

RESOLUTION NUMBER R- 307843
DATE OF FINAL PASSAGE NOV 27 2012

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO
RENEWING THE SAN DIEGO TOURISM MARKETING DISTRICT;
LEVYING ASSESSMENTS UPON THE ASSESSED BUSINESSES
FOR A PERIOD OF THIRTY-NINE AND ONE-HALF YEARS; AND
PRESCRIBING A METHOD FOR COLLECTION OF
ASSESSMENTS.

WHEREAS, the San Diego Tourism Marketing District Procedural Ordinance, San Diego Municipal Code section 61.2501 et seq., (Procedural Ordinance) authorizes the creation of a Tourism Marketing District for the City, and authorizes the levy and collection of an assessment against businesses to fund Tourism Marketing District activities; and

WHEREAS, on September 25, 2012, the Council adopted Resolution No. R-307702, entitled "A Resolution of the Council of the City of San Diego Declaring the Intention of the City Council to Renew the San Diego Tourism Marketing District, and Associated Assessment, Through June 30, 2052, Directing the Mailing of Ballots to Identified Businesses, and Setting Dates for a Public Meeting and a Public Hearing with Respect to the Renewal" (Resolution of Intention), which stated the intention of the City Council to renew the San Diego Tourism Marketing District (TMD) through June 30, 2052, and took certain related actions; and

WHEREAS, a proposed District Management Plan for the renewal period, including a description of the assessment to be levied in connection with the TMD, is on file with the City Clerk as Document No. RR-307843 and incorporated herein by reference (District Plan); and

WHEREAS, as directed by the Resolution of Intention, notice of a public meeting and of a public hearing regarding the TMD renewal was mailed to identified lodging businesses; and

WHEREAS, an assessment ballot was enclosed with each mailed notice; and

WHEREAS, on October 23, 2012 at 2:00 p.m. in the City Council Chambers located at, 202 "C" Street, 12th Floor, San Diego, CA, the City Council held a public meeting on the renewed TMD and received public testimony on the proposed assessment in connection with the renewed TMD (Assessment); and

WHEREAS, on NOV 26 2012 at 2:00 a.m./pm in the City Council Chambers located at, 202 "C" Street, 12th Floor, San Diego, CA, the City Council held a public hearing on the renewed TMD at which all persons were permitted to present written and oral testimony regarding the District and the Assessment (Public Hearing); and

WHEREAS, the City Clerk, as directed by the Resolution of Intention, accepted completed assessment ballots through the close of the Public Hearing; and

WHEREAS, the City Clerk has tabulated the ballots submitted, and not withdrawn, in support of or opposition to the proposed assessment and determined that no majority protest exists, as that term is defined in section 61.2508(a)(10) of the Procedural Ordinance; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, as follows:

Section 1. NO MAJORITY PROTEST

The City Council, having heard and considered all objections to the renewal of the TMD and to the Assessment, finds and determines that a majority protest does not exist with respect to the renewed TMD or the Assessment.

Section 2. RENEWAL OF THE TOURISM MARKETING DISTRICT

The TMD is hereby renewed for a period of thirty-nine and one-half (39.5) years, commencing on January 1, 2013 and terminating on June 30, 2052.

Section 3. BRIEF DESCRIPTION OF DISTRICT

The activities of the District can be generally described as marketing and promotional activities conducted for the benefit of assessed lodging businesses in the City. The boundaries of the District are the same as the boundaries of the City. The rate of the Assessment is 0.55% of assessable rent for all lodging businesses in the City, plus an additional 1.45% of assessable rent for those lodging businesses with 30 or more rooms. Reference is made to the District Plan for a more complete description of the District, the Assessment, and funded activities.

Section 4. LEVY OF ASSESSMENTS

The assessments, as described in the District Plan and clarified in this section, are hereby levied. For purposes of this Resolution:

- (a) The assessment shall be calculated as a percentage of the Assessable Rent of each lodging business.
- (b) "Lodging Business" means a business, other than a recreational vehicle park or campground, that is a "hotel" pursuant to San Diego Municipal Code section 35.0102. Lodging Business does not include a business whose principal purpose is to rent rooms for occupancy to tenants for use as a primary residence, such as a Single Room Occupancy (SRO) Hotel.
- (c) "Assessable Rent" means "rent," as that term is defined in San Diego Municipal Code section 35.0102, subject to the exclusions set forth in San Diego Municipal Code sections 35.0111 and 61.2516. However, for lodging

businesses with seventy (70) or more rooms, "Assessable Rent" shall not include rent resulting from stays pursuant to contracts executed prior to January 1, 2008. For lodging businesses with sixty-nine (69) rooms or fewer, "Assessable Rent" shall not include rent resulting from stays pursuant to contracts executed prior to January 1, 2013. As used in this section "contract" means a written document which was executed by a representative of the lodging business and the transient or the transient's representative prior to the date specified above. The contract must include a provision stating that it is irrevocable, non-cancellable, or non-refundable; signed agreements which can be cancelled are not "contracts" within the meaning of this section. Reservations made at lodging businesses are not considered contracts. Contract does not include agreements between the lodging business and any third-party booking agent for the purpose of booking transient stays at the lodging business, such as a property management company.

Section 5. FORMATION OF FUND

The Chief Financial Officer is authorized to establish an interest-bearing fund for the Renewed TMD.

Section 6. DISTRICT SUBJECT TO MUNICIPAL CODE AMENDMENTS

The operations of the TMD shall be subject to any amendments to the Procedural Ordinance.

Section 7. FUNDING OF ACTIVITIES

The activities to be provided to benefit businesses in the district will be funded by the levy of the Assessment. The revenue from the levy the Assessment shall not be used to provide activities that directly benefit businesses outside the district or for any purpose other than the purposes specified in this Resolution, the Resolution of Intention, and the District Plan.

Section 8. BENEFIT

The City Council finds as follows:

- (a) The activities funded by the Assessment will provide a special and specific benefit to assessed businesses within the TMD that is not provided to those not paying the assessment.
- (b) The Assessment is 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.
- (c) The Assessment is a charge imposed for a specific government service or product provided 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 providing the service or product.
- (d) The rate differential between lodging businesses with 30 or more rooms and smaller lodging businesses reflects the fact that certain activities provided in connection with the TMD are services geared towards the booking of rooms by organized groups, and such groups are not generally served by smaller

lodging businesses. These services will not be provided to lodging businesses assessed at the lower rate.

Section 9. COLLECTION FROM TRANSIENTS

Assessments imposed pursuant to the TMD are levied solely upon the assessed business, and the business owner is solely responsible for payment of the assessment when due. If the owner chooses to collect any portion of the assessment, up to and not to exceed the rate applicable to the business, from a transient, that portion shall be specifically called out and identified for the transient in any and all communications from the business owner as the "San Diego Tourism Marketing District Assessment."

Section 10. BUSINESS OWNER DUTIES AND ACCOUNTING PROCEDURES

The business owner shall be responsible for the remitting of the TMD assessments pursuant to the requirements of this Resolution, the District Plan, and the Procedural Ordinance. For purposes of this resolution, "business owner" shall mean the party responsible for the remitting and reporting of Transient Occupancy Taxes (TOT), and shall be as defined in section 61.2504 of the Procedural Ordinance.

- (a) If passed on to the transient, the amount of the assessment, not to exceed the rate applicable to the business, shall be separately stated from the amount of room rent charged and any other applicable taxes, and each transient shall receive a receipt for payment from the business owner. A duplicate of the receipt given to each transient shall be kept by the business owner in accordance with subsection (c) below.
- (b) Each business owner shall account separately for, and maintain separate monthly summary totals for, assessable and non-assessable

rent and for any assessments collected.

- (c) Each business owner shall maintain its financial and accounting records in a manner deemed acceptable to the City Treasurer. It shall be the duty of every business owner liable for the payment to the City of any assessment imposed to keep and preserve, for a period of three years within the boundaries of this City, all business records as may be necessary to determine the amount of such assessment for which the business owner is liable for payment to the City. The City Treasurer and authorized deputies or agents in the exercise of duties imposed shall have the right to inspect such records at all reasonable times and to apply auditing procedures necessary to determine the amount of assessment due. It shall be unlawful to refuse to allow or to permit such audit to be conducted after a lawful demand therefore by the City Treasurer or the City Treasurer's duly-authorized City employee.
- (d) The costs of additional goods and services, which are not Rent, but which may be sold as a package, or are complimentary with a room, or portion thereof, in a business, shall be accounted for in accordance with guidelines promulgated by the City Treasurer, if any.

Section 11. TIME AND MANNER FOR LEVYING THE ASSESSMENTS;
REMITTING AND REPORTING REQUIREMENTS

Each business owner shall remit assessments and report monthly using the same process as for remitting and reporting TOT as described in San Diego Municipal Code section 35.0114 (a), (b), (c), (d), (e), (f), (h), and (i) or as amended. This obligation shall be effective from January 1, 2013 through June 30, 2052, the duration of the TMD renewed under this Resolution.

Remittances to the City Treasurer shall be at the rate applicable to the businesses' respective Benefit Category(ies). The return filed with the assessments remitted shall indicate the amount of the "Assessable Rent" and any adjustments thereto that pertain to the assessments remitted. The City Treasurer shall be responsible for collection and external auditing of the TMD assessments.

Section 12. REMITTING AND REPORTING REQUIREMENTS UPON
CESSATION OF BUSINESS

Each business owner, upon cessation of business, shall remit and report on assessments using the same process as for remitting and reporting TOT as described in San Diego Municipal Code section 35.0115 (a) and (b) or as amended. This obligation shall be effective from January 1, 2013 through June 30, 2052, the duration of the TMD renewed under this Resolution.

- (a) The duties and terms of liability of the business transferee or purchaser for TMD assessments owed by the transferor or seller are set forth in sections 13 and 14 below.
- (b) Any business owner who fails to comply with the provisions of this section may be subject to appropriate criminal, civil, or administrative remedies.

Section 13. DUTY OF SUCCESSOR OF BUSINESS OWNER

If an owner of a business who is liable for any assessment or penalties under this Resolution sells or otherwise disposes of such business, the successor shall notify the City Treasurer of the date of sale at least thirty (30) days before the date of sale or, if the decision to sell was made less than thirty (30) days prior to the actual sale, then the successor shall notify the City Treasurer immediately and shall withhold the amount of such assessment or penalty until the selling business owner produces a receipt from the City Treasurer showing that the assessment or penalty has been paid or an assessment clearance certificate from the City Treasurer stating that no assessment or penalty is due. If the seller of the business does not present a receipt or assessment clearance certificate within thirty (30) days after a successor business owner commences business, the successor shall deposit the withheld amount with the City Treasurer pending settlement of the account of the seller.

Section 14. LIABILITY OF SUCCESSOR FOR FAILURE TO WITHHOLD;
NOTICE OF AMOUNT DUE

If the successor to the business owner fails to withhold any unpaid TMD assessments and penalty owed by the selling business owner from the purchase price as required by section 13 of this Resolution above, that successor shall be liable to the City for the payment of the amount required to be withheld. Within thirty (30) days after receiving a written request from the successor for an assessment clearance certificate stating that no assessment or penalty is due, the City Treasurer shall either issue the certificate or mail notice to the successor at its address as it appears on the records of the City Treasurer of the estimated amount of the assessment and penalty that must be paid as a condition of issuing the certificate.

Section 15. PENALTIES

Should any business fail to pay TMD assessments to the City Treasurer as required under the Procedural Ordinance, the District Plan, or this Resolution, such businesses are subject to the following penalties in the event of underpayment due to delinquency, fraud or audit deficiencies:

- (a) Delinquency. This section applies to a late or non-payment. Any business owner who fails to remit any assessment imposed by this Resolution or makes a late payment within the time required shall pay a penalty computed in the manner specified in San Diego Municipal Code section 35.0116 (a), as amended, but not to exceed the amount calculated by applying the percentage or rate as specified in San Diego Municipal Code section 35.0116 (a), as amended, to the amount of the assessment due and payable for the entire reporting period in addition to the amount of the assessment.
- (b) Fraud. If the City Treasurer determines that the nonpayment or underpayment of any remittance due is due to fraud or intent to evade the provisions of this Resolution, the Procedural Ordinance, or the District Management Plan, a penalty percentage or rate as specified in San Diego Municipal Code section 35.0116 (b), as amended, applied to the unpaid amount of the assessment shall be added thereto in addition to the penalties stated in subsection (a) of this section.
- (c) Audit Deficiency. This subsection applies after an audit by or on behalf of the City. Following an audit by the City, if a business owner is found to be deficient in either its return or its remittance, or both, the City Treasurer, at his

or her discretion as being cost effective, shall immediately invoice the business owner for the amount of the net deficiency plus a penalty percentage or rate as specified in San Diego Municipal Code section 35.0116 (c), as amended, applied to the net deficiency. If the business owner fails or refuses to pay the deficient amount and applicable penalties within the number of days specified in San Diego Municipal Code section 35.0116 (c) of the date of the City Treasurer's invoice, an additional penalty shall be imposed at the percentage or rate as specified in San Diego Municipal Code section 35.0116 (c), or as amended, per day of the net deficiency, not to exceed the percentage or rate as specified in San Diego Municipal Code section 35.0116 (a), or as amended, for a combined total penalty not to exceed the percentage or rate as specified in San Diego Municipal Code section 35.0116 (a), or as amended, of the net deficiency.

Section 16. FAILURE TO REPORT ASSESSMENTS DUE – JEOPARDY DETERMINATION

Determination of TMD Assessments Due by City Treasurer. If any business owner shall fail or refuse to remit the assessment or to make, within the time provided in this Resolution, any report or remittance of said assessment or any portion thereof required by this Resolution, the Procedural Ordinance, or the District Management Plan, or if such business owner maintains records which are inadequate to show the amount of assessment due, the City Treasurer shall forthwith determine the assessment due and penalties provided for by this Resolution, the Procedural Ordinance, and the District Management Plan against the business owner.

Jeopardy Determinations. When a business owner fails or refuses to make or file a timely return or remittance of assessments due, or when the City Treasurer or duly authorized employee makes a determination, after having applied necessary and generally accepted audit standards or by estimation if no records are available, that a business owner is or will be unable to remit any assessments due at the prescribed time, the City Treasurer may make a written Jeopardy Determination which shall be issued to the business owner to require the business owner to thereafter furnish additional information or provide adequate security as necessary to ensure receipt by the City of any assessments due or to become due, and to remit the assessments on a daily or weekly basis. The business owner shall thereafter report and remit all assessments due under the terms and conditions prescribed by the City Treasurer. The City Treasurer shall cancel the requirements imposed under the Jeopardy Determination once timely accounting and remittance procedures have been established and the business owner is satisfying all obligations imposed by law for the remittance of assessments.

Notice. The City Treasurer shall deliver notice of an assessment due or of a Jeopardy Determination to a business owner or deposit it in the United States mail, postage prepaid, addressed to the business owner at his, her, or its last known place of business.

Penalties collected pursuant to this section shall be returned to the TMD fund. To the extent that any direct administrative costs incurred by the City Treasurer or other City departments for the recovery of TMD assessments and penalties due prior to a referral to the City Treasurer's Collections Division are not recovered through applicable fees, the unrecovered costs may be charged to the TMD fund as a portion of the City's allowable costs for administration of the TMD.

If TMD remittances become delinquent and the City Treasurer makes a determination

to refer that delinquency to the Treasurer's Collections Program, any additional audit and collection costs incurred, including the Collections Program's referral fees and interest, shall be chargeable to and payable by the business operator, however, to the extent that any portion of those costs are not recovered from the business owner, that portion may be charged to the TMD fund as a portion of the City's allowable costs for administration of the TMD.

Section 17. ADMINISTRATIVE REMEDIES OR APPEALS

The business owner may, within fourteen (14) calendar days after the serving or mailing of a notice of TMD assessment, make written request to the City Treasurer for a hearing on the amount assessed. The business owner may challenge the assessment or penalty in the manner specified in section 22.1708 of the San Diego Municipal Code.

If the business owner does not request a hearing within fourteen (14) calendar days, the assessment and penalties determined by the City Treasurer shall become final and conclusive, and the Operator shall pay the City within fourteen (14) calendar days from the date that the notice of assessment is mailed.

If the business owner makes a timely request for a hearing, the City Treasurer shall give not less than five (5) calendar days' written notice in the manner prescribed herein to the business owner of the time and place for a hearing. The hearing shall be conducted in accordance with San Diego Municipal Code section 35.0118, as amended.

Section 18. REFUNDS

A business owner who has remitted an amount in excess of the amount required to be paid by this resolution the Procedural Ordinance, or the District Plan, may receive a credit to the extent of the excess. If the excess is discovered as a result of an audit by the City, no claim need be filed by the business owner. Such credit, if approved by the Treasurer, shall be

applied to any deficiency found or any further assessment payments due under the rules prescribed by the City Treasurer.

No refund shall be paid under the provisions of this section unless the claimant establishes the claimant's right thereto by written records showing entitlement thereto and complies with the requirements of this Resolution and section 22.1708 of the San Diego Municipal Code.

Section 19. ACTIONS TO COLLECT ASSESSMENTS DUE

Any business owner owing money to the TMD, as collected by the City Treasurer under the provisions of this Resolution, shall be subject to an action brought in the name of the City of San Diego for the recovery of such amount due the TMD. Upon the concurrence of the City Attorney and the Chief Financial Officer or designee, the City Treasurer is authorized to compromise the collection of the amount due or establish a schedule of payment for any assessments due, or to discontinue the collection of any claim if it appears that the cost of further proceedings would not be justified by the likely recovery.

Section 20. VIOLATIONS

Any business owner who willfully fails to file any return required by this Resolution, the Procedural Ordinance, or the District Plan, or who files a false return, or who willfully fails or refuses to remit any assessment due, or who refuses to allow an audit to be conducted, may be subject to appropriate criminal, civil, or administrative remedies as provided for under state or local law.

Section 21. TREASURER'S REGULATIONS AND ENFORCEMENT
AUTHORITY

The City Treasurer is hereby authorized to promulgate reasonable rules, interpretations and regulations to implement and enforce the provisions of this Resolution.

Section 22. RECORDATION OF NOTICE AND MAP

Upon the adoption of this Resolution, the City Clerk is hereby directed to record a notice of the levying of the assessments and map of the TMD pursuant to section 61.2511 of the Procedural Ordinance.

Section 23. SEVERABILITY

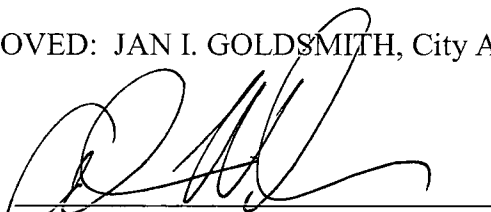
If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Resolution, or any part thereof is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining portions of this Resolution or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional or otherwise invalid and, to that end the provisions of this Resolution are hereby declared to be severable

Section 24. CEQA EXEMPTION

The Council does hereby declare that this activity is exempt from the California Environmental Quality Act (CEQA) pursuant to State CEQA Guidelines section 15378(b)(4).

APPROVED: JAN I. GOLDSMITH, City Attorney

By


Adam R. Wander
Deputy City Attorney

ARW:mm

November 7, 2012

November 13, 2012 Corr. Copy

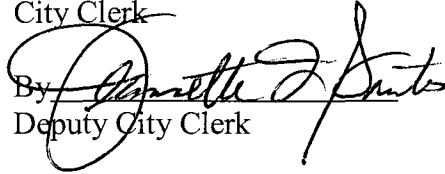
November 21, 2012 Corr. Copy 1

Or.Dept: Econ. Devel

Doc. No.: 477531

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of NOV 26 2012.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 11-27-12
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor