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**MEMORANDUM OF LAW**

**DATE:** April 5, 2005

**TO:** Will Griffith, Director, Real Estate Assets Department

**FROM:** City Attorney

**SUBJECT:** Men's Lounge at the Fairbanks Ranch Country Club

**QUESTION PRESENTED**

Whether the operation of a male-only restaurant and bar at the Fairbanks Ranch Country Club [FRCC] violates the terms of the lease between the City and FRCC?

**SHORT ANSWER**

Yes. After reviewing the terms of the lease and inspecting the facility, it is our opinion that operation of a male-only restaurant and bar is a violation of the lease.

**BACKGROUND**

The City and Watt Industries/San Diego, Inc., entered into a ground lease dated December 20, 1982, for approximately 373 acres next to the San Dieguito River in Fairbanks Ranch [the Property], for the purpose of constructing, operating and maintaining a country club and 27-hole golf course [the Lease]. The Lease was assigned by Watt Industries to FRCC in January, 1986. FRCC built a golf course and clubhouse on the Property and has operated the country club since the facilities were built. The term of the Lease expires on September 26, 2044.

In March 2004, FRCC remodeled its facilities. In conjunction with your request for a legal opinion, Deputy City Attorney Sharon Matthews and I attended a site visit of the newly remodeled facilities on November 18, 2004, with Jack Farris, Deputy Director of READ, Craig Gibson, Supervising Property Agent, and Carol Young, Property Agent. At the Property, we met with Sam Blick and Jackie Richey, FRCC Board Directors, and Steve Wittert, FRCC General Manager and Chief Operating Officer. They accompanied us on a tour of the facilities and answered questions.

The remodeled clubhouse includes a full service restaurant where both men and women can eat [the Mixed Grill], a women's card room, and a full service restaurant and bar adjacent to the men's locker room that is open to men only [the Men's Lounge]. The Men's Lounge and Mixed Grill are separated by the kitchen, with opaque swinging doors separating the Men's Lounge from the Mixed Grill. As you enter the Men's Lounge, the doors to the men's restrooms and locker rooms are on the right, and the bar and dining area are on the left. Picture windows separate the Men's Lounge and the Mixed Grill from the golf course. The Men's Lounge has a full bar area with bar stools, dining tables with comfortable chairs, and game tables. Only male employees are permitted to serve the patrons of the Men's Lounge.

The women's card room is immediately adjacent to the Mixed Grill and has doors that can be closed but were open during our inspection. The women's card room has regular dining tables and service. It looks like and is used as an additional dining area for the Mixed Grill during functions such as the weekly Saturday night steak house dinners and other events. We observed male employees serving women seated in the card room.

The women's locker room includes a small area with a couch, coffee table, television, and telephone. According to FRCC, women can use the telephone to order food from the Mixed Grill and have it delivered to this lounge. There is no dining table, dining area or bar in this lounge area.

## ANALYSIS

The Lease contains a nondiscrimination provision at section IV(B)(12) [the Nondiscrimination Clause]. It provides:

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

This provision is an enforceable term of the City's Lease, agreed to by FRCC. *See Alioto's Fish Company, Ltd. v. Human Rights Commission of San Francisco*, 120 Cal. App. 3d 594, 609 (1981), cert. den., 455 U.S. 944 (1982).

On its face, the operation of a restaurant and bar that is accessible to men only violates the Lease's Nondiscrimination Clause. Currently, service is provided in the Men's Lounge on the basis of sex, and employment as a waiter or bartender in the Men's Lounge is determined on the basis of sex. The Nondiscrimination Clause clearly provides for the facilities to be operated in a nondiscriminatory manner, regardless of the patron's or employee's sex.

FRCC offers several arguments justifying their segregated dining facility. FRCC claims that the Men's Lounge is part of the men's bathroom and locker facilities, and as such, needs to

be separate to protect the privacy of the men using those facilities. According to FRCC, men move between the locker room and the Men's Lounge in various states of dress. If women were permitted into the Men's Lounge, men would not be free to relax in the Lounge before cleaning up or when partially dressed.

The right to privacy argument is a convincing one for separate bathroom and shower facilities, but not for separate dining facilities. *See, e.g.*, Steven B. Arbuss, Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. Rev. 443, 462 n. 98 (1983) (some sex segregated facilities, such as bathrooms and showers, are appropriate for protecting privacy), cross-referencing *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) and *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), cert. den., 376 U.S. 939 (1964). In our society, confining areas for bathrooms, showers, and changing clothes to one gender or the other is a reasonable measure to protect the individual's right to privacy. *Id.*

The Men's Lounge is not, however, a bathroom or even part of the bathrooms. It is a full service restaurant and bar that has been located immediately adjacent to the men's facilities. We have not located any cases or law supporting a gender-specific justification for a restaurant or bar.

Further, FRCC's justifications for single-sex dining areas exacerbate rather than resolve the issue of discrimination. For example, FRCC acknowledges that the Men's Lounge is different from the Mixed Grill in that the Mixed Grill has a dress code and the Men's Lounge does not. That means that women cannot, like men, have a beer at the bar immediately after a round of golf. The casual bar in the Men's Lounge is currently off limits to women.

Likewise, FRCC explains that its Club members were involved in and approved the current design and, with the exception of one member, prefer the separate dining accommodations. However, anti-discrimination laws, and the anti-discrimination provision of the Lease, are intended to protect the minority, even the silent minority, not the majority. There is no indication from FRCC that it sought the approval of female wait staff for their exclusion from the tips available in the Men's Lounge, but even if it had, such exclusion is discriminatory.

Similarly, there is no legal or factual basis for FRCC's position that separate but equal dining facilities are not discriminatory. The United States Supreme Court discredited the "separate but equal" doctrine many years ago. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 493 (1954). In *Brown*, the Court concluded that the operation of a "separate but equal" educational system was inherently unequal and denied equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. *Id.* at 495. The exclusion of women means that female waiters do not have the opportunity to work and earn tips in the Men's Lounge and female patrons cannot socialize with male patrons or guests in the Men's Lounge.

A tradition of discrimination, *i.e.*, the sentiment that this is how things have always been done, also does not justify continued discrimination. *See Marriage Cases*, 2005 WL 583129 (Cal. Super. Ct., Mar. 14, 2005) ("The state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional."). Moreover,

pursuant to section IV.C.(12) of the Lease, "Waiver," any failure by the City to require full compliance with any of the "covenants, conditions or agreements" of the Lease does not prevent the City from enforcing any of its provisions.

### CONCLUSION

FRCC's current exclusion of women, both members and employees, from the Men's Lounge is discriminatory and violates section IV(B)(12) of the Lease. This policy excludes female waiters from serving male patrons dining in the Men's Lounge, and prevents female patrons from joining their male guests and colleagues in the less formal drinking and dining area. The remedy, however, is simple: to comply with the terms of its agreement with the City, FRCC need only remove the signage and open the doors of the Men's Lounge to women, and permit female employees the same opportunities as their male counterparts to work in that area. Although the men's bathroom and shower facilities are immediately adjacent to the Men's Lounge, the doors to those areas can be closed. Screens could be added, if necessary, to further shield the view, as are often used in restaurants to screen the kitchen door from the dining room.

MICHAEL J. AGUIRRE, City Attorney

By

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