

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING

BAY AREA METRO CENTER
YERBA BUENA ROOM, FIRST FLOOR
375 BEALE STREET
SAN FRANCISCO, CALIFORNIA

THURSDAY, FEBRUARY 16, 2017

9:30 A.M.

Reported by:
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A P P E A R A N C E SEnforcement Committee

Greg Scharff, Chair

Mark Addiego

Geoffrey Gibbs

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Raymond Gallagher
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Liz Gallagher
Scott's Jack London Seafood, Inc.

Port of Oakland

Joshua Safran, Attorney at Law
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Richard Sinkoff

A P P E A R A N C E SPublic Speakers

Seth Korsmeier

Kelly Hodgins

Stephen Lewis

Tom Louderback

Sandra Threlfall, Waterfront Action

Naomi Schiff

Keith Miller, California Canoe & Kayak, Inc.

Benjamin Kibcthi

Gina Longmire

Chris McKay

David Lewis, Save the Bay

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P R O C E E D I N G S

9:31 a.m.

COMMITTEE CHAIR SCHARFF: I am going to call the meeting of the Enforcement Committee to order.

Call the roll.

MS. KLEIN: Good morning. Chair Scharff?

COMMITTEE CHAIR SCHARFF: Yes.

MS. KLEIN: Commissioner Addiego?

COMMITTEE MEMBER ADDIEGO: Present.

MS. KLEIN: Commissioner Techel?

COMMITTEE MEMBER TECHEL: Present.

MS. KLEIN: Commissioner Ranchod?

COMMITTEE MEMBER RANCHOD: Present.

MS. KLEIN: Thank you.

COMMITTEE CHAIR SCHARFF: All right. Do we have any public comment for items not on the agenda?

(No response.)

COMMITTEE CHAIR SCHARFF: I don't see any; I just want to make sure we don't have any. Okay.

So I need a motion to approve the draft minutes for October 20th, 2016.

COMMITTEE MEMBER ADDIEGO: I so move, Mr. Chair.

COMMITTEE MEMBER TECHEL: I'll second.

COMMITTEE CHAIR SCHARFF: Okay. All in favor?

(Ayes.)

1 COMMITTEE CHAIR SCHARFF: That passes unanimously.

2 Now we are going to go to a Public Hearing and Possible
3 Vote on a Recommended Enforcement Decision Involving
4 Proposed Cease and Desist and Civil Penalty Order No. CDO
5 2017.01; Scott's Jack London Seafood, Inc. and the Port of
6 Oakland.

7 We clearly have a lot of speakers. How much time would
8 each party need to do their presentation?

9 MR. VERNA: We had an agreement. If I may? I'm
10 Michael Verna, I represent Scott's Restaurant, its legal
11 counsel.

12 COMMITTEE CHAIR SCHARFF: Yes.

13 MR. VERNA: We had an agreement before this meeting
14 with Mr. Zeppetello and also with the Port that the BCDC
15 presentation would take about 30 minutes, our presentation
16 involving all four of us at this table would be
17 approximately 30 minutes and the Port 10 to 20 minutes, with
18 then public comment following off that, if that is
19 acceptable to the Committee.

20 COMMITTEE CHAIR SCHARFF: So we are looking at 30
21 minutes for BCDC.

22 The reason I am asking this is we have a hard stop at
23 12:30 in this room.

24 MR. VERNA: Right.

25 COMMITTEE CHAIR SCHARFF: And so I just want to make

1 sure we get through it and we get it done in the most
2 efficient way. So 30 minutes for BCDC?

3 MR. VERNA: Yes.

4 COMMITTEE CHAIR SCHARFF: Thirty minutes from you?

5 MR. VERNA: Yes.

6 COMMITTEE CHAIR SCHARFF: And then 20 minutes from the
7 Port.

8 MR. VERNA: Or less, yes.

9 COMMITTEE CHAIR SCHARFF: Or less. So that would be an
10 hour and 20 minutes. And then we probably have close to 30
11 minutes of public comment, that gives us an hour for
12 deliberations.

13 MS. TIEDEMANN: Well, there is another matter on the
14 agenda.

15 COMMITTEE CHAIR SCHARFF: There is another matter on
16 the agenda, yes there is.

17 Okay, why don't you start your presentation. And if
18 you could, if you can keep it as brief as possible.

19 MR. ZEPPETELLO: Good morning, Chairman Scharff and
20 Members of the Committee. On February 3rd you were mailed a
21 Recommended Enforcement Decision, including a Proposed Cease
22 and Desist and Civil Penalty Order.

23 Before turning to that document that I would like to
24 summarize events that transpired since this matter was
25 before the Committee on October 20th. As you will recall,

1 at that time you adopted and recommended approval of a
2 Stipulated Order that had been negotiated between BCDC staff
3 and the Respondents. The matter went to the full Commission
4 on November 3rd and at that time the Commission rejected the
5 Recommended Decision.

6 The Commission in its comments and in its motion
7 provided a number of -- raised a number of issues and
8 comments in terms of the reasons for rejecting that
9 proposal.

10 There was a consensus that the penalty was too low and
11 that there needed to be a justification provided for the
12 penalty number.

13 There was a strong feeling that the enforcement
14 proceeding should be separated from a request to amend the
15 permit to increase the number of private days for use of the
16 pavilion.

17 There were comments that there should be a provision
18 for reviewing the permittees' compliance over time.

19 And also that there should be some justification for
20 any increase in the use of the pavilion for private events.

21 Following the Commission meeting, on November 8th the
22 Executive Director spoke with Mr. De La Fuente, Scott's
23 representative, and said that it would be helpful if the
24 parties could reach agreement on the direction provided for
25 the Commission as a basis for settlement discussions and a

1 meeting was set up for the week after Thanksgiving.

2 The Executive Director said that in order to have a
3 productive meeting Scott's should submit something in
4 writing prior to Thanksgiving.

5 Nothing was submitted and we didn't hear from Scott's
6 until December 9, when we received a letter with a
7 settlement proposal from Scott's counsel, Mr. Verna.

8 The proposal, in staff's view, wasn't adequate and non-
9 responsive to the direction provided by the Commission.

10 The proposal was to increase the penalty amount from
11 \$250,000 to \$300,000, so it was an increase, but there was
12 no real justification for the number.

13 The proposal included an amendment of the permit to
14 increase the pavilion usage from 73 days to 103 days.

15 Scott's took the position in its settlement letter for
16 the first time that private use of the pavilion for
17 nonprofit events did not count against the permit limits for
18 private use of the pavilion and in the course of their
19 letter used that to minimize the number of violations, the
20 extent of violations and also minimized their claimed
21 economic benefit from overuse of the pavilion.

22 And perhaps most importantly, Scott's disregarded the
23 Commission's direction to separate the enforcement
24 proceeding from a permit amendment to increase use of the
25 pavilion.

1 On December 19th we responded to the settlement
2 proposal and explained the reasons why it did not respond to
3 the Commission's direction and also on that date sent out a
4 Violation Report and a Complaint for Penalties.

5 One of the things that the Commission said when they
6 rejected the matter on November 3rd was that staff and the
7 respondent should make another attempt to come to a
8 settlement; but if they were unsuccessful in doing so and it
9 appeared that it wouldn't happen, that we should bring the
10 matter back to the Enforcement Committee in 60 days. So by
11 the middle of December it became clear we weren't going to
12 get there and we sent out the violation report and here we
13 are now three months later, three and a half months later.

14 For the remainder of my presentation I am going to
15 respond briefly to some of the legal arguments that were
16 presented by the Respondents in their Statement of Defense;
17 I'll discuss and summarize the violations and some of the
18 relevant penalty factors; third, I will summarize the
19 provisions of the Proposed Cease and Desist Order that was
20 mailed out on February 3rd; and in conclusion at the end I
21 will present both the staff's recommendation and a couple of
22 options that the Committee may want to consider with respect
23 to the proposed penalty.

24 The first argument that I would like to address is
25 Scott's argument that use of the pavilion for nonprofit

1 events is public use and therefore doesn't comply with the
2 permit limits -- is exempt, doesn't count against the permit
3 limits for private use.

4 Recall that prior to issuance of this permit the space
5 occupied by the pavilion was public open space as part of
6 the Port's permit. But for this permit, the pavilion area
7 would be open for unrestricted public access at all times.
8 The permit provides a limitation on that.

9 Here is Section II.B.1 of the permit, Public Access.
10 The pavilion area "shall be made available to the public for
11 unrestricted public access for walking, sitting, viewing,
12 picnicking," and then goes on to say: "and related purposes
13 are more specifically described" later in that section. And
14 then later in that section is the provisions for private use
15 of the pavilion by Scott's.

16 In brief, when the pavilion tent walls, the fabric
17 walls, which is what is authorized, are up, or now the
18 unauthorized wall system is up, the pavilion is in private
19 use. When the walls are down and the public can walk
20 through it is in public use.

21 The permit does not distinguish between private for-
22 profit and nonprofit events because types of events are
23 private. Even a nonprofit event is not open to the public,
24 you have to be invited, and the pavilion is not available
25 for unrestricted use at that time.

1 I think it is important also to note that Scott's first
2 raised this issue of the distinction between nonprofit and
3 for-profit use in settlement discussions with staff last
4 year in support of their request that the staff support a
5 request for increased use of the pavilion. And the argument
6 was they were providing a benefit to the community by
7 allowing the use of the pavilion for nonprofit use and
8 therefore there should be an increase in days.

9 That was part of the stipulated order that was before
10 you in October, but here is a provision from that stipulated
11 order which says that the agreement was they may request
12 authorization to use the pavilion for more days but the
13 total of days were private days, broken down by for-profit
14 and nonprofit.

15 The next argument that I would like to address is
16 Scott's argument that it did not need to seek an amendment
17 from BCDC to construct the wall system and the metal entry
18 doorway because it hasn't substantially changed the use of
19 the pavilion. And that is based on a regulation regarding
20 the need for a permit for a substantial change in use.

21 In brief, the whole issue of substantial change of use
22 is totally irrelevant to this analysis. The permit, and
23 here again is a provision from the permit, specifically says
24 that the pavilion use that is authorized by the amendment
25 shall conform to plans that were adopted in 1995 and later

1 amended and says no material changes shall be made to these
2 plans without written approval of the changes by or on
3 behalf of the Commission.

4 So the Commission reserved the authority in this permit
5 that any changes had to be authorized by the Commission and
6 we don't even get to a substantial change in use analysis.
7 It's that simple.

8 I would like to respond to a couple of arguments made
9 by the Port. The Port claims that the complaint doesn't
10 state claims against the Port and that this is all Scott's
11 fault, the Port didn't do anything wrong.

12 The Port is a co-permittee. And again going back with
13 the history, you will recall that it was in fact Scott's
14 that was added to the Port's permit for Jack London Square.
15 The Port is the original permittee and Scott's was added and
16 then the Commission subsequently split the permits.

17 But the Port is on this permit as the owner of the --
18 the owner of the state tidelands and it has equal
19 responsibilities. We cited in our papers provisions of the
20 Civil Code about the obligations of co-parties on a contract
21 that are generally deemed to be joint. That's that
22 position, the Port is not a nominal permittee, it is a
23 coequal permittee responsible. I would also point out that
24 the Port gains an economic benefit from Scott's use of the
25 pavilion because the rent they receive is based on a

1 percentage of net revenues generated by Scott's from its
2 restaurant and from the pavilion and from overuse of the
3 pavilion.

4 The Port makes an argument that the penalty would
5 require the Port to make a gift of public funds. Again, in
6 our view there is absolutely no merit to this position. The
7 Port is not arguing that it has some kind of sovereign
8 immunity from BCDC enforcement and there is none. As the
9 Committee is well aware, many of our permits are issued to
10 public agencies and if they violate the permit they're
11 liable for penalties and that does not constitute a gift of
12 public funds.

13 I would like to turn to discussing the violations and
14 some of the penalty factors.

15 The first category of violations is the unauthorized
16 construction of the pavilion enclosure system, the metal
17 entry doorway and the wall panels.

18 That was unauthorized construction that was commenced
19 in late 2012. But also it became apparent as a result of
20 staff's investigation that there as also some unauthorized
21 construction previously of a storage area and a roof
22 extension.

23 This figure I'll just use to show, and if I can use the
24 pointer. The pavilion is this -- this is a Public Access
25 Plan. The existing pavilion is in this yellowish color and

1 the orange is public access under the Port's permit. The
2 unauthorized construction against this north wall is a wall
3 panel system. This is in the open position but then these
4 panels come around and enclose the pavilion on this side,
5 and then there's panels along this wall and over here that
6 enclose the pavilion.

7 The storage shed was constructed in a public access
8 area, violating the Port's permit, but outside the scope of
9 what's authorized under Scott's permit.

10 Then the roof extension is in this area here, which is
11 not a public access area but also not under the
12 authorization of Scott's permit.

13 A little bit of the history.

14 Between 2011 December and November of 2012, BCDC --
15 when Scott's first approached BCDC about replacing the old
16 fabric walls with an enclosure system in 2011, staff
17 conducted five site visits, reviewed five sets of plans,
18 prepared design review letters and exchanged numerous
19 meetings and discussions with Scott's. And through that
20 process staff felt that the proposal that Scott's had
21 originally started with was substantially improved, although
22 there were still some concerns, primarily with the metal
23 entry doorway, which I didn't point out that is in this area
24 here, a permanent structure.

25 What should have happened was that Scott's should have

1 completed the process of applying for an amendment and they
2 would have either had staff's support for their proposal, if
3 they had modified it further to eliminate the door, or they
4 could have chosen to go to the Commission despite staff's
5 objection and asked for a permit amendment.

6 But what actually happened is apparently they got
7 frustrated with the process and then they just decided to go
8 ahead and build the plans that they wanted to build,
9 including the metal entry doorway and the wall system, all
10 without authorization. And the Scott's violations in this
11 regard can only be described as knowing and intentional
12 violation of permit requirements and direction from staff.

13 The effect of these violations is in place of the
14 fabric walls that are actually authorized by the permit
15 there are now, even in the open position, permanent walls
16 along the north side and partially along the west side here
17 that go from floor to the pavilion roof, cutting off light.
18 The roof extension and the shed cut off light and then we
19 have got the metal entry frame doorway that is a permanent
20 structure here. The whole effect of this is to make the
21 pavilion a somewhat, well, less open and darker, less
22 inviting public space, even when it is in the open position.

23 Here is a picture of the pavilion. This is the north
24 side wall, that's looking toward the Estuary. You can't
25 even see in the back where the stage is, because again, all

1 the light is cut off from that side.

2 I will also point out these planters have been a
3 continuing issue. These planters are outside the footprint
4 of the pavilion that's authorized under the permit. These
5 are actually a violation of the Port's permit that Scott's
6 continues to put these planters out here.

7 Part of what goes on here is a cumulative effect of it
8 makes the pavilion more private, it makes it appear to be
9 part of the restaurant and less inviting to the public.

10 Here is another picture from the other side. This wall
11 is in the open position, so this would close back. There is
12 the metal entry frame doorway from this side.

13 Here is another view. This is the stage. The roof
14 extension is up here. On the slide I put "Unauthorized
15 Construction and Use." This is just an example of Scott's
16 leaving equipment in the pavilion when it is in the open
17 position and impeding the public space by private equipment
18 associated with the restaurant.

19 This matter went to the Design Review Board in 2014
20 after the unauthorized construction and the Design Review
21 Board commented that the pavilion modifications have
22 compromised the physical and visual public access as
23 required under the permit. That the permanent metal entry
24 door frame should be removed because it makes the public
25 space feel private and creates visual and physical

1 obstructions. And that the storage area and the wall
2 extensions block pavilion access and represent or appear to
3 represent an extension of the restaurant.

4 (Committee Member Gibbs entered the meeting room.)

5 MR. ZEPPETELLO: And finally on this factor I would
6 just note that there was no effort on Scott's part to remove
7 or resolve this violation in the years between 2013 and now.
8 They could have completed the process of a permit amendment
9 or they could have taken steps to remove the metal entry
10 doorway. And I guess one point on that: Scott's insisted
11 for years that they needed the metal entry doorway, it had
12 to be a permanent structure, even though they had previously
13 submitted plans to BCDC that had the door system as part of
14 the retractable panels. Come 2016 they are now prepared to
15 go back to the retractable wall panel system that staff was
16 originally asking them to do over three years ago.

17 The next category of violations is non-compliant use of
18 the pavilion. This is basically the overuse violations.

19 Scott's regularly held more private events in the
20 pavilion than allowed.

21 The effect of this violation is that whenever Scott's
22 used the pavilion for private events in excess of the number
23 authorized by the permit they block physical and visual
24 access. Well, they block physical access to state tidelands
25 and public open space and they block visual access to the

1 Bay -- the Estuary rather, and views of the waterfront.

2 I would note that there are discrepancies in the
3 number, the data, the number of days of overuse in the data
4 provided by Scott's and the data relied upon by BCDC, most
5 of which came from the Port. The Port independently, their
6 security folks give reports to the property manager that
7 then forward them to BCDC. And we think that the numbers
8 from the Port are more reliable and that in many cases, for
9 example if Scott's doesn't take the pavilion down in the
10 evening, the Port will see it up there the next day and we
11 will count that as two days, perhaps of overuse, rather than
12 one. But I would note that even using Scott's data that
13 over the last six years they exceeded the private use limits
14 five of the last six years, including three times this year.
15 So although these violations go back quite a bit in time,
16 they haven't stopped.

17 The next category of violations is unauthorized use of
18 the Franklin and Broadway Street plazas. That's the tents
19 back here. For a ten year period from 2000 to 2011 there
20 was a vehicle in the plaza for 30 days.

21 But this is another -- that stopped but in our
22 violation report on pages 18 to 21 we note these practices
23 continued in 2011 -- rather '12, '13, '14, '15 and four
24 times even in August of 2016.

25 In its Statement of Defense Scott's comments that

1 occasionally it had to install an overflow tent in the plaza
2 and it was forced to do so by customer demands or
3 circumstances of its events. What Scott's doesn't get from
4 staff's point of view is that it needs to live within its
5 permit. If the event customer needs more space then it
6 needs to modify the event, not violate the law and its
7 permit.

8 Three other categories of violations just briefly:

9 Failure to provide required public access improvements.
10 There were a certain number of tables and chairs that were
11 required to be installed going back to the year 2000. These
12 were finally installed in July of 2013, after the
13 enforcement investigation.

14 Although, again, Scott's went ahead and put the tables
15 and chairs in without plan approval from staff, so that's
16 another category of violation; that was resolved in November
17 of 2013, the plan review violation.

18 And finally, untimely submittal of private event
19 schedules. The permit requires Scott's to report on a
20 quarterly basis to the Port and the Port to report annually
21 to BCDC. These event schedules were chronically submitted
22 either late or not at all. As we pointed out in our papers,
23 in fact staff did not receive the event schedules for the
24 years 2008 to 2012 until mid-2013, after the enforcement
25 investigation. So although there was some anecdotal

1 knowledge of overuse of the pavilion, staff really had --
2 was prevented from having a full understanding of the extent
3 of overuse until we got those reports.

4 I now would like to address an issue regarding the
5 failure to record a legal instrument for the public access
6 area.

7 As the Committee knows, virtually all BCDC permits that
8 require public access also require the permittee to record a
9 legal instrument called either a guarantee or a covenant or
10 a deed restriction that guarantees the public access and
11 provides notice to the public and also notice to possible
12 future lessees or property owners that there is a
13 restriction on the use of that area for public access.

14 In 2008 the Port entered into such a covenant for the
15 entirety of Jack London Square except for the pavilion, for
16 the entirety of Jack London Square including state
17 tidelands. However, they now take the position that they
18 can't do that for the 4400 square foot pavilion that is the
19 only area in Jack London not subject to covenant.

20 The Port objects to the term "permanent guarantee."
21 But as BCDC staff and counsel repeatedly explained to the
22 Port, the guarantee by its terms - you can read it in the
23 draft that we provided - it is only in effect so long as the
24 permit is in effect and the uses authorized by the permit
25 remain in effect.

1 So the concern that we have is that the access
2 guarantee needs to be coextensive with the term of the
3 permit. And since the permit is of indefinite duration --
4 Scott's has a lease for a limited term but the lease can be
5 extended or the Port may decide to lease the property to
6 another tenant when the lease runs out with Scott's. We
7 believe it is important that this access guarantee be
8 contemporaneous or coextensive in time with the permit.

9 The Port claims that it is prohibited by state law from
10 recording this guarantee by the State Tidelands Grant.

11 Just the other day, rather than talking in
12 generalities, when I was looking at the guarantee for Jack
13 London Square I saw the reference to the grant, the
14 legislative grant for the pavilion portion. It is from the
15 1941 statutes, Chapter 720, and this is what it says, very
16 briefly: The City or its successors, the Port, shall not at
17 any time grant, convey, give or alienate said lands, or any
18 part thereof, to any individual, firm or corporation for any
19 purpose.

20 This does not prohibit the deed restriction or covenant
21 that we're talking about for two reasons:

22 First, what we are talking about is not a conveyance.
23 It is not conveying these tidelands to any other party.
24 It's a reservation of rights to the public, in the public
25 interest, for a public trust purpose, so it is not a

1 conveyance.

2 And secondly, it is not a covenant that would benefit
3 an individual or a firm or a corporation. It's a public
4 benefit. It's a restriction on what the Port and Scott's
5 can do in the space. The grant, in my view, by the plain
6 language doesn't prohibit a deed restriction of this sort.

7 The other authority that the Port relies upon saying it
8 would be happy to do a 66-year restriction is Civil Code
9 Section 718 which says that tidelands may be leased for a
10 period of not to exceed 66 years. But again, this Code
11 provision doesn't apply because we are not talking about a
12 lease. It's important I think in considering this issue to
13 distinguish between a covenant or a restriction on use and a
14 lease.

15 Scott's also relies on conversations with the Attorney
16 General's Office and State Lands. I won't speak for the
17 Attorney General's Office, maybe Ms. Tiedemann will, but I
18 did try to find out State Lands' position on this just over
19 the past week. I will say that I talked to a couple of
20 attorneys at State Lands, which do feel that a covenant like
21 this is not permissible; they support the Port's position.
22 But when I pressed them on it I didn't get an explanation
23 that made sense to me and I eventually told them that we
24 disagreed and asked them what their authority really was in
25 this situation to prohibit the Port and I didn't get an

1 answer to that either. So I advised them that we were going
2 to stick to our position before the Committee and before the
3 Commission on this. I got nothing in writing disagreeing or
4 responding on this particular point from State Lands.

5 Okay, I think I need to move on and try to finish up
6 here.

7 I talked about some of the penalty factors as I went
8 along, the nature and circumstances of the violations, the
9 gravity.

10 There is information in the violation report about the
11 cost to the state. I believe as of the time the violation
12 report went out it was up to about \$83,000.

13 Ability to pay and effect on ability to continue in
14 business. As you are aware, Scott's has provided profit and
15 loss statements and also balance sheets. By staff's
16 analysis, for each of the past three years Scott's earned an
17 average annual net profit of approximately \$548,000 from the
18 restaurant. They also provided balance sheets which show
19 that Scott's has retained earnings of approximately \$5
20 million, both in 2014 and 2015. These annual net profit
21 figures and balance sheet figures indicate that Scott's has
22 the ability to pay the penalty that is proposed by staff.

23 Briefly just to respond to a couple of additional legal
24 arguments.

25 Both the Port and Scott's raise equitable arguments

1 that BCDC should be barred from seeking penalties due to
2 laches, unclean hands.

3 In response, these defenses, they haven't met -- they
4 haven't shown that these defenses should apply here. There
5 is no evidence of acquiescence on the part of staff that the
6 violations were okay. In fact, the staff's position has
7 been consistent in objecting to the violations and trying
8 to, at least certainly since 2013, bring them into
9 compliance.

10 The respondents have not established any prejudice from
11 any delay in enforcement. No one has identified - Scott's
12 or the Port - any misconduct on the part of BCDC. The only
13 thing they point to is a delay in enforcement. And delay in
14 enforcement under the circumstances here, especially where
15 there was not prompt reporting as required by the permit,
16 don't establish the equitable defenses.

17 Scott's also makes an argument about the statute of
18 limitations. As we pointed out in our papers, there is
19 substantial authority that the civil -- the limitations
20 period in the Code of Civil Procedure apply to proceedings
21 in court and not into administrative actions so this penalty
22 proceeding is not barred by the statute of limitations.

23 I would also point out that most of the violations, the
24 majority of the violations are based on violations in the
25 last, since May of 2013 or within that time period.

1 Scott's also makes an argument that the violations have
2 been over-counted. Most of the violations max out at the
3 \$30,000 cap authorized by the statute. There are some
4 violations, the pavilion overuse and the use of the plaza,
5 where if they exceed the permit limit one day and then they
6 take the pavilion down and then a week later they do it
7 again, in staff's view that's two violations, it's not one
8 violation, it's just not subject to the \$30,000 cap. But
9 that's not double-counting, it's two separate violations.

10 So just very briefly, the terms of the Proposed Cease
11 and Desist Order. I won't go through all of these but just
12 to -- the main points here are to:

13 Comply with the permit.

14 To cease violating the Port's permit by using the
15 Franklin and Broadway Street plazas.

16 Within 15 days remove all the planters from around the
17 pavilion.

18 To submit within 45 days a permit application to
19 request after-the-fact authorization for components of the
20 pavilion, to request authorization for new entry doors, to
21 submit a public access plan for the pavilion and that the
22 request will not include increased use of the pavilion for
23 private events.

24 I will note and I expect you will hear it from Scott's
25 that they, just a few days ago they did submit a permit

1 application that addresses some of these requirements but we
2 haven't had a chance to review it at this point. It is
3 obviously not before you today and staff will be processing
4 that over the next 30 days in due course.

5 Again, this is comply with the permit. Within 30 days:

6 Provide all the public access improvements.

7 Record the legal instrument.

8 Submit all past due event schedules.

9 And we propose that they have a monthly rather than a
10 quarterly requirement so that we can monitor compliance in
11 the event this matter comes back to you or to the
12 Commission.

13 The final substantive provision is that if they fail to
14 submit the permit applications on time or if they are not
15 accepted as complete because of disagreements between staff
16 and the permittees, that the Executive Director shall
17 schedule a hearing to bring this matter back before the
18 Commission to report on the status of compliance with the
19 permits and the order. And that if deemed warranted or
20 recommended by the Executive Director, to possibly modify or
21 revoke the authorization.

22 The final provision - and this is getting to the end of
23 my presentation here - is that they would pay within 30 days
24 a civil penalty. The staff recommendation is \$841,180.

25 That is based on this penalty chart that is in -- there

1 was one attached to the Violation Report and a corrected
2 version attached to the Recommended Decision. The chart
3 shows each violation or category of violation. It shows
4 that staff carefully considered a penalty amount per
5 violation ranging from \$1,000 down to I believe \$100 or
6 \$250. So we weighed the severity of the violations. None
7 of those numbers, the maximum per violation is \$2,000.

8 Page 2 of the chart is the different categories of
9 overuse violations.

10 So the staff's recommendation is to adopt the proposed
11 order.

12 I would like to just conclude by making a few comments
13 on the argument that this is the largest penalty ever for a
14 non-Bay violation; and then also, as I mentioned, to have a
15 couple of options to propose or at least offer.

16 I think it is probably true that this is the largest
17 violation proposed by BCDC staff for violations that don't
18 impact the Bay, but the violations are nevertheless serious.
19 The unauthorized construction in the face of staff saying,
20 'Don't do that, we don't support that,' and with knowledge
21 that they needed a permit amendment, I don't believe staff
22 has ever had that situation before. So flagrant disregard
23 of the process and the requirements, that perhaps warrants
24 something that's unusual and not previously done.

25 And secondly, public access. Public access is one of

1 the two primary goals of BCDC. And blocking public access
2 by overusing the pavilion and modifying the pavilion in ways
3 that changed the public access experience are a serious
4 violations.

5 And finally, these violations continued over a long
6 period of time. And although they went back a long time
7 they have also continued so staff believes the proposed
8 penalty is fully warranted and justified at \$841,000.

9 However, the Committee and the Commission are not bound
10 by the recommendation and staff would just offer for your
11 consideration, if you are inclined, the issue of how far
12 these violations go back in time, over 10 years, close to 15
13 years. We did a calculation using the same per day
14 calculations as on that chart and only went back to January
15 of 2012, January of 2012 to the present time. January of
16 2012 was approximately when Scott's approached staff to
17 change the pavilion and presumably they would have been
18 paying attention to permit compliance. If you use the same
19 factors as in the chart, the penalty for a period from
20 January 2012 to 2016 would be \$565,910.

21 Secondly, we also did a calculation to just offer for
22 your consideration if the penalty were imposed from January
23 of 2013, right after Scott's did the unauthorized
24 construction, January 2013 to the present the penalty would
25 be, the proposed penalty would be \$425,360.

1 The final point I would like to make with respect to
2 possible modification of the staff recommendation is on the
3 issue of the allocation, the possible allocation between the
4 Port and Scott's. As I have said previously, the staff's
5 view is that two permittees on a permit are jointly
6 responsible and it is not the staff's or the Commission's
7 responsibility to try to sort out those disputes.

8 However, we recognize that this is not a situation such
9 as a hypothetical situation where you have two permittees
10 jointly responsible for maintaining a public access area and
11 where they are in a dispute about who is responsible and as
12 a result the permit gets violated and our view is they are
13 both responsible.

14 Here it's true that the Port did not make the decision
15 to proceed and do construction without getting a permit
16 amendment and it wasn't the Port that on a daily basis
17 decided whether or not they were going to hold an event in
18 violation of the permit.

19 So one possibility would be if the Committee or the
20 Commission wanted to get into this would be to -- we would
21 suggest the possibility of allocating the Port full
22 responsibility for the failure to record the legal
23 instrument, which would be \$30,000; and we think the Port
24 and Scott's should be jointly responsible for the overuse of
25 the Franklin and Broadway Plaza.

1 The Port should be responsible for that jointly with
2 Scott's, we believe, because those were violations of the
3 Port's permit and we think the Port could have and should
4 have done more to get those planters and tents and cars out
5 of those plazas when they were violations of not only
6 Scott's -- well Scott's lease with the Port but also the
7 Port's permit.

8 So thank you very much. I would be happy to answer
9 questions or questions after. Thank you.

10 COMMITTEE CHAIR SCHARFF: Thank you. Now we'll hear
11 from Scott's.

12 MS. TIEDEMANN: Mr. Chair, will you note that
13 Commissioner Gibbs is present.

14 COMMITTEE CHAIR SCHARFF: Yes.

15 MS. TIEDEMANN: He arrived shortly after Mr. Zeppetello
16 began his presentation.

17 COMMITTEE CHAIR SCHARFF: I will note just what you
18 said.

19 MS. TIEDEMANN: Thank you.

20 COMMITTEE CHAIR SCHARFF: Welcome, Commissioner Gibbs.

21 COMMITTEE MEMBER RANCHOD: Are you going to take
22 questions on that presentation now or at the end?

23 COMMITTEE CHAIR SCHARFF: Let's go to the end then
24 we'll take all the questions.

25 Go ahead.

1 MR. VERNA: The first speaker for Scott's is going to
2 be Ray Gallagher, the founder and owner of Scott's and the
3 person that was involved in negotiating this permit back in
4 1997 in the first place.

5 COMMITTEE CHAIR SCHARFF: All right.

6 MR. GALLAGHER: Good morning, Commissioners. My name
7 is Raymond Gallagher and I would like to offer my apologies
8 for this situation and I would like to give you some reasons
9 why the occurrence was happening.

10 In approximately 2011 we approached BCDC to improve the
11 pavilion for public access and safety. We take it very
12 seriously that the facility holds 300 people and Fire and
13 ADA codes must be met.

14 We admit that we did not comply with the BCDC
15 procedures before the improvements were made. But BCDC was
16 not ignored, their staff was informed, there were many, many
17 meetings to try to resolve these issues. This does not
18 excuse Scott's for not getting the proper BCDC permits.

19 But the motivation was to improve the pavilion for
20 everyone's use. Reduce the amount of time that the pavilion
21 was in a setup mode. The pavilion's new walls created from
22 an 8 hour turnaround to a 2 hour turnaround. That's
23 removing the time that the facility was in a private mode.

24 We also were faced with the canvas doors and canvas
25 walls would not meet applicable fire codes at this day and

1 age and we went to an all-aluminum structure that was
2 fireproof.

3 BCDC's staff verbally agreed with Scott's in the
4 pavilion before the walls went up.

5 The City of Oakland has now approved all these changes
6 to the pavilion and in compliance with the Municipal Codes,
7 Uniform Building Codes, Fire Codes. We take this very
8 seriously.

9 So BCDC has been involved. Once again, I admit that
10 the permit process was not completed before the work was
11 started.

12 Public access, I would like to give you a history.

13 In 1997 BCDC and Scott's and the Port of Oakland wanted
14 to bring more visitors to the waterfront and turn the
15 Franklin Plaza, which was then a parking lot and service and
16 garbage area, to a public place.

17 Scott's paid for the pavilion, paid all the taxes, paid
18 all the utilities, the maintenance, the improvements, so the
19 public got a huge benefit from no public money being spent.
20 And it has been accomplished, these goals. Hundreds of
21 thousands of people have visited the pavilion for public
22 events and private events over the past 20 years.

23 Scott's goal is to keep that alive but restaurants
24 cannot afford an \$841,000 penalty. If that is adopted, it
25 will be -- take very serious considerations whether Scott's

1 employees, which we have here today, many of them have been
2 with us in excess of 30 years, will be reduced in benefits
3 and salary and it is questionable whether the restaurant can
4 survive that penalty.

5 When you look at retained earnings on a balance sheet,
6 those of you that are familiar with a balance sheet,
7 retained earnings are equity, not cash, and they are very
8 hard to convert from one to the other.

9 So we were trying to promote public access by making
10 the walls removable and faster. We did accomplish that goal
11 but obviously we didn't accomplish the goal within the
12 jurisdiction of BCDC's approval.

13 By closing matter, I would like to continue to deal
14 with BCDC. We feel the resolution can be made. An
15 agreement was made prior to it being rejected by the full
16 board. We feel that rejection was because of
17 misinformation. Our sales in the pavilion are approximately
18 \$830,000 a year and they took that as \$830,000 profit. I
19 don't know how many of you have been in the restaurant
20 business but I have been in the restaurant business for 51
21 years and we do not operate on 100 percent profit. The
22 profitability is somewhere in the neighborhood of 6 percent
23 if you are a very good operator.

24 So we would like to continue to bring people to Jack
25 London Square. We felt we have served the community. When

1 the community reaches out to us to use the pavilion for
2 public events, whether they be the America's Cup or whether
3 they be organizations that directly affect the citizens of
4 Oakland, we have been generous with our use.

5 So we ask the Commissioners to please kindly consider
6 this penalty. We would like to have closure, we would like
7 to move on and we thank you all for your time.

8 COMMITTEE CHAIR SCHARFF: Thank you.

9 (Applause.)

10 MR. VERNA: Mr. Ignacio De La Fuente is going to speak
11 for a few moments because he was involved in the prior
12 agreement that was entered into.

13 MR. DE LA FUENTE: Thank you very much. Good morning,
14 Mr. Chair, Commissioners. Thank you very much for the time.
15 I think, obviously, I cannot say that I am happy to be here
16 again but I'm here.

17 First, I really want to thank you, not only for your
18 commitment to keeping our Bay available for everyone, but
19 being on the City Council for almost 21 years and working
20 with you, with BCDC and the Port of Oakland on many
21 different issues, that would be new parks on the waterfront
22 or that would be the dredging to make the Port more
23 effective.

24 I am here as a friend of Scott's, a friend of Ray
25 Gallagher. I have known the man for thirty-some years and I

1 can tell you that I am -- I am not getting paid to do this,
2 I am doing it because I really believe that the agreement
3 that we reached, the settlement that we reached -- with all
4 due respect to your staff, I'd like to commend them, but at
5 the same time I would like to understand how having spent
6 almost nine months on this myself working with the staff and
7 many, many meetings and providing quite a bit of
8 information, not only on events and the private events and
9 the nonprofit events, but all of us collectively arrived to
10 that settlement agreement, to that stipulated agreement that
11 was in front of you. And very wisely and fairly you
12 approved that agreement and unfortunately something happened
13 on the way to the bank between, between the Committee and
14 the full Commission.

15 But I can tell you that that agreement that your staff
16 recommended unanimously to you a couple of months ago, it
17 was the fruit of a lot of work and a lot of information that
18 was provided. So again, with all due respect, for now to
19 say, well now we're recommending \$840,000 because the full
20 Commission rejected it, I don't think, I don't think it
21 makes any sense to me.

22 Also the reality is that all of us know that for years
23 and years Jack London Square was, was not what it is today,
24 right? And a lot of people worked very hard and a few
25 businesses stuck around and we worked with you to make the

1 water more accessible for people, right? And Scott's
2 restaurant was one of those few, actually, that stuck
3 around, invested the resources, provided jobs for a couple
4 of hundred families that will be impacted this.

5 And that is something that is, in my opinion, is the
6 result to what's happening throughout many of our cities,
7 right? So obviously now Jack London Square is more
8 attractive, more people come. There's new businesses,
9 there's actually new investors that invested their money and
10 purchased the land in Jack London Square and the Port and
11 manage the real estate for the Port and they have all their
12 interests, right? Now that things are looking a little bit
13 better, now we're saying, well, you know, we want to, we
14 want be able to use that too, so it's not fair for Scott's
15 to use that pavilion. Even if they're not saying it -- some
16 people actually said it at the last meeting, right? To me
17 that's the undercurrent of what's happening here.

18 But I think that wisely you reviewed that agreement
19 that we reached with your staff a couple of months ago. And
20 again, fairly you kind of valued the amount of the
21 violations and approved that agreement unanimously.

22 We here, as Mr. Gallagher stated, we really believe
23 that we've got to, obviously, go back to work and do what we
24 do best, which is not only having events that are private
25 events, but nonprofit events.

1 I would like to challenge the fact that private events
2 and nonprofit events are the same. The reality is that
3 that's what we are here for, that's why you are the
4 Commission, right? To provide access to the water for
5 everyone. And we are trying to figure out ways to do it.
6 The City of Oakland, the Port of Oakland, many people are
7 trying to figure out how to bring people back to the water.

8 And we did. I think that when you look at the hundreds
9 of thousands of people that have come to those events in
10 Jack London Square, that now they recognize the water, now
11 they know where the restaurants are, now they know the
12 improvements that we are making, that you are making. I
13 think that that's what I believe is the mission.

14 So again, speaking with your staff and negotiating with
15 your staff and looking at the violations that they have.
16 And I'm going to -- I think that Michael will speak to that.
17 But when you look at that it's really not only unfair, but
18 at the same time I think it's, it might be part of a new
19 approach to fines, a new approach to penalties, a new
20 approach to trying to make sure that the water is protected.

21 And we want to be part of that because we have been
22 there for 30 years. We are not a person to just come and
23 leave. I think Scott's is probably the oldest restaurant in
24 Jack London Square. Pescatore is already closed; so many
25 things are happening.

1 And I think that hopefully you will go back to not only
2 the recommendations that you made before but go back to see
3 that it is a fair settlement, that it is -- our ability to
4 go back to work and our ability to make sure that we will
5 continue keeping that public access.

6 You know what? One of the things that maybe in
7 closing, I didn't want to take that much time, but I am very
8 sure that some of you have been at the pavilion and some of
9 you might have been at events at the pavilion. And I think
10 that when I look at some of the charts and when I look at
11 some of the pictures and all of that, I will invite you
12 really to go and use by yourselves or as a group and just
13 walk in any day, with the pavilion up or with the pavilion
14 down. And when you walk Jack London Square you can assess
15 for yourself if it is really, it is really somehow
16 preventing the access for people, right?

17 Because I think that, again, I understand that it's
18 many businesses there that somehow and in some way or
19 another impact our ability to move. But nevertheless, I
20 think that that's -- the key is, how do we balance and how
21 do we continue bringing people to the water? How do we make
22 our business successful to provide jobs? How do we want to
23 make sure that the reputation of Jack London Square, the
24 Port and the City of Oakland and attractive businesses
25 remain there?

1 And I can tell you that when I look at those numbers of
2 \$841,000, to me it is absolutely something that I don't
3 think is, it's not only not fair but I don't think it's
4 justifiable. And I think that -- I hope that we can
5 finalize -- maybe not finalize because, again, you
6 recommend, then it goes to the full Commission. But at some
7 point we've got to really understand how difficult it is to
8 do business and that all of us are in the same, have the
9 same goal, providing public access for our waterfront in
10 Jack London Square.

11 So I really want to thank you very much for having the
12 courage last time to review your staff's recommendation that
13 took nine months to put together and believes that it was a
14 fair, a fair agreement and that's the reason why you
15 recommended it and I hope you do the same. Thank you very
16 much for your time.

17 (Applause.)

18 COMMITTEE CHAIR SCHARFF: Thank you.

19 MR. VERNA: Good morning. My name is Michael Verna. I
20 am counsel for Scott's Restaurant and Ray Gallagher. We'll
21 try to keep my comments much briefer than our Statement of
22 Defense which filled up 40 pounds of binder because there's
23 a number of legal issues here that we have to contend with.
24 I'm hoping that we don't wind up in court to contest them.
25 The goal here is to find a resolution.

1 In fact, we thought we found one four months ago.
2 Ignacio just explained how the staff recommended \$250,000
3 for the very same violations we are here talking about; that
4 this Committee unanimously endorsed that \$250,000 fine,
5 which even at the time was historic for the type of
6 violations, it did not involve polluting the Bay, it did not
7 involve bay fill, et cetera; and those were rejected by the
8 full Commission.

9 The problem is that the full Commission rejected it
10 based on a misunderstanding of the actual information of
11 profitability that Scott's has been making. There were some
12 other issues but that was the primary issue that was
13 discussed at that Commission hearing.

14 And I think it's important for us to circle back and
15 try to look at the evidence because since the Commission
16 meeting that occurred, we have supplied nine years of profit
17 and loss data for Scott's to staff, we have produced every
18 single event contract for all the events at the pavilion.
19 And these numbers are irrefutable, it's all based on the
20 ReServe accounting software that Scott's maintains. And
21 what it shows is quite simply that Scott's has made nothing
22 close to the amount of money that the Commission thought it
23 was making in net profits to arrive at this decision to send
24 it back to staff and ask for \$250,000 more.

25 Before I get to the numbers let me just restate,

1 \$250,000 was adopted by this Committee unanimously on
2 October 20th, 2016. Somehow on December 19th, two months
3 later, that morphed into \$841,000 by staff, with nothing
4 happening in-between other than the full Commission having a
5 misunderstanding of the facts. That's not right.

6 Now let's talk about the facts. The actual profit.
7 This is all based on data that has been provided to staff
8 and they have had for a long time.

9 The actual annual pavilion sales. And we know the
10 pavilion sales based on the contracts that we have for the
11 pavilion itself, those are all special events as opposed to
12 the restaurant sales, is \$660,000 per year for 2008 to 2016.
13 That's gross sales. That's not money in the pocket, that's
14 gross sales.

15 The profit margin is 4.653 percent. We'd like it to be
16 6 percent like Ray said but the cold, hard reality is that
17 Scott's during that period of time it was 4.653 percent.

18 What does that mean? The average annual pavilion net
19 profit for those nine years was a measly \$30,751. That's
20 for the pavilion. If there is overuse of the pavilion it is
21 not generating any significant net profit to Scott's, that's
22 for sure.

23 And by the way on the overuse issue, to the degree
24 there were events where the pavilion was enclosed beyond the
25 73, all of those were charitable events. Even many of those

1 that are part of the 73 are charitable events. I don't see
2 how it is in the public interest or in the charter of the
3 BCDC to try to not have charitable events at Scott's. And
4 in fact this Commission even approved in that stipulation
5 back in October that they could have more events, up to 124
6 events; that was part of what this Commission approved as
7 well.

8 So what does it mean when we only make \$30,751 in net
9 profits? It means that the staff recommendation of \$841,000
10 is 27 times the annual net profit we make from the pavilion.
11 More money than we have made in profit on the pavilion since
12 it was built in 1997. That's absurd.

13 And as Mr. Gallagher explained to you, there is no
14 \$841,180 sitting in some account at Scott's. This penalty
15 if imposed, or anything close to this penalty if imposed,
16 jeopardizes the jobs of people that are sitting here, it
17 jeopardizes Scott's as an ongoing restaurant and it
18 jeopardizes the entire Port -- the entire Jack London
19 Square.

20 Let us not forget that before Scott's paid for and
21 built the pavilion with the BCDC's, in this partnership with
22 the BCDC, Franklin Plaza was a parking lot and a garbage
23 dumpster area. Now it's been converted into an incredibly
24 nice public area that has brought tens and hundreds of
25 thousands of people down to the waterfront that never would

1 have been there before.

2 That is what this Commission should be doing is
3 promoting public access and not inhibiting the public access
4 and that's what Scott's has been doing. We want to continue
5 that in a partnership going forward and not have
6 antagonistic litigation and arbitrary penalties generated in
7 order to squeeze Scott's and put them in a position where
8 they are unable to continue with that partnership.

9 Now there has been a lot of discussion about public
10 access. Here is a photo of the area. On the left,
11 obviously, is the pavilion, it's in the open configuration;
12 on the right is Kincaid's. As you can see, and anybody that
13 has been down there can see, even when the pavilion is
14 closed it's not like public access is prevented or people
15 cannot get to the waterfront, there's plenty of ways to walk
16 over to the waterfront around there.

17 Here is what the enclosure looked like before 2013 when
18 the improvements were made. These are the canvas walls.

19 What's important to keep in mind here is since public
20 access seems to be the issue of greatest concern here, since
21 we have not polluted the Bay and not changed the water
22 course, have not filled the Bay or anything like that and
23 it's public access, then the question is: Okay, what public
24 access is the pavilion preventing based on the changes that
25 have been made that were unpermitted, right?

1 And if the argument is, as I understand it, that when
2 the walls are up that's preventing people from having a
3 sense of openness, then the issue is, how long does it take
4 to set up the walls and how long does it take to take down
5 the walls, both before and after?

6 And what you find is that before we made the
7 improvements, with the canvas walls, it took 4 hours to set
8 up these canvas walls, very labor-intensive, it took 4 hours
9 to disassemble the canvas walls. The average event time was
10 4 hours. Before the new walls were put in, unpermitted we
11 acknowledge but discussed with BCDC staff, before the walls
12 were put in, 12 hours of time the pavilion was out of
13 commission for public use.

14 Now with the retractable walls, much more attractive,
15 obviously safer, better exit by the way for emergency exits
16 as opposed to having canvas flaps. What is the situation
17 now?

18 With the sliding metal segments it only takes an hour
19 to close them, it only takes an hour to open them back up
20 and you have a 4 hour event time again. What is that? Six
21 hours. You have cut the amount of time that the walls are
22 up by half because of the installation of these walls. And
23 I suggest to you that's exactly why staff had no problem
24 with the retractable walls when there were discussions
25 before they were actually built, the main concern was the

1 metal entry doorway; which we have agreed and agreed months
2 ago to remove and replace with a exit system with the
3 retractable door system.

4 So what does this mean in practice?

5 Well, for the canvas walls at 12 hours of time to set
6 up, take down and have the event over 73 days that are
7 permitted, that's 876 hours that the pavilion was closed.

8 Because of the installation of the new sliding metal
9 wall segments, even though there have been, on average, 8
10 days more, 81 days of days when the pavilion was closed than
11 before, it only takes 6 hours that it's closed, which means
12 you've got 486 hours it is closed, even with more usage.

13 What does that mean? It means these pavilion
14 improvements have added over 16 days of public access per
15 year by having these retractable walls in place. These
16 retractable walls are not inhibiting public access; they are
17 improving public access and these figures are indisputable.

18 Now there has also been discussion about the status of
19 the improvements that were made. And one thing that is --
20 two things that are very important since the last time this
21 matter was before you in October that have changed:

22 One is Scott's now has, it did not have in October but
23 now has, building permits issued by the City of Oakland that
24 has approved all of the structural improvements they made
25 and approves for the removal of the metal entry door frame

1 and approves of the installation of a retractable door in
2 place of that metal entry door frame for exit. That is a
3 big change in circumstance from before. We are moving
4 forward, we are trying to resolve these things.

5 So what has the City of Oakland actually approved?
6 They have approved all of the things, the sliding metal wall
7 segments, the storage, the roof extension; and they have
8 also said that this is CEQA-exempt so we don't have any
9 problems there. It's a done deal insofar as the City of
10 Oakland is concerned. And they are ones that have to
11 enforce the Fire Code, the Building Code, et cetera, right?

12 Now, what we have also done, another significant change
13 from October, is applications were submitted, Marc mentioned
14 it earlier, this week - it took a while to put all this
15 information together - to the BCDC on behalf of both the
16 Port and Scott's to amend the existing permits to have the
17 BCDC follow form to the City of Oakland. If all of this is
18 okay with the City of Oakland we were hopeful it would be
19 okay with BCDC staff. We don't know why it wouldn't be,
20 there are no codes that the BCDC staff has to enforce and
21 the City of Oakland is enforcing those codes.

22 So what we have done is tried to move the process
23 forward to empower the BCDC and its staff to resolve this
24 and get closure because now they have permits in front of
25 them. And if we can resolve these permits, get them issued,

1 resolve a civil penalty back at the \$250,000 level that this
2 Committee had unanimously adopted before, then we can move
3 on and keep this private/public partnership alive and keep
4 Jack London Square moving the way it is as opposed to
5 jeopardizing jobs.

6 Now I have to say that there is an issue here,
7 Mr. Zeppetello raised it and we hope not to be in a position
8 where we have to raise it in court, but there is an issue
9 here as to whether or not Scott's even needs these amended
10 permits, and that's based on this concept of a substantial
11 change in use.

12 Now under the Government Code, I won't get too legal,
13 but under the Government Code the BCDC only is allowed to
14 require a permit if there has been a substantial change in
15 use of any structure. Okay? That's what the law is.

16 Has there been a substantial change in use of any
17 structure from 2012 when we had canvas walls and in 2013
18 when we had retractable walls? The answer is, no, the usage
19 is the same. It was held for events and banquets before, it
20 is held for events and banquets now.

21 Has the occupancy changed? No. The same members of
22 the public, whether they be private parties or they be there
23 at a charitable event are attending those functions.

24 Are the types of events changing? No.

25 So there is a significant legal issue as to whether or

1 not these permits are even required.

2 But we have, in an effort to try to move the process
3 along and get to closure we filed the application for that.
4 And we are told that the BCDC staff has not only reviewed
5 them but they said they would get back to us in 30 days or
6 so on it. We are hopeful that that process can be moved
7 along because we see no reason why those permits would not
8 be issued, especially if we can have a closure with respect
9 to everything else in this matter.

10 Now, there has been mention made by Mr. Zeppetello
11 about the penalties and how this penalty, even though
12 admittedly apparently is the highest penalty in the 50 year
13 history of BCDC, that it's warranted under these
14 circumstances.

15 And I suggest to you that clearly cannot be the case.
16 The fact is, that based on the 50 year history of BCDC, the
17 next-highest civil violation, the next-highest civil penalty
18 for a violation that did not involve wildlife, that did not
19 involve the Bay, that did not involve fill, all the things
20 here, unpermitted construction, failure to do paperwork,
21 overuse of a facility, was \$45,000 to the City of Redwood
22 City; after that it was \$35,000.

23 Somehow that has now been morphed into \$841,180, which
24 is a figure which we suggest is an over-counting of a number
25 of different violations. In fact, \$440,000 of that \$841,000

1 is being hit for every day of overuse back 16 years, okay.
2 BCDC has known, we have a letter from BCDC back in July of
3 2000 asking about overuse and they didn't do anything about
4 it, staff didn't do anything about it for 16 years. There
5 is a point at which this doesn't make a lot of sense and
6 doesn't withstand review.

7 So just insofar as the amount of this penalty vis-à-vis
8 other civil penalties that have been issued for non-Bay
9 fill, non-environmental, non-wildlife violations. We are 20
10 times more, it makes no sense.

11 Now let's put this in context with respect to all
12 penalties. Anything. Anybody that has been putting sludge
13 in the Bay, any penalty at all. We are still, still four
14 times higher than any other non-contested penalty. Point
15 Buckler I'm sure you're all very familiar with because that
16 was recently; but that is being contested. As I understand
17 it that is in Solano County Superior Court right now on a
18 petition for writ of mandate. So what is the next one that
19 has actually be tested and that has been accepted and is not
20 subject to still review? The next-highest is \$220,000,
21 \$210,000 over the history, the 50 year history of the BCDC.
22 And Scott's is now being hit by staff's recommendation of
23 four times that for these violations?

24 All we ask here is that the punishment fit the crime.
25 Mr. Gallagher has very clearly stated that he admits

1 mistakes were made, we admit mistakes were made. There was
2 unpermitted construction. We can have a dispute over
3 whether or not we exceeded the 73 day use limit based on how
4 you define 'private' which is undefined in the permit. But
5 the bottom line here is that all of these things are
6 remedial.

7 The only thing that the BCDC staff structurally wants
8 us to remove is the metal entry door frames and we will do
9 that. We now have a permit to do that and to two reinstall
10 retractable walls that have an emergency exit door and we
11 have a City of Oakland permit to allow us to do that.

12 So there is not much more that Scott's can do than we
13 have already done and we would simply ask you to defend the
14 unanimous decision that you came to back in October, that
15 staff recommended to you in October, of a \$250,000 or less -
16 because \$250,000 is even more than anybody else has paid -
17 and to submit this back to staff so that they can process
18 our application and we can have closure.

19 Scott's wants what BCDC wants. We want people to come
20 to the waterfront. They have been successful at it for 20
21 years. This partnership should not be blown up. Thank you
22 very much.

23 COMMITTEE CHAIR SCHARFF: Thank you.

24 (Applause.)

25 MS. GALLAGHER: Good morning. I just want to reiterate

1 some of the things that Michael Verna said but I also --

2 COMMITTEE CHAIR SCHARFF: So could you say who you are?

3 MS. GALLAGHER: Oh, Liz Gallagher; I'm so sorry.

4 I want to comment on something that Marc said about the
5 last few years. I took over as President in late 2014.
6 Since 2014 to date I have tried to work with Adrienne. I
7 have kept -- the first year I kept it within 73 days. I
8 told my staff, you can't go over, we don't want to be
9 violating any longer. I took the car away that they were so
10 upset about from the extravaganza, I said, you will never
11 see this again. I said, we will do whatever you want. We
12 will remove -- I tried to settle this.

13 I do admit that in 2016 we went over by 3 because I
14 thought we had a deal. I thought we had a deal where we
15 would pay our punishment, we would get more, we could move
16 on and the public could benefit by us having more time to
17 have events in a city where there is so limited -- there are
18 limited venues of that size that can accommodate fund
19 raisers like OMI that we just had this week. Where else
20 could they go at that size? The Marriott? Is the Marriott
21 going to give them a donation like my dad does? Probably
22 not.

23 So I just feel like he is being punished, we are being
24 punished because there are a few people that, you know, it
25 seems to me they're jealous. You know, I'm speaking from my

1 heart, I apologize for what was done before I got there.
2 But I in the last two years have worked with Adrienne to
3 make sure we didn't violate that permit and I was a little
4 shocked when Marc stood up and said it's still going on, so
5 I just wanted to comment to that.

6 I also want to comment to the whole public access
7 question. You guys can see from Michael's slides that right
8 now with those walls not only does it look better for the
9 event but it gives the public more time during the day.

10 The public doesn't really use it at night. The public
11 uses it at night to do things like do drugs. It's not
12 really a place where there is a lot of lighting so you don't
13 really want the public hanging out at night, nor would they
14 want to.

15 And the other point is Jack London Square is several
16 blocks and has beautiful venues to look at the Bay from.
17 this is not really one of them, it's just not. I mean, it's
18 the garbage area of Scott's and Kincaid's.

19 I just hope that you guys will reconsider the fine
20 because in all honesty, whether or not they believe our P&L,
21 that's the truth. I pulled it right out of our accounting
22 system. Whether or not they believe the number of events, I
23 pulled it right out of our event tracking system. We are
24 being called -- I mean, basically that we're lying.

25 I want this to be done, my father wants this to be

1 done, these people that work for us, that benefitted from
2 some of the extra parties that we did because they have
3 families. These are the people that are going to suffer.
4 It's just hard for me to put my head around it. I wish we
5 would just settle this. We were willing to take the other
6 deal just to move on and not be violating our permit any
7 longer and I just really hope that we can get through this.

8 So I think that the four hours that is now given back
9 to the public should be considered a part of the 73 because
10 if 73 -- you know, the amount of time that the pavilion is
11 actually up now is half the time and the public can enjoy it
12 during the day. And as I said, maybe not so much at night
13 but during the day they are able to sit there.

14 And we do open it up to the other tenants. We have
15 Sungevity that comes and has a town hall there and we close
16 the pavilion - we charge them to do it but we close it and
17 they are able to use it. We are not approached very often
18 with people that want to use it but we have never said flat-
19 out, no.

20 Again, I apologize that we're here. I promise as we
21 move forward that I will be more diligent in following the
22 permit to the letter and I hope that you guys will make a
23 decision that can get this to resolution. Thank you.

24 (Applause.)

25 COMMITTEE CHAIR SCHARFF: So Mr. Verna, I think your 30

1 minutes are about up.

2 MR. VERNA: Yes.

3 COMMITTEE CHAIR SCHARFF: So the Port now.

4 MR. SAFRAN: Good morning. My name is Joshua Safran, I
5 am an attorney and I have been asked to help defend the City
6 of Oakland acting by and through its Board of Port
7 Commissioners in this proceeding.

8 By way of a little bit of background, I worked for the
9 Port for six years and went back into private recently. And
10 one of the jokes when I was at the Port was that my
11 portfolio as Deputy Port Attorney was all the weird cases,
12 so guess who got called for this enforcement proceeding?

13 And I use the word "weird" with a little bit of humor,
14 but also in the context of I want to walk you through the
15 Port's view of the complaint and the way that it names -- of
16 BCDC's complaint and the way that it names the Port in that
17 we view it not only as inappropriate for the Port to be
18 named but, quite frankly, in addition to being inappropriate
19 to being absurd on a literary, Joseph Heller, Catch-22 level
20 of absurdity. And if you'll stick with me for a couple of
21 minutes in the very limited amount of time I have I think
22 that you will understand a little bit more why we have that
23 perspective.

24 So first off, BCDC, to be clear, is seeking over
25 \$800,000 from Scott's and it is also seeking over \$800,000

1 from the Port on the theory that we are jointly and
2 severally liable. So if Scott's and the Port can't agree on
3 who pays what or if Scott's is financially insolvent the
4 Port pays it all. Now the Port is not a private party, the
5 Port is a public agency, and all of its money actually
6 belongs to the State of California, which the Port holds in
7 trust for the people of the State of California.

8 To give you a sense operationally of how much \$800,000
9 is: The Jack London Square area is part of the Jack London
10 Improvement District, it's a special business district in
11 the City of Oakland. The Port pays into that to provide for
12 a team of what are called Ambassadors but they're
13 essentially maintenance workers that roam the area making
14 sure that there's no safety problems, abating graffiti,
15 picking up trash and all that kind of stuff. The Port pays
16 \$100,000 a year to provide that service, so \$800,000 is
17 eight years of the public's benefit for that service -
18 that's just one example - that the Port would have to divert
19 from other funds.

20 And it is very curious to us that BCDC feels that it is
21 appropriate and important that state monies essentially be
22 removed from one pocket of the state and put into another
23 pocket of the state. It doesn't make a lot of sense.

24 And part of the reason it doesn't make a lot of sense
25 is as, you've heard from your own Chief Counsel, there's

1 essentially three reasons why BCDC has chosen to go after
2 the Port.

3 The first two reasons are here:

4 One is that Scott's - Scott's, a private for-profit
5 restaurant and not the Port - overused the pavilion for
6 restaurant events. There is not even an allegation that the
7 Port had any involvement in that or had any, you know. We
8 don't hold restaurant events, we are not a restaurant.

9 The second reason is that Scott's, not the Port, made
10 some improvements without a permit. The Port didn't do
11 those improvements, the Port didn't have knowledge of them.
12 And as you see, when the Port did have knowledge of them the
13 first thing they did is report them to BCDC to take
14 Enforcement action, which BCDC waited many years to do.

15 So we don't believe that there is any legal basis
16 whatsoever to name the Port as a respondent. The only
17 response that we have heard from BCDC's Chief Counsel is the
18 one you heard today, which is: Yes, our name is technically
19 on the permit because we are the underlying landowner.
20 There is no language where the Port agrees to be held joint
21 and severally liable, there is no language in the permit or
22 anywhere else that requires that the Port make any payments
23 or assume any liabilities on behalf of Scott's.

24 And the argument that we heard today from Chief Counsel
25 were references to basic background contract law that may be

1 found in the Civil Code, the codification of the English
2 Common Law. And you know when you are an enforcement agency
3 and you are seeking as the basis of your enforcement the
4 English Common Law that you may have a little bit of an
5 enforcement problem. So it is our position that there is
6 absolutely no legal basis to go after the Port.

7 But let's step aside from the legal basis for a moment.
8 You are, after all, a public agency like the Port and you
9 must consider policy considerations in everything that you
10 do, just as the Port does.

11 Even if BCDC had the legal authority to go after the
12 Port, why would it? They know who the offender is. In this
13 case Scott's is alleged to be an offender of the overuse and
14 non-permitted construction. Scott's is a financially
15 solvent business, it has a well-respected place in the
16 Oakland community. It is not like some midnight dumper who
17 showed up on Port lands and dumped a bunch of toxic sludge
18 and drove away in a pickup truck with no license plate. We
19 know exactly who is alleged to have committed the
20 violations. So there is certainly no requirement, even if
21 BCDC could, that it should name the Port. So we ask the
22 question: Why? Why name the Port?

23 The second issue which BCDC's Chief Counsel doesn't
24 consider a gift of public funds, but as a policy
25 consideration it's important: Why would any public agency

1 use public money to pay for a private for-profit
2 restaurant's alleged bad acts? What would be the public
3 policy behind that? We don't see one.

4 And the last point, which is also kind of remarkable to
5 me, is that throughout this process BCDC's counsel and staff
6 has treated the Port just like any other sort of private,
7 you know, party who doesn't really understand the way that
8 the law works and is running cowboy, which is the opposite
9 of the way that the Port has conducted itself.

10 And they must have known that the Port is obviously
11 going to defend itself. And when public agencies go to war
12 against each other there are repeated studies - including a
13 big study in California in 2008 - that whenever public
14 agencies go after each other the only parties that is
15 guaranteed to lose is the public because both agencies waste
16 their precious staff resources, their money. I'm happy to
17 say that private lawyers may enjoy that but there is no
18 benefit to the public in this process and it erodes public
19 trust and goodwill in both agencies.

20 The third reason that is listed for this complaint
21 against the Port is the strange notion that the Port did
22 something wrong by not granting a permanent easement in this
23 area. Now, Chief Counsel has pointed out or attempted to
24 point out that it is not necessarily a permanent easement,
25 it's only an easement that lasts as long as this permit

1 lasts, and the permit is indefinite and potentially infinite
2 but it doesn't have to be permanent.

3 That's fine, we don't care about the nuance. The point
4 that the Port does care about is in the legislative grant
5 from the State of California to the City of Oakland, which
6 was through the City's charter put in the hands of the Port,
7 has a 66 year limitation. So fine, if it is a 68 year
8 permit, if it's a 50 year permit it really doesn't matter,
9 the point is we can't go over 66 years.

10 It is remarkable to us. The State Lands Commission is
11 the Trustor, meaning they are the agency that put this land
12 in the Port's hand as Trustee. Chief Counsel has conceded
13 the State Lands Commission legal conclusion, their
14 determination, is that we are limited to 66 years in these
15 kinds of easements. We cannot refuse to follow the legal
16 instruction of the Trustor of the very lands that we are the
17 Trustee. It's a bizarre request.

18 And the idea that the Port and out of public trust
19 funds would be penalized even \$30,000 for complying with the
20 law, and in this case specifically I was the Deputy Port
21 Attorney that dealt with the former Deputy Attorney General
22 Joe Rusconi who has indicated that if he must we can drag
23 him kicking and screaming and he'll come in and swear under
24 penalty of perjury, this was the guidance we received. We
25 have the statutory language which we rely on, on its face it

1 appears clear. We agree with the Attorney General's Office.

2 And quite frankly, as you'll see a little further, part
3 of the absurdity is you are forcing us to be in a position
4 where we have the state agency who oversees our funds and
5 our lands and the Attorney General's Office telling us one
6 thing, BCDC disagreeing, which they have the right to do.

7 And in 2014 and again this year we invited BCDC to sit
8 down with the Attorney General's Office and the State Lands
9 Commission to come to some kind of reasonable accommodation
10 because, quite frankly, we don't care. We don't have a dog
11 in this hunt.

12 We already view this area as being part of the public
13 access easement for the Square. In fact, there is a public
14 access easement for this area, not particularly for this
15 4,500 square feet, but that covers that entire Square. If
16 you go there it is part of the Jack London Square common
17 area. There is no private leasehold in this area. It is
18 absolutely part of the Port's mission to ensure public
19 access. And we have said again and again, we will provide a
20 66 year easement.

21 The other thing that is important here is in 2014 when
22 this Guidance came down, both from the State Lands
23 Commission and from the Attorney General's Office, by
24 coincidence we were dealing with the Regional Board, with
25 East Bay MUD and BCDC who all at about the same time, the

1 early summer of 2014, were all demanding permanent easements
2 for various different projects on Port lands. And our
3 response to all of the three agencies was the same: 'Hey
4 guys, sorry, sorry, we're stuck with the 66 year
5 restriction.' I have letters of the same date going both to
6 East Bay MUD and to John Bowers at BCDC.

7 And East Bay MUD and the Regional Board, their response
8 was: 'Well, let us see the statutes, we're going to take a
9 look at them.' They both came back and said, 'Yeah, this
10 seems like a fair argument, we get it, the AG's Office is
11 advising. You can't alien any interest for more than 66
12 years. Let's negotiate a resolution that works for both
13 agencies.' And we said, 'Great.'

14 East Bay MUD negotiated with the Port for a couple of
15 months on a number of things on an easement and guess what?
16 They came up with language that worked for us and it worked
17 for the Attorney General's Office that said, at the end of
18 66 years the Port could make a finding that this land is no
19 longer needed for public access. But unless the Port
20 specifically makes that finding there is an evergreen
21 provision where it will automatically renew for another 66
22 years. That worked for us, it worked for East Bay MUD, it
23 worked for the Attorney General's Office.

24 When we attempted to have this conversation with BCDC's
25 counsel at the time, their response was complete

1 intransigence and obfuscation. 'No, it has to be a
2 dedication that lasts as long as this permit, which may be
3 eternal, we don't know. Sixty-six years is completely
4 unacceptable, we won't settle for anything less.' It's
5 important that I emphasize that because our interactions
6 with, quite frankly with all due respect to BCDC's counsel
7 over the years, has been one of child and parent. The Port
8 has been talked down to, the Port has been disrespected, and
9 quite frankly, the Port has been treated with an
10 imperiousness that no permittee should have to deal with but
11 particularly not a public agency who is holding in public
12 trust for the people of the state of California these lands
13 and these funds.

14 COMMITTEE CHAIR SCHARFF: I just want to remind you you
15 have about another 10 minutes.

16 MR. SAFRAN: Okay, I'll be briefer than that,
17 hopefully.

18 The last issue, why we have such a problem with this
19 grant of permanent easement requirement is that one of the
20 things that the Port has to do -- the Port is not in the
21 restaurant business, it is not in the hotel business. The
22 way in which it has to incentivize private parties like
23 Scott's to come in and invest their money into improving the
24 Port's land, how do you incentivize someone to do that?
25 Well they come in and they say, 'Look, a bank is not going

1 to lend to us on a five year lease in order to build this
2 property. We need at least 30 years, we want 60 years.' So
3 in Scott's case they have a 54 year lease, which was the
4 amount of time that they needed in order to get a return on
5 their investment.

6 So what is the Port's protection from any bad acts that
7 these tenants might take? Well that protection is we have
8 in every lease an indemnity and defense provision that
9 basically says, 'Hey, if you guys do something wrong, if you
10 cause something to go wrong and some agency like BCDC comes
11 after us for what you did, you've got to protect us. You
12 have to say that you are willing to write a check to cover
13 the whole amount and you're going to defend us.'

14 Well guess what? Scott's is using this very basis that
15 the Port wouldn't grant a permanent easement and that we did
16 something wrong and that we owe \$30,000 to deny all
17 responsibility for any indemnity, any defense of the Port.
18 The Port is now completely on the hook absent a court order
19 or Scott's agreement that they will indemnify and defend us.
20 So it's sabotaging our relationship with our tenant and our
21 ability to be protected.

22 That's just the inappropriate part.

23 I want to go very quickly, in the spirit of Joseph
24 Heller, to the absurd part. And I have put in a Wikipedia
25 definition of what a Catch-22 is, which is the basis of the

1 book of the same name, which is:

2 "A paradoxical situation in which a solution
3 is impossible because of a set of inherently
4 contradictory and absurd conditions."

5 And I would posit to you in the very limited amount of
6 time that I have that the Port is stuck in the middle of
7 some kind of weird Catch-22, Hellersesque Catch-22, in six
8 different ways.

9 The first is that it was the Port that investigated
10 Scott's unlawful construction and reported it to BCDC
11 itself. The Port was the whistleblower. Yet BCDC didn't
12 take any action for years and years. And when it finally
13 does take action it blames the Port for the very acts that
14 it reported.

15 The second Catch-22: The Port attempted to do
16 everything it could in its very limited capacity as a
17 landlord, not as an enforcement agency, that Chief Counsel
18 in his response to our Statement of Defense says, with no
19 basis, that the Port was in a better position to enforce
20 than BCDC because we were the landlord.

21 No. The only remedy that the Port has against a tenant
22 is whatever its lease allows. In the Port's leases it says
23 that it can send a letter demanding that tenants such as
24 Scott's cure and correct and that they have 15 days to do
25 that cure and correct.

1 However, if there is a circumstance where it can't be
2 remedied that quickly, so long as the tenant, such as
3 Scott's, is making good faith efforts on processing a
4 remediation of that violation - in this case working with
5 BCDC to get a permit - the Port is estopped, is barred from
6 evicting or taking any action against Scott's.

7 And because of BCDC's slow and luxuriant pace of years
8 and years of negotiating with Scott's in good faith the Port
9 remains waiting for its opportunity to enforce under its
10 lease. But it should be noted that the Port sent no less
11 than 9 cease and desist demands to Scott's, sent a Notice to
12 Cure, which was the trigger for the Port's ability to send
13 the Notice of Default, which it also sent in 2013, paving
14 the path for the Port to be able to go into Superior Court
15 and get an injunction against Scott's to shut them down as
16 fast as the Superior Court would move.

17 But it was BCDC that sabotaged the Port's ability to
18 enforce by rolling out five years of negotiations without
19 taking any -- without having any teeth in its enforcement
20 process, allowing Scott's to claim that it was proceeding in
21 good faith to cure violations. And from what I can tell
22 Scott's has been negotiating consistently with BCDC for five
23 years, leaving the Port holding the bag and unable to do
24 anything about the violations.

25 The next Catch-22 is the one that I have already

1 discussed, which is on the one hand we are being told by the
2 powers that be that we have a 66 year limit. BCDC refuses
3 to accept that reality and, importantly, refuses to even
4 negotiate or work with us in any way to accommodate our
5 legal restrictions, is demanding that we do something
6 illegal and seeking \$30,000 against us for not doing
7 something illegal.

8 The next Catch-22 I have already discussed, which is
9 our indemnity and defense which is being sabotaged by BCDC's
10 complaint.

11 The fifth Catch-22: We feel it is very important that
12 we point out to you that East Bay MUD and other agencies
13 were reasonable in working with the Port on the 66 year
14 easement and we feel it is very important that you
15 understand that Scott's is refusing to indemnify and defend
16 the Port.

17 Yet, however helpful that evidence is to us and believe
18 it is helpful, BCDC's Chief Counsel has now twice objected,
19 doesn't want you to hear that information, has attempted to
20 censor the information that you get by formally objecting to
21 our reference to these facts.

22 And from our perspective this is important because it
23 not only is ridiculous but it highlights -- we were given 30
24 days over Christmas and New Year's to respond to a complaint
25 after five years of dithering and inaction and are being

1 accused of submitting late evidence in violation of BCDC's
2 regulations. This highlights for us the ongoing problem
3 that we have where BCDC's counsel and staff treats us with
4 impunity and really isn't solution-oriented, is not focused
5 on finding a resolution, which is all that we want, all that
6 Scott's wants and should be all that BCDC wants.

7 The last and in many ways this is the most important.
8 As you'll see the next slide is our proposed resolution.
9 Why are we stuck on this --

10 MS. THRELFALL (FROM THE AUDIENCE): Please put down the
11 signs so that we can see.

12 MR. SAFRAN: I won't comment on that.

13 Why are we stuck as a co-permittee on this permit?
14 This isn't our pavilion; this isn't our project.

15 COMMITTEE CHAIR SCHARFF: I agree.

16 Just hold on a second.

17 (Addresses members of the audience holding up signs) If
18 you could put the signs down. Because if they can't see the
19 screen that's really interfering with their --

20 COMMITTEE MEMBER ADDIEGO: I assure you, we have read
21 them all.

22 COMMITTEE MEMBER TECHEL: We've seen them.

23 COMMITTEE CHAIR SCHARFF: And we've seen them.

24 SPEAKER (FROM THE AUDIENCE): Thank you.

25 MR. SAFRAN: The Port doesn't want to be on this

1 permit. The reason that the Port is stuck on this permit,
2 which as Chief Counsel pointed, out was severed, it's a
3 separate stand-alone permit. The reason that the Port is on
4 this permit is because BCDC insisted that it be on the
5 permit.

6 Even before there were any violations this has been a
7 major headache for the Port. The Port has limited staff,
8 limited resources and it has bizarre requirements like,
9 Scott's submits records to the Port. The Port then takes
10 those records and submits them to BCDC. Why is the Port
11 stuck as a middleman in this situation and then, of course,
12 blamed when anything goes wrong?

13 So our first proposed resolution; and there are two of
14 them but this is our preferred:

15 BCDC has threatened or suggested this before. Just
16 revoke this permit. We're done, we don't need to be in the
17 middle of this.

18 It completely resolves the enforcement issue, all of
19 these problems go away.

20 There is no likelihood of future enforcement issues
21 because this will just be public access, dedicated to public
22 access and nothing more.

23 It is consistent with BCDC's policy and practice.

24 If its enforcement action is to revoke the permit,
25 great, revoke the permit. It allows greater public access

1 and it takes this insufferable role of the Port as middleman
2 out of the equation.

3 As part of that the Port is not going to be making any
4 payments out of public trust funds on behalf of Scott's or
5 anybody else and that is a deal-killer for us.

6 But if this is something that will work for the BCDC
7 Enforcement Committee we strongly and heartily recommend
8 that this be the approach as the simplest, cleanest,
9 quickest way of resolving this dispute that rages on and on,
10 consuming public resources, staff time and money.

11 The alternative resolution if it's important to BCDC -
12 and I don't know why it would be - but if it's important to
13 BCDC and they refuse to revoke the permit that they have
14 threatened to revoke on multiple occasions, fine. If BCDC
15 determines that it is really important that Scott's continue
16 using this pavilion however often it uses it, we don't want
17 to be in the middle of it.

18 Remove the Port as a co-permittee and the special
19 circumstance where Scott's can put up a bond or whatever
20 else. This will allow greater accountability of Scott's to
21 BCDC. BCDC can directly monitor what Scott's is doing, we
22 don't have us in the middle. This problem of the lag time
23 of Scott's giving something to us and then our guy being on
24 vacation and taking his management leave for two weeks and
25 then being dinged for not forwarding it fast enough.

1 And in that circumstance the Port would absolutely
2 stand by its past commitments of providing a 66 year
3 easement, however negotiated, similar perhaps to what we did
4 with BCDC, to allow absolute public access to this area. We
5 are happy and fine with providing that easement or some
6 variation thereof. But again, under the circumstance that
7 there would be no payments out of public trust funds.

8 So I think that's all the time that I have. There's a
9 bunch more slides here that are informational and provide a
10 lot of, I think, important background including from
11 statutes, from letters, from the lease, that explain how we
12 got here and why we think it's a bad place to have arrived.
13 But we will leave you with the resolutions proposed and we
14 thank you for your time.

15 COMMITTEE CHAIR SCHARFF: Thank you very much.

16 (Applause.)

17 COMMITTEE CHAIR SCHARFF: So now we will turn to the
18 Commission for questions of either the Port or Scott's or
19 BCDC.

20 COMMITTEE MEMBER GIBBS: Could I ask two procedural
21 questions?

22 COMMITTEE CHAIR SCHARFF: Yes.

23 COMMITTEE MEMBER GIBBS: We are scheduled for 9:30 to
24 12:30. Are we intending to stick to that schedule?

25 COMMITTEE CHAIR SCHARFF: Yes, we are.

1 COMMITTEE MEMBER GIBBS: So it is over at 12:30?

2 COMMITTEE CHAIR SCHARFF: That's the plan.

3 COMMITTEE MEMBER GIBBS: Okay. Second, I am not quite
4 sure how we got from \$250,000 to \$841,000 and I would like
5 someone from the staff from BCDC to kind of explain that as
6 best you can based on the public record and everything else.

7 MR. ZEPPETELLO: Yes, just briefly. The \$250,000
8 figure was a negotiated settlement. The \$841,000 figure was
9 generated by looking and counting the violations and adding
10 them up and applying a dollar amount per violation.

11 You know, one of the concerns that the Commission
12 expressed was that the \$250,000 figure appeared to be
13 arbitrary and I think, frankly, it basically was, it was a
14 negotiated number. Scott's said, 'We're paying too much,'
15 we said we needed more, we finally after -- and then the
16 issue that Scott's said, 'We'll pay more if you support this
17 amendment for additional days.' So it was a horse-trading
18 exercise. Whereas when we went to do the violation report
19 we prepared those penalty charts and came up with numbers
20 and counted the violations and the numbers came out where
21 they came out.

22 COMMITTEE CHAIR SCHARFF: Mr. Zeppetello, I had a
23 couple of questions as well.

24 So you sat up there and talked about if we did it from
25 January 2012 the fine would be \$565,000.

1 MR. ZEPPETELLO: Right.

2 COMMITTEE CHAIR SCHARFF: And January 2012 was -- what
3 was the significance of that date?

4 MR. ZEPPETELLO: Well January 2012 was when Scott's
5 first approached staff about replacing the canvas walls. I
6 believe it was actually December of 2011. And it is also
7 approximately a year or a year and a half from the beginning
8 of the enforcement action.

9 COMMITTEE CHAIR SCHARFF: Okay.

10 MR. ZEPPETELLO: But it was really based on when this
11 all sort of started.

12 COMMITTEE CHAIR SCHARFF: And the January 2013, what
13 would be the basis for using that date instead?

14 MR. ZEPPETELLO: The basis for that was again that it
15 was -- that was when the unauthorized construction started,
16 it was December of 2012. So that's when the other
17 violations, the unauthorized construction violations
18 occurred, January of 2013.

19 COMMITTEE CHAIR SCHARFF: I am also really concerned
20 with the ability to pay here. So basically Scott's makes
21 \$565,000 I think was the number, close to it, on an annual
22 basis, was talked about.

23 MR. ZEPPETELLO: Right.

24 COMMITTEE CHAIR SCHARFF: When we look at that ability
25 to pay, I mean, that would be 100 percent. If the fine was

1 \$840,000 it would be one and a half times their entire
2 annual income for the year. When we look at ability to pay
3 does that go into it? How do you view ability to pay, given
4 the \$565,000, on a fine?

5 MR. ZEPPETELLO: Well one of the aspects, I mean, the
6 pavilion profit we think is too narrow a factor, just
7 looking at the profit. I mean, the ability to pay really
8 looks at the corporation and its assets and liabilities and
9 income. So annual net profit is a factor.

10 You know, Mr. Gallagher commented on the issue of what
11 does it mean on a balance sheet to have retained earnings of
12 \$5 million, he says it means equity. When I was in private
13 practice in a law firm it meant we had money in the bank.
14 There is a receivable -- they have a note receivable that
15 appears to be from another corporation for \$6 million. I
16 don't really know what these numbers mean for Scott's, they
17 can speak to it better than I can.

18 COMMITTEE CHAIR SCHARFF: And finally, do you have any
19 comments on the Port? The Port's comments were basically,
20 the \$30,000, they're stuck between a rock and a hard place
21 is basically the essence of their presentation, and they
22 shouldn't be liable for anything else. First of all, should
23 Scott's be liable for the \$30,000 that the Port hasn't
24 recorded the easement? And you yourself sort of indicated
25 that there seems to be a dispute with the Attorney General's

1 Office regarding whether or not they can record this
2 easement. It seems that that's an unclear issue here.

3 MR. ZEPPETELLO: Well I guess a couple of points.

4 With respect to whether Scott's should be responsible
5 for that. We made the point that there should be a covenant
6 and both parties should sign, but it does seem clear that it
7 is really the Port that is raising this problem.

8 The issue of -- the Port's counsel talked about when
9 guidance came down and the legislation. He hasn't provided
10 or I don't see -- I read the provision and I don't see the
11 problem. When I spoke with State Lands I didn't have that
12 document in front of me. They were talking in generalities.
13 Ms. Tiedemann is here from the Attorney General's Office,
14 she can comment. We weren't in party to any of these
15 conversations.

16 COMMITTEE CHAIR SCHARFF: Anyone else?

17 MS. TIEDEMANN: Mr. Chair, I don't want to interfere
18 with the Commissioners' ability to ask questions but before
19 the Commissioners ask questions that tend toward
20 deliberation we should perhaps hear from the public.

21 COMMITTEE CHAIR SCHARFF: So we will hear from the
22 public but we can't ask the questions until we close the --
23 once we close the public hearing we can't really ask
24 questions of -- because that was my understanding last time
25 we met. So I think we will hear from the public. We are

1 not deliberating, we are asking questions.

2 MS. TIEDEMANN: All right.

3 COMMITTEE CHAIR SCHARFF: That's my ruling, I'll stick
4 with it.

5 COMMITTEE MEMBER GIBBS: I have another question.

6 COMMITTEE CHAIR SCHARFF: Okay.

7 COMMITTEE MEMBER GIBBS: On the ability to pay. So for
8 counsel for Scott's and Scott's.

9 In the presentation it has average annual pavilion
10 sales.

11 MR. VERNA: Right.

12 COMMITTEE MEMBER GIBBS: And profit margin and the
13 average annual pavilion net profit. And so you are basing
14 the ability to pay on what comes from the pavilion?

15 MR. VERNA: Yes. The violations -- of the \$841,000 and
16 change that is being asserted against us, \$449,000 is based
17 on computations of overuse going back for every day for 16
18 years, okay. So if half of the -- and the remaining
19 violations are with respect to improvements of the pavilion.
20 So it is all pavilion-related, there is no issue about the
21 restaurant.

22 So it seems to me that if the claim here is related to
23 the pavilion and if the full Commission was of the
24 understanding, which apparently they were, that the pavilion
25 was generating \$800,000 a year, that we needed to make sure

1 with nine years of profit and loss statements and nine years
2 of events statements and nine years o balance statements
3 that BCDC appreciated that that's not the fact, we don't
4 make -- Scott's doesn't make very much money on the pavilion
5 at all. A lot of the time is donated as well to the
6 pavilion.

7 So since the issue is related to the pavilion we
8 focused on the pavilion. It still doesn't deal with the
9 ability to pay issue because there are other expenses that
10 come out of that.

11 COMMITTEE MEMBER GIBBS: I understand why you chose to
12 focus on the pavilion. But unless I'm mistaken, the
13 permittee is not the pavilion at Scott's, the permittee is
14 actually Scott's Restaurant.

15 And so to use an analogy, we made a very major decision
16 to give a permit to the Exploratorium down here on the San
17 Francisco Waterfront. They have a café, they may even have
18 some outdoor events and outdoor seating. And if there's
19 violations there I don't think it relates, we only fine them
20 on the receipts that they have from the café, we would look
21 at their ability to pay from the entire operation.

22 So could you provide us the actual comparable figure
23 for the entire operation? Because I think that is relevant
24 to your ability to pay.

25 MR. VERNA: We have already done that.

1 COMMITTEE MEMBER GIBBS: Okay.

2 MR. VERNA: This is a computation based on the pavilion
3 usage because that is what we are being pursued for is the
4 pavilion.

5 COMMITTEE MEMBER GIBBS: Okay.

6 MR. VERNA: But I think the discussion, I haven't
7 averaged them, but it's somewhere around \$500,000 or
8 \$530,000 or something, is the profit of Scott's Jack London
9 Square. There are other expenses that come out of that
10 profit.

11 COMMITTEE MEMBER GIBBS: Sure.

12 MR. VERNA: That is not money that goes into Ray
13 Gallagher's pocket. There's corporate expenses, there's
14 other things that are involved there.

15 But even so, at \$841,000 that's a year and a half, at
16 \$500,000 that's an entire year's profits. You can't run a
17 restaurant and pay all your profits out to the BCDC and keep
18 all these people employed.

19 COMMITTEE MEMBER GIBBS: I don't think any of us are
20 unsympathetic to your arguments but I think we do need to
21 look at the entire operation, not just the pavilion.

22 MR. VERNA: Fair enough. All those materials have been
23 supplied, we didn't hold back anything on the profit and
24 loss. I distilled it as best I could for this short
25 presentation.

1 COMMITTEE MEMBER RANCHOD: Thanks for the
2 presentations; this is all helpful information. I have a
3 couple of questions for Scott's and then for the Commission
4 staff.

5 Is there any dispute by Scott's that the State has
6 incurred about \$83,000 in costs and more than 1,100 hours of
7 staff time on this matter?

8 MR. VERNA: We have no way to know that, we have been
9 provided no information that supports that. They've said
10 that, I have no way to evaluate that. What I can say is
11 that any time that has been expended since October, if the
12 full Commission had adopted the agreements that we entered
13 into, we wouldn't have any of that time expended. And we
14 had no, Scott's had no control over that.

15 COMMITTEE MEMBER RANCHOD: I've read that in your
16 brief. You also said in your brief that Scott's Jack London
17 Seafood has currently roughly \$5,000 cash on hand.

18 MR. VERNA: That was as of the time we wrote the brief,
19 the end of December, yes.

20 COMMITTEE MEMBER RANCHOD: So is that statement meant
21 to indicate Scott's ability to pay? That seems like a very
22 different number from other numbers that have been provided.

23 MR. VERNA: Well, the profits, the cash on hand is what
24 you would have to use to write a check, okay. So we didn't
25 have, Scott's doesn't have a lot of cash on hand. Profit

1 number is an accounting mechanism that tells you what your
2 overhead, what your total sales are less your expenses and
3 that comes out with a figure. But that money is coming in
4 and going out all the time to pay salaries, to pay for your
5 cost of food, to pay your rent and everything else. So the
6 cash flow issue is a problem.

7 And if I could, the reference to the balance sheet and
8 retained earnings that has been made by Chief Counsel makes
9 no sense whatsoever in the real world insofar as how Scott's
10 operates.

11 COMMITTEE MEMBER RANCHOD: Okay, thank you. Can you
12 just clarify, that statement says 'currently has roughly
13 \$5,000 cash on hand.' That was as of what date?

14 MR. VERNA: When was that? January 23rd?

15 MS. GALLAGHER: Somewhere around there.

16 MR. VERNA: Yes, somewhere around when we filed that.

17 COMMITTEE MEMBER RANCHOD: And is it correct that at
18 the time that we had the proposed settlement before us a
19 couple of months ago, part of that resolution that you were
20 urging the Enforcement Committee to recommend to the full
21 Commission included a payment of \$250,000 in a lump sum?

22 MR. VERNA: Mr. Gallagher was going to pay it out of
23 his personal savings, to advance it on behalf of the
24 restaurant. The restaurant can afford it. That was the
25 negotiated --

1 COMMITTEE MEMBER RANCHOD: So Scott's was prepared
2 through whatever means to make a payment of \$250,000 at that
3 point?

4 MR. VERNA: Yes.

5 COMMITTEE MEMBER RANCHOD: Okay. And is it correct --

6 MR. VERNA: Yes, we were willing to stand by the deal.

7 COMMITTEE MEMBER RANCHOD: Is it correct that as was
8 stated in one of the declarations that you submitted, and I
9 believe also referenced in slides that were shown by
10 Commission staff, that you had made a proposal to resolve
11 this in December that included a lump sum payment of
12 \$300,000?

13 MR. VERNA: Yes.

14 COMMITTEE MEMBER RANCHOD: Okay.

15 MR. VERNA: The restaurant couldn't afford it. We are
16 trying to find resolution. \$300,000 is still six times more
17 than the second-highest fine that has ever been levied for a
18 non-Bay violation.

19 COMMITTEE MEMBER RANCHOD: There is a statement in page
20 12 of the Proposed Cease and Desist and Civil Penalty Order
21 that states: "No other business within BCDC's jurisdiction
22 has so flagrantly, extensively, and knowingly violated the
23 terms of its Permit and the McAteer-Petris Act."

24 Do you disagree with that statement?

25 MR. VERNA: I have no way to know all of the violations

1 that are out there involving BCDC permits. What I find
2 incredulous is that the alleged violations of Scott's and
3 the admitted violations of Scott's are the highest and most
4 significant violations in the 50 year history of BCDC.

5 COMMITTEE MEMBER RANCHOD: Thank you.

6 I have a few questions for staff. On that matter, can
7 you clarify that statement, no other business within the
8 jurisdiction? Over what time period does that involve and
9 who is making that assessment on behalf of staff?

10 MS. KLEIN: Commissioner Ranchod, there are -- most of
11 our public access areas are not subject to dual use. This
12 private use, we haven't seen the use of the public access
13 area be abused in this regard in my career or in any of the
14 records that I have reviewed during my work.

15 COMMITTEE MEMBER RANCHOD: How long have you been at
16 BCDC?

17 MS. KLEIN: Since 1996.

18 COMMITTEE MEMBER RANCHOD: A couple more questions for
19 staff. There is an implication in the presentation that the
20 statute of limitations does not run. I know that the
21 proposed penalty of \$841,000 is going back a number of
22 years. I'm giving you a hypothetical now. In the event
23 that the violations went back to 1985 would it be the
24 staff's position that you could run the penalties all the
25 way back to that point for purposes of calculating a

1 proposed penalty or is there some limit?

2 MR. ZEPPETELLO: Well the point on the legal issue is
3 that the cases have held that the statute of limitations in
4 the Code of Civil Procedure don't apply in administrative
5 enforcement actions. You know, I think going back in time.
6 Ultimately we acknowledged when we brought the proposed
7 settlement to you in October that there were some equitable
8 issues with going back in time and that's why we -- that was
9 one of the reasons that we negotiated a settlement.

10 I argued and believe that the respondents haven't made
11 a case that these penalties should be barred by laches or
12 unclean hands or waiver. But I do recognize and staff is
13 recognizing the discomfort, for want of a better word, that
14 the Committee or the Commission may have in going back in
15 time and going back in time to 1985 would be, you know, even
16 a more difficult stretch. So, you know, that's why we
17 proposed for your consideration a few alternatives to take
18 that into account without waiving our legal argument and
19 position that they haven't made those --

20 COMMITTEE MEMBER RANCHOD: Understood, okay. And you
21 gave us a couple of options going back to running the
22 penalties back to January 2012, January 2013. Have you also
23 done the calculation, a version going back to May 2013 when
24 BCDC issued its first enforcement letter?

25 MR. ZEPPETELLO: We did not, primarily because it was

1 difficult to sort of parse these things midyear so we just
2 did them on an annual basis.

3 COMMITTEE MEMBER RANCHOD: Okay. And then my final
4 question is, could you respond directly to the request or
5 suggestion by the Port that a resolution with respect to
6 their responsibility and liability here could be revoking
7 the permit, or in the alternative, removing the Port as a
8 co-permittee?

9 MR. ZEPPETELLO: Well, one option -- the Commission had
10 a matter last year where co-permittees wanted to split a
11 permit. If Scott's and the Port were to come in together
12 with this permit amendment or a modification of this permit
13 amendment to take the Port off the permit, if they were to
14 agree to do that, then we would process that request.

15 If the Port were to be taken off the permit then the
16 permit would need to be modified to give it a term co-
17 extensive with the lease to Scott's. I think that we'd have
18 to think internally and talk about the issue of the fact
19 that the Port is the underlying property owner. But if the
20 lease term, I believe it goes to 2041, if we had a permit
21 that went to 2041 the issue there would be the permit would
22 require everything to be taken down and the property
23 restored to its current condition unless the permit were
24 amended so it would bring the whole matter back to a new
25 Commission in 20 years to evaluate whether the pavilion

1 should continue to exist or to evaluate the terms and
2 conditions based on a new and amended lease.

3 It's possible to do that but we wouldn't feel
4 comfortable doing that unilaterally in response to an order.
5 I think that the permittees, at least initially, should
6 propose that as a permit amendment.

7 COMMITTEE MEMBER RANCHOD: Thank you.

8 COMMITTEE CHAIR SCHARFF: Commissioner Techel.

9 COMMITTEE MEMBER TECHEL: Just a couple of questions.
10 Again, the process is going to be the same as it was before?
11 We will make findings, make a recommendation and it will go
12 to the full BCDC Commission?

13 MR. ZEPPETELLO: Correct. And we have tentatively
14 scheduled that for April 6th, the first meeting in April.

15 COMMITTEE MEMBER TECHEL: I think for all of us we need
16 to be there.

17 COMMITTEE CHAIR SCHARFF: Yes, we do.

18 COMMITTEE MEMBER TECHEL: What is the history of the
19 public pavilion? I saw the sign, the lighted up sign there
20 that says 'public pavilion' and so it just led me -- what's
21 the history? I think you might have mentioned it earlier.

22 MS. KLEIN: Applications are brought forward to you for
23 consideration. So in '96 the Port and Scott's approached
24 BCDC, as they've described. Our job is to analyze the
25 project consistent -- to find it consistent with the law and

1 the policies. The project was found consistent with the
2 restrictions placed on the private use of the pavilion and
3 the improvements to be made available to the public.

4 The Port manages the use of the pavilion when it is in
5 public use mode. So all of its tenants, including Scott's,
6 are supposed to get prior approval from the Port for any
7 activities that take place in the pavilion, be they private
8 in the case of Scott's, or public in the case of anybody
9 else who may wish to use the pavilion.

10 COMMITTEE MEMBER TECHEL: Okay. So folks other than
11 Scott's have access to the pavilion?

12 MS. KLEIN: Yes. There are other events such as a
13 farmers market, movie night, dancing, that the Port's
14 property manager has worked very hard to promote the greater
15 use of Jack London Square.

16 COMMITTEE MEMBER TECHEL: Okay. The first action that
17 we took, was the Port part of that first action? I don't
18 recall that.

19 MR. ZEPPETELLO: Yes they were, they were a party to
20 that stipulated order.

21 COMMITTEE MEMBER TECHEL: Okay. That's it.

22 COMMITTEE MEMBER ADDIEGO: Thank you, Ms. Techel.

23 I wanted to start off by maybe an apology is in order
24 because I was unable to make the full Commission meeting, as
25 were a couple of others, and so we were unable to be part of

1 that discussion and I think that's unfortunate and certainly
2 it won't happen again.

3 But earlier about an hour and a half ago we heard from
4 Mr. De La Fuente and he challenged me to remember going to
5 Jack London Square. And he said, if you've been to Jack
6 London Square and the pavilion you would recognize that it
7 is a modest impact to the public access. And indeed it is
8 because it creates a problem for the view.

9 COMMITTEE CHAIR SCHARFF: Commissioner Addiego, what we
10 are really trying to do is questions. We will do
11 deliberations and comments next.

12 COMMITTEE MEMBER ADDIEGO: Just give me one more minute
13 and I'll bring that question around.

14 So the modest impact to the public access. My question
15 for our staff is, we have landed on a \$1,000 per day penalty
16 for the public access violations, the flagrant and
17 extensive. And they are and I don't want to see, I don't
18 want to see any of those be washed away. But do we have the
19 ability to move to the low end of the penalty? In other
20 words, instead of \$2,000 on the high or \$1,000 on the
21 middle, \$10 per day; is that within our purview?

22 MR. ZEPPETELLO: Yes, it is within your purview. The
23 penalty statute says the penalty can be between \$10 and
24 \$2,000 per violation.

25 COMMITTEE MEMBER ADDIEGO: I do have one question I

1 need to understand on that point before going in that
2 direction; I really need to understand the spirit. It was
3 Ms. Liz Gallagher who spoke who said she took control in
4 2014. There seems to be a disconnect in what we are trying
5 to accomplish here, Ms. Gallagher. You said you were
6 willing to pay the fine if you went over the limit three
7 times in a year, and I certainly don't think it is the
8 spirit of what we are trying to accomplish here with public
9 access that you see the \$2,000 penalty as an ability to use
10 the space over the limit. Was that, was that it?

11 MS. GALLAGHER: I'm sorry, I'm not following what I
12 said that you misunderstood.

13 COMMITTEE MEMBER ADDIEGO: You mentioned that you went
14 over by three times in one year.

15 MS. GALLAGHER: Right, in 2016.

16 COMMITTEE MEMBER ADDIEGO: And you would be okay with
17 paying the penalty?

18 MS. GALLAGHER: Well, I don't know that I stated that
19 exactly, that's not what I meant.

20 COMMITTEE MEMBER ADDIEGO: Please, please restate.

21 MS. GALLAGHER: I said that the penalty that we were,
22 that your committee agreed to, \$250,000, that we were -- we
23 knew we did wrong, we knew we overused and we wanted to
24 explain why it was overused, because there's a lack of
25 facilities in Oakland. And we admit that the permit, we

1 didn't follow the rules.

2 COMMITTEE MEMBER ADDIEGO: I guess what I'm looking for
3 is, is it just your belief that going over by three times is
4 not a major infraction or you would be willing to pay some
5 penalty with it or are you going to stay within the letter
6 of the agreement?

7 MS. GALLAGHER: I am willing -- I want to.

8 COMMITTEE MEMBER ADDIEGO: I just needed that
9 assurance.

10 MS. GALLAGHER: I really, really want to. We did 73 in
11 2015. And when we were negotiating, most of 2016 we had
12 extra days. So I told my sales force, book a couple more,
13 we're going to get extra days, we're going to get through
14 this, and then we go to the full committee and no, we're
15 not.

16 COMMITTEE MEMBER ADDIEGO: That's good to hear.

17 MS. GALLAGHER: So then I'm in violation. But I just
18 -- I'm a rule follower.

19 COMMITTEE MEMBER ADDIEGO: Okay.

20 MS. GALLAGHER: Had I known --

21 COMMITTEE MEMBER ADDIEGO: That's all I needed to hear.

22 MS. GALLAGHER: Okay.

23 COMMITTEE MEMBER ADDIEGO: You're a rule follower,
24 we've established that.

25 And then finally, Mr. Gallagher, I needed to know where

1 you were coming from because at some point you were going to
2 balance this fine maybe closing the restaurant or maybe by
3 dealing with the compensation and benefits of your
4 employees? I must have heard wrong.

5 MR. GALLAGHER: No, sir. This agreement that was
6 reached, I was going to reach into my savings account and
7 pay the fine completely of my own money.

8 COMMITTEE MEMBER ADDIEGO: Okay, it's good to hear
9 that. And I'm sure --

10 MR. GALLAGHER: I was going to do that because the cost
11 to continue this dialogue that seems to be a conversation in
12 discord at many times. Not blaming anyone, it just is a
13 very complicated issue. We were willing to reach into our
14 pocket, pay the money and settle it.

15 If it goes to \$841,000 that's a deeper pocket and then
16 there would have to be other decisions made and they could
17 affect the wherewithal of the restaurant and the employees,
18 unfortunately.

19 I operate this business for the use of the public and
20 for the benefit of my employees and management. I am
21 basically retired. I am 70 years of age and I have been in
22 business 51 years. This is the first time I have been
23 before a court of law or a jurisdiction like this. I would
24 like to seek resolution. I think it benefits everyone,
25 including the public.

1 COMMITTEE MEMBER ADDIEGO: Thank you.

2 COMMITTEE MEMBER GIBBS: One more question. So I think
3 we are spending a lot of times with Scott's. I think it's
4 important we try and reach a global resolution to the extent
5 that we can. And I think we are going to have the
6 deliberations later and I'll have remarks in two areas. One
7 is the nature of public access and the second is the
8 procedural and organizational issues surrounding the
9 relationship and the fines and everything.

10 But there is one question in regards to the access.
11 And I think I have signaled my position before in earlier
12 meetings. I am a fan of Scott's. I live in Alameda, I have
13 been to a lot of events, we can talk about that in a minute.
14 And I think that the more access to Jack London Square the
15 better and I think you guys are key to that.

16 So what is your outer limit that you would like in
17 terms of possible events or days per year? I think that's
18 something that is important for our deliberations.

19 MR. DE LA FUENTE: During the time that we had these
20 several discussions with staff and negotiations with the
21 staff we looked at actually the number of events and the
22 type of events. And our position has been that we arrive to
23 the numbers or wanted to stay to the letter of the law,
24 right, so it was 73, 20 years ago. Obviously, as you
25 stated, Jack London Square has grown.

1 So we're going to stay within what we agreed to. So
2 that's how we came up with 104 events for private events and
3 20 nonprofit events. Actually it's the only restaurant that
4 actually really does nonprofit events. But we understood
5 that. So when we were not able to achieve resolution I
6 think that Mr. Verna sent the letter of December. I think
7 he increased the amount to \$300,000 and I think reduced some
8 of the days to make it more palatable to BCDC. The issue
9 was too many days so we reduced the number of days, I think,
10 to 104 total, I believe, and \$300,000.

11 So we believe that it is in the best interest of
12 Oakland, the best interest of Jack London Square to have as
13 many events as possible. But we understand the issue of the
14 public access and I think that that's the reason why we
15 proposed 104.

16 COMMITTEE MEMBER GIBBS: Okay. But I can ask that in a
17 second, I'm asking you right now. Is it \$365,000? What is
18 it and then we'll talk about the environmental or logistical
19 or other obstacles. But from your perspective, Scott's,
20 what is the number in an ideal world that you would like to
21 see?

22 MR. DE LA FUENTE: A hundred and twenty.

23 COMMITTEE MEMBER GIBBS: A hundred?

24 MR. DE LA FUENTE: A hundred and twenty. That's what
25 we proposed.

1 COMMITTEE MEMBER GIBBS: Okay.

2 MR. DE LA FUENTE: I think that 104 for-profit events
3 and the 20 that we agreed to then you approved. To us
4 that's a workable number of days that will work for
5 everyone.

6 COMMITTEE MEMBER GIBBS: Okay. So we could, we could
7 go forward with that?

8 MR. DE LA FUENTE: Just one more -- could I?

9 COMMITTEE MEMBER GIBBS: Go ahead.

10 MR. DE LA FUENTE: Just to highlight what Mr. Verna
11 explained. The reality is it more days and more time that
12 is open, that is accessible to the public because of the
13 mechanisms that we installed.

14 COMMITTEE MEMBER GIBBS: I've got it.

15 MR. DE LA FUENTE: That's a key and I don't think the
16 staff really spent that much -- give that too much credit
17 when they negotiated.

18 COMMITTEE MEMBER GIBBS: So to BCDC staff, is there
19 some number of days at which either the environment becomes
20 threatened or public access becomes degraded? What is the
21 upper limit?

22 MR. ZEPPETELLO: Commissioner Gibbs, the direction that
23 we heard from the Commission on November 3rd was to separate
24 the issue of increased days from this enforcement
25 proceeding; so our position at this point is that it is 73

1 days until it goes back to the Commission and until staff
2 has an ability to analyze it. But it is really a decision
3 for the Commission, not for staff, and it is not before us
4 today.

5 MS. TIEDEMANN: I would also point out that the
6 previous stipulated order provided that staff would
7 recommend to the Commission a certain number of days for
8 private pavilion use but it did not commit the Commission to
9 anything in that regard because neither this Committee nor
10 staff can amend the provisions of the existing permit. And
11 I would echo Mr. Zeppetello's comments that the
12 Commissioners were quite concerned about including as part
13 of any agreement or Stipulated Cease and Desist Order a
14 limit on what staff can recommend for a permit amendment.

15 COMMITTEE CHAIR SCHARFF: So I was going to wrap this
16 up and say I have one question, really, which is: Before us
17 is the Proposed Cease and Desist Order; and on that Cease
18 and Desist Order we have heard a lot of complaints about the
19 amount of the fine. But we also have to recommend the
20 entire Cease and Desist Order and parts of that. So I guess
21 I was going to ask Scott's counsel if any of the conditions
22 were -- if there were any of those conditions that he wished
23 to comment on in terms of in opposition to them?

24 MR. VERNA: Well.

25 COMMITTEE CHAIR SCHARFF: Briefly.

1 MR. VERNA: I don't have it right in front of me. The
2 major issue, I will say this, the major issue is that last
3 time we had a stipulation with the Cease and Desist Order it
4 was the payment of a fine and then subject to, as
5 Ms. Tiedemann mentioned --

6 COMMITTEE CHAIR SCHARFF: Well let me just go through
7 them quickly then. There is the provide public access
8 improvements required by the permits. Any issue with that?

9 MR. VERNA: No issue with that.

10 COMMITTEE CHAIR SCHARFF: I understand there is an
11 issue with recording the legal instrument, that's not on
12 you.

13 MR. VERNA: We don't have any control over that.

14 COMMITTEE CHAIR SCHARFF: There is providing the
15 pavilion event schedule.

16 MR. VERNA: We have no problem with that.

17 COMMITTEE CHAIR SCHARFF: There's submit completed
18 application to amend the permit.

19 MR. VERNA: We've already done that.

20 COMMITTEE CHAIR SCHARFF: All right. And then
21 compliance with the Permit Exhibit A Guidelines.

22 MR. VERNA: That would be the 73 and we will agree to
23 go to 73.

24 COMMITTEE CHAIR SCHARFF: And there is no storage or
25 equipment or unauthorized use of public access areas and

1 there was the planter removals.

2 MR. VERNA: The planter removals are fine. I want to
3 make sure we are clear on what they mean by where the
4 storage is. It's been where it's been for 20 years.

5 COMMITTEE CHAIR SCHARFF: Okay.

6 MR. VERNA: As long as that's not -- The problem was it
7 was going to be subject to -- pay the fine and then subject
8 to BCDC staff approval of the permit. That was a problem,
9 it doesn't get us closure. What we are trying to get is
10 closure, get it all done at once. Somebody mentioned the
11 word 'global.' That's what we want. And now that the staff
12 has our permit application we'd like it to be processed and
13 have that resolved along with the penalty.

14 COMMITTEE CHAIR SCHARFF: Okay, thank you. All right.

15 So now we will come to the public and you will have --
16 Let's count this. Everyone is going to have 30 seconds.

17 The first person is Seth Korsmeier to be followed by
18 Kelly Hodgins.

19 MR. KORSMEIER: My name is Seth Korsmeier, I am one of
20 the managers for Scott's. I work over on the other side of
21 the tunnel and I have constant people, especially when this
22 was brought to light on the news, that came up to me and
23 said that they would never have gone to Jack London Square
24 had it not been for the events, both nonprofit and for-
25 profit events, that were held by Scott's in the pavilion.

1 Once they got there, their memories of Jack London
2 Square was it was a dump. The memories now is that it's a
3 great place to go to bring their family. The views that are
4 there, they could not believe that that was such an
5 obstruction. There is so much area there.

6 I just want to reiterate that many, many people have
7 come up to me and said they would not have even gone to Jack
8 London Square if it wasn't for those events that were held
9 there. Thank you.

10 (Applause.)

11 COMMITTEE CHAIR SCHARFF: Kelly Hodgins.

12 MS. HODGINS: Good morning, Commissioners, counsel. My
13 name is Kelly Hodgins.

14 I have been an employee for 20 years at Scott's and I
15 just want to reiterate what was said earlier this morning.
16 I want to attest to -- sorry -- that the substantial fine
17 that is being imposed would definitely jeopardize the
18 employees of the restaurant and it will also affect all of
19 our families.

20 Secondly, I would like to attest that the retractable
21 walls have cut down the time to a quarter of an hour, as
22 mentioned.

23 I would like to attest that Scott's is one of the few
24 facilities in the area that can accommodate large community
25 events and fundraisers and I am very proud of what Scott's

1 and Mr. Gallagher and myself can do for the community. And
2 unfortunately we do have to turn away fundraisers because we
3 are limited to 73 events.

4 Lastly, not as an employee but as the public sector, I
5 want to attest that in the 35 years that I have worked down
6 in Jack London Square --

7 COMMITTEE CHAIR SCHARFF: I'm sorry, that's time.

8 MS. HODGINS: Okay.

9 COMMITTEE CHAIR SCHARFF: If we could have Stephen
10 Lewis to be followed by Tom Louderback. If you could line
11 up a little bit. And after Tom we'll have Sandra.

12 MR. S. LEWIS: It seems like we should harmonize over
13 the issues and the \$841,000 should go to Mr. Gallagher and
14 his improvement and access to the Estuary. You can drive an
15 M-16 tank through the gap between the enclosures with the
16 walls up and the adjacent restaurant. Justice delayed is
17 justice denied and we have seen a lot of delay and
18 obfuscation and who judges the judges?

19 (Applause.)

20 COMMITTEE CHAIR SCHARFF: Tom Louderback.

21 MR. LOUDERBACK: Good morning. My name is Tom
22 Louderback; I moved to Oakland in the early '80s, before
23 Scott's.

24 I know one thing about Jack London Square, Ray
25 Gallagher was there when no one else was there. Places

1 would come and go, the place was blighted. He always
2 maintained a very high standard, he always brought people to
3 Oakland before Oakland was cool.

4 This level of this fine is just -- it's what is wrong
5 with this country right now, it's government overreach. I
6 can't believe that -- no real harm has been done. There is
7 full access even when the pavilion is closed. I've used it
8 myself growing up in Oakland, I've been to events. It's
9 unbelievable to me that, yeah, well, Ray's a special
10 character but you would punish somebody -- and I have to
11 believe there's got to be other motives behind this.

12 COMMITTEE CHAIR SCHARFF: Thank you; that's time.

13 MR. LOUDERBACK: Thank you.

14 (Applause.)

15 COMMITTEE CHAIR SCHARFF: Sandra Threlfall, to be
16 followed by Naomi Schiff.

17 MS. THRELFALL: I'll cede my time to David Lewis.

18 COMMITTEE CHAIR SCHARFF: We don't cede time, everyone
19 gets 30 seconds.

20 MS. THRELFALL: What?

21 COMMITTEE CHAIR SCHARFF: We don't cede time. You can
22 either come up to speak or not.

23 MS. THRELFALL: You don't cede time?

24 COMMITTEE CHAIR SCHARFF: No. You can either come up
25 and speak or not.

1 MS. THRELFALL: Public access is your job. A hundred
2 foot setback is your job. And for six-plus years no one did
3 your job and someone made money off it and it wasn't the
4 public. And for these nonprofit events that they shouldn't
5 be counted, does that mean that they gave the whole event
6 for free? I highly doubt it. This is a public place and
7 the public deserves to have it back.

8 My name is Sandra Threlfall, I am Executive Director of
9 Waterfront Action.

10 COMMITTEE CHAIR SCHARFF: Thank you.

11 Naomi Schiff to be followed by Keith Miller.

12 MS. SCHIFF: Naomi Schiff. I have only lived in
13 Oakland since 1974. I have been to many events, both at
14 Scott's and around Scott's, and yes, the pavilion blocks
15 access to the water views and it also feels like a private
16 place. The enormous confusion here between holding
17 nonprofit events and actual pavilion is a red herring and I
18 really urge you to think seriously about the ability of
19 people to use the space, which to me is what's important.
20 Thank you.

21 COMMITTEE CHAIR SCHARFF: Thank you.

22 Keith Miller.

23 MR. MILLER: Keith Miller, California Canoe and Kayak.

24 I want to thank the BCDC staff and the Port of Oakland
25 for trying to do the right thing here and I actually support

1 the Port's position at this point in time to just rescind
2 the permit entirely.

3 I urge the BCDC to separate the penalty, separate the
4 enforcement from any further amendments. The integrity of
5 BCDC is on the line right now and you guys need to be aware
6 of that.

7 You can borrow on equity, Ray. That's the end, thank
8 you.

9 COMMITTEE CHAIR SCHARFF: Thanks.

10 Benjamin - sorry - K-I-B-C-T-H-I, to be followed by
11 Gina Longmire.

12 MR. KIBCTHI: My name is Benjamin; I am a server at
13 Scott's Seafood.

14 I just want to say that any undue burden posed on
15 Scott's has real-life implication to me and my fellow
16 coworkers over here. So I beseech the Commission to move on
17 the side of equity and reconsider and put a face value on
18 each burden imposed on Scott's. Thank you.

19 (Applause.)

20 COMMITTEE CHAIR SCHARFF: Thank you.

21 MS. LONGMIRE: Hi, my name is Gina Longmire and I had a
22 lot to say, actually, with regards to the philanthropy and
23 the kindness and generous donations showed to my
24 organizations through Scott's, which are numerous
25 nonprofits, but now I feel the need to defend Scott's in

1 what a lot of people have said.

2 Number one, with regards to the public not being
3 allowed into the nonprofit events: That is completely
4 untrue. We offer, we open it up to the public and Scott's
5 has been a part of offering that out. They put it online,
6 they put things in front, everything is open to the public
7 when it comes to those events. So for the ladies behind me
8 to also say that that is not something that -- it's not for
9 public use, it's 100 percent incorrect.

10 In addition the venues, the food, anything that has
11 been given to us by Scott's is almost discounted so it is
12 given at almost a free rate.

13 COMMITTEE CHAIR SCHARFF: Thank you.

14 (Applause.)

15 COMMITTEE CHAIR SCHARFF: Chris McKay to be followed by
16 David Lewis. Chris McKay to be followed by David Lewis.

17 MR. MCKAY: Hello. I was the Harbor Master of Oakland
18 Marina of Jack London Square from 2011 January to April of
19 2015. I during that time saw Jack London square go from a
20 very sort of desolate at night place to a lot of activity.
21 Scott's brought in tens of thousands of people, it added to
22 the community. I don't see that there is any disadvantage
23 to bringing people to the waterfront and I think that the
24 way they were brought there by Scott's is beneficial to our
25 society and especially to Oakland. Thank you.

1 (Applause.)

2 COMMITTEE CHAIR SCHARFF: Thank you.

3 MR. D. LEWIS: Thanks, Commissioners. David Lewis,
4 Executive Director of Save the Bay.

5 I strongly support the staff recommendation. It very
6 accurately reflects what the full Commission recommended and
7 I would strongly urge you not to reduce the penalties as
8 suggested.

9 Because the Commission's permit integrity is on the
10 line here. This is a very important test case. Permits
11 apply to permit holders, whether or not they are venerable
12 businesses, beloved individuals, politically connected,
13 wealthy, charitable or good to their employees.

14 Scott's knows what this permit means. They can afford
15 lawyers and they have afforded lawyers to read the fine
16 print. And they have been defiant in violating the permit
17 over a repeated period of time and you should not reward
18 them for that. Thank you.

19 COMMITTEE CHAIR SCHARFF: Thank you, David.

20 Kelly Hodgins to be followed by Adrienne Klein.

21 MS. KLEIN: It's Steve Real.

22 COMMITTEE CHAIR SCHARFF: Oh, sorry, Steve Real, I was
23 confused too. Kelly Hodgins.

24 UNIDENTIFIED SPEAKER: She already spoke.

25 COMMITTEE CHAIR SCHARFF: She already spoke, all right.

1 So Steve Real. Steve Real.

2 MS. KLEIN: I received a telephone call on February 8
3 from Steve Real. He stated he is a union man who supports
4 keeping jobs in Oakland. That \$250,000 seems like the right
5 fine. He said BCDC isn't thinking right, we should be fair
6 and we are pushing it too far.

7 I informed Mr. Real that he could address you directly
8 in writing or in person but in the absence of hearing again
9 from him that I would address his comments to you on his
10 behalf.

11 COMMITTEE CHAIR SCHARFF: All right, thank you.

12 (Applause.)

13 COMMITTEE CHAIR SCHARFF: And now we return back to the
14 Commission for deliberations but first I need to close the
15 public hearing. So first I'll close the public hearing.

16 COMMITTEE MEMBER RANCHOD: Second.

17 MS. TIEDEMANN: You can vote on that but then I would
18 like to comment on two legal matters.

19 COMMITTEE CHAIR SCHARFF: Okay. So first we'll take a
20 motion to close the public hearing.

21 COMMITTEE MEMBER TECHEL: I'll make that motion.

22 COMMITTEE MEMBER RANCHOD: Second.

23 COMMITTEE CHAIR SCHARFF: All in favor?

24 (Ayes.)

25 COMMITTEE CHAIR SCHARFF: You wanted to comment on some

1 legal matters?

2 MS. TIEDEMANN: Yes, two legal matters.

3 First, a housekeeping matter, that this Committee needs
4 to determine whether it will accept the additional evidence
5 submitted by the Port and remember to do that before you
6 make your decision.

7 Second, on the issue of the 66 year alienation
8 controversy. It is true that one of our office clients, the
9 State Lands Commission, takes the position that the Port may
10 not record an instrument that permanently guarantees the
11 public access.

12 Rather than hashing through that debate I have a
13 suggested solution and addition to the Cease and Desist
14 Order. It is an addition to paragraph III.H of the Cease
15 and Desist Order; that's on page 7 of the Proposed Order.
16 The suggested language is:

17 The recorded instrument may acknowledge the
18 66 year restraint on the alienation of granted
19 public trust lands. However, it must affirm that
20 so long as the permit remains valid the permittees
21 are required to have a valid recorded instrument
22 guaranteeing the public access required by the
23 permit and that a failure to provide that
24 dedication will constitute a violation of the
25 permit.

1 Thank you.

2 COMMITTEE CHAIR SCHARFF: Thank you. And that would be
3 the replacement of the language that is currently there?

4 MS. TIEDEMANN: No, it would be an addition to that
5 language.

6 COMMITTEE CHAIR SCHARFF: Okay, so that would just be
7 an addition, got it. All right, we'll return to the
8 Commission. And could you write that out for us?

9 MS. TIEDEMANN: I have it written out.

10 COMMITTEE CHAIR SCHARFF: Can you pass it out?

11 MS. TIEDEMANN: I only have one copy.

12 Also Commissioners should take this opportunity to
13 report ex parte communications on this matter.

14 COMMITTEE CHAIR SCHARFF: Any ex parte communications?

15 COMMITTEE MEMBER GIBBS: I do have one to report. Sam
16 Lauter of the firm BMWL contacted me on behalf of Scott's
17 late last week by phone.

18 COMMITTEE MEMBER RANCHOD: None to report.

19 COMMITTEE CHAIR SCHARFF: None to report?

20 COMMITTEE MEMBER ADDIEGO: No.

21 COMMITTEE CHAIR SCHARFF: And I have none to report.

22 All right. So now we return to the Committee for
23 deliberations. Go ahead.

24 COMMITTEE MEMBER RANCHOD: I have a couple of questions
25 for staff on the various proposed penalty amounts you laid

1 out, specifically the option of going back to January of
2 2013. You stated that amount, as you've calculated, would
3 be \$425,360. Can you clarify, does that include the
4 calculation of \$30,000 for the failure to record the legal
5 instrument?

6 MR. ZEPPETELLO: Yes, it does.

7 COMMITTEE MEMBER RANCHOD: Okay. So if we were to
8 remove the \$30,000 amount it would reduce that amount by
9 \$30,000?

10 MR. ZEPPETELLO: Correct.

11 COMMITTEE MEMBER RANCHOD: Okay. And is it an option
12 for -- I guess let me ask it this way: Am I correct in
13 understanding that with respect to that part of the proposed
14 penalty which has been proposed as \$30,000 for failure to
15 permanently dedicate and record the legal instrument, that
16 if that penalty was assessed over a period of 4 years
17 instead of 13 years and it was assessed at \$10 a day instead
18 of \$1,000 a day, that that total would then reduce to
19 \$14,600?

20 MR. ZEPPETELLO: I'd have to do the math.

21 MS. KLEIN: This violation is a single occurrence and
22 it caps at \$30,000, Commissioner Ranchod, so it's actually
23 assessed a penalty of \$250 a day in the staff
24 recommendation.

25 COMMITTEE MEMBER RANCHOD: Okay.

1 MS. KLEIN: So at \$10 a day it would take 300 days to
2 reach \$30,000 -- 3,000 days.

3 COMMITTEE MEMBER RANCHOD: Right, okay. I think my
4 math is right. So if we did it that way, if we looked at it
5 going over four years, 2013, '14, '15, '16, that would be
6 1,460 days at \$10 a day, it would be \$14,600.

7 MS. KLEIN: Okay, I'm with you now; correct.

8 COMMITTEE MEMBER RANCHOD: Okay. And can you also
9 clarify with respect to the portion of the penalty that has
10 to do with the overuse of the plaza. Can you clarify? That
11 calculation in here is \$98,500. But does that go back --
12 the amount you had suggested if we go back to January 2013,
13 the \$425,360, what portion is attributed to that part of it?

14 MR. ZEPPETELLO: Going back to January 2013, the amount
15 for the unauthorized use of the plaza would be \$14,500. So
16 you could divide that under our proposal at 50/50. But the
17 total number would be \$14,500 for those violations.

18 COMMITTEE MEMBER RANCHOD: Okay. So if we were to take
19 the \$425,360, subtract the \$30,000 for the failure to record
20 the legal instrument and subtract the overuse of the plaza
21 you would reduce that \$425,000 by \$30,000 and then another
22 \$14,500?

23 MR. ZEPPETELLO: Correct, if you were not going to
24 charge anything for those violations, or assess.

25 COMMITTEE MEMBER RANCHOD: Thanks.

1 COMMITTEE CHAIR SCHARFF: Commissioner Techel.

2 COMMITTEE MEMBER TECHEL: In the presentation you gave
3 us as you talked about the terms of the Proposed Order cease
4 and desist provisions one of them is may -- part of the
5 application was 'may not request authorization for increased
6 use of the pavilion for private events.'

7 We understand today that we are not talking about
8 increased use of the pavilion. But if they sign the permit,
9 the permit they sign is it going to ask for them, is it
10 going to say because of this agreement they may not ask for
11 more days?

12 MR. ZEPPETELLO: No, the point was that based on the
13 direction from the Commission on November 3rd to separate
14 that, that as part of this amendment to resolve these
15 violations and get on a clean slate and authorize or seek
16 authorization for the unpermitted construction, that that
17 should be what the application should cover, not increased
18 days. But they would be free, based on the direction from
19 the Commission, to come back at a future date with a future
20 amendment request to increase days.

21 COMMITTEE MEMBER TECHEL: And where is that in the
22 document, where is that language?

23 MR. ZEPPETELLO: That they would be free to come back
24 later? That is not in there it's just, I guess, implicit
25 that they wouldn't be allowed to do that as part of this

1 application.

2 COMMITTEE MEMBER TECHEL: Where is the language in the
3 document that says they can't put this in their application?

4 MR. ZEPPETELLO: Let me find it for you. I'll be right
5 there. It's on page 6, Item F.1, the last sentence.

6 COMMITTEE MEMBER TECHEL: And your intent is during
7 this process that they may not, but they are not signing
8 something that says we are never going to come back and ask.

9 MR. ZEPPETELLO: Correct.

10 COMMITTEE CHAIR SCHARFF: Any other questions or
11 comments from Commissioners?

12 COMMITTEE MEMBER ADDIEGO: I wanted to maybe echo some
13 of Commissioner Ranchod's direction. I think it might be
14 possible to not pick an arbitrary date and have all of
15 calendar years 2014 to '16 but really look at the minimum
16 penalty as an alternative to the halfway point, which by
17 some rough calculations would drive the fine down to the
18 \$317,000 range, which I think is more than fair given all of
19 the discussion. I think unfortunately BCDC, there was a
20 great amount of time that passed before we brought this into
21 this type of a hearing and I think some of the burden is on
22 us.

23 COMMITTEE CHAIR SCHARFF: So I agree a great amount of
24 time has passed and that's why I was interested in the 2013
25 date, frankly, because I do think a whole bunch of time has

1 passed.

2 But I also wanted to address the Port issues. I think
3 we should dismiss the Port from this proceeding. I think
4 that we should make the change at H. I think we should not
5 fine Scott's for non-recordation of the legal instrument,
6 that's obviously \$30,000.

7 Those are really my comments on this. Commissioner
8 Gibbs.

9 COMMITTEE MEMBER GIBBS: Thank you. I wanted to
10 propose kind of a global settlement for this Committee. I
11 understand that the Commission has given us some direction
12 but I think they will be open to our report-out. Let me --
13 it largely again hinges on two aspects, the access and as
14 Mr. Lewis put it, the permit integrity of this Commission.
15 Let me speak to both.

16 With respect to the access. I think Scott's is the
17 jewel in the crown of Jack London Square. All over the
18 world people go to the waterfront to seek their peace and to
19 enjoy themselves and to have a good time and Scott's
20 provides good food, a beautiful location and frankly a
21 wonderful staff, many of whom are here today.

22 So we too are responsible for the public trust. And I
23 think for the East Bay and for Oakland, having people come
24 down to Jack London Square and seeing a wonderful facility
25 that they can have a reception. I've been to a wedding

1 reception, I've been to fundraisers, maybe even for you,
2 Mr. De La Fuente. I've been to other receptions and it is a
3 wonderful facility. That is very, very important. And
4 that's the broadest view of public access and I think it's
5 appropriate for this Commission to take.

6 With respect to waterfront views and other things. The
7 fact of the matter is -- I am not an architect but it's
8 maybe 300 feet along the front. If you want to see the
9 water you just step around the building and there's plenty
10 of other places to go see the water, okay.

11 (Applause.)

12 COMMITTEE MEMBER GIBBS: So I think it's really
13 important to say that. And furthermore with respect to the
14 Bay in general, the San Francisco Bay in general. If you're
15 going to look at nature and look at the water there's other
16 places to do it. You go to Jack London Square to be part of
17 a community and other things.

18 The argument that this is somehow restricting access is
19 just a red herring and it's not true.

20 I believe that probably some of the higher penalties
21 were based on that notion and I think they are inappropriate
22 so my proposal would be the following:

23 I think Commissioner Ranchod has calculated and laid
24 out a rationale for a fine in the nature of I think it was
25 \$380,000 and he was proposing a three year period to pay

1 that. And I think that is significant, it is higher than we
2 agreed and it sends a signal of what we're doing.

3 I would like to be able to adopt the highest figure
4 that was proposed by Mr. De La Fuente and Scott's for the
5 number of events per year. I believe it was -- was it 140?

6 MR. DE LA FUENTE: Actually 124.

7 COMMITTEE MEMBER GIBBS: One hundred twenty-four.

8 MR. DE LA FUENTE: Yes.

9 COMMITTEE MEMBER GIBBS: One hundred twenty-four, okay.

10 But then I think there has been kind of -- we are
11 wrestling with people just being openly defiant of what we
12 do. And the next highest figure, counsel, for the bird
13 club, was basically somebody that wanted to have a bird club
14 on an island in the middle of the Bay and came to this
15 Commission, and I am paraphrasing his argument, but it was
16 two: One, I had no idea that we needed to get a permit for
17 this; and two, and/or the staff actually told me that we
18 didn't need to. So there is just kind of this pattern of
19 open defiance of BCDC that needs to stop.

20 And so I am going to suggest that staff work with
21 Scott's to come up with some other gesture that recognizes
22 that they realize that it wasn't just mistakes were made but
23 actually you, Scott's, made the mistakes and you didn't
24 cooperate with BCDC like you should have.

25 And Ms. Gallagher, you said you are going to be a rule-

1 follower from now on so let's figure -- there is something
2 that we can figure out that is a symbolic recognition of
3 that. Because I think the money is enough but we do, I
4 think we need that; so I am proposing that.

5 And then finally, I would agree and propose that the
6 Port be dismissed from this action.

7 COMMITTEE CHAIR SCHARFF: So let me understand just so
8 we put it in legal, more legal terms, I think. So we are
9 going to approve the Cease and Desist Order but dismissing
10 the Port?

11 COMMITTEE MEMBER GIBBS: Yes.

12 COMMITTEE CHAIR SCHARFF: So the Port would be
13 dismissed from the Cease and Desist Order?

14 COMMITTEE MEMBER GIBBS: Yes. Yes.

15 COMMITTEE CHAIR SCHARFF: But everything in the Cease
16 and Desist Order would be adopted with the exception of a
17 couple of things. First of all, it would be on page - what
18 is it - 6, H. Yes, page 6, H. We adopt the language that
19 would be in -- that was suggested to us.

20 COMMITTEE MEMBER GIBBS: Yes.

21 COMMITTEE CHAIR SCHARFF: We add that. And then we
22 would lower the fine to -- what was the number you
23 suggested?

24 COMMITTEE MEMBER RANCHOD: I'll get into my proposed
25 number when we get there.

1 COMMITTEE MEMBER GIBBS: Well I think his number.

2 COMMITTEE CHAIR SCHARFF: We're there now.

3 COMMITTEE MEMBER GIBBS: I think his number, I

4 understood his number to be \$356,000.

5 COMMITTEE CHAIR SCHARFF: Okay. Well we're there now

6 so if you want to explain your number.

7 COMMITTEE MEMBER RANCHOD: Okay. I would suggest

8 taking the number the staff had identified as the

9 calculation for January 2013, that was \$425,360. Deleting

10 the \$30,000 of that which was for the failure to deal with

11 the legal instrument and that takes you down to \$395,360. I

12 would submit that that is the appropriate number.

13 In recognition of the business impacts of a fine, a

14 penalty that large I would suggest that the Commission allow

15 that amount to be paid in equal amounts over a three year

16 period so as to minimize the impact on the business.

17 I would give further consideration to a portion of that

18 amount, perhaps 10 or 20 percent, being satisfied by the

19 payment of bringing all of this into compliance and dealing

20 with the permit conditions. I am open to that part of it.

21 I think that number of \$395,360 is a fair amount that

22 balances the clear and knowing willful violations, I

23 believe, that occurred over a long period of time. But

24 recognizing that the Commission is on solid ground going

25 back to 2013, because that is when enforcement proceedings

1 were begun, that is when Scott's was on notice that there
2 were violations and that we were in enforcement context.

3 So that is my suggested number, \$395,360, with the
4 flexibility to satisfy that over a three year period.

5 COMMITTEE CHAIR SCHARFF: So Commissioner Gibbs, this
6 is your motion. That was his suggestion.

7 COMMITTEE MEMBER GIBBS: I will accept that suggestion.

8 COMMITTEE CHAIR SCHARFF: All right.

9 MR. ZEPPETELLO: Could I just make one comment just
10 with respect to the idea of a portion of the penalty being
11 applied for remedial measures. Under the statute the
12 penalties need to be paid into the Bay Fill Cleanup and
13 Abatement Fund and I would suggest that there is no
14 flexibility to do what you suggested, at least on that
15 aspect.

16 MS. TIEDEMANN: I understood the suggestion to be that
17 if remedial measures are in place by a certain date a
18 portion of the penalty would be waived.

19 COMMITTEE CHAIR SCHARFF: Would be waived.

20 COMMITTEE MEMBER RANCHOD: Correct.

21 COMMITTEE CHAIR SCHARFF: Commissioner Gibbs, was that
22 your understanding?

23 COMMITTEE MEMBER GIBBS: That was my understanding.

24 COMMITTEE CHAIR SCHARFF: You need to choose a number,
25 it can't be 10 or 20, you need to have an actual number.

1 COMMITTEE MEMBER GIBBS: I'm a deal maker so I'm going
2 to choose 15.

3 COMMITTEE CHAIR SCHARFF: Okay.

4 COMMITTEE MEMBER GIBBS: Okay?

5 COMMITTEE CHAIR SCHARFF: If that is acceptable to your
6 seconder?

7 COMMITTEE MEMBER GIBBS: All right. All right.

8 COMMITTEE MEMBER RANCHOD: I haven't seconded the
9 motion.

10 COMMITTEE CHAIR SCHARFF: You haven't?

11 COMMITTEE MEMBER RANCHOD: I have not.

12 COMMITTEE CHAIR SCHARFF: Okay.

13 COMMITTEE MEMBER GIBBS: I think the final element
14 would be that Scott's and our staff -- and I see Scott's has
15 at their table and in the audience some of the finest minds
16 in Oakland so I know that they can come up with something to
17 really reflect --

18 MS. TIEDEMANN: It's got to be in this Order.

19 COMMITTEE MEMBER GIBBS: It's got to be in this Order?

20 MS. TIEDEMANN: The procedure is once this Committee
21 makes an Order it will then go to the full Commission for
22 consideration, it will not go back to staff for staff to
23 make adjustments to the Order. So if there is a suggestion
24 it should be in this Order.

25 COMMITTEE MEMBER GIBBS: I don't personally have the

1 suggestion, maybe we could offer as a sense of the Committee
2 that there be some cooperation. I don't know why the car
3 isn't there anymore, I used to love the car, but anyway.

4 COMMITTEE CHAIR SCHARFF: Commissioner Gibbs, I don't
5 think that works. I think that we have -- basically what we
6 are doing today is we are approving this document with
7 changes to it.

8 COMMITTEE MEMBER GIBBS: Okay, so let's do that and I
9 hope there will be some opportunities for further
10 cooperation among all of us. But that would be -- I think
11 that --

12 COMMITTEE CHAIR SCHARFF: So I am going to second
13 Commissioner Gibbs' motion just to get it out there without
14 the 10 to 20 percent, which I think we could discuss, or 15
15 percent, because I didn't understand it yet, basically.

16 So the motion as it stands is: We would approve this
17 document, everything that is in here, the Cease and Desist
18 Order, with the exception of H as I have discussed it,
19 adding the language that we wanted. And that we would then
20 change the penalty amount to \$395,000 and the way we got to
21 that is went to the March -- was it January?

22 MR. ZEPPETELLO: January.

23 COMMITTEE CHAIR SCHARFF: January 2013 date, which
24 makes it \$425,360. We subtract the \$30,000 and that gets us
25 to \$395,000.

1 COMMITTEE MEMBER RANCHOD: And 360.

2 COMMITTEE CHAIR SCHARFF: Right, \$395,360. That's the
3 motion on the table. If people want to make amendments or
4 discuss that.

5 COMMITTEE MEMBER RANCHOD: That includes dropping the
6 Port?

7 COMMITTEE CHAIR SCHARFF: Yes, and dismissing the Port
8 completely.

9 MR. VERNA: There are some hidden costs built in here,
10 am I able to comment on them?

11 COMMITTEE CHAIR SCHARFF: Well we are actually in
12 deliberations so if Commissioners wish to ask you a question
13 they can.

14 MR. VERNA: Okay.

15 COMMITTEE CHAIR SCHARFF: Commissioner Addiego?

16 COMMITTEE MEMBER ADDIEGO: Are we voting on the 15
17 percent?

18 COMMITTEE CHAIR SCHARFF: That is not part of the
19 motion yet but it could become part of the motion.

20 Commissioner Techel.

21 COMMITTEE MEMBER TECHEL: Yes. I am just going to go
22 back to kind of where I was thinking because we were saying
23 we are probably all in a little bit different place looking
24 at this.

25 When the report came in and said they met with Scott's

1 and they had agreed to a \$300,000 fine I thought that was a
2 number that was agreed upon. I think a lot of things in the
3 Cease and Desist were additional things that were added but
4 they are willing to consider that.

5 And I think this is about compliance and this about
6 getting solutions to what is happening and I am -- I think
7 adding fines doesn't make compliance. I think a lot of the
8 things in this Order, it's a really tight timeline, there's
9 lots of details about things that have to be done. I guess
10 I'd rather focus on that part of it, bringing it into
11 compliance, and I think the \$395,000 fine is high.

12 (Applause.)

13 COMMITTEE CHAIR SCHARFF: Further deliberations,
14 comments?

15 COMMITTEE MEMBER GIBBS: I guess counsel did want to
16 make a point so I'll ask you, what was your point, counsel?

17 MR. VERNA: Two points.

18 One, this order, the proposed order does not resolve
19 our pending permit application process so it doesn't get us
20 to closure unless the fine and the permit approval process
21 is combined together, number one.

22 And number two, on page 6, F2, this order requires our
23 application to include a public access plan for the pavilion
24 that we are not obliged otherwise to do. It's an add-on by
25 staff that we estimate is going to cost \$100,000 to \$200,000

1 to do this.

2 COMMITTEE MEMBER GIBBS: Why does a public access plan
3 cost \$100,000 to \$200,000?

4 MR. VERNA: There was discussions about two years ago
5 when were trying to resolve some things and this public
6 access plan, as I understand -- do you know? Here.

7 MR. DE LA FUENTE: The public access, you required it
8 and we actually agreed to that. We arrived to even hiring a
9 landscape architect so it requires investment. In the area
10 where the pavilion is it required investment and required
11 landscaping and required changing -- so it's investment that
12 we agreed to make based on the public access and a plan that
13 was kind of approved by BCDC before, a couple of years ago,
14 and we agreed to do that. So that is 150-grand.

15 COMMITTEE MEMBER GIBBS: Is that what you meant by
16 public access?

17 MR. ZEPPETELLO: I would just comment. Yes, as part of
18 the negotiation going back to 2013, as mitigation and
19 compensation for the wall system and the enclosure system
20 there was discussions between staff and Scott's about some
21 additional public access improvements. Adrienne could
22 comment further but my understanding is there was basically
23 conceptual agreement that this would be done and that has
24 been carried through as part of the stipulated order as
25 well. So it is some additional public access improvements

1 to the plaza outside the pavilion, which is why an amendment
2 to the Port's permit is also required to implement that
3 provision.

4 COMMITTEE MEMBER GIBBS: So has it been done?

5 MR. VERNA: No, this was part of the negotiated -- for
6 \$250,000 plus the public access we had a deal. Now we're
7 talking way more than \$250,000 --

8 COMMITTEE MEMBER GIBBS: And you estimate the public
9 access process would cost \$100,000?

10 MR. DE LA FUENTE: We figure based on the sketches that
11 we have in talking to the landscape architects we're looking
12 at about 150 grand.

13 MR. VERNA: And they are making that a condition of
14 approval of the permit.

15 COMMITTEE MEMBER GIBBS: I understand.

16 MR. VERNA: So it's effectively another fine.

17 COMMITTEE MEMBER GIBBS: I understand, we're trying to
18 figure it out.

19 MR. McCREA: Commissioner Gibbs, if I could? The
20 impetus for the public access plan came out of the
21 cumulative impacts for all of the improvements that were
22 proposed to be left behind. If the walls of this facility,
23 if they are in place, if the Commission approves a permit to
24 allow the walls or even the storage area and the roof
25 structure, cumulatively it is a different public access

1 space than the Commission approved back in the 1990s. To
2 offset those impacts the staff negotiated with Scott's
3 public access improvements outside of the pavilion, right
4 adjacent to it, to increase the desirability of the overall
5 aesthetics of the area to draw people down to the
6 waterfront, et cetera. They are relatively simple
7 improvements that, again, were agreed in concept by
8 everybody.

9 COMMITTEE MEMBER RANCHOD: I'll just note two things as
10 part of the balancing of all the equities here, which is, I
11 am very pleased to see --

12 First, look, acknowledge all the good things for the
13 community and revitalizing Jack London Square. As
14 Commissioner Gibbs said, being a jewel of that area and
15 bringing more people to that area to experience the
16 waterfront. Appreciate it, acknowledge that, that's a good
17 thing. But not in the context of the willful violation of
18 permit conditions.

19 And I want to note what's changed since this
20 Enforcement Committee last considered this matter are a
21 couple of important things. There was information about the
22 business' ability to pay and whatnot; and we can argue about
23 how to interpret those numbers but there are some numbers.
24 The business got the permit from the City and the business
25 submitted the permit amendments to BCDC.

1 Now, this has been pending for many months, for years.
2 And I think it's great that those things have happened; it
3 is also disappointing to me to see that it takes the
4 issuance of a massive unprecedented penalty amount to make
5 some of those things happen in a timely way. So I am
6 pleased that there is responsiveness and I think it is also
7 apparent that it is responsive to the Commission taking the
8 step of issuing a big penalty.

9 Look, in recognition of the -- this was why I was
10 suggesting that some portion of the \$395,360, whether it's
11 10 percent or 15 percent, could be offset by the cost of
12 complying with the terms of the Cease and Desist Order; that
13 landscaping aspect is part of it.

14 COMMITTEE CHAIR SCHARFF: So would you like to make an
15 amendment that says that a portion of up to 15 percent would
16 be waived?

17 COMMITTEE MEMBER RANCHOD: Yes, up to 15 percent of
18 that total penalty amount of \$395,360 can be waived or
19 offset by the timely compliance of these permit conditions,
20 the cost of the timely compliance of the cease and desist
21 requirements. And you can do the math on what 15 percent of
22 \$395,000 is, it is something on the order of \$59,000.

23 COMMITTEE CHAIR SCHARFF: So you are making that as an
24 amendment?

25 COMMITTEE MEMBER RANCHOD: Correct. And I want to

1 clarify that the motion that has been made and that we are
2 discussing now that I just amended does not include anything
3 with respect to the Commission's resolution on the permit
4 amendments or expansion of use of the facility. That to me
5 is a separate issue. The direction that the Commission
6 provided back to this Committee was to separate that issue
7 of increased use, permitted use going forward, from dealing
8 with the compliance issue before us; so that is my
9 understanding.

10 COMMITTEE CHAIR SCHARFF: So you will need a second for
11 your motion. Is anyone going to second his --

12 COMMITTEE MEMBER ADDIEGO: I'll second it.

13 COMMITTEE CHAIR SCHARFF: Okay.

14 MR. ZEPPETELLO: Excuse me, could I just ask for
15 clarification or maybe make a suggestion?

16 COMMITTEE CHAIR SCHARFF: Sure.

17 MR. ZEPPETELLO: If there is going to be an opportunity
18 for suspension I think that perhaps we should -- and there
19 will be three payments over time, maybe we should make it
20 clear that the waiver or suspension would be in the third
21 year or sometime, assuming the first payment would be due
22 within 30 days. And also I think we --

23 COMMITTEE CHAIR SCHARFF: That part about the "over
24 time," I don't think that's in the motion currently.

25 COMMITTEE MEMBER RANCHOD: I'll add it to the motion.

1 It can be paid over three years and I'm fine with the waiver
2 of the up to 15 percent would occur in the third year if
3 that length of time was taken by the business.

4 MR. ZEPPETELLO: Well the last point I think is we need
5 some clarity on what does it mean to be in compliance or
6 that it's clear that the Executive Director -- or maybe it
7 goes back to this Committee to make that determination.
8 Most of these requirements would have -- we have a provision
9 in here that by July 10th the Executive Director would
10 accept the permit applications as complete. So I guess I
11 would maybe just propose that we have a date such as by
12 September 1st of this year the Executive Director makes a
13 decision or makes a recommendation back as to whether they
14 have met the standard to get that waiver. We need some
15 milestone.

16 COMMITTEE MEMBER RANCHOD: That's acceptable and I will
17 take September 1st as the date for demonstrating to the
18 satisfaction of the Executive Director.

19 COMMITTEE CHAIR SCHARFF: So as the seconder are you
20 good with both the paying over time and the date of
21 September 1st?

22 COMMITTEE MEMBER ADDIEGO: I am.

23 MR. VERNA: Could I be heard on this issue? Because we
24 still haven't resolved Item F.2 and what I know we are going
25 to confront here is staff saying we are not in compliance.

1 We have already submitted our BCDC application, we don't
2 have to wait until July, we have already done it. But now
3 they are going to say we are not in compliance because we
4 didn't include in there these public access improvements
5 that have got nothing to do with the underlying permit.

6 MR. ZEPPETELLO: Well you still have 45 days --

7 MR. VERNA: I would propose you take that out. We
8 filed an application to approve the work we've done and
9 removal of the metal entry doors and installation of the
10 retractable door for the exit. That's been done, we can
11 just say that's already been satisfied.

12 MS. KLEIN: If I may? The matter of a filed
13 application is separate and distinct from the matter of
14 whether the project is susceptible to a recommendation of
15 approval. And the inclusion or exclusion, I believe, of a
16 public access component in the application would go not
17 actually toward filability but toward a recommendation on
18 how to act on that application.

19 MR. VERNA: Then that gets back to the global issue.
20 It would be nice to have a recommendation of everything
21 before the Enforcement Committee so we are not getting
22 piecemealed for the next several months.

23 COMMITTEE CHAIR SCHARFF: So why don't we vote on your
24 amendment first, your amendment. Because the amendment
25 doesn't automatically get into the motion, we have to vote

1 separately on the amendment.

2 EXECUTIVE DIRECTOR GOLDZBAND (FROM THE AUDIENCE):

3 Greg, I can't hear you. Microphone, please.

4 COMMITTEE CHAIR SCHARFF: Sorry. I said we should vote
5 on the amendment to the motion because we have to do that
6 before we vote on the main motion or before we make any
7 other amendments. Have we had enough discussion on the
8 amendment? You want to discuss the amendment?

9 COMMITTEE MEMBER TECHEL: I would advocate for 20
10 percent.

11 COMMITTEE CHAIR SCHARFF: So all in favor of the
12 amendment.

13 MR. McCREA: Can you clarify the amendment, please?

14 COMMITTEE CHAIR SCHARFF: The amendment is -- why don't
15 you restate your amendment.

16 COMMITTEE MEMBER RANCHOD: The amendment includes
17 payment of the penalty amount of \$395,360 over a period of
18 three years, should the business choose to do so. It
19 includes an offset of 15 percent of that amount in the third
20 year for costs that are incurred by the business in
21 satisfying the terms of the cease and desist penalty order
22 as determined to the satisfaction of the Executive Director
23 by September 1st, 2017.

24 COMMITTEE CHAIR SCHARFF: All in favor say aye?

25 (Three Ayes: Addiego, Gibbs, Ranchod)

1 COMMITTEE CHAIR SCHARFF: All opposed?

2 (Two Nays: Scharff, Techel)

3 COMMITTEE CHAIR SCHARFF: So there's two in opposition.
4 It passes on a three to two vote.

5 Now we will turn to the main motion, which now includes
6 the amendment. Any other further discussion?

7 COMMITTEE MEMBER ADDIEGO: Maybe we need to reconsider.
8 I didn't hear any argument against the motion to understand
9 what the -- it would be good for this Commissioner if he
10 would understand the resistance to the motion, then I might
11 be willing to reconsider.

12 COMMITTEE MEMBER GIBBS: Well I don't believe we have
13 any resistance.

14 COMMITTEE MEMBER ADDIEGO: I'm sorry, there were two
15 votes against the -- okay. I think I understand Jill's, the
16 20 percent.

17 MS. TIEDEMANN: Well, there has been a vote on the
18 amendment.

19 COMMITTEE CHAIR SCHARFF: There has been a vote.

20 COMMITTEE MEMBER ADDIEGO: I would like the opportunity
21 to reconsider if it's within, it's the same day, the same
22 moment.

23 COMMITTEE CHAIR SCHARFF: I will grant the motion to
24 reconsider since you voted for it. So my opposition to it
25 was simply that I thought it was fairly complicated to go

1 forward for staff, I thought it was complicated in the
2 waiver, I thought it made life a little more difficult. I
3 think if they are going to get to pay over time, when they
4 were originally willing to pay \$300,000 without going over
5 time, I think going to \$395,000 is just fine with me and I
6 didn't see the necessity to make it complicated by saying
7 you get a waiver and you have to do it by this date and all
8 of that and it applies to the third. It was more of a --
9 that was my opposition to it.

10 COMMITTEE MEMBER ADDIEGO: Okay, I understand; I'm
11 okay.

12 COMMITTEE CHAIR SCHARFF: Okay, fine. Now we are back
13 to the main motion? Anyone have further comments or are we
14 ready to vote on the main motion?

15 COMMITTEE MEMBER GIBBS: I just want to be clear that
16 my main motion does include the notion of a global
17 settlement; whatever the full Commission has indicated, I
18 think we can bring that to them. I think for business and
19 for certainty it is important to not keep having this back
20 and forth but settle all these issues as soon as possible.
21 If the full Commission wants to separate the notion of
22 permit days from fine, they can do that, but I think my
23 motion includes the idea that we go to them, we tell them
24 how we spent these three hours and other time in discussions
25 and recommend that to them. So I just wanted to be clear

1 that that's included.

2 COMMITTEE CHAIR SCHARFF: So I don't believe it is. It
3 does not include the number of permit days, that is not in
4 the motion. At this point I think if you want to amend that
5 to include that, that's fine, but I think at the moment it's
6 not in that. We haven't been having the discussion that
7 that's included in it.

8 COMMITTEE MEMBER GIBBS: Okay. Well I would like to
9 amend it to include 124.

10 COMMITTEE CHAIR SCHARFF: So you would like to amend it
11 to 124?

12 COMMITTEE MEMBER GIBBS: Yes.

13 COMMITTEE CHAIR SCHARFF: To include 124 days.

14 COMMITTEE MEMBER GIBBS: Yes.

15 COMMITTEE CHAIR SCHARFF: Okay. Is there a second to
16 that?

17 MS. TIEDEMANN: There needs to be some clarification of
18 the motion because as I indicated previously, this Committee
19 does not have the ability to amend the existing permit. In
20 the stipulated order staff agreed as part of the agreement
21 that it would recommend to the full Commission a different
22 number of days for public events.

23 COMMITTEE CHAIR SCHARFF: So let me just help you with
24 your motion. Your motion could be that this Committee also
25 recommends 124 days to the Commission. Is that --

1 COMMITTEE MEMBER GIBBS: Could it?

2 MR. ZEPPETELLO: Well, it has to be part of a permit
3 amendment.

4 MS. TIEDEMANN: Yes, it has to be part of a permit
5 amendment and that is not what the Commission will be
6 hearing.

7 Under the Commission's regulations when this
8 Committee's Order goes to the Commission - and this is, I
9 would characterize it as unfortunate - but the Commission
10 does not have the ability to tinker at its meeting with what
11 you recommend; it can adopt the order, it can reject it or
12 it can send it back down here. Commissioner Bates
13 characterized that at the November meeting as a ping-pong
14 where, you know, it would have to go back to this Committee
15 for a further hearing in front of this Committee.

16 COMMITTEE CHAIR SCHARFF: So you didn't get a second
17 anyway. I thought I'd just point that out.

18 (Laughter.)

19 COMMITTEE MEMBER GIBBS: My friendly Chairman. Okay,
20 look. So I understand. So let's remove the issue of permit
21 days. I hope that Scott's and staff, and certainly this is
22 one Commissioner that will be willing to work towards
23 achieving that so let's get there sooner rather than later.
24 But the motion then will go forward without any number of
25 permit days. Okay.

1 COMMITTEE CHAIR SCHARFF: And it is now 12:30 so anyone
2 else or should we vote?

3 (No response.)

4 COMMITTEE CHAIR SCHARFF: Okay. All in favor of the
5 motion?

6 (Four Ayes: Addiego, Gibbs, Ranchod, Scharff)

7 COMMITTEE CHAIR SCHARFF: And staff understands the
8 motion and doesn't need any clarifications, right?

9 THE REPORTER: Any nays?

10 COMMITTEE MEMBER TECHEL: I voted no.

11 COMMITTEE CHAIR SCHARFF: You voted, no?

12 COMMITTEE MEMBER TECHEL: Yes.

13 COMMITTEE CHAIR SCHARFF: Sorry. So that was passed on
14 a 4-to-1. So this concludes that item.

15 Then I am going to suggest to staff that we do not take
16 up the next two items and that we defer those to another
17 meeting of the Enforcement Committee. Is that acceptable to
18 staff?

19 MR. ZEPPETELLO: Yes.

20 COMMITTEE CHAIR SCHARFF: With that I'll adjourn the
21 meeting. Meeting adjourned.

22 (Thereupon, the Enforcement Committee
23 meeting was adjourned at 12:30 p.m.)

24 --oOo--

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1 CERTIFICATE OF REPORTER
2

3 I, Ramona Cota, an Electronic Reporter and
4 Transcriber, do hereby certify that I am a disinterested
5 person herein; that I recorded the foregoing San Francisco
6 Bay Conservation and Development Commission, Enforcement
7 Committee Meeting and thereafter transcribed it.

8 I further certify that I am not of counsel or
9 attorney for any of the parties to said meeting, or in any
10 way interested in the outcome of said matter.

11 IN WITNESS WHEREOF, I have hereunto set my hand
12 this 28th day of February, 2017.

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17 RAMONA COTA, CERT**478
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