Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: March 24, 2014

TO: Jeff Sturak, Deputy Chief Operating Officer

FROM: City Attorney

SUBJECT: Legality of the Balboa Park Museums' Current "Free Tuesdays" Practice

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INTRODUCTION

Museums in Balboa Park ("Museums") are required by their leases with the City of San Diego ("City") to offer the public "no fees for general admission" on one day of each month. This once-a-month free admission day eventually occurred with regularity on Tuesdays, and the practice has since been known as "Free Tuesdays." In 2006, the City agreed to temporarily "suspend" the requirement, on the condition that free general admission be offered once a month to San Diego City and County residents (collectively, "San Diego residents") and active military members and their families.[1] This practice was memorialized through subsequent letter agreements; the most recent such agreement has now expired. It is our understanding that READ is preparing to bring the matter before the City Council for further direction, and that READ will recommend to formally amend the Museums' leases to continue the current Free Tuesdays practice and require free admission once a month for San Diego residents and active military members and their families. READ has asked this Office to confirm that there are no legal issues presented by requiring free admission for San Diego residents and active military and their families only, and not for the general public.

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[1] The suspension was apparently a result of concern expressed by the Museums that the Free Tuesdays were causing them financial hardship. *See* letter from James Waring, Deputy Chief Operating Officer-Land Use and Economic Development, to Michael Hager, dated April 14, 2006 ("Waring Letter"), at 1. The suspension was characterized in that letter as a temporary "test," and was not formally approved by the City Council or memorialized in a written lease amendment.

QUESTION PRESENTED

Is the Museums' current practice of extending Free Tuesdays (i.e., free admission) to only San Diego residents and active military members and their families supported by law?

SHORT ANSWER

A reviewing court would most likely find the current Free Tuesdays practice to be lawful, so long as the reasons for the practice are rationally and legitimately based.

ANALYSIS

I. A REVIEWING COURT WOULD LIKELY CONCLUDE THAT THE CURRENT FREE TUESDAYS PRACTICE COMPLIES WITH CALIFORNIA'S CIVIL RIGHTS LAW SO LONG AS IT IS SUPPORTED BY REASONABLE AND NON-PREJUDICIAL JUSTIFICATIONS

Because the current Free Tuesdays practice favors certain groups of people over others, it is necessary to analyze the law regarding disparate treatment based on group characteristics. The Unruh Civil Rights Act ("Unruh"), guarantees that:

> [a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. Cal. Civ. Code §51(b).[2]

The objective of Unruh is to prohibit businesses from engaging in arbitrary, unreasonable, or invidious discrimination. *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 794 (1983); *Pizarro v. Lamb's Players Theatre*, 135 Cal. App. 4th 1171, 1174 (2006); *Sunrise Country Club Ass'n v. Proud*, 190 Cal. App. 3d 377, 381 (1987). Unruh is designed to address concerns "not only with access to business establishments, but with equal treatment of patrons in all aspects of the business." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 29 (1985). Unruh therefore applies to businesses that discriminate by offering price discounts, because a price discount—or an entirely free admission—entails different treatment in a material aspect of business or accommodation. *Id*. To determine if a particular admission discount violates Unruh, a reviewing court would examine if the subject practice is arbitrarily based on a protected individual characteristic. *Starkman v. Mann Theatres Corp*., 227 Cal. App. 3d 1491, 1497 (1991).

[2] All further references are to California codes, unless specified otherwise.

A. Residency-Based Free Admission Practices Likely Are Lawful Under Unruh Because Residency Does Not Appear to Be a Protected Personal Trait and Differential Treatment Based on Residency has Been Found to be Supported by Legitimate Basis

Residency is not a characteristic expressly protected by Unruh. Unruh does, however, apply to characteristics not expressly listed in the statute, as identified by courts.[3] *Harris v. Capital Growth Investors XIV,* 52 Cal. 3d 1142 (1991) (superseded on other grounds by statute as stated in *Munson v. Del Taco, Inc*., 46 Cal. 4th 661 (2009)); *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 932 (2003). Other characteristics not expressly stated in the statute but held by courts to be protected under Unruh involve personal "traits, conditions, decisions, or choices *fundamental* to a person's *identity, beliefs and self-definition.*" *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 842–843 (2005) (emphasis added); *Semler v. General Electric Capital Corp*, 196 Cal. App. 4th 1380, 1394-96 (2011). These personal characteristics do not include distinctions based purely on economic status, like income level. *Harris*, 52 Cal. 3d at 1160.[4, 5] In addition, Unruh only targets discrimination based on "irrelevant differences" or "irrational stereotypes." *Koire*, 40 Cal. 3d at 34-35, 40; *Pizarro*, 135 Cal. App. 4th 1176.

Applying these principles to residency status, a strong argument can be made that residency is more a function of personal choice and economic ability: people largely live where they want, depending on their financial means or other personal considerations. Accordingly, residency would appear to differ from the foundational and intimate characteristics protected under Unruh; one does not choose, or have the ability to change, their national origin or genetic composition, but one generally can exercise discretion to live in a certain city or county. Therefore, a person's residency does not appear to entail the fundamental and innate personal characteristics protected by Unruh.

Other legal authority in California supports the conclusion that residency is not a protected characteristic under Unruh and that there could be a rational basis for treating people different based on residency. In *McClain v. City of South Pasadena*, the court found that limiting municipal swimming pool access exclusively to city residents did not violate the statutory predecessor to Unruh. 155 Cal. App. 2d 423 (1957). As stated by the court, "[a] regulation

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[3] The characteristics expressly articulated by Unruh are "illustrative rather than exhaustive. . . ." *Koire*, 40 Cal. 3d at 28. Also, Unruh "is to be given a liberal construction with a view to effectuating its purposes." *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 113 (1947).

[4] This is true even if a distinction based on economic status has a disparate impact on those with personal characteristics otherwise protected under the Act. *Id.* at 1174.

[5] Additionally, a reviewing court may find significance in the fact that the term 'residency' continues to not be expressly stated as a protected characteristic under Unruh. This is because there are numerous other provisions in California law that *expressly* prohibit treatment based on a person's residency, while the term 'residency' continues to be absent from the list of protected characteristics stated in Unruh. Using standard rules of statutory interpretation, a court may find that the use of the term 'residency' in some laws but not in others may reflect legislative intent that residency is in fact not protected by Unruh. This is especially persuasive since Unruh was enacted and has been repeatedly amended *after* other statutes have expressly prohibited discrimination based on residency, and *after* the *McClain* case (discussed *infra*) specifically excluded residency from civil rights protection.

making different provision for people residing outside a municipality from those residing in it is valid if the classification is based on a reasonable distinction. Such a regulation is not unconstitutional because it results in some practical inequality." *Id.* at 434. Specifically, the *McClain* court found that, among other things, local taxpayer support and the role of the publicly-supported facility in promoting the public welfare provided substantial and lawful rationale for the residency-based restriction. *Id.* at 436-37.[6] This was held to be especially true because the residency-based distinction applied equally to residents and to non-residents, irrespective of race, color, creed or other arbitrary, invidious basis. *Id.* at 437-38.[7] Other legal analysis, including an unpublished case[8] and a California Attorney General Opinion,[9] supports the holding in *McClain*.

Therefore, a lease amendment to memorialize the Museums' current Free Tuesdays practice would likely be found by a court to comply with Unruh so long as it is supported by reasonable and non-prejudicial justifications.

B. Military-Based Free Admission Practices Likely Are Lawful Under Unruh Because a Reviewing Court Would Likely Find That Society Has a Legitimate Interest in Supporting the Military

Courts applying Unruh to distinctions made based on occupational grounds have reached inconsistent results. While Unruh generally protects people based on lawful occupation (*Sisemore v. Master Fin., Inc.*,151 Cal. App. 4th 1386, 1405-06 (2007); *Long v. Valentino*, 216 Cal. App. 3d 1287, 1292–93, 1297 (1989)), one court has noted that the choice of a profession is "a professional and, frequently, an economic choice, rather than a personal characteristic of the type enumerated in [Unruh]." *Roth v. Rhodes,* 25 Cal. App. 4th 530, 539 (1994). A key distinction in the Unruh 'occupational status' cases is the legitimacy of the reason for treating

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[6] It must be noted, however, that the *McClain* court also found significant the fact that the municipal swimming pool had extremely limited capacity, and that a residency restriction was necessary for any meaningful access to the pool by local taxpayers. In addition, the *McClain* court described the municipal swimming pool as a public health and welfare *necessity*, and that therefore the local government was legally mandated to ensure access to the pool by local residents for local health and welfare. *McClain*, 155 Cal. App. 2d at 46-8. Because of the specific facts in *McClain*, it is unknown if a reviewing court would view the *McClain* holding as applicable to the Museums.

[7] "The key is that the discounts must be 'applicable alike to persons of every sex, color, race, [etc.]' ([Civil Code] § 51), instead of being contingent on some arbitrary, class-based generalization." *Koire*, 40 Cal. 3d at 36.

[8] At least one court has upheld residency-based admission practices similar to that practiced by the Museums. In that case, where a plaintiff challenged the reduced ticket prices offered by Disneyland to southern California residents, the court granted summary judgment to Disneyland on the allegation that the residency-based discount violated Unruh. *Simon v. Walt Disney World Co.*, 114 Cal. App. 4th 1162, 1166 (2004). The result in the *Simon* case therefore is consistent with the holding in *McClain*. However, the aspect of the case regarding the Unruh claim was unpublished, and is therefore not binding authority.

[9] California Attorney General Opinion No. SO 75-37 analyzed Government Code section 54091, which prohibits differing treatment at beaches and harbors based on residency. 58 Op. Cal. Att'y Gen. 652 (1975). Whereas there is statewide interest in ensuring full, open access for all state residents to all public beaches (thus making all local residency-based beach access restrictions unlawful), the Attorney General concluded that there is no similar statewide interest in full, open access for all state residents to inland facilities constructed by local governments with municipal funds. *Id.* at 658-59. The Attorney General Opinion indirectly suggests that residency in general is not a protected characteristic under California law.

people differently based on occupation. For example, denying a home loan on generally-available rates just because a person runs a home daycare is not supported by legitimate business rationale (*Sisemore*, 151 Cal. App. 4th 1386), whereas precluding a non-doctor from leasing a doctor's medical office building may be based on professional needs and legitimate considerations not based on prejudice (*Roth,* 25 Cal. App. 4th 530).

In addition, a reviewing court could conclude that the current Free Tuesdays practice incentivizes involvement in the military. This is consistent with other examples in society where institutions and programs promote military involvement, such as Junior ROTC programs in public schools. When reviewing disparate treatment based on otherwise-protected characteristics under Unruh, courts look to other social practices and legislative enactments for evidence of strong public policy supporting the disparate treatment. *Koire*, 40 Cal. 3d at 31; *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 742-43 (1982). Numerous other laws provide for such exceptional treatment for those in the military, often involving significant financial benefits such as favorable loan rates and tax exemptions;[10] one such law even codifies free admission to uniformed military personnel at state and county fairs. Food & Agric. Code § 3022.[11] These examples would support a finding by a reviewing court that public policy favors exceptional treatment for those in the military, and that the Museums' current Free Tuesdays practice is consistent with that policy.

C. Courts Applying Unruh to Admissions Practices at Cultural Institutions have Consistently Upheld Discounts That Serve to Increase Access, in Contrast to Those That Serve to Preclude Protected Groups

Courts applying Unruh to reduced admission practices at cultural and entertainment venues have consistently favored discounts that serve to increase access and participation, in contrast to those that serve as a total bar to certain groups. In contrast to outright bans from an establishment based on a protected characteristic,[12] simply giving a price break to one group (where there is a legitimate basis for favoring that group) while otherwise allowing everyone else access to an establishment has been repeatedly held to comply with Unruh:

> Establishing different price rates for seniors and children in an amusement business does not perpetuate irrational stereotypes. The pricing discounts are aimed directly at encouraging attendance at a family-oriented business. Such classifications recognize that

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[10] Laws favoring people based on military status include veterans' preferences in state civil service examinations (Gov't Code §§ 18971-18979); college tuition fee waivers for veterans and their dependents (Educ. Code § 66025.3); educational assistance to veterans and their dependents (Educ. Code §§ 66025.6, 66025.8; Mil. & Vet. Code §§ 890-899); disabled veterans' business enterprise opportunities (Pub. Cont. Code §§ 10115, 10115.15); waived or reduced fees for hunting and sport fishing licenses/permits for disabled veterans (Fish & Game Code §§ 3033, 3038, 7150, 7151); and property tax exemptions (Rev. & Tax. Code § 205.5).

[11] Review of all these statutes extending privileges to military members reveals there is no reported case law challenging these legislative enactments on grounds of unlawful discrimination or equal protection.

[12] *Sisemore*, 151 Cal. App. 4th at 1405-06; *Long v. Valentino*, 216 Cal. App. 3d at 1292–93, 1297 ("an announcement such as 'You can't eat in my diner because you are a lawyer, bricklayer, female, or Indian chief' would be actionable under the Unruh Act").

> without such incentives these populations may be totally excluded from enjoying some of the pleasures of our society. Paying for the necessities of life frequently strains the pocketbooks of many Americans. Without discount tickets, a family may never be able to afford and enjoy a baseball game, amusement parks, Disneyland, the zoo, *museums*, campgrounds, state fairs, parks or a movie. Making these American pastimes affordable is beneficial to us all.

Starkman, 227 Cal. App. 3d at 1499 (emphasis added).
Similarly, even giving a discount to "baby boomers" does not violate Unruh:

> Providing discounted theater admissions to "baby-boomers" to attend a musical about that generation does not perpetuate any irrational stereotypes. Rather, the discount acts to honor a generation of individuals who . . . have contributed to the economy and participated in and contributed to meaningful civic, cultural, educational, business and recreational activities.

Pizarro, 135 Cal. App. 4th at 1176.

Based on the reasoning in the above excerpts, a court would likely uphold the current Free Tuesdays as a valid reduced admission practice that encourages participation in worthwhile social activity. Rather than working as a blanket *exclusion* from admission of people who are not San Diego residents or active military, the current Free Tuesdays practice only gives San Diego residents and active military families a free admission.[13] This practice actually *promotes* increased attendance at museums, as opposed to precluding attendance by certain individuals.[14]

II. A REVIEWING COURT WOULD LIKELY CONCLUDE THAT THE CURRENT FREE TUESDAYS PRACTICE DOES NOT VIOLATE EQUAL PROTECTION LAWS SO LONG AS IT IS SUPPORTED BY REASONABLE AND NON-PREJUDICIAL JUSTIFICATIONS

The California[15] and U.S.[16] Constitutions ensure all people equal protection under the law, and state equal protection requirements are co-extensive with those guaranteed by U.S.

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[13] An argument could be made that a person who lacks the money to pay *any* admission is therefore entirely excluded from the Museums, whereas a similarly-situated military member with no money would still enjoy admission. However, this argument likely would fail because there is no general fundamental right to free admission at a for-charge place of public amusement. *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 364 (1907); *Rodic v. Thistledown Racing Club, Inc.*, 615 F. 2d 736, 740 (1980).

[14] The cases upholding admission discounts implicitly accept the fact that the benefits of disparate treatment are limited to just the privileged group, even though the same rationale for upholding the practices—increased participation in worthwhile activity—would suggest making the privileges apply more broadly to more people.

[15] Cal. Const., art. I, § 7.

[16] U.S. Const. amend. XIV; *City of Cleburne* v. *Cleburne Living Center,* 473 U.S. 432, 439 (1985).

Constitutional provisions.[17] At places of public accommodation, any practice which amounts to disparate treatment of people based on their general characteristics requires analysis to ensure equal protection is not violated. *Orloff*, 36 Cal. 2d at 739.

However, neither residency nor occupation (whether one is active military or not) are suspect or quasi-suspect classifications under equal protection laws.[18] Similarly, admission to places of public amusement or entertainment, like museums, is not a fundamental or vested right guaranteed by the State or U.S. Constitutions.[19] When differing treatment is based on classifications that are not inherently suspect and does not involve fundamental rights, equal protection is not violated as long as there is a rational basis justifying the treatment.[20] As the court in *McClain* held in rejecting an equal protection challenge to the resident-only restriction at a municipal swimming pool:

> Under either provision [of California or U.S. Constitutional equal protection laws,] the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be actually and palpably unreasonable and arbitrary. . . . 155 Cal. App. 2d at 433.

Therefore, a lease amendment to memorialize the Museums' current Free Tuesdays practice would likely be found by a court to comply with equal protection laws so long as it is supported by reasonable and non-prejudicial justifications.

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[17] 13 Cal. Jur. 3d *Constitutional Law* § 339 (2012); *Landau v. Superior Court*, 81 Cal. App. 4th 191 (1998).

[18] 42 U.S.C. §§ 2000a-2000c (not listing residency or occupation as characteristics protected by principal federal civil rights statute); *City of Cleburne,* 473 U.S. at 440. Regarding residency, various cases have upheld and entertained a rational basis for governmental action discriminating between residents and non-residents. *See Truax v. Raich*, 239 U.S. 33, 42 (1915) and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). Regarding occupation, economic classifications of people will be upheld unless the distinction is clearly unreasonable. *City of Cleburne,* 473 U.S. at 440. While certain law does prohibit discrimination based on "source of income," and income source is *related to* one's occupation, said law only applies to residential housing activities. Gov't Code §12955 (e); *Sisemore*, 151 Cal. App. 4th at 1409-10.

[19] *Western Turf Ass'n*, 204 U.S. at 364; *Rodic*, 615 F. 2d at 740.

[20] *Dandridge v. Williams,* 397 U.S. 471 (1970); *Abe v. Fish & Game Comm'n of Cal*., 9 Cal. App. 2d 300, 303-06 (1935); *McClain*, 155 Cal. App. 2d at 433, 444. "[W]hen classification is not inherently suspect and does not involve a fundamental right, [the] proper test to use in determining whether it violates [the] equal protection clause is the rational basis test." 5 McQuillin Mun. Corp. § 19:25 "*Discrimination—Nonresidents*" (3d ed. 1990).

CONCLUSION

So long as a reasonable and non-prejudicial basis exists for the practice, a reviewing court would likely find that the current Free Tuesdays practice of free admission for San Diego residents and active military members and their families is lawful. Therefore, staff's report to the City Council regarding amendment of the Museums' leases to memorialize the current Free Tuesdays practice should contain facts explaining the rational basis for the different treatment.

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By /s/_____
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cc: Andrea Tevlin, Independent Budget Analyst
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