

CITY COMMISSION MEETING

New Smyrna Beach, FL

March 9, 2010

TO: NSB Mayor, City Commissioners and City Manager and  
City Clerk  
FROM: Bill Koleszar  
SUBJECT: Anglers Yacht Club Offer to Purchase

THE FOLLOWING ITEMS ARE PRESENTED FOR YOUR REVIEW  
AND CONSIDERATION:

- AYC Offer to Purchase \$795,500
- NSB City Code Section 70-161
- AYC 1944 – Lease Property – Marshland
- Property Appraisal \$2,145,000 (3-12-09)
- Glass Opinion – page 2, Lease is Void
- Glass Opinion – page 4, Unauthorized Acts
- Glass Opinion – page 25, Follow City Code Section 70-161
- Recent history 2008 – 2010
- FINAL ISSUES
- Glass Opinion – page 29 & 30, AYC Discrimination
- Federal Statutes

**I respectfully request that this Document be made part of the  
official record this evening.**

**ANGLERS' YACHT CLUB, INC.  
TERM SHEET FOR OFFER TO PURCHASE  
MARCH 9, 2010**

**THIS IS AN OFFER TO PURCHASE THE CITY'S INTEREST IN THE REAL PROPERTY LOCATED AT 2 NORTH CAUSEWAY, CURRENTLY LEASED BY THE ANGLERS' YACHT CLUB, INC., ACCORDING TO THE FOLLOWING PRICE AND TERMS:**

Purchase Price	<u>\$795,500.00</u>
Monthly payment of price amortized over 33 years (396 months) @ 5% interest*	<u>\$4,105.81</u>
Accumulated funds in 33 years if the monthly payment was invested @ 5% interest	<u>\$4,127,976.00</u>

\*City will hold a first mortgage on the real property

Upon approval of this term sheet by the City Commission, a standard real estate purchase contract will be prepared by the Buyer and submitted to the City Attorney for his approval.

---

New Smyrna Beach  
Code of Ordinances City of New Smyrna Beach  
Chapter 70 Streets and Sidewalks and Other Public Places

ARTICLE IV. CERTAIN PUBLIC PROPERTY

Sec. 70-161. Manner of selling, leasing, encumbering and otherwise disposing of any marshlands owned by the city and excluding certain lands.

(a) Whenever the city commission shall determine it to be for the best interest of the city to sell, lease, encumber or otherwise dispose of any part or all of the marshlands owned by the city, the city commission shall by resolution evidence such intent and determination, and shall provide for a public hearing to be held at the usual meeting place of the city commission, and not sooner than 21 days from the time of the adoption of such resolution, to hear protests against such sale, lease, encumbrance or other disposal. Public notice must be given of such public hearing by publishing the notice in a newspaper of general circulation in the city at least two times, not closer than one week apart, prior to such public hearing and the public hearing shall not be held sooner than seven days after the last publication of such notice.

(b) After the public hearing provided for in subsection (a) of this section has been held and after hearing protests, if the city commission is still of the opinion that its marshlands or any part or parcel of such marshlands should be sold, leased, encumbered or otherwise disposed of, the city commission shall then by resolution direct that such marshlands be sold, leased, encumbered or otherwise disposed of at public sale or outcry at the city hall and to the best and highest bidder, for cash. No such public sale shall be had, held or made until a notice has been published in a newspaper of general circulation in the city at least three times, not less than one week apart; and the public sale shall not be had, held or made sooner than seven days after the last publication of the notice. The notice shall fully and completely describe the property to be sold, leased, encumbered or otherwise to be disposed of, and the time and exact place of the public sale.

(c) The proceeds received by the city, from any such sale, lease, encumbrance or other disposal of all or any part of the marshlands of the city shall be placed in a separate special fund and shall be used by the city for capital improvements within the city, and not otherwise.

(d) The lands known as Yacht Club Island and the lands owned by the city that encompass and surround the utilities commission's Swoope Generating Plant in the city are excluded from all of the provisions of this section for the sale of marshlands.

(Laws of Fla., ch. 22408(1943), § 197; Laws of Fla., ch. 65-1966, § 1; Ord. No. 59-89, § 1, 9-12-1989)

*Handwritten notes: 24 days, 1944, City Attorney*

**L E A S E**

THIS AGREEMENT, Made and entered into, in duplicate  
this 28<sup>th</sup> day of April, A.D. 1944, between  
CITY OF NEW SMYRNA BEACH, a municipal corporation  
organized and existing under the laws of the State of  
Florida, and situated in Volusia County, State of  
Florida, party of the first, (hereinafter called the  
lessor,) and Anglers Club of New Smyrna Beach Inc.,  
a corporation organized and existing under the laws  
of the State of Florida and having its principal place  
of business in the City of New Smyrna Beach, Volusia  
County, Florida, party of the second part, (hereinafter  
called the lessee,) WITNESSETH:

That for and in consideration of the rents and covenants  
hereinafter reserved, the lessor does hereby demise  
and let to the lessee, all the following described  
property situated and being in the County of Volusia  
and State of Florida, to-wit:

Lot #3 of Parcel "E" North Causeway  
Sub. or Marshland Sub., New Smyrna  
Beach, Fla., further described as

Beginning at the N.E. Corner of Lot 2  
Parcel "E" North Causeway Sub., and  
running North Easterly along the  
South R/W Line of County Road 150 Feet,  
thence S. 46 Degrees East and parallel  
to the east lot line of Lot 3, 200  
feet to the tide water line of the  
Indian River North, thence westerly  
along the shore of the Indian River  
North 150 feet to the S.E. Corner of  
Lot 2, thence North 46 Degrees West  
200 feet to the point of beginning.

# HAMILTON & JACOBS

A LIMITED LIABILITY COMPANY

COMMERCIAL REAL ESTATE APPRAISERS & CONSULTANTS

*Honesty, Integrity & Quality Since 1924*

Norman G. Hamilton (1882 – 1955)  
N. Arthur Hamilton, MAI (1918 – 2005)

4606 S. Clyde Morris Blvd., Suite 2B  
Port Orange, Florida 32129-7454



Alfred A. (Chip) Hamilton, MAI  
State-Certified General Appraiser 714

Russell J. Hamilton, MAI  
State-Certified General Appraiser 1292

T 386.236.0848  
F 386.236.0852  
info@hjappraisals.com  
www.hjappraisals.com

March 12, 2009

Mr. Khalid Resheidat, Interim City Manager  
City of New Smyrna Beach  
210 Sams Avenue  
New Smyrna Beach, FL 32168

Re: Angler's Club Site  
2 N. Causeway  
New Smyrna Beach, FL 32169  
HJ File #09-3473  
City Of New Smyrna Beach Purchase Order #00027783-00

Dear Mr. Resheidat:

At the request of the City, I have prepared an appraisal for the above referenced property. The purpose of this appraisal is to provide my opinion of the market value of the fee simple interest in the subject site as vacant land. The intended use of this report is for lease negotiations. This appraisal is intended for the use of the City of New Smyrna Beach only; there are no other intended users.

This Summary Appraisal Report has been completed in accordance with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation and the Appraisal Institute.

The attached report details the scope of the appraisal, level of reporting, definition of value, valuation methodology, and pertinent data researched and analyzed in the development of this appraisal.

I certify that I have no present or contemplated future interest in the property beyond this opinion of value. Your attention is directed to the Scope of the Appraisal on page 11 and the General Assumptions and Limiting Conditions located on page 7. Acceptance of this report constitutes an agreement with and an understanding of these assumptions and conditions.

Extraordinary Assumptions:

- None

Hypothetical Conditions:

- Per client request, the subject site is being appraised as though vacant and unencumbered by the existing land lease agreements. The value opinion is for the fee simple land value only.

*Only those Extraordinary Assumptions and Hypothetical Conditions necessary for the development of the appraisal for its Intended Use are used. Nonetheless, the use of Extraordinary Assumptions and/or Hypothetical Conditions might have affected the assignment results.*

It is my opinion that the market value of the fee simple interest in the subject site, as vacant, as of January 15, 2009, subject to the General Assumptions and Limiting Conditions and specific Hypothetical Conditions of this appraisal report, was:

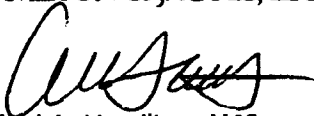
**TWO MILLION ONE HUNDRED FORTY-FIVE THOUSAND DOLLARS  
(\$2,145,000).**

*This confidential report is prepared for the sole use and benefit of City of New Smyrna Beach and is based, in part, upon documents, writings, and information owned and possessed by City of New Smyrna Beach. This report is provided for informational purposes only to third parties authorized to receive it. The appraiser-client relationship is with City of New Smyrna Beach as the client. This report should not be used for any purpose other than to understand the information available to the client concerning this property. City of New Smyrna Beach, and the appraisers, assume no responsibility if this report is used in any other manner.*

In order for this value opinion to be considered valid, this letter must remain attached to the report, which contains 24 pages plus related exhibits.

We thank you for the opportunity to provide our professional services.

Respectfully submitted,  
HAMILTON & JACOBS, LLC



Alfred A. Hamilton, MAI  
State-Certified General Appraiser RZ714

5. The ad valorem taxation of the leased property and whether additional tax revenues are recoverable by the City; and,
6. Such other issues as may be raised by our investigation and analysis of the above.

I have reviewed all of the City's public records related to this matter that the City Clerk's Office and the City Attorney's Office were able to locate and forward to me. I have also reviewed significant documentation provided by the Club, as well as public records from other entities. The review of this voluminous documentation has allowed me to create a chronology of events that I am providing herewith under Tab 1 of the accompanying binder. The specific source for each fact or document referenced in the chronology is set forth therein. Please note, however, that I cannot warrant that this chronology contains all of the relevant facts related to this matter. My review of the documents shows that the relationship between the City, the Club (through its predecessors), and the property in question extends back more than a century to some time prior to 1906. As noted in the chronology, some of the referenced documents, including an original lease dating from 1929, were not found among the City's records. Furthermore, it is possible that events or transactions that might be relevant to my analysis were not chronicled at all.

Not wishing to speculate on what missing documents may have contained, or about what unrecorded events may have transpired over the past hundred plus years, I have endeavored to base my analysis solely on those documents available and to draw inferences only when the available documentation reasonably supports the same. Prior to finalizing the chronology I offered the Club, the City Attorney and other interested parties the opportunity to come forward with any additional documentation they might have relevant to this matter, as well as the opportunity to correct any errors in the initial draft of the chronology. Only the City Attorney responded to this invitation. Therefore, I have assumed that the information reflected in the chronology is accurate and is the best information available. However, I must reserve the right to alter my conclusions if additional documentation is discovered.

#### **Synopsis of Conclusions:**

1. It appears that under the Florida Constitution of 1885, the City Charter and case law in effect at the time, the City did not have lawful authority to enter into the 1944 lease, nor did it have lawful authority to enter into prior and subsequent leases as hereafter discussed. The rationale for this conclusion is not easily summarized but is set forth in detail in the Analysis section of this memorandum.
2. Any contract, including a lease, executed by the City without lawful authority is void and unenforceable from its inception (*a/k/a void ab initio*) and unenforceable by either party.
3. The City did not gain clear legal authority to lease public property to a private entity for a private purpose until 1957. Even then, such a lease was required to serve at least some incidental public purpose.

13. If the subject leases are determined by a court of competent jurisdiction to be *void ab initio* and the City does not negotiate a valid lease with the Club for the property, then the DEP will likely terminate the Club's submerged lands lease as the Club would not have a legal interest in adjacent upland property.

14. Neither the existence of a long term lease (if the subject leases were to be determined valid) nor any other documented action of the City appears to rise to the level of state action that would be necessary under existing law to hold the City liable for any alleged discrimination by the Club.

15. The analysis performed by the Volusia County Property Appraisal's attorney is correct and there is no remedy available under current Florida law to collect taxes that could have been assessed against the property in past years but were not.

16. There are no cases that I have found in my research that sought to have a municipal contract declared *void ab initio* after the passage of such a considerable period of time as is present in this case. A court may be sympathetic to the Club based on the sheer passage of time and the complacency of the City for so many years. Nonetheless, the public policies related to protecting taxpayers from unauthorized acts by their elected representatives remain intact and, based on my analysis, should ultimately prevail in the courts.

17. If this matter ends up being litigated, it will be very expensive for both sides.

**Facts:**

A full chronology of events is set forth beneath Tab 1 of the Exhibit Binder provided with this memo. For ease of review, however, a narrative of the salient facts may prove helpful.

At least as far back as 1906 someone in New Smyrna had constructed a wharf and clubhouse at the terminus of Washington Avenue on either the Berry Canal or on Indian River North. See, Tab 2, University of Florida Maps. The Club asserts that these facilities were maintained by its original predecessor, an unincorporated group of New Smyrna residents and visitors known as the "Sons of Leisure."<sup>1</sup> The Club's assertion appears to be supported by a 1916 map which denotes the clubhouse and wharf as a "Tourist's Club" known as the "Sons & Daughters of Leisure." Id.

---

<sup>1</sup> While the Club traces its roots back to the Sons of Leisure the City Commission minutes use a number of different club names through the years. Some of these minutes explain the name changes and some do not. Likewise, the charter documents provided by the Club do not recite all of the various name changes through the years. Thus, while we assume that all of the referenced names refer to one continuous club ultimately known as the Anglers' yacht Club, the documents I have to not conclusively prove this. Nonetheless, there is no particular reason not to believe this and so, for convenience, after an initial reference to each historical name subsequent references may simply be to the "Club."

a party to a contract that was void *ab initio* because it violated public policy will not be prohibited from raising the invalidity of the contract.

If it is determined that the property was still legally considered marshlands then the only way the City Commission could ratify the subject leases after 1957 would have been to hold the advertised public hearings required by the charter. Again, there is nothing in the record to indicate that this occurred.

In summation, it appears that the City did not have the legal authority to enter into the subject leases at the time each was executed. As such, the leases were void and unenforceable from their inception. Moreover, it appears that the City has never taken the specific actions required to ratify the leases. Any lease for greater than a one-year term is required to be in writing. See, § 689.01, F.S. Therefore, it would appear that, at most, the Anglers' Yacht Club has a *de facto* year-to-year lease on the property that can be terminated by the City upon one year's notice. It is possible that a court could determine that the Club does not even have a year-to-year lease, but is rather a *de facto* tenant at sufferance. In that case, the City could seek to evict the Club from the City's property at any time. In either event, the Club would have a reasonable argument that the City should reimburse the Club for the value of the improvements it made to the property under the legal doctrine of *quantum meruit*. See, Ramsey, supra.

Again, my conclusions on this particular issue are offered with the caveat that they are based on the facts as they have been provided to me as set forth in the chronology. If it is subsequently discovered that material facts have been omitted my conclusions may need to be revised.

#### **Options as to Issue 1.**

1. The City may ratify the subject leases by following its current procedures for leasing City property, including taking an informed vote at an open "Sunshine" meeting. To avoid any issue regarding whether the property is marshland, if the City elects to consider ratifying the subject leases I would suggest the City follow the procedures set forth in §70-161 of the City Code.
2. The City may seek to negotiate a new lease under current fair market terms for the property.
3. The City can file a declaratory judgment action seeking a ruling by a court of competent jurisdiction on the validity of the leases and, if the leases are ruled invalid, the rights of the parties related to the improvements made on the property, including the obligation to repay the SBA loan. Please note that, given the long history of the property other entities, such as the SBA, the DEP, and the Property Appraiser, will likely presume that the leases are valid and continue in effect until either: (1) a court of competent jurisdiction rules otherwise; or, (2) the Anglers' Yacht Club agrees otherwise.
4. The City can assert the leases are invalid and seek to eject the Club from the premises. If the Club does not voluntarily surrender the premises, the City would have to seek to evict them

## RECENT HISTORY 2008-2010

### (2008)

On July 30<sup>th</sup> 2008, Channel 9 ABC News, Orlando, airs its first report on the Anglers Yacht Club (AYC) and the 1944 lease with the City of New Smyrna Beach (NSB).

(See link) <http://www.wftv.com/news/17037483/detail.html?rss=orlc&psp=news>

### (2009)

On January 2<sup>nd</sup> 2009, a group of NSB Citizens provide the Mayor and City Commission with a 9-page report of facts surrounding the AYC and the 1944 City lease.

(See link "Anglers Club White Paper") <http://www.reformnsgovt.org/4.html>

### (2009)

On March 5<sup>th</sup> 2009, the NSB City Attorney provides the Mayor and City Commission with a 10-page legal opinion regarding the AYC lease with the City. The City Attorney concludes:

*"The facts of the history of the relationship of the City and the Club are largely unrecorded, lost or forgotten, making much more difficult an evaluation of the validity of the City leases at their commencement."*

### (2009)

On March 9<sup>th</sup> 2009, Channel 9 ABC News, Orlando, airs its second story on the AYC and the 1944 lease with the City.

(See link) <http://www.wftv.com/video/18897449/index.html>

### (2009)

On March 12<sup>th</sup> 2009, the Mayor and City Commission receive a formal property appraisal from an outside independent Appraiser of the value of the City-owned property leased to the AYC for two dollars (\$2.00) a month.

Mr. John Hagood, the then NSB City Manager, specifically requests that the appraisal exclude the value of all buildings, docks, forty-three boat slips, boat houses, paved parking lots, barbecues, gazebos, retaining walls, seawalls, and other improvements to the property.

**(2009)**

On July 10<sup>th</sup> 2009, the Mayor and City Commission receive a 46-page legal opinion from outside Counsel, Scott Glass, hired by the City to render a legal opinion regarding the validity of the 1944 lease with the City. Mr. Glass concludes:

*“It appears that under the Florida Constitution of 1885, the City Charter and case law in effect at the time, the City did not have lawful authority to enter into the 1944 lease”.*

*“Any contract including a lease, executed by the City without lawful authority is void”.*

*“The public policies related to protecting taxpayers from unauthorized acts by their elected representatives remain in tact and, based upon my analysis, should ultimately prevail in the courts”.*

*“The City can file a declaratory judgment action seeking a ruling by a court of competent jurisdiction on the validity of the leases”.*

(See link “Legal Opinion of Shutts & Bowen, LLP)

<http://www.reformnsbgovt.org/4.html>

**(2010)**

On February 9<sup>th</sup> 2010, at a regularly scheduled City Commission meeting, the City Commission took steps to sell the City-owned property covered by the 1944 lease, to AYC members. This action was not listed on the agenda that evening and was the very last issue discussed before adjournment after 10 p.m. on the night of the Commission meeting.

## FINAL ISSUES

- The very **First Conclusion** reached by Attorney Scott Glass in his 46-page legal opinion provided to the NSB City Commission in July of last year (2009) was: **“The City did not have lawful authority to enter into the 1944 lease.”**
- The very **First Option** cited by Attorney Scott Glass in his 46-page legal opinion provided to the City Commission in July of last year (2009) was: **“If the City elects to consider ratifying the subject leases, I would suggest the City follow the procedures set forth in Section 70-161 of the City Code.”**
- I have reviewed all NSB City Attorney written legal opinions made public and have not found any statements where Mr. Gummey disagrees with the two cited passages from Attorney Glass. I have also not found any conclusions or findings from Mr. Gummey that the 1944 lease is valid.
- If the City Commission continues to ignore the legal opinion of Attorney Glass, that the 1944 AYC lease is void,  

and/or
- If the City Commission attempts to sell, lease, encumber, or dispose of the City owned marshland referred to in the 1944 AYC lease without taking the advise of Attorney Glass regarding City Code Section 70-161,  

and/or
- If the City Commission fails to request a Declaratory Judgment regarding the validity of the 1944 AYC lease,

There will be 3<sup>rd</sup> Party initiated litigation which will certainly not be in the best interest of either the City Commission or the members of the Anglers Yacht Club.

The City Commission has a full-time legal department that is paid for by the Taxpayers whether or not there is litigation. Requesting a Declaratory Judgment regarding the validity of the 1944 AYC lease will not cost the Taxpayers or the City any attorney fees.

If the City Commission continues to ignore the Glass Legal Opinion and the provisions of City Code section 70-161, a 3<sup>rd</sup> Party lawsuit will prove the actions of the NSB City Commission to be a blatant abuse of discretion and unauthorized acts of elected officials.

In addition, any legal document (contract, lease, mortgage, etc.) that the City executes with the Anglers Yacht Club must contain a strong non-discrimination clause to protect the City and NSB Taxpayers from civil and criminal penalties pursuant to the following Federal Statutes.

The following Federal Statutes provide remedies to Parties who have been deprived or had a violation of their rights under the United States Constitution by elected municipal official's abuse of his or her position while acting under color of law. (See attached Glass Legal Opinion pages 29 and 30, specifically footnote 17).

exists until it is finally determined otherwise. If the City were to assert that the Club has no valid interest and the DEP terminated the submerged lands lease, the City could be liable for damages related to such termination if a court subsequently ruled that the Club did have a valid leasehold interest in the uplands.

#### **Issue 4. Allegations that the Club Engages in Explicit or De Facto Discrimination.**

The facts indisputably show that there was a time in the Angler Yacht Club's history, commencing with the February 1951 charter amendment, when the Club engaged in explicit discrimination. From the documents provided by the Club it appears that on paper, if not in reality, the Club's limitation to white males over the age of 21 remained in effect until the Club re-chartered itself in 2003 and removed the race and gender restrictions from membership. Even without these restrictions, however, the Club may be engaging in *de facto* discrimination. In order to conclusively make such a determination, however, additional access to Club records, including membership records and meeting minutes, would be required.

That having been said, whether the Club discriminates may ultimately not be material to the City from a legal standpoint. First, if the leases are void *ab initio*, the City will have the option of removing the Club from public property whether the Club discriminates or not. Second, if the leases are ultimately determined enforceable, the City would not be held liable for any alleged discrimination unless there has been demonstrably significant involvement by the City in fostering or facilitating such discrimination. See, Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5<sup>th</sup> Cir. 1976).

It has long been the law of the land that, "the internal membership policies of a genuinely private club furnish no grist for the federal judicial mill." Id., citing, The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (1958); Evans v. Abney, 396 U.S. 435, 90 S.Ct. 628 (1970); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972). In order for discriminatory actions to be actionable under the Constitution at least one of two criteria must be met. First, if the impetus of the discriminatory action originates from state action, i.e., under the color of law, then it is clearly prohibited. Second, if the discrimination does not originate from state action, but state action is used to enforce private discrimination, then such private discrimination is also constitutionally prohibited. Moose Lodge No. 107, 407 U.S. at \_\_\_\_\_, 92 S.Ct. at 1971.

In Golden, supra, a black citizen and a Jewish citizen brought suit in federal court against a private club seeking to have it enjoined from discriminating on the basis of race and religion. The club owned its own property and clubhouse but leased adjacent bay bottom land from the City of Miami for \$1.00 per year under a long-term lease. But for the existence of the lease and its payment of taxes, the club had no significant involvement with the city. The club was open only to members and invited guests. It did not open its doors to the general public, nor hold itself out as a place of public accommodation. The club accepted no public funds and, admittedly, it did not perform any public service or function. Likewise, other than collecting its nominal rent and taxes, the city did not involve itself with the club or seek to influence its policies or operations. In light of these facts, the court held that there was no state action

involved in the admittedly discriminatory practices of the club and, therefore, no basis to impose a remedy on either the club or the city.

In the instant case, as in Golden, the Club leases land from the City for a nominal rent and pays taxes but otherwise has no significant involvement with the City. As with the Biscayne Bay Yacht Club, the Anglers' Yacht Club is open only to its limited number of members and their invited guests. Also as with the Biscayne Bay Yacht Club, the Anglers' Yacht Club does not open its doors to the general public or hold itself out as a place of public accommodation. Moreover, to the best of my knowledge, as in Golden, the Anglers' Yacht Club does not receive any public funds, nor does it provide a public service or function.<sup>17</sup>

In light of the similarity of the facts between the instant case and the Golden case, and in light of existing federal and state law, it is highly unlikely that a court would find a sufficient connection between the City and the Club's alleged discrimination to hold the City liable. Golden, supra; see also, Solomon v. Miami Woman's Club, 359 F.Supp. 41 (S.D. Fla. 1973).

Finally, I note that, should the subject leases somehow be determined to be valid, there are no provisions in them that explicitly prohibit the Club from discriminating on the basis of race or gender. Thus, such discrimination would not constitute an explicit default under the leases. Moreover, while there is a general provision in the leases whereby the lessee covenants to conform to all municipal ordinances or laws affecting the premises, it is questionable whether such language would be construed to prohibit discrimination. Such provisions are common in leases and are generally intended to ensure that the tenant does not violate building codes, zoning codes, noise ordinances, and the like. It seems doubtful that this language would be given such a broad reading by the courts so as to allow the City to encroach on the constitutionally protected right of free association enjoyed by the members of a private club absent a greater degree of state involvement with such club.

With regard to the impact of the Club's alleged discrimination on its SBA loan and its DEP approved submerged lands lease, those items are addressed elsewhere in this memorandum.

#### **Options as to Issue 4.**

---

<sup>17</sup> The Club may disagree with this assertion in that it has itself claimed in the past that it provides public services. For example, the Club has previously stated in writing that it has hosted numerous charitable events, raised money for college scholarships, and has allowed "meals on wheels" to use the Club's kitchen. While these actions are clearly munificent, they are not municipal. Many private entities, both non-profit and for profit, contribute time, money, products and facilities to charity. Such contributions are not necessarily considered a public function or service. It should be noted that the Property Appraiser did not consider them sufficient to warrant a public service tax exemption. Interestingly, and ironically, the more public functions a private club claims to perform the more likely a court is to find that the club is a quasi-government entity and, therefore, subject to constitutional anti-discrimination provisions. See, Brock v. Watergate Mobile Home Park Association, Inc., 502 So.2d 1380 (Fla. 4<sup>th</sup> DCA 1987). Thus, the stronger the Anglers' Yacht Club argues that it performs a public function or service the greater its exposure may be for *de facto* discrimination claims.

## **Search 42 U.S.C. § 1983 : US Code - Section 1983: Civil action for deprivation of rights**

- **Search by Keyword or Citation**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### **This is right off the DOJ Civil Rights Division Homepage**

Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States.

For the purpose of Section 242, acts under "color of law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prison guards and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim.

The offense is punishable by a range of imprisonment up to a life term, or the death penalty, depending upon the circumstances of the crime, and the resulting injury, if any.

#### **TITLE 18, U.S.C., SECTION 242**

***Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnaping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.***