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TOURISM BUSINESS IMPROVEMENT DISTRICT MANAGEMENT AGREEMENT

THIS TOURISM BUSINESS IMPROVEMENT DISTRICT MANAGEMENT AGREEMENT ("Agreement") is made and entered into as of this 22 day of January, 2019 by and between the CITY OF HUNTINGTON BEACH, a Municipal Corporation ("City"), and the VISIT HUNTINGTON BEACH ("VHB"), a California nonprofit 501(c)(6) corporation and is made with reference to the following:

RECITALS

- A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of the City.
- B. The VHB is a California nonprofit 501(c)(6) corporation formed under the laws of California.
- C. Resolution 2018-84 was adopted on December 17, 2018, by the City Council of the City, upon the petition of the business owners in the proposed district who will pay more than fifty percent (50%) of the assessment proposed to be levied, which renewed the Huntington Beach Tourism Business Improvement District ("TBID") pursuant to the Property and Business Improvement District Law of 1994 contained in Streets and Highways Code 36600-36671 ("1994 Law.") A copy of the resolution and accompanying management district plan is attached hereto as Exhibit A and incorporated herein by this reference (hereinafter the "Plan").
- D. Special assessments levied by the TBID are earmarked solely to fund the activities and improvements described in the Plan.
- E. The Plan designates VHB, as the owner's association, if the City and VHB enter into an agreement to administer and implement the TBID's activities and improvements.
- F. VHB has represented to the City that it possesses the labor and professional skills and expertise to administer and implement the activities and improvements of the TBID described in the Plan.

DRAFT

- G. Resolution 2018-84 provides that the City shall be paid a fee equal to 1% of the amount of the Assessment annually for services rendered in connection with the collection of the assessment and disbursement to the TBID, which can increased in the future, but shall not exceed the actual cost to the City.
- I. The purpose of this Agreement is to set forth the duties and responsibilities of the City and VHB for TBID operations.

NOW, THEREFORE, it is mutually agreed by and between the undersigned parties as follows:

1. INCORPORATION OF RECITALS

The Recitals above are true and correct and constitute an enforceable provision of this Agreement.

2. TERM

The term of this Agreement shall commence on the above written date, and shall continue with all services provided for in this Agreement for the life of the TBID, unless terminated earlier as set forth herein.

3. SERVICES TO BE PERFORMED

VHB shall furnish the following services:

- 3.1 Administer and implement all of the activities and improvements of the TBID as stated, listed, or otherwise described in the Plan.
- 3.2 Provide and keep an accounting of TBID expenditures for each year the TBID is in existence to the City in a format acceptable to the City and any additional documentation and information requested by the City. This may be the same monthly accounting as is presented to the TBID Board at its monthly meeting provided that the City agrees in writing that the format of the report is acceptable.
- 3.3 At the end of each fiscal year (defined as July 1 through June 30), hire an independent professional audit firm to perform a Financial Statement Audit

DRAFT

of the TBID with a Schedule of Notes and other information detailing the TBID's financial statement as needed. In addition, the City Manager or designee may require the auditors to perform certain "Agreed Upon Procedures" to determine whether the TBID's expenditures for the preceding year are consistent with the TBID's Annual Budget, establishing Resolution, the Plan, and any other applicable law, rule or regulation. A copy of said "Agreed Upon Procedures" report, along with the annual Financial Statement Audit, will be provided to the City within one hundred twenty (120) days of the TBID's fiscal year end. As long as there is a separate Schedule of Notes for the TBID, the Financial Statement Audit may be consolidated with the Financial Statement Audit of the VHB. In addition, the City may conduct its own audit and VHB shall reimburse the City for the costs of such audit.

- 3.4 Provide City with an annual report that contains all of the information required by Section 36650 of the 1994 Law, or otherwise required by law, rule or regulation including all matters covered under this Agreement, on or prior to 120 days after close of each fiscal year. The City Council may approve the report as filed, or may modify any particular matter contained in the report and approve it as modified pursuant to 36635 and 36636 of the 1994 Law.
- 3.5 Award and administer all contracts necessary for providing the activities and improvements in the Management Plan, adhering to the following procedure when awarding a subcontract: all contracts over \$30,000.00 VHB will (1) solicit bids for the work; (2) consider the bids received before awarding the contract; and (3) make a written "Bid Record" after the contract is awarded, listing the name and amount bid for each bidder and describing the reasons for awarding the contract to the successful bidder. Unless circumstances are such that it is not feasible, all sub contracts will be awarded to lowest responsive and responsible bidder. In the event the agreement is not bid, VHB shall provide in the bid Record explanation as to why a bid process was not flowed. For any contract, upon the request of City, VHB shall provide City with a copy of the contract and the Bid Record. If the contract is listed as a Destination Product development contract, and determined by City to be a public works project, VHB shall contact the City Manager and Public Works director to establish a procedure to award and administer said contract according to the City Charter and/or any State law requirements in this regard. Any contract involving City Public Works as defined in Huntington Beach Charter Section 614 shall follow the same requirements.

DRAFT

- 3.6 No additional services shall be performed by VHB unless approved in advance in writing by City, stating the dollar value of the services, the method of payment, and any adjustment in contract time. All such services are to be coordinated with City and the results of the work shall be monitored by the City Manager or designee; however, the means by which the work is accomplished shall be the sole responsibility of VHB.

4. TIME OF PERFORMANCE

- 4.1 Time is of the essence in the performance of services under this Agreement and VHB shall perform the services in a diligent and timely manner. VHB shall produce all required reports and documents in the times stated in the 1994 Law and this Agreement. Deviations from time schedule may be made only with the prior written approval of the City Manager or designee. The failure by VHB to perform the services in a diligent and timely manner may result in termination of this Agreement by City as provided herein.
- 4.2 Notwithstanding the foregoing, VHB shall not be responsible for delays due to causes beyond VHB reasonable control. However, in the case of any such delay in the services to be provided under the Plan, each party hereby agrees to provide notice to the other party so that all delays can be addressed.

5. REMITTANCE OF ASSESSMENT TO VHB

- 5.1 The City shall remit the amount received monthly, less the administrative fee to VHB for TBID operations. The City will remit funds in a timely manner, including the use of electronic transfer. The TBID funds will be remitted by the City not later than the end of the month following payment of the assessment to the City. In the event the City is unable to collect all or any portion of the delinquent assessment herein, the City will provide the amount collected and use reasonable efforts to collect unpaid assessments. If successfully collected, the City will remit said amount of TBID. .
- 5.2 VHB shall maintain a separate bank/checking account for TBID funds. Only TBID funds shall be deposited in this account, and only TBID eligible expenditures shall be paid from this account.

DRAFT

- 5.3 Neither the City's general fund nor any other fund or monies of the City, other than the actual TBID assessment received by the City, is liable for any payment under this Agreement. The contractual or other obligations of the VHB are not a debt of the City, nor are they a legal or equitable pledge, charge, lien, or encumbrance upon any of the City's property, income, receipts, or revenues.

6. ADMINISTRATIVE FEE

As provided in the Plan, the City shall be reimbursed from the collected assessments 1% of the total amount of the entire assessment for administrative expenses. The administrative fee of 1% shall be remitted monthly to the City General Fund account. This fee can be increased without modification of this Agreement by the City demonstrating cost to administer exceeds 1%.

7. TRANSIST OCCUPANCY TAX SPECIAL PROJECTS

VHB and City have mutually agreed to terminate the AMENDED AND RESTATED GRANT AGREEMENT BETWEEN THE CITY OF HUNTINGTON BEACH AND HUNTINGTON BEACH MARKETING AND VISITORS BUREAU dated April 10, 2010 (Grant Agreement). The Grant Agreement provided in part that the CITY will grant to BUREAU (VHB) a sum equivalent to ten percent (10%) of CITY'S Transient Occupancy Tax (TOT) collections each month, payable monthly, following collection of same.

The Grant Agreement was scheduled to terminate on October 1, 2021, however, both the City and VHB desire to terminate the Grant Agreement in its entirety and City and VHB agree that the City will grant to VHB a sum equivalent to of the City's Transient Occupancy Tax to pay for specific projects as follows :

7.1 Fiscal Year 2019-20: Grant of \$150,000 to be used for the sole purpose of modifications to the International Surf Museum Board and \$100,000 to assist VHB in the production of U.S. Travel Associations IPW event.

7.2 Fiscal Year 2020-21: Grant of \$125,000 to be used for the sole purpose of modifications to the International Surf Museum and \$100,000 for Amgen Tour Final event.

7.3 Fiscal Year 2021-22: Grant of \$100,000 to be used for toe sole purpose of modification to the International Surf Museum.

DRAFT

Annual payments will be reimbursed to VHB based on accomplishments of listed event/activity, as determined by the City Manager. If the event or activity does not occur, no payments will be provided.

Upon conclusion of the grant for FY 2021-22, the City will have no obligation, duty or otherwise required to provide any Transient Occupancy Tax to VHB.

8. LATE PAYMENT PENALTIES AND INTEREST

- 8.1 Any TBID member failing to remit the assessment within thirty (30) days of the time required shall pay an initial mandatory penalty of ten percent (10%) of the amount of the late assessment in addition to the assessment.
- 8.2 Any TBID member failing to remit the assessment and the initial penalty within sixty (60) days shall be liable for a second mandatory penalty of an additional ten percent (10%).
- 8.3 In addition to the penalties imposed, any member who fails to remit the assessment that is due and owing at the rate of one and one-half percent (1-1/2%) per month for each month or portion of a month that the assessment remains unpaid exclusive of penalties.
- 8.4 Should a member's assessment become twelve months in arrears, it shall be sent to collections. Penalties, interest and the cost of collection shall become part of the assessment required to be paid.
- 8.5 Late payments, penalties, and interest shall be deposited and used in the same manner as the basic assessment. The cost of collection, if any, shall be used to pay the collections agency.

9. COMPLIANCE WITH ALL LAWS

- 9.1 VHB shall at its own cost and expense comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted. In addition, all services by VHB shall conform to applicable City, county, state and federal laws, rules regulations and permit requirements and be subject to the approval of the City Manager or designee.
- 9.2 VHB shall ensure that its board members will undertake training on the Brown Act, which may consist of self-study materials, an online course, or in-person training.

DRAFT

10. WORK PRODUCT, BOOK AND RECORDS

- 10.1 All plans, studies, specifications, data magnetically or otherwise recorded on computer or computer diskettes, records, files, reports, etc., in possession of VHB relating to the matters covered by this Agreement shall be the property of the City, and VHB hereby agrees to deliver the same to the City upon termination of the Agreement.
- 10.2 During the term of this Agreement, and for five years after the term expires or terminates or for any longer period required by law, VHB shall maintain detailed records pertaining to the TBID's administration, including but not limited to ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or concerning budgeting, charges, expenditures, subcontractors (e.g., bid records,) insurance, permits, administrative expenses, and overhead. TBID records shall not be comingled with TOT, tax accounts or any other records of VHB. VHB shall make all such records available to City for inspection, audit, and/or copying at all reasonable times.
- 10.3 VHB will work with the City to assure to the extend faceable each TBID member maintains its records in accordance with Paragraph 10.2 and that the City may perform an audit of TBID payments from TBID hotels. The City as its sole discretion shall conduct the audit and any litigation.

11. INDEPENDENT CONTRACTOR

- 11.1 It is understood that City retains VHB on an independent contractor basis and its board members and staff are not an agent or employee of the City. The VHB is not a public entity and its board members and staff are not public officials or employees of the City. The manner and means of conducting the work are under the control of VHB, except to the extent they are limited by statute, rule or regulation and the expressed terms of this Agreement. Nothing in this Agreement shall be deemed to constitute approval for VHB or any of VHB's employees or agents, to be the agents or employees of City. VHB shall have the responsibility for and control over the means of performing the work, provided that VHB is in compliance with the terms of this Agreement. Anything in this Agreement that may appear to give the City the right to direct VHB as to the details of the performance or to exercise a measure of control over VHB shall mean only that VHB shall

DRAFT

follow the desires of the City with respect to the results of the services. VHB shall be responsible for the payment of all taxes, workers' compensation insurance and unemployment insurance for its employees.

- 11.2 In the event VHB or any board member, employee, agent, contractor, or subcontractor of VHB providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, VHB shall indemnify, protect, defend, and hold harmless the City for the payment of any employee and/or employer contributions for PERS benefits on behalf of VHB or its board members, employees, agents, contractors or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

12. COOPERATION

12.1 VHB agrees to work closely and cooperate fully with the City Manager or designee and any other agencies that may have jurisdiction or interest in the work to be performed. City agrees to cooperate with VHB.

12.2 VHB shall discuss and review all matters relating to policy and TBID direction with the City Manager or designee in advance of all critical decision points to ensure the Management Plan proceeds in a manner consistent with TBID's goals and policies and all applicable laws, rules and regulations. VHB shall hold quarterly meetings with the City Manager.

13. INSURANCE

Without limiting VHB indemnification of the City, and prior to commencement of work, VHB shall obtain, provide and maintain at its own expense during the term of this Agreement, a policy or policies of liability insurance of the type and amounts described below and in a form satisfactory to the City.

- 13.1 Certificates of Insurance. VHB shall provide certificates of insurance with original endorsements to the City as evidence of the insurance coverage required herein. Insurance certificates must be approved by the City Risk Manager prior to commencement of performance of services. Current certification of insurance shall be kept on file with City at all times during the term of this Agreement.

DRAFT

- 13.2 Signature. A person authorized by the insurer to bind coverage on its behalf shall sign certification of all required policies.
- 13.3 Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City Risk Manager.
- 13.4 Coverage Requirements.
- A. Workers' Compensation Coverage. VHB shall maintain Workers' Compensation Insurance Employer's Liability Insurance for its employees in accordance with the laws of the State of California. In addition, VHB shall require each subcontractor to similarly maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California for all of the subcontractor's employees. Any notice of cancellation or non-renewal of all Workers' Compensation policies must be received by the City at least thirty (30) calendar days (or 10 calendar days written notice of non-payment of premium prior to such change. The insurer shall agree to waive all rights of subrogation against the City, its officers, agents, employees and volunteers for losses arising from work performed by VHB for the City.
- B. General Liability Coverage. VHB shall maintain commercial general liability insurance in an amount not less than one million dollars (\$1,000,000) per occurrence for bodily injury, personal injury, and property damage, including without limitation, contractual liability. If commercial general liability insurance or other form with a general aggregate limit is used, wither the general aggregate limit shall apply separately to the work to be performed under this agreement, or the general aggregate limit shall be at least twice the required occurrence limit.
- C. Automobile Liability Coverage. VHB shall maintain automobile insurance covering bodily injury and property damage for all activities of VHB arising out of or in connection with services to be performed under this Agreement, including coverage for any

DRAFT

owned, hired, non-owned or rented vehicles, in an amount not less than one million dollars (\$1,000,000) combined single limit for each occurrence.

- 13.5 Endorsements. Each general liability and automobile liability insurance policy shall be endorsed with the following specific language:
- A. The City, its elected or appointed officers, officials, employees, agents and volunteers are to be covered as additional insureds with respect to liability arising out of work performed by or on behalf of VHB.
 - B. This policy shall be considered primary insurance as respects to the City, its elected or appointed officials, employees, agents and volunteers as respects to all claims, losses, or liability arising directly or indirectly from VHB's operations or services provided to the City. Any insurance maintained by the City, including any self-insured retention the City may have, shall be considered excess insurance only and not contributory with the insurance provided hereunder.
 - C. This insurance shall act for each insured and additional insured as though a separate policy had been written for each, except with respect to the limits of liability of the insuring company.
 - D. The insurer waives all rights of subrogation against the City, its elected or appointed officers, officials, employees, agents and volunteers.
 - E. Any failure to comply with reporting provisions of the policies shall not effect coverage provided to the City, its elected or appointed officers, officials, employees, agents or volunteers.
 - F. The insurance provided by this policy shall not be suspended voided, canceled, or reduced in coverage or in limits, by either party except after thirty (30) calendar days written notice (or 10 calendar days notice of non-payment of premium) has been received by the City.
- 13.6 Timely Notice of Claims. VHB shall give the City prompt and timely notice of claim made or suit instituted arising out of or resulting from VHB's performance under this Agreement.
- 13.7 Additional Insurance. VHB shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of work.

DRAFT

14. INDEMNITY AND HOLD HARMLESS

- 14.1 To the fullest extent permitted by law, VHB shall indemnify, defend and hold harmless the City, its City Council boards and commissions, officers, agents, volunteers, and employees (collectively, the "Indemnified Parties") from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever (individually, a Claim; collectively, "Claims",) which may arise from or in any manner related (directly or indirectly) to the Agreement, any breach of the terms and conditions of this Agreement, any violation of any law, rule or regulation by VHB, any work performed or services provided under this Agreement including, without limitation, VHB's presence or activities conducted pursuant to this Agreement (including the negligent and/or willful acts, errors and/or omissions of VHB, its board members, principals, officers, agents, employees, vendors, suppliers, consultants, contractors, subcontractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable for any or all of them.)
- 14.2 Notwithstanding the foregoing, nothing herein shall be construed to require VHB to indemnify the Indemnified Parties from any Claim arising from the sole negligence or willful misconduct of the Indemnified Parties. Nothing in this indemnity shall be construed as authorizing any award of attorney's fees in any action on or to enforce the terms of this Agreement. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by VHB.
- 14.3 It is understood that the duty of VHB to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by the City of insurance certificates and endorsements required under this Agreement does not relieve VHB from liability under this indemnification and hold harmless clause. This indemnification and hold VHB harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply and shall survive the termination of this Agreement. By execution of this Agreement, VHB acknowledges and agrees to the provisions of this Paragraph and that it is a material element of consideration.

15. CITY'S RESPONSIBILITIES

DRAFT

To assist VHB in the execution of its responsibilities under this Agreement, the City agrees to, where applicable:

- 15.1 Provide access to, and upon request of VHB, one copy of all existing relevant information on file at the City. The City will provide all such materials in a timely manner so as not to cause delays in VHB's work schedule.
- 15.2 Administer annual TBID proceedings.

16. PROHIBITION AGAINST ASSIGNMENTS AND TRANSFERS

Except as specifically authorized under this Agreement, the services to be provided under this Agreement shall not be assigned, transferred, contracted or subcontracted out without the prior written approval of City.

17. CONFLICT OF INTEREST

- 17.1 VHB or its employees may be subject to the provisions of the California Political Reform Act of 1974 (the "Act"), which (1) requires such persons to disclose any financial interest that may foreseeably be materially affected by the work performed under this Agreement, and (2) prohibits such persons from making, or participating in making, decisions that will foreseeably financially affect such interest.
- 17.2 If subject to the Act, VHB shall conform to all requirements of the Act. Failure to do so constitutes a material breach and is grounds for immediate termination of this Agreement by City. VHB shall indemnify and hold harmless the City for any and all claims for damages resulting from VHB's violation of this Paragraph.
- 17.3 VHB certifies that it has disclosed to the City any actual, apparent, or potential conflicts of interest that may exist relative to the services to be provided pursuant to this Agreement. VHB agrees to advise the City of any actual, apparent or potential conflicts of interest that may develop subsequent to the date of execution of this Agreement. VHB further agrees to complete any statements of economic interest required by either City ordinance or State law.

18. TERMINATION

DRAFT

In lieu of a bilateral termination provision without cause, Parties have negotiated and agree that the City may terminate this agreement at any time if it determines at its sole discretion that the VHB has misappropriated funds, committed malfeasance, or violated any law, rule or regulation in providing the activities and improvements described in the Plan or in otherwise administering and implementing the Plan; or has breached this Agreement in any way whether material breach or nonmaterial breach and has failed to cure the breach within 30 days after receiving the City's written demand for cure. This Agreement shall automatically terminate in the event the TBID is disestablished or expires without being renewed.

19. WAIVER

A waiver by either party of any breach of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.

20. SEVERABILITY

If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

21. CONTROLLING LAW AND VENUE

The laws of the State of California shall govern this Agreement and all matters relating to it and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange.

22. AMENDMENTS

This Agreement may be modified or amended only by a written document executed by both VHB and the City and approved as to form by the City Attorney. The City Manager or designee is authorized to execute on behalf of the City, with approval of the City Attorney as to form, an amendment to Sections 3, 5, 6, 8, 11, 14 and 27.

23. INTEGRATED CONTRACT

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This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No oral agreement or implied covenant shall be held to vary the provisions herein.

24. INTERPRETATION

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.

25. EQUAL OPPORTUNITY EMPLOYMENT

VHB represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee or applicant for employment because of race, religion, color, national origin, disability, ancestry, sex or age or other prohibited criteria.

26. NOTICES

All notices, demands, requests or approvals to be given under the terms of this Agreement shall be given in writing, and conclusively shall be deemed served when delivered personally, or on the third business day after the deposit thereof in the United States mail, postage prepaid, first-class mail, addressed as hereinafter provided. All notices, demands, requests or approvals from VHB to the City shall be addressed to the City at:

Attn: City Manager
City of Huntington Beach
2000 Main Street
P.O. Box 190
Huntington Beach, CA 92648

Phone: (714) 375-0465
Fax: (714) 375-5087

All notices, demands, request or approvals from City to VHB shall be addressed to VHB at:

Attn: Kelly Miller, President & CEO
Visit Huntington Beach
155 Fifth Street, Suite 111
Huntington Beach, CA 92648

DRAFT

Phone: (714) 969-3492
Fax: (714) 969-5592

27. AUTHORITY TO EXECUTE

The person executing this Agreement on behalf of the parties hereto warrants and represents that he/she has the authority to execute this Agreement on behalf of his/her entity and has the authority to bind that party to the performance of its obligations hereunder.

28. THIRD PARTY BENEFICIARY

The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties, and their respective successors and assigns, and is made solely and specifically for their benefit. No other person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third-party beneficiary or otherwise.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the day and year first written above.

APPROVED AS TO FORM:

**CITY OF HUNTINGTON BEACH,
a Municipal Corporation**

Fred Wilson, City Manager
City of Huntington Beach

ATTEST:

VISIT HUNTINGTON BEACH

By: _____
City Clerk

By: _____
Kelly Miller
President & CEO

Print Name:_____

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By: _____
Controller

Print Name: _____

Attachment: Exhibit A – Resolution 2018-_____
Exhibit B – Management District Plan