

REUBEN, JUNIUS & ROSE, LLP

Justin A. Zucker
jzucker@reubenlaw.com

May 19, 2021

Delivered Via E-mail: boardofappeals@sfgov.org

President Darryl Honda and Commissioners
San Francisco Board of Appeals
49 South Van Ness, Suite 1475 (14th Floor)
San Francisco, CA 94103

Re: Status Update Regarding Appeal No. 18-140
Complaint No.: 2018-004446ENF
Property: 1686 Market Street
Our File No.: 8608.50

Dear President Honda and Commissioners:

Our office is working with SIC-MCM 72 Gough Street LP, owner (“**Owner**”) of the 3-story, mixed-use building at 1686 Market Street, which houses Espetus Churrascaria, Inc. (“**Espetus**”). On May 15, 2019, Espetus’ appeal of a Notice of Violation and Penalty Decision pertaining to smoke and odor emissions was granted with the understanding that a replacement smoke and odor suppression system (“**Pollution Control Unit**”) permit had been submitted and would be installed after permit issuance. In granting the appeal, this Commission imposed penalties to accrue if a Certificate of Final Completion (“**CFC**”) for the Pollution Control Unit is not obtained within twelve weeks of permit issuance. While the permit for the Pollution Control Unit has been issued additional construction permits are required, including a new fire alarm, hood suppression, and sound barrier wall. All of which must be completed to obtain a CFC and were not known at the time of the appeal. We respectfully request an extension of the 12-week timeline.

San Francisco Office
One Bush Street, Suite 600, San Francisco, CA 94104
tel: 415-567-9000 | fax: 415-399-9480

Oakland Office
492 9th Street, Suite 200, Oakland, CA 94607
tel: 510-527-5589

www.reubenlaw.com

Pollution Control Unit Plan Review

The Pollution Control Unit permit was submitted in May 2019. Processing of the Pollution Control Unit permit, while admittedly delayed some due to preparation of as-built plans in 2019, was stuck in the quagmire of the Department of Building Inspection's ("DBI's") electronic plan review roll out last year. There was a seesawing of the permit being processed in paper at first, then requested to be done electronically, and eventually back to paper. All the while, the Pollution Control Unit was ordered in August 2019, delivered, and is sitting waiting for install. The Pollution Control Unit permit issued on March 24, 2021, and the appeal period for that building permit ran without any challenges.

During processing of the Pollution Control Unit permit, it was determined that additional work and permits were needed to obtain a CFC for the system. The Zoning Administrator imposed a condition of approval on the Pollution Control Unit permit that a sound wall barrier be installed to reduce noise emanating from the rooftop equipment as recommended by the Owner's sound consultant, Charles M. Salter. A permit for the sound barrier wall (BPA No. 2020.10.21.7032) was submitted October 2020 and issued earlier this year. The sound wall barrier has been ordered. However, like many other things there is a much longer lead time for some parts of the sound wall barrier. Some pieces are coming from China and hung up in logistics delays. The sound wall barrier should be delivered for installation in approximately nine weeks.

In addition, the Fire Department's plan check of the Pollution Control Unit permit has required a new fire alarm and hood suppression system. A permit for the new fire alarm (BPA No. 2020.01.30.3114) was submitted January 2020. The fire alarm permit is still being processed. The hood suppression requires a permit from the Fire Department. Pre-Covid, the hood suppression

permit could be obtained over the counter. The Fire Department is anticipating opening for permitting soon and the Owner should be able to get the hood suppression permit over the counter again rather than through the intake process. While the Owner is moving forward with installation of the Pollution Control Unit, it is uncertain when the fire alarm permit will be issued for its installation. Without the fire alarm permit, no CFC can be obtained for the Pollution Control Unit and the Owner sits at the whim of DBI's permit processing, which has been challenging and unpredictable. As a result, Owner requests penalties not accrue until three weeks after issuance of the fire alarm permit to allow time for installation and inspections of the system.

Pollution Control Unit Construction Timeline

The Pollution Control Unit requires new ducting and hood. The kitchen will have to be disassembled for the installation of the new ducts and hood. Thereafter, the Pollution Control Unit and sound wall barrier will be installed on the roof once the sound wall barrier is delivered. The installation of the ducts and hood is anticipated to take approximately four weeks. Approximately another two weeks is needed for installation of the Pollution Control Unit and the sound barrier wall. The installation of the fire alarm is anticipated to take approximately two to three weeks. What remains unknown, however, is when the fire alarm permit will be issued.

Conclusion

The permit for the Pollution Control Unit has been issued and work to install the system is underway. However, when DBI will issue a needed fire alarm permit for the system is uncertain. As such, we respectfully request an extension of the previously imposed timeline to three weeks after issuance of the fire alarm permit to allow for installation of the alarm system and inspections to take place to obtain a CFC for the Pollution Control Unit.

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Page 4 of 4

We have given the Home Owner's Association at 55 Page Street attorney an update on where things stand and will continue to keep him apprised. Thank you for your consideration.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP



By: Justin A. Zucker
Attorney for SIC-MCM 72 Gough
Street LP

cc: Ann Lazarus, Commissioner
Rick Swig, Commissioner
Tina Chang, Commissioner
55 Page Street HOA (*via email only* shammond@clarkhill.com)

Steven L. Hammond
T (415) 984-8554
Email: SHammond@ClarkHill.com

Clark Hill LLP
505 Montgomery Street
13th Floor
San Francisco, CA 94111
T (415) 984-8500
F (415) 984-8599

May 26, 2021

VIA E-MAIL

President Darryl Honda and Commissioners
San Francisco Board of Appeals
49 South Van Ness, Suite 1475 (14th Floor)
San Francisco, CA 94103
Email: boardofappeals@sfgov.org

Re: Opposition to Request for Extension of Commencement of Mandatory Penalties
Appeal No. Appeal No. 18-140 (Hearing Date May 15, 2018)
Complaint No.: 2018-004446ENF (Notice of Violation)
Determination Type: Notice of Violation & Penalty Decision
Property: 1686 Market Street

Dear Hon. President Honda and Hon. Commissioners:

By letter dated May 19, 2021, Justin Zucker of Reuben, Junius & Rose, LLP submitted a letter¹ requesting that this Board of Appeals (the "Board") delay the commencement of mandatory penalties imposed by the Board after a duly noticed and strenuously argued the Appeal of a Notice of Violation & Penalty Decision brought by the Owner² and Espetus. Our office represents concerned residential neighbors/homeowners who for years have sought much-needed relief from the horrible smoke and odor nuisance caused by Espetus Steakhouse, have consistently participated in all administrative proceedings, and who now strenuously object to any delay of the commencement of penalties.

The Board should not consider the request because the Board lacks the legal authority to grant the relief requested. Even so, it would be a horrible miscarriage of justice to delay the commencement of penalties as the request for an extension shows no regard for the people living and working from home next door who continue to suffer. For these reasons, as explained below, we respectfully request that the Board take no action to consider or grant Mr. Zucker's request for a penalty-commencement extension.

¹ Courtesy copy enclosed.

² Capitalized terms not defined in this letter shall have the meanings given to them in Mr. Zucker's letter.

1. **Espetus has irresponsibly delayed replacing their dilapidated meat-grill exhaust system for years with full knowledge of the horrific smoke and odor nuisance imposed on nearby residents.**

For years, Brazilian Steakhouse, Espetus Churrascaria ("Espetus"), has operated an antiquated and dilapidated exhaust system that spews noxious smoke, odors, and particulates from its meat-grilling operation into the dwelling units of next-door residents. The Board's Appellate record shows approximately 224 individual lodged smoke and odor complaints to the Bay Area Air Quality Management District between August 2009 and May 2018. Yet Espetus did nothing helpful to correct the problem despite several direct requests from neighbors.

Over three years ago, on May 4, 2018, the Planning Department issued a Notice of Enforcement requiring the nuisance to be abated. Still, Espetus did nothing other than to give vague unfulfilled assurances. After Espetus lost at the Zoning Administrator's hearing, a Notice of Violation and Penalty Decision was issued against the Owner and Espetus that required prompt abatement of the nuisance.

Rather than correct the problem in a responsible pro-neighborhood way, the Owner and Espetus further delayed compliance. They appealed the Violation and Penalty Decision to the Board and then successfully delayed the Appeal hearing for months based on unfulfilled promises to the Zoning Administrator to abate the nuisance. The original Board Appeal hearing was set for December 12, 2018, and subsequently delayed at appellants' requests at least three separate times until May 15, 2019, based solely on appellants' empty promises that they were working on an imminent fix.

2. **Because of the extreme smoke and odor nuisance and continuous delays by the Owner and Espetus, the Board's decision at the Appeal hearing took the unusual step of imposing mandatory daily fines.**

The evidence on Appeal against the Owner and Espetus included 34 letters of complaint, briefing from this office, and testimony by numerous affected members of the public who passionately spoke about the extreme impact of the smoke and odor from Espetus into their dwelling units on a daily basis.

When this Board finally heard the Appeal, the facts were so compelling for enforcement that upon motion by Commissioner Lazarus, the Board voted 3-0-1 (President Swig recused) voted to amend the Zoning Administrator's Notice of Violation and Penalty Decision to affirm all of the findings by the Zoning Administrator and to add an additional requirement: to amend the Notice of Violation and Penalty Decision to require that penalties of \$250 a day begin to accrue on the date the corrective permit is issued; however, these penalties shall be waived by the Zoning Administrator if a Certificate of Final Completion is issued within twelve weeks of permit issuance. The Board imposed these mandatory fines on the basis that the Zoning Administrator abused his discretion in not providing a date by which penalties would begin to accrue and that the Board's decision comports with the factors required to be considered under Planning Code Section 176(c). (See Wednesday, May 15, 2019, Board of Appeal., Meeting Minutes.)

3. **There can be no further excuses as the Owner and Espetus' exposure to penalties is a plight of their own making.**

Exposure to penalties is a plight of Espetus and the Owner's own making. Instead of the 12-week requirement ordered by this Board serving to compel prompt compliance, it became a safe harbor that allowed the Owner and Espetus to delay the commencement of penalties by "slow-rolling" the permitting process through the delay of necessary plans and calculations, by maintaining unsafe fire-safety equipment and by the delay of procurement of required materials and equipment.

- a. The delay supposedly caused by fire-check is actually a result of significant fire-safety code violations that Owner and Espetus failed to correct for years.

Mr. Zucker's fire-safety "over the counter" argument is disingenuous. The required fire-safety permits result in large part from pre-existing and significant fire-safety code violations by Espetus. The restaurant's failure to keep their fire safety equipment safe and code-compliant cannot justly be a basis for an extension of the commencement of penalties.

The attached DBI Online Permit Tracking Report for the related permit shows: (1) that Espetus and the Owner have been on notice since September 2019 of the SFFD Inspector's comments to fire-safety issues; (2) that many of the fire-safety related problems arise from a "previous permit history [that] indicates expired and incomplete permits"; and (3) that the project sponsor delayed submitting revised plans for almost a year." (See highlighted portions of the attached pollution control unit permit Online Tracking Report dated 5-25-21.)

- b. Mr. Zucker's arguments about the sound wall barrier delay are disingenuous because the project owner could have applied for the permit much earlier and ordered the equipment months ago.

Mr. Zucker's argument that the sound wall barrier materials are on backorder is more of the same – an unwarranted bid to further delay abatement of a nuisance that the project owner should have corrected years ago. The project sponsor unnecessarily delayed filing an application for the sound wall barrier until October 20, 2020. It should have and could have, been submitted much earlier, as shown at a minimum by the permit application plans for the sound wall dated July 15, 2020 – three months before the project sponsor applied for the permit. (See highlighted date of the enclosed sound wall plans, Sheet S-1.)

Further, Mr. Zucker states that the delivery of the sound barrier is delayed but conspicuously omits on what date the Owner ordered the sound-wall barrier materials. As with the Pollution Control Unit ("PCU"), there is no reason that the sound-wall permit could not have been submitted much earlier, the materials ordered when it ordered the PCU in 2019 and been obtained well before the current shortages.

4. **The Board lacks the authority to grant the relief requested as it would violate due process and would be contrary to the requirements of Planning Code Section 176(c).**

The Board lacks authority to grant the relief requested as there is no procedural rule, regulation, ordinance or law that allows for the ex-parte revision of a Board decision after a duly noticed and considered Appeal hearing. Such an extension would violate the due process rights of the numerous parties who submitted written and oral opposition to the Appeal brought by the

Owner and Espetus. Notably, Mr. Zucker provides no authority in his letter for the proposition that the Board has the authority to grant the relief requested.

5. **Conclusion.**

The extension of the commencement of penalties would be an injustice to those afflicted by the smoke and odor from the restaurant and should therefore be disregarded as the Board lacks authority to deny or approve the request. At the Board's Appeal hearing, it overruled the Zoning Administrator's determination and replaced it with the same determination except that it added the 12-week requirement to obtain a CFC to avoid mandatory penalties. There can be no further excuses as it has been over three years since the Planning Department first issued the Notice of Enforcement and two years since the Appeal decision. Especially because the restaurant is open and the smoke and odors are a horrific ongoing nuisance, Mr. Zucker's request for a penalty-commencement extension shows no regard for people living and working from home next door who continue to suffer. An extension of the commencement of penalties based on the date of issuance of a permit would serve only to extend the unintended safe harbor that the Owner and Espetus have relied on to delay compliance for over two years since the Appeal hearing. Penalties are necessary to compel compliance at the earliest possible date.

Sincerely,

CLARK HILL LLP

Steven L. Hammond
Attorney at Law

SLH:lmb

Enclosures

cc: Ann Lazarus, Commissioner
Rick Swig, Commissioner
Tina Chang, Commissioner
55 Page Street HOA (via Radu Patrichi)
Scott Sanchez, Deputy Zoning Administrator
Justin A. Zucker

Permit Details Report

Report Date: 5/25/2021 3:58:26 PM

Application Number: 201905090211
 Form Number: 3
 Address(es): 0854 / 006 / 0 1686 MARKET ST
 Description: REVISION TO 201905039640. PLANNING REVIEW MISSED ON ORIGINAL PERMIT. ROUTE TO PLANNING FOR APPROVAL.TO VERIFY EXISTING DUCTWORK ON ROSE ALLEY MUST BE USED.
 Cost: \$165,000.00
 Occupancy Code: A-2
 Building Use: 05 - FOOD/BEVERAGE HNDLNG

Disposition / Stage:

Action Date	Stage	Comments
5/9/2019	TRIAGE	
5/9/2019	FILING	
5/9/2019	FILED	
3/24/2021	APPROVED	
3/24/2021	ISSUED	

Contact Details:

Contractor Details:

License Number: 611215
 Name: STEVE ROBERTSON
 Company Name: EMCOR SERVICES/MESA ENERGY SYSTEMS INC
 Address: 14450 DOOLITTLE DR * SAN LEANDRO CA 94577-0000
 Phone: 5106701690

Addenda Details:

Description:

Step	Station	Arrive	Start	In Hold	Out Hold	Finish	Checked By	Hold Description
1	BID-INSP	5/9/19	5/9/19			5/9/19	BARNES JEFF	
2	HIS	5/9/19	5/9/19			5/9/19	LUTON MATT	
3	INTAKE	5/9/19	5/9/19			5/9/19	CHAPMAN MARLA	
4	CPB	5/14/19	5/14/19			5/14/19	TORRES SHIRLEY	
5	CP-ZOC	5/14/19	5/16/19			7/9/19	SANCHEZ SCOTT	Approved per plans, application and conditions of approval (below) to install air filtration system. See Complaint No. 2018004446 and Appeal No. 18-140. Revision to 201905039640. Conditions of Approval: 1. The property owner complies with all terms outlined in Notice of Special Restrictions (NSR) No. 2019K444014. 2. The property owner implements all required and recommended mitigation measures outlined in the revised fan analysis report prepared by Charles M. Salter Associates (dated June 15, 2019) prior to obtaining Final Inspection or Certificate of Compliance (CFC) and regular operation of the equipment. This includes obtaining and completing work under a separate building permit application to install the required solid screen wall shielding the equipment from the north property line. 3. The property owner demonstrates compliance with the noise ordinance prior to obtaining Final Inspection or Certificate of Compliance (CFC) and regular operation of the equipment.
6	BLDG	7/11/19	8/5/19			8/5/19	CHEUNG JIMMY	APPROVED, ROUTE TO NEXT STATION.
7	MECH	5/9/19	5/9/19			5/9/19	ORTEGA REYNALDO	Approved, OTC
8	SFFD	5/9/19	5/9/19			5/9/19	CHIN JEFF	

									VIF existing code compliance specifically applicable to solid fuel appliances. Provide as built plans complying with NFPA 17A, and NFPA 96. PCU and Hood suppression to be interlocked and maintained in power failure or provide a single mechanical system. PCU (KES) fire suppression and Interconnection to fire alarm on separate permits. Detail separation distance to Property lines, air intakes, and building openings. JJC
8	SFFD	5/14/19	5/14/19			5/14/19	STUMPP FRED		
9	MECH	8/5/19	8/5/19			8/6/19	ORTEGA REYNALDO	review previous approval OTC - for planning purposes only	
10	SFFD	8/6/19	8/20/19	8/22/19		11/3/19	ESTRELLA JERRY	09.12.19 Verify Fan interlocks and Alarm interconnection, Simultaneous operation of the Pollution Control Unit and Hood fire suppression system is not specified as per NFPA 96 and NFPA 17A. Confirm the specific fire sprinkler and hard piped water hose requirements as per CMC Sec 517. Make Up Air and DSD required if over 2000 cfm. Detail all existing as-built conditions on plans to determine compatibility with proposed PCU "Grease Viper". Water Mist system option is recommended to reduce sparks. Vent termination separation required on roof, specify if venting solid fuel or grease hood. Previous permit history indicates expired and incomplete permits. At least one permit not routed to SFFD for review. Fire Separation permit (issued) inspection required. JJC 10.09.19 Sent comments. JJC transferred from Lt. Chin to FPE Estrella 8.17.2020 PH	
10	SFFD	10/9/19	10/9/19	10/9/19	11/3/20	11/3/20	ESTRELLA JERRY	Approved 11.03.2020 10.09.19 Generated comments pertaining to all open permits including fire separation of occupancy with communicating opening. Removal of duct extensions installed w/o permit, Water Heater ventilation correction, and the Pollution Control Unit. JJC reassigned 8.17.2020 to FPE Estrella	
11	CPB	5/18/20	5/18/20	5/18/20		5/18/20	TORRES SHIRLEY	#611-074-562 electronically submitted. **needs to submit signed plans.	
12	BLDG	11/10/20	11/10/20			11/10/20	CHEUNG JIMMY		
13	MECH	11/10/20	12/10/20	2/9/21		2/11/21	ORTEGA REYNALDO	Approved, recheck stamped paper intake plans, sent of PPC	
14	CP-ZOC	2/11/21	2/19/21			2/19/21	CORRETTE MOSES	Approved R-3 per conditions above (Sanchez)	
15	PPC	2/19/21	2/19/21			2/26/21	EAKIN MIGUEL	02/26/21: TO CPB;ME	
16	CPB	2/26/21	3/2/21			3/24/21	CHEUNG DEREK	3/24: released to Permit Center for customer p/u. -dc	

This permit has been issued. For information pertaining to this permit, please call 628-652-3450.

Appointments:

Appointment Date	Appointment AM/PM	Appointment Code	Appointment Type	Description	Time Slots
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Inspections:

Activity Date	Inspector	Inspection Description	Inspection Status
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Special Inspections:

Addenda No.	Completed Date	Inspected By	Inspection Code	Description	Remarks
0			18A	BOLTS INSTALLED IN EXISTING CONCRETE	epoxy
0			IB36	NRCI-MCH-01-E - MECHANICAL CERTIFICATE OF INSTALLATION	
0			IP10	NRCI-PLB-01-E - PLUMBING	
0			AB16	NRCA-PRC-02-F - COMMERCIAL KITCHEN	

				EXHAUST SYSTEM ACCEPTANCE	
o			IB35	NRCI-ENV-01-E - ENVELOPE CERTIFICATE OF INSTALLATION	
o			AB7	NRCA-MCH-07-A - SUPPLY FAN VARIABLE FLOW CONTROLS ACCEPTANCE	
o			18A	BOLTS INSTALLED IN EXISTING CONCRETE	epoxy

For information, or to schedule an inspection, call 628-652-3400 between 8:30 am and 3:00 pm.

[Station Code Descriptions and Phone Numbers](#)

[Online Permit and Complaint Tracking](#) home page.

Technical Support for Online Services

If you need help or have a question about this service, please visit our FAQ area.

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Very truly yours,

REUBEN, JUNIUS & ROSE, LLP



By: Justin A. Zucker
Attorney for SIC-MCM 72 Gough
Street LP

cc: Ann Lazarus, Commissioner
Rick Swig, Commissioner
Tina Chang, Commissioner
55 Page Street HOA (*via email only* shammond@clarkhill.com)

Building Owner: Mosser Company
 220 Montgomery Steet
 San Francisco, CA 94104
 (628) 895-5515

Structural Engineer: Brock Dickie Engineering
 502 Fredrick Street
 Santa Cruz, CA 95062
 (408) 410-5336

Contractor: A-One Construction, Inc.
 14100 Doolittle Drive
 San Leandro, CA 94577
 (510) 774-0850



MOSSER COMPANY

220 MONTGOMERY ST. SAN FRANCISCO, CA 94104
 (628) 895-5515

Project:

ESPETUS CHURRASCARIA BRAZILIAN RESTAURANT

72 GOUGH ST
 SAN FRANCISCO
 CA, 94102

Vicinity Map



Building Info

72 GOUGH ST
 SAN FRANCISCO
 CA, 94102
 PARCEL #: 0854/006



CASCADE ROOFTOP SCREENS, INC.
 688 WALSH AVENUE, SANTA CLARA, CA 95050
 (408) 827-1700
 GENERAL@CASCADEROOFTOPSCREENS.COM

No.	Revision	Date

Drawings

- RS-1: WEST ELEVATION
- RS-2: NORTH ELEVATION SIGHT STUDY
- S-1: STRUCTURAL DETAILS

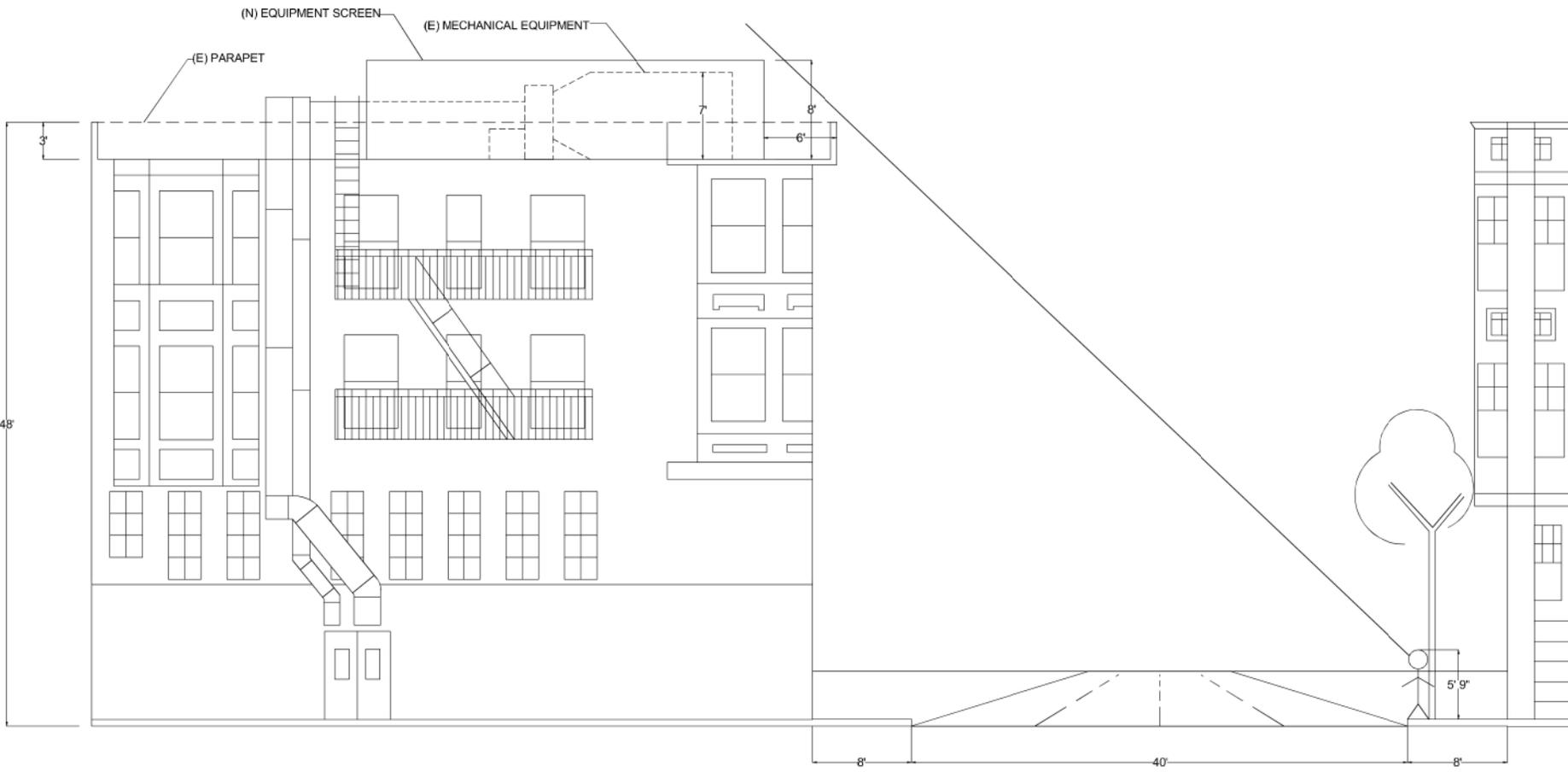
Permit Description

INSTALL A NEW EQUIPMENT SCREEN TO REDUCE THE NOISE EMANATING FROM THE ROOFTOP EQUIPMENT ON THE NORTH SIDE OF THE BUILDING FACING ROSE STREET.

Sheet Title:

COVER SHEET

Project no:
 Date: 2/5/2020
 Sheet no:



Project:



CASCADE ROOFTOP SCREENS, INC.
 688 WALSH AVENUE, SANTA CLARA, CA 95050
 (408) 827 - 1700
 GENERAL@CASCADEROOFTOPSCREENS.COM

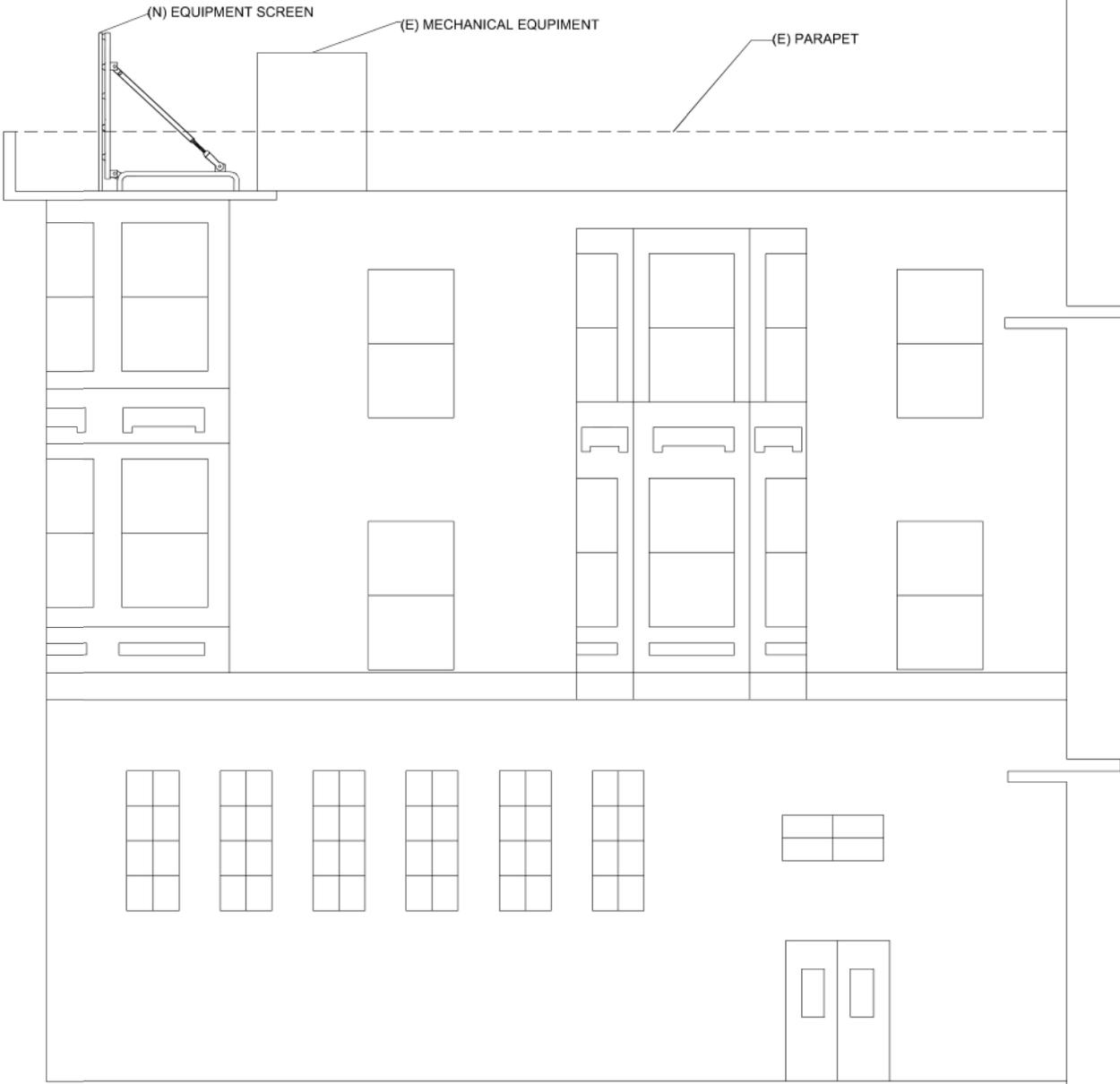
No.	Description	Date

Sheet Title:

Project no:
 Date: 2/6/2020
 Sheet no:

RS-2

Scale: 1/4" = 1'-0"



MOSSER COMPANY
 220 MONTGOMERY ST. SAN FRANCISCO, CA 94104
 (628) 885 - 5515

Project:
ESPETUS CHURRASCARIA BRAZILIAN RESTAURANT
 72 GOUGH ST
 SAN FRANCISCO
 CA, 94102



CASCADE ROOFTOP SCREENS, INC.
 688 WALSH AVENUE, SANTA CLARA, CA 95050
 (408) 627 - 1700
 GENERAL@CASCADEROOFTOPSCREENS.COM

No.	Revision	Date

Sheet Title:
WEST ELEVATION

Project no:
 Date: 1/17/2020
 Sheet no:

RS-1

Scale: 3/8" = 1'-0"

