ORDINANCE NO. ___ C.S.

AN ORDINANCE OF THE COUNCIL OF THE CITY OF MONTEREY
UPDATING ADMINISTRATIVE PROVISIONS OF THE TRANSIENT OCCUPANCY
TAX ORDINANCE THAT DO NOT REQUIRE VOTER APPROVAL

THE COUNCIL OF THE CITY OF MONTEREY DOES ORDAIN, as follows:

SECTION 1:

WHEREAS, 100% of transient occupancy tax is paid by guests of hotels or other lodging facilities. The current rate of transient occupancy tax is 12%, of which 16% is dedicated to the Neighborhood and Community Improvement Program (NCIP), and 84% funds essential City services such as the library, senior and youth recreation programs, police, fire, parks, forestry maintenance, disaster preparedness and more;

WHEREAS, Monterey City Code section 35-22.1 authorizes Chapter 35, Article 3 to be repealed or amended by the City Council without a vote of the people except as required by law, and except for tax increases as that term is defined in Government Code section 53750, and these amendments do not require a vote of the people;

WHEREAS, these amendments reflect that transient occupancy tax does not apply to federal employees traveling on business, even if their room charges are paid directly by the employee and reimbursed by the federal government. (California Credit Union League v. City of Anaheim, 95 F.3d 30 (9th Cir. 1996). Transient occupancy tax does apply to state employees traveling on business even if their room charges are paid directly by the governmental employer. (See 75 Ops.Cal.Apt.Gen 86 (1992); 46 Ops. Cal.Aty.Gen 16 (1965);

WHEREAS, the only way that cities are able to obtain the needed information regarding transient occupancy tax is by the ordinance’s recordkeeping requirement. The recordkeeping requirement bears a rational relationship to a legitimate city purpose, which is to enable the city to assess and to collect transient occupancy tax. The burden of complying with this recordkeeping requirement is not unduly oppressive or costly since it is only a matter of maintaining the records for three years, and having them available for inspection by a city at reasonable times. (City of Vacaville v. Pitamber, 124 Cal.App.4th 739 (2004).)

WHEREAS, the City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA)(CCR, Title 14, Chapter 3 (“CEQA Guidelines”), Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.
NOW THEREFORE, the Monterey City Council declares as follows:

SECTION 2: The above recitals are true and correct and are hereby incorporated and adopted as findings of the City Council as if fully set forth herein.

SECTION 3: Monterey City Code, Chapter 35, Article 3, Section 35-12 is hereby amended to read as follows:

Sec. 35-12. Exceptions from Imposition of Tax.

(a) No tax shall be imposed upon under this Article shall be imposed upon the following:

a. Any person as to whom, or any occupancy as to which, it is beyond the power of the City to impose the tax.

b. Any federal or State of California officer or employee when on official business, and when the room charge is paid directly by the United States Government or the State of California. This exemption does not apply to a transient employed by an exempt entity from payment of the tax when the payment is later reimbursed by the entity.

2. Any officer or employee of a foreign government who is exempt by reason of express provisions of federal law or international treaty.

(b) No exemption shall be granted except upon a claim theretofore made at the time rent is collected upon a form prescribed by the Finance Director.

SECTION 4: Monterey City Code, Chapter 35, Article 3, Section 35-15 is hereby amended to read as follows:

Sec. 35-15. Reporting and remitting of collections.

a. Each operator of a visitor accommodation facility shall, on or before the last day of each even-numbered-month, remit the full amount of taxes collected for the two previous months with the appropriate return form provided by the City, as set forth following: July/August—due September 30; September/October—due November 30; November/December—due January 31; January/February—due March 31; March/April—due May 31; May/June—due July 31. In the event that the due date falls on Saturday, Sunday or a holiday which causes the city offices to be closed, the due date will become the first working day following the Saturday, Sunday or holiday. Failure of City to provide a return form does not excuse operator from the obligation to timely remit the tax pursuant to this Article. (Ord. 3245 § 2, 1996)

b. The Finance Director may establish shorter reporting periods for any visitor accommodation facility if deemed necessary in order to insure collection of the tax and may require further information in the return. The Finance Director may also require that an operator who is delinquent in payment of this tax be placed on a direct deposit system with taxes collected.
deposited directly into the City of Monterey’s TOT account established at the City’s bank on a monthly, weekly, or daily basis.

c. All taxes collected by operator pursuant to this Article are considered public monies and the sole and separate property of City from the time of collection and shall be received and held in trust for the City until remittance thereof is made by operator to the Finance Director. The operator shall establish a separate trust account for the deposit of transient occupancy taxes as they are collected. The bank account shall be established in the ownership of the City of Monterey.

SECTION 5: Monterey City Code, Chapter 35, Article 3, Section 35-15.1 is hereby amended to read as follows:

Sec. 35-15.1. Remitting and Reporting Requirements upon Cessation of Business.

a. An operator who is transferring, selling or terminating their business shall notify the Finance Director in writing of such sale, transfer, or termination and the name and address of the purchaser, or transferee at least 30 days in advance of the date of transfer, sale, or termination, unless the decision to sell, transfer, or terminate was made within less than a thirty (30) day period prior to the transfer, sale or termination, in which case the operator shall then immediately notify the Finance Director.

b. Each operator upon cessation of business for any reason shall on or before 10 days following the cessation of business, make a return to the Finance Director on approved forms of the total taxable rents charged and the amount of tax collected. After filing the final return the operator shall make their records of account available for a closeout audit by the Finance Director or duly authorized City employee.

c. If an operator who is liable for any tax or penalties under this Article sells or otherwise disposes of his the business, his successor shall the successor notify the Finance Director of the date of sale at least thirty (30) days before the date of sale or, if the decision to sell was made less than thirty (30) days prior to the actual sale, then immediately shall withhold a sufficient portion of the purchase price to equal the amount of such tax or penalty until the selling operator produces a receipt from the Finance Director showing that the tax or penalty has been paid or a tax clearance certificate from the Finance Director stating that no tax or penalty is due. If the -seller operator does not present a receipt or tax clearance certificate within thirty (30) days after such successor commences to conduct business, the successor shall deposit the withheld amount with the Finance Director pending settlement of the account of the seller.

d. If the successor to the business fails to withhold a portion of the purchase price as required, it shall be liable to the City for the payment of the amount required to be withheld and any penalty. Within thirty (30) days after receiving a written request from the successor for a tax clearance certificate stating that no tax or penalty is due, the Finance Director shall either issue the certificate or mail notice to the successor at its address as it appears on the records of the Finance Director of the estimated amount of the tax and penalty that must be paid as a condition of issuing the certificate.
SECTION 6: Monterey City Code, Chapter 35, Article 3, Section 35-16 is hereby amended to read as follows:

Sec. 35-16. Penalties and Interest.

a. Original delinquency. Any operator who fails to remit any tax imposed by the Article within the time required shall pay a penalty of 10% of the amount of the tax in addition to the amount of
the tax or the estimated tax.

b. Continued delinquency. Any operator who fails to remit any delinquent taxes on or before a period of 30 days following the date on which the taxes first became delinquent shall pay a second delinquency penalty of 10% of the amount of the tax in addition to the amount of the tax
and the 10% penalty first imposed.

c. Fraud. If the Finance Director determines that the nonpayment of any remittance due under this Article is due to fraud, a penalty of 25% of the amount of the tax shall be added thereto, in addition to the penalties stated in subsections (a) and (b) of this Section.

d. Compounding Interest. In addition to the penalties imposed, any operator who fails to remit any tax imposed by this Article shall pay interest at the rate of 1% per month or fraction thereof on the amount of the tax, exclusive of penalties, from the date on which the remittance first
became delinquent, until paid.

e. Penalties merged with tax. Every penalty imposed and such interest as accrues under the provisions of this Section shall become a part of the tax required to be paid.

f. Audit Deficiency. If, upon audit by the City, an operator is found to be deficient in either its return or its remittance or both, the Finance Director shall immediately invoice the operator for the amount of the net deficiency plus a penalty of ten percent (10%) of the net deficiency. If the operator fails or refuses to pay the deficient amount and applicable penalties within 30 days of the date of the invoice, an additional 10% penalty shall be added to the original deficiency. In addition to the penalties imposed, any operator who fails to remit payment of billed audit deficiencies within 30 days of the date of the invoice shall pay interest at the rate of 1% per month or fraction thereof on the amount of the tax, exclusive of penalties.

SECTION 7: Monterey City Code, Chapter 35, Article 3, Section 35-17 is hereby amended to read as follows:

Sec. 35-17. Failure to collect and report tax; determination of tax by Finance Director.

If any operator shall fail or refuse to collect the tax imposed by this Article, or and to make, within the time provided in this Article, any report and remittance of such tax or any portion thereof, the Finance Director shall proceed in such manner as he they may deem best to obtain facts and information on which to base an estimate of the tax due. As soon as the Finance Director shall procure such facts and information as is possible to obtain upon which to base the assessment of any tax imposed by this Article and payable by any operator who has filed or
refused to collect the same and to make such report and remittance, t The Finance Director shall proceed to determine and assess against such operator the tax, interest, and penalties provided for by this Article. In case such determination is made, t The Finance Director shall give a notice of the amount so assessed by serving it personally, serving it by e-mail, or by depositing it in the United States mail, postage prepaid, addressed to the operator so assessed at the last known place of address. Such operator may within ten days after the serving or mailing of such notice make application, in writing, to the Finance Director for a hearing on the amount assessed. If application by the operator for a hearing is not made within the time prescribed, the tax, interest, and penalties, if any, determined by the Finance Director shall become final and conclusive and immediately due and payable. If such application is made, the Finance Director shall give not less than five days written notice in the manner prescribed in this Section to the operator to show cause at a time and place fixed in such notice why such amount specified therein should not be fixed for such tax, interest, and penalties. At such hearing, the operator may appear and offer evidence why such specified tax, interest, and penalties should not be so fixed. After such hearing, the Finance Director shall determine the proper tax to be remitted and shall thereafter give written notice to the person in the manner prescribed in this Section of such determination and the amount of such tax, interest, and penalties. The amount determined to be due shall be payable after 15 days unless an appeal is taken as provided in Section 35-18. (Ord. 3102, 1992; Ord. 1405, 1964).

SECTION 8: Monterey City Code, Chapter 35, Article 3, Section 35-18 is hereby amended to read as follows:

Sec. 35-18. Appeals.

Any operator aggrieved by any decision of the Finance Director with respect to the amount of such tax, interest, and penalties, if any, may appeal to the Appeals Hearing Board City Council by filing a notice of appeal with the City Attorney's Office Clerk within 15 days of the service or mailing of the determination of tax due. Staff shall fix a time and place for hearing such appeal, and the City Clerk shall give notice in writing to such operator at the last known place of address. The findings of the Appeals Hearing Board City Council shall be final and conclusive and shall be served upon the appellant in the manner prescribed above for service of notice of hearing. Any amount found to be due shall be immediately due and payable upon the service of notice. (Ord. 3102, 1992; Ord. 3080, 1994; Ord. 1405, 1964).

SECTION 9: Monterey City Code, Chapter 35, Article 3, Section 35-19 is hereby amended to read as follows:

Sec. 35-19. Records to be kept.

It shall be the duty of every operator liable for the collection and payment to the City of any tax imposed by this Article to keep and preserve, for a period of three years, not including the present calendar year, within the boundaries of this City, all business records as may be necessary to determine the amount of such tax the operator may have been liable for the collection of and payment to the City, for which records the operator is liable for the collection and payment to the City. The Finance Director and authorized deputies or agents in the exercise of-
duties imposed by this Ordinance shall have the right to inspect such records at all reasonable times. The records maintained by the operator under this section shall include, but are not limited to, the following:

(a) A written report that includes daily records of all of the following:
   1. Name of person occupying the room;
   2. Number or other identifier of the room occupied;
   3. Room rate;
   4. Amount charged, if any, for the occupancy;
   5. Amount of transient occupancy tax collected; and

(b) A written record of each occupancy charge for which an exemption is claimed, including the name of the person occupying the room, date(s) of occupancy, reason(s) for the exemption, and the exemption claim form required under Section 35-12.

...and to apply auditing procedures necessary to determine the amount of tax due to the City. All records which may be necessary to inspect shall be kept within the City or shall be produced within ten (10) working days of written notice at the business location within the City.

In the event that records are not produced upon request, or, such records are not reasonably able to be audited, tax, interest, and penalties will be levied based upon the average room rate and occupancies for similar properties within the City during the audit period. Further, and without limitation, any operator who does not produce records following written notice as set forth herein shall pay, as a civil penalty, in addition to any tax, penalty or interest, the sum of $100.00 per day for each business day the records are not produced for audit.

Further, the City may issue a subpoena pursuant to Government Code section 37104, et. seq., as may be amended, or utilize any other lawful means to access and inspect the records of an operator who refuses to make such records available for inspection.

SECTION 10: Monterey City Code, Chapter 35, Article 3, Section 35-20 is hereby amended to read as follows:

Sec. 35-20. Refunds.

a. Whenever the amount of any tax, interest or penalty has been overpaid or paid more than once or has been erroneously or illegally collected or received by the City under this Article, it may be refunded as set forth in this Section; provided, that a claim in writing is filed in accordance with Section 1-8.2 and within a period of one year from the date of the claimed overpayment.

b. Nothing in this section shall be deemed to bring into being or validate any claim for refund arising from a cause heretofore existent if such claim, whether filed or not, was or would have been invalid because of the then existing statutory term, and nothing in this section shall be deemed to validate, revive, restore or continue any claim for refund previously filed and denied.
c. An operator may claim a refund or take as credit against taxes collected and remitted, the amount overpaid, paid more than once or erroneously or illegally collected or received when it is established in a manner prescribed by the Finance Director that the person from whom the tax has been collected was not a transient; provided, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the transient or credited to rent subsequently payable by the transient to the operator.

dc. A transient may obtain a refund of taxes overpaid or paid more than once or erroneously or illegally collected or received by the City by filing a claim in the manner provided in subsection (a) of this Section, but only when the tax was paid by the transient directly to the Finance Director, or when the transient having paid the tax to the operator establishes to the satisfaction of the Finance Director that the transient has been unable to obtain a refund from the operator who collected the tax.

e. No refund shall be paid under the provisions of this Section unless the claimant establishes his right therefor by written records showing entitlement therefor.

f. It shall be a condition for all persons, including business organizations and entities of any form whatsoever, against whom a jeopardy determination or deficiency determination is made that, prior to the filing of any lawsuit, of any kind whatsoever, including a claim for refund of taxes, injunction, or writ of mandate, or other equitable process, the payment of all taxes, interest and penalties as determined by the City shall be required to be paid as a condition to seeking judicial review of any tax liability. No such legal action shall be proper unless all of the administrative remedies provided in the City Code shall have first been exhausted, including the payment of the full amount owed as set forth and determined by the City. (Ord. 3474 § 2, 2012; Ord. 3350, 2006).

SECTION 11: Monterey City Code, Chapter 35, Article 3, Section 35-21 is hereby amended to read as follows:

Sec. 35-21 Exhaustion of Administrative Remedies

No person may commence or maintain any proceeding, or assert any legal or equitable claim of any kind, whether affirmatively or by defense, against the City challenging or disputing in any way the imposition, assessment or collection of any tax, interest, or penalty, unless the person first deposits with the City the full amount of any tax, interest or penalty imposed or assessed or otherwise challenged or claimed to be in dispute. Only after payment of the full amount of any tax, including interest and any penalties assessed or imposed, claimed to be illegal or otherwise improper, may a person maintain an action to recover the tax and other amounts paid and in dispute, with interest, in such manner as provided by law.

SECTION 12: Monterey City Code, Chapter 35, Article 3, Section 35-22 is hereby added to read as follows:

Sec. 35-22. Collection by court action.
a. Any tax required to be paid by any transient under the provisions of this Article shall be
deemed a debt owed by the transient to the City and payable through the operator. Any tax
collected by an operator which has not been paid to the City shall be deemed funds held in trust
for the account of the City which are due and payable by the operator to the City pursuant to the
provisions of this Article. Any person owing money to the City under the provisions of the Article
shall be liable to an action brought in the name of the City of Monterey for the recovery of such
amount.

b. If any amount required to be paid to the City under this Article is not paid when due, the
Finance Director may record in the office of the Monterey County Recorder a certificate which
specifies the amount of tax and penalties due, the name and address of the operator liable for
the same, a statement that the Finance Director has complied with all provisions of this Article in
the determination of the amount required to be paid and a legal description of the real property
owned by the operator. From the time of the recording of the certificate, the amount required to
be paid together with penalties constitutes a lien upon all real property in the County owned by
the operator or thereafter acquired before the lien expires. The lien has the force, effect and
priority of a judgment lien and shall continue for ten (10) years from the filing of the certificate
unless sooner released or otherwise discharged.

c. At any time within three (3) years after the recording of a certificate of lien under Section 35-21 (b), the Finance Director may issue a warrant directed to any sheriff or marshal for the
enforcement of the lien and the collection of any tax and penalties required to be paid to the City
under this Article. The warrant shall have the same effect as a writ of execution, and be
executed in the same manner and with the same effect as a levy and sale pursuant to a writ of
execution. The Finance Director may pay or advance to the sheriff or marshall such fees,
commissions and expenses for services as are provided by law for similar services pursuant to
a writ of execution.

d. In lieu of issuing a warrant under subsection (c), at any time within the three (3) years after an
assessment was issued or a certificate of lien was recorded under Section 35-21 (b), the
Finance Director may collect the delinquent amount by seizing or causing to be seized any
property, real or personal, of the operator and sell any noncash or nonnegotiable property or a
sufficient part of it at public auction to pay the amount of tax due together with any penalties,
interest and any costs incurred on account of the seizure and sale. Any seizure made to collect
taxes due shall only be of property of the operator not exempt from execution under the

(a) Any tax required to be paid by any transient under the provisions of this chapter shall be
deemed a debt owed by the transient to the City.

(b) Failure of an operator to collect tax required to be paid by a transient shall not excuse the
operator from the operator’s obligation under this chapter. Any such tax collected by an operator
that has not been paid to the City shall be deemed a debt owed by the operator to the City. Any
tax required to be paid by any transient that is not collected by the operator is deemed a debt
owed by the operator to the City.

(c) Any person owing money to the City under the provisions of this chapter shall be liable to an
action brought in the name of the City of Santa Clara for the recovery of such amount.
(d) If any amount required to be paid to the City under this chapter is not paid when due, the Finance Director may, within four years after the amount is due, file an action to collect any unpaid amount and seek a judgment to enforce collection of the debt. All lawful means of judgment collection shall be available to the Director of Finance, including but not limited to a lien on real property.

SECTION 13: the existing Monterey City Code, Chapter 35, Article 3, Section 35-22.1 is restated in full and renumbered as Section 35-22.2, and Section 35-22.1 is hereby added to read as follows:

Sec. 35-22.2. Violations.

Any person violating any provision of this Article shall be subject to administrative citations as provided by Section 1-9, et. seq. of this Code.

Any person violating any of the provision of this Article shall be guilty of a misdemeanor as provided by Section 1-7 of this Code, and shall be liable for costs incurred by City in the prosecution of any civil action filed for any such violation as provided by Section 1-7.1 of this Code.

It shall not be a defense to violations of this Article that the operator has forwarded any return due or tax collected to its principal or corporate headquarters, not that any failure to file or remit taxes was based on the direction or inaction of such principal or corporate headquarters.

Any person charged with the receipt, safekeeping, transfer, or disbursement of these public tax funds who fails to remit said taxes when due shall be subject to the provisions of Penal Code Section 424.

SECTION 14: All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SECTION 15: If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance and the application of such provision to other persons or circumstances shall not be affected thereby.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF MONTEREY this _____ day of ________, 2021, by the following vote:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:
ABSTAIN: COUNCILMEMBERS:

APPROVED:
ATTEST:

__________________________
Mayor of said City

__________________________
City Clerk thereof