

# San Francisco Bay Conservation and Development Commission

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December 22, 2017

**TO:** All Commissioners and Alternates

**FROM:** Lawrence J. Goldzband, Executive Director (415/352-3653) [larry.goldzband@bcdc.ca.gov](mailto:larry.goldzband@bcdc.ca.gov)  
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**SUBJECT: Approved Minutes of October 19, 2017 Commission Meeting**

1. **Call to Order.** The meeting was called to order by Chair Wasserman at the Bay Area Metro Center, 375 Beale Street, Board Room, First Floor, San Francisco, California at 1:05 p.m.

2. **Roll Call.** Present were: Chair Wasserman, Vice Chair Halsted, Commissioners Addiego, Bottoms, Butt, Jahns, McGrath, Nelson (departed at 4:14 p.m.), Pine (arrived at 1:13 p.m./departed at 3:58 p.m.), Ranchod (departed at 3:58 p.m.), Randolph (departed at 3:47 p.m.), Sartipi (represented by Alternate McElhinney), Sears (represented by Alternate Connolly – departed at 3:58 p.m.), Showalter (departed at 3:59 p.m.), Techel (represented by Alternate Hillmer – departed at 3:37 p.m.), Ziegler (departed at 4:17 p.m.) and Zwissler (departed at 4:09 p.m.).

Chair Wasserman announced that a quorum was present.

**Not present were Commissioners:** Alameda County (Chan), Santa Clara County (Cortese), Department of Finance (Finn), Speaker of the Assembly (Gibbs), Contra Costa County (Gioia), Sonoma County (Gorin), State Lands Commission (Lucchesi), City and County of San Francisco (Peskin), Solano County (Spering) and Napa County (Wagenknecht).

3. **Public Comment Period.** Chair Wasserman called for public comment on subjects that were not on the agenda.

Mr. Lawrence Goldberg addressed the Commission: I am one of Scott's Restaurant legal team. I represent Scott's Seafood Restaurant and Scott's was the subject of a civil penalty and a resolution of that civil penalty back in April of this year.

The cease and desist order that was the culmination of that process provided that Scott's would be penalized \$359,360.00 and that it would receive a 15 percent discount of that penalty if it complied with certain presentation of information by September 1st. The 15 percent represented \$59,304.00.

It is our position that Scott's has complied with the cease and desist order and has provided all of the information that was requested of it. It provided quarterly and monthly reports on pavilion usage and it provided that data to CIM which is the Port's agent as had been required of Scott's for the preceding years.

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**BCDC MINUTES**  
**October 19, 2017**

The permit requires that Scott's provide quarterly event data to CIM and that information will be provided to BCDC.

It also required that Scott's provide monthly, after-the-fact pavilion usage data. So an event takes place; the following month occurs – before the 15th of that month Scott's says, we had these events that took place in the preceding month.

On September 15th Executive Director Goldzband wrote to Scott's and denied the 15 percent penalty waiver. Scott's objected and on September 27th a letter was sent from my office and we included as exhibits all of the data that Scott's had compiled and sent to CIM as part of this process.

We understood that it was being forwarded to BCDC. Yesterday, on October 18th Executive Director Goldzband wrote to Mr. Verna and he crystallized the one point that BCDC looked at to decide that Scott's was out of compliance and would be penalized the 15 percent.

He said that, Scott's could have complied with Section 3.1 in a timely manner if Scott's assured that the Port had forwarded the information that it received from Scott's to BCDC.

I have additional information that I would like to provide if I could. I will sum it up as fast as I can.

Chair Wasserman replied: I will give you one more minute.

Mr. Goldberg continued: In brief, Scott's collected all of this information. It provided it to BCDC via the Port. The Port had assured Scott's that it was providing this information every month.

We were told that, if we had cc'd Adrienne Klein with an email that contained this information we would be in compliance. So it really has come down to whether or not Scott's cc'd someone at BCDC rather than providing the information to the Port.

We would say that this is an extremely harsh penalty, \$59,000.00 just by virtue of not cc'ing someone in an email. It is not that Scott's did not compile the information, it did. It is not that Scott's did not transmit the information, it did. It just sent it to the party that it always thought was the recipient of that information. Thank you very much.

One last thing; to the extent that we could speak to this in a formal hearing, we were requested to do so a later date. Mr. Gallagher, who is sick today, would like to speak to this issue. We would like to schedule this for the next available hearing if that is possible.

Chair Wasserman stated: This matter is not on our agenda for action. I am certainly happy to hear a response from our counsel.

Chief Counsel Zeppetello commented: This would just be a process response. The cease and desist order gives the Executive Director the responsibility and the discretion to make this determination. It says, Scott's shall be entitled to a waiver of 15 of the total penalty

amount if the Executive Director determines that Scott's has complied with percent various provisions of the order by no later than September 15th. The Executive Director shall notify Scott's of his determination regarding compliance.

The Executive Director did send a letter on September 15th. On September 27th Scott's objected and purported to appeal. Yesterday Mr. Goldzband responded.

I would say that this is not on the agenda. If the Commission would like to reconsider the issue we would ask that it be calendared so that we could provide this correspondence for your consideration as well. Thank you.

Chair Wasserman continued: Does anybody on the Commission wish to address the issue of calendaring consideration of whether there is a right to appeal or it should be considered?

Commissioner McGrath spoke: I am certainly not comfortable dealing with this as something that is not agendized. I would certainly like to ask questions.

I also want to make sure that the full Commission understands the appellate process. I think I used it once when I was representing the Port of Oakland but that is well over a decade ago. So I think what exactly the procedures are should be very clear if it is agendized.

Commissioner Nelson had a question for staff: The permitted issue here is a permit to Scott's not to the Port. Is that correct?

I am speaking in terms of whether there has been a violation here that clearly matters.

Mr. Zeppetello stated: The obligation was an obligation under the cease and desist order which was issued solely to Scott's.

Chair Wasserman announced: I am going to request that the matter be scheduled for discussion by the Commission. The issues need to be very carefully framed.

Chair Wasserman moved to Approval of the Minutes.

4. **Approval of Minutes of the October 5, 2017 Meeting.** Chair Wasserman asked for a motion and a second to adopt the minutes of October 5, 2017.

**MOTION:** Vice Chair Halsted moved approval of the Minutes, seconded by Commissioner Randolph.

**VOTE:** The motion carried with a vote of 14-0-3 with Commissioners Addiego, Butt, Jahns, McGrath, Nelson, Pine, Ranchod, Randolph, McElhinney, Connolly, Showalter, Hillmer, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and Commissioners Bottoms, Ziegler and Zwissler abstaining.

5. **Report of the Chair.** Chair Wasserman reported on the following:

a. A quick reminder that next week will be our evaluation by the Office for Coastal Management in NOAA that oversees state implementation of the federal Coastal Zone Management Act, and as part of evaluation they will hold a public meeting at the Oakland state building, starting at 6 p.m. on Wednesday the 25th.

b. **Next BCDC Meeting.** Our next meeting will be held on November 2nd, where we may:

Have a briefing on the Resilience by Design initiative.

Hear a briefing by UC Berkeley professor Mark Stacey and UC Davis professor Mark Lubbel on transportation and governance, respectively. This will be an important discussion because it does discuss gaps. This report did not take fully take into consideration our Action Plan. It will be an interesting discussion.

Hold a closed session on our litigation with the U.S. Army Corps of Engineers.

We are starting next month the fourth wave of our workshops. The first workshop was on adapting to rising tides or sea level. It was the general; what should we do? This led to our Action Plan.

The second one was on Bay fill which led to some specific policies including the initiative to amend the Bay Plan to address wetlands and to address social equity issues.

The third one we expect will come to the Commission in January or February of next year and that's on financing the future; how we are going to go about paying for what we know we need to do even though we don't know how much that bill is yet.

That group met this morning and had a presentation about flood control agencies; what they do and what their powers and how they are treated differently under state law from other utilities dealing with water and sewage. That is going to be an interesting part of the discussion when we get to the Commission workshops.

And the fourth wave is education. That may, in fact, be the most important wave and workshop that we have because unless we do a whole lot of education all of the rest of the things that we have talked about are not going to be real effective.

I am looking forward to starting that and any Commissioner that is interested may join us. That will probably not come to the Commission until early fall of next year.

c. **Ex-Parte Communications.** If anybody has had an ex-parte communication on an adjudicatory matter that is before us and wishes to disclose it now you may do so but you have to disclose it in writing. (No comments were voiced)

d. **Executive Director's Report.** Larry Goldzband will now present the Executive Director's report.

**6. Report of the Executive Director.** Executive Director Goldzband reported: I returned home Tuesday evening to find the first Christmas catalog in our mailbox, a mere ten and a half weeks before the holiday. Most important, that means that we are already in the second quarter of our fiscal year. Chenee Williams, our chief budget officer, has done an outstanding job working with our staff to create a three-year pro forma. Based on those projections, we'll create a policy and fiscal presentation to share with the Natural Resources Agency and the Department of Finance projecting BCDC's future in an era in which we need to implement your policy recommendations and our updated strategic plan. I plan to share that presentation with you. So, while waiting for something may make it more exciting, I shall remind you of Stephen Sondheim's great verse that anticipation is good for the soul, but bad for the heart. I urge you to stay calm, persevere and work out regularly.

**a. Budget and staff.** Just two things to report; and the first is a very nice bit of really, really interesting news. Last spring, BCDC held its offsite at China Camp State Park, and met with the staff of the San Francisco Bay National Estuarine Research Reserve, commonly known as the NERR. The NERR is a national network of 29 coastal sites designated to protect and study estuarine systems. Established through the Coastal Zone Management Act, the reserves are a partnership between NOAA and the coastal states. NOAA provides funding and guidance, and each site is managed on a daily basis by a state agency or university with input from local partners. The research reserves cover over 1.3 million acres nationally.

When we met with the local NEER staff, which is led by San Francisco State University faculty who are also associated with the Romberg Tiburon Center, we recognized that we could use each other's expertise to review and analyze the numerous monitoring reports that BCDC receives annually due to our permitting requirements.

In addition, as the San Francisco Estuary Partnership moves forward with its regional monitoring evaluation and study, and San Francisco State University has received a grant from the National Science Foundation to provide internships for its Master's Degree students to work in public policy settings, we figured there could be a great marriage of interests. So, we are starting to formulate how we can have a few graduate-level interns work with BCDC staff on a regular basis to examine our information and we'll expand that process to ensure that we work regionally with our regulatory brethren to help everybody create an even more robust process. And, as the students will be paid by San Francisco State, it's a pretty inexpensive way to leverage funding. More on this topic next summer as we get closer.

**b. Policy.** The second piece of news to report is that each of you has received a memo from Marc Zeppetello, our chief counsel, advising you that you need to complete your state ethics training this year or next. Every two years I let you know of this requirement and every two years I get the same question from at least one or two of you – "Does my local ethics training requirement count? Can I skip out on the state training?" The answer, as it is every

two years, is a resounding - no. As members of a state body, you must complete – and pass – the state ethics training. Please make sure that you complete the form at the end of the course, fulfill it and/or attach it to the certificate of completion and return it to Reggie Abad of staff.

And finally, we just received the quarterly fellow news about NOAA fellows. There is on the fifth page a focus on a BCDC fellow, Alex Brogue. Alex hails from Louisiana and South Carolina and moved here a while ago and is beginning to call the Bay Area home. He has done a great job for BCDC and I encourage you to read this page and a half biography and description of what he is doing.

That concludes my report, Chair Wasserman, and I'm happy to answer any questions you may have.

**7. Consideration of Administrative Matters.** Chair Wasserman stated Jaime Michaels was available to answer any questions regarding the administrative listing mailed on October 13th.

Commissioner McGrath commented: Without going into the merits of the concerns raised about the Marin Audubon Society; just to the single question of – would this increase flooding? Has it been looked at in terms of how we usually look at sea level rise and risks of flooding? Is there any hazard for increase? I know that it says that it is a temporary measure.

Ms. Jaime Michaels replied: No. It will not increase flooding. It has been designed to be pretty high.

**8. Public Hearing and Possible Vote on the Installation of a New Public Pavilion Enclosure System at the Franklin Street Plaza by Scott's Jack London Seafood Inc., and the Port of Oakland, at Jack London Square, in the City of Oakland, Alameda County; BCDC Permit Application No. 1985.019.11B (Material Amendment No. Eleven).** Chair Wasserman announced: Item 8 is a public hearing and possible vote on installation of a new public pavilion enclosure system at the Franklin Street Plaza at Jack London Square by Scott's Seafood and the Port of Oakland. Adrienne Klein will introduce the project.

Chief of Enforcement Klein addressed the Commission: On October 6 you were mailed a summary of an application by the Port of Oakland and Scott's Jack London Seafood, Inc. to convert the enclosure system at a public pavilion authorized to be used for 73 private events per year from fabric panels that hang from the roof and are fully removable to several permanent walls and other structures and 40 movable wall panels.

The proposed project is located within a dedicated public access area within the 100 foot shoreline band and is virtually entirely constructed without benefit of any prior authorization or plan approval from the BCDC staff or the Commission.

The proposed project would involve the removal of 159 feet of public access from Scott's permit and 259 square feet of public access from the Port's permit.

The staff summary lists the issues raised by the project, in particular, whether the proposed project is consistent with the McAteer-Petris Act provisions on public access and the San Francisco Bay Plan policies regarding public access.

On October 13th you were mailed a copy of the staff recommendation to authorize the project.

I will outline for you the two permits that govern the area, the violations that involve the unauthorized construction of the replacement public pavilion and the unauthorized use of it. Then I will discuss the material amendment to legalize the unauthorized construction and cover the special conditions.

This is the six block long area covered by the Port's permit. There is an arrow pointing to a white box showing you the Scott's Restaurant building and the L-shaped structure between the Scott's Restaurant, which is larger, and the Kincaid's Restaurant which is smaller is shown.

The Port's permit covers all of Jack London Square except the public pavilion.

The entire shoreline is dedicated public access including the 20,000 square foot Franklin Street Plaza in which the public pavilion is located.

The Port's permit will soon be administratively amended to clarify the Port's retained public access obligations in the Franklin Street Plaza. They will be transferred from the Scott's permit, which I'll discuss momentarily, into the Port's permit and that is a separate action by the Executive Director.

The Scott's permit authorized in 1996 the construction of a 4,400 square foot public pavilion in the Franklin Street Plaza.

It authorized the enclosure of that pavilion with hanging canvas fabric panels for interim private use.

The interim private use requires no fewer than 292 public use days and no more than 73 private use days.

The violations at the site involve a 10-year period of unauthorized private use of the pavilion and the unauthorized construction of a pavilion enclosure system.

The status of the enforcement action is that on April 6 the Commission voted, and the next day the staff issued, the Commission's Cease and Desist and Civil Penalty Order to Scott's, solely to Scott's, and at the public hearing Scott's agreed to the terms of the Order.

What does the Order require?

It confirms that Scott's cannot hold more than 73 private events per year and must provide required public access improvements as provided for in the existing permit.

It requires Scott's to submit monthly reports to BCDC about the prior month's public pavilion use, which you just heard during the public comment period.

It requires Scott's to submit an application to amend its permit to authorize the illegal pavilion enclosure system and that application must include a new public access plan; the subject of today's public hearing.

And, it prohibits Scott's from requesting more private pavilion use days as part of today's permit application.

The Civil Penalty Order imposed a \$395,000 penalty to be paid in three annual installments in May of the years 2017, 2018, and 2019 the penalty due was paid on time.

As you heard, there was the provision for the possibility of a 15 percent reduction for full compliance with the Order, which determination was to be made by September 1st.

The Determination of the Executive Director was that there was noncompliance with the requirement to provide monthly pavilion use reporting.

So what is not pending before you today is any consideration of a change in the amount of private use of the pavilion. If at a future date Scott's submits an application to request an increase in the private use days that would be considered by a separate action of the Commission.

As already covered, you are not considering the position of the penalty reduction determination.

Now on to the material amendment and what it covers.

There are currently two permittees and the Port has requested to be removed from the permit. If approved, the permit would have one permittee, Scott's Jack London Seafood, Inc.

The permit area would be expanded to include the entire Franklin Street Plaza. Currently it covers only the area under the pavilion. It would capture the adjacent Franklin Street Plaza though that area would remain a required dedicated public access area under the Port's permit. The inclusion of this area in the Scott's permit would allow for changes to the public access associated with the permit, which I will describe momentarily.

The project will result in the loss of 418 square feet of dedicated public access due to the construction.

In the blue outline, the orange is the area required by the Port permit. Please note that the storage area located to the left, west side of the pavilion, outlined in an orange line is also dedicated public access.

The blue line in the orange area is the expanded area that would be subject to the permit.

The yellow is the pavilion 4,400 square foot area.

So the proposal in more detail involves: East would be to the right side of the image, west would be to the left, north, up.

So, on the east side of the pavilion closest to the center, the main center of the Franklin Street Plaza, the permit would require the removal of the unauthorized metal entry doorway that staff believes, if retained, would have had adverse impacts to the public access that could not have been mitigated, specifically to the required view corridor in the open position and physical movement throughout the Plaza. Also, it would authorize installation of four bollards to protect the pavilion when it is in private use mode.

On the north side, the permit would authorize a 40-foot long wall and panel storage.

On the west side, a 60-foot long series of structures that comprise a 13-foot long wall and panel storage, the 255 square foot storage area that I pointed out, and a 20-foot-long wall and roof to create a breezeway.

I covered the private improvements. The public access elements of the project are to:

Improve the layout of public furnishings to establish a procession for the public through the public Franklin Street Plaza.

Existing furnishings would be reused and refurbished.

The new furnishings would consist of matching tables and chairs in both the plaza and the pavilion, lighting to define the procession at night and Tivoli lanterns and uplighting in the pavilion. The Tivoli lanterns would be in place when the pavilion is open as well as the uplighting.

There is an existing requirement for four public shore signs and that will be carried over with the amendment.

This is the public access exhibit attached to the existing permit and it gives you a bit of an idea of what the Franklin Street Plaza improvements looked like at one time, though they are not identical to this presently.

This is an image of the public access plan proposed and you can see the angled series of planters which will have string lights in them that create that procession. So there is a bit of an open area between the pavilion and the other half of the plaza and we believe the layout of the furniture is more inviting. The two areas will read as public because of matching tables and chairs, which can be moved around by the public as desired based on sun and wind and other factors.

Commissioner McGrath had a question: Adrienne, how wide is the narrow point when the pavilion walls would be up between the corner and Kincaid's; somewhat less than 20 feet?

Mr. McCrea answered: I'm just looking at the graphic scale in the drawing. If it's correct it appears to be somewhat less than 20 feet.

Ms. Klein continued: Yes, 18 feet comes to mind. I think there are three numbers. I could check that for you, Commissioner McGrath.

Finally, the amendment would define the term "day." The permit refers to the events as "events" and "days" and "nights" and "weekends" and we wanted to simplify the use parameters for the permittee. And "day" gives them 24 hours and each 24 hour period is considered a single use.

The event reporting will be modified with the elimination of the Port. Their requirements will transfer to the permittee. Rather than having Scott's submit quarterly reports they will submit monthly reports. And rather than doing it manually they will also create an online calendar, a scheduled and actually held events, so that both the Port and BCDC can view the use on an ongoing, real-time basis rather than waiting.

The permit includes special conditions to limit the setup and breakdown time to two hours to minimize impacts on public access before and after events.

The lease under which Scott's is operating at this location expires on August 31st, 2041. As we do in all permits subject to leases, the BCDC authorization must necessarily expire on that date unless the permittee provides us with an amended or new lease and they will be required to come back for an amendment to bring the permit back to life.

So we have been in discussion with Scott's since issuing the recommendation on Friday and we have some modifications to the project.

You have a detailed errata sheet in front of you but the summary in more basic terms is that we had originally required Scott's to remove a stage backdrop that the Design Review Board considered to create a privatizing effect on the public space. Scott's has asked for the option to instead cover the stage backdrop on public use days and we have proposed to modify the recommendation to provide the option for a cover and this would be handled through plan review. If the staff declines to approve the plans for covering the stage backdrop it would need to be removed.

So this is the storage area and it's just here. In your packet sent with the summary you have some photographs which I believe show the stage backdrop.

Commissioner McGrath requested: While you are there, since we received a comment from California Canoe & Kayak about concerns about the bollards could you locate those for us too.

Ms. Klein replied: Yes. The permanent bollard would be located here at the end of the 40-foot wall and the three temporary bollards to be installed only during private events would be at the corners.

Commissioner McGrath asked: They would not halt circulation into the storage area between Scott's and the adjacent property; they would be outside of that area? There is a little alleyway there?

Ms. Klein explained: This area is a shared delivery area.

Commissioner McGrath continued: And it would remain open?

Ms. Klein replied: Between the California Canoe & Kayak -- I suppose Mr. Miller would have to answer that question.

The staff originally crafted the recommendation to require all of the remaining work, including removal of the metal entry doorway, installation of two additional, movable wall panels to replace the permanent metal entry doorway, removal of six bollards along the shoreline to improve public access and removal of the stage backdrop and provision of the public access was all required to be completed by December 15th.

The applicants indicated that would not be possible. We have extended the date to February 28, 2018 and included a provision in those conditions that allow the Executive Director to extend that date for good cause and preclude the use of the pavilion for any private events until the requirements of the special conditions have been met after the due date if they fail to meet it.

That concludes my presentation unless you would like me to go over the errata sheet in more detail, which I am happy to do now or before the vote.

Chair Wasserman asked: Any questions for Adrienne before we open the public hearing. (No comments were voiced)

We will open the public hearing.

Mr. Sandre Swanson spoke: Mr. Chairman and Members, let me just say that historically Scott's has provided the Port of Oakland and this particular area with a large incentive for people to come down and to participate and the pavilion has served a very important purpose so I would hope that we can move forward with approval for the pavilion.

But I hope that we can reach a point -- people will understand there has been a lot of conflict between Scott's and the staff. I hope that we can reach a point to where we can have some common sense and not be so bureaucratic about this arrangement that we can move forward without destroying this business.

So I just hope the Board would, in light of its mission, see what Scott's is trying to do consistent with that mission in providing public access. If there was an email missed here or there, you know, it could have been held by staff. I do not even understand why lawyers have to get involved with this kind of situation.

So I would appeal to the Board. You thought that there should have been a penalty against Scott's, they got their penalty. There has to be some cooperation for this business to survive. The impacts are all on the staff. So I would just appeal to this Board having served on boards like this in the past and having served in the state legislature and understand clearly your purpose in protecting the Bay, but I also think that there has to be some understanding about how people do business on the waterfront. Anyway, so I would leave it at that, Mr. Chairman and Members; thank you so much for your time.

**BCDC MINUTES  
October 19, 2017**

Mr. Goldberg added: I will say that along the lines of what Sandré just said, there has been a tremendous amount of collaboration and cooperation between my office and Mr. Zeppetello's office and staff in trying to find a way forward for everybody and I think that's what people want. I sincerely believe that that's what everyone wants on this one.

I received the errata sheet. In looking at it, in light of discussions that I've had this week with Mr. Zeppetello, the new dates and the new caveat that if it's not -- because of something that Scott's is not doing or is doing that is preventing the completion of these things that they could apply for good cause to have any dates extended. Scott's believes and will try to comply with all the dates that are currently in here so that is a positive, December 15th was unrealistic.

The one thing that I did notice though and that is new that I found this morning is that the part about Scott's shall not be allowed to hold any events if a deadline comes and for whatever reason is not extended and Scott's has not been able to meet it.

I will suggest to the Council that it is not a penalty on Scott's not to have a particular event but it would be a penalty on Jack and Diane and their family's wedding or Governor Brown's charter school if 15 days before the scheduled event Scott's informs the Counsel that it cannot comply because a vendor or a craftsman has been unable to manufacture a part that needs to be hung and therefore cannot be hung in that time; and then for whatever reason good cause is not found and Scott's must cancel that wedding or that next event.

I think there is language that could be crafted but not this exact language because it does not really focus on Scott's, it focuses on members of the public coming down to have their events canceled and they cannot find any place else to have it. Thank you very much.

Chair Wasserman continued: That's all the cards that I have. Mr. Hanson, I will recognize you but I do not have a card so if you have not filled one out please do so.

Mr. McCrea explained: Mr. Hanson is speaking is speaking on behalf of the Applicant. We skipped over the project presentation and Steve is going to give that now.

Mr. Hanson addressed the Commission: My name is Steve Hanson; I am an ex-employee of the Port, 25 years, so I know Jack London Square sort of like the back of my hand.

Scott's Pavilion has attracted probably about 300,000 over the last 10 years that would not normally have come to Jack London Square. So I think from the standpoint of whether it is an asset I think it becomes an asset because it exposes people to our waterfront and the Port of Oakland has spent hundreds of millions of dollars on this waterfront improvement since the mid-eighties.

It is also what we call a public pavilion and it is open to the public, as you can see, most of the time. We all know that.

I just want to talk a little bit about the complexity of this wall system that was built. We are very happy that the staff has helped us sort of massage the time line a little bit so that we could get it in by the end of February, we hope to do that, but the people who manufactured all of these things may no longer be manufacturing them. And further, the design, while we show what the new front doors are going to look like, are not really designed. And all of these components have to be manufactured locally. It is extruded aluminum. It is stainless steel and those kinds of things.

So while we are going to work as diligently as we can to get the improvements that are required as soon as we can, we appreciate the staff's willingness to find if we are doing everything we can to get it done to give us some extra time. I think that is one of the points we wanted to make.

Now the stage is here. This came up relatively late in all of our work that we have been doing since 2012 on this thing, the objection to the stage and its curtains. It is a public stage. It has been used, obviously, when it is in private events, it is also used when it is in public use as a stage for whenever events happen there. As you can see on the bottom right here of this picture this guy is sitting there. He does not seem to be at all concerned about the stage and whether it privatizes the pavilion. That is the issue that staff has. While we do not necessarily agree, we are willing to do whatever it takes to try to fix the situation so that it does not appear to privatize. I just want to point out that on the top right hand side there is another stage in Jack London Square and it is a public stage as well. It is something I had created when we built the marinas and it fronts a green area. So there is more than one stage in Jack London Square and I do not think they privatize anything. I guess the staff has the opinion it has and we will try to accommodate that issue.

This is another view of the complexity of the stage. So removing these panels, which are a heavy-duty MDF plywood in multiple layers and have metal protrusions in them and things like that to make them substantial. It is 18 feet high by 16 feet wide. It is difficult to take them out and then when we take them out we would have to design something to replace the panels that are holding up the wall so we are concerned about that.

So we have tried to come up with something that will address this and staff has said they will work with us on the specific design. As you can see the top elevation here on this back wall of the pavilion shows the faux curtains. And then we are talking about installing diamond-plate/powder-coated aluminum sort of to match the rest of the interior of the pavilion with removable panels that we can slot in there to cover up the stage during the time that the pavilion is open to the public. So we hope that is satisfactory.

The panel doors here, obviously one of the things we have been trying to do since we put up the permanent door frame is come up with a solution to, what do you do with your doors if you don't have a frame for them? Well, we're going to mount these doors into

movable panels. And this is the part that has not been designed yet. We have got an understanding of what it is going to be but the specifics of that design is not done and the components are not done and we have to find the manufacturer. So that is our concern about the time.

Now the Plaza work, we can do that. All of those components are pretty much available under catalogue and commercially available.

So you can see some of the complexity of the panels and all that stuff. Got a lot of parts to them and so that is why we are concerned. So we were hoping for the end of March but we will work with the Commission and try to get it done by the end of February.

That is the extent of my comments.

Commissioner McGrath had questions: Mr. Goldberg, I have two questions. First, is it accurate that construction is underway today?

Mr. Goldberg asked: Construction of what?

Commissioner McGrath explained: Construction of these improvements.

Mr. Goldberg replied: Not today, no, sir.

Commissioner McGrath continued: Has construction taken place since the Commission found a violation and issued a Cease and Desist Order?

Mr. Goldberg replied: We were not authorized to proceed with these new panels until staff approved them so Scott's cannot go ahead and build this new system not knowing what the front of the pavilion is going to look like or whether the remaining new panels that it installed, the solid panels, would be approved by the Commission. So no, it has not, but that is logical because you all have to approve it first.

Commissioner McGrath asked again: So there is no construction that is going on?

Mr. Goldberg explained: Active construction of new doorways and panels there is not.

Commissioner McGrath pressed on: I am searching for a word. That seems to be a rather indirect response to a direct question. Has there been construction in Scott's on this area since the Commission found a violation?

Mr. Goldberg answered: There has not.

Commissioner McGrath continued his inquiry: Okay, I will ask the staff the same question.

The second question I have has to do with the Design Review Board. Certainly I think there can be improvements to public access that may well outweigh the loss of 418 square feet. Generally we rely on the Design Review Board. As I read the staff report fairly carefully there has not been any review of the Design Review Board on this matter since 2015 yet there is a new proposal. Can you tell me why that is?

**BCDC MINUTES**  
**October 19, 2017**

Mr. Goldberg replied: I cannot, sir. I do not know why staff has not looked into it. However, these panels have been in place for many years; it has a violation. The concept that was discussed as part of the Cease and Desist Order --

Commissioner McGrath interjected: Stop for a minute. The decision to avail themselves of the Design Review Board is one that is at the discretion of a permit applicant. As a permit applicant I found it quite frustrating from time to time yet took benefit of it. So it is your choice. Did you choose not to use the Design Review Board or were you unaware that you had that option?

Mr. Goldberg answered: I cannot speak to that personally, sir. But I will say that Scott's complied with the time frames set forth in the Cease and Desist Order and submitted the new application with all of the information that would allow the panels to be built.

Commissioner Zwissler had a question: So I just wanted to follow-up on the question about construction being commenced because in the first page it says "Projection construction has already commenced and is required to be completed." Can I get clarification on that?

Ms. Klein explained: But for the removal of the metal entry doorway and its replacement with a different entrance, the project is complete. And the stage backdrop that we talked about. We made a decision that it made more sense not to have the metal entry door removed in advance of today's public hearing.

Chair Wasserman added: That's right, you cannot remove it until you have the replacement, else the pavilion becomes impossible to use.

Mr. McCrea clarified: I think the question has to do with what has happened so far and what work has stopped.

We began discussions really about this idea back in 2012. In 2013 construction started without authorization. It got to a point in 2013 we issued our first Notice of Violation.

Commissioner Zwissler asked: But that is construction on what was happening in the past. But the construction that nominally has not commenced yet is this new project; is that correct? Or has it commenced?

Ms. Klein replied: The project was built. The matter before you today has been built for four years. This project was constructed. The fabric panels were taken away. The pavilion was closed for a 90 day period approximately when these permanent walls and sliding panels were installed.

The storage area and roof connections were built prior to that in the early 2000s. Staff did not realize those violations existed until we began assessing the proposal to replace the fabric panels and did a number of site visits and realized looking carefully at the plans that the - so it was built in three phases, the roof, the storage area and then in 2012 the replacement panels.

Commissioner Zwissler continued: So what was that image we just saw with new panels that have yet to be fabricated? That is where I am confused, I guess.

Ms. Klein explained: During the negotiations with staff and with the Bay Design Analyst in 2012 the Applicants proposed the metal entry doorway and staff indicated that that was not a project element that it could approve, in large part because of the view corridor requirements and also because we believed it would have permanent adverse impacts on physical public access. It was nevertheless built without a permit. We are not recommending approval of its retention.

Commissioner Zwissler asked: That is the door.

Ms. Klein replied: Yes.

Commissioner Zwissler continued: I just saw a drawing of a bunch of things that needed to be fabricated that may or may not be fabricated between now and the end of February so I am just really confused, what are we talking about?

Ms. Klein gave details: The panels slide apart and create an enclosure and without the metal entry doorway they will not meet and there will be a gap.

Commissioner Zwissler asked: So is it just the doorway that has to be rebuilt?

Mr. Goldberg interjected: That is correct.

Ms. Klein agreed: Yes.

Commissioner Zwissler continued: Got it. I thought the point was being made that there is all this work that is to be done and it is going to take a long time and I saw 50 panels so I was confused.

Mr. Goldberg replied: Excellent point. The 50 panels or 40 panels are already constructed and are standing there.

Mr. Safran spoke: My name is Joshua Safran of the Rudder Law Group; I am here on behalf of our client, the City of Oakland, acting by and through its Board of Port Commissioners, or as we all know it, the Port of Oakland. We are happy to be here in a spirit of cooperation and compromise with staff and with Scott's, it is a happy day.

You may have noticed we are a co-applicant in a little bit of an odd posture, a co-applicant asking to be removed as a permittee. And that stems from this sort of historical oddity of having a large public agency as a co-permittee with a for-profit restaurant who has very different and divergent interests and capabilities and functions; so we think this is good and sound policy and we are really appreciative of staff in bringing this to you and helping us formulate this idea and then supporting the bifurcation or the separation of the two parties.

Just as you may know or you may not know, as a little bit of background, having both the Port and Scott's as co-permittees created a fair amount of confusion as to who was supposed to do what, as will happen when you have two drivers in the driver's seat. Scott's is here today concerned about a \$59,000 penalty or assessment that had to do with confusion as to who they were supposed to send the email to. It is the Port's very strong desire to resolve all those matters of confusion about who gets what and simply have BCDC and Scott's be in a private relationship of the permit the way that BCDC is with any other permittee and sort of keep the Port out of it. The Port wants to stay out of it both because it has its own limited resources and mission scope but also because the Port, it sounded like we were hearing a little bit, sometimes it gets blamed for things that it has no control over.

And during this actual enforcement hearing the Port was originally listed as a respondent to a complaint that sought over \$800,000 in civil penalties, in this case against a public agency for among other sins, not turning over reporting documents from Scott's that it did not have because Scott's had not handed those to the Port. So that put the Port in a real Catch-22 where it certainly didn't feel that it was fair to blame it for things that it had no control over. And also it placed the Port in a position where it functionally had a regulatory role over Scott's without any of the regulatory authority that an enforcement agency like BCDC has. So I think that the separation of the two is wonderful and the Port very much applauds and appreciates that and recognizes that what staff has referred to as the Port's Permit will come up to be revised administratively to conform with Scott's permit.

The only real issue I am here after this boring introduction to why I am really here was we noticed in footnote 1 of the summary, the application summary, that there was a footnote. Yes, I am here for a footnote. But the footnote says the Port's permit, meaning this secondary revision:

"The Port's permit will also require the Port to monitor Scott's private use of the pavilion and report the results to BCDC."

That raised an eyebrow for us because that sounds suspiciously like exactly the reason that we are trying to seek to have the Port and Scott's separated into different permittees. So if this is a matter of the Port receiving reports from Scott's or acting in other ways as an arms-length landlord the Port will be happy to do that. But in a circumstance where the Port is once again back in the middle and trapped in a Catch-22; that is pretty much not what the Port desires. In fact, in that circumstance, which it may not be that circumstance, but in that circumstance the Port's original offer was simply to have the permit revoked because it was not a capability that the Port felt that it had.

Chair Wasserman added: I assume that footnote is a clerical error and the permit will not have any reporting requirements from Scott's to the Port. Is that correct or not?

Ms. Klein replied: No.

Chair Wasserman asked: What reporting requirements will there be?

Ms. Klein explained: The current permit, if you wish to look at --

Chair Wasserman clarified: No, no, in the permit we are about to issue, if we issue it. We are separating the two.

Ms. Klein replied: I misunderstood you.

Chair Wasserman continued: I am talking about going forward. If staff's recommendation is approved by the Commission the permits will be separate. On Scott's permit, or for that matter the Port's permit, will there be any requirement that Scott's makes reports to the Port?

Ms. Klein answered: No.

Chair Wasserman continued: Thank you. So it would only be a matter of your leasehold relationship, which is not our interest.

Mr. Safran replied: Thank you.

Mr. Zeppetello commented: Let me just clarify the issue of the Port. In this permit that you are about to issue the Port is removed as a permittee and there will be no obligation for the Port to report to BCDC.

In the A-permit that Adrienne mentioned as being administratively extended we have proposed, and what that footnote was saying is that we are contemplating requiring the Port to report to BCDC under the A-permit, pavilion usage. The Port has objected to that and we have not yet resolved that issue. But that is not an issue that is before you today and we will hopefully resolve that before the A-permit comes before you.

Commissioner Butt asked: Who owns the property where the pavilion is located?

Mr. Safran answered: The Port holds it in trust for the people of the state of California.

Commissioner Butt continued: Who owns the property where Scott's is located?

Mr. Safran explained: It's a trust, public trust land.

Commissioner Butt pressed further: I'm no lawyer but somebody owns the land, it's not just sort of floating out there in trust.

Chair Wasserman replied: The Port owns the land.

Mr. Safran added: I'm giving you a fancy answer to the Port owns the land, unfortunately, yes.

Commissioner Butt continued: Thank you. That is what I was looking for.

Second of all, this is the most confusing thing I think I have ever seen. As best I can understand it, all of this unpermitted construction, at least unpermitted by BCDC, was done on property owned by the Port, right?

Mr. Safran agreed: Yes.

Commissioner Butt asked: Why didn't the Port make some rule in not allowing it?

Mr. Safran explained: Well, the Port prides itself in being the agency that spotted the unlawful construction or what appeared to be unlawful construction and reported it to enforcement agencies, to both BCDC and the City of Oakland. The City of Oakland issued some sort of a stop-order and BCDC responded but ended up engaging in about five years of protracted negotiations with Scott's.

The Port's only remedy, if I may just very briefly, in that circumstances as a landlord was to issue a Cure and Correct Notice to the tenant saying, hey, you are in violation of this lease term. You have got to fix this because you have to comply with all laws, including the BCDC permit. Our leases work in such a way that if the tenant says, yes, we are actively working on curing this violation, the Port has no remedy but to monitor that they are actively working to cure. So Scott's was able to successfully argue, hey, for five years we have been actively curing this correction by working with BCDC. So in that circumstance the Port was neutered, if you will, from being able to take any unilateral action beyond what BCDC decided to do.

Commissioner Butt asked: So while all this construction was going on nobody at the Port of Oakland ever noticed it?

Mr. Safran replied: No, the Port of Oakland issued 13 separate letters/orders to Scott's not to proceed.

Commissioner Ranchod chimed in: I want to make sure I understand some of the aspects of what's before us. I think, Mr. Goldberg, I want to come back to you because I understand the situation with respect to the Port.

So with respect to Scott's, there is a fair amount of activity that has occurred here in the last week so I just want to make sure I understand this. If staff wants to clarify anything here as well I would appreciate that.

So on October 13th the staff issued the recommendation to the permit application here that was before us and the materials we received prior to this meeting. That was last Friday, Friday the 13th.

On October 16th your office sent correspondence back to the Commission opposing the staff recommendation - please correct me if I am getting this wrong - opposing the staff recommendation because of particular aspects in it and requesting a continuance of this hearing.

Mr. Goldberg agreed: That is correct.

Commissioner Ranchod continued: Subsequent to that earlier today the staff released additional changes to the October 13th recommendation that are before us that appear to address a number of the issues that your correspondence had raised, including whether certain requirements are feasible within the time line because of business needs and whatnot that we have discussed.

So now we are here considering the October 13th staff recommendation as amended with changes that were provided to us earlier today, which sounds like are the result of continued discussion and negotiation between staff and your client.

Mr. Goldberg observed: That's an excellent summary.

Commissioner Ranchod continued: Okay. Thank you for bearing with that. What is your client's position on what is before us currently at this hearing?

Mr. Goldberg answered: Our client's position is that the Council should approve staff's recommendations as amended, with the caveat that the very latest errata that I received just moments before this hearing about canceling events, be changed. And what I would recommend is that instead of saying they would be canceled just add the caveat that extension will not be unreasonably withheld. That should do it.

And back to the Commissioner's question: It has been constructed so perhaps one of the reasons why I didn't understand the question is 44 panels are already hanging there, the track system is already there, it closes beautifully. It's a vast improvement on the tent that was there before. That took seven hours to hang and hours to remove, whereas this panel system just rolls itself into place. The only thing that we are trying to do now, and staff has recommended that we be allowed to do, is cut that frame doorway out, build a series of a couple of new panels to place in there and that system is what we are talking about now.

Commissioner Ranchod asked staff to respond: I would appreciate it if staff could respond to that because it sounds like there is at least one open issue still.

Mr. McCrea explained: Nothing over the past five years has stopped Scott's from holding events or using unauthorized structures. We think that holding their feet to the fire is important. We think that having a reasonable condition of approval such that has been included in the errata sheet will do just that.

Mr. Zeppetello added: I would add just one point. When we had the stipulated order that some of you may remember a year and a half ago or a year ago, Scott's had committed to remove the metal entry door and install the panels within 75 days of approval of the stipulated order, which the Commission did not approve. But from today to the end of February is approximately 130 days, so we basically are giving them approximately double the time that they had committed to do this work and there is a provision for the Executive Director to grant an extension. So I would just add that.

Commissioner Ranchod had another question: A follow-up question is, there is no distinction in the language with respect to events being canceled if certain things have not occurred with respect to whether those events are for-profit events or for charitable purposes?

Mr. Zeppetello answered: Correct, the permit does not make that distinction.

Mr. Safran added: I would be remiss if I did not mention that we did submit a letter on behalf of the Port of Oakland dated October 13, 2017 and we were hoping that that would be included in the record for today's hearing. I am not sure if it made it in there, I didn't find it on the website, but I did want to bring that to your attention, thank you.

Commissioner McGrath commented: I am going to preface this by asking people to look at the first page of the staff summary, which I think is the best kind of overall view. I spent 16 years in Jack London Square; five days a week unless I was traveling, and it is pretty clear that this narrow area is not the most conducive design to public access. People tend to walk away from the water rather than along the water. One of the reasons that they do not walk there is the walkway between the pier on the up-coast side of Scott's and the down-coast side of Scott's is kind of rickety.

So I have two questions for the staff: Did you consider any modifications for public access to improve that, which would seem to me to be a benefit. And that kind of leads into my second question which is, in your view would there be advantage on returning this issue or would there have been an advantage on returning this and other issues like this about the utility to the Design Review Board? Usually we have their recommendation before us.

Ms. Klein clarified: The modification that we have included in the permit is to remove these six bollards, they have been in place, and that was to attempt to address the position that you just put forward that we want to open up the area, the back side or the south side of the pavilion. That is the only modification we have considered.

Without the pavilion the area between the two buildings was 57 feet wide. When the pavilion is open it is 34 feet, that is 80 percent of the time, and when it is closed it is 18 feet. So the narrow point would be here.

Commissioner McGrath pressed for more detail: I am going to push a little harder. In the absence of any action on this permit who is responsible for maintaining that walkway in a workable condition? I would like to see it improved. Maybe that is not a reasonable condition to add to this, maybe I'll make an amendment proposal, but I want to know what the existing responsibility for maintaining that is.

And second, why didn't this go back to Design Review Board? It has been two years and there are some very interesting ideas here that may or may not be something that we can call a net improvement. I would just love their viewpoint for our considerations.

Ms. Klein answered: I will take the first question about who maintains the boardwalk. The reason that area is shaded; this is a wooden boardwalk so it is a transition of different surface treatments, this is paving. The Port is responsible for the wooden boardwalk. The Port's permit, like all our permits, has a maintenance condition and we can certainly take a look and see if it is in need of maintenance. We have sent the Port a letter asking for maintenance of the portions of the Franklin Street Plaza over which it will retain permit and maintenance authority. We could take a look at that for you.

Regarding why this did not go back to the Design Review Board for a third time? We felt that the Design Review Board had provided a lot of good ideas and our Bay Design Analyst and Scott's Landscape Architect and I had a site visit and reworked their proposal to accommodate this. So we did not feel it was necessary to bring the project back to the Design Review Board.

Mr. McCrea added: And if I could just follow-up on one other question that you asked or comment that you made about the Design Review Board comments in front of you. Normally in the application summary we include a section that says Design Review Board Comments and we summarize it for you. For the purpose of clarity and flow in this staff report, the application summary dated October 6th; their comments have been folded in. You will see comments on page 10, you will see comments on page 11, on page 12, on page 13 and page 14.

Chair Wasserman commented: I have a couple of comments. One is just a little bit about history that goes in part to Commissioner Butt's question. There are a lot of disagreements about what did happen and did not happen in the course of these very long discussions between BCDC and Scott's primarily and a bit the Port. Scott's certainly talked to BCDC before taking action and actually had a number of interchanges.

Scott's chose, one, to do a design-build process for what was a new technique for this pavilion with the sliding walls.

The BCDC approval process, as is true with many planning commissions, is not well adapted to design-build processes because you do not see complete plans.

Scott's chose to proceed with the building before resolving that problem or getting approval, which is why we did the Cease and Desist Order and reached that decision, amongst other reasons. But all of that was going on. So it was not as if they went out in the middle of the night and did it. They did it without permission, lots of discussion, and we have taken care of that.

I would entertain a motion to close the public hearing.

**MOTION:** Commissioner Nelson moved to close the public hearing, seconded by Commissioner Ranchod. The motion carried by a voice vote with no abstentions or objections.

Commissioner Nelson had questions for staff: So a couple of questions for staff. First, there have been a couple of comments about the passageway between Kincaid's and this pavilion; it is not a terribly inviting place. I have not been there for a little while but even though I am a commissioner and know it is public access it does not feel inviting to me.

I notice that one of the requirements is to maintain the public signage requirements in the permit. Can you just walk us through that, what those public signage requirements are to make sure we have a sense of how we are trying to make sure that the public is aware that this is public space?

Ms. Klein answered: The permit requires two movable lollipop-style public shore signs to be located within the pavilion and there are two posted on the walls. I believe one is here and I cannot remember where the other one is.

There is a requirement I just discovered in the Port's permit for one to be posted here and I do not believe it is in place so I mean to mention that to the Port.

Commissioner Nelson continued his inquiry: Thank you. The second question is about the bollards. We received a communication from California Canoe & Kayak. And for folks who are not familiar, as you mentioned earlier, California Canoe & Kayak is immediately to the north of the pavilion and shares that adjacent alleyway. Their communication with staff suggested they have two objections to the bollards; the first is that the permanent bollard next to that 40 foot wall would be unnecessary and the second is an objection to the temporary bollards. It seems to me that those concerns are two separate concerns, one is about access to the shared storage-service alley and the second seems to be a concern about maintaining public access. Can you walk us through the requirement for those bollards and how we are going to make sure that just as the walls are retracted when it is not in private use that those temporary bollards are removed at the same time? Why do we need those bollards?

Ms. Klein explained: At a certain point during the negotiations or during the development of the design, Scott's mentioned they are concerned about damage from vehicles to the pavilion walls, to the investment when it is in a closed position. As has been stated a number of times, there are vehicles that enter this area. The use of the area is governed by the Port's Vehicle Access Plan which limits the hours and duration during which vehicles can be in the area. The trash removal area for Kincaid's is located right here so they do need to come through the Plaza and Scott's wanted to install maybe 13 heavy, long planters around the perimeter of the pavilion and leave them in place at all times. They have, I suppose, scaled back their protection system to the minimal proposal based on input that they received from staff.

Commissioner Nelson asked: To the permanent and the temporary bollards.

Ms. Klein replied: Yes. So the condition would only allow the bollards to be the three movable ones to be in place when the pavilion is in private event mode and it would be a violation of the permit to leave them in place or install them on a non-event day.

Commissioner Nelson added: Just as it would be to leave the panels closed on a non-event day.

Ms. Klein agreed: Correct, yes.

Commissioner Showalter commented: I just want to confirm what I think I have heard repeatedly. At the bottom of your errata sheet on the end there is the provision that the Executive Director may extend the due date for good cause and if Scott's fails to comply, presumably after that extension, then no private events would be allowed. So it is not like we are saying that this February 28th day is hard and fast. If something comes up that our esteemed Executive Director feels is a reasonable extension he will make that but it does require that Scott's communicate actively with BCDC; is that correct?

Executive Director Goldzband answered: Yes.

Commissioner Zwissler had a procedural question: This is sort of a process question. We are very specific in what we are requiring in terms of three trees and gold sailboats and string lights, et cetera and they are going to have to be maintained specifically for 24 years just like that? Do we do that? What happens if there are five trees or two trees? I am trying to understand how we get this specific.

Ms. Klein replied: You make an excellent point, Commissioner Zwissler. Generally we use the plan review process to drill down into the details and the permits are a bit more general, although we do specify the number of benches, the width of the trails and signs and so forth.

In this case we felt it was necessary to be quite detailed. These details are spelled out in the new license concession agreement that is an amendment to the lease and if changes are desired the permit would need to be amended as well as new plans. It would be a non-material amendment.

Commissioner Zwissler asked: Not a public hearing on trees or lights?

Ms. Klein answered: Correct.

Commissioner Zwissler replied: Good.

Chair Wasserman had questions: I just have a couple of questions and a comment and then the recommendation.

The lease that goes to 2041 is the existing lease that has been there for some period of time; is that correct?

Mr. Zeppetello answered: Correct.

Chair Wasserman continued: Thank you. If I understand correctly, and there will be an opportunity to ensure that I understand correctly, the only true difference in this moment between the Applicant and the staff recommendation has to do with this issue of if they don't meet the deadlines and they have not been extended by the Executive Director, would like mutually -- not unreasonably withheld.

I will make the comment for your benefit, Mr. Goldberg, although I have this debate with public lawyers all the time, I don't think public agencies get to act unreasonably, I think it is a violation of due process. There are times when you may have an agreement with a public agency in their unilateral discretion; that implies something different, that is not here. So I think without the additional language that is there, recognizing that reasonableness is often in the eye of the beholder.

Staff recommendation, please.

Ms. Klein continued: On October 13th you were mailed a copy of the staff report recommending the Commission authorize the proposed project as conditioned. This recommendation on Application Number 1985.019.11B includes special conditions as modified that require the permittee by December 15th, 2017 to fully install the public access proposal pursuant to staff-approved plans, some of which are on file and some of which are still outstanding.

By December 31st, 2017 to create and maintain an online real-time calendar of scheduled events to be made available on a consistent basis to the Port, BCDC and the public and on a monthly basis to update this calendar to reflect actual events and provide an assessment of how the use of the pavilion for private events was consistent with the requirements of the permit to BCDC staff.

And finally, by February 28th to remove the unauthorized metal entry doorway, remove or cover the wood stage curtain located in the public access area and replace the complete construction by installing two additional panels at the pavilion.

As conditioned the staff believes the project is consistent with your law and Bay Plan policies regarding public access and with that we recommend that you adopt the recommendation.

Commissioner McGrath commented: This is a difficult vote for me. It is not my sole time in the rodeo here. Rodney Freeman and I used to take our instruments out underneath the pavilion if it was open and try to find tables and chairs that were supposed to be there and play music at lunchtime and along would come a garbage truck to empty the Kincaid's garbage.

As an employee of the Port of Oakland I used to have to deal with Scott's parking cars, usually the Jaguars or the Maseratis, in the turnaround area.

Those are to some degree a product of design mistakes that we made in the past and what I see here after careful consideration is the staff has done the best job that they can of trying to cure some of the design problems in the original permit. And I will be a little specific:

First of all, some of the privatization just exists as a matter of that roof. If that roof was before us I would vote against it. I would cut that off so we had a better corridor here. I would argue vehemently against it. That corridor is very narrow, particularly when there are also garbage trucks going through it; but that exists.

The area in front of Kincaid's is indeed a dead zone. You walk through it, nobody is there. Will Travis used to say, eating in a public access area is protected public access of the highest form.

I think creating an area closer to the water than the plaza on the other side is the best way to animate that and I think the staff has done a pretty good job. You have satisfied my concerns that somebody is responsible for maintaining that rickety wooden walkway; maybe the Port should put it in the budget or make sure that it is okay.

So I am going to support this. I think the staff has worked with a difficult set of circumstances. I do not think that the 40 foot wall versus the 30 foot wall is a massive impediment to public access. I think most of the privatization already occurs with the roof. I think the same about the stage backdrop and covering it would be fine. Making sure that the furniture is out there and making sure that there is an animated walkway that invites people down so they could actually pass in front of Scott's, I think you have done the best job you could with difficult circumstances so I will support the staff recommendation. And I will add a last note; my Executive Director is never going to do anything to unreasonably withhold an approval.

**MOTION:** Commissioner McGrath moved approval of the staff recommendation, seconded by Vice Chair Halsted.

Commissioner Butt had further comments: I am a relative newcomer to this compared to Commissioner McGrath and I have to confess I have never been to this site. I have eaten in Scott's once but I did not go outside so my whole source of information is the presentations we have had, the staff report and the testimony by various people.

I have to tell you that all of this has left me with about as little sympathy for the Port of Oakland and Scott's as I can muster. I just don't have any sympathy at all for either one of them. The gentleman from the Port of Oakland talked about the public trust when he was trying to avoid admitting that he was the owner.

BCDC is all about the public trust. We are the executor of the public trust. We are the safeguard of the public trust.

From everything I have seen the Port of Oakland and Scott's have done everything they can to avoid the public trust and to compromise it and subvert it. The gentleman from the Port of Oakland pled that they rented out Scott's like we should praise them for that. You know, if the Port of Oakland cannot manage its tenants they have got a big problem. And I think what bothered me the most is that instead of fixing the problem as a landlord they come crying to BCDC to fix it for them on a regulatory basis. That is just really bad public policy. If I were the regulatory guru here this would look a lot worse than it does now.

The one thing I am concerned about is taking the Port of Oakland out of this permit. They own the property. Scott's has been around a long time and I assume they are a thriving business but some of the best restaurants we know go out of business every day. So if Scott's goes under then we are left with a zombie permittee there. I would offer, first of all I will offer it as a friendly amendment, that we do not take the Port of Oakland out from under this; I think they are a big cause of the problem and they need to remain on the hook to make sure that there is somebody there if Scott's goes away.

Chair Wasserman asked for legal advice: Just to check with legal counsel that we can do that?

Deputy Attorney General Posner offered the following advice: An amendment after it has been a motion and a second, is that what you are asking me?

Chair Wasserman continued: Yes. Not so much on the Robert's Rules question, that one I know pretty well.

Commissioner Butt added: Well I can offer it as a friendly amendment with the consent of the mover or I can offer it as a substitute motion.

Commissioner McGrath spoke: I see your point that in the event of a closure the maintenance responsibilities, that are key to offsetting the use of the pavilion, would not have anybody to take care of them. On the other hand, if the restaurant closes the pavilion is no longer in use and that area is more open for public use.

Chair Wasserman had a suggestion: I am going to make a suggestion. Assuming that Commissioner Butt's motion to make a second is proper, if we did that and that were passed, I would request a friendly amendment to the amendment that we can revisit that as to this permit when we consider the Port permit, which needs to be amended. Because the Port has an existing permit which currently includes this.

I do think the issue of taking down the roof if that were to be appropriate, if Scott's were to unfortunately close, is a legitimate one and that we should be clear we know who is responsible for that. And unless staff can tell me who would be responsible if we remove the Port from this permit at this time then I think that would be a better way to go. Staff is conferring.

Commissioner Butt continued: Another way of asking this is, what is the compelling reason for taking the Port out of this as a permittee?

Mr. Zeppetello explained: It goes back to the history. It was originally the Port's permit, Scott's got added to the permit in the 1980s and then the permit was split, so now there is a Port permit for all of Jack London Square except the pavilion.

When the enforcement action was brought for this permit on the pavilion it was brought jointly against the Port and Scott's. The Enforcement Committee felt that it was inappropriate to issue an order against the Port because they felt that it was really Scott's responsibility for these violations. As a result of discussions after the matter was at the Enforcement Committee the Port and Scott's agreed to jointly submit an amendment whereby the Port would be taken off the permit and I think that's part of the Cease and Desist Order.

And I would just comment. I think that it would be possible to keep the Port on the permit but we would have to amend. You cannot just put the Port on the caption. There is no language in this existing document that has any obligations directed to the Port. So I would think that maybe Chairman Wasserman's suggestion that we deal with this in the A-permit if we want to ensure the Port's obligations with respect to what might happen if Scott's were to go out of business we could do it there.

Commissioner Nelson had a question for staff: Just a question for staff. My recollection on my time on the Commission is that we do not traditionally require permits to be issued to both the lessor and the lessee on properties that we issue permits for so I am trying to think this issue through. So the question is; can you think of circumstances where we have routinely done this in the past where we require both owner and lessee?

Mr. Zeppetello replied: I think there are circumstances and maybe Brad can better answer it. I think it is more unusual to have only one.

Ms. Klein stated: The Port of San Francisco is on all of its permits along with its tenants, for example.

Chair Wasserman added: This permit makes clear that it is only Scott's we are giving the permit to for the pavilion area and the rest of the plaza; but the current Port permit covers all of the area except the pavilion.

Mr. Zeppetello agreed: Correct.

Chair Wasserman continued: So I will put it to staff. Assume we approve staff's recommendation today and assume, heaven forbid, the unfortunate circumstance that Scott's goes out of business. Who is responsible for taking down the pavilion if it were determined that that should happen?

Under the proposed permit there is a provision that when the lease terminates, if the permit is not extended, Scott's would have that obligation. If Scott's were to go out of business? It is not clearly addressed in the existing permit but I would think that BCDC would have the authority in terms of abating a condition or requiring the removal of unauthorized structure to issue an order against the Port, a Cease and Desist Order to remove what at that point be unauthorized structures. So I think we would have the authority to order the Port to do that.

Commissioner McGrath commented: In response to Commissioner Butt's very well-reasoned comment. I am also uncomfortable with the removal of the Port from the permit. It is unusual in our circumstances. The difficulty as expressed by the Port attorney representative is that they believe they do not have the discretion to compel action in the event of a violation because of the nature. I have no way of knowing whether or not they have more discretion than they have given us and I hesitate to delay this to run that question down. I think the Chair's solution, which is; we address that question, is an appropriate one. What I guess seals the deal for me is the permit here is to authorize permanently walls on something that we authorized in 1995-1996. Whether we agree with that or not I think our job is to make the best of it. And if Scott's goes out of business those 73 days are no longer authorized, the walls come down and we have got more chairs than we used to. It's the best of a bad deal, I think.

Mr. McCrea had a suggestion: There may be a way we could amend this recommendation slightly to get at what the concern is about what happens if the permittee goes away leaving the structure in place. On page 33 of the staff recommendation there is an abandonment clause. The abandonment clause is a standard condition that is included in all BCDC permits. It typically is for work in the Bay but it reads: "If, at any time, the Commission determines that the improvements in the Bay authorized herein have been abandoned for a period of two years or more, or have deteriorated to the point that public health, safety or welfare is adversely affected, the Commission may require that the improvements be removed by the permittee(s), its assignees or successors in interest, or by the owner of the improvements, within 60 days or such other reasonable time as the Commission may direct."

We could tweak that language to capture this structure.

Chair Wasserman stated: I appreciate that creativity. I am going to suggest the following.

Chair Wasserman then recognized Commissioner Butt, before making his suggestion.

Commissioner Butt continued: Well, I'll go with that. At the last meeting we talked about the responsibility for local agencies to not issue permits for waterfront work before BCDC had provided their approvals and I believe the Chair asked staff to go out and research and find out who was doing that and who wasn't doing it. But this is the same problem. Actually you have two public agencies, you have got the City of Oakland and the Port of Oakland apparently

looked the other way while Scott's came in here and built all kinds of unpermitted structures and then when the problem came up they threw it back to BCDC to solve. The Port of Oakland, they are as big a part of the problem here as Scott's is and I hate to see them get out from under this. Maybe we can move toward doing smarter things in the future. I have not seen their lease either and we are just going on their word that somehow they cannot enforce it. The Port of Oakland is a big organization, they have got a lot of lawyers, if they cannot write a lease that is enforceable they have got a lot of other problems; they need to get some new lawyers.

Chair Wasserman continued: My suggestion that, in fact, we do not deal with this issue here, recognizing that as you have pointed out and squeezed out of the questions, the Port owns this land. And just on a practical sense the Port if Scott's goes out of business has a huge interest in getting somebody else in there so it is not that they are going in any way likely turn their back. But nonetheless they need to be held accountable; I suggest we deal with that.

Do you wish to seek a second for your motion or not?

Commissioner Butt responded: I will withdraw it.

Commissioner Ranchod stated: I want to make clear I support your proposal to address the issue with the Port in the Port's permit, the A-permit. When that is brought to the Commission that staff include that as part of the scope of what is being brought to us so that it does not slide further. I will support this with that understanding and that intent.

It is prudent for us to be planning for all scenarios. Of course we hope that Scott's continues to be in business and thrive in this area and continue to bring people out for enjoyment of the area, that is something we wish to see the business succeed and at the same time we need accountability for obligations that have been set in the past.

Vice Chair Halsted agreed: I would just like to say briefly that I share your view, I do support coming back to this. And if there's any question I think that we probably, a few of us, most of us do.

Chair Wasserman asked: Does the Applicant accept the recommendations?

Mr. Goldberg answered: Yes, it does.

Mr. McCrea added: As a reminder, Chair Wasserman, federal representatives do not vote on this matter because it is a permit matter. We have 15 voting members today, 13 votes are needed for approval.

**VOTE:** The motion carried with a vote of 15-0-0 with Commissioners Addiego, Butt, Jahns, McGrath, Nelson, Pine, Ranchod, Randolph, McElhinney, Connolly, Showalter, Hillmer, Zwissler, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and no abstentions.

**9. Briefing on Possible Caltrans Proposal to Retain Five Piers of the Former East Span of the San Francisco-Oakland Bay Bridge.** Chair Wasserman stated Item 9 was a briefing by Caltrans on a potential proposal to retain five piers of the former east span of the Bay Bridge.

Permit Analyst Tinya Hoang addressed the Commission: Today you will receive a briefing from Caltrans on a concept involving the retention of five piers from the former east span of the Bay Bridge which were required to be removed in BCDC Permit No. 2001.008.41 to offset fill associated with the new east span of the bridge.

The permit which was issued in 2001 and since that time amended on 41 separate occasions authorized bridge construction, and to offset the new fill impacts, required removal of the former east span, revegetation of the touchdown area in Oakland, eelgrass restoration, creation of bird roosting habitat and funding towards offsite mitigation.

The cantilevered fills of the new span is greater than that of the former double-deck span while the volume of solid fill of the new span is less since the new span is supported by smaller and fewer piers.

In 2015 you approved Amendment No. 41 to the permit to allow demolition of 15 piers of the former east span using controlled explosives.

Caltrans is now exploring the possibility of retaining and improving the five remaining piers to serve as public access and wildlife habitat areas. Four of these piers are located on the Oakland side while one pier is located adjacent to Yerba Buena Island. Retention of these piers, and additional not yet authorized fill, would result in Bay fill; exactly how much is not yet known. In addition, such a project would be subject to the review of your two advisory boards, the Design Review Board and the Engineering Criteria Review Board.

The Commission is not taking action on this project today. This briefing is intended to provide information about the concept and offer you an opportunity to ask questions and provide early guidance to the staff and Caltrans. In order for the proposal to move forward and certainly before project commencement, the proposal would have to be approved by the Commission. If Caltrans decides to continue the application process a public hearing and vote would likely be scheduled sometime this winter.

I would like to introduce Dr. Brian Maroney of Caltrans who will present the briefing.

Dr. Maroney presented the following: I find myself standing in front of you again saying, I think this is the last time. The only thing that comes to mind is, I have this flashback to my mother telling me, Brian, you just don't know when to quit, do you?

Commissioners thank you very much. It is a pleasure to be here. Every time Stefan and I go and visit with Brad and the BCDC staff, it is a good day. It is something I always look forward to and I always learn something and they are really helpful in guiding us about what the next steps are.

First of all I want to give you a real quick briefing on how we are doing and how we are following up on the promises that we made but we also want to give you an overview on some of the opportunities that you might have as the Bay Conservation and Development Commission.

I am a bridge engineer so I need perspective from an architect and I need a perspective from an environmental manager.

Blake Sanborn is our lead architect on the team and we have a whole team of architects. He is out of AECOM. The team is made up of public and private elements. Our environmental manager, Stefan Galvez will be here. I also invited from East Bay Regional Parks, Bob Nisbet. We will ask them to come up and offer their perspectives. We also asked Mr. Bob Beck from TIDA to be here. I am the Chief Bridge Engineer for the Toll Bridge Seismic Retrofit Program. I have been wearing the hat of project manager for the last three years and I work directly for Mr. Dan McElhinney who is part of the Commission and is here today.

You have already heard about the schedule and I think you have a pretty good sense about that.

We have followed up to the promises we made to you and all the other agencies that have been involved, California Department of Fish and Wildlife, the National Marine Fisheries Services, the Corps of Engineers and every single partner we have in there. The controlled blasting has really been effective. We have not collected one listed fish which is really important. We have many people observing and collecting data. What has been key is that we have worked with all the different resource agencies and the scientists that focus on life in the Bay that know about the fish and the migrations and when those fish are there. They have given us September, October and November to do this controlled blasting. I think this is really important where the listed species that are at highest risk; they are not there at that time so that is really important.

We also have a blast design where we are not blowing this thing up. We are imploding and basically what we are doing is we are shearing off, we are removing the concrete from the rebar and then we let gravity take care of it. That is why it is so effectively falling straight down through the water column.

We are using the blast attenuation system which is something that we developed as part of this effort where we take Bay water which is reasonable to assume it is incompressible. It is a perfect wave transmitter. It transmits a compression wave and that is what is a threat to dolphins, porpoise, Harbor seals as well as fish. What we do is we put about three percent air in that water and now all of a sudden it's not water anymore. It's compressible. There are real sound physics behind this. We have only been performing this work at slack tide where the tidal current is not moving the bubbles inside the blast curtain.

We have two more to go and in about a week and a half we will be doing Piers 14, 15 and 16 and then two weeks later we are hoping to do Piers 17 and 18. If weather conditions do not allow for it, then we won't go. We have a back-up plan and we have a back-up plan to the back-up plan.

When you work out on the Bay and you work in heavy construction you have to have those kinds of things. I believe we are going to be done on or near those dates. If we are lucky we are actually going to be cleaned up from the bottom of the Bay by the end of November and that is really valuable to us because if we go into December we have to get additional permits and we have to be constantly monitoring for herring. And if we see any herring we have to shut down construction until those herring leave.

Pier E2 is a massive pier very close to the shoreline. That is one of the piers that we have not contracted to have removed.

On the Oakland side, Piers 19, 20, 21 and 22 are marine piers. Those are piers that are inside the water. They are a lot smaller piers. Those are the five piers we are thinking about retaining.

Over one year ago, the Toll Bridge Program Oversight Committee gave Stefan Galvez and me an assignment. They said, don't take those out yet. We want you to reach out to the resource agencies and tell us, does everybody actually want us to retain those piers? Is there a value in public access and preservation of some element of the history of the bridge as well as some environmental benefits?

We have been reaching out to folks like the Corps of Engineers, the Coast Guard, California Department of Fish and Wildlife, the National Marine Fisheries Services and BCDC. We have also reached out to folks who are associated with the East Bay Regional Park who will operate and maintain the planned park at Oakland touchdown which is a pretty big deal. We have also reached out to the City of San Francisco, TIDA, et cetera who own the island and are developing Treasure Island as well as parts of Yerba Buena Island, and we wanted to see if they are interested and we have done that.

We are now at the point where we have conceptual ideas. We have conceptual costs estimates. We have a conceptual schedule. I can't really take another step until I get a chance to interact with the DRB. The integration with these different agencies is vital for the design of these elements.

I will now show you about a 30 second video pertaining to our work on Pier E9 and E10. The foundations now all have pile foundations underneath them.

The only pier on the east side that goes to rock is E2 which is good for the City and County of San Francisco who may someday be owning and operating these. All the other piers are pile foundations for there is no place for that material to collapse and we have to dredge it up and bring it out.

The Park CEQA document is about to be released in about one month. It does have some pier opportunities in that document.

I promise you that whatever I am directed by BCDC and TBPOC to do, I will carry out my duties properly to remove these piers if directed to. If you direct me to build something I will do this. We have lost the ability to walk out along the Bay experiencing it and then going home. We have an interesting opportunity to make that happen here.

At Pier E2, we have an incredible viewing platform to go out and see that bridge as it reaches out over 1,000 feet from T1 tower. You can experience people taking kayaks from the Berkeley kayak launch and coming over here or even small boats being used. It adds to the potential for the park and this could be one way for people to experience the park by arriving via the water. This will also connect us with history. Old bridges are an ideal way to experience history. The tunnel is also a very good experience relating to history.

Timeliness is a very important factor in this project. A budget is a moral commitment and we need to stay within budget for this project. I could be done and out of here by the end of November. It will take about 30 million dollars to complete the construction on this project. The TBPOC actually told us to slow down and take a pause.

I am very lucky to have a really good team on this project and we are ready to go if everybody tells us to. I do not want to make a mistake so I need to reach out and work with all the others including the DRB.

Right now, I am looking at three different alternatives as far as timelines are concerned. The first one is, if directed, I can remove these piers and it can be done very efficiently. We can have a relatively simple public access or we can have some enhanced architectural design. This might require the POC to look for other sources of funds.

We have been working with all the agencies but our stakeholders at East Bay Regional Park are very important particularly with the City of San Francisco and TIDA. What we would like to do is give these assets to those folks and have them maintain and operate them. But I don't want to give something to somebody who does not want it. I want them receiving it in a happy mode. BATA and MTC have said that they are willing to take toll funds to make sure these are maintained. This is really important because the last thing we want to do is have a maintenance problem.

I am trying to let the design engineer and the architect have as much leeway as they can but there are a few things I lay down the law on. First of all, the design criteria; we will follow AAOHTO, the American Association of Highway Transportation Officials. This is the national bridge code. We will also follow the California Bridge Design Specifications. We have to consider earthquakes in our designs. This will lead us to a 75-year design life. I have asked the designers to follow ADA guidelines.

I am an engineer and I believe in science. I believe that there is global warming and polar caps and glaciers are melting. I asked the design team to take the BCDC recommendations and go to the top. The last thing I want is a bridge with my name on it where it ends up in saltwater and we are adding on the FEMA 100-Year Flood Plain.

We are trying to follow all those rules so if you have any concerns about the quality of the design you do not need to have them. We are taking it above a building and at the level of a bridge.

Mr. Blake Sanborne addressed the Commission: I might just illustrate many of the points that Brian's been talking to you all about using images. This slide is showing overlooks and the promenade. We understand that the proximity to the Bay Trail as well as the Water Trail of this location is important. As a result, we are looking for opportunities to access the water from these proposed public access points. In addition, there may be opportunities for habitat preservation and, perhaps, creation. These are images of oyster gardens, artificial reefs and concrete tide pools. We are not just looking at public access but how we can add another dimension by enriching this place for the local ecology. As part of that, there comes the opportunity to educate the public and visitors about what they are seeing. This is an opportunity for people to not only come and stroll, but also a place to learn.

Historic preservation is something that is in the fore of our mind and there are a lot of interesting relationships here. There is a great connection between history of the Torpedo Building and Pier E2.

Art is something that we are interested in incorporating and the rich art scene we have in the Bay Area is vibrant and abundant. There are opportunities to include that richness in this project.

One of the things that we will be doing is preserving Pier E2 for public access but we also want to open up some of the other views to the Bay. Our proposal would be to take off the upper volume of the pier which makes the transition from the shore to the pier a more manageable exercise. From that vantage point, you do have an amazing view of the tower of the bridge but you also have an amazing view out to the Bay and of the Torpedo Building, and it is a special location.

Parking and circulation will be key to the success of Pier E2. The idea is to provide vehicular access and a parking zone approximate to Pier E2.

The proposal is to bridge out to Pier E2, provide some sort of railing so that you are safe and then look at the opportunities on Pier E2 to make it more habitable.

On the Oakland side, the existing conditions are also very promising. The highway is designed in such a way that acoustically most of the sound seems to go up. When you are there, it is surprisingly quiet. The reflections coming off the water in this location are magical and it is a completely different view and experience when compared to driving over it.

We are thinking that public access could be extended starting from Pier E23, which is on the shore, out to E22 and extending to E21. That would be the limit of what we are thinking right now would be the public access here.

Piers 19 and 20 would be dedicated to habitat and uninterrupted by human intervention.

Mr. Stefan Galvez commented: The components of construction of the new Bay Bridge include the impact analysis and a mitigation component that was agreed on between the Commission and Caltrans. By removing the original east span, the volume in the Bay will result in a net gain of volume for the San Francisco Bay. The high level of suspended fill will result in that increase of suspended fill. We are committed to minimizing impacts and fill in the Bay and providing that great experience for public access and for recreational opportunities that is lacking at this time.

We remain in compliance with the original authorization.

We have been working on this project since 2001/2002. There is a large compensation package involved which, is a total of about 16.1 million dollars. We believe that this compensation package clearly exceeds the impacts that we have had. It was predicated on removing the existing east span.

The U.S. Fish and Wildlife Service is in the process of restoring about 700 acres associated with Heron Ranch for tidal marsh. This project has been able to accomplish a lot for the Bay. We remain committed to looking at additional opportunities, but we have been of great benefit to increasing Bay volumes and marsh areas.

We have one outstanding issue which is the shore bird roosting habitat. We believe that there may be an opportunity to also build something in as part of that component. That is still being explored.

We have done a lot of work pushing the contractor, asking for innovative construction techniques to minimize impacts. We have had a much smaller footprint in regards to impacts that we anticipated originally.

We are going to retain some fill in there and there will be additional fill but we believe it is minimal fill. You have the ability to approve this additional fill if it is minor and if the benefits exceed the detriment to the Bay. We believe that this is the case and that we meet your criteria here. We believe we are within the intent of your policies.

Since 2001, there have not been that many public recreation opportunities. We believe that there are still areas that are under-served for public access. There has been tremendous growth here in Oakland. The Bay Area has gained about one million people in the last 15 years and there is higher demand for this type of facility.

We are coming before you asking you to endorse this project in concept. We would like to go to the DRB for guidance as well. We have been working on different alternatives and refining the options that we have out here. We want to move forward and develop those alternatives and get into a contract with our existing contractor and initiate construction by the summer of 2018.

It is a very aggressive schedule but it will be of benefit to the region. We are partnering with the East Bay Park District and TIDA. We are identifying the roles and responsibilities for operation, maintenance and ownership. We hope to include BCDC on these discussions and make sure you feel comfortable with these responsibilities.

Thank you for your time and I am going to invite Mr. Nisbet and Mr. Beck to speak and they are behind this plan.

Mr. Robert Nisbet addressed the Commission: I am with East Bay Regional Park District. I am the assistant general manager with the District. I am here today to convey on behalf of our Board that we are very supportive of this project. They have heard of it in concept. Clearly, Caltrans is on a very tight schedule. A decision does need to be made regarding the three options. I am here to speak on behalf of our Board. We are going to be going back to our Board in a couple of weeks and get more detail. Everything that we have heard is that we understand the opportunities here and it will be an anchor to Gateway Park.

This idea was being talked about even five or six years ago. The EIR for the park is close to being released and it is included in there. This idea will be covered by the EIR that is about to go public. This concept goes back several years.

The opportunities are limitless here. We started out thinking of it as a fishing pier but it is much, much more than just a fishing pier. We are calling it, on the Oakland side, an observation platform. It will be a platform to view the beautiful new Bay Bridge. There are stunning views from both sides.

This is the old bridge, and we really think that is important. Once we are involved in operating and maintaining this area, we will have interpretive signs out there. We will do that to acknowledge that when you walk on this platform, you are on the old bridge. On the Oakland side, it goes out two piers, then two more are left. This is important for two reasons. One is the history of the property. Once you are on the platform, the old bridge will be below you and you need an interpretive sign to let you know that. The possibility for habitat restoration and bird watching is also present.

A kayak launch will also add to the usefulness of the facility. There is a possibility for all types of pop-up activities such as yoga and music, et cetera. This is going to be an anchor on one side, and the Bridge Yard building is going to be the anchor at the other.

The public benefit clearly outweighs the public detriment.

We would pursue this collectively, and there are many agencies involved. There are nine agencies, and we are all partners on this. Here we have this opportunity where the money is creating itself; we are finding money that would be put into demolishing the old piers, and it goes into this project instead.

I want to acknowledge all of the agencies up to this point. We have been having a lot of staff-to-staff meetings to get to this here. I want to especially acknowledge staff from BATA, MTC and Caltrans and their creativity in getting to this point.

Mr. Robert Beck was recognized: I am with the Treasure Island Development Authority. The area surrounding Pier E2 is a Caltrans right-of-way. In May of 2015 the Treasure Island Development Authority took title to the Torpedo Building which adjoins this location. The building is of 1891 construction and is a historic structure, and at this point, it is little more than a structural shell. We do have an interest in revitalizing that facility and bringing it back to public use. We face big hurdles to doing so. The proposed project at E2 helps a lot with this. We are very supportive of it. This will enhance our endeavors to bring activity to the Torpedo Building and bring it back to life.

Overall, Treasure Island Development Authority is engaged in the redevelopment of Treasure Island and Yerba Buena Island. Construction activity is beginning out there, and we are very interested in leveraging this opportunity. I have presented the concept to the sub-committee of our Board and there is great interest there as well.

We encourage you to give it your consideration.

Executive Director Goldzband commented: Tinya and Brad could you please let the Commission know what you think you would like the Commission to be able to say toward the Design Review Board with regard to thoughts about the concept? What does the DRB want to hear? What does Caltrans want to hear?

Brad McCrea commented: The Design Review Board usually responds to proposals that have been developed before they come to the Commission. I think they would be very comfortable taking a look at this. They usually see it first.

There are some policy considerations around fill. There are permit requirements around fill. Those considerations are your purview not the Design Review Board. There has been a lot of discussion around this with BCDC staff. The former Chief of Permits, Bob Batha, and I had our first conversation with Caltrans back when we were at 50 California Street about this idea. This idea has been around a long time. It is early. There is no application. We don't know exactly what the numbers are. There are factors in regards to fill quantity, and they need to be analyzed.

There has been a lot of support. You have heard about three public agencies here. Your direction to us is certainly welcomed. What we would really like to hear is your thoughts on this. We would want to know whether you like it or whether you don't. We would like to hear what you think so that we can move forward with the Caltrans staff and bring you a recommendation in the future if they bring an application to us.

Vice Chair Halsted commented: Back in 2009 before we had learned about Caltrans' ability of implosion an architectural grad student at Berkeley came forward with an idea to me that we try to preserve the old bridge for open-space purposes. It was a pretty interesting idea but we forwarded it on to someone and it didn't really meet anyone's standards.

This does accomplish some of that by preserving history and open-space and access to the water. I was very involved in the opening up of Pier 7 on the San Francisco waterfront which is another long pedestrian access pier to the water. It really makes a huge difference in peoples' ability to understand the Bay. We should continue to explore this and do the best we can for the Bay and for the habitat but also for the people who would benefit from being in the Bay.

I am always delighted to see the creativity from an agency such as Caltrans. We thank you for that. I urge us to continue on and take it to DRB and get their best insights before it has been developed and then more after it has been fleshed out a bit.

Commissioner Butt commented: The unbridled enthusiasm that we are seeing here leads me to wonder if we are missing something. My understanding is that you could take 30 million dollars right now and you could remove the rest of these piers or you could spend it on some kind of amenity that doesn't get rid of the piers. I see two public agencies supporting this both of whom would love to have as much of that 30 million dollars as they can get; preferably all of it. What I would like to find out is how the money shakes out of all of this. I did not hear anybody talk about what the budget would be for putting in all these bridges and observation points and amenities.

I don't know whether that is a 15 million dollar project or a 100 million dollar project. That is one thing I would like to hear more about because I have this vision like, let's do something great with 30 million dollars; let's leave these hunks of concrete in there, and 50 years later, we are going to have hunks of concrete in there. My first thought would be to get rid of them. You've got 30 million dollars - that money could go away; while you've got it, blow them out. If you can do something like this and you can use the money to do it and somebody spends some time doing some design work and selling it, it could be worth looking at.

I am little skeptical of statements like the other two Piers E19 and E20 would be reserved for historical and ecological habitat value. I did hear your enthusiastic explanation of how valuable these things are historically. I am a lifelong, architectural historian and old bridge piers kind of leave me cold (laughter).

I think the guy from Treasure Island would like to see that money used to rehab his Torpedo Building.

My big concern is, what are these projects going to cost, who is going to pay for them, who is going to manage them and is it all workable?

I admire the excitement of East Bay Regional Park District, one of the great public agencies we have in the Bay Area but if somebody is going to provide them the money to do this project nobody could do it better. If you are looking for them to find the money to do it; I wouldn't count on it – they can't find the money to do the projects they've got commitments to now.

Commissioner Nelson spoke: I am a lifelong East Bay resident. To this day I regret the fact that we've lost the Berkeley Pier. You can't go out on the water. It is not the same walking around the Bay shoreline or walking out on a pier. This is a really exciting opportunity there to replace what is now a lost resource in Berkeley. Once you are south of Emeryville, from a water access perspective, kayaking and so forth, there is limited access for small craft on much of the Oakland shoreline. It is particularly limited in west Oakland.

This is a really exciting opportunity from that perspective. We do have to think about our limitations with regard to approving fill for public access. We need to think about that creatively. This is an important issue for us to wrestle with.

The question that Commissioner Butt raised about habitat is important. The original bridge provided habitat for a very significant roosting of a cormorant colony. I suspect there is significant habitat potential if we are creative.

I thought I would ask if any of the Caltrans team, East Bay Park District or the City of San Francisco have given thought to what the next steps are and what might be done with those outboard two piers in order to make sure that they do provide significant habitat?

Commissioner Zwissler had questions: I would also like to hear a little bit more about what is the status of the Gateway Park? Is there funding to actually get it rolling? How does this project line up with the development of Gateway?

I heard the possibility of boat access or ferry or water taxi access. Are these piers intended to receive that?

Is there any opportunity to leverage or use these projects for some adaptation in the development of Gateway?

Mr. Nisbet replied: We are very excited about Gateway Park and we see this as an anchor of one side of it.

The Park District has about five or six million to move forward with the next phase. As soon as the EIR is circulated and certified, we would move forward and start doing that design. We would still have to go out for funds. We have different opportunities that we are looking at for a financing plan for the full on development and construction.

One component will certainly be the Bridge Yard Building. We just entered into a lease with Caltrans to operate that. And we are going to be taking the next steps to activate that building. We feel this will be an anchor for the park with possible revenue generation that could feed into development of the park.

Mr. McCrea added: And BCDC has one million dollars in a State Coastal Conservancy bank account earmarked for Gateway Park that was mitigation money for a former Caltrans project.

Dr. Maroney commented: It is tough and there is no money there. Mr. McElhinney will tell you that is how I manage things. I don't step into something unless I am ready to do it. So before I sign a contract I not only have to have the dollars for that contract I also have to have a reserve; just in case there are change orders. It has been my experience that when you get out in construction, there are always changes. If you go out there without that reserve, you are naïve, or else you are misleading some people. I don't do that.

The TBPOC by legislation from the state of California signed off by the Governor the POC, the Toll Bridge Oversight directors; that is the Director of Caltrans, the Director of the California Transportation Commission and the Metropolitan Transportation/Bay Area Toll Authority directors are responsible for executing the retrofit on all of these toll bridges as well as maintaining all of those assets. By law and permit, they must remove all of these piers right now. They have to and they are financially responsible for it. Right now they have to remove them and they have 30 million dollars to do it.

First of all, they have to vote it. They have to approve, by law, every set of plans and specs. Before I get to sign a contract with a contractor, the Toll Bridge Program Oversight Committee must approve it. And they also have to approve the dollars for that. Once that is approved, by law, then we have to have a vote with the Bay Area Toll Authority because they are the financial dollar managers.

They collect all of the tolls from all the toll bridges and then they distribute that money as they think is appropriate within the balance of time and money and the money in from the tolls and the money out for maintaining all of those assets. Right now, there is a very clear responsibility; they must take those piers out and there is the 30 million dollars. I also have a small reserve in case I have to have change orders.

The POC has the authority if they think it is the right thing to do. They haven't done this yet but they could on December 12th of this year. They could say, yes, go forward with this amount of dollars, and they will set that dollar amount and allow for some appropriate reserve for construction.

**BCDC MINUTES**  
**October 19, 2017**

I never let myself get cornered. That is why I have three options. I am going forward with a set of plans and we are negotiating right now with the contractor to sign a contract March 1st to remove them. I am also going forward with an advanced planning study design; kind of what you would expect Caltrans to put out if we are kind of not working with world class architects. That is going to be the modest-priced one.

I am also letting the architects have freedom to explore even greater opportunities. That is how I am managing it; making sure that my bosses are never cornered. And they can say, with this dollar amount – take them out, go with the modest one or these additional enhancements that they believe are appropriate – go forward with that and they authorize those dollars.

And we take design and the quantities, we take the equipment that we need to build it, we take the labor that we need to build it and we develop our estimates and we actually have the contractor onboard right now. We are actually negotiating with the contractor while we develop the design and it helps to have the contractor right there.

We actually have a plan to finance it. And again, the POC right now has to take them out, that's 30 million dollars. They said, if there is consensus in the community, they are willing to commit those dollars into these opportunities. That is how that is managed.

My intention is, if we are going forward with this, I'm not thinking we leave those out there blank. That is leaving a mess for somebody else. My understanding is that I am supposed to do something like this with Piers 19 and 20. I need to have input from the proper professionals. We already have the foundation; we can do anything with concrete. These choices need to be made by professionals in the right kind of environment.

Mr. Sanborne spoke: Yesterday I was having a discussion with a biologist at our firm and one of the things that we do is share knowledge. Some of the opportunities that we see for Piers 19 and 20 are creating a shoal for shore-bird habitat. It is ideally situated if we elevate that about three feet. There is an active cormorant colony on the bridge. Piers 19 and 20 are perfect for cormorant habitat because this is out in the sun and they can dry their wings and it is close enough to the pier where we are providing public access.

I don't think it is just smoke and mirrors for those two piers. We really are interested in establishing habitat.

The second thing we are interested in is below water. We are talking about opportunities for oysters and mollusks to colonize those piers.

Mr. Galvez added: One of the first things that we heard from the agencies is that, you are not going to leave those piers out there with no clear purpose because they don't want to see a dilapidated structure. We are looking for a clear purpose; something that we all could be proud of.

Commissioner Bottoms commented: South of Emeryville your pictures show a disarray of roads, weeds, overgrowth particularly during a drought time. Those things are typically forgotten by agencies. I hate to see new development be forgotten and go that direction.

Informing the public about a change in direction is important so you have buy-in or public comment.

Those tolls that you said you already have commitment to taking care of some form of maintenance; does that mean that I can anticipate an increase in tolls next year?

Is this a no-fee access or a fee access relative to both these areas? The public has paid for them once so are they paying for it again?

After the public has used this area, is it cleaned up? Is there fishing allowed or not allowed? Is it going to be kept in a pristine way so that more people want to go there and not be turned off by the condition of the area? I don't know if East Bay Parks is picking that up or the Oakland Port or whoever is closest to that.

In terms of plant materials; is it xeriscape or is it all just concrete design? Is it something that is going to be aesthetically pleasing and relatively low maintenance?

You talked about bringing utilities down such as electricity but is that also water? Are you going to provide that water for plant materials that need it during a drought situation?

Commissioner Butt still had funding questions: I still didn't hear what this is going to cost. These guys are engineers and they know what stuff like this will cost and I think that's the most important thing. If we have 30 million dollars, how far can we go with it?

Dr. Maroney replied: The basic project is about 30 million dollars, about even.

Commissioner Butt asked: But what is the scope of it? On the western pier you take the top off of it and you build a bridge out to it. And on the eastern side, you build a bridge out to three piers and the other two piers you just leave there, right?

Dr. Maroney answered: No. The Corps of Engineers made it very clear to us that they will not allow and support a dilapidated structure out there. It must have a purpose.

Commissioner Butt continued: Piers E19 and E20 you don't show any work on those. They are just going to sit there for birds, for cormorants.

Dr. Maroney answered: For birds and wildlife as well as education. That is exactly what they are for.

Commissioner Butt pressed for more detail: The birds would go out on the first three on the east side and then the other two would just stay the way they are, right?

Dr. Maroney explained: No. They would be modified like something that you see in these images.

Commissioner Butt continued: And you think all of that can be done for 30 million dollars?

Dr. Maroney replied: If you make steps and that is the requirement for the project, yes.

Commissioner Butt explained: I'm just trying to find out what you can do for 30 million dollars. Having access to that money; all of that has to go back to the state Department of Transportation so it is not guaranteed.

Dr. Maroney answered: No, but they are the ones that told us to come and talk to you about this. At E2, it is a savings to do what we are proposing in this project. On the other side, it will cost more.

Commissioner Butt continued: I would also be interested if anybody has done any projections about how much public use you think these would get. These things are not on the Embarcadero. They are in locations that are going to be hard to get to and it would be useful for somebody to look at some of their existing piers and look at the utilization of those and project some idea about what level of public use they would expect from piers that are in locations where you have to want to go there to be there.

Dr. Maroney replied: These are all excellent points.

Commissioner McGrath commented: I think re-purposing historic structures is a grand tradition. The studies for rebuilding the Berkeley Pier are underway. This is relevant to the question of cost. The three piers on the Oakland side integrated into a park makes a lot of sense.

There are sea level rise issues that this park has to deal with but this can be above it. Fishing is important. It is one of the very few free activities, and I think we have a responsibility to provide facilities of all incomes.

I was initially pretty skeptical of keeping Pier E2. There are some intriguing ideas there if it can be integrated into a park that is well enough used; I have an open mind.

I remain skeptical about E19 or E20. I am highly skeptical of concrete tide pools. Real habitat has a dynamic to it. It is not preserved in concrete no matter how well done.

A fishing pier is heavily used. The benefit of this relative to Berkeley; we are thinking of our replacement costs at Berkeley of six to eight million. We might have to truncate the pier in order to have it be functional.

The idea of being able to work with really beefy support structures is attractive. I am not worried about that thing lasting. It will.

Commissioner Addiego commented: Commissioner Nelson's commentary made me realize that for many Bay Area residents this is their opportunity to be on the Bay; that is on the pier. In my community the fishing pier is a very big deal. I wanted to thank the individuals who expressed their enthusiasm for what will be. I think, great potential use.

Commissioner Jahns commented: I echo the civic feelings about this project. It sounds like management has thought ahead on all of this. When you are talking about habitat, it is important to make sure that you are creating an ecological function, not just a structure.

I am wondering if you have reached out to the State Coastal Conservancy or Department of Fish and Wildlife. I would urge the folks at AECOM to feel free to do that if you haven't already.

It might also be helpful to learn about some of the initiatives that they are running. There is new funding awarded through the Cap and Trade bill that was just passed.

Commissioner McElhinney commented: This is an opportunity for BCDC along with the other agencies to use implosion as opposed to demolition of these structures has a time constraint and the funds are available. We are under construction and we have a great contractor who is going to give us a bid to do this work. They are on a fast track. When they come back in a few months, we will see where we are overall. This is a terrific public access opportunity.

Chair Wasserman agreed: I echo those thoughts. I think this is one of the most exciting public access projects we've seen. This is really exciting.

Vice Chair Halsted mentioned: I want to mention that our colleague Susan Gorin lost her house in the fire along with many other people. If you have a chance to reach out to her it would be appreciated.

**10. Adjournment.** The Commission meeting was adjourned at 4:20 p.m.

Respectfully submitted,

LAWRENCE J. GOLDZBAND  
Executive Director

Approved, with no corrections, at the  
San Francisco Bay Conservation and  
Development Commission Meeting  
of January 4, 2018

R. ZACHARY WASSERMAN, Chair

**BCDC MINUTES  
October 19, 2017**