

**CALENDAR ITEM
C78**

A 41
S 23

06/28/10
WP 391.1
S.Young
M.DeBernardo

GENERAL LEASE – COMMERCIAL USE

APPLICANT:

The Kissel Company
dba Paradise Cove Land Company
28128 Pacific Coast Highway
Malibu, CA 90265

AREA, LAND TYPE, AND LOCATION:

0.2629 acre, more or less, of sovereign land in the Pacific Ocean, at Paradise Cove, Malibu, Los Angeles County.

AUTHORIZED USE:

Operation, use, and maintenance of the existing Paradise Cove Pier for commercial events, commercial film set location, fishing, and recreational use. Authorized uses specifically exclude the mooring, docking, storage, fueling, and launching of any vessels including personal watercraft from the pier.

LEASE TERM:

10 years, beginning February 25, 2009.

CONSIDERATION:

Reported and paid annually, five percent of operator's gross income derived from pier rental for private parties, commercial events, and film set location events and three percent of operator's gross income derived from the sale of food and beverages served on the Lease Premises; with a minimum annual rent of \$2,565, with the State reserving the right to fix a different rent for all consideration due periodically during the lease term. In the event other commercial uses are commenced, which are not authorized by the Commission and as provided in the Lease, Lessee shall pay 10 percent of the gross income generated from the unauthorized commercial use.

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SPECIFIC LEASE PROVISIONS:

Insurance:

Liability insurance with combined single limit coverage of no less than \$2,000,000

Bond:

\$25,000

BACKGROUND INFORMATION:

On February 25, 1949, the Commission authorized the issuance of a 15-year lease to William D. Swanson for a recreational pier at Paradise Cove in Malibu, Los Angeles County. At that time, the pier was used for mooring and launching of small boats, pier fishing, and related activities. Annual rent was set initially at \$50. Subsequently in 1956, the Commission authorized a lease amendment for construction of an extension to the existing pier and also authorized the annual rent to be increased to \$100. In 1958, the Commission authorized the assignment of the lease to Joseph Morris. In 1964, The Kissel Company, Inc. dba Paradise Cove Land Company (Kissel) acquired the pier from Joseph Morris. In 1976, the Commission authorized a 15-year General Lease - Commercial Use to Kissel for a commercial fishing pier. In 1989, the Commission authorized the issuance to Kissel of a new General Lease – Recreational Use because staff had been advised that the pier use had changed from commercial use to recreational use. In 1999, on the expiration date of the lease, Kissel applied for a new ten-year General Lease – Recreational Use. The Commission authorized issuance of a new lease to Kissel on April 23, 1999. The lease subsequently expired on February 24, 2009 and has, since been in holdover status.

Prior to the 2009 expiration of the Lease, Commission staff became aware that the pier was being used and advertised as available for rental by Kissel. The pier was featured on the Kissel website as available for rental for private functions (weddings, private social events, commercial film set locations, etc.) In addition, staff received evidence that unauthorized and unpermitted new construction was taking place on the pier for installation of equipment for the purpose of launching Jet-Skis or personal watercraft. Staff was also contacted by the California Film Commission who had received an application for a film permit in connection with the use of the pier for an auto manufacturer's video commercial, for which Kissel received rental income.

In letters dated May 27, 2008 and October 29, 2008, Commission staff notified Kissel that the unauthorized commercial use of the pier and installation of equipment on the pier constituted violations and potential default under the terms of the Lease. In a letter dated November 21, 2008, Kissel advised Commission staff that commercial activity would cease and further that there would be no boat

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or Jet Ski launching facilities installed on the pier. Kissel's letter was accompanied by an application for a new General Lease – Recreational Use. Subsequent to Kissel's letter of November 21, staff was made aware by the city of Malibu (City) that commercial event permits (issued by the City) were being requested by Kissel or its agents in connection with the use of the pier.

In a letter dated August 19, 2009, the Commission staff again advised Kissel that continued commercial activities involving the pier were an egregious violation of the Lease. In the letter, Commission staff demanded that Kissel submit an application for a General Lease – Commercial Use and further, provide financial statements detailing all income generated from commercial-related activities taking place on the Lease Premises from February 25, 1999 to the present. Commission staff's letter noted that non-compliance with the demands would result in the Attorney General's office filing a lawsuit against The Kissel Company dba Paradise Cove Land Company to enjoin all future use of the pier and to collect appropriate compensatory and punitive damages for breach of the Lease and fraud. On September 1, 2009, Kissel submitted an application for a General Lease – Commercial Use and provided the requested financial information relating to revenue generated from the commercial use of the pier.

Following a lengthy review of the unauthorized commercial activities taking place on the pier from 1999 to 2009, Commission staff discovered that a significant number of commercial activities took place on the pier that were not disclosed by Kissel in previous correspondence to the Commission. In a letter dated February 9, 2010, Commission staff advised Kissel that the review had been completed and continued violations by Kissel were apparent. Commission staff, in an effort to resolve the matter, required Kissel to meet certain conditions prior to the Commission considering a new lease. These conditions were as follows:

1. Rent would be adjusted during the lease holdover period by 25 percent, for the period of February 25, 2009 to February 24, 2010. Subsequent rent for the holdover tenancy would be billed at the adjusted rate.
2. No commercial activity would be permitted on the pier during the holdover tenancy.
3. Kissel would pay back rent in the amount of \$75,095.24 for unjust enrichment, including penalties and interest, for the unauthorized commercial use of the pier.
4. Kissel would pay compensation to the Commission for staff costs associated with addressing Kissel's violations of the Lease.

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OTHER PERTINENT INFORMATION:

1. Applicant owns the uplands adjoining the lease premises.
2. On September 1, 2009, the Applicant (Kissel) submitted an application for a new General Lease – Commercial Use for the existing pier previously authorized by the Commission in 1999 as a General Lease – Recreational Use pier. Commission staff is recommending that the Commission authorize the assessment to Kissel for payment of back rent as well as for the reimbursement to the Commission of staff costs associated with the collection effort.
3. The original pier was constructed in 1949 to be approximately 400 feet long and 20 feet in width. At that time, the pier was estimated to extend approximately 325 feet seaward of the mean high tide line in Santa Monica Bay. Since 1949, the configuration of the pier has been modified a number of times including extension. In 1983 a storm damaged the pier, resulting in a shorter length. The pier is now estimated to be approximately 260 feet in length occupying approximately 0.2629 acre.
4. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c) (3)], the staff has determined that this activity is not subject to the provisions of CEQA because it is not a "project" as defined by CEQA and the State CEQA Guidelines.

Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, sections 15060 (c) (3) and 15376.

5. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code sections 6370, et seq. Based upon the staff's consultation with the persons nominating such lands and through CEQA review process, it is the staff's opinion that the project, as proposed, is consistent with its use classification.

EXHIBITS:

- A. Location and Site Map
- B. Land Description

PERMIT STREAMLINING ACT DEADLINE:

N/A

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RECOMMENDED ACTION:

IT IS RECOMMENDED THAT THE COMMISSION:

CEQA FINDING:

Find that the activity is exempt from the requirements of CEQA pursuant to Title 14, California Code of Regulations, section 15061 as a Categorically Exempt Project, Class 1, Existing Facilities. Title 2, California Code of Regulations, section 2905 (a)(2).

SIGNIFICANT LANDS INVENTORY FINDING:

Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code Sections 6370, et seq.

AUTHORIZATION:

Authorize issuance of a General Lease – Commercial Use to The Kissel Company dba Paradise Cove Land Company, beginning February 25, 2009, for a term of 10 years, for an existing pier as shown on Exhibit A (for reference purposes only) and on lands as described on Exhibit B attached and by this reference made a part hereof; consideration being five percent of operator's gross income derived from pier rental for private parties, commercial events and film set location events and three percent of operator's gross income derived from the sale of food and beverages served on the Lease Premises and reported and paid annually; with a minimum annual rent of \$2,565, with the State reserving the right to fix a different rent for all consideration due periodically during the lease term. In the event other commercial uses are commenced, which were not previously authorized by the Commission, Lessee shall pay 10 percent of the gross income generated from the unauthorized commercial use; additional consideration in the amount of \$75,095.24 in back rent will be paid to the Commission by the Lessee within 30 days of the authorization of this Lease; Liability insurance for combined single limit coverage of \$2,000,000; and surety in the amount of \$25,000.