

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF APPROVING AN)	RESOLUTION NO. 20-5129
AMENDED AND RESTATED VISITOR)	
DEVELOPMENT FUND SERVICES)	Introduced by Chief Operating Officer
AGREEMENT)	Marissa Madrigal in concurrence with Council President Lynn Peterson

WHEREAS, on January 31, 2001, Metro, City of Portland and Multnomah County entered into the Visitor Facilities Intergovernmental Agreement (the “Original VFIGA”) to support regional tourism and spectator facilities, the visitor and hospitality industry and to maximize the economic development benefits associated with visitor facilities, programs and services; and

WHEREAS, the Original VFIGA provided that certain funds collected from the tax increases would be dedicated to visitor development purposes managed by a nonprofit entity whose board of directors is comprised of representatives of the visitor services industry and government officials; and

WHEREAS, on April 26, 2001, Metro, City of Portland and Multnomah County entered into the original Visitor Development Fund Services Agreement, whereby the identified the Visitor Development Fund, Inc., an Oregon nonprofit corporation with a board of directors comprised of representatives of the visitor services industry and government officials, as the entity capable of carrying out the visitor development purposes contemplated by the Original VFIGA; and

WHEREAS, the Original VFIGA was subsequently amended in January of 2020 (the “Second Amended and Restated VFIGA”), to provide mechanisms for maintaining resilient funding reserves, adequate funding for the visitor development fund, vital and competitive tourism facilities, and improved conditions for the community and people experiencing homelessness to help Portland remain a desirable destination; and

WHEREAS, as contemplated in the Second Amended and Restated VFIGA, the Visitor Development Fund Services Agreement must now be updated and revised to, among other things, extend its duration and conform it to the terms of the Second Amended and Restated Visitor Facilities Intergovernmental Agreement; now therefore

BE IT RESOLVED that the Metro Council hereby authorizes the Metro Council President to execute the First Amended and Restated Visitor Development Fund Services Agreement, in a form substantially similar to the one attached hereto as Exhibit A.

ADOPTED by the Metro Council on this 24th day of September, 2020.

Lynn Peterson

Lynn Peterson, Council President

Approved as to Form:

Carrie MacLaren

Carrie MacLaren, Metro Attorney

FIRST AMENDED AND RESTATED VISITOR DEVELOPMENT FUND SERVICES AGREEMENT

THIS FIRST AMENDED AND RESTATED VISITOR DEVELOPMENT FUND SERVICES AGREEMENT (the "Agreement" or "this Agreement") is made among VISITOR DEVELOPMENT FUND, INC., an Oregon nonprofit corporation ("VDFI"); Metro, a metropolitan service district ("Metro"), MULTNOMAH COUNTY, OREGON, a municipal subdivision (the "County"); and CITY OF PORTLAND, a municipal corporation (the "City"), each individually a "Party" and collectively the "Parties", who agree as follows:

RECITALS

A. The Parties and other entities entered into a Memorandum of Understanding dated September 14, 1999 to plan, budget for, and administer the expenditure of certain revenues from the 2.5% increase in the County transient lodging tax and vehicle rental tax in support of regional visitor facilities and to further develop the visitor industry in the Portland metropolitan area.

B. The County adopted ordinances needed to implement the tax increases and the County, City, and Metro entered into the Visitor Facilities Intergovernmental Agreement, dated January 31, 2001, the Amended and Restated Visitor Facilities Intergovernmental Agreement, dated October 25, 2013, and the Second Amended and Restated Visitor Facilities Intergovernmental Agreement, dated December 5, 2019.

C. The Visitor Facilities Intergovernmental Agreement provides that certain funds collected from the tax increases will be dedicated to visitor development purposes by a nonprofit entity whose board of directors is comprised of representatives of the visitor services industry and government officials.

D. Visitor Development Fund, Inc. is an Oregon nonprofit corporation with a board of directors comprised of representatives of the visitor services industry and government officials.

E. The County, City, and Metro agreed that VDFI is a qualified entity capable of carrying out the purposes contemplated by the VFIGA and entered into the Visitor Development Fund Services Agreement, dated April 26, 2001.

F. The Parties desire to provide for the administration of the Visitor Development Fund, including financial and administrative oversight.

G. The Parties desire to enter into this First Amended and Restated Visitor Development Fund Services Agreement to conform it to the Second Amended and Restated Visitor Facilities Intergovernmental Agreement and to extend its term as provided herein.

AGREEMENT

1. DEFINITIONS AND STATEMENT OF INTENT

- 1.1. **Definitions.** Unless otherwise specified in this Section, capitalized words in this Agreement shall have the same meaning as terms defined in the VFIGA. The definitions of the Second Amended and Restated Visitor Facilities Intergovernmental Agreement are attached in Exhibit A for ease of use.

For purposes of this Agreement, the following definitions apply:

- 1.1.1. “Claims” is defined in Section 13.1.
- 1.1.2. “Default” is defined in Section 12.3.
- 1.1.3. “Industry Representative Member” is defined in Section 4.1.1.1.
- 1.1.4. “Public Bodies”, or individually “Public Body”, means the City of Portland, Multnomah County and Metro acting through their duly elected governing bodies, unless otherwise noted below.
- 1.1.5. “Public Body Member” is defined in Section 4.1.1.2.
- 1.1.6. “Purpose” as used in this Agreement means that the expenditures of the allocation of revenues from the VFTA to the VDF, which are described in Section 3.3.10 of the VFIGA, shall be expended by VDFI to attract visitors to Portland and Multnomah County consistent with the purposes stated in the VFIGA and seek to maximize hotel and short term rental occupancy and vehicle rentals.
- 1.1.7. “Taxes” means the transient lodging and the motor vehicle rental taxes imposed under Multnomah County Code Chapter 11, as specified in the Second Amended and Restated Visitor Facilities Intergovernmental Agreement.
- 1.1.8. “Visitor Development Fund” or “VDF” means one or more accounts used by VDFI to receive the funds described in Section 3.3.10 of the VFIGA and for payment of obligations of the VDFI as permitted in the VFIGA and this Agreement. To avoid ambiguity, the VDF shall be separate and independent from Travel Portland’s account(s).
- 1.1.9. “Visitor Facilities Intergovernmental Agreement” or “VFIGA” means the Second Amended and Restated Visitor Facilities Intergovernmental Agreement, dated December 5, 2019, which is attached as Exhibit A.

1.2. Statement Of Intent

1.2.1. Statement of Intent. The Parties intend that this Agreement is an enforceable contract with respect to the subject matter involved.

2. ADMINISTRATION OF VDFI BY TRAVEL PORTLAND

VDFI shall use the administrative services of Travel Portland, and at the direction of and under the supervision of the VDFI Board, Travel Portland shall provide such services within its available resources. Travel Portland's administration shall include 1) designating the VDFI Administrator, 2) fiscal management of VDF funds, 3) duties assigned through the VFIGA, and 4) other duties as may be necessary to achieve the Purposes of this Agreement.

3. VISITOR DEVELOPMENT FUND, INC. AND INCORPORATION

The Parties agree that Visitor Development Fund, Inc. is an Oregon nonprofit corporation, exempt from federal and state taxation pursuant to IRC § 501(c)(6).

4. VDFI BOARD AND OBLIGATIONS OF VDFI

During the term of this Agreement, VDFI agrees that its articles of incorporation and bylaws will provide for its Board of Directors to be appointed as follows:

4.1. Number and Tenure

4.1.1. Number. The VDFI Board shall consist of fifteen (15) members, as follows:

4.1.1.1. Seven (7) Industry Representative Members that shall consist of:

4.1.1.1.1. five (5) members who are representatives of "Operators" of "Hotels" or "Short Term Rentals", as such terms are defined in Portland City Code 6.04.010 and 6.05.020, and;

4.1.1.1.2. two (2) members who are representatives of "Commercial Establishments" "Renting" "Motor Vehicles", as such terms are defined in Multnomah County Code Chapter 11;

4.1.1.2. Six (6) Public Body Members that shall consist of:

4.1.1.2.1. two (2) members who are members of the Portland City Council appointed by the City's Mayor;

4.1.1.2.2. two (2) members who are members of the Multnomah County Commission appointed by the County's Chair; and

4.1.1.2.3. two (2) members of the Metro Council appointed by the Metro Council President. For as long as Section 5.3.3 of the VFIGA is in effect, one Metro member shall be the Metro Councilor whose district contains the urban area of Multnomah County east of the City of Portland.

4.1.1.3. Two (2) Travel Portland Members who shall be Travel Portland's 1) Chief Executive Officer and 2) Board President or other Travel Portland Board member as may be nominated consistent with Section 5.2.

4.1.2. Term. The term of the VDFI Board members shall be as follows:

4.1.2.1. The term of Industry Representative Members shall not expire until the VDFI Board has appointed the successor board member.

4.1.2.2. The term of Public Body Members shall be 1) until the City Mayor or County Chair appoint new representatives and 2) until the Metro Council President appoints new representatives or for as long as Section 5.3.3 of the VFIGA is in effect, until an election determines a new Metro Councilor for the Metro district containing the urban area of Multnomah County east of the City of Portland.

5. **NOMINATION AND APPOINTMENT OF INDUSTRY REPRESENTATIVE MEMBERS AND TRAVEL PORTLAND MEMBERS**

5.1. Nomination. The Executive Committee of Travel Portland's Board of Directors, as defined in the Travel Portland bylaws, shall nominate all Industry Representative Members and Travel Portland Members.

For as long as section 5.3.3 of the VFIGA is in effect, the Executive Committee shall make reasonable efforts to assure that one of the hotel operators serving as an Industry Representative Member is from the urban area of Multnomah County east of the city of Portland.

5.2. Confirmation of Industry Representatives. Following nomination by the Executive Committee of Travel Portland's Board of Directors, the VDFI Board, at its next regularly scheduled meeting and through a vote of its duly appointed

members, shall confirm the appointment of Industry Representative Members and Travel Portland Members. An Industry Representative Member is not able to participate in or vote on VDFI Board matters until confirmed by the VDFI Board.

6. **REJECTION OF VDFI BOARD APPROVAL OF INDUSTRY REPRESENTATIVE MEMBERS AND TRAVEL PORTLAND MEMBERS**

Each Public Body shall have sixty (60) days from the date the VDFI Board confirms an Industry Representative Member or Travel Portland Member to reject that appointment. If a Public Body rejects an Industry Representative Member or Travel Portland Member, a new member will be nominated and confirmed as described in Section 5 and may be rejected under this Section 6.

7. **POWERS AND FUNCTIONS OF THE VDFI**

During the term of this Agreement, VDFI shall have the following powers and functions:

7.1. **Powers and Functions.**

7.1.1. The VDFI Board shall:

7.1.1.1. Supervise, oversee, and approve expenditures that achieve the Purpose; and

7.1.1.2. Formulate and develop programs that will achieve the Purpose.

7.1.2. The VDFI Administrator shall:

7.1.2.1. Prepare and present to the VDFI Board a quarterly budget and cash flow analysis for review to assure that the Purposes are being achieved; and;

7.1.2.2. Provide for the administration of the VDFI and VDF as described in Section 2.

7.2. **Audit**

All accounting records and documents, and other such related information shall be made available for the Public Bodies' inspection at any time during the term of this Agreement. The Board shall cause an annual financial audit to be performed in accordance with generally accepted accounting standards and shall distribute the annual financial statements together with the auditor's report to the public bodies within thirty (30) days of receipt.

7.3. Participation in Dispute Resolution

VDFI, through the VDFI Board, may participate in the dispute resolution process established in Section 8 of the VFIGA in the manner provided for in the VFIGA.

8. CONFORMANCE OF VDFI ARTICLES OF INCORPORATION AND BYLAWS

The VDFI's articles of incorporation and bylaws shall, at all times during the term of this Agreement, conform to Section 4, 5, 6, and 7.

9. POWERS AND DUTIES OF PUBLIC BODIES

9.1. The Public Bodies may reject a VDFI Board appointee or remove Industry Representative Members or Travel Portland Members for "good cause." "Good cause" exists when:

9.1.1. the appointee or member fails to meet the qualifications provided for above, or

9.1.2. the appointee or member has been convicted of any felony, or a misdemeanor related to the duties of a VDFI Board member; or

9.1.3. the VDFI Board member, through demonstrated actions or failures to act, has created serious questions regarding the ethical or legal integrity of the member's ability to perform the duties of a VDFI Board member.

9.2. The Public Bodies will allow the VDFI to participate in any matter submitted to the DRC pursuant to the VFIGA at Section 8. VDFI participation will be as follows:

9.2.1. The VFTA Administrator will give notice of any matter submitted to the DRC by giving written notice to the VDFI Administrator at the same time and in the same manner as is required under the VFIGA for the initiation of the dispute resolution process.

9.2.2. When the DRC is convened, the VFTA Administrator shall give notice of all meetings of the DRC to the VDFI Administrator. The VDFI Board may submit written material to the DRC regarding the matter as described in the VFIGA, and may, through a VDFI Board member or other representative selected by the VDFI Board, participate in the meetings of the DRC. The VDFI Board representative will not be a voting member of the DRC.

9.2.3. The Public Bodies shall notify the VDFI Administrator when they convene a meeting to consider amendments to the VFIGA. The Public Bodies will provide written notice to the VDFI Board at least sixty (60)

calendar days in advance of amending the VFIGA. The notice shall include an explanation with reasonable particularity of the proposed amendment and, if available, a copy of the proposed amendment.

9.3. Metro Obligations and Powers

- 9.3.1. Metro will appoint and may remove VDFI Board members as specified in Sections 4 and 6 above.
- 9.3.2. Metro will give notice, as described in the VFIGA, to VDFI Administrator concerning any request for Additional OCC Operating Support.

9.4. County Obligations and Powers

- 9.4.1. County will appoint and may remove VDFI Board members as specified in Sections 4 and 6 above.
- 9.4.2. Acting through the VFTA Administrator, the County will make payments to the VDFI as provided for in the VFIGA.

9.5. City Obligations and Powers

- 9.5.1. City will appoint and may remove VDFI Board members as specified in Sections 4 and 6 above.
- 9.5.2. Until the Stadium Bonds are paid in full, the City will make payments to the VDF equal to the amount utilized to pay Stadium Bonds derived from transient lodging taxes collected in the East County Cities as described the VFIGA. The payment amount will be calculated in the manner provided in Exhibit B.

10. AMENDMENT

No amendment, change, or modification of this Agreement shall be valid unless in writing and agreed to by all of the Parties hereto.

11. TERM

This Agreement shall commence on July 1, 2020 and its duration shall be perpetual unless terminated as set forth in Section 12. The Parties acknowledge, however, that the Charter of the City of Portland limits the duration of the contracts that may be entered by the City (with certain exceptions not applicable here) to five (5) years with one renewal of five (5) years. Therefore, as to the City, this contract shall extend for five (5) years from its commencement date and at the end of that term shall be automatically renewed for an additional five (5) years without further action of the Parties. If, at the end of each ten (10) year period, the City Council re-authorizes City participation in this Agreement,

the other Parties agree to enter into another agreement with the City on the same terms contained in this Agreement, as it may have been amended at that time, for an additional five (5) year term, with an additional five (5) year renewal. If the City Council does not re-authorize City participation in this Agreement, the Agreement shall continue in effect as to the remaining Parties, who shall make such modifications to the Agreement as are required by the fact that the City is no longer a Party.

12. TERMINATION

- 12.1. **Termination by Agreement.** This Agreement may be terminated by the unanimous agreement of the Parties, which agreement shall be in writing and signed by the Parties.
- 12.2. **Sunset.** This Agreement shall terminate when the VFIGA terminates and there are no funds remaining in the VDF to be expended by the VDFI.
- 12.3. **Default and Termination.** "Default" means any material breach of a Party's obligations under this Agreement, which the defaulting Party does not fully cure within sixty (60) days of written receipt of notice thereof. This Agreement may be terminated by the nondefaulting Party(ies) by written notice of termination specifying the reason for such termination and a termination date. Such termination shall become effective upon the sixtieth (60th) day following receipt of written notice by the defaulting Party. Termination of this Agreement shall not in any way affect those continuing obligations of the Parties pursuant to this Agreement which are specifically stated to survive the termination of this Agreement.

13. MEDIATION AND ARBITRATION

- 13.1. **Arbitration and Mediation in Lieu of Litigation.** The Parties agree that all claims, controversies or disputes, whether they be statutory, contract and/or tort claims between or among the Parties hereto which arise out of or are related to this Agreement, or which relate to the formation, interpretation, breach or invalidity of this Agreement, whether arising before, during or after termination, including jurisdiction of the Arbitrator(s) or arbitrability (hereinafter collectively referred to as "Claims"), shall be resolved in accordance with the mediation and arbitration procedures specified herein. The Parties shall have in arbitration all remedies for breach of contract provided by Oregon law, including injunctive relief and specific enforcement.

- 13.1.1. **Mediation.** All Claims shall be initially submitted to mediation. The Parties shall agree to a mediator. If the Parties cannot agree as to the selection of a mediator, then any Party may request appointment of a mediator from the American Arbitration Association or the Arbitration Service of Portland, Inc., whichever organization is selected by the Party which first initiates mediation by filing a claim in accordance with the

filing rules of the organization selected. The Parties shall share equally the cost of the mediation process.

13.1.2. Arbitration. Any Claims that have not been resolved by mediation shall be resolved by compulsory and binding arbitration in accordance with the then-effective Commercial Arbitration Rules of the American Arbitration Association or the then-effective arbitration rules of the Arbitration Service of Portland, Inc., whichever organization is selected by the Party which first initiates arbitration by filing a claim in accordance with the filing rules of the organization selected, except that the following shall apply:

13.1.2.1. Every person nominated or recommended to serve as an arbitrator shall be a lawyer who has had experience as an arbitrator for at least ten (10) years and at least ten (10) years' experience as a practicing attorney with expertise in municipal and contract law;

13.1.2.2. If the dispute involves more than \$500,000, or a claim regarding termination for Default, three (3) arbitrators having such qualifications and experience shall be appointed, each of whom shall be selected in the same manner as set forth for the selection of a single arbitrator;

13.1.2.3. The arbitrator(s) shall base the award on this Agreement and applicable law and judicial precedent and shall accompany their award with a written explanation of the reasons for their award. The arbitration shall be governed by the substantive laws of the State of Oregon applicable to contracts made and to be performed therein.

13.1.2.4. Judgment upon the award rendered pursuant to such arbitration may be entered in any court having jurisdiction thereof. The Parties shall share equally the fees and costs charged by the arbitration entity. The Parties knowingly and voluntarily waive their rights to have their dispute tried and adjudicated by a judge or jury. In the event a Party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, any other Party is entitled to costs, including reasonable attorney's fees, for having to compel arbitration or defend or enforce the award.

13.1.3. Place of Arbitration and Venue. The place of arbitration shall be Portland, Oregon. In the event that this arbitration clause is inapplicable or not enforceable for any reason and any Party chooses to file an action or suit, then such action or suit shall be brought and heard in the appropriate court

(state or federal) in the City of Portland, State of Oregon. The Parties expressly consent to the jurisdiction of such court.

14. GENERAL PROVISIONS

- 14.1. **Notice.** Any notice or communication required or permitted to be given by any Party under this Agreement shall be deemed to have been given or delivered if sent or delivered as described in Section 10.2 of the VFIGA.
- 14.2. **Severability.** Nothing contained herein shall be construed to require the commission of any act contrary to law, and wherever there is any conflict between any provisions contained herein and any present or future statute, law, ordinance, or regulation contrary to which the Parties have no legal right to contract, the latter shall prevail; but, the provision of this Agreement which is affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law, and all other provisions of this Agreement shall remain in full force.
- 14.3. **Neutral Interpretation.** This Agreement constitutes the product of negotiations of the Parties hereto and any enforcement hereof will be interpreted in a neutral manner and not more strongly for or against any Party based upon the source of the draftsmanship hereof.
- 14.4. **Waiver.** Failure of any Party at any time to require performance of any provision of this Agreement shall not limit the Party's right to enforce the provision, nor shall any waiver of any breach of any provision be a waiver of any succeeding breach of the provision or a waiver of the provision itself or any other provision.
- 14.5. **Time.** TIME IS OF THE ESSENCE with respect to the performance of the duties and obligations of this Agreement.
- 14.6. **Counterparts and Electronic Transaction.** This Agreement may be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one and the same Agreement. The Parties agree that they may conduct this transaction, including any amendments or extension, by electronic means including the use of electronic signatures and facsimiles.
- 14.7. **Calculation of Time.** All periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the state of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or such holiday, the period shall be extended to include the next day which is not a Saturday, Sunday, or such holiday.
- 14.8. **Attorney Fees.** Except as provided in Section 13, if a suit, action, arbitration or other proceeding of any nature whatsoever is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or

with respect to any dispute relating to this Agreement, the prevailing Party shall be entitled to recover from the losing Party its attorney fees, paralegal fees, accountant fees, and other expert fees, and all other fees, costs and expenses actually incurred and reasonably necessary in connection therewith. In the event of suit, action, arbitration or other proceeding, the amount of fees shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

14.9. **Successors and Assigns.** All of the terms and provisions contained herein shall inure to the benefit of and shall be binding upon the Parties hereto and their respective heirs, legal representatives, successors and assigns.

14.10. **No Assignment.** This Agreement may not be assigned by operation of law or otherwise. Any attempted assignment in violation hereof shall be null and void.

14.11. **Schedule of Exhibits.** The following exhibits are attached and incorporated herein by reference:

Exhibit A Second Amended and Restated Visitor Facilities Intergovernmental Agreement

Exhibit B Calculation of Amount of Civic Stadium Debt Service Derived From East County Cities

14.12. **Entire Agreement.** This Agreement and the exhibits described in Section 14.11 constitute the entire agreement among the Parties, integrate all of the terms and conditions mentioned herein or incidental hereto, and supersede all negotiations or previous agreements between the Parties or their predecessors in interest with respect to all or any part of the subject matter hereof.

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This Agreement is executed as of the latest date set forth below.

VISITOR DEVELOPMENT FUND, INC.

Jeff Miller
President and CEO

Date

CITY OF PORTLAND

Approved as to form

Tracy Reeve
City Attorney

Ted Wheeler
City of Portland Mayor

Date

MULTNOMAH COUNTY

Approved as to form

Jenny Madkour
County Counsel

Deborah Kafoury
Multnomah County Chair

Date

METRO

Approved as to form

Carrie MacLaren
Metro Attorney

Lynn Peterson
Metro Council President

Date

IN CONSIDERATION OF RESOLUTION NO. 20-5129, FOR THE PURPOSE OF APPROVING AN AMENDED AND RESTATED VISITOR DEVELOPMENT FUND SERVICES AGREEMENT

Date: September 10, 2020
Department: Visitor Venues
Meeting Date: September 24, 2020

Prepared by: Amy Nelson, 503.314.2360
amy.nelson@oregonmetro.gov

ISSUE STATEMENT

The purpose of the Visitor Development Fund Service Agreement amendment is to update the agreement to reflect historic and current operational practices of VDFI Board and Public Bodies (i.e. City Council, County Board and Metro Council) and to conform the agreement to terms and roles and responsibilities of the Second Amended and Restated Visitor Facilities Intergovernmental Agreement (VFIGA).

Significant changes to the agreement include:

- Update and streamline definitions to align with VFIGA definitions
- Eliminate references to defunct organizations and shift to more broadly defined terms to eliminate need for future non-substantive amendments
- Add clear definition of Travel Portland's role in administration of VDFI Board
- Update clauses related to VDFI Board of Director's Industry Representative composition and process for nomination, confirmation, and removal
- Update and clarify clauses related to Public Body VDFI Board members, including language that allows for changes to Metro Council members once East County allocation ends when Stadium Bonds are paid off.
- Clarification of VDFI Board powers and functions, including simplification of budget process
- Clarification of dispute resolution processes consistent with VFIGA

ACTION REQUESTED

Request for Metro Council to approve Resolution 20-5129.

BACKGROUND

The VDFSFA is an existing agreement originally entered into in 2001. The VDFSFA is being amended to, among other things, conform it to the Second Amended and Restated Visitor Facilities Intergovernmental Agreement.