ASSISTANT CITY ATTORNEY
MARY JO LANZAFAME

DEPUTY CITY ATTORNEY
ADAM R. WANDER

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO THE CITY COUNCIL

PROPOSED AMENDMENTS TO THE SAN DIEGO TOURISM MARKETING DISTRICT PROCEDURAL ORDINANCE

INTRODUCTION

The Mayor's Office is proposing amendments to the City's Tourism Marketing District (TMD) Procedural Ordinance (San Diego Municipal Code sections 61.2501 through 61.2527). The TMD was conceived and developed by representatives from the hotel industry in partnership with the City as a result of diminishing public resources available for effective and competitive destination marketing. Industry representatives were interested in developing a new source of revenue for marketing and promotion in order to enhance the lodging industry business in San Diego. The lodging industry is one of the largest revenue generators for the San Diego economy and a key employment sector. On May 8, 2007 the San Diego City Council adopted the San Diego Tourism Marketing District Procedural Ordinance (Procedural Ordinance) that allows for the creation of a Tourism Marketing District. On January 1, 2008, the current TMD began its initial five-year term. The proposed amendments to the Procedural Ordinance seek to allow for a longer term of the TMD, to more clearly articulate certain procedures contained in the ordinance, and to address the special and specific benefits conferred to those assessed.

ANALYSIS

On November 2, 2010, California voters approved Proposition 26 (Prop 26), a ballot initiative that amends provisions of articles XIII A and XIII C of the California Constitution by limiting the ability of local government agencies to impose fees and charges. As a result, "any levy, charge, or exaction of any kind" imposed, increased, or extended by local government agencies on or after November 3, 2010 is considered a special tax requiring two-thirds voter approval unless the charge is for:

1. A benefit or privilege conveyed directly to the payor that is not provided to those not charged;
2. A service or a product provided directly to the payor that is not provided to those not charged;
3. Certain regulatory fees;
4. Entrance fees, or charges for the purchase, rental, or lease of local government property;

5. Fines imposed by the judicial branch or local government for a violation of law;
6. A charge imposed as a condition of property development; or
7. Assessments and property-related fees imposed in accordance with article XIII D of the California Constitution.

The first exception to Prop 26 is found in article XIII C, § 1(e)(1), which excludes from the new definition of tax "[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege."

There are differing opinions with regards to whether the first exception to Prop 26 is applicable to business-based assessments, such as the TMD. A number of experts in the special assessment district industry believe that this exception applies to business-based assessments. However, the Legislative Analyst's impartial analysis of Prop 26 identifies non-property-based assessments as being potentially converted to taxes requiring voter approval pursuant to Prop 26: "[S]ome business assessments could be considered to be taxes because government uses the assessment revenues to improve shopping districts (such as providing parking, street lighting, increased security, and marketing), rather than providing a direct and distinct service to the business owner." Proposition 26, Analysis by Legislative Analyst, California General Election, Tuesday, November 2, 2010, Official Voter Information Guide at 58.

Therefore, there may be some risk to the City if the City forms a TMD without seeking voter approval, unless the program of services to be funded by the TMD assessments are provided directly and only to the assessed businesses and not to others who are not assessed. This would likely allow for marketing efforts that are geared specifically towards assessed businesses. In order to alleviate some of the risk, many of the proposed amendments clarify that the Procedural Ordinance shall be used to form a TMD which provides a direct and distinct service to the assessed businesses that is not provided to those not assessed. During the formation or renewal of a TMD, when the City and business owners are determining which services will be provided using TMD funds, the necessity of these services conferring a direct benefit to only the payors must be kept at the forefront of the decision-making process. A TMD formed in this way would likely fall within the first exception to Prop 26 and would not require two-thirds voter approval.

The seventh exception to Prop 26 is found in article XIII C, § 1(e)(7), which excludes from the new definition of tax: "[a]ssessments and property-related fees imposed in accordance with the provisions of Article XIII D." Article XIII D of the California Constitution (Article XIII D), also known as Proposition 218, defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." Cal. Const. art. XIII D, § 2(b). As discussed above, a TMD assessment is levied against businesses, not property. Therefore, TMD assessments are not subject to the requirements of Article XIII D. However, the exception does not require that the assessments be *subject to* Article XIII D, but rather that the assessments be imposed *in accordance with* Article XIII D. The phrase, "in accordance with" has been defined somewhat broadly by the courts. In *City of Norfolk v. Norfolk Landmark Pub. Co.*, the court found that "[t]he language, 'in accordance with the constitution and laws of the state,' is the equivalent of 'not repugnant to,' 'not in conflict with,'

or 'not inconsistent with' the laws and constitution of the state." *City of Norfolk v. Norfolk Landmark Pub. Co.*, 28 S.E. 959, 960 (Va. 1898). In *McDaniel vs. Chevron Corp.*, the court found that when an ERISA pension plan stated that the lump-sum benefits would be calculated "based on" or "in accordance with" assumptions found in certain mortality tables, that such phrases could reasonably be interpreted as indicating that those mortality tables should be utilized as "a starting point" or "foundation." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000).

The purpose of the proposed amendments to the notice, protest, and hearing requirements associated with the levy of a new or increased TMD assessment is to more clearly articulate the procedures the City has always utilized with respect to new or increased TMD assessments. Article XIII D is the foundation for these procedures and they differ only slightly from the requirements of Article XIII D. The language included in the proposed amendments to the Procedural Ordinance more closely tracks the language of Article XIII D. It is the intent that the amendments to the notice, protest, and hearing requirements in the Procedural Ordinance will clarify that the TMD assessments are levied in accordance with Article XIII D. Therefore, a strong argument can be made that the TMD falls within the seventh exception to Prop 26 and does not require two-thirds voter approval.

In addition to the amendments made in light of Prop 26 discussed above, the only other proposed substantive changes made to the Procedural Ordinance are extending the life of any TMD to a maximum of forty years, establishing a procedure for validating the formation of the TMD, and including a limitations period for challenging the assessments that is consistent with other special assessment districts in the State statutes.

JAN I. GOLDSMITH, CITY ATTORNEY

By Elisa A Cusato for
Adam R. Wander
Deputy City Attorney

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