



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Dave Sykes,  
City Manager  
Nora Frimann,  
Acting City Attorney

**SUBJECT:** Settlement of Litigation with Bay 101      **DATE:** September 10, 2020

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## **RECOMMENDATION**

- (a) Approve the Settlement Agreement to settle pending lawsuits filed by Bay 101 against the City of San José.
- (b) Approve an ordinance amending various sections of Title 16 of the San José Municipal Code relating to gaming control to allow jackpots, promotions and tournaments in compliance with state gambling law and regulation; ownership of more than one cardroom in San José; and an owner of a cardroom to play poker and in poker tournaments held at his or her cardroom.

## **OUTCOME**

The settlement of pending lawsuits brought against the City by Bay 101 challenging annual regulatory fees, including an appeal brought by Bay 101 of a Superior Court decision in the City's favor on a challenge to regulatory fees, and two other suits filed in 2014 and 2016 related to a 2009 settlement agreement. The proposed settlement requires Council consideration of certain amendments to Title 16, provides for a meet and confer and mediation process prior to the filing of litigation challenging regulatory fees, and increases the annual charitable contribution Bay 101 is to make to address societal issues related to gambling.

## **BACKGROUND**

There are a number of pending lawsuits brought by Bay 101, and negotiations to resolve those lawsuits as well as to reach an agreement on increased taxes and an increase of a charitable contribution by Bay 101 have taken place over the past couple of years. The litigation that is the subject of this settlement includes Bay 101's appeal of a lawsuit initially filed in December 2013 challenging the legitimacy of the City's gaming regulatory fees charged in six fiscal years which resulted in a verdict by Superior Court Judge Paul Bernal in the City's favor. In addition, two other lawsuits filed in June 2014

and August 2016 seeking declaratory and injunctive relief, and alleging breach of a 2009 settlement agreement, are resolved by this settlement.

The terms of the settlement also include two revisions to the 2009 settlement agreement. The first provides for an increase in the annual charitable contribution that Bay 101 is required to make to address societal impacts of gambling in the San Jose community from a minimum of \$125,000 based on certain financial calculations to the sum of \$250,000 with an annual increase of 3% and certain reviews of the amount over the next 10 years. Commencing in FY 2031/32, increases in the contribution will be tied to year over year increases in the cardroom gross revenues, not to exceed 3%. Additionally, this agreement provides for a meet and confer and mediation process to be followed prior to Bay 101 filing a challenge of regulatory fees in the future, replacing a sentence in the earlier agreement that has been in dispute.

The agreement also provided for the council to consider placing on the November 2020 ballot a measure to increase the Cardroom Gross Receipts Tax for an amount not greater than 16.5%; impose a Gross Receipts Tax on revenues from third party funding and proposition player services at the cardrooms starting at 5% for gross receipts up to \$25 million and increasing to 10% if gross receipts are over \$30 million, and to provide for an increase of 30 gaming tables in the San Jose cardrooms. The Council considered that measure on August 4<sup>th</sup> and voted to place it on the ballot at that time.

Finally, the settlement agreement provides that the Council will consider changes to Title 16 of the City's Municipal Code to allow jackpots and promotions as approved by the State of California; and provisions modifying the stimulation of play provisions, tournament guarantees, ownership of more than one cardroom in San José, and allowing owners to play poker in their own cardroom, all subject to approval or review by the Gaming Administrator. Changes to Title 16 are subject to review by the State.

The lawsuits that are the subject of the settlement agreement are stayed pending certain conditions set out in the agreement. The ballot measure was approved on August 4<sup>th</sup>. The proposed Municipal Code revisions before the Council are to be considered and voted on prior to September 30<sup>th</sup>. The lawsuits are to be dismissed following a vote on the ballot measure, whether or not the measure passes; and if the measure passes, approval by the Gaming Administrator of an additional 15 tables at Bay 101.

## **ANALYSIS**

The ballot measure provisions of the settlement as well as several of the Title 16 revisions were of interest to the City because of anticipated increased revenue to the City, with continued oversight and approvals by the Gaming Administrator. The resolution of the pending litigation means that City resources will no longer be used defending those lawsuits and the changes to the process of challenging regulatory fees should assist in resolving potential disputes over those fees without litigation. The

increase in the charitable contribution will provide additional financial support for community-based services related to gambling impacts.

### **CONCLUSION**

Approval of the settlement and of the proposed changes to Title 16 will facilitate the resolution of several pending lawsuits against the City and are anticipated to increase revenue to the City.

### **CLIMATE SMART SAN JOSE**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

### **PUBLIC OUTREACH**

This memorandum will be posted on the City's Council Agenda website for the September 22, 2020 Council Meeting.

### **COORDINATION**

This memorandum has been coordinated with the City Manager's Office, the City Attorney's Office and the Police Department.

### **COST SUMMARY/IMPLICATIONS**

The settlement is expected to provide increased revenues to the City over time.

### **CEQA**

Not a Project; File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

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City Manager

NORA FRIMANN  
Acting City Attorney

By: /s/ David Sykes  
DAVID SYKES  
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By: /s/ Nora Frimann  
NORA FRIMANN  
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For questions please contact Nora Frimann, Acting City Attorney, at 408-535-1900.