ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF ANAHEIM AMENDING CHAPTER 2.12 (TRANSIENT OCCUPANCY TAX) OF TITLE 2 (TAXES) OF THE ANAHEIM MUNICIPAL CODE TO MODIFY THE OPERATOR'S COLLECTION DUTIES.

WHEREAS, by the adoption of Ordinance 5305, May 27, 1992; Ordinance 5338, October 27, 1992; Ordinance 5436, August 2, 1994; Ordinance 5495, May 9, 1995; Ordinance 5741, November 7, 2000; Ordinance 5777, August 28, 2001; and Ordinance 5866, June 17, 2003; the City Council of the City of Anaheim ("City Council") added and amended Chapter 2.12 (Transient Occupancy Tax) to Title 2 (Taxes) of the Anaheim Municipal Code (the "Code") for the purpose of imposing a tax for the privilege of occupancy in hotels located within the City of Anaheim ("City"); and

WHEREAS, Chapter 2.12 (Transient Occupancy Tax) is known and referred to as the "Transient Occupancy Tax Code"; and

WHEREAS, on December 12, 2016, the California Supreme Court issued its opinion in the case *In re Transient Occupancy Tax Cases,* 2 Cal.5th 131 (2016), in response to the petition for writ of mandate of online travel companies ("OTCs") that were challenging the determination of the City of San Diego that the OTCs were responsible for paying transient occupancy tax ("TOT") on their service fees; and

WHEREAS, the San Diego ordinance at issue before the California Supreme Court assessed and calculated the transient occupancy tax obligation as a percentage of the "Rent charged by the Operator" of the hotel, which is the same basis for assessment and calculation of TOT under the Anaheim ordinance; and

WHEREAS, the California Supreme Court described the San Diego OTC transactions as arising out of the "merchant model," whereby the price the hotel charges the OTC for the room is the wholesale price subject further to a "rate parity" agreement that bars the OTC from selling a room for a rent lower than a “floor” room rate which the hotel quotes its customers directly; and

WHEREAS, the California Supreme Court held that "To the extent a hotel determines the markup, such as by contractual rate parity provisions requiring the OTC to quote and charge the customer a rate not less than what the hotel is quoting on its own website, it effectively 'charges' that amount, whether or not it ultimately receives or collects any portion of the markup, and that amount is therefore subject to the tax," and further stated that: "Thus, it is the wholesale room rate plus the hotel-determined markup, exclusive of any discretionary markup set by the OTC, that is 'charged by the Operator' and subject to the tax”; and

WHEREAS, despite the ruling of the California Supreme Court that TOT is due on the full amount of the "floor room rate" set and required by hotel operators to be charged by OTCs to hotel customers (defined in the Anaheim ordinance as "transients"), and despite the applicability of this

ruling to the Anaheim TOT ordinance, the City believes that Anaheim hotel operators have not in every case remitted TOT to Anaheim on this full amount of "rent," but may have remitted TOT in some instances only on the lower wholesale room rate, resulting in an underpayment of TOT to the City; and

WHEREAS, the California Supreme Court also held that because the San Diego ordinance imposed the duty to remit the tax solely on “the Operator” it did allow the city to assess TOT directly against an OTC, and the Court rejected other arguments that OTC’s should be treated as operators for purposes of TOT collection under the ordinance; and

WHEREAS, the Anaheim hotel operators have advised the City that, in certain transactions where they have established and required a floor room rate through a rate parity agreement or other hotel operator-determined mark up, it would assist in facilitating their collection of the full amount of TOT if payment were to be made by customers directly to the hotel operators; and

WHEREAS, the Anaheim hotel operators have specifically identified those certain transactions of under-collection of TOT as being limited to circumstances where the hotel operator: (a) has established and required a floor room rate through a rate parity agreement or other hotel-determined mark up; and (b) the OTC, rather than the hotel operator, handles the financial transactions related to the hotel reservations, received the hotel guest's payment, and is listed on the hotel guest's credit card receipt; and

WHEREAS, the City Council desires to protect and serve its residents, visitors and others who depend upon the full collection of all properly due City taxes by facilitating efforts by hotel operators to collect and remit the proper amount of TOT; and

WHEREAS, pursuant to the California Environmental Quality Act (Public Resources Code Section 21000 *et seq.;* herein referred to as "CEQA") and the State of California Guidelines for Implementation of the California Environmental Quality Act (commencing with Section 15000 of Title 14 of the California Code of Regulations; herein referred to as the "State CEQA Guidelines"), the City is the "lead agency" for the preparation and consideration of environmental documents for this ordinance; and

WHEREAS, the City Council finds and determines that this ordinance is not subject to CEQA pursuant to Sections 15004, 15060(c)(2), 15060(c)(3), and 15061(b)(3) of the State CEQA Guidelines, because it will not result in a direct or reasonably foreseeable indirect physical change in the environment, there is no possibility that it may have a significant effect on the environment, and it is not a "project," as that term is defined in Section 15378 of the State CEQA Guidelines.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ANAHEIM DOES ORDAIN AS FOLLOWS:

SECTION I. Sections 2.12.005 and 2.12.020 of Chapter 2.12 (Transient Occupancy Tax) of Title 2 (Tax) of the Anaheim Municipal Code) shall be, and the same hereby are amended and restated to read in their entirety as follows:

2.12.005 DEFINITIONS.

For purposes of this chapter, the following words, terms, phrases, and the derivations and variants thereof, shall have the meanings given herein:

.010 “Anaheim” or “City” means the City of Anaheim.

.020 “City Auditor” means the Audit Manager of the City.

.021 “Direct Payment" means the payment of rent from a transient directly to an operator who collects the rent directly from the transient, and shall include where the transient's rent payment directly to the operator is made or processed using cash, check, credit card, debit card, or any other direct in-person or electronic payment and collection method, but shall exclude the Indirect Payment of rent from a transient to a third party who then remits the rent, in whole or in part, to the operator.

.025 “Fiscal Year” means the period commencing July 1 of one calendar year through June 30 of the immediately subsequent calendar year.

.030 “Homeless person” means any person who lived or resided in Anaheim immediately prior to being provided shelter in a hotel by a Qualifying Nonprofit Service Organization.

.040 “Hotel” means any structure or portion thereof, which is occupied by persons for lodging or sleeping purposes for periods of less than thirty consecutive days including, without limitation, any hotel, bachelor hotel, motel, lodging house, rooming house, bed and breakfast inn, apartment house, dormitory, vacation ownership resort, public or private club, mobilehome or house trailer at a fixed location, or other similar structure or portion thereof, and any space, lot, area or site in any trailer court, camp, park, or lot which is occupied or intended or designed for occupancy by a tent, trailer, recreational vehicle, mobilehome, motorhome, or other similar conveyance, where such structure, space, lot, area or site is occupied by persons for lodging or sleeping purposes for periods of less than thirty consecutive days.

.045 “Indirect Payment" means the payment of rent from a transient directly to a third party who collects the rent directly from the transient and who then remits the rent, in whole or in part, to the operator, and shall include where the transient's rent payment directly to the third party is made or processed using cash, check, credit card, debit card, or any other direct in-person or electronic payment and collection method, but shall exclude the Direct Payment of rent from the transient to the operator.

.050 “Operator” means any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity. Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same

duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both. For purposes of the notice and appeal provisions of this chapter only, “operator” shall also include any managing employee or employee in charge of the hotel.

.060 “Qualifying Nonprofit Service Organization” means any nonprofit service organization which (a) is a member of the Anaheim Human Services Network, (b) directly pays the cost of sheltering homeless persons in a hotel and (c) does not directly or indirectly further any religious purpose by providing such shelter.

.070 “Qualifying Rental Agreement” means and is limited to a written contract signed by both the landlord and tenant, legally enforceable by either party, for a rental period of not less than thirty consecutive days. "Qualifying Rental Agreement” shall expressly exclude: (1) any agreement regardless of length of the rental term which is terminated for any reason by either party or by mutual consent prior to the thirtieth consecutive day of the tenancy, or (2) any agreement regardless of the length of the rental term which is for occupancy of lodging or sleeping space which is not the legal residence or principal dwelling place of the occupant, or (3) any agreement which would be unlawful or constitute a violation of law.

.080 “Rent” means the consideration charged by an operator for accommodations, including without limitation any (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of such accommodations including, but not limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service. "Rent" shall not include any charge, billing, or account or portion thereof which the operator finds to be worthless or uncollectible and charged off for tax purposes. If any such worthless or uncollectible rent is thereafter collected, the amount shall be considered rent in the month collected and the tax collected shall be included in the next monthly payment to Anaheim by the operator. “Rent” shall also not include any amount upon which a sales or use tax is imposed pursuant to Chapter 2.04 of this Code if the imposition of a tax pursuant to this Chapter 2.12 would be deemed to constitute an additional sales and use tax conforming to all of the conditions set forth in subdivision (b) of Section 7203.5 of the Revenue and Taxation Code of the State of California. (Ord. 5777 § 12; August 28, 2001.)

.090 “Tax” (where such term is not capitalized) means the amounts imposed pursuant to Section 2.12.010 of this chapter; “Tax” (where such term is capitalized) means 1) the tax and 2) any applicable interest and penalties imposed by this chapter and 3) any amount collected by an operator under a representation that it is a tax which is not refunded in accordance with this chapter.

.100 “Transient” means any person who exercises occupancy, or is entitled to occupancy, of any room, space, lot, area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral. Any such person shall be deemed to be a transient until the thirtieth consecutive day of such occupancy or right of occupancy and the tax imposed by this Chapter shall be due upon all rent collected or

accruing prior to said thirtieth consecutive day unless the occupancy is pursuant to a Qualifying Rental Agreement. (Ord. 5305 § 1 (part); May 27, 1992: Ord. 5741 § 1; November 7, 2000.)

2.12.020 OPERATOR'S COLLECTION DUTIES.

.010 Each operator shall collect the tax to the same extent and at the same time as the rent is collected from every transient. The amount of the rent and the tax thereon shall be separately stated from all other amounts on all receipts and books of record of the hotel, and each transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon. No operator shall advertise or state in any manner, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the operator or that the tax will not be added to the rent or that, if added, any part of the tax will be refunded except in the manner hereinafter provided. Notwithstanding the foregoing provision of this subsection, nothing contained herein shall require the operator to separately state the rent and the tax thereon on receipts and books of record or prohibit the operator from advertising or stating that the tax will be assumed or absorbed by the operator or that such tax will not be added to the rent, provided such room accommodations constitute a portion of a collective group of services, privileges, entitlement or benefits (hereinafter "benefits") which benefits include, at a minimum, room accommodations and food and beverage services or room accommodations and at least one other benefit having an ascertainable fair market value (hereinafter "special package") offered for one fixed charge (hereinafter "special package rate").

Further, as of July 15, 2020, but only in those circumstances where the operator has set and required a floor room rate that must be charged by a third party to a transient, an operator shall only collect rent from a transient, and at the same time shall collect the tax on the full amount charged by the operator, through Direct Payment from the transient to the operator. Notwithstanding the July 15, 2020 date for the mandatory commencement of the Direct Payment of rent and tax from the transient to the operator under the circumstances where the operator has set and required a floor room rate that must be charged by a third party to a transient, if the terms of a lawful and fully executed contract that was entered into and in effect between an operator and a third party prior to May 12, 2020 would be impaired by the Direct Payment requirement of this subsection, the Direct Payment provision shall not apply to collection of rent under that contract until the earlier of: (1) its renewal, amendment, or extension; or (2) July 15, 2021. On or before July 15, 2020, any operator claiming such an impairment of contract shall file with the License Collector a statement of impairment under penalty of perjury. The burden shall be on the operator to prove and document its claim of impairment to the reasonable satisfaction of the City in the operator's filed statement, through provision of the relevant contract, the entry and end dates of the contract, and an explanation of how the City's Direct Payment requirement impairs the contract.

.011 In the event the operator fails to separately state the rent and tax from other amounts on all receipts and books of record, the operator shall file with the License Collector a statement of each special package rate on a form (hereinafter "Special Package Form")

provided by the License Collector. The Special Package Form shall include the special package rate, and an itemization of the values of the items included, including, at a minimum, the rent, tax, and any other item. The operator must submit documentation to substantiate the claimed fair market value of individual items included other than rent and tax. The License Collector shall mark the date of receipt on the Special Package Form and review the submitted information to determine if sufficient information is provided to verify that the numbers are mathematically correct and complies with this chapter. If the package meets the foregoing requirements, the License Collector shall assign a unique number to the Special Package Form and return a copy to the operator within fourteen City business days of receipt. The operator may use the assigned unique number or may assign the operator's unique name/number to each package and notify the License Collector to imprint the name/number on the Special Package Form. This unique name/number must appear on all receipts and books of record whenever the package is sold. If the package fails to meet the requirements of this Subsection, the License Collector will advise the operator of any required changes within fourteen City business days. The operator must either make the required changes and resubmit the Special Package Form or comply with subsection 2.12.020.010. A new Special Package form must be submitted in the event of any change in the special package rate or the specified rate (subsection 2.12.020.013), or other items in the special package which exceeds ten percent and for any new special package(s) offered/used. Any change of items within the special package constitutes a new special package. The effective date of the special package rate shall be the date of receipt by the License Collector if the package is approved.

.012 No Special Package Form shall be accepted for filing unless accompanied by a filing fee in the amount established by resolution of the City Council.

.013 As to any package sold by the operator for which the License Collector has approved the package and assigned the unique number, the tax shall apply only to the amount of rent identified in the Special Package Form (hereinafter "specified rate") until such time as the License Collector shall inform the operator that the approval is revoked.

.014 In the event an operator fails to comply with subsection 2.12.020.010 and also fails to file a Special Package Form and obtain approval of a specified rate pursuant to subsection 2.12.020.011, the portion of the special package rate attributable to the room accommodations for purposes of determining the tax (hereinafter "imputed rate") shall be deemed the lesser of (a) the amount collected for the total special package or (b) an amount equal to the median average double occupancy room rate for such accommodations as posted in such room pursuant to the requirements of Section 1863 of the Civil Code (or any successor section). The burden to prove such posted room rates shall be upon the operator. In the event the operator fails to present satisfactory proof of such rates, such posted rates shall be deemed the posted rates in effect at the time of the audit.

.015 Notwithstanding subsections 2.12.020.011 and 2.12.020.013, if any audit reveals that the gross income to the operator attributable to the accommodations portion of such special package (hereinafter "audited rate") is more than ten percent greater than the specified rate, the rent for tax purposes shall be the audited rate. In the event subsection

2.12.020.014 applies and the audited rate is greater than the imputed rate, the rent for tax purposes shall be the audited rate. The audited rate shall be determined by an audit of a sample of the special packages sold by the operator within an individual special package category. The audited rate shall be the amount of the special package rate remaining after deducting the fair market value of each of the benefits included in the special package rate other than room accommodations and room tax. Where more than one type of special package was offered within the audit period, each special package shall be audited separately for purposes of determining the applicable audited rate. Credits or offsets shall not be allowed between different special packages. (Ord. 5777 § 12; August 28, 2001)

.020 Any amount charged and collected by the operator from any transient beyond the period for which the tax is imposed, which amount is in excess of the rent theretofore charged the transient for the same accommodations and upon which rent tax was imposed and collected, shall be conclusively deemed collected under the representation by the operator that such excess amount was tax. If the operator gives such person written notice prior to the accrual of the obligation therefor that such excess amount constitutes an increase in the rental rate this subsection shall not apply. The burden to prove such notice shall be upon the operator.

.030 Whenever an operator who has collected any sum under the representation that it was tax (which sum was not required to be collected as tax) remits said sum to Anaheim and thereafter refunds such sum in whole or part, such operator may take the amount of such refund as a credit against future transient taxes only upon submitting to the License Collector a statement under penalty of perjury specifying the reasons for the credit and proof of payment of such refund.

.040 Nothing contained in this chapter shall require the refund by Anaheim to any person of such sum collected by the operator and remitted to Anaheim even where such sum was not otherwise required to be collected and remitted.

.050 Nothing contained in this chapter shall be deemed to authorize as a credit against tax any amount paid by the operator to any tour promoter, travel agent, or third party other than the transient. Travel agent commissions are an expense of the operator and may not be deducted from the rent. (Ord. 5305 § 1 (part); May 27, 1992.)

SECTION 2. SEVERABILITY.

The City Council of the City of Anaheim hereby declares that should any section, paragraph, sentence, phrase, term or word of this ordinance be declared for any reason to be invalid, it is the intent of the City Council that it would have adopted all other portions of this ordinance independent of the elimination of any such portion as may be declared invalid. If any section, subdivision, paragraph, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance, and each section, subdivision, paragraph, sentence, clause and phrase thereof,

irrespective of the fact that any one (or more) section, subdivision, paragraph, sentence, clause or phrase had been declared invalid or unconstitutional.

SECTION 3. CERTIFICATION.

The City Clerk shall certify to the passage of this ordinance and shall cause the same to be printed once within fifteen (15) days after its adoption in the *Anaheim Bulletin,* a newspaper of general circulation, published and circulated in the City of Anaheim.

SECTION 4. EFFECTIVE DATE.

This ordinance shall take effect and be in full force thirty (30) days from and after its final passage.

THE FOREGOING ORDINANCE was introduced at a regular meeting of the City Council of the City of Anaheim held on the __ day of _____ 2020, and thereafter passed and adopted at a regular meeting of said City Council held on the __ day of _____ 2020, by the following roll call vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

CITY OF ANAHEIM

By: _____
MAYOR OF THE CITY OF ANAHEIM

ATTEST:

_____
CITY CLERK OF THE CITY OF ANAHEIM