



Staff Report

City of Manhattan Beach

TO: Honorable Mayor Cohen and Members of the City Council

THROUGH: Geoff Dolan, City Manager

FROM: Bruce Moe, Finance Director
Robert V. Wadden, Jr., City Attorney
Sharon Koike, Assistant Finance Director

DATE: September 15, 2009

SUBJECT: Adoption of Ordinance No. 2128 Amending Section 8.20 of Chapter 8 of the Manhattan Beach Municipal Code to Add a New Section 8.20.150 Requiring Payment of Disputed Transient Occupancy Tax Prior to Litigation

RECOMMENDATION:

Staff recommends that the City Council adopt Ordinance No. 2128 amending Section 8.20 of the Municipal Code to add a new section 8.20.150 requiring payment of disputed Transient Occupancy Tax (TOT) prior to litigation.

FISCAL IMPLICATION:

There is no immediate fiscal implication in enacting this ordinance. By amending the City's TOT ordinance to include a "pay first, litigate later" provision it will require full payment of TOT before a taxpayer may litigate collection of the tax. Under the current ordinance payment is delayed until a final settlement is reached which can be several years.

BACKGROUND:

At the September 1, 2009 meeting, the City Council introduced and waived further reading of Ordinance No. 2128, which amends Section 8.20 of Chapter 8 to add a new section 8.20.150 requiring payment of disputed TOT prior to litigation.

In fiscal year 2007, the League of California Cities advised its members of an issue regarding potential losses of transient occupancy taxes (TOT) as a result of travelers booking hotel rooms on-line via such services as Travelocity, Hotels.com, Expedia, etc. These firms, known as on-line travel companies (OTC), are collecting TOT, but not remitting the entire amount to cities. The firm of Baron and Budd is working with affected cities to correct the problem, and recently the firm recommended that its clients make changes to their TOT ordinances that will facilitate the collection of TOT from the OTC's.

DISCUSSION:

Under the City's current ordinance, the OTC's have been able to delay TOT payment indefinitely through the use of protracted litigation. In order to expedite the payment of the taxes owed, Baron and Budd have recommended that the City's current ordinance be amended to include a "pay first, litigate later" provision. This ordinance will require an entity that disagrees with a tax assessment, to pay the deficiency in full before challenging the assessment in court. The purpose of including this provision is to ensure that once the administrative process has been completed, a taxpayer cannot use legal procedures to delay payment of taxes.

Since becoming aware of this issue, the City has been exhausting our administrative remedies as requested by the Superior Court. This is required before the Court will address the underlying legal issues related to TOT assessments due from the online travel companies. Before the City prepares to issue tax assessments against the OTC's, it is recommended that the City's TOT ordinance be amended to include a strong and clear "pay first, litigate later" provision. This amendment will require payment to the City of all taxes owed before they can litigate and seek a refund. This will prevent the OTC's from withholding payment owed the City until judgment has been rendered in judicial actions or a settlement agreement is reached.

Once the City's ordinance is amended to include the provision, Baron and Budd recommend continuing to advance the litigation against the OTC's and negotiate with them for the production of their transactional data. Once the data is obtained and adequately analyzed, the City should then issue tax assessments against the online travel companies (expected to occur in November of this year). Baron and Budd believe that incorporating the "pay first, litigate later" provision into the City's TOT ordinance is an important step in getting a Court ruling in our favor and requiring the online travel companies to pay the full amount of tax, interest and penalties owed the City before they can challenge the assessment. If the City Council adopts Ordinance 2128 it will take effect in 30 days.

Attachment: A. Ordinance No. 2128

ORDINANCE NO. 2128

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MANHATTAN BEACH, CALIFORNIA, AMENDING THE MANHATTAN BEACH MUNICIPAL CODE TO ADD A NEW SECTION 8.20.150 REQUIRING PAYMENT OF DISPUTED TOT TAX PRIOR TO LITIGATION

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF MANHATTAN BEACH, CALIFORNIA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. The Manhattan Beach City Council hereby finds as follows:

- a. The City of Manhattan Beach presently imposes a transient occupancy ("TOT") tax on hotels and other places of lodging;
- b. Enforcement of the tax is generally faster and more efficient if the taxpayer initiating a challenge to the tax is obligated to pay the tax prior to filing a court action challenging the tax;
- c. It is therefore necessary and in the interest of the health, safety and welfare of the residents of Manhattan Beach to amend the City's local massage TOT ordinance to require payment of the tax prior to litigation;
- d. Pursuant to the California Environmental Quality Act (CEQA) and the Manhattan Beach CEQA Guidelines, this ordinance is exempt from CEQA in that it is covered by the general rule that CEQA [Section 15061 (3)] only applies to projects which have the potential for causing a significant effect on the environment, and since it can be seen with certainty that there is no possibility that the activity will have a significant effect on the environment, the activity is not subject to CEQA.

SECTION 2. A new section 8.20.150 is hereby added to Title 8, Chapter 8.20 of the Manhattan Beach Municipal Code to read as follows:

" 8.20.150 Challenge To Tax

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against the City or an officer thereof, to prevent or enjoin the collection of taxes sought to be collected pursuant to this Chapter and payment of all tax, interest and penalties shall be required as a condition precedent to seeking judicial review of any tax liability."

SECTION 3. Each and every other provision of Chapter 8.20 shall continue in full force and effect.

SECTION 4. Any provisions of the Manhattan Beach Municipal Code, or appendices thereto, or any other ordinances of the City, to the extent that they are inconsistent with this ordinance, and no further, are hereby repealed.

SECTION 5. This notice shall be published by one insertion in *The Beach Reporter*, the official newspaper of the City, and this ordinance shall take effect and be in full force and operation thirty (30) days after its final passage and adoption.

SECTION 6. The City Clerk shall certify to the adoption of this ordinance; shall cause the same to be entered in the book of original ordinances of said City; shall make a minute of the passage and adoption thereof in the records of the meeting at which the same is passed and adopted; and shall within fifteen (15) days after the passage and adoption thereof cause the same to be published by one insertion in *The Beach Reporter*, the official newspaper of the City and a weekly newspaper of

general circulation, published and circulated within the City of Manhattan Beach hereby designated for that purpose.

PASSED, APPROVED, and ADOPTED this 15th day of September, 2009.

Ayes:
Noes:
Absent:
Abstain:

Mayor, City of Manhattan Beach, California

ATTEST:

City Clerk

APPROVED AS TO FORM:

By 

City Attorney