



City Council Meeting Date: May 2, 2023

TO: Honorable Mayor and City Councilmembers

FROM: Jeff Malawy, City Attorney
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Christie Donnelly, Management Services Director
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SUBJECT: Analysis and Response to Allegations Made By Martin Bender Regarding Visit Lompoc, Inc. and the Lompoc Tourism Improvement District

Recommendation:

Staff recommends the City Council:

- 1) Receive and file this report.

Background:

Allegations by Martin Bender

At the March 21, 2023, City Council meeting, Martin Bender, a member of the public, provided a document to the City Council during public comment that makes several allegations related to the City's management of its contract with Visit Lompoc, financial statements prepared by Visit Lompoc, actions taken by Councilmember Cordova, and issues related to assessments imposed by the Lompoc Tourism Improvement District. At the April 4, 2023, City Council meeting, Mr. Bender repeated some of his claims through verbal comments during the public comment period.

This report analyzes and responds to Mr. Bender's March 21 and April 4 allegations.

Lompoc Tourism Improvement District

In 2013, the City created the Lompoc Tourism Improvement District ("LTID"), which is a form of Property and Business Improvement District governed by Streets & Highways Code Section 36600 *et seq.* The LTID had an original term of 5 years (2014-2018) and was renewed in 2018 for another 10 years (2019-2028). The LTID allows the City to levy assessments against transient lodging businesses (e.g., hotels, motels, etc.) located within the LTID, which are then used to promote tourism in the City.

As part of creating the LTID, and as required by state law, the City approved a Management District Plan, which, among other things, states the businesses that will be

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assessed, the activities proposed for the operation of the district, the total amount proposed to be expended for such activities, the amount of the assessment, and the number of years that the assessment will be levied. (Str. & H. Code § 36622.) An original Management District Plan was adopted by the City Council in 2013 and a new Management District Plan was adopted in 2018.

As required by state law, an Owners' Association was designated to administer and implement the activities specified in the Management District Plan. Visit Lompoc is the Owners' Association for the LTID.

City's Contract with Visit Lompoc

Visit Lompoc, dba Explore Lompoc, is a California nonprofit corporation and serves as the Owners' Association for the LTID. The City entered into a contract with Visit Lompoc on July 28, 2014, to act as the Owners' Association for the LTID, and the contract was then renewed on August 29, 2018, and expires on December 31, 2028. This report will refer to the current contract between the City and Visit Lompoc as the "VL Contract."

Councilmember Cordova's Role in Visit Lompoc

Councilmember Cordova is the president of Visit Lompoc and has held this position since before she became a member of the City Council. Councilmember Cordova does not receive any compensation from Visit Lompoc. The City entered into the VL Contract before Councilmember Cordova became a member of the City Council.

Discussion:

1. Visit Lompoc Annual Reports

State law requires the Owners' Association (Visit Lompoc) to prepare a report for each fiscal year and to file the report with the city clerk. (Str. & H. Code § 36650.) Section 2.10 of the VL Contract requires Visit Lompoc to submit an annual report for each calendar year within the first 60 days of that year, so it can be presented to the City Council by the second meeting in March. Visit Lompoc's annual reports begin by presenting that year's projected budget, then present the actual expenses for the preceding calendar year. For example, the 2019 report (for January 1, 2019 – December 31, 2019) was presented to the City Council in 2019 and presents 2019 projected budget and 2018 actual expenses. The 2022 report (for January 1, 2022 – December 31, 2022) presents 2022 projected budget and 2021 actual expenses.

There is no deadline in state law for Visit Lompoc's submission of annual reports or for presentation of the annual reports to the City Council.

Mr. Bender claims that Visit Lompoc has submitted its annual report late every year from 2017 to 2023.

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Regarding the 2017 and 2018 annual reports, Mr. Bender refers to the incorrect VL Contract. The 2017 and 2018 annual reports were under the prior version of the VL Contract effective from 2014 through 2018. Section 2.9 of that prior version of the VL Contract required annual reports to be submitted each year by January 31. There is no deadline by which they must be presented to the City Council. Staff has confirmed that the 2017 and 2018 annual reports were submitted by Visit Lompoc to the City on June 15, 2017 and July 9, 2018, respectively, which is after the deadline in the VL Contract.

The 2019 through 2023 annual reports are under the current VL Contract, which requires submission to the City within the first 60 days of the calendar year. In 2019, Visit Lompoc contended it was not required to submit an annual report because it was the “first year” of the new VL Contract, pursuant to Streets & Highways Code 36650(a). That caused delay in submission of the 2019 report. On May 30, 2019, at the request of City administration staff, the City Attorney sent a letter to Visit Lompoc explaining that a 2019 annual report was due (Attachment 1). On June 20, 2019, Visit Lompoc responded (Attachment 2) and agreed to prepare and submit the 2019 annual report. The 2019 annual report was submitted to the City Council on August 6, 2019.

Visit Lompoc submitted the 2020 annual report on August 11, 2020, and submitted the 2021 annual report on July 14, 2021. Those reports were submitted to the City Council jointly on April 19, 2022. City Finance staff confirms that city staffing shortages caused by both COVID-19 and attrition in the position that was previously responsible for presenting the annual reports resulted in those reports not being presented to the City Council by the second meeting in March as the VL Contract intends (but does not require).

Visit Lompoc has not yet submitted its 2023 annual report to the City.

Visit Lompoc has explained to staff that the March deadline for submitting annual reports is difficult to meet because the December TBID assessment payments are not due to the City from hoteliers until January 30th. After receiving payment of the assessment, the City processes the payment and disburses funds to Visit Lompoc, which usually occurs in March. After Visit Lompoc receives the funds from the City, the funds are processed by Visit Lompoc’s financial consultants to prepare financial reports and tax filings, and only then can Visit Lompoc proceed to have the annual report prepared by its consultant, CIVITAS, which requires additional time. Given these constraints, Visit Lompoc has explained that a more realistic deadline for submitting annual reports to the City would be July or August.

In an effort to avoid future late submissions, City staff will remind Visit Lompoc of the timing requirements in the VL Contract for the submission of annual reports. However, late submissions are not a violation of state law and, given the time constraints and process requirements explained above, it seems likely that annual reports may continue to be submitted after the deadline in the VL Contract.

2. Brown Act

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State law requires Visit Lompoc to comply with the Brown Act. (Str. & H. Code § 36612.) This is also a requirement of the VL Contract. (Section 2.11.) Mr. Bender claims that Visit Lompoc is not complying with the Brown Act because it “does not publicly post notice of meetings, agendas, or minutes.”

Visit Lompoc has confirmed it complies with the Brown Act by publicly posting agendas for its meetings, and all of its meetings are open to the public. Additionally, Visit Lompoc provides its agendas to the City Clerk to post at City Hall. There is no requirement under the Brown Act to publicly post minutes.

3. City Administration Fee

Under the VL Contract, the City collects the LTID assessments and then disburses them to Visit Lompoc. (Sections 3.1 & 5.1.) The City is permitted to use 1% of the assessment to cover administrative costs, which increases by 0.1% each year starting in 2019. (Section 5.2.)

Mr. Bender claims that Visit Lompoc “underpaid” the City for the City’s administrative costs in 2019, 2020, and 2021. This is a misunderstanding of the how the VL Contract works. Visit Lompoc is not required to make any payments to the City. Instead, the City’s administrative fee is deducted from the amount that the City disburses to Visit Lompoc.

Nonetheless, Mr. Bender is correct that the City has not always withheld the correct amount for the City’s administrative fee. In April 2022, the City’s finance division discovered that it had not been deducting the graduated increase in the administration fee. It then reviewed all LTID assessments collected since the start of the current VL Contract and calculated how much the City should have collected for the administrative fee. The finance division then reduced the May 2022 disbursement to Visit Lompoc by the difference and alerted Visit Lompoc to this change. The graduated increase in the City’s administrative fee has been accounted for going forward. Staff reported on this error and subsequent correction at the June 7, 2022, City Council meeting. An additional \$2,934.79 was withheld by the City from disbursements to Visit Lompoc in 2022 to fix the previous shortage.

4. Performing Services Related to the LTID

Section 9 of the VL Contract states that: “[Visit Lompoc] or its employees will not act as consultant or perform services of any kind for any person or entity in regard to the LTID without the prior written consent of City.” Mr. Bender states that there is a “potential” violation of this requirement because Councilmember Cordova is the president of Visit Lompoc and is also the president of Legend Hospitality, a business that provides management and consultant services to the Hilton Garden Inn, one of the businesses that is part of the LTID.

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This is not a violation of the VL Contract. Councilmember Cordova's work for Legend Hospitality and the Hilton Garden Inn is not work done "in regard to the LTID," or for Visit Lompoc.

5. Increases in the LTID Assessment

Effective January 1, 2020, the LTID assessment rate was increased from 2% to 3% of gross short-term room rental revenue. Mr. Bender claims that this increase violated state law because the City Council did not hold a public hearing prior to approving the increase. This claim is false.

Under state law, "If a city council proposes to levy a new or increased business assessment, the notice and protest and hearing procedure shall comply with Section 54954.6 of the Government Code..." (Str. & H. Code § 36623(b).) Consequently, the first question is whether the increase from 2% to 3% counted as an "increased assessment" under state law. In fact, it did not.

Government Code Section 54954.6(a)(1)(D) states that the term "new or increased assessment" does not include "[a]n assessment that does not exceed an assessment formula or range of assessments previously specified in the notice given to the public pursuant to [Government Code Section 54954.6(c)(2)(G)] and that was previously adopted by the agency or approved by the voters in the area where the assessment is imposed."

On March 20, 2018, the City Council adopted a resolution of intention to renew the LTID. (Resolution No. 6164(18).) Section 7 of the Resolution states, in pertinent part:

The annual assessment rate is 2% of gross short-term room rental revenue. During the ten-year term, the assessment rate may be increased by the Visit Lompoc Board to a maximum of 5% of gross short-term room rental revenue. The maximum increase in any year shall be 1% of gross short-term room rental revenue.

The proposed LTID Management District Plan ("Plan") was included with the staff report for that item. Section IV.D of the Plan includes the same language regarding the assessment amount as the resolution. According to the staff report for Item 7 on the May 15, 2018, City Council agenda, a 45-day notice was sent to all businesses in the proposed LTID on March 21, 2018. This was the public notice required by Government Code Section 54954.6(c)(2)(G).

On May 15, 2018, the City Council held the public hearing to determine whether to renew the LTID. As a result of the hearing, the language in the Plan was modified to allow Visit Lompoc to *request* an increase in the assessment as part of its annual report rather than simply increasing the assessment, and to state that the increase would be "subject to the Council's approval as part of that annual report." The City Council approved the Plan as amended.

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In its 2019 annual report, Visit Lompoc requested, as part of its annual report, that the City Council increase the assessment from 2% to 3%, to be effective on January 1, 2020. The City approved this increase by approving the annual report.

As explained above, the City Council's action did not require a public hearing because the change in the assessment did "not exceed an assessment formula or range of assessments previously specified in the notice given to the public pursuant to [Government Code Section 54954.6(c)(2)(G)] and that was previously adopted by the agency or approved by the voters in the area where the assessment is imposed."

Moreover, the Plan itself does not require changes to the assessment to be adopted at a public hearing, but only requires that they be approved through the approval of the annual report.

Mr. Bender also claims that the VL Contract required the City to hold a public hearing in order to increase the assessment amount. This is also false.

Section 12.1 of the VL Contract states that: "The services to be provided hereunder shall be subject to any changes in the Plan. Such changes, which are mutually agreed upon by and between City and [Visit Lompoc], after a hearing process per the [Property and Business Improvement District Law], shall be incorporated in written amendments to this Agreement."

The increase in the assessment did not change the Plan because the option and procedure for increasing assessments was already in the Plan. Furthermore, the increase in the assessment did not change the nature of the services provided by Visit Lompoc. Therefore, neither the Plan or the VL Contract needed to be amended, and no public hearing was required.

6. Identification of Assessment Charges on Hotel Bills

Section IV.D of the Plan requires that if the businesses in the LTID pass through the assessment to their patrons, then the assessment must be listed as a separate line item on the bill or receipt and must be identified as "TID Assessment." Mr. Bender alleges that none of the businesses in the LTID are doing this properly. City staff will request that Visit Lompoc remind the LTID businesses of the requirements in the Plan to the extent that such communications fall within Visit Lompoc's existing scope of work under the VL Contract or the Plan.

7. Visit Lompoc Financial Reports

Mr. Bender claims that there are discrepancies and inaccuracies in each of Visit Lompoc's financial reports going back to the 2019 annual report, resulting in \$284,795.51 that is unaccounted for. Mr. Bender also raises questions about the accuracy of Visit Lompoc's tax filings.

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City staff is not required to perform a financial audit of the information in every annual report. However, in preparing this staff report, a high-level review revealed that the “actual collections” reported by Visit Lompoc do not match the payments made to Visit Lompoc by the City. This could be for a variety of reasons, including but not limited to, a difference between accrual-basis accounting and cash-basis accounting methodologies, timing differences, or errors in Visit Lompoc’s bookkeeping. In addition, Visit Lompoc reports a “carryover” amount for each year that the City’s finance division is unable to confirm. A complete, independent, financial audit would need to be performed to be able to identify any discrepancies (as well as the extent and reason for those discrepancies), or any errors that may or may not have been made by Visit Lompoc.

Under Section 10.1 and 10.2 of the VL Contract, the City has the right to inspect Visit Lompoc’s records and to conduct a contract compliance audit. The City Council may direct city staff to engage an auditing firm to undertake an independent financial audit of Visit Lompoc’s financial statements, if desired.

8. Violations of Government Code 1090 and Political Reform Act

Mr. Bender claims that Councilmember Cordova has violated Government Code Section 1090 and the Political Reform Act, both of which are related to conflicts of interest. Mr. Bender submitted these and other claims to the California Fair Political Practices Commission (“FPPC”) on March 28, 2023, and they are currently under consideration by the FPPC. The City Attorney’s office will provide the City Council with a further update on these issues when a response or determination is received from the FPPC.

Fiscal Impact:

None.

Conclusion:

After review, staff has determined that the majority of Mr. Bender’s claims are without merit. To the extent the claims do have merit, staff will take the corrective actions outlined in this report. If desired, the City Council may direct staff to undertake an audit of Visit Lompoc’s financial statements.

Respectfully submitted,



Jeff Malawy, City Attorney

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Christie Donnelly, Management Services Director

APPROVED FOR SUBMITTAL TO THE CITY COUNCIL:

Dean Albro, City Manager

- Attachments: 1) May 30, 2019, Letter to Visit Lompoc
2) June 20, 2019, Letter from Visit Lompoc