

**BOARD OF PORT COMMISSIONERS
CITY OF OAKLAND**

4/22/2021
Item No.: 6.1
CT/msr



ORDINANCE: APPROVING THE TERMS AND CONDITIONS OF AN AMENDED AND RESTATED SPACE/USE PERMIT ("RESTATED SUP") WITH EACH OF THE FOUR FOOD & BEVERAGE CONCESSIONAIRES OPERATING AT OAKLAND INTERNATIONAL AIRPORT; SPECIFICALLY: HFF OAK VENTURE, LLC; RYLO MANAGEMENT, LLC; SOARING FOOD GROUP II, LLC; AND, SSP AMERICA OAK, LLC TO MODIFY EACH EXISTING SPACE/USE PERMIT ("SUP") INCLUDING: (1) ADOPTING CONSTRUCTION SCHEDULES AND COMMENCEMENT OF PAYMENT OF MINIMUM ANNUAL GUARANTEE BASED ON THE PERCENTAGE OF ENPLANED PASSENGERS COMPARED TO CY2019; (2) EXTENDING THE TERM OF EACH SUP THROUGH MARCH 31, 2033, PLUS TWO ONE-YEAR OPTIONS FOR THE PORT OF OAKLAND ("PORT") TO EXTEND (LATEST EXPIRATION OF MARCH 31, 2035); (3) ADJUSTING THE CALCULATION OF MINIMUM ANNUAL GUARANTEE; (4) ADDING A NEW 15% TIER FOR FOOD SALES TO THE PERCENTAGE OF GROSS REVENUES CALCULATION EFFECTIVE JANUARY 1, 2026; (5) SETTING THE DATE FOR CONTRIBUTIONS TO THE MARKETING FUND; (6) ADJUSTING AND SETTING THE DATE FOR CONTRIBUTIONS TO THE MID-TERM REFURBISHMENT FUND; (7) DELETING ONE UNIT FROM THE DEFINITION OF ASSIGNED SPACE WITH HFF OAK VENTURE, LLC; (8) AUTHORIZING THE EXECUTIVE DIRECTOR TO APPROVE A CHANGE IN CONCEPT; AND (9) AUTHORIZING THE EXECUTIVE DIRECTOR TO EXECUTE EACH RESTATED SUP AND ANY OTHER DOCUMENTS NECESSARY TO EFFECT THESE MODIFICATIONS; ALL FOR THE FOOD & BEVERAGE CONCESSIONS PROGRAM AT OAKLAND INTERNATIONAL AIRPORT.

WHEREAS, on November 8, 2018, the Board of Port Commissioners of the City of Oakland ("Board") approved a SUP for Food and Beverage Concession with each of the following four concessionaires - SSP America OAK, LLC ("SSP"); HFF Oak Venture, LLC ("HFF"); Soaring Food Group, LLC and later assigned to Soaring Food Group II, LLC ("Soaring"); and Rylo Management, LLC ("Rylo")(collectively, the "Concessionaires") at Oakland International Airport ("Airport"); and

WHEREAS, the Board has reviewed and evaluated the Agenda Report for Agenda Item No. 6.1, dated April 22, 2021 (the "Agenda Report") and related agenda materials, has received the expert testimony of Port of Oakland ("Port") staff, and has provided opportunities for and taken public comment; now, therefore

BE IT ORDAINED by the Board of Port Commissioners of the City of Oakland as follows:

Section 1. The Board hereby finds and determines that the Board's previous action to approve entering into the SUPs with the Concessionaires was determined to be exempt from the requirements of the California Environmental Quality Act ("CEQA") pursuant to Section 15301 "Existing Facilities" of the CEQA Guidelines which exempts the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. Approval of the Concessionaires falls within this class of exemptions. No additional environmental review is required to take the action recommended in the Agenda Report.

Section 2. In acting upon this matter, the Board has exercised its independent judgment based on substantial evidence in the record and adopts and relies upon the facts, data, analysis, and findings set forth in the Agenda Report and in related agenda materials and in testimony received.

Section 3. The Board hereby approves the terms and conditions set forth in the Agenda Report for the Amended and Restated Space/Use Permit ("Restated SUP") with SSP, HFF, Soaring, and Rylo, including:

(a) Establishing Construction Milestones tied to Current Enplaned Passenger Volume compared to the same period in CY2019, including:

- (i) Requiring HFF to construct and open Oaklandish Coffee Collective (Unit T1-FB-G4) within 180 days from the date the Board adopts the ordinance approving the Restated SUP;
- (ii) Authorizing the Executive Director of the Port ("Executive Director") to terminate the Restated SUP by providing written notice to HFF, if HFF has not commenced construction on Unit T1-FB-G4 within 90 days of from the date the Board adopts the ordinance approving the Restated SUP. Such notice of termination shall be exclusive to the benefit of the Port and shall not be considered a notice of default subject to cure by HFF;
- (iii) SSP to construct and open Peet's Coffee (Unit T2-FB-G27) within 150 days from the date the Board adopts the ordinance approving the Restated SUP;
- (iv) SSP to construct and open Sierra Nevada (Unit T2-FB-G28) within 180 days from the date the Board adopts the ordinance approving the Restated SUP (prior to year-end 2021); and,
- (v) Authorizing the Executive Director to terminate the Restated SUP by providing written notice to SSP if SSP has not

commenced construction on both of Units T2-FB-G27 and T2-FB-G28 within 90 days of from the date the Board adopts the ordinance approving the *Restated SUP*. Such notice of termination shall be exclusive to the benefit of the Port and shall not be considered a notice of default subject to cure by SSP.

- (vi) For all other units, the construction schedule will advance using set enplaned passengers ("ENP") of 50%, 65%, and 80% of CY2019 enplanements, and for Units located in Terminal 1, those ENPs would be calculated for all airline passengers except Southwest Airlines.

(b) Extend the term by an additional three years through March 31, 2033; in addition, the Port would be provided two one (1)-year options to extend, with a latest expiration date of March 31, 2035.

(c) Adjust the Minimum Annual Guarantee ("MAG") as follows:

- (i) MAG to be waived for closed units, transition units, and/or under-construction units;
- (ii) Eliminate the \$250 per square foot MAG for the smallest units (less than 1,000 square feet) and combine with the next level; therefore, MAG would be \$200 per square foot for units up to 5,000 square feet (and remain at \$100 per square foot for units greater than 5,000 square feet);
- (iii) MAG to be tied to ENP percentages of 50%, 65%, and 80% compared to CY2019 ENPs and the Port to provide notice to Concessionaires when these "milestones" have been achieved;
- (iv) After the Port provides notice that an ENP milestone has been reached, Concessionaires to have either 150 days (units less than 1,000 square feet) or 180 days (units greater than 1,000 square feet) to construct and open units or MAG will kick-in regardless if the unit is open and operating; and
- (v) Provide that if the aviation industry experiences another significant decrease in passenger traffic similar to the COVID-19 Pandemic, MAGs will be automatically suspended until traffic recovers (percentage and any other rental obligations would remain due and payable).

(d) Establish a new Percentage Rent effective as of January 1, 2026, of 15% of gross sale on food items in excess of:

- (i) \$3 Million for units less than 2,500 square feet, or
- (ii) \$4 Million for units greater than 2,500 square feet.

(e) Delete Unit T2-FB-G25 from the definition of Assigned Space in the Restated SUP with HFF.

(f) Set the commencement date for Concessionaires' contributions (0.5% of Gross Receipts) to the Marketing Fund to be the first day of the fourth month following the opening date of each unit.

(g) Set the commencement date for Concessionaires' contributions to the Mid-Term Refurbishment Fund as the first day of the 18th month after the opening date of each unit, and:

- (i) With staggered opening dates of each unit, the "Mid-Term" will be defined as the point in time half-way between each unit's opening date and the March 31, 2033, expiration date of the Restated SUP;
- (ii) In lieu of depositing cash, a substitution of a letter of credit for the total required amount would satisfy the contributions to the Mid-Term Refurbishment Fund;
- (iii) Any and all contributions already made by each Concessionaire would remain in the escrow account; and
- (iv) Rather than reduce the amount to be contributed to the Mid-Term Refurbishment Fund, the Port will waive rental for Storage Space through December 31, 2021 (occupancy of Storage Space is covered by separate agreements which will be submitted to the Board in the near future).

(h) Authorize the Executive Director to approve a substitution of a new concept, including type of food and beverage operation (e.g., full service, quick serve, fast casual, etc.), if required because of the failure/closure of a street-side local concept or for other operational reasons.

(i) Authorize the Aviation Director of the Port to unilaterally close a Transition Unit operated by HFF or SSP when a nearby unit opens after reconstruction.

Section 4. The Board hereby authorizes the Executive Director to execute the Restated SUP with each of SSP, HFF, Soaring, and Rylo, and any other documents necessary to effect the proposed modifications, and to make such additions, modifications, or corrections as necessary to implement the Restated SUP or to correct errors, subject to the limitations set forth herein and provided that any such addition, modification, or correction does not materially differ from the terms and conditions set forth herein and in the Agenda Report, subject to approval as to form and legality by the Port Attorney.

Section 5. This ordinance is not evidence of and does not create or constitute (a) a contract(s), or the grant of any right, entitlement or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Port. Unless and until a separate written contract is duly executed on behalf of the Board as authorized by this ordinance, is signed as approved as to form and legality by the Port Attorney, and is delivered to other contracting party, there shall be no valid or effective contract.

Section 6. This ordinance shall take effect on the date of its final adoption; provided, however, that if a petition protesting the adoption of this ordinance is timely and duly submitted to the elections official of the City of Oakland in the manner required under California Elections Code § 9237, the effective date of this ordinance shall be suspended, and all actions authorized by this Ordinance shall be null and void.

DRAFT

President.

Attest: _____
Secretary.

Approved as to form and legality:

Port Attorney