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REPORT TO HONORABLE
MAYOR AND CITY COUNCILMEMBERS

PROPOSED DEDICATION OF PORTIONS OF FAIRBANKS RANCH AND ROSE CREEK FOR PARK AND RECREATION PURPOSES PURSUANT TO CALIFORNIA SENATE BILL NO. 1169 AND SAN DIEGO CHARTER SECTION 55

INTRODUCTION

On November 27, 2012, the City Council considered a list of approximately 11,000 acres of property proposed by San Diego Canyonlands (SDC) and Community Planning Groups to include in a document entitled "Declaration of the Dedication of Land" (Declaration), to dedicate the property for park and recreation purposes pursuant to California Senate Bill No. 1169 (SB 1169). To assist the City Council and in response to the request made by the Land Use and Housing Committee on October 17, 2012, this Office provided Report RC-2012-25 (Nov. 20, 2012) entitled "Dedication of Real Property for Park and Recreation Purposes pursuant to California Senate Bill No. 1169 and San Diego Charter Section 55," as Attachment A. On November 27, 2012, the City Council approved Resolution R-307902, attached as Attachment B, which approved the Declaration listing 6567.72 acres and thereby prohibiting a use for other than park and recreation purposes without ratification or approval by a vote of two thirds of the electorate. At the November 27, 2012 Council hearing, questions arose regarding the potential San Diego Charter section 55 (Section 55) dedication of the Fairbanks Ranch[1] and Rose Creek properties. This Office was directed to return to the City Council before the end of this calendar year with the analysis for the City Council to then consider the inclusion of the Fairbanks Ranch and Rose Creek properties in the Declaration.

QUESTIONS PRESENTED

1. Would the use of portions of Fairbanks Ranch by the Fairbanks Ranch Country Club, Inc., be inconsistent with the dedication of the property pursuant to Section 55 for park and recreation purposes?

2. Would the use of portions of Fairbanks Ranch by the Fairbanks Polo Club, be inconsistent with the dedication of the property pursuant to Section 55 for park and recreation purposes?

[1] Although Fairbanks Ranch was not defined at the Council hearing, this Office was provided two leases to review, one with Fairbanks Ranch Country Club, Inc. and one with Fairbanks Polo Club. This Report analyzes both leases.

3. Did San Diego Resolution R-256124 (Mar. 30, 1982) (Resolution) dedicate the properties identified as Fairbanks Country Club for park and recreation purposes pursuant to Section 55?

4. Would the continued use for flood control purposes of portions of Rose Creek that the Transportation & Storm Water Department manages as a flood control facility be inconsistent with the dedication of the property pursuant to Section 55 for park and recreation purposes?

SHORT ANSWERS

1. Continued use by the Fairbanks Ranch Country Club, Inc. of a portion of Fairbanks Ranch in accordance with the current lease may be inconsistent with park and recreation purposes pursuant to Section 55 because the general public is excluded from the property in accordance with the lease.

2. Continued use by the Fairbanks Polo Club of a portion of Fairbanks Ranch in accordance with the holdover provision of the expired lease may be inconsistent with park and recreation purposes pursuant to Section 55 because the general public is limited to a large extent in its use of the property in accordance with the terms of the lease.

3. Resolution R-256124 did not dedicate the properties known as Fairbanks Country Club for park and recreation purposes pursuant to Section 55.

4. Continued use of a portion of the Rose Creek property for flood control would not be inconsistent with park and recreation purposes pursuant to Section 55.

FACTS

I. FAIRBANKS RANCH PROPERTY

The property commonly known as Fairbanks Ranch, approximately 572 acres, was acquired from Watt Industries/San Diego Inc. (Watt Industries) by the City in 1983 by grant deed (Grant Deed). *See* Attachment C.[2] At the time of the acquisition of the property, the property was comprised of five lots.[3] The Grant Deed provides that one of the five lots was to be leased to Watt Industries and the remaining four lots were to be maintained by the City as open space in accordance with certain covenants, conditions and restrictions set forth in the Grant Geed.[4] Pursuant to Resolution R-307902, a portion of the open space lots of Fairbanks Ranch,

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[2] Watt Industries reserved several rights that if realized may significantly interfere with park and recreation purposes. However, without a specific proposal by Watt Industries to exercise a right reserved in the Grant Deed, an analysis cannot be done to determine whether such use would violate Section 55.

[3] Since acquisition of the property by the City, assessor parcel numbers have been assigned the property, but do not necessarily correlate with the boundaries of the five lots at the time of acquisition.

[4] Additionally, it has come to the attention of this Office that the City acquired an easement for sewer purposes on a portion of the lot leased to Watt Industries, which currently is the location of sewer pump station #79. However, as discussed in footnote 7, because sufficient facts have not been provided and could not be analyzed, we recommend against dedicating this portion of the property pursuant to SB 1169 and Section 55.

approximately 80 acres, were added to the Declaration and will be dedicated to park and recreation purposes pursuant to SB 1169.

In accordance with the Grant Deed, one lot, approximately 372 acres, was leased back to Watt Industries pursuant to the terms of the Percentage Lease between the City of San Diego and Watt Industries/San Diego, Inc. (Country Club Lease) for the construction, operation and maintenance of a private country club and golf course facilities. Country Club Lease, sections I.A and V. The Country Club Lease is attached as Attachment D. In 1986, the Country Club Lease was assigned by Watt Industries to Fairbanks Ranch Country Club, Inc. Fairbanks Ranch Country Club, Inc. does not allow members of the general public to enter the country club and golf course facilities. Instead, pursuant to the bylaws of the Fairbanks Ranch Country Club, Inc., membership is required to enter and use the country club and golf course facilities. The Country Club Lease is scheduled to expire in 2044, but may be extended at the City's discretion in accordance with Section V of the lease.

In 1986, the City and the Fairbanks Polo Club entered into a Lease Agreement (Polo Club Lease) for the construction and operation of a polo facility on a portion of one of the four open space lots.[5] The property covered by the Polo Club Lease is also subject to the covenants, conditions and restrictions of the Grant Deed. The Polo Club Lease expired on August 31, 2012, but the Fairbanks Polo Club remains in possession of the property pursuant to the holdover provision in section 2.02 of the Polo Club Lease. The Polo Club Lease is attached as Attachment E.

The Polo Club Lease includes the following provision that requires the lessee to not exclude the general public from the property:

> The general public shall not be wholly or permanently excluded from any portion of the premises. LESSEE may develop reasonable restrictions for the facility use provided they are consistent with the rights of the general public, and are designed to allow the LESSEE to use the premises for the purposes specified herein. LESSEE agrees that all activities conducted on the premises will be as stated in Section 1.02, Uses, of this lease.
>
> LESSEE shall, at all times during the lease term, maintain a CITY-approved sign identifying the property as City-owned and available for public use consistent with the terms of this lease. The sign shall be installed by the LESSEE at a location agreeable to CITY.

Polo Club Lease, section 1.10.

However, Exhibit C (Public Access Regulations) to the Polo Club Lease specifies that use of the leased property by the general public is limited. For example, the polo field areas are open to the general public for passive uses, such as spectating or picnicking, only during the daylight hours; only the polo club members and their invitees may play polo on the leased

[5] It is this Office's understanding that polo facilities have been authorized to operate on the property in accordance with the Grant Deed.

property; and public access to the premises may be restricted to only ticketed spectators during special events.

II. ROSE CREEK PROPERTY

The Rose Creek property in question is approximately 18-27 acres along Rose Creek that straddles Interstate 5 in the Pacific Beach and Clairemont Mesa neighborhoods, and is owned in fee by the City of San Diego (Rose Creek Property).[6] The Rose Creek Property consists of two non-contiguous segments totaling about 1.5 miles in length. The segment east of Interstate 5 is approximately 100 feet wide, and the segment west of Interstate 5 is approximately 200 feet wide. In between the two City-owned segments, Rose Creek runs through a railroad right of way, the Caltrans right of way, and private property.

The Rose Creek Property is currently managed by the Transportation & Storm Water Department for flood control purposes. East of Interstate 5 the flood control channel is fully concrete-lined, and west of Interstate 5 it is improved with rip rap sides. The channel ranges in width from approximately 60 feet east of Interstate 5 to approximately 125 feet west of Interstate 5. The Rose Creek Property is primarily used for passive flood control to convey runoff during storm events. Rose Creek conveys storm runoff from over 23,000 acres including urbanized areas around Rose Canyon and San Clemente Canyon.

All but the portion of the Rose Creek Property south of Grand Avenue is included in the City's Master Storm Water System Maintenance Program (Master Maintenance Program) and Programmatic Environmental Impact Report (PEIR), which were approved by the Council on October 24, 2011. Routine channel maintenance under the Master Maintenance Program involves the use of heavy equipment to clear accumulated sediment and vegetation out of channels to restore flood control capacity. Under the PEIR, the City is required to mitigate for impacts caused by channel maintenance, including impacts on biological, land use, and water quality resources. Therefore, maintenance results only in temporary disturbance of the area. Maintenance is anticipated to occur at three-year intervals.

ANALYSIS

The use of dedicated park lands in the City is governed by Section 55, which provides in pertinent part that real property that is dedicated for park and recreation purposes may be used only for park and recreation purposes without a vote of the public:

> All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two thirds of the qualified electors of the City voting at an election for such purpose.

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[6] A portion of the Rose Creek Property does not have an assessor's parcel number assigned. Therefore, to identify those portions of Rose Creek would require a survey and legal description, which staff estimates cannot occur prior to December 31, 2012.

A proposed use that is incidental or ancillary to park and recreation purposes is a proper use of a dedicated park if the incidental or ancillary use is consistent with park and recreation purposes. *Slavich v. Hamilton*, 201 Cal. 299, 303 (1927). Where a park is dedicated by a private individual, the permissible uses of the land are strictly construed in accordance with the grant deed. *Spires v. City of Los Angeles*, 150 Cal. 64, 66 (1906); *Slavich*, 201 Cal. at 303. In contrast, where the City is the grantor, the permissible uses are more liberally construed. *Spires*, 150 Cal. at 66; *Slavich*, 201 Cal. at 303. Where the City dedicates a park, uses are permissible as long as they "tend to further and promote the enjoyment of the people under the general dedication of the land for their benefit." *Spires*, 150 Cal. at 66. For example, straightening the course of a natural waterway for flood control was found to be consistent with park purposes, especially since the park property had been damaged by previous floods. *Ritzman v. City of Los Angeles*, 38 Cal. App. 2d 470, 473 (1940).

In contrast, a use which would be inconsistent with park purposes or which would unreasonably interfere with the public's enjoyment of the park is impermissible on dedicated park land. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 470 (1976). Courts tend to focus on three factors: (1) the amount of space occupied by the use relative to the size of the park; (2) the location of the use in the park; and (3) the duration of the use. *City & County of San Francisco v. Linares*, 16 Cal. 2d 441, 447 (1940) (finding that temporary suspension of park surface use for ten months and permanent installation of entrance and exit for underground public parking, allowed by the San Francisco Charter, occupying 6.5% of the park was an insignificant interference with park use).

The facts of each situation must be evaluated in order to determine whether a proposed use is consistent or inconsistent with the dedicated park purpose. Accordingly, a case-by-case analysis must be performed each time a use is being considered for property dedicated for park and recreation purposes.

I. IF FAIRBANKS RANCH IS DEDICATED FOR PARK AND RECREATION PURPOSES, CONTINUED USE UNDER THE COUNTRY CLUB LEASE MAY BE INCONSISTENT WITH CHARTER SECTION 55

Property dedicated for park and recreation purposes is to be devoted to park and recreational uses for the enjoyment of the general public, and not to the exclusion of the general public. *See Spires*, 150 Cal. at 66; *San Vicente Nursery School v. Los Angeles County*, 147 Cal. App. 2d 79, 85 (1956). In the case of *San Vicente Nursery School,* a nonprofit corporation conducted a private nursery school on approximately one-half of one percent of a park pursuant to a lease with the County of Los Angeles. *Id.* at 81-83. The children were admitted to the school on a first-come first-serve basis. *Id.* at 81. The court held that the County of Los Angeles did not have the authority to permit the exclusive use and occupancy of the park property by the nursery school. *Id.* at 85-87. A golf course open to the general public is a consistent use with park and recreation purposes. *Save Mile Square Park Committee v. County of Orange*, 92 Cal. App. 4th 1142, 1146-67 (2001).

Similarly, this Office has issued opinions that have addressed proposals for exclusive use of dedicated park property and has consistently advised that dedicated park property must remain open to the public. For example, in 1938, this Office opined that a permit to the Balboa Tennis

Club for the exclusive use and operation of tennis courts on a portion of Balboa Park would violate the law, although the general public would be permitted to use the tennis courts when not in use by the Balboa Tennis Club. 1938 Op. City Att'y 90 (Mar. 2, 1938). *See also* 1946 Op. City Att'y 58 (Jan. 31, 1945) (a lease to an organization to use a building for an event open to members only may legally be done for no longer than a couple of days and only if similar opportunities were made available to other organizations); 1977 City Att'y MOL 190 (May 10, 1977) (charge for admission to the Japanese Garden in Balboa Park is permitted so long as no class or portion of the general public is excluded from the facility); 1981 City Att'y MOL 132 (May 18, 1981) (a community agency may operate a recreational facility so long as the facility is open to the general public on a nondiscriminatory basis).

Notwithstanding the general rule discussed above, courts have also found certain uses consistent with park purposes even though the use excludes the general public. For example, the California Supreme Court held that a lease of a building for a memorial hall and a meeting place for organizations whose membership was military veterans was a use consistent with park purposes and would not interfere with the enjoyment of the general public. *Slavich*, 201 Cal. at 308-09. The court made note of the following regarding the memorial building: (1) it occupied a small portion of the park; (2) it would add to the beauty and attractiveness of the park; (3) it would provide a monument to the veterans; (4) it would be used for pleasure purposes only; and (5) its proposed use was kept within the bounds of park purposes. *Id.* at 307-08.

Here, if the property subject to the Country Club Lease were dedicated for park and recreation purposes, a court would most likely find the exclusive use of the property to be inconsistent with park and recreation purposes and to interfere with the public's enjoyment of the park. In accordance with the Grant Deed and Country Club Lease, the Fairbanks Ranch Country Club, Inc. operates a private country club and golf course on the leased property. Entry onto the leased property and use of the golf course facilities require membership with the Fairbanks Ranch Country Club, Inc., in accordance with its bylaws. The Amended and Restated Bylaws of the Fairbanks Ranch Country Club, Inc. are attached as Attachment F. Additionally, the country club and golf course facilities occupy the entirety of the leased property, except for a portion that is occupied by the City's sewer pump station #79.[7] This instance is significantly different than the *Slavich* case because the general public would be excluded from what would be the entirety of the park, that is, the entire leasehold. Even if the additional 80 acres of open space scheduled to be dedicated by SB 1169 were added to the equation, the leased property (approximately 372 acres) comprises the greater majority of the property that would be dedicated for park and recreation purposes (approximately 452 acres).

To date, we find no legal authority to support dedicating property for park and recreation purposes subject to private uses that would be inconsistent with park and recreation purposes. Therefore, assuming a court were to find the existing use to be inconsistent with park and recreation purposes, dedicating the land under SB1169 would create a circumstance directly

[7] This Office does not have sufficient facts regarding sewer pump station #79 in order to perform an analysis whether such a use is consistent or may coexist within property dedicated for park and recreation purposes. If this portion of the property could legally be identified by an assessor parcel number or legal description, this Office would recommend the portion of the leased property occupied by the sewer pump station #79 not be considered for dedication pursuant to SB1169 and Section 55 until such time as the requisite analysis may be performed.

contrary to Section 55. Section 55 states, in relevant part, that "[a]ll real property . . . dedicated . . . by statute of the State Legislature for park, [or] recreation . . . purposes *shall not be used* for any *but* park, [or] recreation . . . purposes . . . ." (emphasis added). In light of this plain and limiting language, if the land was dedicated, the City could be subject to claims by the Fairbanks Ranch Country Club, Inc. for breach of contract and interference with existing property rights. Alternatively, persons interested in upholding the dedication could seek judicial intervention if the uses under the Country Club Lease continued for the lease term.

II. IF FAIRBANKS RANCH IS DEDICATED FOR PARK AND RECREATION PURPOSES, CONTINUED USE UNDER THE POLO CLUB LEASE MAY BE INCONSISTENT WITH CHARTER SECTION 55

If the subject property were dedicated for park and recreation purposes, the use of the property under the Polo Club Lease may also be a use inconsistent with park and recreation purposes. Section 1.10 of the Polo Club Lease does not permit the Fairbanks Polo Club to exclude the general public from the leased property. However, Exhibit C (Public Access Regulations) to the Polo Club Lease specifies that use of the lease property by the general public is limited to a great extent. For example, the polo field areas are open to the general public for passive uses, such as spectating or picnicking, only during the daylight hours; only the polo club members and their invitees may play polo on the leased property; and public access to lease premises may be restricted to only ticketed spectators during special events. Additionally, the polo club facilities occupy the entirety of the 120 acres leased to the Fairbanks Polo Club. Again, this instance would be distinguishable from the *Slavich* case involving a veteran's memorial hall because not just a portion of the property dedicated for park and recreation purposes would exclude the general public.

However, the Polo Club Lease has expired and the Fairbanks Polo Club continues to occupy the leased property under the terms of the Polo Club Lease on a month-to-month basis. Polo Club Lease, Section 2.02. If the City were to terminate the Fairbanks Polo Club's month-to-month tenancy, the use, that may be inconsistent with Section 55, would cease.

Nonetheless, Watt Industries reserved several rights pursuant to the Grant Deed. One such reservation is for water utilities in, over, under and across the property, with the caveat that the water utilities not unreasonably interfere with the City's use or the open space nature of the property. It is possible that a use consistent with Section 55 could interfere with the property rights reserved by Watt Industries. Therefore, to avoid potential claims by Watt Industries, the Council should consider delaying dedicating the property for park and recreation purposes until such time Watt Industries' rights under the Grant Deed expire.[8] Additionally, the Fairbanks Polo Club use pursuant to the Polo Club Lease would have to terminate.

[8] Similarly, based on analysis of the Grant Deed, which we recently received, the cautious approach is that the open space parcels of Fairbanks Ranch that were included in the Declaration pursuant to Resolution R-307902 be removed from the Declaration.

III. SAN DIEGO RESOLUTION R-256124 DID NOT DEDICATE THE PROPERTY KNOWN AS FAIRBANKS COUNTRY CLUB FOR PARK AND RECREATION PURPOSES PURSUANT TO CHARTER SECTION 55

On March 30, 1982, the City Council adopted the Resolution, attached as Attachment G, that approved the specific plan for the property known as Fairbanks Country Club.[9] When interpreting a resolution, the courts do not go beyond the usual and ordinary meaning of the language in the resolution, unless the language is ambiguous. *City of Vista v. Sutro & Co.*, 52 Cal. App. 4th 401, 409 (1997). There is no statement or reference in the Resolution that it dedicates the Fairbanks Country Club property pursuant to Section 55.

Even if the Resolution was intended to dedicate the property identified as Fairbanks Country Club for park and recreation purposes, the dedication would not be valid because it did not comply with Section 55. Section 55 states that real property owned in fee by the City may be dedicated by either an ordinance of the City Council or by statute of the State Legislature. San Diego Charter § 55. For the property identified as the Fairbanks County Club to have been dedicated, it must have been dedicated by ordinance or the Resolution must have been passed in the manner and with the formality of an ordinance. Case law is clear that if a resolution is passed in the "manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance." *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 648 (1971); *see also City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 566 (1970). The Resolution was not passed in the manner or formalities required for the enactment of an ordinance by the City Council. Specifically, the Resolution was passed and adopted on the same date, i.e. March 30, 1982. At the time, San Diego Charter section 16[10] provided that all ordinances, except for specific exceptions not applicable here, were to be passed only after a minimum of 12 days from the date of its introduction. Therefore, both the plain language of the Resolution and the adoption of the Resolution pursuant to the formalities of a resolution, not an ordinance, provide that the Resolution did not serve to dedicate the property identified as Fairbanks Country Club for park and recreation purposes.

IV. THE CURRENT USE OF THE ROSE CREEK PROPERTY FOR FLOOD CONTROL WOULD NOT CONFLICT WITH CHARTER SECTION 55

It is very likely a court would find the continued use of the Rose Creek Property for flood control purposes does not violate Section 55, should the City dedicate the Rose Creek Property for park and recreation purposes. The Rose Creek Property was not acquired by the City through a private dedication for park use, and so what constitutes a permissible use is not strictly construed under *Spires*.

This Office has not opined on whether the use of property for flood control is consistent with park use under Section 55, but has issued a number of opinions on other uses. Among the

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[9] Resolution R-256123 was analyzed in this Office's Report RC-2012-25, referenced above, and also did not dedicate the property known as Fairbanks Country Club. See Attachment A.

[10] San Diego Charter section 16 was repealed effective July 30, 2010, and replaced with San Diego Charter section 275 as a result of the strong-mayor form of government becoming permanent in the City.

uses found consistent with park uses under Section 55 are temporary holiday tree collection and recycling sites, City Att'y MOL 2008-20 (Nov. 13, 2008); underground sludge and sewer lines, 1990 City Att'y MOL 211 (90-17; Jan. 26, 1990); and a wastewater recycling facility with only temporary construction impacts, 1985 City Att'y MOL 463 (85-85; Nov. 19, 1985). Among the uses found inconsistent with park uses are a homeless shelter, City Att'y MOL 2009-8 (Sept. 11, 2009); a pigging station (a wastewater treatment facility component), 1994 City Att'y MOL 559 (94-64; July 26, 1994); and a child care facility for City workers, 1985 City Att'y MOL 252 (85-49; Aug. 28, 1985).

The flood control use would be consistent with park use because it would "promote the enjoyment of the people under the general dedication of the land for their benefit" under *Spires*. *Spires*, 150 Cal. at 66. Rose Creek is used only for passive flood control, that is, to convey runoff during storm events. Therefore, the current flood control use has no appreciable impact on potential park and recreation uses beyond that of a naturally occurring river or stream. In fact, the flood control channel currently coexists with a bike path that runs adjacent to it west of Interstate 5. The improved Rose Creek channel protects not only surrounding developed areas from flooding, but also protects the Rose Creek Property itself from flood damage, like the permissible flood control channel straightening in *Ritzman*. *Ritzman*, 38 Cal. App. 2d at 473. Moreover, maintaining the flood control capacity of Rose Creek involves the removal of accumulated vegetation which often contains invasive and exotic species, thereby enhancing the park and recreation use.

Furthermore, applying the *Linares* factors discussed above supports the conclusion that there is no Section 55 conflict. The factors are: (1) the amount of space occupied by the use relative to the size of the park; (2) the location of the use in the park; and (3) the duration of the use. *Linares*, 16 Cal. 2d at 447. Under the first factor, the flood control channel itself takes up a large portion of the Rose Creek Property. Under the second factor, the flood control use occurs in the channel that runs through the center of the Rose Creek Property. These two factors could weigh towards a conclusion that the flood control use would unreasonably interfere with park use, but for the unobtrusive nature of the flood control use. The passive flood control use of Rose Creek has no appreciable impact on potential park and recreation uses despite its relatively large size and prominent location within the Rose Creek Property.

When considering the third *Linares* factor, the duration of use, the most tangible impact on park and recreation use would occur during channel maintenance or repair. However, maintenance or repair is a temporary impact, an insignificant interference with park use. Maintenance is anticipated to occur for several weeks at a time on a three year cycle. Channel repair would occur on a less frequent schedule, on an as-needed basis. Access to the public may need to be limited during maintenance and repair to ensure public safety, as heavy equipment will likely be used to dredge accumulated vegetation and sediment from the channel. Compared to the ten-month interruption that was upheld in *Linares*, any short-term closure to the public for channel maintenance or repair likely would be insignificant.

Finally, Senate Bill 1169 specifically reserves "to the city council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities to be located thereon do not significantly interfere with the park and recreational use of the property." "Utilities" generally include storm water conveyance facilities. *See, e.g.*, Cal.

Gov't Code § 50335 (including "storm drain pipes or ditches" in a list of "utilities" for which easements may be granted); Cal. Civ. Code § 1001(a) (including "drainage" among a list of "utility services" for which private property owners may exercise eminent domain to obtain a utility easement). No utility easement in favor of the City for Rose Creek is needed in this case because the City already owns the Rose Creek Property in fee. This provision of SB 1169, however, supports the conclusion that continued use of the Rose Creek Property for flood control purposes would be consistent with Section 55, should the City dedicate the Rose Creek Property for park purposes.[11]

CONCLUSION

If the City dedicates the Fairbanks Ranch property subject to the Country Club Lease, continued use by the Fairbanks Ranch Country Club, Inc. of a portion of Fairbanks Ranch in accordance with the corresponding lease, a court would very likely find the use to be inconsistent with park and recreation purposes. Likewise, continued use by the Fairbanks Polo Club of a portion of Fairbanks Ranch in accordance with the hold over provision of the expired lease would likely be inconsistent with park and recreation purposes. Therefore, if either property is dedicated, a court could find that the dedication is inconsistent with Section 55.

Also, Resolution R-256124 did not dedicate the properties known as Fairbanks Country Club for park and recreation purposes pursuant to Section 55. Finally, continued use of a portion of the Rose Creek property for flood control would not significantly interfere with park and recreation purposes; therefore dedication of the property for park and recreation purposes would not violate Section 55.

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By /s/ Heather L. Stroud
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Stacey LoMedico, Director, Park and Recreation Department
Chris Zirkle, Deputy Director, Open Space Division
James Barwick, Director, Real Estate Assets Department
Lane MacKenzie, Asset Manager, Real Estate Assets Department

[11] However, dedication of the Rose Creek property pursuant to SB 1169 cannot include that portion of the Rose Creek property that does not have an assessor parcel number and a legal description.

Attachments: Attachment A – City Attorney Report dated November 20, 2012
Attachment B – Resolution No. 307902
Attachment C – Grant Deed
Attachment D – Percentage Lease between the City of San Diego and Watt Industries/San Diego, Inc.
Attachment E – Lease Agreement between the City of San Diego and Fairbanks Polo Club
Attachment F – Amended and Restated Bylaws of Fairbanks Ranch Country Club, Inc.
Attachment G – Resolution No. 256124

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ATTACHMENT A

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November 20, 2012

REPORT TO HONORABLE
MAYOR AND CITY COUNCILMEMBERS

DEDICATION OF REAL PROPERTY FOR PARK AND RECREATION PURPOSES PURSUANT TO CALIFORNIA SENATE BILL NO. 1169 AND SAN DIEGO CHARTER SECTION 55

INTRODUCTION

San Diego Charter section 55 (Section 55) provides for the dedication of property owned in fee by the City for park and recreation purposes by means of a City Council ordinance or statute by the State Legislature. On September 12, 2012, California Senate Bill No. 1169 (SB 1169) was chaptered amending California Fish and Game Code section 2831. Section 2831(a) dedicates for park and recreational purposes City of San Diego lands designated as of January 1, 2013, as open space lands in a document entitled "Declaration of the Dedication of Land." The Declaration is to be approved by the City Council by a resolution. *See* SB 1169 attached as Attachment A. SB 1169 reserves to the City Council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities do not significantly interfere with the park and recreational use of the property. The City Council will be considering for approval a resolution that includes a list of designated open space property owned in fee by the City, and thereby dedicating the property for park and recreation purposes pursuant to SB 1169.

San Diego Canyonlands (SDC) presented to the City a list of approximately 11,000 acres of property that SDC recommends for dedication by SB 1169. Some of the properties proposed by SDC for dedication are outside of the City's jurisdictional limits. Some of the properties proposed by SDC for dedication do not meet the conditions outlined in Council Policy 700-17 (CP 700-17). Some of the properties proposed by SDC for dedication have been identified by SANDAG (San Diego Association of Governments) as possibly being needed for future light rail or railroad purposes. Staff from the Park and Recreation Department, the Real Estate Assets Department, and other departments as necessary, reviewed the list provided by SDC and recommended 5,881 acres for dedication at the Land Use and Housing Committee (LU&H) meeting held on October 17, 2012. At the conclusion of the discussion on this item, LU&H recommended that the City Council dedicate all of the approximately 11,000 acres proposed by SDC and any additional property recommended by the Community Planning Groups. LU&H also requested that this Office advise the City Council on issues raised at the meeting regarding permitted uses for, and restrictions on, property dedicated for park and recreation purposes.

QUESTIONS PRESENTED

1. May real property that is owned in fee by the City and located outside of the City's jurisdictional boundaries be dedicated for park and recreation purposes pursuant to Section 55?

2. May City Council waive CP 700-17, Policy on Dedication and Designation of Park Lands, to include real property that does not meet the conditions provided in CP 700-17? If so, how may the City Council waive CP 700-17?

3. May future railroads and railroad facilities be located on or across real property that is owned in fee by the City and has been dedicated for park and recreation purposes pursuant to Section 55?

4. May bikeways be located on or across real property that is owned in fee by the City and has been dedicated for park and recreation purposes pursuant to Section 55?

5. What is the City's legal recourse when real property that is owned in fee by the City and has been dedicated for park and recreation purposes pursuant to Section 55 is encroached upon?

6. Did San Diego Resolution R-256123 (Mar. 30, 1982) (Resolution) dedicate the properties identified as Fairbanks Country Club for park and recreation purposes pursuant to Section 55?

SHORT ANSWERS

1. The City does not have the authority to dedicate property that is owned in fee by the City and is located outside of its jurisdictional boundaries.

2. CP 700-17 is a policy statement of the City Council adopted by resolution. Therefore, if the City Council were to decide to dedicate property pursuant to Section 55 that does not meet the conditions outlined in the policy, the City Council may waive the policy by another resolution.

3. Future railroads and railroad facilities may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the railroad is a public utility and does not significantly interfere with the park and recreational use of the property, or if the railroad may coexist with the park purpose of the property.

4. Bikeways may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the proposed bikeway is consistent with the park and recreational use of the property or if the bikeway is on the right-of-way of a street or road that is authorized by the City Council pursuant to Section 55.

5. The City has several options available to address encroachments upon City-owned real property that has been dedicated for park and recreation purposes pursuant to Section 55 when the encroachment begins after the City acquired fee title to the property. The City's options are limited if the encroachment began prior to the City's acquisition of the property if the encroaching party can satisfy the legal elements necessary to prove adverse possession of, or an easement by prescription over or upon, the encroachment area.

6. The Resolution did not dedicate the properties known as Fairbanks Country Club for park and recreation purposes pursuant to Section 55.

BACKGROUND

Real property may be proposed for public purpose dedications by means of a private grant of property or by action of a public entity. Property proposed for dedication by private individuals is strictly construed according to the terms of the grant. On the other hand, dedication by a public entity receives a less strict construction. *Slavich v. Hamilton*, 201 Cal. 299, 303 (1927).

Section 55 provides, in part, that:

> All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two thirds of the qualified electors of the City voting at an election for such purpose.

San Diego Charter § 55. Real property owned in fee by the City may be dedicated for the purposes of park and recreation pursuant to an ordinance or State legislation. *Id.* The issue, then, is what uses are included in park and recreation purposes. A proposed use that is incidental or ancillary to park and recreation purposes is a proper use of a dedicated park if the incidental or ancillary use is consistent with park and recreation purposes. Whether a use is incidental or ancillary to the public's enjoyment of a park is determined by whether a use is consistent or inconsistent with park purposes. *Slavich*, 201 Cal. at 303. For example, museums, restaurants, hotels, zoological and botanical gardens, libraries, art galleries and conservatories are all ancillary to the full enjoyment of dedicated park property, and thereby consistent with park purposes. *Spires v. City of Los Angeles*, 150 Cal. 64, 66-67 (1906); *Slavich*, 201 Cal. at 303. On the other hand, a use that constitutes misuse or a diversion from the park use is inconsistent or unreasonably interferes with the use of the property for park and recreation purposes. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 470 (1976); *San Vicente Nursery School v. Los Angeles County*, 147 Cal. App. 2d 79, 85 (1956); 11A McQuillin Mun. Corp. § 33:78 (3rd ed. 2012). Use of dedicated park property for a city hall, hospital, jail, municipal buildings or offices would not be ancillary to the park purpose of promoting the recreation and pleasure of the public generally, and are thereby inconsistent with park purposes. *Spires*, 150 Cal. at 67. Therefore, any use in dedicated park property must be consistent with the park and recreation purpose.

There are also those uses of dedicated park property that have been determined to not violate the general purpose of the proposed park use as a result of changed conditions, customs, usages and improvements. *Abbot Kinney Co. v. City of Los Angeles*, 223 Cal. App. 2d 668, 675 (1963); *Griffith v. City of Los Angeles*, 175 Cal. App. 2d 331, 337 (1959). For example, when private land developers dedicated property to the City of Los Angeles in 1904 for a pleasure park or beach, the means of transportation to and from the property was by way of electric railroad cars, horse cars, bicycles and horse-drawn vehicles, but rarely by automobile. *Abbot Kinney*, 223 Cal. App. 2d at 669-71. In 1954, the city constructed an automobile parking area on a portion of the dedicated property, approximately seven percent of the total dedicated property. *Id.* at 671. The court held that the use of a portion of the property for parking of automobiles did not violate the general purpose of the grant of dedication because of the change in the mode of public transportation. *Id.* at 675. The parking area allowed for the public's new means of transportation, which allowed the public to enjoy the park and beach.

The facts of each situation must be evaluated in order to determine whether a proposed use is consistent or inconsistent with the dedicated park purpose. Accordingly, case-by-case analysis must be performed each time a use is being considered for property dedicated for park and recreation purposes.

I. THE CITY DOES NOT HAVE THE AUTHORITY PURSUANT TO THE CHARTER TO DEDICATE REAL PROPERTY IT OWNS THAT IS LOCATED OUTSIDE OF THE CITY'S JURISDICTIONAL LIMITS

Generally, a city has the power to dedicate property it owns for a public purpose. *City of Oakland v. Burns*, 46 Cal. 2d 401, 405 (1956); *Copeland v. City of Oakland*, 19 Cal. App. 4th 717, 722 (1993). However, a municipal corporation has "generally no extraterritorial powers of regulation. It may not exercise its governmental functions beyond its corporate boundaries." *City of Oakland v. Brock*, 8 Cal. 2d 639, 641 (1937). Governmental functions are those governmental powers delegated to the municipality, the police functions of a city in "conserving the health of its citizens" and the exercise of dominion and control thereof. *Chafor v. City of Long Beach*, 174 Cal. 478, 486 (1917); *Benton v. City of Santa Monica*, 106 Cal. App. 339, 343 (1930).[1]

The dedication of property for park and recreation purposes is a governmental power delegated to the City pursuant to Section 55. Further, San Diego Charter section 3 (Section 3) states, in relevant part, "The municipal jurisdiction of The City of San Diego shall extend to the limits and boundaries of said City."[2] Pursuant to Section 55 and Section 3, the dedication of property for park and recreational use is a governmental function that may be exercised only within the territorial limits of the City. As a result, the City does not have the authority to

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[1] On the other hand, a city may exercise proprietary powers as to property that it owns located outside of its corporate boundaries. *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001) (citing *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir. 1989)). Proprietary functions are those functions that are ordinarily exercised by private persons and do not involve conserving the health of its residents or exercising police powers; for example the buying, selling, or granting of property or matters of contract. *Chafor*, 174 Cal. at 486-87; *Benton*, 106 Cal. App. at 343.

[2] However, Section 3 does provide for the regulation, use, and government of the City's water systems within and without the jurisdictional boundaries of the City.

dedicate property that is owned in fee by the City and is located outside of its jurisdictional boundaries.

II. THE CITY COUNCIL MAY WAIVE COUNCIL POLICY 700-17 AND CONSIDER FOR DEDICATION PURSUANT TO SB 1169 ALL OF THE REAL PROPERTY RECOMMENDED BY SAN DIEGO CANYONLANDS

CP 700-17, Policy on Dedication and Designation of Park Lands, attached as Attachment B, provides a process for reviewing real property to identify property that is suitable for dedication or designation pursuant to Section 55. Section III of CP 700-17 sets forth conditions for review of land acquired for open space park purposes.

A council policy is a policy statement to guide or set forth procedures of various functions of the City that is adopted by resolution by the City Council. Council Policy 000-01. The City Council has the authority to amend or retire a council policy by resolution. *Id.* Accordingly, if the City Council were to decide to dedicate certain property that does not meet the conditions outlined in CP 700-17, it may do so by waiving CP 700-17 by separate resolution.

III. RAILROADS AND RAILROAD FACILITIES POTENTIALLY MAY COEXIST ON PROPERTY DEDICATED FOR PARK AND RECREATION PURPOSES

As mentioned above, SDC has proposed for dedication pursuant to SB 1169 certain properties that have been identified by SANDAG as possibly being needed for future light rail or railroad purposes. SB 1169 reserves to the City Council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities do not significantly interfere with the park and recreational use of the property.

Although use of dedicated park property for railroad purposes may generally be considered an inconsistent use[3], a railroad may be considered a public utility for which an easement may be granted pursuant to SB 1169 and CP 700-17. Public utilities include common carriers. Cal. Const. art. XII, § 3; Cal. Pub. Util. Code § 216. A common carrier is defined as a person or corporation that provides transportation for compensation to or for the public. Cal. Pub. Util. Code § 211. Therefore, a railroad may qualify for a utility easement on dedicated park land pursuant to SB 1169 and section V.C of CP 700-17, so long as the railroad and its facilities do not significantly interfere with the park and recreational use of the property. However, this analysis assumes that only an easement, not a fee interest, in the City's property would be sufficient to meet the purposes of the proposed railroad. If fee title is necessary for the use of the property for railroad purposes, voter approval would be required for the City to sell dedicated property for a non-park and recreational use.[4]

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[3] Courts in other states and an opinion issued by this Office have stated that a railroad is generally an inconsistent use of dedicated park land. *To What Uses May Park Property be Devoted*, 18 A.L.R. 1246 (originally published 1922); *To What Uses May Park Property be Devoted*, 63 A.L.R. 484 (originally published 1929); 1986 City Att'y MOL 143, 145 (ML 86-15; Feb. 11, 1986).

[4] A railroad may have the power to condemn City property. In such an instance, a different analysis would be required.

In addition, the courts in three cases in California have specifically addressed the issue of a railroad on dedicated park property. In all three cases, the courts determined that it is not unlawful for a railroad use of dedicated park land or determined that the two public purpose uses may coexist. The California Supreme Court in *People ex rel Britton v. Park & Ocean Railroad Co.*, 76 Cal. 156 (1888) held that the railroad that ran along southern and western portions of Golden Gate Park in the City of San Francisco was not unlawful (i.e. not a nuisance) because it did not interfere with the use or enjoyment of the park by the public. *Id.* at 157, 160. In that case, the City and County of San Francisco had authorized the railroad use along its streets and the Park Commissioners had authorized the railroad use in the park. The Court discussed that the portions of the park that the railroad ran through were either unused by the public, used for the purpose of a temporary nursery, were in a "state of nature," or were sandy with either great depressions or elevations, such that these portions of the park were unfrequented by visitors of the park. *Id.* at 161-62. The court also mentioned that the railroad was a means of ingress, egress and transportation for the public to enjoy the park. *Id.* at 162-63.

The court in *City of Los Angeles v. Los Angeles Pacific Co.*, 31 Cal. App. 100 (1916), addressed the issue of use of dedicated park property for railroad purposes when the City of Los Angeles condemned existing railroad and railroad facilities (i.e. power pole line over the property and subway under the property) in order to dedicate the property under its Charter for park purposes. The City of Los Angeles argued that its title to the property must be clear of any existing pole line and subway rights because the use for railroad purposes was inconsistent with the proposed use for park purposes. *Id.* at 109. The court disagreed with the city and cited *Britton* stating that it was not uncommon to have a railroad in a park, and that a railroad and a park may coexist. *Id.* The court also noted that the pole line and right-of-way for the subway were a part of a railroad that extended beyond the city's limits and was under State control. *Id.* at 110. Therefore, the city could not seek to condemn property with established rights of way, tracks and depots for the purpose of dedicating the property for park purposes and expect the court to not inquire whether both the public use for railroad and public use for park are consistent or may coexist. *Id.* Finally, the court noted that the city's charter authorizing the dedication of property as public park or parks prohibited non-park uses after acquisition of the property, but did not prohibit non-park uses that existed when the property was acquired. *Id.* at 110-11.

In the case of *Humphreys v. City & County of San Francisco*, 92 Cal. App. 69 (1928), the City and County of San Francisco imposed an assessment for the construction of a tunnel for railroad purposes through Buena Vista Park and Duboce Park and a street car line through Duboce Park to provide rapid transit between two distant sections of the city. In determining whether the assessment was proper, the court addressed whether the construction of the tunnel and street railway was an unlawful use of the parks. *Id.* at 72. The court held that the tunnel was to be entirely beneath the surface of Buena Vista Park and therefore it "could not possibly interfere with the free or customary use of the park for any or all park purposes." *Id.* at 73. The street car line was to run over the surface of Duboce Park and then enter the tunnel, and the laying of the tracks would require removal of sidewalk, curb, lawn, shrubs, trees and path. *Id.* The portion of Duboce Park for the tunnel and street railway would run along the southern boundary of the park constituting "a small fraction of the entire park area." *Id.* The court also considered testimony from city employees and park commissioners, and the trial court's findings that the park property where the tunnel and railway were proposed had been occupied by brush and shrubs, and was not frequented by the public. *Id.* at 77-78. The court determined that,

although the purpose of the tunnel and street car line was to facilitate transportation between two distant parts of the city, they would also incidentally be a medium for ingress, egress and transportation for the public to enjoy the privileges of the park. *Id.* at 78. Therefore, the court held that the public railroad use of the park was not "so inconsistent with the purposes for which the park was dedicated as to constitute an unlawful use" of Duboce Park. *Id.*

Specific proposals for future railroad and railroad facility uses over property proposed to be dedicated pursuant to SB 1169 are not available. Therefore, without a specific proposal, the analysis needed to determine whether such proposed use may legally exist on dedicated park property cannot be performed. However, as discussed above, future railroads and railroad facilities may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the railroad is a public utility and does not significantly interfere with the park and recreational use of the property, or if the railroad may coexist with the park purpose of the property.

IV. BIKEWAYS MAY BE AN INCIDENTAL USE THAT IS CONSISTENT WITH THE USE OF PROPERTY DEDICATED FOR PARK AND RECREATION PURPOSES

As discussed above, property dedicated for park and recreation purposes may include uses that are incidental or ancillary to such purpose. A bikeway is defined as a "thoroughfare for bicycles." Merriam-Webster Dictionary 87 (1997). Although there are no cases on point as to whether a bikeway is incidental or ancillary to a park and recreation purpose, common knowledge provides that bicycles are both a means of transportation and are utilized for exercise, recreation, health and enjoyment for the public. Bicycle racks have been determined to be a common amenity to recreational trails, thereby implying that riding of bicycles is an allowed recreational use of parks. *Toews v. United States*, 376 F.3d 1371, 1374 (Fed. Cir. 2004). Therefore, a bikeway may be a use consistent with the use of property dedicated pursuant to Section 55 for park and recreation purposes.

Additionally, Section 55 provides, in part,

> Whenever the City Manager recommends it, and the City Council finds that the public interest demands it, the City Council may, without a vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance or statute for park, recreation and cemetery purposes.

San Diego Charter § 55. California Streets and Highway Code section 890.4 states that a bikeway may exist on the right-of-way of streets or roads. Accordingly, if a bikeway were proposed as part of a future or existing street or road on property dedicated for park and recreation purposes pursuant to Section 55, the bikeway may be authorized as part of the street or road. Therefore, bikeways may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the proposed

bikeway is consistent with the park and recreational use of the property or if the bikeway is on the right-of-way of a street or road that is authorized by the City Council pursuant to Section 55.

V. THE CITY'S OPTIONS WHEN CONSIDERING ENCROACHMENTS ON PROPERTY DEDICATED FOR PARK AND RECREATION PURPOSES PURSUANT TO CHARTER SECTION 55 WILL DIFFER DEPENDING UPON WHEN THE ENCROACHMENT WAS ESTABLISHED

An encroachment onto City property is prohibited, and cannot ever ripen to any title, interest or right against the City if the encroachment begins after the City acquires ownership. Cal. Civ. Code § 1007. As a result, the City may seek the removal of such an encroachment on its property. However, Council Policy 700-06 (CP 700-6), Encroachments on City Property, attached as Attachment C, provides for instances when requests for intended encroachments or existing encroachments may be authorized on City property and when an enforcement action against an existing encroachment may be waived. Section I.B.2 of CP 700-06 sets forth criteria the Park and Recreation Department must consider before determining whether to authorize an encroachment on property dedicated for park and recreation purposes pursuant to Section 55. If an encroachment does not meet the criteria allowing for authorization, an enforcement action may proceed to remove the encroachment. See the memorandum entitled "Natural Gas Pipeline Through Pottery Canyon Natural Open Space Park for Service to 2737 Torrey Pines Road," dated February 1, 2012, for an analysis of encroachments on City dedicated parkland, attached as Attachment D.

It must be noted that the discussion above regarding encroachments on City property assumes that the encroachment was established after the City acquired the property. If the encroachment existed prior to the City acquiring fee title to the property, the situation may be very different. If an encroaching party can establish that an encroachment pre-existed City ownership and can establish all the elements of adverse possession[5], then the encroaching party can acquire fee simple title to the portion of the property encroached upon commencing the moment that the elements for adverse possession are established for the required time. *See Webber v. Clarke*, 74 Cal. 11, 19 (1887); *Kunza v. Gaskell*, 91 Cal. App. 3d 201, 210 (1979). In such an instance, the City would not have owned the fee title to that portion of the property with the encroachment either at the time the City attempted to acquire the property or at the time of attempting to dedicate that portion of the property pursuant to Section 55. This would result in the City having the burden to correct all documents that proposed to dedicate that portion of the property.

Similarly, if an encroachment existed prior to the City acquiring a fee title interest in a property and all the elements of a prescriptive easement[6] are met, then the encroaching party has acquired an easement by prescription to that portion of the City's property with the encroachment. In such a situation, the City would need to determine whether the prescriptive easement encumbrance on the property would be consistent with the park and recreation

[5] Adverse possession may result in the acquisition of fee title interest upon the showing of open and notorious occupation continuously for five years and taxes were paid pursuant to a claim of right (by California Code of Civil Procedure section 325) or color of title (by California Code of Civil Procedure section 322).

[6] An easement by prescription requires the showing of open and notorious use continuously for five years and in only some instances the payment of taxes, pursuant to California Civil Code section 1007.

purposes of the dedicated property. If the encumbrance were determined to not be consistent with park and recreation purposes and the City desired to sell that portion of the property to the encroaching party, voter approval would be required for the City to sell dedicated property for a non-park and recreational use.

The City has several options available to address encroachments upon City-owned real property that has been dedicated for park and recreation purposes pursuant to Section 55 when the encroachment begins after the City acquired fee title to the property. The City's options are limited if the encroachment began prior to the City's acquisition of the property if the encroaching party can satisfy the legal elements necessary to prove adverse possession of, or an easement by prescription over or upon, the encroachment area.

VI. SAN DIEGO RESOLUTION R-256123 DID NOT DEDICATE THE PROPERTY KNOWN AS FAIRBANKS COUNTRY CLUB FOR PARK AND RECREATION PURPOSES PURSUANT TO CHARTER SECTION 55

On March 30, 1982, the City Council adopted the Resolution, attached as Attachment E, that approved and adopted an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego. The action taken by the City Council in the Resolution is stated, in part, as follows:

> BE IT RESOLVED, by the Council of the City of San Diego that it hereby approves and adopts an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego, shifting those properties known as Fairbanks Country Club from Future Urbanizing to the Planned Urbanizing Area, which amendment shall become effective upon adoption of an appropriate amendment to the Progress Guide and General Plan of the City of San Diego, subject to the following conditions, ...

The Resolution provides that the amendment to shift the properties known as Fairbanks Country Club to the Planned Urbanizing Area is to become effective upon adoption of an amendment to the Progress Guide and General Plan of the City, but subject to several conditions. The first condition (Condition) states,

> That the precedential-setting value of this decision be limited to the open space only, requiring that 75% of the land be dedicated to open space in order to establish the overriding open space value of the plan. This should indicate that the Growth Management Policy is adherent and that it is only being overridden when 75% or greater dedication of open space is accomplished.

When interpreting a resolution, the courts do not go beyond the usual and ordinary meaning of the language in the resolution, unless the language is ambiguous. *City of Vista v. Sutro & Co.*, 52 Cal. App. 4th 401, 409 (1997). The Condition does *not* state that seventy-five percent of the property is actually being dedicated to park and recreation purposes. It merely

subjects the action to meeting certain conditions before shifting the properties to a certain land use designation.[7]

Even if the Resolution was intended to dedicate the property identified as Fairbanks Country Club for park and recreation purposes, the dedication would not be valid because it was not done pursuant to Section 55. Section 55 states that real property owned in fee by the City may be dedicated by either an ordinance of the City Council or by statute of the State Legislature. San Diego Charter § 55. For the property identified as the Fairbanks County Club to have been dedicated, it must have been dedicated by ordinance or the Resolution must have been passed in the manner and with the formality of an ordinance. Case law is clear that if a resolution is passed in the "manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance." *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 648 (1971); *see also City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 566 (1970). The Resolution was not passed in the manner or formalities required for the enactment of an ordinance by the City Council. Specifically, the Resolution was passed and adopted on the same date, i.e. March 30, 1982. At the time, San Diego Charter section 16[8] provided that all ordinances, except for specific exceptions not applicable here, were to be passed only after a minimum of 12 days from the date of its introduction. Therefore, both the plain language of the Resolution and the adoption of the resolution pursuant to the formalities of a resolution, not an ordinance, provide that the Resolution did not serve to dedicate the property identified as Fairbanks Country Club for park and recreation purposes.

CONCLUSION

The City does not have the authority to dedicate property that is owned in fee by the City and is located outside of its jurisdictional boundaries. CP 700-17 is a policy statement of the City Council adopted by resolution. Therefore, if the City Council were to decide to dedicate property pursuant to Section 55 that does not meet the conditions outlined in the policy, the City Council may waive the policy by another resolution. Future railroads and railroad facilities may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the railroad is a public utility and does not significantly interfere with the park and recreational use of the property, or if the railroad may coexist with the park purpose of the property. Bikeways may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the proposed bikeway is consistent with the park and recreational use of the property or if the bikeway is on the right-of-way of a street or road that is authorized by the City Council pursuant to Section 55. The City has several options available to address encroachments upon City-owned real property that has been dedicated for park and recreation purposes pursuant to Section 55 when the encroachment begins after the City acquired fee title to the property. The City's options are limited if the encroachment began prior to the City's acquisition of the property if the encroaching party can satisfy the legal elements necessary to

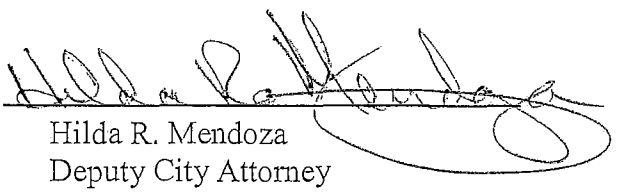
[7] Although it is unclear what the Condition means, it is clear that the only action by the Resolution is shifting the land use designation of the properties known as Fairbanks Country Club.

[8] San Diego Charter section 16 was repealed effective July 30, 2010, and replaced with San Diego Charter section 275 as a result of the strong-mayor form of government becoming permanent in the City.

prove adverse possession of, or an easement by prescription over or upon, the encroachment area. Finally, the Resolution did not dedicate the properties known as Fairbanks Country Club for park and recreation purposes pursuant to Section 55.

Whenever the City Council is considering dedicating property for park and recreation purposes pursuant to Section 55, to avoid legal complications, the property should be evaluated to ensure there are no restrictions that would prohibit the dedication of the property for park and recreation purposes, and that there are no encumbrances or other conditions on the property that would be inconsistent with the dedication of the property for park and recreation purposes. Our Office will assist staff with such an evaluation as necessary.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Hilda R. Mendoza
Deputy City Attorney

HRM:als
Attachments: Attachment A – Senate Bill No. 1169
Attachment B – Council Policy 700-17
Attachment C – Council Policy 700-06
Attachment D – City Attorney Memorandum dated Feb. 1, 2012
Attachment E – Resolution No. 256123
RC-2012-25
Doc. No. 475246_3

ATTACHMENT A

Senate Bill No. 1169

CHAPTER 275

An act to amend Section 2831 of the Fish and Game Code, and to amend Section 1 of Chapter 644 of the Statutes of 2007, relating to wildlife resources.

[Approved by Governor September 7, 2012. Filed with Secretary of State September 7, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1169, Kehoe. Natural community conservation planning.

The Natural Community Conservation Planning Act authorizes the Department of Fish and Game to enter into agreements with any person or public entity for the purpose of preparing a natural community conservation plan to provide comprehensive management and conservation of multiple wildlife species. The act requires a plan to identify and provide for those measures necessary to conserve and manage natural biological diversity within the plan area while allowing compatible and appropriate economic development, growth, and other human uses. The act requires each natural community conservation plan to include an implementation agreement governing specified matters.

Existing law exempts from specified provisions of the act any natural community conservation plan or subarea plan initiated on or before January 1, 2000, or amendment thereto, by Sweetwater Authority, Helix Water District, Padre Dam Municipal Water District, Santa Fe Irrigation District, or the San Diego County Water Authority, which the department determines is consistent with the approved San Diego Multiple Habitat Conservation Program or the San Diego Multiple Species Conservation Program, if the department finds that the plan has been developed and is otherwise in conformance with the act. Existing law deems certain lands designated as open-space lands as of January 1, 2008, to be dedicated land under the City Charter of San Diego.

This bill would deem those lands designated as open-space lands as of January 1, 2013, to be dedicated land under the city charter.

The people of the State of California do enact as follows:

SECTION 1. Section 1 of Chapter 644 of the Statutes of 2007 is amended to read:

Section 1. The Legislature finds and declares all of the following:

(a) The basis for the lands currently designated as open space by the City of San Diego is a Multiple Species Conservation Program (MSCP) for the City of San Diego.

(b) In 1997, the City of San Diego signed a 50-year agreement with the Department of Fish and Game and the United States Fish and Wildlife Service to conserve approximately 55,000 acres of open space within the City of San Diego under the MSCP. Included in the MSCP are designated and dedicated open-space parcels. The City of San Diego has identified in excess of 15,000 acres of city-owned parcels that were intended to be dedicated open space under the city charter, but have not been converted from designated to dedicated open space. Dedicated open space cannot be sold or exchanged without a two-thirds vote of the people. In 2007, the Mayor of the City of San Diego and, by a unanimous vote, the city council, passed a resolution to support this effort to convert those parcels from designated to dedicated open space. Approximately 6,600 acres were converted to dedicated open space with the filing of documents with the Office of the County of San Diego Assessor/Recorder/County Clerk prior to January 1, 2008. Approximately 10,000 acres remain on a list established by the City of San Diego in 2006 of places eligible to be converted to dedicated open-space lands. The San Diego City Council voted on January 23, 2012, to support the effort to convert additional city-owned open-space parcels from designated to dedicated open space.

(c) Therefore, in keeping with the desire of the City of San Diego to ensure that the lands currently designated as open space cannot be sold or exchanged without a vote of the people, and consistent with the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code), these lands should become dedicated land under state law and the City Charter of the City of San Diego.

SEC. 2. Section 2831 of the Fish and Game Code is amended to read:

2831. (a) Notwithstanding any other provision of law, lands designated as of January 1, 2013, as open-space lands in a document entitled "Declaration of the Dedication of Land" approved by a resolution of the San Diego City Council in the same manner in which the city council processes approval of dedicated open space, reserving to the city council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities to be located thereon do not significantly interfere with the park and recreational use of the property, and filed with the Office of the City Clerk for the City of San Diego, and, if required, at the Office of the County of San Diego Assessor/Recorder/County Clerk, are dedicated land under the City Charter of the City of San Diego.

(b) Upon filing of that document in accordance with subdivision (a), the Office of the City Clerk for the City of San Diego, and, if applicable, the

Office of the County of San Diego Assessor/Recorder/County Clerk shall make the document available for inspection by the public upon request.

O

ATTACHMENT B

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: POLICY ON DEDICATION AND DESIGNATION OF PARK LANDS
POLICY NO.: 700-17
EFFECTIVE DATE: August 5, 1985

BACKGROUND:

Park lands are an invaluable resource for citizens of the City of San Diego. It is important to protect these lands from being converted to nonrecreational uses. Such protection is best provided in the form of dedication or designation.

PURPOSE:

To establish a policy for the protection of park lands by dedication (Section 55 of the City Charter) or designation as defined herein.

LEGAL CONSIDERATIONS:

Section 55 of the City Charter provides in pertinent part as follows:

> All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose. However, real property which has been heretofore or which may hereafter be set aside without the formality of an ordinance or statute dedicating such lands for park, recreation or cemetery purposes may be used for any public purpose deemed necessary by the Council.

POLICY:

I. All land acquired for resource-based park and recreation purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter within one year of the date that the City accepts the property deed.

II. All land acquired for population-based park and recreation purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter upon acquisition if the following affirmative conditions exist:

The Park Service District appears to contain no other alternative park site;

The population has reached the population minimum stated in the City's Progress Guide and General Plan;

The Park and Recreation Board, City Manager and/or City Council determine that there are no unusual circumstances which indicate dedication consideration should be deferred.

III. All land acquired for open space park purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter if it meets the following conditions:

A. The land either fits the criteria of resource-based parks, in that it is the site of distinctive scenic or natural or cultural features, and is intended for City-wide use; is a complete open space system or sub-system; or at a minimum is a portion of a sub-system sufficient to stand on its own. (Isolated properties designated as open space shall be dedicated only upon the City's obtaining sufficient additional adjacent land to meet this requirement.)

B. The land does not include areas which are undesirable for park purposes, would be more suitable for other purposes, or which could be traded or sold to obtain more desirable park lands or to fund park improvements. In these cases, to provide flexibility in making revisions which would be beneficial to meeting the City's open space goals, the land shall not be dedicated.

C. The deed to the property is free of restrictions which might preclude dedication as park land.

IV. All land held in City interest for park and recreation purposes, not meeting the requirements for dedication as specified in Sections I, II and III, including land held in less than fee ownership, shall be designated by resolution and thereafter be subject to public hearing process prior to any other use or disposition, except for dedication.

V. Requests for dedication or designation of a park site shall include the following information:

A. How the park site implements the Park and Recreation Element or Open Space Element of the Progress Guide and General Plan and/or the Community Plan.

B. For population-based parks, an estimate of the long term development schedule.

C. For open space park land, reservation of the City Council's authority to establish easements for utility purposes in, under, and across the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property.

VI. The Park and Recreation Board shall annually review the City inventory of park lands to determine the status of lands meeting the requirements for dedication or designation as specified in Sections I, II, III, and IV. Staff will subsequently report the findings of the Board to the City Council.

VII. City park lands, dedicated and designated, shall be clearly identified in any Planning Commission or Council action which affects the park site. Lands which are neither dedicated nor designated shall not be counted as satisfying any requirements or standards for park land.

VIII. Following designation of a park, nonconflicting nonrecreational uses may only be permitted upon recommendation of the Park and Recreation Board and approval of the City Council.

CROSS REFERENCE:
City Charter Sec. 55
Council Policy 100-02
Council Policy 600-23
Council Policy 700-03
Council Policy 700-07

HISTORY:

Adopted by Resolution R-186031 01/13/1966
Amended by Resolution R-193887 06/06/1968
Amended by Resolution R-218126 04/12/1977
Amended by Resolution R-254869 08/24/1981
Amended by Resolution R-263807 08/05/1985

ATTACHMENT C

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: ENCROACHMENTS ON CITY PROPERTY
POLICY NO.: 700-06
EFFECTIVE DATE: May 24, 1999

BACKGROUND:

Many instances of unauthorized encroachments on City property are reported or discovered each year. Responsibility for the protection of City property from unauthorized encroachments and the mechanisms by which the City can enforce its property rights have not been clear. Additionally, there are currently no guidelines for City staff to use in evaluating proposed encroachments which could benefit the public and generate revenue for the City.

PURPOSE:

To establish policies related to the protection of City property from unauthorized encroachment by private parties; to establish guidelines by which requests for encroachments may be considered; to establish the responsibilities of City departments regarding the protection of City property from unauthorized encroachments; to establish policies specifically related to erosion and drainage control measures on City property; and to establish policies regarding the disposition of existing unauthorized encroachments; and to establish guidelines and an evaluation process for encroachment authorization of telecommunication facilities on parkland and open space.

DEFINITIONS:

Encroachment - development, construction on or use of City property.

City Property - land which is owned in fee title by the City excluding such land which is public right-of-way.

Detrimental - causing any of the following: significant adverse impact on sensitive resources or historic sites; impediments to access or use; a hazardous or potentially hazardous condition, a potential public liability (including economic); causing any other situation or condition which is not in the City's best interest.

Permit Issuing Authority - that department designated as responsible for determining whether or not an encroachment can be allowed - see Section 1(F) of this Policy.

Permittee - Person or entity seeking encroachment authorization pursuant to this Policy.

I. POLICIES- GENERAL

A. Unauthorized Encroachments. It is the City's policy to protect its property from unauthorized encroachment and to seek remedy, e.g., removal, repair, restoration, etc. when such activity occurs, to recover its costs related to such action to the greatest extent possible, and to purse administrative and legal actions, fines and damages when necessary and/or prudent.

B. Guidelines for Encroachment Authorization. It is the City's policy that requests for authorization to encroach on City property be considered as follows:

1. General City Property: The City may grant authorization for encroachment on its property if it is determined by the responsible department that the requested action would not violate any deed restrictions related to the City property, map requirements or other land use regulations; would not be detrimental to the City's property interests; would not preclude other appropriate use; would be consistent with the City's General Plan; and would otherwise be prudent and reasonable.

2. Dedicated or Designated Parkland and Open Space: The City may grant authorization for encroachment on dedicated or designated parkland and open space if it is determined by the responsible department that the requested action would not only meet criteria for General City property as stated above, but would also be consistent with City Charter Section 55; i.e., that it would not change or interfere with the use or purpose of the parkland or open space. Permission for encroachment on dedicated or designated parkland and open space that would benefit only a private party shall not be granted.

   a. In addition to complying with the above criteria, proposed telecommunications facilities must be disguised such that they do not detract from the recreational or natural character of the parkland or open space. Further, proposed telecommunication facilities must be integrated with existing park facilities, and must not disturb the environmental integrity of the parkland or open space.

   b. Prior to encroachment authorization, the proposed telecommunication facility must be reviewed by the Park and Recreation Department to determine whether the facility complies with the criteria of Section B. If the Park and Recreation Department determines that the proposed facility complies with Section B, the Community Planning Committee for the potentially affected parkland or open space must be notified. The proposed facility must then be reviewed by the following advisory bodies for a recommendation:

      i) Community Recreation Council for park or open space where encroachment is proposed;
      ii) Area Committee, a subcommittee of the Park and Recreation Board, or Citizens' Advisory Committee for open space area where encroachment is proposed, as appropriate;
      iii) Design Review Committee, subcommittee of the Park and Recreation Board, as appropriate; and
      iv) Park and Recreation Board, or governing open space Task Force for those areas where they exist.

c. The recommendation of the Community Recreation Council, the Area Committee or Citizen's Advisory Committee, and the Design Review Committee, as applicable, shall be submitted to the Park and Recreation Board or governing open space Task Force. The Park and Recreation Board, or governing open space Task Force, shall submit its recommendation as follows:

i) For minor telecommunication facilities, to the Park and Recreation Director, who shall determine whether the facility should be authorized.

ii) For major telecommunication facilities, to the City Council, who shall determine whether the facility should be authorized.

If the facility is authorized, the Real Estate Assets Department shall negotiate and prepare the necessary encroachment authorization.

C. Written Encroachment Authorization Required. It is the City's policy that permission to encroach on City property may be granted only by written encroachment authorization and shall be contingent upon such stipulations and conditions deemed appropriate by the City to protect its property and interests. Such stipulations shall include, but not be limited to:

1) The encroachment shall be installed and maintained in a safe and sanitary condition at the sole cost, risk and responsibility of the Permittee;

2) The Permittee shall agree to at all times indemnify and save the City free and harmless from and pay in full any and all claims, demands, losses, damages or expenses that the City may sustain or incur in any manner resulting from the construction, maintenance, use, repair or presence of the encroaching structure or development installed hereunder, including any loss, damage or expense arising out of (a) loss of or damage to property, (b) injury to or death of a person, excepting any loss, damage, or expense and claims for loss, damage or expense resulting in any manner from the negligent act or acts of the City, its contractors, officers, agents or employees;

3) When the encroachment authorization is in the form of an Encroachment Permit, the Permittee must agree to remove the encroachment within thirty (30) days after notice by the Permit-Issuing Authority to do so;

4) The City shall have the authority to remove any encroachment or cause its removal if the Permittee does not comply with the thirty (30) day notice required by Section I.C.3., and all costs related to such action shall be chargeable to the Permittee;

5) The Permittee shall be required to maintain a policy of liability insurance in an amount satisfactory to the City in order to protect the City from any potential claims which may arise from the encroachment;

6) When the encroachment authorization is in the form of an Encroachment Permit, the Encroachment Permit shall be recorded in the office of the County Recorder and shall relate to the property directly adjacent to the encroachment and shall run with that property. Therefore, only an adjacent property owner can receive an Encroachment Permit; and

7) Acknowledgement that authorization by the Permit Issuing Authority and receipt of all appropriate development permits must be obtained prior to any future improvements or modifications to the encroachment.

In addition to the above stipulations, the Permittee must obtain all other relevant permits and approvals including, but not limited to, Coastal Development Permits, Sensitive Coastal Resource Permits, Hillside Review Permits, Resource Protection Permits, etc., prior to the construction of the authorized encroachment. Normal noticing requirements and community review for such discretionary permits apply.

D. Fees and Costs.

1. It is the City's policy that the Permittee shall pay an encroachment authorization fee established to recover costs associated with processing the request for encroachment authorization, and with monitoring, inspection or installation of the encroachment where appropriate. In addition, the City shall require payment of an annual encroachment fee which will include a reasonable charge for use of City property and recovery of annual inspection cost.

2. All monies received for placement of minor telecommunication facilities on parkland and open space areas shall be deposited into the Park and Recreation Department General Fund budget. All monies received for placement of major telecommunication facilities shall be deposited into an appropriate account for use within the parkland or open space area where the facility is located.

3. Telecommunication facilities receiving encroachment authorization for parkland or open space may be subject to additional costs, including but not limited to, costs associated with mitigation of visual or physical impacts to the specific park or open space site, and costs associated with complying with applicable local, state or federal law.

E. Development Permits. It is the City's policy that departments which issue development permits shall be aware of City property interests and may not issue permits for development which encroaches on City property without proof from the Permittee that written authorization has been obtained from the Permit Issuing Authority.

F. Permit Issuing Authority/Responsibilities.

1. City Council - Responsible for approving the placement of major telecommunication facilities on dedicated or designated parkland or open space.

2. Neighborhood Code Compliance Department - Responsible for the protection of City property from unauthorized encroachments and enforcement related thereto.

3. Real Estate Assets Department - Responsible for the issuance of encroachment authorization on general City property and leaseholds, and, for negotiation and preparation of encroachment authorizations for previously approved telecommunication facilities to be located on dedicated or designated parkland or open space. It is also responsible for providing the other departments with information regarding property lines, ownership and title, as necessary.

4. Park and Recreation Department - Responsible for the issuance of encroachment authorizations, and for approval by the Park and Recreation Director of the placement of minor telecommunication facilities, on dedicated and designated parkland and open space. It is also responsible, in consultation with the Planning and Development Review Department for certain coastal rights-of-way which are not used as streets.

5. Engineering and Capital Projects Department - Responsible for issuance of encroachment authorization on land owned by the Water and Sewer Funds.

6. Planning and Development Review Department - Responsible for the review and issuance of discretionary permits associated with all applications for telecommunication facilities.

II. POLICIES - EROSION CONTROL MEASURES

A. Erosion Control By City. It is the City's policy to provide erosion control measures on City property to the extent that funding is available and public improvements or public safety are jeopardized. It is the City's policy to not assume responsibility for erosion control measurers on its property to protect private property.

B. Erosion Control By Private Parties.

1. It is the City's policy to consider giving authorization to private parties for erosion control measures on City property in as reasonable a manner as possible pursuant to the other policies stated herein.

2. For purposes of determining whether or not erosion control measures by private parties will be allowed on dedicated or designated parkland or open space, an action will be considered beneficial to the parkland or open space if it

contributes to the stabilization of bluff or cliffs that are steeper than the angle at which the soil is naturally stable.

C. Mitigation. It is the City's policy that any authorization to provide erosion control measures on City property shall include provisions for visual impact mitigation and enhancement.

III. POLICIES - DRAINAGE CONTROL MEASURES

A. Drainage Control By Private Parties. For purposes of determining whether or not drainage control measures by private parties will be allowed on dedicated or designated parkland or open space, and existing encroachment will be considered beneficial if it is and remains the only reasonable method of preventing surface erosion of parkland or open space due to uncontrolled drainage; a proposed encroachment will be considered beneficial if it meets the above criteria and qualifies for all regulatory permits.

B. Mitigation. It is the City's policy that any authorization to provide drainage control measures on City property shall include provisions for visual impact mitigation and enhancement.

IV. POLICIES - EXISTING ENCROACHMENTS

A. Type of Encroachment: Erosion and Drainage Control Measures. If consistent with other sections of this policy, it is the City's policy to offer an encroachment authorization for erosion and drainage control measures. The authorization shall contain all the stipulations and requirements set forth in Section I of this Policy, including a permit fee and annual charge. In addition, a requirement to improve or bring the encroachment up to safe and acceptable standards, including aesthetic standards, as determined necessary by the City Manager may be imposed. In the coastal areas, coastal permits will be required for those encroachments placed after October of 1988.

B. Type of Encroachment: Private Use and Enjoyment. It is the City's policy that encroachments for private use and enjoyment are not appropriate on City property and may not be authorized. Such encroachments are generally construed to be detrimental to the City's interest because of the singularly private benefit that is gained from them by a private party. Examples are stairways, walls, fences, decks, antennas, and landscaping which is not necessary for erosion control and which have the appearance of private property. It is the City's policy to pursue removal or other corrective action, provided however, that if the encroachment is minor in nature; i.e., is unobtrusive and does not impede access or use of the City property, the City Manager may waive enforcement action. However, it is understood that such encroachments may be subject to a recordation of official notice of the encroachment with the County Recorder and that lack of enforcement action does not constitute authorization to encroach or surrender City property rights. This policy also does not impact requirements to obtain building or other development permits.

C. Unauthorized Encroachments. In the event that the City evaluation indicates that a particular unauthorized encroachment cannot be authorized or allowed to remain because it is hazardous or a potential liability to the City or because it is either detrimental or non-beneficial per this Policy, or in the event that the private property cannot or will not obtain the required authorization, the City shall pursue administrative and legal remedies to protect its interests and shall, to the greatest extent possible, collect damages and costs related to the enforcement of this Policy.

D. Ocean Front Walk. It is not the intent of this Policy to modify or supersede in any way the requirements of San Diego Municipal Code Section 103.0538 which apply to the Ocean Front Walk area.

HISTORY:

"Horton Plaza - Billboards"
Adopted by Resolution R-169963 03/15/1962
Repealed by Resolution R-254869 08/24/1981
(Incorp. into Council Policy 700-05 "Horton Plaza - Use Of")
"Encroachments on City Property"
Adopted by Resolution R-282396 07/26/1993
Amended by Resolution R-291658 05/24/1999

ATTACHMENT D

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: February 1, 2012

TO: Stacey LoMedico, Director, Park and Recreation Department
James Barwick, Director, Real Estate Assets Department

FROM: City Attorney

SUBJECT: Natural Gas Pipeline Through Pottery Canyon Natural Open Space Park for Service to 2737 Torrey Pines Road

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INTRODUCTION

You have asked for a legal opinion concerning the legality of installing a natural gas pipeline through dedicated parkland and Pueblo Lands. Specifically, you have asked whether the City may grant a utility easement to San Diego Gas and Electric (SDG&E) through Pottery Canyon Natural Open Space Park (Pottery Canyon Park) in order to provide service to a private home owned by Mr. Bill Allen, which is located adjacent to Pottery Canyon Park at 2737 Torrey Pines Road. Pottery Canyon Park is dedicated parkland on Pueblo Lands. In researching the issue, Real Estate Assets Department staff discovered that, although Mr. Allen has been utilizing the Pottery Canyon Park driveway, identified by signage as Pottery Park Driveway, for ingress and egress purposes to access his private property, the City never granted Mr. Allen such rights over City property. According to Mr. Allen, his family has been accessing their property via Pottery Park Driveway since his family acquired their abutting property in 1945. Accordingly, this memorandum will also address the issue of Mr. Allen's use of Pottery Park Driveway to access his property.

QUESTIONS PRESENTED

1. May the City grant an easement to SDG&E through dedicated parkland and Pueblo Lands for private use?

2. May the City authorize encroachments onto City owned property?

SHORT ANSWERS

1. San Diego Charter section 55 does not preclude the granting of such an easement; however, it would violate Council Policy 700-06 and may violate the intent of Charter section 219.

2. Mr. Allen's current use of Pottery Park Driveway is an encroachment as defined in Council Policy 700-06 and a trespass onto City property. However, pursuant to Council Policy 700-06, the Mayor may permit certain encroachments and is authorized to waive enforcement action against an encroachment if it is determined to be minor in nature.

BACKGROUND

The land that is the site of Pottery Canyon Park was originally acquired by the City of San Diego as part of the Pueblo Lands grant in 1874 and the City dedicated the land to park use pursuant to San Diego Ordinance O-11159 on January 4, 1974. The Park is located off of Torrey Pines Road in La Jolla. According to a 2010 title report, Mr. Allen owns three parcels of property adjacent to Pottery Canyon Park. On the attached aerial photo (Attachment A), the three parcels described in the title report are shown as only two parcels, Parcel Nos. 34673201 and 34654044.

Pottery Canyon Park is outlined on Attachment A in yellow and numbered 001, which encompasses Parcel No. 34675001. Cars gain access to the Park via Pottery Park Driveway, a long, narrow, paved driveway that runs along the tree line of the southern border of the Park, directly adjacent to Mr. Allen's parcels. Near the entrance to the Park, at the bottom of Pottery Park Driveway, there is a gate with a lock which crosses the Driveway. Past the gate, at the top of Pottery Park Driveway, the pavement makes a turn into Mr. Allen's private property and continues as his private driveway to his house. No documentation has been provided which demonstrates who built the gate, but presumably the purpose of the gate is to block public access to the Park during restricted times.[1] Nevertheless, Park and Recreation Department staff has stated that Mr. Allen himself often opens, closes, and locks the gate as he chooses. Mr. Allen undoubtedly has the combination to the lock on the gate because access to his private property occurs significantly past the gate and, therefore, there would be no other means for Mr. Allen to access his private property when the Park is closed. According to City staff, Mr. Allen has claimed that his family built Pottery Park Driveway and claims that his family has been using Pottery Park Driveway for ingress and egress to their property since they took ownership of their property in 1945. However, no record exists to show that the Allen family was ever granted permission to build Pottery Park Driveway or to access their private property from Pottery Park Driveway. In fact, there are numerous signs at the entrance to Pottery Park Driveway stating that the property is under video surveillance and protected by a private security firm. According to City staff, the City did not install such signs nor does it contract with the private security firm.

In addition to the three parcels mentioned above, Mr. Allen owns an easement across a fourth parcel for the stated purposes of a "road," as well as, sewer, water, gas, power, and telephone lines (Roadway Easement). His Roadway Easement runs along the northern 25 feet of Parcel

[1] Signs at Pottery Canyon Park indicate that the Park closes at 6:00pm.

No. 34654045 (*See* Attachment A) and gives Mr. Allen legal access to his property from Torrey Pines Road. However, there is currently no road or driveway located over the Roadway Easement, and instead, the Allen family has been using Pottery Park Driveway for ingress and egress to their property for many years. Furthermore, the Allen Family Trust granted a conservation easement across a sizeable portion of his parcels to the City in 1997 (Conservation Easement). On Attachment A, the Conservation Easement is outlined in yellow and numbered 002, which encompasses the majority of Parcel Nos. 34673201 and 34654044. That Conservation Easement prohibits the construction of new roadways, but allows the continued use of easements granted prior to the Conservation Easement and the undergrounding of utilities.

ANALYSIS

I. CHARTER SECTION 55 DOES NOT PRECLUDE THE CITY FROM GRANTING AN EASEMENT IN FAVOR OF SDG&E THROUGH DEDICATED PARKLAND AND PUEBLO LANDS. HOWEVER THE PROPOSED EASEMENT WOULD VIOLATE COUNCIL POLICY 700-06 AND MAY VIOLATE THE INTENT OF CHARTER SECTION 219.

A. Charter Section 55

Pottery Canyon Park was dedicated to park use within the meaning of Charter section 55, pursuant to San Diego Ordinance O-11159 on January 4, 1974. The power of a charter city, such as San Diego, over the use of dedicated parks, as over other exclusively municipal affairs, is all-embracing, limited only by the city's charter. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455 (1976). In San Diego, the use of dedicated parklands is governed by Charter section 55 which provides in pertinent part:

> All real property owned in fee by the City . . . formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two thirds of the qualified electors of the City.

This Office has previously opined that underground utilities are permissible uses of dedicated parkland so long as these uses do not detract from the park and recreational use of the property, and therefore do not require a vote of the electors.[2] 1994 City Att'y MOL 559 (94-64; July 26, 1994); 1990 City Att'y MOL 211 (90-17; Jan 26, 1990). In the attached Memorandum of Law dated January 26, 1990 (Attachment B), this Office addressed the question of whether underground utilities were appropriate uses of dedicated parkland. 1990 City Att'y MOL 211 (90-17; Jan 26, 1990). More specifically, the two questions addressed were whether a proposed sewer could be placed underground through Rose Canyon Open Space Park Preserve and

[2] Similarly, City Council Policy 700-17, Policy on Dedication and Designation of Park Lands, section V.C. provides that "[f]or open space park land, reservation of the City Council's authority to establish easements for utility purposes in, under, and across the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property."

whether a proposed sludge line could be placed underground through Mission Bay Park and Sunset Cliffs Park. 1990 City Att'y MOL 211 (90-17; Jan 26, 1990). Rose Canyon Open Space Park Preserve, Sunset Cliffs Park, and Mission Bay Park are all dedicated in perpetuity as public parks pursuant to Charter section 55. This Office determined that the pipelines would not detract from the use of the lands for park and recreation purposes, and thus would not require two-thirds voter approval as provided by Charter section 55. Please refer to the attached Memorandum for the analysis supporting this Office's determination that underground pipelines are generally permissible uses of dedicated parkland. The analysis and cited case law of that Memorandum support our determination here that the undergrounding of utilities lines through Pottery Canyon Park without a vote of the electorate would not violate Charter section 55.

B. Council Policy 700-06

While granting an easement to SDG&E through Pottery Canyon Park for underground utilities may be consistent with Charter section 55, Council Policy 700-06 prohibits granting encroachments that benefit only a private party. Section I.B.2. of Council Policy 700-06 states: "Permission for encroachment on dedicated or designated parkland and open space that would benefit only a private party shall not be granted." Therefore, the easement contemplated would violate Council Policy 700-06. In light of this, the City Council must waive that portion of the Council Policy before staff may grant an easement through Pottery Canyon Park. However, this Office would caution staff to consider the ramifications of establishing a practice of granting utility easements through dedicated parks which benefit only a single private property owner. To allow it even once may weaken the City's position to decline allowance of such easements in the future and years down the road there could be any number of private utility easements running through City parklands.

C. Charter Section 219

According to Real Estate Assets Department staff, Pottery Canyon Park is comprised of Pueblo Lands as defined by Charter section 219. Charter section 219 limits what the City may do with respect to such Pueblo Lands in a number of ways.

> No sale of Pueblo Lands owned by The City of San Diego which are situated North of the North line of the San Diego River shall ever be valid and binding upon said City unless such sale shall have been first authorized by an ordinance duly passed by the Council and thereafter ratified by the electors of The City of San Diego at any special or general municipal election. The City Manager shall have authority to lease Pueblo Lands, provided that any lease for a term exceeding one year shall not be valid unless first authorized by ordinance of the Council. No lease shall be valid for a period of time exceeding fifteen years.

San Diego Charter § 219.

Charter section 219 contains no explicit constraints with respect to the City granting easements over, under, or through Pueblo Lands. An easement is not a conveyance of title and, therefore, is not a sale. *Melidizadeh v. Mincer*, 46 Cal. App. 4th 1296, 1305-06 (1996). Accordingly, a grant of an easement over, under, or through Pueblo Lands would not violate Charter section 219 with respect to the prohibition against the sale of Pueblo Lands. The issue is then whether an easement is a lease.

An easement and a lease are distinguishable. A lease grants to the tenant the rights of exclusive possession and use of real property for a specified period of time. It is both a conveyance of an estate in the land and a contract for the possession and use of the property in exchange for rent. A lease vests a possessory estate in real property against all persons, including the owner of the fee. Witkin, Summary of California Law, vol. 12, *Real Property* §§ 504, 517 (10th ed. 2005). An easement, on the other hand, is an interest in the land of another, which entitles the owner of the easement to a limited use of the other's land. An easement creates a non-possessory right to enter and use land of another and only restricts the owner of the underlying fee from interfering with the uses authorized by the easement. Witkin, Summary of California Law, vol. 12, *Real Property* § 382 (10th ed. 2005). The owner of the underlying fee retains every other incident of ownership that is not inconsistent with the easement. *Id.* Thus, a lease creates an estate in real property, but an easement merely creates an interest in real property that is not an estate.

However, while easements and leases may be technically and legally distinguishable because fee owners retain some of their property rights in the easement areas, utility easements such as the one contemplated here generally include numerous restrictions upon the owner of the underlying property. Such restrictions can result in the loss to the City of virtually all control over the easement area. Utility easements generally restrict what the underlying fee owner can build, the planting of trees and vegetation, how trees and vegetation may be maintained, and generally what activities the owner of the underlying fee can carry out on and over the easement. As such, it could be argued that a grant by the City of such a large bundle of rights and the restrictions that the utility easement would put on the City's use of the property is contrary to the intent of Charter section 219.

On the other hand, a valid counter-argument would be that such a reading of the Charter would violate the canon of statutory construction, *expressio unius est exclusio alterius* ("to say one thing is to exclude another"). "'While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.'" *Arden Carmichael*, 93 Cal. App. 4th at 516 (citing 2A Singer, Sutherland Statutes and Statutory Construction, *Literal Interpretation*, § 46.06, at 192 (6th ed. 2000)). The drafters of the Charter specifically did not discuss easements with regard to Pueblo Lands. It is unclear which argument a court would find more persuasive. The most cautious approach would be to not grant a utility easement over, under, and through Pottery Canyon Park, which is on Pueblo Lands.

II. MR. ALLEN DOES NOT HAVE A LEGAL RIGHT OF ACCESS TO HIS PROPERTY VIA POTTERY PARK DRIVEWAY.

A. Mr. Allen Cannot Establish Abutter's Rights or Prescriptive Rights to Pottery Park Driveway.

Courts have long recognized a number of "abutter's rights" enjoyed by property owners along public roads. *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal. 4th 507, 517 (2006). Abutting property owners may have certain private rights in existing public streets, including the ability of the abutting landowner to enter and leave his premises by way of the street. *Rose v. California*, 19 Cal. 2d 713, 728 (1942). No such rights exist with respect to driveways.

> These rights, described as being in the nature of easements and "deduced by way of consequence from the purposes of a public street" (Perlmutter v. Greene (1932) 259 N.Y. 327, 182 N.E. 5, 6), include the right of access to and from the road, and the right to receive light and air from the adjoining street. (See Eachus v. Los Angeles etc. Ry Co. (1894) 103 Cal. 614, 617–618, 37 P. 750; Barnett v. Johnson (1863) 15 N.J.Eq. 481, 487–488; 10A McQuillin, The Law of Municipal Corporations (3d ed.1999) §§ 30.65 at p. 426; Pepin, *California and the Right of Access: The Dilemma Over Compensation* (1965) 38 So.Cal. L.Rev. 689, 690.) Judicial recognition of these rights derives from the perceived expectations of those who own or purchase property alongside a public street, to the effect that the land enjoys certain benefits associated with its location next to the road.

Id. (emphasis added). *See also Rose v. California*, 19 Cal. 2d 713 (1942). Pottery Park Driveway is located on City property. Although the Driveway is owned by the City and appears to have been built to provide access into the Park, there is no evidence that the Driveway was ever dedicated as a public street and accepted into the City's street system. The use of the word "Driveway" in the name further supports the idea that it is a City-owned driveway and not a public street. Thus, Mr. Allen does not have an abutter's right of access to his private property from Pottery Park Driveway, since it is not a public street.

Furthermore, the Allen family's long time use of Pottery Park Driveway as access to their property does not establish any right to continue using the Driveway for access. Since 1935, California Civil Code section 1007 has specified that no person can obtain prescriptive rights against any City-owned property.

> Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or

> owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof.

Cal. Civ. Code § 1007.

Therefore, neither the fact that Pottery Park Driveway was built abutting Mr. Allen's property nor the fact that the Allen family has been using the Driveway for access to their private property for many years establishes Mr. Allen's legal right to use the Driveway in such a manner.

B. Pursuant to Council Policy 700-06, the Mayor may permit certain encroachments onto City parkland and is authorized to waive enforcement action against an encroachment if it is determined to be minor in nature.

Mr. Allen has admitted to City staff that he does not have documentation providing him legal access over Pottery Park Driveway to his private property. Accordingly, his continued use of Pottery Park Driveway during non-park hours is a trespass onto City property.[3] His use is also an encroachment for purposes of Council Policy 700-06.[4] Council Policy 700-06 allows for the City to grant authorization for encroachment on dedicated parkland if it is determined by the Park and Recreation Department that the requested action would not only meet the Policy's criteria for granting such authorization over general City property, but would also be consistent with Charter section 55, "i.e., that it would not change or interfere with the use or purpose of the parkland or open space." Council Policy 700-06 I.B.2.

There has been at least one case in California dealing with the issue of whether a government agency may properly grant permission to a private property owner to access their private property through a dedicated park. In *Big Sur Properties v. Mott*, 62 Cal. App. 3d 99 (1976), a plaintiff residential property owner sought to compel the director of the California Department of Parks and Recreation to consider its application for a permit under California Public Resources Code section 5003.5. California Public Resources Code section 5003.5 gives the State Department of Parks and Recreation discretion to grant a permit for a right-of-way across a park to an owner whose property is separated from a highway or road by the park. The court in *Big Sur* held that because the deed dedicating the property as State parkland was from a private individual and was exclusively for public park purposes and uses incidental to those purposes, the property cannot be used for other purposes without violating the public trust, and that a right-of-way for private access to private property outside the park is not an incidental use. *Id.* at 104. The court also held that California Public Resources Code section 5003.5 must be construed consistently with the public trust, in that it may be applied to dedications by the public, but not to dedications by private donors. *Id.* at 105.

The holding in *Big Sur* is consistent with the long-established difference in construction and treatment between dedications by private donors and dedications by the public. *Slavich v. Hamilton*, 201 Cal. 299, 303 (1927). Where property is acquired through private dedication, the permissible uses of that property outlined in the dedication document are strictly construed. In

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[3] A trespass may occur if a person, entering property pursuant to a limited consent as to the purpose for entry, exceeds those limits. *Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal. App. 3d 1, 17 (1977).

[4] Council Policy 700-06 defines "encroachment" as "development, construction on or use of City property."

contrast, where the City dedicates its City-owned property, the permissible uses may not be as strictly construed. Here, the City dedicated its own property as parkland, and therefore, a court could more liberally construe the permissible uses of that parkland. A narrow reading of the *Big Sur* case would allow for it to be distinguished from the issue at hand, in that: (1) the deed granting the park in the *Big Sur* case explicitly restricted the granting of a permit for right-of-way through the park, whereas no such explicit restriction exists here; and (2) to grant the permit in the *Big Sur* case would have required a 600-foot extension of an existing road, whereas no extension of Pottery Park Driveway is required here. Therefore, an argument could be made that the issue at hand is factually distinguishable from the *Big Sur* case. A court may not disapprove of Mr. Allen's use of Pottery Park Driveway to access his property where the Park was dedicated by the City itself and no modifications to the existing Park are required. Conversely, a court will also consider the City's practice to strictly construe the permissible uses of dedicated parkland.

Council Policy 700-06 requires that permission to encroach on City property must be granted by written encroachment authorization containing stipulations and conditions deemed appropriate by the City to protect its property and interests, and sets forth a number of such stipulations and conditions that must be contained in the written authorization. However, as discussed above, Council Policy 700-06 does not allow for the authorization of encroachments on dedicated parkland or open space that would benefit only a private party. Council Policy 700-06 I.B.2. Thus, if the Park and Recreation Department determines that Mr. Allen's use of Pottery Park Driveway is consistent with Charter section 55 – that it would not change or interfere with the use or purpose of the parkland – and wishes to grant authorization for Mr. Allen to encroach on Pottery Canyon Park, the Council must first waive the section of Council Policy 700-06 prohibiting encroachments that benefit only a private party.

The most significant risk to the City in authorizing Mr. Allen's encroachment would come in the form of a challenge to the City's determination that the encroachment is consistent with Charter section 55. However, as discussed above, the City dedicated Pottery Canyon Park. Therefore, a court would more likely construe the permissible uses more liberally. Further, the risk may be mitigated to some extent by including in the encroachment agreement a requirement that Mr. Allen indemnify and hold the City harmless against such a challenge.

In lieu of the City granting authorization for an encroachment, Council Policy 700-06 allows for the Mayor to waive enforcement action against an existing encroachment if "the encroachment is minor in nature; i.e., is unobtrusive and does not impede access or use of the City property . . . ." Council Policy 700-06 IV.B. Here, Mr. Allen is using Pottery Park Driveway for ingress and egress to his private property which abuts the Driveway. A fair argument could be made that such use is unobtrusive and does not impede access or use of the City property, and if that is the case, the Mayor could waive any enforcement action against Mr. Allen. Should the Mayor decide to waive enforcement action against Mr. Allen, section IV.B. of Council Policy 700-06 clarifies that "it is understood that such encroachments may be subject to a recordation of official notice of the encroachment with the County Recorder and that lack of enforcement action does not constitute authorization to encroach or surrender City property rights." The City's waiver of enforcement against Mr. Allen, if the City chose to do so, would not be granting permission for Mr. Allen to access his property via Pottery Park Driveway. On the contrary, it would be recognition of his unlawful trespass and encroachment onto City property and merely a

declination to currently pursue enforcement. This same argument under section IV.B. of Council Policy 700-06 could not be made with respect to Mr. Allen's closing and locking of the gate allowing access to Pottery Canyon Park, particularly if Mr. Allen does so at times when the Park is supposed to be open. That type of private use and control over City property would be obtrusive and would impede access and use of the City property. Accordingly, if a waiver of enforcement is granted, such acts by Mr. Allen should not be allowed to continue. Furthermore, all non-City signs referencing video surveillance and private security patrol should be removed at Mr. Allen's expense and the City should determine whether any video surveillance equipment has been unlawfully placed on City property.

III. THE CONSERVATION EASEMENT OVER MR. ALLEN'S PROPERTY, AS CURRENTLY WRITTEN, DOES NOT ALLOW THE CONSTRUCTION OF A NEW DRIVEWAY.

As mentioned earlier in the Background section of this memorandum, the Willis M. Allen 1988 Family Trust granted to the City of San Diego a conservation easement pursuant to a Deed of Conservation Easement dated September 12, 1997. The Conservation Easement covers all of the land that lies between Mr. Allen's house and the Roadway Easement that would allow him to build a driveway. Attachment A depicts Mr. Allen's house located on Parcel No. 34673201 and his Roadway Easement for a driveway that lies on Parcel No. 34654045. The Conservation Easement (identified as "the Property" in the Deed of Conservation Easement) covers all of the area between the two, including all of Parcel No. 34654044.

Section 1 of the Conservation Easement explains the purpose of the Conservation Easement as follows:

> 1. Purpose. It is the purpose of this Easement to assure that the Property will be managed and maintained in a manner that is, to the maximum extent possible, in its natural, undisturbed scenic and open space condition and to prevent any use of the Property that will significantly impair or interfere with its conservation values. [Grantor intends that this Easement will confine the use of the Property to activities such as those involving pasturing, scenic enjoyment, and passive recreational use, that are consistent with the purpose of this Easement.]

Section 4 of the Conservation Easement lists the prohibited uses. It states:

> 4. Prohibited Uses. Except as expressly set forth in this Easement, any activity or use of the Property inconsistent with the conservation purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited:
>
> k. The construction of any new roadway, provided however, that the reconstruction or relocation of any existing roadway shall be permitted as long as it is planned to minimize or mitigate its impact on the conservation values of the Property.

Therefore, under the existing terms of the Conservation Easement, it is unlikely that Mr. Allen could construct an "alternative" driveway from his property to Torrey Pines Road without violating the express language in the Conservation Easement.

CONCLUSION

While granting an easement to SDG&E through Pottery Canyon Park for underground utilities that will serve only Mr. Allen's private property may be allowable under Charter section 55, it violates Council Policy 700-06, and may violate the intent of Charter section 219. Ultimately, the determination of whether to allow the easement will be a policy decision, but the City should take caution and consider the ramifications of establishing a practice of granting utility easements through dedicated parkland and Pueblo Lands which benefit only a single property owner. Such a practice could result in more private utility easements running through City parklands.

With respect to Mr. Allen's access to his property, there is no documentation showing that Mr. Allen may legally access his private property via Pottery Park Driveway. Pottery Park Driveway is not a public road, and therefore, Mr. Allen cannot properly claim abutter's rights of ingress and egress to his property from Pottery Park Driveway. Furthermore, Mr. Allen cannot claim prescriptive rights to use Pottery Park Driveway in such a manner. Mr. Allen's current use of Pottery Park Driveway is an encroachment as defined in Council Policy 700-06 and a trespass onto City property. However, the City may be able to grant authorization for such an encroachment. The most significant risk to the City in authorizing Mr. Allen's encroachment would come in the form of a challenge to the City's determination that the encroachment is consistent with Charter section 55. The City may further mitigate the risk by including in the encroachment agreement a requirement that Mr. Allen indemnify and hold the City harmless against such a challenge. If the City does not wish to authorize the encroachment but also does not wish to pursue enforcement at this time, the Mayor is authorized to waive enforcement action against such an encroachment if it is determined to be minor in nature. Furthermore, it appears that Mr. Allen is not permitted to construct a driveway from his property to Torrey Pines Road without violating the express terms of the Conservation Easement.

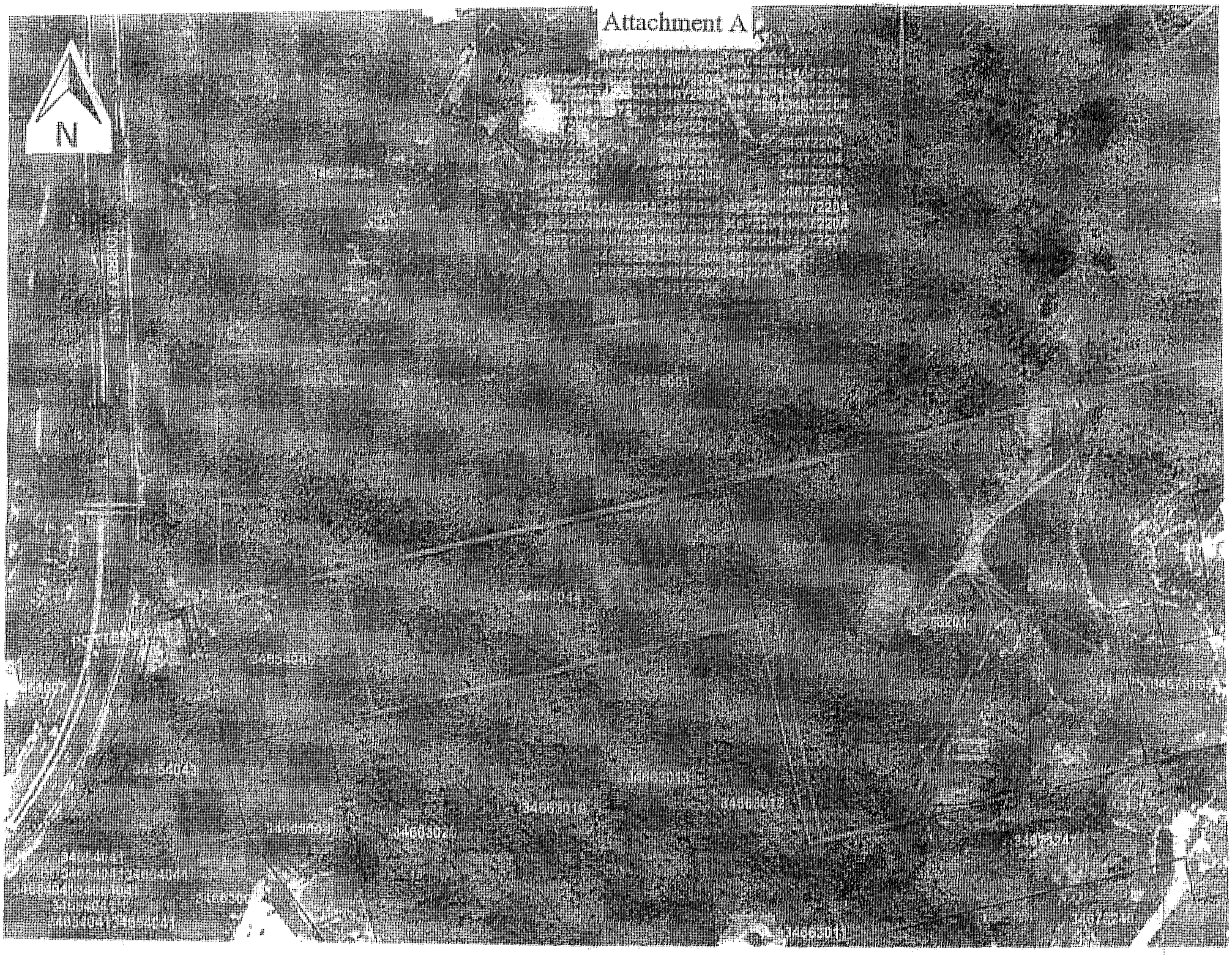
JAN I. GOLDSMITH, CITY ATTORNEY,

By
Adam R. Wander
Deputy City Attorney

ARW:js
cc: Sherri Lightner, Councilmember, District 1
Carl DeMaio, Councilmember, District 5

PL#2011-07560
Attachments

Attachment A



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CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

CITY ADMINISTRATION BUILDING
202 "C" STREET
SAN DIEGO, CALIFORNIA 92101-3863
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RONALD L. JOHNSON
ASSISTANT CITY ATTORNEY
STUART H. SWETT
SENIOR CHIEF DEPUTY CITY ATTORNEY
JACK KATZ
SENIOR CHIEF DEPUTY CITY ATTORNEY
CURTIS M. FITZPATRICK
ASSISTANT CITY ATTORNEY
(SPECIAL PROJECTS)

MEMORANDUM OF LAW

DATE: January 26, 1990

TO: Susan Hamilton, Deputy Director, Clean Water Program, Roger Graff, Deputy Director, Engineering Division, via Milon Mills, Jr., Water Utilities Director

FROM: City Attorney

SUBJECT: Underground Pipes Through Dedicated Park Lands

In a memorandum authored by Roger Graff, dated November 9, 1989, the Water Utilities Department sought a legal opinion as to whether the proposed Third Rose Canyon Trunk Sewer can be placed (underground) through dedicated open space park lands, without a vote of the electorate. In a similar vein, a memorandum authored by Susan Hamilton, dated November 22, 1989, requested an opinion as to whether a proposed twelve inch sludge line can be routed (underground) through Mission Bay Park and Sunset Cliffs Park. Although these two memoranda arose from different factual circumstances, they both require analysis of the same issue and will be addressed jointly in this response.

All of the park lands in question are owned in fee by The City of San Diego. The Rose Canyon Open Space Park Preserve was dedicated as such by Ordinance No. O-15073, in 1979; Sunset Cliffs Park was dedicated as such by Ordinance No. O-15941, in 1983; and Mission Bay Park was dedicated as such by Ordinance No. O-8628, in 1964. Rose Canyon Open Space Park Preserve and Sunset Cliffs Park are dedicated in perpetuity for "park and recreational purposes." Mission Bay Park is dedicated in perpetuity "as a public park to be developed and maintained for such purposes."

In Hiller v. City of Los Angeles, 197 Cal. App. 2d 685 (1961), the court stated:

> The disposition and use of park lands is a municipal affair (Wiley v. City of Berkeley, 136 Cal. App. 2d 10 (1955); Mallon v. City of Long Beach, 44 Cal. 2d 199 (1955)), and a charter city "has plenary powers with respect

> to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter." (City of Redondo Beach v. Taxpayers, Property Owners, etc., City of Redondo Beach, 54 Cal. 2d 126, 137 (1960)).

Id. at 689.

Section 55 of the Charter of The City of San Diego establishes a Park and Recreation Department and addresses the disposition and use of park lands. This section states in pertinent part:

> All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.

The sole issue presented is whether the placement of underground utility pipes (be they sludge or sewer) through dedicated park lands without prior voter approval would constitute a violation of section 55 of the charter.

Under a strict construction of charter section 55, one might hastily conclude that placing underground utility pipes through dedicated park lands is not a "park, recreational or cemetery use" of those lands and thus requires prior voter approval. However, in City and County of San Francisco v. Linares, 16 Cal. 2d 441, 444 (1940), the court, in quoting Slavich v. Hamilton, 201 Cal. 299 (1927), stated:

> The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted. (Harter v. San Jose, 141 Cal. 659 (1904); Spires v. City of Los Angeles, 150 Cal. 64 (1906)) (emphasis added).

Following the trend recognized by Slavich, Harter, Spires, and City and County of San Francisco, in 1985 Council Policy No. 700-17 was amended to reserve to the City Council, "authority to establish easements for utility purposes in, under, and across the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property." This reservation of authority has been included in park dedication ordinances enacted after 1985. Because all three of the dedication ordinances in issue were enacted prior to 1985, the changes to Council Policy No. 700-17 are not applicable. Therefore, in determining whether or not the proposed uses of these dedicated park lands are proper, the uses must be examined in the context of the existing case law.

While the construction of buildings and roads and other surface uses in, through and across dedicated park lands has been a frequently litigated issue, the same cannot be said of subsurface uses of dedicated park lands. However, many of the principles espoused in surface use cases have analogous applicability to the issue at hand. In this regard, it has been stated that, "the real question seems to be whether the use in a particular case, and for a designated purpose, is consistent or inconsistent with park purposes." Slavich v. Hamilton, 201 Cal. 299, 303 (1927).

In McQuillin's treatise on municipal corporations, it is stated that: "[a] dedication is always subject to preexisting rights . . . ." and "[t]o constitute misuser or diversion, the use made of the dedicated property must be inconsistent with the purposes of the dedication or substantially interfere with it." McQuillin, The Law of Municipal Corporations, volume 11, sections 33.70, 33.74 (3d Ed. 1971). This addresses also the peripheral question raised by Mr. Graff's memorandum pertaining to the status of those pipes in Rose Canyon which were emplaced in the land prior to its dedication as park lands.

In City and County of San Francisco v. Linares, 16 Cal. 2d 441 (1940), the issue was examined as to whether or not a proposed use of Union Square Park would substantially interfere with the use of the land as a park. In that case, the court ruled that the construction and operation of a subsurface parking garage, as proposed, did not interfere with the surface use of the land as a park. In Best v. City and County of San Francisco, 184 Cal. App. 2d 396 (1960), a similar ruling was made based on a similar use of Portsmouth Square (a dedicated park).

It should be pointed out that the City and County of San Francisco has a charter provision whereby the Board of Park Commissioners may lease "sub-surface space under any public park

and the right and privilege to conduct and operate therein a public automobile parking station, provided that said construction . . . and operation will not be, in any material respect or degree, detrimental to the original purpose for which said park was dedicated . . . ."

Although The City of San Diego has no specific charter provision directly enabling the placement of underground pipes in dedicated park lands, the San Francisco cases are still applicable to the extent that they identify criteria which were considered by the courts when determining whether a subsurface use causes interference with the use of the land for the dedicated purpose. In that regard the court identified as determinative, "the restoration of the surface to its previous condition as a public park, with attractive landscaping and the usual public park facilities and conveniences." Linares, 16 Cal. 2d at 447.

In People ex rel. State Lands Commission v. City of Long Beach, 200 Cal. App. 2d 609, 621 (1962), the court cited Central Land Co. v. City of Grand Rapids, 302 Mich. 105, 4 N.W. 2d 485 (1942), in which the Michigan Supreme Court ruled that the erection and operation of oil wells on dedicated park lands did not substantially interfere with the use of the land as a park because, "defendants [had] taken rather extraordinary care in so operating the oil wells on park property that this activity [did] not materially impair the use of the land [as a park]." The court identified as a significant factor in its determination that no material impairment occurred, the fact that the pipelines leading from the wells to the storage tanks were contained wholly underground.

With this backdrop, we must determine whether or not placement of an underground twelve inch sludge line and an underground seventy-two inch trunk sewer line constitute uses which are inconsistent with the purposes of the dedication or substantially interfere with it.

While it is true that during construction of the proposed pipelines, there will be a disturbance of the surface, this disturbance is brought about by reason of necessity and is an unavoidable incident of a purely temporary nature. This type of temporary disturbance was dismissed as diminimus by the court in Linares. The court's primary concern was any interference with use of the land as a park, which would be caused by existence of the completed project.

It is difficult to imagine how the existence of underground pipes would in any way interfere with the surface use of the land for park and recreation purposes (particularly in unimproved open

space dedicated park lands). It seems axiomatic that where the use creates no interference, the use is not inconsistent with the dedicated purpose.

Additionally, it is noteworthy that section 55 of the charter provides that the City Council, upon recommendation by the City Manager and when the public interest demands, "may without vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance," for park and recreation purposes.

The power to construct and maintain sewers is incidental to the power to construct and maintain streets. Harter v. Barkley, 158 Cal. 742, 745 (1910). Because the charter already authorizes the construction and maintenance of streets and highways through dedicated park lands, by implication it authorizes the lesser incidental use of placing water utility pipes thereunder, which by themselves constitute less of an impact upon the surface use of the land for the dedicated purpose.

The proposed underground pipelines may not enhance the use of the dedicated lands as parks, but if they are contained wholly underground, with no surface appurtenances, and the surface of the land is restored to its original condition, emplacement of the proposed pipelines certainly would not detract from the use of the lands for park and recreation purposes. As such, it is our conclusion the proposed pipelines are not uses requiring prior voter approval as provided by Charter section 55.

JOHN W. WITT, City Attorney

By Richard L. Pinckard
Richard L. Pinckard
Deputy City Attorney

RLP:mrh:460:710.2(x043.2)
ML-90-17

ATTACHMENT E

(R-82-1004)
REV.

RESOLUTION NUMBER R- 256123

Adopted on MAR 30 1982

WHEREAS, the Planning Commission held a public hearing on November 19, 1981 and December 3, 1981, to consider an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego for the purpose of shifting those properties known as the Fairbanks Country Club from Future Urbanizing to Planned Urbanizing, and recommended such action to the City Council; and

WHEREAS, the City Council considered the Planning Commission recommendations at a public hearing conducted on December 8, 1981; and

WHEREAS, the proposal conforms to the guidelines and requirements of the Progress Guide and General Plan of The City of San Diego for effecting a shift from the Future Urbanizing to the Planned Urbanizing Area; and

WHEREAS, the proposal conforms to City Council Policy No. 600-30 which specifies the guidelines and requirements for effecting a shift of land from the Future Urbanizing to the Planned Urbanizing Area. NOW, THEREFORE,

BE IT RESOLVED, by The Council of The City of San Diego that it hereby approves and adopts an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego, shifting those properties known as Fairbanks Country Club from Future Urbanizing to the Planned Urbanizing Area, which

01685

amendment shall become effective upon adoption of an appropriate amendment to the Progress Guide and General Plan of the City of San Diego, subject to the following conditions:

1. That the precedential-setting value of this decision be limited to the open space only, requiring that 75% of the land be dedicated to open space in order to establish the overriding open space value of the plan. This should indicate that the Growth Management Policy is adherent and that it is only being overridden when 75% or greater dedication of open space is accomplished.

2. That facilities and services of surrounding properties in the future urbanizing areas should be maintained at a rural level of services as opposed to an urbanizing level of services; i.e.: road systems, fire, police, ambulance and care, etc. that is brought to the property, does not have to be brought up to an urbanizing level of services if it is brought to a future urbanizing area.

3. That the City Council, under Council Policy 600-29, can limit the development of the project to a certain number of units per year, and to phasing of those units if it feels that such phasing would accomplish a limitation of impact on the surrounding area, and upon Council's policies and goals.

R-256123

01686

APPROVED: John W. Witt, City Attorney

By: Frederick C. Conrad
Chief Deputy City Attorney

FCC:clh:630
12/7/81
REV.4/20/82
Or.Dept:Plan.
R-82-1004

R-256123

01687

Passed and adopted by the Council of The City of San Diego on MAR 30 1982 by the following vote:

Councilmen	Yeas	Nays	Not Present	Ineligible
Bill Mitchell	☐	☑	☐	☐
Bill Cleator	☑	☐	☐	☐
Susan Golding	☑	☐	☐	☐
Leon L. Williams	☑	☐	☐	☐
Ed Struiksma	☑	☐	☐	☐
Mike Gotch	☐	☑	☐	☐
Dick Murphy	☑	☐	☐	☐
Lucy Killea	☐	☑	☐	☐
Mayor Pete Wilson	☐	☐	☑	☐

AUTHENTICATED BY:

PETE WILSON
Mayor of The City of San Diego, California.

(Seal)

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California.

By June A. Blackwell, Deputy.

Office of the City Clerk, San Diego, California

Resolution Number R- 256123 Adopted MAR 30 1982

CC-1070 (REV. 1-80)

011688

ATTACHMENT B

5505

(R-2013-362)
REV.COPY 11/27

RESOLUTION NUMBER R- 307902

DATE OF FINAL PASSAGE NOV 30 2012

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN DIEGO APPROVING THE DECLARATION OF THE DEDICATION OF LAND THEREBY DEDICATING _____ ACRES OF REAL PROPERTY OWNED IN FEE BY THE CITY FOR PARK AND RECREATION PURPOSES PURSUANT TO SENATE BILL NO. 1169.

WHEREAS, San Diego Charter section 55 (Charter) provides that all real property owned in fee by the City may be dedicated in perpetuity by ordinance of the City Council or by statute of the State Legislature for park and recreation purposes; and

WHEREAS, Senate Bill No. 1169 (SB 1169) approved by Governor Jerry Brown on September 7, 2012, amends California Fish and Game Code section 2831 to provide that lands designated as open space lands in a document entitled "Declaration of the Dedication of Land" (Declaration) and approved by resolution of the City Council as of January 1, 2013, are dedicated for park and recreation purposes under the Charter; and

WHEREAS, SB 1169 further provides that such approval of the Declaration is to be by resolution of the City Council in the same manner in which the City Council processes approval of dedicated open space, reserving to the City Council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities to be located thereon do not significantly interfere with the park and recreational use of the property; and

WHEREAS, the Charter provides that all property dedicated for park and recreational use shall not be used for any but park and recreation purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose; and

WHEREAS, Council Policy 700-17, Policy on Dedication and Designation of Park Lands, sets forth conditions that property owned in fee by the City must meet to be considered for dedication pursuant to the Charter; and

WHEREAS, in accordance with the Charter and Council Policy 700-17, 11,432 acres of real property owned in fee by the City have been reviewed by staff to determine which properties meet the conditions for dedication; and

WHEREAS, it is not the intent of the City to dedicate any real property that is encumbered by an easement for solely private purposes or any real property that is not owned in fee by the City; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the Declaration of the Dedication of Land, including parcels with assessor parcel numbers 348-010-65 and 348-840-07 in site codes L310RU, L312RU, L313RU, L314RU, and L315RU, on file in the Office of the City Clerk as Document No. RR- 307902, is approved, thereby dedicating 6567.27 acres of real property owned in fee by the City for park and recreation purposes pursuant to SB 1169; however, the approval of the Declaration does not extend to any real property that is encumbered by an easement for solely private purposes or any real property that is not owned in fee by the City, as determined by a court of competent jurisdiction or the City Council by resolution or ordinance.

BE IT FURTHER RESOLVED, that the Council of the City of San Diego reserves the authority to grant easements for utility purposes in, under and across the dedicated property so

long as such easements and facilities to be located thereon do not significantly interfere with the park and recreational use of the property.

APPROVED: JAN I. GOLDSMITH, City Attorney

By _____
Hilda R. Mendoza
Deputy City Attorney

HRM:als
11/28/12
11/28/12 COR.COPY
11/30/12 REV. COPY
Or.Dept: Park & Rec
Doc. No.: 458904_7

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of NOV 27 2012 .

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: 11-30-12
(date)

_____
JERRY SANDERS, Mayor

Vetoed: _____
(date)

_____
JERRY SANDERS, Mayor

ATTACHMENT C

Deed to open space lots and golf course lot in Fairbrook Country Club Unit No. 1

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL TO

CITY CLERK
202 "C" ST.
SAN DIEGO CA
92101

MAIL TAX STATEMENTS TO

C

1878

32964

RECORDED IN OFFICIAL RECORDS OF SAN DIEGO COUNTY, CA.
1983 OCT 24 PM 2:21
VERA L. LYLE
COUNTY RECORDER

NO FEE

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Corporation Grant Deed

TO 1921 CA (12-74) THIS FORM FURNISHED BY TICOR TITLE INSURERS

486-073-01
A.P.N.

The undersigned grantor(s) declare(s):
Documentary transfer tax is $ none .
( ) computed on full value of property conveyed, or
( ) computed on full value less value of liens and encumbrances remaining at time of sale.
( ) Unincorporated area: ( ) City of _____, and
FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, WATT INDUSTRIES/SAN DIEGO, INC.

a corporation organized under the laws of the State of California hereby GRANTS to

THE CITY OF SAN DIEGO, a municipal corporation

the following described real property in the City of San Diego
County of San Diego , State of California:

See legal description of property granted hereby set forth on Exhibit "A" attached hereto and by this reference made a part hereof.

The covenants, conditions and restrictions set forth on Exhibit "B" attached hereto are by this reference made a part hereof.

RESERVING THEREFROM, until December 31, 2044, as a mineral interest and not as a royalty interest, all of the minerals of every kind, including, but not limited to, all oil, gas, hydrocarbons and associated substances in, under or that may be extracted, produced and saved from said real property but without the right of entry to the surface of said real property or the top 500 feet of the subsurface of said real property for the purposes of exploring for, developing and removing such materials.

In Witness Whereof, said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its Vice President and Assistant Secretary thereunto duly authorized.
Dated: September 19, 1983

WATT INDUSTRIES/SAN DIEGO, INC.

By _____ Vice President

By _____ Assistant Secretary

STATE OF CALIFORNIA
COUNTY OF San Diego } ss.

On September 19, 1983 before me, the undersigned, a Notary Public in and for said State, personally appeared Stephen C. Games known to me to be the Vice President, and Robert Mincer known to me to be Asst. Secretary of the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the within Instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Diane E. Thatcher

OFFICIAL SEAL
DIANE E THATCHER
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires OCT 23, 1984

(This area for official notarial seal)

Title Order No. _____ Escrow or Loan No. _____

EXHIBIT "A" TO GRANT DEED

Lots 1, 2, 4, 9 and 10 of Map No. 10730 of FAIRBANKS COUNTRY CLUB NO. 1 filed in the Office of the County Recorder of San Diego County, on SEPTEMBER 29, 1983

This is to certify that the interest in real property conveyed by this instrument to the City of San Diego, a municipal corporation, is hereby accepted by the undersigned officer on behalf of the City of San Diego, pursuant to authority conferred by Resolution No. 198686, adopted by the Council of the City of San Diego on December 18, 1969, and the grantee consents to recordation thereof by its duly authorized officer.

Dated 9-29-83 By

ASSISTANT TO THE City Manager

AFTER RECORDING, MAIL TO CITY CLERK

R- 259343

EXHIBIT "B" TO GRANT DEED

BY THE CONVEYANCE AND ACCEPTANCE of this Grant Deed, WATT INDUSTRIES/SAN DIEGO, INC., a California corporation ("Grantor") and THE CITY OF SAN DIEGO, a municipal corporation ("Grantee"), declare, covenant and agree as follows:

1. Grantor is the owner, owns an interest in or is a partner of a partnership which is the owner (or formerly was such owner) of that certain real property located in the City of San Diego, County of San Diego, California, more particularly described as follows:

> Lots 1 through 18, inclusive, of Parcel Map No. 12638 filed in the Office of the County Recorder of San Diego County on March 25, 1983

("Benefited Land").

2. Pursuant to that certain Percentage Lease between Grantor and Grantee approved by San Diego City Council Resolution No. R-257594 on December 6, 1982 ("Lease"), the real property conveyed by this Grant Deed consists of (a) premises leased for the purpose of constructing and maintaining a country club, golf course and related activities, more particularly described as follows:

> Lot 2 of Map No. 10730 of FAIRBANKS COUNTRY CLUB NO. 1 filed in the Office of the County Recorder of San Diego County on SEPT. 29, 1983

("Country Club"), and (b) real property contiguous to the Country Club to be preserved and maintained as "Open Space" areas, more particularly described as follows:

> Lots 1, 4, 9 and 10 of Map No. 10730 of FAIRBANKS COUNTRY CLUB NO. 1 filed in the Office of the County Recorder of San Diego County on SEPT. 29, 1983.

The Open Space is referred to herein as the "Affected Land", and, pursuant to the Lease, is to be maintained by Grantor.

3. The Affected Land is presently designated open space and as floodway zone, floodplain fringe zone and Agricultural zone (A-1-1) by the City of San Diego Progress Guide and General Plan, the Fairbanks Country Club Specific Plan and the City of San Diego's zoning maps.

4. Grantee for and on behalf of itself, and on behalf of each successive owner, during its, his, her or their ownership of any portion of the Affected Land herein granted by Grantor to Grantee, and each person having any interest in the Affected land derived through any such owner, covenants, and agrees that it, he, she or they:

(a) Shall keep and preserve the Affected Land as Open Space in a natural condition as near as possible, or may permit it to be utilized for any or all of the following purposes and no others:

(i) All agricultural uses relating to the growing, harvesting, processing or selling of field or grain crops, fruit and vegetables;

(ii) Passive non-commercial recreational uses (e.g., picnicking, walking, hiking, and similar activities), and reasonable support facilities, including any restrooms and parking facilities as may be reasonably required, for such uses;

(iii) Active non-commercial recreational uses not involving large assemblages of people or automobiles, nor involving the use of motor-driven machines or vehicles (e.g., equestrian activities, jogging, frisbee, and similar activities).

(b) Shall, notwithstanding any other provision hereof, prevent any of the following purposes, uses and activities from being conducted upon the Affected Land:

(i) Apiaries;

(ii) Aviaries;

(iii) Parking lots which are designated and intended to serve facilities located on the Affected Land other than as specifically allowed above;

(iv) Single-family dwellings;

(v) Churches, schools or day care facilities;

(vi) Public utility substations;

(vii) Raising, killing or dressing of livestock, poultry, fowl, rabbits or any other animal;

(viii) Airways, taxiways and pads of heliports and helistops;

(ix) Establishments or enterprises involving large assemblages of people or automobiles, including, but not limited to, recreational facilities publicly or privately operated;

(x) Fairgrounds;

(xi) Natural resources development and utilization, including, but not limited to, extracting, processing, storing, selling and distributing sand, gravel, rock, clay, decomposed granite and soil, and the manufacturing, producing, processing, storing, selling and distributing of asphaltic concrete, Portland Cement concrete, concrete products and clay products;

(xii) Racetracks;

(xiii) Travel trailer parks together with incidental facilities for the convenience of occupants;

(xiv) Dams and reservoirs;

(xv) Ground water replenishment works, including, but not limited to, diversion dams, percolation beds, spreading grounds and injection wells; provided, however, that desiltation facilities are expressly permitted to be built and maintained upon the Affected Land;

(xvi) Accessory buildings, other than as may be specifically allowed hereinabove, and uses customarily incidental to any of the above uses, including, but not limited to:

(A) The boarding and lodging of farm or other employees;

(B) Construction and maintenance of living quarters for farm or other employees with or without their immediate families;

(C) Lighted signs, commercial signs or unlighted signs, single-faced or double-faced exceeding 12 square feet in area for each face;

(xvii) Any other use similar in character to the uses, including accessory uses, enumerated in this section and inconsistent with the purpose and intent of this deed restriction.

5. (a) Grantee or its successors shall permit no use of the Affected Land in violation of the provisions hereof. In the event any use is contemplated which is not specifically permitted by the terms of this document, such use shall not be allowed without Grantee having first obtained Grantor's (or Grantor's successors') written consent thereto. Grantor or its successors shall not unreasonably withhold such consent. If Grantor or its successors disapprove a contemplated use, such disapproval shall be in writing and shall specify, with reasonable particularity, the reason(s) for such disapproval. If Grantor or its successors fail either to so approve or disapprove such contemplated use within thirty (30) days after the same have been submitted to Grantor or its successors, it shall be conclusively presumed that Grantor or its successors have approved such use. Such submission shall be deemed effective if Grantee submits its written request for consent to Grantor, or its corporate successors, and any homeowners associations in the Benefited Land area and posts signs describing such proposed use in at least twenty (20) locations reasonably calculated to give adequate notice of such proposed use to all of Grantor's successors.

(b) Grantor and Grantee agree that in the event of a dispute between them or their successors with respect to whether Grantor or its successors have unreasonably withheld their approval of a contemplated use submitted in accordance with the foregoing, they shall submit any such dispute to arbitration in accordance with the following provisions:

(i) Within fifteen (15) days after the written demand by either of the parties for arbitration, each of the

parties shall choose an arbitrator and give the other written notice of such choice, or in case of the failure of either party so to do, the other party shall have the right to appoint an arbitrator to represent the defaulting party. The two arbitrators thus appointed (in either manner) shall select and appoint in writing a third arbitrator and give written notice thereof to Grantor and Grantee or their successors, or if within ten (10) days after the appointment of said second arbitrator, the two arbitrators shall fail to appoint a third, then either party shall have the right to make application to the Superior Court of San Diego County to appoint such third arbitrator.

(ii) The three arbitrators so appointed (in either manner) shall promptly fix a convenient time and place for hearing the matter to be arbitrated and shall give written notice thereof to each party at least ten (10) days prior to the date so fixed. The hearing date shall be set for not more than sixty (60) days from the date of the demand for arbiration unless it is necessary to apply to the Superior Court for appointment of a third arbitrator. In such latter event, the hearing date shall be set for not more than thirty (30) days after the date such third arbitrator is so appointed. The arbitrators shall, within ten (10) business days after the hearing, render their decision with respect to whether Grantor or its successors have unreasonably withheld their approval of a contemplated use submitted to them.

(iii) The decision or award of the majority of the arbitrators shall be final and nonappealable except that upon the satisfaction of the conditions set forth in Section 1286.4 of the California Code of Civil Procedure, the decision or award of the majority of the arbitrators may be vacated upon the grounds set forth in Section 1286.2 of said Code of Civil Procedure. Further, any decision or award of the majority of the arbitrators may, upon satisfaction of the conditions set forth in Section 1286.8 of the Code of Civil Procedure, be corrected in accordance with the provisions of Section 1286.6 of said Code of Civil Procedure.

(iv) If two of the three arbitrators first appointed as aforesaid shall fail to reach an agreement in the determination of the matter in question, the same shall be decided by three new arbitrators, who shall be appointed and shall proceed in the same manner and within the same time frame, as hereinabove set forth, and said process shall be repeated until a decision is finally reached by two of the three arbitrators selected.

(v) Each party shall pay the costs and fees of the arbitrator chosen by such party and shall pay one-half of such costs and fees of the third arbitrator.

(c) Neither Grantor nor its successors shall be liable in damages to anyone on whose behalf a contemplated use is submitted for approval. Every person who submits a contemplated use for approval, either directly or through Grantee, agrees that he, she or it will not bring any action or suit against Grantor or its successors to recover any such damages.

6. Notwithstanding any other provision hereof, for a period of ten (10) years following the date of execution of this Grant

Deed, Grantor, or its successors, shall have the right to acquire easements from Grantee, at no cost, for utilities and public right of way required by governmental agencies, including Grantee, to serve the Benefited Land.

7. Notwithstanding any other provision hereof, Grantee shall have the right to establish underground utility easements upon the Affected Land provided said easements do not adversely affect or interfere with Open Space or Golf Course activities conducted on the Country Club portion of the deeded property.

8. Notwithstanding any other provision hereof, Grantor reserves the right to relocate all or a portion of Via de la Valle upon the Affected Land upon the request of Grantee's City Engineer.

9. Notwithstanding any other provision hereof, Grantor reserves a water utility easement in gross, in, over, under and across the Affected Land and the Benefited Land, to serve the Country Club, for the purpose of importing water from public or private sources to benefit the Country Club. However, in exercising its rights under this provision, Grantor will not unreasonably interfere with Grantee's use of, nor the open space nature of, the Affected Land.

10. Notwithstanding any other provision hereof, Grantor shall be permitted to build and maintain upon the Affected Land no more than five (5) signs promoting and advertising Olympic Games and/or Grantor's real property development upon the Benefited Land and the Country Club portion of the deeded property. The locations, style and design of such signs shall be at Grantor's sole discretion, subject to applicable City ordinances, as shall the period of time during which such signs, or any of them, shall remain erected. In no event, however, shall any such signs remain erected after ten (10) years from the date of execution of this Grant Deed.

11. Monetary damages for the breach of the covenants contained herein are declared to be inadequate and Grantee or its successors may be enjoined by any court of competent jurisdiction from commencing or proceeding with the construction of any improvements to, or permitting any use upon, the Affected Land which are in violation of the covenants set forth herein, or, if an improvement is constructed, may be ordered by any court of competent jurisdiction to remove such improvements.

12. Each successive owner, during its, his, her or their ownership, of any portion of the Affected Land, and each person having any interest in the Affected land derived through any such owner, shall be bound hereby for the benefit of the Benefited Land. Each successive owner, during its, his, her or their ownership, of any portion of the Benefited land, and each person having any interest in the Benefited Land derived through the Grantor, shall be benefited by the covenants contained herein, it being intended that the burden and benefit of the covenants shall run with the land.

13. Any violation of the covenants herein contained shall be deemed to be a continuing violation hereof and no delay in the delivery of any notice of any violation hereof or in the enforcement of any rights or the seeking of any remedies provided hereunder shall constitute, or be deemed to constitute, a waiver of

the right to give such notice, enforce such right or seek such remedy at any time after the occurrence of such violation.

14. Except in the event of arbitration in accordance with Paragraph 5 above, if any owner(s) of the Affected Land or the Benefited land commences litigation for the judicial interpretation, enforcement or rescission hereof, the prevailing party shall be entitled to a judgment against the other for an amount equal to reasonable attorney's fees and other costs incurred.

15. The covenants herein contained are for the benefit of the Benefited Land and have been made with the intent of satisfying the requirements of Section 1468 of the California Civil Code.

16. In the event any term, covenant, condition, provision or agreement herein contained is held to be invalid, void or otherwise unenforceable by any court of competent jurisdiction, the invalidity of any such term, covenant, condition, provision or agreement shall in no way affect the validity of any other term, covenant, condition, provision or agreement herein contained.

17. So long as WATT INDUSTRIES/SAN DIEGO, INC., a California corporation, its successors or assigns, or any partnership of which WATT INDUSTRIES/SAN DIEGO, INC. is a partner, owns any portion of the Benefited Land, and THE CITY OF SAN DIEGO, a municipal corporation, owns any portion of the Affected Land, the provisions contained within this Exhibit "B" to this Grant Deed may be terminated or amended by an instrument in writing executed by both and recorded in the Office of the County Recorder of San Diego County, California, without the need for approval by any other owner of any portion of the Benefited Land or the Affected Land. The term "successors or assigns" as used in this Paragraph only, shall mean the named corporation or any person or entity hereafter acquiring all of the then existing assets of the same by purchase, liquidation, merger or reorganization.

GRANTEE hereby accepts the above covenants, conditions and restrictions to this Grant Deed. These covenants, conditions and restrictions shall terminate and be of no further force or effect at 11:59 p.m. on December 31, 2044.

THE CITY OF SAN DIEGO

By _____
ASSISTANT TO THE City Manager

APPROVED as to form and legality this 27 day of September, 1983.

JOHN W. WITT, City Attorney

By _____
Deputy

R - 259343

ATTACHMENT D

DUPLICATE

RECORDING REQUESTED BY

RETURN TO:
THE CITY OF SAN DIEGO
PROPERTY DEPARTMENT
CITY OPERATIONS BUILDING
1222 FIRST AVE., MAIL STATION 503
SAN DIEGO, CA 92101
ATTN: Bob Collins

1889

ORIGINAL

83-382065
RECORDED IN OFFICIAL RECORDS OF SAN DIEGO COUNTY, CA.
1983 OCT 24 PM 2:21
VERA L. LYLE
COUNTY RECORDER

NO FEE

PERCENTAGE LEASE

BETWEEN

THE CITY OF SAN DIEGO

AND

WATT INDUSTRIES/SAN DIEGO, INC.

(OF THE PROPERTY)

NOTE: IF A CHANGE IN USE IS CONSIDERED, REVIEW DEED RESTRICTIONS TO SEE IF IT IS PERMISSIBLE. THE DEEDS ARE FILED BEHIND THIS INSTRUMENT.

DOCUMENT NO. RR-257594-1

FILED DEC 6 1982
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

TABLE OF CONTENTS

PERCENTAGE LEASE

PERCENTAGE LEASE

Approved by Council Resolution
No. R-257594 Dated DEC 6 1982

THIS LEASE AGREEMENT is executed by and between THE CITY OF SAN DIEGO, a municipal corporation, hereinafter "CITY", and WATT INDUSTRIES/SAN DIEGO, INC., a California corporation, hereinafter called "LESSEE".

I. LEASED PREMISES. CITY hereby leases to LESSEE and LESSEE leases from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described as Lot B of Tentative Map 02-199-0, hereinafter "T.M. 02-199-0," and delineated as Lot B on Exhibit "A" attached hereto and by this reference made part of this lease. Said real property is hereinafter sometimes called "premises" and "leased premises".

A. PERMITTED USE. The premises are leased to LESSEE for the purpose of:

(1) Constructing, operating and maintaining thereon a country club and 27-hole golf course facilities, including, but not limited to, permanent lakes, gallery mounds, paved cart paths, and a clubhouse with men's and women's locker rooms, clubrooms, banquet rooms, kitchen and snack bar facilities, parking, bar, cardrooms and tennis facilities in accordance with the General Development Plan on file with the City Clerk as Document No. RR-257594-2 and

SEE EXHIBIT "B" ATTACHED HERETO FOR LEGAL DESCRIPTION. -1- OF GOLF COURSE (LEASED PREMISES)

(2) Such other related and incidental purposes and at such rents as may first be approved in writing by CITY and for no other purpose.

B. OBLIGATION TO DILIGENTLY USE. LESSEE covenants to use the premises for the above-specified purposes and to diligently pursue said purposes throughout the term hereof.

C. RELATED COUNCIL ACTIONS. By the granting of this lease, the City Council of the City of San Diego is not obligating itself with regard to any other discretionary action relating to development or operation of the premises. Such discretionary action includes, but is not limited to, rezonings, variances, environmental clearances or any other governmental agency approvals which are required.

D. OPEN SPACE AREAS. Contiguous to the leased premises is that certain real property herein referred to as the "Open Space areas" described as Lots A, C, D and E of T.M. 02-199-0 and delineated as Lots A, C, D and E on Exhibit "A"

II. TERM OF LEASE.

A. COMMENCEMENT AND TERMINATION. The term of this lease shall be sixty-one (61) years commencing on the date of acquisition of title by CITY to the leased premises or in no event later than January 1, 1984; provided, however, the term may be extended as hereinafter provided. If CITY does not acquire title to the leased premises by January 1, 1984, this lease shall terminate.

B. SURRENDER OF PREMISES. At the expiration or earlier termination of this lease, LESSEE shall execute, acknowledge and deliver to CITY, within five days after written demand by CITY, a valid and recordable quitclaim deed covering all of the leasehold premises. The leasehold premises shall be delivered free and clear of all liens and encumbrances.

III. CONSIDERATION.

A. RENT. As rent for and in consideration of this lease, LESSEE shall pay rent as follows:

(1) The basic rent due for the first twenty-five (25) years of the term is Three Thousand Dollars ($3,000.00), payable upon execution hereof.

EFFECTIVE DATE 9/27/85 2nd Yr. 9/27/2003 Ord. No. 9/2004

(2) Commencing on the first day of January of the twentieth (20th) year following the sale of eighty percent (80%) of the proposed 1,100 memberships (which is 880 memberships) or commencing January 1, 2010, whichever date or event shall first occur, and continuing thereafter until January 1, 2030, rent shall be paid as follows:

LESSEE shall pay to CITY quarter-annually in arrears as percentage rent, an amount equal to ten percent (10%) of the Gross Receipts, as defined below, an amount equal to four percent (4%) of the Gross Food Receipts, as defined below, and an amount equal to six percent (6%) of the Gross Beverage Receipts, as defined below. On or before the sixtieth (60th) day following the end of each quarter-annual lease year (defined below) LESSEE shall, without notice or demand from CITY, deliver to CITY in the manner prescribed for giving notices, a statement prepared by a certified public accountant or a financial officer of LESSEE showing the Gross Receipts, Gross Food Receipts and Gross Beverage Receipts on or from the premises for that quarter-annual lease year, and shall concurrently pay to CITY such percentage rent. A quarter-annual lease year shall be each three (3) month period during a calendar year. Within sixty (60) days after the end of each calendar year during the term hereof that percentage rents are payable to CITY, LESSEE shall furnish to CITY a statement in writing, duly certified to be true and correct by a financial officer of LESSEE, showing in detail the Gross Receipts, Gross Food Receipts and Gross Beverage Receipts of the leased premises during the immediately preceding calendar year.

(3) Commencing on January 1, 2030, and continuing thereafter through the remainder of the term, rent shall be paid as provided in Section III, A.(2) above; provided, however, the percentage rent for the Gross Receipts shall be twelve percent (12%) in lieu of the ten percent (10%) specified therein.

B. ADDITIONAL CONSIDERATION. In addition to the rent due hereunder and as additional consideration, LESSEE shall:

(1) At its sole expense, maintain, throughout the term, all Open Space areas, including, but not limited

Initials

to, the channel to be constructed through the property on Lot B as shown on Exhibit "A" subject to the conditions found in Paragraph IV, B.(11) herein. The obligations of LESSEE pursuant to this subparagraph (1) shall terminate as to any portion of the Open Space areas subsequently leased or released pursuant to a written agreement between CITY and a person or entity other than LESSEE.

(2) Develop the leased premises in accordance with the CITY approved General Development Plan identified in Section IV, B.(14), Development, of this lease.

(3) During the first twenty-five (25) years of the lease term ending December 31, 2009, pay to CITY three percent (3%) of all memberships sold in excess of Twenty-Five Million Dollars ($25,000,000.00) by LESSEE in LESSEE or in the facilities operated by LESSEE on the leased premises. Sale of memberships for other than full cash payment shall be regarded as sales at full cash value of said memberships for purposes of this provision. Payment shall be made quarter-annually pursuant to Section III, A.(2) above. Thereafter, the terms for payment of percentage rent provided in Section III, A.(2) shall be controlling.

C. DEFINITIONS.

(1) The term "Gross Receipts" shall mean the total, as determined under the cash method of accounting, of all gross receipts which are the charges for merchandise, services, rents, subleases and from all other sources derived, including, but not limited to, all deposits not refunded, orders taken on or from the premises to be filled or paid for elsewhere, sales by all subtenants, concessionaires or licensees, gross receipts from coin-operated or other vending, weighing and other devices on the premises, consideration received by LESSEE, sublessees, licensees, permittees or employees from the operation of public telephones on the premises, fees for lessons, green fees, tennis court fees, public and private banquets held for other than members of LESSEE, membership dues and all other fees paid by members of LESSEE, brokerage commissions, fees and any proceeds retained by LESSEE in the transfer of a membership, sale of memberships in LESSEE or the facilities operated by LESSEE, and fees and other receipts of whatever nature or source derived by LESSEE, sublessees,

licensees, permittees or employees resulting from the occupancy of the premises. Anything herein to the contrary notwithstanding, the term "Gross Receipts" shall not include Gross Food Receipts or Gross Beverage Receipts.

(2) The term "Gross Food Receipts" shall mean the total, as determined under the cash method of accounting, of all gross receipts which are the charges for all food served and sold on the premises, including non-alcoholic beverages, but shall not include public or private banquets held for other than members of LESSEE, which shall be included in Gross Receipts.

(3) The term "Gross Beverage Receipts" shall mean the total, as determined under the cash method of accounting, of all gross receipts which are the charges for all alcoholic beverages served and sold on the premises.

(4) Excluded from the definitions of Gross Receipts, Gross Food Receipts and Gross Beverage Receipts, or subtracted if previously included, shall be:

(a) All uncollected credit and installment balances reasonably determined, subject to the demonstration of diligent collection efforts by LESSEE and shown on LESSEE's books to be uncollectible;

(b) All sums collected and paid out for sales taxes, luxury taxes, excise taxes and similar taxes required by law to be added to the total purchase price, whether now or hereafter in force, to be collected from customers and paid to government agencies by LESSEE;

(c) Merchandise returned to shippers or manufacturers;

(d) All credits and cash refunds made on any sale that took place on or from the premises;

(e) All cash or credit received in settlement of any claims for loss of or damage to merchandise;

(f) Gift certificates or like vouchers, if not issued for value, until the time they have been converted into a sale by redemption;

(g) That portion of the purchase price by which the price is actually reduced for merchandise traded in for credit;

(h) Bulk sales made by LESSEE not in the ordinary course of business not to exceed the cost thereof, except sales of merchandise traded in for credit; and

(i) Any income or receipts that, under generally accepted accounting principles, are derived from the sale or disposal of any capital assets, or from the retirement of any of LESSEE's indebtedness, or from LESSEE's investment of any funds not invested in the premises or the operation of LESSEE's business within the premises.

D. FINANCIAL RECORDS MAINTENANCE.

(1) LESSEE shall keep true, accurate and complete records in a manner and form satisfactory to CITY from which CITY can at all reasonable times determine the nature and amounts of gross receipts subject to rental from the operation of the leased premises. Such records shall show all transactions relative to the conduct of the operation, and such transactions shall be supported by documents of original entry such as sales slips, cash register tapes, purchase invoices and tickets issued or other means satisfactory to CITY. All sales or rentals of merchandise and services rendered shall be recorded by means of cash register system which automatically issues a customer's receipt or certifies the amount recorded on a sales slip. Said cash register shall have a locked-in total which is constantly accumulating, which total cannot be reset, and at the option of CITY, a constantly locked-in accumulating printed transaction counter which cannot be reset, and/or a printed detailed audit tape located within the register. Complete beginning and ending cash register readings shall be made a matter of daily record. The City Auditor and Comptroller shall audit the business of LESSEE, its agents, sublessees, concessionaires or licensees operating on the premises at least once every

three (3) years or more frequently as deemed appropriate by the City Auditor.

In the event such audit discloses that the percentage rental required for the period audited exceeds the amount of percentage rental paid to CITY by LESSEE during said period, LESSEE shall, within thirty (30) days of notification thereof by CITY subject to subparagraph D.(4) hereof, pay to CITY the amount of such deficiency. In the event that such audit discloses that the percentage rental required for the period audited is less than the amount of rents paid to CITY during said period, the amount of overpayment shall be credited against the then next successive quarter-annual lease year until said overpayment is fully credited. Any such overpayment occurring in the last quarter-annual lease year shall be refunded by CITY within thirty (30) days of said audit findings.

(2) LESSEE shall also maintain accurate records of actual and projected operating expenses and revenue, and such other operating information as CITY from time to time deems necessary and LESSEE shall submit such information to CITY upon request.

(3) Said records and accounts shall be maintained separate from all other accounts not relating to the operation of the leased premises and shall be made available to CITY at one location within the limits of the City of San Diego. CITY shall have, through its duly authorized agents or representatives, the right to examine and audit said records and accounts at any and all reasonable times. Any additional sums due CITY as determined by CITY's audit are due and payable within thirty (30) days of notification thereof by CITY.

(4) In the event that such audit discloses that the rent for the audited period has been underpaid in excess of five percent (5%) of the total required rent, then LESSEE shall pay CITY ten percent (10%) of the amount by which said rent was underpaid in addition to the unpaid rents so shown to be due CITY as compensation to CITY for audit and administrative costs and loss of interest.

E. DELINQUENT RENT. In the event LESSEE fails to pay the applicable rents or any audit deficiencies when due, then LESSEE shall pay CITY, in addition to the

delinquent rent, a sum of money equal to five percent (5%) of said delinquent rent; provided, however, in the event said delinquent rent is still unpaid after fifteen (15) days of becoming delinquent, then LESSEE shall pay CITY, instead of said five percent (5%), a sum of money equal to ten percent (10%) of said delinquent rent. It is the intent of this provision that CITY shall be compensated by such additional sums for loss resulting from rental delinquency and costs to CITY of servicing the delinquent account. The City Manager, at his option, may for good cause waive any such delinquent compensation required herein, upon written application of LESSEE.

IV. COVENANTS AND CONDITIONS.

A. CITY COVENANTS.

(1) Quiet Possession. LESSEE, paying the said rent and performing the covenants and agreements herein, shall and may at all times during the said term peaceably and quietly have, hold and enjoy the premises for the term hereof. If CITY for any reason whatsoever cannot deliver possession of the premises to LESSEE at the commencement of said term as hereinbefore specified, or if LESSEE is dispossessed through action of a title superior to CITY's, then and in either of such events, this lease shall not be void or voidable nor shall CITY be liable to LESSEE for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the City Manager of CITY a proportionate reduction of the rent covering the period or periods during which LESSEE is prevented from having the quiet possession of all or a portion of the leased premises.

(2) Right to Assign and Sublet. When in the opinion of the City Manager, if it is deemed consistent with the best interests of CITY, LESSEE may assign this lease or any interest therein and may sublease any portion thereof to an assignee or sublessee who has, in the opinion of the City Manager, the financial capability and overall competence to successfully operate the assigned or subleased premises. The consent of the City Manager will not be unreasonably withheld. This lease and any interest herein shall not be assignable by operation of law without the written consent of the City Manager.

If CITY has been notified in writing of the existence of a trust deed or mortgage secured by the leasehold, CITY agrees to give the trustee or beneficiary notice of any sublease or assignment prior to CITY's approval thereof. Approval of any assignment or sublease shall be conditioned upon assignee or sublessee agreeing in writing that they will assume the rights and obligations thereby assigned or subleased and that they will keep and perform all covenants, conditions and provisions of this lease which are applicable to the rights acquired.

(3) Right to Encumber.

(a) Subject to Section IV.A(2) and the prior written consent of CITY, which consent shall not be unreasonably withheld, LESSEE shall have the right to encumber the leasehold estate by mortgages, deeds of trust, conditional or unconditional assignments, security agreements and other instruments of hypothecation (any and all of which are herein referred to as "mortgage", and holder of any mortgage is herein referred to as "mortgagee"); any mortgagee shall have the right to:

(i) Cure any breach hereunder;

(ii) Foreclose the mortgage; and

(iii) Accept an assignment of the leasehold estate in lieu of such foreclosure.

(b) The proceeds of any of the above-listed approved encumbrances must be spent to improve the leasehold interest of LESSEE.

(c) No exercise by LESSEE of any option or election herein, and no agreement between CITY and LESSEE amending or terminating this lease, shall be effective without the written consent thereto of each mortgagee holding a mortgage in effect at the time of such exercise or agreement.

(d) All fire and other casualty insurance proceeds shall be disbursed pursuant to the terms and conditions of this lease.

(e) Any condemnation award proceeds shall be disbursed pursuant to this lease.

(f) Anything to the contrary notwithstanding in this lease regarding CITY's remedies upon breach, CITY shall not be entitled to exercise any of the remedies granted herein unless and until:

(i) CITY has delivered a written notice (describing with reasonable specificity each breach claimed by CITY to exist) to each mortgagee of record as of the date of such notice; and

(ii) There has been failure of such breach to be cured within thirty (30) days after said delivery of such written notice.

(g) If a breach (other than the failure to pay rent or other sums required hereby) occurs, CITY, anything to the contrary notwithstanding in this lease regarding CITY's remedies upon breach, shall not exercise any right or remedy so long as a mortgagee:

(i) Commences during the thirty (30) day period described in the preceding paragraph the judicial or other foreclosure of the mortgage;

(ii) Prosecutes said foreclosure with reasonable diligence; and

(iii) Cures, during said thirty (30) day period, all breaches which are capable of being cured and, during the period of said foreclosure, performs or causes to be performed all acts required by this lease which the mortgagee is capable of performing; included in said curing and in said performance shall be, without limitation thereto, payment of all rents, monies and charges required by this lease to be paid by LESSEE.

(h) In the event the leasehold estate is transferred at any foreclosure sale pursuant to a mortgage, or in the event of an assignment in lieu of foreclosure, the following shall apply:

(i) Subject to the prior written consent of CITY, which consent shall not be unreasonably withheld, the transferee shall acquire the leasehold estate without necessity of CITY's consent, anything herein to the contrary notwithstanding, and the leasehold estate shall thereafter be freely assignable by the foreclosing party without necessity of CITY's consent.

(ii) Except as excused by reason of the next-following subpart, the transferee shall have a reasonable time to cure then-existing nonmonetary breaches.

(iii) The following breaches, if any, relating to the prior LESSEE shall be deemed cured: 1) attachment, execution or other judicial levy upon the leasehold estate, 2) assignment of the leasehold estate for the direct or indirect benefit of creditors of LESSEE, 3) judicial appointment of a receiver or similar officer to take possession of the leasehold estate or the premises, or 4) filing any petition by, for or against LESSEE under any chapter of the Federal Bankruptcy Act.

(iv) By its acceptance of the leasehold estate, the transferee shall assume this lease and covenant with CITY to be bound hereby.

(i) In the event of any conflict between this subpart (3) and any other provision of this lease, this subpart shall prevail.

(j) If such transferee shall be a national or state bank, federal or state savings and loan association, life insurance company or other lending institution, such transferee shall, by its assignment of the leasehold estate, be relieved of any and all liability arising after the effective date of such assignment.

(4) Right to Terminate. LESSEE shall have the right to terminate this lease at any time during the first two (2) years of the term upon thirty (30) days

written notice to CITY. Upon proper delivery of such notice, this lease shall terminate and be of no further force and effect. LESSEE shall not be entitled to any rebate in prepaid rent upon such termination, and in no event shall LESSEE or CITY have any further obligations to each other with respect to this lease upon such termination.

B. LESSEE COVENANTS.

(1) Management. LESSEE agrees to provide and maintain competent professional management, to the reasonable satisfaction of the City Manager, for the leased premises.

(2) Legal Descriptions. LESSEE agrees to provide CITY with legal descriptions of the leased premises and of the Open Space areas within a reasonable period of time after a final map records for the Fairbanks Country Club Subdivision and title to the leased premises is conveyed to CITY.

(3) Affirmative Action. LESSEE agrees to take affirmative action to improve employment opportunities of minorities and women. When applicable, LESSEE agrees to abide by the Affirmative Action Program for Lessees as it now exists or is hereafter amended. A copy of the program, effective as of the date of this lease, is on file in the Office of the City Clerk and by this reference is incorporated herein. Minorities are presently defined as Mexican-American, Black, Filipino, American Indian and Asian/Oriental. The goal of this program shall be the attainment of the employment of minorities and women in all areas of employment in a total percentage of employment approximately equal to the total level of minority and women employment as established by CITY for its Affirmative Action Program each year.

(4) Compliance with Law. LESSEE agrees, at its sole cost and expense, to comply and secure compliance with all the requirements now in force, or which may hereafter be in force, of all municipal, county, State and Federal authorities, pertaining to the premises, or the operations conducted thereon, and to faithfully observe and secure compliance with, in the use of the premises, all applicable county and municipal ordinances and State and Federal statutes now in force or which

may hereafter be in force, and to pay before delinquency all taxes, assessments and fees assessed or levied upon LESSEE or the leased premises, including the land and any buildings, structures, machines, appliances or other improvements of any nature whatsoever, erected, installed or maintained by LESSEE or by reason of the business or other activities of LESSEE upon or in connection with the leased premises. LESSEE recognizes and understands that this lease may create a possessory interest subject to property taxation and that LESSEE may be subject to the payment of property taxes levied on such interest. LESSEE further agrees that such tax payment shall not reduce any rent due CITY hereunder and that any such tax shall be paid by LESSEE before becoming delinquent. , The judgment of any court of competent jurisdiction, or the admission of LESSEE or any sublessee or permittee in any action or proceeding against them, or any of them, whether CITY be a party thereto or not, that LESSEE, sublessee or permittee has violated any such ordinance or statute in the use of the premises shall be conclusive of that fact as between CITY and LESSEE.

(5) Construction/Alterations. LESSEE agrees not to construct or install any buildings or structures on the premises or otherwise improve or alter the premises in any manner except in accordance with plans and specifications previously submitted to the City Manager and approved by him in writing. LESSEE shall not make any major structural or architectural design alterations to approved buildings, structures or improvements installed on the premises except in accordance with plans and specifications previously approved in writing by the City Manager. This provision shall not limit or set aside any obligation of LESSEE under this lease to maintain the premises in a decent, safe, healthy and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this lease to make any improvements or alterations to the premises or to assume any expense therefor.

(6) Construction Bond. LESSEE agrees to file with CITY, prior to commencement of any construction performed upon the premises, a faithful performance bond in the amount of one hundred percent (100%) of the construction costs of the work to be performed.

Said bond may be in cash or may be a corporate surety bond satisfactory to CITY or in a combination of both. Said bond shall insure that the construction commenced by LESSEE shall be completed in accordance with approved plans, or at the option of CITY, that the uncompleted construction be removed and the premises restored to a condition satisfactory to CITY. The surety bond will be filed with CITY and any cash used as a part of the bond may be deposited with CITY to be held in trust for the purpose specified above or may be placed in an escrow or other trust approved by CITY. Upon application by LESSEE, CITY may waive or modify this requirement to file a bond. In the event that LESSEE fails to file any such required bond, this lease may be terminated by CITY.

(7) Indemnity. LESSEE agrees that CITY, its agents, officers and employees, shall not be liable for any claims, liabilities, penalties, fines or for any damage to the goods, properties or effects of LESSEE, its sublessees or representatives, agents, employees, guests, licensees, invitees, patrons or clientele or of any other person whomsoever, nor for personal injuries to, or deaths of any persons, whether alleged to have been caused by or resulting from any acts or omission of LESSEE or its sublessees in or about the leased premises, or any act or omission of any person, or from any defect in any part of the leased premises, or from any other cause or reason whatsoever. LESSEE agrees that CITY, its agents, officers and employees, shall not be liable for any act or omission of LESSEE, its sublessees or representatives, agents, employees, guests, patrons or clientele, in any parts of the Open Space areas. LESSEE agrees to indemnify and save free and harmless CITY and its authorized agents, officers and employees against any of the foregoing alleged liabilities and any costs and expenses incurred by CITY on account of any claim or claims therefor.

(8) Insurance Coverage. During the entire term of this lease and including and covering both the leased premises and the Open Space areas, LESSEE agrees to procure and maintain public liability insurance which names CITY as an additional insured with an insurance company satisfactory to CITY licensed to do business in California, to protect against loss from liability imposed by law for damages on

account of bodily injury, including death therefrom, suffered or alleged to be suffered by any person or persons whomsoever, resulting directly or indirectly from any act or activities of CITY or LESSEE, its sublessees or any persons acting for CITY or LESSEE or under its control or direction, and also to protect against loss from liability imposed by law for damages to any property of any person caused directly or indirectly by or from acts or activities of CITY or LESSEE, or its sublessees, or any person acting for CITY or LESSEE, or under its control of direction. Such property damage and public liability insurance shall also provide for and protect CITY against incurring any legal cost in defending claims for alleged loss. Such public liability and property damage insurance shall be maintained in full force and effect during the entire term of this lease in the amount of not less than One Million Dollars ($1,000,000.00) COMBINED SINGLE LIMIT LIABILITY. LESSEE agrees to submit a policy of said insurance to CITY on or before the effective date of this lease indicating full coverage of the contractual liability imposed by this lease and stipulating that the insurance company shall not terminate, cancel or limit said policy in any manner without at least thirty (30) days prior written notice thereof to CITY. If the operation under this lease results in an increased or decreased risk in the opinion of the City Manager, then LESSEE agrees that the minimum limits hereinabove designated shall be changed accordingly upon request by the City Manager. LESSEE agrees that provisions of this paragraph as to maintenance of insurance shall not be construed as limiting in any way the extent to which LESSEE may be held responsible for the payment of damages to persons or property resulting from LESSEE's activities, the activities of its sublessees or the activities of any person or persons for which LESSEE is otherwise responsible.

LESSEE also agrees to procure and maintain during the entire term of this lease, a policy of fire, extended coverage and vandalism insurance on all permanent property of an insurable nature located upon the leased premises. Said policy shall name CITY as an additional insured and shall be written by an insurance company satisfactory to CITY licensed to transact business in the State of California and shall be in an amount sufficient to

cover at least one hundred percent (100%) of the replacement costs of said property. LESSEE agrees to submit a certificate of said policy to CITY on or before the effective date of this lease. Said policy shall contain a condition that it is not to be terminated or cancelled without at least thirty (30) days prior written notice to CITY by the insurance company. LESSEE agrees to pay the premium for such insurance and shall require that any insurance proceeds resulting from a loss under said policy are payable jointly to CITY and LESSEE and said proceeds shall constitute a trust fund to be reinvested in rebuilding or repairing the damaged property or said proceeds may be disposed of as specified in Section IV, B.(12) Waste, Damage or Destruction, hereof; provided, however, that within the period during which there is in existence a mortgage or deed of trust upon the leasehold, then and for that period all policies of fire insurance, extended coverage and vandalism shall be made payable jointly to the mortgagee or beneficiary, the named insured and CITY, and shall be disposed of jointly by the parties for the following purposes:

(a) As a trust fund to be retained by said mortgagee or beneficiary and applied in reduction of the debt secured by such mortgage or deed of trust with the excess remaining after full payment of said debt to be paid over to LESSEE and CITY to pay for reconstruction, repair or replacement of the damaged or destroyed improvements in progress payments as the work is performed. The balance of said proceeds shall be paid to LESSEE; provided, however, nothing herein shall prevent LESSEE, at its option and with the approval of said mortgagee or beneficiary, from filing a faithful performance bond in favor of said mortgagee or beneficiary and CITY in an amount equivalent to said insurance proceeds in lieu of surrendering said insurance proceeds to said mortgagee or beneficiary and CITY.

(b) In the event that this lease is terminated by mutual agreement and said improvements are not reconstructed, repaired or replaced, the insurance proceeds shall be jointly retained by CITY and said mortgagee or beneficiary to the extent necessary to first discharge the debt secured by said mortgage or deed of trust

and then to restore the premises in a neat and clean condition. Said mortgagee or beneficiary and CITY shall hold the balance of said proceeds for CITY and LESSEE as their interests may appear.

LESSEE agrees to increase the limits of liability when, in the opinion of CITY, the value of the improvements covered is increased, subject to the availability of such insurance at the increased limits. LESSEE agrees, at its sole expense, to comply and secure compliance with all insurance requirements necessary for the maintenance of reasonable fire and public liability insurance covering the premises, buildings and appurtenances.

(9) Labor and Materialmen's Bond. LESSEE agrees to save CITY free and harmless, indemnify it against all claims for labor and materials in connection with improvements, repairs or alterations to the leased premises, and the cost of defending against such claims, including reasonable attorney's fees. In the event that improvements, repairs or alterations are constructed on the leased premises by other than CITY, and a lien is filed, LESSEE agrees to file with CITY within five (5) days, a bond sufficient to pay in full all claims of all persons seeking relief under the lien. The bond shall be acknowledged by LESSEE, as principal, and by a corporation satisfactory to CITY licensed by the Insurance Commissioner of the State of California to transact the business of a fidelity and surety insurance company, as surety.

(10) Legal Proceedings. LESSEE agrees that should it become necessary for CITY to commence legal proceedings to collect rent, recover possession or enforce any other provision of this lease, the prevailing party will be entitled to legal costs in connection therewith, including reasonable attorney's fees as determined by the court. The parties agree that the law of the State of California shall be used in interpreting this lease and will govern all disputes under this lease and will determine all rights and obligations hereunder. Personal service either within or without the State of California shall be sufficient to give personal jurisdiction to any court in which an action is filed for litigation of rights under this lease.

Initials _____

(11) Maintenance. LESSEE agrees to assume full responsibility for the operation and maintenance of the premises and the Open Space areas including, but not limited to, the channel through the leased premises, throughout the term hereof without expense to CITY unless otherwise specified herein, and to perform all repairs and replacements necessary to maintain and preserve the premises and the Open Space areas in a decent, safe, healthy and sanitary condition in a manner satisfactory to CITY and in compliance with all applicable laws. LESSEE agrees that CITY shall not be required to perform any maintenance, repairs or services or to assume any expense not specifically assumed herein in connection with the premises and the Open Space areas; provided, however, LESSEE shall not be responsible for the maintenance and repair of Open Space areas leased, transferred or used by CITY or by CITY's agents, employees, independent contractors, grantees and licensees, except in those cases where the Open Space areas are used by the general public. If the areas leased, transferred or used by CITY or by CITY's agents, employees, independent contractors, grantees or licensees cease to be so leased or used, and said areas are substantially returned to their original open space state, LESSEE shall once again become responsible for the maintenance and repair of said Open Space areas.

LESSEE's required performance of the Open Space maintenance hereunder shall include removal of nuisances, obstructions, hazards, and evidence of illegal dumping; and, as a minimum, at least semi-annual litter and weed abatement pursuant to the requirements of City ordinances as such ordinances may be amended from time to time.

(12) Nondiscrimination. LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry or national origin in LESSEE's use of the premises, including, but not limited to, the providing of goods, services, faci-

lities, privileges, advantages and accommodations, and the obtaining and holding of employment.

(13) Utility Costs. LESSEE agrees to order, obtain and pay for all utilities and services, and installation charges in connection therewith.

(14) Waste, Damage or Destruction. LESSEE agrees to give notice to CITY of any fire or other damage that may occur on the leased premises within ten (10) days of such fire or damage. LESSEE agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises and the Open Space areas clean and clear of refuse and obstructions, and to dispose of all garbage, trash and rubbish in a manner satisfactory to CITY. If the leased premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy and sanitary, LESSEE agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage, or LESSEE agrees to clear and remove from the leased premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage.

LESSEE agrees that preliminary steps toward performing repairs, restoration or replacement of the premises shall be commenced by LESSEE within thirty (30) days and the required repairs, restoration or replacement shall be completed within a reasonable time thereafter. CITY may determine an equitable deduction in the minimum annual rent requirement for such period or periods that the premises are untenantable by reason of such damage.

(15) Signs. No signs shall be displayed on the premises without the prior consent of CITY.

(16) Development. LESSEE agrees to develop the leased premises in accordance with the General Development Plan approved by the City Manager and filed in the Office of the City Clerk as Document No. RR 257594-2

C. CONDITIONS.

(1) Administration and Notices. Control and administration of this lease is under the jurisdiction of the City Manager of CITY as to CITY's interest herein and any communication relative to the terms or conditions or any changes thereto or any notice or notices provided for by this lease or by law to be given or served upon CITY may be given or served by registered letter deposited in the United States mails, postage prepaid, and addressed to the City Manager, Attention Property Director, City Administration Building, 202 "C" Street, San Diego, California 92101. Any notice or notices provided for by this lease or by law to be given or served upon LESSEE, mortgagee, trustee or beneficiary, may be given or served by depositing in the United States mails, postage prepaid, a letter addressed to said LESSEE at 16236 San Dieguito Road, P.O. Box 8086, Rancho Santa Fe, California 92067, or at the leased premises, or at such other address designated in writing by LESSEE, mortgagee, trustee or beneficiary, or may be personally served upon them or any person hereafter authorized by them to receive such notice. Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the principals of the parties so served, upon personal service or forty-eight (48) hours after mailing in the manner required herein.

(2) CITY Approval and Consent. The approval or consent of CITY, wherever required in this lease, shall mean the approval or consent of the City Manager except in the following situations which shall require resolution by City Council:

(a) Any amendment to the terms, covenants or conditions of this lease.

(b) Any assignment of controlling interest in this lease, which shall not include such assignments as shall be made solely for pledging the leasehold as security for a loan or loans as may be authorized by the City Manager within the scope of this lease, provided that such security assignments do not transfer possession of the leasehold; provided, however, the initial assignment from LESSEE to the association that will own and operate the country

club and golf course will not require City Council approval.

(c) Any sublease of a major portion of the revenue producing activities of the premises or a major portion of the premises. The term "major" in this context, shall mean 20% or more of the revenue producing activities on which lease rents are paid to the City or 20% or more of the area of the leasehold, whichever applies.

(d) Any revision to the approved General Development Plan which substantially changes the concept of uses, quality and exterior design of the improvements and development of leased premises.

(e) Any substantial modification to the Open Space or to the level of maintenance required under Section IV.B.(11) Maintenance hereof.

(3) Eminent Domain. In the event the leased premises or any part thereof shall be taken for public purposes by condemnation as a result of any action or proceeding in eminent domain, then the interests of CITY and LESSEE (or beneficiary or Mortgagee if there is a trust deed or mortgage then in effect) in the award and the effect of the taking upon this lease shall be as follows:

(a) In the event of such taking of only a part of the leased premises, leaving the remainder of the premises in such location and in such form, shape and size as to be used effectively and practicably, in the opinion of CITY, for the conduct thereon of the operations permitted hereunder, this lease shall terminate and end as to the portion of the leased premises so taken as of the date title to such portion vests in the condemning authority, but shall continue in full force and effect as to the portion of the leased premises not so taken, and from and after such date the minimum rental, if any, required by this lease to be paid by LESSEE to CITY shall be reduced in the proportion to which the value of the leased premises so taken bears to the total value of the premises; provided, however, CITY shall have the right, with the consent of

LESSEE, to substitute like adjacent property and maintain the rent schedule without diminution.

(b) In the event of the taking of only a part of the leased premises, leaving the remainder of the premises in such location and in such form, shape or reduced size as to render the same not effectively and practicably usable, in the opinion of CITY, for the conduct thereon of the operations permitted hereunder, this lease and all right, title and interest thereunder shall cease on the date title to the premises or the portion thereof so taken vests in the condemning authority.

(c) In the event the entire leased premises are so taken, this lease and all of the right, title and interest thereunder shall cease on the date title to the premises so taken vests in the condemning authority.

(d) In the event of any taking under Subparagraphs (a), (b) or (c) hereinabove, the only portion of any award of compensation which shall be paid to LESSEE shall be the fair market value of LESSEE's interest in the improvements placed upon that portion of the leased premises which are taken by the condemning agency. It is the intention of this provision that LESSEE shall not in any condemnation receive any bonus or penalty by reason of LESSEE's contractual rights in connection with the property condemned.

(e) Notwithstanding the foregoing provisions of this Section, CITY may, in its discretion and without affecting the validity and existence of this lease, transfer CITY's interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. In the event of such transfer by CITY, LESSEE shall retain whatever rights it may have to recover from the said authority the fair market value of LESSEE's interest in the improvements taken by the authority and which LESSEE has placed upon the leased premises in accordance with the provisions of this lease.

(4) Entry and Inspection. CITY reserves and shall always have the right to enter the premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises or to inspect the operations conducted thereon. In the event that such entry or inspection by CITY discloses that the premises or the Open Space areas are not in a decent, safe, healthy and sanitary condition, CITY shall have the right, after ten (10) days written notice to LESSEE, to have any necessary maintenance work done for and at the expense of LESSEE, and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done in order to keep the premises in a decent, safe, healthy and sanitary condition. Further, if at any time CITY determines that the premises or Open Space areas are not in a decent, safe, healthy and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this Section shall not create any obligations on CITY or increase obligations elsewhere in this lease imposed on CITY.

(5) Holding Over. The occupancy of the premises after the expiration of the term of this lease shall be construed to be a tenancy from month to month, and all other terms and conditions of this lease shall continue in full force and effect. The extension of the term of this lease, pursuant to Section V hereinafter, shall not be deemed a tenancy from month to month.

(6) Merger. The voluntary or other surrender of this lease by LESSEE, or a mutual cancellation thereof, shall not work a merger and shall, at the option of CITY, terminate all or any existing subleases or subtenancies or may, at the option of CITY, operate as an assignment to it of any or all such subleases or subtenancies.

(7) Oral Representation. It is specifically understood and agreed hereby that this lease contains the complete expression of the whole agreement between

the parties hereto, and that there are no promises, representations, agreements, warranties or inducements, either expressed orally or implied by the parties, except as are fully set forth herein; and further, that this lease cannot be enlarged, modified or changed in any respect except by written agreement duly executed by and between the parties.

(8) Ownership of Improvements. All improvements, except such fixtures as are hereinafter described on the attached addendum, which have been installed by LESSEE in accordance with the provisions of this lease, shall at the option of CITY become the property of CITY upon expiration or sooner termination of this lease.

LESSEE shall have the right to remove from the premises only those fixtures described on the attached addendum at any time prior to the expiration or earlier termination of this lease, provided that such removal would not, in the opinion of CITY, restrict the operation of the premises to the extent that the rent paid to CITY is reduced as a direct result therefrom. LESSEE's removal of any of said fixtures shall be at LESSEE's own expense and shall be conditioned upon LESSEE's repairing any damage to the remaining improvements and upon LESSEE leaving the premises in good order and condition. In the event LESSEE does not so remove said fixtures prior to the expiration of this lease, CITY may require LESSEE to remove, sell or destroy the same, or CITY may remove, sell or destroy the same at the expense of LESSEE, and if the proceeds of the sale are not adequate, LESSEE shall promptly pay to CITY its reasonable cost of any such removal, sale or destruction, together with the reasonable cost of repair of damages to CITY's property resulting from such removal, sale or destruction. At the option of CITY, any such fixtures not removed by LESSEE may be deemed abandoned and may be removed and sold by CITY and all income received by CITY therefrom shall be the property of CITY exclusively. Said addendum may be changed from time to time upon approval of the City Manager, without further resolution by the City Council.

(9) Remedies of CITY.

(a) Default by LESSEE. In the event that:

(i) LESSEE shall default in the performance or fulfillment of any covenant or condition herein required to be performed or fulfilled by LESSEE and shall fail to cure said default within thirty (30) days following the service on LESSEE of a written notice from CITY specifying the default complained of; or

(ii) LESSEE shall voluntarily file or have involuntarily filed against him any petition under any bankruptcy or insolvency act or law; or

(iii) LESSEE shall be adjudicated a bankrupt; or

(iv) LESSEE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon LESSEE or upon any person claiming through LESSEE, immediately terminate this lease and all rights of LESSEE and of all persons claiming rights through LESSEE in or to the premises or in or to further possession thereof, and CITY may thereupon enter and take possession of the premises and expel LESSEE and all persons so claiming rights thereto. Provided, however, in the event that any default described in subpart (a)(i) of this Section is not curable within thirty (30) days after the service of a written notice upon LESSEE, CITY shall not terminate this lease pursuant to said default if LESSEE immediately commences to cure said default and diligently pursues such cure to completion.

(b) CITY Recourse. If a mortgagee shall perfect its right to cure said default or defaults through litigation or through foreclosure, pursuant to Section IV, A.(3) hereinabove, then CITY shall have the option of the following courses of action in order that such default or defaults may be expeditiously corrected:

(i) CITY may correct or cause to be corrected said default or defaults and charge the costs therefor (including costs incurred by CITY in enforcing this provision) to the account of LESSEE, which charge shall be due and payable on the date that the rent is next due after presentation by CITY of a statement of all or part of said costs.

(ii) CITY may correct or cause to be corrected said default or defaults and may pay the costs thereof (including costs incurred by CITY in enforcing this provision) from the proceeds of any insurance fund held by CITY and LESSEE, or by CITY and mortgagee, or CITY may use said funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent to correct said default or defaults or to pay the costs of such correction performed by or at the direction of CITY.

(iii) CITY may terminate this lease as to the rights of LESSEE herein by assuming liability for any mortgage. LESSEE will assume and agrees to pay any and all penalties or bonuses required by the mortgagees as a condition for early payoff of the related notes by CITY. CITY may, as an alternative, substitute for said terminated LESSEE a new LESSEE reasonably satisfactory to the mortgagee.

Should said default or defaults be noncurable by LESSEE, then any mortgagee shall have the absolute right to substitute itself to the estate of LESSEE hereunder and to commence performance of this lease and this lease shall not terminate if such mortgagee shall give notice in writing of its election to so substitute itself and commence performance within thirty (30) days after service upon it of written notice by CITY of the default. In the event of the election by the mortgagee to so substitute itself to LESSEE's estate hereunder, CITY expressly consents to said substitution and authorizes said mortgagee to

perform under this lease with all the rights, privileges and obligations of the original LESSEE hereunder, subject to cure of the default if possible by mortgagee, and LESSEE expressly agrees to assign all of its interest in and to its leasehold estate in that event.

(c) Abandonment by LESSEE. Even though LESSEE has breached the lease and abandoned the property, this lease shall continue in effect for so long as CITY does not terminate LESSEE's right to possession, and CITY may enforce all of its rights and remedies under this lease, including, but not limited to, the right to recover the rent as it becomes due under this lease. For purposes of this subpart (c), the following do not constitute a termination of LESSEE's right to possession:

(i) Acts by CITY of maintenance, or preservation, or efforts to relet the property.

(ii) The appointment of a receiver upon initiative of CITY to protect CITY's interest under this lease.

(d) Damages. Damages which CITY may recover in the event of default under this lease include the worth, at the time of award, of the amount by which the unpaid rent for the balance of the term after the date of award, or for any shorter period of time specified in this lease, exceeds the amount of such rental loss for the same period that LESSEE proves could be reasonably avoided. The remedies provided by this Section are not exclusive and shall be cumulative to all other rights and remedies possessed by CITY, and nothing contained herein shall be construed so as to defeat any other rights or remedies to which CITY may be entitled.

(10) Reservation of CITY Rights. CITY hereby reserves all rights, title and interest in any and all gas, oil and minerals beneath the leased premises. CITY shall have the right to enter the leased premises for the purpose of making repairs to or developing municipal services. CITY hereby reserves the right to grant and use such easements or establish and use such rights of way over, under, along and

across the leased premises for utilities, thoroughfares or access as it may deem advisable for the public good. Provided, however, CITY shall not unreasonably interfere with LESSEE's use of the premises and will reimburse LESSEE for physical damages, if any, to the permanent improvements of LESSEE located on the leased premises resulting from CITY's exercising the rights retained in this paragraph. Such reimbursement may include an offset in the rent due CITY proportionate to the amount of said physical damage as determined by the City Manager. CITY shall pay the costs of maintenance and repair of all CITY installations made pursuant to the rights reserved herein.

(11) Time is of the Essence. Time is of the essence of each and all of the terms and provisions of this lease and this lease shall inure to the benefit of and be binding upon the parties hereto and any successor of LESSEE as fully and to the same extent as though specifically mentioned in each instance, and all covenants, stipulations and agreements in this lease shall extend to and bind any assigns or sublessees of LESSEE.

(12) Waiver. The waiver by CITY of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition, or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by CITY shall not be deemed to be a waiver of any preceding breach by LESSEE of any term, covenant or condition of this lease, regardless of CITY's knowledge of such preceding breach at the time of acceptance of such rent. Failure on the part of CITY to require or exact full and complete compliance with any of the covenants, conditions or agreements of this lease shall not be construed as in any manner changing the terms hereof and shall not prevent CITY from enforcing any provision hereof.

V. EXTENSION OF TERM.

A. EXPIRATION OF TERM. On or before six (6) months prior to the expiration of the original sixty-one (61) year term, CITY shall, in its discretion, determine whether the premises shall become publicly operated or remain

privately operated or be designated for some use other than as a golf course.

(1) Public Operation. In the event CITY determines that public operation of the premises as a golf course is in the best interest of CITY, it shall deliver notice thereof to LESSEE within thirty (30) days of such determination, in which event this lease shall expire and terminate pursuant to Section II hereinabove.

(2) Private Operation. In the event CITY determines that the premises shall remain privately operated as a golf course, it shall deliver notice thereof to LESSEE within thirty (30) days of such determination, and the following shall be applicable:

(a) The term of this lease shall not automatically expire at the end of its original term but shall continue thereafter so long as LESSEE is not otherwise in breach hereof, until all other subparts of this subpart (2) have been complied with.

(b) Upon the determination provided for herein, CITY shall enter into good faith negotiations with LESSEE for a new lease for continued operation of the premises as a private golf course. The term of said new lease shall be for a minimum of fifteen (15) years.

(c) If after the expiration of one (1) year good faith negotiations the parties have not arrived at an agreement for a new lease, CITY shall have the right, if it so chooses, to seek other potential operators of the premises for a private golf course.

(d) In the event CITY negotiates an agreement with another operator for a private golf course that includes any term more favorable to the prospective operator than the terms that existed at the time good faith negotiations were terminated between CITY and LESSEE, CITY shall offer the agreement to LESSEE. LESSEE shall have the right to accept the agreement within thirty (30) days of receipt thereof upon the terms and conditions negotiated for

the continued operation of the premises as a private golf course.

(3) Other Designation. Nothing herein shall preclude CITY from designating the premises for other uses at the expiration of the term.

IN WITNESS WHEREOF, this Lease Agreement is executed by CITY, acting by and through the City Manager, and by LESSEE, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO

Date 12/17/82

By _____
ASSISTANT TO THE CITY MANAGER

LESSEE:

WATT INDUSTRIES/SAN DIEGO, INC.,
a California corporation

Date 11/11/82

By _____

By _____

APPROVED as to form and legality this 20 day of December, 1982.

JOHN W. WITT, City Attorney

By _____
DEPUTY

Barbara J. Berridge

OFFICIAL SEAL
BARBARA J. BERRIDGE
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires March 29, 1985

R- 257594

Initials

THIS ADDENDUM IS ATTACHED TO AND MADE A PART OF THAT CERTAIN LEASE BY AND BETWEEN THE CITY OF SAN DIEGO, A MUNICIPAL CORPORATION, AND WATT INDUSTRIES/SAN DIEGO, INC., A CALIFORNIA CORPORATION, LESSEE, DATED December 17, 1982.

SECTION IV., PARAGRAPH C - 8, OWNERSHIP OF IMPROVEMENTS (continued)

LESSEE, in accordance with this Section hereof, has the right to remove from the demised premises only those fixtures as described below:

All personal property not affixed to the leased premises.

City Manager's Initials

LESSEE's Initials

1925

EXHIBIT "B"

Lot 2, Fairbanks Country Club Unit No. 1, in the City of San Diego, County of San Diego, State of California, according to map thereof No. 10730, filed in the Office of County Recorder of San Diego County, September 29, 1983.

City Manager's Initials _____ Lessee's Initials _____

RJC:sn(1)D7
10-24-83

ASSIGNMENT AND ASSUMPTION OF LEASE
AND
CONSENT TO ASSIGNMENT AGREEMENT

The City of San Diego, a municipal corporation, as Lessor (City), Watt Industries/San Diego, Inc., a California corporation (Assignor) and Fairbanks Ranch Country Club, Inc., a California nonprofit mutual benefit corporation (Assignee), do agree as follows:

1. Assignor hereby transfers and assigns to Assignee for valuable consideration all its right, title and interest in and to that certain Percentage Lease Agreement dated December 6, 1982 by and between the City as Lessor and Watt Industries/San Diego, Inc., a California corporation, Lessee, filed as Document RR 257594-1 in the Office of the City Clerk of San Diego, California and recorded as Document 83-382965 on October 24, 1983, in the Office of the County Recorder of San Diego, California, covering premises more particularly described in said lease agreement and as described on Exhibit A attached hereto.

2. Assignee hereby assumes without limitations all rights, obligations and liabilities of the Assignor as Lessee under said lease agreement and agrees to fully and faithfully perform each every covenant, condition and provision of said lease agreement.

3. City hereby consents to the assignment to and assumption by Assignee of said lease agreement and declares subject to the performance of an audit of the membership sales by the City Auditor and Comptroller and determination that no sums are due City, pursuant to Section III Consideration subparagraph B(3) Additional Consideration, that there are to the best of our knowledge no breaches or defaults of the lessee's obligations under said lease agreement.

4. Assignor hereby consents to remain as a party to the lease agreement until Assignee shall have operated the business on the leasehold premises profitably for a period of one calendar year and until such time that any impending lawsuits regarding membership sales are settled. "Profitably for a period of one calendar year" for the purposes of this paragraph shall mean and require that Assignee have greater total revenues than expenses from use and operation of the leasehold for one calendar year as substantiated by an independent professional accounting firm to the reasonable satisfaction of the City Manager.

5. Assignee agrees during the entire remaining lease term to employ competent professional management to operate the day-to-day operations of the Country Club in a manner acceptable to the City Manager whose acceptance shall not be unreasonably withheld.

6. Assignee acknowledges that the development provision, Section IV Covenants and Conditions Paragraph B(16), of the lease agreement requires that the Lessee complete the last 9 holes of the golf course by December 31, 2009 with construction to commence no later than December 31, 2008, and agrees to comply with such requirement.

7. Assignee acknowledges that the lease agreement contains a maintenance provision which, among other things, requires the Lessee to assume full responsibility for operation and maintenance of the river channel and open space areas north and south of the premises and that Lessee, as a minimum, shall perform semiannual litter and weed abatement on said open space areas.

8. Assignor warrants that it has fulfilled all of the terms and conditions of that certain Development Agreement dated September 8, 1983, the Subdivision Agreement dated September 12, 1983, the Conditional Use Permit 10-644-0 dated January 31, 1983, the Planned Residential Permit 20-252-0 dated July 22, 1982, and any other miscellaneous land use permits between the City and itself with regard to the premises.

9. Assignee acknowledges that it is aware of the terms and conditions of the grant deed from Watt Industries/San Diego, Inc., to the City covering the premises and any and all encumbrances on the premises.

10. Assignee will provide City with a copy of the resolution passed by its board of directors approving the purchase of the country club by the membership prior to closing of escrow.

11. Assignee will obtain City's approval prior to encumbering the leasehold premises during the term of the lease agreement.

12. This agreement maybe executed in counterparts each of which shall be deemed an original.

LESSOR: THE CITY OF SAN DIEGO

Date 1-30-86

By _____
DEPUTY CITY MANAGER

ASSIGNOR: WATT INDUSTRIES/SAN DIEGO, INC., a California corporation

Date 1-31-86

By _____

By _____

ASSIGNEE: FAIRBANKS COUNTRY CLUB, INC., a California nonprofit mutual benefit corporation

Date January 31, 1986

By _____

By _____

Approved as to form and legality this 30 day of January, 1986.

JOHN W. WITT, City Attorney

By _____
Deputy

RJC:baa(3)108
1-27-86

EXHIBIT "A"

Lot 2, Fairbanks Country Club Unit No. 1, in the City of San Diego, County of San Diego, State of California, according to Map thereof No. 10730, filed in the Office of the County Recorder of San Diego County, September 29, 1983.

RJC:jw(97-1)
1-31-86

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

On January 30, 1986 before me, the undersigned, a Notary Public in and for said State, personally appeared J. P. Fowler known to me to be the Deputy City Manager of the City of San Diego and known to me to be the person who executed the within instrument on behalf of said public corporation, agency or political subdivision, and acknowledged to me that such public corporation, agency, or political subdivision executed the same.

SUBSCRIBED AND SWORN TO before me on January 30, 1986.

WITNESS my hand and official seal.

Signature Lorna M. Murt

Lorna M. Murt

Name (Typed or Printed)

OFFICIAL SEAL
LORNA M. MURT
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My Comm. Expires May 13, 1986

CAT. NO. NN00737
TO 21945 CA (1–83)

TICOR TITLE INSURANCE

(Corporation)

STATE OF CALIFORNIA
COUNTY OF San Diego } ss.

On January 31, 1986 before me, the undersigned, a Notary Public in and for said State, personally appeared Joseph Davis

~~personally known to me~~ or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the President, and R A Watt ~~personally known to me~~ or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the Chairman of the Board ~~Secretary~~ of the Corporation that executed the within instrument and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Juliet S. Martinez

OFFICIAL SEAL
Juliet S. Martinez
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires July 9, 1986

(This area for official notarial seal)

STAPLE HERE

CAT. NO. NN00737
TO 21945 CA (1–83)

TICOR TITLE INSURANCE

(Corporation)

STATE OF CALIFORNIA
COUNTY OF San Diego } ss.

On January 31, 1986 before me, the undersigned, a Notary Public in and for said State, personally appeared Glenn Evans

~~personally known to me~~ or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the President, and James K. Sterrett, II ~~personally known to me~~ or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the Secretary of the Corporation that executed the within instrument and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Juliet S. Martinez

OFFICIAL SEAL
Juliet S. Martinez
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires July 9, 1986

(This area for official notarial seal)

STAPLE HERE

ATTACHMENT E

COPY

Document No. RR- 265268

FILED MAR 17 1986
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

THE CITY OF SAN DIEGO

FAIRBANKS POLO CLUB

LEASE OUTLINE

LEASE OUTLINE

CITY OF SAN DIEGO

THIS LEASE AGREEMENT is executed between the CITY OF SAN DIEGO, a municipal corporation, herein called "CITY," and Fairbanks Polo Club, a California nonprofit corporation, hereinafter called "LESSEE."

SECTION 1: USES

1.01 Premises. CITY hereby leases to LESSEE and LESSEE leases from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described in Section 10.01 herein. Said real property is hereinafter called the "premises".

1.02 Uses. It is expressly agreed that the premises are leased to LESSEE solely and exclusively for the purposes of construction and operation of a polo facility; for the instruction in polo for beginning, intermediate and advanced players; polo games and matches; boarding of horses and training of horses; and for such other related or incidental purposes as may be first approved in writing by the City Manager and Watt Industries/ San Diego, Inc., or its successor, and for no other purpose.

LESSEE shall not allow any activity on the premises which would involve large assemblages of people or automobiles. LESSEE specifically acknowledges that leasehold uses are restricted in accordance with the deed from Watt Industries/ San Diego, Inc., to the CITY recorded October 24, 1983, as Reception No. 259343 in the County Recorder's Office of San Diego County and LESSEE agrees to use premises in such a manner as not to violate the restrictions contained in said deed.

LESSEE covenants and agrees to use the premises for the above-specified purposes and to diligently pursue said purposes throughout the term hereof. Failure to continuously use the premises for said purposes, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY.

1.03 Related Council Actions. By the granting of this lease, neither CITY nor the Council of CITY is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the premises. Discretionary action includes, but is not limited to rezonings, variances,

environmental clearances or any other governmental agency approvals which may be required for the development and operation of the leased premises.

1.04 Quiet Possession. LESSEE, paying the rent and performing the covenants and agreements herein, shall at all times during the term peaceably and quietly have, hold and enjoy the premises. If CITY, for any reason, cannot deliver possession of the premises to LESSEE at the commencement of the term, or if during the lease term LESSEE is temporarily dispossessed through action or claim of a title superior to CITY'S, then and in either of such events, this lease shall not be voidable nor shall CITY be liable to LESSEE for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the City Manager of CITY a proportionate reduction of the minimum or flat rate rent for the period or periods during which LESSEE is prevented from having the quiet possession of all or a portion of the premises.

1.05 Easements and Reservations.

a. CITY hereby reserves all rights, title and interest in any and all subsurface natural gas, oil, minerals and water on or within the premises. LESSEE shall have the right, at LESSEE'S sole cost, to develop and use on the lease premises all natural water necessary to carry out the purpose of this lease, but it is expressly agreed that said water shall be used only on the leased premises. LESSEE agrees that, upon termination of this agreement, it will leave any wells developed or used on the lease premises during the term of this lease in good order and condition and that the casing shall be left in place.

b. CITY reserves the right to grant and use easements or establish and use rights-of-way over, under, along and across the leased premises for utilities, thoroughfares, or access as it deems advisable for the public good.

c. CITY has the right to enter the premises for the purpose of making repairs to or developing municipal resources and services.

However, CITY shall not unreasonably or substantially interfere with LESSEE'S use of the premises and will reimburse LESSEE for physical damages, if any, to the permanent improvements located on the leased premises resulting from CITY exercising the rights reserved in this section. Such reimbursement may include a reduction in the rent proportionate to the amount of physical damage as determined by CITY. CITY will

pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

Notwithstanding the foregoing paragraph, the CITY may remove, without payment to LESSEE or its sublessees for its business or physical damage to its property, the area required for the right-of-way for roadway SF 728 from the premises should it be necessary. Further, CITY shall reduce the rent for the premises in proportion to the area so removed for said roadway. In the event the removal of property does not leave sufficient area suitable for LESSEE'S uses, LESSEE shall have the option to cancel the lease effective as of the first day of the month in which such removal occurs.

1.06 Competent Management. Throughout the term of this lease agreement, LESSEE shall provide competent management of the leased premises to the satisfaction of the City Manager. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a polo facility and an equestrian center (if approved and developed) and related activities in a fiscally responsible manner.

1.07 Hours of Operation. Hours of operation are subject to prior approval by the City Manager or his authorized representative.

1.08 Rates and Charges. All charges for merchandise and services or facilities on said premises shall be subject to prior written approval by the City Manager or his authorized representative.

1.09 Political Activities. The leased property shall be used exclusively for the purposes specified in Section I, USES, hereof. The premises shall not be used for working or campaigning for the nomination or election of any individual to any public office, be it partisan or nonpartisan. Provided, however, that LESSEE shall not be precluded from providing a forum for open public debate by candidates such as occurs at a "candidate forum" and similar events.

1.10 Public Use. The general public shall not be wholly or permanently excluded from any portion of the premises. LESSEE may develop reasonable restrictions for the facility use provided they are consistent with the rights of the general public, and are designed to allow the LESSEE to use the premises for the purposes specified herein. LESSEE agrees that all activities conducted on the premises will be as stated in Section 1.02, Uses, of this lease.

LESSEE shall, at all times during the lease term, maintain a CITY-approved sign identifying the property as City-owned and available for public use consistent with the terms of this lease. The sign shall be installed by the LESSEE at a location agreeable to CITY.

SECTION 2: TERM

2.01 Commencement. The term of this agreement shall be 26 years commencing on the first day of the calendar month following execution by the City Manager. "Lease year" as used in this lease shall mean the 12-month period commencing on the first day of the calendar month following the execution of this lease by the City Manager.

2.02 Holdover. Any holding over by LESSEE after expiration or termination shall not be considered a renewal or extension of this lease. The occupancy of the premises after the expiration or termination of this agreement constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect; provided, however, CITY shall have the right to apply a reasonable increase in rent to bring the rent to fair market value and to terminate the holdover tenancy at will.

2.03 Quitclaim and Surrender of LESSEE'S Interest. On execution of this lease, the LESSEE shall deliver to the CITY a quitclaim deed in recordable form quitclaiming all its rights in the premises. CITY may record such deed only on the expiration or earlier termination of this lease. In the event the CITY requires any subsequent quitclaim deed, the LESSEE or its successor in interest shall deliver the same within five (5) days after receiving written demand therefor.

At the expiration or earlier termination of this lease, LESSEE shall surrender the premises to CITY free and clear of all liens and encumbrances, except those liens and encumbrances which existed on the date of execution hereof, and in a decent, safe and sanitary condition, and in the case of termination of this lease by CITY prior to the end of the specified lease term any liens and encumbrances approved in writing by the City Manager during the lease term.

2.04 Surrender of Premises. At termination of this lease for any reason, LESSEE shall execute, acknowledge and deliver to the CITY, within five (5) days after written CITY demand, a valid and recordable quitclaim deed covering all of the leasehold premises. The premises shall be delivered free and clear of all liens and encumbrances, and in a decent, safe and sanitary condition.

If LESSEE fails or refuses to deliver the required deed, the CITY may prepare and record a notice reciting the LESSEE'S failure to execute this lease provision and the notice will be conclusive evidence of the termination of this lease and all LESSEE rights to the premises.

SECTION 3: RENT

POLO FACILITY

3.01 Place of Payment. Rent is due monthly in advance on or before the first day of each calendar month. All monthly rents will be prorated during the first and final months of any rental period in order to achieve payment on the first day of each calendar month. Checks should be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 2289, San Diego, California 92112-4165 or delivered to 1222 First Avenue, Third Floor, San Diego, California.

The place and time of payment may be changed at any time by CITY upon thirty (30) days' written notice to LESSEE. Mailed rental payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. LESSEE assumes all risk of loss and late payment charges if payments are made by mail, or if postmarks are illegible, in which case the payment shall be deemed paid upon actual receipt by the City Treasurer.

3.02 Rent.

a. Rent Amount. The initial rent for the first year shall be $1,000 per month. The rent for the second year shall be $2,100 per month.

b. (1) CPI Index Adjustments. On the first day of the third year following the effective date of the lease and on the first day of each lease year thereafter during the lease term, the rent shall be adjusted to reflect increases in the Consumer Price Index (CPI).

The index used will be the CPI for "All Urban Consumers" for Los Angeles/Long Beach/Anaheim, California. If this index is no longer published, the index for adjustment will be the U.S. Department of Labor's Comprehensive Official Index most comparable to aforesaid index. If a rental adjustment is calculated using an index from a different base year than 1967, which equaled a base figure of 100 for the CPI, the base figure used will

first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.

If the Department of Labor indices are no longer published, another index generally recognized as authoritative will be substituted by agreement of CITY and LESSEE. If the parties cannot agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the Regional Office of the Bureau of Labor Statistics or its successor, notwithstanding continued reference herein to "CPI" in any event.

Regardless of the index publication dates, the effective date of the rent adjustment is as specified in this Section 3.02, b.(1). Until the rent adjustment can be reasonably determined by the index method, LESSEE will continue to make payments at the existing rental rate. When the adjustment is determined, the balance of rents due at the adjusted rate will be paid to the CITY within thirty (30) days. In no event shall the adjusted rent as established by the Consumer Price Index be less than the rent in existence immediately prior to the adjustment date and in no event shall such adjusted rent be more than six and one-half percent (6.5%) of the rent in existence immediately prior to the adjustment date.

(2) Index Adjustment Computation. The rent for each rental period following the adjustment, until the next adjustment or other rental determination as provided herein, shall be determined prior to the date of adjustment by multiplying the rent which is effective immediately prior to said adjustment by the "adjustment figure" established as follows:

The "adjustment figure" shall be established by dividing the "current index" by the "base figure", both as defined herein:

The "base figure" for the first such adjustment shall be a three-month average of index figures published by said CPI using the fourth, fifth and sixth full months preceding the effective date of this agreement.

To illustrate, if the lease began in May, the CPI figures for November (sixth month), December (fifth month) and January (fourth month) preceding May would be averaged to establish the base figure (Example 1).

The "current index" shall be a three-month average of index figures published by said CPI. The three months to be used to establish said average shall be the fourth, fifth and sixth months preceding the adjustment date.

The "base figure" for each successive adjustment shall be the "current index" figure used in the last preceding adjustment period (Example 2).

Example 1

Current Index / Base Figure $\frac{121}{110}$ = 1.10 (Adjustment Figure)

Effective Rent x 1.10 = Adjusted Rent

Example 2

Current Index / Based Figure $\frac{138}{121}$ = 1.14 (Adjustment Figure)

Effective Rent x 1.14 = Adjusted Rent

The adjustment figure is then multiplied by the monthly rent from the preceding adjustment period and the new rent is determined. Using the foregoing examples, if the rent is now $1,000 per month, after the first adjustment it will be $1,100 per month ($1,000 x 1.10). In the second adjustment it will be $1,254 per month ($1,100 x 1.14).

c. Additional Rent. In addition to the rent specified in Subsection 3.02(a) herein (as adjusted), on or before 60 days after the end of each lease year, LESSEE shall remit to CITY ten percent (10%) of its gross income from the polo facility in excess of ten times the rent paid during the previous lease year.

Example:

The annual rent is $25,200 per year. Say LESSEE'S gross income is $300,000, then, the percentage rent due CITY would be calculated as follows:

Gross Income	$300,000
Less 10 times the annual rent for the polo facility	$252,000
	$ 48,000
Percentage due CITY	x .10
Additional rent equals	$ 4,800

RENT - - EQUESTRIAN CENTER (if approved and developed)

3.03 Minimum Rent.

a. Minimum Rent. In the event City Council approves of the development of an equestrian center at a future date on a portion of the premises, CITY and LESSEE agree that the then effective minimum rent for the entire premises (approximately 80 usable acres) will be apportioned 75 percent to the polo facility and 25 percent to the equestrian center. The initial annual minimum rent for the equestrian center shall be established by multiplying .25 by the then effective annual minimum rent for the entire premises. The annual minimum rent shall become effective upon commencement of the operation (defined as when LESSEE begins to solicit business or receive revenue from its equestrian center).

If the minimum rent for the equestrian center is greater than the percentage rent as required herein below, on a calendar month basis, then 1/12 of the annual minimum rent is required to be paid for that month. Minimum rents are to be paid in monthly installments on or before the day of the calendar month when percentage rents are due pursuant to Section 3.04.

Provided, however, in the event that the combined total percentage rent payments and monthly installments during any lease year equal or exceed the required annual minimum rent for that year, then, for the balance of such year, LESSEE shall discontinue paying monthly installments of the minimum rent and shall continue paying only percentage rents until the beginning of the ensuing lease year. Provided further, in the event minimum rents paid plus percentage rents paid exceeds the annual minimum rent and also exceeds the rent which would have been paid if the percentage rent had been paid on total gross income, the excess over the annual minimum rent shall be credited against the next payable rent as it becomes due. It is the intent of this provision that the LESSEE shall pay monthly installments of the annual minimum rent as a guarantee against the percentage rent requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the term shall prevail on an annual basis.

b. Minimum Rent Adjustment. Effective at the beginning of the first day of the sixth lease year after the equestrian center operation commences and at the beginning of each two and one-half period thereafter during the term,

the annual minimum rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the two years preceding the adjustment date. Said annual minimum rent shall then be divided by twelve (12) to establish the new monthly minimum rent. It is recognized that such adjustments shall be calculated by CITY upon completion of payments due for the preceding rental period in order to determine the amount of the adjustments to be effective on the dates stated herein. Until such calculations are completed, LESSEE shall continue paying monthly minimum rents at the prior rate. Any additional rents determined by the adjustment to be due for the months previously paid at the prior rate shall be paid to CITY within thirty (30) days following written notice. In no event shall any such minimum rent adjustment result in a decrease in the minimum rent requirement in effect immediately prior to the adjustment date.

c. Percentage Rents. Percentage rents for the equestrian center will be calculated on a calendar-month basis and will consist of the following percentages of the gross income resulting from the use of the premises:

Percentages		Business Activities
Ten Percent	(10%)	All activities except sale of horses not owned by LESSEE and income from vending machines.
Twenty-five Percent	(25%)	Of commissions or any other compensation paid to LESSEE or sublessees for the right to install or operate coin-operated vending, game or service machines or devices on the premises, including telephones, or 10% of the gross income of any such coin-operated machines or devices owned, rented or leased by LESSEE or sublessees for use on the premises.
Ten Percent	(10%)	Of actual commissions received for brokerage of horses.

The City Manager in his sole discretion, may approve another percentage rate or flat rate of rent for each other incidental service or operation supplementary to the permitted use(s) set forth under Uses, hereof as may be approved in writing by the City Manager prior to commencement of such other service(s) or operation(s). Provided, however, any activity conducted on the premises without prior approval by the City Manager shall be subject to the requirements of Section 3.09, UNAUTHORIZED USE CHARGE, hereof.

d. Percentage Rate Adjustment. At least four months prior to the end of the tenth year following the equestrian center's commencement of operations, the parties hereto, by mutual consent or through appraisal as hereinafter set forth, will adjust the percentage rates of LESSEE'S gross income attributable to the equestrian center to be paid CITY effective upon the first day of the eleventh year following commencement of operations. Said adjustment will be made to the degree necessary to provide a fair rental to CITY as determined by the City Manager and LESSEE, taking into consideration the criteria set forth in paragraph e. below. In the event that such adjustment is not made by mutual consent prior to two months before the end of said ten-year period, then the parties hereto will refer the matter to appraisal under the terms hereinafter set forth.

e. Percentage Rate Appraisal. In the event the parties do not agree upon the amount of adjustment to said percentage rates as provided for in the previous section, then the adjustment shall be determined by a qualified professional independent real estate appraiser selected by mutual consent of the parties to this agreement from the list of appraisers approved by the CITY. In the event the parties do not reach agreement as to selection of a mutually acceptable appraiser, then CITY and LESSEE will each select a qualified professional independent real estate appraiser who in turn will select a third qualified professional independent real estate appraiser who will be employed to set the percentage rates to be applied to LESSEE'S gross income for the ensuing period until the next percentage rate adjustment. In the event a mutually acceptable third appraiser is not agreed upon between the two selected appraisers within ten days, then the third appraiser will be appointed by the presiding judge of the Superior Court of the State of California, County of San Diego, acting in his individual capacity, upon application by either CITY or LESSEE with prior notice thereof to the other party. In the event that the

Superior Court Judge declines to make the appointment, the parties hereto agree that the third appraiser shall be promptly determined in accordance with the rules of the American Arbitration Association. Said third appraiser shall complete the assignment within sixty (60) days of appointment. Each party shall pay the cost of its own selected appraiser and both CITY and LESSEE agree to equally share the cost of the third mutually selected or court appointed appraiser or appraiser appointed through arbitration. CITY and LESSEE agree to accept and be bound by the percentage rates determined by the appraiser selected or appointed to complete the assignment.

In establishing the percentage rates for the items under controversy, the appraiser shall consider the CITY'S property as a fee simple absolute estate, as vacant and available for a full lease term equal to the initial full term of this lease on the open market for the authorized purposes of this lease at the commencement of the rental period under review. The appraiser will be guided by prevailing market percentage rates for similar operations primarily within the Southern California area, if available. In the event the appraisal is not completed in time to permit the percentage adjustment to be made, LESSEE agrees to continue to pay rent in accordance with the then existing lease rates and the adjustment, when determined, will be retroactive to said effective date of rental adjustment as hereinabove established. Any deficiency shall be paid by LESSEE to CITY within sixty (60) days after determination of the new percentage rate(s). In no event, however, shall any rent adjustment result in any decrease in any percentage rental rate.

3.04 Payment Procedure. On or before the last day of the calendar month following the calendar month in which the gross income subject to rents was earned, LESSEE will provide CITY with a correct statement from the equestrian center together with a payment of rent on all applicable gross receipts in a form selected by CITY. The statement will be signed by LESSEE or its sublessee or an authorized agent, attesting to the accuracy thereof, which shall be legally binding upon LESSEE or its sublessees. Each statement will indicate or include as to the equestrian center:

a. One-twelfth of the annual minimum rent until the full annual rent is achieved in any lease year.

b. Total gross receipts for the subject month, itemized as to business categories for which separate percentage

rents are established. A gross receipts breakdown of each business conducted on the premises must be included when a reported category shows gross income to be from more than one business operation.

c. The percentage rental due the CITY, computed and totaled.

d. The accumulated total of all rents previously paid for the current lease year.

e. Payment in the greater of the two following amounts: One-twelfth of the annual minimum rent or the total percentage rent due CITY computed as described in this section.

3.05 Gross Income. "Gross income or receipts" as used in this lease shall include all income resulting from the polo facility and the equestrian center (if approved and developed) from whatever source derived whether received or to become due. Gross income shall include, but not be limited to, income from membership sales (except as provided in Section 3.06 herein), dues, all fees paid by members of LESSEE, brokerage commissions, fees and proceeds retained by LESSEE in the transfer of a membership or sale of a membership in LESSEE. Provided, however, gross income shall not include federal, state or municipal taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid over periodically by LESSEE to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by LESSEE in computing gross income. Gross income shall not include refunds for goods returned for resale on the premises or refunds of deposits. The amount of such taxes and refunds shall be clearly shown on the books and records of LESSEE or its sublessee. The percentage rent shall be calculated and paid by LESSEE on the basis of said gross income whether the income is received by LESSEE or by any sublessee, permittee or licensee, or their agents and all gross income received by any sublessee, permittee, licensee or other party as a result of occupancy of said premises or the operation thereof shall be regarded as gross income of LESSEE for the purpose of calculating the percentage rent hereunder required to be paid by LESSEE to CITY, except as may be otherwise specified by or pursuant to this lease. Notwithstanding the above, income received by any licensee or permittee as a result of any activity that occurs without the LESSEE's knowledge or consent shall not be regarded as gross income of LESSEE.

3.06 Exclusions from Gross Income for Capital Expenditures.

On or before sixty (60) days after the end of each lease year, LESSEE shall provide to CITY all vouchers, receipts, and invoices documenting the total cost of Capital Expenditures (defined to be those expenditures set forth in Exhibit B herein) incurred by LESSEE during the preceding lease year. Notwithstanding the provisions of Section 3.05 above, income received by LESSEE from membership sales shall not be included in Gross Income for purposes of calculating the percentage rent due under Section 3.02(c) above, except to the extent that such income received by LESSEE (a) during any single lease year exceeds the total cost of Capital Expenditures incurred by LESSEE during that same lease year, or (b) exceeds a cumulative total of $750,000 at any time during the term of the lease. In the event that the total cumulative income from membership sales over the term of the lease exceeds $750,000, all income in excess of $750,000 shall be deemed gross income for the remainder of the term of the lease.

3.07 Inspection of Records.

a. Records. LESSEE and any sublessee, permittee, or licensee shall, at all times during the lease term, keep or cause to be kept true and complete books, records and accounts of all financial transactions in the operation of the polo facility and the equestrian center (if approved and developed) and financial transactions resulting from the use of the premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices or other documents as necessary to allow CITY to easily determine the total gross income.

Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issues a receipt. The registers will be equipped with devices that lock sales totals and other transaction numbers and sales details that are not resettable. Totals registered shall be read and recorded at the beginning and end of each business day.

In the event of admission charges or rentals, LESSEE shall issue numbered tickets for each such admission or rental and shall keep an adequate record of such tickets, as well as a record of unissued tickets.

All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such system is approved by CITY.

b. Financial Statements. Within sixty (60) days after the end of each lease year as previously established herein, LESSEE will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of rents paid CITY from the polo facility and the equestrian center (if approved and developed) for the year are classified according to the categories of business established for any percentage rental and for any other business conducted on or from the premises. Said statement shall be signed by LESSEE or its authorized agent, attesting to the accuracy thereof, which shall be legally binding upon LESSEE.

c. Right to Inspect. All LESSEE'S books of account, records and supporting documentation, as described under a. Records will be kept at least five years and made available to CITY in one location within the City of San Diego. Said books and records shall be maintained separate from all other accounts not relating to the leased premises. The CITY, at its discretion, shall have the right to inspect and audit the business of LESSEE, its agents, sublessees, concessionaires and licensees operating on and in connection with the premises as necessary and appropriate for CITY to determine the amounts of rent due CITY in compliance with the requirements of this lease.

On CITY'S request, LESSEE will promptly provide, at LESSEE'S expense, any necessary data to enable CITY to fully comply with all requirements of the state or federal government for lease information or reports concerning the premises. Such data will include, if required, a detailed breakdown of LESSEE'S receipts and expenses.

d. Audit Cost. The full cost of the CITY'S audits will be borne by CITY unless one or both of the following conditions exists, in which case LESSEE hereby agrees to pay CITY'S cost of audit:

(1) The audit reveals an underpayment of more than five percent (5%) or more than $10,000, whichever is less between the rent due as reported and paid by LESSEE pursuant to this lease and rent due as determined by the audit; or

(2) LESSEE has failed to maintain complete and true books, records, accounts and supporting source documents in strict accordance with the Inspection of Records Section.

LESSEE shall pay any deficiency determined by the audit plus interest on such amount as defined in the Delinquent Rent provision of this lease within thirty (30) days of notice thereof by CITY. CITY will credit any overpayment against incoming rents. Any overpayment determined after the end of this lease will be refunded by CITY within thirty (30) days of confirmation by the City Manager of the audit findings.

e. Default. LESSEE'S failure to keep complete and accurate records by means of double entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this lease, a breach of this lease and cause for termination.

3.08 Delinquent Rent and Audit Fees. If the LESSEE fails to pay the rent when due, the LESSEE will pay in addition to the unpaid rents, five percent (5%) of the delinquent rent. If the rent is still unpaid at the end of fifteen (15) days, the LESSEE shall pay an additional five percent (5%) [being a total of ten percent (10%)] which is hereby mutually agreed by the parties to be appropriate to compensate CITY for loss resulting from rental delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account.

In the event that the CITY audit, if applicable, discloses that the rent for the audited period has been underpaid in excess of five percent (5%) of the total required rent, then LESSEE shall pay CITY the cost of the audit plus ten percent (10%) per year on the amount by which said rent was underpaid in addition to the unpaid rents as shown to be due CITY as compensation to CITY for administrative costs and loss of interest as previously described herein. In the event the CITY audit discloses that the unpaid rent is less than five percent of the total rent, then in the event LESSEE fails to pay said unpaid rent within thirty (30) days after written notice from CITY, an additional fee of ten percent (10%) of said unpaid amount shall be added to the unpaid amount to compensate CITY for costs and losses due to such nonpayment. LESSEE agrees to pay such amounts and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that CITY will incur from LESSEE'S late payment. Acceptance of late charges and any portion of the late payment by CITY shall in no event constitute a waiver of LESSEE default with respect to late payment, nor prevent CITY from exercising any of the other rights and remedies granted in this lease.

3.09 Unauthorized Use Charge. LESSEE will pay CITY twenty percent (20%) of the gross receipts for any service or use that is not permitted by this lease. This payment is subject to the due date provided in this lease for rental payments, and the provision for delinquent rent. The existence of the twenty percent (20%) charge in this clause and the payment of this charge or any part of it, does not constitute an authorization for a particular service or use, and does not waive any CITY rights to terminate a service or use or to default LESSEE for participating in or allowing any unauthorized use of the leased premises.

SECTION 4: ASSIGNMENT

4.01 Time is of Essence; Provisions Binding on Successors. Time is of the essence of all of the terms, covenants and conditions of this lease and, except as otherwise provided herein, all of the terms, covenants and conditions of this lease shall apply to, benefit and bind the successors and assigns of the respective parties, jointly and individually.

4.02 Assignment and Subletting. Subject to prior CITY approval in each instance, LESSEE may assign this lease and any interest herein and may sublease any portion hereof to an assignee or sublessee who has, in the opinion and in the sole and absolute discretion of the City Manager, the financial capability and overall competence to successfully operate the assigned or subleased portion of the premises in a manner at least comparable to the operations of LESSEE. This lease and any interest herein shall not be assignable by operation of law without the written consent of the CITY. "Assignment," for the purposes of this clause shall include any transfer of any ownership interest in this lease by LESSEE or by any partners, principals, or stockholders, as the case may be, from the original LESSEE, its general partners, or principals.

Approval of any assignment or sublease shall be conditioned upon the assignee or sublessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions and provisions of this agreement which are applicable to the rights acquired. The City Manager may require, as a condition to approval of any sublease or assignment, that the proposed sublessee or assignee pay additional rent to CITY to equal the full fair market rent justifiable at the date of such proposed sublease or assignment and that this lease or the requested sublease otherwise be revised to comply with standard CITY lease requirements that are then current.

4.03 Encumbrance. Subject to prior consent by the CITY, which shall not be unreasonably withheld, LESSEE may encumber this lease, its leasehold estate and its improvements thereon by deed of trust, mortgage, chattel mortgage or other security instrument to assure the payment of a promissory note or notes of the LESSEE, upon the express condition that the net proceeds of such loan or loans be devoted exclusively to the purpose of developing the leased premises in accordance with the section hereof entitled Development Plan; however, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the premises; on-site improvements; escrow charges; premiums for hazard insurance, or other insurance or bonds required by CITY; title insurance premiums; reasonable loan costs such as discounts, interest and commissions; and architectural, engineering and attorney's fees and such other normal expenses incidental to such construction.

Any subsequent encumbrances on the premises or on any permanent improvements thereon must first have the approval, in writing, of the City Manager. Such subsequent encumbrances shall also be for the exclusive purpose of development of the premises. Provided, however, after the premises are fully developed in accordance with said development plan to the satisfaction of the City Manager, proceeds from refinancing or from such subsequent encumbrances may be used to reduce LESSEE'S equity so long as there is also substantial benefit to the CITY therefrom. The City Manager shall have the sole and absolute discretion to approve or disapprove any such proposed subsequent encumbrance, including but not limited to amending the lease to provide then current rents and provisions.

In the event any such approved deed of trust, mortgage or other security type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, the CITY will accept the approved mortgagee or beneficiary thereof as its new tenant under this lease with all the rights, privileges and duties granted and imposed in this lease.

Any default, foreclosure or sale pursuant to said deed of trust, mortgage or other security instrument, shall be invalid with respect to this lease without prior notice thereof to and approved by CITY. Upon prior approval by CITY, said mortgagee or beneficiary may assign this lease to its nominee, if nominee is a reputable, qualified and financially responsible person in the opinion of CITY. Any deed of trust, mortgage or other security instrument shall be subject to all of the

terms, covenants and conditions of this lease and shall not be deemed to amend or alter any of the terms, covenants or conditions hereof.

4.04 Defaults and Remedies.

a. Default. In the event that:

(1) LESSEE shall default in the performance of any covenant or condition required by this lease to be performed by LESSEE and shall fail to cure said default within thirty (30) days following written notice thereof from CITY; or

(2) LESSEE shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or

(3) LESSEE shall be adjudicated a bankrupt; or

(4) LESSEE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon LESSEE or upon any person claiming through LESSEE, immediately terminate this lease and all rights of LESSEE and of all persons claiming rights through LESSEE to the premises or to possession thereof; and CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Paragraph a.(1) of this section is not curable within thirty (30) days after notice to LESSEE, CITY shall not terminate this lease pursuant to the default if LESSEE immediately commences to cure the default and diligently pursues such cure to completion.

In the event that there is a deed of trust or mortgage on the leasehold interest, CITY shall give the mortgagee or beneficiary written notice of the default or defaults complained of, and the mortgagee or beneficiary shall have thirty (30) days from such notice to cure the default(s) or, if any such default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue such cure to completion. The thirty-day period may be extended during such time as mortgagee or beneficiary pursues said cure with reasonable diligence.

b. Remedies. If the mortgagee or beneficiary shall be required to exercise its right to cure said default or defaults through litigation or through foreclosure, then CITY shall have the option of the following courses of action in order that the default or defaults may be expeditiously corrected:

(1) CITY may correct said default or defaults and charge the costs thereof to the account of the LESSEE, which charge shall be due and payable on the date that the rent is next due after presentation by CITY to LESSEE and mortgagee or beneficiary of a statement of said costs.

(2) CITY may correct said default or defaults and may pay the costs thereof from the proceeds of any insurance fund held by CITY, CITY and LESSEE or by CITY and mortgagee or beneficiary, or CITY may use the funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent to correct the default or defaults or to pay the costs of correction performed by or at the direction of CITY.

(3) CITY may terminate this lease as to the rights of LESSEE by assuming or causing the assumption of liability for any trust deed or mortgage. LESSEE agrees to assume and pay any and all penalties or bonuses required by the beneficiaries, trustees or mortgagees as a condition for early payoff of the related obligations by CITY. CITY may, as an alternative, substitute for the terminated LESSEE a new LESSEE reasonably satisfactory to the mortgagee or beneficiary. Any reasonable cost incurred by CITY in releasing to a new tenant shall be the responsibility of the terminated LESSEE, and LESSEE hereby agrees to reimburse CITY for any such costs.

Should the default or defaults be noncurable by LESSEE, then any lender holding a beneficial interest in the leasehold whose qualifications as an assignee have been approved by CITY shall have the absolute right to substitute itself to the estate of the LESSEE hereunder and to commence performance of this lease. If such mortgagee or beneficiary shall give notice in writing of its election to so substitute itself within the thirty-day period after receiving written notice by CITY of the default and the default, if curable, is cured by such mortgagee or beneficiary, then this lease shall not terminate pursuant to the default. In that event, the CITY expressly

consents to the substitution and authorizes the mortgagee or beneficiary to perform under this lease with all the rights, privileges and obligations of the LESSEE, subject to cure of the default, if possible, by mortgagee or beneficiary. LESSEE expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.

c. Abandonment by LESSEE. Even though LESSEE has breached the lease and abandoned the property, this lease shall continue in effect for so long as CITY does not terminate this lease, and CITY may enforce all its rights and remedies hereunder, including, but not limited to, the right to recover the rent as it becomes due, plus damages.

d. Waiver. Any CITY waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the City Manager in order to constitute a valid and binding waiver. CITY delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this lease. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. The CITY'S acceptance of any rents is not a waiver of any default preceding the rent payment. CITY and LESSEE specifically agree that the property constituting the premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the City Manager or the CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppal, but the CITY shall at all times, subject to applicable statute of limitations, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the City Manager to take action or require the cure of any default after such default is brought to the attention of the City Council by the City Manager or by any concerned citizen.

4.05 Eminent Domain. If all or part of the premises is taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of the CITY and LESSEE (or beneficiary or mortgagee), will be as follows:

a. In the event the entire premises are taken, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

b. In the event of a partial taking, if, in the opinion of the CITY, the remaining part of the premises is unsuitable for the lease operation, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

c. In the event of a partial taking, if, in the opinion of the CITY, the remainder of the premises is suitable for continued lease operation, this lease shall terminate in regard to the portion taken on the date of the transfer of title or possession of the condemning authority, whichever occurs first, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the premises taken.

d. Award. All monies awarded in any such taking shall belong to CITY whether such taking results in diminution in value of the leasehold or the fee or both; provided, however, LESSEE shall be entitled to any award attributable to the taking of, or damages to, LESSEE'S then remaining leasehold interest in installations or improvements of LESSEE. CITY shall have no liability to LESSEE for any award not provided by the condemning authority.

e. Transfer. CITY has the right to transfer the CITY'S interests in the premises, in lieu of condemnation, to any authority entitled to exercise the power of eminent domain. If a transfer occurs, the LESSEE shall retain its possessory interest in the fair market value of any improvements placed on the premises in accordance with this lease.

f. No Inverse Condemnation. The exercise of any CITY right under this lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.

SECTION 5: INSURANCE RISKS/SECURITY

5.01 Indemnity. LESSEE at all times shall relieve, indemnify, protect and save CITY and any and all of its boards, officers, agents and employees harmless from any and all claims and demands, actions, proceedings, losses, liens, costs, judgments, civil fines and penalties of any nature whatsoever in regard to or resulting from the use of the premises, including, but not limited to, expenses incurred in legal actions, death, injury or damage that may be caused directly or indirectly by:

a. Any unsafe or defective condition in or on the premises of any nature whatsoever which may exist by reason of any act, omission, neglect, or any use or occupation of the premises,

b. Any operation, use or occupation conducted on the premises,

c. Any act, omission or negligence on the part of LESSEE, its employees, agents, sublessees, invitees, licensees; or

d. Any failure by LESSEE to comply or secure compliance with any of the lease terms or conditions.

5.02 Insurance. LESSEE shall take out and maintain at all times during the term of this lease the following insurance at its sole expense:

a. Public liability and property damage insurance in the amount of not less than ONE MILLION DOLLARS ($1,000,000) COMBINED SINGLE LIMIT LIABILITY with an occurrence claims form. This policy shall cover all injury or damage, including death, suffered by any party or parties, from acts or failures to act by CITY or LESSEE or by authorized representatives of CITY or LESSEE, on or in connection with the use or operation of the premises.

b. Fire, extended coverage and vandalism insurance policy on all insurable property on the premises, in an amount to cover 100 percent of the replacement cost. Any proceeds from a loss shall be payable jointly to CITY or LESSEE. The proceeds shall be placed in a trust fund to be reinvested in rebuilding or repairing the damaged property. If there is a mortgage or trust deed on the leasehold in accordance with the Encumbrance section hereof, the proceeds may be paid to the approved mortgagee or beneficiary so long as adequate provision reasonably satisfactory to CITY has been made in each case for the use of all proceeds for repair and restoration of damaged or destroyed improvements on the premises.

c. Conditions. All insurance policies will name the CITY as an additional insured, protect the CITY against any legal costs in defending claims and will not terminate without sixty (60) days' prior written notice to the CITY. All insurance companies must be satisfactory to the CITY and licensed to do business in California. All policies will be in effect on or before the first day of the lease, except "course of construction fire insurance" shall be

in force on commencement of all authorized construction on the premises and full applicable Fire Insurance coverage shall be effective upon completion of each insurable improvement. A copy of the insurance policy will remain on file with CITY during the entire term of the lease. At least thirty (30) days prior to the expiration of each policy, LESSEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the terms of this lease.

d. Modification. CITY, at its discretion, may require the revision of amounts and coverages at any time during the term by giving LESSEE sixty (60) days' prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the premises. LESSEE also agrees to acquire any additional insurance required by CITY for new improvements, in order to meet the requirements of this lease.

e. Accident Reports. LESSEE shall report to CITY any accident causing more than Ten Thousand Dollars ($10,000) worth of property damage or any serious injury to persons on the premises. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses and other pertinent information.

f. Failure to Comply. If the LESSEE fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, CITY has the right to obtain the insurance. LESSEE shall reimburse CITY for the premiums paid with interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer or insurers and rate of interest. Said reimbursement and interest shall be paid by LESSEE on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection f., if LESSEE fails or refuses to take out or maintain insurance as required in this lease or fails to provide proof of insurance, CITY has the right to declare this lease in default without further notice to LESSEE and CITY shall be entitled to exercise all legal remedies in the event of such default.

5.03 Waste, Damage or Destruction. LESSEE agrees to give notice to the CITY of any fire or other damage that may occur on the leased premises within ten (10) days of such fire on damage. LESSEE agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash and rubbish in a manner satisfactory to the CITY. If the leased premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy and sanitary, LESSEE agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage, or at the CITY'S option, LESSEE agrees to clear and remove from the leased premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to the CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage using for either purpose the insurance proceeds as set forth in Section 5.02, Insurance, hereof.

LESSEE agrees that preliminary steps toward performing repairs, restoration or replacement of the premises shall be commenced by LESSEE within thirty (30) days and the required repairs, restoration or replacement shall be completed within a reasonable time thereafter. CITY shall allow an equitable deduction in the minimum annual rent requirement for such period or periods that said premises are untenantable by reason of such damage.

5.04 Security Deposit. A security deposit shall be paid to the CITY by LESSEE in the sum of One Thousand Dollars ($1,000) on or before the effective date of this lease. All or any portion of the principal sum shall be available unconditionally to CITY for correcting any default or breach of this lease by LESSEE, LESSEE'S successors or assigns, or for payment of expenses incurred by CITY as a result of LESSEE'S failure to faithfully perform all terms, covenants and conditions of this lease.

The security deposit shall take one of the forms set out below:

a. Cash. Cash deposits shall be deposited with CITY and CITY shall not be liable to LESSEE for any interest thereon. Provided further, any interest earned by CITY from such deposit or redeposit shall be and remain the property of CITY.

b. An instrument(s) of credit from one or more financial institutions, subject to regulation and insurance by the state or federal government, pledging that the funds are on deposit and guaranteed for payment, and agreeing that any or all shall be paid to CITY or order upon demand by CITY.

The financial institution and the form of any instrument pledging the funds must be approved by the CITY.

LESSEE will maintain the required security deposit throughout the lease term and for ninety (90) days thereafter unless previously released by the CITY. Failure to do so shall be considered a default and is grounds for immediate termination of this lease.

In the event CITY utilizes all or any portion of the security deposit, LESSEE shall reimburse the deposit within ten (10) days of notice from CITY to bring the security deposit up to the full specified amount.

The security or any balance thereof will be returned to the LESSEE within ninety (90) days following expiration or termination of this lease, provided LESSEE has faithfully complied with all terms, covenants and conditions hereof.

The security deposit may be increased by CITY proportionate to any increased performance or rental liability of LESSEE upon sixty (60) days' prior written notice from CITY of such required increase.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

6.01 Acceptance of Premises. By signing this lease, LESSEE represents and warrants that it has independently inspected the premises and made all tests, investigations and observations necessary to satisfy itself of the condition of the premises. LESSEE agrees it is relying solely on such independent inspection, tests, investigations and observations in making this lease. LESSEE further acknowledges that the premises are in the condition called for by this lease, that CITY has performed all work with respect to the premises and that LESSEE does not hold CITY responsible for any defects in the premises. Further, LESSEE acknowledges that the premises lie within the floodplain of the San Dieguito River and is subject to inundation, the existence of reservations contained in the deed from Watt Industries/San Diego, Inc., to the City, the existence and location of easements encumbering the premises, that the property does not have frontage along or access

rights to El Camino Real and that CITY has made no representations regarding the availability of water for use on the premises.

6.02 Entry and Inspection. CITY reserves and shall always have the right to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises or to inspect the operations conducted thereon. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy and sanitary condition, CITY shall have the right, after ten (10) days' written notice to LESSEE, to have any necessary maintenance work done for and at the expense of LESSEE and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done in order to keep said premises in a decent, safe, healthy and sanitary condition. Further, if at any time the CITY determines that said premises are not in a decent, safe, healthy and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy and sanitary. Said bond shall be in an amount adequate in the opinion of the CITY to correct the said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this lease imposed on CITY.

6.03 Maintenance. LESSEE agrees to assume full responsibility and cost for the operation and maintenance of the premises (including litter and weed abatement) throughout the term. LESSEE will make all repairs and replacements necessary to maintain and preserve the premises in a decent, safe, healthy and sanitary condition satisfactory to the CITY and in compliance with the Development Plan described in Section 6.12 hereof and with all applicable laws.

6.04 Improvements/Alterations. No improvements, structures or installations shall be constructed within the premises and the premises may not be altered by the LESSEE without prior written approval by the City Manager. Further, LESSEE agrees that major structural or architectural design alterations to approved improvements, structures or installations may not be made on the premises without prior written approval by the City Manager and Watt Industries/San Diego, Inc., or its successors and such approval shall not be unreasonably withheld. This provision shall not relieve the LESSEE of any obligation under this lease to maintain the premises in decent, safe, healthy and sanitary condition, including structural repair and restoration of damaged or worn improvements.

The CITY shall not be obligated by this lease to make or assume any expense for any improvements or alterations.

6.05 Utilities. LESSEE agrees to order, obtain and pay for all utilities and service and installation charges in connection with the development and operation of the leased premises. All utilities will be installed underground.

6.06 Construction Bond. Whenever there is any construction to be performed on the premises, LESSEE shall deposit with CITY, prior to commencement of said construction a faithful performance bond in the amount of 100 percent of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction commenced by LESSEE shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the incomplete construction shall be removed and the premises restored to a condition satisfactory to CITY. The bond or cash will be held in trust by CITY for the purpose specified above or at CITY'S option it may be placed in an escrow or other trust approved by CITY.

6.07 Liens. LESSEE will at all times save CITY free and harmless and indemnify CITY against all claims for labor or materials in connection with operations, improvements, alterations or repairs on or to the premises, and the costs of defending against such claims, including reasonable attorney's fees.

If improvements, alterations or repairs are made to the premises by LESSEE or by any party other than CITY and a lien or notice of lien is filed, LESSEE shall within five (5) days of such filing either:

a. Take all actions necessary to record a valid release of lien, or

b. File with CITY a bond, cash, or other security acceptable to CITY, sufficient to pay in full all claims of all persons seeking relief under the lien.

6.08 Taxes. LESSEE agrees to pay, before delinquency, all taxes, assessments and fees assessed or levied upon LESSEE or the premises including the land, any buildings, structures, machines, equipment, appliances or other improvements or property of any nature whatsoever, erected, installed or maintained by LESSEE or levied by reason of the business or other LESSEE activities related to the leased premises, including any licenses or permits. LESSEE recognizes and agrees that this lease may create a possessory interest subject to

property taxation and that the LESSEE may be subject to the payment of taxes levied on such interest and that LESSEE shall pay all such possessory interest taxes.

LESSEE further agrees that payment for such taxes, fees and assessments will not reduce any rent due the CITY.

6.09 Signs. LESSEE agrees not to erect or display any permanent banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without the prior written consent of the CITY. If any such unauthorized item is found on the premises, LESSEE agrees to remove the item at its expense within 24 hours notice thereof by CITY or CITY may thereupon remove the item at LESSEE'S cost.

6.10 Ownership of Improvements and Personal Property.

a. LESSEE shall have the right to remove any and all its improvements, trade fixtures, structures and installations or additions to the premises constructed on the premises by LESSEE at lease termination or expiration except for landscaping, irrigation systems, the club house, storage facilities and perimeter fencing which shall be deemed to be part of the premises and shall become at CITY'S option the CITY'S property, free of all liens and claims except as otherwise provided in this lease.

b. If the CITY elects not to assume ownership of all or any improvements, trade fixtures, structures and installations, CITY shall so notify LESSEE thirty (30) days prior to termination or 180 days prior to expiration and the LESSEE shall remove all such improvements, structures and installations as directed by the CITY at LESSEE'S sole cost on or before lease expiration or termination. If the LESSEE fails to remove any improvements, structures and installations as directed, the LESSEE agrees to pay CITY the full cost of any removal.

c. LESSEE-owned machines, appliances, equipment (other than trade fixtures) and other items of personal property shall be removed by LESSEE by the date of the expiration or termination of this lease. Any said items which LESSEE fails to remove will be considered abandoned and become the CITY'S property free of all claims and liens, or CITY may at its option remove said items at LESSEE'S expense.

d. If any removal of such personal property by LESSEE results in damage to the remaining improvements on the premises, LESSEE agrees to repair all such damage.

e. Any necessary removal by either CITY or LESSEE which takes place beyond said expiration or termination hereof shall require rental by LESSEE to CITY at the rate in effect immediately prior to said expiration or termination.

f. Notwithstanding any of the foregoing, in the event LESSEE desires to dispose of any of its personal property used in the operation of said premises upon expiration or termination of this lease, then CITY shall have the first right to acquire or purchase said personal property.

6.11 Unavoidable Delay. If the performance of any act required of CITY or LESSEE is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rental as required pursuant to this lease. In the event LESSEE or CITY claim the existence of such a delay, the party claiming the delay shall notify the other party in writing of such fact within ten (10) days after the beginning of any such claimed delay.

6.12 Development Plan. LESSEE agrees to develop the leased premises in accordance with the General Development Plan approved by the City Manager and Watt Industries/San Diego, Inc., and filed in the Office of the City Clerk which plan is hereby incorporated by this reference. The general contents and provisions of the development plan are described in Exhibit A hereto. The City Manager or his designee shall have the authority to authorize changes to the plan upon concurrence from Watt Industries/San Diego, Inc., or its successor, provided that the basic concept may not be modified without City Council approval and a document evidencing any approved changes shall be filed in the Office of the City Clerk. Failure by LESSEE to comply with the General Development Plan shall constitute a major default and subject this lease to termination by CITY.

SECTION 7: GENERAL PROVISIONS

7.01 Notices

a. Any notice required or permitted to be given hereunder shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to LESSEE at the leased premises or at such other address designated in writing by LESSEE; and to CITY as follows:

IF TO CITY:

City Manager, Attention Property Director
City Administration Building
202 "C" Street, M.S. 9B
San Diego, CA 92101-4155

IF TO LESSEE:

Fairbanks Polo Club
P.O. Box 2388
La Jolla, CA 92038

or to any mortgagee, trustee or beneficiary, as applicable at such appropriate address designated in writing by the respective party.

b. Any party entitled or required to receive notice under this lease may by like notice designate a different address to which notices shall be sent.

7.02 Compliance with Law. LESSEE will at all times in the construction, maintenance, occupancy and operation of the premises, comply with all applicable laws, statutes, ordinances and regulations of the CITY, County, State and Federal Government, at LESSEE'S sole cost and expense. In addition, LESSEE will comply with any and all notices issued by the City Manager or his authorized representative under the authority of any such law, statute, ordinance, or regulation.

7.03 CITY Approval. The approval or consent of the CITY, wherever required in this lease, shall mean the written approval or consent of the City Manager unless otherwise specified, without need for further resolution by the City Council.

7.04 Nondiscrimination. LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, age or physical handicap in LESSEE'S use of the premises, including, but not limited to, the providing of goods,

services, facilities, privileges, advantages and accommodations, and the obtaining and holding of employment.

7.05 Equal Opportunity. LESSEE agrees to abide by the CITY'S Affirmative Action Program for LESSEES as it exists or is amended to the extent that the program is applicable to this lease. A copy of the program effective as of the date of this lease is on file in the City Clerk's Office and by this reference is part hereof. The program's goal is the attainment of employment for minorities and women in all areas of employment, in a total percentage as established by the CITY for its Affirmative Action Program each year.

7.06 Partial Invalidity. If any term, covenant, condition or provision of this lease is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.

7.07 Legal Fees. In the event of any litigation regarding this lease, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorney's fees.

7.08 Number and Gender. Words of any gender used in this lease shall include any other gender, and words in the singular number shall include the plural, when the tense requires.

7.09 Captions. The lease Table of Contents, section headings and captions for various articles and paragraphs shall not be held to define, limit, augment or describe the scope, content or intent of any or all parts of this lease. The numbers of the paragraphs and pages of this lease may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this lease.

7.10 Entire Understanding. This lease contains the entire understanding of the parties. The LESSEE, by signing this agreement, agrees that there is no other written or oral understanding between the parties in respect to the leased premises. Each party has relied on its own examination of the premises, advice from its own attorneys, and the warranties, representations and covenants of the lease itself. Each of the parties in this lease agrees that no other party, agent or attorney of any other party has made any promise, representation or warranty whatsoever, which is not contained in this lease. The failure or refusal of any party to read the lease or other documents, inspect the premises and obtain legal or other advice relevant to this transaction, constitutes a waiver of any objection, contention or claim that might have been based on these actions. No modification, amendment or alteration of this lease will be valid unless it is in writing and signed by all parties.

7.11 CITY Employee Participation Policy. It is the policy of the CITY that all CITY contracts, agreements or leases with consultants, vendors or LESSEES shall include a condition that the contract, agreement or lease shall be unilaterally and immediately terminated by the CITY if the contractor or LESSEE employs an individual who within the twelve months immediately preceding such employment did in his/her capacity as a CITY officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the selection of the contractor or LESSEE. It is not the intent of this policy that these provisions apply to members of the City Council.

7.12 Bylaws. Membership in LESSEE'S organization shall be open to anyone meeting the requirements of its rules and bylaws. All restrictions, rules, bylaws, and fees, if any, and changes thereto proposed by LESSEE'S organization shall, before being put into effect, be submitted to and receive the written approval of the City Manager. Bylaws shall be on file in the office of the Property Department prior to CITY execution of this lease.

SECTION 8: CONDITIONS SUBSEQUENT

8.01 Termination of Lease. In the event that any of the following should occur, and upon thirty (30) days written notice by LESSEE to CITY, LESSEE'S obligations under the terms of this lease shall become voidable by LESSEE or may be suspended by LESSEE for a period of time to be agreed upon by the parties:

a. LESSEE determines that water is not available to irrigate the leased premises at a cost less than thirty percent (30%) of the annual minimum rent. (Cost shall mean the aggregate cost of purchasing water and pumping water from on-site wells.)

b. LESSEE cannot obtain public liability insurance as required by Section 5.02 herein or cannot obtain said insurance at a cost less than thirty percent (30%) of the annual minimum rent.

c. Flooding occurs which causes material damages to the premises. In the event that LESSEE opts to terminate the lease under this provision, LESSEE shall: (a) pay to CITY its pro rata share of rent due as calculated to the date that the material damage occurs, and (b) remove, at LESSEE's expense, any debris on the premises occasioned by damage to the facilities on the premises. In the event that the LESSEE decides to continue operations of

the Polo Club despite material damage caused by flooding, the rent shall be reduced in proportion to the extent of the damage until such time as the Polo Club facilities are restored as provided in Section 5.03.

d. LESSEE loses access to the premises, for reasons over which LESSEE has no control, from either Via de la Valle or El Camino Real for a period of time exceeding thirty (30) days.

8.02 Water Service. The CITY of San Diego does not presently have a water service system to furnish water to LESSEE. The CITY, however, does have an existing temporary water service agreement with Santa Fe Irrigation District (hereinafter referred to as District) which can be amended to provide water to the premises. CITY will seek an amendment to the water service agreement with the District provided LESSEE agrees to the following:

a. LESSEE shall bear all costs of securing temporary water service from the District including, but not limited to: an amendment of the agreement between CITY and District, payment of all applicable fees to District and construction of temporary connection to District facilities and their removal when required.

b. LESSEE shall connects to CITY's water system at the request of the City Manager on or before June 30, 1993. LESSEE shall bear all costs of connecting to CITY's water system for:

(1) Payment of all applicable fees (including, but not limited to, water capacity changes, reimbursement and connection fees) at the time of the connection; and

(2) Construction of all on-site and off-site water facilities as required by the CITY's Water Utilities Department from new subdivisions in the area at the time of connection.

c. LESSEE may, within 90 days after the request of CITY to connect to CITY's water system, cancel this lease if the terms, conditions and costs of such connection are unacceptable to LESSEE.

SECTION 9: SIGNATURES

IN WITNESS WHEREOF, this Lease Agreement is executed by CITY, acting by and through its City Manager, and by LESSEE, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO

Date 3-31-86

By _____
Deputy City Manager

LESSEE: FAIRBANKS POLO CLUB

Date 3-14-86

By _____
President

By _____
Secretary

APPROVED as to form and legality this 31 day of March, 1986.

Date _____

By _____
Deputy City Attorney

RJC:baa(6)61
3-6-86

10.01 Legal Description

That portion of Lot No. 1 of Fairbanks Country Club Unit No. 1, according to Map thereof No. 10730, in the City of San Diego, filed in the Office of the County Recorder of the County of San Diego, State of California, described as follows:

Beginning at the Northerly terminus of the West line of said Lot 1; thence South 89°02'46" East along the boundary of Lot 1 a distance of 2,668.58 feet; thence North 00°36'06" East 20.00 feet; thence South 89°57'49" East 175.32 feet; thence South 00°55'54" West 246.03 feet; thence South 65°34'37" East 227.34 feet; thence North 29°55'09" East 611.49 feet; thence South 72°03'30" East 587.57 feet; thence North 74°40'00" East 128.58 feet; thence North 23°11'55" East 106.62 feet; thence North 12°54'09" West 232.88 feet; thence North 46°58'30" West 143.63 feet; thence South 86°23'17" West 301.60 feet; thence North 19°19'23" East 163.19 feet; thence North 23°08'51" West 190.26 feet; thence North 29°08'26" East 12.54 feet to the beginning of a non-tangent 849.00-foot radius curve concave Northwesterly, a radial line to said point bears South 28°24'52" East; thence Northeasterly along the arc of said curve through a central angle of 23°43'57", a distance of 351.66 feet; thence leaving said curve along a non-tangent line North 41°16'49" East 63.42 feet to the beginning of a non-tangent 540.00-foot radius curve concave Northwesterly, a radial line to said point bears South 48°43'11" East; thence Northeasterly, along the arc of said curve through a central angle of 32°41'21", a distance of 308.09 feet; thence leaving said curve along a non-tangent line South 87°36'22" East 1,474.63 feet; thence leaving the boundary of said Lot 1 South 42°52'00" West 850.00 feet; thence South 41°20'34" West 522.34 feet to the beginning of a tangent 3,135.00-foot radius curve concave Northwesterly; thence Southwesterly along the arc of said curve through a central angle of 21°38'43", a distance of 1,184.34 feet; thence leaving the arc of said curve along a radial line to said curve North 27°00'43" West 154.26 feet; thence North 53°39'49" West 120.00 feet; thence South 80°40'46" West 96.25 feet; thence South 25°51'38" West 95.00 feet; thence South 59°28'51" West 105.00 feet; thence North 66°12'16" West 80.00 feet; thence South 82°40'21" West 275.00 feet to the beginning of a tangent 175.00-foot radius curve concave Easterly; thence Southerly along the arc of said curve through a central angle of 94°23'35", a distance of 288.31 feet; thence South 11°43'14" East 132.00 feet; thence South 78°16'46" West 1,186.00 feet to the beginning of a tangent 2,930.00-foot radius curve concave Northerly; thence Westerly along the arc of said curve through a central angle of 09°12'35", a distance of 470.97 feet, thence leaving the arc of said curve along a non-tangent line South 83°52'53" West 553.67 feet to a line which is parallel with and 10.00 feet North of the South line of said Lot 1; thence North 89°28'00" West a distance of 625.91 feet to the West line of said Lot 1; thence along said West line North 00°24'12" West 722.48 feet and North 01°31'23" East 404.64 feet to the Point of Beginning, except that portion of Lot 1 dedicated for Via De La Valle by City Council Resolution 262466.

10.02 General Development Plan

The General Development Plan consists of:

a. Plot Plan

b. Development Schedule

c. Financial Plan

d. Schematic Elevations

e. Landscape Plan

f. Others as applicable

and is filed in the Office of the City Clerk referenced to this lease.

EXHIBIT "B"

FAIRBANKS POLO CLUB

COST PROJECTION*

DEVELOPMENT COSTS	PHASE I	PHASE II	TOTAL
Design & Engineering	$20,000	$ 10,000	$ 30,000
Irrigation System:			
Engineering	5,000	3,000	8,000
2" Meter		3,375	3,375
4" Meter	14,500		14,500
Water Blending Facility	20,000		20,000
Extend Pipe to East Field		15,000	15,000
Well Approx. 300 ft.	60,000	30,000	90,000
Main Line/Pump Station	40,000	8,000	48,000
8 Side Role Sprinkler Lines	23,000	10,000	33,000
Purchase Grass Stolens	60,000	22,000	82,000
Planting Grass	20,000	10,000	30,000
Grading	35,000	18,125	53,125
Entrance	8,000		8,000
Road & Culverts	15,000	10,000	25,000
Landscaping, Draining, Irrigation	30,000	20,000	50,000
Fencing	25,000	10,000	35,000
Water Distribution Systems	20,000	15,000	35,000
Utilities Improvements	15,000	10,000	25,000
Clubhouse		125,000	125,000
Storage Facilities	10,000	10,000	20,000
Total Development Costs and Capital Improvements			$750,000

*The costs shown above are estimates. LESSEE shall receive full credit for actual expenditures which may exceed line-item estimates provided that actual expenditures for other line-items are commensurately below the estimated costs for those items and provided further that the total development and capital improvement costs claimed pursuant to Section 3.06 herein do not exceed a total of $750,000 during the lease term.

Addendum to Lease Agreement Between the City of San Diego, Lessor, and Fairbanks Polo Club, Lessee

Whereas, the City Council during its hearing of the Fairbanks Polo Club Lease requested that certain provisions be added to the agreement concerning public access and construction of permanent structures on the premises.

Now, therefore, City and Fairbanks Polo Club agree to incorporate the attached Exhibit "C" concerning public access regulations into the lease agreement. Also, Fairbanks Polo Club will be required to obtain City Council approval prior to construction of any permanent structures (such as the Club House) on the leasehold premises, except as otherwise provided in the lease.

In witness whereof, this addendum is executed by City, acting by and through its City Manager, and by Lessee, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO

Date 8-25-86 By _____
Deputy City Manager

FAIRBANKS POLO CLUB

Date 7-29-86 By _____
Harry A. Collins

By _____
Chris A. Collins

APPROVED AS TO FORM AND LEGALITY THIS 20 DAY OF August, 1986.

By _____
Deputy City Attorney

RJC:st(108-2)
7-16-86

EXHIBIT "C"

PUBLIC ACCESS REGULATIONS

(1) During the first 18 months of the Lease Term, the Polo Club shall be permitted to restrict or prohibit public access to any and all areas of the Polo Club site. This temporary restrictive period is needed to insure that the grass for the polo fields is allowed to fully mature. Fencing, posting signs, chaining access roads, and any other means reasonably necessary to control pedestrian, horse, and vehicular traffic on the Polo Club site shall be allowed during this period; provided, however, that the Public Trail (indicated in red on the site plan attached hereto as Exhibit "A" and incorporated herein by reference) shall remain open to the public at all times.

(2) At such time as the grass on those polo fields developed during Phase I has matured such that polo matches may be played on the fields, the following regulations shall govern public access to the Polo Club site:

(a) The Public Trail (shown in red on Exhibit "A") shall remain open to the public at all times.

(b) The polo field areas (shown in yellow on Exhibit "A") shall be open to the public during daylight hours for passive uses (i.e., spectating, picnicking) which do not interfere with use of the Polo Fields by Polo Club members practicing or playing polo nor with maintenance, planting, watering, or other normal operations of the Polo Club. The Polo Club may reasonably direct the public to designated areas to provide a safety buffer between the public and the operations of the Polo Club. Spectators at the polo matches or practices shall be granted priority of use over other members of the public. Public access to the Polo Club site shall be prohibited after daylight hours.

(c) Only Polo Club members and their invitees shall be allowed to play polo on the Polo Club facilities. Equestrian use of the Polo Club site by non-members shall not be permitted.

(d) Unless specifically authorized by the Polo Club, motorized vehicles shall be allowed only where designated or directed by Polo Club management.

(e) Due to safety considerations, certain areas of the Polo Club site must necessarily be limited to use by Polo Club members and invitees only. Accordingly, those areas shown in blue and brown on Exhibit "A" shall be reserved for horse-related activities (e.g., corrals, barns, exercise facilities, etc.). The public shall not be permitted in these areas without prior authorization from the Polo Club.

(f) Notwithstanding any of the above, the Polo Club reserves the right to restrict public access to the Polo Club site during certain special events (e.g., charity fund-raisers sponsored by the Polo Club, charity fund-raisers sponsored by groups other than the Polo Club, tournaments, etc.). Such restrictions may be necessary in order to insure that only ticketed spectators are allowed to attend the special events.

(g) No animals, other than horses and seeing-eye dogs, shall be allowed on the Polo Club premises without prior authorization from the Polo Club.

(h) The Polo Field in the northeast corner of the Polo Club site (to be developed during Phase II) shall not be open to public access until a road is built on the site to access the field. At such time as the road is provided, public access shall be governed by the provisions above.

(i) The areas designated for particular uses on the color coded site plan attached hereto as Exhibit "A" may be subject to change as the plans for the Polo Club evolve.

(R-86-1729)

RESOLUTION NUMBER R- 265268

ADOPTED ON MAR 17 1986

BE IT RESOLVED, by the Council of The City of San Diego, that the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, a lease agreement with FAIRBANKS POLO CLUB, a California nonprofit corporation, for City-owned open space property north of the Fairbanks Country Club Golf Course, under the terms and conditions set forth in that lease agreement on file in the office of the City Clerk as Document No. RR- 265268.

APPROVED: JOHN W. WITT, City Attorney

By _____
Harold O. Valderhaug
Deputy City Attorney

HOV:ps
03/11/86
Or.Dept:Prop.
Job:218154
R-86-1729
Form=r.none

(R-86-1734)

RESOLUTION NUMBER R- 265269

ADOPTED ON MAR 17 1986

BE IT RESOLVED, by the Council of The City of San Diego that it be, and it is hereby certified, that the information contained in FINAL NEGATIVE DECLARATION NO. EQD 85-0785 in connection with the Fairbanks Polo Club lease of City-owned property north of the Fairbanks Country Club Golf Course, on file in the office of the City Clerk, has been completed in compliance with the California Environmental Quality Act of 1970, as amended, and the State guidelines thereto, and that said Declaration has been reviewed and considered by this Council.

APPROVED: John W. Witt, City Attorney

By _____
Harold O. Valderhaug
Deputy City Attorney

HOV:ps
03/14/86
Or.Dept:Prop.
R-86-1734
Form=r.neg

NOTICE OF DETERMINATION

TO: X County Clerk
County of San Diego
220 W. Broadway
San Diego, CA 92101

___ Office of Planning and Research
1400 Tenth Street, Room 121
Sacramento, CA 95814

FROM: City of San Diego
City Administration Building
202 "C" Street
San Diego, CA 92101

EQD Number: EQD 85-0785 State Clearinghouse Number: _____
(If submitted to Clearinghouse)

Project Title: FAIRBANKS POLO CLUB - City Lease Agreement

Project Location: In the Floodplain Fringe at the corner of Via de la Valle and El Camino Real in the Fairbanks Ranch Specific Plan Area (Lot 1, Blk. #1, Fairbanks Country Club Subdivision, Map #10730)

Project Description: Development of a polo facility which will include polo fields, a club house, portable corrals and pasture areas.

This is to advise that The City of San Diego City Council (Decision-making Body) on March 17, 1986 (date) approved the above described project and made the following determinations:

1. The project in its approved form ___ will, X will not, have a significant effect on the environment.

2. ___ An Environmental Impact Report was prepared for this project and certified pursuant to the provisions of CEQA.

   X A Negative Declaration was prepared for this project pursuant to the provisions of CEQA. Resolution R-265269.

   Record of project approval may be examined at the address above.

3. Mitigation measures ___ were, X were not, made a condition of the approval of the project.

4. (EIR only) Findings ___ were, X were not, made pursuant to CEQA Guidelines Section 15091.

5. (EIR only) A Statement of Overriding Considerations ___ was, X was not, adopted for this project.

It is hereby certified that the final environmental report, including comments and responses, is available to the general public at the office of the Environmental Quality Division, Fifth Floor, 202 "C" Street, San Diego, CA 92101.

Date Received for Filing: _____ June C. Blackwell
Signature

Deputy City Clerk
Title

Revised 12/13/85

Passed and adopted by the Council of The City of San Diego on MAR 17 1986 by the following votes:

YEAS: Wolfsheimer, Cleator, McColl, Struiksma, McCarty, Martinez.

NAYS: Jones, Gotch.

NOT PRESENT: None.

VACANT: Mayor.

AUTHENTICATED BY:

ED STRUIKSMA
Deputy Mayor of The City of San Diego, California

CHARLES G. ABDELNOUR
City Clerk of The City of San Deigo, California

By JUNE A. BLACKNELL
Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of RESOLUTION NO. R- 265268 passed and adopted by the Council of The City of San Deigo, California, on MAR 17 1986

CHARLES G. ABDELNOUR
City Clerk of The City of San Deigo, California

(SEAL) By June A. Blacknell
Deputy

Rev. 7-86

ATTACHMENT F

AMENDED AND RESTATED

BYLAWS OF

FAIRBANKS RANCH COUNTRY CLUB, INC.

(A California Nonprofit Mutual Benefit Corporation)

ARTICLE 1. DEFINITIONS.

"Accounting Year" shall mean the year adopted by Fairbanks Ranch Country Club, Inc, a California Nonprofit Mutual Benefit corporation (the "Club"), as its accounting year for financial purposes.

"Articles" shall mean the Articles of Incorporation of the Club.

"Board of Directors" or "Board" shall mean the governing board of the Club.

"Bylaws" shall mean the bylaws of the Club, as amended from time to time.

"Club" shall mean Fairbanks Ranch Country Club, Inc. a nonprofit mutual benefit corporation of that name, incorporated under the Nonprofit Mutual Benefit Corporation Law of California and operating pursuant to its Articles and these Amended and Restated Bylaws (the "Bylaws").

"Club Facilities" shall mean the golf course, clubhouse, tennis courts, parking lots and all related improvements and physical facilities developed by Fairbanks Founders, Ltd., a

California limited partnership ("FFL") in the City of San Diego, California, and operated by FFL or by the Club.

"Club Regulations" shall mean the regulations referred to in Section 4.4 hereof.

"Director" shall mean a member of the Board of Directors of the Club.

"Family" shall mean the spouse, and the children (by blood, marriage or legal adoption) and the spouses of such children under the age of twenty-two (22) years, of a Member, whose name shall be registered with the Secretary of the Club.

"FFL" shall mean Fairbanks Founders, Ltd., a California limited partnership, which is the sponsor of the Club, or its successors or assigns.

"Manager" shall mean the person or persons named as such pursuant to Section 10.1 hereof.

"Member" shall mean a Voting Member, a Social Member, a Junior Member and such other classes of membership, if any, which shall be created pursuant to Section 2.6, hereof.

"Voting Member" shall mean a member of the Club, pursuant to Section 2.1, 2.2 and 2.3 hereof.

"Membership Committee" shall mean the committee of the Club described at Article 6 hereof.

"Opening Date" shall mean the date that, in the sole opinion of FFL, construction of the Club Facilities is completed and the Club Facilities are opened for use by the Members.

"Operating Fund" shall mean the fund described at Section 7.1 hereof.

"Operating Agreement" shall mean the Amended and Restated Lease, Option and Operating Agreement dated _____ _____, 1985 between FFL and the Club.

"Privileges of the Club" shall mean the right to use the Club Facilities and to sponsor guests to use those facilities subject to any rules and regulations which may from time to time be established by the Board.

"Record" or "Recorded" with reference to a document shall mean the filing of such document in the official records of San Diego County, California.

ARTICLE 2. MEMBERSHIP.

SECTION 2.1. FOUNDER MEMBERSHIPS. Founder Members shall include only those persons who are limited partners of FFL and the corporate designee of the general partner of FFL. The procedures hereinbelow for election to membership shall not apply to any original limited partner of FFL or initial corporate designee of the general partner. Founder Members shall enjoy all of the Privileges of the Club, plus preferred parking and a special, assigned locker. Founder Memberships will be voting, proprietary, assessable and transferable in accordance with the terms of these Bylaws. Founder Memberships shall be exempt from dues for a period of five years from the date Regular Members

first pay dues provided the Membership is not transferred (except within the family of a Founder Member). Thereafter, they will pay the same dues applicable to Regular or Corporate Memberships, as the case may be. The issuance of thirty-five (35) Founder Memberships is hereby authorized.

SECTION 2.2. REGULAR MEMBERSHIPS. Only persons at least twenty-one (21) years of age shall be eligible for Regular Membership. Regular Members shall enjoy all of the Privileges of the Club. Regular Memberships shall be voting, proprietary, assessable and transferable in accordance with the terms of these Bylaws. The issuance of four hundred forty-four (444) Regular Memberships is hereby authorized.

SECTION 2.3. CORPORATE MEMBERSHIPS. A corporation or other entity may purchase a Corporate Membership. The membership certificate shall be issued in the name of a person designated by the Corporate Member. Said designee must be at least twenty-one (21) years of age. Said designee will enjoy the full Privileges of the Club. A Corporate Membership will be voting, proprietary and assessable in accordance with the terms of these Bylaws. From time to time, the Corporate Member may request the Club to change the designated person on the membership certificate, subject to Membership Committee review. The issuance of six (6) Corporate Memberships is hereby authorized.

SECTION 2.4. SOCIAL MEMBERSHIPS. Only persons at least twenty-one (21) years of age shall be eligible to become Social Members. Social Members shall enjoy all of the Privileges of the Club except use of golf facilities, assigned lockers, and sponsoring guests to use the golf facilities. Social Memberships will be assessable, nonvoting, nonproprietary and transferable. The issuance of four hundred (400) Social Memberships is hereby authorized.

Section 2.5 JUNIOR MEMBERSHIPS. Only persons between the ages of twenty-two (22) and thirty-eight (38), inclusive, who are the children and stepchildren (and their spouses) of Regular or Founder Members (and their spouses) shall be eligible to become Junior Members. Junior Members shall enjoy all the Privileges of the Club. Junior Memberships will be assessable, nonvoting, nonproprietary and nontransferable. A Junior Member may purchase a Regular Membership at any time, upon payment of the applicable membership fee for a Regular Membership. A Junior Membership will expire at the time the Junior Member attains the age of 39. Amounts previously paid for a Junior Memberhip shall be applied, in full, to the membership fee payable for a Regular Membership. The issuance of fifty (50) Junior Memberships is hereby authorized.

SECTION 2.6. OTHER CLASSIFICATIONS. The Board may establish other classifications of nonproprietary, nonvoting,

nonassessable, nontransferable memberships, upon such conditions and with such privileges as the Board in its discretion shall determine.

SECTION 2.7. EXTENSION OF PRIVILEGES. The Board may extend the Privileges of the Club to such other persons and upon such terms as the Board may from time to time prescribe.

SECTION 2.8. APPLICATION AND SELECTION. Except for Founder Members, application and selection for membership in the Club shall be in accordance with procedures established by the Board of Directors and administered from time to time by the Membership Committee pursuant to the following:

Paragraph A. Application. Every applicant shall submit an application on a form provided by the Board which shall be accepted by the Club's Membership Secretary only if complete. The application shall be deemed complete and current when all required information shall have been accepted by the Club's Membership Secretary.

Paragraph B. Selection. The Membership Committee shall meet at regular intervals to review each current application and interview applicants. An applicant who fails to appear for an interview for which he was given at least ten days' notice shall be deemed to have withdrawn his application unless the Membership Committee shall excuse the absence. After such investigation and consultation as it may deem necessary, the Committee shall vote

whether or not to accept the applicant and immediately shall notify the Club's Membership Secretary of its decision.

The Membership Committee shall determine, in each instance in which its decision with respect to an applicant is favorable, that the applicant has established and enjoys a reputation in his business and social communities for honesty and personal integrity.

In no event shall membership criteria, as determined by the Board, discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry or national origin; such membership criteria as are applied at any time shall be applied uniformly to all persons who then are applicants for the same class of membership.

Paragraph C. Notification. Immediately upon receipt of the decision of the Membership Committee as to an applicant, the Club's Membership Secretary shall notify the applicant of the result. If the applicant is not elected to membership, the Club may refuse to receive a reapplication for any form of membership for a period of up to one year from the date of failure of election. If the decision is favorable, the requisite notice shall be a Notice of Election in such form as the Board of Directors shall establish. The Notice of Election to a membership shall be accompanied by copies of the Club Regulations, the Articles and the Bylaws.

Paragraph D. Membership Fee and Notification. For so long as the provisions of Article 8 hereof shall be in effect, any membership fee shall be determined and paid in such amount and manner, and certification shall be made and notices given in such manner and at such time, as provided in or pursuant to that Article. Thereafter, the membership fee shall be such amount and payable in such a manner as the Board of Directors may determine from time to time; provided, that at any one time the membership fee and terms of payment of the membership fee shall be uniform for all prospective members of each respective class. Upon receipt of the requisite fee, the Club's Membership Secretary shall notify the prospective member and the membership shall become effective as of the date of such notification.

Paragraph E. Membership Certificate. The Board may provide for issuance of certificates or cards in such form as it may determine, evidencing membership in the Club. If issued, such certificates or cards shall be consecutively numbered and shall set forth at least the following: the name of the Member, the class of membership, the date of issuance, that the Club is a non-profit mutual benefit corporation which may not make distributions to its Members during its life or on dissolution, and that the membership evidenced by the certificate or card is subject to restrictions on transferability, which restrictions are on file with the Secretary of the Club and are open for

inspection on the same basis as other records of the Club. The date of issuance of each certificate or card shall be entered in the records of the Club by the Secretary. If any certificate or card is lost, damaged or destroyed, a new certificate or card may be issued upon such terms and conditions as the Board may direct. In the case of a Corporate Member, the membership certificate or card shall be issued in the name of the individual designated by the corporation or other entity.

SECTION 2.9. TERMINATION AND TRANSFER. Termination and transfer of membership shall be as follows:

Paragraph A. Transfer or Termination of Membership. A membership shall not be transferred or terminated except in accordance with the terms of this Section 2.9.

Paragraph B. General. No membership in the Club shall be sold or transferred except as provided in these Bylaws and a transfer made except as herein provided shall not confer upon a transferee any of the Privileges of the Club. No Member of the Club shall publicly advertise his membership for sale, or permit such advertisement.

Paragraph C. Transfer Rights of Members. A transfer shall be accomplished in the following manner:

(1) A Member desiring to exercise his transfer rights shall notify the Club's Membership Secretary in writing of his desire to surrender his membership in exchange for payment of the

"Selling Price" (as hereinafter defined). The Membership Secretary shall place the name of said Member next in order on a list which relates to the class of membership offered for sale (the "Sellers Waiting List").

(2) Such surrender shall not take effect unless and until the Club has resold such membership. Said Member may, at any time before he has been notified that his membership has been resold, revoke his offer to surrender by giving written notice thereof to the Club's Membership Secretary and in such event the Membership Secretary shall promptly remove said Member's name from the Sellers Waiting List. However, if said Member does revoke his offer to surrender his membership, he may not exercise his transfer rights for one calendar year from the revocation date, except by paying a fee in addition to any transfer fees, to be established by the Board of Directors.

(3) Upon receipt of a notice pursuant to (1) above, the name of the accepted applicant whose name first appears on the applicable waiting list shall be notified that a membership is available for him to purchase;

(4) Upon receipt by the Club's Membership Secretary of the Selling Price from said accepted applicant and provided that there is at such time an unrevoked surrender of a membership, the Secretary of the Club shall (1) cause said membership to be cancelled on the books of the Club, (2) issue a new membership

certificate to said accepted applicant and (3) within thirty (30) days of the receipt of the Selling Price by the Club (and upon verification that all amounts due and owing to the Club by such Member have been paid) pay to said surrendering Member the Selling Price, less all dues and other charges of said Member which remain unpaid, including any required transfer fee.

(5) The term "Selling Price" means, subject to the provisions of Article 8, below, an amount of money determined by the Board in its sole and absolute discretion and may be determined separately by class.

Paragraph D. Transfer Fee. Except as provided herein, a transfer fee shall be collected by the Club in connection with any issuance of a new membership certificate pursuant to this Section 2.9. The fee shall be within the sole and absolute discretion of the Board. No transfer fee shall be paid upon changes in corporate designees or upon transfer made pursuant to Paragraph E of this Section; provided, however, that the Board, in its sole discretion, may impose a nominal processing fee.

Paragraph E. Transfers to Family. If a Member desires to transfer his membership to his spouse, son or daughter such proposed transferee shall file an application in the same manner as any other applicant. If such applicant is elected to membership, a new membership certificate shall be issued to such transferee, provided written certification has been received by the

Secretary of the Club declaring under penalty of perjury that such transferee is either the spouse, son or daughter of the transferor and the transferor member's membership certificate has been surrendered to the Club properly endorsed by the transferor or, if applicable, by the legal representative of the transferor.

Paragraph F. Deceased Members. The Board may, in its sole discretion, and subject to any conditions imposed by the Board, agree to waive all or any portion of the dues of a deceased member. A membership may be transferred only to family members by will or by intestate succession. In the event that such membership would be transferred by will or by intestate succession to a person other than one of the named family members, the legal representative of any deceased Member may exercise the deceased Member's transfer rights. Any surrender of a decedent's Membership must become effective within ninety (90) days after the date of death. The Board may, at its discretion, extend said ninety (90) day period. If no surrender becomes effective within said ninety (90) days or any extension thereof, the Board, after ten (10) days written notice to such legal representative, may offer such membership for sale to accepted applicants, subject to any waiting list then established, and sell it for the Selling Price then established and pay to the legal representative the Selling Price less the amount of any indebtedness of the decedent or his estate then due and unpaid and any required transfer fee.

The surviving spouse of a deceased member who is legally entitled to the membership and who does not elect to utilize Paragraph E of this Section, "Transfers to Family", may elect, within ninety (90) days (or such extended period as the Board may provide) of the death of the spouse, to sell said membership, and in that event such membership will have preference over all other memberships offered for sale.

In the event that such election is not made within (90) days (or such extended period as the Board may provide) of the spouse's death, any subsequent offer to sell will be placed next in order on the Sellers Waiting List.

Paragraph G. Initial Limitation on Transferability: Except for transfers made pursuant to Paragraphs E and F, above, there shall be no transfer of other memberships within each respective class until all initial memberships in each such respective class have been sold. Solely for purposes of this Paragraph G, any membership which is reserved for individuals purchasing homesites from Fairbanks Ranch Company, a California general partnership or homes from Watt Industries/San Diego, Inc., a California corporation shall be deemed to have been sold. After all initial memberships within a particular class are sold, transferability will be permitted subject to approval of an applicant by the Membership Committee.

Paragraph H. Waiting Lists. The Board may establish waiting lists by class of membership for (1) accepted applicants to whom membership is then available for issuance or transfer (with separate waiting lists being established for accepted applicants who are Property Owners, as defined below, and accepted applicants who are not Property Owners), and (2) Members who desire to transfer their membership. Except as provided herein, the Board shall regulate all aspects of any waiting list established, including, without limitation, priority on the list.

Upon acceptance by the Membership Committee, owners of lots, homes or condominiums created on the following described real property in the County of San Diego ("Property Owners") shall be placed on the waiting list established for Property Owners according to the date of their acceptance for membership by the Membership Committee:

(1) Fairbanks Ranch, encompassing Lots 6 through 623 of Tract 3877 (Units 1 through 5) as recorded in the Official Records of San Diego County.

(2) 340 units approved by the City of San Diego as shown on Tentative Map. 02-199-0, Lots 1 through 10, and also shown on PRD 20-252-0, as filed in the office of the Clerk of the City of San Diego.

(3) 125 units approved by the County of San Diego and known as Tentative Tract 4385.

Upon acceptance by the Membership Committee, accepted applicants who are not Property Owners shall be placed on the waiting list established for persons who are not Property Owners according to the date of their acceptance for membership by the Membership Committee.

As memberships are placed on the waiting lists maintained for Members of each class who desire to transfer their memberships, such memberships will be offered alternatively to those persons on the waiting list established for persons who are not Property Owners and those persons on the waiting list established for Property Owners. If any accepted applicant on a waiting list does not complete the purchase of an offered membership, such membership shall be offered to the next successive accepted applicant on such waiting list.

For example, the first membership that becomes available for transfer shall be offered to the first person on the waiting list established for persons who are not Property Owners. If such person does not complete the purchase of such membership, it shall be offered to each successive person on the waiting list established for persons who are not Property Owners until a sale is completed. The second membership that becomes available for transfer shall be offered to the first person on the waiting list established for persons who are Property Owners. If such person does not complete the purchase of such membership, it shall be

offered to each successive person on the waiting list established for persons who are Property Owners until a sale is completed.

Junior Members who are Property Owners and who have attained age 39 shall have priority over all other Property Owners with respect to the purchase of a Regular Membership. Junior Members who are not Property Owners and who have attained age 39 shall have priority over all other applicants who are not Property Owners with respect to the purchase of a Regular Membership.

Paragraph I. Vacancies in Memberships. When a vacancy or vacancies shall occur in a membership of the Club by resignation without transfer, or by death without transfer by the legal representative of such deceased member as herein provided, or for any reason, the Board of Directors shall have the power to fill such vacancy by election as provided in these Bylaws, and on the payment of any required membership fee, if any such membership fee shall be so required.

Paragraph J. Resignations. Any member may resign his membership; provided, however, such resignation may be refused by the Board. No member may resign until all indebtedness owing the Club has first been paid in full. Such resignation shall be submitted in writing to the Board and, upon its acceptance, shall operate as a release and assignment to the Club of all right, title and interest of such member in and to the property and assets of the Club and of all claims of whatever nature by such member against the Club.

Paragraph K. Sale Of A Membership Subject To Any Indebtedness To The Club When Sales Price Not Sufficient To Reimburse Club. In the event of the sale of any membership at a time when there is an indebtedness to the Club with respect to such membership, and in the further event that the amount of the Selling Price of said membership, less any applicable transfer fee, is insufficient to satisfy such indebtedness, the former owner of the membership shall be legally obligated to pay the Club the unpaid balance of any such indebtedness.

Paragraph L. Exceptional Case Repurchase. The Board may from time to time in its sole discretion and notwithstanding the existence of a Sellers Waiting List of Members seeking to transfer their memberships authorize the immediate repurchase by the Club of such Memberships in exceptional cases where a Member or the heirs of a deceased Member would suffer substantial hardship by the placement of such Membership on a waiting list.

Paragraph M. Physical Incapacity. If a member becomes permanently physically incapacitated to an extent that such member is no longer able to use the Club's Facilities, such member may, after offering his membership for sale in the manner set forth in Paragraph C of this Section, file a petition with the Secretary of the Club requesting that the payment of dues on such membership be waived. The Board may, in its sole discretion, and subject to any conditions imposed by the Board, agree

to waive all or any portion of the dues on such Membership. The Board may admit such incapacitated member as a temporary Social Member of the Club notwithstanding the fact that no Social Memberships are then available.

Paragraph N. Transfers Of Memberships By Expelled Members. Any member who has been expelled from the Club shall not be entitled to transfer his membership or receive any sum or amount therefor except through a transfer effectuated in the manner hereinafter set forth. When such expulsion shall become effective, the Board of Directors may sell such membership for the price set by the Board within its sole and absolute discretion. The Club shall retain from the selling price of said membership the amount of any indebtedness of said expelled member then due and unpaid to the Club, and then remit the balance of such selling price to said former member.

Paragraph O. Suspension. The Board of Directors, pursuant to the Club Regulations, and the procedure for notice and opportunity to be heard set forth in Paragraph P of this Section, may suspend for the period of the default all rights and privileges of Members, including without limitation the right of a Member to vote, who shall be in default in the payment of any sums due (including charges incurred by Family or guests) for a period in excess of one month after a bill therefor has been given, which default shall constitute cause for suspension.

Paragraph P. Expulsion. The Board of Directors, by a majority vote of the Directors present at a regularly held meeting of the Board, may determine to seek expulsion of, or such other lesser sanctions as it deems appropriate including suspension against, any Member for cause. For the purposes of this Paragraph, the term "cause" as applied to conduct of a Member shall mean any of the following:

(1) Default. Being in default in the payment of any sums due (including charges incurred by Family or guests) for a period in excess of three months (3) after a bill therefor has been given.

(2) Multiple Default. Being in default, on two occasions in any twelve (12) month period or on three (3) occasions in any twenty-four (24) month period, in the payment of any sums due for a period in excess of one (1) month after a bill therefor has been given.

(3) Felony. Conviction of a felony.

(4) Detrimental Conduct. The performance in or on the Club Facilities, by a Member or by his spouse, of acts which the Board shall find to be detrimental to the best interests of the Club. Conduct of the Family or guests of a Member may, but ordinarily shall not, be cause for expulsion of a Member, but may result in denial of privileges to such Family members or guests, in such manner and for such time as the Board of Directors may determine.

The determination to be made by the Board shall be that the conduct found to be detrimental consisted of an act or acts sufficiently objectionable, in the judgment of the Board and in the context of Club relations, to give discomfort and offense to reasonable persons of the age, education and background of the typical Member to such a degree that such persons would be likely to prefer not to associate further with the offending individual.

A Member shall be given notice of the determination of the Board of cause for his expulsion not more than fifteen (15) days after such determination has been made (the "Determination Date"), which notice shall state the reason therefor and the time and place of the hearing thereon, and shall be given in writing personally to the Member whose conduct is in question or sent by first class mail to his last address as shown on the records of the Club. Said hearing shall be before the Board and the place of the hearing shall be posted in a prominent place in the clubhouse of the Club not more than fifteen (15) days after the Determination Date.

The hearing must be held not less than fourteen (14) nor more than ninety (90) days after the date of such notice. All rights and privileges of the Member shall be suspended from the date of such notice until final disposition of the matter. Any Member shall have the right to be present at the hearing. The Member may elect to be heard orally or in writing.

If the conduct in question arises under subparagraph (1) or (2) above, the hearing will not proceed unless the Board shall receive the Secretary's certificate that all uncontested arrearages of the Member have been paid. The failure of the Member to pay all such amounts prior to the hearing shall be taken to be the resignation of such Member, which shall be effective on the date of the hearing and immediately prior to the convening of the Board for the hearing, and the matter shall be deemed closed, subject to Paragraph J of Section 2.9., above.

The Board shall limit the proceedings at the hearing to (a) the establishment, to the satisfaction of a majority of the Directors present at the hearing, of the conduct believed to constitute cause, (b) a statement of the Member (and of such other persons, reasonable in number, as may be presented at the hearing by such Member) in explanation or in mitigation of the conduct alleged to constitute cause, (c) statements of other Members, if they are in support of the Member in mitigation of such conduct, and (d) a vote of the Board. The affirmative vote of two-thirds of the Directors present at the hearing shall be required for expulsion of the Member, and if such vote is achieved the expulsion will be effective immediately. If the vote is insufficient for expulsion, the matter shall be dismissed and any suspension of the Member based on the same conduct immediately shall be rescinded, subject to Paragraph O, above, of

this Section. A former Member who has been expelled shall not be reinstated, except as a new applicant in accordance with Section 2.8, above.

Paragraph Q. Income or Receipts. In the event of the sale (upon dissolution of the Club or otherwise) or other disposition of the assets of the Club, no Member in his capacity as a Member, shall receive any property or proceeds therefrom, except that Members may be repaid, upon resolution of the Board of Directors, up to the amount of their membership fee actually paid to the Club, for such membership. Any excess proceeds shall be distributed in accordance with the Club's Articles of Incorporation or, to the extent the Articles do not so provide, in accordance with the Nonprofit Mutual Benefit Corporation Law of California. In no other event shall a Member share in any income, receipts, division, disposition or other enjoyment of assets of the Club, except to the extent of his ordinary and usual privilege of use of the Club Facilities. In no event shall a Social Member, a Junior Member or a member of any other class that may be created pursuant to Section 2.6, hereof, share in any income, receipts, division, disposition or other enjoyment of assets of the Club, except to the extent of his express privilege of use of the Club Facilities.

Paragraph R. Corporate Memberships. Notwithstanding anything to the contrary contained herein, Corporate Memberships may only be transferred under terms and conditions established by the Board from time to time and on a case by case basis.

ARTICLE 3. VOTING, MEETINGS AND ELECTIONS.

SECTION 3.1. VOTING. Voting rights in the Club shall be held by Voting Members only and shall be exercised as follows:

Paragraph A. Number of Votes. At any meeting of the Members, or at any election, each Voting Member then in good standing shall be entitled to cast one vote.

Paragraph B. Proxies. Except as otherwise provided herein, any Voting Member entitled to vote may attend and vote at meetings and elections, or may vote by proxy holder duly appointed by a written proxy signed by the Voting Member and filed with the Secretary of the Club prior to the commencement of the meeting at which the proxy is to be exercised. A proxy shall be for a term not to exceed eleven (11) months unless otherwise expressly provided therein, except the maximum term of any proxy shall be three (3) years from the date of execution of the proxy, and may be revoked by the Voting Member executing it at any time prior to the vote pursuant thereto by written notice to the Secretary or personal attendance and voting at a meeting. A proxy shall be deemed to be revoked when the Secretary of the Club receives actual notice (prior to the vote pursuant thereto)

of the default of the Voting Member in the payment of amounts due, or of the death or judicially declared incompetence of the Voting Member, or of the termination of such Voting Member's status as a Voting Member, whether by death, expulsion or otherwise. The revocability of a proxy which states on its face that it is irrevocable shall be governed by the provisions of the Nonprofit Mutual Benefit Corporation Law of California. Payment of arrearages so that the Voting Member is no longer in default shall be deemed to revive an otherwise valid proxy.

SECTION 3.2. MEETINGS AND QUORUM.

Paragraph A. Annual Meetings. The first annual meeting shall be held in the County of San Diego on a date to be designated by the Board of Directors designated by FFL pursuant to the Operating Agreement, which is not less than ten (10) days nor more than ninety (90) days immediately following the Transfer Date, as such date is defined in the Operating Agreement. Thereafter, there shall be an annual meeting of the Members on the first Tuesday of March of each year at 2:00 P.M. at the clubhouse of the Club, or at such other reasonably convenient time not more than thirty (30) days before or after such date, or at such other place in San Diego County as may be designated by the Board of Directors.

Paragraph B. Special Meetings. Following the holding of the first annual meeting of the Members as provided in this

Section, special meetings of the Members may be called at any time by the President of the Club, by the Board or by Voting Members representing five percent or more of the total voting power of all Voting Members, to consider matters which, by the terms of the Club's Articles or Bylaws, require the approval of all or some of the Voting Members, or for any other proper purpose. Special meetings shall be held at such place as is fixed for the annual meetings pursuant to Paragraph A of this Section. Except in special cases where other express provision is made by statute, notice of such special meetings shall be given in the same manner as for annual meetings. The notice shall specify the date, time and place of the meeting and the matters which will be considered, and no other business may be considered. Upon request in writing to the President or Secretary of the Club by any person entitled to call a special meeting, the officer forthwith shall cause notice to be given to the Voting Members entitled to vote that a meeting shall be held at a time fixed by the Board not less than thirty-five (35) nor more than ninety (90) days after the receipt of the request. If the notice is not given within twenty (20) days after receipt of the request, the person requesting the meeting may give the notice. Nothing contained in this Paragraph shall be construed as limiting, fixing or affecting the time when a meeting of Members can be held when the meeting is called by an action of the Board.

Paragraph C. Quorum. The presence at any meeting, in person or by proxy, of Voting Members having a majority of the total vote in the Club shall constitute a quorum. Suspended Voting Members shall not be counted in determining such total vote. If any meeting cannot be held because a quorum is not present, the Voting Members present may adjourn the meeting to a time not less than forty-eight (48) hours nor more than thirty (30) days from the time the original meeting was called. At the subsequent meeting, the presence, in person or by proxy, of Voting Members having one-quarter of the total vote in the Club shall constitute a quorum. The Voting Members present at a duly called and held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough Voting Members to leave less than a quorum, if such action taken, other than adjournment, is approved by at least a majority of the Voting Members required to constitute a quorum.

Paragraph D. Majority. Unless otherwise expressly provided herein or prohibited by law, any action may be taken at any meeting of the Members upon the affirmative vote of a majority of the total vote present.

Paragraph E. Results. After tabulation of ballots, the Board of Directors shall notify all Members, by mail or by posting of notices at the clubhouse of the Club, or both, of the

outcome of the vote. If insufficient votes were cast to constitute a quorum, the Board shall so certify, and the election shall be of no effect.

Paragraph F. Consent of Absentees. The transactions approved at any meeting of Members, either organizational, annual or special, however called and noticed, shall be as valid as though approved at a meeting duly held after regular call and notice, if a quorum is present either in person or by proxy, and if, either before or after the meeting, each of the Voting Members entitled to vote and not present in person or by proxy signs a written waiver of notice or a consent to the holding of such meeting or an approval of the minutes thereof. The waiver of notice or consent need not specify either the business to be transacted or the purpose of any annual or special meeting of Voting Members, except that if action is taken or proposed to be taken for approval of any of the matters specified in Paragraph H hereof, the waiver of notice or consent shall state the general nature of the proposal. All such waivers, consents or approvals shall be filed with the corporate records or made a part of the minutes of the meeting.

Paragraph G. Waiver by Attendance. Attendance by a Member at a meeting shall also constitute a waiver of notice of that meeting, except when the person objects, at the beginning of the meeting, to the transaction of any business due to the inade-

quacy or illegality of the notice. Also, attendance at a meeting is not a waiver of any right to object to the consideration of matters required to be included in the notice of the meeting, and not so included, if that objection is expressly made at the meeting.

Paragraph H. Notice of Certain Agenda Items. If action is proposed to be taken at any meeting for approval of any of the following proposals, the notice shall also state the general nature of the proposal. Member action on such items is invalid unless the notice or written waiver of notice states the general nature of the proposal(s):

(i) Removing a Director without cause;

(ii) Filling vacancies on the Board of Directors;

(iii) Amending the Articles or Bylaws;

(iv) Approving a contract or transaction in which a Director has a material financial interest;

(v) Adoption of a plan of distribution of assets.

Paragraph I. Manner of Giving Notice. Notice of any meeting of the Members shall be given either personally or by first-class mail, telegraphic or other written communication, charges prepaid, addressed to each Member at the address given by the Member to the Club for the purpose of notice. Unless otherwise required by statute or these Bylaws, such notice shall be given not less than ten (10) days nor more than ninety (90) days

prior to the date fixed for such meetings. If no address appears on the Club's books and no other has been given, notice shall be deemed to have been given if either (i) notice is sent to that Member by first-class mail or telegraphic or other written communication to the Club's principal executive office, or (ii) notice is published at least once in a newspaper of general circulation in San Diego County. Notice shall be deemed to have been given at the time when delivered personally or deposited in the mail or sent by telegram or other means of written communication. An affidavit of the mailing or other means of giving any notice of any Members' meeting may be executed by the Secretary, Assistant Secretary, or any other person giving the notice, and if so executed, shall be filed and maintained in the Minute Book of the Club.

Paragraph J. Adjourned Meetings and Notices Thereof. Any meeting of the Members, annual or special, whether or not a quorum is present, may be adjourned from time to time by the affirmative vote of a majority of the votes entitled to be cast and represented at such meeting in person or by proxy, but in the absence of a quorum, no other business may be transacted at any such meeting unless these Bylaws otherwise provide.

When any meeting of the Members is adjourned, notice of the reconvening of the adjourned meeting shall be given as in the case of the original meeting so adjourned unless the time and

place for the adjourned meeting is fixed by those in attendance at the original meeting. If the adjournment is for more than forty-five (45) days or if after adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each Voting Member of record entitled to vote at the meeting. Except as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at any adjourned meeting, other than by an announcement at the meeting at which such adjournment is taken.

SECTION 3.3. RECORD DATE FOR VOTING MEMBER NOTICE, VOTING, AND GIVING CONSENTS.

Paragraph A. Record Date. For the purposes of determining which Voting Members are entitled to receive notice of any meeting, to vote, or to give consent to corporate action without a meeting, the Board of Directors may fix, in advance, a "record date," which shall not be more than sixty (60) nor fewer than ten (10) days before the date of any such meeting, nor more than sixty (60) days before any such action without a meeting. Only Voting Members of record at the close of business on the date so fixed are entitled to notice, to vote, or to give consents, as the case may be, notwithstanding any transfer of any membership on the books of the Club after the record date, except as otherwise provided in the Articles, by agreement, or in the Nonprofit Mutual Benefit Corporation Law of California.

Paragraph B. Failure of Board to Determine Date. Unless fixed by the Board of Directors, the record date for determining those Voting Members entitled to receive notice of, or to vote at, a meeting of Voting Members, shall be the next business day preceding the day on which notice is given, or, if notice is waived, the next business day preceding the day on which the meeting is held.

Unless fixed by the Board, the record date for determining those Voting Members entitled to vote by ballot on corporate action without a meeting, when no prior action by the Board has been taken, shall be the day on which the first written consent is given. When prior action of the Board has been taken, it shall be the day on which the Board adopts the resolution relating to that action.

SECTION 3.4. ACTION WITHOUT MEETING. Any action, including the election of Directors, which under the provisions of the California Nonprofit Mutual Benefit Corporation Law may be taken at a meeting of the Voting Members, may be taken without a meeting of the Voting Members and without prior notice if (a) the written ballot of every Voting Member is solicited, (b) the required number of signed approvals in writing, setting forth the action so taken, is received, (c) the number of ballots cast within the time period specified equals or exceeds the quorum to be present at a meeting authorizing the action, and (d) the

number of approvals equals or exceeds the number of votes that would be required to approve the action at a meeting assuming the number of ballots cast equals the total number of votes which would have been cast at a meeting.

Ballots shall be solicited in a manner consistent with the requirements of subdivision (b) of Section 7511 and Section 7514 of the California Nonprofit Mutual Benefit Corporation Law, or such other section which may be in effect from time to time. All such solicitations shall indicate the number of responses needed to meet the quorum requirement and shall state the percentage of approvals necessary to pass the measure submitted. The solicitation must specify the time by which the ballot must be received in order to be counted.

Subject to Sections 7611 and 7613 of the California Nonprofit Mutual Benefit Corporation Law, any Voting Member casting a ballot, or the proxy holders of a Voting Member or a personal representative of the Voting Member or the proxy holders' or personal representative's proxy holders, may revoke the ballot, or substitute another, by a writing received by the Club prior to the time specified in the solicitation pursuant to the preceding paragraph, but may not do so thereafter. Such revocation is effective upon its receipt by the Secretary of the Club.

After tabulation of the ballots, the Board shall notify all Members, by mail or by posting of notices at the clubhouse of

the Club, or both, of the outcome of the election. If insufficient votes were cast to constitute a quorum, the Board shall so certify, and the election shall be of no effect.

ARTICLE 4. BOARD OF DIRECTORS.

SECTION 4.1. CORPORATE POWERS. Subject to the provisions of Article 8 hereof, the corporate powers of the Club shall be vested in, exercised by and under the authority of, and the affairs of the Club shall be controlled by, a Board of Directors, who shall have the exclusive right and responsibility to perform the duties and obligations and to exercise the powers and authority of the Club as set forth in the Articles and these Bylaws. The Board may delegate the management of the activities of the Club to any person or persons, executive company, or committee however composed, provided that the activities and affairs of the Club shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board.

SECTION 4.2. QUALIFICATION AND ELECTION.

Paragraph A. Qualification. Those Directors serving as such at the time of the first annual meeting at which Voting Members shall vote, shall resign effective upon election of their successors, and thereafter each member of the Board shall be elected as provided in Paragraph B of this Section 4.2. Each Director, other than those serving prior to the first annual meeting, must be a Voting Member of the Club in good standing at the time of his election.

Paragraph B. Election of Directors. The number of Directors shall be nine (9). The Directors shall be classified with respect to the time for which they shall severally hold office, by dividing them into three (3) classes, to be known as Classes "A," "B," and "C." Of the Directors chosen at the first annual meeting, Class A shall consist of three Directors, each to hold office for one (1) year, or until the next annual meeting; Class B shall consist of three Directors, each to hold office for two (2) years, or until the second annual meeting; and Class C shall consist of Three Directors, each to hold office for three (3) years, or until the third annual meeting. At each annual meeting, the successors to the class of Directors whose terms shall expire in that year shall be elected to hold office for a term of three (3) years, so that the term of office of one class of Directors shall expire in each year.

Paragraph C. Term. Subject to Paragraphs A and B of this Section 4.2, Directors shall serve for a term of three (3) years or until their respective successors are elected, or until their death, resignation or removal, whichever is earlier.

Paragraph D. Removal and Resignation. Any Director may resign at any time by giving written notice to the President, the Secretary or the Board. Such resignation shall be effective upon the giving of such notice, unless the notice specifies a later time for the effectiveness of such resignation. If the Board

accepts the resignation of a Director tendered to take effect at a future time, the Board shall have the power to elect a successor to take office when the resignation shall become effective. A Director shall be deemed to have resigned, effective immediately, upon the termination for whatever reason of his membership in the Club.

A Director may be removed by vote of the Voting Members; provided, however, that unless the entire Board is removed, an individual Director shall not be removed prior to the expiration of his term of office if the votes cast against removal, or not consenting in writing to such removal, would be sufficient to elect the Director if voted at an election at which the same total number of votes were cast and the entire number of Directors authorized at the time of the most recent election of Directors were then being elected.

Paragraph E. Vacancies. A vacancy or vacancies shall be deemed to exist in case of the death, resignation or removal of any Director, or if the Voting Members shall increase the authorized number of Directors but shall fail at the meeting at which such increase is authorized or any adjournment thereof to elect the additional Director(s) so provided for, or in the event the Voting Members fail at any time to elect the full number of authorized Directors. Except for a vacancy created by the removal of a Director, vacancies on the Board may be filled by a

vote of a majority of the remaining Directors, whether or not less than a quorum, or by a sole remaining Director, until his successor is elected by the Voting Members. In the event of an increase in the authorized number of Directors, no more than one Director may be appointed by the Board, rather than elected by the Voting Members, to fill a vacancy created thereby. The Voting Members may elect a Director at any time to fill any vacancy not filled by the Directors. A vacancy created by the removal of a Director shall be filled only by the vote of the Members at a duly called annual or special meeting of Members. Each Director so elected to fill a vacancy shall hold office for the balance of the term of the Director so replaced. The Voting Members may elect a Director at any time to fill any vacancy not filled by the Directors.

Paragraph F. Number of Directors. The number of Directors shall be nine (9). Such number may be changed by an amendment of this Paragraph by the affirmative vote of two-thirds of the total votes cast in person or by proxy at an election or a meeting of Members.

SECTION 4.3. MEETINGS.

Paragraph A. Place of Meeting. All meetings of the Directors shall be held at the clubhouse of the Club, if reasonably possible, and otherwise at a place as close thereto as reasonably possible, as designated at any time by resolution of the Board or by written consent of a majority of Directors.

Paragraph B. First Annual Meeting. Immediately following the first annual meeting of the Members and after each annual meeting of the Members, the Board shall hold a regular meeting at the same place for the purpose of the election of officers and the transaction of other business. Notice of such meeting is hereby dispensed with.

Paragraph C. Regular Meetings. At each annual meeting, the Board shall adopt a schedule of its other regular meetings to be held during the forthcoming year. No notice shall be required for regular meetings as scheduled.

Paragraph D. Special Meetings. Special meetings of the Board may be called at any time by the President or by one-third of the authorized number of Directors. Special meetings shall be held on four days notice by first-class mail, postage prepaid, or on forty-eight (48) hours notice delivered personally or by telephone or telegraph. Notice of the special meeting need not be given to any Director who signs a waiver of notice or a written consent to holding the meeting or an approval of the minutes thereof, whether before or after said meeting, or who attends the meeting prior thereto or at its commencement without protesting the lack of such notice. All such waivers, consents and approvals shall be filed with the Club records or made a part of the minutes of the meeting.

Paragraph E. Quorum. A majority of the authorized number of Directors shall constitute a quorum of the Board of Directors, and if a quorum is present, in person or by telephone, the decision of a majority of those present shall be the act of the Board in the absence of an express statutory or other requirement as to the matter under consideration.

Paragraph F. Action Without A Meeting. Any action required or permitted to be taken by the Board may be taken without a meeting, if all Directors individually or collectively consent in writing to such action. Such written consent or consents shall be filed with the minutes of the proceedings of the Board. Such action by written consent shall have the same force and effect as the unanimous vote of the Directors.

In the event that any Director shall be absent from four consecutive regular meetings of the Board, the Board may, by action taken at the meeting during which said fourth absence occurs, declare the office of said absent Director to be vacant.

SECTION 4.4. CLUB REGULATIONS. The Board of Directors from time to time and in its sole discretion may adopt, amend and repeal; in such manner as the Board may determine, Club Regulations for the interpretation and implementation of the provisions of the Club's Articles and Bylaws. The Club Regulations shall set forth standards and procedures for the administration, operation, maintenance and use of the Club Facilities, and such other

matters as the Board may determine to be necessary and desirable, subject to Article 8 hereof. A copy of the Club Regulations, as adopted, amended and repealed from time to time, shall be mailed, posted in the clubhouse of the Club or otherwise made available to each Member, and may be recorded.

SECTION 4.5. POWERS. Without in any way limiting the powers provided to the Board of Directors by law, or by the Articles or elsewhere in these Bylaws, the Board of Directors shall have the power (i) to make and enforce Club Regulations, (ii) to construe and interpret, and to fix, enforce and remit penalties for any violation of, the Bylaws and Club Regulations, (iii) to fix fees, dues and charges, (iv) to appoint, remove and replace the Club Manager or Managers, or other personnel, if any, and (v) generally to do all things necessary and desirable consistent with the laws of the State of California and with the Club's Articles and Bylaws, for the management and control of the property and affairs of the Club.

ARTICLE 5. OFFICERS.

SECTION 5.1. OFFICERS. The Officers of the Club shall be: a President, one or more Vice-Presidents, a Secretary and a Chief Financial Officer. If there are two or more Vice-Presidents, one shall be designated the Executive Vice-President. The Club, at the discretion of the Board, also may have one or more Assistant Secretaries and one or more Assistant Financial Offi-

cers and such other Officers as may be appointed in accordance with the provisions of Section 5.3. The President and the Executive Vice-President, if there is one, must be members of the Board, but the other Officers need not be. Each Officer must be a Member of the Club in good standing at the time of his election. One person may hold two or more offices, except that the offices of President and Secretary shall not be held by the same person.

SECTION 5.2. APPOINTMENT. The Officers of the Club, except such Officers as may be appointed in accordance with the provisions of Sections 5.3 or 5.5, shall be chosen annually by the Board, and each shall hold office until resignation, removal or disqualification to serve, or until a successor is elected and qualified.

SECTION 5.3. SUBORDINATE OFFICERS. The Board may appoint, or may empower the President to appoint, such other Officers as the affairs of the Club may require (including the Assistant Secretaries and Assistant Financial Officers mentioned in Section 5.1, above), each of whom shall hold office for such period, have such authority and perform such duties as provided in the Bylaws or as the Board may determine from time to time.

SECTION 5.4. REMOVAL AND RESIGNATION. Any Officer may be removed, either with or without cause, by the Board or by any Officer upon whom such power of removal may be conferred by the

Board, except that only the Board shall remove an Officer chosen by the Board.

Any Officer may resign at any time by giving written notice to the Board, the President or the Secretary of the Club. Any such resignation shall take effect at the date of the receipt of such notice or any later time specified therein. Unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. An Officer shall be deemed to have resigned, effective immediately upon the termination of membership in the Club, without need for written notice or acceptance.

SECTION 5.5. VACANCIES. A vacancy in any office because of death, resignation, removal, disqualification or for any other cause may be filled for the remainder of the term by the Board of Directors in the manner prescribed in this Article for regular appointments to such office.

SECTION 5.6. DUTIES OF OFFICERS.

Paragraph A. President. The President shall be elected by the Board from among its members. The President shall be the Chief Executive Officer of the Club and, subject to the control of the Board, shall have general supervision, direction and control of the affairs and Officers of the Club. The President shall preside at all meetings of the Board, and shall have the general powers and duties of management, usually vested in the

office of President of a corporation, along with such other powers and duties as may be prescribed by the Board or these Bylaws.

Paragraph B. Vice-President. Vice-Presidents shall be elected by the Board, but only an Executive Vice-President need be a Director. In the absence or disability of the President, the Vice-President (or the Executive Vice-President, if there is one) shall perform all the duties of the President, and when so acting shall have all the powers of and be subject to all the restrictions applicable to the President. The Vice-President(s) shall have such other powers and perform such other duties as may be prescribed from time to time by the Board or these Bylaws.

Paragraph C. Secretary. The Secretary shall be elected by the Board, but need not be a Director. The Secretary shall keep or cause to be kept, at the principal office of the Club or such other place as the Board may order, a book of minutes of all meetings of Directors and Members, including the time and place of holding, whether regular or special and, if special, how authorized, the notice thereof given, the names of those present at Directors' meetings, the number of Members and votes present in person or by proxy at Members' meetings, the proceedings of all such meetings and other relevant matters.

The Secretary shall keep appropriate current records showing all Members of the Club and their addresses, and shall

give notice of all the meetings of the Members and of the Board as required by these Bylaws or by law.

The Secretary shall keep the Seal of the Club in safe custody and shall have such other powers and perform such other duties as may be prescribed by the Board or these Bylaws.

Paragraph D. Chief Financial Officer. The Chief Financial Officer shall be elected by the Board, but need not be a Director. The Chief Financial Officer shall keep and maintain adequate and correct accounts of the properties and business transactions of the Club, including accounts of its assets, liabilities, receipts, disbursements, gains, losses, capital and surplus. The books of account at all reasonable times shall be open to inspection by any Director. The Chief Financial Officer shall deposit all money and other valuables in the name and to the credit of the Club with such depositories as may be designated by the Board. The Chief Financial Officer shall disburse funds of the Club as may be ordered by the Board and shall render to the President and to the Board, whenever they request it, an account of all of his transactions as Chief Financial Officer and of the financial condition of the Club. The Chief Financial Officer shall have such other powers and perform such other duties as may be prescribed by the Board or these Bylaws.

ARTICLE 6. MEMBERSHIP COMMITTEE. A Membership Committee, having the powers and authority as provided in Paragraph B

of Section 2.7, above, and in the Club Regulations, but subject to Article 8, below, shall be appointed. It shall have at least three members, all of whom must be Voting Members of the Club and appointed by the affirmative vote of at least a majority of the authorized number of Directors.

ARTICLE 7. THE CLUB BUDGET; DUES AND CHARGES. For so long as the provisions of Article 8, below, shall be in effect, the Club Facilities may be owned and operated by FFL, and FFL's budget for the operation of such facilities, the Club budget and all dues and charges will be determined, levied and paid pursuant to that Article. During such period, the following provisions shall apply only to the extent they are not inconsistent with that Article.

SECTION 7.1. CLUB OPERATING FUND. There shall be a Club operating fund, into which shall be deposited all amounts paid to the Club as:

(a) Regular fees,

(b) Regular dues,

(c) Special or additional dues,

(d) Miscellaneous fees and charges, or

(e) Income attributable to the operating fund,

and from which the Club shall make disbursements in performing the functions for which the foregoing dues are charged.

SECTION 7.2. CLUB DUES.

Paragraph A. Budget. At least sixty (60) days prior to the Opening Date, the Board of Directors shall determine the estimated budget of the Club for the balance of the accounting year, including any operating reserves and funds for capital improvements. The Board shall subtract from its budget estimate any amount then in the operating fund plus an amount equal to estimated income receivable in the balance of the accounting year. Any sum then remaining shall be the estimated gross dues requirement and, if approved by the Board of Directors, shall be the total regular Club dues for the period in question.

Each year thereafter, at least sixty (60) days prior to the beginning of the upcoming accounting year, the Board shall determine its estimated budget for the period, as provided above, and shall subtract therefrom an amount equal to the anticipated balance (exclusive of any reserves) in the operating fund at the end of the prior accounting year, and an amount equal to estimated income receivable in the coming accounting year. Any sum then remaining shall be the estimated gross dues requirement and, if approved by the Board of Directors, shall be the total regular Club dues for the accounting year in question.

Paragraph B. .Regular Dues. When the Board of Directors shall have made the estimates and determinations required by Paragraph A above, total regular Club dues shall be allocated and charged as follows:

(1) Allocation. The total regular Club dues for the period in question shall be divided by the total number of memberships then outstanding; provided, that the Board may allocate total dues in such a manner as to charge Membership classes different amounts of dues. The resulting sum(s) for each class shall be the share(s) which shall be allocated to each Member by class for such period.

(2) Notice. A Notice of Dues, showing the total regular Club dues and the Member's share and stating the amount and number of equal payments required to pay such share, shall be given in writing to each Member at least thirty (30) days before the first such payment is due. Regular dues shall be payable monthly (or may be paid annually, semi-annually or quarterly pursuant to Club Regulations) in advance. After the Opening Date, the month in which a membership is issued or terminated (as determined by the Secretary's certification thereof) shall count as a full month for purposes of dues, but no dues shall be charged for months prior to such issuance or after such termination.

Paragraph C. Additional Dues. If at any time during any accounting year the approved regular dues requirement shall appear to be inadequate for any reason (including nonpayment of any Member's share thereof), the Board shall determine and charge additional dues in the amount of such actual or estimated inade-

quacy, which amount shall be charged to the Members individually in the manner set forth in Paragraph B, above, and shall be payable to the Club in a lump sum upon a specified date, or in such other manner as the Board may designate.

SECTION 7.3. CHARGES. After the Opening Date, the Board of Directors or its designated representative shall determine from time to time the separate charges which the Club may make for individual services and for playing privileges. Such charges shall be published in the form of menus, fee tables and price lists supplied to the Members or posted in the clubhouse of the Club, or both. In addition, the Board of Directors or its designated representative may establish minimum required expenditures by Members for Club goods or services.

SECTION 7.4. REIMBURSEMENT AND ENFORCEMENT.

Paragraph A. Reimbursement Charge. The Board shall levy a reimbursement charge against every Member whose failure to comply with the Club's Articles, Bylaws or Club Regulations shall cause the expenditure of funds by the Club in performance of its functions. Such charges shall be limited to the amount so expended, plus interest at the maximum rate then permissible under California law from the date expended by the Club until paid, and shall be due and payable to the Club when levied.

Paragraph B. Enforcement of Fees. Each amount charged hereunder as dues, or as an additional fee or charge (including

charges incurred by Family or guests of a Member) for use of the Club Facilities, shall be a separate, distinct, and personal debt and obligation of the Member against whom the same is charged. In the event of a default in payment of any fees, the Club shall enforce each such obligation by such means as are provided in these Bylaws or as the Board may determine.

ARTICLE 8. THE OPERATING AGREEMENT. FFL will be the owner and operator of the Club Facilities which will be used by the Club. Pursuant to the Operating Agreement between FFL and the Club, FFL will, upon exercise of the option contained therein, transfer all of the Club Facilities to the Club. Until purchase of the Club Facilities from FFL, many of the matters with which these Bylaws are concerned shall be governed by the provisions of the Operating Agreement, which for that purpose is incorporated herein by this reference as though set forth in full herein.

ARTICLE 9. INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS.

SECTION 9.1. Definitions. For the purpose of this Article:

"Agent" means any person who is or was a Director, Officer, employee, or other agent of this Club, or is or was serving at the request of this Club as a Director, Officer, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprise;

"Proceeding" means any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative or investigative; and

"Expenses" includes, without limitation, all attorneys' fees, costs, and any other expenses incurred in the defense of any claims or proceedings against an Agent by reason of his position or relationship as Agent and all attorneys' fees, costs, and other expenses incurred in establishing a right to indemnification under this Article.

SECTION 9.2. SUCCESSFUL DEFENSE BY AGENT. To the extent that an Agent of the Club has been successful on the merits in the defense of any proceeding referred to in this Article, or in the defense of any claim, issue, or matter therein, the Agent shall be indemnified against expenses actually and reasonably incurred by the Agent in connection with the claim. If an Agent either settles any such claim or sustains a judgment rendered against him, then the provisions of Sections 9.3 through 9.5 of this Article shall determine whether the agent is entitled to indemnification.

SECTION 9.3. ACTIONS BROUGHT BY PERSONS OTHER THAN THE CLUB. Subject to the required findings to be made pursuant to Section 9.5 below, the Club shall indemnify any person who was or is a party, or is threatened to be made a party, to any proceeding (other than an action brought by, or on behalf of, the Club,

or in an action brought on the grounds that such person was or is engaging in self-dealing within the meaning of California Corporations Code Section 5233 or by an Officer, Governor or person granted relator status by the Attorney General, or by the Attorney General for any breach of duty relating to assets held in charitable trust), by reason of the fact that such person is or was an agent of the Club, against expenses, judgments, fines, settlements and other amounts actually and reasonably incurred in connection with the proceeding.

SECTION 9.4. ACTION BROUGHT BY OR ON BEHALF OF THE CLUB.

Paragraph A. Claims Settled Out of Court. If any agent settles or otherwise disposes of a threatened or pending action brought by or on behalf of the Club, with or without approval, the agent shall receive no indemnification for either amounts paid pursuant to the terms of the settlement or other disposition or for any expenses incurred in defending against the proceeding.

Paragraph B. Claims and Suits Awarded Against Agent. The Club shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action brought by or on behalf of the Club or in an action brought on the grounds that such person was or is engaging in self-dealing within the meaning of California Corporations Code Section 5233, or brought by the Attorney General or a person

granted relator status by the Attorney General for breach of duty relating to assets held in charitable trust, to procure a judgment in the Club's favor, by reason of the fact that the person is or was an Agent of the Club, against expenses actually and reasonably incurred by such person in connection with the defense or settlement of that action, provided that both of the following are met:

(1) The determination of good faith conduct required by Section 9.5 of this Article below must be made in the manner provided for in that Section; and

(2) Upon application, the court in which the action was brought must determine that, in view of all of the circumstances of the case, the Agent should be entitled to indemnity for the expenses incurred. If the agent is found to be so entitled, the court shall determine the appropriate amount of expenses to be reimbursed.

SECTION 9.5. DETERMINATION OF AGENT'S GOOD FAITH CONDUCT. The indemnification granted to an Agent in Sections 9.3 and 9.4 of this Article above is conditioned on the following:

(1) Required standard of conduct. The Agent seeking reimbursement must be found, in the manner provided below, to have acted in good faith, in a manner he or she believed to be in the best interest of the Club, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like

position would use in similar circumstances. The termination of any proceeding by judgment, order, settlement, conviction, or on a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person did not act in good faith or in a manner which he reasonably believed to be in the best interest of the Club or that he or she had reasonable cause to believe that his or her conduct was unlawful. In the case of a criminal proceeding, the person must have had no reasonable cause to believe that his or her conduct was unlawful.

(2) Manner of determination of good faith conduct. The determination that the Agent acted with the required standard of conduct shall be made by:

(i) the Board by a majority vote of a quorum consisting of Directors who are not parties to the proceeding; or

(ii) the affirmative vote or written ballot of a majority of the votes of the Voting Members represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum), with the persons to be indemnified not being entitled to vote thereon; or

(iii) the court in which the proceeding is or was pending. Such determination may be made on application brought by the Club or the Agent or the attorney or other person rendering services in connection with the defense, whether or not the

application by the Agent, attorney or other person is opposed by the Club.

SECTION 9.6. LIMITATIONS. No indemnification or advance shall be made under this Article, except as provided in Section 9.2, in any circumstance when it appears:

(1) that the indemnification or advance would be inconsistent with a provision of the Articles, a resolution of the Voting Members, or an agreement in effect at the time of the accrual of the alleged cause of action asserted in the proceeding in which the expenses were incurred or other amounts were paid, which prohibits or otherwise limits indemnification; or

(2) that the indemnification would be inconsistent with any condition expressly imposed by a court in approving a settlement.

SECTION 9.7. ADVANCE OF EXPENSES. Expenses incurred in defending any proceeding may be advanced by the Club prior to the final disposition of the proceeding upon receipt of an undertaking by or on behalf of the Agent to repay the amount of the advance unless it is determined ultimately that the Agent is entitled to be indemnified as authorized in this Article.

SECTION 9.8. CONTRACTUAL RIGHTS OF NONDIRECTORS AND NONOFFICERS. Nothing contained in this Article shall affect any right to indemnification to which persons other than Directors and Officers of this Club, or any subsidiary hereof, may be entitled by contract or otherwise.

SECTION 9.9. INSURANCE. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any Agent of the Club against any liability asserted against or incurred by the Agent in such capacity or arising out of the Agent's status as such, whether or not the Club would have the power to indemnify the Agent against that liability under the provisions of this Article.

ARTICLE 10. MISCELLANEOUS.

SECTION 10.1. MANAGER. The Board of Directors may employ the services of a Manager or Managers to manage the affairs of the Club and, to the extent not inconsistent with the laws of the State of California, the Board may delegate to such person or persons any of its powers and duties under and pursuant to the Articles and these Bylaws.

SECTION 10.2. BOOKS AND RECORDS.

Paragraph A. Keeping Records. The Board of Directors shall cause to be maintained, adequate and correct records of account and minutes of the proceedings of its Members, Board and committees of the Board. The Club shall also keep a record of its Members giving their names and addresses. The minutes shall be kept in written form. Books and records shall be kept in either written form or in any other form capable of being converted into written form.

Paragraph B. Inspection of Corporate Records. The Club's records and books of account shall be open to inspection on the written demand of any Member, at any reasonable time during usual business hours, for a purpose reasonably related to the Member's interests as a Member. The inspection may be made in person or by an agent or attorney, and shall include the right to copy and make extracts.

Each Director shall have the absolute right at any reasonable time to inspect all books, records and documents of the Club and the physical properties owned or controlled by the Club. The right of inspection by a Director includes the right to make extracts and copies of documents.

Paragraph C. Annual Report. The Club shall notify each Member yearly of the Member's right to receive a financial report pursuant to California Nonprofit Mutual Benefit Corporation Law Section 8321(a). Except for any year in which the Club receives less than Ten Thousand Dollars ($10,0000) in gross revenues or receipts, on the written request of a Member, the Board shall promptly cause the most recent annual report to be sent to the requesting Member. The annual report shall be prepared no later than 120 days after the close of the Club's Accounting Year. The annual report shall contain in appropriate detail the following:

(1) A balance sheet as of the end of such Accounting Year and an income statement and statement of changes in financial position for such Accounting Year;

(2) A statement of the place where the names and addresses of the current Members are located; and

(3) Information concerning any transactions and indemnifications as required by California Nonprofit Mutual Benefit Law Section 8322, if such transaction or indemnification took place. The annual report shall be accompanied by any report thereon of independent accountants or, if there is not such a report, the certificate of any authorized Officer of the Club that such statements were prepared without audit from the books and records of the Club.

Paragraph D. Annual Statement of Certain Transactions and Indemnifications. The Club shall furnish annually to its Members, within 120 days after the close of the Club's Accounting Year, a statement of any transaction or indemnification described in California Nonprofit Mutual Benefit Corporation Law Sections 8322(d) and (e), if such transaction or indemnification took place. Such annual statement also shall be affixed to and sent with the notice of each Member's right to receive an annual report described in Paragraph C of this Section.

SECTION 10.3. CORPORATE SEAL. The Club shall have a Seal, circular in form, having within its circumference the words

"Fairbanks Ranch Country Club, Inc., incorporated February 11, 1983, State of California". The Secretary shall have custody of the Seal and shall affix it in all appropriate cases to all Club documents or instruments. Failure to affix the Seal shall not, however, affect the validity of any document or instrument.

SECTION 10.4. SALE OF ASSETS. Notwithstanding anything to the contrary in these Bylaws, but subject to any more stringent requirement of the Nonprofit Mutual Benefit Corporation Law of the State of California applicable from time to time, the Board shall not wind up or dissolve the Club or sell all or substantially all of its assets, nor shall this Section be amended, except upon the vote or written consent of Voting Members representing fifty percent or more of the total voting power of the Club.

SECTION 10.5. AMENDMENT OF BYLAWS. These Bylaws may be amended or repealed by the Voting Members by the affirmative vote of a majority of the total votes cast in person or by proxy at an election or meeting of Members, duly called for the purpose according to the Club's Articles and Bylaws, or by the Board by the affirmative vote of two-thirds of the authorized number of Directors; provided, however, that Article 2 (except Section 2.1 and Paragraph H of Section 2.9, thereof), Section 3.1 of Article 3, Sections 4.1 and 4.2 of Article 4, unless expressly provided otherwise (for example, in Paragraph E of Section 4.2),

shall not be amended or repealed without the affirmative vote or written consent of Members holding not less than three-fourths of the total voting power of the Club. Section 2.1, Paragraph H of Section 2.9 of Article 2 and Article 8 shall not be amended or repealed. This Section 10.5 may not be amended or repealed with respect to Section 2.1, Paragraph H of Section 2.9 of Article 2 or Article 8, nor may this Section 10.5 be amended or repealed with respect to any other provision of these Bylaws mentioned herein, except upon the vote of Members holding not less than the same percentage of the total voting power of the Club as would be required to amend such other provision pursuant to the terms of this Section 10.5.

SECTION 10.6. NOTICES. Any notice or other document relating to or required by the Club's Articles or Bylaws or by the Club Regulations shall be in writing and may be delivered either personally or by first-class mail, postage prepaid. If delivered by first-class mail such document shall be deemed to have been delivered seventy-two hours after it has been deposited in the United States mail, postage prepaid, addressed to the Club or the Board of Directors at the street address or P.O. Box number of the clubhouse which is part of the Club Facilities, or to a Director or Member at the last address of such Director or Member in the records of the Secretary of the Club.

SECTION 10.7. CONSENT TO WAIVER OF NOTICE. Transactions at any meeting of the Members or of the Board, at which a quorum is present, however called or noticed, shall be as valid as though had at a meeting duly held after regular call and notice; provided, that, either before or after the meeting, each Voting Member not present in person or by proxy at a meeting of the Members, or each Director not present at a meeting of the Board, shall sign (a) a written waiver of notice, or (b) a consent to the holding of such meeting, or (c) an approval of the minutes thereof. All such waivers, consents and approvals shall be filed with the records of the Club and made a part of the minutes of the meeting.

SECTION 10.8. GENDER. For clarity and convenience only, masculine pronouns will be used thoughout, except where the antecedent can only be feminine, and shall be deemed to include the feminine wherever appropriate.

ATTACHMENT G

(R-82-909 REV.)

RESOLUTION NUMBER R- 256124

Adopted on MAR 30 1982

WHEREAS, the Planning Commission of The City of San Diego held a public hearing on November 19, 1981 and December 3, 1981, to consider the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB; and

WHEREAS, the Planning Commission approved and recommended to the City Council adoption of the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB; and

WHEREAS, City Council Policy 600-7 requires that public hearings to consider revisions of the PROGRESS GUIDE AND GENERAL PLAN FOR THE CITY OF SAN DIEGO shall be scheduled concurrently with all public hearings on proposed community plans; and

WHEREAS, the Planning Commission of The City of San Diego has held concurrent public hearings to consider the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB and amendment of the GENERAL PLAN in order to retain consistency between said plans; and

WHEREAS, on December 3, 1981, the Planning Commission approved and recommended for adoption by the City Council an amended GENERAL PLAN; and

WHEREAS, California Government Code, Section 65869 provides that mandatory elements of the GENERAL PLAN may not be amended more than three times per years; and

WHEREAS, it is the intention of the City Council to consider amendments to the PROGRESS GUIDE AND GENERAL PLAN FOR THE CITY OF SAN DIEGO at hearings conducted on a semi-annual basis; and

WHEREAS, the Council of The City of San Diego held a public hearing to consider the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB; and

WHEREAS, the Council of The City of San Diego, by majority vote, approved the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB; NOW, THEREFORE,

BE IT RESOLVED, by the Council of The City of San Diego, as follows:

1. That this Council hereby approves the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB, a copy of which is on file in the office of the City Clerk as Document No. RR-256124 .

2. That the SPECIFIC PLAN FOR FAIRBANKS COUNTRY CLUB shall become effective upon adoption of an appropriate amendment to the PROGRESS GUIDE AND GENERAL PLAN FOR THE CITY OF SAN DIEGO incorporating said plan.

APPROVED: John W. Witt, City Attorney

By _____
Frederick C. Conrad
Chief Deputy City Attorney

FCC:clh:630
12/7/81
Revised 3/30/82
Or.Dept:Plan.
R-82-909
ps

01691

R-256124

Passed and adopted by the Council of The City of San Diego on MAR 30 1982, by the following vote:

Councilmen	Yeas	Nays	Not Present	Ineligible
Bill Mitchell	☐	☑	☐	☐
Bill Cleator	☑	☐	☐	☐
Susan Golding	☑	☐	☐	☐
Leon L. Williams	☑	☐	☐	☐
Ed Struiksma	☑	☐	☐	☐
Mike Gotch	☐	☑	☐	☐
Dick Murphy	☑	☐	☐	☐
Lucy Killea	☐	☑	☐	☐
Mayor Pete Wilson	☐	☐	☑	☐

AUTHENTICATED BY:

PETE WILSON,
Mayor of The City of San Diego, California.

(Seal)

CHARLES G. ABDELNOUR,
City Clerk of The City of San Diego, California.

By June A. Blackwell, Deputy.

Office of the City Clerk, San Diego, California

Resolution Number R-256124 Adopted MAR 30 1982

CC-1276 (REV. 1-82)

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