



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: September 6, 2016

TO: Mayor and City Councilmembers

FROM: Michael A. Guina, City Attorney
Maurice Kaufman, Public Works Director

SUBJECT: **Resolution Of The City Council Of The City Of Emeryville Approving Assignment Of The Sport Fishing Concession Agreement Between The City Of Emeryville And Craig Stone To Andrew Guilano And Authorizing The City Manager To Execute Written Approval Of Assignment**

RECOMMENDATION

Staff recommends the City Council adopt the proposed resolution (Attachment 1) approving assignment of the Sport Fishing Concession Agreement to Andrew Guilano and authorizing the City Manager to execute written approval in a form attached to the proposed resolution.

BACKGROUND

On April 1, 1988, the City entered into a concession agreement with Hank Schramm for sport fishing concession operations. On December 18, 2001, the City Council entered into a Sport Fishing Concession Agreement ("Agreement") between the City and Craig Stone, which continued the initial agreement with Mr. Schramm. The Agreement was for a period of ten years, commencing January 1, 2002, and ending on December 31, 2011. On December 21, 2011, prior to expiration of the Agreement, the parties executed a Month-to-Month Extension of the Agreement.

The Agreement provides Mr. Stone the exclusive right to book passengers for the sport fishing boat operators (currently 9 boats) berthed at "J" dock. He also sells fishing licenses, rents and sells fishing equipment, rents and sells fishing tackle and supplies, and sells food and beverages to sport fishing passengers. The concession is a desirable use which generates significant fishing activity at the Emeryville Marina and brings patrons to the City.

As compensation for booking passengers on the fishing boats, Mr. Stone is entitled to a Percentage Fee of 7.5% of gross revenues from sales of tickets to the boats. In lieu of the Business License Tax normally due from the boat operators, Mr. Stone collects and remits to the City a City Tax of 2.5% of the gross revenues generated from the sales of tickets. The 2.5% City Tax is in addition to the 7.5% Percentage Fee paid to Mr. Stone.

For the June 2015 – June 2016 period, the City collected approximately \$35,000 in lieu-tax. The normal Business License Tax would have generated about \$1,600. Thus the Agreement represents approximately \$33,000 in additional revenue over the collection of a Business License Tax.

At its meeting on February 19, 2013, the City Council considered extending the month-to-month Agreement with Mr. Stone for another 10 year term. The Council decided against a further long-term amendment and instead referred the matter to the Marina Committee for a recommendation.

The Public Works Committee (the successor to the Marina Committee) considered this matter at its meeting on July 21, 2016. The Committee recommended the City Council issue a Request For Proposals (RFP) for a long-term extension of the Agreement. Given Mr. Stone's declining health, the Committee also recommended the Agreement be transferred from Mr. Stone to an interim concessionaire while the RFP process takes place.

At its meeting on August 16, 2016, after learning of the decline of Mr. Stone's health and his inability to operate the concession on his own, the City Council provided direction to staff that it would consider approving an assignment of the Agreement to Andrew Guiliano.

DISCUSSION

The assignment of the Agreement to Mr. Guiliano (see Attachment A to the Resolution), will be on the same terms and conditions as the current Agreement with Mr. Stone. The term of the Agreement is still month to month, which will allow the City Council to issue a RFP in the future. Both the Assignor and the Assignee have agreed to the terms of the proposed Assignment Agreement.

Section 6 of the Agreement governs assignment of the Agreement to another party. It requires: (1) that the concessionaire provide at least (90) days written notice of its intention to assign the Agreement; (2) demonstration that the assignee is capable of performing the obligations under the Agreement; (3) the Concessionaire is not in any breach of the Agreement; and (4) there are no material objections presented. What constitutes a material objection is determined by the City Council.

Staff recommends that the City Council waive the (90) day written notice of its intention to assign the Agreement based on Mr. Stone's health condition. With respect to whether the assignee is capable of performing the obligations under the Agreement, Mr. Guiliano has submitted a letter, attached as Attachment 3, representing that he can perform the obligations as set forth in the Agreement.

Finally, with respect to whether there are any material objections to the assignment, staff recommends that the City Council find that there are no material objections. On

August 18, 2016, Mr. Boudames of Comp Express, Inc. contacted the City Attorney's Office to inform the City that his company allegedly had entered into a purchase and sale agreement with Craig Stone of Emeryville Sport Fishing to purchase the business at 3310 Powell Street. Mr. Boudames further alleged that Mr. Stone has failed to fulfill his obligations under the Purchase and Sale Agreement and he was suing Mr. Stone, as well as others, for breach of contract. He then provided a copy of the alleged purchase and sale agreement, as well as a conformed copy of the complaint filed in Alameda Superior Court.

According to staff's interpretation of the purchase and sale agreement, whether Mr. Stone failed to perform under the alleged purchase and sale agreement is irrelevant as to the City's approval of the assignment of the Agreement to Mr. Guiliano. The Agreement is with Mr. Stone as an individual, not in his capacity as an officer of any corporation. The purchase and sale agreement provided is an agreement between Emeryville Sport Fishing, signed by Mr. Stone in his capacity as an officer for the company. Furthermore, under section 1.1.3 of the purchase and sale agreement, only permits and licenses, to the extent the seller's rights in such licenses are transferable, are included in the purchase and sale agreement. Per the terms of section 6 of the Agreement, the Agreement is not transferrable without City approval and terminates upon transfer to a third party without the consent of the City. In addition, it is unclear whether the Agreement falls under the definition of license and permit as used in the purchase and sale agreement. Thus, staff recommends that the City Council find Mr. Boudames' objection is not material because there is not substantial evidence to show that Mr. Stone transferred the Agreement to Comp Express, Inc.

FISCAL IMPACT

The discussion above details the revenue currently received through the Agreement (\$35,000) in contrast to the projected annual tax revenue received from Business License Tax from the individual boat operators (\$1,600).

CONCLUSION

Staff recommends the following:

1. Allow staff presentation.
2. Open public hearing to take any testimony.
3. Close public hearing and adopt the recommended resolution, which is attached as Attachment 1.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

APPROVED BY:



Carolyn Lehr, City Manager

Attachments:

1. Resolution
 - a. Attachment A to the Resolution: Assignment Agreement
 - i. Exhibit A to Assignment Agreement: Power of Attorney for Craig Stone
 - ii. Exhibit B to Assignment Agreement: Sport Fishing Center Concession Agreement
 - iii. Exhibit C to Assignment Agreement: Month to Month Extension Dated December 1, 2011
2. Letter from Mr. Guiliano
3. Documents provided by Mr. Boudames