Each contractor shall make every effort to promote after-school, summer and vacation employment to minority youth.

11. Each contractor shall develop on-the-job training opportunities and participate and assist in any association or employer-group training program relevant to the contractor's employee needs.

12. Each contractor shall on a reasonable periodic basis review and evaluate all minority personnel for promotional opportunities, and shall encourage minority employees to seek such opportunities.

13. Each contractor shall make sure that seniority practices and job classifications do not have a discriminatory effect.

14. Each contractor shall make certain that all facilities and company activities are nonsegregated.

15. Each contractor shall continually monitor all personnel activities to ensure that their equal employment opportunity and affirmative action policies are being carried out.

16. Following the hiring of each contractor, Lessee will inform the Port's ERDP department who may contact the contractor to assist in providing referral of applicants for job openings.

III. OTHER CONDITIONS

A. Nondiscrimination

In no event may a contractor utilize the goals, timetables or affirmative action steps required by this Plan in such a manner as to cause or result in discrimination against any person on account of race, color, religion, sex or national origin.

B. CONTRACTORS AND SUBCONTRACTORS BOUND

Lessee shall cause this Plan to be a part of all contracts.

IV. COMPLIANCE PROCEDURES

A. Reporting Requirements

Lessee shall promptly submit to the Port's Executive Director for each contractor, on U.S. Department of Labor, Payroll Report Form WH - 347, or other approved form, the contractor's complete, certified weekly payroll records for all workers involved in construction of the Project, with each worker identified as to minority or nonminority status. In case the contractor shall fail to submit the weekly payroll records to Lessee within one (1) week after the payroll date, Lessee agrees that no payments will be made to the contractor until such required reports are received.

B. Enforcement

Lessee every two weeks shall review the contractors' employment practices during the construction of the Project and shall fully cooperate with the Port in order that the Port from time to time, upon reasonable prior notice to Lessee, also may review such employment practices. Violation of any substantial requirement of the terms of the Affirmative Action Plan shall be deemed to be material noncompliance by the contractor with its contract.

If the contractor demonstrates that it has satisfied its minority hiring goals, the contractor shall be presumed to be in compliance with its obligations and no formal sanctions or proceedings leading toward sanctions shall be instituted. Where Lessee or the Executive Director finds that the contractor has agreed (except where Lessee invokes the procedures of Paragraph 7.2 of the Agreement) to take such action and impose such sanctions as may be appropriate. When Lessee proceeds with such formal action of declaring the contractor out of compliance, it has the burden of proving that the contractor or subcontractor has not met the minority hiring goals of this Plan. However the contractor's failure to meet its goals shall shift to it the requirement to come forward with evidence to show that it has met the "good faith" requirements of this Plan by instituting at least the Specific Affirmative Action Steps previously listed and by making every "good faith" effort to make those steps work toward the attainment of the goals of minority hiring. It shall be no excuse that the union with which the contractor has a collective bargaining agreement providing for exclusive referral failed to refer minority employees.

In the event that a contractor does not meet the goals of this Plan, it shall be relieved of any purported noncompliance if it can reasonably demonstrate its "good faith" attempt to meet the goal in accordance with this Plan.

C. Sanctions

In the event of a contractor's noncompliance with this Plan, whether willful or inadvertent, the contractor shall be considered in substantial breach of contract. In the case of such a breach, Lessee agrees promptly to take appropriate remedial and other actions against the involved contractor that are reasonably calculated to result in ultimate compliance with this Plan. Such actions may include, among other things (1) imposition of liquidated damages, and/or (2) withholding all or

portions of contract payments to the involved contractor until the involved contractor is in compliance with this Plan, and/or (3) termination of the involved contractor and securing a new contractor. Appropriate actions shall be determined by Lessee in its good faith reasonable judgment. Lessee agrees that each of its contracts with its prime contractors shall provide for imposition of liquidated damages of One Thousand Dollars ($1,000.00) per day for each day of non-compliance with the requirements imposed by this Plan, and that each contract awarded by the prime contractor shall contain a like provision. Such liquidated damages provision will be applicable only when the default by the contractor is non-curable. All liquidated damages shall be paid over to the Port and used for the purposes set forth in Paragraph 5.2 of the Agreement. Lessee agrees that it shall keep the Port fully informed and shall fully consult with the Port concerning all contract breaches involving this Plan and Lessee's proposed remedial and other actions.

MINORITY AND WOMEN PROFESSIONAL CONTRACTS AFFIRMATIVE ACTION PLAN

A. **Goals:**

Lessee agrees that Lessee and Lessee's contractors shall exercise good faith efforts to seek the following goal for MBE Professional Contracts: For MBE's, a goal of at least twenty-six percent (26%) of the total contract price of all Professional Contracts for the Project; provided, however, that the amount of contracts awarded to WBE's shall be credited toward the MBE goal up to a total sum not exceeding two percent (2%) of the total contract price of all Professional Contracts. In determining whether this goal has been satisfied, Professional Contracts entered into before the effective date of the Lease shall also be considered.

For purposes of this Plan, the Port and Lessee agree that the total contract cost of Professional Contracts shall be deemed to be _____ Dollars ($_____). This sum shall not be subject to adjustment to actual costs resulting from Professional Contracts for the Project.

B. **Good Faith Efforts:**

Efforts that are merely pro forma are not good faith efforts to meet the goal. Efforts to obtain MBE participation are not good faith efforts to meet the goal, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation consistent with reasonably available minority contractors.

"Good faith efforts" for purposes of this Plan include but are not limited to the following affirmative action steps:

(1) Active solicitation of MBE's to be contractors in Professional Contracts.

(2) Documented contacts with MBE's and minority professional associations, community business assistance organizations, and related entities.

(3) Provision of assistance (including forms) to MBE's in such matters as business proposal preparation, and provision of general advice to MBE's.

(4) Encouragement of MBE's to joint venture with other MBE's or non-MBE's in order to qualify for Professional Contracts.

(5) Advertising for proposals from MBE's in local minority newspapers, and in other daily and weekly newspapers and area media.

(6) Utilizing MBE lists and other related information available from the Port, State of California, federal government or elsewhere.

(7) Active efforts to inform the Oakland professional community of Lessee's goals and available Professional Contract opportunities in the Project.

Lessee agrees that in discussing Professional Contracts with prospective professional contractors for the Project, Lessee or Lessee's contractor in good faith shall encourage and assist, when requested, such prospective contractors who have women and minority employee underutilization, in developing an employee affirmative action plan. Lessee also agrees that all Professional Contracts entered into by Lessee or a contractor shall contain a provision substantially the same as Paragraph 3 (excluding subparagraph F thereof) of this Affirmative Action Agreement.

C. <u>Documentation of Good Faith Efforts</u>:

Before or promptly after a Professional Contract is awarded by Lessee or a contractor, Lessee shall do one or both of the following:

(a) If the professional contractor is one which Lessee believes is an MBE or WBE, or a joint venture with an MBE or WBE partner, Lessee shall so advise the Executive Director in writing ("Notice of Selection or Intended Selection"). The Notice of Selection or Intended Selection shall include the factual grounds upon which Lessee bases Lessee's belief. The

JR/2-27-87
JR3-13-87 (REVISED)

Scott's
Lease Description

All that certain shoreline and water area situate in the City of Oakland, County of Alameda, State of California, more precisely in the area known as Jack London Square.

Beginning at the most northwesterly wall of that Port of Oakland Building F-106, identified as Point "A" Point of Beginning, for the purpose of this description.

thence North 26/15/30 East 19.660 feet

B - thence South 63/44/30 East 125.49 feet

C - thence South 26/15/30 West 19.66 feet

D - thence South 63/44/30 East 23.00 feet

E - thence South 26/15/30 West 30.00 feet

F - thence North 63/44/30 West 10.00 feet

G - thence South 26/15/30 West 41.34 feet

H - thence South 71/15/30 West 42.426 feet

I - thence North 63/44/30 West 165.00 feet

J - thence North 26/15/30 East 71.929 feet

K - thence South 18/44/30 East 15.571 feet

M - thence North 71/15/30 East 4.00 feet

N - thence North 18/44/30 West 2.50 feet

O - thence North 71/15/30 East 15.00 feet

P - thence South 18/44/30 East 2.50 feet

Q - thence North 71/15/30 East 4.00 feet

R - thence South 18/44/30 East 6.50 feet

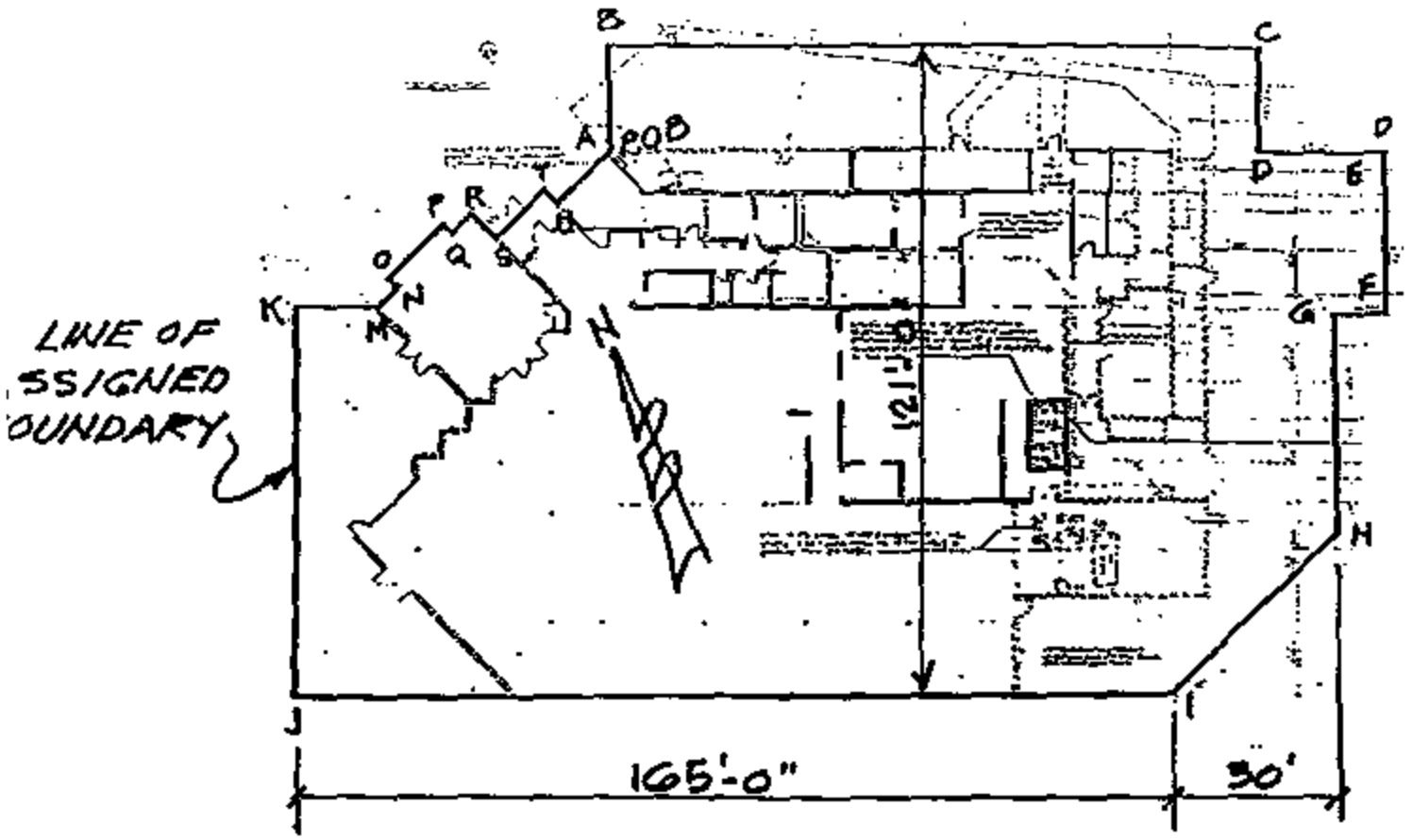
S - thence North 71/15/30 East 12.66 feet

T - thence South 18/44/30 East 4.00 feet

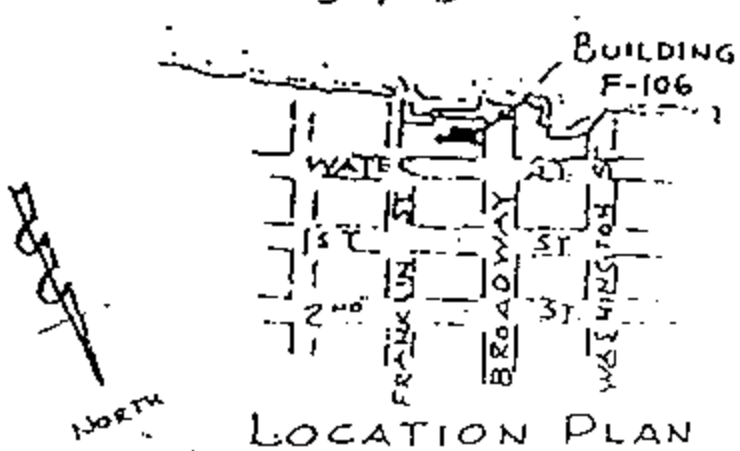
U - thence North 71/15/30 East 14.279 feet to

A - the Point of Beginning

The above described area contains 21,044.987 square feet/.4831 acres.



ESTUARY



LOCATION PLAN

SCOTT'S

Executive Director promptly shall consider the Notice of Selection or Intended Selection and notify Lessee in writing whether the Port concurs in Lessee's belief. The Executive Director within seven (7) working days after receipt of the Notice of Selection or Intended Selection may give written notice to Lessee ("Disagreement Notice") that in the reasonable good faith belief of the Executive Director Lessee's belief is incorrect. If no such Disagreement Notice is given within said period, the professional contractor shall be deemed to have the status set forth in Lessee's Notice of Selection of Intended Selection. Each Disagreement Notice shall specifically respond to the factual grounds set forth in the Notice of Selection or Intended Selection, and shall set forth all of the grounds upon which the Executive Director believes that the professional contractor does not have the status claimed by Lessee. If a Disagreement Notice timely is submitted to Lessee, Lessee or Lessee's contractor shall not enter into the proposed Professional Contract or immediately shall terminate the Professional Contract entered into, or Lessee shall appeal the Rejection Notice as provided in Paragraph 6.2 of the Affirmative Action Agreement.

(b) Except when Lessee has met its goal under this Plan, Lessee shall in writing present a separate request (hereinafter "Request for Determination") to the Executive Director for each Professional Contract or proposed Professional Contract (at Lessee's option) to determine whether, with respect to such Professional Contract or proposed Professional Contract, Lessee has complied with this Plan, accompanied by all documentation concerning MBE and WBE participation referred to in this Plan. The Executive Director within seven (7) working days after receipt of the Request for Determination and all such documentation shall determine in writing ("Rejection Notice") on the basis of this Plan, such documentation and such other pertinent information that may be made available, either that Lessee with respect to the Professional Contract or proposed Professional Contract has complied with this Plan, or that Lessee has not so complied. The Port's Executive Director's determination shall be reasonable and shall be made as promptly as is reasonably practicable. If the Port's Executive Director issues no written determination within said seven (7) working day period, Lessee shall be deemed to have satisfied the Plan with respect to the professional contractor involved in the Request for Determination. If the Executive Director issues a written determination to Lessee within said seven (7) working day period that Lessee has not complied with this Plan, Lessee or its contractor at Lessee's

option shall (1) not enter into the proposed Professional Contract or shall terminate the Professional Contract entered into, or (2) if Lessee decides that Lessee or its contractor will enter into the Professional Contract, or decides not immediately to terminate the Professional Contract, Lessee shall appeal the Rejection Notice as provided in Paragraph 5.2 of the Affirmative Action Agreement.

D. Post-Award Procedures

MBE's or WBE's awarded a Professional Contract may be dismissed by Lessee or its contractor, but in securing a replacement Lessee shall comply with this Plan unless replacement is required on an emergency basis in which case Lessee or its contractor shall make those efforts under the circumstances that are reasonable to secure an MBE or WBE (as the case may be) replacement. Lessee shall promptly notify the Executive Director in writing of all replacements of MBE's in the same manner as specified in Paragraph C of this Plan above. This Paragraph D shall not apply to dismissal of an MBE or WBE who was not necessary for achieving Lessee's 26% goal.

JACK LONDON SQUARE

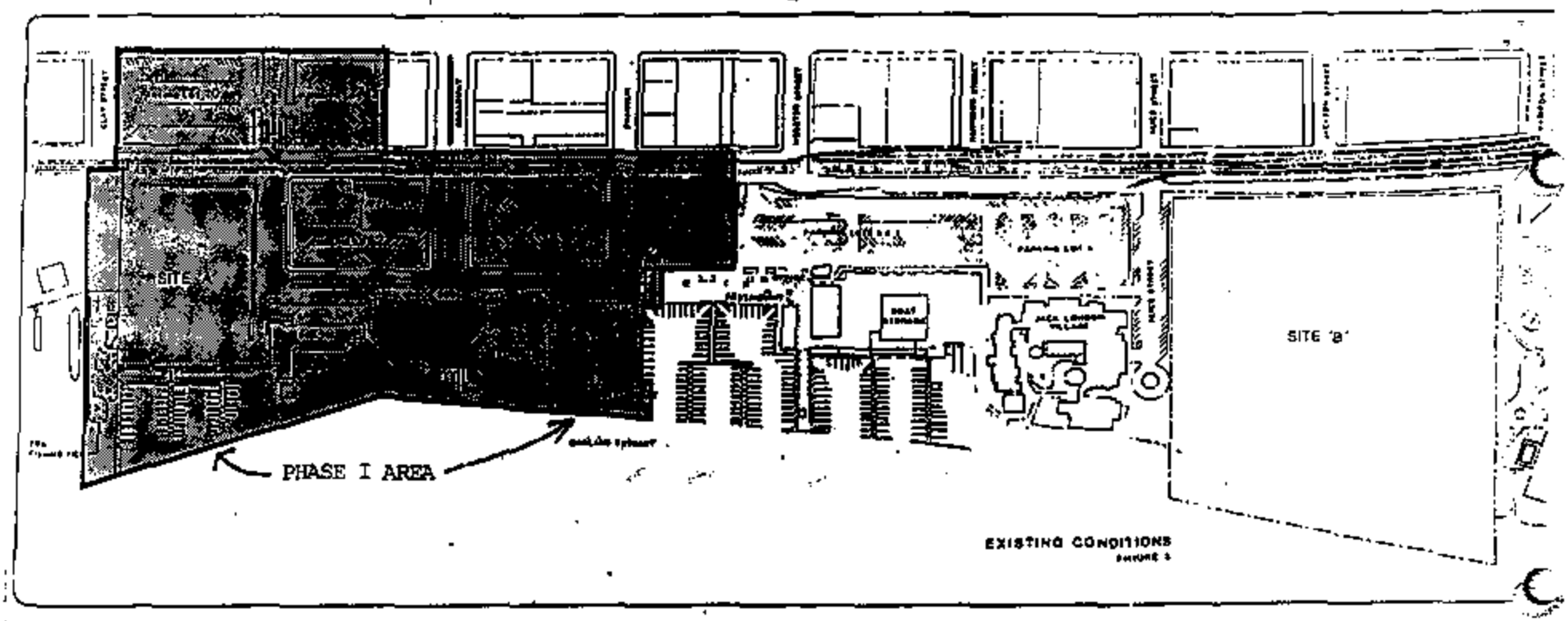


EXHIBIT D

IRREVOCABLE LETTER OF CREDIT

Irrevocable and Transferable
Letter of Credit #_____

Amount: U.S. $_____

To: Port of Oakland
Attention: Director of Properties
66 Jack London Square
Oakland, California 94607

_____, 198__

Gentlemen:

For the account of [LESSEE'S NAME], a [_____], we hereby issue in your favor our Irrevocable Letter of Credit for U.S. $_____.

The amount of this credit is available to you by your drafts on us at sight accompanied by the following statement signed by you.

> "I certify that the amount of our drawing is due the Port of Oakland pursuant to the terms of the Lease dated _____, 198__ between the Port of Oakland and [LESSEE'S NAME], a [_____.]"

Drafts must clearly specify the number of this credit and be presented at our counters at _____, in Oakland, California (or in San Francisco, California) not later than the close of business on _____, 19____, or such later date as this credit shall have been extended to.

This credit shall be deemed automatically extended without amendment for additional periods of one year from the present or any future expiration date unless thirty (30) days prior to any such date we notify you and [LESSEE'S NAME] by

registered mail that we elect not to consider the letter of credit renewed for any such additional period. You may then draw on us at sight with your statement certifying that the amount drawn covers [LESSEE'S] outstanding obligation to you.

This Letter of Credit is subject to the "Uniform Custom and Practice for Documentary Credits" (1983 Revision), International Chamber of Commerce Publication No. 290.

We engage with you that drafts drawn under and in compliance with the terms of this credit will be duly honored by us on delivery of documents as specified.

Very truly yours,

_____

Authorized Signature and Title

LAW FILE COPY

THIRD SUPPLEMENTAL AGREEMENT

Between

PORT OF OAKLAND

And

SCOTT'S JACK LONDON SEAFOOD, INC.,
a Corporation

Dated

April 6, 1993

COPY OF DOCUMENT RECORDED
JUL - 1 1993 93237196
AS NO
HAS NOT BEEN COMPARED WITH ORIGINAL
ALAMEDA COUNTY RECORDER

FOURTH SUPPLEMENTAL AGREEMENT

Between

PORT OF OAKLAND

And

SCOTT'S JACK LONDON SEAFOOD, INC.,
a Corporation

Dated

March 1, 1994

PORT OF OAKLAND - OFFICIAL BUSINESS
DOCUMENT REQUIRED TO BE RECORDED UNDER GOVERNMENT CODE SECTION 37393, AND ENTITLED TO FREE RECORDATION UNDER GOVERNMENT CODE SECTION 27383

RECORDED ON BEHALF OF AND WHEN RECORDED RETURN TO:

Stanley P. Hébert
Port Attorney
Port of Oakland
530 Water Street, 4th Floor
Oakland, California 94607

ORIGINAL

RECORDED IN OFFICIAL RECORDS
ALAMEDA COUNTY, CA
PATRICK O'CONNELL, COUNTY RECORDER

Jacobs
Jow
Jones
Kaminermeier
Ogden
Sanchez
Sherrod
Szudy
Tash
Tao
Washington
White
Wong
Division File

'93 AUG 11 4

DH

FOURTH SUPPLEMENTAL AGREEMENT AND ESTOPPEL
(GALLAGHER BLOCK LEASE)

THIS FOURTH SUPPLEMENTAL AGREEMENT AND ESTOPPEL (this "**Agreement**"), dated as of July 1, 1993 ("Effective Date"), is by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, hereinafter called the "**Port**" or "**Lessor**", and **OAKLAND PORTSIDE ASSOCIATES**, a California limited partnership, hereinafter called "**Lessee**" or "**OPA**".

R E C I T A L S

A. Lessor and Lessee are parties to that certain Lease (as such Lease has been, is hereby, or may hereafter be amended, modified or supplemented, the "Lease") dated July 21, 1987 and recorded August 5, 1987, in the Official Records of Alameda County, California (the "Official Records") as Instrument No. 87-219660, which lease has been supplemented and amended by that certain First Supplemental Agreement dated April 5, 1988 and recorded June 22, 1988 in the Official Records as Instrument No. 88-148836 (the "First Supplemental Agreement"), by that certain Second Supplemental Agreement and Estoppel (Gallagher Block Lease) dated December 20, 1991, and recorded December 20, 1991, in the Official Records as Instrument No. 91-338212 (the "Second Supplemental Agreement") and by that certain Third Supplemental Agreement (Gallagher Block Lease) dated March 24, 1992, and recorded May 13, 1992, in the Official Records as Instrument No. 92-148906 (the "Third Supplemental Agreement"). All initially capitalized terms used in this Agreement and not specifically defined shall have the meanings given such terms in the Lease unless the context herein clearly requires otherwise.

B. As referenced in the First Supplemental Agreement, Bankers Trust Company, a New York banking corporation ("Bank") has made a term and construction loan to Lessee (the "Loan"), which Loan is secured by, among other things, (i) that certain Construction and Term Loan Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing dated as of June 21, 1988 (as amended to date and concurrently herewith, the "Deed of Trust") and recorded June 22, 1988 in the Official Records as Instrument No. 88-148840; and (ii) that Certain Assignment of Leases dated as

Fidelity

PORT OF OAKLAND - OFFICIAL BUSINESS
DOCUMENT REQUIRED TO BE RECORDED UNDER GOVERNMENT CODE SECTION 37393, AND ENTITLED TO FREE RECORDATION UNDER GOVERNMENT CODE SECTION 27383

RECORDED ON BEHALF OF AND WHEN RECORDED RETURN TO:

Stanley P. Hébert
Port Attorney
Port of Oakland
530 Water Street, 4th Floor
Oakland, California 94607

LOS 13042-01

RECORDED IN OFFICIAL RECORDS
ALAMEDA COUNTY
PATRICK O'CONNELL, CO. RECORDER

Commercial Real Est.
Doolittle
Henson
Jacobs
Jones
Kammermeier
Ogden
Sanchez
Shetrow
Szudy
Tash
Tse
Washington
White
Wong
Division File

ORIGINAL

FOURTH SUPPLEMENTAL AGREEMENT AND ESTOPPEL
(SITE A OFFICE BUILDING COMPLEX LEASE)

THIS FOURTH SUPPLEMENTAL AGREEMENT AND ESTOPPEL (this "**Agreement**"), dated as of July 1, 1993 ("Effective Date"), is by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, hereinafter called the "**Port**" or "**Lessor**", and **OAKLAND PORTSIDE ASSOCIATES**, a California limited partnership, hereinafter called "**Lessee**" or "**OPA**".

R E C I T A L S

A. Lessor and Lessee are parties to that certain Lease (as such Lease has been, is hereby, or may hereafter be amended, modified or supplemented, the "Lease") dated April 9, 1987 and recorded August 5, 1987, in the Official Records of Alameda County, California (the "Official Records") as Instrument No. 87-219662, which lease has been supplemented and amended by that certain First Supplemental Agreement dated April 5, 1988 and recorded June 22, 1988 in the Official Records as Instrument No. 88-148837 (the "First Supplemental Agreement"), by that certain Second Supplemental Agreement and Estoppel (Site A Office Building Complex Lease) dated December 20, 1991, and recorded December 20, 1991, in the Official Records as Instrument No. 91-338214 (the "Second Supplemental Agreement") and by that certain Third Supplemental Agreement (Site A Office Building Complex Lease) dated March 24, 1992, and recorded May 13, 1992, in the Official Records as Instrument No. 92-148907 (the "Third Supplemental Agreement"). All initially capitalized terms used in this Agreement and not specifically defined shall have the meanings given such terms in the Lease unless the context herein clearly requires otherwise.

B. As referenced in the First Supplemental Agreement, Bankers Trust Company, a New York banking corporation ("Bank") has made a term and construction loan to Lessee (the "Loan"), which Loan is secured by, among other things, (i) that certain Construction and Term Loan Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing dated as of June 21, 1988 (as amended to date and concurrently herewith, the "Deed of Trust") and recorded June 22, 1988 in the Official Records as Instrument No. 88-148840; and (ii) that Certain Assignment of Leases dated as

FOURTH SUPPLEMENTAL AGREEMENT

THIS FOURTH SUPPLEMENTAL AGREEMENT, dated as of March 1, 1994 (the "Third Amended Lease"), by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, (hereinafter "Port"), and **SCOTT'S JACK LONDON SEAFOOD, INC.**, a corporation, (herein "Lessee").

W I T N E S S E T H:

WHEREAS, the Port, as Lessor, and **SCOTT'S JACK LONDON SEAFOOD, INC.**, as Lessee, are parties to that certain Lease dated the April 9, 1987, recorded on September 9, 1988, as Document Number 88-237370 of the Official Records of Alameda County (said Lease, as previously amended, is herein called "the Lease"); and

WHEREAS, the Port and Lessee wish to amend the Lease to delete CAM-Promotion Percentage Rent and to increase the amount of Percentage Rent;

NOW, THEREFORE, the Port and Lessee agree as follows:

1. **Percentage Rent**

That portion of Section 4.2.1. of the Lease that provides as follows:

"... equal to 4.2% of 'Gross Receipts'..."

is hereby amended to read as follows:

"... equal to 4.5% of 'Gross Receipts'..."

2. **CAM-Promotion Percentage Rent**

Section 17 of the Lease is hereby amended to read as follows:

"17. **Required Marketing Expenditures; Additional Rent**

As used in this Section 17, "Lessee's Fiscal Year" means the period April 1 through March 31. The term "marketing" includes restaurant advertising, publicity and promotions. Lessee shall provide to the Port not later than May 1, 1994, written

verification of the amount Lessee spent on marketing the restaurant on the Premises for Lessee's Fiscal Year 1993-1994. Lessee agrees that said amount is subject to audit by the Port. For Lessee's Fiscal Year 1994-1995 and in each subsequent Lessee's Fiscal Year of the term of the lease (except for the last Lessee's Fiscal Year for which an appropriate proration shall be made if required) Lessee shall either (1) spend not less than $28,000 more for marketing the restaurant on the Premises than Lessee spent for marketing in Lessee's Fiscal Year 1993-1994 or (2) pay to the Port, as additional rent, not later than 30 days after Lessee's Fiscal Year in question the shortfall between (a) what Lessee spent on marketing the restaurant in said Lessee's Fiscal Year and (2) the amount Lessee spent on marketing the restaurant in Lessee's Fiscal Year 1993-1994, increased by $28,000. Lessee shall maintain complete records of all marketing expenditures for the same period as the Lease requires for maintenance of other records of business transactions in order to calculate rent, and the Port shall be entitled to review and copy said records on the same terms and conditions that the Port may review and copy said other records of business transactions. Lessee shall submit to the Port within 30 days after the end of Lessee's Fiscal Year 1994-1995, and within 30 days after the end of each subsequent Lessee's Fiscal Year (or, if the term of this Lease expires or terminates on other than the last day of a Lessee's Fiscal Year, then within 30 days after the date of expiration or termination) a complete and detailed accounting of all amounts Lessee spent for marketing the restaurant in the immediately preceding Lessee's Fiscal Year.

3. **Effective Date**

This Agreement shall be effective April 1, 1994. Sections 1 and 2 of this Agreement shall apply to the portion of the term commencing April 1, 1994, and all payments of rent due under the Lease for the portion of the term before March 1, 1994, shall remain due and payable notwithstanding said Sections 1 and 2.

4. **Lease In Effect**

Except as provided in this Agreement, the Lease, as previously amended, is hereby ratified, confirmed and approved.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
Executive Director

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation

By _____
(Signature)

R. J. Gallagher
(Print or Type Name)

Attest _____
(Signature)

Michael Stagg
(Print or Type Name)

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE PORT ATTORNEY.

Approved as to form and legality this 25th day of May, 1994.

_____
Port Attorney

Port Resolution No. 94071

THIRD SUPPLEMENTAL AGREEMENT

THIS THIRD SUPPLEMENTAL AGREEMENT, dated as of April 6, 1993 (the "Third Amended Lease"), by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, (hereinafter "Port"), and **SCOTT'S JACK LONDON SEAFOOD, INC.**, a corporation, (herein "Lessee").

W I T N E S S E T H:

WHEREAS, the Port, as Lessor, and **SCOTT'S JACK LONDON SEAFOOD, INC.**, as Lessee, are parties to that certain Lease dated the April 9, 1987, recorded on September 9, 1988, as Document Number 88-237370 of the Official Records of Alameda County; and

WHEREAS, the Port and Lessee have entered into that certain First Supplemental Agreement dated as of September 5, 1989 (the "First Amended Lease"), which amends the Lease by providing for deferral of portions of the Minimum Monthly Rent for that portion of the term of the Lease from December 1, 1988, through December 31, 1989, for the deferral of a total of $263,000 in Minimum Monthly Rent during said portion of the term of the Lease; and

WHEREAS, the Port and Lessee have entered into that certain Second Supplemental Agreement dated as of June 2, 1992 (the "Second Amended Lease"), which further amends the Lease by providing for deferral of additional rent in the amount of $87,500.34;

WHEREAS, Lessee has requested the Port to agree to a deferral of additional rent, and to a four-year schedule (beginning July 1, 1993) for repayment of all deferred and unpaid rent;

WHEREAS, the Port and Lessee wish to amend the Lease to provide for certain rental deferrals and related agreements;

NOW, THEREFORE, the Port and Lessee agree as follows:

1. **Rent Deferral**

1.1. **Rent Deferral (New Deferral Amount)**: The Port and Lessee agree that the following estimated amount of rent will have accrued and been unpaid by agreement of the Port and Lessee under the First Amended Lease, the Second Amended Lease and the Third Amended Lease as of June 30, 1993:

(a)	**Rent Deferred Under First Amended Lease And Second Amended Lease**: Rent deferred and which will remain unpaid as of June 30, 1993, assuming Lessee makes the payments required under the Second Amended Lease----------	$169,615.66
(b)	**Rent Deferred Under This Third Amended Lease**: All minimum monthly rental due under Lease for the period January 1, 1993, through June 30, 1993, (except for payments on New Deferral Amount under the Second Amended Lease)----------	$145,000.00 (estimate only)
	TOTAL -------	$314,615.66 (estimate only)

The above stated total estimated amount of $314,615.66 is herein referred to as the "Revised New Deferred Amount." It is understood and agreed that neither the calculation of the Revised New Deferred Amount nor any other provision of this Third Amended Lease shall constitute a waiver or release of Lessee from payment of any rent obligation which is based upon a percentage of Gross Receipts should a review or audit of Gross Receipts show that Lessee is obligated to pay more rent than previously was assumed.

1.2. **Payment of Revised New Deferral Amount**: The Port agrees that Lessee may defer the payment of all rent coming due under the Lease for the period January 1, 1993, through June 30, 1993 (except for payments on the New Deferral Amount under the Second Amended Lease). Lessee agrees to pay to the Port the Revised New Deferral Amount, together with interest at the rate of eight and one-half percent interest (8½%) per annum on the unpaid balance, in forty-eight (48) equal monthly installments commencing July 1, 1993, and continuing each month thereafter until all of the Revised New Deferral Amount, including said interest, has been paid

in full to the Port. Each monthly installment shall be due on or before the first day of the month. The payment schedule for Lessee's payment of the Revised New Deferral Amount, including interest thereon, is attached hereto as Exhibit "A-4". Lessee and the Port agree that when the actual amount of rent deferred for the period January 1, 1993, through June 30, 1993, is determined, each of them shall execute an amendment to the Lease setting forth such determination and attaching an appropriate revision to Exhibit "A-4."

2. **Lease In Effect**

Except as provided in this Third Amended Lease, the Lease, as previously amended, is hereby ratified, confirmed and approved.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
Executive Director

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation

By _____
(Signature)

Raymond J. Gallagher
(Print or Type Name)

Attest _____
(Signature)

Bettie A. McCoy
(Print or Type Name)

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE PORT ATTORNEY.

Approved as to form and legality this 30th day of June, 1993.

Stanley P. Hébert
Port Attorney

Port Resolution No. 93138

EXHIBIT
"A-4"

Estimated
AMORTIZATION SCHEDULE FOR SCOTT'S SEAFOOD

PRINCIPAL	314,615.66
RATE	8.50
TERM (IN YEARS)	4.00
PAYMENT	7,754.74

PERIOD #	PAYMENT	INTEREST	PRINCIPAL	O/S BALANCE
				314,615.66
07/01/93	7,754.74	2,228.53	5,526.21	309,089.45
08/01/93	7,754.74	2,189.38	5,565.36	303,524.09
09/01/93	7,754.74	2,149.96	5,604.78	297,919.31
10/01/93	7,754.74	2,110.26	5,644.48	292,274.83
11/01/93	7,754.74	2,070.28	5,684.46	286,590.36
12/01/93	7,754.74	2,030.02	5,724.73	280,865.64
01/01/94	7,754.74	1,989.46	5,765.28	275,100.36
02/01/94	7,754.74	1,948.63	5,806.11	269,294.24
03/01/94	7,754.74	1,907.50	5,847.24	263,447.00
04/01/94	7,754.74	1,866.08	5,888.66	257,558.34
05/01/94	7,754.74	1,824.37	5,930.37	251,627.97
06/01/94	7,754.74	1,782.36	5,972.38	245,655.60
07/01/94	7,754.74	1,740.06	6,014.68	239,640.91
08/01/94	7,754.74	1,697.46	6,057.29	233,583.63
09/01/94	7,754.74	1,654.55	6,100.19	227,483.44
10/01/94	7,754.74	1,611.34	6,143.40	221,340.04
11/01/94	7,754.74	1,567.83	6,186.92	215,153.12
12/01/94	7,754.74	1,524.00	6,230.74	208,922.38
01/01/95	7,754.74	1,479.87	6,274.88	202,647.50
02/01/95	7,754.74	1,435.42	6,319.32	196,328.18
03/01/95	7,754.74	1,390.66	6,364.08	189,964.10
04/01/95	7,754.74	1,345.58	6,409.16	183,554.93
05/01/95	7,754.74	1,300.18	6,454.56	177,100.37
06/01/95	7,754.74	1,254.46	6,500.28	170,600.09
07/01/95	7,754.74	1,208.42	6,546.32	164,053.77
08/01/95	7,754.74	1,162.05	6,592.69	157,461.07
09/01/95	7,754.74	1,115.35	6,639.39	150,821.68
10/01/95	7,754.74	1,068.32	6,686.42	144,135.26
11/01/95	7,754.74	1,020.96	6,733.78	137,401.47
12/01/95	7,754.74	973.26	6,781.48	130,619.99
01/01/96	7,754.74	925.22	6,829.52	123,790.47
02/01/96	7,754.74	876.85	6,877.89	116,912.58
03/01/96	7,754.74	828.13	6,926.61	109,985.97
04/01/96	7,754.74	779.07	6,975.67	103,010.29
05/01/96	7,754.74	729.66	7,025.09	95,985.21
06/01/96	7,754.74	679.90	7,074.85	88,910.36
07/01/96	7,754.74	629.78	7,124.96	81,785.40
08/01/96	7,754.74	579.31	7,175.43	74,609.97
09/01/96	7,754.74	528.49	7,226.25	67,383.72
10/01/96	7,754.74	477.30	7,277.44	60,106.27
11/01/96	7,754.74	425.75	7,328.99	52,777.28
12/01/96	7,754.74	373.84	7,380.90	45,396.38
01/01/97	7,754.74	321.56	7,433.18	37,963.20
02/01/97	7,754.74	268.91	7,485.84	30,477.36
03/01/97	7,754.74	215.88	7,538.86	22,938.50
04/01/97	7,754.74	162.48	7,592.26	15,346.24
05/01/97	7,754.74	108.70	7,646.04	7,700.20
06/01/97	7,754.74	54.54	7,700.20	(0.00)
	372,227.63	57,611.97	314,615.66	(0.00)

DUPLICATE ORIGINAL

THIRD SUPPLEMENTAL AGREEMENT

Between

PORT OF OAKLAND

And

SCOTT'S JACK LONDON SEAFOOD, INC.,
a Corporation

Dated

April 6, 1993

DUPLICATE ORIGINAL

SECOND SUPPLEMENTAL AGREEMENT

Between

PORT OF OAKLAND

And

SCOTT'S JACK LONDON SEAFOOD, INC.,
a Corporation

Dated

June 2, 1992

SECOND SUPPLEMENTAL AGREEMENT

THIS SECOND SUPPLEMENTAL AGREEMENT, dated as of June 2, 1992, by and between the **CITY OF OAKLAND**, a municipal corporation, acting by and through its Board of Port Commissioners, (hereinafter "Port"), and **SCOTT'S JACK LONDON SEAFOOD, INC.**, a corporation, (herein "Lessee").

W I T N E S S E T H:

WHEREAS, the Port, as Lessor, and **SCOTT'S JACK LONDON SEAFOOD, INC.**, as Lessee, are parties to that certain Lease dated the April 9, 1987, recorded on September 9, 1988, as Document Number 88-237370 of the Official Records of Alameda County;

WHEREAS, the Port and Lessee have entered into that certain First Supplemental Agreement dated as of September 5, 1989, which amends the Lease by providing for deferral of portions of the Minimum Monthly Rent for that portion of the term of the Lease from December 1, 1988, through December 31, 1989, for the deferral of a total of $263,000 in Minimum Monthly Rent during said portion of the term of the Lease;

WHEREAS, through July 31, 1992, the balance of the Minimum Monthly Rent deferred under the First Supplemental Agreement, that remains unpaid, is $156,737.72, and Lessee has requested the Port to defer payment of an additional amount of rent, in the amount of $87,500.34 for certain past periods, thereby increasing the total amount of rent requested to be deferred through July 31, 1992, to the amount of $244,238.06; and

WHEREAS, the Port and Lessee wish to amend the Lease to provide for certain rental deferrals and related agreements;

NOW, THEREFORE, the Port and Lessee agree as follows:

1. **Rent Deferral**

1.1. **Rent Deferral (New Deferral Amount)**: The Port and Lessee agree that the following rent, among other rent, has accrued under the Lease:

(a)	**Minimum Monthly Rent**: accrued between December 1, 1988, and December 31, 1988, which was deferred under the First Supplemental Agreement and which remains unpaid (principal only) ----------	$156,737.72
(b)	**Other Accrued And Unpaid Rent**: (i) Minimum Monthly Rent and CAM-Promotion Percentage Rent for months of November and December 1991, and January and February 1992----------	$73,390.24
	(ii) Percentage Rent for months of December 1991, and January 1992----------	$14,110.10
	TOTAL -------	$244,238.06

The above stated total sum of $244,238.06 is hereinafter referred to as the "New Deferred Amount." It is understood and agreed that neither the calculation of the New Deferred Amount nor any other provision of this Second Supplemental Agreement shall constitute a waiver or release of Lessee from payment of any rent obligation which is based upon a percentage of Gross Receipts should a review or audit of Gross Receipts show that Lessee is obligated to pay more rent that previously was assumed.

1.2. **Payment of New Deferral Amount**: Lessee agrees to pay to the Port the New Deferral Amount, together with interest at the rate of eight and one-half percent interest (8½%) per annum on the unpaid balance, in thirty-six equal monthly installments commencing on August, 1992, and continuing each month thereafter until all of the New Deferral Amount, including said interest, has been paid in full to the Port. Each monthly installment shall be due on or before the first day of the month. The payment schedule for Lessee's payment of the New Deferral Amount, including interest thereon, is attached hereto as Exhibit "A-3".

2. **Delinquency Charge**

That portion of the first sentence of Section 4.3 of the Lease which provides "for a period of 10 days after it becomes due

and payable" is hereby amended to read "for a period of 20 days after it becomes due and payable."

3. **Cancellation of Delinquency Charges**

The Port hereby agrees, cancels, waives and releases the sum of $19,625.81 of delinquency charges incurred by Lessee under Section 4.3 of the Lease as of May 11, 1992, and in consideration therefor Lessee hereby waives any and all rights (if any), and releases the Port from any and all liability to (if any) or claims by Lessee, arising out of or in connection with the April 24, 1991, letter agreement between the Port (acting through its Executive Director) and Lessee (acting through Raymond Gallagher) regarding the Pavilion building in Jack London Square, including, without limitation, any rights (if any) or claims to any credit against any rent accrued, paid or to be accrued under the Lease.

4. **Additional Security Deposit**

In addition to the Deposit required to be maintained by Lessee under Section 4.5 of the Lease, Lessee also shall deposit and maintain on deposit with the Port, until Lessee has fully satisfied all of its obligations under Section 1.2 of this Second Supplemental Agreement, an additional security deposit in the sum of $100,000. Said additional security deposit shall be in cash or shall be an irrevocable letter of credit and, except as otherwise provided in this Section 4, shall be subject to all of the terms and provisions applicable to the Deposit under Section 4.5 of the Lease.

Any irrevocable letter of credit provided hereunder shall be in the form of Exhibit "B-3" attached hereto and by this reference incorporated herein. The irrevocable letter of credit shall be confirmed by and payable at the counters of a bank in San Francisco or Oakland. Lessee agrees in good faith to use its best efforts to include the fourth paragraph of Exhibit "B-3", pertaining to automatic extension of the irrevocable letter of credit, in any such letter of credit submitted to the Port pursuant to this Section. If despite Lessee's good faith best efforts Lessee is unable to secure such a provision, the Port will accept a letter of credit without such provisions, but in that case unless the Port receives a written extension or replacement of the letter of credit at least 30 days before the end of the term of the letter of credit, the Port without notice to Lessee may negotiate the letter of credit and retain all proceeds as a cash deposit pursuant to the terms of this Section 4 and Section 4.5 of the Lease.

3. **Effective Date; First Supplemental Agreement**

This Second Supplemental Agreement shall not become effective unless and until Lessee has submitted to the Port the additional security deposit required by Section 4 hereof and the Port Attorney has approved the form and legality of the additional security deposit if it is an irrevocable letter of credit. At such time that this Second Supplemental Agreement may become effective, the First Supplemental Agreement shall then be deemed terminated and canceled as to all obligations thereunder which otherwise would accrue after the effective date of the Second Supplemental Agreement. The effectiveness of the this Second Supplemental Agreement shall be evidenced by its recordation at the request of the Port Attorney.

4. **Lease In Effect**

Except as provided in this Second Supplemental Agreement, the Lease is hereby ratified, confirmed and approved.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
Executive Director

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation

By _____
(Signature)

Raymond J Gallagher
(Print or Type Name)

Attest _____
(Signature)

SUSAN J. CHRISTIANSEN
(Print or Type Name)

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE PORT ATTORNEY.

Approved as to form and legality this 9th day of November, 1992

_____
Port Attorney

Port Resolution No. 92414

SCOTT'S JACK LONDON SEAFOOD

PRINCIPAL	244,238.06
RATE	8.50
TERM (IN YEARS)	3.00
PAYMENT	7,709.99

PERIOD #	PAYMENT	INTEREST	PRINCIPAL	O/S BALANCE
				244,238.06
08/01/92	7,709.99	1,730.02	5,979.97	238,258.09
09/01/92	7,709.99	1,687.66	6,022.33	232,235.76
10/01/92	7,709.99	1,645.00	6,064.99	226,170.76
11/01/92	7,709.99	1,602.04	6,107.95	220,062.81
12/01/92	7,709.99	1,558.78	6,151.22	213,911.59
01/01/93	7,709.99	1,515.21	6,194.79	207,716.81
02/01/93	7,709.99	1,471.33	6,238.67	201,478.14
03/01/93	7,709.99	1,427.14	6,282.86	195,195.28
04/01/93	7,709.99	1,382.63	6,327.36	188,867.92
05/01/93	7,709.99	1,337.81	6,372.18	182,495.74
06/01/93	7,709.99	1,292.68	6,417.32	176,078.43
07/01/93	7,709.99	1,247.22	6,462.77	169,615.66
08/01/93	7,709.99	1,201.44	6,508.55	163,107.11
09/01/93	7,709.99	1,155.34	6,554.65	156,552.48
10/01/93	7,709.99	1,108.91	6,601.08	149,951.37
11/01/93	7,709.99	1,062.16	6,647.84	143,303.53
12/01/93	7,709.99	1,015.07	6,694.93	136,608.61
01/01/94	7,709.99	967.64	6,742.35	129,866.26
02/01/94	7,709.99	919.89	6,790.11	123,076.15
03/01/94	7,709.99	871.78	6,838.20	116,237.94
04/01/94	7,709.99	823.35	6,886.64	109,351.30
05/01/94	7,709.99	774.57	6,935.42	102,415.88
06/01/94	7,709.99	725.46	6,984.55	95,431.33
07/01/94	7,709.99	675.97	7,034.02	88,397.31
08/01/94	7,709.99	626.15	7,083.85	81,313.46
09/01/94	7,709.99	575.97	7,134.02	74,179.44
10/01/94	7,709.99	525.44	7,184.56	66,994.88
11/01/94	7,709.99	474.55	7,235.45	59,759.44
12/01/94	7,709.99	423.30	7,286.70	52,472.74
01/01/95	7,709.99	371.68	7,338.31	45,134.43
02/01/95	7,709.99	319.70	7,390.29	37,744.13
03/01/95	7,709.99	267.35	7,442.64	30,301.49
04/01/95	7,709.99	214.64	7,495.36	22,806.14
05/01/95	7,709.99	161.54	7,548.45	15,257.68
06/01/95	7,709.99	108.06	7,601.92	7,655.77
07/01/95	7,709.99	54.23	7,655.77	0.00
	277,559.79	33,321.73	244,238.06	0.00

Exhibit "A-3"

IRREVOCABLE LETTER OF CREDIT

Irrevocable and Transferable
Letter of Credit #_____

Amount: U.S. $_____

To: Port of Oakland
530 Water Street
Oakland, California 94604

_____, 19___

Gentlemen:

For the account of Scott's Jack London Seafood, Inc., a California corporation, we hereby issue in your favor our Irrevocable Letter of Credit for U.S. $100,000.00.

The amount of this credit is available to you by your drafts on us at sight accompanied by the following statement signed by your Executive Director or Director of Finance.

"I certify that the amount of our drawing is due the Port of Oakland pursuant to the terms of the Lease dated April 9, 1987, between the Port of Oakland and Scott's Jack London Seafood, Inc., as said Lease has been amended by the Second Supplemental Agreement dated as of June 2, 1992, between said parties."

Drafts must clearly specify the number of this credit and be presented at our counters at _____, in Oakland, California (or in San Francisco, California) not later than the close of business on _____, 19____, or such later date as this credit shall have been extended to.

This credit shall be deemed automatically extended without amendment for additional periods of one year from the present or any future expiration date unless thirty (30) days prior to any such date we notify you and Scott's Jack London Seafood, Inc., by registered mail that we elect not to consider the letter of credit renewed for any such additional period. You may then draw on us at sight with the above specified signed statement.

This Letter of Credit is subject to the "Uniform Custom and Practice for Documentary Credits" (1983 Revision), International Chamber of Commerce Publication No. 400.

We engage with you that drafts drawn under and in compliance with the terms of this credit will be duly honored by us on delivery of documents as specified.

Very truly yours,

_____

Authorized Signature and Title

PORT OF OAKLAND

BOARD OF PORT COMMISSIONERS

First Supplemental Agreement

THIS FIRST SUPPLEMENTAL AGREEMENT, dated as of this 5th day of September 1989, by and between the CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners (hereinafter "Port"), and SCOTT'S JACK LONDON SEAFOOD, INC., a corporation (hereinafter "Lessee").

W I T N E S S E T H:

WHEREAS, the Port as Lessor and Scott's Jack London Seafood, Inc., as Lessee are parties to that certain Lease dated April 9, 1987, recorded on September 9, 1988 as Document Number 88-237370 of the Official Records of Alameda County;

WHEREAS, the parties to the Lease desire to amend the minimum rent provision of said Lease to provide for a rental deferral period and to make provisions for the repayment of rent deferred during the specified period;

NOW, THEREFORE, the Port and Lessee agree as follows:

1. Rental Deferral: Notwithstanding any provision in that certain Lease dated April 9, 1987 between the Port and Lessee to the contrary, commencing December 1, 1988 ("accrual date") through and including December 31, 1989, ("deferral period") the Port hereby agrees to defer portions of rent and other monies due it from Lessee pursuant to that certain Lease between the Port and Scott's Jack London Seafood, Inc., dated April 9, 1987, and recorded the 19th day of September 1988 as Document No. 88-237370 in the Official Records of the Alameda County Recorder. Minimum monthly rent during the deferral period shall be FIVE THOUSAND AND 00/100 DOLLARS ($5,000.00). Lessee shall pay to the Port minimum monthly rent on or before the first day of each and every month during the term of this First Supplemental Agreement and any extension thereof, without setoff, in advance and without previous demand. The deferred amount shall be the rent due under that certain Lease between the Port and Scott's less Five Thousand and 00/100 Dollars ($5,000.00), the minimum monthly rent due pursuant to this First Supplemental Agreement, ("Deferred Amount").

2. Effective Date Term: This First Supplemental Agreement shall become effective the date it is signed on behalf of the Port (the "Effective Date"). The term of this First Supplemental shall be six (6) years commencing on the accrual date.

3. Option to Extend Term of Deferral Period: The Port in its sole discretion may extend the term of the deferral period for a one (1) year period commencing when deferral period specified in Paragraph 1 of this First Supplemental Agreement expires. The Port and Lessee agree to promptly execute and acknowledge appropriate documents memorializing exercise of the option hereunder.

4. Interest: Interest on the principal balance remaining unpaid shall accrue from the commencement of the accrual date at the prime rate as announced by the Bank of America on that date. Such rate shall not exceed 10% or be less than 8.5% per annum. Should the Bank of America no longer exist or fail to announce a prime rate, the prime rate shall be the rate charged to the most creditworthy borrowers for ninety-day unsecured loans.

5. Adjustment of Interest: At the end of the 1st six (6) months of the term of this Supplemental Agreement and every six (6) months thereafter during the remainder of said term ("Interest Rate Adjustment Date"), the interest rate herein provided to be paid by Lessee on or before the first day of each calendar month during the term of this Agreement, shall be adjusted to the prime rate as announced by the Bank of America each adjustment to become effective on the interest rate adjustment date, provided that in no event shall the adjusted interest rate be less than .085% or greater than .10%. Pending the determination of the adjusted interest rate, Lessee shall continue to pay to the Port the amount of the payable for the preceding period; and if the adjusted interest rate as finally so determined should exceed the interest rate for the previous period, Lessee shall pay to the Port the accrued excess amount then due within 30 days after the Port sends to Lessee a written request therefore.

6. Interest-only Period: Interest only shall be payable on the unpaid balance of this First Supplemental Agreement in consecutive monthly installments on the first day of each and every month during the term of this First Supplemental Agreement, without setoff, in advance and without previous demand commencing January 1, 1990, and continuing until December 1, 1994, at which time any remaining principal and accrued but unpaid interest shall be due and payable. However, if Lessee's gross receipts, as defined by that certain Lease between the Port and Lessee dated April 9, 1987, exceed Five Hundred Thousand and 00/100 Dollars ($500,000.00) in any one

month, Lessee shall pay to the Port the sum of Three Thousand and 00/100 Dollars ($3,000.00) which sum shall be applied to the principal due hereunder in addition to any monthly interest rate payments and other payments due pursuant to this First Supplemental Agreement.

7. Letters of Credit: Upon execution of this ~~Third~~ First Supplemental Agreement, Lessee shall pay to the Port One Hundred Thousand and 00/100 Dollars ($100,000.00) as a deposit, which sum (and any additions thereto required hereunder) shall be evidenced by irrevocable letter of credit. Said sums, together with any additions thereto required hereunder, is sometimes herein referred to as "the Deposit". On January 1, 1990, Lessee shall pay to the Port the remaining deferred amount, (the total deferred amount less the before-mentioned $100,000.00 evidenced by a letter of credit) which shall also be evidenced by an irrevocable letter of credit. The Deposit shall be retained by the Port as a debtor and not as a trustee. If Lessee defaults in the performance of any obligation hereunder, the Port may apply any portion of the Deposit as necessary to cure the default or to compensate the Port for the default, and Lessee, within 10 days after the Port's demand therefore, shall deposit with the Port the sum that is necessary to restore the Deposit to the full amount then required by this First Supplemental Agreement. Upon termination of this First Supplemental Agreement, the deposit shall be returned to Lessee at Lessee's last address known to the Port.

Each irrevocable letter of credit shall be in the form of Exhibit "A" attached hereto and by this reference incorporated herein. The irrevocable letter of credit shall be confirmed by and payable at the counters of Imperial Bank of Oakland. Lessee agrees in good faith to use its best efforts to include the fourth paragraph of Exhibit "A", pertaining to automatic extension of the irrevocable letter of credit, in any such letter of credit submitted to the Port pursuant to this Section. If despite Lessee's good faith best efforts Lessee is unable to secure such a provision, the Port will accept a letter of credit without such provisions, but in that case unless the Port receives a written extension of the letter of credit at least 30 days before the end of the term of the letter of credit, the Port without notice to Lessee may negotiate the letter of credit and retain all proceeds as a cash deposit pursuant to the terms of this Section.

8. Lease in Effect: Except as provided in this First Supplemental Agreement, the Lease is hereby ratified, confirmed and approved.

IN WITNESS WHEREOF, the parties hereto thereunto duly authorized, have executed this agreement the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
President of said Board

By _____
Secretary of said Board

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation

By _____
(Signature)

Raymond J. Gallagher
(Print or Type Name)

Attest _____
(Signature)

Malcolm Brod
(Print or Type Name)

Approved as to form and legality this 20th day of October, 1989.

_____
Port Attorney

Port Resolution No. 31598

IMPERIAL BANK
California's Business Bank
IMPERIAL BANK INTERNATIONAL
Telex 4740628
Answer Back Imperial INW
International Division • 9920 South La Cienega Boulevard • Inglewood, California 90301

DATE: July 31, 1989

IRREVOCABLE STAND-BY
LETTER OF CREDIT NO. SB00339

ADVISING BANK:

FOR ACCOUNT OF:
SCOTT'S JACK LONDON SEAFOOD, INC.
3470 MOUNT DIABLO BLVD.
SUITE #A310
LAFAYETTE, CA. 94549

BENEFICIARY:
PORT OF OAKLAND
66 JACK LONDON SQUARE
P.O.BOX 2064
OAKLAND, CA. 94604

AMOUNT:
USD 100,000.00
One Hundred Thousand U.S.DOLLARS
Only

EXPIRATION: December 31, 1989

GENTLEMEN:

WE HEREBY ESTABLISH OUR IRREVOCABLE LETTER OF CREDIT IN YOUR FAVOR AVAILABLE BY YOUR DRAFT(S) DRAWN AT SIGHT ON IMPERIAL BANK, AND ACCOMPANIED BY DOCUMENTS SPECIFIED BELOW.

COVERING:
RENT ACCURAL FOR SCOTT'S JACK LONDON SEAFOOD, INC.

DOCUMENTS REQUIRED:
(1) A STATEMENT SIGNED BY AN AUTHORIZED PORT OF OAKLAND OFFICIAL DECLARING THAT SCOTT'S JACK LONDON SEAFOOD, INC. IS PAST DUE OR DELINQUENT UNDER THEIR LEASE AGREEMENT DATED APRIL 4, 1987 AS MODIFIED BY THE PORT OF OAKLAND AGENDA MINUTES DATED FEBRUARY 7, 1989.
(2) THIS ORIGINAL LETTER OF CREDIT

ALL BANKING CHARGES OTHER THAN OURS ARE FOR BENEFICIARY'S ACCOUNT.
ALL DOCUMENTS TO BE FORWARDED TO US IN ONE COVER BY REGISTERED AIRMAIL.

WE HEREBY AGREE WITH BONA FIDE HOLDERS THAT ALL DRAFT(S) DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT SHALL MEET WITH DUE HONOR UPON PRESENTATION AND DELIVERY OF DOCUMENTS AS SPECIFIED TO THE DRAWEE IF DRAWN AND PRESENTED FOR NEGOTIATION ON OR BEFORE EXPIRATION DATE OF THIS CREDIT.
THE AMOUNT AND DATE OF EACH NEGOTIATION MUST BE ENDORSED ON THE BACK HEREOF BY THE NEGOTIATING BANK.

THIS CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1983 REVISION) INTERNATIONAL CHAMBER OF COMMERCE, PUBLICATION NUMBER 400.

AUTHORIZED SIGNATURE

AUTHORIZED SIGNATURE

IRREVOCABLE LETTER OF CREDIT

Irrevocable and Transferable
Letter of Credit #_____

Amount: U.S. $_____

To: Port of Oakland
Attention: Director of Properties
66 Jack London Square
Oakland, California 94607

_____, 198__

Gentlemen:

For the account of [Lessee's Name], a California _____ _____ Partnership, we hereby issue in your favor our Irrevocable Letter of Credit for U.S. $_____.

The amount of this credit is available to you by your drafts on us at sight accompanied by the following statement signed by you.

> "I certify that the amount of our drawing is due the Port of Oakland pursuant to the terms of the Lease dated _____, 198__ between the Port of Oakland and [Lessee's Name], a [description of Lessee]."

Drafts must clearly specify the number of this credit and be presented at our counters at _____, in Oakland, California (or in San Francisco, California) not later than the close of business on _____, 19____, or such later date as this credit shall have been extended to.

This credit shall be deemed automatically extended without amendment for additional periods of one year from the present or any future expiration date unless thirty (30) days prior to any such date we notify you and [Lessee's Name] by

registered mail that we elect not to consider the letter of credit renewed for any such additional period. You may then draw on us at sight with your statement certifying that the amount drawn covers [Lessee's Name]S' outstanding obligation to you.

This Letter of Credit is subject to the "Uniform Custom and Practice for Documentary Credits" (1983 Revision), International Chamber of Commerce Publication No. 290.

We engage with you that drafts drawn under and in compliance with the terms of this credit will be duly honored by us on delivery of documents as specified.

Very truly yours,

_____

Authorized Signature and Title

D-606
Port--CEO/Secretary

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

On this _____day of _____, in the year _____, before me, _____, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared _____ and _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the _____Chief Executive Officer or his designee and _____ Secretary respectively of the Board of Port Commissioners of the City of Oakland, the municipal corporation that executed the within Instrument, and also known to me to be the officers who executed it on behalf of said City, and they acknowledged to me that said City executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
NOTARY PUBLIC in and for said
County of Alameda, State of California

D-606
Corporation--President/Secretary

STATE OF California)
) ss.
COUNTY OF Alameda)

On this 18th day of September, in the year 1989, before me, David Hoard, a Notary Public in and for such County and State, personally appeared Raymond J. Gallagher, personally known to me (or proved to me on the basis of satisfactory evidence) to be the _____ President, and Malcolm Stroud known to me (or proved to me on the basis of satisfactory evidence) to be the _____ Secretary of Scott's Jack London Seafood, Inc, the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such corporation executed the within Instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

OFFICIAL SEAL
DAVID HOARD
NOTARY PUBLIC - CALIFORNIA
ALAMEDA COUNTY
My Comm. Expires Dec. 21, 1990

David Hoard
NOTARY PUBLIC in and for said
County and State

COPY OF DOCUMENT RECORDED
ON SEP 19 1988 AS NO. 88-237370
HAS NOT BEEN COMPARED WITH ORIGINAL
ALAMEDA COUNTY RECORDER

LAW FILE COPY

LEASE

BETWEEN

PORT OF OAKLAND

AND

SCOTT'S JACK LONDON SEAFOOD, INC.

DATED

April 9, 1987

1
Scott's - (left side)

LEASE

BETWEEN

PORT OF OAKLAND

AND

SCOTT'S JACK LONDON SEAFOOD, INC.

DATED

April 9, 1987

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06/26/84 JEN:mg (D#154)
12/14/84 JEN:mg
03/14/85 JEN:mg
08/08/86 JEN:mgj
08/27/86 JEN:mgj
02/18/87 JEN:mgj
02/27/87 JEN:mgj
03/11/87 JEN:mgj (D#163)
03/20/87 JEN:mgj (D#165)
04/02/87 JEN:mgj (D#168)
04/08/87 JEN:mgj (D#173)

L E A S E

THIS LEASE, dated as of April 9, 1987, by and between the CITY OF OAKLAND, a municipal corporation ("the City"), acting by and through its Board of Port Commissioners ("the Port"), and SCOTT'S JACK LONDON SEAFOOD, INC., a corporation ("Lessee"),

W I T N E S S E T H:

WHEREAS, the City of Oakland is the owner in fee of that certain property located in the Port Area of the City of Oakland at Jack London Square, consisting of approximately .4851 acres of improved land, said property being referred to hereinafter as "the Property"; and

WHEREAS, the Port is vested with the complete and exclusive power, and it is the Port's duty for and on behalf of the City with respect to the Port Area, to make provisions for the needs of commerce, shipping and navigation of the port, to promote and develop the port, and in the exercise of such power and fulfillment of such duty, to enter into any lease of City-owned properties in the Port Area upon such terms and conditions as the Board of Port Commissioners shall prescribe, which terms and conditions shall include control over the rates, charges and practices of the Lessee to the extent permitted by law; and

WHEREAS, the Port has determined that commerce, shipping and navigation of the port will be promoted and enhanced by leasing the Property to Lessee for the uses and purposes, and subject to the terms and conditions, set forth in this Lease;

NOW, THEREFORE, for the better promotion of commerce, shipping and navigation and the development of the port, and for and in consideration of the faithful performance of the Port and Lessee of the terms, covenants and conditions hereof and of the payments herein provided to be made by Lessee, the Port and Lessee hereby agree as follows:

1. Lease and Description of the Property: The Port has leased and demised, and by these presents does lease and demise unto Lessee, and Lessee by these presents does lease, hire and take from the Port the Property which is located in the Port Area of the City of Oakland, County of Alameda, State of California, and more particularly described and depicted respectively in Exhibit A and Exhibit B attached hereto and by this reference incorporated herein. The Property together with the improvements thereon from time to time are sometimes hereinafter referred to as "the Premises".

This Lease is subject to (1) all easements, covenants, conditions, restrictions, reservations, rights of way, liens, encumbrances and other matters of record, (2) all matters discoverable by physical inspection of the Property or that would be discovered by an accurate survey of the Property and (3) all matters known to Lessee or of which Lessee has notice, constructive or otherwise including, without limitations, those shown on attached Exhibits A and B.

The Port reserves to itself and the right to grant to others in the future nonexclusive utility easements over, under, through, across or on the Property in locations that will not unreasonably interfere with Lessee's use of the Premises. Any interference shall be temporary, and all work on the Premises shall proceed expeditiously. Lessee shall be given reasonable notice before commencement of any work on the Premises. Such work shall not result in the closure of or unreasonable interference with the access to any business on the Premises. In the event the installation or maintenance of such future utility lines in such easements causes any damage to the Premises, or any portion thereof, including but not limited to pavement, curbs and sidewalks, the same shall be repaired by the Port at its expense, if not so repaired by the party installing and maintaining the line.

2. Effective Date; Term:

2.1. Effective Date; Term: This Lease shall become effective upon the effective date of the ordinance authorizing the Lease ("the Effective Date"). However, if said ordinance does not become effective immediately upon the expiration of 30 days from and after the date of its final passage because of the referendum process, then this Lease shall not become effective except by mutual written agreement of the Port and Lessee.

The term of this Lease shall commence upon the first day of the first full calendar month after the effective date of this Lease and shall terminate upon the 31st day of August, 2041.

3. Use of Premises:

3.1. Required and Permitted Uses: The Property shall be used by Lessee only for the maintenance and operation of a first-class restaurant and cocktail lounge and facilities incidental and reasonably related thereto.

3.2. Compliance with Law; Indemnity: Lessee shall not use or permit the Premises, or any part thereof, to be used in whole or in part for any purpose other than as hereinabove set forth, nor for any use in violation of any present or future laws, ordinances, general rules or regulations at any time applicable thereto of any public or governmental authority, including the City and the Port, relating to filling of or discharges into the water, sanitation or the public health, safety or welfare. Lessee hereby expressly agrees at all times during the term of this Lease, at its own cost, to maintain and operate the Premises in a clean, wholesome and sanitary condition, and Lessee shall at all times faithfully obey and comply with all laws, rules and regulations applicable thereto adopted by federal, state, local or other governmental bodies or departments or officers thereof and applicable to the Premises; provided, however, that Lessee may reasonably and in good faith contest any such law, rule or regulation through appropriate proceedings, and, during such contest, Lessee need not comply therewith, provided further, that Lessee shall at all times reasonably protect the interest of the Port under this Lease, shall indemnify the Port for all Port expenses (exclusive of general office and administrative expenses) actually and reasonably incurred as a result of said contest, and shall promptly comply with any such contested law, rule or regulation if any such contest is resolved against Lessee.

If major installations are required in the last 20 years of this Lease by such health or sanitary laws, Lessee may elect to terminate its Lease upon 6 months' prior written notice to the Port, if Lessee does not wish to pay the cost of such installations. For the purposes of this Section, the term "major installation" shall be deemed to be any installation for which the cost of construction is a sum exceeding the minimum rent paid for the first 6 months of the preceding year of the term of this Lease.

Lessee agrees to defend and indemnify the Port and Port officers, employees and agents from and against any penalties or charges and administrative and/or judicial proceedings (including, without limitation, attorneys' fees and legal expenses incurred by the Port in connection with such penalties or charges and proceedings) imposed on or involving the Port for any violation or alleged violation by Lessee or by Lessee's licensees, sublessees or invitees, of any and all laws, ordinances and regulations applicable to Lessee's use of the Premises and which violation is not solely the result of acts or omissions on the part of the Port or its officers, agents or employees.

4. Rent; Rent Adjustment; Performance Deposit:

4.1. Minimum Monthly Rent:

4.1.1. Minimum Monthly Rent: Minimum Monthly Rent is $13,100.00 per month.

Lessee shall pay to the Port Minimum Monthly Rent on or before the first day of each and every month during the term of this Lease, without setoff, in advance and without previous demand.

4.1.2. Adjustment of Minimum Rent: At the end of the first 12 months of the term of this Lease, and every 12 months thereafter during the remainder of said term ("Rent Adjustment Date"), the Minimum Rent herein provided to be paid by Lessee on or before the first day of each calendar month during said remaining term, shall be adjusted to equal 75% of the monthly average of the total of the Minimum Rent and Percentage Rent payable to the Port by Lessee for the 12 month period immediately preceding the Rent Adjustment Date; provided that in no event shall the adjusted Minimum Rent be less than the theretofore existing Minimum Rent. Notwithstanding the provisions of this Section 4.1.2 hereinabove set forth, in the event this Lease is assigned to another Lessee, other than Bayside Hosts, Inc., the minimum rent shall be immediately adjusted, effective on the date of any such assignment, to equal 100% of the monthly average of the total of the Minimum Rent and Percentage Rent payable to the Port by Lessee for the 12 month period immediately preceding the date of such assignment; provided that in no event shall the so adjusted Minimum Rent be less than the theretofore existing Minimum Rent; and provided further that in such event the said 100% of total rental criteria shall likewise apply to any

subsequent annual rental adjustments. Pending the final determination of the adjusted Minimum Rent, Lessee shall continue to pay to the Port the amount of the Minimum Rent payable for the preceding period, and if the adjusted Minimum Rent as finally so determined should exceed the amount of Minimum Rent for the previous period, Lessee shall pay to the Port the accrued excess amount then due within 30 days after the Port sends to Lessee a written request therefore.

After determination of the adjusted Minimum Rent the amount thereof may be adjusted upwards and made retroactive to the Rent Adjustment Date in the event and to the extent that the Port discovers through an audit or otherwise that Percentage Rent paid to the Port during said preceding 12-month period was less than the sum which actually should have been paid by Lessee to the Port pursuant to this Lease.

4.2. Percentage Rent:

4.2.1. Amount of Percentage Rent: Lessee shall pay to the Port, without setoff and without previous demand, within 15 days after the close of each calendar month of the term of this Lease, a further sum, herein called "Percentage Rent", equal to 4.2% of "Gross Receipts" during said calendar month.

Notwithstanding any other provision (if any) of this Lease to the contrary, Lessee shall pay all Percentage Rent required by this Lease within 30 days after expiration or earlier termination of the term of this Lease.

If any "Gross Receipts", upon which Percentage Rent is payable and which under this Lease may be accounted for an actual receipt basis, are received by or on behalf of Lessee after expiration or earlier termination of the term of this Lease, Lessee shall render a full report thereof to the Port and shall pay to the Port Percentage rent thereon within 15 days after receipt of such "Gross Receipts".

4.2.2. Definition of Gross Receipts: The term "Gross Receipts" when used in this Lease shall include all gross receipts from any and all business carried on in whole or in part upon the Premises, by Lessee or any subtenant, licensee or concessionaire of Lessee including but not limited to sales of food, alcoholic and non-alcoholic beverages and any and all other revenue and sales. Gross Receipts shall include cash and the

fair market value of any other consideration from such business. Except as expressly provided herein, no cost or expense shall be deduced in computing Gross Receipts.

Sales taxes collected by Lessee from its patrons or through vending machines shall be excluded from Gross Receipts.

No deduction shall be made from Gross Receipts by reason of any credit loss sustained or discount or deduction that may be applicable by reason of the acceptance or use of credit cards, other credit arrangements or the like. If a charge for any sale is not made or collected, the fair market value thereof nevertheless shall be included in the term Gross Receipts.

4.2.3. Percentage Rent Offset: There shall be subtracted from the Percentage Rent otherwise payable to the Port for activities on the Premises each month during the term hereof pursuant to this Section the amount of Minimum Rent for the month upon which such Percentage Rent is based, and only the difference, if any, obtained after subtracting such Minimum Rent from the Percentage Rent shall be payable to the Port hereunder.

4.2.4. Monthly Accounting: Lessee shall maintain or cause to be maintained adequate accounting systems and controls to insure that all Gross Receipts are recorded on an accrual basis. Within 15 days after the close of each calendar month during the term of this Lease, Lessee shall render to the Port, in a form reasonably satisfactory to the Port, an accounting for the preceding month of all business transactions that are subject to Percentage Rent, setting forth in particular for said month all Gross Receipts, as heretofore defined in this Section. Lessee shall keep or cause to be kept true and accurate books and records showing all of such business transactions, including without limitation business transactions of subtenants, and the Port shall have the right, through its representatives and at all reasonable times, upon at least 7 days' prior written notice to Lessee, to inspect such books and records, including City business tax records and State of California sales tax return records, and Lessee hereby agrees to make or cause to be made such books and records available to the Port or its authorized representatives upon request. Said books and records shall be retained for at least 7 years after occurrence of the transactions to which they relate. If such books and records are not kept and maintained within a radius of 50 miles from the main

offices of the Port in Oakland, California, upon request of the Port Lessee shall make such books and records available to the Port for inspection and audit at a location within said 50-mile radius or Lessee shall pay to the Port the reasonable and actual costs incurred by the Port in inspecting and auditing such books and records, including but not limited to travel, lodging and subsistence costs. If the Port's audit reveals that for any one year period Gross Receipts reported in Lessee's monthly accounting to the Port were 5% or more less than the Gross Receipts required to be reported pursuant to this Lease, Lessee shall pay to the Port all of the Port's reasonable and actual costs (including without limitation the prorated salary of the Port's auditors, fringes and overhead allocation) incurred by the Port in auditing such books and records. If, however, the parties cannot agree on the results of the Port's audit, the parties shall submit the dispute to 3 independent certified public accountants (CPAs) who practice in Oakland, the Port and Lessee each to pick 1 and the 2 CPAs to pick the third. The arbitration shall be conducted under the rules of the American Arbitration Association. The costs of retaining the CPA firms, as well as the Port's said reasonable and actual costs incurred by the Port in inspecting such books and records, shall be shared by the Port and Lessee in accordance with the decision of the CPAs based on the amount by which the decision of the CPAs exceeds or is less than the amount of the Gross Receipts in question reported by Lessee to the Port.

4.2.5. Maximum Percentage Rent: Lessee acknowledges that a substantial portion of the consideration for this Lease is the Percentage Rent to be paid to the Port, and it is therefore a condition of this Lease and Lessee hereby covenants and agrees that Lessee shall at all times use its best efforts to operate and maintain the Premises in a manner that will produce at all times the maximum volume of Percentage Rent consistent with the terms and conditions of this Lease.

4.3. Delinquency Charge: Any payment required to be made by Lessee under this Lease (all such payments are hereby agreed to be rent) that remains due and unpaid under the terms of this Lease for a period of 10 days after it becomes due and payable shall be subject to a delinquency charge, for violation of this Lease and as liquidated damages, of $50.00 plus a sum equal to 0.05% (five one-hundredths of one percent) per day of such delinquent payment for each day from the date such payment became due and payable until payment has been received by the Port. Unpaid delinquency charges that accrue shall be compounded

monthly. The Port shall apply any monies received from Lessee first to any accrued delinquency charges and then to any other payments then due hereunder. The delinquency charges provided by this Section are in addition to all other remedies that the Port may have that are provided by this Lease or otherwise by law with respect to any payment that has become due and has not been paid.

4.4. Accord and Satisfaction: No payment by Lessee or receipt by the Port of a lesser amount of any sum due hereunder, shall be deemed to be other than on account of the earliest due rent or payment, nor shall any endorsement or statement on any check or any letter accompanying any such check or payment be deemed an accord and satisfaction, and the Port may accept such check or payment and pursue any other remedy available in this Lease, at law or in equity. The Port may accept any partial payment from Lessee without invalidation of any contractual notice required to be given herein (to the extent such contractual notice is required) and without invalidation of any notice required to be given pursuant to California Code of Civil Procedure Section 1161, et seq., or of any successor statute thereto.

4.5. Security Deposit: Prior to commencement of the term of this Lease, Lessee shall pay to the Port the sum of $30,000.00, as a security deposit which sum (and any additions thereto required hereunder) shall be evidenced by cash or certificates of deposit payable to the Port, or such other similar interest-bearing instruments or securities acceptable at the sole discretion of the Port. Said sum, together with any additions thereto required hereunder, is sometimes herein referred to as "the Deposit". The Deposit shall be retained by the Port as a debtor and not as a trustee. If Lessee defaults in the performance of any obligation hereunder, the Port may apply any portion of the Deposit as necessary to cure the default or to compensate the Port for the default, and Lessee, within 10 days after the Port's demand therefor, shall deposit with the Port sum that is necessary to restore the Deposit to the full amount then required by this Lease. Upon the termination of the Lease and Lessee's vacation of the Premises, the amount of the Deposit remaining, after curing Lessee's defaults and compensating the Port for damages caused by Lessee, shall be returned to Lessee at Lessee's last address known to the Port.

Interest on certificates of deposit shall be payable to Lessee by the issuer thereof. The Port shall not be required to pay to or credit Lessee with any interest on any Deposit. The issuing bank shall provide that a certificate of deposit is payable in San Francisco or Oakland.

In the event this Lease is assigned to another Lessee, other than Bayside Hosts, Inc., the required Deposit shall be an amount equal to 3 times the monthly average of the total of the Minimum Rent and Percentage Rent payable to the Port by Lessee for the 12 month period immediately preceding the date of such assignment and shall be further increased in the same manner each 12 months thereafter. Lessee shall pay any such increase in the deposit amount in monthly installments of $1,000.00 until the full amount of the increased deposit is paid to the Port. In no event, however, shall the Deposit at any time be decreased. Lessee shall deposit with the Port the increased amount of the Deposit within 30 days after the Rent Adjustment Date, or in any case where adjusted rent is determined hereunder by appraisal, within 30 days after Lessee's receipt of the appraiser's opinions, or in the case of any such assignment within 30 days of the date of such assignment.

Lessee's payment of the Deposit shall not limit Lessee's liability to the Port for the payment of amounts due to the Port by Lessee in excess of the amount of the Deposit.

5. Standard of Service; Rates and Charges: Lessee shall construct, furnish, maintain and operate the Premises, and provide all other services and facilities offered in connection therewith, in a first-class manner as currently provided by Lessee and shall furnish and maintain a standard or service at least equal to that of the better class of similar businesses providing similar services and facilities in the San Francisco Bay Area. Lessee agrees to furnish or cause to be furnished good, prompt and efficient service and to furnish said service on a fair, reasonable and reasonably nondiscriminatory basis to all users thereof, and to charge fair, reasonable and reasonably non-discriminatory prices for each unit of sale or service; provided, that Lessee may make reasonable and reasonably nondiscriminatory discounts, rebates or other similar types of price reductions to volume purchasers. Noncompliance with this provision shall constitute a material breach of this Lease. Upon reasonable prior written notice to Lessee, the Port shall have reasonable access to and the right to inspect all rental schedules and schedules of rates or prices for products, services and facilities provided or performed upon the premises.

Lessee shall keep the restaurant and bar facilities on the Premises open for full service lunch and dinner 7 days per week and provide food, beverages and services thereat during hours of each day as business conditions shall warrant, but such hours shall be subject to the approval of the Executive

Director who may also specify the hours during which said facilities shall be kept open for business and the services thereof made available to the public; provided, however, the Port agrees that it shall not require Lessee to open the restaurant or bar for business before 11:00 a.m. or to keep them open after 11:00 p.m. Lessee, without further approval of the Port may close for business on Thanksgiving Day, Christmas Day and New Years Day.

6. Condition of the Property: Except as may be otherwise expressly provided in this Lease, including but not limited to Section 10 hereof, the taking of possession of the Property by Lessee shall in itself constitute acknowledgment that the Property is in good and tenantable condition, and Lessee agrees to accept the Property in its presently existing condition, "as is," and that the Port shall not be obligated to make any improvements or modifications thereto except to the extent that may otherwise be expressly provided in this Lease. Lessee represents and acknowledges that it has made a sufficient investigation of the conditions of the Property existing immediately prior to the execution of this Lease and is satisfied that the Property will safely support the type of improvements to be constructed and maintained by Lessee upon the Property.

7. Improvements:

7.1. Improvements by Lessee: Lessee shall with due diligence, at its own cost and expense, proceed to expand the existing improvements upon the demised premises to provide an approximate 5,000 square foot expansion of the restaurant building to provide a banquet facility and related facilities. The said improvements shall be completed by Lessee not later than 18 months after the Effective Date of this Lease, subject to delays caused by the Port's construction in Jack London Square and force majeure as defined in Section 44 hereof at a cost to Lessee of not less than $900,000.00 including furniture, fixtures and equipment used on the premises, structural remodeling, professional fees and "soft costs".

Without intending to extend the time in which Lessee is required to complete said improvements hereinabove described, it is hereby understood and agreed that in the event said improvements are not completed prior to the date hereinabove specified in this Section 7.1 for completion of improvements Lessee's Percentage Rental set forth in Section 4.2 hereof shall increase from 4.2% to 7% of Gross Receipts effective from and after said date.

By letter dated 9-28-88, the Lessee expended:

Leasehold imps	$1,464,386.88
FF&E	256,659.12
total	1,721,046.00

The layout, specifications, detailed plans and architectural plans of all improvements to be constructed upon the Property and adjacent thereto shall be subject to the prior written approval of the Port.

Lessee, or its licensed contractor, also shall secure at no cost to the Port all other necessary permits, including, but not limited to, building permits and any necessary approvals and permits from the San Francisco Bay Conservation and Development Commission. Lessee agrees to comply with all terms and conditions of permits whether secured by Lessee or the Port.

Lessee shall be responsible for the repair of any Port or other facilities which are damaged as a result of Lessee's construction activities.

Lessee within 30 days of completion of the improvements hereinabove described as evidenced by a Notice of Completion and issuance of a final Certificate of Occupancy for all of the improvements shall submit to the Port a statement signed by Lessee's chief financial officer of the total of Lessee's expenditures for the improvements (including the cost of any tenant improvements then in place), equipment, furnishings and trade fixtures, together with a complete set of "as-built plans" for said improvements hereinabove described.

Lessee agrees that in the performance of work under this Lease, Lessee shall comply with the applicable prevailing wage requirements of California Labor Code Sections 1720 et seq. and Port Ordinance No. 1606, as amended (hereinafter said statutory and ordinance requirements are sometimes collectively referred to as "the prevailing wage requirements"). Generally these requirements apply to construction, alteration, demolition or repair work, and the laying of carpet and maintenance work, of more than $1,000.00, which is made on or to Port property and the cost of which is paid for in whole or in part by the Port's advance or reimbursement to Lessee or by credit against rent or other sums due the Port. The following provisions of this Section apply only if, and to the extent that, the prevailing wage requirements are applicable. Lessee agrees that any action by Lessee or its assignee against the Port for the recovery of penalties or forfeitures shall be commenced, and written notice thereof shall be actually received by the Port, within the ninety-day period after the Port's Chief Engineer notifies Lessee in writing that the Chief Engineer has determined that the work is complete. Lessee agrees that such suit on the Lease for alleged breach thereof in not making an advance or

reimbursement or in not permitting a credit to rent or other sums due the Port is the exclusive remedy of Lessee or the Lessee's assignee with reference to such penalties or forfeitures. Lessee or Lessee's assignee may bring such suit without permission of the Port, but the suit shall be limited to the recovery of the penalties or forfeitures without prejudice to Lessee or Lessee's assignee's rights in other matters affecting the Lease. Lessee agrees that no other issues shall be presented to the court in such case and the burden shall be on the plaintiff to establish plaintiff's right to the penalties or forfeitures withheld or to be withheld.

Lessee agrees that to the extent that Lessee is required to comply with the prevailing wage requirements, Lessee shall assure that all workers are paid the prevailing rate of per diem wages, and travel and subsistence payments (defined in applicable collective bargaining agreements filed in accordance with Section 1773.8 of the California Labor Code), in effect on the date of the Port's first approval of a building permit or other approval of the work. Copies of the applicable prevailing rate of per diem wages are on file at the Port's principal office and will be made available to any interested party on request. Lessee agrees to post a copy of the prevailing rate of per diem wages at each job site.

Lessee, as a penalty to the Port, shall forfeit $25 for each calendar day, or portion thereof (or such other sum as specified from time to time by Section 1775 of the California Labor Code), for each worker paid less than the applicable prevailing rates for such work or craft in which such worker is employed. The difference between such prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by Lessee.

To the extent that there is insufficient money due Lessee as an advance, reimbursement or credit to cover all penalties forfeited and amounts due and in all cases where the Lease does not provide for a money payment by the Port to Lessee, and except in cases where enforcement authority is vested in the State pursuant to Section 1775 of the California Labor Code, the Port not later than 90 days after the filing of a valid notice of completion in the office of the Alameda County Recorder or not later than 90 days after the Port's acceptance of the work, whichever last occurs, may maintain an action in any court of competent jurisdiction to recover the penalties and the

amounts due provided for herein. Lessee agrees that no issue other than that of the liability of Lessee for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon Lessee to establish that the penalties and amounts demanded in such action are not due. Out of any money withheld or recovered or both there shall first be paid the amount due each worker and if insufficient funds are withheld or recovered or both to pay each worker in full the money shall be prorated among all such workers.

Lessee agrees to keep or cause to be kept by each contractor and subcontractor an accurate payroll record for each worker employed on work covered by this Subsection showing all of the information specified in subsection (a) of Section 1776 of the California Labor Code. All such payroll records shall be certified, available for inspection and filed in accordance with the procedures specified in subsections (b)-(e) inclusive of Section 1776 of the California Labor Code. In the event of noncompliance with the foregoing requirements concerning payroll records which continues for more than 10 days after the Port gives to Lessee written notice specifying in what respects Lessee must comply, Lessee shall forfeit as a penalty to the Port for each worker $25 for each calendar day, or portion thereof, until strict compliance is effectuated.

Lessee shall be responsible for complying with Section 1777.5 of the California Labor Code concerning apprenticeable occupations, with respect to all work covered by that section.

For purposes of this Subsection, Lessee shall be deemed to be a "contractor" as that term is used in Sections 1720 et seq. of the California Labor Code. Except where the context otherwise requires, the definitions of terms and phrases contained in the State prevailing wage law, Sections 1720 et seq. of the California Labor Code, and in the implementing administrative regulations, shall apply to the same terms and phrases which are used in this Subsection.

7.2. <u>No Improvements by the Port</u>: The Port is not obligated to construct or install any improvements on or off of the Property.

7.3. <u>Fixtures and Equipment</u>: Lessee shall at its own cost and expense, provide and maintain all equipment, furnishings and trade fixtures upon the demised premises required

for the maintenance and operation of a first-class business of the type to be conducted pursuant to Section 3 hereof.

8. Security Concerning Improvements: Before the approval by the Port of building permits for construction work hereunder as described in Subsection 7.1 hereof or for other significant construction work on the premises for which the Port deems such security to be advisable, Lessee, or its contractors, at no cost or expense to the Port, shall furnish to the Port two separate securities, as follows:

8.1. Performance Bond: A bond in cash, or securities satisfactory to the Port in its sole discretion, or issued by a surety company licensed to transact business in the State of California and satisfactory to the Port, in a sum of not less than 100% of the total estimated cost of the initial construction and other work required hereunder, payable to the Port and conditioned upon full, faithful and satisfactory performance by Lessee of the initial construction work within the period of time specified in this Lease. Upon Lessee's full, faithful and satisfactory performance, said bond shall be cancelled or returned to Lessee, as the case may be; otherwise, such part of the amount of the bond as shall be required to complete the work shall be payable to or retained by the Port, as the case may be. In the event that said bond shall be in cash, the Port shall have the right to invest and reinvest the same as it shall see fit, and any interest earned thereon during the time it is so held by the Port shall accrue to and belong to the Port, and Lessee shall have no interest in or claim thereto.

8.2. Labor and Material Bond: A bond in cash or securities satisfactory to the Port in its sole discretion, or issued by a surety company licensed to transact business in the State of California and satisfactory to the Port with Lessee's contractor or contractors, as principals, in a sum not less than 100% of the total estimated cost of the contract or contracts for the initial construction and other work required hereunder, guaranteeing the payment for all materials, provisions, provender, supplies and equipment used in, upon, for or about the performance of said work or labor done thereon of any kind whatsoever and protecting the Port from any liability, losses or damages arising therefrom.

In the event and to the extent that Lessee obtains from Lessee's contractor or contractors the bonds required hereunder which are satisfactory to the Port, the Port,

upon application by Lessee and upon naming the Port as an additional obligee of Lessee's principal and surety under such bond or bonds, shall release Lessee from and consent to the cancellation of the bond or bonds originally furnished by Lessee.

8.3. Letter of Credit in Lieu of Performance and Labor and Material Bonds: In lieu of the performance bond and the labor and material bond required hereunder, Lessee may provide to the Port one or more Irrevocable Letters of Credit, substantially in the form attached hereto as Exhibit "D". The Irrevocable Letter of Credit shall be confirmed by and payable at the counters of a bank in San Francisco or Oakland.

The Port agrees that the Irrevocable Letters of Credit may provide, in language acceptable to the Port Attorney, that the total sum thereof may be reduced by a sum equal to 90% of the amount that Lessee's construction lender certifies has been disbursed from the construction loan fund for construction of the Improvements. Lessee is required to maintain the Irrevocable Letters of Credit in the amount herein specified until 60 days after recordation of a notice of completion of all work secured by the Irrevocable Letters of Credit and until Lessee has provided to the Port a full and complete copy of the recorded notice of completion.

The Port shall be entitled to receive payment under an Irrevocable Letter of Credit, upon any one of the following conditions:

(1) The Port receives notice from the issuer of the Irrevocable Letter of Credit that the issuer will not renew the Irrevocable Letter of Credit and at least 15 business days before expiration of the Irrevocable Letter of Credit Lessee has not provided the Port with a replacement Irrevocable Letter of Credit. Lessee agrees in good faith to use its best efforts to include the fourth paragraph of Exhibit " " pertaining to automatic extension of the Irrevocable Letter of Credit in any such letter of credit submitted to the Port pursuant hereto. If despite Lessee's good faith best efforts Lessee is unable to secure such a provision, the Port will accept a letter of credit without such provision, but in that case unless the Port receives a written extension of the letter of credit at least 30 days before the end of the term of the letter of credit, the Port without notice to Lessee may negotiate the letter of credit and retain all proceeds as security pursuant to this Section.

(2) The Port declares this Lease forfeited for Lessee's default in accordance with the default provisions of this Lease.

(3) The Port in accordance with this Lease exercises its option to pay or otherwise discharge a judgment or lien for labor and material furnished for construction of the Improvements.

In the event of payment to the Port under condition (1) above, the Port will retain the cash payment as security in lieu of the Irrevocable Letter of Credit, and shall transfer all or such portion of the payment, without interest, to Lessee as may be appropriate upon satisfaction of the conditions for withdrawal of Irrevocable Letters of Credit as provided above, or upon receipt of a new Irrevocable Letter of Credit.

In the event of termination of this Lease under condition (2) above, the Port may retain the payments as liquidated damages in lieu of any other monetary relief to which the Port might otherwise be entitled by virtue of this Lease or by operation of law (except for Lessee's breach of its obligation to deliver to the Port all Construction Documents as specified below in this Section, it being the agreement of the Port and Lessee that the damages arising from the breach would be extremely difficult and impractical to ascertain.

In the event of payment to the Port under condition (3) above, immediately upon written notice from the Port that the Port has applied all or portions of the payment to pay or discharge a judgment or lien, Lessee shall submit to the Port additional Irrevocable Letters of Credit or cash so that the total sum in the form of Irrevocable Letters of Credit and cash in the hands of the Port is equal to the total sum required to be maintained in Irrevocable Letters of Credit in accordance with this Section.

Lessee hereby assigns and transfers to the Port, as part of the security for the lien-free completion of construction of the Improvements, all of Lessee's right, title and interest (existing on the Effective Date of this Lease or existing any time thereafter) in all plans and specifications, diagrams, drawings and other documents pertaining to construction of the Improvements ("Construction Documents"); provided, however, that (a) unless and until there is a termination of this Lease under condition (2) above, Lessee shall have sole right to

possession and use of the Construction Documents and the Port may not interfere with such possession or use of the Construction Documents and (b) immediately upon the occurrence of the events above described which permits Lessee to withdraw all remaining Irrevocable Letters of Credit, the Port shall be deemed to have assigned and transferred to Lessee all of the Port's right, title and interest in the Construction Documents. Lessee agrees that immediately upon a termination of this Lease under condition (2) above, Lessee shall deliver to the Port all Construction Documents and Lessee shall make no further use of such Construction Documents.

The Port shall not be required to pay to or credit Lessee with any interest on any payment received upon the Port's negotiation of any Irrevocable Letter of Credit.

9. Title to Improvements: All improvements constructed, erected or installed upon the demised premises shall become the property of the Port upon completion of construction or installation thereof and shall remain upon the demised premises on termination of this Lease. No improvements shall be removed from the Premises by Lessee at any time without the prior written consent of the Port. Title to all equipment, furnishings and trade fixtures placed by Lessee upon the Premises shall remain in Lessee, and replacements, substitutions and modifications thereof may be made by Lessee throughout the term of this Lease, and Lessee may remove the same before termination of this Lease if Lessee is not then in default under this Lease; provided that before termination of the Lease Lessee shall repair to the satisfaction of the Port any damage to the Premises caused by such removal and, provided further, that usual and customary lighting, plumbing, wall-to-wall carpeting, window coverings, air conditioning and heating fixtures shall remain upon the Premises and be surrendered therewith upon termination of this Lease at which time title thereto shall pass to the Port. Before termination of this Lease, Lessee shall remove all equipment, furniture, furnishings and trade fixtures from the Premises unless otherwise agreed by the Port.

Lessee agrees and hereby makes the irrevocable and binding election not to take for federal income tax purposes investment tax credits or depreciation on assets financed with the proceeds of tax exempt Port bonds or notes, unless the Port otherwise expressly agrees in advance in writing signed by the Port. Lessee also agrees at the Port's request from time to time to execute such additional documents reasonably requested by the

Port or its bond counsel to effectuate and/or evidence said agreement an election. This agreement and election, and the obligation to execute said documents relative thereto is binding on each successor or assignee of Lessee.

10. Maintenance of Improvements; Alterations and Additions: Lessee agrees that during the entire term of this Lease, at its own cost and expense, it shall keep and maintain the Premises in first-class order, repair and condition. Lessee shall perform, at its own cost and expense, any and all maintenance, repairs, rehabilitation or reconstruction thereto, whether required by structural failure or deterioration or by operations of Lessee or otherwise. The Port shall have no maintenance, repair, rehabilitation or reconstruction obligations of any kind with respect to the Premises except that the Port will have the obligation to perform regular and normal inspection, maintenance and repair to the existing pier on the Premises, but if, notwithstanding such regular and normal inspection, maintenance and repair, the pier maintenance or repair requires a major expenditure in the last 10 years of the term of this Lease ("major expenditure" being defined for the purposes of this Section as in excess of 6 months minimum rent) the Port has the option upon 30 days' prior written notice to Lessee to cancel the Lease without effecting the repairs and without liability to Lessee. For 30 days after receiving the notice of cancellation, Lessee may agree to do the repairs at its expense, and if it elects in writing to the Port to do so, Lessee shall perform the required maintenance and repair forthwith and the Port's said notice of cancellation shall be of no further force and effect.

If Lessee for a period of 45 days after written notice from the Port shall fail, neglect or refuse to perform, or to commence and continuously and diligently proceed in good faith to complete, any required repair or maintenance, the Port may perform such repair or maintenance and Lessee shall reimburse the Port within 30 days after receipt of notice from the Port demanding payment for the cost thereof, including the Port's reasonable administrative overhead. In performing such repair, the Port shall interfere as little as reasonably possible with Lessee's operations on the Premises. The making of such repairs or performance of maintenance by the Port shall in no event be construed as a waiver of the duty of Lessee to make repairs or perform maintenance as herein provided.

Lessee may make alterations, additions, or betterments to the Premises only after complete plans and specifications therefore have been submitted to and approved by the Port

and after securing, at no cost to the Port, all necessary building and other permits from the Port, the City and other appropriate governmental agencies. In addition, Lessee shall maintain, at its expense, all equipment, furnishings and trade fixtures upon the Premises required for the maintenance and operation of a business of the type to be conducted pursuant to this Lease.

Lessee hereby expressly waives the right to make repairs at the expense of Lessor and the benefit of the provisions of Sections 1941 and 1942 of the Civil Code of the State of California or any successor statute thereto.

10.1. Five-Year Plans for Renovation and Replacement: Lessee agrees to prepare and submit to the Port for approval no later than January 1, 1997 and, in addition, 60 days prior to the date of commencement of each subsequent Plan Year (as herein defined), a five-year plan for renovation and for replacement of furniture, fixtures and equipment including, without limitation, heating and air conditioning equipment.

This Subsection and said five-year plans shall apply to all of the improvements.

Each of said five-year plans shall set forth a detailed systematic program of expenditures by Lessee for renovation and replacement for each Plan Year, and shall provide for establishment of a reserve for renovation and replacements for each Plan Year during the five-year plan period. The first year of the first five-year plan shall commence one year after business operations begin and said first year and each succeeding year thereafter are hereby designated a "Plan Year".

Representatives of the Port and Lessee shall conduct a joint maintenance inspection of the Premises not later than 120 days before commencement of each Plan Year. The purpose of the inspections shall be to determine items of maintenance, repair and renovation which should be performed by Lessee. Not later than 90 days before commencement of each Plan Year, the Port may notify Lessee of items requiring maintenance, repair and renovation. Lessee's five-year plan shall make provision for timely performance of all required work including without limitation work required by the Port.

The Port's Executive Director shall approve or disapprove each of said five-year plans within 30 days after its submission. If the Port's Executive Director disapproves said five-year plan or proposed amendment thereto,

Lessee within 30 days thereafter shall submit to the Port a revised five-year plan and the Executive Director shall approve or disapprove said revised five-year plan within 15 days after its submission. The Executive Director's approval of said five-year plan or said five-year revised plan shall not unreasonably be withheld or delayed. Lessee shall comply with each approved five-year plan.

Each of said five-year plans shall among other things, provide for Lessee's expenditure for renovations and replacements of furniture, fixtures and equipment each Plan Year thereafter of the five-year plan of a minimum of 1% of annual Gross Receipts during the Plan Year. So long as Lessee maintains the Premises in first-class order, repair and condition, Lessee shall be deemed to have complied with Lessee's five-year plan if Lessee has expended the said minimum percentage amount specified above for items covered by said plan; provided, however, that the Port and Lessee each agree that, upon the reasonable request from time to time by the other, it shall negotiate in good faith to adjust the percentage of Gross Receipts being deposited for renovations and replacements under this subsection, based upon prior experience and reasonable forecasts of funds necessary for renovations and replacements hereunder.

On or before the close of each Plan Year, Lessee shall deposit the required percentage of Gross Receipts for the Plan Year in a bank account or accounts especially designated and maintained to satisfy this subsection; provided, that all or a portion of said required sum may be directly expended at any time for the purposes specified in this subsection. Such monies, either spent directly or as withdrawn from the bank account, shall be spent only for the following purposes: maintenance, repair, and renovation as determined and detailed in the five-year plan or otherwise, including without limitation replacement of furniture, fixtures and equipment. Each expenditure, and each withdrawal from the bank account, shall be supported by copies of invoices detailing work done and paid for, which invoices shall be submitted to the Port's Executive Director for filing. The Port's Executive Director may object to any expenditure believed not covered by the foregoing description of authorized expenditures, provided that such objection be made within 30 calendar days after transmission of the invoices, and provided further that any disputes shall be submitted to arbitration under the rules of the American Arbitration Association.

To the extent that at the end of any Plan Year Lessee's total expenditures pursuant to its Port approved plan during the Plan Year exceeds the cumulative sum Lessee is then required to have expended or deposited in said special bank account, then up to the extent of said excess Lessee may refrain from further expenditures of deposits so long as the Premises are in the condition required by this Lease. Any money so deposited in said bank account shall not be withdrawn for any purpose other than expenditure for renovations and replacements hereunder.

Lessee may in lieu of depositing said money in a bank account maintain said money in, or convert any of said money deposited in a bank account to, interest-bearing certificates of deposit which shall be specially earmarked for the uses specified by this subsection. Interest earned on said deposit and certificates is not required to be used for renovation and replacement under this subsection, and Lessee may use and dispose of said interest at any time for Lessee's own purposes. Lessee agrees to provide to the Port from time to time at the written request of the Port documentary evidence which clearly establishes that Lessee is and has been maintaining the special bank account and/or the specially earmarked certificates of deposit required by this subsection.

In each five-year plan Lessee shall state in reasonable detail sufficient to determine Lessee's full compliance with this subsection all actions Lessee has taken since submittal of Lessee's last five-year plan to the Port to comply with this subsection and said five-year plan. Such statement shall include, without limitation, the following:

(1) The renovations and replacements made and the amount of expenditures therefor; and

(2) The amount of money from Gross Receipts deposited in said special bank account, maintained in said certificates of deposit or expended pursuant to this subsection.

Any portion of the minimum percentage amount to be expended for said renovation and replacement for a Plan Year may be deferred and carried over into the next year if permitted by the approved five-year plan or by the prior written consent of the Port.

11. Signs; Outside Displays: Lessee shall not install, paint, inscribe or place any signs upon the exterior of the Premises or upon the interior of the Premises if intended to be viewed from the exterior thereof. However, upon request by Lessee, the Port agrees not unreasonably to withhold or delay consent to signs which state the name of the tenant or tenants or the type of businesses conducted on the Premises and that otherwise comply with applicable Port sign policies. All new signs installed shall be in conformity with any applicable sign standards established by the Jack London Square Business Association. Before termination of this Lease, Lessee shall remove to the satisfaction of the Port all signs installed, painted, inscribed or placed by it in or upon the interior or exterior of the Premises; provided that before termination of the Lease Lessee shall repair and/or repaint the Premises to the satisfaction of the Port as required on account of such removal.

12. Utilities: Lessee shall pay for all water, gas, heat, electricity, fuel, power, telephone service, and other utilities, including any connections to and from the utility connection points to the Premises, as well as janitor or watchman services and mechanical fire alarm or security services which may be furnished to Lessee. The Port warrants that to the extent any such connections to and from the utility connection points were made by the Port the connections were constructed in a good and workmanlike manner. In the event the Port provides or pays for any utility services, Lessee shall pay the Port for such services or reimburse to the Port such payment not later than the first day of the calendar month following Lessee's receipt from the Port of a billing statement for said services or reimbursement all other utility services required by Lessee shall be provided by Lessee at its expense.

13. Taxes and Assessments: The property interests created by this Lease may be subject to property taxation and Lessee hereunder in whom the possessory interest is vested may be subject to the payment of property taxes levied on such interest. Lessee agrees timely to pay all lawful taxes, assessments, fees or charges which at any time may be levied or charged by the state, county, city or any tax or assessment levying body against the transfer of the leasehold interest hereunder upon recordation or otherwise, or upon any activity carried on under this Lease, any interest in this Lease or any possessory right which Lessee may have in or to any property covered hereby by reason of its use or occupancy thereof or otherwise, as well as

all lawful taxes, assessments, fees and charges on goods, merchandise, fixtures, appliances, equipment and property owned by Lessee in or about the Premises.

Lessee at no cost to the Port reasonably may contest the legal validity or amount of any such taxes, assessments, or charges for which Lessee is responsible hereunder, and institute such proceedings as Lessee considers necessary; provided, however, that Lessee shall at all times defend and indemnify the Port against any and all losses and costs resulting therefrom, and protect the Port and the Premises from foreclosure of any lien, and that the Port shall not be required to join in any proceeding or contest brought by Lessee.

14. Fire Insurance: The Port shall carry builder's all risk insurance (which may exclude earthquake and flood coverage), at Lessee's cost and expense, at all times during construction of improvements hereunder by Lessee and until commencement of fire and extended insurance coverage required herein on said improvements as completed. Such coverage shall be in an amount equal to the full replacement cost of the improvements. Lessee shall reimburse the Port for the premium cost of such builders all risk coverage (and any flood and/or earthquake insurance) upon receipt of the Port's billing for said cost.

The Port shall maintain, at the cost and expense of Lessee, during the entire term of this Lease (but only after such required builder's all risk coverage is cancelled as to new improvements), a policy or policies of insurance against loss or damage by fire with extended coverage endorsements, or when reasonably obtainable all risk fire coverage, including at the sole option of the Port, earthquake and flood coverage, covering all improvements (excluding only paving, pilings, parking lot curbs and landscaping and foundations below the lowest surface of the ground), with an insured value in an amount equal to 100% of the full replacement costs of all contents and improvements. Said insurance policy or policies shall provide that the insurers waive their rights of subrogation against Lessee. Lessee shall reimburse the Port for the premium cost of such fire insurance (and flood and/or earthquake insurance) upon receipt of the Port's billing for said cost.

Lessee also shall maintain at its cost and expense fire legal liability insurance in an amount at least equal to the deductible amount of the fire insurance policy the Port is required to maintain under this Section, which deductible is

currently $100,000.00, and business interruption insurance, insuring that Minimum Monthly Rent will be paid to the Port for a period of up to 12 months if the Premises are destroyed or rendered inaccessible by a risk insured against by the policy or policies of fire insurance the Port is required to maintain under this Section. Said insurance policies shall provide that the insurers waive their rights of subrogation against the Port. Lessee shall maintain on file with the Port during the entire term hereof, a certificate or certificates or an endorsement or endorsements evidencing said fire legal liability insurance and business interruption insurance.

Lessee shall provide to the Port at least 30 days prior to the expiration of any such policy a certificate or an endorsement showing that such insurance coverage has been renewed or replaced. If such coverage is cancelled or reduced, then within 15 days after receipt of written notice of such cancellation or reduction in coverage, but in no event later than the effective date of cancellation or reduction, Lessee shall provide the Port a notice of reinstatement or a certificate or certificates or an endorsement or endorsements as appropriate, showing that the required insurance has been reinstated or replaced. At the Port's request, Lessee agrees promptly to provide the Port a full and complete copy of each policy required to be maintained hereunder. Each policy shall be subject to the approval of the Port, which approval shall not unreasonably be withheld.

On failure to provide any certificate, endorsement or other document as required by this Section, Lessee shall be in substantial default of this Lease and the Port may proceed in accordance with the default section of this Lease. However, at its option and sole and absolute discretion the Port may, but is not obligated to procure without further notice to Lessee all or portions of the required insurance at Lessee's expense and Lessee shall pay to the Port the Port's cost of procurement of such insurance upon receipt of billing from the Port for said cost.

Lessee shall obtain from its insurers under all policies of insurance maintained under this Section by Lessee at any time during the term of this Lease certificates or endorsements providing a waiver of all rights of subrogation which the insurer may have against the Port. Lessee hereby waives any right which it may have against the Port on account of any loss or damage occasioned to Lessee arising from any risk covered by the insurance that Lessee is required to carry under this Section or covered by any other insurance maintained by Lessee insuring the Premises, its contents or other of Lessee's personal property on or about the Premises.

On failure to provide any endorsement or other document as required by this Section, Lessee shall be in substantial default of this Lease and the Port may proceed in accordance with the default section of this Lease. However, at its option and sole and absolute discretion the Port may, but is not obligated to, (1) procure without further notice to Lessee all or portions of the required insurance at Lessee's expense and Lessee shall pay to the Port the Port's cost of procurement of such insurance upon receipt of billing from the Port for said cost or (2) approve a program of self insurance in lieu of required insurance upon such terms, conditions and limitations as may be imposed at the Port's sole and absolute discretion.

Deductibles and self-insured retentions which exceed $2,500.00 shall be permitted in Lessee's insurance policies only at Lessee's written request and upon the prior written approval of the Port, which approval shall not be unreasonably withheld or delayed; provided, however, that Lessee agrees that it shall be reasonable in all cases for the Port to condition its approval on Lessee's first depositing with the Port, as additional security deposit and subject to all of the other provisions of this Lease applicable to a security deposit, a sum determined by the Port up to the amount of the deductible or self-insured retention. Such additional security deposit shall be in the form specified for a security deposit under other provisions of this Lease, but shall not be considered for purposes of increasing the security deposit pursuant to provisions of this Lease other than this Section.

In any case under this Section that Lessee is required to provide to the Port an endorsement or copy of a policy and the policy is not available, the Port agrees to accept in lieu thereof, and on a temporary basis only, a binder in a form reasonably satisfactory to the Port.

In instances in which Lessee is required under this Section to pay the cost of insurance maintained by the Port and Lessee objects in writing to the Port to the cost of such insurance, on the basis that such cost is unreasonable by comparison to the then existing insurance market, the Port will review the said cost and discuss any reasonably possible insurance alternatives with Lessee; provided, that nothing herein stated shall limit the Port's discretion to place and maintain any such insurance policies as hereinabove set forth to avoid a lapse in insurance coverage. If after any such review and discussion a dispute still remains between the parties as to the

said reasonableness of the cost of any such insurance maintained by the Port, including disputes as to the type of coverage, amount of coverage and amount of deductible as these matters relate to cost, such dispute shall be resolved by binding arbitration before the American Arbitration Association in Oakland. The prevailing party shall recover reasonable attorneys' fees and costs. The arbitration award shall be enforceable in any court having jurisdiction.

15. Damage or Destruction of Improvements: In any case under this Section that Lessee is required or elects to restore the Premises after damage or destruction the Port agrees promptly to execute all adjustment documents and to endorse any proceeds to Lessee and/or Lender. Lessee agrees to keep the Port advised during the adjustment process. In the case where Lessee is required or elects under this Section to restore the Premises, and subject to the rights of any Lender set forth in this Lease, the proceeds of insurance shall be held by Lessee and/or Lender as trust funds to be used for the purpose of restoring the Premises damaged by fire or other casualty. Lessee agrees to use good faith reasonable efforts to have all Lenders agree in relevant loan documents to have insurance proceeds applied to restoration of the Premises. Lessee also agrees that if, nevertheless, a Lender will not so agree but reserves the power to apply all or portions of such proceeds against its loan, then in the event of a loss Lessee shall use diligent, good faith reasonable efforts (including legal action), in consultation with Lessee's legal counsel and the Port, to cause all proceeds of insurance to be applied to restoration, but not so as to jeopardize Lessee's interest in the leasehold estate in the good faith reasonable judgment of Lessee's attorney. In any case under this Section that Lessee elects to terminate this Lease on account of damage or destruction Lessee agrees promptly to execute all adjustment documents and to endorse any proceeds to the Port subject to the rights of Lessee and any Lender as described in this Section.

If during the term of this Lease the improvements are damaged or destroyed by fire or other insured casualty to an extent in excess of 50% of the then replacement cost thereof, Lessee is hereby granted the privilege, upon giving at least 60 days' prior written notice to the Port (such notice to be given within 60 days after such damage or destruction), to cancel and annul this Lease; provided, however, that if in such case Lessee shall not so elect to cancel and annul this Lease, it hereby agrees with due diligence to restore the improvements to a good and tenantable condition notwithstanding any inadequacy of insurance proceeds therefor.

If this Lease is cancelled or annulled in accordance with this Section, there shall be paid from insurance proceeds any amount which is payable to any Lender. The Port's interest in the remainder of the insurance proceeds payable as a result of such damage or destruction shall be determined by applying the ratio which the then expired number of years of the original term of this Lease bears to the original term to the total amount of such insurance proceeds, including the amount thereof paid to Lenders. The phrase "original term" in the preceding sentence shall include options to extend which Lessee exercised before the damage or destruction occurred. The remainder of the insurance proceeds after deducting said amount paid to the Port shall be payable in full to Lessee after first deducting therefrom for the benefit of the Port the difference, if any, between the insurance proceeds which would have been paid to the Port had Lessee maintained all of the insurance coverage required by this Lease and the insurance proceeds actually paid to the Port under the insurance coverage actually maintained by Lessee.

In addition to any other requirements to repair or rebuild as may be contained in this Section, in the event the improvements are damaged or destroyed by fire or other insured casualty to an extent less than 50% of the then existing replacement cost thereof, Lessee with due diligence shall repair or restore any such loss, notwithstanding any inadequacy of insurance proceeds therefor.

If during the term of this Lease the improvements are damaged or destroyed to an extent in excess of 10% of the then replacement cost thereof by a cause not insured against hereunder and by a cause other than Lessee's willful or intentional and wrongful act or omission, then within 60 days after such damage or destruction, Lessee shall elect by written notice delivered to the Port either to repair, reconstruct or replace the damaged improvements, or to terminate this Lease as of the date of such damage or destruction. If no written notice is delivered to the Port within said 60-day period Lessee conclusively shall be deemed to have elected to repair, reconstruct and replace. If within 30 days after Lessee delivers to the Port a notice to terminate hereunder, the Port delivers to Lessee written notice that the Port agrees to pay all of the cost of reconstruction that exceeds said 10%, Lessee's election to terminate shall then become ineffective. In all cases that Lessee elects not to terminate the Lease, or is not authorized hereunder to terminate the Lease, Lessee shall repair, reconstruct or replace the damaged improvements with due diligence and at its

sole cost and expense (except to the extent the Port has agreed to pay a portion thereof as provided in the immediately preceding sentence).

No election by Lessee to cancel under this Section shall be effective if before the casualty the Port has given Lessee notice of default and Lessee has not cured each such default. If Lessee elects to terminate this Lease as provided in this Section, the Port by written notice to Lessee given within 30 days of the date notice of termination is given by Lessee to the Port, may require Lessee, at Lessee's sole cost and expense within 90 days of receipt of such notice from the Port to demolish and lawfully dispose of off of Port property part or all of the improvements and place the Premises in a secure, safe and reasonably level condition; provided, however, that in no event shall Lessee be obligated to repair or restore any portion of the improvements; and provided, further, Lessee, by written notice to the Port given within 30 days of the giving by the Port of the written notice specified immediately above, may elect to rescind its notice to the Port cancelling this Lease on account of such damage or destruction and, if such notice is timely given by Lessee, the provisions of this Section shall apply as though Lessee had elected not to cancel this Lease on account of such damage or destruction.

In the event of any damage caused by a risk for which insurance is required hereunder, there shall be no abatement or reduction of rent. In the event of any damage caused by an uninsured casualty, Lessee shall be entitled, except when such damage or destruction results from Lessee's negligence or other wrongdoing, to fair and reasonable abatement of Minimum Monthly Rent for the period and to the extent Lessee is deprived of the full use of the Premises as contemplated hereunder. Such abatement of Minimum Monthly Rent shall be determined by ascertaining the extent to which the utility to Lessee of the Premises for the uses permitted by this Lease has been diminished on account of said damage or destruction.

For purposes of this Lease an "uninsured casualty" shall mean a casualty for which Lessee is not hereunder required to, and does not, maintain insurance. "Insured casualty" shall mean any casualty for which Lessee is required hereunder to, or does, maintain insurance.

The Port and Lessee hereby waive the provisions of California Civil Code Sections 1932 and 1933, and of any other statutes which relate to termination of a lease when leased property is destroyed and agree that such event shall be governed by the terms of this Lease.

16. Indemnification and Liability Insurance:

16.1. Indemnification: Lessee shall defend, indemnify and hold the Port harmless against all claims, suits, liability and expense for any loss of, or damage, injury or death to, any person or any property (including the person or property of the Port or of Lessee, its officers, employees, agents or invitees), which directly or indirectly arises out of Lessee's occupancy or use of the Premises or Lessee's activities related thereto.

These obligations of Lessee shall not apply to any such loss, damage, injury or death caused solely by the negligence or other wrongful conduct of the Port but shall apply under all other circumstances. The obligations of Lessee under this Section arising by reason of any occurrence taking place during the term of this Lease, shall survive any termination of this Lease.

For purposes of this subsection, "the Port" shall include the Board of Port Commissioners and each of its Commissioners, officers, employees and agents.

16.2. Liability Insurance: Lessee shall maintain in force during the term of this Lease comprehensive general liability insurance, including bodily injury and property damage insurance, with such limits and coverage as may be reasonably requested by the Port from time to time, but in no event for less than the sum of One Million Dollars ($1,000,000.00) combined single limit per occurrence and in no event with less than the following coverages:

1. Premises and Operations
2. Products and Completed Operations
3. Contractual
4. Owned and Nonowned Automobiles
5. Liquor Liability
6. Personal Injury

Each policy of insurance maintained pursuant to this Section shall provide the following:

(1) The Board of Port Commissioners and each of its Commissioners, officers, employees and agents is an additional insured;

(2) Coverage shall not be cancelled or reduced without at least 30 days prior written notice to the Port.

(3) A severability of interest or cross-liability endorsement, reading generally as follows:

> Cross-Liability - In the event of one of the assureds incurring liability to any other of the assureds, this policy shall cover the assured against whom claim is or may be made in the same manner as if separate policies had been issued to each assured. Nothing contained herein shall operate to increase underwriters' limit of liability.

Before commencement of the term of this Lease, Lessee shall provide to the Port a certificate or certificates or an endorsement or endorsements evidencing all of the liability insurance required under this Section. Lessee shall provide to the Port at least 30 days prior to the expiration of any such policy a certificate or an endorsement showing that such insurance coverage has been renewed or replaced. If such coverage is cancelled or reduced, then within 15 days after receipt of written notice of such cancellation or reduction in coverage, but in no event later than the effective date of cancellation or reduction, Lessee shall provide the Port a notice of reinstatement or a certificate or certificates <u>or</u> an endorsement or endorsements as appropriate, showing that the required insurance has been reinstated or replaced. At the Port's request Lessee agrees promptly to provide the Port a full and complete copy of each policy required to be maintained hereunder. Each policy shall be subject to the approval of the Port, which approval shall not unreasonably be withheld.

On failure to provide any certificate, endorsement or other document as required by this Section, Lessee shall be in substantial default of this Lease and the Port may proceed in

accordance with the default section of this Lease. However, at its option and sole and absolute discretion the Port may, but is not obligated to, (1) procure without further notice to Lessee all or portions of the required insurance at Lessee's expense and Lessee shall pay to the Port the Port's cost of procurement of such insurance upon receipt of billing from the Port for said cost or (2) approve a program of self insurance in lieu of required insurance upon such terms, conditions and limitations as may be imposed at the Port's sole and absolute discretion.

Deductibles and self-insured retentions shall be permitted only at Lessee's written request and upon the prior written approval of the Port, which approval shall not be unreasonably withheld or delayed; provided, however, that Lessee agrees that it shall be reasonable in all cases for the Port to condition its approval on Lessee's first depositing with the Port, as additional security deposit and subject to all of the other provisions of this Lease applicable to a security deposit, a sum determined by the Port up to the amount of the deductible or self-insured retention. Such additional security deposit shall be in the form specified for a security deposit under other provisions of this Lease, but shall not be considered for purposes of increasing the security deposit pursuant to provisions of this Lease other than this Section. Lessee agrees that for any such deductible or self-insured retention amount, Lessee shall provide to the Port defense and indemnification at least equal to the defense and indemnification to which the Port would be entitled as an additional insured had Lessee provided the above specified coverages respectively under Insurance Services Office form number GL 0002 (Ed. 1/73), Insurance Services Office form number GL 0404, and Insurance Services Office form number CA 0001 (Ed. 1/78).

In any case under this Section that Lessee is required to provide to the Port an endorsement or copy of a policy and the policy is not available, the Port agrees to accept in lieu thereof, and on a temporary basis only, a binder in a form reasonably satisfactory to the Port.

17. <u>CAM-Promotion Percentage Rent</u>: Lessee shall pay to the Port, without setoff (except as herein expressly provided) and without previous demand, within 30 days after the close of each calendar month of the term of this Lease, as additional rent CAM-Promotion Percentage Rent equal to 0.8% of all Gross Receipts for use by the Port to maintain and promote Jack London Square Phase I Area from time to time as the Port determines appropriate

in its sole discretion; provided, however, that in no event shall the total of CAM-Promotion Percentage Rent paid by Lessee each calendar year be less than $22,000.00, and Lessee's last monthly payment of CAM-Promotion Percentage Rent for each calendar year shall include any additional amount which may be necessary so that the total CAM-Promotion Percentage Rent paid by Lessee for the calendar year equals at least $22,000.00. A sketch of Jack London Square and the Phase I Area thereof is attached hereto as Exhibit "D" and by this reference incorporated herein. If Lessee becomes a member of a business association consisting of the Port and Port tenants in Jack London Square Phase I Area, then so long as Lessee remains a member and there is effective a management agreement between the Port and the business association, Lessee may credit against and deduct from CAM-Promotion Percentage Rent the assessments Lessee has paid to the business association (except for interest or penalties). Lessee agrees that Lessee's default in payment of Lessee's assessments under Lessee's Membership Agreement with such a business association shall constitute and be deemed to be a default under this Lease, whether the assessments are the same or lesser or greater than the CAM-Promotion Percentage Rent.

18. No Liens: Lessee shall pay for all labor done or materials furnished in the repair, replacement, development or improvement of the demised premises by Lessee and shall keep said premises and Lessee's possessory interest therein free and clear of any lien or encumbrance of any kind whatsoever created by Lessee's act or omission.

Notwithstanding any provision to the contrary contained in this Lease, Lessee may with the prior approval of the Port encumber the leasehold estate hereby created, trade fixtures, equipment and other personal property with a deed of trust or other security device for the following purposes: (1) to finance construction of permanent improvements and structures upon the demised premises required to be constructed pursuant to Section 7 hereof; (2) to provide "take-out" financing of any construction loan, not to exceed 85% of the fair market value of the leasehold improvements or in the alternative to secure institutional financing for general corporate purposes not to exceed 65% of the fair market value of said improvements; and (3) to finance Lessee's capital additions and equipment, acquisitions and/or replacements reasonably required in pursuit of its business activities on the premises. In the event Lessee does not encumber the leasehold estate, trade fixtures, equipment and other personal property to the extent allowed under Items (2) and

(3) of this Section 18 hereinabove set forth, Lessee may encumber the said trade fixtures, equipment and other personal property with a security device securing an indebtedness not in excess of the amount which would be permitted under said Items (2) and (3) hereof.

19. Assignment and Subletting: Except as hereinafter expressly provided, Lessee shall not, either directly or indirectly, voluntarily or involuntarily, assign, hypothecate, encumber or transfer this Lease or any interest therein or sublet the whole or any part of the demised premises, or license the use of same, or suffer any other person or entity to occupy, use or manage (except management by Lessee's employees) the same, in whole or in part, without the prior written consent of Lessor evidenced by resolution of its Board of Port Commissioners. Neither this Lease nor any interest therein shall be assignable or transferable in proceedings in attachment, garnishment or execution against Lessee, or in voluntary or involuntary proceedings in bankruptcy or insolvency or receivership taken by or against Lessee or by any process of law (including, without limitation, the transfer of this Lease or any interest therein by testacy or intestacy), and possession of the whole or any part of the demised premises shall not be divested from Lessee in such proceedings or by any process of law, without the prior written consent of the Port evidenced by resolution of its Board of Port Commissioners. No occupancy or use of the demised premises by any prospective transferee, sublessee, or assignee shall occur before the Port's written consent to the transfer, sublease, or assignment. Any breach of the provisions of this Section shall constitute a default and shall cause this Lease to terminate immediately at the option of the Port without further notice to Lessee. Lessee shall not be deemed to be in default if Lessee causes an attachment or execution to be removed within ten (10) days of levy, or if Lessee causes an involuntary proceeding in bankruptcy to be dismissed or receiver to be removed within thirty (30) days of the date of commencement of said proceeding or appointment of said receiver.

Lessee may without further consent of the Port assign its interest in this Lease as Lessee to Bayside Hosts, Inc.

Notwithstanding the provisions of this Section 19 hereinabove set forth, the Port agrees that it will not unreasonably withhold its consent to assignment of this Lease by Lessee if the proposed assignee's operating entity has a similar net

worth to: Lessee's operating entity's net worth (adjusted for inflation) at the commencement of the term of this Lease or Lessee's operating entity's net worth at the time of proposed assignment, whichever is greater, and the proposed assignee has a substantially similar operational ability to Lessee's. It is understood and agreed that notwithstanding the Port's consent to any such assignment, the provisions of Sections 4.1.2 and 4.5 hereof relating to adjustment of the minimum rental and increase in the performance deposit shall apply to such assignment, other than an assignment to Bayside Hosts, Inc.

A prohibited assignment within the meaning of this Section 19 shall include, but is not limited to, the following:

(1) If Lessee is other than a corporation, the transfer of the Lease or any of Lessee's interests therein to a corporation that is not wholly owned by Lessee;

(2) If Lessee consists of more than one person or entity, or a combination of a person or persons and an entity or entities, a purported assignment, voluntary, involuntary, or by operation of law of any interest in the Lease from one or more such persons or entities, to any other person or persons or entity or entities whether or not such other person or persons or entity or entities are Lessees;

(3) If Lessee is a partnership, a withdrawal or change, voluntary, involuntary, or by operation of law, of any general partner, or the dissolution of the partnership;

(4) If Lessee is a corporation, any dissolution, merger, consolidation, or other reorganization of Lessee, or the sale or other transfer of a controlling percentage of the capital stock of Lessee, or the sale of more than fifty percent (50%) of the value of the assets of Lessee whether in one conveyance or cumulatively in the aggregate in more than one conveyance. The phrase "controlling percentage" means the ownership of, and the right to vote, stock possessing at least fifty percent (50%) of the total combined voting power of all classes of Lessee's capital stock issued, outstanding, and entitled to vote for the election of directors. This section (4) shall not apply to a corporation the stock of which is traded through an exchange or over the counter.

The Port's consent to or waiver of its option to terminate this Lease in the event of a default on account of, any assignment, transfer, occupation or use requiring prior written Port consent shall not be construed or deemed to be a waiver of the restrictions hereinabove contained or to be a consent to or waiver of objections to any subsequent assignment, transfer or occupation or use by another person.

Lessee and the Port acknowledge and agree that the rights retained by and granted to the Port pursuant to this section constitute a material part of the consideration for entering into this Lease and constitute a material and substantial inducement to the Port to enter into this Lease at the rental, for the terms, and upon the other covenants and conditions contained in this Lease, and that the acceptability of Lessee, and of any sublessee, assignee or other transferee of any right or interest in this Lease, involves the exercise of broad discretion by the Port in promoting commerce, navigation and shipping in the Port Area of the City of Oakland.

Lessee agrees that as a condition to the Port's consideration of any request by Lessee for each proposed sublease, assignment, or other transfer that Lessee shall deliver to the Port a nonrefundable processing fee of not less than One Hundred Dollars ($100.00). The Port's Director of Properties, or such other Port representative designated from time to time by the Port's Executive Director, may within ten (10) days of receipt of said fee give to Lessee notice that said fee shall be increased by a sum, not to exceed an additional Four Hundred Dollars ($400.00), that said Director or such other designated representative may in his discretion determine is necessary to cover the anticipated Port administrative costs and expenses, including labor, in processing and investigating Lessee's request. Lessee agrees that unless and until said fee, and any request for such additional fee, is delivered to the Port, Lessee shall be deemed to have made no request to the Port to assign or sublease. The minimum and maximum fees shall be adjusted upon the commencement of each successive year of this Lease, in the same percentage as the change in last Consumer Price Index published prior to the date of each succeeding one year period from the last such index published prior to the commencement of the term of this Lease; provided that in no event shall the adjusted fees be less than the theretofore existing fees.

In addition, the parties hereto each agree that Lessee's request for consent to any proposed sublease, assignment or other transfer shall not be deemed to have been submitted to the Port unless and until Lessee, except as and to the extent excused in writing by the Port's Director of Properties, shall have submitted to the Port, in writing, the following information and documents:

(1) The name of the proposed subtenant, assignee or other transferee;

(2) The nature of proposed subtenant's or assignee's business to be carried on in the premises;

(3) Each of the terms and provisions of the proposed sublease, assignment or transfer, including without limitation the full consideration for such sublease, assignment or transfer;

(4) A balance sheet of the proposed subtenant or assignee as of a date within at least ninety (90) days of the request for the Port's consent;

(5) Statements of income or profit and loss of the proposed subtenant or assignee for the two (2) year period preceding the request for the Port's consent;

(6) A statement in reasonable detail as to the business experience of the proposed subtenant or assignee during the five year period preceding the request for the Port's consent;

(7) Such other information and documents relating to the proposed sublessee's or assignee's business, experience, finances as the Port may request.

It is understood and agreed that the Port's consent to a requested sublease, assignment or other transfer, if said consent in the Port's sole discretion is granted, shall not be granted unless and until the Port receives each of the following:

(1) In the case of a proposed assignment, a full and complete executed copy of all documents to effectuate the assignment, together with a document in recordable form whereby the proposed assignee shall expressly assume all the covenants and conditions of this Lease;

(2) In the case of a proposed sublease, a full and complete copy of the executed sublease, which sublease shall contain a provision, satisfactory to the Port and to each leasehold mortgagee having an interest at the time the sublease is executed, requiring sublessee to attorn to the Port or, in the event of any proceeding to foreclose any leasehold mortgage, to the leasehold mortgagee, or any person designated in a notice from leasehold mortgagee, if Lessee defaults under this Lease and if the sublessee is notified of Lessee's default and instructed to make sublessee's rental payments to Lessor or leasehold mortgagee or designated person as in this section.

Lessee shall not accept, directly or indirectly, more than three (3) months' prepaid rent from any sublessee and said copy of the executed sublease shall recite this restriction and sublessee's acknowledgment of the same.

(3) In the case of any other proposed encumbrance or proposed transfer, a full and complete executed copy of all documents to effectuate the encumbrance or transfer, which documents shall incorporate directly or by reference all of the provisions of this Lease.

Unless otherwise provided by resolution adopted by the Board of Port Commissioners, no subletting or assignment, even with the Port's consent, shall relieve Lessee of its rental or other obligation to be performed by Lessee hereunder, and Lessee shall continue to be liable as a principal and not as a guarantor or surety, to the same extent as though no assignment or subletting had been made.

Lessee immediately and irrevocably assigns to the Port, as security for Lessee's obligations under this Lease, all rent from any subletting of all or a part of the premises as permitted by this Lease, and the Port, as assignee and as attorney-in-fact for Lessee, or a receiver for Lessee appointed on the Port's application, may collect such rent and apply it toward Lessee's obligations under this Lease; except that, until the occurrence of an act of default by Lessee, Lessee shall have the right to collect such rent.

Lessee agrees that it shall immediately notify the Port in writing of any cancellation or surrender of any sublease. No modification of any sublease, assignment or other transfer after the Port's initial consent shall be effective without the prior written approval of the Port as evidenced by resolution of its Board of Port Commissioners.

It is understood and agreed that Lessee may, with the prior written consent of the Port evidenced by resolution of its Board of Port Commissioners, assign, transfer, mortgage or encumber Lessee's interest in the demised premises under this Lease and leasehold estate hereby created, to a lender on the security of the leasehold estate, and Lessee may execute any and all instruments in connection therewith necessary or proper to complete any such loan and perfect the security therefor to be given such lender. Any such lender shall have the right at any time during the term hereof and while this Lease is in full force and effect: (a) To do any act or thing required of Lessee hereunder and all such acts or things done hereunder shall be as effective to prevent a forfeiture of Lessee's rights hereunder as if done by Lessee; and (b) to realize on the security of the leasehold estate and to acquire and succeed to the interest of the Lessee hereunder by foreclosure or by a deed or assignment given in lieu of foreclosure and thereafter at such lender's option to convey or assign the interest in or title to this leasehold estate to any other person subject to all the terms, conditions and covenants of this Lease. Upon receipt of written request, the Port shall confirm in writing to any such lender the rights of such lender granted under this section.

Two (2) copies of any and all security devices or instruments shall be filed with the Port prior to the effective date thereof, and the Lessee shall give to the Port prior written notice of any changes or amendments therein.

20. Hazardous Substances: No goods, merchandise or material shall be kept, stored or sold in or on said demised premises which are in any way explosive or hazardous; and no offensive or dangerous trade, business or occupation shall be carried on therein or thereon, and nothing shall be done on said premises other than as is provided for in Section 3 of this Lease which will increase the rate of or suspend the insurance upon said premises or other structures of the Port; and no machinery or apparatus shall be used or operated on said demised premises which will in any way injure said premises or adjacent buildings; provided, however, that nothing in this Section contained shall preclude Lessee from bringing, keeping or using on or about said premises such materials, supplies, equipment and machinery as are appropriate or customary in carrying on its said business, or from carrying on its business in all respects as is generally usual.

21. Forfeitures: It is mutually covenanted and agreed and this Lease is made upon the condition that if the rents or other sums which Lessee herein agrees to pay, or any part thereof, shall be unpaid on the date on which the same shall become due, or if default be made in any of the terms, agreements, conditions or covenants herein contained on the part of Lessee, or should Lessee abandon and cease to use the premises for a period of fifteen (15) days at any one time except when prevented by fire, earthquake, wars, strike or other calamity beyond its control, then and in any such event, at its option, the Port may declare this forfeited, whereupon all improvements of every kind and description shall, at the option of the Port, be forfeited to and become the property of the Port, and the Port may exercise all rights of entry and re-entry upon the demised premises.

Lessee shall not be considered to be in default until the expiration of three (3) days (in the case of a failure in the payment of rent or other sums herein provided to be made by Lessee) or fifteen (15) days (in all other instances) after written notice by the Port to Lessee (and to any mortgagee or other lienholder who may have a leasehold mortgage or other lien on the Lease and to any trustee to whom the leasehold created hereby may have been assigned under a trust indenture and who shall have requested, in writing, the Lessor for such notice specifying the address to which said notice shall be sent) and if, during such three (3) or fifteen (15) day period, as the case may be, such failure or condition in violation of the provisions of this Lease shall have been cured or obviated by Lessee or any such mortgagee or other lienholder or trustee (Lessor hereby agreeing that said mortgagee, lienholder or trustee shall have said right), then upon payment performance or satisfaction of such term, covenant or condition, any right of the Lessor to terminate this Lease or re-enter upon the demised premises by reason of such failure shall cease.

Lessor shall not declare if within such three (3) or fifteen (15) day period, as the case may be, the mortgagee or other lienholder or trustee commences an action to obtain possession of said premises, including the appointment of a receiver, or institutes foreclosure proceedings to sell the interest of Lessee at foreclosure sale, or acquires title to the interest of Lessee by deed or assignment in lieu of trustee's sale or foreclosure proceedings, and thereafter diligently proceeds in good faith to cure such failure or condition in violation of the provisions of this Lease; provided, however, that the rental

agreed to be paid under this Lease is paid and the other covenants of Lessee hereunder which are capable of being performed by such mortgagee, lienholder or trustee are being fully performed.

Any purchaser at a trustee's sale or foreclosure sale, or, in case a deed or assignment is executed in lieu of trustee's sale or foreclosure proceedings, the new owner shall have the same right to cure any default as is given to Lessee.

If any condition which would entitle the Port to declare a default is of such nature that it cannot be remedied within fifteen (15) days, such declaration of default, termination and right of re-entry, or other rights of Lessor, shall be postponed as long as the Lessee or any such mortgagee or other lienholder or trustee shall have commenced the elimination of such condition within said fifteen (15) days and shall then be continuously and diligently proceeding in good faith to cure the same.

22. Right of Entry as Agent: In any and all cases in which provision is made herein for the termination of this Lease, except by forfeiture, or for exercise by the Port of right of entry or re-entry upon said premises, or in case of abandonment or vacating of the premises by Lessee, and the Port may not elect to invoke a forfeiture of said Lease, Lessee hereby irrevocably appoints the Port the agent of Lessee to enter upon said premises and remove any and all persons and/or property whatsoever situated upon said premises, and place all or any portion of said property, except such property as may be forfeited to the Port, in storage for account of and at expense of Lessee; and in such case the Port may relet the premises upon such terms as to it may seem fit, and if a sufficient sum shall not thus be realized after paying expenses of such reletting and collecting to satisfy the rent and other sums herein agreed to be paid, Lessee agrees to satisfy and pay any deficiency, and to pay expenses of such reletting and collecting. Lessee hereby exempts and agrees to save harmless the Port from any cost, loss or damage arising out of or caused by any such entry or re-entry upon said premises and/or the removal of persons and/or property and storage of such property by the Port or its agents.

23. Surrender and Holding Over: Lessee covenants that at the expiration of the term of this Lease or upon its earlier termination it will quit and surrender said premises in good state and condition, reasonable wear and tear and damage by the

elements excepted. The Port shall have the right upon such termination to enter upon and take possession of all said premises. Should Lessee hold over the use of said premises after this Lease has been terminated in any manner, such holding over shall be deemed merely a tenancy from month to month and at a rental to be fixed by the Port, payable monthly in advance, but otherwise on the same terms and conditions as herein set forth.

It is understood and agreed that nothing contained in this Lease shall give Lessee any right to occupy the demised premises at any time after expiration of the term of this Lease or its earlier termination, and that this Lease shall not create any right in Lessee for relocation assistance or payment from the Port upon expiration of the term of this Lease or upon its earlier termination or upon the termination of any holdover tenancy pursuant to this section. Lessee acknowledges and agrees that upon such expiration or termination, it shall not be entitled to any relocation assistance or payment pursuant to the provisions of Title 1, Division 7, Chapter 16, of the Government Code of the State of California (Sections 7260 et seq.) with respect to any relocation of its business or activities upon the expiration of the term of this Lease or upon its earlier termination or upon the termination of any holdover tenancy pursuant to this section.

24. Duty to Guard Goods: Lessee shall assume the responsibility for the guarding and safekeeping of and risk of loss to all property, stock merchandise and equipment stored or located upon or used in connection with the said premises.

25. Waivers: No waiver by either party at any time of any of the terms, conditions or covenants or agreements of this Lease or of any forfeiture shall be deemed or taken as a waiver at any time thereafter of the same or of any other term, condition or covenant or agreement herein contained, nor of the strict and prompt performance thereof. No delay, failure or omission of the Port to re-enter the demised premises or to exercise any right, power or privilege, or option, arising from any default, nor any subsequent acceptance of rent then or thereafter accrued shall impair any such right, power, privilege or option or be construed a waiver of any such default or relinquishment thereof, or acquiescence therein, and no notice by the Port shall be required to restore or revive time as of the essence after waiver by the Port of default in no one or more instance. No option, right, power, remedy or privilege of the Port shall be construed as being exhausted by the exercise thereof in one or more instances. It is agreed that each and all of the rights, powers,

options or remedies given to the Port by this Lease are cumulative, and no one of them shall be exclusive of the other or exclusive of any remedies provided by law, and that exercise of one right, power, option or remedy by the Port shall not impair its rights to any other right, power, option or remedy.

26. Right to Inspect Premises: The Port or its duly authorized representatives, or agents and other persons for it, may enter upon said premises at any and all reasonable times during the term of this Lease for the purpose of determining whether or not Lessee is complying with the terms and conditions hereof or for any other purpose incidental to rights of the Port.

27. Agent for Service of Process: It is expressly agreed and understood that if Lessee is not a resident of this State, or is an association or partnership without a member or partner resident of this state, or is a foreign corporation, then in any such event Lessee shall file with the Port a designation of a natural person residing in the County of Alameda, State of California, giving his name, residence and business address as his or its agent for the purpose of service of process in any court action between him or it and the Port arising out of or based upon this Lease, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon such Lessee; and it is further expressly agreed, covenanted and stipulated that if for any reason service of such process upon such agent is not possible, then in such event Lessee may be personally served with such process out of this state, and that such service shall constitute valid service upon such Lessee; and it is further expressly agreed that Lessee is amenable to the process so served, submits to the jurisdiction of the court so acquired, and waives any and all objection and protest thereto.

28. Automobile Parking: Lessee shall have and is hereby granted a nonexclusive right or license to use, in common with others, automobile parking areas provided by the Port in the vicinity of the demised premises for the parking of automobiles of its patrons and customers, it being understood and agreed, however, that the Port may at any time, without notice, close any of the said automobile parking areas, assign a particular area for parking of Lessee's customers, make a charge for the privilege of parking therein, restrict or limit such parking or devote such parking areas to other uses.

Lessee shall participate in the Port's established and controlled parking validation program and shall purchase validation stickers or participate in such other comparable parking validation program as the Port may establish.

29. Trade Names: The name or names under which Lessee shall elect to operate the restaurant and cocktail lounge shall be subject to the prior written approval of the Port's Executive Director, which approval shall not be unreasonably withheld. Lessee agrees to operate the restaurant and cocktail lounge only under the name so approved; provided, that Lessee shall initially use the name "Scott's Seafood Grill and Bar" for said restaurant and cocktail lounge without further approval of the Port's Executive Director. Lessee shall not maintain, operate or authorize by franchise any similar facility in the City of Oakland or in the East Bay Area within 10 miles of the demised premises under any name or names the same or similar to the name under which the facility constructed hereunder is maintained and operated.

30. Disposal of Trash and Garbage: Lessee agrees to handle and dispose of its trash, garbage and refuse in a sanitary manner and not to pile any boxes, cartons, barrels, trash, debris or refuse in or about the demised premises. Lessee shall properly screen its refuse containers from public view.

31. Licenses and Permits: Lessee agrees to maintain, at its own expense, throughout the term of this Lease, any necessary liquor licenses or permits upon the demised premises and any other licenses or permits required for the conduct of Lessee's business activities on the demised premises.

32. Fumes and Odors: Lessee agrees to conduct its operations upon the demised premises and to use the most modern equipment available so as to reduce to the minimum that is reasonably practicable the emanation from the demised premises of fumes and odors.

33. Annoying or Injurious Conduct: Lessee shall not, without the advance written consent of the Port, install any exterior decorations or painting or install any radio or television antennae, loudspeakers, sound amplifiers, or any devices on the exterior walls of the demised premises. No loudspeakers, radios or other means of broadcasting to be heard outside the demised premises shall be used by Lessee. Lessee shall not use any false or misleading advertising, or engage in any unfair trade practices injurious to other tenants of the Port.

34. Waiver of Claims: The Lessee hereby waives any claim against the City of Oakland, and the Board of Port Commissioners, its officers, agents or employees, for damage or loss caused by any suit or proceedings directly or indirectly attacking the validity of this Lease, or any part thereof, or by any judgment or award in any suit or proceedings instituted by a party other than the Port directly or indirectly attacking the validity of this Lease, or any part thereof, or by any judgment or award in any suit or proceeding declaring this Lease null, void or voidable, or delaying the same, or any part thereof, from being carried out.

35. Extensions of Time: The Port shall have the right to grant reasonable extensions of time to Lessee for any purpose or for the performance of any obligation of Lessee hereunder.

36. Successors: Each and every of the provisions, agreements, terms, covenants and conditions herein contained to be performed, fulfilled, observed and kept shall be binding upon the successors and assigns of the parties hereto, and the rights hereunder, and all rights, privileges and benefits arising under this Lease and in favor of either party shall be available in favor of the successors and assigns thereof, respectively; provided no assignment by or through Lessee in violation of the provisions of this Lease shall vest any rights in such assignee or successor.

37. Board of Port Commissioners: The term "Board of Port Commissioners" as used in this Lease shall mean the department of the City of Oakland presently operating under such name and as presently constituted, or any successor thereof.

38. Time of Essence: Time is hereby expressly declared to be of the essence of this Lease.

39. Notices: Any notice required or permitted to be given Lessee may be given to it at 73 Jack London Square, Oakland, California 94607; provided, however, that if Lessee shall give notice in writing to the Port of any change in said address, then and in such event such notice shall be given to Lessee at the changed address specified in such notice. Any notice permitted or required to be served upon the Port may be served upon it at 66 Jack London Square, Oakland, California 94607; provided, however, that if the Port shall give notice in writing to Lessee of any change in said address, then and in such event such notice shall be given to the Port at such substituted address.

40. Equal Opportunity; Nondiscrimination:

A. Equal Opportunity and Nondiscrimination: In furtherance of the Port's long-standing policy to insure that equal employment opportunity is achieved and nondiscrimination is guaranteed in all Port-related activities, it is expressly understood and agreed with respect to Lessee's activities upon the premises:

(1) That Lessee shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, physical handicap, or veteran's status. Lessee shall take affirmative action to ensure that applicants and employees are treated fairly. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Port's Equal Opportunity Employment Officer setting forth the provisions of this section.

(2) That Lessee shall, in all solicitations or advertisements for employees placed by or on behalf of Lessee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, age, physical handicap, or veteran's status.

(3) That Lessee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Port's Equal Opportunity Employment Officer, advising the labor union or workers' representative of the Lessee's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) That Lessee shall not discriminate by segregation or otherwise against any person or persons because of race, color, religion, sex, age, national origin, physical handicap, or veteran's status in furnishing, or by refusing to furnish, to such person or persons the use of any public facility upon the Premises, including any and all services, privileges, accommodations, and activities provided thereby.

(5) That Lessee shall maintain work force records showing male, female and minority employees by job category and similar information with respect to new hires and shall permit the Port's Equal Employment Opportunity Officer to inspect such records at all reasonable times and not less than annually and shall submit a summary of such information annually on a form provided by the Port.

(6) That Lessee shall undertake the steps outlined in its affirmative action program attached hereto as Exhibit "C" and by this reference incorporated herein to promote effective utilization of minorities, women, handicapped persons, and veterans. Any change(s) in the Lessee's affirmative action program approved by an appropriate federal or state agency or required as a result of a court order shall be submitted to the Port within thirty (30) days after the approval or order, and shall be complied with by Lessee. Such affirmative action program and such changes thereto shall be accorded the same level of confidentiality as provided for by the state or federal regulations or court order under which it was originally submitted.

(7) That Lessee's noncompliance with the provision of this section shall constitute a material breach of this Lease. In the event of a breach of any of the above-stated nondiscrimination and affirmative action covenants, the Port shall have the right to consider but not be limited to the following:

(i) Terminate this Lease pursuant to Section 20 hereof and to re-enter and possess said land and the facilities thereon, and to hold the same as if this Lease had never been made without liability therefor; or

(ii) Seek judicial enforcement of said covenants.

(8) The Port shall assist Lessee in preparing the required affirmative action program to secure equal employment opportunities, whenever such assistance would be beneficial and shall be available to advise and counsel Lessee in the implementation of Lessee's Affirmative Action Program.

41. Employment Resources Development Program: It is further expressly understood and agreed with respect to Lessee's activities upon the demised premises:

(1) That Lessee shall cooperate in implementing the goals of the Port's Employment Resources Development Program, hereinafter called the "ERDP", as set forth in Port Resolution No. 26291, as amended. Lessee understands the Port's "ERDP" seeks to address the needs of Port tenants for a qualified work force and the needs of Oakland's chronically unemployed and underemployed for employment, by identifying employment opportunities, by providing employment training and counseling for persons seeking such opportunities and by facilitating the employment of those persons qualified to fill the jobs identified;

(2) That Lessee understands that cooperation in implementing the goals of the Port's ERDP involves considering Port ERDP referrals consistent with relevant state and federal anti-discrimination regulations seeking to insure equal employment opportunity;

(3) That Lessee shall provide copies of all solicitations or advertisements for employees placed by or on behalf of Lessee to the Port's Executive Director or his designee, so that the Port may assists in providing Lessee with the names of qualified unemployed and underemployed residents of Oakland and others, including minorities, women, physically handicapped persons, and veterans seeking such employment or training opportunities through the Port's ERDP efforts.

42. Quiet Possession: Lessee, upon performing its obligations hereunder, shall have the quiet and undisturbed possession of the demised premises throughout the term of this Lease.

43. Attorneys' Fees and Costs: If the Lessee or the Port commences any action or proceeding against the other arising out of or in connection with this Lease, the prevailing party shall be entitled to have and recover from the losing party reasonable attorneys' fees and costs of suit. The Port shall also be entitled, at the election of the Port, to have and recover from Lessee all other reasonable costs and expenses associated with the Port's enforcement of the provisions of this Lease.

44. Force Majeure: If either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure material, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, or other reason of a like nature not the fault of the

party delayed in performing work or doing acts required under this Lease, the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

45. Tidelands: This Lease and the Premises hereby demised shall at all times during the term of this Lease be subject to the limitations, conditions, restrictions and reservations contained in and prescribed by the act of the Legislature of the State of California entitled, "An act to transfer to the City of Oakland a surface easement over certain tide and submerged lands and to define the powers and duties of the City in relation thereto", approved June 13, 1941 (Statutes 1941, Chapter 720), and the Charter of the said City.

46. Termination of Prior Lease: Upon the date of commencement of the term of this Lease that certain Lease between the Port and Lessee, as successor to PORTOAK CORP., a corporation, dated the 1st day of March, 1966 and recorded that 12th day of April, 1966 in Reel 1747, Image 254, Official Records at Alameda County, California, shall terminate; provided that such termination shall not effect liabilities of the parties hereto which accrued prior to such termination.

47. Agreement in Quintuplicate: This agreement is executed in quintuplicate, each copy of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners,

By _____
President

Attest _____
Secretary

SCOTT'S JACK LONDON SEAFOOD, INC., a corporation,

By _____

Pres. Raymond J. Gallagher
(Print Name and Title)

Attest _____ Exv.P.

Malcolm Stroud Exv.P.
(Print Name and Title)

Approved as to form and legality this 28th day of July, 1987.

_____
Port Attorney

Port Ordinance No. 2755

administrative agencies so created shall be administered by the City Administrator or by a department head or other officer appointed by and responsible to him/her. **(Amended by: Stats. November 1988 and March 2004.)**

Section 601. Boards and Commissions. The Council may create by ordinance such operational, advisory, appellate or rule-making boards and commissions as may be required for the proper operation of any function or agency of the City and prescribe their function, duties, powers, jurisdiction and the number of board and commission members, their terms, compensation and reimbursement for expenses, if any, subject to the provisions of this Article. Members of boards and commissions shall be appointed by the Mayor subject to confirmation by the affirmative vote of five members of the Council and may be removed for cause, after hearing, by the affirmative vote of at least six members of the Council. Vacancies shall be filled for any unexpired term in the same manner as the original appointments were made; provided, however, that if the Mayor does not submit for confirmation a candidate to fill the vacancy within 90 days of the date the vacancy first occurred, the Council may fill the vacancy. If the Mayor does submit for confirmation a candidate to fill a vacancy within the 90-day time frame and the Council does not confirm the candidate, the 90-day period shall commence anew. For purposes of this Section, a seat filled by a holdover appointment will be considered vacant as of the expiration of the holdover's prior term of office. **(Amended by: Stats. November 1988 and March 2004.)**

Section 602. Continuation. The departments, agencies, boards and commissions heretofore created by prior Charter, ordinance or administrative order, other than those provided for in Articles IV, V, VII, and IX of this Charter, may be modified or discontinued by ordinance adopted pursuant to this Article and are hereby continued until so modified or discontinued. **(Amended by: Stats. November 1988.)**

ARTICLE VII
PORT OF OAKLAND

Section 700. Establishment of a Port Department. To promote and more definitely insure the comprehensive and adequate development of the Port of Oakland through continuity of control, management and operation, there is hereby established a department of the City of Oakland known as the "Port Department." **(Amended by: Stats. November 1988.)**

Section 701. Board of Port Commissioners. The exclusive control and management of the Port Department is hereby vested in the Board of Port Commissioners, which shall be composed of seven (7) members who shall be appointed by the Council, upon nomination by the Mayor.

No person shall be appointed as, or continue to hold office as, a member of the Board who is not at the time of his appointment, and has not been continuously for thirty (30) days immediately preceding his appointment, and who shall not continue to be during his term, a bona fide resident of the City of Oakland.

The members of the Board shall serve without salary or compensation. **(Amended by: Stats. November 1988 and Stats. November 2000.)**

Section 702. Organization, Terms of Office. The Board of Port Commissioners shall consist of seven (7) members nominated by the Mayor and appointed by the Council for a term of four (4) years. Members in office at the time this section takes effect shall continue in office until their successors are appointed and qualified. For terms commencing July 10, 1969, two (2) members shall be appointed to fill the positions expiring upon that date, and two (2) additional members shall be ap-

pointed to bring the membership of said Board to seven (7); provided, that the terms of such two additional members shall be for such original duration, in no event to exceed four years, as will insofar as practicable permit appointment at the end of subsequent terms of office of members, of either one or two members. (**Amended by: Stats. November 1988.**)

Section 703. Removal. Any member of the Board may be removed from office by the affirmative vote of six (6) members of the Council in the same manner and subject to the same conditions as the Council may remove the members of any of the Boards provided for in this Charter in Article VI. (**Amended by: Stats. November 1988.**)

Section 704. Ordinances and Resolutions. All action taken by the Board of Port Commissioners shall be by resolution, except as hereinafter set forth in this Article. Any member of the Board may require a record of the vote on any resolution to be made in its minutes. The Board shall keep a minute book wherein shall be recorded the proceedings taken at its meetings and it shall keep a record and index of all of its resolutions and ordinances.

No ordinance or resolution shall be passed or become effective without receiving the affirmative-votes of at least four (4) members of the Board.

To constitute an ordinance a bill must, before final action thereon, be passed to print and published with the ayes and noes at least once in the official newspaper of the City. Between the first and final readings at least five (5) days shall elapse. The enacting clause of all ordinances passed by the Board shall be substantially in these words:

Be it ordained by the Board of Port Commissioners of the City of Oakland as follows:

All ordinances shall be signed by the President or Vice-President of the Board and attested by the Secretary.

A certified copy of each ordinance adopted by the Board shall be forthwith filed with the City Clerk, and the City Clerk shall keep a record and index thereof which shall at all times be open to public inspection. (**Amended by: Stats. November 1988.**)

Section 705. Ordinances Required in Certain Cases. All proceedings for the acquisition of real property by purchase, condemnation, or otherwise, or the granting of any lease longer than one (1) year, the fixing, regulating, and altering schedules of rates, dockage, wharfage, tolls, and charges for all public-owned docks, piers, wharves, slips and other facilities, and for services rendered by the Port Department, and the adoption of all general rules and regulations of the Board, excepting administrative regulations of a temporary nature, shall be taken by ordinance. (**Amended by: Stats. November 1988.**)

Section 706. Powers and Duties or the Board. The Board of Port Commissioners shall have the complete and exclusive power, and it shall be its duty for and on behalf of the City:

(1) To sue and defend in the name of the City in all actions and proceedings wherein there is involved any matters within the jurisdiction of the Board.

(2) To make provisions for the needs of commerce, shipping, and navigation of the port, to promote, develop, construct, reconstruct, alter, repair, maintain, equip and operate all water front properties including piers, wharves, sea walls, docks, basins, channels, slips, landings, warehouses, floating and other plants or works, dredge, and reclaim land, construct, equip and operate terminal trackage with sidings and turnouts and railroad connections between docks, piers and other port structures, and connect the same with mainline tracks, and to establish, equip and operate all other facilities or aids incident to the development, protection and operation of the port, as may be deemed proper and desirable in its judgment, and it may modify its plans from time to time as the requirements of commerce, shipping and navigation may demand, and as part of such development and operation to provide for tugs, dredges, fireboats, barges, cold storage plants, and all other publicly owned facilities or appliances

incident to the operation of the port, of such number and character, and in such places as the Board may deem feasible and proper.

(3) To take charge of, control, and supervise the Port of Oakland, including all the water front properties, and lands adjacent thereto, or under water, structures thereon, and approaches thereto, storage facilities, and other utilities, and all rights and interests belonging thereto, which are now or may hereafter be owned or possessed by the City, including all salt or marsh or tidelands and structures thereon granted to the City in trust by the State of California for the promotion and accommodation of commerce and navigation.

(4) To have control and jurisdiction of that part of the City hereinafter defined as the "Port Area" and enforce therein general rules and regulations, to the extent that may be necessary or requisite for port purposes and harbor development, and in carrying out the powers elsewhere vested in the Board.

Provided, however, that with the approval of the Council the Board may relinquish to the Council control of portions of the said area, and likewise, upon request of the Board, the Council may, by ordinance, enlarge the Port Area.

(5) To require owners of water terminal properties and facilities within the port to keep the same in proper condition and repair and to maintain them with especial reference to the reduction of fire hazard or nuisances, and it shall have the right to inspect such terminal facilities at reasonable times.

(6) To exercise all the powers pertaining to the waterfront, wharves, dredging machines, or the port and its operation and maintenance, which have been heretofore conferred upon the City and the Council by Section 106 of this Charter.

(7) To regulate the berthing, anchoring, towing, loading, unloading and mooring of vessels within the port.

(8) To handle, store and recondition all commodities; to sell or otherwise dispose of personal property within its possession or ownership, and, generally, to perform all services customary, necessary or expedient in connection with the development and operation of the port.

(9) To issue receipts, negotiable or otherwise, for property or merchandise in its charge or possession.

(10) To fix all rates, dockage, rentals, tolls, wharfage, and charges, for the use and occupation of the public facilities or appliances of the port, and for services rendered by the Port Department, and to provide for the collection thereof.

(11) To use, for loading and unloading cargo; with the right to collect tolls, dockage and other terminal charges thereon, such portions of the streets of the City ending or fronting upon the water areas of the harbor of said City, as may be used for said purposes.

(12) To build piers, wharves, docks, bulkheads, slips or other structures, across and upon such streets, provided only that access be provided to the public at the shoreward end thereof.

(13) To lend its aid to secure the improvement of navigable tidal waters within or adjacent to the port, where, in its opinion, such improvements are economically justifiable, and in the general carrying out of its powers to cooperate with neighboring cities, other ports, the State of California, or the United States Government, and appear before state, federal and other public legislative and administrative authorities.

(14) To manage the business of the Port and promote the maritime and commercial interests by proper advertisement of its advantages, and by the solicitation of business, within or without the port, within other states or in foreign countries, through such employees and agencies as it may deem expedient.

(15) To acquire in the name of the City by purchase, condemnation, gift, lease, or otherwise take over and hold all lands, property, property rights, leases, or easements, and personal property of every kind, necessary or convenient for the development and operation of the port, or for the carrying out of the powers herein granted to the Board. Whenever the Board determines that any lands owned by the City within its jurisdiction have become unnecessary for port purposes or harbor development, it may in its discretion transfer such lands to the control of the Council, free from all restrictions, or it may sell or

exchange such lands, by ordinance subject to the referendum provisions of this Charter.

(16) To purchase materials and supplies.

(17) To enter into contracts, agreements, or stipulations (other than leases) germane to the scope of its powers and duties.

(18) To let all work by contract, or order it done by any labor, as the Board may determine.

(19) To have and exercise the right of eminent domain within the "Port Area" on behalf of and in the name of the City for port purposes, harbor development or the carrying out of any of the powers granted to said Board, and to exclusively find and determine by ordinance adopted by a two-thirds vote of all of its members the public interest and necessity thereof.

(20) To appoint a Port Attorney, whose duty it shall be to pass upon the form and legality of all contracts within the jurisdiction of the Board, give legal advice to the Board on official matters, defend and (subject to direction from the Board) prosecute or compromise all actions at law or in equity and special proceedings for or against the City or any officers thereof in his official capacity, pertaining to matters within the jurisdiction of the Board. The Board shall fix and provide for his compensation.

(21) To employ and appoint an Executive Director, and such other officers, employees and agents as may be necessary in the efficient and economical carrying out of its functions and to prescribe and fix their duties, authority and compensation, and to require such officers, employees and agents to give a bond in such an amount as the Board may require for the faithful discharge of their duties. All offices and places of employment in the permanent service of the Board shall be created by ordinance duly passed.

(22) To provide and equip offices.

(23) To provide in the Port Area, subject to the provisions of Section 727, for other commercial development and for residential housing development; provided that any residential housing development shall be approved by the Board with the consent of the City Council.

(24) To provide for financing of Port facilities through the issuance of bonds or other forms of debt instruments which are secured by a pledge of, or are payable from, all or any part of the revenues of the Port and/or which may be secured in whole or in part by interests, liens or other forms of encumbrance (other than in or on fee title in land) or lease in property. Such debt instruments shall be issued and sold in such manner and upon such terms and conditions, and shall contain such provisions and covenants, as the Board may fix and establish by the provisions of one or more procedural ordinances. Such debt instruments shall not constitute a debt, liability or obligation of the City of Oakland and shall be payable exclusively from revenues and other assets of the Port.

(25) To provide for the issuance and sale, or to cause the issuance and sale, of any form of equity instruments or securities which represent interests in property (other than fee title and land) used or owned by the Port and which participate in incidents of ownership of such property; provided, that such property shall not include property of the Port which was owned or used by the Port prior to the date of the adoption of this Section. For the purpose of facilitating the issuance and sale of such equity instruments, the Port is authorized to create and to participate in legal entities, including but not limited to, trusts, corporations and partnerships, and to pledge and grant security interests, liens or other forms of encumbrance or lease in such property (other than fee title in land) to secure the repayment of such equity instruments. Such equity instruments, or combinations of debt and equity instruments, shall be issued and sold, and such entities created, in such manner and upon such terms and conditions, as the Board may fix and establish by the provisions of one or more procedural ordinances. Such equity instruments shall not constitute a debt, liability or obligation of the City of Oakland and shall be payable exclusively from revenues, other funds and property of the Port pledged thereto.

(26) To expend all funds necessary to the carrying out of the powers and duties herein expressed.

(27) To adopt and enforce such ordinances, orders, regulations and practices as are necessary for the proper administration and discharge of its duties and powers, or for the management and government of the port, and its facilities.

(28) To prescribe fines, forfeitures and penalties for the violation of any provision of this Article, or of any ordinance, but no penalty shall exceed Five Hundred Dollars ($500.00) or six (6) months imprisonment, or both.

(29) To have and exercise on behalf of the City all the rights, powers and duties in respect to the subject matters herein provided for, that are now or which may hereafter be vested in the City, or any of its departments or officers, or which may be provided for by general law.

(30) To do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the City, or any of the provisions of this Article, and to exercise all powers not in conflict with the Constitution of the State, or with this Charter, germane to the scope of its powers, purposes and duties. **(Amended by: Stats. November 1988.)**

Section 707. Operation of Facilities. Notwithstanding any other provision of this Charter to the contrary, the Board shall not be required to directly operate all of the properties, facilities and utilities under its control or jurisdiction, and shall have the power to authorize the operation of any of such properties, facilities and utilities by a private person, firm, association or corporation, whether by lease, franchise, license, assignment, permit or otherwise, upon such terms and conditions as the Board shall prescribe, which terms and conditions shall include control over the rates, charges and practices of said private party to the extent permitted by law. **(Amended by: Stats. November 1988.)**

Section 708. Building Permits. No person or persons shall construct, extend, alter, improve, erect, remodel or repair any pier, slip, basin, wharf, dock or other harbor structure, or any building or structure within the "Port Area" without first applying for and securing from the Board a permit so to do, in accordance with the rules and regulations adopted by it. In approving or denying the right to said permit, the Board shall consider the application therefor, the character, nature and size and location of the proposed improvement, and exercise a reasonable and sound discretion in the premises.

Provided, however, that applications for building permits pertaining to privately owned property within the "Port Area" shall be made to the Executive Director who shall consider and act upon them in the same manner as applications for such permits made to the Board. Any person excepting to any denial, suspension or revocation of a permit applied for or held by him pursuant to the provisions of this section, or any person excepting to the granting of, or to the refusal to suspend or revoke a permit applied for or held under the provisions of this section, may appeal to the Board by filing with the Secretary a written notice of such appeal setting forth the specific grounds thereof. Such notice must be filed within fourteen (14) days after notice of such denial, suspension, revocation or granting, or refusal to suspend, revoke or grant, such permit, constituting the basis of such appeal, but in no event later than thirty (30) days after the date of the denial, suspension, revocation or granting of the permit. The Secretary shall forthwith set said matter for hearing before the Board and cause notice thereof to be given (1) to the appellant, and (2) to the adverse party or parties, or to the attorney, spokesman or representative thereof, not less than five (5) days prior to such hearing. At such hearing the appellant shall show cause, on the grounds specified in the notice of appeal, why the action excepted to should not be approved. The Board may continue such hearing from time to time, and its findings and conclusions on the appeal shall be final and conclusive in the matter.

Such permit issued by the Board or the Executive Director shall be in addition to any permit which may be required by law from the Building Inspector of the City. **(Amended by: Stats. November 1988.)**

Section 709. Leases. The Board shall have the power to make and enter into any lease of any properties belonging to or possessed by the City under its jurisdiction for a term of not to exceed sixty-six (66) years, provided that all leases made shall be subject to referendum. **(Amended by: Stats. November 1988.)**

Section 710. Contracts. All contracts shall be made and entered into in accordance with the conditions and procedures established by the Board, but subject to bid limit and race and gender participation programs established by the Council pursuant to the provisions of Sections 807 and 808 of this Charter. **(Amended by: Stats. November 1988, March 1996.)**

Section 711. Supervision of Leases, etc. The Board shall take over and control, and shall have the power to grant, all leases, concessions, easements, privileges, spur tracks and other permits, wharfing-out rights, and waterfront or other franchises relating to the harbor or port and located within the "Port Area" and receive the income therefrom, but this shall not include franchises for the construction and maintenance of railroads, power lines, gas mains and other utilities of a general nature which may extend through other portions of the City into the Port Area and which are within the jurisdiction of the Council pursuant to the provisions of Article X of this Charter, and subject to the supervision of the City Administrator.

It shall be the duty of the Board to see that all provisions of such leases, concessions, easements, privileges, permits, rights or franchises within its jurisdiction are faithfully observed, and it may cause to be instituted such actions or proceedings in the name of the City as may be necessary to enforce the provisions thereof, or to revoke, cancel, or annul them when they have become forfeitable in whole or in part, or are illegal, or void or voidable. **(Amended Stats. November 1988 and March 2004.)**

Section 712. Restrictions of Powers of Council. No franchise shall be granted, no property shall be acquired or sold, no street shall be opened, altered, closed or abandoned, and no sewer, street, or other public improvement shall be located or constructed in the "Port Area," by the City of Oakland, or the Council thereof, without the approval of the Board. **(Amended by: Stats. November 1988.)**

Section 713. Public Streets. Whenever the Board shall determine that it is necessary to open, close, improve, alter or vacate a public street or part of a public street within the "Port Area," a certified copy of the resolution so determining such necessity shall be filed by the Board in the Office of the City Clerk, with the request that the City Administrator and the Council initiate and carry to completion the proceedings necessary to effect said proposal. **(Amended by: Stats. November 1988 and March 2004.)**

Section 714. Personnel System. All permanent places of employment in and under the Board shall be included within the personnel system of the City established pursuant to and subject to the provisions of Article IX of this Charter, except the Executive Director and his two principal assistants, the Secretary of the Board, the Port Attorney and Legal Assistants, chief wharfinger, field and traffic representatives, and all persons employed in the physical or mechanical handling, moving or checking of cargo and freight. The exemption of such personnel from the operation of civil service rules shall not in any way affect such pre-existing civil service rights as such employee may hold. **(Amended by: Stats. November 1988.)**

Section 715. Annual Budget. The Board shall annually, on or before the fourth Monday of May, or not less than one week prior to the submission of the annual appropriation ordinance by the City Administrator, should the Council advance the date therefor, but not later than the third Monday of July, carefully prepare a budget setting forth the estimated receipts of the Port, and revenue from other sources, for the ensuing year, and the sums of money necessarily required for the administration of the department, and for maintenance, operation, construction and devel-

opment of the port and its facilities for the ensuing year, and stating the amount necessary to be raised by tax levy for said purposes. Said budget when so prepared, shall be certified by the President and Secretary of the Board, and a certified copy thereof shall, on or before said date, be filed with the Council, one with the City Administrator, and one with the Auditor. **(Amended by: Stats. November 1988 and March 2004.)**

Section 716. Tax Levy Funds. In the event that said Port budget, as provided for in the foregoing section, shall request or provide for the allocation or appropriation to the Port by the Council of any funds raised or to be raised by tax levy or in any manner to be obtained from general revenues of the City, or shall request the incurring or payment of any financial obligation by the City for the Port's use and benefit, or shall not provide for Board servicing of existing or future general obligation bonds of the City issued for Port purposes, the Council shall have the authority to reject said budget and to require it to be revised to meet with Council approval, subject, however, to the Board's covenants with the holders of all of the then outstanding revenue bonds issued by the Board.

The Treasurer shall keep all Port funds separate from other funds in his possession, and the Board shall have the exclusive management and disbursement of the same. **(Amended by: Stats. November 1988.)**

Allocation of Funds.

Section 717 (1). All Port facilities, airport facilities and terminal facilities of any kind or character are hereby consolidated and shall be operated as a single project by the Board in the interest of transportation by land, by sea and by air, it being hereby found and determined that transportation facilities of all classes implement and augment each other to such an extent that the same must in the public interest be operated singly and under one central supervision and control. Wherever in this Charter the terms "port", "project", or "facilities" are used, the same shall include all facilities under the jurisdiction of the Board, irrespective of whether the same shall be port or airport facilities or other real or personal property or equipment of the Port and related improvements, structures or facilities. **(Amended by: Stats. November 1988.)**

Section 717 (2). All moneys once apportioned or appropriated to the Board, including, without limiting the generality of the foregoing, all moneys heretofore apportioned or appropriated to and now under the control of the Board, shall be and remain under the control and order of and shall be expended by the Board for the purpose for which apportioned or appropriated and shall be kept separate and apart from all other moneys of the City or the Board. All surplus moneys which, in the judgement of the Board, are not needed for the purpose for which apportioned or appropriated, shall be allocated to and deposited in the Revenue Fund provided for in Section 717 (3). **(Amended by: Stats. November 1988.)**

Section 717 (3). All income and revenue from the operation of the port or from the facilities of the port, of whatever kind or nature, and all net income from leases or any other source of income or revenue, including, without limiting the generality of the foregoing, all such income and revenue now under the control of the Board, shall be and remain under the control and order of and shall be expended by the Board; provided that all such income and revenue shall be allocated to and deposited in a special fund in the City Treasury (which is hereby created) designated "Port Revenue Fund" and shall be kept separate and apart from all other moneys of the City or the Board and shall be used and applied for the following purposes and in the following order of priority, to wit:

First: For the payment, as the same become due and payable, of the principal of and interest on any or all general obligation bonds of the City of Oakland heretofore and hereafter issued for port purposes, but only to the extent required by the Constitu-

tion of the State of California or otherwise as determined by resolution of the Board.

Second: For the payment of the principal of and interest on revenue bonds, or other evidences of indebtedness payable solely from revenues as in Section 718 provided, which are due or become due during the fiscal year in which the revenues in said funds, or either thereof, are received or are to be received, together with reserve fund payments, sinking fund payments or similar charges in connection with such revenue bonds due or to become due in such fiscal year, including all payments required to be made pursuant to the terms of any resolution authorizing the issuance of revenue bonds, or required by the terms of the contract created by or upon the issuance of revenue bonds.

Third: For the payment of all costs of maintenance and operation of the facilities from or on account of which such money was received. General costs of administration and overhead of the Board not directly chargeable to each facility under its control shall be apportioned fairly by the Board, upon such reasonable basis as it may determine, to each such facility.

Fourth: For defraying the expenses of any pension or retirement system applicable to the employees of the Board.

Fifth: For necessary additions, betterments, improvements, repairs or enlargements of any facilities, and, to the extent determined by a resolution or resolutions of the Board, for replacements, renewals or reconstruction of any facilities.

Sixth: For establishing and maintaining reserve or other funds to insure the payment on or before maturity of any or all general obligation bonds of the City now outstanding or hereafter issued for any facility under the control of the Board, but only to the extent required by the Constitution of the State of California or otherwise as determined by resolution of the Board.

Seventh: For establishing and maintaining reserve or other funds to insure the payment on or before maturity of any or all revenue bonds of the Board hereafter issued.

Eighth: For establishing and maintaining such other reserve funds pertaining to the facilities of the Board as shall be determined by a resolution or resolutions of the Board.

Ninth: For transfer to the General Fund of the City, to the extent that the Board shall determine that surplus moneys exist in such fund which are not then needed for any of the purposes above stated. **(Amended by: Stats. November 1988.)**

Financing of Harbor and Airport Operations.

Section 718 (1). General Obligation Bonds of the City. The City of Oakland may from time to time incur general obligation bonded indebtedness in the manner provided by law for the acquisition, construction or completion of any port facilities or improvements of the Port of Oakland, including land, rights of way and air easements. The proceeds from the sale of any general obligation bonds now authorized, or which may hereafter be authorized, for any such purposes, shall be under the control of, and shall be expended by, the Board for the objects and purposes for which such general obligation bonded indebtedness was incurred. Whenever, in the opinion of the Board, it is desirable for the City of Oakland to incur additional general obligation bonded indebtedness for any project within the jurisdiction or control of the Board, the Board shall prepare tentative plans, estimates and bond retirement schedules and submit its recommendations in writing to the City Council, which shall thereupon take such action as it deems advisable to reject or carry out such recommendations. **(Amended by: Stats. November 1988.)**

Section 718 (2). Methods of Financing Not Exclusive. Nothing in this Section 718 contained shall in any way abridge, control, limit, restrict or revoke the power of the electors of the City of Oakland to vote for and cause to be authorized and issued general obligation bonds of the City of Oakland for the acquisition, construction or completion of any project herein defined, or any additions thereto or betterments or improvements thereof, irrespective of

whether or not revenue bonds for such purpose have been, or may thereafter be issued hereunder, and nothing herein contained shall prevent the financing of any project or any additions, betterments or improvements thereof from any other funds which may be legally available for that purpose. Revenue bonds authorized to be issued hereunder shall not be subject to charter limitations as to the amount of general obligation bonded indebtedness of the City of Oakland nor be taken into consideration in determining the amount of general obligation bonded indebtedness which the City of Oakland is authorized to incur, and the issuance of revenue bonds as in this Article VII provided shall be deemed to constitute a supplemental and additional method of providing funds for the financing of harbor, airport or other real or personal property or equipment of the Port and related improvements, structures or facilities. Such revenue bonds shall be issued in the name of the Board of Port Commissioners of the City of Oakland and shall constitute obligations only of the Board, payable in accordance with their terms from revenues of any project, as in this Article VII authorized. (**Amended by: Stats. November 1988.**)

Section 718 (3). Rates, Tolls and Charges. Without limiting any power in this Charter conferred upon the Board, the Board has power for any of the purposes of this Section 718 to fix rates, tolls, fees, rentals or charges for the use of the facilities provided by any project, or for any services rendered in connection therewith, and to alter, change or modify the same at its pleasure, subject to any contractual obligation which may be entered into by the Board with respect to the fixing of such rates, tolls, fees, rentals or other charges; and, by a resolution of issue or otherwise, to enter into covenants to increase rates, tolls, fees, rentals or other charges from time to time; provided, however, that any person shall be permitted to use or operate any facilities provided by any project only upon payment of the regularly established charge therefor, except as may be otherwise specifically provided in a resolution of issue. All rates, fees, rentals and other charges shall be paid only in such coin or currency as on the date of payment is legal tender for public and private debts. (**Amended by: Stats. November 1988.**)

Section 718 (4). Authorization of Revenue Bonds. Each issue of revenue bonds shall be authorized by the Board by a resolution of issue adopted by the affirmative votes of at least five (5) members of the Board at a duly assembled meeting. Each resolution of issue shall prescribe the purpose or purposes for which, and the terms and conditions on which, said revenue bonds are to be issued. (**Amended by Stats. November 1988.**)

Section 718 (5). Validity of Revenue Bonds Not Affected by Actions of City or Boards Relative to Project.

(a) The validity of the authorization and issuance of any revenue bonds by the Board shall not be dependent on or affected in any way by:

(i) Proceedings taken by the City or the Board for the acquisition, construction or completion of any project or any part thereof;

(ii) Any contracts made in connection with the acquisition, construction, or completion of any project; or

(iii) The failure to complete any project for which bonds are authorized to be issued. (**Amended by: Stats. November 1988.**)

Section 718 (6). Rights of Bondholders. Except as provided otherwise in any resolution of issue, the holder of any bond issued pursuant to this Section 718 may, by mandamus or other appropriate proceedings, require and compel the performance of any of the duties imposed upon the Board or the City or the Council or any official or employee of the Board or the City or assumed by any thereof in connection with the acquisition, construction, completion, operation, maintenance, repair, reconstruction or insurance of any project, or the collection, deposit, investment, application and disbursement of rates, fees and charges derived from the operation and use of any project and all other revenues, or in connection with the deposit, investment or disburse-

ment of the proceeds received from the sale of the bonds under this Section. The enumeration of such rights and remedies does not, however, exclude the exercise or prosecution of any other rights or remedies available to the holders of bonds issued pursuant to this Section 718. **(Amended by: Stats. November 1988.)**

Section 718 (7). Section Confers Complete Authority. The provisions of this Section constitute full and complete authority for the issuance of revenue bonds as herein provided by the Board and no other procedure, or proceedings, consents, approvals, orders or permission from the Council or any municipal officer or board of the City of Oakland, shall be required for the acquisition, construction or completion of any project, or the issuance of any revenue bonds under this Section 718 except as specifically provided in this Section 718. The powers and authorities conferred by this Section are in addition to and supplemental to all other powers and authorities conferred upon the Board. **(Amended by: Stats. November 1988.)**

Section 719. Moneys on Hand. All moneys in the Harbor Maintenance and Improvement Fund at the time of the adoption of this Charter and all other revenues and funds in the possession of the City set aside for port purposes, shall immediately be under the jurisdiction and control of the Board. **(Amended by: Stats. November 1988.)**

Section 720. Duties of Treasurer. All moneys under the control of the Board shall be immediately paid over to the Treasurer of the City of Oakland, who shall have the care and custody of said funds, and shall keep separate accounts thereof, and pay out the same, as provided in this Charter. **(Amended by: Stats. November 1988.)**

Section 721. Revolving Fund. The Board shall have authority to set up by ordinance a sufficient contingent or revolving fund from which the Executive Director shall be entitled to draw warrants directly upon the Treasurer for the prompt payment of transient laborers, and the Treasurer shall upon presentation of same, pay such warrants. Statements of such payments shall be filed with the Board at its regular meetings and shall be approved by the Board and endorsed by the President and Secretary thereof, and audited as in the case of ordinary claims. **(Amended by: Stats. November 1988.)**

Section 722. Additional Powers. The City Council, subject to the approval of the Board, may by ordinance confer upon and delegate to the Board, from time to time, such additional powers and duties which may be vested in it, and which it may deem necessary or convenient to carry out the general purposes of such Board. **(Amended by: Stats. November 1988.)**

Section 723. Liberal Construction. If any section, clause, word, or provision of this Article shall be held unconstitutional, the other sections, clauses, words, or provisions of this Article shall not be affected thereby. All the provisions of this Article shall be liberally construed. **(Amended by: Stats. November 1988.)**

Section 724. The provisions of this Article shall supersede and control all other provisions of the Charter in conflict therewith. To all other extent, the powers, duties, and functions heretofore vested in the Council, or any of the officials, boards, or departments of the City, shall be unimpaired. **(Amended by: Stats. November 1988.)**

Section 725. Port Area. The "Port Area" under the exclusive jurisdiction of the Board of Port Commissioners shall be the same area that existed immediately prior to the adoption of this Section, as it has been defined by Charter and by ordinance, and as it may hereafter be altered by Council ordinance in accordance with and upon the recommendation of the Board, or by amendment of this Charter. **(Amended by: Stats. November 1988.)**

Section 726. Without denial or disparagement of other powers now held by or that may hereafter be

given to the City of Oakland or its legislative bodies under or by the Constitution or the laws of the State of California, the City Council and Board of Port Commissioners are hereby authorized and empowered to grant and convey all or any portion of or interest in the tidelands and submerged lands located in the Middle Harbor area of the City, lying between the Estuary of San Antonio and Seventh Street, and westward of Bay Street extended southerly, to the United States of America for public and governmental (including military or naval) purposes, subject to such terms, conditions, and reservations, if any, as the Council and Board shall deem proper. No ordinance or other measure passed in respect to any such grant shall be subject to the referendum provisions of this Charter. All proceedings heretofore taken to accomplish such a grant are hereby ratified, confirmed and approved, and the completion thereof and making of such grant is hereby authorized. **(Amended by: Stats. November 1988.)**

Section 727. Land Use and Development. The Board shall develop and use property within the Port Area for any purpose in conformity with the General Plan of the City. Any variation therefrom shall have the concurrence of the appropriate City board or commission; provided, that the Board may appeal to the Council for final determination of adverse decisions of such board or commission, in accordance with uniform procedures established by the Council. **(Amended by: Stats. November 1988.)**

Section 728. Living Wage and Labor Standards at Port-Assisted Businesses.

(1) Scope and Definitions. The following definitions shall apply throughout this Section:

(A) "Port" means the Port of Oakland.

(B) "Port-Assisted Business" or "PAB" means (1) any person involved in a Port Aviation or Port Maritime Business receiving in excess of $50,000 worth of financial assistance from the Port, or (2) any Port Contractor involved in a Port Aviation or Port Maritime Business if the person employs more than 20 persons per pay period, unless in the prior 12 pay periods the person has not had more than 20 such employees and will not have more than 20 persons in the next 12 pay periods. A PAB shall be deemed to employ more than 20 persons if it is part of an 'enterprise' as defined under the Fair Labor Standards Act employing more than 20 persons. "Port Contractor" means any person party to a Port Contract as herein defined.

(C) "Port Contract" means:

(1) Any service contract with the Port for work to be performed at the Port under which the Port is expected to pay more than $50,000 over the term of the contract;

(2) Any contract, lease or license from the Port involving payments to the Port expected to exceed $50,000 either (a) over the term of the contract, lease or license, or (b) during the next 5 years if the current term is less than 1 year but may be renewed or extended, either with or without amendment;

(3) Any subcontract, sublease, sublicense, management agreement or other transfer or assignment of any right, title or interest received from the Port pursuant to any of the foregoing contracts, leases or licenses.

A contract, lease or license with the Port or any agreement derived therefrom shall not be deemed a Port Contract unless entered into after enactment of this Section, or amended after enactment of this Section to benefit in any way the party dealing with the Port.

(D) "Employee" means any individual employed by a PAB in Port related employment.

(E) "Person" includes any natural person, corporation, partnership, limited liability company, joint venture, sole proprietorship, association, trust or any other entity.

(F) "Valid collective bargaining agreement" as used herein means a collective bargaining agreement entered into between the person and a labor organization lawfully serving as the exclusive collective bargaining representative for such person's employees.

(G) "Port Aviation or Port Maritime business" means any business that principally provides services related to maritime or aviation business related services or whose business is located in the maritime or aviation division areas as defined by the Port.

(2) Exemptions from Coverage. In addition to the above exemption for workforces of fewer than 20 workers, the following persons shall also be exempt from coverage under this Section:

(A) An Employee who is (1) under twenty-one (21) years of age and (2) employed by a nonprofit entity for after-school or summer employment or for training for a period not longer than ninety (90) days, shall be exempt.

(B) An Employee who spends less than 25 percent of his work time on Port-related employment.

(C) A person who employs not more than 20 employees per pay period.

(3) Payment of Minimum Compensation to Employees. Port-Assisted Businesses shall provide compensation to each Employee of at least the following:

(A) Minimum Compensation. The minimum compensation shall be wages and health benefits totaling at least the rate of the living wage ordinance of the City of Oakland.

(B) Credit for Health Benefits. The PAB shall receive a credit against the minimum wage required by this Section for health benefits in the amount provided by and in accordance with the living wage ordinance of the City of Oakland.

(4) Notifying Employees of their Potential Right to the Federal Earned Income Credit. Each PAB shall inform each Employee who makes less than twelve dollars ($12.00) per hour of his or her possible right to the federal Earned Income Credit ("EIC") under Section 2 of the Internal Revenue Code of 1954, 26 U.S.C. §32, and shall make available the forms required to secure advance EIC payments from the business. These forms shall be provided to the eligible Employees in English (and other languages spoken by a significant number of such Employees) within thirty (30) days of employment under this Section and as required by the Internal Revenue Code.

(5) Preventing Displacement of Workers. Each PAB, which is to replace a prior PAB shall offer employment to the Service Employees of the prior PAB, if, these Employees worked for the prior PAB for at least 90 calendar days. Such Employees may be not be terminated by the new PAB during the first 90 workdays except for just cause. The new PAB may operate at lower staffing levels than its predecessor but in such event, shall place the prior Employees on a preferential reinstatement list based on seniority. For purposes of this Section, a PAB "replaces" another if it (1) assumes all or part of the lease, contract or subcontract of a prior employer or obtains a new lease, contract, or sublease, and (2) offers employment which Employees of the prior PAB can perform. In the case of a replacement connected to the new PAB relocating from another location, in staffing decisions the new PAB may recognize seniority from its prior locations in addition to the seniority of the prior PAB's workforce. "Service Employees" means all employees except manager, supervisors, professionals, paraprofessionals, confidential and office employees.

(6) Waiver.

(A) A PAB who contends it is unable to pay all or part of the living wage must provide a detailed explanation in writing to the Port Executive Director who may recommend a waver to the Port board. The explanation must set for the reasons for its inability to comply, including a complete cost accounting for the proposed work to be performed with the financial assistance sought, including wages and benefits to be paid all employees, as well as an itemization of the wage and benefits paid to the five highest paid individuals employed by the PAB. The PAB must also demonstrate that the waiver will further the public interests in creating training positions which will enable employees to advance into permanent living wage jobs or better and will not be used to replace or displace existing positions or employees or to lower the wages of current employees.

(B) The Port Board will grant a waiver only upon a finding and determination that the PAB has demonstrated the necessary economic hardship and that waiver will further the public interests in providing training positions which will enable employees to advance into permanent living wage jobs or better. However, no waiver will be granted if the effect of the waiver is to replace or displace existing positions or employees or to lower the wages of current employees.

(C) Such waivers are disfavored, and will be granted only where the balance of competing interests weighs clearly in favor of granting the waiver. If waivers are to be granted, partial waivers are favored over blanket waivers. Moreover, any waiver shall be granted for no more than one year. At the end of the year the PAB may reapply for a new waiver which may be granted subject to the same criteria for granting the initial waiver.

(D) Any party who objects to the grant of a waiver by the Port Board may appeal such decision to the City/Port Liaison Committee, who may reject such waiver.

(7) Retaliation and Discrimination Barred; No Waiver of Rights.

(A) A PAB shall not discharge, reduce the compensation of or otherwise discriminate against any person for making a complaint to the Port, participating in any of its proceedings, using any civil remedies to enforce his or her rights, or otherwise asserting his or her rights under this Section.

(B) Any waiver by an individual of any of the provisions of this Section shall be deemed contrary to public policy and shall be void and unenforceable, except that Employees shall not be barred from entering into a written valid collective bargaining agreement waiving a provision of this Section if such waiver is set forth in clear and unambiguous terms. Any request to an individual by a PAB to waive his or her rights under this Section shall constitute a violation of this Section.

(8) Enforcement.

(A) Each PAB shall maintain for each person in Port-related employment a record of his or her name, pay rate and, if the PAB claims credit for health benefits, the sums paid by the PAB for the Employee's health benefits. The PAB shall submit a copy of such records to the Port at least by March 31st, June 30th, September 30th and December 31st of each year, unless the PAB has employed less than 20 persons during the preceding quarter in which case the PAB need only submit a copy of such records every December 31st. Failure to provide a copy of such records within five days of the due date will result in a penalty of five hundred dollars ($500.00) per day. Each PAB shall maintain a record of the name, address, job classification, hours worked, and pay and health benefits received of each person employed, and shall preserve them for at least three years.

(B) If a PAB provides health benefits to persons in Port-related employment but does not pay for them on a per-hour basis, then upon the PAB's request, the amount of the hourly credit against its wage obligation shall be the Port's reasonable estimate of the PAB's average hourly cost to provide health benefits to its Employees in Port-related employment. The PAB shall support its request with such documentation as is reasonably requested by the Port or any interested party, including labor organizations in such industry.

(C) Each PAB shall give written notification to each current Employee, and to each new Employee at time of hire, of his or her rights under this Section. The notification shall be in the form provided by the Port in English, Spanish and other languages spoken by a significant number of the Employees, and shall also be posted prominently in areas at the work site where it will be seen by all Employees.

(D) Each PAB shall permit access to work sites and relevant payroll records for authorized Port representatives for the purpose of monitoring compliance with this Section, investigating employee complaints of noncompliance and evaluating the operation and effects of this Section, including the production for inspection and copying of its payroll records for any or all persons employed by the PAB. Each PAB shall permit a representative of the labor organizations in its industry to have access to its workforce at the Port during non-working time and in non-work areas for the purpose of ensuring compliance with this Section.

(E) Notwithstanding any provision in Article VI of this Charter to the contrary, the City Administrator may develop rules and regulations for the Port's activities in (1) Port review of contract documents to ensure that relevant language and information are included in the Port's RFP's, agreements and other relevant documents, (2) Port monitoring of the operations of the contractors, subcontractors and financial

assistance recipients to insure compliance including the review, investigation and resolution of specific concerns or complaints about the employment practices of a PAB relative to this section, and (3) provision by the Port of notice and hearing as to alleged violations of this section.

(9) Private Rights of Action.

(A) Any person claiming a violation of this Section may bring an action against the PAB in the Municipal Court or Superior Court of the State of California, as appropriate, to enforce the provisions of this Section and shall be entitled to all remedies available to remedy any violation of this Section, including but not limited to back pay, reinstatement or injunctive relief. Violations of this Section are declared to irreparably harm the public and covered employees generally.

(B) Any employee proving a violation of this Section shall recover from the PAB treble his or her lost normal daily compensation and fringe benefits, together with interest thereon, and any consequential damages suffered by the employee.

(C) The Court shall award reasonable attorney's fees, witness fees and costs to any plaintiff who prevails in an action to enforce this Section.

(D) No criminal penalties shall attach for any violation of this Section, nor shall this Section give rise to any cause of action for damages against the Port or the City.

(E) No remedy set forth in this Section is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law. This Section shall not be construed to limit an employee's right to bring a common law cause of action for wrongful termination.

(10) Severability. If any provision or application of this Section is declared illegal, invalid or inoperative, in whole or in part, by any court of competent jurisdiction, the remaining provisions and portions thereof and applications not declared illegal, invalid or inoperative shall remain in full force or effect. The courts are hereby authorized to reform the provisions of this Section in order to preserve the maximum permissible effect of each subsection herein. Nothing herein may be construed to impair any contractual obligations of the Port. This Section shall not be applied to the extent it will cause the loss of any federal or state funding of Port activities. **(Amended by: Stats. March 2002 and March 2004)**

ARTICLE VIII
FISCAL ADMINISTRATION

Section 800. Fiscal Year. The fiscal year for the City shall commence on the first day of July of each year. **(Amended by: Stats. November 1988.)**

Section 801. Budget. Each department, office and agency of the City shall provide in the form and at the time directed by the Mayor and City Administrator all information required by them to develop a budget conforming to modern budget practices and procedures as well as specific information which may be prescribed by the Council. Under the direction of the Mayor and Council, the City Administrator shall prepare budget recommendations for the next succeeding fiscal year which the Mayor shall present to the Council, in a form and manner and at a time as the Council may prescribe by resolution. Following public budget hearings, the Council shall adopt by resolution a budget of proposed expenditures and appropriations necessary therefor for the ensuing year, failing which the appropriations for current operations of the last fiscal year shall be deemed effective until the new budget and appropriation measures are adopted. **(Amended by: Stats. November 1988 and March 2004.)**

Section 802. Levy of Property Tax. Not later than the date set by state law for this purpose, the Council shall by resolution fix the rate of property tax to be levied and levy the tax upon all taxable property in the City. Such rate shall be adequate to meet all obligations of the City for the fiscal year, taking into account estimated revenue from all other sources. Should the Council fail to fix the rate and levy taxes within the time prescribed, the rate for the next preceding fiscal year shall thereupon be automatically effective, and a tax at such rate shall be levied upon all taxable property in the City for the