

From: David Lewis <dlewis@savesfbay.org> **Date:** Friday, January 12, 2018 at 3:02 PM **To:** Marc Zeppetello <marc.zeppetello@bcdc.ca.gov> **Cc:** "Klein, Adrienne@BCDC" <adrienne.klein@bcdc.ca.gov>, Larry Goldzband <larry.goldzband@bcdc.ca.gov>, "McCrea, Brad@BCDC" <brad.mccrea@bcdc.ca.gov> **Subject:** RE: Westpoint Marina and Scott's Seafood enforcement

Chairman Schaff and Members of the Enforcement Committee:

Save The Bay previously submitted the attached letter and testified at the November 16, 2017, supporting the proposed Cease and Desist and Civil Penalty Order for Westpoint Harbor, LLC. We support the Executive Director's proposed revisions to the Order, and **we urge the Enforcement Committee to adopt the recommended enforcement decision, including the Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01** at your meeting next Thursday, January 18, 2018 (item 7).

In addition, **we urge the Enforcement Committee to support the Executive Director's determination that Scott's Jack London Seafood, Inc. ("Scott's"):** (1) **has not fully complied in a timely manner with all applicable requirements of the Cease and Desist and Civil Penalty Order No. CDO 2017.01 ("Order")** and had not maintained full compliance with the Order and the Permit through September 1, 2017, and, therefore, (2) is not entitled to receive the 15% waiver of the total penalty amount under the Order. Save The Bay has provided testimony over the last three years in support of strong BCDC enforcement and penalties for Scott's repeated permit violations, and the permittee's appeal of the Executive Director's decision is without merit. This is item 5 on the Committee's January 18, 2018, agenda.

Thank you for your consideration.

--
David Lewis
Executive Director, Save The Bay
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SAVE THE BAY

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

January 12, 2018

Greg Scharff, Chair
and Member of the Enforcement Committee
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

SUBJECT: Response to Letter from Scott's Jack London Seafood, Inc., dated January 10, 2018

Dear Commissioner Scharff and Members of the Committee:

On January 10, 2018, counsel for Scott's Jack London Seafood, Inc. ("Scott's") submitted a letter to the Enforcement Committee arguing that Scott's would appear before the Committee on January 18th to address two issues: (1) Scott's appeal of the Executive Director's determination that Scott's is not entitled to a waiver of 15% of the total penalty amount under Cease and Desist and Civil Penalty Order No. CDO 2017.01; and (2) "BCDC staff's insistence that Scott's remove decorative wooden stage curtains in the Pavilion." As stated in the meeting notice for the January 18th Enforcement Committee meeting, and in the accompanying staff report for agenda item number 5, the Commission Chair has referred the first issue to the Committee for its consideration. The Chair has not referred the second issue to the Enforcement Committee and the second issue is not noticed on the agenda for the January 18th Committee meeting.

The Bagley-Keene Open Meeting Act requires the notice of an Enforcement Committee meeting to be provided at least ten days in advance of the meeting and to "include a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed." Gov't Code §§ 11125(a), 1125(b). The Act further states that "[n]o item shall be added to the agenda subsequent to the provision of this notice, unless otherwise permitted by this article." *Id.* § 11125(b). Because the second issue on which Scott's would like to address the Committee, which it unilaterally raised and argued in its January 10th letter, has not been properly noticed, pursuant to the Bagley-Keene Open Meeting Act, the Committee may not consider the issue at its January 18th meeting.

In addition, Commission staff objects on two grounds to Scott's letter as to the second issue argued by Scott's in its letter, and further objects to the Committee's potential consideration of that issue at any future Enforcement Committee meeting. First, the Commission Chair has not referred the issue to the Committee. Second, the issue is a permitting matter, not an enforcement matter, which the subject permit gives staff discretion to decide.

Greg Scharff, Chair
and Member of the Enforcement Committee
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More specifically, the second issued raised by Scott's concerns Special Condition II.F of the amended permit for the public pavilion at Jack London Square (BCDC Permit No. 1985.019.11(B)) issued on October 25, 2017. Special Condition II.F is entitled "Remove Permanent Stage Backdrop and Use Temporary Backdrop as Needed," and provides, in part:

By no later than February 28, 2018, the permittee shall remove or cover the unauthorized permanent wooden, painted backdrop mounted around the door of the storage area....If the permittee wishes to cover it, it must first secure BCDC staff plan approval pursuant to the requirements of Special Condition II.A, Specific Plans and Plan Review....If staff declines to approve the plan, for example because it determines that retention of the stage backdrop with a cover will continue to feel private and result in the conversion of public access to private use, the stage backdrop may not be covered and must be removed."

The possibility of Scott's covering rather than removing the unauthorized wooden backdrop was discussed at the Commission meeting on October 19, 2017. At that meeting, Scott's agreed to the terms of Special Condition II.F. and the Commission subsequently adopted the amended permit. Approximately two months later, BCDC staff denied Scott's proposed plan to cover the unauthorized wooden backdrop in a letter dated December 22, 2017. Scott's is now improperly seeking, by its January 10th letter, to have the Enforcement Committee review and reverse the staff's decision on this matter. However, the amended permit grants staff the authority and discretion whether or not to approve any plan submitted by Scott's to cover the backdrop, and also clearly states that if staff declines to approve such a plan "the stage backdrop may not be covered and must be removed." Scott's cannot attempt to circumvent the terms and requirements of Special Condition II.F., or essentially seek an amendment of Special Condition II.F, by unilaterally requesting that the Enforcement Committee hold a hearing to consider Scott's complaints and reverse the staff's determination.

Thank you for your consideration.

Sincerely,



MARC ZEPPELLO
Chief Counsel

MZ/lc

cc: Michael Verna, Esq. (by email)
David Alderson, Esq. (by email)



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& DEVELOPMENT COMMISSION

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January 10, 2018

Via Email and Overnight Delivery

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Brad McCrea
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- Re: (1) Executive Director's Denial of Scott's 15% Penalty Waiver Re Compliance with Cease and Desist and Civil Penalty Order No. COO 2017.01;**
(2) Staff's Insistence that Scott's Remove Decorative Wooden "Stage" Curtains at the Public Pavilion (BCDC Amended Permit No. 1985.019.11B)

Dear Director Goldzband, Chairman Scharff, Mr. Zeppetello, and Mr. McCrea:

Scott's appears before the Enforcement Committee to address two issues:

1) Reversal of Director Goldzband's denial of the 15% penalty waiver (amounting to \$59,304) granted to Scott's in the April 7, 2017 Cease and Desist and Civil Penalty Order No. CDO 2017.01 ("CDO"), on the grounds that (a) Scott's was in compliance with Section III of the CDO and thus entitled to the waiver, and (b) by the Director's own admission, his denial is based entirely on a failure by the Port's property manager to forward a measly two months of Pavilion event calendars to BCDC staff, which in themselves didn't show any overuse or permit violation by Scott's anyway; and

2) BCDC staff's insistence that Scott's remove decorative wooden stage curtains in the Pavilion *even though* (a) there is nothing in the CDO that requires this, (b) the wooden curtains

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do not impact public access of the waterfront in any way, (c) the wooden curtains have been in place for over 20 years *without objection* from any member of the public or BCDC, and (d) removal of the curtains would simply expose an unsightly steel door. Scott's has offered to simply cover the wooden curtains with fabric when the Pavilion is not in use, but staff has refused to agree.

Short History

Committee members will recall that Staff's initial recommendation to the Commission was that Scott's be penalized \$841,400, all cash, for its alleged permit violations. That penalty was reduced by this Committee almost a year ago to \$395,360, to be paid over three years, with a 15% discount of \$59,304 for the third installment if the Executive Director determined that Scott's was in compliance with Section III of the CDO as of September 1, 2017. (See relevant portions of CDO, attached as Exhibit "A"). The rationale expressed by this Committee for overruling staff's recommendation (and adopted by the full Commission by unanimous vote) was to not overburden Scott's with costs that jeopardized its ability to continue to do business as an anchor tenant in Jack London Square and to reward it for its good faith efforts to comply with the CDO.

Unfortunately, the reality of the situation is that jobs and Scott's future *have been* jeopardized as it has been forced to incur upwards of \$850,000 in attorney's fees, consultant costs, equipment purchases, design costs, etc. as a result of this BCDC prosecution--\$118,000 in attorney's fees alone *since the CDO was issued last April*—because of staff's unreasonableness and nitpicking. And this doesn't even count the \$131,786.67 Scott's has already paid as its first installment of the civil penalty.

Denying Scott's the \$59,304 discount mandated by the full Commission (because Scott's failed to carbon copy staff on its event calendar email to the Port's property manager, even though BCDC ultimately received the calendars anyway) and insisting on removal of the decorative wooden curtains (for no apparent reason other than staff's contrived claim that this somehow "privatizes" the space), are the two latest examples. Enough is enough.

Denial of Scott's \$59,304 Penalty Discount is Not Warranted

As admitted in Director Goldzband's letter of October 18, 2017, the *only* basis for his decision to deny Scott's this 15% civil penalty discount is because the Port's property manager (CIM) did not forward Pavilion event calendars for June and July to BCDC Staff timely (even though he acknowledges that BCDC was ultimately apprised of Scott's usage for those two months). As clearly stated in Director Goldzband's letter:

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“Scott’s could have complied with Paragraph III.I if *the Port* had in fact forwarded to BCDC in a timely manner Scott’s reports of actual Pavilion usage for the subject months, but the Port did not do so.” (Goldzband letter, Oct. 18, 2017, p. 2; emphasis added; Exhibit “B” hereto).

The Port was still a co-permittee with Scott’s at that time and the landlord to whom Scott’s reported Pavilion usage for years. And BCDC Staff knew that Scott’s was sending its event reports to the Port’s property manager, CIM (as evidenced by Mr. Zeppetello’s June 7 email and Ms. Klein’s receipt of CIM’s Notice of Compliance on July 17). Yet never did BCDC staff state that failure of Scott’s to carbon copy the BCDC on these monthly emailed reports would be considered a material violation of the CDO by Scott’s subjecting it to a \$59,304 penalty. Nor has BCDC penalized the Port, *as co-permittee*, for this alleged violation of the CDO. By Director Goldzband’s own admission, he is penalizing Scott’s for the Port’s failure to forward two emailed reports.

Moreover, Director Goldzband’s October 18, 2017 letter makes clear that his decision to penalize Scott’s was *not* based on Pavilion over usage by Scotts in violation of the Permit or any refusal to provide public access to the Pavilion. So *even if* the Port had forwarded Scott’s June and July event reports to BCDC on July 15 and August 15, there is *nothing* BCDC would have done with them as they don’t disclose any permit violation. We know this because BCDC staff *admits receiving* the reports for June and July Pavilion usage later yet took no action as a result nor claimed any permit violation by Scott’s.

Neither the Permit nor the CDO specify how these monthly event reports are to be disseminated. Scott’s provided all quarterly and monthly Pavilion use data to CIM as had been required of Scott’s for the preceding years. The Permit requires Scott’s to submit quarterly event data to CIM (not to cc those cover emails to the BCDC) and CIM is to then forward that information to BCDC. Director Goldzband’s October 18, 2017 letter agrees that sending quarterly data to CIM was in compliance with the Permit. But he then claims that Scott’s “materially violated” the CDO because it did not copy BCDC staff on two emails to CIM enclosing the June and July monthly reports, *even though* he apparently concedes that Scott’s was told by Jennifer Koidal of CIM that *she* was forwarding those reports to BCDC. There is no dispute that Scott’s provided timely and accurate data reflecting actual Pavilion usage, times, dates, etc. to CIM. And there is no dispute that BCDC staff received the *same* data contained on the monthly reports for June and July when they received the quarterly reports.

It is a shame that after all of the collaborative work undertaken by the parties to resolve past differences, that there are yet more chasms to cross. The Commission (not BCDC Staff) proposed and authorized the 15% discount to Scott’s, unless Scott’s materially violated the CDO. Not cc’ing BCDC Staff on two emails to the Port’s property manager for June and July Pavilion usage that did not disclose any permit violation cannot be construed as material violations,

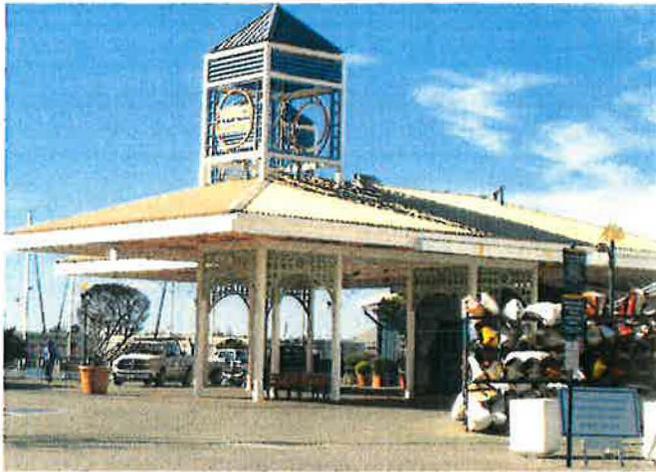
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especially when BCDC staff was ultimately provided with the June and July schedules anyway and took no action as a result. Be mindful that the June and July reports disclosed a total of only four events—clearly not Pavilion over usage or a permit violation.

Staff's Unreasonable Refusal to Accept Scott's Proposal to Cover the Stage Decoration When the Pavilion is in Public Mode

Amended Permit No. 1985.019.11(B) issued on October 25, 2017 requires that Scott's either "remove or cover the permanent wooden, painted stage backdrop mounted around the door of the storage area." (See Section F, copy attached as Exhibit "C"). As these wooden backdrop curtains hide and beautify an unsightly metal roll up stage door and provide a much nicer background for speeches and presentations, Scott's has proposed to "cover" these curtains with fabric while the Pavilion is in public mode rather than remove them. Below are photographs of the Pavilion and wooden stage curtains showing how they enhance the Pavilion area, with the lower left photo depicting what the fabric covered stage would look like when no private functions are taking place.

Four Views of the Wooden "Stage" Curtains Wall Decoration, plus Proposed Cover (Exhibits E-H).



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Frankly, Scott's would rather leave the wooden curtains in place and not cover them at all, but relented to staff's insistence that they be at least covered and thus agreed to this term in the Amended Permit. But now staff has refused to accept Scott's proposal to cover the wooden curtains while the Pavilion is in public mode, claiming that:

“. . . the public space would still be privatized by the covered stage instead of the exposed roll up door . . . (as) the curtain will draw as much, if not more, attention to itself . . . (and) the cover would attract graffiti. For these reasons and after careful consideration, we hereby **deny** your proposal to cover the stage curtains and request that Scott's proceed with their removal.” (Adrienne Klein letter, December 22, 2017, attached as Exhibit “D”)

One wonders how much “careful consideration” staff devoted to this, as Ms. Klein's letter fails to cite any facts to support staff's decision. This is even more baffling given the stage backdrop has been in place for *over twenty (20) years* with no complaints from any member of the public *or BCDC* that these wooden curtains “privatized” the Pavilion or impeded public access to the waterfront in any way. No doubt this Committee is aware of the recent court ruling in *Sweeney/Point Buckler Club LLC v. BCDC*, in which the court found that BCDC's long standing failure to object to a permittee's usage establishes BCDC's “vindictiveness” and invalidates its enforcement actions.

Beyond this, staff's refusal to accept Scott's proposal (or simply allow the wooden stage backdrop to remain in place without any fabric covering while in public mode) simply defies common sense. Before Ms. Klein's letter (Exhibit “D”), no one ever suggested or established (and certainly not BCDC staff) that public access has been hindered one iota due to the presence of the wooden curtains or that members of the public have chosen not to enter the Pavilion when it is in public mode because they were concerned that the space was “private” due to the presence of the curtains. After all, what the curtains do is partially cover an unsightly metal roll up door to the storage shed with a decoration. On the other hand, countless event participants have enjoyed the framing these wooden curtains offer when giving speeches or toasts and the like.

Furthermore, the presence of the wooden stage curtains enhance the tremendous improvements Scott's has agreed to make (at its sole cost) to accommodate public access to the Franklin Street Plaza area as a whole through the addition of new furniture, signage, lighting and the refurbishment of many existing items on the Port's property. In fact, Scott's has agreed to do everything else BCDC and the Port have asked. For BCDC staff to now demand the complete removal of these wooden curtains is unnecessary, nitpicky, and raises the appearance of “vindictiveness”.

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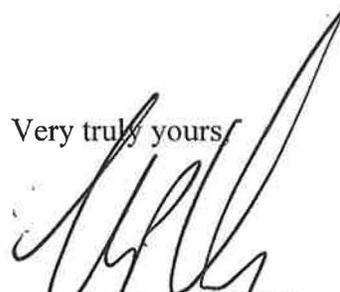
Conclusion

The goal here is to develop an environment where Jack London Square can become the public and economic resource the parties have always envisioned. Part of BCDC's mandate is to *help* businesses thrive through positive resource development and improved public access. At the end of the day, Scott's, the Port and BCDC should be partners and not rivals.

Scott's is doing its part. It simply asks that BCDC staff join with it to do its part as well. Jobs and Scott's ability to do business are on the line. Scott's has been punished enough. This Committee should (1) order that Scott's 15% penalty waiver be reinstated in accordance with the CDO as there was no material violation, and (2) order that the wooden stage backdrop/curtains be allowed to remain in place or, alternatively, that Scott's proposal to install a fabric cover over those curtains be approved while the Pavilion is in public mode.

We ask that this letter and enclosures be submitted to the members of the Enforcement Committee for consideration at the January 18, 2018 hearing and that it be made part of the public record. Thank you.

Very truly yours,



MICHAEL P. VERNA

cc: Joshua Safran, Esq. (Port of Oakland)
Elizabeth Gallagher (Scott's)

EXHIBIT A

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

BCDC ISSUED

Scott's Jack London Seafood, Inc.
2770 Camino Diablo, #B
Walnut Creek, CA 94597

COMMISSION
CEASE AND DESIST AND CIVIL PENALTY
ORDER NO. CDO 2017.01

Respondent.

Effective Date: April 7, 2017

TO SCOTT'S JACK LONDON SEAFOOD, INC.:

I. CEASE AND DESIST

Pursuant to California Government Code Section 66638, Scott's Jack London Seafood, Inc. , and all of its agents and employees, and any other persons acting on behalf of or in concert with it (collectively "Scott's" or "Respondent") is hereby ordered to cease and desist all activity in violation of BCDC Permit No. 1985.019.09B, BCDC Permit No. 1985.019.22A, or the McAteer-Petris Act ("MPA") at Jack London Square in Oakland, as described herein. Specifically, Scott's is ordered to:

A. Cease and desist from violating BCDC Permit Nos. 1985.019.09B and 1985.019.22A, and the McAteer-Petris Act.

B. Fully comply with requirements of Sections III and IV of this Cease and Desist and Civil Penalty Order ("Order").

II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings and this Order includes: (1) all documents and other evidence cited herein including Attachment A – Additional Findings; and (2) all additional documents listed in the Index of Administrative Record, Attachment B hereto.

A. BCDC Permit No. 1985.019.09B, as amended through October 7, 1997 ("the Permit"), issued jointly to Scott's and the Port of Oakland ("Port"), authorizes the construction, use, and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza at Jack London Square in Oakland, for shared public and private use at a ratio of 80% public to 20% private, and the installation of café seating, benches, lighting, and other site furnishings within the pavilion and larger, approximately 23,000-square-foot plaza.

B. BCDC Permit No. 1985.019.022A, as amended through October 22, 2014 ("the Port's Permit"), issued to the Port, authorized certain development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets at Jack London Square.

possible to reach an agreement with Scott's and the Port on a revised proposed stipulated order that would be acceptable to the Commission. Therefore, on December 19, 2016, staff commenced a formal enforcement proceeding by mailing to Scott's and the Port a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint").

N. On January 23, 2017, Scott's and the Port each submitted their respective Statement of Defense and accompanying supporting documents. On February 16, 2017, the Enforcement Committee held a public hearing on this matter at which it considered the staff's presentation of the Executive Director's recommended enforcement decision, presentations by Scott's and the Port, and public comment by a number of parties. The Enforcement Committee adopted the Executive Director's recommended enforcement decision with modifications. **Among other modifications, the Enforcement Committee recommended that the Port be dismissed from this action and that the proposed penalty be reduced from \$841,100 to \$395,360, payable in three annual installments and with the opportunity for Scott's to be entitled to a waiver of 15% of the penalty, in the third year, if Scott's timely complies, and maintains compliance, with this Order.**

O. In summary, the violations or categories of violation of the Permit or the Port's Permit documented by BCDC staff's enforcement investigation include the following:

1. Unpermitted development by unauthorized construction in public access areas of a metal-framed entry doorway, wood and metal-framed walls, multiple moveable wall panels and ceiling tracks in the pavilion; storage area and stage; roof extension and planters.
2. Non-Permit compliant use of the pavilion, in violation of Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion, during the period 2004-2015:
 - a. Providing fewer than 292 public use days per year;
 - b. Providing, on average per month during winter season, fewer than five (5) public use weekend days and nights;
 - c. Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
 - d. Holding, on average per month during summer season, more than three (3) private use weekend days and nights;
 - e. Providing fewer than three (3) public use weekend days and nights per month; and
 - f. Holding more than two consecutive private use days.
3. Unpermitted use of the Franklin and Broadway Street plazas by placing tents and stanchions, storing event related equipment (including planters), and displaying promotional vehicles;

5. **Economic Savings.** The Commission is not in a position to quantify any economic savings to Respondent resulting from the violations, but Scott's has clearly benefitted economically from deferring removal of the unauthorized construction at the pavilion while continuing to over use the pavilion for private events. Similarly, Scott's has profited from the events in excess of 73 per year that it holds in the pavilion.

J. **Such other matters as justice may require.** No business located within BCDC's jurisdiction other than Scott's has made such extensive use of a dedicated public access space for private profit. No other business within BCDC's jurisdiction has so flagrantly, extensively, and knowingly violated the terms of its Permit and the MPA. Moreover, as of the date of this Order, all but one of the violations (plan approval) are ongoing and Respondent has neither removed the unauthorized structures, filed as complete the permit amendment application necessary to seek authorization for the unpermitted construction, nor ceased the non-compliant and illegal uses of the pavilion and the unpermitted uses of the Franklin Street Plaza.

K. Based on consideration of the relevant factors set forth in Government Code Section 66641.9(a), the penalty amounts authorized by Government Code Section 66641.5(e), and the preceding findings, the Commission hereby finds that an administrative civil penalty of \$395,360 is justified to resolve this matter. Scott's shall pay the total penalty amount in three equal installments, of \$131,786.67 each, over a three-year period, in accordance with Paragraph IV.M, below. **Provided, however, that if the Executive Director determines that Scott's has complied with this Order and the Permit in accordance with Paragraph IV.L, below, Scott's shall be entitled to a waiver of 15% of the total penalty amount, or \$59,304, and this amount shall be deducted from the third annual installment payment.**

L. **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 fully and in a timely manner with each and every requirement of Paragraphs III.A, III.B, III.C, III.D, III.E, III.F, III.G, and III.I of this Order and has maintained full compliance with this Order and the Permit through September 1, 2017.** By no later than September 15, 2017, the Executive Director shall notify Scott's in writing of his determination as to whether or not Scott's has complied with the referenced requirements of this Order and has maintained compliance with this Order and the Permit through September 1, 2017, and, therefore, whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount.

M. Pursuant to Government Code Section 66647, Scott's shall remit payments to the Commission, by cashier's checks, payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund as follows: (1) within 30 days of the Effective Date of this Order, a payment of \$131,786.67; (2) by no later than May 7, 2018, a payment of \$131,786.67; and (3) by no later than May 7, 2019, a payment of \$131,786.67, unless the Executive Director has determined, in accordance with Paragraph IV.L, above, that Scott's is entitled to a waiver of 15% of the total penalty amount, in which case the payment shall be \$72,482.67.

V. TERMS

A. Under Government Code Section 66641, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to \$6,000 for each day in which such violation persists. In addition, upon the failure of any person to comply with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

B. This Order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.

C. Scott's must conform strictly to this Order.

D. This Order does not constitute a recognition of property rights.

E. This Order is effective upon issuance thereof.

VI. OPPORTUNITY FOR JUDICIAL REVIEW

Under Government Code Section 66639, within thirty (30) days after service of a copy of a cease and desist order issued by the Commission, any aggrieved party may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure. Failure to file such an action shall not preclude a party from challenging the reasonableness and validity of the order in any judicial proceedings brought to enforce the order or for other civil remedies.

DATED: April 7, 2017



LAWRENCE J. GOLDZBAND
Executive Director
San Francisco Bay Conservation and
Development Commission

List of Attachments

Attachment A: Additional Findings

Attachment B: Revised Index of Administrative Record

EXHIBIT B

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

October 18, 2017

Michael P. Verna, Esq.
Bowles & Verna LLP
2121 N. California Blvd., Suite 875
Walnut Creek, CA 94596

SUBJECT: Determination that Scott's Has Not Complied Fully with Commission Cease and Desist and Civil Penalty Order No. CDO 2017.01 (the "Order")

Dear Mr. Verna:

By letter dated September 27, 2017, you objected to and purported to appeal the determination, set forth in my September 15th letter to Liz Gallagher, "that Scott's has not complied fully and in a timely manner with certain requirements of the Order and the Permit and, therefore, is not entitled to a waiver of 15% the total penalty amount." We treat your letter as a request for reconsideration.

My letter discusses three provisions of the Order: Paragraphs III.F, III.I, and III.G. Each of these provisions is discussed further below in light of the arguments made in and documentation attached to your September 27th letter.

Paragraph III.F. Paragraph III.F requires Scott's and the Port to submit a fully complete and properly executed application to amend the permit for the pavilion "no later than 45 days after the Effective Date of this Order." The Order's Effective Date was April 7, 2017, and, therefore, Scott's and the Port were required to have submitted a fully complete application to amend the permit by no later than May 22nd. Scott's and the Port did not submit a fully complete application until August 24th, or 139 days after the Order's Effective Date.

As you know, by letter dated June 9, 2017, BCDC staff determined that the application initially submitted on April 4th and supplemented on May 22nd was still incomplete and could not be filed pending submission of specified information. Nevertheless, staff's June 9th letter stated that Scott's and the Port had done an excellent job of responding to staff's May 22nd letter, and that in light of their responsiveness and the substantial progress that had been made on the public access proposal, staff would not take the position that Scott's and the Port had failed to comply with the 45-day deadline established by Paragraph III.F. I regret that staff did not condition the assurance provided in its June 9th letter on continued diligence by Scott's and the Port to provide the information necessary to complete the application in a timely manner or by a specified date. Had staff done so, I would likely have found that Scott's and the Port failed to comply with the Paragraph III.F deadline. However, in light of the position taken by staff on June 9th, your September 27th letter correctly notes that my determination that Scott's has failed to comply with the Order is not based on Scott's and the Port's unwarranted delay in submitting a fully complete application.



Paragraph III.I. Paragraph III.I provides, in part, that “Scott’s shall submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.”

Nothing in your September 27th letter or the accompanying exhibits demonstrates that Scott’s timely complied with this reporting obligation except for the month of May (as acknowledged in my September 15th letter). Specifically, Scott’s has not refuted that: (1) it failed to submit to BCDC a monthly statement listing all events held the pavilion in April by May 15th; (2) it submitted to BCDC pavilion usage information for April and May on June 6th, only after Mr. Zeppetello informed you, as a courtesy, that Scott’s had already failed to comply with Paragraph III.I on one occasion (*i.e.*, for April, by May 15th), before it happened again and there was a second violation; and (3) despite Mr. Zeppetello having brought the initial violation of this reporting obligation to Scott’s attention, it failed to submit to BCDC monthly statements listing all events held at the pavilion in June and July, by July 15th and August 15th, respectively.

Scott’s argues that it complied with its reporting obligation under Paragraph III.I by submitting pavilion usage information to the Port because the Order does not specify how Scott’s is supposed to submit its reports to BCDC and because it assumed that the Port was sending Scott’s reports to BCDC. **Scott’s could have complied with Paragraph III.I if the Port had in fact forwarded to BCDC in a timely manner Scott’s reports of actual pavilion usage for the subject months, but the Port did not do so.** To the extent that Scott’s relied on the Port to serve as its agent for purposes submitting the required monthly reports to BCDC, it was Scott’s obligation to ensure that its agent complied with Paragraph III.I; the Port’s failure to submit the reports to BCDC is attributable to Scott’s.

Scott’s complains that finding noncompliance here is “frustrating and unfair” because BCDC staff was aware that the Port’s property manager, CIM, was in receipt of Scott’s monthly reports and could easily have contacted CIM and asked for the reports if staff did not have them. However, while BCDC staff is well aware that the permit requires Scott’s to provide quarterly event schedules to the Port, staff did not know that Scott’s was providing pavilion usage information to the Port on a monthly basis.¹

More importantly, Scott’s fails to appreciate that under the Order, the reporting obligation is Scott’s. It is not BCDC’s responsibility to ask Scott’s or the Port for reports that Scott’s is required to provide. Mr. Zeppetello attempted to prevent this from becoming an issue by calling the first violation of Paragraph III.I to Scott’s attention on June 6th and sending a follow-up email the next day to both you and Ms. Gallagher to explain what Scott’s needed to do to comply with Paragraph III.I. Scott’s has no one to blame but itself for the subsequent reporting violations of failing to submit to BCDC the required monthly pavilion usage reports for July and August.

¹ On June 14th, Adrienne Klein, BCDC’s Chief of Enforcement, was copied on an email that Scott’s had sent to the Port’s property manager attaching “revised updated pavilion reports” for the second, third, and fourth quarters. Ms. Klein assumed these attachments were the quarterly schedules for private events required under the permit, not both retrospective reports of events that had occurred for the prior months and scheduled events for future months. As discussed in my September 15th letter, Ms. Klein was also copied on a July 14th email that Scott’s sent to the Port’s property manager forwarding the same sets of three quarterly reports that had been attached to Scott’s June 14th email and, therefore, the second quarterly report shows scheduled, and not actual, pavilion use for June. Ms. Klein did not receive another email regarding pavilion usage until October 10th, when she was copied on another email from Scott’s to the Port’s property manager providing the “New Monthly Report for Scott’s Pavilion Usage 2017 for September & Updated Remaining Quarterly Reports.” Thus, it appears that Scott’s did not begin monthly reporting of actual pavilion usage until October, after receiving my September 15th letter.

Michael Verna, Esq.

October 18, 2017

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As stated in my September 15th letter, Scott's repeated failures to comply with the Paragraph III.I monthly reporting requirement are material violations of the Order. On this basis, I reaffirm my determination that Scott's has not complied fully and in a timely manner with each and every applicable requirement of the Order and has not maintained full compliance with the Order and the Permit through September 1, 2017.

I shall briefly address two related issues. First, Scott's claims that its pavilion usage reports attached to your September 27th letter show that no overuse is occurring. Whether or not that is the case is not clear, given the discrepancies in the different quarterly reports prepared on different dates and the uncertainty as to whether the reports show scheduled versus actual pavilion usage for certain month. However, the key point for compliance purposes is that Scott's did not provide pavilion usage information to BCDC for the relevant months until after September 1st, in response to my September 15th letter, rather than on a monthly basis as required by the Order.

Second, though the Order provides for the Executive Director to make a compliance determination as of September 1, 2017, for purposes of determining whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount, please bear in mind that the Order, including Paragraph III.I, remains in effect. Therefore, Scott's continues to be required to submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.

Paragraph III.G. Paragraph III.G requires Scott's to provide all improvements within the public access area required by Special Condition II.B.5 of the permit including: (1) at least 4 public access signs, two permanent and two temporary; and (2) at least 15 tables and 35 chairs that are to be in place at all times except when the pavilion is in use for private events. My September 15th letter described staff's observations during an August 30th site visit of a number of violations of the requirements of Special Condition II.B.5 with respect one public access sign and certain furnishings. In response, your September 27th letter argues that maintaining "full compliance" with the Special Condition II.B is an impossible standard, particularly given that the public may move furnishings and remove signs.

We appreciate the information provided by your September 27th letter regarding Scott's efforts to ensure that the required signs and public access improvements are in place at all times. While not excusing the violations observed during staff's August 30th site visit, upon reconsideration, those violations are excluded as a basis for my determination that Scott's has not maintained full compliance with the Order and the permit through September 1, 2017.

The Order Does Not Provide for an Appeal to the Commission. If I refuse to accept Scott's objections, Scott's demands that this matter be scheduled for a hearing before the Commission pursuant to Paragraph III.J of the Order. Paragraph III.J provides only for the Executive Director to schedule further review by the Commission if Scott's and the Port fail to submit a complete application to amend the permit by 45 days after the Order's Effective Date or if the application has not been filed as complete by July 10th. The opportunity for further review by the

Michael Verna, Esq.
October 18, 2017
Page 4

Commission under Paragraph III.J is moot now that the application to amend the Permit has been filed as complete. Moreover, Paragraphs IV.K and IV.L of the Order grant the Executive Director sole discretion to determine whether or not Scott's has complied with the Order and the permit through September 1, 2017. The Order does not give Scott's the right to appeal this determination to the Commission.

Conclusion. For the above reasons, I reaffirm my determination that Scott's has not complied fully and in a timely manner with each and every applicable requirement of the Order and has not maintained full compliance with the Order through September 1, 2017. Therefore, Scott's shall not be entitled to a waiver of 15% of the total penalty amount.

Please contact the Commission's Chief Counsel, Marc Zeppetello, at (415) 352-3655 or marc.zeppetello@bcdc.ca.gov, if you have any questions.

Sincerely,



LAWRENCE J. GOLDZBAND
Executive Director

LG/MAZ/gg

EXHIBIT C

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

PERMIT NO. 1985.019.11(B)

(Issued Originally on March 13, 1986, As

Amended through October 25, 2017)

MATERIAL AMENDMENT NO. ELEVEN

Scott's Jack London Seafood, Inc.

1719 Bonanza Street

Walnut Creek, California 94596

ATTENTION: Liz Gallagher, President

Ladies and Gentlemen:

On August 17, 1995, the San Francisco Bay Conservation and Development Commission, by a vote of 15 affirmative, 0 negative and 0 abstentions, approved Material Amendment No. Eight to which the original amended permit was issued. Moreover, on July 8, 1997, the Executive Director, pursuant to Regulation Section 10822, approved corrected Amendment No. Ten. On October 7, 1997, the Executive Director, pursuant to Regulation Section 10822, approved Amendment No. Nine to which this ~~corrected~~ amended permit ~~is hereby~~ was issued. Moreover, on October 19, 2017, the San Francisco Bay Conservation and Development Commission, by a vote of 15 affirmative, 0 negative, and 0 abstentions, approved Material Amendment No. Eleven to the original resolution pursuant to which this amended permit is hereby issued:

A. Authorized Project. Subject to the conditions stated below, the permittees ~~are~~ is granted permission to do the following in an approximately 4,500-square-foot area, immediately east of Scott's Restaurant in Jack London Square, in the City of Oakland, Alameda County:

1. **Within the 100-foot shoreline band, construct, ~~and~~ use and maintain the following:**
 - a. ~~Use a dedicated public access plaza for the periodic, temporary installation and use of a 4,500-square-foot banquet tent as part of Scott's Restaurant through January 15, 1996, pursuant to Special Condition II-B-2 (Amendment No. Eight);~~
 - ba. ~~Construct, use and maintain a~~ A 4,400-square-foot, 19 to 40-foot-tall pavilion for shared public and private use, pursuant to Special Condition II-B-2 (Amendment No. Eight);
 - b. On the north side of the public pavilion, a 40-foot-long wall and 30 moveable wall panels, two of which contain doors, and one permanent bollard (partially after-the-fact) (Amendment No. Eleven);
 - c. On the west side of the public pavilion, a 60-foot-long series of structures comprised of a 13-foot-long wall with a door and 10 moveable wall panels, a 255-square-foot storage area, a 368-square-foot breezeway covered by a



PERMIT NO. 1985.019.11(B)

Scott's Jack London Seafood, Inc.
(Issued Originally on March 13, 1986, As
Amended through October 25, 2017)

MATERIAL AMENDMENT NO. ELEVEN

Page 12

shall serve as notice to staff to conduct a compliance review. If an event arising from causes beyond Scott's control occurs that will delay timely compliance with the provisions of this paragraph, Scott's shall notify BCDC by e-mail within five business days of when Scott's first knew of the event and shall describe the cause or causes of the delay, the measures taken or to be taken by Scott's to minimize the delay, and the additional time requested to comply. The Executive Director may grant an appropriate extension of time to comply with the provisions of this paragraph for good cause shown. If Scott's fails to comply with the provisions of this paragraph by February 28, 2018, or by the date of any extension of time granted by the Executive Director, Scott's shall not hold any private events in the pavilion after February 28, 2018, or after the date of any extension granted by the Executive Director, until Scott's complies with the provisions of this paragraph.

F. Remove Permanent Stage Backdrop and Use Temporary Backdrop as Needed (Permit No. 1985.019.11B). By no later than February 28, 2018, the permittee shall remove or cover the unauthorized permanent wooden, painted stage backdrop mounted around the door of the storage area. If the stage backdrop is removed, the exposed surface shall be treated as necessary to be visually clean and consistent with the surrounding materials. If the permittee wishes to cover it, it must first secure BCDC staff plan approval pursuant to the requirements of Special Condition II.A, Specific Plans and Plan Review. The plans must show a comparison of the public access benefits and impacts of removal versus retention. If staff declines to approve the plan, for example because it determines that retention of the stage backdrop with a cover will continue to feel private and result in the conversion of public access to private use, the stage backdrop may not be covered and must be removed. Immediately following this work, the permittee shall notify the BCDC staff in writing, accompanied by photographic evidence, which shall serve as notice to staff to conduct a compliance review. If the stage backdrop is removed, the permittee may install a temporary stage backdrop as needed only for the duration of each calendared private event. If an event arising from causes beyond Scott's control occurs that will delay timely compliance with the provisions of this paragraph, Scott's shall notify BCDC by e-mail within five business days of when Scott's first knew of the event and shall describe the cause or causes of the delay, the measures taken or to be taken by Scott's to minimize the delay, and the additional time requested to comply. The Executive Director may grant an appropriate extension of time to comply with the provisions of this paragraph for good cause shown. If Scott's fails to comply with the provisions of this paragraph by February 28, 2018, or by the date of any extension of time granted by the Executive Director, Scott's shall not hold any private events in the pavilion after February 28, 2018, or after the date of any extension granted by the Executive Director, until Scott's complies with the provisions of this paragraph.

G. Authorization Terminates on August 31, 2041 (Permit No. 1985.019.11B). This authorization is based on the lease between the Port of Oakland and Scott's of the real property that is the subject of this amended permit (lease originally dated April 8, 1987 and last amended November 7, 1995) that will terminate on August 31, 2041. This authorization shall

PERMIT NO. 1985.019.11(B)

Scott's Jack London Seafood, Inc.
(Issued Originally on March 13, 1986, As
Amended through October 25, 2017)

MATERIAL AMENDMENT NO. ELEVEN

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N. Best Management Practices

1. **Debris Removal.** All construction debris shall be removed to an authorized location outside the jurisdiction of the Commission. In the event that any such material is placed in any area within the Commission's jurisdiction, the permittee(s), its assignees, or successors in interest, or the owner of the improvements, shall remove such material, at their expense, within ten days after they have been notified by the Executive Director of such placement.
2. **Construction Operations.** All construction operations shall be performed to prevent construction materials from falling, washing or blowing into the Bay. In the event that such material escapes or is placed in an area subject to tidal action of the Bay, the permittee(s) shall immediately retrieve and remove such material at its expense.

O. In-Kind Repairs and Maintenance. Any in-kind repair and maintenance work authorized herein shall not result in an enlargement of the authorized structural footprint and shall only involve construction materials approved for use in San Francisco Bay. Work shall occur during periods designated to avoid impacts to fish and wildlife. The permittee(s) shall contact Commission staff to confirm current restricted periods for construction.

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

LAWRENCE J. GOLDZBAND
Executive Director
San Francisco Bay Conservation and
Development Commission

By:  _____
MARC ZEPETELLO
Chief Counsel

MAZ/AK/ra

cc: U. S. Army Corps of Engineers, Attn: Regulatory Functions Branch
San Francisco Bay Regional Water Quality Control Board,
Attn: Certification Section
Environmental Protection Agency
City of Oakland, Attn: Planning & Building Department

EXHIBIT D

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

December 22, 2017

VIA EMAIL

Steve Hanson
6899 Bristol Drive
Berkeley, CA 94705

SUBJECT: Plan Denial of Wood Fake Curtain Cover at Scott's Jack London Seafood Inc.
(BCDC Permit No 1985.019.11B)

Dear Mr. Hanson:

By letter dated November 21, 2017, you submitted a four-page letter with seven exhibits which together comprise a proposal to cover the permanent stage backdrop on the west side of the pavilion. You made this submittal in accordance with the requirements of Special Condition II.B.F of the above-referenced Scott's permit, which requires the stage backdrop to be removed or covered by February 28, 2017.

You propose to install an electronically-activated, roll-down, two-tone fabric shade that would cover the stage when the pavilion is in public event mode. While BCDC appreciates the proposal, we believe that the public space would still be privatized by the covered stage instead of the exposed roll up door. We are concerned that, like the stage, the curtain will draw as much, if not more, attention to itself. We are also concerned about the possibility that the cover would attract graffiti. For these reasons and after careful consideration, we hereby **deny** your proposal to cover the stage curtains and request that Scott's proceed with their removal.

From reading your letter, it appears that the removal of the stage backdrop will not adversely affect the functioning of the roll up door because its mechanics are located inside the storage room. However, we understand you have concerns about the work needed to secure the storage area absent the stage backdrop that will also result in an attractive finished affect. Therefore, we request that you please provide more detail about this area than is currently provided on page 7 of your submittal.

If you have any questions, please contact me at 415-352-3609 or adrienne.klein@bcdc.ca.gov.

Very truly yours,

ADRIENNE KLEIN
Chief of Enforcement

AK/ra

cc: Liz Gallagher, President, Scott's
Lawrence Goldberg,
Marc Zeppetello, BCDC
Brad McCrea, BCDC
Richard Sinkoff, Port of Oakland



EXHIBIT E



SCHEDULE BOARDING DEPARTURES CLOSED PLEASE USE WESTERN STREET DECK

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EXHIBIT F

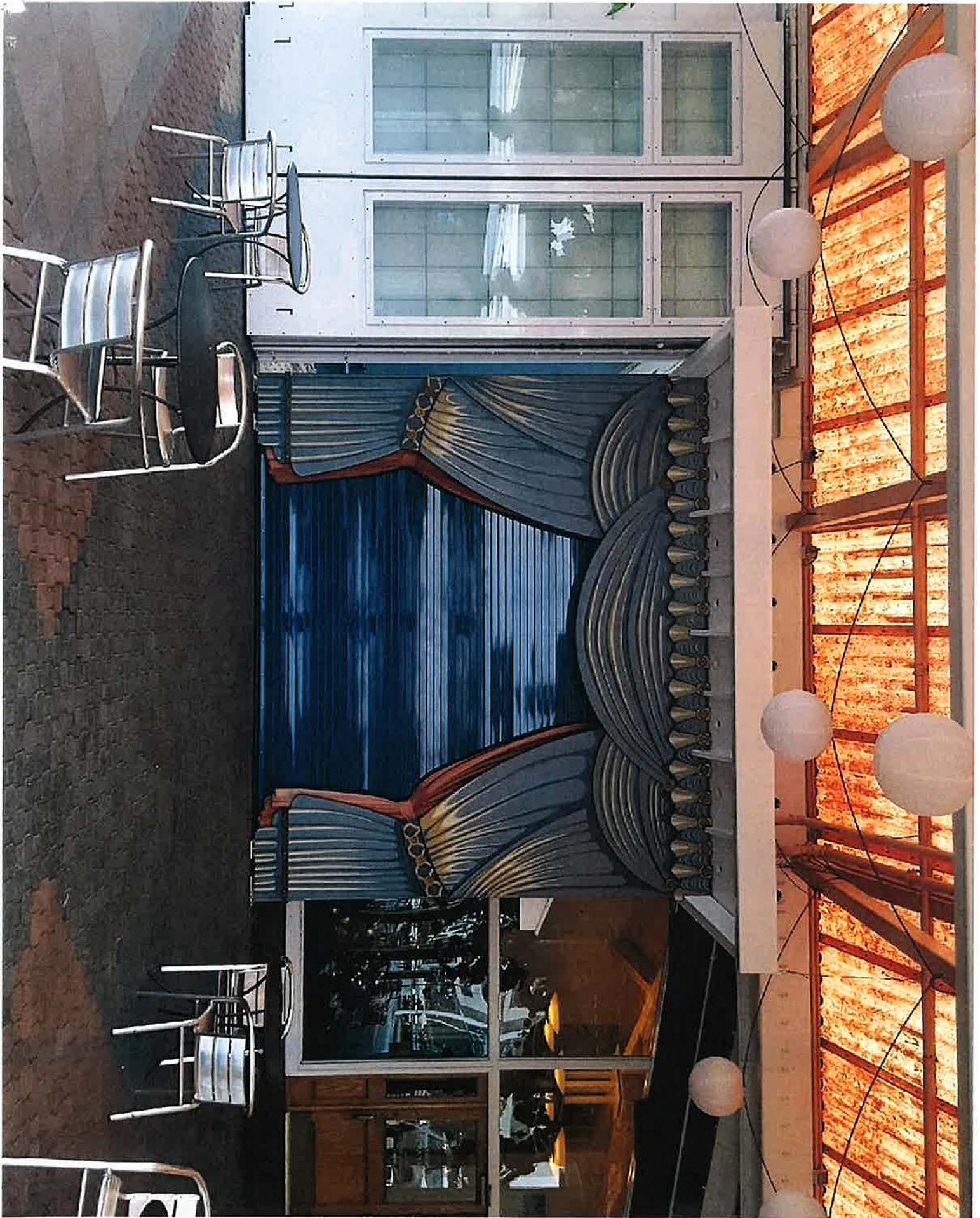


EXHIBIT G



EXHIBIT H

