

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
(619) 236-6220**

DATE: April 9, 2013

TO: Honorable Mayor and City Council

FROM: Jan Goldsmith, City Attorney 

SUBJECT: *Tourism Marketing District
Item 115*

Following the March 28 City Council meeting, I became aware of media reports that so distorted what the proposed Amendment to the November, 2012, Operating Agreement actually does that I feel compelled to publicly correct misconceptions.

1. The Amendment does not change the length of the 2012 Operating Agreement, the TMD or the assessment. The 2012 Operating Agreement has a term of 5 years. The Amendment does not change that. Nor, does it change the 39.5 year duration of the TMD or the assessment.
2. The Amendment does not “guarantee” or otherwise commit any funding to the Balboa Park Centennial Celebration. It simply allows an application to be submitted to the TMD for funding, something that could be done by any group. The Amendment does not commit the TMD to approve funding.
3. The Amendment does not change our opinion as to the legality of the assessment. Our opinion remains as set forth in our July 27, 2012, Memorandum of Law, pages 6 and 9, which can be found on our website under Documents, Memorandum of Law. Whether the TMD has met the high standard we outline in the memorandum will be up to the courts. There is a substantial risk that a court will overturn the assessment as an illegal tax in violation of Proposition 26.
4. The Amendment does not strengthen protections for the City in the event the assessment is overturned and the City is ordered to repay funds collected. The Amendment weakens protections, but allows for release of funding.

Honorable Mayor and City Council

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As discussed in the public Memorandum we issued on March 28, 2013 (a copy of which is attached), the “most sure-fire way to protect the City’s General Fund is for the City to hold all of the assessment funds and not disburse any such funds to the TMD Corporation pending the outcome of the Lawsuits. This is already provided for in section 5.1.3 of the Operating Agreement.” [page 1]

Under the Amendment, the City would no longer have the right to withhold from the TMD funds collected from those hotels that execute the waiver and indemnity. The waiver and indemnity agreements offer some protection for the City (subject to potential legal arguments described on pages 2 and 3 of the attached memo), but weaken the original protections set forth in section 5.1.3 of the Operating Agreement providing for withholding of all funds.

JG:cbs

Attachment: Memorandum dated March 28, 2013

cc: Andrea Tevlin, Independent Budget Analyst (*w/Attachment*)

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: March 28, 2013

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Tourism Marketing District Report of Activities and Risk Allocation

On March 28, 2013, the City Council (“Council”) will consider approving the Tourism Marketing District (“TMD”) budget and disbursing assessment funds to the Tourism Marketing District Corporation (“TMD Corporation”). Prior to the outcome of the three lawsuits challenging the validity of the TMD (collectively, “Lawsuits”), Council should consider options to further protect the City and its General Fund if the court invalidates the TMD. The current operating agreement between the City and the TMD Corporation for administration of the TMD (“Operating Agreement”) contains a number of provisions to protect the City and limit exposure to the City’s General Fund. Such provisions include a clause which allows the City to cease disbursements to the TMD Corporation during the period of litigation and a very broad indemnification provision. However, the TMD Corporation is only funded under the Operating Agreement by TMD assessments. Thus, without further security, this indemnification provision provides little protection to the City if a court invalidates the TMD. Therefore, listed below are a number of options which may be available to protect the City and its General Fund.

I. WITHHOLD ALL ASSESSMENT FUNDS PENDING THE OUTCOME OF THE LAWSUITS

The most sure-fire way to protect the City’s General Fund is for the City to hold all of the assessment funds and not disburse any such funds to the TMD Corporation pending the outcome of the Lawsuits. This is already provided for in section 5.1.3 of the Operating Agreement. Short of that, there are a few other mechanisms available to reduce the risk to the City, all with varying levels of protection. However, none of the other mechanisms provide risk-free solutions.

II. SURETY BOND

The TMD Corporation could purchase a bond to secure its indemnification obligations under the Operating Agreement. A bond is a written obligation which binds the signatories to pay a sum certain upon the happening of an event.

One of the most common types of bonds is a performance bond, or surety bond in the non-construction context. The performance bond protects the obligee from financial loss should a contractor fail to perform a contract in accordance with its terms and conditions. A surety bond may be obtained to guarantee performance of contracts involving subjects other than public or private construction projects, such as to guarantee and answer for the debt of another if the debt is not paid when due. *Beverly Hills Nat'l Bank v. Glynn* 267 Cal. App. 2d 859 (1968).

III. GUARANTEES FROM INDIVIDUAL HOTELS

Individual hotels located within the TMD, and which stand to benefit from the TMD activities, could guarantee the TMD Corporation's indemnification obligations under the Operating Agreement. This could potentially take the form of a guaranty agreement in the City's favor, a letter of credit, a trust deed, or some other security.

IV. WAIVERS AND INDEMNIFICATION FROM INDIVIDUAL HOTELS

A. Waivers

Individual hotels could waive their rights to file a claim against the City for refund or reimbursement should the court invalidate the TMD. The law generally encourages out-of-court settlements, and courts support fairly negotiated releases. *Casey v. Proctor*, 59 Cal. 2d 97, 111 (1963); *Skrbina v. Fleming Cos.*, 53 Cal. Rptr. 2d 481, 489 (1996). A waiver, release, or exculpatory contract is the abandonment, relinquishment, or giving up of a right or claim that might otherwise be enforced; it constitutes a defense to the assertion of a claim. Cal. Civ.Code, §1541; *Pellett v. Sonotone Corp.*, 26 Cal. 2d 705, 711, (1945) (overruled on other grounds); *McCray v. Casual Corner, Inc.* 812 F. Supp. 1046, 1048 (1992). "Release, indemnity and similar exculpatory provisions are binding on the signatories and enforceable so long as they are . . . 'clear, explicit and comprehensible in each [of their] essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.'" *Powers v. Superior Court*, 196 Cal. App. 3d 318, 320 (1987). A broad interpretation of a general release is not unconscionable or contrary to public policy. *General Motors Corp. v. Superior Court*, 12 Cal. App. 4th 435, 443 (1993); *Neverkovec v. Fredericks* 74 Cal. App. 4th 337, 345 (1999).

It is important to note, however, that waivers, releases, and exculpatory contracts that involve the public interest may be invalidated by a court as a matter of law. The difficulty comes in identifying those contracts in which one party will be defeated in an attempt to enforce exculpation. *Tunkl v. Regents of the University of California*, 60 Cal. 2d 92 (1963). In *Tunkl*, the

California Supreme Court ruled that a release clause “may stand only if it does not involve ‘the public interest’” *Id.* at 96.¹

B. Indemnification

In addition to the waiver, the City could enter into an indemnification agreement with the individual hotels, whereby the hotel would indemnify the City for any third party claims for refunds. Such an indemnification agreement would almost certainly not be invalidated by a court.

In *County of San Joaquin v. Stockton Swim Club* (1974) 42 Cal. App. 3d 968, a clause in the contract provided that the club “agreed to hold the public agencies ‘free and harmless from any loss, damage, liability, cost or expense that may arise during or be caused in any way by such use or occupancy of the property.’” *Id.* at 971. In rejecting a club member’s argument, the court stated: “This is not a case where a public entity attempts to exculpate itself from its negligence toward members of the public by exacting a waiver of liability as a condition to rendering an essential public service. Rather it is an indemnity agreement by which the promisee seeks to enforce the promisor’s agreement to indemnify him if and when a third party asserts a claim against the promisee. The latter is not within the class of contracts condemned by the *Tunkl* decision. [Citations.]” *Id.* at 972–73; *See also No Oil, Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223 (1987).

V. WAIVERS FROM INDIVIDUAL HOTELS WITHOUT THE INDEMNIFICATION

As discussed above, if the City obtains waivers from individual hotels without the inclusion of an indemnification provision protecting the City from third party claims, the City would be exposed to significantly more risk. If a court determines that such a waiver involves the public interest, the waiver may be invalidated as a matter of law. Furthermore, waivers from individual hotels, even if valid, would not protect the City against potential third party claims – be they individual

¹ The *Tunkl* court established the following six-factor test for determining when an exculpatory agreement involves the public interest:

1. When the activity at issue “concerns a business of a type generally thought suitable for public regulation;”
2. When the party seeking to enforce the release and be relieved of liability is “engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;”
3. When “[t]he party holds himself out as willing to perform this service for any member of the public who seeks it;”
4. When as a result of the essential nature of the service, the party seeking exculpation holds “a decisive advantage of bargaining strength against any member of the public who seeks his services;”
5. When “[i]n exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation [with no provision for payment of additional fees to] obtain protection against negligence;”
6. When “as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.”

Id. at 100-101.

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March 28, 2013

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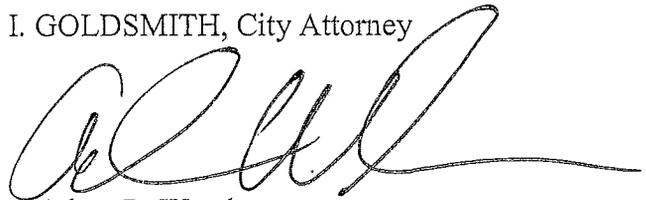
third party claims or a class action third party claim. Lastly, such waivers may not offer much protection against class action claims, where the class consists solely of the hotels themselves.

CONCLUSION

The City could pursue several options to protect its General Fund pending the outcome of the Lawsuits. Anything short of withholding all of the TMD assessment funds would necessarily involve some exposure to risk for the City and its General Fund. A surety bond or some other instrument securing the TMD Corporation's indemnification obligations under the Operating Agreement would likely provide the next best level of protection for the City. This Office can provide a more detailed analysis once an actual proposal is negotiated by the parties.

JAN I. GOLDSMITH, City Attorney

By

A handwritten signature in black ink, appearing to read 'A. Wander', with a long horizontal flourish extending to the right.

Adam R. Wander
Deputy City Attorney

ARW:mm

cc: Andrea Tevlin, Independent Budget Analyst