



Council Meeting: September 29, 2009

SUBJECT: Ordinance to amend Sunnyvale Municipal Code Chapter 3.16 (Transient Occupancy Tax)

REPORT IN BRIEF

Staff recommends that Council adopt an amendment to Chapter 3.16 (Transient Occupancy Tax) of the Sunnyvale Municipal Code by adding Section 3.16.170 (Payment of assessed taxes required prior to legal action). The proposed section requires payment of assessed but disputed taxes, as a precondition to pursuing judicial review of the City's tax assessment.

BACKGROUND

In light of the recent series of online travel companies' litigation cases involving other California cities regarding the amount of transient occupancy tax (TOT) assessed, OCA reviewed Sunnyvale's TOT provisions.

EXISTING POLICY

Presently, Sunnyvale's transient occupancy tax ordinance does not expressly require a party responsible for collecting and remitting to the City transient occupancy taxes to remit to the City the amount of a tax assessment prior to pursuing judicial review of the City's tax assessment.

DISCUSSION

Because Sunnyvale does not require payment of assessed TOT as a precondition to judicial review, a party may attempt to delay payment of taxes due and owing to the City while litigation related to the City's tax assessment is pending.

The proposed ordinance (also referred to as a "pay first, litigate later" provision) will require the tax assessment, including all taxes, interest, and penalties, to be paid as a condition precedent to pursuing judicial review (e.g. litigation) relating to the tax assessment. The proposed ordinance protects the City against delay tactics that could preclude payment of taxes legitimately due and owing to the City for several years.

The State of California enforces this rule, as set forth in Article XIII, Section 32, of the California Constitution:

SEC. 32. No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to

prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

The State requires that all taxes due to the State be paid before seeking judicial review of a tax assessment. The pay first, litigate later rule allows revenue collection to continue during litigation so funds necessary for essential public services are not withheld from the State.

There is no constitutional provision expressly applying the pay first, litigate later rule to local taxes and there is a dispute as to whether this provision extends to local governments in the absence of an express legislative enactment. To avoid any uncertainty as to whether this constitutional provision applies to cities, several local governments in the State have enacted a pay first, litigate later rule to ensure its application for local tax assessments.

Adoption of the proposed ordinance will provide Sunnyvale with the same benefits as the State and other local jurisdictions and provide for the timely recovery of transient occupancy taxes due and owing the City.

FISCAL IMPACT

The proposed ordinance will have no impact on the overall amount of revenue generated by the City's transient occupancy tax scheme.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

ALTERNATIVES

Council may consider the following alternatives:

1. Adopt the proposed ordinance.
2. Reject the proposed ordinance.

RECOMMENDATION

Staff recommends Alternative #1.

Reviewed by:

David E. Kahn, City Attorney
City Attorney's Office
Prepared by: Nicole Clemens, Special Deputy City Attorney

Attachments

Attachment A – Proposed ordinance amending Chapter 3.16 (Transient Occupancy Tax) of the Sunnyvale Municipal Code

ATTACHMENT A

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE AMENDING CHAPTER 3.16 (TRANSIENT OCCUPANCY TAX) OF TITLE 3 (REVENUE AND FINANCE) OF THE SUNNYVALE MUNICIPAL CODE BY ADDING SECTION 3.16.170 REQUIRING PAYMENT OF ASSESSED TAXES PRIOR TO LEGAL ACTION

THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. SECTION 3.16.170 ADDED. Section 3.16.170 is hereby added to Chapter 3.16 (Transient Occupancy Tax) of Title 3 (Revenue and Finance) of the Sunnyvale Municipal Code to read as follows:

3.16.170. Payment of assessed taxes required prior to legal action.

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 2. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council declares that it would have adopted this ordinance and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more section, subsection, sentence, clause or phrase be declared invalid.

SECTION 3. EXEMPTION FROM CEQA. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

SECTION 4. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 5. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in *The Sun*, the official newspaper for publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2009, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2009, by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST:

APPROVED:

City Clerk
Date of Attestation: _____

Mayor

(SEAL)

APPROVED AS TO FORM AND LEGALITY:

David E. Kahn, City Attorney