

DATE ISSUED: March 13, 2002

REPORT NO. 02-052

ATTENTION: Honorable Mayor and City Council  
Docket of March 18, 2002

SUBJECT: First Amended and Restated Agreement between the City and Westshaw to Implement Proposition 'C' on the Bougainvillea (DSD No. 89-1296)

REFERENCE: City Council Resolutions R-288200 and R-288960 relating to the Agreement (Attachment 2).  
Document No. RR-288960 filed July 14, 1997 in the office of the City Clerk--the original recorded Agreement (Attachment 3).  
City Council Resolution R-288197 relating to the Environmental Document (Attachment 4).

#### SUMMARY

Issue(s) - Should the City Council approve the First Amended and Restated Agreement between the City and Westshaw to Implement Proposition 'C' on the Bougainvillea (DSD No. 89-1296)--Attachment 1?

Manager's Recommendation(s) -

1. State for the record that the City of San Diego as Lead Agency has reviewed and considered the final Environmental Document. The City of San Diego as Lead Agency under CEQA prepared and completed EIR, File No. 89-1296, dated November 21, 1996 and Mitigation Monitoring and Reporting Program covering this activity (adopted on December 10, 1996 by Resolution R-288197).
2. Approve the First Amended and Restated Agreement between the City and Westshaw to Implement Proposition 'C' on the Bougainvillea (DSD No. 89-1296).

Other Recommendation(s) - None.

Fiscal Impact -

This project will have a net positive effect on the Habitat Acquisition Fund. As described in the original Agreement, construction of the Hotel approved by permit 89-1296 called for the provision of City revenues over a 10-year period of \$6.3 million from the Hotel. The \$6.3 million is exclusively for the acquisition of open space lands essential to the viability of habitat systems within or in the vicinity of the NCFUA, consistent with ongoing habitat planning efforts. Such funds could be used to support bonds for such acquisition. This First Amended and Restated Agreement adds a provision which permits early payment of the funds. Prepayment of the funds could range from Two million

dollars if paid within one year of approval of this First Amended and Restated Agreement up to Four million dollars if paid within five years of approval of this First Amended and Restated Agreement.

## BACKGROUND

On March 26, 1996 the voters of the City of San Diego approved Proposition "C" which authorized the City of San Diego to issue a Conditional Use Permit for the development of a 300- unit Hotel on Westshaw's property contingent upon the establishment of a financing or funding mechanism for City revenues over a 10-year period of \$6.3 million from the Hotel, exclusively for the acquisition of open space lands essential to the viability of habitat systems within or in the vicinity of the NCFUA, consistent with ongoing habitat planning efforts. Such funds could be used to support bonds for such acquisition.

On December 10, 1996 the City Council directed the City Manager (R-288200) to return to City Council for a noticed public hearing to consider execution of an agreement with the applicant which would address issues concerning the implementation of the resort/hotel portion of the project and set forth the terms and conditions related to the collection, credit, and deferment of the Proposition "C" open space acquisition funds. The original Agreement approved by the City Council on July 14, 1997 implemented the requirements of Proposition "C" as follows (Attachment 3):

Westshaw Associates or their successor's in interest shall pay to the City of San Diego a total of \$6.3 million dollars.

Payments to the City shall begin five years from the time that the certificate of occupancy is issued for the Hotel.

Annual payments thereafter shall be due on December 30<sup>th</sup> of each year until the balance is paid off.

Payments shall be calculated at \$10 per room per night rented and paid on an annual basis. Annual payments are expected to be \$630,000 per year based on current estimates for Hotel occupancy rates.

Not inclusive of the \$6.3 million dollars contemplated by Proposition "C", the City of San Diego will be received a check in the amount of One Million Nine Hundred Fifty Thousand dollars (\$1,950,000) to secure the acquisition of biological resources in mitigation of Impacts of the Bougainvillea project.

## DISCUSSION

### **Proposition "C" Obligation and Payment of Transient Occupancy Tax and Other Fees**

The current Agreement is being amended to specify the rate and method of payment of the Proposition "C" Obligation and the in lieu Transient Occupancy Tax for all units which are not traditional hotel rooms (interval ownership/timeshare units). All rooms, keys, or interval ownership/timeshare units of the 300-suite resort/hotel lodging facility are treated as rented transient occupied hotel rooms within the meaning of Chapter 3, Article 5, Division 1 of the San Diego Municipal Code which relates to Transient Occupancy Tax.

The payment of the Proposition "C" Obligation from Westshaw may, at Westshaw's option, in

advance of the timeline set forth in paragraph 3 of the Agreement, be paid in one lump sum by Westshaw as follows:

Two million dollars (\$2,000,000) if paid within one year of the date of approval of this Amended Agreement.

Two million five hundred thousand dollars (\$2,500,000) if paid within two years of approval of this Amended Agreement.

Three million thousand dollars (\$3,000,000) if paid within three years of approval of this Amended Agreement.

Three million five hundred thousand dollars (\$3,500,000) if paid within four years of approval of this Amended Agreement.

Four million dollars (\$4,000,000) if paid within five years of approval of this Amended Agreement.

Any lump sum payment beyond the five years of approval of this Amended Agreement would require renegotiation of the prepayment terms.

In addition to the payment of the Proposition "C" Obligation Westshaw was required to pay in lieu Transient Occupancy Taxes and Other Fees for all rooms, keys, or interval ownership/timeshare units of the 300-suite resort/hotel lodging facility. This requirement will be implemented as follows:

All hotel units will be subject to the normal and customary Transient Occupancy Tax [TOT] rates of the City.

When any interval ownership/timeshare unit is sold to either the original buyer or a subsequent buyer, the transfer will be subject to a fee of 3/4 percent of 1 percent of the sales price and shall be paid to the City at closing of escrow [Transfer Fee]. The In Lieu TOT Transfer Fee shall be subject to the same percentage increase or decrease as would be applied to any increases or decreases on a percentage basis as is applied to the citywide TOTs.

Additionally, Westshaw agrees to pay City, on an annual basis, 9% (or any percentage increase as set forth within the Amended Agreement) of the gross collection of all of the Homeowners Association dues [Impound Fee] which shall be assessed against all units (with the exception of units operated solely for hotel purposes) and collected with the standard Homeowners Association dues. The base Homeowners Association dues, per key, shall be no less than \$5,000 in year one, to increase, at a minimum, consistent with the figures set forth in the Schedule Attachment 5 and incorporated by reference into the Amended Agreement. The Impound Fee shall be subject to the same increases on a percentage basis as those imposed on Citywide TOT's as set forth in the most current version of Chapter 3, Article 5, Division 1 of the San Diego Municipal

Code.

To the extent that any interval ownership/timeshare unit is not utilized by the owner and is returned into the hotel operations and rented out on a nightly basis, that unit shall be subject to the full TOTs that are applicable to other hotel units throughout the City.

The Impound Fees and Transfer Fees shall be paid annually to the City in the same method as used for the citywide collection of TOTs.

**Mitigation Obligation**

The currently approved Agreement required Westshaw to pay \$1,950,000 to City to compensate for the loss of 66.69 acres of habitat. Westshaw has satisfied the requirement to permanently preserve off-site biological resources as identified in Environmental Impact Report [EIR], No. 89-1296, through the payment of the "in lieu" fees, in accordance with the Agreement. The "in lieu" fees were paid to the City on October 1, 1997, and the monies were placed in the City's Habitat Acquisition Fund (Fund # 10571). On December 16, 1998, \$1,000,000 of the Habitat Acquisition Fund was encumbered (Auditor's Certificate 9900520) for the initial payment of the 40-acre Mesa Top South property acquisition and on September 3, 1999, an additional \$1,733,962 was encumbered (Auditor's Certificate 2000145) as final payment for the 105-acre San Dieguito property acquisition. The payment of the \$1,950,000 has been used to acquire critical habitat lands under the Habitat Acquisition Fund. Westshaw and the City have complied with the Mitigation Obligations anticipated under the Agreement.

The attached Amended and Restated Agreement incorporates all the provisions identified within this report. Therefore staff recommends the adoption of the Amended and Restated Agreement between the City and Westshaw.

ALTERNATIVE(S)

1. Deny the First Amended Agreement between the City and Westshaw to Implement Proposition 'C' on the Bougainvillea (DSD No. 89-1296).

Respectfully submitted,  Tina P. Christiansen, A.I.A. Development Services Director		Approved: P. Lamont Ewell
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EWELL/TPC/MEE

Note: The attachments are not available in electronic format. A copy is available for

review in the Office of the City Clerk.

- Attachment(s):
1. First Amended Agreement between the City and Westshaw to Implement Proposition 'C' on the Bougainvillea (DSD No. 89- 1296)
  - ..... 2. City Council Resolutions R-288200 and R-288960 relating to the Agreement.
  - ..... 3. Document No. RR-288960 filed July 14, 1997 in the office of the City Clerk--the original recorded Agreement.
  - ..... 4. City Council Resolution R-288197 relating to the Environmental Document.
  - ..... 5. Transient Occupancy Tax versus in Lieu Fees Analysis.