

87100/12

March 12, 1980

Fred Caploe
Williams & Caploe
P.O. Box 70
Martinez, CA 94553

A 80-03-09H

Dear Mr. Caploe:

Thank you for your letter on behalf of Mr. Arthur R. Harvey, Jr., dated February 14, 1980, seeking advice regarding the disqualification provision of the Political Reform Act pursuant to Government Code Section 83114(b). The facts as I understand them are as follows. Mr. Harvey is the Senior Real Estate Administrator of the City of Pittsburg Redevelopment Agency. Mr. Harvey is interested in leasing property from the City that is located within its redevelopment area for the purpose of developing a restaurant, either individually or jointly with the Pittsburg Economic and Housing Development Corp. (a nonprofit organization). The question you have asked our office to consider is whether it would be a conflict of interest under the Act for Mr. Harvey to enter into such an arrangement with the City.

Government Code Section 87100 provides:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Government Code Section 87103 provides in part that:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

Fred Caploe
March 12, 1980
Page Two

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

. . .

The Political Reform Act restricts the governmental acts of a public official, not his or her private acts. It would not, therefore, be a violation of the Political Reform Act for Mr. Harvey to enter into any financial arrangements as a private individual.

Finally, I can only advise you concerning the provisions of the Political Reform Act, and you may want to determine yourself whether there are any problems created by other laws regarding conflicts of interest, such as Government Code Section 1090, et seq.

I hope that this letter is helpful. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Dwight E. Dickerson
Counsel
Legal Division

DED:plh

CHARLES J. WILLIAMS
A PROFESSIONAL CORPORATION
FRED CAPLOE
A PROFESSIONAL CORPORATION

LAW OFFICES OF
WILLIAMS & CAPLOE
ATTORNEYS AT LAW
917 LAS JUNTAS STREET
P. O. BOX 70
MARTINEZ, CALIFORNIA 94553

F P P C
FEB 15 1 08 PM '80
TELEPHONE
916 228-8840

February 14, 1980

Fair Political Practices Commission
1100 "K" Street, Second Floor
Sacramento, CA 95814

Re: Request for Legal Opinion Under Political Reform Act of 1974

Dear Sirs:

We represent Arthur R. Harvey, Jr., Senior Real Estate Administrator of the Redevelopment Agency of the City of Pittsburg, California. At his request, we prepared a legal opinion on the question of Mr. Harvey's potential conflict of interest with reference to a proposed lease by him of property owned by the City of Pittsburg. A copy of our opinion dated January 29, 1980, is enclosed. We also enclose a copy of Mr. Harvey's letter of February 7, 1980, to the Pittsburg City Manager.

On January 17, 1980, when Mr. Harvey first contacted me, I called your office and discussed the question in general terms with Mr. Dwight Dickerson of your legal staff. He was very helpful and took the time to respond as best he could at that time. Among other things, he suggested Mr. Harvey write your office requestings its opinion on his situation. This letter sets forth Mr. Harvey's specific request for such an opinion. Mr. Dickerson advised that, as far as he knew, the FPPC had not issued any such opinions.

If we can be of any further assistance, please advise. Thank you in advance for your courtesy and cooperation.

Sincerely,

Fred Caploe
Fred Caploe (dk)

FC/dkh

Enclosures

cc: Arthur R. Harvey, Jr.
John Shaw, Pittsburg City Attorney

February 7, 1980
954 Fallen Leaf Way
Pittsburg, CA 94565

S. Anthony Donato
City Manager
City of Pittsburg
2020 Railroad Avenue
Pittsburg, CA 94565

Re: Relocation of Brent's Bar and Restaurant to
Marina Coffee Shop Site

Dear Mr. Donato:

As you know, I have entered into an agreement to purchase Bill Brent's business with the intent to reestablish said business in the Marina through P.E.H.D.C.

My position of Real Estate Administrator for the Redevelopment Agency and City work immediately raised the question of possible conflict of interest.


Therefore, on the advice of the City Attorney, John Shaw, I retained the law firm of Williams and Caploe to research and write a legal opinion.

I enclose a copy of said opinion and transmittal letter for the City's files and public record and have forwarded a copy to Mr. Shaw and P.E.H.D.C. respectively.

It appears that I can own and operate a business on public property so long as I follow the advice set forth in the opinion.

I will be pleased to discuss this matter further at your convenience.

Sincerely,


A. R. HARVEY, JR.

enclosure
cc: City Attorney
R. Beyer, P.E.H.D.C.
✓ Williams and Caploe
D. Piantanida

CHARLES J. WILLIAMS
A PROFESSIONAL CORPORATION
FRED CAPLOE
A PROFESSIONAL CORPORATION

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917 LAS JUNTAS STREET
P. O. BOX 70
MARTINEZ, CALIFORNIA 94553

TELEPHONE
(415) 228-2840

January 29, 1980

Arthur R. Harvey, Jr.
c/o City Hall
65 Civic Drive
Pittsburg, CA 94565

Re: Legal Opinion: Potential Conflict of Interest - Proposed
Lease for City of Pittsburg Marina Restaurant Site

Dear Rob:

You have requested our legal opinion on the following
general question:

Would you, a full-time Senior Real Estate Administrator
of the Redevelopment Agency ("Agency") of the City of
Pittsburg ("City"), who also performs some non-Agency
related work for the City, have any conflict of interest
if you, in your private capacity, were to lease or
sub-lease property owned by the City for purposes of
owning and operating a private restaurant?

CONCLUSION

We believe that the question can be answered in the
negative but only so long as you conform with the recommenda-
tions made and that both the City and the Agency act favorably
in connection with your requests. Once this has been
accomplished and if the lease is entered into, you must
constantly be aware of the possibility of potential conflict
and must make every effort while in the employ of the City
and the Agency to avoid any possibility that a violation of
any of the statutes hereafter referred to might occur.

FACTS SURROUNDING EMPLOYMENT

Our legal opinion set forth herein is based upon the
following facts which you have related to us.

Arthur R. Harvey, Jr.
January 29, 1980
Page 2.

From approximately 1973 up to and including the present, you have been employed full-time by the Agency of the City with the job title of Senior Real Estate Administrator. No written job description, per se, has ever existed for your position. However, with the exceptions hereafter noted, you have performed and now do perform the duties set forth in the written job description of "Real Estate Administrator", attached hereto as Exhibit 1.

Organizationally, your position is as set forth in red on "City of Pittsburg Organizational Chart", attached as Exhibit 2. As noted in Exhibit 2, the City Council is also the Agency Board and the City Manager is the Executive Director of the Agency. The City Attorney is also General Counsel of the Agency. Organizationally, the Agency is one of four divisions of the Community Development Department of the City. That division is headed by Anthony Aiello. Mr. Aiello is Director of both the Redevelopment Agency and the City Housing Authority. He is your immediate superior. The only other Redevelopment/Housing Division employee is the Real Estate Administrator who is junior to you and whose job description is set forth in Exhibit 1.

As to your specific duties, they include all of those set forth in Exhibit 1 except those relating to the Pittsburg Housing Authority. Additionally, since 1973, you have spent, from time to time, in the range of up to 20-25% of your work-time doing work for the City unrelated to the Agency. The amount of time has varied in any given year from almost no City work to never more than 20-25% devoted to such work.

The City work has consisted in the main of the following matters: (1) Supervision of appraisal, negotiation and acquisition, and some negotiation by you, of rights-of-way within assessment districts established by the City Council. This work was mainly done from 1973-1975 with limited clean-up detail still remaining. (2) From 1974-1975, when the City was forming the Marina Expansion Project, and its engineers were designing the Project for presentation to and approval by the State Department of Navigation and Ocean Development (DNOD), you performed certain work to ensure that the City would have clear title to land within the Project boundaries. The State of California imposed this requirement on the City as a condition to distribution by the State of DNOD funds for that Project. It is within this Marina Project that you would like to lease or sub-lease a restaurant site. The Agency still has

Arthur R. Harvey, Jr.
January 29, 1980
Page 3.

title to some land within the DNOD/Marina Project boundaries; and one of your assignments as Agency Senior Real Estate Administrator is to prepare property descriptions of such land and thereafter prepare and mail notices of public hearing of the Agency Board's intention to dedicate that land to the City at no cost. This work is relatively minor in terms of time. (3) In 1979, you did some work on City tax liabilities for property owned by it outside City boundaries; you compiled some data for the Housing Authority and for the City Building Department; and you have acted in general as the real estate resource man for the City doing such things as investigating title questions relating to park expansion, trades of lands within the sphere of the General Services Administration, and the like.

None of the foregoing City work has interfered or been inconsistent with your Agency work.

You have also explained that the Agency Board has advised you that it is in the process of establishing tax-increment financing of a new Agency project to assist it in repaying certain project start-up costs which are not covered by Agency budget funds and which the federal government will not approve. The City is advancing these start-up costs to the Agency as a loan. These loans will be repaid out of the contemplated tax-increment financing measures. The Agency has advised you that you will be performing certain as-yet undefined duties with respect to the establishment of these measures. It presently appears that these duties will involve essentially Agency work; and it is presently unclear as to how much of your time will be needed to perform these duties.

Turning now to the financial and other incidents of your employment, it is your understanding that, although you were hired as an Agency employee, you have all of the fringe benefits and privileges of any regular, full-time City employee within its civil service system, except that you may be terminated at any time without cause when the Agency budget no longer has funds for your position. Your research has not uncovered any City or Agency ordinances, resolutions, personnel rules, or the like specifying your rights, duties, or other employment conditions. (This opinion does not address the issue of your legal rights if the Agency purported to terminate you without cause, given the fact that you have performed and are performing City work as indicated. You have stated your belief that, in such event, you would be entitled to all of the rights of any regular, full-time City employee.) With

Arthur R. Harvey, Jr.
January 29, 1980
Page 4.

respect to discipline, you have indicated that, while you have had no experience with this area, Mr. Aiello would be the person imposing it as to Agency work, with ultimate approval or disapproval of his decisions by the Agency Executive Director, Mr. Donato (who is also the City Manager). It is apparently presently unclear how discipline might be imposed as to City work.

Your salary check is issued to you by the City Finance Department against City funds for all work you perform, whether Agency or City related. The check is signed by the Assistant City Manager. The City thereafter bills the Agency for the amount of such salary; and the Agency issues a check (signed by the Major, acting as Chairman of the Agency Board, and the City Manager, acting as Agency Executive Director) to the City out of Agency funds (i.e., Community Development Block Grants) approved by the federal government for its annual Agency budget as such funds are received. As we understand it, at budget time each year, the Agency staff works jointly with the City Community Development Department and indirectly with HUD on the succeeding year's budget. Once approved, funds are sent to the Agency staff for Agency purposes (such as reimbursement to the City for staff salaries); but the federal government regulations prohibit the Agency from having funds that will not be spent within a 3-day period. This requirement accounts for your salary check being issued by the City subject to later reimbursement by the Agency on receipt of funds from the federal government.

THE PROPOSED LEASE

You have stated your desire to acquire an interest in a piece of property in the Marina Expansion Project area originally acquired by the Agency but now owned by the City. You propose either to lease the subject property as a joint lessee with the Pittsburg Economic & Housing Development Corporation ("PEHDC") (a private, non-profit corporation); or to sub-lease it from the PEHDC.

There is no fixed form of lease for this site. However, attached as Exhibit 3 is a proposed form of lease on another site within the Marina Expansion Project. It has not been executed but is being negotiated. Your understanding is that the seven key points set forth on page 2 of the City Manager's cover letter of November 27, 1979, would be similar to your Proposed Lease.

Arthur R. Harvey, Jr.
January 29, 1980
Page 5.

Obviously we cannot give a firm opinion without the actual proposed lease; and must assume that the latter will be substantially similar to Exhibit 3. We also assume that your participation will not be affected by the rules and regulations of any federal or state agency which must approve the lease.

LEGAL ANALYSIS

The general question you raise involves an examination of four different statutes dealing with conflicts of interest: (1) Health and Safety Code Section 33130 [of the Community Redevelopment Law]; (2) Government Code Sections 1090, et seq.; (3) Government Code Sections 1125, et seq.; and (4) Government Code Sections 8100, et seq. [Political Reform Act of 1974].

An initial word is in order about what we have referred to as your partially hybrid employment situation. This opinion does not address that situation in any respect. We suggest nothing either way. Additionally, we express no opinion on the question of City ownership of lands within the Marina Expansion Project Area originally acquired by the Agency.

1. Community Redevelopment Law Conflicts Statute

We begin with this statute. It most specifically governs your employment situation. If it precluded the proposed lease, that is the final answer.

Section 33130 prohibits any Agency employee from [1] "acquiring any interest" in Agency property [2] "within a project area within the community" where such employee [3] "in the course of his duties is required [a] to participate in the formulation of or [b] to approve [i] plans or [ii] policies "for a project area." (Brackets and emphasis are added.) The remainder of the section is inapplicable. You are an agency employee within the meaning of this section.

As to bracket [1], the proposed lease is within the broad term "any interest" in any Agency property. Moreover, the purpose of section 33130 and the other statutes is to ensure that public officials and employees extend absolute loyalty to the best interests of their employer by removing the possibility of any direct or indirect personal influence that might bear on the employee's decision.

Arthur R. Harvey, Jr.
January 29, 1980
Page 6.

As to bracket [2], it appears that the proposed lease is "within a project area". That term is defined in Health and Safety Code Section 33320.1 in very general terms as a blighted area. Since the Agency originally acquired the property, it presumably must have been designated as a "blighted area".

However, it appears that the proposed lease is not proscribed by Section 33130 because, turning to bracket [3], nothing in the course of your Agency or City duties require you to participate in formulating redevelopment plans or policies. Starting with the simplest question first, you are not required to participate in approving such plans or policies. Conceivably, one might argue that you are required to participate in approving plans or policies to the extent that participation contemplates staff input on any level that assists the Agency Board which has the final word on such formulation. However, this does not appear to be the case based upon the description of your duties as you have related them to us.

2. The General Conflicts Statute

Government Code Sections 1090 and 1092 provide that city employees "shall not be financially interested in any contract made by them in their official capacity", prohibits them from being "purchasers at any sale or vendors at any purchase made by them in their official capacity" and makes the contract voidable. Serious penalties for violation are also imposed (Section 1097).

The judicial interpretation of these provisions expresses a broad rule of law that public officials may not use their official position for their own benefit or for the benefit of anyone except the public agency itself nor represent the public agency in any transaction in which the official is personally interested.

This rule applies to one who acts in an advisory capacity only. It does not encompass only the "making" of a contract and its narrow, technical sense, but encompasses also preliminary discussions, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. It is not necessary to show actual fraud, dishonesty or loss.

Arthur R. Harvey, Jr.
January 29, 1980
Page 7.

In order to avoid the application of these provisions to the proposed lease you must have ~~avoided and must in the future avoid~~ any connection with the proposed lease or the property in your official capacity as an employee of the City or the Agency and not, as such an employee, participate in any preliminary discussions, planning, preparation of documents or solicitation of bids in connection with the property.

Moreover, we advise you to have entered into the official records of the City and the Agency a disclosure of your intentions with reference to the proposed lease and the property and request that the disclosure be entered upon the official minutes of the Agency and the City Council.

3. The Incompatible Activities Statute

Government Code Section 1126 prohibits a local agency employee from engaging in any activity or enterprise for compensation (such as the proposed lease) which is inconsistent, incompatible, in conflict with or inimical to his duties as a local agency employee, or the duties, functions, or responsibilities of his appointing power or the agency by which he is employed.

An employee is also prohibited from performing outside work for pay where his efforts will be subject to approval by any other officer, employee, board or commission member of his employing body (here, the City), unless the City has approved such work. The City is authorized by this section to determine which outside activities are inconsistent or incompatible with the duties of its employees but you have advised us that the City has not done this.

In your case, your proposed activity does not on its face appear to be inconsistent with your duties as a City employee. Conceivably an inconsistency could arise in the future. You have indicated that you function as an all-around real estate resource man for the City and that the City could require you to do some work in the future regarding tax-increment financing of City-owned property in the area within which the subject property is located. For example, if the City might wish to assign you to collect delinquent rents from tenants of City property, and, in your capacity as City tenant your rent was delinquent, clearly there would be a prohibited conflict. Similarly, if the result of your City work in the tax-increment financing program would establish a tax to which you would object under the proposed lease if you were not a City employee, there would be a prohibited conflict.

Arthur R. Harvey, Jr.
January 29, 1980
Page 8.

We would suggest that this matter be resolved by your requesting the City Council to make a determination that your proposed activity in your private capacity is not an activity or enterprise which is "inconsistent, incompatible, in conflict with, or inimical to your duties as an employee of the City within the meaning of Government Code Section 1126". The same determination should be made with reference to the Agency and both determinations entered upon the minutes of the respective bodies.

4. Political Reform Act

The Political Reform Act of 1974 as amended (Government Code Sections 81000-91014), insofar as applicable here, deals with conflicts of interest (Sections 87100-87313).

Although by its terms it is not applicable to employees, provision exists for the City Council to adopt a conflict of interest code applicable to designated City employees. We presume that the City of Pittsburg has adopted such a conflict of interest code for its employees as required by Section 87300, and although we have not seen its provisions, we assume that it is similar to the conflict of interest code applicable to elected officials. What follows is predicated upon that assumption.

You are precluded from making or attempting to use your official position to influence a governmental decision in regard to the proposed lease. We disregard the analysis of whether or not you have a financial interest since you clearly do so within the meaning of the Act.

Therefore, if you have ~~refrained and continue to refrain~~ from participating in the making of or attempting to use your official position to influence a decision by the City Council or the Agency with reference to the proposed lease and with reference to all future activities occurring during the period of time that you are lessee, there is no prohibition in this statute which would preclude the proposed activity.

Irrespective of the literal wording of the statutes discussed above, we would urge you to follow the notion that you may have a prohibited interest the moment you place

Arthur R. Harvey, Jr.
January 29, 1980
Page 9.

yourself or are placed in a situation where your personal interests will conflict with the faithful performance of your duties as a public employee. This is the best way that you can assure yourself of avoiding a conflict or inconsistency between your public duties and your private proprietary activities.

Very truly yours,

FRED CAPLOE
CHARLES J. WILLIAMS
WILLIAMS & CAPLOE

By: Charles J. Williams
Charles J. Williams

CJW/FC/dkh

Enclosures

City of Pittsburg

REAL ESTATE ADMINISTRATOR

DEFINITION

Under direction, to buy, sell and lease real property; and to do related work as required.

EXAMPLES OF DUTIES

Reviews appraisal reports for acquisition and disposition of real property; negotiates the purchase, sale and leasing of real property; negotiates owner participation agreements in urban renewal areas handles escrow transactions; obtains title reports; consults with attorney with regard to, and helps prepare data for, eminent domain actions; keeps records on all real estate transactions in which he participates; inspects, with the help of employees of the City Building and Housing Department, dwelling units to determine their compliance with applicable codes and their suitability for leasing by the Pittsburg Housing Authority; aids owners in planning and financing rehabilitation of dwelling units; interprets and explains urban renewal and public housing programs and procedures to individuals and groups.

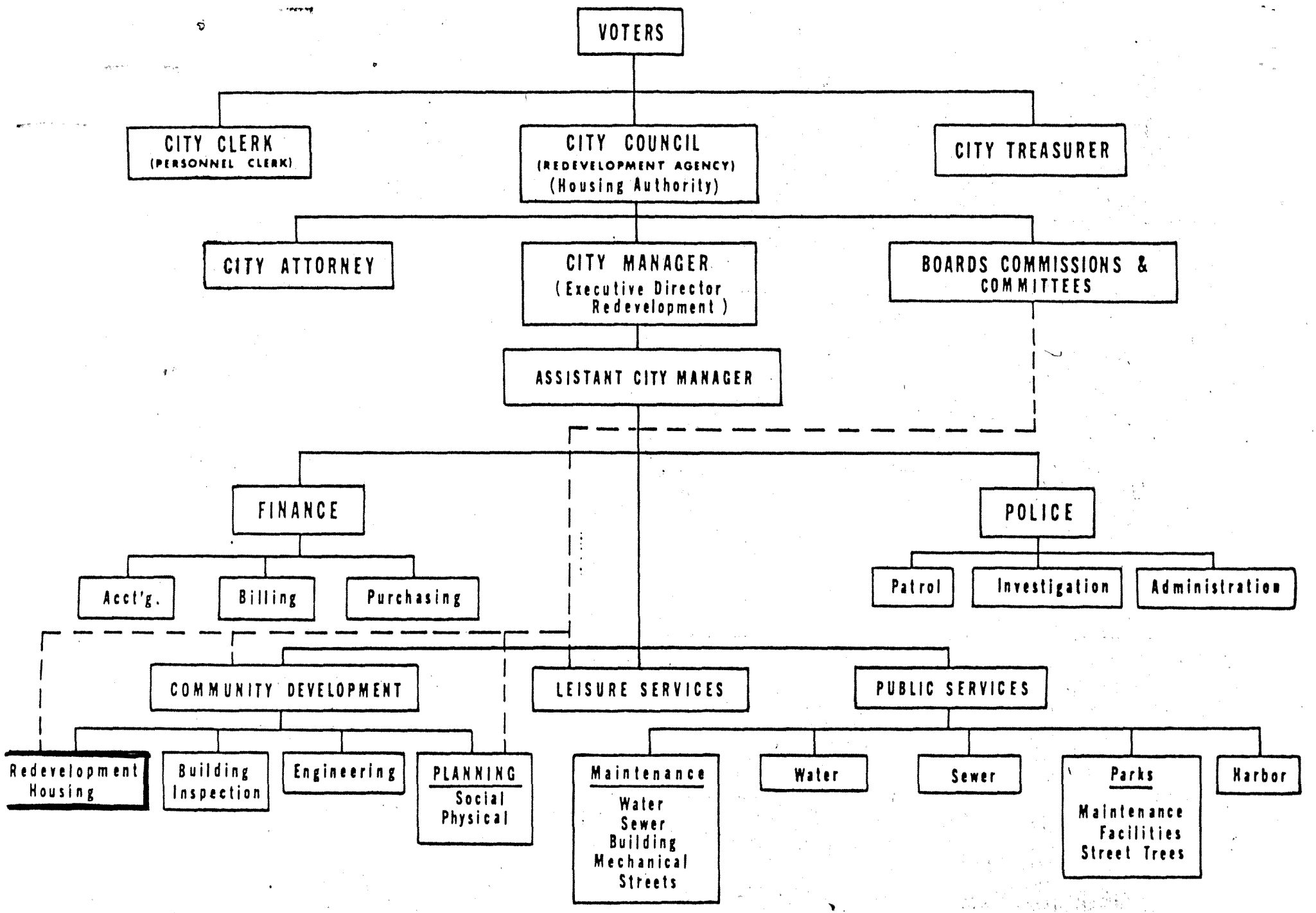
DESIRABLE QUALIFICATIONS

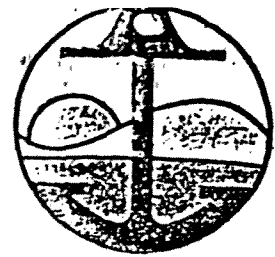
Training and Experience - Graduation from high school plus five (5) years of increasingly responsible, full-time, paid work experience, at least three years of which must be in the field of real estate.

License and Certificate - Possession of a valid State of California Real Estate Salesman's License.

Knowledges, Skills and Abilities - Knowledge of routine office procedures. Understanding of real estate law, mortgage financing and real estate appraisal techniques. Ability to get along well with all people. Ability to follow complicated, written instructions accurately. Public speaking ability.

CITY OF HILLSBORO ORGANIZATION CHART





CITY OF PITTSBURG CA

CIVIC CENTER • P.O. BOX 1518 • PITTSBURG, CALIFORNIA 94565

November 27, 1979

*Copies mailed to
PE #19C
B Ross
1/7/80*

Rich Morrell
Morrell Realty Inc.,
1225 David Avenue
Concord, CA 94518

Mr. Morrell, this letter is to bring you up to date on the procedure to be followed to consummate the lease between your clients and the City of Pittsburg for restaurant site #1. Also please find enclosed a proposed draft lease between the two parties.

Because the marina area was financed in part from a loan from the State of California, Department of Boating and Waterways, it is necessary that the state law relating to leasing of this type of property be closely followed. Herein are the following steps which must be taken prior to City approval of the proposed lease.

1. City and Lessee should reach tentative agreement on terms of the proposed lease;
2. Lease exhibits which relate to the plat plan and building and grounds layout must be specific in all aspects, such as building height, walkway access to the public, number of proposed berths, building location to water, parking layout, etc. The exhibits must be prepared as a first item of business;
3. Environmental impact review which would result in either a negative declaration or environmental impact report must be prepared for the proposed lease prior to City action on the lease;
4. The proposed lease with environmental impact review should be sent to the Department of Boating and Waterways;
5. The Corps of Engineers and the Department of Wildlife must also be simultaneously consulted for their review and approval;
6. Once state and federal agencies have given initial approval, a notice of public hearing shall be published in the local newspaper advertising a public hearing on the proposed lease;

Rich Morrell
November 27, 1979
Page Two

7. After the publication of notice of public hearing, the City Council shall conduct a public hearing on the proposed lease. The City Council will be free at this time to act on the proposed lease.

With respect to the enclosed proposed lease, the lease closely follows the format of other leases which the State Department of Boating and Waterways has previously approved in the past for marina facilities in the Bay Area.

Herein is a brief summary of key points covered by the lease:

1. The lease area shall be described by legal description which will be prepared and inserted at Page 1 of the proposed lease;
2. The term of the lease shall be thirty years with an option to renew for ten (see Paragraph 2);
3. The rental payment schedule is set out at Page 3, Paragraph 4. With respect to the control of rates, charges and level of service, City reserves the right to review said items on a periodic basis. (See Paragraph 5, Page 7);
4. Lessee is to post a \$10,000 refundable security deposit; however, if after ninety days Lessee fails to perform obligations imposed by the lease, the \$10,000 security deposit shall be forfeited;
5. Fire and liability insurance requirements are found at Pages 15, 16, and 17;
6. Paragraph 20, Page 20, allows for the Lessee to hypothecate or sign the lease hold interest providing permission is first obtained from City;
7. The following exhibits will be needed prior to review by the City Council:

Exhibit "A" - plat plan (see Page 1)
Exhibit "B" - proposed menu (see Page 7)
Exhibit "C" - improvement renderings (See Pages 8, 9)
Exhibit "D" - site plan regarding parking and
landscape maintenance areas (See page 10)

If you have any questions, please advise.

S. ANTHONY DONATO
City Manager

enclosures

LEASE

THIS LEASE is made by and between the CITY OF PITTSBURG, a municipal corporation, hereinafter called "City" or "Lessor," and

hereinafter called "Lessee."

1. DESCRIPTION OF PREMISES.

In consideration of the mutual promises hereinafter contained, Lessor leases to Lessee those certain premises in the City of Pittsburg, County of Contra Costa, State of California, designated as shown on the plat, marked "Exhibit A" attached hereto, and more specifically described hereinafter subject to the following terms and conditions.

2. TERM.

The term of this lease shall be THIRTY (30) years, commencing upon the first day of the calendar month next succeeding the date of award of this lease.

Lessee shall have the option to renew the lease for a period of TEN (10) years and shall thereafter have the right to exercise a second option for an additional TEN (10) year period. The option to renew shall be exercised by Lessee in writing NINETY (90) days prior to termination by personally serving the renewal notice on City or posting in the U. S. Mails.

3. USE OF PREMISES.

The leased premises shall be used by Lessee for the construction, establishment, and operation of a first-class restaurant. Such restaurant may include a cocktail lounge, rooms for meetings and small banquets, and other uses incidental thereto. Lessee may also prepare food and beverages for consumption off the leased premises.

Lessee shall not use or permit the demised premises or any part thereof to be used in whole or in part for any purpose other than as hereinabove set forth at any time during the term of this lease, except with the prior written consent of the City, nor for any use in violation of any present or future laws, ordinances, general rules or regulations at any time applicable thereto of any public or governmental authority, including the City of Pittsburg, relating to sanitation or the public health, safety or welfare. Lessee hereby expressly agrees at all times during the term of this lease, at its own cost and expense to maintain and operate all building improvements on the demised premises in a

clean, wholesome and sanitary condition, and Lessee shall at all times faithfully obey and comply with all laws, rules and regulations applicable thereto adopted by federal, state, local or other governmental bodies or departments or officers thereof.

4. RENTAL.

A. Minimum Rental

Lessee shall pay as rental each month of the term of this lease, in advance without previous demand, in lawful money of the United States of America, upon execution of this agreement, the minimum amount of four hundred dollars (\$400) per month for the first six (6) months of this lease.

B. Percentage Rental

On the first day of the seventh (7th) calendar month of this lease, Lessee shall pay a minimum of eight hundred dollars (\$800) per month, or a percentage of Lessee's gross, whichever is greater, according to the following schedule:

1.5% for seventh (7th) through eighteenth (18th) month

2.5 % for the nineteenth (19th) through the
thirtieth (30th) month

2.5% up to one million dollars (\$1,000,000) and

3.0% over one million dollars (\$1,000,000) for the
thirty-first (31st) through sixtieth (60th)
month.

The above stated rental fees shall terminate after five (5) years and shall be renegotiated. Both parties intend that in the fifth (5th) year, the rental fees shall be renegotiated to become effective in

the sixth (6th) year of the lease.

Percentage rental to be paid by Lessee shall be the total of the amounts payable as percentage rental for each of the business operations as set forth above. Monthly percentage rental shall be calculated separately for each of the business operations set forth above as follows:

- 1) Multiply the gross sales for the month by 12,
- 2) enter foregoing percentage rental table with the amount arrived at in step 1) to establish the correct percentage or equation for the calculation of percentage rental,
- 3) solve the percentage equation established in step 2) with the amount arrived at in step 1),
- 4) divide the amount arrived at in step 3) by 12.

Add the percentage rental for each business operation as calculated in step 4) to establish total monthly percentage rental. Any amount previously paid as minimum rental for that month shall be deducted from the total monthly percentage rental and only the excess, if any, of such percentage rental over such previously paid amount shall be paid to City.

C. Definition of Gross Sales

The term "gross sales" as herein used shall include all gross receipts from any business carried on in whole or in part upon the demised premises, including, but not limited to the sales of food and alcoholic and non-alcoholic beverages all gross revenue to Lessee from coin operated vending machines, revenue from rental of any space or

facilities, any and all other revenues from sales or use charges received by Lessee, the sale of merchandise of any sort whatsoever, and all services performed for which charge is made by Lessee or by any other person, persons or corporation selling merchandise or performing services of any sort in, upon, or from any part of the said demised premises, and shall include sale of merchandise or performance of services either for cash or for credit, regardless of collections. Gross receipts shall include the fair market value of any consideration received by Lessee, or any of its concessionaires, in addition to or in lieu of cash for any of the services, facilities, items, goods or merchandise as covered herein.

Gross sales shall not include any of the following:

1) Merchandise returned for which cash has been fully refunded or credited;

2) sales on credit or paid by dishonored check to the extent that such sales are charged off as losses or bad debts; provided, however, if such sales so charged off shall later be collected to the extent collected;

3) any sums received for telephone calls, telegraphs, or teletype messages, made by employees or customers, to the extent charges for such items are made by the public utility involved;

4) the amount of any city, county, state, or federal sales, luxury, utility or excise tax upon or based upon the sale of services or sales price of merchandise and which must be paid by Lessee or collected from its customers, and paid to the taxing authority by Lessee or by a concessionaire;

5) sales of fixtures after use thereof in the conduct of Lessee's business in the demised premises;

6) any sums received as repayment of money advanced to or paid on behalf of customers on which there is no profit and is only a reimbursable transaction, and any sums received which are to be transferred or paid back to said customers, or which receipts are a deposit only, provided, however, that any deposits forfeited or included as payment of an account are to be included in gross sales.

D. Accounting Record

1) Within twenty (20) days after the close of each calendar month of the term of this lease, Lessee shall render to City, in a form satisfactory to City, an account of its business transactions during the preceding month, setting forth in particular its gross sales, as heretofore defined, for said month.

2) Lessee shall keep true and accurate books and records showing all of its business transactions, and shall provide City with a copy of an annual audit reflecting all gross sales as defined herein, and it shall be certified to by the principal auditor preparing same. City shall have the right through its representatives, and at all reasonable times, to inspect all books and records involved in the determination of gross sales, including State of California sales tax return records; Lessee hereby agrees that all such records and instruments are available to City, and that it shall make the same available to the City upon demand.

E. Delinquent Rental Payments

In the event that Lessee is delinquent for a period of sixty (60) days or more in paying to City any rental or other sum payable to City

pursuant to this agreement, Lessee shall pay to City interest on such delinquent amount at the rate of one percent (1%) per month from the date such sum was due and payable until paid.

5. STANDARD OF SERVICE: CONTROL OF RATES, CHARGES AND SERVICE.

Lessee shall furnish, maintain and operate said business in a first-class manner and shall furnish and maintain a standard of service at least equal to that of the better class restaurants providing similar services and facilities in the San Francisco Bay Area during the entire term of this lease, and at reasonable prices comparable to those prevailing for similar services and facilities in said area. Lessee shall maintain at all times a menu for the public which equals the variety of food set forth in Exhibit.

City shall have access to and the right to inspect all schedules of rates or prices for food, liquor, other merchandise sold and services performed or provided upon the demised premises.

If City determines any such rate, charge, or level of service to be unreasonable, inappropriate, or inadequate, the same shall be modified as directed by City. No such determination shall be made by City until Lessee has been given a reasonable opportunity to justify such rate or charge.

If Lessee disagrees with the determination of City, he may, by written notice to City, require the matter to be arbitrated in the following manner: City and Lessee shall within ten (10) days after such notice select an arbitrator from a list of not less than ten (10) names supplied from the State of California Conciliation Service. The arbitrator shall be selected from a coin flip and striking process until

one last name remains.

The arbitration shall be held as reasonably soon as possible. Costs of the arbitration shall be shared equally. The decision shall be in writing and shall be given significant weight by City in making a final determination.

Lessee shall keep said business open for services there at during such hours of each day as normal to these types of operations and as business conditions shall warrant; Lessor expressly reserves and retains the right to approve and specify the minimum hours during which said facilities shall be kept open for business and the services thereof shall be made available to the public.

Lessee shall at all times during normal business hours retain upon the demised premises a qualified and competent person or persons to act as manager or managers of the activities conducted by Lessee thereon. Lessee shall designate an individual who shall, in the absence of Lessee, be authorized to represent and act for Lessee in all matters pertaining to this lease and Lessee's operations hereunder.

6. IMPROVEMENTS TO BE CONSTRUCTED BY LESSEE.

A. Lessee shall, without cost to City, immediately upon commencement of the term of this lease, proceed with plans for the construction of and construct a restaurant and related public open spaces, walkways, service and storage areas, landscaping and other facilities within the demised premises all in general accordance with the improved renderings, floor plans and plat plans as set forth in the proposal, submitted by Lessee to City, more particularly described

in Exhibits and in conformance to the Pittsburgh Municipal Code.

Construction drawings and specifications shall be submitted to City for its approval within five (5) months after the execution of this lease by City. City agrees to act promptly upon the submission to approve said drawings and specifications.

B. Lessee shall, at its own cost and expense, make all utility connections from its improvements to the serving utility facilities. All utility lines shall be underground.

Lessee shall commence construction of said building and improvements immediately upon receiving from City necessary permits for Lessee's improvements and shall complete such construction and open said business within twelve (12) months from and after receipt of such permits provided, however, that any delay in construction due to fire, earthquake, wars, strikes, or other calamity beyond the reasonable control of Lessee shall extend the time in which said construction must be completed by the length of such delay.

C. All improvements shall be constructed in accordance with the laws of the State of California regarding access to public accommodations for physically handicapped persons.

D. "Improvements" shall be deemed to include, but limited to buildings, structures, fences, utility lines, parking areas, walkways, landscaping and other fixed improvements to the land and additions, alterations, betterment, equipment, machinery, apparatus, boilers, tanks and the like affixed thereto and made a part thereof.

7. ARCHITECTURAL REVIEW.

The design of all improvements shall be subject to review and approval by the City's Planning Commission and City Council.

8. TITLE TO IMPROVEMENTS.

All improvements made to the demised premises shall be and remain the property of Lessee until termination of this lease, whether by expiration of the term, cancellation, forfeiture or otherwise, and upon such termination all such improvements shall be and become the property of City and shall remain upon and be surrendered with the premises as part thereof.

9. MAINTENANCE OF EQUIPMENT, FURNISHINGS, AND EXTERIOR PREMISES.

Lessee shall provide and maintain, at its own cost and expense, throughout the entire term of this lease, any and all equipment, fixtures, furniture and furnishings in good order and repair necessary for use in and about the demised premises in order to maintain and operate thereon a first-class restaurant, meeting rooms and cocktail lounge, including an air-conditioning system.

Lessee shall maintain the exterior premises including landscaping, in an attractive, clean, well-kept manner.

In addition, Lessee agrees to maintain certain designated parking and landscaped areas, more particularly described in Exhibit , beginning in the sixth (6th) year of the lease.

Lessee's fixtures, furnishings and furniture shall remain Lessee's property. Any damage to the premises arising from their removal shall be repaired by Lessee at its own cost and expense.

and to the satisfaction of the City.

Nothing herein shall impair or defeat the lien or encumbrance of any instrument given by Lessee to secure the purchase of any such equipment, fixtures, furniture or furnishings.

10. EARLY ENTRY BY LESSEE.

Lessee may enter upon the demised premises at any time after the commencement of the term of this lease in order to perform any necessary work in connection with the construction of improvements by Lessee, subject to compliance by Lessee with the requirements of Paragraph 13 of this lease.

11. POSTING OF SECURITY DEPOSIT AND SURETY BOND.

Within thirty (30) days of the execution of this lease, Lessee shall deposit with City a cashier's check acceptable to the City Attorney, in the amount of ten thousand dollars (\$10,000.00). Said deposit shall be released without penalty upon receipt of notification by Lessee that the lease has been forfeited by Lessee, provided that such notice shall be received by City not later than ninety (90) days after the date of execution of this lease.

If Lessee fails to perform any obligation imposed under the lease after the ninetieth (90th) day following lease execution, the ten thousand dollar (\$10,000.00) security deposit shall be automatically forfeited. Upon full performance by Lessee in the construction of the improvements, the ten thousand dollar (\$10,000.00) security deposit shall be returned to Lessee.

Prior to the commencement of construction of the improvements herein

required to be constructed by Lessee under Subparagraph A of Paragraph 6, Lessee shall, at its own cost and expense, furnish to City a surety bond of a surety company licensed to transact business in the State of California and satisfactory to City with Lessee's contractor or contractors as principal, in a sum not less than fifty percent (50%) of the total estimated cost of the construction contract or contracts for the improvements and facilities set forth in Paragraph 8 of this lease, guaranteeing the payment for all materials, provisions, provender, supplies and equipment used in, upon, for or about the performance of said construction work or labor done thereon of any kind whatsoever, or to her instrument of security approved by the City Attorney of equal or greater effect to guarantee completion of such construction and payment of all such items. In the event that Lessee obtains from its contractor or contractors such bond in like amount which is satisfactory to City, City, upon allocation by Lessee and upon naming City an additional obligee of Lessee's principal and surety under such bond, will release Lessee from and consent to the cancellation of the bond or instrument of security originally furnished by Lessee pursuant to the provisions of this subparagraph.

12. TERMINATION IN EVENT OF INSOLVENCY OR BANKRUPTCY.

If Lessee shall make an assignment for the benefit of creditor, become insolvent, or if proceedings and bankruptcy be instituted by or against Lessee, or if the receiver or trustee in bankruptcy or a receiver of any property Lessee shall be appointed in any suit or proceedings brought by or against Lessee, the balance of the rent for the entire term of this lease shall be considered at once due and payable without notice by Lessor, and this lease shall cease and terminate and Lessor make take possession of the premises.

13. FORFEITURE.

This lease is made upon the condition that if the rents or other sums which Lessee herein agrees to pay, or any part thereof, shall be unpaid on the date on which the same shall become due, or if default be made in any of the terms, agreements, conditions, or covenants herein contained on the part of Lessee, or should Lessee abandon and cease to use the premises for a period of sixty (60) days at any one time except when prevented by fire, earthquake, wars, strikes or other calamity beyond its control, then and in such event, at the option of City as evidenced by resolution of City Council, this lease shall become forfeited, and City may exercise all rights of entry and re-entry upon the demised premises. Lessee shall not be considered in default as to any provisions of this lease where such default is the result of, or pursuant to, any process, order or decree of any court or regulatory body. No default shall be declared by City as to any breach which may be cured or obviated by Lessee until the expiration of thirty (30) days after written notice by City to Lessee (and to any lending agency holding of record an encumbrance on the leasehold premises), of such

default during which thirty (30) day period such default shall not have been cured or obviated; provided, that only five (5) days written notice shall be required in the case of a default in the payment of rent or other sums herein provided to be paid by Lessee. Such default shall be deemed to have been cured or obviated prior to the expiration of such notice period if, except for failure to pay rent or other sums of money when due, Lessee or such lending agency shall have commenced to cure or obviate such default prior to the expiration of such notice period and shall prosecute such work to completion with reasonable diligence even though performance of such term, agreement, condition or covenant shall not have been effected or completed strictly within the notice period.

In the event any such notice of default is given by City on the ground that Lessee has abandoned or ceased to use the premises, such lending agency shall have the optional right to obtain a substitute lessee, suitable to City, within sixty (60) days after the giving by City of said thirty (30) days written notice, and City's acceptance of such lessee shall not be unreasonably withheld. Any such substitute lessee shall take and hold possession of the leasehold premises under the terms and conditions of this lease; and upon written notice by City to the lending agency and to the Lessee of the acceptance by City of such substitute lessee, Lessee shall within ten (10) days thereafter assign in writing all of its rights and interest in said lease to said substitute lessee. Said assignment shall be in a form suitable for recording in Contra Costa County.

In the event that Lessee shall fail or refuse to execute and deliver

such assignment within said period, City may give Lessee written notice of cancellation of this lease by reason of said default and failure or refusal to so assign.

This lease shall be deemed cancelled upon the mailing of the last mentioned notice by City and City shall thereupon enter into a new lease with said substitute lessee on the same terms and conditions herein provided.

14. FIRE INSURANCE.

Lessee, at its own cost and expense, shall carry fire insurance with extended coverage endorsements thereon on all improvements made or constructed by Lessee to or upon the demised premises in an amount equal to ninety percent (90%) of the full insurable value of such improvements, naming the City and Lessee, as their interests may appear, as the insured in any such policy or policies. The proceeds of any such insurance in the event of any loss or damage shall be used for the repair or rebuilding of the improvements made or constructed by Lessee upon the demised premises. Lessee, at its own cost and expense, shall carry adequate insurance on the plate glass in the restaurant building, provided, however, that it may, with the prior written approval of City, be relieved of such obligation conditioned upon the written agreement of the Lessee that it will immediately replace, at its own cost and expense, any broken or damaged plate glass. A certificate or certificates evidencing such insurance coverage shall be filed with City prior to the commencement of construction of any improvements by Lessee upon the demised premises, and such certificate or certificates shall provide that such insurance coverage will not be cancelled or reduced without at least thirty (30) days prior written notice to City.

At least thirty (30) days prior to the expiration of any such policy or policies, a certificate or certificates showing that such insurance coverage has been renewed shall be filed with City.

Said fire insurance shall also name as an insured any lending agency holding as security an encumbrance on the leasehold estate, as its interest may appear.

15. LIABILITY INSURANCE AND HOLD HARMLESS AGREEMENT.

Lessee shall maintain in full force and effect during the term of this lease, comprehensive liability insurance in the amount of five hundred thousand dollars (\$500,000.00) combined single limit and Lessee further agrees to provide in said insurance policy that the state and City of Pittsburg, its Council, its appointive and elective members shall be named as an additional insured in said policies. A duplicate policy evidencing such insurance shall be filed with the City and State of California, within thirty (30) days of execution of this lease by City and prior to any entry upon the premises herein demised and said policy shall provide that said insurance coverage shall not be cancelled or reduced without at least thirty (30) days prior written notice to the City and state. On failure to file such certificate, the City may, without further notice, cause this lease to be forfeited and exercise such other rights as it may have in the event of Lessee's default on the date of expiration of such insurance coverage unless such certificate is filed with the City prior to such expiration.

Lessee, as an express condition of this lease, agrees to hold the City and State of California harmless from any and all liability and claims for damages or suits for or by reason of any death or any injury or

injuries to any person or persons or damages to property of any kind whatsoever, whether the person or property of Lessee its agents or employees, its sublessees, concessionaries or licensees or third persons, from any cause of causes whatsoever while in or upon said premises or any part thereof during the term of this lease or occasioned by any occupancy of use of said premises or any activity carried on by Lessee its sublessees, concessionaires or licensees in connection therewith and Lessee hereby covenants and agrees to indemnify and to save harmless the City and state, her officers, agents and employees from all liabilities, charges, expenses, including attorneys' fees and costs on account of or by reason of any such death or deaths, injury or injuries, liabilities, claims, suits or losses however occurring or damages growing out of same.

16. WORKER'S COMPENSATION INSURANCE.

Lessee shall maintain in force during the term of this lease, in an amount and with coverage satisfactory to City, Worker's Compensation Insurance. A certificate evidencing such insurance coverage shall be filed with City prior to entry upon the premises herein demised.

17. FAILURE TO PROCURE INSURANCE.

In case of failure on the part of Lessee to procure or renew the herein required insurance, City may, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith and all monies so paid by City shall be repaid by Lessee to City upon demand.

18. RESTORATION OF PREMISES.

In the event that, during the term of this lease, the demised premises shall be damaged or destroyed to an extent in excess of fifty percent (50%) of the then value thereof due to a cause not covered by insurance,

and if the parties are unable to agree upon a substantial reconstruction of the building, either party is hereby granted the privilege, upon giving thirty (30) days written notice to the other party (such notice to be given within thirty (30) days after such damage or destruction) to cancel and annul this lease; provided, however, that it is in such case neither party shall so elect to cancel and annul this lease and notice to that effect is given by each party to the other party, Lessee agrees to restore with due diligence the building and structures appurtenant thereto. In the event that the damage to or destruction of the demised premises is less than fifty per cent (50%) of the then value, and is due to causes not covered by insurance Lessee shall with due diligence reconstruct the building and appurtenances thereto.

In the event that the damage to or destruction of said premises is covered by insurance, Lessee shall restore said premises to a good and tenantable condition.

In the event that during the term of this lease the demised premises shall be damaged or destroyed to an extent in excess of fifty percent (50%) of the value thereof due to a cause not covered by insurance, and Lessee and City are unable to agree upon substantial reconstruction of the building, and Lessee or City shall exercise the privilege hereinabove granted of giving thirty (30) days written notice to cancel and annul this lease, the party giving said notice shall also give at the same time thirty (30) days written notice to any lending agency holding an encumbrance of record on the leasehold estate; and unless said encumbrance shall be fully paid and extinguished prior to the

expiration of said thirty (30) day period, said lending agency shall be suitable to City, acceptance of who by City shall not be unreasonably withheld, and said substitute lessee and said lending agency shall have the optional right to rebuild and restore the improvements on the leasehold premises, subject to all of the terms and conditions hereof. If the lending agency elects to so obtain for City a substitute lessee hereunder at the expiration of said thirty (30) day period, it shall thereupon give written notice of such election to City and to Lessee, and shall have sixty (60) days thereafter within which to obtain another lessee suitable to City. Upon the acceptance of said substitute lessee by City, Lessee shall assign in writing, in a form suitable for recording in Contra Costa County, all of its right, title and interest hereunder to said substitute lessee. Lessee shall be thereupon released from any further obligation under this lease, provided Lessee is not otherwise in default hereunder. In the event that the lending agency exercises its said option to obtain a substitute lessee, the lending agency and substitute lessee shall have nine (9) months from the date of written acceptance by City of said substitute lessee, within which to rebuild and restore said leasehold improvements.

19. DESTRUCTION OF PREMISES.

In case of destruction, partial destruction, or damage by fire, Lessee shall not be liable for the full monthly rental herein specified during the time that said demised premises are thus rendered untenable and unfit for Lessee's occupancy due to such damage or destruction, but in such case Lessee shall pay a pro rata amount only of the monthly rental herein reserved, for such part of the herein demised premises as Lessee

can use and occupy economically, and shall from the date of restoration of said premises pay the full monthly rental herein reserved. If at the time either party shall have elected to cancel this lease as herein provided, and Lessee shall not be or be deemed to be in default as to any terms, covenants, conditions or agreements in this lease contained by Lessee to be kept, performed, discharged or paid, City shall restore to Lessee any unearned portion of the current monthly installment of rent paid in advance by Lessee and shall return to Lessee for cancellation all policies of insurance, the premiums on which were paid by Lessee, who shall then be entitled thereto.

20. SUBLEASE, ASSIGNMENTS AND SUCCESSORS.

Lessee shall not either directly or indirectly give, assign, hypothecate, encumber, transfer or grant control of this lease or any interest, right, or privilege therein, or sublet the whole or any portion of the demised premises or reassign the use of the same in whole or in part, without obtaining the prior written consent of City and state, and said consent shall not be unreasonably withheld.

Neither this lease nor any interest therein shall be assignable or transferable in proceedings in attachment, garnishment, or execution against Lessee, or in voluntary or involuntary proceedings in bankruptcy or insolvency or receivership taken by or against Lessee or by any process of law, and possession of the whole or any part of the demised premises shall not be divested from Lessee in such proceedings or by any process of law, without written consent of City and state. Any breach of the provisions of this paragraph shall give City the right to terminate this lease immediately.

In the event the Lessee is a corporation, the principal stockholders of

such corporation shall not transfer control of the corporation by sale or assignment of interest unless such transfer has the prior approval of City and state. City shall not unreasonably withhold such approval.

The preceding provisions of this section notwithstanding, Lessee shall have the right to pledge, mortgage or hypothecate any and all interest of Lessee in the within lease to a lending agency as security for a construction loan for the building required to be constructed by Lessee. Said lending agency, upon foreclosure, shall have the right to assign the within lease to an individual, partnership or corporation of its choice, subject to all of the terms of the within lease, and subject to obtaining the prior written consent of City and state, which consent shall not be unreasonably withheld.

Lessee shall also have the right to pledge, mortgage or hypothecate any and all interest of said Lessee in this lease to a lending agency as security for a permanent or "take-out" loan to liquidate the construction loan for the building required to be constructed by Lessee. The lending agency making such construction or "take-out" or permanent loan on the improvements required hereunder to be made by the Lessee shall also have all of the rights and remedies set forth in any security document such lending agency shall hold on the leasehold estate. In the event the lending agency holding a security document on the leasehold estate shall acquire or take possession of the leasehold by consent or default of the Lessee, or in connection with a foreclosure, said lending agency shall have the right to assign, encumber or hypothecate this lease for the uses and purposes permitted by Paragraph 4

hereof, provided that such assignee shall be suitable to City, but approval of any such assignee shall not be unreasonably withheld.

Lessor shall not declare a default and terminate this lease in case of voluntary or involuntary proceedings in bankruptcy, insolvency or receivership, taken by or against Lessee, if within thirty (30) days after receipt of written notice from City of such proceedings the lending agency commences an action to obtain possession of said premises, including the appointment of a receiver, or institutes foreclosure proceedings to sell the interest of Lessee at foreclosure sale, or acquires title to the interest of Lessee by deed or assignment in lieu of trustee's sale or foreclosure proceedings, provided, however, that the rental agreed to be paid under this lease shall be paid and the other covenants of Lessee hereunder which are capable of being performed by such lending agency shall be fully performed.

Each and all of the provisions, agreements, terms, covenants and conditions herein contained to be performed, fulfilled, observed and kept shall be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, and all rights, privileges, and benefits arising under this lease and in favor of either party shall be available in favor of the heirs, executors, administrators, successors, and assigns thereof respectively; provided that no assignment or subletting by or through Lessee in violation of the provisions of this lease shall vest any rights in any such assignee or sublessee.

21. FUMES AND ORDERS.

Lessee shall conduct its operations upon the demised premises and use

the most modern equipment available so as to reduce to the minimum that is reasonably practicable the emanation from the demised premises of fumes and odors.

22. PROMOTION OF CITY AND FACILITIES.

Lessee shall, in good faith and with all reasonable diligence, use its best efforts, suitable advertising and other means, to promote the use of the facilities covered by this lease and to promote and aid the commerce of the Pittsburgh Marina and the use of its facilities.

23. SIGNS.

Any sign advertising the restaurant shall undergo architectural review as a part of the architectural review process.

24. RIGHTS NONEXCLUSIVE.

It is understood and agreed that the right of Lessee hereunder and that the City retains the right to lease or license other restaurants, cocktail lounges or similar facilities or operations within the marina.

25. UTILITY CHARGES.

Lessee shall pay for all light, heat, water, gas or other utility services required by it in connection with its use of the demised premises.

26. TAXES.

Lessee shall pay all lawful taxes, assessments or charges which at any time may be levied by any federal, state, county, city or any tax or assessment levying agency upon any interest in this lease or any possessory right which Lessee may have in or to the premises covered hereby or the improvements thereon by reason of its use of occupancy thereof or other wise, as well as all taxes, assessments and charges on goods, merchandise, fixtures, appliances, equipment and property

owned by it in or about said premises.

27. NO LIENS.

Lessee shall pay for all labor done or materials furnished in the repair, replacement, development or improvement of the demised premises by Lessee and shall keep said premises and Lessee's possessory interest therein free and clear of any lien or encumbrance of any kind whatsoever created by Lessee's act or omission except as herein expressly permitted.

28. RIGHT OF ENTRY.

In any case in which provision is made herein for the termination of this agreement by City, or in the case of abandonment or vacating of the premises by Lessee, if the lending agency holding an encumbrance upon the leasehold estate has not remedied or otherwise removed the default as hereinabove provided, City in lieu of declaring a forfeiture may enter upon the premises. To such end, Lessee hereby irrevocably appoints City its agent to remove any and all persons or property from said premises and to place any such property in storage for the account of and at expense of Lessee. In such case, City may relet the premises upon such terms as to it may seem proper, and if a sufficient sum shall not be realized thereby, after paying expenses of such reletting, to satisfy the rent and other sums herein agreed to be paid by Lessee, Lessee agrees to any any such deficiency. Lessee further agrees to save City harmless from any loss or damage or claim arising out of the action of City in pursuance of this paragraph.

29. SURRENDER OF PREMISES.

Lessee covenants and agrees that at the expiration of this lease, or upon its earlier termination, it will quit and surrender said premises

with all the improvements thereon in as good state and condition as the same were when possession thereof was given to Lessee, reasonable wear and tear excepted, and Lessee agrees, unless otherwise permitted in writing by City, to remove all personal property belonging to Lessee. Upon such termination, City shall have the right to enter upon and take possession of all of the said premises; provided always, however, that nothing in this paragraph contained shall obligate Lessee to make any repairs which by any other provision of this lease it shall be relieved or exempt from making.

30. INSPECTION OF PREMISES.

City or its duly authorized representatives or agents may enter upon said premises at any and all reasonable times during the term of this lease for the purpose of determining whether or not Lessee is complying with the terms and conditions hereof or for any other purposes incidental to rights of City.

31. MONTH-TO-MONTH TENANCY.

If Lessee holds over after the expiration of this lease for any cause, such holding over shall be deemed to be a tenancy from month-to-month only, at the same rental per month and upon the same terms, conditions, restrictions and provisions as herein contained. Such holding over shall include any time employed by Lessee to remove machines, appliances and other equipment during the thirty (30) day period hereinafter provided for such removal.

32. WAIVERS.

No waiver by City at any time of any of the terms, conditions, covenants or agreements of this lease shall be deemed or taken as a waiver at any time thereafter of the same or any other terms, conditions, covenants

or agreements herein contained, nor of the strict and prompt performance thereof by Lessee. No delay, failure or omission of City to reenter the demised premises or to exercise any right, power, privilege or option arising from any default, nor subsequent acceptance of rent then or thereafter accrued, shall impair any such right, power, privilege or option, or be construed to be a waiver of any such default or relinquishment thereof, or acquiescence therein, and no notice by City shall be required to restore or revive time as of the essence hereof after waiver by City of default in one or more instances. No option, right, power, remedy or privilege of City shall be construed as being exhausted or discharged by the exercise thereof in one or more instances. It is agreed that each and all of the rights, powers, options or remedies given to City by this lease are cumulative, and no one of them shall be exclusive of the other or exclusive of any remedies provided by law, and that the exercise of one right, power, option or remedy by City shall not impair its rights to any other right, power, option or remedy.

33. TIME OF ESSENCE.

Time is expressly declared to be of the essence of this lease.

34. NOTICES.

Any notice permitted or required to be served upon Lessee may be served upon it at

If Lessee shall give notice in writing to City of any change in said address, then and in such event such notice shall be given to Lessee at such substituted address. Any notice permitted or required to be served upon City may be served upon it at City of Pittsburg,

Administrative Offices, 2020 Railroad Avenue, Pittsburg, CA 94565,

provided, however, that if City shall give notice in writing to Lessee of any change in said address, then and in such event such notice shall be given to City at such substituted address.

35. CONCURRENCE BY OTHER AGENCIES.

It is understood that this lease is not binding on either Lessee or City until approved by the State of California.

36. RELATIONSHIP TO STATE.

City of Pittsburg Marina is made possible through a construction loan agreement between the State of California and the City. In support of this loan, City has pledged its gross revenues received from the operation of any facility located or erected within the marina area. The leased parcel described herein is included in said area. In the event state is required to assume responsibility of the City marina pursuant to the above-mentioned City-state construction loan agreements, the Lessee's obligation shall be to state as Lessor.

DATED: _____

CITY OF PITTSBURG, a municipal corporation

BY: _____
MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

BY: _____

JOHN R. SHAW
CITY ATTORNEY